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THE INCONVENIENCE OF JUSTICE: HOW UNMITIGATED OFFICIAL MISCONDUCT ALMOST DESTROYED THE LIVES OF FIVE YOUNG BOYS FROM HARLEM

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I. INTRODUCTION

Cool bursts of wind announced the imminent arrival of evening on the night of April 19,1989.[1] The sun, getting its legs back after a tough winter, just gave "The Big Apple" a 60 degree show for the spring.[2] The celestial changing of the guard summoned the moon to relieve the sun for some well-deserved respite amongst the approaching darkness which was slowly beginning to envelop Harlem's lower West Side.[3] Sometime after the evening began to settle in, around 30 of the city's teenaged Black and brown citizens began to assemble for a round of mischief in "the city that never sleeps."[4] Around the same time, 28 year old, Trisha Ellen Meili was preparing to go on her usual night run in Central Park.[5] Unbeknownst to the nation, the picturesque, dimly lit walkways of New York's most famous park would soon become the backdrop for one of the most evocative events to occur in the city in a decade.[6] As the sun began its ascent and re-assumed its post in the sky, the shelter afforded by the darkness soon dissipated leaving the previous night's discretions exposed to the light of a new day. Youthful pretense breathed life into chaos; that

* We would like to thank our families for the love, support and patience they afforded us during this journey. We worked incredibly hard on this project. We hope we have made you proud. This could not have been accomplished without you!

[1] Weather for April 19, 1989, WUNDERGROUND, https://www.wunderground.com/.

[2] *Id.*

[3] *Id.*

[4] SARAH BURNS, THE CENTRAL PARK FIVE: THE UNTOLD STORY BEHIND ONE OF NEW YORK CITY'S MOST INFAMOUS CRIMES 15 (New York: Vintage Books 2012).

[5] Nancy E. Ryan, *Affirmation in Response to Motion to Vacate Judgment of Conviction,* Supreme Court of the State of New York, County of New York (Dec. 5, 2002).

[6] M.A. Farber, *'Smart, Driven' Woman Overcomes Reluctance*, N.Y. TIMES (July 17, 1990), https://www.nytimes.com/1990/07/17/nyregion/smart-driven-woman-overcomes-reluctance.html.

chaos then coupled with bravado; that union begot tragedy.[7] A tragedy so egregious, so unpardonable, it induced even the most reasonable among us to abandon their belief in our most fundamental constitutional values, in favor of rabid retaliation and the wanton abuse of due process and fair play.[8] It compelled the exodus of the presumption of innocence from our garden, under compulsion; the belief was, only guilt could inhabit the souls of the perpetrators of such a trespass.[9] This abomination evoked the most lamentable of emotions from deep within those that we are supposed to trust the most to always be rational.[10] The outcry from the public was heard at the highest levels of government.[11] The New York City Police Department and the Manhattan District Attorney's office embarked on a mission to find and convict someone for this, most heinous crime, with the encouragement and financial incentivization of one of the city's most affluent citizens.[12] In the end, the lives of six innocent people would be changed forever.[13]

[7] *Id.*
[8] Jim Dwyer, *The True Story of How a City in Fear Brutalized in Central Park Five*, N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/arts/television/when-they-see-us-real-story.html.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] "*Bring Back the Death Penalty. Bring Back Our Police!"*. Open Letter from Donald J. Trump. NewYork.
[13] Emma Dibdin, *Korey Wise, the Eldest Member of the Central Park Five, Is Now an Activist*, THE OPRAH MAGAZINE (Sep. 20, 2019), https://www.oprahmag.com/entertainment/tv-movies/a29136416/korey-wise-now-central-park-five/.

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II. THE CENTRAL PARK FIVE

a. When the Street Lights Come On

On the north side of the park, a group of around thirty young people assembled outside of Central Park preparing for a night of troublemaking and mischief.[14] Upon entering the park, the teenaged troupe immediately began acting out with the careless energy typical of their sophomoric status.[15] Members of the group began harassing bikers, one of which was Michael Vigna.[16] He was accosted by the group at approximately 9:05 p.m. that evening.[17] Others were more aggressive.[18] Some robbed people in the park.[19] One of their victims was Antonio Diaz;[20] a few minutes after Michael Vigna was accosted, Antonio Diaz was assaulted, robbed and left unconscious just north of the 102nd Street transverse.[21] Between approximately 9:24 p.m. and approximately 9:45 p.m. different joggers were assaulted by the group in the park.[22] One victim, schoolteacher John Loughlin, was hit from behind and rendered unconscious from the blow.[23] The horde of teenagers continued their pillaging of the park's visitors notwithstanding the fact that they were leaving a mounting assemblage of victims in their wake and it was just a matter of time until the police were called and they would respond.[24]

Numerous 911 calls concerning the conduct of the youths in the park garnered a response from the NYPD.[25] Multiple responses of police officers entered the north side of the park and canvassed the area until they came upon the group.[26] Upon seeing the police, the

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[14] Jim Dwyer & Kevin Flynn, *New Light on Jogger's Rape Calls Evidence into Question*, N.Y. TIMES (Dec. 1, 2002), https://www.nytimes.com/2002/12/01/nyregion/new-light-on-jogger-s-rape-calls-evidence-into-question.html.
[15] Ryan, *supra* at 5.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at 4.
[24] *Id.*
[25] *Id.*
[26] *Id.*

youths immediately dispersed in every direction.[27] In hot pursuit, the police were able to detain and arrest around 24 teenaged boys that night.[28] Each of the boys that were detained were brought to the 24th Precinct for questioning regarding the events that took place in the park.[29] Among those boys arrested were Raymond Santana, 14, and Kevin Richardson, also 14, who were each arrested at around 10:15pm.[30] Yusef Salaam, 15, Antron McCray, 15, and Kharey Wise, 16, were taken into custody the following day, April 20, 1989.[31] Together they are known as the Central Park Five.[32]

b. Trisha Meili

The evening of April 19, 1989 started off as any other night for 28 year old, Trisha Ellen Meili; an investment banker by day, she loved to indulge in her ritual of jogging in the evenings as a way of clearing her mind and keeping in shape.[33] At around 8:55 p.m. Trisha left her home on East 83rd Street to go jogging in Central Park on her normal route which would take her along the transverse road (which runs in an "s" shaped curve connecting the East and West Drives of the park).[34] Upon entering the park, clad in her long Black leggings and white T-shirt, she put on her headphones and headed into the park to embark on her nightly run.[35] She started this run alone, but she would soon have dangerous company.[36]

While Trisha was jogging, her route brought her north on the East Drive by the 102nd Street entrance to the park.[37] There she was observed by a teenager who, unbeknownst to Trisha, began to follow her.[38] The teen, taking great measures not to be detected, followed Trisha across the 102nd Street transverse and then continued stealthily pursuing her as she moved to the north side of the transverse road and

[27] *Id.*
[28] *Id.* at 12.
[29] *Id.*
[30] *Id.* at 4.
[31] *Id.* at 5.
[32] BURNS, *supra* note 4.
[33] Oprah Winfrey, *Oprah Talks to the Central Park Jogger*, OPRAH (Apr. 2002), https://www.oprah.com/omagazine/oprah-interviews-the-central-park-jogger/2.
[34] Ryan, *supra* note 5.
[35] *Id.* at 29-30.
[36] *Id.*
[37] *Id.*
[38] *Id.*

headed west.[39] Trisha, still wearing her headphones, may have been too preoccupied with her music to notice the teen following her as he closed the gap between them and made his approach.[40] Using the cloak of darkness as cover, the teen steadily increased his speed and attacked her from behind; he struck her with "a heavy blow" to the back of her head with a big "stick," knocking her helplessly forward and onto the ground.[41] Still conscious, but dazed to a point where she could not defend herself, Trisha was unable to resist the teen's attack.[42] Her attacker dragged her off the main road and onto a hidden grassy area where he could continue his evil uninterrupted.[43]

At some point after being dragged into the grass Trisha regained some of her bearings and began "talking and protesting."[44] She was bleeding from the right rear side of her head and there was blood on the right shoulder of her white t-shirt.[45] At this point, the chronology of the events that transpired is not clear.[46] What is clear is that Trisha Ellen Meili was forcibly raped, repeatedly beaten with a rock to the head, and almost killed by a merciless rapist.[47] When this predator was done feasting on the vestiges of Trisha's once vibrant and hopeful frame, he left her there alone in a dark, shallow area of the park bleeding, barely breathing, and unconscious, to die.[48]

At around 1:30 a.m. a passerby noticed Trisha and notified the police.[49] The police responded to find Trisha's body at the bottom of a slope in the grass, still unconscious.[50] Whenever she breathed it would make a gurgling noise as if there was blood in her airway.[51] She was a S.T.A.T. run to East Harlem's Metropolitan Hospital; upon arrival her condition was so severe that medical staff thought she would die and commissioned a priest to have her last rites read to her.[52] She was in a coma for 12 days before regaining consciousness.[53] She suffered severe

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[39] *Id.*
[40] *Id.*
[41] *Id.* at 30.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 31.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.* at 32.
[49] *Id.* at 4.
[50] *Id.* at 32, 33.
[51] *Id.* at 32.
[52] Winfrey, *supra* note 33.
[53] *Id.*

brain damage, severe hypothermia, internal bleeding, blood loss, a fractured skull and her eye was dislodged from the socket. After seven weeks in the hospital she required six months of rehabilitation at Gaylord Hospital in Connecticut.[54]

c. Arrest and Interrogation

All the boys arrested in the park that night were interrogated.[55] At some point the investigators began to target a smaller group of 8 teens, which was then reduced to the five teens at the center of this case.[56] The boys were sequestered and peppered with questions by detectives in the interrogation room.[57] The boys were never given a call to contact their parents, and never offered an attorney to represent their interests.[58] All of the teens came into the interrogation room stating that they did not rape anyone, but after 30 hours of being threatened, lied to, and manipulated, with no food, drink or sleep, they began to wear down.[59] They began to give up; they began to believe what the police were saying—"if you cooperate you can go home."[60] So, they cooperated.[61] But the going home... never happened.[62]

By the time the police coached the young men through the coerced confessions, each of the five young men had incriminated the other four in the sexual assault on the jogger.[63] However, not one of the teens admitted to committing the act of rape themselves.[64] Each of the boys testified to what other boys did to Trisha. Through their statements, however, they also implicated themselves as accomplices to the crime, because in telling on the others they placed themselves at the scene.[65] The only evidence any of the teens committed the act of rape or sexual assault was the confession of the other four teens in the recorded confessions.[66] The video confessions displayed the boys

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[54] BURNS, *supra* note 4.
[55] Ryan, *supra* note 5.
[56] *Id.*
[57] BURNS, *supra* note 4.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] Ryan, *supra* note 5, at 9.
[64] *Id.*
[65] *Id.*
[66] *Id.* at 55.

recounting distorted reflections of that night.[67] Each confession consisted of conflicting accounts of the actions that transpired on that night.[68] The boys' eyes were visibly darting on and off the screen (to detectives coaching them from the shadows) as they stuttered and stammered through the rehearsed confession.[69] The video showed them being led in the questioning by Assistant District Attorney Elizabeth Lederer and even when they messed up or admitted they did not know something, ADA Lederer continued on without questioning the veracity of their confessions.[70] The few times she did challenge a conflict in their confession, she pointed it out to the boys and either lead them into an acceptable retraction of what they said or allowed the boys to substitute one illogical statement for another which was just as, or even more, untenable.[71] Some of the boys placed the event on the other side of the park away from the seat of the crime scene where the assault on the jogger took place.[72] Some described actions of people who were later found to have not committed those actions or who pleaded to other crimes that took place in another area, far away from the crime scene.[73] Kharey Wise submitted two separate video tape confessions.[74] One hour after completing his first video confession Kharey asked to speak to ADA Lederer again stating that his earlier statement was a lie because he "was trying to play innocent."[75] ADA Lederer asked him whether the police made him change his testimony he answered "no" (the same detectives that she was inquiring about were in the room during the interview with Kharey and the ADA when she asked the question).[76] As far as statements, Kharey Wise alone submitted four of them; he submitted two written statements and two videotaped statements.[77] Each time he submitted a statement the police would bring it to ADA Lederer, and she would send them back to

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[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] *When They See Us*, HISTORY VS HOLLYWOOD (2019), https://www.historyvshollywood.com/reelfaces/when-they-see-us/.
[71] *Id.*
[72] Ryan, *supra* note 5, at 49-50.
[73] *Id.*
[74] *Id.*
[75] When They See Us, *supra* note 70.
[76] *Id*. It is difficult to believe that ADA Lederer's questioning of Korey Wise re: whether he was coerced by detectives to offer more information was anything more than procedural jargon for the video; it was not out of concern for justice; At most it was manipulative and maliciously disingenuous.
[77] Ryan, *supra* note 5.

force Kharey to write another statement because it wasn't incriminating enough.[78] After 24 hours of interrogation, the prosecution felt they had what they needed to present to a grand jury.[79]

On May 4, 1989, an indictment was filed against each of the five teens with the following charges:[80] Attempted Murder in the second Degree, Rape in the First Degree, Sodomy in the First Degree, Sexual Abuse in the First Degree, and two counts of Assault in the First Degree related to the attack on Trisha Meili.[81] They were also charged with Robbery in the First Degree, two counts of Robbery in the Second Degree, two counts of Assault in the Second Degree related to an attack on jogger David Lewis.[82] Each of the five teens was also charged with Riot in the First Degree.[83] Each of the five teens pled "not guilty" to all of the charges.[84]

d. Trial of The Central Park Five

Two weeks after recording their confessions, each of the five boys recanted their confession.[85] Every child reported that they were deprived of their right to representation by counsel; the police violated their Miranda Rights by not advising them of their right to be silent, and their confessions were coerced by NYPD detectives through threats and actual physical violence during the interrogations.[86] At their arraignment each child pleaded "not guilty."[87]

None of the evidence collected at the crime scene was dispositive, or conclusive with particularity in connecting any of the accused teens to the rape and assault on Trisha Meili.[88] Yet, all the

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[78] Jim Dwyer, *Interview of The Central Park Five*, TIMESTALKS, https://www.youtube.com/watch?v=qvymhI4uGSI, (last visited Mar. 11, 2021)
[79] *Id.*
[80] There were other teens that were indicted and eventually convicted for crimes that occurred in the park that night as well. This writing only follows the legal journey of these five young boys.
[81] Ryan, *supra* note 5, at 10-11.
[82] *Id.*
[83] *Id.* at 4.
[84] *Id.*
[85] Dwyer, *supra* note 78.
[86] *Id.*
[87] Sydney H. Schanberg, *A Journey Through the Tangled Case of the Central Park Jogger*, THE VILLAGE VOICE (Nov. 26, 2002), https://www.villagevoice.com/2002/11/19/a-journey-through-the-tangled-case-of-the-central-park-jogger/.
[88] Ryan, *supra* note 5, at 55.

evidence was elicited at trial.[89] Every blood sample, hair strand, and article of clothing collected was tested for forensic evidence.[90] None of expert witnesses testified that the biological evidence collected matched any of the boys with certainty.[91] There were hair samples that were collected that appeared to be consistent with the jogger (this was done by the only available means of testing at the time, manual microscopic analysis which is very subjective by nature).[92] The only conclusion that could be made from the hair samples was that the hair had similar characteristics to those of Trisha Meili and "could have come from her."[93] A blood-stained rock was found at the site.[94] No DNA profile could be created from the biological evidence found on the rock.[95] Alternatively, the blood was typed according to the ABO system which can only determine blood type.[96] The test results indicated that the blood type of the blood found on the rock was the same blood type as that of Trisha Meili.[97]

There were semen samples collected at the scene that were recovered from a white sock.[98] Upon testing, the DNA results of the semen did not match any of the five teens accused in this attack.[99] In fact, the DNA profile derived from the semen on the sock conclusively excluded all five of the boys accused.[100] There was also a hair found on the sock; the hair did not match any of the boys either.[101] In fact, the DNA did not match any of the hair samples or semen samples collected by police, including those of the jogger or her boyfriend.[102] This established a whole separate and distinct DNA profile that NYPD and the Manhattan District Attorney's office refused to appraise or even consider in their calculus, a determination of the merit of the accusations levied against the five teens charged with this vicious

[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*

attack.[103] At minimum, under the Brady Doctrine, they should have let the defense know about the DNA test results as it was exculpatory evidence; evidence material to a jury finding the boys not guilty at trial.[104] Harlan Levy, former Manhattan District Attorney, stated in his memoir,[105] that Elizabeth Lederer came to him during the case and said she felt like she was "kicked in the stomach" because the DNA did not match any of the boys.[106] Levy then went on to detail how he and Lederer conspired together to work the narrative in a manner that would bind the boys to the remaining evidence.[107] They never told the attorney for the five teens that the DNA did not match any of the defendants.[108]

III. THE COURT IS THE SAVIOR: PROSECUTION'S CASE IS RESURRECTED FROM "DEATH BY EVIDENTIARY FAILINGS"

At the trial, the prosecution realized that because they engineered a scenario wherein all the boys had implicated each other in the attack, they could not try them all at the same time.[109] Thus, the District Attorney's office came up with the idea to have two trials.[110] Antron McCray, Yusef Salaam, and Raymond Santana were tried separately from Kharey Wise and Kevin Richardson.[111]

Despite the many allowances Judge Thomas B. Galligan afforded the prosecution, they could not present any evidence in court that was material to the boys guilt; no evidence produced by the prosecution established that the boys committed the crimes they were charged with other than their own written and video statements in either trial.[112] Again, the DNA found on the scene did not match any of

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[103] *Id.*
[104] Brady v. Maryland, 373 U.S. 83 (1963).
[105] HARLAN LEVY, THE BLOOD CRIED OUT: A PROSECUTOR'S SPELLBINDING ACCOUNT OF THE POWER OF DNA (Harper Collins: London 1996).
[106] The fact that ADA Lederer felt like she was "kicked in the stomach" was indicative of the fact that she knew the DNA match was important to proving the boys' guilt. The fact that it did not match was material, if not dispositive, in establishing their innocence. She violated the Brady Doctrine by not turning over that exculpatory evidence.
[107] LEVY, *supra* note 105.
[108] *Id.*
[109] U.S. CONST. Amend. VI.
[110] Ryan, *supra* note 5, at 10-11.
[111] *Id.*
[112] *Id.* at 12.

the accused.[113] Expert testimony at the trial established the DNA found on the sock and the victim came from the same source; it also established that it was not a mixture.[114] This meant that only one person ejaculated.[115] None of the boys testified in court to the rape of Trisha Meili or ejaculating during the incident.[116] The prosecution relied on an emotional plea to the jury by showing photographic evidence of the crime scene and the injuries sustained by the survivor.[117] No medical expert that testified stated that "the injuries the jogger sustained could only have been inflicted by multiple perpetrators."[118] Assistant District Attorney Nancy Ryan, who was assigned to re-investigate the Central Park Jogger case in 2002, wrote in her motion to vacate, "Ultimately, there proved to be no physical or forensic evidence recovered at the scene or from the person or effects of the victim which connected the defendants to the attack on the jogger, or could establish how many perpetrators participated."[119]

Despite the lack of evidence tying the youths to the attack on the jogger, the blatant abuse of due process, and the defense's repeated pleas to the judge to dismiss the case, the judge still refused.[120] Ultimately, the jury convicted all five children on various charges associated with the vicious attack on Trisha Meili.[121] Each of the boys, after being found guilty, was sentenced to a jail term ranging from 5 to 13 years in prison.[122] Every one of the teens that appealed their sentence was denied in the higher courts.[123] It took 12 years (of which Kharey Wise served every minute – much of it in solitary confinement) for the 5 teens to get exonerated and the story of their innocence to be told to the world.[124] It took 12 more years for their suffering to be

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[113] *Id.*
[114] *Id.* at 15.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* at 16.
[119] *Id.*
[120] Ronald Sullivan, *Judge Rejects Defense Claim in Central Park Jogger Case*, N.Y. TIMES, (Aug. 10, 1990), https://www.nytimes.com/1990/08/10/nyregion/judge-rejects-defense-claim-in-central-park-jogger-case.html.
[121] Ryan, *supra* note 5, at 16.
[122] *Id.* at 10-11.
[123] *Id.*
[124] Susan Saulny, *Judge Vacates Convictions in 1989 Central Park Jogger Case*, N.Y. TIMES (Dec. 19, 2002), https://www.nytimes.com/2002/12/19/nyregion/judge-vacates-convictions-in-1989-central-park-jogger-case.html.

acknowledged by the City of New York because then Mayor Michael Bloomberg refused to settle.[125] In 2014, the five wrongfully convicted men received a settlement of $41 million from Mayor Bill DeBlasio.[126]

IV. POLICE MISCONDUCT

Police are usually the first contact a defendant has with the criminal justice system.[127] Police make the arrests, handle the investigations, collect the evidence, conduct the interrogations, and make the initial conclusions in the form of criminal charges concerning the guilt or innocence of a defendant.[128] The authority that limits police power is rooted in the U.S. Constitution.[129] This country's founding fathers were especially concerned about the government having too much power.[130] Thus, they specifically drafted protections within the Constitution to enjoin the government from being more powerful than the people.[131] The Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution enumerate procedure that law enforcement must abide by in order to ensure that the constitutional protections guaranteed to defendants are properly afforded to them throughout the arrest process and afterwards.[132] In most situations when a defendant is detained/arrested by police they are afforded those constitutional protections.[133] Whenever those protections are denied by any state actor, whether intentional or by mistake, it manifests in grave and irreparable damage to the wrongly accused.[134]

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[125] Melanie Eversley, *NYC reaches $40M settlement with Central Park Five*, USA TODAY (Jun. 19, 2014), https://www.usatoday.com/story/news/nation/2014/06/19/central-park-five-settlement/11031437/.
[126] *Id.*
[127] GEOFFREY P. ALPERT & ROGER P. DUNHAM, FORCE FACTOR: MEASURING POLICE USE OF FORCE RELATIVE TO SUSPECT RESISTANCE 11 (1997).
[128] *Id.*
[129] U.S. CONST. amend. IV.
[130] James D. Best, *The Founders Believed In Limited Government*, WHAT WOULD THE FOUNDERS THINK?, http://www.whatwouldthefoundersthink.com/the-founders-believed-in-limited-government, (Mar. 11, 2021). "The Founders distrusted strong governments. Their own experience and study of history taught them overly powerful governments turned oppressive."
[131] *Id.*
[132] Twining v. New Jersey, 211 U.S. 78, 106 (1908).
[133] *Id.*
[134] *Id.*

Police misconduct manifests itself in different forms.[135] Whether it be false testimony by an overzealous officer, faulty police work, explicit bias, implicit bias, confirmation bias, or a host of other intentional or unintentional reasons, the fact is that police misconduct results in thousands of innocent people going to jail for crimes they did not commit.[136]

V. WRONGFUL CONVICTION

Time is free, but its priceless. You can't own it, but you can use it. You can't keep it, but you can spend it. Once you've lost it you can never get it back.[137] - Harvey Mackay

This quote from entrepreneur Harvey Mackay about time rings true for many who have lived long enough to know how valuable time is. There is no satisfactory remedy for the loss of time. When innocent people are wrongfully accused and convicted, many of the damages they suffer are irreparable. A wrongfully convicted person can never be fully compensated for the loss of their freedom and time. In the last four decades the "War on Drugs" and more recently the "War on Terror" has placed the freedom of people of color and the freedom of the poor in the cross hairs of law enforcement.[138] Those at the intersection of race and poverty statistically have been shown to suffer the most at the hands of the government's pretextual wars.[139] Paul Craig Roberts[140] in his article entitled, "The Wrongful Causes of Conviction" wrote, "Wrongful conviction is on the rise because the protections against it have been eroded by the pursuit of devils: drug dealers, child molesters and terrorists, all of whom must be rounded up at all

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[135] Rebecca Brown, *3 Ways Lack of Police Accountability Contributes to Wrongful Convictions*, INNOCENCE PROJECT (Aug. 17, 2020), https://innocenceproject.org/lack-of-police-accountability-contributes-to-wrongful-conviction/.
[136] *Id.*
[137] Harvey Mackay, *Time is Free – Harvey Mackay*, PIONEER THINKING, https://pioneerthinking.com/time-is-free, (Mar. 11, 2021).
[138] Erik Sherman, *Nixon's Drug War An Excuse To Lock Up Blacks And Protesters, Continues*, FORBES (Mar. 23, 2016), https://www.forbes.com/sites/eriksherman/2016/03/23/nixons-drug-war-an-excuse-to-lock-up-Blacks-and-protesters-continues/?sh=48ffc5af42c8.
[139] *Id.*
[140] Paul Craig Roberts does not feel that wrongful conviction is a "racially motivated phenomenon." While we agree that wrongful convictions do affect victims that come from every race and gender we maintain that it disproportionately affects the poor in general and poor people of color in particular in this nation; Poor people of color are more likely than any other group to be the victim of a wrongful conviction.

cost."[141] He further stated that constitutional principles which form the foundation of our guaranteed rights, (due process, the attorney-client privilege, equality before the law, the right to confront adverse witnesses…self-incrimination, retroactive law, and attacks against a person through his property), have been breached due to the culture adopted by police and prosecutors which have prioritized convictions over justice.[142]

The most common causes of wrongful conviction include mistaken identity, perjurious testimony, forced, false confessions, corruption of scientific evidence, ineffective legal representation, explicit and implicit biases, and lastly, but most egregious, official misconduct by both the police and the prosecution.[143]

VI. WRONGFUL ARRESTS

Police are human; they are not infallible. However, willful and intentional police conduct, which contravenes their sworn oath to serve and protect, violates the due process guarantees of the Bill of Rights.[144]

When police engage in behaviors that target particular groups of people, the outcome can result in wrongful arrests; even worse, wrongful convictions.[145] Police bias, whether implicit or explicit, often places innocent people in the crosshairs of illicit official misconduct.[146] When police pull over people in vehicles, or conduct "*Terry* stops" on the street, they are entrusted to be reasonable when detaining/arresting only those people who they suspect of having committed a crime, are committing a crime or are about to commit a crime.[147]

Police should never infringe on the liberty interests of any person.[148] When these "Terry stops" are not based on a reasonable suspicion or reliable information but rather rooted in explicit or

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[141] Paul Craig Roberts, *The Causes of Wrongful Conviction*, THE INDEPENDENT REVIEW, https://www.independent.org/pdf/tir/tir_07_4_roberts.pdf.
[142] *Id.*
[143] H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System* (Sept. 2003), https://lawweb.colorado.edu/profiles/pubpdfs/furman/03SeptTCL-Furman.pdf.
[144] In re Winship, 397 U.S. 358 (1970). Stated that in addition to being found guilty beyond a reasonable doubt a criminal defendant is entitled to procedural due process.
[145] *Twining*, 211 U.S. at 106. Established that rights to due process are "implicit in the concept of ordered liberty."
[146] *Id.*
[147] *Id.*
[148] *Id.*

implicit biases, police place the individual freedoms of the public in danger.[149]

VII. CONFIRMATION BIAS

Confirmation bias is "the tendency to search for, interpret, favor, and recall information in a way that affirms one's prior beliefs or hypotheses."[150] Far too often law enforcement, convinced that the suspect is guilty, engages in the practice of trying to "create a case."[151] This entails law enforcement gathering evidence, directing questioning, and interpreting evidence in a manner which best affirms their pre-existing belief.[152] Evidence should be examined objectively. Investigators should make conclusions based on where the evidence leads them.[153] They should not interpret, dismiss, hide or willfully misrepresent evidence so that it fits neatly into a narrative that affirms their preconceived conclusions.[154] This practice is dangerous; the ramifications include wrongfully convicting someone for a crime they did not commit, allowing the real perpetrator of the crime to escape punishment for their crime, and the sowing of distrust of the criminal justice system into communities affected the most by this practice.

The Central Park Five were just part of a larger group of youths that were apprehended within days of the rape of Trisha Meili.[155] They were not initially arrested for rape.[156] They were arrested pursuant to calls to 911 which reported a group of youths assaulting people in Central Park.[157] It was only later, after the Trisha Meili was found, that they were interrogated relative to the rape.[158] The police, now began to question the youths relative to their involvement in the crime.[159] When their interrogations, evidence, and eyewitness

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[149] *Id.*
[150] SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 233, (McGraw-Hill Education 1993).
[151] KARL ASK & AFRODITI PINA, ON BEING ANGRY AND PUNITIVE: HOW ANGER ALTERS PERCEPTION OF CRIMINAL INTENT, 2(5), 494-499 (Social Psychological and Personality Science 2011).
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] Ryan, *supra* note 5, at 16.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*

testimony did not give them the results they wanted, the police embarked upon a campaign of mental and physical interrogatory tactics.[160] The detectives manipulated the teens into confessing to fabricated accounts of the rape that were inconsistent, untenable, and unsupported by any of the physical evidence obtained from the crime scene.[161]

VIII. MISTAKEN IDENTIFICATION

Research data has shown that one of the most, if not the most, common factors that contribute to wrongful convictions is mistaken identification.[162] In a study done by The Innocence Project pertaining to cases where the defendant was exonerated due to DNA evidence, it was estimated that out of the 70 cases reviewed in which defendants were wrongfully convicted, 87% were wrongfully convicted due to mistaken identity.[163] H. Patrick Furman in his writing entitled, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, noted that in four crime-simulation studies (where a crime is simulated spontaneously, unbeknownst to the subjects and they are asked to identify the perpetrator) 294 people attempted 536 identifications and only 42% of the eyewitnesses accurately picked out the perpetrator.[164] It is assumed that most of the cases of mistaken identity are the result of an honest mistake.[165] However, "unduly suggestive" police conduct during the identification process is sometimes to blame when witnesses misidentify the perpetrator of a crime.[166] Justice William Brennan famously wrote, "The vagaries of eyewitness identification are well known, the annals of criminal law are rife with instance of mistaken identification."[167] Misidentifications can occur at various times throughout the adjudicative process. In the

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[160] Chris Smith, *Central Park Revisited*, NEW YORK MAGAZINE (Oct. 21, 2002), https://nymag.com/nymetro/news/crimelaw/features/n_7836/index.html.
[161] *Id.*
[162] Furman, *supra* at 143.
[163] *see About*, INNOCENCE PROJECT, https://www.innocenceproject.org/causes/index.php, (last visited Mar. 11, 2021). (the Innocence Project at the Benjamin N. Cardozo School of Law was created in 1992).
[164] Furman, *supra* at 143.
[165] *Id.*
[166] *Id.*
[167] *Id.*

Central Park Jogger case, the only identifications came from the manipulated and forced confessions of the boys themselves.[168] Due to her injuries, Trisha Meili could not remember the assault.[169] There was no witness produced in court that testified to seeing any of the boys participate in her rape.[170]

IX. LINEUPS

Lineups are a type of identification process where law enforcement "line up" a group of people and ask the witness to pick out the suspect from the group of people. There are many problems with this type of identification process, the following are a few of those problems.

Traditionally, it was thought to pass muster for law enforcement to find people with the same likeness as the arrestee and ask the witness to identify the perpetrator from among them.[171] This process that was traditionally used does not protect an innocent person that was wrongly arrested. Law enforcement should find people that look like the actual description given by the witness of the suspect. If the arrestee does not fit the description of the actual suspect and the other known innocents do, it will lower the incidence of misidentifications.[172] A better way to conduct lineups is to show the witness suspects, or photographs of suspects, one at a time.[173] Sequential, rather than group, viewing has been shown to be effective in reducing the probability that a witness will pick someone because they resemble the perpetrator and the witness believes that the perpetrator is amongst the group.[174]

An effective means of reducing misidentification is to use a line up the suspect may or may not be in.[175] If you use a lineup that does not contain the suspect and the witness identifies a known innocent as the offender, law enforcement can then interrogate the witness again

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[168] *Id.*
[169] *Ryan, supra* note 5, 10-11.
[170] *Id.*
[171] Furman, *supra* note 143.
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*

to reassess their memory of the event and their description of the suspect.[176]

Show ups are when a suspect is brought to the crime scene and placed in the view of the witness for the identification to take place.[177] Show ups should not ever be the sole identification process determinative of if a person remains in custody or not.[178] For a show up to pass constitutional muster, the suspect must be detained near the crime scene, usually within a close period of time after the incident.[179] The likelihood of a witness not picking a person that is handcuffed or in a police car as the culprit is slim to none.[180]

"Unduly suggestive" conduct by law enforcement has been blamed for many misidentifications of innocent people.[181] To avoid this, law enforcement that were involved in the arrest or interrogation of an alleged suspect should not be in the room with a witness during the lineup. The person conducting the lineup should not know who the suspect is. This eliminates the possibility of the witness being coached or prodded to pick a suspect by law enforcement. This is called a double-blind procedure.[182]

There is bound to be an occasion where an eyewitness truly believes they can identify the suspect, and they will get it wrong. There are other variables that are beyond the control of police investigators like cross-race identifications; there is a much higher chance of a misidentification when the witness is of a different race than the accused.[183] The criminal justice system will never be able to control that. However, through diligent and meticulous investigation, police can reduce arrestee's exposure to biased investigation procedures "that compromise the quality of eyewitness identification.[184] In the Central Park Jogger case there was no lineup; the only eyewitness to the attack was in a coma.[185] There were no witnesses to the crime.[186] Further, the only boys that knew each other were Yusef and Kharey.

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[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION 6 (Cambridge University Press 1995).
[184] *Id.*
[185] Ryan, *supra* note 5, at16.
[186] *Id.*

None of the other boys knew each other and could not have picked each other out of a lineup.

X. FORCED CONFESSIONS

Police engage in various sophisticated techniques to extract confessions from suspected criminals and alleged witnesses to crimes.[187] These techniques range from physical force to mental and emotional coercion, which investigators employ to persuade suspects to "tell the truth" during an investigation.[188] Much scholarly effort has been dedicated to understanding why an innocent person would falsely testify against one's self.[189] The interrogation techniques used by police are very powerful and effective tools.[190] Those techniques become even more effective when utilized by state actors who invoke their power and authority to encourage (or intimidate) alleged perpetrators to confess.[191] One could never deny the utility of such tactics; in situations where the police have a stubborn and/or non-cooperative suspect, or witness, these techniques can be useful.[192] However, the same techniques that can convince a person to admit to a crime that he *has* committed are also capable of eliciting a confession from an innocent person for a crime that he *has not* committed.[193]

Most police interrogations use a combination of these techniques to induce confessions.[194] These techniques range from brute physical coercion (though almost nonexistent today) to invocations of moral obligations to threats of long sentences in prison.[195] A skilled investigator can single handedly navigate through this gamut of interrogational methodologies.[196] Others work in tandem; each investigator commits to the role of either "good guy" or "bad guy," rotating in and out of the interrogation room until the target confesses or supplies them with the information they need. It may seem untenable to most people that an innocent person would ever confess to

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[187] Furman, *supra* note 143, at 18-19.
[188] FRED EDWARD INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS, (3d. ed. 1986).
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*

a crime that he did not commit.[197] But most people have never been interrogated for 24 hours, with no food, or drink, or sleep.[198] Most have never had their livelihoods, families, and social status threatened to be taken away from them.[199] Most people have never been told that they would be locked away in jail for the rest of their lives if they didn't "do the right thing and confess."[200] These same people make up the juries across the nation that ultimately decide the fate of innocent people who were forced to confess under duress.[201]

Once a confession is forced out of the accused it forever taints any subsequent claims of innocence.[202] When someone signs a confession and the judge allows it into evidence, juries have historically had a difficult time disbelieving the confession.[203] Once someone gives a confession, neither the prosecutor nor the judge questions its veracity.[204] Defense counsel has an uphill fight advocating for their client's innocence.[205] Juries usually believe police; even if they have doubts, they err on the side of the police in most situations.[206]

In the Central Park Jogger case, all the boys pled, "not guilty," at their arraignment.[207] Each adamantly stated that they were forced to confess and to implicate the other boys in their statements.[208] Each statement the prosecution presented was full of contradictions and misstatements that were factually inconsistent, yet the judge allowed the statements into evidence, and the jury believed that the statements were volitional offerings by each of the boys.[209] This is in spite of the fact that none of the evidence presented at trial supported any of the prosecution's contentions of guilt.[210] Nothing the prosecution presented tied any of the boys to the crime.[211] Not one of them. The

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[197] *Id.* at 20.
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] Ryan, *supra* note 5, at 16.
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.*

only piece of evidence that placed them at the scene of the crime were their statements. They were all convicted. That's how dangerous forced confessions are.

XI. USE OF INFORMANTS

Law enforcement has always used informants in some manner to assist in their campaigns against crime.[212] Informants usually work on a quid pro quo arrangement; in return for their testimony they receive some favor or incentive from the police and/or prosecutor.[213]

These arrangements are inherently untrustworthy. Courts should utilize a higher level of scrutiny of these relationships between informants and police, keeping foremost the balance between individual liberty interests and the public interests in enforcing the law.[214] Special attention must be given to any relationship that incentivizes cooperation. Incentives can induce a defendant to cooperate, out of fear that the inducement will be given to another instead.[215] Such relationships often encourage, if not promote, dishonesty in order to obtain the inducement being offered.[216]

Even genuine eyewitness testimony is generally unreliable.[217] That is more reason why the testimony of compensated informants should be even more seriously scrutinized.[218] It is necessary to have a procedure that screens potential informants and gives the defense an opportunity to investigate not only the reliability of the informant's testimony but to also investigate the reliability of the investigators that arranged the testimony as well.[219] H. Patrick Furman writes, "Given the percentage of wrongful convictions that were attributable, at least in part, to inaccurate testimony by cooperating witnesses, some commentators have argued that special precautions should be taken to ensure that the integrity of these witnesses (and the reliability of their testimony) is examined adequately."[220] The writers'

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[212] Furman, *supra* note 143, at 20.
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.*

of this note go a step further and suggest that the court allow that the reliability of the investigating officers who arranged the testimony of the informant be a consideration of the court as well in determining the weight of an informants' testimony.

XII. DISPARITY IN ENFORCEMENT OF PENAL CODE ALONG RACIAL LINES

When Trisha Meili was found, it was believed that she would not survive the night.[221] Initially, homicide detectives were brought in to investigate the case.[222] The fact that she was brutally raped complicated Manhattan District Attorney Robert Morgenthau's decision as to whom to assign the case.[223] An adamant demand by Linda Fairstein, head of the Sex Crimes Division, convinced Morgenthau to allow her office to prosecute the case.[224]

A Black prisoner serving time for sexual assault is three-and-a-half times more likely to be innocent than a white sexual assault convict.[225] According to a crime victim survey, 70% of white sexual assault victims were attacked by white men and only 13% by Black men.[226] 57% of exonerees for sexual assault are African American.[227] Half of all sexual assaults that led to exoneration, which contained eyewitness misidentifications, involved a Black male allegedly sexually assaulting a white woman.[228] The statistics suggest racial bias or, at least, an overall callous disinterest in wrongfully convicting Black men who are charged with the sexual assault of white women.

Exoneration statistics concerning those charged with murder are even more horrific. African Americans comprise half of all defendants exonerated for murder in this country.[229] When you factor in that African Americans represent only 13% of the population in the United States,[230] the result is that African Americans accused of

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[221] Ryan, *supra* note 5, at 16.
[222] Smith, *supra* note 160.
[223] *Id.*
[224] *Id.*
[225] *Id.* at 12.
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.* at 4.
[230] *Id.*; SONYA RASTOGI, ET. AL., THE BLACK POPULATION: 2010 6 (United States Census Bureau 2011).

murder are seven times more likely to be falsely charged and convicted of a murder that they did not commit.[231] These statistics do not discount the great work done by most police and prosecutors on a daily basis. Most convictions for murder are properly investigated and those convicted are found guilty beyond a reasonable doubt due to constitutionally procured and admissible evidence that substantiates their conviction. However, the statistics do highlight an obvious problem with the criminal justice system. Critical examination lends to the belief that both explicit bias and implicit bias which contribute to selective enforcement of the law by law enforcement officials, has fostered an environment wherein the mere accusation of unlawful conduct by a person of color or other minority group invokes a belief of guilty until proven innocent.[232] This belies the promise of the U.S. Constitution which guarantees a fair and speedy trial, and an presumption of innocence until proven guilty.[233] Innocent African Americans are seven times more likely of being wrongfully accused and convicted of murder than an innocent Caucasian American.[234] "Those who have been exonerated spent on average more than 14 years in prison before they are released."[235] Some, like Michigan exoneree Richard Phillips, have spent over 40 years in prison before being exonerated.[236] This injustice is not relegated to men of color. Cathy Wood, a white woman, spent 35 years in prison in the state of Nevada for a murder that she did not commit.[237] There are many other wrongfully convicted people languishing in prisons throughout this country of every demographic who will likely die in prison for a crime they did not commit.

Implicit bias is not enough to explain the disparity in treatment between Black and White people within the criminal justice system of this country. Implicit bias refers to a bias which occurs automatically,

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[231] *Id.* at 12.
[232] *Id.*
[233] U.S. CONST. Amend. VI.
[234] RASTOGI, *supra* note 230.
[235] *Id.*
[236] Joey Horan, Sarah Leeson & Emma Winowiecki, *Longest-serving exoneree in US history "just glad to be free" after 47 years in prison*, MICHIGAN RADIO (May 9, 2018), https://www.michiganradio.org/post/longest-serving-exoneree-us-history-just-glad-be-free-after-47-years-prison. Richard Phillips spent 47 years in prison before being exonerated.
[237] Scott Sonner, *$3M for Nevada woman wrongly imprisoned 35 years for murder*, RENO GAZETTE JOURNAL (Aug. 28, 2019), https://www.rgj.com/story/news/2019/08/28/3-m-nevada-woman-wrongly-imprisoned-35-years-murder/2143625001/.

without thought and is based on inferences drawn from extrinsic beliefs and ideals.[238] Implicit bias affects one's decisions although the subject is not cognizant of why or how it manifests itself in their conduct.[239] When analyzing many of the cases where people were wrongfully convicted for sexual assault, especially when the accused is a Black male and the victim is a white woman, we see cases of orchestrated injustice that is purposefully organized and carried out by state actors.[240] Knowingly false arrests, forced confessions, racial profiling, willful misrepresentation of evidence by "experts," witness tampering, blatant Brady violations, intentional Miranda violations, etc., have each played a role in one or more cases where defendants were wrongfully convicted.[241] Therefore, to not consider police misconduct, prosecutorial misconduct, and/or racial bias, in the calculus for explaining wrongful convictions, is untenable.

XIII. PROSECUTORIAL MISCONDUCT

a. The Story of John Brady: A Fool in Love

John Leo Brady was from a poor family of tobacco farm workers in southern Maryland.[242] His young parents, struggling financially, gave him over to his paternal grandparents and his Aunt Celeste who raised him from infancy through his teen years.[243] Brady had a tough time in school as he suffered from serous otitis media, a medical condition in which the ears persistently emit a thick, horrible smelling mucus.[244] He was constantly teased by classmates whom referred to him as "stink ears."[245] Brady dropped out of school in the eighth grade to work on his uncle's farm where he was employed until the age of 19 when he enlisted in the Air Force.[246] He remained in the Air Force for

[238] *Implicit Bias*, PERCEPTION INSTITUTE, https://perception.org/research/implicit-bias/, (last visited Mar. 11, 2021).
[239] *Id.*
[240] Furman, *supra* note 143, at 20.
[241] *Id.*
[242] Thomas L. Dybdahl, *An Odd, Almost Senseless Series of Events*, THE MARSHALL PROJECT (Mar. 3, 2020), http://www.themarshallproject.org/2018/06/24/an-odd-almost-senseless-series-of-events#.
[243] *Id.*
[244] *Id.*
[245] *Id.*
[246] *Id.*

four years, in which overtime Brady's medical condition was cured, he got married, obtained his G.E.D., got divorced, and eventually returned to Maryland.[247]

In 1958, Brady met a young lady named Nancy and her brother Donald Boblit.[248] Nineteen-year-old Nancy, although married, took a liking to Brady and soon they fell in love.[249] Nancy eventually became pregnant; when Brady found out he was going to be a father he did not know what to do.[250] He was working and he had a car, but he was behind on his bills.[251] He wanted to show Nancy he loved her and he would provide for their child.[252] Without forethought or planning, the barely literate Brady wrote Nancy a check for thirty-five thousand dollars, which he postdated two weeks.[253] He told Nancy to wait the whole two weeks before cashing it and promised her it would be in the bank.[254]

After much thought and deliberation, Brady came up with a plan that he was sure would get him the money he so desperately needed.[255] He decided he was going to rob a bank.[256] He recruited his friend and future brother-in-law, Donald Boblit, to help him pull off the heist.[257] The first thing they needed to do was get a reliable getaway car and luckily, Brady knew a man named William Brooks who just bought a brand new Ford Fairlane.[258] Brady knew William Brooks well, he worked on the farm owned by Brady's grandparents when Brady was a child.[259] He was staying with Brady and his Aunt Celeste while recovering from surgery.[260]

Brady and Boblit decided to place a log in the dirt road so that Brooks would have to get out of his car to move it.[261] The plan was to

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[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *Id.*

grab Brooks, tie him up, put him somewhere safe, use the car for the bank robbery, bring the car back to Brooks and then let him go.[262]

As Brady and Boblit lay in ambush in the dark of the June summer night, they saw the lights from a car in the distance approaching.[263] Brady informed Boblit that Brooks was not to be harmed.[264] "I don't want him hurt, Donald, not at all," warned Brady; "He was good to me when I was a kid."[265] Brooks stopped in front of the log as planned, when he stepped out of the car to move the log, Boblit approached him with a double barrel shotgun.[266] Brooks began begging for his life, "Please don't kill me. Please!" cried Brooks.[267] Worried that his incessant appeals for mercy would alert others, Boblit hit him in the back of the head with the shotgun rendering him dizzy but still conscious.[268] They put Brooks in the back of the car and drove to a dense part of the woods to leave Brooks there until they came back for him the next day.[269] When they arrived to the wooded area, Boblit had his own ideas; "We got to kill him," said, Boblit. "He seen me."[270] Brady immediately yelled at Boblit to put the gun away.[271] After the two got Brooks into the thick of the forest Brady walked away to think about what to do next, but while he was away Boblit wasted no time putting his own plan into action.[272] He immediately took his own red plaid shirt, tied the sleeves together and began strangling the frail, dizzy William Brooks with it.[273] When Brady realized what Boblit was doing he raced over to stop him, but he was too late. William Brooks, a dear old family friend of Brady, was dead.[274]

They took $255.30 from Brook's wallet and left him in the thick of the woods.[275] They never robbed the bank; they embarked on a cross country journey to Washington state to escape from the long arm of the

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[262] *Id.*
[263] *Id.*
[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.*

law.[276] After about 200 miles, Boblit got homesick and said he wanted to go home so they parked the car and took a Trailways bus back to Washington D.C. and caught a cab back to Maryland.[277]

The next day Brady drove to his Aunt's house and she informed him that the police were there looking for him.[278] Terrified at the thought of going to jail, Brady took his share of the robbery proceeds and bought a ticket to Cuba.[279] He arrived in Havana by noon the next day.[280] Safely out of the country, he began to think about Nancy and his soon to be born child.[281] He contemplated returning home, convincing himself that he overreacted and that he could just go back and tell the police that all they did was hit Brooks and leave him by the road.[282] Brady thought it would not be that bad and maybe he and Nancy could work things out (knowing by this time Nancy would be furious because the check he gave her bounced).[283] The next day Brady walked into the American Embassy in Cuba and spilled his guts.[284] Brady and Boblit, were charged with murder in the first degree.[285] Since they were both accusing each other of committing the murder, the trials were held separately, with Brady's trial was the first one.[286]

At Brady's trial he admitted to being part of the crime, but maintained that he was not the one that committed the actual killing.[287] Brady's attorneys wanted to review the last of Boblit's five statements concerning his involvement in the crime, but the prosecutor withheld it.[288] That Boblit confessed to killing Brooks alone in the last statement, which was withheld by the prosecution, did not come to light until after Brady was already tried, convicted, and sentenced to death.[289] After retaining a new attorney and discovering that Boblit admitted in the withheld statement that he killed Brooks by himself,

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[276] *Id.*
[277] *Id.*
[278] *Id.*
[279] *Id.*
[280] *Id.*
[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *Brady*, 373 U.S. at 84.
[286] *Id.*
[287] *Id.*
[288] *Id.*
[289] *Id.*

Brady and his attorneys appealed his conviction and sought a new trial due to the fact that this evidence was suppressed by the prosecution.[290] The Court of Appeals held that the prosecution's suppression of evidence violated Brady's due process rights and the case was remanded for a new trial on the issue of punishment alone.[291] The Supreme Court of the United States found that due process requires the prosecution to turn over any evidence, even if it is favorable to the defense, when the evidence is material to either the guilt or punishment of the defendant.[292] The Supreme Court specifically analyzed the holding of *Mooney v. Holohan*, in which they found that the prosecution is required to disclose all exculpatory evidence.[293] Furthermore, the Court held that it would violate the due process clause if they were to deprive a defendant of their right to a fair trial by deliberate dishonesty.[294] Additionally, Justice William O. Douglas in his opinion in *Brady* emphasized that, "[S]ociety wins not only when the guilty are convicted but when criminal trials are fair," the system suffers when the accused are treated wrongly and "the prosecutor should not be the architect of a proceeding that does not comport with standards of justice."[295] From *Brady v. Maryland*[296] emerges the brady doctrine or the brady material rule, which states that under the due process clause the prosecution must turn over evidence favorable to the accused upon request even if the evidence is material to either culpability or punishment.[297]

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[290] *Id.* at 85.
[291] *Id.*
[292] *Id.* at 86.
[293] Mooney v. Holohan, 294 U.S. 103, 112 (1935).
[294] *Id.*
[295] *Id.* at 87.
[296] *Brady*, 373 U.S. at 83.
[297] *Id.*

b. The Birth of Brady Evidence

Through the holding and rule from *Brady v. Maryland*[298], the terms Brady material or Brady evidence were created.[299] Brady material is known as exculpatory evidence that would favor a criminal defendant in proceedings leading up to trial.[300] That includes all evidence that is in possession of the government, may that be the police or the prosecutor, which could help a criminal defendant appear to be innocent to a judge or jury.[301] As found by the Supreme Court in *Brady*[302] and the implicit meaning of Brady material, the police or the prosecutor has a duty to disclose each piece of evidence that would be considered exculpatory.[303] The foundation and importance of the rule is that if evidence is found that was not disclosed previously the defendant would be entitled to relief for a Brady violation.[304] Furthermore, the defendant would have to make his or her case by showing the evidence and explaining why it would be exculpatory; show it is favorable to prove their innocence and impeach the government witness or evidence.[305] The Brady doctrine provides that it is the prosecution's duty to disclose evidence that would change the outcome of a case; it would be unjust to not make known the existence of such evidence to the defendant.[306] In order to find a true Brady violation the evidence at issue must be favorable to the defendant.[307] When a prosecutor does not surrender exculpatory evidence willfully, the defendant is prejudiced by the suppression of such evidence.[308]

In theory, *Brady v. Maryland*[309] should work to deter the police, the prosecutors, and any other government official from suppressing exculpatory evidence. Moreover, the Brady Doctrine is also necessary to have in place in order to prevent government officials from

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[298] *Id.*
[299] STEPHEN MICHAEL SHEPPARD, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION: BRADY MATERIAL (Aspen Publisher 2012).
[300] *Id.*
[301] *Id.*
[302] *Brady*, 373 U.S. at 83.
[303] SHEPPARD, *supra* note 299.
[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] *Id.*
[308] *Id.*
[309] *Brady*, 373 U.S. at 83.

suppressing crucial evidence, and if those government officials do in fact suppress crucial evidence the Brady Doctrine is necessary to aid in penalizing those officials.[310] It protects and gives rightful relief to the wrongfully accused.[311] If the Brady doctrine is meant to assist the wrongfully accused and prevent government officials from withholding essential evidence in violation of the Constitution, why has it consistently failed in that endeavor since its inception? The University of California Irvine Newkirk Center for Science & Society, The University of Michigan Law School, and Michigan State University College of Law created a project in conjunction with the Center on Wrongful Convictions at Northwestern University School of Law known as The National Registry for Exonerations (hereinafter "Registry") which provides information about every known exoneration in the United States since the year 1989.[312] The Registry has demonstrated that official misconduct is one of the leading causes of someone being falsely accused or falsely convicted for crimes that he or she did not commit.[313] Approximately 54% of exonerations are due to official misconduct by law enforcement as of this year.[314] More specifically, between the year 1989 and 2019, in cases of sexually abused individuals, 45% of exonerations are due to official misconduct, in cases of sexual assault 38% of exonerations are due to official misconduct, and in cases of a homicide 75% of exonerations are due to official misconduct.[315] Thus, if official misconduct has been a clear issue for more than 30 years and the Brady doctrine has been in effect for more than 50 years, why does our criminal justice system continue to have this issue?

Jessica Brand, in the Journal *The Appeal*, explores these exact questions related to the ineffectiveness of the Brady Doctrine.[316] Brand notes that, as shown by The Registry, many public defenders in the country are aware of the many times Brady violations occur.[317] She states, "[A]t best, prosecutors commit Brady violations because they

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[310] Jessica Brand, *The Epidemic of Brady Violations: Explained,* THE APPEAL (Apr. 25, 2018), https://theappeal.org/the-epidemic-of-brady-violations-explained-94a38ad3c800/.
[311] *Id.*
[312] *Exonerations by Contributing Factor,* THE NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx.
[313] *Id.*
[314] *Id.*
[315] *Id.*
[316] Brand, *supra* note 310.
[317] *Id.*

are fallible, and they suffer from confirmation bias, which leads them to focus on evidence that validates what they already believe."[318] Additionally, Brand claims that prosecutor's most likely do not claim all evidence as "material," meaning they do not claim that the evidence would create a different outcome in the case.[319] In other words, Brand is suggesting that prosecutors and police officers do not turn over all evidence because not all the evidence is necessary, according to them, to turn over.[320] The Supreme Court has sought to put a stop to prosecutors not disclosing all evidence, even if it is not necessary evidence, in order to avoid prosecutors from withholding evidence that is potentially exculpatory.[321] The Supreme Court held in *Kyles v. Whitley* that prosecutors have the obligation to disclose all evidence regardless of the prosecution considering it exculpatory evidence.[322] In *Kyles*, defendant, Curtis Lee Kyles, was convicted of a murder in the first degree, but before trial Kyles' counsel demanded that the State disclose the exculpatory evidence the prosecution was withholding.[323] The defendant was arrested, after an informant (who changed his name and story numerous times) provided incriminating information on the defendant for the murder of a woman in the parking lot.[324] The government denied any exculpatory evidence, despite their knowledge of: eyewitness statements, a tape recording of other suspects, a written statement given by another suspect, the print out of the license plate numbers from the parking lot, internal police memorandum that involved seizing evidence, and evidence linking another suspect to other crimes in the same area.[325] The Court stated:

> A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict, the possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a *Brady* violation by demonstrating that some of

[318] *Id.*
[319] *Id.*
[320] *Id.*
[321] Kyles v. Whitley, 514 U.S. 419, 451 (1995).
[322] *Id.*
[323] *Id.* at 428.
[324] *Id.* at 423-8.
[325] *Id.* at 428-9.

> the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.[326]

In other words, the Court felt it would have been more useful for the prosecution to include all evidence because there is a possibility that a jury would find the evidence probative of a defendant's innocence.[327]

c. Brady Doctrine: Effective Law or Doctrinal Chatter?

One would assume that based on the holdings of *Brady* and *Kyles*, the law would set prosecutors and other government officials straight when it comes to official misconduct.[328] Although it seems the Supreme Court has attempted to hold wrongdoing prosecutors accountable, the law still protects them.[329] According to 42 United States Code § 1983, prosecutors and other government officials often have either absolute immunity or qualified immunity.[330] Essentially, the purpose of 42 United States Code § 1983 is to provide relief to a party who is deprived of their constitutional rights or privileges in an action at law, suit in equity, or any other proper proceeding for redress when a government official has abused his or her position of authority.[331] Furthermore, a plaintiff would have to state a claim under 42 United States Code § 1983 challenging the conduct of a government official that was acting under "color of state law" and would have to prove that the conduct of the government official deprived the plaintiff of his or her rights.[332] Moreover, although 42 USCS § 1983 was created to protect a person's right or privileges, it established that certain state and federal legislators and government officials have immunities from being prosecuted for possibly being responsible for the deprivation of a person's rights or privileges.[333] The

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[326] *Id.* at 434-5.
[327] *Id.*
[328] *Id.*
[329] 42 U.S.C. § 1983.
[330] *Id.*
[331] *Id.*
[332] *Id.*
[333] *Id.* at 253.

Civil Rights Act explains that there are two types of immunities and narrows down who exactly has those immunities.[334] The Act recognizes that a state and federal legislators have absolute immunity while executive officers are often given qualified immunity.[335] Additionally, absolute immunity is applicable as well to prosecutors and state administrative officials who are performing functions analogous to that of a prosecutor.[336] Absolute prosecutorial immunity is applied when a prosecutor is preparing for trial or is appearing in court to present evidence.[337] To determine the scope of a prosecutor's absolute immunity from liability of 42 United States Code § 1983, a court will ask first whether the practical function of the conduct of the prosecutor merited absolute immunity. Secondly, after determining if absolute immunity is justified, the court will ask whether the absolute immunity for the conduct at issue is "necessary to advance the policy interests."[338] A qualified immunity is applicable where a government official cannot be held liable for civil damages, even when the conduct violates a clear statutory or constitutional right.[339]

The doctrine creates a conundrum since a prosecutor or a government official is most likely to be accused of violating a defendant's civil rights when acting within their line of work.[340] Simply put, there would not be a claim from a wrongfully convicted person or even a criminal against the prosecutor for a violation of their rights if it were not for the prosecutor's misconduct while they perform their duties.[341] A noteworthy issue is whether the Civil Rights Act has a "disclaimer" that states, although you have the right to protect your constitutional rights and fight for them, there are still limitations on top of those rights.[342] Often the government officials and prosecutors are the individuals a defendant would need to protect themselves against, while also being among the individuals that have an absolute

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[334] *Id.*
[335] *Id.*
[336] *Id.* at 343.
[337] *When is a prosecutor entitled to absolute immunity from civil suit for damages under 42 U.S.C.A. § 1983: post-Imbler cases*, 67 A.L.R. Fed. 640.
[338] *Id.*
[339] 42 U.S.C. § 1983. at 344.
[340] Kate McClelland, *"Somebody Help Me Understand This": The Supreme Court's Interpretation of Prosecutorial Immunity and Liability Under § 1983*, 102 J. CRIM. L. & CRIMINOLOGY 1323 (2013),
[341] *Id.*
[342] 42 U.S.C. § 1983.

and qualified immunity from liability; making it difficult for a defendant to seek protection at all.

A leading case that discusses prosecutorial immunities from suit under 42 USCS § 1983 is *Imbler v. Pachtman*.[343] The issue presented to the in *Imbler* is whether a state prosecuting attorney acting within the scope of his duties as a prosecutor was liable for alleged deprivations of a defendant's constitutional rights under 42 USC § 1983.[344] The Supreme Court held a prosecutor acting within his duties has an absolute immunity for a civil suit and cannot be found liable.[345] In this case the petitioner was convicted of murder and the defendant was the prosecuting attorney that conducted the trial.[346] Petitioner's conviction of murder was successfully vacated based on the evidence the respondent had discovered, but purposefully suppressed from trial.[347] The petitioner brought suit against the defendant for suppressing exculpatory material evidence from trial and for using false testimony at trial seeking damages from the prosecutor for depriving the petitioner of his rights due to the prosecutor's misconduct.[348] The Court held that the prosecutor has the opportunity to enjoy absolute immunity from a 42 USC § 1983 suit.[349] The Court explains that although this immunity may leave the person wrongfully convicted or accused without remedy against the prosecutor that wronged him or her, without the immunities prosecutors would be prevented from properly doing their job functions.[350] Thus, the Court claims that giving a prosecutor qualified immunity over absolute immunity would not be enough to "protect" them and their duties as prosecutors, and a prosecutor should have the same protection of judges and grand jurors acting within the scope of their duties.[351] A prosecutor has the ability to do as they please before trial and can use their discretion when deciding to include or exclude the evidence they would like for the trial with immunity for their misconduct.[352]

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[343] Imbler v. Pachtman, 424 U.S. 409, 409 (1976).
[344] *Id.* at 410.
[345] *Id.*
[346] *Id.* at 411.
[347] *Id.*
[348] *Id.* at 416-7.
[349] *Id.* at 420.
[350] *Id.* at 424.
[351] *Id.* at 423.
[352] *Id.*

d. Plea Bargaining: Who does it help?

Rule 11 of the Federal Rules of Criminal Procedure governs when a defendant enters a plea.[353] A defendant has the choice to plead "not guilty," "guilty," or if the court allows, the defendant can plead "nolo contendere."[354] If the court consents to a nolo contendere plea it means that the defendant is reserving the right to have an appellate court review an adverse determination of a specified pretrial motion.[355] If the defendant does not enter a plea at all, the court must enter a plea of not guilty.[356] Before a defendant considers accepting the plea of not guilty or nolo contendere, the defendant must appear in open court and the court should make clear that the defendant understands their rights and what the plea may mean for them once it is entered.[357] Moreover, aside from the defendant needing to understand their rights, the court must be sure that the plea the defendant enters is completely voluntary and not coerced by outside forces.[358] In addition, when the defendant pleads guilty or nolo contendere the court must be sure there is a factual basis to the defendant's plea.[359] When a defendant is arraigned and charged, typically with the maximum charge or punishment, the defendant is given an opportunity to plead guilty or not.[360] A plea-bargain is an agreement that is made between the prosecution and the defendant in which, if the defendant agrees to plead guilty to the crime, regardless of whether or not the person is guilty, the charges against the defendant will be diminished.[361] Plea bargaining will occur before trial and it is a process of negotiation of offers and counteroffers between a prosecuting attorney and the defendant alongside their attorney.[362] If the defendant chooses to plead not guilty, but is found guilty later at trial the court warns the

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[353] Fed. R. Crim. Pro. XI (a) 1.
[354] *Id*.
[355] *Id*. at (a)(2).
[356] *Id*. at (a)(4).
[357] *Id*. at (b)(1).
[358] *Id*. at (b)(2).
[359] *Id*. at (b)(3).
[360] Bureau of Justice Assistance U.S. Dept. of Justice, Plea and Charge Bargaining. Introduction 1.
[361] *Id*.
[362] Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3607 (2013).

defendant that the charges can later be harsher.[363] Within the negotiation process of offers and counteroffers by the prosecution and the defense there are two broader categories that are being negotiated.[364] Those two categories are charge bargaining and sentence bargaining.[365] Charge bargaining is when the defendant will agree to plead guilty and in exchange the prosecution promises to drop reduce the severity of the defendant's charge.[366] Sentence bargaining is when the defendant will also agree to plead guilty and the prosecution promises to recommend a lesser sentence.[367] Ultimately, the judge makes the decision on how to punish the defendant if that defendant pleads guilty.[368] In other words, the judge may choose to not take the prosecutions' recommendation in sentencing or also may choose to not accept the guilty plea.[369] To avoid any risk a defendant generally will take the plea bargain in fear that a jury might find the evidence against them more incriminating.[370] With that said, an obvious issue raised here is that plea bargaining can cause an innocent person to be charged for something they did not do and it can coerce a defendant into a guilty plea out of fear.[371] Additionally, a defendant that is more violent or dangerous and that has actually committed the crime may walk away with a lesser more lenient sentence because they were giving a plea bargain.[372] It is argued that plea-bargaining is more economically efficient, and a clear benefit for the prosecution and for the criminal system because fewer cases go to trial.[373] This efficiency is said also to eliminate costs related to trial and the government benefits by a plea-deal,[374] but does this "efficiency" outweigh the possibility of putting an innocent person in jail?

The plea bargaining system of this country has been heavily criticized for the reasons stated above and because it gives a lot more authority and discretion to prosecutors when they are interrogating a

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[363] Bureau of Justice Assistance U.S. Dept. of Justice, Plea and Charge Bargaining. Introduction pg. 1.
[364] Petegorsky, *supra* note 362.
[365] *Id.*
[366] *Id.*
[367] *Id.*
[368] *Id.*
[369] *Id.*
[370] Bureau of Justice Assistance U.S. Dept. of Justice, Plea and Charge Bargaining. Introduction pg. 1.
[371] *Id.*
[372] *Id.*
[373] Petegorsky, *supra* note 362.
[374] *Id.*

defendant and giving the defendant their "options."[375] The question this raises is, although it is true that Rule 11 of the Federal Rules of Criminal Procedure states after a defendant enters a guilty plea under a plea bargain the court asks defendant if they understand the charges and if this plea is entered voluntarily,[376] how much of an investigation is done? Also, how thorough is that investigation? Statistics have shown that allowing a prosecutor to continue to have a lot more authority and discretion than they should when interrogating a defendant that is of a certain socioeconomic status, gender, race, and age have affected the charges in a plea bargain.[377] Statistics and studies have shown that Black defendants are less likely to receive a reduced charge compared to white defendants.[378] Moreover, studies have also shown that more Black defendants are incarcerated than white defendants. They receive longer prison and jail sentences as well.[379] The prosecutors, as stated above, have broad discretionary authority to make decisions regarding pleas deals and lessening charges of defendants in order to obtain guilty pleas.[380] After all, the prosecutor is the one to speak to defendant's counsel when it comes to creating a plea deal.[381] The disparities in sentencing and jail time in different racial groups often begins with that discussion, and too often the process will disfavor a Black defendant.[382] The statistics from Berdejo's study reveal prosecutors are more likely to offer reductions to white defendants than to Black defendants and Black defendants with no prior convictions were 25% less likely to get offered charge reductions than white defendants with no prior convictions.[383]

Plea bargaining denies the defendant the opportunity to see all of the evidence that the prosecution has.[384] Avis Buchanan, the director of the Public Defender Service for the District of Columbia,

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[375] Bureau of Justice Assistance U.S. Dept. of Justice, Plea and Charge Bargaining. Introduction pg. 2.
[376] *Id.*
[377] *Id*.
[378] *Id*.
[379] Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1213 (2018).
[380] *Id*.
[381] *Id*.
[382] *Id*. at 1200.
[383] *Id.*
[384] Christopher Wright Durocher, *The Rise of Plea Bargains and Fall of the Right to Trial*, AMERICAN CONSTITUTION SOCIETY (Apr. 4, 2018), https://www.acslaw.org/expertforum/the-rise-of-plea-bargains-and-fall-of-the-right-to-trial/.

stated that the defendant may get a more "favorable" bargain relative to what the defendant believes would be the charge for the crime, but then they are not able to factor in the exculpatory evidence that could potentially help their case; this often leads to defendants pleading guilty to crimes they did not commit.[385]

e. Plea Bargaining and The Brady Doctrine: Can't we all just get along?

Under *Brady v. Maryland* and *Kyles v. Whitley* all exculpatory evidence given to the prosecution must be included, otherwise the prosecution has abused their authority and discretion.[386] Furthermore, the Supreme Court has found that the principle behind the production of Brady Material must be extended to all federal prosecutors and it is their constitutional duty to, "volunteer exculpatory matter to the defense, even in the absence of specific request for Brady material."[387] How this relates to plea-bargaining and how it can create a bigger "mess" in the process of an interrogation and investigation is because, as stated above, the prosecutors are responsible for offering the plea-deal or plea-bargain to the defense.[388] In other words, prosecutors are handling the evidence while also negotiating with the defendant.[389] Prosecutors have full discretion when deciding to include or not include evidence.[390] This places the defendant in an unfair position during the negotiation process. The defendant does not see all of the evidence that they have and may very well accept a plea deal for a crime they did not commit, while the prosecution has evidence in their possession that would show otherwise.

Imagine being arrested for a crime and then investigated by the prosecutors handling all the evidence in the case. A prosecutor, who is in possession of exculpatory evidence that is probative as to a defendant's innocence, can frame their questions and their "story" of what happened based on the evidence they have. Even though they

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[385] *Id.*
[386] *Brady*, 373 U.S. at 86; *Kyles*, 514 U.S. at 428.
[387] Constitutional Duty of Federal Prosecutor to Disclose Brady Evidence Favorable to Accused, 158 A.L.R. Fed. 401 (1999).
[388] Berdejo, *supra* note 379.
[389] *Id.*
[390] *Id.*

know that the evidence in their possession may not conclusively demonstrate a defendant's guilt. Meanwhile, the prosecution still interrogates and harshly questions a defendant because they "believe" that the defendant committed the crime. The prosecution will then threaten the defendant with a long sentence and suggest they take a plea bargain deal now and plead guilty so that their jail time will be less than what it would be if they were eventually found guilty after a jury trial. This is not a pursuit of justice; it is a pursuit of convictions.

In a 2005 study, four college professors used college students as subjects in an experiment to test the psychology of plea bargaining deals for an innocent defendant.[391] The students were told that the "guilty" condition in the scenario was when they agreed to help another student after being explicitly told not to.[392] The "innocent" students were the students that were not approached for any help on the assignment.[393] Afterwards the guilty and innocent students were approached and all told that they were guilty of cheating on the assignment of multiple-choice questions that they were given.[394] The accused were offered plea deals, then told if they plead guilty they could leave.[395] If they did not take the deal the matter would be brought to the academic review board for further investigation.[396] The experiment showed that nearly all of the guilty students took the plea deal and approximately 46% of those students who were innocent also accepted the plea deal or were going to take the plea deal.[397] This study demonstrates the problem with plea bargains. Even an innocent person, who has done nothing wrong, is apt to take "a good deal" when told that the alternative is a lengthy sentence of incarceration.[398]

This research demonstrates how the relationship between authority and fear (whether it be jail or loss of opportunity) may induce one to accept responsibility for something they did not do. An innocent person may plead guilty if they believe cooperating will prevent them from severe punishment. One's freedom, possessions, and/or family

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[391] VANESSA A. EDKINS & LUCIAN E. DERVAN, PLEADING INNOCENTS: LABORATORY EVIDENCE OF PLEA BARGAINING'S INNOCENCE PROBLEM 16 (2012).
[392] *Id.*
[393] *Id.*
[394] *Id.* at 17.
[395] *Id.*
[396] *Id.*
[397] *Id.* at 18.
[398] *Id.*

may be more important to them than having a reputation for cheating. Likewise, a prosecutor, similar to the professors in the experiment, may persuade an innocent defendant into taking a plea deal by telling them that they will receive a lesser sentence if they take the deal now rather than be found guilty at trial and face a harsher punishment.

When analyzing the wording of what a plea bargain is, Carmody-Wait describes plea-bargaining as a "valued component of the criminal justice system," and that it can benefit both parties also saving valuable judicial resources.[399] A plea-bargain is generally meant to represent a compromise negotiated between the defendant and the "People."[400] It is understandable when a plea deal is offered to encourage a guilty defendant to confess in exchange for a lenient sentence in order to avoid the time and expense of a trial. But, when an innocent person pleads guilty, how is this justified? How does negotiating a guilty plea deal with an innocent person "save valuable judicial resources?" Releasing innocent people does not cost a dime.

Furthermore, Carmody-Wait explains that plea bargaining is meant to provide a prompt resolution of criminal proceedings, but how is rushing this process just?[401] Lastly, if plea bargaining is meant to save valuable resources and get through criminal proceedings quickly,[402] how would one know if the prosecution is not simply forcing a plea deal to speed up the process? Even further, how does speeding up the process equate to justice if an innocent person pleads guilty to a crime and goes to jail?

If an innocent person is persuaded to plead guilty out of fear of losing at trial and prosecutors are withholding exculpatory evidence, they are violating the Brady Doctrine.

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[399] 33 Carmody- Wait 2d § 182:32.
[400] *Id.*
[401] *Id.*
[402] *Id.*

f. Prosecutorial Misconduct in The Central Park Five Case: Brady, Who?

In order to tie the above issues of prosecution misconduct, police misconduct, and the misuse of the Brady Doctrine to the case of the Central Part Five, it would be helpful to address how the prosecutors in the Central Park Five case misused DNA evidence that could have aided in proving the innocence of the five boys when the case commended.

In the book *And the Blood Cried Out,* Harlan Levy discusses DNA evidence, exculpatory evidence in the courtroom, and the many discussions Levy has had with prosecutors in the past.[403] In the chapter, Inside the Central Park Jogger Trial, Levy discussed his conversations with Elizabeth Lederer.[404] Lederer called Levy to discuss the Central Park Case and discuss her concerns.[405] Lederer said to Levy, "I feel…like I've been kicked in the stomach," as Levy described that Lederer was always a very composed woman.[406] Levy revealed that Lederer was very upset that none of the DNA found on the jogger or at the crime scene matched any of the boys charged with the rape of this poor woman.[407] Lederer hoped the FBI would eventually find DNA evidence that would match one, if not all, of the boys to the crime.[408] She was distraught that none of the boy's DNA was found anywhere at the scene.[409] Levy explains how this new information affected them and made them question whether they had the right "guys" in jail.[410] Furthermore, Levy discussed that the prosecution eventually had the false testimony and statements of the boys claiming they were responsible for the rape.[411] Levy explains that when the DNA results came in none of it matched any of the five boys, Lederer discussed how they could essentially get around this problem because she believed those boys were responsible.[412] First, they hid the

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[403] LEVY, *supra* note 105.
[404] *Id.* at 59.
[405] *Id.*
[406] *Id.*
[407] *Id.* at 59-60.
[408] *Id.*
[409] *Id.*
[410] *Id.*
[411] *Id.* at 78.
[412] *Id.* at 79.

DNA testing results from the defendant's attorneys.[413] When it came to light that the prosecution withheld this exculpatory evidence, in violation of the Brady Doctrine, Lederer attacked the reliability of the DNA testing; she proposed other scenarios to explain why the DNA did not match any of the boys.[414] The possibility of Lederer having the wrong people in jail for the rape of the jogger was impossible to her and she persisted instead to look for alternative reasons, such as maybe the hospital that did the collection of semen did not have enough to match the boys semen to the semen found on the girl, or that the boys that raped her did not ejaculate on her or inside of her.[415] Additionally, Lederer attempted to convince the jury that the DNA evidence was in fact consistent with the guilt of the five boys; which of course was not true as she had stated to Levy in her conversation.[416]

What was so appalling about Harlon Levy's discussion about Lederer's actions was she knew those boys were not guilty of rape and she knew the DNA did not match; yet she persisted to prosecute them as if they were the rapists responsible and eventually put them in jail for a crime they did not commit.[417] She knew the DNA did not match; instead of looking for the culprit who did match the DNA Lederer decided to build a fallacious case against the five young teens.[418]

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[413] BURNS, *supra* note 4.
[414] LEVY, *supra* note 105, at 79.
[415] *Id*. at 79-80.
[416] *Id*. at 81.
[417] *Id*.
[418] *Id*.

g. Solutions

The discussions above highlight how both police and prosecutorial misconduct can lead to unjust prosecution of criminal defendants. There has to be a better way to ensure that fairness and justice are the goals of prosecutors, not convictions. Below are possible reforms and solutions the authors of this note believe could aid in avoiding innocent people from being wrongfully convicted.

First, educating children in schools. It is evident that the teens at the center of this case did not know their rights when being interrogated.[419] If there were to be a system of volunteers, even law students, that spoke to young individuals in high schools all over the country, especially in poor communities and communities of color, to tell them what their rights are, we could avoid many of them being pressured by police and prosecutors to confess to crimes they did not commit. This would be so that young adults and individuals are not afraid to simply follow what the police tells them to do because they believe they will help them or believe they will be punished for not doing what they tell them to. Often young individuals do not fully understand their rights and may require more of an explanation of their rights before they understand their rights.[420] Frequently, these young individuals do not know that they are able to request to have a parent or guardian present when being interrogated simply because they are minors.[421]

Moreover, continuing with the issue of police misconduct during interrogations of minors, all interrogations should be recorded to protect the rights of the individual, as well as their safety. This not only would create a less complicated system to monitor if individuals are having their rights violated by police officers, but also would help monitor the police themselves. If police officers knew that they were being taped they would refrain from treating the individual who is being interrogated in a dehumanizing way or disrespectfully.

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[419] *Id.*
[420] *Protecting Justice: Juveniles and the Coercive Environment of Police Interrogations*, 95 U. DET. MERCY L. REV. 517, 517 (2018).
[421] *Id.*

XIV. CONCLUSION

Every criminal defendant has a right to have their guaranteed constitutional protections preserved by police from the moment they attach and throughout the criminal adjudicative process; infringement of those most fundamental rights is violative of the Constitution.[422] Violations of such fundamental protections afforded by the Constitution exponentially quantify the probability that an innocent citizen will be unjustly convicted of a crime that they did not commit. There are 2.3 million people in prison in the United States.[423] It is estimated that between 2.3 and 5.0 percent of all prisoners in this country are innocent.[424] To put this in perspective, 1% would be equal to over 20,000 prisoners.[425] We can infer from these statistics that the ordeal the Central Park Five suffered was not an anomaly. Police misconduct is being documented to a greater degree today than any other time in history with the help of cell phones and social media. However, even with video proof of police abuse, actual convictions of police or prosecutors for official misconduct is almost nonexistent. The courts creation of the doctrine of qualified immunity continues to insulate police and prosecutors who engage in egregious and abusive conduct while dealing with alleged criminals.[426] It is our position that the doctrine of qualified immunity needs to be either amended or struck down in its entirety for the establishment of a tenable and sustainable pathway to justice for defendants in our country's criminal justice system. The constitutionality of the doctrine of qualified Immunity was up before the Supreme Court in 2020.[427] The Supreme Court voted not to grant certiorari to the case before the court.[428]

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[422] *Know Your Rights: A Guide to the United States Constitution* (Apr. 27, 2012), https://www.justice.gov/sites/default/files/usao-ne/legacy/2012/04/27/Civil%20Rights%20Book-NE-2.pdf.
[423] *How Many Innocent People are in Prison?*, THE INNOCENCE PROJECT (Dec. 12, 2011), https://innocenceproject.org/how-many-innocent-people-are-in-prison/#:~:text=A%20recent%20Mother%20Jones%20article,and%20experts%20in%20the%20field.&text=estimate%20is%20that%201%20percent,20%2C000%20people%2C%20are%20falsely%20convicted.
[424] *Id.*
[425] *Id.*
[426] 42 U.S.C. § 1983.
[427] Nina Totenberg, *Supreme Court Will Not Reexamine Doctrine that Shields Police in Misconduct Suits*, NPR (June 15, 2020), https://www.npr.org/2020/06/15/876853817/supreme-court-will-not-re-examine-doctrine-that-shields-police-in-misconduct-sui.
[428] *Id.*

As of the time of this writing there have been more than 2000 exonerations since 1989.[429] It is uplifting to know that so many innocent people are now free to enjoy the rest of their lives in freedom. But it is bittersweet. That number only reflects 2.0% of the estimated innocent people that are still in jail, most with no hope of ever returning to society. Many of those innocent people will die in jail. We, as a society, must do better.

[429] *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://innocenceproject.org/dna-exonerations-in-the-united-states/.