

WHITE PAPER

**Wrongful Convictions of Sexual Assault:
An Untold Story of Systematic Injustice**



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It is difficult to imagine a greater injustice than to convict and send an innocent person to prison. Indeed, the haunting specter of a man wrongfully charged, convicted, and sentenced has long been part of the American consciousness.

In 1960, Lee Harper published *To Kill a Mockingbird*, the harrowing account of Tom Robinson, a black man accused of raping a young white woman. Despite clear evidence of innocence, Robinson was convicted. Ironically, the hapless man was shot and killed as he tried to escape. One critic would later write of the seminal novel, “In the twentieth century, *To Kill a Mockingbird* is probably the most widely read book dealing with race in America, and its protagonist, Atticus Finch, the most enduring fictional image of racial heroism.”¹

But the broader lessons of *To Kill a Mockingbird* did not appear to penetrate the awareness of the legal community. Indeed, commentators held to the belief that innocent persons were rarely, if ever convicted. Justice Sandra Day O’Connor summarized the prevailing view: “Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent.”²

But beginning in 1989, the advent of forensic DNA analysis, which is uniquely probative in identifying a rapist, served to challenge fundamental assumptions about the accuracy and fairness of the criminal justice system. Justice David Souter would decry how wrongful convictions were occurring “in numbers never imagined before the development of DNA tests.”³

While long-overdue analyses of the problem of wrongful convictions have been conducted in recent years, this research has focused mostly on homicide cases. Considerably less attention has been placed on sexual assault. These cases represent the second leading exoneration crime category after homicide, consisting of 23% of all exonerations in the United States from 1989 to 2012.⁴ This White Paper endeavors to advance our understanding of the problem of wrongful convictions of sexual assault.

Behind every statistic are real people who have experienced the failure of our criminal justice system. One such man was Marvin Anderson:⁵

On July 17, 1982, a white woman was raped in Hanover County, Virginia. The woman told police that the black assailant had mentioned he “had a white girl.” Marvin

¹ Crespino, J. (2000). "The Strange Career of Atticus Finch." *Southern Cultures* 6(2), 9–30.

² *Herrera v. Collins*, 506 U.S. 390, 420 (1993).

³ *Kansas v. Marsh*, 544 U.S. 1060 (2006), (Souter, J., dissenting).

⁴ Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989-2012*, Report by the National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (last visited Oct. 30, 2015).

⁵ National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=2995> (last visited Oct. 30, 2015).

Anderson, 18 years old, was the only black man that police knew who lived with a white woman. The woman was shown black-and-white mug shots of half a dozen men, and one color image of Marvin Anderson. She pointed to Anderson as the assailant. Anderson was convicted and sentenced to 210 years in prison.

Six years later, a man named John Otis Lincoln came forward, claiming he was the perpetrator. He even offered specific details of the crime. But the presiding judge refused to accept his confession.

After forensic DNA testing became available in 1989, Anderson again sought to establish his innocence. By a stroke of luck, a specimen from the case was located in the laboratory notebook of the criminalist who had performed the original serology test.

On December 6, 2001, the DNA test excluded Anderson as the perpetrator. When the forensic profile was run against Virginia's convicted offender DNA database, it matched that of John Otis Lincoln. On August 21, 2002, after 15 years in prison and 4 years on parole, the Virginia governor granted Anderson a full pardon.

In more ways than one, the saga of Marvin Anderson is emblematic of the pernicious problem of wrongful convictions of sexual assault.

Literature Review

The research on wrongful convictions can be traced back to the early 1900s. Conceding to the social taboos of the time, the early analyses ignored or downplayed miscarriages of justice in rape cases. Edwin Borchard's 1932 classic, *Convicting the Innocent*, openly conceded that wrongful convictions of rape were "intentionally omitted from this collection."⁶ Thirty years later, Edward Radin published *The Innocents*, detailing 70 wrongful convictions, of which only three involved wrongful convictions of rape.⁷

Extent of Wrongful Convictions

Various attempts have been made over the years to estimate the extent of wrongful convictions:

- Employing a sample of murder-rape death sentences and exonerees from several states during the period 1982-1989, Risinger estimated a rate of 3.3% to 5.0%.⁸
- Relying on qualitative methods, Zalman estimated the innocence rate at between 0.5% and 1%.⁹
- Applying survival analysis to defendants sentenced to death, Gross and colleagues calculated a wrongful conviction rate of at least 4.1%.¹⁰

⁶ Borchard, Edwin, and Russell E. Lutz. *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice*, Garden City, N.Y.: Garden City Publishing Co. (1932).

⁷ Radin, Edward D. *The Innocents*. New York: William Morrow & Co. (1964).

⁸ Risinger, D.M. *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, *Journal of Criminal Law and Criminology*. Vol. 97. Pg. 761-806 (2007).

⁹ Marvin Zalman, *Quantitatively Estimating the Incidence of Wrongful Convictions*, 48 *CRIM L. BULL.* 221, 245-46 (2012).

The Urban Institute undertook post-conviction DNA analyses in Virginia in which samples from both the convicted person and victim were available. The convictions had been imposed before DNA testing became widely available for forensic purposes. The study concluded:¹¹

The convicted offender was eliminated as the source of questioned evidence in 33 out of 227 convictions (15 percent) where a determination could be made from the DNA analysis, and that elimination was supportive of exoneration.

This study revealed a wrongful conviction rate for rape cases more than three times higher than previous estimates that had focused largely on homicide convictions.

Contributing Factors to Wrongful Convictions of Rape

In 2011, Bedau and Radelet published the findings of a study that had examined 24 rape cases carrying potential death penalties. They identified the following causes of wrongful rape convictions, with some cases implicating more than one cause:¹²

- Perjury by prosecution witness: 70.8%
- Conviction demanded by community outrage: 58.3%
- Coerced or other false confession by police: 16.7%
- Inadequate consideration of alibi evidence: 12.5%
- Other overzealous police work: 12.5%
- Police negligence: 4.2%
- Mistaken eyewitness identification: 8.3%
- Incompetence of defense counsel: 4.2%
- Fraudulent alibi or false guilty plea made by defendant: 4.2%

Convicting the Innocent, an analysis of the first 250 persons exonerated by DNA testing, found that rape accounted for the majority of exonerations, representing 68% of all cases.¹³ The most common causes of the 250 wrongful convictions were faulty forensic and eyewitness evidence, representing 74% and 76% of all exonerations, respectively.

A 2015 review article by Reggie Yager analyzed the legal and research literatures on wrongful convictions of sexual assault. Reflecting on the Urban Institute study reviewed above, Yager noted that “a lot of our cases today are very much like it was between 1973 and 1987; they are tried without DNA evidence.” He concluded, “If 15 percent of cases

¹⁰ Samuel R. Gross, Barbara O’Brien, Chen Hu, Edward H. Kennedy, *Rate of False Conviction of Criminal Defendants Who are Sentenced to Death*. Proceedings of the National Academy of Sciences, Vol. 111 (2014).

¹¹ John Roman et al., *Post-Conviction DNA Testing and Wrongful Conviction* 6 (2012).

¹² Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, Stanford Law Review Vol. 40, No. 1, (1987). Page 65.

¹³ Brandon L. Garrett, *Convicting the Innocent*, Figure A.2., (2011).

tried without forensics in the 70s and 80s were incorrect, that should be a fair assessment of how many cases tried today without DNA evidence are also erroneous.”¹⁴

Methods

This White Paper utilizes data provided by the National Registry of Exonerations (NRE), which tracks all confirmed exonerations in the United States from 1989 to the present time.

This project examines the adult sexual assault cases cataloged in the NRE database as of April 3, 2015. To sharpen our analytical focus, we included only those cases in which sexual assault was the most serious crime charged, thus omitting cases in which the accused was charged with both murder and sexual assault. Relying on this dataset of 269 cases, we identify the correlates and contributing factors to wrongful convictions of sexual assault. For comparative purposes, we also present selected findings on the 1,575 exonerations for all crime categories.

We caution the reader that exoneration data cannot be considered representative of all wrongful convictions. Reversing a wrongful convicted person is a time-consuming process. Out of necessity, these efforts focus on individuals with long sentences typically arising from felony convictions. Thus, persons who have been wrongfully convicted of misdemeanors are far less likely to be beneficiaries of efforts to establish their innocence. Nonetheless, these exoneration data can provide important insights into the correlates and causes of wrongful convictions.

CORRELATES

We now present the findings for a number of demographic, criminological, and other variables:

- A. Race
- B. Age
- C. Sex
- D. Strangers versus Acquaintances
- E. Crime Location, by State
- F. Legal Jurisdiction
- G. Adjudication Timeline
- H. Sentence Length
- I. No-Crime Cases

¹⁴ Yager, Reggie, *What's Missing from Sexual Assault Prevention and Response*, April 22, 2015. Page 24. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2697788

A. Race

Racial bias has long been endemic to the American criminal justice system, even more so in sexual assault cases. Table 1 reveals that African-Americans comprise 61.7% of the 269 sexual assault cases, compared to 46.5% of all 1,575 exonerations:

Table 1: Race

	<i>Caucasian</i>	<i>African-American</i>	<i>Hispanic</i>	<i>Other</i>
<i>Sexual Assault Exonerations</i>	31.9%	61.7%	5.9%	0.4%
<i>All Exonerations</i>	40.3%	46.5%	11.5%	1.7%

B. Age

Our second analysis examines the exoneree’s age at the time of the crime, revealing a mean age of 26.9 years. The data also reveal a substantial age range, as summarized in Table 2:

Table 2: Age Distribution

	<i>10 to 24 years</i>	<i>25 to 34 years</i>	<i>35 to 44 years</i>	<i>45 to 90 years</i>
<i>Sexual Assault Exonerations</i>	44.9%	36.8%	14.5%	3.7%

C. Sex

The NRE dataset reveals that the sexual assault exonerations consist entirely of males. In contrast, males represent 90.9% among all exoneration cases.

D. Strangers versus Acquaintances

The social and legal dynamics of sexual assaults perpetrated by strangers versus acquaintances differ. We reviewed the descriptive summaries of each of the 269 sexual assault cases to ascertain whether the assailant was a stranger or acquaintance of the victim. We defined stranger as a person with whom the victim had not interacted previously and could not readily recognize.

Table 3 reveals that in nearly three-quarters of the 269 cases, the attacker was a stranger to the victim:

Table 3: Stranger vs. Acquaintance

	<i>Stranger</i>	<i>Acquaintance</i>	<i>Unknown</i>
<i>Sexual Assault Exonerations</i>	72.5%	27.1%	0.4%

E. Crime Location, By State

The 269 sexual assault exonerations occurred in 36 states and the District of Columbia. Table 4 lists the top 10 states:

Table 4: Top Ten States

<i>State</i>	<i>Number</i>
1. Texas	197
2. New York	188
3. California	152
4. Illinois	151
5. Michigan	55
6. Florida	52
7. Pennsylvania	51
8. Ohio	50
9. Louisiana	44
10. Wisconsin	40
All States	980

F. Legal Jurisdiction

The enactment and enforcement of criminal laws traditionally has rested with the states. Accordingly, nearly all sexual assault cases fell within the jurisdiction of the states, as shown in Table 5:

Table 5: Legal Jurisdiction

	<i>State</i>	<i>Federal</i>	<i>Military</i>
<i>Sexual Assault Exonerations</i>	97.4%	1.9%	0.7%

G. Adjudication Timeline

How many years passed between the commission of the crime and the conviction? By subtracting the mean year of the crime occurrence from the year of conviction, we can gauge the efficiency of the criminal justice system in adjudicating the case. For sexual assault cases, the mean adjudication timeline involved 1.1 years. For all exonerations, the adjudication timeline was somewhat longer – 1.8 years.

The faster adjudication timeline of sexual assault convictions can be attributed to a variety of factors, possibly including public pressure for speedy adjudication.

H. Sentence Length

Among the 269 sexual assault exonerees, sentence lengths ranged from probation to life without parole. Sixty-two men were handed life sentences, and seven other men carried the burden of a possible life sentence (e.g., “40 years to life”).

For analytical purposes, these sentences were recoded according to the following procedure:

1. Life sentences were calculated as 39 years, based on the United States Sentencing Commission estimate.¹⁵
2. For sentences such as “30 years to Life,” we calculated the mean of the number of specified years and 39 years. For example, “20 years to Life” was calculated as 29.5 years.
3. When the sentence consisted of a range, we calculated the mean number of years. For example, a sentence of 5-15 years was coded as 10 years.

One percent of the sexual assault exonerees were given probation; these persons were included in the “0-10 years” category. Based on this methodology, the mean sentence for sexual assault exonerees is calculated to be 30.6 years.

Table 6 presents the distribution of sentence lengths, grouped in 10-year intervals. The “Not Sentenced” row reflects cases where charges were dropped before the sentencing phase or before a retrial:

Table 6: Sentence Length

	<i>Sexual Assault Exonerations</i>
Not Sentenced	4.5%
0 - 10 years	13.8%

¹⁵ United States Sentencing Commission, *Life Sentences in the Federal System* (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf.

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11-20 years	17.1%
21-30 years	15.6%
31-40 years	31.2%
41-50 years	6.7%
51-60 years	3.7%
61-70 years	2.6%
71-80 years	2.6%
81-90 years	1.1%
91-100+ years	1.0%

I. No-Crime Cases

A case is classified as a No-Crime when the person is convicted because the exoneree was accused of a crime that never occurred. Table 7 shows that in 15.6% of sexual assault cases, there was no actual crime, which represents a higher percentage than for all exonerations:

Table 7: No-Crime Cases: Sexual Assault Exonerations vs. All Exonerations

	<i>No Crime</i>
<i>Sexual Assault Exonerations</i>	15.6%
<i>All Exonerations</i>	11.1%

CONTRIBUTING FACTORS AND RECOMMENDATIONS

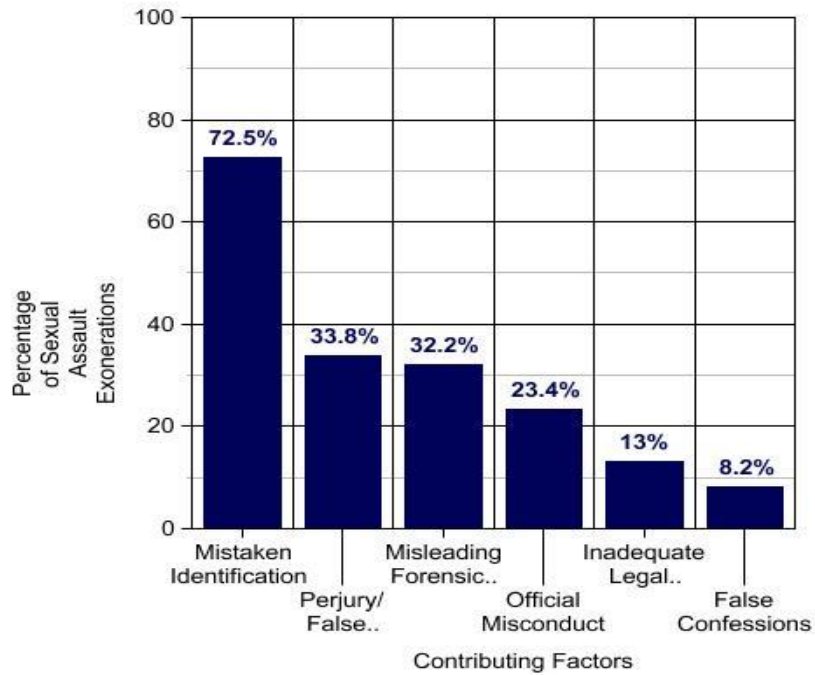
We now turn our focus to the contributing factors of wrongful convictions in sexual assault cases. The National Registry of Exonerations has identified six contributing factors:¹⁶

1. **Mistaken Witness Identification**—At least one witness mistakenly identified the exoneree as a person the witness saw commit the crime.
2. **Perjury or False Accusation**—A person other than the exoneree falsely accused the exoneree of committing the crime for which the exoneree was later exonerated, either in sworn testimony or otherwise.
3. **False or Misleading Forensic Evidence**—Exoneree's conviction was based at least in part on forensic information that was (1) caused by errors in forensic testing, (2) based on unreliable or unproven methods, (3) expressed with exaggerated and misleading confidence, or (4) fraudulent.
4. **Official Misconduct**—Police, prosecutors, or other government officials significantly abused their authority or the judicial process in a manner that contributed to the exoneree's conviction.
5. **Inadequate Legal Defense**—The exoneree's lawyer at trial or on appeal provided obviously and grossly inadequate representation.
6. **False Confession**—The exoneree falsely confessed if (1) he or she made a false statement to authorities which was treated as a confession, (2) the authorities claimed that the exoneree made such a statement but the exoneree denied it, or (3) the exoneree made a statement that was not an admission of guilt, but was misinterpreted as such by the authorities.

Figure 3 displays the frequency of these contributing factors for sexual assault cases:

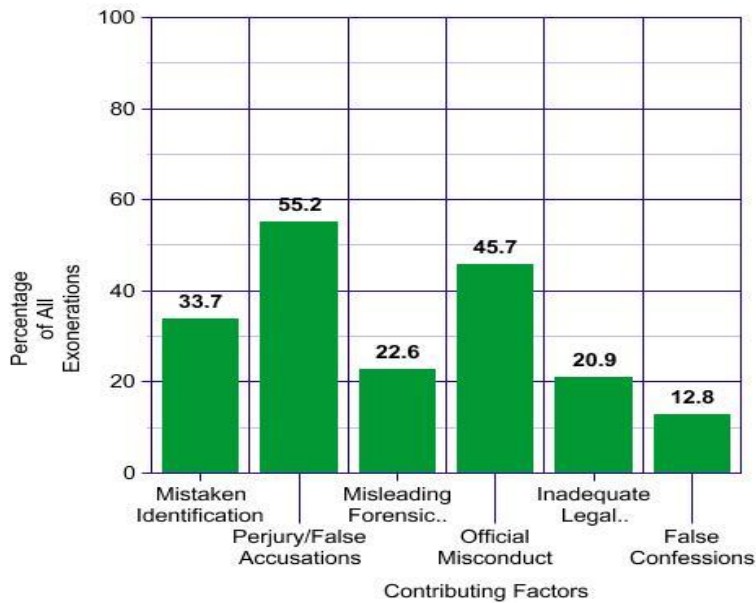
¹⁶ *National Registry of Exonerations: Glossary*, Michigan Law (2015), <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx>.

Figure 3: Contributing Factors: Sexual Assault Exonerations



By way of comparison, Figure 4 presents the contributing factors for all exonerations:

Figure 4: Contributing Factors: All Exonerations



For sexual assault exonerations, the most common contributing factor is mistaken eyewitness identification, manifested in 72.5% of cases. For all exonerations, perjury/false accusations and official misconduct are the leading contributing factors.

We now undertake a more in-depth discussion of each of the contributing factors.

Mistaken Identification

By far the most frequent contributing factor to wrongful convictions of sexual assault is mistaken identification by eyewitnesses. According to the data, 195 of the 269 sexual assault cases involved mistaken eyewitness identification, representing 72.5% of the total.

Cases of mistaken identification usually can be traced to flawed police procedures.¹⁷ Three types of identification procedures have been utilized by law enforcement:

1. Show-up identification in which the eyewitness is presented with a single suspect at the scene of the crime.
2. Live lineups which typically include six persons, one of whom is the suspected perpetrator and the remaining five are fillers.
3. Photo arrays which involve the use of photographs, not live individuals.

Show-up identification is not recommended because the suspect is often presented in handcuffs, creating an abiding impression of guilt.¹⁸ Live lineups and photo arrays are known to be susceptible to a variety of biases, as well:

- Informal remarks, facial expressions, or other non-verbal behavior by law enforcement personnel.
- Displaying the photograph of the suspect for a longer period of time than the photographs of the fillers.
- Co-witness effects in which the complainant learns another witness has already identified a suspect as the perpetrator¹⁹
- The cross-race effect in which the victim and suspect are of a different race, which has been shown to increase the likelihood of a mistaken identification.²⁰

To better understand the cross-race effect, we analyzed the race of the exoneree in mistaken eyewitness identification cases for sexual assault. Table 8 shows that African-Americans are more likely to be identified as the perpetrator (67.7% of misidentification cases), compared to cases not involving misidentification (45.9% of other cases):

¹⁷ Gary L. Wells, *Eyewitness Identifications: Systematic Reforms*, Wis. L. Rev. 617, 618 (2006).

¹⁸ Cicchini, Michael D. & Joseph G. Easton, *Reforming the Law on Show-Up Identifications*, J. Crim. L. & Criminology (2010).

¹⁹ Skagerberg, Elin M. and Daniel B. Wright, *The co-witness misinformation effect: Memory blends or memory compliance?* MEMORY (2008).

²⁰ Brian H. Bornstein et al., *The Cross-Race Effect: Resistant to Instructions*, J. Crim. L. & Criminology VOL. 2013 (2013).

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Table 8: Mistaken Eyewitness Identifications by Race

	<i>Caucasian</i>	<i>African American</i>	<i>Hispanic</i>	<i>Other</i>
<i>Sexual Assault Cases with Eyewitness Misidentification (n=195)</i>	25.1%	67.7%	6.7%	0.5%
<i>Sexual Assault Cases without Eyewitness Misidentification (n = 74)</i>	50.0%	45.9%	4.1%	0.0%

In one study, the researcher deceptively informed subjects that they gotten into trouble at school many years before. This procedure succeeded in imparting a false recollection into 65% of the research participants.²¹

Recommendations

The ground-breaking report, *Identifying the Culprit: Assessing Eyewitness Identification*, provides 11 recommendations how to improve eyewitness identification procedures.²²

1. Train all law enforcement officers in eyewitness identification so officers ask open-ended questions, avoid suggestiveness, and minimize verbal interactions among witnesses.
2. Implement double-blind lineup and photo array procedures to minimize the effects of inadvertent verbal and non-verbal cues by lineup administrators.²³ There should be no distinguishing characteristics that differentiate the actual suspect from the fillers.
3. Use standardized witness instructions indicating the perpetrator may or may not be in the photo array or lineup.
4. Document witness confidence judgments regarding the accuracy of the identification.
5. Videotape the witness identification process to preserve the conditions associated with the identification.

²¹ Elizabeth F. Loftus, *Memories of Things Unseen*, University of California, Irvine (2004).

²² National Academy of Sciences. *Identifying the Culprit: Assessing Eyewitness Identification*. Washington, DC (2014), http://www.innocenceproject.org/causes-wrongful-conviction/copy_of_IdentifyingtheCulpritAssessingEyewitnessIdentificationNAS10.02.2014.pdf.

²³ Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, Law and Human Behavior (1998), <http://dgsearch.no-ip.biz/Eyewitness/Eyewitness%20Identification%20Procedures.pdf>.

6. Conduct pretrial judicial inquiry to assure the reliability of evidence presented at trial.
7. Make juries aware of prior identifications so jurors do not assign excessive weight to in-court identifications.
8. Utilize expert testimony so jurors gain a basic understanding of the scientific research on eyewitness memory.
9. Use jury instructions. In Massachusetts for example, the Supreme Court has ruled that “Judges must instruct jurors that eyewitnesses may have greater difficulty accurately identifying someone who is not their own race, unless both prosecution and defense agree that it’s not an issue.”²⁴
10. Establish a National Research Initiative on Eyewitness Identification to develop a research agenda, promote high-quality research, and translate research findings into policies and procedures.
11. Conduct additional research on system and estimator variables.

Perjury and False Accusations

The problem of perjury and false allegations has been recognized since at least 1932 when a landmark study revealed the problem of a “single prosecuting witness, who later proves to have been a perjurer, but whom the jury believes in preference to the accused,” a travesty that was noted to be a “common occurrence in rape cases.”²⁵

Similarly, Bedau and Radelet reported that in 13 of the 24 rape cases, there was no “victim” because the crime of rape never occurred.²⁶ More recently, Yager concluded that in sexual assault cases, “the rate of false allegations is at least 8-10 percent and as many as 40 percent of allegations may be more likely false than not.”²⁷

Ninety-one cases in our dataset involved perjury or a false accusation, representing 33.8% of the total. We reviewed the NRE case summaries to assess whether the alleged assailant was an acquaintance or a stranger:

²⁴ Martin Finucane, *Judges Must Instruct Juries that Cross-Racial IDs Can be Flawed*, The Boston Globe (June 25, 2015), <http://www.bostonglobe.com/metro/2015/06/25/high-court-requires-judges-instruct-juries-that-cross-racial-identification-can-flawed/2vBrsgqcyNY4p35pREA3IO/story.html>.

²⁵ Borchard, Edwin, and Russell E. Lutz, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice*, Garden City, NY: Garden City Publishing Co. (1932).

²⁶ Bedau, Hugo A. & Michael L. Radelet. *Miscarriages of Justice in Potentially Capital Cases*, Stan. L. Rev. Vol. 40, No. 1, 21-179 (1987), <http://deathpenalty.procon.org/sourcefiles/hugobedaumichaeleradelet.pdf>.

²⁷ Yager, Reggie, *What’s Missing from Sexual Assault Prevention and Response*, April 22, 2015. Page 76. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2697788

Table 9: False Accusations/Perjury by Acquaintances vs. Strangers

	<i>Acquaintance</i>	<i>Stranger</i>	<i>Unknown</i>
<i>False Accusations/Perjury Absent (n = 178)</i>	12.4%	87.1%	0.5%
<i>False Accusations/Perjury Present (n=91)</i>	56.0%	44.0%	0.0%

For the 178 cases in which false accusation or perjury were absent, only a small percentage of these allegations (12.4%) were made by an acquaintance. But when false accusations or perjury were involved, the allegation was far more likely (56.0%) to be made by an acquaintance, as illustrated in this case:

Donald Glassman, an archivist at Barnard College in New York City, was accused by his wife of forcing himself upon her. Even though there was no physical or forensic evidence, Glassman was convicted on October 17, 2007 of rape in the third degree. He then fired his attorney and was granted a new trial.

He testified that his now former wife had been coached to fabricate the charges because she was an immigrant from the Dominican Republic and wanted to obtain a green card pursuant to the Violence against Women Act. On February 11, 2009, Glassman was acquitted of all charges.²⁸

Recommendations

Countering false allegations and perjury begins with thorough investigative work in which police follow up on every credible lead, check alibi witness, and explore all plausible explanations.

A second approach to deterring wrongful convictions is thorough cross-examination, based on the information the prosecutor has disclosed to the defense.

False allegations can also be discouraged by imposing stronger evidentiary and procedural standards to prove the allegation and by enforcing existing perjury laws when there is clear and convincing evidence of misrepresentation by the complainant.

²⁸ Maurice Possley, *Donald Glassman*, National Registry of Exonerations (2015), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4007>.

Misleading Forensic Evidence

Forensics consists of the analysis of biological evidence such as fingerprints, hair, bite marks, DNA samples, and bloodstain patterns. Unfortunately, the science of forensics has not always lived up to the promise of providing reliable confirmation of the perpetrator's identity. In the words of the Committee on Identifying the Needs of the Forensic Science Community:²⁹

Forensic science facilities exhibit wide variability in capacity, oversight, staffing, certification, and accreditation across federal and state jurisdictions. Too often they have inadequate educational programs, and they typically lack mandatory and enforceable standards, founded on rigorous research and testing, certification requirements, and accreditation programs.

Among the 269 sexual assault cases analyzed in the present study, there were 87 instances of false or misleading forensic evidence, representing 32.2% of the total.

In recent years, DNA testing has come to be considered the gold standard for forensic science, as a result of well-defined laboratory procedures, reproducible standards, and high probative value. Particularly in sexual assault cases, the question of innocence or guilt often hinges on the results of the DNA analysis.

But even with DNA testing, errors can occur. Only limited quantities of DNA may be available for analysis, which limits the quantity of test information. Samples may become contaminated or are processed inappropriately. FBI quality standards require that the DNA report contains a description of the evidence examined, listing of the loci analyzed, description of the methodology, results, and an interpretative statement regarding any inferences that can be drawn³⁰ -- conditions that are not always fulfilled in practice. In one study, 17 expert DNA examiners asked to render interpretations gave inconsistent answers.³¹

One project examined 156 convictions that were reversed by post-conviction DNA testing,³² concluding that 60% of the cases involved misleading forensic expert testimony on the prosecutor's side. Exculpatory forensic evidence was not disclosed, false statistics were reported, and statements were made without scientific support.

The account of William Harris represents a particularly egregious example:

²⁹ Committee on Identifying the Needs of the Forensic Science Community, *Strengthening Forensic Science in the United States: A Path Forward*. Washington, DC. National Academies Press.

³⁰ DNA Advisory Board, 2000; Quality assurance standards for forensic DNA testing laboratories, *Forensic Science Communications* 2(3).

³¹ Dror I.E. and Hampikian G., Subjectivity and bias in forensic DNA mixture interpretation, *Science and Justice*, 51(4):204-8 (Dec. 2011).

³² Garrett, Brandon L. & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1 (2009).

William Harris of West Virginia, a black man, was charged with rape. During the trial, expert witness Fred Zain testified that the DNA taken from the victim excluded 96% of the male population, leading to the conclusion of a DNA match. However, the specimen consisted of a mixture of semen and vaginal secretions, creating the possibility of the defendant's blood markers "masking" the victim's sample. Zain failed to mention this fact to the jury, resulting in a guilty verdict and a 10-20 year prison sentence. Eight years later, Harris's DNA was found to not match the sperm found on the victim.³³

Recommendations

The Committee on Identifying the Needs of the Forensic Science Community has called for the establishment of an independent National Institute of Forensic Science,³⁴ a recommendation echoed by others.³⁵ The institute would be a government entity to establish and enforce scientific standards for forensic evidence. The report also makes a number of specific recommendations:

- Forensic laboratories should operate independently from police departments and prosecutors' offices to minimize conflicts of interest.
- Certification, based on written examinations, supervised practice, proficiency testing, and adherence to a code of ethics, should be mandatory for forensic science practitioners.
- Laboratories should obtain accreditation by establishing quality-control procedures, confirming the reliability of procedures, and identifying mistakes.
- Forensic reports should indicate the level of uncertainty inherent in the conclusions.
- Common terms such as "match," "consistent with," and "cannot be excluded as the source of" need to be better defined and used consistently.

Official Misconduct

Prosecutors wield considerable power in the criminal justice system. The prosecutor decides whether to charge a person with a crime, the number and type of counts, the nature of the plea to be negotiated, and the type and length of the punishment.

According to the American Bar Association Canons of Professional Ethics, "the primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."³⁶ Despite this ethical tenet, one of the contributing factors to wrongful convictions is misconduct involving prosecutors or police officials. Of the 269 cases in the NRE

³³ Innocence Project, *William Harris*, National Registry of Exonerations (2012), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3285>.

³⁴ Committee on Identifying the Needs of the Forensic Science Community, *Strengthening Forensic Science in the United States: A Path Forward*, Washington, DC, National Academies Press (2009).

³⁵ Garrett, Brandon L. & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1 (2009).

³⁶ ABA Canons of Professional Ethics, http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf

dataset, 63 instances of official misconduct occurred during the criminal proceeding, representing 23.4% of all sexual assault cases.

There are many ways in which a prosecutor can engage in misconduct that contributes to a wrongful conviction.³⁷ The Registry of Prosecutorial Misconduct reveals the following types of prosecutor malfeasance were present in 104 sex crime cases.³⁸ More than one misconduct type can be present in a single case:

Table 10: Leading Types of Prosecutor Misconduct for Sex Crimes

<i>Misconduct Type</i>	<i>Percentage</i>
Inadmissible evidence/Arguing facts not in evidence	49.0
Inflammatory statements/Witness harassment	35.6
Brady	19.2
Vouching	18.3
Impugning the defense attorney	17.3
Mischaracterizing	14.4
Misstating the law/Shifting burden of proof	9.6
Other	2.9

Recommendations

The CPI White Paper, *Roadmap for Prosecutor Reform*, outlines a number of policies to strengthen prosecutorial ethics:³⁹

- A. Education and Media
 - 1. Public Education
 - 2. Mass Media
 - 3. Continuing Legal Education
- B. Legal Framework
 - 4. Campaigning for Political Office
 - 5. Over-Criminalization
 - 6. Legal Defense
 - 7. Diversion Programs
 - 8. Innocence Commissions

³⁷ Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 Wis. L. Rev. 402 (2006), <http://hosted.law.wisc.edu/lawreview/issues/2006-2/joy.pdf>.

³⁸ Center for Prosecutor Integrity, Registry of Prosecutorial Misconduct, accessed November 22, 2015, <http://www.prosecutorintegrity.org/registry/database/>.

³⁹ Center for Prosecutor Integrity, *Roadmap for Prosecutor Reform* (2014), <http://www.prosecutorintegrity.org/wp-content/uploads/WhitePaper-RoadmapProsecutor Reform.pdf>.

9. Prosecution Review Boards
- C. Office Policies
 10. Policy and Procedure Manuals
 11. Conviction Integrity Units
- D. Adjudication
 12. Petitioning of Charging Decisions
 13. Open-File Discovery
 14. Witness and Jailhouse Informant Agreements
 15. Plea Bargaining Reform
 16. Mandatory Judicial Reporting
- E. Justice for Victims
 17. Exoneration or Sentence Reduction
 18. Civil Lawsuits
 19. Statute of Limitations
 20. Post-Exoneration Compensation

Inadequate Legal Defense

According to the Sixth Amendment and the due process clause of the Fourteenth Amendment, every defendant in a criminal prosecution is entitled to assistance of counsel. Unfortunately, inadequate legal defense was found to be the fifth most common contributing factor to wrongful convictions of sexual assault, occurring in 13.0% of such cases.

The Supreme Court has explained that, “Right to counsel is the right to *effective* assistance of counsel” (emphasis added).⁴⁰ Deficient performance by the defense counsel, by itself, is not sufficient to establish ineffective assistance. The inadequate performance must result in prejudice to the defendant, and but for the deficient practice, the result would have been different.⁴¹ “This requires showing that counsel’s errors were sufficiently serious as to deprive the defendant of a fair trial, a trial whose result is reliable,” the Supreme Court has opined.⁴²

These errors usually occur as a result of inaction, as opposed to intentional misconduct:

- Investigate the facts
- Adequately communicate with the defendant
- Effectively prepare for litigation
- Examine prosecution witnesses
- File timely motions
- Object to improper evidence presented at trial

⁴⁰ Gideon v. Wainwright, 372 U.S. 335 (1963).

⁴¹ Strickland v. Washington, 466 U.S. 668 (1984).

⁴² Id.

Recommendations

Defender offices at the local, state, and federal levels should be allocated greater resources to allow for additional staff to be hired, so more time can be devoted to individual cases. Increasing salaries for experienced public defenders will incentivize them to stay in public service instead of leaving after they acquire trial experience.

Voucher programs have been implemented in several jurisdictions as a means of giving indigent defendants access to a broader array of legal assistance. If an indigent defendant does not wish to be represented by the assigned public defender, the court provides a voucher for the defendant to hire a private attorney of his choosing.

False Confessions

False confessions are a recognized contributor to wrongful convictions. A confession by the defendant, whether true or not, carries enormous weight in the context of a trial. Even when credible evidence indicates the confession was coerced, experience shows that jurors have difficulty discounting such admissions.

Among wrongful convictions of sexual assault, false confessions represent the sixth leading contributing factor. According to our dataset, 8.2% of the sexual assault cases involved a false confession.

Wrongful confessions are especially problematic among young defendants. Table 11 reveals that those who are most likely to falsely confess to an allegation of sexual assault are 25 years and under:

Table 11: Age at Time of False Confession

	<i>25 and Under</i>	<i>26 and Older</i>
<i>Sexual Assault Cases Involving False Confessions (n = 22)</i>	72.7%	27.3%
<i>Sexual Assault Cases Not Involving False Confessions (n = 247)</i>	50.2%	49.8%

False confessions arise from a combination of unethical investigative practices, defendant personality factors, and other contributors.⁴³ One study found that 84% of false confessions occurred after interrogations of six hours or longer, with an average duration

⁴³ Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, American Psychology-Law Society, [http://web.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20online%20\(09\).pdf](http://web.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20online%20(09).pdf).

of more than 16 hours.⁴⁴ The Innocence Project has identified a number of factors that contribute to wrongful confessions:⁴⁵

- Duress
- Coercion
- Intoxication
- Diminished capacity
- Mental impairment
- Ignorance of the law
- Fear of violence
- Actual infliction of harm
- Threat of a harsh sentence
- Misunderstanding the situation

Suspects who are mentally ill or intellectually impaired are especially vulnerable to coercive tactics,⁴⁶ as this case reveals:⁴⁷

Carl Chatman, a black man, was a 47 years-old Army veteran who was an alcoholic, homeless, and suffered from schizophrenia. Chatman was accused of raping a court aid in a Chicago courtroom. Interrogated by police, he soon confessed to the crime.

Two witnesses testified at trial that the detectives had coached him on what to say and gave him details about the crime. Nevertheless, he was convicted and sentenced to 30 years. Carl Chatman was exonerated in 2013.

Recommendations

Due to the powerful evidentiary weight that confessions carry in the trial and sentencing contexts, it is important that wrongful confessions be avoided.

The single most important reform is the electronic recording of all custodial interrogations, from beginning to end.⁴⁸ Police officers and detectives are less likely to use suggestive or illegal measures if they know that they are being monitored. If the validity of a confession is later questioned, the videotape can be reviewed. More than 20 states now require the recording of custodial interrogations.

⁴⁴ Richard A. Leo and Steven A. Drizin, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 894-900 (2004).

⁴⁵ Innocence Project, False Confessions or Admissions, <http://www.innocenceproject.org/causes-wrongful-conviction/false-confessions-or-admissions#sthash.8oO5UXat.dpuf>.

⁴⁶ Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, Journal of the American Academy of Psychiatry and the Law Online (2009), <http://www.jaapl.org/content/37/3/332.long>.

⁴⁷ National Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4268>.

⁴⁸ Saul Kassin, *Why confessions trump innocence*, American Psychologist (2012), <http://www.ncbi.nlm.nih.gov/pubmed/22545597>.

The Center for Wrongful Convictions has proposed several other methods to curb wrongful confessions:⁴⁹

- Restrict the duration of interrogations
- Ban the use of polygraphs and voice-stress analysis
- Limit lying by interrogators
- Prohibit implicit promises of leniency
- Encourage judges to hold pretrial hearings before confessions are admitted into evidence

THE LEGACY OF JIM CROW

Wrongful convictions represent a disturbing indictment of our criminal justice system. The wrongly convicted are punished for a crime they did not commit. Our communities are not safer when the wrong person is put behind bars. Justice is betrayed.

This White Paper represents an effort to elucidate the correlates and contributing factors associated with wrongful convictions of sexual assault. This analysis can serve as a basis for developing practical solutions. This White Paper also reveals an account of unfinished business with regard to racial justice in America.

The problem of false allegations, vigilante justice, and wrongful convictions of sexual assault can be traced to the post-Civil War period in which protecting the sexual purity of white women became the focus of a regional fervor. One woman told a Georgia audience in 1897 that “if it takes lynching to protect the woman’s dearest possession from drunken, raving human beasts, then I say lynch a thousand a week.”⁵⁰

The mere accusation of rape frequently became the occasion for mob action. Between 1889 and 1941, 17% of all black men who were lynched had been accused of rape.⁵¹ In a minority of cases, the accusations were adjudicated by the criminal justice system, but the life-or-death outcome was often the same. Historian Jerrold Packard writes:

Blacks were found guilty upon mere accusation, with no substantive evidence offered, no adequate counsel granted, and no real attempt on the part of the courts to provide evenhanded justice. Such judicial lynchings occurred when the *lack* of guilt was, at least in retrospect, as clear as water.

⁴⁹ Center for Wrongful Convictions, *False and Coerced Confessions*, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/issues/falseconfessions/>.

⁵⁰ Grace Hale, *Making Whiteness: The Culture of Segregation in the South, 1890-1940*, at 234, New York: Pantheon Books (1998).

⁵¹ Jerrold M. Packard, *American Nightmare: The History of Jim Crow*, at 132-133, St. Martin’s Press, New York City, (2002).

In the earliest known systematic analysis of 24 wrongful convictions of rape, the authors reached two disturbing conclusions:⁵²

1. In 13 of the cases, subsequent evidence showed no rape been committed.
2. Every one of the cases involved a white accuser and black defendant.

A more recent study examined 250 DNA exonerations arising from convictions reached from 1974 to 2008. While nearly 90% of sexual offenses had been committed by offenders of the same race as the victim,⁵³ 49% of all misidentification cases for rape involved a white victim and a black or Latino defendant.⁵⁴

The perception of racial bias persists to the present time. In 2002, Wanetta Gibson accused high-school classmate Brian Banks of rape. Despite the absence of any witnesses or corroborative evidence, Banks was sentenced to six years in prison, followed by five years of probation, and lifetime registration as a sex offender. Five years into his prison sentence, Gibson recanted. On May 24, 2012, Judge Mark C. Kim reversed the conviction and released Banks. Afterwards, Banks revealed how his defense attorney had convinced Banks, an innocent man, to accept the plea offer:⁵⁵

If [you] go into that courtroom, the jury [is] automatically going to see a big, black teenager and automatically assume [you are] guilty.

Syracuse University professor Boyce Watkins views the conviction of Brian Banks as emblematic to black Americans: “The story of Brian Banks is, unfortunately, quite common, particularly among young Black males.”⁵⁶

Allegations of sexual assault on college campuses are tinged with the same bias. According to Harvard Law professor Jeannie Suk:⁵⁷

And if we have learned from the public reckoning with the racial impact of over-criminalization, mass incarceration, and law enforcement bias, we should heed our legacy of bias against black men in rape accusations. The dynamics of racially disproportionate impact affect minority men in the pattern of campus sexual-misconduct accusations, which schools, conveniently, do not track, despite all the campus-climate surveys.

⁵² Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, Stan. L. Rev. Vol. 40, No. 1, at 65 (1987).

⁵³ Lawrence A. Greenfeld, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* (1997), <http://www.mincava.umn.edu/documents/sexoff/sexoff.pdf>.

⁵⁴ Brandon L. Garrett, *Convicting the Innocent*, at 73 (2011).

⁵⁵ Gregory Moore, *Banks Not Angry at Gibson, But Should We Be?* (May 30, 2012),

<http://lbpost.com/life/2000000385-brian-banks-not-angry-at-wanetta-gibson-but-should-we-be>.

⁵⁶ Boyce Watkins, *For Man Falsely Accused of Rape, All Liars Should Go To Prison*, NewsOne (May 25, 2012), <http://newsone.com/2017297/for-man-falsely-accused-of-rape-all-liars-should-go-to-prison/>.

⁵⁷ Suk, Jeannie, “Shutting Down Conversations About Rape at Harvard Law,” *The New Yorker*, Dec. 11, 2015. <http://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school>

Brandon Garrett concludes:⁵⁸

There is a long history of discrimination surrounding charges of rape involving white women and black men. There is also some evidence that prosecutors may pursue more serious charges in cases involving white victims and black men. There is evidence that white jurors may be less sympathetic to black defendants, and may be more likely to convict black defendants in crimes involving white victims.

While the American criminal justice system may never achieve accurate determinations in all cases, the challenge of our era is to dramatically reduce wrongful convictions for all crimes, particularly for sexual assault. As public and legal awareness of this problem expands, we must insist that there will be fewer Marvin Andersons, William Harris', and Carl Chatmans who are victimized by the American criminal justice system.

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⁵⁸ Brandon L. Garrett, *Convicting the Innocent*, at 73 (2011).