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The prosecutor as minister of justice: preaching to the unconverted from the post-conviction pulpit

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THE PROSECUTOR AS MINISTER OF JUSTICE: PREACHING TO THE UNCONVERTED FROM THE POST-CONVICTION PULPIT

Daniel S. Medwed*

Abstract: This Article explores how the “minister of justice” theory of the American prosecutor has translated into practice in the post-conviction arena. Specifically, this vague theory, when coupled with a dearth of ethical rules and judicial guidance, has not gained traction in the post-conviction sphere, and few concrete principles exist to govern prosecutorial behavior after the conviction of a criminal defendant. This Article argues for a fuller realization of the minister-of-justice ideal for prosecutors in the post-conviction process where the factual innocence of a criminal defendant is in question. To truly effectuate the minister-of-justice goal, prosecutors should take a more active part in rectifying wrongful convictions by considering the formation of internal post-conviction “innocence units” geared toward ferreting out potential wrongful convictions and assisting in presenting them to courts.

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* Associate Professor of Law, University of Utah, S.J. Quinney College of Law. J.D. Harvard Law School, 1995; B.A. Yale College, 1991. I am grateful to Maureen Howard, Jackie McMurtrie, the University of Washington School of Law, and the *Washington Law Review* for inviting me to participate in this symposium on prosecutorial ethics in tribute to the late Norm Maleng, the longtime and well-respected chief prosecutor of King County. Special thanks as well to Bruce Green, Sharissa Jones, and Ellen Yaroshefsky for sharing their thoughts on an earlier draft of this piece and to Tara Harrison and Razvan Ungureanu for their helpful research assistance.

INTRODUCTION

One of my law students recently had a job interview with a prosecutor's office. The interview seemed to be progressing nicely, in the student's estimation, until he was asked whether his previous experiences in the law had provided him with a chance to "taste blood." Silence reigned until the interviewer followed up by explaining his wish to hire only trial lawyers who had already tasted blood and liked it. This anecdote once again alerted me to the troubling disconnect between the "minister of justice" ideal of the American prosecutor and the on-the-streets reality of prosecutorial behavior. The image of the prosecutor as carnivorous aggressor in the adversarial den of the criminal courts is alive and well, not necessarily in such blatant form as the infamous "Two-Ton Contest" in Illinois—in which prosecutors vied to handle cases involving the heaviest criminal defendants in the hopes of becoming the first to convict four thousand pounds of flesh¹—but rather in numerous, more subtle ways. That is, the institutional and societal acceptance of the view that the prosecutor's primary goal is "to convict" lingers, even in the face of evidence that wrongful convictions occur with disturbing regularity in the United States.

This notion of the American prosecutor as principally concerned with garnering and maintaining convictions not only contributes to the conviction of the innocent, but also makes it vastly harder for the wrongfully convicted to achieve freedom, a daunting undertaking even under perfect circumstances. After a defendant has been convicted, it becomes increasingly difficult to critically examine the underlying legitimacy of that result. Appellate courts are limited in the issues that they may consider during the direct appeal of criminal convictions, and generally entertain only those topics presented to the judge at trial.² The

1. See, e.g., Maurice Possley & Ken Armstrong, *The Flip Side of a Fair Trial*, CHI. TRIB., Jan. 11, 1999, at 1 (discussing the nature of the "Two-Ton Contest" within the State's Attorney's Office for Cook County).

2. See, e.g., URSULA BENTELE & EVE CARY, *APPELLATE ADVOCACY: PRINCIPLES AND PRACTICE* 77 (4th ed. 2004) ("At all levels of appellate review, it is a fundamental rule that the appellate court is bound strictly by the record of the evidence adduced in the trial court. . . . [T]he next most important limitation on an appellate court's scope of review is the general rule that any legal issue raised on appeal must have been 'preserved.' That is, the issue must first have been presented to the trial court.").

task of evaluating claims of factual innocence therefore typically falls into the realm of the collateral post-conviction process, such as writs of habeas corpus or coram nobis, or their statutory analogues.³ States are notoriously suspicious of post-conviction innocence claims based on newly discovered evidence,⁴ and the procedures in this area usually reflect this distrust by featuring stringent statutes of limitations, onerous burdens of proof, and deferential standards of appellate review.⁵ A key variable, then, in the ability of a criminal defendant to have a chance for success on a post-conviction claim of innocence often lies in the nature of the prosecutor's response; prosecutorial openness to the possibility of the defendant's innocence may go a long way toward convincing the judge of the merits of that claim, if only to the extent of granting an evidentiary hearing.⁶

This Article argues for a fuller realization of the minister-of-justice ideal for prosecutors in the post-conviction process where the factual innocence of a criminal defendant is in question, and builds upon a previous piece that I wrote regarding the phenomenon of prosecutorial resistance to innocence claims.⁷ Specifically, to truly effectuate the

3. See generally Daniel S. Medwed, *California Dreaming? The Golden State's Restless Approach to Newly Discovered Evidence of Innocence*, 40 U.C. DAVIS L. REV. 1437 (2007) [hereinafter Medwed, *California Dreaming*] (discussing California's approach to post-conviction innocence claims based on newly discovered non-DNA evidence); Daniel S. Medwed, *Introduction to Beyond Biology: Wrongful Convictions in the Post-DNA World*, 2008 UTAH L. REV. 1 (2008) (introducing a symposium on wrongful convictions unrelated to DNA evidence); Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655 (2005) [hereinafter Medwed, *Up the River*] (analyzing state approaches to newly discovered non-DNA evidence claims); Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 382–84 (2002) (critiquing state post-conviction statutes governing DNA testing).

4. See, e.g., *People v. Sutton*, 15 P. 86, 88 (Cal. 1887) (suggesting that claims of newly discovered evidence should be “regarded with distrust and disfavor”).

5. See generally Medwed, *Up the River*, *supra* note 3 (describing the procedures through which post-conviction claims of innocence are typically litigated in state courts).

6. See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 128 (2004) (“[W]here post-conviction innocence claims are unrelated to DNA testing, such as those involving statements by previously unknown witnesses or confessions by the actual perpetrator, the prosecution can influence how courts will resolve the claims by deciding whether to cooperate with the defense . . .” (internal citations omitted)); see also Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. (forthcoming 2009) (manuscript at 22, on file with author) (“A court is more likely to grant relief if the prosecutor joins in a defendant's motion to set aside his conviction based on new evidence.”).

7. See Paul Parker & Ben Coate, *Whose Justice? Prosecution and Defense Reactions to Capital-Case Reversals*, 29 JUST. SYS. J. 367, 379–80 (2008) (explaining the results of an empirical study of

minister-of-justice goal, prosecutors should play a more active role in rectifying wrongful convictions by forming internal post-conviction “innocence units” geared toward ferreting out potential wrongful convictions and assisting in presenting these cases to courts.⁸ Part I of this Article discusses the minister-of-justice ideal for prosecutors, as articulated by the U.S. Supreme Court and assorted codes of professional conduct, and the countervailing pressure on prosecutors to procure convictions at the trial level. Next, Part II examines the rules governing prosecutors’ post-conviction duties to correct wrongful convictions (or rather, the lack thereof) and explores how prosecutorial attitudes evolve in the aftermath of a conviction—how institutional, professional, and psychological incentives are normally aligned with preserving the integrity of the trial result. Part III of the Article advocates for the creation of internal prosecutorial innocence units as a way of fulfilling the minister-of-justice ideal in the post-conviction sphere, emphasizing the ethical and moral obligations of prosecutors to facilitate the exoneration of the innocent, not to mention the practical benefits that would ensue. The establishment of these units would help to strengthen the legacy of Norm Maleng, the late King County prosecutor to whom this symposium is dedicated, and who, by all accounts, embraced and embodied the minister-of-justice concept as few others have.⁹

reactions to exonerations and noting that “overall the data here seem to support Medwed’s argument about the commitment that prosecutors have to a particular outcome”); *see generally* Medwed, *supra* note 6 (examining issues related to prosecutorial resistance to post-conviction innocence claims). Several other scholars have addressed the nature of prosecutors’ post-conviction ethical obligations in the context of innocence and have recommended, in general, that prosecutors should do more to promote justice than the rules currently seem to require. *See generally* Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 CAL. W. L. REV. 389 (2002) (exploring the ethical obligations of prosecutors in the realm of post-conviction innocence claims); Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171 (2005) (analyzing the issues surrounding the post-conviction ethical obligations of prosecutors, including situations related to innocence claims). In addition, Bruce Green and Ellen Yaroshefsky are currently working on an interesting article on this topic. *See* Green & Yaroshefsky, *supra* note 6.

8. I have raised this idea before, and I wish to develop and refine it further in this Article. *See* Medwed, *supra* note 6, at 175–77 (suggesting that district attorneys’ offices consider creating post-conviction units).

9. *See, e.g.*, Jim Brunner, *Maleng Leaves a Living Legacy*, THE SEATTLE TIMES, May 25, 2007, at A1 (noting that U.S. District Court Judge Ricardo Martinez recalls that “Maleng often told his prosecutors, ‘Our job is to do justice, and that doesn’t necessarily mean a conviction.’”). Norm Maleng advocated for, among other innovations, alternatives to incarceration for certain non-violent criminal offenders and helped to create a specialized drug court in King County to address the particular issues wrought by drug addiction. *Id.* Shortly before his death, Maleng wrote in a foreword to a report released by the American Bar Association’s Ad Hoc Innocence Committee that

I. THE “MINISTER OF JUSTICE” MODEL PRIOR TO CONVICTION: IDEALS AND REALITY

A. *Theory*

For over 150 years, courts and scholars have consistently urged for the image of the American prosecutor as a “minister of justice,” a person who, in effect, never loses a case, whether conviction or acquittal, as long as the outcome is fair.¹⁰ Prosecutors in the United States represent “the people,” not individual victims or the interests of special groups.¹¹ As a result, the prosecutor’s role in the adversarial system differs substantially from that of the defense attorney; the prosecutor is a quasi-judicial officer. In 1935, the U.S. Supreme Court classified the prosecutor as

the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.¹²

“[t]he next step is to instill in every prosecutor’s office, police agency, and crime laboratory an unwavering ethic to seek the truth through the most reliable methods available. This carries with it the obligation to refrain from using investigative techniques that may yield questionable results.” ABA CRIMINAL JUSTICE SECTION’S AD HOC COMM. TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY* ix (Paul Giannelli & Myrna Raeder eds., 2006).

10. The American prosecutor’s obligation to seek justice is traceable as far back as George Sharwood’s 1854 “Essay on Professional Ethics.” J. George Sharwood, *An Essay on Professional Ethics* (F.B. Rothman 5th ed. 1993) (1854). *See also* Jane Campbell Moriarty, “*Misconvictions, Science, and the Minister of Justice*,” 86 NEB. L. REV. 1, 21–22 n.117 (2008).

11. *See* Angela Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 57–58 (1998) (discussing how this populist model evolved in the 1820s as a way of making the government accountable to the electorate).

12. *Berger v. United States*, 295 U.S. 78, 88 (1935); *see also* *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (“We have several times underscored the ‘special role played by the American prosecutor in the search for truth in criminal trials.’”).

This view of the prosecutor as a minister of justice has manifested itself in numerous rules of professional responsibility. For instance, the comments to Rule 3.8 of the Model Rules of Professional Conduct, a rule entitled “Special Responsibilities of a Prosecutor,”¹³ state that “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”¹⁴ Likewise, the American Bar Association’s Criminal Justice Standards reflect this vision, asserting that “[t]he duty of the prosecutor is to seek justice, not merely to convict.”¹⁵ Even the guidelines put forth by the National District Attorneys Association, an organization devoted to the interests of prosecutors, proclaim that “[t]he primary responsibility of prosecution is to see that justice is accomplished.”¹⁶

Judicial opinions from jurisdictions across the country have also endorsed the minister-of-justice model of prosecutorial behavior¹⁷ and

13. This is the sole rule in the Model Rules of Professional Conduct addressing the unique responsibilities of the prosecutor. See Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 *FORDHAM L. REV.* 1413, 1429 (2007); Hans P. Sinha, *Prosecutorial Ethics: The Duty to Disclose Exculpatory Material*, *PROSECUTOR*, Jan.–Mar. 2008, at 20 (“Viewing the Rules of Professional Conduct as a pyramid, Rule 3.8 would constitute the summit of this pyramid. Not only does this rule speak specifically to the unique responsibilities of the prosecutor, but recognizing the uniqueness and power of prosecutors, it is also the only rule drafted specifically for one segment of the profession.”).

14. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2008).

15. CRIMINAL JUSTICE STANDARDS COMMITTEE, ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3-1.2(c) (3d ed. 1993) [hereinafter ABA STANDARDS FOR CRIMINAL JUSTICE]; see also *id.* at 3-1.2(b) (“The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.”).

16. NAT’L DIST. ATTORNEYS ASS’N, NATIONAL PROSECUTION STANDARDS 1.1 (2d ed. 1991).

17. See, e.g., *In re Peasley*, 90 P.3d 764, 772 (Ariz. 2004) (observing that a prosecutor’s interest “is not that it shall win a case, but that justice shall be done” (internal quotations omitted)); *State v. Pabst*, 996 P.2d 321, 328 (Kan. 2000) (“A prosecutor is a servant of the law and a representative of the people. . . . We are unable to locate an excuse for a prosecutor’s failure to understand the remarkable responsibility he or she undertakes when rising in a courtroom to announce an appearance for the State of Kansas.”); *State v. Young*, 755 A.2d 547, 548 (Me. 2000) (“As we have noted previously, prosecutors are held to a higher standard regarding their conduct during trial because they represent the State . . . and because they have an obligation to ensure that justice is done, as opposed to merely ensuring that a conviction is secured.”); *Hosford v. State*, 525 So.2d 789, 792 (Miss. 1988) (“A fearless and earnest prosecuting attorney . . . is a bulwark to the peace, the safety and happiness of the people. . . . [I]t is the duty of the prosecuting attorney, who represents all the people and has no responsibility except fairly to discharge his duty, to hold himself under proper restraint and avoid violent partisanship, partiality, and misconduct which may tend to deprive the defendant of the fair trial to which he is entitled” (quoting *Adams v. State*, 30 So.2d 593, 596 (Miss. 1947))); *Jeschke v. State*, 642 P.2d 1298, 1303 (Wyo. 1982) (noting that prosecutors must be mindful that their duty is to pursue justice, not merely to convict).

admonished prosecutors to strive against the conviction of the innocent so as to best emulate this ideal.¹⁸ Notably, courts have created rules governing the disclosure of exculpatory evidence (*Brady* material) to defendants,¹⁹ protections against the presentation of perjured testimony,²⁰ and restrictions on the manner in which prosecutors may comment on the evidence at trial.²¹ Specific rules of professional responsibility, moreover, have served to reinforce these doctrines, with the effect that any failure to abide by them supposedly results in sanctions against the individual prosecutor involved.²²

18. *See, e.g.*, *Bailey v. Commonwealth*, 237 S.W. 415, 417 (Ky. 1922) (“[T]he duty of a prosecuting attorney is not to persecute, but to prosecute, and that he should endeavor to protect the innocent as well as to prosecute the guilty.”); *Hurd v. People*, 25 Mich. 405, 416 (1872) (“The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent.”).

19. *See generally* *Brady v. Maryland*, 373 U.S. 83 (1963) (the seminal case creating this duty). A defendant’s access to “*Brady* material” is treated as a constitutional right. *See, e.g.*, *Arizona v. Youngblood*, 488 U.S. 51, 55 (1988) (describing the constitutionally guaranteed right of access to exculpatory evidence).

20. *See, e.g.*, *Mooney v. Holohan*, 294 U.S. 103, 112–13 (1935); *see generally* ROBERT M. BLOOM, *RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM* (2002) (describing the issues related to the use of jailhouse informants at criminal trials, including the problem of perjury); Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645 (2004); Raeder, *supra* note 13; Melanie D. Wilson, *Prosecutors “Doing Justice” Through Osmosis—Reminders to Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67 (2008).

21. *See, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320, 332–33 (1985); *People v. Greenwall*, 22 N.E. 180, 182 (N.Y. 1889) (“The district attorney representing the majesty of the people, and having no responsibility except fairly to discharge his duty, should put himself under proper restraint, and should not, in his remarks in the hearing of the jury, go beyond the evidence, or the bounds of reasonable moderation.”); *see also* Charles L. Cantrell, *Prosecutorial Misconduct: Closing Argument in Oklahoma*, 31 OKLA. CITY U. L. REV. 379, 379 (2006) (discussing “[t]he persistent and ongoing problem of prosecutorial misconduct during final arguments in criminal cases” and attributing it to “built-in pressures of the legal system that allow and even encourage it”); Bennett L. Gershman, *Misuse of Scientific Evidence by Prosecutors*, 28 OKLA. CITY U. L. REV. 17, 35 (2003) (“When courts criticize prosecutors for misconduct, they often are referring to the prosecutor’s unfair closing argument.”). For a comprehensive account of the subject, *see* Bennett Gershman’s excellent treatise, BENNETT L. GERSHMAN, *PROSECUTORIAL MISCONDUCT* (2d ed. 1999).

22. *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 15, Standard 3-3.11(a) (“A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.”); *id.* Standard 3-3.1(a) (“A prosecutor ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts, but the prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies.”); *see also* MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (1998) (mandating that the prosecutor in a criminal case “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . .”).

Even so, the reliance on “justice” as a governing principle of prosecutorial behavior is problematic because of the term’s inherent vagueness.²³ As R. Michael Cassidy has observed, “The legal profession

Regardless of the rules of professional responsibility, state disciplinary organizations are notoriously reluctant to sanction prosecutors even upon judicial findings of misconduct. *See* ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 147 (2008) (“[S]ome of the language of [Model Rule] 3.8 is vague and subject to interpretation, providing very little clear guidance to prosecutors and making it difficult to sustain complaints against prosecutors before disciplinary authorities.”); Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 *HOFSTRA L. REV.* 275, 277 (2007) (“The Supreme Court has recommended that prosecutors be referred to the relevant disciplinary authorities when they engage in misconduct. However, for reasons that remain unclear, referrals of prosecutors rarely occur. Even when referrals occur, state bar authorities seldom hold prosecutors accountable for misconduct.”); Paul C. Giannelli & Kevin C. McMunigal, *Prosecutors, Ethics, and Expert Witnesses*, 76 *FORDHAM L. REV.* 1493, 1518 (2007) (“As many commentators have recognized, disciplinary sanctions for *Brady* violations appear to be illusory.”); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 *WIS. L. REV.* 399, 427 (2006) (“Bar disciplinary authorities should implement a system to review reported instances of prosecutorial misconduct and, when they deem it appropriate, conduct investigations or recommend discipline.”); Samuel J. Levine, *Taking Ethical Obligations Seriously: A Look at American Codes of Professional Responsibility Through a Perspective of Jewish Law and Ethics*, 57 *CATH. U. L. REV.* 165, 170 (2007) (“[T]he discretionary nature of many of the rules often provides lawyers the opportunity to disregard ethical deliberation without fear of serious consequences.”).

23. *See, e.g.*, R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to “Seek Justice,”* 82 *NOTRE DAME L. REV.* 635, 637 (2006) (“‘Justice’ is an example of a highly generalized axiom of behavior—it does not set forth permissible and impermissible conduct, and it does not set out criteria for how prosecutors are supposed to determine what is just.”); Joy, *supra* note 22, at 408 (“Yet, the history of ethics rules directed toward prosecutors demonstrates that the ethics rules generally have been limited to nonspecific pronouncements that the prosecutor has ‘special’ responsibilities, different from other lawyers, and that the prosecutor should ‘seek justice.’”); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 *VAND. L. REV.* 45, 50 (1991) (contending that the “high-minded but overly general ‘justice’ rule masks the difficulty of regulating” conduct by prosecutors); *see also* *United States v. Agee*, 597 F.2d 350, 371 (3d Cir. 1979) (Gibbons, J., dissenting) (urging for firm requirements to minimize prosecutorial misconduct, and noting that judicial “tongue clicking” about prosecutorial misconduct “has been notoriously ineffective”). One of the most egregious contemporary examples of a prosecutor’s failure to do justice, and the inability of the rules of ethics to adequately deter prosecutorial misbehavior, is Mike Nifong’s performance in the Duke lacrosse case. *See, e.g.*, Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to “Do Justice,”* 76 *FORDHAM L. REV.* 1337, 1338 (2007) (“The ethics rulings resulting from this case regarding the established charges of improper pretrial statements by Nifong, his failure to disclose DNA evidence that tended to negate guilt, and his deceptive statements to the trial court, lawyers, and the bar are instructive. However, broad generalization from the rulings is likely to be of limited value because the factors that produced this disaster in combination with the clarity of proof will likely not be seen again soon.”); Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 *GEO. MASON L. REV.* 257, 257 (2008) (“As global as Nifong’s ethics violations were, the case illustrates the importance of specific duties rather than broad precepts for the imposition of professional discipline.”).

has left much of the prosecutor's day-to-day decision making unregulated, in favor of this catchall 'seek justice' admonition."²⁴ And, as Cassidy and others have noted, this absence of guidance has left tough ethical questions largely in the hands of trial prosecutors alone.²⁵ Scholars in the field of prosecutorial ethics have, not surprisingly, articulated an array of responses to this state of affairs, most of which are highly critical of the broad, often hortatory nature of the canons of prosecutorial ethics.²⁶ Some commentators press for more stringent rules of professional responsibility to channel prosecutorial behavior and cabin the exercise of individual discretion,²⁷ others recommend increased training for prosecutors in rendering ethical decisions,²⁸ and

24. See Cassidy, *supra* note 23, at 637; Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1597 (2003) (characterizing Model Rule 3.8 as "woefully incomplete"); Joy, *supra* note 22, at 410–11 (observing that the first set of professional ethics rules passed by the American Bar Association in 1908 contained little guidance for prosecuting and noting that except for a "statement condemning the suppression of evidence of innocence, the 1908 Canons did not define what it meant to do justice, or how the prosecutor should reconcile their zealous representation of the government's interest in a conviction with justice for the accused").

25. See Cassidy, *supra* note 23, at 637–39 (discussing various proposals for channeling prosecutorial discretion). The lack of guidance may be especially troublesome given the well-chronicled expansion of prosecutorial power in recent decades. See Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 395 (1992) ("[A]s the prosecutor's investigating, charging, convicting, and sentencing powers have escalated, the 'inherent inequality' between the prosecutor and the defendant has intensified, making the adversary system almost obsolete."); Bruce A. Green & Fred C. Zacharias, "*The U.S. Attorneys Scandal*" and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187, 188 (2008) ("The centralization of authority within DOJ that the recent firings [of six U.S. attorneys] exemplify can be seen as a mechanism that facilitates abuse of government power because it enables the Attorney General and other high-ranking DOJ officials to enforce prosecutorial decisions that promote partisan objectives, either out of sympathy for the President's interests or in direct response to White House importuning.").

26. See *supra* notes 23–25 and accompanying text; *infra* notes 27–29 and accompanying text. For an interesting essay in support of the broad "do justice" obligation, see Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1338, 1340 (2004) ("[T]he prosecutor's broad ethical obligation to seek justice serves as a workable and, indeed, appropriate standard for prosecutorial ethics.").

27. See, e.g., Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 616 (1999); Joy, *supra* note 22, at 420 ("[T]here is room for much more guidance and clearer ethical obligations for prosecutors."); see also Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 897 (suggesting that prosecutors' offices should create and publicize their internal policies concerning discretionary decision-making); Joy, *supra* note 22, at 424–25 ("Implementing internal policies that value ethical conduct, and implementing and enforcing internal discipline when those norms are violated, would go a long way toward addressing the issue of prosecutorial misconduct . . . Internal controls, though, are unlikely to be enough.").

28. See generally Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 257 (1988) ("Careful training is obviously an essential

still others suggest that “a renewed focus” on virtuous conduct can help prosecutors resolve ethical quandaries.²⁹ Regardless of the many advantages of these proposals, prosecutors are currently bound by only a few tangible ethical rules in the pretrial and trial spheres, leaving the amorphous concept of justice to inform much of prosecutorial behavior.

B. Practice

The minister-of-justice concept—while noble in theory—has not always translated seamlessly into practice at the trial level in light of the reality of prosecutorial culture and its organizational pressures. A series of factors cause trial prosecutors to view their jobs primarily through the lens of gaining “wins” (convictions) and avoiding “losses” (acquittals).³⁰ In an occupation where success may be difficult to gauge, an individual prosecutor’s conviction rate serves as a quantifiable, if imperfect, means of evaluating performance and supervisors often consider this data in awarding promotions.³¹ Some prosecutorial offices unabashedly use conviction rates as a motivational device—for example, by internally distributing attorneys’ “batting averages,” or listing each lawyer by name on a bulletin board with a series of stickers reflecting the conclusions of their recent cases (green for convictions and red for acquittals).³²

ingredient of any program to induce proper prosecutorial conduct.”); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 293 (2000) (“New prosecutors need thorough orientation programs; these should be followed up with adequate re-training.”).

29. See generally Cassidy, *supra* note 23.

30. See, e.g., Goldberg & Siegel, *supra* note 7, at 409 (“The number of convictions obtained may be a measure of a prosecutor’s individual success or failure.”). The desire to “win” is intertwined with the pressure to offer plea bargains and avoid the time, risk, and expense of trial. This pressure, in turn, could lead to the conviction of the innocent. See, e.g., F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 190 (2002) (“[T]he incentives to a plea bargain are powerful enough to blind the prosecutor to the defendant’s actual culpability.”).

31. See, e.g., Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA J. SOC. POL’Y & L. 305, 321 (2001) (“Promotions within the Los Angeles District Attorney’s office often include consideration of conviction rates.”); Erik Luna, *System Failure*, 42 AM. CRIM. L. REV. 1201, 1213 (2005) (“In general, front-line prosecutors are evaluated for promotion (and thus higher salary and prestige) by their win-loss record, while chief prosecutors will be reelected or retained based on, *inter alia*, the rate and number of convictions obtained by their office.”); Catherine Ferguson-Gilbert, Comment, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 293 (2001) (“Promotions for subordinate prosecutors depend on their ‘scores’ for convictions.”).

32. See Ferguson-Gilbert, *supra* note 31, at 290.

On a macro level, chief prosecutors tend to cite their offices' overall conviction records to justify their budgets to local politicians and to demonstrate, above all, that they are “tough” on crime.³³ This “tough on crime” rhetoric often resonates with the public, an important consideration given that nearly all state and local district attorneys gain their positions through public elections.³⁴ Therefore, institutional and professional incentives in most prosecutorial offices are steadfastly aligned with the goal of earning convictions—an ambition that does not invariably dovetail with the minister-of-justice concept.³⁵

Institutional and professional incentives to obtain convictions are frequently buttressed by psychological pressures as well. As I have written previously, prosecutors who operate within organizations that prize convictions “may begin to internalize the emphasis placed on conviction rates and view their win-loss record as a symbol of their self-worth.”³⁶ Victories at trial can boost a lawyer’s confidence and, concomitantly, his or her ego; it is not farfetched to suggest that trial lawyers are renowned for their “big egos” because of the need to exude confidence before judges and juries.³⁷

Additionally, the unique relationship between individual police officers and prosecutors can have a subtle, and potentially untoward, psychological impact on how cases are prosecuted. Specifically, police “tunnel vision” is a well-chronicled contributor to wrongful convictions; tunnel vision occurs when detectives, after concentrating on a particular suspect, subconsciously disregard the possibility of alternative perpetrators or exculpatory evidence throughout the remainder of the investigation.³⁸ Prosecutors, for their part, work closely with the police

33. See Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 350 n.223 (2001) (noting the pressure prosecutors face to justify their budgets); Moriarty, *supra* note 10, at 23 (“In reality, however, protecting the innocent from conviction does not stand on equal footing with convicting the guilty—it is doubtful that any elected prosecutor campaigned on the notion of cases he did not prosecute.”).

34. See DAVIS, *supra* note 22, at 166–69 (describing the electoral process for prosecutorial offices across the country); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 734 (1996) (noting that over ninety-five percent of state and local prosecutors are elected); Green & Yaroshefsky, *supra* note 6 (manuscript at 21) (“Releasing convicted defendants is rarely a route to political popularity.”).

35. See, e.g., BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246 (2000) (noting that prosecutorial misconduct occurred in forty-two percent of the initial batch of sixty-two DNA exonerations).

36. Medwed, *supra* note 6, at 138.

37. See *id.*

38. See Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49

and may fall prey to a comparable form of tunnel vision at the trial stage,³⁹ especially as they typically receive only the evidence incriminating the person whom the police consider the culprit.⁴⁰ Prosecutors directly interact not only with the police, but also with the victims and witnesses in their cases, and may become somewhat emotionally attached to them and their accounts of the criminal event.⁴¹ Indeed, decades ago, George Felkenes observed that the various incentives and pressures facing prosecutors led to the emergence of a “conviction psychology”⁴² in the corridors of prosecutorial offices, and there is nothing to indicate that this phenomenon has abated over the years.

The upshot of this discussion is that the idealistic image of the prosecutor as a minister of justice and the attendant doctrines calculated to transform this image into reality may regrettably mask a much less glowing truth about prosecutorial conduct at the trial level. In particular, the demand to obtain convictions can result in prosecutors inadvertently (and, more rarely, purposefully) aiding in the conviction of the innocent.⁴³ For instance, one study of seventy-four DNA exonerations discovered that an element of prosecutorial misconduct occurred at trial

HOW. L.J. 475, 479 (2006) (discussing the effect of tunnel vision on prosecutors); Dianne L. Martin, *Lessons About Justice from the “Laboratory” of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002) (observing that tunnel vision is a recurring cause of wrongful convictions in common law jurisdictions). For a detailed analysis of the wide-ranging effect of tunnel vision in the criminal justice system, see generally Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006).

39. See Findley & Scott, *supra* note 38, at 327–31.

40. *Id.* at 330 (“Prosecutors see the evidence generated by the police investigation, but often do not see the evidence about alternative suspects who were rejected too quickly, about eyewitnesses who failed to identify the defendant, or about other disconfirming evidence that police dismissed as insignificant.”).

41. See, e.g., Judith L. Maute, “*In Pursuit of Justice*” in *High Profile Criminal Matters*, 70 FORDHAM L. REV. 1745, 1747 (2002) (“Overzealous prosecutors may become too closely aligned with law enforcement personnel and forensics witnesses who are willing to shade or falsify their testimony in order to obtain a conviction.”).

42. See, e.g., George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 99 (1975) (“The work environment of the prosecutor places on him demands that are often ambiguous and conflicting. The strains of maintaining public support and acting effectively in prosecuting suspects make this highly visible government position vulnerable to numerous compromises. One such compromise is the ‘conviction psychology’ attributed to some prosecutors.”).

43. See, e.g., Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecutorial Discipline Seriously*, 8 D.C. L. REV. 275, 275–76 (2004) (discussing the prosecutorial misconduct involved in the wrongful convictions of Dennis Fritz and Ron Williamson in Oklahoma).

in thirty-three of those cases.⁴⁴ Even more, irrespective of the role played by prosecutors at trial, wrongful convictions are an inevitable component of the American criminal justice system for, like all systems designed and operated by humans, it is fallible.⁴⁵ To that end, it is crucial to survey the rules governing prosecutors' responses to post-conviction claims of innocence—some of which are bound to be meritorious—and to ponder as a normative matter how prosecutors *should* respond to such claims in order to best comport with the minister-of-justice goal.

II. PROSECUTORIAL OBLIGATIONS AND POST-CONVICTION CLAIMS OF INNOCENCE

A. *Resisting Innocence*

In light of data suggesting that wrongful convictions are widespread, prosecutors should adopt a more open-minded approach to post-conviction innocence claims than has traditionally been the case. Since 1989, over 200 prisoners have proven their innocence through post-conviction DNA testing.⁴⁶ This figure likely belies the existence of a much larger group of innocent inmates who remain incarcerated, as biological evidence suitable for DNA testing is seldom available in criminal cases,⁴⁷ and procedural and evidentiary obstacles make it

44. See The Innocence Project, Understand the Causes: Government Misconduct, <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited Feb. 11, 2009), *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washlrev35n44.pdf>.

45. See, e.g., FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI: A CRITICAL ANALYSIS FOR LAWYERS AND LAYMEN 108 (Little, Brown, & Co. 1927) (“All systems of law, however wise, are administered through men, and therefore may occasionally disclose the frailties of men. Perfection may not be demanded of law, but the capacity to correct errors of inevitable frailty is the mark of a civilized legal mechanism.”).

46. For an updated listing of DNA exonerations, see The Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/> (last visited Feb. 11, 2009), *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washlrev35n46a.pdf>. See also BARRY SCHECK & PETER NEUFELD, 200 EXONERATED: TOO MANY WRONGLY CONVICTED (2007), www.innocenceproject.org/200/ip_200.pdf, *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washlrev35n46b.pdf> (analyzing the first two-hundred DNA exonerations in the United States).

47. See, e.g., *Death Penalty Overhaul: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002) (statement of Barry Scheck, Co-Founder, The Innocence Project), *available at* 2002 WL 1335515 (“The vast majority (probably 80%) of felony cases do not involve biological evidence that can be subjected to DNA testing.”); Nina Martin, *Innocence Lost*, S.F. MAG., Nov. 2004, at 78, 105 (“[O]nly about 10 percent of criminal cases have any biological evidence—blood, semen, skin—to test.”).

burdensome for prisoners to attain exoneration in cases lacking the magic bullet of biology.⁴⁸ In both DNA and non-DNA innocence cases, prosecutorial responses to innocence claims can influence the outcomes,⁴⁹ even if a prosecutor technically lacks the authority to unilaterally order the release of an inmate.⁵⁰ Most notably, a prosecutor's willingness to join in a defense motion for an evidentiary hearing, facilitate a post-conviction investigation into a claim's merits, and/or readily consent to DNA testing sends an important, possibly instrumental, message to the judiciary and removes a major impediment to the favorable resolution of such cases—adversarialism.⁵¹ The minister-of-justice model, if taken seriously, implies that prosecutors should take all reasonable steps necessary to verify whether an innocence claim is viable, and, upon achieving such confirmation, assist in exonerating that defendant.

Yet, despite the foregoing observations, there are alarming signs that prosecutors do not unflinchingly adhere to the minister-of-justice ethos in the post-conviction arena. One study by the Innocence Project at the Benjamin N. Cardozo School of Law demonstrated that prosecutors had consented to post-conviction DNA testing in *less than half* the cases in which DNA testing ultimately exonerated an inmate.⁵² The annals of criminal law are also rife with tales of prosecutors behaving defensively even when faced with strong evidence of innocence exculpating the convicted. At the extreme end of the spectrum, prosecutors have apparently destroyed evidence to maintain a trial result,⁵³ less extreme but still deeply worrisome, prosecutors confronted with the likelihood of

48. See *supra* notes 4–5 and accompanying text.

49. See generally Medwed, *supra* note 6.

50. As Fred Zacharias explains:

A prosecutor who learns of even fully exculpatory evidence does not have personal authority to release a convicted defendant. The ordinary procedure for adjusting a conviction is for a defendant to bring a motion to vacate the judgment and for a new trial (with or without the prosecutor's blessing). Only once a court grants that motion does the prosecutor regain the discretion to dismiss or to negotiate a result that she had before conviction.

Zacharias, *supra* note 7, at 185–86.

51. See Green, *supra* note 27, at 638 n.133 (mentioning that prosecutors often respond defensively to post-conviction innocence claims by discounting the legitimacy of the purported newly discovered evidence); Zacharias, *supra* note 7, at 186–87 (“[A] prosecutor’s consent to a motion for a new trial may have a persuasive effect on a judge making these determinations.”); see generally Medwed, *supra* note 6 (analyzing prosecutorial resistance to post-conviction innocence claims).

52. See Medwed, *supra* note 6, at 129 n.15.

53. See *id.* at 129 n.18.

a wrongful conviction in their jurisdiction have more than once concocted revised theories of the case that bear scant resemblance to the approach at trial in order to rationalize the continued incarceration of a defendant.⁵⁴ What might explain such disturbing accounts? While a full-fledged assessment of the bases for prosecutorial animosity to post-conviction innocence claims transcends the scope of this Article, it is worth briefly addressing a handful of the key explanations: (1) the lack of firm post-conviction ethical obligations mandating particular prosecutorial responses to innocence claims, (2) resource constraints, (3) concerns for systemic finality, and (4) psychological barriers.

With respect to ethics, prosecutors encounter few concrete obligations to implement the minister-of-justice ideal in the post-conviction setting in general and in the realm of innocence claims in particular. Indeed, the ethical rules guiding prosecutorial approaches to post-conviction innocence claims often seem more nebulous than those applicable to prosecutors in the pretrial and trial stages. To be sure, this may be largely a function of the unique foundation upon which such claims rest. Many of the ethical rules covering prosecutorial behavior in the pretrial and trial contexts—including the obligation to disclose *Brady* material—are grounded in concerns for fairness and due process to criminal defendants.⁵⁵ Post-conviction claims of innocence, however, do not intrinsically implicate process-oriented values; the crux of an innocence claim normally lies not in whether the trial was fair, but whether it was factually accurate.⁵⁶ Perhaps it should not come as a shock to learn that most ethical rules pertaining to prosecutors, given that they derive from fairness-based goals, fail to mold themselves easily to the odd contours of factual innocence claims that crop up after trial. In addition, as Fred Zacharias has noted, the dearth of post-conviction ethical obligations for prosecutors may be partly attributable to the basic fact that legislators and professional code drafters have not historically paid much attention

54. See, e.g., Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 523–38 (2008) (discussing the case of Bruce Dallas Goodman in Utah and the manner in which prosecutors responded to DNA results signaling that Goodman was not the source of semen in a case prosecuted as a rape-murder).

55. See, e.g., Goldberg & Siegel, *supra* note 7, at 407 (“First, innocence-based claims for postconviction review are premised on the notion that the trial result was factually incorrect, *not* that the trial process was somehow unfair. The existing constitutional obligations for prosecutors to disclose evidence or information . . . have all been based on the constitutional guarantee of due process under the fourteenth amendment.”).

56. *Id.* See also *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002) (finding no *Brady* violation for failing to turn over “old” evidence for “new” testing in post-conviction sphere).

to post-conviction issues.⁵⁷ For example, a well-regarded font of prosecutorial ethics—the American Bar Association’s *Standards for Criminal Prosecutions*—encompasses prosecutorial behavior at each stage of the pretrial and trial process through sentencing and then suddenly ceases.⁵⁸

Along with the paucity of ethical rules, resource limitations affect prosecutorial responses to inmates’ assertions of innocence. Prosecutorial offices, like all government agencies, have finite resources and are politically accountable for their expenditures.⁵⁹ In accordance with these fiscal constraints, trial prosecutors often carry large caseloads, a burden that would presumably grow if offices were to apportion certain lawyers toward the assessment of post-conviction innocence claims and remove them from the trial and direct appeals dockets.⁶⁰ Simply put, asking for prosecutors to do more work in post-conviction matters might push many of these financially strapped organizations beyond the breaking point.

The criminal justice system on the whole also has a strong concern for finality. Ultimately, cases must become final for judges, lawyers, victims, and even defendants, to experience some psychological closure.⁶¹ And, if cases did not have a point of finality, the system could grind to a halt, overcome by a seemingly endless spate of appeals and collateral petitions.⁶² The prospect of encouraging prosecutors to

57. See Zacharias, *supra* note 7, at 173 (“Prosecutorial discretion is at its height in the postconviction context because legislators and professional code drafters have not focused on postconviction issues.”).

58. See *id.* at 174 (“The American Bar Association’s *Standards for Criminal Prosecutions*, for example, address prosecutorial conduct at all stages through sentencing, but then stop.”)

59. See *supra* note 33 and accompanying text.

60. See, e.g., Chemerinsky, *supra* note 31, at 312 (“In speaking to many assistant District Attorneys, I heard the constant complaint about the sheer volume of cases and how difficult it was for them to do anything but try to process them as effectively as possible.”).

61. See, e.g., Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 606 (2002) (noting that the U.S. Supreme Court has emphasized that “finality is essential to both the retributive and deterrent functions of the criminal law and to the interests of victims of crimes in obtaining closure”); see also Green & Yaroshefsky, *supra* note 6 (manuscript at 42) (“There is a legitimate interest in something approximating ‘finality’ in the criminal process, which would be seriously undercut by a standard calling for prosecutors to try to secure a convicted defendant’s release whenever new evidence raises no more than a reasonable doubt about guilt, rather than some genuine likelihood of innocence.”).

62. See, e.g., George C. Thomas III et al., *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 294 (2003) (“If there were no way at some point to impose a sentence with finality, prisoners would endlessly search for scraps of new evidence and

undertake a more proactive stance in reevaluating trial results and investigating innocence claims violates the very principle of finality.⁶³

Last, but not least, prosecutors encounter powerful psychological impediments to the idea of aiding in the evaluation and possibly the investigation of post-conviction innocence claims. As an initial matter, there is the “needle in a haystack” dilemma; the avalanche of post-conviction petitions filed by inmates each year admittedly contains few meritorious claims.⁶⁴ This imbalance between the frivolous and the valid creates a disincentive for courts, let alone prosecutors, to muster the energy to tackle each claim with zest and equanimity.⁶⁵ Pervasive cynicism about post-conviction petitions may contaminate some prosecutors and jaundice their view of innocence claims.⁶⁶ Furthermore, showing openness to a post-conviction claim of innocence could jeopardize a prosecutor’s “tough on crime” veneer,⁶⁷ or perhaps worse, show personal and professional weakness.⁶⁸

Cognitive biases also partially account for why prosecutors appear so resistant to the idea of wrongful convictions occurring on their watch or even on that of a predecessor.⁶⁹ For instance, scholars have studied the

bombard courts with petitions to reopen cases.”).

63. In a sense, it also undercuts the jury’s role. *See, e.g.*, *Lee v. Moore*, 213 So.2d 197, 198 (Ala. 1968) (commenting in a civil case that courts should be reluctant to grant motions for a new trial “because the verdict of a jury results from one of the most precious rights in our system of government, that is, the right of trial by jury”).

64. *See Medwed, supra* note 6, at 148–50.

65. *Id.*

66. *See, e.g.*, Adam Liptak, *Prosecutors See Limits to Doubt in Capital Cases*, N.Y. TIMES, Feb. 24, 2003, at A1, *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washlrev35n66.pdf> (noting that Jennifer Joyce, circuit attorney for St. Louis, Missouri, “saw a ‘steady trickle’ of ‘deceitful and sadistic’ motions” where “[t]he defendant knows he is guilty . . . and he wants to play the lottery”).

67. *See Medwed, supra* note 6, at 153 (discussing how prosecutors often campaign on tough-on-crime platforms).

68. *See, e.g.*, Goldberg & Siegel, *supra* note 7, at 409 (“Prosecutors may be perceived as being ‘soft’ on crime or sympathetic to defendants if they assist with, or fail to object to, postconviction testing.”). As Abbe Smith has noted, “In order not to be played for a fool, taken for a ride, considered a sucker—a nightmarish reputation for a prosecutor—prosecutors often become suspicious, untrusting, disbelieving.” Abbe Smith, *Can You be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 384 (2001).

69. *See, e.g.*, Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 515 (2007) (“A growing literature seeks to attribute poor prosecutorial decision making to a set of information-processing biases that we all share, rather than exclusively to ethical or moral lapses. . . . [P]rosecutorial resistance to defense claims of innocence can be viewed as deep (and inherently human) adherences to the ‘sticky’ presumptions of guilt that result from various forms of cognitive bias . . .”).

effect of the “status quo bias,” a cognitive heuristic explaining that individuals cling to their initial decision in most matters and that it takes a significant amount of contrary data to push them away from that reference point.⁷⁰ As Alafair Burke has observed, this form of bias—in which individuals seek to confirm, rather than reject, their initial hypotheses—affects how people interpret evidence challenging a previous theory.⁷¹ That is, people may selectively process new information by overvaluing data supportive of their earlier decision and discounting findings that undermine it.⁷²

The status quo bias likely affects many prosecutors handling post-conviction innocence claims on cases they previously tried. Information is sparse regarding how prosecutors administer the receipt and review of post-conviction claims of innocence,⁷³ but it appears that smaller offices tend to assign such petitions to the attorney who originally handled the case, whereas larger offices might allocate them to other lawyers in the appeals unit or trial bureau, or more rarely, to attorneys exclusively entrusted with litigating collateral cases.⁷⁴ Where post-conviction

70. Medwed, *Up the River*, *supra* note 3, at 701–02; *see also* Moriarty, *supra* note 10, at 25 (“It may be that the system asks too much of a lawyer to both play the game and call a foul on himself during it. The first problem, of course, is in the need for second-guessing oneself in the heat of competition, requiring prosecutors to question continually whether the investigation has nabbed the right person.”).

71. Alafair S. Burke, *Improving Prosecutorial Decision-Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1593–94 (2006) (discussing the confirmation bias, which appears comparable to the status quo bias); *see also* Findley & Scott, *supra* note 38, at 308 (discussing confirmation bias and noting that “[d]ifferent researchers use slightly different labels for related and sometimes overlapping conditions and effects”); *id.* at 309 (“Confirmation bias, as the term is used in psychological literature, typically connotes the tendency to seek or interpret evidence in ways that support existing beliefs, expectations, or hypotheses.”).

72. Burke, *supra* note 71, at 1593–94 (describing the phenomenon of selective information processing). Burke also raises a number of other fascinating cognitive biases that may affect prosecutorial decision-making, including “belief perseverance” (in which people embrace a theory even long after countervailing evidence suggests that it should be abandoned); *see also* Findley & Scott, *supra* note 38, at 314–16 (discussing the presence of belief perseverance in many wrongful convictions).

73. *See* Green & Yaroshefsky, *supra* note 6 (manuscript at 29) (“But it is likely that, despite what is known about cognitive biases, prosecutors’ offices ordinarily refer new evidence to the trial prosecutor who obtained the conviction if he is still in the office, on the theory that he best knows the case and is therefore best qualified to determine whether the evidence is new, credible and significant.”); *see generally* Medwed, *supra* note 6, at 143–44 (“Admittedly, there is limited data pertaining to how prosecutors’ offices across the country handle post-conviction motions administratively.”).

74. *See* Medwed, *supra* note 6, at 143–44.

petitions are assigned to the same prosecutors who tried the case,⁷⁵ the impact of the status quo bias might be profound; people are often especially reluctant to second-guess their own choices.⁷⁶

Even when petitions are distributed to other lawyers in the office, the status quo bias probably persists. Studies show that individuals within the same profession or organization frequently respect the decisions of their cohorts due to the power of “conformity effects,” a desire to act in line with a peer.⁷⁷ A person may be particularly reluctant to alter a colleague’s decision where that colleague had access to greater information at the time of the preceding decision.⁷⁸ This situation emerges when a post-conviction litigator reviews the work of a trial attorney who, among other things, interacted with witnesses and the police closer in time to the event that gave rise to the prosecution. Similar to the status quo bias, the “egocentric bias” shows that people generally like to craft a flattering vision of themselves and their occupation, and thus neglect or discount information that contradicts that positive self-image.⁷⁹ These biases could infect not only the individual prosecutor reviewing his or her own trial work after procuring a conviction, but also a colleague analyzing the performance of a co-worker in the organization.

B. Counteracting the Resistance to Innocence

Despite the many barriers, strands of common law doctrine and certain rules of professional responsibility reveal that prosecutors bear some semblance of a duty to take post-conviction claims of innocence

75. *See id.*

76. This may be intertwined with the “egocentric bias.” *See infra* note 79 and accompanying text. Individuals may be particularly wary of second-guessing their initial decisions after those decisions have received external validation—for instance, through trial results and affirmation on direct appeal. *See Findley & Scott, supra* note 38, at 319 (discussing the “reiteration effect,” whereby one’s confidence in a claim increases after that claim has been repeated and affirmed).

77. *See Medwed, Up the River, supra* note 3, at 702–03; *see also* Findley & Scott, *supra* note 38, at 309 (mentioning how the confirmation bias can be “amplified” when the initial hypotheses stemmed from “a person of superior status in a team effort”). Moreover, a prosecutor who disagrees with a superior’s vision of a case could face a difficult ethical conundrum. *See, e.g., Benjamin Weiser, Doubting Case, City Prosecutor Aided Defense, N.Y. TIMES*, June 23, 2008, at A1 (discussing the saga of an assistant prosecutor in New York City who questioned his superiors’ decision to challenge a post-conviction innocence claim and, instead, surreptitiously assisted the defense).

78. *See Medwed, Up the River, supra* note 3, at 702–03.

79. *Id.* at 701.

seriously. First, language from case law—admittedly often in the form of dicta—intimates that a prosecutor’s *Brady* obligations continue into the post-conviction sphere; seemingly, prosecutors are ethically required to disclose after-acquired information that undermines confidence in the integrity of a conviction.⁸⁰ Some courts have hinted that requests for post-conviction DNA testing implicate this lingering *Brady* duty and that, accordingly, defendants should be entitled to retrieve the biological evidence from their cases.⁸¹ Several scholars have even posited that due process protections may mandate such disclosure.⁸² Nevertheless, the post-conviction scope of the duty to disclose exculpatory evidence is far from clear and at least one prominent scholar deems the issue of whether *Brady* applies to collateral claims “unsettled.”⁸³

80. See, e.g., *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (“[T]he duty to disclose [exculpatory material] is ongoing.”); *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) (observing that prosecutors should notify authorities of information that “casts doubt upon the correctness of the conviction”); *Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997) (“We also agree, and the State concedes, that the duty to disclose is ongoing and extends to all stages of the judicial process.”); *State v. Bennett*, 81 P.3d 1, 9 (Nev. 2003) (indicating that the duty to disclose exculpatory evidence extends to post-conviction proceedings). *Contra Grayson v. King*, 460 F.3d 1328, 1337 (11th Cir. 2006) (“*Imbler* does not suggest that the prosecution maintains an ongoing *due process* obligation to inform the defense of after-acquired evidence that might cast doubt on a conviction. . . . [I]t is the suppression of evidence before and during trial that carries *Brady*’s constitutional implications.” (emphasis in original)); *Gibson v. Superintendent of N.J. Dep’t of Law & Pub. Safety*, 411 F.3d 427, 444 (3d Cir. 2005) (suggesting that the *Brady* duty does not continue after trial).

81. See, e.g., *Sewell v. State*, 592 N.E.2d 705, 708 (Ind. Ct. App. 1992) (“*Brady* is implicated in post-conviction requests for forensic tests only where a conviction rests largely upon identification evidence and advanced technology could definitively establish the accused’s innocence.”); *Dabbs v. Vergari*, 570 N.Y.S.2d 765, 768 (N.Y. Sup. Ct. 1990) (“[W]here evidence has been preserved which has exculpatory potential, that evidence should be discoverable after conviction.”); *Jenner v. Dooley*, 590 N.W.2d 463, 471–72 (S.D. 1999) (holding that the government must allow for DNA testing in compelling cases based on principles of “elementary fairness”). The U.S. Supreme Court recently agreed to hear a case from Alaska in which a major issue concerns whether defendants have a limited federal constitutional right to have access to biological evidence for post-conviction DNA testing. See *District Attorney’s Office v. Osborne*, U.S. Supreme Court, (Nov. 3, 2008), available at <http://www.supremecourtus.gov/qp/08-00006qp.pdf>, permanent copy available at <http://www.law.washington.edu/wlr/notes/84washlrev35n81.pdf> (listing the questions presented in the case).

82. See Brian T. Kohn, *Brady Behind Bars: The Prosecutor’s Disclosure Obligations Regarding DNA in the Post-Conviction Arena*, 1 CARDOZO PUB. L. POL’Y & ETHICS J. 35 (2003); Kreimer & Rudovsky, *supra* note 61. *Contra Zacharias*, *supra* note 7, at 192 (“*Brady* and its progeny alone do not establish a prosecutorial duty to make genetic samples available for testing or to conduct DNA testing. Nevertheless, the DNA issue is *sui generis*. . . . Prosecutors’ willingness to release the samples for testing and/or to authorize government testing therefore assumes particular significance.”).

83. *Zacharias*, *supra* note 7, at 190 (observing that, while there is “superficial support for the

Second, building upon the doctrinal allusions to a post-conviction *Brady* obligation, the Model Rules of Professional Conduct were recently amended to clarify that prosecutors should occasionally serve a more active function to facilitate the release of the wrongfully convicted. In February 2008, comment 1 to Rule 3.8 was adjusted to respond, in part, to the wave of exonerations in the past two decades.⁸⁴ This comment now prescribes that prosecutors should take “special precautions . . . to prevent *and to rectify* the conviction of innocent persons,”⁸⁵ and also alerts prosecutors to the fact that “[c]ompetent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation.”⁸⁶

Fortunately, amendments to the Rule reach beyond mere exhortation in the commentary. The text of Rule 3.8 itself was expanded to impose affirmative obligations on prosecutors in certain instances. Under the modified Rule, when “a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted,” that attorney is compelled to act by “promptly disclos[ing] that evidence to an appropriate court or authority”⁸⁷ Additionally, if the original conviction occurred within the prosecutor’s jurisdiction, he or she bears an extra responsibility to “undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not

notion that the obligation to disclose is perpetual,” “no court has directly applied *Brady* to the postconviction context, and most courts agree that *Brady*’s applicability is unsettled even with respect to the period in which direct appeals are still pending”). *But see id.* at 190–91 (conceding that disclosure may be required when a prosecutor obtains possession of exculpatory evidence that directly pertains to an element of a properly filed collateral claim).

84. *See supra* note 46 and accompanying text (discussing the series of DNA exonerations since 1989); *see also* Am. Bar Ass’n, Criminal Justice Section, *Report to the House of Delegates* (Feb. 2008) (recommending the addition of new paragraphs (g) and (h) to Rule 3.8) (on file with the author), *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washlrev35n84.pdf> [hereinafter “ABA Report”]; Stephen A. Saltzburg, *Changes to Model Rules Impact Prosecutors*, 23 CRIM. JUST. 1, 13 (2008) (“The additions to Rule 3.8 reflect the long-standing concern among prosecutors, defense counsel, judges, and academics about the risk that any criminal justice system, even working at its best, may produce wrongful convictions, and the importance of remedying such convictions in the face of important newly discovered evidence.”).

85. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2008); *see also* Saltzburg, *supra* note 84, at 1 (discussing the amendments to comment 1 of Rule 3.8).

86. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1.

87. *Id.* R. 3.8(g).

commit.”⁸⁸ In cases where that evidence rises to the level of “clear and convincing” evidence of innocence, as opposed to a reasonable likelihood thereof, prosecutors under Rule 3.8 must do something more: “the prosecutor shall seek to remedy the conviction.”⁸⁹ To remedy the conviction, freshly minted comment 8 to Rule 3.8 suggests that “[n]ecessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant and, where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted.”⁹⁰

At the risk of bursting the bubble of enthusiasm generated by these changes, it should be noted that newly amended Rule 3.8 has no binding effect—it is, after all, only a model rule that has yet to be adopted by a single state.⁹¹ Moreover, the amendments may remain too vague to operate effectively in practice.⁹² Regardless of Rule 3.8’s possible lack of teeth, though, it symbolizes a critical shift in thinking about prosecutorial ethics and criminal justice.⁹³ For at this juncture, perhaps

88. *Id.*

89. *Id.* R. 3.8(h).

90. *Id.* R. 3.8 cmt. 8; *see also id.* R. 3.8 cmt. 9 (“A prosecutor’s independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.”).

91. *See Green & Yaroshefsky, supra* note 6 (manuscript at 6) (noting that “state courts have not yet adopted these rules”). These amendments, however, are derived from similar provisions adopted by the New York State Bar Association. *See* ABA Report, *supra* note 84, at 1. Moreover, there is a petition currently pending before the Wisconsin Supreme Court to enact a slightly modified version of these amendments. *See* Petition, In the Matter of the Amendment of Supreme Court Rules Chapter 20 Rules of Professional Conduct for Attorneys, No. 08-24 (Wis. 2008), *available at* <http://www.wicourts.gov/supreme/docs/0824petition.pdf>, *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washrev35n91a.pdf>. And in Colorado, the state Supreme Court Standing Committee on the Rules of Professional Conduct approved the creation of a subcommittee to consider whether Rules 3.8(g) and (h) should be recommended for adoption to the Supreme Court. *See* Colo. Supreme Court Standing Comm. on the Rules of Prof’l Conduct, Meeting Agenda (Aug. 21, 2008), *available at* [http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Rules_of_Professional_Conduct_Committee/8.21.08_meeting_agenda\(1\).pdf](http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Rules_of_Professional_Conduct_Committee/8.21.08_meeting_agenda(1).pdf), *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washrev35n91b.pdf>.

92. *See* Saltzburg, *supra* note 84, at 13 (“Despite the widespread support for the Criminal Justice Section recommendation, not everyone was persuaded that sections (g) and (h) provided clear enough guidance to prosecutors.”); *see also id.* at 14 (addressing some of the concerns regarding the amendments’ vagueness).

93. Indeed, it serves as a welcome signal that attorneys and scholars perceive a need for greater regulation of prosecutorial behavior, and it is an about-face from the recent reticence to amend the model rules accordingly. *See, e.g.,* ABA Report, *supra* note 84, at 3 (“The obligations to avoid and

for the first time ever, a wide swath of scholars, judges, and lawyers are acutely aware of a central failing of our system: that innocent suspects fall through the cracks and end up imprisoned. A byproduct of this awareness is a blossoming understanding that prosecutors are uniquely positioned—as well as morally and ethically obligated—to help rectify these errors.⁹⁴

The question then becomes the following: how should post-conviction prosecutors actually proceed in implementing the minister-of-justice concept and assisting in the exoneration of the innocent? Situations involving *Brady* material in the post-conviction setting yield relatively easy fixes, as Rule 3.8's altered requirements make plain. Where prosecutors know of credible exculpatory evidence suggesting that an innocent person has been convicted, they should provide notice, and, occasionally, do much more.⁹⁵ But what about circumstances other than a prosecutor's knowledge of an inmate's likely innocence and/or the surfacing of *Brady* material after conviction?⁹⁶ Might not the lessons of the innocence movement portend that prosecutors should take affirmative action to investigate potential wrongful convictions in their jurisdictions, rather than respond solely after exculpatory evidence lands in their laps? In other words, should prosecutors be proactive—not just

rectify wrongful convictions, to which the proposed provisions give expression, is the most fundamental professional obligation of criminal prosecutors.”); Green, *supra* note 24, at 1574-75 (observing that the Ethics 2000 Commission that examined the Model Rules was “less inclined to augment prosecutors’ special responsibilities” and that “the existing provisions of Rule 3.8 do not adequately cover the full range of troubling prosecutorial conduct”). Additionally, the amendments suggest that prosecutors who violate the new provisions may be subject to disciplinary action. *See, e.g.*, ABA Report, *supra* note 84, at 5 (“Further, it is important not simply to educate prosecutors but to hold out the possibility of professional discipline for lawyers who intentionally ignore persuasive evidence of an unjust conviction.”).

94. *See, e.g.*, Green & Yaroshefsky, *supra* note 6 (manuscript at 43) (“As the executive branch official best positioned to assess whether a convicted defendant is factually innocent, the prosecutor has primary responsibility for correcting error and abdicates this responsibility when she fails to take reasonably available measures to rectify wrongful convictions.”).

95. *See* Zacharias, *supra* note 7, at 210 (“A prosecutor who knows for a fact that a convicted defendant is innocent should take some action. No conception of the prosecutor’s role—as an advocate, defender of the public trust, or protector of victims—would countenance the prosecutor’s participation in keeping a clearly innocent person incarcerated.”); *see also supra* notes 84–90 and accompanying text.

96. In Bruce Green and Ellen Yaroshefsky’s excellent discussion of this issue, they define the “key question” as “how convinced the prosecutor must be of the defendant’s innocence or how doubtful she must be of the convicted defendant’s guilt to call for her to rectify an apparent injustice through whatever judicial or executive process is available.” Green & Yaroshefsky, *supra* note 6 (manuscript at 46); *see also id.* (manuscript at 42–48).

reactive—in grappling with the inevitable existence of wrongful convictions in their jurisdictions? In my view, the answer is a resounding and unequivocal yes.

III. THE INNOCENCE MOVEMENT AND PROSECUTORIAL ETHICS: THE CASE FOR PROSECUTORS TAKING GREATER STEPS TO FACILITATE THE RELEASE OF THE INNOCENT

A. *The Merits of Prosecutorial Innocence Units*

Currently, inmates seeking assistance in investigating and litigating post-conviction claims of innocence rely greatly on the services of one of the approximately forty nonprofit “innocence projects” nationwide.⁹⁷ The precise structure of these organizations varies considerably. Many innocence projects are affiliated with law schools and take the form of clinics in which law students undertake the bulk of the investigative legwork under the supervision of law faculty,⁹⁸ while others are freestanding nonprofits or linked with journalism schools.⁹⁹ In addition, some have a regional focus whereby they only agree to represent prisoners in particular jurisdictions and/or solely handle cases involving DNA testing.¹⁰⁰

Despite their cosmetic differences, innocence projects share the same core value—a commitment to exonerating the factually innocent.¹⁰¹ Maintaining this commitment is often expensive and time-consuming given that projects must engage in a laborious case-screening process to isolate meritorious cases from the bevy of requests directed their way.¹⁰² With some exceptions, innocence projects struggle to make ends meet and their survival may depend on the benevolence of a few essential donors and law school deans.¹⁰³ Financial limitations exacerbate another

97. For a listing of innocence projects, see The Innocence Project, About Us: Other Projects, <http://www.innocenceproject.org/about/Other-Projects.php> (last visited Feb. 12, 2009), *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washrev35n97.pdf>.

98. See Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097, 1098 n.3 (2003).

99. See Medwed, *supra* note 54, at 551 nn.289–90.

100. Medwed, *supra* note 98, at 1100–01.

101. *Id.*

102. *Id.*

103. *Id.* at 1105–06 (discussing how, considering the scarcity of resources, innocence projects must find the best cases as efficiently as possible).

fundamental hindrance to the success of innocence projects; nonprofit organizations unconnected with law enforcement are not ideally positioned to investigate innocence claims. Law students, well-intentioned and energetic as they might be, usually lack the training and experience in conducting field investigations so often required to verify and substantiate an innocence claim.¹⁰⁴ Projects may try to utilize pro bono private investigators and lawyers to do their heavy lifting,¹⁰⁵ but it would be unwise to rely wholly on the magnanimity of individuals willing to provide free services.

Unlike innocence projects, prosecutors' offices are ideally situated to assess post-conviction innocence claims.¹⁰⁶ First, prosecutors enjoy largely unfettered access to files from other cases in the jurisdiction. This is a significant benefit in analyzing, say, an innocence claim revolving around an assertion that the chief prosecution witness lied when that witness has testified in other matters in the city or county. Second, prosecutors can tap into a ready, able, and conceivably willing group of veteran investigators—the police—who are equipped with a vast information network and their own cabinets chock full of case files.

Other advantages to the creation of prosecutorial innocence units become clear upon reflection. Prosecutors in such units would soon develop expertise in the area of post-conviction procedure and innocence claims, thereby making them more efficient and effective evaluators of a claim's merit than generalist criminal lawyers from the trial or appellate division.¹⁰⁷ Moreover, achieving organizational separation between the trial bureau and the attorneys in charge of reviewing post-conviction petitions could minimize the impact of the status quo bias.¹⁰⁸ Centralizing responsibility for post-conviction innocence claims could also foster stronger relationships between individual attorneys in the unit and lawyers associated with innocence projects because they will have

104. *See generally id.* (discussing the challenges innocence-project supervisors encounter in trying to utilize students effectively).

105. *Id.* at 1115 (mentioning that innocence projects may benefit from referrals from attorneys in the community as a means of finding good cases to investigate).

106. *See, e.g.,* Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 *FORDHAM URB. L.J.* 553, 567 (1999) (“[I]n any given case it is often the prosecutor who possesses the information that can lead to the fairest and most expeditious decision.”).

107. *See* Medwed, *supra* note 6, at 175.

108. *See* Burke, *supra* note 69, at 525–26 (“A ‘fresh look’ by attorneys unassociated with initial sticky charging decisions may dilute the biasing effects of selective information processing and belief perseverance.”).

repeated opportunities to interact and gain one another's trust.¹⁰⁹ Solidifying these relationships, in turn, could yield greater cooperation in submitting innocence claims to the courts, and thus, greater faith on the part of judges about the validity of those claims in which the defense and the prosecution present a united front.¹¹⁰

Without a doubt, there are arguments militating against the formation of internal innocence units within prosecutors' offices. The impact of "conformity effects" described above would remain to some extent, as prosecutors within the unit might be reluctant to second-guess the trial decisions of a co-equal in the office, even if located in another bureau.¹¹¹ Furthermore, assignments to the innocence unit might be treated with disdain, perceived as akin to work in the Internal Affairs Bureau of a police department in which members of such divisions are often viewed as "rats" principally concerned with questioning the decisions and ethics of their colleagues.¹¹² Conceivably, lawyers in an innocence unit could have difficulty wresting information from suspicious peers, and might worry about reprisals that could impair the chance for professional advancement in the future. Political considerations could also augur against forming such units; chief prosecutors might (rightly or wrongly) fear that the public will view the creation of these entities as a blot on their "tough on crime" reputations and hold it against them come election day.¹¹³ Finally, resource limitations may render the feasibility of innocence units impractical, especially in smaller district attorneys' offices.¹¹⁴

On the whole, however, the combination of the prosecutor's unique obligation to serve as a minister of justice, the lessons learned by this era of DNA exonerations, the difficulties that nonprofit innocence projects

109. See Medwed, *supra* note 6, at 175.

110. See *supra* notes 6 & 51 and accompanying text (describing how prosecutorial responses to innocence claims can affect the courts' impressions of their merits).

111. See *supra* note 77–78 and accompanying text.

112. See Medwed, *supra* note 6, at 176. Indeed, many prosecutors could find the prospect of these units threatening given that their mere presence signals that individual prosecutors may lack the ability to do justice on their own. See, e.g., David Meier, *The Prosecution's Perspective on Post-Conviction Relief in Light of DNA Technology and Newly Discovered Evidence*, 35 NEW ENG. L. REV. 657, 657–58 (2001) (quoting a prosecutor commenting that "I would like to think that there is no need to establish an innocence unit or an innocence project in a prosecutor's office. On the contrary, ensuring that only the guilty are convicted is what a prosecutor should be doing, day in and day out.>").

113. See *supra* notes 67–68 and accompanying text.

114. See Medwed, *supra* note 6, at 176.

often face, and the reality that prosecutors stand in the best position to evaluate innocence claims after trial together support the formation of “innocence units.”¹¹⁵ Ideally, an in-house prosecutorial innocence unit would both investigate claims of innocence by prisoners—whether brought to the unit’s attention by inmates or labeled as possible wrongful convictions by members of the unit itself—and litigate these matters. The emergence of prosecutorial innocence units would likely lead to more fruitful investigations and additional exonerations of the factually innocent. And, over time, these units would enhance the legitimacy of the criminal justice system by giving the public greater reason to believe in the accuracy of trial results and the dedication of prosecutors to realizing the “do justice” aspiration.¹¹⁶

B. *Current Innocence Unit Models*

A handful of prosecutors’ offices have already created innocence units, mainly with a focus on the issue of post-conviction DNA testing.¹¹⁷ Some of these units are organized to field requests for DNA testing from inmates and then assess the merits of the inquiry;¹¹⁸ others have unilaterally initiated voluntary reviews of cases in which biological evidence could be available for testing.¹¹⁹ Several prosecutorial agencies, including ones in St. Paul, Houston, and New York City, have succeeded in clearing innocent prisoners and assisting in their exonerations.¹²⁰ At least one office—the district attorney’s office in

115. *See id.* (“Housing post-conviction units with the state attorney general’s office could be an efficient alternative to the placement of these divisions in county prosecutorial offices, and might minimize the potential for intra-organizational resentment by creating greater distance between trial and post-conviction prosecutors.” (internal citations omitted)).

116. *See, e.g.,* Christopher A. Bracey, *Truth and Legitimacy in the American Criminal Process*, 90 J. CRIM. L. & CRIMINOLOGY 691, 693 (2000) (reviewing WILLIAM PIZZI, *TRIALS WITHOUT TRUTH* (1999)) (“[T]he American trial system is fundamentally ‘weak,’ according to Professor Pizzi, because it privileges fairness norms at the expense of ‘truth.’” (internal citation omitted)).

117. *See* Peter Neufeld, *Legal and Ethical Implications of Post-Conviction DNA Exonerations*, 35 NEW ENG. L. REV. 639, 641 (2001) (“Increasingly, progressive-minded prosecutors around the country are setting up their own ‘innocence projects.’”); Zacharias, *supra* note 7, at 198–200. *Contra* Meier, *supra* note 112, at 657.

118. *See* Mark Lee, *The Impact of DNA Technology on the Prosecutor: Handling Motions for Post-Conviction Relief*, 35 NEW ENG. L. REV. 663, 663–67 (2001) (describing how the Suffolk County (Boston, Mass.) District Attorney’s Office fields requests for DNA testing from inmates).

119. For examples of some of these programs, see Medwed, *supra* note 6, at 126 nn.3–4; Zacharias, *supra* note 7, at 198–200.

120. *See* Medwed, *supra* note 6, at 126 n.3.

Santa Clara County, California—has taken staunch measures to exterminate any festering “conviction psychology” to the point where employees receive awards upon uncovering innocent criminal defendants in the jurisdiction.¹²¹ These exemplars show that the DNA era has affected how some prosecutors’ offices conceive of and execute their duty to serve justice. That being said, the efforts of these programs, though laudable, fall short of fully implementing the minister-of-justice ideal because their missions usually encompass only the narrow category of cases in which biological evidence is available for testing.¹²²

The Dallas County, Texas program may serve as the best model for other prosecutorial offices to replicate in forming internal innocence divisions. Established in July 2007 by newly elected district attorney Craig Watkins,¹²³ Dallas’s Conviction Integrity Unit has two primary missions.¹²⁴ First, the Conviction Integrity Unit oversees the review of more than 400 DNA cases in conjunction with the Innocence Project of Texas and in accordance with Texas law governing motions for forensic testing.¹²⁵ Second, the Conviction Integrity Unit considers all cases (DNA and non-DNA) where evidence identifies different or additional perpetrators, and is committed to investigating and litigating such matters.¹²⁶ Under the supervision of a senior deputy chief, the unit is staffed by a full-time assistant district attorney, an investigator, and a legal assistant,¹²⁷ and coordinates with the local public defender’s office in searching for worthwhile cases.¹²⁸ Watkins seems quite proud of this

21. See Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 *FORDHAM L. REV.* 1453, 1481 n.188 (2007); Office of the County of Santa Clara Dist. Att’y, Innocence Project, <http://www.santaclara-da.org> (follow “District Attorney’s Office Directory” hyperlink; then follow “District Attorney Departments” hyperlink; then follow “Innocence Project” hyperlink) (last visited Feb. 12, 2009), *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washrev35n121.pdf>.

22. See *supra* note 47 and accompanying text.

23. See Ronald F. Wright & Marc L. Miller, *Dead Wrong*, 2008 *UTAH L. REV.* 89, 95 (2008) (“While some may hope that newcomers to the prosecutor’s office like Craig Watkins will increase chances for cooperation with the innocence movement, their hope founders upon another reality about American prosecutors: opportunities to work with newcomers come rarely.”).

24. For an official description of the Conviction Integrity Unit, see Dallas County Dist. Att’y Conviction Integrity Unit, <http://www.dallasda.com/conviction-integrity.html> (last visited Feb. 12, 2009), *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washrev35n124.pdf>.

25. *Id.*

26. *Id.*

27. *Id.*

28. See, e.g., Jennifer Emily, *In First Year as Dallas County DA, Watkins Shifts Focus from*

unit, which his website touts as “the first of its kind in the United States,”¹²⁹ and his pride appears justified. Watkins’s innovation has thus far enjoyed remarkable success in its short life, resulting in the exoneration of at least eight inmates¹³⁰ and granting requests for DNA testing to twenty prisoners whose overtures had been rebuffed by previous prosecutors.¹³¹

A confluence of factors, some of them unique to Dallas, apparently converged to make Watkins’s unit thrive. Surely, Watkins’s personal beliefs and his visceral rejection of the “conviction psychology” constitute a major reason.¹³² But, on a more basic level, Dallas’s atrocious history of wrongful convictions created a fertile political environment in which someone like Watkins could be elected and his idea for a post-conviction unit could bloom. Post-conviction DNA testing has produced nineteen exonerations in Dallas since 2001, a figure exceeding that of any other county in the nation and surpassing that of many states.¹³³ What is more, Watkins convinced Dallas County commissioners early on to fund this unit by earmarking over \$300,000 in 2007,¹³⁴ and his efforts recently yielded another grant of more than \$450,000.¹³⁵ It is one thing to devise a novel idea; it is something else to construct one that can attract financial backing. Watkins’s recent arrival in office also means that the “integrity” of virtually all of the convictions

Winning to Justice, DALLAS MORNING NEWS, Dec. 30, 2007, at A1, *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washrev35n128.pdf>.

129. *Id.*

130. E-mail from Natalie Roetzel, Executive Director, Innocence Project of Texas, to Daniel S. Medwed, Associate Professor of Law, S.J. Quinney College of Law (Nov. 18, 2008, 9:32 MST) (on file with author), *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washrev37n130.pdf> (mentioning that there have been eight formal exonerations since Craig Watkins took office, with several additional exonerations pending).

131. *See, e.g.*, Jennifer Emily, *Dallas County District Attorney: 3 More Inmate DNA Tests Approved*, DALLAS MORNING NEWS, May 24, 2008, at B11, *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washrev35n131.pdf>.

132. *See* Emily, *supra* note 128, at A1.

133. *See* Steve McGonigle & Jennifer Emily, *A Blind Faith: 18 of 19 Local Cases Overturned by DNA Relied Heavily on Unreliable Testimony*, DALLAS MORNING NEWS, Oct. 12, 2008, at 1A, *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washrev37n133.pdf>. Indeed, Dallas County’s tally of DNA exonerations is higher than that of all of the other cities and counties in Texas combined. *Id.* (noting that “[s]eventeen exonerations have occurred elsewhere in Texas”).

134. *See* Emily, *supra* note 128, at A1.

135. *See, e.g.*, Jennifer Emily, *Dallas County DA’s Office Gets Grant for DNA Tests*, DALLAS MORNING NEWS, June 6, 2008, at B2, *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washrev35n135.pdf>.

his unit is examining occurred during his predecessors' terms in office and, therefore, discovery of error casts a pall on his political rivals and accrues to his benefit.¹³⁶ It will be interesting to see if the Conviction Integrity Unit stands the test of time—whether it survives in the event Watkins is re-elected and post-conviction claims of innocence relating to trials prosecuted under his auspices inevitably arise.¹³⁷ While some of the factors leading to the formation of the Conviction Integrity Unit in Dallas—the election of a new district attorney, the precursors' miserable record on innocence issues, and the county's willingness to fund the initiative—may not exist throughout the country,¹³⁸ the experiment of Craig Watkins serves as a beacon to guide other prosecutors amenable to creating internal innocence units, and in the process, effectuate the minister-of-justice ideal in the post-conviction setting.

I ultimately envision the growth of prosecutorial innocence units as a complement to, rather than a replacement for, traditional innocence projects. There will always be a need for organizations willing to formally represent inmates in the event that an innocence claim enters

136. See Wright & Miller, *supra* note 123, at 93 (describing the bad reputation of Watkins's predecessor, Bill Hill, and noting that "[i]t is easier to accept scrutiny of closed cases if they were investigated and prosecuted under your predecessor in office. This is doubly true if your predecessor was a political opponent."); see also Ashley McAndrew, *A Day in the Life of Government Lawyers: Karen Wise, Assistant District Attorney, Dallas*, 70 TEX. B.J. 516, 517 (2007) (quoting Wakins as saying, "Dallas district attorneys before me were more about convictions, convictions at all cost . . . They were less concerned with the actual crime problems affecting Dallas."); Sylvia Moreno, *New Prosecutor Revisits Justice in Dallas*, WASH. POST, Mar. 5, 2007, at A4, *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washlrev35n136.pdf> ("Most of the exonerations date to cases tried in the 1980s under Dallas' legendary law-and-order district attorney, Henry Wade."); Emily, *supra* note 128 (describing 14 cases cleared through DNA testing under Watkins).

137. See *supra* note 136 and accompanying text. Another prominent example of an incoming prosecutor aggressively helping to exonerate prisoners wrongfully convicted during a predecessor's regime occurred in New Orleans when Eddie Jordan replaced long-time District Attorney Harry Connick, Sr. See Medwed, *supra* note 6, at 161–64. One observer, a public defender, expressed skepticism that Jordan would remain open to post-conviction innocence claims, commenting that "Jordan is a lot more relaxed listening to criticism of old cases because they weren't handled under his tenure by people he hired and trained and supported. The real test will come when people from his administration get socked with these kinds of criticisms and complaints about cases handled under his watch . . ." Michael Perlstein, *Open to Appeal: Convicted Criminals Say DA Policy Change Gives Them Fair Shot*, TIMES-PICAYUNE (New Orleans), July 20, 2003, at National 1, *permanent copy available at* <http://www.law.washington.edu/wlr/notes/84washlrev35n137.pdf>.

138. See Green & Yaroshesky, *supra* note 6 (manuscript at 49) ("Where there is no independent state body to investigate new exculpatory evidence, a large, urban office such as that of Dallas County can create an independent internal unit Smaller prosecutors' offices can pool their resources to create a unit to investigate claims from each of their counties, or they can seek the agreement of the state attorney general's office to review such claims.").

the post-conviction litigation phase. Likewise, I do not see these units superseding the possibility of state legislatures establishing bipartisan “innocence commissions” with subpoena powers and ample funding as vehicles to investigate innocence claims and refer the most meritorious of them to the courts. Only one state, however, has adopted this type of “innocence commission.” The North Carolina Innocence Inquiry Commission, which was formally approved in the summer of 2006, has license to investigate claims of innocence based on new evidence that was unavailable at the time of trial.¹³⁹ If a majority of a bipartisan committee (composed of, among others, a judge, prosecutor, and defense attorney) deems a case credible, three judges must review it.¹⁴⁰ Such a case would be reversed only upon a unanimous finding of “clear and convincing evidence” of innocence by the panel.¹⁴¹

North Carolina’s initiative appears to be patterned after the United Kingdom’s Criminal Cases Review Commission, a much-heralded body that has facilitated the exoneration of numerous inmates since its formation in 1995.¹⁴² Although approximately a dozen other jurisdictions across the United States have innocence commissions, none of these match North Carolina’s model in terms of the breadth of its investigative authority and ability to prompt court proceedings.¹⁴³ The establishment of additional innocence commissions based on North Carolina’s structure would be a positive development and an effective complement to the prosecutorial innocence unit model.¹⁴⁴

139. See, e.g., Andrea Weigl et al., *Easley Signs Law Creating Innocence Panel*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 4, 2006, at B5, permanent copy available at <http://www.law.washington.edu/wlr/notes/84washrev35n139.pdf>.

140. *Id.*

141. *Id.*

142. See generally Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT’L L. REV. 1241 (2001); David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U. L. REV. 91 (2000).

143. See Robert C. Schehr, *The Criminal Cases Review Commission as a State Strategic Selection Mechanism*, 42 AM. CRIM. L. REV. 1289, 1299, 1299 n.40 (2005) (listing the twelve states). In contrast, virtually all of these other innocence commissions are bipartisan associations of law-enforcement specialists, academics, retired judges, politicians, and community activists charged not with the goal of rectifying existing miscarriages of justice but rather with conducting reviews of previously overturned wrongful convictions, isolating the problems in those cases, and recommending systemic changes. See, e.g., Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 351–53 (2002) (citing the benefits of such commissions); Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of “Innocence Commissions” in America*, 86 JUDICATURE 98, 98–105 (2002) (same).

144. See Medwed, *supra* note 54, at 552–53 (discussing innocence commissions as potential bodies for investigating innocence claims raised by prisoners during parole hearings). Professors

CONCLUSION

This Article has examined the ethical obligations surrounding the duty of prosecutors to remedy wrongful convictions and the competing pressures that keep prosecutors from uniformly fulfilling this duty. To better realize the oft-proclaimed minister-of-justice ideal, prosecutors should play a more active role in investigating and litigating post-conviction innocence claims by forming internal innocence divisions with their own staffs and budgets. Prosecutorial innocence divisions would serve as welcome, perhaps essential, companions to the entities through which innocence claims are usually explored, not to mention a concrete way in which to implement the minister-of-justice ideal in the post-conviction arena.

Green and Yaroshefsky suggest that the creation of independent innocence commissions, such as North Carolina's, might be preferable to the formation of prosecutorial innocence units. *See* Green & Yaroshefsky, *supra* note 6 (manuscript at 49) ("One question is who should investigate and evaluate new evidence. Research on cognitive bias suggests that this responsibility should not be entrusted to the prosecutor who secured the conviction, and ideally, should not be entrusted to that prosecutor's office. It would be preferable for states to adopt systems of review that, as in England, Canada and North Carolina, entrust investigations and evaluations to independent bodies which have internal, graduated processes for responding to new, exculpatory evidence.").