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# The Race Effect on Wrongful Convictions

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## THE RACE EFFECT ON WRONGFUL CONVICTIONS

Arthur L. Rizer III<sup>†</sup>

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## I. INTRODUCTION

On the front of its splendorous building the highest court in the land has written, "Equal Justice Under Law."<sup>1</sup> The statement begs the question: equal justice for whom? In 1863 President Lincoln tried to answer this question. In his famous speech delivered after the Battle of Gettysburg, he stated: "Four score and seven years ago our fathers brought forth, upon this continent, a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal."<sup>2</sup> The United States has fallen short of this statement in its criminal justice system because all men are not treated equally in a court of law.

The 1960 publication of Harper Lee's classic novel, *To Kill a Mocking Bird*, followed by the motion picture in 1962, brought to the public's attention the issues of bias in the criminal justice system that resulted in wrongful convictions.<sup>3</sup> In reading this book, one must stop and contemplate how many innocent persons have been falsely convicted due to racial animus within the criminal justice system. Although the prosecution in this story is fictional, there is a dearth of actual, comparable prosecutions throughout

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The purpose of this Comment is to suggest and demonstrate the deficiencies in our criminal justice system. This Author believes that the American system is the most effective model to date. However, it is not beyond the possibilities of improvement and it is our duty as patriots to suggest ways to improve the system. In addition this article is written in the spirit of the Gonzaga University School of Law mission statement to "encourage [ ] students to learn [and] seek answers not only to 'what is' but 'what should be.'" GONZAGA UNIV. SCH. OF LAW, 2002-03 CATALOG 44.

1. The Supreme Court of the United States, *available at* <http://www.supremecourtus.gov/>. The words articulate the responsibility and duty of the highest court of the land. Equal Justice Under Law, *at* <http://www.nlcpi.org/pdf/EqualJusticeUnderLaw.pdf> (last visited Sept. 23, 2002). "As the guardian and interpreter of the U.S. Constitution, it is the responsibility of the Supreme Court to protect the rule of law and to ensure that constitutional protections . . . are applied equally to all citizens." *Id.*

2. President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) *available at* <http://www.loc.gov/exhibits/gadd/gadrf.html>.

3. HARPER LEE, *TO KILL A MOCKING BIRD* (Warner Books 1988) (1960).

this country. In 1986 more than one thousand people were proven to be wrongfully convicted, and several of those were executed.<sup>4</sup> Moreover, reliable estimates show that the number could exceed eight thousand every year.<sup>5</sup>

This comment will address the issue of the race effect on wrongful convictions. Part II will discuss the effect of this country's history of bias in the courts by analyzing the broader context of race-motivated laws and the ways in which racism is tolerated in the system. Part III will briefly describe the effect associated with cross-racial identification of eyewitnesses and its impact on wrongful convictions. Part IV will address the connection between poverty and wrongful convictions and how this has a direct effect on minorities due to the disproportionate poverty levels in their communities. Finally, Part V will address the institutionalized racism conducted by the criminal justice system's actors including lawmakers, prosecutors, judges, and the jury.

## II. HISTORICAL VIEW AND EFFECTS OF RACE IN THE CRIMINAL JUSTICE SYSTEM

In order to truly understand why race is such a major factor when it comes to wrongful convictions, one must discuss the broader historical context of race in the criminal justice system and the development of certain laws. Also, one must recognize that criminal statutes targeting race existed for most of the twentieth century.<sup>6</sup> The administration of punishment, or the lack thereof, has direct ties to both the race of the offender and the race of the

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4. Harvey Gee, *Eyewitness Testimony and Cross-Racial Identification*, 35 NEW ENG. L. REV. 835, 835 (2001). See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 21-86 (1987) (listing twenty-three persons put to death that were conclusively innocent). See also, James S. Liebmann, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2052 (2000) (discussing that from 1973 until 1995 the appellate courts throughout the country heard roughly 300 appeals from death row inmates and reversed 47% of those capital judgments due to errors in the proceedings).

5. See ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* (1996). See also *State v. Barton*, 998 S.W.2d 19, 30 (Mo. 1999) (stating that “[s]ince 1976, the death penalty has been reinstated in most states. . . [and since that date] 77 death row inmates found guilty by unanimous juries have been set free; the number of death row inmates later found to have been wrongfully convicted is thus about one-seventh of the number of prisoners executed”).

6. Videotape: *Innocence and Race* (Bryan Stevenson Video Lecture at the Gonzaga School of Law Wrongful Conviction Course 2002).

victim.<sup>7</sup> For instance, North Carolina had mandatory capital crime statutes for those cases where a black man was convicted of raping a white woman.<sup>8</sup> In contrast, a white man convicted of the same crime would receive a maximum of one year in prison.<sup>9</sup> Throughout the legal history of the United States the criminal code illustrates these types of disparities.

#### A. *The Scottsboro Effect*

The issue on racial disparity in the system went un-addressed for many years. Then, in 1931 the Court decided *Powell v.*

7. See Thomas P. Sullivan, *Repair or Repeal – Report of the Governor’s Commission of Capital Punishment*, 90 ILL. B.J. 304, 307 (2002). (“[A] study conducted . . . found a statistically significant disparity in the treatment of defendants whose victims were white rather than African American . . .”). In another study, conducted in South Carolina between 1977 and 1981, 321 homicide defendants who committed capital murder were more likely to face the death penalty by prosecutors if the victim was white. See Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 765-67 (1984); see also Arnold Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327, 1331 (1985) (indicating that if the victim of a capital crime is white, the death penalty is more often the punishment than if the victim is a minority); William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1067-88 (1984) (stating arbitrariness is rampant in the use of the death penalty).

8. Susan H. Bitensky, *Section 1983: Agent of Peace or Vehicle of Violence Against Children*, 54 OKLA. L. REV. 333, 372 n.61 (2001); Constance R. LeSage, *The Death Penalty for Rape - Cruel and Unusual Punishment?*, 38 LA. L. REV. 868, 870 n.8 (1978) (noting that the National Association for Advancement of Color People Legal Defense Fund lobbied to stop the use of the capital punishment in rape cases because it suspected that the institution was used against black men for raping white women); see also G.L. Stelzer, *Chemical Castration and the Right to Generate Ideas: Does the First Amendment Protect The Fantasies of Convicted Pedophiles?*, 81 MINN. L. REV. 1675, 1709 n. 5 (1997) (discussing the history of castration in the Kansas Territory as punishment for African American men who raped or tried to rape white women); Barbara Holden-Smith, *Inherently Unequal Justice: Interracial Rape and the Death Penalty*, 85 J. CRIM. L. & CRIMINOLOGY 1571, 1572 (1996) (stating white slave owners were desperate “to stem the tide of burgeoning black male citizenship,” thus, “the rise of the mythic Black rapist”).

According to statistics, less than 29% of the Blacks lynched between 1889 and 1918 were accused of either rape or attempted rape. Moreover, the percentage of lynching victims accused of sexual attacks on white women decreased over time, even as lynching became increasingly concentrated in the South and increasingly more depraved.

Lisa A. Crooms, *Speaking Partial Truths and Preserving Power: Deconstructing White Supremacy, Patriarchy, and the Rape Corroboration Rule in the Interest of Black Liberation*, 40 HOW. L.J. 459, 512 n.106 (1997).

9. See Bitensky, *supra* note 8.

*Alabama*,<sup>10</sup> better known as the “Scottsboro Boys Case.”<sup>11</sup> In this notorious case, nine black men were charged with raping two white girls on a freight train while traveling near Scottsboro, Alabama.<sup>12</sup> On the day of each trial there was not a definitive defense attorney in place, and in four one-day trials, eight of the nine were found guilty and received the death penalty.<sup>13</sup> As a consequence of this injustice, organizations like the American Civil Liberties Union and the Communist Party became involved in the campaign to vindicate the men or to mitigate their penalties.<sup>14</sup> Publicity generated by this case prompted an exploration of the effect of race in the judicial system. The exploration made it clear that race was one of the major obstacles to a fair and just proceeding.<sup>15</sup>

The Justice Department began collecting statistics in 1930 regarding how sentences and criminal prosecutions were being conducted.<sup>16</sup> Their data reinforces the notion that race was a factor in criminal prosecution and punishment.<sup>17</sup> For instance, in Alabama less than 5% of murders involved black perpetrators and white victims.<sup>18</sup> Most people are astonished to hear this; they expect the number to be much higher.<sup>19</sup> The death rows in Alabama perpetuate the misconception.<sup>20</sup> “Although 67% of all murder victims in the State of Alabama are black, 84% of all people

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10. 287 U.S. 45 (1932).

11. *Id.* at 49-51.

12. *Id.*

13. *Id.* at 50.

14. Norman Chachkin, *History of Constitutional Litigation for Human Rights In U.S. – Especially Race Issues*, 517 PLI/LIT 417, 425 (1999).

15. See Thomas Morawetz, *Fantasy, Celebrity, and Homicide*, 6 HASTINGS WOMEN’S L.J. 209, 209-60 (1995).

16. Harry Barnes, *Carter Center Symposium on the Death Penalty*, 14 GA. ST. U. L. REV. 329, 372-73 (1997).

17. *Id.* at 372-73. The author stated:

I look at this case now of JonBenet Ramsey, where there has been intense media attention, and I don’t want to minimize the tragedy of that crime. But when I think about that case, I think about the dozens of little black girls and little black boys who have been murdered in cities across this country over the last nine months, none of whom we can name, none of whom we can identify. And yet those crimes are no less tragic.

*Id.* at 373.

18. *Id.* at 372-73.

19. *Id.* at 372 (“When [this statistic is given,] everybody is shocked, because when they read the press, when they look at the data that is being presented to them on an almost constant basis, the image is that all crimes are committed by people of color against people who are white.”).

20. *Id.*

who have been sentenced to death in that state have been sentenced to death for crimes committed against people who are white.”<sup>21</sup> Furthermore, approximately three-quarters of those who have been executed in Alabama were black.<sup>22</sup> The trend is not changing; a higher percentage of black people were executed in Alabama between 1972 and 1997 than between 1930 and 1972.<sup>23</sup>

The Justice Department was also able to establish that between 1930 and 1972, 89% of the people who were executed for the crime of rape in America were black men convicted of raping white women.<sup>24</sup> In addition, 100% of the people executed for a rape conviction perpetrated their crime on a white victim.<sup>25</sup> This statistic is even more disturbing when one considers that black women are much more likely to be victims of sexual assault, yet the punishments for their perpetrators are conspicuously less severe.<sup>26</sup> These racial disparities give a historical backdrop to the race factor and its influence on the criminal justice system.

In the 1960s there was incredible activism to combat certain aspects of racism (“Jim Crow” laws, racial bias, segregation laws, voting challenges, etc.);<sup>27</sup> however, little of this energy has been directed toward the undercurrent of racism still flowing in the courts.<sup>28</sup> Today, if one had to find an area of public administration where the remnants of slavery still survive, it would be in the

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21. *Id.*

22. *Id.* at 372-73.

23. *Id.* The Justice Department began collecting execution statistics in 1930. *Id.*

24. Brittany Glidden, *When the State is Silent: An Analysis of AEDPA’S Adjudication Requirement*, 27 N.Y.U. REV. L. & SOC. CHANGE 177, 203 n.149 (noting that the Justice Department found that from 1930 until 1972, 405 of the 455 individuals sentenced to death for rape were black); *see also*, Michael J. Klarman, *The White Primary Rulings: A Case Study in the Consequences of Supreme Court Decisionmaking*, 29 FLA. ST. U. L. REV. 55, 104 n.322 (discussing specifically that black men are the only people that received the death penalty for rape, and moreover, only for the rape of white women).

25. Klarman, *supra* note 24, at 104 n.322.

26. One study conducted in Philadelphia found that black women were twelve times more likely to be raped than white women were. DONAL E.J. MACNAMARA & EDWARD SAGARIN, *SEX, CRIME, AND THE LAW* 52 (1977); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN’S L.J. 103, 122 n.118 (1983) (stating that citizen interviews illustrate that black women are at a much higher risk to be victims’ of rape than white women are). This is devastating to the “black women community” considering that judges, prosecutors, juries, police officers, and every-day citizens view rape of black women as less serious than the rape of white women. *Id.*

27. *See* Stevenson, *supra* note 6.

28. *Id.*

criminal justice system.<sup>29</sup> The courts have been reluctant to examine this issue. The lack of judicial attention to racial injustice can be seen in its most insidious form with the inequitable administration of the death penalty.<sup>30</sup>

Three cases highlight this point. First, in *Furman v. Georgia*,<sup>31</sup> opponents of the death penalty argued that the use of the death penalty was a violation of the Eighth and Fourteenth Amendments because it was arbitrary, unpredictable, and racially discriminatory.<sup>32</sup> To support their argument, they presented the same type of data provided above, arguing that the respective races of the victim and the offender was the primary variable regarding administration of the death penalty.<sup>33</sup> The Court accepted this data and held that the death penalty was being administered unfairly.<sup>34</sup>

After the *Furman* decision, states scrambled to pass new death penalty statutes that conformed to the new decision.<sup>35</sup> However, opponents of the death penalty persisted, which brought about the second case, *Gregg v. Georgia*.<sup>36</sup> Here death penalty opponents argued that as long as racial bias is evident in society, bias would exist in criminal justice.<sup>37</sup> Furthermore, they asserted that the new death penalty statutes did not protect against a racially biased application of the death penalty. The Court held that they were not going to presume racism simply because it was a death penalty case.<sup>38</sup> This gave rise to the third case, *McCleskey v. Kemp*,<sup>39</sup> which embraces the critical issues of race consciousness in criminal law.<sup>40</sup>

### B. *The McCleskey Effect*

In *McCleskey*, opponents of the death penalty went back to the Supreme Court with data that examined every homicide in Georgia that occurred in a seven-year period and came up with extremely

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29. *Id.*

30. *Id.*

31. 408 U.S. 238 (1972).

32. *Id.* at 239.

33. *Id.* at 250.

34. *Id.* at 248.

35. *See* *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that statutory factors of aggravation and mitigation were constitutional despite contention that statute permitted arbitrary and freakish imposition of the death penalty).

36. *Id.* at 179-80.

37. *Id.* at 175-207.

38. *Id.*

39. 481 U.S. 279 (1987).

40. *Id.*

powerful data demonstrating that a black perpetrator is eleven times more likely to get the death penalty than a white criminal charged with the same crime.<sup>41</sup> Moreover, a black defendant is twenty-two times more likely to get the death penalty if the victim is white.<sup>42</sup>

The data shows that race was the greatest predictor of who received the death penalty in the state of Georgia.<sup>43</sup> In addition, it is important to point out that the Court accepted the data as presented; it did not challenge the numbers and accepted the fact that there was sufficient evidence proving race played a factor in the administration of the death penalty. However, the Court refused to order a stay on the execution<sup>44</sup> on two grounds. First, the Court reasoned that a stay on executions would open a Pandora's box. Clever lawyers would respond to a stay with evidence of disparity in other crimes and disrupt many areas of the justice system other than capital cases.<sup>45</sup> Justice Brennan responded to this notion by saying that the Court has a "fear of too much justice."<sup>46</sup> Second, the Court reasoned that a certain amount of racial bias is "inevitable."<sup>47</sup>

### C. *The Impact of McCleskey*

When one thinks about *McCleskey*, one thinks about abdication -- a concession to racial bias. In *Brown v. Board of Education*<sup>48</sup> the Court was faced with a situation where it could have said that a certain amount of racial bias is "inevitable," and that the problem is too big for the Court. Instead, the Court said that depriving a child of an equal opportunity to an education because of the color of his or her skin was unconstitutional and wrong.<sup>49</sup> Thus, because it was unconstitutional it was *not* inevitable.<sup>50</sup> Although these cases address substantially different factual situations and sought different outcomes, they contain the same core questions of equality and fairness. Yet, in one case the Court was willing to stay

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41. *Id.* at 286.

42. *Id.*

43. *Id.* at 320.

44. *Id.* at 279-82.

45. *Id.* at 317.

46. *Id.* at 339 (Brennan, J. dissenting).

47. *Id.* at 312.

48. 347 U.S. 483 (1954).

49. *Id.* at 495-96.

50. *See id.*

for the long fight in the interest of justice and fairness while in the other case the Court retreated from a commitment to equal justice and equal opportunity.

The most important impact of *McCleskey* is the attitude it sets. The case established the basis for how race continues to undermine the hope of minorities who are brought before the criminal courts. By tolerating a presumption of criminality that is assigned to minority defendants, the indifference the criminal justice system creates an atmosphere where the innocent have an increased likelihood of wrongful conviction.

### III. EYEWITNESS TESTIMONY AND CROSS-RACIAL IDENTIFICATION

Few studies have focused on the ability of Hispanic, Native American, or Asian individuals to accurately identify other races or be accurately identified.<sup>51</sup> Thus, this section will primarily focus on cross-racial identification between white witnesses and black suspects.

“There has been a growing body of social science research that reveals the important role in which race plays in assessing the reliability of a witness identification when the witness and the person identified are of the same or of different races.”<sup>52</sup> As a result of this research, it is conclusive that race influences the accuracy of witness identification.<sup>53</sup>

#### A. *Wrongful Convictions Due to Faulty Eyewitness Testimony*

Eyewitness testimony is the most influential evidence for juries.<sup>54</sup> Ironically, this same testimony is extremely unreliable.<sup>55</sup> There is “no clear method for estimating the frequency of wrongful accusations based [solely] on faulty eyewitness testimony.”<sup>56</sup> However, the evidence shows that eyewitness testimony is unreliable. Because juries rely heavily on unreliable eyewitness testimony as a basis for conviction, the role it plays in wrongful convictions is clear. In fact, 74% of wrongful convictions that were vindicated due to DNA testing had the element of a bad

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51. Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 938-41 (1984).

52. Gee, *supra* note 4, at 835.

53. *Id.* at 850-51.

54. Loftus, *supra*, note 5.

55. Gee, *supra* note 4, at 837.

56. *Id.* at 836.

eyewitness.<sup>57</sup>

The problem with eyewitness identification is embedded in psychology.<sup>58</sup> For example:

When a witness to a crime must later identify the person who was seen before, various psychological factors can play an important role: the retention interval or period of time between the crime and the identification; the exposure time and amount of time that the witness has had to look at the essential subject; prior knowledge; expectations; misleading suggestions; and stress . . . [T]hese factors will operate to reduce the accuracy of an identification, just as they affect the accuracy of any kind of testimony.<sup>59</sup>

The inherent unreliability of this kind of testimony makes the admission of this evidence in criminal trials problematic; this problem is enhanced in situations involving cross-racial identifications.

*B. Faulty Eyewitness Testimony in Cross-Racial Identification  
Increases Wrongful Convictions Among Minorities*

William Jackson spent five years in an Ohio penitentiary on a spurious rape charge before being released.<sup>60</sup> The real rapist did not particularly look like Mr. Jackson. Nevertheless, two white women swore under oath that Mr. Jackson was the man who raped them. They were wrong.<sup>61</sup> Despite Mr. Jackson's several alibi witnesses, the (all white) jury convicted him.<sup>62</sup> These types of misidentifications are neither unique nor rare. "Legal observers have long recognized that cross-racial identifications by witnesses are disproportionately responsible for wrongful convictions."<sup>63</sup>

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57. Michael J. Saks & Lauri Constantine, *Model Prevention and Remedy of Erroneous Convictions Act*, 33 ARIZ. ST. L.J. 665, 674 (2001).

Many crimes leave no biological evidence. Because there is no DNA to test, many erroneous convictions can never be uncovered by later DNA testing and the victims of those errors will never be exonerated. In addition, now that DNA is used more routinely, the prominence of discovered errors will decline or disappear, yet most of the systemic causes of error will continue to generate errors.

*Id.*

58. Gee, *supra* note 4, at 837.

59. *Id.* at 837-38.

60. Johnson, *supra* note 51, at 935.

61. *Id.*

62. *Id.*

63. *Id.* at 935-36.

People make identifications by recognizing facial features.<sup>64</sup> Those of one race have a harder time recognizing faces of people from different races.<sup>65</sup> It is not totally understood if this is due to prejudices or from having fewer experiences with members of other races.<sup>66</sup> It is not clear why one person can more easily identify someone from the same race.<sup>67</sup> Psychologists believe two reasonable explanations exist: “[1] different races often have distinctive features in common; and [2] people make more mistakes in cross-racial identification” situations due to a decrease in attention to people of other races.<sup>68</sup>

What is clear is that there are discrepancies in cross-racial identification, and those discrepancies have crept into our criminal justice system in the form of eyewitness testimony.

### *C. Solutions and Safeguards*

One suggestion towards alleviating the problem is to help, not hinder, jury education. First, permit the defense to “present psychological testimony about the factors that affect the reliability of eyewitness accounts,”<sup>69</sup> particularly the problems associated with cross-racial identification.<sup>70</sup> Second, allow for jury instructions that inform the jury of this problematic evidence and that they should weigh the evidence accordingly.<sup>71</sup>

In addition, steps should be taken to ensure that the police conduct correct lineups (both actual and photo). There is no point in compounding the problem with unfair lineups that increase the defendant’s chances of being erroneously identified.<sup>72</sup>

Courts have already applied procedural safeguards to prevent erroneous identifications. One such safeguard is the defendant’s right to counsel at post-indictment line-ups.<sup>73</sup> Another is the due process fairness requirement in all identification proceedings,

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64. *Gee, supra* note 4, at 843.

65. *Id.* at 843-44.

66. *Id.* at 844.

67. *Id.*

68. *Id.*

69. *Id.* at 849.

70. *Id.* at 841-49.

71. For example, a sample jury instruction could read: “Members of the Jury, it has been shown that cross-cultural identifications are less reliable than identifications where there are no cross-racial implications.”

72. *Gee, supra* note 4, at 841-42.

73. *See, e.g., United States v. Wade*, 388 U.S. 218 (1967).

including uncounseled photo arrays and pre-indictment line-ups.<sup>74</sup> If these safeguards are breached, the evidence will be deemed inadmissible at a suppression hearing. In order to further eliminate racial bias, these safeguards should be enforced more rigorously.

Finally, some argue that there should be an outright exclusion of inherently untrustworthy identification evidence.<sup>75</sup> At the very least, there should be required collaboration for the admission of eyewitness testimony.<sup>76</sup> However, neither remedy is likely to be universally adopted and both are inappropriate for selective application to cross-racial identifications.<sup>77</sup>

#### IV. IT IS BETTER TO BE RICH AND GUILTY THAN POOR, INNOCENT, AND A MINORITY

By some accounts the title of Jeffrey Reiman's book, "*The Rich Get Richer and the Poor Get Prison*," gives a good prelude to justice in America.<sup>78</sup> One fact that puts this into perspective is that 51% of the people executed in America were executed in the state of Mississippi and its fellow southern states.<sup>79</sup> Compensation for lawyers appointed to try capital cases in Mississippi is capped at \$3,500.<sup>80</sup> In Alabama, lawyers representing post-conviction death row inmates cannot be paid more than \$1000.<sup>81</sup> For states that report how much they spend on capital punishment trials, the average cost is \$40,750—almost \$40,000 over the post-conviction cap in Alabama.<sup>82</sup>

This section will show that people in poverty are at a much

74. See, e.g., *Stovall v. Denno*, 388 U.S. 293 (1967).

75. Johnson, *supra* note 51, at 957.

76. *Id.* at 958.

77. *Id.*

78. JEFFREY REIMAN, *THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE* (4th ed. 1995).

79. Margaret Vandiver & Michel Coconis, "*Sentenced to the Punishment of Death*": *Pre-Furman Capital Crimes and Executions in Shelby County, Tennessee*, 31 U. MEM. L. REV. 861, 864 n.11 (2001). The fellow southern states are Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. *Id.* at n.10.

80. Keith B. Norman, *Kudos! H.B. 53 Becomes Law*, ALA. LAW., July 1999, at 220. The previous cap had been \$1000. *Id.*

81. EQUAL JUSTICE INITIATIVE OF ALABAMA, REPRESENTATION OF DEATH ROW PRISONERS, available at <http://www.eji.org/representation.html>.

82. Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281, 313 n.123 (1991).

greater risk to be wrongfully convicted. Further, it is well documented that minorities are disproportionately poor. Thus, if the dots are connected from the lack of justice for the poor to poverty rampant in minority communities, coupled with the fact that minorities warm a lot of beds in prison, it can be deduced that minorities are at a higher risk of being wrongfully convicted.

A. *Wrongful Convictions and the Impoverished in America*

There are many factors that account for the wrongful convictions of poor people. The most prevalent are the lack of competent counsel, the lack of resources, police misconduct, the focus of law enforcement, and a general lack of credibility given the impoverished by society.

Many people clutch their pocketbooks or keep an eye over their shoulder when a street person is walking close by. Why is this? This author believes that people in poverty have an automatic lack of credibility in this society. The general public harbors a chauvinism that criminals are usually poor. Thus, poor people get treated like criminals.<sup>83</sup>

With the lack of credibility comes a host of other problems, such as police misconduct in the gathering of confessions.<sup>84</sup> Based on what has been learned from DNA exonerations, 44% of wrongful convictions involved false confessions obtained through police misconduct.<sup>85</sup>

There is a considerable amount of evidence to indicate that the criminal justice system benefits the rich, not the poor, because: the wealthy benefit from a criminal justice system that sends the message that it is the poor, not the rich, who commit crimes and whom the middle class should fear. As a result of the criminal justice system's focus on street crime and not "white collar" or environmental crime, it is the poor who seem a threat to the social order, not the rich; and this view reinforces the familiar American association between wealth and virtue, poverty and moral bankruptcy . . . . "If we can convince [society] that the poor are poor because of their own shortcomings,

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83. See Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 MERCER L. REV. 443, 455 (1999).

84. See Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 724 n.170 (1996).

85. Saks & Constantine, *supra* note 57 at 64.

particularly moral shortcomings like incontinence and indolence, then we need acknowledge no . . . responsibility to the poor.” [The result is that] “the ultimate sanctions of criminal justice dramatically sanctify the present social and economic order, and the poverty of criminals makes poverty itself an individual moral crime!”<sup>86</sup>

Perhaps the major deterrent to obtaining justice for indigent defendants is the lack of competent lawyers to represent them.<sup>87</sup> Since most people who are charged with crimes are poor, most lawyers who represent them are public defenders.<sup>88</sup> The public defender system has many problems in itself. For instance, the National Association of Criminal Defense Lawyers issued a warning in 1997 that “such low-bid contracting, designed to ‘process the maximum number of defendants at the lowest cost-without regard to truth, justice, or innocence’ was violating citizens’ rights and leading to wrongful convictions.”<sup>89</sup> It is estimated that 28% of wrongful convictions are in part or directly a result of shoddy defense work.<sup>90</sup>

Another factor that compounds the lack of competent counsel is the limit put on resources to support a meaningful defense.<sup>91</sup> All defendants are entitled to a forceful defense, and it is practically impossible to assemble a compelling defense without access to some of the multitude of assets that are accessible to the state. This problem is exponentially amplified in the case of poor defendants.

### B. Minorities and Poverty in America

Minorities make up 19.7% of the population in the United

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86. Angela P. Harris, *Criminal Justice as Environmental Justice*, 1 J. GENDER RACE & JUST. 1, 10-11 (1997) (quoting REIMAN, *supra* note 78, at 142).

87. See Dirk Johnson, *Shoddy Defense by Lawyers Puts Innocents on Death Row*, N.Y. TIMES, Feb. 5, 2000, at A1 (noting that despite heightened concern about inadequate legal representation and wrongful convictions in death penalty cases, funding for several legal aid organizations has been cut and eliminated in recent years).

88. Smith & Montross, *supra* note 83, at 455.

89. Stephen B. Bright, *Glimpses at a Dream Yet to be Realized*, CHAMPION, Mar. 1998, at 14.

90. Saks & Constantine, *supra* note 57, at 674.

91. Amber J. McGraw, *Life But Not Liberty? An Assessment of Noncapital Indigent Defendants’ Rights to Expert Assistance Under the Ake v. Oklahoma Doctrine*, 79 WASH. U.L.Q. 951, 952-53 (2001).

States<sup>92</sup> with blacks making up the largest fraction of minorities at 12.1%.<sup>93</sup> Among minority groups, American Indians living in poverty are three times the national average.<sup>94</sup> In the ten largest cities, blacks constitute 32% of the poor and nationwide they are 29% of those that are impoverished.<sup>95</sup> This is approximately three times the poverty level of white Americans.<sup>96</sup>

As stated, the poor are predominantly represented by public criminal defense lawyers.<sup>97</sup> “The clients of [these] criminal defense lawyers are not only predominantly poor, but they are also disproportionately nonwhite.”<sup>98</sup> This is not surprising in view of the composition of American cities. The result of this poverty and other elements discussed is that minorities experience an increased likelihood of being wrongfully convicted because they are more likely to be poor.

### C. Prisons in America

The connection between poverty, minority status, and wrongful convictions is highlighted by looking at the prison population in this country. America had about 330,000 people in prison in 1972.<sup>99</sup> The incarceration rate grew to nearly 1.8 million in 1998,<sup>100</sup> of which minorities made up 58.7% of the prison populace, with blacks at 41.2% and whites at 41.3%. Thus, there are 6.6 times more white people in the United States but only 0.1% more of them in prison than black people.<sup>101</sup>

92. 2000 U.S. CENSUS BUREAU REP.

93. *Id.*

94. Larry EchoHawk, *Child Sexual Abuse in Indian Country: Is the Guardian Keeping in Mind the Seventh Generation?*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 83, 91 n.43 (2001).

95. Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 WM. & MARY J. WOMEN & L. 53, 92 n. 154 (1999) (citing Martin Gilens, *Race and Poverty in America: Public Misperceptions and the American News Media*, 60 PUB. OPINION Q. 515, 527-36 (1996)). Interestingly, blacks are pictured as being poor 62% of the time in print media and 65% of the time in the news. *Id.*

96. Cass R. Sunstein, *Well-Being and the State*, 107 HARV. L. REV. 1303, 1314 n.41 (1994).

97. Smith & Montross, *supra* note 83, at 455.

98. *Id.*

99. Stephen C. Thaman, *Is America a Systematic Violator of Human Rights in the Administration of Criminal Justice?*, 44 ST. LOUIS U. L.J. 999, 1015 n.147 (2000).

100. *Id.*

101. 2000 U.S. CENSUS BUREAU REP.

#### *D. Suggestions and Solutions*

This is an embedded social issue, one that needs to be addressed on the most basic levels of fundamental fairness and respect for fellow humans. While this country has come a long way with issues of racism through education and a public focus on diversity, there needs to be an equally strong focus on understanding those who are poor. We also should enact zero-tolerance policies for police misconduct (the extraction of false confessions in particular). This can be accomplished by legislating civil remedies, by firing rogue police officers, and, in some cases, by criminal prosecution for the worst offenders. Attracting public defenders who care about the system by increasing their pay and “prestige” in society would also begin to address this problem. We should ban, or at least modify, caps on the monetary resources allowed public defenders. After all, access to justice comes at a price. Finally, we should search for ways to help public prosecutors to seek justice, rather than rewarding only the highest conviction rates.

### V. INSTITUTIONALIZED RACISM THAT IMPACTS MINORITIES BEING WRONGFULLY CONVICTED

The inherent racism in the criminal justice system may be the most damaging. Part II addressed the “inevitable” amount of racism that is tolerated within the system; this section will address specific aspects of the criminal justice system and how they contribute to racial disparities in wrongful convictions.

#### *A. Congress / Legislature*

Lawmakers of this country have been on a crusade to criminalize some varieties of behavior, most notably with the drug laws. The issues relating to the war on drugs will be addressed in this section because they are legislative-based movements.

The drug laws are discriminatorily designed in their very basis. As public knowledge grew about crack and its effects on criminal behavior in the 1980s, so did legislative concern.<sup>102</sup> The public

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102. Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System That Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines' Classifications Between Crack and Powder Cocaine*, 25 U. TOL. L. REV. 215, 215 (1994).

wanted action against the crack epidemic, and Congress responded<sup>103</sup> with laws mandating much stiffer penalties against crack cocaine than its powder counterpart.<sup>104</sup>

These harsher penalties had a disparate effect on the black community. The Federal Sentencing Guidelines mandate a minimum five-year and maximum twenty-year imprisonment term for simple possession of five grams or more of crack cocaine.<sup>105</sup> Thus, the sentence for possession of one gram of crack cocaine is equal to the sentence for possession of 100 grams of powder cocaine.<sup>106</sup> This particularly impacts the black community because 91% of those who are charged with crack-related offenses are black.<sup>107</sup> Conversely, those charged with possession of powder cocaine are predominately white.<sup>108</sup>

Another example that exhibits this disparity is the “meth war.” By some accounts, Methamphetamine, or crystal meth, is considered one of the most devastating drugs available to users.<sup>109</sup> Yet the sentencing related to this drug is minimal, even though its presence is considered an epidemic. Is it any coincidence that its users are predominantly white?

Partly due to these guidelines, incarceration is at a historic high, particularly among blacks. This fuels the perception and presumption that minorities are mostly criminals. Thus, the current crack laws have created an environment with a substantially greater risk of wrongful conviction based upon race-biased suspicions for people of color.

An easy solution to this quandary is to simply standardize the punishment. Although this would not prevent blacks from going to jail, it would make their powder cocaine counterpart users equally culpable.

#### B. *The Prosecutor*

Another fact that has been learned from DNA exonerations is that 40% of wrongful convictions contain an element of

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103. *Id.*

104. *Id.*

105. U.S. SENTENCING GUIDELINES MANUAL §§ 2D1.1(a)(3), 2D1.1(c)(8) (1996). For the sentencing table, *see id.* at ch. 5, Pt. A.

106. *Id.* § 2D1.1(a)(3).

107. Leitman, *supra*, note 102, at 216.

108. *Id.*

109. Irene Edicott & Lisa Vares, *Help Win the War on Meth*, SEATTLE POST-INTELLIGENCER, Jan. 31, 2003, at B7.

prosecutorial misconduct.<sup>110</sup> The obvious case where this happens is where the prosecutor himself is racist and prosecutes because of the defendant's race and not the likelihood of guilt. The more subtle and harmful problem is the prosecutor's discriminatory use of peremptory strikes in jury selection. In *Batson v. Kentucky*,<sup>111</sup> the Supreme Court said that the discriminatory use of preemptory strikes was unconstitutional.<sup>112</sup> The *Batson* decision laid out a three-step test to determine whether the state's employment of peremptory challenges is a violation of the Fourteenth Amendment.<sup>113</sup> First, the defense must show intentional racial discrimination.<sup>114</sup> Second, once the defense has made this showing, the burden then shifts to the prosecution to offer a race-neutral reason for the challenge.<sup>115</sup> Lastly, the court determines if the explanation is race-neutral or racial discrimination.<sup>116</sup>

Prosecutors, however, can get around this mandate by stating racially-neutral reasons for excusing prospective jurors.<sup>117</sup> A problem with this is that many courts consider almost anything other than an overt statement such as "I want him off because he is black" as a race-neutral reason.<sup>118</sup> As a result, many black

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110. Saks & Constantine, *supra* note 57, at 673-74.

111. 476 U.S. 79 (1986).

112. *Id.* at 88 (stating that a peremptory challenge used to bar persons from the jury based on gender or race is a violation of the 14th Amendment).

113. *Id.* at 96.

114. *Id.* The defendant must show: (1) the defendant is from a recognized racial group; (2) that group has been excluded from the jury; and (3) the nature of the case indicates that the exclusion was race motivated. *Id.* This has been expanded since *Batson* to include the defendant's ability to object even if the defendant and the removed juror do not share the same racial background. *See, e.g.* Tangleff v. Senkowski, 135 F.3d 235, 247-48 (2d Cir. 1998) (holding that a white defendant was allowed to challenge the exclusion of black juror). The *Batson* decision has also been expanded to allow the prosecution to challenge the defendant's use of challenges when racially motivated. *See, e.g.* United States v. Sowa, 34 F.3d 447, 452 (7th Cir. 1994).

115. *Batson*, 476 U.S. at 97.

116. *Id.* at 98.

117. *Gamble v. State*, 357 S.E.2d 792, 794-95 (Ga. 1987).

118. *See, e.g.* United States v. Diaz, 176 F.3d 52, 76-77 (2d Cir. 1999) (holding that there was no suggestion of discrimination because rate of challenges was not considerably higher than minority percentage of the population); Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co., 236 F.3d 629, 636-38 (11th Cir. 2000) (holding that there was no inference of discrimination when plaintiffs in civil rights case used peremptory challenges to strike Caucasian jurors); Pemberthy v. Beyer, 19 F.3d 857, 872 (3d Cir. 1994) (holding that there was no inference of discrimination when the state used peremptory challenges to exclude prospective jurors who were Spanish speaking because both Spanish speaking Latino and non-

defendants are tried by a panel of all white jurors. A perfect illustration of this can be seen in the 1996 motion picture, *A Time to Kill*, when the defendant, a black man, looks at his all white jury and asks, "This is a jury of my peers?"<sup>119</sup>

In *Booker v. Jabe*,<sup>120</sup> the prosecutor exercised twenty-six of his allotted thirty peremptory challenges; twenty-two of those challenges were used against black jurors. The end result was an all white jury.<sup>121</sup>

Prosecutorial misconduct also results in wrongful convictions when race is injected in a trial in a prejudicial manner. For instance, in *Russell v. Collins*<sup>122</sup> the prosecutor said in his closing arguments, "Can you imagine the fear that [the victim] went through . . . with three blacks[?]"<sup>123</sup> This was asked to an all white jury when referring to a white victim.<sup>124</sup> These comments are especially exasperating to defendants because appellate courts refuse to remedy the situation, instead employing the harmless error doctrine and not reversing the conviction.<sup>125</sup> In *Russell*, the Fifth Circuit deemed the comments "regrettable" in a footnote giving a cursory glance at its impact.<sup>126</sup>

Blatant prosecutorial racism that leads to wrongful convictions can be addressed by eliminating prosecutors' shields from civil and criminal liability. Simple misconduct can be somewhat thwarted with other disciplinary actions, including termination. Courts could also prevent such misconduct leading to wrongful convictions by being willing to prevent the use of peremptory strikes when they appear to be racially based. This author believes a common sense approach would be sufficient. Further, courts could use the same common sense approach to stop prosecutors

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Latino jurors stricken); *Mitchell v. Rees*, 114 F.3d 571, 578 (6th Cir. 1997) (holding that there was no inference of discrimination when no black persons were on jury and prosecutor exercised challenges to strike black jurors); *United States v. Hartsfield*, 976 F.2d 1349, 1355-56 (10th Cir. 1992) (holding that there was no inference of discrimination because jury contained five jurors with Hispanic last names and two alternates with Hispanic first or last names).

119. *A TIME TO KILL* (Warner Brother Studios 1996).

120. 775 F.2d 762 (8th Cir. 1985).

121. *Id.* at 764.

122. Petition for a Writ of Certiorari at 18, *Russell v. Collins*, 944 F.2d 202 (5th Cir. 1991) (No. 10,560), *cert. denied*, 501 U.S. 1278 (1991).

123. *Id.*

124. *Id.*

125. *Id.*

126. 944 F.2d at 204 n. 1.

from using racially charged language in order to exaggerate jurors' fears and reservations by judicial intervention at the moment the comment is made and even calling a mistrial if the misconduct is severe. In addition, appellate courts could give due weight to the issue and refrain from automatically deeming such conduct harmless.

### C. *The Court / Judges*

It has been said that, as a minority, you should be more concerned with people wearing black robes than those wearing white ones.<sup>127</sup> The judicial system has shown an indifference to certain levels of racism through the "inevitable" doctrine<sup>128</sup> and, in accepting race as a legitimate category for suspicion, by tolerating racial profiling.<sup>129</sup>

These indifferences show up in ways that are disempowering to minorities. For example, in *Peek v. State* the judge, who was sitting over a capital case said, "Since the nigger mom and dad are here anyway, why don't we go ahead and do the penalty phase today instead of having to subpoena them back at cost to the state."<sup>130</sup> If the judge had been a businessman for a major corporation, he would have been fired, but in a system where racial bias is "inevitable," biased people can continue to preside over our courts.

Some solutions to this particular problem may be unrealistic because of their side effects. One suggestion is to limit the liability shield of judges. Another is to remove judges who show a tendency for racial bias. Further, there is an argument to mandate a reversal where the judge makes racially motivated comments during the proceeding.

### D. *The Jury*

"Many jurors harbor racial prejudices. Although these prejudices are often subtle,"<sup>131</sup> and other times overt, they

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127. See Stevenson, *supra* note 6.

128. McCleskey v. Kemp, 481 U.S. 279, 312 (1987).

129. See State v. Ruiz, 504 P.2d 1307 (Ariz. Ct. App. 1973) (stating that Hispanic persons were properly stopped where it was officers' experience that it was unusual for persons other than black people to frequent the area except for purpose of buying drugs).

130. 488 So.2d 52, 56 (Fla. 1986). This judge was re-elected, and is currently sitting on the bench.

131. *Development in the Law: Race and the Criminal Process: Racist Juror Misconduct*

contaminate the jury behind the curtain of jury deliberation.<sup>132</sup> Thus, it is imperative that attorneys eliminate prospective jurors before they are shielded by the deliberation room door.

Juries are more likely to convict a person of another race than of their own.<sup>133</sup> “Because most juries are predominantly white, even when only marginal evidence is provided,” black defendants are acquitted less often than white ones.<sup>134</sup> Furthermore, if the victim is white, a black defendant’s chances of an acquittal are even less.<sup>135</sup>

The races of the defendant and the victim play a major role in wrongful convictions.<sup>136</sup> A study done in 1978 by Marina Miller and Jay Hewitt demonstrates this phenomenon.<sup>137</sup> The study was of 133 college students.<sup>138</sup> They were told to pretend they were jurors and then were shown a videotape of a case involving a black man charged with the rape of a thirteen-year-old girl.<sup>139</sup> Half of the study participants were told that the girl was black and the other half were told she was white.<sup>140</sup>

Miller and Hewitt found that both [b]lack and [w]hite students tended to convict more often when they shared racial affinity with the victim. Sixty-five percent of the

*During Deliberations*, 101 HARV. L. REV. 1595, 1595 (1988).

132. *Id.*

133. Gee, *supra* note 4, at 842.

134. *Id.* The statistic holds true for black jurors in trials of black defendants. See Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841, 880 (1997) (proposing that requiring majority black juries to hear cases involving African-American criminal defendants “would be in keeping with civil affirmative action’s goal of correcting ongoing racial discrimination. Several scholars have documented white juror prejudice against black criminal defendants. Majority black juries would prevent conviction and punishment based on this prejudice.”).

135. *Id.*

136. As in the case involving O. J. Simpson, “[o]nce a defendant is charged it is virtually impossible to prevent race from entering other phases of the trial.” Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion-Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 387-88 (2000); see also, Richard A. Boswell, *Crossing the Racial Divide: Challenging Stereotypes About Black Jurors*, 6 HASTINGS WOMEN’S L.J. 233, 235-36 (1995) (“Even before the trial, there was speculation that the prosecution would be prevented from obtaining a conviction if the death penalty was requested . . .”).

137. Cynthia K.Y. Lee, *Race and the Victim: An Examination of Capital Sentencing and Guilt Attribution Studies*, 73 CHI. KENT L. REV. 533, 543 (1998).

138. *Id.*

139. *Id.* The make up of the study was “eighty-three women, approximately half of whom were Black and half of whom were White, and fifty men, half of whom were Black and half of whom were White.” *Id.*

140. *Id.*

[w]hite students voted for conviction when they thought the victim was [w]hite, but only 32% voted for conviction when they thought the victim was [b]lack. Eighty percent of the [b]lack students voted for conviction when they thought the victim was [b]lack, but only 48% voted for conviction when they thought the victim was [w]hite.<sup>141</sup>

To help alleviate this problem, the court should strive to maintain a jury pool whose makeup reflects the community at large. Further, the system should take on the responsibility of obtaining participation from minorities in the trial process. Attorneys should use *voir dire* to examine prospective jurors with regard to racial biases, because jurors will usually give only slight inferences to such biases in their examination. Also, attorneys should attempt to create a comfort zone so that jurors feel free to talk about race. Moreover, attorneys should not be too narrow-minded about who they believe could be a racist. Prospective jurors are not likely to come in with white robes or with swastika tattooed on their foreheads.

## VI. CONCLUSION

“Symbolic racists’ do not express blatantly racist attitudes because it is no longer socially acceptable to do so, while ‘aversive racists’ believe that they are not racist even while holding racist beliefs.”<sup>142</sup> Regardless of how social scientists label it, it is agreed that a shift has occurred in the way racists express their racist attitudes.<sup>143</sup> This attitude is spilling over into the criminal justice system at the expense of innocent people of color. It is affecting people like Walther McMillan, who spent six years on death row even though he had thirty-five alibi witnesses to prove his innocence.<sup>144</sup>

Avoiding wrongful convictions is not just about the innocent souls who are trapped by it. It is also a law-and-order issue: when

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141. *Id.*

142. Risa L. Golubogg, *Reckoning with Race and Criminal Justice*, 106 YALE L.J. 2299, 2303-04 (1997) (reviewing JEROME G. MILLER, *SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM*, (1996)). “The theory of ‘symbolic racism’ posits that whites express negative feelings toward blacks indirectly rather than directly.” *Id.* at 2304 n.26. “‘Aversive racists’ believe that they are not prejudiced, but they retain subtly racist attitudes because of the historically embedded racist culture of the United States.” *Id.* at n.27.

143. *Id.* at 2304.

144. See Stevenson, *supra* note 6.

innocent people go to jail, the real killers or rapists are still on the loose and free to break the law anew. In the *McMillan* case, the real killer had six years to commit other crimes. Avoiding wrongful convictions also is essential to the social contract that we all have with our government. If we lose faith in the belief that the criminal system is attempting to represent “justice,” how many will embrace radical, even revolutionary, methods to obtain the justice they feel eludes them?

This concern is especially relevant in the aftermath of September 11. There is a high potential for arbitrary and capricious convictions based on emotion and fear, rather than justice and due process. While protecting against terrorism is paramount to this nation, faith in a fair system is equally imperative.<sup>145</sup>

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145. The issue of wrongful convictions has mainly been one that follows the liberal ideology. However, this author contends that it is also a conservative / Republican issue as well. The conservative platform is one of limited government - keeping our government from making arbitrary and capricious decisions. If government is allowed to put innocent citizens in jail (and in some cases kill them) due to social injustices, laziness, racial motivation, and because they can get away with it, we are expanding government's power immensely. Taking one's liberty or life is the ultimate power.