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THE COLOR OF INNOCENCE:
Quantifying the Impact of Race on Wrongful Convictions

Ngozi Ndulue

Abstract

The study of wrongful convictions in the United States is almost one hundred years old, and our understanding of the reasons for wrongful convictions remains rooted in longstanding framing of the issue. Using observational research of documented wrongful convictions, scholars have recognized several factors that have been present in the cases of those whose wrongful convictions have been documented. Racism has been long understood to contribute to wrongful convictions, but it is not included in the standard list of leading contributing factors. Given this omission, attempts to examine increasingly rich data sets often provide a very surface-level analysis of the role of race in producing wrongful convictions.

This article reviews the intersection of racism with the traditional list of contributing factors. There is considerable overlap between racism and each factor, but racism has an independent impact on the cases of exonerees, the majority of whom are Black. As such, racism merits independent examination as a contributing factor in and of itself.

The feasibility of this contributing factor is tested on a subset of existing publicly available exoneration data by focusing on a particularly relevant subset of exonerations, those in which the exonerated individual was originally sentenced to death. The test is carried out by defining potential confines for a racism contributing factor and evaluating the past twenty years of death penalty exonerations using this definition. Though imperfect, the test shows that a racism contributing factor would apply to a significant percentage of cases of defendants of color.

This article demonstrates the possibilities for independently quantifying the role of racism in wrongful convictions. Such assessment could provide a foundation for a more nuanced understanding of race effects in this specialized area of empirical scholarship. Empirical research has been central to pursuing remedies for wrongful convictions and procedural reforms to prevent them from occurring in the first place. Without a full understanding of the role of

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race in these cases, the story being told by the data and any proposed solutions flowing from this analysis are missing a crucial component.

About the Author

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Table of Contents

Introduction 59

Illustrating the Challenge: The Case of Curtis Flowers, Infected by Racial Bias, Reduced to Evidentiary Issues and Official Misconduct 60

I. Study of the Leading Causes of Wrongful Convictions 62

II. Racism in Wrongful Convictions as Seen Through the Established Leading Factors Lens 67

A. *Mistaken Witness Identification* 68

B. *False Confession* 70

C. *Official Misconduct* 72

D. *Perjury or False Accusation* 73

E. *False or Misleading Forensic Evidence* 74

F. *Inadequate Legal Defense* 76

III. The Argument for Elevating Racial Bias to a Leading Factor 77

A. *Addressing Counter Arguments* 78

IV. Fleshing Out the Racism Factor by Assessing Wrongful Capital Convictions 79

A. *Understanding the Role of Race in the Administration of the Death Penalty* 80
1. Historical Roots 80
2. Racism in the Modern Death Penalty 82
B. *Testing the Practicality of Quantifying a Racism Leading Factor* 86
1. Defining the Racism Contributing Factor 86
2. Test Design 88
3. Test Results 89
4. Implications 89
Conclusion 89

Introduction

Much of the literature on wrongful convictions focuses on the "canonical" causes of wrongful convictions, often listed as mistaken witness identification, false confession, perjury or false accusation, false or misleading forensic evidence, official misconduct, and inadequate legal defense. While understanding each of these factors is essential to preventing and righting wrongful convictions, properly situating the role of race is crucial in addressing how wrongful convictions occur and what interventions will be effective in preventing them.

Part I of this Article examines the development of the body of research on wrongful convictions. It recognizes the significance of recent attempts to comprehensively capture all post-1989 exonerations. It also notes the importance of wrongful convictions research in advocacy from the inception of this area of study.

Part II explores the research that has been conducted about the role each of the canonical factors play in the conviction of factually innocent defendants. This analysis includes a review of existing research and examples of how race intersects with the presence or absence of each individual factor.

Part III of this Article argues that instead of looking at racism as a factor feeding into each of these main drivers, an effective approach to righting and preventing wrongful convictions must treat racism as what it is: a primary driver that determines who is wrongfully convicted, how people are wrongfully convicted, and why exoneration is delayed for defendants of color. It discusses some practical barriers to accurately assessing the role of racism in individual wrongful convictions.

Part IV provides some practical guidance on how to operationalize a quantitative assessment of racism in wrongful convictions. It uses a review of two decades of death row exonerations to examine how a racism factor could be assessed. The results of this review support the conclusion that defining a racism contributing factor is feasible.

Illustrating the Challenge: The Case of Curtis Flowers, Infected by Racial Bias, Reduced to Evidentiary Issues and Official Misconduct

The case of death row exoneree Curtis Flowers is a prime example of what we miss when we subsume racial bias in other factors that contribute to wrongful capital convictions. Curtis Flowers was tried six times for the 1997 murders of four people in Winona, Mississippi.[1] There were no eyewitnesses to the murders, and no physical evidence connected Mr. Flowers to the case.[2] The main evidence that was developed against him consisted of the accounts of jailhouse informants, the presence of a single particle of gunshot residue on his hands that could have a variety of non-firearm related sources, and his possession of a shoe box of a shoe similar to one worn by the perpetrator.[3]

At first the elected county district attorney, Doug Evans, attempted to try Mr. Flowers separately for each murder despite the fact that the murders all occurred in the same incident.[4] The jurors for his first trial were all white; for the second trial, the only Black juror was seated because the defense attorney challenged as racially discriminatory DA Evans's attempt to use a discretionary peremptory strike to exclude the juror. The judge found that DA Evans was attempting to discriminate and allowed the juror to remain.[5] Mr. Flowers's separate trials for the murders of two of the victims resulted in convictions and death sentences. The Mississippi Supreme Court overturned the convictions and death sentences because of the impropriety of introducing evidence of the other murders when each murder was being tried separately and because of additional prosecutorial misconduct in closing arguments in each of the trials.[6]

At Mr. Flowers's third trial, he was capitally charged for all four murders. Again DA Evans used peremptory strikes to seat a jury with eleven white members and one Black member.[7] The Mississippi Supreme Court overturned the conviction again, finding that the case presented "as strong a prima facie case of racial discrimination as we have ever seen in the context of a Batson challenge."[8] Mr. Flowers was tried a fourth and fifth time but not charged capitally; DA Evans remained the prosecutor for these trials. Without the extra tools for jury discrimination available in death penalty cases,[9] the jury was more racially balanced both times with seven white and five Black jurors in the fourth

1. Flowers v. Mississippi*,* 588 U.S. 284, 287 (2019).
2. Brief of Appellant at 3, 21–35, Flowers v. Mississippi, No. 2010-DP-01348-SCT (Miss. July 1, 2013).
3. *Id.* at 14, 40.
4. Flowers v. State, 773 So. 2d 309, 313 (Miss. 2000).
5. *Flowers,* 588 U.S. at 289.
6. Flowers v. State, 773 So. 2d 309 (Miss. 2000); *Flowers,* 588 U.S. at 289–90.
7. *Flowers*, 588 U.S. at 290; Brief of Appellant at 1–2, Flowers v. Mississippi, No. 2010-DP-01348-SCT (Miss. July 1, 2013).
8. Flowers v. State, 947 So. 2d 910, 935 (Miss. 2007).
9. *See* Equal Just. Initiative, Race and the Jury: Illegal Racial Discrimination in Jury Selection (2021), https://eji.org/report/race-and-the-jury/what-needs-to-happen/#examples-from-across-the-country [https://perma.cc/93T4-MJC7]; Ngozi Ndulue, Death Penalty Info. Ctr., Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty (Robert Dunham ed., 2020).

trial and reportedly nine white and three Black jurors in the fifth trial.[10] Both juries hung, unable to agree on Mr. Flowers's guilt or innocence.[11]

Mr. Flowers was tried a sixth and final time in 2010. He was charged capitally again, and DA Evans used peremptory strikes to seat a jury of eleven white people and one Black person.[12] The jury convicted him and sentenced him to death.[13] The Mississippi Supreme Court upheld the conviction and sentence in the face of a *Batson* challenge,[14] but the U.S. Supreme Court reversed the conviction in 2019.[15] The Court observed that "[t]he [s]tate's relentless, determined effort to rid the jury of black individuals strongly suggests that the [s]tate wanted to try Flowers before a jury with as few black jurors as possible, and ideally before an all-white jury."[16] In 2020, after DA Evans was taken off the case, the Mississippi Attorney General dropped all charges against Mr. Flowers.[17] Mr. Flowers was, therefore, exonerated.[18]

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10. Brief of Appellant at 2, Flowers v. Mississippi, No. 2010-DP-01348-SCT (Miss. July 1, 2013); *Flowers*, 588 U.S. at 291.
11. *Flowers*, 588 U.S. at 291.
12. *Id.* at 292.
13. *Id.*
14. Flowers v. State, 158 So. 3d 1009, 1057–58, 1075 (Miss. 2014).
15. *Flowers*, 588 U.S. at 351.
16. *Id.* at 306.
17. Motion of the State of Mississippi to Dismiss the Indictment Against Curtis Giovani Flowers at 1–4, Mississippi v. Flowers, No. 2003–0071-CR (Sept. 4, 2020); Order of Dismissal of Indictment with Prejudice at 1, Mississippi v. Flowers, No. 2003–0071-CR (Sept. 4, 2020). Allegations about DA Evans's discriminatory use of peremptory strikes continue to form the basis of legal challenges. *See* Brief of Petitioner, Pitchford v. Cain, No. 24–7351 (U.S. Aug. 15, 2025).
18. For the two leading definitions of exoneration, see *Understanding the Registry*, The Nat'l Registry of Exonerations, https://exonerationregistry.org/understanding-registry [https://perma.cc/37JF-M3PX] (last visited May 22, 2026) ("Exoneration—A person has been exonerated if he or she was convicted of a crime and, following a post-conviction re-examination of the evidence in the case, was relieved of all the consequences of the criminal conviction, and either: (1) was declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) received (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence, or (ii) an acquittal of all charges factually related to the crime for which the person was originally convicted, in a court of the jurisdiction in which the person was convicted, or (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have occurred after evidence of innocence became available that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known by the defendant and the court at the time the plea was entered. The evidence of innocence need not be an explicit basis for the official act that exonerated the person. Despite any other facts, a defendant is not exonerated if there is undisputed evidence that the defendant knowingly possessed physical objects the possession of which directly proves the defendant's guilt of the crime for which the defendant was convicted, or a factually related crime."); *Criteria for Inclusion on DPIC's Innocence List*, Death Penalty Info. Ctr. , https://deathpenaltyinfo.org/stories/criteria-for-inclusion-on-dpics-innocence-list [https://perma.cc/S8YQ-X5QC] (last visited May 22, 2026) ("Defendants must have been convicted, sentenced to death and subsequently either- [1]Been acquitted of all charges related to the crime

Mr. Flowers's case is analyzed in the National Registry of Exonerations, the largest comprehensive database of all exonerations since 1989. For each exoneration, the National Registry includes a list of factors contributing to the wrongful conviction, a subset of the canonical factors described below.[19] The Registry entry for Mr. Flowers summarizes the story of the crime and serial prosecutions, including details about racial discrimination in jury selection.[20] For Mr. Flowers, the contributing factors listed are "Mistaken Witness ID, False or Misleading Forensic Evidence, Perjury or False Accusation, Official Misconduct."[21] The same coding is used in the Death Penalty Information Center's exoneration database, the definitive collection of all exonerations of people who were at one time on death row.[22]

Official misconduct in this situation includes the prosecutor's persistent racial discrimination in jury selection across six trials, but one must ask what we might be missing when a case that was so infected with racial bias does not have this aspect systemically captured and tracked. This Article addresses what we lose when we make no attempt to systematically capture the wrongful convictions in which racial bias or discrimination played a contributing role. I further attempt to define a racism contributing factor that provides an example of the possibility of quantifying an issue that is central to many wrongful convictions.

I. Study of the Leading Causes of Wrongful Convictions

The scholarship around wrongful convictions has evolved greatly over the past century, but before delving into this scholarship, a note on terminology. Throughout this article, I write about both "wrongful convictions" and "exonerations." These two concepts are not interchangeable. First, my use of "wrongful convictions" is limited to cases in which a person is convicted despite being factually innocent of the crime of which they were accused. There are many other situations in which a conviction may be "wrongful," including when there has been some violation of constitutional rights, gross misconduct has been committed, a person was overcharged, or when a person is legally but not

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that placed them on death row, or [2] Had all charges related to the crime that placed them on death row dismissed by the prosecution or the courts, or [3] Been granted a complete pardon based on evidence of innocence . . . . We believe the term 'exonerated' is entirely appropriate to refer to the individuals on this list . . . .Exonerate means to clear, as of an accusation, and seems to come from the Latin 'ex' and 'onus' meaning to unburden.").

19. *Understanding the Registry*, The Nat'l Registry of Exonerations, https://exonerationregistry.org/understanding-registry [https://perma.cc/37JF-M3PX] (last visited May 22, 2026).

20. Maurice Possley, *Curtis Flowers*, The Nat'l Registry of Exonerations, https://exonerationregistry.org/cases/12889 [https://perma.cc/6M7U-3PLB] (last updated July 23, 2025)

21. *Id.*

22. *Innocence Database*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/database/innocence [https://perma.cc/87NG-AT2J] (last visited May 22, 2026) (searched using term "Curtis Flowers).

factually innocent.[23] Second, because of the difficulty in procuring information about instances in which someone has been wrongfully convicted but has not been exonerated, exoneration statistics are often used to draw conclusions about patterns in wrongful convictions. Any such conclusions may be limited by the fact that there are some wrongful convictions that are going to be more conducive to exonerations (e.g. single perpetrator sexual assaults) than others.[24]

Most writers trace the beginning of organized scholarship about wrongful convictions to the work of Edwin Borchard.[25] In the early 20th century, there was great skepticism about the frequency of wrongful convictions. In 1923, esteemed jurist Judge Learned Hand wrote, "Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream."[26] Against this backdrop of skepticism, Borchard attempted to advocate for compensation for the wrongly convicted by writing *Convicting the Innocent* in 1932.[27] Borchard provided concrete examples about the existence of wrongful convictions in an attempt to advocate for compensation for those who had been wrongfully convicted and analyzed the cases of eighty-two people who had been wrongfully convicted in sixty-five separate cases.[28] He concluded that the main reasons for wrongful conviction were "(1) Mistaken eyewitness identification; (2) reliance on circumstantial evidence (frequently accompanied by perjury); (3) 'carelessness or overzealousness' by the prosecutors; (4) 'zealousness' or gross negligence by the police; (5) prejudicial inferences drawn from the prior record of the person accused of the crime; (6) false confessions; (7) unreliable 'expert' evidence; and (8) inadequate defense because 'the accused were poor persons.'"[29]

23. *See* Marvin Zalman, *Edwin Borchard's Innocence Project: The Origin and Legacy of His Wrongful Conviction Scholarship*, 1 Wrongful Conviction L. Rev. 124 (2020). The contributions of early documenters of lynchings and quantitative studies of wrongful accusations in this context bears mention. *See* Ida B. Wells-Barnett, Lynch Law in Georgia (1899); Ida B. Wells, *Lynch Law*, *in* The Reason Why the Colored American is not in the World's Columbian Exposition 25 (1893); Nat'l Assoc. for the Advancement of Colored People, Thirty Years of Lynching in the United States 1889–1918 (1919).
24. *See* Ryanne Berube et al., *Identifying Patterns Across the Six Canonical Factors Underlying Wrongful Convictions*, 3 Wrongful Conviction L. Rev. 166, 169 (2022) ("Studying exonerations as a 'proxy' has allowed researchers to better understand the causes and correlates of wrongful convictions and continues to be the most promising method available to develop evidence-based policy recommendations."*); see generally* Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions,* 90 Wash. U. L. Rev. 1133 (2013) (analyzing empirical data concerning those exonerated following revelations of systemic police and/or prosecutorial misconduct, especially in relation to other instances of wrongful convictions).
25. *See* Zalman, *supra* note 23.
26. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).
27. Zalman, *supra* note 23, at 135.
28. Nat'l Inst. of Just., Wrongful Convictions: The Literature, the Issues, and the Unheard Voices 19 (2023), https://www.ojp.gov/pdffiles1/nij/251446.pdf [https://perma.cc/N4VN-9LMY] (citing Edwin M. Borchard, Convicting the Innocent: Sixty-Five Errors of Criminal Justice (1932)).
29. *Id.* (quoting Edwin M. Borchard, Convicting the Innocent: Sixty-Five Errors of Criminal Justice (1932)).

After Borchard's book, there were modest developments in innocence scholarship, but most focused on specific egregious cases of wrongful conviction.[30] The next major contribution to innocence scholarship came with Hugo Bedau and Michael Radelet's 1987 examination of wrongful conviction in capital cases. In an analysis of 365 capital cases in which they argued individuals had been wrongfully convicted, Bedau and Radelet found that witness error and false confessions were prevalent themes.[31]

The advent of DNA exonerations was a game changer in the understanding of the causes and prevalence of wrongful convictions.[32] The first DNA exoneration occurred in 1989, and in the years following, Barry Scheck and Peter Neufeld founded the Innocence Project to pursue DNA exonerations around the country. The Innocence Project's litigation, policy advocacy, and research expanded the understanding of the scope and characteristics of wrongful convictions.[33] With data and individual stories, the understanding of how people are wrongfully convicted has fueled reform across the country for the past three decades.[34]

The scholarship of Samuel Gross and the creation of the National Registry of Exonerations marked another huge step forward. Much of the past study of wrongful conviction had relied upon gathering a group of individual cases but was limited by incomplete records of exonerations. The Registry was founded in 2012 and aims to comprehensively list every exoneration that has occurred

30. *Id.* at 4; Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 Alb. L. Rev. 1465, 1477–80 (2011).

31. Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 22–173 (1987).

32. *See* Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 6 (2011) ("DNA exonerations have changed the face of criminal justice in the United States by revealing that wrongful convictions do occur and, in the process, altering how judges, lawyers, legislators, the public, and scholars perceive the system's accuracy.").

33. *Id.*; Innocence Project, Wrongful Convictions Involving Unvalidated or Improper Forensic Science that Were Later Overturned through DNA Testing 1 (2009), https://www.innocenceproject.org/wp-content/uploads/2016/02/DNA_Exonerations_Forensic_Science.pdf. [https://perma.cc/4XX7-SULB].

34. *See Transforming Systems*, Innocence Project, https://innocenceproject.org/transforming-systems/ [https://perma.cc/BEN4-VA9D] (last visited Sept. 22, 2025); Marvin Zalman & Julia Carrano, *Sustainability of Innocence Reform*, 77 Alb. L. Rev. 955, 957 (2014) ("Within two decades, innocence advocates have advanced an impressive array of criminal justice system changes that are likely to reduce the number of wrongful convictions."). Despite this mounting evidence, skeptics have remained. In 1994, Justice Scalia used the crime for which Henry McCollum and Leon Brown were on death row as an example of a case truly deserving the death penalty. *Callins v. Collins*, 510 U.S. 1141 (1994) (Scalia, J., concurring). McCollum and Brown were exonerated in 2014. Maurice Possley, *Henry McCollum*, Nat'l Registry of Exonerations, https://exonerationregistry.org/cases/11629 *[https://perma.cc/D9FQ-E6PJ] (*last visited Sept. 13, 2025); Maurice Possley, *Leon Brown*, Nat'l Registry of Exonerations, https://exonerationregistry.org/cases/11630 [https://perma.cc/X5HA-543E] (last visited Sept. 13, 2025). The DNA era did not sway Justice Scalia. *See* Kansas v. Marsh, 548 U.S. 163, 198 (2006) (Scalia, J., concurring).

since 1989.[35] Early analysis of exonerations seemed to support widely held assumptions, like the theory that most wrongful convictions are the product of mistaken eyewitness identification.[36] However, as the Registry grew, it became clear that perjury or false accusation and official misconduct were much more prevalent than was originally estimated. The Registry now records more than 3700 exonerations and is one of the main sources cited in wrongful convictions research.[37]

Though the scholarship around innocence has grown by leaps and bounds over the last century, modern discussion of the "leading causes," "contributing factors," or "legal causes of error" that lead to the conviction of the innocent often resembles a more streamlined version of Borchard's descriptive list. Innocence researchers have historically relied upon six main reasons for wrongful conviction: mistaken witness identification, false confession, perjury or false accusation, false or misleading forensic evidence, official misconduct, and inadequate legal defense.[38] The National Registry of Exonerations lists these contributing factors and tracks the incidence of all but inadequate legal defense. Although the Registry also records inadequate legal defense, it does not comprehensively report the number of cases in which this was a factor because of the difficulty of determining the level of defense preparedness with the limited information available to the public.[39]

The National Registry of Exonerations defines each factor as follows and notes the incidence rate for all but inadequate legal defense.

- **Mistaken witness identification:** This factor is present when "[a]t least one witness mistakenly identified the exoneree as a person the witness saw commit the crime."[40] Cases in which this factor was present make up 27% of the Registry's recorded exonerations.[41]

35. *What We Do*, The Nat'l Registry of Exonerations (last visited Feb. 15, 2024), https://exonerationregistry.org/about.
36. *See*, *e.g.*, Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later.*, 33 L. & Hum. Behav. 1 (2009); Arye Rattner*, Convicted But Innocent: Wrongful Conviction and the Criminal Justice System* 12 L. & Hum. Behav. 283, 292 (1988).
37. *See Explore Exonerations*, The Nat'l Registry of Exonerations , https://exonerationregistry.org/cases?f%5B0%5D=n_pre_1989%3A0 [https://perma.cc/FK3M-USAQ] (last visited May 22, 2026).
38. *See* Ryanne Berube et al., *Identifying Patterns Across the Six Canonical Factors Underlying Wrongful Convictions*, 3 Wrongful Conviction L. Rev. 166 (2022); Leona D. Jochnowitz & Tonya Kendall, *Analyzing Wrongful Convictions Beyond the Traditional Canonical List of Errors*, 37 Touro L. Rev. 579, 580–663 (2021).
39. *See*, *e.g.*, Samuel R. Gross & Michael Shaffer, The Nat'l Registry of Exonerations, Exonerations in the United States, 1989 – 2012 43 (2012) ("Because we can't produce even a reasonable estimate of the frequency of ineffective legal defense, we don't include that factor here, despite its importance."), https://exonerationregistry.org/sites/exonerationregistry.org/files/documents/exonerations_us_1989_2012_full_report.pdf [https://perma.cc/4GYM-WSE9].
40. *Understanding the Registry*, The Nat'l Registry of Exonerations, https://exonerationregistry.org/understanding-registry [https://perma.cc/8ZYT-TENJ] (last visited May 22, 2026).
41. *% Exonerations by Contributing Factor*, The Nat'l Registry of Exonerations ,

- **False confession:** This factor is present when the case involves a false "statement made to law enforcement at any point during the proceedings which was interpreted or presented by law enforcement as an admission of participation in or presence at the crime, even if the statement was not presented at trial."[42] Cases in which this factor was present make up 13% of the Registry's recorded exonerations.[43]
- **Official misconduct:** This factor is present when "[p]olice, prosecutors, or other government officials significantly abused their authority or the judicial process in a manner that contributed to the exoneree's conviction."[44] Cases in which this factor was present make up 60% of the Registry's recorded exonerations.[45]
- **Perjury or false accusation:** This factor is present when "a person other than the exoneree committed perjury by making a false statement under oath that incriminated the exoneree in the crime for which the exoneree was later exonerated, or made a similar unsworn statement that would have been perjury if made under oath."[46] Cases in which this factor was present make up 64% of the Registry's recorded exonerations.[47]
- **False or misleading forensic evidence:** This factor is present when the case involves "[f]aulty or misleading expert or forensic evidence [that] may have led to a factually erroneous conclusion."[48] Cases in which this factor was present make up 25% of the Registry's recorded exonerations.[49]
- **Inadequate legal defense:** This factor is present when "[t]he exoneree's [sic] trial attorney at trial provided obviously and grossly inadequate representation."[50] Cases in which this factor was present make up 26% of the Registry's recorded exonerations.[51]

In the past twenty years, some scholars have questioned whether this "leading causes" or "contributing factors" framework is the most useful way to explore the way wrongful convictions are produced.[52] However, this fram-

https://exonerationregistry.org/exonerations-contributing-factor [https://perma.cc/78U7-HSB5] (last visited May 22, 2026).

42. *Understanding the Registry*, *supra* note 40.
43. *% Exonerations by Contributing Factor*, *supra* note 41.
44. *Understanding the Registry*, *supra* note 40.
45. *% Exonerations by Contributing Factor*, *supra* note 41.
46. *Understanding the Registry*, *supra* note 40.
47. *% Exonerations by Contributing Factor*, *supra* note 41.
48. *Understanding the Registry*, *supra* note 40
49. *% Exonerations by Contributing Factor*, *supra* note 41.
50. *Understanding the Registry*, *supra* note 40.
51. Although the NRE does not analyze the percentage of exonerations involving inadequate legal defense for fear of underestimating the scope of the issue, researchers evaluating the NRE data have looked at the prevalence of this factor. Ryanne Berube et al., *supra* note 38, at 176.
52. Matthew Barry Johnson, Wrongful Conviction in Sexual Assault 132–42 (2021); Jochnowitz & Kendall, *supra* note 38, at 580–663; Eric Colvin, *Convicting the Innocent: A Critique of Theories of Wrongful Convictions*, Crim. L. F. (2009) (suggesting an

ing remains resilient and prevalent. Every year, studies are released looking at specific wrongful conviction metrics separated among the leading factors.[53] One reason for this may be the ease of using these factors for quantitative analysis. Since the National Registry dataset categorizes exonerations by factor, researchers have an easily accessible and analyzable dataset.[54] Given the importance of these factors in shaping our understanding of wrongful convictions, it is crucial to understand the role that race is playing among these factors.

II. Racism in Wrongful Convictions as Seen Through the Established Leading Factors Lens

Though wrongful convictions scholarship has not always been explicitly race focused, some of the most high-profile wrongful convictions in the early years of wrongful conviction scholarship were those of Black men in the Jim Crow south. In *Moore v. Dempsey*,[55] the U.S. Supreme Court intervened after the sham trials and murder convictions of fifty-one Black people (twelve of whom were sentenced to death). The case expanded the availability of federal habeas corpus relief for state court cases in which defendants did not receive fair trials. The convictions and death sentences stemmed from widespread violence of white mobs against Black people in the 1919 race massacre in Elaine, Arkansas.[56] In 1931, the case of "the Scottsboro boys" drew international attention. Nine Black men and boys were convicted in Alabama of the rape of a white woman, and eight were sentenced to death. They were eventually exonerated when the woman admitted that no crime had occurred.[57] Almost two decades later, the case of "the Groveland four" had similar facts, with three Black men and a sixteen-year-old Black teenager accused of rape of a white woman. One of the men was killed by a "posse" before he could be brought to trial, the two surviving men were sentenced to death (though one was later killed by the sheriff in an "escape attempt"), and the teenager was sentenced to life in prison. The two surviving defendants were eventually granted executive clemency.[58]

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alternative framework separating "investigative errors" and "adjudicatory errors"); Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. Contemp. Crim. Just. 201, 201–223 (2005).

53. Matthew Barry Johnson & Janquel D. Acevedo, *Wrongful Conviction in Texas: 'Sex Assaults', False Guilty Pleas, Stranger Rape With Misidentification, and Drug Offenses*, 5 Wrongful Conviction L. Rev. 27 (2024); Eran Itskovich, Roni Factor & Daniel Ohana, *Haven't They Suffered Enough? Time to Exoneration Following Wrongful Conviction of Racially Marginalized Minority- vs. Majority-Group Members*, 25 Punishment & Soc'y 1233 (2023); Ryanne Berube et al., *supra* note 38.
54. *See, e.g.*, Ryanne Berube et al., *supra* note 38, at 169 ("[T]he NRE's dataset is the most frequently cited source in the quantitative study of wrongful convictions.").
55. Moore v. Dempsey, 261 U.S. 86 (1923).
56. *Id.*; Bedau & Radelet, *supra* note 31, at 36; Ida B. Wells-Barnett, The Arkansas Race Riot (1920).
57. Bedau & Radelet, *supra* note 31, at 63, 65.
58. *Id.* at 120; *see generally* Gilbert King, Devil in the Grove (2012) (providing a historical account of Thurgood Marshall's defense in the case).

Defending innocent Black people against the potential for wrongful convictions and execution was a central part of civil rights work throughout the country in the first half of the 20th century, along with challenging segregation and racial violence against Black people. The pervasiveness of racial bias in wrongful convictions spurred the justice focused work of NAACP advocates such as Thurgood Marshall, Rosa Parks, and Walter E. White and organizations such as the NAACP Legal Defense and Education Fund.[59]

Wrongful convictions fueled by racism are not historical relics. Stark racial disparities in wrongful convictions highlight the powerful role that racial bias plays throughout the criminal legal system. Racism affects who is wrongfully convicted, the reasons for the wrongful conviction, and how long it takes to be exonerated.

Since 1989, more than 3700 people have been exonerated from criminal convictions, and the majority of these exonerees are Black. Nearly 25% of those exonerated since 1989 pled guilty, and nearly 75% of this number are Black and brown people.[60] The Registry estimates that Black people are seven and a half times more likely to be wrongly convicted of murder than innocent white people, almost eight times more likely to be wrongfully convicted of sexual assault, and nineteen times more likely to be wrongfully convicted of drug crimes.[61] For all murder convictions, it takes Black people on average three years longer than white people to be exonerated.[62]

This Article argues for racism to be seen as an independent root cause of wrongful convictions. Existing research shows that racial bias and discrimination play a role in the presence of each of the commonly recognized leading factors. This overlap between racism and other factors provides an important indicator of the pervasiveness of racism in wrongful convictions.

A. *Mistaken Witness Identification*

Mistaken witness identification is one of the factors about which there is the most research on the role that race plays in producing wrongful convictions. This is in part due to the robustness of research into what, for many decades, was seen as the main factor leading to wrongful convictions.[63] The most recent data from the National Registry of Exonerations shows that mistaken witness identification is a factor in a little over a fourth of known exonerations.[64]

Researchers have found time and again that eyewitness identifications are incredibly unreliable. In a particularly dramatic demonstration of this

59. *See generally* Scott W. Stern, *The NAACP's Rape Docket and the Origins of Criminal Procedure*, U. Pa, J.L. & Soc, Change (2021) (exploring NAACP's efforts to combat racial bias in wrongful convictions specifically through the organization's rape docket).
60. *Research Resources*, The Innocence Project, https://innocenceproject.org/research-resources/ [https://perma.cc/GUK2-HRLK] (last visited Apr. 24, 2026);; *Race and Wrongful Conviction*, The Innocence Project, https://innocenceproject.org/race-and-wrongful-conviction/ [https://perma.cc/XA97-Z87K] (last visited Apr. 24, 2026).
61. King, *supra* note 58, at 48.
62. Samuel R. Gross et al., Nat'l Registry of Exonerations, Race and Wrongful Convictions in the United States 2022 12 (2022).
63. Gross & Shaffer, *supra* note 39, at 4, 40.
64. *% Exonerations by Contributing Factor*, *supra* note 41.

principle, a 1974 newscast showed video of a man snatching a woman's purse and then looking directly at the camera. Afterwards, viewers were shown a lineup and asked to call a number to identify the culprit or say that he was not present in the lineup. Researcher Robert Buckhout received 2145 calls before he unplugged his phone. Of those who called, only 14% correctly identified the purse snatcher, the same percentage that would be expected if viewers were picking a person at random.[65]

While eyewitness identification is unreliable in general, cross-racial identification is even more error prone.[66] When making cross-racial identifications, individuals are more likely to be wrong and are more confident in the accuracy of their identification.[67]

These faulty cross-racial identifications would have a devastating effect on wrongful convictions in any context, but this baseline unreliability is even more significant when it is viewed in the context of the broader American society and criminal legal system. Though most crimes are intra-racial, a disproportionate number of wrongful convictions have been the product of cross-race eyewitness misidentification.[68] For example, for Black defendants falsely convicted of raping white women, eyewitness misidentification is the leading cause of wrongful conviction.[69]

One factor that contributes to the perniciousness of cross-racial identification is the wide scope of law enforcement activity in Black communities. Aggressive street level policing, dragnet policies such as stop and frisk, and broad community surveillance under the guise of anti-gang enforcement are just a few of the ways that Black people can come into law enforcement's radar.[70] As a result, Black people are much more likely than white people to have contact with the criminal legal system throughout their life course.[71] Even if many of these contacts do not lead to a conviction, Black people are more likely to be included in police databases from which photo lineups are drawn.[72]

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65. Barry Scheck et al., Actual Innocence: Five Days to Dispatch and Other Dispatchs from the Wrongly Convicted 43–44 (2000).
66. John T. Wixted & Gary L. Wells, *The Relationship Between Eyewitness Confidence and Identification Accuracy: A New Synthesis*, 18 Psych. Sci. Pub. Int. 10, 14 (2017); John Paul Wilson et al. , *The Cross–Race Effect and Eyewitness Identification: How to Improve Recognition and Reduce Decision Errors in Eyewitness Situations*, 7 Soc. Issues & Pol'y Rev. 83, 85–86 (2013).
67. Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review.*, 7 Psychology, Public Policy, and Law 3, 21–27 (2001).
68. Gary L. Wells et al., *From the Lab to the Police Station: A Successful Application of Eyewitness Research.*, 55 Am. Psych. 581, 589 (2000).
69. Gross et al., *supra* note 62, at 2.
70. *See generally* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010) (arguing that the criminal justice system functions as a contemporary system of social control despite formally adhering to colorblindness).
71. *See* Rebecca Vallas & Sharon Dietrich, Ctr. for Am. Progress, One Strike and You're Out: Removing Barriers to Economic Security and Mobility for People with Criminal Records 5 (2014).
72. *See* Clare Garvie et al., Georgetown L. Ctr. on Priv. & Tech., The Perpetual Line-up: Unregulated Police Face Recognition in America 3, 53–56 (2016).

In the age of facial recognition, this enhanced exposure to police contact also means that Black people are more likely to be included in digital databases from which facial recognition matches are drawn. Since facial recognition "matches" are a combination of computer programs that are less accurate at distinguishing Black faces and human beings determining whether there's a true match, this technological solution is just as liable (and some argue more liable) to result in flawed cross-racial misidentifications.[73]

Portia Woodruff, a 32-year-old Black woman from Detroit, was arrested in front of her small children after a faulty facial recognition match. Though she was more than eight months pregnant and was thus an incredibly unlikely suspect for the carjacking, police relied heavily on an inaccurate facial recognition match. Her picture was part of the mugshot database because of prior arrest. Similar stories are surfacing around the country where six of the seven known faulty facial recognition technology arrests were of Black people.[74]

There are also significant intersections between police misconduct and eyewitness misidentification. Eyewitness misidentification can occur because of honest mistakes and sloppy procedures. However, police also steer witnesses to specific suspects who they have already decided are guilty. These intentionally suggestive witness identifications occur twice as frequently in the cases of Black and Latinx exonerees as they do in the cases of white exonerees.[75]

B. *False Confession*

Although false confession is the least common factor in the Registry's recorded exonerations, studies have found this factor to be present in 69% of DNA exonerations of people of color.[76] False confessions are often elicited through coercive police tactics, sometimes involving physical brutality and in other instances using bullying, threats, incentives, or feigned intimacy. This police pressure can be particularly effective on vulnerable defendants. Young people, people with intellectual disability, and people with mental health issues are at heightened risk to falsely confess.[77]

Though youth is an independent factor in the likelihood of a false confession, there is a heightened risk for Black children. Social science studies have found that Black children are seen as older, more culpable, and less human than white children.[78] Police can view situations that would elicit sympathy

73. *See id.*; Jannice Cebreros, *Facial Recognition Technology and Wrongful Arrests in the Digital Policing Era*, 100 Wash. L. Rev. Online 33, 37–41 (2025).
74. Kashmir Hill, *Eight Months Pregnant and Arrested After False Facial Recognition Match*, N.Y. Times (Aug. 6, 2023), https://www.nytimes.com/2023/08/06/business/facial-recognition-false-arrest.html.
75. Gross et al., *supra* note 62, at 7; Samuel R. Gross et al., Nat'l Registry of Exonerations, Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement (2020).
76. Sara C. Appleby, Guilty Stereotypes: The Social Psychology of Race and Suspicion in Police Interviews and Interrogations 113 (2015) (Ph.D. dissertation, City University of New York) (CUNY Academic Works).
77. Gross & Shaffer, *supra* note 39, at 59–60.
78. Patrick Webb et al., *The Color of Confinement: Examining Youth Exoneration Decisions and the Critical Race Theory*, 18 J. Ethnicity Crim. Just. 206 (2020).

for a white child as suspicious when a Black child is involved. For example, Innocence Project exoneree Huwe Burton went from a traumatized teenager who discovered his mother's dead body to a crack-crazed predator who murdered his mother for drug money. He eventually confessed after being questioned for hours with no access to a guardian and having been promised that he would be allowed to leave if he just told the police what they wanted to hear.[79] Stereotypes about Black criminality and a downplaying of Mr. Burton's trauma turned the victim of a tragedy into a cold-hearted perpetrator.

However, defendants' vulnerability is not limited to their personal characteristics but also includes situational factors. When considering the intersection of race and false confessions, a significant factor is the way that heavy-handed police tactics have always had an outsized role in Black communities. These police practices have been enhanced in the era of mass incarceration and the "War on Drugs." Police coercion related to social control of Black communities can be as pervasive and brutal as the work of Detective Jon Burge's hit squad that operated in Chicago in the 1980s and 90s.[80] Detective Burge and his colleagues would torture confessions out of Black suspects using electrocution, the threat of burns, and beatings. Eventually, more than 100 Black men received relief and compensation as the result of police actions of this era, with victims of this abuse being exonerated as recently as 2018.[81]

But even aside from this extreme violence, race has played a consistent role in how Black exonerees have experienced interrogations.[82] The role of race in false confessions goes beyond an examination of the individual biases of officers involved in interrogations. It also intersects with systemic factors related to the role of the criminal legal system in the lives of Black people. For example, multiple studies have shown that Black and brown people are more likely than white people to be detained pretrial, a result of socioeconomic inequality, policing trends, and general increased involvement with the criminal legal system. When a person is detained pretrial and given the option to confess in order to secure immediate release, people often take this option. So Black defendants' vulnerability to pretrial detention puts them at elevated risk of falsely confessing.

79. *Huwe Burton*, Innocence Project, *https://innocenceproject.org/cases/huwe-burton/* [https://perma.cc/LPK8–5J4S] (last visited Apr. 24, 2026).

80. Joey L. Mogul, *The Struggle for Reparations in the Burge Torture Cases: The Grassroots Struggle That Could*, 21 Pub. Int. L. Rep. 209, 209–10 (2016).

81. Heather Cherone, *Cost of Burge-Era Torture Grows as Chicago City Council Agrees to Pay 2 Wrongfully Convicted Men $14M*, WTTW (Jan. 26, 2022, 8:28 PM), https://news.wttw.com/2022/01/26/cost-burge-era-torture-grows-chicago-city-council-agrees-pay-2-wrongfully-convicted-men.

82. *See generally* J. Guillermo Villalobos & Deborah Davis, *Interrogation and the Minority Suspect: Pathways to True and False Confession*, 1 *in* Advances in Psychology and Law 1 (Monica K. Miller & Brian H. Bornstein eds., 2016) (discussing six sources of vulnerability to interrogation-induced confession among racial minorities).

C. *Official Misconduct*

Official misconduct is present in the majority of exonerations, and it plays an even more prominent role in the wrongful convictions of Black defendants.[83] The rate of official misconduct in murder cases with Black defendants is 78%, while official misconduct occurs in 64% of cases of white murder defendants.[84] Rates of official misconduct are even more pronounced in capital murder exonerations, with similar racial disparities.[85] The cases of Black people exonerated from murder convictions are almost 50% more likely to involve police misconduct than those of white people exonerated from murder convictions.[86]

As discussed above, America's law enforcement culture enables rampant official misconduct that contributes to wrongful convictions of Black defendants accused of serious crimes. The over-policing of Black communities and lack of accountability for police misconduct continue to produce wrongful convictions and to endanger the lives of Black people.

For example, one year after Louisville Metro Police Department officers killed Breonna Taylor while serving a no-knock warrant in the middle of the night, the U.S. Department of Justice instituted an investigation into whether Louisville police engaged in a pattern or practice of civil rights violations. In March 2023, the DOJ concluded that Louisville police have committed a wide range of misconduct in using excessive force, executing search warrants, and engaging in street-level enforcement. The Louisville police targeted Black people, responded inappropriately to people with mental health issues, and reacted aggressively to people engaged in demonstrations.[87]

Nine of Kentucky's twenty-two exonerations stem from Louisville (Jefferson County) investigations, and five of these nine exonerees are Black.[88]

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83. *% Exonerations by Contributing Factor*, *supra* note 41; *Exonerations – States* (map), Nat'l Registry of Exonerations, https://exonerationregistry.org/Exonerations-in-the-United-States-Map#crimeState [https://perma.cc/JP3B-JC79] (last visited Apr. 24, 2026).

84. Gross et al., *supra* note 62, at 6; *see also* Melanie Clark Mogavero et al., *A Conjunctive Analysis of False Accusations, Official Misconduct, and Race in Violent and Sexual Exonerations Cases*, 40 Behav. Sci & L. 756, 770 (2022) (reviewing the cases of males exonerated of felony convictions as reflected in the National Registry and finding that "among those who were falsely accused of a non-sexual homicide, cases that involved multiple forms of misconduct occurred three times more often among cases of Blacks compared to Whites. Blacks also had more cases that involved misconduct among multiple actors (i.e., police and prosecutors). Blacks not only had more official misconduct than Whites but more types of misconduct by multiple actors.").

85. Gross et al., *supra* note 62, at 6 ("The overall rate of misconduct is a bit higher in capital cases—up from 73% to 78% (105/134)—but the difference by race is similar: 85% (63/74) of Black exonerees who were sentenced to death were victims of official misconduct, compared to 70% (32/46) of white death-row exonerees.").

86. *Id.* at iii.

87. U.S. Dep't of Just., Civ. Rts. Div. & U.S. Att'y's Off., West. Dist. of Ky., Civ. Div., Investigation of the Louisville Metro Police Department and Louisville Metro Government 1–3, 54–57, 63 (2023).

88. *Explore Exonerations*, Nat'l Registry of Exonerations, https://exonerationregistry.org/cases?f%5B0%5D=n_pre_1989%3A0&f%5B1%5D=state%3AKentucky (last visited Apr. 24, 2026).

Police misconduct played a role in each of the Black exonerees' cases, including that of William Gregory who was represented by the Innocence Project and became Kentucky's first DNA exoneree.[89] Issues in several of the exonerees' cases were mirrored by misconduct highlighted in the DOJ's report. The DOJ report highlights the overall failure to keep police accountable for repeated misconduct, allowing some department employees to "violate[] the law and LMPD policy again and again over the course of years."[90] Former Louisville detective Mark Handy is one such employee. Handy served less than three weeks in prison after exonerations revealed that his misconduct contributed to four recognized wrongful convictions.[91]

D. *Perjury or False Accusation*

The connection of official misconduct to the perjury and false accusations contributing factor elevates the role of this factor in the cases of Black defendants.[92] As discussed above, heavy-handed police tactics have always been a reality in Black communities, and it has been heightened because of the last fifty years of policing and criminal legal system developments.[93] The ubiquity of the criminal legal system in the lives of so many Black communities gives police leverage to threaten or incentivize to get inculpatory testimony.[94]

In Jabar Walker's case, his wrongful murder conviction stemmed from widespread police corruption in New York City. The crime for which Mr. Walker was wrongfully convicted occurred in the jurisdiction of the 30th police precinct, known in the 1990s as the "Dirty 30". The Dirty 30 got its name from the widespread police corruption that was unearthed there. Police in the precinct nicknamed the area "Wild Kingdom" and proceeded to treat the people as less than human. Instead of keeping the peace in response to the real challenges facing the community, the police officers in the precinct were stealing, selling drugs and guns, extorting drug dealers, manufacturing evidence, pressuring witnesses, and perjuring themselves.[95]

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89. *Id.*; *William Gregory*, Innocence Project, *https://innocenceproject.org/cases/william-gregory/* [https://perma.cc/RK6N-4Y8J] (last visited Apr. 24, 2026).
90. U.S. Dep't of Just., Civ. Rts. Div. & U.S. Att'y's Off., West. Dist. of Ky., Civ. Div., *supra* note 87, at 79.
91. *Former Louisville Detective Charged with Misconduct*, Innocence Project (Sept. 27, 2018), https://innocenceproject.org/news/former-louisville-detective-charged-with-misconduct/ [https://perma.cc/7UU6-J5ZG].
92. *See* Berube et al., *supra* note 24, at 185 (analyzing the prevalence of the leading contributing factors among the National Registry's exoneration database as of November 3, 2021, and concluding that "where there is official misconduct, there is often perjury or false accusations (and vice versa)"); Mogavero, *supra* note 84, at 759.
93. Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" was a "War on Blacks,"* 6 J. Gender Race & Just. 381, 386–412 (2002).
94. *See* Clifford S. Zimmerman, *From the Jailhouse to the Courthouse: The Role of Informants in Wrongful Convictions*, in Wrongly Convicted: Perspectives on Failed Justice 55–76 (Saundra D. Westervelt & John A. Humphrey eds., 2001); Andrew E. Taslitz, *Wrongly Accused Redux: How Race Contributes to Convicting the Innocent: The Informants Example*, 37 SW. L. Rev. 1091, 1121–45 (2008).
95. *Jabar Walker Exonerated After 25 Years of Wrongful Conviction in Manhattan Double Homicide*, Innocence Project (Nov. 27, 2023), https://innocenceproject.

The Dirty 30 is well known because revelations of the precinct's corruption led to an unusual number of prosecutions, with more than thirty-four officers arrested or charged of crimes and more than fifty criminal cases thrown out because of police corruption. The scandal resulted in the creation of the Mollen Commission and significant police reform efforts in New York.[96]

Police used leverage against witnesses who were already behind bars or who were facing criminal charges to secure a conviction without regard to the true perpetrator. The same system that allowed them to continually violate the rights of people in the 30th precinct led to the impunity that allowed Mr. Walker to remain in prison for twenty-five years for a crime he did not commit.[97]

Mr. Walker's case is illustrative of the difficulty of obtaining an exoneration when perjury or false accusation is combined with official misconduct. Cases with a combination of these factors have the highest average sentence length and the longest time between conviction and exoneration.[98]

E. *False or Misleading Forensic Evidence*

Forensic or scientific testimony is often seen as neutral and objective, but studies have explored the role of cognitive biases of many types in the analysis of forensic evidence.[99] The 2016 President's Council of Advisors on Science and Technology (PCAST) Report found significant issues with the reliability of the findings of forensic examiners. The report found that forensic examiners can come to incorrect conclusions about whether two samples match because of the tendency to look for similarities between two samples instead of differences and because they are influenced by "extraneous information and external pressures about a case."[100]

Although there are few studies about the specific role that racial bias plays in the interpretation of forensic evidence, researchers are beginning to explore this area.[101] A 2021 study by Itiel Dror and coauthors focused on the

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org/jabar-walker-exonerated-after-25-years-of-wrongful-conviction-in-manhattan-double-homicide/ [https://perma.cc/JP27–8E9U].

96. *See* Milton Mollen et al., N.Y, Comm'n to Investigate Allegations of Police Corruption & the Anti-Corruption Proc. of the Police Dep't, Commission Report 1–9 (1994).

97. *See Jabar Walker Exonerated After 25 Years of Wrongful Conviction in Manhattan Double Homicide*, *supra* note 95.

98. Berube et al., *supra* note 24, at 185.

99. *See* Janis C. Purcal, *The Role of Implicit Racial Bias in Forensic Testimony,* The Champion, July 2021, at 27–34; Comm. on Identifying the Needs of the Forensic Sci. Community et al., Nat'l Rsch. Council of the Nat'l Acads., Strengthening Forensic Science in the United States: A Path Forward 122–24 (2009).

100. President's Council Of Advisors On Sci. & Tech., Exec. Off. of the President, Forensic Science In Criminal Courts: Ensuring Scientific Validity Of Feature-Comparison Methods 49 (2016).

101. *See generally* Maitreya Badami, *Preventing and Correcting Wrongful Convictions for Abusive Head Trauma Using the California Racial Justice Act*, 20 Stan. J. C.R. & C.L. 381, 389 (2024) ("Recent studies have demonstrated at least two key areas in which implicit racial bias seems likely to create a disproportionate impact on charging people of color with [Shaken Baby Syndrome/Abusive Head Trauma]: 1) the decision by medical personnel whether to refer a particular case for a child abuse investigation

role that information about race and relationship to a child plays in forensic pathologists' evaluation of a child's injuries. The researchers reviewed death certificates for the death of children under six in Nevada, and they found that the deaths of Black children were more likely to be ruled homicides than the deaths of white children. The researchers then asked 133 forensic pathologists to review the death certificates along with a narrative with irrelevant information. Those forensic pathologists who were told that the child was brought to the hospital by a white grandmother were much more likely to find the death an accident compared to forensic pathologists who were told that the child was brought to the hospital by the Black boyfriend of the child's mother.[102]

Dror's study demonstrates that conclusions about the import of forensic evidence can be influenced by the forensic pathologist's opinion of whether a person is a grieving victim or a suspect. This effect is evident in other circumstances in which supposedly objective assessments of causation are being made by experts. Fire investigators initially determined that an accidental house fire killed Angela Garcia's two daughters. Ms. Garcia, a Black woman from Ohio, attempted to get insurance to pay for the damage and was suspected of inflating the cost of items in the home. When fire investigators learned this, they decided that the house fire was purposely set. Ms. Garcia did not get the benefit of the doubt. She went from being seen as a grieving mother to a mother who had set fire to her home with her two sleeping children to get insurance money.[103]

This factor also overlaps with the intentional misconduct that occurs when a suspect is identified and authorities need to find evidence to bolster the prosecution's case. Forensic chemist Joyce Gilchrist worked with Oklahoma County District Attorney Bob Macy from 1980–2001. She testified in at least twenty-four death penalty cases, and DA Macy stated that she could "do things with evidence that nobody else was able to do."[104] The reason she could do so was because she fabricated, hid, and lied about evidence. This included her testimony that hair found at a crime scene had "negroid characteristics" and dismissing evidence that the evidence was inconsistent with the blood type of Robert Lee Miller Jr. Mr. Miller, who was one of 173 Black men rounded up for questioning, was convicted and sentenced to death for two rapes and murders. Ten years later, he was exonerated.[105]

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and 2) the diagnostic decision by forensic pathologists.").

102. Itiel Dror et al., *Cognitive Bias in Forensic Pathology Decisions*, 66 J. of Forensic Scis. 1751, 1752–56 (2021).

103. *Guilty Plea Series: The Case of Angela Garcia*, , Innocence Project (Oct. 23, 2018), https://innocenceproject.org/guilty-plea-series-the-case-of-angela-garcia/ [https://perma.cc/75GX-KD5A]; *see also* Rachel Dissell, *Woman Convicted in 2001 of Setting Fire That Killed Two Daughters Asks for New Trial,* cleveland.com (Jan. 2, 2014, 4:22 PM), https://www.cleveland.com/court-justice/2014/01/woman_convicted_in_2001_of_set.html [https://perma.cc/6ZTL-F73P];; Garcia v. Andrews, 488 F.3d 370 (6th Cir. 2007).

104. Lois Romano, *Police Chemist's Missteps Cause Okla. Scandal*, Wash. Post (Nov. 25, 2001), https://www.washingtonpost.com/archive/politics/2001/11/26/police-chemists-missteps-cause-okla-scandal/547d35bb-bfe3–461b-a9d7–28eeaac219ec/.

105. Tiana Herring, Death Penalty Info. Ctr., Deeply Rooted: How Racial History Informs Oklahoma's Death Penalty 37–42 (2022); Maurice Possley, *Robert Lee Miller*

F. *Inadequate Legal Defense*

The connections between inadequate legal defense have not been studied as extensively as many of the other factors. This is likely for the same reason that the Registry is very transparent about the extent to which the cases it codes as involving inadequate legal defense may be an undercount. There are some errors that are visible from the transcripts (that are not universally available for wrongful conviction researchers), but it is very hard to comprehensively evaluate counsel's performance without significant reinvestigation of the case.[106]

Explicit and implicit racial bias affect the quality of defense representation. Egregious cases of demonstrated explicit bias resulted in challenges to defendants' convictions,[107] but less visible bias can result in inadequate defense. Research about implicit bias demonstrates that it can affect defense lawyers' representation, especially when defense lawyers are predominately white and clients are disproportionately people of color.[108] Black and brown people are less likely to have the means to afford private attorneys and are thus more likely to be represented by public defenders. L. Song Richardson and Phillip Atiba Goff have explored the ways that implicit bias can play a role in public defender triage. They note that public defenders are often overworked given the underfunding of indigent defense services. As a result, attorneys are usually time pressured and must make choices about what cases to prioritize in an atmosphere that is ripe for implicit and explicit biases to affect decisions.[109] And of course, when police and prosecutorial misconduct are factors in the case, dogged defense work is needed to uncover inconsistencies and hidden evidence. The ubiquity of official misconduct in the wrongful convictions of Black defendants put them at particular disadvantage when they are represented by lawyers not committed to uncovering evidence of their innocence.

In a review of all Registry exonerations in which inadequate legal defense has been identified, Rosa Greenbaum found that failures to investigate and

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Jr., Nat'l Registry of Exonerations (Sept. 8, 2021), https://exonerationregistry.org/cases/10698; Fair Punishment Project ; America's Top Five Deadliest Prosecutors: How Overzealous Personalities Drive the Death Penalty 10 (2016).

106. Gross & Shaffer, *supra* note 39, at 41–43.

107. Paul Messick, *Represented by a Racist: Why Courts Rarely Grant Relief to Clients of Racist Lawyers*, 109 Cal. L. Rev. 1231, 1235–41, 1258 (2021).

108. *See* Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. Rev. 1493, 1532–48 (2021); Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 Yale L. J. 2236, 2254–58 (2013); Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 Seattle U. L. Rev. 755, 760–67 (2012); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DePaul L. Rev. 1539, 1545–56 (2004).

109. L. S. Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L.J. 2626, 2634–41 (2013); *see also* Jeff Adachi, *Public Defenders Can Be Biased, Too, and It Hurts Their Non-White Clients*, Wash. Post (June 7, 2016), https://www.washingtonpost.com/posteverything/wp/2016/06/07/public-defenders-can-be-biased-too-and-it-hurts-their-non-white-clients/; Maurice Chammah, *Do Public Defenders Spend Less Time on Black Clients?*, The Marshall Project (May 2, 2016, 10:00 PM), https://www.themarshallproject.org/2016/05/02/do-public-defenders-spend-less-time-on-black-clients [https://perma.cc/T6X8-XLQ3].

prepare for trial occurred in the vast majority of cases.[110] For Black defendants, these failures could be the result of general overwork and lack of resources. However, stereotypes about Black criminality can lead to skepticism in the defendant's legal team about whether to credit their protestations of innocence.[111] This skepticism can lead to an unwillingness to thoroughly investigate innocence issues and a focus on a favorable plea bargain or sentence instead.

III. The Argument for Elevating Racial Bias to a Leading Factor

Despite the ability to identify race effects in each factor, it remains important to separately analyze and categorize wrongful conviction cases fueled by racism. To understand why, I will return to my original example, Curtis Flowers's case. According to the Registry's coding, his is a case of "Mistaken Witness ID, False or Misleading Forensic Evidence, Perjury or False Accusation, Official Misconduct."[112] Each factor contributes to the understanding of how and why Curtis Flowers was wrongfully convicted, and racism arguably played a role in the application of each of these factors to Mr. Flowers's case. However, it is not possible to understand how Mr. Flowers could be tried six times for a murder he did not commit without foregrounding racial injustice.

In this case, several particular harms occur. A researcher who is interested in examining how racism affected Mr. Flowers's case would only have the race listed in the Registry to go from. While it is likely that racism affects every single Black exoneree, especially when we consider structural racism and not simply bias or discrimination, Mr. Flowers's case is definitely in a more aggravated category in which racism was a primary reason for his wrongful conviction.

To understand the role that race played in his case, researchers would have to review narrative descriptions like those kept on the Registry's or Death Penalty Information Center's websites. The amount of effort that this would take limits the number of researchers who would attempt it; currently, most of the scholarship about race that analyzes Registry data is focused on analysis that can be drawn from the data already coded by the Registry staff (e.g. the contributing factors, whether DNA was present, whether the individual pled guilty).[113] The goal of using the contributing factors to better understand and prevent wrongful conviction cannot be met using the existing framework. Without specific coding for the factor, the development of research on racial bias in exoneration cases will continue to languish.

This is not just a problem that affects the paucity of research studies. The leading factors framework is a tool that assists us in exploring more deeply how

110. Rosa Greenbaum, Investigating Innocence: Comprehensive Pre-trial Defense Investigation to Prevent Wrongful Convictions 17 (2019), (M.A. thesis, University of California, Irvine) (eScholarship).
111. *See* Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 Minn. L. Rev. 367, 402–23(1996).
112. Possley, *supra* note 20.
113. *See, e.g.*, Berube et al., *supra* note 24; Mogavero et al., *supra* note 84.

a specific factor or combination of factors impacts wrongful conviction. This understanding is vital for identifying and prioritizing legal and policy interventions. This has been true since Professor Borchard's initial study in which he began to categorize reasons for wrongful conviction. *Convicting the Innocent* was part of Professor Borchard's policy advocacy for compensation of wrongfully convicted individuals. In order to be successful in securing compensation legislation, he first had to describe the problem and convince policymakers that wrongful convictions occur.[114]

Modern day understanding of the characteristics of the leading causes of wrongful conviction has been greatly assisted by having a central repository for this data. In the years since the Registry was created, there has been a surge both in scholarship and in innovations around addressing wrongful convictions. For example, with comprehensive data collection, the importance of official misconduct has become clear, outpacing mistaken eyewitness identification as one of the leading factors of wrongful conviction by far.[115] This understanding of the need for reform has been part of the push for reform prosecutors and conviction integrity units in prosecutors' offices. Prosecutor reform has been crucial to changing the innocence landscape, with reform prosecutors adopting open file discovery, refusing to pursue the death penalty, and cooperating with post-conviction investigations. Conviction integrity units are now partners in exonerations of dozens of exonerees each year.[116]

Another aspect that we lose when we subsume racism within separate contributing factors of wrongful conviction is a full understanding of the intersection between individual level behavior and larger structural factors. In the section above, the era of mass incarceration and the War on Drugs is connected to almost every factor. But when we view these interactions separately, we miss the ways that structural racism is a force of its own that operates independently to contribute to the wrongful conviction of Black people.

A. *Addressing Counter Arguments*

Because of the ubiquity of racism in the criminal legal system and in wrongful convictions, the breadth of the factor is one reason to challenge the addition of racism as an independent leading factor contributing to wrongful conviction. However, my argument is that this very breadth makes the racism factor more meaningful. Knowing that the majority of wrongful convictions involve official misconduct and/or false accusation helps to shape our understanding of the solutions. Similarly, so would be an understanding that a large portion of defendants of color are wrongfully convicted because of racism.

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114. Zalman, *supra* note 23, at 135.

115. Nat'l Inst. of Just., *supra* note 28, at 10; *see also* Samuel R. Gross, *What We Think, What We Know and What We Think We Know about False Convictions*, 14 Ohio J. Crim. L 753, 770 (2017).

116. *See, e.g.*, Nat'l Registry of Exonerations, 2023 Annual Report 3 (Mar. 18, 2024), https://exonerationregistry.org/sites/exonerationregistry.org/files/documents/2023%20Annual%20Report.pdf [https://perma.cc/BQC9-AH6D] (concluding that Conviction Integrity Units were involved in 60 of the 153 exonerations in 2023).

Right now, we can cite examples of cases where a judge or juror exhibited explicit racial bias, prosecutorial arguments relied on racist stereotypes, or experts relied on discredited racist science. Yet, we have no uniform way of coding in a way that connects these variables. If we did, avenues for further research would open up. For example, when reviewing the cases of capital exonerees with the "racism" factor, we could evaluate how many had trials by jury and study how many were tried by all-white juries.[117] This would be a more fine-grained inquiry than looking at the trials of all defendants of color.

Another argument could be raised about the scope of the problem. Since racism operates in ways that are not always visible, it is inevitable that any attempt at categorization would be underinclusive. If any reasonable rule to distinguish the cases in which racial bias was a leading factor will be an undercount, does this counsel against adding racial bias to the canonical drivers of wrongful conviction? I argue that it does not. One of the powerful reasons for creating this list is to identify trends and similarities among the cases of known wrongful convictions. In this way, the racism factor would mimic the inadequate legal defense factor, which is definitely undercounted but still can lead to important analysis and policy proposals.[118]

IV. Fleshing Out the Racism Factor by Assessing Wrongful Capital Convictions

To address practical barriers to coding wrongful convictions, a starting point would be limiting it to the universe of wrongful capital convictions. As discussed below, racism is a throughline in the history of U.S. capital punishment, and one of the strongest patterns we see in capital wrongful convictions cases is the disproportionate rate at which Black people are convicted and sentenced to death for crimes which they did not commit. Despite this knowledge, we still do not have estimates of the role that race played in the conviction of innocent capital defendants. Because the number of exonerated modern capital defendants is modest, 202 at the time this writing,[119] this provides the opportunity to trial the use of a stand-alone racism factor in a limited and well-documented research universe.

117. The author acknowledges that such an undertaking would be impossible for some older cases. However, a cabined version of this inquiry could be done by limiting cases by jurisdiction and date and focusing on jurisdictions with robust jury information. *See generally* Elisabeth Semel et al., *Guess Who's Coming to Jury Duty?: How the Failure to Collect Juror Demographic Data Contributes to Whitewashing the Jury Box* (Feb. 2024), https://www.law.berkeley.edu/wp-content/uploads/2024/02/Guess-Whos-Coming-to-Jury-Duty_2–14–24.pdf [https://perma.cc/7BZU-FUJL].

118. Rosa Greenbaum, *Investigating Innocence: Comprehensive Pre-trial Defense Investigation to Prevent Wrongful Convictions* (master's thesis, Univ. of Cal. Irvine 2019).

119. *Innocence Database*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/database/innocence [https://perma.cc/C5MP-485X] (last visited August 16, 2025).

A. *Understanding the Role of Race in the Administration of the Death Penalty*

From American colonial times, race has always had a determining factor in who was charged with capital crimes, who received a death sentence, who was executed, and how they were executed.

1. Historical Roots

Though the origins of the U.S. death penalty can be traced back to prior systems of justice, the institution of slavery was central to the penalty's development in the colonial period and early American history.[120] Colonial statutes in slaveholding colonies provided different punishments for crime based on the race of the defendant and the victim. For example, in Georgia, white people could be executed only for murder, while there were more than 200 crimes for which Black people could face capital punishment. Available data about execution rates in both northern and southern colonies shows that the rate of execution for Black people was much greater than that for white people. And when executions took place, the methods of execution sometimes varied by race, with Black people executed with methods that had been long disfavored in England as being too brutal.[121]

Despite the racial disparities in execution, economic factors affected how many Black people were executed before the Civil War. Punishment of enslaved people was often left to their owners, and the execution of an enslaved person was seen as a taking of property by the state. As a result, some colonies explicitly allowed for reimbursement of an owner after an enslaved person was executed.[122]

The post–Civil War period led to formal equality after the advent of the Fourteenth Amendment. This meant the end of explicit provisions for different punishment based on race, but it did not end observable differences in treatment and numerical disparities. Economically, the end of slavery created a demand for cheap labor in the South, a demand that formerly enslaved people were compelled to fill.[123] The penal system was brought to bear to ensure that labor was provided and to enforce other methods of social control. Operating beside the potential for execution through the courts was a system of racial violence that included widespread lynchings and mob violence.[124]

120. *See* Diann Rust-Tierney, *Dismantling Structural Racism to End Capital Punishment*, 67 Howard L.J. 275, 280–86 (2024).

121. *See generally* Ngozi Ndulue, Death Penalty Information Center, Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty (Robert Dunham ed., 2020); Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. Chi. L. Rev. 243, 246–48 (2015); McCleskey v. Kemp, 481 U.S. 279, 329–30 (1987) (Brennan, J., dissenting) (citing Ga. Penal Code (1861)); Brief of NAACP et al. as Amici Curiae, Aikens v. California, 403 U.S. 952 (1971) (No. 5059), app. A: Pre-Civil War History of Punishment for Rape in Southern States and Washington, D.C.).

122. United States v. Amy, 24 F. Cas. 793, 809 (C.C.D. Va. 1859).

123. Gilbert King, Devil in the Grove 48 (2012); David Oshinsky, Worse than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice (1997).

124. Equal Just. Initiative, , *Lynching in America: Confronting the Legacy of Racial Terror*

The early 1900s brought organized international anti-lynching activism. Lynchings continued to be commonplace occurrences until slowly decreasing in the 1920s–30s, at the same time as executions began to rise. Lynchings were seen as alternatives for executions and vice versa, to the extent that some attempts to abolish the death penalty were met with concern that lynchings would increase.[125]

Allegations of sexual violence by Black men against white women were particularly combustible situations.[126] The ubiquity of racial violence for these allegations is evidenced by newspaper headlines of the times, proclaiming that a Black man was hanged for "the usual crime."[127] From the 1930s when the federal government began collecting comprehensive statistics on executions until the last rape execution in 1967, 90% of the 455 men executed for rape were Black.[128] Though the race of victims is not specifically known for executions conducted before 1930, it is clear that execution for rape was generally focused on crimes involving white victims. In fact, there is no documented execution in the history of the United States for the rape of a Black woman who survived the attack.[129]

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60 (3d ed. 2017); Walter White, Rope and Faggot: A Biography of Judge Lynch (1929); Mary Church Terrell, *Lynching from a Negro's Point of View*, 178 N. Am. Rev. 853, 853 (1904) ("Hanging, shooting and burning black men, women and children in the United States have become so common that such occurrences create but little sensation and evoke but slight comment now.").

125. Ndulue, *supra* note 121, at 13.

126. The specter of Black sexual aggression was used to justify the prevalence of lynching; though the majority of lynchings were not for alleged assault, lynching and mob violence were always a possibility when such allegations surfaced. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1272 (1991) ("Ironically, while the fear of the Black rapist was exploited to legitimate the practice of lynching, rape was not even alleged in most cases."); Terrell, *supra* note 124, at 854–55 (discussing allegations of rape as a pretext for support for lynchings); Ida B. Wells-Barnett, Southern Horrors: Lynch Law in All Its Phases (1892).

127. Barry Scheck et al., Actual Innocence 203 (2000). The specter of Black sexual aggression was used to justify the prevalence of lynching; though the majority of lynchings were not for alleged assault, lynching and mob violence were always a possibility when such allegations surfaced. *See* Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 Chi.-Kent L. Rev. 359, 365 (1993) ("[T]he social meaning of rape has centered on a racialized sexual mythology arising from slavery. This mythology defines Black women as sexual objects, while it defines Black men as sexual predators."); Crenshaw, *supra* note 126 at 43 ("The well-developed fear of Black sexuality served primarily to increase white tolerance for racial terrorism as a prophylactic measure to keep Blacks under control.").

128. Brief for the American Civil Liberties Union, the ACLU of Louisiana, & the NAACP Legal Defense and Educational Fund, Inc., as Amici Curiae Supporting Petitioner at 10, Kennedy v. Louisiana, 554 U.S. 407 (2008) (No. 07–343) (citing Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 Annals of the Am. Acad. of Pol. & Soc. Sci. 119, 129 (1973)); U.S. Dep't of Justice, Bureau of Prisons, National Prisoner Statistics, Bulletin No. 45, *Capital Punishment 1930–1968* (1969).

129. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1,

While executions were used to "protect" white women from the sexual violence of Black men, instead of being seen as beings in need of protection, women of color were historical targets for the use of the death penalty. Although women have always made up a small amount of those sentenced to death, Black women have been disproportionately subjected to the death penalty throughout U.S. history. Historians have documented 702 female executions; of this number, Black women and girls account for 436 executions, and white women and girls account for 229 executions. Black women and girls have been executed at two times the rate of white women and girls.[130]

2. Racism in the Modern Death Penalty

Historical patterns of racial disparity are reflected in the modern-day death penalty. Currently, 41% of those on death row are Black despite the fact that Black people make up 13% of the population. In the "modern era" of the death penalty (since 1972), there have been more than 1500 executions. Eighty-one percent of these executions were for cases in which a white victim was killed. For most executions, the race of the victim was the same as the race of the defendant. But in Black-white interracial cases, twenty-one white people were executed for a crime involving a Black victim, while 299 Black people were executed for murders involving white victims.[131] Since 1972, there have been four executions of Black women, accounting for 25% of all modern female executions.[132]

Comprehensive studies of the death penalty have been done in death penalty jurisdictions across the country. In 1990, the U.S. General Accounting Office conducted a meta-analysis of the available studies and found that "[i]n 82% of the studies [reviewed], race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found more likely to be sentenced to death than those who murdered blacks."[133] The evidence was more mixed for the effect that the race of the defendant had on the outcome.[134] A numbers of studies throughout the post-*Furman* period have found "there is little evidence of disparities in charging and sentencing based on defendant race; there is consistent evidence of disparity on the race of the victim regardless of defendant race; and the largest disparities are observed based on the combination of defendant race (Black) and victim race (white)."[135]

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23 n.99 (1990).

130. David V. Baker, Women and Capital Punishment in the United States: An Analytical History 33 (2016).

131. *Executions by Race and Race of Victim*, Death Penalty Info. Ctr, https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim [https://perma.cc/UH9H-NUJ6] (last visited Feb. 15, 2024).

132. *Executions of Women*, Death Penalty Info. Ctr, https://deathpenaltyinfo.org/death-row/women/executions-of-women [https://perma.cc/W4XE-N349] (last visited Feb. 15, 2024).

133. *Supra* note 131; *see also* Gen. Acct. Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* 6 (Feb. 26, 1990).

134. Gen. Acct. Office, *supra* note 133 at 6.

135. Jeffrey A. Fagan et al., *Getting to Death: Race and the Paths of Capital Cases after*

Researchers have explored the reasons for racial disparities in charging, sentencing, and execution. For example, Professor Jennifer Eberhardt examined the relationship between defendant appearance and death sentencing. In a study of Philadelphia death penalty case, Eberhardt reviewed capital cases with Black defendant with either Black or white victims. When the victim was white, Black defendants who had more stereotypically Black features—thicker lips, darker skin, more textured hair, etc.—were more likely to be sentenced to death than Black defendants who had less stereotypically Black features. When the victim was Black, there was no sentencing difference.[136] The inference that can be made from Eberhardt's study is that death sentencing is affected by fears of interracial violence against white people and images of the stereotypical dangerous Black man. This inference is supported by other recent social science studies.

In general, the use of the death penalty is higher in states that had the highest number of lynchings and that have the most lax enforcement of hate crimes laws.[137] Professor Brandon Garrett has looked more deeply into local differences in the rate of imposition of the death penalty. He found that though the rate at which Black people are murder victims is invariably higher than the rate at which white people are victimized, when the white victimization rate begins to approach the Black victimization rate, the death penalty is used more frequently.[138]

Studies of implicit bias also point to causes for persistent racial disparity. Professor Justin Levinson considered anti-Black bias in relationship to punishment. He found that in general, it was easier for study participants to connect white faces with concepts of mercy, grace, and rehabilitation. Conversely, it was easier for study participants to connect Black faces with concepts of retribution, guilt, and punishment. He also considered the way that implicit bias affected

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Furman, 107 Cornell L. Rev. 1565, 1571 (2022); *see also* Frank R. Baumgartner et al., *#BlackLivesDon'tMatter: Race-of-victim Effects in US Executions, 1976–2013*, 3 Pols., Grps., & Identities 209, 221 (2015); Catherine M. Grosso et al., *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, *in* America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction 525 (James R. Acker et al. eds., 3d ed. 2014); Meg Beardsley et al., *Disquieting Discretion: Race, Geography & the Colorado Death Penalty in the First Decade of the Twenty-First Century*, 92 Denv. U. L. Rev. 431, 439 (2014); David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638, 1645 (1998); *but see* Tim Lyman, *Chi-Grams of Louisiana Capital Charging* (Feb. 1, 2022) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4148636 (suggesting that the most common study design underestimates race-of-defendant effects).

136. *See generally* Jennifer Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 Psychol. Sci. 383 (2006).

137. David Jacobs et al., *Vigilantism, Current Racial Threat, and Death Sentences*, 70 Am. Sociol. Rev. 656, 670 (2005); Steven F. Messner et al., *Distrust of Government, the Vigilante Tradition, and Support for Capital Punishment*, 40 L. Soc. Rev. 559, 559 (2006).

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respondents' views of punishment. He determined that respondents with more anti-Black implicit bias endorsed strong belief in the importance of retribution and punishment.[139]

These findings are borne out by studies about jurors as well. Researchers have found that white men are most likely to endorse favorable views about retribution and are less sympathetic to the mitigation evidence presented by Black defendants.[140] When juries are all-white or almost all white, they are more conviction prone, more likely to endorse false facts, deliberate less, and are less likely to vote in favor a criminal defendant.[141]

Juries in capital cases are less likely to be diverse because of a number of converging factors. In capital cases, juries must be "death qualified" meaning that they must be willing to impose a death sentence. Because jurors of color are less likely to support the death penalty, this by itself eliminates several jurors who would refuse to impose the death penalty. It also skews the questioning and helps prosecutors identify jurors of color who, though able to impose the death penalty, have doubts about its use. This is particularly important because prosecutors can use discretionary "peremptory strikes" to exclude jurors from sitting on a case. These strikes have long been used to exclude jurors of color. Though prosecutors must justify their use of peremptory strikes if challenged, the strike will be allowed to go through if the prosecutor provides a race neutral reason that is not shown to be pretextual. Hesitation about the death penalty provides one such reason. Peremptory strikes are also more abundant in capital cases, giving prosecutors more ability to exclude jurors of color.

Death sentencing also has racial undertones. In determining whether a defendant deserves a sentence of death, the jury must decide whether the crime and the defendant fit into the "worst of the worst" category. That means that the defense counsel is tasked with providing a compelling story of why the client deserves to live. A strong factor for juries in making this decision is whether the defendant will pose a future danger to society. In some states, like Texas, juries must make an explicit future dangerousness finding.[142] Regardless of whether this finding is explicit, researchers have found that estimations of future dangerousness are at the forefront of jurors' minds.[143] Yet future dangerousness perceptions are deeply tied to racial stereotypes about crime and criminality.

139. Justin D. Levinson et al., *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 545–50 (2014).

140. Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 Law & Soc'y Rev. 69, 88 (2011); Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 Ann. Rev. L. & Soc. Sci. 269, 272–73 (2015).

141. Samuel R. Sommers, *Race and the Decision Making of Juries*, 12 Legal & Criminological Psychol. 171, 175 (2007); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597, 607–08 (2006); William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 259 (2001).

142. *See* Buck v. Davis, U.S. 100, 116 (2017); Jurek v. Texas, 428 U.S. 262, 268 (1976).

143. *See generally* William J. Bowers & Benjamin D. Steiner, *Death by Default: An*

Social science studies have shown that merely showing study participants the picture of Black faces makes participants more attuned to potential criminality.[144] When participants are shown a grainy picture of a gun that is slowly put into focus, they are able to recognize it much faster after being primed with a Black face.[145] Study participants are also likely to view a narrative about ambiguous behavior as more indicative of culpability when the person in the narrative has dark skin.[146] This also applies to young children; participants are more likely to interpret the behavior of children as indicative of criminality if the children are Black.[147] With this strong association of Blackness and criminality, it is hard to see how jurors' perceptions of future dangerousness would be unaffected.

Racial disparities are seen in post-conviction stages of capital cases. In a Georgia study, researchers found that racial disparities increased as cases wound their way through the appeals system, finding that white victim cases were seventeen times more likely to end in execution.[148] As discussed above, the majority of capital exonerees are Black and almost two-thirds are people of color.[149] Yet, this does not mean that defendants of color face an easy path to exoneration. In death penalty cases, Black people wait an average of 4.3 years longer than white people for exoneration.[150]

Mr. Flowers's case demonstrates many of the ways that race infects the administration of the death penalty. Three of the four victims in his case were white, putting his case into the category that has the most pronounced racial disparities. The prosecution was able to exclude all or almost all Black jurors from Mr. Flowers's capital trials.[151] Each of those trials ended in a conviction and death sentence. The two times Mr. Flowers was tried non-capitally, he was tried before a diverse jury that was unable to vote to convict him, highlighting the weakness of the evidence against him.[152] Despite challenging his conviction

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Empirical Demonstration of False and Forced Choices in Capital Sentencing, 77 Tex. L. Rev. 605 (1999).

144. Bryan Stevenson, *A Presumption of Guilt: The Legacy of Lynching and How it Still Shapes American Criminal Justice*, N. Y. Rev. of Books (July 13, 2017), https://www.nybooks.com/articles/2017/07/13/presumption-of-guilt/ [https://perma.cc/J494–87GT].

145. Jennifer Eberhardt, et al. *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 876, 881 (2004).

146. Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Judgments of Ambiguous Evidence*, 112 W. Va. L. Rev. 307, 337 (2010).

147. *See generally* Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. Personality & Soc. Psych. 526 (2014).

148. Scott Phillips & Justin Marceau, Whom the State Kills, 55 Harv. C.R.-C.L. L. Rev. 585, 606 (2020).

149. *Innocence Database*, Death Penalty Info. Ctr., *https://deathpenaltyinfo.org/database/innocence* [https://perma.cc/C5MP-485X] (last visited Feb. 27, 2026).

150. Death Penalty Info. Ctr., The Innocence Epidemic 24 (2021), https://dpic-cdn.org/production/documents/pdf/The-Innocence-Epidemic.pdf?dm=1683576587 [https://perma.cc/FM2N-CBH8].

151. Flowers v. Mississippi*,* 588 U.S. 284, 287 (2019).

152. Br. for Appellant at 2, Flowers v. Mississippi, No. 2010-DP-01348-SCT, at 4 (Miss. July 1, 2013); Flowers*,* 588 U.S. at 306.

at every stage, it took Mr. Flowers twenty-three years to be exonerated.[153] Race was central to Mr. Flowers's conviction and death sentence, as it is for many capital exonerees.

B. *Testing the Practicality of Quantifying a Racism Leading Factor*

Given the importance of racism in the evolution and modern application of the death penalty, understanding the role of racism in death penalty exonerations is of particular importance. To test the feasibility of quantifying the racism leading factor, I provide a potential set of criteria for the applicability of the factor and test the ability to determine the presence of the factor using readily available data about the last twenty years of exonerations.

1. Defining the Racism Contributing Factor

What does it look like to decide whether racism contributed to a wrongful capital conviction? No matter what criteria used, we know that the larger systemic and institutional impacts of racism means that racism could be tied to all the wrongful capital convictions of people of color. However, in order to provide an assessment of whether racism had a particular effect on a capital prosecution that resulted in an exoneration, we can use the lessons learned from past cases.

I propose a racism contributing factor that is limited to cases in which six situations are present:

Racism in target selection/investigation: For example, death row exoneree Clarence Brandley was told by an investigating officer that because he was "the n***er" among the two people who found the victim (a white teenage girl), he would hang for the crime.[154] The NRE lists "False or Misleading Forensic Evidence, Perjury or False Accusation, Official Misconduct" as the factors contributing to Brandley's wrongful conviction.[155]

Race based coercion/bullying: Death row exonerees and brothers Leon Brown and Henry McCollum were coerced into falsely confessing to the murder of a Black teenage girl. The officers lied to them, yelled at them, and called

153. *Innocence Database*, Death Penalty Info. Ctr., *https://deathpenaltyinfo.org/database/innocence* [https://perma.cc/C8NY-JT6D] (last visited Feb. 27, 2026).

154. Arman Badrei, *Clarence Brandley: Unjustly Convicted, Overdue for Justice*, Tex Observer (Mar. 20, 2023), https://www.texasobserver.org/clarence-lee-brandley-death-penalty-wrongfully-convicted/ [https://perma.cc/XNF8-MBFJ] (quoting the judge who granted the motion to vacate as stating: "In the 30 years this Court has presided over matters in the judicial system, no case has presented a more shocking scenario of the effects of racial prejudice, perjured testimony, witness intimidation, an investigation, the outcome of which was predetermined, and public officials who, for whatever motives, lost sight of what is right and just."). Jesse Johnson's case provides another example. Ken Otterbourg, *Jesse Johnson,* Nat' Registry of Exonerations, https://exonerationregistry.org/cases/13594 [https://perma.cc/3KWK-3L5Q] (last visited Sept. 13, 2025) (quoting reports of a police officer stating: "A n—-—got murdered, and a n—-—is going to pay for it.").

155. Alexandra Gross, *Clarence Brandley,* Nat' Registry of Exonerations https://exonerationregistry.org/cases/10280 [https://perma.cc/ST6B-NN66] (last visited Sept. 13, 2025).

them racial slurs to elicit the confessions.[156] The NRE lists "False Confession, Perjury or False Accusation, Official Misconduct" as the factors contributing to Brown's and McCollum's wrongful convictions.[157]

Race based argument, including animal references: Calvin Johnson was exonerated from a rape conviction based on a tainted cross-racial misidentification. At trial, the prosecutor explained the witness's failure to identify Johnson from the stand as the result of her not wanting "to look at the animal that raped her."[158] The NRE lists "Mistaken Witness ID, False or Misleading Forensic Evidence" as the factors that contributed to Johnson's wrongful conviction.[159]

Race based expert or lay testimony: Robert Miller was sentenced to death for rape and murder he did not commit after a trial in which disgraced forensic scientist, Joyce Gilchrist, falsely testified that "[n]egroid" hairs on the victim matched Miller's.[160] The NRE lists "False Confession, False or Misleading Forensic Evidence" as the factors contributing to Miller's wrongful conviction.[161]

Racially biased decision-makers: Darrel Jones was sentenced to life without parole for a murder in Brockton, Massachusetts. He was convicted by an all-white jury. Juror interviews later revealed allegations that two jurors thought Jones was guilty because he was Black, and his conviction was overturned based on a judge crediting racial bias allegations against one of the jurors. The NRE lists "Mistaken Witness ID, Perjury or False Accusation, Official Misconduct, Inadequate Legal Defense" as contributing factors to Jones's wrongful conviction.[162]

Race-based jury discrimination: Rodricus Crawford was sentenced to death for the murder of his son, who actually died of natural causes. Caddo Parish, Louisiana, prosecutors followed a long-standing pattern[163] and used

156. Gilliam v. Sealey, 932 F.3d 216, 226–27 (4th Cir. 2019); *see also* Ctr. for Death Penalty Litig., *Saved From the Executioner: The Unlikely Exoneration of Henry McCollum* (2017), https://www.cdpl.org/wp-content/uploads/2017/06/SAVED-FROM-EXECUTION-web-final1.pdf [https://perma.cc/A2EZ-NTRW].

157. Maurice Possley, *Henry McCollum,* Nat' Registry of Exonerations, , https://exonerationregistry.org/cases/11629 [https://perma.cc/AZ7M-E4DW] (last visited Sept. 13, 2025); Maurice Possley, *Leon Brown,* Nat' Registry of Exonerations, , https://exonerationregistry.org/cases/11630 [https://perma.cc/47LF-S6BZ] (last visited Sept. 13, 2025).

158. Calvin Johnson, Exit to Freedom 91 (2003).

159. Maurice Possley, *Calvin Johnson Jr.*, Nat' Registry of Exonerations https://exonerationregistry.org/cases/10559 [https://perma.cc/822S-4RC2] (last visited Sept. 13, 2025).

160. Maurice Possley, Nat'l Registry of Exonerations, *Robert Lee Miller Jr*. Nat' Registry of Exonerations, , https://exonerationregistry.org/cases/10698 [https://perma.cc/L4QE-CD4C] (last visited Sept. 13, 2025).

161. *Id.*

162. Ken Otterbourg, Nat'l Registry of Exonerations, *Darrell Jones*, https://exonerationregistry.org/cases/12675 [https://perma.cc/L2LK-H7K4].

163. Ursula Noye, Reprieve, *Blackstrikes: A Study of the Racially Disparate Use of Peremptory Challenges by the Caddo Parish District Attorney's Office* (Aug. 2015), https://web.archive.org/web/20180511010520/https://blackstrikes.com/resources/Blackstrikes_Caddo_Parish_August_2015.pdf [https://perma.cc/HM2H-JMKF]. Glenn Ford's case provides another example of Caddo Parish prosecutors using

peremptory strikes to exclude five of the seven Black jurors in the venire. This race discrimination in jury selection resulted in the reversal of Crawford's conviction.[164] The NRE lists "False or Misleading Forensic Evidence, Official Misconduct" as the factors contributing to Crawford's wrongful conviction.[165]

Cross-racial misidentification: Paul Browning was convicted in part based on the testimony of two witnesses who claimed that he robbed and murdered a jewelry store owner. The two white witnesses positively identified Browning despite many inconsistencies between Browning and initial descriptions of the perpetrator, including the fact that the man who committed the crime had wavy loosely curled hair and Browning had a large afro. At trial, one witness admitted that she thought all Black men look alike. The NRE lists "Mistaken Witness ID, False or Misleading Forensic Evidence, Perjury or False Accusation, Official Misconduct, Inadequate Legal Defense" as the factors contributing to Browning's wrongful conviction.[166]

One can see evidence of racism by reviewing the narrative of exonerations, but the role of racism is not systematically tracked. Below, I provide an example of what a review of exonerations for racism would look like, which I hope provides proof of the feasibility and usefulness of such a review.

2. Test Design

In assessing the presence of absence of these situations, I limited myself to the information available on the definitive databases for death row exonerations, the NRE's database limited to sentence=death and the Death Penalty Information Center's innocence database. Because of the slightly different inclusion criteria, I included all cases in either list. I reviewed exonerations for the last twenty years (2004–2024). This review took me approximately fifteen hours. For non-white exonerees,[167] I reviewed the NRE description, the Death Penalty Information Center description of innocence, and the first page of Death Penalty Information Center search results. For white exonerees, I read the Death Penalty Information Center description of innocence and would read more if any indications of racism were hinted at in the description.[168]

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peremptory strikes to exclude Black jurors to wrongfully convict and sentence a man to death. Maurice Possley, *Glenn Ford*, Nat' Registry of Exonerations, , https://exonerationregistry.org/cases/11542 [https://perma.cc/T34L-59QJ] (last visited Sept. 13, 2025).

164. Maurice Possley, *Rodricus* Crawford, Nat' Registry of Exonerations, , https://exonerationregistry.org/cases/12227 [https://perma.cc/24NR-V3AE] (last visited Sept. 13, 2025); Maurice Possley, , *Harold Wilson*, Nat' Registry of Exonerations, https://exonerationregistry.org/cases/10679 [https://perma.cc/KNC5-B7MW] (last visited Sept. 13, 2025) (*Batson* reversal in Harold Wilson's case).
165. Rodricus Crawford, *supra* note 164.
166. Maurice Possley, *Paul Browning*, Nat' Registry of Exonterations, https://exonerationregistry.org/cases/12810 [https://perma.cc/2U55-WYUJ] (last visited Sept. 13, 2025).
167. By "non-white", I included all the people coded by the NRE as Asian, Black, Hispanic, Other, and Don't Know.
168. In the review of 2004–2024 exonerations, I conducted more extensive research on one exoneree listed as white, Seth Penalver.

3. Test Results

My review of these twenty years revealed twenty-one cases with some question of racism as a contributing factor under my defined criteria and thirteen cases that met the criteria on the face of the websites.[169] This was out of sixty-nine cases total and forty-eight cases of non-white exonerees. This means that 27% of all 2005–2024 death row exonerations could definitely be coded with the racism contributing factor. Up to 44% could possibly be so coded if the initial research was followed up to confirm the presence or absence of the listed criteria.

4. Implications

This demonstration provides an instructive proof of concept that addresses some criticisms of this approach. First, given the information already being provided about exonerees, one can glean enough information from a casual review to begin to quantify a racism contributing factor. This means that identifying the existence of this factor would not be overly burdensome for researchers in this field. Secondly, racism that is over and above the significant systemic and institutional racism that is the backdrop of American society is affecting a substantial percentage of the cases of non-white exonerees. This should not be surprising given the extraordinary racial disparities in wrongful capital convictions. Finally, though the racism contributing factor may not capture all relevant cases, it can be identified in enough cases to provide fertile ground for further research.

Conclusion

The study of wrongful convictions has grown by leaps and bounds. It began with understanding the phenomenon through observation of known cases, and it has become much richer through the extraordinary efforts of researchers to comprehensively document exonerations. While study of the phenomenon has deepened, it is hindered by the lack of quantification of one of the major driving factors in producing wrongful convictions: racism.

To ensure that our understanding of wrongful convictions captures the prevalence of this crucial factor, wrongful convictions researchers can use straightforward criteria to categorize cases in which racism played a significant role. A small-scale test shows that this categorization is possible with widely available information for the subset of wrongful capital convictions. This test supports a conclusion that the racism contributing factor is a feasible addition to the broader categorization of all exonerations.

Research on wrongful convictions affects how we understand the scope of the problem and how to address it. In a fruitful period for empirical research into wrongful convictions, we would be doing the field a disservice to continue without attempting to quantify the extensive role that we see racism playing in these cases.

169. Data on file with author.