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SMOKE BUT NO FIRE:
WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED OF
CRIMES THAT NEVER HAPPENED

Jessica S. Henry*

ABSTRACT

Nearly *one-third* of exonerations involve the wrongful conviction of an innocent person for a crime that never actually happened,¹ such as when the police plant drugs on an innocent person, a scorned lover invents a false accusation, or an expert mislabels a suicide as a murder. Despite the frequency with which no-crime convictions take place, little scholarship has been devoted to the subject. This Article seeks to fill that gap in the literature by exploring no-crime wrongful convictions as a discrete and unique phenomenon within the wrongful convictions universe.

This Article considers three main factors that contribute to no-crime wrongful convictions: official misconduct in the form of police lies, aggressive policing tactics, and prosecutorial malfeasance; the mislabeling of a non-criminal event as a crime; and outright fabrications by informants and non-governmental witnesses with motivations to lie. This Article then provides an empirical analysis of existing data from the National Registry of Exonerations about no-crime exonerations and compares data between no-crime exonerations and actual-crime exonerations in terms of contributing factors, crime types, and race and gender distinctions. In doing so, this Article demonstrates that no-crime wrongful convictions, where a person is convicted of a crime that did not occur, are materially different from actual-crime wrongful convictions, where the wrong person is convicted of a crime that did occur but was committed by another. Finally, this Article concludes with policy reform recommendations that specifically seek to reduce the incidence of no-crime wrongful convictions.

INTRODUCTION

The most familiar wrongful conviction narrative is that of an innocent

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¹ See *Browse Cases: Detailed View*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Feb. 27, 2018).

person who is wrongly convicted of a crime that *actually* happened. A woman was raped. A man was murdered. A child was assaulted. A house was deliberately burned to the ground. Drugs were bought or sold. In each of these scenarios, an innocent person was wrongly identified as the perpetrator of an actual crime. He or she is ultimately arrested, prosecuted, convicted and punished for a crime that he or she did not commit. These “real crime, wrong perpetrator” convictions constitute the majority of known wrongful convictions, and provide compelling stories of “who dunnit” criminal investigations gone terribly and tragically wrong.

This Article explores a different kind of wrongful conviction: innocent people who are convicted of crimes that *never* occurred. In other words, these cases involve people who are convicted for events that were never criminal or that never even happened. Nearly *one-third* of exonerations since 1989 involve no-crime convictions.² And that number refers only to the no-crime wrongful convictions cases that have been uncovered, remedied and counted.³ Although no-crime convictions are far more prevalent than might first be imagined, virtually no scholarship to date has examined no-crime wrongful convictions and exonerations.⁴

The conviction of a person for a crime that never happened seems more like a surreal scene from Kafka than a true story from the American justice system.⁵ Yet, no-crime convictions are all too real and happen far too often.⁶ As used in this Article, “no-crime convictions” refer to the scenario where a person was convicted of a crime that never actually happened, such as where a natural or accidental event was erroneously labeled a crime, or where a crime was fabricated that did not occur. In contrast, “actual-crime wrongful convictions” refer to the scenario where the wrong individual is erroneously convicted of a crime committed by someone else. Most wrongful conviction scholarship to date focuses on actual-crime wrongful convictions. This Article seeks to bring much-needed attention to the significant, but overlooked, phenomenon of no-crime convictions.

Part I of this Article explores the primary causes of no-crime wrongful convictions: official misconduct, the mislabeling of a non-criminal event as a crime, and lies by informants and non-governmental witnesses with a motive to lie. Part I.A considers no-crime wrongful convictions that are

² *Id.* Data for the first 2,000 exonerations in the National Registry of Exonerations is on file with the author.

³ See *infra* Part II.B.

⁴ The National Registry of Exonerations collects data about certain types of no-crime exonerations. See, e.g., NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016 (2017). The subject, however, has not been the primary focus of wrongful conviction scholarship within the academy.

⁵ See ROBERT P. BURNS, KAFKA’S LAW: THE TRIAL AND AMERICAN CRIMINAL JUSTICE 3 (2014).

⁶ See *infra* Part III.B.

the product of official misconduct. It specifically examines two forms of police misconduct: outright police fabrications, as in the case where the police plant or falsify evidence to obtain an arrest where no crime in fact occurred; and over-zealous police practices that result in sweeping arrests of broad swaths of people, often poor people of color, sometimes for crimes that never happened. It also considers the important role of prosecutorial misconduct in contributing to the incidence of no-crime convictions. Next, Part I.B explores no-crime convictions that result from the erroneous labeling of a natural or accidental event as a crime, such as an accidental fire that is mislabeled an arson or a suicide that is mislabeled a murder. This section also analyzes how and why criminal mislabeling occurs, and considers the effect of tunnel vision on the pursuit of a non-criminal event as a crime. Part I.C discusses no-crime convictions that are the product of fabrications by informants and false accusers. Building on the typologies developed in Part I, Part II of this Article explores the existing data relating to no-crime convictions. Using data from the National Registry of Exonerations, Part II.A first examines known data about wrongful convictions generally. This section highlights the absence of robust information about wrongful convictions based on misdemeanors and guilty pleas as an important data limitation with implications for the study of no-crime convictions. Part II.B explores existing data about no-crime convictions, and specifically analyzes no-crime conviction exoneration data as it relates to contributing factors, crimes types, and race and gender. As the data demonstrates, no-crime convictions have unique characteristics that make them separate and distinct from actual-crime wrongful convictions. Part III offers policy reform recommendations that specifically address the unique issues that arise in no-crime wrongful convictions.

I. NO-CRIME CONVICTIONS: THE INITIAL INCIDENT

No-crime convictions are based on criminal allegations where nothing criminal happened.⁷ In other words, no-crime wrongful convictions are based on the erroneous determination that a crime occurred when, in fact, there was no crime at all. Although there is no criminological or societal interest served by the arrest, prosecution and conviction of a person for non-criminal or entirely fabricated events, no-crime convictions happen with seeming frequency.

As demonstrated by the top-three contributing factors in no-crime

⁷ This is to be distinguished from events that are not crimes because of legal justification. For instance, the firing of a gun at another in self-defense is justifiable, and therefore not criminal, even if it results in death. It would not, however, be considered a “no-crime” wrongful conviction.

conviction cases,⁸ no-crime convictions can be divided into three main types: convictions based on official misconduct,⁹ convictions based on the erroneous labeling of an event as a crime,¹⁰ and convictions based on deliberate falsehoods.¹¹ As will be discussed, these categories are not always discrete. No-crime cases may begin with police misconduct, but ultimately be “proven” with the assistance of a prosecutor by false testimony. An expert may erroneously label a death as a homicide, and the police may falsify evidence to bolster that claim. With that caveat, these three categories present analytically distinct “triggers” or starting points for the process that leads to a no-crime conviction.

A. *No-Crime Convictions Based on Official Misconduct*

Although most police officers do their jobs fairly and to the best of their ability, stories abound about individual officers, and sometimes entire police units or departments, who have engaged in rampant misconduct.¹² This misconduct can take various forms, including planting evidence or tampering with witnesses to manufacture crimes that never occurred,¹³ or making false arrests pursuant to aggressive policing policies.¹⁴ Because the police make arrests, in many ways they create, or at least foster, the first official narrative of when and whether a crime has occurred and who is the perpetrator of that crime. Prosecutors also bear significant responsibility for no-crime convictions, either through their complacency in uncritically accepting the original police narrative, or through their affirmative misconduct in hiding evidence.¹⁵

1. *Police Fabrications on the Ground and in the Courtroom*

That some police officers falsify and fabricate evidence is an unfortunate reality.¹⁶ Many of these police-fabricated crimes are never

⁸ See *infra* Table 1 (describing the top three contributing factors in no-crime convictions: perjury/false accusations (59%), official misconduct (36%) and forensic error (32%)).

⁹ See *infra* Part II.A.

¹⁰ See *infra* Part II.B.

¹¹ See *infra* Part II.C.

¹² See, e.g., POLICEMISCONDUCT.NET (last visited Feb. 27, 2018) (providing links to news stories related to police misconduct); *Police Brutality, Misconduct and Shootings*, N.Y. TIMES, <https://www.nytimes.com/topic/subject/police-brutality-misconduct-and-shootings> (last visited Feb. 27, 2018) (providing the same).

¹³ See *infra* Part II.A.1.

¹⁴ See *infra* Part II.A.2.

¹⁵ See *infra* Part II.A.3.

¹⁶ See Vida B. Johnson, *Bias in Blue: Instructing Jurors to Consider the Testimony of Police Officer Witnesses with Caution*, 44 PEPP. L. REV. 245, 268–72 (2017) (discussing cases where the police “trumped up” charges).

uncovered.¹⁷ Those that are revealed portray a disturbing picture of police overreach and abuse, often within our nation's poorest communities of color.¹⁸

Police lie for reasons that are varied and complex.¹⁹ On occasion, police fabricate evidence for personal monetary gain. For instance, in 2013, ex-narcotics officer Jeffrey Walker planted drugs in a South Philadelphia drug dealer's car and then broke into his home to steal \$15,000.²⁰ This apparently was not entirely unusual. Walker also testified that his narcotics squad stole over \$1 million dollars from drug dealers.²¹

Financial incentives to fabricate crime, however, are not limited to the individual officer on the beat. Entire law enforcement departments operate under significant financial pressures and incentives to make arrests, regardless of their accuracy, to raise revenues from fines and court fees,²²

¹⁷ See Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1135, 1185 (2013) (arguing that “[h]undreds of thousands, perhaps millions, of people have been convicted of such crimes” due to police misconduct, although data is “too limited to permit any accurate generalizations” about numbers of cases).

¹⁸ See, e.g., Barbara Boyer, *Two Former NJ Officers Face More Federal Charges*, PHILA. INQUIRER (Sept. 10, 2011), <https://www.policeone.com/officer-misconduct-internal-affairs/articles/4348206-Two-former-NJ-officers-face-more-federal-charges/> (conveying that at least 200 convictions that targeted the poor black community of Camden, New Jersey were vacated due to police misconduct); Skip Hollandsworth, *Snow Job*, TEX. MONTHLY (Apr. 2002), <http://www.texasmonthly.com/articles/snow-job/> (describing police misconduct targeting blue-collar Mexican immigrants in Dallas, Texas and resulting in the vacatur of convictions); see also SAMUEL R. GROSS ET AL., NAT'L REGISTRY OF EXONERATIONS RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 20 (2017) [hereinafter RACE AND WRONGFUL CONVICTIONS] (discussing fifteen group exonerations, made up of 1,840 wrongly convicted defendants, the majority of whom were African American and who were framed for drug crimes that never happened).

¹⁹ See Johnson, *supra* note 17, at 286–94 (discussing various motivations for police misconduct); see also Michelle Alexander, *Why Police Lie Under Oath*, N.Y. TIMES (Feb. 2, 2013), <http://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html> (describing how police departments incentivize arrest numbers, which can lead to wrongful convictions).

²⁰ Matt Gelb, *Former Philly Narcotics Cop Jeffrey Walker Sentenced to 3 1/2 Years in Prison*, PHILA. INQUIRER (July 29, 2015), http://www.philly.com/philly/news/20150730_Former_Philly_narcotics_cop_Jeffrey_Walker_sentenced_to_31_2_years_in_prison.html. Although six of Walker's fellow officers were later tried and acquitted of police corruption, over 580 convictions have been overturned in Philadelphia due to police misconduct.

²¹ Mark Fazlollah, *Once Crooked Cop Now Witness for Those He Arrested*, PHILA. INQUIRER (Sept. 16, 2016), http://www.philly.com/philly/news/20160916_Once_crooked_cop_now_witness_for_those_he_arrested.html.

²² See U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–15 (2015).

or to obtain monies and other assets through civil and criminal forfeiture laws that directly result from arrests and convictions.²³ The pressure to meet arrest numbers can certainly result in the arrests of innocents for crimes that never happened. In New York City, a detective admitted to routinely fabricating evidence to meet departmental arrest quotas.²⁴ Officers who fail to meet internal arrest goals may be overlooked for promotion, receive less desirable assignments, or face reprimand.²⁵

Other police officers lie for personal career advancement.²⁶ For instance, in Tulia, Texas, Tom Coleman, an undercover officer for hire, entirely fabricated drug charges against forty-six people, almost all of whom were poor and black.²⁷ Based solely on Coleman's say-so, the defendants were arrested and thirty-seven were convicted, either after trial or upon a guilty plea.²⁸ It was later revealed that Coleman had invented the drug crimes from whole-cloth, and that all thirty-seven convicted defendants were entirely innocent of the drug crimes for which they had been convicted.²⁹ Before Coleman was convicted and sentenced to

²³ See Marian R. Williams, Research Note, *Civil Asset Forfeiture: Where Does the Money Go?*, 27 CRIM. JUST. REV. 321, 321–323 (2002).

²⁴ See John Marzulli, *We Fabricated Drug Charges Against Innocent People to Meet Arrest Quotas, Former Detective Testifies*, N.Y. DAILY NEWS (Oct. 13, 2011) <http://www.nydailynews.com/news/crime/fabricated-drug-charges-innocent-people-meet-arrest-quotas-detective-testifies-article-1.963021>; Tim Stelloh, *Detective Is Found Guilty of Planting Drugs*, N.Y. TIMES (Nov. 1, 2011), <http://www.nytimes.com/2011/11/02/nyregion/brooklyn-detective-convicted-of-planting-drugs-on-innocent-people.html>.

²⁵ See Saki Knafo, *How Aggressive Policing Affects Police Officers Themselves*, ATLANTIC (July 13, 2015), <http://www.theatlantic.com/business/archive/2015/07/aggressive-policing-quotas/398165/>; Veronica Rocha, *Whittier Police Officers Sue, Say They Were Forced to Meet Quotas*, L.A. TIMES (Mar. 4, 2015), <http://www.latimes.com/local/lanow/la-me-ln-whittier-ticket-quotas-20150304-story.html>; Joel Rose, *Despite Laws and Lawsuits, Quota-Based Policing Lingers*, NPR (Apr. 4, 2015), <http://www.npr.org/2015/04/04/395061810/despise-laws-and-lawsuits-quota-based-policing-lingers>.

²⁶ See *supra* note 25.

²⁷ See Covey, *supra* note 18, at 1150–52.

²⁸ *Id.* at 1150; see also NATE BLAKESLEE, TULIA: RACE, COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN (2005); Kevin Johnson, *Taking the “Garbage” Out in Tulia, Texas: The Taboo on Black-White Romance and Racial Profiling in the “War on Drugs”*, 2007 WIS. L. REV. 283, 286; Adam Liptak, *\$5 Million Settlement Ends Case of Tainted Texas Sting*, N.Y. TIMES (Mar. 11, 2004), http://www.nytimes.com/2004/03/11/us/5-million-settlement-ends-case-of-tainted-texas-sting.html?_r=0.

²⁹ See Covey, *supra* note 18, at 1149–50.

probation for perjury,³⁰ he was awarded lawman of the year in 2000.³¹

Some police officers engage in widespread corruption simply because that misconduct is accepted, and sometimes ingrained, in the operational culture.³² In the Rampart scandal, for instance, Los Angeles police officers affiliated with the Community Resources Against Street Hoodlums (CRASH) unit were arrested for a wide range of rampant misconduct.³³ According to Raphael Perez, one former CRASH officer who testified for the State pursuant to a cooperation agreement, the CRASH unit routinely engaged in a stunning range of illegal activity, including unauthorized killings, routine beatings of suspects, theft, and drug dealing.³⁴ Perez also revealed the CRASH practice of planting evidence on suspects, lying in court, and knowingly obtaining coerced or fabricated statements.³⁵ The result of an investigation into the Rampart CRASH unit was the vacatur of more than 150 convictions.³⁶

Professor Russell Covey carefully examined existing data of about eighty-seven vacated cases in the Rampart scandal.³⁷ Covey concluded that thirty-eight of those cases involved actually innocent defendants who were convicted in no-crime cases manufactured by the Rampart CRASH unit: “In these [thirty-eight] cases, police planted drugs or guns on suspects, lied about observing defendants committing crimes, or coerced confessions from innocent defendants.”³⁸ It bears noting that the true extent of CRASH misconduct remains unknown. In his testimony, Perez claimed that “ninety percent of the officers that work CRASH, and not just Rampart CRASH, falsify a lot of information. They put cases on people.”³⁹ If Perez is correct, then far more than 150 defendants were convicted of crimes that never occurred, but that allegation has not been

³⁰ Greg Cunningham, *Coleman Gets 10 Years Probation*, AMARILLO GLOBE NEWS (Jan. 19, 2005), http://amarillo.com/stories/011905/new_1065314.shtml

³¹ BLAKESLEE, *supra* note 27, at 4; *see also* Rebecca Leung, *Targeted in Tulia, Texas?*, SIXTY MINUTES, <http://www.cbsnews.com/news/targeted-in-tulia-texas-26-09-2003/>.

³² *See* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 454 (2004); *see also* *Special Litigation Section Cases and Matters: Law Enforcement Agencies*, U.S. DEP’T JUST., <https://www.justice.gov/crt/special-litigation-section-cases-and-matters0#police> (last visited Feb. 27, 2018) (providing links to investigations of over twenty law enforcement agencies relating to misconduct and rights violations).

³³ *See* BLUE RIBBON RAMPART REVIEW PANEL, RAMPART RECONSIDERED: THE SEARCH FOR REAL REFORM SEVEN YEARS LATER (2006) [hereinafter RAMPART RECONSIDERED].

³⁴ *Id.* at 9.

³⁵ *Id.*

³⁶ *Id.* at 71; *see also* Covey, *supra* note 18, at 1137–39.

³⁷ Of the 150 vacated convictions, Covey was able to obtain adequate data for analysis in eighty-seven cases. Covey, *supra* note 18, at 1148.

³⁸ *Id.* at 1149.

³⁹ RAMPART RECONSIDERED, *supra* note 34, at 53.

investigated.⁴⁰ Unfortunately, Rampart is only one example of widespread police abuse and misconduct, each of which has resulted in an unknown number of no-crime convictions.⁴¹

Finally, police sometimes fabricate evidence in pursuit of a twisted ideal of justice. An officer may believe that a suspect is guilty and therefore will take whatever steps are necessary to get the “criminal” off the streets.⁴² In these cases, the police knowingly plant evidence to completely create a case, or to strengthen a weak evidentiary case, against a suspect who is believed to be guilty.⁴³ “Noble cause corruption,” where the police believe the ends of catching a “bad guy” justify the means of fabricating evidence or lying, has devastating consequences for the innocent.⁴⁴

To be clear, police fabrication extends beyond planting evidence and fabricating charges. After inventing a crime that did not occur, the police will often double-down on their initial misconduct by representing their lies as truth to the prosecution, and to the court in pre-trial hearings.⁴⁵ If the case is not resolved by a guilty plea, the police will then lie at trial, a

⁴⁰ See Covey, *supra* note 18, at 1138–39.

⁴¹ *Id.* at 1142–43 (detailing significant police scandals in Louisiana, New Jersey, and Texas); RACE AND WRONGFUL CONVICTIONS, *supra* note 19, at 20.

⁴² See John Ferak, *Evidence Planting Claims Not Limited to Steven Avery*, POST-CRESCENT (Mar. 2, 2016),

<http://www.postcrescent.com/story/news/local/steven-avery/2016/03/02/evidence-planting-claims-not-limited-steven-avery/81109806/> (“Some cops justify planting evidence because they believe the suspect is evil and needs to be locked away from society Other crooked cops hold grudges against suspects for a variety of reasons, and still others rationalize that if a suspect didn't do this crime, they're bound to commit other ones.”).

⁴³ See, e.g., Adam Beam, *Lawsuit: Kentucky Police Planted Evidence in Murder Case*, U.S. NEWS & WORLD REPORT (Apr. 5, 2017),

<https://www.usnews.com/news/best-states/kentucky/articles/2017-04-05/lawsuit-kentucky-police-planted-evidence-in-murder-case> (describing detectives alleged to have “worked hard” to frame innocent defendants for fear evidence would point elsewhere); Janine Anderson, *Charges Filed Against Former Kenosha Officer*, KENOSHA NEWS (May 24, 2015), http://www.kenoshanews.com/news/charges-filed-against-former-kenosha-officer/article_fa1e1b0d-2d12-5fde-802f-3cff767ddaf6.html (describing officer who planted evidence at murder crime scene to create case against the primary suspect who was later revealed to be innocent).

⁴⁴ See Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119, 154 (2012) (defining noble cause corruption as where the police believe “it is appropriate to manufacture evidence against a suspect because ‘he is clearly guilty anyway’”).

⁴⁵ See Steve Mills & Todd Lighty, *Cops Rarely Punished When Judges Find Testimony False, Questionable*, CHI. TRIB. (May 6, 2016), <http://www.chicagotribune.com/news/local/breaking/ct-chicago-police-testimony-met-20160506-story.html>.

phenomenon so common that it has earned the name “testilying.”⁴⁶

2. *Aggressive Police Practices and Policies*

In addition to flagrant corruption, police policies and practices can lead to no-crime convictions. Arrests for offenses such as drug possession, trespass, or other “quality of life” crimes are almost always the result of police-initiated actions. Sometimes referred to as the “broken windows” approach to policing, police actively pursue possible low-level offenders and less serious instances of criminality under the theory that offenders who commit minor crimes may also be caught committing more serious crimes.⁴⁷ Innocent people are often arrested, prosecuted and convicted under these broad sweeping policies, sometimes for crimes that never actually happened.

In New York, for instance, Operations Clean Halls, also known as the Trespass Affidavit Program (“TAP”), was created in 1991 to reduce criminal activity in “high-crime” areas.⁴⁸ Under Operation Clean Halls, property owners authorized the police to enter their buildings and arrest anyone inside who was unlawfully on the premises.⁴⁹ People, particularly Blacks and Latinos from the poorest neighborhoods, were routinely arrested for trespass, even within the confines of their *own* apartment buildings.⁵⁰ As described in a report by the New York Lawyers for the Public Interest:

“Many residents report frequent police abuse of authority, particularly around the enforcement of trespass laws. For example, in [certain public housing units operated by the New York City Public Housing Authority] approximately 30% of the residents surveyed reported they had been charged with trespassing, despite the fact they lived there. Approximately 70% of those surveyed at the [public housing units] reported they had been repeatedly stopped

⁴⁶ For background information about testilying, see I. Bennet Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835 (2008); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).

⁴⁷ See Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 457 (2000).

⁴⁸ *Ligon v. City of New York*, 925 F. Supp. 2d 478, 484–85 (S.D.N.Y. 2013).

⁴⁹ See Matt Taibbi, *Mike Bloomberg’s New York: Cops in Your Hallways*, ROLLING STONE (Apr. 3, 2012), <http://www.rollingstone.com/politics/news/mike-bloombergs-new-york-cops-in-your-hallways-20120403>.

⁵⁰ See N.Y. LAWYERS FOR THE PUB. INTEREST, NO PLACE LIKE HOME: A PRELIMINARY REPORT ON POLICE INTERACTIONS WITH PUBLIC HOUSING RESIDENTS IN NEW YORK CITY 2 (2008).

by police officers when simply coming and going around their homes.”⁵¹

Upon arrest for trespass, people would be brought to the precinct, booked and fingerprinted, and assigned an attorney at arraignment. Having spent hours, and sometimes the night, in a holding cell waiting for court, many people—including innocent people who were not unlawfully present in the building and therefore were not legally trespassing—opted to plead guilty to trespass.⁵²

Because the police routinely patrolled the same buildings, innocent people, including factually innocent people who pled guilty to trespass, were sometimes arrested on multiple occasions.⁵³ Each subsequent arrest and conviction from a guilty plea to trespass increased the potential penal and collateral consequences: less favorable plea offers, increased fines and other penalties, and of course, a criminal record, with significant implications for future employment, financial and housing prospects.⁵⁴ The number of wrongly convicted people caught in the web of Operation Clean Halls is unknown, but it would be no exaggeration to say that in New York City, hundreds, if not thousands, of innocent people were arrested and convicted for trespass based on behavior that was entirely lawful. In response to the concern that innocent people were being routinely arrested and harassed, several civil rights groups challenged Operation Clean Halls and, after protracted litigation, those suits were resolved in a legal settlement.⁵⁵

Police-initiated crime measures have surely resulted in wrongful convictions around the country. Harris County, Texas, presents an interesting illustration of just how frequently innocent people are convicted of crimes that never happened. In Harris County, police officers routinely stop people, typically poor people of color, on suspicion of drug-related crimes.⁵⁶ If a substance is found, the police conduct a field test, and if that test yields a positive result, the person is arrested.⁵⁷

⁵¹ *Id.*

⁵² In New York, depending on the circumstances, trespass can be a minor violation. *See* N.Y. PENAL LAW § 140.05 (McKinney 2016). It can also be a misdemeanor, *id.* §§ 140.10, 140.15, or even a felony. *Id.* § 140.17.

⁵³ *See* Julie Turkewitz, *In New York, a 20-Year-Old Policy Suddenly Prompts a Lawsuit*, ATLANTIC (May 1, 2012), <https://www.theatlantic.com/national/archive/2012/05/in-new-york-a-20-year-old-policy-suddenly-prompts-a-lawsuit/256584>.

⁵⁴ *See* MARGARET COLGATE-LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE § 2:1 (2016 ed.).

⁵⁵ *See* Univ. of Mich. Law Sch., *Case Profile*, *Ligon v. City of New York*, C.R. LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/detail.php?id=12496> (last visited Feb. 27, 2018) (summarizing the *Ligon* litigation and subsequent settlement).

⁵⁶ *See* RACE AND WRONGFUL CONVICTIONS, *supra* note 19, at 18.

⁵⁷ *Id.* at 18–19.

In Harris County, as in many counties around the country, most of the street arrests were based on positive results from inexpensive, and often unreliable, drug tests in the field.⁵⁸ As in most counties around the country, most of the defendants in Harris County who were arrested after a positive field test pled guilty, rather than risk lengthy prison sentences or lengthy pre-trial detention.⁵⁹ What makes Harris County unusual is that the County sent the field tests to crime laboratories for confirmation even after a guilty plea conviction; most jurisdictions do not bother.⁶⁰ Equally unusual was that Harris County's Conviction Integrity Unit followed up, and dismissed, any conviction that was not supported by the lab results.⁶¹ The Harris County Integrity Unit dismissed convictions in at least 133 cases where the field test erroneously showed a positive result, when in fact there were no drugs at all.⁶² Sixty-two percent of these exonerees were African American, even though only 20% of Harris County residents are African American.⁶³ Harris County can be viewed as a canary in the mine: the number of innocent defendants in other jurisdictions who have been wrongly arrested and convicted based on inaccurate drug field tests, and who subsequently pled guilty to crimes that never happened, is likely significant and entirely unknown.⁶⁴

Trespassing and drug possession are just two examples of no-crime convictions that are the product of aggressive police tactics. These policies disproportionately harm the poor, and particularly poor people of color, who often plead guilty not only to crimes they did not commit, but to crimes that never even happened. At the less serious end of the spectrum, the guilty pleas may yield "only" a minor criminal record.⁶⁵ But for others, these convictions carry with them prison time, court fees and associated costs, and lost income.⁶⁶ In addition, even relatively minor convictions can result in a loss of employment or child custody, render a person ineligible for subsidized housing, or prevent people from obtaining specified licenses, to mention only a few of the very real collateral consequences that come from convictions for crimes that never occurred.⁶⁷

⁵⁸ See Ryan Gabrielson & Sander Topher, *How a \$2 Roadside Drug Test Sends Innocent People to Jail*, N.Y. TIMES MAG. (July 7, 2016), <https://www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html>.

⁵⁹ RACE AND WRONGFUL CONVICTIONS, *supra* note 19, at 17–18.

⁶⁰ *Id.* at 18.

⁶¹ *Id.*

⁶² *Id.* at 17.

⁶³ *Id.* at 18.

⁶⁴ See *id.* at 18; Gabrielson & Topher, *supra* note 59.

⁶⁵ But see Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 297–303 (2011).

⁶⁶ *Id.*

⁶⁷ For a comprehensive inventory of collateral consequences from criminal convictions,

3. *No-Crime Convictions Based on and Bolstered by Prosecutorial Misconduct*

Prosecutors in many ways are the most powerful actors in the criminal justice system. They decide whether and when to bring charges, what charges to bring, and whether to offer a plea. They also have unfettered access to the evidence in a criminal case, and although they are required to turn over exculpatory evidence to the defense, it is difficult to know whether and to what extent they are complying with these obligations. These powers must be used with caution. As the Supreme Court has held:

[A prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.⁶⁸

In the context of no-crime convictions, prosecutorial misconduct can take many forms. For instance, the prosecutor engages in misconduct when he uncritically accepts the police's version of events, and fails to conduct an independent review of the arrest charges and supporting evidence. In misdemeanor cases, prosecutors routinely bring charges without questioning whether a crime even happened in the first place.⁶⁹ In addition, prosecutors often elect to bring as many, and as serious, charges as possible against a defendant to induce a plea and keep trial verdicts flexible.⁷⁰ The result, however, is that even innocent people will often opt to plead guilty. In Harris County, Texas, that is exactly what happened: innocent people pled guilty to drug crimes well before forensic tests proved no crime had been committed.

see *National Inventory of Collateral Consequences of Conviction*, COUNCIL OF ST. GOVERNMENTS JUST. CTR., <https://niccc.csgjusticecenter.org/> (last visited Feb. 27, 2018); see also LOVE ET. AL., *supra* note 55, § 2:1.

⁶⁸ Berger v. United States, 295 U.S. 78, 88 (1935).

⁶⁹ See Alexandra Natapoff, *Why Misdemeanors Aren't So Minor*, SLATE (Apr. 27, 2012), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged_.html (conveying that ninety-six percent of misdemeanor arrests in certain jurisdictions convert automatically into criminal charges because prosecutors do not properly screen cases, but rather “charge all petty arrestees on whatever basis the police arrested them”).

⁷⁰ See Kyle Graham, *Crimes, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CALIF. L. REV. 1573, 1582–83 (2012); Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 154–55 (2011).

Prosecutors also may engage in more deliberate misconduct that turns the trajectory of the case against the defendant, including, quite frequently, failing to turn over exculpatory evidence,⁷¹ providing informants with non-public information to make their testimony appear more accurate and authentic,⁷² failing to disclose incentives offered to informants,⁷³ and “tacitly acquiescing or actively participating in the presentation of false evidence by police.”⁷⁴ In the murder conviction of Beverly Monroe, the prosecutor knew that the Medical Examiner had initially concluded that the death was not a homicide.⁷⁵ Rather than carefully evaluate that narrative, the prosecutor pursued a murder charge against Monroe, hid the Medical Examiner’s report, found an informant to testify falsely, did not disclose the deal that had been made with that informant, and hid exculpatory evidence relating to the position of the body that was more consistent with a suicide narrative than a murder one.⁷⁶ Monroe was convicted and spent 10 years in prison before she was exonerated.

B. No-Crime Convictions Based on Non-Criminal Events that are Mislabeled Crimes

1. Mislabeled a Natural or Accidental Event as a Crime

In addition to flagrant official misconduct, no-crime convictions can occur when criminal blame is assigned to a non-criminal event; i.e., when an accidental or naturally-occurring circumstance is erroneously designated as a crime. For instance, numerous people have been wrongly convicted of homicide based on an erroneous medical diagnosis of shaken baby syndrome.⁷⁷ Audrey Edmunds, for instance, was wrongly convicted of murder and sentenced to eighteen years in prison after an infant died in

⁷¹ See Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, viii (2015) (describing an “epidemic of Brady violations abroad in the land” (quoting *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013)); Jon B. Gould et. al., *Predicting Erroneous Convictions*, 99 IOWA L. REV. 471, 488 (2014).

⁷² Kozinski, *supra* note 72, at xxii.

⁷³ See BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 123–40 (2011).

⁷⁴ Kozinski, *supra* note 72, at xxii–xxiii; see also Bennett L. Gershman, *The Prosecutor’s Contribution to Wrongful Convictions*, in *EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD* 109, 114 (Allison D. Redlich et al. eds., 2014).

⁷⁵ See *Monroe v. Angelone*, 323 F.3d 286, 312 (4th Cir. 2003); see also *infra* Part II.B.1.

⁷⁶ *Id.* at 298–99, 312.

⁷⁷ See Deborah Tuerkheimer, *The Next Innocence Project: Shaken Baby Syndrome and the Criminal Courts*, 87 WASH. U. L. REV. 1, 9–10 (2009); Lee Scheier, *Shaken Baby Syndrome: A Search for Truth*, CHI. TRIB. (June 12, 2005), http://articles.chicagotribune.com/2005-06-12/features/0506120513_1_child-abuse-syndrome-shaken.

her care.⁷⁸ There was no evidence of trauma, and no one claimed to see her shake the baby. An expert, however, testified that the infant appeared to have suffered from “shaken baby syndrome.”⁷⁹ “Shaken baby syndrome, sometimes referred to today as “abusive head trauma,” rests on a “triad” of factors: “subdural hemorrhage, retinal hemorrhage, and encephalopathy (brain abnormalities and/or neurological symptoms).”⁸⁰ Because the expert believed that the infant demonstrated signs of the triad, the expert testified that the child must have died from shaken baby syndrome. Edmunds was found guilty, and after serving eleven years in prison for murder, was exonerated by scientific evidence disproving that diagnosis.⁸¹

In some instances, a sudden unexplained death can be mislabeled a crime by mistaken medical personnel. In 1989, in Columbus, Mississippi, seventeen-year-old Sabrina Butler found her nine-month-old son lifeless in his room.⁸² After calling the hospital, Butler and a neighbor frantically performed CPR, to no avail. Citing a swollen abdomen and bruises on the baby, medical personnel in the emergency room contacted the police, who interrogated Butler as a murder suspect and elicited a false confession.⁸³ Butler was prosecuted for capital murder. At trial, experts testified that the baby’s injuries were consistent with abuse.⁸⁴ Based on this testimony, Butler was convicted and sentenced to death.⁸⁵ Five years later, she was exonerated from Mississippi’s death row, after evidence revealed that her baby had died from a kidney disorder, and that the presence of bruises on the infant could have been caused by the administration of CPR.⁸⁶

Much like the mistaken medical diagnoses of murder, forensic experts

⁷⁸ *State v. Edmunds*, 746 N.W.2d 590, 592–93 (Wis. Ct. App. 2008).

⁷⁹ *Id.*; Tuerkheimer, *supra* note 79, at 3. For background information about Shaken Baby Syndrome, see Genie Lyons, *Shaken Baby Syndrome: A Questionable Scientific Syndrome and a Dangerous Legal Concept*, 2003 UTAH L. REV. 1109, 1110; Molly Gena, Comment, *Shaken Baby Syndrome: Medical Uncertainty Cases Doubt on Convictions*, 2007 WIS. L. REV. 701, 705–08.

⁸⁰ Keith A. Findley et al., *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right*, 12 HOUS. J. HEALTH L. & POL’Y 209, 212–13 (2012).

⁸¹ *Edmunds*, 746 N.W.2d at 592–93.

⁸² See Maurice Possley, *Sabrina Butler*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3078> (last updated Nov. 23, 2016); Sabrina Butler, *I Spent More Than Six Years as an Innocent Woman on Death Row*, TIME (May 30, 2014), <http://www.time.com/2799437/i-spent-more-than-six-years-as-an-innocent-woman-on-death-row/>.

⁸³ Butler, *supra* note 84.

⁸⁴ *Butler v. State*, 608 So. 2d 314, 316 (Miss. 1992); Butler, *supra* note 84.

⁸⁵ Butler, 608 So. 2d at 318.

⁸⁶ *Sabrina Butler-Smith*, WITNESS TO INNOCENCE, <http://www.witnesstoinnocence.org/exonerees/sabrina-butler.html> (last visited Feb. 27, 2018); Sabrina Butler, *supra* note 84.

also often erroneously mislabel an innocent or natural event as criminal. Fire science, for instance, played a critical role in the mislabeling of an accidental fire as arson in at least twelve known cases that resulted in a wrongful conviction.⁸⁷ In Utah, Herbert Landry was convicted of arson based largely on the testimony of an expert who testified that he found “pour patterns” indicating a deliberate fire.⁸⁸ The expert also testified that Oscar, an “ignitable liquid smelling dog,” alerted several times at the scene, which the expert believed indicated that the fire was deliberately set.⁸⁹ Despite Landry’s insistence that he was innocent, he was convicted of arson.⁹⁰ After a protracted legal battle, Landry’s conviction was eventually overturned, based in part of counsel’s poor performance in failing to contest the debunked and outdated “pour pattern” scientific testimony and the absence of scientific validity relating to Oscar’s “alert.”⁹¹ Similarly, William Vasquez, Amaury Villalobos and Raymond Mora were convicted in 1981 of deliberately setting a fire in Brooklyn that killed a woman and five young children.⁹² Decades later, reexamination of the fire science established that the fire had not been intentionally set.⁹³ Vasquez and Villalobos served thirty-three years in prison before their release; Mora died in prison well before his exoneration.⁹⁴

Still other no-crime wrongful convictions occur when a death by suicide is mislabeled a crime. Beverly Monroe, for instance, was wrongly convicted of murder for the suicide death of her romantic partner, Roger Zygmunt de la Burde.⁹⁵ In 1992, Burde was found dead of a single gunshot wound to the head in his mansion in Virginia.⁹⁶ The medical examiner initially declared his death a suicide.⁹⁷ A detective, however,

⁸⁷ See *supra* note 2.

⁸⁸ Maurice Possley, *Herbert Landry*, NAT’L REGISTRY EXONERATIONS (Jan. 30, 2017), <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5078>.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *Landry v. State*, 380 P.3d 25, 39 (Utah Ct. App. 2016).

⁹² Maurice Possley, *Amaury Villalobos*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4813> (last updated Mar. 6, 2017); Stephanie Clifford, *3 Men Imprisoned in 1980 Brooklyn Arson Case Are Exonerated*, N.Y. TIMES (Dec.16, 2015), https://www.nytimes.com/2015/12/17/nyregion/3-men-imprisoned-in-1980-brooklyn-arson-case-are-exonerated.html?_r=0.

⁹³ Clifford, *supra* note 94.

⁹⁴ *Id.*

⁹⁵ Stephanie Denzel, *Beverly Monroe* NAT’L REGISTRY EXONERATIONS (Nov. 7, 2016), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3482>.

⁹⁶ *Monroe v. Angelone*, 323 F.3d 286, 290 (4th Cir. 2003).

⁹⁷ *Id.* at 291.

suspected that Burde had been murdered.⁹⁸ Because Burde had been having an affair, the investigator honed in on Munroe as the suspect.⁹⁹ Over a three-month period, the detective repeatedly questioned Monroe at length, suggesting that Monroe was present at Burde's death, but had blocked the traumatic event from her mind.¹⁰⁰ Finally, Monroe told the detective that she may have been present in the room when Burde killed himself, and after eight hours of interrogation, signed a statement to that effect.¹⁰¹ The prosecution construed her statement as a murder confession and zealously pursued murder charges against her. At trial, the prosecution offered testimony that said the position of the gun near the body meant the death could not have been by suicide, and a witness who claimed Monroe unsuccessfully attempted to buy a gun the year before Burde's death. Monroe was convicted and sentenced to twenty-two years in prison.¹⁰² She was exonerated in 2003, after it was discovered that the prosecution had withheld exculpatory evidence, including forensic reports that indicated Burde's death had in fact been a suicide, a statement from the caregiver who found Burde admitting that he had moved the body, and a previously undisclosed deal with the witness, who was in fact an incentivized informant, to testify about the alleged attempted gun purchase.¹⁰³ Monroe is not unique; other innocent people have been wrongly convicted of homicide in no-crime cases involving suicide.¹⁰⁴

2. *The Impact of Tunnel Vision and Cognitive Bias on No-Crime Convictions*

The police contribute to the mislabeling problem in no-crime convictions by failing to pursue cases with an objective, open mind. Once the police decide, even mistakenly, that a crime has occurred, they look at the "crime" through a singular law enforcement lens. Tunnel vision is a term most often used to describe the process by which lead actors in the criminal justice system "focus on a suspect, select and filter the evidence that will 'build a case' for conviction, while ignoring or suppressing

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 302.

¹⁰¹ *Id.* at 303.

¹⁰² *Id.* at 292.

¹⁰³ *Id.* at 298–99, 312; Tom Campbell, *Monroe 'Good at Smiling Now'; Enjoying Freedom During Appeal*, RICHMOND TIMES-DISPATCH, Apr. 7, 2002, at B1.

¹⁰⁴ See, e.g., Elizabeth Webster & Jody Miller, *Gendering and Racing Wrongful Conviction: Intersectionality, "Normal Crimes," and Women's Experiences of Miscarriage of Justice*, 78 ALB. L. REV. 973, 1015 & n.280 (2015) (identifying four cases where women were wrongly convicted of homicide in cases that involved men's suicide).

evidence that points away from guilt.”¹⁰⁵ Tunnel vision “is the product of a variety of cognitive distortions, such as confirmation bias, hindsight bias, and outcome bias, which can impede accuracy in what we perceive and in how we interpret what we perceive.”¹⁰⁶ Confirmation bias, the tendency of individuals to seek or interpret evidence in ways that support existing beliefs, expectations, or hypotheses, takes over.¹⁰⁷

Individual police officers actively pursue evidence that supports their position that a crime has occurred while ignoring, downplaying, disregarding or minimizing information and evidence that does not support that view.¹⁰⁸ This is not a conscious process, but rather reflects a natural human impulse that can have grievous consequences in a criminal case. Tunnel vision results in a self-fulfilling prophecy. As the sociologist Robert Merton explained in his groundbreaking 1948 article *The Self-Fulfilling Prophecy*:

The self-fulfilling prophecy is, in the beginning, a *false* definition of the situation evoking a new behavior which makes the original false conception come *true*. This specious validity of the self-fulfilling prophecy perpetuates a reign of error. For the prophet will cite the actual course of events as proof that he was right from the very beginning.¹⁰⁹

In the context of no-crime convictions, the police engage in “tunnel vision” when they lock into the theory that a crime was committed.¹¹⁰ Once the police believe a crime was committed, they are duty bound to try to solve it. This means working to find a suspect who committed that crime, even though, in reality, there is none.

Their tainted investigative lens has far-reaching influence on the future of the case. Confirmation bias is not limited to the police.¹¹¹ After an

¹⁰⁵ Dianne L. Martin, Lessons About Justice from the “Laboratory” of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence, 70 UMKC L. REV. 847, 848 (2002); see also Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292; Brian Reichart, *Tunnel Vision: Causes, Effects, and Mitigation Strategies*, 45 HOFSTRA L. REV. 451, 451 (2016).

¹⁰⁶ Keith A. Findley, *Tunnel Vision*, in CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL RESEARCH 303, 308 (Brian L. Cutler ed., 2012).

¹⁰⁷ See Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175–76 (1998).

¹⁰⁸ *Id.*; see also Andrew E. Taslitz, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 TEX. TECH L. REV. 315, 361 (2012).

¹⁰⁹ Robert K. Merton, *The Self-Fulfilling Prophecy*, 8 ANTIOCH REV. 193, 195 (1948).

¹¹⁰ See Findley & Scott, *supra* note 107, at 292.

¹¹¹ See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of*

arrest by the police, prosecutors are supposed to carefully review the evidence at the outset to determine whether to pursue charges and which charges to seek.¹¹² Yet, rather than questioning the label of “crime” as designated by the police, prosecutors too often will weigh evidence that advances the likelihood that a crime occurred, and will ignore, fail to disclose, or minimize the importance of evidence that undermines or contradicts that theory.¹¹³

Once an event is initially labeled a crime, the crime label gains traction and momentum through every step of the criminal justice process. Criminal justice actors blindly accept, embrace and even amplify that initial incorrect crime label through a narrow and focused lens that seeks only to establish criminal culpability along the pathway to conviction. The police label an event a crime, the prosecution uncritically embraces the event as a crime and seeks out evidence to support the perspective that a crime has occurred, and the judge and jury eventually accept that narrative. If a crime was committed, then *someone* must have committed the crime. The criminal designation then sets into motion a process that ends only with the conviction of an innocent person for a crime they did not commit and that never occurred.

C. No-Crime Convictions Based on Fabrications by Informants and False Accusers

A third category of no-crime conviction relates to criminal accusations that are based on complete fabrications and lies. There are three primary sources of these lies: police fabrication, informants and false accusations. Because police fabrication has been explored in the broader context of

Cognitive Science, 47 WM. & MARY L. REV. 1587, 1605–06 (2006); Nickerson, *supra* note 109, at 178 (1998) (describing the tendency to give “greater weight” to confirmatory than disconfirming evidence).

¹¹² *But see* Natapoff, *supra* note 70 (conveying that ninety-six percent of misdemeanor arrests in certain jurisdictions convert automatically into criminal charges because prosecutors do not properly screen cases, but rather “charge all petty arrestees on whatever basis the police arrested them”).

¹¹³ *See* Gerard Fowke, Note, *Material to Whom?: Implementing Brady's Duty to Disclose at Trial and During Plea Bargaining*, 50 AM. CRIM. L. REV. 575, 594 (2013) The author argues:

Confirmation bias insinuates itself into the process early on. When police hone in on a suspect, they focus on his guilt. When the search emphasizes evidence of guilt over the ambiguous or exculpatory, some *Brady* evidence will never be found. And the prosecutor is not in the field, tracking down leads; she relies on investigators. So, before the information even gets to the prosecutor, it has been shaped by their biases to confirm the suspect's guilt.

Id. (internal citations omitted).

police misconduct,¹¹⁴ this section focuses primarily on informants, who may provide false information to gain a benefit from the police or prosecution, and false accusations.

1. Informants

Informants are individuals who provide testimony against a defendant in exchange for a benefit. Some informants obtain case-related benefits, such as avoiding criminal arrest or prosecution, having serious charges reduced or dismissed, or receiving a reduced sentence.¹¹⁵ Other informants obtain benefits such as cash,¹¹⁶ or more “prosaic” rewards such as “televisions, bail reduction for a girlfriend, donuts, ‘smokes,’ cell transfers, an end to beatings by deputy sheriffs, [or] lunch outside the jail.”¹¹⁷ In a grand jury hearing relating to an investigation into the Los Angeles snitch system, one witness explained that the rewards did not have to be significant: an “extra banana with a meal” might be sufficient to provoke false testimony from an informant.¹¹⁸

Informant testimony is notoriously unreliable,¹¹⁹ yet prosecutors often rely on that testimony to build their cases. In the context of no-crime wrongful convictions, any informant who provides evidence is likely lying because no crime ever took place. That informants lie is not news. As one noted jurist admonished prosecutors about the unreliability of jailhouse snitches:

Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law. This willingness to do anything includes not only truthfully spilling the beans on friends

¹¹⁴ See *supra* Part II.A.

¹¹⁵ NORTHWESTERN UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM 3 (2004) [hereinafter THE SNITCH SYSTEM].

¹¹⁶ *Id.* at 13. For example, Darryl Moore had serious drug and weapons charges pending that left him facing a life sentence as a habitual offender. He agreed to testify against three men in a drug conspiracy case in exchange for the dismissal of his pending charges and for cash and other benefits. Moore’s pending charges were also dropped. Moore testified and the three men were convicted. Although Moore later recanted, the remaining living defendants who were convicted continue to serve life sentences. Moore also went on to rape and murder an eleven-year old girl. *Id.*

¹¹⁷ Carl N. Hammarskjold, *Smokes, Candy and the Bloody Sword: How Classifying Jailhouse Snitch Testimony as Direct, Rather than Circumstantial, Evidence Contributes to Wrongful Convictions*, 45 U.S.F. L. REV. 1103, 1109 (2011).

¹¹⁸ *Id.* at 1113 (citing FRED KAUFMAN, THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORRIN 562 (1998)).

¹¹⁹ See Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 743 n.30 (2016) (citing cases recognizing the unreliability of informants).

and relatives, but also *lying, committing perjury, manufacturing evidence*, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they come into contact, including—and especially—the prosecutor. A drug addict can sell out his mother to get a deal, and burglars, robbers, murderers and thieves are not far behind. Criminals are remarkably manipulative and skillfully devious. Many are outright conscienceless sociopaths to whom “truth” is a wholly meaningless concept. To some, “conning” people is a way of life. Others are just basically unstable people. A “reliable informer” one day may turn into a consummate prevaricator the next.¹²⁰

Despite the inherent unreliability of informant testimony, their testimony is frequently critical evidence in a criminal prosecution. It is also frequently a contributing factor in cases of wrongful convictions.¹²¹

2. *Civilian Fabrications*

False accusations from civilian accusers who lie for a variety of reasons, such as to obtain a monetary gain or because of mental or emotional limitations, also contribute to no-crime convictions.¹²² Consider, for instance, the accuser who claims she was assaulted to win a custody dispute. Robert Doyle was sentenced to twenty years in prison after his ex-wife, with whom he was engaged in a bitter custody dispute, falsely accused him of abusing their three daughters.¹²³ Sometimes a jilted lover brings a false accusation to seek revenge against an ex-lover or spouse. Casey Ehrlick was convicted of rape, despite continued protestations of innocence and his claim that his ex-girlfriend was retaliating against him for their break-up; his ex-girlfriend later admitted that the rape did not happen.¹²⁴ Brian Banks, a high school student with a

¹²⁰ Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1383 (1996) (emphasis added).

¹²¹ See THE SNITCH SYSTEM, *supra* note 117, at 3 (45.9% of 111 death row exonerations examined included false informant testimony); GARRETT, *supra* note 74, at 124 (21% of the first 250 DNA exonerations involved false informant testimony).

¹²² See J. McNamara et al., *Characteristics of False Allegation Adult Crimes*, 57 J. FORENSIC SCI. 643, 644 (2012) (summarizing that motivations for false allegations include mental illness/depression, attention/sympathy, financial/profit, alibi, and revenge).

¹²³ Stephanie Denzel, *Robert E. Doyle*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3189> (last updated Aug. 30, 2016).

¹²⁴ Maurice Possley, *Casey Ehrlick*, NAT'L REGISTRY EXONERATIONS (June 23, 2016), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4925>. A

promising NFL football career, was also convicted of raping a high school girl who later admitted no rape had occurred, but that she had lied to cover up the fact that she was sexually active; she fabricated a criminal accusation to cover-up other behavior.¹²⁵ Still others bring false accusations to get attention. Conor Oberst, lead singer for the band Bright Eyes, was falsely accused of rape by a fan in the comments section of a magazine article.¹²⁶ Although no criminal charges were filed, social media seized upon the allegations. Eventually the fan publicly apologized, explaining that she “made up those lies about him to get attention.”¹²⁷

No-crime convictions may begin with police misconduct, an erroneous labeling decision, or flat-out lies. They may be fostered by the prosecution. They each end, however, with the erroneous conviction of a person for a crime that never happened. To better understand no crime convictions, this next section explores the scope of wrongful convictions generally, and no-crime convictions specifically, using exoneration data from the National Registry of Exonerations.

II. THE SCOPE OF NO-CRIME CONVICTIONS

Not much is known about the scope and frequency of no-crime convictions. Existing data about no-crime convictions derive primarily from the National Registry of Exonerations.¹²⁸ The National Registry of

similar situation occurred to Joe Elizondo. See Maurice Possley, *Joe Elizondo*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4018> (Oct. 14, 2012) (describing how Elizondo was falsely accused by his two step-sons of sexual assault and was exonerated after it was revealed that the sexual abuse had never occurred and that the step-sons’ biological father had forced them to testify against Elizondo in retaliation for marrying his-ex-wife).

¹²⁵ Maurice Possley, *Brian Banks*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3901> (last updated June 8, 2015). A similar situation occurred to William McCaffrey. See Stephanie Denzel, *William McCaffrey*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3417> (last updated Nov. 3, 2015) (explaining how McCaffrey was convicted of a rape that never happened based on the testimony of a woman who wanted to cover up a fight that she had been in).

¹²⁶ Amanda Marcotte, *Conor Oberst and the Myth of the Woman Who Cried Rape*, DAILY BEAST (July 15, 2014), <http://www.thedailybeast.com/articles/2014/07/15/conor-oberst-and-the-myth-of-the-woman-who-cried-rape.html>.

¹²⁷ *Id.*

¹²⁸ Other organizations also compile data about wrongful convictions in specific areas. The Innocence Project, for instance, maintains data about exonerations resulting from post-conviction DNA testing. Its database is highly informative about individual DNA-related exonerations and overall patterns in DNA-related exonerations. See INNOCENCE PROJECT, <https://www.innocenceproject.org> (last visited Feb. 27, 2018). The DNA-based exonerations are also included in the Registry. See *supra* note 2. Similarly, the Death

Exonerations is a project of the University of Michigan Law School that was co-founded with the Center on Wrongful Convictions “to provide detailed information about known exonerations in the United States since 1989.”¹²⁹ It continuously collects and publishes updated information about reported exonerations around the country, and shares its findings on its website and in annual reports that detail the patterns and trends of exonerations. To qualify for inclusion in the National Registry of Exonerations, wrongly convicted individuals must have been “relieved of all the consequences of a criminal conviction by a government official or body with the authority to take that action,” and the governmental act must have been, in the judgment of the National Registry of Exonerations, “the result at least in part, of evidence of innocence.”¹³⁰ If a person is exonerated, but that case is not reported to the National Registry of Exonerations, it will not be included in the Registry.¹³¹

To understand the context in which no-crime convictions occur, Part III.A examines the known exoneration data about wrongful convictions generally and its limitations. Part III.B analyzes no-crime exoneration data specifically, and demonstrates significant and material differences between no-crime convictions and actual-crime convictions in the areas of contributing factors, crime types, and race and gender patterns.

A. *General Data About Wrongful Convictions and Its Limitations*

Penalty Information Center maintains a searchable database about exonerations from death row. *See* DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/> (last visited Feb. 27, 2018). These cases are also included in the Registry. An additional website, FOREJUSTICE, also has a searchable database of innocence that includes international exonerations, exonerations in the US prior to 1989, and cases in the U.S. after 1989. *See* FOREJUSTICE, http://forejustice.org/search_idb.htm (last visited Feb. 27, 2018).

¹²⁹ NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Feb. 27, 2018). Unless otherwise specified, the data in this article refers to the National Registry of Exoneration data (hereinafter “Registry”) as of March 1, 2017, which includes 2,000 known exonerations. The Registry is continuously updated. Data relating to the first 2,000 exonerations, current as of March 1, 2017, is available on file with the author.

¹³⁰ *Glossary*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited Feb. 27, 2018).

¹³¹ *See* Samuel R. Gross, *What We Think, What We Know and What We Think We Know About False Convictions*, 14 OHIO ST. J. CRIM. L. 753, 761–62 (2017) (writing that the Registry is limited to cases reported to, and discovered by, the National Registry of Exonerations). *But see* Jon B. Gould & Richard A. Leo, *The Path to Exoneration*, 79 ALB. L. REV. 325, 370–71 (2016) (arguing that the Registry’s definition of exoneration is potentially over-inclusive because evidence of innocence does not need to be explicitly included in the governmental action).

The number of people who have been wrongly convicted in the United States¹³² is unknown, and perhaps unknowable.¹³³ Samuel Gross, a leading researcher on innocence, conservatively estimates that “[i]f all death-sentenced defendants remained under sentence of death indefinitely, at least 4.1% would be exonerated.”¹³⁴ If Gross is right, and 4.1% is a metric that can be applied to all convictions, then nearly *one hundred thousand* people in prison or under correctional control were wrongly convicted.¹³⁵ Even if a far more conservative error rate is used, such as 1% of all convictions, over 20,000 wrongly convicted people are in our criminal justice system today.¹³⁶

In truth, accurate data about the actual number of wrongful convictions do not exist.¹³⁷ Instead, existing data captures a narrow sliver of wrongful

¹³² This Article focuses exclusively on no-crime wrongful conviction within the United States. Although well-beyond the scope of this paper, no-crime wrongful convictions are not unique to the United States. See Malcolm Brown, *Dingo Baby Ruling Ends 32 Years of Torment for Lindy Chamberlain*, GUARDIAN (U.K.) (June 12, 2012), <https://www.theguardian.com/world/2012/jun/12/dingo-baby-azaria-lindy-chamberlain> (detailing Australia’s infamous “dingo baby” case, in which police misconduct, bad forensic science, and an overzealous prosecution resulted in murder convictions for an accidental death of a baby who was killed by a dingo). Wrongful convictions are a global phenomenon, and several internationally-based innocence organizations are working to help the wrongly convicted throughout the world. See *Innocence Network Member Organizations*, INNOCENCE NETWORK, <http://innocencenetwork.org/members/> (last visited Jan. 29, 2018) (listing domestic and international innocence organizations).

¹³³ See GARRETT, *supra* note 74 (arguing that existing data represent the tip of the iceberg of all actual wrongful convictions); James R. Acker, *Taking Stock of Innocence: Movements, Mountains, and Wrongful Convictions*, 33 J. CONTEMP. CRIM. JUST. 8, 10 (2017) (summarizing estimates on numbers of wrongful convictions); Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1559 (“It is fair to say that the proven cases of actual innocence are just the tip of the innocence iceberg, so to speak.”).

¹³⁴ Samuel R. Gross et. al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT’L. ACAD. SCI. 7230, 7230 (2014).

¹³⁵ This calculation represents 4.1% of the roughly 2.3 million people in America’s prisons and jails. See PETER WAGNER & BERNADETTE RABUY, *MASS INCARCERATION: THE WHOLE PIE* 2017, at 1 (2017).

¹³⁶ *But see* *Kansas v. Marsh*, 548 U.S. 163, 198 (2006) (Scalia, J., concurring) (“That would make the error rate [in felony convictions] .027 percent—or, to put it another way, a success rate of 99.973 percent.” (quoting Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES (Jan. 26, 2006), <http://www.nytimes.com/2006/01/26/opinion/the-innocent-and-the-shammed.html>)).

The suggestion that there is a .027 error rate has been roundly criticized as being based on inaccurate and distorted mathematical assumptions. See D. Michael Risinger, *Innocents Convicted: An Empirically Justified Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 771 n.17 (2007).

¹³⁷ Adam Liptak, *Consensus on Counting the Innocent: We Can’t*, N.Y. TIMES (Mar. 25, 2008), <http://www.nytimes.com/2008/03/25/us/25bar.html>.

convictions: those few cases that have resulted in exonerations.¹³⁸ Exoneration data serve as a proxy, and a highly imperfect one at that, for the number of all wrongful convictions.¹³⁹ By its definition, exoneration data focuses only on the uncovered and proven cases of individuals who were wrongly convicted; it does not include innocent people whose innocence has not been (and may never be) revealed. In addition, data from the National Registry of Exonerations and other innocence organizations typically only count cases in which there has been an official declaration of innocence.¹⁴⁰ Thus, people whose innocence has been established to a near certainty but who have not been officially exonerated by a governmental entity are also not counted in the data.¹⁴¹

1. Limited Data Exists About Misdemeanor Wrongful Convictions and Convictions Based on Guilty Pleas

One significant data limitation about wrongful convictions is the absence of information about innocent people convicted of misdemeanors. Misdemeanor convictions constitute the bulk of all convictions in the criminal justice system,¹⁴² but scant data exists about the frequency and scope of wrongful convictions in the misdemeanor context.¹⁴³ A similar data black hole exists in the context of guilty pleas in wrongful convictions.

The misdemeanor system is rife with conditions that can lead to wrongful convictions. Described as “assembly-line” justice, misdemeanor courts seek speedy resolution of cases. Upon arrest for a misdemeanor,

¹³⁸ See Acker, *supra* note 135, at 10.

¹³⁹ See Gross et. al., *supra* note 136, at 7234.

¹⁴⁰ See Gould & Leo, *supra* note 133, at 334–35.

¹⁴¹ See, e.g., David Grann, *Trial by Fire*, NEW YORKER (Sept. 7, 2009), <http://www.newyorker.com/magazine/2009/09/07/trial-by-fire>. Cameron Todd Willingham was executed, after being convicted in Texas of a capital crime for the arson-murder of his three children. Although nearly all modern fire scientists who have reviewed his case agree that the fire was accidental and was not arson, no Texas official with authority to do so has pardoned Willingham for the crime or officially acknowledged his innocence. Because there was no governmental finding of innocence, Willingham’s case is not included in the Registry.

¹⁴² Roberts, *supra* note 66, at 281–82; see also ROBERT C. BORUCHOWITZ ET AL., NAT’L ASSOC. OF CRIMINAL DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* 10 (2009).

¹⁴³ Samuel R. Gross, Opinion, *The Staggering Number of Wrongful Convictions in America*, WASH. POST (July 24, 2015), https://www.washingtonpost.com/opinions/the-cost-of-convicting-the-innocent/2015/07/24/260fc3a2-1aae-11e5-93b7-5eddc056ad8a_story.html (“The problem [innocent people pleading guilty] may be worst at the low end of the spectrum, in misdemeanor courts where almost everybody pleads guilty.”).

people are processed through an overburdened system, locked in a dank holding cell (sometimes overnight), and forced to wait for their cases to be called. It is only then that they meet their overburdened assigned attorney, if one is provided, and at that moment, depending on the nature of the case, they are also often offered a plea. These plea offers typically carry seemingly de minimis consequences that can range from “time served” awaiting arraignment, to community service or nominal fines.¹⁴⁴ Many people choose to plead guilty out of expediency: a plea enables even innocent defendants to avoid public humiliation, repeated, unpleasant and protracted court dates, and the opportunity costs of fighting misdemeanor charges, such as the loss of work and child care issues.¹⁴⁵ In addition, people may be warned that the plea offer is take-it-or-leave-it today, which will allow them to be immediately released from court custody.¹⁴⁶ It is perhaps not surprising that innocent defendants facing low-level misdemeanor charges often make the seemingly rational choice to plead rather than to fight the charges against them.¹⁴⁷

In the rare instance that a person chooses to contest misdemeanor charges, a judge will decide whether to release them on their own

¹⁴⁴ Misdemeanor convictions carry with them the possibility of up to one year imprisonment. The idea that misdemeanor convictions have minimal consequences is inaccurate. Misdemeanors have serious collateral consequences that can be far more damaging than the misdemeanor punishment itself. *See* Roberts, *supra* note 66, at 297–303 (arguing that collateral consequences from misdemeanor convictions can, *inter alia*, include lost employment, educational and housing opportunities, and can lead to deportation).

¹⁴⁵ *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1132 (2008) (discussing “process costs” in low-level cases to innocent defendants).

¹⁴⁶ Gross, *supra* note 145. According to Gross:

Why then did they plead guilty [to the misdemeanor charges when they were innocent]? As best we can tell, most were held in jail because they couldn’t make bail. When they were brought to court for the first time, they were given a take-it-or-leave-it, for-today-only offer: Plead guilty and get probation or weeks to months in jail. If they refused, they’d wait in jail for months, if not a year or more, before they got to trial, and risk additional years in prison if they were convicted. That’s a high price to pay for a chance to prove one’s innocence.

Id.

¹⁴⁷ *See id.*; Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014),

<http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/>. However, this can have severe collateral consequences. *See supra* note 146.

recognizance or to set bail.¹⁴⁸ Even low-levels of bail may prove beyond a poor defendant's reach, which means that an innocent person who refuses to plead guilty to misdemeanor charges may spend weeks or months in pre-trial detention awaiting a trial date.¹⁴⁹ If a plea offer is made that avoids pre-trial incarceration, many defendants will seize the opportunity to be immediately released.

The net result is that factually innocent people plead guilty, leaving behind a sworn admission of guilt and often a sparse record from which any future appeal could be taken.¹⁵⁰ In the context of a misdemeanor case, few innocent defendants are willing, or able, to invest significant resources in seeking to overturn their convictions,¹⁵¹ a decision made even more complex by the reality that they may have waived their right to appeal as part of their plea conviction.¹⁵² Moreover, innocence organizations give priority to defendants convicted of more serious crimes who are serving lengthy sentences. Indeed, although some innocence organizations have no minimum sentence requirement,¹⁵³ others will not review a case unless the person has a specified length of time left to serve, typically for a serious felony conviction.¹⁵⁴ As one report lamented: “[T]here is no national Innocence Project for the hundreds of thousands of misdemeanor cases that lack DNA evidence.”¹⁵⁵ It is difficult, then, for an innocent person convicted of a misdemeanor offense to gain the assistance of an innocence project to help pursue their claim, if they were inclined to do so

¹⁴⁸ See Lisa W. Foderaro, *New Jersey Alters Its Bail System and Upends Legal Landscape*, N.Y. TIMES (Feb. 6, 2017), https://www.nytimes.com/2017/02/06/nyregion/new-jersey-bail-system.html?_r=0; Shaila Dewan, *When Bail Is out of Defendant's Reach, Other Costs Mount*, N.Y. TIMES (June 10, 2015), <https://www.nytimes.com/2015/06/11/us/when-bail-is-out-of-defendants-reach-other-costs-mount.html>.

¹⁴⁹ JAMIE FELLNER, HUMAN RIGHTS WATCH, *THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY* 31–32 (2010).

¹⁵⁰ Bowers, *supra* note 147, at 1132 (detailing “process costs” in low-level cases to innocent defendant).

¹⁵¹ See Roberts, *supra* note 66, at 320 & n.184.

¹⁵² See Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 209 (2011) (data demonstrates that nearly two-thirds of defendants who plead guilty waived their right to appeal).

¹⁵³ See, e.g., *Application Process*, ARIZ. JUST. PROJECT, <https://www.azjusticeproject.org/process> (last visited Feb. 27, 2018) (no minimum sentence requirement).

¹⁵⁴ See, e.g., *The Connecticut Innocence Project/Post-Conviction Unit*, CONN. DIV. PUB. DEFENDER SERVICES, <http://www.ct.gov/ocpd/cwp/view.asp?a=4087&q=479218> (last modified Sept. 17, 2015) (limiting assistance to cases where a person has five or more years left to serve, with at least a minimum ten-year sentence).

¹⁵⁵ NAT’L LEGAL AID & DEFENDER ASS’N, *A RACE TO THE BOTTOM: EVALUATION OF TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS IN MICHIGAN* 15 (2008).

in the first place.

In felony cases, the stakes are even higher. Factually innocent defendants plead guilty, often to avoid the real risk of a far more severe sentence if they should lose at trial.¹⁵⁶ Trial can be an extremely risky proposition for the innocent. The innocent defendant who wants to assert their right to a trial is often asking the judge or jury to credit his or her testimony and to discredit the sworn testimony of an officer witness or other prosecution witnesses.¹⁵⁷ This is often unsuccessful. In Tulia, Texas, for instance, forty-eight defendants were charged with drug crimes based on the word of a sole law enforcement officer (later revealed to be corrupt) who had entirely fabricated the existence of drugs.¹⁵⁸ Several defendants initially contested the charges against them, and lost at trial.¹⁵⁹ The resulting trial sentences were “nearly thirteen times harsher than sentences imposed following guilty pleas,”¹⁶⁰ and ranged from 20 to 361 years.¹⁶¹ The remaining innocent Tulia defendants, none of whom actually had possessed or sold drugs, pled guilty to avoid harsher penalties after trial.¹⁶²

Little is known about the actual number of factually innocent people who have been wrongfully convicted based on a guilty plea.¹⁶³ Over 95% of all criminal cases are resolved by guilty pleas.¹⁶⁴ Exonerations from guilty plea convictions occur far less frequently than might otherwise be expected. Of the 350 DNA-based exonerations identified by the Innocence Project, only 11% were the result of guilty pleas.¹⁶⁵ The National Registry of Exonerations has identified only 360 exonerations in total from guilty pleas.¹⁶⁶ This barely scrapes the surface of the scope of wrongful convictions from guilty pleas. As the National Registry of Exonerations itself cautioned: “There must be many innocent defendants . . . [who] accept plea bargains to months or years in jail. There could be thousands or tens of thousands a year, but we never learn about them. It would be prohibitively expensive to investigate and prove the innocence

¹⁵⁶ See Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L. Q. 67, 72 (2005).

¹⁵⁷ See RACE AND WRONGFUL CONVICTIONS, *supra* note 19, at 24.

¹⁵⁸ Covey, *supra* note 18, at 1142, 1166–67.

¹⁵⁹ *Id.* at 1167.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See NAT’L REGISTRY OF EXONERATIONS, INNOCENTS WHO PLEAD GUILTY 1 (2015).

¹⁶⁴ Jon H. Blume & Rebecca K. Helm, Essay, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 163 (2014); *Why So Many Innocent People Plead Guilty to Crimes They Don’t Commit?*, GUILTY PLEA PROBLEM, <http://guiltypleaproblem.org/> (last visited Feb. 27, 2018) [hereinafter *Guilty Plea Problem*].

¹⁶⁵ *Guilty Plea Problem*, *supra* note 166.

¹⁶⁶ *Id.*

of each defendant.”¹⁶⁷ Even absent the ability to quantify guilty plea wrongful convictions, it seems clear that these occur far more frequently than existing data otherwise suggest.¹⁶⁸ This has been highlighted by the numbers of plea convictions in group exonerations, as discussed in the following section.

2. *Group Exonerations are not Included in the Registry Data*

Thousands of people have been exonerated as part of a “group exoneration.” The National Registry of Exonerations defines “group exonerations” as exonerations that are “a remedy for a concerted pattern of misconduct by one or several police officers who systematically frame innocent defendants, usually by planting drugs.”¹⁶⁹ The great majority of these exonerations involved innocent people who were framed by the police for drug crimes that never happened.¹⁷⁰ The National Registry of Exonerations has so far identified fifteen group exonerations in thirteen cities, resulting in *nearly 1900 known exonerations*.¹⁷¹ This is nearly equal to the number of cases in the entire Registry. Yet, the National Registry of Exonerations excludes group exoneration data from the Registry. They explain that because many individuals involved in group exonerations were initially convicted after a guilty plea, their subsequent exonerations were handled summarily with limited (if any) personal details or even individualized information about their convictions.¹⁷² Few details exist about the factual innocence of the men and women whose convictions were vacated and dismissed as a result of the discovered police misconduct.¹⁷³ To avoid including in the Registry factually guilty people whose conviction were tainted by police misconduct, all group exoneerees were excluded.¹⁷⁴

The decision to exclude “group exoneration” data has an obvious, and minimizing, effect on the exoneration data relating to no-crime wrongful convictions. Indeed, as defined by the National Registry of Exonerations

¹⁶⁷ See NAT’L REGISTRY OF EXONERATIONS, GUILTY PLEAS IN “GROUP EXONERATIONS” 2 (2015).

¹⁶⁸ See Covey, *supra* note 18, at 1165–66.

¹⁶⁹ NAT’L REGISTRY OF EXONERATIONS, *supra* note 169, at 1 (defining group exonerations).

¹⁷⁰ See RACE AND WRONGFUL CONVICTIONS, *supra* note 19, at 1.

¹⁷¹ *Id.* at 20.

¹⁷² *Id.* at 25.

¹⁷³ *Id.*

¹⁷⁴ While understandable, this approach may be overly conservative. Professor Covey, for instance, established the innocence of at least thirty-eight Tulia defendants and thirty-seven Rampart defendants, and has studied the factual predicates for their exonerations. See Covey, *supra* note 18, at 1149–50. A compelling case could be made for, at minimum, adding these individuals to the Registry.

itself, “group exonerations” often involve the very definition of one type of no-crime conviction: those cases where “police officers . . . systematically frame innocent defendants, usually by planting drugs.”¹⁷⁵ Because of the real difficulties in parsing through the group exoneration cases to determine factual guilt and innocence, the Registry data is highly under-inclusive of no-crime conviction cases.

B. Data About No-Crime Wrongful Convictions and Exonerations

Notwithstanding these significant data limitations, the best compilation of no-crime wrongful convictions cases comes from The National Registry of Exonerations. Using data from the Registry, this section analyzes the first 2000 known exonerations in the Registry, and specifically examines the “NC” or no-crime cases identified within the Registry. This section explores the most prevalent crime types, the factors that contribute to wrongful convictions, and race and gender patterns within the no-crimes wrongful conviction data. This section reveals significant distinctions between no-crime exonerations and actual crime exonerations.

1. Factors Contributing to No-Crime Wrongful Convictions and How They Differ from Actual-Crime Wrongful Convictions

Scholars and advocates for the innocent have identified the most common factors that contribute to wrongful convictions: eyewitness misidentification, false confessions, official misconduct, forensic error, perjured testimony, and ineffective lawyering.¹⁷⁶ Although the list of contributing factors has been refined over time, it has remained fairly consistent since Yale Law Professor Edwin Borchard in 1932 began to document wrongful conviction cases and their causes.¹⁷⁷ As exoneration data reveal, most wrongful convictions are the result of multiple factors

¹⁷⁵ NAT’L REGISTRY OF EXONERATIONS, *supra* note 169, at 1.

¹⁷⁶ For background information about how these factors lead to wrongful convictions, see BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2d ed. 2001).

¹⁷⁷ See EDWIN M. BORCHARD, CONVICTING THE INNOCENT 375–78 (1932) (identifying, in a ground-breaking study of sixty-five known wrongful convictions, a number of factors that contribute to wrongful convictions, including eyewitness misidentification, official misconduct and perjured testimony, and offering policy solutions); *see also* Peter Neufeld & Barry C. Scheck, *Foreword* to EDWARD CONNORS ET AL., U.S. DEP’T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE xxviii, xxx (1996) (“Interestingly, in many respects the reasons for the conviction of the innocent in the DNA cases do not seem strikingly different than those cited by . . . Borchard Mistaken eyewitness identification, coerced confessions, unreliable forensic laboratory work, law enforcement misconduct, and ineffective representation of counsel, singly and often in combination, remain the leading causes of wrongful convictions.”).

that play out together in a perfect storm. The types of factors vary depending on the nature of the crime, the suspect, and other conditions.

Table 1: Contributing Factor ¹⁷⁸

| | All Exonerations | No Crime Exonerations | Actual Crime Exonerations |
|---|-------------------------|------------------------------|----------------------------------|
| DNA | 22% | 2% | 32% |
| False Confession | 12% | 5% | 16% |
| Eyewitness Misidentification | 30% | 0% | 44% |
| False/Misleading Forensic Evidence | 24% | 32% | 20% |
| Perjury/False Accusation | 56% | 59% | 55% |
| Official Misconduct | 51% | 36% | 58% |
| Inadequate Defense | 23% | 23% | 24% |

As indicated in Table 1, the top three contributing factors in no-crime convictions are perjury/false accusations (59%), official misconduct (36%) and forensic error (32%).¹⁷⁹ The data reflect some similarities between no-crime exonerations and actual-crime exonerations. In both, for instance, perjury/false accusations occur in over 55% of all cases, and both categories demonstrate a similar occurrence of inadequate legal defense (23% versus 24%). But no-crime exonerations differ from actual-crime convictions in significant ways that highlight the unique quality of no-crime convictions.

For instance, as illustrated in Table 2, eyewitness misidentification is the greatest factor contributing to wrongful convictions in cases where innocence was established by DNA testing.¹⁸⁰ Among *all* exonerations in the Registry, including exonerations that did not involve DNA, eyewitness misidentification appears third in importance. Among no-crime convictions, however, mistaken eyewitness identification is present in *zero* percent of no-crime exonerations. (Table 1). The absence of mistaken eyewitness testimony in no-crime convictions could reflect the reality that few witnesses claim to have seen a no-crime event. But, more likely, the absence of misidentifications reflects the fact that many no-crime

¹⁷⁸ To maintain data consistency, the causation categories listed in Table 1 are taken from the Registry.

¹⁷⁹ See *supra* Part II for a discussion of how these factors contribute to no-crime convictions.

¹⁸⁰ See also *Eyewitness Misidentification*, INNOCENCE PROJECT, <https://www.innocenceproject.org/causes/eyewitness-misidentification/> (last visited Feb. 27, 2018).

convictions involve cases where eyewitness identification is not at issue. For instance, in drug cases, a police officer is often the main witness. In child sexual abuse cases, the “victim” often knows the wrongly accused.

Another significant difference between contributing factors in no-crime cases and actual crimes cases is the prevalence of forensic error. Forensic error appears more frequently as a contributing factor in no-crime convictions (32%) than in actual crime convictions (20%). Perhaps this is because no-crime convictions may depend on expert testimony more frequently than actual crime convictions for diagnosis (and exoneration).¹⁸¹ In cases that are primarily dependent on experts for diagnosis, such as shaken baby syndrome or arson, an expert performs a retrospective analysis of the evidence in the case to reach his or her conclusion that a crime was committed and/or that the accused was the perpetrator.¹⁸² Absent that erroneous testimony, there would be no crime in the first instance. Conversely, DNA played almost no role in no-crime exonerations (2%) compared to actual crime exonerations (32%). This could perhaps be explained by the fact that DNA, in most instances, would not be present in no-crime convictions since no perpetrator existed in the first instance.

2. Crime Types in No-Crime Wrongful Exonerations

The most frequent crimes in no-crime exonerations are markedly different than in actual-crime exonerations. As illustrated in Table 2, “[d]rug possession or sale” is the most frequent exoneration category among no-crime convictions (29.1%), but occurs far less frequently in actual-crime exonerations. (3%).¹⁸³ After drug crimes, child sex abuse (27.3%) is the most common no-crime exoneration, compared to actual-crime exonerations (3%). In contrast, in actual-crime cases, murder is the most significant category of exoneration (54%), followed by sexual assault (17.6%).¹⁸⁴

Table 2: Crime Type

| | All Exonerations | No Crime Exonerations | Actual Crime Exonerations |
|---------------------------|------------------|-----------------------|---------------------------|
| Drug Possession or | 11.8% | 29.1% | 3.3% |

¹⁸¹ See *supra* Part II.B.

¹⁸² See *supra* Part II.B.

¹⁸³ If the actual innocence no-crime cases identified by Professor Covey, *supra* note 18, were included here, the exoneration data in no-crime drug cases would be even more stark.

¹⁸⁴ The data in Table 2 includes only the “worst conviction” associated with an exonerated defendant in a no-crime wrongful conviction case. For instance, if a defendant is convicted of murder that was caused by arson, only the murder conviction would appear in this data.

| Sale | | | |
|------------------------|-------|-------|-------|
| Child Sex Abuse | 11.3% | 27.3% | 3.5% |
| Sexual Assault | 15.0% | 9.9% | 17.6% |
| Murder | 39.4% | 8.0% | 54.9% |

The crime type disparities between no-crime and actual-crime exoneration data are striking and raise important questions for future research. In terms of drug cases, the data may reflect, in part, the surge in exonerations that has resulted from the concentrated attention of the Harris County Conviction Integrity Unit (CIU), a single county in Texas which alone accounts for 133 exonerations.¹⁸⁵ As Harris County continues its work, more cases are likely to be uncovered. Future research could focus on the prevalence of no-crime drug convictions,¹⁸⁶ and could examine the impact of CIUs on drug convictions around the nation.

More research is needed to examine the differences between crime categories in no-crime exonerations and actual crime exonerations. For instance, there is a higher frequency of no-crime exonerations in child-sex abuse cases than in actual crime cases. Perhaps the data can be explained, in part, by the exonerations that occurred in the wake of the child sex abuse hysteria that existed in the 1970s. At this point, many of these cases have been reinvestigated, and the exoneration numbers in this category may level off, or increase at a diminishing rate to include cases outside of those types of cases.¹⁸⁷ So too, the data raises interesting questions about the different rates of exonerations within crime categories. Why, for instance, are murder exonerations more frequent in actual-crime convictions (55%) than in no-crime convictions (8%)? Why are adult sexual assault exonerations more frequent in actual-crime convictions (17%) than in no-crime convictions (10%)?

3. *Racial and Gender Data in No-Crime Exonerations*

As illustrated in Table 3, African Americans constitute 47% of all known exonerees in all wrongful convictions, compared to 38% of Caucasians and 12% of Hispanics. However, in the aggregate, Caucasians are more likely to be exonerated than African Americans in no-crime convictions. (See Table 3). Among no-crime exonerations, Caucasians are the largest group of exonerees (53%), compared with African-Americans (33%), Hispanics (11%), and Asian/Native American/Other (2.3%). Conversely, 54% of defendants in actual-crime exonerations are African American, compared with 31% Caucasian and 12% Hispanic. (Table 3).

¹⁸⁵ See RACE AND WRONGFUL CONVICTIONS, *supra* note 19, at 18–19.

¹⁸⁶ See *supra* Parts II.A.1, II.A.2.

¹⁸⁷ See, e.g., NAT’L REGISTRY OF EXONERATIONS, *supra* note 5, at 7–8 (predicting that child sex abuse hysteria cases “most likely . . . have run their course”).

Table 3: Race and Ethnicity

| | Black | Caucasian | Hispanic | Asian/Native American/Other |
|----------------------------------|--------------|------------------|-----------------|------------------------------------|
| No Crime Exonerations | 33.1% | 53.1% | 11.5% | 2.3% |
| Actual Crime Exonerations | 54.0% | 31.9% | 12.2% | 1.9% |
| All Exoneration | 47.1% | 38.9% | 12.0% | 2.0% |

The data gains richer context when it is examined by race and type of no-crime conviction. (See Table 4).

Table 4: Race and Ethnicity by Crime Type in No-Crime Convictions

| | Black | Caucasian |
|--------------------------------|--------------|------------------|
| Drug Possession or Sale | 54.7% | 27.1% |
| Sexual Assault | 40% | 55.4% |
| Murder | 18.9% | 71.7% |
| Child Sex Abuse | 17.2% | 68.9% |

Drug-related crimes constitute the largest category of no-crime exonerations. (Tables 2, 3). Given that African Americans are over-represented in drug crimes nationally,¹⁸⁸ it would be reasonable to anticipate that African Americans would make-up the majority of exonerations in no-crime drug conviction cases.¹⁸⁹ The Registry data bear this out. African Americans constitute a majority (54.7%) of exonerees in no-crime wrongful conviction drug cases. And this number would certainly be higher if “group exoneration” data were considered. Outside of drug convictions, however, blacks are significantly *less* likely to be exonerated than whites in all categories of no-crime conviction cases: child sex abuse (17.2% v. 68.9%); murder (18.9% v. 71.7%) and sexual

¹⁸⁸ See MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 20 (2007) (“Despite average rates of drug use among the general population, African Americans who use drugs are more likely to be arrested than other groups. And this disparity extends throughout the criminal justice system. While African Americans constitute 14% of the nation’s monthly drug users, they represent 37% of those persons arrested for a drug offense and 56% of those in state prison for a drug conviction.”); *Decades of Disparity: Drug Arrests and Race in the United States*, HUM. RTS. WATCH (Mar. 2, 2009), https://www.hrw.org/report/2009/03/02/decades-disparity/drug-arrests-and-race-united-states#_ftn21.

¹⁸⁹ See *supra* Part II.A.2.

assault (40% v. 55.4%). (See Table 4)

No-crime exonerations also reveal significant gender differences. As demonstrated in Table 5, women constitute less than 10% percent of all known exonerees. In actual-crime wrongful conviction cases, women represent less than 5% of all exonerees. Within the no-crime exonerations, however, women comprise nearly 20% of exonerees.

Table 5: Gender

| | Male | Female |
|----------------------------------|-------------|---------------|
| No Crime Exonerations | 80.3% | 19.7% |
| Actual Crime Exonerations | 95.5% | 4.5% |
| All | 90.5% | 9.5% |

The finding that women are more likely to be exonerated in no-crime cases than in actual-crime cases is statistically significant. In a recent study about women and wrongful convictions, Andrea Lewis and Sara Sommervold suggest that stereotypes about women within the criminal justice system can lead to unfair and overzealous prosecutions, particularly when there is an unexplained injury or death to a family member.¹⁹⁰ If women are stereotyped as nurturers and natural caregivers,¹⁹¹ then women who are perceived to have violated that role are re-cast as a “flawed mother,”¹⁹² an “evil women,”¹⁹³ or even a “monster.”¹⁹⁴ This is particularly true within a blame-seeking society that often refuses to accept that sometimes people, including children, die without clear explanation.¹⁹⁵ The study finds that “no-crime cases that have been uniquely susceptible to stereotype-driven theories include arson, shaken baby syndrome, and sudden illness or death.”¹⁹⁶

Additional research about race and gender in the context of no-crime convictions is needed. In terms of racial differences in exoneration rates between no-crime convictions and actual crimes, more research is needed to determine why African Americans are exonerated less frequently in murder and sexual assault cases than are Caucasians. Are there conscious or subconscious race-based biases that make it harder for official actors to

¹⁹⁰ Andrea Lewis & Sara L. Sommervold, *Death, But Is It Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women*, 78 ALB. L. REV. 1035, 1049 (2015).

¹⁹¹ *Id.* at 1039–40.

¹⁹² *Id.* at 1041.

¹⁹³ *Id.* at 1044–46.

¹⁹⁴ *Id.* at 1040.

¹⁹⁵ *Id.* at 1047–48.

¹⁹⁶ *Id.* at 1050.

acknowledge and remedy the error in these most serious no-crime cases? So too additional research is warranted relating to why women are exonerated more frequently in no-crime cases than in actual-crime cases. Are women more likely to be arrested and ultimately convicted because of gendered investigation techniques? Are women more vulnerable to conviction in no-crime cases? Is there a selection bias in terms of resources dedicated to women and the cases in which they are exonerated?

As the exoneration data demonstrate, although no-crime wrongful convictions share commonalities with actual-crime convictions, they also present different and distinct issues than actual-crime wrongful convictions. More research is needed to understand the cause and effect of these differences. Moreover, the unique characteristics of no-crime convictions give rise to specific policy proposals designed to reduce their prevalence.

III. REFORM RECOMMENDATIONS TO ADDRESS NO-CRIME CONVICTIONS

No-crime convictions are a unique subset of wrongful convictions. This section builds on the existing body of literature calling for reforms to reduce wrongful convictions generally,¹⁹⁷ and hones in on specific reforms that may reduce the prevalence of no-crime convictions. These modest proposals include a call to: a) improve police and prosecution training, and hold official actors accountable for their misconduct; b) take misdemeanor charges seriously; c) scrutinize the admission of forensic evidence and exclude questionable science; and d) increase resources to innocence organizations for non-DNA cases.

A. *Take Steps to Improve Police and Prosecutorial Misconduct, and Hold Corrupt Actors Accountable*

¹⁹⁷ See, e.g., BARRY SCHECK ET AL., *supra* note 178; SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES 1989–2003 (2012); Hannah Laqueur et al., *Wrongful Conviction, Policing, and the "Wars on Crime and Drugs"*, in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 93, 93–102 (Allison D. Redlich et al. eds., 2014); Cynthia J. Najdowski, *Interactions Between African Americans and Police Officers: How Cultural Stereotypes Create a Wrongful Conviction Pipeline for African Americans*, in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 55, 56 (Allison D. Redlich et al. eds., 2014); Brandon Garret, *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, 931 (2008); Talia Roitberg Harmon, Research Note, *Predictors of Miscarriages of Justice in Capital Cases*, 18 Just. Q. 949 (2001); Talia Roitberg Harmon & William Lofquist, *Too Late for Luck: A Comparison of Post-Furman Exonerations and Executions of the Innocent*, 51 CRIME & DELINQ. 498 (2005).

Police and prosecutorial misconduct are significant contributors to wrongful convictions, and reform proposals have been made elsewhere to reduce the incidence of official misconduct.¹⁹⁸ In the context of no-crime convictions, however, several points should be emphasized.

First, police and prosecutors have an important role to play in reducing the prevalence of false and perjured testimony, the most frequent factors that contribute to no-crime convictions.¹⁹⁹ False testimony in no-crime convictions comes in two primary forms: false testimony from incentivized informants, which occurs less frequently, and false testimony from civilian accusers. Reform proposals addressing the use of informants who testify pursuant to incentives include the creation of a rebuttable evidentiary presumption that informant testimony is unreliable or a requirement that courts conduct pre-trial hearings relating to the admissibility and reliability of the informant,²⁰⁰ a mandate that the prosecution record any deal or promise made by a police officer or prosecutor to an informant and turn over any evidence of a deal to the defense in a timely manner,²⁰¹ and better oversight of the content and timing of jury instructions relating to the inherent reliability challenges that arise in informant testimony.²⁰² These reforms, if implemented, would surely help to reduce the number of wrongful convictions generally, and no-crime convictions specifically, that occur from false testimony by informants.

In no-crime convictions, the prevalence of civilian witnesses who fabricate crimes for motives of revenge, child custody, or diverting attention elsewhere presents a different, and perhaps more challenging, scenario for reform. In this context, reform efforts could begin with the first moment of contact between the accuser, and the police and

¹⁹⁸ See, e.g., Monu Bedi, *Toward a Uniform Code of Police Justice*, 2016 U. CHI. LEGAL F. 13; David S. Cohen, *Official Oppression: A Historical Analysis of Low-Level Police Abuse and a Modern Attempt at Reform*, 28 COLUM. HUM. RTS. L. REV. 165 (1996); Peter Walkingshaw, *Prior Judicial Findings of Police Perjury: When Hearsay Presented as Character Evidence Might Not Be Such a Bad Thing*, 47 COLUM. J.L. & Soc. Probs. 1 (2013); Georgina C. Yeomans, *When Cops Are Robbers: Reconciling the Whren Doctrine and 18 U.S.C. § 242*, 115 COLUM. L. REV. 701 (2015); Matthew V. Hess, Comment, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149.

¹⁹⁹ See *supra* Part III.B, Table 2.

²⁰⁰ See ALEXANDRA NAPATOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 194 (2009); Roth, *supra* note 121, at 784–86; Sandra Guerra Thompson, *Judicial Gatekeeping of Police Generated Witness Testimony*, 102 J. CRIM. L. & CRIMINOLOGY 329, 378–79 (2012).

²⁰¹ See DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 48 (2012) (recommending that informant interviews be electronically recorded); Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 861 (2002) (same).

²⁰² See Roth, *supra* note 121, at 794.

prosecution. When presented with the claim that a crime has occurred, the police should be trained to investigate that allegation with an objective and open mind and to follow the evidence where it leads. If the evidence points away from the existence of a crime, then they should not continue to seek out suspects. Police training on the perils of tunnel vision and confirmatory bias could increase awareness and reduce its impact.

Second, it is important to reduce institutional arrest incentives. Financial incentives in the form of sweeping forfeiture laws, fines and fees that inure to the fiscal benefit of law enforcement should be re-examined.²⁰³ These “policing for profit” strategies can result in informal arrest quotas and wide-sweeping arrests of the poor and most vulnerable members of the community, including those who are innocent of any crime.²⁰⁴ Similarly, while broad policing initiatives designed to prevent crimes are laudable, they tend to be a blunt instrument that can do more harm than good. Policing initiatives should be developed in partnership with the communities most likely to be impacted, so that the arrest of innocent people for low-level crimes that simply are not happening, like trespass or drugs based on inaccurate field tests, can be reduced or eliminated. In the long term, policies to remove these low-level offenses from the criminal justice arena in the first instance would go a long way in reducing the prevalence of arrests and guilty plea convictions in misdemeanor no-crime cases.²⁰⁵

Third, training should emphasize the prosecution’s obligation to independently evaluate police recommendations about criminal charges rather than rubber stamp what is presented to them. In the context of civilian accusations, the prosecution should be particularly wary of the accuser who provides a narrative that is internally inconsistent, inconsistent with other evidence, or circular, incomplete or contradictory.²⁰⁶ Rather than seek additional evidence to bolster an unreliable story, prosecutors should be trained to proceed with caution and to not minimize or ignore significant problems with the accuser’s narrative. Training should reinforce the need to independently verify any narrative provided to them by an accuser, and to carefully consider possible motives to fabricate and the presence or absence of corroborative evidence. It also should encourage prosecutors to decline to prosecute cases where the accusation has significant indicia of unreliability.

For the police officers and prosecutors who abuse their positions, consequences should be severe. Yet, today, consequences for official

²⁰³ Laqueur et al., *supra* note 199, at 102.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 103–104; *see also* Roberts, *supra* note 66, at 297–303.

²⁰⁶ *See* Gershman, *supra* note 75, at 113.

misconduct are quite limited.²⁰⁷ While some officers are criminally prosecuted and sentenced, others are permitted to remain on the force or receive little more than a slap on the wrist for the great harm they have caused to innocent people. Tom Coleman, for instance, received a ten-year probation sentence for his overt and deliberate misconduct in Tulia.²⁰⁸ Depending on the scope of misconduct, officers could be publicly reprimanded, required to be retrained, suspended without pay, fired, and prosecuted. Similarly, prosecutors who engage in serious misconduct resulting in wrongful convictions should be suspended, disbarred and prosecuted. Yet, prosecutors are rarely sanctioned for their official misconduct.²⁰⁹ Existing laws that grant absolute immunity to prosecutors for their official misconduct²¹⁰ should be eliminated, or at least modified, so that individuals who knowingly and deliberately cause or allow the wrongful conviction of an innocent person can be held accountable.²¹¹ So, too, official misconduct—and the names of those who engage in that conduct—should not be kept secret.²¹² The deliberate pursuit of a conviction in a case where no crime ever occurred is a colossal abuse of society’s trust in the criminal justice system and an enormous and unjustified waste of taxpayer money. Sanctions should be appropriately proportionate given the severity of the resulting harm.²¹³

B. Take Misdemeanor Charges Seriously

²⁰⁷ Alan Feuer, *Wrongful Convictions Are Set Right, but Few Fingers Get Pointed*, N.Y. TIMES (Aug. 8, 2017), https://www.nytimes.com/2017/08/08/nyregion/wrongful-convictions-are-set-right-but-no-fingers-get-pointed.html?mcubz=3&_r=0.

²⁰⁸ Cunningham, *supra* note 31. Tom Coleman was sentenced to probation for the perjury that resulted in the conviction of thirty-eight people. *Id.*

²⁰⁹ See SIDNEY POWELL, LICENSED TO LIE 397–401 (2014) (describing how after Isaiah McCoy was exonerated from Delaware’s death row based on the prosecutor’s egregious misconduct at trial, the prosecutor was suspended for a mere sixth months from the practice of law); Jessica Masulli Reyes, Ex-prosecutor Suspended for *Mocking Death Penalty Defendant*, NEWS J. (July 29, 2015), <http://www.delawareonline.com/story/news/local/2015/07/28/ex-prosecutor-suspended-mocking-death-penalty-defendant/30782685/> (describing the same).

²¹⁰ In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court held that prosecutors are completely immune from liability for even the most egregious kinds of misconduct such as such as withholding exculpatory evidence, or knowingly relying on fabricated or perjured evidence.

²¹¹ See Kozinski, *supra* note 72, xxxix–xli (arguing for the abolition of absolute prosecutorial immunity and suggesting that the standard, at minimum, be qualified immunity).

²¹² See Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1069–71, 1064 n.21 (2009).

²¹³ See Kozinski, *supra* note 72, at xlii (arguing that the U.S. Department of Justice could pursue prosecutorial misconduct as a civil rights violation).

In many ways, misdemeanor cases are the neglected step-children of the innocence movement and the criminal justice system in general. Little is known about just how many no-crime wrongful convictions occur in the misdemeanor context, but their frequency should not be surprising.²¹⁴ Misdemeanor courts yield assembly-line justice with harried defenders, indifferent prosecutors and courts that move defendants through the system as quickly as possible by authorizing and accepting guilty pleas. These cases are often rushed through the system, without careful examination of the underlying factual predicate for the cases. Yet, the long-term consequences of misdemeanor convictions can be devastating, with damage done to the innocent person's immigration status, employment and housing prospects, educational opportunities, and the like. Training for defense lawyers about the potential long-term consequences could help defense lawyers more properly assess plea offers and help their clients think carefully before pleading guilty. The same training should be offered for prosecutors and judges so that they, too, understand that far more is at stake than the single misdemeanor case before them.

In addition to training, specific policies can be implemented that would reduce the incidence of an innocent person pleading guilty to a crime that did not happen. For instance, in drug arrests that rely solely on a positive field test, courts should defer accepting a plea until there is lab confirmation that an illegal substance is present and policies should be implemented that prevent people from being detained pre-trial while awaiting those results. As the 133 exonerations from Harris County, Texas painfully demonstrate, positive field tests in drug cases are often wrong.²¹⁵ Multnomah County in Oregon now requires lab testing before a conviction is secured in a drug case.²¹⁶ Other counties and states should avoid securing convictions before lab results verify that the alleged substance is in fact an illegal drug.

When an innocent defendant pleads guilty to a misdemeanor conviction in the no-crime context, damage is done to the legitimacy of our entire criminal justice system. The very foundation on which justice rests crumbles when the system indifferently accepts as routine, or at least does not reject, the idea that innocent defendants plead guilty to "minor" crimes that never happened for the sake of expediency.

C. Scrutinize Forensic Evidence and Exclude Questionable Science

²¹⁴ See Gross & O'Brien, *supra* note 199, at 931.

²¹⁵ See RACE AND WRONGFUL CONVICTIONS, *supra* note 19, at 18.

²¹⁶ Ryan Gabrielson, *Prosecutors in Portland Change Policy on Drug Convictions*, PROPUBLICA (Nov. 28, 2016). <https://www.propublica.org/article/prosecutors-in-portland-change-policy-on-drug-convictions>.

False or misleading forensic evidence is a significant contributing factor to the incidence of no-crime convictions.²¹⁷ In the context of bad forensic evidence, courts can and should play a significant gatekeeper function.²¹⁸ Courts should require the prosecution to make a proper evidentiary showing before experts are permitted to testify at trial,²¹⁹ and rigorous hearings should be conducted that carefully consider the foundation on which expert evidence is admitted.²²⁰ Courts should follow the recommendation set out by the President’s Council of Advisors on Science and Technology Report, which provides explicit guidance about the scientific and empirical foundations that should be satisfied before scientific evidence is admissible.²²¹ Too often, courts permit the admission of scientific evidence that is unreliable, inaccurate and misleading.²²² Because scientific expert testimony can be the lynchpin of a no-crime conviction which may lack other evidentiary basis, it is critical that courts ensure the proposed testimony satisfies reliability standards.

Along similar lines, prosecutors who rely on expert evidence to prove their cases should be held to high standards to ensure that the proposed evidence meets current standards in the field and that the proposed testimony is accurate and reliable.²²³ Prosecutors should be cautioned against drawing exaggerated and misleading conclusions from expert testimony. Prosecutors should also be reluctant to pursue cases that rely exclusively on forensic evidence. For instance, in shaken baby syndrome

²¹⁷ See NAT’L ACAD. OF SCIS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 7 (2009) (concluding that most forensic “sciences” lack scientific validity: “With the exception of nuclear DNA analysis . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source”).

²¹⁸ See Nancy Gertner, *Judges Need to Set a Higher Standard for Forensic Evidence*, N.Y. TIMES (Feb. 4, 2016), <http://www.nytimes.com/roomfordebate/2015/03/30/robert-durst-handwriting-and-judging-forensic-science/judges-need-to-set-a-higher-standard-for-forensic-evidence>.

²¹⁹ Jurisdictions vary as to the admissibility of expert testimony. In Federal Court, the admission of expert testimony is subject to the *Daubert* standard and Federal Rules of Evidence 702. See FED. R. EVID. 702. States use a variety of approaches such as the *Frye* test, or modifications of the *Frye* test.

²²⁰ Gertner, *supra* note 220.

²²¹ See PRESIDENT’S COUNCIL OF ADVISORS ON SCI. & TECH., FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016) [hereinafter FORENSIC SCIENCE IN CRIMINAL COURTS].

²²² See Gertner, *supra* note 220; see also Nancy Gertner, *Commentary on the Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. REV. 789 (2011).

²²³ See Gershman, *supra* note 75, at 115 (“Prosecutors’ use, and misuse, of scientific evidence has been one of the principal causes of wrongful convictions . . .”).

cases, it is generally accepted that a conviction should not rest solely on the expert testimony.²²⁴ This recommendation could be applied across the spectrum.

From the defense perspective, the forensic evidence scale is heavily tilted against the accused. Unlike the prosecution, the defense is often denied funding to hire its own experts.²²⁵ When the prosecution calls an expert, it is critical that the defense have an opportunity to rely on experts to help decipher the accuracy and reliability of the proposed testimony.²²⁶ Defense lawyers should receive appropriate and timely funding to evaluate the accuracy of the presented science.²²⁷ For instance, if a doctor is called to testify about shaken baby syndrome, or a fire science expert to testify about signs of arson, the defense should have access to an expert who can help decipher that testimony.

Another reform proposal in the area of forensic science relates to forensic scientists and forensic science laboratories.²²⁸ One significant way to improve the quality and the credibility of crime laboratories is by making them independent from police or prosecution offices.²²⁹ Independent laboratories would be accredited by an independent outside organization and subject to regular oversight.²³⁰ Another possible

²²⁴ See Findley, *supra* note 82, at 212.

²²⁵ See, e.g., Ellen Yaroshefsky & Laura Schaefer, *Defense Lawyering and Wrongful Convictions*, in EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 123, 136 (Allison D. Redlich et al. eds., 2014); Pamela Casey & Ingo Keilitz, *An Evaluation of Mental Health Expert Assistance Provided to Indigent Criminal Defendants: Organization, Administration, and Fiscal Management*, 34 N.Y.L. SCH. L. REV. 19 (1989); Jay A. Zollinger, *Defense Access to State-Funded DNA Experts: Considerations of Due Process*, 85 CALIF. L. REV. 1803, 1809 (1997); John Devlin, Comment, *Genetics and Justice: An Indigent Defendant's Right to DNA Expert Assistance*, 1998 U. CHI. LEGAL F. 395; Mark P. Goodman, Note, *The Right to a Partisan Psychiatric Expert: Might Indigency Preclude Insanity?*, 61 N.Y.U. L. REV. 703 (1986); Donna H. Lee, Note, *In the Wake of Ake v. Oklahoma: An Indigent Criminal Defendant's Lack of Ex Parte Access to Expert Services*, 67 N.Y.U. L. REV. 154 (1992).

²²⁶ See Yaroshefsky & Schaefer, *supra* note 227, at 136.

²²⁷ *Id.*

²²⁸ See NAT'L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009); Paul C. Gianelli, *Regulating DNA Laboratories: The New Gold Standard?*, 69 N.Y.U. ANN. SURV. AM. L. 617 (2014); Paul C. Gianelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163 (2007) [hereinafter Gianelli, *Wrongful Convictions*].

²²⁹ See, e.g., Paul C. Giannelli, *Regulating Crime Laboratories: The Impact of DNA Evidence*, 15 J.L. & POL'Y 59, 75 (2007); Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439, 469–73 (1997); Andre A. Moenssens, *Novel Scientific Evidence in Criminal Cases: Some Words of Caution*, 84 J. CRIM. L. & CRIMINOLOGY 1, 6 (1993) ("[Crime labs] may be so imbued with a pro-police bias that they are willing to circumvent true scientific investigation methods for the sake of 'making their point.'").

²³⁰ See, e.g., GEORGE H. RYAN, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL

response is the creation of forensic science commissions.²³¹ At bare minimum, lab employees should meet educational requirements and be certified, and their certifications should be renewable and based on both professional evaluations and participation in continuing education. Rogue forensic scientists—Fred Zain, Joyce Gilchrist and Annie Dookhan to name only a few—were able to falsify lab results and help convict thousands of people of crimes they did not commit, and in some instances, that simply did not happen, because there was virtually no oversight of their work.²³² Ensuring reliable forensic evidence is one critical way to reduce no-crime convictions.

D. Increase Resources Allocations to the Discovery of Non-DNA Wrongful Conviction Cases

To uncover and redress more no-crime wrongful convictions, innocence organizations need more funding and a broader mission to assist people convicted in no-crime cases. DNA is rarely a factor in no-crime conviction cases.²³³ This means that defendants convicted of a crime that did not happen are unlikely to receive support from traditional innocence organizations that require the presence of DNA. The Innocence Project, for instance, only accepts cases where there is “physical evidence that, if subjected to DNA testing, will prove that the defendant is actually innocent,” and clearly states on its submission page that the Innocence Project “does NOT review claims where DNA testing cannot prove innocence.”²³⁴ In addition, many no-crime convictions involve offenses which may be less serious than murder and sexual assault and may carry with them lesser penalties. These cases garner less attention and resources simply because many innocence organizations cannot allocate scarce resources towards cases at the lower-end of the criminal spectrum.

Depending on the nature of the crime charged and the resulting

PUNISHMENT 52 (2002 (noting in Recommendation 20 that “[an] independent state forensic laboratory should be created, operated by civilian personnel, with its own budget, separate from any police agency or supervision”); *see also* Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 STAN. L. & POL’Y REV. 381, 422–23 (2004) (highlighting Illinois and Houston public officials’ support for an independent lab system).

²³¹ Gianelli, *Wrongful Convictions*, *supra* note 230, at 228–34 (outlining the structure and resources needed for a successful forensic science commission).

²³² Mark Hansen, *Crime Labs Under the Microscope After a String of Shoddy, Suspect and Fraudulent Results*, A.B.A. J. (Sept. 2013), http://www.abajournal.com/magazine/article/crime_labs_under_the_microscope_after_a_string_of_shoddy_suspect_and_fraudu/.

²³³ *See supra* Table 1.

²³⁴ *Submit a Case*, INNOCENCE PROJECT, <https://www.innocenceproject.org/submit-case/> (last visited Feb. 27, 2018).

sentence, no-crime defendants often have limited options for assistance. Success in certain no-crime cases, however, requires high levels of expertise to establish that no arson occurred, no shaking occurred, or no violent action triggered an unexplained death.²³⁵ This typically requires specialized skills and resources, often well beyond the scope of an individual defendant and his or her family.²³⁶

If no-crime defendants are unable to secure outside assistance, many no-crime convictions will never be uncovered. As Hugo Bedau and Michael Radelet presciently noted in their 1987 study of 350 miscarriages of justice about the parties who were responsible for the defendant's eventual exoneration: "In no case was it the defendant alone; without exception the defendant needed the help of others."²³⁷ This undoubtedly remains true today.

CONCLUSION

Although the process of exoneration is difficult for all wrongful convictions, no-crime wrongful convictions raise unique and difficult challenges. When an innocent person is convicted of a crime committed by someone else, the guilty perpetrator remains at large.²³⁸ Yet, in that terrible scenario, the innocent person has a chance—no matter how slim—of proving his or her innocence by establishing the identity of the actual perpetrator. The defendant can perhaps use existing crime scene evidence, such as DNA or fingerprints, to identify the offender.²³⁹ Or perhaps the defendant will get lucky, and the actual offender will confess

²³⁵ Gould & Leo, *supra* note 133, at 330–31 (noting the emergence of fifty-five innocence based projects or related organizations within the American innocence network, an additional fourteen international innocence organizations, the creation of numerous prosecution conviction integrity units, and even the first wrongful conviction review unit at the Office of the Public Defender Office in Iowa).

²³⁶ See Tuerkheimer, *supra* note 79, at 15 & n.91. In one high profile case, Louise Woodward, a British au pair working in America, was tried for the murder of an infant in her care. Represented by Barry Scheck, the trial was a master class of experts. Ultimately, the trial court reduced the jury's verdict of murder to involuntary manslaughter, allowing Woodward to be sentenced to time served and to return to England. *Id.*

²³⁷ Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 64 (1987).

²³⁸ James R. Ackers, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1632 (2013).

²³⁹ See, e.g., Wilton Dedge, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/wilton-dedge/> (detailing how Wilton Dedge was exonerated after twenty-two years in prison through results from untested DNA evidence that proved he was not the perpetrator); Don Terry, *DNA Tests and a Confession Set Three on the Path to Freedom in 1978 Murders*, N.Y. TIMES, June 15, 1996, at A6 (post-conviction DNA testing revealed innocence of Ford Heights Four).

to the authorities²⁴⁰ or will brag to someone who tells the police about the crime he got away with.²⁴¹ Or maybe evidence will eventually be uncovered that will point to the real perpetrator.²⁴² In an actual criminal case, the possibility always exists that the true offender's identity someday will be revealed and that the innocent person will be vindicated at last. In contrast, the innocent defendant in a no-crime conviction cannot exonerate him or herself by proving the identity of the real perpetrator *because there is no real perpetrator*. This leaves the innocent defendant in a no-crime case in the nearly impossible situation of attempting to prove that no crime in fact occurred. Proving a negative is notoriously difficult.

No-crime convictions are important because they highlight the genuine dysfunction that exists within our overburdened and increasingly indifferent criminal justice system. No-crime cases are marred by blind acquiescence at best, and active misconduct at worst. No-crime convictions emphasize the willingness of governmental actors, on the ground and in the courts, to look the other way, even where the evidence is not solid, the science is shaky, and the misconduct is rampant.

A system that permits people to be convicted of crimes that never happened is broken. Perhaps more broken than we ever could have imagined. Whether it be an erroneous labeling of an event as a crime or a bald-faced lie that sparks a criminal conviction, all no-crime convictions yield the same tragic and wasteful outcome: an innocent person is held

²⁴⁰ See, e.g., DAVID PROTESS & ROB WARDEN, A PROMISE OF JUSTICE 189–92 (1998) (describing the “Ford Heights Four”, who were ultimately exonerated after, *inter alia*, one of the actual killers confessed); Saul Kassin, Opinion, *False Confessions and the Jogger Case*, N.Y. TIMES (Nov. 1, 2002), <http://www.nytimes.com/2002/11/01/opinion/false-confessions-and-the-jogger-case.html> (describing the “Central Park Jogger” case, in which five teenagers were exonerated after being convicted of rape and assault, when Matias Reyes—a convicted rapist and murderer—confessed to committing the crime, which was confirmed by DNA); Scott Hornoff, NEW ENG. INNOCENCE PROJECT, <http://www.newenglandinnocence.org/new-england-exonerees/2016/5/3/scott-hornoff> (last visited Feb. 27, 2018) (describing Scott Hornoff, a police officer who was wrongly convicted of murder in 1996, despite a strong alibi and no physical evidence connecting him to the crime, who was exonerated after the real perpetrator, Todd Barry, confessed to the murder in 2002).

²⁴¹ See Rob Warden, *Illinois Death Penalty Reform: How It Happened, What It Promises*, 95 J. CRIM. L. & CRIMINOLOGY 381, 402 (2005) (describing Gary Gauger, who was exonerated from Illinois's death row for the murder of his parents, and how the real perpetrators bragged about the murders and were arrested and convicted for the crimes).

²⁴² Kevin Davis, *Detectives Neglected Murder Tip Police Shrugged Off Hamwi Case Data*, SUN SENTINEL (Feb. 7, 1993), http://articles.sun-sentinel.com/1993-02-07/news/9301080352_1_purvis-detectives-innocent-man (describing John Gordon Purvis, a non-violent, mentally ill man convicted of murdering a neighborhood woman and her infant child, exonerated after the police received a tip naming the actual murderers—the woman's former husband and two hit men).

criminally responsible for a crime that never happened in the first instance.