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The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence

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THE NEW PROSECUTOR'S DILEMMA: PROSECUTORIAL ETHICS AND THE EVALUATION OF ACTUAL INNOCENCE

Dana Carver Boehm*

Buoyed by advances in forensic science, the number of postconviction exonerations has significantly risen in the American criminal justice system over the last twenty years. The ethical obligations of prosecutors faced with such claims, however, have not kept pace. Most efforts within district and U.S. attorneys' offices have been incremental at best, and even those few prosecutors' offices with more robust "conviction integrity units"—units that affirmatively investigate claims of actual innocence and seek to mitigate the likelihood of wrongful convictions in the first place—suffer from various structural defects. Often a prosecutor's default posture when faced with a claim of actual innocence is to defend the guilty verdict as quickly and efficiently as possible.

There is good reason for prosecutors to be skeptical of inmate innocence claims. Those prisoners who raise postconviction claims of actual innocence largely lose, and rightfully so; for many, perhaps most, pursuing habeas relief is a matter of routine that follows the exhaustion of appeals. But however understandable prosecutors' skepticism, it comes at a cost: the actually innocent often are grouped together with the frivolous filers and face the same mountain of prosecutorial noncooperation notwithstanding the merits of their claims. This is the new "prosecutor's dilemma": how to honor the commitment to doing justice by way of postconviction review without wasting precious resources on frivolous petitions.

This Article provides a framework to assist prosecutors in separating the actually innocent from the masses of nonmeritorious postconviction challenges, and in ratcheting down the prosecutorial zeal reflexively associated with these challenges. The proposed framework, called "tiered review," takes a pragmatic approach to postconviction review, setting up a multistage process by which prosecutors weed out meritless postconviction petitions early on and then apply increasingly intensive levels of scrutiny to the claims of innocence. Under tiered review, a prosecutor's office investigates a petitioner's innocence claim if that person can point to some new evidence (broadly defined) of

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innocence, drops its opposition to the petitioner’s claim should that investigation demonstrate a “reasonable likelihood of innocence,” and affirmatively supports the petitioner’s exoneration effort where the investigation yields “clear and convincing evidence” that the petitioner was wrongfully convicted. Drawing on extensive interviews with prosecutors from conviction integrity units in Dallas County, Texas; Harris County, Texas; New York County, New York; Santa Clara County, California; and Cook County, Illinois, tiered review illustrates how changes in office culture and the structure of postconviction review can mitigate inherent biases that make objective postconviction review so challenging. And while the proposal discussed below does not purport, as no proposal can, to eliminate the prosecution of the innocent entirely or to discover every convicted innocent, it does provide a feasible mechanism whereby prosecutorial zeal and discretion can be directed toward the most ethical and professionally responsible ends.

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INTRODUCTION

In December 2011, the Virginia Court of Appeals exonerated forty-six-year-old Thomas Haynesworth, formally acknowledging that he had spent twenty-seven years behind bars for a crime he did not commit. Haynesworth's release from prison was not the direct result of exonerating DNA, an eyewitness recantation, an assertion of a constitutionally deficient trial, or revelations of police or prosecutorial misconduct. Haynesworth's pro bono counsel made a compelling argument for his innocence,¹ but as a minority of the Virginia Court of Appeals made clear in a vigorous dissent, Haynesworth almost certainly would *not* have been found innocent but for the avid support of then-Virginia Attorney General Ken Cuccinelli, who had affirmatively joined Haynesworth in his petition for a writ of actual innocence.²

Like Cuccinelli, prosecutors across the country have the power and influence to free from prison this country's convicted innocent.³ Nevertheless, in the vast majority of documented exonerations, prosecutors have vigorously opposed the habeas petitions of the wrongfully convicted—sometimes for decades—before ultimately agreeing to the prisoners' release, if they ever agree at all.⁴

¹ The Mid-Atlantic Innocence Project and Hogan Lovells US LLP jointly represented Haynesworth in his actual innocence petition. The Author, then the lead associate of Hogan Lovells' *pro bono* department, assisted in Haynesworth's case from 2010 to 2011.

² Haynesworth v. Commonwealth, 717 S.E.2d 817, 818 (Va. Ct. App. 2011) (Elder, J., dissenting) (“[T]here is no direct evidence that exonerates Haynesworth. The Attorney General has merely expressed his opinion that Haynesworth is innocent.” (emphasis omitted)).

³ While prosecutors have no statutory authority to order a prisoner's release, when the very arm of the state responsible for the initial imprisonment of that individual renounces its conviction, proclaims that individual's innocence, and seeks that person's release, it stands to reason that courts would not object.

⁴ See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 129 (2004) (“[P]rosecutors have consented to

Haynesworth is not, unfortunately, unique: a recent survey suggests that since 1989, the United States has seen 873 prisoners exonerated as actually innocent of the crimes for which they were convicted.⁵ Given that the vast majority of these exonerations are DNA-based, most assume that this number—or any other wrongful conviction estimate—represents only a fraction of those prisoners wrongfully incarcerated.⁶ If, as is commonly asserted, it is better for some number of guilty to go free than to convict a single innocent person,⁷ there is a clear need for a mechanism that would help prosecutors distinguish meritorious claims of innocence from the unmeritorious.

In the face of these conviction errors, it is tempting to blame the prosecutors. But while a natural prosecutorial zeal for maintaining convictions may play a role in the reflexive resistance to actual innocence claims,⁸ a far more important and pragmatic reality is at play: prosecutors confront a massive number of postconviction challenges, the overwhelming majority of which are, in fact, frivolous. For every Thomas Haynesworth, there are many more Ray Dansbys (a convict who claimed actual innocence despite the fact that multiple witnesses, including his son, watched him shoot his ex-wife multiple times at point blank range)⁹ and Edwin Marreros (a convict who, after exhausting his appeals and habeas remedies, filed a pro se actual innocence claim that made no real argument

DNA tests in less than fifty percent of the cases in which testing later exonerated the inmate.”).

⁵ SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012, at 7 (2012), available at http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf. The accuracy of exoneration figures is always somewhat controversial, particularly where non-DNA cases are included. In some respects, the 873 figure is conservative, as it excludes “group exonerations” that have gained widespread public attention and typically involve mass police misconduct, such as those seen in Tullia, Texas; Dallas, Texas (the “Sheetrock Scandal”); and Los Angeles, California (the “Rampart Scandal”). *Id.* at 3, 80–90. The Innocence Project also keeps a frequently updated tally of exonerations in which it is involved, which typically involve DNA, on its website. INNOCENCE PROJECT, <http://www.innocenceproject.org> (last visited Apr. 15, 2014); see also Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005) (noting an earlier tally from the authors of the National Registry of Exonerations Study); Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1553 nn.15–16 (2008) (discussing the empirical studies related to this topic).

⁶ GROSS & SHAFFER, *supra* note 5, at 3; JIM PETRO & NANCY PETRO, FALSE JUSTICE: 8 MYTHS THAT LEAD TO WRONGFUL CONVICTIONS 97 (2011); Glenn A. Garber & Angharad Vaughan, *Actual-Innocence Policy, Non-DNA Innocence Claims*, 239 N.Y.L.J. 1, 3, Apr. 4, 2008, available at <http://www.glenngarber.com/common/pdf/GarberActualInnocence.pdf>.

⁷ See Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997) (citing various authors that have expounded on Blackstone’s original quote).

⁸ See generally Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004).

⁹ See *Dansby v. Norris*, 682 F.3d 711, 714 (8th Cir. 2012).

for innocence but necessitated a response nevertheless).¹⁰ This tension is the new “prosecutor’s dilemma”¹¹: how to honor the prosecutor’s commitment to doing justice by identifying the convicted innocent, without wasting precious resources on largely frivolous petitions.

This Article prescribes a systematic framework to mitigate the problems associated with the new prosecutor’s dilemma, a framework that allows prosecutor’s offices to review actual innocence claims, particularly where DNA evidence is not available.¹² Using existing conviction integrity units as a case study, the Article advocates for a postconviction review regime—called “tiered review”—that is structured to foster innocence seeking, openness, and objectivity and is guided by concrete standards of review that apply to each case and are to be applied by each prosecutor. Systematized postconviction review along these lines not only strikes a good balance between prosecutors’ ethical obligations and budgetary constraints but also would facilitate consistent review that also is better suited to prosecutors’ role as ministers of justice.

The Article proceeds in three Parts. Part I.A analyzes prosecutorial postconviction ethical obligations as presently required by law, specifically

¹⁰ See *Marrero v. Ives*, 682 F.3d 1190, 1192–93 (9th Cir. 2012).

¹¹ See Russell L. Christopher, *The Prosecutor’s Dilemma: Bargains and Punishment*, 72 *FORDHAM L. REV.* 93, 107–09 (2003) (referring to the prosecutor’s choice either to agree not to prosecute a culpable cooperating witness to secure conviction of certain other guilty defendants or to prosecute the potential cooperating witness and lose the ability to prosecute other guilty defendants); Jonathan A. Rapping, *Who’s Guarding the Henhouse? How the Prosecutor Came to Devour Those He Is Sworn to Protect*, 51 *WASHBURN L.J.* 513, 537 (2012) (describing the “prosecutor’s dilemma” as the difficult choice “to refuse to prosecute more cases than the system can handle justly . . . or to bring cases without regard for resources in order to satisfy society’s increasingly punitive appetite”); Amy Ma, Note, *Mitigating the Prosecutors’ Dilemma in Light of Melendez-Diaz: Live Two-Way Videoconferencing for Analyst Testimony Regarding Chemical Analysis*, 11 *NEV. L.J.* 793, 802–03 (2011) (describing the “prosecutors’ dilemma” as the quandary prosecutors face in deciding whether to expend the significant resources and logistical challenges inherent in presenting the live analyst testimony now required in cases requiring scientific analysis, or simply not to prosecute many of these cases).

¹² This Article focuses largely on the efforts of district attorneys’ offices. These prosecutors are responsible for far more criminal prosecutions than the federal government, and many operate in states that offer postconviction remedies based on actual innocence (the Supreme Court has refused to recognize such a claim at the federal level). H. Geoffrey Moulton, Jr. & Daniel C. Richman, *Of Prosecutors and Special Prosecutors: An Organizational Perspective*, 5 *WIDENER L. SYMP. J.* 79, 95 (2000). Nevertheless, this Article purposefully uses the broader term “prosecutors,” because the ethical obligations that apply to district attorneys apply equally to federal prosecutors, because these prosecutors encounter the same postconviction challenges (though on a smaller scale, perhaps, given the lack of a judicial remedy), and because in the District of Columbia federal prosecutors do engage in the prosecution of nonfederal crimes and are obligated to respond to claims under the District of Columbia’s actual innocence statute. See Fran Quigley, *Torture, Impunity, and the Need for Independent Prosecutorial Oversight of the Executive Branch*, 20 *CORNELL J.L. & PUB. POL’Y* 271, 310 (2010).

analyzing prosecutors' ethical obligations with regard to their review of actual innocence claims. The latest iteration of the Model Rules has attempted to provide some direction to prosecutors who face ethical questions regarding convictions already obtained, but the majority of states have no ethical guidelines in this context whatsoever. Part I.B then summarizes the descriptive and prescriptive scholarship on postconviction ethics. Scholars addressing these questions have largely analyzed the cognitive biases causing prosecutorial resistance to innocence claims, as well as the circumstances under which a prosecutor might affirmatively assist in an inmate's exoneration efforts.¹³ No one, however, has attempted to develop a decision-making framework for prosecutors' offices to employ in responding to claims of actual innocence.

Part II presents five case studies that serve as the partial basis for the tiered review approach described in Part III. Relying on extensive interviews with prosecutors in conviction integrity units in Dallas County, Texas; Harris County, Texas; New York County, New York; Santa Clara County, California; and Cook County, Illinois, Part II summarizes the lessons to be learned from the practice of systematized postconviction review.

Part III presents the Article's main practical and intellectual contributions: (1) a series of structural changes to the way that postconviction review is conducted, and (2) the concept of "tiered review," or the use of a series of concrete standards to assess and respond to claims of actual innocence. To counterbalance the natural resistance prosecutors feel toward innocence claims, postconviction review must be integrated into the office structurally, in three ways: (1) a management-level prosecutor must direct the review of innocence claims; (2) the review must be performed by someone other than the original prosecutor; and (3) the office must, with specific exceptions outlined below, cooperate with inmates by opening case files and approving requests for DNA testing.

These structural changes, however, are incomplete without the concept of tiered review. Under tiered review, a prosecutor assesses whether a claim meets a particular standard of proof before investing further resources in reviewing the claim. The tiers function as follows: The review of an initial claim of actual innocence is subject to the office's usual protocols, as modified by the structural changes just described. That process will, without more, result in a denial of the claim. However, when a petitioner presents new evidence that introduces a bona fide issue as to the petitioner's innocence, the office will investigate that claim. If the investigation demonstrates a "reasonable likelihood of innocence," the office will drop its opposition to the claim. And finally, in the event that the investigation yields "clear and convincing evidence" that the petitioner was wrongfully convicted, the office will affirmatively support exoneration for the petitioner.

Part IV identifies and responds to counterarguments against investing in postconviction reform, arguing that adoption of the proposed structural changes

¹³ See, e.g., David Luban, Lecture, *The Conscience of a Prosecutor*, 45 VAL. U. L. REV. 1, 16–17 (2010); Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 175 (2005).

and tiered review are realistic—and potentially inevitable—prospects for the majority of prosecutors' offices. Part IV also shows how postconviction review may be instrumental in remedying some of the most serious criminal justice issues for today, including mass incarceration and racial disparities in the criminal justice system.

Before proceeding, there are two caveats. First, while tiered review and the associated structural modifications presented here can be applied broadly by prosecutors' offices across the country, the proposals are clearly aspirational in nature. By proposing a structure that requires significant additional effort and resources from prosecutors' offices across the country, the proposal likely will be subject to criticism for being overly burdensome. At the same time, by attempting to make the burden of reviewing postconviction actual innocence claims manageable and practicable for prosecutors, it is likely also to be criticized by innocence advocates for being underinclusive in terms of its ability to detect the claims of the convicted innocent. Such is the nature of proposals aimed at addressing the problem of wrongful conviction. Professor Fred Zacharias, the first scholar to engage the question of postconviction prosecutorial ethics, observed:

At best, one can only hope to identify considerations, reasons, or ways of analyzing appropriate conduct by prosecutors. The absence of legal constraints eliminates the possibility of defining clearly correct, or incorrect, behavior. Similarly, a consensus regarding particularized ethics rules is unlikely to develop. In most cases, the conflict between the presumption of guilt and seemingly "fair" prosecutorial conduct is strong, thus rendering any resolution debatable.¹⁴

The resolution proposed below is, without question, debatable. The aim of this Article is not to prescribe a definitive solution, but to advance the current conversation beyond postconviction prosecutorial ethics and the prosecutor's role in restoring justice to the wrongfully convicted to discussion of the specific steps those prosecutors can and should take in doing so.

Second, some may argue that because the number of convicted innocent is relatively small, devoting finite resources to the problem of wrongful conviction is misguided, particularly given the scale of other criminal justice problems like mass incarceration and racial injustice. But this argument misses the point. There is no question that mass incarceration is, as William Stuntz called it, "the criminal justice crisis of our age"¹⁵ and that it disproportionately has impacted the United States' minority populations.¹⁶ But these problems are all related. Systematized

¹⁴ Zacharias, *supra* note 13, at 175.

¹⁵ WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 246 (2011).

¹⁶ *See, e.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW* 54–57 (2012); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 3–4 (2006); Ian F. Haney Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1026 (2010). As of 2006, black men were six to eight times more likely to be incarcerated than whites, an incarceration trend that does not appear closely

postconviction review can lead to broader improvements to prosecutorial culture; reorienting prosecutorial culture to justice seeking through use of a postconviction review framework can also benefit larger criminal justice problems, including mass incarceration and racial injustice. Like wrongful conviction, mass incarceration and racial injustice are tied in part to misused prosecutorial authority. While postconviction review is not a magic bullet for either mass incarceration or racial injustice, the improvements to prosecutorial culture that attend that reform have far-reaching consequences for other problems as well.

I. PROSECUTORIAL ETHICS AND POSTCONVICTION RELIEF

Prosecutorial ethics have long been a topic of scholarly discussion, but in the postconviction context, this discussion has resulted in very few concrete legal rules. Part I.A lays out the law on postconviction ethics, the whole of which amounts to a model rule that only eight state bars have adopted.¹⁷ Because so few states have adopted rules on postconviction prosecutorial ethics, most prosecutors are left to rely on their overinvoked but nebulously defined role as “ministers of justice,” a role which scholars have in recent years parsed closely in the postconviction context.

Part I.B outlines the scholarship on prosecutorial postconviction ethical obligations, which is much more developed than the current law: scholars have explored the existence of a prosecutorial postconviction ethical obligation,¹⁸ investigated why wrongful convictions occur and how they can be avoided,¹⁹ and analyzed the specific steps prosecutors should take to remedy existing wrongful

correlated with crime rates. *See* PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 31 (2009).

¹⁷ As of May 2012, the ABA reports that Idaho adopted Model Rules 3.8(g) and (h) without modification, and Colorado, Delaware, North Dakota, Tennessee, Washington, and Wisconsin have adopted modified versions of the rule. AM. BAR ASS’N, CPR POLICY IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.8(G) AND (H), at 1 (2012) [hereinafter ABA REPORT], *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/3_8_g_h.authcheckdam.pdf. As of that report, ten jurisdictions were studying the rule to determine whether adoption would be desirable. *Id.* (noting Alaska, Arizona, California, the District of Columbia, Hawaii, New Hampshire, New York, Pennsylvania, and Vermont). In July 2012, New York also adopted Model Rule provisions 3.8(g) and (h) in modified form. *See* N.Y. UNIFIED COURT SYS., COURT NOTICES 119 (2012), *available at* <http://www.daasny.org/Court%20Notices%20Rule%203.8.pdf>.

¹⁸ *See, e.g.*, Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 481 (2009); Luban, *supra* note 13, at 16–17; Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 55–57 (2009); Medwed, *supra* note 8, 132; Zacharias, *supra* note 13, at 175.

¹⁹ *See, e.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 165–69 (2011). *See generally* GROSS & SHAFFER, *supra* note 5.

convictions.²⁰ This Article is an attempt to bridge these three scholarly efforts by constructing a concrete postconviction review framework that would satisfy prosecutors' postconviction ethical duties in a way that is not only effective in remedying wrongful convictions but also practical, effective, and capable of widespread implementation.

A. *The Governing Postconviction Ethical Standards*

Prosecutors' ethical obligations are set forth in federal and state statutes and regulations, the Constitution, case law, and state bar rules of professional conduct;²¹ but virtually none of these bodies of law imposes any postconviction ethical obligations. The exception to this rule is Model Rule 3.8, provisions (g) and (h), which, to date, only eight states have adopted.²² Those provisions are "standards meant to be the bare minimum, not to establish the full scope of prosecutors' responsibility."²³ For prosecutors in all other states, the only postconviction ethical direction is the mandate to act as "ministers of justice,"²⁴ a vague duty referenced by the Supreme Court and the Model Rules,²⁵ and one which essentially results in the matter being entirely subject to prosecutorial

²⁰ See, e.g., CTR. ON THE ADMIN. OF CRIMINAL LAW'S CONVICTION INTEGRITY PROJECT, ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTOR'S OFFICES 4–5 (2012) [hereinafter INTEGRITY PROJECT REPORT] (outlining five specific practices prosecutors should adopt in order to ensure conviction integrity), available at http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf; Medwed, *supra* note 8, 169–80; Medwed, *supra* note 18, 58–65; Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2238–52 (2010); Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y.L. SCH. L. REV. 1033, 1033–50 (2012) (detailing creation of and specific innocence cases handled by the Dallas County Conviction Integrity Unit).

²¹ See generally Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223 (1993) (discussing the adoption of the ABA's Model Rules and suggesting that the trend toward specificity in lawyer regulation may go too far).

²² ABA REPORT, *supra* note 17, at 1; see also David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 227–28 (2011) (noting earlier data indicating only five states having adopted Model Rules provisions 3.8(g) and (h)). Unlike most Model Rules amendments, which originate with the American Bar Association, Model Rules 3.8(g) and (h) was the product of "reasoned debate" among New York prosecutors, defense attorneys, and judges regarding prosecutors' ethical obligations upon discovery of new evidence that would call into question a conviction. *Id.* at 232.

²³ Green & Yaroshefsky, *supra* note 18, at 472–73.

²⁴ MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2013).

²⁵ See *Berger v. United States*, 295 U.S. 78, 88 (1935); MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2013).

discretion. As a result, individual prosecutors typically determine what their postconviction ethical obligations are on a case-by-case basis, without the guidelines of a formal ethics rule or, often, clear instruction from their chief prosecutor.²⁶

1. The Baseline for Prosecutorial Postconviction Ethical Obligations: Minimalist Ethical Principles Established by the Model Rules Are a Baseline, Not a Standard

Most state bars have chosen to impose *no* concrete postconviction obligations on their prosecutors.²⁷ Even in those few states whose bars have adopted Model Rule 3.8(g) and (h),²⁸ the requirements imposed on prosecutors are fairly minimal. Indeed, like all formal ethics rules, Model Rule 3.8(g) and (h) set a floor of conduct, falling below which may result in professional discipline—not an ethical standard for the virtuous prosecutor to follow.

Model Rule 3.8(g) and (h) states,

(g) 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, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) 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 commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.²⁹

²⁶ See Michele K. Mulhausen, Comment, *A Second Chance at Justice: Why States Should Adopt ABA Model Rules of Professional Conduct 3.8(g) and (h)*, 81 U. COLO. L. REV. 309, 309 (2010).

²⁷ See Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427, 463–500 (2009).

²⁸ Colorado, Delaware, Idaho, New York, North Dakota, Tennessee, Washington, and Wisconsin have adopted the rule in some form or another. ABA REPORT, *supra* note 17, at 1.

²⁹ MODEL RULES OF PROF'L CONDUCT R. 3.8(g)–(h) (2013).

Notably, these provisions require no affirmative action on the part of the prosecutor upon mere receipt of a claim of actual innocence. The provisions do not apply at all unless the prosecutor *already knows* exculpatory information, which must be “new” and create “a reasonable likelihood” that a defendant was wrongfully convicted. In other words, the prosecutor is under no obligation to affirmatively consider an inmate’s innocence claim, even where a prosecutor strongly suspects (but does not “know”) that additional evidence may exist that would call that person’s conviction into doubt. Nor does it impose an obligation to engage in good-faith, objective review of postconviction claims, whether in the habeas or innocence context. Instead, these provisions set a “high threshold” for prosecutorial postconviction action.³⁰ But “the disciplinary standard was not intended to imply that when exculpatory evidence does not achieve that level of significance, it should be ignored.”³¹ Rather, proponents of the rule assumed that prosecutors would engage in some degree of scrutiny and investigation in order to explore innocence claims and determine whether the evidence in question was significant enough to require disclosure under the rule.³² Thus far, that has not proven true, either in or out of states that have adopted the Model Rules provisions.

Model Rules provisions 3.8(g) and (h) represent an important step forward in identifying that the prosecution does have *some* obligation following conviction and in setting a baseline standard of proof for prosecutors to follow when they do encounter potentially exonerating evidence. But they fail to impose any obligation on prosecutors to actually review the many claims of innocence that cross their desks or to give those claims anything more than a perfunctory, skeptical review. Although there are no concrete rules mandating good-faith prosecutorial review of innocence claims, the obligation of prosecutors to serve as “ministers of justice” would appear to mandate just that type of review. Indeed, while few concrete rules govern prosecutors in the postconviction context, their aspirational obligation to serve justice likely requires more.

2. *The Aspirational Role of Prosecutors in Effecting Postconviction Justice*

Beyond the Model Rules, the “law” mandating prosecutorial postconviction conduct is effectively nonexistent. Given the longstanding prosecutorial mandate to “serve justice,” it would seem that prosecutors are obligated to act more proactively than the Model Rules suggest where innocence claims are concerned. But to call the charge to “serve justice” a legal standard to guide prosecutors reviewing actual innocence claims is to overstate its usefulness. As Professor David Luban observed, “[T]here is no consensus about what justice is, and we have every reason to doubt there ever will be.”³³ Indeed, there is no reason to assume that prosecutors who have fought these petitions through to the bitter end

³⁰ Green & Yaroshefsky, *supra* note 18, at 511.

³¹ *Id.*

³² *Id.* at 511–12.

³³ Luban, *supra* note 13, at 20.

are not motivated by a desire to serve justice. Justice, as a guide for prosecutorial action, provides no analytical power that can guide a conscientious prosecutor in the review of claims of actual innocence.

This lack of guidelines is problematic given the incentives prosecutors have to maintain a conviction regardless of the merits of the innocence claim before them. While prosecutors generally aspire to seek justice, their default response to postconviction innocence claims is often characterized by reflexive skepticism and strenuous resistance, a reflex generated by the importance of conviction statistics for raises, recognition, and district attorney politics; social pressure from police officers and other prosecutors; the fact that most such claims are baseless; and the importance of giving finality to victims and the public.³⁴ Although the law requires little of prosecutors following a guilty verdict, the prosecutor's obligation to ensure that "guilt shall not escape or innocence suffer"³⁵ suggests that prosecutors *should* play a proactive role in exonerating the convicted innocent.

In other words, prosecutors operate under an ongoing obligation to justice, an obligation that does not terminate upon receipt of a jury verdict. As stated by the National District Attorneys Association, "The primary responsibility of prosecution is to see that justice is accomplished."³⁶ Of course, "justice" is a somewhat imprecise guideline for prosecutorial conduct, and reliance on that term for day-to-day prosecutorial decision making essentially has left difficult ethical questions to be decided by individual prosecutors, who are making these decisions based on their individual moral compasses and the exigencies of limited resources. Part III of this Article parses what "justice" may require of prosecutors in the postconviction context.

B. Postconviction Prosecutorial Ethics Scholarship

The role of prosecutors in postconviction relief has been a hot topic in legal academia since at least 2005, when Professor Zacharias first suggested that prosecutors' "minister of justice" role may require them to proactively engage actual innocence claims even after the rendering of a guilty verdict. The scholarship largely has followed three paths: (1) an exploration of the existence of

³⁴ See, e.g., Green & Yaroshefsky, *supra* note 18, at 475–76; Medwed, *supra* note 8, at 134–48.

³⁵ *Berger v. United States*, 295 U.S. 78, 88 (1935) (specifically referencing the U.S. Attorney); see also Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 612–13 (1999) (detailing the historical roots of the prosecutor's role to "seek justice"); MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2013) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that . . . special precautions are taken to prevent and to rectify the conviction of innocent persons.").

³⁶ NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS 1-1.1 (3d ed. 2009), available at <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf>.

a prosecutorial postconviction ethical obligation,³⁷ (2) an investigation of why wrongful convictions occur and how they can be avoided (an inquiry which necessarily involves the role prosecutors can play in avoiding and remedying wrongful convictions),³⁸ and (3) a discussion and analysis of the specific steps prosecutors are now or should be taking to remedy existing wrongful convictions.³⁹

Following Professor Zacharias's groundbreaking 2005 article, Professors Bruce Green, Daniel Medwed, and Ellen Yaroshefsky, among others, began exploring the contours of a prosecutor's postconviction ethical responsibilities.⁴⁰ This scholarship not only makes a strong case for the existence of an affirmative postconviction ethical obligation but also promotes a view that where claims of innocence are involved, justice-minded prosecutors should work hand in hand with defense lawyers and the Innocence Project in objectively assessing those claims.⁴¹ Professor Zacharias identifies a variety of scenarios in which a prosecutor may be obligated to investigate an innocence claim,⁴² Professor Medwed suggests prosecutors should create internal structures in order to do just that,⁴³ and Professors Green and Yaroshefsky articulate the circumstances under which a prosecutor should actively support an innocence claim, even articulating a specific standard that prosecutors should employ in doing so.⁴⁴ This Article pushes this scholarship still further, identifying specific practices and standards of review to be used in efficiently weeding out valid innocence claims from among the frivolous.

Professors Brandon Garrett and Samuel Gross have compiled a number of surveys that not only attempt to grasp the scope of this country's wrongful conviction problem but also to draw conclusions regarding the most prominent

³⁷ See, e.g., Green & Yaroshefsky, *supra* note 18, at 41; Luban, *supra* note 13, at 16–17; Medwed, *supra* note 18, at 55–57; Zacharias, *supra* note 13, at 176.

³⁸ See, e.g., GARRETT, *supra* note 19, at 6–11; GROSS & SHAFFER, *supra* note 5, at 1–5.

³⁹ See, e.g., INTEGRITY PROJECT REPORT, *supra* note 20, at 4; Medwed, *supra* note 8, at 130–32; Medwed, *supra* note 18, at 37–38; Scheck, *supra* note 20, at 216–18; Ware, *supra* note 20, at 1049–50.

⁴⁰ See, e.g., Douglas H. Ginsburg & Hyland Hunt, *The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond*, 7 OHIO ST. J. CRIM. L. 771, 771–72 (2010); Green & Yaroshefsky, *supra* note 18, at 467–73; Medwed, *supra* note 8, at 130–32; Medwed, *supra* note 18, at 37–38.

⁴¹ See, e.g., Green & Yaroshefsky, *supra* note 18, at 516; Luban, *supra* note 13, at 16–17.

⁴² Zacharias, *supra* note 13, at 176.

⁴³ Medwed, *supra* note 18, at 37–38, 58–65 (citing examples of effective prosecutorial postconviction review, including that by the Dallas County Conviction Integrity Unit, United Kingdom Criminal Cases Review Commission, and the North Carolina Innocence Inquiry Commission).

⁴⁴ See, e.g., Green & Yaroshefsky, *supra* note 18, at 495–508. This Article parses that standard in Part III.B.

contributing factors to wrongful conviction.⁴⁵ Reviewing the data from these studies indicates that a high correlation exists between wrongful conviction and eyewitness identification, unsubstantiated confessions, government informant testimony, or non-DNA forensic analysis of physical evidence.⁴⁶ These conclusions not only allow prosecutors and police to improve preconviction procedures for bringing charges, but they provide prosecutors flags for wrongful conviction that prosecutors may rely on as part of their postconviction review protocol.⁴⁷

Finally, a growing number of scholars are applying a pragmatic approach to prosecutorial postconviction ethics, exploring the specific steps prosecutors are now or should be taking to remedy existing wrongful convictions.⁴⁸ Scholars like Professor Medwed and Professor Rachel Barkow posit concrete, practical suggestions for prosecutors' offices to implement in improving prosecutorial objectivity,⁴⁹ while practitioners like Barry Scheck of the Innocence Project and Michael Ware (formerly of the Dallas County Conviction Integrity Unit) discuss in concrete terms how best to counteract natural prosecutorial inclinations toward upholding conviction, using specifically Dallas's Conviction Integrity Unit as an example of the innovations possible in a prosecutor's office.⁵⁰ Likewise, this Article draws upon the experiences of Dallas and four other conviction integrity units to identify innovations in postconviction review that comply with prosecutors' postconviction ethical obligations and also are practical and palatable to prosecutors and, therefore, may be of interest to other prosecutors.

This Article builds on and bridges the important scholarship described above, making several unique contributions to the literature on the prosecutors' role in postconviction review of actual innocence claims. First, as just discussed, this Article canvasses five functioning conviction integrity units, gathering information that is, for the most part, not publicly available but that is essential for identifying feasible ways in which prosecutors can play a role in exonerating the convicted innocent. Second, this Article distills from the practices of conviction integrity units principles that encourage objective prosecutorial review and can be broadly applied in prosecutors' offices across the country, large or small, cash strapped or

⁴⁵ See GARRETT, *supra* note 19, at 6–13; GROSS & SHAFFER, *supra* note 5, at 40 (highlighting factors associated with exonerations); PETRO & PETRO, *supra* note 6, at 115.

⁴⁶ See Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence*, 77 *FORDHAM L. REV.* 2893, 2928 (2009). There is a significant volume of high-quality scholarship exploring the common causes of wrongful conviction and identifying those listed here as some of the most prevalent causes. See, e.g., GARRETT, *supra* note 19, at 8–11; GROSS & SHAFFER, *supra* note 5, at 40. That discussion is outside the scope of this Article, but in the past five years, there have been several very interesting statistical analyses done on this topic.

⁴⁷ See *infra* Part III.B.

⁴⁸ See, e.g., Scheck, *supra* note 20, at 2250–51; Ware, *supra* note 20, at 1049–50.

⁴⁹ See Medwed, *supra* note 8, at 169–181; Medwed, *supra* note 18, at 58–65; INTEGRITY PROJECT REPORT, *supra* note 20, at 4–9.

⁵⁰ Scheck, *supra* note 20, at 2250; Ware, *supra* note 20, at 149–50.

well funded. Third, this Article fills a gap not only in the scholarship but in prosecutorial practice, by combining these principles with clearly articulated standards of proof that would assist prosecutors in determining whether additional action in investigating or responding to an innocence claim is appropriate. This final innovation is important for a number of reasons: improving consistency in office responses to innocence claims, assisting prosecutors in fulfilling their duty to serve justice, and ensuring that office resources are expended under circumstances the chief prosecutor has determined are appropriate and in a way that will distinguish valid innocence claims from the significant number of frivolous ones efficiently.

II. THE PRACTICE OF POSTCONVICTION REVIEW

As mentioned above, this Article is not the first to identify the need to address postconviction ethics. And indeed, other scholars have relied on innovative efforts in the Dallas and New York County district attorney's offices to create a system for evaluating innocence claims and preventing wrongful conviction.⁵¹ Part II goes further than these previous efforts, presenting the first in-depth evaluation of five such efforts—known as “conviction integrity units”—operating throughout the country.⁵² The conviction integrity units reviewed in Part II—Dallas County, Texas; New York County, New York (“Manhattan”); Harris County, Texas; Santa Clara County, California; and Cook County, Illinois, based on interviews with the directors of each unit or other senior prosecutors in the office⁵³—reveal not only important basic principles but also notable absences of standardized review within or among prosecutors' offices. The lack of clearly articulated standards of proof that would guide prosecutorial discretion—or a reliance on “gut feeling” for

⁵¹ Green & Yaroshefsky, *supra* note 18, at 494; Scheck, *supra* note 20; Ware, *supra* note 20, at 1034.

⁵² Because information on prosecutorial decision making and methodology is, generally, not publicly available, gathering information regarding postconviction review regimes is a challenge. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 58 (1998) (noting that public access to information regarding prosecutorial practices has “not expanded since the 1820s”). Because the American prosecutor, as Angela Davis has observed, both is “the most powerful official[] in the criminal justice system” and wields its power with vast, unreviewable discretion, the dearth of publicly available information on how prosecutors exercise that discretion is troubling from a constitutional rights and transparency perspective and from a government efficiency perspective. See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2009).

⁵³ The information in Part II is a product of interviews with the directors of the Dallas County, Harris County, and Santa Clara County conviction integrity units. Information regarding Manhattan's conviction integrity unit was obtained by interviewing a senior assistant district attorney in the office (the unit director was on vacation), and information regarding Cook County's program was obtained through an interview with Fabio Valentini, the immediate supervisor of the conviction integrity unit director and the chief of Cook County's Criminal Bureau.

identifying a valid innocence claim—leaves even the efforts of these highly effective conviction integrity units vulnerable to individual prosecutorial biases and potential discrimination. Where Part I presents the legal and scholarly efforts to understand postconviction ethics, Part II provides the practical context gleaned from the five units highlighted herein. This context makes clear the need for and benefits of the proposal in Part III.

A. Case Studies in Conviction Integrity Unit Implementation

1. Dallas County District Attorney's Office

In the wake of a series of embarrassing public exonerations, Dallas County residents elected Craig Watkins district attorney on a platform of restoring integrity to the district attorney's office.⁵⁴ Watkins pulled his first assistant, Terri Moore, from private practice and immediately implemented a new approach to the problem of wrongful conviction.⁵⁵ They studied the county's wrongful convictions, reviewing them in the same way that the Federal Aviation Administration investigates an airplane crash scene, working backward from the wrongful conviction to see what malfunction in the system caused that result.⁵⁶ Watkins also hired an innocence project attorney to form a "Conviction Integrity Unit," which would review postconviction claims of actual innocence, and he assigned the unit an additional prosecutor, paralegal, and investigator, all of whom would work on postconviction claims of innocence full time.⁵⁷ While many innocence statutes bar those who have pled guilty, lack new evidence, or are no longer incarcerated from filing a claim of innocence,⁵⁸ Dallas County's Conviction Integrity Unit decided to

⁵⁴ For decades before Watkins's election, the county had been infamously resistant to innocence claims. See John Buntin, *2008 Public Officials of the Year: Exoneration Man, Craig Watkins*, GOVERNING, <http://www.governing.com/poy/Craig-Watkins.html> (last visited Apr. 20, 2014). Despite resistance to DNA testing on the part of Watkins's predecessors, by the time Watkins took office as district attorney in 2007, Dallas County had already seen nine DNA exonerations—more than any other county in the United States. Ware, *supra* note 20, at 1035. The county's tenth, eleventh, and twelfth exonerations came during Watkins's first weeks in office. *Id.* (citations omitted).

⁵⁵ Ware, *supra* note 20, at 1039. *The Thin Blue Line*, a 1988 documentary depicting the wrongful conviction of Randall Adams who initially received a death sentence, presents a particularly disturbing account of Dallas County justice under long-time district attorney Henry Wade. See generally THE THIN BLUE LINE (1988).

⁵⁶ Ware, *supra* note 20, at 1039.

⁵⁷ GARRETT, *supra* note 19, at 259; Ware, *supra* note 20, at 1034, 1040–41.

⁵⁸ Texas has not adopted an actual innocence statute. Rather, the exclusive postconviction remedy in final felony convictions in Texas courts is through a writ of habeas corpus. See TEX. CODE CRIM. PROC. ANN., art. 11.07, § 5 (West Supp. 2012) ("After conviction the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner"). Texas courts have, however, recognized a freestanding innocence claim through habeas jurisprudence for inmates who can produce new evidence of innocence. See, e.g., *Ex parte*

review all claims of actual innocence, from misdemeanors to major felonies, regardless of how old the case.⁵⁹ Further, the unit would not use as its touchstone the rather stringent standard applied by Texas courts for determining whether a petitioner is actually innocent.⁶⁰ Indeed, the only real restriction employed by the office would be a jurisdictional one: the conviction must be a Dallas County conviction.⁶¹ Announcement of the unit's creation was greeted by a massive flood of innocence claims from prisoners across Texas and the country, numbers which have since tapered off to fifteen to twenty new claims a week.⁶²

Watkins also decided to reverse the office's longstanding opposition to DNA testing, implementing a policy of supporting testing if there was relevant biological evidence to test and the outcome of that test was potentially dispositive on the issue of guilt or innocence.⁶³ In the two years following that policy change, nine people were exonerated.⁶⁴ Although inmates have no right to postconviction discovery in Texas, as in virtually every state across the country, Dallas County also adopted an "open file" policy of providing requesting inmates with access to prosecution files.⁶⁵ While the open-file policy is not without some limits (e.g., inmates making an Eighth Amendment claim may be asked which particular portions of the file are relevant to the claim),⁶⁶ generally, where allegations like prosecutorial misconduct are made, the trial file is readily provided to the requesting party.⁶⁷ Early on, Dallas also began a collaborative review of its DNA case files with the Innocence Project of Texas, in which, upon a showing of a "plausible claim of innocence,"⁶⁸ Dallas would provide the Innocence Project the prosecution's entire file, including work product.⁶⁹ This practice, among others,

Duke, No. AP-76762, 2012 WL 1059895, at *1 (Tex. Crim. App. Mar. 28, 2012) (unpublished decision). The Texas Court of Criminal Appeals first articulated its innocence standard for noncapital cases in *Ex Parte Elizondo*, 947 S.W.2d 202 (Tex. Crim. App. 1996). Under that decision, a petitioner "must show by clear and convincing evidence that no reasonable juror would have convicted [the applicant] in light of the new evidence." *Id.* at 212 (Baird, J., concurring). While that standard still holds sway for noncapital cases, the Texas legislature has altered that standard for capital cases. *See* TEX. CODE CRIM. PROC. ANN., art. 11.071 (West 2012).

⁵⁹ *See* Telephone Interview with Russell Wilson, Conviction Integrity Unit Chief, Dallas Cnty. Dist. Attorney's Office (June 27, 2012) [hereinafter Wilson Interview].

⁶⁰ *See id.*; *see also Ex Parte Elizondo*, 947 S.W.2d at 212.

⁶¹ *See* Wilson Interview, *supra* note 59.

⁶² *Id.*

⁶³ Ware, *supra* note 20, at 1039.

⁶⁴ PETRO & PETRO, *supra* note 6, at 208.

⁶⁵ *See* Wilson Interview, *supra* note 59.

⁶⁶ *Id.*

⁶⁷ *See id.* (noting that upon instituting the open-file policy, the office soon discovered that providing the trial file to every requester was more costly than anticipated).

⁶⁸ Scheck, *supra* note 20, at 2250.

⁶⁹ *Id.* Scheck also cited the Conviction Integrity Unit's willingness to investigate leads proposed by the inmate claiming innocence where the unit is uniquely situated to pursue those leads; the unit's willingness to allow the Innocence Project or other inmate lawyers to

led Barry Scheck, cofounder of the Innocence Project, to actively promote the Dallas model as “the most prominent and successful model for a Conviction Integrity Unit.”⁷⁰

Just as Watkins began his tenure by reforming and updating office policies on *Brady*⁷¹ disclosures, eyewitness identifications, and police lineups, the Conviction Integrity Unit continued to review closely its exonerations for ways to improve office procedure.⁷² All of the exonerations uncovered to date were obtained under prior district attorneys, but where the attorneys who prosecuted the cases still work in the DA office, they are notified of the exoneration and its cause, and if appropriate, additional steps to reform office procedure may be taken.⁷³ Moreover, to ensure unbiased review of an innocence claim, the initial prosecuting attorney typically plays only a limited role in the postconviction review process.⁷⁴ Where the innocence claim alleges a *Brady* violation, the original prosecutor almost certainly will receive an inquiry about disclosures;⁷⁵ however, if the convicted individual claims an eyewitness misidentification, the office believes there is little reason to consult with the original prosecutor.⁷⁶

Watkins was well aware that he risked the disfavor of Dallas County’s veteran prosecutors by instituting a conviction review program. Indeed, “more than 200 of the 267 attorneys [in the office] had actively campaigned for his opponent” in the election, believing Watkins lacked sufficient trial experience to be district attorney.⁷⁷ “It’s difficult,” Watkins acknowledged. “I still walk around the office gently because I know there are a lot of people who still don’t want me here.”⁷⁸ Watkins had to work hard to ensure his Conviction Integrity Unit was not marginalized within the office. Structurally, he ensured the unit was integrated with the already-existing units that were likely to have overlapping cases and that these divisions (appellate and writ) would operate under the direction of the head

investigate leads those entities are uniquely situated to pursue; the unit’s ongoing, close working relationship with the public defender’s office, which includes a willingness to freely exchange information and to engage in joint investigations; and the unit’s formal adoption of Model Rule 3.8 as official policy. *Id.* at 2250–51.

⁷⁰ *Id.* at 2250.

⁷¹ 373 U.S. 83 (1963).

⁷² See Wilson Interview, *supra* note 59. The new office policy regarding *Brady*, implemented during Watkins’s tenure, specifies that a prosecutor may be fired if the *Brady* violation is sufficiently egregious. *See id.*

⁷³ *Id.* According to Russell Wilson, no prosecutor currently with the office has had a wrongful conviction that was the product of prosecutorial misconduct. The majority of wrongful convictions have been the product of an erroneous eyewitness identification or similar error, often linked with insufficient prior office protocols, which have since been revised during Watkins’s tenure. *See id.*

⁷⁴ *See id.*

⁷⁵ *Id.*

⁷⁶ *See id.*

⁷⁷ Buntin, *supra* note 54.

⁷⁸ *Id.*

of the unit.⁷⁹ The head of the Conviction Integrity Unit is number three in the office in terms of authority, reporting directly to the district attorney, and, by virtue of this seniority, would ensure the office's exoneration-focused policies would be implemented actively in all divisions.⁸⁰

Even more critical to office morale has been the successful discovery and exoneration of many convicted innocent individuals, validating the work of the unit and underscoring the reality of the wrongful conviction problem. Dallas County's rapid reform of office culture may in part be a function of its initial focus on DNA cases, where exonerations can be quick, straightforward, and indisputable.⁸¹ These decisive, conclusive, and unquestionable exonerations demonstrated clearly the importance of the team's work to prosecutors in the office and the importance of having such a unit as part of the office's core mission.⁸²

2. *Harris County District Attorney's Office*

Pat Lykos, then-district attorney for Harris County, Texas, set up that office's Post-Conviction Review Unit in 2009, having run for office on a platform of reform.⁸³ Harris County has "a reputation as one of the harshest prosecutorial jurisdictions in the state,"⁸⁴ leading the country in sending defendants to death row.⁸⁵ Indeed, since the Supreme Court reinstated capital punishment in 1976,

⁷⁹ See Wilson Interview, *supra* note 59.

⁸⁰ *Id.*

⁸¹ See *id.* Henry Wade, Dallas's district attorney from the 1950s through the 1980s, made preservation of DNA evidence office policy. As a result, Dallas had a massive cache of DNA cases to use at the outset of its conviction integrity efforts. See Michael Graczyk, *After Dallas DA's Death, 19 Convictions Are Undone*, USA TODAY (July 29, 2008, 1:54 PM), http://usatoday30.usatoday.com/news/nation/2008-07-29-2653195694_x.htm.

⁸² See Wilson Interview, *supra* note 59 (noting that starting with the DNA cases "cleared the path" in terms of establishing the necessity of the Conviction Integrity Unit).

⁸³ See Telephone Interview with Baldwin Chin & Alicia O'Neil, Post-Conviction Review Unit, Harris Cnty. Dist. Attorney's Office (July 21, 2012) [hereinafter Chin & O'Neil Interview]. Lykos's predecessor, Chuck Rosenthal, resigned in 2008 after having been caught sending racist and pornographic e-mails from his work account (Rosenthal had survived a crime lab scandal four years earlier which resulted in nearly four hundred prisoners being entitled to new DNA testing). Ben Crair, *Pat Lykos: Texas' Capital Punishment Avenger*, DAILY BEAST (Apr. 4, 2011), <http://www.thedailybeast.com/articles/2011/04/04/pat-lykos-texas-capital-punishment-avenger.html>.

⁸⁴ Brandi Grissom, *An Interview with Harris County DA Pat Lykos*, TEX. TRIB. (Aug. 27, 2010), <http://www.texastribune.org/texas-news-media/tt-interview/an-interview-with-harris-county-da-pat-lykos/>.

⁸⁵ *Id.* Johnny Holmes was an iconic Texas prosecutor, from his handlebar mustache to the 111 defendants he sent to death row between 1992 and 2000 alone. See Brandi Grissom, *A Tough Prosecutor Finds His Certitude Shaken by a Prisoner's Exoneration*, TEX. TRIB. (Nov. 18, 2011), <http://www.texastribune.org/library/multimedia/john-bradley-texas-prosecutor-asserts-change-of-heart/>. Nor did Holmes give any breaks to lesser

Harris County—the third largest county in the nation (it includes the city of Houston)⁸⁶—has sent more prisoners to the death chamber than any state in the country.⁸⁷

Lykos is no liberal (she is a self-described “Goldwater-Reagan Republican”),⁸⁸ but nevertheless has instituted dramatic change within the Harris County District Attorney’s Office.⁸⁹ Among these reforms was her institution of a Post-Conviction Review Unit, which she staffed with two experienced prosecutors from within the office and an investigator.⁹⁰ Lykos explained her decision to institute the new Unit:

I think every major district attorney’s office needs it. We have 50,000 felony cases a year filed in Harris County on average and over 80,000 misdemeanor cases. You can’t have that volume without errors being made. . . . Public trust and confidence in the system is everything. If you’re to have civil order, you have to have the public trust the system. They have to have confidence that it’s fair, that the law is applied equally.⁹¹

The Innocence Project of Texas has lauded creation of the new unit,⁹² and in the first three years of its existence, the unit has played a leading role in the exoneration of three convicted innocents.⁹³ Since announcing its postconviction

criminals: he once sought a life sentence for a substitute teacher who sold a joint to a student. Crair, *supra* note 83.

⁸⁶ Grissom, *supra* note 84.

⁸⁷ Crair, *supra* note 83.

⁸⁸ *Id.*

⁸⁹ Lykos introduced a series of reforms that angered law enforcement, such as “extending leniency to first time DWI offenders and people caught with trace amounts of cocaine.” See Doug Miller, *GOP Voters Reject Lykos, Choose Anderson in Harris County DA Race*, KHOU 11 NEWS (May 29, 2012, 11:13 PM), <http://www.khou.com/news/politics/Lykos-loses-to-Anderson-in-GOP-race-for-DA--155569755.html>. “During [Lykos’s] first weeks in office, many longtime prosecutors left the DA’s office,” and “dozens of past and present prosecutors supported [Anderson, Lykos’s opponent] and showed up at [Anderson’s] election night victory party.” *Id.* Her reforms, along with her management style, ultimately led to her defeat in the May 2012 district attorney primary (her term ended in December 2012). See *id.*

⁹⁰ Chin & O’Neil Interview, *supra* note 83. The prosecutors both had rotated through multiple divisions in the Harris County District Attorney’s Office and already had established credibility as prosecutors; neither felt as though they were viewed or treated any differently (i.e., as office ombudsman) by virtue of their move to the Post-Conviction Review Unit. *Id.*

⁹¹ Grissom, *supra* note 84.

⁹² See Peggy O’Hare, *For Inmates, Proving Innocence Remains Uphill Battle*, HOUS. CHRON. (Aug. 1, 2010), <http://www.chron.com/news/houston-texas/article/For-inmates-proving-innocence-remains-uphill-1711959.php>.

⁹³ See Chin & O’Neil Interview, *supra* note 83.

review program, Harris County has been besieged by claims of actual innocence, the vast majority of which are baseless. There have been “[l]ots of frivolous claims,” Lykos has commented. “But we review everything.”⁹⁴ Unlike the conviction integrity units in other jurisdictions, Harris County limits its review to cases with the potential to yield definitive *forensic* confirmation of innocence.⁹⁵ Harris County’s Post-Conviction Review Unit is tasked with responding to letters claiming actual innocence plus all requests for postconviction DNA.⁹⁶

Harris County’s policy on postconviction file sharing also differs from Dallas County’s. Unlike Dallas, Harris County does not open its files to unrepresented inmates.⁹⁷ But once an inmate has been appointed an attorney (which happens in all DNA testing requests that qualify under the postconviction DNA testing statute and many innocence claims with a forensic component), the office will permit the attorney to see the parts of the file relevant to the requested DNA or forensic testing.⁹⁸ Like with the other conviction integrity units, guilty pleas, expiration of statutes of limitation, misdemeanor offenses, or lack of a judicial remedy are not considered bars to review.⁹⁹ If an exoneration would require the unit to make a credibility determination (such as in a case of witness recantation), however, the investigation ends there: the office views this type of determination as within the province of a jury and therefore outside the purview of prosecutorial review.¹⁰⁰ In the unit’s view, the proper venue for those cases is the court system, where a judge can make the required credibility determination.¹⁰¹ Of course, the initial innocence claim itself often does not provide sufficient information to determine whether conclusive, objective exonerating forensic evidence exists or whether reliance on a credibility determination ultimately would be required. Therefore, the unit may still review a claim that lacks an express tie to forensics in an initial claim.

The Post-Conviction Review Unit has instituted several structural protections to preserve its independent judgment. As in Dallas, the unit reports directly to the district attorney and her first assistant, and is only accountable to them.¹⁰² Second, for those cases in which investigation is warranted, the unit avoids discussing the investigation with the original prosecutor of the case until the investigation (including witness interviews and forensic testing) is complete and the unit has made its own preliminary assessment.¹⁰³ For those cases that appear to be headed in the general direction of a new trial or exoneration, however, the office views

⁹⁴ O’Hare, *supra* note 92.

⁹⁵ See Chin & O’Neil Interview, *supra* note 83.

⁹⁶ The Post-Conviction Review Unit is responsible for responding to requests for DNA testing, but unless a credible claim is made that the evidence will be of an exonerating nature, the office enforces the limits of the statute as written. *Id.*

⁹⁷ See Chin & O’Neil Interview, *supra* note 83.

⁹⁸ See *id.*; TEX. CODE CRIM. PROC. ANN. art. 64 (West 2003).

⁹⁹ See Chin & O’Neil Interview, *supra* note 83.

¹⁰⁰ *Id.*

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ *Id.*

consultation with the original prosecutor as an essential part of the process, as the prosecutor may have information not reflected in the paper files. And if the case is headed toward exoneration, consulting with the prosecutor is the best way to confirm the unit's investigation has been thorough.¹⁰⁴ Equally importantly, including the prosecutor in the conversation helps ensure the unit does not come to be viewed as the office auditor, indiscriminately searching for the arguably innocent.¹⁰⁵

3. *New York County (Manhattan) District Attorney's Office*

When Cyrus R. Vance Jr. assumed his post as Manhattan district attorney in January 2010, he replaced Robert Morgenthau, who had served as the Manhattan district attorney for thirty-five years and established what many considered "the country's premier prosecutorial office."¹⁰⁶ Vance began his legal career in the Manhattan district attorney's office in the 1980s, and even then the office had a unique culture that favored exoneration.¹⁰⁷ When Vance came to office, he built on this tradition, initiating a Conviction Integrity Program with a two-fold purpose of preventing wrongful convictions on the front end of the criminal justice process and addressing claims of actual innocence on the back end.¹⁰⁸

Vance set up Manhattan's Conviction Integrity Program in March 2010, a program with three main components: a Conviction Integrity Committee, a conviction integrity chief, and an outside Conviction Integrity Policy Advisory Panel.¹⁰⁹ The committee, comprised of ten senior members of the district

¹⁰⁴ *Id.*

¹⁰⁵ *See id.*

¹⁰⁶ Press Release, N.Y. State Bar Ass'n, Robert M. Morgenthau Receives New York State Bar Association's 2011 Gold Medal (Jan. 31, 2011), *available at* <http://www.nysba.org/CustomTemplates/Content.aspx?id=6708>.

¹⁰⁷ Cyrus R. Vance, Jr., N.Y. Cnty. Dist. Attorney, Conviction Integrity Conference Speech, New York University (Dec. 6, 2011), *available at* <http://manhattanda.org/conviction-integrity-conference-speech> (referencing how each new attorney was told about the Wylie-Hoffert murder case, in which the district attorney developed doubts about a detailed confession to a brutal murder and spearheaded a far-reaching reinvestigation which ultimately led to the suspect's exoneration).

¹⁰⁸ *Id.* Because this Article is directed at postconviction review efforts, it focuses its analysis on what the Manhattan district attorney's office calls the "back end" of its Conviction Integrity Program.

¹⁰⁹ The Advisory Panel consists of leading criminal justice experts, including legal scholars like Bruce Green and Rachel Barkow, former prosecutors, and Innocence Project Co-Founder Barry Scheck, who together advise the office on national best practices and evolving issues in the area of wrongful convictions. *Wrongful Conviction*, N.Y. CNTY. DIST. ATTORNEY'S OFFICE, <http://www.manhattanda.org/wrongful-conviction> (last visited Mar. 22, 2014); Press Release, N.Y. Cnty. Dist. Attorney's Office, N.Y.C. DA Vance Announces Conviction Integrity Program (Mar. 4, 2010) [hereinafter N.Y. Cnty. ADA Press Release], *available at* <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a.dgerEtkWA>.

attorney's staff, focuses on the front end of the process, reviewing and revising practices and policies related to training, case assessment, investigation, and disclosure obligations, with a particular eye for the most common errors leading to wrongful conviction, such as eyewitness misidentification and false confessions.¹¹⁰ While Manhattan has long required its prosecutors to comply with rigorous checklists to ensure justice on the front end of the criminal justice process, and had long required its prosecutors to be convinced of guilt "beyond a reasonable doubt" prior to proceeding with a prosecution, the committee, upon its inception, engaged in further development of these checklists to specifically address the problem of wrongful conviction.¹¹¹ These detailed checklists have two virtues for prosecutors: helping to ensure the defendant in the case is the actual perpetrator and assisting prosecutors in making a stronger case against the actual perpetrator.¹¹² For instance, because eyewitness misidentification is a common contributor to wrongful conviction,¹¹³ in cases involving only one eyewitness, Manhattan prosecutors use an office-created checklist on the types of corroborative evidence for which they should look. These checklists both bolster cases and serve as a reminder that extra care is required in that particular type of case to avoid wrongful conviction.¹¹⁴ Likewise, the committee updated the office's checklists for *Brady*-disclosure obligations, reminding prosecutors of what types of material they should be looking for and specific places where they should be looking.¹¹⁵ For all of these materials, the committee relied on the latest research put together by cognitive scientists and other empirical analysis done by its Advisory Panel members.¹¹⁶ These advisors also play an ongoing, albeit largely intermittent, advisory role for Manhattan's Conviction Integrity Program, where the conviction integrity chief seeks their advice on an ad hoc basis as specific issues arise that are relevant to their expertise.¹¹⁷

As another component of this front-end process, Manhattan revised its training regime to incorporate best practices for avoiding wrongful convictions, adding a "conviction integrity" component to each of its major training sessions.¹¹⁸ New Manhattan prosecutors are trained on how to recognize the warning signs of a wrongful conviction,¹¹⁹ using real cases in which the office discovered a wrongful

¹¹⁰ *Wrongful Conviction*, *supra* note 109.

¹¹¹ See Telephone Interview with Manhattan Assistant District Attorney, (July 6, 2012) [hereinafter Manhattan ADA Interview].

¹¹² *Id.*

¹¹³ GARRETT, *supra* note 19, at 48–50, 80.

¹¹⁴ See Manhattan ADA Interview, *supra* note 111.

¹¹⁵ *Id.*; see also Vance, Jr., *supra* note 107.

¹¹⁶ See Manhattan ADA Interview, *supra* note 111.

¹¹⁷ See *id.*

¹¹⁸ Vance, Jr., *supra* note 107.

¹¹⁹ *Id.*; see also DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 133 (2012) (advocating training as one way to mitigate the occurrence of wrongful conviction).

conviction as models.¹²⁰ The office intentionally selected innocence cases in which very senior, and very well respected, assistant district attorneys in the office had been fully convinced that they had the right person, only to later discover they were wrong.¹²¹ By using these types of cases for training purposes, not only are prosecutors made more attuned to and aware of warning signs, but the realization that senior, well-respected prosecutors could have made this mistake increases the focus of young prosecutors on avoiding the error, underscores the message that it could happen to anyone, and removes in part the stigma of a discovery of this kind of error, thereby improving objectivity for the postconviction review process.¹²²

For his conviction integrity chief, Vance tapped a senior assistant district attorney, Bonnie Sard, who had been at the Manhattan district attorney's office since 1994 and was highly respected within the office.¹²³ In her capacity as conviction integrity chief, Sard coordinates the committee's activities and leads reinvestigation of any case that appears to present a meaningful claim of actual innocence.¹²⁴ Like Dallas, Manhattan has no real limitations on the types of claims it will review; it simply asks applicants to specify what evidence they have of innocence and how the district attorney's office would be able to look further into that evidence.¹²⁵ The office does not necessarily consider a guilty plea as a bar to review, so long as there is a plausible explanation of why the defendant pled guilty; but it does view the existence of a guilty plea as an important factor to consider when evaluating a claim of actual innocence.¹²⁶ Likewise, Manhattan does not use the legal parameters of the state innocence statute (which authorizes a motion to vacate a conviction on the basis of new evidence)¹²⁷ to set the parameters of the unit's initial review because, as one assistant observed, it is "hard to know on the front end [of an investigation] where you'll be on the back end."¹²⁸ In other words, while new evidence may be a statutory requirement, its lack does not bar review of the innocence claim by the Manhattan office, as exonerating new evidence often may be uncovered over the course of an investigation.

Postconviction claims of actual innocence go directly to the Conviction Integrity Program, where they are logged, tracked, and receive an initial review by

¹²⁰ See Manhattan ADA Interview, *supra* note 111.

¹²¹ See *id.*

¹²² *Id.*

¹²³ Vance, Jr., *supra* note 107; *Meet the Executive Team*, N.Y. CNTY. DIST. ATTORNEY'S OFFICE, <http://manhattanda.org/meet-executive-team> (last visited Apr. 19, 2014); N.Y. Cnty. ADA Press Release, *supra* note 109.

¹²⁴ N.Y. Cnty. ADA Press Release, *supra* note 109.

¹²⁵ See *Wrongful Conviction*, *supra* note 109.

¹²⁶ Vance, Jr., *supra* note 107.

¹²⁷ N.Y. CRIM. PROC. LAW § 440.30(b)(i)(1) (McKinney Supp. 2013) ("The court shall deny any [motion to vacate a sentence] made pursuant to this paragraph where . . . the defendant's motion . . . does not seek to demonstrate his or her actual innocence . . .").

¹²⁸ Manhattan ADA Interview, *supra* note 111.

Bonnie Sard.¹²⁹ Unlike in Dallas, however, in Manhattan, the prosecutor who originally tried the case does play a role in the review process.¹³⁰ In most instances, Sard consults with the prosecuting attorney as part of her initial review of the case and, if she is convinced that there has been no miscarriage of justice, she forwards that conclusion directly to the district attorney.¹³¹ Also unlike the Dallas conviction integrity regime, in Manhattan, the assistant district attorneys who conduct any required reinvestigation into a claim of innocence are not devoted full time to the conviction integrity team. Rather, if Sard determines further investigation of a claim is needed, she forwards the claim to an assistant district attorney, who will manage the reinvestigation of the case along with the rest of her caseload.¹³² That assistant district attorney will then report her conclusions back to Sard, who determines whether additional review is necessary; Sard then reports the decision to the district attorney.¹³³ In cases where a full-scale investigation is conducted, which often takes from six to twelve months, the Conviction Integrity Committee will meet and review the assistant's findings upon conclusion of the investigation, often for several hours.¹³⁴ In those instances, where an inmate is represented by counsel, that lawyer will be invited to attend the meeting and make a recommendation to the district attorney as to how the office should proceed.¹³⁵

Like Dallas County, Manhattan does not employ a concrete standard in determining guilt or innocence, as Vance explained:

I do not pretend that we have devised a simple formula in this regard. I will say this: if in reviewing a case, we are looking at the same evidence the jury saw, and if the trial seems to us to have been conducted in a fair and competent manner, we would be strongly disinclined to vacate a jury verdict of guilty—even if we feel, in hindsight, that we might have reached a different verdict. But on the other hand, if we now have evidence the jury did not know, or if there was some procedural defect in the trial that prevented the jury from evaluating the evidence fairly, then we would be more inclined to substitute our view of the case for that of the trial jury. But in each instance, the question is the same, and remains central: do we believe, or at least strongly suspect, that the defendant is actually innocent?¹³⁶

In the year and a half since the program began, Manhattan has vacated one conviction (the case awaits retrial) and confirmed through investigation that two

¹²⁹ Vance, Jr., *supra* note 107.

¹³⁰ *See id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Manhattan ADA Interview, *supra* note 111.

¹³⁵ Vance, Jr., *supra* note 107.

¹³⁶ *Id.*

other convictions were valid.¹³⁷ Although Vance acknowledges that the program is still a work in progress, he also has described the results of his Conviction Integrity Program as “unequivocal”: “the system we have devised works.”¹³⁸

4. Santa Clara County District Attorney’s Office

In 2011, the newly elected district attorney in Santa Clara County, California Jeffrey Rosen, established a Conviction Integrity Unit for his district.¹³⁹ Like Dallas, Santa Clara had encountered its fair share of bad press in the lead up to creation of the unit, including a series of misconduct allegations against prosecutors in the office¹⁴⁰ and the suspension of one such prosecutor by the California State Bar Association.¹⁴¹ Like Lykos and Watkins, Rosen ran on a

¹³⁷ *See id.*

¹³⁸ *Id.*

¹³⁹ *See* Interview by David Onek with Jeffrey Rosen, Santa Clara Cnty. Dist. Attorney, The Criminal Justice Conversations Podcast with David Onek, Episode #24 (May 23, 2011) [hereinafter Rosen Interview], available at http://www.law.berkeley.edu/files/CrimJusPod_Episode24v2.pdf.

¹⁴⁰ Sue Dremann, *DA Officially Creates Conviction-Integrity Unit*, PALO ALTO ONLINE (Mar. 17, 2011, 3:17 PM) http://paloaltoonline.com/news/show_story.php?id=20427. The sanctioning of this Santa Clara prosecutor by the California State Bar is notable in part because of the extreme rarity of prosecutorial sanctioning. Between 1970 and 2009, only forty-four cases had been brought in which prosecutors faced disciplinary proceedings for misconduct relating to defendants’ constitutional rights. DAVIS, *supra* note 52, at 128–29. This was even true in cases where appellate courts, in reversing a conviction due to *Brady* violations or prosecutors knowingly allowing lying witnesses to testify, described the prosecutors’ behavior as “unforgivable,” “intolerable,” “beyond reprehension,” and “illegal, improper and dishonest.” *Id.* at 135–36. Indeed, not only were these prosecutors not sanctioned by their respective bars, their offices largely chose not to discipline them either. *Id.* at 136–38; *see also* MEDWED, *supra* note 119, at 29–31 (arguing that current prosecutorial discipline is ineffective); Scheck, *supra* note 20, at 2222 (noting the lack of interoffice sanctions and arguing in favor of interoffice sanctions in light of the ineffectiveness of state bar and judicial remedies).

¹⁴¹ In a rare instance of a state bar sanctioning an active prosecutor, in May 2012, the California State Bar charged Santa Clara Deputy District Attorney Troy Benson with five counts of misconduct, including suppressing evidence and then lying to conceal having done so. The charges stemmed from a 2006 child molestation case in which Benson allegedly failed to turn over a videotape that cast doubt on whether the victim was, in fact, abused, and then denied concealing the evidence, including while under oath in court. The defendant in the case served four years in prison before his conviction was overturned on the basis of Benson’s conduct (conduct expressly condemned by the appellate court). The discovery of the suppressed videotape led to the discovery of thousands of other such undisclosed tapes, forcing prosecutors and public defenders to reexamine hundreds of molestation cases. Tracey Kaplan, *State Bar Charges Santa Clara County Prosecutor with Misconduct; Disbarment Possible*, SAN JOSE MERCURY NEWS (May 17, 2012, 11:43:01 AM) http://www.mercurynews.com/crime-courts/ci_20646441/state-bar-charges-santa-clara-county-prosecutor-misconduct.

platform of renewing ethical integrity, promising to raise the District Attorney's Office's ethical standards and to restore integrity and public trust in the office.¹⁴² During his campaign, Rosen pledged to improve training for prosecutors and to review any cases alleging misconduct or miscarriages of justice.¹⁴³ His victory over incumbent Dolores Carr was the first time in more than eighty years that an incumbent district attorney had failed to win reelection in Santa Clara County.¹⁴⁴

Rosen tapped David Angel, an experienced prosecutor known as a reformer in the office, to be his first Conviction Integrity Unit director.¹⁴⁵ Along with Angel, the office assigned a special assistant district attorney and a full-time investigator to the unit. Not only had Angel reformed the county's eyewitness protocol and pushed for the recording of suspect interviews in cases involving violent crime, but he also participated in an internal office investigation that resulted in the exoneration of a man wrongfully convicted and sentenced to life in prison.¹⁴⁶ In addition to his years of experience as a prosecutor, Angel also teaches a seminar on righting wrongful convictions at Santa Clara Law School with Northern California Innocence Project Executive Director Cookie Ridolfi. Angel is also well regarded by both prosecutors and defense lawyers,¹⁴⁷ a valuable asset given that, like Manhattan and Dallas, Santa Clara often collaborates with the Innocence Project on postconviction innocence cases.¹⁴⁸

Like Manhattan, Santa Clara's program involves prominent front- and back-end components. On the front end, the office strengthened its training for prosecutors and police officers on ethics, discovery obligations, and the warning signs of wrongful convictions, often drawing upon old cases of official misconduct and wrongful convictions from the office to instruct on how to avoid these problems.¹⁴⁹ Rosen also changed the office's policy on *Brady* disclosures. Under

¹⁴² See Rosen Interview, *supra* note 139.

¹⁴³ Mike Colgan, *Santa Clara District Attorney Unveils 'Integrity Unit,'* CBS SAN FRANCISCO (Mar. 18, 2011, 11:32 AM) <http://sanfrancisco.cbslocal.com/2011/03/18/santa-clara-district-attorney-unveils-integrity-unit/>.

¹⁴⁴ *Id.*

¹⁴⁵ Dremann, *supra* note 140.

¹⁴⁶ *Id.* Indeed, when an earlier Santa Clara district attorney, George Kennedy, decided to set up a task force to investigate and improve protocols relating to wrongful conviction in the early 2000s, he also chose David Angel to spearhead the project (the task force was later disbanded under Dolores Carr). See Telephone Interview with David Angel, Conviction Integrity Unit Director, Santa Clara Cnty. Dist. Attorney's Office (July 19, 2012) [hereinafter Angel Interview].

¹⁴⁷ See *David Angel—Prosecutor Relights County's Conviction Integrity Unit*, VERITAS INITIATIVE (Mar. 28, 2011) <http://www.veritasinitiative.org/news/david-angel-prosecutor-relights-countys-conviction-integrity-unit/>.

¹⁴⁸ Mike Colgan, *Santa Clara District Attorney Unveils 'Integrity Unit,'* CBS SAN FRANCISCO (Mar. 18, 2011) <http://sanfrancisco.cbslocal.com/2011/03/18/santa-clara-district-attorney-unveils-integrity-unit/>.

¹⁴⁹ Rosen Interview, *supra* note 139; see also Colgan, *supra* note 148 (noting Angel's campaign promise to achieve the goals of improved training and addressing past instances of misconduct).

California law, prosecutors must turn over the evidence at least thirty days before trial, but Rosen initiated a new policy under which his prosecutors would disclose information even earlier (“as soon as feasible”).¹⁵⁰ To facilitate both pretrial discovery and posttrial review, Santa Clara also began streamlining its discovery process by relying more heavily on web-based software and digital evidence storage,¹⁵¹ and it invited public defenders and private criminal defense attorneys to provide input on other potential ways to improve discovery.¹⁵² Rosen also has taken a hard line among his assistants on complying with discovery obligations: in 2011, the press covered a story in which Rosen pulled a prosecutor off a high-profile gang case because the prosecutor failed to provide timely discovery.¹⁵³

Santa Clara’s Conviction Integrity Unit focuses its efforts on postconviction claims of actual innocence,¹⁵⁴ but under some circumstances it will even review alleged sentencing injustices.¹⁵⁵ While Santa Clara does not limit the claims it reviews to the legal requirements of the California innocence law,¹⁵⁶ it does generally require either a showing of some new evidence that was not presented to the jury or a very credible allegation of some sort of official misconduct.¹⁵⁷ Of course, where credible, respected defense attorneys have raised concerns about the conviction of their clients, the office has investigated those cases as well.¹⁵⁸ Indeed, Santa Clara has participated in two exonerations in cases in which there was no new evidence or allegations of misconduct but where a seasoned defense attorney expressed deep concerns that a wrongful conviction had occurred.¹⁵⁹

Rosen changed office policy on DNA testing and postconviction discovery as well. While California’s DNA testing statute is fairly defendant friendly,¹⁶⁰ Santa Clara adopted an even less demanding standard for DNA requests, permitting

¹⁵⁰ Rosen Interview, *supra* note 139.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Santa Clara does limit itself to *postconviction* claims of actual innocence. If the claim is raised in an open case, the unit refers the claim back to the trial deputy and instructs the defendant to bring it to the attention of the relevant division director if appropriate. *See* Angel Interview, *supra* note 146. Angel indicated that failing to honor this division could generate the perception of the unit as an ombudsman looking over trial prosecutor’s shoulders. *Id.*

¹⁵⁵ *See* Rosen Interview, *supra* note 139 (indicating Santa Clara’s willingness to review certain incarceration cases under California’s Three Strikes policy where the third strike was a nonviolent offense).

¹⁵⁶ *See, e.g., In re Bell*, 170 P.3d 153, 157 (Cal. 2007) (recognizing a claim of actual innocence under California law).

¹⁵⁷ *See* Angel Interview, *supra* note 146.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See id.* (referring to California’s DNA testing law as robust); *see also* OFFICE OF ATTORNEY GENERAL, STATE OF CALIFORNIA, LETTER FROM CAL. ATTORNEY GENERAL BILL LOCKYER 2–3 (2001), available at <http://oag.ca.gov/sites/all/files/pdfs/publications/finaproof.pdf> (outlining parameters of the DNA testing statute).

testing upon any request, so long as the inmate is willing to pay for it.¹⁶¹ The office also has an open-file policy, which Angel has said actually serves as a good first filter for the postconviction review process, allowing the prosecutor to confirm that the file is complete and that all appropriate information was turned over initially.¹⁶² And, of course, the office's new digitalization of its case file system makes its open-file policy less costly and time consuming than it would be otherwise, and it generally ensures a more complete file.¹⁶³

Like Manhattan, Santa Clara has taken a middle-of-the-road position with regard to the original prosecutor's involvement in the postconviction review process. As Angel explained, it is essential that the trial attorney not be in charge of the review in order to preserve the independence of the evaluation (a policy which, he notes, benefits the original prosecutor—ensuring credibility for the finding that no prosecutorial error occurred).¹⁶⁴ On the other hand, if the reviewing attorney does not consult with the original prosecutor at all, the Conviction Integrity Unit may appear to be searching for prosecutorial error and come to be viewed by line attorneys as a watchdog, rather than as a prosecutorial failsafe.¹⁶⁵ For those reasons, when Angel or one of his assistant district attorneys conducts the initial review, pulls the file, and decides further investigation is warranted, the original prosecutor receives a courtesy call or e-mail explaining that a review is underway and soliciting any information the original prosecutor might consider helpful.¹⁶⁶ Most often, the original prosecutor does not have information to share, but in a minority of cases, the prosecutor does weigh in, and her views, dismissive or affirming, are taken into consideration.¹⁶⁷

Santa Clara has structured the unit to maximize its independence and objectivity. Angel is part of the office's executive management and reports directly to Rosen.¹⁶⁸ He participates in the weekly executive meetings in which the most pressing current issues and office priorities are discussed and through which the moral tone of the office is set.¹⁶⁹ As Angel explained, having the Conviction Integrity Unit as a central part of the process is crucial to its success and credibility within the office so that it is not viewed as an adversarial side entity, but instead as central to the mission of the office.¹⁷⁰ The centrality of Santa Clara's Conviction Integrity Unit is also ensured by the office hierarchy: Angel oversees the office's appellate division, its crime lab, and its training program.¹⁷¹ By virtue of his

¹⁶¹ Angel Interview, *supra* note 146.

¹⁶² *See id.*

¹⁶³ *See id.*

¹⁶⁴ *See id.*

¹⁶⁵ *See id.*

¹⁶⁶ *See id.*

¹⁶⁷ *See id.*

¹⁶⁸ *See id.*

¹⁶⁹ *See id.*

¹⁷⁰ *See id.*

¹⁷¹ *See id.* Through its direction of the office's training programs, the unit can affirmatively deal with overall policies and practices and be responsive to the concerns of

oversight over these divisions, Angel is able to ensure that avoiding and remedying wrongful convictions is a central part of Santa Clara's core mission. Indeed, Angel's authority over the appellate unit is important to setting the appropriate standard for prosecutorial conduct. When appellate prosecutors are narrowly focused on maintaining convictions, they may defend on appeal questionable ethical behavior on behalf of the original prosecutor simply because a constitutional justification for doing so exists.¹⁷² This is true even where justice may be better served by repudiating such behavior and even allowing the conviction to be reversed.¹⁷³ The Conviction Integrity Unit has the authority, however, to change the way these cases are argued and to send the message to prosecutors, courts, and the public that, as Angel explained, "the standard in our office is not the constitutional minimum."¹⁷⁴

5. *Cook County State's Attorney's Office*

In February 2012, Cook County State's Attorney Anita Alvarez announced her office's creation of a Conviction Integrity Unit¹⁷⁵ and that the office already was looking into thirty-five cases in which defendants claimed innocence.¹⁷⁶ Both during and before Alvarez's tenure, Cook County has had a long-term problem with wrongful conviction. Alvarez has come under heavy criticism from the Innocence Project for her handling of the wrongful convictions of young black men, specifically the cases of the Dixmoor Five and Englewood Four, cases which involved exonerating DNA.¹⁷⁷ Although Alvarez has come under fire herself in

the public sector and private bar. Through its oversight of the crime lab—which in Santa Clara is, according to Angel, top notch—the unit can ensure that the maximum in *Brady* material is provided to defendants. *See id.* The office has taken the view that complete transparency regarding forensic analysts and analysis is the prosecutorial obligation; as a result, Santa Clara produces to defendants information regarding any corrective action taken against an analyst, the results of the relevant analyst's proficiency tests, and anything else arguably negative that is not directly related to a purely personnel matter. *See id.*

¹⁷² *See id.*

¹⁷³ *See id.*

¹⁷⁴ *Id.*

¹⁷⁵ Rob Wildeboer, *Alvarez: New Unit Will Prevent Wrongful Conviction*, WBEZ 91.5 (Feb. 3, 2012), <http://www.wbez.org/story/alvarez-new-unit-will-prevent-wrongful-convictions-96082>. The office had been established the previous month. *See* Telephone Interview with Fabio Valentini, Chief of Criminal Bureau, Cook Cnty. State's Attorney's Office (July 19, 2012) [hereinafter Valentini Interview].

¹⁷⁶ *Innocence Project Isn't Satisfied With the Creation of Illinois Unit to Study Wrongful Convictions*, N. STAR NEWS & ANALYSIS (Feb. 9, 2012), <http://www.thenorthstarnews.com/issue/id/february-9-2012>.

¹⁷⁷ *Id.* The Dixmoor Five, all then teenagers, confessed to the 1991 murder of a fourteen-year-old girl and were convicted, even though law enforcement officials had DNA evidence that indicated none of them participated in the crime. *Id.* Similarly, the Englewood Four involved four black male teenagers who were coerced by police into

recent years,¹⁷⁸ Cook County's wrongful conviction problem predates her time in office. According to the National Registry of Exonerations, a joint project by the University of Michigan and Northwestern University law schools, Illinois—and Cook County specifically—leads the country in wrongful convictions since 1989.¹⁷⁹

Cook County's Conviction Integrity Unit has four attorneys dedicated to reviewing postconviction claims on a full-time basis: the deputy supervisor in the Special Litigation Unit and three other experienced attorneys.¹⁸⁰ In addition, the unit has two full-time investigators and a victim and witness specialist.¹⁸¹ The unit is under the umbrella of Cook County's Criminal Bureau and its Special Litigation Division, along with Cook County's Post-Conviction Unit, which reviews and responds to habeas cases. Like Dallas and Manhattan, Cook County does not restrict its review to claims cognizable in court—it will review a claim of actual innocence whether or not it complies with statutory or precedential requirements for an innocence claim.¹⁸² Indeed, Cook County may proceed with postconviction review even while a judge is still deciding whether an inmate's actual innocence claim should move forward.¹⁸³ Unlike Dallas, Cook County did not obtain additional funding or grant money to set up its Conviction Integrity Unit, choosing instead to divert resources from other office programs in favor of its postconviction review program.¹⁸⁴

In the wake of announcing the unit's creation, Cook County received a tidal wave of claims of actual innocence, which only began slowing months later.¹⁸⁵ At present, it is prioritizing the most serious claims of actual innocence, like murders

confessing to the 1994 rape and murder of a prostitute, also despite police and prosecutorial access to exonerating DNA. *Id.*

¹⁷⁸ *See id.* (“Lawyers have rained withering criticism on Alvarez over her handling of the wrongful convictions of young black men, especially when DNA evidence had shown someone else committed the crimes for which the men spent decades in prison.”).

¹⁷⁹ *Cook County Leads Nation in Wrongful Convictions*, CBS CHICAGO (June 12, 2012, 10:18 AM), <http://chicago.cbslocal.com/2012/06/12/cook-county-leads-nation-in-wrongful-convictions/>.

¹⁸⁰ Valentini Interview, *supra* note 175.

¹⁸¹ Rummana Hussein, *Prosecutor Alvarez Creates Team to Probe Wrongful Conviction Claims*, CHI. SUN TIMES (Feb. 2, 2012, 7:08 PM), <http://www.suntimes.com/news/politics/10396284-418/prosecutor-alvarez-creates-team-to-probe-wrongful-conviction-claims.html>.

¹⁸² Valentini Interview, *supra* note 175. Illinois has enacted a postconviction relief statute that specifically provides for an actual innocence claim if the petitioner can show material new evidence that is not cumulative of evidence available to it at trial. *See People v. Ortiz*, 919 N.E.2d 941, 948–952 (Ill. 2009). In addition, the Illinois Supreme Court has held the due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence. *Id.*

¹⁸³ Valentini Interview, *supra* note 175.

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*

and rapes, and cases where individuals are still incarcerated.¹⁸⁶ Cases bearing the standard indicia of a wrongful conviction case (cases involving only one eyewitness, a confession with little supporting evidence, or a confession case involving a juvenile or low IQ individual) receive special attention.¹⁸⁷ While a guilty plea is not a bar to review, it is a factor the unit considers when weighing the merits of the claim and determining where it falls in terms of priority of review.¹⁸⁸ The office does not have a formal open-file discovery policy or a blanket policy of consenting to DNA cases, but, according to the office, it does, for the most part, comply with discovery requests and only rarely objects to requests for DNA testing.¹⁸⁹

Decisions regarding whether innocence claims should be investigated are made using the experienced judgment of the prosecutors responsible for the unit—both the Criminal Bureau chief and the supervisor of the Conviction Integrity Unit.¹⁹⁰ In the vast majority of cases, the initial reviewer pulls the case file and relevant transcripts in order to assess the credibility of the actual innocence claim, with the exception to this practice occurring where the initial letter contains so much information that reviewing the file is unnecessary.¹⁹¹ If further investigation is needed, the unit supervisor most often assigns the case to one of the unit's assistant district attorneys but occasionally handles the investigation herself.¹⁹² Reinvestigations are conducted much like initial investigations, though with the passage of ten, twenty, or thirty years, the investigation is far more difficult. The reviewing prosecutor looks for the same things she would have in a preconviction review of the case: consistency or inconsistency in witness accounts, whether the offender's account is credible and genuine, and whether there is physical evidence (DNA or otherwise) that was not tested contemporaneously but that might have become testable since or requires retesting.¹⁹³ Just as with the initial charging decision, the prosecutor is instructed to review the case with no presumption of the suspect's guilt, but she does weigh to some degree the fact that the individual has been convicted by a jury, has had a trial judge likely reject a motion for new trial, and generally has had the verdict upheld on appeal and in the postconviction context.¹⁹⁴

The office has no standard or scientific formula for determining when and whether an inmate has demonstrated her innocence.¹⁹⁵ Rather, the unit relies on the

¹⁸⁶ *See id.*

¹⁸⁷ Wildeboer, *supra* note 175; *see also* Valentini Interview, *supra* note 175.

¹⁸⁸ *See* Valentini Interview, *supra* note 175.

¹⁸⁹ *See id.* In Harris County, for instance, prosecutors deny requests for DNA testing where the DNA testing requested would not provide definitive proof of guilt or innocence in any event. *See* Chin & O'Neil Interview, *supra* note 83.

¹⁹⁰ *See* Valentini Interview, *supra* note 175.

¹⁹¹ *See id.*

¹⁹² *See id.*

¹⁹³ *See id.*

¹⁹⁴ *See id.*

¹⁹⁵ *See id.*

expertise of the prosecutors reviewing the case as individuals who have tried a large number of cases and developed instincts through their experience as to what evidence is good or bad.¹⁹⁶ Where the unit determines that there was not sufficient evidence to prosecute an inmate, the office may *nolle pros* the case or not oppose a postconviction claim of innocence.¹⁹⁷ Where there are lingering questions internally about whether the person is actually guilty, regardless of whether the case is in a preconviction stage or a postconviction stage, Cook County's policy is to dismiss the case and not prosecute it again.¹⁹⁸

B. What These Units Indicate and What They Are Missing

The conviction integrity units in all five of these jurisdictions represent a significant and impressive investment of time, energy, funds, and experience by very busy prosecutors with finite resources. Through this dedication of intellectual and financial resources, and now through the years of experience these offices have gained through conducting postconviction review, several overarching, essential components of postconviction review are apparent, including the importance of encouraging innocence seeking, openness, and objectivity. Each of the conviction integrity units reviewed above, and particularly Dallas and Santa Clara, have structured their units in an attempt to make conviction integrity, or innocence seeking, part of the office culture. For example, in Santa Clara County, the conviction integrity unit director also oversees the office's appellate division, and by refusing to defend constitutionally questionable changes on the appellate side, he has changed the office's preconviction practices, requiring the office to operate well above the constitutionally required standards of conduct.¹⁹⁹ All conviction integrity units but Harris County and Cook County have embraced open-file discovery and open-DNA-testing policies, and all carefully circumscribe the role of the original prosecutor in reviewing innocence claims. The efforts of these conviction integrity units demonstrate the effectiveness and feasibility of these policies, and all of these policies taken together form a postconviction review structure that is capable of widespread implementation by prosecutors' offices across the country.

While Dallas County was able to secure additional funding specifically aimed at implementing a conviction integrity unit, the majority of these units represent a significant expenditure and a shifting of resources away from other office priorities. But postconviction review need not be this expensive. As detailed below in Part III, postconviction review does not require a freestanding conviction integrity unit: applying the three essential principles above can assist any office in improving its ability to identify the wrongfully convicted, whether the office has prosecutors dedicated full time to this kind of review or not.

¹⁹⁶ *See id.*

¹⁹⁷ *See id.*

¹⁹⁸ *See id.*

¹⁹⁹ Angel Interview, *supra* note 146.

III. RESOLVING THE PROSECUTOR'S DILEMMA: STRUCTURAL MODIFICATIONS AND TIERED REVIEW

The efforts of the five studied district attorneys' offices provide important insights for effective postconviction review, but even among these highly effective units, there is room for improvement. Part III proposes to resolve remaining structural weaknesses in a way that will be tractable in other district attorneys' offices. Part III.A draws together the most useful aspects of these units and uses them to outline three broadly applicable structural modifications for prosecutorial postconviction review: (1) a management-level prosecutor must direct the review of innocence claims; (2) the review must be performed by someone other than the original prosecutor; and (3) the office must, with specific exceptions outlined below, cooperate with inmates by opening case files and approving requests for DNA testing.

Part III.B then supplies what the established structure of each conviction integrity unit lacks: legal and ethical principles that can guide that postconviction review process. As explained in the introduction, "tiered review" functions guide the posture that prosecutors adopt in the face of claims of actual innocence. The concept of tiered review encompasses three components: (1) a prosecutorial investigation where a bona fide issue exists as to the petitioner's innocence, (2) dropping of prosecutorial opposition to an innocence claim where the investigation demonstrates a "reasonable likelihood of innocence," and (3) affirmative support for exoneration in the event that the investigation yields "clear and convincing evidence" that the petitioner was wrongfully convicted.

Taken together, these two pieces represent a complete review framework: first, a postconviction review *structure* designed to efficiently manage inherent prosecutorial biases, and second, a postconviction review *process* that operates within that structure using clear standards of review on which prosecutors can rely to determine what action is appropriate and when with regard to an innocence claim. Although in a resource-abundant world, prosecutors' offices across the country could each have a "Conviction Integrity Unit" devoted exclusively to postconviction review of innocence claims, in the vast majority of prosecutors' offices, the resources to dedicate prosecutors full time to that effort are simply missing.²⁰⁰ While the framework set forth below is based on lessons learned from conviction integrity units, it could just as easily be used by an appellate division, postconviction writ division, or individual prosecutors who encounter claims of actual innocence.

The most important characteristic of this type of postconviction review is the standardization itself—that a fairly detailed protocol, with a clearly assigned

²⁰⁰ Indeed, for offices in less populous cities that receive far fewer innocence claims, it would be a waste of money and effort to do so. Of the approximately 2,500 district attorney offices across the United States, 85% are operated by four lawyers or fewer. *See* Telephone Interview with Scott Burns, Exec. Dir., Nat'l Dist. Attorneys Ass'n (July 2, 2012) [hereinafter Burns Interview].

standard of review and policy of maintaining an eye for innocence, is adopted by an office in its entirety and employed by all prosecutors engaged in reviewing innocence claims. While the specific standards of proof required in the procedural component outlined in Part III.B are certain to be interpreted differently depending upon the prosecutor applying the standard,²⁰¹ the very process of applying an objective standard—of stepping away from “gut instinct” and attempting to look dispassionately at the evidence to determine whether it reaches the appropriate threshold—forces prosecutors to at least try to excise their biases and train a sharp eye on the merits of the case before them. This effort—and the support that a clear office policy of objective review provides for engaging in such an effort—helps to align prosecutorial postconviction action with the minister of justice role prosecutors seek to observe.

A. Essential Components of a Framework for Responding to Actual Innocence Claims

The fundamental principles of a postconviction review regime, detailed below, are principles that apply as well to a six-prosecutor conviction integrity review team as to a two-prosecutor district attorney's office. These basic principles include (1) fostering an office culture of seeking innocence by integrating the postconviction review process into the office structure, (2) establishing a policy of openness by freely authorizing DNA testing and providing open-file discovery, and (3) encouraging objectivity by creating an office authority position with direct access to the district attorney responsible for innocence claim review.

1. Fostering an Office Culture of Seeking Innocence

A crucial component for ensuring objective review of postconviction claims is to develop an office policy of seeking innocence by making the awareness of wrongful conviction an integral part of office culture. By instituting a standardized office-wide postconviction review policy, the district attorney sends the message that prosecutors should seek out wrongful convictions. When prosecutors are actively involved in the exoneration process pursuant to office policy, it opens up the possibility for an exoneration to be perceived as an office victory rather than a public embarrassment. Having the goal of finding the wrongful conviction before it finds the office incentivizes prosecutors to give claims of innocence an objective review, harnessing the prosecutor's naturally competitive spirit in pursuit of postconviction justice. Moreover, where the district attorney institutes a policy that acknowledges the reality of wrongful convictions and educates prosecutors on their common causes, she removes some of the stigma associated with having obtained a wrongful conviction, which improves office morale, encourages objective review, and improves the likelihood that prosecutors with postconviction review

²⁰¹ See *infra* Part III.B.

responsibilities will not be viewed with suspicion or hostility by others within the office.²⁰²

District attorneys signal to the office and the public their commitment to innocence through whom they choose to lead their conviction integrity efforts and by how they integrate a postconviction review process into the office's existent operations. In Dallas County, the past two heads of the conviction integrity unit have been criminal defense lawyers.²⁰³ To ensure that this individual was not marginalized and would have the necessary authority to implement desired reforms, Watkins made him third in command in the office and supervisor over the office's existent postconviction units (e.g., the divisions handling appeals and postconviction writs).²⁰⁴ In Santa Clara County, David Angel, a highly respected and long-time prosecutor, was chosen to lead the unit, operate as the office's third in command, and oversee appeals, postconviction writs, and all training for the office.²⁰⁵ Angel uses the appeals process to set the tone for post- and preconviction prosecutorial efforts. By refusing to defend questionable prosecutorial ethical conduct on appeal, Angel requires above-the-constitutional-minimum ethical conduct from the office's prosecutors prior to conviction, thereby increasing the robustness of day-to-day ethics in the office. Doing so also saves costs: ensuring the office operates well above the constitutional minimum on the front end reduces the amount of litigation the office faces on the back end in habeas and appeals, and it makes future claims far easier to defend.²⁰⁶ Entwining postconviction review efforts with appellate strategy also ensures a uniform office-wide position on issues of prosecutorial ethics—without it, individual appellate attorneys end up responding to arguments and resolving immediate problems on a case-by-case basis, without any connection to an overall office policy to ensure that the mistake is not repeated in the future.²⁰⁷

2. *Establishing a Policy of Openness and Disclosure*

In virtually all of the offices with conviction integrity units, a key part of sending a message of innocence seeking to prosecutors and the public has been to adopt a generous policy of DNA testing and file sharing, notwithstanding the lack

²⁰² Where an office establishes as the baseline that wrongful convictions do occur and that avoiding prosecution of the innocent is a priority, prosecutors essentially will have to “opt out” of the office default in order to continue adversarial, reflexive responses to innocence petitions, and, therefore, fewer mistakes will be made in both the pre- and postconviction contexts. Cf. Neil Savage, *Redesigning Banking with Behavioral Economics in Mind*, MIT TECH. REV., Apr. 2011, at 18, 18–19 (citing behavioral economics for the proposition that where one sets the baseline for conduct matters (e.g., it is easier to convince someone to try something if they have to opt out rather than opt in)).

²⁰³ Wilson Interview, *supra* note 59.

²⁰⁴ *See id.*

²⁰⁵ *See* Angel Interview, *supra* note 146.

²⁰⁶ *See id.*

²⁰⁷ *See id.*

of a postconviction discovery obligation.²⁰⁸ As each of the offices acknowledged, there are significant trade-offs—namely, cost—to an open-DNA-testing policy and an open-file policy. Given the volume of frivolous claims that prosecutors receive, the costs of open DNA testing and particularly of file sharing are not insignificant. Nevertheless, a policy of transparency is not only important for detecting the wrongfully convicted,²⁰⁹ but also for the message transparency sends to the public and to prosecutors.

While an open-file policy is a closer case, the benefits of an open-DNA-testing policy exceed the costs, for several reasons. First, the costs of an open-testing policy can, to some extent, be cabined. For instance, most offices require the requester to make a showing that the results of the testing sought be actually conclusive as to guilt or innocence prior to footing the bill for the testing.²¹⁰ Prosecutors also can implement policies that discourage frivolous testing requests: in Dallas County, when an inmate requests DNA testing that ultimately confirms his or her guilt, the district attorney's office shares information regarding the request and confirmatory result with the parole board, and that information may delay access to parole.²¹¹ Second, the costs of DNA testing are relatively low—especially when compared with the costs of litigating a request under the relevant state DNA testing statute.²¹² According to the Santa Clara County's district attorney's office, the costs of allowing DNA testing are actually lower than the costs of contesting the requests.²¹³ Third, the consequences of contesting an exonerating DNA test are extremely high. A hotly contested DNA exoneration has, in the past, meant the end of a district attorney's tenure.²¹⁴ It can unnecessarily extend the imprisonment of an innocent individual, and it can delay arrest of the real perpetrator—which may allow the statute of limitations to run on charging the actual perpetrator, not to mention leave the real perpetrator free to commit additional crimes.²¹⁵ Fourth, allowing DNA testing communicates to prosecutors,

²⁰⁸ See, e.g., Angel Interview, *supra* note 146; Wilson Interview, *supra* note 59.

²⁰⁹ See Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 270 (“A transparent criminal justice system, one which provides full disclosure of information to the opposing parties in as timely a manner as possible, should help to reduce the number of miscarriages of justice.”).

²¹⁰ See, e.g., Angel Interview, *supra* note 146; Wilson Interview, *supra* note 59. If a murder took place in an alley littered with cigarette butts, prosecutors likely would not be inclined to pay for testing for each cigarette butt in the hopes that doing so may provide a lead for an already convicted individual. In other instances, Santa Clara County, for instance, grants requesters access to any DNA testing they choose, provided that they are willing to pay for it. Angel Interview, *supra* note 146. If the requester can meet the statutory requirement, of course, he or she can have the state cover the costs. *See id.*

²¹¹ Wilson Interview, *supra* note 59.

²¹² See Angel Interview, *supra* note 146.

²¹³ *See id.*

²¹⁴ *See infra* note 315 and accompanying text.

²¹⁵ Jason Kreag, an attorney with the Innocence Project, framed the issue in a request to Clark County District Attorney Steven Wolfson:

prisoners, defense counsel, and the public that the office is confident in its results but also open to the possibility of innocence—a move that increases public confidence in the criminal justice system. Given the relatively low costs of testing, high costs of litigation, extremely high costs of contesting a valid request for testing, and benefits to a policy of openness, permitting access to DNA testing seems to be the clear answer.

Open-file discovery is another important component of a postconviction review framework, though implementing an open-file policy presents a much closer case than does DNA testing: the costs are higher and the benefits not as obvious. No jurisdiction grants a petitioner postconviction discovery as of right,²¹⁶ but despite that fact, the majority of the conviction integrity programs discussed above have an open-file policy. The policy implemented, in each case, is not without limits—privileged and confidential information is not disclosed by any office, and the requester typically is required to make some proffer of why the requested evidence is relevant to her claim of innocence to obtain her file.²¹⁷ Offices also cabin costs by requiring requesters or a representative of the requester to come to an onsite location to view the documents or evidence, rather than tasking someone within the office with the time-consuming job of photocopying files.²¹⁸ As files become increasingly digitalized, the costs continue to decrease,²¹⁹ and because offices are increasingly adopting policies requiring prosecutors to include every document and piece of evidence related to the case in the file, the contents of the file will become increasingly accurate as well.²²⁰ Finally, as the Criminal Bureau chief from Cook County noted, because in most offices the innocence claim reviewer is required to pull and review the file whenever a claim of actual innocence is received, the added costs of making the file available to the petitioner are not that high.²²¹ Indeed, searching for confidential, privileged, or relevant materials may actually be a helpful exercise, forcing the reviewer to look

My question is simple: what do you have to lose by consenting to testing? If the results confirm Ms. Labato's involvement in the murder, then that would effectively end the case, and Ms. Labato's conviction would stand. . . . But if the testing identified someone other than Ms. Labato as the murderer, then that result could not only serve as compelling evidence of Ms. Labato's innocence but also bring the true perpetrator to justice.

Mark Godsey, *Tuesday's Quick Clicks*, WRONGFUL CONVICTIONS BLOG (June 26, 2012), (emphasis omitted) <http://wrongfulconvictionsblog.org/2012/06/26/tuesdays-quick-clicks-17/>.

²¹⁶ See Angel Interview, *supra* note 146; Chin & O'Neil Interview, *supra* note 83; Manhattan ADA Interview, *supra* note 111; Valentini Interview, *supra* note 175; Wilson Interview, *supra* note 59.

²¹⁷ See, e.g., Angel Interview, *supra* note 146; Wilson Interview, *supra* note 59.

²¹⁸ See, e.g., Angel Interview, *supra* note 146; Wilson Interview, *supra* note 59.

²¹⁹ Angel Interview, *supra* note 146.

²²⁰ See, e.g., *id.* (requiring written permission from office leadership to withhold any information from case files).

²²¹ See Valentini Interview, *supra* note 175.

closely at the file contents when making a determination regarding whether further investigation is needed.

Unfortunately, the costs of an open-file policy include more than simply copying or making a file available. However cabined the policy may be, an open-file policy requires already overwhelmed prosecutors to spend valuable time reviewing case files for privileged and confidential information. In large offices that handle a significant volume of cases, it may be costly and time intensive to pull files from off-site locations and to discover the relevant set of files when the trial prosecutor is no longer with the office. And, of course, more often than not, this significant time and energy will be expended for a claim that is entirely without merit.

More significantly, postconviction file sharing is virtually certain to increase litigation costs. If inmates already are inclined to frivolous claims of actual innocence, providing inmates with case file information is likely to increase the number of claims filed and provide fodder to use in giving claims facial validity. Allegations of *Brady* violations are also likely to increase where a file contains information that an inmate may not have seen before. Moreover, for the many offices that do diligently provide trial discovery and *Brady* disclosures to opposing counsel, they are providing inmates with information they already should have received, via their defense counsel, prior to trial. Because an open-file policy is certain to increase inmate litigation, to some extent an open-file policy results in prosecutors subsidizing future frivolous claims with their time and resources.

On the other hand, allowing external review of office files—by inmates or their lawyers—serves as a valuable backstop to prosecutors' efforts to ensure a diligent and objective review of a case file. First, for the typical indigent, convicted innocent—someone without resources to hire a lawyer or investigator and with no right to a court-appointed lawyer—the odds of uncovering exculpatory evidence without prosecutorial assistance are remarkably low.²²² Even for those who were adequately represented by counsel in the first instance, postconviction review may be the first opportunity the convicted has to see the inculpatory and exculpatory evidence assembled by the prosecutor. The inmate's personal knowledge of the witnesses involved, the timing of events, and her own alibi may give her an edge over a prosecutor in terms of identifying relevant exonerating evidence. Moreover, that inmate and her counsel almost certainly have more time than a prosecutor to spend reviewing the file. And, of course, innocence projects may also have more resources to devote to case review, if only they could receive access to prosecutors' files. Some innocence projects spend eight months reviewing a case file—far more time than a prosecutor is able to spend—and review it with an eye well trained to search for relevant indicators of innocence and consider alternate forensic testing methods.²²³ Although the costs of allowing open-file access are

²²² See Rosen, *supra* note 209, at 284–85.

²²³ *Id.* For instance, in 2004, a man convicted of rape, kidnapping, and murder was exonerated after seventeen years in prison after new evidence was discovered in his case by Emory Law students who were interning with the Georgia Innocence Project. The county

certainly high, for prosecutors interested in avoiding injustice and establishing an office policy that prioritizes innocence seeking, opening their files to inmates in search of exoneration—even the guilty ones—should be an office priority. Offices with an open-file policy view it as essential to ensuring that the public not view prosecutors as trying to conceal bad facts. As the head of the Dallas County Conviction Integrity Unit, Russell Wilson, explained, referencing the prosecutor’s duty to ensure justice, “Let’s get to the merits—either it’s a good case or not.”²²⁴

By sharing case files and allowing DNA testing, the prosecutor moves away from the adversarial role that often inheres in prosecution by the nature of the investigation, indictment, and trial process, and moves closer to the minister of justice ideal. Creating an office policy of openness to some extent forces prosecutors to put aside the “defend the conviction” mentality and accept the consequences of an outside evaluation of the case on the merits. That this is true for all cases, not just for those cases where inmates have made some sort of showing of merit or prosecutorial misconduct, also establishes an ethos in the office that openness and disclosure is simply office policy—not an attempt by a postconviction inspector general to delve through the files of hardworking prosecutors trying to do their jobs. Indeed, a policy of openness with regard to DNA testing and file sharing promotes a mentality within the office more akin to the “neutral administrative agency” role advocated by Professors Green and Yaroshefsky.²²⁵ This type of office culture makes finding the innocent needle in the haystack far more likely than it would be otherwise. While a policy of transparency is not without significant cost, for those prosecutors truly concerned about righting the wrongs of wrongful conviction, the benefits outweigh the costs.

3. *Facilitating Objective Review and Neutralizing Prosecutorial Biases*

Perhaps most importantly, to recognize a wrongful conviction, prosecutors need objectivity, a legitimate challenge in an environment where conviction statistics often are the measure of a good prosecutor.²²⁶ That challenge is

district attorney’s office had told Clarence Harrison that all of the evidence in his case had been destroyed, but the interns discovered a slide of the rapist’s semen from the victim’s rape kit in Harrison’s files, a slide that ultimately exonerated him of the crime. *Guilty Until Proven Innocent*, EMORY MAG. (2005), http://www.emory.edu/EMORY_MAGAZINE/spring_2005/innocence2.html.

²²⁴ Wilson Interview, *supra* note 59.

²²⁵ See Green & Yaroshefsky, *supra* note 18, at 506 (citing Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2124 (1998)).

²²⁶ *Id.* at 511 (“Whoever engages in [postconviction review] should not reflexively seek to uphold the prior conviction, but should at least be neutral and open-minded if not, as in the Dallas office, skeptical regarding the legitimacy of the conviction.”). As Richard Rosen has noted, while there must be a presumption of guilt after conviction in order for the U.S. criminal justice system to operate, that rebuttable presumption unnecessarily and unfairly burdens the convicted innocent: “Because it is now clear that wrongful convictions

compounded by the fact that the number of valid innocence claims is so low when compared with the number of baseless innocence claims prosecutors must review. A member of the Harris County postconviction review team explained, "Our job entails probably 90 percent failure."²²⁷ Nevertheless, the conviction integrity units studied all structured the review process to maximize the objectivity and neutrality of the reviewer, first and foremost by ensuring postconviction review was directed by an office authority, not by the original prosecutor in the case.

The conviction integrity unit prosecutors interviewed were unanimous in noting the importance of ensuring that postconviction review was directed by an office authority.²²⁸ While data on postconviction review processes (and any internal district attorney offices' processes) are notoriously difficult to obtain, the general wisdom is that in many, and possibly the majority, of prosecutors' offices across the country, postconviction claims of innocence are automatically assigned to the original prosecutor.²²⁹ Even in those offices where appellate divisions handle postconviction matters, the original prosecutor is frequently consulted,²³⁰ as that individual is considered the office authority on the case. It is possible the prosecutor has information regarding the case that is not included within the case file. Accordingly, many offices view that prosecutor as best positioned to defend the conviction, in terms of experience, personal knowledge, and office efficiency. While this assignment system makes sense as a matter of prosecutorial efficiency, and if the goal is defending the conviction alone, it is counterproductive to determining the validity of the innocence claim. As various scholars have observed, prosecutors have strong institutional, professional, and cognitive incentives that tend toward resisting claims of innocence, particularly when the conviction was one an individual personally obtained.²³¹ For that reason, involving

occur, thought should be given to changing those aspects of the system that unfairly burden innocent people who find themselves among the convicted." Rosen, *supra* note 209, at 281.

²²⁷ Chin & O'Neil Interview, *supra* note 83. One can query whether not finding more innocent petitioners is truly a "failure," since often these investigations—and particularly DNA testing—confirm the guilt of the person already in prison, bolstering the credibility of the criminal justice system.

²²⁸ See Angel Interview, *supra* note 146; Chin & O'Neil Interview, *supra* note 83; Manhattan ADA Interview, *supra* note 111; Valentini Interview, *supra* note 175; Wilson Interview, *supra* note 59.

²²⁹ Green & Yaroshefsky, *supra* note 18, at 509 n.250; Medwed, *supra* note 8, at 143–44.

²³⁰ Green & Yaroshefsky, *supra* note 18, at 509 n.249; Medwed, *supra* note 8, at 143–44.

²³¹ Medwed, *supra* note 8, at 143–48. Gauging prosecutorial success usually breaks down along the prosecutor's "win" (conviction) and "loss" record, and this data is often used in promotion decisions. Medwed, *supra* note 18, at 44. Moreover, prosecutors generally bring charges against defendants whom they think are guilty, and the affirmation of a jury verdict frequently can boost a lawyer's confidence in the defendant's guilt—a confidence that may be difficult to shake by a convict's assertion of innocence (which often requires additional investigation to confirm). *Id.* at 45; Medwed, *supra* note 8, at 142–43. In addition, questioning a conviction may cause tension with police investigators with

the original prosecutor in the postconviction review process often can make objective review of that claim more challenging than it would be otherwise.²³²

The most effective postconviction review systems isolate the original prosecutor from the investigation until a preliminary opinion has been formed by the reviewing attorney. In Harris County, prosecutors conduct a full investigation and reach a preliminary conclusion before contacting the original prosecutor to solicit his or her views on guilt or innocence.²³³ While postconviction review prosecutors have reached a preliminary opinion at that time, the conversation with the original prosecutor is far from *pro forma*.²³⁴ The prosecuting attorney's personal experience with the case and its accompanying investigation may yield some information or insight that postconviction review prosecutors have missed.²³⁵ Moreover, if the original prosecutor is convinced of the inmate's guilt and the reviewer is convinced of the inmate's innocence, engaging in a dialogue with that prosecutor may be useful in understanding what went wrong in the original case, helping the original prosecutor understand what subsequent evidence has indicated, preparing the strongest possible argument in favor of innocence, and preparing for a pitch to the district attorney or the office's executive management committee.

While the original prosecutor may have valuable insight to add (though often prosecutors will not even remember the prosecution),²³⁶ a fresh set of eyes is key to unbiased review. Not only does the original prosecutor have a vested interest in maintaining the conviction, but her view on the guilt or innocence of the inmate is irrelevant in the postconviction context—the odds are high that the original prosecutor thought the defendant was guilty, or otherwise she would not have brought the case²³⁷—and that view almost certainly would have been validated by

whom a prosecutor works, where that investigator is convinced of the defendant's guilt, and particularly where a confession or evidence may have been achieved by investigative overreaching. Medwed, *supra* note 8, at 144–45; Medwed, *supra* note 18, at 45–46. Prosecutorial bias also is impacted by macrolevel incentives: prosecutors' offices often gauge their own success by their office's overall conviction record, and politicians and the electorate consider these factors in assessing prosecutorial effectiveness. Medwed, *supra* note 18, at 45. This results in pressure on line attorneys to uphold their convictions and on chief prosecutors to ensure the same. *Id.*; see also MEDWED, *supra* note 119, at 22–25 (discussing various cognitive biases that naturally occur in police investigation and criminal prosecution, including “confirmation bias” or “expectancy bias” and “belief perseverance,” that tend to contribute to tunnel vision on the part of police and prosecutors).

²³² Medwed, *supra* note 8, at 142–48.

²³³ See Chin & O'Neil Interview, *supra* note 83.

²³⁴ See *id.*

²³⁵ See *id.*

²³⁶ See Wilson Interview, *supra* note 59.

²³⁷ Prosecutors may not bring charges without “probable cause.” Green & Yaroshefsky, *supra* note 18, at 497; see also *United States v. Barner*, 441 F.3d 1310, 1315 (11th Cir. 2006). This standard is incorporated in state ethics rules. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2013). Some prosecutor's offices have set a higher standard

the jury's verdict in the case. Fresh review by a prosecutor not involved in the original conviction, who is looking at the evidence for the first time and evaluating motives, alibis, and witness credibility without the pressure of public impatience for an arrest, a police investigator's belief in the individual's guilt, the ticking clock of the Speedy Trial Act,²³⁸ or a looming trial date, may go a long way toward ensuring objective review of a past conviction.²³⁹

Of course, even where the original prosecutor is not involved in reviewing a postconviction claim of innocence, collegial relationships can often be an obstacle to unbiased review. When prosecutors are called upon to review the work of their peers or former peers, personal relationships may color their interpretation of the case or the prosecutorial conduct involved in the case.²⁴⁰ A prosecutor who discovers intentional misconduct or potentially sanctionable conduct when reviewing an innocence claim may be reticent to report it because of the fear of negative implications (sanctions or damage to professional reputation) for a colleague; negative reaction from other prosecutors or police investigators for having second-guessed the decision or reported the misconduct of a colleague;²⁴¹ and professional consequences for one's self, should discovery of a wrongful conviction damage office statistics or hurt the reelection chances of the district attorney.²⁴²

The challenges inherent in reviewing a peer's conviction underscore the importance of having an office authority engage in the initial review or at least closely oversee the postconviction review process. In Dallas, Harris, Santa Clara, and Manhattan, the initial postconviction review typically is performed by a prosecutor who is the third most senior in the office or a member of the district attorney's management team.²⁴³ At that level of seniority and with the established credibility attendant to that position, the reviewer is likely to be less concerned about potential professional consequences resulting from unwinding a conviction, and her conclusions are much more likely to carry weight among line prosecutors and the district attorney. In addition, as someone who is in a supervisory position and therefore is frequently required to evaluate and review other prosecutors' performance, a senior prosecutor is less likely to be swayed by peer pressure and the social hazards inherent in investigating a colleague's conviction. Indeed, a long-time prosecutor who has reached the senior ranks of the office likely has experience engaging in postmortem review of other prosecutors' mistakes or

within their office, however, requiring that the prosecutor be convinced beyond a reasonable doubt that the defendant is guilty. *See, e.g., Vance, Jr., supra* note 107.

²³⁸ 18 U.S.C. § 3161 (2012).

²³⁹ MEDWED, *supra* note 119, at 127–28.

²⁴⁰ Medwed, *supra* note 8, at 175–76.

²⁴¹ The danger exists that conviction integrity units may be viewed by prosecutors as an office “inspector general”—someone constantly looking over prosecutors' shoulders and second-guessing their discretionary choices. *See id.* at 176.

²⁴² *Id.* at 134–37, 156–57, 176.

²⁴³ *See* Angel Interview, *supra* note 146; Chin & O'Neil Interview, *supra* note 83; *Meet the Executive Team*, *supra* note 123; Wilson Interview, *supra* note 59.

alleged misconduct. Perhaps most importantly, a senior prosecutor—particularly the third most senior in the office—has direct access to the district attorney, which ensures that her conclusions regarding guilt or innocence are not filtered by others who may have conflicting incentives with regard to the case being investigated.

Of course, having an experienced prosecutor engage in postconviction review comes with its own potential hazards. To be sure, if cynicism is a problem among prosecutors who review stacks of frivolous innocence claims, presumably a more senior prosecutor, who has spent more years watching the guilty claim innocence, would experience a higher degree of innate skepticism. It may be more difficult under those circumstances for that person to review an innocence claim with the objectivity and detachment necessary to detect actual innocence. It is for this reason that some have suggested the use of outside advisory committees to review postconviction claims of innocence,²⁴⁴ and this is perhaps why Dallas County uses defense lawyers to head its conviction integrity unit. On the other hand, most prosecutors' offices across the country lack the resources to hire someone from outside the office to engage in postconviction review.²⁴⁵ Moreover, bringing in someone from the outside—and particularly a defense lawyer—to engage in an oversight function over career prosecutors may result not only in morale problems and division within the office (given the traditional cultural-adversarial divide between prosecutors and defense lawyers), but it may make line prosecutors more resistant to postconviction review than they would be if the process were being directed by an experienced prosecutor whom they respected.²⁴⁶ Indeed, the importance of having a senior, highly respected prosecutor leading the postconviction review process was a common refrain among conviction integrity unit directors.²⁴⁷ Most of the conviction integrity unit prosecutors considered a seasoned prosecutor to be better positioned to assess the validity of an earlier conviction and more likely to have that prosecutor's conclusions regarding guilt or innocence respected by other prosecutors in the office, and, for that reason, better able to create the culture of innocence seeking necessary to achieve an effective postconviction review process.²⁴⁸ Whether it is a senior prosecutor or a seasoned criminal defense lawyer at the helm, having a well-respected lawyer with high-level office authority leading any postconviction effort is essential to that effort's success.

B. Tiered Review

The three principles outlined above are essential to a strong postconviction review regime, but without a well-defined set of standards to guide the review process itself, postconviction review may still be subject to prosecutorial biases.

²⁴⁴ See Wilson Interview, *supra* note 59.

²⁴⁵ See Burns Interview, *supra* note 200.

²⁴⁶ See Valentini Interview, *supra* note 175.

²⁴⁷ See *id.*; Angel Interview, *supra* note 146.

²⁴⁸ See Angel Interview, *supra* note 146; Valentini Interview, *supra* note 175.

This section creates a clear set of guidelines to direct prosecutorial discretion, a framework that instructs prosecutors on when additional investigation is appropriate, when they should drop opposition to a petition claiming innocence, and when their ethical obligations require active support of an innocence claim. Standardized review is essential to an effective postconviction review process;²⁴⁹ where prosecutors have no articulable standard to guide their discretion, the justice they administer is likely to vary case by case, based on the prosecutor who reviews it. Where prosecutors rely solely on their instincts to assess the strengths and weaknesses of a case, inherent biases are more likely to play a role in decision making, and racial and socio-economic inequity is more likely to result.²⁵⁰

Such standards are notably absent from the conviction integrity units discussed above. Instead, the effectiveness, efficiency, and accuracy of the postconviction review process rely entirely on the appropriately exercised discretion of prosecutors.²⁵¹ In describing how each determined what petitions to support, prosecutors used expressions like “you know it when you see it,” “when it keeps you up at night,” and “no scientific formula.”²⁵² But the problem with the “you know it when you see it” standard in this context is that the convicted innocent quite often are in jail because they appeared to be guilty in the first instance—indeed, the original prosecutor may likewise have become convinced of guilt based on a gut instinct. Only a small fraction of wrongful convictions are a product of prosecutorial misconduct.²⁵³ Far more often, wrongful convictions occur because well-meaning, dedicated, hard-working prosecutors simply fail to detect the flaws in their cases.²⁵⁴ This mistake is even more likely in the postconviction context, where convictions are stamped with the authority of a previous prosecutor, a jury, and often multiple rounds of judges (on appeal and in habeas) and where there are a variety of other incentives toward upholding a conviction that the prosecutor may not even detect affecting her judgment.²⁵⁵

The framework below—derived by combining the experience of conviction integrity units with the experience of convicted innocents—is a first step at

²⁴⁹ See Wilson Interview, *supra* note 59.

²⁵⁰ As Angela Davis has observed, unfettered prosecutorial discretion lends itself to discrimination and inconsistent justice. See DAVIS, *supra* note 52, at 5.

²⁵¹ The Dallas Conviction Integrity Unit has been run since its inception by prosecutors who spent their career as criminal defense lawyers, and for that reason they bring to the job a unique set of biases that in some cases may vary fairly dramatically from those of the typical prosecutor. See Wilson Interview, *supra* note 59.

²⁵² See Chin & O’Neil Interview, *supra* note 83; Valentini Interview, *supra* note 175; Manhattan ADA Interview, *supra* note 111.

²⁵³ See GARRETT, *supra* note 19, at 208.

²⁵⁴ See MEDWED, *supra* note 119, at 22–25.

²⁵⁵ See *id.*; Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 516–20 (2007) (outlining ways in which cognitive bias affects prosecutors); Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 183–86 (2007) (exploring prosecutorial passion as an influence on prosecutors’ decisions in plea bargaining).

prescribing a comprehensive standard for prosecutors' offices to apply in reviewing postconviction cases. There is certain to be disagreement among prosecutors and among scholars as to which standard of proof strikes the appropriate balance between the need to ferret out the convicted innocent and the need to protect the many other important functions served by this nation's prosecutors. Most important, though, is that prosecutors adopt *some* clear framework to govern prosecutorial discretion, and the below proposal is an attempt to begin a conversation on how the specific contours of that framework should look.

1. Initial Screening Procedures and When Investigation Is Warranted: Stating a Claim of Innocence

A cost-effective middle ground for identifying the convicted innocent without wasting prosecutorial resources would require an inmate to state a claim of actual innocence by pointing to either some new evidence not presented to the jury (broadly defined) or a sufficiently serious allegation of misconduct that one might question the integrity of the criminal justice process the petitioner received, a factor that would increase the likelihood that an actually innocent individual had been convicted.²⁵⁶ Where an inmate "states a claim" of this nature, further investigation is warranted.²⁵⁷ And where the underlying case bears the red flags of a wrongful conviction, prosecutors should employ detailed checklists to ensure no new evidence is overlooked.²⁵⁸ Moreover, conviction integrity prosecutors cast a

²⁵⁶ Santa Clara also reviews a third category of cases: those brought to its attention by credible, well-respected defense counsel. *See* Angel Interview, *supra* note 146. There is no doubt that concerns expressed by reputable, experienced defense counsel about a conviction can be a good indicator of a wrongful conviction. Nevertheless, announcing a policy of investigating "reputable" defense counsel concerns raises at least two problems: (1) prosecutors will end up engaging in their own ad hoc evaluation of credibility—meaning that in some instances compliant defense counsel will be rewarded with postconviction attention while defense counsel less willing to "play nice" will not, and (2) defense counsel will begin to interpret their duty to represent their clients zealously to include an obligation to raise a pro forma innocence claim with the local district attorney's office. Neither of these scenarios would help conserve resources or serve justice.

²⁵⁷ Other innocence-inquiry bodies employ a similar or slightly lower standard. In England, the Criminal Cases Review Commission engages in a screening for "bare eligibility"—namely, that the conviction occurred within its jurisdiction and that all appeals be exhausted. Green & Yaroshefsky, *supra* note 18, at 491 & n.137. Likewise, the North Carolina Innocence Commission conducts an initial screening to determine whether the petitioner is claiming complete factual innocence based on "credible" and "verifiable" evidence that had not previously been heard. *Id.* at 492.

²⁵⁸ Research suggests that lawyers can be "primed" to focus on certain aspects of their identity (e.g., a prosecutor's "minister of justice" role) through reflection and can in this way neutralize cognitive biases that may otherwise impact their decision making. *See* Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 45–47 (2009). For that reason, careful review of a checklist—and the reflection doing so

wide net in the claims they are willing to review, even considering claims where statutes of limitations have expired, where petitioners have no postconviction recourse left, and where individuals have pled guilty or state statutes of limitations on their ability to claim innocence have run.

Where a petitioner articulates some sort of discernible innocence claim, conviction integrity units engage in further screening to determine whether investigation is needed,²⁵⁹ most often by pulling the individual's case file and communicating with the individual or her attorney by phone or letter, a process that is not terribly time intensive.²⁶⁰ In the case of Harris County, where this screening indicates the potential for forensic evidence that may be persuasive on the question of guilt or innocence, further investigation will be conducted.²⁶¹ Dallas County imposes a threshold question of whether the innocence claim (or other information in the prosecutor's possessions) indicates the potential for new exculpatory evidence, a standard it equates with the required Federal Rule of Civil Procedure 12(b)(6) showing in civil cases: Does the applicant state a cognizable innocence claim?²⁶² If the answer is affirmative, the office undertakes further investigation.

Imposing a "new evidence" requirement for additional investigation makes sense from the perspectives of conserving resources, respecting finality, and deferring to a jury verdict, but it only makes sense from the perspective of freeing the convicted innocent if the term "new evidence" is broadly defined. For instance, evidence that could have or should have been discovered by diligent trial counsel does not qualify as "new evidence" under some state innocence statutes.²⁶³ In the realm of wrongful conviction, one cannot assume diligent defense counsel.²⁶⁴ In Harry Miller's case, for instance, Miller—who ultimately was wrongfully convicted of robbery—had a virtually irrefutable alibi that his attorney was aware of, but defense counsel nevertheless failed to call witnesses that could substantiate

entails—may allow prosecutors to neutralize the cognitive biases that may result in a reflexive decision that an individual is guilty.

²⁵⁹ Many of the letters prosecutors receive never require prosecutors to pull a case file or call the claimant in prison because many do not allege factual (or "actual") innocence, but rather they complain about prison conditions or the sentence received or attempt to reargue the evidence presented to the jury at trial. *See* Green & Yaroshefsky, *supra* note 18, at 512. According to former Dallas County Conviction Integrity Director Mike Ware, during his tenure, at least 25% of the claims his office received had nothing to do with factual innocence and could be dismissed with no further effort. *See id.* at 512 n.259. When it is unclear whether a factual claim of innocence is being made, these offices often call the inmate or send a letter requesting further information, a low-cost process that typically screens out additional petitioners. *See id.*; Wilson Interview, *supra* note 59.

²⁶⁰ *See, e.g.,* Angel Interview, *supra* note 146; Chin & O'Neil Interview, *supra* note 83; Wilson Interview, *supra* note 59.

²⁶¹ *See* Chin & O'Neil Interview, *supra* note 83.

²⁶² *See* Green & Yaroshefsky, *supra* note 18, at 512 & n.258.

²⁶³ *See* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1671 (2008).

²⁶⁴ *See* GARRETT, *supra* note 19, at 10, 165–67; GROSS & SHAFFER, *supra* note 5, at 41–43 (recognizing the role of inadequate defense counsel in wrongful conviction).

the alibi, relying instead upon Miller's testimony alone.²⁶⁵ While the testimony of these witnesses was not "new" or newly discovered in the postconviction phase, that testimony demonstrated clearly Miller's innocence and was evidence that the jury that convicted him never heard.²⁶⁶ The United States's indigent defense system is populated by a significant number of skilled, under-paid, diligent defense counsel, but it also contains a number of defense attorneys who are not diligent and whose lack of commitment to criminal cases is only exacerbated by local and state governments' refusal to adequately pay defense counsel.²⁶⁷ Given the deficiencies of the U.S. indigent defense system, it is not realistic to assume trial counsel diligence in determining whether evidence qualifies as "new."

Just as an assumption of trial counsel diligence makes little sense when identifying the convicted innocent, another common "new evidence" requirement in state innocence statutes—that to qualify as "new" the evidence must be admissible—would deny exoneration to many of the wrongfully convicted and would put prosecutors in a difficult moral dilemma. There is a great deal of inadmissible evidence that may influence a prosecutor's decision to charge an individual and likewise a great deal of inadmissible evidence that may influence his or her belief regarding an inmate's guilt or innocence;²⁶⁸ this evidence should influence prosecutorial judgment in both instances. Special Assistant District Attorney Angel enunciated a "new evidence" standard that strikes a balance between respecting the finality of a jury verdict, the importance of conserving investigative resources for meritorious cases, and the need to actually exonerate the wrongfully convicted: there "has to be some new evidence that was not presented to [the] jury already or some really legitimate allegation of misconduct of some sort—(such as the) evidence was there, but something went so wrong that we can't trust [the criminal justice] process."²⁶⁹

2. *When Actual Innocence Claims Warrant Further Investigation: A Bona Fide Dispute as to Guilt*

Knowing how far to proceed in the investigation process is far more challenging than making the discrete decision to engage in an investigation. In the preconviction context, the Model Rules are silent with regard to investigative directives, and even the more aspirational ABA Prosecution Function Standards discuss investigation in terms of proscriptions (e.g., avoiding invidious discrimination and use of illegal means to investigate) rather than prescriptions for

²⁶⁵ See Stephen Dark, *An Innocent Man*, SALT LAKE CITY WEEKLY (June 23, 2011), http://www.cityweekly.net/utah/article-35-14164-an-innocent-man.html?current_page=1.

²⁶⁶ *Id.*

²⁶⁷ See generally JON B. GOULD, THE INNOCENCE COMMISSION: PREVENTING WRONGFUL CONVICTIONS AND RESTORING THE CRIMINAL JUSTICE SYSTEM 171–73, 201 (2007) (discussing Virginia's notoriously underfunded indigent defense system).

²⁶⁸ Green & Yaroshefsky, *supra* note 18, at 500.

²⁶⁹ Angel Interview, *supra* note 146.

aspirational ethical conduct.²⁷⁰ While the question involves a significant degree of prosecutorial discretion, one clear guideline prosecutors can apply in deciding whether to continue to pursue exculpatory evidence is to question whether a bona fide issue as to the guilt of the petitioner still exists.²⁷¹ If one views the decision to investigate in the first place as tied to a Federal Rule of Civil Procedure 12(b)(6)-type standard, the decision to terminate an investigation could be seen to turn on Federal Rule of Civil Procedure 56(a): the investigation ends when there remains “no genuine dispute as to any material fact.”²⁷²

Of course, knowing whether a dispute is “genuine” is the challenge in these cases, a challenge exacerbated by the fact that often the postconviction investigation occurs ten, twenty, or thirty years after the crime originally was committed. Conducting an investigation years after the fact poses very serious challenges. Witnesses may no longer be available, and some evidence not preserved. Prosecutors may be called upon to make credibility determinations with regard to recanting witnesses and, in doing so, are forced to engage in some degree of second-guessing the jury that initially heard and believed those witnesses’ testimonies.²⁷³ Witness recollections—unreliable under even the best circumstances—are likely to be further weakened by the passage of time.²⁷⁴ For that reason, prosecutors must question how much weight to give a jury verdict vis-à-vis their own objective assessment of the postconviction state of the evidence. There is inherent subjectivity in this type of assessment, which is why Harris County limits its postconviction review to only those cases where objective, definitive forensic evidence of innocence exists.²⁷⁵

Limiting postconviction review to only forensically resolvable cases, however, would knock out a significant number of cases where individuals clearly merit exoneration. Thomas Haynesworth, the exonerated defendant mentioned in the Introduction, would not be a free man under this standard. And while nonforensic new evidence poses an exponentially larger challenge for investigators and prosecutors, there are objective indicia prosecutors can look to in assessing a petitioner’s claim of innocence: consistency in accounts;²⁷⁶ the credibility of the

²⁷⁰ See AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION §§ 3-3.1 to 3-3.11 (3d ed. 1993), available at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf

²⁷¹ This standard is a variation on one found in the Utah innocence statute, under which, in order to obtain an evidentiary hearing, a petitioner must demonstrate a “bona fide issue as to whether the petitioner is factually innocent.” *Miller v. State*, 226 P.3d 743, 747 (Utah Ct. App. 2010) (citing UTAH CODE ANN. § 78B-9-402(6)(b)(i) (LexisNexis Supp. 2009)).

²⁷² FED. R. CIV. P. 56(a).

²⁷³ See Valentini Interview, *supra* note 175.

²⁷⁴ GARRETT, *supra* note 19, at 48, 72 (referencing the fallibility of eyewitness testimony and the unreliability of long-term memory).

²⁷⁵ See Chin & O’Neil Interview, *supra* note 83.

²⁷⁶ See Valentini Interview, *supra* note 175.

petitioner; untested DNA evidence or DNA evidence for which there now exist improved testing techniques;²⁷⁷ or trial testimony of questionable forensic accuracy (e.g., hair comparison, fingerprint analysis, or blood-typing). Indeed, prosecutors can and should inform their nonforensic investigations by educating their attorneys and investigators on the typical hallmarks of wrongful conviction.²⁷⁸ Prosecutors should engage in the search for evidence of innocence with the same diligence with which they would search for evidence of guilt pretrial, but because they only need worry about convincing their office—not a jury—they can end an investigation where they become sufficiently convinced of the inmate’s innocence. As in the pretrial context, detailed checklists may serve an important role in ensuring that an investigation covers all necessary bases and does not fall prey to tunnel vision. Likewise, training prosecutor office investigators, local police, and the local crime lab on common mistakes that lead to wrongful conviction and how to identify such convictions may well help these individuals avoid confirmatory bias when engaging in postconviction review. Such training also serves to streamline and reduce the costs of the investigation process—ensuring that not only prosecutors, but their investigators, know what to look for and how to do so efficiently.

Estimating the added costs of engaging in this type of investigation is impossible, because regimes will vary depending upon the caseload and willingness to pay of each jurisdiction, as well as each office’s evidence retention policies (those offices that do not retain evidence from old cases are necessarily limited in their ability to reinvestigate old cases). Of the conviction integrity units discussed above, Dallas County and Harris County employ two attorneys who work full time on the postconviction review process, typically one senior and one more junior prosecutor.²⁷⁹ While Dallas County was able to obtain additional funding to initiate its postconviction program, Harris County simply had to divert resources from other office programs.²⁸⁰ One could estimate the additional cost for hiring additional prosecutors, plus a full-time investigator as most programs

²⁷⁷ *Id.* Of course, New York County District Attorney Cyrus Vance has observed that in the two years that the county’s conviction integrity unit has functioned, it has not encountered any cases in which exonerating DNA evidence existed. *See* Vance, Jr., *supra* note 107.

²⁷⁸ *See* Cynthia E. Jones, *supra* note 46, at 2927–29 (identifying four “leading causes of wrongful convictions”). There is a significant volume of high-quality scholarship exploring the common causes of wrongful convictions and identifying eyewitness identification, confessions, government informant testimony, and non-DNA forensic analysis of physical evidence as some of the most prevalent causes. That discussion is outside the scope of this Article, but in the past five years, there have been several very interesting statistical analyses done on this topic. *See generally* GARRETT, *supra* note 19; GROSS & SHAFFER, *supra* note 5; PETRO & PETRO, *supra* note 6.

²⁷⁹ Chin & O’Neil Interview, *supra* note 83; Wilson Interview, *supra* note 59. *Cf.* Valentini Interview, *supra* note 175 (employing four attorneys).

²⁸⁰ *See* Angel Interview, *supra* note 146; Chin & O’Neil Interview, *supra* note 83; Wilson Interview, *supra* note 59. Cook County also found a way to fund the program internally, without any additional resources. *See* Valentini Interview, *supra* note 175.

have,²⁸¹ but adopting a full conviction integrity unit is simply not practical for the majority of district attorneys' offices across the country,²⁸² particularly given the public's well-documented underfunding of programs that benefit the incarcerated.²⁸³ Postconviction review in other places is bound to look much different. Prosecutors can ration the diversion of resources from ongoing cases to these types of postconviction investigations by tackling innocence claims on a triage basis, with the most serious offenses and longest-incarcerated defendants' cases taken up first. Indeed, this is standard practice for some conviction integrity units.²⁸⁴

While the costs of postconviction investigation are significant, postconviction investigations do have some innate efficiencies over those conducted pretrial. In the pretrial context, police detectives conduct the investigation, select a suspect, and then present the results of their investigation to a prosecutor—a process that often transfers investigative tunnel vision to prosecutorial tunnel vision.²⁸⁵ In the postconviction context, the prosecutor actively directs the investigation from beginning to end (often through its own investigators in offices that employ those). For that reason, prosecutors have a unique ability to ensure that resources are directed only toward the specific nodes of a case that may point toward innocence. And, of course, while police officers often operate without immediate legal direction indicating when and whether they have met their burden of proof, where prosecutors direct an investigation, they can expand or stop the investigation immediately when the standards set forth in this framework have been met. For instance, where prosecutors are able to confirm guilt (such as by receiving a confirmatory DNA analysis) or to confirm the lack of a bona fide issue (such as by finding definitive evidence contradicting a petitioner's specific innocence claim or discovering his or her story directly contradicted by multiple other credible witnesses in the case), they should conclude the investigation.

More importantly, though, the dollars spent on investigation may result in equivalent savings in litigation costs—regardless of whether the investigation reveals additional evidence of innocence or guilt. In the face of an explosion of postconviction habeas and actual innocence claims, prosecutors' typical response is to review the case file and the transcripts of a case and refute the petitioner's claims on that basis. This may be effective in securing a speedy dismissal where a petitioner is pro se, but in cases with some merit or where the Innocence Project, pro bono counsel, or diligent defense counsel is involved, the litigation may take years or be accompanied by bruising media attention, and the petitioner may have to work through not only habeas requests, but requests for DNA testing, actual

²⁸¹ See, e.g., Angel Interview, *supra* note 146; Chin & O'Neil Interview, *supra* note 83; Wilson Interview, *supra* note 59.

²⁸² See Burns Interview, *supra* note 200.

²⁸³ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 570 n.242 (2001).

²⁸⁴ See, e.g., Angel Interview, *supra* note 146; Valentini Interview, *supra* note 175.

²⁸⁵ See MEDWED, *supra* note 119, at 22–25.

innocence petitions, and then litigation over wrongful conviction compensation.²⁸⁶ Some hotly contested cases could be far more quickly disposed of if the prosecution discovered more conclusive evidence of guilt. Further, many of these cases could be disposed of far more quickly—and without the added years of litigation costs, media embarrassment, and wrongful incarceration—by an up-front investment in independent investigation. No doubt prosecutorial funds will be spent investigating more meritless claims of innocence than meritorious ones; but overall, the costs of proactively exploring guilt or innocence may be smaller than the costs of reactively claiming guilt until the petitioner can prove otherwise. And, of course, this cost-effective response has the added benefit of better serving justice, which is the primary mission of the prosecutor’s office.

Postconviction review also promises to generate preconviction efficiencies. The discovery of valid innocence claims through postconviction review communicates unequivocally to line prosecutors that wrongful conviction occurs and, further, educates them on the warning signs of a potential wrongful conviction. This in turn improves investigative practices, trial strategy, and office disclosure policies. As Dallas County District Attorney Craig Watkins observed about his conviction integrity unit, “What we’ve created is a laboratory where we can study the failure of the system.”²⁸⁷ Use of lessons learned from that laboratory may help prosecutors’ offices weed out indictments that should be dismissed and prosecutors who are not taking seriously their ethical obligation to uphold justice,²⁸⁸ and it may even reveal a pattern of inadequate *Brady* observance that may require revision of office practices on the front end of the criminal justice system. The office education on wrongful conviction that is likely to accompany adoption of a standardized review framework therefore offers not only to reduce the incidence of wrongful conviction, but it also offers to reduce resources wasted

²⁸⁶ See, e.g., Dark, *supra* note 265; Wade Goodwyn, *Free After 25 Years: A Tale of Murder and Injustice*, NPR (Apr. 28, 2012, 5:00 AM), <http://www.npr.org/2012/04/28/150996459/free-after-25-years-a-tale-of-murder-and-injustice?ps=rs>; Brandi Grissom, *Williamson Prosecutor Asserts a Change of Heart*, N.Y. TIMES (Nov. 17, 2011, 2013), http://www.nytimes.com/2011/11/18/us/williamson-prosecutor-john-bradley-has-a-change-of-heart.html?_r=1&pagewanted=all%22%20%5Co%20%22Times%20article (summarizing Michael Morton’s long battle for exoneration, which included requests for case files and DNA testing, followed by a request for an innocence petition); Emiley Morgan, *After Being Imprisoned for 3 1/2 Years, Man Exonerated in 2003 Robbery*, DESERET NEWS (Sept. 12, 2011, 1:29 PM) <http://www.deseretnews.com/article/705390718/After-being-imprisoned-for-3-12-years-man-exonerated-in-2003-robbery.html?pg=2> (detailing Harry Miller’s long battle for exoneration, which included a contested appeal, a petition for actual innocence, and ultimately the pursuit of compensation).

²⁸⁷ Leslie Wimmer, *Dallas County DA Speaks to Fort Worth Community*, FORT WORTH BUS. PRESS (July 20, 2010, 5:12 PM) <http://fwbusinesspress55.1upprelaunch.com/main.asp?SectionID=18&SubSectionID=43&ArticleID=12597>.

²⁸⁸ See MEDWED, *supra* note 119, at 22–25 (discussing various cognitive biases that naturally occur in police investigation and criminal prosecution, including “confirmation bias” or “expectancy bias” and “belief perseverance,” that tend to contribute to tunnel vision on the part of police and prosecutors); Medwed, *supra* note 8, at 139–40.

on investigating the wrong suspect or conducting trials that are likely to end in acquittals or mistrials. In other words, postconviction review, and the lessons learned from it, promise future preconviction savings.

3. *When Actual Innocence Claims Require a Prosecutor to Drop Opposition to Release: A Reasonable Likelihood of Innocence*

Once an investigation is concluded, the prosecutor faces the thorny question of what to do and what her ethical obligations require when doubts remain about the conviction's validity. Model Rule 3.8(h) suggests that a prosecutor should "seek to remedy the conviction" when "clear and convincing evidence" shows the defendant was wrongfully convicted.²⁸⁹ Green and Yaroshefsky consider the Model Rules standard too high and assert that a prosecutor should seek an inmate's release upon determining that the defendant is "probably innocent."²⁹⁰ While it is certainly true that "the state and federal government have an obligation to free innocent individuals,"²⁹¹ a question remains regarding how much certainty is required for prosecutors to advocate for release and whether a lesser level of certainty would counsel prosecutors to defer to postconviction judicial processes. This would passively allow convicted individuals to free themselves by not opposing such efforts, rather than bringing the full weight of the executive to bear in favor of their release. This Article suggests a difference between those two actions on the part of the government, and while Green and Yaroshefsky make a compelling case that the "probably innocent" standard is sufficient for dropping prosecutorial opposition to postconviction claims of innocence, a higher degree of certainty may be required for active prosecutorial attempts to secure exoneration.

The "probably innocent" standard that Green and Yaroshefsky propose, which seems to be roughly equivalent to a "reasonable likelihood of innocence" standard,²⁹² may trigger a moral obligation on the part of the prosecutor not to oppose release,²⁹³ but it seems to fall short of the level of conviction required to campaign for the release of someone who was convicted by a jury and whose conviction was upheld by multiple judges. Given the far cry from anything approximating certainty that "probably innocent" denotes, it may not be in the best interest of society, finality, justice, or a prosecutor's political reputation to actively seek to free or exonerate that individual. While, as discussed below, state statutory innocence standards need not bind prosecutors, where they are only 51%

²⁸⁹ MODEL RULES OF PROF'L CONDUCT R. 3.8(h) (2013).

²⁹⁰ See Green & Yaroshefsky, *supra* note 18, at 508.

²⁹¹ *Id.* at 505.

²⁹² *Id.* at 516 ("When a prosecutor concludes that a convicted defendant is reasonably likely to be innocent, the appropriate steps may vary depending on the jurisdiction . . ."); see also MODEL RULES OF PROF'L CONDUCT R. 3.8(g) (2013) (imposing an investigatory obligation on the prosecutor where "new, credible and material evidence creat[es] a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted").

²⁹³ See Green & Yaroshefsky, *supra* note 18, at 516.

convinced of innocence, justice may be better served by deferring to the criminal justice process, the jury verdict, and postconviction judicial review procedures rather than substituting an uncertain prosecutor's opinion for their judgments. Conviction integrity prosecutors spoke frequently about the challenge of respecting a jury verdict while engaging in postconviction review.²⁹⁴ Where new evidence causes a prosecutor to doubt a conviction, but further investigation leaves that prosecutor only with the conclusion that the individual is "probably innocent," there is still a very good chance that the convicted individual is, in fact, guilty. A prosecutor should only seek to keep someone in prison when convinced of that person's guilt—just as a prosecutor should only seek to convict an individual of whose guilt the prosecutor is convinced²⁹⁵—but a higher standard is required for that prosecutor to actively work toward that individual's release.²⁹⁶

4. When Actual Innocence Claims Require a Prosecutor to Affirmatively Assist in Release: The Clear and Convincing Evidence Standard

As discussed above, there can be a significant difference in both outcome and perception when a prosecutor's office calls for an individual's exoneration versus when a prosecutor drops opposition to an actual innocence petition, and for that reason, it makes sense that a different standard of proof would attach to one outcome over the other. Under Model Rule 3.8(h), a prosecutor must seek to "remedy" a conviction when "clear and convincing evidence" establishes existence of a wrongful conviction.²⁹⁷ Of course, under the Model Rules, the steps necessary to meet this duty to "remedy" are not, in fact, all that onerous:

Necessary 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

²⁹⁴ See, e.g., Chin & O'Neil Interview, *supra* note 83; Valentini Interview, *supra* note 175; Wilson Interview, *supra* note 59.

²⁹⁵ See generally Bennett L. Gershman, *The Prosecutor as Minister of Justice*, 60 N.Y. ST. B.J. 8 (May 1988).

²⁹⁶ The ethical challenges associated with determining whether to support a petitioner's request for release or exoneration are often further complicated by generational shifts in prosecutorial culture. In offices where prosecutorial culture has shifted from conviction seeking to justice seeking, an investigation may reveal cases that were prosecuted successfully years ago but likely would not be prosecuted today based on the same evidence. See Valentini Interview, *supra* note 175. Again, the question of how to proceed must revolve around the legal standard: if the prosecutor believes the defendant to be "probably innocent," he or she likely should not oppose that individual's release. If the prosecutor is persuaded to a higher degree of certainty, active advocacy may be appropriate, and if the prosecutor is persuaded to a lesser degree of certainty, the prosecutor may be obligated to defend the conviction.

²⁹⁷ MODEL RULES OF PROF'L CONDUCT R. 3.8(h) (2013).

has knowledge that the defendant did not commit the offense of which the defendant was convicted.²⁹⁸

While these suggested steps may be appropriate to avoid disciplinary action, the presence of “clear and convincing evidence” actually dictates a more robust response for prosecutors committed to serving justice.

Setting a higher standard for active prosecutorial support is appropriate both from normative and efficiency perspectives. Normatively speaking, the prosecutor acts as an official representative of the U.S. government. The United States Supreme Court explained in *Berger v. United States*:²⁹⁹

[The prosecutor] is the representative not of an ordinary party to a controversy, but 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.³⁰⁰

In other words, the actions of a prosecutor carry with them the imprimatur of the sovereign—which is one reason prosecutors are so powerful in the postconviction context. By actively seeking the release of a convicted individual, by joining a motion with the defense as the government did with Haynesworth and Odom, the government is sending the message—as it expressly did in those cases—that those individuals are actually innocent.³⁰¹ That *mea culpa* on the part of the government is not warranted where an individual is “probably innocent” or there is a “reasonable likelihood” of innocence.

Employing a “clear and convincing” standard for active government support is important also from an efficiency and cost perspective. First, given the official *mea culpa* that attends a joint motion with the government, such motions ultimately may form the basis for a petition for wrongful incarceration compensation. Given the significance of the payout that can result, prosecutors should be convinced of an individual’s innocence prior to officially acknowledging such innocence. Second, affirmative support of a petition requires an expenditure of time on the part of the prosecutor’s office—far more so than nonopposition to an actual innocence or habeas petition would—and an expenditure of political and public capital.

Applying a “probable” innocence standard would likely mean that some portion of the time prosecutors will be expending government resources to free an individual who is guilty. Advocating for such individuals on the basis of just over 50% certainty may cause division within a prosecutor’s office, potentially

²⁹⁸ MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 8 (2013).

²⁹⁹ 295 U.S. 78 (1935).

³⁰⁰ *Id.* at 88.

³⁰¹ See also Medwed, *supra* note 5, at 1559 (“Exonerations may also result from prosecutors joining in a defense request to free the inmate prior to a fullfledged evidentiary hearing or opting not to retry a defendant . . .”).

generating resentment toward the postconviction review process and skepticism toward the concept of “wrongful conviction.” Pitching innocence to a governor’s office where prosecutors have no “clear and convincing evidence” at which to point may also reduce the prosecutors’ credibility with the governor’s office, where typically a very high standard for innocence is required.³⁰² Finally, exonerating the “probably innocent” may sacrifice the public’s trust in the criminal justice system. Where prosecutors are not completely convinced, the public also is not likely to be completely convinced, and therefore applying supporting innocence on the basis of “probability” may engender public distrust in the criminal justice system. In addition, where prosecutors are not clearly convinced of innocence, they risk being held personally responsible for freeing criminals who may ultimately commit further crime. Indeed, in hotly contested district attorney elections, any question regarding the certainty of someone’s innocence prior to exoneration can become a campaign issue.³⁰³ Not only is this potential outcome problematic in terms of public safety, but it also risks triggering public backlash against the exoneration movement, a move clearly counterproductive to justice.

IV. THE POLITICAL PROSPECTS OF RESOLVING THE NEW PROSECUTOR’S DILEMMA

Of course, as with any proposal, the structural modifications and the concept of tiered review will not eliminate entirely the problem they address. Nor is perfection the criterion required to assess the proposal’s utility. That said, an open question remains regarding whether prosecutors’ offices are likely to adopt a tiered innocence analysis framework, particularly in the absence of a model rule that sets disciplinary consequences for failing to meet a certain standard of postconviction conduct.

While there may be a will to adopt postconviction review procedures in large cities with liberal district attorneys, like Manhattan and Dallas, one might wonder whether implementing postconviction review is a realistic possibility in those jurisdictions where adversarial culture is most entrenched and where skepticism toward innocence claims is at its highest. These are the offices where wrongful conviction is most likely and where exoneration is most difficult.³⁰⁴ For those offices where allegations of actual innocence are viewed most skeptically, where prosecutors are most adamant that current office practices are sufficient to ensure that wrongful convictions do not occur,³⁰⁵ and where aggressive prosecutorial

³⁰² Green & Yaroshefsky, *supra* note 18, at 485–87.

³⁰³ See, e.g., Jennifer Emily, *Attorneys Who Oppose Craig Watkins’ Re-Election as Dallas County District Attorney Fault Actions of His Conviction Integrity Unit*, DALLAS MORNING NEWS (Nov. 30, 2010, 12:06 PM), <http://www.dallasnews.com/news/politics/local-politics/20101025-Attorneys-who-oppose-Craig-Watkins-688.ece>.

³⁰⁴ GROSS & SHAFFER, *supra* note 5, at 32–33.

³⁰⁵ See, e.g., Foon Rhee, *Commentary: How Innocent People Land in Prison*, MCCLATCHY DC (June 12, 2012), <http://www.mcclatchydc.com/2012/06/12/151901/commentary-how-innocent-people.html> (citing one district attorney who explained that she did

culture is so entrenched that a sea change toward a “minister of justice” mentality seems most impossible,³⁰⁶ an embarrassing high-profile wrongful conviction may be most likely. These types of incidents have in some instances created dramatic pressure for reform, even in districts previously adamant about the frivolousness of postconviction review, and they may be sufficient to force prosecutors to embrace a postconviction review system. For other prosecutors’ offices, an evolution toward adopting a postconviction review framework is likely to be more gradual. But either way, the widespread adoption of postconviction review procedures is not only realistic, but the politics of wrongful conviction are pushing prosecutors in that direction, some swiftly and others gradually.

A. *The Case for Dramatic Near-Future Reform*

Almost all of the conviction integrity units discussed above were formed in the wake of a public crisis of confidence in the district attorney’s office. In Dallas County and Cook County, a series of embarrassing public exonerations galvanized public attention to the need for postconviction reform, essentially requiring a dramatic sea change in how prosecutors review and respond to postconviction claims of innocence.³⁰⁷ Indeed, conviction integrity has become a hot topic in district attorney elections across the country, and a particularly popular campaign promise in counties that have experienced one or more high-profile exonerations in recent history.³⁰⁸ Brooklyn DA Kenneth Thompson vowed to resolve an alleged crisis of wrongful convictions during his campaign.³⁰⁹

In Lake County, Illinois, the 2012 Democratic candidate for state attorney made his proposed conviction integrity unit the centerpiece of his campaign.³¹⁰ In some elections, like that which brought Dallas County’s Craig Watkins to office,

not need a formal conviction integrity unit because “[m]y whole office is an integrity unit”).

³⁰⁶ See, e.g., Graczyk, *supra* note 81 (discussing the legacy of Henry Wade, Dallas County district attorney for thirty-six years, which in recent years has included nineteen proven wrongful convictions and significant allegations of prosecutorial misconduct). Some claimed Wade’s office had a “cowboy kind of mentality,” though his son disputed the characterization, explaining that Wade was simply “very competitive.” *Id.*

³⁰⁷ See *supra* Parts II.A.1, 5.

³⁰⁸ See, e.g., Eric Zorn, *Cynic, Optimist Examine Alvarez’ New Philosophy*, CHICAGO TRIB. (Feb. 3, 2012, 1:50 PM), http://blogs.chicagotribune.com/news_columnists_ezorn/2012/02/alvarez-to-partner-with-advocates.html (connecting Cook County District Attorney Alvarez’s recent adoption of a conviction integrity unit with media attention for failure to reexamine a 2004 case, a dozen exonerations that have occurred since she took office in 2008, and the fact that she is currently running for reelection).

³⁰⁹ Oren Yaniv, *Brooklyn DA Kenneth Thompson Off to Slow Start at Fixing Wrongful Convictions*, NY DAILY NEWS (Apr. 6, 2014), <http://www.nydailynews.com/new-york/nyc-crime/b-klyn-da-thompson-slow-fix-wrongful-convictions-critics-article-1.1747848>.

³¹⁰ See Chris Kennedy, *Lake County State’s Attorney*, ABC EYEWITNESS NEWS, http://abclocal.go.com/wls/feature?section=news/politics/local_elections&id=8800657 (last visited May 12, 2014).

public outrage surrounding a high-profile wrongful conviction has been decisive, paving the way for a dramatic shift in administration and office culture, even in traditionally conservative, adversarial prosecutor's offices.³¹¹

Craig Watkins won the election in Dallas County in 2007 after the county faced a series of embarrassing public exonerations. Although Dallas County had long been a conservative, tough-on-crime district, and Watkins was a defense attorney with no prosecutorial experience, he was elected on a platform of restoring public trust in the criminal justice system, the promise of improved conviction integrity a central tenet of his campaign.³¹² Dallas County had elected conservative, highly aggressive prosecutors for years, but the very public wrongful conviction problems of the county swept Watkins into office and resulted in a complete cultural change of that office.³¹³ Watkins's experience demonstrates that even in jurisdictions with an entrenched adversarial culture—where there is a focus on “winning” rather than “administering justice”³¹⁴—a tidal wave of public opinion can effect cultural transformation. And the public often demands this type of transformation in the wake of particularly egregious instances of wrongful conviction, as seen in Dallas County in 2007 and more recently in Williamson County, another Texas county still reeling from a high-profile exoneration vigorously resisted by the district attorney.³¹⁵

³¹¹ See, e.g., Brandi Grissom, *Morton Case Is Focus of Williamson County DA Race*, TEX. TRIB. (May 16, 2012), <http://www.texastribune.org/texas-dept-criminal-justice/michael-morton/michael-morton-case-central-heated-wilco-da-race/> (discussing the prominence of Michael Morton's exoneration in the Williamson County district attorney election); *supra* Part II.A.; *supra* note 54 and accompanying text (discussing Dallas's history of wrongful convictions prior to Craig Watkins's election victory).

³¹² See EDWARD GRAY, HENRY WADE'S TOUGH JUSTICE: HOW DALLAS COUNTY PROSECUTORS LED THE NATION IN CONVICTING THE INNOCENT 16 (2010) (detailing the no-mercy justice distributed by legendary Texas prosecutor Henry Wade and his pre-Watkins successors); Buntin, *supra* note 54.

³¹³ Radley Balko, *Is This America's Best Prosecutor?*, REASON.COM (Apr. 7, 2008), <http://reason.com/archives/2008/04/07/is-this-americas-best-prosecut> (noting the firing of nine top-level prosecutors); Graczyk, *supra* note 81. Immediately upon taking office, Watkins removed prosecutors from the previous administration who were perceived to lack Watkins's commitment to reforming office practices, while others left voluntarily. Wilson Interview, *supra* note 59.

³¹⁴ Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2091 (2010). For example, “even the best of the prosecutors— young, idealistic, energetic, dedicated to the interests of justice—are easily caught up in the hunt mentality of an aggressive office.” H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1702 (2000).

³¹⁵ John Bradley, the district attorney of Williamson County, Texas, recently lost his bid for reelection due to his prominent role in resisting the innocence claim of Michael Morton, a man convicted in 1987 of murdering his wife and whom DNA evidence exonerated in 2010. See Grissom, *supra* note 311. Bradley was not district attorney at the time of the conviction but resisted for years Morton's request for access to his case file and DNA testing, thereby extending Morton's stay in prison and allowing the real killer (who had subsequently committed another murder) several more years of freedom. See *id.*;

Regardless of whether it occurs in a red or blue state, wrongful conviction tends to evoke a visceral, “this-could-happen-to-me” response that bridges traditional political and social divides.³¹⁶ As Professor Abbe Smith observed, “at least in principle, protecting the innocent is one of the few things in the criminal justice system that everyone can agree on—the left and the right, defense lawyers and prosecutors, police and the public.”³¹⁷ In the wrongful conviction context, the public is not only united by an innate sense of injustice, but by the reality that the prosecution’s error also allowed the perpetrator of a heinous crime to go free.³¹⁸ In a country where the criminal justice system relies largely on elected prosecutors, the increasing incidences of public exonerations—and the public outrage that accompanies them—has triggered a dramatic change in various jurisdictions across the nation and promises to ensure that an increasing number of prosecutors’ offices will adopt postconviction review regimes.

B. An Eventual but Inevitable Tipping Point: The Case for Gradual Adoption of Systematized Postconviction Review

Not every prosecutor’s office will encounter an embarrassing exoneration or become enmeshed in an election where conviction integrity is the central issue, but a gradual nationwide shift toward systematized postconviction review seems likely nevertheless. The prevalence of DNA testing statutes and innocence statutes ensures that prosecutors will continue to have to grapple with postconviction claims of innocence.³¹⁹ As courts increasingly allow habeas petitioners to circumvent procedural defaults in the habeas context where a credible case for innocence has been made,³²⁰ more habeas petitioners will claim innocence, and

Goodwyn, *supra* note 286. Morton’s conviction was featured prominently in the campaign in which Bradley sought reelection. For example, mixed in with other election signs along Williamson County roads were signs with red bandanas tied at the corners, which read, “Remember Michael Morton Vote No to John Bradley”; the jury foreman from Morton’s trial recorded a campaign ad for Bradley’s opponent, referencing the case; and the family of the woman murdered by the real killer while he was still at large were actively involved in campaigning for Bradley’s opponent. Grissom, *supra* note 311.

³¹⁶ See Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer’s Growing Anxiety About Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315, 321 (2010).

³¹⁷ *Id.*

³¹⁸ In Dallas County alone, the Conviction Integrity Unit’s efforts between 2007 and 2012 have identified ten previously unknown actual perpetrators over the course of exonerating the convicted innocent. Ware, *supra* note 20, at 1041.

³¹⁹ See generally Garrett, *supra* note 263; Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008).

³²⁰ Although federal courts have not recognized a federal freestanding actual innocence claim, a colorable claim of actual innocence may toll habeas statutes of limitation that otherwise have passed, remove the bar to a successive habeas petition, or impact the court’s analysis of prejudice. See, e.g., *Herrera v. Collins*, 560 U.S. 390, 440–41 (1993) (Blackmun, J., dissenting).

prosecutors will continue to face pressure to review and respond to these claims. And, of course, the number of DNA exonerations continues to rise, as the Innocence Project makes its way through a cache of preserved DNA evidence from Virginia crime labs,³²¹ as Dallas County works its way through its own DNA stockpile,³²² and as the Colorado Attorney General Office's Justice Review Project uses federal funding to review thousands of Colorado convictions in search of cases that could benefit from modern DNA testing.³²³ These DNA cases continue to focus the public's attention on the need for postconviction review, and they will continue to punish those prosecutors who have no standardized protocol and no office procedure for dealing with innocence claims.

At some point, the stockpile of conclusive DNA exonerations will be exhausted, and defense lawyers and conviction-integrity-minded prosecutors will be left with only the murkier, more debatable, inherently inconclusive cases of innocence—but this eventuality only makes adoption of a standardized protocol more important. Non-DNA cases often do not evoke the visceral public response that DNA cases do because there is more likely to be a lack of consensus regarding guilt or innocence.³²⁴ For those prosecutors disinclined to reconsider closed convictions, non-DNA cases pose little threat of public embarrassment, even if the prosecutor responds to that claim in a way that is reflexive and unstudied. In other words, the abundance of non-DNA cases—the vast majority of the exoneration cases that remain undiscovered³²⁵—threatens to derail the steady progress toward standardized postconviction review that has been achieved over the past ten years. At the same time, these non-DNA cases, because they are far murkier and less conclusive than DNA cases, are just the type of case for which the review framework proposed above would be most useful, because these are the cases where a prosecutor is most likely to struggle to determine whether further investigation or supporting a petition is warranted.

³²¹ See Frank Green, *Va. DNA Data Support Innocence of 33 Convicted of Sex Crimes, Study Concludes*, RICHMOND TIMES-DISPATCH (June 18, 2012, 1:21 PM), <http://www2.timesdispatch.com/news/2012/jun/18/va-dna-data-supports-innocence-of-33-convicted-of--ar-1996030/> (stating that Urban Institute study documents thirty-three individuals for whom DNA evidence indicates their innocence and that “more people remain to be cleared by the Virginia project”).

³²² See Scott Horton, *In Texas, 41 Exonerations from DNA Evidence in 9 Years*, HARPER'S (Jan. 5, 2011, 4:18 PM), <http://harpers.org/archive/2011/01/hbc-90007895> (noting that although at one point it appeared Dallas had nearly exhausted its review of its DNA stockpile for exonerations, the county's crime lab then discovered a new cache of DNA evidence to test).

³²³ See Associated Press, *Man Convicted in Colorado Freed by DNA Evidence*, BOSTON.COM (May 1, 2012), http://www.boston.com/news/local/vermont/articles/2012/05/01/man_convicted_in_colorado_freed_by_dna_evidence/.

³²⁴ See Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1161–62 (2011).

³²⁵ See GARRETT, *supra* note 19, at 11–13, 271; GROSS & SHAFFER, *supra* note 5, at 10.

Regardless of what lies ahead in terms of DNA cases, the legal academy and the innocence movement have initiated a debate on prosecutorial postconviction ethics that is unlikely to abate even when DNA cases taper off. The debate over prosecutorial postconviction ethics initiated by Professor Fred Zacharias in 2005³²⁶ has become a talking point for crusading district attorneys like Cyrus Vance and Craig Watkins.³²⁷ These prosecutors are active in their efforts to ensure that the issue remains on the public radar and is a topic of conversation at prosecutorial conferences and in the media.³²⁸

Finally, the spread of innocence projects to law schools across the country ensures that postconviction justice will be part of the ethic of the next generation of prosecutors in this country. While law school innocence projects are not without their critics,³²⁹ they teach students the qualities of “thoroughness and skepticism,” with the skepticism being directed toward fallible forensics and the occasionally dysfunctional criminal justice system.³³⁰ Innocence projects are more likely to draw future prosecutors than traditional criminal defense clinics, because innocence project participants can avoid the moral choice of whether they are willing to represent the actually guilty³³¹ (a choice the prosecutorially inclined may be less willing to make). And for those future prosecutors not directly involved in on-campus innocence projects, the existence of these clinical programs ensures they have contact with fellow students who are involved and that they hear about the high-profile exonerations in which these innocence projects occasionally are involved.³³² Innocence projects across law school campuses are raising awareness

³²⁶ See generally Green & Yaroshefsky, *supra* note 18, at 46–73; Zacharias, *supra* note 13, at 173–76 (discussing a prosecutors’ ethical duty to serve justice after a conviction); Luban, *supra* note 13, at 16–17 (proposing expectations for prosecutors when new evidence suggests a convicted person may be innocent); Medwed, *supra* note 8 (discussing institutional and political barriers that deter prosecutors from recognizing potentially valid innocence claims); Medwed, *supra* note 18, at 125–32 (arguing for a fuller realization of the minister-of-justice ideal for prosecutors in the postconviction process).

³²⁷ See, e.g., Vance, Jr., *supra* note 107.

³²⁸ See, e.g., INTEGRITY PROJECT REPORT, *supra* note 20 (incorporating findings of the 2011 conviction integrity conference attended by various conviction integrity unit directors, academics, and others); Buntin, *supra* note 54; Vance, Jr., *supra* note 107.

³²⁹ See Smith, *supra* note 316, at 326–28 (noting that innocence projects tend to foster a mentality among law students that is counterproductive to indigent defense).

³³⁰ Keith A. Findley, *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 CLINICAL L. REV. 231, 231 (2006).

³³¹ See Smith, *supra* note 316, at 326–28 (criticizing innocence projects for encouraging students to value the representation of innocent people over the representation of the guilty in need of diligent criminal defense).

³³² For instance, in 2004, a man convicted of rape, kidnapping, and murder was exonerated after seventeen years in prison after new evidence was discovered in his case by Emory Law students, who were interning with the Georgia Innocence Project. *Guilty Until Proven Innocent*, *supra* note 223; see also *Know the Cases: Clarence Harrison*,

of wrongful conviction among the next generation of prosecutors and decreasing reflexive skepticism toward actual innocence claims. Whether the current generation of prosecutors comes to recognize the merits of systematizing postconviction review or not, the work of campus innocence projects is increasing the likelihood that postconviction review will be an important reality for the next generation.

The dedicated advocacy of district attorneys like Vance and Watkins and the growing popularity of the innocence movement among the next generation of prosecutors ensure a gradual but steady evolution toward widespread adoption of systematized postconviction review.

V. CONCLUSION

The rise of DNA exonerations has triggered an explosion of postconviction innocence claims, one to which prosecutors across the country generally have been slow to respond. Although the reality of wrongful conviction is widely understood, most prosecutors operate from a default position of resistance to innocence claims, in large part because the overwhelming majority of these claims are, in fact, frivolous. And while prosecutors, as “ministers of justice,” are ethically obligated to remedy wrongful convictions, the vast majority of states lack ethical guidelines that mandate prosecutors do so and assist them in determining how best to do so. As a result, prosecutors across the country face a new dilemma: how to honor the prosecutor’s commitment to serving justice by identifying the convicted innocent, without wasting precious resources investigating largely frivolous petitions.

This Article attempts to help prosecutors resolve that dilemma, proposing structural modifications to prosecutors’ offices and a concept of tiered review, or a standardized postconviction review regime that balances prosecutors’ ethical duties with the budgetary limitations prosecutors face. Drawing upon the experiences of five conviction integrity units, the Article identifies three key components that can be applied by any prosecutors’ office interested in postconviction review. It also identifies and remedies a notable deficiency in these conviction integrity units: the utter lack of any type of concrete review standard to be applied when engaging in the process of review. The proposal suggests clear standards of review to be used at each stage in the postconviction review process, calibrated to serve justice—as prosecutors are obligated to do—while respecting the budgetary constraints prosecutors face. Use of such standards is essential for ensuring consistency and accuracy in the review process and avoiding racial or socioeconomic discrimination.

High-profile public exonerations have drawn attention to the problem of postconviction review and indeed have inspired institution of the conviction integrity units catalogued above. While some might query whether widespread adoption of a standardized postconviction review framework is realistic, the rise in

public exonerations and the increased attention prosecutors are devoting to this problem demonstrate how practical this type of review is. Making such review standard practice across the country promises to make a difference not just in minimizing wrongful convictions and facilitating appropriate exonerations, but doing so also has the potential to strengthen prosecutorial efficiency and effectiveness, improve the consistency of justice the accused in this country receive (reducing the incidence of racial and socioeconomic discrimination), and point prosecutors back toward their traditional role as ministers of justice.