



## Volume 1, Issue 2

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**Injustice Anywhere:  
An Introduction to the Innocence Network Conference Scholarship Panel Articles**

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*“Injustice anywhere is a threat to justice everywhere.”*

Martin Luther King, Jr.  
Letter from the Birmingham Jail

Martin Luther King Jr.’s words continue to resonate today. The particular injustice brought to bear by the wrongful conviction of a factually innocent person serves to illuminate the broader injustices of the criminal legal system writ large. This issue features a series of articles accepted as part of the Innocence Scholarship Panel session scheduled for the annual Innocence Network Conference in Chicago, Illinois in March 2020. While the conference was ultimately cancelled due to public health concerns connected to the Covid-19 pandemic, some of the authors were able to present their papers remotely in April. The full collection of accepted papers appears below. The Innocence Network is an affiliation of organizations dedicated to remedying individual instances of wrongful conviction of the innocent, while working to address the systemic causes and supporting the exonerated after they are freed. Each year, the Innocence Network Conference provides an opportunity for an international gathering of several hundred attorneys, legal scholars, social scientists, journalists, exonerees, and their families and supporters. The Innocence Scholarship Panel is a regular feature of the conference, creating a venue for legal and social science scholars to showcase their research on emerging wrongful conviction topics. This field of scholarship plays a critical role in chronicling and framing the direction of the Innocence Movement, and in recent years, has developed synergies with broader themes of racial justice.

This year, a series of high-profile incidents involving police violence against Black men in the United States, including the killing of George Floyd – along with the disparate effects of the Covid-19 pandemic on communities of color – have brought renewed attention to the deep-seeded injustices inherent in the American criminal punishment system. Incarcerated populations have been exposed to Covid-19 at far higher rates than the general public, and have seen their already limited access to the outside world diminish, with family and attorney visits severely curtailed in many jurisdictions. Further, those fighting wrongful convictions from behind bars face a heightened risk of Covid-19-related illness or death before they can fully litigate their innocence claims. The combined impact of a global health pandemic and sustained civil unrest in response to racial injustices in policing has led to public discourse that is more readily focused on mass incarceration and the pervasive racial disparities involved in policing, prosecution, and sentencing practices. In this moment, the work of wrongful conviction legal scholars and social scientists takes on a special importance. Indeed, highlighting the profound failures underlying wrongful convictions of factually innocent people serves to illustrate the deeper flaws in the criminal

punishment system. In this way, as criminal justice reform gains a wider and more receptive audience among the general public, a sharpened understanding of the underlying causes of wrongful conviction – along with their devastating and wide-reaching effects – becomes even more critical.

The selected authors from the 2020 Scholarship Panel have conducted research and written pieces that address compelling and timely issues that hold particular relevance given the current political, legal, and social climate in the United States and around the world. Collectively, the authors examine the injustices that both cause and flow from wrongful convictions. These interesting and provocative pieces address the role of racial bias in medical diagnosis of child abuse, consider to what degree exonerations have historically led to the prosecution of the true perpetrator, examine the challenges of re-entry following exoneration, and explore how “justice safety centers” could be developed to prevent wrongful convictions from occurring in the first place.

Understanding how and why wrongful convictions happen—and responding to their broad-reaching effects on exonerees, their families and communities, and society as a whole—has always been important. But in the current climate of heightened public awareness of mass incarceration and structural racism, these articles provide invaluable contributions to the discussion about the future of criminal justice reform.

**Do Racial Stereotypes Contribute to Medical Misdiagnosis of Child Abuse?  
Investigating Tunnel Vision in the Emergency Room**

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*Despite growing recognition that misdiagnoses of child abuse can lead to wrongful convictions, little empirical work has examined how the medical community may contribute to these errors. Previous research has documented the existence and content of stereotypes that associate race with child abuse. The current study examines whether emergency medical professionals rely on this stereotype to fill in gaps in ambiguous cases involving Black children, thereby increasing the potential for misdiagnoses of child abuse. Specifically, we tested whether the race-abuse stereotype led participants to attend to more abuse-related details than infection-related details when an infant patient was Black versus White. We also tested whether this heuristic decision-making would be affected by contextual case facts; specifically, we examined whether race bias would be exacerbated or mitigated by a family's involvement with child protective services (CPS). Results showed that participants did exhibit some biased information processing in response to the experimental manipulations. Even so, the race-abuse stereotype and heuristic decision-making did not cause participants to diagnose a Black infant patient with abuse more often than a White infant patient, regardless of his family's involvement with CPS. These findings help illuminate how race may lead to different outcomes in cases of potential child abuse, while also demonstrating potential pathways through which racial disparities in misdiagnosis of abuse and subsequent wrongful convictions can be prevented.*

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### **I Why We Need to Investigate Racial Stereotyping and Tunnel Vision in the Emergency Room**

Recent cases involving legal appeals, acquittals, and exonerations have shined a light on medical misdiagnosis of child abuse as a source of wrongful convictions. Consider, for example, the 2008 case involving Adrian Thomas, a 26-year-old African American man who was charged with the murder of his four-month-old son Matthew (see *People v. Thomas*, 2014). Thomas's wife called 911 after finding Matthew unresponsive in their home. Upon arrival at a local hospital, Matthew was determined to be in critical condition and then transferred to the pediatric intensive care unit of a major hospital, where his health continued to decline and he eventually died. Following two days of lengthy and intensive police interrogation during which detectives repeatedly lied to Thomas, Thomas confessed to forcefully slamming Matthew down on a bed several times. Despite almost immediately recanting the coerced confession after being arrested, Thomas was convicted by a jury for murdering his son. Nearly five years later, however, the New York Court of Appeals determined Thomas's coerced confession should not have been allowed as evidence. In the subsequent retrial, absent the incriminating coerced confession, the jury was persuaded by defense evidence contradicting the pediatric critical care doctor's diagnosis of shaken baby syndrome, including the absence of a skull fracture that the doctor had documented and expert testimony opining that Matthew's death was a result of an overwhelming pneumococcal infection and sepsis. Thomas was acquitted in 2014 (National Registry of Exonerations, 2020).

Thomas's case became a cause célèbre because the contrast in outcomes from his original trial and retrial so clearly demonstrates how coerced confessions can shape juror decision-making and lead to wrongful convictions. However, his case also raises important questions about the role of medical professionals in generating wrongful allegations of child abuse in the first place. Before Matthew died, the pediatric critical care doctor who was tending to him told the detectives investigating the incident that "somebody murdered this child" (Babcock & Hadaegh, 2011). This undoubtedly informed the detectives' strong presumption of Thomas's guilt, their decision to interrogate him, and their use of coercion to elicit his confession. But what led the doctor to ignore the evidence that Matthew was suffering from an acute infection, such as his low white blood cell count, and instead determine that his injuries were caused by abuse? In particular, would the doctor have come to the same conclusion if Matthew had been White rather than Black?

The question of whether race contributed to the medical misdiagnosis in Adrian Thomas's case is founded on research indicating that Black individuals are both disproportionately more likely to be implicated in child abuse (e.g., Flaherty et al., 2008) and wrongfully convicted (see Gross et al., 2017; Najdowski, 2011; Olney & Bonn, 2015). To investigate the influence of race on the probability of an abuse-related diagnosis, we had emergency medical professionals review a fictional case involving an infant patient who was depicted as either Black or White, but who otherwise experienced an identical pattern of symptoms prior to being taken in at an emergency room. We predicted that stereotypes that link child abuse to Black individuals (see, e.g., Krowchuk, 1989; Najdowski & Bernstein, 2018) would produce confirmation bias and tunnel vision in medical professionals' information-processing and decision-making, thereby increasing the likelihood of an abuse-related diagnosis for a Black versus White infant. We also explored how stereotyping would be affected by a contextual cue that would suggest an infant's symptoms were the product of abuse: prior involvement of the family with child protective services ("CPS"; Nouman & Alfandari, 2020).

Next, we review the extant literature suggesting that medical misdiagnosis of abuse is more likely to affect Black than White children and families. We then discuss evidence suggesting that a stereotype linking race and child abuse may underlie such racial disparities and describe the psychological process by which the race-abuse stereotype may affect medical decision making. We further discuss how effects of the race-abuse stereotype may be exacerbated or mitigated by contextual case information. We present the study we designed to test those hypothesized effects, and then conclude with a discussion of our findings, directions for future research, and implications for reducing racial disparities in medical misdiagnosis of abuse, unwarranted social welfare and legal intervention, and, ultimately, wrongful convictions.

## II Race and Medical Misdiagnosis of Abuse

Of the nearly eight million children investigated for suspected maltreatment in 2018, 11% were referred to CPS by medical professionals (Children's Bureau, 2020). Of importance, although hospitals are the third most common source to identify child maltreatment (Sedlak et al., 2010), only 25% of the cases that hospitals report to CPS are deemed worthy of investigation (Sedlak & Ellis, 2014). This investigation rate is low compared to other sentinel groups (e.g., 94% of cases reported by social services and 64% of cases reported by law enforcement result in investigation), suggesting that the medical community may be more likely than others to suspect child abuse when it has not actually occurred. Not surprisingly then, Adrian Thomas's case is but one of many that have raised controversy regarding medical misdiagnosis of abuse in both legal and medical circles (see, e.g., *The People of the State of New York v. Renee Susan Bailey*, 2014; Possley, 2018; Wester, 2019). Kirschner and Stein (1985) first drew attention to this issue 35 years ago by reporting on 10 cases in which false accusations were lodged against families after emergency room physicians mistook life-threatening illnesses or postmortem artifacts as child abuse. More recently, shaken baby syndrome (also known as abusive head trauma) has been identified as a problematic diagnosis that contributes to wrongful convictions (National Registry of Exonerations, 2020). The supposedly tell-tale symptoms of shaken baby syndrome—subdural hematoma, retinal bleeding, and brain swelling—can stem from a variety of other causes, including, for instance, sudden infant death syndrome, venous sinus thrombosis (see Zakirova, 2017), and external hydrocephalus



(Wester, 2019). As a result, medical and legal experts are increasingly likely to dispute the appropriateness of a shaken baby syndrome diagnosis (see, e.g., Findley et al., 2012; Jenny, 2014; Lynøe et al., 2017). Indeed, 11% of the 2,000 shaken baby syndrome cases that went to criminal court between 2001 and 2015 were either dropped, dismissed, or resulted in overturned convictions because secondary analyses showed other causes of death (Cenzipper, 2015).

Despite growing concerns about medical misdiagnosis of abuse, little research has examined how medical personnel make such egregious errors. Kirschner and Stein (1985) identified the “uniform failure of the hospital staff either to elicit a careful history from the parents or to believe the parents’ story” and “an attitude of suspicion and/or hostility toward the parents” (p.875) as possible contributing factors. It is notable, however, that 60% of the cases they reviewed involved Black children at a time when no more than 40% of the study site’s population was Black (Yonek & Hasnain-Wynia, 2011), indicating that race may have played a role, too. This would be consistent with other research showing that doctors and hospitals are more likely to identify and report a child’s injuries as resulting from abuse when the child is Black rather than of any other race (Flaherty et al., 2008; Hampton & Newberger, 1985; but see Laskey et al., 2012). For example, a retrospective chart review of infants and toddlers who were hospitalized for skull or long-bone fractures showed that children were more likely to be subjected to a skeletal survey and reported to child protective services for suspected abuse if they were Black or Hispanic rather than White (Lane et al., 2002). In a more recent study, Hymel et al. (2018) concluded that disparities in the rates of evaluating and reporting young children for abusive head trauma in pediatric intensive care units manifested only among children who were not ultimately classified as having experienced abuse; no similar racial difference emerged among children who were determined to be abuse victims. An experimental study of mandated reporters yielded similar results. Specifically, Zellman (1992) examined responses to several vignettes describing potential physical or sexual abuse and found that the reporters were more likely to label a child’s injury as abuse and perceived the incident as more serious and deserving of a report to authorities when the child’s family was described as Black rather than White. Taken together, the research indicates that decision-making related to maltreatment is permeated by greater suspicion of Black families.

The potential for abuse to be misdiagnosed disproportionately more often in Black versus White children is concerning for three reasons. First, it subjects Black children and families to unwarranted child welfare and criminal investigations, thereby contributing to racial disparities in wrongful convictions. In support, even though research suggests that innocent Black individuals who are convicted of crimes are less likely to be exonerated compared to their White counterparts (Gross et al., 2017), Black individuals compose 18% of defendants exonerated for shaken baby syndrome (National Registry of Exonerations, 2020) but only 13% of the United States population (U.S. Census, 2018). The second reason that a link between race and medical misdiagnosis of abuse is alarming is that it leads other causes of Black children’s symptoms to be overlooked, potentially contributing to racial health disparities that have been broadly documented in medical research (Jarquin et al., 2011; Lewis & van Dyke, 2018). For example, research has shown that even when Black and non-Black children are treated by the same doctor, Black children are less likely to be diagnosed with respiratory tract infections and less likely to receive antibiotic treatments (Gerber et al., 2013). Third, to the extent that suspicion is disproportionately targeted at Black rather than White children, there is a risk that doctors may underdiagnose abuse affecting White children. In fact, there is evidence that actual abusive head trauma is more likely to go

unrecognized in White than minority children (Jenny et al., 1999). For all of these reasons, it is critical that the underlying mechanisms that produce more medical misdiagnosis of abuse for Black than White children be understood.

### **III Racial Stereotyping as an Explanatory Mechanism**

Balsa and McGuire (2003) outline three explanations for general racial health disparities that are also relevant to understanding misdiagnosis of abuse. The first is that physicians are prejudiced and have less concern for Black individuals than others. However, many studies have revealed no explicit preference among medical professionals for White versus Black patients, and levels of explicit bias do not relate to decisions about who should be treated (e.g., Green et al., 2007; for review, see Smedley et al., 2003). The second mechanism relates to the uncertainty that clinicians face in their decision-making process. On the one hand, such uncertainty may be amplified by miscommunications or misunderstandings that occur between non-Black doctors and their Black patients, given that only 5% of all active physicians in 2018 were Black (Association of American Medical Colleges, 2019). On the other hand, doctors may use the patient's racial category in and of itself as a cue to reduce uncertainty. Black children may in fact be more likely than others to experience maltreatment (e.g., Hussey et al., 2006; Sedlak, 1997). Such data about group rates and probabilities may facilitate accurate diagnosis in some cases, but it is likely to lead to inaccurate decision-making about other individuals (Balsa & McGuire, 2001). This point is closely related to the third factor contributing to racial disparities, which is that negative and exaggerated stereotypes may automatically and non-consciously influence medical decision-making in ways that result in disparate treatment of racial groups. The purpose of this research is to explore the role of stereotypes associating race and child abuse in generating medical misdiagnoses of abuse.

It has long been recognized that child abuse is a socially constructed phenomenon subject to being identified on the basis of stereotypes about the types of people who are likely abusers (Gelles, 1975). Moreover, stereotypes that link crime and violence with Black race have been documented (see, e.g., Devine, 1989), and other studies have shown that medical professionals associate child abuse specifically with Black individuals. For instance, Krowchuk's (1989) survey of registered nurses revealed that they believe child abusers are stereotypically Black (Krowchuk, 1989). More recently, Najdowski and Bernstein (2018) performed two studies with samples of doctors, nurses, and other medical professionals to identify the content and strength of the race-abuse stereotype. Their research revealed a considerable level of consensus across participants' responses and, thus, about the existence and substance of beliefs in the medical community that Black children are more likely than others to be abused. Those findings are unsurprising, given that negative stereotypes portraying Black infants and children as "damaged creatures" have been common throughout history (Hoberman, 2012, p.72). How, though, might they affect diagnostic decision-making by medical professionals?

It is well-established that stereotypes can have a subtle yet biasing influence on the way people perceive others, process information, and form judgments, regardless of the extent to which they consciously endorse the stereotypes (e.g., Devine, 1989). Although it has been hypothesized that stereotypes contribute to racial disparities in diagnostic decision-making, the validity of this

proposition has only rarely been tested empirically. Moskowitz et al. (2012) demonstrated that even subliminally exposing physicians to faces of Black men so quickly that they could not be consciously registered was sufficient to activate stereotypes about the types of diseases and disorders with which Blacks are likely to present. Other studies indicate such stereotype activation can translate into less favorable perceptions of patients, diagnoses, and treatment recommendations. For instance, Abreu (1999) experimentally manipulated whether a sample of clinical therapists were subliminally exposed to lists of words that were either related to stereotypes about Blacks or neutral. All participants then read the same vignette describing a fictional patient. Results showed that those who were exposed to the racial-stereotype-relevant words, as compared to the neutral words, perceived the fictional patient to be more hostile. In other research, Green et al. (2007) showed that the more physicians implicitly or automatically and non-consciously exhibited preferences for White people, the less likely they were to recommend a potentially life-saving intervention (i.e., thrombolysis) in response to a clinical vignette involving suspected myocardial infarction when the patient was Black versus White. These effects transcend the research context to affect real-world decision-making, too: van Ryn et al. (2006) found that physicians who reported greater endorsement of negative stereotypes in relation to their own Black patients' personal habits were less likely to recommend heart bypass surgery for them relative to their White patients. Combined, these studies suggest that patient race "can influence providers' beliefs about and expectations of patients independent of other factors" (van Ryn & Williams, 2003, p. 497), thereby contributing to more negative health outcomes for Black and White patients. The findings also point to the possibility that medical professionals may rely on the stereotype associating race and abuse when evaluating children's symptoms in ways that lead them to be more likely to misdiagnose children who are Black as opposed to White.

Our study tests that hypothesis and explores the psychological mechanisms that could underlie the effect. Specifically, we rely on theory and research on confirmation bias to understand how stereotypes might translate into misdiagnoses in cases involving Black children. Confirmation bias involves the tendency to search for evidence that supports an existing hypothesis (for review, see Nickerson, 1998). Part of this process involves assuming the hypothesis is true and asking questions that are designed to bolster the hypothesis. As reviewed by Bornstein and Emler (2001), medical professionals are not immune to developing this kind of "tunnel vision." This is concerning because stereotypes can fuel confirmation bias and tunnel vision. For example, people more readily attend to and more deeply process evidence when it is consistent rather than inconsistent with a stereotype (e.g., Bodenhausen, 1998). Further, people require less evidence to make judgments that are consistent with a stereotype (e.g., Biernat et al., 2008). As Nickerson (1998) stated, "once a person is convinced that members of a specific group behave in certain ways, he or she is more likely to seek and find evidence to support the belief than evidence to oppose it, somewhat independently of the facts" (p.183). Thus, stereotypes about who is likely to be a victim of abuse might become the hypothesis that medical professionals unwittingly try to prove. Therefore, we predict that, when medical professionals encounter Black children, stereotypes associating race and child abuse are activated. As a result, we expect that medical professionals engage in selective information-processing strategies aimed at—intentionally or unintentionally—confirming the stereotype-derived hypothesis that the child's symptoms are the result of abuse. Ultimately, we anticipate that this process will increase the probability of an abuse diagnosis when the child patient is portrayed as Black versus White.

#### **IV Racial Stereotyping in the Context of CPS Involvement**

Unfortunately, medical professionals often have to make judgments about abuse based on an incomplete picture of their child patient's history; in these circumstances, they may use whatever information is explicitly available to guide them (Nouman & Alfandari, 2020). As a result, their decisions may be "vulnerable and dependent on extraneous contextual information" (Lockhart & Satya-Murti, 2017, p.1537). Thus, a patient's race and related stereotypes are especially likely to influence medical decision-making when compelling evidence does not exist to support a particular diagnosis or course of action (for reviews, see Balsa & McGuire, 2003; Dovidio et al., 2008). In fact, Burgess et al. (2006) distinguished between two stereotyping effects: automatic stereotyping, whereby stereotypes influence perceivers' judgments outside of their conscious awareness, and secondly, goal-modified stereotyping, whereby the need to comprehend a situation increases the likelihood that a perceiver will apply stereotypes in that situation. We hypothesize that emergency medical professionals use racial stereotypes to fill in the gaps in ambiguous cases and increase their certainty for making a diagnosis for their child patients.

Yet, once medical professionals have information that more clearly points to a diagnosis of abuse, it remains unclear how stereotypes may influence their decision-making. A child's family history of CPS involvement is a frequent red flag for suspicion of abuse to medical professionals (Nouman & Alfandari, 2020), so we considered how this factor might moderate the effect of race on diagnostic decision-making. On the one hand, once medical professionals become aware of CPS involvement, given that this information on its own supports the hypothesis of abuse, they may no longer rely on the race-abuse stereotype to disambiguate a child's symptomatology. This may reduce racial bias in information-processing and increase the likelihood of an abuse diagnosis at a similar rate for Black and White children. On the other hand, however, it is also possible that upon learning about CPS involvement, medical professionals may find the race-abuse stereotype relevant and useful for further disambiguating information (see Kunda, 1990). Thus, the contextual cue of CPS involvement may exacerbate stereotyping effects and increase risk of misdiagnoses for Black versus White children. We test these competing predictions in the current research, too.

#### **V Overview and Hypotheses**

The current study conforms to a 2 (infant patient race: Black, White) X 2 (CPS history: involved, uninvolved) between-subjects experimental design. Our goal was to advance theoretical knowledge related to race, intergroup perceptions, stereotyping, and the influence these factors have on decision making as well as applied knowledge about racial disparities in medical misdiagnoses and wrongful convictions. Specifically, we sought to reveal the underlying psychological mechanisms that explain how racial stereotypes lead to medical misdiagnosis, particularly related to child abuse. Therefore, we examined the effects of an infant's race and the family's involvement with CPS on emergency medical professionals' diagnostic decision-making and to identify the psychological mechanisms that would explain the effects. Based on prior theory and research (e.g., Balsa & McGuire, 2003; Devine, 1989; Najdowski & Bernstein, 2018; van Ryn et al., 2006), we predicted that emergency medical professionals would be more likely to find that the infant's symptoms were caused by abuse when the infant was Black versus White. We further hypothesized that the effect of infant race on decision-making would be explained by greater

activation of the race-abuse stereotype and, in turn, more selective information-processing aimed at confirming abuse. Because prior work suggested that CPS involvement could on its own support a hypothesis of abuse (Nouman & Alfandari, 2020), we also tested whether participants would be more likely to diagnose abuse when the infant's family was involved with CPS as compared to when it was not, regardless of the infant's race. However, we also explored whether the tendency for emergency medical professionals to be more suspicious of abuse when the infant was Black would be reduced or exacerbated when the family had a history of CPS involvement, as the confluence of that contextual cue with the race-abuse stereotype could result in tunnel vision (see, e.g., Nickerson, 1998).

## VI Method

### Participants

Participants were 167 non-Black emergency medical professionals (99% doctors, 1% nurse practitioners). Thirty-three percent of the sample identified as women and 80% as White or Caucasian (with 13% Asian, 3% Hispanic or Latino, and 5% who self-identified as "other" races/ethnicities). On average, participants were 46 years old ( $SD = 11$ , range = 28 to 72 years old) and had practiced medicine for 15 years ( $SD = 9$ , range = 2 to 39 years). Forty-nine percent of participants worked in community hospitals, 27% in university hospitals, 21% in teaching hospitals, and 3% in other settings. The majority of facilities were located in urban settings (53% versus 38% in suburban and 9% in rural).

Examination of manipulation checks revealed that 15 participants did not correctly perceive the race of the infant, 19 missed the experimental manipulation of CPS involvement, and 4 did both. Twenty-one participants failed to answer one or both of the manipulation checks altogether. These 59 participants were excluded from analyses, reducing the final sample to 108 participants. A series of chi-square analyses and t-tests ensured there were no significant differences between participants who were dropped versus retained in the final sample in terms of demographic or background characteristics, all  $\chi^2s(1-4) \leq |2.04|$ ,  $ts(147-149) \leq |0.32|$ ,  $ps \geq .21$ .

### Materials

The materials, derived from the actual criminal court trial of Adrian Thomas (*People v. Thomas*, 2014), included a case summary and an ambulance report.

**Case summary.** The summary described an ambiguous case involving an infant patient who suffered from a variety of symptoms that could have resulted from either infection or abuse. Specifically, to suggest the infant was suffering from some sort of infection, he was described as having a mild fever, being tired and restless, crying more than usual, and vomiting in the day preceding his admittance to the emergency department. To suggest that an abusive incident may have occurred, the summary stated that the mother reported the infant had been crying loudly from the bedroom he was in with his father but the crying stopped abruptly, and when she checked on him she saw the infant lying in his crib, apparently fine, while the father stood over him looking upset. The summary otherwise described the decline in the infant's health throughout the night, the decision to call 911 after finding him "lifeless, limp, and not breathing," the initial interventions by the emergency medical technicians, and arrival at the hospital.

The summary included the experimental manipulation related to the infant's race, which was never explicitly stated. Instead, the infant was portrayed as either Black or White via use of race-appropriate names, following Laskey et al. (2012), and an image of the infant. Specifically, the Black infant was named Darnel Washington and the White infant was named Andrew Becker, based on the association of the first names (Glaser et al., 2015) and the prevalence of the last names with respect to each race (Gaddis, 2017). Images of the infant were selected through a pretest of 28 medical professionals who were recruited via snowball sampling. Participants viewed four images of infant patients obtained from public online sources. For each infant, they first responded to an open-ended question that asked how many months old they thought the baby was. They then indicated how sick the child appeared to be (on a 10-point scale ranging from 1, *very healthy* to 10, *very sick*) and identified the baby's race (*White, Black, or Hispanic/Latino*). The images selected for use as stimuli were those that depicted infants who were (a) most frequently identified as Black and never identified as White and (b) most frequently identified as White and never identified as Black. Paired sample t-tests showed that ratings for the two infants did not differ significantly in terms of perceived health ( $M = 7.65$ ,  $SD = 2.04$  and  $M = 7.48$ ,  $SD = 1.97$ , respectively),  $t(22) = -0.34$ ,  $p = .73$ ; however, the Black infant was perceived as approximately one and a half months older than the White infant ( $M = 7.05$  months,  $SD = 3.97$  versus  $M = 5.41$  months,  $SD = 2.65$ ), a statistically significant difference,  $t(21) = -2.08$ ,  $p = .05$ .

The summary also included the experimental manipulation of CPS involvement. In the CPS-involved condition only, the summary additionally noted that the infant patient's mother asked the admitting nurse in the emergency room to "contact her social worker at Child Protective Services," revealing that "the family currently had an open case."

**Ambulance report.** The summary was supplemented with an ambulance report that reiterated some information from the summary and provided additional details regarding the infant patient's condition (e.g., heart rate, blood pressure, etc.).

### Measures

**Stereotype activation.** Following past studies (Goff et al., 2008; Najdowski et al., 2015; Steele & Aronson, 1995), we developed a word-stem completion task to measure stereotype activation. In preliminary research (Najdowski & Bernstein, 2018), 53 medical professionals listed words associated with the stereotype that Black children are more likely than other children to be abused by their parents. Participants generated 131 words which we then organized into 25 construct groups based on relatedness (e.g., "*uneducated*," "*no education*," "*lack of education*," "*uninformed*," "*illiterate*," and "*education*" were grouped together for the construct of "*uneducated*"). Eight construct groups that included responses from only one participant were dropped to ensure results were not influenced by any single participant's idiosyncratic beliefs. The final 17 race-abuse stereotype constructs were "*drugs*," "*stressed*," "*poor*," "*neglect*," "*ghetto*," "*cycle*," "*uneducated*," "*batterer*," "*culture*," "*unskilled*," "*hood*," "*spank*," "*misbehaving*," "*unmarried*," "*scary*," "*strict*," and "*lazy*." These words were given to a separate sample of 40 medical-professionals, who rated how strongly each word related to the stereotype linking race to child abuse. The five words rated as most strongly related to the stereotype were *drugs*, *stressed*, *poor*, *neglect*, and *ghetto*. We omitted at least two letter spaces from each word so that the word stem could be completed with other, non-stereotype-related words (e.g., ST\_E\_ED). The stereotype-related word stems were then intermixed randomly with five filler word stems that

could not be completed as words that would fit the stereotype (i.e., product, sheet, glove, reason, mover). Participants were instructed to complete all 10-word stems with the first real words that came to their minds and to work quickly as they did so.

Stereotype activation was calculated as the ratio of target word stems the participant filled out in a stereotype-related manner (e.g., STRESSED instead of STEEPLD) divided by the total number of target word stems the participant completed. Therefore, higher scores on this measure reflect greater activation of the race-abuse stereotype.

**Preliminary diagnosis.** Participants' spontaneous preliminary diagnoses were assessed with the open-ended question, "Based on your first impression of this case, what do you think is the cause of the child's condition? That is, what is your preliminary diagnosis?" Two independent raters coded a random sample of responses (20%) to determine whether the diagnoses were consistent with abuse (e.g., shaken baby syndrome, non-accidental trauma), non-abuse-related causes (e.g., influenza, sudden infant death syndrome), or both abuse- and non-abuse-related causes. Interrater agreement was achieved (Krippendorff's  $\alpha = .96$ ), disagreements were resolved by discussion, and then the remaining data were coded by one rater. This variable was further dichotomized to indicate whether participants made any mention of abuse or not.

**Likely causes of symptoms.** Next, participants were provided a list of 11 potential diagnoses and asked, "Based on the information you have, which of the following are the most likely causes of the child's symptoms?" They were instructed to rank their top five choices, with "1" being the most likely diagnosis. The causes listed were grouped for analyses as (a) incriminating abuse-related causes, comprising intracranial trauma, trauma secondary to abuse, and blunt force trauma; (b) exonerating infection-related causes, including meningitis, streptococcus infection, and septic shock; and (c) nondeterminative causes, with intracranial abnormality, neurogenic pulmonary edema, cerebral edema, coagulopathy, and subdural hemorrhage. Proportions were calculated to indicate how many of the three abuse-related causes and three infection-related causes were listed as the top five most likely explanations for the child's symptoms. Also, we coded whether participants ranked an abuse-related cause or infection-related cause as the top most likely diagnosis.

Participants' confidence in judgment about the top most likely cause of the child's symptoms also was assessed using the item, "how confident are you that your top-ranked diagnosis is correct?" Responses were given on a scale ranging from 0 (*not at all confident*) to 10 (*extremely confident*).

**Additional testing.** Participants were asked, in light of their top-ranked diagnosis, "what tests would you order to determine if that preliminary diagnosis is correct or incorrect?" They were instructed to select up to three out of eight possible tests. As with the likely causes of symptoms, the tests were grouped for analyses as (a) incriminating abuse-related tests, including a skeletal survey or ophthalmology consult; (b) exonerating infection-related tests, with lumbar puncture or blood results; and (c) nondeterminative tests, comprising a neurological exam, physical exam, chest x-ray, or cranial CT scan or ultrasound. Proportions were computed to reflect how many of the two abuse-related tests and two infection-related tests were selected.

**Surprise recall.** In line with Bodenhausen (1988), participants completed a surprise recall task. They were instructed to “write down everything you can remember about the child’s case, no matter how small the detail, regardless of whether you think the information was relevant to your diagnosis or not.” They were encouraged to use as close to the original wording as possible. Two independent raters coded a random sample of responses (20%) for references to specific pieces of evidence, including (a) the infant’s race and name, (b) CPS involvement (among participants in the CPS-involved condition only), (c) abuse-related details (e.g., that the father looked upset while in the bedroom with the infant crying, that the infant was slightly shaken up and down when found nonresponsive), (d) fabricated abuse details (e.g., that the infant was screaming; that the father was frustrated, not concerned about the infant’s wellbeing), and (e) infection-related details (e.g., fever, wheezing, no obvious injuries). Interrater agreement was achieved (all Krippendorff’s  $\alpha \geq .85$ ), disagreements were resolved by discussion, and then the remaining data were coded by one rater. Following Bodenhausen, proportions were calculated to reflect the number of details recalled out of those that were presented for abuse (with and without including fabrications) and infection.

**Evidence importance.** Also following Bodenhausen (1988), participants rated details from the case summary and ambulance report in terms of “how important it was to your ability to reach a diagnosis” using a 5-point scale ranging from -2 (*Unimportant*) to +2 (*Important*). Two evidence items were related to the experimental manipulations—the race of the infant and, for participants in the CPS-involved condition, the open social work case. Abuse-related details included the mother’s and father’s behavior, which would be rated as important only if they were used as incriminating evidence due to their irrelevance to an infection-related diagnosis. Ratings for the mother’s and father’s behavior were averaged to create a reliable scale for abuse-related detail importance ( $\alpha = .75$ , inter-item correlation = .60). Infection-related details included poor appetite, fever, respiratory distress, duration of symptoms, and that there were no visible signs of trauma. Ratings for these five items were averaged to yield a reliable scale for infection-related detail importance ( $\alpha = .69$ , *M* inter-item correlation = .37). Six other evidence items (i.e., shock, crying, vomiting, child’s age, pupils fixed and dilated, non-responsiveness) would not help to distinguish between abuse or infection as the cause of the child’s symptoms and are not considered further.

**Forced-choice diagnosis.** Participants responded to an item adapted from Laskey et al. (2012) to assess their suspicion of abuse. Specifically, we presented a mock timer with the message “Please wait while we update our results...” to suggest that data was being tabulated (it was not). We then told participants that “Based on the data we have collected so far; the two most common diagnoses are *Septic shock* and *Trauma secondary to abuse*.” We then asked, “Based on the material you read, which of these two diagnoses is the best explanation for the child’s condition?” Participants then chose between the diagnoses of *Septic shock* or *Trauma secondary to abuse*.

Following Bodenhausen (1988), participants’ confidence in their forced-choice diagnosis was assessed by the item, “how confident are you that this diagnosis is correct?” Responses were made on an 11-point scale ranging from 0 (*not at all confident*) to 10 (*extremely confident*).

**Manipulation checks.** A series of manipulation check questions were administered to ensure that participants were paying attention to the details that had been presented to them. Specifically, we asked participants, “How old was the child you read about?” Response options



were either *less than 1 year old* or *more than 1 year old*. Participants then answered, “What was the race of the child you read about?” (*Black/ African American* or *White/Caucasian*) and “According to the materials you read, did the child’s mother ask a nurse to contact her Child Protective Services social worker?” (yes or no).

**Demographic and background characteristics.** Participants also reported their professional title, gender, racial/ethnic background, age, number of years of practicing emergency medicine, and type and setting of work institution.

### **Procedure**

Emergency medical professionals were recruited through invitations distributed by email to members of the American Medical Association listserv, following past research (see, e.g., Braithwaite et al., 2003). Considering that nonresponse is common for web surveys (Dillman et al., 2014), with physicians’ response rates ranging between 1% and 3% (S. Painter, personal communication, May 3, 2017), we distributed invitations to 15,000 individuals twice with the goal of achieving a sample of approximately 150 participants.

Interested individuals accessed an anonymous online survey at their convenience. Respondents were screened for eligibility based on professional credentials (i.e., medical professionals) and practice specialty (i.e., emergency medicine). Those who were eligible were given information about the study and asked to consent to participate. After providing consent, participants reviewed the case summary and ambulance report and completed the measures of stereotype activation, preliminary diagnosis, likely cause of symptoms, confidence in top-ranked diagnosis, additional testing, surprise recall, evidence importance, forced-choice diagnosis, confidence in diagnosis, manipulation checks, and demographic and background characteristics.

Finally, participants were debriefed about the purpose of the study, thanked for their time, and directed to a separate non-anonymous survey to indicate whether they would like to be compensated with a gift card to Amazon or Starbucks. We distributed \$25 gift cards in the preferred format by email.

## **VII Results**

Two-way between-subjects’ analyses of variance (ANOVAs) were used to examine the main and interactive effects of infant race and CPS involvement on single continuous measures. For dependent measures that were meaningfully and statistically correlated, two-way between-subjects’ multivariate analyses of variance (MANOVAs) were employed. Log-linear models were used to test for main and interactive effects of infant race and CPS involvement on dichotomous measures. For analyses examining effects of race within the CPS-involved condition, independent samples t-tests were employed on continuous measures and chi-square analyses were used on dichotomous measures. All means and standard deviations for continuous measures are provided in Table 1, and all frequencies for dichotomous measures are presented in Table 2.

Bivariate correlation analyses explored whether any participant demographic or background characteristics were significantly associated with the dependent measures. When they

were, additional analyses tested for effects of the independent variables on the relevant dependent measure while controlling for the implicated characteristic. Results of these supplementary analyses (available upon request) did not differ substantively from those presented next.

To preview, analyses revealed no evidence that the implicit race-abuse stereotype influenced emergency medical professionals to engage in heuristic decision-making by diagnosing abuse more often when the infant patient was Black rather than White, nor were diagnoses significantly affected by the family's involvement with CPS. Even so, participants reported significantly more actual and fabricated abuse-related details on the surprise recall task when the infant was portrayed as Black versus White, although this effect manifested only when CPS was involved with the family. Although the infant's race was perceived by participants to be a less influential factor in their decision making when the family was involved with CPS relative to when it was not, as predicted, participants perceived the parents' behavior to be significantly more important to their ability to reach a diagnosis when the infant was Black versus White.

### **Stereotype Activation**

An ANOVA revealed that the degree to which stereotypes linking race and abuse were activated in participants' minds was not affected by the race of the infant, whether CPS was described as being involved with the family, nor the interaction of those two variables, all  $F_s(1, 104) \leq .29$ ,  $p_s \geq .59$ , partial  $\eta^2_s \leq .003$ .

### **Preliminary Diagnosis**

Overall, 75% of participants spontaneously mentioned a diagnosis involving an abusive incident. Log-linear modeling showed that the frequency of participants' spontaneous abuse diagnoses did not differ depending on the infant's race, whether CPS was involved, nor the interaction between the two, all  $b_s \leq |.60|$ ,  $z_s \leq |.97|$ ,  $p_s \geq .34$ .

### **Likely Causes of Symptoms**

Because the proportion of incriminating abuse-related and exonerating infection-related causes listed in the top five most likely causes of the infant's condition were significantly correlated,  $r(108) = -.53$ ,  $p < .001$ , a MANOVA was employed to test effects on these variables. Results revealed that the multivariate infant race main effect and infant race by CPS involvement interaction effect were both nonsignificant, all  $F_s(2, 103) \leq .92$ ,  $p_s \geq .40$ , Wilk's  $\lambda_s \geq .98$ , partial  $\eta^2_s \leq .02$ . Although there was a marginally significant multivariate effect of CPS involvement,  $F(2, 103) = 2.31$ ,  $p = .10$ , Wilk's  $\lambda = .96$ , partial  $\eta^2 = .04$ , univariate tests showed no statistical difference in the proportion of abuse- or infection-related causes identified as a function of whether CPS was previously involved or not, all  $F_s(1, 104) \leq 1.44$ ,  $p_s \geq .23$ , partial  $\eta^2_s \leq .01$ .

**Table 1.** Means and Standard Deviations for Continuous Measures as a Function of Infant Race and CPS Involvement

	Black			White		
	No CPS	Prior CPS	Overall	No CPS	Prior CPS	Overall
	Involvement	Involvement		Involvement	Involvement	
	<i>M (SD)</i>	<i>M (SD)</i>	<i>M (SD)</i>	<i>M (SD)</i>	<i>M (SD)</i>	<i>M (SD)</i>
Stereotype activation	.34 (.18)	.35 (.22)	.35 (.19)	.35 (.23)	.31 (.20)	.33 (.22)
Proportion of...						
...abuse-related causes likely	.68 (.30)	.72 (.22)	.69 (.27)	.63 (.36)	.71 (.25)	.66 (.32)
...infection related causes likely	.44 (.41)	.52 (.35)	.47 (.38)	.38 (.37)	.46 (.35)	.42 (.36)
...abuse-related tests ordered	.23 (.31)	.30 (.34)	.25 (.32)	.29 (.31)	.27 (.33)	.28 (.31)
...infection-related tests ordered	.29 (.31)	.25 (.30)	.27 (.31)	.21 (.28)	.31 (.32)	.25 (.30)
... abuse-related info recalled	.20 (.22)	.22 (.13)	.21 (.18)	.24 (.15)	.16 (.14)	.21 (.15)
...abuse-related info recalled (including fabricated abuse)	.39 (.29)	.60 (.29)	.47 (.30)	.53 (.27)	.38 (.32)	.46 (.30)
... infection-related info recalled	.36 (.24)	.36 (.19)	.36 (.22)	.36 (.25)	.33 (.20)	.35 (.23)
Importance <sup>a</sup> of...						
...infant's race	-.87 (1.09)	-1.05 (.94)	-.94 (1.03)	-.70 (1.19)	-1.54 (.88)	-1.05 (1.14)
...open social work case	--	1.25 (.85)	--	--	1.08 (.93)	--
...parents' behavior	1.35 (.58)	1.43 (.63)	1.38 (.60)	1.29 (.73)	.88 (.94)	1.11 (.84)
... infection-related evidence	1.03 (.58)	.98 (.80)	1.01 (.67)	1.10 (.57)	.85 (.92)	.99 (.74)
Confidence <sup>b</sup> in...						
... top-ranked diagnosis	6.06 (2.83)	6.25 (2.53)	6.14 (2.69)	5.76 (2.44)	5.58 (2.48)	5.68 (2.44)
...forced-choice diagnosis	6.55 (2.50)	6.65 (2.21)	6.59 (2.37)	6.30 (2.35)	5.62 (2.32)	6.02 (2.34)

<sup>a</sup> Evidence importance was rated on a five-point scale from 1 (*unimportant*) to 5 (*important*).

<sup>b</sup> Confidence in diagnoses was rated on an 11-point scale from 0 (*not at all confident*) to 10 (*extremely confident*).

**Table 2.** Effects of Infant Race and CPS Involvement on Categorical Measures

	Black			White		
	No CPS	Prior CPS	Overall	No CPS	Prior CPS	Overall
	Involvement	Involvement		Involvement	Involvement	
Preliminary abuse diagnosis	77%	65%	73%	79%	75%	77%
Forced-choice abuse diagnosis	74%	75%	75%	73%	75%	74%

With regard to the causes ranked as the top most likely explanation for the infant's symptoms, 59% of participants identified an abuse-related cause whereas 27% reported an infection-related cause (13% selected a cause that could be related to either abuse or infection). Log-linear modeling showed that the frequency with which participants selected either an abuse- or infection-related cause as the top most likely also did not differ depending on the infant's race, whether CPS was involved with the family, nor the interaction of those variables, all  $b_s \leq |.29|$ ,  $z_s \leq |.44|$ ,  $p_s \geq .66$ . An ANOVA also revealed no significant main or interactive effects on participants' confidence in their top-ranked diagnoses, all  $F_s(1, 104) \leq .92$ ,  $p_s \geq .34$ , partial  $\eta^2_s \leq .01$ .

### **Additional Testing**

The proportion of incriminating abuse-related and exonerating infection-related tests that participants indicated they would order were significantly correlated,  $r(108) = -.48$ ,  $p < .001$ , so a MANOVA was used to investigate whether infant race, CPS involvement, or the interaction of the two affected these variables. Results showed no significant multivariate main or interactive effects, all  $F_s(2, 103) < .71$ ,  $p_s > .50$ , partial  $\eta^2_s < .01$ .

### **Surprise Recall**

No participants in the White infant condition recalled the infant's race or name, but of those in the Black infant condition, one reported remembering the infant's race and four others mentioned his racially stereotypic name. Only one of these five participants read that the family was involved with CPS.

Of the participants in the CPS involved condition, 57% ( $n = 25$ ) made mention of CPS on the recall task. The likelihood of doing so did not differ significantly as a function of the infant's race, however (60% in the White infant condition as compared to 54% in the Black infant condition),  $\chi^2(1, 44) = .15$ ,  $p = .70$ ,  $\phi = .06$ .

A MANOVA was conducted to examine main and interactive effects of infant race and CPS involvement on the proportion of incriminating abuse-related and exonerating infection-related details that participants recalled, as these variables were significantly correlated,  $r(108) = -.29$ ,  $p = .003$ . Again, there were no significant multivariate effects, all  $F_s(2, 103) \leq 1.42$ ,  $p_s \geq .25$ , partial  $\eta^2_s \leq .03$ .

We also investigated whether participants fabricated details that were consistent with abuse, which 12% ( $n = 13$ ) did (3 to 4 participants in each of the four experimental conditions). An ANOVA tested whether the race or CPS manipulations affected the proportion of abuse-related information recalled when accounting for participants' fabrications. The analysis revealed no main effects of infant race or CPS involvement, all  $F_s(1, 104) \leq .55$ ,  $p_s \geq .46$ , partial  $\eta^2_s \leq .005$ . However, the infant race by CPS involvement interaction did reach significance,  $F(1, 104) = 10.21$ ,  $p = .002$ , partial  $\eta^2 = .09$ . Simple effects analyses showed that, when there was no mention of CPS involvement, participants unexpectedly mentioned marginally fewer actual and fabricated abuse-related details when the infant was depicted as Black rather than White,  $F(1, 104) = 3.69$ ,  $p = .06$ , partial  $\eta^2 = .03$ . However, when participants read that CPS was involved, as predicted, participants mentioned significantly more actual and fabricated abuse-related details when the infant was portrayed as Black versus White,  $F(1, 104) = 6.49$ ,  $p = .01$ , partial  $\eta^2 = .06$ .

### Evidence Importance

On average, participants rated the infant's race as unimportant to their diagnostic decision-making ( $M = -1.00$ ,  $SD = 1.09$ ). An ANOVA showed that, although the perceived importance of the infant's race did not vary depending on whether the infant was Black or White,  $F(1, 104) = .59$ ,  $p = .44$ , partial  $\eta^2 = .01$ , it was rated as significantly more important when the family was not involved with CPS as compared to when it was,  $F(1, 104) = 6.13$ ,  $p = .02$ , partial  $\eta^2 = .06$ . This effect was not significantly moderated by infant race,  $F(1, 104) = 2.59$ ,  $p = .11$ , partial  $\eta^2 = .02$ .

In contrast, overall, participants indicated that the family's open social work case was important to their ability to reach a diagnosis ( $M = 1.16$ ,  $SD = .89$ ). A  $t$ -test showed, however, that the perceived importance of this evidence did not depend on the race of the infant,  $t(42) = -.62$ ,  $p = .54$ , Cohen's  $d = .19$ .

We used a MANOVA to test effects on evidence importance ratings in light of the significant correlation between ratings for the incriminating abuse-related details regarding the parents' behavior and the exonerating infection-related details,  $r(108) = .24$ ,  $p = .01$ . There was no multivariate main effect of CPS involvement, nor was there a significant multivariate infant race by CPS involvement interaction effect, all  $F$ s ( $2, 103$ )  $\leq 1.49$ ,  $ps \geq .23$ , partial  $\eta^2$ s  $\leq .03$ . However, results showed a marginally significant multivariate main effect of infant race,  $F(2, 103) = 2.35$ ,  $p = .10$ , Wilk's  $\lambda = .96$ , partial  $\eta^2 = .04$ . The univariate tests revealed that, although there was no statistical difference in the perceived importance of the infection-related evidence as a function of infant race,  $F(1, 104) = .05$ ,  $p = .83$ , partial  $\eta^2 < .001$ , participants rated the parents' behavior as significantly more important when the infant was Black versus White,  $F(1, 104) = 4.68$ ,  $p = .03$ , partial  $\eta^2 = .04$ .

### Forced-Choice Diagnosis

Finally, when forced to choose between two options, 74% of participants suspected the infant's condition was caused by trauma secondary to abuse rather than septic shock. This rate did not vary significantly as a function of the infant's race, whether CPS was involved, or the interaction of those variables, all  $b$ s  $\leq |.08|$ ,  $z$ s  $= |.09|$ ,  $ps \geq .93$ . Participants' confidence in their diagnosis also was not significantly affected by the experimental manipulations, all  $F$ s ( $1, 104$ )  $\leq 1.87$ ,  $ps \geq .17$ , partial  $\eta^2$ s  $\leq .02$ .

## VIII Discussion

We predicted that emergency medical professionals would be more likely to conclude that an infant had been abused when he was depicted as Black rather than White. This hypothesis was not supported. Specifically, our analyses revealed no evidence of differential medical response to our experimental manipulation of the infant's race when participants spontaneously generated a diagnosis for the infant, when they ranked the likely causes of his symptoms, or when they were forced to choose between an abuse-related or infection-related diagnosis. Moreover, the infant's race did not affect the extent to which the stereotype linking race and abuse was activated for participants or participants' likelihood of ordering tests that would be consistent with the hypothesis that the infant had been abused.

Even so, our study showed that emergency medical professionals reported being significantly more likely to consider the parents' behavior when reaching a diagnosis for a Black versus White infant. This is notable as it provides empirical evidence that race affects the way families are evaluated in the medical context, with Black parents receiving greater scrutiny and consideration relative to their White counterparts, even when all other facts are held constant. This is in line with studies suggesting that medical professionals are more likely to look for evidence of abuse in cases involving Black rather than White children (Lane et al., 2002), even when the children have the exact same symptoms (Zellman, 1992), and even when suspicion of abuse may be unfounded (Hymel et al., 2018).

Of note, although ratings of the perceived importance of the father's and mother's behavior were analyzed together due to their being strongly correlated, that correlation was unexpected, as the materials were designed to implicate that the father may have abused the infant, not the mother. It is consistent, however, with research showing that when fathers abuse their children, mothers are perceived as responsible for the abuse, even when they are unaware of the abuse and do not condone it (Ford et al., 2001; Kalichman, 1992). In some situations, mothers are even seen as more responsible for stopping abuse than the fathers who are perpetrating it (Kalichman, 1992). This appears to be especially true for Black families, as our results showed that the perceived importance of the father's and mother's behavior were more strongly associated when the infant was Black than White ( $r_s = .65$  versus  $.56$ ,  $p_s < .001$ ). These findings are logical when considered in the historical evolution of perceptions of racial identities, as Black and White women have been viewed through separate lenses consistently over time and, consequently, held to different standards (see, e.g., Dow, 2015; Roberts, 2014). As specifically related to abuse, Black women are simultaneously perceived as less empathetic victims and more responsible for its occurrence (Donovan & Williams, 2002; Esqueda & Harrison, 2005; Willis et al., 1986). Such judgments may extend to Black mothers, who may be seen as more responsible than White mothers for the abuse of their children even when they did not perpetrate the abuse, as seen in the present research.

We also found that information about the infant's family having an open case with CPS had no effects on emergency medical professionals' diagnostic decision-making, despite having other influences on the way they reacted to the case. Past theory and research led us to competing hypotheses about whether CPS involvement would reduce or magnify the impact of the infant's race on participants' information-processing (see, e.g., Kunda, 1990; Nouman & Alfandari, 2020). Our findings do little to settle the debate. On the one hand, the CPS case was perceived as important to participants' ability to reach a diagnosis regardless of the infant's race. Moreover, participants rated the infant's race as a significantly more important piece of evidence when no mention of CPS was made than when materials referred to the family's open CPS case, regardless of whether the infant was portrayed as Black or White. This is consistent with theory and research suggesting that the more ambiguous the situation, the more likely people are to rely on heuristic-decision making to help them make sense of the world (see, e.g., Duncan, 1976). Our results support the idea that CPS involvement may reduce ambiguity about the causes of the infant's condition and lessen medical professionals' reliance on the race of the patient in their decision-making.

Yet, this stands in contrast with our other findings showing that CPS involvement interacted with infant race to affect the number of actual and fabricated details suggesting that the infant had been abused that emergency medical professionals recalled. Specifically, when CPS

was not involved, participants unexpectedly recalled a lower proportion of actual and fabricated abuse-related details for a Black than White infant. When participants read that the family had an open CPS case, however, the pattern reversed in a way that was consistent with the race-abuse stereotype: they recalled a higher proportion of actual and fabricated abuse-related information for a Black versus White infant. These results are more consistent with prior work finding that expectations about a case formed from extraneous information can lead to confirmation bias and corruption of judgments in the domain of forensic science (for review, see Kassin et al., 2013). In our study, emergency medical professionals who learned that the infant patient came from an abusive family environment were more likely than others to not only attend to evidence that was consistent with the hypothesis that the infant's symptoms were caused by abuse, but also to misperceive and manufacture evidence in line with that hypothesis. In fact, this pattern did not emerge when considering recall for only actual abuse-related details, nor when considering recall for infection-related details. This is deeply concerning as false or misleading forensic evidence contributed to all of the wrongful convictions involving allegations of shaken baby syndrome reported to date by the National Registry of Exonerations (2020).

Future research will need to replicate our findings and discern whether contextual cues such as CPS involvement in fact mitigate or exacerbate racial stereotyping. We consider a few points of which such work must be mindful. First, how can we resolve the contradiction between (a) participants' self-reports of being uninfluenced by the infant's race on average and especially when the family was involved with CPS and (b) the actual differences found in the importance attributed to Black versus White parents' behavior and recall of abuse-related details (both true and false) to the detriment of the Black family who had an open CPS case? One possibility is that participants may simply have been reluctant to recognize or honestly report that they respond to children Black and White families differently for fear of behaving or being perceived as a racist (see Sommers & Ellsworth, 2001). In support, the Green et al. (2007) study we previously described showed that the negative association between physicians' implicit racial bias and racially disparate treatment of patients emerged only when the physicians were unaware that the study was focused on understanding racial health disparities. When physicians inferred this focus, however, higher levels of implicit bias were instead correlated with increased treatment recommendations for Black patients, indicating that physicians corrected for their bias in their decision-making. To combat the potential for this social desirability bias in our research, we attempted to mask the study's purpose by subtly implying the infant's race through names and images, as previous studies have confirmed that using stereotypically Black and White names is sufficient to successfully manipulate race categorization without stating race outright (Glaser et al., 2015; Holbrook et al., 2016). However, only participants who perceived the infant's race as intended were retained in analyses, and it remains possible that any notice of race may activate motivation to control biased responding. Further, we developed a word-stem completion task that we hoped would be sensitive to participants' implicitly held stereotypes about race and abuse, even in the event that they were unable or unwilling to express those stereotypes explicitly (see Fisher, 1993). However, even though some of our findings were in line with the race-abuse stereotype, we did not find any difference in stereotype activation as a function of infant race. Future research should aim to determine whether our word-stem completion task was in fact a valid measure of this construct, and if not, more creative work will be needed to address this challenge.



A second issue that will need to be examined in future work is that none of the effects of infant race or CPS involvement on information-processing actually translated into biased decision-making. This is encouraging as it suggests that medical professionals may not believe that suspicion of abuse based on these factors—either individually or in tandem—should justifiably impact their decision-making. As racial disparities have become a topic of concern in the medical community, it may be the case that emergency medical practitioners in our study did not rely on racial stereotypes to reach a diagnosis because they are already aware of and check their biases. In support, studies have shown that the majority of physicians are aware that racial biases can impact their interactions with patients and treatment decisions below the level of conscious awareness (Green et al., 2007; Tsai & Michelson, 2017). Our findings suggest that emergency medical professionals may be self-aware enough to of this possibility to ensure that even when non-medical contextual factors affect their perceptions and information-processing, they do not impair their ability to reach an unbiased diagnosis. Future research might explore the strategies that doctors and other practitioners employ to avoid racial bias and remain focused only on relevant factors that reliably reduce uncertainty in cases in which abuse is a possible cause of their child patient’s symptoms.

### **Methodological Strengths and Limitations**

Like all studies, the present research has a number of methodological strengths and limitations that should be taken into account while interpreting the results. To begin, our study was ecologically valid in many regards. Our participants were actual emergency medical professionals, and the case summary that they reviewed was based on an actual wrongful conviction case involving a misdiagnosis of child abuse (see *People v. Thomas*, 2014). We also used images of hospitalized infants and an ambulance report as stimuli to increase the realism of the study relative to others that used only written materials (e.g., Lane et al., 2002; Zellman, 1992).

Still, caution is warranted in generalizing from our results to actual cases. Participants completed the study at their convenience under conditions that do not mirror the real-world environment in which they would actually be treating patients. That is, our study lacked the urgency, competing demands on attention, and other stressors that may accompany diagnostic decision-making as it occurs in an emergency department (see Munro, 2019). As a result, our study may not have taxed participants’ cognitive resources to a representative degree, and they may have had more opportunity to engage in systematic rather than heuristic, stereotype-based decision-making (see Chaiken, 1980; Lockhart & Satya-Murti, 2017; Teal et al., 2012). Therefore, our null findings do not necessarily mean that medical decision-making is not influenced by the race-abuse stereotype, but rather that the design of the study did not allow the effects to become apparent. Future research should extend from the present study by using more ecologically valid methods to better understand how emergency medical professionals make decisions when real children’s lives are at stake.

Another factor that may have inhibited our ability to detect effects of infant race and CPS involvement on diagnoses is the level of ambiguity presented in the stimuli. Although we intended the case to be highly ambiguous, three out of four participants spontaneously mentioned abuse-related causes on an open-ended question asking for a preliminary diagnosis. Future research may find it fruitful to increase ambiguity by bolstering the scenario with more details that implicate an infection as the cause of the infant’s condition. Moreover, as Nouman and Alfandari (2020) noted,

certain individuals in the medical community may simply be more suspicious of or sensitive to the possibility of abuse than others due to their own professional or personal experiences. It may be the case that emergency medical professionals always consider abuse as a potential cause when evaluating infant patients, reducing the perceived ambiguity of their situations. Future studies with medical professionals from different settings or with different levels of concern over the issue may reveal differences in their likelihood of being a source of unwarranted reports of child maltreatment.

Finally, many participants were dropped due to missed manipulation checks (either because they failed to answer altogether or answered incorrectly), which, while not altogether surprising given that we never explicitly mentioned the infant's race, did result in a smaller than expected sample. Our analyses may not have been sufficiently powered to detect effects (see Barnes et al., 2019). Even so, it is unlikely a larger sample would have altered our findings as the nonsignificant differences were small, with effect sizes ranging from less than .01 to .04. Still, future research is needed to determine whether our findings replicate with larger samples.

## IX Conclusion

Our study sought to illuminate issues that should be taken into consideration in wrongful conviction cases based on unfounded allegations of child abuse. Because Black children are overrepresented in reports of suspected abuse (Hill, 2007) and three out of four cases reported by the medical community are not deemed worthy of investigation (Sedlak & Ellis, 2014), we investigated whether racial stereotyping by emergency medical professionals could contribute to disproportionality in unwarranted reports. It is now well-accepted that confirmation bias and tunnel vision can cause innocent people to be wrongfully accused and convicted (Findley & Scott, 2006), so we also analyzed these psychological phenomena in diagnostic decision-making. Overall, our findings provide mixed evidence about the role that the race-abuse stereotype (Najdowski & Bernstein, 2018) plays in this process. Specifically, we found that an infant's race and his family's involvement with CPS affected emergency medical professionals' attention to and interpretation of information, but not their ultimate diagnoses.

More work is needed to elucidate whether and when racial stereotyping influences this potential pathway to miscarriages of justice, but our findings do call for interventions that educate medical professionals about the possible ways that stereotypes may contribute to misdiagnosis of abuse. The fact that we found effects on our participants' information-processing but not decision-making is consistent with prior work suggesting that many medical practitioners are already aware of the need to ensure that bias does not contaminate their judgments (Green et al., 2007; Tsai & Michelson, 2017). In fact, bias training and other interventions designed to enhance racial sensitivity appear to be prevalent in hospitals throughout the United States (e.g., Tsai & Michelson, 2017) and evidence suggests they can be effective (e.g., Devine et al., 2012; FitzGerald et al., 2019; Zeidan et al., 2019). Our findings suggest that it might be beneficial to expand existing training to address the potential for racial bias in the context of child abuse cases. In particular, effective strategies are needed to reduce the racial disparities we found in the level of scrutiny to which medical professionals' subjected parents as well as their likelihood of going beyond the facts of the case.

It remains to be seen whether policy safeguards should also be implemented to reduce the likelihood that medical professionals' biased information-processing translates into misdiagnosis of abuse. There has been at least enough evidence of racial disparities in this outcome (e.g., Hymel et al., 2018; Zellman, 1992) to show the need for reviews within the child welfare system to better understand why it occurs, and why it has sometimes led to wrongful convictions in the criminal justice system (e.g., *People v. Thomas*, 2014). Now that we have shined a light on this problem, we hope that researchers, medical professionals, and policymakers will continue to identify the issues that contribute to it and work to develop solutions.

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## Identifying and Charging True Perpetrators in Cases of Wrongful Convictions

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*True perpetrators—those who commit crimes that others were wrongfully convicted of—are a danger to society. Left unapprehended, these individuals often continue to commit crimes that could have otherwise been avoided. Despite the risk they pose, only about half of true perpetrators in DNA exoneration cases have been identified. Further, only 50% of those who have been identified have been charged with the wrongful conviction crime(s) they committed. Previous research on wrongful convictions, prosecutorial discretion in charging decisions, and prosecutors' treatment of post-conviction innocence claims provide a starting point for investigating what factors underlie the identification and charging of true perpetrators. To explore these factors, we analyze 367 DNA exoneration cases and the consequent 149 unique, identified true perpetrators. Results revealed that prosecutorial misconduct as a contributor to the wrongful conviction decreased the odds that a true perpetrator would be identified, but the odds increased if the victim was White and the exoneree was Black compared to if both were White. Odds of identification also decreased when, compared to murder, the most severe wrongful conviction crime type was child sex abuse or sexual assault. These factors were not significantly associated with the odds of an identified true perpetrator being charged with a wrongful conviction crime. A qualitative study revealed both definitively prohibitive and potentially influential factors that could influence a prosecutor's decision not to charge an identified true perpetrator with these crimes. These findings indicate policy solutions that could hold true perpetrators of wrongful convictions crimes responsible for their actions.*

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- Appendix

## **I Identifying and Charging True Perpetrators in Cases of Wrongful Convictions**

Wrongful convictions inflict upon an innocent person one of the world's greatest injustices—being convicted for a crime they did not commit. Broadly, there are two categories of wrongful convictions in which the wrongfully convicted individual is factually innocent: “no-crime” wrongful convictions where one is convicted for a crime that never occurred, and “wrong-person” wrongful convictions where the wrong person was convicted for the crime (Acker & Redlich, 2011; Bingham et al., 2013).<sup>1</sup> To date, there have been 367 DNA exonerations in the United States as defined by the Innocence Project; that is, 367 individuals determined by DNA evidence to be factually innocent of the crime for which they were convicted (Innocence Project, 2020). Furthermore, The National Registry of Exonerations (NRE) has estimated an additional 2,247<sup>2</sup> exonerations have occurred across the United States since 1989 (The National Registry of Exonerations, n.d.-a). For each wrong-person wrongful conviction, there is at least one individual, the “true perpetrator,” who actually committed the crime for which the exoneree was wrongfully convicted. As wrong-person wrongful convictions make up approximately 60% of all known wrongful convictions cases (Norris, Bonventre, & Acker, 2018), true perpetrators have escaped culpability, at least initially, for a crime they actually committed in nearly 1,500 cases.

Although the literature regarding wrongful convictions broadly is extensive—covering a variety of factors including mistaken witness identification (e.g., Clark, 2012; Garrett, 2011), false or misleading forensic evidence (e.g., Cooper & Meterko, 2019; Garrett & Neufeld, 2009; Kassin, Dror, & Kukucka, 2013), and the aftermath of wrongful convictions (e.g., Norris, 2014; Thompson, Molina, & Levett, 2012; Westervelt & Cook, 2012)—research about true perpetrators specifically is just beginning to develop. Most research on the topic aims to estimate the number of additional crimes true perpetrators commit due to instances of wrongful conviction (Baumgartner et al., 2018; Conroy & Warden, 2011; Norris, Weintraub, et al., 2019; West & Meterko, 2016). The consensus across this line of work is that when true perpetrators escape justice, they continue to pose a significant public safety risk by committing additional serious crimes. Only recently has research started to examine factors that influence whether or not true perpetrators are identified (Weintraub, 2020), but scholars have speculated that contributors to wrongful convictions, such as false confessions, may affect the likelihood of true perpetrator identification (Norris, Weintraub, et al., 2019). Additional work is needed to understand the factors underlying the identification of true perpetrators so that more of these individuals can be identified and a more accurate estimate of the harm they cause produced.

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<sup>1</sup> There also exists a third type of wrongful conviction, which occurs when someone is factually guilty of a crime and convicted, but there are procedural errors with their case (Gould & Leo, 2010; Medwed, 2008). However, studies which discuss wrongful convictions almost exclusively focus on factually innocent wrongful convictions, as do the present studies.

<sup>2</sup> Most recent data are as of 2 February 2020.

However, just identifying true perpetrators is not enough to ensure public safety and justice; these outcomes hinge on these individuals then being charged with the crimes they committed for which someone else was wrongfully convicted. According to data provided by the Innocence Project, only half of identified true perpetrators in DNA exoneration cases have been charged with the wrongful conviction crime. It remains unknown why a full 50% of these individuals have not been charged with the wrongful conviction crime as this contradicts both the due process and crime control models of the criminal justice system (Acker, 2013; Packer, 1968). Thus, the present studies serve as an exploratory examination of what legal and extralegal factors might influence the identification and charging of a true perpetrator.

In the following sections, we discuss the importance of identifying and charging the true perpetrators of wrongful convictions offenses, hypothesize as to what factors will impact these outcomes, and empirically test the relation between the hypothesized factors and the identification (Study One) and charging (Study Two) of true perpetrators. Following these analyses, we explore individual wrongful convictions cases to identify additional definitively prohibitive and potentially influential factors related to prosecutorial discretion in charging a true perpetrator (Study Three). Finally, we discuss the policy implications of our findings and provide directions for future research.

## II Background

Since 2011, scholars have paid increasing attention to the damage true perpetrators inflict upon society, their victims, and not the least of which, the wrongfully convicted individuals. Broadly, members of the public find the possibility that the criminal justice system can punish an innocent person for another individual's crime to be concerning (Zalman, Larson, & Smith, 2012). Additionally, cognizance of wrongful convictions can damage the public's trust in the criminal justice system (Gould & Leo, 2010), and may even lead to decreased support for the death penalty (Baumgartner, DeBoef, & Boydston, 2008; Fan, Keltner, & Wyatt, 2002; Norris & Mullinix, 2019; Unnever & Cullen, 2005). As explained by Jason Carmichael & Stephanie Kent (2015), "The public's confidence in the criminal justice system is shaken as they grapple with both the public safety concern that the actual perpetrator is among them, as well as the disappointment in the system's concern with individual justice" (p.705). Recently, the issue has grown more salient to the public, as wrongful convictions are increasingly featured on the news, on streaming platforms, and in podcasts (Demos & Ricciardi, 2015; Leveritt, 2002; Stratton, 2019; Zalman, Larson, & Smith, 2012).

### Identifying True Perpetrators

The concerns held by the public about the dangers of wrongful convictions are warranted, as the vast majority of true perpetrators commit at least one crime after someone else has been wrongfully convicted for their own criminal actions (Norris, Weintraub, et al., 2019). The identification of true perpetrators is necessary to know the full negative impact of their wrongful liberty on public safety. Studies quantifying true perpetrators' crimes have been done with samples ranging from state-wide wrongful convictions (Baumgartner et al., 2018; Conroy & Warden, 2011), to national samples (Norris, Weintraub, et al., 2019; West & Meterko, 2016). Extrapolated

information about the criminal impact of true perpetrators in DNA exoneration cases to federal data on annual convictions has found that incarcerating the wrong individuals may lead to more than 41,000 additional crimes being committed each year (Norris, Weintraub, et al., 2019). Furthermore, the types of crimes that true perpetrators commit are not inconsequential. They are often serious crimes, categorized as violent or felony-level offenses (Baumgartner et al., 2018; Conroy & Warden, 2011; West & Meterko, 2016), and primarily consist of sexual assault as well as other violent crimes including armed robbery, aggravated assault, and homicide (Norris, Weintraub, et al., 2019; West & Meterko, 2016). In these cases, identifying a true perpetrator can quite literally mean the difference between life and death. One analysis found that 39 serial homicide offenders altogether committed an additional 79 homicides after the wrong individuals were convicted for their first homicide crimes (Yaksic et al., 2020). Each of these studies notes, importantly, that an accurate estimate of true perpetrators' criminality is evasive. The only way for speculations to approach the true answer is to identify more true perpetrators.

Identifying true perpetrators is not only important for community safety and trust in the criminal justice system, but also to achieving justice for those who are wrongfully convicted. In a study of wrongful convictions and "near misses"<sup>3</sup>, true perpetrator identification was the basis for an exoneration in 58% of wrongful convictions and 57% of near misses. In fact, true perpetrator identification is second only to DNA evidence as a basis for exoneration (Gould & Leo, 2015). Moreover, true perpetrator identification and DNA evidence often go hand-in-hand; DNA analysis, which is usually done in an attempt to obtain evidence of the wrongfully convicted person's innocence, can also identify a true perpetrator in the process. In cases where DNA analysis exonerates a wrongfully convicted individual, it can identify the true perpetrator either by direct match or comparison of a DNA sample from the crime scene to a suspect (Innocence Project, 2020).

Thomas Haynesworth is one example of an exoneree who had his case overturned because DNA evidence identified the true perpetrator. Haynesworth was accused and convicted of having committed multiple sexual assaults, while the true perpetrator remained free and committed more of these crimes. Twenty-five years after Haynesworth was wrongfully convicted, DNA evidence simultaneously cleared his name and matched Leon Davis, who had been apprehended by the state for the sexual assaults he had committed while Haynesworth was incarcerated. Had Davis been identified sooner, or been apprehended instead of Haynesworth, at least a dozen additional victims could have been spared from his crimes (Acker, 2013; Green & Williams, 2009).

Identifying these actual perpetrators is the first step to ensuring justice is served, but the limited extant research on the topic leaves little direction for how best to empirically examine the factors underlying their identification. In an effort to do so, we first turn to factors most often associated with cases of wrongful convictions, hypothesizing that these factors are likely to also impact true perpetrator identification due to the close relation of the subjects. Specifically, we include defining characteristics of wrongful convictions cases, such as contributors to wrongful convictions (e.g., eyewitness misidentification and prosecutorial misconduct), case demographics (e.g., the most severe crime type and high volume exoneration county), and the assistance of an innocence organization (e.g., Gould, Carrano, Leo, & Young, 2013; West & Meterko, 2016). We

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<sup>3</sup> "Near misses" were defined by the authors as "those who had charges dismissed before conviction or were acquitted on the basis of factual innocence" (Gould & Leo, 2015, p.333).

then include additional factors that are related to criminal justice outcomes more broadly, such as race (e.g., Eberhardt et al., 2006; Viglione, Hannon, & DeFina, 2011) and the advent of DNA technology (e.g., Bowman & Gould, 2020; Weintraub, 2020). We hypothesize that, given the overarching effect of these variables in the criminal justice system, they likely impact outcomes for true perpetrator identification as well.

### **Charging True Perpetrators**

Beyond just identifying who they are, charging true perpetrators with the wrongful conviction crime also contributes to maintaining public safety, and is likely important to exonerees' reentry to society after being wrongfully accused and held responsible for crimes they did not commit. When an innocent individual is charged and convicted, they lose not only their livelihood but their reputation due to beliefs by others that they committed a heinous crime. These beliefs often remain intact even if the exoneree's convictions are overturned or expunged from their record, as many continue to face prejudice in their daily lives and experience traumatic psychological effects from their wrongful conviction (Clow, Blandisi, Ricciardelli, & Schuller, 2011; Westervelt & Cook, 2008). Moreover, most exonerees never receive apologies or even acknowledgments of fault from those who had a hand in their wrongful conviction, although receiving one could be beneficial to their psychological well-being and reintegration (Penzell, 2007). Larry Fuller, an exoneree who did receive an apology from an Assistant District Attorney ("DNA Clears Man in Rape, Judge Rules," 2006), told the Innocence Project in an interview that an apology provides an "acknowledgment that they cannot deny you" and that with the apology, "the stigma [was] gone" (Penzell, 2007, pp. 145-146). Thus, charging the true perpetrators for their crimes could allow exonerees to face less public ridicule and gain some satisfaction that the state acknowledged and attempted to right its wrong.

Given these potential benefits, it is unclear why half of identified true perpetrators are not charged for the crimes they committed and for which someone else was held responsible. The decision to charge a true perpetrator may differ from a prosecutor's decision to charge other offenders, given the additional circumstances a prosecutor must consider when undertaking an exoneration case. These circumstances can include: the passage of a significant amount of time since the crime was committed and investigation was conducted (Gould & Leo, 2015; Meterko, 2016); retraumatizing victim(s) who believe the case to have been resolved, and may have to cooperate with an entirely new investigation (Brody & Acker, 2015; Irazola et al., 2013); an exonerated party that the prosecutor may not believe to be factually innocent (Westervelt & Cook, 2008), and more. Still, the fundamental question for prosecutors remains the same: whether or not to bring charges against an offender. Therefore, we first explore research regarding prosecutorial discretion in non-exoneration cases, examining how this decision-making process may change for cases of true perpetrators.

Prosecutors have complete discretion in deciding whether or not to charge anyone accused of a crime (Albonetti, 1987; Jacoby, 1980). The decision is complex and based on several factors (Bowers, 2010; Gershman, 2010), requiring prosecutors to weigh a number of rationales when considering not charging an accused individual (Goldstein, 1981; Greenawalt, 1987; Miller, 1969). Altogether, these considerations can be condensed into three distinct groups, as laid out by Josh Bowers (2010): legal, equitable, and administrative.

Legal considerations encompass whether a prosecutor has enough evidence to press charges against an accused person (Bowers, 2010; Goldstein, 1981; Miller, 1969; *Wayte v. United States*, 1985). However, these considerations are likely slightly different when deciding whether or not to charge a true perpetrator. Although a prosecutor may decline to charge a true perpetrator if they deem the available evidence insufficient to point to legal guilt, or if they believe the evidence does not adequately exonerate the wrongfully convicted individual and point to the true perpetrator, it is unlikely that there is an actual lack of available evidence. The fact-finding process to overturn a wrongful conviction is long and arduous, with research indicating that the exoneration process can be as long as 21.5 years, on average, from conviction to release (Meterko, 2016).

The time it takes to complete this lengthy process is partially due to the fact that the requirements to reverse a conviction can be quite burdensome.<sup>4</sup> Although they are often held to be synonymous, one's factual innocence does not necessarily lead to an exoneration (Leo, 2017). Instead, significant evidence and proof must be gathered and submitted to the court via a specific process to secure a wrongfully convicted individual's release. For example, to vacate a judgment based on new evidence in New York, the Criminal Procedure Law requires that:

New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence (N.Y. CPL § 440.10).

With such high standards required to exonerate an individual, there should be no dearth of evidence to at least begin compiling a case against the true perpetrator. Thus, it is likely factors other than legal considerations that account for why so many identified true perpetrators are not charged for their crimes.

The second group of considerations described by Josh Bowers (2010) are equitable factors. Prosecutors may weigh whether it is the just decision to charge a perpetrator depending on how they judge the character of the offender, the severity of the offense, or if doing so serves the best interests of the public (Goldstein, 1981; Greenawalt, 1987; Miller, 1969). In exoneration cases, a prosecutor choosing not to charge the true perpetrator may be a manifestation of their judgments that a prosecution is not necessary for any number of reasons, such as if the perpetrator is already incarcerated for another crime, or if they believe that the exoneree is still factually guilty despite being exonerated.

Lastly, practical or administrative considerations, such as whether there are enough resources to prosecute the case, can cause a prosecutor to decide against pressing charges (Bowers, 2010; Goldstein, 1981). Though adequate resources are necessary for any prosecution, those involving true perpetrators may actually require fewer resources than other cases because of the evidential burden required to exonerate the wrongfully convicted, as described above. Still,

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<sup>4</sup> For a review of other factors that contribute to an exoneree's time to exoneration see Jon Gould & Richard Leo (2015, pp.356-360).

prosecutors may find it difficult to justify using resources to prosecute a true perpetrator for crimes someone else has already been previously convicted of. Overall, even though the decision to prosecute a true perpetrator is still within a prosecutor's discretion, the qualitative difference between cases borne out of wrongful convictions and those that are not makes it unlikely that these legal, equitable, and administrative considerations completely account for outcomes regarding the decision to charge true perpetrators. In addition, the decision is likely to be also related to the previously discussed criminal justice and wrongful conviction case factors, as well as how prosecutors process post-conviction innocence claims more broadly.

Prior research indicates that prosecutors are largely uncooperative with post-conviction innocence claims by simply failing to help overturn wrongful convictions or going so far as to stand in the way of exoneration efforts (Gould & Leo, 2015; Webster, 2019). This unwillingness to cooperate may be especially likely to occur if the prosecutor still believes the wrongfully convicted individual is guilty (Zacharias, 2005). It may also stem from an interest in finality, or keeping the original decisions made by the criminal justice system intact, and therefore making prosecutors hesitant to charge another person for a crime that has already been tried in the system (Ginsburg & Hunt, 2009; Kreimer & Rudovsky, 2002; Medwed, 2004).

In general, this resistant behavior is likely the result of the psychological and structural factors at play in the criminal justice system that disincentivize prosecutors from cooperating with post-conviction claims of innocence (Medwed, 2004; O'Brien, 2009; Webster, 2019). New information that contradicts one's own sense of a situation presents a risk in that it challenges what is thought to be true, causing one to hold on to their original beliefs more strongly as a result (Lord, Ross, & Lepper, 1979). In the present context, this tendency, known as confirmation bias, may cause prosecutors to discard new evidence of innocence in favor of their previously held beliefs in the innocent person's guilt (Burke, 2006; Findley & Scott, 2006; Jonakait, 1987; Levenson, 2016). Their beliefs may be especially strong if years have passed since the exoneree was found guilty of the crime (Findley, 2008; Jonakait, 1987). Moreover, it is likely psychologically trying for a prosecutor, who is intended to act as a minister of justice, to have to revisit a case in which the result may indicate that they, or other members of their office, were involved in convicting an innocent person (Goldberg & Siegel, 2002; Medwed, 2004; Schoenfeld, 2005). With the expectation that a prosecutor embodies a role in which they advocate for justice on behalf of the people (*Berger v. United States*, 1935), an overturned conviction based on the factual innocence of the wrongfully convicted party may cause members of the public to lose faith in their office (Green, 2019). Furthermore, if prosecutors agree to consider post-conviction claims of innocence, they risk offending other members of their "courtroom workgroup,"<sup>5</sup> with whom they must work closely and on a continuous basis (Webster, 2019). Cooperating with a post-conviction claim of innocence, or acknowledging it by charging an alternative perpetrator after an exoneration, may indicate to other members of the workgroup that they, too, participated in having an innocent person convicted of a crime they did not commit, potentially complicating future working relationships (Medwed, 2004; Zacharias, 2005).

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<sup>5</sup> Members of a courtroom workgroup can include police, forensic analysts, informants, defense attorneys, judges and any other criminal justice actor who shares common goals and works with the prosecutor regularly (Eisenstein & Jacob, 1977; Webster, 2019).



Due to all of the above explained reasons, we posit that prosecutions of true perpetrators are, in some ways, fundamentally different from prosecutions of other offenders. Thus, we hypothesize that factors related to wrongful convictions in general are most likely to affect whether or not a true perpetrator is charged, just as we believe they will impact identifying true perpetrators. However, we still anticipate that the legal, equitable, and administrative considerations that impact prosecutors' decisions to charge other offenders might appear in their rationales not to charge a true perpetrator with the wrongful conviction offense(s). We test these hypotheses and those regarding identifying true perpetrators in three studies, detailed below.

### **III Current Studies**

Despite the importance of identifying and charging true perpetrators, the factors that influence these outcomes largely remain unknown. Therefore, the present works seek to determine if and how different factors impact whether or not a true perpetrator is identified, and whether or not an identified true perpetrator is charged with the wrongful conviction crime. Specifically, we aim to answer the following research questions:

1. What case factors affect whether or not a true perpetrator is identified?
2. For true perpetrators who have been identified, what case factors affect whether or not they are charged with the wrongful conviction offense(s)?
3. For true perpetrators who have been identified, what additional prohibitive and discretionary factors affect whether or not they are charged with the wrongful conviction offense(s)?

To answer these questions, we examined 367 wrong-person DNA exoneration cases and 161 unique true perpetrators. A full list of cases and true perpetrators, by criminal event, can be found in the Appendix.

### **IV Study One: Identifying True Perpetrators**

#### **A. Data and Methods**

Data consisted of 367 wrong-person wrongful conviction cases. For the purposes of this study, a case is defined as a single individual who was exonerated for a crime they did not commit through DNA evidence.<sup>6</sup> The data were provided by two leading innocence organizations; specifically, the 367 cases and some accompanying information were compiled by the Innocence Project, and matched with the public dataset from the National Registry of Exonerations<sup>7</sup> website to include additional details for each case. The following factors, described below, serve as the independent variables for Study One.

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<sup>6</sup> One criminal event may result in multiple cases. For example, the 367 DNA exoneration cases in our sample include each member of the Exonerated Five as an individual case, although they were all convicted of the same crime.

<sup>7</sup> Most recent data as of 2 February 2020.

### Independent Variables

**Contributors to Wrongful Convictions.** The contributors to wrongful convictions used for this study include: eyewitness misidentification, false confessions, perjury or falsified accusations, false or misleading forensic evidence, and inadequate legal defense, as defined and coded by the NRE (for definitions, see “Glossary,” n.d.-b). Each of the contributors was classified as being either present or absent in each case.<sup>8</sup>

**Prosecutorial Misconduct.**<sup>9</sup> Following previous work (Weintraub, 2020), summaries from the Innocence Project and NRE websites were qualitatively coded for evidence of actual or alleged prosecutorial misconduct. As systemic issues often cause the identification of prosecutorial misconduct at trial to be incomplete (Davis, 2009; West, 2010; West & Meterko, 2015), data were collected in a variety of ways to ensure accuracy of the code. Specifically, cases were coded as containing prosecutorial misconduct if summaries mentioned information about a prosecutor failing to turn over material or impeachment evidence to the defense (*Brady/Napue* violations) or explicitly stated that the conviction was vacated based on prosecutorial misconduct (*Brady v. Maryland*, 1963; *Napue v. Illinois*, 1959). Afterwards, independent research was conducted utilizing: additional innocence databases (Gordon, 2003; Forejustice, 2018; Innocence Project, 2020; The Center for Public Integrity, 2003); academic sources (West & Meterko, 2015); data sources for academic articles (West, 2010); and news stories of exonerations, all of which were qualitatively analyzed for similar constructs (e.g., *Brady* violations), and coded accordingly.

**Most Severe Crime Type.** Most severe crime type for a wrongful convictions case was coded using “worst crime display” as provided by the NRE public dataset.

**High Volume Exoneration Counties.** To control for counties that are over-represented in cases of wrongful convictions involving DNA exonerations (The National Registry of Exonerations, 2019), we included a variable to flag high volume exoneration counties. Following previous work (Weintraub, 2020), any county which had 6 or more cases in the sample was grouped into a category of high-volume wrongful conviction cases ( $n = 100$ ). These counties included: Cook, IL ( $n = 39$ ); Dallas, TX ( $n = 26$ ); Harris, TX ( $n = 9$ ); Jefferson, LA ( $n = 7$ ); New York, NY ( $n = 7$ ); Cuyahoga, OH ( $n = 6$ ); and Gage, NE ( $n = 6$ ).

**Assistance of an Innocence Organization.** As innocence organizations have additional tools and resources that are not available to lay people trying to prove their own innocence, we accounted for whether or not an innocence organization assisted in a wrongful conviction case. Assistance of an innocence organization was coded and defined by the NRE (see “Glossary,” n.d.-b).

**Crime Occurrence Before or After 1989.** Convictions that resulted in DNA-based exonerations and occurred before the advent of modern DNA science are likely qualitatively different than those that occurred after. The use of DNA technology in the context of U.S. exonerations did not begin until approximately 1989 (Gross & Shaffer, 2012), so cases were

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<sup>8</sup> 213 (58%) cases had more than one contributor.

<sup>9</sup> We coded prosecutorial misconduct as a substitute for the “official misconduct” variable provided by the NRE. Correspondence with a researcher at the NRE revealed that cases may be coded as both official misconduct and “false or misleading forensic evidence” for the same actions (Maurice Possley, personal communication, 13 October 2017). Thus, the substitution was made to avoid multicollinearity between these two variables.

broken into two groups and coded dichotomously based on the year of conviction provided the Innocence Project: convicted before 1989 and convicted in or after 1989.

**Race.** The pervasive cultural stereotypes in the U.S. linking Black individuals and criminality (Blair, Judd & Fallman, 2004; Devine, 1989), as well as the fact that Black individuals are more easily dehumanized and are seen as more culpable for their actions than their White counterparts (Goff et al., 2014), have contributed to racially disparate outcomes in the criminal justice system. Specifically, Black offenders receive harsher and longer sentences, and are more likely to be sentenced to death in capital cases, than White offenders (Eberhardt et al., 2006; Viglione, Hannon, & DeFina, 2011). This pattern is further exacerbated when the victim of a Black offender is White (Eberhardt et al., 2006). To determine if there is a similar effect of race on outcomes for true perpetrators, the race of the wrongfully convicted individual and victim were coded as: (1) a Black exoneree and victim; (2) a White exoneree and victim; (3) a Black exoneree and White victim; or (4) a White exoneree and Black victim.<sup>10</sup>

### Dependent Variable

**True Perpetrator Identification.** Cases were defined as having an identified true perpetrator in one of two ways based on data provided by the Innocence Project. First, if the true perpetrator was discovered via a “database hit,” in which the DNA profile from the crime scene or victim matched to a previously unknown suspect in the database). Second, if the true perpetrator who committed the crime was identified by a “direct comparison,” meaning the DNA profile was compared against that of an alternate suspect instead of a database. A dichotomous variable was created to indicate whether or not a true perpetrator was identified in one of these manners (see Table 1).

**Table 1.** Frequencies of Independent Variables by True Perpetrator Identification

		No True Perpetrator Identified		True Perpetrator Identified		Total	
		<i>n</i>	%	<i>n</i>	%	<i>n</i>	%
False Confession	No	156	86%	124	67%	280	76%
	Yes	26	14%	61	33%	87	24%
Mistaken Witness Identification	No	35	19%	88	48%	123	34%
	Yes	147	81%	97	52%	244	67%
Perjury/False Accusation	No	127	70%	91	49%	218	59%
	Yes	55	30%	94	51%	149	41%

<sup>10</sup> Some research (e.g., Platz & Hosch, 1988; Teitelbaum & Geiselman, 1997) has examined how those of Hispanic/Latinx ethnicity compare to Black individuals regarding criminality and outcomes in the criminal justice system. However, due to the limited research on the topic and very few cases ( $n = 26$ ) in our dataset, these cases were not coded for race in the analysis.

False/Misleading Forensic Evidence	No	100	55%	110	60%	210	57%
	Yes	82	45%	75	41%	157	43%
Inadequate Legal Defense	No	164	90%	167	90%	331	90%
	Yes	18	10%	18	10%	36	10%
Prosecutorial Misconduct <sup>a</sup>	No	114	71%	139	77%	253	74%
	Yes	47	29%	41	23%	88	26%
Most Severe Crime Type	Accessory to Murder	0	0%	1	1%	1	<1%
	Attempted Murder	2	1%	1	1%	3	1%
	Attempted Violent Crime	0	0%	1	1%	1	<1%
	Burglary/Unlawful Entry	0	0%	1	1%	1	<1%
	Child Sex Abuse	18	10%	8	4%	26	7%
	Kidnapping	1	1%	3	2%	4	1%
	Murder	41	23%	93	50%	134	37%
	Robbery	3	2%	7	4%	10	3%
	Sexual Assault	117	64%	69	37%	186	51%
High Volume Exoneration Counties	Weapon Possession or Sale	0	0%	1	1%	1	<1%
	Low Volume	141	78%	126	68%	267	73%
Assistance of an Innocence Organization	High Volume	41	23%	59	32%	100	27%
	No	96	53%	96	52%	192	52%
Crime Occurrence Before or After 1989	Yes	86	47%	89	48%	175	48%
	Before 1989	126	69%	101	55%	227	62%
Race <sup>b</sup>	After 1989	56	31%	84	45%	140	38%
	White Exoneree & Victim	48	37%	40	27%	88	32%
	Black Exoneree & Victim	32	25%	34	23%	66	24%
	White Exoneree & Black Victim	1	1%	2	1%	3	1%

Black Exoneree & White Victim	48	37%	70	48%	118	43%
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<sup>a</sup> Twenty-six cases were not coded for prosecutorial misconduct because there was a possibility that prosecutors committed misconduct, but the circumstances of the case made it unclear (e.g., a state forensic analyst misrepresented evidence that may or may not have been known to the prosecution).

<sup>b</sup> Ninety-two cases were not coded for race because either the race of the victim or exoneree could not be determined, there were multiple victims of different races, or the exoneree or victim were Hispanic/Latinx.

## B. Results

A logistic regression analysis specified the relations between the described independent variables and the odds of identifying ( $n = 185$ ) versus not identifying ( $n = 182$ ) the true perpetrator (see Table 2). The model was statistically significant ( $\chi^2(13) = 53.98, p < .001$ , Nagelkerke  $R^2 = .27$ ), supporting our hypothesis that these factors impact the odds of identifying a true perpetrator. Specifically, prosecutorial misconduct was significantly and negatively associated with the odds of identifying a true perpetrator. The odds of a true perpetrator being identified were more than twice as likely for cases in which prosecutorial misconduct was not a contributing factor to the wrongful conviction than for cases in which it was ( $B = -0.71, p = .04, OR = 0.49$ ).

Also significantly associated with the odds of identifying a true perpetrator was most severe crime type ( $\chi^2(2) = 10.12, p = .01$ ). Specifically, the odds of identifying a true perpetrator were almost five times greater when the most severe crime type was murder than when the most severe crime type was child sexual abuse ( $B = -1.56, p = .03, OR = 0.21$ ). Similarly, the odds of identification were nearly four times greater when the most severe crime type the exoneree was convicted of was murder compared to sexual assault ( $B = -1.35, p < .01, OR = 0.26$ ).

Lastly, race of the exoneree and victim was significantly associated with the odds of identifying a true perpetrator ( $\chi^2(2) = 12.57, p < .01$ ). Specifically, compared to cases in which the exoneree and victim were both White, the odds of a true perpetrator being identified were 244% greater when the exoneree was Black and the victim was White ( $B = 1.24, p < .01, OR = 3.44$ ). There was no significant difference in the odds of identifying the true perpetrator if the exoneree and victim were both Black ( $B = 0.16, p = .69, OR = 1.18$ ) as compared to when the exoneree and victim were both White. Contrary to our hypothesis, none of the other contributors to wrongful convictions, nor high volume exoneration county, assistance of an innocence organization, or crime occurrence before or after 1989 were significantly associated with the odds of identifying a true perpetrator (all  $ps \geq .16$ ).

**Table 2.** Logistic Regression Analysis of True Perpetrator Identification

	<i>B</i>	<i>SE(B)</i>	<i>Wald</i>	<i>p</i>	<i>OR</i>	<i>95% C.I. for OR</i>	
						<i>Lower</i>	<i>Upper</i>
Constant	0.66	0.54	1.52	0.22	1.93		
False Confession	0.32	0.42	0.58	0.45	1.38	0.60	3.16
Mistake Witness Identification	-0.49	0.48	1.06	0.30	0.61	0.24	1.55
False/Misleading Forensic Evidence	0.18	0.39	0.21	0.65	1.19	0.56	2.53
Perjury/False Accusation	0.48	0.34	2.01	0.16	1.61	0.83	3.11
Inadequate Legal Defense	-0.42	0.52	0.66	0.42	0.66	0.24	1.82
High Volume Exoneration County	0.29	0.35	0.68	0.41	1.33	0.68	2.62
Assistance of an Innocence Organization	-0.24	0.31	0.62	0.43	0.79	0.43	1.43
Crime Before/After 1989	0.43	0.34	1.60	0.21	1.53	0.79	2.98
Prosecutorial Misconduct	-0.71*	0.36	3.89	0.04	0.49	0.24	0.99
Most Severe Crime Type <sup>a</sup>							
Murder (reference category)			10.12	0.01			
Child Sex Abuse	-1.56*	0.72	4.72	0.03	0.21	0.05	0.86
Sexual Assault	-1.35*	0.44	9.62	< 0.01	0.26	0.11	0.61
Race <sup>b</sup> White Exoneree & White Victim (reference category)			12.57	< 0.01			
Black Exoneree & Black Victim	0.16	0.42	0.16	0.69	1.18	0.52	2.66
Black Exoneree & White Victim	1.24*	0.38	10.76	< 0.01	3.44	1.64	7.19
Summary Statistics							Nagelkerke <i>R</i> <sup>2</sup>
				$\chi^2$	df	<i>p</i>	
				53.98	13	< .001	0.27

Accessory to Murder, Attempted Murder, Attempted Violent Crime, Burglary/Unlawful Entry, Kidnapping, Robbery, and Weapon Possession or Sale were dropped from the model as there were either 0 or 1 case(s) in one of the outcomes.

b White exoneree and Black victim was dropped from the model as there was only one case in one of the outcomes.

\* $p < .05$

### C. Discussion

We found that prosecutorial misconduct, most severe crime type, and the race of the defendant and the victim all significantly impacted the probability of identifying a true perpetrator. In line with prior research (Weintraub, 2020), prosecutorial misconduct was found to be negatively associated with the odds of identifying a true perpetrator. As previously discussed, prosecutors historically do not cooperate with the majority of post-conviction innocence claims (Webster, 2019), especially in high-stakes cases such as those with prosecutorial misconduct (Bowman & Gould, 2020). Therefore, prosecutors may be more inclined to object to post-conviction petitions for DNA testing—the mechanism which would identify a true perpetrator in these DNA exoneration cases—if prosecutorial misconduct was present at trial. And, because courts often put a great deal of emphasis on the prosecutor's recommendation in post-conviction DNA petitions (Ginsburg & Hunt, 2009; Green & Yaroshefsky, 2009; Kreimer & Rudovsky, 2002; Medwed, 2004), their opposition could prohibit the identification of a true perpetrator.

Additionally, psychological factors that originally caused a prosecutor to commit misconduct at trial can carry over beyond the trial stage and result in an unwillingness to help identify a true perpetrator post-conviction (Jonakait, 1987; O'Brien, 2009; Yaroshefsky, 2013). A prosecutor's belief in an innocent person's guilt at trial, whether founded or not, can cause them to pursue an innocent individual to the point of committing acts of misconduct (Schoenfeld, 2005). After having gone to such lengths to have the wrongfully convicted person found guilty, it is likely more difficult to combat this belief even when faced with evidence to the contrary post-conviction. This tunnel vision on the wrongfully convicted person can translate into a resistance or refusal to cooperate with the necessary steps to identify the true perpetrator, like the post-conviction DNA petitions mentioned above (Jonakait, 1987; O'Brien, 2009). Moreover, concerns about losing the public's confidence can be amplified if in addition to the wrongful conviction, a prosecutor's act of misconduct directly contributed to that wrongful conviction (Kreimer & Rudovsky, 2002; Orenstein, 2011).

Compared to a case having the most severe crime type of murder, the true perpetrator was less likely to be identified if the most severe crime type was child sex abuse or sexual assault. One reason for this may be the inclusion of a vulnerable victim in child sex abuse and sexual assault cases that is not present in murder cases. Most experts agree that the trauma and stigma surrounding sexual abuse and assaults not only cause significant underreporting by victims, but also a fear of being revictimized by the investigation and prosecution (see Brody & Acker, 2015). Thus, although one reason for bringing charges against true perpetrators is to get justice for the victims, prosecutors may be less willing to reinvestigate an exoneration case for fear of upsetting or retraumatizing the victims of sexual assault or abuse, especially if the cases involve children.

Race of the victim and exoneree was also shown to be a significant factor in the outcome of true perpetrator identification, as it is in other areas of criminal justice. In the current context, the odds of identifying a true perpetrator were much greater when the exoneree was Black and the victim was White, compared to when the exoneree and victim were both White. However, the odds of identification were no different when the offender and victim were both Black, compared to when they were both White. These findings are in line with research on sentencing outcomes, especially in capital cases, where the outcome is the worst for the offender when the offender is Black and the victim is White (e.g., Eberhardt et al., 2006). Although identifying true perpetrators is a positive outcome, thus appearing contradictory to such previous research, these results are logical when viewed through the lens of the true perpetrator, for whom being identified is a negative outcome. Viewing these results through this lens also clarifies the found relation between race and true perpetrator identification. It is likely that finding the true perpetrators in cases with a Black exoneree and White victim is considered more important to prosecutors, as Black offenders are seen as more culpable for their actions and White victims are not dehumanized in the way Black individuals can be (Goff et al., 2014), thus increasing the odds of identification. Moreover, research has shown that implicit biases, rooted in broad cultural stereotypes, affects prosecutorial discretion at every decision-point (Smith & Levinson, 2012). Thus, it is likely that together, these circumstances increase the odds of identifying a true perpetrator if the accused is Black.

Although identifying true perpetrators is important for understanding the consequences of wrongful convictions, public safety and justice require them to then be charged for their crimes. Having established which of the hypothesized factors impact the identification of true perpetrators, the next step is to test their effect on charging. Study Two aims to achieve this by examining if and how these factors impact the odds of charging identified true perpetrators.

## **V Study Two: Charging True Perpetrators**

### **A. Data and Methods**

To examine the factors that affect the charging of a true perpetrator, the unit of analysis was changed from exoneration case to an identified true perpetrator. Each true perpetrator who actually committed the crimes that the individual in the case was wrongfully convicted of was identified as a single observation. For the cases in which no true perpetrator was identified, the number of true perpetrators was assumed to be one unless otherwise specified by the Innocence Project or National Registry of Exonerations (e.g., if multiple DNA profiles were identified). Duplicate cases, where one true perpetrator was named for multiple exonerees in one criminal event, were dropped from the dataset. Of the estimated 344 unique true perpetrators, 161 were identified by name or DNA and thus the state had the necessary information to potentially charge them. Each of these 161 identified true perpetrators was coded for whether or not they were charged with the wrongful conviction crime. Eleven observations were dropped from our analyses, as there was not sufficient information (e.g., a name) to verify whether or not the true perpetrator had been charged. One additional identified true perpetrator was dropped because, as of this



writing, he had been arrested but not yet charged. Thus, the final dataset consisted of 149 unique, identified true perpetrators.<sup>11</sup>

### **Independent Variables**

All of the independent variables from Study One were utilized in the current study (i.e., contributors to wrongful convictions, most severe crime type, high volume exoneration counties, assistance of an innocence organization, crime occurrence before or after 1989, and race).

### **Dependent Variable**

**Charging Identified True Perpetrators.** Observations were coded as to whether or not an identified true perpetrator was charged for the crimes for which the exoneree was convicted.<sup>12</sup> Identified true perpetrators were defined as having been charged if information from the Innocence Project, National Registry of Exonerations, and news stories about the exonerations of the wrongfully convicted individual indicated that the true perpetrator had been charged. Thus, a dichotomous variable was created to indicate whether or not an identified true perpetrator was charged with the wrongful conviction crime.

## **B. Results**

A logistic regression analysis specified the relations between the described independent variables and the odds of charging ( $n = 75$ ) versus not charging ( $n = 74$ ) an identified true perpetrator with the wrongful conviction crime. The model was not statistically significant ( $\chi^2(17) = 25.87, p = .08$ ), indicating that all together, the independent variables are not associated with the odds of charging an identified true perpetrator. This finding is contrary to our hypothesis that factors relevant to wrongful convictions and criminal justice outcomes broadly would also be influential in whether or not a true perpetrator was charged with the wrongful conviction crime.

## **C. Discussion**

We did not find that our independent variables are associated with the odds of charging an identified true perpetrator, indicating that the factors underlying true perpetrator identification and charging decisions appear to differ from one another. This may be due to the different roles prosecutors play in identifying versus charging true perpetrators. Although prosecutors participate in the post-conviction processes which can identify a true perpetrator in DNA exoneration cases, such as providing recommendations regarding post-conviction petitions for DNA testing (Ginsburg & Hunt, 2009; Green & Yaroshefsky, 2009), handling these petitions is not necessarily within their daily job duties. Conversely, the decision of whether or not to charge an offender is exactly within the typical duties of a prosecutor (Albonetti, 1987; Jacoby, 1980), even if some of the circumstances surrounding true perpetrator cases are less common. Therefore, it is likely that reasons affecting a prosecutor's ability and willingness to bring charges against any offender also

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<sup>11</sup> One true perpetrator, Walter Ellis, is included twice in this analysis as he is the true perpetrator of two separate wrongful convictions criminal events, involving different groups of exonerees (see Appendix).

<sup>12</sup> We specifically chose to examine whether or not a true perpetrator was charged as opposed to convicted because the goal of this analysis was to examine if the state even sought justice in charging the true perpetrator. Additionally, using conviction of the true perpetrator as the outcome variable would have required additional considerations such as charge bargaining and jury decision-making, which were not the focus of the current study.

impact the decision to bring charges against a true perpetrator. Study Three explores whether the reasons prosecutors may resist post-conviction innocence claims, and similar rationales to those proffered by prosecutors in non-true perpetrator cases, appeared throughout cases where the prosecutor did not charge an identified true perpetrator with the wrongful convictions crime.

## VI Study Three: Exploring Cases of Uncharged True Perpetrators

### A. Data and Methods

To determine the factors that may have impacted the decision not to charge an identified true perpetrator, the sample was limited to the unique true perpetrators who were identified but not charged with the wrongful conviction crime(s) ( $n = 74$ ). Using data from the Innocence Project, National Registry for Exonerations, court documents, and publicly available sources such as news articles and media reports, and books, we conducted a qualitative content analysis to identify categories or themes that emerged regarding the decision not to charge an identified true perpetrator (Cho & Lee, 2014; Moretti, van Vliet, Bensing, et al., 2011). Specifically, each author individually conducted open coding to identify potential patterns in the data and grouped these patterns based on construct relatedness. After completing this coding, we discussed the identified patterns together and created a codebook.<sup>13</sup> Closed coding was then completed independently in accordance with the codebook. Our codes were then compared, and discrepancies addressed and resolved via discussion.

Seven factors were identified that could be categorized into two mutually exclusive groups, which we termed “definitively prohibitive” and “potentially influential” factors in the charging decision. Each identified true perpetrator was coded for if the definitively prohibitive and potentially influential factors were absent or present. For cases in which none of the identified codes were present, and for which no other factors were identified, “unknown” was coded.

**Definitively Prohibitive Factors.** Definitively prohibitive factors were defined as reasons why a prosecutor *could not* charge an identified true perpetrator with the wrongful conviction crime(s). Two non-mutually exclusive factors fit this definition: death and expiration of statutes of limitations. In these cases, a prosecutor was definitively prohibited from charging the true perpetrator either because that individual had died, or the law prohibited such action.

**Death.** Death was coded if it was determined that the true perpetrator died before the exoneration of the wrongfully convicted person.

**Statutes of Limitations.** Statutes of limitations are “a statutory limitation on the prosecution of an offense if the formal prosecution is not commenced, usually by return of an indictment or filing of an information, within a specified period after the completion of the offense” (U.S. Dept. of Justice, 2020). To code for whether or not a statute of limitations was a definitively prohibitive factor, we first identified the top charge (or specific most severe crime) that each exoneree was convicted of based off of the most severe crime type. Top charge was identified using the same

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<sup>13</sup> Each codebook item is described in the following subsections and listed in Table 3.

sources as previously used in Study One and Study Two (e.g., the Innocence Project, the National Registry of Exonerations, court documents, media reports, etc.). If the specific crime could not be identified, top charge was coded as the most serious crime that could be defined under the most severe crime type. For example, if an exoneree was convicted of “sexual assault” and no specific charge could be found, the most serious sexual assault offense was identified in the state’s penal code (e.g., “aggravated rape with a deadly weapon”) and coded as the top charge for that true perpetrator. Using the top charge allowed us to be conservative in our estimates of whether true perpetrators would be prohibited from being charged due to an expired statute of limitations by coding for the longest possible statute of limitation they could have faced, and thus providing the best opportunity for the true perpetrator to be charged.

Once top charge was identified, information from the accompanying statute of limitations was coded for each offense by researching each state’s specific penal codes. Specifically, we recorded the time at which the statute of limitations clock begins (e.g., at the time of the crime, time of arrest, etc.) and the length of the statute of limitations in years. We then compared the date the statutes of limitations expired to the date the wrongfully convicted individual was exonerated to determine if the statute expired before the exoneree was released, thus prohibiting prosecutors from charging the true perpetrator.

**Potentially Influential Factors.** In addition to the definitively prohibitive factors, we identified five non-mutually exclusive reasons why a prosecutor *might not* have charged the identified true perpetrators: incarceration, guilt, evidence, embarrassment, and psychiatric incapacitation. Each factor was coded as present or absent for each identified true perpetrator.

**Incarceration.** In some cases, prosecutors may have chosen not to charge the identified true perpetrator because they were already incarcerated for another crime, even though there is no law prohibiting them from doing so. Incarceration was coded as a potentially influential factor if the identified true perpetrator was incarcerated at the time of the exoneration, or if one of the aforementioned sources indicated incarceration as part of the prosecutor’s discretionary process. For example, one source read: “[the true perpetrator], it turns out, was serving time in the same prison for the rape of a woman in the same apartment complex as the victim assaulted in [exoneree’s] case” (Greene, 2007). To determine the incarceration status of the true perpetrator, true perpetrators were searched on states’ Department of Corrections websites, as well as searching the aforementioned sources for reports of incarceration, following previous work (see Norris, Weintraub, et al., 2019).

**Guilt.** Prosecutors are bound by ethical standards that require them not to proceed with charges against an individual if belief in their guilt beyond a reasonable doubt is lacking (Gershman, 2010). Thus, guilt was coded as present for any cases in which the decision not to charge the identified true perpetrator was potentially influenced by a belief on the part of the prosecutor that the exoneree was still guilty. For example, after one exoneration by DNA, the prosecutor still “continue[d] to investigate whether he [the exoneree] has any connections to [the victim]” (Emch, 2001, para. 25).

**Evidence.** Evidence refers to a subjective concern on the part of the prosecutor that although the true perpetrator was identified, there was not enough evidence to charge them with

the wrongful conviction crime. Evidence was coded as a potentially influential factor if a source indicated that prosecutors stated that this was a concern of theirs, regardless of how objectively strong or weak the evidence was.

**Embarrassment.** Embarrassment was coded as present for cases in which the decision not to charge the identified true perpetrator was indicated to have been influenced by embarrassment on the part of the prosecutor. For example, in writing about one wrongful conviction case, the news reported that the prosecutor’s “rationale for not prosecuting...is known only to her, but a decision to prosecute the case would certainly have created embarrassment for [the Assistant District Attorney]” (Warden, 2015, para. 9).

**Psychiatric Incapacitation.** Similar to incarceration, psychiatric incapacitation was coded as a potentially influential factor if it was determined, using publicly available data, that the identified true perpetrator was residing in a psychiatric facility when the exoneree was released.

## B. Results

Of the 74 true perpetrators who were identified but not charged, there was a definitively prohibitive factor for 25 (34%) of them. Ten (14%) identified true perpetrators died before the exoneree was released, and therefore were not charged with the wrongful conviction crime. Thirteen (18%) identified true perpetrators could not be charged because the statute of limitations for the top charge wrongful conviction crime had expired by time the exoneree was released. For two (3%) additional identified true perpetrators, the statute of limitations would have prohibited being charged, but the true perpetrator died before the exoneree was released (see Table 3).

**Table 3.** Frequencies of Definitively Prohibitive and Potentially Influential Factors

Definitively Prohibitive Factors ( $n = 25$ )	$n$	%
Death	10	40%
Statute of Limitations	13	52%
Death and Statute of Limitations	2	8%
Total	25	100%
Potentially Influential Factors ( $n = 49$ ) <sup>a</sup>		
Unknown	25	51%
Incarceration	20	41%
Guilt	4	8%
Evidence	3	6%
Embarrassment	1	2%
Psychiatric Incapacitation	1	2%

<sup>a</sup> Cases were coded either as Unknown, or with at least one potentially influential factor. Because these factors were not mutually exclusive, the total exceeds 100%.

The 25 individuals who were coded with a definitely prohibited factor were then removed from the analysis, and the remaining 49 (66%) identified true perpetrators were examined for potentially influential factors. Incarceration was the most common potentially influential factor, occurring in 20 (41%) of these cases. Guilt was a potential factor in four (8%) cases, and evidence was a potential factor in three (6%) cases. Finally, embarrassment and psychiatric incapacitation were both potential factors in just one (2%) case. For nineteen (39%) identified true perpetrators, only one potentially influential factor was identified, and for five (10%) identified true perpetrators, two of these factors were identified. For the remaining 25 (51%) identified true perpetrators, no potentially influential factors were identified (see Table 3).

### C. Discussion

This exploratory study uncovered a variety of reasons that potentially or decisively caused the prosecutor not to charge the true perpetrator for the wrongful conviction crime(s). Across all of the cases and both the definitively prohibitive and potentially influential factors, one of the most prominent factors affecting charging an identified true perpetrator was an expired statute of limitations. Despite using the most conservative estimates, statutes of limitations still affected 20% of all identified true perpetrators.<sup>14</sup> That is, in these cases the statute of limitations had expired by the time the wrongfully convicted person was exonerated, thus eliminating the possibility for these true perpetrators to be charged. It is important to emphasize, again, that this percentage represents the least possible number of true perpetrators who could be protected from charges due to an expired statute of limitations, as only the least restrictive statute for the most serious crime was analyzed.<sup>15</sup> Further, 96 (59%) of the identified true perpetrators in the sample could have faced charges for more than one crime.<sup>16</sup> Given that these additional lesser crimes likely had more restrictive statutes of limitations which would have expired earlier than the single top charge coded, our estimate of how often an expired statute of limitations prohibited the prosecutor from charging the true perpetrator with a wrongful conviction crime is an underestimate. Additionally, the expiration of a statute of limitations was only explored for the identified true perpetrators who were not charged. For just the data examined herein, there are, at minimum, an additional 182 true perpetrators who were not identified and may be similarly protected from being charged with the wrongful convictions crime by expired statutes of limitations. Furthermore, this study only examines the effect of statutes of limitations in 367 DNA exoneration cases; however, there are an estimated 2,247 additional exonerations (“National Registry of Exonerations,” 2020).<sup>17</sup> Extrapolating from the conservative estimates of the current results, wherein 20% of true perpetrators were affected by statutes of limitations, that is an additional 450 true perpetrators, who could have escaped culpability for their crimes due to statutory restrictions.

The leading potentially influential factor in the decision to charge identified true perpetrators for the wrongful convictions crime(s) was incarceration. Although there is no legally

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<sup>14</sup> Defined as the thirteen individuals for whom the statute of limitations expired in addition to the two individuals who died but for whom statutes of limitations would have been prohibitive regardless.

<sup>15</sup> To this point, by changing the definitions for the top charges that could not be identified from the most serious to the least serious crime that could be defined in the most severe crime type, an expired statute of limitations becomes prohibitive in 31% of cases.

<sup>16</sup> Counts of how many charges a true perpetrator could have faced are based on how many crimes the wrongfully convicted person was convicted of.

<sup>17</sup> Most recent data are as of 2 February 2020.

prohibitive obstacle to doing so, prosecutors appeared to have an aversion to charging someone who was already incarcerated for a different offense. This may be due to the equitability or administrative considerations, as it would not necessarily serve the public or be a good use of resources to charge someone who is already incapacitated from committing another crime. A similar equitability argument can be made for psychiatric incapacitation, in which prosecutors may have believed that the psychiatrically incapacitated ought not be charged for their crimes in the name of justice. However, convicting these true perpetrators for the wrongful conviction crimes could add more time to their sentences, simultaneously protecting society and further punishing that individual for their additional crimes. Even for cases where the true perpetrator had already been permanently removed from society, convicting them of the wrongful conviction crime(s) could also provide closure to both the victim and exoneree. This was the case for Leon Davis, the true perpetrator of the crimes in Thomas Haynesworth's case. When investigations began into Haynesworth's innocence, Davis was already serving multiple sentences of life imprisonment for the crimes he continued to commit after Haynesworth was wrongfully incarcerated (Acker, 2013; Green, 2009). In such cases, the goal of charging the true perpetrator would be to help heal the innocents affected by the crime and wrongful conviction, as opposed to simply punishing the guilty.

Several of the other potentially influential factors we found (i.e., embarrassment, guilt, and evidence) fit with the previously discussed psychological and structural factors which may cause prosecutors to be uncooperative with post-conviction innocence claims. For instance, concerns about their own involvement in a wrongful conviction, and perceptions from the public and their courtroom workgroup, may cause embarrassment that dissuades prosecutors from charging the true perpetrator. Additionally, confirmation bias likely affects both a prosecutor's belief that the wrongfully convicted individual is still guilty of the crimes, an equitability consideration, and the belief that there is not enough evidence to charge the true perpetrator, in line with the legal considerations for not charging a perpetrator.<sup>18</sup> In both cases, the previously held belief of the exoneree's guilt would overpower any new information indicating their innocence and the guilt of another.

As the first of its kind, the findings uncovered in this work only begin to scratch the surface of factors that affect outcomes for true perpetrators' identification and charging for the wrongful conviction crime. But it provides a plethora of directions for future research, and sheds light on potential policy implications, both of which are discussed next.

## VII General Discussion

The current studies serve as a first step to examining why true perpetrators are or are not identified and subsequently charged with the crimes they committed and for which someone else was wrongfully convicted. We discovered that though some case factors related to wrongful convictions impacted the odds of true perpetrator identification, the decision to charge a true perpetrator with the wrongful conviction crime was instead associated with the reasons prosecutors

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<sup>18</sup> It is important to note, again, that "evidence" was coded if any sources indicated that the prosecutor was hesitant about the strength of the evidence against the true perpetrator. This was a subjective code based on the prosecutors' belief, and not any objective measure of the strength of the evidence.

press charges on perpetrators more broadly, and how they process post-conviction claims of innocence. Of the findings herein, the most actionable is that regarding the role of statutes of limitations in prohibiting prosecutors from charging true perpetrators. Especially for cases in which the true perpetrator has not yet been identified, the length of imprisonment of the wrongfully convicted individual will likely exceed the corresponding statute of limitations. Statutes of limitations were originally implemented to protect defendants due process rights by ensuring the availability of evidence and that the adjudication of such matters occurred diligently and swiftly (*United States v. Lovasco*, 1977). However, in cases of wrongful convictions, this long-standing precedent fails. In all cases of wrongful convictions, not only has an innocent individual suffered an unjust loss of liberty, but the true perpetrators cannot be held legally responsible.

One potential solution, which has been adopted by at least 27 states, is to create DNA exceptions to statutes of limitations (Rape, Abuse & Incest National Network, 2012). These exceptions, broadly, can suspend or extend statutes of limitations in cases where DNA evidence identifies the actual perpetrator of a crime (End the Backlog, “Statute of Limitations,” n.d.). However, these statutes are not perfect; they are often limited to only include some offenses (e.g., Ga. Code § 17-3-2.1), or only to change the length of time before the statute of limitations expires instead of removing it entirely (see N.J. Stat. § 2C:1-6; Ohio Rev. Code Ann. § 2901.13). These caveats still allow a true perpetrator to escape being charged for the wrongful conviction crimes. Extending or eliminating statutes of limitations entirely in cases of wrongful convictions could create a clearer path for prosecutors to seek justice for the victims of the true perpetrators and those wrongfully convicted for their crimes.

### **Limitations and Future Directions**

These studies are not without their limitations. The data were constricted to wrongful conviction cases in which the exoneree was exonerated by DNA, as defined by the Innocence Project. However, the NRE currently reports over 2,000 additional exonerations which do not fit this definition and thus are not included in the Innocence Project’s database (“National Registry of Exonerations,” 2020). It is possible that exonerations compiled by the Innocence Project, and analyzed here, are qualitatively different than others, and thus the factors that affect the identification and charging of true perpetrators in these cases are qualitatively different as well. Due to these reasons, we hesitate to extrapolate our findings beyond exonerations based on DNA evidence.

In addition, we cannot be certain that the factors we identified in Study Three as potentially influential factors in the decision to charge true perpetrators were in fact the reasons prosecutors failed to do so. Our judgments were based upon what was reported and quoted by secondary sources and may not accurately reflect the actual reasons for a prosecutor’s discretionary judgments. Furthermore, although we were exhaustive in coding for definitively prohibitive and potentially influential factors, no such factors were found for a full 51% of the subsample. But this number does not necessarily indicate a lack of such factors for these cases. We only coded for the listed variables if there was an explicit indication of the concept in a public or obtained source. There are likely several additional factors, both conscious and subconscious, that influence a prosecutor’s decision to charge an identified true perpetrator that would not be found in such limited public sources. To dig deeper into these factors, future research should consider speaking

directly with prosecutors and probing them for how they may arrive at a decision to charge the true perpetrator with the wrongful conviction crime.

For a few reasons, our estimate of cases in which the statutes of limitations would prevent the charging of a true perpetrator are an underestimate. First, our coding for statutes of limitations was limited to the identified top charge, which was done purposely to provide a conservative estimate of the number of true perpetrators who would be protected from charges due to an expired statute of limitations. However, as we posited when discussing why it was still important to charge true perpetrators even if they are already incarcerated, bringing charges for all crimes committed serves to provide justice for the victims and punishment for the offenders. The same can be said for charging an individual for all of the crimes they committed during a single criminal event. By excluding the lesser crimes from our analysis and focusing on the ability to charge a true perpetrator instead of charging an individual crime, we likely severely underestimated how impactful statutes of limitations are on charging true perpetrators. Future research should look further into all crimes a true perpetrator could potentially be charged with and non-DNA based exonerations, thus estimating a more accurate judgment on the impact of these statutes. Additionally, we did not examine how DNA exceptions for statutes of limitations impacted the statutes of limitations faced by the true perpetrators in our sample. It is possible that there are statutes in our sample that were waived or extended, therefore eliminating cases in which the statute of limitations served as a prohibitive factor to the true perpetrator being charged for the wrongful conviction crime. Thus, future research should further examine how these statutes of limitations effect identifying and charging true perpetrators in wrongful convictions cases.

Another next step for researchers would be to include the perspective of the crime victims, and how their opinions about and willingness to participate in official action against the true perpetrator affects the odds of them being identified and charged. As previously discussed, prosecutors may be less willing to reinvestigate a wrongful conviction that was based on sexual assault or abuse for fear of upsetting or retraumatizing the victims. In fact, research has shown that the process of seeing their case reopened can be traumatizing for crime victims (Irazola et al., 2013) and impact their likelihood to support prosecution (Kingsnorth & MacIntosh, 2004), especially for those who suffered great harm (Spohn and Holleran, 2001), such as sexual assault or abuse. This point is best illustrated by both Jennifer Thompson-Cannino and Tomeisha Artis, who were both victims of rape and whose mistaken eyewitness identifications contributed to wrongful convictions. As Jennifer Thompson-Cannino explained about discovering this fact, “Silently, I berated myself. It meant I had screwed up...I had brought disgrace upon [the detective’s] investigation, and the whole Burlington Police Department” (Thompson-Cannino, Cotton, & Torneo, 2009, p. 213). She continues, stating, “... [the detective] and [my husband] were both worried about the effects of me reliving it all...” (Thompson-Cannino, Cotton, & Torneo, 2009, p. 236). Both women also experienced a fear of public backlash after the men they identified were exonerated and the true perpetrator found, with Tomeisha Artis stating, “It was horrible for me...The comments that people was saying, that I needed to go to prison. I picked this guy out. I needed to pay” (“National Institute of Justice,” 2017), and Jennifer Thompson-Cannino claiming, “I had spent so many years protected by law from the public’s knowing my name...The mistake I made affected so many lives...I knew it was risky to show my face on TV” (Thompson-Cannino, Cotton, & Torneo, 2009, pp. 236-237).



Unfortunately, their fears are justified. Due to the fact that sexual assault is seen as qualitatively different from other crimes, the individuals accused and convicted of committing such offenses face serious consequences, both from a sentencing and societal perspective (Brody & Acker, 2015). Being partially responsible for causing such stigma to attach to an innocent person due to a mistaken eyewitness identification may retraumatize victims in wrongful convictions cases even further and cause them to experience backlash from society. Therefore, the opinion of and impact on victims may have a strong impact on the prosecutor's discretion as related to identifying and charging of true perpetrators, especially in cases of sexual assault and sexual abuse, and thus deserves careful consideration in future research.

Although they are some of the first to examine true perpetrator identification and charging, the present studies have implications for criminal justice policy and practice. Practitioners, victims, exonerees, and the public alike have an interest in bringing these actual perpetrators to justice and should therefore focus on abolishing barriers that would inhibit such actions. This could take many forms, from making it common practice to charge those already in prison to lengthen their sentence and ensure public safety, to abolishing statutes of limitations that make it impossible to do so. By continuing to do research on these issues, the possibility of creating evidence-based policy increases, thus creating robust laws that are backed by science.

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## Appendix

### *Exonerees and True Perpetrators by Criminal Event*

Exoneree(s)	True Perpetrator(s)
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Abbitt, Joseph Lamont	Unknown <sup>a</sup>
Abdal, Warith Habib	Unknown <sup>a</sup>
Abernathy, Christopher	Unknown <sup>a</sup>
Adams, Kenneth Gray, Paula Jimerson, Verneal Rainge, Willie Williams, Dennis	Johnson, Ira Robinson, Arthur Rodriguez, Juan
Alejandro, Gilbert	Unknown <sup>a</sup>
Alexander, Richard	Murphy, Michael
Allen, Donovan	Unknown <sup>a</sup>
Anderson, Marvin	Lincoln, John
Arledge, Randolph	Sims, David
Atkins, Herman	Unknown <sup>a</sup>
Avery, Steven	Allen, Gregory
Avery, William	Ellis, Walter <sup>b</sup>
Ayers, David	Unknown <sup>a</sup>
Bain, James	Unknown <sup>a</sup>
Barbour, Bennett	Glass Jr., James Moses
Barnes, Steven	Unknown <sup>a</sup>
Barnhouse, William	Unknown <sup>a</sup>
Barr, Jonathan Harden, James Sharp, Shainne Taylor, Robert Veal, Robert	Randolph, Willie B.
Bauer, Chester	Unknown <sup>a</sup>
Beaver, Antonio	Unnamed <sup>c</sup>
Beranek, Richard	Unknown <sup>a</sup>

Bibbins, Gene	Gordon, Emanuel
Bivens, Phillip Dixon, Bobby Ray Ruffin, Larry	Harris, Andrew
Blair, Michael	Unknown <sup>a</sup>
Bledsoe, Floyd	Bledsoe, Tom
Bloodsworth, Kirk	Rufner, Kimberly S.
Booker, Donte	Adams, Pettis
Boquete, Orlando	Unknown <sup>a</sup>
Bradford, Marcellius Ollins, Calvin Ollins, Larry Saunders, Omar	Harris, Eddie "Bo" Roach, Duane
Bradford, Ted	Unnamed <sup>c</sup>
Bravo, Mark	Unknown <sup>a</sup>
Brewer, Kennedy	Johnson, Justin
Briscoe, Johnny	Smith, Larry
Brison, Dale	Unknown <sup>a</sup>
Bromgard, Jimmy Ray	Tipton, Ronald Dwight
Brown, Danny	Preston, Sherman
Brown, Dennis	Unknown <sup>a</sup>
Brown, Jr., Knolly	Unknown <sup>a</sup>
Brown, Keith	Mosley, Samuel
Brown, Leon McCollum, Henry	Artis, Roscoe
Brown, Nathan	Unnamed <sup>c</sup>
Brown, Patrick	Rickard, Robert
Brown, Roy	Bench, Barry

Bryant, Malcolm	Unknown <sup>a</sup>
Bryson, David	Unknown <sup>a</sup>
Bullock, Ronnie	Unknown <sup>a</sup>
Buntin, Harold	Unknown <sup>a</sup>
Burnette, Victor	Unknown <sup>a</sup>
Butler, Jr., A.B.	Unknown <sup>a</sup>
Byrd, Kevin	Unknown <sup>a</sup>
Cage, Dean	Unknown <sup>a</sup>
Callace, Leonard	Unknown <sup>a</sup>
Cameron, Ronjon	Unknown <sup>a</sup>
Camm, David	Charles Boney
Capozzi, Anthony	Sanchez, Altemio C.
Caravella, Anthony	Unknown <sup>a</sup>
Chalmers, Terry	Unknown <sup>a</sup>
Chaparro, Anthony	Unknown <sup>a</sup>
Charles, Clyde	Charles, Milo
Charles, Ulysses Rodriguez	Unknown <sup>a</sup>
Chatman, Charles	Unknown <sup>a</sup>
Clark, Robert	Arnold, F. Anthony
Coco, Allen	Unknown <sup>a</sup>
Cole, Timothy B.	Johnson, Jerry Wayne
Coleman, Nevest Fulton, Darryl	Unnamed <sup>c</sup>
Cotton, Ronald	Poole, Bobby
Courtney, Sedrick	Unknown <sup>a</sup>
Courtney, Uriah	Unnamed <sup>c</sup>

Cowans, Stephan	Unknown <sup>a</sup>
Criner, Roy	Unknown <sup>a</sup>
Cromedy, McKinley	Unknown <sup>a</sup>
Crotzer, Alan	Unknown <sup>a</sup>
Cruz, Rolando Hernandez, Alejandro	Dugan, Brian
Cunningham, Calvin Wayne	Unknown <sup>a</sup>
Dabbs, Charles	Unknown <sup>a</sup>
Dail, Dwayne Allen	Neal, William Jackson
Danziger, Richard Ochoa, Christopher	Marino, Achim Josef
Davidson, Willie	Unknown <sup>a</sup>
Davis, Cody	Prichard, Jeremy
Davis, Dewey Davis, Gerald	Unknown <sup>a</sup>
Davis, Donya	Unknown <sup>a</sup>
Davis, Jeramie	Davila, Julio
Davis, Larry Northrop, Alan	Unknown <sup>a</sup>
Daye, Frederick Renee	Pringle, David Smallwood, Eddie
Dean, James Gonzalez, Kathleen Shelden, Debra Taylor, Ada JoAnn White, Joseph Winslow, Thomas <sup>b</sup>	Smith, Bruce
Dedge, Wilton	Unknown <sup>a</sup>
Deskovic, Jeffrey	Cunningham, Steven
Dewey, Robert	Thames, Douglas

Diamond, Garry	Unknown <sup>a</sup>
Diaz, Luis	Unknown <sup>a</sup>
Dillon, William	Unknown <sup>a</sup>
Dixon, John	Unknown <sup>a</sup>
Dominguez, Alejandro	Unknown <sup>a</sup>
Doswell, Thomas	Unknown <sup>a</sup>
Dotson, Gary	Unknown <sup>a</sup>
Dupree, Jr., Cornelius Massingill, Anthony	Unknown <sup>a</sup>
Durham, Timothy	Unknown <sup>a</sup>
Echols, Douglas Scott, Samuel	Unknown <sup>a</sup>
Elkins, Clarence	Mann, Earl
Erby, Lonnie	Moore, Johnnie
Evans, Jerry Lee	Unknown <sup>a</sup>
Evans, Michael Terry, Paul	Unknown <sup>a</sup>
Fain, Charles	Unknown <sup>a</sup>
Fappiano, Scott	Unknown <sup>a</sup>
Fears, Jr., Joseph R.	Knighton
Fogle, Lewis	Unknown <sup>a</sup>
Fountain, Wiley	Unknown <sup>a</sup>
Frey, Joseph	Crawford, James E.
Fritz, Dennis Williamson, Ronald Keith	Gore, Glenn
Fuller, Larry	Unknown <sup>a</sup>
Gagnon, Richard	Hill, Bruce Antwain

Gates, Donald Eugene	Unknown <sup>a</sup>
Giles, James Curtis	Brown, Michael Bryant, Stanley
Gillard, Larry	Unnamed <sup>c</sup>
Godschalk, Bruce	Unknown <sup>a</sup>
Gonzales-Barboza, Juan Carlos	Unknown <sup>a</sup>
Gonzalez, Angel	Unknown <sup>a</sup>
Gonzalez, Hector	Unknown <sup>a</sup>
Good, Donald Wayne	Unknown <sup>a</sup>
Goodman, Bruce Dallas	Unknown <sup>a</sup>
Gossett, Andrew	Unknown <sup>a</sup>
Gray, Anthony	Fleming, Anthony Gerald
Gray, David A.	Unknown <sup>a</sup>
Green, Anthony Michael	Rhines, Rodney
Green, Edward	Unknown <sup>a</sup>
Green, Kevin Lee	Parker, Gerald
Green, Michael Anthony	Three Unnamed <sup>c</sup>
Gregory, William	Unknown <sup>a</sup>
Hadaway, Sammy Ott, Chaunte	Ellis, Walter <sup>b</sup>
Halsey, Byron	Hall, Clifton
Halstead, Dennis Kogut, John Restivo, John	Unknown <sup>a</sup>
Harrell, Dion	Unknown <sup>a</sup>
Harris, William	Unknown <sup>a</sup>
Harrison, Clarence	Unknown <sup>a</sup>

Harward, Keith	Crotty, Jerry L.
Hatchett, Nathaniel	Unknown <sup>a</sup>
Hayes, Travis Matthews, Ryan	Love, Rondell
Haynesworth, Thomas	Davis Jr., Leon W.
Heins, Chad	Unknown <sup>a</sup>
Henton, Eugene	Unknown <sup>a</sup>
Hicks, Anthony	Unknown <sup>a</sup>
Holdren, Larry	Unknown <sup>a</sup>
Holemon, Jeffrey	Unknown <sup>a</sup>
Holland, Dana	Bolden, Gordon
Holloway, Daryl	Unknown <sup>a</sup>
Honaker, Edward	Unknown <sup>a</sup>
Howard, Darryl	Jones, Jermeck
Hunt, Darryl	Brown, Willie E.
Ireland, Kenneth	Benefield, Kevin M.
Isbell, Teddy Kagonyera, Kenneth Mills, Damian Wilcoxson, Robert Williams, Jr., Larry	Pickens, Lacy Rutherford, Robert Summey, Bradford
Jackson, Dwayne	Grissom, Howard Dupree
Jackson, Raymond Williams, James	Anderson, Frederick Sayles, Marion Doll
Jackson, Willie	Jackson, Milton
James, Henry	Unknown <sup>a</sup>
Jean, Lesly	Unknown <sup>a</sup>
Jenkins, Jerry Lee	Derr, Norman Bruce

Jenkins, Paul Lawrence, Freddie Joe	David Wayne Nelson
Johnson, Albert K.	Unnamed <sup>c</sup>
Johnson, Andrew	Unknown <sup>a</sup>
Johnson, Anthony	Brown, Matthew
Johnson, Arthur	Unnamed <sup>c</sup>
Johnson, Calvin	Unknown <sup>a</sup>
Johnson, Larry	Unknown <sup>a</sup>
Johnson, Richard	Unknown <sup>a</sup>
Johnson, Rickey	McNeal, John C.
Jones, Clifford	Unknown <sup>a</sup>
Jones, Joe C.	Russell, Joel L.
Jones, Ronald	Unknown <sup>a</sup>
Karage, Entre Nax	Jordan, Keith
Kelley, Eric Lee, Ralph	Dixon, Eric Anthony
Kelly, Jr., William M.	Miller, Joseph
Kordonowy, Paul D.	Unknown <sup>a</sup>
Kotler, Kerry	Unknown <sup>a</sup>
Krone, Ray	Phillips, Kenneth
Laughman, Barry	Unknown <sup>a</sup>
Lavernia, Carlos Marcos	Unknown <sup>a</sup>
Lindsey, Johnnie	Unknown <sup>a</sup>
Linscott, Steven	Unknown <sup>a</sup>
Lloyd, Eddie Joe	Unknown <sup>a</sup>
Lowery, Eddie	Brewer, Daniel Lee



Lyons, Marcus	Anderson, Carl B.
Mahan, Dale Mahan, Ronnie	Unknown <sup>a</sup>
Maher, Dennis	Unknown <sup>a</sup>
Marshall, Michael	Unnamed <sup>c</sup>
Mayes, Larry	Unknown <sup>a</sup>
McCarty, Curtis	Unknown <sup>a</sup>
McClendon, Robert	Unknown <sup>a</sup>
McCray, Antron Richardson, Kevin Salaam, Yusef Santana, Raymond Wise, Korey	Reyes, Matias
McGee, Arvin	Alberty, Edward
McInnis, Edward	Unknown <sup>a</sup>
McKinney, Lawrence	Unknown <sup>a</sup>
McMillan, Clark Jerome	Boyd, David Louis
Mercer, Michael	Brown, Arthur
Miller, Billy Wayne	Unknown <sup>a</sup>
Miller, Christopher	Boyd, Charles Stadmire, Richard
Miller, Jr., Robert Lee	Lott, Ronald
Miller, Neil	Taylor, Lawrence
Mitchell, Marvin	Unknown <sup>a</sup>
Mitchell, Perry	Unknown <sup>a</sup>
Moon, Brandon	Unknown <sup>a</sup>
Morton, Michael	Norwood, Mark Alan
Moto, Vincent	Unknown <sup>a</sup>

Mumphrey, Arthur	Mumphrey, Charles Thomas, Steve
Nelson, Bruce	Moore, Terrence
Nelson, Robert	Haley, Jerry F.L.A.
Nesmith, Willie James	Unknown <sup>a</sup>
Newton, Alan	Unknown <sup>a</sup>
O'Donnell, James	Unknown <sup>a</sup>
Ochoa, James	McCollum, James T.
Odom, Kirk	Unnamed <sup>c</sup>
Ortiz, Victor	Unknown <sup>a</sup>
Pacyon, Douglas	Unknown <sup>a</sup>
Pallares, Jose	Unnamed <sup>c</sup>
Patterson, Maurice	Starkey, James
Peacock, Freddie	Unknown <sup>a</sup>
Pendleton, Marlon	Unknown <sup>a</sup>
Peterson, Jamie Lee	Ryan, Jason Anthony
Peterson, Larry	Unknown <sup>a</sup>
Phillips, Michael	Banks, Lee Marvin
Phillips, Steven	Goodyear, Sidney Alvin
Pierce, Jeffrey Todd	May Jr., Omar D.
Pinchback, Johnny	Unknown <sup>a</sup>
Piszczek, Brian	Unknown <sup>a</sup>
Pope, David Shawn	Roberts, James Milton
Powell, Anthony	Dixon, Jerry
Rachell, Ricardo	Hawthorne, Andrew Wayne

Reynolds, Donald Wardell, Billy	Unknown <sup>a</sup>
Richardson, Gerard	Unknown <sup>a</sup>
Richardson, Harold Saunders, Michael Swift, Terrill Thames, Vincent	Douglas, Johnny
Richardson, James Joseph	Unknown <sup>a</sup>
Rivera, Juan	Unknown <sup>a</sup>
Roberts, Horace	Leal, Joaquin Harris Jr., Googie Harris Sr., Googie
Roberts, Rodney	Unknown <sup>a</sup>
Robinson, Anthony	Unknown <sup>a</sup>
Rodriguez, George	Unknown <sup>a</sup>
Rogers, Mandel	Hines, Joseph Jackson, Cedrick
Rollins, Lafonso	Unknown <sup>a</sup>
Roman, Miguel	Mirando, Pedro
Rose, Peter	Unknown <sup>a</sup>
Ruffin, Julius Whitfield, Arthur Lee	Doxie, Aaron
Saecker, Frederic	Unknown <sup>a</sup>
Salazar, Ben	Unknown <sup>a</sup>
Sarsfield, Eric	Unknown <sup>a</sup>
Scott, Calvin Lee	Sauls, Steven Wayne
Scott, Winston	Unknown <sup>a</sup>
Scruggs, Dwayne D.	Unknown <sup>a</sup>
Shephard, David L.	Unknown <sup>a</sup>

Sledge, Joseph	Unknown <sup>a</sup>
Smith, Billy James	Unknown <sup>a</sup>
Smith, Frank Lee Townsend, Jerry	Mosley, Eddie
Smith, Walter D.	Unknown <sup>a</sup>
Snyder, Walter	Unknown <sup>a</sup>
Sonnier, Ernest	Breaux, Avery Gus Thomas, Kirk Jerome
Starks, Bennie	Unknown <sup>a</sup>
Sterling, Frank	Christie, Mark
Stinson, Robert Lee	Price, Moses
Sutherlin, David Brian	Unnamed <sup>c</sup>
Tall Bear, Johnny	Unknown <sup>a</sup>
Tapp, Christopher	Brian Dripps
Taylor, Ronald Gene	Carroll, Roosevelt
Thibodeaux, Damon	Unknown <sup>a</sup>
Thomas, Victor Larue	Unknown <sup>a</sup>
Thompson, Hubert	Unnamed <sup>c</sup>
Thurman, Philip Leon	Unnamed <sup>c</sup>
Tillman, James Calvin	Foster, Duane
Toney, Steven	Unknown <sup>a</sup>
Towler, Raymond	Unknown <sup>a</sup>
Tribble, Santae	Unknown <sup>a</sup>
Turner, Keith	Unknown <sup>a</sup>
Vargas, Luis	Unknown <sup>a</sup>
Vasquez, David	Unknown <sup>a</sup>

Velasquez, Eduardo	Unknown <sup>a</sup>
Villasana, Armand	Unknown <sup>a</sup>
Waller, James	Unknown <sup>a</sup>
Waller, Patrick	Bell, Byron Simmons, Lemondo
Wallis, Gregory	Unknown <sup>a</sup>
Warney, Douglas	Johnson, Eldred
Washington, Calvin E.	Carrol, Bennie
Washington, Earl	Tinsley, Kenneth Maurice
Waters, Kenneth	Unknown <sup>a</sup>
Waters, Leo	Caulk, Joe Bill
Watkins, Jerry	McCormick, Joseph Munson, Kenneth
Watkins, John	Unknown <sup>a</sup>
Webb, III, Thomas	Harris, Gilbert Duane
Webb, Mark	Unknown <sup>a</sup>
Webb, Troy	Unknown <sup>a</sup>
Webster, Bernard	Powell, Darren L.
White, John Jerome	Perham, James
Whitley, Drew	Unknown <sup>a</sup>
Wiggins, David Lee	Unknown <sup>a</sup>
Williams, Derrick Raphel	Unknown <sup>a</sup>
Williams, Jr., Johnny	Unknown <sup>a</sup>
Williams, Michael	Unknown <sup>a</sup>
Willis, Calvin	Unknown <sup>a</sup>
Willis, John	McGruder, Dennis

Wilson, Sharrif Yarbough, Anthony	Unknown <sup>a</sup>
Woodall, Glen	Good, Donald Eugene
Woodard, James Lee	Unknown <sup>a</sup>
Woods, Anthony	Unknown <sup>a</sup>
Woods, Cathy	Halbower, Rodney
Wright, Anthony	Byrd, Ronnie
Wyatt, Rickey Dale	Unknown <sup>a</sup>
Wyniemko, Kenneth	Gonser, Craig
Yarris, Nicholas	Unknown <sup>a</sup>
York, Kenneth	Unknown <sup>a</sup>
Youngblood, Larry	Cruise, Walter

<sup>a</sup>True perpetrator has not been identified.

<sup>b</sup>Walter Ellis was the true perpetrator of two separate crime events, thus is listed twice.

<sup>c</sup>True perpetrator was identified through DNA, but their name was not released to the public.

**“They open the door, kick you out, and say, ‘Go’”  
Reentry Challenges After Wrongful Imprisonment**

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*Drawing on 24 in-depth semi-structured interviews with exonerees, this study explores the post-release experiences and struggles upon reentry. Findings highlight the urgent need to provide support to individuals who have been victimized by the very system that is supposed to protect their fundamental rights. It is essential that more customized holistic approaches be implemented to address the wide range of often-interrelated practical, social and psychological issues. Furthermore, services should be provided immediately upon release and be offered indefinitely as hardships often linger well after release. Ultimately, the goal of this paper is to encourage action toward comprehensive support after wrongful imprisonment.*

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## I Introduction

To date, there have been 367 DNA exonerations (Innocence Project, 2020) and over 2,600 exonerations when including non-DNA cases (National Registry of Exonerations, 2020). However, since there is no systematic method to determine the accuracy of a criminal conviction, and since the United States warehouses 2.2 million prisoners (Kaeble & Glaze, 2016), and incarcerates 670 people per 100,000 citizens, (Walmsley, 2016), the true number of wrongful convictions is likely significantly higher. In many cases the actual guilt of the convicted individual is known only by that individual, therefore making the true number both unattainable and unknowable (Gross & O'Brien, 2008).

In this research, we examine the struggles faced by wrongfully convicted individuals after they return to the community. Scholars have devoted a great deal of attention to research on factors that contribute to wrongful convictions- such as eyewitness mistakes, false confessions and “junk” science (Garrett & Neufeld, 2009; Kassin, 2002, 1997; Wells, et.al, 1998). In addition, many have shared their stories of innocence through biographical and autobiographical books (Leo, 2005). Most of these accounts, however, focus on life leading up to the arrest and the legal issues resulting in their wrongful conviction (Leo, 2005). While important, these accounts tell us little about what happens after release. The impact of the wrongful conviction includes more than just a struggle to survive prison while fighting for one’s freedom (Westervelt & Cook, 2012); the effects linger well after success is won in the courtroom.

Justice for those who have been exonerated extends beyond just freedom from confinement; the damage inflicted by the criminal justice system through wrongful conviction destroys lives and requires long-term, sustained restoration and support long after release. To achieve this there must first be an understanding as to what exonerees need to rejoin society and prosper and how those needs shift over time. In this study, our goal is to contribute to the research on wrongful convictions and prompt action toward comprehensive and individualized support for returning exonerees.

## II Consequences of Incarceration and Barriers to Reentry for Exonerees

Researchers have generally found that wrongfully convicted individuals suffer from many of the same consequences as other formerly incarcerated people upon release from prison, such as psychological trauma, long-term mental health challenges, and stigmatization. In addition to these, however, scholarship has shown that the lived experiences of wrongful imprisonment might be worse than for other incarcerated people due to the unjust nature of the situation (Campbell & Denov, 2004). For this population the transition after incarceration is often compounded by a host of unique experiences (Westervelt & Cook, 2008), such as the suddenness of release without time to prepare (Grounds, 2004), mistrust and fear by community members that are either unfamiliar with what exoneration means or doubt the person’s authentic innocence (Campbell & Denov, 2004), and absence (or denial) of post-release programming, support or housing (Weisman, 2004; Westervelt & Cook, 2010).



Evidence suggests that formerly incarcerated individuals report substantial post-incarceration mental health challenges, such as depression, posttraumatic stress disorder (PTSD), and anxiety (Mallik-Kane & Visher, 2008; Bronson & Berzofsky, 2017; Alexander Bloch et al., 2020). These challenges are largely produced by the prison environment itself. Under the strict formal and informal rules of the prison, individuals often experience the frustration and deprivation of living in a total institution (Goffman, 1961; Sykes, 1958) that promotes self-destructive changes in behavior (Haney, 2002; Zamble & Porporino, 2013; Middlemass & Smiley, 2020) and unhealthy coping mechanisms (Branham, 1992; Clemmer 1940). These issues often lead to problems after release including increased substance abuse (Petersilia 2003, James & Glaze, 2006; Chandler & Fletcher, 2009; Chamberlain, et.al., 2019) and diminished long-term psychological health (Zamble & Porporino 1988; Gonzalez & Connell, 2014; Wilper, et al., 2009).

Some researchers have studied the mental health of exonerees specifically and found that these individuals experience similar psychological, emotional, and social challenges as parolees (Campbell & Denov, 2004; Grounds, 2004; Cook et.al., 2014; Westervelt & Cook, 2010; Wildeman et al., 2011). In many cases, the nature of the wrongful detention may exacerbate these effects. Simon (1993) found that even brief wrongful detention (less than 24 hours) may result in long-term psychological trauma. However, since wrongly convicted individuals serve 11 years on average (Gross & Shaffer, 2012), these damages are amplified. In early work on exoneree mental health, Adrian Grounds (2004) interviewed exonerees and concluded that "those released following wrongful conviction and imprisonment may have significant psychiatric and adjustment difficulties of the kind described in other groups of people who have suffered chronic psychological trauma" (p. 175). Grounds also found that the overwhelming majority of exonerees suffered from PTSD and personality changes, while a smaller, though still substantial, subgroup experienced depression, panic disorders, and paranoia. Consequently, exonerees report difficulty sleeping, increased irritability and moodiness, and other symptoms that can make life after prison even more arduous. Likewise, Westervelt and Cook (2010) spoke with death row exonerees and found that these individuals had difficulty adapting to outside life and experienced prolonged feelings of bitterness and anger.

In addition to mental health issues, exonerees must also deal with negative perceptions by the public. It is well established that people hold negative stereotypes of formerly incarcerated offenders (Dijker & Koomen, 2003; Hirschfield & Piquero, 2010; Rade, et. al., 2016; Moore, et.al., 2018); exonerees are viewed similarly (Thompson, et. al., 2012; Clow & Leach, 2015; Kuckucka, et. al., 2019; Campbell & Denov, 2004; Keene, et. al., 2018; Menard & Pollock, 2014). Lopez (2002) argues that "[t]he most damaging injury inflicted upon the wrongfully convicted is not necessarily the time lost behind bars, but the stigma that follows them for the rest of their lives" (Lopez, 2002, p.720). This stigma could be due in part to the public's inadequate understanding of exoneration, lack of awareness about the general prevalence of wrongful convictions and perception that exonerees are dangerous or socially undesirable (Bell, et. al., 2008; Clow & Leach, 2009; Thompson & Levett, 2010; Blandisi et al., 2015). Recent research has also shown that race might play a factor in how exonerees are viewed by the public (Howard, 2018). Finally, some cases receive substantial negative publicity making it more likely that the individuals involved face higher scrutiny than others that escape similar attention (Martin, 2006). Unsurprisingly in light of these studies, exonerees feel they are not accepted by community members, that their

innocence is doubted, and that they have to continue to fight to assert their innocence and reconstruct their reputations to earn the public's trust (Westervelt & Cook, 2010).

Employment can sometimes mitigate the barriers of reentry by helping returning citizens obtain economic security, medical care, housing, and other positive outcomes (Haney, 2002; Grounds & Jamieson, 2003). Finding and maintaining employment, however, is often difficult for individuals reentering society (Pager, 2003; 2008; Grounds & Jamieson, 2003; Berg & Huebner, 2011; Looney & Turner, 2018) and exonerees cite it as their most important concern (Westervelt & Cook, 2010). For many exonerees, the stigma associated with their status reduces likelihood of finding meaningful work and they may face hiring discrimination similar to ex-offenders (Kuckuka et al., 2019). Like parolees and other formerly incarcerated people, exonerees are subject to background checks that often turn up criminal records even after expungement (Shlosberg et al., 2012) and remain visible to potential employers (Chunias & Aufgang, 2008). Even when criminal records are not uncovered, exonerated people are required to explain their employment gap (Armbrust, 2004).

While these issues are not uncommon for other formerly incarcerated individuals (non-exonerees), it may be more difficult since exonerees are often ineligible for job training, vocational services, and opportunities that are often made available to parolees (Scheck, et.al., 2000; Grounds, 2004; Cook, Westervelt, & Maruna, 2014). Altogether, the lack of training, long gaps in employment history, and negative public perception make it extremely difficult for these individuals to find and retain jobs. Consequently, without resources from work, many exonerees become dependent on others, potentially straining supports in the community (Scott, 2010).

With the challenges of gaining meaningful employment and the lack of assistance or guidance throughout the reentry process, exonerees are likely to seek compensation to achieve basic security and help restore their lives (Martin, 2006). Financial compensation can aid exonerees in several ways. Not only does payment help exonerees overcome the substantial barriers to re-entry, it may make them feel valued by society (Mandery, et. al, 2013). However, compensation is not enough. Westervelt and Cook (2012, p. 237) state, "[t]he overarching element they wish for is restoration, restoration of the components of their financial, familial and emotional lives that they believe were destroyed by their wrongful conviction." Related to financial security, many exonerees also lack adequate housing and although some exonerees have family or friends to stay with, at least in the short term, many live temporarily with their lawyer (Westervelt & Cook, 2008) or resort to living in an unsafe temporary housing condition, such as homeless shelters (Chunias & Aufgang, 2008).

The harms of being wrongfully convicted continue long after an individual is exonerated. Westervelt and Cook (2008) describe the imprisonment of an innocent person as a "sustained catastrophe" that extends over long periods, much like the experience by abuse victims or prisoners of war. Following release, these individuals struggle with seemingly simple everyday tasks like relearning how to sleep, eat, shop, walk, use money, and even dress themselves (Westervelt & Cook, 2012).

In this paper we aim to expand on the work cited above to describe and explore the challenges exonerees face after prison. Although there are also many exoneree success stories,

here we highlight issues and problems that exonerees face at different time periods after release. Our hope is that by concentrating on these specific narratives we might better direct local and national support to improve post-prison life for exonerees.

### **III Data and Methods**

We conducted semi-structured, in-depth interviews with a sample of 24 exonerees over the course of approximately five years (November 2015 - June 2020). For the interview protocol, we follow Rubin and Rubin's (2005) suggestions for initial broad qualitative questions to provide conversational discussions with the intention to investigate deeper or "thicker" descriptions of meaning (Geertz, 1994). This data collection approach is suitable for this type of research given that the goal is to uncover and unpack the individual lived experiences of respondents (Charmaz, 1990).

We initially recruited exonerees to participate by reaching out to our professional contacts who work closely with this population. Following interviews individuals recommended others that they thought would be interested in speaking with us. Once exoneree contact information was obtained, a member of the research team reached-out to the individual, explained the purpose of the study and provided a consent form. If respondents agreed to the interview, the research member scheduled, and later interviewed, individuals in-person or virtually. Participants were compensated \$100 for their time. Individuals were included in the study if they were wrongfully convicted of a crime and later cleared of all charges.

In the interview we asked a series of questions related to individual incarceration and post-incarceration experiences. For insight into life after prison, we asked about obstacles that individuals faced upon release (such as health issues, financial struggles, personal relationships, fears, etc.) and feelings of preparedness for community reentry. We also asked exonerees about successes and challenges associated with employment, relationships, health, the legal system and individual coping strategies. We inquired about the process and/or struggles with reintegration and the idea of closure, attitudes toward law enforcement and the criminal justice system. Finally, we asked respondents to share their own ideas on how reentry could be improved for other exonerees.

All interviews were audio-recorded, transcribed verbatim and assigned a confidential code number (e.g., R1, R2, R3, etc.). Coding and analysis were conducted in four steps. In step one, a sub-group of interviews were reviewed to compile a close code outline – a list of concepts and themes represented in the data. In step two, all interviews were coded line by line, where sections of text were assigned descriptive labels (assigned open-codes). Once open coding was complete, in step three, data were integrated by grouping open coded segments under the close code outline. Lastly, data was analyzed by comparing and contrasting the material grouped together to identify patterns, dimensions and relationships among the identified concepts and themes.

#### **A. Sample Description**

Twenty-four individuals were interviewed for this study; each had been wrongfully convicted and incarcerated between five and 28 years with an average of 18.5 years. The majority of the participants are male ( $n = 17, 70.8\%$ ), with seven ( $29.2\%$ ) female participants. Ten ( $41.7\%$ )

participants are White, nine (37.5%) are African-American or Black and five (20.8%) are Hispanic or Latinx.<sup>1</sup> Three respondents were sentenced to death and five were sentenced to life without the possibility of parole. The remaining sentences ranged from seven to 65 years. The majority of participants were wrongfully convicted of murder (n = 15, 62.5%). Other charges of wrongful conviction included sexual assault, robbery, aggravated assault, child sexual assault and kidnapping. Finally, individuals were drawn from all U.S. regions: 10 were from the Northeast, two from the Midwest, nine from the South, and three from the West.<sup>2</sup>

As noted in Dworkin (2012), sample sizes for qualitative work tend to be smaller than samples in quantitative studies. Our intention was not to speak for all exonerated people (though we are confident that the experiences narratives provided here speak for at least some), but to closely examine how reentry is experienced and described by exonerees, how these experiences change over time, and why so many barriers exist.

In the findings section below, when possible, we try to use specific quotes to illustrate key concepts throughout the paper. In some cases, we paraphrase or trim what individuals told us to flow within the paper and/or to obscure information that might identify respondents. This was especially important since the known universe of exonerees is small and we wanted to protect the identities of all those that volunteered their stories. Although some individuals were quoted more than others, all voices were equally important.

Finally, throughout the paper although we use the term ‘exonerees’ to collectively discuss the respondents, some of the quotes and analysis describe time periods prior to legal exoneration. We use this collective term to avoid confusion while still focusing on the reentry experiences of all those interviewed.

#### IV Results

The personal costs of wrongful conviction are vast. Acute and chronic harms are caused at all stages of the criminal justice process - arrest, legal proceedings, conviction, and prison. When individuals are released, our society expects that freedom is good enough and that they’ll be successful on their own, with little or no state support. For most, however, the euphoria of release, however blissful, is fleeting and followed by substantial challenges. From those we spoke with, the challenges often began on day one and continue throughout their lives.

In this paper we first describe the context of initial release for those we spoke with and the tribulations immediately faced in day-to-day life. In the second section we discuss the resources (or lack thereof) available to exonerees after release. Finally, in the third section we outline long-term challenges. From an extensive initial list, we group these barriers into five primary categories relating to technology, financial stability, stigma, mental health, and social relationships.

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<sup>1</sup> Race/ethnicity and gender demographics were compiled from the National Registry of Exoneration. (<http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx>) accessed on June 25, 2020.

<sup>2</sup> Regions were created from Census categories.

### A. First Day Out: Elation and then Paralysis

It was surreal, I step out of the courtroom and the sky, the blue, not a cloud in sight. The sun was out, sunlight on my face and fresh air. I guess it felt surreal. Then I stepped to the press conference, there was a ton of media there, everything I ever wanted to say. [...] I spoke for like two and a half hours giving an off the cuff presentation. I went to a luncheon after that. I had some of my favorite foods. Then I went to my aunt's house and just sat around the table awkwardly which was this great big party to the break of dawn but by that point I had really lost touch with everybody. I really couldn't relate to the people that were there so I felt out of place so I just wound up going outside and just sitting outside for most of the night. [R1]

R1's quote demonstrates the range of emotions felt by many exonerees upon release. Those we spoke with often felt initial bliss; finally, they were free and finally their voices were heard. And although each celebrated in different ways – some very publicly, and some very privately – the initial joy sobered considerably as reality set in. This sobering period varied by person. For individuals like R6, elation was quickly replaced by fear and apprehension as he realized an unfamiliar world lay before him: “the second day I got out, it was, I was sweating profusely, I was very, I was nervous, I was afraid. [I] Didn't know what to expect.”

The majority of those we interviewed in this project were notified of their release suddenly and found themselves ejected from detention without time to plan. While perhaps well intended, as few would choose to be detained any longer, the sudden expulsion created initial hardships and few from our sample were fortunate enough to have enough saved resources to overcome these challenges. Some of our respondents, like R9, used up their entire savings in the legal processes prior to, during and after incarceration. R16 described his frustration with the state after release:

[I got] zero. I did not receive nothing in any form of any compensation or anything that would assist me, you know, upon my reentry. No type of tools whatsoever. And I can specifically say here [in my state], there is no compensation law, you know, for those who injustice fell upon their lap, and when I came home, I had no help from the mayor. I had no help from the government. I had nothing but what I went in with.

The most anyone received at release was gate money, a state-specific small monetary package set according to years served<sup>3</sup>, and whatever individuals still had in his or her commissary account. In some cases, the release was so rapid there wasn't enough time to gather personal belongings, or as R5 put it, “they open a door, kick you out and say ‘go.’” Many we spoke with had to return to the prison to collect their things and any amount owed to them by the state.<sup>4</sup> At most, exonerees left prison with little more than the clothes on their backs and just enough money for a train ticket. R11 told us she received \$100 from the state and wanted to frame the check to

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<sup>3</sup> For our sample, the amount varied from \$50 to \$100.

<sup>4</sup> Individuals from our sample were released at different times. Some states have made important improvements to their release policies but not all.

remind her of her liberation. However, when she left prison, she didn't have enough support and was forced to cash the check out of necessity. She now just has a photograph of it to remind her. Equipped with few resources and released into a changed world, many of the exonerees felt the embeddedness of prison life after release. R11 described this feeling as a form of paralysis:

I didn't know how to do anything. I was...you're kind of childlike you know? You need permission to do everything. So even to take a step in one direction or the other, you kind of look to somebody like, "is this okay?" It's strange and Instead of being a stranger in a strange land, I felt like a stranger in a familiar land you know? I spoke the language, but I wasn't sure what I was allowed to do. So, you're very unsure of yourself in every way and I couldn't make decisions.

Like R11, R24 saw himself as an outsider. His family took him out for pizza to celebrate the freedom he had won and although many of his family members were there to celebrate with him, he felt distant and unsure of himself.

[T]hat night, we took a lot of pictures and everything and I don't know why, but pizza is something that I wanted when I first came home. So, we went to go eat Pizza Hut and my mom, my parents were there, well, my mom and my stepdad because my dad passed away while I was incarcerated and, and my son, and it was our first visit together. So, it was really hard and difficult and I just, I still couldn't believe it. I didn't know how to act. I didn't know how to respond. It's like I felt foreign, you know, it was so different. It's like they're my family, but I haven't been around them in so long and even though they would come visit it was still, you know, different. I don't know if that makes sense.

Similarly, R15 felt the shock of release right away. After nearly two decades in prison, R15 was relieved that she was finally able see her son, a toddler when she was sent away and now an adult. After the reunion with her family she quickly became overwhelmed by how ill-equipped she felt living what she felt was a normal life. Fortunately, unlike many others we spoke with, she had her brother and other key support actors there to assist her. She told us that without them, she wouldn't have survived the transition.

My first day out of prison. [...] I was up most of the night. I got to watch my son sleep for the first time in [almost two decades] and woke up and see him in his bed, do normal parent stuff. But the next day I called my brother. [...] I got on the phone with him and I just started crying and I said, I don't have a toothbrush. ... I wasn't prepared for this. [...] And I said I had absolutely nothing to wear and I put back on my prison uniform, and I said, "that's all I've got is a prison uniform." And, it just hit me, what am I going to do? Where am I going to go? [...] So, my brother said, "listen to me. I buy clothes for the kid. You can fit in his clothes. You go up and get a shirt and a pair of shorts. You take a shower. Put on a clean outfit. I'm going to be over there to get you. We're going to go shopping." And I said, "Okay." And he did that, and we went out to eat with my son, and it was nice. And then when we went in the store, I was just ... I guess, overwhelmed. I couldn't, I couldn't focus on anything. You know there was all these colors and all these choices and I

didn't know what to look at first, and he was like “you know what, why don't you stay back here in the fitting room and I'll just bring you outfits and whatever you like, and [whatever] feels good, that's what we'll get. [R15]

Many of the individuals interviewed in this project have been denied resources in prison because of their resolution in proclaiming innocence, or in the minds of correctional officials, denying responsibility. After incarceration most states have no structure to support the transition and assume that individuals will be able to adjust, or that friends, family and the community can and will assist. As the average time served among exonerees we spoke to was over 18 years, many loved ones that might offer support have moved on with their lives, migrated to new parts of the country, or passed away. Ultimately, the reentry process for exonerees starts bleak and in many cases, becomes harder throughout the years.

### **B. Insufficient Support**

I feel [that for exonerees it is] worse because there's no system in place for exonerees [...]. There's nothing established by legislation or anything. There hasn't been anything in place to try to assist us, to give us financial assistance or housing assistance or education. So, I honestly feel that we're being actually prejudiced [against] by this lack of system being put in place. I think actually a person that comes out paroled is in a better position because there's a bunch of organizations out there for them. [R2]

R2's quote highlights what nearly all of the respondents shared with us – that there are few support services available to exonerees and worse, they feel abandoned by the system. After the initial excitement of release waned, it became all too clear for exonerees that they were ill-equipped to establish their new lives. The majority were released without any transitional planning and without support services in place. In the first few months after release, housing instability was common along with inadequate access to medical care, food, and financial resources. Those without family nearby to assist them found themselves with nowhere to settle, raising doubts about their futures. Some felt hopeless as they struggled to find stability. R10 commented, “I was broken, I was struggling, I had jobs here and there [...] my living situation was really bad.” Echoing this feeling of desperation and lack of certainty about the future, R3 stated, “I'm 33 years old and living on the couch with zero, with ten years of no work experience and I don't really know where I'm going next.”

In addition to housing, access to medical care was a major concern raised by exonerees, particularly because they experienced a range of health issues following their release, including asthma, high blood pressure, diabetes, cancer, and mental health disorders, to name a few. Several mentioned that it took months before they had medical care or that their coverage was inadequate. They found themselves having to pay for services out of pocket or not get the treatment they needed. R22 shared,

I couldn't get any resources; I couldn't get health care. I couldn't, and that was hard because I couldn't get my dental work, I couldn't get physicals. I had to pay full,

full amounts for these things and it was, it was very difficult. The resources weren't there [...].

The inability to access affordable health care adds to the burden exonerees experience at a time when their physical and mental health needs are significant, and the cumulative stress they experience could very well contribute to a worsening of their conditions.

The overwhelming majority of respondents were not able to find immediate work or find jobs that provided financial stability. Those who found employment were in a better position to meet their needs. In the absence of well-paying jobs, some of the exonerees had to apply for public assistance. R2 informed us that there is no support available to exonerees beyond what is available to other citizens through government programs.

I've had to apply for public assistance. That's the only type of assistance that is available." [...] "[I]t took me about a month and a half before I actually saw anything maybe a month and a half or two. Yeah it takes a little while but I'm on Medicaid and public assistance.

Like the respondent above, R3 agreed that the only social supports available are the same supports afforded to everyone else. He indicated that he was a welfare recipient and received food stamps, but he was notified that assistance was contingent on him actively seeking employment and attending job fairs.

Having no resources upon release and having to navigate bureaucracies to apply for and access supports may feel like another form of victimization by the State. In fact, the majority of respondents seemed to take stock of what they were provided with upon their release, particularly in relation to parolees. There was widespread agreement that parolees receive an array of services and supports both through parole and through reentry organizations that is simply not available to exonerees. R13 views parolees as having several advantages over exonerees, which are reflected in the following statement:

Oh yeah. Yeah, because they [non-exonerees leaving prison] get reentry help, they get housing, they get food stamps, they get clothing. [...] I had a good time, believe me, buying my wardrobe. I did but it'd have been nice if somebody would have given me three outfits [...] I think that they have resources available to them that the rest of us don't have.

There is typically some period of transitional planning for parolees prior to release, and they often receive assistance in setting up their support system. Several other advantages to being on parole were highlighted by respondents, including the benefit of having a guide through the reentry process as well as routine monitoring. R12 stated, "it helps when you have a probation or parole officer helping point you in the directions of the grants. I had none of that [...] But it helps when you have a P.O. pushing, you know, these people." R17 also feels that that certain parole requirements, such as having to maintain employment, might help motivate parolees as well as give them access to job-related services that exonerees do not have. These advantages were in fact noted by R18, who spent 16 years on parole before he was finally exonerated. While he felt a great



deal of anxiety over complying with the conditions of parole, he believes that having to report kept him motivated and on track. He also thinks that being on parole gave him the encouragement he needed to find and maintain gainful employment.

The respondents who were legally exonerated felt abandoned by the State and had difficulty accessing supports through non-profits. R15 was specifically told by a staff member at a reentry organization that she was ineligible for services due to her exoneration, even though her record was not expunged. Without a central structure in place to connect them to services, exonerees are “cut off” from social support and feel disconnected. Achieving their freedom is often the first step in a very long and difficult road to reintegration. The next section will document the long-term challenges that exonerees experience.

### **C. The Long Road Ahead**

I think I had delusions of grandeur that it was going to be much easier than it was. I somehow thought that I'd come home and I'd find a job and things would pretty much return to normal within six months or so and boy, was I in for a big surprise.  
[R23]

R23's quote reflects the reality of the enduring effects of wrongful conviction. Exoneration is not a magic wand that restores life to “normal.” The majority of our respondents experienced long-term hardships related to technology, financial stability, stigma, mental health, and social relationships.

#### **Technology**

To be functional in modern society individuals are expected to rapidly understand significant cultural, technological, and legal changes upon release. While prisons are not completely removed from the rest of society since some of these changes (customs, language, information about current events, etc.) make their way in regardless of how high the walls are, those we spoke with felt they were significantly behind their peers. As R3 explained two years after release, “I'm still on an extreme lag. I'll always be 10 years behind. That's why now I'm 38 and I'm still in school. Take that 10 years back and I would have been out of school 10 years ago. I might be on my second career by now. I haven't even started yet.”

In our sample, changes in technology were described as the most startling and most challenging issue to overcome right after release. Some incarcerated people are able to get access to computers and some forms of technology, but these exposures are viewed as privileges granted to individuals for a variety of reasons, including taking responsibility for criminal behavior. In the case of wrongfully convicted people, taking responsibility often means admitting to both the criminal offense and accepting state punishment. For example, R18 explained that he was always willing to participate in programs and treatments, but that his access was limited because he never accepted guilt for the crime of which he was convicted. Among the respondents, few individuals had access to computers or other technology trainings and since their sentences were so long, the world they returned to had changed considerably.

I did not know how advanced technology had moved since I've been... 17 years is a long time. That's a teenage life. So, you come home in 17 years, and like my 3 and 4-year-old nieces, they can operate my phone and computers like professionals. I'll sit here stuck and they [say] "give it me." [R9]

Most prison re-entry scholars connect lapses in technology-related skills to employment barriers (e.g., Ogbonnaya-Ogburu et al., 2019), and, to a degree, those we spoke with corroborate these findings. However, to those we interviewed here, technology was more vital than employment and framed almost all aspects of social life. R3, for example, was frustrated that he couldn't access basic communication resources like email and social media: "It took weeks and weeks just to build up a familiarity with the Internet or getting a Facebook account, getting a Gmail account and understanding the difference between logging into Gmail and logging into Facebook which would seem like a very simple thing when it comes slowly but all at once it can be a lot." R21 was similarly frustrated. It seemed to him that people no longer even communicated the same way. He still tries to call people, but is irritated that no one picks up the phone. He's started to adapt but he feels it is not just learning how to use a new device, human interaction has changed. Others shared this observation that the nature of human interaction evolved in their absence. R6 recalled his unfamiliarity with the norms and conventions of social media:

I took to social media. Like Facebook, for example...That was not good for me because what happened, I started friending everybody and what my friends started saying to me was [...] you have to be careful about that and who you're friending and all these kinds of things. Cause eventually these people can tend to...get into your business, you wanna know who's who and all those kinds of things. So, [...] that was a learning experience [...].

### **Financial Stability**

As noted above, the majority of respondents were released with little to no support from the State and had to rely either on what they accumulated in personal savings or on support from family members. Compensation is not guaranteed in all states, and even when it is, the rewards are not automatic. Exactly half of the exonerees we spoke with received compensation by the state.<sup>5</sup> For some, funds were received in a timely matter (within the first year), others had to wait decades to be compensated. The amount of compensation ranged from \$10,000 to several million. Among the twelve individuals who did not receive payment from the state, three have claims that are pending and the remainder either live in states without compensation statutes or they are ineligible (e.g., plead guilty, falsely confessed, case still opened, etc.). To illustrate this challenge, R8 expressed the following:

Some of it is [...] trying to transition back into society which is difficult for some people, and some of it is also trying to get compensation. You know, a lot of guys have been going...decades, and we have to file suits which is ridiculous [...] to get some type of compensation, and then they fight us on that. Like, this whole situation is ridiculous. Because if somebody, you know, like if you take somebody's life for 20-something years in prison. Then come home most of the time, by the time we

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<sup>5</sup> This includes exonerees who were compensated either through existing state statutes or state court of claims. It does not include individuals who received funds from civil lawsuits or a private bill.

come home, we'[re] older, we'[re] not in the best of health, you know we, we don't get no type of health benefits, we don't get no jobs. We don't have anything.

It is clear that R8 feels exonerees do not have adequate resources to navigate the long-term challenges they face, such as unemployment and poor health. Other respondents felt that the compensation they received was inadequate. R9 waited 15 years to be compensated, and was compensated only after an automatic compensation law was passed. Even then, he did not feel that a monetary value could be placed on all that he lost. R19 expressed a concern that compensation on its own is not enough unless additional resources are also provided, such as counseling and financial advising. In the absence of these additional resources, settlements provided might not be enough to sustain exonerees as they navigate reentry challenges.

Not all respondents were legally exonerated at the time of their release. Some were released on recognizance after newly discovered evidence raised questions about their convictions. Others were released on parole before their convictions were overturned. These respondents were not entitled to compensation until they were legally exonerated, which was months to years later in most cases.

In these circumstances, some respondents waited several years beyond that for their records to be expunged, complicating the process of finding employment and further undermining their financial stability. As R23 stated, "nobody wants to hire a person who has been in prison for 14 years for murder." R14 agreed that with the conviction still on his record, no one would give him the benefit of the doubt. He explained, "I was a liability. Nobody's going to take a chance. At the time I had not been exonerated so, you know, it's hearsay, you know, nobody would, nobody would trust me."

Those who are legally exonerated at the time of release do not always fare better than those who are not. Several respondents faced skepticism and felt they had to answer for their convictions even after they were cleared of their crimes. In their view, many assumed they were still guilty or somehow involved in the crime and were let off on a technicality, which made it difficult to find well-paying job opportunities. R4 reported, "cause even though we were exonerated it was still difficult. Like there still were no jobs because people were still saying we were guilty." He further commented that potential employers assumed, "They got exonerated, but they got exonerated on a technicality. They must have did something. And that's what people couldn't let go."

Even when employers are sympathetic, they are often reluctant to offer jobs to individuals who spent time behind bars. According to R20,

People are sympathetic, but because of the way of the world today and the things that are happening, when they go to hire you [...] people look at you, they look at your mentality, what you been through, the type of person that you might be, because you got to be working with other individuals.

R20 perceives that employers are concerned about the effects of institutionalization despite his innocence. There is also a common viewpoint among respondents that even if their records have been expunged; their names will turn up in an Internet search causing them to lose job

opportunities because employers view them as a risk. R20 faced years of difficulty in securing stable employment, even though he was pardoned by the Governor. He explained:

[...] everywhere I turned my conviction kept coming up for some particular reason. It would show up when I go for employment positions and stuff, even though I had a full unconditional pardon from the governor, even though I had an expungement order signed by administrative judges that the records were no longer acceptable and all. They will still come up and then I would have to answer for them and what person when you telling her that you'd been wrongfully imprisoned for something [for 10 years] and you've only been home 2 years. They don't know anything about you. They had no idea what type of person you are, with the kind of involvement that you been in, the pain that you've been subjected to, your kind of mentality. You know, so it became a lot harder during that time.

Decades later, R20 is still being denied job opportunities due to his past. He expressed disbelief that he always finds himself having to explain a wrongful conviction from more than 30 years ago.

There are other barriers to finding employment in addition to stigma. Some respondents feel they have limited opportunities because they lag behind others in terms of marketable skills. R1 told us he had trouble finding gainful employment not because of his guilt but because of his lack of experience compared to other job seekers.

R8 explained that individuals who are incarcerated are unable to acquire skills that keep pace with societal and technological change:

Whatever job training, or skills, we may have learned inside the prison, is you know, out of date. Because while we're working with these computers out here, what they're working with in [prison], business 2003 type, you know, computers. They have no Internet, so they're working with stuff that's out of touch with what society is dealing with. So, when we come out here, we just seem lost, like really don't understand what's going, and unfortunately, they didn't do anything to try to assist and fix the transition.

This is yet another example of how technology presents challenges to successful reintegration. While incarcerated, individuals typically do not have access to the most recent technological developments, creating deficits in their qualifications. For those who are incarcerated for many years, disruptions in work history serve as an additional barrier to employment. R11 stated the following:

I had no idea what I was going to do... didn't know how to do anything, and no one would hire me. I went in when I was 27, I came out when I was 45. Nobody's hiring a 45-year-old woman with no work experience, who was in prison, but she didn't do it right?

While limited skills and work histories are a barrier faced by other individuals who have been incarcerated and are not unique to exonerees, it is particularly cruel that they should have to

experience these challenges given the injustice they suffered. In the face of these obstacles in securing employment, some of the participants felt they could never fully rebuild their lives.

### **Stigma in the Community**

While they clearly experienced discrimination in the job market, many exonerees felt stigmatized in the broader community when they returned home. When asked if people doubted her innocence, R11 replied,

[They] still are. That follows, that is the shadow. That Peter Pan shadow that follows you forever. Wherever you go, you can't cut it off and put it in a drawer. It, it, that's always going to be with you. There's always going to be somebody who says, 'Oh, yeah, I was a technicality,' or you know whatever and you just have to accept that. There will be people, that's just part of the lasting effects of wrongful conviction.

This is similar to what R4 described earlier about his experience in the job market – that even though they have been exonerated, some will assume they got off on a technicality. Several respondents described a similar feeling within the community. They perceived there to be an assumption that they were still somehow involved in the crime. R7 recalled what it was like when she returned home and encountered those who doubted her innocence:

I mean that was a lot of people [that doubted me] but I didn't come in contact with them really until I felt the stigma of that community when I got out. I mean as far as them not wanting their children being around me, or people talking about me or calling me child killer, and that kind of thing like that. Some people were like, 'I slipped through the cracks of the system.' You know, they were on the good side, of the DA.

Some respondents had to contend with the police and/or prosecutor continuing to assert their guilt following their release, which contributed further to doubts of their innocence among the public. R23 indicated,

Yeah, well, the official statement from the district attorney's office and the chief of police was, 'I'm guilty.' They know they had the guilty person, there was evidence that my attorney wouldn't let be brought out at trial and I got off on a technicality, but people, good people of the city could rest assured, they were going to take me back to trial and send me back to prison.

In communicating to the public that the respondent was actually guilty, R23 was afraid that the State would set him up to be re-convicted. In fact, several respondents expressed a fear of being victimized by the State again. They were concerned about being framed by the police for another crime because it happened so easily the first time. Some even feared retaliation by the police because their exoneration made the department look bad.

Stigma was experienced in other ways as well. Regardless of whether or not people believed in their innocence, the respondents believed that others in the community viewed them

with caution because they thought the prison damaged or changed them in negative ways. R9 explained it as such:

Even being exonerated, just the concept of being in prison and when you go meet people, they'll still see and look at you like, as if you are a convict cause you went through the experience of it. There's no way going through the experience not adapting to that environment, which I had to survive. Um, that aspect of the stigma follows me everywhere.

It is undoubtedly difficult to heal in a community where one feels unwelcome or mistrusted. Our interviews revealed a wide range of emotions experienced by exonerees upon their return and they may struggle to cope with these emotions for many years.

### **Mental health**

Respondents experienced a range of mental and emotional health problems, interfering with their ability to move forward. These included trust issues, difficulty with emotional expression, depression, PTSD, and even guilt. Trust was a theme that emerged in relation to re-establishing social ties. Establishing trust in personal relationships was difficult for some exonerees, in part due to the injustice they experienced and in part due to being in prison. Respondents noted that after years of institutionalization, it is difficult to let your guard down after returning to the community. R18 explained that among the biggest challenges of reentry was:

[...] abandoning the convict mentality and getting back into normal life, that not, not everybody was a goon that was out to get you. That, there, there are good folks out here and that was the perception, [...] everybody had it in for you before, every, everybody was a possible enemy.

R15 similarly questions others' motives and stated simply that he doesn't trust people anymore. He finds himself wondering what others are seeking to get out of a relationship with him.

Difficulties with emotional expression further complicate reintegration experiences. Emotional turmoil in the years following their incarceration was common among respondents, even as they experienced joy and relief in finally being free. For some, expressing their emotions was difficult because they were desensitized through their institutionalization. R16 explained,

Being [in prison] and being raised by wolves, you know, I mean staff speaking of, and you know the mentality and the attitude that they had had towards me in a way they treated me and just my environment. The environment alone it desensitized me, it desensitized me, so it's hard for me to do naturally what one's supposed to do like shed tears...at events where one should shed tears, you know? For me, this is that much difficult for me to be able to express my emotions and I attribute that to where I came from. Trust me.

R16's statement reflects the struggle exonerees may have in releasing their emotions after years of having to suppress them. R24 detailed how the suppression of emotion while incarcerated was a barrier to his healthy emotional functioning after his release:

A wrongful conviction has you physically locked up, but emotionally and mentally it's like, [...] you have to be strong [...] I couldn't show any emotion, I couldn't. I had to be strong. I was still trying to come home and it's like, you have to put [on] this front because you have to survive in there and you kind of just go with the flow of everything and so emotionally, I feel like I never learned how to deal with my emotions. So, I kind of like [...] bottled it up and now it's hard for me to do that, you know, I've gone to a couple of counseling sessions. [...] I fought for so many years. We're talking about 20-something years and now what do I do? I fought for so long. I don't even know what to do anymore. I don't know what kind of future I want [...] because you can never plan those things because you never know what might happen and [...] you know, all these emotions that I [...] I wasn't in touch with all these years, I'm trying to get in touch with now and I'm a mess. You know, emotionally, I just react wrong or I just, I don't know how to express myself. I get frustrated and it's like, you know, it affects my family, it affects my wife, you know, it's just, it's horrible, but I know I'm the one that needs the help.

There is a range of emotional experiences described in the above account. The respondent struggles to respond to situations in socially appropriate ways, which has complicated his intimate relationships, but the emotions he grapples with have also depressed his outlook for the future. He seems to have developed a generalized anxiety about life.

Several respondents experienced depression and PTSD following their return home. Even routine events in their daily lives can trigger their trauma. R12 explained:

But mentally, you know, we're not really mentally stable sometimes, you know, cause you hit the bout of, you know, depression, or you'll hit a bout of PTSD. You'll hit these moments of rough life where most people don't have, you know, and we hit [...] certain triggers [...] where [...] for me, you know, I watch certain shows or [hear] certain sentences or, you know, when you're having a conversation or, again like I said, when you remember certain things, you know?

The respondent said that hearing certain words in everyday conversation, or simply viewing television shows, can trigger memories of traumatic events. These situations are almost unavoidable. Others mentioned that talking about their experiences of wrongful conviction triggered their pain, even if they felt it was important and ultimately therapeutic to do so. In describing the impact of talking about her experience, R15 stated:

It's always, it's always very emotional. [...] I lost [time with] my child, and that, it's never going away. It's never going to heal. It's never going to be okay. I'm never going to be okay with that. I'm always going to be sad. I'm always, it's always going to take a toll. It's going to wear me down, but I know that many other women exonerees can't talk about their experience. They are too hurt, they're too broken, they're too scarred. So, no matter how much it, it wears me out, I'm gonna keep doing it because I want people to know that it's not just me.

Although she feels a sense of responsibility in sharing her story, the respondent is reminded of all that she lost in the process. R16 similarly explained that sharing his story opens up wounds that have never fully healed, “at first, initially, you know, it used to like compound my injury [...] it would just rehash...wounds that I don't think will ever close...”.

In addition to experiencing emotional and psychological turmoil, several respondents expressed feelings of guilt for various reasons, including surviving long enough to be exonerated when their co-defendants did not, implicating others during forced confessions, and leaving friends in prison behind. R6, for example, described conflicted emotions over his exoneration because his co-defendant died in prison. He explained:

Walking out the courtroom, after I was exonerated...it was really kind of mixed. I had mixed emotions [...] Leaving the court room of course I was very, very happy and excited to be out for one and to see my family that supported me and to see [his] family there too. But, at the same time, I was very sad too because I know that I was walking out of the courtroom, you know, without this man, you know, and, unfortunately for him, he passed away in prison [...].

The respondents also reported feeling guilty over leaving their friends in prison behind. R12 told us, “I mean, an honest truth, it hurts sometimes because I think about my friends in there. So, it hurts that I left them.” The guilt described by respondents was in part due to leaving friends behind but also leaving behind others who might be innocent. In discussing her advocacy efforts, R15 informed us that she fights for new legislation for the ones they left behind and to, “make things better and right for them.”

R12 also grappled with feelings of guilt over implicating his friends in the crime, and it continued to eat away at him and impede recovery even though they eventually forgave him.

You know, there's a lot of things that I still haven't dealt with myself with mental problems as it is. But I still haven't dealt with some of the things, you know, I still live with the guilt cause again, like I told you, I implicated other people in this crime that had nothing to do with it. But these people were my friends... We've all worked out the, you know, the hatred and the feelings and we've moved past that, but for me, I haven't. I still know what I did was wrong, even though I didn't have a choice. But I know it's wrong, and it eats at me daily, you know, So there are a lot of, you know, it's just mental problems that we, I shouldn't say we, but for me, it's just trying to work through and live with every day.

The participants overwhelmingly said they do not feel a sense of closure. Even among those who are fully exonerated, have expunged records, and received compensation, there is widespread agreement that they will never fully recover. These reparations are too little and too late given all they have lost.



### **Social Relationships**

Social relationships changed drastically for the respondents while they were incarcerated, which became all too clear when they returned home. In some cases, their severed bonds were beyond repair. Some experienced the dissolution of their romantic partnerships as a result of their convictions and imprisonment. Many experienced the loss of one or both of their parents while incarcerated and they were hit hard with that reality upon their return home. The emotional consequences of their wrongful conviction and imprisonment were exacerbated by grief over the loss of their parents. Others lost valuable time with their children and struggled to repair the emotional connection between them, especially because most of their children were very young at the time of their conviction. R11 experienced several types of loss as a result of her incarceration. She explained:

I'm also trying to reconnect with my children, you know, people, a lot of people didn't have the good fortune to have had children before they went in and those who did, you know, not all have the good fortune of being able to stay connected with them. And so, when my parents died that [was] sort of the end of my connection to my children. [...] I saw them four times a year during school holidays. So, who am I, you know? So the shorter answer is that you become estranged, yeah, so that's one of the difficulties is trying to reconnect with your children or whatever family you might have, And on their end of it, they feel often guilty for not having perhaps believed you are not being supportive enough and so that remains between you, so it's hard.

This respondent lost her parents and ultimately lost touch with her children, making it difficult for her to reconnect with them, but her quote also reflects an awkwardness that can set in when family members feel they let down their loved ones. R1 described a similar phenomenon:

More recently as I've interacted a little bit, albeit sporadically, once in a blue moon type thing with members of my extended family, there is awkwardness on their part they'll bring up, you know, they're sorry they weren't there for me, that kind of thing, sorry they didn't help me they didn't know. That kind of thing.

An awkwardness can also result from the fact that time has advanced in the exonerees' absence and their loved ones have moved on with their lives. R10 noted, "after a while, people get so used to you not being around that they like kind of forget you, so." In fact, several participants mentioned that their families moved away from their hometowns and they did not have any family to return home to, making the transition all the more difficult. These individuals seemed to face the greatest challenges in finding stable housing and navigating the social world.

## **V Discussion and Policy Considerations**

Over the past two decades, researchers have repeatedly reported that wrongfully convicted people face continuing hardships upon reentry. What is shocking is that despite an increase in the number of innocence organizations, growing bi-partisan support for criminal justice reform, and increased attention on wrongful conviction cases, little has changed for exonerees. We find here

that even individuals that have received compensation and/or been free for decades continue to face significant challenges. For some the barriers have changed but largely, they still exist.

Since exonerees are not considered to be under the care of the criminal justice system once convictions are overturned, they do not often have access to the same reentry services offered to other citizens recently released from prison. Thus, exonerees can rarely take advantage of prerelease counseling, job training, substance abuse treatment, and housing assistance, and have no point person, as parolees commonly do. This lack of access to services often compounds the stress of post-incarceration adjustment among exonerees. As R16 explains:

In comparison to a parolee, an exoneree, has no chance whatsoever with succeeding. [...] When a parolee come[s] home [...] and you[re] still a ward of the state, you have a laundry list of assistance... [I]t would have been more befitting for me to come home, like, on some type of parole because I would have been able to have the amenities of six months free housing assistance. I would have had the mental treatment or help... help and support and all other things that, as an exoneree, you get nothing but an apology, whether it's sincere or not. [...] that's it.

At a minimum, exonerees should have access to the support offered to parolees, as we found exonerees who did have access to them valued them. We should, however, go beyond minimal one-size-fits-all services. Assistance should be customized to individual needs, which would require empowering exoneree voices so they have some ownership over the process. In our study, exonerees cited multiple complex challenges related to technology, financial stability, social adjustment, mental health, and negative perceptions in the community that shifted over time. The exoneree population is small enough that customizable support is attainable with political will.

A major focus should be to build exoneree skills needed to be successful in society. Current technological training should be a priority as many exonerees report difficulties acclimating to society after sometimes lengthy imprisonment. Following release, additional workshops and mentorships should be offered to assist with both job-readiness and social skills.

As others have also noted (see Westervelt & Cook, 2012) exonerees want recognition of the harm done to them – harm that is caused not only by the individuals working for criminal justice organizations, but the institutions themselves. Exonerees express the need for both compensation and public apology. A system should be put in place to accomplish both of those objectives. Not only would this help wrongfully convicted individuals heal, it may alleviate community stigma. R11 explained this dual need:

An apology is validation. [It] validates you as a human being. And I think that's helpful. [...] Compensation also validates us [as] human beings and gives you some degree of satisfaction, you know? That at least they recognized me in that way.

Without assistance or guidance throughout the reentry process, exonerees' only means of restoration is often financial compensation (Martin, 2006). In places that do provide compensation, the calculation can be impersonal and removed from the lived experiences of exonerees. R9 describes this state calculation:

I did get compensation for, yearly for six years. But the thing with compensation is, they give you what they think you should have. And nothing else. The time. They start calculating your years, hours, time. I don't know how you can calculate somebody's life, that you took, but that's how they do it. And they issue it out to you, the way they think you should have it.

Post-release needs extend beyond monetary fixes. Individuals also desire access to, and resources for, mental health services. These services should be provided immediately after release and should continue for as long as exonerees feel they need it. Researchers have also found that speaking about their experience helps some exonerees build confidence through acknowledgment and affirmation (Konvisser, 2015). As such, funding should be directed to organizations like Healing Justice, the Sunny Center, and others that are providing safe spaces for all those who are harmed by wrongful convictions.

The federal government currently provides few resources for exonerees. Several states recognize exoneree needs but support is piecemeal and inadequate. More federal and state funding should be allocated for exonerees and other victims of miscarriages of justice and these resources should not be wholly run by state agencies. Non-governmental organizations, which are increasingly directed or staffed by exonerees, should be financially supported in their crucial work.

It is evident that exonerees face significant, multi-faceted, barriers after release from prison. A holistic approach that can address these needs is necessary. We, as a society, can no longer turn our backs on those we have harmed so greatly. While some argue that we have made great strides in addressing the factors that contribute to wrongful convictions, there is limited public policy reform addressing life after exoneration.

### **A. Limitations and Future Research**

As discussed in the introduction, the universe of those wrongfully convicted is simply unknowable and likely well above the official rates reported by the Innocence Project and National Registry of Exonerations. The findings presented here may illuminate some of the struggles faced by exonerees after release but are not necessarily illustrative of the needs and obstacles faced by the general population of exonerees.

Further, in this study we relied on snowball sampling from individuals connected to innocence networks, therefore, our sample might be comprised of individuals that are more connected and thus, more likely to have access to resources upon reentry. Prior research has also shown that recruitment may be particularly challenging for individuals with a significant trauma history (e.g. Rose et. al., 1999). While many exonerees believe in the importance of speaking out in an effort to educate and raise awareness of systemic injustices, others feel that their involvement can be re-traumatizing and trigger posttraumatic stress disorder (PTSD) symptoms (Weigand, 2008).

In our analysis we did not focus directly on comparing demographic characteristics of exonerees to determine how these characteristics may have shaped the reentry experience. In future interviews, and the next phase of this project, we will add new questions and expand our analysis

to incorporate issues related to race, class, gender, and other forms of identity. We acknowledge that the current work only reveals anecdotal differences and a more systematic investigation is warranted. Additionally, in this paper we focus only on challenges after release from prison, and omit the many examples of positive reentry we heard throughout the interviews. In future publications we will highlight these narratives to expand on ways exonerated people have adapted to challenges and found success despite barriers. Next, it is still unclear whether, and in what ways, exonerees experience reentry different than other formerly incarcerated individuals. Future research should compare these groups to differentiate their lived experiences after prison. Lastly, in subsequent works we hope to expand in more theoretical directions. For example, Westervelt and Cook (2008; 2012) found in their interviews a form of survivor's guilt where exonerees feel remorseful for living while others remain incarcerated or died. This guilt sometimes manifests into hyper-arousal, intrusive thoughts, feelings of hopelessness and apathy. After prison, exonerees sometimes have difficulty envisioning the future, connecting to others emotionally, and struggle with feelings of fear, worthlessness, helplessness, isolation, and rejection. In our interviews, respondents also described various examples of guilt, such as regret that they were able to leave prison while friends or others believed to also be wrongfully imprisoned remained incarcerated. Many exonerees in our sample became involved in the innocence movement to provide a way to give back and fight for others who have experienced injustice. We hope to expand these ideas in future works and differentiate types of guilt and outline how exonerees cope with these feelings.

## VI Conclusion

The conviction and subsequent incarceration of an innocent person is the ultimate miscarriage of justice. Although wrongful convictions may just be a small proportion of all cases that pass through the system, individual lives are disrupted, communities are torn apart and public confidence is undermined. In addition to these detrimental effects there is a public safety concern; when an innocent person is in prison it often means that a guilty person is free (Norris, et.al, 2020).

While it is likely that many wrongfully convicted and incarcerated people remain in detention, some have been released and recognized by the state as innocent through the exoneration process. Nevertheless, these individuals face substantial challenges re-entering society. Exonerees are often stigmatized, isolated, denied access to government benefits, suffer additional law enforcement scrutiny, and face significant healthcare barriers.

In this paper we have highlighted many of these obstacles and suggested some broad and concrete ways to begin to address them. The experiences and struggles faced by this unique group of individuals highlights the urgent need to provide support to individuals who have been victimized by the very system that is supposed to protect their fundamental rights. It is our obligation as a society to provide assistance to help exonerees upon release.

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## Innocence and Prevention: Could We Build Justice Safety Centers?

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*Some contemporary writers argue that wrongful convictions represent system failures in a complex criminal justice system. Currently explorations are underway into whether pursuit of non-blaming, all-stakeholders, forward-looking “sentinel event” reviews focused on lowering risk rather than laying blame can improve safety from wrongful convictions. This article reviews the underlying theory of safety-based practices and sketches one model of how work on preventing wrongful convictions might be institutionalized: made a part of a new culture of continuous improvement that lowers the risk of future wrongful convictions and offers a degree of restorative justice to the victims of errors.*

- I. Using Safety’s Wider Lens
- II. Reviewing the Event, Not the Performance
- III. A Place to Learn: Creating the Space for Stories
- IV. Marshaling, Interrogating, Improving, and Disseminating Data
- V. A Model to Amend (Or Reject)

Innocence work naturally prioritizes a tight, reactive focus—a concentration on apprehending errors and rescuing individual clients.

But the people closest to the suffering of the justice system’s victims are also best placed to appreciate the restorative value of honoring their exonerated clients’ perspectives, recognizing the harms done to the original crime’s victims, and preventing new tragedies. Like it or not, innocence workers and exonerated men and women inherit a unique guardianship relation with future defendants, their families, and communities.

What if we focused on learning the lessons of the last wrongful conviction in order to prevent the next one? Can we find a way to make continuous learning available? Offer exonerated men and women and the original crime’s survivors roles in a restorative process? Develop the capacity for a “forward-looking accountability”<sup>1</sup> that prevents future tragedies?

This piece concludes with a sketch of one potential vehicle for accomplishing these things. Others have been discussed previously.<sup>2</sup> But weighing the potential (if any) of such efforts requires adjusting the perspective that we naturally employ when litigating claims and sharing histories.

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<sup>1</sup> Virginia A Sharpe, “Promoting Patient Safety: An Ethical Basis for Policy Deliberation” (2003) 33 Hastings Ctr Rep S2 at S8, S10.

<sup>2</sup> See e.g., Keith Findley, “Learning From Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions” (2002) 38 Cal W L Rev 333; Kent Roach, “The Role of Innocence Commissions: Error Discovery, Systemic Reform, or Both?” (2010) 85 Chicago-Kent L Rev 89.

### I Using Safety's Wider Lens

Barry Scheck recently observed that every exoneration or “near miss” raises the “[Q]uestion the ‘innocence movement’ has asked from the beginning: What went wrong and how do we fix it so it doesn’t happen again?”<sup>3</sup> Addressing that question, as Scheck points out, is not so easy: “By its very nature this is a ‘system’ question involving multiple stakeholders that intersects with complex ethical, legal, and scientific issues.”<sup>4</sup>

The work of exposing a wrongful conviction and winning exoneration is channeled within a traditional process. Except in cases where a DNA comparison offers a compelling independent lever, investigators and lawyers litigating a wrongful conviction must generally find a mistake or a rule violation, and then prove that it was harmful.<sup>5</sup>

In this vision the criminal justice system is a Newtonian arrangement of components: linear and sequential. Effects follow inevitably from causes. This view, which is characteristic of media accounts of wrongful convictions as well as of legal proceedings, foregrounds the broken component— “the eureka part”—and then offers it as the cause of a miscarriage of justice. Sometimes, the broken component is human: a dishonest police officer, a “dry-labbing” forensic worker, or a prosecutor who buries exculpatory evidence. Sometimes the broken element is technical—a faulty interrogation method or identification technique, or an unscientific forensic comparison.

As a result, corrective efforts focus on repairing or replacing the broken individual components. For example, we can work to modernize identification practices by developing and instituting science-supported best practices such as “double-blind” photo displays and immediate post-identification confidence reports in eyewitness cases.<sup>6</sup> We can require video recording of all interrogations, or ban Reid method interrogations of young or developmentally disabled people.<sup>7</sup> The revelation of wrongful conviction cases has played an important role in generating improvement in routine investigative practices.<sup>8</sup>

When the failed component is human, we can isolate and discipline the human actor. Anyone who has been a direct witness to the devastating personal consequences of planting evidence, suborning the perjured testimony of jailhouse informants, or hiding exculpatory evidence naturally feels a heightened desire to see appropriate punishment imposed. By now, the startling impunity with which “bad apple” cops, prosecutors, and ineffective defenders have

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<sup>3</sup> Barry Scheck, “The Integrity of Our Convictions: Holding Stakeholders Accountable in an Era of Criminal Justice Reform” (2019) *Geo LJ Ann Rev Crim Proc* iii [Scheck].

<sup>4</sup> *Ibid.*

<sup>5</sup> Brandon Garrett, “Innocence, Harmless Error, and Federal Wrongful Conviction Law” (2005) 2005 *Minn L Rev* 36.

<sup>6</sup> See e.g., John Turtle, RCL Lindsay & Gary Wells, “Best Practice Recommendations for Eyewitness Procedure: New Ideas for the Oldest Way to Solve a Case” (2003) 1 *Can J Pol & Sec Serv* 1.

<sup>7</sup> See generally, Kyle C Scherr, et al, “Cumulative Disadvantage: A Psychological Framework for Understanding How Innocence Can Lead to False Confession, Wrongful Conviction, and Beyond” (2020) 15(2) *Perspect Psychol Sci* 353.

<sup>8</sup> James M Doyle, *True Witness: Cops, Courts, Science, and the Battle Against Misidentification* (New York, Palgrave MacMillan, 2005) at 131-140 (On reform impact of first DNA exonerations) [Doyle].

populated the wrongful convictions list has created a reservoir of rage that intensifies the focus.<sup>9</sup> For many people the first order of business in the aftermath of a wrongful conviction is to seek the discipline and punishment of the culpable actors. The punishment of insider wrongdoing is an important factor in producing system legitimacy and public faith in the law. No system can function without disciplining its conscious rule-breakers, and, making the sanctioning of misconduct a reality is a perfectly reasonable place to start.<sup>10</sup>

Still, if preventing future wrongful convictions is one of our goals, the punishment—however draconian—of a lone unethical practitioner, or the reform of a single forensic practice is a bad place to stop. There is much more to learn from a wrongful conviction than that some techniques are faulty, some cops and prosecutors are dishonest, some defenders are lazy.

We have to make room somehow for a complementary process that focuses not on blame but on prevention. A developing body of insights from researchers who study safety in aviation, medicine, and other high-risk fields indicates that uncovering a wrongful conviction can illuminate a very broad array of critical system weaknesses.<sup>11</sup>

The phrase “criminal justice system” is everywhere, but what sort of system do we mean? Sometimes “system” seems to refer to an enigmatic eco-system—a pond or a swamp where local actions produce mysterious impacts on the far shore. Sometimes “system” denotes a mechanical construction of gears and switches—a linear, sequential, Newtonian arrangement of discrete causes that generate automatic effects. It can be easily captured in a timeline, flow chart, or “fish bone” diagram. One domino falls; it knocks over the next.

Over the past decade an alternative explanatory paradigm has begun to gain traction. It understands the criminal justice system not as a chaotic wetland and not as a “complicated” machine with many parts, like a jet airliner at rest. In this conception, criminal justice, like a jet airliner *in operation*, is a complex adaptive system in which the frontline operators are engaged in “sense-making” in a dynamic environment.<sup>12</sup>

Wrongful convictions can be understood as system errors arising in a complex socio-technological system.<sup>13</sup> It is generally impossible to discover a single broken component or incompetent operator that fully explains the event. Even in situations where it appears that an

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<sup>9</sup> For an example of the frustration bred by this impunity, see Kate Levine & Joanna Schwartz, “Hold Prosecutors Accountable Too” *Boston Review* (22 June 2020), online: <http://bostonreview.net/law-justice/kate-levine-joanna-schwartz-hold-prosecutors-accountable-too>.

<sup>10</sup> For a number of astute proposals for clarifying and enhancing that process, see Scheck, *supra* note 3.

<sup>11</sup> See authorities collected in James M Doyle, Essay: “A “Safety Model” Perspective Can Aid Diagnosis, Prevention, and Restoration After Criminal Justice Harms” (2019) 59 Santa Clara L Rev 107.

<sup>12</sup> Sidney Dekker, *Safety Differently: Human Factors for a New Era*, 4<sup>th</sup> ed (Boca Raton, CRC Press: Taylor & Francis Group, 2015); Stanley Dekker, Paul Cilliers & Jan-Hendrik Hofmeyr, “The Complexity of Failure: Implications of Complexity Theory for Accident Review” (2011) 49 Safety Sci 939; Ivan Pupildy & Crista Vessel, “The Learning Review: Adding to the Accident Investigation Toolbox” in *EU Commission Joint Research Centre* (Ispra, Italy, Nov 2017) [Pupildy].

<sup>13</sup> See generally, Boaz Sangero, *Safety from False Convictions* (Scotts Valley, CA, CreateSpace Independent Publishing Platform, 2016) [Sangero]; James M Doyle, “Learning from Error in American Criminal Justice” (2010) 100 J Crim L & Criminol 109.

individual's misconduct is responsible for the harm, someone hired that "bad apple"; someone supervised him; someone failed to prevent or intercept his missteps; someone (or many "someones") created the environment in which he decided he would zig when he should have zagged. The shifting, overlapping (and often conflicting) goals, conditions, and influences that buffet sharp end actors and produce mistakes are not determinative, as failed switches or frozen gears would be; their impacts are probabilistic. The effects are not linear and sequential; everyone's actions are affecting everyone else's actions simultaneously. While it is true that "upstream" police are affecting the "downstream" prosecutors, the police decisions are affected by their understandings of the prosecutors' downstream requirements,<sup>14</sup> and both groups are affected by what they anticipate in the courtroom. All the actors are responding to pressures from caseloads, budgets, politics, and media. A "bad apple" explanation is not sufficient. Even identifying a free-standing "rotten barrel" (for example, a police department or crime lab) will almost never provide either an adequate diagnosis or a fully effective treatment. Safety cannot be found in a single component or silo any more than wetness can be found in single molecule of H<sub>2</sub>O. Complexity requires an understanding not simply of components, but also of their interactions.

Even the paradigmatic misconduct case of a prosecutor hiding exculpatory evidence is an "organizational accident". The dishonest prosecutor did not contrive the wrongful conviction on his or her own.<sup>15</sup> The police had to arrest the wrong person<sup>16</sup> and "shape" the evidence for the prosecutor.<sup>17</sup> Their mistake might have been influenced by frailties in local forensic science systems. The prosecutors' office culture may have exacerbated cognitive biases,<sup>18</sup> incentivized shortcuts and "workarounds," and created pressure to produce convictions. Information systems may have created pockets of "structural secrecy."<sup>19</sup> A "see-no-evil" tradition of trial court oversight may have warped judges' conduct. The jury failed to intervene. Enormous caseloads and grudging funding may have gutted the defense function and made the detection of the prosecutor's suppression or independent identification of the exculpatory evidence nearly impossible. The distant appellate courts that developed a legal architecture resting on a framework of "materiality" may have encouraged the prosecutor to gamble on deviating (just a little further) from the requirements of due process.<sup>20</sup>

All of the individuals involved had reasons for their decisions; all were trying to make sense of a swirling cloud of overlapping and often clashing influences as they chose their courses of action. The possibility (or unlikelihood) of exposure and punishment for misconduct may well

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<sup>14</sup> Somli Trivedi & Nicole Gonzalez-VanCleve, "To Serve and Protect Each Other: How Prosecutor-Police Codependence Enables Police Misconduct" (2020) 100 BU L Rev 895 [Trivedi]; Kim Rossmo & Jocelyn Pollack, "Confirmation Bias and other Systemic Causes of Wrongful Convictions: A Sentinel Events Approach" (2019) 11 Ne L Rev 791 [Rossmo].

<sup>15</sup> James Doyle, "Orwell's Elephant and the Etiology of Wrongful Convictions" (2015/2016) 79 Alb L Rev 895.

<sup>16</sup> Rossmo, *supra*, note 14.

<sup>17</sup> Trivedi, *supra*, note 14.

<sup>18</sup> See Barbara O'Brien, "A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making" (2009) 74 Mo L Rev 999 at 1022, 1032.

<sup>19</sup> Andrew Guthrie Ferguson, "Big Data Prosecution and Brady" (2020) 67 UCLA L Rev 180 [Ferguson].

<sup>20</sup> Riley E Clifton, "Note—A Material Change to Brady: Rethinking Brady v Maryland, Materiality, and Criminal Discovery" (2020) 110 J Crim L & Criminol 307.

be one of the influences, but when it is it will be one influence among many.<sup>21</sup> Everyone's work affected everyone else's work. Typically, numerous information gaps and misunderstandings, actions, and omissions--no one of which is independently sufficient to cause the event--combine with each other and with latent system weaknesses, and only then produce (or nearly produce) the disaster.

Safety researchers such as Charles Perrow argue that Murphy's Law is wrong—that everything that can go wrong usually *doesn't*, and then we draw the wrong conclusion.<sup>22</sup> The absence of known accidents is not proof of safety. The absence of exonerations is not proof that the system has not generated wrongful convictions and will not generate more. In this view the absence of a disaster proves only that the probabilities inherent in various unsafe conditions and acts have not coalesced today; it does not prove that they are not present, or that they will not coalesce tomorrow.<sup>23</sup> If these conditions are not identified and addressed there will be no guarantee that the same dismal narrative will not be repeated with another practitioner—who may not be a “bad” actor, but may not be an exemplary actor either—when his turn comes.

## II Reviewing the Event, Not the Performance

The submerged nature of the criminal system's dangers is unsettling, but a useful converse of the Perrow maxim is that when an exoneration *does* make a dangerous condition visible that event can be, as patient safety pioneer Dr. Donald Berwick argued, “A treasure.”<sup>24</sup> Careful examination of an exoneration through a safety lens will reveal not only a defective component (e.g., hair comparison or coercive interrogation) or isolated dishonest human (e.g., a prosecutor who hides Brady material) but an extensive “influence map” of overlapping and interactive dangers and weaknesses that can be addressed and mitigated before the next practitioners confront them.<sup>25</sup>

A fully contextualized *event* review can contribute to system resilience in a way that a *performance* review aimed at misconduct cannot.<sup>26</sup> The logic of complexity<sup>27</sup> dictates that no criminal justice “silo,” no matter how dedicated and well-meaning its representatives, can address

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<sup>21</sup> The steps recommended by Scheck, *supra*, note 3, (at least as I understand them) are aimed to bolster this influence by thoughtfully increasing the clarity of the choices and actionable nature of ethical and procedural contexts rather than by simply ratcheting up the frequency and ferocity of threatened penalties. They recognize the complexity of the pathway between knowing ethical precepts and applying them. See generally, Max H Brazerman & Francesca Gino, “Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty” (2012) 8 Ann L Soc Sci 85.

<sup>22</sup> William Langewiesche, *Inside the Sky: A Meditation on Flight* (New York, Vintage, 1998) at 196 (referencing Charles Perrow); Charles Perrow, *Normal Accidents* (Princeton, Princeton U Press, 1984).

<sup>23</sup> Professor Boaz Sangero has argued there is a “Hidden Accidents” principle at work in criminal justice that makes mistakes hard to see and often impossible to prove: Sangero, *supra*, note 13.

<sup>24</sup> Donald Berwick, “Continuous Improvement as an Ideal in Healthcare” (1989) 320 New Eng J Med 53 at 54.

<sup>25</sup> See, Pupilidy, *supra*, note 12.

<sup>26</sup> Sidney Dekker, *The Second Victim: Error, Guilt, Trauma and Resilience*, 1<sup>st</sup> ed (Boca Raton, Florida, CRC Press, 2013) (quoting Ivan Pupilidy) [Dekker].

<sup>27</sup> Sidney Dekker, et al., “The Complexity of Failure: Implications of Complexity Theory for Safety Investigations” (2011) 49 Safety Sci 939.

all of these conditions on its own. It also underlines the importance of reviewing a wrongful conviction from an “all-ranks” perspective. An event review is free to act on both of these precepts.

Because criminal justice is a system under pressure “workarounds,” triage, and “covert work rules” multiply. The “work-as-imagined” by rule-makers and Best Practice authors and the “work-as-done” by the people on the frontlines diverge. This doesn’t usually occur through explicit rebellion and repudiation; it proceeds by a process of practical drift.<sup>28</sup> As safety expert Sidney Dekker explains:

...[D]ecisions that are seen as “bad decisions” after the accident (even though they seemed like perfectly acceptable ideas at the time) are seldom big, risky steps. Rather, there is a long and steady progression of small incremental steps that unwittingly take an organization toward its boundaries. Each step away from the original norm that meets with empirical success (and no obvious sacrifice of safety) is used as the next basis to depart just that little bit more. It is this incrementalism that makes distinguishing the abnormal from the normal so difficult. If the difference between what “should be done” (or was done successfully yesterday) and what is done successfully today is minute, then this slight departure from an earlier established norm is not worth remarking or reporting on.

Disciplinary processes (when they occur<sup>29</sup>) generate information in a story-like format, but, as Susan Bandes has pointed out, their tendency is to present atomized anecdotes, blinded to system implications:

The conventional story of blame and purposeful misconduct dangerously misdescribes the way governmental misconduct works, by disaggregating it into a series of individual, anecdotal acts. Government causes harm not through the misdeeds of a single malevolent person who wants to harm a specific individual, but through the collective decision-making of numerous people many of whom are acting in good faith. Few have affirmatively to act in bad faith, because all of the incentives are skewed in favor of simply not acting at all.<sup>30</sup>

In a misconduct-oriented performance review, the factors that persuaded frontline workers that their decision was evidence of informed, veteran workmanship, not a dangerous rule violation, will be overlooked altogether or brushed aside as “excuses.” The desire to avoid treating influences and conditions as mitigation of misconduct reduces the appreciation of their explanatory power. When a rule violator is identified as “the cause” of a wrongful conviction, but his misconduct is not also examined as an *effect*, we can doom ourselves to an endless game of whack-a-mole when subsequent practitioners see the same deviation as a normal, pragmatic adjustment to unchanged facts of life. Reform efforts will always stay one tragedy behind.

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<sup>28</sup> Scott A Snook, *Friendly Fire: The Accidental Shoot Down of U.S. Blackhawks over Northern Iraq* (Princeton, Princeton U Press, 2000) at 232-236.

<sup>29</sup> See Trevidi, *supra*, note 14.

<sup>30</sup> Susan Bandes, “Patterns of Injustice: Police Brutality in the Courts” (1999) 47 *Buff L Rev* 1275 at 1330.

Many acts and omissions are not accounted for in discipline-oriented reviews because they implicate no legal theory of culpability. The distant authors of an unsafe policy or technique, the architects of information systems,<sup>31</sup> the bureaucratic sources of daunting caseloads and inadequate budgets, the accelerators of media frenzy, all of whom contributed to the likelihood of a wrongful conviction, are not liable in a performance-oriented punitive review. It is important, of course, to learn what these influential figures did, but it is also important to learn *why* they did it. In many cases they will not recognize their own contributions to the wrongful conviction.

Fault-based proceedings in the aftermath of a wrongful conviction (e.g., criminal prosecutions, departmental disciplinary hearings, professional ethics reviews, or civil tort suits) are built on adversarial structures heavily weighted with due process protections for the person accused. These concerns constrict participation. In contrast, an all-stakeholders event review could offer restorative capability by mobilizing the perspectives of numerous persons harmed.

No one questions, for example, that the original crime's victims were wounded by the wrongful conviction,<sup>32</sup> or that the actual perpetrator's subsequent victims suffer great harms because the opportunity to incapacitate him was missed when the exoneree took the offender's place in prison. Existing review processes provide no space for the recognition of these very real harms. A disturbing portion of the wrongful conviction list is comprised of innocent people who pleaded guilty: their detailed accounts of their experiences could be invaluable to our understanding of the system influences that convinced them to abandon their fight.

Besides, existing punitive vehicles deprive the persons harmed by a wrongful conviction of healing that might be experienced if they were allowed to participate in the work of preventing their harrowing experiences being visited on future victims of system error. Medicine's experience with "disclosure and apology" approaches to medical error events indicates that patients (or their survivors) value the opportunity to turn their experience to some use in preventing harm to others.<sup>33</sup> The tireless participation of exonerated men and women in Innocence efforts indicates how strongly the same impulse is felt in criminal justice.<sup>34</sup>

A learning-oriented event review also provides a venue for direct community participation that a disciplinary process does not offer. In most known wrongful conviction cases, after all, a jury, the proxy for the community, played an indispensable role in the tragedy.<sup>35</sup> By lending non-professional citizen participants to a learning review the community can both keep the professional players honest and enforce a measure of transparency. Just as importantly, the community can express its sense of its own accountability for the outcome, rather than seeming to off-load

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<sup>31</sup> See Ferguson, *supra*, note 19.

<sup>32</sup> Lara Bazelon, *Rectify: The Power of Restorative Justice After Wrongful Conviction* (Boston, Beacon Press, 2018); Healing Justice, online: <https://healingjusticeproject.org>.

<sup>33</sup> See Jennifer K Robbenolt, *Apologies and Medical Error* (Philadelphia, Clinical Orthopedics & Related Research, February, 2008) online: <https://www.ncbi.nlm.nih.gov/PMC2628492/>.

<sup>34</sup> See for example, Witness to Innocence, online: <https://www.witnesstoinnocence.org>. Healing Justice, online: <https://healingjusticeproject.org>.

<sup>35</sup> Submerged misdemeanor wrongful convictions which do not necessarily implicate juries are very likely to be quite numerous. Issa Kohler-Haussman, "Managerial Justice and Mass Misdemeanors" (2014) 66 Stan L Rev 611 at 663-664.



responsibility onto the handiest professional scapegoat. As Sidney Dekker points out, to terminate proceedings with the punishment of a practitioner and nothing more sends a strange message:

Paying off the first victim and sending off the second [the final practitioner] denies the reality and the humanity of the relationship between the two . . . Where first victims are given the impression that their lives had been entrusted to a disposable cog in the organizational machine, what does that say about the organization's own duty ethic in relation to its patients, passengers, clients?<sup>36</sup>

In a complementary learning review an exonerated citizen can witness his or her community accepting its responsibility for seeing that nothing similar happens in the future. The learning reviews can enhance legitimacy by showing that neither community members nor criminal justice professionals will accept “Nothing to see here, move along” as a response.

Currently the advantages of these learning reviews are being explored in the real world. In the United States, demonstration sites<sup>37</sup> have begun to enlist in the U.S. National Institute of Justice / Bureau of Justice Assistance Sentinel Events Initiative (SEI),<sup>38</sup> an examination of the potentials of non-blaming, all-stakeholders, forward-looking, learning reviews of adverse events, “near misses”, and “good catches.” Preliminary reports from “beta site” reviews—for example, an all-stakeholders analysis<sup>39</sup> of a “near miss” prosecution of innocent men in a Philadelphia multiple homicide—have shown that the safety-oriented approach can pay the predicted dividends. Additional jurisdictions will gather crucial experience<sup>40</sup> by conducting these pioneering reviews. But the question will remain whether these learning reviews, however useful they prove, can be sustained as an ongoing, routine feature of criminal justice culture.

The safety claim for the event reviews is not simply that they will uncover a large number of system weaknesses—although they will do that—but that if adopted as a normal practice they can introduce a cultural change. What is being tested here is whether the practice of sentinel event reviews can be “[A] key driver of the development and perpetuation of the safety cultures built by the aviation and medical industries.”<sup>41</sup> Can we make “[T]he errors themselves the mechanism for learning and change”?<sup>42</sup> Can we help criminal justice practitioners see—and fulfill—their own

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<sup>36</sup> Dekker, *supra*, note 26 at 98.

<sup>37</sup> Online: <https://www.bja.gov/sentinel-events-initiative/demonstration-project.html>.

<sup>38</sup> Online: <https://nij.ojp.gov/topics/articles/sentinel-events-initiative>.

<sup>39</sup> John Hollway & Ben Grunwald, “Applying Sentinel Event Reviews to Policing” (2019) 18 *Criminol & Pub Pol’y* 705 (sentinel event review of “near miss” mistaken homicide investigation).

<sup>40</sup> Katherine Darke Schmidt, et al., *Paving the Way: Lessons Learned in Sentinel Event Reviews* (Washington, DC, National Institute of Justice, 2014); Douglas Starr, “A New Way to Reform the Judicial System” *The New Yorker* (21 March 2015).

<sup>41</sup> David Klinger, “Organizational Accidents and Deadly Officer Involved Shootings” (2020) *Annals of Am Acad Pol & Soc Sci* 687, online: <https://www.cambridge.org/core/journals/law-and-social-inquiry/article/learning-model-of-useofforce-reviews/B7E9FF03862C5D22F4C72FCEBABB300B>.

at 41 [Klinger].

<sup>42</sup> Barbara Armacost, “Police Shootings: Is Accountability the Enemy of Prevention” (2019) *Ohio St L J* 907 at 938 [Armacost].

individual responsibilities for a just collective outcome by making learning reviews an embedded, routine element of criminal justice practice?

These ideas have potential for application across the whole range<sup>43</sup> of criminal justice errors, but their value is particularly striking where the error exposed is a wrongful conviction. No one in criminal justice wants to play a role in another wrongful conviction.

### III A Place to Learn: Creating the Space for Stories

But where would all of this happen? It may make sense to begin working on that problem now, as the experience generated by the N.I.J. Sentinel Event demonstration sites accumulates. There have been numerous thoughtful approaches to the challenge of learning from exonerations.<sup>44</sup> Mobilizing the safety-driven notions of system complexity may advance those efforts a little further.

One reflexive response to the “where” question is “We need a National Transportation Safety Board for exonerations.” But criminal justice is an intensely local enterprise. Laws, procedures, budgets, demographics, and history vary significantly from place to place. Any event review should harness national reservoirs of expertise, but it must also be attentive to idiosyncratic local features. Although we would ultimately hope to construct a capacity for “forward-looking accountability” with national—even international—scope it seems likely that we had better build it from the ground up rather than from the top down. Besides, we should hesitate before sacrificing the restorative justice and culture shifting advantages that sustained local community and practitioner involvement produce by handing matters over to a distant group of elevated technocrats. A flexible structure resembling the Innocence Network’s—a constellation of locally expert and embedded facilities linked to exploit synergies and disseminate lessons—might best exploit the possibilities and provide continuity.

Assembling collaborative learning groups and designing their processes on a “one-off” basis will present a daunting challenge for most jurisdictions, and that will inhibit the mobilization of productive learning reviews. At best, reviews will be executed only on the crisis-oriented basis of the Warren Commission or the Kaufmann Report<sup>45</sup> into the Guy Paul Morin case, when public outcry following a cataclysmic disaster requires action. That approach threatens to confuse learning and disciplinary review goals and to overlook the opportunities presented by “high frequency, low impact” events that aviation and other fields have found tremendously informative.

There are strong arguments for building stable local and regional platforms where the practice of continuous learning from events can take place, but it isn’t clear that any existing model will suffice. An established infrastructure that can be called on when an array of stakeholders

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<sup>43</sup> There is, for example, a growing interest in applying this approach to fatal officer-involved shootings. See Klinger, *supra*, note 41; Armacost, *supra*, note 42.

<sup>44</sup> Barry Scheck and Peter Neufeld immediately proposed a learning from error facility when the first round of DNA exonerations was revealed: Doyle, *supra*, note 8.

<sup>45</sup> *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin* (Toronto, Attorney General of Ontario, 1998), online: [External link to full text of Kaufman Report on Guy Paul Morin](#).

recognizes learning potential—rather than one that must be laboriously assembled when some spectacular scandal provides the spur—can better promote a culture of safety in criminal justice. The infrastructure, if designed with supporting a statewide capability in mind, could relieve stakeholders of the burden of “re-inventing the wheel” every time that document management, specialist interviews, and the systems-oriented approaches to the group analysis of an event are implicated. It can provide a coherent platform for integrating the data-driven insights of the researchers with the street level narratives of the practitioners and community members. It can perform the bibliographical function of mustering lessons learned elsewhere. It can promote consistency in de-identifying materials designated for distribution, and then organize sharing the results.

A state or provincial Criminal Justice Safety Learning Center can ameliorate the fact that many stakeholder actors involved in criminal justice events are rooted in overlapping but not co-extensive areas of responsibility. A given event, for example, might involve a neighborhood addiction support program, a City police force, a County prosecutor, a statewide Court system and Public Defender agency, and a regionally or demographically determined forensic science catchment area. These entities might be variously immune from civil suits, or self-insured, or covered within regional risk pools, and may all be attempting to manage their shared risks from individual, atomized positions of vulnerability.

Moreover, a Criminal Justice Safety Learning Center that is available to lend its capacities can address the reality that it is simply impossible for many smaller places<sup>46</sup> to support the standing ability to convene a learning group. It can provide the criminal justice system’s leaders with a reliable way to communicate to their communities that whatever the outcome of parallel disciplinary proceedings targeting individuals, the system’s leaders are determined that the event at issue will never recur.

A neutral platform supporting a collaboration among equals is more promising than an effort “owned” by one of the collaborators. Contemporary reform efforts often germinate and then focus their efforts within silos. For example, there are progressive District Attorneys who understand the advantages of learning from error analyses.<sup>47</sup> Organizations such as The Institute for Innovation in Prosecution<sup>48</sup> and Fair and Just Prosecution,<sup>49</sup> recognizing the power wielded by local prosecutors, have begun to promote reform programs that mobilize elected prosecutors’ unique influence. But this advocacy inevitably summons an image of Heroic Prosecutors, doing justice in their lonely way. An event review conducted by the prosecutor, on the prosecutor’s turf, is likely to generate skepticism among the other necessary stakeholders as they are considering enlisting in “the DA’s thing.” Police and defenders are likely to regard invitations to the District Attorney’s office to take part in the District Attorney’s initiative without enthusiasm.

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<sup>46</sup> Lawrence W Sherman, “Reducing Fatal Police Shootings as Systems Crashes: Research, Theory, and Practice” (2018) 1 *Ann Rev Criminol* 421.

<sup>47</sup> See e.g., George Gascon, “Using Sentinel Events to Promote System Accountability” and John Chisholm, “Moving Beyond a Culture of Defensiveness and Isolation” in *Nat’l Institute of Justice, Mending Justice: Sentinel Event Review* (Washington, DC, National Institute of Justice, 2014).

<sup>48</sup> Online: <https://www.prosecution.org/our-mission>.

<sup>49</sup> Online: <https://fairandjustprosecution.org>.

Community stakeholders, whose insights into the iatrogenic harms inflicted by the professionals' efforts (and proposed reforms) are indispensable, are likely to be very wary of lending their credibility to what will seem to be a particular agency's campaign of self-rehabilitation. Similar "Do I trust my host?" issues will handicap even police departments (such as Tucson's<sup>50</sup>) that are open to conducting "critical incident reviews" and confronting events (again, a "suicide-by-cop" would be another example) that implicate numerous other agencies and domains.

While the police and prosecutors can lead in these situations, and the Innocence community can have an important catalytic role to play in assembling these elements, this leadership must take the unusual form of leadership that forswears control—leadership *into collaboration*.

#### IV Marshaling, Interrogating, Improving, and Disseminating the Data

The ecology of contemporary criminal justice reform is shaped by a commitment to correcting the data-starved state of knowledge about criminal justice work as it is performed. Terms such as "evidence-based" and "data-driven" acquire talismanic significance in reform discourse. The productive role of intensely local data analysis has been illuminated by the dedicated and inventive approaches of Amy Bach and Measures for Justice.<sup>51</sup> This long overdue pull in the direction of improving the system's capacity for introspection through data may make a local event review approach seem irrelevant to some—may make it seem to promise only a pointless accumulation of anecdotes at the expense of rigorous statistical analyses.

This is a short-sighted view. A state or provincial Center with the capacity to develop, solicit and collect data across the agencies implicated in a wrongful conviction will pay important dividends.

Neither event narratives nor data compilations are independently sufficient. Each informs (and challenges) the other. Having the narratives without discerning the patterns into which they fall does not help much. At the same time, "What is measurable is not the same as what is valuable."<sup>52</sup> Any state level Learning Center will facilitate the collection of data, but a state level Learning Center that combines event reviews and data-driven efforts, will also help to ensure that the data we have is the data we need.<sup>53</sup> (For example, data on the cascading racial inequalities<sup>54</sup>

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<sup>50</sup> Online: <https://www.tucsonaz.gov/police/critical-incident-review-board-cirb-0>.

<sup>51</sup> Online: <https://measuresforjustice.org>. See Amy Bach, *Ordinary Injustice: How America Holds Court*. (New York, Picador Publishing, 2010).

<sup>52</sup> Tricia Wang, "Why Big Data Needs Thick Data" *Ethnography Matters* (13 May 13), online: <https://medium.com/ethnography-matters/why-big-data-needs-thick-data-b4b3e75e3d7>.

<sup>53</sup> *Ibid.* See generally, Barry Friedman & Elizabeth Jänszky, "Policing's Information Problem, Working Paper" (2019) Pub Law & Leg Theory Res Paper Series 19. On the question of narrative complementing data, see Robert L Wears & Ben-Tzion Karsh, "Thick v. Thin: Description Versus Classification in Learning from Case Reviews" (2008) 51 *Annals Emerg Med* 262.

<sup>54</sup> James M Doyle, "Discounting the Error Costs: Cross Racial False Alarms in the Culture of Contemporary Criminal Justice" (2001) 7 *Psychol Pub Pol'y & L* 253.

embedded in actual law enforcement practices could be collected and analyzed.) It will point to new areas of interest where salient data should be sought, and it will protect against the danger that measures of outputs might unintentionally obscure issues of process. Where the statistical compilations can depict how things are (or were) the narrative event reviews can alert us to where they are going as the environment changes, interactions and overlaps proliferate, caseload and budget pressures grow, and the inevitable processes of practical drift, workarounds, and triage take hold. Whether or not this combination of perspectives generates quick answers it will certainly generate good questions: areas for empirical inquiry about capacities, interactions, and vulnerabilities. The Center can provide a platform where the narratives and the data can be held in productive tension.

### V A Model to Amend (Or Reject)

It may prove helpful as results from demonstration sites arrive if observers, critics, and potential adopters have available for contemporaneous review some rough sketch of legislation designed to help allow jurisdictions to provide for continuous learning on a sustained basis. The “draft” below is provided as a starting point. It closely follows (to the point of paraphrase) the enabling legislation<sup>55</sup> for the Betsy Lehman Patient Safety Center, a small Massachusetts state agency that accomplishes in the healthcare sphere much of what a Criminal Justice Safety Learning Center might hope to achieve in criminal justice.

The SEI Demonstration Site efforts will likely take many forms, but the Betsy Lehman Patient Safety Center offers an analogy for criminal justice safety activities that suggests one straightforward and distinctly “doable” approach from the array of possibilities.<sup>56</sup> It indicates that a place to do safety work that offers risk reduction and a measure of restorative justice on a sustained basis may be within reach for a quite modest investment.<sup>57</sup>

The Betsy Lehman Center is a statewide agency with a small budget and a small professional staff.<sup>58</sup> With a comparable staff available, a state center for Criminal Justice Safety (maintained, for example, at a public university’s criminal justice school, or law school, or under the auspices of a state or provincial Attorney General or Supreme Court) could provide local jurisdictions with a neutral moderator, process expertise, and substantive subject matter experts from event-relevant fields. It could provide services to victims and other persons harmed that ensures that they would not be re-traumatized by participation in event reviews. It could manage documents, develop taxonomies of error, and provide de-identifying protocols that would allow

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<sup>55</sup> See *Mass Gen Laws*, 2018, c 12C, §15(e) [*Mass Gen Laws*].

<sup>56</sup> See “Betsy Lehman Center for Patient Safety” online: <https://www.betsylehmancenterma.gov>.

<sup>57</sup> See *Nat’l Institute of Just., The Sentinel Events Roundtable Summary Proceedings from an Expert Roundtable* (Washington, DC, National Institute of Justice, 2013), online: <http://nij.gov/topics/justice-system/sentinel-events/roundtable.htm>.

<sup>58</sup> The Massachusetts Governor’s budget request for fiscal year 2017 was \$1.53 million: “Center for Health Information and Analysis – Budget Summary” Mass Gov, online:

[http://budget.digital.mass.gov/bb/h1/fy17h1/brec\\_17/dpt\\_17/hlhcf.htm](http://budget.digital.mass.gov/bb/h1/fy17h1/brec_17/dpt_17/hlhcf.htm).

The Center is also authorized to seek supplementary foundation and federal support.

for disseminating the event analyses generated by local participants, relieving smaller jurisdictions within a state of the need to maintain a standing review capacity locally.

What could emerge—echoing the structure of the Innocence Network—is a web of Centers, each deeply versed in local law and conditions and experienced in event analysis, networked to achieve coordination, information-sharing, and other synergies.

A version of the Betsy Lehman Center’s ability to afford confidentiality<sup>59</sup> to participants could also be an important element of the development of the criminal justice system’s safety perspective, although perhaps not in the expected way. It is easy to overstate the seriousness of the threat of increased civil liability for criminal justice harms as a substantive matter. Many important learning events chosen for review (e.g., “near misses”, “good catches”) trigger no financial liability. In others, (events that in medical cases would be classified as “closed claims”) the financial costs have already been realized, and logically can be treated as investments that ought to pay off in lessons to be learned.<sup>60</sup> Beyond the choice of specific events for review, a variety of case-specific devices, such as judicial protective orders and confidentiality agreements can be mobilized to provide sufficient event-specific protection in particular instances. These predictions are open to argument, of course, and the NIJ/BJA “demonstration projects” should shed further light on their accuracy, but there are indications that the liability concerns in terms of actual increased vulnerabilities will be marginal—something to be worked through, not a disqualification.

Besides, as the heroic scholarship of Joanna Schwartz on police indemnification has shown, the public entities paying for the event under current review are in a position to benefit exponentially from enhancements to future safety.<sup>61</sup> The best way to avoid liability is to avoid the harm, and in a context such as policing in which 99.98 percent<sup>62</sup> of money received by plaintiffs is paid from public funds, not the funds of the practitioners, the reduction in public risk from repeated harms could more than overbalance in policy terms any discomfort that the conduct of learning reviews instills.

Although it may naturally seem to mid-level lawyers in local government agencies that their primary mission is to avoid lawsuits, the mission of the criminal justice system as a public entity is *not* to avoid lawsuits, but to do—and, at least as importantly, to be seen to be doing—justice. If people are harmed by criminal justice error the public (yes, the tax-paying public) wants to see them fairly compensated.<sup>63</sup> The fact is, the fear of liability exposure is actually generated by the recognition that the public—in its civil jury incarnation—will *demand* the payment of

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<sup>59</sup> See Mass Gen Laws, *supra*, note 55 (“Information collected . . . or reported . . . shall not be a public record . . . shall be considered confidential and shall not be subject to subpoena or discovery or introduced into evidence in any judicial or administrative proceeding. . .”).

<sup>60</sup> See Joanna C Schwartz, “Introspection Through Litigation” (2015) 90 Notre Dame L Rev 1055 at 1083.

<sup>61</sup> Joanna C Schwartz, “How Governments Pay: Lawsuits, Budgets, and Police Reform” (2016) 63 UCLA L Rev 1144 at 1181; Joanna C Schwartz, “Police Indemnification” (2014) 89 NYL Sch L Rev 885 at 955.

<sup>62</sup> Joanna C Schwartz, “Police Indemnification” (2014) 89 NYL Sch L Rev 885 at 995. See also, John Rappaport, “How Private Insurers Regulate Public Police” (2017) 130 Harv L Rev 1539 at 1547.

<sup>63</sup> Kimberley A Clow, et al., “Public Perception of Wrongful Conviction: Support for Compensation and Apologies” (2012) Alb L Rev 1415.

damages from public funds if offered that option. Even so, although liability concerns may in fact be outweighed by the benefits that safety perspective learning reviews offer, even mistaken concerns about liability remain significant in practical terms when they frighten stakeholders away from learning-oriented processes.

Progress toward a safety perspective in criminal justice will have to be encouraged by leadership, but it cannot be imposed, from the top downwards. There is not, and there probably never can be, a criminal justice an exact equivalent to the Joint Commission on Accreditation (that imposes accreditation standards on all hospitals), or the National Transportation Safety Board (that compels transportation industry cooperation with investigation of every accident). At least in the United States, experience with generations of reform efforts shows that the highly localized and hyper-fragmented state of the criminal justice institutional environment that Malcolm Feeley identifies as a structural element of the American system simply does not allow for the imposition of this sort of grand scheme from above.<sup>64</sup>

If a safety-oriented approach to criminal justice advances at all it will be by following the classic pattern of diffusion of innovation that Everett M. Rogers described. It will have to attract willing collaborators: first followers, early adopters, an early majority, a late majority, and (eventually) laggards.<sup>65</sup> Because the learning reviews require *all* stakeholders' perspectives to be fully effective, progress will require gathering groups of diverse collaborators in a context in which every potential group membership holds a veto. Fears of liability augmentation, whether they are sincere or are used simply to cloak inertia and inchoate discomfort with novelty, can be a destructive inhibiting force.<sup>66</sup> The anxieties of a few nervous lawyers can easily turn a promising restorative justice moment into a grudging, protracted, process of semi-disclosure that aggravates public distrust in the justice system. Dealing with those inhibitions sooner rather than later, as in the Betsy Lehman Center authorizing legislation's "safe harbor" language, is likely to be a productive strategy. It is at least a strategy to be kept in mind and tested against experience as Demonstration Sites mobilize and proceed.

A sketch of a draft statute instituting such a Center follows. Its utility lies less in its substance than in its potential for providing the widely dispersed demonstration site participants and those who observe their progress with a common target to criticize, amend—for that matter, reject.

In this incarnation, the Center is named for John Adams, the second president of the United States and a leader of the movement for American independence from Great Britain. A plaque stands inside the door of the Center, with a quotation from the closing argument Adams delivered when he defended the British soldiers charged in the Boston Massacre:

It's of more importance to community that innocence should be protected, than it is that guilt should be punished; for guilt and crimes are so frequent in the world,

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<sup>64</sup> Malcolm M Feeley, "How to Think About Criminal Court Reform" (2018) 98 BUL Rev 673.

<sup>65</sup> Everett M Rogers, *Diffusion of Innovations*, 5th ed (New York, Simon & Shuster, 2003).

<sup>66</sup> James M Doyle, "Keeping the Wrong Secrets: The "Cone of Silence" Around Exonerations" *The Crime Report.Org* (New York, The Center on Media, Crime and Justice at John Jay College, 28 May 2019), online: <https://thecrimereport.org/2019/05/28/keeping-the-wrong-secrets-the-cone-of-silence-around-exonerations/>.

that all of them cannot be punished; and many times they happen in such a manner that it is not of much consequence to the public, whether they are punished or not.

But when innocence itself, is brought to the bar and condemned, especially to die, the subject will exclaim, it is immaterial to me whether I behave well or ill; for virtue itself is no security. And if such a sentiment as this should take place in the mind of the subject, there would be an end to all security whatsoever.<sup>67</sup>

**Draft statute:**

John Adams Center for Public Safety and Criminal Justice Learning; Board; Education and Research program

Section 15.

(a) For the purposes of this section, the following words shall, unless the context clearly requires otherwise, have the following meanings:

"Adverse event", injury to a person resulting from a criminal justice intervention or failure to intervene and not to the underlying condition of the person.

"Board", the public safety and criminal justice errors reduction board.

"Adams center", the John Adams center for public safety and criminal justice learning.

"Incident", an incident which, if left undetected or uncorrected, might have resulted in an adverse event.

"Criminal justice error", the failure of criminal justice system management to institute or complete as intended a safe action, or the use of a wrong plan to achieve an outcome.

"Public safety", freedom from accidental or avoidable injury from crime or from the criminal process.

(b) There shall be established the John Adams center for public safety and criminal justice learning. The purpose of the Adams center shall be to serve as a platform and clearinghouse for the development, evaluation and dissemination of learning in criminal justice, including, but not limited to, the sponsorship of training and education programs, the development of best practices for public safety and criminal justice learning, and the conduct of collaborative learning reviews of events. The Adams center shall: (1) coordinate the efforts of state and local agencies engaged in the regulation, contracting or delivery of criminal justice and those individuals or institutions licensed by the commonwealth to provide criminal justice to meet their responsibilities for public safety and criminal justice learning; (2) assist all such entities to work as part of a total system of public safety including public health and mental health services; (3) develop appropriate

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<sup>67</sup> *Rex v Wemms*, in L Wroth & Hiller Zobel, eds, *Legal Papers of John Adams, Vol 3* (Cambridge, Harvard U Press, 1965) at 240.



mechanisms for all stakeholders to be included in a statewide program for improving public safety; and, (4) provide a platform for all-stakeholders, forward-looking, learning reviews of events and incidents in criminal justice (5) provide a platform for identifying, soliciting, interrogating, maintaining, and evaluating data related to criminal justice goals and operation. The Adams center shall coordinate state participation in any appropriate state or federal reports or data collection efforts relative to public safety and criminal justice learning. The Adams center shall conduct learning reviews, support learning reviews at the request of jurisdictions within the state, and analyze available data, research and reports for information that would improve education and training programs that promote public safety.

(c) Within the Adams center, there shall be established a public safety and criminal justice errors reduction board. The board shall consist of the Director of the Executive Office of Public Safety, the Attorney General, the Chief Counsel of the Committee for Public Counsel Services, the executive director of the center, the Director of Public Health, The Director of Mental Health and the Commissioners of Corrections, the Chief Justice of the Supreme Judicial Court and/or their Designees and two Community Representatives to be nominated by the Governor. The board shall appoint, in consultation with the advisory committee, the director of the Adams center by a unanimous vote and the director shall, under the general supervision of the board, have general oversight of the operation of the Adams center. The director may appoint or retain and remove expert, clerical or other assistants as the work of the Adams center may require. The coalition for the prevention of public safety and criminal justice errors shall serve as the advisory committee to the board. The advisory committee shall, at the request of the director, provide advice and counsel as it considers appropriate activities including, but not limited to, serving as a resource for studies and projects undertaken or sponsored by the Adams center. The advisory committee may also review and comment on regulations and standards proposed or promulgated by the Adams center, but the review and comment shall be advisory in nature and shall not be considered binding on the Adams center.

(d) The Adams center shall develop and administer a public safety and criminal justice learning education and research program to assist criminal justice professionals, criminal justice facilities and agencies and the general public regarding issues related to the causes and consequences of criminal justice error and practices and procedures to promote the highest standard for public safety in the commonwealth. The Adams center shall annually report to the governor and the legislature relative to the feasibility of developing standards for public safety and criminal justice learning programs for any state department, agency, commission or board to reduce criminal justice errors, and the statutory responsibilities of the commonwealth, for the protection of persons together with recommendations to improve coordination and effectiveness of the programs and activities.

(e) The Adams center shall (1) identify and disseminate information about evidence-based best practices to reduce criminal justice errors and enhance public safety; (2) conduct learning reviews in the aftermath of adverse events or incidents that maximize participation by community and practitioner community members, (3) develop a process for determining which evidence-based best practices should be considered for adoption; (4) serve as a central clearinghouse for the collection and analysis of existing information on the causes of criminal justice errors and strategies for error prevention; (5) increase awareness of error prevention strategies through public

and professional education; and (6) develop appropriate vehicles for the compensation of persons harmed by criminal justice system errors.

(f) The information collected by the Adams center or reported to the Adams center shall not be a public record as defined in section 7 of chapter 4, shall be confidential and shall not be subject to subpoena or discovery or introduced into evidence in any judicial or administrative proceeding, except as otherwise specifically provided by law.

(g) The Adams center shall report annually to the Legislature regarding the progress made in improving public safety and criminal justice learning. The Adams center shall seek federal and foundation support to supplement state resources to carry out the Adams center's public safety and criminal justice learning goals.