Innocence after Death

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INTRODUCTION

Within the complicated landscape of the effort to identify, explain, and prevent wrongful convictions, an interesting type of proceeding has begun to emerge. Posthumous exonerations, which declare an individual innocent following his death, have been seldom discussed, but they can serve an important role in the innocence movement. The exoneration of a deceased defendant may appear, at first glance, to be a mostly empty gesture, which may explain the lack of attention devoted to this proceeding to date. The posthumous exoneration has an essential corrective justice function, however, for individuals, communities, and societies. At the individual level, posthumous exonerations, which are generally based on DNA evidence or similarly definitive proof of innocence, ensure belated justice. From a systemic perspective, they offer a greater opportunity to reveal the causes of wrongful convictions than do the currently available proceedings to exonerate live defendants. In so doing, they provide valuable data for the reform of the investigation and prosecution of criminal cases. In a world in which the credibility of the criminal justice system and its safeguards is questioned with each new addition to the list of wrongful convictions, this function is essential.

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This Article will follow Samuel Gross’s convention of using the male pronoun when referring to exonerated defendants because men comprise approximately 96% of the total exonerations. See Samuel R. Gross et al., Exonerations in the United States, 1989 Through 2003, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 n.2 (2005).

See, e.g., Sonja B. Starr, Sentence Reduction as a Remedy for Prosecutorial Misconduct, 97 GEO. L.J. 1509, 1532–33 (2009) (discussing constitutional remedies that “have traditionally sought to repair the impact of the violation”—a “form of ‘corrective justice’” that has also “played a central role in private law”).

See, e.g., Susan A. Bandes, Framing Wrongful Convictions, 2008 UTAH L. REV. 5, 12 (describing the innocence movement as evoking public concern over “our fallible [criminal justice] system”).
The systemic benefits of posthumous exonerations are twofold. First, on a practical level, cases in which the innocence of a defendant can be scientifically proven after conviction are rare; to date, they have been largely limited to convictions obtained prior to 1989, for which biological evidence continues to be available for DNA testing. Because of the importance of the data and the small size of the potential data set, identifying and investigating each wrongful conviction is critical, regardless of whether the wrongfully convicted defendant is alive or dead. Secondly, because of the unique considerations involved in posthumous exonerations, they present an unusual opportunity for an examination of the problems that led to the defendant’s wrongful conviction. Because it is too late to free the innocent defendant, the families and attorneys who bring posthumous innocence claims are likely to turn instead to the question of how the convictions were obtained—and the judges who hear such cases are more likely to provide the answers. This was demonstrated in a 2009 Texas case, when a county district judge, while exonerating Timothy Cole ten years after his death, conducted a searching inquiry into the causes of his conviction. In its opinion, the court described the entire course of evidentiary and investigatory missteps and provided recommendations to the legislature for reform.

The posthumous exoneration of Timothy Cole—and the four others that have occurred since DNA testing was first used to prove post-conviction innocence—represent an important extension of the innocence movement and demonstrate that actual innocence proceedings of all types could be used, not only to exonerate individual defendants, but also to illuminate the causes of wrongful convictions.

Since the first post-conviction DNA exoneration of an innocent criminal defendant in 1989, the legal literature has closely followed the more than two hundred convicted defendants who have proven

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6 Id. at 10-15.

7 See Garrett & Neufeld, supra note 4, at 4. The first post-conviction DNA exoneration occurred in 1989, when DNA tests proved that Gary Dotson, convicted of rape in Indiana in 1979, was innocent. Id.
their innocence through this new technology. Although innocence claims were made prior to the DNA revolution, their importance and numbers have swelled with the help of science, as DNA can offer—unlike the recanting of a jailhouse snitch or another individual's post-trial confession to the crime—conclusive evidence of actual innocence: "DNA evidence is 'uniquely probative' and 'timeless' if preserved and tested properly." This certainty makes DNA exonerations extremely useful in the study of the causes of wrongful convictions. The means of achieving post-conviction justice through the use of this evidence, however, have been as varied as the cases themselves.

A diverse array of parties have initiated efforts to exonerate innocent defendants, from the defendants themselves (in living exoneration cases) to family members, innocence projects, religious groups, the media, and even representatives of foreign governments. When these parties seek exoneration through the courts, the forum in which nearly eighty percent of the post-conviction exonerations since 1989 have occurred, they face limited procedural options. They may make a motion for new trial based on newly discovered evidence (an option often accompanied by

8 In 2010, the Innocence Project reported that "[t]here have been 252 post-conviction DNA exonerations in the United States." The Innocence Project, Facts on Post-Conviction DNA Exonerations, http://www.innocenceproject.org/Content/351.php (last visited Mar. 16, 2010).

9 Of the 340 exonerations identified in a report investigating exonerations from 1989 through 2003, 196 occurred without the help of DNA evidence. Gross et al., supra note 1, at 524.


11 Id. (DNA testing, unlike other forensic and non-biological techniques, allows "data-based, probabilistic assessments of the meaning of evidentiary 'matches.'" (footnote omitted)).

12 See, e.g., infra notes 66-68 and accompanying text (discussing family members' efforts to exonerate Timothy Cole after Cole died in prison).

13 See, e.g., infra note 68 and accompanying text (discussing the Texas Innocence Project's role in obtaining the posthumous exoneration of Timothy Cole); infra notes 120-22 (discussing innocence groups' role in attempting to obtain DNA testing for deceased capital defendants believed to be innocent).

14 See, e.g., infra notes 120-22 and accompanying text (discussing religious groups' participation in motions to obtain DNA testing to prove capital defendants' innocence).

15 See, e.g., infra notes 120-22 (describing the Boston Globe's efforts to obtain access to evidence for DNA testing to prove the innocence of deceased capital defendants).


17 See, e.g., Gross et al., supra note 1, at 524 (describing how, of the 340 exonerations identified between 1989 and 2003, 263 involved dismissals of criminal charges by courts based on new evidence).
a strict statute of limitations), raise a habeas claim, or invoke coram nobis, either in its common-law form or through a judicial or legislative codification, to address facts and evidence previously not before the court. When successful, these efforts typically result in formal dismissal of charges, vacation of an indictment and conviction, reversal of a case with instructions for a directed verdict of not guilty, or acquittal on retrial based on proof of non-participation in a crime. Recently, some states have also passed innocence legislation to provide a formal venue through which parties may request DNA testing, although these laws generally do not provide a process for formal exoneration if the testing proves the defendant’s innocence. Due to these limited options, parties have turned to creative methods to obtain a formal exoneration. Although with decreasing frequency, some exonerations have occurred through state governors’ and executive boards’ pardons, others occur through prosecutors’ extrajudicial decisions to drop charges at the post-conviction stage.

Many academic studies of post-conviction exonerations focus on the evidentiary and investigative errors leading to wrongful convictions, including reliance upon questionable eyewitness testimony, introduction at trial of false confessions or testimony from

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18 See, e.g., Daniel S. Medwed, Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts, 47 ARIZ. L. REV. 655, 659 (2005) [hereinafter Medwed, Up the River] (explaining that “every state currently permits at least some form of post-trial relief on the basis of newly discovered evidence” but that “[i]n general, these remedies are characterized by stringent statutes of limitations”).

19 See, e.g., Schlup v. Delo, 513 U.S. 298, 324 (1995) (allowing federal habeas petitioners to raise actual innocence claims from state convictions by “support[ing] [their] allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial”).

20 See Medwed, Up the River, supra note 18, at 673, 675.

21 See Gross et al., supra note 1, at 524 (describing how, of the 340 exonerations studied, 263 resulted in dismissal of criminal charges and 31 resulted in acquittal on retrial); see also infra notes 255-61 and accompanying text (discussing court-based exonerations and the related procedures).

22 See Garrett, Innocence, supra note 10, at 1682–83, 1719–23, 1723 n.426. In 2008, all but six states had post-conviction DNA testing statutes. Alabama, Alaska, Massachusetts, Mississippi, South Carolina, and South Dakota had no such statutes, and Oklahoma’s statute expired in 2005. Id. at 1719–23, 1723 n.426. Most states provide no guidance as to how exoneration should occur after the DNA test has been conducted. Id. at 1683.

23 Many authors argue that pardons are exceedingly rare and that their rate is declining. See, e.g., Rachel E. Barkow, Essay, The Ascent of the Administrative State and the Demise of Mercy, 121 HARV. L. REV. 1332, 1348 (2008) (observing that “grants of executive clemency have plummeted in recent decades”); Bruce A. Green and Ellen Yaroshefsky, Prosecutorial Discretion and Post-Conviction Evidence of Innocence, 6 OHIO ST. J. CRIM. L. 467, 485 (2009) (explaining the rarity of grants of executive clemency). Pardons still, however, make up a notable percentage of post-conviction exonerations. See, e.g., Gross et al., supra note 1, at 524 (explaining that 42 of the 340 exonerations studied involved cases where “governors (or other appropriate executive officers) issued pardons based on evidence of the defendants’ innocence”).

24 See, e.g., infra text accompanying note 109.
jailhouse informants, misuse or misidentification of "non-DNA-tested forensic evidence" such as hair and blood samples, and prosecutorial misconduct, such as the knowing elicitation of perjured testimony or the failure to disclose exculpatory evidence. Other literature focuses on the difficulty of obtaining DNA testing or raising an actual innocence claim in court, and suggests ways to improve access to court, arguing for constitutional innocence claims and better legislation. Few of these studies, however, describe in detail the judicial proceedings or executive actions that have ultimately exonerated defendants or the findings that were made as part of those proceedings. This Article will begin to fill this gap by illuminating the value of posthumous exonerations and their role in the innocence movement, focusing on how these proceedings allow courts to make meaningful findings on the causes of the underlying conviction. It will suggest how the civil, quasi-inquisitorial investigation followed in one posthumous exoneration in Texas could serve as a model, not only for subsequent posthumous proceedings, but also, with certain modifications, for all exonerations, producing more and better findings on the causes of wrongful convictions.

Part I will describe the Cole case and the other posthumous exonerations that have occurred in the last two decades. Part II will argue that posthumous exonerations are worthwhile from an individual justice perspective in their provision of remedies, and that they are justified by the rationale behind the abatement doctrine, which firmly closes a case and vacates the conviction and indictment upon the death of the defendant. Although, unlike a posthumous exoneration, the abatement doctrine requires the closure of a case


26 See, e.g., id. (naming "eyewitness identification," "use of forensic evidence," and "alleged government malefassance or misconduct" as "common themes" in the trials underlying twenty-eight wrongful conviction cases studied); The Innocence Project, The Causes of Wrongful Conviction, http://www.innocenceproject.org/understand/ (last visited Mar. 6, 2010) (showing that, of the first 225 wrongful convictions studied and later corrected through DNA evidence, 77% were based on "[e]yewitness [mis]identification," 52% resulted from "[u]nvalidated/[i]mproper [f]orensics," 23% resulted from "[f]alse [c]onfessions/[a]dmissions," and 16% resulted from [i]nformants/[s]nitches," and explaining that these totaled to more than 100% because wrongful convictions sometimes have multiple causes).

27 See, e.g., Garrett, Innocence, supra note 10; Medwed, Up the River, supra note 18, at 656-60.

28 See sources cited supra note 27.

29 This is likely due in part to the dearth of such findings, as Gross has noted. See infra note 225 and accompanying text.
upon the death of the defendant, it does so for reasons such as fairness and the avoidance of wrongful conviction—reasons that overlap with the purposes of posthumous exonerations. Part III will focus on how posthumous exonerations contribute important data points to a small set of DNA exonerations used in the study of wrongful convictions, thus providing more findings to support broader reforms. It will then describe the failure of existing exoneration procedures to investigate the causes of wrongful conviction and the resulting creation, in some states, of innocence commissions. Part IV will argue that posthumous exonerations offer courts a unique opportunity to conduct an inquiry into how the erroneous conviction was obtained and will urge that where innocence commissions do not exist, legislatures should expand the procedural and jurisdictional bases for these proceedings. This Part will discuss the necessary elements of a useful posthumous exoneration statute, comparing arguments for quasi-inquisitorial and adversarial exoneration proceedings. The Article will conclude that, while posthumous exonerations may present the best opportunity for generating judicial findings on the factors leading to the conviction of innocent defendants, these findings should be encouraged in all exonerations.

I. POSTHUMOUS EXONERATIONS: FIVE DEFENDANTS, FOUR STATES

A. Defining and Counting Exonerations

The true number of exonerations, including posthumous ones, is difficult to identify. Samuel Gross, in a University of Michigan study of exonerations from 1989 through 2003 that offers the “most comprehensive compilation of exonerations available,”30 identified a total of 340 exonerations during that time period—144 of which relied upon DNA evidence31—but emphasized that the study was not exhaustive.32 Because the criminal justice system is administered at multiple levels of government, and because capital cases tend to get much of the focus, many exonerations fail to surface in even the most detailed studies.33 Gross suggests that if prison sentences were reviewed as scrupulously as death sentences, the past fifteen years would have yielded over 29,000 “non-death row exonerations,” assuming the same exoneration rate for death and

30 Gross et al., supra note 1, at 525.
31 Id. at 524.
32 Id. at 525.
33 See id.
non-death cases. On the other hand, he observes, death cases likely involve more false convictions due to investigative challenges, the guilty individual’s strong incentive to frame another defendant, and prosecutors’ and society’s desire to bring individuals to justice for the most “heinous crimes” committed. Others, however, argue that non-capital cases may lead to more erroneous convictions. Many non-capital rape cases, for example, rely heavily on eyewitness testimony, which is one of the leading causes of wrongful conviction. Further, given the “greater scrutiny” that capital cases receive, “they may be less susceptible to error than noncapital cases.” Despite this disagreement, all agree that exonerations are difficult to identify and impossible to accurately tally.

The challenge of identifying and counting innocence cases is also exacerbated by differing definitions of exonation; the term “exonation” can be applied to a number of different proceedings and outcomes. Exonation—whether it occurs as part of an executive order, a one-line statement by a judge, or an unusually detailed posthumous proceeding—generally indicates a full erasure of a previous conviction, which is retroactively deemed erroneous. The subject of an exoneration is an innocent person convicted of a crime. C. Ronald Huff, Ayre Rattner, and Edward Sagarin define these “convicted innocents” as “people who have been arrested on criminal charges . . . who have either pleaded guilty to the charge or have been tried and found guilty; and who, notwithstanding plea or verdict, are in fact innocent.” Samuel Gross has a somewhat more fine-grained definition of innocent defendants, identifying them as those whose cases represent “undisputed” misidentifications of the perpetrator. He defines such undisputed misidentifications as

34 Id. at 532.
35 Id.
36 See, e.g., D. Michael Risinger, Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate, 97 J. CRIM. L. & CRIMINOLOGY 761, 785–86 (2007) (arguing that the wrongful conviction rate might be higher in non-homicide, pre-DNA rape cases than in death penalty cases, but that “[t]here are no good data on this issue directly”).
38 See, e.g., Richard A. Rosen, Innocence and Death, 82 N.C. L. REV. 61, 74 (2003) (“The reality is that we do not and cannot know how many innocent people are convicted.”).
those where "(1) there has been a judicial or executive determination of the innocence of the accused or (2) the prosecuting authority that originally charged the defendant now agrees that he or she is in fact innocent."41

This Article will generally discuss cases that fit Gross's definition of innocence.42 Therefore, it will count as exonerations only those cases that officially relieve a factually innocent, convicted individual of any guilt associated with the crime charged, whether through dropped charges, a dismissed indictment and vacated conviction, a reversal or acquittal that specifically declares the individual innocent or otherwise free of guilt and vacates the conviction,43 or an official pardon or similar executive exoneration granted on actual innocence grounds.

Although definitions differ, and the exact number of exonerations for wrongful convictions in the United States cannot be determined, some conclusions may be safely drawn. Due to the availability of DNA testing, the exoneration rate has greatly increased in recent years—from an average of twelve annually from 1989 through 199444 to eighteen annually from 2000 through 200945—and there have been very few posthumous exonerations.46

41 Id.
42 The extent to which guilt must be withdrawn from an individual's record to establish a true exoneration varies to some degree. Huff, Rattner, and Sagarin, for example, do not require erasure of guilt by an official body. Instead, in their 1996 study of convicted innocents, they define exonerated individuals as those whose innocence has been "either admitted by the prosecution and the police or so clearly established as to be beyond question." HUFF ET AL., supra note 39, at 10-11. In a study of post-conviction DNA exonerations, Brandon Garrett and Peter Neufeld, following a narrower definition, identify exonerated defendants as those whose "conviction was vacated by a court or [who] received an executive pardon after DNA test results excluded them, and . . . were not retried." Garrett & Neufeld, supra note 4, at 12 n.26. In comparison, Samuel Gross's comprehensive report on DNA exonerations from 1989 through 2003 defines an exoneration as "an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted." Gross et al., supra note 1, at 524. This includes governors' or other executives' pardons, acquittals on retrial, dismissal by courts on the basis of new evidence, and the relatively infrequent posthumous acknowledgment by states that a deceased defendant is innocent. Id. Similarly, the Innocence Commission for Virginia defines an "official exoneration" as one that occurs through "a governor's pardon or a court's order, or when prosecutors concede[] that the wrong person has been convicted." INNOCENCE COMM'N FOR VA., A VISION FOR JUSTICE: REPORT AND RECOMMENDATIONS REGARDING WRONGFUL CONVICTIONS IN THE COMMONWEALTH OF VIRGINIA 3 (2005), available at http://www.thejusticeproject.org/wp-content/uploads/a-vision-for-justice.pdf.
43 Major studies of exonerations of innocent defendants exclude defendants acquitted due to the "exclusion of crucial evidence . . . or other violations of suspects' rights," HUFF ET AL., supra note 39, at 11, or "insufficient evidence of identity or . . . improper use of suggestive identification procedures," Gross, supra note 40, at 412. For purposes of this Article, I also follow this method.
44 Gross et al., supra note 1, at 527.
B. Known Posthumous Exonerations

Timothy Cole’s case is a rare example of a posthumous exoneration based on DNA evidence. Gross’s study identified only four cases between 1989 and 2003 wherein “states posthumously acknowledged the innocence of defendants who had already died in prison,” only one of which—the exoneration of Frank Lee Smith of Florida—used DNA evidence to prove innocence. The Saint Petersburg Times believed Smith’s case to be “the first time in this country that posthumous DNA testing has proved a person’s innocence.”

1. The Cole Court of Inquiry

In 1985, a student in a parking lot in Lubbock, Texas was raped in her car. She immediately reported the crime, providing a detailed description of her assailant. Similar previous attacks indicated the presence of a serial rapist in Lubbock, and the Lubbock police conducted stakeouts of the area in which the assaults had begun. Timothy Cole, who resembled a description of the composite drawing created by police artists, visited a pizza parlor near the scene of the crime several weeks after the rape had occurred and quickly became a prime suspect, despite inconsistencies between his behavior and the behavior of the serial rapist, as well as significant exculpatory evidence. The police obtained a picture of Cole and placed it in a lineup; Cole’s photo was a Polaroid of him looking straight ahead, which stood out among the other mug shots of men looking away. The victim tentatively identified Mr. Cole as the rapist in the photo lineup, stating, “I think that is him,” which led the police to write, “That is him” beside Cole’s picture. After the police arrested Cole, the victim identified him as the assailant in a live lineup the following day, after which the police stated that the victim “was positive of

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46 See Gross et al., supra note 1, at 524 (identifying only four posthumous exoneration between 1989 and 2003).  
47 Id.  
48 See Sydney P. Freedberg, He Didn’t Do It, ST. PETERSBURG TIMES, Jan. 7, 2001, at 1A  
49 Id.  
50 Cole Decision, supra note 5, at 3.  
51 Id. at 4, 7.  
52 Id. at 4–7.  
53 Id. at 5–6.  
54 Id. at 6.  
55 Id. at 7.
[her] identification and there [was] no doubt in her mind."56 The victim, however, had not made a statement to this effect.57 Blood serum and gross hair analysis were inconclusive but did not exclude Cole, who was charged, convicted, and sentenced to twenty-five years in prison in September 1986.58

In 1995, a convicted rapist named Jerry Johnson sent a letter to Lubbock County judges explaining that he had committed the crime, requesting that they allow him to confess and that they clear Timothy Cole’s name.59 The judges ignored the letter.60 After serving more than thirteen years of his sentence, all the while asserting his innocence,61 Cole died in 1999 of an asthma attack in prison,62 which was “exacerbated” by his work in the prison cotton fields.63 The Innocence Project of Texas eventually took up Cole’s case and discovered evidence that pointed definitively to Johnson, including DNA from the victim’s clothing, which the Project had persuaded the Lubbock district attorney to locate and test.64 Johnson, in the meantime, was finally able to make a written confession with the assistance of Texas Tech law students.65

Cole’s surviving family members, joined by the victim of the crime,66 petitioned to clear Cole’s name under a Texas statute that allows a state district court judge to convene a court of inquiry to investigate “offense[s] . . . committed against the laws of [Texas].”67 A Lubbock county court denied their original motion to convene a court of inquiry, and the family, represented by the Innocence Project of Texas and Barry Scheck of the Innocence Project, filed a petition with another county court, asking that a court of inquiry be convened.68 This second court agreed,69 asserting its jurisdiction

56 Id. (alteration in original).
57 Id.
58 Id. at 8.
59 Id.
60 Id.
61 Id.
62 Cole fought the conviction until his appeals ran out and was repeatedly denied parole because he refused to confess guilt. Id.
63 See id. at 9.
64 See id. at 9 (listing Michele Mallin, the victim, as a petitioner).
65 TEX. CODE CRIM. PROC. ANN. art. 52.01(a) (Vernon 2006).
66 Id.
67 Id. The Texas Code of Criminal Procedure, which granted the court authority to convene a court of inquiry, simply provides:

When a judge of any district court of this state, acting in his capacity as magistrate,
under the court of inquiry statute and two provisions of the Texas Constitution:70 article 1, section 13, which requires that “every person for an injury done him . . . shall have remedy by due course of law,”71 and article 1, section 30, which provides crime victims with a right to be “treated with fairness and with respect . . . throughout the criminal justice process.”72 The court conducted a thorough investigation of the case through sworn testimony and documentary evidence in a two-day hearing.73 At the conclusion of the hearing, the court ordered, adjudged, and decreed in April 2009 that Cole “was, and is, innocent of the crime for which he was convicted and imprisoned,” thus exonerating Cole and “forever” removing “[a]ll legal disabilities attaching to him and his survivors as a result of his wrongful conviction.”74 In reaching this conclusion, the court relied on the strong DNA evidence, which was attested to in a Texas Department of Public Safety Report;75 errors in the eyewitness identification process;76 and the other evidence pointing toward Johnson as the perpetrator.77

As a result of the exoneration granted by Judge Baird, a Texas state senator requested an opinion from the Attorney General on the legality of granting a posthumous exoneration.78 The Attorney General confirmed the legality of this practice,79 and in March 2010 the governor granted Cole a full posthumous pardon.80

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70 Cole Decision, supra note 5, at 1–2.
72 TEX. CONST. art. I, § 30(a)(1).
73 See Cole Decision, supra note 5, at 1.
74 Id. at 16.
75 Id. at 9.
76 See id. at 11–12.
77 See id. at 13.
79 Authority of the Governor to Grant a Posthumous Pardon, Op. Tex. Att’y Gen. No. GA-0754 (Jan. 7, 2010), available at http://www.oag.state.tx.us/opinions/opinions/50abott/op/2010/htm/ga-0754.htm (explaining that a previous attorney general opinion concluded that posthumous pardons were not permitted but that “the modern development of United States Supreme Court precedent supports the Governor’s authority to issue posthumous pardons,” and that “a Texas court would likely conclude that the Governor may grant a posthumous pardon under current Texas law”).
2. Other Posthumous Exonerations

Cole’s case is one of a small number of posthumous exonerations. As noted above, only four others have occurred since 1989, and none of these cases generated the types of detailed findings produced in Cole. Further, only Frank Lee Smith’s case, in which the court also relied upon DNA evidence in posthumously exonerating Smith, bears a resemblance to Cole’s.

Frank Lee Smith pleaded not guilty to first-degree murder and sexual battery of an eight-year-old girl, but in 1986 a Florida jury found him guilty and sentenced him to death. At trial, the State’s evidence consisted primarily of a statement by Smith and three witness identifications. One witness stated that he had a conversation with a man near the victim’s house, but that he could not recall “how the guy looked” and could not positively identify Smith. The victim’s mother testified that when she arrived home, she saw a man from a distance and later identified him as Smith by observing his shoulders. The third and most credible witness at the time of trial stated that a man near the victim’s house had flagged her down the night of the crime, and she later identified this man as Smith. Following trial, however, the third witness signed an affidavit recanting her testimony and positively identifying another perpetrator.

After a long line of appeals and requests for post-conviction relief, Smith found some reprieve when the Florida Supreme Court granted a stay of execution and reversed the trial court’s summary denial of his motion under the Florida Rules of Criminal Procedure, holding that the trial court erred in “failing to conduct an evidentiary hearing to evaluate [the] newly discovered evidence”—specifically, the new affidavit of the key witness. Later, the Florida Supreme Court again vacated and remanded Smith’s case on the grounds of improper ex parte communications between the state attorney and the trial court judge. In the meantime, the state attorney’s office began to worry about the shaky case and filed a motion for crime-scene

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81 This Article argues, however, that these types of cases still present courts with an opportunity to make such findings.
82 See Smith v. Dugger, 565 So. 2d 1293, 1294 (Fla. 1990) (per curiam).
83 Id. at 1295–96.
84 See id. at 1295.
85 See id. at 1295–96.
86 See id. at 1296.
88 Dugger, 565 So. 2d at 1297.
89 See Smith, 708 So. 2d at 254–55.
evidence to allow for DNA testing. This motion was denied, and the state attorney's office reversed course, resisting the defense attorneys' later requests for DNA testing. In late 2000, DNA results from an FBI analysis confirmed that Smith was not guilty. Smith, however, had died in prison of pancreatic cancer earlier that year. Smith was posthumously exonerated on December 22, 2000, when a county circuit judge granted, in a one-page order, the State's motion to vacate and set aside judgments.

The three other posthumous exonerations identified by Gross, which did not rely upon DNA evidence, occurred in Massachusetts and Indiana. In 1965, the "Salvati Four"—Joseph Salvati, Peter Limone, Louis Greco, and Henry Tameleo—were convicted of first-degree murder in a "gangland slaying" in Chelsea, Massachusetts. Salvati was sentenced to life in prison, and the remaining defendants were sentenced to death. In 2000, a Department of Justice task force investigating corruption in Boston's FBI office released FBI records that implicated another defendant in the murder. Then, in 2002, a congressional committee released a deposition showing that the crucial witness in the Salvati Four case was a hit man recruited by the FBI to give perjured testimony in exchange for a highly beneficial plea bargain; there was strong evidence that this crucial witness had done the killing. Further, an FBI document released in 2001 showed that prior to trial, the FBI had received an informant list naming the murderers and that this list did not include any members of the Salvati Four. Given this newly released evidence, in 2001, Limone and Salvati separately moved for new trials in Middlesex Superior Court with the district attorney's support. The court vacated their convictions based on the new

90 Freedberg, supra note 48.
91 Id.
92 Id.; Dan Malone, DNA Test Clears Man After Death; Condemned Inmate's Case May Prompt More Reviews, DALLAS MORNING NEWS, Dec. 16, 2000, at 1A.
93 Freedberg, supra note 48.
97 See id. at 42–43.
98 See Ranalli, supra note 95.
99 See Jonathan Wells, Another Day in Court, BOSTON HERALD, Jan. 4, 2001, at 5 (noting that a defense attorney affidavit released in early January 2001 showed that one of the attorney's clients had told him that the crucial witness had planned the killing).
100 J.M. Lawrence, Men Jailed in Mob Hit Clear Final Hurdle, BOSTON HERALD, Jan. 31, 2001, at 5 [hereinafter Lawrence, Men Jailed].
101 Wells, supra note 99 (stating that the "Suffolk County District Attorney . . . is preparing to seek new trials" for Salvati and Limone and to "support Limone's motion to stay the
Salvati had already been released from prison due to a commutation, but the court ordered Limone released, stating: “The conduct of certain agents of the bureau . . . stains the legacy of the FBI.” Later that month, the district attorney “filed a strongly worded nolle prosequi declaring the state’s decision not to further prosecute,” stating that “[t]he Commonwealth has concluded that it does not now have a good faith basis—legally or ethically—to proceed with any further prosecution” against Salvati, but the statement “stopped short of dropping charges.” The district attorney filed a similar motion for Limone.

Limone and Salvati were thus exonerated after serving more than thirty years in prison. Greco, however, had died in prison five years earlier, and Tameleo was also deceased when his living co-defendants were exonerated. In November 2004, the Suffolk District Attorney’s office exonerated Louis Greco by filing a motion in Suffolk Superior Court to “drop all charges against Greco posthumously,” citing “legal and ethical considerations raised by the newly discovered FBI documents, as well as principles of consistency and fundamental fairness.” The Boston Herald reported that the District Attorney’s office also “posthumously vacated the 1968 life sentence of Henry Tameleo” in January 2007, although it did not describe whether the office followed the same procedure for exoneration. In an unusually successful tort case filed after the exoneration, the families of the Salvati Four obtained more than $100 million in damages under theories of malicious prosecution and intentional infliction of emotional distress.

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102 Lawrence, Men Jailed, supra note 100, at 5. 
103 Id. 
104 Id. Because the district attorney’s office formally indicated that it would not further prosecute, and given the FBI’s evidence that the Salvati Four were not involved in the murder, this Article counts the case as an “exoneration,” as does Samuel Gross. See Gross et al., supra note 1, at 524. The facts, however, do not fully fit within this Article’s definition of exoneration. The case is included because it is one of the few examples of a posthumous exoneration and fits most of the definitional components of such an exoneration.

105 J.M. Lawrence, Men Jailed, supra note 100, at 5. 
107 See Ranalli, supra note 95. 
110 See Limone v. United States, 497 F. Supp. 2d 143, 250–51 (D. Mass. 2007). On appeal, the First Circuit affirmed the full award of damages on the alternate finding of emotional...
The final known, recent posthumous exoneration occurred in Indiana. A woman in a rural Indiana farmhouse was killed in 1975, and investigators searched in vain for the killer for two years.\(^\text{112}\) In 1977, seventeen-year-old John Jeffers, who was in a juvenile detention facility, told guards that he and another teenage boy had committed the murder.\(^\text{113}\) His story had inconsistencies, and Jeffers did not match the description of the suspects provided by witnesses.\(^\text{114}\) He changed his story to correspond with news accounts, however, and was charged with murder, pleaded guilty, and was sentenced to thirty years in prison.\(^\text{115}\) In 2001—almost twenty years after Jeffers had died in prison—a woman confessed that she and her ex-husband had committed the murder.\(^\text{116}\) Although she had made the same confession twenty-seven years earlier to a church group, it had been ignored.\(^\text{117}\) In 2003, the confessor’s husband was convicted and sentenced to forty-five to sixty-five years in prison, and the state indicated that it was persuaded that Jeffers had not committed the murder.\(^\text{118}\) There is, however, no evidence of an official posthumous exoneration of Jeffers by state prosecutors or the courts, aside from the fact that another murderer has now been convicted in the case.\(^\text{119}\)

These five cases appear to be the only posthumous exonerations in the past two decades, although several additional unsuccessful attempts have been made. The Boston Globe, religious groups, and innocence projects have made several requests in court for DNA testing in cases of deceased capital defendants. For example, their request in Ellis Wayne Felker’s case in Georgia was successful,\(^\text{120}\) although the DNA tests ordered by the court produced only inconclusive results.\(^\text{121}\) Similarly, in the Virginia Coleman case, advocates eventually persuaded Governor Mark Warner to order

distress. See Limone v. United States, 579 F.3d 79, 108 (1st Cir. 2009).
\(^\text{113}\) Id.
\(^\text{114}\) Id.
\(^\text{115}\) Id.
\(^\text{116}\) Id.
\(^\text{117}\) Id.
\(^\text{118}\) Jodi S. Cohen, Man Found Guilty in 1975 Slaying of Woman in Indiana, CHI. TRIB., Aug. 20, 2003, § 2, at 5; see also Yates & Lynch, supra note 112 (noting that, after the 2001 confessions, investigators were “convinced Jeffers had nothing to do with the killing, confirming what many in the community believed all along”).
\(^\text{119}\) See Cohen, supra note 118.
\(^\text{120}\) See Malone, supra note 92, at 1A (describing the parties and the case).
\(^\text{121}\) See Maria Glod & Michael D. Shear, Warner Orders DNA Testing in Case of Man Executed in ’92, WASH. POST, Jan. 6, 2006, at A1.
DNA tests more than fourteen years after the defendant's execution.\textsuperscript{122} The tests showed that the defendant was indeed guilty.\textsuperscript{123}

The paucity of posthumous exonerations may be explained, in part, by the legal system's traditional hesitance, seen in the common-law doctrine of abatement, to continue criminal proceedings after the death of the defendant. This Article will later discuss the importance of posthumous exonerations to the broader innocence movement. The following Part, however, will address their value to the families of innocent defendants, as well as crime victims and the larger community, arguing that these considerations alone justify departing from the usual practice of ending criminal proceedings upon the defendant's death.

II. INDIVIDUAL JUSTICE AFTER DEATH: THE ARGUMENT FOR REOPENING THE CLOSED BOOK

The posthumous exoneration is, like every other exoneration, a means of obtaining individual justice. Because wrongful convictions affect victims, families, and the public at large, they have consequences that linger past the death of the defendant. As illustrated by courts' justifications for the abatement doctrine—which acts primarily for the benefit of the individual defendant by abruptly ending a case upon his death—the need to address these consequences outweighs the need for finality.

A. Righting the Wrong

Although posthumous exoneration can serve a valuable role in the effort to prevent wrongful convictions by producing instructive findings on their causes, this will often not be the primary reason for which they are sought or conducted. A central justifying purpose behind all forms of exoneration is the core human need to retroactively erase a poor reputation wrongly attributed to an individual. In many senses, this is a remedial need, rooted in corrective justice,\textsuperscript{124} to right the wrongs and restore the injured,

\textsuperscript{122} See id.
\textsuperscript{123} See Moffit & Greene, supra note 16.
\textsuperscript{124} See Starr, supra note 2, at 1532-33 ("Constitutional remedies have traditionally sought to repair the impact of the violation to 'the greatest possible degree'—that is, to make the defendant whole. This idea, which is a form of 'corrective justice,' has also played a central role in private law." (footnote omitted)).
The wronged individual (and those around him) cannot personally benefit from this remedy, it is important. The instinctive need for justice does not end with a defendant’s death, but continues to be felt by his family and friends, the greater community, and the victim of the crime:

One of the results of conviction is ‘infamy’—the offender’s name is besmirched, her reputation ruined. When a person has been wrongfully convicted, even long after the unjust sentence has been served, sometimes long after the convict is dead, friends of the wrongly punished person may seek a pardon. Why?—to establish her innocence, to clear her good name, to make sure that her name does not “live on in infamy.”

Carol and Jordan Steiker similarly recognize the reputational consequences of wrongful convictions, observing that “those who are innocent and sentenced to death suffer the additional devastation of being blamed for a terrible crime; their names, families, and entire lives are forever tainted by such ignominy, quite apart from the death of their bodies.” This permanent stain, although it can never be fully erased, is best addressed by a formal exoneration, which serves as a revisionary practice to end “a range of appropriate negative responses triggered by a wrongful action.”

As Meir Dan-Cohen observes, the exoneration is the means by which “stigma

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125 Margaret Jane Radin, Essay, Compensation and Commensurability, 43 DUKE L.J. 56, 61 (1993). This Article, in the interest of brevity, presents a simplified view of remedy through compensation. As Radin has taught us, views on compensation conflict. Under a “quid pro quo” commodified conception of compensation, the status quo ante can be restored through the payment of “the cost in dollars of the injury.” Id. at 59. But under the core noncommodified conception of compensation, “dollars and exchange” are not the answer to harm, unless the monetary compensation for harm is viewed as an action “to symbolize public respect for the existence of certain rights and public recognition of the transgressor’s fault in disrespecting those rights.” Id. at 60-61.


127 Steiker & Steiker, supra note 37, at 588. Although they note these consequences, they also observe that focusing too much on the wrongful conviction of innocent defendants, particularly in the capital context, could distract from more important issues. See id. at 597 (arguing that “the comparative prevalence of . . . injustices [other than the execution of an innocent defendant] suggests that the risk of executing innocents might deserve less attention than other normative claims against the death penalty”).

is officially removed," an action of “erasing a nasty event from one’s record.” This stigma is, of course, felt most keenly by the wrongfully convicted defendant, but undoubtedly extends to those close to him. Timothy Cole’s mother, for example, cited a “commitment[]” she had made to her son to “clear his name.”

The posthumous exoneration thus serves the remedial function that Frederick Lawrence has called “de-stigmatization”—a “full rectification of the harm from false accusations and convictions,” and an assurance that the exoneree’s family can benefit from his restored “standing in society.” A “stigma” is a necessary precursor to all of the central theories underlying criminal punishment, according to Lawrence, and its removal plays an important role, even in a posthumous case. In the retributive realm, desert of punishment cannot attach “[i]n the absence of stigma.” Nor would deterrence occur, in the consequentialist camp, without a stigma that sent a message to society at large. And under the “expressive theor[y] of punishment,” the stigma serves as the defining point for comparing the individual’s acts to society’s values and judging accordingly. A court’s erasure of stigma, under all three theories, removes the grounds for criminal punishment.

In removing stigma and thus the basis for punishment, a posthumous exoneration clears the exoneree’s name. In this way, posthumous exonerations serve a function similar to that served by Lawrence’s proposed judicial remedy for wrongful convictions, a lawsuit modeled on a defamation claim that would focus on the “falseness of the accusation of conviction” and would grant relief in the form of a declaration of innocence.

Neither Lawrence’s proposed declaration-of-innocence suits nor posthumous exonerations award monetary damages. Of course, posthumous exonerations, like innocence declarations, could support later compensation under a tort theory—as occurred in the

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129 Id.
130 Id. at 121.
132 Frederick Lawrence, Declaring Innocence: Use of Declaratory Judgments to Vindicate the Wrongly Convicted, 18 B.U. PUB. INT. L.J. 391, 397 (2009).
133 Id.
134 Id. at 396.
135 Id.
136 Id. at 396–97.
137 Id. at 400.
139 See id. at 400–01 (discussing how a declaration of innocence could potentially bind a
Salvati Four case—or under a statutory mechanism providing compensation to exonerees’ families. The posthumous exoneration, particularly if it occurs in tandem with compensation, perhaps falls within Margaret Jane Radin’s “redress” conception of compensation, a form of corrective justice “showing the victim that her rights are taken seriously,” which is “accomplished by affirming that some action is required to symbolize . . . public recognition of the transgressor’s fault in disrespecting those rights.” In the posthumous exoneration, the transgressor is the government, which has harmed the deceased defendant, the defendant’s family, and society.

Posthumous exonerations, like all exonerations, are also important to the community and its sense of fairness and justice. As such, they also serve an expressive remedial function for the community. As Sonja Starr explains, “[g]overnment actions can . . . inflict expressive harms,” meaning that they violate core principles shared by society, or “undermine collective understandings.” Starr notes that “[o]ne objective of legal remedies is to combat these kinds of expressive harms, to respond to a wrongful message with a better message.” Community members are outraged by the knowledge that one of their neighbors has been wrongly convicted and by the thought that the same fate could befall them. Posthumous exonerations help restore

state board that allocates compensation to wronged individuals (citing Tennison v. Cal. Victim Comp. & Gov’t Claims Bd., 62 Cal. Rptr. 3d 88, 94 (Ct. App. 2007))).

140 See Limone v. United States, 497 F. Supp. 2d 143, 250–51 (D. Mass. 2007) (awarding more than $100 million in damages to the families of the Salvati Four on the basis of malicious prosecution and intentional infliction of emotional distress). On appeal, the First Circuit affirmed the full award on the basis of intentional infliction of emotional distress. See Limone v. United States, 579 F.3d 79, 108 (1st Cir. 2009).

141 See Radin, supra note 125, at 60–61.

142 Id. at 61.

143 Starr, supra note 2, at 1534; see also Elizabeth S. Anderson & Richard H. Pildes, Expressive Theories of Law: A General Restatement, 148 U. PA. L. REV. 1503, 1527–28 (2000) ("A person suffers expressive harm when she is treated according to principles that communicate negative or inappropriate attitudes toward her . . . .").


145 Id. at 1535.

146 See, e.g., Steiker & Steiker, supra note 37, at 588 (observing that the “[p]ublic fear of unjust violence at the hands of the state” arises as a result of wrongful convictions and executions). But see Malone, supra note 92 (suggesting that even with evidence of exonerations, communities may not be swayed, observing that “[n]ational polls show that although many believe some innocent people may have been executed, most Americans still favor capital punishment," and quoting a forensic scientist who believes “[b]ecause it’s the nature of gut belief, I honestly don’t think [DNA exoneration is] going to change things very much").
a feeling of justice to communities and suggest that equity prevails or, at least, offer the “closure” desired by, for example, residents in Knox County, Indiana, following the posthumous proof of John Jeffers’s innocence, which ended a case that had been “on everybody’s mind” for years.

Posthumous exonerations can also be of great importance to the crime victims and other witnesses who later learn that the wrong man was convicted. For those who have unwittingly contributed to the conviction of an innocent man, participating in, or even learning of, a posthumous exoneration can be a valuable way of addressing lingering doubts and possible feelings of guilt and anger. The rape victim in Timothy Cole’s case, for example, was one of the parties who petitioned to convene a court of inquiry to clear Cole’s name. In Jeffers’s case, the victim’s mother expressed relief when another individual eventually confessed, explaining that she was “just glad” and that she and her family “had a feeling [Jeffers] didn’t do it.” And the witness who was pressured to testify against Frank Lee Smith and later recanted her testimony visits Smith’s grave regularly.

Of course, posthumous exonerations, for all of their sound justifications, do not always bring feelings of justice, closure, and equity. Although Cole’s family showed “signs of healing” following posthumous proof of his innocence—one of his brothers went back to college, and the other entered a drug and alcohol treatment program and appeared “optimistic” about his future—other members of deceased defendants’ families view the remedy as insufficient and untimely. A close friend of Louis Greco, reacting to the posthumous exoneration that occurred more than thirty-five years after his conviction and approximately eight years after his death in prison, summed up his view in three words: “Big [expletive] deal.”

Nor are posthumous exonerations always conducted in a manner that invokes forgiveness, apology, regret, or even the belief that the person is in fact innocent. The prosecutors of the Salvati Four, for example, consistently denied any wrongdoing and refused for years...
to join in the defendants’ quests for justice, despite federal investigations showing strong indications of unusual FBI misconduct in the case, including the FBI’s knowledge at the time of the case that its witness had framed the defendants. The motion by the Suffolk Assistant District Attorney to posthumously drop all charges against Louis Greco stated, “It appears that justice may not have been done.” This is not the full and unconditional clearing of a man’s name that the family or community might have hoped for. Gross has similarly described prosecutors’ lack of repentance when live defendants are exonerated. In one DNA exoneration of a death row defendant, the original prosecutor asserted that “[i]t doesn’t really change my opinion that much that [the defendant is] guilty,” and another prosecutor, when dismissing charges against an innocent man who had spent more than eleven years in prison, insisted that “[t]he action I have taken today is neither a vindication nor an acquittal of the defendant.”

But posthumous exonerations do not only serve to satisfy the need for forgiveness and closure. They can also inspire prosecutors to reopen a case and attempt to find the real perpetrator, a valuable outcome in itself. After the FBI confirmed through DNA evidence that Frank Lee Smith (then deceased) had not killed an eight-year-old girl, prosecutors began investigating another suspect. In the Jeffers case, twenty years after Jeffers died in prison, prosecutors investigated and obtained a conviction for the individual they believe to be the real killer. After the individual’s ex-wife belatedly confessed and implicated both her ex-husband and herself in the murder, prosecutors believed the details she provided about the murder to be too accurate to be coincidental, thus leading to his investigation and eventual conviction. The ex-wife pleaded guilty to second-degree murder.

Others have similarly noted exonerations’ contribution to the identification of the real perpetrator. For example, California’s Commission on the Fair Administration of Justice, in advocating

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154 See Wells, supra note 99, (explaining that “[u]ntil now, prosecutors . . . have steadfastly defended the integrity of the prosecution and conviction”).
155 Id. (explaining the federally released reports that the FBI suppressed evidence of the four men’s innocence, knew who the real killers were, and knew of the murder before it happened).
156 Gross et al., supra note 1, at 526 (internal quotation marks omitted).
157 See Malone, supra note 92.
158 Cohen, supra note 118.
159 Yates & Lynch, supra note 112.
160 Cohen, supra note 118.
the continued funding of innocence projects, pointed to the case of Kevin Green, “whose [pre-death] exoneration in Orange County led to the conviction of the real murderer and rapist.” The Commission concluded that “the work of innocence projects also advances the interest of public safety.” Similarly, the Innocence Project of Virginia observed that, in the case of one exonerated Virginia defendant, “four other brutal assaults might have been prevented if the correct perpetrator had been identified and prosecuted rather than the innocent man who was convicted.”

Similarly, the Innocence Project policy directors have more generally observed that the only person who “benefits from refusing to learn whether or not an innocent person was convicted of a serious crime” is the perpetrator. Similarly, Huff, Rattner, and Sagarin argue that it is important to concentrate on the “small percentage of convicted innocents,” rather than just the “judicially released guilty,” for the following reasons:

(a) The conviction of the innocent leaves the guilty free to commit more crimes, thus threatening public safety; and (b) each instance of the conviction of an innocent enhances the possibility that there will be more not-guilty verdicts against the truly guilty.

Posthumous exonerations, then, address the multitude of harms that result from a wrongful conviction and extend past the defendant’s death. As illustrated by an examination of the rationale behind the abatement doctrine, these benefits outweigh the arguments for closing cases upon a defendant’s death.

B. Posthumous Exoneration and the Abatement Doctrine

Despite the strong family and community-based justifications for exonerating wrongfully convicted defendants after death, few procedural mechanisms exist for conducting such exonerations. Partially due to these procedural limitations, only five defendants have been posthumously exonerated since the first DNA exoneration.

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163 INNOCENCE COMM’N FOR VA., supra note 42, at 1.


165 HUFF ET AL., supra note 39, at 12.

166 See supra notes 66–123 and accompanying text (detailing the creative court procedures that have been followed in posthumous exonerations).
of a live defendant in 1989. Although it is impossible to say with certainty, the dearth of posthumous exonerations may also be due in part to a legitimate desire for finality. But this objection loses its force in the face of definitive proof that a conviction is wrongful. A final limiting factor—and perhaps the strongest—may be the general refusal of the criminal justice system to engage in posthumous proceedings, as illustrated by the abatement doctrine, which is the common-law rule ending criminal process upon the defendant’s death. To the extent that this is the case, however, it is unfortunate, as a close examination of the abatement doctrine shows that it is motivated by a desire to prevent the injustice of a wrongful conviction.

Under the abatement doctrine, cases incomplete at the time of a defendant’s death—including unappealed convictions—are erased on the grounds that “all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.” The doctrine extends to appeals as of right, but not to discretionary or collateral review. In Durham v. United States, the Supreme Court made clear that “death pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception.” Traditionally, under these circumstances, the appellate court treats the case as moot and dismisses the appeal (if an appeal is pending), “vacating all prior orders, and remanding the case for dismissal.” The defendant “is

167 See supra note 7 and accompanying text. For a discussion of the five defendants exonerated, see supra Part I.
168 See, e.g., United States v. Christopher, 273 F.3d 294, 297 (3d Cir. 2001) (“[T]he rule followed almost unanimously by the Courts of Appeals is that a conviction abates on the death of the accused before his appeal has been decided.”); United States v. Pauline, 625 F.2d 684, 684 (5th Cir. 1980) (“When a defendant dies pending direct appeal of his criminal conviction it for many years has been the unanimous view of the lower federal courts and the vast majority of state courts that not only the appeal but also all proceedings had in the prosecution from its inception are abated.” (footnotes omitted)).
169 United States v. Dunne, 173 F. 254, 258 (9th Cir. 1909) (quoting United States v. Daniel, 47 U.S. (6 How.) 13 (1848)).
170 As the Seventh Circuit has explained, “[t]he Supreme Court may dismiss the petition [for certiorari] without prejudicing the rights of a deceased petitioner, for he has already had the benefit of the appellate review of his conviction to which he was entitled of right.” United States v. Moehlenkamp, 557 F.2d 126, 128 (7th Cir. 1977); see also Dove v. United States, 423 U.S. 325, 325 (1976) (per curiam), (refusing to apply the abatement doctrine and thus refusing to vacate the conviction of a defendant who died pending review of his petition for certiorari).
172 Id. at 483.
173 Moehlenkamp, 557 F.2d at 127. The only exception to this course of action involves cases pending on certiorari to the United States Supreme Court, where the Court has determined that it simply will not take action on the petition. See Dove, 423 U.S. at 325 ("The Court is advised that the petitioner died...on November 14, 1975. The petition for certiorari is therefore dismissed."). Dove, a per curiam opinion, "overruled" Durham's abatement doctrine in
deemed never to have been convicted or even charged.\textsuperscript{174}

The strength and continued persistence of the abatement doctrine, even where society is arguably wronged by its application, is demonstrated by United States v. Lay,\textsuperscript{175} where the government agreed that Kenneth Lay’s death in July 2006—which occurred “before sentencing, before a final judgment could be entered, and before a notice of appeal could be filed”\textsuperscript{176}—required “abatement \textit{ab initio}” of the conviction and indictment but requested that the court delay the vacation to allow the fraud victims to obtain restitution.\textsuperscript{177} The district court refused the government’s request, concluding that Lay’s conviction had to be vacated and the action against him dismissed.\textsuperscript{178} Under the abatement doctrine, then, even an “order of restitution cannot stand in the wake of [a defendant’s] death.”\textsuperscript{179} Most of the federal circuits have also consistently followed this approach.\textsuperscript{180}

a terse statement, holding, “[t]o the extent that \textit{Durham v. United States} . . . may be inconsistent with this ruling, \textit{Durham} is overruled.” \textit{Id.} Most appellate courts have interpreted this only to mean that the doctrine does not apply to petitions for certiorari pending before the Court. \textit{See Pauline}, 625 F.2d at 685; United States v. Littlefield, 594 F.2d 682, 683 (8th Cir. 1979); \textit{Moehlenkamp}, 557 F.2d at 128; United States v. Bechtel, 547 F.2d 1379, 1380 (9th Cir. 1977) (per curiam).

\textsuperscript{174} United States v. Estate of Parsons, 367 F.3d 409, 415 (5th Cir. 2004).
\textsuperscript{175} 456 F. Supp. 2d 869 (S.D. Tex. 2006).
\textsuperscript{176} \textit{Id.} at 874.
\textsuperscript{177} \textit{Id.} at 871.
\textsuperscript{178} \textit{Id.} at 875. The United States had argued that “the Lay Estate should not be unjustly enriched with the proceeds of fraud” and asked the court to defer its ruling on the motion filed by Lay’s estate to vacate and dismiss, believing that the verdicts against Lay at least “provide[d] a basis for the likely disgorgement of fraud proceeds totaling tens of millions of dollars.” \textit{Id.} at 871 (internal quotation marks omitted). The district court, disagreeing with the government, observed that the rule of abatement clearly applies where a defendant dies during the pendency of an appeal, but also cited the Fifth Circuit’s holding that “the rule of abatement applies equally to cases in which a defendant, such as [Lay], dies prior to the entry of judgment.” \textit{Id.} at 874 (alteration in original) (quoting United States v. Assett, 990 F.2d 208, 211 (5th Cir. 1993)) (internal quotation marks omitted). Further, although the \textit{Lay} court noted that the United States Supreme Court has slightly tempered its abatement doctrine from the version originally developed in \textit{Durham} by partially overruling it in \textit{Dove}, it determined that the Court’s language left most of the doctrine intact, with the exception of petitions for certiorari. \textit{See Lay}, 456 F. Supp. 2d at 872 (citing \textit{Dove}, 423 U.S. at 325). Several other circuits have reached this conclusion as well. \textit{See Pauline}, 625 F.2d at 685; \textit{Littlefield}, 594 F.2d at 683; \textit{Moehlenkamp}, 557 F.2d at 128; \textit{Bechtel}, 547 F.2d at 1380.

\textsuperscript{179} \textit{Parsons}, 367 F.3d at 415.
\textsuperscript{180} The Ninth Circuit, like the Fifth, applies the doctrine not only where an appeal was pending at the defendant’s death, but also where a defendant was convicted and died before he could raise an appeal. \textit{See United States v. Oberlin}, 718 F.2d 894, 896 (9th Cir. 1983) (“We see no reason to treat a criminal defendant who dies before judgment is entered any differently from one who dies after a notice of appeal has been filed.”). The Fourth Circuit has a similarly broad abatement doctrine, under which “[d]eath pending appeal of a criminal conviction abates not only the appeal but all proceedings in the prosecution from its inception.” United States v. Dudley, 739 F.2d 175, 176 (4th Cir. 1984) (quoting \textit{Oberlin}, 718 F.2d at 895).
One of the central justifications for the abatement doctrine is the understanding that the appeals process—the means of achieving a final and "correct" result in the American justice system—has been cut short or suspended before it could have commenced, since the individual capable of initiating or continuing the appeal is deceased. A decisive result in the case has not been reached and cannot be reached now that the relevant party is no longer available to appear in court. Further, the courts reason, "the state should not label one as guilty until he has exhausted his opportunity to appeal." The Seventh Circuit, for example, has observed:

[When an appeal has been taken from a criminal conviction to the court of appeals and death has deprived the accused of his right to our decision, the interests of justice ordinarily require that he not stand convicted without resolution of the merits of his appeal, which is an "integral part of [our] system for finally adjudicating [his] guilt or innocence." The Fifth and Ninth Circuits have quoted this same language in applying the doctrine. Thus, the abatement doctrine seeks to prevent wrongful convictions by giving the deceased defendant the benefit of the doubt in his unexhausted appeals. If anything, this concern mitigates in favor of allowing posthumous exonerations. Indeed, these jurisdictions' willingness to posthumously vacate convictions on the chance—sometimes unaccompanied by any direct evidence—that an appeal might ultimately have undermined that conviction suggests that they should also be willing to consider cases where there is strong evidence that a conviction was factually invalid, even where the defendant is no longer alive.

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[a]n often unstated premise underlies the remedy of abatement ab initio: that appellate review of a conviction is so integral to the array of procedural safeguards due a criminal defendant that incapacity to obtain such review nullifies the jury verdict. No other rationale explains the reversal that occurs through abatement ab initio.

Id.

182 Parsons, 367 F.3d at 413.

183 Moehlenkamp, 557 F.2d at 128 (alterations in original) (quoting Griffin v. Illinois, 351 U.S. 12, 18 (1956)).

184 See Parsons, 367 F.3d at 413–14; Oberlin, 718 F.2d at 896.

185 See, e.g., Cavallaro, supra note 181, at 944 (recognizing that abatement applies even in situations where "[n]othing about [the] defense at trial or on appeal had suggested [that a defendant] was innocent of the crimes charged").
Moreover, under the abatement doctrine, the courts reason that the conviction, which could never be fully appealed as a result of the death of the convicted, may unjustly leave a permanent black mark on the defendant's reputation. The Fifth Circuit, for example, observes that "arguably the family [of the deceased convicted] is comforted by restoration of the decedent's 'good name'" through abatement. The Louisiana Supreme Court has similarly found:

[T]he surviving family has an interest in preserving, unstained, the memory of the deceased defendant or his reputation. This interest is of sufficient legal significance to require that a judgment of conviction not be permitted to become a final and definitive judgment of record when its validity or correctness has not been finally determined because the defendant's death has caused a pending appeal to be dismissed.

Posthumous exonerations address this same fundamental concern in cases where there is strong evidence that the stain from "final convictions"—not just unappealed or incompletely appealed convictions—may be unwarranted. Thus, although the abatement doctrine, on its face, would appear to cut against conducting posthumous exonerations, the policy underlying the abatement doctrine supports allowing them.

Some authors, however, believe that the abatement doctrine may be weakening. Several state courts—recognizing the interests of the defendant's family and the public in a full adjudication of the defendant's guilt—have taken a different route, refusing to automatically vacate convictions but allowing appeals to continue after a defendant's death. The Pennsylvania Supreme Court, for example, after an appellant died pending the outcome of an appeal, stated that "it is in the interest of both a defendant's estate and society that any challenge initiated by a defendant to the regularity or constitutionality of a criminal proceeding be fully reviewed and

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188 See Russell P. Butler, What Practitioners and Judges Need to Know Regarding Crime Victims' Participatory Rights in Federal Sentencing Proceedings, 19 Fed. Sent'g Rep. 21, 22 (2006) (citing State v. Korsen, 111 P.3d 130 (Idaho 2005)) (arguing that "[t]he direction to treat victims with fairness is already affecting state criminal justice jurisprudence" and citing the "abrogation of the abatement ab initio doctrine" as an example of this trend); see also Cavallaro, supra note 181, at 943, 958 (arguing that the doctrine is strong, since it exists in a "plurality" of states and eleven out of the twelve circuits, but observing that "[i]n recent years . . . there has been some resistance to the remedy of abatement").
decided by the appellate process." Wisconsin has determined that the defendant is neither entitled to abatement of the criminal proceedings ab initio nor barred from pursuing an appeal. Similarly, the Kansas Supreme Court, in reasoning that reflects the needs expressed by families and concerned members of communities in posthumous exonerations, has observed:

Oftentimes rights other than those of an individual defendant are involved. . . . The family of the defendant and the public have an interest in the final determination of a criminal case." Kansas has at least "twice reviewed criminal proceedings after the death of the defendant-appellant, in order to determine the liability of the decedent’s estate for costs of prosecution.

In rejecting the abatement doctrine, these courts have thus focused on the collateral consequences of criminal convictions. This reasoning also supports allowing posthumous exoneration, as these consequences are no less serious after the appellate process is complete.

On the other hand, several state courts rejecting the abatement doctrine have not been swayed either by the possibility of innocence prior to the completion of the appellate process or by the familial and societal interest in a complete adjudication. These states dismiss the appeal upon the death of a defendant but refuse to vacate the conviction, citing a need for finality and a faith in the accuracy of a conviction even where there was no opportunity for appeal. These arguments for finality, which reason that “it is better policy to allow the litigation to end and the presumptively valid conviction to stand than it is to allow the convicted defendant’s survivors to

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190 See State v. McDonald, 424 N.W.2d 411, 415 (Wis. 1988) (holding that “when a defendant dies while pursuing postconviction relief, irrespective of the cause of death, . . . the defendant’s right to an appeal continues,” but that a defendant is not “entitled to have the criminal proceedings abated ab initio”).
192 Id. at 803.
193 See, e.g., State v. Clements, 668 So. 2d 980, 981–82 (Fla. 1996) (holding that “the death of the defendant does not extinguish a presumably correct conviction and restore the presumption of innocence which the conviction overcame”); People v. Peters, 537 N.W.2d 160, 163 (Mich. 1995) (finding it inappropriate to abate the conviction of a deceased defendant on the ground that conviction destroys the presumption of innocence regardless of the right to appeal).
194 See Clements, 668 So. 2d at 981–82; Peters, 537 N.W.2d at 163–64; see also Herrera v. Collins, 506 U.S. 390, 417 (1993) (noting that the burden of showing a right to prove “actual innocence” post-conviction is very high due to the disruptive effect of such claims on the need for finality in capital cases).
pursue litigation ad infinitum, in an effort to clear the deceased defendant’s name,” cut equally against posthumous exonerations and abatement. The finality argument, however, loses some of its force when DNA or other similarly conclusive evidence of innocence is available. Regardless, posthumous exonerations should be allowed even in jurisdictions that do not follow the abatement doctrine. As will be argued in Part III, the value of posthumous exonerations to the effort to address the causes of wrongful conviction merits conducting them even if the need for justice in the individual case is deemed not to.

III. POSTHUMOUS EXONERATIONS AND THE INNOCENCE MOVEMENT: DNA, INNOCENCE COMMISSIONS, AND THE SEARCH FOR THE UNDERLYING CAUSES OF WRONGFUL CONVICTIONS

The debate surrounding the abatement doctrine and its alternatives weighs concerns about avoiding injustice in the individual case against society’s need for finality, and jurisdictions have not all read the scales the same way. There is an additional factor in favor of allowing posthumous exonerations: all exonerations are a valuable resource, providing critical raw material for the study of the causes of wrongful conviction, a crucial part of the effort to reform the criminal justice system to prevent further such convictions.

Exonerations have occurred for centuries, but only with the advent of DNA technology have individuals widely been able to prove, based on scientific testing, that they are factually innocent of the crimes for which they have been charged or convicted. This flood of definitive exonerations, in cases that previously lacked the benefit of DNA testing, has led to a broad-based campaign for reform. As cases proving that innocent defendants have been convicted and incarcerated for crimes that they did not commit have piled up, some states have created innocence commissions to attempt to address these alarming failures of the criminal justice system by identifying and eliminating their root causes.

Where innocence commissions exist, they need wrongful convictions to study, and posthumous exonerations—regardless of whether they are accompanied by judicial fact-finding—produce this scarce resource. In the many jurisdictions without these commissions,

195 Peters, 537 N.W.2d at 163–64.
196 See, e.g., Herrera, 506 U.S. at 412, 414 (noting, in the context of exoneration through clemency, that “[i]n England, the clemency power was vested in the Crown and can be traced back to the 700’s” and that “since the British Colonies were founded, clemency has been available in America”).
however, judicial fact-finding in both posthumous and traditional exoneration may be a useful alternative.\textsuperscript{197}

A. Valuable Data Points from a Small DNA Window

The innocence movement is not new, but it has changed over time as forensic techniques, judicial procedures, politics, and societal perceptions of justice have evolved. Bruce Smith notes that “[i]n the early decades of the twentieth century, America witnessed a period of sustained interest in the issues of wrongful conviction and wrongful execution,” when the American Prison Congress conducted a one-year investigation of wrongful executions in American history.\textsuperscript{198} After surveying prison wardens to determine whether they had any “personal knowledge” of wrongful executions, the Congress concluded (perhaps unsurprisingly) that it had not identified any wrongful executions in American history.\textsuperscript{199} Smith observes that the movement became more serious upon the 1932 publication of Yale Law professor Edwin Borchard’s \textit{Convicting the Innocent: Errors in Criminal Justice}, a book similar in content and tone to some of the innocence commission reports published today.\textsuperscript{200} \textit{Convicting the Innocent} discussed sixty-five wrongful convictions from England and America and described their underlying causes, such as erroneous eyewitness testimony and false confessions.\textsuperscript{201}

More widespread public recognition of wrongful convictions did not begin until during and after the civil rights era, when cases of African-American defendants accused of raping and murdering white women were critically reviewed. Clarence Norris, for example, one of the nine African-American “Scottsboro Boys” convicted for the rape of Ruby Bates in a train car in Alabama in 1931, was pardoned by Alabama in 1976, long after it was discovered that the rape story was false.\textsuperscript{202} He was the only surviving defendant and the only one of the nine to be pardoned.\textsuperscript{203}

Smith, however, pinpoints the “true” start of the modern innocence movement at 1987,\textsuperscript{204} when Hugo Bedau and Michael Radelet

\textsuperscript{197} See infra Part IV.
\textsuperscript{198} Bruce P. Smith, \textit{The History of Wrongful Execution}, 56 Hastings L.J. 1185, 1215 (2005).
\textsuperscript{199} Id.
\textsuperscript{200} See id. at 1216.
\textsuperscript{201} Id. (citing EDWIN BORCHARD, CONVICTING THE INNOCENT: ERRORS OF CRIMINAL JUSTICE, at xiii (1932)).
\textsuperscript{203} Id. at 118.
\textsuperscript{204} Smith, supra note 198, at 1216.
published data on wrongful convictions, which one of the authors had begun collecting twenty years earlier.\textsuperscript{205} The authors searched the \textit{New York Times Index}, libraries, and archives; published announcements regarding their research in attorneys' and criminologists' newsletters; and surveyed nearly every state governor to try to identify cases and their causes.\textsuperscript{206} They ultimately identified 350 cases\textsuperscript{207} and catalogued the type of actions—either state-based, such as executive pardons, or unofficial, such as another person confessing to the crime or later scholarly research—that proved that "defendants convicted of capital or potentially capital crimes" were innocent.\textsuperscript{208} They also described and characterized the causes of wrongful conviction in each case.\textsuperscript{209} This type of investigation into wrongful convictions was soon to become easier, however, and to spur a nationwide innocence litigation movement, with the advent of the first DNA-based exoneration.

Since 1989, when a DNA test confirmed that Gary Dotson, convicted of rape ten years earlier and sentenced to twenty-five to fifty years in prison, had not committed the crime,\textsuperscript{210} the rate of exonerations and the attention paid to the causes of the wrongful convictions leading to these exonerations have drastically increased. Although there was only one other DNA exoneration in 1989 (following Dotson's pioneering exoneration), and there was only an average of between one and six per year through 1995,\textsuperscript{211} the average from 2000 to 2009 was eighteen, with some years in this period producing as many as twenty-four exonerations.\textsuperscript{212} Exonerations based on DNA evidence\textsuperscript{213} are particularly useful to the study of wrongful convictions, as they typically produce a much higher degree of certainty of the defendant’s innocence than is possible through most conventional means,\textsuperscript{214} and "there is no reason to think that the

\begin{itemize}
\item[\textsuperscript{205}] See Hugo Adam Bedau & Michael L. Radelet, \textit{Miscarriages of Justice in Potentially Capital Cases}, 40 STAN. L. REV. 21, 25 (1987) (noting that the first list of death penalty cases involving miscarriages of justice was not published until 1964).
\item[\textsuperscript{206}] See id. at 27–28.
\item[\textsuperscript{207}] See id. at 23, 48.
\item[\textsuperscript{208}] See id. at 23–24.
\item[\textsuperscript{209}] See Garrett & Neufeld, supra note 4, at 4–5 (describing Dotson's case and the DNA tests).
\item[\textsuperscript{210}] See Innocence Project, supra note 45. In 2002, twenty-four wrongfully convicted defendants were exonerated. \textit{Id}.
\item[\textsuperscript{211}] Gross et al., supra note 1, at 527.
\item[\textsuperscript{212}] See supra note 4, at 4–5 (describing Dotson’s case and the DNA tests). It is likely that most posthumous exonerations will be based on DNA evidence or other similarly hard proof, as it is difficult to build a case with a dead defendant and, as argued later, parties will not likely wish to invest the resources to seek an exoneration unless they are reasonably certain the conviction was wrongful.
\item[\textsuperscript{214}] As one scholar put it, "[T]he many other cases where one group of human beings
documented factors that initially led to the wrongful convictions in those cases later unraveled by DNA” will appear less frequently in the non-DNA cases.215 As Barry Scheck and Peter Neufeld have observed, “Courts, scholars, and policy makers are all beginning to recognize that the most important aspect of the wave of post-conviction DNA exonerations is what it can teach us about all the other cases (the vast majority) where DNA testing is not available.”216 These exonerations largely exist within a limited window in time, however, as they most commonly result from convictions obtained prior to the availability or refinement of DNA testing.217 As D. Michael Risinger has explained:

As DNA technology has become more sensitive, more accurate, and more generally available and understood, the number of cases in which such testing is not done for the original trial shrinks. . . . Those who are guilty in the relatively small percentage of cases where DNA evidence is available will be convicted with much greater confidence, and those who can be exonerated by DNA will be exonerated before or at trial.218

The small size of this window means that every case matters, and—as demonstrated by the posthumous exonerations that have already occurred—exonerable defendants from this time period can and do die before proving their innocence.219 Without posthumous
exoneration, the lessons that could be gleaned from their misfortunes die with them.

Further, increasing the number of exonerations available for study is particularly important because the existing dataset is rather small. The study by Michael Radelet and Hugo Bedau, introduced above, and now including ten more years of exoneration cases, identified 350 defendants that the authors "believed had been wrongfully convicted in capital (or potentially capital) cases in the period from 1900 to 1985." The authors later updated the inventory through 1991, adding sixty-six more cases to this list for a total of 416 "wrong-person convictions," which they define as involving "official judgments of error" and "unofficial judgments" that are sufficiently conclusive as to indicate innocence. Studies that include non-capital exonerations involve similarly small data sets. In 1987, for example, Samuel Gross described all known eyewitness misidentifications that had led to the "conviction of innocent people," which totaled only ninety-seven. Although the low numbers could simply suggest that there are few wrongful convictions, this is not the consensus in the literature, which points to the difficulty of identifying wrongful convictions as a contributing factor to the low total. Even the most comprehensive and sophisticated studies available have been forced to rely on secondary sources. As Gross explains in describing the methodology of one of the most thorough DNA exoneration studies to date:

There is no national registry of exonerations, or any simple way to tell from official records which dismissals, pardons, etc., are based on innocence. As a result, we learned about many of the cases in our database from media reports. But the

220 See RADELET ET AL., supra note 202.
221 Id. at ix-x.
222 Id. at 17. In the authors' view, sufficiently conclusive evidence of innocence, though based on "unofficial judgments," includes a confession by the "real culprit"; a determination that the crime never took place; a conclusion by a state official—following investigation—that "the convicted defendant really is innocent," despite an extrajudicial official never coming to the innocent's aid; and a conclusion by the defendant's attorney or family, based on "crucial evidence," that the defendant is innocent. Id. This study counts more cases than are typically included in exoneration research, since it encompasses cases where family members or the attorney find "crucial evidence" of the innocence of the defendant but cannot convince an official institution to declare such innocence." Id. Samuel Gross only includes cases where there is an official determination of innocence by a prosecutor, executive, or judge. See Gross, supra note 40, at 412.
223 Gross, supra note 40, at 413 (ninety-seven of the misidentification cases resulted in convictions; thirty-nine additional cases did not). Gross was only concerned with misidentifications that led to "the conviction of innocent people." Id. at 396.
224 For example, Gross et al. conclude that "it is certain . . . that many defendants . . . no doubt thousands, have been falsely convicted of serious crimes but have not been exonerated." Gross et al., supra note 1, at 527.
media inevitably miss some cases—and we, no doubt, have missed some cases that were reported.225

Because of the paucity of known exonerations and the challenge of locating new ones, each new point added to the set, including an exoneration of a wrongful conviction after death, adds meaningfully to the available information on wrongful convictions. As Anne-Marie Moyes has argued in the capital context:

If the public is to assess properly the reliability of its capital punishment system, and any potential corruption within that system, it must have access to information in the government’s control. . . . If the electorate is to have an informed debate about the appropriateness of the death penalty, it must have full access to information, and this access should include the ability to posthumously test DNA evidence in the state’s custody.226

The limited number of cases containing biological evidence, which could not be tested at trial but was sufficiently preserved to allow for post-1989 testing, makes each additional case valuable to both the public and the individual exonerated.

B. The Need for Findings: The Gap Left by Existing Exoneration Procedures

Merely cataloguing wrongful convictions does not reveal their causes, and existing methods of exoneration have largely failed to conduct this sort of inquiry. This need has been filled, in some states, by the creation of innocence commissions. Some posthumous exonerations have also inspired other reforms, perhaps because the public is particularly incensed by the knowledge that a defendant has died before he can enjoy his freedom.227 Following Timothy Cole’s posthumous exoneration, for example, the Texas Legislature created a blue-ribbon panel, the “Tim Cole Advisory Panel on Wrongful Convictions,” to recommend procedural safeguards in

225 Id. at 525.
227 See, e.g., Alisa LaPolt & Marjorie Menzel, Lawmakers Look at Bill to Ease Inmate Access to DNA Tests, FLA. TODAY, Apr. 18, 2001, at 1. In reference to Frank Lee Smith’s death of cancer in prison before he could be exonerated, one member of a Catholic, anti-death penalty group stated: “It was such a blatant injustice. . . . He died a horrible death, and he was not guilty.” Id.
criminal cases. Frank Lee Smith’s posthumous exoneration in 2000 in Florida similarly “prompted” the Florida Legislature to pass a bill providing access to “postsentencing DNA testing.”

Despite these sporadic efforts, inspired by posthumous exonerations, to improve findings and make evidence accessible in post-conviction innocence cases, existing procedures for exonerations fail to consistently produce useful findings that can serve as lessons for meaningful, systemic reform. Authors have generally not studied the content of exonerations (the findings made in the judicial order, executive decree, or similar document officially exonerating the individual) but have focused instead on the number and types of exonerations that have occurred, the causes of the wrongful convictions leading to the exoneration, and the reforms that should be implemented to reduce the wrongful conviction rate. Several, however, have noted the dearth of specific findings about the causes of wrongful conviction cases. Barry Scheck and Peter Neufeld, for example, observe:

Although these cases [“110 post-conviction DNA exonerations . . . in the 10 years preceding September 1, 2002”] all involve convictions on serious felony charges that were affirmed on direct appeal, and often upheld after post-conviction proceedings in both state and federal courts, there has never been a detailed opinion written about what went wrong in any of these cases, much less an analysis offering suggestions on what could be done to prevent similar miscarriages of justice.

The authors note that, instead of preparing a written opinion about the causes or suggesting reforms, officials follow a cursory procedure:

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229 See Marc Caputo, Bill Would Offer Inmates DNA Tests, PALM BEACH POST, Mar. 23, 2001, at 10A (describing the Florida House companion bill to Florida Senate Bill 366 allowing inmates access to DNA tests to prove their innocence).
231 See, e.g., Bedau & Radelet, supra note 205 (documenting 350 cases of capital defendants later found innocent).
232 See, e.g., Garrett & Neufeld, supra note 4, passim (examining forensic testimony during the trials of innocent convicted persons); Gross, supra note 40, at 398–402 (examining the problems associated with eyewitness identifications).
233 See, e.g., Scheck & Neufeld, supra note 216 (proposing the creation of “innocence commissions” to investigate errors in the criminal justice system).
234 Id. at 98–99.
[T]he exculpatory DNA results are received, an order vacating the conviction (or a gubernatorial pardon) is issued, and, in a few cases, the judge or the governor offers an apology. To confound matters further, many, but by no means all, of the public officials who should be most concerned about the underlying causes of such wrongful convictions blithely proclaim that the “system has worked” and assiduously avoid the suggestion there is anything further to investigate. Those officials who want to get to the root of these problems do not have an independent body to which they can turn for further investigation or policy recommendations.235

Keith Findley, like Scheck and Neufeld, bemoans the lack of a consistent, formal procedure for exoneration, observing that “ordinarily no inquiry is made into the causes of the error. Often, the order setting aside the conviction is a one-line order entered in the trial court.”236 Although an appellate court “occasionally” recognizes and discusses the errors, he notes, “almost never is there a searching inquiry to determine what led to the errors, and how they can be prevented in the future.”237 He views this not only as a problem for the individual case, as it prevents a thorough examination of the causes of wrongful conviction, but also as a community-wide concern, since it stymies attempts to identify common flaws in the criminal justice system.238

Indeed, the typical limited-finding exoneration is problematic because it does little to aid the effort to prevent future, similar errors. Manuel Utset argues that “a sequence of nonmaterial errors can lead to a wrongful conviction” and that these types of errors are particularly difficult to identify.239 Only detailed findings, describing the many events in the case from the beginning of the investigation, can produce the nuanced data that can potentially reveal the non-obvious, “cumulative errors”240 that may lead to a wrongful conviction. Yet it appears that most exonerations (of living defendants) create few, if any, findings about the causes of a wrongful conviction, despite the gravity of the judicial error that has occurred.

235 Id. at 99 (footnote omitted).
237 Id.
238 See id. at 338.
240 Id. at 88.
Pardons, for example, which offer little to no explanation of the procedural or substantive errors underlying wrongful convictions are a historically common form of exoneration, although their frequency has substantially declined in recent years, and they are now “rarely granted.” State pardons based on evidence of innocence—what this Article will refer to as “innocence pardons”—are typically issued by the governor as authorized by the state constitution or courts, or by boards with clemency-granting powers. 

Pardons are a form of clemency. SAMUEL P. STAFFORD II, NAT’L CTR. FOR STATE COURTS, CLEMENCY: LEGAL AUTHORITY, PROCEDURE, AND STRUCTURE xiii (1977). Clemency also includes “commutation of sentence, reprieve, or remission of fines and forfeitures.” Id. Pardons are the only type of clemency that offer true exoneration, since only a pardon (provided it is a full pardon) relieves the offender of all guilt and the punishment associated with that guilt. See, e.g., MOORE, supra note 126, at 5 (distinguishing pardons from the reprieve, which “postpones execution of the sentence for a specified period of time,” and the commutation, where “punishment takes place, but in a reduced form”).

Innocence pardons can be distinguished from those granted on alternate grounds, such as political or merciful pardons. See, e.g., James D. Barnett, The Grounds of Pardon, 17 AM. INST. CRIM. L. & CRIMINOLOGY 490, 492 (1927) (describing how former Arkansas Governor Jeff Davis “pardoned an average of one convict a day during his term of six years,” explaining that if he “did not show mercy, . . . [he] would not expect mercy when . . . [he] bowed before the judgment seat”); William Glaberson, States’ Pardons Now Looked at in Starker Light, N.Y. TIMES, Feb. 16, 2001, at A1 (discussing Wisconsin Republican Governor Tommy G. Thompson’s pardon of the son of a Republican state senator, who had previously been convicted of cocaine possession, and how New Jersey Governor Christie Whitman pardoned “the aunt of the director of the casino commission’s division of licensing,” who had been “convicted on gambling charges”).

There are several recent examples of pardons by state governors. In 1980, four Illinois men were convicted of quadruple murder in Illinois. A state police investigation identified the real killers and found three witnesses who confirmed the men’s innocence. See RADELET ET AL., supra note 202, at 283–84. In 1991, Illinois Governor Jim Edgar pardoned the men, although the pardon was accompanied by his statement that it was “not because I’m saying they’re innocent.”
These commonly occur with no associated judicial intervention, though pardons are sometimes granted prior to or following a court’s declaration of innocence. Another long-followed method of exoneration is for the prosecution to indicate that it will not continue to press charges, either by explicitly dropping the charges, dismissing the indictment, joining in the defendant’s motion for a new trial, or agreeing to or failing to respond to a defendant’s motion in court to dismiss all charges. Arroyo Miguel, for example, was convicted of manslaughter in New York in 1965. Witnesses who supported the prosecution’s original case against Arroyo later testified that they had seen another man kill the victim and recanted their initial testimony, leading to the subsequent arrest and indictment of the other man. After the trial judge set aside Arroyo’s original conviction, the prosecution dismissed the indictment against him. Similarly, Craig Bell was convicted by a jury of second-degree murder in Virginia in 1987. Two months later, after another man confessed to the crime, the prosecution dropped the charges against Bell and a judge released him. And as described in Part I, the prosecution in the Salvati Four case supported the defendants’ motion for a new trial and a stay of the

Id. at 284 (internal quotations omitted). In 1993, Virginia Governor Douglas Wilder issued an executive order for clemency in Walter Snyder’s case after DNA evidence showed that he had not committed the rape he was convicted for and the Commonwealth’s Attorney had requested clemency. See INNOCENCE COMM’N FOR VA., supra note 42, at 19. Later, in 2003, Governor Mark Warner of Virginia pardoned Julius Ruffin twenty-one years after his arrest. Ruffin had successfully obtained a court order for DNA testing under Virginia’s then-new DNA testing statute, and the tests verified that another individual—already in prison—had committed the crime. Id. at 18. In one of the most recent examples, in 2008, Illinois Governor George Ryan pardoned four men, convicted of rape and murder in 1986, who were proven innocent by DNA. See Jodi Wilgoren, Illinois: Governor Pardons for 4 Cleared by DNA, N.Y. TIMES, Oct. 18, 2002, at A21.


246 See, e.g., HUFF ET AL., supra note 39, at 19 (describing the case of Johnny Binder, in which a court released Binder from prison after another individual confessed to the crime for which he had been convicted, and the Texas Board of Pardons and Paroles then recommended a full pardon); see also text accompanying supra note 80 (describing Texas Governor Rick Perry’s posthumous pardon of Timothy Cole following a court of inquiry’s determination of Cole’s innocence).

247 See, e.g., Matt Burgard, His Challenge Now: Freedom, HARTFORD COURANT, July 12, 2006, at A1 (discussing James Tillman’s exoneration, in which the prosecutor stated in court that Connecticut would not seek a new trial and the superior court then formally dismissed all charges).

248 See RADELET ET AL., supra note 202, at 283.

249 Id.

250 See id. at 286.
execution of Limone’s sentence.251 Later, through a motion nolle prosequi, the prosecution indicated to the court that it would not further prosecute the case, although it never formally dropped the charges.252

Occasionally, when prosecutors use a passive technique such as dropped charges to remedy a wrongful conviction, their motions or public statements provide some evidence, although sparse, of the causes underlying the wrongful conviction, or at least provide a form of apology to the family. These offer little in terms of concrete findings, however. In the Suffolk District Attorney’s 2004 motion to posthumously drop all charges in Louis Greco’s case, the motion included reasons of “legal and ethical considerations raised by the newly discovered FBI documents, as well as principles of consistency and fundamental fairness,” as discussed above.253 On the other hand, prosecutors frequently refuse to concede any wrongdoing even when they request the dismissal of charges.254

Even when courts ultimately and officially issue an exoneration for a living or deceased defendant, they do not often provide a detailed analysis of what went wrong. This is true regardless of whether the exoneration is in the form of a vacation of the conviction and a new trial,255 a reversal and remand for new trial with a directed verdict of acquittal, a dismissed indictment,256 or an acquittal at the end of a new trial (all of which must involve some clear indication of innocence to count as an exoneration here).257 In the Salvati Four case, for example, while the court vacated the convictions and ordered the release of those who were still alive and in prison, there is no indication that the court did anything more than strongly chastise the

251 See Wells, supra note 99.
252 Lawrence, Men Jailed, supra note 100.
253 Lawrence, Suffolk DA, supra note 109.
254 See, e.g., Gross et al., supra note 1, at 525–26 (discussing prosecutors’ statements upon dismissal of charges in exoneration cases, wherein they suggested that their actions did not mean that the defendant was innocent of the crime).
255 See, e.g., INNOCENCE COMM’N FOR VA., supra note 42, at 14 (discussing how the “Commonwealth’s Attorney petitioned the court to set aside [Craig] Bell’s conviction” after another individual confessed).
256 See, e.g., id. at 15 (discussing the drawn-out exoneration process for Jeffrey Cox, wherein, following the acceptance by the Virginia Supreme Court of Cox’s habeas appeal, “the Virginia Attorney General’s office reached a settlement with Cox’s attorneys in which the Commonwealth agreed that the writ should be granted, the convictions vacated, and Cox should be released from prison,” after which the court “acted accordingly and dismissed the original indictment”).
257 Major studies of exonerations of innocent defendants exclude defendants acquitted due to “insufficient evidence of identity or . . . improper use of suggestive identification procedures.” Gross, supra note 40, at 412; see also HUFF ET AL., supra note 39, at 11 (explaining that there is a “significant difference between being found ‘not guilty’ according to the standards of our legal system and establishing complete innocence”).
FBI agents who, it appeared, had knowingly produced perjured testimony in the case.\footnote{258} In Frank Smith’s case, the exoneration came in the form of a one-page order simply stating:

THIS CAUSE having come before this Court upon State’s Motion to Vacate and Set Aside Judgments and Sentences, and this Court having considered same, hereby GRANTS the State’s Motion to Vacate and Set Aside Judgments and Sentences, based upon newly discovered DNA evidence.\footnote{259}

Other cases involving acquittal on retrial, which do not all fit within this Article’s definition of an exoneration because they are based on claims of procedural error as opposed to, or in addition to, actual innocence,\footnote{260} also offer limited discussion of errors in the investigative and prosecutorial process.\footnote{261}

Unlike pardons or prosecutorial actions, post-exoneration claims for damages sometimes do produce findings of what went wrong. Claims filed under 18 U.S.C. § 1983, of course, can reveal constitutional violations leading to wrongful convictions. For example, Herman Atkins, who was exonerated eight years after his conviction as a result of DNA testing,\footnote{262} brought a § 1983 claim after his release, alleging the investigation leading to his conviction

\footnote{258 See J.M. Lawrence, Second Man Exonerated in 1965 Mob Killing Case, BOSTON HERALD, Jan. 19, 2001, at 2 (noting the judge’s remarks that “[t]he conduct of certain agents of the bureau . . . stains the legacy of the FBI”).}


\footnote{260 Other authors follow a similar definition, which excludes acquittals on procedural grounds. See supra notes 39, 41 and accompanying text.}

\footnote{261 Some cases that only count as exonerations under Radelet, Bedau, and Putnam’s definition (because they are based on insufficient evidence or other constitutional infirmities rather than factual innocence) have produced somewhat more detailed findings about the problems in the process. See, e.g., RAEDELET ET AL., supra note 202, at 297. In Cox v. State, for example, the Florida Supreme Court vacated a defendant’s sentence, reversed the conviction, and remanded with a directed order of acquittal. 555 So. 2d 352, 353 (Fla. 1989) (per curiam). In so doing, the court outlined—albeit briefly—some of the prosecutorial problems in the case. See id. (citing insufficient evidence as the primary reason for the court’s holding). The court observed that the evidence relied upon was questionable, explaining that “hair analysis and comparison are not absolutely certain and reliable” and that “[a]lthough a serologist testified that Cox has type O blood, he also testified that forty-five percent of the world’s population has type O blood.” Id. As discussed earlier, however, these acquittals are not true exonerations because they do not declare an individual to be innocent of the crime charged or dismiss the charges. As Samuel Gross explains, “[a]cquittals and reversals are not usually based on affirmative findings of innocence but rather on deficient evidence of guilt, and they do not necessarily dissipate the suspicion against an accused person.” Gross, supra note 40, at 412. Thus, it is impossible to be sure that any errors discussed by the court led to a genuinely wrongful conviction.}

\footnote{262 Atkins v. County of Riverside, 151 F. App’x 501, 503 (9th Cir. 2005).}
violated his due process right. In partially reversing the district court’s denial of relief, the Ninth Circuit made detailed findings about the errors in the investigation, holding that “[t]here is a ‘clearly established’ due process right not to be subjected to criminal charges on the basis of deliberately fabricated false evidence by the government,” and observing that because a “fabricated conversation” may have been included in a police report, “a factual question remains whether Atkins was subjected to criminal charges ‘on the basis of deliberately fabricated evidence.’” By their nature, however, § 1983 claims reach only constitutional violations, the potential of which to lead to wrongful convictions is generally well-established.

Tort-based claims arising from a previous determination of innocence may be more useful in producing the needed findings. This is true because the judge, in assessing the damages question, is likely to carefully describe the harms underlying the damages. For example, the district court’s opinion in the Salvati Four tort case is more than 100 pages long, and it tells a detailed story of the many wrongs that led to Tameleo’s and Greco’s erroneous conviction and imprisonment; recounting every stage of the case with minute precision and focusing on the FBI’s many missteps.

In total, while a smattering of exonerations, and the civil cases that sometimes follow, offer occasional insights into errors in the prosecutorial process, they fail to consistently include such findings and almost never do so comprehensively. As a result of this failure and in pursuit of concrete recommendations for reform, some states have created innocence commissions of various types.

C. The Response in Some States: Innocence Commissions

In response to the need for investigation into the causes of wrongful convictions, some states have created an alternative forum for the generation of such findings: the innocence commission.
Although innocence commissions specifically tasked with investigating all wrongful conviction cases are a recent development, the concept goes further back in history. As early as the 1930s, state commissions were sometimes appointed to investigate individual cases with questionable convictions. In Oregon, for example, Jordan Theodore confessed to first-degree murder and was sentenced to death in 1932. The only evidence implicating Theodore was his confession, and he consistently argued that his confession had been coerced. In response to public anger, the state appointed a “special gubernatorial commission” to “re-investigate the case,” and in 1934, the governor commuted Theodore’s sentence to life imprisonment. The conviction was finally set aside and the indictment was dropped in 1964.

Modern innocence commissions exist in several forms. Great Britain has the most formal of such commissions, the Criminal Cases Review Commission (“CCRC”), which was created by the Criminal Appeal Act of 1995. The CCRC’s role is “to consider suspected miscarriages of justice; to arrange for their investigation where appropriate; and to refer cases to the Court of Appeal where the

level. See, e.g., Garrett, Innocence, supra note 10, at 1714–15 (noting that “[p]rosecutor’s offices have established internal institutions to review potential wrongful conviction cases”). In 1999, Richard Devine, then the Cook County State’s Attorney, promised to “make a ‘comprehensive, personal review of evidence and legal proceedings in all death penalty cases after all appeals have been exhausted and before a petition of clemency is filed with the governor.’” David Horan, The Innocence Commission: An Independent Review Board for Wrongful Convictions, 20 N. Ill. U. L. Rev. 91, 119 (2000) (quoting Maurice Possley & Christi Parsons, Devine Vows Closer Look at Death Penalty: New Guidelines To Heighten Prosecutors’ Scrutiny, Chi. Trib., Feb. 10, 1999, at 1). This approach is not amenable to generating meaningful findings because it relies on those who initially seek convictions to police themselves, and it presents grave conflict of interest issues. See, e.g., id. at 122 (arguing that “those who are charged with investigating and prosecuting crimes in the first instance should not be burdened with the sole institutional responsibility of investigating when they have erred or suffered a breach from within of their ethical duties to prosecute the guilty and exonerate the innocent”).

Another option for obtaining more detailed findings in exonerations, as well as offering more opportunities for exoneration, would be to expand the powers of the executive to investigate innocence and grant clemency. Scholars, however, tend to be skeptical of the efficacy of this approach, partly due to the vast discretion typically held by the executive under clemency laws, and they argue that “state governors have simply proven too politically vulnerable to seriously consider clemency in most capital cases.” Id. at 120. Richard Rosen similarly views clemency as “a political crapshoot that forces the innocent and guilty alike to rely on popularly elected politicians . . . to ensure that ultimate justice is done.” Richard A. Rosen, Innocence and Death, 82 N.C. L. Rev. 61, 87 (2003).

RADELET ET AL., supra note 202, at 320.

Id.

Id.

investigation reveal[s] matters that ought to be considered further by the courts." The only U.S. innocence commission that fits this "screen and refer" model is North Carolina's—the North Carolina Innocence Inquiry Commission—which was established by the legislature and approved by the governor in 2006. This Commission "investigate[s] and evaluate[s] post-conviction claims of factual innocence." Once a claim, which can only be based on new evidence, is deemed sufficiently strong to merit further study, the Commission initiates a formal inquiry, notifies the victim, and conducts a Commission hearing. If the petitioner in this hearing (with the assistance of an attorney) introduces "sufficient evidence of factual innocence to merit judicial review," the Commission then sends the case to a three-judge panel where the convicted person "must prove innocence by clear and convincing evidence."

With the exception of North Carolina, most innocence commissions in the United States do not refer cases to courts but instead make detailed investigations into the cases of previously exonerated defendants, determine the causes of these wrongful convictions, and suggest reforms to prevent future errors. For example, the Innocence Commission for Virginia, which aims "[t]o assist in examining the problems that may lead to wrongful convictions," conducted what it defined as an "independent, objective, and thorough investigation into eleven wrongful convictions" in Virginia to complete a 2005 report on wrongful

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274 Horan, supra note 269, at 147.
278 Id.
279 The North Carolina Innocence Inquiry Commission is unique in this regard:

The North Carolina Innocence Inquiry Commission, which received legislative and gubernatorial approval in the summer of 2006, is entrusted with the duty of assessing claims of innocence predicated on new evidence unavailable at the time of trial. If a majority of the proposed eight-member committee (consisting of, inter alia, a judge, prosecutor, and defense lawyer) considers a case sufficiently credible, the state’s chief justice would be obligated to appoint three judges to review it. Only a unanimous finding of “clear and convincing evidence” of innocence by those three judges would generate a reversal of the conviction.

Medwed, Dilemma, supra note 275, at 555 (footnotes omitted).
The Commission, which is a collaboration of several university-led innocence projects, appointed pro bono attorneys as “case investigators,” wrote detailed case reports on Virginia innocence cases, and produced final recommendations for avoiding wrongful convictions. These recommendations include providing special instructions to witnesses participating in identification procedures and videotaping of all police interrogations in serious felony and homicide cases.

Other commissions take a broader approach under what this Article describes as a “comprehensive study” model, summarizing innocence cases from around the country in addition to conducting case reviews of their own and holding hearings on the causes of wrongful convictions. Connecticut, for example, established the Connecticut Advisory Commission on Wrongful Convictions in 2003, granting the Commission the power to review “any case involving a wrongful conviction and recommend reforms to lessen the likelihood of a similar wrongful conviction occurring in the future.” The Commission aims “to conduct investigations to determine the cause or causes of individual cases of wrongful conviction in the State of Connecticut,” to “identify current Connecticut procedures implicated by causes of wrongful conviction, and to recommend best practices in the form of procedural, administrative, or statutory changes, or

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281 See supra note 42, at 3.
282 See id. at vii (describing the Commission as a collaboration of George Mason University’s Administration of Justice Program, the Mid-Atlantic Innocence Project of American University’s Washington College of Law, and Georgetown University’s Constitution Project).
283 Id. at 4.
284 For example, in the case of Marvin Anderson, who was convicted in 1982 for rape based on an erroneous eyewitness identification, the Commission discussed how a lab expert had testified that she “blood typed” swabs from Anderson and the victim and could not identify Anderson as the source of semen in the victim’s rape kit. Id. at 13. Anderson also failed to match the victim’s description of the perpetrator. Id. The police, however, arranged a photo array—in which Anderson’s photo was the only color photo—and the victim erroneously pointed to Anderson. Id. She again erroneously chose Anderson in a live lineup. Id. Ignoring the conflicting evidence and leads suggesting that another individual with a sexual assault record may have been the real perpetrator, the police forged ahead and the prosecution obtained a conviction. Id. Anderson eventually persuaded a county circuit court to order DNA testing, which confirmed his innocence, and then applied for and received a pardon from the governor. Id. at 13-14. In another case, in which Earl Washington was convicted of rape and murder and sentenced to death, the commission noted that Washington, who was later pardoned (with the exception of the lesser charges) by the governor in 2000 based on DNA testing, did not know the facts of the crime when he signed his confession. See id. at 21–22.
285 Id. at 8–12.
education and training.”287 It also reviews cases from other states to
to help identify the causes of wrongful conviction.288

California’s Commission on the Fair Administration of Justice, which
completed its investigation and disbanded in 2008,289 similarly
examined wrongful convictions by studying reports from other
innocence commissions and states290 as well as California wrongful
conviction cases.291 As part of the investigative process, it convened
a public hearing where experts, police, concerned citizens, prosecutors,
and criminal defense agencies testified about the causes of wrongful
convictions.292 After making these case inquiries and findings,293 the
Commission published recommendations for improving eyewitness

287 Id. At the Commission’s meetings, it receives briefings on the details of Connecticut
wrongful conviction cases, such as that of James C. Tillman, who was convicted of rape in 1988
based primarily upon the victim’s identification of Tillman in a police photo lineup. Later DNA
testing proved his innocence, and the charges against him were dismissed. See State of
Connecticut Judicial Branch, Advisory Commission on Wrongful Convictions, Meeting Minutes 2
(Nov. 28, 2006), http://www.jud.ct.gov/committees/wrongfulconviction/WP_minutes_112807.pdf; Presentation
to the Connecticut Innocence Commission (Nov. 28, 2006), http://www.jud.ct.gov/committees/wrongfulconviction/Tillman.pdf; see also Burgard, supra
note 247 (explaining Tillman’s alleged crime and conviction).

288 See California Advisory Commission Mission Statement, supra note 286 (identifying
as a “[s]pecific Commission objective[ ]” the goal to “[t]o identify and study the most common
causes of wrongful conviction, both in Connecticut and nationally”).

index.html (last visited Mar. 20, 2010).

290 See CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS
REGARDING EYE WITNESS IDENTIFICATION PROCEDURES 1–3 (2006), http://www.ccfaj.org/
documents/reports/eyewitness/official/eyewitnessidrep.pdf [hereinafter CCFAJ, EYE WITNESS
IDENTIFICATION PROCEDURES].

291 See CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS

292 See CCFAJ, EYE WITNESS IDENTIFICATION PROCEDURES, supra note 290, at 4.

293 For example, the Commission observed that in Herman Atkins’s case (a DNA-based
exoneration for rape, after Atkins spent more than eight years in prison), Atkins’s “defense at
trial was based on mistaken eyewitness identification,” and a criminalist from the state
laboratory “improperly testified that Atkins was included in a population of only 4.4% of the
population that could have contributed the semen.” CCFAJ, FORENSIC SCIENCE EVIDENCE, supra
note 291, at 4. The report concluded that “[t]he serology data, in fact, was not probative of
guilt or innocence but the jury was nonetheless misled by the state’s expert.” Id.

In the case of Jeffrey Rodriguez, who spent five years in prison before being exonerated
by DNA evidence, the Commission found:

[A] shaky eyewitness identification was corroborated by the testimony of a
criminalist who claimed his pants contained a stain with a combination of motor oil
and cooking oil. Such a combination would have connected him to the crime scene.
Subsequent tests by a state crime lab concluded that the stain was not as described.
Although at his first trial jurors voted 11–1 to acquit, by the time of his retrial his
family ran out of money, and his lawyer failed even to call the defense witnesses
who had testified at the first trial.

Id.
testimony, changing policies regarding the use of jailhouse informants at trial, avoiding false confessions, improving the preservation and use of scientific evidence, and increasing the accountability of the prosecution and defense lawyers.\(^{294}\) It also made strong arguments for continued funding of university-led innocence projects.\(^{295}\)

The Pennsylvania Advisory Committee on Wrongful Convictions\(^{296}\) has a similar mandate to study the "underlying causes of wrongful convictions" and make recommendations for reform\(^{297}\) after reviewing cases.\(^{298}\) Similarly, the Wisconsin Criminal Justice Study Commission has "a broad mandate to study different aspects of the system and craft solutions to problems they identify."\(^{299}\) The Commission anticipates that it will produce "reports, conferences, guidelines, research papers, legislation, and jury instructions."\(^{300}\) It has, to date, generated one report on DNA testing backlogs\(^{301}\) and a position paper on the use of false confessions in criminal cases, which makes detailed findings from other states' exonerations to reach conclusions about the problems inherent to these confessions.\(^{302}\)


\(^{297}\) See Pa. S. Res. 381.

\(^{298}\) Id. (directing the committee to “review cases in which an innocent person was wrongly convicted and subsequently exonerated, . . . identify the most common causes of wrongful convictions, identify current laws, rules and procedures implicated in each type of causation, and identify . . . solutions in the form of legislative, rule or procedural changes or educational opportunities for elimination of each type of causation,” and to subsequently report to the Senate with findings and recommendations, which should include “potential implementation plans, cost implications, including possible savings, and the impact on the criminal justice system for each potential solution”).


\(^{300}\) Id.


\(^{302}\) WIS. CRIMINAL JUSTICE STUDY COMM’N, POSITION PAPER ON FALSE CONFESSIONS 1 (2007), http://www.wcjsc.org/Position_Paper_on_False_Confessions.pdf. The report discusses the case of Christopher Ochoa, convicted in Texas for rape and murder. After two twelve-hour interrogation sessions, where detectives lied about the strength of the evidence against him (they
Texas also formed a comprehensive study commission in 2008, when a judge on the state's highest criminal court created the Texas Criminal Justice Integrity Unit, an "ad hoc committee" comprised of district attorneys, defense attorneys, judges, state representatives and senators, crime lab directors, the director of the state’s police chief association, and judges. The committee “review[s] the strengths and weaknesses of the Texas criminal justice system,” hearing speakers from innocence and justice projects, police departments, universities, and crime labs who address problems with various evidentiary procedures. It has recommended several legislative changes, such as reforming eyewitness identification procedures and implementing a “[t]raveling DNA [l]ab,” which would “act as an unannounced check on criminal labs” throughout Texas.

The final type of state innocence commission, the “blue ribbon panel,” is charged with the task of studying a specific wrongful conviction issue and generating a report. Governor George Ryan of Illinois “appointed a blue-ribbon panel to study the death penalty and make recommendations to correct its failings.” The Commission, made up of judges, prosecutors, defense attorneys, police officers, and even a novelist, reviewed death penalty cases and issued a report with eighty-five specific recommendations for reforms, including review of eyewitness identification procedures, increased funding for defense attorneys, and intensified “scrutiny” of in-custody defendant had none), “repeatedly told Ochoa that they knew he had murdered” the victim, and “told him that he would face the death penalty if he did not admit to the crime.” Ochoa “eventually broke down” and signed a confession. More than twelve years after Ochoa had been convicted, a serial rapist confessed to the murder and rape, and DNA testing verified Ochoa’s innocence. The report, after investigating and evaluating current interrogation techniques, concluded that existing safeguards against false confessions are ineffective and suggested solutions, including: electronically recording all interrogations; prosecutorial consideration of the confession’s content and its fit “with the other evidence in the case”; and the need for judges to “determine whether juries need additional [expert] assistance in evaluating the reliability of a confession.”


305 Id. at 3.

306 See id. at 3–4.

307 Id. at 7.

308 Findley, supra note 236, at 348–49.
Because blue ribbon panels' study task can be broadly defined to include, for example, investigation into past wrongful convictions, the work of these panels is sometimes very similar to that of other states' comprehensive study commissions. New York's State Bar Association, for example, convened a "blue ribbon task force" charged with studying the "systemic, procedural and statutory causes that contribute to wrongful convictions and propos[ing] solutions to this growing problem." In 2009, it issued its final report "for the consideration of the House of Delegates," summarizing the causes of wrongful convictions based on fifty-three "carefully reviewed" case studies and providing recommendations for reform. The commission, like others, attributed the wrongful convictions to six central errors: "[g]overnment [p]ractices," "[i]dentification [p]rocedures," "[m]ishandling of [f]orensic [e]vidence," "[u]se of [f]alse [c]onfessions," "[u]se of [j]ailhouse [i]nformants," and "[d]efense [p]ractices." As shown by these state efforts, innocence commissions have been conducting, for about a decade now, the very type of investigation seen in the Cole case. Although they have nuanced differences, all of them undertake several common tasks. First, they identify and investigate new cases, or summarize cases already reviewed by other states, which did not have the benefit of DNA when they were originally tried and in which DNA later established innocence. They also identify the many non-biological errors that occurred in these cases. Based on these identified problems, they recommend that the legislature, the police, defense attorneys, and prosecutors amend various procedures currently followed in order to prevent future wrongful convictions. In carrying out this work, innocence commissions do what other institutions—courts and the legislature, in particular—typically have not: they collect and carefully review all of the relevant cases, glean important data on causes from those cases, and record their findings in detailed reports. Further, the commissions are typically composed of a diverse array of individuals,

309 Id. at 349 (explaining that the commission reviewed cases from the twenty-four years following the reimplementation of the death penalty in Illinois).
312 Id. at 6.
313 See discussion supra Part I.B.1.
thus helping to ensure that recommendations represent several perspectives. Innocence commissions, as bodies tasked specifically with investigating wrongful conviction cases and making recommendations for reform, may thus be the best institutions to make the sort of findings that this Article argues are crucial in an exoneration. Indeed, Barry Scheck and Peter Neufeld view these commissions as the key to a more just system, arguing that “innocence commissions can serve as a capstone reform that keeps in place a recurring systemic examination of defects and remedies in the criminal justice system before the current ‘learning moment’ brought about by post-conviction DNA exonerations fades.”

With the exception of North Carolina, innocence commissions in the United States, however, do not themselves exonerate wrongfully convicted defendants or refer such defendants to courts but instead study exonerations resulting from other processes. And, as in any study, a large sample size will produce more trustworthy results. Thus, as discussed in Part III.A, it is critical to uncover as many wrongful convictions as possible—including cases in which the defendant has died. For jurisdictions with innocence commissions to study the raw data of wrongful convictions, determine their causes, and suggest reforms, therefore, posthumous exonerations will be valuable regardless of how they are conducted. As an alternative for the many states without such a commission, however, posthumous exonerations can—due to the nature of the parties and the case—

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314 See, e.g., Pa. S. Res. 381 (requiring the Pennsylvania Advisory Committee on Wrongful Convictions to include representation, at minimum, from prosecution, defense, law enforcement, corrections, judiciary, and victim assistance); State of Connecticut Judicial Branch, Commission Composition, http://www.jud.ct.gov/committees/wrongfulconviction/#COMPOSITION (last visited Mar. 21, 2010) (explaining that the individuals appointed to Connecticut’s Advisory Commission on Wrongful Conviction “will bring to the Commission differing areas of expertise”); see also supra text accompanying note 309 (describing the diverse composition of Illinois’s blue ribbon panel).

315 This Article does not argue for any particular type of innocence commission, as other authors have. Lissa Griffin, for example, has argued for commissions similar to the one later implemented in North Carolina, with full investigative powers and the “power to entertain claims of factual innocence, as opposed to claims of error or misconduct.” Griffin, supra note 273, at 1302. David Horan similarly has argued for an expanded form of innocence commission, which would “investigate cases of alleged wrongful felony convictions, sua sponte or upon application from a defendant or his representative, family, or friends, and refer convictions with a ‘real possibility’ of being quashed on an appeal to the state’s appellate courts.” Horan, supra note 269, at 166. Stanley Fisher proposed the establishment of “Official Commissions of Inquiry,” similar to Governor Ryan’s death penalty commission in Illinois. See Fisher, supra note 96, at 71. Keith Findley proposed an analogous “Criminal Justice Study Commission.” Findley, supra note 236, at 352-353. In contrast, this Article simply argues that some form of extrajudicial body charged with making these exclusive findings is the best method for revealing the causes of wrongful convictions.

316 Scheck & Neufeld, supra note 216, at 100.

317 See discussion supra Part III.A.
produce innocence commission-type fact-finding about the causes of wrongful convictions within the existing judicial exoneration apparatus, and legislatures should act to make judicial posthumous exonerations more widely possible.

IV. POSTHUMOUS EXONERATIONS AS A VEHICLE FOR FACT-FINDING ON THE CAUSES OF WRONGFUL CONVICTION

To date, detailed court findings about the causes of wrongful convictions have occurred infrequently, but the proceedings in the Cole case—which produced a thorough discussion of the investigative missteps leading to Cole’s conviction and proposed reforms—show that in jurisdictions without innocence commissions, courts could provide an alternative forum for conducting these sorts of inquiries, particularly in posthumous cases. The courts, in other words, although they may not always possess the competence or credibility of innocence commissions, could nonetheless potentially fill these commissions’ role to some degree.

This Part argues that posthumous exonerations offer opportunities for findings that are less likely to arise in living exonerations and that given these unique considerations, as well as the importance of doing justice in the individual case and adding to the number of known wrongful convictions, legislatures should create an avenue for judicial posthumous exoneration proceedings, as well as other opportunities for posthumous vindication, such as executive clemency. These proceedings could be quasi-inquisitorial, along the lines of the Cole court of inquiry, but this is not necessary, provided that courts (or another institution conducting exonerations) have adequate information to make an accurate determination of innocence and, more importantly, the power to make detailed findings.

A. The Exonerating Judge as a One-Person Innocence Commission

Posthumous exonerations, because of their scarcity, have so far failed to create any discernible trend in the type of proceedings relied upon or in the findings generated. Some have followed the path of living exonerations, wherein courts simply vacate convictions. In one, the prosecutor simply dropped charges, thus, as in living exonerations, failing to create any meaningful findings. The

318 See discussion supra Part I.B.1.
319 See supra text accompanying note 94 (describing courts’ posthumous vacation of charges against Frank Lee Smith).
320 See supra text accompanying note 109 (explaining that the prosecution posthumously dropped charges against Louis Greco).
Cole, case, however, demonstrates the potential of posthumous exonerations, and perhaps all exonerations, to generate findings about what went wrong in a case and, accordingly, suggest reforms.

In Cole, a county district court judge, who formerly sat on the state’s highest criminal court and who is known for his willingness to consider creative approaches, utilized a Texas statute allowing his court to sit as a court of inquiry to conduct a searching investigation of the events leading to the conviction of Timothy Cole and to eventually exonerate him. Having heard evidence in the form of “documentary proof and sworn testimony,” including testimony from an expert on eyewitness testimony put on by the petitioners’ Innocence Project counsel, the court also prepared lengthy “findings of fact,” which detailed the crime that occurred and the ensuing investigation and trial. After describing the entire prosecutorial process in depth, as well as providing a detailed account of appellate courts’ management of the case and the real perpetrator’s multiple unheeded attempts to confess to the rape following Cole’s conviction, the court concluded by summarizing the many errors that occurred at each stage in the process. The court noted that, despite the fact that “[n]o evidence linked Tim Cole to the crimes committed” by the rapist, “all attention was focused on Tim Cole. There was no effort to broaden or expand the investigation. Even worse, the police deliberately ignored facts that got in the way of their theory.” The court also observed that a Special Fields Bureau Chief from a county district attorney’s office, who “testified to the [c]ourt as an expert on the causes and consequences of wrongful convictions in Texas,” explained at the hearing that this type of “tunnel vision . . . played a contributing role in many of the wrongful convictions analyzed by his office.” The court determined that the “photographic line-up put together by the police was clearly suggestive.” It noted that, according to expert testimony, when the officer who is involved in the investigation and who knows which potential defendant he or she prefers to have picked also conducts the photo lineup, this “increases

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321 See, e.g., Program for Offenders That Just Might Work, AUSTIN AM.-STATESMAN, Aug. 15, 2008, at A12 (explaining the history of Charlie Baird’s career as a judge and describing his “inclination to keep all but the most incorrigible defendants out of prison”).
322 See Cole Decision, supra note 5, at 1.
323 Id.
324 See id. at 9–10.
325 See id. at 2–10.
326 See id. at 2–13.
327 Id. at 10.
328 Id. at 9, 11 (internal quotation marks omitted).
329 Id. at 11.
the danger that verbal and physical cues will be given to the witness as to who to pick.\textsuperscript{330} Further, the victim was "never told that the suspect may or may not have been in the photo spread . . . or that the investigation of the case would continue regardless of her identification."\textsuperscript{331} The court again referred back to the expert testimony from the hearing, which demonstrated that the "failure to make [these sorts of admonishments] here contributed to the misidentification made by [the victim]."\textsuperscript{332}

After identifying the errors leading to the wrongful conviction, the court set out a distinct portion of the opinion entitled, "To the Texas Legislature\textsuperscript{333} and proceeded to list concrete suggestions for changes to the law, including better eyewitness identification procedures, such as requiring the provision of specific written admonishments to the witness before the witness is shown a lineup and array.\textsuperscript{334} The court also concluded:

Laws should be enacted to provide judicial review to prisoners claiming innocence. Technical hurdles should be removed in such cases, especially where there is a solid claim based on newly discovered or established scientific evidence.\textsuperscript{335}

In issuing the exoneration and, at the same time, making these detailed findings and suggestions for reform, a Texas district court created a document that, in content and form, looked remarkably similar to findings made by innocence commissions. This is perhaps not surprising, as Professor Scheck, who has called for such detailed findings,\textsuperscript{336} appeared on behalf of Cole's family.\textsuperscript{337}

Other posthumous exonerations could follow this pattern, whether judges are moved to conduct this sort of inquiry themselves or, perhaps more likely, to be sympathetic to counsel's attempts to turn the proceeding in this direction. This is, in part, because without a live prisoner to be freed, the public's interest in ensuring the proper function of the criminal justice system becomes more prominent\textsuperscript{338}. 

\textsuperscript{330} Id.
\textsuperscript{331} Id.
\textsuperscript{332} Id. at 12.
\textsuperscript{333} Id. at 13.
\textsuperscript{334} See id. at 14. Innocence commissions have suggested similar reforms. See, e.g., CCFAJ, EYE WITNESS IDENTIFICATION PROCEDURES, supra note 290, at 5–6.
\textsuperscript{335} See Cole Decision, supra note 5, at 14.
\textsuperscript{336} See supra note 216 and accompanying text.
\textsuperscript{337} See Cole Decision, supra note 5, at 1.
\textsuperscript{338} This is not a normative claim that society should prioritize the investigation of procedural errors in posthumous wrongful conviction cases over those involving live
[W]hen third parties, like the media or a public interest group, seek access to the evidence—not in the name of the executed, but in the name of the public generally—the principles of finality are not implicated. Such third-party suits are brought to further the public’s right to assess the functioning of government institutions.  

Another important consideration is the family’s desire to turn their relative’s ordeal into something meaningful. As Cole’s brother explained, “all those things that we’ve experienced, we don’t want for anyone else . . . . If [Tim’s] death accomplishes that, then his life was not in vain. That’s basically our ultimate desire.” Judges, moved by similar feelings, might be more willing to entertain attempts by innocence groups like the Innocence Project to obtain these sorts of findings.  

Although any exoneration could potentially provide a similar forum, when the defendant is still a part of the proceeding, it is more likely that the only question addressed closely by the court will be whether or not the defendant is innocent and should be released from prison. As discussed in Part III, in live exonerations it is common for the state to get rid of the case by agreeing to vacate the conviction or to drop the charges, at which point a busy judge, and the newly freed prisoner, may be less inclined to conduct any further investigation.  

Further, although parties will not always request such fact-finding, the types of parties bringing claims in posthumous cases—often innocence groups, the media, and religious groups—all of whom seek broader criminal justice reforms in addition to an individual remedy for the deceased defendant’s family—suggest that fact-finding will be frequently and, perhaps in light of the Innocence Project’s success in Cole, increasingly requested. Legislative action to create new posthumous exoneration procedures will likely be necessary, however, to realize this potential. This action will be required both to open the door to court for aggrieved parties seeking posthumous vindication for an individual defendant and to ensure that judges have the power to make findings when the parties so request.

defendants. It is rather an observation that the parties and courts are likely more willing in posthumous cases to look to the procedural errors because the focus on the physical release of the defendant is absent.

339 Moyes, supra note 226, at 995–96.
340 Blackburn, supra note 131 (internal quotation marks omitted).
341 See supra notes 255–68 and accompanying text.
342 See supra text accompanying notes 120–22.
B. Making Posthumous Exoneration Possible

Given the importance of posthumous exonerations, legislatures should expand the jurisdictional and procedural bases for these proceedings, particularly in jurisdictions where innocence commissions have not been, and perhaps will not be, created. Few legal avenues to posthumous exoneration currently exist. The dearth of formal, standardized procedures for posthumously examining cases was most recently highlighted in Texas, in a case that may have national implications. In 1991, a fire killed several children in Texas. Todd Willingham, the father of the children, explained that he had attempted to run into the burning building to try to save them. A jailhouse snitch later implicated Willingham, leading to his conviction and execution in 2004. In the time between his arrest and execution, Willingham emphatically and consistently asserted his innocence. In August 2009, a fire science expert, in a report produced at the request of the Texas Forensic Science Commission, concluded that there was no evidence linking Cameron Todd Willingham to the fatal 1991 fire for which he was executed. Nine other nationally known fire scientists have also looked at the case and reached similar conclusions.

The Commission, after receiving the fire scientists’ report, announced plans to scrutinize the report and draw its own conclusions. The fire scientists’ report, combined with the Commission’s conclusions, could potentially produce valuable findings highlighting the grave forensic, testimonial, and other errors that may have led to the wrongful conviction of a man for a fire that he did not set. They could also be the foundational documents for the first posthumous exoneration of an executed defendant if Texas ultimately concedes that Willingham was indeed innocent. Two days before the Commission was to hold a hearing with testimony from an arson expert who believed that the testimony in the Willingham case was false and unjustified, however, Texas Governor Rick Perry replaced the presiding officer of the Commission with a conservative, “tough-on-crime chief prosecutor” and also replaced two other

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343 Adequate opportunity for DNA testing, of course, will also be necessary.
344 David Grann, Trial by Fire, NEW YORKER, Sept. 7, 2009, at 42.
345 Id. at 47.
346 Id. at 48, 57.
347 Steve Mills, Report Questions if Fire was Arson, CHI. TRIB., Aug. 25, 2009, § 1, at 11.
348 Id.
349 Id.
350 Id.
351 Chuck Lindell & Jason Embry, Perry Shakes Up Agency Investigating Man’s
Commission members.\textsuperscript{352} The newly appointed presiding officer promptly canceled the hearing.\textsuperscript{353} While the ultimate outcome of the inquiry remains uncertain, the ad hoc and politically charged nature of the process used to review the Willingham case, along with the jurisdictional liberties that had to be taken in Cole to reach the question of innocence,\textsuperscript{354} demonstrate the inadequacy of the currently available avenues for posthumous exoneration.

Where innocence commissions do not exist, courts\textsuperscript{355} could use their discretion in living exoneration cases to make detailed findings, but they traditionally have not. Thus, current opportunities for the type of exoneration and findings that occurred in Cole are limited. At least twenty states that provide for a new trial based on the discovery of new evidence require filing within a period ranging from sixty days to three years after the date of the original judgment,\textsuperscript{356} thus limiting many posthumous (and living) actual innocence claims that rely on DNA evidence.\textsuperscript{357} Further, the statutes that provide for post-conviction DNA testing do not typically include a specific procedure for exoneration once testing occurs.\textsuperscript{358} And many of these statutes expressly apply only to defendants still in prison or custody, thus barring any chance at posthumous exoneration.\textsuperscript{359} Even where courts have found ways to grant posthumous exonerations, their jurisdictional grounds appear somewhat tenuous. In the Cole case, for


\textsuperscript{353} \textit{Id.}

\textsuperscript{354} \textit{See Cole Decision, supra note 5, at 1–2 (identifying the provisions of the Texas Constitution and Texas Code of Criminal Procedure that, according to the judge convening the court of inquiry, provided the court with jurisdiction).}

\textsuperscript{355} Legislatures could also expand the ability of non-judicial institutions, such as pardon boards, to conduct posthumous proceedings. In light of the argument above that each new confirmed wrongful conviction adds an important data point to the set—even if that data point does not come with detailed findings—enabling posthumous exoneration in any form would be worthwhile. As will be discussed, however, courts are the best option for making findings where innocence commissions are not in place.

\textsuperscript{356} \textit{See Medwed, Up the River, supra note 18, at 676–77 (summarizing the statutes).}

\textsuperscript{357} \textit{See Cynthia E. Jones, Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes, 42 AM. CRIM. L. REV. 1239, 1250 (2005) (observing that “most post-conviction litigation based on DNA testing is initiated many years after the original conviction (usually because DNA technology was not available at the time of trial”).}

\textsuperscript{358} \textit{See Garrett, Innocence, supra note 10, at 1683 (explaining that many states grant the trial judge “discretion in deciding whether to grant relief based on post-conviction DNA testing”).}

\textsuperscript{359} \textit{See id. at 1680 (observing that “twenty-one jurisdictions require that the petitioner be incarcerated or in custody in order to obtain testing”).}
example, the court utilized a proceeding typically reserved for grand jury-type investigations into state officials' misconduct in order to address the deceased defendant's case. Thus, there is a need to ensure, through legislatively created causes of action, that courts have clear jurisdiction over posthumous cases.

These processes need not take the form of a quasi-inquisitorial proceeding such as that in Cole. One approach would be to modify the currently limited avenues to courts offered by the post-conviction DNA testing statutes and statutes that provide for new trials based on newly discovered evidence. Some scholars have already argued for an expansion of these statutes to accommodate more exonerations of living defendants, suggesting that statutes of limitations in new evidence statutes should be stricken or greatly lengthened, for example, and that, more generally, the standard for granting relief based on new evidence of innocence should be loosened. Additional reforms, however, would be necessary to ensure that posthumous exonerations could occur through these existing avenues. In addition to lengthening statutes of limitations for new evidence claims, legislatures would have to remove the common requirement that an individual must be in prison or on probation in order to gain access to DNA testing.

A second, and perhaps preferable, means of ensuring that courts may consider posthumous exoneration claims is for the legislature to create a new cause of action. Some political leaders have already attempted this sort of reform. Governor Ryan of Illinois, for example, proposed to "create a law to ensure that claims of 'actual innocence' (as opposed to technical legal issues) are heard," although this law would not have specifically addressed posthumous exonerations. Additionally, in 2009, the Texas Legislature proposed a more comprehensive solution, considering a new proceeding that would have created a "process to exonerate and compensate convicts after they have died."

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361 See Medwed, Up the River, supra note 18, at 678.
362 See Griffin, supra note 273, at 1305.
363 See supra note 359 and accompanying text.
364 Horan, supra note 269, at 119.
Scholars have also argued for these types of reforms. For exonerations of both deceased and living defendants, Stanley Fisher, in his thorough study of wrongful convictions in Massachusetts, suggests that Massachusetts should implement an Innocence Protection Act (as the majority of states already have done). The Act would define "the conditions and procedures under which prisoners may obtain post-conviction access to evidence for testing purposes," as well as the "standards for relief." Anne-Marie Moyes has alternatively argued that "a provision that mandates post-execution access to DNA evidence should be added to states' freedom of information acts." This, however, does not provide a specific forum within which posthumous exoneration may then occur.

No matter the exact legislatively enabled avenue to courts that is chosen, given the importance of gathering data from the limited number of pre-DNA wrongful conviction cases that exist, there must be assurance that all potentially meritorious innocence claims, including those involving deceased defendants, may be brought. Several parameters will be necessary, of course, to ensure that only these potentially meritorious and valid claims are heard. In light of the evidentiary difficulty of conclusively establishing actual innocence after the death of the defendant and the need to limit further burdens on the court system, legislatively created exoneration procedures should require, as many DNA-testing statutes already do, that a petitioner make a prima facie showing of "materiality" or a likelihood of factual innocence. For exoneration cases, this would likely require introduction of a DNA test or similarly conclusive evidence. Further, cost-shifting measures should be implemented to provide monetary relief to the parties who successfully prove a defendant's innocence in an exoneration proceeding and to ensure that the state does not bear these costs if the claim fails.

Legislatures, by creating a new cause of action for posthumous exonerations—with sufficient constraints to ensure that the courts are

366 Fisher, supra note 96, at 70–71.
367 Moyes, supra note 226, at 997.
368 See, e.g., Garrett, Innocence, supra note 10, at 1682 (discussing various state requirements for exoneration relief once DNA testing has occurred, such as New York's "reasonable probability of innocence" and Pennsylvania's "more-probable-than-not" standard (citing N.Y. CODE CRIM. PROC. § 440.30 (McKinney 2005); 42 PA. CONS. STAT. ANN. § 9543 (West 2007))).
369 See, e.g., id. at 1676 (observing that eighty-four percent of jurisdictions require a showing of "materiality" for a defendant to gain access to DNA testing, meaning that "a reasonable probability exists that the petitioner would not have been convicted if exculpatory results had been obtained through DNA testing" (internal quotation marks omitted)).
370 At least one state DNA-testing statute has a similar provision. See id. at 1708 n.384 (citing MD. CODE ANN., CRIM. PROC. § 8-201(g) (LexisNexis 2007)).
not flooded with frivolous innocence claims years after defendants' deaths—can help to ensure that as many wrongful convictions as possible are discovered. They should also ensure that, where innocence commissions are not available to make findings on the causes of wrongful convictions in posthumous exonerations, courts will be able to fill in the gap. Legislatively enabled posthumous exoneration proceedings must therefore provide adequate opportunities for the institution conducting the inquiry to identify the information that will lead to these findings, if the parties so request.

One possible model, and one that would seem to guarantee these types of findings, is a quasi-inquisitorial proceeding similar to the court of inquiry employed in the Cole case.\(^3\) Texas is the only state that provides for this sort of proceeding,\(^3\) and the court of inquiry does not appear, in intent or form, to fit posthumous exoneration cases like Cole. Rather, it offers a type of modified grand jury proceeding, allowing citizens, for example, to demand investigations into potential misconduct by governing officials.\(^3\) The type of investigation permitted by a court of inquiry, however, if modified by a legislature to include wrongful conviction claims, would allow courts to conduct a detailed analysis of systemic errors in the investigation and prosecution of a case.

Once a Texas court of inquiry is convened, the district or county attorney in the jurisdiction of the court of inquiry must assist the judge who has convened the court, helping him or her examine the case through the use of live evidence and witnesses.\(^3\) The judge

\(^{371}\) See generally Cole Decision, supra note 5.


\(^{373}\) Timothy Cole's case is one of the few courts of inquiry convened under this provision in recent history. In another request for a court of inquiry, the court refused to act upon an inmate's allegations that prison officials "committed the criminal offenses of official oppression . . . and tampering with governmental records" after the inmate lost one year of accrued good time credit. See In re Johnson, No. 07-04-0568-CV, 2004 WL 2937304, at *1 (Tex. App. Dec. 20, 2004). Another court rejected a request for a court of inquiry involving criminal trespass charges for want of jurisdiction because the claimant filed in a Texas appellate court, and the court found that "courts of inquiry are to be conducted by district judges, not appellate court judges and no final, appealable judgment or order has been entered in the trial court." Davis v. State, No. 2-04-462-CR, 2004 WL 2624252, at *1, (Tex. App. Nov. 18, 2004) (footnote omitted). In another case, an individual who alleged that two police officers had sexually assaulted her persuaded a district court to convene a court of inquiry in 2004, but the court found "no probable cause to issue arrest warrants" for the officers. In re Court of Inquiry, 148 S.W.3d 554, 555 (Tex. App. 2004). The woman attempted to appeal this determination and the appellate court, noting the "absence of statutory authorization for an appeal from the magistrate's determination made in connection with the court of inquiry," held that she had no right of appeal. Id. at 556.

\(^{374}\) TEX. CODE CRIM. PROC. ANN. art. 52.01(c) (Vernon 2009). If the Court of Inquiry is convened to address the district or county attorney's activities, an attorney pro tem shall assist instead. Id. art. 52.01(d).
conducting the court of inquiry “may allow the introduction of any documentary or real evidence which he deems reliable.” The judge may also issue subpoenas, but “[a]ll witnesses testifying in any [c]ourt of [i]nquiry have the same rights as to testifying as do defendants in felony prosecutions in [Texas].” “A person may be compelled to give testimony or produce evidence when legally called upon to do so” in the Court, even if the testimony would incriminate him or her. The law provides, however, that the witness “shall not be prosecuted or subjected to any penalty or forfeiture for . . . any transaction, matter or thing” relating to that testimony or evidence.

This proceeding grants broad investigative powers to the judge and is quasi-inquisitorial, in that it relies upon the judge and an individual assisting the judge to gather information deemed relevant and evaluate that information based on an independent review, rather than being presented with the arguments of competing counsel. Its loose evidentiary standard permits a sweeping inquiry into a case and, if adopted and expanded by a state legislature, would allow for the very type of detailed investigation that could produce the necessary detailed findings in exonerations. Further, there is no provision for appeal from the court of inquiry, thus making it the true “court of last resort” and avoiding endless legal challenges.

Some scholars would likely embrace this type of inquisitorial process. Despite the long-held notion that the American judicial system is adversarial to its core—and that it should be—scholars have persuasively argued that “inquisitorial procedure is neither alien to our traditions nor inherently unfair” and that America’s “legal system only became fully ‘adversarial’ in the relatively recent past.” Further, despite its current formal rejection of inquisitorial procedures, the system—whether purposefully or out of necessity—employs alternatives to fully adversarial procedures in both criminal cases (through plea bargaining and prosecutorial discretion, for example) and civil matters, as evidenced by the use of special masters. Indeed, it is not uncommon for special masters within the

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375 Id. art. 52.02.
376 Id. art. 52.03.
377 Id. art. 52.04(a).
378 Id. art. 52.05.
379 Id.
380 See TEX. CODE CRIM. PROC. ANN. art. 52.01(a) (Vernon 2006) (allowing a judge to convene a court of inquiry but not providing for an appeal from this unique proceeding).
382 See id. at 1188–89.
383 See id. at 1191–92.
judicial system to actively manage the pretrial discovery process or implement a consent decree post-trial, "a task which may require them to undertake their own investigations, often on an ex parte basis," and state courts have used special masters to investigate the causes of wrongful conviction in habeas cases.

Whether described as "quasi-inquisitorial" or as a modified version of the adversarial process, such as Abram Chayes's "diffused adversarial system," there is a legitimate view that American courts are, like it or not, moving toward a model where judges have substantial control over cases. This suggests that conducting a posthumous exoneration through a court of inquiry or similar quasi-inquisitorial proceeding may be a natural extension of an increasingly common procedure. In arguing that the private law model of bipolar private disputes has evolved to a public law system, for example, Chayes suggests that this system is a "new model of judicial action and the judicial role, both of which depart sharply from received conceptions." This model, which Chayes describes as a "diffused adversarial structure," represents a system wherein "[t]he judge is . . . active, with responsibility . . . for organizing and shaping the litigation to ensure a just and viable outcome"; "[t]he party structure is not rigidly bilateral but sprawling and amorphous"; and "[t]he subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy." John Langbein also describes "growing manifestations of judicial control of fact-gathering in certain strands of federal procedure" in America and observes that "these techniques have been seeping into the conduct of ordinary litigation."

Providing perhaps an additional justification for a quasi-inquisitorial court proceeding, Owen Fiss has argued that "[t]he function of adjudication, whether in the nineteenth century or twentieth century, torts or criminal law, contract or antitrust, . . . has not been to resolve disputes between individuals, but rather to give meaning to our public values." If this is so, given the strong public

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384 Id. at 1194.
387 Id. at 1288–90.
388 Id. at 1308.
389 Id. at 1302.
values of avoiding convictions of innocent defendants, it makes ample sense to provide a court proceeding within which posthumous exoneration may occur—particularly exoneration after a defendant's death, where public values, and not a release from prison, dominate the debate.

Judges in a quasi-inquisitorial posthumous exoneration might also have unique advantages in collecting information and identifying the issues, which is important for developing findings about the causes of wrongful conviction. Chayes, in arguing that America's legal system increasingly operates under a public law model with more judicial involvement in cases, suggests that there are good reasons for this model, arguing:

[T]he judiciary may have some important institutional advantages for the tasks it is assuming . . . .

. . . [T]he court, although traditionally thought less competent than legislatures or administrative agencies in gathering and assessing information, may have unsuspected advantages in this regard. Even the diffused adversarial structure of public law litigation furnishes strong incentives for the parties to produce information. If the party structure is sufficiently representative of the interests at stake, a considerable range of relevant information will be forthcoming. And, because of the limited scope of the proceeding, the information required can be effectively focused and specified. Information produced will not only be subject to adversary review, but as we have seen, the judge can engage his own experts to assist in evaluating the evidence. Moreover, the information that is produced will not be filtered through the rigid structures and preconceptions of bureaucracies.

Langbein similarly argues that judicial fact-finding promotes judicial economy and creates more relevant facts. He urges that unlike in the adversarial system, where the two "cases" (formed by each side presenting a different version of the case) "function as traffic rules for the partisan presentation of evidence to a passive and ignorant trier," "[t]he [inquisitorial] judge who gathers the facts

392 See Chayes, supra note 386, at 1302.
393 Id. at 1307-08 (footnote omitted).
394 See Langbein, supra note 390, at 830.
395 Id.
soon knows the case as well as the litigants do, and he concentrates each subsequent increment of fact-gathering on the most important issues still unresolved."  

On the other hand, there are familiar and reasonable arguments for continuing to strive for an adversarial tradition even in posthumous proceedings where the defendant is absent, and attempts by a legislature to employ a quasi-inquisitorial proceeding for posthumous exonerations would likely invoke these arguments. Adversaries identify those facts for which there is sufficient evidence and exchange written pleadings and stipulations, thus narrowing the issues. In a posthumous exoneration, given the long history of the case and the potentially endless stream of evidence that accompanies it, pre-trial stipulations may be particularly important. Further, adversaries provide strong and individually prepared opposing arguments, thus preventing the judge, who is supposed to be a neutral arbiter, from having to make arguments for each side and entering bias-creating territory. Even innocence commissions, adversarialists might argue, offer more potential for the introduction of opposing viewpoints and the avoidance of bias than would inquisitorial courts, since the commission purposefully appoints a diverse group of people to serve on the investigative panel. Reasoned opposition may be especially valuable in posthumous exonerations proceedings, where justifiable outrage over the plight of the deceased defendant could make judges too quick to condemn the processes that led to the wrongful conviction.

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396 Id. at 831-32. One non-trivial problem with the court of inquiry and similar quasi-inquisitorial processes that could be followed for posthumous exonerations, however, arises from the relatively loose procedures that they employ. Although the traditional constitutional and procedural protections that apply in criminal proceedings will not be implicated as heavily in posthumous cases, as the defendant will not be present, all exoneration proceedings will still require baseline guarantees of due process and other procedural protections. Courts’ refusal to grant a posthumous exception to the attorney-client communications privilege, for example, shows that there are legitimate ongoing concerns with a defendant’s privacy—and the incentives of evidentiary rules during a defendant’s life—which cannot be ignored posthumously.

397 Lynn Splitek, in contrast, argues that posthumous proceedings cannot, by their nature, be adversarial, and that this illegitimates the proceeding: “[T]he public’s interest in a final determination is served only when the final judgment is the product of a thoughtful, fully adversarial process. After the defendant’s death, release of the defendant is no longer at stake and punishment is no longer a concern.” Lynn Johnston Splitek, Note, State v. McDonald: Death of a Criminal Defendant Pending Appeal in Wisconsin—The Appeal Survives, 1989 Wis. L. Rev. 811, 833.


399 See Fuller, supra note 398, at 382-83.

400 See supra notes 304, 309 and accompanying text.
Practically speaking, there would also be zealous adversaries to collect the evidence and present the legal arguments in an adversarial posthumous proceeding. Innocence groups like the Innocence Project are devoted to identifying and pursuing meritorious innocence claims. Prosecutors, in turn, are repeat players in the criminal justice system and have a strong interest in defending the processes used to obtain convictions, and they may well wish to participate, thereby making an adversarial proceeding a potentially viable option. Prosecutors frequently oppose DNA testing even after defendants have died, demonstrating a continued interest in validating their previous work. Moreover, they are accustomed to defending investigative and prosecutorial procedures in the habeas context. In the face of DNA evidence or similarly strong evidence of the defendant’s innocence, however, and in light of limited prosecutorial resources and the absence of a prisoner to be set free, many prosecutors may not wish to participate in some or all posthumous exonerations proceedings, even if allowed by statute. This suggests that the quasi-inquisitorial model could be common in practice if not in name.

This Article will not resolve the deep-rooted question of whether quasi-inquisitorial processes produce unbiased decisions based on the best available information. That determination must be left to the larger, ongoing debate around the value of competing court structures. Ultimately, either an adversarial or inquisitorial model could be an effective means of generating meaningful findings in posthumous cases. The most important aspect of any proceeding enabled by a legislature will be an assurance that the judge has the ability—and preferably the duty—to bring to light the causes of the wrongful conviction.

CONCLUSION

The recent focus on innocence has produced hundreds of exonerations. Although these exonerations have begun to reveal the causes of wrongful convictions and have inspired needed reforms to

401 See, e.g., Green & Yaroshefsky, supra note 23, at 475 (“Prosecutors may approach claims of innocence with great skepticism and resist them strenuously on the theory that the principles of finality underlying the legal impediments to post-conviction relief should similarly influence prosecutors’ own attitude toward post-trial innocence claims.”); Daniel S. Medwed, The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence, 84 B.U. L. REV. 125, 136 (2004) [hereinafter Medwed, Zeal Deal] (observing that “upon achieving a conviction, both the individual prosecutor and the office may become vested in maintaining the integrity of the conviction”).

402 See Medwed, Zeal Deal, supra note 401, at 129 (“Empirical proof suggests that prosecutors have consented to DNA tests in less than fifty percent of the cases in which testing later exonerated the inmate.”).
the criminal justice system, much work remains to be done. An infrequently recognized facet of this movement is the posthumous exoneration. This phenomenon, as yet rare, demonstrates an increasing recognition that even where justice comes too late for the individual defendant, the act of exonerating the wrongfully convicted has benefits that extend far beyond the individual. These frequently intangible, but nonetheless considerable, benefits flow to the defendant’s family, the victim, and the larger community. As this Article has argued, the value of posthumous exonerations greatly outweighs the need for finality, a conclusion bolstered, perhaps surprisingly, by the rationale underlying the abatement doctrine, which closes criminal cases upon the defendant’s death.

Posthumous exonerations are distinctly valuable, from a systemic perspective, for two reasons. In addition to ensuring that more wrongful convictions from within the small DNA window are uncovered and allowing us to separate out and positively identify the errors that lead to wrongful convictions, they also provide an example of how courts can make meaningful findings about these errors. Indeed, because the physical release of the defendant is no longer at issue, posthumous exonerations are prime opportunities for courts to make a broader inquiry into the causes of wrongful conviction. Of course, posthumous exonerations likely should not take precedence over the living: the cases of those innocent defendants still serving time in prison for crimes that they did not commit should be heard as soon as possible. Further, where innocence commissions are available, they are the most competent institution to make such findings. But legislatures should provide an avenue to posthumous exonerations in courts in order to produce case studies for innocence commissions (which do not themselves exonerate individuals), to generate findings in the many states where innocence commissions do not exist, and to provide belated justice to families, victims, and communities.

Identifying wrongful convictions and rooting out their causes does not come close to offering a comprehensive solution for the challenges facing today’s criminal justice system. The term “wrongful conviction” itself is, perhaps, artificially limited, as it excludes many convictions that are highly problematic but not technically “erroneous—such as, for example, those obtained by guilty pleas coerced by over-charging.” Elevated attention to “glamorous”

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403 See, e.g., Bandes, supra note 3, at 14 (arguing that the “‘zone of perceived injustice’” encompassed within the term “wrongful conviction” should be expanded (quoting Craig Haney, Exoneration and Wrongful Condemnations: Expanding the Zone of Perceived Injustice in Death Penalty Cases, 37 GOLDEN GATE U. L. REV. 131, 142 (2006))).
innocence claims may distract resources from the many other problems in the system that need attention, such as disproportionate punishment. As Susan Bandes argues in the capital punishment context, "Given the enormous amount of work left to be done in reforming the criminal justice system . . . it would be dispiriting to think that the movement drew all its power from revulsion at the execution of those able to prove they were blameless." Nonetheless, wrongful convictions proven through DNA, although not a "panacea," tell a powerful story, and can be the basis of important reform if properly conducted. A single exoneration in the form of a one-line vacation of a judgment or a curtly phrased clemency order does little for the system; an exoneration with detailed findings does much more. With the strong grounding of a scientifically proven error, one can, with attention and expertise, start from the certainty of innocence and seek the causes of a wrongful conviction, whether those arise from procedural missteps, entrenched police and prosecutorial culture, or inadequate counsel. Better live and posthumous exonerations can teach us lessons that must not be lost: long after today's innocent defendants are dead, their ordeals can help others avoid the same fate.

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405 Bandes, supra note 3, at 7–8.
406 Id. at 16.
407 See, e.g., id. at 21 (discussing "incentive structures deeply imbedded in police culture, prosecutors' offices, and other agencies").