

LEGAL AND SOCIAL EXONERATION: THE CONSEQUENCES OF MICHAEL TONEY'S WRONGFUL CONVICTION

Elizabeth S. Vartkessian & Jared P. Tyler***

I. INTRODUCTION

In the last twenty years increasing scholarly attention has been devoted to understanding the causes and consequences of wrongful convictions.¹ This research has added enormously to our collective understanding of how the criminal justice system can sometimes fail to detect, convict, and punish the responsible party and instead focus its limited resources on securing the conviction and sentence of an innocent person.² Our ability to identify some wrongful convictions has been greatly assisted by advances made in DNA technology.³

The use of DNA evidence has been pivotal to the discovery and release of numerous innocent men and women from prison.⁴ Yet, as other commentators have pointed out, reliance on DNA evidence to designate innocence has confused our understanding of what it means to be innocent, wrongfully convicted, and exonerated.⁵ The use of DNA evidence to prove innocence has likely given some members of the public pause when considering whether an accused

* Elizabeth S. Vartkessian, Ph.D. is a visiting researcher at the University at Albany in the School of Criminal Justice. The authors wish to thank Dr. Sandra Westervelt, Dr. Kimberly Cook, Robert Norris, Jonathan Kerr, and Brandon Moon for their comments and feedback on earlier drafts. All mistakes are our own.

** Jared P. Tyler is a capital defense attorney in private practice in Houston, Texas. The authors worked on Mr. Toney's defense team and dedicate this article to him.

¹ See Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825 (2010) (reviewing literature related to miscarriages of justice); Richard A. Leo, *Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction*, 21 J. CONTEMP. CRIM. JUST. 201 (2005) (analyzing wrongful conviction scholarship to date).

² See Gould & Leo, *supra* note 1; Leo, *supra* note 1.

³ See generally Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005) (explaining how the use of DNA evidence has contributed to the increased rate of exonerations nationwide).

⁴ *Id.*

⁵ Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1160–61 (2010/2011).

is guilty.⁶ However, it has also made society increasingly expectant of such proof in relation to claims of innocence.⁷ This is concerning since most criminal cases do not actually involve DNA evidence.⁸ Moreover, the emphasis on DNA has, in some cases, made it more difficult for those who have been wrongfully convicted and eventually exonerated without the benefit of such evidence to obtain social acceptance of their innocence.⁹ For those who have been released due to other factors such as the use of junk science, eye witness misidentification, or prosecutorial misconduct,¹⁰ members of the communities to which they return may continue to call into question their innocence in spite of their exoneration.¹¹

Researchers are just beginning to investigate the unique set of challenges facing the exonerated as they attempt to rebuild their lives after release.¹² In particular, pioneering research has identified similarities in the experiences of the exonerated and victims of state harm.¹³ Such a comparison helps to clarify how the state can play a central role in creating and intensifying the

⁶ *Id.* at 1188–89.

⁷ See generally Paul R. Brewer & Barbara L. Ley, *Media Use and Public Perceptions of DNA Evidence*, 32 SCI. COMM. 93 (2010) (discussing the media's influence on the increasing importance of DNA evidence in convictions or acquittals).

⁸ See Gross et al., *supra* note 3, at 531. In addition, even in cases in which DNA evidence is present, many states allow for the destruction of such evidence within a relatively short period of time. See Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1240–41 (2005); see also *Non-DNA Exonerations*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/non-dna-exonerations.php> (last visited Mar. 23, 2012) (“These cases underscore a critical point: DNA testing alone cannot overturn most wrongful convictions. In fact, experts estimate that DNA testing is possible in just 5–10% of all criminal cases.”).

⁹ See Robert J. Norris, *Assessing Compensation Statutes for the Wrongly Convicted*, 23 CRIM. JUST. POL'Y REV. 1, 4 (Forthcoming 2012, Published Online 2011). This is especially true in jurisdictions which link restitution for a wrongful conviction to the presence of DNA evidence as proof of innocence. See *id.* at 13.

¹⁰ See Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 929, 932–33 (2008).

¹¹ This is not to say that those who have been exonerated with DNA evidence always return to communities that accept their exoneration as indicative of their factual innocence. See TIM JUNKIN, BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA 261–62 (2004). Mr. Bloodsworth was treated harshly by a number of members of the community who taunted him after his release. *Id.*

¹² Sandra D. Westervelt & Kimberly J. Cook, *Coping with Innocence after Death Row*, 7 CONTEXTS 32, 33 (2008) [hereinafter Westervelt & Cook, *Coping with Innocence*]; see also Kathryn Campbell & Myriam Denov, *The Burden of Innocence: Coping with a Wrongful Imprisonment*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 139, 141 (2004); Sandra D. Westervelt & Kimberly J. Cook, *Framing Innocents: The Wrongly Convicted as Victims of State Harm*, 53 CRIME, L. & SOC. CHANGE 259, 265 (2010) [hereinafter Westervelt & Cook, *Framing Innocents*].

¹³ Westervelt & Cook, *Framing Innocents*, *supra* note 12, at 261–64.

problems faced by the wrongfully convicted¹⁴ in the aftermath of release. Conceptualizing exonerees as victims of state harm helps to capture the array of challenges faced by those who have been wrongfully convicted and imprisoned.¹⁵ In addition, it enables a broader discussion about the responsibility of the state to protect the welfare of the exonerated by taking steps to ease their transition back into the free world. This article expands on this growing area of research into exonerees as victims of state harm by providing a case study of statements by public officials in the aftermath of exoneration. Through an analysis of public comments in the aftermath of the exoneration of Michael Roy Toney, the 134th person exonerated from death row in the United States,¹⁶ we discuss how public statements made by the state may impact public perceptions of the exoneree as wrongfully convicted, thus potentially increasing the challenges they face after exoneration and release.

In 1999, Mr. Toney was convicted and sentenced to death for killing three people in what was at that time “the longest-running unsolved bombing investigation in the [nation].”¹⁷ Nine years later, his conviction was vacated due to numerous *Brady* violations.¹⁸ The Attorney General of Texas subsequently dismissed the indictment and Mr. Toney was released from custody.¹⁹ As discussed in the next section of this article, although the indictment was dismissed because there was no credible evidence of Mr. Toney’s guilt, the

¹⁴ We use the phrase “wrongfully convicted” interchangeably with “innocent.” However, we do not mean to suggest that only those who are innocent can be wrongfully convicted. We endorse the commonly advanced view that a wrongful conviction can also be the result of legal errors which render the proceedings unfair. See Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1219 n.1 (2005) (“To the contrary, I count myself among those who use the term ‘wrongful conviction’ to refer not only to the conviction of the innocent but also to any conviction achieved in part through the violation of constitutional rights or through the use of systems and procedures that render the proceedings fundamentally unfair.”).

¹⁵ Westervelt & Cook, *Framing Innocents*, *supra* note 12, at 259, 261–64.

¹⁶ *Innocence Cases: 2004–Present*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/innocence-cases-2004-present> (last visited Mar. 23, 2012).

¹⁷ Alex Branch, *Death Row Inmate Whose Conviction was Overturned Maintains that He is Innocent*, FORT WORTH STAR-TELEGRAM, Dec. 21, 2008, available at <http://truthinjustice.org/tony.htm>.

¹⁸ *Ex parte Toney*, No. WR-51,047-03, 2008 WL 5245307, at *1 (Tex. Crim. App. Dec. 17, 2008); *Ex parte Toney*, No. AP-76056, 2008 WL 5245324, at *1 (Tex. Crim. App. Dec. 17, 2008). Several pieces of exculpatory evidence were identified during the course of post-conviction investigations. See *infra*, Section II.B.

¹⁹ *Innocence: List of Those Freed From Death Row*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last updated Mar. 23, 2012). We endorse the criteria used by the Death Penalty Information Center (“DPIC”) in determining whether someone has been exonerated. See *id.*

nature of his exoneration and the reaction by public officials cultivated unwarranted doubt about Mr. Toney's factual innocence even after the charges against him had been dismissed.²⁰

Section two discusses how public statements made by state officials served to impede Mr. Toney's reintegration into society, providing an opportunity to examine what it means to be "exonerated." Interestingly, another individual was exonerated from Texas death row shortly after Mr. Toney on the basis of similar prosecutorial misconduct.²¹ However, the public statements made by officials in Anthony Graves' case were very different. The statements provided by public officials in Mr. Graves' case serve as a sharp contrast to those made in Mr. Toney's case, which called into question the exoneree's innocence.²² They also serve as a good example of how, in an exoneration that does not involve DNA evidence, favorable public comments by the state and the victim's family, and positive treatment by the media is needed to persuade the community of the exoneree's factual innocence.²³ This is in contrast to exonerations that involve DNA, in which factual innocence is often not called into question.

Throughout the article, we take a closer look at the tension that exists in defining factual innocence in light of a non-DNA exoneration. We argue that in addition to the need for terms such as exoneration and innocence to be more precisely—and perhaps institutionally—defined in order to better understand the extent of wrongful convictions within the criminal justice system, we must also ensure that those who have been exonerated do not continue to be victims of their wrongful conviction. With the increasing privileges given to exonerations linked to DNA evidence, practical steps should be taken to protect exonerees who have no such evidentiary support. Thus, in section three we suggest that after exoneration state officials have an obligation to abide by the same ethical rules which regulate their conduct during a criminal

²⁰ See *infra* Section II.

²¹ Anthony Graves was released from Texas death row in 2010, making him the 136th person exonerated from death row. See *48 Hours: Grave Injustice* (CBS News television broadcast Apr. 23, 2011), available at <http://www.cbsnews.com/video/watch?id=7363660n>. The charges against him were dismissed after a retrial had been ordered due to numerous *Brady* violations. See *id.*

²² See *id.*; Jeff Carlton, *Ex-Texas Death Row Inmate Freed; AG Drops Charges*, SAN DIEGO UNION-TRIB., Sept. 3, 2009, <http://www.signonsandiego.com/news/2009/sep/03/us-death-sentence-overtured-090309/?nation>.

²³ Heather Weigand, *Rebuilding a Life: The Wrongfully Convicted and Exonerated*, 18 B.U. PUB. INT. L.J. 427, 434 (2009); Frederick Lawrence, *Declaring Innocence: Use of Declaratory Judgments to Vindicate the Wrongly Convicted*, 18 B.U. PUB. INT. L.J. 391, 397 (2008).

investigation. When an indictment has been dismissed and a person released from prison, the state should not be free to invite undue speculation about an exoneree's innocence, but instead should have the same obligation to respect the constitutional presumption of innocence as it applies in any other criminal case.²⁴ Accordingly, we suggest that while the use of state bar grievances and the pursuit of defamation claims against state officials and media outlets who have failed to protect the social aspect of exoneration might be useful tools in curbing the continued victimization of exonerees by the state in individual cases, states should afford affirmative protections to the exonerated. We also suggest that given the growing number of known wrongful convictions, additional empirical research into the responses of the state and coverage of media in the aftermath of exoneration ought to be conducted in order to better understand the nature and extent of the harm caused to the exonerated in the aftermath of release.

II. WRONGFULLY CONVICTED AND EXONERATED

What does it mean to be exonerated? At its most basic level exonerate means to unload.²⁵ The concept of unloading or unburdening is related to the concept of responsibility. A person who is released from carrying a burden can no longer be said to be responsible or accountable for it.²⁶ Likewise, in the law a person who is exonerated can no longer be said to be responsible for the act they were once accused of committing.²⁷ While there are variations of the definition, we suggest that given the etymology of the term, the definition set forth by the Death Penalty Information Center ("DPIC") is most closely related to the principal meaning of the word—the removal of responsibility for an act that a person was once accountable for.²⁸ DPIC includes cases in which a person has either: (a) been acquitted of all charges related to the crime that placed them on death row, (b) had all charges related to the crime that placed them on death row dismissed by the prosecution, or (c)

²⁴ Findley, *supra* note 5, at 1163 ("By the same token, once a court or executive does vacate a conviction based on evidence of innocence, unless and until the person is convicted again, claims that the person is actually guilty are also meaningless, and indeed inappropriate from prosecutors who, having failed to prove guilt, have a duty to respect the constitutional presumption of innocence.").

²⁵ Margery Bedford Naylor, *Epistemic Justification*, 25 AM. PHIL. Q. 49, 50 (1988).

²⁶ Oswald A. J. Mascarenhas, *Exonerating Unethical Marketing Executive Behaviors: A Diagnostic Framework*, 59 J. MARKETING 43, 43 (1995).

²⁷ BLACK'S LAW DICTIONARY 657 (9th ed. 2009).

²⁸ See *Innocence: List of Those Freed From Death Row*, *supra* note 19.

been granted a complete pardon based on evidence of innocence.²⁹

Critically, the criteria outlined above only speak to the legal aspects of exoneration. However, as the origins of the word indicate, to become unburdened is to leave liability behind. Thus, while current conceptions of exoneration revolve around how best to classify whether a wrongfully convicted person can rightly be viewed as an exoneree, there is a social element to exoneration which is not codified and often forgotten.

A. *From Suspect to Wrongfully Convicted*

On Thanksgiving Day in 1985, a briefcase containing a pipe bomb was left on the porch of a trailer home near Lake Worth, Texas.³⁰ The residents of the trailer home opened the briefcase, resulting in an explosion that killed three family members.³¹ The Bureau of Alcohol, Tobacco, and Firearms (“ATF”), who had jurisdiction over the case, surmised the bomb had been placed at the trailer by mistake and was perhaps intended for a different trailer.³² After briefly focusing on a troubled teenage suspect who was rumored to have boasted about delivering the bomb, the investigation ran out of leads and tapered off in 1987.³³

At the time the bombing occurred, Michael Toney, who was not a suspect during the initial investigation,³⁴ was then aged nineteen and living with his girlfriend, Kim, twenty-five miles away. Mr. Toney worked construction jobs and committed petty thefts with his then good friend Chris.³⁵ Chris and Mr. Toney subsequently had a falling out and parted ways, not seeing each other again until Mr. Toney was being tried for capital murder fourteen years later. Mr. Toney and Kim married in early 1986, but were divorced within three years.³⁶

After the Oklahoma City bombing in 1995,³⁷ the ATF redoubled

²⁹ *Id.*

³⁰ Branch, *supra* note 17.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Terror Hits Home: The Oklahoma City Bombing*, FBI, <http://www.fbi.gov/about-us/history/famous-cases/oklahoma-city-bombing> (last visited Mar. 23, 2012). The bombing of the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995 resulted in the deaths of 168 people and injured over 500 others. Kevin Johnson, *McVeigh Witnesses Chosen*, USA TODAY, Apr. 20, 2001, available at 2001 WLNR 3780591.

its efforts on solving outstanding bombing cases.³⁸ It put together a task force consisting of investigators from the ATF, the Texas Department of Public Safety, and the Tarrant County District Attorney's Office. The renewed investigation offered a reward for information, and soon began receiving tips pointing them back to the original suspect the ATF had investigated in 1986–87. In 1997, the Tarrant County District Attorney began grand jury proceedings against this suspect. Many of the suspect's friends and associates from ten years earlier were subpoenaed to testify. One such associate was an individual named Bennie, who was in prison at that time and had previously told investigators that he had been with the suspect on the evening of the bombing.

Mr. Toney was also in prison at that time for burglary convictions.³⁹ Mr. Toney and Bennie's paths crossed in 1997 at a prison in Henderson, Texas when Mr. Toney was being bench warranted.⁴⁰ At the time, Bennie had recently been returned from the custody of the ATF task force where he had been taken for further questioning and polygraph evaluation concerning the Thanksgiving Day bombing, information about which he relayed to Mr. Toney.

Mr. Toney was an intelligent man who often offered his services as a jail house lawyer, assisting other inmates with their legal cases. One inmate with whom Mr. Toney was housed in county jail during the pendency of his bench warrant, Charles, was particularly desperate to be released.⁴¹ In an effort to help Charles, Mr. Toney suggested that he could probably obtain his release by offering information on unsolved crimes to the authorities in exchange for his freedom.⁴² Mr. Toney conveyed to Charles information he had learned about homicides he believed were open and being actively investigated, one of which was the Thanksgiving Day bombing.⁴³

Charles used the information Mr. Toney had provided him and secured his release.⁴⁴ He also, however, gave the authorities Mr. Toney's name as the person responsible for the crimes he described,

³⁸ See Dave Michaels, *Man Held in '85 Bombing that Killed 3 in Tarrant He is First Suspect in Case that Confounded Officials*, DALLAS MORNING NEWS, Dec. 5, 1997, at 29A.

³⁹ Branch, *supra* note 17.

⁴⁰ Bench warrants are orders issued by judges in Texas directing that prison authorities produce a prisoner at a particular place and time. See 13 TEX. JUR. 3D CONTEMPT § 59 (2012). Prisoners are often transferred from state prisons to county jails when bench warranted.

⁴¹ Branch, *supra* note 17.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

saying Mr. Toney had confessed to him.⁴⁵ He signed a statement blaming Mr. Toney for three different homicides, including the Thanksgiving Day bombing.

The task force quickly investigated Mr. Toney's background.⁴⁶ His ex-wife, Kim, told them that on Thanksgiving in 1985 she, Mr. Toney, and his best friend Chris went to a nature preserve in Lake Worth to do some fishing and stopped on the way at a location near the trailer that was bombed. Kim said that she saw Mr. Toney exit the truck they were in, get something out of the bed of the truck, and run in the direction of the trailer park. As he "disappeared in[to] the darkness," she "got a glimpse of Michael carrying a briefcase in his left hand."⁴⁷ Mr. Toney returned to the truck empty-handed and they proceeded to the nearby nature preserve.

Investigators then found Mr. Toney's former best friend, Chris, living in New Mexico.⁴⁸ At the time, Chris was on bond awaiting trial for a seventh drunk driving offense. When approached by investigators he denied knowing anything about a bombing by Mr. Toney.⁴⁹ He maintained that he knew nothing about the bombing when subpoenaed before a grand jury, even though he had been granted immunity with respect to his part in the crime.⁵⁰ However, after having been given a polygraph test, which he purportedly failed, Chris then gave two statements implicating himself and Mr. Toney in the bombing.⁵¹ The second statement, signed four days after the first, repeated aspects of the first statement, but contained a fuller and more detailed account. An indictment against Mr. Toney followed in December of 1997.⁵²

Mr. Toney's trial took place in 1999.⁵³ The only testimony connecting him to the offense came from Kim and Chris, but Kim's story was not particularly incriminating, other than placing Mr.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Transcript of Record at 23:62–63, *State v. Toney*, No. 0676220D (Tex. 297th Dist. May 13, 1999).

⁴⁸ Gabrielle Crist, *Witness Testifies He Kept Bombing Secret 12 Years the Man Says He Told No One His Friend Planted a Briefcase Bomb Because He Feared For His Life*, FORT WORTH STAR-TELEGRAM, May 13, 1999, available at 1999 WLNR 1384159.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Branch, *supra* note 17.

⁵³ Doug J. Swanson, *Is He Lying, or Were They? Man Says Conviction in Trailer Park Bombing Built on False Testimony*, DALLAS MORNING NEWS, Nov. 21, 2005, <http://dallasnews.com> (follow "DMN Story Archive" hyperlink; then search "Headline" for "trailer park bombing"; then follow "Search" hyperlink) (subscription required).

Toney near the scene of the bombing with a briefcase.⁵⁴ Rather, it was Chris' statements and testimony that provided a damning and detailed account of his and Mr. Toney's involvement.⁵⁵ In particular, Chris testified that Mr. Toney had briefly opened the briefcase showing him the bomb inside.⁵⁶ He even described the colors of the bomb's wires.⁵⁷

However, Chris' testimony was not very credible—he appeared disheveled and visibly shook on the witness stand. At one point the prosecutor interrupted his own direct examination to ask if Chris was reading from his written statement, to which he responded that he was. Even the prosecution acknowledged that Chris “was not much of a witness, in large part because of drinking”⁵⁸ which was estimated by the lead prosecutor to be “18 to 24 cans [of beer] a day.”⁵⁹ The jury was told that Chris had originally denied that he knew anything about the bombing, but the prosecution explained that these were lies and that Chris had “decided to tell the truth” after being confronted with the results of his polygraph test.⁶⁰

Mr. Toney's defense attempted to establish that there was insufficient evidence on which to convict, and that the incriminating testimony of the two witnesses against Mr. Toney was caused by their faulty memory, law enforcement coercion and manipulation, and bias against Mr. Toney.⁶¹ The defense theorized that the core events Kim and Chris recalled and about which they testified—i.e., going to a nature preserve near Lake Worth—did occur, but transpired well after Thanksgiving 1985.⁶² Mr. Toney testified in

⁵⁴ *Id.*

⁵⁵ See Crist, *supra* note 48.

⁵⁶ Swanson, *supra* note 53.

⁵⁷ Mr. Toney's counsel were not given any of the written statements of Kim or Chris in advance of their testimony. See Doug J. Swanson, *1985 Murder Case: Tarrant Withheld Evidence, DA Says Documents Favorable to Death Row Inmate; Retrial Expected in Bomb Slayings*, DALLAS MORNING NEWS, Oct. 3, 2008, <http://dallasnews.com> (follow “DMN Story Archive” hyperlink; then search “Headline” for “1985 Murder Case”; then follow “Search” hyperlink) (subscription required). The statements were only turned over after the witnesses had testified on direct examination. See *id.* Texas does not provide for discovery in the normal course of criminal prosecutions. See, e.g., TEX CRIM. PROC. CODE ANN. § 39.14(a) (West 2009). Thus, going into the trial, counsel for Mr. Toney had no idea what Kim's and Chris' testimony would be.

⁵⁸ Swanson, *supra* note 53.

⁵⁹ *Id.*

⁶⁰ Transcript of Record at 22:69, State v. Toney, No. 0676220D (Tex. 297th Dist. May 12, 1999).

⁶¹ Branch, *supra* note 17.

⁶² See *id.* The defense had documentary evidence from the ATF itself which reflected that Chris had purchased two rifles—one of which was used to shoot a beaver at the nature preserve—and that these rifles had not been purchased until *after* Thanksgiving. See *id.*

his own defense about how he learned about the bombing and had provided this information to Charles to use to secure his release.⁶³ The defense also presented Bennie's testimony corroborating Mr. Toney's account that Bennie knew and had shared with Mr. Toney information about the Lake Worth bombing.⁶⁴

Despite the weaknesses in the prosecution's case, the evidence presented to the jury was surprisingly enough for them to convict Mr. Toney of the crime.⁶⁵

B. Post-Conviction Discoveries

In 2008, the Texas Court of Criminal Appeals vacated Mr. Toney's conviction based on a plethora of material information favorable to his case, which the prosecution had suppressed, relating to the task force's investigation and the credibility of its witnesses and their accounts.⁶⁶ This information was discovered in 2006 when post-conviction counsel for Mr. Toney obtained Department of Public Safety ("DPS") investigation records that had never before been disclosed.⁶⁷ These documents contained narratives of task force interviews with witnesses, including Kim and Chris that destroyed their credibility.⁶⁸ We describe some, but by no means all, of this evidence as it relates to these two prosecution witnesses in order to demonstrate the nature of the evidence on which Mr. Toney's eventual exoneration was secured.

Kim had been presented to the jury as a witness whose memory was pristine. Her recall was so good that she could, in fact, recall exactly what sweater she wore on Thanksgiving Day in 1985.⁶⁹ However, it was revealed after trial that she had suffered memory loss as a result of her exposure to toxic chemicals in the first Gulf

⁶³ *Id.* Charles was never called by either side. *Id.* While he had quickly recanted his statement implicating Mr. Toney in the media, he feared retaliation by the state for having provided false information to the authorities, and could therefore not be relied upon by the defense to tell the truth at trial. *Id.* He did eventually provide sworn statements to Mr. Toney's counsel in post-conviction proceedings where he recanted his earlier implication of Mr. Toney. Swanson, *supra* note 53.

⁶⁴ Swanson, *supra* note 53.

⁶⁵ *Id.*

⁶⁶ Branch, *supra* note 17.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Selwyn Crawford, *Toney Guilty of Murder: Execution Sought in Bomb Deaths*, DALLAS MORNING NEWS, May 21, 1999, <http://dallasnews.com> (follow "DMN Story Archive" hyperlink; then search "Headline" for "Toney guilty of murder"; then follow "Search" hyperlink) (subscription required).

War.⁷⁰ The DPS records showed that Kim, in her initial account of that evening to investigators, never told them that she recalled Mr. Toney leaving the truck with a briefcase and returning without one.⁷¹ It was not until three days after giving her initial account that Kim “recalled” this fact.⁷² The records reflected that this memory was in fact only produced after the task force had called in an ATF specialist to perform a cognitive interviewing technique, and possibly hypnosis, on Kim.⁷³ It was only after this that the detail of a briefcase in Mr. Toney’s hand was added to her story.⁷⁴

While Kim’s testimony was the product of confabulation,⁷⁵ the DPS records showed that Chris’ was the product of coercion. Chris recanted his testimony against Mr. Toney in a sworn affidavit not long after the trial.⁷⁶ When he was first approached by the task force in New Mexico he told them he had no memory of Thanksgiving Day in 1985, but his denial was not accepted.⁷⁷

⁷⁰ Branch, *supra* note 17.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ The jury never knew about Kim’s memory loss generally or that the existence of a briefcase was a late addition to her story elicited by use of a trained hypnotist. The prosecution presented Kim’s testimony to the jury, including her recollection of the briefcase, as though she had divulged it all in one piece to passive investigators. During closing argument, the prosecution argued,

She takes the initiative, she goes to the Hurst library, she gets in the microphish [sic] back there and looks it back up and says, oh, my God, oh, my God. I know what we did.

He said he was delivering contracts. I know where he went. ATF, I was there. I think I was there. I will show you in the morning. Pick me up and I will take you on the route.

I can show you where he stopped that night. I can show you where he left the briefcase. I will direct you there.

Transcript of Record at 28:64, State v. Toney, No. 0676220D (Tex. 297th Dist. May 20, 1999) (emphasis added).

⁷⁵ Adopting memories that are false in fact is not an unusual phenomenon. See Laura Beil, *The Certainty of Memory Has Its Day in Court*, N.Y. TIMES, Nov. 29, 2011, <http://www.nytimes.com/2011/11/29/health/the-certainty-of-memory-has-its-day-in-court.html?pagewanted=all>. Memory is not merely a stored perception that is discretely recalled at some later time. See *id.* In fact, memory and recall cannot be so easily disentangled. See *id.* The inferences we make while recalling can then *become* memory. See *id.* Thus, the act of recall itself affects the content of memory. See *id.* Many factors can influence what inferences get made during recall, among the most powerful being suggestion. See generally DAVID SPIEGEL, *Hypnosis and Suggestion*, in MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST 138–43 (Daniel L. Schacter ed., 1995) (discussing the power of suggestion on memory). And when suggestion is combined with stereotype or prejudice, the influence is stronger. See generally Mally Shechory et al., *Effects of Stereotypes and Suggestion on Memory*, 54 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 113 (2010) (describing a study on the interactive effect of stereotype and suggestion on accuracy of memory). Accordingly, a particularly motivated “recaller” will be very vulnerable to even subtle suggestion.

⁷⁶ Swanson, *supra* note 53.

⁷⁷ *Id.*

Investigators had just obtained a statement from Kim about a trip the three of them had taken that evening to a nature preserve, so investigators already knew what kind of story Chris would eventually remember.⁷⁸ It was just a matter of getting there.

Although Chris testified during his first encounter with the task force that he had lied to the investigators and “told them nothing,” in fact, quite a lot happened during this initial exchange. Chris had not merely denied knowing anything about a bombing; he initially told investigators he had no memory of Thanksgiving Day 1985 *at all*.⁷⁹ The records provided a narrative of investigators’ first interview with Chris and, although written by his interrogators, showed that Chris’ first responses to the investigators’ questions were never accepted. As it turned out, however, Chris’ first responses—none of which accorded with law enforcement’s theory of the crime as related by Kim—corroborated Mr. Toney’s independent trial testimony.⁸⁰

⁷⁸ *See id.*

⁷⁹ Transcript of Record at 22:66, *State v. Toney*, No. 0676220D (Tex. 297th Dist. May 12, 1999).

⁸⁰ The investigators’ interview of Chris proceeded in two identifiable parts. In the first part of the interview, Chris was mostly allowed to give the investigators an open and unguided account regarding what he remembered about his and Mr. Toney’s relationship and Thanksgiving Day 1985. In the second part of the interview, Chris was no longer allowed to tell the investigators what he remembered and believed to be true. Instead, the investigators overcame Chris’ denials of memory by eliciting responses from him through leading questioning and “confrontations” that achieved their objective of getting something from him which was close to what Kim had said.

The law enforcement report of the interview itself used the word “confronted” to describe the interrogator’s conduct. U.S. BUREAU OF ALCOHOL, TOBACCO, & FIREARMS, REPORT OF THE INTERVIEW OF CHRISTIE KLARK MEEKS 2, 6 (1997). Law enforcement officers are trained to use confrontation in interrogations as part of an interview method known as the Reid Technique. *See* FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 213 (4th ed. 2001). The technique requires officers to begin an interrogation with a non-accusatorial interview during which the officer makes an assessment of whether the suspect is being truthful or deceptive. *See id.* at 5–7. If the officer decides the suspect is being deceptive, the remainder of the interrogation is designed with the sole purpose of obtaining a confession, i.e., to have the suspect admit information the interrogator seeks. *See id.* at 210–16 (encouraging the use of the nine steps of interrogation on suspects, who seem guilty in the opinion of the investigator, in order to elicit the truth). Immense psychological pressure is brought to bear on the suspect—including overt accusations and confrontations—to obtain admissions. *See id.* Research reflects, however, that the average law enforcement officer performs no better than lay individuals when attempting to distinguish truth from deception. *See* Saul M. Kassin, *Confession Evidence: Commonsense Myths and Misconceptions*, 35 CRIM. JUST. & BEHAV. 1309, 1310 (2008) (citing Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCHOL. REV. 214, 230–31 (2006); Aldert Vrij et al., *Increasing Cognitive Load to Facilitate Lie Detection: The Benefit of Recalling an Event in Reverse Order*, 32 LAW & HUM. BEHAV. 253, 253 (2008) (reporting better lie detection among police officers when stories were told in reverse order)). Research also reflects that police investigators demonstrate a guilt bias in their perception of suspects, including in their perception of true and dishonest statements. *See* Christian A. Meissner & Saul M. Kassin,

Chris never implicated himself or Mr. Toney in the bombing during this initial interrogation.⁸¹ But investigators did manage to lead Chris—through a series of confrontations using Kim's story as a template—into endorsing a story about having gone to a nature preserve. Chris was invariably vague on the details, however, until his interrogator filled him in first. At one point in the interview, his interrogator literally showed him a series of photographs representing the locations that investigators told him he, Kim, and Mr. Toney had traveled to on Thanksgiving Day.

The newly revealed narrative of the task force's first meeting with Chris explained the reason why he was subpoenaed to give grand jury testimony. While he had not yet implicated himself and Mr. Toney in the bombing, he had acceded to enough of his interrogator's leading questions and "confrontations" to corroborate the basic outlines of the story they had received from Kim. In his grand jury testimony, Chris also did not implicate either himself or Mr. Toney in a bombing. Only after he was given a polygraph exam that he was accused of having failed, did he begin to implicate himself and Mr. Toney.⁸²

Thus, the new records showed how Chris' story was entirely

"He's guilty!": *Investigator Bias in Judgments of Truth and Deception*, 26 LAW & HUM. BEHAV. 469, 478 (2002); see also Christian A. Meissner & Saul M. Kassin, "You're Guilty, So Just Confess!": *Cognitive and Behavioral Confirmation Biases in the Interrogation Room*, in INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 85, 87–88 (G. Daniel Lassiter ed., 2004) [hereinafter Meissner & Kassin, "You're Guilty, So Just Confess"] (explaining findings of bias in police officers' detection of lies); Samuel M. Kassin, Christian A. Meissner & Rebecca J. Norwick, "I'd Know a False Confession if I Saw One": *A Comparative Study of College Students and Police Investigators*, 29 LAW & HUM. BEHAV. 211, 214–21 (2005). Two studies were conducted whose findings indicated that students presented with audiotaped and videotaped confessions were more accurate than police who were found to be more confident in their judgments and more likely to judge confessors as guilty; further, informing participants that half of the confessions were false did not increase accuracy or lower confidence. *Id.* These facts help explain the prevalence of false confessions.

⁸¹ Crist, *supra* note 48.

⁸² *Id.* Richard A. Leo has described the purpose of polygraph examinations in interrogations not as a truth-discovering tool, but rather as leverage to extract confessions. RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 82–83 (2008). When suspects are invariably told that they have failed, the alleged neutrality and objectivity of the machine lends more weight to law enforcement accusations of guilt, thereby increasing the psychological pressure on the person being interrogated. See *id.* at 86–88. After trial, Chris told post-conviction counsel's investigator that he had been threatened with being charged with the bombing. See Doug Swanson, *Recurring Nightmare: Scars, Those Visible and Deep Within, Mar Youngest Victim of Long-Ago Bombing*, DALLAS MORNING NEWS, Nov. 22, 2005, <http://dallasnews.com> (follow "DMN Story Archive" hyperlink; then search "Headline" for "Recurring Nightmare"; then follow "Search" hyperlink) (subscription required). Threats were a standard technique in the renewed task force investigation; more than one witness associated with the task force's first suspect complained at trial and before the grand jury about having been threatened by investigators.

manufactured, beginning initially with a denial of any memory of an uneventful Thanksgiving Day twelve years in the past and ultimately culminating in a detailed, six-page written statement in which Chris remembered everything from what kind of mixed drink Mr. Toney had on that specific day to the colors of the wires on the bomb of which Mr. Toney allegedly gave him a glimpse of in the briefcase.

Although he was given immunity and never charged, Chris' written statements were in substance false confessions, because they implicated him in a capital murder.⁸³ While false confessions are now understood to be much less rare than previously believed, it remains somewhat unusual for a wrongful conviction to be based on the false confession of a third party.⁸⁴ Convictions and confessions alike are usually proved false by DNA evidence.⁸⁵ In contrast to the typical exoneration, in which the exoneration in essence proves the confession false, Mr. Toney's exoneration required proving Chris' confession to be false.

Based on this and other impeachment evidence, Mr. Toney's conviction was vacated by Texas's highest criminal court and remanded back to the trial court for further proceedings.⁸⁶

III. CLOUD OF SUSPICION

Mr. Toney's exoneration occurred over two stages—first with the reversal of his conviction and then with the dismissal of the original charges against him.⁸⁷ However, the newly discovered reports that had been withheld by the trial prosecutor—which formed the basis for the reversal—did little to convince local prosecutors or the

⁸³ See Crist, *supra* note 48.

⁸⁴ Mr. Toney's is not, however, the only Texas case in which a wrongful conviction was based on the false confession of a third party. Christopher Ochoa falsely confessed to a rape and homicide, implicated his then-friend Richard Danziger in his confession, and then falsely testified against Danziger, who was wrongly convicted. *Christopher Ochoa*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Christopher_Ochoa.php (last visited Mar. 23, 2012). Unlike in Mr. Toney's case where the third-party confessor was given immunity and remained free, Mr. Ochoa was prosecuted and also wrongly convicted. *Id.* Mr. Ochoa's and Mr. Danziger's exonerations were secured not through impeachment of the state's evidence, but through a freely-given confession by the actual perpetrator of the crime. *Id.* Ochoa, like the third-party confessor in Mr. Toney's case, claimed he made his false confession after being threatened with the death penalty by his interrogators. *Id.*

⁸⁵ Gross et al., *supra* note 3, at 527–31.

⁸⁶ *Ex parte Toney*, No. WR-51,047-03, 2008 WL 5245307, at *1 (Tex. Crim. App. Dec. 17, 2008); *Ex parte Toney*, No. AP-76056, 2008 WL 5245324, at *1 (Tex. Crim. App. Dec. 17, 2008).

⁸⁷ Alex Branch, *Man Convicted in Bombing Dies in Wreck 1 Month After His Release*, FORT WORTH STAR-TELEGRAM, Oct. 5, 1999, available at 2009 WLNR 19579017.

victims' family of Mr. Toney's factual innocence. Consider this contemporaneous news account:

Last week, the Texas Court of Criminal Appeals overturned Toney's capital murder conviction because Tarrant County prosecutors withheld evidence favorable to his defense. Among the 14 documents were records that cast doubt on the testimony of two key witnesses against him.

The Tarrant County district attorney's office is weighing whether to retry the 23-year-old case. An official said last week that the office intends to but that it has not made a final decision.

Toney's defense team alleges that his conviction was the product of the manipulation and intimidation of witnesses during the investigation and prosecutorial misconduct in the courtroom. At the time of Toney's arrest, they say, the case was the longest-running unsolved bombing investigation in the U.S.

"I think a task force was formed to solve this and was clearly motivated to get someone," said Rebecca Bauer Kahan, one of Toney's attorneys.

Mike Parrish, the lead prosecutor in the first trial, left the district attorney's office this year. He recently declined a request for an interview, saying he could not comment on a pending case.

Officials with the district attorney's office have denied that they knowingly sponsored false or misleading testimony and say their opinion on Toney's guilt has not changed.

"We still think he is the man that committed the offense," said Chuck Mallin, chief of the appellate division.

Relatives of the victims are equally unswayed by the new evidence.

"I know that Michael Toney is as guilty as he can be," said Susan Blount, whose husband and 15-year-old daughter died. "He is squirming and trying to get out of it because he never wants to admit it. He never will."

Blount's sister, Lynne Wright, whose son died, said: "He is guilty 100 percent. He did it no matter what is coming out or what his attorneys say was lacking in evidence or wasn't turned over."

No physical evidence connects Toney to the bombing. Toney, who was 19 when it occurred, was convicted on the testimony

of his ex-wife and a former best friend. His lawyers say one need only look at the recent string of exonerations in Dallas County for proof that eyewitness testimony can lead to false convictions.⁸⁸

After his conviction was overturned, Mr. Toney was moved to the local county jail while authorities decided how to proceed.⁸⁹ The local district attorney's office recused itself due to the revelations of its rampant suppression of evidence, and an Assistant Attorney General was appointed special prosecutor and conducted his own review.⁹⁰ The impeachment evidence undermining the state's witnesses, all told, was damning.⁹¹ Almost nine months after Mr. Toney's judgment had been vacated by Texas's highest criminal court, the Assistant Attorney General moved to dismiss all charges against him.⁹² Public statements issued by the state indicated that the charges against Mr. Toney were dismissed because it needed more time to complete its investigation into the bombing, but given the state of the evidence it is exceedingly implausible that prosecutors reasonably expected that Mr. Toney would ever be retried.⁹³

On the evening of September 2, 2009, Mr. Toney walked out of jail a completely free man after twelve years of incarceration, ten of which were spent on death row.⁹⁴ His release was unexpected, but the few accounts which described it did little to quell the suspicion about his involvement in the crime:

Susan Blount, whose husband and daughter were killed in the bombing, told the Fort Worth Star-Telegram that the attorney general's office notified her about Toney's release.

"They wanted to let me know so I wouldn't be surprised," she said. "They have indicated that it is still their intent to retry the case, but they needed more time to go over all the information and evidence."⁹⁵

Despite the fact that Mr. Toney had been exonerated, having had his sentence overturned and the indictment against him dismissed, the state, and subsequently the victims' family, framed his release

⁸⁸ Branch, *supra* note 17.

⁸⁹ Alex Branch, *Inmate Moved from Death Row to Tarrant County Jail*, FORT WORTH STAR-TELEGRAM, Jan. 30, 2009, available at 2009 WLNR 1808803.

⁹⁰ Carlton, *supra* note 22.

⁹¹ Swanson, *supra* note 53.

⁹² Carlton, *supra* note 22.

⁹³ *Id.*

⁹⁴ Branch, *supra* note 89.

⁹⁵ Carlton, *supra* note 22.

in terms of a legal technicality and spoke of the need for more time to investigate rather than the fact that, after a review of the evidence, there was no credible evidence that Mr. Toney had committed the bombing.⁹⁶

Anthony Graves' exoneration provides a stark contrast to Mr. Toney's. Like Mr. Toney, Mr. Graves' conviction was vacated due to the suppression of material impeachment evidence against the only state witness connecting him to a six-person homicide.⁹⁷ Like Mr. Toney, the charges against Mr. Graves were eventually dropped following an independent review of the case by a special prosecutor who had been appointed to assist the district attorney in retrying him.⁹⁸ The basis of Mr. Graves' exoneration was therefore the same as Mr. Toney's—impeachment evidence and the lack of any credible evidence that he had committed the offense.

However, in sharp contrast to the state's comments in Mr. Toney's case, the prosecutor assigned to Mr. Graves' case publicly endorsed his innocence on the day he was released, recognizing that faulty work on the part of his predecessor had led to the wrongful conviction:

On Wednesday, Burleson County District Attorney Bill Parham conceded that Graves "is an innocent man" and obtained his release. "There is nothing that connects Anthony Graves to this crime," he said after completing a five-month investigation of his predecessor's seriously flawed handiwork. "I did what I did because that's the right thing to do."⁹⁹

Likewise, media reports presented Mr. Graves' release and wrongful conviction alongside other highly publicized cases of likely wrongful convictions:

In Texas, evidence emerged of critical errors in two cases where executions had already occurred (Cameron Willingham and Claude Jones). In addition, Anthony Graves

⁹⁶ *Id.* Research indicates that prosecutors are more likely to frame an exoneration as the result of a legal loophole or failure rather than as the result of a wrongful conviction. See Paul Parker & Ben Coate, *Whose Justice? Prosecution and Defense Reactions to Capital-Case Reversals*, 29 JUST. SYS. J. 367, 379–80 (2008).

⁹⁷ *Graves v. Dretke*, 442 F.3d 334, 336, 344–45 (5th Cir. 2006).

⁹⁸ Harvey Rice, *State Denies Compensation to Wrongly Convicted Man*, HOUSTON CHRON., Feb. 14, 2011, <http://www.chron.com/news/houston-texas/article/State-denies-compensation-to-wrongly-convicted-man-1692982.php>.

⁹⁹ Editorial, *Death-Row Case Underscores Fallibility*, DALLAS MORNING NEWS, Oct. 28, 2010, <http://www.dallasnews.com/opinion/editorials/20101028-Editorial-Death-row-case-underscores-1489.ece>.

was exonerated from Texas' death row and the prosecutor acknowledged, "We found not one piece of credible evidence that links Anthony Graves to the commission of this capital murder . . . He is an innocent man."¹⁰⁰

Furthermore, community support for Mr. Graves poured forth in media accounts of his release:

I could not be happier for Anthony Graves, whose personal nightmare of being wrongly accused in a 1992 murder is finally over. The Burlison County DA said yesterday, "He's an innocent man." Not, "We don't have enough facts to retry this man." That admission makes me happy for Graves, but angry at the same time. What was done to Anthony Graves was pure human error, easily avoided, and (frighteningly enough) easily duplicated. Prosecutors chose to believe one lie from an admitted and known liar—the one lie that could send Graves to death row and put a pelt on their wall and a trophy in their case. We should all be disgusted about what was done to Anthony Graves even as we celebrate his freedom after 12 years on death row and four years in a county jail. His lawyers proved that prosecutors withheld evidence (a statement from the only eye witness in the case who recanted). That technical trial error, not the truth, got the original conviction tossed out. Pride wounded, prosecutors vowed to try again, despite the fact that there was no physical evidence linking Graves to the case. From the *Houston Chronicle*:

Kelly Siegler, a prosecutor hired to re-try Graves, agreed with Parham.

"After months of investigation and talking to every witness who's ever been involved in this case and people who've never been talked to before, after looking under every rock we could find, we found not one piece of credible evidence that links Anthony Graves to the commission of this capital murder," Siegler said.

That should chill you to the bone. That should make you angry. That should make you question how a man could be

¹⁰⁰ *DPIC's Year End Report: Executions Down 12% Nationwide, 29% in Texas; Death Sentences Near Historic Lows*, PRNEWswire, Dec. 21, 2010, available at <http://www.prnewswire.com/news-releases/dpics-year-end-report-executions-down-12-nationwide-29-in-texas-death-sentences-near-historic-lows-112228919.html> (alteration in original).

sent to death row by a jury that found him guilty beyond a reasonable doubt. That jury was lied to, by the real killer and by prosecutors who said they were representing you and me, the people of Texas, in this case. That makes me mad.¹⁰¹

This commentary, provided by the editor of a well-regarded newspaper in Texas, highlights the important role the media can play in helping to support an exoneree's transition into free society. Additionally, such remarks help to remind the community about the reasons for the exoneree's release, positioning accountability for the harm caused to Mr. Graves squarely on the unethical and unlawful actions of the trial prosecutor.

The exoneration of Earl Washington provides an even stronger public declaration of innocence. Mr. Washington was exonerated from Virginia's death row in 2000 after DNA evidence confirmed his wrongful conviction.¹⁰² News accounts declared his innocence with titles such as "Innocent Man Released After Nine Years."¹⁰³ Accounts of Mr. Washington's exoneration did not question his factual innocence:

Earl Washington Jr. walked out of prison Monday after spending 9 1/2 years on death row for a murder he didn't commit.

Largely illiterate and with an IQ of 69, Washington confessed to the 1982 rape and slaying of Rebecca Lynn Williams even though no fingerprints or biological evidence tied him to the crime.

However, DNA tests showed he was wrongly convicted. He was moved off death row in 1994 after his sentence was commuted to life.

He was released from Greensville Correctional Center in Jarratt . . . [early] Monday and taken to Virginia Beach, where he had been assigned to live in an apartment building run by a support center for mentally disabled people, state officials said.

"He's here and he's a free man," said Andie Plumley, chief operations officer for the center, Support Services of Virginia, which is helping Washington make his transition to

¹⁰¹ Michael Landauer, *We Should Greet Anthony Graves' Release with Joy and Disgust*, DALLAS MORNING NEWS BLOG (October 28, 2010), <http://dallasmorningviewsblog.dallasnews.com/archives/2010/10/we-should-greet.html>.

¹⁰² Libby Lewis, *Virginia Crime Lab to Undergo Review*, NPR (May 29, 2005), <http://www.npr.org/templates/story/story.php?storyId=4635444>.

¹⁰³ *Innocent Man Released After Nine Years*, MOUNT AIRY NEWS, Feb. 13, 2001, at 8A.

life outside prison. She said Washington met with friends during the morning.

Washington has six months of parole to serve on an unrelated assault conviction.

Washington, 40, came within nine days of being executed in the electric chair in 1985 but was granted a stay.

A 1993 DNA test cast doubt on his guilt and prompted then-Gov. L. Douglas Wilder, a Democrat, to commute his sentence to life. Last fall, additional DNA tests found genetic material belonging to two other men, and Republican Gov. Jim Gilmore pardoned Washington.

“It made me happy,” Washington said in an interview Friday. “He (Gilmore) did a good job by my book.”¹⁰⁴

As Mr. Washington’s case illustrates, exonerations secured by DNA evidence may often convey stronger claims to factual innocence within the community than other exonerations. Thus, in the absence of DNA evidence, such ardent support of an exoneree’s factual innocence as occurred in Mr. Graves’ case is likely to be required to aid in relieving some of the lingering suspicions as to the exoneree’s involvement in the crime for which they were originally convicted.

In addition to the importance of comments made to the press by state actors are those made by victims’ family members. While it is hard to know what factors influence whether a family member will accept the prospect that an innocent person has been punished for the crime, it is likely that their statements will often reflect those of the state.¹⁰⁵ Tragically, one month after Mr. Toney was exonerated he was killed in a car accident.¹⁰⁶ After the accident the victims’ family members were quoted as being resolute in their belief that he was guilty:

However, relatives of the bombing victims remain steadfast in their belief that Toney was guilty. Susan Blount, whose daughter Angela Blount, 15, and husband Joe Blount, 44, died in the bombing, said she considers Toney’s death the end of the case.

“I don’t mean to bring religion into this, but God works in mysterious ways,” Susan Blount said. “He got out of prison, and he should not have gotten out of the prison.” Toney was

¹⁰⁴ *Id.*

¹⁰⁵ Carlton, *supra* note 22.

¹⁰⁶ Branch, *supra* note 89.

released from jail one month before his death. The attorney general's office dropped the charges against him, saying it needed more time to examine the evidence. The attorney general's office, however, retained the right to retry Toney later.¹⁰⁷

Here, the state's insinuation that Mr. Toney was not innocent of the crime for which he had been exonerated was strongly shared by members of the victim's family. In fact, the family members appeared to express the belief that Mr. Toney's untimely death was a form of poetic justice for his exoneration.¹⁰⁸ Indeed, the cloud of suspicion that Mr. Toney labored under during his first month of freedom was so strong that he eventually left town, moving to a rural part of East Texas located hours away from where he wished to live.¹⁰⁹ Mr. Toney described being followed and harassed by law enforcement agents to the point where he worried about what might happen to him if he remained in Fort Worth.

Again, this is in direct contrast to comments made by the victim's family members in the aftermath of Mr. Graves' exoneration:

Davis admits that though there was no physical evidence against Graves from the very beginning, he did believe him to be guilty for many years.

"For 18 years it was embedded in us to believe that he was guilty," Davis said.

But after sitting through numerous trials against both Graves and co-defendant Robert Carter, who was executed in 2000 for the murders, Davis began to notice patterns that cast doubt into his mind about Graves' involvement.

Graves had consistently pleaded innocent, while Carter pleaded guilty, naming Graves as an accomplice.

Two weeks before his execution, however, Carter recanted his statements saying his naming of Graves was a lie.

After Graves' exoneration this week, Davis and his family realized that much of what they were led to believe about Graves was through manipulation of then-prosecutor Charles Sebesta.

"I thought that Charles Sebesta had some compassion for my

¹⁰⁷ Alex Branch, *Suspect in Texas Bombing May Be Dead, but Probe Goes On*, FORT WORTH STAR-TELEGRAM, Oct. 6, 2009, available at <http://www.mcclatchydc.com/2009/10/06/76646/suspect-in-texas-bombing-may-be.html>.

¹⁰⁸ *See id.*

¹⁰⁹ These revelations were given to the authors by Mr. Toney directly after his exoneration.

family,” Davis said, “but his ultimate was to win at any cost, and he didn’t care how we felt one way or another.”

Davis believes Sebesta was deceitful with fake evidence and manipulated witnesses.¹¹⁰

Thus, public statements in the aftermath of exoneration are likely to take various forms despite similarities across cases. As the comments in this section indicate, the failure to view an exoneree as factually innocent appears to be more likely in cases which do not include DNA evidence and in which the exoneree fails to garner community support. Such community support is undoubtedly linked to public comments made by the state and the victim’s family and the portrayal of the exoneree by the media.

A. *Social Exoneration*

As mentioned previously, exoneration has an important social element. In fact, those who have been exonerated point to the social acceptance of their exoneration as being of paramount importance. As Mr. Graves stated, “[b]eing exonerated by the public meant just as much to me as being exonerated by the courts.”¹¹¹ Research with those who have been wrongfully convicted indicates that most want people to believe they are innocent and for state actors to apologize for the wrong they have done.¹¹²

However, as the excerpts concerning Mr. Toney indicate, state actors may in fact both fail to apologize for the harm caused by the wrongful conviction and continue to victimize the exoneree by calling into question their innocence. It goes without saying that language is powerful and the choice to frame any exoneration as a legal technicality rather than an egregious harm perpetrated against an innocent person shapes people’s general understanding of the criminal justice system and their perceptions of the exonerated.¹¹³ By framing exoneration as a legal technicality, the state is able to avoid acknowledgment of the harm caused and ignore systematic problems within the criminal justice system.

¹¹⁰ Safiya Ravat, *Murder Victims’ Family Blasts DA After Suspect Exonerated*, HOUSTON CHRON., Oct. 31, 2010, at A23.

¹¹¹ *48 Hours: Grave Injustice*, *supra* note 21.

¹¹² See Campbell & Denov, *supra* note 12, at 155; see also Abigail Penzell, *Apology in the Context of Wrongful Conviction: Why the System Should Say It’s Sorry*, 9 CARDOZO J. CONFLICT RESOL. 145, 146 (2007) (“[A]n apology can be an integral part of exonerees’ reintegration into society.”).

¹¹³ See, e.g., Findley, *supra* note 5, at 1185 (stating that wrongful convictions should not be subordinated as unimportant “technicalities”).

Beyond the global effect that the state's comments may have on views of the criminal justice system is the everyday, lived experience of the exoneree, who must face a host of challenges.¹¹⁴ Exoneration does not end the traumatic experiences that a wrongfully convicted person has lived through. In fact, it marks the beginning of new challenges they must face as they struggle to reenter society. As exoneree Curtis Edward McCarty explained after his release from prison:

"I missed the entirety of my adult life," he said. "I was starting just right on that cusp of maturity when they did it. I'd quit drinking and doing all the drugs. I was going to school. I had a job. And I lost it all."

He said that leaving prison was intimidating, no matter what other prisoners had told him. "All the bravado of getting out—I'm going to do this. I'm going to do that—it's just that," he said. "It's bravado, and it's empty. Because the reality of it is, life passed you by. People have moved on to family and careers.

"Everything they told me is true. You walk out, and it's not exciting. It's frightening. You're starting at Square 1. It's like landing on a new planet. I'm kind of just standing around befuddled."¹¹⁵

In addition to these challenges, when the state frames a wrongful conviction as a legal technicality, public acceptance of the wrongful conviction falls short. Although the wrongfully convicted individual may no longer be confined in prison, he or she continues to carry the burden of blame for the crime. Thus, without public acknowledgment that exoneration removes responsibility for the crime, it appears that exoneration falls short of correcting a wrongful conviction.

IV. PROTECTING THE EXONERATED FROM FURTHER STATE HARM

In the aftermath of release from prison, exonerees have a number of immediate concerns such as housing, finance, transportation, and health services. However, there are also other longer-term concerns as the newly released struggle to re-establish relationships, find employment, and clear their criminal record and/or their name in

¹¹⁴ See, e.g., JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 3-4, 21 (2003).

¹¹⁵ Cheryl Camp, *Convicted Murderer is Freed in Wake of Tainted Evidence*, N.Y. TIMES, May 22, 2007, <http://www.nytimes.com/2007/05/22/us/22exonerate.html?pagewanted=print>.

the community.¹¹⁶ In addition, the psychological effects of imprisonment will linger long after release.¹¹⁷ As research indicates, the wrongfully convicted often deal with traumatic disorders, such as posttraumatic stress, which further complicate their ability to live healthy and productive lives.¹¹⁸ Given that the state has caused harm to the wrongfully convicted, it seems appropriate that they should take steps to help restore their well-being. Such steps should surely include engaging in activities which would support, rather than discourage, the community's acceptance of their wrongful conviction.¹¹⁹

In addition, there are currently institutional obstacles which encourage society to be skeptical of an exoneree.¹²⁰ These obstacles are codified in a number of compensation statutes which provide parameters for eligibility for remuneration for the wrongfully convicted.¹²¹ As discussed briefly in the next section, while state legislatures should provide support to the wrongfully convicted, states which have attached narrow limitations on who can rightfully access funds or limits to what the state provides in terms of social support may actually inhibit rather than encourage exonerees' re-integration into society.

A. *Current Obstacles*

Twenty-seven states currently have statutes which provide some type of restitution and/or reentry assistance to those who have been

¹¹⁶ See *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Compensating_The_Wrongly_Convicted.php (last visited Mar. 25, 2012).

¹¹⁷ See *id.*

¹¹⁸ See Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 165, 165 (2004). This study examined eighteen men, mostly from the United Kingdom, who were released after a wrongful conviction. Of the eighteen male participants, "[f]ourteen . . . met . . . [the] . . . criteria for 'enduring personality change following catastrophic experience,'" and "[twelve] met the criteria for post-traumatic stress disorder . . ." *Id.* The author reports that the group exhibited "major problems [with] psychological and social adjustment, particularly within families." *Id.* Especially important are the noted similarities between those released after being wrongfully convicted and war veterans. *Id.*

¹¹⁹ One study on the reactions by the prosecution and defense to death penalty reversals identifies that reaction to the state regarding the outcome of a case is fueled more by their commitment to winning than by their role as a minister of justice. See Parker & Coate, *supra* note 96, at 367.

¹²⁰ See Walter Matthews Grant et al., *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 939 (1970).

¹²¹ See Norris, *supra* note 9, at 2.

exonerated.¹²² Although all twenty-seven statutes provide some form of financial restitution, the amounts vary widely.¹²³ Few statutes provide for other equally important forms of support, such as employment assistance and training,¹²⁴ educational assistance,¹²⁵ counseling and mental health services,¹²⁶ physical health services,¹²⁷ court costs, fines, and detention facility costs remuneration,¹²⁸ child support payments,¹²⁹ attorney's fees,¹³⁰ and lost wages or income compensation.¹³¹ In addition, only four states provide for record expungement and one of these does not do so immediately upon release.¹³²

Most of these statutes also include eligibility requirements and explicit disqualifications.¹³³ In some states, eligibility restrictions include consideration of the type of evidence which resulted in the exoneration. For instance, three states restrict eligibility for compensation to DNA exonerations.¹³⁴ Indeed, when Mr. Graves was exonerated he was ineligible for compensation because of the way in which he was exonerated.¹³⁵ As one media account explained:

What a difference a choice of words can make in an individual's life, especially a life once condemned to death.

In the Texas criminal justice system, it usually is not enough to be innocent, as long as someone thinks you're guilty.

The word "conviction" carries a lot of weight, until "exoneration" enters the picture.

¹²² See *Reforms by State*, INNOCENCE PROJECT, <http://www.innocenceproject.org/news/LawView.php> (last visited Mar. 25, 2012).

¹²³ Norris, *supra* note 9, at 7–9 & n.b.

¹²⁴ *Id.* at 7 (finding only five of twenty-seven statutes include such a provision).

¹²⁵ *Id.* (finding only eight of twenty-seven statutes include such a provision).

¹²⁶ *Id.* (finding only five of twenty-seven statutes include such a provision).

¹²⁷ *Id.* (finding only four of twenty-seven statutes include such a provision).

¹²⁸ *Id.* (finding only five of twenty-seven statutes include provisions for court costs and fine remuneration while a mere two states provide for detention facility costs).

¹²⁹ *Id.* (finding only one state includes such a provision).

¹³⁰ *Id.* at 7 (finding only eight of twenty-seven statutes include such a provision).

¹³¹ *Id.* (finding only three of twenty-seven statutes include such a provision).

¹³² *Id.* at 7.

¹³³ *Id.* at 8. Thirteen states place limits on the types of crime, four require a pardon and twenty include explicit disqualifications such as a prior felony conviction (one), subsequent felony conviction (five), concurrent sentence (twelve), guilty plea (six), fabricating evidence or suborning perjury (three), waived appellate rights (one), and minimum time served (one). *Id.*

¹³⁴ *Id.* at 8. A number of statutes also prevent the exoneree from pursuing civil redress from the state if they accept restitution. *Id.*

¹³⁵ Bob Ray Sanders, *One Word Keeps Anthony Graves from Receiving Compensation*, STAR-TELEGRAM, Feb. 19, 2011, <http://www.star-telegram.com/2011/02/19/2861095/one-word-keeps-anthony-graves.html>.

Then there's "dismissed," which can be music to a defendant's ears—unless, of course, he already has been convicted, sentenced and spent 18 years in prison, 12 of them on Death Row.

Dismissed?

What about innocent? What about exonerated? What about a "terrible mistake" by the state for which the state should be liable for compensation? Why can't we say what it really is?

....

Under the Tim Cole Compensation Act, named for a wrongly convicted man from Fort Worth, those falsely imprisoned are entitled to \$80,000 for each year of confinement. Lawyers for Graves prepared a claim for him and submitted it to the Texas Comptroller's Office.

That claim was rejected because the word "innocent" didn't appear in the paperwork. Again, Graves was never found "not guilty," as his case was eventually "dismissed." Absent a court proclaiming him "innocent" and without a pardon from the governor, a spokesman for the comptroller's office said, Graves is not entitled to any compensation under the law.

Most of the exonerations in Texas have been supported by DNA evidence that was presented to a judge who, in turn, issued an order to free those falsely convicted. In effect, the judge declared them "innocent."

But in Graves' case, where there is no DNA evidence and the district attorney's office circumvented a court decision by dismissing the case, he is left in the cold because of a word that isn't—and technically cannot be—included in his claim application.¹³⁶

However, the state of Texas passed a new act in 2011 which enabled Mr. Graves to receive compensation for his wrongful conviction.¹³⁷ Nevertheless, had Mr. Toney survived the fatal car

¹³⁶ *Id.* Although Anthony did eventually receive financial compensation, he did not receive a statement of innocence, nor was his criminal record cleared of the capital murder charges. *Wrongfully Convicted Texas Man to Get \$1.4M*, CBS NEWS, June 22, 2011, <http://www.cbsnews.com/stories/2011/06/22/48hours/main20073292.shtml>. Counsel who represented Anthony stated "[w]ithout a declaration of innocence, Anthony will never have his name and reputation restored. . . . He will always be a man convicted of capital murder. He has the right to have that stigma removed." *Id.*

¹³⁷ Brandi Grissom & Julián Aguilar, *Senate Approves Anthony Graves Compensation Bill*,

accident he still would have been ineligible for compensation without further litigation or effort even though the basis of their exonerations was the same.¹³⁸

Current statutes often therefore appear to inhibit rather than encourage mechanisms which can aid in healing some of the harm caused to exonerees by a wrongful conviction. An apology or acceptance of responsibility from the state is often useful in redressing such harm, especially in cases where a conviction was the result of prosecutorial misconduct.¹³⁹ However, many exonerees will never receive such recognition due to the stringent rules which shield prosecutors from lawsuits by the wrongfully convicted.¹⁴⁰ Consequently, many prosecutors can escape taking responsibility for a wrongful conviction and continue to cast suspicion upon the exoneree after release.¹⁴¹

Thus, one contributing factor of the failure of exoneration to adequately address the harms perpetrated against the wrongfully convicted is the codification of narrowly structured compensation statutes which merely provide financial support to eligible exonerees. Such statutes fail to place proper emphasis on re-entry

TEX. TRIB., May 18, 2011, <http://www.texastribune.org/texas-dept-criminal-justice/death-penalty/senate-approves-anthony-graves-compensation-bill/>. The newly enacted law also provided for health insurance for the exoneree. *Id.*

¹³⁸ See H.B. 417, 82d(R) Leg. Sess. (Tex. 2011). Although the amended scheme does now allow for compensation based on a dismissal of charges following post-conviction relief, it requires that the district court's dismissal order be

based on a motion to dismiss in which the state's attorney states that no credible evidence exists that inculpatates the defendant and, either in the motion or in an affidavit, the state's attorney states that the state's attorney believes that the defendant is actually innocent of the crime for which the person was sentenced.

Id.

¹³⁹ Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 87 (2004) ("Victims and victimized communities have long viewed remorse and apology as essential elements of justice for crimes. For example, one victim who was sexually abused by a priest demanded expressions of remorse to help him find closure and heal."); see also Juan Mendez, *Prosecution: Who & For What?*, in DEALING WITH THE PAST: TRUTH AND RECONCILIATION IN SOUTH AFRICA 87, 90 (Alex Boraine et al. eds., 1994) ("[T]he prosecution itself will provide a measure of healing and show the victims that their plight has not been forgotten by the state and society.>").

¹⁴⁰ Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 724–26 (2004) (providing a summary of absolute immunity for prosecutors and qualified immunity for police officers).

¹⁴¹ But see Jordan Smith, *Panel Emphasizes Need for Prosecutorial Oversight*, AUSTIN CHRON., Apr. 6, 2012, <http://www.austinchronicle.com/news/2012-04-06/panel-emphasizes-need-for-prosecutorial-oversight/>. Between the years 2004–2008 Texas courts have confirmed 91 cases of prosecutorial misconduct within the state. *Id.* One such former prosecutor, Ken Anderson is facing a court of inquiry in order to determine whether his actions in a wrongful conviction case violated criminal statutes. *Id.*

services and on promoting actions which may aid exonerees in acquiring the public support that many desire.¹⁴² Given the lack of uniformity across statutes, it is difficult to determine what values are being promoted by advancing some forms of compensation, but not others.¹⁴³ Such inconsistency across statutes appears to muddle rather than clarify any broader understanding of how society should treat the exonerated. For example, restricting access to restitution to those whose wrongful conviction has been proven with DNA evidence appears to elevate DNA exonerations to a position as the only meritorious cases of actual innocence, leaving other exonerees to be viewed by the public as possibly guilty individuals released on a legal technicality.

B. Limiting statements in the aftermath of exoneration

While there are a number of steps which can be taken to help the exonerated, such as increasing the uniformity between state and federal restitution statutes,¹⁴⁴ creative litigation geared towards recovering damages,¹⁴⁵ and declarations of innocence,¹⁴⁶ we confine our suggestions here to steps which can be taken in order to protect an exoneree against continued speculation as to their guilt.

Prosecutors' statements about an individual who has been released but not exonerated by DNA evidence can set the tone for how an exoneree will be received and viewed by the broader public, including the media.¹⁴⁷ As we have seen, where exoneration has been secured by DNA evidence, a prosecutor's continued insistence

¹⁴² For example, research on those who have been wrongfully convicted and released from prison indicates that having the government or other criminal justice personnel take responsibility for the wrongful conviction was of paramount importance. See Campbell & Denov, *supra* note 12, at 155.

¹⁴³ See INNOCENCE PROJECT, MAKING UP FOR LOST TIME: WHAT THE WRONGFULLY CONVICTED ENDURE AND HOW TO PROVIDE FAIR COMPENSATION 15–16, 23, 27–31 (2009), available at http://www.innocenceproject.org/docs/Innocence_Project_Compensation_Report.pdf.

¹⁴⁴ See *id.* at 5; *Model Legislation, 2011 State Legislative Sessions*, INNOCENCE PROJECT (last updated Dec. 2010), http://www.innocenceproject.org/docs/2011/modelbills/Compensation_Model_Bill_2011.pdf.

¹⁴⁵ Bernhard, *supra* note 140, at 726–28, 731–32, 734–37 (providing an overview of some areas associated with prosecutorial misconduct where exonerees have successfully litigated for damages).

¹⁴⁶ Lawrence, *supra* note 23, at 392. Lawrence proposed that the wrongfully convicted person could pursue a declaratory judgment in civil court. The suit would not be for damages or identify blame to any single party, but rather it would provide the exonerated with a statement of “innocence” rather than a finding of “not guilty.” *Id.*

¹⁴⁷ Westervelt & Cook, *Framing Innocents*, *supra* note 12, at 262.

of guilt will have little impact on community beliefs.¹⁴⁸ But where exoneration has been secured because of other factors, such as impeachment of the state's evidence, the prosecution's statements can have an immense impact on how an exoneree is received by the community.¹⁴⁹ This is therefore an area on which criminal justice reformers and those seeking to minimize the damage done to victims of state harm ought to focus some attention.

Because Mr. Toney was then facing retrial, the prosecutor's statement to the press following the overturning of his conviction that "[w]e still think he is the man that committed the offense,"¹⁵⁰ was prohibited by Texas ethics rules that bar statements by lawyers to the media constituting an "opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration."¹⁵¹ But ethics rules regulating attorney speech to the media are designed to protect the integrity and fairness of ongoing or future judicial proceedings.¹⁵² They are not designed to protect the reputations of the wrongly convicted or to aid their reintegration into society.¹⁵³ In addition, such rules are not always applicable to public statements made by attorneys after an indictment has been dismissed for lack of evidence.¹⁵⁴ Even if applicable, the violation of such a rule is not likely to result in any serious discipline.¹⁵⁵ Such rules therefore do not prevent, or even offer a remedy for, the damage done to a wrongly convicted individual by such statements.

Likewise, a potential civil rights suit against a prosecutor for defamation, besides posing many procedural and practical obstacles, simply does not serve the important state interests of helping an exoneree who has served long periods of time in prison reintegrate into society and avoid further harm from the state.¹⁵⁶ Even if such a

¹⁴⁸ See Brewer & Ley, *supra* note 7, at 94.

¹⁴⁹ See, e.g., Landauer, *supra* note 101.

¹⁵⁰ Branch, *supra* note 17.

¹⁵¹ TEX. R. PROF'L CONDUCT R. 307(b)(4), *reprinted in* TEX. GOV'T CODE ANN. ART. 10 § 9 (West 2005).

¹⁵² See *id.* R. 3.07(a).

¹⁵³ See *id.* cmt. 1 ("[P]aragraph (a) provides that in the course of representing a client, a lawyer's right to free speech is subordinate to the constitutional requirements of a fair trial.").

¹⁵⁴ See *id.* R. 3.07(b).

¹⁵⁵ See generally *id.* R. 3.07, cmt. 4 (noting that there are no standards of discipline set in the rule).

¹⁵⁶ Such claims, called "stigma plus" or "reputation plus" claims, require the plaintiff to prove (1) the utterance of a statement about him or her injurious to his or her reputation, "that is capable of being proved false, and that he or she claims is false," and (2) "some tangible and material state-imposed burden . . . in addition to the stigmatizing statement." Velez v. Levy, 401 F.3d 75, 87 (2d Cir. 2005) (citing *Doe v. Dep't of Pub. Safety*, 271 F.3d 38,

suit can be successfully maintained, the exoneree may be monetarily compensated, but impediments to their smooth social reintegration have already been laid and suspicion cast upon them.¹⁵⁷ Due to the severity of the harm from a wrongful conviction as well as the state's role in imposing it, the state should have affirmative obligations to avoid such additional harm to an exoneree's social reintegration, rather than merely be only potentially subject to heavily burdened remedial measures.

Accordingly, it ought to be considered whether, in cases like Mr. Toney's where the presumption of innocence has been restored and charges dismissed due to the absence of any credible evidence, states should afford affirmative protections to the exonerated. This is especially important for those whose exonerations were not obtained through exculpatory DNA evidence. In cases which have been dismissed for lack of evidence, such measures could include the imposition of legal restrictions on public comments by prosecutors that could reasonably be viewed as casting suspicion upon the exonerated.

C. Future Research

Each year more wrongfully convicted individuals are freed from prison. As such, there is a need for research to investigate how society responds to their traumatic experiences in order to facilitate a smoother transition and a faster, long lasting recovery for the exoneree. While recent research by Westervelt and Cook provides a critical step forward in understanding the array of issues which the exonerated face,¹⁵⁸ we suggest that research which focuses on the public reaction to exoneration must also begin.¹⁵⁹ Such research

47 (2d Cir. 2001), *rev'd on other grounds* Com. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003) (alteration in original); Paul v. Davis, 424 U.S. 693, 701 (1976). A mere "free-standing defamatory statement" . . . is not a constitutional deprivation." Velez, 401 F.3d at 87 (quoting Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623, 631-32 (2d Cir. 1996)) (alteration in original). Moreover, prosecutors have qualified immunity from such claims. Geter v. Fortenberry, 849 F.2d 1550, 1552 (5th Cir. 1988).

¹⁵⁷ Beth English, *Life After Death Row*, 4 UNCG RES. 8 (2006), available at <http://www.uncg.edu/rsh/PDF/UNCGResearch06.pdf> (discussing the struggles of exonerees once they are released back into free society).

¹⁵⁸ SAUNDRA D. WESTERVELT & KIMBERLY J. COOK, *LIFE AFTER DEATH ROW: EXONEREES' SEARCH FOR COMMUNITY AND IDENTITY* (Rutgers Univ. Press forthcoming 2012) (discussing life after exoneration).

¹⁵⁹ Gross and Matheson conducted an analysis of media accounts from victim family members in cases where the defendant was exonerated and concluded that most family members believe the defendant to have been released on a technicality. See Samuel Gross & Daniel Matheson, *What They Say at the End: Capital Victims' Families and the Press*, 88

could include a systematic content analysis of post-exoneration news reports and official reactions to wrongful convictions and individuals' release. By tracking media accounts and public reaction to exonerations we would be able to better understand the social aspect of exoneration and the factors that agitate the ability for an exonerated person to be fully relieved of their liability for the crime.¹⁶⁰ In addition, such research could track cases over time, keeping account of how public statements and community reactions concerning the exonerated change. In cases like Mr. Toney's where the state claimed it needed more time to investigate his case and potentially retry him, such research could account for the rates at which exonerations, which are framed as a legal technicality, are actually re-prosecuted. This would enable those within the criminal justice community to have a better grasp on how current responses to exonerations may fail to socially restore the identity of the wrongfully convicted.

V. CONCLUSION

Reactions to a wrongful conviction in the aftermath of exoneration vary. In some instances, this variance is likely due to the type of exonerating evidence used to identify and free the wrongfully convicted. Regardless of the reasons behind such public reactions, when the public questions an individual's exoneration, the ability of the exoneration to fully address an individual's wrongful conviction is impeded.

Although some states attempt to remedy the harm caused to the exonerated through compensation statutes aimed mainly at providing financial support upon their release,¹⁶¹ such measures are limited. As previous research shows, money cannot replace the time spent away from loved ones, the relationships lost or that were never able to be formed due to incarceration, the exoneree's inability to have a family, or the fact that members of society may continue to believe the exoneree is guilty.¹⁶² Accordingly, the events surrounding the release of an exonerated person will have an effect on their ability to experience a smooth transition into free society.

CORNELL L. REV. 486, 515 (2003).

¹⁶⁰ See David Niven, *Southern Newspaper Coverage of Exonerations from Death Row*, 11 J. CRIM. JUST. & POPULAR CULTURE 20, 20 (2004).

¹⁶¹ Norris, *supra* note 9 (discussing characteristics of compensation statutes of various states).

¹⁶² Westervelt & Cook, *Coping with Innocence*, *supra* note 12, at 37.

In addition to the effect statements made by state officials can have on the ability of an exonerated person to reintegrate, they may have a lasting social impact. Such comments can compel members of the community to feel like the system is broken, that longer harsher punishments are warranted, or that the rights of criminal defendants are overly protected, thereby shaping the public discourse regarding criminal sanctions. The exonerated thus continue to be burdened by their wrongful conviction and society continues to labor under misapprehensions concerning the criminal justice system. Every wrongful conviction ought to be a moment for examination of the ability of our criminal justice system to accurately identify the perpetrators of harm, and not an opportunity to promulgate further damage to the wrongly convicted who have been harmed by it.