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Exonerations in the United States, 1989 – 2012

Report by the National Registry of Exonerations

June, 2012

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National Registry of Exonerations

This is the first Report from the **National Registry of Exonerations**, a joint project of the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law.

The Registry can be found at exonerationregistry.org. It includes detailed information on the 873 individual exonerations in the United States from January, 1989, through the end of February, 2012, that are the main subject of the Report that follows.

We will maintain this website on an ongoing basis, adding cases as we learn about them, both new exonerations that have not yet occurred and old ones that we do not now know about. Our current total is 901. We will issue periodic reports on the cases that are listed in the Registry.

We welcome corrections and suggestions of any sort. We especially welcome information about exonerations that have not come to our attention. One important conclusion of the Report is that there are many more exonerations than we know about. We hope that readers and visitors to the web site will let us know about cases that we have missed, and about errors or omissions in cases that we do report.

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The lion's share of the work of finding, researching, and coding cases – and a great deal of writing the summaries – was done by a group of wonderful University of Michigan law students and recent law graduates: Charles Armbrust, Amy Bruning, Ryan Bush, Stephanie Denzel, Allen Ginzburg, Tina Hoang, Ben Lawless, Karen Oprea, Michael Perry, Kristina Saleh, Scott Seagrave, Alex Shookhoff, Cameron Smith and Kevin Weber. Alexandra Gross gathered information and wrote summaries about many of the death row and shaken baby syndrome exonerations, and Edward Kennedy helped with better statistical analysis than we deserved.

Six months ago Maurice Possley took over major responsibility for investigating and reporting exoneration cases. We are very fortunate. He has contributed to this Report in many ways, including advising, editing and correcting – and as co-author of Section VI. We also had editorial comments and advice from Phoebe C. Ellsworth, Brandon Garrett, Alexandra Gross and Rob Warden; painstaking editing from Sean Karunaratne and Ted Koehler; and organizational assistance from Karen Rushlow that was practically perfect in every way. Rich Savitski did superb work creating the web site; Alexander Lee equaled him for graphic design.

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Exonerations in the United States, 1989 – 2012
Report by the National Registry of Exonerations

Samuel R. Gross & Michael Shaffer

"When one man dies it is a tragedy. When thousands die it's statistics."
Joseph Stalin, 1945[1]

I. Introduction

This report is about 873 exonerations in the United States, from January 1989 through February 2012. Behind each is a story, and almost all are tragedies.

> Edward Carter, a 19-year-old African American man, was convicted of the rape of a pregnant woman in Detroit in 1974 and sentenced to life in prison. Carter's conviction rested entirely on the cross-racial identification by the white victim. Approximately 30 years later, he sought DNA testing through a Michigan innocence project. A search revealed that the biological evidence that was collected at the time of the crime had been destroyed, but a police officer who was involved in the search became curious. He found fingerprints that had been lifted from the crime scene and on his own sent them to the FBI's Automated Fingerprint Identification System. The prints were matched to a convicted sex offender who was in prison for similar rapes committed at about that time in the same area. Based on this new evidence, Carter was released in 2010, after more than 35 years in prison.[2]

The tragedies are not limited to the exonerated defendants themselves, or to their families and friends. In most cases they were convicted of vicious crimes in which other innocent victims were killed or brutalized. Many of the victims who survived were traumatized all over again, years later, when they learned that the criminal who had attacked them had not been caught and punished after all, and that they themselves may have played a role in condemning an innocent person. In many cases, the real criminals went on to rape or kill other victims, while the innocent defendants remained in prison.

[1] David McCullough, TRUMAN 510 (2003).

[2] Exonerations that are discussed without specific references may be found in the National Registry of Exonerations.

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Some of the stories have villains; many do not. Few have happy endings.

> In 1985 a white student was abducted and raped by an African American man at Texas Tech University in Lubbock, Texas. Two weeks later the victim was shown six photographs of young African American men. Five were black and white side views; one was a color frontal shot of Timothy Cole, a 26 year old veteran who was studying at Texas Tech and who became a suspect because he talked to a detective near the scene of the abduction. The victim picked Cole's picture, identified him at a live lineup the next day, and testified against him at trial. Cole's brother and several friends also testified and swore that Cole was studying at home at the time of the crime. Cole was convicted in 1986 and sentenced to 25 years in prison. His appeal was denied.
>
> In 1995, Jerry Wayne Johnson, a Texas prisoner serving a 99-year sentence for two rapes, wrote to Lubbock County police and prosecutors that he had committed the rape for which Cole had been convicted. His letters were ignored. In 1999 Cole, who was severely asthmatic, died in prison. In 2000 Johnson wrote another letter confessing to Cole's crime to a supervising judge. It was summarily rejected. Eight years later, DNA tests obtained by the Innocence Project of Texas proved that Johnson was guilty of the rape and that Cole had been innocent. Cole was exonerated in an extraordinary posthumous court hearing in 2009, and pardoned by the governor of Texas in 2010.

Ten innocent defendants were exonerated after death, even though it is highly unusual to reconsider the guilt of defendants who are dead. Many more left prison with disabling injuries or diseases. Some died within a year or two of release, sometimes at their own hands. Others returned to prison for new crimes that they did commit. Almost all irretrievably lost large portions of their lives – their youth, the childhood of their children, the last years of their parents' lives, their careers, their marriages.

The worst part is that is that they are the fortunate few.

The 873 exonerations we analyze in this report are listed and described in the National Registry of Exonerations, which is maintained and updated on a regular basis. They are available at: exonerationregistry.org.

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These are not the only exonerations we know about. We also discuss a larger set: at least 1,100 convicted defendants who were cleared since 1995 in 12 "group exonerations," that occurred after it was discovered that police officers had deliberately framed dozens or hundreds of innocent defendants, mostly for drug and gun crimes.[3] The group exonerations do not appear on the National Registry. We have only sketchy information about most of these cases. For some of the scandals we can only estimate the numbers of exonerated defendants and know few if any of their names. Some of these group exonerations are well known; most are comparatively obscure. We began to notice them by accident, as a by-product of searches for individual cases. We have no doubt that there have been other group exonerations in the past 23 years that we have not spotted.

It is essential to put these numbers in context. No matter how tragic they are, even 2,000 exonerations over 23 years is a tiny number in a country with 2.3 million people in prisons and jails. If that were the extent of the problem we would be encouraged by these numbers. But it's not. These cases merely point to a much larger number of tragedies that we do not know about.

The most important conclusion of this Report is that there are far more false convictions than exonerations. That should come as no surprise. The essential fact about false convictions is that they are generally invisible: if we could spot them, they'd never happen in the first place. Why would anyone suppose that the small number of miscarriages of justice that we learn about years later – like the handful of fossils of early hominids that we have discovered – is anything more than an insignificant fraction of the total?

In any event, the exonerations we know about tell us something about the ones we have missed. Eighty-three percent of the exonerations in the Registry were in rape and homicide cases,[4] which together constitute about 2% of felony convictions,[5] but the problems that cause false convictions are hardly limited to rape and murder. For example, in 47 of the exonerations the defendants

[3] *See infra* Part VI.

[4] *See infra* Table 2.

[5] *E.g.*, MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2000 (2003), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=913.

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were convicted of robbery compared to 203 convictions for rape, even though there is every reason to believe that there are many more false convictions for robbery than for rape. For both rape and robbery, the false convictions we know about are overwhelmingly caused by mistaken eyewitness identifications[6] – a problem that is almost entirely restricted to crimes committed by strangers – and arrests for robberies by strangers are at least several times more common than arrests for rapes by strangers.[7] Why so comparatively few robbery exonerations? Because DNA evidence is the factual basis for the vast majority of rape exonerations, but DNA is hardly ever useful in proving the innocence of robbery defendants.

Even among rape and murder cases, only a small minority of false convictions end in exoneration. A quarter of murder exonerees were sentenced to death (101/409), and nearly half of all homicide and sexual assault exonerees were sentenced to death or life imprisonment (345/721). But overall, very few convicted murderers are sentenced to death, and the great majority of rape defendants plead guilty and receive sentences of several years in prison.[8]

Why do so few rape and murder convictions with comparatively light sentences show up among the exonerations? Most innocent defendants with short sentences probably never try to clear their names. They serve their time and do what they can to put the past behind them. If they do seek justice, they are unlikely to find help. The Center on Wrongful Convictions, for example, tells prisoners who ask for assistance that unless they have at least 10 years *remaining* on their sentences, the Center will not be able to help them because it is overloaded with cases where the stakes are much higher.

Finally, there is the matter of blind luck. To return to the case of Edward Carter: What are the odds that someone in Carter's position would be cleared? Consider the pitfalls:

What if the real rapist had not left his fingerprints at the scene? Or if the prints from the crime scene, like the biological evidence, had been destroyed? Or never collected? Or if the true

[6] *See infra* Table 13.

[7] Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 529-31 (2005).

[8] DUROSE & LANGAN, *supra* note 5.

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criminal's prints were not in the FBI database? Or if the police officer who sent the prints to the FBI had not done this extracurricular work? What if Carter had given up and not sought DNA testing after thirty years in prison? What if he had never heard of DNA? What if Carter had pled guilty and been sentenced to 10 years as part of a plea bargain? What if he had been released on parole after 20 or 25 years, or had died in prison at the age of 50 – would anybody have cared enough to reconsider his case?

Many of the exonerated defendants we know about are the beneficiaries of equally improbable chains of happenstance. For each, there are many other unknown innocent defendants whose convictions remain undisturbed.

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II. The Cases

1. The Definition of "Exoneration"

We study exonerations to learn about false convictions. Exonerations and the processes that produce them are interesting in themselves, but they are most important as the best source of information we have about the accuracy of our system of criminal adjudication, and the only source of direct evidence about the error we most want to avoid: convicting the innocent.

The only false convictions that we know about are those for which evidence that was not presented at time of conviction proves that the convicted defendant is innocent. But who judges that proof? The procedure for convicting a defendant of a crime is set by law: unless the defendant pleads guilty, he must be convicted at a trial before a judge or a jury by proof beyond a reasonable doubt. There is no parallel procedure for deciding that a convicted defendant is innocent.

Defendants who are convicted at trial can appeal – an option that is generally unavailable to the great majority of convicted defendants who plead guilty – but most appeals are limited to claims that the procedure at trial was faulty. The defendant may not present new evidence and the appellate court does not review the accuracy of the trial court's judgment. A defendant who wins on appeal is not declared innocent; in most cases, he just gets a chance to go to trial again. As a result, almost all the exonerations that we know about take place outside the framework of ordinary criminal appeals.[9]

We do not claim to be able to determine the guilt or innocence of convicted defendants. In difficult cases, nobody can do that reliably. That's the central problem of the criminal justice system and the underlying cause of all mistaken convictions: In many cases we just don't know whether a defendant is guilty or innocent, before trial or after. For our purposes, the best we can do is to rely on the actions of those who have the authority to determine a defendant's legal guilt.

[9] Most exonerated defendants have their convictions vacated by courts at some point, but that almost always occurs in some form of "collateral review" or "extraordinary relief" proceeding after the process of ordinary appellate review has run its course. *See generally* Brandon Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008).

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"Exoneration," as we use the term, is a legal concept. It means that a defendant who was convicted of a crime was later relieved of all legal consequences of that conviction through a decision by a prosecutor, a governor or a court, after new evidence of his or her innocence was discovered.

We do not include any case in which there is an official determination that the defendant is not guilty of the charges in the original conviction but did play some role in the crime and may be guilty of a lesser crime that involved the same conduct. For example, a defendant who is acquitted of murder on retrial but convicted of robbery for the same event has not been exonerated. We also exclude any case in which a defendant pled guilty to any charge that is factually related to the original conviction, regardless of how minor the charge he pled to and regardless of the strength of the evidence of the defendant's innocence. We exclude any case in which a conviction was vacated and charges dismissed for legal error without new evidence of innocence – even if the conviction was reversed for insufficient evidence to prove guilt beyond a reasonable doubt. And we exclude all cases in which there is unexplained physical evidence of guilt, such as unexplained contraband in the possession of a defendant, or identifying physical trace evidence.

2. Who's Exonerated, and by What Procedure

All told, we know of 873 individual exonerations from January 1989 through February 2012. For these exonerees:

- 93% were men (816/873) and 7% were women (57/873).[10]
- We know the race of the defendants in 92% of the cases (802/873):
  - 50% were black (399/802),
  - 38% were white (303/802),
  - 11% were Hispanic (86/802), and
  - 2% were Native American or Asian (14/802).

[10] Because of this lopsided distribution, we generally refer to exonerated defendants using male pronouns.

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- 8% pled guilty (71/873) and the rest were convicted at trial – 87% by juries and 8% by judges.
- 37% were cleared at least in part with the help of DNA evidence (325/873).
- 63% were cleared without DNA evidence (548/873).
- Almost all had been in prison for years; half for at least 10 years; more than 75% for at least 5 years.
- As a group, the defendants had spent more than 10,000 years in prison for crimes for which they should not have been convicted – an average of more than 11 years each.[11]

As a procedural matter, these exonerations occurred in several ways; in some cases, in more than one way:

Pardons: In 113 cases, governors (or in some states, other government officers or bodies) issued pardons based on evidence of the defendants' innocence, including 41 cases of defendants whose charges had previously been dismissed, and three who had been acquitted on retrial by a jury or a judge.[12]

Dismissals: In 673 cases, criminal charges were dismissed by courts, generally on motion by the prosecution, after new evidence of innocence emerged (not counting those in which the defendant was later pardoned).

Acquittals: In 76 cases, the defendants were acquitted on retrial on the basis of newly presented evidence that they were not guilty of the crimes for which they were originally

[11] This is a conservative estimate of the direct consequences of these wrongful convictions. We have not counted time spent in custody before conviction. Nor have we included time spent on probation or parole, or time on bail or other forms of supervised release pending trial, retrial, or dismissal, even though all of these statuses involve restrictions on liberty – some mild, some onerous.

[12] Under the Texas Wrongful Imprisonment Act (the "Tim Cole Act"), for example, an exonerated defendant may need a pardon even after a dismissal or an acquittal in order to be eligible for compensation for wrongful incarceration. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 103.001 (2011).

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convicted, mostly by juries (at least 67 cases), occasionally by judges (at least four cases).[13]

Certificates of Innocence: In a small but growing number of cases – 11 to date – courts have issued "certificates of innocence," "declarations of wrongful imprisonment," or similar judgments of innocence.[14] (In one case, the defendant had already received an executive pardon.)

Posthumous Exonerations: Ten defendants received posthumous exonerations; two of them also received a judicial declaration of innocence.

3. Exonerations Found and Exonerations Missed

Exonerations are unlikely, uncommon and unrepresentative of the mass of invisible false convictions. But what about the exonerations themselves – aren't they conspicuous public events? And as a result, don't we have a nearly full count of exonerations?

Unfortunately, not at all.

In 2004, a group of researchers at the University of Michigan Law School released a report entitled *Exonerations in the United States, 1989 through 2003*.[15] That study – the "2003 Report" – listed 340 exonerations over the 15-year period it covered. It was, at the time, the only general study of exonerations in the United States in what might be called the modern era, which began with the first DNA exonerations in 1989.

The 2003 Report acknowledged that it was incomplete. This report is more comprehensive and as a result provides better evidence about what we don't know. We have located quite a few cases that were missed in the 2003 Report because they did not make a splash in the media and

[13] In several cases, we know that an exonerated defendant was acquitted at retrial but not whether it was a jury or bench trial.

[14] *See, e.g.*, 735 ILL. COMP. STAT. 5/2-702 (2012) (detailing Illinois's procedure for filing a petition for a certificate of innocence).

[15] *See* Gross et al., *supra* note 7.

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were not the product of work by innocence projects or other organizations with law reform agendas, but we know of no systematic method to identify low visibility exonerations. In some cases, we only learned about them through personal contacts; as best we can tell, we have only scratched the surface.

For example, Edward Carter's case[16] got zero attention from the media – no news stories, no blogs, nothing. It produced no written court opinions. We heard about it from colleagues of the attorney who represented Carter because it occurred in southeast Michigan, where much of the work of constructing this Registry has taken place. If it had happened in Indiana, we would never have learned of it.

The low-profile cases that we have found are more varied than the exonerations that make headlines or can be found on organizational websites. The data for this report include 155 previously unknown exonerations from 1989 through 2003, the period covered by the 2003 Report. As a group, these missed cases differ from the ones that were covered in the 2003 Report in several ways. For example, a third were for crimes other than homicide or rape (51/155) – compared to 4% for the 2003 Report – and 14% (22/155) involved convictions for non-violent crimes, compared to 1% of those previously reported.

This suggests that the exonerations we don't know about are disproportionally cases of less severe crimes than rape and murder, and less extreme punishments than those we have found. If so, it may be that the great majority of exonerations in the United States do not involve murder or rape – or DNA evidence – are not the work of innocence projects, and receive little or no attention.

4. Limitations

There are two major problems in using exonerations to study false convictions: misclassification, and underinclusion.

[16] *See supra* Part I.

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(i) Misclassification

Exonerations are an imperfect proxy for false convictions. There's no way around that. This imprecision cuts both ways. Inevitably, a few exonerated defendants are guilty of the crimes for which they were convicted, in whole or in part – just as some patients who are diagnosed with cancer are in fact cancer free – and many others, who have not been exonerated, were falsely convicted. The real issue for any research project is the frequency of these errors.

(a) Guilty defendants misclassified as innocent. Our criteria for exoneration are designed to identify cases of convicted defendants who are factually innocent of the crimes for which they were convicted. Our legal system places great weight on the finality of criminal convictions. No more than 1-2% of criminal convictions are reversed on ordinary "direct" appeals,[17] and very few of the exonerations we know about occur in that process. Direct appeal is generally limited to a review of the record that was made in the trial court, but for a case to count as an exoneration there must have been evidence of innocence that was not presented at trial. After direct appeal, courts and prosecutors are exceedingly reluctant even to reconsider cases, let alone reverse convictions. When they do – and it's rare – it's usually because of a compelling showing of error. As a result, in the great majority of these exonerations there is, at the end of the day, no dispute about the innocence of the exonerated defendants.

Even so, some state officials continue to express doubts about the innocence of exonerated defendants, sometimes in the face of extraordinary evidence. For example, when Charles Fain was exonerated by DNA in Idaho in 2001, after 18 years on death row for a rape murder, the original prosecutor in the case said, "It doesn't really change my opinion that much that Fain's guilty."[18] This attitude is understandable. After working hard for years to investigate and convict a person of a heinous crime, it can be difficult to recognize that one was wrong from the start,

[17] For example, in 2007-08, approximately 82,823 defendants were convicted in federal courts, and fewer than 931 had convictions reversed entirely or in part. MARK MOTIVANS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2008 – STATISTICAL TABLES, at Tables 4.2, 6.2 (2010), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1745. A study of appeals in the intermediate court of appeal in California "in the fiscal year ending June 30, 1974" found that 4.8% of appeals by criminal defendants resulted in complete reversals, Thomas Y. Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 7 AM. BAR FOUND. RES. J. 543, 551 (1982) – but the great majority of criminal convictions are by guilty plea, and do not involve appeals.

[18] Raymond Bonner, *Death Row Inmate is Freed After DNA Test Clears Him*, N.Y. TIMES, Aug. 24, 2001, at A11.

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especially if the defendant lied to the police, or confessed (however implausibly), or has a criminal record.

Because of the great difficulty in making judgments about innocence, we rely on official decisions, with all their imperfections. We do not attempt to reach an independent judgment on the factual innocence of each defendant in our data. That is not our purpose. Instead, we look at overall patterns in the exonerations that have accumulated in the past 23 years and hope to learn something about the causes of false convictions and the operation of our criminal justice system in general.

If a defendant's guilt is officially confirmed, he is excluded from this list, regardless of earlier decisions. Such a defendant no longer counts as exonerated. We know of one such case: Timothy Hennis, who was convicted of a triple murder in North Carolina in 1986 and acquitted on retrial in 1989. Hennis was included in the 2003 Report, but excluded from the current database because he was reconvicted for the same crimes in 2010 in a military court.[19]

There are, no doubt, a small number of other guilty defendants who have not been identified among the hundreds of exonerations that we have studied. Unfortunately, we don't know who they are.

(b) Innocent defendants misclassified as guilty. On the other hand, we do know about a substantial number of convicted defendants who are very likely innocent – in some cases unquestionably innocent – but who have not been exonerated. For example:

- In 1978 Curtis McGhee and Terry Harrington were convicted of murder in Council Bluffs, Iowa, on the basis of a confession from a supposed accomplice. In February, 2003, the Iowa Supreme Court reversed the convictions because the police had concealed exculpatory evidence concerning another suspect. By then

[19] *See* John Schwartz, *In 3rd Trial, Conviction in Murders From 1985*, N.Y. TIMES, Apr. 8, 2010, at A13. The successive prosecutions in military court did not violate the Fifth Amendment's prohibition against double jeopardy because of the "dual sovereignty" doctrine. The Federal government and the state of North Carolina are considered separate "sovereigns" and each may prosecute a single defendant for the same offense without violating the Fifth Amendment. Heath v. Alabama, 474 U.S. 82, 88-89 (1985).

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the confessor, and all other key prosecution witnesses, had recanted their testimony. McGhee decided to play it safe. He took a deal, pled guilty to second degree murder and was released. We have not included McGhee in our data – nor any other defendant who pled guilty in order to be released, regardless of the evidence of the defendant's innocence – despite the fact that in 2007 a federal court ruled that McGhee's guilty plea was obtained by prosecutorial fraud.[20] On the other hand, Terry Harrington refused to take a similar deal and got a dismissal when the state's star witness at the original trial recanted once more; his case does count as an exoneration.[21]

In the process of locating exonerations for the Registry, we compiled files on at least 44 cases of defendants whose convictions were vacated and who might have been exonerated, but who ultimately accepted plea bargains to avoid the risk of conviction on retrial. We ignored many similar cases in which it was immediately apparent that the defendants pled guilty rather than risk reconviction.

- In 1990, David Parker was convicted of murdering Prentis Reid in East St. Louis in 1986. The conviction rested on testimony from police officers that three witnesses had identified him as the killer. At trial, however, one of those witness – who was wounded in the attack, and first identified Parker in a hospital – told the jury that he signed a statement identifying Parker only to stop the police from hounding him while he was recovering. A second witness also recanted his out-

[20] *See* McGhee v. Pottawattamie County, 475 F. Supp. 2d 862, 910 n.19 (S.D. Iowa 2007) (quoting McGhee v. Pottawattamie County, No. 4:05-cv-00255, slip op. at 16 (S.D. Iowa Feb. 6, 2007)).

[21] The McGhee case is not unique. For example, brothers Juan and Henry Johnson were convicted of murder in Chicago in 1991, based on three eyewitness identifications. Their convictions were reversed by the Illinois Appellate Court in 2002, after which they were offered a deal: plead guilty and be sentenced to time already served. Henry took the deal and pled guilty. Juan did not; he was exonerated in February 2004 when a jury found him not guilty of murder. A federal jury later awarded Juan Johnson $21 million in damages after the three eyewitnesses revealed that they were coerced by a police detective to identify the both Johnson brothers. Henry Johnson, who was not exonerated, did not benefit from this discovery.

The case of Kerry Max Cook is a famous example of a defendant who has not been exonerated despite overwhelming evidence of innocence. In 1978, he was convicted and sentenced to death for the brutal 1977 murder, rape and mutilation of a 21-year-old secretary in Tyler, Texas. In 1994, and after many appeals, a reversal, and a hung jury, he was convicted and sentenced to death again. Two years later the Texas Court of Criminal Appeals overturned his second conviction because of egregious prosecutorial and police misconduct. In 1999, facing the risk of another conviction and another death sentence, Cook pled no contest to a reduced charge of non-capital murder and was released. He had spent 21 years in prison, on and off death row, and had been repeatedly and viciously assaulted. Two months after his plea, DNA tests identified semen found on the victim's panties. It came from her boyfriend, an alternative suspect, and not from Cook, as the prosecution had argued. There's little doubt that Cook is innocent, but he was not exonerated. *See Kerry Max Cook*, THE PLEA, FRONTLINE http://www.pbs.org/wgbh/pages/frontline/shows/plea/four/cook.html (last visited May 7, 2012); *Reasonable Doubt?*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/additional-innocence-information#Released (last visited May 7, 2012).

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> of-court identification and testified that the police said they would charge him with the murder if he didn't implicate Parker. The third witness testified that he was beaten until he agreed to sign his statement. There was no other evidence linking Parker to the crime, but the jury convicted him and he was sentenced to 30 years in prison. In 1992, the Illinois Appellate Court vacated the judgment and dismissed charges because these coerced and recanted identifications were insufficient evidence to support a criminal conviction.[22] Nonetheless, we do not count Parker's case as an exoneration because the decision to dismiss the charges was not influenced by any evidence of innocence that was not presented at trial.

Parker's case is far from unique.[23] We know of at least 16 defendants whose convictions were reversed for insufficient evidence, and who are very likely innocent, but who are not included in the list of exonerees.

We have made no attempt to systematically search for innocent defendants who have not been exonerated. We have, however, considered and rejected dozens of convicted defendants who are clearly or likely innocent but who do not meet our criteria for exoneration. That's an inevitable consequence of setting a standard for inclusion that is strict enough to exclude almost all guilty defendants.

(ii) Underinclusion

The main problem with using exonerations to study false convictions is not misclassification of cases we know about, but the much larger groups of cases we know nothing about.

What we know about false convictions – and what we don't know – can be described as series of

[22] People v. Parker, 600 N.E.2d 529 (1992).

[23] For example, In September 1991, in the course of an aggressive interrogation by a Michigan State Police sergeant, Dawn McAllister – a mentally disturbed woman with a history of delusions – confessed that she had suffocated her infant son two years earlier. There was no evidence that the child died of suffocation. At the time, two doctors had determined that the cause of death was Sudden Infant Death Syndrome (SIDS). They repeated that finding in testimony at trial, and added that the body showed none of the usual signs of intentional suffocation. Nonetheless, in 1992 a Michigan jury convicted McAllister of second degree murder. Two year later, the Michigan Court of Appeals dismissed the charges because, in the absence of any evidence separate from the confession that a murder had actually occurred, there was insufficient evidence to sustain a verdict of guilt. In fact, of course, the evidence points overwhelmingly to innocence – but because the dismissal was entered without consideration of new evidence, the case does not count as an exoneration. *See* David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817 (2003).

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concentric circles, based on the seriousness of the underlying crimes.

At the center are rape and murder. The exonerations we have identified are primarily murder and rape cases. But there are rape and murder exonerations we don't know about – perhaps a majority – and there are many other innocent rape and murder defendants who have not been exonerated. Death sentences, for example, produce exonerations at nine times the rate for all homicide convictions.[24] Could it be that death sentenced prisoners are nine times more likely to be innocent than all convicted homicide defendants? If the error rate for death sentences and other homicide cases are similar, that must mean that 90% or more of false convictions in ordinary homicide cases are never detected – or if they are, that we don't know about them.

The next circle out from rape and murder convictions includes other very serious crimes of violence. We have found a substantial number of exonerations in such cases, mostly for robbery, but they only highlight the larger number of false convictions that we have missed. For example, as we mentioned, there is every reason to believe that several times more defendants are falsely convicted of robbery than of rape, but without an equivalent to DNA evidence for robbery cases, only a tiny fraction are exonerated.

Out beyond murder, rape and robbery, our ignorance deepens further. Felonious assault cases, for example, account for nearly half of all violent felony convictions in the United States,[25] but just over 1% of known exonerations (11/873). Is this because wrongful convictions are much less common for assault than for more serious crimes? Or is it because, in the absence of DNA evidence, innocence is extremely difficult to prove? Or because sentences for assault are comparatively short, so there is less time to secure the defendants' release and less incentive to

[24] From 1992 through 2006, state courts convicted an estimated total of 152,018 defendants of homicide. Bureau of Justice Statistics, Criminal Justice Sourcebook, http://www.albany.edu/sourcebook/tost_5.html. The database records 156 exonerees who were convicted of homicide during these years, so the estimated rate of known exonerations among all homicide convictions is 0.10%. During this same period, 3,451 persons were sentenced to death in the United States. http://www.albany.edu/sourcebook/pdf/t600022010.pdf . The Registry includes 31 exonerees sentenced to death who were convicted between 1992 and 2006. The estimated rate of exonerations among those sentenced to death in that period is thus 0.90%.

[25] DUROSE & LANGAN, *supra* note 5.

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try? Or because the assault exonerations that occur are not widely reported? Or is it a combination of these reasons and perhaps others? We don't know.[26]

These problems only become worse as we move beyond violent felonies, for which defendants are often sentenced to years of imprisonment, to less severe but more common criminal convictions. About 95% of all felony convictions in the United States are based on guilty pleas. The main reason defendants plead guilty is to obtain relatively light sentences. It works: 60% of convicted felons in state courts receive probation or are sentenced to local jails for terms of two years or less, usually much less.[27] But only 8% of the exonerations we collected involved guilty pleas (71/873), and they are atypical guilty pleas: three-quarters were pleas to murder or rape; more than 85% of the exonerees who pled guilty were sentenced to at least four years in prison; and nearly two-thirds were sentenced to 10 years or more. We know very little about false convictions based on guilty pleas, even for rape and murder, and next to nothing about false convictions of defendants who plead guilty to lesser felonies. And yet the number of undetected false convictions among these cases must dwarf the number for more extreme crimes.

And then there are misdemeanors. Roughly five times as many defendants are convicted of misdemeanors as of felonies in the United States, and the guilty plea rate for misdemeanors is even higher than for felonies.[28] For many if not most misdemeanor defendants, the biggest risk is not punishment after conviction but pre-trial detention until the case is resolved. In that context, the legal process is focused on dispatching cases as quickly as possible rather than evaluating the evidence for and against guilt. In some courts, misdemeanor defendants are arraigned, plead

[26] Death sentences were 0.085% of all prison sentences in the United States from 1977 through 2004 (Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. OF EMPIRICAL LEGAL STUD. 927, 947 n.46 (2008)), but they account for 11.57% of the exonerations in our data (101/873). In other words, the exonerations we know about are more than 130 times more common for death sentences than for all prison commitments. Could it be that capital trials are 130 times more likely to produce false convictions than other serious felony cases? Consider: If death sentences are "merely" ten times as likely to be miscarriages of justice as other felony convictions, that means that more than 90% of falsely convicted defendants who are sentenced to prison are never exonerated.

[27] DUROSE & LANGAN, *supra* note 5.

[28] Alexandra Natapoff, *Misdemeanors*, 85 S. CALIF. L. REV. 34 n.141 (forthcoming 2012.

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guilty and are sentenced en masse.[29] Plainly this is a setting in which mistakes are common – but virtually none of those mistakes are ever corrected by exoneration.

In summary, for homicide and sexual assault, the crimes for which known exonerations are most common, we probably miss many exonerations – and we certainly miss most of the underlying false convictions. For other felonies, we only know about a scattering of exonerations; for misdemeanors, essentially none. These are blank spaces on our map of false convictions: we know they must happen, but we don't see them.

[29] Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008; Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011); Natapoff, *supra* note 28, at 36 n.151-52.

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III. Basic Patterns

1. Exonerations by Crime

The 2003 Report divided the exonerations it listed into four crime categories: *Murder* (including a few manslaughter convictions), *Rape* (including other sexual assaults), *Other Crimes of Violence*, and *Drug and Property Crimes*.[30] In Table 1 we compare the cases in the 2003 Report and those in the National Registry, using those classifications.

Table 1: Exonerations by Category of Crime

CRIME	1989 - 2003 REPORT	1989 – 2012 REPORT
Murder (including manslaughter)	**60% (205)**	**48% (416)**
Rape (and other sexual assaults)	**36% (121)**	**35% (305)**
Adult Victims	**30% (103)**	**23% (203)**
Minor Victims	**5% (18)**	**12% (102)**
Other Crimes of Violence	**3% (11)**	**11% (94)**
Drug and Property Crimes	**1% (3)**	**7% (58)**
TOTAL	**100% (340)**	**100% (873)**

The data for the 2003 Report consisted primarily of exonerations that were comparatively easy to locate: DNA exonerations,[31] death row exonerations,[32] and, less reliably, other murder exonerations. Our database reflects an effort to find other types of exonerations. We have succeeded, in part. The main indication is that the proportion of exonerations that do not involve homicide or sexual assault has increased from 4% to 17%. At the same time, the proportion of murder cases has dropped substantially, from 60% to 48% as we were able to gather information about more exonerations for less conspicuous crimes.

[30] We coded cases with multiple charges by the most serious crime for which the defendant was convicted using the following descending scale: murder, manslaughter, attempted murder, rape, other violent crimes, non-violent crimes. For example, if the exonerated defendant was convicted of murder and rape we classified the exoneration as a murder; if he was convicted of robbery and rape we classified it as a rape.

[31] *See Know the Cases*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/ (last visited May 4, 2012).

[32] *See Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-and-death-penalty (last visited May 2, 2012).

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The overall proportion of exonerations in sexual assault convictions remained largely unchanged from the 2003 Report, 35% as compared to 36%, but the composition of cases within that group has changed. Cases with adult victims decreased from 30% to 23% while the proportion of exonerations in child sex abuse cases doubled, from 5% to 12%. Part of the reason for this change is better information about the epidemic of child sex abuse hysteria cases that swept across the country in the late 1980s and early 1990s and resulted in convictions of more than seventy defendants, the great majority of whom were certainly innocent.[33] The 2003 Report had access to spotty information about most of these cases and listed only a single such case as an exoneration. In this Report, with much better information, we cover 48 child sex abuse hysteria exonerations.

Homicides and sexual assaults still dominate the list, with 83% of the total (721/873). And as before, among homicide exonerations, death sentences stand out: they add up to 12% of all exonerations despite the fact that fewer than 0.1% of prisoners who are sent to prison go there under sentence of death.[34] But we have located many more exonerations than the 2003 Report, and nearly ten times as many in cases other than rape and murder. That makes it possible to divide the cases into finer crime categories, and to look for patterns within those categories. We have enough exonerations to separate convictions for child sex abuse from those for sexual assaults on adult victims; as we'll see, they are on the whole quite different types of cases. We can also look separately at exonerations for robbery – which make up half of the exonerations for crimes of violence other than homicide or sexual assault (47/94). And we can to begin to learn something about exonerations for non-violent crimes. See Table 2.

[33] *See infra* Part V.

[34] *See* Gross & O'Brien, *supra* note 26, at 942.

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Table 2: Exonerations by Crime, 1989 – 2011

CRIME	EXONERATIONS
Homicide	**48% (416)**
Murder	47% (409)
Death sentences	12% (101)
Other murder convictions	35% (308)
Manslaughter	1% (7)
Sexual Assault	**35% (305)**
Sexual assault on an adult	23% (203)
Child sex abuse	12% (102)
Other Crimes of Violence	**11% (94)**
Robbery	5% (47)
Attempted murder	2% (18)
Assault	1% (11)
Arson	0.7% (6)
Kidnapping	0.6% (5)
Child Abuse	0.2% (2)
Supporting Terrorism	0.2% (2)
Miscellaneous	0.3% (3)
Non-Violent Crimes	**7% (58)**
Drug crimes	3% (25)
Tax/Fraud/Bribery & Corruption	1% (12)
Gun Possession	0.6% (6)
Theft/Stolen Property	0.5% (4)
Solicitation/Conspiracy	0.3% (3)
Sex Offender Registration	0.2% (2)
Destruction of Property	0.2% (2)
Miscellaneous	0.5% (4)
TOTAL	**100% (873)**

2. Exonerations over Time

The number of known exonerations per year increased rapidly from 1989 through 1999, from 11 to 40 – a pattern we also observed, with smaller numbers, in the 2003 Report. Since 2000 the rate of exonerations has stabilized, with considerable year-to-year variation, in the range from 45 to 66. Throughout this period, exonerations that include DNA evidence have been outnumbered by those that do not. From 2000 through 2010 (the last year with reasonably complete data), DNA

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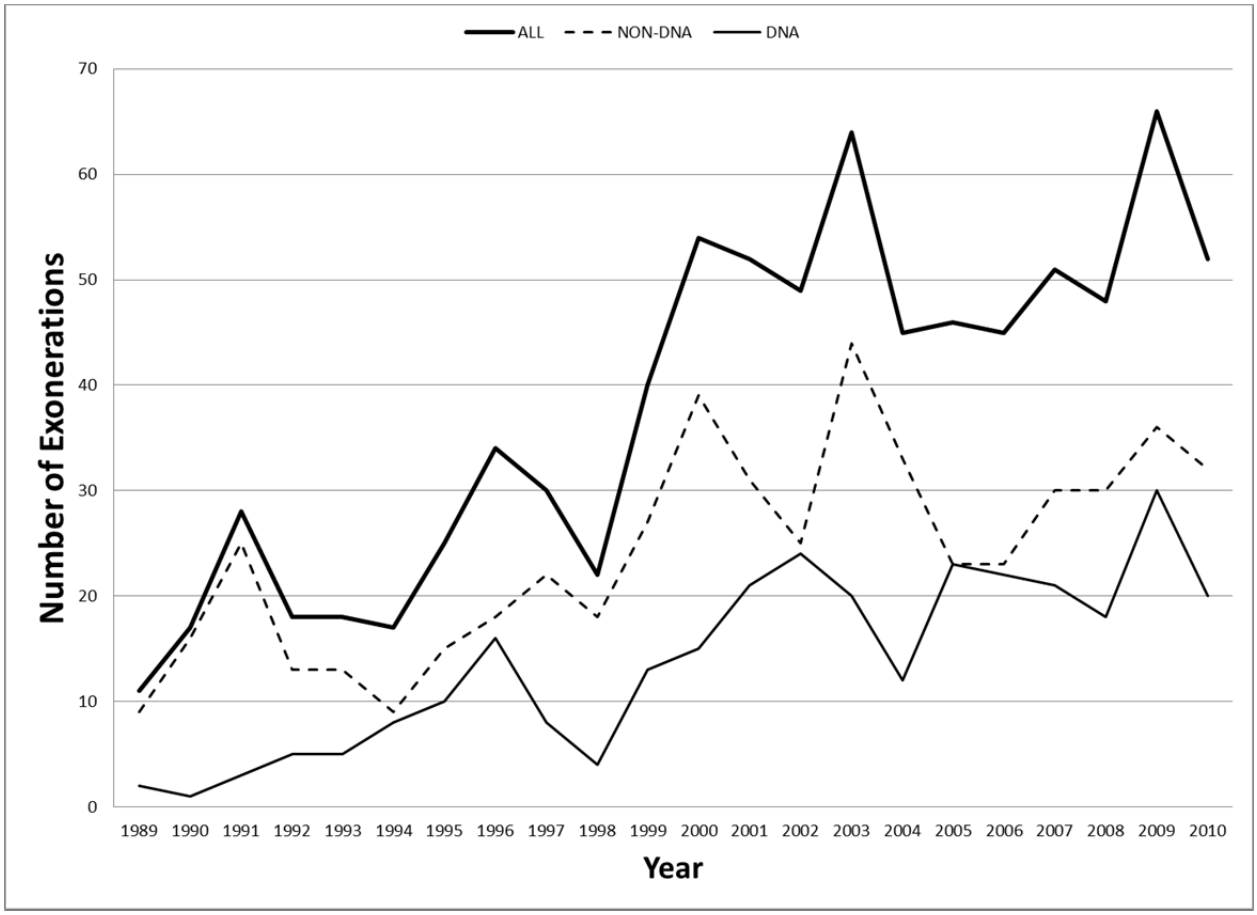
exonerations constitute 40% of the total (226/572), an average of 21 DNA exonerations and 31 non-DNA exonerations a year since the beginning of the 21st century.[35] See Figure 1.

Figure 1: Number of Exonerations by Basis, Over Time



[35] The actual numbers of exonerations by year and by basis are tabulated below. The numbers of cases for 2012 is obviously preliminary. So too are the numbers for 2011, because some exonerations that occurred in that year did not come to our attention in time to be coded by March 1, 2012.

BASIS	'89	'90	'91	'92	'93	'94	'95	'96	'97	'98	'99	'00	'01	'02	'03	'04	'05	'06	'07	'08	'09	'10	'11	'12	TOTAL
DNA	2	1	3	5	5	8	10	16	8	4	13	15	21	24	20	12	23	22	21	18	30	20	19	5	**325 (37%)**
Other	9	16	25	13	13	9	15	18	22	18	27	39	31	25	44	33	23	23	30	30	36	32	17	0	**548 (63%)**
TOTAL	11	17	28	18	18	17	25	34	30	22	40	54	52	49	64	45	46	45	51	48	66	52	36	5	**873 (100%)**

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3. DNA and Non-DNA exonerations

Historically, DNA has been used primarily in rape exonerations.[36] Sixty-three percent of all sexual assault exonerations since 1989 included DNA evidence, but that total is misleading. DNA was a factor in only 23% of the child sex abuse exonerations (23/102), but it contributed to 84% of all the adult sexual assault exonerations (170/203). In contrast, DNA evidence was used in 30% of the homicide exonerations, and in 10% of exonerations for non-homicidal crimes of violence other than rape (9/94). See Table 3.

Table 3: Proportion of Exonerations Based on DNA, by Category of Crime

Homicide	**30% (123/416)**
All Sexual Assaults	**63% (193/305)**
Sexual Assault on an adult	**84% (170/203)**
Child sex abuse	**23% (23/102)**
Other Crimes of Violence	**10% (9/94)**
Drug and Property Crimes	**0% (0/58)**
ALL CASES	**37% (325/873)**

There has been, however, a shift over time in the frequency of DNA evidence in homicide exonerations: From 1989 through 2003, 19% of homicide exonerations were based at least in part on DNA (44/227), compared to 42% of homicide exonerations since the beginning of 2004 (79/189). Another way to look at this shift is to consider the proportion of all DNA exonerations that involve specific types of crimes. Homicides were 28% of the first 155 DNA exonerations, from 1989 through 2003, and 47% of the next 170 DNA exonerations, from 2004 through February 2012. Since 2008, 55% of DNA exonerations have been homicide cases (51/92) – a pattern that is due in part to a succession of 5 multi-defendant DNA murder exonerations,

[36] Almost three-quarters of the DNA exonerations in the 2003 Report were sexual assault cases (105/144), and 87% of the rape exonerations listed in that report were based on DNA. DNA also played an important but secondary role in homicide cases, contributing to 19% of the murder exonerations in that report. All of the DNA exonerations in the 2003 Report were homicide or sexual assault cases.

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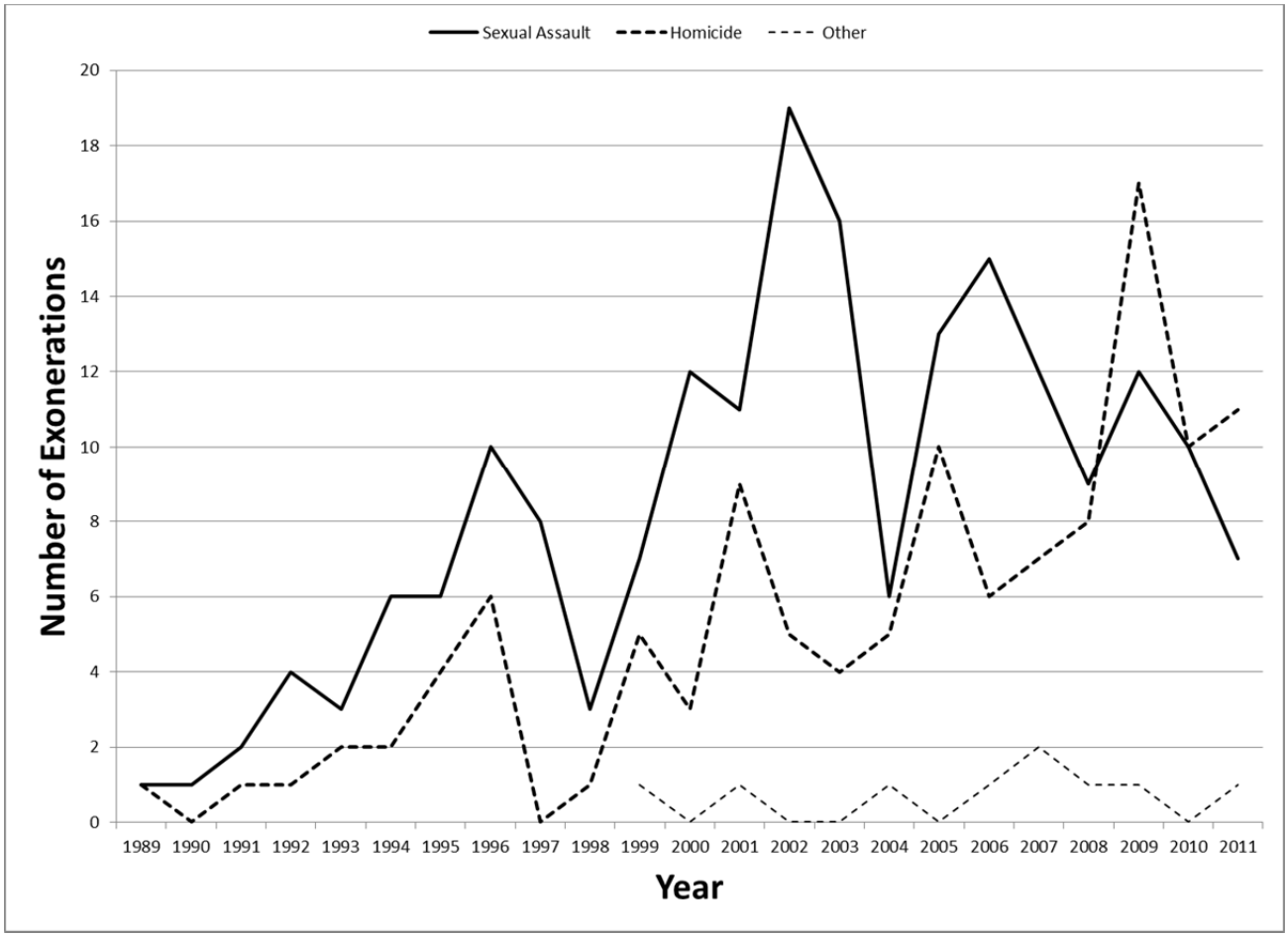
totaling 20 individual defendants.[37] At least for the moment, murder rather than rape has become the leading crime for DNA exonerations.

Figure 2: DNA Exonerations by Crime, Over Time



This shift has not, for the most part, reduced the centrality of rape to DNA exonerations. In 53% of the DNA homicide exonerations in our data (65/123), the defendant was also convicted of a sexual assault and in another 22% of DNA murder exonerations, there was a rape for which the defendant was not convicted, usually because it was not charged (27/123). In other words, DNA exonerations are increasingly about rape-murder rather than rape alone. Of 44 DNA exonerations since the beginning of 2010, 32 included sexual assaults (15 rape-murders, 15 rapes, and two child sex abuse cases), and 12 did not (11 murders and one robbery).

[37] Jonathan Barr and four codefendants, Illinois, 2011; Harold Richardson and three codefendants, Illinois, 2012; Phillip Bivens and two codefendants, Mississippi, 2010-11; James Dean and five codefendants, Nebraska, 2008-2009; Kenneth Kagonyera and Robert Wilcoxson, North Carolina, 2011.

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DNA exonerations are still concentrated almost exclusively among the most serious and uncommon violent crimes. Ninety-seven percent of the DNA exonerations that we know about (316/325) are for homicides or sexual assaults. Six of the nine non-homicide non-rape DNA cases in our data occurred since 2006, but even in that period they make up less than 5% of DNA exonerations. Recently, a lot of attention has focused on the potential of DNA as an investigative tool for property crimes, from burglary to auto theft.[38] Perhaps DNA is gaining a foothold in pre-trial investigations of such cases, but so far it seems to have had little impact on reinvestigating property crimes after conviction.[39]

4. Time to Exoneration

With a few exceptions, exonerations take a long time. The overall average is 11.9 years from conviction to exoneration, 13.0 years from arrest. The range is huge. At the low end, Shaun Deckinga was exonerated on July 1, 1993, in St. Louis County, Minnesota, three weeks after he was convicted and sentenced to 10 years in prison, when the real robber was caught and confessed. At the other extreme, we have Jerry Pacek, who confessed to a murder in Brackenridge, Pennsylvania in 1958, at age 13, after 17 hours of interrogation. He was convicted as an adult, served 10 years, and was exonerated in 1991, at age 55, because a year earlier, a former FBI agent became interested in the case, reinvestigated it 41 years after the fact, and proved Pacek's innocence.

In general, the time to exoneration is longer for more serious crimes. The median time from conviction ranges from four years for nonviolent crimes to 13.3 years for sexual assaults and 12.9 years for homicides (Table 4, left column). The likely explanation is that there is much less incentive to work to exonerate a defendant once he has been released, and those convicted of lesser crimes are released sooner than those convicted of major violent crimes.

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[38] Kenworthey Bilz, *Self-Incrimination Doctrine is Dead; Long Live Self-Incrimination Doctrine: Confessions, Scientific Evidence, and the Anxieties of the Liberal State*, 30 CARDOZO L. REV. 807, 809-810 (2008); Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CAL. L. REV. 721 (2007).

[39] Of the 9 DNA exonerations in which the defendants were not convicted of homicide or sexual assault – 2 kidnappings, 5 robberies and 2 attempted murders – 3 (the kidnapping and an attempted murder) included uncharged rapes, and the DNA was derived from semen; one (a robbery) involved blood; and 5 (4 robberies and the other attempted murder) were based on DNA from perspiration or "touch DNA," skin cells shed on contact with an object.

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DNA exonerations also take longer than non-DNA exonerations; the median time from conviction is 14.9 years compared to 7.8 years. This is true for homicide cases, where the median time is 15 years with DNA and 11.9 years without; for sexual assault cases, where the comparable numbers are 14.6 years and 7.1 years; and for child sex abuse exonerations, where the median times are 17 years with DNA and 5.9 without DNA. See Table 4 (middle columns).

Table 4: Median Time From Conviction to Exoneration In Years

		DNA Cases	Non-DNA Cases	ALL CASES
Homicide	(416)	15.0	11.9	12.9
Sexual Assault	(203)	14.6	7.1	13.3
Child Sex Abuse	(102)	17.0	5.9	8.1
Robbery	(47)	*	5.4	5.0
Other violent	(47)	*	7.5	7.7
Nonviolent	(58)	*	4.0	4.0
ALL CRIMES	(873)	14.9	7.8	10.7

* 5 or fewer cases per cell

To explain why DNA exonerations in general take so long we need to look at changes over time. DNA exonerations weren't always the slow ones. The first DNA murder exoneration was obtained by David Vasquez, in Arlington County, Virginia in January 1989, four years after he was convicted. The second DNA exoneration for rape, Edward Green's in Washington, D.C. in 1990, came within months of his conviction. That has changed. Non-DNA exonerations take longer now than they did 20 years ago, an average of 12.1 years from 2007 through 2011 compared to 7.4 years for 1989-1993 – an increase of 63%. DNA exonerations, however, take far longer than they used to. The average time from conviction to a DNA murder exoneration went from 6.8 years in 1989-1993 to 17.9 years in 2007-2011, an increase of over 160%. For DNA rape exonerations, the change was from to 6.9 years to 21 years, an increase of more than 200%. See Figures 3, 4 & 5.

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Figure 3: Time to Exoneration: All Crimes (Five-Year Moving Average)

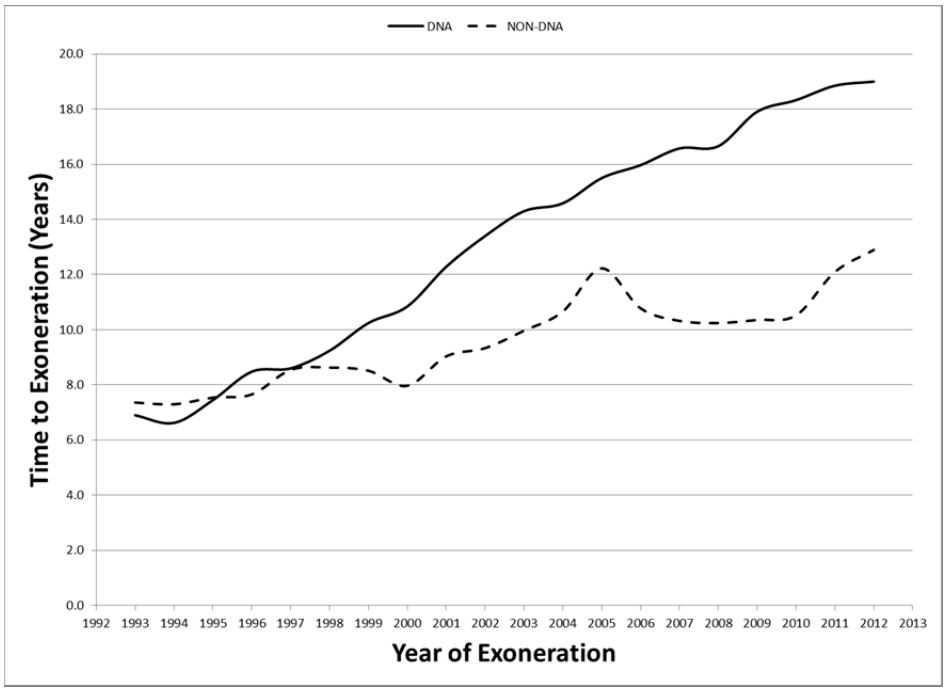

Figure 4: Time to Exoneration: Homicide (Five-Year Moving Average)

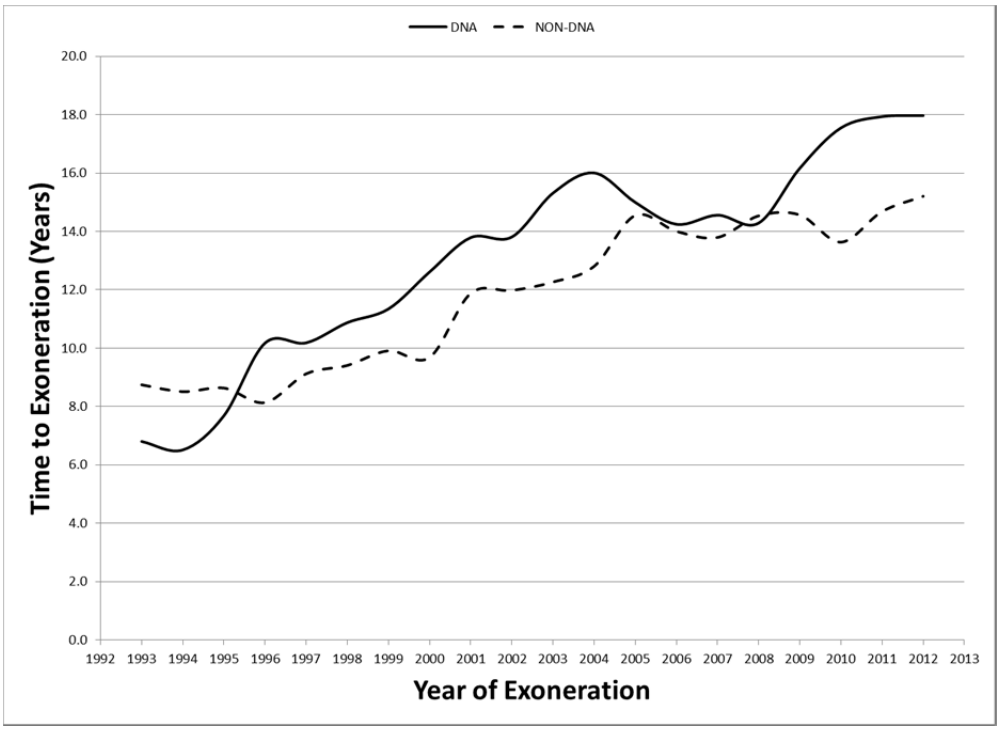

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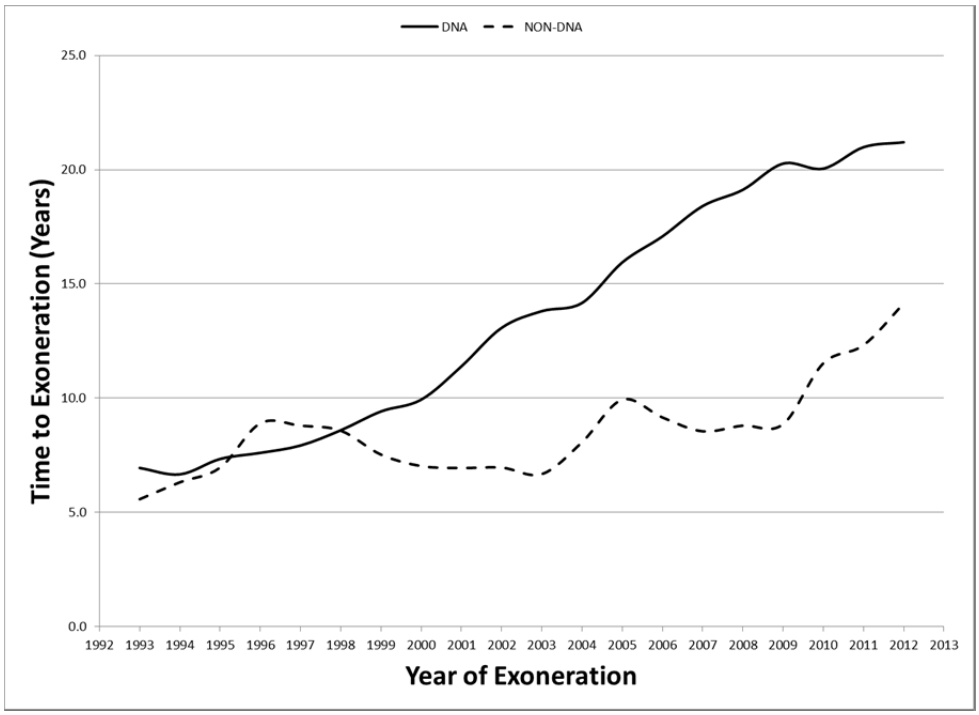
Figure 5: Time to Exoneration: Sexual Assault (Five-Year Moving Average)



It's easy to explain the huge increase over the years in the time from conviction to exoneration in DNA cases. In 1989, when post-conviction DNA testing was in its youth, hardly any cases included potentially exonerating biological samples that had been tested before trial. Not surprisingly, many of the DNA exonerations in that period were cases with convictions that were only a few years old. These were the low-hanging fruits: recent convictions with DNA evidence that had not yet been tested. Twenty years later, there are very few recent cases with probative DNA that was not tested before trial. As a result, there are undoubtedly fewer recent false convictions in rape cases and in homicide cases that include rapes. But there are still many innocent defendants who were convicted of rape and murder 20 to 40 years ago, and if sufficiently probative biological evidence can be found, they can still be exonerated by DNA.

The aging of the pool of cases from which DNA exoneration are drawn helps explain why murder (typically rape-murder) rather than rape is now the primary crime for DNA exonerations. Innocent murder defendants are much more likely to be in prison 25 to 30 years after conviction than innocent rape defendants, and they and their supporters are more likely to continue to press for their release.

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It's not as clear why the non-DNA exonerations that we know about also take longer from conviction to exoneration in recent years than they did twenty years ago (although, by a much smaller amount than the DNA exonerations). There has been a proliferation of innocence projects across this time period, and an increase in the resources that are available to correct wrongful convictions. Perhaps these new resources are devoted primarily to investigating innocence claims by prisoners with long sentences who have been in prison for long periods of time. Or perhaps the reason is simply that the average prisoner behind bars today has been there longer than the average prisoner in 1990.

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5. Gender

Ninety-three percent of the exonerees we know about are men. This is not surprising. Very few women are convicted of serious crimes in the United States,[40] and especially not the violent felonies that draw long prison sentences and dominate the list of known exonerations.[41]

Superficially, the few female exonerees look like the much larger group of males: 42% were convicted of murder, compared to 48% for the men; and 37% were convicted of sexual assaults, compared to 35%. Equal proportions of each gender were convicted of other violent crimes (10%) and nonviolent crimes (7%). See Table 5.

This similarity breaks down, however, when we consider the ages of the alleged victims. Of 21 female exonerees in sexual assault cases, all were convicted of child sex abuse – compared to only 29% of male sexual assault exonerees (81/284). Of 24 female exonerees convicted of murder, seven – 29% – were charged with killing victims under 14 years old, compared to 11% of male murder exonerees (44/392). Two additional female exonerees were convicted of child abuse. In one case the supposed victim died; in the other, he suffered severe brain damage.

Table 5: Exonerations by Gender and Crime

CRIME	MALE (816)	FEMALE (57)
Homicide	48%	42%
Sexual Assault	25%	-
Child Sex Abuse	10%	37%
Child Abuse	-	4%
Other Crimes of Violence	10%	10%
Non-Violent Crimes	7%	7%
TOTAL	100%	100%

[40] *See Characteristics of Felony Offenders Convicted in State Courts*, Sourcebook of Criminal Justice Statistics Tbl. 5.45.2002 (2002), *available at* http://www.albany.edu/sourcebook/pdf/t5452002.pdf (showing that women accounted for 17% of state court convictions for violent, drug, weapons, and property offenses in 2002).

[41] *Id.* (showing that women committed 11% of violent offenses in 2002, including 10% of homicides, 3% of sexual assaults, and 8% of robberies).

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Women are heavily concentrated among the small minority of exonerations in which no crime was committed, as opposed to the great majority in which there was a crime but someone else did it. Overall, 54% of the female exonerees (31/57), but only 12% of the men (96/816), were convicted of crimes that never occurred. In 84% of the no-crime cases with female exonerees, the women were convicted of violent crimes against children (26/31), including 43% of all child sex hysteria exonerations (20/46) and four of the five shaken baby syndrome exonerations. All told, 53% of female exonerees were convicted of violent crimes against children, compared to 17% (141/816) of male exonerees.

6. Race

We know the race or ethnicity of the defendant for 92% of the exonerations (802/873), and the distribution is lopsided: half of all the exonerees are black, 38% white and 11% Hispanic. See Table 6 (we have highlighted the cells in which a particular racial group has majority of the exonerated defendants for a specific crime).

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Table 6. Exonerations by Race Of Defendant and Type of Crime*

	White	Black	Hispanic	Other	TOTAL
Homicide (385)	37%	49%	13%	2%	101%
Sexual Assault (196)	32%	**63%**	5%	-	100%
Child Sex Abuse (93)	**69%**	25%	5%	-	99%
Attempted Murder (17)	12%	**59%**	24%	6%	101%
Robbery (39)	18%	**64%**	18%	-	100%
Other Violent Crimes (24)	33%	46%	8%	13%	100%
Drug Crime (20)	10%	**60%**	30%	-	100%
Other Non-Violent Crimes (28)	**57%**	29%	11%	4%	101%
ALL CRIMES (802)	38%	50%	11%	2%	101%

* Table limited to cases with data on race of defendant. Percentages may not add up to 100% due to rounding.

It's no surprise that black defendants are heavily overrepresented among exonerees: they are heavily overrepresented among those arrested and imprisoned for violent crimes and drug crimes. But the disproportions we see are greater than what one would expect.

In 2000, for example, 46% of state and federal prisoners were black; in 2008, that proportion was 38%.[42] Using either bench mark, black exonerees, at 50%, are somewhat overrepresented among all exonerees – but this disparity is unevenly distributed. In 2008, 43% of homicide prisoners were black,[43] only slightly fewer than the 49% of homicide exonerees who were black. For robbery, the difference is greater: 52% of prisoners and 64% of exonerees were black; for drug

[42] Heather C. West & William J. Sabol, *Prisoners in 2009*, BUREAU OF JUSTICE STATISTICS BULLETIN (2010), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2232.

[43] *Id.*

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crimes, 45% of prisoners and 60% of exonerees were black (but the number of cases is small).[44] Finally, for sexual assault, the difference is huge: 25% of prisoners, but 63% of exonerees were black.

On the other hand, 69% of child sex abuse exonerations and 57% of exonerations for non-violent crimes other than drugs had white defendants.

7. Exonerations by Jurisdiction

The 873 exonerations in the Registry come from 43 states, the District of Columbia, the Commonwealth of Puerto Rico, 19 federal districts, and the military. They are very unevenly distributed by state, and especially when broke down by county. This suggests we are missing many cases – both innocent defendants from jurisdictions where exonerations are vanishingly rare, and exonerated defendants whose cases have received little or no public attention.

(i) Exonerations by state

Two-thirds of the exonerations in the 2003 Report (226/340) were concentrated in 10 states. We see the same level of concentration in our current list. Excluding Federal cases, the top 10 states again account for 64% of all exonerations (535/834). See Table 7.

[44] *Id.* A disproportionate number of drug exonerees are also Hispanic, 30% compared to 20% of drug prisoners, but the total number of Hispanic drug exonerees is only 6, so this proportion is not reliable.

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Table 7: Exonerations by State, Top Ten

1989 – 2003 (N = 340)		1989 – 2011 (N = 873)	
1. Illinois	54	1. Illinois	101
2. New York	35	2. New York	88
3. Texas	28	3. Texas	84
4. California	27	4. California	79
5. Louisiana	17	[*Federal*	*39*]
6. Massachusetts	16	5. Michigan	35
7. Florida	15	6. Louisiana	34
8. Pennsylvania	13	7. Florida	32
9. Oklahoma	11	8. Ohio	28
10. Missouri	10	9. Massachusetts	27
		10. Pennsylvania	27

The number of exonerations is associated with use of the death penalty. Eight of the top 10 in 2003, and seven on the current list, had large death row populations for all or most of the time during which these exonerations occurred[45] – a factor that may affect the number of false convictions as well as the number of exonerations.[46] The rankings also seem to be influenced by the location of major long-standing innocence projects in the two top states: the Center on Wrongful Convictions in Chicago and the Innocence Project in New York City. These organizations may have increased both the total number of exonerations in those states and the proportion of exonerations that become widely known. The number of known exonerations is also partly determined by the nature of the mass media: exonerations in major media markets like New York, Los Angeles, and Chicago are more likely than those in small towns and rural areas to be reported in media that are archived in national databases.

There are two new entries in the top half of the current list on Table 7. There were no federal exonerations in the 2003 Report, but there are now 39; and Michigan, which had 4 exonerations

[45] All death sentences in Illinois were commuted in 2003, and the death penalty was ultimately abolished in 2011. *Illinois*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/illinois-1 (last visited May 7, 2012). New York also abolished capital punishment, in 2007, but even before, it had not had substantial number of death sentences since 1967, when state law was changed to greatly narrow the availability of capital punishment. *See New York*, DEATH PENALTY INFO.CTR., http://www.deathpenaltyinfo.org/new-york-1 (last visited May 7, 2012).

[46] Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 L. & CONTEMP. PROBLEMS 125 (1998).

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in the 2003 Report, now has 35, an 11-fold increase. Both changes are due, in large part, to better research rather than a change in the actual rate of exoneration. This is most clear for Michigan, where much of the work of assembling this Registry was done. Michigan, it seems, now has the same advantage for spotting exonerations that Illinois and New York had eight years ago: because it is a center for work on false convictions, exonerations are more likely to be discovered than those that occur elsewhere.

In part, the rankings in Table 7 reflect population. The six most populous states – in order of size: California, Texas, New York, Florida, Illinois, and Pennsylvania – are among the top 10 states on both lists. But population is only part of the story. Five of the top 10 states in raw number of exonerations, including two of the most populous (Illinois and New York), remain on the list when we switch to exonerations per capita (controlling for population), while the two with the largest populations, California and Texas, drop off the table to numbers 23 and 11 respectively.[47] Compare Table 8 to Table 9.

[47] The number of exonerations per capita is standardized. The raw number is divided by the national average (0.283 per 100,000). Thus the standardized rate per capita for the nation as a whole is 1.000, by definition; the rate for Illinois, for example, means that Illinois had 2.785 times more exonerations per capita than the national average; and the rate for Florida means that Florida had 0.6 times the national average of exonerations per capita. All rankings are based on the 2010 United States census, which reported a national population of 308,745,538.

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Table 8: Number of Exonerations
Top Ten States

	Number of Exonerations	Rate per Capita, Standardized
1. Illinois	101	2.785
2. New York	88	1.606
3. Texas	84	1.182
4. California	79	0.750
5. Michigan	35	1.253
6. Louisiana	34	2.653
7. Florida	32	0.602
8. Ohio	28	0.859
9. Massachusetts	27	1.459
9. Pennsylvania	27	0.752
NATION	873	1.000

Table 9: Exonerations Per Capita
Top Ten States

	Rate per Capita, Standardized	Number of Exonerations
1. Illinois	2.785	101
2. Louisiana	2.653	34
3. New York	1.606	88
4. Mississippi	1.550	13
5. Massachusetts	1.459	27
6. Oklahoma	1.414	15
7. Washington	1.315	25
8. Wisconsin	1.306	21
9. Michigan	1.253	35
10. Alabama	1.184	16
NATION	1.000	873

(ii) Exonerations by county

Almost all criminal prosecutions in the United States are handled by county rather than state authorities. There are 3,028 counties in the United States, ranging from Los Angeles County, California, population 9,818,605, to Loving County, Texas, population 82.[48] We know of exonerations in only 301 counties. Most of the largest counties have at least one exoneration, but 156.8 million people, more than half the population of the United States, live in counties in which there have been no reported exonerations at all, and another 12.5 million live in counties with more than a million people but with only one or two known exonerations since 1989.

In Table 10 we display the top 10 counties in the country by number of exonerations. In Table 11 we show the top counties in exonerations per capita, for counties with populations over

[48] COUNTY GOVERNMENT OVERVIEW, NAT'L ASS'N OF CNTYS. (2010), *available at* http://www.naco.org/research/pubs/documents/county_management_and_structure/research_county_management_and_structure/county_government_overview_june2010.pdf. The total number of counties includes a small number of cities that are not part of any county but rather handle the governmental functions of counties themselves. All references to county populations in the next three paragraphs are based on information from the National Association of Counties website.

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300,000.[49] (If we included smaller counties, the list would consist entirely of counties with fewer than 100,000 people that happened to have a single exoneration or a group of several.)

Table 10: Number of Exonerations, Top Ten Counties

	Number of Exonerations	Rate per Capita, Standardized
1. Cook IL (Chicago)	78	5.311
2. Dallas TX	36	5.377
3. Los Angeles CA	23	0.829
4. Kern CA	20	8.426
5. Suffolk MA (Boston)	19	9.308
6. Wayne MI (Detroit)	18	3.497
7. Kings NY (Brooklyn)	16	2.260
8. Bronx NY	15	3.831
9. New York NY (Manhattan)	14	3.123
10. New Orleans LA	13	13.374
NATION	873	1.000

Table 11: Exonerations Per Capita, Top Ten Counties with Population over 300,000

	Rate per Capita, Standardized	Number of Exonerations
1. New Orleans LA	13.374	13
2. Suffolk MA (Boston)	9.308	19
3. Kern CA	8.426	20
4. Jefferson LA	6.542	8
5. Dallas TX	5.377	36
6. Cook IL (Chicago)	5.311	78
7. Clark WA	4.158	5
8. District of Columbia	4.115	7
9. Bronx NY	3.831	15
10. Wayne MI (Detroit)	3.497	18
NATION	1.000	873

Some counties, individually or in small groups, dominate the exonerations in their states. Cook County has more exonerations than any other county in the country, and accounts for more than three-quarters of the exonerations in Illinois (78/101). But Cook County has 5.2 million inhabitants, 40% of the population of Illinois; as a result it's in the 6th position on the list of exonerations per capita. The five counties that make up New York City – including three of the top ten in numbers of exonerations (Kings, Bronx and New York) – have 63% of the New York State exonerations (56/88) and 40% of the state population. Suffolk County has 70% of Massachusetts exonerations (19/27), and with population of only 722,000, 12% of the total for the state, it ranks second in exonerations per capita. New Orleans, with 13 exonerations and a

[49] *See supra* note 47 for a description the standardized rate of exonerations per capita. For the purpose of this analysis, we treat the District of Columbia as a county.

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population 344,000, ranks first; it and neighboring Jefferson Parish between them have more than 60% of Louisiana's exonerations (21/34) but only 18% of the people.

Some comparisons within states are revealing. Dallas County, for example has 36 exonerations, second only to Cook County, while Harris County (Houston) with 70% more people, has only 12 exonerations. Much of the credit for the Dallas exonerations goes to a unique institution. In 2007, Craig Watkins, the newly elected District Attorney of Dallas County, created a Conviction Integrity Unit that has received national attention for actively seeking out, investigating and exonerating innocent defendants.[50] The District Attorney's Conviction Integrity Unit is an essential reason why Dallas had 19 exonerations from 2007 through 2011 – more than any other county in the country in that period – but it does not explain why Dallas already had 17 exonerations at the end of 2006, before Watkins took office, while Harris County had only 6.

The most important reason for the high exoneration rate in Dallas is the county crime lab, the Southwestern Institute for Forensic Sciences (SWIFS). SWIFS has a policy that is rare among American crime labs: it retains all biological samples it tests rather than destroying them or returning them to the police agencies that sent them.[51] As a result, post-conviction DNA samples are more likely to be found in Dallas than in Houston – or for that matter, than in almost any county in the country. Unsurprisingly, 21 of the 36 Dallas exonerees were freed by DNA. If the biological samples in their cases had been processed by the Houston Police Department Crime Lab rather than by SWIFS most of them would probably still be in prison.[52]

Perhaps the most telling comparisons are between counties with substantial numbers of exonerations and nearby ones with essentially none. Table 12 lists the 16 counties with more than 900,000 people but no exonerations, or just one.

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[50] *See, e.g.*, Eugene Robinson, Editorial, *A Test of DNA and Courage*, WASH. POST, Jan. 7, 2011, at A19; Jennifer Emily, *In First Year as Dallas County DA, Watkins Shifts Office's Focus from Winning to Justice*, DALLAS MORNING NEWS, Dec. 30, 2007.

[51] James Ragland, *Dallas County's Long-Preserved Evidence Key in Exonerations*, DALLAS MORNING NEWS, July 2, 2008.

[52] *See Never-Ending Scandal; Will HPD's Crime Lab Ever Get Fixed?*, HOUSTON CHRON., Aug. 18, 2011, at B8; Rosanna Ruiz & Robert Crowe, *HPD Again Shuts Down Crime Lab's DNA Unit*, HOUSTON CHRON., Jan. 26, 2008, at A1.

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For example, Alameda County, California, with 1.5 million people, had no exonerations, and Contra Costa County, directly to the north with over a million people, had one. On the other hand Santa Clara County, bordering Alameda on the south with 1.8 million people, had 10 exonerations. Very likely the presence of the Northern California Innocence Project in Santa Clara County increased the number of exonerations there. Still, it's hard to believe that Alameda County, which has an excellent Public Defender's Office and many more violent crimes than Santa Clara,[53] has had no exonerations in the past 23 years. More likely there have been at least several exonerations in Alameda County – and additional ones in Contra Costa as well – but without a local innocence project they didn't receive enough attention for us to find them.

Table 12: Counties with More than 900,000 People and No More than One Exoneration

County	Population	Number of Exonerations
Riverside CA	2,189,641	1
San Bernardino CA	2,035,210	
Bexar TX	1,714,773	
Alameda CA	1,510,271	
Palm Beach FL	1,320,134	1
Oakland MI	1,202,362	1
Hennepin MN	1,152,425	1
Orange FL	1,145,956	1
Fairfax VA	1,081,726	
Contra Costa CA	1,049,025	1
Salt Lake UT	1,029,655	1
Honolulu HI	953,207	
Mecklenburg NC	919,628	1
Pinellas FL	916,542	1
Bergen NJ	905,116	
Wake NC	900,993	1

[53] In 2009, for example 11,189 violent crimes were reported in Alameda and 5,013 in Santa Clara County. *Reported Crimes and Crime Rates*, CALIF. DEP'T OF JUSTICE, OFFICE OF THE ATT'Y GEN., *available at* http://ag.ca.gov/cjsc/statisticsdatatabs/CrimeCo.php .

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There are many similar comparisons in other states.[54] Why, for example, is there one exoneration in Palm Beach County, Florida (1.3 million), while neighboring Broward County (1.8 million, with a comparable crime rate) has 9 exonerations?[55] Why are there no exonerations in Bexar County, Texas, population 1.7 million, but 8 exonerations in Travis County – just 85 away miles with a population of one million and a lower crime rate?[56] There are only two plausible answers to these questions: In many counties innocent defendants are rarely exonerated; and many exonerations that do occur remain under the radar.

A complete list of exonerations by state and county is available with this report.

[54] For example, Oakland County, a suburb of Detroit, has one exoneration, while nearby Wayne County has 18. That could be because Wayne is more populous than Oakland, 1.8 million to 1.2 million, and includes the troubled City of Detroit, with its high crime rate. But Macomb County, another suburban county due east of Oakland, has only 841,000 people and 7 exonerations.

[55] *See Crime in Florida – Palm Beach County*, FL. DEP'T OF LAW ENFORCEMENT, *available at* **Error! Hyperlink reference not valid.**; *Crime in Florida – Broward County*, FL. DEP'T OF LAW ENFORCEMENT, *available at* http://www.fdle.state.fl.us/content/getdoc/1a5f9112-9838-4d65-ad21-f5538f61f484/Broward.aspx.

[56] *See* TRAVIS CNTY. CRIM. JUSTICE PLANNING, COMPARISON OF CRIMINAL JUSTICE STATISTICS OF THE SIX LARGEST URBAN COUNTIES IN TEXAS 1 (2008) (showing that in 2007, Bexar County, Texas had 28,034 convictions for murder, rape, robbery, assault, and burglary, while Travis County had 13,706 convictions for the same crimes).

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IV. Some Causes of False Convictions

1. Overview

There is a well-known list of factors that are associated with exonerations: eyewitness misidentification, false confession, perjury, false or misleading forensic evidence, official misconduct. We see all these factors on display in these cases. See Table 13.

Table 13: Exonerations by Crime and Contributing Factors

	Mistaken Witness Identification	Perjury or False Accusation	False Confession	False or Misleading Forensic Evidence	Official Misconduct
Homicide (416)	27%	**64%**	25%	23%	**56%**
Sexual Assault (203)	**80%**	23%	8%	**37%**	18%
Child Sex Abuse (102)	26%	**74%**	7%	21%	**35%**
Robbery (47)	**81%**	17%	2%	6%	26%
Other Violent Crimes (47)	**51%**	**43%**	15%	17%	**40%**
Non-Violent Crimes (58)	19%	**52%**	3%	3%	**55%**
ALL CASES (873)	**43%**	**51%**	15%	24%	**42%**

We have highlighted those factors that appear in at least a third of the exonerations for a particular category of crimes. For all exonerations, the most common causal factors are perjury or false accusation (51%), mistaken eyewitness identification (43%), and official misconduct (42%).

(i) Overall patterns

We focus primarily on false or misleading evidence by lay witnesses: mistaken eyewitness identifications, perjury or false accusation, and false confessions. To understand the impact of these witnesses, we do our best to separate *mistakes* from *lies*.

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The mistakes we discuss are primarily *mistaken eyewitness identifications*. We discuss some causes of errors based mistaken identifications: suggestive identification procedures, cross-racial identification, and the absence of corroboration by evidence of other sorts.

Most of the lies we have identified are also eyewitness identifications. We see two types: *deliberate misidentifications* of defendants as the perpetrators of real crimes and false accusations that the defendants committed *fabricated crimes*.

A smaller group of cases involve a very different sort of lie: *false confessions,* usually as a result of coercive interrogations. We found false confessions in 15% of all cases, but the impact of this problem also extends to cases in which an actual or potential codefendant confessed and implicated the exonerated defendant as well. All told, in nearly a quarter of the exonerations the defendant either falsely confessed or was falsely accused by a codefendant who confessed.

The frequency of these factors varies greatly from one type of crime to another:

- For homicide exonerations, the leading cause of false conviction is *perjury or false accusations*, mostly *deliberate misidentifications*. Homicides cases also include a high rate of *official misconduct*, and 76% of all *false confessions* in the database.
- The great majority of sexual assault and robbery exonerations include *mistaken eyewitness identifications*. Many sexual assault cases also include *bad forensic evidence*.
- Child sex abuse exonerations, by contrast, primarily involve *fabricated crimes* that never occurred at all.
- The small number of drug crime exonerations we have found have a high rate of *deliberate misidentifications*.

(ii) Missing data; ineffective legal defense

The frequencies of the factors we list are in part a function of the availability of information. We almost always know when a defendant has confessed; it is a central fact that is likely to be mentioned in any description of a criminal case. We believe our data on that issue are reasonably complete. On the other hand, we often have no way of knowing if a witness has lied in

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testimony, and we're even less likely to know if she lied to the authorities outside of court or if the authorities themselves committed serious misconduct. If it's not caught, misconduct goes unnoticed, in our data as elsewhere. As a result, the proportions of cases we report under estimate the extent of these problems.

The same applies, in force, to incompetent or inadequate legal defense. For 104 exonerations, our information includes clear evidence of severely inadequate legal defense, but we believe that many more of the exonerated defendants – perhaps a clear majority – would not have been convicted in the first instance if their lawyers had done good work. The failures of defense counsel are overwhelmingly sins of omission, especially the failure to investigate. Unless those failures are actually litigated, they are likely to go unmentioned, and in many cases there is no occasion to question the competence of the defense attorney. For example:

> In March 1987, a student at the University of Alabama was raped in her apartment by a masked man who then stole her car. Several days later, another student picked Jeffry Holemon out of a lineup as the man he saw emerging from the victim's car after the rape. Based on this identification, Holemon was convicted in 1988. Ten year later – with the aid of a jailhouse lawyer – Holemon got the DA's office to locate and do DNA tests on the rape kit, which exonerated him. He was released soon after, in January 1999.

As best we can tell, the quality of Holemon's defense was never raised as an issue at any point. That's not surprising. For all we know, the defense attorney may have failed to interview or call several alibi witnesses who would have testified that Holemon was elsewhere at the time of the crime. But that sort of failure, however damaging, cannot normally be raised on appeal because appeals are limited to the record that was actually made at trial, and litigation on a failure to investigate requires a hearing at which new evidence is presented. The issue may be litigated separately *after* appeal, but it's uncommon because most defendants cannot afford to hire lawyers, and they are not entitled to appointed counsel at that stage.[57] Ten years later, when Holemon was finally exonerated by DNA, no one bothered about what might have happened if his defense at trial had been different.

[57] *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007).

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This seems to be a general pattern. We found clear evidence of unacceptable legal defense work in 17% of the non-DNA exonerations (95/548), but only in fewer than 3% of the DNA cases (9/325). Apparently once they had exculpatory DNA evidence, advocates for the exonerees rarely had to try to excavate those ruins.

Because we can't produce even a reasonable estimate of the frequency of ineffective legal defense, we don't include that factor here, despite its importance.[58]

2. Witnesses: Mistakes and Lies

Eyewitness misidentification is uniformly described as the most common cause of false convictions. The 2003 Report, for example, found eyewitness misidentifications in 64% of the exonerations it collected, including 88% of the rape cases and 50% of the murder cases. Why are the figures here so much lower: 43% mistaken eyewitness identifications overall, 80% for sexual assaults, and a mere 27% for homicides?

The answer is that the 2003 Report, like other compilations of exonerations,[59] combines two types of misidentifications we have done our best to separate: eyewitnesses who lie, and those who are mistaken.[60] We found many more deceitful eyewitnesses than earlier compilations, but we probably have missed others.

(i) Eyewitness errors

The misidentifications we report in Table 13 are *mistaken eyewitness identifications* – the more common type.

[58] We do list Ineffective Legal Defense on the National Registry web site because the information is useful for understanding those cases in which we were able to identify this problem.

[59] *E.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT 45-83 (2011).

[60] The 2003 Report mentions that "at least sixty" exonerated defendants were deliberately misidentified by someone who claimed to have seen the crime, including 43% of the misidentifications in murder exonerations, Gross et al., *supra* note 7, at 543, and data for that report include six rape cases and six child sex abuse cases in which defendants were identified as having committed a crime that never occurred, see Samuel Gross *Convicting the Innocent*, 4 ANN. REV. L. & SOCIAL SCI. 173, 183 (2008), but these cases are not analyzed separately.

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> In July 1982, in Hanover, Virginia, a young white woman was raped and beaten by a black man who was a total stranger. The victim reported that the rapist said that he "had a white girl." Marvin Anderson was the only black man the police knew who lived with a white woman. He had no criminal record, so the police obtained a color identification card photograph from his employer and showed it to the victim together with several black and white mug shots of other men. She picked Anderson. Less than an hour later, she was shown a live lineup in which Anderson was the only man whose photograph she had previously been shown. She picked Anderson again. He was convicted in 1983, spent 15 years in prison, and was released on parole. Several years after his release, DNA testing on a piece of the rape kit that was preserved by a fluke proved that Anderson was innocent. He was exonerated in 2002.

Why was Marvin Anderson misidentified? Eyewitness mistakes may be caused by situational variables: the length of time of the observations, the distance from which they were made, the lighting, the races of the witness and the person observed, and so forth. They may also be caused by intentional or unintentional suggestiveness in lineups and other post-crime identification procedures employed by the police. There is a large body of high-quality research that demonstrates the effects of these variables. The lessons of these studies are well known, if not always observed in practice: Use identification procedures that are designed and administered to minimize suggestive influence. Record the process of pretrial identification, and the level of confidence expressed by the witnesses at their initial encounters with the suspects. Be wary of identifications made under circumstances that are known to produce errors (e.g., cross-racial identifications from a distance in dim light). And recognize that many eyewitnesses make mistakes, even under the best of circumstances and even when they are confident about their choices.[61]

(a) Suggestiveness. Many of the misidentifications we see are the product of suggestive police investigations. For example:

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[61] *See, e.g.*, GARRETT, *supra* note 59, at 45-83; Elizabeth F. Loftus, James M. Doyle, & Jennifer E. Dysart, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (4th ed. 2007); Gary L. Wells, *Applied Eyewitness Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOCIAL PSYCHOL. 1546 (1978); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 L. & Human Behavior 603 (1998).

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> After Mario Hamilton was shot and killed in Brooklyn on April 18, 1980, his grief-stricken 15-year-old brother Martell was questioned for hours by police officers who insisted that he identify Colin Warner as one of the killers. Eventually, he said that he saw Warner near the scene of the crime and his identification was used at trial to secure Warner's erroneous conviction. Warner was exonerated in February 2001 when a detailed re-investigation showed that he was elsewhere at the time of the crime and that there was only one killer—a man named Norman Simmonds, who admitted that he shot the victim and insisted that he did it alone.

Telling a bereaved teenager that he must identify a specific suspect is about suggestive as you can get. We are confident that this heavy-handed tactic produced a false identification; that's what Martell Hamilton himself said 21 years later, when Warner was finally exonerated.

But suggestiveness can be more subtle. Merely using a lineup with a photograph of the suspect that stands out from the others will cause many witnesses to pick it. That may be what sent Marvin Anderson to prison. In another case, it might be an unintentional gesture or the officer's body language or tone of voice when calling the numbers of the lineup members.

We can spot some obviously suggestive identifications, but many others go unnoticed because subtle suggestive influences are overlooked in the record, or unsubtle ones are successfully concealed. In Jeffrey Holemon's case, for example, all we know is that a witness mistakenly picked him out of a lineup as the man he saw leaving the victim's car. Did he make that mistake because Holemon looked conspicuously different from the other men in the lineup? Or because an officer improperly singled him out to the witness? Or was it an unavoidable error? We have no idea.

We cannot meaningfully estimate the frequency of suggestive identification procedures, but we do know that it is a major problem. Brandon Garrett, who was able to obtain trial transcripts for 161 DNA exonerations with misidentifications, found that one or more suggestive procedures were used in 87% of the cases.[62]

[62] GARRETT, *supra* note 59, at 48, 54-55.

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(b) Number of eyewitnesses. Thirty-eight percent of exonerations with mistaken identifications included multiple eyewitnesses (142/375). For example:

> In March 2001, Rachel Jernigan was identified by five eyewitnesses as the short Hispanic woman with acne scars who robbed a Bank of America branch in Gilbert, Arizona, the previous September. She was convicted and sentenced to 14 years in prison. Seven years later, Juanita Rodriguez-Gallegos, another short Hispanic woman with acne scars who had been arrested for similar bank robberies in 2001, admitted that she committed the robbery for which Jernigan was imprisoned and Jernigan was released.

Multiple eyewitnesses are twice as common among misidentifications for robbery, 58% (22/38), as for rape, 26% (42/163), probably because rapes usually have a single victim and are committed out of sight of other witnesses. Homicides fall in between: 44% of cases with erroneous identifications involve multiple eyewitnesses (50/113).[63]

Courts sometimes worry about identifications by a single eyewitnesses,[64] and feel more comfortable in cases like Cody Davis's 2006 robbery trial in Palm Beach, Florida, because, as the prosecutor told the jury "you have two witnesses, again, that made the identification of Cody Davis, the defendant."[65] But whatever leads one witness to mistake an innocent person for a criminal often leads other witnesses to make the same mistake – a dangerous possibility if police, prosecutors, judge and jurors then interpret these redundant misidentifications as corroborating each other. That seems to be what happened in Davis's case; he was convicted and sentenced to 3 years. Fortunately, five months later, Jeremy Prichard, the real robber, confessed to the crime and Davis was freed.

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[63] Brandon Garrett reports a multiple misidentification rate of 36% for misidentified defendants among the first 250 DNA exonerations in the United States. GARRETT, *supra* note 59, at 50. The rate of multiple mistaken witness identifications for the DNA exonerations in these data is somewhat lower – 31% (64/207) – as expected, since Garrett's cases include intentional as well as mistaken identifications. Gross reports a higher rate of multiple misidentification – 60% – for a set of 136 misidentifications in the United States from 1900 through 1983, Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 413 (1987), but that figure is not entirely comparable. It excludes cases without useable data on the number of eyewitness, *id.* at 418-419, in nearly 30% of the cases the defendants were never convicted (39/136); and the mix of crimes is very different from the cases we analyze: robbery was the most serious crime in 41% of the cases (56/136), compared to 6% of the cases here; and homicides accounted for only 18% of the cases (24/136), but 48% of the exonerations we cover here.

[64] *E.g.*, Wilson v. Mazzuca, 570 F.3d 490, 506 (2d Cir. 2008) ("[T]he prosecution's case was based *entirely* on a single eyewitness identification" and was therefore weak.).

[65] GARRETT, *supra* note 59, at 50.

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(c) Initial suspicion. Even in a case like Colin Warner's,[66] it's not clear that the suggestive identification was the main cause of the false conviction. By the time the police interviewed Martell Hamilton, the victim's brother, they had already concluded that Warner was guilty. He had been identified by another witness who picked Warner's picture out of a "mug book" containing hundreds of pictures of convicted offenders, including Warner's picture because of a prior weapons conviction. In other words, Warner first became a suspect because his appearance reminded a witness of a criminal. That resemblance focused the investigation on Warner. What followed was what it took to make the initial suspicion stick.

Suspects come to the attention of the police in many ways, but cases in which the initial suspicion is based on the suspect's appearance may be particularly risky. Consider Johnny Pinchback:

> In March 1984, two teenage girls were raped in Dallas. A few days later they saw Pinchback in a parking lot and thought he was the rapist. Pinchback, who cooperated with the police and steadfastly denied that he was guilty, was convicted based solely on the girls' identifications, and sentenced to 99 years. He was exonerated by DNA 27 years later.

There was no suggestiveness in the initial chance encounter that led to Pinchback's misidentification. As far as we can tell, there was no suggestiveness in any later identification procedure in the Pinchback case. The problem is a different one that often goes unnoticed: when the initial suspicion is based on the suspect's appearance, the *only* evidence that points to guilt may be the fact that he reminds witnesses of the real criminal. By contrast, if a suspect initially comes to police attention because he was found in the vicinity of the crime, or had a motive to kill the victim, or was seen in the victim's car, there is at least some evidence other than his appearance that suggests that the defendant is guilty.

In this respect, Colin Warner's case is like Pinchback's: His appearance reminded one witness of the criminal, and that led the police to persuade or coerce a second witness to go along. The

[66] *See supra* Section IV.2(i)(a).

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danger of error might have been much the same if the police hadn't had to lean on the victim's brother to identify Warner. That would simply have meant that Warner reminded two witnesses of the criminal – but we know that two eyewitnesses can be just as wrong as one.

There are several ways a suspect can first come to the attention of the authorities based on his appearance. He might be seen by a witness in a public place (like Johnny Pinchback); or picked from a large array of photographs (like Colin Warner); or spotted because he resembles a verbal description of the criminal, or a composite picture, or a surveillance video. All told, in 35% of the exonerations with mistaken witness identification, the defendants were initially suspected based on some type of information about their appearance (130/375),[67] including 20% of homicide cases (23/113), 32% of robbery cases (12/38), and 47% of sexual assault cases (77/163).[68]

(d) Cross-racial identification. We saw in Table 6 that 63% of sexual assault exonerations had black defendants, compared to 25% of all prisoners who were convicted of sexual assaults. Why this huge racial disparity? The answer appears to be the race of the victim, and the difficulty of making cross-racial identifications of strangers. Consider this case:

> In January 1985, Ronald Cotton, a black man, was convicted of raping Jennifer Thompson, a white woman, in Burlington, North Carolina. Thompson was the only eyewitness at the trial, and by all accounts she was very effective. She was absolutely confident of her identification, in part because she spent a considerable amount of time with the rapist and was determined to observe him closely so that she would be able to identify him. She was equally confident when Cotton was retried 1987, convicted again, and sentenced a second time to life in prison. Even so, she was wrong. Cotton was exonerated eight years later, in 1995, after DNA tests proved that he was innocent, and that the real rapist was a different black man who was in prison on other charges. Thompson went to great lengths to make

[67] In 6% of the cases with mistaken witness identifications we could not determine the basis for the initial suspicions (22/375).

[68] Gross, *supra* note 63, reports that in 60% of 136 misidentifications in the United States from 1900 through 1983 the initial suspicion was based on the appearance of the misidentified suspect. The cases covered by that study are very different from those discussed here, as described in note 63. Moreover, the data on this issue in the 1987 study were much less complete than our data, leading the author to conclude that the true proportion of misidentifications with initial suspicions based on appearance was at least 40% of the cases collected, and "probably in the neighborhood of 50 to 60 percent." *Id.* at 418 n.79.

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> amends to Cotton and befriend him and to speak out and publicize the case and the terrible mistake she had made. Ultimately, Thompson and Cotton co-authored a book that tells this story, *Picking Cotton.*[69]

Mistaken eyewitness identifications occurred in 80% of all sexual assault exonerations (see Table 13). More than two-thirds of sexual assault exonerations with eyewitness errors had black defendants (109/163). Of these black-defendant sexual assaults with mistaken eyewitnesses, 72% had white victims (69/96).[70]

Most women who are raped are victimized by men of their own race. Inter-racial rape is uncommon and rapes of white women by black men are a small minority of all rapes, about 5%.[71] But sexual assaults by black defendants on white victims were 53% of *all* exonerations in sexual assault cases with erroneous eyewitness identifications (69/131).[72]

There are many possible explanations for this disturbing pattern. Of all the problems that plague the American system of criminal justice, few are as incendiary as the relationship between race and rape. Nobody would be surprised to find that bias and discrimination continue to play a role in rape prosecutions. Still, the simplest explanation for this racial disparity is probably also the most powerful: the perils of cross-racial identification. One of the strongest findings of systematic studies of eyewitness evidence is that white Americans are much more likely to mistake one black person for another than to do the same for members of their own race.[73]

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[69] Jennifer Thompson-Cannino & Ronald Cotton, PICKING COTTON (2009).

[70] In 13 cases with black defendants the race of the victim is unknown. Overall, we lack data on the race of the victim for 31 of the 163 sexual assault exonerations with mistaken witness identifications, or 19%.

[71] Gross et al., *supra* note 7, at 547 n.55.

[72] This proportion is based on the 80% of the cases for which we know the race of both the defendant and the victim (131/163). Among the 20% of sexual assaults without mistaken eyewitness identifications, only about a third of the defendants were black (14/40), data on race of victim were less complete (23/40), and among those cases with race of victim data about a third involved black defendants and white victims.

Counting cases with other racial combinations, 60% of sexual assault exonerations with eyewitness mistakes involved cross-racial identifications (79/131). Five of the additional 10 cross racial cases were Hispanic defendants who were misidentified by white victims; three were black defendants misidentified by Hispanic victims; and two were white defendants misidentified by minority victims.

[73] See Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL., PUB. POL'Y & L. 3 (2001).

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(ii) Eyewitness lies

Lying is a general problem. Witnesses lie about all sorts of things, in court and out. There is no single reason why witnesses lie, and no well-defined solution. The best remedy for witness errors – careful investigative procedures that avoid suggesting answers to witnesses – does nothing to reduce deliberate lies. Lies are often hard to distinguish from errors, or from the truth for that matter, even if you know the basic facts of a case. A lie by a witness who says she saw the defendant near the scene of a murder may never be spotted, even after it's proven that someone else was the killer.

We collected all important lies that we could spot, on the witness stand and elsewhere, under the heading *perjury or false accusations.* We identified such lies in 51% of all exonerations – more than any other causal factor – but there are certainly many others that we missed. Most of these lies are by people who claimed to be eyewitnesses. They come in two flavors:

(1) Twenty-seven percent of the exonerations include known *deliberate misidentifications*: one or more witnesses who falsely claimed to have seen the exonerated defendant commit a crime that someone else committed (231/873). Most of these identifications are classified as lies because, given that the defendant has been proven innocent, because the witness knew the defendant or the real criminal, or both, and could hardly have mistaken one for the other. Forty-six percent of the deliberate misidentifications were by witnesses who claim to be accomplices of the exonerated defendants (105/231). For example:

> In December 1976, David Harris was arrested in Vidor, Texas, in connection with the murder of Dallas patrolman Robert Wood. He promptly blamed the killing on Randall Dale Adams, a passing acquaintance with whom he had spent most of the day leading up to the murder. Harris said that he stole the car from which the patrolman was shot, was present at the murder, drove Adams away from the scene, and kept the stolen car afterwards. Based on his own statements, he could have been convicted of auto theft and as an accessory to the murder. Instead Harris testified against Adams at trial, and after Adams was convicted and sentenced to death, all charges against Harris were dropped. Adams was exonerated in 1989. By then, Harris had been sentenced to death for another murder, in 1985. He was executed in June 2004.

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(2) An additional 11% of the exonerations involve *fabricated crimes*: cases in which someone claimed to have witnessed the exoneree commit a crime that in fact never occurred (96/873). The typical case in this group is a false claim of child sex abuse against a defendant who was well known to the complaining witness – a relative, a friend or a teacher. These false complaints are usually produced by pressure on the children from relatives, police officers or therapists; they generally unravel when the witnesses recant. Occasionally we see an exoneration in a case in which a total stranger was accused of a crime that never happened.

> In 1977, in a suburb of Chicago, 16-year-old Cathleen Crowell faked a rape because she was afraid she had become pregnant by her boyfriend. In the course of the investigation that followed, she picked Gary Dotson's picture out of a photo lineup and said he was the rapist. Dotson was sentenced to 25 to 50 years in prison. In 1985 Crowell, by then married and living in New Hampshire, recanted and told prosecutors that she had lied. Despite the recantation, it took until 1989 to clear Dotson, after the first post-conviction DNA testing in a rape exoneration in the United States showed that the semen in the rape kit collected from Crowell did not come from Dotson, but could have come from her boyfriend.

If Crowell had not recanted, her misidentification would have been seen as a mistake rather than a lie.

There is some overlap between categories of misidentification. Some cases with lying identifications also include one or more mistaken identifications; Randall Dale Adams, for example, was identified by three uninvolved witnesses in addition to the real killer. All told, 76% of the exonerations in our data include one or more misidentifications, mistakes or lies or both (667/873). That's 12% more than the proportion of misidentifications in the 2003 Report because we have found more deliberate misidentifications, 27% compared to 18% in 2003 (60/340), and many more fabricated crime cases, 11% compared to 3.5% (12/340).[74] See Table 14.[75]

[74] See Gross, *supra* note 60, at 183 (2008) (reporting that the 340 exonerations in the 2005 Report included 6 rape cases and 6 child sex abuse case in which no crimes ever occurred).

[75] Among DNA exonerations – only 1% of which involve fabricated crimes (3/325) – our findings are very similar to other research. Brandon Garrett reports that 76% of the first 250 DNA exonerations in the United States included eyewitness misidentification. GARRETT, *supra* note 59. Among our DNA cases, 65% included mistaken eyewitness identifications (212/325), but 82% included either mistaken or intentional misidentifications (265/325).

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Table 14: Exonerations by Crime and Form of Eyewitness Misidentification

	Mistaken Eyewitness Identifications	Lies by Supposed Eyewitnesses		Any Eyewitness Misidentification
		Deliberate Misidentifications	Fabricated Crimes	
Homicide (416)	27%	**44%**	0.2%	**64%**
Sexual Assault (203)	**80%**	8%	8%	**96%**
Child Sex Abuse (102)	26%	3%	**67%**	**95%**
Robbery (47)	**81%**	9%	4%	**94%**
Other Violent Crimes (47)	**51%**	26%	4%	**75%**
Drugs (25)	24%	**48%**	8%	**80%**
Other Nonviolent Crimes (33)	15%	6%	12%	30%
ALL CASES (873)	**43%**	27%	11%	**76%**

Some type of eyewitness misidentification evidence, mistaken or intentional, was presented in 94% or more of all sexual assault, child sex abuse and robbery exonerations. This is to be expected. By definition, these non-homicidal crimes of violence, real or fake, leave live victims – or alleged victims – who almost always testify and identify the defendant. In most cases they provide accurate information that helps convict guilty defendants, but sometimes they make mistakes or lie and identify innocent defendants. In rape and robbery exonerations, the misidentifications were overwhelmingly mistakes. In child sex abuse exonerations the witnesses usually lied and invented crimes that never happened.

> By March 1995, Officer Robert Perez had been investigating child sex abuse in Wenatchee, Washington for over a year and he believed he had uncovered a major child sex ring. He took one suspected victim, 10-year-old Donna Everett, in his squad car and drove around Wenatchee and East Wenatchee as she pointed out 22 homes and building where she said she and other children had been abused, including the East Wenatchee Pentecostal Church of God House of Prayer. She

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> claimed that she had been raped by virtually every adult she had met, as had almost every child she ever knew. Later, Donna's 12-year-old sister, Melinda, echoed the charges and added more names, first to Perez and eventually in court. They spoke of child-swapping orgies where adults took children six at a time into rooms and took turns having sex with them. Ultimately, authorities charged 43 men and women with 29,726 counts of rape and sex abuse of 60 children, ages five through 16, over a six-year period.
>
> In June 1996, Melinda Everett, by then 13, gave a detailed videotaped statement in which she recanted her accusations. She said that she had been pressured by Perez and denied ever being sexually abused or witnessing anyone being sexually abused. In the end, 11 of the convicted Wenatchee defendants were exonerated; the rest pled guilty in exchange for reduced sentences and were released.[76]

Misidentifications are also the rule among the small number of individual drug-crime exonerations. Most of the drug-crime identifications are lies, blaming the defendants for crimes that other people committed. These individual exonerations, however, are swamped by the hundreds of group exoneration cases – which we discuss separately in Section VI – in which police officers fabricated drug crimes wholesale.

(iii) Lies in general

Eyewitness lies are the largest group of lies that contribute to false convictions, but they are not the only ones and they are not evenly distributed across crime categories. Three-quarters of child sex abuse exonerations include perjury or false accusations; virtually all of these lies are by supposed eyewitnesses. Perjury and other critical lies are almost as common among homicide exonerations – we found them in 66% of the cases – but in more than one-third of those homicide cases there were no lies by eyewitnesses; the false witnesses were all jailhouse snitches, law enforcement officers, forensic witnesses, and so forth. See Table 15.

[76] Some of the fabrications in child sex hysteria cases appear to be delusions rather than lies. For example, 4 year-olds claimed to have been sodomized with meat hooks and taken to outer space in hot air balloons. Most of those cases involve fabrications by multiple witnesses, at least some of which appear to be lies. *See infra* Part V.

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Table 15: Exonerations by Crime and Category of Lies

	Lies by Supposed Eyewitnesses		Lies in Cases Without Eyewitness Deception	Any Perjury or False Accusation
	Deliberate Misidentifications	*Fabricated Crimes*		
Homicide (416)	**44%**	0.2%	22%	**66%**
Sexual Assault (203)	8%	8%	10%	26%
Child Sex Abuse (102)	3%	**67%**	5%	**75%**
Robbery (47)	9%	4%	6%	19%
Other Violent Crimes (47)	26%	4%	15%	**45%**
Drugs (25)	**48%**	8%	16%	**72%**
Other Nonviolent Crimes (33)	6%	12%	21%	**39%**
ALL CASES (873)	27%	11%	16%	**53%**

Homicide investigations differ from other criminal investigations in two major ways:

(1) There are often no surviving eyewitnesses to homicides. As a result, we see comparatively few eyewitness misidentifications among homicide exonerations and most of those that do occur are deliberate.[77] See Table 14. Eyewitnesses do make mistakes, but if they are the victims of violent crimes, they certainly try to tell the truth and are usually accurate. In their absence, the police may be relegated to other types of evidence that are considerably worse. For example:

> At 5:45 a.m. on April 18, 1994, in Mayport Florida, Chad Heins – who was drunk and had a sleep disorder – woke from a deep sleep in the apartment he shared with

[77] It's not easy to fake a homicide, but we know of one manslaughter exoneration based in part on an attempt to fabricate a crime. In February 1987, in St. Paul, Richard Dziubak's mother fell downstairs in a scuffle with her son, and got up apparently unharmed. Later that day, she was found dead in her bed. She left a note saying that her son killed her by pushing her downstairs. Dzuibak pled guilty to manslaughter. He was exonerated two years later after toxicology tests revealed that her blood contained a fatal overdose of antidepressants, 100 times the prescribed level. Even with the letter from the deceased, however, the main cause of the false conviction was the failure of the medical examiner to obtain a toxicology report, which led to an erroneous conclusion about the cause of death.

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> his brother Jeremy, who was on board a Navy ship, and his sister-in-law Tina. He discovered three small fires, and then, after he put them out, he found Tina's body in her bedroom, stabbed 27 times. No evidence except his presence in the apartment connected Heins to the murder. DNA analysis of three hairs found in the victim's bedroom showed that they did not come from Chad, Jeremy or Tina Heins. Nonetheless, Chad was convicted of Tina's murder in December 1996, and sentenced to life in prison with the help of two "jailhouse snitches" – prisoners who testified that he spontaneously confessed his guilt to them while in jail awaiting trial. Chad Heins was exonerated in 2007 after the DNA profile of a single unidentified male was linked not only to the hairs found in the victim's bedroom but also to scraping from under the victim's fingernails and to semen found on her sheets.

(2) The stakes in homicide cases are exceptionally high. As a result, police and prosecutors invest far more resources in homicide investigations than they devote to other crimes.[78] That is as it should be. The main effect is that killers are more likely than rapists or robbers to be caught and brought to justice – and far more likely than thieves or drug users.

These high stakes, however, also produce errors. When the incentives to produce evidence are sufficiently high, evidence will be produced, and some of it will be false. A murderer is at far greater risk than a rapist – especially if he might be sentenced to death – and far more motivated to frame an innocent person in order to deflect attention from himself. Co-defendants, accomplices, jailhouse snitches and other police informants can all hope for substantial rewards if they provide critical evidence in a murder case – even false evidence – especially if the authorities are desperate for leads. The police themselves may be tempted to cut corners and falsify evidence to convict a person they believe committed a terrible murder. The net result is that exonerations in homicide cases include comparatively few eyewitness errors, substantially more deliberate misidentifications, and a high proportion of cases with perjury or false accusations by other types of witnesses.[79]

The murder of Jeanine Nicarico is a good example:

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[78] Gross, *supra* note 46.

[79] *Id.*

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> In February 1983, 10-year-old Jeanine Nicarico was abducted from her home in Naperville, Illinois, raped, and killed – a crime of stunning brutality. The murder was the subject of a long, frustrating, unsuccessful investigation – a humiliating public failure. Thirteen months after the murder and less than two weeks before the local prosecutor stood for re-election, three men were indicted: Rolando Cruz, Alejandro Hernandez, and Stephen Buckley. Cruz and Hernandez were convicted and sentenced to death; their convictions were reversed by the Illinois Supreme Court. They were convicted again, but this time only Cruz was sentenced to death. Again the convictions were reversed. Finally, at Cruz's third trial, 12 years after the murder, the case fell apart when a high-ranking police official admitted that Cruz never made a statement about the murders that the prosecution presented at both trials as tantamount to a confession. The judge entered a judgment of acquittal. DNA testing later linked the crime to a serial sex killer who had confessed to the Nicarico murder years before.

What seems to have happened is this: Under intense pressure, the police convinced themselves that they knew who killed Jeanine Nicarico and they manufactured evidence to convince prosecutors and for use in court. If the criminal had taken jewelry from the Nicarico home rather than a child – or even if he had knocked a family member unconscious or set the home on fire – there would probably have been a minimal investigation, no arrests, no trial, and no erroneous convictions.[80]

[80] In some highly charged murders, the police manufacture a case out of whole cloth. When Ronda Morrison was murdered on November 1, 1986, in Monroeville, Alabama, there were no suspects, and an eight-month investigation turned up no leads. Then the police arrested a man by the name of Ralph Myers in connection with a different killing in a nearby county, and pressured him into saying that he was with Walter McMillian – a local resident – and saw him shoot Ms. Morrison. Myers initially denied that he knew McMillian or anything whatever about the killing, but eventually gave in and said what he was told to say. McMillian was convicted and sentenced to death; he spent six years on death row before the frame-up was exposed. *See* Peter Applebome, *Alabama Releases Man Held on Death Row for Six Years*, N.Y. TIMES, Mar. 3, 1993, at A1. It is easy to see the hand of racism in this case. Apparently McMillian was chosen for the role of killer because he was a black man in rural Alabama who was known to have carried on an extra-marital affair with a white woman. But the nature of the crime was also an essential ingredient. Even the most racist police would hardly go to all that trouble for anything less than a heinous crime, and they would be most likely to do it for capital murder.

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3. False Confessions

(i) False confessions by defendants

False confessions are a particularly disturbing type of evidence.[81] Most people don't believe they would ever admit committing a crime of which they were innocent, and many are skeptical that anybody else would. And yet it happens – 135 times among the exonerations we cover.

> In November 1989, a high school classmate of 16-year-old Jeff Deskovic was raped, beaten and strangled in Westchester County, New York. Deskovic became a suspect because he seemed overly distraught at the victim's death, visiting her wake three times. Police spoke with Deskovic several times, and in January 1990, he agreed to a polygraph examination. Over a period of six hours, Deskovic was held in isolation, given three polygraph tests by an examiner who was instructed to "get the confession," and grilled by officers who told him that they knew he was guilty, that he had failed the lie detector test – and that he could go home if he just told them what he had done.
>
> Eventually, Deskovic gave up and admitted, sobbing, that he had killed the girl. Years later, he explained, "I felt my life was in danger. I didn't think they were going to stop until I told them what they wanted to hear." By the end of the interrogation he was under the table, curled up in the fetal position, crying. He was convicted of rape and murder in January 1991 and exonerated in November 2006, after 16 years in prison when DNA tests showed that the semen recovered from the victim came from a convicted murderer who was in prison for the murder of another woman.

The primary reason that innocent defendants confess is that they are coerced into doing so – frightened, tricked, exhausted or all three. Sixty percent of the confessions we located were clearly coerced (82/135). An additional 12% of defendants denied making the confessions that were attributed to them or denied that what they said was meant as an admission of guilt (16/135). Eleven percent of the confessions appear to have been voluntary (15/135).[82]

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[81] *See* RICHARD LEO, POLICE INTERROGATION AND AMERICAN JUSTICE (2008); Steven A. Drizen & Richard Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004); Saul M. Kassin, *The Psychology of Confessions*, 4 ANN. REV. OF L. & SOC. SCI. 193 (2008); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUMAN BEHAVIOR 3 (2010).

[82] Sixteen percent of the false confessions could not be classified (22/135).

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As the 2003 Report noted, "False confessions don't come cheap."[83] They usually require long, grueling interrogations, sometimes stretching over days. Not surprisingly, three-quarters of all false confessions were in homicide cases (102/135); they occurred in 25% of all homicide exonerations. See Table 16 (left column).

Table 16: Exonerations by Crime and Type of False Confession

	Confession By Defendant	Confession by Co-defendant	Confession by Defendant or Co-defendant
Homicide (416)	**25%**	**23%**	**39%**
Sexual Assault (203)	**8%**	**3%**	**8%**
Child Sex Abuse (102)	**7%**	**1%**	**8%**
Robbery (47)	**2%**	**2%**	**4%**
Other Crimes of Violence (47)	**15%**	**6%**	**19%**
Non-Violent Crimes (58)	**3%**	**9%**	**12%**
ALL CASES (873)	**15%**	**13%**	**24%**

(ii) False confessions by (possible or actual) co-defendants

The impact of false confessions is not limited to the cases of the defendants who confessed.

> Christopher Ochoa falsely confessed to rape and murder in Austin, Texas, in 1988 after he was threatened with execution if he did not cooperate. In the process, he also implicated his friend, Richard Danziger. Both were convicted of these crimes. In 1996, a convicted felon named Achim Josef Marino began writing letters to the authorities confessing to the crimes and supplying details that only the criminal could know. Even so, it took until 2002 for DNA testing to exonerate Ochoa and Danziger and prove Marino's guilt. By then, Danziger had suffered severe permanent brain damage from a savage attack in prison.

[83] Gross et al., *supra* note 7, at 544.

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This sort of thing happens quite a bit. Paula Gray, for example, a mildly retarded 17-year-old girl falsely confessed and implicated four innocent men in a rape and double murder in Chicago in 1978; they were ultimately exonerated by DNA 18 years later.

All told, thirteen percent of the exonerated defendants were convicted at least in part on the basis of false confessions by others who claimed to have participated in the crimes along with them (112/873). All of these supposed accomplices could have been charged as co-defendants of the exonerees and many were, but some were allowed to plead guilty to lesser crimes or unrelated crimes in return for implicating one or more other suspects, and some were not charged at all.

Eighty-six percent of these "co-defendant confessions" are concentrated among homicide exonerations (96/112), an even higher proportion than false confessions by the exonerees themselves. Sixty-three percent of these third-party confessions occur in cases in which the defendants themselves did not confess. The effect is to substantially increase the reach of the damage from false confessions, to 24% of all exonerations and to 39% of homicide exonerations. See Table 16.

(iii) False confessions by juveniles and the mentally disabled

It's well known that false confessions are particularly common among those who are especially vulnerable to pressure from the police.[84] Jeff Deskovic was an example of one category of vulnerable defendants – juveniles. Earl Washington is an example of another – the mentally retarded.

> In June 1982, Rebecca Lynn Williams was raped and murdered in Culpeper, Virginia. In 1983, Earl Washington, a 22-year-old black man with an I.Q. of about 69, was arrested nearby for an alleged burglary and malicious wounding. Over two days of questioning, Washington "confessed" to five separate crimes. Four of the "confessions" were not pursued because Washington's descriptions did not match the actual crimes and because the victims did not identify Washington as

[84] *See* Drizin & Leo, *supra* note 81; Joshua Tepfler, Craig M. Cooley & Tara Thompson, *Convenient Scapegoats: Juvenile Confessions and Exculpatory DNA in Cook County, IL*, 62 RUTGERS L. REV. 887 (2010)

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> the criminal. In the fifth confession, however, Washington said that he killed Rebecca Lynn Williams, who could no longer set the record straight. Washington's initial confession – before police officers helped clean it up – was riddled with errors. He did not know the race of his supposed victim (white), the address where she was killed, or that he had supposedly raped her. Nonetheless, Washington was convicted and sentenced to death in January 1984. He was exonerated by DNA 16 years later, in 2000.

The 2003 Report found that 42% of exonerated defendants who were younger than 18 at the time of the crime confessed, as did 69% of exonerees who were mentally ill or mentally retarded, compared to 8% of adults with no known mental disabilities. We see the exact same patterns here, but the proportion of confessions for exonerees with mental disabilities is even higher, 75%. Overall, one sixth of the exonerees (147/873) were juveniles, mentally disabled, or both, but they accounted for 59% (79/135) of the false confessions. See Table 17.

Table 17: False Confessions by Age and Mental Disability

Age and Mental Status of the Exonerated Defendant	Proportion Who Falsely Confessed
Juveniles – under 18 at time of crime (39/92)	**42%**
11 – 14 year olds (14/19)	***74%***
15 – 17 year olds (25/73)	***34%***
Mentally Ill or Mentally Retarded (53/70)	**75%**
Adults Without Known Mental Disabilities (56/719)	**8%**
ALL CASES (135/873)	**15%**

This is not news, but it's no less disturbing for being familiar. Plainly, it's comparatively easy to get children and mentally handicapped suspects to confess. That is an advantage for the police. Most confessions – even confessions obtained under coercive circumstances and confessions from unusually vulnerable suspects – are no doubt true. But not all confessions are true, and the types of defendants who confess most readily when they are guilty may also be most likely to give up and confess when they are innocent.

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(iv) False confessions and guilty pleas

About one-fourth of the exonerees who confessed in police interrogations later pled guilty in court (35/135), compared to 5% of exonerees who did not confess (36/738). The rest recanted their false confessions and went to trial. Overall, 8% of exonerees in our data were convicted by guilty pleas (71/873), a higher rate than in the 2003 Report – 6% (20/340) – but startlingly few for a system in which 95% of felony convictions are the products of guilty pleas.

This does not mean that innocent defendants hardly ever plead guilty. Very likely, the great majority of those innocent criminal defendants who are convicted do plead guilty – but they are rarely exonerated. Defendants who plead guilty have an exceptionally hard time convincing anybody of their innocence or even getting a hearing. Even more important, they almost always get much lighter sentences than defendants who go to trial – that's *why* they plead guilty – so neither they nor anybody else has much of an incentive to pursue exoneration. Consider this case:

> In April 2004, after four hours of aggressive interrogation without his parents or a lawyer, 12-year-old Jonathan Adams admitted that he killed nine-year-old Amy Yates in Carrollton, Georgia. About a year later, he pled guilty in juvenile court and was sentenced to 12 months in a residential psychiatric treatment facility. Six months later, a mentally-challenged 18-year-old confessed to killing the girl, saying he wanted to make the truth known as part of a spiritual transformation. Two months later, Adams was released.

If the actual killer had not voluntarily come forward, Adams would never have been exonerated. Chances are that nobody would even have tried to prove his innocence. We know of 28 exonerated defendants who confessed, pled guilty and received long prison sentences ranging from 10 years to life, but only six (including Adams) who were sentenced to less than 10 years.

It may well be that most innocent defendants who plead guilty, like Adams, get comparatively light sentences, and try to put the whole episode behind them as rapidly as possible. It makes sense: confessions are extremely hard to overcome in court, and the penalty for going to trial and

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losing may be huge, up to and including the defendant's life.[85] But we don't know. By trial or by plea, with or without a confession, the only false convictions we know about are those few that end in exoneration.

(v) False confessions and DNA

DNA testing can prove unequivocally that biological material that must have been left by the criminal – semen, saliva, blood or skin cells – did not come from the defendant. In many cases, this amounts to incontrovertible evidence of innocence.

Among murder exonerations, where false confessions are comparatively common, DNA was a factor in 51% of cases with false confessions (52/102), but only 23% of exonerations without false confessions (71/314). The likely explanation is that many prosecutors and judges believe that confessions are virtually always true, and demand irrefutable evidence of innocence to agree to an exoneration of a defendant who has confessed.[86] Consider a couple of cases in which innocent defendants *were* ultimately released based on DNA evidence.

- In October 1996 in Waukegan, Lake County, Illinois, after four days of exhausting and frightening interrogation, Juan Rivera, a 19-year-old former special education student, confessed to the rape-murder of 11-year-old Holly Staker. Rivera's initial confession did not correspond to the facts of the crime, but a second confession a day later came closer. This revised confession was the basis for Rivera's murder conviction in 1997 and for a second conviction in 2001 after the first was reversed on appeal. In 2005, DNA tests eliminated Rivera as a source of semen recovered from Staker's vagina. Rivera's second conviction was vacated, but Lake County State's Attorney Michael Waller insisted on taking Rivera to trial a third time on the theory that the 11-year-old victim was sexually active and the semen came from a voluntary sexual partner rather than her killer. There was no evidence to support this defamatory speculation, but it was enough – together with Rivera's confession – for a third murder conviction in 2009. In 2011, the Illinois Appellate Court reversed that conviction because it was "unjustified and cannot stand."

[85] *See generally* Bowers, *supra* note 28.

[86] Saul M. Kassin, *Why Confessions Trump Innocence*, AM. PSYCHOLOGIST (advance online publication Apr. 30, 2012).

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- In another case in Lake County, in 2005, a distraught Jerry Hobbs confessed after 20 hours of questioning to killing his 8-year-old daughter and her 9-year-old friend. In 2008, while Hobbs was still in jail awaiting trial, DNA tests showed that semen found in the mouth, anus and vagina of one of the victims came from someone other than Hobbs. Nonetheless, prosecutors refused to release Hobbs on the theory that the girl (who was found fully-clothed) had somehow picked up the semen – in three separate orifices – while playing at the crime scene, a wooded area where couples might have gone for sex. More than two years later, the semen was matched to a convicted rapist and suspected murderer who was acquainted with the girls. Hobbs was freed in August 2010, after more than five years in custody. Although State's Attorney Waller said he was "not convinced" that Hobbs had no role in the killings, he didn't believe he could prove the case beyond a reasonable doubt.[87]

These are extreme cases from a single county and the innocent defendants were ultimately released. We trust that few prosecutors would hold a defendant in jail for years on the theory that a confession to police officers by a traumatized and desperate man trumps an indisputable DNA exclusion. But these were rape-murders. The great majority of murder cases *do not have any DNA evidence* of any sort. From the look of things, an innocent defendant who confesses to a robbery-murder will have a hard time even getting a hearing on the basis of recantations by eyewitnesses or the discovery of suppressed evidence of perjury by an informant or alibi evidence or other new evidence of innocence that might have lead to exoneration if he hadn't confessed.

4. Bad Forensic Evidence

False or misleading forensic evidence was used to obtain nearly one-fourth of the convictions that ended in exoneration. See Table 13. In recent years the use of forensic evidence in American criminal cases has come in for a great deal of criticism.[88] The problems with forensic evidence range from simple mistakes to invalid techniques to outright fraud. We see clear

[87] Andrew Martin, *The Prosecution's Case Against DNA*, N.Y. TIMES, Nov. 27, 2011, at MM44.

[88] *See, e.g.*, NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009), *available at* www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf; Brandon Garrett & Peter Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009); Paul C. Giannelli, *Scientific Fraud*, 46 CRIM. L. BULL. 1313 (2010).

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examples of all of these, although in some cases it's impossible to distinguish one type of forensic error from another.

- In March 1998, Alan Gell was convicted and sentenced to death for killing Allen Ray Jenkins on April 3, 1995, in Aulander, North Carolina. The date was critical; Gell had been out of state or in jail from April 3, 1995 until after the victim's body was found on April 15. At trial, a doctor testified that the state of decomposition of Jenkins' body suggested that he died around April 3. At a retrial in February 2004, the defense called 17 witnesses who testified that they had seen Jenkins alive after April 3. Further, a pathologist testified that given the high temperature in the house where Jenkins was found, his body would have decomposed quickly and therefore he probably died after April 3. Gell was acquitted.

- In 2000, Phillip Cannon was convicted of a triple murder in Polk County, Oregon, and sentenced to life in prison. The main evidence connecting Phillip to the crime was testimony by an FBI agent that the bullets used to kill the victim were metallurgically identical to bullets found in Cannon's home. In 2004, a report by the National Academy of Sciences found that the FBI testimony – based on metallurgical analysis linking a particular bullet to ones found in a suspect's cartridge box – was overstated, unreliable and misleading.[89] In 2005, the FBI discontinued this type of analysis. In 2009, Cannon was granted a new trial because of the unreliability of the forensic evidence used to convict him; in December of that year charges were dismissed.

- In 1986, Curtis Edward McCarty was sentenced to death in Oklahoma City for a 1983 rape-murder. Forensic analyst Joyce Gilchrist provided critical evidence at trial, testifying that semen recovered from the victim's body had the same blood type as McCarty. In fact, the semen came from a "non-secretor," which means that it could not reveal the blood type of the donor. Gilchrist also testified that hairs found at the scene came from McCarty, even though she had concluded in 1983 that the hairs from the crime scene were not similar to McCarty's. After McCarty was arrested in 1985, she changed her notes and reversed her findings to say that the crime scene hairs could have been McCarty's; at trial she testified that McCarty "was in fact" at the crime scene. Attorneys for McCarty discovered the switch in 2000 when Gilchrest was under investigation for fraud in other criminal cases. McCarty was exonerated by DNA in 2007 after 21 years in prison.

[89] John Solomon, *FBI's Forensic Test Full of Holes*, WASH. POST, Nov. 18, 2007, at A01.

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Among the major crime categories, bad forensic evidence is most likely to show up among sexual assault exoneration – 37% of the cases (76/203) – followed by homicide, 23% (96/416), and child sex abuse, 21% (21/102); it is only rarely an issue in robbery exonerations, 6% (3/47).

This pattern is about what we expected. Biological evidence is routinely collected in sexual assault investigations and routinely used at trial, so there are many opportunities for forensic error or fraud. Forensic evidence is also nearly universal in homicide trials: pathologists almost always testify to the cause of death. In rape cases, however, forensic evidence is often more critical because it is used to identify the criminal, these days with DNA, decades ago with less probative and sometimes misleading conventional blood-type evidence. More important, forensic evidence – DNA – is in the vast majority of rape exonerations. When DNA evidence from a rape kit is used to clear an innocent defendant, earlier misuses of the same biological sample are very likely to be noticed and be reported. On the other hand, when a murder defendant is exonerated by a confession from the real killer, forensic error and fraud are less likely to be detected. Not surprisingly, bad forensic evidence is a known factor in 42% of homicide exonerations with DNA evidence (52/123) – which overwhelmingly include rapes in addition to the charged homicides[90] – but in only 16% of homicide exonerations without DNA evidence (47/293). In short: If good forensic evidence (DNA) is used to exonerate a defendant, it's much more likely than otherwise that bad forensic evidence was a factor that led to the defendant's conviction.

In some uncommon types of exonerations, false or misleading forensic evidence was essential to the prosecution's claim that what happened was a crime rather than an accident. In Section V we discuss two such categories: shaken baby syndrome exonerations and arson exonerations.

5. Official misconduct

Official misconduct is unlike the other contributory factors that we find. It's not a type of evidence that might mislead a court and convict an innocent person, but a broad category of behaviors that affect the evidence that's available in court, and the context in which that evidence

[90] *See supra* Section III.3.

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is seen. The range of misconduct is very large. It includes flagrantly abusive investigative practices that produce the types of false evidence we have discussed: committing or procuring perjury; torture; threats or other highly coercive interrogations; threatening or lying to eyewitnesses; forensic fraud. At the far end, it includes framing innocent suspects for crimes that never occurred. The most common serious form of official misconduct is concealing exculpatory evidence from the defendant and the court.[91]

Investigative procedures that generate false evidence may or may not involve misconduct as we use the term. For example, an interrogation that produces a false confession will only be classified as misconduct if it was severely abusive. Consider two examples:

- In 1996, Ricky Cullipher, a troubled 15-year-old with an I.Q. of 71, was interrogated by police in Hampton City, Virginia without a parent or a lawyer present. He confessed to shooting a friend. That interrogation was certainly bad practice – especially since we know that adolescents and people with limited mental acuity are particularly prone to false confessions – but we do not classify it as misconduct. (There was, however, other misconduct in the case, by the prosecutor.)

- Daniel Gristwood became a suspect soon after his wife was attacked with a hammer and nearly killed in Onandaga, New York in January 1996. He confessed after he was held for 34 hours without food or sleep and questioned for 16 hours straight. Clearly this was police misconduct, and is listed as such in the Registry.

The process of obtaining a false eyewitness identification may involve misconduct, but only if it includes a deliberate attempt to manipulate, persuade or coerce the eyewitness. For example, presenting a suspect to an eyewitness in a one-on-one show up is almost always a bad investigative technique, but it is permitted. Without more, it is not misconduct. Some identification procedures, however, are considerably worse.

> In 1992, a white woman who was raped by a black stranger in Contra Costa County, California, was shown a photo lineup that included a picture of Albert

[91] KATHLEEN M. REILLY & MAURICE POSSLEY, VERITAS INITIATIVE, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009 (2010); Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10-14, 1999.

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> Johnson. She expressed doubt whether Johnson was the rapist and said his complexion was too light. The officer – who had assured her that the rapist was in the lineup – told her that Johnson's appearance in the photograph might be different from his present appearance because it was taken after he had spent years in prison with little exposure to the sun.

This was clear misconduct. Telling an eyewitness that one person in a lineup spent years in prison is not just bad form. It's the same as saying "that's the one, ignore the others" – especially after the same officer assured the victim that her rapist was among those shown. Providing an on-the-spot explanation for differences in appearance only made it worse. The victim herself later complained that she was pressured into identifying Johnson; if she hadn't said so, we probably would not know how the identification was obtained.

Misbehavior is rarely advertised. If misconduct is not uncovered in litigation or by journalists, we don't know about it. As a result, our data underestimate the frequency of official misconduct, as we've mentioned.[92]

The misconduct we do know about occurs in 42% of all exonerations (368/873), including 56% of homicide cases (232/416), 35% of child sex abuse cases (36/102), but only 18% (37/203) of sexual assault cases. It is likely that misconduct by police or prosecutors or both is more common in homicide exonerations than others for reasons we've discussed: Homicides are more important than other crimes, and often also more difficult to investigate and prosecute, so the temptation to lie and cheat is unusually strong. Perjury and false confessions are both more common in homicide cases than sexual assault cases; perjury by government agents *is* official misconduct, and both of these types of false statements may be obtained by misconduct.

On the other hand, murder convictions are also more likely than other convictions to receive detailed attention on review after conviction. It may be that one reason we see more official misconduct among homicide exonerations is they have been more thoroughly picked over after the fact than other cases.

[92] See *supra* Part IV.1(ii).

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V. No-Crime Exonerations

Here are two exonerations, from opposite ends of the spectrum of severity of the underlying conviction, that share a fundamental feature:

- In April 2000, Robert Farnsworth Jr. confessed under police pressure to stealing a cash bag from his employer, a Wendy's restaurant in Jackson, Michigan. He immediately retracted his confession and claimed that he had put the bag in a bank night deposit box as he was supposed to do. Nonetheless, Farnsworth was convicted of grand larceny, given a six-month suspended sentence, and ordered to pay a fine and restitution. Eight months later, another cash bag went missing. This time the bank took apart the deposit box and found three bags of cash, including the one from Wendy's that Farnsworth deposited.

- In August 1999, four children of Patricia Reser – a girl and three boys, ages nine to 13 – testified in Yamhill County, Oregon that from 1988 until 1994 they were physically abused and forced to have sex with each other and with Reser and her boyfriend. Reser admitted in court that she had been "a drug dealer, a whore, a thief, a junkie and a bad mommy," but denied any physical or sexual abuse. She testified that she believed the children had been persuaded to make the accusations by therapists and by their foster mother. Reser was convicted on numerous counts of rape and sex abuse and sentenced to 116 years in prison. In 2002, the two older boys told their foster mother that they had lied about the sex abuse. Oregon state police re-investigated the case, and all four children recanted and passed polygraph exams. Reser was exonerated in June 2002.

Unlike most of the exonerees, Farnsworth and Reser were convicted of crimes that never occurred. Exonerations of this sort – "no-crime" cases – are uncommon even as exonerations go. We found 129 of them, 15% of known individual exonerations. In 78% of the no-crime exonerations, defendants like Patricia Reser were deliberately framed for non-existent crimes (100/129). We discussed some examples in section IV(1)(ii), on eyewitness lies.[93] As we noted there, these individual cases are vastly outnumbered by the police corruption group exonerations that we discuss in section VI. The remaining 22% of the no-crime exonerations are cases like

[93] *See supra* pp. 50-54.

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Farnsworth's in which defendants were convicted by mistake because a disease, an accident or a suicide was misinterpreted as a crime (29/129).

If a crime has actually been committed, an innocent defendant may be able to prove that someone else did it: someone who left his DNA at the crime scene or his fingerprints; someone who was arrested for another murder and confessed to this one as well or bragged about doing it or did other similar crimes; someone who was caught with the loot or the car or the victim's blood on his shirt. Proving that someone else committed the crime is by far the most common method of achieving an exoneration – but it's unavailable to defendants like Farnsworth and Reser because the crimes for which they were convicted never occurred.

Proving that a crime did not happen can be extremely difficult. It is likely that false convictions of this sort are only rarely discovered.

1. Mistakes

In 29 exonerations, authorities misinterpreted the facts and mistakenly concluded that a crime had been committed. A few of these mistakes concerned non-violent crimes – like the theft that Farnsworth was convicted of – but most of the cases involved death (12 convictions for murder, three for manslaughter and one for child abuse) or events that might have caused death (three convictions for arson and one for child abuse). In all but one, an accident or a suicide was mistaken for a crime.[94] The exception is the exoneration of Medell Banks:

> In August 1999, in Choctaw County, Alabama, Victoria Banks, her estranged husband Medell Banks, Jr., and her sister Dianne Tucker were arrested for the murder of an infant supposedly born to Victoria two months earlier. All three defendants were mentally retarded, all eventually confessed after they were

[94] We know of several older cases in which defendants were convicted of killing victims who turned up alive, but none since 1989. In 1819, Jesse and Stephen Boorn, two brothers from Manchester, New Hampshire, were convicted and sentenced to death for the murder of their brother-in-law, Russell Colvin, who had disappeared seven years earlier. They were freed several months later after Russell Colvin was found in New Jersey, alive and well, and was tricked into returning to Manchester a month before Stephen's scheduled hanging. ROB WARDEN, WILKIE COLLINS'S THE DEAD ALIVE: THE NOVEL, THE CASE, AND WRONGFUL CONVICTIONS (2005). Edwin Borchard describes five additional cases involving eight defendants who were convicted of killing victims who were later found alive. EDWIN M. BORCHARD, CONVICTING THE INNOCENT—ERRORS OF JUSTICE (1932).

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> threatened with the death penalty and interrogated at length in isolation, and all pled guilty to manslaughter. There was never any physical evidence that the baby ever existed. In fact, Victoria Banks had tubal ligation in 1995 and medical tests later confirmed that it was intact throughout the relevant period, making pregnancy impossible. Dianne Tucker's sentence was reduced and she was released in 2002. Medell Banks was exonerated and released in January 2003. Victoria Banks herself did not dispute her guilt and never challenged her five-year sentence.

(i) Shaken baby cases

In more than half of the no-crime mistake cases in which someone actually died or was injured, the victims were infants or children (9/15). Five of them are "shaken baby syndrome" cases.

> In October 2003, Julie Baumer brought her six-week-old nephew to the hospital because he was lethargic, fussy, and unwilling to eat. A CT scan revealed that the infant, who suffered severe permanent brain damage, had a skull fracture and substantial bleeding in his brain. Baumer was charged with first-degree child abuse and convicted in September 2005 on the theory that her nephew was suffering from shaken baby syndrome because of violent shaking by Baumer. There was no physical evidence that Baumer had abused the baby or that she was responsible for the injury that caused the skull fracture. She was sentenced to 10-to-15 years in prison. Her conviction was reversed in 2009 and she was acquitted on retrial in October 2010 after her attorneys presented six expert witnesses who testified that the baby clearly suffered from venous sinus thrombosis, a form of childhood stroke that exhibits effects that can be mistaken for those of shaken baby syndrome.

In a typical shaken baby syndrome case, an infant is taken to an emergency room and dies within hours. The medical personnel detect a "triad" of three symptoms: hemorrhages in the retina, swelling of the brain, and bleeding under the skull. According to the prevailing medical wisdom as of 20 years ago, this triad of symptoms definitively proves that the baby was killed by shaken baby syndrome (SBS), the effects of violent shaking that makes the baby's head whip back and

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forth.[95] The diagnosis amounts to proof that a crime has been committed. What's more, the theory goes, in such cases there is no "lucid" symptom-free interval between the shaking and the catastrophic injuries or death. In other words, if you find these three symptoms that means the baby was injured or killed by the last adult who was responsible for her care.[96]

In recent years the medical theory underlying shaken baby syndrome has come under strong attack. Many doctors and bio-engineers now claim that it is not physically possible for humans to shake a baby hard enough to produce these effects, that the triad of telltale symptoms can be produced by other causes, and that babies suffering from such injuries often show no symptoms for long periods of time.[97] Even some of the doctors who pioneered the SBS theory now say that it may be flawed.[98]

Baumer's case is not typical of the SBS cases that are described in the literature. Her lawyers were able to establish the actual cause of the infant's injuries. In most shaken baby cases, there is much less information. New medical evidence may persuasively show that the baby was *not* killed by shaking, but this is an unsatisfying result. It means that at the end of the day an infant has died, but we don't know why. This is also not the sort unambiguous evidence that is likely to lead to exoneration. Not surprisingly, in four of five shaken baby exonerations that we know about, the defense was able to find medical evidence of the real cause of the death or the injuries suffered by the baby in question. There are probably other false convictions in SBS cases that have not been remedied because there is no way to establish the true cause of death or injury.[99]

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[95] *See* Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1, 11 (2009); Emily Bazelon, *New Evidence on Shaken Baby Syndrome*, N.Y. TIMES (July 5, 2011, 4:25 PM), http://6thfloor.blogs.nytimes.com/2011/07/05/new-evidence-on-shaken-baby-syndrome/.

[96] *See* Emily Bazelon, *Shaken-Baby Syndrome Faces New Questions in Court*, N.Y. TIMES, Feb. 2, 2011, at MM30.

[97] *Id.*; Tuerkheimer, *supra* note 95, at 17-20. For more on the criminal justice system's trouble adapting to scientific evolution on this issue, see Deborah Tuerkheimer, *Science-Dependent Prosecution and the Problem of Epistemic Contingency: A Study of Shaken Baby Syndrome*, 62 ALA. L. REV. 513 (2011).

[98] *E.g.*, *Rethinking Shaken Baby Syndrome*, NAT'L PUB. RADIO (June 29, 2011), http://www.npr.org/2011/06/29/137471992/rethinking-shaken-baby-syndrome (detailing the reservations of Dr. Norman Guthkelch, a retired pediatric neurosurgeon who is credited with discovering shaken baby syndrome, about how the diagnosis is used in court).

[99] The exception is the landmark case of Audrey Edmunds who was exonerated in July 2008 after the Wisconsin Court of Appeals ordered a new trial because "newly discovered evidence in this case shows that there has been a shift in mainstream medical opinion since the time of Edmunds's trial [12 years earlier] as to the causes of the types of trauma" suffered by the infant she was caring for. *State v. Edmunds*, 746 N.W.2d 590, 598-99 (Wis. Ct. App. 2008).

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(We also know of two additional exonerations – those of Sabrina Butler and Kenneth Marsh – in which the defendants were convicted of killing young babies by abuse that did not involve shaking, and exonerated by evidence that the deaths were accidental.)

(ii) Arson cases

> In August 1987, Ernest Willis was convicted and sentenced to death in Pecos County, Texas, for setting a fire that burned down a house and killed two women. The only evidence that the fire was caused by arson was testimony from local "arson experts" who reached that conclusion based on their examination of the remains of the house. For example, they testified that charred marks on the floor were "pour patterns" left by a flammable liquid that had been poured on the floor before the fire started. In October 2004, Willis was exonerated and released after the county prosecutor obtained a detailed reevaluation of the case by forensic arson scientists who concluded that the prosecution's expert testimony at trial was valueless and that the fire was probably an accident.

Willis was lucky. In 1992, five years after he was sentenced to death, the National Fire Protection Association issued "NFPA 921,"[100] a major report with new guidelines that for the first time applied scientific principles to the analysis of the remains of suspicious fires. That report established that the type of folk-wisdom arson expertise that was used in Willis's case and many others has no scientific basis. Fortunately for Willis, the Pecos County prosecutor was prepared to act on that basis. Cameron Todd Willingham, of Corsicana, Texas, was not so lucky. He too was sentenced to death for arson-murder. The fatal fire in his case was similar to the fire in the Willis case and the evidence for and against arson was essentially identical. Willingham steadfastly maintained that the fire was an accident, but the courts, the prosecutor, and the governor all agreed that there was no reason to revisit the conclusions reached at trial. Willingham was put to death in February 2004, eight months before Ernest Willis was released.[101]

The problem with false arson convictions is that in most cases there is no way to prove that a fire was *not* caused by arson. At best, a convicted defendant might convince a court that once the

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[100] NAT'L FIRE PROTECTION ASS'N, NFPA 921: GUIDE FOR FIRE AND EXPLOSION INVESTIGATIONS (1992).

[101] Steve Mills & Maurice Possley, *Texas Man Executed on Disproved Forensics*, CHI. TRIB., Dec. 9, 2004, at A1.

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junk-science testimony is eliminated, there is no probative evidence of specific telltale signs that the fire was deliberately set: multiple points of origin, the use of accelerants, etc. But an arsonist could start a fire by intentionally mimicking an accidental fire – dropping a lit cigarette on a sofa, or crossing electric wires to create a short circuit.

Courts do not like to exonerate convicted felons without affirmative evidence of innocence. We know of only six exonerations in arson cases in which no arson occurred, including three in which the main charge was murder. There may have been many mistaken arson convictions in the period before the NFA 921 guidelines were consistently applied. For example, between 1984 and 2001, the number of structure fires in Massachusetts remained roughly stable, but the number of such fires classified as arson by fire inspectors fell by more than 70 percent.[102] The only plausible explanation is that fire inspectors have become much less likely to label a fire as arson: they now require truly probative physical evidence.

2. Fabricated Crimes

We know of 100 individual exonerations of defendants whose crimes were deliberately fabricated. We also know about more than 1,100 defendants who were framed by police officers and exonerated in groups when large scale patterns of police corruption were uncovered. We discuss these group exonerations in Section VI.

Several individual exonerees were framed for drug or gun crimes in the same manner as hundreds of those who were cleared in group exonerations (including one who was convicted of a drug robbery that never happened) and one was framed for solicitation. However, nearly 90% percent of the individual exonerations for fabricated crimes are sexual assault cases (89/100). They are unevenly divided between a minority of convictions for rapes of adults (19) and a larger group of child sexual assault cases (70).[103]

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[102] Jack Nicas, *Another Arson Conviction Challenged; Scientists Questioning Investigative Practices That Were Used for Years*, BOSTON GLOBE, Sep. 8, 2010, at 1.

[103] The data also include one additional child sex abuse case that is best categorized as a mistake rather than a fabrication. In the case of 16-year-old Dayna Christoph, her mother and her therapists became convinced that she had raped her 7- year-old sister. Christoph confessed under pressure. She was sentenced to juvenile incarceration in Washington State in 1995, and exonerated in 2000. Nobody ever interviewed or examined the supposed victim, and the adults involved apparently all believed that the rapes had taken place.

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(i) Adult sexual assault

Eleven exonerees were convicted after women, and in one case a man, falsely accused them of rape when in fact there had been no sexual contact between the accused and the accuser. Gary Dotson's exoneration is such a case;[104] so are the exonerations of Mark Clark and Jeff Schmieder:

> In August 1998, Regina Birindelli of Auburn, Washington told police that she had been raped by three men in May of that year. In December 1998, Mark Clark and Jeff Schmieder were convicted of first-degree rape. On May 20, 1999, charges against both men were dismissed after a defense investigator proved that Birindelli was in jail on the day she claimed to have been abducted, handcuffed and repeatedly raped and sodomized.

Some of the complainants in these cases lied to cover up consensual sex with other men, as Cathleen Crowell later admitted in the Dotson case.[105] Birindelli apparently had a score to settle with Mark Clark and hoped to get other favors from the authorities if she testified for them as a victim.

Some rape defendants admit to sex with the complaining witness, but claim it was consensual. Sometimes the meaning of consent is rife with ambiguity. In other cases, the defendant is simply lying about consent; that may be far more common than outright lies from the complainant. But if an innocent defendant in this situation is convicted – and it happens – his only hope for release is persuasive new evidence that the defendant lied.

We know of eight exonerations in cases where the defendant did have sex with the complainant, but it was consensual. In all of them the defendant was able to produce persuasive external evidence of perjury. Nathaniel Lewis, for example, was convicted in 1996 of raping a fellow student at the University of Akron in Ohio. He was exonerated in 2002 based on a portion of the supposed victim's diary in which she wrote that the sex was consensual and that she had accused

[104] *See supra* Section IV.2(ii).

[105] *See supra* Section IV.2(ii).

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Lewis of rape because she was tired of being considered promiscuous. But if the complainant sticks to her guns and is not caught lying at trial or doing or saying things that are inconsistent with her accusation, an innocent defendant's position seems hopeless.

(ii) Child sex abuse

(a) Child sex abuse hysteria cases. In 55% of all no-crime exonerations, the underlying conviction was for child sex abuse (71/129). Two-thirds of these cases were generated in a wave of child sex abuse hysteria that swept the country 30 years ago (48/71).[106]

Starting in the early 1980s, some prosecutors, therapists and child welfare workers became convinced that child sex abuse on a massive scale was rampant in their communities. They believed that most of the victims were too afraid or embarrassed to discuss the abuse, so they worked to overcome this fear and reluctance by using highly suggestive, persistent and unrelenting questioning techniques when interviewing the young children. It worked. Some of the children complied and accused parents, day-care workers and adult acquaintances of numerous horrifying and bizarre acts. This led to a series of extraordinary prosecutions, many involving allegations of satanic rituals.[107]

Probably the best known was the McMartin Pre-School prosecution in Manhattan Beach, California. In March 1984, seven defendants were charged with 321 counts of abuse involving 48 children. In 1986, after 20 months of preliminary hearings, a new district attorney dismissed all charges against five of the defendants. In 1990 – after a *three-year trial*, the longest in American history – one of the two remaining defendants was acquitted of all charges. The other was acquitted on 52 of 65 counts and the jury was unable to reach a decision on the remaining

[106] One of the child sex abuse hysteria cases is that of Danya Christoph, which we categorize as a mistake rather than a fabrication. *See supra* note103.

[107] *See generally* KATHERINE LYON, WITCH HUNT: A TRUE STORY OF SOCIAL HYSTERIA AND ABUSED JUSTICE (1998); DEBBIE NATHAN & MICHAEL SNEDEKER, SATAN'S SILENCE: RITUAL ABUSE AND THE MAKING OF A MODERN AMERICAN WITCH HUNT (1995); DOROTHY RABINOWITZ, NO CRUELER TYRRANIES: ACCUSATION, FALSE WITNESS, AND OTHER TERRORS OF OUR TIMES (2003); *Innocence Lost: the Plea* (PBS television broadcast May 27, 1997), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/innocence/.

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counts. Five months later, the last defendant was retried on 6 counts; the jury could not agree on any verdict and the charges were dismissed.[108]

In 2005, a 30 year-old man who had testified for the McMartin prosecution as a nine year-old told his story of the investigation:

> It was an ordeal. I remember thinking to myself, "I'm not going to get out of here unless I tell them what they want to hear." …
>
> I remember telling [the investigators] nothing happened to me. I remember them almost giggling and laughing, saying, "Oh, we know these things happened to you. Why don't you just go ahead and tell us? Use these dolls if you're scared."
>
> Anytime I would give them an answer that they didn't like, they would ask again and encourage me to give them the answer they were looking for. It was really obvious what they wanted. …
>
> Maybe some things did happen. Maybe some kids made up stories about things that didn't really happen, and eventually started believing they were telling the truth. Maybe some got scared that the teachers would get their families because they were lying. But I never forgot I was lying.[109]

In some of the child sex hysteria cases, the children's stories were preposterous. Children at the Little Rascals Day Care Center in Edenton, North Carolina, said that they had seen babies killed, children taken out on boats and thrown overboard to feed sharks, and children taken to outer space in a hot air balloon.[110] In Kern County, California, children described mass orgies with as many as fourteen adults who forced groups of children to inhale eighteen-inch lines of cocaine or heroin, gave them injections with syringes that left large bruises, and hung the children from hooks as the adults repeatedly sodomized them.[111] Needless to say, no physical evidence ever corroborated any of these absurd claims.

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[108] *See* Robert Reinhold, *The Longest Trial – A Post-Mortem; Collapse of Child-Abuse Case: So Much Agony for So Little*, N.Y. TIMES, Jan. 24, 1990, at A1.

[109] Kyle Zirpolo, as told to Debbie Nathan, *I'm Sorry; A Long-Delayed Apology from One of the Accusers in the Notorious McMartin Pre-School Molestation Case*, LOS ANGELES TIMES, Oct. 30, 2005, at MM10.

[110] *Innocence Lost*, *supra* note 107.

[111] NATHAN & SNEDEKER, *supra* note 107.

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In other cases, the accusations were merely unbelievable. In Wenatchee, Washington, a town of 55,000 residents, police arrested 43 people on charges that 60 children, ages five to 16, had been raped or sexually abused 29,726 times over a six-year period – an average of more than 100 rapes a year for each abuser – but somehow nobody noticed at the time.

More than 150 defendants were charged in child sex abuse hysteria prosecutions across the country and more than 70 were convicted. The cases began to fall apart when some of the child witnesses recanted. In Wenatchee, 30 of the 43 defendants were convicted at trial or pled guilty to reduced charges in 1994 and 1995. In 1996, a key prosecution witness – a girl who had testified that she and every child she knew had been abused by almost every adult they had contact with over a period of several years – gave a video-taped recantation in which she said that she had been pressured into making these accusations and that in fact she had never been abused and never witnessed other children being abused. In 1998, a judge reviewing one of the convictions wrote that the lead detective in Wenatchee could get the young witnesses "to say whatever he wanted them to say." By the end of 2000, all of the Wenatchee defendants had been released: 11 were exonerated; seven had their convictions reversed and entered no contest pleas to lesser charges with no further imprisonment; and 12 had been released years earlier, when they pled guilty or no contest and received suspended sentences or short terms that they had already served.

Most of the 48 child sex abuse hysteria exonerations we know about came in batches: 20 in Kern County, 11 in Wenatchee, and smaller sets in Nevada, North Carolina and New York City. Once these massive investigations began to unravel, all the convictions they produced were called into question. Even so, exonerations were not automatic; they were contested case by case. In Wenatchee, as we mentioned, some defendants whose convictions were reversed on appeal had their charges dismissed, but others were persuaded to accept plea bargains for immediate release. In Kern County, most of the exonerations had occurred by the mid-1990s, but one defendant, John Stohl, remained in prison until 2004. In both locations, defendants who pled guilty and were released early were never exonerated. By contrast, in some of the police corruption group

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exonerations that we discuss in Section VI, authorities were much more willing to vacate and dismiss any conviction in which a corrupt police officer played a critical role.

(b) Other child sex abuse cases. Twenty-three of the child sex abuse convictions that led to exoneration were based on fabrications that involved a single defendant. In most, a child falsely accused an adult family member. Patricia Reser's case[112] is an unusual example for two reasons: four of her children testified against her, and she is a woman, the only one in this group. The men include 7 fathers (1 adopted) and 4 step-fathers, plus three boyfriends of the children's mothers.

Some children falsely accuse a parent of sex abuse out of anger. Some accuse their step-father or their mother's boyfriend in order to get rid of him. But the most common explanation for false accusations of this sort is a divorce or custody dispute.

> Mark Cleary and his girlfriend had two daughters. After they separated, the girls' mother allowed them to visit Cleary several times in 1986 at his home in Macomb Township, Michigan, but she stopped the visits when conflicts between the parents became bitter. In January 1987, Cleary's seven-year-old daughter accused him of raping her a year earlier. There was no physical evidence of abuse, but in 1989, Cleary was convicted and sentenced to 20-to-30 years in prison. Eight years later, in 1997, Cleary's daughter told her mother-in-law that she had lied. The daughter, by then 17, signed a sworn statement saying that she had never been molested and that she had lied under pressure from her mother. She described in detail how her mother had rehearsed her statements to the police and her testimony in court. Cleary was released in 2004 and exonerated in February 2005.

Divorce and custody battles are extremely common in the United States. Sometimes they include charges of sexual abuse of the children by one parent or the other, or both. Many judges, prosecutors and child welfare agencies are skeptical of accusations of child sex abuse in custody battles, for obvious reasons. Some ex-partners are prepared to believe the worst about each other, especially when their children are involved. Others are so angry or bitter or vindictive that they will manufacture evidence against their former partners. And of course, the custodial parent of a young child can scare or manipulate the child into saying things that are false, intentionally or

[112] *See supra* pg. 68.

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unintentionally. More than 80% of custodial parents of children who live with only one parent are mothers,[113] so it's not surprising that most of the false accusations we know about are directed against fathers.

Charges of child sex abuse cannot be ignored even if the context is suspicious. Some lead to prosecutions and convictions; most of those, we hope and expect, are accurate. In many child sex abuse cases, however, there is no physical evidence of any value because the assaults are said to have occurred months or years before they were reported. If a father (or step-father, or mother's boyfriend, or teacher) is falsely convicted of sex abuse based solely on testimony by a child, his only hope of exoneration is for the accuser to recant – and even then, the courts may be reluctant to dismiss the charges. Mark Cleary, for example, was finally exonerated almost eight years after his daughter repudiated her accusations.

How often do such false convictions occur? We have no idea, but in a country with more than 20 million children living with only one parent,[114] it's hard to believe that 23 exonerations in 23 years is more than a token number.

[113] AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2011 Table 3, *available at* http://www.census.gov/population /www/socdemo/hh-fam/cps2011.html.
[114] *Id.*

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VI. Group Exonerations

This section was co-authored by Maurice Possley.

The 2003 Report discussed three group exonerations "of innocent defendants who were falsely convicted as a result of large scale patterns of police perjury and corruption."[115]

1. *Los Angeles, California, 1999-2000*. The "Rampart Scandal" began to unravel in 1999 when authorities learned that officers in the Rampart division of the Los Angeles Police Department had routinely lied on arrest reports and in testimony, framed innocent defendants by planting guns or drugs on them, and on several occasions shot and killed or wounded unarmed suspects and innocent bystanders and planted guns on suspects after shooting them. In the aftermath of this scandal, between 100 and 150 criminal defendants had their convictions vacated and dismissed by Los Angeles County judges in late 1999 and 2000. The great majority were young Hispanic men who were believed to be gang members, and who had pled guilty to false felony gun or drug charges.

2. *Dallas, Texas, 2002.* The Dallas "Sheetrock Scandal" came to light in January of 2002. At least 80 defendants in Dallas, Texas, were falsely charged with possession of quantities of "cocaine" that turned out, when finally analyzed, to consist of powered gypsum, the primary constituent of the building product Sheetrock. Most of the Sheetrock cases were dismissed before trial, but some innocent defendants had pled guilty and were in prison or had been deported to Mexico.

3. *Tulia, Texas, 2003*. In 1999 and 2000, 39 defendants were convicted of selling cocaine in Tulia, Texas, on the uncorroborated word of a single dishonest undercover narcotics agent. In 2003, 35 of them – all who were technically eligible – were pardoned when it was shown that the undercover officer had systematically lied about these cases, booked in evidence quantities of highly diluted cocaine from a personal stash, and charged the defendants with drug sales that had never occurred. Two additional defendants were granted writs of habeas corpus vacating their convictions, which were later dismissed.[116]

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[115] 2003 Report, supra note 1 at 533. The 2003 Report describes these cases as "mass exonerations," but the term may be misleading since some of the groups involve 5 to 20 exonerations, and there may be others in that range that we have not yet identified.

[116] Russell D. Covey, *Mass Exoneration Data and the Causes of Wrongful Convictions* working paper (Working Paper 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1881767.

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In the process of assembling the data that we report here, we have run into at least 9 additional group exonerations:

1. *Oaklyn, New Jersey, 1989-1991.* In August, 1991, Oaklyn police officer Robert Kane pleaded guilty and was sentenced to prison for falsifying the results of breathalyzer tests on drivers he stopped for drunk driving, and stealing money from their purses and wallets when he booked them. A total of 155 convictions for driving under the influence were dismissed.[117]

2. *Philadelphia, Pennsylvania, 1995-1998.* On February 28, 1995, five narcotics officers of the 39th District of the Philadelphia Police Department were indicted by a federal grand jury for a variety of felonies stemming from a long-standing pattern of theft, perjury, deception and violence. Among other crimes, they planted drugs and manufactured evidence in numerous cases. Over the next three years charges were dismissed against 138 felony defendants in cases from the 39th District, all of whom had been convicted. Subsequently, the investigation of the 39th spread to other districts and ultimately resulted in the dismissal of more than 200 additional convictions.[118]

3. *Oakland, California, 2000.* In November, 2000, four Oakland police officers known as "The Riders" were charged with assault, making false arrests, filing false reports and other charges. One officer remains a fugitive. The other three were tried twice, but the charges were dismissed after mistrials were declared in both trials when the juries deadlocked. Oakland settled lawsuits for more than $11 million brought on behalf of more than 120 people who alleged they were victimized by the officers. A total of 76 convictions were set aside and another 25 probation or parole revocations were also dismissed.[119]

4. *Washington, D.C. 2000.* In 2000, U.S. Attorney Jay Stephens obtained dismissals of 32 drug convictions following an investigation of narcotics cases handled by

[117] John Way Jennings & Larry Lewis, *Judge Overturns Convictions Of 155*, PHILA. INQUIRER, July 20, 1995, at S01.

[118] Joseph A. Slobodzian, *Jailed Officer Set To Go Home*, PHILA. INQUIRER, Nov. 21, 2000, at B01; *see also* Interview with Bradley S. Bridge, Attorney, Philadelphia Defender Association (Mar. 2012).

[119] Guy Ashley, *'Riders' Suits Settled; $11 million*, CONTRA COSTA TIMES (California), Feb. 21, 2003, at A6; *see also* Interview with James Chanin, Plaintiffs' Attorney in Lawsuit, Berkeley, CA (Mar. 2012).

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D.C. Metropolitan police officer Lugenia Dorothy King. King's cases came under scrutiny after she tested positive for cocaine use in 1989.[120]

5. *Louisville, Kentucky, 2003. Louisville:* In 2003, two detectives assigned to a narcotics unit staffed by Louisville and Jefferson County law enforcement were convicted of obtaining warrants with false affidavits and pocketing money meant for informants. Jefferson County prosecutors report they dismissed about 20 convictions.[121]

6. *Mansfield, Ohio, 2008.* In May 2007, Jerrel Bray, a long-time drug dealer and police informant from Mansfield, Ohio, was in jail in nearby Cleveland for shooting a man in a drug deal. A public defender came to talk to him about a different drug case in which Bray had provided evidence against the lawyer's client, and Bray – who was worried that his work as a snitch might get him killed in jail – began to talk about how he and his police handlers had faked evidence in dozens of drug cases, among other crimes. Ultimately, a Richland County sheriff's detective pleaded guilty to perjury during a drug trial and a federal Drug Enforcement Administration agent was indicted and acquitted of charges of perjury and false arrests. By 2012, 20 convicted drug defendants had been exonerated and released.[122]

7. *Benton Harbor, Michigan, 2009-2012.* In 2009 and 2010, two Benton Harbor police officers were indicted on federal corruption charges related to dozens of drug arrests in that city from 2006 to 2008. Among other crimes, they were charged with embezzling money from the police department, stealing from suspects, fabricating drug buys, and planting drugs on suspects or in their homes. They were eventually sentenced to 37 months and 30 months in prison. By March, 2012, at least 69 defendants who were convicted of drug crimes based on testimony by those officers had their convictions vacated and charges dismissed.[123]

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[120] Barton Gellman, *'Interests Of Justice' Often Slow; Few Freed Despite Tainted Drug Cases*, WASH. POST, Feb. 3, 1990, at B4; *see also* Interview with Jay Stephens, Former U.S. Attorney (Mar. 2012).

[121] Gregory A. Hall, *Police-Corruption Trial Opens Tomorrow*, COURIER-JOURNAL (Louisville, KY), Jan. 13, 2003, at 1A; *see also* Interview with Harry Rothgerber, First Assistant, Commonwealth's Attorney's Office, Jefferson County, Kentucky (Mar. 2012).

[122] Mark Caudill, *Deputy Gets Probation, Weekend Jail*, MANSFIELD NEWS JOURNAL (Ohio), Feb. 17, 2010; *see also* E-mail from Jon Loevy, Attorney for Exonerated Defendants in Federal Civil Rights Lawsuit (Mar. 2012).

[123] Eartha Jane Melzer, *Drug Cases Dismissed Following Pleas by Corrupt Narcotics Cops*, MICH. MESSENGER, Sept. 28, 2009; *see also* Interview Arthur Cotter, Berrien County District Attorney (Mar. 2012).

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8. *Tulsa, Oklahoma, 2009-2012.* In 2010, six Tulsa police officers and one federal agent were indicted in a federal investigation of corruption in law enforcement in Tulsa, including charges of planting drugs and faking drug buys. By March 2012, at least 28 convicted defendants were released from prison after drug and related charges were dismissed.[124]

9. *Camden, New Jersey, 2010-2012.* In the summer of 2008, the new Camden police chief initiated an investigation into corruption in his own department, which he later turned over to the FBI. By March, 2012, three former Camden police officers had pleaded guilty to federal conspiracy charges, another officer was convicted at trial and a fifth officer was acquitted. As a result, 193 drug convictions were dismissed.[125]

Table 18 summarizes our information on the exonerations in these 12 police scandals:

[124] Harper, *Inmate Linked to Police Probe Released*, TULSA WORLD, Feb. 2, 2012, at A1; *see also* Interview and E-mail with James D. Dunn, Assistant District Attorney, Tulsa County District Attorney's Office (Mar. 2012).

[125] George Anastasia, *Former Camden Officer's Appeals Rejected in Corruption Case*, PHILA. INQUIRER, Mar. 8, 2012, at B04; E-mail from Jason Laughlin, Spokesman for Camden County Prosecutor's Office (Mar. 2012).

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Table 18: Group Exonerations, 1995 - 2011

PLACE AND DATE	NUMBER OF EXONERATED DEFENDANTS	CRIMES CHARGED
Oaklyn, NJ, 1991	155	Drunk driving
Philadelphia PA, 1995-1998	At least 339	Mostly drugs
Los Angeles CA, 1999-2000	100 to 150	Mostly drugs & gun possession
Oakland, CA, 2000	101	Mostly drugs
Washington, DC, 2000	32	Drugs
Dallas TX, 2002	6 to 15	Drugs
Tulia TX, 2003	37	Drugs
Louisville, KY, 2003	20	Mostly drugs
Mansfield OH, 2008	20	Drugs
Benton Harbor MI, 2002-12	69	Mostly drugs
Tulsa OK, 2009-10	28	Mostly drugs
Camden NJ, 2010-12	193	Mostly drugs
ALL CASES	**At least 1,100**	**Primarily drug charges**

The list in Table 18 is just a start. We have not conducted a systematic, in-depth search for group exonerations. We have learned that they are not easy to study from a distance. Most do not get national attention; some barely make regional news beyond the articles about the corrupt officers; and the local news coverage we can find for those we do know about is often sketchy.

Even when there is widespread attention to investigations of police corruption, identifying convictions that were dismissed as a result is often difficult. For example, numerous police scandals have rocked the New York police department in the past decade, and there are reports of hundreds upon hundreds of cases being dismissed,[126] but few indicate whether the dismissals occurred prior to or after conviction.

Some of the investigations we have listed – the one in Tulsa, for example – are still on-going, as far as we know, and may produce more exonerations. Others that we have not listed are at earlier

[126] Jim Dwyer, *The Drugs? They Came From the Police*, N.Y. TIMES, Oct. 14, 2011, at A23.

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stages of development. For example, in April of 2009, a Philadelphia public defender – acting on information from a police informant who confessed to a long career of theft, perjury and deception in cooperation with his police handlers – challenged 53 drug convictions that appear to have been based on fabricated evidence. As of this writing, those challenges are on hold, pending the outcome of a joint FBI and local investigation of corruption among Philadelphia narcotics officers.[127]

In some instances, police scandals did not generate large scale reviews of cases brought by the corrupt officers or, if reviews were done, prosecutors notified defense attorneys of potentially suspect cases and left it up to them or the defendants to pursue vacating the convictions. As a result, there is no really effective way to determine the true number convictions set aside.

For example, beginning in the 1990s and extending into the late 2000s, a series of Chicago police corruption scandals resulted in convictions of more than a dozen police officers on charges relating to the falsification of drug cases, theft of narcotics from drug dealers and users and filing false reports.[128] The Cook County State's Attorney's office says it has no idea how many convictions were later dismissed, although a review of federal lawsuits reveals that several defendants sued the City of Chicago after their convictions were vacated.[129]

There is no way to tell whether prosecutorial reviews are cursory on the one hand or painstakingly extensive on the other. In St. Louis, for example, state and federal prosecutors launched a review of hundreds of convictions that were based on evidence from several St. Louis police officers, including two who pled guilty in 2009 to federal charges that include stealing money and drugs, falsifying reports, and planting drugs on suspects. As of March 2012, one convicted defendant had been released and prosecutors said they had not found any other

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[127] Matt Stroud, *A Matter of Conviction: If Philly Cops Were Fabricating Evidence, What Happens to the People They Sent to Jail?*, PHIL. CITY PAPER, Feb. 23, 2011.

[128] Maurice Possley, *When Cops Go Bad, Everybody Pays*, CHI. TRIBUNE, Oct. 22, 2006, *available at* http://articles.chicagotribune.com/2006-10-22/news/0610210288_1_officers-charges-drug-dealers; Frank Main *Cops' Arrests Get 10 Felony Cases Tossed Out*, CHI. SUN-TIMES, May 9, 2005, at 21; Maurice Possley & Gary Marx, *Austin 7 Arrests Fall Apart In Court*, CHI. TRIBUNE, Jan. 25, 1997, at N1; Mark Warnick, *City Cop Scandals Dash Drug Trials*, CHI. TRIBUNE, Dec. 25, 1997, at C1; David Heinzmann & Annie Sweeney, *Federal Probe Nets 4 SOS Cops, No Brass*, CHI. TRIBUNE, Apr. 8, 2011, at C9.

[129] Email from Andrew Conklin, Media Spokesperson, Cook County State's Attorney's Office (Mar. 2012).

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convictions that they believed they should dismiss.[130] We are in no position to judge the accuracy of that conclusion.

In Manatee County, Florida, four members of a county street level drug fighting unit were charged with a large array of federal crimes, including stealing money from suspects, planting evidence, filing false reports and covering up crimes committed by fellow officers. The federal charges outlined four particular cases where the officers framed defendants—including the planting drugs in a souped-up Mustang and arresting its owner so that the officers could seize the car for their own use. Beyond the four frame-ups—in which the convictions were later vacated—authorities did not dismiss any other convictions.[131]

In some instances, investigations were never pursued at all.

In 2002, for example, the Dallas, Texas, District Attorney's Office dismissed pending charges against 20 defendants who were apparently framed by two former Dallas police officers who were themselves convicted of stealing money from suspects and falsifying reports. Three convicted defendants who were still imprisoned also had their convictions reversed, but prosecutors made no attempt to identify other defendants who had been falsely convicted in this conspiracy on the ground that it was "up to the individual defendant."[132]

Wholesale police frame-ups of innocent defendants are at one end of a continuum. At the opposite end we find isolated acts of perjury in particular cases; many individual exonerations that include police perjury probably fit this mold. In between, there are serial perjurers: officers who frame innocent defendants repeatedly over the course their career, but not as part of a concerted plan or large scale conspiracy. In all likelihood, the great majority of such cases are never discovered, from one end of the spectrum to the other.

The group exonerations we have found are overwhelmingly cases in which police officers

[130] Christine Byers, *Man Grasps Second Chance for Life*, ST. LOUIS POST-DISPATCH, Dec. 5, 2010, at A1.

[131] Timothy O'Hara, *Judge to Hand Down Final Sentence*, SARASOTA HERALD-TRIBUNE, Oct. 2, 2000, at BM1; Interview with Jeff Del Fuoco, Former Federal Prosecutor (Mar. 2012).

[132] Todd Bensman, *False Drug Convictions May Linger*, DALLAS MORNING NEWS, Sept. 8, 2002.

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planted drugs and guns on suspects. It takes a lot to overcome the practical presumption that police tell the truth in court, especially when the competing story comes from an accused drug dealer or a gang member. The cases that come to light are those in which the evidence of corruption becomes unanswerable, which is most likely in scandals with many innocent victims. When that point is reached, the dam breaks and there is a flood of dozens or hundreds of convictions that are recognized as unreliable or baseless.

The innocent defendants who were released as a result of these scandals were exonerated as we define the term. These cases are highly important and their numbers may rival or exceed individual exonerations. Nonetheless, we do not include group exonerations in our database because they are fundamentally different from exonerations based on individual investigations and cannot usefully be studied together.

The unit of observation for an individual exoneration is the defendant and his case. The investigations that lead to these exonerations produce a great deal of information about each case, and much of that information is publicly reported.

Group exonerations are viewed through the prism of the corrupt officer or the police conspiracy. Once that basic picture comes into focus, exonerations may be handled summarily and receive little or no attention. As a result, we may know little or nothing about the individual cases that are dismissed in the aftermath: not the dates of arrest, conviction and exoneration; not the facts of the alleged crime; not the mode of conviction or the sentence; not even the names of the exonerated defendants. For some of the group exonerations listed, we don't even know the number of exonerated defendants,[133] and in some it is clear that many innocent defendants who were framed and convicted have never been identified or exonerated. In both Dallas and Los Angeles, for example, many innocent defendants were deported to Mexico or Central America after conviction, and never returned to obtain dismissals. In short, we have too little information on the defendants in group exonerations to include them in our database; and in any event, the two categories should be studied separately rather than mixed together.

[133] The exception is Tulia, for which we have detailed information. *See* NATE BLAKESLEE, TULIA: RACE, COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN (2005).

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In some group exonerations, it is likely that quite a few of the convicted defendants who were cleared were in fact guilty. For example, Professor Russell Covey has examined reasonably detailed information on 87 of the Rampart exonerations in Los Angeles.[134] He concluded that 38 cases qualified as exonerations by the criteria we employ, and the defendants are highly likely to be innocent; 27 cases included "evidence of criminal culpability" by the defendant; and 22 cases were too unclear to call. This suggests that half or more of the Rampart exonerees were innocent, but many others were not. On the other hand, Covey concludes that virtually all the exonerated Tulia defendants were innocent. Based on the evidence we have reviewed, we agree.

Given all these qualifications, we can make a few general observations about these shameful affairs:

- There is nothing new about such abuses of power. For example, in the 1920's, New York City police officers framed innocent women on charges of prostitution and then collected kickbacks from bail bondsmen and defense attorneys, and occasionally bribes from the innocent defendants directly. After this practice came to light in 1930, half a dozen defendants were pardoned and at least one police officer was convicted of perjury.[135]

- All but two of these scandals center on drug crimes. Some earlier group exonerations fit that pattern as well. In 1977, for example, the Governor of Vermont pardoned 71 defendants who were convicted of drug crimes based on testimony from a state trooper who was caught systematically lying and framing innocent defendants.[136] Corruption, of course, is endemic among police officers who try to enforce laws that criminalize popular lines of business: gambling, drug trafficking, bootlegging, prostitution. Many of the criminals have the money and the skill to buy off the police, and many officers are tempted to steal and sell the products they are supposed to suppress. Since the crimes involved have no direct victims, they are easy to fake: plant the drugs or falsely swear to

[134] Covey, *supra* note 116, at 10-12.

[135] Borchard, *supra* note 94.

[136] Joyce Jensen, *Full Unconditional Pardons*, N.Y. TIMES, Jan. 9, 1977, at 4, 22.

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a sale, and it's done. It's an easy way to build an award-winning record: arrest criminals (or those that other police officers will think are criminals), steal their money or their drugs or both, and eliminate competitors of the criminals who pay for police protection.

- The innocent drug defendants in these group exonerations were overwhelmingly black (Philadelphia, Tulia, Benton Harbor, and Camden, among others) or Hispanic (Los Angeles, Dallas). Many were also particularly vulnerable because of their background, criminal history or legal status: some were gang members (especially in Los Angeles); some no doubt really were drug dealers, or at least drug users; and many were deportable aliens.

- With the exception of the Tulia cases, these group exonerations depended substantially or entirely on investigations by police agencies or prosecutors or both. Most involved federal investigations (Philadelphia, Mansfield, Benton Harbor, Tulsa, and Camden).

We have identified 12 group exonerations over a 17-year period. Between them, they led to at least 1,100 separate exonerations and probably quite a few more. There have been others. We have scratched the surface of this issue, but just. We hope to learn more and report about these scandals again in 12 to 18 months.

There's no question that police corruption on this scale is a highly important problem, even though we don't yet have a clear idea of its scope. What we already know about these cases also illustrates a major difficulty in any attempt to catalogue exonerations: It's easy to miss whole categories of cases that don't fit our preconceptions of what false convictions and exonerations look like.

The group exonerations we have found also offer a window into a world of individual false convictions we don't otherwise see: cases of innocent defendants who plead guilty and receive comparatively light punishment. For example, 27 of the 37 Tulia exonerees pled guilty; most of them received probation and fines or were sentenced to incarceration for periods from few

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months to one or two years.[137] If innocent defendants in the Tulia scandal and other group exonerations accepted such plea bargains there must be many others who also did so in individual cases. There may be thousands, possibly tens of thousands of similar false convictions every year, but we never learn about them. It would be prohibitively expensive to conduct investigations to establish the innocence of the defendants in such cases. It never happens – except in the context of group exonerations.

[137] Samuel Gross *Convicting the Innocent*, 4 ANN. REV. L. & SOCIAL SCI. 173, 181 (2008)

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VII. Exonerations We Don't Know About

How can we describe events we don't know about? One strategy is to look at their close cousins, events we learned about almost by accident but might well have missed. Consider these two exonerations:

- On November 23, 1979, two black men, one armed with a pistol, abducted a white couple from a parking lot in Dallas, robbed them, took the woman to a park and raped her. A week later two young African American men, Cornelius Dupree, Jr., 21, and Anthony Massingill, 19, were arrested because they resembled suspects in a different sexual assault. Massingill was carrying a pistol. The next day, the rape victim identified Dupree and Massingill from a photographic lineup, but her companion did not identify either of them. Both victims identified the defendants at trial, and in June 1980 Dupree and Massingill were convicted. Dupree was sentenced to 75 years; Massingill, who was also convicted of a separate rape-robbery, was sentenced to life. Dupree was released on parole in July 2010, after 30 years in prison. In December of that year, as a result of a joint investigation by the Innocence Project and the Dallas County District Attorney's Office, DNA tests were conducted on the surviving remnants of the biological evidence from the rape; the tests cleared both Dupree and Massingill. Dupree was officially exonerated on January 4, 2011. Massingill remains imprisoned for his second rape-robbery conviction and has not been formally exonerated in either case.

- On June 12, 2009, Julian Hinojosa, a gang member, was shot and killed in Detroit, Michigan by man with a bandana over his face in a group that apparently included members of a rival gang. On November 13, 2009, Rayshard Futrell was convicted of first degree murder for shooting Hinojosa and sentenced to life imprisonment without the possibility of parole. The only evidence tying Futrell to the crime was a cross-racial eyewitness identification by a woman who saw the shooter for a few seconds before he pulled up his bandana all the way up. In January, 2010, Futrell's appeal was assigned to a lawyer for the Michigan State Appellate Defender's Office, who immediately began reinvestigating the case. She discovered that the police had obtained a video from a nearby store surveillance camera that clearly showed Futrell near the scene of the crime but wearing unmistakably different clothes from those worn by the shooter. It is unclear whether this video was given to Futrell's trial lawyer, but in any event it was not presented at his trial. Based on that evidence, the prosecutor's office agreed to vacate the conviction and dismiss

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> the charges, and on October 28, 2010, Futrell was exonerated of the murder of Julian Hinojosa and released. However, because Futrell had testified falsely at trial – he said that he was not anywhere near the scene of the shooting at all – the prosecutor required him to plead guilty to perjury, for which he was sentenced to 3 years probation.

In some ways, these two exonerations are similar: Both defendants were convicted at trial of violent crimes that they did not commit, both were sentenced at a young age to extremely severe punishments – 75 years and life imprisonment, both convictions were based on cross-racial eyewitness misidentifications by strangers, and both were ultimately cleared and freed. But the events that led up to these two exonerations and the reactions to them were very different.

Cornelius Dupree's case is the sort of exoneration we've become accustomed to reading and hearing about over the past twenty years: A defendant is falsely convicted of rape or murder, fights against all odds to regain his freedom and clear his name, and is finally exonerated by DNA thanks to dedicated volunteer help from an overburdened innocence project after decades in prison – in Dupree's case, a record, nearly 31 years.

Many of the 325 DNA exonerations fit this mold. These are highly disturbing stories and they receive a great deal of attention, as they should. Dupree's exoneration is a clear example. His release was reported in well over a hundred print and broadcast news stories, editorials and columns – and hundreds of blog entries. He can be found in Wikipedia, Facebook, and countless Google listings. Dupree and the District Attorney of Dallas County both appeared on national news programs to discuss the case.[138] Four months after his exoneration, Dupree testified before the Texas State legislature in support of a bill to set standards for eyewitness identification procedures.[139]

Rayshard Futrell's exoneration, on the other hand, went entirely unnoticed. There were no news stories; online searches come up empty; he is not listed on the website of any organization; bloggers, not to mention state legislatures, have not heard of him.

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[138] *See CBS Morning News* (CBS television broadcast Jan. 5, 2011); *Wrongful Convictions and DNA Evidence*, THE DIANE REHM SHOW (Jan. 6, 2011), *available at* http://thedianerehmshow.org/shows/2011-01-06/wrongful-convictions-and-dna-evidence.

[139] *See* Brandi Grissom, *Exonerated Men Plead for Justice System Change*, TEXAS TRIB., Feb. 22, 2011.

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In some ways, Futrell seems less sympathetic than Dupree. He may have been a gang member, and he certainly lied at his trial. But other more celebrated exonerees also lied at trial or had serious criminal records or unsavory companions. Dupree, for example, was arrested with a gun-carrying companion, and for all we know, he too lied to the police back in 1979. And Futrell was all of 18 years old when he was sentenced to life imprisonment without the possibility of parole for a murder that he did not commit and his only criminal record was a term of probation for driving without a license as a juvenile.

One reason for the striking difference in attention to these two cases is that Futrell was astonishingly lucky for a defendant who was falsely convicted of murder. If there had been no surveillance video, he'd be in prison today and would probably remain there until his death. Instead, he went home after less than a year and half in custody, while Dupree was locked up for nearly 31 years.

But the main reason that Rayshard Futrell is totally obscure is that his exoneration was not brought about by an innocence project that is devoted to identifying and freeing innocent defendants, but instead by a public defender. It is one of a number of low-profile exonerations by working professionals in the criminal justice system – the defense lawyers, prosecutors and police officers whose main jobs are arresting, prosecuting and defending the guilty. They often do nothing to call attention to their innocence cases and sometimes actively work to keep them from public view.

Cornelius Dupree's exoneration, on the other hand, could hardly be missed. It helped that he had spent more than 30 years in prison, a record for a DNA exoneration – but Edward Carter spent *35 years* in prison before he was exonerated in Detroit in 2010,[140] and his release went completely unnoticed. The essential reason why Dupree is so well known is that his exoneration was the result of a joint investigation by two organizations that are eager to publicize their work: the Innocence Project in New York and the Conviction Integrity Unit of the Dallas County District Attorney's Office, both of which have received national attention for identifying and correcting false convictions.

[140] *See supra* page 1.

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Carter and Futrell are in this Registry because they were exonerated in Detroit and were represented by Michigan lawyers whom we happen to know personally. That is a flashlight with a very narrow beam. How many similar cases in other states have we missed? There must be some, probably many.

The exoneration of Jeffrey Holemon was covered by the local press, but barely.[141] When he was exonerated by DNA in Tuscaloosa, Alabama in January 1999, after 12 years in prison for a rape he did not commit, there were a few articles in the Birmingham News and the Tuscaloosa News, but none appear in online news databases. We spotted the case, but knew very little about it until we located and interviewed Mr. Holemon himself and the deputy district attorney who was involved in the process. Holemon's case was not included in the 2003 Report; until recently it was not listed on the Innocence Project web site, which tracks all known DNA exonerations. Why was this exoneration missed?

What distinguishes Holemon from most DNA exonerees we know about is that he dealt directly with the office of the prosecutor who convicted him. After 11 years in prison, and after he had provided a DNA sample in preparation for consideration for parole, a jailhouse lawyer helped Holemon write a petition for DNA testing to the Tuscaloosa County District Attorney, where a deputy DA located the rape kit and had it tested. That did it.

We found 154 exonerations from 2009 through 2011. Innocence organizations – innocence projects and other groups that focus primarily on remedying wrongful convictions – had a hand in 75 of them, almost half, including 43 of the 69 known DNA exonerations in that period. Prosecutors and police were actively involved in 42 of these 154 exonerations, including 21 of the DNA cases, but innocence organizations were also involved in some of the same cases and several others were the work of the Dallas County Conviction Integrity Unit, which essentially is an innocence organization. Excluding those leaves 21 cases from 2009 through 2011, nine with DNA, in which a police department or a prosecutor's office took some initiative that led to an exoneration in a case that did not also involve an organization that focuses on that sort of work.

[141] *See supra* page 42.

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These exonerations are the tip of an iceberg. Prosecutors and police are the work horses of the criminal justice system. They see all of the cases, they are more likely than anybody to run across new evidence that a defendant is innocent, and they probably get more requests for help from wrongfully convicted defendants than everybody else in the country combined. Sometimes they take action.

- In 1985, Carlos Lavernia, a Cuban immigrant, was convicted of a 1983 rape in Austin, Texas based entirely on an identification by the victim. For more than a dozen years he wrote and filed legal pleadings and sent numerous letters and asking for help, to no avail. In November 1999, he was visited by Detective J.W. Thompson who considered Lavernia a suspect in another rape from 1983. Lavernia gave Thompson a DNA sample (which cleared him in the case Thompson was investigating) and implored him to have the DNA from his own case tested. Thompson asked the prosecutor who tried the case to do so and he did. The case file had been destroyed, but by a fluke clothing with semen stains was found and DNA tests cleared Lavernia in September 2000.

- In December 2005, James Ochoa pled guilty to carjacking in Buena Park, California and was sentenced to two years in prison. He had been excluded as the source of DNA found on several items in the car in question, but the judge threatened him with 25 years in prison if he was convicted, so Ochoa accepted a plea bargain over his lawyer's objection. Ten months later, a Buena Park police detective noticed that the DNA from the car matched a profile recently added to national database – that of Jaymes T. McCollum, who was serving time for an unrelated carjacking in Los Angeles. The detective confronted McCollum, who confessed to the Buena Park carjacking. The prosecutor immediately obtained an order vacating Ochoa's conviction, and he was released the next week.

There are about 2,330 local prosecutors' offices in the United States,[142] approximately 12,575 local police departments[143] – and perhaps 70 innocence organizations, which among them account for 25 to 30 exonerations a year.[144] If prosecutors averaged one exoneration a year for every hundred district attorney's offices, they'd exceed the output of all innocence organizations;

[142] DUREN BANKS & STEVEN W. PERRY, PROSECUTORS IN STATE COURTS, 2007 – STATISTICAL TABLES 1 (2011).

[143] BRIAN A. REAVES, LOCAL POLICE DEPARTMENTS, 2007, at 6 (2010).

[144] *See Innocence Network Member Organizations*, THE INNOCENCE NETWORK, http://www.innocencenetwork.org/members (last visited May 4, 2012).

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the police would get there with an average one exoneration for every 600 departments. We think it is highly likely that they do more than that. For all we know, they may account for 20 or 50 or 200 individual exonerations a year.

If so, why are these exonerations unknown? The fundamental reason is that there is no official method for recording exonerations. James Ochoa, for example, had his conviction vacated on motion of the Orange County, California District Attorney, and then charges were dismissed. If you examined the court records, that's probably all you'd see. There might be no way whatever to know that it was an exoneration. Convictions are vacated for a host of more common reasons; modification of the sentence, for example. As a result, a record search would be extremely difficult even if the records were kept in one place. In fact, it's impossible. Court records in America are scattered across 94 federal districts and several thousand county courthouses, and police records are even harder to locate.

With no practical way to identify exonerations from official records, most of the ones we know about are those that get substantial attention in the media and on the internet. That's unlikely to happen if the participants are not interested in attention or actively seek to avoid it, which may be true of all of the professional repeat-player participants in the process: police, prosecutors, judges and defense attorneys.

In movies and books, criminal prosecutions are battles between police and prosecutors on one side and defense lawyers on the other. In reality, the practice of criminal law is mostly a repetitive process of negotiation and accommodation between long-term players who must deal with each other for years if not decades. On TV, an exoneration looks like a singular victory for a criminal defense attorney; you imagine that the lawyer would want to celebrate and get credit for it. But there's usually someone to blame for the underlying tragedy, often more than one person, and the common culprits include defense lawyers as well as police officers, prosecutors and judges. In many cases, everybody involved has egg on their face.

An outsider to a legal community may have little to lose by calling a press conference and denouncing actual or perceived injustice. A working stiff in the local courthouse will think about

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it twice, or not at all. This may be especially true in a small county where everyone involved, from the first officer on the scene to the judge at trial, roots for the same high school football team. Even in a large city, however, a defense attorney may pay heavily if she embarrasses the people she works with every day and the other actors involved may be actively hostile to publicity about false convictions. We know of some exonerations that took place entirely within local legal circles, but there are undoubtedly many others that we've never heard of.

Rayshard Futrell was exonerated after evidence of his innocence was presented to the judge who presided over his conviction, at a hearing that was held 10 months after trial and before his initial appeal had been argued. That's why he went home 16 months after he was arrested for murder. This type of procedure has huge advantages as a method of dealing with false convictions: it makes it possible to address errors quickly and cheaply, while the evidence is readily available and before an innocent defendant has spent years in prison. We know of a handful of such exonerations. Many states have no regular procedure for such post-trial pre-appeal evidentiary hearings, and some judges frown on them even in states like Michigan where they are permitted – but they do occur, and probably much more often than we know about.

Several attorneys who have obtained exonerations at this early stage have told us that it can be comparatively easy to persuade the prosecutor and the judge who tried a case to reopen it and to reverse the conviction when the trial is still fresh in their minds and before the case is taken over by other prosecutors and other judges on appeal – assuming, of course, that there is persuasive new evidence that the defendant is innocent. The hearing may be seen as a low-key process of correcting an error before it's passed on. By the same token, they say, everybody understands that this sort of in-house error correction is supposed to remain in house. Rayshard Futrell's appellate lawyer has told us that it would probably have been considerably more difficult to reach an agreement to release him if his case had attracted attention from the media.[145] Another lawyer who participated in more than one such case told us about a judge who was explicit – "I don't want to read about this in the papers" – and who called the lawyers back to his chambers to complain when a short article on the dismissal of the conviction appeared in the local legal newssheet.

[145] Interview with Valerie Newman, Michigan State Appellate Defender's Office (Apr. 24, 2012).

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Against that background, it's hardly surprising that the only people who ever hear about exonerations like Rayshard Futrell's are his relatives and friends, those who worked on the case, and their friends and colleagues.

Judges and defense attorneys may shy away from publicity about exonerations, but prosecutors have much more at stake.

- In April 1989, Raymond Santana, Kharey Wise, Kevin Richardson, Antron McCray and Yusef Salaam, ages 14 to 16, confessed to a horrific assault and rape in Manhattan's Central Park that nearly killed a 28 year-old woman jogger. All five were convicted in 1990, even though DNA from the rape did not match any of the defendants but came from a single unknown male. In 2002, an imprisoned serial rapist and murderer named Matias Reyes confessed to the police that he alone committed the crime and provided information that was consistent with the known facts. His DNA matched the crime scene DNA. After an exhaustive investigation, Manhattan District Attorney Robert Morgenthau issued a detailed report concluding that Reyes was indeed the sole rapist and that the confessions of the original defendants were inconsistent, inaccurate and unreliable. Based on that investigation, Morgenthau moved to vacate and dismiss the convictions of Santana, Wise, Richardson, McCray and Salaam.

  The next year, the New York City Police Department issued a detailed report criticizing Morgenthau's investigation and his report. The police concluded that there was nothing wrong with the interrogations of the defendants or with their confessions; and that, despite the fact that none of the defendants ever mentioned Reyes, "most likely" all five had been his accomplices in the assault and rape.

- In January 2005, Claude McCollum, a college student with significant learning disabilities, gave a detailed statement about the rape-murder of an elderly female professor at a community college in Lansing, Michigan. The police interpreted the statement as a confession, although McCollum claimed he was only answering hypothetical questions. In February 2006, McCollum was convicted and sentenced to life in prison.

  In September 2007, Ingham County Prosecuting Attorney Stuart Dunnings III was informed that a serial rape-murderer named Matthew Macon had confessed to the murder. He was also told for the first time that a state police sergeant who

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> testified at McCollum's trial had written a report concluding, based on his analysis of surveillance videos, that McCollum could not have committed the crime. Dunnings immediately contacted McCollum's appellate lawyer. With the help of the chief judge of the Court of Appeals, Dunnings filed an expedited motion for a new trial two weeks after he first heard about the new evidence; he secured McCollum's exoneration and release from state prison within weeks after that. He also asked the Michigan State Attorney General to investigate the conduct of the deputy prosecutor who tried the case. On August 20, 2008, the Attorney General concluded that the trial prosecutor committed misconduct by not effectively informing McCollum's trial lawyer of the state police sergeant's report. Dunning fired the deputy prosecutor the next day.
>
> On August 31, 2008, the major newspaper in Ingham County, the Lansing State Journal, published an editorial opposing Dunnings' reelection. The main argument was that he could not be trusted because the Attorney General's investigation that he requested, and acted on, showed that "His subordinates… did not even inform Dunnings of a critical analysis of video evidence that put McCollum elsewhere at the time of [the victim's] death."[146]

Neither District Attorney Morgenthau in New York nor Prosecuting Attorney Dunnings in Lansing could have avoided publicity in these exonerations. Both cases were well-known locally, and the Central Park Jogger case nationally as well. But it's easy to see why they might have kept them quiet if they could have. Prosecutors depend on police departments to investigate the cases they file and produce evidence in court. Damaging an elected prosecutor's relations with the local police is a heavy price – second only to electoral defeat. After a high-profile exoneration, the prosecutor may be criticized for releasing a guilty person, or for convicting an innocent person, or for both. He may demoralize his own office by disciplining subordinates (as Dunnings did); or he may provoke an internal battle in his office (which happened to Morgenthau).[147]

> In 2008, a well-known criminal defense attorney in a large western city received a call from a local prosecutor he had known for years. The prosecutor told him that her office had a case in which they were prepared to move to vacate the

[146] Editorial, *Dunning, Dems Put Ingham Voters in Bind*, LANSING ST. J., Aug. 31, 2008, at 8A.

[147] Barbara Ross, Alice Mcquillan & Robert Ingrassia, *DA's War Over Jogger Case, Aides Split on Teens' Convictions*, DAILY NEWS (New York), Oct. 15, 2002, at 4; Dave Goldiner, *5 'Absolutely' Guilty, Prosecutor Has No Regrets in Jogger Rape Convictions*, DAILY NEWS (New York), Nov. 25, 2002, at 3.

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> convictions and dismiss the charges against a defendant who had been in prison for 15 years. Would the defense attorney be willing to represent that defendant – on condition that he not speak or write about the case in any public forum? The attorney agreed. It turned out that the defendant, by then a 40-year-old black man, had been convicted of robbery and attempted murder for a carjacking in 1992 in which a 12-year-old boy was shot in the thigh. The only evidence against the defendant was the identification testimony of two of the three white victims. The bullet from the boy's leg was recovered, but not the gun. In 2006, a prisoner serving a life sentence for murder wrote to the police department that investigated the case and confessed that he rather than the convicted defendant was the carjacker. Eight months later, a detective interviewed the new confessor, who told him where to find the gun from the 1992 carjacking. The gun was retrieved and ballistic tests matched it to the bullet taken from the young victim's thigh. The defendant was released six months later. Nobody noticed, except those directly involved.

This is a real case. We know about it because a friend of ours is a colleague of the defense attorney. She suggested that we give that attorney a call and he agreed to tell us about the case and include it in the Registry on condition that we not draw attention to it or describe its origin. Accordingly, we have modified the dates and facts of the crime in the description above – but not the prosecutor's condition for proceeding with the exoneration.

This may be an extreme example. We have no way of knowing if other prosecutors exact equally explicit promises of silence. It seems wrong, but it's not illegal or unethical in any obvious way – at least not if the prosecutor is committed to releasing the defendant in any event. But how often is an explicit promise necessary? Most of the exonerations that we do know about were not big news items and many local defense attorneys can be relied on to keep quiet even if they don't take a vow of silence.

In short, police and prosecutors are more likely than anybody else to learn to run into post-conviction evidence of innocence. They have the resources and the authority to act on that sort of information and they have strong institutional incentives to keep it quiet when they do. And the defense attorneys and judges who participated in the original convictions – and their friends and associates – have similar if weaker incentives.

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Hospitals, doctors and other health professionals provide medical help to the victims of medical malpractice, but they are not in the business of publicizing the incompetence and carelessness of their employees and colleagues. By the same token, most lawyers and law enforcement professionals have no interest in drawing attention to the tragic errors in their own line of work, even though they may do what they can to correct them. Judging from the few exonerations we happened to learn about despite their near-invisibility, there are many others that we have missed.

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VIII. Conclusion

The most important thing we know about false convictions is that they happen and on a regular basis. We don't know how often they occur or what types of cases are most common. Most false convictions never see the light of day. We know only about the rare ones that are discovered and corrected (at least in part) by exoneration – and we miss many cases in which innocent defendants are exonerated, probably most. We do know that the more we look, the more exonerations we find, and the more varied they are.

The most important goal of the criminal justice system is accuracy: to identify and condemn the guilty, and to clear the innocent. The most effective way to do so is by careful, honest and open-minded work before conviction, in the investigation and prosecution of criminal charges.

The next most important task is to remain open minded after conviction about the possibility of error. The overwhelming majority of convicted defendants are guilty. Most never dispute their guilt and few ever present substantial post-conviction evidence of innocence. When that does happen, however, it should be taken seriously. We know of many exonerated defendants who were imprisoned for years, even decades after they presented strong evidence of their innocence. We cannot prevent all false convictions, but we must not compound these tragedies by stubbornness or arrogance or, worst of all, indifference.

The National Registry of Exonerations is the largest database of its kind ever assembled. We have already learned a great deal from it. In particular, it is now clear that false convictions are not one sort of problem but several, and that the solutions that might prevent them vary drastically from one context to another: For homicides, the biggest problem is perjury and false accusation, most often by supposed eyewitnesses, with official misconduct a close second. False convictions in adult rape cases, on the other hand, are primarily based on eyewitness mistakes – more often than not, mistakes by white victims falsely identifying black defendants. Most false convictions in child sex abuse cases, by contrast, are for fabricated crimes that never occurred. And so forth.

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We will learn more as the Registry matures and we gather data about a larger number of exonerations across a wider range of settings. The more we learn about false convictions the better able we will be to prevent them, or failing that, to identify and correct them after the fact.