

“Wrongful Convictions: New Solution to an Old Problem”

Honors Program Thesis

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Abstract: This paper will explore the prevalent issue of wrongful convictions and how exonerees of the prison system spend several years of their life innocent but in prison. A solution, a committee on prosecutorial conduct is analyzed and considered whether it is helpful enough to change a racist judicial system. There has to be more done overall and to combat how innocent people, mainly black men, are convicted of crimes they did not commit.

Key words: journalism, prison, wrongful convictions, exoneree, prosecutor, law, judicial system,
innocent

It took 12 years. Twelve years that included hard prison labor until five innocent men's crimes were absolved. Five young men, children really, not old enough to vote or buy alcohol or even lottery tickets, spent their defining years in a cold cell. They had no prospects for a future, they couldn't even finish high school with their peers. They endured the mindless living of prison, day in and day out doing the same thing with seemingly no end in sight. Over the years in prison they became adults, but they had to grow up fast from the initial first day in prison garb. All of this, all of those years of mental and emotional pain, sometimes physical too, all for nothing. Why? Because they were innocent. They wasted their youth for something they didn't do and they will never get it back.

They are the Central Park Five, as the world has come to coin them and their story starts April 19, 1989. Raymond Santana, Kevin Richardson, Antron McCray, Yusef Salaam and Kharey Wise were just teenagers, all either 14 to 16 years of age when they were accused of brutally beating and raping Trisha Meili, dubbed the "central park jogger" and leaving her to die on that April night. The 28-year-old investment banker survived but did not remember the attack. Though the teenagers were proven innocent in 2002, they initially confessed to the crimes. Salaam, Santana and McCray were found guilty of rape, assault, robbery and riot for the attacks on Meili and other separate assaults on two male joggers. All three of these teenagers were sentenced five to 10 years in a juvenile detention facility in upstate New York. Richardson was sentenced the same amount of time at a juvenile facility, but was convicted of attempted murder, rape, sodomy, assault and robbery in connection with all three attacks on the joggers. Wise, however, was the only teen tried as an adult and was charged with sexual abuse and assault for the attack on Meili, but was acquitted of the male joggers' attacks. Wise was sentenced five to 15

years in prison. Even though all five were found innocent of their crimes in 2002, they had already served their sentences, ranging from six to 13 years.¹

Wrongful conviction is exactly what these men, who were just teenagers when they were sent to prison. The men were not guilty, thus wrongfully convicted of a crime. After their release from prison and being proven innocent, they were exonerated of their crimes, becoming exonerees of the prison system and having a clean record because they were innocent to begin with.

The case for wrongful conviction, that is where someone was sentenced to serve time because of a crime later found that they did not commit, was present even during the initial trial. There were inconsistencies within the confessions, with those of Wise, McCray, Santana and Richardson videotaped, and no physical evidence tying them to the crime scene. This is to date one of the most famous wrongful conviction cases ever seen, and it will continue to remain so because five young men were innocent and spent the height of their teenage years and adulthood in prison, innocent while having to exist with men who were guilty of committing real, horrifying crimes.

Salaam claimed in a 2016 op-ed published by the Washington Post, that interrogators possibly deprived the teens of food, drink and sleep for over 24 hours. Despite their attorneys insisting the young men were coerced by investigators into giving false statements and being in these interrogations that lasted hours, the five boys were still convicted. Though the Central Park Five insisted on their innocence and being coerced, it took until June 2002 that their claims were

¹ Weiser, Benjamin. "5 Exonerated in Central Park Jogger Case Agree to Settle Suit for \$40 Million." The New York Times. June 20, 2014. Accessed December 15, 2018. <https://www.nytimes.com/2014/06/20/nyregion/5-exonerated-in-central-park-jogger-case-are-to-settle-suit-for-40-million.html>.

seriously considered when Matias Reyes claimed sole responsibility for raping and beating Meili in Central Park. Reyes was a convicted murderer and serial rapist, already serving a 33-year prison sentence when he provided details of the assault on Meili and his DNA was matched with that at the crime scene.²

The case reopened and investigations followed, with then Manhattan District Attorney Robert Morgenthau recommending in December 2002 that all charges against the Central Park Five be thrown out. Later that month, a judge set aside the verdicts. From that point of reclaimed innocence by these now adults, there were still people who believed they were guilty, including police officials who were very critical of the evidence in the district attorney's new investigations. On the other side, the criminal justice advocates who had supported their innocence were pleased with the news, despite the five already having served their sentences. Charles J. Tejada, the State Supreme Court Justice handling the case said in his ruling that Reyes' confession and the corroboration from the DNA match at the crime scene created the probability that "the verdict would have been more favorable to the defendants." Tejada did not call for or allow a new trial against the five and the district attorney's office decided to dismiss all the original indictments. Up until this point of Reyes' confession, the five were still deemed guilty despite their claims of innocence and the faulty evidence found during their initial trials. After Reyes' confession, there did not need to be any new trial conducted because there was no indecision when it came to the innocence of these men, in light of the actual rapist stepping forward. With the throwing out of previous trials and dropping all indictments from the past, these men were now classed as wrongfully convicted because they had been in prison. But

² Cook, Lauren. "Central Park 5: What to Know Ahead of the Netflix Series." Am New York. July 25, 2018. Accessed December 15, 2018. <https://www.amny.com/news/central-park-five-1.19884350>.

without Reyes confessing, these men, though already having completed their sentences, would have still been “guilty.” But to understand why they were convicted in the first place with a guilty verdict sending them to jail, there has to be an analysis of factors lead to wrongful convictions and contribute to sending innocent people to rot in prison for years of their lives.

People are convicted of crimes they did not commit so often that organizations like the Innocence Project are needed to help defend those who claim innocence but have exhausted all their efforts in the legal system; there is even a National Registry of Exonerations. As of December 7, 2018, there is a total of 2,316 exonerees on the registry.³ This shouldn’t be needed. So how do we stop this very old, very real and serious problem? There are several ways that have been explored for years to try and combat this issue, but there are even greater steps now as society and the government are becoming involved. In New York State, the exact same place the Central Park Five were convicted, a new system for curbing this problem, specifically prosecutorial misconduct, is being enacted. Prosecutorial misconduct is, simply when prosecutors on cases over step their bounds and their decisions during cases become ethically questionable. Prosecutors are powerful when it comes to building up a case against the accused, something that worries many from the innocence project networks because cases can be defined by the information and evidence presented by the prosecutor. In conjunction with the police they are meant to be fair and truthful, however that can come under a gray area. While they are meant to provide all evidence, even evidence that will acquit the person they are accusing, some may not turn over their findings at all.

³ "Exonerations By State." Charles Chatman - National Registry of Exonerations. Accessed December 15, 2018. <http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>.

According to data from the National Registry of Exonerations, the contributing factors found to be most prevalent and common in wrongful conviction cases include, false confession, false or misleading forensic evidence, mistaken witness identification, official misconduct, and perjury or false accusation. False confession garnered 12 percent, forensic evidence was 24 percent, witness identification was 29 percent, misconduct was 52 percent, and false accusation was a whopping 58 percent. When it comes to the leading factors of wrongful convictions pertaining to sexual assault cases, as is the Central Park Five case, the three major factors are mistaken witness identification at 67 percent, false accusation at 42 percent and official misconduct with 38 percent.⁴

These numbers show just how defining the Central Park case is because it is a perfect example of how these leading causes were evident and proved true in the case itself. There was mistaken witness identification of the boys who were just being teenagers in the park but accused of doing something more violent. Then the false accusation is tied with this as those who identified the five mistakenly accused them. Besides being falsely accused and mistakenly identified, there was also evidence of prosecutorial misconduct. The teenagers were coerced into their confessions when there was no real evidence and the prosecutors on the case set up the young men with the answers leading them to confessing. For false forensic evidence, which in this case was no evidence to begin with, the data from the registry found in sexual assault cases to be around 30 percent in cases. The Central Park Five case has false confession from all five men. Though false confession was at eight percent as a contributing factor in sexual assault cases, false confession is still prevalent overall and continues to be today. Once the truth about

⁴ "Percent of Exonerations By Contributing Factor." Charles Chatman - National Registry of Exonerations. Accessed December 15, 2018. <http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx>.

their false confessions and no evidence tying them to the crime, the Central Park Five were officially innocent once again, or exonerated. But at what cost? They had already served their sentences and though they were filing a lawsuit against New York State for 41 million dollars, there is only so much money can do. Being wrongfully convicted when innocent caused these five to be sent away when they were just teenagers. They were helpless and despite being coerced and not having any DNA to link them to the crime, they were still convicted. Herein lies the problem. Despite no evidence and lengthy, unethical interrogations being the only reasons for their conviction, there were no concrete aspects of this case that justified the five teenagers being locked up. So why did it happen?

In the court case *Berger v. United States*, 295 U.S. 78 (1935), five men were all indicted and charged with violating the Espionage Act of 1917. Their case was assigned to Judge Kenesaw Mountain Landis, but the defendants all appealed to the courts, stating that Landis was biased against anyone of German heritage. According to the California Innocence Project, in this case, Justice George Sutherland explained prosecutorial misconduct meant “overstepping the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.”⁵ In a 1963 case, *Brady v. Maryland*, the U.S. Supreme Court ruled that prosecutors must disclose evidence favorable to a defendant. That doesn’t happen all the time. According to a report by Ken Armstrong and Maurice Possley, Chicago Tribune staff reporters and also workers for the innocence projects themselves, found that in the first study of its kind, the Chicago Tribune analyzed thousands of court records, appellate rulings and lawyer disciplinary records from across the United States. It found that, “since a 1963 U.S.

⁵ "Berger v. New York." *Oyez*. Accessed December 15, 2018. <https://www.oyez.org/cases/1900-1940/255us22>.

Supreme Court ruling designed to curb misconduct by prosecutors, at least 381 defendants nationally have had a homicide conviction thrown out because prosecutors concealed evidence suggesting innocence or presented evidence they knew to be false.” Armstrong and Possley make sure to iterate how the U.S. Supreme Court, in its rulings of wrongful conviction centering around prosecutor misconduct, has “declared such misconduct by prosecutors to be so reprehensible that it warrants criminal charges and disbarment. But not one of those prosecutors was convicted of a crime.”⁶ As Peter Joy, professor of law at Washington University in St. Louis wrote, “there is a need for special ethics rules to govern the conduct of prosecutors.”⁷ Though this is a goal for those who want fair and ethical prosecutors, nothing has come to fruition. Except now. In a 2010 study conducted by the Innocence Project, one-quarter, or 63 of 255 DNA exoneration cases involved appeals and/or civil suits claiming prosecutorial misconduct.⁸ For years in New York, exonerees and other advocates, like innocence organization, It Could Happen To You, had built a coalition behind senators and assembly people who introduced and tried to get passed, a law to oversee prosecutors. Never before was this law thought of besides in New York. After years of trying, both in June 2014 and 2016, Sen. John DeFrancisco, R-Syracuse, tried to have the bills passed but they both died in the Senate Rules Committee. Finally, on August 21, 2018 Governor Andrew Cuomo signed into law a bill (S.2412-d/A.5285-c)

⁶ Armstrong, Ken, and Maurice Possley. "Part 1: The Verdict: Dishonor." Chicago Tribune. August 18, 2009. Accessed December 15, 2018. <https://www.chicagotribune.com/news/watchdog/chi-020103trial1-story.html>.

⁷ Joy, Peter A., The Relationship between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System. Wisconsin Law Review, Vol. 2006, p. 399, 2006; Washington U. School of Law Working Paper No. 06-11-05. Available at SSRN: <https://ssrn.com/abstract=948307>

⁸ West, Emily M. "Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases." October 2010. Accessed December 15, 2018. https://www.innocenceproject.org/wp-content/uploads/2016/04/pmc_appeals_255_final_oct_2011.pdf.

establishing the commission on prosecutorial conduct. DeFrancisco was on the forefront of this bill for years and was then joined by Assemblyman Nick Perry, D-Brooklyn.

Though the bill passed and was signed by Cuomo, it is still very uncertain how this will work out or even be implemented. The bill will have a \$5.5 million fiscal implication, but DeFrancisco says the cost is necessary. You can't be cheap apparently when it comes to finding a panel of people to be investigator and pay them to oversee complaints against prosecutors. The goals of this bill as set by DeFrancisco are for prosecutors to be held accountable to standards set by a judicial conduct commission tasked to oversee the procedures prosecutors follow. This law stems from wrongful imprisonments of individuals whose prosecutors did not reveal all of the information and evidence available, or coerced the defendants into false confession.⁹ This was evident in the Central Park Five case. The prosecutor, Linda Fairstein, who was not the lead prosecutor on the case, but the former chief of the sex-crimes unit at the Manhattan District Attorney's Office, was the supervisor, had her ethical conduct questioned. At the end of November 2018, she was awarded the Mystery Writers of America Association's Grand Master award, the highest honor one could receive. She was awarded for her writings, but her involvement in the Central Park Five case was what damned her reputation and led to a protest from other novelists that resulted in the association revoking her grandmaster honor. Even though in July 2018 she wrote in an essay for the New York Law Journal that the confessions from the teenagers were not coerced during the investigation and interrogations, her innocence remains questioned. She was present while the suspects were interrogated for hours, and in a 2002 interview with the New Yorker, she said her role as supervisor was essentially being "the

⁹ "NY State Senate Bill S2412." NY State Senate. December 11, 2018. Accessed December 15, 2018. <https://www.nysenate.gov/legislation/bills/2017/s2412/amendment/original>.

800-pound gorilla, to help [the lead prosecutor] and the cops get the resources they needed." In the end, after hours and extreme questioning, four of the five boys falsely confessed on video under pressure.¹⁰

The issue of prosecutorial misconduct is prevalent, even from the 1980s when this case occurred. As DeFrancisco advocated for, the bill will form an 11-member panel to receive and investigate complaints of misconduct by the district attorneys and their assistants. The commission's findings will be made available to the public and referred to the governor, who has the power to remove a prosecutor from office, but the timeline for when this commission is to be picked and formed and begin work is still unknown. There is no clear answer to when these things will happen and be put in place, but there should be meetings to discuss these issues in January when congress is back in session. But this isn't the only solution to prosecutor ethicality and conduct. Unknown to many, but certainly not DeFrancisco, there is already a grievance committee in place. This committee handles the complaints against prosecutors and ensures any misconduct is examined and thoroughly vetted. About five or six years ago, McNamara wanted to work with DeFrancisco to make the grievance process more robust on the forefront, but that never happened. DeFrancisco did not cooperate and instead tried to push this bill through multiple times, only for it to be rejected. His bill is "retaliation" McNamara says, against the Moreland Commission, which was created by Cuomo with the aim of investigating politicians and curbing public corruption. The head of the commission is district attorney Fitzpatrick from Syracuse. DeFrancisco wanted the district attorneys to be held accountable just as he and his

¹⁰ Flynn, Meagan. "Mystery Writers Group Rescinds Award from Sex Crimes Prosecutor over Her Role in Central Park Five Rape Case." The Washington Post. November 30, 2018. Accessed December 15, 2018. https://www.washingtonpost.com/nation/2018/11/30/mystery-writers-group-rescinds-award-sex-crimes-prosecutor-over-her-role-central-park-five-rape-case/?noredirect=on&utm_term=.a560b0b43ee1.

fellow politicians are. Despite all of this and what led to the law's formation is mute, because it passed. But it passed with reservations. Cuomo approving the bill was contingent on changes to the legislation, which lawmakers agreed to pass when the session reopens in Albany in January. While this commission, be it good or bad, there is still the issue of innocent people being convicted. Will this commission truly help those who are innocent, and if it had been in place during the Central Park Five case, would it have helped them?

In a statement, Cuomo said this commission would “give New Yorkers comfort that there is a system of checks and balances in the criminal justice system, and to root out any potential abuses of power to ensure that our justice system is just for all New Yorkers.”¹¹ The commission will not begin its work until the amendment has been approved. With all of this questioning of the commission going on, the real impact it has on wrongful convictions needs to be taken into account. Though prosecutors do play a part in wrongful convictions, it is not the only factor and that needs to be considered. You can offer up a solution to the part, but will that fix the whole? Probably not. Or at least McNamara doesn't think so, mainly because the committee isn't even constitutional, an ironic twist for a law that's supposed to make prosecutors more constitutionally ethical. While the commission is meant to form and begin in January 2019, the District Attorneys Association of the State of New York, or DAASNY, intends to sue and block the commission from forming. Albany County David Soares, who is president of DAASNY, has with DAASNY, advocated for strengthening the state's current disciplinary process in place of the commission, which they have called both unnecessary and unconstitutional. To the district attorneys, the new

¹¹ "Governor Cuomo Signs Legislation to Establish Nation's First Commission on Prosecutorial Conduct." Governor Andrew M. Cuomo. August 27, 2018. Accessed December 15, 2018. <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-establish-nations-first-commission-prosecutorial-conduct>.

commission is basically just a copy of the judicial conduct commission. A “large percentage of people know the law’s wrong,” said McNamara. The separation of powers is the aspect that is the most unconstitutional, because there is no real separating of the legislature. The legislature consists of the district attorneys and they would be overseen by those on the commission, which is again, legislative. There is on executive or judicial branches there to ensure fair separation of powers. The judges assigned to cases are already fair and impartial, being more executive than anything, so the legislature should not be overseeing them. It is an unconstitutional ex post facto law that would retroactively change the legal consequences of convictions. The Fourth Amendment of prohibiting unreasonable searches and seizures, or the probable cause rule, “puts us [district attorneys] in the corner and marginalizes us,” said McNamara. This new bill would effectively turn the lens and bypass the law. Current DAASNY President, Albany district attorney, David Soares already does acknowledge the problem, McNamara said. The district attorneys have sued Albany’s Supreme Court and DAASNY is according to a copy of the 27-page complaint from DAASNY obtained by the NY Law Journal. Cuomo spokesman Tyrone Stevens told the NYLJ the governor's office was confident it could surmount the lawsuit. "We believe in a fair and equal justice system that place no one above the law and ensures officers of the court are held accountable to upholding this fundamental standard," Stevens said.¹²

In the D.A.’s Association, a study found that those who needed to be punished for misconduct, either being fired or losing their license was one in a thousand. Since 1978, there have been 44 cases across the country where prosecutors were punished because of their

¹² Clark, Dan M. "Cuomo, Lawmakers Agree on Changes to Prosecutorial Misconduct Commission Bill." *The Legal Intelligencer*. August 20, 2018. Accessed December 15, 2018. <https://www.law.com/newyorklawjournal/2018/08/20/cuomo-lawmakers-agree-on-changes-to-prosecutorial-misconduct-commission-bill/?slreturn=20181115145719>.

misconduct.¹³ Prosecutorial misconduct is real, but to fix it, for the most part is just a need to take out human mistakes. For McNamara, in 12 years, there was not one time an allegation was made and was true. The commission will not do much more than the judicial commission is already doing, and to say that this new commission will fix prosecutorial misconduct and human error is a faulty promise.

The DNA in cases has also been a major issue pertaining to wrongful convictions. McNamara and Fitzpatrick established the commission of forensic evidence, something they hope will help in preventing accusing innocent people and being accurate in cases that rely heavily on DNA, just as the Central Park Five case could have used. Shockingly, the state Attorney General's office does not take part in this commission, which is ironic with the recent accusations against former Attorney General Eric Schneiderman of sexual assaults, something DNA evidence would be key for during those trials. Another issue is questionable forensic science. According to Katherine Judson, clinical instructor at the University of Wisconsin School of Law, it is indisputable that science will help, but it will not solve all of wrongful convictions' problems. There is "no silver bullet," says Judson. "It requires a lot of cooperation and collaboration." Regardless, McNamara wanted to emphasize how there are already several commissions in place that are doing the work, and more, that the new commission proposes to do. When evidence is present, sometimes it can be misused. According to Judson, an issue with evidence is that someone overstates the value of evidence in their own mind. "The bias is really the problem," Judson says. To fix this problem, witnesses and other key investigators, including prosecutors need to recognize that they have biases and no one can get rid of them, but one can

¹³ Gordon, Neil. "Misconduct and Punishment – Center for Public Integrity." Center for Public Integrity. December 06, 2017. Accessed December 15, 2018. <https://publicintegrity.org/accountability/misconduct-and-punishment/>.

mitigate and minimize them. “Everyone has implicit bias,” says Judson. “We’re humans, we all have it and we all have our own lens we look through.”

And when these biases are so present and misconduct is considered, each appellate division has a grievance committee that reviews complaints against attorneys in New York, as McNamara pointed out. Those committees are made up of both attorneys and non-attorneys and appointed by the court. The committees have the power to censure, suspend or disbar the attorneys from practicing. There are consequences to district attorneys that have grievances. A judge can suppress evidence if a prosecutor makes a mistake, they can be civilly sued and have their license revoked. The public even has a say, because the district attorneys are publicly elected to office. Supporters of the bill have claimed the grievance committees do not address prosecutorial misconduct effectively or quickly enough. To find their decisions, the public has to go to a website to see if any infractions have been made against the individual attorneys. In an effort to fix this, the commission will be required to make its decisions and any supporting documents available to the public on the internet.¹⁴

According to the original legislation passed, three of the commission’s members will be appointed by Chief Judge Janet DiFiore. Cuomo, the speaker of the Assembly, and the majority leader of the state Senate will each appoint two members. The minority leaders of both chambers will each get one choice. According to the bill, one of the Cuomo’s appointees has to be a public defender and the other has to be a prosecutor. One of DiFiore’s appointees has to be a justice of the Appellate Division. The other two have to be judges of any court other than the Appellate Division or Court of Appeals. The six remaining appointees have to be equally split between

¹⁴ ““The Right Thing” Ethical Guidelines for Prosecutors.” 2016.
<http://www.daasny.com/wp-content/uploads/2016/02/2016-Ethics-Handbook.pdf>.

prosecutors and defense attorneys. The commission will appoint its own chair. When this happens, the power will be with Democrats, who will appoint at least five of the commission's members versus three from Republicans.

While he does suggest a need for reform in this current judicial system, there are other ways to prevent wrongful convictions, some of which are already in place and have been long before this new bill. McNamara believes the grievance committee "is too secret." The public holds district attorneys accountable and this was, according to McNamara, already doing so with the judicial committee and website in place. In the meantime, McNamara believes there are other ways besides the commission to prevent innocent people from being incarcerated. A major issue is that confessions are not recorded and lead to inaccurate confessions. Technology changed everything as the criminal justice system knew it. Police now wear body cameras, and they sit ready and willing to show the truth. To McNamara, "cameras changed everything for prosecutors. Crimes rates went down and there was eye witness identification if the suspects were strangers." It is essential that prosecutors, instead of being overseen by a committee, be able to change what are major factors of wrongful convictions. McNamara thinks variables that prosecutors can control, including video tape confessions, eyewitness identification and others should be managed first so they are not unreliable any more in deciding who is going to prison.

Oneida is the only county in New York to tape eye witness identification, and 'it's being done in the right way,' said McNamara. Besides the need to continue using technology to their advantage, there is more to wrongful convictions on a defense level. For McNamara, good, educated district attorneys are key in preventing wrongful convictions on the prosecutors' part. From what he has seen in his experience in Oneida County, the newer attorneys haven't passed

any tests to show they have experience, basically just straight from law school with one year field experience, if that. It's a very learn as you go system, which can be problematic. Back when McNamara was in school in 1992, there was no training in law school and that seems to be an issue still to this day, and there needs to be more room in the curriculums for robust training for district attorneys. Not only will DeFrancisco's plan cost the taxpayer money, the current mechanism in place does not cost anything. Though McNamara does admit there could be changes to the system already in place, he insists there is no need for money to go towards a political committee. "District attorneys do not equal politics," said McNamara. According to him, the committee DeFrancisco wants would be comprised of political individuals and not of anyone who has knowledge of the job, such as retired judges or prosecutors.

Back in May when originally protesting the bill, a solution McNamara offered for the current committee is to be more transparent. The grievance committee could release how many private letters were given to prosecutors and in what counties they were issued in instead of having to dig for them online. With that there could be a yearly report of all grievances given to the government and media, to ensure the public understands that something is being done about the complaints. The committee could also take advantage of having a panel full of retired judges and prosecutors, or any individuals with knowledge of the law and prosecutors' jobs who would be able to say, "that's not right." Currently, the professions are a mix of business to lawyers, not all of whom know the inner workings of the judicial system pertaining to district attorneys or what is acceptable or not for prosecutor conduct.

While this commission and the grievance committee already in place have high hopes, there is still no real solution to wrongful convictions, and there may never be. A fact we have to

face, as wrongful convictions do not occur *just* from unethical prosecutors or a lack of DNA, or any of the other factors, but from something more systemic within the criminal justice and judicial system. The two major factors leading to wrongful conviction are misconduct and discrimination. As witnessed throughout American history and portrayed even in novels such as *To Kill A Mockingbird*, most innocent African American defendants were wrongfully convicted of sexual assault and raping white women. According to the National Registry of Exonerations, out of the 321 sexual assault exonerations across the country, black men were convicted the most, with 189 cases. Black men are convicted of sexual assault more than any other race.¹⁵ This is mirrored in the Central Park Five case. The five teenagers convicted were either black or hispanic, a major key in their being accused. According to the National Registry of Exonerations report, the leading cause of false convictions was mistaken eyewitness identification.

This is a well-known process but is prone to error when white Americans are asked to identify black strangers. Eyewitness identification is “the main cause of wrongful convictions,” said Scott McNamara. According to John P. Rutledge, a managing attorney at Rutledge Law Center in Nevada, a cross-racial ID occurs when an eyewitness of one race is asked to identify a particular individual of another race. In his writings he claims “the last half-century's empirical study of cross-racial IDs has shown that eyewitnesses have difficulty identifying members of another race.” Known as the “own-race” effect or “own-race” bias, the “own-race effect” is “strongest when white witnesses attempt to recognize black subjects.”

Those wrongfully incarcerated tend to be men and African American men more than

¹⁵ "Exonerations by Race and Crime." Charles Chatman - National Registry of Exonerations. Accessed December 15, 2018. <http://www.law.umich.edu/special/exoneration/Pages/ExonerationsRaceByCrime.aspx>.

anyone, a long standing fact that reflects the racism of the American judicial system. As of October 15, 2016, the National Registry of Exonerations listed 1,900 defendants who were convicted of crimes and later exonerated because they were innocent. About 47 percent of them were African Americans, which is three times the amount of African Americans in the population. The causes the National Registry have identified stem from the “inevitable consequences of patterns in crime and punishment to deliberate acts of racism, with many stops in between.” You must first look at the large amount of murders within the black community itself. The murder rate in the black community sends many to prison who are innocent, not because they “deserve to” but because they are innocent victims of crimes committed by another. While this violence is in the black community quite frequently, the homicide rates alone “do not explain the high number of African Americans who were falsely convicted of murder or the length of time they spent in prison before release.”¹⁶

Systemic racism in the criminal justice system is clearly an issue that leads to wrongful convictions and that the new committee will not be able to fix. But will it fix anything in the system when it comes to prosecutors being unethical?

James Acker, a distinguished professor of criminal justice at SUNY Albany and a expert on wrongful convictions believes that, “assuming the legislation goes into effect and is not derailed by the constitutional challenge that has been made by the prosecutors' association, I will be most interested to learn whether the commission has any effect--either positive (in the sense of curbing misconduct) or as the prosecutors fear, a negative effect (as in subjecting prosecutors to frivolous claims, interfering with the other important business they do, and generally

¹⁶ Gross, Samuel R., Maurice Possley, and Klara Stephens. "Race and Wrongful Convictions in the United States." March 7, 2017. http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf.

representing unnecessary duplication of existing ethical and legal constraints).”

This watchdog commission being created will cause strain on prosecutors who will be closely watched and have to essentially watch their backs. Acker makes it clear that, “few people, no matter what their profession or other activities, enjoy being closely scrutinized and judged as they go about their business. We perhaps should not be surprised that prosecutors who feel they will be living in a fishbowl do not welcome the additional oversight.”

“Nevertheless,” he says, “prosecutors occupy a special position and they have a special obligation: to do justice, and not merely convict. For a host of reasons, psychological, professional, and other, some prosecutors have not faithfully prioritized their obligation to do justice over the quest to gain a conviction.”

In his studies over the past few decades, Acker has found that prosecutors are rarely held accountable for transgressions, and that transgressions rarely are called to the attention of the public or the justice system, which can be at fault due to being under current ethical and legal guidelines. Contrary to the district attorneys who believe this to be a great injustice to the prosecutors handling cases, Acker maintains the belief that the oversight commission will do more good than harm by having “the potential to enhance accountability, detect and discourage misconduct.” Prosecutorial misconduct is one of many factors that contribute to wrongful convictions, a small solution to a larger problem, “so this reform will clearly not be a magic bullet. But to the extent it may help avoid future wrongful convictions and encourage highly ethical conduct it seems to me to be a step in the right direction.”

Despite all of these committees and all of these efforts to curb wrongful convictions, the amount of exonerees being exonerated of their crimes has been steadily increasing since records

started to be kept in 1989. More people are being convicted of crimes and then exonerated, being proven innocent several years or even decades into their prison sentence. Not only does this time in prison have negative mental, emotional and physical impacts on the wrongfully convicted and their families, there is also a consequence for the state. To pay for the suffering toll on its victims, the state has to then pay reparations to try and make up for the life experiences taken away from them. Without the proper tools in place to prevent wrongful convictions, there will continue to be more innocent people placed in jail and guilty people, possibly murderers or rapists, out on the loose and roaming the streets while someone innocent rots in jail.

According to a report conducted by the National Registry of Exonerations, those who have been exonerated spent on average more than 14 years in prison before being released. Many more have not been exonerated at all, and will most likely they will die in prison. According to Judson, There's no timeline to how long it takes.¹⁷ The accused are entitled to a speedy case. For the Wisconsin Innocence Project, their cases are typically those with people in the worst, most dire straits; those who have a significant amount of time left or are under threat of being sentenced to the death penalty. They start with the state court and have a motion to withstand verdict. The convicted has to work their way up in the state and then federal system. When they run out of opportunities to appeal, or it's basically the end of the road for them, because they lose their right to a court appointed attorney because they've gone through all options of the system. There are waiting lists though to have your case reviewed by innocence projects, mainly due to a lack of lawyers, money, and basically all necessary resources. Students may choose to review cases and accept them or not, pro bono for experience. From there, the new lawyers have to file a

¹⁷ Gross, Samuel R., and Michael Shaffer. "Exonerations in the United States, 1989 – 2012." June 2012. https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

new document asking for a new court trial. For the lawyers working on these cases, they have the difficult job to question and to ask, how can this person be innocent, when all these people think they're guilty? At the end of the trial, if they succeeded and were able to right the injustice to the innocent person, the state will have to pay these people back. While not all states compensate those who were incarcerated, 33 including the District of Columbia and the federal government do, or it's the least they can do.

It's the least they can do for those who suffered in prison, at the hands of an inherently racist system that had no faith in them or their claims, but had all the faith in the prosecutors and the witnesses who sentenced them. Through all of this, the new approach to evidence and DNA, the new commissions and the old commissions, there is still one common problem that needs to be fixed -- those that are being convicted are innocent. They are not somewhat guilty that provides some foundation for convicting them, they are innocent and targeted by a racist system that wants to bring them down, quite literally as they are shuffled into isolated areas of the country to rot away in a prison cell.

There needs to be more done for the innocent. There needs to be more resources and money pooled into innocence projects to look into the cases that will help everyone, not just those under the threat of death penalty. There is only so much this new commission can do, and even if it is successful, it takes time to process the grievances. All the while, the innocent are waiting in purgatory, hoping someone will believe them and help free them from their fate. The Central Park Five reflect this issue so clearly. Even if there was someone to question the prosecutors and help them, they would have already served most of their sentences before their cases would have been reviewed. There needs to be help right from the start, from the initial

accusation, and work to be clear of any bias before a trial begins and minds can be swayed. The new commission is a start, but it's not the solution, no matter how much it may help. More needs to be done, but there is no one way to help except to restructure the whole judicial process and investigate and rule with a clear and open mind.