

# *Introduction*

## PHANTOM CRIMES

IN 2012, RODRICUS CRAWFORD WAS WRONGLY CONVICTED and sentenced to death in Louisiana for the murder of his one-year-old son, Roderius.<sup>1</sup> Years later, it was revealed that Roderius had not been killed but rather had died from pneumonia and sepsis in his lungs.

How, then, did Crawford wind up on death row for a murder that never happened?

At the time of Roderius's death, Crawford was a nineteen-year-old African American man living in Shreveport, Louisiana, a mostly impoverished city whose population was largely African American.<sup>2</sup> Crawford lived at home with his mother and a number of other relatives in a house down the road from Roderius's mother, Lakendra Lott. A talented dancer, Crawford worked a number of odd jobs to make ends meet. Most important: by all accounts, Crawford adored his son.

One morning, Crawford woke to find Roderius unresponsive in the bed next to him. A relative frantically called 911, but responders were slow to answer. After yet another call to 911, the dispatcher contacted a third party to check on what was happening. She snidely commented: "They're acting a fool over there. . . . They ask for everything, but [the] baby's dead." An unknown male responded: "Probably slept on [the] damn baby. There'll be 100 folks in the house."<sup>3</sup>

When responders finally did arrive, they placed the baby in the ambulance, and shut the doors to his parents. They decided to wait until the police arrived to tell Crawford the terrible news that his infant son was dead. Family members began knocking on the ambulance doors to see why the vehicle had not yet left for the hospital. Instead of opening the doors, the paramedics panicked, believing the concerned family was a dangerous criminal mob.<sup>4</sup>

From the outset, the paramedics seemed to presume foul play. One responding paramedic designated normal fluid from the child's nose as abnormal, claimed to see bruising on the baby's buttocks that was not visible to the naked eye, and found petechiae (broken blood vessels) in the baby's eyes, even though none were not found in the autopsy.<sup>5</sup> Another responding paramedic reportedly described the home as a "crime scene."<sup>6</sup>

The police, too, appeared to consider Roderius's death as suspicious from the very beginning. When the ambulance left for the hospital, the police brought Lott and Crawford directly to the precinct. At the precinct, the police did not treat Crawford as a grieving father, but instead aggressively questioned him about bruises on the baby's lip. When Crawford explained the baby slipped in the bathroom just the day before (a fact also confirmed by Lott and one that entirely explained the bruised lip), the police pressed harder for a different explanation. None was forthcoming.

Later that morning, without waiting for the lab results, a forensic pathologist declared that Roderius died from homicide by intentional smothering, citing the bruises on the baby's lip as support for his finding.<sup>7</sup> When testing later revealed the presence of bacterial pneumonia in the baby's lungs, the pathologist dismissed the illness and accompanying sepsis as coincidence. He never even conducted basic tests that could have confirmed Crawford's timeline for the child's fall in the bathroom.

Enter Dale Cox. Cox was a formidable Louisiana prosecutor in Caddo Parrish, where Shreveport is located, and was an ardent and outspoken supporter of capital punishment. Between 2010 and 2015, eight out of twelve death sentences in Louisiana came from Caddo Parish, four of which were directly attributable to Cox.<sup>8</sup> When asked to respond to a story about an innocent black man in Louisiana who had been wrongly condemned to die, Cox unapologetically replied that he believed the death penalty should be used more frequently and that "we need to kill more people."<sup>9</sup>

Cox charged Crawford with capital murder for the intentional killing of Roderius.

Crawford was tried in a courthouse where a Confederate veterans monument dominates the front landscape. At the start of the trial, Cox eliminated black jurors from the case—improperly, as the Louisiana Supreme Court later ruled.<sup>10</sup> During the trial itself, Cox relentlessly questioned witnesses about Crawford's lack of steady employment and his prior marijuana convictions, as though being unemployed or using marijuana explained an otherwise inexplicable crime. Aside from these personal attacks, however, the case

rested almost exclusively on the testimony of the state forensic pathologist who testified that the baby was smothered and that the bruises on the baby's lip were consistent with death by smothering. The pathologist also incorrectly testified that the baby's brain swelling was caused by smothering when, in reality, it was caused by pneumonia with sepsis.

A different forensic pathologist from Michigan, Daniel Spitz, flatly disagreed with the state's findings. Spitz concluded that the baby suffered from severe bacterial pneumonia, which entered his blood stream, causing septic shock and death. Spitz's opinion was ignored by the prosecution before trial, and the jury considering the case apparently credited the state pathologist's testimony over Spitz's. Later, Spitz would tell a reporter from the *New Yorker* that in his opinion, "there wasn't enough evidence to even put this before a jury. You didn't have anybody who thought this guy committed murder except for one pathologist who decided that it was homicide on what seemed like a whim."<sup>11</sup>

Despite the questionable evidence, the jury convicted Crawford and sentenced him to death. Cox later wrote in a letter to the state's probation department: "I am sorry that Louisiana has adopted lethal injection as the form of implementing the death penalty," because "Mr. Crawford deserves as much physical suffering as it is humanly possible to endure before he dies."<sup>12</sup>

On appeal, Crawford's lawyers had other pathologists review the file. Each agreed that the baby had died of pneumonia. News media outlets picked up the story, and a lengthy *New Yorker* article drew significant attention to his case.<sup>13</sup> Online petitions to overturn Crawford's conviction were circulated around the country. National advocacy groups like the ACLU took up his cause. Four years after he was sentenced to death, Crawford's murder conviction and death sentence were overturned by the Louisiana Supreme Court because Cox had improperly excluded black people from the jury pool in violation of the U.S. Constitution.<sup>14</sup> At least two of those Louisiana Supreme Court judges seemed entirely perplexed as to how Crawford had ever been charged with capital murder in the first place, let alone convicted. As one judge wrote: "No rational trier of fact could have concluded that the State presented sufficient evidence to prove beyond a reasonable doubt that the defendant had the specific intent to kill his one-year-old son."<sup>15</sup>

In 2017 the state declined to retry Crawford and he became the 158th innocent person exonerated from death row since 1973.<sup>16</sup> The years he spent at Angola on Louisiana's notorious death row left their mark. At Angola, Crawford was kept in solitary confinement in a tiny, windowless cell for twenty-three hours day.<sup>17</sup> Three times a week, he was allowed outside for one

hour in a small outdoor cage similar to a dog pen. Although the heat index easily rose above 90 degrees, Crawford had no access to air conditioning, ice, or even fans.<sup>18</sup> When asked to reflect on his experience, Crawford described it this way:

You feel like an animal, period. . . . It's all a mind game. . . . You can go crazy. Not can—you're going crazy. . . . [The experience] messed with me. . . . Who can imagine an innocent person being on death row, and they talk about killing you, and you wake up in a little cell every day? I can't explain it. That's a feeling I hope nobody could feel.<sup>19</sup>

It is certainly a feeling Crawford should never have experienced.

Crawford's wrongful conviction was based on the premise that a crime had been committed, when in reality no crime had ever occurred. Because a death by illness was wrongly labeled a death by murder, Crawford wasted years of his life on Louisiana's notorious death row. Crawford's conviction and death sentence devastated his family and his extended community, who were left to deal with his absence and to make sense of the state's insistence that Crawford had committed a senseless act of violence. The community expended countless resources in investigating, prosecuting, defending, convicting, and incarcerating Crawford—for a case where no crime occurred at all.

Crawford was convicted because of a number of interrelated factors. He was black and poor in a city rife with racial division. Responders arrived with biased expectations about what had likely occurred in Crawford's home, and ignored evidence suggesting that the infant's death was caused by illness. The police investigated with tunnel vision, anticipating from the outset that Crawford had engaged in wrongdoing. The medical examiner prematurely committed to homicide as a cause of death and disregarded and minimized clear medical evidence that pointed to quite a different conclusion. The prosecutor was gung-ho to secure yet another capital conviction, and the judge went along for the ride.

It would be easy to dismiss Crawford's experience as bad luck or as a strange anomaly in the criminal justice universe. But that would be a mistake. As crazy as it sounds, potentially thousands of innocent people have been wrongly convicted of crimes that simply did not occur. In fact, nearly *one-third* of all known exonerations of innocent people involve no-crime wrongful convictions.<sup>20</sup> And those are only the cases that we know about. The actual number of no-crime wrongful convictions that have occurred throughout history is unknown and perhaps unknowable.

## THE FIRST KNOWN NO-CRIME WRONGFUL CONVICTION

History is replete with examples of no-crime wrongful convictions. In fact, the first wrongful conviction ever recorded was a case involving a murder that never happened.<sup>21</sup>

In 1812, Richard Colvin vanished without a trace from his home in Manchester, Vermont. Colvin's brothers-in-law, Jesse and Stephen Boorn, were suspected of playing a role in his disappearance. Years later, in 1819, a man claimed that the ghost of Colvin appeared in his dream and directed him to dig up Colvin's murdered body from the Boorns' cellar. Armed with this spectral mandate, the townspeople dug through the Boorns' cellar floor. They found items belonging to Colvin, but no body. Soon after, a boy found bones under a tree near the Boorn farm. Triumphantlly touting the bones as proof that Colvin had been murdered, the town arrested the Boorn brothers.

While in custody, Jesse Boorn confessed that Stephen, with Jesse's help, had killed Colvin. What prompted that confession is unknown, but he recanted shortly after making his statement. Later, but before the trial began, the bones were reexamined and determined to be of an animal—and not human—origin. The town nonetheless pursued its case, relying heavily on Jesse's confession and the new testimony of a jailhouse informant who had shared Jesse's cell. The informant claimed Jesse had told him about the murder and further claimed that the Boorns' father was involved. Soon after, Stephen provided a written statement in which he confessed to the crime but denied that his father and brother participated. Why Stephen confessed is also unknown, but whatever the reason, his confession shored up a case otherwise thin on evidence.

With Stephen Boorn's confession and the informant's testimony (but no body or bones), the prosecution proceeded to trial. Both Boorn brothers were convicted of murder and sentenced to death on the gallows. Jesse's sentence was later commuted to life in prison. With Stephen's life literally hanging in the balance, a minister read a newspaper article about Richard Colvin and recognized him as a man *who was alive and well in New Jersey*. With Colvin identified, the Boorn brothers were released from prison. There had been no murder.<sup>22</sup>

More than sixty years later and a few states to the west, William Jackson "Jack" Marion was not so lucky. In the earliest days of Nebraska's statehood, Marion eked out a living delivering goods from town to town in his

horse-drawn wagon.<sup>23</sup> Marion and his friend John Cameron left Nebraska for Kansas to look for work on the railroad. Only Marion returned. A dead body was later discovered, wearing clothing believed to have been Cameron's. Marion was charged and convicted of Cameron's murder, and died by hanging in 1877. Four years after Marion's public execution, Cameron returned to Nebraska, very much alive. He'd left Marion seeking adventure on a trip that took him across Alaska, Colorado, and Mexico—and had no idea that he was thought to be dead or that Marion had been held responsible for his supposed murder. One hundred years after Marion's execution, the state of Nebraska issued a posthumous pardon.<sup>24</sup>

Of course, not every no-crime conviction in our early history involved a living person reappearing from the dead. The Salem witch trials of 1692 marked a time of mass hysteria.<sup>25</sup> When girls fell sick and could not be cured by the local doctor, witchcraft was blamed for their symptoms. In Salem, Massachusetts Bay Colony, the town moved swiftly to control the perceived forces of evil by accusing innocent people of being witches and holding witchcraft trials. All told, twenty people were wrongly condemned and executed for being witches, nineteen by hanging and one who was pressed to death, while another five people died in prison. The colonial American experience of convicting and punishing so-called witches for the harm that their fictive spells allegedly caused in their community serves as a stark reminder of how easy it is to scapegoat and convict innocent people for crimes that never happened.

## CONTEXTUALIZING NO-CRIME WRONGFUL CONVICTIONS

### *The Very Big Picture*

The subject of wrongful convictions—of innocent people being wrongly convicted of crimes they did not commit—has entered today's mainstream consciousness. Wrongful convictions have captured the attention of the public and media alike, as shown by the recent breakout successes of season one of *Serial* on National Public Radio, television shows such as *Making a Murderer* and *False Confessions*, and scores of books and Hollywood movies. Increased public awareness of wrongful convictions is a good thing, because it illuminates what defense practitioners and scholars have long known: the system is more prone to error than anyone ever imagined.

Most cases brought to the public's attention involve "actual-crime wrongful convictions," where an innocent person is convicted of a crime committed by someone else. A woman is raped, a man is murdered, or a building is intentionally burned to the ground. In these actual-crime wrongful conviction scenarios, a crime is committed, but the wrong person is identified as a suspect. The accused is dragged through the criminal justice system and is prosecuted, convicted, and punished for actions committed by someone else. Years later, sometimes decades later, the wrongful conviction is uncovered and the innocent person is cleared of wrongdoing. In the best-case scenario, the real offender is identified and the crime is finally and correctly solved.

This book focuses on no-crime wrongful convictions, which are different from actual-crime convictions in that no crime ever happened. A natural or accidental event might be mislabeled a crime, as when an illness-related death is wrongly attributed to murder, or an accidental fire is mislabeled as arson. A supposed victim might invent a false accusation. Corrupt police might plant evidence on a suspect and then lie about a crime's occurrence.

Once an event is mislabeled a crime, forward momentum often fueled by circular reasoning takes over. If a crime was committed, then someone must have committed the crime; therefore, the police have to find the perpetrator of that crime. Once the police identify the perpetrator of the crime, the existence of the crime is solidified. The prosecutor, in cooperation with the police, push forward to build a case against the alleged perpetrator. The initial, erroneous designation of a crime sets in motion a process that almost inexorably leads to a wrongful conviction.

It's the stuff of nightmares. But it is all too real. The old saying "Where there's smoke, there's a fire" is wrong. Sometimes, there's just smoke.

### *Systemic Weaknesses That Enable No-Crime Wrongful Convictions*

The possibility of error—of convicting an innocent person of a crime they did not commit—is built into our criminal justice system. Under the United States Constitution, the prosecution need only prove a defendant's guilt "beyond a reasonable doubt." This standard of proof does not mean guilt beyond any doubt or beyond all error. Nor does it require proof of guilt to an absolute certainty. Stated another way, the reasonable doubt standard permits the possibility that an innocent person will be convicted of a crime.

Courts of appeal are charged with detecting and correcting errors made by trial courts. Yet appellate courts are not well suited to responding to claims of innocence, for reasons discussed in greater detail in chapter 7. But we do know that appellate courts reverse criminal convictions infrequently,<sup>26</sup> even when defendants raise compelling claims of actual innocence. It is an unfortunate truth that although our system permits the possibility of error, it is poorly equipped to respond to the errors that inevitably occur.

It is not the standard of proof alone that creates the possibility of a wrongful conviction. It is also the reliability of the evidence presented in court. If a prosecutor presents evidence that is inaccurate, exaggerated, or simply false, or a judge admits evidence that is unreliable, that evidence will skew an otherwise seemingly fair process. In cases involving a jury trial, for instance, jurors work diligently to evaluate the evidence against a defendant and to reach an accurate and fair outcome. Perhaps it can even be said that jurors do a good job of reaching a verdict based on the quality of the evidence presented to them. When system processes are subverted through, for instance, the presentation of faulty forensic science or lying witnesses, the jury is bound to get it wrong. The decisions they make are only as reliable and accurate as the evidence presented to them.

### *The Scope of Innocence*

The total number of wrongful convictions, both actual and no-crime, is unknown. That hasn't stopped scholars from trying to figure out their frequency. Perhaps the best estimate was offered by Samuel Gross, a leading innocence scholar, who conducted a study of wrongful convictions in death penalty cases. Gross found that if all death-sentenced defendants remain under sentence of death indefinitely, at least 4.1 percent would be exonerated.<sup>27</sup> That's roughly one innocent person for every twenty-five death sentences.

Can we extrapolate from Gross's study that 4.1 percent of *all* convictions are wrongful? Maybe not. On the one hand, death penalty cases receive the most legal attention and postconviction scrutiny by courts and lawyers because of the seriousness of the penalty and the fact that an execution cannot be undone. This may mean that we are much more likely to uncover errors in death penalty cases than in any other kind of cases. On the other hand, there might be more errors in death penalty cases because there is so much pressure on the police to solve the types of crime that usually result in capital charges, and so much pressure on the prosecutors to get convictions. In other words,

it may be that a 4.1 percent error rate is accurate only in cases involving a death sentence, and not in non-death-penalty cases. It is hard to know.

But we can estimate. In 2016, more than 6.6 million people were under the supervision of adult correctional systems.<sup>28</sup> An even greater number of people had been convicted of a crime but were no longer under correctional supervision. Even a conservative error rate of 1.0 percent (or even 0.1 percent) means that *thousands* of innocent people have been wrongly convicted whose innocence has never been uncovered.

Although we can offer only best guesses when it comes to the number of people who have been wrongly convicted, we know a little bit more about exonerations, or cases where innocent people convicted of crimes were officially declared innocent by someone in a position of authority to do so. Even those exoneration data are cautionary rather than conclusive. They capture only the very tip of the much larger innocence iceberg: the lucky few who were able to clear their names. Exoneration data, by their very definition, do not include innocent people whose innocence has not been (and may never be) proven.

The best information about known exonerations comes from the National Registry of Exonerations (NRE), which has tracked known exonerations since 1989. As of June 30, 2019, the NRE had recorded 2,468 exonerations. Of these, nearly *one-third* of all known exonerations (910) involved no-crime wrongful convictions. This means that in nearly one-third of all known exonerations, a person was convicted of a crime that never happened.

But even on their face, the NRE data undercount all wrongful convictions generally, and no-crime wrongful convictions specifically. That's because the compilations are only as good as the exoneration cases the Registry knows about and because of NRE data classification decisions. In its data the NRE does not count defendants who were part of "group exonerations," which happen when multiple people, some of whom are innocent and some of whom might well be guilty, have their convictions overturned because of police misconduct or other system errors.<sup>29</sup> More than 2,500 people were cleared of wrongdoing in the group exonerations that took place between 1989 and April 2018,<sup>30</sup> and at least some of those cases involved innocent people in no-crime convictions, such as when the police planted evidence or falsified charges as part an uncovered police scandal (see chapter 4). Obviously, if even a portion of the group exoneration data was included in the NRE count, there would be many more no-crime cases.

Exoneration data are also limited in the context of no-crime misdemeanor cases. Misdemeanor cases are the bread and butter of the criminal

justice system. The court system processes roughly 10 million misdemeanor cases each year.<sup>31</sup> Courts, prosecutors, and public defenders are drowning in cases involving people facing low-level criminal charges. As discussed in more detail in chapter 8, thousands of innocent people are convicted of misdemeanors, often after they enter a plea of guilty, based on crimes that never actually happened. We know very little about these cases, except that few innocent people are ever exonerated from misdemeanor convictions.

Plea bargaining is another obstacle to capturing the full scope of wrongful convictions. Innocent people plead guilty to all kinds of cases, felonies and misdemeanors alike. This should come as no surprise: nearly 95 percent of cases in the criminal justice system are resolved by a plea bargain.<sup>32</sup> Of all known exonerations, nearly 20 percent come from innocent defendants who were convicted after a guilty plea.<sup>33</sup> My students cannot believe that innocent people plead guilty in cases where no crime occurred. I have heard students say time and again that they “would never plead guilty to a crime they didn’t commit, let alone a crime that never happened.”

In reality, however, a guilty plea is often the most reasonable option presented to a defendant. Innocent defendants who insist on asserting their constitutional right to a trial risk sitting in jail for weeks, months, or even years while awaiting their day in court because they are too poor to make bail. A guilty plea may provide them with the quickest route home to their children, employment, and other responsibilities. In addition, innocent defendants may plead guilty to avoid the risk of receiving a more severe sentence if they are convicted after trial. Informally called a “trial penalty,” defendants receive harsher and lengthier sentences after a jury trial than if they plead guilty.<sup>34</sup> In the warped world of the criminal justice system, it is rational for innocent people to choose to plead guilty.

Consider what happened in Tulia, Texas, in 1999. Forty-eight defendants, almost all of whom were black and poor, were charged with drug crimes.<sup>35</sup> Several defendants went to trial, insisting on their innocence, and were convicted by a jury that credited the sworn testimony of a law enforcement officer over the word of the charged defendants. The resulting prison sentences were astonishingly long: from 20 years to a high of 361 years in prison. The remaining Tulia defendants received the message loud and clear, and quickly pled guilty despite their innocence to avoid similarly harsh penalties. As chapter 4 discusses in greater depth, it was later discovered that the charges against all forty-eight defendants were entirely fabricated; the

defendants, including those who pled guilty, had been wrongly convicted of drug crimes that never happened.

### *No-Crime Wrongful Conviction Exoneration Data*

Scholars have identified a set of the most common factors that contribute to wrongful convictions either singularly or, more often, in combination: eyewitness misidentification, false confessions, official misconduct, forensic error, perjured testimony, and ineffective legal counsel.<sup>36</sup> These contributing factors have remained fairly constant since 1932, when Yale law professor Edwin Borchard first began studying wrongful conviction cases and their causes.<sup>37</sup>

Because no-crime convictions are a subset of wrongful convictions, it is not surprising that they are in general caused by the same factors as wrongful convictions or that there are some similarities between actual-crime and no-crime wrongful conviction exoneration data. As demonstrated in table 1, the top two contributing factors in no-crime convictions are perjury or false accusations (61%) and official misconduct (42%). In actual-crime wrongful convictions, the top two prevalent factors remain the same but in inverse order: official misconduct (60%) is the primary contributing factor in actual-crime wrongful convictions, followed by perjury or false accusation (56%). In addition, both no-crime wrongful convictions and actual-crime wrongful convictions demonstrate a similar occurrence of inadequate legal defense (25% versus 26%).

But no-crime exoneration data differ from that for actual-crime convictions in ways that highlight unique characteristics of no-crime wrongful convictions. For instance, as illustrated in table 1, within the NRE exoneration data, mistaken eyewitness identification is present in *less than 1 percent* of no-crime exonerations (0.02%), but it is the third most prevalent factor in all exonerations (28%) and the third most prevalent factor in all actual-crime exonerations (45%). Innocence Project research also demonstrates that eyewitness misidentification is the most prevalent contributing factor where innocence was proven by DNA evidence.<sup>38</sup> That no-crime exonerations almost never involve mistaken eyewitness testimony likely reflects the fact that in many no-crime wrongful conviction cases, eyewitness identification is not at issue, either because a police officer is the main witness or because the “victim” in false accusation cases often knows the wrongly accused.

While DNA played a significant role in actual-crime exonerations (30%), it played almost no role in no-crime exonerations (2%). The absence of DNA

TABLE 1 Exonerations by factor contributing to conviction (percentage)

	All exonerations	No-crime	Actual-crime
		exonerations	exonerations
DNA	20	2	30
False confession	12	5	16
Eyewitness misidentification	28	0	45
False/misleading forensic evidence	23	29	19
Perjury/false accusation	58	61	56
Official misconduct	54	42	60
Inadequate defense	26	25	26

NOTE: All figures have been rounded.

evidence in the overwhelming majority of no-crime exonerations makes sense. In no-crime wrongful convictions, DNA evidence is unlikely to be present, since no crime, and therefore no perpetrator, existed in the first place.

Another significant difference in contributing factors between no-crime and actual-crime cases is the prevalence of forensic error. Forensic error appears more frequently as a contributing factor in no-crime convictions (29%) than in actual-crime convictions (19%). This may well reflect the nature of no-crime wrongful convictions, some of which rely on expert testimony for diagnosis and for exoneration. In cases involving wrongful allegations of arson or shaken baby syndrome, for instance, forensic error was central to the conclusion that a crime was committed. Or, as later chapters show, bad forensic science was used to shore up weak cases where it would have been difficult to prove that a crime was ever committed.

As the data in table 2 demonstrate, drug possession or sale cases constitute 30 percent of all no-crime exonerations in the NRE data set, followed by child sex abuse cases, which make up 24 percent of no-crime exonerations. This contrasts starkly with actual-crime exonerations, of which drug cases make up only 3 percent of cases, and child sex abuse only 4 percent. Conversely, in actual-crime cases, murder is the most prevalent category of exoneration (56%), followed by sexual assault (16%); these categories appear less frequently in the no-crime exoneration data: murder accounts for 8 percent of no-crime exonerations, and sexual assault in 9 percent.<sup>39</sup>

In terms of no-crime exonerations in drug cases, the NRE data have limitations. The data reflect a significant number of exonerations that came out

TABLE 2 Exonerations by type of crime (percentage, rounded)

	All exonerations	No-crime	Actual-crime
		exonerations	exonerations
Drug possession or sale	13	30	3
Child sex abuse	11	24	4
Sexual assault	13	9	16
Murder	38	8	56

of the Conviction Integrity Unit (CIU) in Harris County, Texas, where people pled guilty based on positive field tests conducted on site that indicated the presence of illegal drugs but that were later proven wrong by lab results.<sup>40</sup> The number of drug exonerations may soon begin to decline as Harris County completes its review of backlogged cases. As explored in chapter 4, Harris County was unique in that it sent out field tests for lab confirmation even after a plea conviction was reached. Most jurisdictions do not confirm field tests once a case is resolved; innocent people who plead guilty to drug possession based on a faulty field test are unlikely to be exonerated. In addition, the NRE excludes from its data “mass exonerations” that result in large-scale dismissal of cases due to police or forensic science misconduct. It does so because the exonerations are not based on the guilt or actual innocence of the person convicted per se, but rather reflect decisions by a particular jurisdiction that the convictions are so tainted that they cannot be permitted to stand. As a result, the data involving exonerations in no-crime drug cases may overrepresent the efforts of Harris County’s CIU, while they may undercount the innocent people convicted for drugs that were planted on them by the police or that were not drugs in the first place.

The higher prevalence of no-crime exonerations in child-sex abuse cases may be fueled in part by the exonerations that occurred in the wake of the child sex abuse hysteria of the 1970s. The exoneration numbers in this category may level off, or increase at a diminishing rate to include cases outside the hysteria-induced cases.<sup>41</sup>

Although the factors that contribute to actual-crime wrongful convictions are similar to those that cause no-crime wrongful convictions, this book examines how those contributing factors play out specifically in no-crime cases. It also specifically examines what triggers no-crime cases in the first place. In this way, the book positions no-crime wrongful convictions

squarely within the scholarly literature and demonstrates that they are a subject worthy of examination in their own right.

*Why We Should Care about No-Crime  
Wrongful Convictions*

All actual-crime and no-crime wrongful convictions are tragedies—the perfect storm of a system gone terribly awry. The fallout is disastrous for the innocent person who is wrongly convicted, for their families and extended communities, and for society at large.

All innocent people accused of crimes they did not commit experience trauma the likes of which we can only imagine. They experience the humiliation and indignity of being arrested, of being portrayed as a criminal and sometimes as a monster, of seeing their marriages and partnerships fray or disintegrate, of having their minor children placed in foster care, of watching family and friends turn on them in the face of criminal accusations, and of having their protestations of innocence ignored by police, prosecutors, and sometimes their own lawyers. They are dragged through an indifferent court system where they reluctantly enter guilty pleas, or expend tremendous time, energy, and resources fighting the charges against them. If they decide to go to trial, they may be held in pretrial detention, unable to make bail. When their day in court finally arrives, they are forced to endure day after day of court proceedings, listening to people testify under oath to inaccurate, incorrect, or false evidence. And they are forced to hear the judge or jury pronounce their guilt.

Once found guilty, whether after a trial or after a plea, the wrongly convicted person may be sent to prison. The correctional system makes no distinction between incarcerated people who are factually guilty and those who are factually innocent. The innocent experience the same treacherous and dehumanizing conditions as anyone confined to prison. They sit in overcrowded cells, receive equally poor health care, and experience the same cacophony of sounds and lack of privacy as those who are guilty. For the innocent, prisons are particularly traumatic, though, because they are forced to suffer extreme conditions of punishment and deprivation all the while knowing they did nothing criminal. They may even spend time in solitary confinement (a form of punishment that can cause permanent psychological trauma),<sup>42</sup> not because they are “dangerous” but perhaps because they did not follow exacting and arcane prison rules, or because they needed to be

protected from others, or because they could not control their own outrage and frustration at the injustice of their situation.

Sometimes an innocent person is exonerated, but most of the time their innocence remains undetected, leaving the wrongly convicted to serve their time slowly, painfully, and alone. Separated from their families, sometimes for years, and painted as criminals, people who are wrongly convicted may complete their prison terms only to find their lives and dreams in tatters after their release. Tainted by a criminal record, they may be barred from obtaining work and housing and from exercising the right to vote. Importantly, even the wrongly convicted who receive probationary sentences or time served for more minor offenses still suffer the stigma of a criminal record for a crime that only they (and perhaps their loved ones) know they did not commit.

But if the experiences of all wrongly convicted people are similar in certain respects, there are significant differences between actual-crime and no-crime convictions.

When an actual-crime wrongful conviction occurs, the wrong person was held responsible. This means that the real perpetrator remains at large.<sup>43</sup> In no-crime conviction cases, however, there is no perpetrator. An innocent person can never hope to be exonerated by establishing the identity of the actual perpetrator, because there is none. This leaves the no-crime wrongly convicted defendant in the nearly impossible position of having to prove that no crime ever occurred. As they say, it is awfully hard to prove a negative. Yet that is exactly what a person in a no-crime wrongful conviction case must do if they ever hope to prove their innocence.

What is repelling and astonishing about no-crime cases is that unbelievable quantities of time, energy, and human capital, not to mention taxpayer dollars, are wasted investigating, prosecuting, convicting, incarcerating, and in some cases, supervising people (whether on probation, parole, or a sex offender registry) for events that were never criminal and should never have been pursued by the criminal justice system. In no-crime conviction cases, the state needlessly expends taxpayer resources pursuing convictions against its own citizens for fictional crimes. Think about that. The state seizes innocent people and builds cases against them using inaccurate, unreliable, and at worst, completely manufactured evidence, to gain convictions for crimes that did not happen. In a no-crime conviction case, every single strand of evidence introduced by the state to “prove” the defendant committed the crime is patently invalid because, in reality, no crime ever occurred. Kafka could not have invented a more bizarre and terrifying scenario. When the