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DNA Exonerations and Stakeholder Responses: A Case of Cognitive Dissonance

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DNA EXONERATIONS AND STAKEHOLDER RESPONSES: A CASE OF COGNITIVE DISSONANCE?

ANNE RICHARDSON OAKES* AND JULIAN KILLINGLEY**

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The availability of DNA testing developed in the 1980s transformed the ability of prosecutors to secure convictions while providing Innocence Projects with the tools to overturn them. However, DNA exonerations which establish conclusively that a person convicted of a crime is in fact innocent, can represent a major threat to the value systems and therefore the self-belief of stakeholders who acted in good faith and in the genuine but mistaken belief that the exoneree was guilty. This Article reports on the findings of an investigation into stakeholder responses to DNA exonerations between 1990-1999 when DNA evidence was new and more likely to be met with skepticism—and the second period 2010-2019 by which time DNA testing had become a routine aspect of police criminal investigative procedure. The research detected little or no difference between the two periods, leading to the conclusion that, to the extent that the responses indicate continuing belief in the guilt of the exoneree, an explanation couched in terms of cognitive dissonance and confirmation bias might be appropriate.

INTRODUCTION

Nearly sixty years ago Professor Herbert Packer commented on the value systems that underpin the procedures of criminal justice and motivate their actors. “Crime Control” values prioritize the ability of the criminal justice process to repress criminal conduct.¹ From this perspective, reliable outcomes are a function of appropriate legislative powers and effective resourcing that enable police, prosecutors, and judges to screen suspects, determine guilt, and punish those convicted in a timely fashion.² “Due Process” values, however, locate the accuracy of decision-making by reference to a panoply of legal and procedural requirements, the purpose of which is to protect the individual from the otherwise overweening power of the state and its apparatus.³ These values represent the polarities of a continuum, upon which the various actors locate themselves according to their priorities. Police and prosecutors are likely to locate their value systems closer to the crime control pole. Defendants and defense lawyers are likely to locate themselves closer to a due process pole. Judges might be thought to locate themselves closer to the due process pole but may in practice be sensitive to the crime control values that they consider will please the executive or the electorate to whom they owe their position.⁴

In a democracy committed to the rule of law, appeal and review procedures exist whereby errors can be exposed and convictions can be overturned. Exonerations undermine public confidence in the accuracy of criminal process and erode respect for the rule of law.

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1. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 6 (1964).

2. *See id.* at 9–10.

3. Packer, *supra* note 1, at 13–23.

4. *See generally* Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants’ Due Process Rights*, 81 N.Y.U. L. REV. 1101, 1103–13 (2006), Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime”, Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 332–38 (2010) and Gregory DeAngelo & Bryan C. McCannon, *Judicial Elections and Criminal Case Outcomes*, 49 J. LEGAL STUD. 199, 200 (2020) (quoting Sotomayor J. in *Woodward v. Alabama*, 571 U.S. 1045, 1050 (2013), “[T]he only answer ... in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures.”).

Significantly for this Article, the exoneration of individuals previously thought to be guilty presents a challenge to the value systems of those actors who regard themselves as stakeholders within the criminal justice system and have confidence in the integrity of the processes and structures within which they operate and the ability of the values to which they subscribe to deliver outcomes that are accurate and reliable. An incorrect attribution of guilt which has convicted an innocent person and enabled the true perpetrator of crime to go unpunished, will expose the limitations of both crime control and due process values.

In the United States there has been in recent years an increasing academic and professional interest in the exoneration of victims of miscarriages of justice 'Innocence projects' are now associated with many law schools; among the best-known is that of Cardozo School of Law founded in 1992 by attorneys Peter Neufeld and Barry Scheck with a mission to exonerate the innocent, improve case law, and reform laws and policies to prevent wrongful convictions.⁵ In 2012, The National Registry of Exonerations was established as a project of a number of academic institutions.⁶ The project's website provides detailed information on every known wrongful conviction in the United States since 1989.⁷ The figures record a steady increase in the numbers of exonerations. In the decade 1990-1999, there was a mean of forty-two exonerations each year.⁸ In the decade 2000-2009, there was an increase to a mean of seventy-nine cases each year⁹ and a further increase to a mean of 139 cases each year in the decade 2010-2019.¹⁰ The data disclose a racial dimension; out of a total of 2,839 exonerees, 1,404 were Black, a little over forty-nine percent of the

5. See INNOCENCE PROJECT, <https://innocenceproject.org/about/>.

6. See THE NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Oct. 21, 2022) (The National Registry of Exonerations is a project of the Newkirk Center for Science & Society at University of California Irvine, the University of Michigan Law School and Michigan State University College of Law.).

7. *Id.*

8. See *id.* Means in this Article are rounded to the nearest integer. For 1990-99, figures were 1990 (24), 1991 (41), 1992 (40), 1993 (40), 1994 (34), 1995 (41), 1996 (52), 1997 (53), 1998 (39), and 1999 (55), see *id.*

9. For 2000-09, figures were 2000 (101), 2001 (97), 2002 (67), 2003 (83), 2004 (59), 2005 (66), 2006 (78), 2007 (77), 2008 (69) and 2009 (98), see *id.*

10. For 2010-19, figures were 2010 (83), 2011 (75), 2012 (119), 2013 (103), 2014 (155), 2015 (172), 2016 (182), 2017 (172), 2018 (174) and 2019 (153), see *id.*

total.¹¹ The significance of this is apparent from the fact that official racial demographics show that as of July 1, 2019, the proportion of Black or African-Americans in the population of the United States was 13.4 percent.¹²

The Registry provides analysis of the factors that contributed to the wrongful convictions within its database.¹³ Although in some cases more than one factor was present, the figures indicate that there were 540 exonerations (19%) that were attributable at least in part to DNA evidence.¹⁴ It was the purpose of our research and the focus of this Article to examine the responses of stakeholders to these cases.

There is no doubt that the availability of DNA (deoxyribonucleic acid) testing has transformed the ability of prosecutors to secure convictions.¹⁵ Juries can be offered guarantees concerning the genetic source of biological material that are accurate and reliable. As Professor Morawetz explains, “DNA evidence is special; investigators can tell with certainty whether a sample of DNA did or did not come from a particular individual.”¹⁶ It is in the context of exonerations however, that DNA evidence can become a ‘magic bullet’ for proving innocence.¹⁷ Since the development of DNA testing in the mid-1980s, the significant number of exonerations that it has sustained has enabled innocence projects to demonstrate “that blacks and the poor were by far the most likely persons to be unjustly convicted, that eyewitness accounts are very commonly unreliable, that defense

11. SAMUEL R. GROSS ET AL., RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 1 (2017), https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf.

12. See *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

13. The most common contributory factor was perjured evidence or false accusations at trial—this occurred in 1,716 cases (60.4%). The next commonest cause was what the Registry labels as “official misconduct”—this was present in 1,569 cases (55.3%). Other major factors in descending order of frequency of occurrence were mistaken witnesses in 797 cases (28.1%), inadequate legal defence in 772 cases (27.2%), faulty forensics in 687 cases (24.2%) and false confessions in 351 cases (12.4%). See THE NATIONAL REGISTRY OF EXONERATIONS, *supra* note 6.

14. See DANIEL S. MEDWED, WRONGFUL CONVICTIONS AND THE DNA REVOLUTION—TWENTY-FIVE YEARS OF FREEING THE INNOCENT (2017) (concerning a broad overview of DNA’s role in exonerating the innocent).

15. See *id.*

16. Thomas Morawetz, *Book Review*, 67 J. LEG. EDUC. 644, 645 (2018) (reviewing DANIEL S. MEDWED, WRONGFUL CONVICTIONS AND THE DNA REVOLUTION—TWENTY-FIVE YEARS OF FREEING THE INNOCENT (2017)).

17. *Id.*

attorneys often perform inadequately and that prosecutors often fail to scrutinize evidence and seek justice.”¹⁸

It is of course the case that wrongful convictions can and do come about because of bad faith on the part of those who give and/or interpret the evidence upon which the case for the prosecution has been constructed. It is also the case that police and prosecutorial misconduct, such as the failure to turn over exculpatory evidence to defense counsel, which results in a conviction of the innocent, can be motivated by the so-called ‘noble cause’, i.e. a genuine belief in the suspect’s guilt and a commitment to the view that the desired end—conviction—will justify the means used to achieve it.¹⁹ Our research was not concerned with bad faith. Our starting point was that DNA exonerations, which establish conclusively that a person convicted of a crime is in fact innocent represent a major threat to the value systems and therefore the self-belief of those stakeholders who acted in good faith and in the genuine but mistaken belief that the exoneree was guilty.

‘Cognitive dissonance’ is a term used by social psychologist Leon Festinger to describe the psychological discomfort felt when a person holds two conflicting beliefs.²⁰ The imperative to resolve this discomfort can and frequently will induce “activity oriented toward dissonance reduction.”²¹ As Tavris and Aronson explain:

So powerful is the need for consonance that when people are forced to look at [evidence that conflicts with their beliefs], they will find a way to criticize, distort, or dismiss it so that they can maintain or even strengthen their existing belief.²²

In the context of exonerations, we might expect stakeholders who have previously been convinced that a suspect has been correctly identified, prosecuted, and convicted, but who subsequently are confronted with irrefutable exonerating evidence, to resolve their

18. *Id.* at 646.

19. See Randall Grometstein, *Prosecutorial Misconduct and Noble-Cause Corruption*, 43(1) CRIM. L. BULL. Art. 1 (2007).

20. See LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 3 (1957).

21. *Id.*

22. CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS AND HURTFUL ACTS 22 (3d ed. 2015); see also Wayne A. Wallace, *The Effect of Confirmation Bias in Criminal Investigative Decision Making*, WALDEN DISSERTATIONS AND DOCTORAL STUD., Jan. 2015, at 22–23.

cognitive dissonance experiences with reactions that will confirm their original beliefs. The role in police and prosecutorial case construction of so-called ‘confirmation bias’, or the desire to interpret the available evidence in terms of intuitions of guilt or innocence previously formed, has been widely discussed;²³ as Andrew Sanders points out, in an adversarial system “[i]t is the duty of the police to gather together as much evidence *against*—not about—the suspect as possible”.²⁴

Our research set out to examine the attitudes of stakeholders to the exoneration of those originally thought to be the perpetrators of crimes with the perspectives of cognitive dissonance and confirmation bias in mind. We were particularly interested in, and focus specifically on, DNA exonerations as examples most likely to generate an extreme response. In the section that follows, we first present an outline of our investigative methodology. We then present the results of our investigations which we have split into two ten-year periods. Our purpose was to consider whether there was a difference between responses to the first period—1990-1999 when DNA evidence was new and more likely to be met with skepticism—and the second period 2010-2019, by which time DNA testing had become a routine aspect of police criminal investigative procedure. Somewhat to our surprise, our research detected little difference between the two periods. However, we consider it to be significant that skepticism on the part of stakeholders who might be expected to be committed to crime control values was consistently expressed. In the third part of this Article, we consider some explanations that have been or may be advanced. We have not been able to say that any one of these explanations by itself is definitive for the findings of our research. Nevertheless, we consider that, when taken in combination, it is not unreasonable to conclude that underlying the reactions of these stakeholders is an experience of cognitive dissonance brought about by a major challenge to the values which they consider ground the criminal justice process.

In conclusion, we note that in recent years, as DNA testing has become a routine aspect of police investigation of crime, one of the consequences of DNA-based exonerations has been a more general acceptance of the need to review investigative and prosecution procedures and a new willingness to review suspect convictions. When such reviews indicate that investigatory or prosecutorial misfeasance has been a function of an excess of crime control zeal, the findings are

23. See TAVRIS & ARONSON, *supra* note 22, at 22.

24. Andrew Sanders, *Constructing the Case for the Prosecution*, 14 J. L. & SOC’Y 229, 230 (1987).

unlikely to be welcomed by the stakeholders concerned. They nevertheless have a vital role to play in restoring public confidence in the legitimacy of criminal process which DNA exonerations have done so much to shake.

I. PROSECUTORIAL RESPONSES TO EXONERATIONS 1990-1999 AND 2010-2019

A. *Investigative Methodology*

We selected for investigation a structured sample of fifty wrongful conviction cases within the United States where DNA evidence formed part of the exoneration process. A criterion for selection was that a case should be one where the press sought and reported at least one reaction to DNA test results or exoneration from stakeholders in the original conviction. The National Registry of Exonerations database was used to select these.²⁵ Rather than select cases at random from the entire database, we hypothesized that there might be a difference between stakeholder reactions to exonerations that took place between 1990-1999 and those that place between 2010-2019.²⁶ We reasoned that DNA evidence in the earlier period was relatively new and that stakeholders might have exhibited more skepticism toward cases that relied on evidence of that kind. By way of contrast, we considered that stakeholders might be less skeptical of exonerations drawn from the latter period because by then DNA evidence was well established and its use widely accepted.

The cases selected were mostly rape or sexual assaults and some murder cases. It is unremarkable that exoneration tends to largely comprise such cases because many sexual assaults result in perpetrators leaving their DNA on the victim's body or clothing. DNA evidence also figures frequently in homicides because many are rape-murders or stabbings where the perpetrator cuts himself during the murder, leaving DNA at the scene.

In subsection B below, we present an analysis of twenty-five cases, detailed in Table 1, drawn from the period 1990-1999.²⁷

25. See THE NAT'L REGISTRY OF EXONERATIONS, *supra* note 6.

26. In this Article, we use the terms 'exonerate' or 'exoneration' to include not guilty verdicts on retrial, judge-ordered post-conviction dismissals of charges and gubernatorial pardons.

27. The exonerees and the years of their exoneration were Leonard Callace (1992) "Callace", Walter Snyder (1993) "Snyder", Mark Bravo (1994) "Bravo", Edward Honaker (1994) "Honaker", Richard Johnson (1996) "R. Johnson", Chester Bauer

Name of Exoneree	Race	Crime	Year Convicted	Year Exonerated
Callace, Leonard	White	Sexual assault	1987	1992
Snyder, Walter	Black	Sexual assault	1986	1993
Bravo, Mark	Hispanic	Sexual assault	1990	1994
Honaker, Edward	White	Sexual assault	1985	1994
Johnson, Richard	Black	Sexual assault	1992	1996
Bauer, Chester	White	Sexual assault	1983	1997
Byrd, Kevin	Black	Sexual assault	1985	1997
Durham, Timothy	White	Child sex abuse	1993	1997
Hicks, Anthony	Black	Sexual assault	1991	1997
Mitchell, Marvin	Black	Child sex abuse	1990	1997
Salazar, Ben	Hispanic	Sexual assault	1992	1997
Reynolds, Donald & Wardell, Billy	Black/Black	Sexual assault	1988	1997
Mahan, Dale & Mahan, Ronnie	White/White	Sexual assault	1986	1998
Mitchell, Perry	Black	Sexual assault	1984	1998

(1997) "Bauer", Kevin Byrd (1997) "Byrd", Timothy Durham (1997) "Durham", Anthony Hicks (1997) "Hicks", Marvin Mitchell (1997) "M. Mitchell", Ben Salazar (1997) "Salazar", Donald Reynolds & Billy Wardell (1997) "Reynolds & Wardell", Dale & Ronnie Mahan (1998) "the Mahans", Perry Mitchell (1998) "P. Mitchell", Warith Habib Abdal (1999) "Abdal", Clyde Charles (1999) "Charles", McKinley Cromedy (1999) "Cromedy", Dennis Fritz & Ronald Keith Williamson (1999) "Fritz & Williamson", Anthony Gray (1999) "A. Gray", David A. Gray (1999) "D. Gray", Jeffery Holemon (1999) "Holemon", Calvin Johnson (1999) "C. Johnson, Jr.", Ronald Jones (1999) "R. Jones", James E. Richardson (1999) "Richardson" and John Willis (1999) "Willis." See THE NAT'L REGISTRY OF EXONERATIONS, *supra* note 6.

Abdal, Warith Habib	Black	Sexual assault	1983	1999
Charles, Clyde	Black	Sexual assault	1982	1999
Cromedy, McKinley	Black	Sexual assault	1994	1999
Fritz, Dennis & Williamson, Ronald K.	White/White	Murder	1988	1999
Gray, Anthony	Black	Murder	1991	1999
Gray, David A.	Black	Attempt murder	1978	1999
Holemon, Jeffery	White	Sexual assault	1988	1999
Johnson, Calvin	Black	Sexual assault	1983	1999
Jones, Ronald	Black	Murder	1989	1999
Richardson, James E.	White	Murder	1989	1999
Willis, John	Black	Sexual assault	1993	1999

Table 1: Selected DNA exonerations 1990-1999²⁸

In subsection C, we present a similar analysis of a further twenty-five exoneration cases, detailed in Table 2, drawn from the period 2010-2019.²⁹

28. *Id.*

29. The exonerees and the years of their exoneration were Jermaine Arrington (2010) “Arrington”, John Watkins (2010) “Watkins”, David Ayers (2011) “Ayers”, Dwayne Jackson (2011) “Jackson”, Derrick Raphael Williams (2011) “D. Williams”, Robert Dewey (2012) “Dewey”, Darrin Hill (2012) “Hill”, Uria Courtney (2013) “Courtney”, Michelle Murphy (2014) “Murphy”, Michael Phillips (2014) “Phillips”, Luis Vargas (2015) “Vargas”, Larry Williams (2015) “L. Williams”, Dion Harrell (2016) “Harrell”, Daryl Holloway (2016) “Holloway”, Darryl Howard (2016) “Howard”, Clifford Jones (2016) “C. Jones”, Nevest Coleman & Darryl Fulton (2017) “Coleman & Fulton”, Clemente Aguirre-Jarquín (2018) “Aguirre”, Eric Kelley and Ralph Lee (2018) “Kelley & Lee”, Freddie Joe Lawrence and Paul Jenkins (2018) “Lawrence & Jenkins”, Christopher Miller (2018) “Miller”, Horace Roberts (2018) “Roberts”, Ernest Sonnier (2018) “Sonnier”, Johnny Tall Bear (2018) (in some reports named Tall Bear) “Tall Bear” and Nicholas McGuffin (2019) “McGuffin”. See THE NAT’L REGISTRY OF EXONERATIONS, *supra* note 6.

Name of Exoneree	Race	Crime	Year Convicted	Year Exonerated
Arrington, Jermaine	Black	Murder	1995	2010
Watkins, John	White	Sexual assault	2004	2010
Ayers, David	Black	Murder	2000	2011
Jackson, Dwayne	Black	Robbery	2003	2011
Williams, Derrick R.	Black	Sexual assault	1993	2011
Dewey, Robert	White	Murder	1996	2012
Hill, Darrin	Black	Sexual assault	1999	2012
Courtney, Uriah	White	Sexual assault	2006	2013
Murphy, Michelle	Native American	Murder	1995	2014
Phillips, Michael	Black	Sexual assault	1990	2014
Vargas, Luis	Hispanic	Sexual assault	1999	2015
Williams, Larry	Black	Murder	2002	2015
Harrell, Dion	Black	Sexual assault	1992	2016
Holloway, Daryl	Black	Sexual assault	1993	2016
Howard, Darryl	Black	Murder	1995	2016
Jones, Clifford	Black	Murder	1981	2016
Coleman, Nevest & Fulton, Darryl	Black/Black	Murder	1997	2017
Aguirre-Jarquin, Clemente	Hispanic	Murder	2006	2018
Kelley, Eric & Lee, Ralph	Black	Murder	1996	2018

Lawrence, Freddie L & Jenkins, Paul	White/White	Murder	1995	2018
Miller, Christopher	Black	Sexual assault	2002	2018
Roberts, Horace	Black	Murder	1999	2018
Sonnier, Ernest	Black	Kidnapping	1986	2018
Tall Bear, Johnny	Native American	Murder	1992	2018
McGuffin, Nicholas	White	Manslaughter	2011	2019

Table 2: Selected DNA exonerations 2010-2019³⁰

For practical and ethical reasons, we took the decision to obtain our information from media reports that were contemporaneous with the exoneration to be considered. For each exoneree, the News files in Westlaw or Newspapers.com databases were searched and examined for media reports of evidence of the reactions of stakeholders to the exoneration proceedings. Some reports contain quotations from stakeholders, others summarize reactions gathered firsthand or secondhand by reporters or news agencies. We acknowledge that this approach has limitations; the reporters involved were filing news items rather than consciously seeking to categorize the reactions of constituent stakeholders. Information gathering then becomes a second-hand exercise which almost inevitably involves a degree of interpretive creativity. In the circumstances, however, we consider that these reports represent the best evidence obtainable. We take the view that they can generally be considered reliable because no instances were found where rival news agencies or media reported contradictory reactions from the same stakeholders.

In terms of ‘stakeholders’, we note that media reports of exoneration proceedings typically focus on the exoneree. This is not surprising as the response of the person who has been wrongly imprisoned is a ‘human interest’ story that is likely to interest a wide audience. However, for our research we chose to focus on those who played parts in securing or sustaining wrongful convictions rather than the exonerees themselves.

30. *See id.*

It is not surprising that the media paid closest attention to the responses of the prosecution team; they were, after all, the prime architects of the wrongful convictions. As Sanders points out, it is only the prosecution team that is potentially apprised of all the facts—the other stakeholders see mainly the evidence selected and presented to them at trial that comprises the prosecution’s prevailing ‘theory of the case’.³¹ In the subsections that follow, each appropriate stakeholder’s response is noted, and a tentative taxonomy is presented.

B. Responses to Exonerations 1990-1999

We examined the cases of twenty-five exonerees during this period whom we listed previously.³² In twenty-four out of twenty-five of the exonerations (96%), the press reported responses of police, prosecutors, or state appellate attorneys.³³ In ten of the exonerations

31. See Sanders, *supra* note 24, at 231–34.

32. See *supra* Table 1.

33. See, e.g., *Man Cleared in '81 Rape Accused of Covering up for His Brother: Lawyer Ridicules Sheriff's Charge Against Defendant Vindicated by DNA*, DALL. MORNING NEWS, Apr. 11, 2000, at 17A (sheriff accepts only that Clyde Charles may be innocent following DNA test showing innocence); *Wrongfully Imprisoned for Rape, Ex-Nurse Gets \$3.9 Million*, CONTRA COSTA NEWSPAPERS, May 7, 1998, at A08 (prosecution said, regarding Mark Bravo, that investigators did their job by the book); Alexander Lane, *Falsely Convicted Man Turns Inward After Leaving Prison*, STAR-LEDGER, Oct. 30, 2000, at 11 (prosecutor says that if Cromedy was tried today, they would have gotten it right); *Kevin Byrd*, NAT'L REGISTRY OF EXONERATIONS, (June 2012) (district attorney and sheriff wrote a letter to Governor Bush seeking a pardon for Byrd) (this and the following examples may be accessed at <https://www.law.umich.edu/special/exoneration/>); *Leonard Callace*, NAT'L REGISTRY OF EXONERATIONS, (June 20, 2019), (prosecution dismissed all charges and did not pursue a new trial because of the DNA evidence); *Timothy Durham*, NAT'L REGISTRY OF EXONERATIONS, (Nov. 28, 2016), (prosecutor, DNA evidence showed Durham did not commit the crime, dismissed the case); *Anthony Hicks*, NAT'L REGISTRY OF EXONERATIONS, (Oct. 11, 2017), (prosecution declines to retry Hicks after DNA test excluded Hicks as perpetrator); *Edward Honaker*, NAT'L REGISTRY OF EXONERATIONS, (June 13, 2015), (petition for clemency joined by the state); *Calvin Johnson Jr.*, NAT'L REGISTRY OF EXONERATIONS, (Nov. 21, 2016), (District Attorney decided to drop the charges after reviewing DNA test results); *Dale Mahan*, NAT'L REGISTRY OF EXONERATIONS, (Oct. 19, 2017), (prosecution, despite insisting that brother Ronnie Mahan was guilty, moved for dismissal of charges); *Ronnie Mahan*, NAT'L REGISTRY OF EXONERATIONS, (Oct. 19, 2017), (prosecution, despite insisting Dale Mahan was guilty, moved for dismissal of charges); *Marvin Mitchell*, NAT'L REGISTRY OF

EXONERATIONS, (Jan. 2, 2018), (prosecution refused to seek a new trial based on the DNA evidence); *Perry Mitchell*, NAT'L REGISTRY OF EXONERATIONS, (June 2012), (state refused to try Mitchell again after DNA evidence); *Ben Salazar*, NAT'L REGISTRY OF EXONERATIONS, (Nov. 8, 2019), (DNA showed Salazar was excluded but District Attorney's office continued to test); *Walter Snyder*, NAT'L REGISTRY OF EXONERATIONS, (Aug. 21, 2019), (prosecution joined with the Innocence project in seeking a gubernatorial pardon for Snyder); Michael S. Perry, *James E. Richardson Jr.*, NAT'L REGISTRY OF EXONERATIONS, (June 1, 2020), (state appointed judge recommends a new trial); Maurice Possley, *Dennis Fritz*, NAT'L REGISTRY OF EXONERATIONS, (May 2, 2022), (Dennis Fritz was exonerated and released in April 1999); Maurice Possley, *Ronald Williamson*, NAT'L REGISTRY OF EXONERATIONS, (July 10, 2014), (state's incorrect use of DNA evidence leads to Williamson's eventual exoneration); Maurice Possley, *Anthony Gray*, NAT'L REGISTRY OF EXONERATIONS, (Aug. 26, 2017), (state's attorney became concerned that Gray might not have been involved); Maurice Possley, *Jeffery Holemon*, NAT'L REGISTRY OF EXONERATIONS, (June 2012), (District Attorney's office presented rape kit that exonerated Holemon); Rob Warden, *Warith Habib Abdal*, NAT'L REGISTRY OF EXONERATIONS, (June 29, 2020), (supervising judge dismissed the indictment based on DNA evidence); Rob Warden, *David A. Gray*, NAT'L REGISTRY OF EXONERATIONS, (Dec. 20, 2019), (prosecutors declined to retry Gray); Rob Warden, *Richard Johnson*, NAT'L REGISTRY OF EXONERATIONS, (June 2012), (DNA testing excluded Johnson, but state attorney proceeded with the prosecution); Rob Warden, *Ronald Jones*, NAT'L REGISTRY OF EXONERATIONS, (Dec. 21, 2019), (prosecution eventually dismisses the charges two years after DNA evidence exonerated Jones); Rob Warden, *Donald Reynolds*, NAT'L REGISTRY OF EXONERATIONS, (May 12, 2020), (defense attorney persuaded prosecutors to agree to that the DNA test exonerated Reynolds); Rob Warden, *Billy Wardell*, NAT'L REGISTRY OF EXONERATIONS, (May 12, 2020), (defense attorney persuaded prosecutors to agree to that the DNA test exonerated Wardell); Rob Warden, *John Willis*, NAT'L REGISTRY OF EXONERATIONS, (May 12, 2020), (prosecution misrepresented nature of DNA test and claimed that the DNA material no longer existed). Only in the case of Bauer is there no reported response from the police or prosecutor—possibly because Bauer remained imprisoned for an unrelated offense and attracted less media sympathy, see Lise Olsen, *Reopened Rape Case Dogs Crime Lab Worker*, SEATTLE POST-INTELLIGENCER, A1 Oct. 10, 2002).

(40%), the press sought the responses of the victims of the original crimes.³⁴ In seven cases (28%) the responses of judges were stated,³⁵

34. Press sought responses from victims in Bravo, Byrd, Callace, Charles, Cromedy, Durham, A. Gray, Hicks, the Mahans and Snyder. See Brian Barber, *DA Won't Take '91 Rape Case to Trial Again*, TULSA WORLD, Dec. 9, 1997, at A1 (press spoke to victim's mother, victim said she did not want to continue to prosecute Durham); Kathy Barrett Carter, *No Apology Offered as Rape Charge is Dropped Judge in Middlesex County Dismisses Case After Tests Clear Man Imprisoned for 6 Years*, STAR-LEDGER, Dec. 21, 1999, at 47 (press spoke to victim's mother, victim said she did not want to continue to prosecute Cromedy); William B. Falk, *DNA, and the Crime He Didn't Commit Unmistaken Identity*, NEWSDAY, Nov. 22, 1992, at 6 (victim declined to be interviewed on Callace's exoneration); Anne Gearan, *DNA Test Leads to Pardon of Man Convicted of Rape Seven Years Ago*, AP NEWS (Apr. 23, 1993), <https://apnews.com/article/e5a5e522158428a9cb23398f21e18f1e> (victim remains convinced that Snyder is the rapist); Annie Gowen, *MD. Man Freed in 1991 Rape and Murder; Despite Guilty Plea in Calvert County Case, DNA Evidence Pointed Elsewhere*, WASH. POST, Feb. 9, 1999, at B01, 1999 WLNR 8672395 (victim's widower believes A. Gray's exoneration was fair and truthful); Thao Hua, *California and the West \$4 Million Goes to Man Wrongly Convicted of Rape*, L.A. TIMES, Apr. 30, 1998, at 3 (Bravo's accuser recanted her accusation); John Makeig, *A Free Man/Inmate Allowed to Leave Custody/Man Cleared by DNA Tests is Reunited with his Family After Court Hearing*, HOUS. CHRON., July 31, 1997, at a29, 1997 WLNR 6615874 (victim continues to insist that Byrd raped her despite DNA evidence); Carol Robinson & Robert K. Gordon, *Ticket to Freedom? Brothers Say DNA Proves Innocence*, BIRMINGHAM NEWS, Dec. 2, 1997, at 1 (victim still believes the Mahans are her rapists despite the DNA evidence exonerating them); Cary Segall, *5 Years in Prison; Rape Case Dismissed*, WIS. STATE J., Apr. 24, 1997, at 1A, 1997 WLNR 4965269 (victim remains confident her identification of Hicks, as the rapist, is correct).

35. Press sought responses from judges in Bauer, Byrd, Hicks, R. Johnson, R. Jones, Richardson, and Wardell. See *People v. Wardell*, 230 Ill. App. 3d 1083, 1097 (Ill. App. Ct. 1992) (trial judge discredits the validity of the DNA test and refuses to accept the results); Becky Bohrer, *Former Justices Join in Request for Crime Lab Investigation*, AP ALERT – WASH., Aug. 27, 2004 (judge “bothered” by affirming conviction joins exoneration cause after DNA testimony in Bauer case); Daniel J. Lehmann, *Judge Drops Rape Conviction of Man Freed by DNA Test*, CHI. SUN TIMES, Mar. 9, 1996, at 3 (judge tells R. Johnson, “I deeply regret I found you guilty of this offense”); Makeig, *supra* note 34, at a29 (judge frees Byrd based on reaction to DNA evidence); Steve Mills & Ken Armstrong, *Yet Another Death Row Inmate Cleared*, CHI. TRIB., May 18, 1999, at 1 (Judge John E. Morris mocks DNA evidence in R. Jones case, suggests they save the argument for the press); Cary Segall, *supra* note 34, at 1A (court convinced by DNA evidence exonerates Hicks); Michael S. Perry, *James E. Richardson, Jr.*, THE NAT'L REGISTRY OF EXONERATIONS, (June 1, 2020),

in five cases (20%) the responses of jurors³⁶ and in four (16%) the responses of state governors.³⁷

1. The Prosecution Team

Examination suggested police and prosecutors' responses fell into four broad divisions ranked in order of increasing acceptance of the exoneree's likely innocence. In Table 3, we present a taxonomy of prosecutorial responses reported in these twenty-five cases and their relative frequencies:

Character of Responses	Frequency of Instances
'Obstruction of possible exoneration'	2 cases
'Skepticism of innocence'	7 cases
'Acceptance with reservations'	9 cases
'Acceptance of innocence'	4 cases

Table 3: Prosecutorial Responses to Exonerations (1990-1999)³⁸

Happily, the least frequent response of the prosecution team was its active obstruction of the defense's efforts to exonerate. Press reports instance two cases where prosecutors actively obstructed the

<https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3576> (appointed retired circuit court judge recommends Richardson's case be retried).

36. Press sought responses from jurors in Bravo, Callace, Hicks, Honaker, and C. Johnson, Jr.. See *Man Falsely Accused of Rape is Freed*, ST. LOUIS POST-DISPATCH, Jan. 12, 1994, at 02A (juror says they struggled with belief that Bravo was guilty, "tried everything to find him not guilty"); Falk, *supra* note 34, at 6 (juror illustrates the doubts they faced in Callace's conviction); Sarah Huntley, *Honaker Jurors Say Witnesses Convinced Them*, ROANOKE TIMES (VA), Nov. 6, 1994, at A8 (juror in disbelief about exoneration but says if the governor found the DNA evidence convincing then Honaker must be innocent); Cary Segall, *Convict Deserves Retrial, Two Jurors Say*, WIS. STATE J., May 28, 1996, at 2A (jury was previously convinced but DNA evidence raised a reasonable doubt about Hick's guilt).

37. Press sought responses from governors in Byrd, Honaker, Salazar and Snyder. See *Man Convicted of Rape is Pardoned by Bush He's Ruled Not Guilty After DNA Evidence Studied*, DALL. MORNING NEWS CO., Nov. 21, 1997, at 26A (relating to Salazar); Gearan, *supra* note 34 (relating to Snyder); Laura Lafay, *Case of the Wrong Man Has Name: Edward Honaker*, ROANOKE TIMES (VA), Aug. 22, 1994, at A1 (relating to Honaker); Makeig, *supra* note 34, at a29 (relating to Byrd).

38. Note that there were not press reports of prosecutorial responses in every case examined in this period.

defense and attempted to hinder collection of exonerating evidence.³⁹ As *Newsday* reported in one case, “For more than a year, the Suffolk County DA’s office has used taxpayers’ money to build a high stone wall around the truth, sending young assistant district attorneys into court with thick legal briefs to argue that Callace should not be allowed to have the evidence tested.”⁴⁰

Even if active obstruction of the defense was uncommon, that did not mean that prosecutors necessarily were accepting the exoneree’s innocence. Prosecution skepticism of innocence was detected in seven cases.⁴¹ Press reports representative of such attitudes include those of a sheriff:

One of those involved in the initial investigation of Pellicano’s death, former Calvert County sheriff Lawrence C. Stinnett, said yesterday there was no doubt in his mind that Gray was involved in the crime. Stinnett said Gray confessed to police without pressure on two occasions, providing them with key details of the crime scene and murder. He called [the state attorney]’s actions a “dereliction of duty.”⁴²

Another reaction, this time from a State’s Attorney:

39. The cases were Callace and Richardson. See William B. Falk, *supra* note 34; Michael S. Perry, *supra* note 35.

40. Jim Dwyer, *A Key to Justice, But Only if Used*, *NEWSDAY*, Mar. 30, 1992, at 2.

41. The cases were those of Bravo, A. Gray, D. Gray, R. Jones, the Mahans, Reynolds & Wardell, and Willis. See *Wrongfully Imprisoned for Rape, Ex-Nurse Gets \$3.9 Million*, *supra* note 33, at AO8 (prosecution said, regarding Mark Bravo, that investigators did their job by the book); *Dale Mahan*, *supra* note 33 (prosecution, despite insisting the brother were guilty, moved for dismissal of charges); *Ronnie Mahan*, *supra* note 33 (prosecution, despite insisting Mahan’s guilt, moved for dismissal of charges); *Anthony Gray*, *supra* note 33 (state’s attorney became concerned that Gray might not have been involved); *David A. Gray*, *supra* note 33 (prosecutors declined to retry Gray); *Ronald Jones*, *supra* note 33 (prosecution eventually dismisses the charges two years after DNA evidence exonerated Jones); *Donald Reynolds*, *supra* note 33 (defense attorney persuaded prosecutors to agree to that the DNA test exonerated Reynolds); *Billy Wardell*, *supra* note 33 (defense attorney persuaded prosecutors to agree to that the DNA test exonerated Wardell); *John Willis*, *supra* note 33 (misrepresented nature of DNA test and claimed that the DNA material no longer existed).

42. Gowen, *supra* note 34, at B01 (relating to the A. Gray case).

At a news conference earlier Friday, Haine said he was not ready to dismiss charges despite the DNA evidence. He said he would ask Alton police to pursue “some unanswered questions” before deciding whether to try him again. “I’m not convinced yet that there is sufficient cause for me to walk away from this case,” Haine said. “I have a profound respect for past verdicts fairly rendered.”⁴³

However, the most frequent response was one of acceptance with reservations, of which evidence was found in nine cases.⁴⁴ Typical reports of these attitudes included:

Kloch said Snyder would have been acquitted if the DNA evidence was admitted at trial. Kloch's office prosecuted the case. "There's only one person who knows whether he committed this crime and that's Walter Snyder," Kloch said. "But with this evidence there's reasonable doubt in my mind."⁴⁵

Additionally:

“The latest tests of two male pubic hairs found at the crime scene raised reasonable doubt about Hicks' guilt,

43. Charles Bosworth Jr. & Terry Hillig, *Man in Prison on Rape Shuns Limited Freedom Test for DNA Casts Doubt on His Conviction*, ST. LOUIS POST-DISPATCH, Oct 3, 1998, at 15 (relating to the D. Gray case).

44. The cases were those of Abdal, Byrd, Cromedy, Durham, Fritz & Williamson, Hicks, C. Johnson, Jr., Salazar, and Snyder. See Lane, *supra* note 33, at 11 (prosecutor said that if Cromedy was tried today, they would have gotten it right); *Kevin Byrd*, *supra* note 33 (district attorney and sheriff wrote a letter to Governor Bush seeking a pardon for Byrd); *Timothy Durham*, *supra* note 33 (prosecutor, DNA evidence showed Durham did not commit the crime, dismissed the case); *Anthony Hicks*, *supra* note 33 (prosecution declines to retry Hicks after DNA test excluded Hicks as perpetrator); *Calvin Johnson Jr.*, *supra* note 33 (attorney decided to drop the charges after reviewing DNA test results); *Ben Salazar*, *supra* note 33 (DNA showed Salazar was excluded but District Attorney's office continued to test); *Walter Snyder*, *supra* note 33 (prosecution joined with the Innocence Project in seeking a gubernatorial pardon for Snyder); *Dennis Fritz*, *supra* note 33 (Dennis Fritz was exoneration and released in April 1999); *Ronald Williamson*, *supra* note 33 (state's incorrect use of DNA evidence leads to Williamson's eventual exoneration); *Warith Habib Abdal*, *supra* note 33 (supervising judge dismissed the indictment based on DNA evidence).

45. Gearan, *supra* note 34 (relating to the Snyder case).

said Deputy District Atty. Judy Schwaemle. The evidence, she said, 'does not proclaim him innocent. It merely introduces reasonable doubt.'⁴⁶

Finally, four cases were found where the prosecution team clearly showed acceptance of innocence.⁴⁷ Perhaps the best exemplar of this attitude was that of a Commonwealth's Attorney:

Persuaded by the evidence, Nelson County Commonwealth's Attorney Phillip Payne joined in the request. "A prosecutor has several hats to wear," Payne says. "When we think someone has done the dirty deed, we have to be as aggressive as we can. But when there is doubt, when we think we've got an innocent person, the prosecutor has to be just as much of an advocate as the defense lawyer. ... I don't mean to sound corny, but it's our duty to see that justice is served."⁴⁸

2. Jurors

There were fewer reports of juror responses. In Table 4, we present a taxonomy of juror responses reported in these twenty-five cases and their relative frequencies:

Character of Responses	Frequency of Instances
'Guilt seemed clear at trial'	2 cases
'Having second thoughts'	1 case
'Still unconvinced of innocence'	2 cases

Table 4: Juror Responses to Exonerations (1990-1999)⁴⁹

46. *DNA Tests Free Man in Jail 5 Years*, CHI. TRIB., Apr. 24, 1997, at 4 (relating to the Hicks case).

47. See *Jeffrey Holemon*, *supra* note 33 (prosecutor locating a rape kit that exonerated Holemon); *Richard Johnson*, *supra* note 33 (prosecutor agreeing to dismiss charges against R. Johnson); *Clyde Charles*, *supra* note 33 (crime laboratory retesting original sperm evidence); *Edward Honaker*, *supra* note 33 (state's expert stating he would not have testified at the trial).

48. Lafay, *supra* note 37, at A1 (relating to the Honaker case).

49. Note that there were not press reports of juror responses in every case examined in this period.

In two cases, jurors reflected upon the trial and suggested that notwithstanding their reservations, guilt seemed clear.⁵⁰ As one juror remarked of Callace's trial:

"I certainly had my doubts," one of the jurors recently said in an interview. [...] "But I felt it would have been a mistake to let someone go who had committed this crime. We didn't have a good impression of Callace, obviously. And the girl seemed so sure. She was very convincing." Still, the juror said, he was haunted by the case for a long time.⁵¹

In another case, two jurors admitted to being troubled by subsequent DNA evidence in the Hicks case and had second thoughts. They believed the trial might have had a different outcome if such evidence had been available at the time.⁵²

In two cases, jurors stressed the strength of eyewitness victim evidence at the trial and defended their original decisions to convict.⁵³ One juror explained his response:

Juror Ray Ramsey returned to the victim's testimony, as he explained his reaction to the pardon. "I guess the DNA test proves he was innocent," said Ramsey, who was self-employed during the case. "But I listened to the girl at the trial. She had stayed with him for hours during the rape. I thought she would know. She was absolutely and positively certain that he raped her. In fact, to be honest, if the trial was today, I'd probably vote the way I did the first time around."⁵⁴

Although confronting jurors with the consequences of their mistaken decisions is understandable, jurors are lay people and must

50. See Falk, *supra* note 34, at 6; *DNA Tests, Confession Set Man Free From Prison*, MONTREAL GAZETTE, Jan. 12, 1994, at B6 (juror referencing how all evidence pointed towards Bravo).

51. Falk, *supra* note 34, at 6.

52. See Cary Segall, *supra* note 37, at 2A (juror stating they were unaware that evidence impeached Hicks).

53. See Sarah Huntley, *supra* note 36, at A8 (juror stating that the witness seemed very credible); *From Inmate to Celebrity*, ATLANTA JOURNAL-CONSTITUTION, June 20, 1999, at C3 (juror stating that the witness seemed very reliable).

54. Huntley, *supra* note 36, at A8.

make their decisions based on the evidence put before them at trial. In three of the five cases reported on, jurors referred to the convincing victim evidence presented at trial as instrumental in their decisions to convict.⁵⁵

3. Victims

In Table 5, we present a taxonomy of victims' responses reported in these twenty-five cases and their relative frequencies:

Character of Response	Frequency of Instances
'Recanted accusation'	1 case
'No comment'	2 cases
'Continued belief in guilt'	5 cases
'Acceptance of exoneration'	2 cases

Table 5: Victims' Responses to Exonerations (1990-1999)⁵⁶

The most extreme response is that of a recanted accusation by a 'victim'—the 'victim' essentially says, "I made it all up." In this cohort of exonerees there was a single instance of exoneration following a recanted accusation.⁵⁷ False accusations are most commonly associated with allegations of sexual misconduct, as was the case here. Searches of law review articles in Westlaw using the search "adv: TI("false! accus!")" produced twenty-one articles, the majority of which discussed false allegations of sexual abuse of children. Psychological research has shown that false accusations are more likely to be made when the accuser is afforded anonymity, and it is perhaps significant that most jurisdictions afford children and rape complainants anonymity.⁵⁸

In two cases, the media were unable to contact victims for their responses. Rather, they were informed by their lawyers that they did

55. See Falk, *supra* note 34, at 6; Huntley, *supra* note 36 at A8; *From Inmate to Celebrity*, *supra* note 53, at C3.

56. Note that there were not press reports of victims' responses in every case examined in this period.

57. See Michael Kennedy, *DNA Test Clears Man Convicted of Rape*, L.A. TIMES, Jan. 16, 1994, at B11, 1994 WLNR 4174871.

58. See Suzanne O. Kaasa et al., *False Accusations in an Investigative Context: Differences Between Suggestible and Non-Suggestible Witnesses*, 31 BEHAV. SCI. & L. 574, 587 (2013); Lloyd W. Klemke & Gary H. Tiedeman, *Toward an Understanding of False Accusation: The Pure Case of Deviant Labeling*, 2 DEVIANT BEHAV. 261, 262 (1982).

not wish to comment on the exonerations.⁵⁹ Perhaps the only surprising thing about this finding is that refusals to comment were not more common. Our research considered mostly the gravest cases in the criminal code. For many victims, the circumstances of the crime will rank as one of the most stressful events of their lives, and the desire to ‘move on’ may be compelling. Seeking victim reactions to exonerations potentially reopens old wounds and risks revictimization. Society’s desire to help victims heal is reflected in the formalization of victim support services in states,⁶⁰ the formation of a National Center for Victims of Crime,⁶¹ and the continuing struggle to constitutionalize the rights of victims.⁶²

In five cases where victims’ views on exonerations were obtained, the victims continued to believe in the guilt of those originally convicted despite their subsequent exonerations.⁶³ Some victims were adamant in their beliefs. This is epitomized in the Mahans’ case, where the press reported the victim’s reaction as “[t]hey were guilty 13 years ago and they’re guilty today . . . I will not rest until these

59. The cases were those of Callace and Cromedy. *See generally Leonard Callace, supra* note 33 (no media reports discussing juror responses to Callace’s exoneration); *McKinley Cromedy, supra* note 33 (no media reports discussing juror responses to Cromedy’s exoneration).

60. *See, e.g.,* Massachusetts (<https://www.mass.gov/orgs/massachusetts-office-for-victim-assistance>), Virginia (<https://www.dcjs.virginia.gov/victims-services>); Washington state (<https://victimsupportservices.org/>).

61. *See* NAT’L CENTER FOR VICTIMS OF CRIMES, <https://victimsofcrime.org/> (last visited Oct. 13, 2022) (detailing the organization’s aims and work).

62. *See* Laurence H. Tribe, *In Support of a Victims’ Rights Constitutional Amendment*, 9 LEWIS & CLARK L. REV. 659, 659 (2005) (discussing the rationale for a victims’ rights amendment to the United State Constitution); 18 U.S.C. § 3771 (federal statute protecting victims’ rights afforded by the Crime Victims’ Rights Act); *Victims’ Rights*, PRETRIAL JUST, CENTER (last visited Oct. 16, 2022) (providing a useful starting point for state victims’ rights law research).

63. *See* Patricia Davis, *DNA Test Helps Unlock a Prison Cell*, WASH. POST, Apr. 29, 1993, at 6 (officer stating he agrees with victim about Snyder’s guilt); Julie DeCour, *New Trial Possible in Rape Case*, TULSA WORLD, Dec. 13, 1996, at A1 (victim remaining confident that Durham is guilty, but will not object to the exoneration); Robert K. Gordon, *DA to Recommend Dropping Rape Case Against Brothers*, BIRMINGHAM NEWS, Nov. 25, 1998, at 2, 1998 WLNR 7058768 (prosecutor agreeing with victim that the Mahans are guilty); Cary Segall, *supra* note 34, at 3A (victim remaining confident in her identification); *Bush Refuses to Pardon Inmate Despite DNA Test Evidence Indicates Texas Man’s Conviction for Rape was Mistake*, BALT. SUN., Sept. 14, 1997, at 14A (victim insisting Byrd raped her).

animals are left where they belong.”⁶⁴ However, in another case, the prosecutor stated that although the victim remained convinced of the guilt of the offender, she accepted that DNA tests had raised reasonable doubts:

Schwaemle said the evidence was still substantial and that the victim, a 26-year-old technical writer in 1990, remains confident her identification was correct. But Schwaemle said after the hearing that the victim, who has left Madison, wanted to do the right thing and understood Hicks shouldn't be prosecuted in light of the new tests.⁶⁵

Finally, in two cases, the victims wholly embraced the exonerating evidence and accepted that their original belief in the exonerees' guilt was mistaken.⁶⁶ That attitude is well exemplified in a report of a victim's reaction to Anthony Gray's exoneration: “The slain woman's widower, Michael Pellicano Sr., 54, was at yesterday's hearing and told a reporter that he bears no ill will toward Gray. ‘I do feel it was fair to let him out. . . . I really do think it was Mr. Fleming by himself who committed the crime.’”⁶⁷

4. Judges

Trial and appellate judges would not normally be expected to give media comments on a verdict or exoneration; however, our research found examples where judges have made clear their views on the true guilt or innocence of exonerees. In Table 6, we present a taxonomy of judges' responses reported in these twenty-five cases and their relative frequencies:

Character of Responses	Frequency of Instances
‘Apologetic acceptance’	1 case
‘Acceptance of innocence’	1 case
‘Possibly mistaken’	1 case
‘Hostile rejection’	4 cases

64. Robinson, *supra* note 34, at 1.

65. Segall, *supra* note 34, at 3A.

66. See *Victim Tells Court She Wanted Man Released After DNA Test*, DAILY PRESS (Va.), Feb. 28, 2002, at C3 (victim advocating for Charles' release); Gowen, *supra* note 34, at B01.

67. Gowen, *supra* note 34, at B01.

Table 6: Judicial Responses to Exonerations (1990-1999)⁶⁸

There was a single instance of a judge offering a personal apology from the bench:

I deeply regret I found you guilty of this offense," Circuit Judge James M. Schreier said. The judge then took a recess, arose from the bench, paused with his back to the courtroom and headed for chambers. . . . The judge convicted him in a bench trial in 1992 for the woman's attack, but a jury later found him not guilty of the girl's rape.⁶⁹

In another case, a judge showed clear acceptance of a defendant's innocence by immediately freeing him from custody (despite having no authority to do so) and co-signing a letter along with the district attorney and sheriff petitioning the governor for a pardon.⁷⁰ In a third case, a judge confessed to having doubts about a convicted man's guilt.⁷¹ He thought the case warranted further examination saying, "I believe, because of my experience in the Bauer case, there deserves to be a closer look."⁷²

Possibly the most troubling cases are those where judges were obstructive, hostile, or openly scoffed at claims of innocence. In four cases, circuit judges exhibited varying degrees of skepticism of exonerating evidence.⁷³ The most measured comments were those

68. Note that there were not press reports of judicial responses in every case examined in this period.

69. Lehmann, *supra* note 35, at 3 (referencing the case of R. Johnson).

70. See Makeig, *supra* note 34, at a29 (after receiving the exonerating DNA report, the district attorney asked Governor Bush to pardon Kevin Byrd); John Makeig, *After 12 Years, DNA Clears Inmate in Rape Case*, HOUS. CHRON., Jul 29, 1997, at a1, 1997 WLNR 6615589 (District Judge Shaver signed a letter asking Governor Bush to pardon Kevin Byrd because of an exonerating DNA test).

71. The case was that of Bauer. See Bohrer, *supra* note 35.

72. *Id.*

73. See Ronald Jones, *supra* note 33 (circuit judge refused to allow DNA testing saying, "What issue could possibly be resolved by DNA testing?"); Donald Reynolds, *supra* note 33 (circuit judge denied the request for DNA testing on the grounds he did not believe there was enough information available to substantiate the validity of the test); Billy Wardell, *supra* note 33 (circuit judge denied the request for DNA testing on the grounds he did not believe there was enough information available to substantiate the validity of the test); Anthony Hicks, *supra* note 33 (despite the inconclusiveness of the DNA, a jury found Mr. Hicks guilty).

reported on appeal of the trial court judge's refusal to grant DNA tests:

The trial judge stated "I do not believe that there is enough information available to either substantiate the validity of this test and the probative value of this test. * * * [A]s it stands right now I believe it is still in its embryonic stage. . . . Before pronouncing sentence, the trial judge noted the armed robbery of J.C. and the attempted armed robbery of C.H. The trial judge then stated: "You weren't satisfied with that. You were going to have some more fun with some white girls."⁷⁴

More overtly hostile were the remarks of Cook County Circuit Judge John E. Morrissey regarding Ronald Jones's attempts to obtain DNA testing as reported in the Chicago Tribune:

"What issue could possibly be resolved by DNA testing?" Cook County Circuit Judge John E. Morrissey asked during a 1994 hearing. When reminded at a later hearing that prosecutors had contended during the trial that semen found in the victim's body was left there by Jones, Morrissey retorted: "Save arguments like that for the press. They love it. I don't."⁷⁵

In all, the reactions of judges were not substantially different to those of prosecutors described above.

5. Governors

Perhaps surprisingly, the responses of state governors to petition for pardons were both the most consistent and most impartial of all stakeholder responses reported by the media. However, some surprise is expressed because all governors are politicians but only a few are lawyers. Exonerations represent a failure of due process to convict perpetrators and it might be thought that an exoneration was an event from which a governor might manufacture political capital if so minded.

Reports of responses by state governors were found in four cases and all might be classed as being expressed in ostentatiously, cautious

74. See *Illinois v. Wardell*, 595 N.E.2d 1148, 1151 (Ill. App. Ct. 1992).

75. See *Mills*, *supra* note 35, at 1.

terms.⁷⁶ Representative comments were reported of Texas Governor George W. Bush in Salazar's case: "I feel strongly that the courts must review legal issues, including chain of custody and the validity of evidence, before I act," the governor said. "The new DNA evidence was reviewed by a court, and the court found Ben Salazar innocent."⁷⁷

C. Responses to Exonerations 2010-2019

The overall analysis of responses performed in Subsection B above was repeated for this data set. In twenty out of the twenty-five exonerations examined (80%),⁷⁸ the media reported responses of the

76. See *Kevin Byrd*, *supra* note 33 (despite incontrovertible proof of Kevin Byrd's innocence, Governor Bush only pardoned Mr. Byrd after a court validated the new evidence.); *Edward Honaker*, *supra* note 33 (after rounds DNA testing by the Forensics Science Associates, the test showed Mr. Honaker's innocence, Governor granted Mr. Honaker's petition for clemency); *Ben Salazar*, *supra* note 33 (after a third round of DNA testing and a recommendation from the Texas Board of Pardons and Paroles, Governor Bush pardoned Mr. Ben Salazar); *Walter Snyder*, *supra* note 33 (after two blood test by the Center for Blood Research and FBI confirming the result of Mr. Snyder's innocence, the Governor pardoned him.).

77. See *Man Convicted of Rape is Pardoned by Bush - He's Ruled not Guilty After DNA Evidence Studied*, DALL. MORNING NEWS, Nov. 21, 1997, at A26, 1997 WLNR 6675982.

78. See Maurice Possley, *Clemente Aguirre-Jarquín*, NAT'L REGISTRY OF EXONERATIONS (Jan. 28, 2020), (this and the following examples can be found at <https://www.law.umich.edu/special/exoneration/Pages/>); Maurice Possley, *Jermaine Arrington*, NAT'L REGISTRY OF EXONERATIONS (June 2012); Maurice Possley, *David Ayers*, NAT'L REGISTRY OF EXONERATIONS (Mar. 2, 2022); Maurice Possley, *Nevest Coleman*, NAT'L REGISTRY OF EXONERATIONS (June 23, 2018); Maurice Possley, *Darryl Fulton*, NAT'L REGISTRY OF EXONERATIONS (July 23, 2018); Maurice Possley, *Robert Dewey*, NAT'L REGISTRY OF EXONERATIONS (Nov. 27, 2015); Maurice Possley, *Dion Harrell*, NAT'L REGISTRY OF EXONERATIONS (Jan. 21, 2021); Maurice Possley, *Darryl Howard*, NAT'L REGISTRY OF EXONERATIONS (Aug. 31, 2022); Maurice Possley, *Dwayne Jackson*, NAT'L REGISTRY OF EXONERATIONS (June 2012); Maurice Possley, *Clifford Jones*, NAT'L REGISTRY OF EXONERATIONS (Aug. 22, 2018); Maurice Possley, *Eric Kelley & Ralph Lee*, NAT'L REGISTRY OF EXONERATIONS (July 26, 2022); Maurice Possley, *Nicholas McGuffin*, NAT'L REGISTRY OF EXONERATIONS (July 21, 2020); Maurice Possley, *Christopher Miller*, NAT'L REGISTRY OF EXONERATIONS (Mar. 20, 2022); Maurice Possley, *Michelle Murphy*, NAT'L REGISTRY OF EXONERATIONS (Oct. 10, 2020); Maurice Possley, *Michael Phillips*, NAT'L REGISTRY OF EXONERATIONS (July 8, 2021); Maurice Possley, *Horace Robert*, NAT'L REGISTRY OF EXONERATIONS (Aug. 25, 2021); Maurice Possley, *Johnny Tall Bear*, NAT'L REGISTRY OF EXONERATIONS (Mar.

prosecuting team comprising police, medical examiners, prosecutors, or state appellate attorneys.⁷⁹ In eight of the exonerations (32%),⁸⁰ the media sought the responses of the victims of the original crimes.⁸¹ In five cases (20%),⁸² the responses of judges were noted.⁸³ However, in no cases were responses found from jurors or state governors.⁸⁴ In every category of respondent, it was found that fewer responses were sought or reported during the decade of 2010-2019. Such a picture is likely too consistent to be no more than a statistical anomaly resulting from the relatively small sample size of twenty-five exonerations in each decade studied. The likely causes of this are discussed later.⁸⁵

1. The Prosecution Team

Prosecutorial responses were a little more evenly distributed across categories but there was still an overall slant toward

11, 2019); Maurice Possley, *Luis Vargas*, NAT'L REGISTRY OF EXONERATIONS (July 2, 2019); Maurice Possley, *John Watkins*, NAT'L REGISTRY OF EXONERATIONS (June 2012); Maurice Possley, *Derrick Williams*, NAT'L REGISTRY OF EXONERATIONS (June 2012); Ken Otterboug, *Larry Williams*, NAT'L REGISTRY OF EXONERATIONS (Oct. 11, 2015).

79. See generally Gregory Pratt, *2 Inmates Will Have Longer Wait for DNA Results in Case. They were Hoping to be Cleared in 1994 Rape, Murder*, CHI. TRIB., Nov. 9, 2017, at 7 (the Chicago Tribune published that the state attorneys were close to reaching a recommendation in the case but are waiting for additional test result); *Rape Case Spurs Debate About DNA*, ARIZ. REPUBLIC, Jan. 21, 2011, at B1 (the Arizona Republic newspaper published prosecutors claim Mr. Watkins still could have committed the crime despite the exonerating DNA test).

80. See *Jermaine Arrington*, *supra* note 78; *Sedrick Courtney*, *supra* note 78; *Darrin Hill*, *supra* note 78; *Daryl Holloway*, *supra* note 78; *Michael Phillips*, *supra* note 78; *Ernest Sonnier*, *supra* note 78; *Luis Vargas*, *supra* note 78; *Derrick Williams*, *supra* note 78.

81. See generally Dan Morse, *After 15 Years in Prison, Montana Man is Cleared of Murder*, WASH. POST, Oct. 31, 2010, at C04, 2010 WLNR 25817413.

82. See *Clemente Aguirre-Jarquin*, *supra* note 78; *David Ayers*, *supra* note 78; *Nevest Coleman*, *supra* note 78; *Darryl Fulton*, *supra* note 78; *Eric Kelley & Ralph Lee*, *supra* note 78; Maurice Prossley, *Freddie Lawrence & Paul Jerkins*, NAT'L REGISTRY OF EXONERATIONS (Jan. 11, 2021), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5340>.

83. See generally *Judge Vacates Convictions in Montana Case*, MONT. NEWS LEADER (Apr. 13, 2018, 6:31 PM), <https://www.ktvq.com/news/2018/04/13/judge-vacates-convictions-in-montana-murder-case/>; Makeig, *supra* note 34, at a1.

84. See *supra* notes 78–83 and accompanying text.

85. See *infra*, Section IV.

skepticism of claims of innocence rather than acceptance of them. In two-thirds of cases, reactions tended towards rejections of actual innocence claims and only one-third towards acceptance.⁸⁶

In Table 7, we present the same taxonomy of prosecutorial responses as reported in the earlier twenty-five cases and their relative frequencies:

Character of Responses	Frequency of Instances
'Obstruction of possible exoneration'	6 cases
'Skepticism of innocence'	6 cases
'Acceptance with reservations'	3 cases
'Acceptance of innocence'	5 cases

Table 7: Prosecutorial Responses to Exonerations (2010-2019)⁸⁷

In six cases, clear evidence was found that the prosecution team had been obstructive towards attempts to exonerate convicted

86. We found twenty clear reports of responses by members of the prosecution team to exoneration claims. Twelve tended towards rejections of innocence (responses we classed as obstructive or skeptical) and six tending to acceptance (responses we classed as accepting or accepting with reservations). *See e.g., Michelle Murphy, supra* note 78 (prosecutor continued to publicly state Murphy was guilty); *Darryl Howard, supra* note 78 (prosecutor failed to disclose evidence favorable to the defense); *Eric Kelley & Ralph Lee, supra* note 78 (prosecution did not admit innocence); *Nicholas McGuffin, supra* note 78 (prosecution failed to disclose evidence favorable to the defense); *John Watkins, supra* note 78 (denied post-conviction testing twice); *Clemente Aguirre-Jarquín, supra* note 78 (judge denied petition for new trial, ultimately recused herself); *Horace Roberts, supra* note 78 (petition to test DNA denied); *David Ayers, supra* note 78 (detectives had fabricated and concealed exculpatory evidence); *Darrin Hill, supra* note 78 (prosecution did not admit innocence); *Johnny Tall Bear, supra* note 78 (prosecution would not agree to DNA testing); *Derrick William, supra* note 78 (prosecution did not admit innocence); *Larry Williams, supra* note 78 (prosecution unapologetic about pressuring defendants to admit guilty); *Darryl Fulton, supra* note 78 (prosecution agreed Fulton's conviction should be vacated); *Nevest Coleman, supra* note 78 (prosecution agreed Coleman's conviction should be vacated); *Dion Harrell, supra* note 78 (prosecution asked that Harrell's conviction be vacated based on DNA evidence); *Dwayne Jackson, supra* note 78 (prosecution admitted sending an innocent man to prison); *Michael Phillips, supra* note 78 (District Attorney personally apologized to Phillips); *Luis Vargas, supra* note 78 (prosecution admitted to mistaken identification).

87. *See supra* notes 78, 80, 82 and accompanying text. Note that there were not press reports of prosecution team responses in every case examined in this period.

people.⁸⁸ In the case of Larry Williams, prosecutors seem to have abandoned their theory of the case advanced at trial and made claims of previously unmentioned co-conspirators to explain away inconvenient DNA evidence. As one reporter noted, “Court filings under then-District Attorney Ron Moore indicated his office believed the men remained guilty in Bowman's death, and his top assistant prosecutor developed new case theories to account for DNA evidence that tended to point to other suspects.”⁸⁹ In Harrell's case, prosecutors unaccountably blocked efforts to test materials:

“For a year, we were told, ‘There is no evidence, that it's lost or destroyed,’” she said. Then, in October 2014, she was told the rape kit with slides of sperm had been located and was sent to the New Jersey State Police crime lab, but the prosecutor's office would not agree for DNA testing to be performed on the slides, Potkin said. [. . .] Telephone calls to the prosecutor's office were not returned.⁹⁰

In another six cases, prosecutors were less obstructive but remained skeptical of innocence.⁹¹ In these cases, the prosecution team signaled their rejection of claims of innocence but did not actively work to hinder exoneration efforts. Reactions of this kind are problematic for exonerees because, while they have been exonerated

88. *Dion Harrell*, *supra* note 78 (laboratory analyst testified that Mr. Harrell committed the crime based on his blood type, but the analyst lied.); *Darryl Howard*, *supra* note 78 (prosecutor said this was not a sexual crime despite the half inch laceration in victim's vagina and analyst said the sperm found in one of the victims did not match Mr. Howard); *Eric Kelley & Ralph Lee*, *supra* note 78 (detectives appeared to have lied about Mr. Kelley and Mr. Lee admitting to have committing the crime); *Michelle Murphy*, *supra* note 78 (prosecutor said he believe Ms. Murphy was guilty still despite the exonerating DNA test); *Michael Phillips*, *supra* note 78; *Larry Williams*, *supra* note 78 (prosecutor continued to believe that Mr. Williams was guilty even though the commission said the evidence favor Mr. Williams innocence).

89. See Tonya Maxwell, *Trio Innocent in 2000 Murder*, THE CITIZEN-TIMES, Oct. 1, 2015, at A1, 2015 WLNR 864148.

90. See Kathleen Hopkins, *Prosecutors fight DNA Test in Rape Case*, ASBURY PARK PRESS, Jan. 10, 2015, at A1, 2015 WLNR 864148.

91. See *Clemente Aguirre-Jarquín*, *supra* note 78; *Jermaine Arrington*, *supra* note 78; *David Ayers*, *supra* note 78; *Tall Bear*, *supra* note 78; *John Watkins*, *supra* note 78; *Derrick Williams*, *supra* note 78; see generally Maxwell, *infra* note 92; *Rape Case Spurs Debate About DNA*, *supra* note 79.

by one arm of the state, their innocence continues to be put into question by others.

Typical responses of this kind are seen in the cases of Clemente Aguirre-Jarquin and John Watkins. Reports of the state attorney's response to Aguirre-Jarquin's exoneration suggest an insidious undermining of his innocence: "The Seminole-Brevard state attorney said he didn't believe the immigrant's story about finding the dead bodies of his next-door neighbors and trying to help. [. . .] There was no apology or admission of error. Archer simply said he didn't see 'a reasonable likelihood of success at trial.'"⁹² In Watkins' case, prosecutors contrived to walk back exonerating DNA evidence:

Last month, about halfway through a 14-year sentence, Watkins was released from prison in part because the test results showed the DNA did not belong to him. Nonetheless, police and prosecutors are not convinced they charged the wrong man, and they now insist that DNA evidence is not "black and white," but more a shade of gray. [. . .] Though the DNA found on the victim was not Watkins', prosecutors claim he still could have committed the crime without leaving a genetic print.⁹³

In the remaining cases, prosecutors were increasingly open to the possibility that defendants had been wrongfully convicted. In three cases, when faced with exonerating DNA evidence, prosecutors signaled only lukewarm acceptance of innocence.⁹⁴ So in the case of Coleman and Fulton, the *Chicago Tribune* noted that despite the fact that DNA evidence had cast doubt on the soundness of their convictions nearly six months previously, the head of the local convictions integrity unit regretted that the state was only "close" to reaching a recommendation in their cases.⁹⁵

92. See Scott Maxwell, *Killing Without Accuracy isn't Justice Commentary*, ORLANDO SENTINEL, Nov. 11, 2018, at 1, 2018 WLRN 34957054.

93. See *Rape Case Spurs Debate About DNA*, *supra* note 79, at B1.

94. See Coleman & Fulton, *supra* note 78; McGuffin, *supra* note 78; Vargas, *supra* note 78; see generally Pratt, *supra* note 79, at 7.

95. See Pratt, *supra* note 79, at 7.

However, in another five cases, the reactions of prosecutors to claims of innocence were more positive.⁹⁶ Perhaps the most striking example is that of Clifford Jones. International law firm Cleary Gottlieb asserted that this was believed to be the first time the Manhattan District Attorney's office had consented publicly to the vacatur of a conviction of murder.⁹⁷

2. Judges

The search for judicial reactions to exonerating evidence in 2010-2019 revealed fewer reports than for the period 1990-1999. Previously, seven instances had been found, but this time we found only five.⁹⁸ During this period no apologies were offered to exonerees in open court.

In Table 8, we present the same taxonomy of judicial responses as reported in the earlier twenty-five cases and their relative frequencies:

Character of Responses	Frequency of Instances
'Apologetic acceptance'	None
'Acceptance of innocence'	1 case
'Possibly mistaken'	3 cases
'Hostile rejection'	1 case

96. See *Christopher Miller*, *supra* note 78 (prosecutor joining defense counsel in filing joint motions to vacate the conviction); *Clifford Jones*, *supra* note 78 (prosecution agreed to vacate the convictions and dismiss the charges); *Dwayne Jackson*, *supra* note 78 (District Attorney feeling regret after office sent an innocent man to prison); *Horace Roberts*, *supra* note 78 (prosecution agreeing to vacate the conviction and immediately release Roberts from prison); *Robert Dewey*, *supra* note 78 (Assistant District Attorney joining with defense counsel to vacate the conviction).

97. See *DNA Evidence Used to Overturn Convictions for Pro Bono Client*, CLEARY GOTTLIEB (Sept. 14, 2016), <https://www.clearygottlieb.com/news-and-insights/news-listing/dna-evidence-used-to-overturn-criminal-convictions-for-pro-bono-client>.

98. There were seven defendants but five cases as two cases involved co-defendants. See Leila Atassi, *'It's over Now' for Man Who Served 10 Years in Prison/Court: Testimony Trampled on Rights*, CLEVELAND PLAIN DEALER, Sept. 13, 2011, at A1, 2011 WLNR 18292422; Gregory Pratt, *'You're Free to Go.'* Dec. 2, 2017, at 1, 2017 WLNR 37460832 (reaction delivered by judge to Coleman and Fulton informing the two they were "free to go"); *Clemente Aguirre-Jarquín*, *supra* note 78; *Freddie Joe Lawrence*, *supra* note 82; *Paul Jenkins*, *supra* note 82; *Ralph Lee*, *supra* note 78; *Eric Kelley*, *supra* note 78.

Table 8: Judicial Responses to Exonerations (2010-2019)⁹⁹

A single case was noted where the judge seemed to accept the exoneree's innocence by her remarks in open court—even if she did not actually apologize.¹⁰⁰ Addressing David Ayers, Judge Nancy Russo said, “I know prison is very hard, . . . [b]ut you look well, and you've had very good lawyers working on your behalf . . . Welcome back into the community, Mr. Ayers.”¹⁰¹

In three cases, judges were more circumspect in their remarks.¹⁰² These responses were categorized as acknowledgements that their prior convictions were “possibly mistaken”. The most cautious of these responses was that of the New Jersey three-judge panel in the appeals of Freddie Joe Lawrence and Paul Jenkins which wrote:

Our system of criminal justice fundamentally depends upon the soundness of the evidence presented to jurors at trial [. . .] When, as here, the soundness of that evidence and the resulting verdicts is seriously undermined by newly-obtained DNA evidence of third-party guilt, we cannot turn a blind eye to the revelation and the probability that defendants, who have been incarcerated since 1996, would have been acquitted.¹⁰³

Here the Court showed itself to be forthright in defense of the requirements of due process without fully committing itself to a proclamation of innocence as shown by its cautious insertion of the qualifying word ‘probability’ before the phrase ‘would have been acquitted.’

Finally, as an indication of a retreat from the previously more commonly expressed hostile rejections of possible innocence, a single case was found where a trial court judge refused to admit new DNA evidence. It was later suggested that she would use her tough-on-an-accused-murderer ruling to try to score a judicial promotion before a

99. Note that there were not press reports of judicial responses in every case examined in this period.

100. Atassi, *supra* note 98, at A1.

101. *Id.*

102. See Darryl Fulton, *supra* note 78; Eric Kelley, *supra* note 78; Freddie Joe Lawrence, *supra* note 84; Nevest Coleman, *supra* note 78; Paul Jenkins, *supra* note 82; Ralph Lee, *supra* note 78.

103. S.P. Sullivan, *New DNA Evidence ‘Seriously Undermined’ Murder Case Against 2 N.J. Men, Court Rules*, NJ.COM, Mar. 12, 2018, at 1, 2018 WLNR 7685137.

group of political appointees.¹⁰⁴ In the capital case of Clemente Aguirre-Jarquín, the defendant filed a post-conviction motion for a new trial based on newly discovered DNA evidence.¹⁰⁵ The Circuit Court denied his motion in 2013, stating that the evidence was insufficient to merit a new trial.¹⁰⁶ In reversing that decision and granting him a new trial, the Florida Supreme Court criticized the Circuit Court's decision. It observed that "the newly discovered evidence gives rise to a reasonable doubt as to his culpability" and that no longer was "Aguirre the creepy figure who appears over Samantha's bed in the middle of the night; he is now the scapegoat for her crimes."¹⁰⁷

3. Victims

In Table 9, we present the same taxonomy of victim responses as reported in the earlier twenty-five cases and their relative frequencies:

Character of Response	Frequency of Instances
'Recanted accusation'	None
'No comment'	None
'Continued belief in guilt'	4 cases
'Acceptance of exoneration'	3 cases

Table 9: Victims' Responses to Exonerations (2010-2019)¹⁰⁸

Media reports of victim responses were found in eight cases, some thirty-two percent of the total studied.¹⁰⁹ There was no recanted

104. See Maxwell, *supra* note 94, at 1.

105. See Dan Sullivan, *A Man Who's Still on Death Row*, TAMPA BAY TIMES, Sept. 8, 2013, at 4P, 2013 WLNR 22565624.

106. See *id.*

107. Aguirre-Jarquín v. State, 202 So. 3d 785, 795 (Fla. 2016).

108. Note that there were not press reports of victims' responses in every case examined in this period.

109. See Dan Morse, *supra* note 81; James Queally, *Time After Time, Luis Vargas' Efforts to Clear His Name Met Rejection*, L.A. TIMES, Nov 25, 2015, at 1, 2015 WLNR 34963596; Brian Rodgers, *Inmate Fighting to Clear His Name Leaves Jail*, HOUS. CHRON., Aug. 7, 2009, 2009 WLNR 15315484; Josh Simerman, *Cleared Man Faces His Accusers*, BATON ROUGE ADVOCATE, Sept. 11, 2013, at B1, 2013 WLNR 22669566; Bruce Vielmetti, *Another Exonerated Inmate Sues the City of Milwaukee – and His Defense Attorney*, MILWAUKEE J. SENTINEL, Oct. 7, 2019, 2019 WLNR 30382687; John

accusation among this group and two exonerees could not be contacted to comment in person.¹¹⁰

Three victims accepted that the original trial verdict was wrong and that the exonerees had produced sufficient contradictory evidence either to establish their innocence or to cast sufficient doubt on the verdict to overturn it.¹¹¹ It cannot be known exactly how a person feels when a belief they may have held for many years is overturned and they realize that an innocent person has been wrongly imprisoned. The feelings of a victim, who came to accept that their mistaken identification of the person whom they previously thought had raped them, is well illustrated by the victim's response in Michael Phillips' case. "Ms. Garza talked with the rape victim about the exonerating DNA. 'At first she was a little bit, maybe, in shock. But then, almost immediately, she started crying and said that it was terrible that Mr. Phillips had gone to prison.'"¹¹²

Some victims clearly found it difficult to believe that they were mistaken about the identity of the perpetrator of such an intimate crime as rape and that their evidence might have led to a wrongful conviction. In four cases, victims refused to recant their identifications of perpetrators and continued to adhere to their original accusations.¹¹³ The strength of their rejection of the exoneree's innocence can be gauged from the reported reaction of the victim to one exoneration: "She said that she is still adamant that Derrick

Wilkens, *A Fight for Innocence*, SAN DIEGO UNION-TRIB., Mar. 2, 2014, 2014 WLNR 5891191; Stacy Teicher Khadaroo, *Justice delayed: Texas Man First to be Cleared by DNA Review of Old Rape Kits*, CHRISTIAN SCI. MONITOR (July 25, 2014), <https://www.csmonitor.com/USA/Justice/2014/0725/Justice-delayed-Texas-man-first-to-be-cleared-by-DNA-review-of-old-rape-kits>; *You can Never Over-Push the Innocent Enough*, CITIZEN-TIMES, Apr. 29, 2011, 2011WLNR 8342462.

110. See Brian Rogers, *27 Years Wrongly Behind Bars to End / Houston Man Jailed Longer than any Exonerated Texan for a Rape He Didn't Commit*, HOUS. CHRON., July 29, 2010, at A1, 2010 WLNR 15131986 (Sonnier was not contacted although the prosecuting Assistant District Attorney reported that he was aware of the DNA development but declined to comment upon it); Wilkens, *supra* note 109 (Courtney was uncontactable).

111. See Simerman, *supra* note 109, at B1; Vielmetti, *supra* note 109.

112. Khadaroo, *supra* note 109.

113. See Richard Dymond, *18 Years Later, Victim Couldn't Bear Retrial*, BRADENTON HERALD, Apr. 6, 2011, at A1, 2011 WLNR 12072151; Morse, *supra* note 81, at C04 (victim's mother disappointed in the exoneration of Simmons); Queally, *supra* note 109, at 1 (victim remained confident in original identification of Vargas as her attacker); Wilkens, *supra* note 109 (victim did not recant her identification of Courtney).

Williams is the man that raped her,” [assistant state attorney Lon] Arend said. “She identified him in multiple photo arrays and in a live lineup and in a trial.”¹¹⁴ It is notable that, notwithstanding the strength of her conviction as to his guilt, the victim felt unable to testify at a proposed retrial of Williams.¹¹⁵

II. EXPLAINING STAKEHOLDER SKEPTICISM

Of the fifty exoneration cases reviewed—all of which were supported by DNA evidence to a greater or lesser degree—various stakeholders were resistant or actively hostile to the possibility that the exoneree had been wrongfully convicted.

We do not claim that this sample of fifty cases is a scientific one. We repeat our reservations concerning the significance of the conclusions to be drawn from a relatively small number of cases drawn randomly from reported exonerations during the relevant decades. Nevertheless, we suggest that what we have found can represent a straw in the wind. What seems clear is that increased familiarity with DNA evidence has not significantly diminished skepticism of innocence. Looking first at those most intimately invested in the accuracy of attributions of guilt—the original victims of the crimes that led to wrongful convictions—we found no greater acceptance of exonerations in later cases than earlier ones. Of ten media reports of victim reactions for the decade 1990-1999, five (50%) were of victims who adhered to their original belief in the guilt of the exoneree.¹¹⁶ In the later decade 2010-2019, we found eight media

114. Dymond, *supra* note 113.

115. Compare Dymond, *supra* note 113, at A1, with Bindu Bansinath, *Alice Sebold Apologizes to the Man Wrongfully Convicted of Raping Her*, THE CUT (Dec. 1, 2021), <https://www.thecut.com/2021/12/alice-sebold-apologizes-to-man-exonerated-in-her-rape-case.html> (novelist issued apology to man convicted of her rape but exonerated sixteen years later).

116. See Cody Ellerd, *DNA Crusaders Defend the Wrongly Imprisoned*, INTER PRESS SERV., Apr. 15, 2000 (accuser continued to insist Snyder was the rapist); Gordon, *supra* note 63, at 2 (victim remains adamant about her original belief that the Mahans were her attackers); Ginnie Graham, *Prisoner is Set Free by Science*, TULSA WORLD, Oct. 16, 2001, at 1, 2001 WLNR 11812771 (victim believes Durham was her rapist despite other evidence); Claudia Kolker, *Something to Smile About/Bush to Pardon Houston Man/DNA Clears Kevin Byrd After 12 Years in Prison*, HOUS. CHRON., Oct. 9, 1997, at A1, 1997 WLNR 6578786 (victim maintained belief Byrd raped her); Segall, *supra* note 34, at 1A (victim believing Hicks was rightfully convicted); see also *supra* Section II(B)(iii) (categorizing victim responses as ‘continued belief in guilt’).

reports of reactions of victims. Analysis of those showed that four (50%) were ones where victims retained their original belief in the guilt of the exoneree.¹¹⁷ Although numbers were small for both decades, the proportion of victim responses obtained expressing skepticism of the innocence of exonerees remained the same.

Looking next at the broader stakeholder class labelled as the 'prosecution team,' we found a greater number of responses and some divergences. During the 1990-1999 decade, twenty-four cases were discovered where reactions of members of the prosecution team were reported. In nine of these (37.5%), the team was skeptical of the exoneree's innocence.¹¹⁸ In the later decade, 2010-2019, twenty cases were discovered where reactions of the prosecution team were reported. However, twelve of these (60%) were ones that were categorized as responses being skeptical of the exoneree's innocence.¹¹⁹

117. See Dymond, *supra* note 113, at A1 (victim's mother disappointed in the exoneration of Arrington); Queally, *supra* note 109, at 1 (victim remained confident in original identification of Vargas as her attacker); Wilkens, *supra* note 109 (victim did not recant her identification of Courtney); see also *supra* Section II(C)(iii).

118. In Section II(B)(i), we assigned both categories, 'obstruction of possible exoneration' and 'skepticism of innocence,' as being skeptical of the exoneree's innocence. See Gowen, *supra* note 34, at B01; John Kennedy, *Wrongful Conviction: State Considers Changing Law to Compensate Man After 24 Years*, PALM BEACH POST, Sept. 13, 2012, at 1A, 2012 WLNR 23000984; Kennedy, *supra* note 57, at 1; Kevin McDermott, *Ex-inmate Deserves to Know Why Ryan Denied Probation Lawyer Says Although He Is Free, Alton May Seek to have Criminal Record Here*, ST. LOUIS POST-DISPATCH, July 19, 2000, at B3, 2000 WLNR 863459; Raoul V. Mowatt, *Ex-Con Hits System that Put Him on Death Row*, CHI. TRIB., Mar. 3, 2000, at 5, 2000 WLNR 8281336; Maurice Possley, *Prisoner to Go Free as DNA Clears Him in Beauty Shop Rape*, CHI. TRIB., Feb. 24, 1999, at 1, 1999 WLNR 6721651; Ronald Jones, *supra* note 33; Dale Mahan, *supra* note 33; Ronnie Mahan, *supra* note 33; Alex Rodriguez, *Lawyer in Roscetti Case Offers Forgotten a Lifeline*, CHI. TRIB., Dec. 9, 2001, at 1, 2001 WLNR 10702261 (prosecutors' beliefs of the innocence of Wardell and Reynolds); Olivia Winslow, *DNA Challenge to '84 Rape, Murder*, NEWSDAY (USA), Jan. 11, 1995, at A22, 1995 WLNR 517199.

119. See Dymond, *supra* note 113, at A1; Ann Givens, *Not guilty in 1995 murder*, NEWSDAY, June 9, 2012, at A15, 2012 WLNR 12072151; Khadaroo, *supra* note 109; Maxwell, *supra* note 94, at 1; Dan Morse, *supra* note 81, at C04; Dion Harrell, *supra* note 78; Michelle Murphy, *supra* note 78; Johnny Tall Bear, *supra* note 78; John Watkins, *supra* note 78; S. P. Sullivan, *supra* note 105; *When the eyewitness is strong, everything goes wrong*, SOUTH FLORIDA SUN SENTINEL, Apr. 17, 2020, 2020 WLNR 10989406. The categories 'obstruction of possible exoneration' and 'skepticism of

It may be significant that the proportion of reported cases where the prosecution team were skeptical increased during the decade 2010-2019. This is at variance with what we expected to find—while skepticism among victims seems to have remained unchanged, skepticism among prosecution teams seems to have increased substantially. While we have found no verifiable explanation for this, we revert to our initial observation that exonerations represent a threat to the values of the criminal justice process. While stakeholders whose primary interest is due process can see an exoneration as an ultimate exercise in vindication, this is not the case for those stakeholders whose primary concern is crime control. These are stakeholders who are likely to be heavily invested in a commitment to the reliability of criminal justice process as a guarantor of accurate outcomes. When that investment is shown to have been misplaced, we might expect a reaction manifested in terms of denial and/or continued assertion of a commitment to the integrity of the initial finding of guilt.

We referred earlier to the concepts of ‘cognitive dissonance,’ the tension that arises “when someone’s thoughts or beliefs are incompatible with their behavior,”¹²⁰ and the closely related theory of confirmation bias, the tendency to search for and interpret information in line with one’s preconceptions.¹²¹ As Tavis & Aronson’s work suggests, denials of fact or attributions of responsibility can often be explained in these terms. Professor Aviva Orenstein has suggested that similar considerations can affect the judgment of police officers and disrupt the ability of a prosecutorial team to be objective about exculpatory evidence.¹²² We suggest that our findings can fit if not bear out this conclusion and flag up two drivers, the first practical and the second psychological which in combination might ground such a cognitive tension.

In the first place, as Professor Orenstein has suggested, there are practical issues that might lead prosecutors to be skeptical of exonerations.¹²³ As she points out, issues of finality and cost can be compelling—district attorneys, police chiefs and sheriffs as elected officials are budget holders accountable for expenditures incurred.

innocence,’ as seen in Section III(C)i) are attributable as being ones skeptical of the exoneree’s innocence.

120. Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV., 401, 426 (2011).

121. *Id.* at 425–26 (discussing the new theories on psychological and cognitive challenges facing prosecutors).

122. *See id.* at 426–27.

123. *Id.* at 426.

Acceptance of the accuracy of an exoneration entails acknowledgment that not only have past expenditures been wasted but that fresh costs of investigation, prosecution, and judicial resources are likely to be incurred.¹²⁴ Structural incentives coinciding with a prosecutor's career interests are also likely to have a bearing. A successful exoneration claim after a major felony conviction will detract from a prosecutor's tally of successes, thereby calling into question her competence and diminishing her standing in the eyes of peers and superiors.¹²⁵ Moreover, to the extent that the exoneration discloses evidence of poor investigative practice, prosecutorial misconduct and compromised forensic evidence, there are implications for working relationships which are likely to be disrupted as team members engage in apportioning blame.¹²⁶ When prosecution team stakeholders make statements supportive of an exoneration, they will be effectively critiquing their office's own behavior. This is unlikely to

124. *Id.* at 420. For an indication of the scale of some of these costs, see Priscillia Hunt et al., *The Price of Justice: New National and State-Level Estimates of the Judicial and Legal Costs to Taxpayers*, 42 AM. J. CRIM. JUST. 231, 232 (2017) (discussing such costs are incurred twice over if a crime has to be reinvestigated and re-prosecuted).

125. See Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 CORNELL J.L. & PUB. POL'Y 53, 77 (2012) ("[C]areer-advancement structures in prosecutors' offices increase the danger of prosecutorial misconduct. A prosecutor protective of a 'win-loss' record has an incentive to commit misconduct, to cut constitutional and ethical corners in order to secure a guilty verdict in a weak case, to make an incorrect decision about the law, and to win at all costs.").

126. See generally Eric Gonzalez, *Reckoning with Wrongful Convictions: Lessons Learned from an Examination of 25 Wrongful Convictions in Brooklyn, New York*, 35 CRIM. JUST. 4 (2021) (discussing a prosecutor's perspective on causes of wrongful convictions); *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <https://innocenceproject.org/causes-wrongful-conviction/> (noting that of the first 325 DNA exonerations, 47% implicated unvalidated or improper forensics) (last visited Oct. 11, 2022); *New Report: Prosecutorial Misconduct and Wrongful Convictions*, INNOCENCE PROJECT, <https://innocenceproject.org/new-report-prosecutorial-misconduct-and-wrongful-convictions/> (reporting that sixty-five of the first 255 DNA exonerations raised allegations of prosecutorial misconduct and that 18% of such claims resulted in overturned convictions) (last visited Oct. 11, 2022); *What You Need to know About Police Misconduct and Wrongful Convictions*, INNOCENCE PROJECT, <https://innocenceproject.org/police-misconduct-wrongful-convictions-what-you-should-know/> (noting that police officers committed misconduct in nearly 37% of exoneration cases between 1989–2020, according to a recent report by the National Registry of Exonerations) (last visited Oct. 11, 2022).

be welcomed by other members of the team or senior colleagues who may prefer silence or skepticism as the better course of action.

A second factor we might consider is the role of personality. Research indicates that the INTJ (Introverted, Intuitive, Thinking, Judging) personality profile in the Myers-Briggs Type Indicator® (“MBTI”) is found five times more common among lawyers than it is found generally.¹²⁷ The suggestion is that those with the INTJ profile will typically become stressed in situations where their competence is challenged.¹²⁸ Legal teams involved in the original prosecution are unlikely to accept with equanimity claims of actual innocence after conviction that challenge their competence.¹²⁹ Moreover, it seems that the legal profession is attractive to and will recruit individuals with a propensity to view the world with a high degree of skepticism.¹³⁰ Research by Dr. Larry Richard, using another proprietary tool, the Caliper Profile, has assessed the personality profiles of more than 1000 lawyers.¹³¹ His findings reported that the incidence of the trait called “Skepticism” in the profile was consistently the highest scoring trait among lawyers tested, averaging around the 90th percentile.¹³² This might suggest support for the proposition that prosecutors are likely to be skeptical about claims and findings of actual innocence. Caliper asserts that its profiles are ‘scientifically validated’ and explains that claim.¹³³ However, it should be noted that the tool is principally designed for use as a predictor of salesmanship

127. See Brian Dalton, *Deviations from the Norm: The Lawyer ‘Type’ and Legal Hiring*, ABOVE THE LAW (May 20, 2014, 4:41 PM), <https://abovethelaw.com/2014/05/deviations-from-the-norm-the-lawyer-type-and-legal-hiring/>.

128. *INTJ: MBTI® Personality Profile*, THE MYERS-BRIGGS COMPANY, <https://eu.themyersbriggs.com/en/tools/MBTI/MBTI-personality-Types/INTJ> (last visited Oct. 11, 2022).

129. However, as satisfying as this may be, the MBTI has been criticized because of its perceived lack of validating data. See, e.g., David J. Pittenger, *Measuring the MBTI... and Coming Up Short*, 54 J. CAREER PLAN. & EMP. 48, 51 (1993).

130. See *id.*

131. See Dr. Larry Richard, *Herding Cats: The Lawyer Personality Revealed*, LAWYERBRAIN, https://www.lawyerbrain.com/sites/default/files/caliper_herding_cats.pdf (discussing the various personality traits that distinguish lawyers from the public) (last visited Oct. 26, 2022); see also *The Caliper Profile*, CALIPER, <https://calipercorp.com/caliper-profile/> (detailing the tool and its uses) (last visited Oct. 26, 2022).

132. Richard, *supra* note 131.

133. See Eric Baker, *What We Mean When We Say Caliper Assessments Are ‘Scientifically Validated,’* CALIPER (May 22, 2018), <https://calipercorp.com/blog/what-we-mean-when-we-say-caliper-assessments-are-scientifically-validated/>.

capabilities—although it can be argued that lawyers sell arguments rather than products.¹³⁴

CONCLUSION

This Article began with the intent of testing a hypothesis that early public and professional unfamiliarity with DNA evidence would be evidenced by increased stakeholder skepticism towards exonerations during the decade 1990-1999 when compared with attitudes of similar stakeholders to exonerations during the decade 2010-2019. No evidence for any such disparity was found. Analysis of stakeholder responses to exonerations revealed a range of attitudes across all classes. However, only one group was notable for its significantly increased hostility to exonerations—prosecutors. We mooted a range of possible explanations but have not been able to offer definitive answers. However, a common factor in these explanations is the personal investment many prosecutors make in advancing their theories of the case. When that investment is shown to have been misplaced, we suggest that the concepts of cognitive dissonance and confirmation bias can offer plausible explanations for continuing commitments to the guilt of an exoneree.

We conclude this Article with the following observations. As we noted earlier, the role of DNA evidence in securing exonerations appears to have declined¹³⁵ as probative DNA evidence in major felony prosecutions is now tested before trial.¹³⁶ The effect has been that the nature of exonerations has changed. In a 2016 short article, The National Registry of Exonerations notes that until 2008 DNA exonerations were mostly sexual assault cases. More recently, such exonerations are increasingly about rape-murder, as persons convicted of these offenses are likely to still be in the system.¹³⁷ In

134. See CALIPER, *The Trusted Choice for Sales Selection*, <https://caliper corp.com/sales/> (last visited Oct. 10, 2022).

135. See Laura Sullivan, *National Exonerations on the Rise, and Not Just Because of DNA*, NPR (Feb. 4, 2014, 3:47 AM), <https://www.npr.org/2014/02/04/271120630/exonerations-on-the-rise-and-not-just-because-of-dna?t=1640702853705> (“Only one-fifth of the exonerations last year relied on newly tested DNA. More than 30 percent occurred because law enforcement agencies reopened a long-closed case or handed over their records to someone else who wanted to take a look.”); see also *Changes in DNA Exonerations Over Time*, NAT’L REGISTRY OF EXONERATIONS 3 (April 18, 2016), https://www.law.umich.edu/special/exoneration/Documents/Changes_In_DNA_Exonerations.pdf.

136. NAT’L REGISTRY OF EXONERATIONS, *supra* note 135, at 2.

137. *Id.*

general terms, however, the availability of DNA testing has given the criminal justice system what has been described as a “sharp, cold shower”.¹³⁸ The knock-on effect of DNA-based exonerations, says law professor Samuel Gross, “has made us realize that we have to re-examine other cases as well... [T]hat was a serious wake-up call, because that showed we made mistakes in a lot of cases where it never occurred to anybody that a mistake had been made.”¹³⁹

Several counties have now set up “conviction integrity units” or “conviction review units” to review the conduct of old cases. At the date of writing, the National Registry of Exonerations lists ninety-five such units, forty-two of which have recorded at least one successful exoneration.¹⁴⁰ As Scott Burns, the executive director of the National District Attorneys Association, has pointed out, there are obvious resourcing issues which limit the capacity to develop these units. Nevertheless, the increasing attention paid to review of old cases builds public trust and can only enhance confidence in the integrity of convictions.¹⁴¹ As the numbers of exonerations based on DNA evidence continue to decline, the effect on stakeholder responses remains to be seen.

138. See Laura Sullivan, *supra* note 135 (quoting Samuel Gross).

139. *Id.*

140. Most of these units are located within District Attorney or State Attorney offices, the oldest recorded unit being that of Santa Clara County, founded in 2002, see *Conviction Integrity Units*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> (last visited on Oct. 14, 2022). Data extracted on June 27, 2022, and showing exonerations recorded as of June 14, 2022. The Santa Clara County exonerations link revealed six exonerations recorded as of June 14, 2022. See *id.*

141. Laura Sullivan, *supra* note 135.