The Path To Exoneration

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I. Introduction

The empirical study of the wrongful conviction of the innocent in America began in earnest with Edwin Borchard's 1932 book, *Convicting the Innocent*, in which he catalogued 65 cases of actual innocence, described their legal causes (eyewitness misidentification, witness perjury, false confessions, police and prosecutorial misconduct, inadequate defense counsel, etc.) and recommended some possible solutions. Following the blueprint created by Borchard, several writers and scholars of wrongful conviction in the next half-century would also aggregate wrongful conviction cases, detail their evidentiary sources and then recommend criminal justice policy reforms intended to minimize their occurrence. This included Erle Stanley Gardner's *The Court of Last Resort* (1952) [eighteen cases],[3] Barbara and Jerome Frank's (1957) *Not Guilty* [34 cases],[4] Edward Radin's (1964) *The Innocents* [80 cases],[5] and a chapter by Hugo Bedau (1964) in *The Death Penalty in America* [74 Cases].[6] In 1987, Hugo Bedau and Michael Radelet published the largest compilation of erroneous conviction cases in the pre-DNA era – 350 (capital and potentially capital) cases in America from 1900 to 1985.[7]

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[3]Erle Stanley Gardner, THE COURT OF LAST RESORT (1952)
[4]Barbara and Jerome Frank, NOT GUILTY (1957)
[5]Edward Radin, THE INNOCENTS (1964)
[6]Hugo Bedau, *Murder, Errors of Justice, and Capital Punishment* in Hugo Bedau, THE DEATH PENALTY IN AMERICA (1964) at 434.
[7]Hugo Bedau & Michael Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 STAN. L. REV. 21 (1987).

From Borchard to Bedau and Radelet, these works of scholarship and popular writing were not only compelling, but deeply disturbing, if not downright shocking: they detailed case after case in which an innocent person was falsely accused of a serious crime he did not commit (typically murder) and then wrongly arrested (by police who did not have probable cause or collected or created false or misleading evidence), wrongly prosecuted (by district attorneys based on false and misleading evidence), wrongly convicted (by a jury or judge who mistakenly believed the defendant was, as a matter of fact, guilty beyond a reasonable doubt) and wrongly imprisoned, usually for many years if not decades, until their factual innocence was finally exposed (if it ever was). Some may even have been executed.[8] As described and aggregated by the various authors mentioned above, these cases – like an Edward Munch painting -- screamed out injustice to anyone willing to listen. They chronicled story after story of repeated criminal justice system failure, narratives made all the more striking by the fact that our legal system, in theory, endows criminal defendants with more constitutional rights and protections to safeguard the innocent and prevent erroneous convictions than any other in the world.

These wrongful convictions were triple tragedies: the lives of the factually innocent but wrongly convicted defendants (and their families) were forever damaged, if not destroyed; the true perpetrator(s), if not already incarcerated for another felony or felonies, remained free to perpetrate even more violent crimes; and the original crime victims, and their families, were left to re-experience the pain of their victimization once the wrongful conviction was exposed and the true perpetrator was finally brought to justice, if/when that even happened.

Although many cases of wrongful conviction were documented, aggregated and written about by scholars, journalists, lawyers and others in the era from Borchard to Bedau and Radelet

[8] Bedau and Radelet, *supra* note 7 at 72-75.

(1987), these cases were either ignored or treated as individual tragedies, no more than one-offs, rather than as illustrative of a criminal justice system that was highly prone to error because of structural truth-seeking flaws. Prior to 1989 virtually all observers assumed that factually erroneous convictions were so rare as to be anomalous, if not freakish, especially in serious felony and capital cases.[9] At the time, the wrongful conviction of the innocent "was never more than a fleeting issue for most criminal justice practitioners, policy makers, the media and the public."[10] The cases amassed by Borchard, Gardner, Frank, Radin, Bedau, Radelet and many others were almost universally treated as isolated instances by a legal system that was highly resistant to any accusation of factual error in its conviction process. As Rob Norris has written:

> Although hundreds of wrongful convictions had been uncovered prior to the late 1980s, they were often met with skepticism or downright dismissal. Despite evidence that suggested a person was innocent, talk of criminal justice errors was rarely met with any true concern; instead, the response tended to suggest that the person or people were not innocent, but got off on a technicality or had done something else to warrant conviction and punishment. At the very least, if it was accepted that an error had occurred, they were seen as exceptionally rare and did not justify systemic reform.[11]

Across the spectrum, legal officials, academics, the media, and the public perceived the justice system to be virtually infallible.

The DNA exoneration cases in the 1990s and 2000s, of course, would radically change this perception. Since early 1989, more than 330 innocent men and women have been released from lengthy prison sentences after being exculpated by post-conviction DNA testing, including almost two dozen individuals from death row. As the DNA exonerations began to aggregate in the early and mid-1990s, they attracted substantial and sustained media coverage, which built on

[9] Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALBANY L. REV. 1465 (2010/2011) at 1479: "In 1990, very few Americans thought of wrongful convictions as a problem. Most would have said that criminal justice was deficient in not catching, convicting, imprisoning, and executing enough criminals."
[10] Robert Norris (2015). *The "New Civil Rights": The Innocence Movement and American Criminal Justice* at 10. Doctoral Dissertation, University of Albany, SUNY. Filed on May 2, 2015.
[11] Norris, *supra* note 10 at 154.

itself, and, more than anything else, began to shatter the "myth of infallibility" that previously characterized most people's beliefs – from lay people to legal officials – about the accuracy of convictions in the criminal justice system. The ever-expanding number of DNA exonerations gave rise to what Marvin Zalman has called "innocence consciousness,"[12] which, he argues, "replaces a belief that the justice system almost never convicts an innocent person."[13]

In the 1990s and 2000s, the problem of the innocent but wrongly convicted was in the background or foreground of virtually any serious conversation about American criminal justice, and regularly made its way into popular consciousness. DNA exoneration cases were not only extensively covered in national and local print media, but they were also regularly featured in documentaries, television programs, plays, movies, and popular true crime books and novels. In the 1990s and 2000s, the American public became more cognizant of the problem of wrongful conviction than at any time in American history.[14] The innocent but erroneously convicted and incarcerated criminal defendant was no longer universally perceived as an isolated and aberrational tragedy, but, rather, by many as a systemic and worrisome feature of the landscape of American criminal justice. More so than at any other time, the steady drumbeat of post-conviction DNA exonerations in the 1990s and 2000s (and the sustained media attention they received) convinced policy-makers, journalists, and the American public that the problem of

[12] Marvin Zalman has defined this as, "the idea that innocent people are convicted in sufficiently large numbers as a result of systemic justice system problems to require efforts to exonerate them, and to advance structural reforms to reduce such errors in the first place. Innocence consciousness replaces a belief that the justice system almost never convicts an innocent person. When translated into public opinion, innocence consciousness becomes one of the forces generating policy change." See Marvin Zalman, "Wrongful Conviction: Comparative Perspectives" at 3. Forthcoming in *Cambridge Handbook of Social Problems* (8/29/2015).
[13] Zalman, *supra* note 9 at 14.
[14] Norris, *supra* note 10 at 12.

wrongful conviction in American was both a reality and a nightmare for hundreds, perhaps tens of thousands,[15] of innocent men and women in America.

In the post DNA era (1989 to the present), we now know a good deal about the evidentiary sources and correlates of wrongful conviction – perhaps most notably, eyewitness misidentification, false confessions, perjured informant testimony and forensic error[16] – especially in rape, homicide and capital cases.[17] We also know a good deal about policy reforms designed to minimize and prevent the wrongful conviction of the innocent, such as double-blind and documented line-up procedures, electronic recording of interrogations, external oversight of crime labs, and improved documentation and disclosure of informant testimony.[18] But, despite the amount of empirical knowledge we have accumulated in the last quarter century about the evidentiary sources of and remedies for the wrongful conviction of the innocent, we still know very little about how they are discovered and rectified or the bases for achieving exoneration.

To our knowledge, the only scholars who have systematically examined the discovery and remedy of error are Hugo Bedau and Michael Radelet. In their study of 350 miscarriages of justice in capital and potentially capital cases in America from 1900 to 1985, Bedau and Radelet sought to identify where error was exposed after the defendant was convicted and who was primarily for responsible for the defendant's eventual exoneration.[19] Strikingly, as Bedau and Radelet note, "in no case was it the defendant alone; without exception the defendant needed the help of others."[20] Yet in more than a third of their cases, no identifiable person or group was

[15] Sam Gross has argued, "Any plausible guess at the total number of miscarriages of justice in America in the last fifteen years must be in the thousands, perhaps tens of thousands." See Samuel Gross et al., *Exonerations in the United States*, 1989 Through 2003, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005) at 551.
[16] Brandon Garrett, CONVICTING THE INNOCENT (2011).
[17] *Id*.
[18] *Id*.
[19] Bedau and Radelet, *supra* note 7 at 64-72. In 23 of the 350 cases of wrongful conviction in Bedau and Radelet's catalogue, the innocent defendant was executed.
[20] *Id*. at 64.

responsible for exposing the miscarriages of justice.[21] In most cases the defendant was exonerated because of the efforts of individuals outside of the criminal justice system (e.g., volunteer attorneys, journalists, family or friends, relatives of the victim, etc.), rather than because of it.[22] Bedau and Radelet summarize the lesson to be learned from their data:

> There is no common or typical route by which an innocent defendant can be vindicated, and vindication, if it ever comes, will not necessarily come in time to benefit the defendant. The criminal justice system is not designed to scrutinize its own decisions for a wide range of factual errors once a conviction has been obtained. Our data show it is rare for anyone within the system to play the decisive role in correcting error…In the bulk of the cases, the defendant has been vindicated not because of the system but in spite of it….In short, the lesson taught by our data is how lucky these few erroneously convicted defendants were to have been eventually cleared.[23]

Yet much has changed since Bedau and Radelet wrote their landmark article on the risk of executing the innocent in America, which was published in 1987 – two years before post-conviction forensic DNA testing was first used to free innocent prisoners. At the time of their article, Bedau and Radelet wrote that most erroneously convicted defendants had "no place to turn for vindication,"[24]and that the Court of Last Resort in the 1950s had been the only group, public or private, ever established for the purpose of investigating and seeking to reverse individual wrongful convictions.[25] Of course, the major development in this regard since Bedau and Radelet's article has been the establishment of innocence projects across the country that seek to reverse cases of wrongful convictions and, more generally, an innocence movement[26] that seeks to educate the public about the causes of these miscarriages of justice and strategically

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[21] *Id*. at 70.
[22] *Id*.
[23] *Id*.
[24] *Id*. at 71.
[25] *Id*. at 69. At the time of Bedau and Radelet's 1987 article, Centurion Ministries – the first modern American innocence project -- had been in existence for only six years and was not well known.
[26] Marvin Zalman has defined the innocence movement as, "a related set of activities by lawyers, cognitive and social psychologists, other social scientists, legal scholars, government personnel, journalists, documentarians, freelance writers, and citizen-activists who, since the mid-1990s, have worked to free innocent prisoners and rectify perceived causes of miscarriages of justice." Zalman, *supra* note 9 at 1468.

promote criminal justice system reform. There are now 55 innocence projects or related organizations that are part of the American innocence network, as well as another 14 innocence-based organizations outside the United States that also belong this network.[27] As Kent Roach has pointed out, "error correction in the United States is essentially privatized and based on volunteer work."[28] However, recently, a number of prosecutors' offices across the country have developed conviction integrity units, whose mission is to conduct internal reviews of potential wrongful convictions of the innocent. As a result, there are now for the first time in American history numerous (private and public) organizations dedicated to identifying, exposing and rectifying erroneous convictions of the innocent in the criminal justice system.[29]

Despite these changes, we still know very little about how wrongful conviction errors are discovered, how they are responded to and by whom, the methods through which they are rectified and the mechanisms of exoneration in a legal system that is highly averse to post-conviction challenges based on factual innocence.[30] Almost 30 years later, Bedau and Radelet's analysis in the *pre-DNA* era remains the only empirical study of the discovery of error in the *post-DNA* era. Our article breaks new ground. It is the first systematic empirical study of how the American criminal justice system discovers and responds to factual error based on actual

[27] Zalman, *supra* note 12 at 14.
[28] Kent Roach, "The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?" 85 Chicago-Kent Law Review, 89 (2010) at 119.
[29] *See* Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L.R. 2215 (2010). Even more recently, a public defender's office has developed a wrongful conviction division, which is essentially the symmetric equivalent of a prosecutor's conviction integrity unit. To our knowledge, the Office of the Public Defender in Iowa is the first public defender's office in the country to start a wrongful conviction review unit. The goal of the unit will be to "systematically review and identify potential cases involving wrongful convictions and pursue available legal remedies." See "Branstad, Public Defender Announce Division to Help Wrongly Convicted People." See OurQuadCities.com at http://www.ourquadcities.com/news/branstad-public-defender-announce-division-to-help-wrongly-convicted-people (last accessed on November 1, 2015).
[30] *See* David Wolitz, "Innocence Commissions and the Future of Post-Conviction Review," 52 Arizona Law Review, 1027, 1033 (2010) ("American criminal law has traditionally refused to recognize the legitimacy of post-conviction claims of innocence").

innocence. We do so by statistically analyzing a data set of 260 cases of wrongful conviction of the innocent and 200 near misses (i.e., dismissals and acquittals) of the innocent to better understand the sources of and bases for exoneration; who is responsible for, as well as who opposes, exoneration; the statistical correlates of exoneration; and the primary methods and mechanisms involved in the path to exoneration.

Our data ultimately reveal several findings: that wrongful convictions are difficult to reverse in the absence of dispositive evidence of innocence; that various state actors (police, prosecutors, judges) remain entrenched in a highly adversarial mind-set in the post-conviction exoneration process; that no single state actor or organization seems willing to take responsibility declaring innocence or seeking exonerations; and that post-conviction exonerations take a very long time, even when DNA evidence seems to be the primary basis for challenging a conviction. After examining the policy implications of our data, we argue that police and prosecutors need to take a more active role in the review and reversal of factually erroneous convictions, that additional juridical proceedings are needed for the wrongly convicted to prove their innocence even after conviction, and that more effort needs to go into preventing wrongful convictions at the front end because the means and parties available to free the innocent who have been wrongly convicted are so limited and the path to exoneration following conviction is fraught with so many challenges in the American system of criminal justice.

II. Methodology

Our research utilizes a database we previously constructed to compare wrongful convictions with so-called near misses. That work, funded by the National Institute of Justice, examined how the justice system "gets it right" when faced with an innocent defendant and sought to explain how criminal justice officials can better identify and weed out innocent

suspects to avoid a wrongful conviction.[31] To do so, we collected 460 cases, divided between 260 wrongful convictions and 200 near misses. Each case in our study involved a factually innocent defendant indicted after 1980 by a state for a violent felony against a person[32] who was later relieved of all legal responsibility for the crime. Of the two categories of cases, erroneous convictions referred to defendants who were factually exonerated after conviction, whereas near misses signified those who had charges dismissed before conviction or were acquitted on the basis of factual innocence.

We used a conservative definition of factual innocence that distinguished factual innocence (i.e., the defendant did not commit the crime) from innocence based on procedural error or other purely legal criteria (so-called legal innocence).[33] To qualify for inclusion in our database, a case had to contain: (1) a judicial, executive, or legislative acknowledgement that the individual did not commit the crime for which he was erroneously indicted (including a statement of innocence by a prosecutor, governor, judge, state compensation board, or a juror after an acquittal), and (2) evidence that would convince a reasonable person that the individual did not commit the crime. In general, a prosecutor's decision not to retry a defendant after a judge overturned the defendant's conviction was not, by itself, considered a sufficient statement of innocence to include the case in our study. However, in a few rare single-defendant rape

[31] JON B. GOULD, JULIA CARRANO, RICHARD A. LEO, AND JOSEPH YOUNG, PREDICTING ERRONEOUS CONVITIONS: A SOCIAL SCIENCE APPROACH TO MISCARRIAGES OF JUSTICE (2013), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/241389.pdf.

[32] This includes murder in any degree, voluntary manslaughter, attempted murder, aggravated assault, rape or other sexual assaults involving penetration, attempted rape, and robbery. As with virtually all research on wrongful convictions, we acknowledge that the cases studied are not representative of the majority of criminal or even felony cases. To date, most known erroneous convictions and exonerations have been for serious violent crimes, such as murder, rape, and robbery. *See, e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008); Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Convictions: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927 (2008).

[33] Although a legally innocent defendant may also be factually innocent of the crime, this is not always true. Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 832-33 (2010).

cases in which DNA tests on the semen indisputably excluded the defendant as the contributor, we did not require the case to have an official statement of innocence.

We cast a wide net to identify potential cases, employing a systematic, common methodology and using multiple approaches. Our research team scoured prior publications in the field; conducted Internet searches; investigated media coverage of these incidents; queried individuals who had written extensively about erroneous convictions or who worked for organizations involved in identifying and documenting erroneous convictions; and solicited potential cases through coordinated national outreach to lawyers and criminal justice officials and organizations. In this regard, we were fortunate to have the assistance of the Innocence Project, the National Institute of Justice, the National District Attorney's Association, the Association of Prosecuting Attorneys, and the National Association of Criminal Defense Lawyers.

Once our team identified potential cases, we assessed them thoroughly to ensure that they met the project's criteria, especially that of factual innocence. Throughout this process, our researchers eliminated more than half the cases initially identified because they did not match the study's selective criteria. Because the initial project was intended to identify which factors predicted an erroneous conviction rather than a near miss, we collected and coded multiple aspects of each case, from the demographics of the defendant(s) and victim(s) to location effects, the nature of the crime, facts available to police and prosecutors, and quality of efforts by police officers, prosecutors, forensic examiners, and defense attorneys. All told, we captured more than 600 statistical variables about each case.

These case facts came from multiple sources. We obtained court or other governmental records, collected information through academic articles and news sources, and supplemented

these written documents with interviews of sources knowledgeable about the cases, including defense attorneys, prosecutors, journalists, police officers, former judges, jurors, and others involved in the cases. We were especially grateful to the Innocence Project, which permitted us access to its database of trial transcripts and court proceedings as compiled by the law firm of Winston and Strawn. Our own database of the 460 cases has been "cleaned" to remove identifying information of confidential sources and has been shared with the National Institute of Justice for archiving.

At that time of the initial study, we also collected information about the exoneration process for each case, whether the defendant was cleared following conviction or saw his case dismissed prior to trial. We now use that information to examine exonerations more closely and systematically – how they occur, who is involved, and what issues are most determinative. We have significantly more information about the wrongful convictions than the near misses, but even so, the findings and available comparisons shed considerable light on the process of exoneration – a path that is fraught with multiple challenges for the innocent defendant.

III. Findings and Analysis

Prior research has identified multiple factors associated with wrongful convictions, from errors in eyewitness identification to false confessions, to tunnel vision.[34] In fact, our previous work was able to isolate those sources associated with wrongful convictions when compared to near misses. Among those factors were: punitiveness of the state in which the crime occurred; the defendant's prior record; the defendant's younger age; intentional misidentification; forensic

[34] *See, e.g.*, Gross & O'Brien, *supra* note 31; Garrett, *supra* note 31; BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

errors; weak facts for the prosecution; *Brady* violations;[35] false non-eyewitness testimony; and weak defense efforts.[36] In addition, several factors were shared between wrongful convictions and near misses, such as false confessions, unintentional misidentification, and official misconduct by police or prosecutors. As we argued, these three mistakes may bring innocent defendants into the criminal justice system, whereas the other nine factors may explain why a factually innocent defendant is wrongly convicted instead of acquitted.[37] In total, our prior study identified twelve failings or conditions that propel an innocent defendant along to an erroneous conviction. We are hesitant to call these sources "causes" – in part because some explain the decision to indict and others the successive conviction – but, like some prior research,[38] our inquiry generated a list of problematic factors that increase the likelihood of a wrongful conviction.

A. Bases for Exoneration

If these twelve sources may lead to an erroneous conviction, far fewer of them have provided the basis for exoneration. To be sure, after conviction the defendant must go beyond explaining how he was mistakenly convicted to demonstrate convincingly that he was innocent. Examining the 260 cases of wrongful conviction, we find only six bases for exoneration, and even among those, two are significantly more prevalent than others. As Table One illustrates, almost 80 percent of defendants achieved exoneration through the presentation of DNA testing,

[35] That is, failures of the prosecution to disclose exculpatory evidence to the defense. *Brady v. Maryland*, 373 U.S. 83 (1963).
[36] Jon B. Gould, Julia Carrano, Richard A. Leo, and Katherine Hail-Jares, *Preventing Wrongful Convictions*, 99 IOWA L.R. 471 (2014).
[37] *Id*.
[38] *See, e.g.*, Talia Roitberg Harmon, *Predictors of Miscarriages of Justice in Capital Cases*, 18 JUST. Q. 949 (2001); Talia Roitberg Harmon and William S. Loftquist, *Too Late for Luck: A Comparison of Post*-Furman *Exonerations and Executions of the Innocent*, 51 CRIME & DELINQ. 498 (2005); Gross & O'Brien, *supra* note 31; Garrett, *supra* note 31.

and more than half (58%) also were able to identify the true perpetrator following conviction. In fact, defendants were able to establish both bases in 42 percent of cases (no table shown). The other bases – lack of a crime, non-DNA forensic evidence, physical impossibility, and confessions – were found in far fewer cases, the largest rate being just three percent.

Table One – Bases for Exoneration

Basis for Exoneration	**% of Cases**
DNA Testing	79%
Identification of True Perpetrator	58%
No Crime Occurred	3%
Scientific Evidence (non-DNA)	3%
Physical Impossibility	2%
Confession	0.4%
Total	381 bases in 260 cases

Of these bases, a majority were the sole source of exoneration. As Table Two indicates, 54 percent of cases had just one basis for exoneration, and another 45 percent had two. Only one percent of cases had three bases, and none had more. Matching these results with those in the previous table, it's evident that the vast majority of exonerations have turned on two or fewer bases and that these sources are almost exclusively DNA testing and discovery of the true perpetrator. Indeed, the primary basis – far and away – was DNA testing. Although 58 percent of defendants were cleared by identifying the true perpetrator, DNA testing was used in the great number of these cases. Only 16 percent of exonerations named the true perpetrator without relying on DNA evidence. Nor did these patterns change over the period we studied. Whether cases were exonerated as early as 1980 (the first cases collected) or as late as 2010 (the end of our data collection), the number and types of bases were statistically unchanged. Defendants were cleared almost exclusively by DNA testing or identifying the true perpetrator, and even there almost 80 percent of exonerations relied on DNA evidence.

Table Two Number of Bases for Exoneration Per Case

Number of Bases for Exoneration	% of Cases
1	54%
2	45%
3	1%
Total	260 cases

1. Comparison to Near Misses

The patterns of exoneration in wrongful convictions differ substantially from the bases in near misses. Tables Three and Four below compare these two categories of cases. Whereas exonerations were founded almost exclusively on DNA testing and identification of the actual perpetrator, near misses turned on additional bases that were more evenly distributed. Although a majority of near misses were based on identification of the true perpetrator, four other bases had roughly equivalent rates, including DNA testing (27 percent of cases), non-DNA forensic evidence (25 percent), physical impossibility (23 percent) and lack of a crime (20 percent). Moreover, near misses were more likely to see multiple bases for dismissal or acquittal, with almost half having two or more bases.

Table Three: Bases for Exoneration of Wrongful Convictions vs. Dismissal/Acquittal of Near Misses

Basis for Exoneration	% of WC Cases	% of NM Cases
DNA Testing	79%	27%
Identification of True Perpetrator	58%	57%
No Crime Occurred	3%	20%
Scientific Evidence (non-DNA)	3%	25%
Physical Impossibility	2%	23%
Confession	0.4%	2%
Witness Recantation	0%	4%
Other	0%	0.5%
Total	381 bases in 260 cases	314 bases in 196 cases

Table Four: Number of Bases for Exoneration of Wrongful Convictions vs. Dismissal/Acquittal of Near Misses

Number of Bases for Exoneration	% of WC Cases	% of NM Cases
1	54%	53%
2	45%	37%
3	1%	8%
4	0	2%
Total	260 cases	196 cases

2. Case Type

The wrongful convictions varied not simply on the number and bases of exoneration; they also differed across the type of underlying crime. Within our database, the vast majority of exonerations were for rape (55%) and murder (38%), which together constituted 93 percent of the cases.[39] Yet, defendants were exonerated of these crimes through distinctly different methods. Ninety-five percent of rapes were overturned on the basis of DNA testing, whereas a small majority of murder convictions (56 percent) were exonerated on the same basis. By contrast, 82 percent of exonerations for murder turned on the identification of the true perpetrator, while only 41 percent of rapes were based on the same approach. (No table shown). Certainly, it makes sense that most sexual assaults would be cleared by DNA, since the crime itself often involves biological evidence that can be tested against the defendant's profile. A DNA exclusion is strong exculpatory evidence. Murder scenes, by contrast, are less likely to include the defendant's DNA, and as a result, exonerations for homicides must turn on other means. That the other basis is almost exclusively a single source is quite telling about the criminal justice system, a point that we take up shortly.

[39] Gould, et al., *supra* note 35.

3. Defendant Background

Apart from the type of crime, few case facts correlated statistically with the number or bases of exoneration. Of these, each reflected the background or standing of the defendant and were linked to the number of bases for exoneration. Defendants who had not graduated high school, suffered from a cognitive impairment, were not fluent in English, or were younger than the average defendant (24 years-old) were likely to be exonerated by a larger number of bases (two or three) than other defendants (one). So, for example, a middle school dropout might have had his conviction overturned on two bases whereas a high school graduate was exonerated on a single basis. The same would hold true for non-native English speakers, who might have been exonerated on two bases when a native speaker would have been freed on one basis.

It is difficult to say whether these correlations reflect a larger number of underlying errors in the cases – which might lead to additional bases for exoneration – or whether younger defendants with limited skills benefitted from heightened post-conviction advocacy that subsequently turned up multiple bases for exoneration. We know, for example, that four of the demographic variables mentioned above correlate with the strength of the prosecution's case at trial.[40] Weaker cases involved indictments of non-native English speakers who did not graduate from high school and also had a cognitive impairment. (No table shown.) Of course, a weaker set of case facts is not automatically synonymous with an erroneous prosecution, although prior research has identified that factor as one predictor of wrongful convictions.[41] So, it is possible, perhaps even likely, that non-native English speakers, defendants who did not graduate from high school, and suspects with a cognitive impairment were both subject to a greater number of

[40] *Id*.
[41] *Id*.

errors that led to a wrongful conviction and also benefitted from post-conviction advocacy that identified multiple bases for exoneration.

It might be tempting to label this conclusion a distinction without a difference: whether certain defendants are a greater risk of multiple mistakes in their original prosecutions, we know that their exonerations often turned on more than one basis. But sources of error are not synonymous with bases of exoneration, at least as we use them here. The former are what generate a mistaken indictment and then lead to a wrongful conviction. The latter, by contrast, are the means of proving the defendant did not commit the crime. As we noted, there have been two primary, if not exclusive, methods of clearing the innocent – DNA testing and identification of the true perpetrator. Unlike near misses, few innocent defendants have won their freedom by presenting non-DNA scientific evidence or offering a witness' recantation, among other bases. Wrongful convictions seem to be reversed only when there is "hard," irrefutable evidence that the defendant did not commit the crime. To be sure, these findings might be different under a broader definition of exoneration – one, for example, that does not require an official declaration of innocence[42] – but it seems virtually certain from our data that the criminal justice system only clears a defendant post-conviction when the proof of innocence cannot be denied.

This is a point worth underscoring when remembering that the wrongful convictions and near misses both involve defendants who are factually innocent. Theoretically, one might have expected them to be resolved through similar means: if both categories of defendants are factually innocent, wouldn't they benefit from the same bases to establish their innocence and win their freedom? However, the results suggest that prosecutors, judges, and jurors are open to a greater variety of exculpatory evidence when the defendant has been indicted but not yet

[42] *See* discussion, page 45, *infra.*

convicted. Once there is a declaration of guilt – and the resulting presumption that the decision receive deference – justice officials become suspicious of other showings of innocence. Whereas a false confession might be enough to convince a prosecutor to drop charges before trial, after conviction that evidence becomes only part of a story that either leads to the discovery of the actual perpetrator or convinces a court or prosecutor to consider DNA evidence that then clears the defendant.

Perhaps this is the way the criminal justice system is supposed to work. As Professor Paul Bator famously argued a half-century ago,[43] a criminal justice system cannot operate without a sense of finality, and a judge's or jury's conclusion of guilt is supposed to mean that reasonable doubt of innocence no longer exists. Still, we wonder if the limited means of exoneration result from reasonable trust in the criminal justice system or officials' fears of being labeled "soft on crime." It is no secret that prosecutors or even judges can be motivated by political concerns. One of the most famous studies in this regard found that judges' sentencing becomes more severe when cases are heard closer to a judicial election.[44] Why should exonerations be any different, with prosecutors and judges concerned about the ensuing uproar if convicted defendants are released when the evidence is "merely" suggestive of innocence? We have seen examples of this behavior in cases like Earl Washington, in which former Virginia Governor Doug Wilder offered Washington a reprieve from death row, but not full exoneration, even when the governor's office had evidence suggesting Washington's innocence.[45] Although Wilder was willing to spare Washington's execution, shouldn't we expect greater openness by our justice

[43] Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).
[44] Carlos Berdejó and Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECONS. & STATS. 741 (2013).
[45] JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM (2007).

officials to a defendant's showing of innocence, even if presented post-trial? We certainly think so and offer suggestions in a later section to improve the consideration of innocence claims.

B. Who Is Responsible for the Exoneration?

An exoneration is a joyous occasion for the innocent defendant. The photo of his departure from prison often shows him surrounded by family and his defense team and sometimes flanked by the advocacy group that helped investigate his claim of innocence. Wrapped up in that picture is the assumption that the innocent must depend on "their people" to prove an exoneration instead of relying on police or prosecutors to come forward to right a wrong. The state and defense line up on opposite sides in the initial trial, and their polar positions continue straight through the exoneration process, the photo suggests.

We tested this assumption, examining which parties played a significant role in the exoneration process. By definition, the term was fluid, meaning that multiple parties may be responsible for an exoneration. And, in fact, the data show exactly that. As Table Five demonstrates, as many as 18 different categories of individuals or groups played a significant role in exonerating the 260 defendants. By "significant role," we mean engaged in substantial investigation or advocacy. So, for example, a judge who dismissed a case with prejudice may have literally exonerated the defendant, but unless she actively pushed police or prosecutors to re-investigate a case, she would have not qualified in our database as having played a significant role in the exoneration.

Table Five: Who Played a Significant Role in Exonerations

Entity	% of Cases
Defendant	30%
Victim	2%
Real Perpetrator	12%
Witness	2%

Police	9%
Convicting Prosecutor	2%
Subsequent Prosecutor	7%
Judge	2%
State Administrative Office	3%
Federal Law Enforcement	4%
Original Defense Lawyer	3%
Subsequent Defense Lawyer	21%
Defendant's Family	10%
Defendant's Friend	1%
Journalist	4%
Professor	2%
Innocence Project	34%
Other Individual or Group	11%
Total	407 involvements in 260 cases

For ease of discussion, we have collapsed categories of participants, combining anyone retained by or related to the defendant into a single category as well as merging all efforts by prosecutors and law enforcement entities under a common heading. Similarly, we combined advocacy or involvement by innocence organizations as well as investigations by journalists, professors, or independent groups (like Centurion Ministries). Displayed this way, Table Six provides a shaper contrast of the involvement of various groups. Defendants, their family, friends, and lawyers played a significant role in about two-thirds of exonerations, whereas innocence organizations were involved in a simple majority of cases. By contrast, prosecutors and law enforcement played an active role in fewer than one-quarter of exonerations. Although prosecutors may have consented to the exoneration – by, for example, not opposing a motion to vacate a judgement or even refusing to refile charges after a court's dismissal of charges – they and their partners in law enforcement were a guiding force in just 22 percent of exonerations.

Nor was there significant overlap between groups. In only one-quarter of the cases in which police and prosecutors pushed for exoneration were innocence organizations or the

defendant's family or advocates significantly responsible as well. Half of the time, defendants' efforts were matched with significant assistance from innocence organizations, but they received comparable assistance from police and prosecutors just nine percent of the time. Similarly, when innocence organizations were primarily responsible for an exoneration, police and prosecutors joined in the effort less than 10 percent of the time. These differences were statistically significant (no table shown).

Table Six: Categories of Parties Responsible for an Exoneration

Entity	**% of Cases**
Defendant/Defense	64%
Law Enforcement/Prosecutors	22%
IP/Prof/Journalist/Other Group	51%

In fact, police and prosecutors were the largest source of opposition to an exoneration. As Table Seven demonstrates, only six groups actively opposed exonerations, and almost all of these were state functionaries. Our definition of active opposition recorded those situations in which a party went beyond his/her normal role orientation – for example, a prosecutor opposing a motion for new trial – to actively campaign against exoneration. So, the one percent of judges we coded as actively opposed did not simply rule against the defendant but spoke openly about their certainty of the conviction outside of court.

Table Seven: Who Actively Opposed Exoneration

Entity	% of Cases
Police	3%
Convicting Prosecutor	2%
Subsequent Prosecutor	8%
Judge	1%
State Administrative Office	1%
Other Group	1%
Police/Prosecutors Combined	13%

There are multiple ways of interpreting these data. On one hand, the rate of opposition is relatively low and does not include certain groups – victims and witnesses – that might have campaigned against an exoneration. On the other hand, when combined, police and prosecutors were the largest source of opposition to an exoneration. It seems relatively clear from these data that the adversarial nature of the criminal justice system continues from the trial level to subsequent efforts to exonerate the innocent. That is, most of the responsibility for exoneration rests with the defendant, his lawyers, family or friends or allied advocacy groups that helped to investigate his case. Whether prosecutors or law enforcement officials are confident in their earlier efforts and see no need to reopen a case or just trust in the finality of criminal judgements, they only occasionally play an active role in exonerating the innocent after conviction. Indeed, in just two percent of exonerations was the original prosecutor substantially responsible for the effort, with subsequent prosecutors taking an active role in only seven percent of exonerations. At the same time, subsequent prosecutors were four times more likely than the convicting prosecutor to oppose an exoneration – although both rates of opposition were quite small. We are not exactly sure how to interpret this difference other than that subsequent prosecutors may feel greater latitude to advocate either way.

The low rate of prosecutorial involvement in exonerations highlights recent efforts to establish conviction integrity units in some prosecutors' offices across the country.[46] In Table Eight below, we list the exonerations from our dataset in which a prosecutor took a responsible role. The 23 cases occurred in 12 states. But, even as late as 2010, only two of those exonerations occurred in counties with conviction integrity units. One took place in Dallas, Texas and the other in the borough of Manhattan in New York City.[47] We cannot say definitively whether the two exonerations in Dallas and New York owed to the efforts of local conviction integrity units, but there are reasons to be doubtful. The Dallas unit began in 2007,[48] and the Manhattan office was established in March of 2010,[49] making the latter at least an unlikely source for the subsequent activity identified in Table Eight.

Table Eight – States in Which Prosecutors Were Responsible for Exonerations

State	Prior DA	Subsequent DA	Total
MA	0	2	2
MO	1	1	2
MN	1	0	1
MT	0	1	1
NC	0	2	2
NJ	0	1	1
NY	1	1	2
OH	0	1	1
OR	0	2	2
PA	0	2	2
TX	1	4	5
VA	0	2	2
Total	4	19	23

[46] *See* discussion, pages 36-38, *infra*.
[47] The other New York exoneration occurred in Eric County, whereas the additional three Texas exonerations took place in Harris, Pecos, and Travis Counties.
[48] NATIONAL REGISTRY OF EXONERATIONS, EXONERATIONS IN 2014, 5 (2015), *available at* http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf.
[49] NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE, CONVICTION INTEGRITY PROGRAM, *available at* http://manhattanda.org/wrongful-conviction.

Reviewing this table, it's striking how few of the 260 exonerations were the work of prosecutors[50] and how geographically skewed the prosecutors' involvement was. Exonerations were found in 35 states, so the 12 represented in Table Eight reflect about a third of all states with an exoneration. Nationally, just nine percent of exonerations owed to the substantial involvement of prosecutors. Among northern states, the rate was 8.3 percent. Excluding Texas and Virginia, which had among the largest number of exonerations of any state, only 5.4 percent of exonerations in the South involved a prosecutor. However, exonerations in Texas and Virginia had among the highest rates of prosecutor involvement, 13 percent each.

At first glance, these last results are promising, since prosecutors provided the greatest assistance to defendants in those states that had the greatest number of exonerations. Yet, the overall percentages are still low and, outside of Texas and Virginia, rare in the South. Admittedly, the results are correlational, as the total number of exonerations involving prosecutors was too small to perform a regression and control for other potential influences, but the findings are both stark and concerning. They are also consistent with multiple other studies that have found geographically disparate patterns in the criminal justice system.[51]

C. Method of Exoneration

Having examined how innocence is established, we next turn our attention to the method by which exonerations occurred. Among the 260 exoneration, there were 11 procedural variations that defendants experienced. As Table Nine details, these varied from a governor's

[50] The results are even starker when recalling our definition of factual innocence. In each of these cases, an official had to declare the defendant innocent, several of them prosecutors. Yet, while prosecutors may have been willing to accede to the accumulated exculpatory evidence and admit the defendant was, in fact, innocent, they rarely took an active role in establishing the defendant's innocence.

[51] *See, e.g.*, DAVID BALDUS, GEORGE WOODWORTH, AND CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990); Michael J. Songer and Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161 (2006).

pardon to a court's dismissal of the case with prejudice to a judge's dismissal without prejudice and a prosecutor's decision not to refile. It is important to remember our initial study incorporated two criteria for innocence: first, an official declaration of innocence by someone with the power to do so – e.g., a governor, prosecutor, judge, or juror – and second, facts that would convince a reasonable person of the defendant's innocence. Hence, unlike the National Registry of Exonerations,[52] which does not necessarily link the two, a prosecutor's failure to refile charges following the dismissal of a case would not count as an exoneration unless the prosecutor, judge, or other empowered official also declared the defendant innocent.[53]

Table Nine – Exoneration Method

Procedure	**% of Cases**
Governor's Pardon	14%
State Trial Court Dismisses With Prejudice	3%
State Supreme Court Dismisses With Prejudice	0.4%
Federal District Court Dismisses With Prejudice	0.8%
State Trial Court Dismisses Without Prejudice, Prosecution Then Refuses to Refile	52%
State Appellate Court Dismisses Without Prejudice, Prosecution Then Refuses to Refile	2%
State Supreme Court Dismisses Without Prejudice, Prosecution Then Refuses to Refile	9%
Unspecified State Court Dismisses Without Prejudice, Prosecution Then Refuses to Refile	13%
Federal District Court Dismisses Without Prejudice, Prosecution Then Refuses to Refile	3%
Court Dismisses Without Prejudice, Retrial and Acquittal	1%
Other	1%
Total	242 cases[54]

[52] NATIONAL REGISTRY OF EXONERATIONS, GLOSSARY, *available at* http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx.
[53] We have discussed these implications previously. *See*, Gould, et al., *supra*, note 35.
[54] We were unable to determine the method of exoneration in 18 cases among the 260 wrongful convictions in our study.

Once again, we collapsed categories and, in Table Ten, present the three most common procedural mechanisms of exoneration. The vast majority of defendants received relief when a state court of some level threw out charges and the prosecution subsequently refused to refile (again, with an official also declaring the defendant to be factually innocent). In only 14 percent of exonerations did a governor pardon the defendant, and all other methods combined to just 10 percent of exonerations. Returning to Table Nine, in only 4.2 percent of cases did a court at any level dismiss the case *with* prejudice. Courts may have set the stage for prosecutors in most exonerations by dismissing charges, but exonerations waited in three-quarters of the cases until the prosecution refused to refile charges.

Table Ten – Method of Exoneration Method, Collapsed Categories

Procedure	**% of Cases**
Governor's Pardon	14%
State Court Dismisses Without Prejudice, Prosecution Then Refuses to Refile	76%
All Others	10%
Total	242 cases

We did not find any patterns between the bases and methods of exoneration. That is, DNA exonerations were no more likely to have occurred by a governor's pardon or court order, for example. However, we did identify a geographic pattern to the method of exoneration, with governors in southern states five times more likely than their colleagues in the North to have issued a pardon. (No table shown.) Was this a sign that courts are more open to claims of post-conviction innocence in the North, that there are even judicial mechanisms there to rectify an erroneous conviction? Or, are errors so obvious and egregious in southern states that even a

governor – an elected official who must regularly face the voters – would feel compelled to issue a pardon?

It's important not to over-claim, for gubernatorial pardons occurred in only seven states, whereas exonerations in general were found in 35 states. Table Eleven presents data on the seven states, detailing the number of exonerations identified in each state as well as the breakdown between pardons and other methods of exoneration.

Table Eleven: States With Gubernatorial Pardons

Method	**IL**	**MD**	**MO**	**NB**	**NC**	**VA**	**TX**
Gov	6%	50%	17%	83%	33%	80%	29%
State Ct & Prosec	88%	50%	83%	17%	67%	20%	63%
Other	6%	0	0	0	0	0	8%
Total	33	2	6	6	6	15	38

Certainly, the vast majority of exonerations among these seven states occurred in Illinois, Virginia and Texas, yet Illinois saw a small percentage of pardons. In fact, Virginia with 12 pardons (80 percent of 15 exonerations) and Texas with 11 pardons (29 percent of 38 exonerations) make up two-thirds of the gubernatorial pardons. We tested Virginia and Texas in logistic regressions on pardons and found that the two explain away other geographic influences on pardons. That is, with the two states included as a dummy variable, any relationships between gubernatorial pardons and a state's southern location, its political climate, its punitive climate or its crime rate disappear. (No table shown.)

This is not to say that geography is irrelevant in explaining why some defendants received a governor's pardon and others were exonerated through the courts' and prosecutors' decisions. Rather, it means that most of the relevant differences are found in Virginia and Texas

specifically. Virginia, of course, had the infamous "21-day rule" that prevented a defendant from reopening a conviction – even with evidence of factual innocence – once 21 days had passed from sentencing.[55] Texas likely reflects a different phenomenon, where its statistical power is found in the raw number of exonerations (38) rather than the percentage of those (29 percent) that were established by a governor's pardon. Some of these trends may have since changed, at least in Virginia which has bypassed the 21-day rule with a Writ of Actual Innocence,[56] although not enough exonerations have yet occurred since the legislative change to test this hypothesis. For now, we feel confident in saying that exonerations by pardon were geographically limited in the 30 years of our study and that the vast majority of pardons took place in just two states.

In fact, it's just as significant how rare a pardon was outside of Virginia and Texas. Removing these two states, defendants received a pardon in just 11 of the remaining 189 exonerations for which we have data. That is a pardon rate of 5.8 percent, hardly a sign that governors have been willing and eager to enter the fray and pardon the factually innocent. To be sure, a governor's pardon is often seen as the last line of defense if the courts and prosecutors are unwilling to act, but there are also several cases (in Illinois, for example) in which governors have acted unilaterally and ahead of the courts to right a wrongful conviction.[57] We don't claim to know why a governor issues a pardon in one case but not another, and we're not prepared here to try unpacking the political and/or legal calculus a governor undertakes in weighing a pardon. However, it's evident from our data that factually innocent defendants should not rest their hopes for exoneration on a governor's pardon. For that matter, few procedural mechanisms had success

[55] Rule 1:1. Finality of Judgments, Orders and Decrees, Rules of Supreme Court of Virginia (2011).
[56] Code of Virginia §19.2-327.2 (2001) and §19.2-327.10 (2004).
[57] In Illinois, former Governor George Ryan pardoned four death row inmates and commuted 164 death sentences to life without parole. Austin Sarat and Nasser Hussain, *On Lawful Lawlessness: George Ryan, Executive Clemency, and the Rhetoric of Sparing Life*, 56 STANFORD L. REV. 1307 (2004).

in achieving an exoneration, save one: as our data indicate, almost 80 percent of those exonerated on the basis of factual innocence have had to rely on a prosecutor's decision not to refile charges following a court's order to vacate the initial conviction.

The method of exoneration did not turn on who was involved in an exoneration, either. So, for example, the Innocence Project was no more likely than other groups or individuals to achieve a gubernatorial pardon. Nor were the defendant's demographics significantly correlated with any particular method. Rather, exonerations largely took a common path – a dismissal by a state court and the prosecution's refusal to refile charges on the basis of factual innocence. We recognize that these results are affected by our definition of innocence, but a broader definition would likely have found an even starker pattern. If, for example, we were to employ the definition of exoneration used by the National Registry of Exonerations, a prosecutor's failure to refile charges following dismissal likely would have counted even if no official acknowledged the defendant were factually innocent.[58] Hence, we would have added several more exonerations to the analysis, yet most of them would have followed the same procedural path – a state court's dismissal without prejudice and a prosecutor's failure to refile charges.

The result, then, is a criminal justice system in which no single representative of the state wishes to take primary responsibility for exonerations. The courts aren't dismissing cases with prejudice, and prosecutors are waiting for a court's dismissal before deciding to drop the indictment. Furthermore, we know from Table Five that prosecutors aren't bringing these cases to the courts' attention on their own. Theirs is primarily a reactive role. Again, this may be understandable in an adversarial system of justice in which prosecutors are supposed to argue for conviction and defendants push for their innocence. Habits die hard, and prosecutors likely

[58] Although the National Registry pairs a dismissal with evidence of innocence, it does not explain what qualifies as this or how much evidence is necessary. National Registry of Exonerations, Glossary, *supra* note 51.

maintain their role orientations after conviction, or perhaps because of conviction. Furthermore, the courts, which prize legitimacy and often finality, are willing to defer to judgments raised earlier in a case's history. So, maybe it's understandable that an exoneration occurs only after multiple agents of the state acknowledge that an error has occurred – first, the courts by dismissal and then the prosecution by refusing to refile charges.

But we cannot help thinking that these cases also depict a system in which officers of the court, not to mention the court itself, seem scared to "do the right thing." It's just as easy to explain our results by saying that judges "pass the buck" to prosecutors and prosecutors wait for the "cover" of a court's decision before deciding to dismiss charges. One need only look at cases like Edward Honaker[59] to recognize situations in which weak evidence, flawed procedures, and incredible theories formed the basis of an erroneous conviction that was passed along in the criminal justice system without those who should have known better moving to reverse the error. Our data cannot say explicitly whether judges and prosecutors should have stepped forward earlier and on their own to rectify a wrongful conviction. Certainly, additional research into this question would be helpful. But our data raise legitimate, normative questions about whether judges and prosecutors should – nay, must – take greater responsibility for remedying erroneous convictions on their own.

D. **Time to Exoneration**

Exonerations take time, in many cases lots of time. We analyzed the time between conviction and exoneration and determined that it took a median 159 months, or more than 13 years, for a factually innocent defendant to be exonerated. We are unable to distinguish how

[59]Among other details, a week after the crime, police had taken the victim and her boyfriend to a hypnotist to help them construct a composite sketch of the attacker, a fact that had not been disclosed to the defense ahead of trial. Multiple other facts of the crime did not match Honaker, but perhaps most glaringly, Honaker had previously undergone a vasectomy and could not have been the source of sperm found at the crime scene. Gould, *supra* note 34.

much of that time was spent waiting for a third party or group to investigate a defendant's innocence claim and what portion of the gap involved active investigation or litigation. However, our data suggest that multiple facts correlate with the span between conviction and exoneration, including demographic differences of the defendant, the nature of the crime, cultural characteristics of the state or court, and parties or claims involved in the exoneration process. As Table Twelve below indicates, there were as many as 18 variables that correlated with the waiting time. The table also provides information on the strength and direction of the relationship. All of the relationships represented in this table were statistically significant at the .1 level, and almost all satisfied the .05 benchmark.

Table Twelve – Correlates With Length of the Exoneration Process (in Months)

Variable	**Correlation (p value)**
Defendant Demographics	
High school graduate	-.199 (.035)
Age	-.143 (.024)
Gang membership	-.177 (.005)
Nature of the Crime	
Relationship between Defendant and Victim	-.139 (.028)
Number of charges	-.112 (.082)
Sexual Assault	.156 (.012)
Area Culture	
Southern State	.299 (.000)
Punitive State	.199 (.005)
Conservative State	.272 (.000)
Higher Crime Rate	-.230 (.000)
Exoneration Process	
DNA is basis	.332 (.000)
No crime occurred is basis	-.178 (.004)
Number of bases	.186 (.003)
Prosecutors/Law Enforcement Played a Role in Exoneration	-.229 (.000)
Innocence Project Community Played a Role in Exoneration	.207 (.001)

Victim Played a Role in Exoneration	-.179 (.004)
Real Perpetrator Played a Role in Exoneration	-.108 (.085)
State Administrative Agency Played a Role in Exoneration	.149 (.017)

From this list of variables, we ran OLS regressions within categories to determine which variables were most explanatory and, from those results, conducted a similar regression across categories that incorporated the six most promising variables. These results are presented in Table Thirteen below. The findings suggest that four variables are most vital in predicting the length of the exoneration process following a defendant's conviction. Defendants convicted in conservative states, younger suspects (< 24), those who were exonerated by DNA, and defendants who were assisted by an innocence organization were all likely to see their exonerations take longer than other factually innocent defendants. An R^2 value of .201 is merely modest, suggesting that other unaccounted variables also may explain exoneration length. But within the data available, we are able to isolate four factors that predict some of the time it takes between conviction and exoneration.

Table Thirteen: Regression – Time To Exonerate (in Months)

Variable	**B**	**SE**	**Beta**	**Sig**
Conservative State	35.45	10.45	.218	.001
Defendant Age	-1.39	.685	-.122	.043
Number of Charges	-2.65	1.66	-.100	.113
DNA as Basis of Exoneration	48.73	13.98	.234	.001
Law Enforcement/Prosecutors Involved in Exoneration	-12.69	14.05	-.058	.367
Innocence Project Community Involved in Exoneration	18.99	9.83	.117	.055
Constant	142.55	23.23	----	.000

R^2 = .201

Certainly, it makes sense that exonerations would take longer in conservative states, as political leaders and criminal justice officials would presumably be more hesitant than in other regions to consider the claims of the convicted. So, too, it is understandable that younger defendants would face longer odds, and thus greater time, in securing the necessary support to investigate and prove their innocence claims. As we have argued previously, younger defendants are less sophisticated in their understanding of the criminal justice system and may lack the resources to secure post-conviction help.[60]

But, what should we make of the role of DNA testing in lengthening the exoneration process, not to mention the involvement of the Innocence Project and related organizations? This is not an artifact of the date of conviction, with earlier cases having to wait for the development of DNA technology before the defendants could be cleared. We added a control variable to test for the date of conviction, and it did not change the results. Rather, the involvement of innocence organizations and DNA testing are both likely related and reflective of similar phenomena. It's widely known that most of the Innocence Project's exonerations involved DNA testing, and although we do not have similar data for allied organizations, the data in Table One alone suggest that the vast majority of exonerations (79 percent) involved DNA testing. For that matter, the Innocence Project and many of the regional innocence projects require an application and extensive screening of a defendant's case before the groups even agree to investigate the case. This process alone may lengthen the course of an exoneration. It's also possible that innocence organizations take on the most complex cases, which require greater investigation and advocacy, or even that they are the place of last resort for defendants who haven't been able to prove their innocence on their own. Any of these explanations would lengthen the exoneration

[60] Gould, et al., *supra* note 35.

process and explain the results in Table Thirteen. Certainly, these are more logical explanations than that innocence organizations are especially inefficient or have any incentive to delay the exoneration process.

IV. Implications

Examining the results of this study in aggregate, we believe there are four broad conclusions from the data. First, wrongful convictions were reversed only when there was "hard," irrefutable evidence that the defendant did not commit the crime. The vast majority of exonerations relied on one or two bases, and even then most required DNA evidence. Although prosecutors, judges, and jurors are open to a greater variety of exculpatory evidence when the defendant has been indicted but not yet convicted, the declaration of guilt at trial reduces the openness of those same justice officials to showings of innocence. The same is true for governors. It is not enough to show that the defendant is likely innocent; if an official is to declare a mistaken conviction, the evidence must establish the defendant's innocence with certainty.

Second, and a related point, the adversarial nature of the criminal justice system continues from the trial level to subsequent efforts to exonerate the innocent. Police and prosecutors maintain their role orientations, infrequently taking a central role in investigating or advocating for exoneration and serving as the largest combined source of opposition to exonerations. Nor do the groups work in tandem. More often, exonerations seem to reflect the primary efforts of a single collective, whether the defendant and his team, innocence organizations, or even police and prosecutors. Post-conviction review is not synergistic.

That said, no single body seems willing to declare a wrongful conviction. Gubernatorial pardons were relatively rare, and judges almost never dismissed a case with prejudice. Eighty

percent of the time, the factually innocent had to rely on a prosecutor's decision not to refile charges following a court's order to vacate the initial conviction. Between the exacting proof of innocence and the multiple procedural hurdles involved, it is a long and difficult path for the innocent defendant who seeks his exoneration.

Finally, exonerations take a long time, even longer when based on DNA evidence, which seems to be the primary basis for clearing defendants. It may take considerable investigation to uncover biological evidence susceptible to testing, and even then the backlog for DNA testing can be considerable in certain states.

All in all, then, the results paint a picture of a criminal justice system that, at best, trusts in the legitimacy of criminal convictions and, at worst, resists the declaration of a wrongful conviction. More modestly, we say that the U.S. system of exoneration remains true to the criminal justice system's adversarial roots. It is extremely difficult to clear a convicted defendant unless the parties can establish another suspect's guilt or prove through DNA testing that the convicted individual did not commit the crime. Judges, prosecutors, and governors are reluctant to act on their own, and agents of the state, by and large, aren't stepping forward to clear the innocent. In fact, they have fought exonerations at the same rate in which they've helped establish innocence.

Perhaps police and prosecutors shouldn't be expected to review post-conviction claims; they're busy enough trying to catch and convict the guilty. But, there is considerable research to suggest that additional defendants are innocent of the charges for which they have been convicted. A number of studies have sought to estimate the erroneous conviction rate in the U.S. Estimates vary, although most cap the rate at 3 or 5 percent.[61] The best estimates are for

[61] *See* Robert J. Ramsey and James Frank, *Wrongful Conviction: Perceptions of Criminal Justice Professionals Regarding the Frequency of Wrongful Conviction and the Extent of System Error*, 53 CRIME & DELINQ. 436

wrongful convictions in capital cases, which two reputable studies put at 3.3-4.1 percent.[62] If these figures are right, then there are literally thousands of innocent defendants waiting for exoneration. Our dataset numbers only 260 defendants, and even the National Registry of Exonerations – which spans 25 years and incorporates a more inclusive definition of exoneration – included 1,689 individuals as of the date of this writing.[63] Considering that the U.S. criminal justice system convicts more than 1 million people of a felony each year,[64] an error rate of even three percent would predict no fewer than 30,000 erroneous convictions in a single year. Even if we limit the estimate to those defendants convicted of a felony at trial,[65] the number of erroneous convictions would be at least 1,500 in a single year. Rudimentary math tells us that the number of exonerations to date is but a fraction of the defendants who might legitimately qualify for exoneration.

A. Conviction Integrity Units

So, yes, we do believe it's the responsibility of police and prosecutors to take a more active role in the investigation and consideration of post-conviction claims of innocence, and it's just as important for judges to be willing to entertain new or enhanced evidence that suggests a convicted defendant may, in fact, be innocent. The question is how to accomplish these goals. To

(2007); Marin Zalman, Brad Smith and Amy Kinger, *Officials' Estimates of the Incidence of "Actual Innocence" Convictions*, 25 JUST. Q. 72 (2008).

[62] Michael D. Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 768 (2007); Samuel R. Gross, Barbara O'Brien, Chen Hu, and Edward H. Kennedy, R*ate of false conviction of criminal defendants who are sentenced to death*, 111 PROCEEDINGS OF NAT'L ACADEMY OF SCI. OF U.S. 7230 (2014).

[63] National Registry of Exonerations, *available at* http://www.law.umich.edu/special/exoneration/Pages/about.aspx.

[64] In 2006, for example, 1,132,290 defendants were convicted of a felony in the state courts. These are among the most recent data from the Bureau of Justice Statistics. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006 – STATISTICAL TABLES, *available at* http://www.bjs.gov/content/pub/pdf/fssc06st.pdf.

[65] According to the Bureau of Justice Statistics, approximately 5 percent of felony convictions were obtained by trial. Bureau of Justice Statistics, *supra* note 63,

their credit, several prosecutors' officers have recently created conviction integrity units,[66] designed to examine the accuracy of prior convictions when legitimate questions are raised about the guilt of the defendant. First created in San Clara, California in 2002 and replicated most famously in Dallas, Texas a few years later, at least 20 prosecutors' offices have created a conviction integrity unit.[67]

Barry Scheck famously laid out an argument for these units in 2010, arguing that "we need them" and "they will work."[68] Scheck takes ABA Model Rule of Professional Conduct 3.8 as the basis for conviction review units, in which the ABA calls upon prosecutors to "promptly disclose" and "undertake further investigation . . . to determine whether the defendant was convicted of an offense that the defendant did not commit" should the prosecutor know of "new, credible and material evidence [that creates] a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted."[69] As Scheck argues, "conviction integrity programs are models for internal regulation of prosecutorial offices," allowing prosecutors "to 'right' wrongful convictions as directed" by their professional obligations.[70]

Since conviction integrity units are relatively new developments,[71] there has not yet been significant research into their effectiveness or drawbacks.[72] Arguably the most comprehensive

[66] We recognize there is some debate over the label for these units, whether conviction integrity, conviction review, or another name. We adopt the term used first by the Dallas County District Attorney's Office Conviction Integrity Unit.
[67] The National Registry of Exonerations reported 15 conviction integrity units as of 2014. The National Registry of Exonerations, *supra* note 47. However, John Hollway, executive director of the Quatrone Center for the Fair Administration of Justice at the University of Pennsylvania Law School, which will soon publish a report on this subject, puts the number at no less than 20 prosecutors' offices. Conversation with John Hollway (Oct. 29, 2015).
[68] Scheck, *supra* note 28.
[69] AMERICAN BAR ASSOCIATION, MODEL RULES OF PROF'L CONDUCT R. 3.8 (2008).
[70] Scheck, *supra* note 28, at 2216 and 2255.
[71] As the National Registry of Exonerations notes, there was one in 2008, two in 2009, nine in 2013, and 15 in 2014. See National Registry OF Exonerations, *supra* note 47.
[72] *See, e.g.*, Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y. L. Sch. L. Rev. 1033 (2011-2012).

review to date, conducted by the Quatrone Center for the Fair Administration of Justice at the University Pennsylvania School of Law, is due to be released as this article goes to press, so we leave it to that report and the ensuing discussion to better assess the value of conviction integrity units. We also note the National Registry's reminder that conviction integrity units "are not the only setting in which prosecutors and police officers work to exonerate innocent defendants."[73] We agree. Our point is that police and prosecutors must take a more active role in the review and reversal of erroneous convictions.

The National Registry of Exonerations has published data suggesting that law enforcement has been more active in exonerations over the last three years. Their figures up to 2011 are consistent with our findings, indicating that law enforcement "cooperated" in fewer than 25 percent of cases. Of course, their definitions of exoneration and cooperation are broader than ours,[74] but even so, the National Registry shows that law enforcement cooperated in fewer than 10 percent of exonerations from 1989 to 1999 and at rates of 12-25 percent in the exonerations of 2000-2011. Beginning in 2012, however, their data suggest that law enforcement cooperated in 52 percent of exonerations, followed by 36 percent in 2013 and 54 percent in 2014.[75]

We would be delighted if these improved rates ushered in a new trend in which law enforcement – and prosecutors – became active partners in the exoneration of innocent defendants. As the National Registry reports, 72 percent (90/125) of the exonerations they recorded in 2014 were from conviction integrity units, and more than half of all exonerations

[73] National Registry of Exonerations, *supra* note 47.
[74] As explained earlier, the National Registry does not require a finding of factual innocence to establish an exoneration. National Registry of Exonerations, Glossary, *supra* note 51. Further, they define cooperation as "at the initiative or with the cooperation of law enforcement." National Registry of Exonerations, *supra* note 47, at 4.
[75] National Registry, *supra* note 47.

were accomplished with the cooperation of law enforcement.[76] Those are certainly promising results, but as the National Registry also notes, 54 percent of all exonerations in 2014 came from just three conviction integrity units, those in Dallas, Brooklyn, and Houston (Harris County).[77] So, while 2014 may have been a "good year," with three of the most established conviction integrity units hitting their stride, this is not yet a sign that police and prosecutors nationwide have fully embraced the call to "'right' wrongful convictions."[78] In a best case scenario, we are only at the beginning of an anticipated and needed wave.

However, we think there are multiple reasons to worry, or at least to see the glass as not yet half-full. Certainly, the "trend," such as it is, in police and prosecutorial involvement is but a few years and comes mainly, it seems, from a few exemplary jurisdictions. Their experience contrasts with the many more cases we've chronicled since 1980 in which convicted defendants have had to depend primarily on their family, friends, and attorneys to investigate and prove their innocence. Further, there are several more unfortunate examples in which prosecutors not only were unwilling to reconsider cases but also have gone to greater lengths to avoid responsibility for their errors. For example, our prior research identified *Brady* violations as a significant cause of wrongful convictions.[79]

We do not mean to suggest that most failures to disclose exculpatory evidence are the result of intentional wrongdoing, but there are too many unfortunate and high profile examples of prosecutors intentionally hiding evidence,[80] failing to train their colleagues on the

[76] *Id*.
[77] *Id*.
[78] Scheck, *supra* note 28.
[79] Gould, et al., *supra* note 35.
[80] Consider the Michael Morton case in Texas. INNOCENCE PROJECT, MICHAEL MORTION, *available at* http://www.innocenceproject.org/cases-false-imprisonment/michael-morton.

requirements of disclosure,[81] and silencing critics who raise questions about evidence.[82] Indeed, the fact that few, if any, jurisdictions have adopted sentinel events initiatives[83] – in which teams of colleagues come together in a non-judgmental way to consider the sources and lessons of wrongful convictions and near misses – suggests that there is still much more to be done to change the culture, priorities and commitment of prosecutors and law enforcement so that they are increasingly willing to consider innocence claims post-conviction. We are not saying that these claims don't warrant a skeptical eye, nor do we expect a floodgate of exonerated defendants. Rather, we believe the existing conviction integrity units are a limited (albeit positive) start with much more to be done.

B. The Courts

It is not just police and prosecutors who need to increase their energies in rectifying erroneous convictions; the courts have a role to play as well. In his article, Judging Innocence," University of Virginia law professor Brandon Garrett examined the criminal appeals and post-conviction proceedings for people eventually exonerated through DNA testing. As he noted, post-trial proceedings "poorly addressed factual deficiencies in these trials. Few exonerees brought claims regarding those facts or claims alleging their innocence. For those who did, hardly any claims were granted by courts. Far from recognizing innocence, courts often denied relief by finding errors to be harmless."[84] Garrett's conclusions are not only consistent with our findings that few courts were willing to dismiss erroneous cases with prejudice, they are also reflective of the Supreme Court's approach in *Herrera v. Collins*,[85] in which the majority refused

[81] As evidenced in the New Orleans' district attorneys' office. *Connick v. Thompson*, 563 U.S. 51 (2001)
[82] This is said to have occurred in Los Angeles. *See Garcetti v. Ceballos*, 547 U.S. 410 (2006).
[83] NATIONAL INSTITUTE OF JUSTICE, MENDING JUSTICE: SENTINEL EVENT REVIEWS (2014).
[84] Garrett, *supra* note 31.
[85] 506 U.S. 390 (1993).

to review a claim of actual innocence under habeas corpus. Passing the buck, the Court suggested that the petitioner file a clemency petition with the state pardon and parole board rather than seeking relief in the courts.

Part of the problem has been the lack a procedural mechanism under which courts may consider claims of innocence. Virginia, most famously, has employed the "21-day rule,"[86] which prohibits trial judges from considering new evidence if presented more than 21 days after sentencing. As detailed by the Innocence Commission for Virginia[87] and others,[88] the 21-day rule prevented multiple innocent defendants from presenting newly discovered, exculpatory evidence to the courts that would have warranted their exoneration. In recognition of the 21-day rule's limitations, the Virginia General Assembly in 2001 adopted a new Writ of Actual Innocence[89] permitting defendants with newly discovered biological evidence to petition the Supreme Court of Virginia for relief. Three years later, the General Assembly created a separate writ allowing defendants to present newly discovered non-biological evidence of innocence to the Virginia Court of Appeals.[90] The latter writ is unavailable if the defendant originally pled guilty whereas the former allows an exception if the conviction involved capital murder or a serious felony.

As promising as Virginia's new procedures might seem, they have rarely been invoked. According to the Virginia State Crime Commission,[91] as of 2013 the Virginia Supreme Court had received 49 petitions for innocence based on biological evidence, of which it had granted

[86] Rule 1:1. Finality of Judgments, Orders and Decrees, Rules of Supreme Court of Virginia (2011).
[87] INNOCENCE COMMISSION FOR VIRGINIA, A VISION FOR JUSTICE (2005), *available at* http://www.exonerate.org/ICVA/full_r.pdf
[88] *See, e.g.*, Editorial, *Virginia's "21-day rule" needs to go*, WASH. POST, Nov. 12, 2012, *available at* https://www.washingtonpost.com/opinions/virginias-21-day-rule-needs-to-go/2012/11/19/443bfb62-3298-11e2-bfd5-e202b6d7b501_story.html
[89] Code of Virginia §19.2-327.2 (2001).
[90] Code of Virginia §19.2-327.10 (2004).
[91] VIRGINIA STATE CRIME COMMISSION, JOINT MOTION FOR WRIT OF ACTUAL INNOCENCE (2013), *available at* http://vscc.virginia.gov/Writ%20report.pdf.

just four – a grant rate of 8.1 percent. By contrast, the Virginia Court of Appeals had received 243 petitions for innocence based on non-biological evidence, from which it freed just three defendants. That is a grant rate of 1.2 percent. Part of the reason for such low rates is the Virginia Supreme Court's determination that defendants under either writ must "establish they did not, as a matter of fact, commit the crimes for which they were convicted." It is not enough "merely [to] produce evidence contrary to the evidence presented at their criminal trial" or, as one petitioner urged the Court, to establish that "no rational trier of fact could have found [the defendant] guilty beyond a reasonable doubt."[92] Certainty of innocence is required. It is not surprising, then, that the successful petitions for innocence in Virginia have been joined by the Commonwealth's Attorney General.[93]

But what of the defendant who is innocent but cannot establish those facts to a certainty? Is he confined to the length of his sentence simply because "our society has a high degree of confidence in criminal trials"[94] and the courts are reluctant to revisit a criminal conviction unless innocence is assured? A new and better model has been developed in the District of Columbia, which in 2001 created its own Innocence Protection Act.[95] Under D.C. statute, a judge may either "vacate a conviction and dismiss the relevant count with prejudice" or "grant a new trial."[96] The statute's beauty is its differential levels of certainty. If a petition for actual innocence provides "clear and convincing evidence that the movant is actually innocent of the crime," then the judge may vacate the judgement. If, though, the evidence only suggests "that it is more likely than not that the movant is actually innocent of the crime" then the judge may

[92] *Carpitcher v. Commonwealth*, Record No. 060638 (Va, 2007).
[93] Anonymous telephone call with a representative of an innocence organization (Oct. 21, 2015).
[94] *Herrera*, 506 U.S. at 490 (O'Connor, J., concurring).
[95] Code of the District of Columbia, §22-4135 (2001).
[96] *Id*.

grant a new trial.[97] Either way, a defendant is given an opportunity to win his freedom if the newly discovered evidence puts the legitimacy of his original conviction into question.

There will undoubtedly be those who criticize D.C.'s approach, seeing it as a threat to the legitimacy of criminal courts by re-litigating cases in which an enterprising defendant can raise enough evidence – some of it perhaps dubious – to gain a new trial. Perhaps the most problematic example would be a case in which the defense "discovers" new alibi witnesses who place him at some generic location at the time of the crime. However, the D.C. statute requires judges to scrutinize the newly discovered evidence carefully and grant a new trial only if the defendant's innocence is more likely than not. A judge would not free a defendant in this situation but instead give the prosecution another chance to try the case and deal with the newly discovered evidence, which presumably the court considered reliable enough to warrant the new trial. A defendant only secures outright exoneration under D.C. law if the new facts provide clear and convincing evidence of his actual innocence – not serious doubts so that a reasonable trier of fact would have failed to convict, but instead substantial proof of actual innocence. This is a reasonable compromise between securing rightful convictions and providing innocent defendants a real opportunity to prove their innocence when new exculpatory evidence arises.

The level of proof for dismissal with prejudice in Washington, D.C. – clear and convincing evidence of innocence – is similar to the standard in ABA Rule 3.8, whereby a prosecutor is compelled to "remedy" a conviction if she "knows of clear and convincing evidence establishing that a defendant . . . was convicted of an offense that the defendant did not commit."[98] The ABA Rule is just seven years old and has been implemented in fewer than a

[97] *Id*.
[98] ABA, *supra* note 68.

dozen states since its 2008 publication.[99] For that matter, the District of Columbia's Innocence Protection Act has yet to be widely adopted.[100] Hence, there is much more to be done in creating judicial vehicles to fairly consider post-conviction innocence claims and motivate prosecutors – and law enforcement – to investigate credible claims of innocence. We now have judicial and ethical models. The question is whether they will be more readily adopted and fully implemented.

C. Preventing Wrongful Convictions

We do not want to be seen as pessimistic, but a realistic look at our findings certainly raises doubts about the willingness and ability of the U.S. criminal justice system to remedy erroneous convictions. If a prosecutor or judge needs only clear and convincing evidence of innocence to act, why have so many of the exonerations relied on DNA testing or identification of the actual perpetrator? That suggests a level of certainty not required under the ABA's Model Rule in order to move for exoneration. To be sure, our results differ from those of the National Registry of Exonerations, which in its most recent annual report claimed that DNA exonerations were just 18 percent of all exonerations in 2014.[101] According to the National Registry, the percentage of exonerations based on DNA has been falling for the last decade (from 40 percent in 2005 to 18 percent in 2014), although the absolute number of DNA exonerations has remained relatively stable.[102] We are unable to estimate this claim with our own data, as our database ends in 2010, and two-thirds of the exonerations we recorded took place before 2005.

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[99] ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, STATES MAKING AMENDMENTS TO THE MODEL RULES OF PROFESSIONAL CONDUCT DATES OF ADOPTION, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/chrono_list_state_adopting_model_rules.html

[100] Nor are there publicly available data on the implementation of the Innocence Protection Act in Washington, D.C.

[101] National Registry of Exonerations, *supra* note 47.

[102] *Id*.

We take seriously the National Registry's contention that non-DNA exonerations have risen in the last several years, particularly as a result of mass exonerations in jurisdictions like Harris County, Texas, whose scandal involving drug cases accounted for a quarter of all exonerations the National Registry reported in 2014.[103] But, we also think it is important to recall how the National Registry defines an exoneration. Although that definition includes official declarations of innocence, it relies primarily on a determination that the defendant was "relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action."[104] Although the Registry pairs that condition with its judgement that the action was "the result, at least in part, of evidence of innocence," that evidence "need not be an explicit basis for the official action that exonerated the person."[105] Put another way, a case might count in the National Registry even though the defendant was not, in fact, innocent of the crime. The classic example would be a court's dismissal of a case without prejudice and a prosecutor's failure to refile charges because he isn't confident he could obtain a conviction on retrial. Even if he thought the defendant guilty, and even if the available evidence put the defendant's actual innocence in question, the National Registry would include the case if there were some evidence that pointed to innocence. Here, we might say the defendant is legally not guilty, but that would not necessarily mean he is factually innocent.[106]

By contrast, our database requires certainty of the defendant's factual innocence, which is why the limited modes of exoneration stand out so starkly. Judges, prosecutors, and law

[103] *Id*.
[104] National Registry of Exonerations, Glossary, *supra* note 51.
[105] *Id*.
[106] We recognize these are fine distinctions, and we do not mean to disparage the National Registry's definition. The term exoneration has both a technical and popular connotation, and one could reasonably use either their or our definition. Not surprisingly, we prefer ours because it leaves little question about the defendant's factual innocence. Also, as we describe in the following text, the focus on certainty brings into bright relief the limited bases that have been accepted to achieve exoneration.

enforcement are requiring proof of another suspect's involvement or exculpatory DNA results to exonerate an innocent defendant. Yet, these same officials are willing to consider other forms of exculpatory evidence when releasing an innocent suspect following indictment but prior to conviction. It's not as if the defendants are any more innocent of the crime prior to trial than after conviction. Rather, the badge of guilt conveyed by a conviction seems to make officials unwilling to consider multiple types of exculpatory evidence or actively pursue the matter on their own.

Thus, even if there has been progress – whether reflected by the National Registry's post-2010 data or the rise of prosecutors' conviction integrity units – it seems a basic truth that the criminal justice system isn't going to be as good at righting wrongful convictions as it is dismissing wrongful indictments or even preventing mistaken arrests or charges. In the end, perhaps the ultimate lesson from our research is that even more energy needs to go into preventing wrongful convictions in the first place so that innocent defendants don't have rely on the limited bases, means, and parties that might free them. Like others,[107] we have previously identified factors that put innocent defendants at greater risk of a wrongful conviction,[108] and those same reports outline a series of measures that may mitigate those risks.[109] We endorse those recommendations and praise as well sentinel event review that may bring to light the forces that lead to wrongful convictions (or even near misses) and highlight changes that could improve justice processes.[110]

[107] *See* Gross, et al., *supra* note 14; Gross and O'Brien, *supra* note 31; Garrett, *supra note* 15; Harmon, *supra* note 37; Harmon and Loftquist, *supra* note 37.
[108] Gould, et al., *supra* note 35
[109] Gould, et al., *supra* note 30.
[110] *See* National Institute of Justice, *supra* note 82.

It will take a holistic approach to prevent and rectify wrongful convictions – implementing lessons learned that prevent the arrest and charging of innocent suspects, ensuring suspects have a fair opportunity to defend themselves, and ensuring that post-conviction mechanisms exist that provide innocent defendants a real opportunity for exoneration. This process will require the involvement of all parties in the criminal justice system, from law enforcement to prosecutors, judges, and even defendants and their advocates. Having previously identified those factors that put innocent defendants at greater risk of conviction,[111] we now show that the path to exoneration following conviction is fraught with multiple challenges. As much as we hope times are changing for the better, it is imperative that people of good will keep up their energy, advocacy and reform. Justice demands as much.

[111] Gould, et al., *supra* note 35.