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Wrongful Convictions and Race:
Structural Incentives and Implicit Bias
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Wrongful Convictions and Race: Structural Incentives and Implicit Bias

*“It is better that ten guilty persons escape, than that one innocent person suffer”
-Benjamin Franklin (Harvard Law School Library)*

Introduction

The modern state gains its power from its monopoly on the legitimate use of violence. The monopoly is meant to protect the citizens. Citizens cede their rights to the state, and in return, the state provides certain services and uses its monopoly to protect the citizens. However, the United States has been using its use of violence against innocent citizens through wrongful convictions. Police and prosecutors have made innocent citizens suspects. Then, “fair” trials have sent hundreds of innocent men and women to jail. Wrongful convictions are contrary to the duties and rights of a republican government. The US has failed to not only protect its citizens, but members of the judicial system have actually become a part of using this violence to imprison innocent men. Because of this disturbing affront to justice I have chosen to investigate the causes lying behind wrongful convictions so we can prevent this miscarriage of justice.

Although the Innocence Project has exonerated 317 wrongfully convicted people through DNA evidence (Innocence Project 2014), the actual number of people who have been wrongfully convicted is much higher. The information available concerns wrongful convictions of innocent persons that have been successfully overturned through forensic evidence, but there are many innocent people who were never exonerated. Also, some innocent people were administered the death penalty before their rulings could be overturned, making it impossible to ever show they were wrongfully convicted. Further, wrongful conviction for the most part includes murder and

sexual assault crimes. However, felonies are over-represented in wrongful convictions because they garner more attention and have much harsher sentences (Rattner 1988, 287-289). Due in part to the death penalty and the overlook of misdemeanors, we will never know how many people have been wrongfully convicted, but we can learn the causes of wrongful convictions to prevent them from happening again.

There are many different causes of wrongful convictions, but often more than one cause contributes to each case. In my paper I will argue that the main causes behind wrongful convictions stem from errors committed by the police and prosecutors, and that these errors target certain social groups more than others, such as racial minorities. Other errors occur because the judicial system allows unreliable and biased evidence to be used in courts against the defendants. Informants may be explained by race, due to the lack power inequality between informants and suspects that occurs most in other causes. I will argue that the differences in race in the case of informants from the other causes is because there is not a structural power inequality between the informant and the suspect. More research needs to be done on wrongful convictions so we can have more information on the causes and on race.

Eyewitness misidentification is the leading cause, and I will go into more detail later as to the many implications of eyewitness misidentification. Rattner (1988, 289-290) points to police and prosecutorial overzealousness as a contributing cause behind most cases. Other causes include perjury by witnesses, which I include under eyewitness misidentification or snitching in this paper. Informants contribute to wrongful convictions, as well as others which I will discuss in greater detail throughout this paper. Overall, however, these causes seem to indicate that the

problems are caused by members of the criminal justice system, such as police and prosecutors. For instance, the police officers encourage snitching (Rattner 1988, 289-290).

Using the data from the Innocence Project, I compiled the data from their 317 cases to determine which factors contribute most to wrongful convictions, the races of the wrongfully convicted, and where most wrongful convictions occur. As mentioned earlier, the type of crime can be misleading since felonies are disproportionately represented because they have higher penalties and garner more attention. There may be more misdemeanors, but because of the short sentence convicts may not go to the trouble of working towards an exoneration. For this reason, I also included the sentence in my data. This also helps me determine how many cases involve capital punishment, which is unfortunately not the complete total as some executions were carried out before exoneration. The location of the wrongful conviction matters because different states have different methods for judicial selection. I will explore this dynamic later in the paper to determine which judicial system is most prone to error, and whether such error may be attributable to the accountability of the judges to the public. The race of the victim is important in this analysis, as I will explore how the judicial system treats members of different races. This will help me determine if there is bias in the judicial system, and if the flaws that cause wrongful convictions affect one group of the population more than others.

I argue that the different factors of wrongful convictions indicate problems in the judicial system, which has a racial bias against minorities. The criminal justice system has an implicit bias and structural incentives that lead to wrongful convictions. Whether intentional or not, there is an implicit bias which I contend leads to racially biased wrongful conviction. Research has shown that people have an implicit bias which is a favorable or unfavorable bias towards

someone based on implicit attitudes and stereotypes. They can cause people to behave in a way that contradicts their principles (Greenwald and Krieger 2006, 950-951). Perhaps the police have a bias that leads them to believe that crime occurs more in areas of racial minorities and low income people, which leads them to identify someone as a suspect. While it may not follow their principles of fairness, this implicit bias may influence their decisions. Also, there are structural incentives for police and prosecutors to turn out as many convictions as quickly as possible. Their superiors are putting pressure on them to close as many cases as possible, which leads them to want to convict the suspect they have, and find corroborating evidence so the prosecutor can convict the suspects. The criminal justice system's design yields wrongful convictions. There needs to be serious reform to overcome these errors. Police need to be insulated from these pressures, and new procedures should protect people from this bias.

The evidence I will present is troubling. The judicial system was created to protect the citizens, yet it has been turned against certain groups unfairly. Many errors may not be intentionally biased, but the bias still exists. While there are many different contributing factors to wrongful convictions, the main factors, like eyewitness misidentification, have been proven to be too prone to error to be the leading evidence in a case. Also, factors like police and prosecutorial overzealousness demonstrate the judicial system's aggressive nature in trying to convict a suspect because of their incentives. Further, forced confessions are a part of police overzealousness, and informants can be encouraged to give convicting evidence by the police in order to save themselves. These flaws demand urgent repair, and a closer investigation of how the system operates. Further, the judges that preside over such a conviction should be examined

to see if they are elected or appointed to determine which system is most likely to bring about wrongful convictions.

To fix this serious problem we need to better understand it. However, one must keep in mind that much of the data on wrongful convictions is unknown since so many have occurred without our knowledge. These cases may be only a fraction of those that have actually occurred, and may not be the best representation of the crimes for which people have been wrongfully convicted. More research is necessary on this topic. The biases and errors presented in this paper demand urgent repair, and I will make some suggestions to reduce the number of wrongful convictions at the end of my argument.

I will begin this paper by looking at prior work on eyewitness misidentification, then go into analysis on my data from the Innocence Project to draw conclusions about the causes. I will then use the same to data to investigate the use of informants. I next turn to wrongful convictions by state and use different methods to see which state is most likely to have a wrongful conviction, and then look for a commonality among the most likely states. Finally, I turn to solutions to reduce the error of wrongful convictions and reform the judicial and criminal justice systems.

Eyewitness Misidentification

Marvin Anderson was living in Virginia when a white woman was raped in the nearby area. The victim recalled hearing the rapist, who she identified as black, saying he had “a white woman.” The officer only knew one black man nearby with a white girlfriend: Marvin Anderson. For that reason Anderson became a suspect. The police showed the victim black and white mug shots, and a colored picture of Anderson. She identified him. Then, in the lineup, she again

identified Anderson. However, no one from the other mugshots appeared in the lineup. At this point in the trial the community began to suspect another black man, who was in possession of the bicycle known to be at the scene of the crime. The trial continued, however, and Anderson received a total sentence of 210 years. He had no prior record. Anderson's case shows the flaws of the victim's memory. It also demonstrates the implicit bias of the system. The officer suspected Anderson from the start. When the victim identified the suspect from photos, Anderson's colored identification card stood out among the other black and white mugshots. Then, in the lineup, Anderson was the only person to appear in both the photos and in the lineup. The process, whether intentional or not, led the victim to identify Anderson.

Multiple studies show that eyewitness error is the leading cause of wrongful convictions. In the data I collected, it was the leading cause. According to Wise, Dauphinais, and Safer (2007), 75% of the first 180 wrongful convictions counted eyewitness error as the leading cause. In a separate study of 340 wrongful convictions, eyewitness error made up 64% of the cases. This factor contributes to wrongful convictions in part because eyewitness recollection is flawed. People are susceptible to suggestions, and an eyewitness account can easily be molded through suggestion.

As noted by Wise, Dauphinais, and Safer, scientific research proves the flaws of eyewitness testimony. The court has certain standards for eyewitness testimony, but they have not taken recent scientific studies into account. For instance, the court prefers witnesses who better observe the crime, but recent studies show that post-event comments or suggestions can distort the eye witness's memory. Also, the court does not account for some circumstances that can affect memory, such as the stress of a situation like rape. Also, the race of the victim or

suspect can affect an eyewitness memory (Wise, Dauphinais, and Safer 2007, 807-819).

Importantly, cross-racial identification is more difficult. Research has already shown that it is harder for white witnesses to correctly identify a non-white witnesses in a separate study (Free and Ruesink 2012, 199). Further, a witness may be able to describe a suspect perfectly, but still be unable to identify the correct suspect. There are many other factors that distort eyewitness testimony that are not included in the court's standards that studies show affect an eyewitness testimony. For the purpose of this paper, I need only note that the judicial system does not yet and cannot ever control all factors. This leads to the admissibility of erroneous testimony. For instance, an account that at one point was reliable may be altered by post-event commentary. Also, a stressful crime harms the memory. The court needs to update its laws to prevent inaccurate evidence entering the court. Also, there should be more control over how lawyers and police treat eyewitnesses to protect the evidence (Wise, Dauphinais, and Safer 2007, 807-819).

However, according to a 1987 study, eyewitness testimony served as either the only or the primary evidence for 80,000 criminal trials annually in the U.S. People's memories are imperfect, making eyewitness testimony imperfect. Yet jurors are most persuaded by it than they are by other pieces of evidence (Wise, Dauphinais, and Safer 2007, 810-819). Scientific evidence supports the weakness of eyewitness testimony, but the Supreme Court's rulings uphold eyewitness testimony in court, and has allowed for the use of photographs before trials among other methods that can be suggestive to the eyewitness. The court has acknowledged the suggestivity, and the weakness of some eyewitness testimony, but in recent history has supported its use in court¹. Further, courts in general have been less likely to allow expert testimony in the

¹ 1967 *United States vs Wade*: Court ruled that a defendant has a right to have an attorney present at post-indictment pretrial lineup. In the event that an attorney is not present, the identification can still be used to prove the defendant's guilt. 1967 *United States vs. Stovall*: Court ruled that if eyewitness identification was suggestive, it could be used if it

trial, which tends to be more accurate than eyewitness testimony. Expert testimony can also be used to inform the jurors of the factors affecting eyewitness testimony (Wise, Dauphinais, and Safer 2007, 810-819). Given the aforementioned flaws of eyewitness evidence, experts could ensure that jurors rely less on eyewitnesses when making their decision.

Lindsay, Wells, and O'Connor conducted an experiment in 1989 to test the reliability of eyewitness testimony in court. First, they set up a mock crime. They asked the mock eyewitnesses to identify the perpetrator of said crime by means of photos. They then asked the eyewitnesses to appear in mock trial. They used real lawyers in the mock trial, but controlled for impact of the lawyers' experience to ensure that it did not influence the results. The results showed that in 68% of the cases in which the eyewitness correctly identified the guilty suspect, the jury voted guilty. On the other hand, in 70% of cases in which the eyewitnesses identified the innocent suspect, the jury voted guilty. There was no other evidence presented at this trial. Jurors voted based solely on eyewitness testimony. This study shows that jurors cannot distinguish between accurate and inaccurate eyewitness testimony. Because the difference between 68% and 70% is negligible, jurors are not more likely to believe inaccurate testimony. However, it demonstrates the power of testimony in a trial. While a lawyer's experience did not play a role, the confidence of the eyewitness influenced the mock jury, making them more likely to believe confident eyewitnesses. I must make an important distinction: the confidence of the eyewitness

was imperative. 1967 *United States vs. Gilbert*: The Court ruled that the trial court is required to provide a new trial if the eyewitness testimony was the result of an illegal post-indictment lineup, unless the identification is harmless beyond a reasonable doubt. 1968 *Simmons vs. United State*: court rule that in-court identification is permissible even if it is suggestive. *Kir vs. Illinois*: Court ruled that an individual has a right to counsel in pretrial identification only if it took place after criminal proceedings were initiated against the defendant. *United States vs. Ash*: Court ruled that the defendant does not have a right to attorney at a photo array. *Neil vs. Biggers* and *Manson vs. Brathwaite*: Court ruled that suggestive identification procedures are admissible if they were reliable. (Wise, Dauphinais, and Safer 2007, 810-819)

does not always correlate to the accuracy of the eyewitness testimony. That is to say that an eyewitness identifying an innocent suspect may be more confident than an eyewitness identifying a guilty suspect (Lindsay, Wells, and O'Connor 1989, 333-337). These results suggest that standards for the use of eyewitness testimony in court should be raised if this piece of evidence bears such weight in the minds of the jurors. Further, it shows that the testimony still bears a strong influence of the jury regardless of the eyewitness accuracy.

Many have questioned the reliability of eyewitness testimony in the past, leading them to investigate the science behind eyewitness accounts. This information can help us understand the flaws and benefits of eyewitnesses. The court should use scientific evidence in reforming the court's standards and thereby reducing the chance of further wrongful convictions. Psychologists and researchers in other fields have done studies to find when witnesses are most reliable and how to make their testimony most reliable (Doyle 2010, 115). The key part is interviewing an eyewitness, and doing it in such a way that their memory is not affected. I will introduce specific reforms at the end of this analysis. For example, officers conducting the interview should not know the identity of the suspect so they cannot be biased (Wise, Dauphinais, and Safer 2007, 848). Loftus investigated the psychology of the memory of eyewitnesses. She described memory as "trace evidence". Doyle (2010) describes her findings on memory, "Like blood or semen found at a crime scene, memory evidence was difficult to recover, easy to contaminate, and even worse, once exposed to contamination, impossible to take back into a laboratory to test for whether the contaminants had taken effect" (Doyle 2010, 115). Taken with the results of the previous study, it would seem important to preserve the integrity of eyewitness testimony.

Eyewitness Misidentification and the Innocence Project

As noted in Table 1, the majority of wrongful convictions in which the race is known involve black people, mostly male, who were wrongfully convicted. I drew my data from the Innocence Project's list of successfully exonerated cases. There was a total of 317 cases. In these cases I determined the race either based on the photo of the wrongfully convicted, if given, or based on the description of the person who was exonerated, if given. Of the 317 cases, I was able to determine race in 234 cases. In these 234 cases, 61.97% were black, 5.98% were Hispanic, and 32.05% were white. This shows a clear majority of black victims of wrongful convictions, which is not surprising given the majority black men who make up the prison system in the United States.

Among these cases I am interested in looking at eyewitness misidentification. In Table 2 I broke down the causes behind the 317 cases of wrongful convictions. There are often multiple causes behind wrongful convictions, so many causes are listed as contributing to one case. 222 cases can count eyewitness misidentification as the sole or contributing cause. Among those 222 cases, I broke them down in Table 3 to show how often eyewitness misidentification contributes to wrongful convictions of different races. I was particularly interested in how race contributes to wrongful convictions because cross-racial identification may contribute to misidentification. Further, because police and prosecutors can manipulate the process, either consciously or unconsciously, the evidence becomes flawed. I wanted to see if eyewitness misidentification affects race, or whether race can be a deciding factor in misidentification. As mentioned earlier, of the cases in which race is known, blacks are victims in 61.79% of cases. Among cases of eyewitness misidentification in which race is unknown, 51.80% of cases show blacks who were wrongfully convicted, 20.27% whites, and 4.05% Hispanic. When looking only at cases where

race is known, the difference is even more noticeable. Of the 169 cases of eyewitness misidentification where race is known, 85.80% were black, 26.23% were white, and 5.33% were Hispanic.

While the data clearly shows that blacks are more often the victims of wrongful convictions than other races, there is an even larger majority of blacks that are wrongfully convicted because of eyewitness misidentification. Cross-racial identification clearly plays a role in these errors, but the strength of its effect is unfortunately unknown. Previous research has shown that white witnesses are more likely than non-white witnesses to incorrectly identify non-white individuals (Free and Ruesink 199). Most cases unfortunately do not give the race of the victim in their description. However, since the majority of eyewitness misidentification cases wrongfully convict black people, cross-racial identification clearly plays a role.

Another important factor is how police and prosecutors contribute to eyewitness misidentification. Are they biased against black people? Perhaps so many black people are wrongfully identified since black people already make up a majority of wrongful convictions; however, the difference between the overall total of wrongful convictions involving blacks and the percentage of eyewitness misidentifications involving blacks is too great to argue this. While cross-racial identification surely plays a role in this, the system is clearly disadvantaging blacks. Perhaps police are simply so overeager to have someone convicted for a crime that they do not always worry about the guilt of the suspect. However, there is an overrepresentation of blacks in wrongful convictions. Some might also argue that more blacks are wrongfully convicted because they are more likely to commit a criminal offense. A study based on data from 2004 looked at offending rates by race, and found that 39 percent of incarceration rate for blacks could not be

explained by racial differences in offending. So a higher incarceration rate by race cannot explain the large number of wrongfully convicted black men (Free and Ruesink 2012, 13).

As shown in the case of Marvin Anderson, police can either consciously or unconsciously bias the eyewitness into choosing the person they already suspect. They may be more likely to suspect a black person. Whether these biases and error are done on purpose or not, they show a bias in the criminal justice system that needs to be fixed. The flaws that sentence innocent people to jail and let guilty people walk free are disturbing. Even more disturbing is that these flaws, particularly those involving the use of eyewitness accounts as evidence, unfairly harm one part of the population more than others.

Table 1	
Race	# of wrongful convictions (Percent of race known)
Black	145 (62.0%)
Hispanic	14 (6.0 %)
White	75 (32.1%)

Table 2	
Cause	# of cases (percent of total cases)
Eyewitness Misidentification	222 (70.0%)
Forensic sciences	143 (45.1%)
Forced confessions	83 (26.2%)
Informants	38 (12.0%)
Bad lawyering	13 (4.1%)

Government Misconduct	47 (14.8%)
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Table 3	
# of Cases involving EM (% of total)	Race of wrongfully convicted
115 (51.8%)	Black
9 (4.1%)	Hispanic
45 (20.3%)	White
53 (23.9%)	No race given

I then explored the other causes that contributed to cases involving eyewitness misidentification. In the table below I break down the contributing causes and their frequency. I also compare the race of the wrongfully convicted in various cases to see if race has a particular effect on the combination of causes. Forensic science at first seems to be an impartial cause, but it actually has been used incorrectly in courts. Prosecutors have used faulty science in court, while backed by their forensic evidence. It may actually be used in a racially biased way. Over half of the forensic science cases in combination with eyewitness misidentification affect innocent black men. It may indicate misconduct or implicit bias on the part of the prosecutor or police. Cases involving both eyewitness misidentification and informants influence more white suspects than black, so race may be contributing in another way since there is not a power inequality between the informant and the defendant, as there is in the case of government misconduct. However, in the other combinations there is a much larger number of minority suspects. For example, although the race is unknown in 8 of the 14 cases of government

misconduct, over half of the cases involve minority suspects. Also, in the combination of forced confessions and eyewitness misidentification, there are 25 cases. Of these 25, 17 are minority suspects, which is also more than half. Finally, bad lawyering only had 10 cases, of which only one is white, leaving eight cases of black suspects and one unknown. Government misconduct and forced confessions indicate flaws in the justice system. Government misconduct is misconduct on the part of prosecutors or police. Forced confessions are poor conduct on the part of the police as well.

The evidence I presented shows that errors in the prosecutorial and police system affect minority suspects more than white suspects in combination with eyewitness misidentification. Personal accounts seem to indicate that the police have been biased in its use of eyewitnesses. However, this bias is especially problematic. Since the errors are committed by members of the criminal justice system, it appears that there is systemic bias against racial minorities. This bias should not be tolerated. The previous evidence on the bias in eyewitness misidentification on its own is troubling, but there are numerous biases and error in the criminal justice system that work together to put innocent black men behind bars.

Table 4					
Causes contributing to EM cases	# of occurrence	# of blacks	#of whites	# of Hispanics	# unknown
Informants	12	3	6	0	3
Government Misconduct	30	14	6	2	8
Forced Confessions	25	15	6	1	3

Forensic Science	91	48	20	7	16
Bad Lawyering	10	8	1	0	1

Informants

While it is not the leading cause in my data set, Natapoff describes informants as a leading cause in wrongful convictions. Like eyewitness misidentification, the testimony of one person is used to put an innocent person in jail. Also like eyewitness misidentification, juries tend to believe the testimony of informants. However, informants stand to gain something from incriminating someone. A victim would most gain from having the person who committed the crime placed in jail. An informant, on the other hand, simply stands to gain from giving testimony against anyone.

Informants willingly give up incriminating information on others to benefit themselves. Natapoff describes the role of informants as “part of a thriving market for information. In this market, informants trade information with police and prosecutors in exchange for lenience[y], the dismissal of charges, reduced sentences, or even the avoidance of arrests” (Natapoff 2010, 110-111). Informants influence investigations, plea bargaining, and trials. They also personally influence police officers. Police have come to rely heavily on informants as a source of evidence. They spend a great deal of time with their personal informants. They protect them when they are helpful and punish them when they refuse to give information. This relationship biases the police officers, and they often fail to substantiate the information that the informants provide (Natapoff 2010, 111-112).

Since informants are rewarded for speaking, they have an incentive to talk. However, they are rewarded regardless of the accuracy of their information. They may have more incentive to lie than tell the truth. The problem arises when they face no consequences for lying. Further, since police tend to be biased when speaking to their own informants, there are few safeguards to prevent the inaccurate information from affecting the criminal justice system. This information starts the investigation, and can be the principal evidence in a trial. The court allows for the admittance of this evidence without the necessary screenings (Natapoff 2010, 111-112). As Natapoff says, “When this happens, the integrity of the system is at stake” (Natapoff 2010, 112). Not only does the court allow the information into the trial, but juries seem to believe informants’ evidence regardless of its truth. These informants can be dishonest, and yet neither police nor juries can see the lies. Informants are causing wrongful convictions (Natapoff 112-113).

Overall, more minorities fall victim to wrongful convictions than do white people. However, informants cause more wrongful convictions for white men than for minority men. Table 5 breaks down the data for cases in which informants was listed as a cause. Eyewitness misidentification harms more minority men than white men, making the case of informants seem like an anomaly, when it may be explained in the context of power inequality between suspects (especially those of low-income) and police. Aside from forensic science errors, eyewitness misidentification more often correlates with government misconduct and forced confessions than other causes. Both causes are a form of misconduct on either the part of prosecutors or police. Eyewitness misidentification, while often the fault of the witness, can be manipulated by police in the line-ups and mugshots shown to the witness. These causes affect more minority men than

white men. Informants are a lie on the part of people who benefit from giving any information, truthful or not. Police may encourage informants to talk, but Natapoff's analysis seems to suggest that the informants are the source of evidence, and that they influence all parts of investigation and trials. It is unclear whether police encourage informants to talk about certain people. In government misconduct and forced confessions, police and prosecutors create the flaws that lead in part to wrongful convictions. More research needs to be done on this topic. Not enough research has been done on this cause with regards to race. It would also be interesting to know the races of the informants.

While there is not enough evidence to support any theory on the relationship between informants and race, I will explore some possible theories as to the cause. Informants are encouraged to give up information, even lies, by the criminal justice system. However, they are further removed from the criminal justice system than are government misconduct and forced confessions. Informants are often in jail themselves. This changes the power dynamic between the informant and the suspect. In government misconduct and forced confessions, the person causing the error is in a position of power, and there is an inequality of power between them and the suspect. Informants are often in jail themselves, so there is not that inequality. Perhaps this lack of power inequality means that less black suspects are wrongfully convicted in this manner. Perhaps those in power are more likely to suspect racial minorities and those of low income, but informants are unbiased or biased in different ways.

Another theory is based on the incentives of an informant. Like informants, eyewitness misidentification is outside the system. The witnesses' memory can be influenced by police, but the information that informants give can also be influenced by police. Yet informants do not

intend to go off their memory, they only intend to get the benefit from incriminating someone else. Eyewitnesses go off of their memory, but much of their misidentification may arise from cross-racial identification. Perhaps informants are less likely to harm minority groups because they are not biased against any person. Rather they simply want to help themselves lower their terms, and will incriminate anyone.

There is also the possibility that informants are in fact biased. In prison there are many rival factions. Informants could speak against someone from a rival faction. If the informants are part of a black faction, they may have an incentive to speak against a white faction.

Unfortunately I do not have information on the race of the informants, which might help either corroborate or disprove some of these theories, but future work should explore this possibility.

Informants are a flaw in the criminal justice system. Informants should only be allowed
in court

after the validity of their testimony has been tested through a pretrial session in which the details of the informant's knowledge are explored. Also, the personal background and benefits that informants receive for testifying should also be considered before it can influence jurors.

Solutions to this cause of wrongful convictions will be discussed later. The relationship between race and informants should be further explored. Informants may cause wrongful convictions more for white victims than minority groups because of their distance from the criminal justice system, or it may be because of their nondiscrimination in incriminating anyone.

Table 5	
Cases involving informants	# of cases (% of cases involving informants)
Total	38
# black	8 (21.1%)
# white	17 (44.7%)
# Hispanic	1 (2.6%)
# unknown	12 (31.6%)

Wrongful Convictions by State

Using the information gathered from the innocence project I broke the wrongful convictions down by each state to see where the errors occurred most. By doing so, I hoped to find some commonality between the states' population or judicial systems that would point to a cause of wrongful convictions. Since states with smaller populations would be less likely to have wrongful convictions since they have less people, I did not want to rely solely on comparing the states with the highest number of wrongful convictions. There are many factors to consider that might contribute to wrongful convictions.

Table 6 shows a breakdown of the the top ten states based on the rate of wrongful convictions by population. In my research I excluded Wyoming and Washington DC. based on their very small populations of less than a million, which would make any number of wrongful convictions seem substantial. I used data from the US Census Bureau to find the population for each state based on the most recent census in July 2014. I considered finding the populations of the time of the wrongful convictions, but they took place over so many different years that the

less biased way was the use of the most recent census. While many states that had some of the most wrongful convictions are listed as the highest according to this ranking, there are other states that have a small population yet very few wrongful convictions, such as Montana, which scored as the fifth most common state for wrongful convictions. Table 8 shows the data on the wrongful convictions based on the rate of wrongful convictions by population of each state.

Table 6			
State	# of wrongful convictions	Population*	Rate of wrongful convictions**
Illinois	43	12.8906 million	3.336
West Virginia	6	1.8503 million	3.243
Nebraska	6	1.8815 million	3.189
Louisiana	14	4.6497 million	3.011
Montana	3	1.0236 million	2.931
Oklahoma	11	3.8781 million	2.836
Virginia	16	9.3263 million	1.922
Texas	48	26.957 million	1.781
Mississippi	5	2.9941 million	1.67
Missouri	9	6.0636 million	1.484

Worried that population was not the best way to consider which state was most likely to have a wrongful conviction, I then turned to crime rate. I used the crime rate according to the US Census, which determines crime rate by the number of violent crimes committed per 1000,000 population. This would give me the number of wrongful convictions per crimes that occur in each state, which would then indicate which state is more likely to wrongfully convict based on

each crime committed. I felt like this would be a more accurate indicator of how often each state's judicial system commits an error(s) that would lead to a wrongful conviction. Table 7 shows the ten states most likely to have a wrongful conviction based on this method. Six of the same states appeared in both lists: Texas, Illinois, Virginia, Oklahoma, West Virginia, and Nebraska. Four states appeared in Table 7 that do not appear in Table 6: New York, Ohio, Pennsylvania, and Wisconsin. Since Table 7 seems to be a better predictor of the rate of wrongful convictions, I will be using this data when discussing which states are most likely to have wrongful convictions. Table 9 shows the the number of wrongful conviction that occur for each race for each of the ten states.

Table 7			
State	# of wrongful convictions	Crime Rate	Rate of wrongful convictions
Texas	48	516	0.093
Illinois	43	542	0.0793
New York	29	435	0.0667
Virginia	16	282	0.0567
Ohio	10	350	0.0286
Pennsylvania	11	439	0.0251
Wisconsin	7	284	0.0246
Oklahoma	11	497	0.0221
West Virginia	6	280	0.0214
Nebraska	6	282	0.0213

***according to US Census Bureau as of July 2014**

**** Found by dividing the # of wrongful convictions by the number of millions of population**

Table 8 (rankings based on Table 6)					
State	# of black victims (% total)	# of white victims (% total)	# of Hispanic victims (% total)	# race unknown (% total)	Total #
Illinois	24 (55.8%)	2 (4.7%)	4 (9.3%)	13 (30.2%)	43
West Virginia	1 (16.7%)	5 (83.3%)	0 (0%)	0 (0%)	6
Nebraska	0 (0%)	4 (66.7%)	0 (0%)	2 (33.3%)	6
Louisiana	12 (85.7%)	1 (7.1%)	0 (0%)	1 (7.1%)	14
Montana	0 (0%)	2 (66.7%)	0 (0%)	1 (33.3%)	3
Oklahoma	4 (36.4%)	4 (36.4%)	0 (0%)	3 (27.3%)	11
Virginia	7 (43.8%)	2 (12.5%)	0 (0%)	7 (43.8%)	16
Texas	24 (50%)	12 (25%)	5 (10.4%)	7 (14.6%)	48
Mississippi	4 (80%)	0 (0%)	0 (0%)	1 (20%)	5
Missouri	5 (55.6%)	0 (0%)	1 (11.1%)	3 (33.3%)	9

Table 9 (rankings based on Table 7)					
State	# of black victims	# of white victims	# of Hispanic victims	# race unknown	Total #
Texas	24 (50%)	12 (25%)	5 (10.4%)	7 (14.6%)	48
Illinois	24 (55.8%)	2 (4.7%)	4 (9.3%)	13 (30.2%)	43
New York	7 (24.1%)	11 (37.9%)	0 (0%)	11 (37.9%)	29
Virginia	7 (43.8%)	2 (12.5%)	0 (0%)	7 (43.8%)	16
Ohio	7 (70%)	1 (10%)	0 (0%)	2 (20%)	10
Pennsylvania	3 (27.3%)	3 (27.3%)	0 (0%)	5 (45.5%)	11
Wisconsin	3 (42.9%)	2 (28.6%)	0 (0%)	2 (28.6%)	7
Oklahoma	4 (36.4%)	4 (36.4%)	0 (0%)	3 (27.3%)	11
West Virginia	1 (16.7%)	5 (83.3%)	0 (0%)	0 (0%)	6
Nebraska	0 (0%)	4 (66.7%)	0 (0%)	2 (33.3%)	6

Table 10 shows the percentage of the populations of the ten states in Table 7 according to the three races for which I have found wrongful convictions; black, white, and Hispanic. I also included the national average to give some perspective. Overall, of course, I found majority white in all states since they are the majority race. I found that for no state did the black

population make up 20% or more. The percent Hispanic was generally small except for the first three states listed. Five states wrongfully convicted more black people than any other ethnicity: Texas, Illinois, Virginia, Ohio, and Wisconsin. Oklahoma and Pennsylvania have a tie between black and white people wrongfully convicted. The rest have more white victims than black. Of all ten states only two wrongfully convicted Hispanic people: Texas and Illinois, which have some of the highest Hispanic populations in this list. With the exception of New York, which has 11 cases in which the race is unknown, the two states, West Virginia and Nebraska, that have more white victims than black also have the highest white populations on this list. Why do most of the states that are most likely to wrongfully convict more often wrongfully convict black people than white people? What biases exist in their judicial systems? I included the population percentages to see if the populations most likely to have wrongful convictions had the largest black populations, but I did not find that. I did not find a direct correlation between racial populations and the likelihood to wrongfully convict anyone, or racial minorities. For example, Washington D.C., which is 36th most likely to wrongfully convict someone, has a minority white population at 43.4% of their population. They have four wrongful convictions. Of these four, one is a black victim and the other three have races unknown. Unfortunately since most of the cases have unknown race, it is hard to draw conclusions based on Washington D.C. However, they have a higher black population than any other race, yet they have a low rate of wrongful convictions. So since the majority of wrongful convictions in which the race is known have black victims, this shows that simply because a state has a larger black population does not make that state more likely to have a wrongful conviction. This would support my argument that there are

errors and biases in the criminal justice system that make the minority racial populations more likely to be wrongfully convicted.

There is also the possibility that the makeup of juries contributes to the racial bias in wrongful convictions. Unfortunately I do not have data on the racial makeup of each wrongful conviction, but most of these ten states have white populations that are higher than the national average. This is not to say that white jurors are just convicting black people, but there could be an unintentional bias. Also, it may not help the defendant to have a jury made up mostly of another racial group. There needs to be more research, but this could be a contributing explanation of the racial bias found in wrongful convictions.

Table 10			
State	% Population Black	%Population white	% Population Hispanic
U.S. National population	13.2	77.7	17.1
Texas	12.40%	80.30%	38.40%
Illinois	14.70%	77.70%	16.50%
New York	17.50%	70.90%	18.40%
Virginia	19.70%	70.80%	8.60%
Ohio	12.50%	83.20%	3.40%
Pennsylvania	11.50%	83.20%	6.30%
Wisconsin	6.50%	88.10%	6.30%
Oklahoma	7.70%	75.40%	9.60%
West Virginia	3.60%	93.80%	1.40%
Nebraska	4.80%	89.70%	9.90%

I will next turn to the judicial selection systems by state. If a judge is held accountable to a population that prefers harsher convictions he may be more likely to give harsher sentences and

convict more often so as to appear hard on crime. Judicial selections can vary between between systems in which judges are chosen by the electorate, if they are appointed, or a combination of the two. The varying systems exist in order to either create a judicial system with greater accountability or independence. Some believe that judges should be accountable to the electorate in their decisions, while others believe that judges should operate independent of the wishes of the public (Wasmann 1986, 169). For the purpose of my paper, what matters is how the judges act based on how they are selected. I am concerned with whether more accountable system makes judges more likely to wrongfully convict.

A study done by Wasmann explored whether people's perception of the judicial system varied depending on the selection system that existed for them. They found that it did not vary significantly across systems. However, they did find that non-legal professionals were more critical of judges and more likely to find flaws. Judges and lawyers had more confidence in judges and were less likely to think of flaws. Since judges are more accountable to lay people since they make up a larger portion of the electorate, they may feel pressured. Clearly the majority of the electorate is more likely to find flaws in their rulings and more likely to be critical (Wasmann 1986, 180-181). So would they be more likely to wrongfully convict if they are accountable to an electorate? Gordon and Huber (2004) have already shown that judges nearing re-election are likely issue harsher sentences (Gordon and Hubes 2004, 25-256). Given the results of their work, it is likely that judges nearing re-election could be influenced in their likelihood to issue wrongful convictions.

The judges in Texas are selected through partisan elections. One scholar theorizes that Texas turned to election for judicial selection to decrease government power and put it more

under the people's control (Klemme 2002, 432). Being that Texas is most likely to wrongfully convict, this would support my argument. However, it is necessary to look at more states. In addition to Texas, New York, Pennsylvania, and West Virginia choose their judges through partisan elections. New York has a more complex system, but most judges are chosen through partisan elections. Ohio chooses its judges through nonpartisan elections, yet the candidates are still chosen in party primaries, which shows that the party still plays a role in elections. Wisconsin also holds nonpartisan elections, as does Oklahoma for district court judges. Appellate judges in Oklahoma are chosen through merit selection. Merit selection is meant to combine aspects of accountability and independence. Nebraska also chooses its judges through merit selection. The state that is second most likely to wrongfully convict, Illinois, has a combination of partisan and nonpartisan retention elections. According to the National Center for State Courts, Illinois judges are initially elected through partisan elections for their first term, then re-elected through uncontested nonpartisan retention elections. The retention election aspect of Illinois's system is probably an effort to make judges more independent in their decision making since they do not have to campaign against anyone, but they are still accountable to the electorate. The judges in Virginia are chosen by its legislature. So while they are still elected, they are not chosen by the general public, but representatives of the public. Since Weismann's study said that non-legal professionals are more critical of judiciary, state legislature members may be less critical if they have a background in law. This method may be intended to give Virginia judges a degree of independence from the general public.

Overall, eight of the ten states have some form of either partisan or nonpartisan competitive election for at least some of their judges. Two have merit selection, and only

Virginia has their legislature choose their judges. Most of the ten states hold elections, which does not necessarily indicate that elections yield more wrongful convictions since most states hold elections to select their judges. Of these ten states, nine have some form of election in which the judges are held accountable to the electorate. Five of the 38 states in which wrongful convictions have taken place have a system in which judges are appointed and do not face elections, giving them more independence. Since there is such a small number of states that appoint judges, it is unlikely that simply having an appointment system makes a judicial system less likely to wrongfully convict. However, having elections may affect the likelihood of wrongful convictions if judges feel that they must appear hard on crime to face their electorate. Appointments could insulate the judges, or it could simply make them accountable to a legislature or governor, which could also affect their decision making. Unfortunately there's not enough evidence to draw a conclusion from the effect of judicial selection systems on wrongful convictions.

Table 11	
State	Type of Election
Texas	partisan
Illinois	Partisan and Retention
New York	Partisan
Virginia	Elected by Legislature
Ohio	nonpartisan
Pennsylvania	partisan
Wisconsin	nonpartisan
Oklahoma	merit selection and nonpartisan

West Virginia	partisan
Nebraska	merit selection

It is difficult to draw a definitive conclusion from the evidence presented in this section. However, based on the populations of the ten states by race, as well as the breakdowns of the wrongful convictions by race, it is clear that the higher number of wrongful convictions of black people does not correspond to the minority populations by state. All ten states have a largely white populations, yet there are less white convictions than there are minority overall. The judicial selection systems of the ten states do not clearly indicate which system is worse, yet there should be concern of the accountability of judges to the electorate. This accountability becomes more complicated since most of the general public consists of non-legal professionals, who are more likely to be critical of judges. This means that judges have incentives to give harsher sentences when they face re-election.

Solutions and Prevention

The research is incredibly troubling. Not only have the judicial and criminal justice systems wrongfully convicted so many innocent people, but they disproportionately convict more innocent minorities than other social groups. The system is designed to protect the people, yet it harms those most vulnerable. One might argue that there is a high incarceration rate for racial minorities, yet this does not match the crime rate in the United States. According to Arvanites and Asher, “Racial composition and income inequality will have a significant effect on imprisonment *when controlling* for crime” (Arvanites and Asher 1988, 207-208). There are

different theories about the causes of greater imprisonment for racial minorities. Many cultural conflict theorists argue that whites view racial minorities as a threat, and associate areas with more minorities with more crime. Research has been done to find what exactly causes this racial inequality. Even when controlling for offense, prior record, and prison record, racial minorities receive more prison sentences, longer prison sentences, and serve longer time in prison. This research seems to argue that there is no explanation based on crime rate or other factors to explain that there is not a bias causing the large incarceration rate for racial minorities (Aravintes and Asher 208-209). When combined with the research done in this paper, it becomes clear that the larger number of wrongful convictions for racial minorities cannot simply be explained by larger incarceration rates for minorities, since these incarceration rates are biased against minorities. Since crime rates and previous offenses cannot explain the bias towards imprisonment for minorities, it is hard to argue against the bias created by the criminal justice system and members of the judicial system.

Now that I have explained all of the problems in the criminal justice and judicial systems, I think it is important to prevent future wrongful convictions, as well as allow for the wrongfully convicted to be released from prison. I will use the recommendations made by the researchers I referenced in this paper, then use their specific recommendations to make a broader recommendation.

With regards to the problems of wrongful convictions, Arye Rattner suggests having more filters placed in the judicial system. If the eyewitness identification is the only piece of evidence in the trial, he suggests that the validity of the evidence should be decided in a pre-trial session by a judge or jury before it can be used in court. In the cases involving eyewitness

identification as contributing evidence, the jury should be given special cautionary instructions. Also, an expert witness should be allowed in trial to advise on the eyewitness evidence (Rattner 1988, 292).

Wise makes important recommendations not only on how to treat eyewitness identification in court, but also how to treat eyewitnesses after the crime to prevent the evidence from becoming contaminated in the first place. He suggests using various methods to get more information from the witness, to prevent officers from contaminating the memory and evidence from the witness, and to prevent officers from giving into systemic pressures. To get more information from eyewitnesses, officers should not interrupt witnesses in their accounts, which prevents witnesses from telling the full story. They should also ask more open-ended questions rather than close-ended, which is more encouraging for witnesses. Further, officers need to make witnesses feel safe, making the witness willing to speak freely.

Secondly, officers must refrain from introducing post-event information when interviewing eyewitnesses, which can seem credible to the witness and thereby affect their recollection of the event. Also to prevent contamination of evidence, officers must be insulated from systemic pressures that might influence officers in their interviews. Since officers are concerned with getting the suspect prosecuted, they tend to look for evidence from the witness that would incriminate the suspect they have. Law enforcement may encourage officers to get corroborating evidence from the witnesses, and may even encourage officers to be aggressive and manipulate the witnesses in order to get information to convict the suspect. Also, beginning officers may conduct interviews on site after the crime, but do not have sufficient training to get

the most information and avoid manipulating the evidence (Wise, Dauphinais, and Safer 2007, 842-848).

Finally, psychological techniques should be employed in interviews to avoid contamination and get the most information. For example, the officers conducting the interviews should not know the identity of the suspect so that they will not be biased. Also, defense attorneys should be allowed to either be present or see videos of the interviews as a censure against manipulation and other errors during interviews. “Cognitive interviews,” as developed by Fisher and Geiselman should be used with interviewing eyewitnesses as it improves the recollection of witnesses without manipulating the evidence² (Wise, Dauphinais, and Safe 2007, 848).

Wise, Dauphinais, and Safer next turn to identification procedures, and using scientific evidence to correct them. According to his research:

“There is strong empirical evidence that most eyewitnesses employ a relative judgment process in selecting a suspect from a photo array or a lineup. In other words, eyewitness tend to select the lineup member who most closely resembles the perpetrator of the crime.” (Wise, Dauphinais, and Safer 2007, 852)

I find this knowledge troubling, but believable. Because so many eyewitness misidentifications are cross-racial, it is not surprising that witnesses make a relative judgment. Also, Wise, Dauphinais, and Safer point out that witnesses assume that officers already have a suspect when

² Cognitive interviews were developed by Ronald Fisher and Ed Geiselman to maximize reporting and collection of witness without contaminating their memory through 3 ways: 1)improve social dynamics of an interview by encouraging the officer to establish rapport and show empathy 2)improve memory and recall using mnemonic devices and recording the interview and 3) improve communication through open-ended questions and not interrupting the eyewitness (Wise, Dauphinais, and Safer 2007, 848-849).

they are asked to make an identification. Witnesses feel pressured to be able to identify someone, so they may use relative judgment to make some identification.

Not only are eyewitnesses sometimes flawed in their identification methods, but law enforcement officers may conduct identification and line-up procedures with bias and commit procedural errors. Wise, Dauphinais, and Safer make recommendations to ensure that the identification is based on the eye witness's memory rather than the identification procedure, as was the case of Marvin Anderson mentioned earlier in this paper. Wise, Dauphinais, and Safer make ten recommendations on identification procedure³, all intended to decrease bias on the part of law officers and to decrease the probability of eyewitness misidentification based on miscellaneous errors.

They also address the use of eyewitness evidence in trials, and how to prevent faulty eyewitness testimony from being used in courts. He finds that judges who are more educated on eyewitness factors are more likely to create legal safeguards in the court, such as educating jurors about the factors affecting eyewitness testimony. They recommend that all actors in the criminal justice system receive education on eyewitness factors so that they can reduce error, such as law officers, attorneys, and judges (Wise, Dauphinais, and Safer 2007, 865-868).

Natapoff makes recommendations to test the reliability of informants before using them as evidence in court through pre-trial reliability hearings. Given the bias of the informants, who

³ Wise, Dauphinais, and Safer make ten recommendations on identification procedures: 1) law enforcement should use identification procedure only when there is probable cause to believe the suspect committed the crime 2) it should be ascertained whether the suspect has previously seen the suspect before conducting an identification procedure 3) only one suspect should be included in every identification procedure 4) number of lineup members should be increased 5) suspect in identification procedure should not stand out from the rest 6) law officers should use sequential identification procedures, or have the witness view lineup members one at a time 7) lineup administrator should not know identity of suspect 8) eyewitness should be given cautionary instructions 9) all identification procedures should be videotaped 10) an eyewitness should make a statement of his or her confidence at the time of identification (Wise, Dauphinais, and Safer 2007, 856-864)

are rewarded for speaking, the truth of their testimony needs to be explored. These hearings would expose the benefits that the informants receive from testifying. Illinois has already enacted a similar statute that would expose the criminal history of the informants, the benefits the informants receives, details on what the defendant said to the informants, and other information that affects the informant's reliability. While this statute only applies to informants in custody, it can be used in courts for all informants since all have a bias that influences them to lie (Natapoff 2010, 112-115).

Doyle focuses on broader solutions to errors in the criminal justice system with regards to eyewitness error, but that can be applied in general. He believes that different parties of the criminal justice system should work together to prevent errors. He focuses on reporting errors and reviewing them to improve the system overall. A key part of this is organization by all actors to come together and review problems. By working together, they can better review the errors and thereby prevent future errors of the same kind. The members of the system will benefit from this, as will future members of the criminal justice system. Reporting is essential, as is organization (Doyle 2010, 145-146).

Finally changes should be made to exonerate more wrongfully convicted. For example, Free and Ruesink recommend a centralized data source on wrongful convictions. Various sources, such as the Innocence Project and the Center on Wrongful Convictions, offer valuable information, but they should be centralized to make research easier. Additionally, data on past cases of wrongful convictions should be preserved, not only for historical and research reasons but also to help understand errors and prevent future wrongful convictions. As mentioned earlier in this paper, the data on wrongful convictions is biased in that it has an overrepresentation of

felonies. Since felonies have more serious sentences, even the death penalty, they garner more attention than small misdemeanors. Free and Ruesink recommend looking into wrongful convictions on lesser crimes, which far exceed the number of more serious crimes. They recommended that law schools begin programs to look into wrongful convictions in areas near them. Just because not all 50 states are listed as having wrongful convictions does not mean that wrongful convictions have not occurred for less serious crimes in all states.

Table 12 outlines the various solutions to wrongful convictions based on the researcher who proposed them. I believe that all of these recommendations must be used to prevent wrongful convictions and help those already wrongfully convicted. This topic does not have enough research or recognition. Not only must we know more about wrongful convictions, but all members of the criminal justice system should be aware of their potential errors. We can only stop wrongful convictions if systemic reform is implemented. I have already shown that there is implicit bias and structural incentives within the criminal justice system that lead to wrongful convictions. Only widespread systemic reform can end wrongful convictions, implemented with education for members of the criminal justice system and centralized research.

Table 12	
Researcher	Solution
Rattner	pre-trial session for EM and expert witness
Wise, Dauphinais, and Safer	cognitive interviews, insulation of officers from systemic pressures, insulation of eyewitnesses from post-event information
Wise, Dauphinais, and Safer	identification procedure reform and education of members of judicials system

Natapoff	pre-trial hearings on informants
Doyle	central organization to review wrongful convictions and reporting
Free and Ruesink	Centralized data and investigation of misdemeanors

Conclusion

This thesis illustrates the systemic problems in the judicial system. Unfortunately, these problems target the most marginalized in the community, black and brown men, particularly of bad background. Many racial minorities live in areas that are already over-policed, and suffer from racial profiling by the police. Racial profiling is already generally accepted as a problem, but one problem that does not receive as much attention is the cross-racial eyewitness misidentification. Eyewitness misidentification is the leading cause of wrongful convictions, many of which may be identified cross-racially. Since they are done cross-racially, it is targeting brown and black men, making it dangerous to be black in this country. Even committing no crimes does not keep them from serving time in jail because the system because the system allows witnesses to convict innocent men. Further, the system rewards informants and punishes those who do not inform, thus encouraging people to accuse anyone, including innocent men. The system is designed to put someone away for every crime committed. Unfortunately it is flawed and enables too many innocent men to be put away, or to be put to death. The quantity of evidence required to convict someone is insufficient, and the quality of the evidence required is also lacking.

Further, two of the states with the most wrongful convictions, Texas and Illinois, both have judges elected by popular election. Although it is important for the judges to be accountable

to people, this accountability requires judges to answer to the demands of the public, which involves doling out harsh sentences to someone for a heinous crime. The key factor in eye witnesses, informants, and judges is that they are all punishing someone, but it is the someone that matters. The someone should be the person guilty for the crime at hand, not someone who has already paid back society for a past crime, or someone who was born without white skin. The system does not guarantee the conviction of the guilty person. Not only does that let the guilty person walk free to commit more crimes, but it costs the lives of the documented hundreds, and most definitely undocumented thousands who are wrongfully convicted. The system disproportionately targets black and brown men, not guilty men. Reform is necessary.

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