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What We Think, What We Know and What We Think We Know About False Convictions

Samuel R. Gross*

“When one man dies it is a tragedy. When thousands die it’s statistics.”
Joseph Stalin, 1945¹

Abstract

False convictions are notoriously difficult to study because they can neither be observed when they occur nor identified after the fact by any plausible research strategy. Our best shot is to collect data on those that come to light in legal proceedings that result in the exoneration of the convicted defendants. In May 2012, the National Registry of Exonerations released its first report, covering 873 exonerations from January 1989 through February 2012. By October 15, 2016, we had added 1,027 cases: 599 exonerations since March 1, 2012, and 428 that had already happened when we issued our initial report but were not known to us. In this paper I discuss what can and cannot be learned from the exonerations that we have collected. The cases we find and list are not a complete set of all exonerations that occur—not nearly—but it’s clear from the patterns we see in known exonerations that false convictions outnumber exonerations by orders of magnitude. We cannot estimate the rate of false convictions or their distribution across crime categories. We can confidently say, however, that they are not rare events—and other research has estimated the rate of false convictions among death sentences at 4.1%, which provides an anchor for estimates

* Thomas & Mabel Long Professor of Law, University of Michigan Law School. This is a revised version of the 26th Annual Walter C. Reckless-Simon Dinitz Memorial Lecture, which I was honored to give on April 17, 2015, at The Ohio State University. In order to retain as much of the lecture format as possible, I have only provided footnotes where absolutely necessary. The original data in this paper are all from the National Registry of Exonerations, which I edit. Information about individual exonerees or their cases can easily be found on the Registry website under their names. I would like to thank Professor Emerita Ruth Peterson and the Ohio State University Criminal Justice Research Center for inviting me to give the Reckless-Dinitz Memorial Lecture and for being gracious hosts, Professor Joshua Dressler for arranging for this publication and the editorial staff of the *Ohio State Journal of Criminal Law* for their patient help. The research that is discussed in this article is based on the impressive work of the staff of the National Registry of Exonerations, past and present: Michael Shaffer, Alexandra Gross, Shannon Leitner, Kaitlin Jackson, Klara Stephens, and, more than anybody, Maurice Possley. I am deeply grateful.

¹ DAVID MCCULLOUGH, TRUMAN 420 (1992).

of the rate for other violent crimes. We know that several types of false or misleading evidence contribute to many erroneous convictions (eyewitness misidentifications, false confessions, bad forensic science, perjury and other lies), as does misbehavior by those who process criminal cases: misconduct by police and prosecutors; incompetence and laziness by defense attorneys. Beyond that, we cannot say how false convictions are produced. It's clear, however, from the relative prevalence of these factors that the process differs radically from one type of crime to another. Data from one local jurisdiction (Harris County, Texas) strongly suggest that across the country thousands if not tens of thousands of innocent defendants a year plead guilty to misdemeanors and low-level felonies in order to avoid prolonged pretrial detention. And our data clearly show that innocent African Americans are much more likely to be wrongfully convicted of crimes than innocent whites, in part because of higher criminal participation in the African American community and in part because of discrimination.

I. INTRODUCTION

In 1974, Edward Carter, a 19-year-old African American, was convicted of the rape of a pregnant woman in a men's room on the campus of Wayne State University in Detroit. He was sentenced to life in prison. Carter's conviction rested entirely on a cross-racial identification by the white victim. In fact, at the time of the crime, Carter was in custody for theft; he told his defense attorney but she did nothing to prove his ironclad alibi. Nor did she check and find out that his blood type did not match the semen left by the rapist.

About 30 years later, Carter sought DNA testing through a Michigan innocence project. A search revealed that the biological evidence that was collected at the time of the crime had been destroyed, but a police officer who was involved in the search became curious. He found fingerprints from the crime scene that did not match Carter's fingerprints and—acting on his own—sent them to the FBI's Automated Fingerprint Identification System. The prints were matched to a convicted sex offender who was in prison for similar rapes committed at about the time of the Wayne State rape and in the same area.

Based on this new evidence—plus records that showed that he was in custody at the time of the crime, and had the wrong blood type—Carter was exonerated and freed on April 14, 2010, after more than 35 years in prison for a crime he did not commit.

Edward Carter's case may sound familiar. Exonerations have become common—about three a week in the United States in 2015—and most involve rape or murder. But it's unlikely that you ever heard of this one. Many exonerations

are well known locally and some make headlines across the country, but many others are hidden from view. Edward Carter's exoneration received no public attention whatsoever in 2010, and barely any in the years since.

The National Registry of Exonerations collects and disseminates information on all known exonerations in the United States since 1989, a total of 1,900 as of October 2016. Some are for comparatively minor crimes. Wassillie Gregory, for example, was arrested in Bethel, Alaska, in July, 2014, by a police officer who wrote in his report that Gregory was "clearly intoxicated" and that "I kindly tried to assist Gregory into my cruiser for protective custody when he pulled away and clawed at me with his hand." Two days later, without a defense lawyer, Gregory pled guilty to "harassment." He was exonerated 10 months later because a surveillance video showed the officer handcuffing Gregory and then repeatedly slamming him onto the pavement.

Most exonerations in the Registry, however, are for vicious crimes of violence in which innocent victims were killed or brutalized. Many victims who survived were traumatized again, years later, when they learned that the criminal who had attacked them had not been caught and punished after all, and that they themselves may have played a role in destroying the life of an innocent person. In many cases, the real criminals went on to rape or kill other victims, while the innocent defendants remained in prison.

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

In 1985, a white female student was abducted and raped by an African American man at Texas Tech University in Lubbock, Texas. Two weeks later the victim was shown six photographs of young African American men. Five were black and white side views; one was a color frontal shot of Timothy Cole, a 26-year-old veteran who was studying at Texas Tech and who became a suspect because he talked to a detective near the scene of the abduction. The victim picked Cole's picture, identified him at a live lineup the next day, and testified against him at trial. Cole's brother and several friends also testified and swore that Cole was studying at home at the time of the crime. Cole was convicted in 1986 and sentenced to 25 years in prison. His appeal was denied.

In 1995, Jerry Wayne Johnson, a Texas prisoner serving a 99-year sentence for two rapes, wrote to Lubbock County police and prosecutors that he had committed the rape for which Cole had been convicted. His letters were ignored. In 1999 Cole, who was severely asthmatic, died in prison. In 2000, Johnson wrote another letter confessing to Cole's crime, this one to a supervising judge. It was summarily rejected. Eight years later, DNA tests obtained by the Innocence Project of Texas proved that Johnson committed the 1985 rape in Lubbock and that Cole had been innocent. Cole was exonerated in an extraordinary posthumous court hearing in 2009, and pardoned by the governor of Texas in 2010.

At least fifteen innocent defendants have been exonerated after death since 1989, even though it is highly unusual to reconsider the guilt of defendants who are dead. Many others left prison alive with disabling injuries or diseases. Some died within a year or two of release. Others returned to prison for new crimes that they did commit. Almost all irretrievably lost large portions of their lives—their youth, the childhood of their children, the last years of their parents' lives, their careers, their marriages.

The worst part is that these are the fortunate few. We know of thousands of exonerations in the United States in the past 27 years but there is no doubt that hundreds of thousands of innocent defendants were convicted in that period, and almost all will never be known.

This article focuses on numbers and patterns of false convictions and exonerations, on statistics. But each case in this long list is a story—and with few exceptions every story is a heartbreaking tragedy.

II. KNOWN EXONERATIONS

A. *Who was Exonerated, When and for What*

Of the 1,900 individuals exonerated from January 1989 through October 2016:

- 91% were men and 9% were women.²
- 47% were black, 39% were white, 12% were Hispanic and 2% were Native American, Asian or Other.
- 17% pled guilty, 76% were convicted at trial by juries and 7% were convicted by judges.
- 23% were cleared at least in part with the help of DNA evidence and 77% were cleared without DNA evidence.
- 80% were imprisoned for more than one year before they were released, 57% for at least 5 years, and 38% for 10 to 39 years.
- As a group, the exonerated defendants spent more than 16,710 years in prison for crimes for which they should not have been convicted—an average of 9 years each.³

² Because of this lopsided distribution, I generally refer to exonerated defendants using male pronouns.

³ This is a conservative estimate of the direct consequences of these wrongful convictions. We do not count time spent in custody before conviction. Nor do we include time spent on probation or parole, or time on bail or other forms of supervised release pending trial, retrial, or dismissal, even though all of these conditions involve restrictions on liberty—some mild, some onerous.

More than 80% had been convicted of crimes of violence, including 42% who were convicted of homicide, 26% who were convicted of sexual assaults, and 5% of robbery. Of the minority who were convicted of non-violent crimes, most (12% of the total) were convicted of drug crimes. See Table 1:

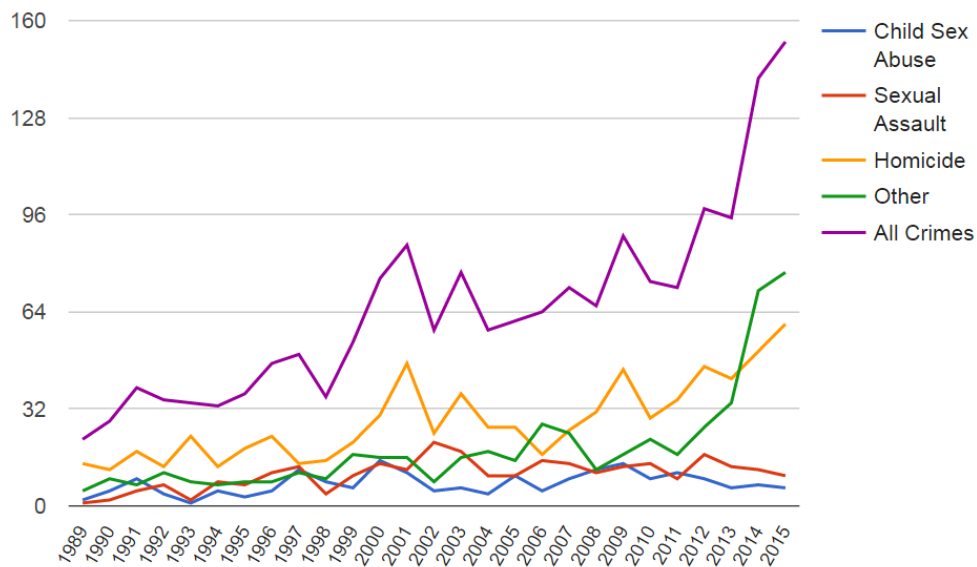
Table 1. Exonerations by Crime, 1989–2016

Homicide	42%	(801)
Murder	40%	(762)
Death sentences	6%	(115)
Other murder convictions	34%	(647)
Manslaughter	2%	(39)
Sexual Assaults	26%	(501)
Sexual assault on an adult	15%	(290)
Child sex abuse	11%	(211)
Other Crimes of Violence	14%	(261)
Robbery	5%	(100)
Attempted murder	2%	(35)
Assault	4%	(69)
Arson	1%	(20)
Kidnapping	0.7%	(13)
Child & Dependent Adult Abuse	0.4%	(7)
<i>Other Violent Felonies</i>	1%	(17)
Non-Violent Crimes	18%	(337)
Drug crimes	12%	(221)
Tax/Fraud/Bribery & Corruption	2%	(32)
Gun Possession	0.8%	(15)
Theft/Stolen Property	0.6%	(12)
Solicitation/Conspiracy	0.6%	(12)
Sex Offender Registration	0.5%	(9)
Burglary/Unlawful Entry	0.5%	(9)
Immigration	0.2%	(4)
<i>Miscellaneous</i>	1.2%	(19)
TOTAL	100%	(1,900)

The pattern of exonerations by crime bears little resemblance to the distribution of all criminal convictions in the United States. Fewer than 20% of felony convictions—but 82% of exonerations—are for violent crimes; fewer than 1% are homicides, which account for 42% of exonerations. Only 4% of exonerations—but at least 80% of all criminal convictions—are misdemeanors. Clearly, exonerations are heavily concentrated among the most serious convictions, as I discuss in more detail in the next section.

There is a strong temporal pattern among known exonerations, a rapid increase in the annual rate over the past quarter century, from fewer than 30 in 1989 to more than 150 in 2015. See Figure 1:

Figure 1. Number of Exonerations by Year and Type of Crime 1989–2015



B. Exonerations That We Miss

1. Why Many Exonerations Remain Hidden

You might think we'd know all about exonerations. Releasing a convict from prison because he's innocent is not supposed to happen. It's a "man bites dog" story—so it's big news, right? Well, sometimes yes and sometimes no.

- On November 23, 1979, two black men, one armed with a pistol, abducted a white couple from a parking lot in Dallas, robbed them, took the woman to a park and raped her. A week later, two young African American men, Cornelius Dupree, Jr., 21, and Anthony Massingill, 19, were arrested because they resembled suspects in a

different sexual assault. Massingill was carrying a pistol. The next day, the rape victim identified Dupree and Massingill from a photographic lineup, but her companion did not identify either of them. Both victims identified the defendants at trial, and in June 1980, Dupree and Massingill were convicted. Dupree was sentenced to 75 years; Massingill, who was also convicted of a separate rape-robbery, was sentenced to life.

Dupree was released on parole in July 2010, after 30 years in prison. In December of that year, as a result of a joint investigation by the Innocence Project and the Dallas County District Attorney's Office, DNA tests were conducted on the surviving remnants of the biological evidence from the rape; the tests cleared both Dupree and Massingill. Dupree was officially exonerated on January 4, 2011. Massingill was exonerated on his joint conviction with Dupree in October 2014, but remains in prison for his other conviction.

- On June 12, 2009, Julian Hinojosa, a gang member, was shot and killed in Detroit, Michigan by man with a bandana over his face who was part of a group that apparently included members of a rival gang. On November 13, 2009, Rayshard Futrell was convicted of first degree murder for shooting Hinojosa, and sentenced to life imprisonment without the possibility of parole. The only evidence tying Futrell to the crime was a cross-racial eyewitness identification by a woman who saw the shooter for a few seconds before he pulled up his bandana all the way up.

In January 2010, Futrell's appeal was assigned to a lawyer for the Michigan State Appellate Defender's Office, who immediately began reinvestigating the case. She discovered that the police had obtained a video from a nearby store surveillance camera that showed Futrell near the scene of the crime but wearing unmistakably different clothes from those worn by the shooter. It's unclear whether this video was given to Futrell's trial lawyer, but in any event it was not presented at his trial. Based on that evidence, the prosecutor's office agreed to vacate the conviction and dismiss the charges, and on October 28, 2010, Futrell was exonerated of the murder of Julian Hinojosa and released. However, because Futrell had testified falsely at trial—he said that he was nowhere near the scene of the shooting—the prosecutor required him to plead guilty to perjury, for which he was sentenced to 3 years' probation.

In some ways, the exonerations of Cornelius Dupree and Rayshard Futrell are similar. Both were convicted at trial of violent crimes that they did not commit;

each was sentenced at a young age to an extremely severe punishment—75 years or life imprisonment; both convictions were based on cross-racial eyewitness misidentifications by strangers; and both were ultimately cleared and freed. But the events that led up to these two exonerations and the reactions to them were very different.

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

Many of the 432 DNA exonerations in the Registry fit this mold. These are highly disturbing stories and they receive a great deal of attention, as they should. Dupree's exoneration is a clear example. His release was reported in well over a hundred print and broadcast news stories, editorials and columns—and hundreds of blog entries. He can be found on Wikipedia, Facebook, and countless Google listings. Dupree and the District Attorney of Dallas County both appeared on national news programs to discuss the case. Four months after his exoneration, Dupree testified before the Texas State legislature in support of a bill to set standards for eyewitness identification procedures.

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

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

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

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

attention to their occasional innocence cases and sometimes actively work to keep them from public view.

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

Edward Carter and Rayshard Futrell are in the Registry because they were exonerated in Detroit, one county over from Ann Arbor, Michigan, where the Registry was compiled, and were represented by Michigan lawyers whom we happen to know personally. That's a flashlight with a very narrow beam. How many similar cases in other states have we missed? There must be many.

Why are these exonerations unknown? The fundamental reason is that there is no official method for recording exonerations.

James Ochoa, for example, had his conviction vacated on motion of the Orange County, California, District Attorney, and then charges were dismissed. If you examine the court records, that's probably all you'll see. There might be no way whatsoever to know that it was an exoneration. Convictions are vacated for a host of more common reasons—modification of the sentence, for example. As a result, a record search would be prohibitively difficult even if the records were kept in one place. In fact, it's impossible. Court records in America are scattered across 94 federal districts and several thousand county courthouses, and police records are even harder to locate.

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

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

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

local courthouse will think twice, or never consider it at all. This is especially true in a small county where everyone involved, from the first officer on the scene to the judge at trial, roots for the same high school football team. Even in a large city, however, a defense attorney will pay if she embarrasses the people she works with every day. We know of some exonerations where all participants belong to the same local legal circle, but there must be many more that we've never heard of.

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

Attorneys who have obtained exonerations at this early stage have told us that it can be comparatively easy to persuade the prosecutor and the judge who tried a case to reopen it and to reverse the conviction when the trial is still fresh in their minds and before the case is taken over by other prosecutors and other judges on appeal—assuming, of course, that there is persuasive new evidence that the defendant is innocent. The hearing may be seen as a low-key process of correcting an error before it's passed on.

By the same token, we're told, everybody understands that this sort of in-house error correction is supposed to remain in house. Rayshard Futrell's appellate lawyer, for example, told us that it would have been considerably harder to reach an agreement to release him if his case had attracted attention from the media. Another lawyer told us about a judge who agreed to dismiss charges against an innocent defendant but added "I don't want to read about this [in the newspapers]." He later called the lawyers back to his chambers to complain when a short article on the dismissal appeared in the local legal news sheet.

Against that background, it's hardly surprising that the only people who ever hear about many exonerations are the exoneree's relatives and friends, those who worked on the case and their friends and colleagues.⁴

⁴ It's possible that differences in our ability to *detect* exonerations partly explain two strong patterns we see among known exonerations: the overwhelming bias toward crimes of violence, especially murder and sexual assault, and the increase in the number of exonerations over time. It may well be that exonerations for lesser crimes receive less attention and are therefore less likely to be noticed. Similarly, it may be that better reporting, or better access to reported information on the internet, has led us to a higher proportion of the exonerations that occurred in recent years.

2. How Many Exonerations Have We Missed?

When the Registry was launched, we issued a report that analyzed our first 873 exonerations, those we identified through February 2012.⁵ From then through October 2016, the Registry added 1,027 cases, including 428 exonerations that occurred before March 2012, but which we did not know about at the time. Specifically, of the cases we added in the four-and-a-half years since our initial report, 32% occurred more than 10 years before they were listed, 49% occurred more than five years before listing, and 67% occurred more than one year before listing.

In other words, we keep learning about exonerations that happened years ago. How many we find depends primarily on how much time we have to search. There is no indication that we have come close to identifying anything like all the exonerations that have occurred. Plainly, there are more exonerations that we still have not found; we have no idea how many.

III. HOW MANY FALSE CONVICTIONS ARE THERE?

A. Background

In a 2006 Supreme Court opinion, the late Justice Antonin Scalia reported the rate of false conviction in the United States with breathtaking precision: “[We have an] error rate [of] .027 percent—or, to put it another way, a success rate of 99.973 percent.”⁶ Eighty-three years earlier, Judge Learned Hand offered an even rosier description: “Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.”⁷

These pronouncements are comforting, but baseless. Hand’s casual claim that innocent people are never convicted is simply inconsistent with well-known facts. We’ve seen thousands of these unreal dreams in broad daylight, and new ones come to light almost every week.

Scalia requires slightly more attention. He arrived at his 0.027 error rate by taking the number of exonerations in the largest published list at the time⁸—340

Both of these patterns, however, also reflect real differences in the likelihood of exoneration. There is no doubt that far more time and attention are devoted to post-conviction claims of innocence in serious violent felonies, especially murder, than in other cases; I discuss this issue in the next section. And it’s equally clear that the total resources that are available to reexamine contested convictions have increased greatly over the last two decades.

⁵ SAMUEL GROSS & MICHAEL SHAFFER, NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989 – 2012 (2012).

⁶ *Kansas v. Marsh*, 548 U.S. 163, 198 (2006) (Scalia, J., concurring).

⁷ *U.S. v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

⁸ Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524–25 (2005).

cases, from 1989 through 2003—and dividing it by an estimate of the number of all felony convictions in the United States in that period.⁹ That might make sense if the study he used was anything like a comprehensive account of false convictions, an impossible feat that the authors specifically disavowed. Among other issues, 96% of the 340 exonerations listed were murder and rape cases, which between them account for less than 2% of felony convictions. They are far outnumbered by assaults, drug crimes, automobile thefts and other comparatively light felonies that are hardly ever reexamined to see if the defendant might be innocent. And of course, even for murder and rape, numerous false convictions remained uncorrected—probably the great majority—and many of the cases in which the defendants had been exonerated were not known to the authors.

By Scalia's logic, we could estimate the proportion of baseball players who've used steroids by dividing the number of major league players who've been caught by the total of all baseball players at all levels: major league, minor league, semi-pro, college, and little league—and maybe football and basketball players as well.

In fact, we know little about false convictions, and we certainly don't know how common they are. The very occurrence of a false conviction is a reflection of our ignorance. We never know that a defendant is innocent when he is convicted—if we did, he would not be convicted—and we rarely know better later on.

The essence of the problem is that we are trying to study events that we can't observe. It's not simply that we don't know whether a particular prisoner is innocent. We also may not know whether he is HIV positive, but we can test him for that condition, or the prison population as a whole, or a random sample. We can't do anything like that for false convictions.

Because of these difficulties, criminologists have often said that the rate of false conviction is not merely unknown but unknowable. To actually estimate the proportion of erroneous convictions we need a well-defined group of cases within which we can identify all erroneous convictions, or at least a high proportion of them. That's a tall order. It's hard to imagine how that might be done for criminal convictions in general.

B. What We Can Tell From Exonerations Generally

Our ignorance, however, is not complete. We can learn something about the many false convictions we miss from the much smaller number of exonerations we see.

The method is simple: The rate of exoneration varies dramatically from one type of crime to another. Unless there is some plausible reason to believe that errors are much more frequent among those crimes for which we know of many

⁹ *Kansas v. Marsh*, 548 U.S. at 198 (2006) (Scalia, J., concurring).

exonerations, these disparities mean that almost all false convictions are missed for those crimes with few known exonerations. It's easiest to see this for the major violent crimes that account for nearly two-thirds of known exonerations: murder, rape¹⁰ and robbery.

The exonerations in the Registry are based on convictions that are spread unevenly over a sixty-year period, from 1956 through 2016, with the great bulk occurring after 1980.¹¹ There is no way to calculate meaningful "rates" of exoneration across this entire period even if we had accurate figures on the number of convictions, which we don't. But we do have decent estimates of the numbers of convictions for the relevant categories for several years from 1996 through 2004, which—together with the count of known exonerations in the Registry—allow us to estimate relative rates of exoneration across crimes:¹²

- Robbery convictions outnumber rape convictions by more than 3 to 1, but there have been more than two-and-half times as many exonerations for rape as for robbery. This suggests a rate of exonerations for rape that is about 8.5 times the rate for robbery.
- Robbery convictions outnumber non-capital murder convictions by about 5.7 to 1, but non-capital murder exonerations outnumber robbery exoneration by almost 6.5 to 1—which translates into a relative rate of exonerations for murder about 37 times the rate for robbery.
- Only about 3% of murder convictions resulted in death sentences, but 15% of murder exonerees were sentenced to death (115/762), which implies that the exoneration rate among death sentences is about 5.7 times that for other murder convictions, and about 210 times the rate for robbery convictions.

¹⁰ The "rape" exonerations we discuss in this section are a narrower category than "sexual assault," the closely related category that's displayed on the Registry website. "Rape" includes only crimes in which an orifice of the victim's body was penetrated by a part of the assailant body or by an object, and it does not include any crimes against victims under 16 years old, which we classify as "child sex abuse." Eighty-nine percent of adult sexual assault exonerations are classified as rape (259/290 at N=1,900).

¹¹ See *Exonerations by Year of Conviction and Type of Crime*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/ExonerationConvictionYearCrimeType.aspx> [<https://perma.cc/94WS-HCWS>] (last visited Feb. 7, 2017).

¹² The estimates of the relative numbers of felony convictions in the United States from 1996 through 2002 are derived from the U.S. Dept. of Justice Bureau of Justice Statistics ("BJS") "State Court Sentencing of Convicted Felons" series, <http://www.bjs.gov/index.cfm?ty=pbse&sid=48> [<https://perma.cc/F5DP-WJ7D>], for years 1996 to 2004. (Before 1996, these reports did not separate out "rape" from other sexual assaults.) The number of death sentences is derived from the BJS "Capital Punishment" series, <http://www.bjs.gov/index.cfm?ty=pbse&sid=1> [<https://perma.cc/J2SL-EW4U>].

Table 2. Estimated Relative Exoneration Rates

Robbery	1
Rape	8.5
Non-Capital Murder	37
Death Sentences	210

These estimates are just illustrations, but the differences are stark and telling nonetheless.

Robbery and rape are both crimes of violence in which the perpetrator is often a stranger to the victim. As a result, robberies and rapes alike are susceptible to the well-known dangers of eyewitness misidentification, as we see in the exoneration we know about: 71% of rape exoneration included mistaken eyewitness identifications (184/259), as do 81% of robbery exoneration (81/100).

Not only do robbery convictions greatly outnumber rape convictions, but we'd expect the proportion of eyewitness errors to be higher in robbery investigations. Rape victims usually spend a considerable amount of time in close physical proximity to the criminal; robberies are often quick, and typically involve much less physical contact. And yet the number of robbery exoneration is a fraction of the number of rape exoneration.

We know the reason for this huge disparity: DNA. Eighty-eight percent of rape exoneration with misidentifications include DNA evidence (162/184), compared to 14% of robbery exoneration with misidentifications (11/81). If, somehow, DNA permitted us to identify robbers as effectively as it identifies rapists, we might have over 800 robbery exoneration rather than 100. But that hardly means that we would know about all false convictions in robbery cases.

The next jump in the rate of exoneration, from rape to murder, cannot be explained by DNA, which was used in less than a quarter of murder exoneration (179/762). The obvious reason for the much higher exoneration rate is that many more resources are devoted to re-examining the guilt of defendants who are convicted of murder. The severity of these convictions influences everybody: defense attorneys, innocence projects, judges, prosecutors and police.

That process is amplified again when we get to death sentences. Far more time and money are spent on capital cases than on other murder prosecutions—especially after a death sentence is pronounced. Death sentences are all reviewed by appellate courts, almost always several times. Claims of innocence are much more likely to be identified, pursued and taken seriously. Everyone, from defense lawyers to innocence projects to governors to state and federal judges, is likely to be particularly careful to avoid the execution of innocent defendants. The net result is an exoneration rate more than 200 times that for robbery convictions.

Murder convictions may also be more prone to error than convictions for rape and robbery, especially when they produce death sentences. There are theoretical

reasons to think so,¹³ but not by a factor 10 or 30—let alone 210. Most of this enormous difference can only reflect a profoundly different process of detecting and correcting errors. This means that even among rape, robbery and non-capital murder convictions—which account for more than 1,000 known exonerations to date—only a small minority of innocent defendants are exonerated.

Below the level of these major violent crimes, the differences in rates of exoneration are even more stark, as I've mentioned: Non-violent crimes comprise more than 80% of felony convictions but fewer than 20% of exonerations; there are, for example, about three times as many felony convictions for theft as for robbery but one eighth the number of exonerations. And misdemeanor convictions outnumber felonies by at least 4 to 1, but account for a few percent of exonerations. The inevitable conclusion is that only a tiny fraction of innocent defendants who are convicted of misdemeanors or non-violent felonies are ever exonerated.

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

C. *Death Sentences*

The death penalty occupies a unique corner of the American system of criminal justice. Two aspects of this status matter for our purposes. First, we know far more about death sentences than any other criminal convictions. The Bureau of Justice Statistics of the Department of Justice collects data on every death sentence pronounced in the United States since 1973, including the current legal status of the defendant from conviction through removal from death row by resentencing, execution, death from natural causes—or exoneration. There are no comparable data for non-capital sentences.

Second, as we just saw, the rate of exoneration for death sentences is many times higher than for other criminal convictions. This extremely high exoneration rate suggests that a substantial proportion of innocent defendants who are sentenced to death are ultimately exonerated, perhaps a majority. If so—and given the availability of detailed data on all death sentences—we can use capital exonerations as a basis for estimating the rate of false conviction among death sentences.

¹³ Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 *LAW & CONTEMP. PROBS.* 125 (1998).

A study published in 2008 found that 2.3% of all death sentences imposed from 1973 through 1989 resulted in exoneration by the end of 2004.¹⁴ Another study, in 2007, estimated that if biological samples had been available for testing in all cases, 3.3% of defendants sentenced to death between 1982 and 1989 for murders that included rape would have been exonerated by DNA evidence through February 2006,¹⁵ but that estimate is based on only 11 exonerations.

Most exonerations take considerable time. The average interval from conviction to exoneration in capital cases is about 15 years. Calculating a rate of exoneration based on recent death sentences would be misleading since some defendants who remain on death row will eventually be exonerated. Both of these studies are limited to convictions that occurred at least 15 years before the study date and therefore include a high proportion of all exonerations that will ever occur in the relevant groups. Nonetheless these studies underestimate the false conviction rate for death-sentenced defendants because they do not account for the comparatively few exonerations that occur after the study period, or the many false convictions that are never detected at all.

The engine that produces the extraordinary rate of exoneration in capital cases is a deep and widely shared concern about the danger of executing innocent people. That anxiety produces a uniquely searching process of reinvestigation and reconsideration of claims of innocence by capital defendants who remain on death row, under threat of execution. Over time, however, most death-sentenced prisoners are removed from death row and resentenced to life in prison.

Capital defendants who are resentenced to life imprisonment are out of the line of fire for execution—a huge benefit—but they also no longer benefit from the resources and attention that are devoted to prisoners who might be put to death. If they are innocent, they are probably out of luck. Once the threat of execution is removed, their chances of exoneration drop back to the background rate for all murders, or close to it.

That channeling means that it's possible to improve our estimate of the rate of false capital convictions by calculating what the rate of capital exonerations would be if all death sentences were subject for an indefinite period to the level of scrutiny that applies to those still facing the prospect of execution.

A 2014 study published in the Proceedings of the National Academy of Sciences does just that.¹⁶ Using “survival analysis”—a statistical technique commonly employed in epidemiological studies—the study estimates that “if all

¹⁴ 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, 927 (2008).

¹⁵ D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 762 (2007).

¹⁶ Samuel R. Gross, Barbara O'Brien, Chen Hu & Edward H. Kennedy, *Rate of False Conviction of Criminal Defendants who are Sentenced to Death*, 111 PROC. NAT'L ACAD. OF SCI. 7230 (2014).

death-sentenced defendants remained under sentence of death indefinitely, at least 4.1% would be exonerated,” and concludes that “this is a conservative estimate of the proportion of false conviction among death sentences in the United States.”¹⁷ That means that most innocent defendants who have been sentenced to death have not been exonerated, and many—including the great majority of those who have been resentenced to life in prison—probably never will be.

Can we generalize from the 4.1% error rate for death sentences to other criminal convictions in the United States? The authors of the study specifically disavow that possibility because capital prosecutions “are handled very differently from other criminal cases.”¹⁸

Even so, this finding does teach us something about convictions of innocent defendants who are not sentenced to death. We don’t know the rates for other crimes; they may be lower or they may be higher. But with a 4% error rate for death sentences, it’s hard to believe that false convictions occur in a mere fraction of a percent of lesser cases.

IV. CAUSES OF FALSE CONVICTION

When we talk about “causes” of false conviction we usually mean facts in particular cases that increase the probability that an innocent defendant will be convicted by providing misleading evidence of guilt or concealing evidence of innocence. I’ll discuss some of those in this section.

Background facts about the defendant can also increase the odds of wrongful conviction—age, gender, wealth and criminal history, for example—or facts about the crime, such as the date and location where it was committed. These factors are typically discussed (if at all) as aspects of discrimination rather than causes of error. In the next section I’ll discuss the background factor with the most pervasive influence on American criminal justice: race.

A. *The “Leading Causes” of Erroneous Convictions*

For most of a century, the leading cause of false convictions was well known. Edwin Borchard described it in *Convicting the Innocent*, the first wide-ranging and well-documented collection of exonerations, which he published in 1932: “Perhaps the major source of these tragic errors is an identification of the accused by the victim of a crime of violence.”¹⁹

Thirty-five years later, the Supreme Court chimed in: Misidentifications caused by improper police procedures “probably account[] for more miscarriages

¹⁷ *Id.* at 7230.

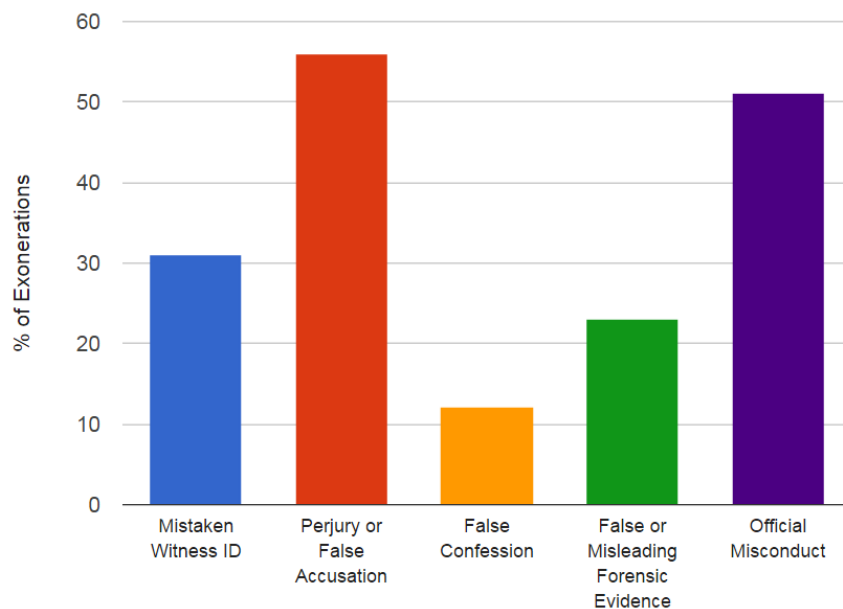
¹⁸ *Id.* at 7235.

¹⁹ EDWIN BORCHARD, *CONVICING THE INNOCENT* xiii (1932), http://library.albany.edu/preservation/brittle_bks/Borchard_Convicting/intro_notes.pdf [<https://perma.cc/MNW9-TMQQ>].

of justice than any other single factor—perhaps . . . more such errors than all other factors combined.”²⁰ I said the same myself in an article in 1987: “[A]s far as anyone can tell, eyewitness misidentification is by far the most frequent cause of erroneous convictions.”²¹ And as recently as April 2015, the Innocence Project website echoed this view: “Eyewitness misidentification is the greatest contributing factor to wrongful convictions.”²²

We were all wrong. As we see in Figure 2, mistaken eyewitness identification is the third most common contributing causal factor in known exonerations. It occurred in 30% of the cases, less often than perjury or false accusations (56% of the cases) and official misconduct (51%).

Figure 2. Exonerations by Contributing Factors



We were wrong because we generalized from the cases we knew. Borchard assembled 65 false convictions from the late nineteenth and early twentieth

²⁰ U.S. v. Wade, 388 U.S. 218, 229 (1967) (quoting WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26).

²¹ Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 396 (1987).

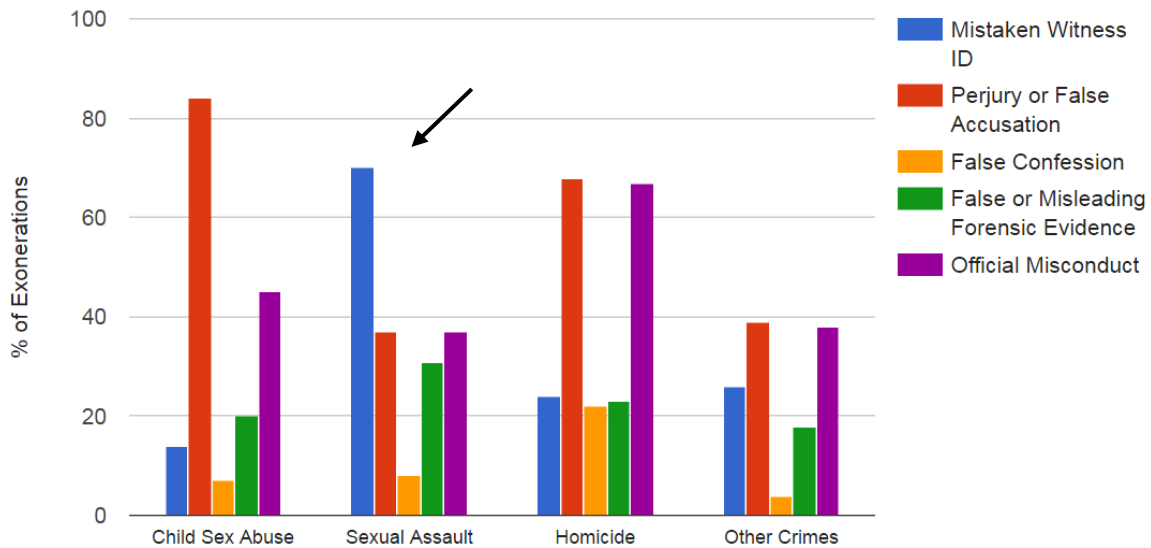
²² The Innocence Project has since amended that description to say that “Eyewitness misidentification is the greatest contributing factor to wrongful convictions *proven by DNA testing*.” *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes/eyewitness-misidentification/> [<https://perma.cc/436C-F7X7>] (emphasis added).

centuries, an average of 2 or 3 per year, and had limited information on most of them. Nearly half of that small group included misidentifications, more than any other of several factors he considered. For many years, Borchard’s book and a few smaller collections provided the only reasonably systematic case data on wrongful convictions.

The Innocence Project, on the other hand, has assembled a comprehensive collection of exonerations in which DNA evidence established the innocence of the defendant, starting with the first two DNA exonerations in 1989. But DNA testing is useful primarily in rape cases, in which it can often identify the criminal with unmistakable accuracy; 78% of the DNA exonerations on the Innocence Project list include sexual assaults. In the more extensive database maintained by the Registry, sexual assaults are less than a sixth of the total.

Figure 3 displays the same contributing factors we saw in Figure 2, but broken down by the type of the crime. That immediately resolves the apparent conflict between the Registry and the Innocence Project (as of April 2015). Mistaken eyewitness identification, at 70%, is the leading factor contributing to false convictions among *sexual assault* exonerations in the Registry—the category of crimes that dominates the Innocence Project list. But for homicides, child sex abuse and other crimes—which account for 85% of the exonerations in the Registry—mistaken identifications come in third or fourth.

Figure 3. Exonerations by Crime and Contributing Factors



The main lesson to draw from Figure 3 is more general: The frequency of causal factors associated with false conviction varies hugely from one crime to

another. For example, 69% of exonerations for adult sexual assault include mistaken identifications and 38% include perjury or other deliberate false accusations; but for child sex abuse exonerations it's the other way around: 84% include perjury or false accusation but only 14% had mistaken identifications.

It makes no more sense to talk about the "leading cause" or even the "causes" of "false conviction" in general than it does to talk about the causes of "disease." Cigarette smoking is the main cause of lung cancer, but may have little or no impact on contracting Parkinson's disease; the risk of heart disease is increased by a diet high in saturated fat, but the risk of Ebola is not; and so forth. It's more useful to think of false conviction as a collection of different diseases or syndromes depending on the crime for which the defendant was convicted and on other factors, each with a distinct combination of causal factors.

Table 3 illustrates some of these patterns. (For each category of cases, I have highlighted the most common contributing factor, and any other factor that is present in more than half of the cases.)

Table 3. Exonerations by Crime and Contributing Factors
(N=1,900)

	Mistaken Witness Identification	Perjury or False Accusation	False Confession	False or Misleading Forensic Evidence	Official Misconduct
Murder (762)	25%	69%	21%	22%	69%
Sexual Assault (290)	70%	38%	8%	32%	38%
Child Sex Abuse (211)	14%	84%	7%	21%	45%
Robbery (100)	81%	23%	3%	7%	37%
Drug Crimes (221)	3%	26%	2%	46%	24%
ALL CASES (1,900)	30%	56%	12%	24%	51%

- For **murder** exonerations, the leading contributing causes of the underlying false convictions are perjury or false accusation (69%)—usually deliberate false testimony identifying the defendant as the killer—equaled by official misconduct (69%). (Murder exonerations also include more than two-thirds of all false confessions in the Registry, but false confessions, while highly

important, are comparatively uncommon, occurring in only 12% of all cases).

- The great majority of **sexual assault** exonerations include mistaken witness identifications (70%). Substantial minorities include official misconduct (38%) or perjury or false accusation (38%)—usually accusations that the defendant committed an assault that never happened. A comparatively high number of sexual assault cases also include false or misleading forensic evidence (32%).
- **Robbery** exonerations had an even higher rate of mistaken witness identification than sexual assaults (81%), but lower rates of perjury or false accusation (23%) and official misconduct (37%).
- An overwhelming majority of **child sex abuse** exonerations include perjury or false accusations (84%), mostly testimony by the complainants accusing the defendants of fabricated crimes. A large minority include official misconduct (45%).
- The most common contributing cause for **drug crime** exonerations is forensic evidence that falsely identified substances seized from the defendants as illegal drugs (46%). A minority include perjury or false accusations (26%), often by police officers or police informants who framed the defendants for crimes they did not commit.

B. *What We Miss*

Breaking down exonerations by type of crime helps us understand what we do know about the causes of false convictions, but it doesn't address a bigger problem: There are whole provinces of this territory about which we know little or nothing at all. Our ignorance comes in several flavors.

1. Missing Data in General, and on Inadequate Legal Defense in Particular

The frequencies of the causal factors we list are in part functions of the availability of information. We almost always know when a convicted defendant has confessed; it's a central fact that is likely to be mentioned in any description of a criminal case. But we often have no way of knowing if a witness lied in court, and we're even less likely to know if she lied to an officer on the street or if the prosecutor concealed evidence of the defendant's innocence. A lot of misconduct, in all spheres of life is successfully hidden; if not, there'd be a lot less misconduct to hide.

The same applies, in force, to incompetent or ineffective legal defense. In 23% of the exonerations in the Registry we have clear evidence of what we code as "Inadequate Legal Defense" (442/1,900). We believe, however, that many more exonerated defendants—perhaps a majority—would not have been wrongfully convicted if their lawyers had done good work defending them. Ineffective

defense attorneys may contribute to more false convictions than any other factor we have mentioned, but our data won't tell one way or the other.

The failures of defense counsel are overwhelmingly sins of omission, most often failures to investigate. Unless those failures are actually litigated they are likely to go unmentioned, and in many exonerations the competence of the defense attorney is never explored. For example:

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

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

This seems to be a general pattern. We found clear evidence of unacceptable legal defense work in 21% of the non-DNA exonerations (394/1,486), but only 11% of the DNA cases (48/432), like Holemon's. Apparently, once they have exculpatory DNA evidence, advocates for the exonerees rarely need to try to excavate those ruins.

We identify known instances of Ineffective Legal Defense in the Registry because it's useful to identify the cases in which we know about this problem, but we don't include it in any quantitative descriptions because we can't produce a reasonable estimate of its frequency.

The problem of missing data on Ineffective Legal Defense is apparent because we do know a fair amount about it from those cases in which it is reported. For other potentially important factors—the training, supervision and resources of the police department and prosecutor's office, for example—we have no systematic information whatever.

2. Causal Complexity

In about 80% of rape exonerations, the identity of the man who committed the rape was the only issue at trial,²³ and 90% of those convictions included mistaken eyewitness identifications. But how could that be otherwise? If the victim had been killed, the case would have been classified as murder rather than rape. Since these rape cases all included victims who survived, in all but a handful the victim testified and identified her attacker. Unless for some reason the victim could not see the rapist (no light; he wore a mask, as in Jeffrey Holemon's case; he covered her face), rape cases are rarely prosecuted unless the victim is able to identify the defendant. Once we learn that the defendant is innocent, we know that she misidentified him.

But that just moves the inquiry back one step: Why did the victim misidentify the defendant? Was it because of the inherent difficulty of the task? Or the suggestiveness of the identification process? Or was the misidentification the product of some earlier misfortune, mistake, or misconduct?

In one case, the victim may have seen the defendant on the street and believed she recognized him as the man who raped her a week before. In another, she may have been persuaded that the defendant was the rapist by a detective who told her that the defendant had committed five other rapes in the area that year. In both cases, the misidentification caused the false conviction, but if we don't know what led to it we can't say how it might have been prevented. The category—"misidentification"—is too general, and the information we need to focus in on the sequence of events is often unavailable.

This difficulty applies with equal force to events that occur after a particular factor has come into play. Even critical investigative errors do not necessarily lead to false convictions; in fact, the evidence we have suggests that they usually don't:

- A 1987 study collected 60 eyewitness misidentifications in criminal investigations, 58% of which did not lead to convictions.²⁴
- A 2004 study examined 125 cases with proven false confessions; in 81 of them—almost two-thirds of the total—the defendant was never convicted, usually because charges were dropped before trial or never filed at all because of clear evidence of innocence.²⁵

²³ In the remaining 20% of rape exonerations the assault never happened. Instead, the supposed victim lied about a consensual sexual encounter or fabricated an attack from scratch. These cases almost always involve accusations against men who were known to the complainants.

²⁴ Gross, *supra* note 21, at 414.

²⁵ Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 951 (2004). It's likely many similar cases went unnoticed in this and the previous study cited because misidentifications and false confessions that are exposed early in the process and then disregarded probably attract much less attention than those that are discovered later on, after more damage is done.

In other words, frequently the critical question is not “Why was the defendant misidentified?” but “Why did a misidentification lead to an erroneous conviction?” To answer that question, we need to learn how erroneous convictions are avoided in most cases in which innocent suspects are misidentified (or confess). We can’t do that by looking solely at cases in which innocent defendants were convicted.

3. Missing Cases: Guilty Pleas

Since the beginning of 2014, 133 defendants have been exonerated in Harris County, Texas (home to Houston), after pleading guilty to drug possession. In all of these cases, the defendants pled guilty before the supposed drugs they possessed were tested in a crime lab, and were exonerated weeks, months or years later after testing was done and no illegal drugs were found.

Why did these defendants plead guilty even though they possessed no controlled substances? Some may have had powders or pills that they thought were illegal drugs but were not. But as far as we can tell, most pled guilty to get out of jail.

In a typical case, the defendant had a criminal record and could not post the comparatively high bail that was set for him. If he pled not guilty he’d remain in jail for months before trial, and then risk years in prison if convicted. It’s hardly surprising that an innocent defendant in that situation would accept a deal to plead guilty and go home immediately or in a few days or weeks.

The only reason we know about these false guilty pleas is that the Harris County crime lab tests the materials seized from the defendants after they plead guilty. Few crimes labs do that, which means that lab tests are rarely done in routine drug cases, since more than 95% or more of drug possession convictions are based on guilty pleas—in Harris County, it’s 99.5%—and most are entered before lab tests. Instead, most arrests are based on cheap and notoriously error-prone, on-the-spot “presumptive” field tests for drugs, and nothing more is done before the inevitable guilty plea.²⁶

In Dallas, in the early 2000s, the District Attorney’s Office had a policy against analyzing suspected drugs in its forensic lab unless the case was going to trial. As a result “any defendant unwilling to risk a jury verdict and long sentence would never know if the drugs he had just pleaded guilty to selling were, in fact, drugs.”²⁷

²⁶ Ryan Gabrielson & Topher Sanders, *How a \$2 Roadside Drug Test Sends Innocent People to Jail*, N.Y. TIMES MAG. (July 7, 2016), http://www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html?_r=0 [<https://perma.cc/QK72-LGC6>].

²⁷ Mark Donald, *Dirty or Duped?*, DALL. OBSERVER (May 2, 2002), <http://www.dallasobserver.com/news/dirty-or-duped-6394643>. See also Robert Tharp, *Drug Cases Marred - Several Arrests Jeopardized by Fake Cocaine Dallas Police Examining Paid Informant’s Role in Targeting Dealers*, DALL. MORNING NEWS, Jan. 1, 2002, at 23A; Paul Duggan, “Sheetrock Scandal” Hits Dallas Police, WASH. POST, Jan. 18, 2002, at A12.

That enabled the notorious “Dallas Sheetrock Scandal:” dozens of defendants were framed by police who faked field tests on many kilos of “cocaine” that was really powdered gypsum, the main component of the building material sheetrock. It continued for years because no defendant asked for a lab test. That’s extreme, but the ordinary, everyday bureaucratic pressure of pre-trial detention can do a lot of the same work.

Even in Harris County, where post-plea lab tests were run, they had little effect for years. Sometimes the tests weren’t done until long after the defendants had served their sentences. Often the paperwork notifying the prosecutor of the results got lost or misplaced. By early 2014, when the DA’s office realized the magnitude of the problem, they had a backlog of more than 200 defendants who pled guilty to possession of non-existent drugs; they’re still working through it.

If post-plea drug tests were routinely done across the country, we’d learn about thousands of additional false drug convictions in other counties. But that would only be the tip of a huge iceberg.

Hundreds of thousands of defendants plead guilty every year to avoid pre-trial detention in non-drug cases. Why wouldn’t they? Those charged with misdemeanors and light felonies may face months, even years in jail waiting for trial, but get weeks or days—or no time at all—if they plead guilty.

How many of these defendants are innocent? We have no idea, and no way to find out. A simple drug test won’t answer the question, and nobody is going to reinvestigate a routine shoplifting, assault, or disorderly conduct case. Judging from drug possession pleas in Harris County, it’s many thousands.

If I had to bet, I’d say the most common cause of false conviction, by far, is the prospect of prolonged pretrial detention of innocent criminal defendants who are unable to post bail in comparatively low-level prosecutions. But—except for the unique context of drug possession guilty pleas in Harris County—almost none of them show up among the exonerations we post on the Registry.

Plea bargaining is the great American method of sweeping problems in criminal cases under the rug. The defendant’s constitutional rights may have been violated? No problem; give him a good enough deal, he’ll plead guilty and that’ll be the end of it. The evidence of guilt is weak? Reduce the charges enough and he’ll probably go for it, and then we’ll never have to present what evidence we do have.

That applies to innocence. An innocent defendant who pleads guilty is far less likely to be exonerated than one who goes to trial. It’s much harder to convince anybody that you’re innocent when you told a court that you’re guilty; you have fewer avenues for review; and, most important, if you take a plea bargain you will get a shorter sentence, usually a much shorter sentence—that’s why defendants accept plea bargains—and the scarce resources it takes to reopen a case and achieve an exoneration are usually reserved for defendants with more severe punishments.

Guilty pleas account for 95% of felony convictions, but—excluding drug cases—only 10% of known exonerations. That’s an exoneration rate 170 times

lower than for trials. If you believe it reflects the actual rate of errors in the 95% of convictions that are based on plea bargaining, it's very reassuring. Thus, for example, a distinguished Colorado judge wrote that "I can't imagine the 'innocent-but-pleading' rate is anywhere near 1 out of 100," which led him to conclude that "wrongful convictions [are] . . . exceedingly rare."²⁸ In general, we have no idea how many innocent defendants plead guilty because we almost never try to find out.

In Harris County, for drug possession cases, no one had to try. The police lab just ran the tests and eventually the lawyers and the courts took notice. It was serendipitous—cheap, easy and definitive—and the proven cases of innocent people who pled guilty are anything but rare.

Are there other major causal factors that lead to other types of false convictions that rarely turn into exonerations? We don't know.

V. RACE

Race is a major factor in the production of false convictions in the United States. The basic numbers tell the story. Whites are 62% of the national population, as of 2014, but 39% of known exonerees; blacks make up 12% of the population and 47% of exonerations—including 50% of exonerations for murder, 59% of exonerations for sexual assault and 55% of exonerations for drug crimes. Other things equal, an African American is about six times more likely to be falsely convicted of a crime and then exonerated than a non-Hispanic white American.

Other things, of course, are anything but equal. African Americans are heavily over-represented throughout the criminal justice system. In 2006, for example, 39% of defendants convicted of violent felonies in state courts were black, as were 44% of those convicted of drug crimes.²⁹ The overall rate of imprisonment for black men is nearly six times the rate for white men,³⁰ which seems comparable to the racial imbalance in exonerations.

²⁸ Morris B. Hoffman, *The Myth of Factual Innocence*, 82 CHI.-KENT. L. REV. 663, 672 n.44, 671 n.38 (2007).

²⁹ SEAN ROSENMERKEL, MATTHEW DUROSE & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006 - STATISTICAL TABLES 17 tbl.3.2 (2009), <http://www.bjs.gov/content/pub/pdf/fssc06st.pdf> [<https://perma.cc/Z657-F7H2>].

³⁰ E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2014, at 15 tbl.10 (2015), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p14.pdf> [<https://perma.cc/FG5G-WU6T>]. The numbers of convicted and imprisoned defendants in this section are all approximations taken from studies by the Bureau of Justice Statistics of the United States Department of Justice. These studies are spotty and incomplete, but they provide best available national data. As a result, the numbers in the text, while telling, have to be considered as illustrations. I do not compare exoneration and national criminal justice data for Hispanic defendants because that ethnic category is tabulated differently in different studies, and the quality of the data is worrisome.

But these two racial patterns are not comparable. For the most part, inmates in American prisons are guilty. The African Americans among them may have been victims of discrimination by the police or in court, but the overwhelming majority are imprisoned for crimes they did commit. Exonerees, whatever their race, are innocent victims of the criminal process.

The large and consistent racial disparities we see in exonerations are not caused by the criminal conduct of the innocent defendants. They must be due to racial differences in criminal investigation, prosecution and punishment.

Figuring out how that racial gulf is generated, however, is more complicated. Table 4 displays the racial proportions of exonerations for several major crimes:

Table 4. Exonerations by Race of Defendant and Type of Crime*
(N=1,900)

	White	Black	Hispanic	Other	TOTAL
Murder (762)	36%	<u>50%</u>	12%	2%	100%
Sexual Assault (290)	34%	<u>59%</u>	6%	1%	100%
Child Sex Abuse(211)	<u>64%</u>	25%	9%	2%	101%
Robbery (100)	20%	<u>62%</u>	15%	3%	100%
Drug Crimes (221)	24%	<u>55%</u>	19%	2%	100%
ALL CRIMES (1,900)	39%	47%	12%	2%	100%

* Percentages may not add up to 100% due to rounding.

We'll look at three types of crimes.

A. Murder

Most of the huge racial disparity in murder exonerations can be traced to equally huge disparities in murder convictions. African Americans are about six times more likely to be convicted of murder than white Americans, and more than seven times as likely to be killed in a homicide. These killings are overwhelmingly intra-racial: 86% of white murder victims and 92% of black murder victims were killed by members of their own race.

Police who are searching for a killer usually learn his race from witnesses. When they're told he's black, they will, appropriately, focus on black suspects. If there are no witnesses who saw the killer, the police will assume that he's probably from the same neighborhood and social circle as the victim—and therefore, given pervasive racial segregation, probably of the same race. Which is true. As a result, African Americans are far more likely than whites to be investigated, arrested and convicted of murder—and inevitably, far more likely to be falsely convicted.

Innocent black suspects, including those who are convicted and the few who are exonerated, are not responsible for the epidemic of black on black murders. They are collateral damage. They pay a heavy price for living in communities where murder is common. Like their relatives and neighbors who are killed, they are victims of those murders.

Racial differences in murder convictions, however, do not entirely explain the enormous difference in the rates of exoneration. Forty-two percent of defendants imprisoned for murder are African-American but they account for the same number of exonerations as the remaining 58%. That means that on average, a prisoner convicted of murder is 38% more likely to be exonerated if he is black. Unless some unknown and improbable process gives innocent black convicts a big advantage in obtaining exonerations, it also means that blacks convicted of murder are about 38% more likely to be innocent than other prisoners doing time for murder.

Some of this additional risk of erroneous conviction is caused by racism. For example:

In 1980, a Texas ranger investigating the rape-murder of a high school student told the two custodians who found the body, Clarence Brandley and a white colleague, "One of you is going to have to hang for this" and, turning to Brandley, added, "Since you're the nigger, you're elected." Brandley was sentenced to death in 1981 and exonerated in 1990.

In 1987, in Monroeville, Alabama, police framed Walter McMillian for the murder of a clerk at a dry cleaner's. McMillian, a 46-year old African-American man, had numerous alibi witnesses, all black: he was at a fish fry at the time of the killing. The only reason to suspect him was that he had a white girlfriend. McMillian was sentenced to death in 1988 and exonerated in 1993.

Most of the racial disparity in exonerations that's not explained by murder convictions is probably caused by less overt biases, intentional or unintentional. Police and prosecutors may think that because blacks as a group are more likely to commit murder than whites, the individual black suspect before them is more likely to be guilty than a white suspect facing the same evidence. This is a form of

racial profiling. Or they may simply mistrust claims of innocence by black defendants and alibi evidence from black witnesses because black people are unfamiliar to police officers who are themselves white and seem less trustworthy than white witnesses.

B. *Sexual Assault*

The over-representation of black defendants in exonerations is even greater for sexual assault than for murder, 59% compared to 50%, five times the proportion of African-Americans in the population. Unlike murder, these numbers are way out of line with the racial composition of sexual assault convictions. As of 2013, 24% of American prisoners convicted of sexual assault were black, while 47% were white and 22% were Hispanic.³¹ Judging from known erroneous convictions, a prisoner serving time for sexual assault is about three-and-a-half times as likely to be innocent if he's black than if he's white.

As we've seen, 71% of rape exonerations include eyewitness mistakes; in 70% of those cases the defendant was black. In nearly half of all rape exonerations with eyewitness misidentifications black men were convicted of raping white women, a racial combination that appears in no more than 6% of sexual assault convictions in the United States.³²

There are many possible explanations for this disturbing pattern, but the simplest is probably the most powerful: the perils of cross-racial identification. One of the strongest findings of systematic studies of eyewitness identification is that white Americans are much more likely to mistake one black person for another than to do the same for members of their own race.³³

But eyewitness misidentification is not the only troubling factor in these cases. Black defendants also account for 43% of rape exonerations that do not include eyewitness mistakes. Of all the problems that plague American criminal justice, few are as incendiary as the relationship between race and rape, so it's no surprise that racial bias and outright racism also play a role in wrongful convictions for sexual assault. Marvin Anderson, for example, was suspected of rape in Virginia because the real rapist told the victim that he "had a white girl," and Anderson was the only black man known to the police who lived with a white woman. He spent 15 years in prison before he was exonerated by DNA.

³¹ CARSON, *supra* note 30, at 30 App. tbl.4 (the remaining 7% were American Indians and Alaska Natives; Asians, Native Hawaiians, and other Pacific Islanders; and persons of two or more races).

³² See Gross et al., *supra* note 8, at 548 n.55.

³³ See Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL. PUB. POL'Y & L. 3 (2001).

C. Drug Crimes

Enforcement of drug laws bears little resemblance to law enforcement for violent crimes. Illegal drug use is the quintessential victimless crime. It's only rarely reported to the police, so we have no direct information on the frequency or characteristics of drug offenses. The only systematic data on illicit drug use in the United States come from anonymous annual surveys by the federal Department of Health and Human Services. The most recent survey, like earlier ones, found that about 10% of the population over 12 years of age used illegal drugs in the previous year, and that this use was more or less evenly distributed by race: 8.8% for Hispanics, 9.5% for whites and 10.5% percent for blacks.³⁴

Convictions for drug crimes are another matter entirely. Thirty-eight percent of those serving prison terms for drug offenses are black, more than three times their proportion in the population.³⁵ Most of these prisoners were convicted of drug trafficking. We don't have decent data on the number of drug sellers by race (or at all); the number of African Americans drug dealers on the street could conceivably be proportional to their number in prison but it seems unlikely since most users get drugs from members of their own race. But 40% of those imprisoned for drug possession are also black, compared to 37% who are white, despite the fact that blacks are 12% of the population and use drugs at about the same rate as whites.

Drug crime exonerations are even more racially concentrated: 55% have black defendants and 24% white defendants. Doing the math, we find that overall blacks are more than five times as likely to go to prison for drug possession as whites, and (judging from exonerations) innocent black people are about ten times more likely to be convicted of any drug crime than innocent white people.

Most drug defendants are convicted of misdemeanors, and even for felonies relatively few go to prison. In general, convictions with comparatively light sentences are heavily underrepresented among exonerations, as we've seen. But we have a unique window on errors in ordinary, low-level drug cases: the 133 Harris County (Texas) guilty-plea drug exonerations that I discussed in the previous section.

³⁴ SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. 14-4863, RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 26 (2014), <http://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf> [<https://perma.cc/9Y6Y-T95N>]. The rate was considerably lower for Asian, 3.1%, and a bit higher for Native Americans, Pacific Islanders and those who identify with more than one race.

³⁵ CARSON, *supra* note 30, at 30 App. tbl.4. A 2009 study by Human Rights Watch found comparable racial ratios for drug crime arrests from 2000 through 2007. HUMAN RIGHTS WATCH, DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES (2009), <https://www.hrw.org/report/2009/03/02/decades-disparity-drug-arrests-and-race-united-states> [<https://perma.cc/TB55-BPS6>].

Thirty-nine percent of the 133 Harris County guilty-plea drug exonerations were misdemeanors, compared to 1%, for the rest of the Registry. Only seven of the 133 were sentenced to prison, five of them for two years each, one for six years, and one for seven; ninety-seven were sentenced to shorter terms of confinement in jail; and 29 were sentenced to probation. By contrast, among the 88 other drug exonerees in the Registry, only 18 got no incarceration, while two-thirds (58) were sentenced to two years or more in prison, including seven who got life sentences.

In other words, these 133 guilty plea cases from Harris County look a lot more like routine drug prosecutions than the other drug exonerations we know about, as we would expect since those drug defendants were exonerated by a fortuity—post conviction drug tests showed up unbidden—rather than as a result of a concerted effort.

Despite the unique setting, the racial composition of the Harris County drug exonerations is familiar: 62% of the exonerees are black in a county with 20% black residents, about five times the rate for other racial groups.

We know why these innocent black defendants in Harris County pled guilty rather than go to trial: It was their best option, given that they had been arrested, charged and held in jail. The real question is this: Why were so many innocent black defendants arrested for drug possession and held on bail when there is no reason to believe that blacks are more likely than whites to possess illegal drugs?

Most of these arrests were based on erroneous drug field tests on materials found in searches conducted after traffic stops. Anybody who is subjected to that process is at risk of a false conviction. I have no useful data on policing in Harris County, but across the country, African American drivers are about as likely to be stopped as white drivers, but three times as likely to be searched once stopped.³⁶ As a result, they bear much of the brunt of drug law enforcement—including false drug possession convictions, which may number in the thousands if not tens of thousands a year.

Why do officers search African Americans for drugs at such a high rate? Part of the reason, no doubt, is outright conscious racism. For the most part, however, the explanations are more mundane.

Blacks are more likely than whites to live and work in areas that are heavily patrolled because of high crime rates.

Blacks may also draw more police attention because they are several times more likely than whites to have criminal records.³⁷ Those records also mean that

³⁶ CHRISTINE EITH & MATTHEW R. DUROSE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008, at 7 tbl.9 & 10 tbl.14 (2011), <http://www.bjs.gov/content/pub/pdf/cpp08.pdf> [<https://perma.cc/FW3T-5SSC>].

³⁷ See, e.g., Sarah Shannon et al., *Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948 to 2010* (2011), <http://paa2011.princeton.edu/papers/111687> [<https://perma.cc/SE4J-SLBD>] (paper delivered at the Population Association of America Annual Meeting on Apr. 1, 2011).

bail will be higher, so they are more likely to face the Hobson's choice of plea bargaining: plead guilty or stay in jail. But that explanation is in part circular: One reason that more black people have criminal records, especially for drug crimes, is that police are more likely to stop and search them.

And, of course, blacks are subject to racial profiling. Some police officers stop and search cars driven by black motorists simply because they believe that African Americans as a group are more likely than others to commit drug crimes. This practice became notorious in the late 1990s as "driving while black"—trolling for drugs on the highway by searching cars with black drivers. Most of the victims of these illegal searches are scared, inconvenienced and humiliated, but never arrested because no drugs are found. Some, however, are arrested and convicted of drug possession. Judging from what we see in Harris County, that group includes quite a few who are innocent.

D. *Summary*

One reason that nearly half of exonerees are black is that African Americans, as a group, commit crimes at higher rates than whites. As a result, African Americans are more likely to be prosecuted and convicted—including innocent African Americans. This explains most but not all of the disparity in murder exonerations, some of the disparity in rape exonerations and none of the disparity in drug possession exonerations.

A second reason is that evidence used in prosecutions with black defendants is more error-prone than evidence in similar cases with white defendants. A version of this problem—the unreliability of cross-racial eyewitness identification—is a likely explanation for much of the extraordinary number of sexual assault exonerations with black defendants and white victims, but it cannot explain the entire racial disparity in rape exonerations.

A third reason is that blacks are likely to live in high crime neighborhoods that are heavily policed, and are more likely to have criminal records. This high level of attention may be legitimate and may explain some of the disparity in drug possession exonerations, but it's difficult, if not impossible to distinguish from illegitimate racial profiling which has long been a staple of drug policing, and a problem throughout the criminal system.

Finally, some of the racial disparity in arresting, prosecuting and convicting innocent defendants for all crimes is caused by racial prejudice, from unconscious bias to explicit racism.

VI. CONCLUSION

Studying false convictions is as difficult as it is fascinating. We can't create them, obviously, but neither can we observe them when they happen or test for them after the fact. We're limited to those few that resurface, typically years later, as exonerations—and even there, we're badly handicapped. No American

jurisdiction has any system for recording exonerations; we have to go out and find the stories by whatever means we can devise.

The National Registry of Exonerations does just that: We find research and publish information on exonerations, and do our best to distill systematic data from them. We've collected 1,900 cases since 1989, and we've learned a great deal from them, but everything we can say is bounded by the limitations of the process.

Here's one example of many: We know of 217 exonerations in New York, more than any other state except Texas. One reason is that since 1984 all claims for compensation from the state for wrongful imprisonment are handled by a single court, the New York Court of Claims in Albany, New York, and the clerk's office at that court has been extraordinarily helpful to us in identifying cases and providing records for us to review. That has led to approximately 35 New York exonerations that we might not otherwise have found.

That's good. We welcome information on exonerations from any source; this is one of many clusters we've happened on. But fertile sources produce biases. This unique opportunity in New York means that our data may over-represent exonerations from New York, and among them exonerations after long terms of imprisonment for which large damages may be due—and no doubt other biases that we're not aware of. And in the background, of course, exonerations themselves are wildly unrepresentative of false convictions, as we've explored at length.

Patchy and unrepresentative data can mislead. On this topic they've led smart people to say that convictions of innocent defendants are vanishingly rare—which is demonstrably false; to conclude the eyewitness misidentification is the most common cause of false convictions—which has been contradicted by better but still incomplete data; and to believe that innocent people almost never plead guilty—but we have seen that they do, in large numbers.

All the same, we've learned quite a bit, if we're careful to separate what we know from what we believe.

We know that the number of known exonerations is increasing, that the number of all exonerations is substantially higher and that the number of false convictions is far higher than the number of exonerations.

We know false convictions are more likely to be detected if the punishment is severe, ranging from death sentences—for which the rate of exonerations is vastly higher than for other crimes—to misdemeanors, where almost none occur.

We don't know the rate of false convictions in general, but we do have a good estimate for death sentences: 4.1%. This suggests that the rate for other violent felonies is somewhere in the range from one to several percent.

We don't have a decent picture of how wrongful convictions are produced, but we can identify some of the causal factors: several forms of false evidence (misidentifications, false confessions, bad forensic science, perjury and other lies) and misbehavior by those who process criminal cases (official misconduct, ineffective legal defense). There are also strong indications that situational factors are major contributors, especially pre-trial detention.

We know that African Americans are more likely to be falsely convicted than whites, in part because innocent blacks are members of a community with a higher crime rate than whites and in part because of various types of bias and racial discrimination.

There's far more to learn—and not just from general patterns. The stories of the exonerations are equally instructive. For example:

In 1975, 18-year-old Ricky Jackson, 17-year-old Ronnie Bridgeman and Ronnie's 20-year-old brother Wiley were sentenced to death for a robbery-murder in Cleveland, Ohio. The only evidence connecting them to the crime was the testimony of 12-year-old Eddie Vernon who said he saw the crime and identified the defendants in court.

Thirty-six years later, in 2011, Cleveland Scene magazine published a detailed examination of the case highlighting numerous inconsistencies in Vernon's testimony. In 2013, after repeated conversations with his pastor, Vernon recanted his testimony; and in 2014, he testified at a court hearing that "I don't have any knowledge about what happened at the scene of the crime. Everything was a lie. They were all lies."

Vernon told the judge that he heard a rumor that Jackson and the Bridgeman brothers committed the crime, so he went to the scene and told police he saw them do it in order to help the authorities. "I'm thinking, 'I'm doing the right thing.'" He testified that he tried to retract his statement before trial, but the detectives told him that since he was too young to go to jail himself they would arrest his parents for perjury if he backed out, so he gave in. Other evidence at the 2014 hearing showed that after Vernon came forward in 1975, police dropped other highly plausible suspects with records for armed robbery.

In November 2014, 39 years after they were sentenced to die, Ricky Jackson, Ronnie Bridgeman and Wiley Bridgeman were exonerated.