

Prosecutorial Discretion and Post-Conviction Evidence of Innocence[†]

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I. INTRODUCTION

A recent front-page *New York Times* article highlighted a dispute about how prosecutors should exercise discretion when, after criminal proceedings have ended, new information casts doubt on a convicted defendant's guilt.¹ The subject of the article was the New York state-court conviction of two men for the 1990 murder of a bouncer outside the Palladium nightclub in lower Manhattan and the state prosecution's response years later, after a federal informant admitted that he and a fellow gang member, not the convicted defendants, were responsible for the shooting.²

Over a lengthy period chronicled by documentary filmmakers, Bronx detectives unearthed increasing amounts of exculpatory evidence³ while the Manhattan prosecutor's office appeared indifferent if not hostile to their efforts.⁴ But eventually, the office appointed a senior trial prosecutor to work with other

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¹ Benjamin Weiser, *Doubting Case, City Prosecutor Aided Defense*, N.Y. TIMES, June 23, 2008, at A1.

² *Id.* Other sources have covered the case in great detail. See Cooley Godward Kronish LLP, Pro Bono: Case Studies, *The People of the State of New York v. David Lemus and Olmedo Hidalgo*, <http://www.cooley.com/practices/casestudies.aspx?casestudyid=&practiceid=37411920> (last visited Jan. 20, 2009); *Dateline NBC: In the Shadow of Justice*, <http://www.msnbc.msn.com/id/20091700/> (last visited Jan. 20, 2009).

³ See *Dateline NBC: In the Shadow of Justice*, *supra* note 2; see also Sabrina Tavernise, *One More Chance to Overturn Their Murder Convictions*, N.Y. TIMES, Jan. 31, 2005, at B4. (In an unrelated investigation, a gang member by the name of Joey Pillot admitted that he and another gang member, Thomas Morales, were the two men who did the shooting.)

⁴ See *Dateline NBC: In the Shadow of Justice*, *supra* note 2; see also Damien Cave, *Lawyers Want New Hearing for 2 Convicted in 1990 Murder*, N.Y. TIMES, July 20, 2004, at B3. (“[T]he district attorney's office had been moving too slowly and withholding evidence. It took more than a year for summaries of interviews with witnesses to make their way to the defense, despite several requests . . .”).

detectives to investigate the Palladium convictions.⁵ After almost two years, the prosecutor concluded that the convicted defendants were innocent, and he recommended supporting their application to set aside their convictions.⁶ The heads of the office rejected the recommendation, however, and directed the senior prosecutor to oppose the application in court.⁷ According to the news account, he did so nominally, while ensuring that all the exculpatory evidence came out at the judicial hearing, thereby subverting the district attorney's aim of preserving the convictions.⁸ At the hearing's end, the senior prosecutor persuaded his superiors to assent to overturning the conviction of one defendant but not the other,⁹ and when the court nonetheless vacated both convictions,¹⁰ the district attorney's office insisted on retrying the second defendant.¹¹ By then, the senior prosecutor had resigned from the office.¹² The trial ended in acquittal in November 2007.¹³

⁵ See *Dateline NBC: In the Shadow of Justice*, *supra* note 2; see also Sabrina Tavernise, *New Evidence Gives Defense Hope in '90 Case*, N.Y. TIMES, Apr. 19, 2005, at B1. ("Prosecutors, too, have worked hard to review the case. For the past year, Daniel Bibb, of the cold case unit at the district attorney's office, has interviewed more than 50 people in 14 states, 3 New York State prisons and 8 federal prisons . . .").

⁶ See Weiser, *supra* note 1 (A re-examination by Daniel Bibb of the district attorney's office came to the conclusion that "[h]e believed that the two imprisoned men were not guilty, and that their convictions should be dropped."); Sabrina Tavernise, *A Prosecutor's Report Raises Doubts About 2 Convictions*, N.Y. TIMES, Mar. 21, 2005, at B2. (The report stated: "Significant evidence indicates that Lemus and Hidalgo were NOT involved in the homicide."); Anemona Hartocollis, *Citing New Admission, Lawyers Seek Murder Case's Dismissal*, N.Y. TIMES (Final Edition), May 13, 2007, at 31. ("In a television interview, Daniel Bibb, a former prosecutor in the Manhattan district attorney's office, said that he believed the defendant, David Lemus, was the wrong man.").

⁷ Weiser, *supra* note 1. (Despite Mr. Bibb's conclusion that the two men were innocent, "top officials told him . . . to go into a court hearing and defend the case anyway.").

⁸ See *id.* ("He tracked down hard-to-find or reluctant witnesses who pointed to other suspects and prepared them to testify for the defense. He talked strategy with defense lawyers. And when they veered from his coaching, he cornered them in the hallway and corrected them.").

⁹ Sabrina Tavernise, *Prosecutors Asking Court to Free Convict*, N.Y. TIMES, July 23, 2005, at B1. ("Prosecutors said the conviction of Olmado Hidalgo should be overturned because new evidence that has surfaced would cause a jury to look more favorably on his case. They did not ask the judge to cancel the conviction of Mr. Hidalgo's co-defendant, David Lemus, because they said the new evidence would not have helped him."). After the district attorney agreed that Hidalgo's conviction should be vacated and that he should not be retried, Hidalgo commenced a civil rights action against the district attorney's office and others based on his wrongful conviction. The action reportedly resulted in a \$2.6 million settlement. See Benjamin Weiser, *Settlement for Man Wrongly Convicted in Palladium Killing*, N.Y. TIMES, March 31, 2009, at A19.

¹⁰ See Anemona Hartocollis & Colin Moynihan, *Free After 14 Years, and Learning to Use a Cell*, N.Y. TIMES, Oct. 20, 2005, at B3 ("David Lemus . . . walked out of State Supreme Court in Lower Manhattan yesterday a free man, hours after a judge overturned his conviction in the killing. . . . In July, Justice Hayes overturned Mr. Hidalgo's conviction . . .").

¹¹ See *id.* ("Mr. Lemus's troubles are not over. Prosecutors said yesterday that they intended to retry him.").

¹² See Weiser, *supra* note 1.

The question in the Palladium case was not the familiar one of how to exercise prosecutorial discretion regarding whether to institute charges and proceed to trial. Rather, the question was how to exercise prosecutorial authority after a conviction is obtained. Nevertheless, both the prosecutor's office and the former senior prosecutor implicitly analogized to how prosecutors exercise discretion at the outset of a prosecution. The prosecutor's office issued an official statement that, "[n]obody in this office is ever required to prosecute someone they believe is innocent."¹⁴ The senior prosecutor similarly observed that traditionally, "[i]f the evidence doesn't convince" the prosecutor, he should make the tough decision not to proceed to trial, rather than leaving the decision to the judge and jury.¹⁵

The observations raised more questions than they answered, however. For example, assuming that the ultimate decision whether to bring a case rests with the elected district attorney, not the trial prosecutor, by what standard and through what process should the district attorney decide whether to bring or proceed on criminal charges in light of doubts about the defendant's guilt? How convinced must the ultimate decision-maker be of the defendant's guilt before proceeding with a trial? And how does this standard translate when a convicted defendant's guilt is reexamined? If the prosecutor who conducted the post-conviction investigation is personally convinced of the defendant's innocence, or has reasonable doubts about the defendant's guilt, should the chief prosecutor (a) defer to that judgment and join in a post-conviction motion to set aside the conviction; (b) assign that prosecutor to conduct post-conviction proceedings in a manner that assures that all the exculpatory evidence is fairly presented; or (c) assign a different prosecutor to defend the convictions in a matter that assures that exculpatory evidence is tested in an adversary proceeding?

The *New York Times* article raised questions about how the district attorney made the decision to reject the senior prosecutor's recommendation to assent to the defendants' release, suggesting that the district attorney may have been motivated by political self-interest during an election year in which his opponent publicly criticized how his office had handled the case.¹⁶ In a letter to the editor, the district attorney disputed this, however.¹⁷ He explained that his office's investigation was ongoing and unresolved at the time of the post-conviction hearing, and his office's "mission was to conduct a fact-finding proceeding, with witnesses under oath and

¹³ Anemona Hartocollis, *Man Convicted in Club Death is Acquitted at Second Trial*, N.Y. TIMES, Dec. 7, 2007, at B3.

¹⁴ See Weiser, *supra* note 1.

¹⁵ *Id.*

¹⁶ *Id.* ("As the hearing unfolded in 2005, Mr. Morgenthau, running for re-election, was sharply criticized by an opponent who said he had prosecuted the wrong men.")

¹⁷ Robert M. Morgenthau, Letter to the Editor, *The Manhattan District Attorney Responds*, N.Y. TIMES, June 30, 2008, <http://query.nytimes.com/gst/fullpage.html?res=9D03E5D71631F933A05755C0A96E9C8B63>.

subject to cross-examination, affording us the opportunity to resolve substantial issues involving the weight and credibility of the evidence.”¹⁸ The news account also raised questions about how the senior prosecutor handled the post-conviction proceedings after his recommendation was rejected. Professor Stephen Gillers commented that the prosecutor acted improperly by “subvert[ing] his client’s case,” whereas one of the defense lawyers in the case took the view that the senior prosecutor had honorably fulfilled his “duty to search out the truth.”¹⁹ The latter view seems more reasonable given the district attorney’s explanation that his office was conducting a fact-finding proceeding, not adopting an adversarial stance.

The Palladium case is unusual in lifting the curtain, if only slightly, on internal disagreement over whether and, if so, how to defend a conviction when new evidence raises substantial doubts about its reliability.²⁰ But the problem that precipitated the disagreement is a recurring one. Often, even years after a conviction, witnesses recant their testimony, additional witnesses come forward, or other new evidence or information emerges that tends to exonerate a convicted defendant.²¹

There is now a burgeoning literature on wrongful criminal convictions thanks in large part to the Innocence Project and DNA testing.²² No one knows how many people who plead guilty or who are convicted by a jury are factually innocent. But the number of exonerations in the comparatively few old cases in

¹⁸ *Id.*

¹⁹ Weiser, *supra* note 1. Likewise, in a posting on the web, Professor David Luban offered a defense of the senior prosecutor’s conduct. See David Luban, Legal Profession Blog, *Luban on New York Prosecutor Story: When a Good Prosecutor Throws a Case*, http://lawprofessors.typepad.com/legal_profession/2008/06/when-a-good-pro.html (last visited Jan. 20, 2009). The state court’s disciplinary agency later looked at the matter and concluded that disciplinary proceedings against the prosecutor were unwarranted. Benjamin Weiser, *Lawyer Who Threw a Case is Vindicated, Not Punished*, N.Y. TIMES, March 5, 2009, at A23.

²⁰ As some have argued, there is a significant lack of transparency in prosecutorial decision-making. See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1566 (1981) (arguing that with respect to prosecutorial discretion generally, “[w]e presently tolerate a degree of secrecy in one of our most crucial decisionmaking agencies that is not only inconsistent with an open and decent system of justice, but that may not even be efficient in avoiding the additional effort necessary to make the system accountable.”).

²¹ See discussion *infra* Part II.A.

²² See, e.g., JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2003) (chronicling multiple stories of uncovering wrongful convictions); Jennifer Boemer, *In the Interest of Justice: Granting Post-Conviction Deoxyribonucleic Acid (DNA) Testing to Inmates*, 27 WM. MITCHELL L. REV. 1971 (2001) (discussing the use of DNA testing in exonerations); Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 340–56 (2006) (detailing the story of David Wong, a man wrongfully convicted in 1984 and exonerated in 2004 after new witnesses came forward and other witnesses recanted earlier testimony); Benjamin N. Cardozo School of Law, Innocence Project, <http://www.innocenceproject.org> (last visited Jan. 20, 2009) [hereinafter Innocence Project] (stating that 234 people have been exonerated through post-conviction DNA testing); Northwestern University School of Law Center on Wrongful Convictions, <http://www.law.northwestern.edu/wrongfulconvictions> (last visited Jan. 20, 2009) (same).

which DNA testing can be conducted suggests that the numbers are meaningful.²³ Mistakes are made notwithstanding that the reasonable doubt standard and other features of the criminal process are designed to prevent wrongful convictions on the premise that it is better for factually guilty defendants to go free than for innocent defendants be punished.²⁴ Precisely because of the traditional societal aversion to wrongful convictions, the apparent prevalence of the problem should be a cause of public concern.

Building on prior judicial pronouncements,²⁵ new ABA model ethics rules propose that when a prosecutor learns of new exculpatory evidence that is “material” and “credible,” and that establishes “a reasonable likelihood” that a convicted defendant is innocent, the prosecutor should disclose the new evidence to the court and to the defendant and conduct a reasonable investigation to determine whether a miscarriage of justice in fact occurred.²⁶ Further, the model rules would call on the prosecutor to attempt to set the conviction aside if the investigation leads to “clear and convincing” evidence of the defendant’s

²³ See Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005) (finding that from 1989 through 2003 there were 340 exonerations in the United States and detailing the ways the defendants were exonerated); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007) (analyzing data from convictions in the 1980s and finding that there is about a 3.3% error rate for capital convictions during that time period).

²⁴ See *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (“I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”).

²⁵ See *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) (observing that prosecutors are “bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction”); *Thomas v. Goldsmith*, 979 F.2d 746, 749–50 (9th Cir. 1992) (“[W]e believe the state is under an obligation to come forward with any exculpatory . . . evidence in its possession. We do not refer to the state’s past duty to turn over exculpatory evidence at trial, but to its present duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding.”); *Houston v. Partee*, 978 F.2d 362, 366–69 (7th Cir. 1992) (denying claim of prosecutorial immunity for failure to turn over post-conviction, newly discovered exculpatory evidence because the evidence was discovered outside of the prosecutor’s duties and because of the absence of any judicial check at that point in the process); *Monroe v. Butler*, 690 F. Supp. 521, 525 (E.D. La. 1988) (refusing to limit the application of Brady to pre-conviction, saying, “[t]he prosecutor’s duty to disclose material, exculpatory evidence continues through the period allowed by the State for post-conviction relief.”).

²⁶ MODEL RULES OF PROF’L CONDUCT [hereinafter A.B.A. MODEL RULES], R. 3.8(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.”).

innocence.²⁷ But state courts have not yet adopted these rules and, in any event, the rules set standards meant to be the bare minimum, not to establish the full scope of prosecutors' responsibility.²⁸ They would leave much to prosecutors' discretion.²⁹

Traditionally, discussions of prosecutorial discretion focus on charging and plea bargaining decisions.³⁰ But on occasions when new evidence casts doubt on a convicted defendant's guilt, questions of prosecutorial discretion take on comparatively greater importance. When there is an inadequate factual basis for criminal charges, a criminal trial will often (though not invariably) act as a corrective.³¹ In contrast, the legal process holds out little hope for wrongfully convicted defendants, especially in the absence of help from prosecutors. Commentators have written about psychological reasons why prosecutors might be unduly skeptical of post-conviction challenges,³² have identified institutional

²⁷ *Id.* at R. 3.8(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."). For a discussion of R. 3.8(g) & (h) and the adoption process, see Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS (forthcoming 2009).

²⁸ See CRIM. JUST. SEC., AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES (2008), available at http://www.abanet.org/leadership/2008/midyear/sum_of_rec_docs/hundredfiveb_105B_FINAL.doc (accompanying proposed A.B.A. Model Rule 3.8(g) & (h)); "The Rule and Comments are designed to provide clear guidance to prosecutors concerning their minimum disciplinary responsibilities, with the expectation that, as ministers of justice, prosecutors routinely will and should go beyond the disciplinary minimum. In many instances, a prosecutor will receive information about a defendant that does not trigger the rule's disclosure obligation and will be called upon to decide whether that information is nevertheless sufficient to require some investigation."; see also A.B.A. MODEL RULES, Scope 16 ("The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.").

²⁹ See *id.* at R. 3.8, cmt. 9 ("A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.").

³⁰ See, e.g., Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471 (1993) (discussing the exercise of discretion in plea bargaining); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259 (2001) (discussing discretion in the plea bargaining and charging stages); Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. SUPP. 643 (2002) (discussing discretion in the charging stage).

³¹ See Keith Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893 (2008) (describing procedural and evidentiary rules and forensic science issues that place innocent defendants at a disadvantage in the criminal justice process); George C. Thomas III et al., *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 272-73 (2003) (arguing that the trial process cannot weed out all innocent defendants because weak cases are the ones most likely to be tried, the trial process cannot protect against incompetent defense lawyering and the prevalence of plea bargaining means that most defendants do not receive the benefit of the final screening process of a trial).

³² See Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. & LIBERTY 512 (2007) [hereinafter Burke, *Invitation to Prosecutors*] (discussing strategies that

impediments to a fair response,³³ and have proposed structural reform.³⁴ But comparatively little attention has been given to the fundamental question of what we affirmatively expect prosecutors to do when new evidence comes their way suggesting that a convicted person may be innocent.³⁵ This article explores that question.

might help prosecutors overcome cognitive biases in discretionary matters); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006) [hereinafter Burke, *Cognitive Science*] (stating that four cognitive biases affect prosecutor's decision-making: confirmation bias, selective information processing, belief perseverance and the avoidance of cognitive dissonance); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006) (discussing individual and institutional sources and effects of tunnel vision and suggesting systemic remedies); Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847 (2002) (examining Canadian and British materials showing that tunnel vision of prosecutors and the use of informant testimony contribute to wrongful convictions); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 138–48 (2004) [hereinafter Medwed, *Zeal Deal*] (outlining various reasons why prosecutors oppose post-conviction claims of innocence: prosecutors come to value convictions as a sign of self-worth and have trouble questioning this self-affirmance, prosecutors may feel that being hard-nosed serves the public good, often the prosecutor does not receive the defendant's evidence at the charging stage, prosecutors become personally committed to the conviction and have trouble grappling with the possibility that the wrong man is behind bars, in many offices there is a culture of winning cases, prosecutors are unwillingness to have victims revisit an allegedly decided case); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35 (2009) [hereinafter Medwed, *Preaching*] (arguing for a minister of justice model to overcome individual and institutional incentives to uphold the trial result).

³³ See Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 352 (2001) ("Because of political or institutional constraints, . . . prosecutors may be fearful of offending police, victims, or superiors by appearing to be too defense-minded."); Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 CAL. W. L. REV. 389, 409 (2002) (stating that prosecutor's offices often feel public pressure not to look soft on crime).

³⁴ See Tim Bakken, *Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System*, 41 U. MICH. J. L. REFORM 547 (2008) (proposing the option of a more inquisitorial process); Goldberg & Siegel, *supra* note 33, at 410–12 (proposing that prosecutors should seek the most accurate testing and fully disclose exculpatory evidence, but should take account of the need for finality); D. Michael Risinger, *Unsafe Verdicts: The Need for Reformed Standards for the Trial and Review of Factual Innocence Claims*, 41 HOUS. L. REV. 1281 (2004) (proposing different evidentiary standards for innocence claims and adoption of a standard of review similar to Britain's "unsafe verdict" standard); Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 230–38 (2005) (proposing changes in the structure of the prosecutor's office, legislation and the ethics codes); Medwed, *Preaching*, *supra* note 32 (proposing post-conviction units on a minister of justice model within prosecutors' offices).

³⁵ Among the most significant prior writings addressing prosecutorial discretion in the post-conviction stage are those by Daniel Medwed and Fred Zacharias. See Medwed, *Zeal Deal*, *supra* note 32 (exploring the influence of the prosecutors' office and political pressures in causing prosecutors to oppose post-conviction claims of innocence); Medwed, *Preaching*, *supra* note 32 (exploring prosecutorial attitudes post-conviction); Zacharias, *supra* note 34 (discussing how

II. BACKGROUND

A. Refining the Question

In asking how prosecutors should respond when new evidence or information casts doubt on the factual guilt of a convicted defendant, it is important to distinguish and put to the side situations in which the prosecutor learns of a possible procedural defect that casts doubt on the fairness of the adjudication, such as when the prosecutor discovers that exculpatory material was arguably withheld in violation of *Brady v. Maryland*³⁶ or that the trial jurors may have improperly considered extra-record evidence.³⁷ Although there are many roadblocks to challenging convictions on any ground, legal error is much easier to challenge on appeal or in post-conviction hearings.³⁸ Understandably, great weight is put on guilty verdicts when they are the outcome of knowing and voluntary guilty pleas³⁹ or procedurally fair trials.⁴⁰ Courts may overturn jury verdicts in the rare cases in which no reasonable jury could have found guilt beyond a reasonable doubt,⁴¹ but courts may not otherwise substitute their evaluation of the strength of the evidence

prosecutors are implicated in post-conviction claims of innocence, and the legal and ethical considerations surrounding their actions).

³⁶ 373 U.S. 83 (1963) (a prosecutor's failure to disclose exculpatory, material evidence is a violation of due process if it occurs before or during trial).

³⁷ See, e.g., *Drew v. Collins*, 964 F.2d 411, 414 (5th Cir. 1992) (jury misconduct for considering parole law during sentencing deliberations); *United States v. Weiss*, 752 F.2d 777, 783 (2d Cir. 1985) (consideration of extra-record evidence may amount to juror misconduct).

³⁸ See, e.g., *Thomas III et al.*, *supra* note 31, at 277–81 (discussing how state courts have been forced to craft exceptions so that claims of innocence not based on legal error can be heard as well as how state laws have barred courts from hearing such claims altogether); *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (“Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”).

³⁹ *Thomas III et al.*, *supra* note 31, at 277 (suggesting that cases involving guilty pleas by the defendant are generally least deserving of post-conviction claims of innocence).

⁴⁰ Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 293 (2003) (citing a series of simulated trials done by researchers, where it was found that “[i]n these simulated trials, people are more accepting of verdicts that resulted from fair trial procedures, independent of the favorableness or fairness of those verdicts”); *Rose v. Clark*, 478 U.S. 570, 579 (1986) (“[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed. As we have repeatedly stated, ‘the Constitution entitles a criminal defendant to a fair trial, not a perfect one.’”) (citations omitted).

⁴¹ *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (“[I]f the settled procedural prerequisites for such a claim have otherwise been satisfied[,] . . . the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.”).

for that of a jury.⁴² Thus, in the interest of finality, it is made exceedingly difficult for a defendant to obtain relief based on the discovery of new evidence, absent procedural error of some kind.⁴³

This presents a central philosophical question for prosecutors. Prosecutors have a tradition, not uniformly honored, of “confessing” or correcting error when they learn that discovery material was wrongly withheld or other procedural violations occurred,⁴⁴ but there is no established tradition guiding prosecutors’ response to newly discovered, exculpatory evidence.⁴⁵ Prosecutors may approach claims of innocence with great skepticism and resist them strenuously on the theory that the principles of finality underlying the legal impediments to post-conviction relief should similarly influence prosecutors’ own attitude toward post-trial innocence claims.⁴⁶ Doing so would discourage unworthy post-conviction claims and minimize incentives for criminal defendants or their compatriots to manufacture false exculpatory evidence or to intimidate trial witnesses to secure recantations.⁴⁷ Opposing post-conviction innocence claims would also conserve

⁴² See, e.g., *Schlup v. Delo*, 513 U.S. 298, 329 (1995) (“It is not the district court’s independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do.”).

⁴³ See *Thomas III et al.*, *supra* note 31, at 277–88 (discussing federal and state time limitations on claims of innocence imposed primarily in the interest of finality).

⁴⁴ See *Napue v. Illinois*, 360 U.S. 264, 269–70 (1959) (failure of prosecutor to correct false statement of witness that he did not receive anything in exchange for his testimony was a violation of defendant’s due process right); *United States v. Alli*, 344 F.3d 1002, 1007 (9th Cir. 2003) (prosecutor must take steps to correct known false statements even if the defense counsel knew them to be false and tried to expose this fact to the jury); *Northern Mariana Islands v. Bowie*, 243 F.3d 1109 (9th Cir. 2001) (prosecutor’s duty requires him to act when put on notice of the “real possibility of false testimony”) (citing *Napue*, 360 U.S. at 269–70, 79).

⁴⁵ See *Goldberg & Siegel*, *supra* note 33, at 406–09 (“Although innocence-based claims for postconviction testing appear to implicate [action by a prosecutor], such claims do not readily implicate existing legal obligations, either for disclosure by prosecutors or access to evidence by defendants.”).

⁴⁶ See *Seth F. Kreimer & David Rudovsky*, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 563 (2002) (questioning the overemphasis prosecutors place on finality); *Zacharias*, *supra* note 34, at 175, 212–13 (stating that a prosecutor’s propensity for a certain post-conviction standard may be influenced by principles of finality); *Tafero v. State*, 406 So. 2d 89, 94 n.11 (Fla. Dist. Ct. App. 1981) (“[T]he fact that the state agrees that a conviction should be set aside because of newly discovered evidence neither prevents the entry of the original judgment nor fosters the rule of finality.”).

⁴⁷ See *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996) (reviewing prosecutors’ opposition to post-conviction DNA testing ordered in a federal habeas case because “granting the motion ‘would open the flood gates for DNA testing’”); *Myrna S. Raeder*, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 *FORDHAM L. REV.* 1413, 1419–20 (2007) (Prisoners become informants not only when requested to but by alleging that they have information on anyone that might be of value.); *Zacharias*, *supra* note 34, at 215–16 (arguing that prosecutors may resist claims of innocence to avoid opening the floodgates to constant requests from defendants); *Brooke A. Masters*, *2 Conservative Jurists Back DNA Testing*, *WASH. POST*, Mar. 29, 2002, at A7 (“Joshua Marquis, an Oregon

police, prosecutorial and judicial resources,⁴⁸ minimize the burden on witnesses and victims,⁴⁹ and potentially discourage public second-guessing and promote public confidence in the reliability of the criminal process.⁵⁰ Alternatively, prosecutors may take the view that, given the proven fallibility of the criminal process and the public aversion to wrongful punishment, they should play a vigorous role in uprooting and correcting factual error.⁵¹ Doing so might be thought to counterbalance and legitimize legal impediments to post-conviction relief for factually innocent defendants.

Of course, there is not always a clear distinction between claims of innocence and claims of legally cognizable procedural error. New information may suggest both that the defendant is factually innocent and that the proceeding was legally defective. For example, evidence that a jailhouse informant testified falsely will be exculpatory, but it may also provide a legal ground for challenging the

prosecutor and board member of the National District Attorneys Association, warned that inmates would abuse a blanket rule on DNA testing.”); Richard A. Oppel Jr., *States Move Toward Easing Obstacles to DNA Testing*, N.Y. TIMES, June 10, 2000, at A8 (statement of Richard E. Trodden, president of the Virginia Association of Commonwealth Attorney that prosecutors would want any law on post-conviction DNA requests to be written “as narrowly as possible, so we just don’t open the floodgates.”).

⁴⁸ See *Jenner v. Dooley*, 590 N.W.2d 463, 471 (S.D. 1999) (DNA testing should be granted where it would not impose an unreasonable burden on the state); Medwed, *Zeal Deal*, *supra* note 32, at 157–58 (prosecutors may oppose post-conviction innocence claims because if the wrongfully convicted defendant is exonerated, the state may be required to compensate him or her and inadvertently draw from the prosecutor’s funds in doing so); Thomas III et al., *supra* note 31, at 295–99 (detailing efficiency calculations based on a standard used by Judge Richard Posner).

⁴⁹ Goldberg & Siegel, *supra* note 33, at 409 (“[V]ictims of violent crime seek finality as a way of promoting closure. A defendant’s postconviction request for scientific tests threatens to undermine [this] finality, which adds to the resistance to such testing.”); David Meier, *The Prosecution’s Perspective on Post-Conviction Relief in Light of DNA Technology and Newly Discovered Evidence*, 35 NEW ENG. L. REV. 657, 659–60 (2001) (discussing the hardship of going to the victim’s family after they thought justice was done and telling them that the wrong man may have been convicted).

⁵⁰ See Kreimer & Rudovsky, *supra* note 46, at 563 (“[T]o the extent that DNA exonerations reveal systemic flaws in the criminal justice system . . . some prosecutors may believe that exonerations undermine the credibility of the system.”); Zacharias, *supra* note 34, at 227 (stating that prosecutors may believe that post-conviction claims may undermine public confidence in the prosecutor’s office, hamper public cooperation and impact relationships with law enforcement investigations); Ellen Yaroshfsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275, 299 (2004) (“Wrongful conviction cases have decreased public confidence in the integrity of the criminal justice system, and, to the extent that police and prosecutors are responsible for wrongful convictions, in those government offices.”).

⁵¹ Jodi Wilgoren, *Prosecutors Use DNA Test to Clear Man in ‘85 Rape*, N.Y. TIMES, Nov. 14, 2002, at A22 (Susan Gaertner, the chief prosecutor in St. Paul where a man was cleared through DNA testing, explained that “[t]he major reason we undertook this review is because of the attack on prosecutors and the criminal justice system lately[.] . . . I’m afraid that it’s left an impression with the public that all we care about is convictions, and not justice.”).

conviction.⁵² Likewise, the discovery of a credible alibi witness who could easily have been located by the defense lawyer will suggest the possibility that the conviction was factually erroneous and that the defendant was deprived of effective assistance of counsel.⁵³ But the discovery of new exculpatory evidence does not invariably imply that the trial was procedurally defective. For example, the defendant may be convicted based on the testimony of eyewitnesses who are certain of their identifications but nevertheless wrong.⁵⁴ In this example, the innocent defendant would have no valid post-conviction claim that the trial was unfair, but new evidence may nevertheless establish that he did not commit the crime in question.

Doubts about a convicted defendant's guilt may arise in any number of ways. The public has now grown accustomed to doubts raised by the results of DNA tests of evidence from old cases. In some rape cases, for example, DNA testing may establish with a high degree of certainty that the defendant was innocent because it is agreed that there was only one assailant and the test shows that he was not the defendant.⁵⁵ In other cases, DNA testing may raise questions about the defendant's guilt but not be conclusive.⁵⁶ Prosecutors generally accept the

⁵² See Raeder, *supra* note 47, at 1413–14 (“In these due process claims [involving jailhouse informants], defendants generally allege that the prosecutors knowingly introduced false or perjurious testimony, did not correct the testimony when its falsity was discovered, or failed to disclose exculpatory *Brady* material that would have contradicted the mendacious witness.”).

⁵³ *Glover v. Miro*, 262 F.3d 268, 278–79 (4th Cir. 2001) (ineffective assistance because counsel failed to contact potential alibi witnesses); *Griffin v. Warden, Md. Corr. Adjustment Ctr.*, 970 F.2d 1355, 1358 (4th Cir. 1992) (counsel's failure to call alibi witnesses was ineffective assistance because counsel's reliance on plea bargain was not rational).

⁵⁴ False certainty is a well-documented problem. See, e.g., *People v. Anderson*, 205 N.W.2d 461, 483 (Mich. 1973) (The defendant spent 375 days in prison for another man's crime. Dimples Anderson, the victim, gave mistaken eyewitness testimony convicting the defendant. The defense attorney asked Anderson, “It's possible that you could have made a mistake today?” To which he replied, “No.”); Noah Clements, *Flipping a Coin: A Solution for the Inherent Unreliability of Eyewitness Identification Testimony*, 40 IND. L. REV. 271 (2007) (stating that most studies show that mistaken identification is the leading cause of unjust convictions in the United States); Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1489–90 (2008) (reviewing overwhelming scientific evidence of faulty eyewitness identifications); Gary L. Wells, *Eyewitness Identification: Systemic Reforms*, 2006 WIS. L. REV. 615, 620 (2006) (discussing witness certainty and faulty eyewitness identification procedures).

⁵⁵ See Cynthia Bryant, *When One Man's DNA is Another Man's Exonerating Evidence: Compelling Consensual Sexual Partners of Rape Victims to Provide DNA Samples to Postconviction Petitioners*, 33 COLUM. J.L. & SOC. PROBS. 113, 119–21 (2000) (stating that tests that exclude a suspect are generally not controversial); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (examining causes of wrongful convictions in empirical study of DNA based exonerations); see generally Benjamin N. Cardozo School of Law, Innocence Project, *The Causes of Wrongful Conviction*, <http://www.innocenceproject.org/understand/> (last visited Jan. 20, 2009).

⁵⁶ See Bryant, *supra* note 55, at 117–22 (the weight of testing that is inclusive of a suspect is often contested, i.e. when the sample from the crime scene is consistent with the sample from the defendant); see also Anna Franceschelli, *Motions for Postconviction DNA Testing: Determining the*

reliability of the test results, but they do not necessarily agree on the significance of the results.⁵⁷

Many other kinds of new information may also raise doubts about the reliability of convictions, even though prosecutors are unlikely to accord the information as much respect as DNA test results.⁵⁸ Prosecution witnesses recant.⁵⁹ New eyewitnesses or informants come forward who exonerate the defendant and implicate someone else.⁶⁰ New scientific understandings cast doubt on the credibility of forensic evidence used at trial⁶¹—e.g., new questions have been raised about the reliability of bite mark evidence⁶² and lead bullet analysis.⁶³ New

Standard of Proof Necessary in Granting Requests, 31 CAP. U. L. REV. 243, 264 (2003) (inconclusive results might be of no legal significance).

⁵⁷ See Adam Liptak, *Prosecutors Fight DNA Use for Exoneration*, N.Y. TIMES, Aug. 29, 2003, at A1 (“Prosecutors acknowledge that DNA testing is reliable, but they have grown increasingly skeptical of its power to prove innocence in cases where there was other evidence of guilt.”); see also Franceschelli, *supra* note 56, at 263–64 (The significance of inclusive results might be contested depending on the defendant’s contention on appeal, it may be the case where the theory is not that the defendant’s DNA should be missing, but rather that the crime was not committed. Further, the significance of exclusive results might be contested if the prosecution adopts a theory that while the defendant may not have left DNA on a victim, he was nevertheless a participant in the crime.).

⁵⁸ See Medwed, *Zeal Deal*, *supra* note 32, at 131–32 (“Notably, non-DNA cases are much harder for defendants to overturn through post-conviction proceedings because of the absence of a method to prove innocence to a scientific certainty.”).

⁵⁹ See, e.g., Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. THIRD WORLD L.J. 75 (2008) (citing cases of recanting witnesses and arguing that witness recantations should be supported by corroborating witness in claims of innocence); see also Northwestern Univ. Sch. of Law, Center on Wrongful Convictions, Meet the Exonerated, <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/alMcMillianSummary.html> (last visited Jan. 20, 2009) (Walter McMillian was sentenced to death for the murder of a store clerk but was later exonerated when three witnesses came forward to say that they had lied at trial.) and Northwestern Univ. Sch. of Law, *supra* at <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/flJentSummary.html> (last visited Jan. 20, 2009) (William Jent & Ernest Miller were convicted of rape and murder, only to be exonerated when a witness testified that he had been coerced by a local sheriff to give false testimony.).

⁶⁰ See, e.g., Northwestern Univ. Sch. of Law, *supra* note 59, at <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/caBigelowSummary.html> (Jerry Bigelow was convicted of murder, robbery and kidnapping due to the testimony of a companion, but witnesses later came forward to say that the companion had confessed to them that he was the one who committed the crimes.) (last visited Jan. 20, 2009).

⁶¹ Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 CAL. L. REV. 721, 724 (2007) (“In recent years, empirical studies and select trial courts have called into question the legitimacy of evidentiary stalwarts like handwriting, voice exemplars, hair and fiber, bite and tool marks, and even fingerprints.”).

⁶² Paul C. Giannelli & Kevin C. McMunigal, *Prosecutors, Ethics, and Expert Witnesses*, 76 FORDHAM L. REV. 1493, 1501–06 (2007) (describing the erroneous bite-mark testimony given by Dr. Michael West); Allen P. Wilkinson & Ronald M. Gerugthy, *Bite Mark Evidence: Its Admissibility Is*

information casts doubt on the reliability of particular testimony or evidence at the defendant's trial. For example, evidence that a jailhouse informant,⁶⁴ accomplice witness,⁶⁵ police officer⁶⁶ or expert witness⁶⁷ lied in a different case may raise questions about whether the same witness was truthful in the defendant's case. A new forensic technique may suggest that previously untested crime-scene evidence is exculpatory.⁶⁸

These situations raise the question of how the prosecutor should respond upon learning of evidence or information that casts doubt on a conviction's reliability—or even whether prosecutors should pro-actively make some efforts to learn about such information, rather than simply reacting to its arrival.⁶⁹ When should

Hard to Swallow, 12 W. ST. U. L. REV. 519, 537 (1985) (questioning the reliability of bite mark analysis).

⁶³ William A. Tobin & Wayne Duerfeldt, *How Probative Is Comparative Bullet Lead Analysis?*, CRIM. JUST., Fall 2002, at 26, 33 (“We believe that the current practice of CBLA is scientifically flawed, and that no scientifically or statistically adequate data exist to support its foundation.”).

⁶⁴ See Paul C. Giannelli, *Brady and Jailhouse Snitches*, 57 CASE W. RES. L. REV. 593, 596–97 (2007) (A prisoner, Leslie Vernon White, admitted to fabricating a great number of alleged confessions and having engaged in multiple acts of perjury. A grand jury investigating Mr. White's testimony found that the District Attorney's Office “failed to fulfill the ethical responsibilities required of a public prosecutor by its deliberate and informed declination to take the action necessary to curtail the misuse of jail house informant testimony.”).

⁶⁵ Christine J. Saverda, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 YALE L.J. 785 (1990) (arguing for reform of accomplice testimony by requiring corroboration).

⁶⁶ Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1046–47 (1996) (referencing a study done by Myron Orfield in Chicago finding that “52% [of the prosecutors, judges and police officers surveyed] believed that at least ‘half of the time’ the prosecutor ‘knows or has reason to know’ that police fabricate evidence at suppression hearings, and 93%, including 89% of the prosecutors, stated that prosecutors had such knowledge of perjury ‘at least some of the time.’ Sixty-one percent, including 50% of the state's attorneys, believed that prosecutors know or have reason to know that police fabricate evidence in case reports, and 50% of the prosecutors believed the same with respect to warrants . . .”).

⁶⁷ See, e.g., Raeder, *supra* note 47, at 1421 (describing the story of Joyce Gilchrist, a forensic chemist, whose multiple incorrect hair analyses was discovered through later DNA testing. It later surfaced that Gilchrist had knowingly lied while testifying.); Giannelli & McMunigal, *supra* note 62 (citing numerous cases of false expert testimony).

⁶⁸ See Murphy, *supra* note 61, at 723 (“But currently on the horizon are a new generation of forensic sciences capable of uncovering and inculping criminal offenders at an order of magnitude greater than that afforded by traditional forensic techniques. This array of exciting new methods—such as DNA typing, data mining, location tracking, and biometric technologies—represents a marked advance over the rudimentary techniques of old, and will surely stake a central and indispensable role in the future administration of criminal justice.”); Findley, *supra* note 31 (arguing that adversarial adjudication of forensic science places defendants at risk of wrongful convictions and disproportionately favor the prosecution over the defendant and calling for institutionalized oversight by scientists).

⁶⁹ Some prosecutors' offices proactively initiate reviews of cases where DNA is available. See Medwed, *Zeal Deal*, *supra* note 32, at 126 nn.3–4; Susan Gaertner, *Driving Home Prosecutors'*

prosecutors disclose their information to the defendant, defense counsel (if the defendant is represented), the court, or other law enforcement authorities? To what extent, and in what manner, should prosecutors investigate or ask others to investigate? Is it sufficient simply to assess the credibility of the new evidence or must the original trial evidence be reexamined? When, and in what manner, should prosecutors seek to secure the release of convicted defendants in light of credible new evidence of innocence, and when, and by what means, should prosecutors oppose defendants' efforts to overturn their convictions or secure clemency?

These situations also raise the question of how prosecutors' offices in general should be structured to address the problem of factually erroneous convictions. Should prosecutors assign investigative responsibility to the original trial prosecutor (if he or she is available), on the theory that the trial prosecutor best knows the trial evidence and the investigation that produced it and will therefore be best equipped to evaluate the credibility of the new information in the context of the overall evidence? That is evidently what the district attorney's office initially did in the Palladium case.⁷⁰ Or, as later occurred in that case, should the office assign a new prosecutor who was uninvolved in the original trial to make a fresh and unbiased review more likely?⁷¹ Indeed, should district attorneys create special units staffed by such lawyers⁷² or advocate for the legislature or the judiciary to create independent commissions? To what extent should thoughts on these questions be informed by the experience in other countries and what does that experience teach us?⁷³ To what extent should the thinking be informed by social science literature on cognitive bias?⁷⁴

Commitment to Justice, A.B.A. CRIM. JUST. SEC. NEWSL., Spring 2008, at 6 (Minnesota prosecutor initiates systemic DNA review).

⁷⁰ *Dateline NBC: In the Shadow of Justice*, *supra* note 2 (chronicling Bronx detectives' frustration at the district attorney's office's initial apparent indifference into their investigation into whether Lemus and Hidalgo were wrongly convicted of the Palladium murder).

⁷¹ *See Weiser*, *supra* note 1 ("Over 21 months, starting in 2003, [Daniel Bibb] and two detectives conducted more than 50 interviews in more than a dozen states, ferreting out witnesses the police had somehow missed or ignored.").

⁷² *See Moreno*, *infra* note 76 and accompanying text; Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 437 (2007) (In North Carolina, "[a] new law created a supplementary North Carolina Innocence Inquiry Commission, with an eight-member panel that reviews criminal post-conviction cases raising indicia of innocence.").

⁷³ *See, e.g.,* Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1268-70 (2001) (In England, "[i]f leave to appeal is granted, the standard for reversal on appeal is whether the court of appeal believes the conviction is 'unsafe.' An 'unsafe' conviction is one in which the court entertains a 'lurking doubt' that the defendant was rightly convicted, i.e., one in which the court is not 'sure' that the defendant was 'rightly convicted.'" Further, the court may grant requests considering newly discovered evidence when the court "'think[s] it necessary or expedient in the interests of justice' to do so."); *id.* at 1276 (In Canada, the Criminal Cases Review Commission "review[s] the applications of convicted defendants who claim they have been wrongfully convicted and . . . refer[s] cases to the court of

It is virtually impossible to know how federal and state prosecutors across the United States currently deal with these questions. Certainly, there have been many reported cases in which prosecutors learned of new evidence, investigated or failed to investigate, and made or opposed efforts to secure the defendant's release.⁷⁵ At least one prosecutor, Dallas district attorney Craig Watkins, has established a unit to reexamine cases in which wrongful convictions may have been obtained before he took office.⁷⁶ But because prosecutors' internal processes are not transparent, very little is known about the internal deliberations and rationales for what prosecutors have done.⁷⁷ After the Palladium case, for example, neither the former senior prosecutor nor his former office would publicly disclose the details of the office's internal deliberations.⁷⁸

How prosecutors respond is not entirely a matter of discretion. There is authority suggesting that, as an ethical or constitutional matter, prosecutors sometimes have a post-conviction obligation to disclose new exculpatory evidence. For example, the United States Supreme Court stated in *Imbler v. Pachtman*⁷⁹ that prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."⁸⁰ Additionally, the ABA recently adopted Rules 3.8(g) and (h) of the Model Rules of Professional Conduct, which, if eventually adopted by state courts, would constrain prosecutors' discretion. In essence, Rule 3.8(g) requires prosecutors to disclose and investigate new exculpatory evidence when it is material and credible,⁸¹ while Rule 3.8(h) requires them to try to overturn or otherwise rectify the conviction when they know of "clear and convincing" evidence that the defendant was in fact innocent.⁸² These provisions are meant to establish the disciplinary minimum, not to fully elaborate the

appeal for review where there is a 'real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made.'").

⁷⁴ See sources cited *supra* note 32.

⁷⁵ See Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 638 (1999) (In the case of Jeffrey Blake, after conviction an original witness recanted, and a new witness came forward in support of Blake, but his motion for a new trial was still opposed by prosecutors at first; however the office later joined in the motion.); *Houston v. Partee*, 978 F.2d 362, 364 (7th Cir. 1992) (prosecutors opposed motions of wrongly convicted plaintiffs after substantial exculpatory evidence surfaced); Boemer, *supra* note 22, at 1987 ("Moreover, it's not only the courts that can procedurally bar a defendant's right to post-conviction DNA testing, but prosecutors as well.").

⁷⁶ Sylvia Moreno, *New Prosecutor Revisits Justice in Dallas*, WASH. POST, Mar. 5, 2007, at A4; see *infra* text accompanying notes 168–77.

⁷⁷ See *supra* notes 20 & 25 and accompanying text.

⁷⁸ See *supra* notes 5–7 and accompanying text.

⁷⁹ 424 U.S. 409 (1976).

⁸⁰ *Id.* at 427 n.25.

⁸¹ See *supra* note 26.

⁸² See *supra* note 27.

professional expectations for prosecutors.⁸³ They do not prescribe how to respond when the credibility of new evidence has yet to be evaluated. They leave prosecutors substantial discretion to decide how to investigate new evidence.⁸⁴ And they do not prescribe how to act when, at the end of an investigation, serious doubts have been raised, but the defendant's innocence has not been clearly and convincingly established. At present, prosecutors cannot find much additional guidance in other sources such as the ABA Standards of Criminal Justice⁸⁵ or the National District Attorneys' Association standards.⁸⁶

B. *Legal and Procedural Background*

It is important to take account of the legal and procedural background against which prosecutors act when they make discretionary decisions in response to new post-conviction evidence of innocence. What is most striking is the contrast pre-conviction and post-conviction in the law's attitude toward the risk of erroneous convictions.⁸⁷ At trial, the prosecution has the burden of proving guilt beyond a reasonable doubt, and the defendant's rights to counsel, trial by jury, compulsory process, and cross-examination, among others, are similarly intended to minimize the risk that an innocent defendant will be punished.⁸⁸ In contrast, once a defendant is convicted after a fair trial, there is a strong presumption of the defendant's factual guilt, which may be impossible to overcome through the judicial process,⁸⁹ despite our knowledge that trials are fallible.⁹⁰

⁸³ See *supra* note 28.

⁸⁴ See *supra* note 29.

⁸⁵ A.B.A. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-8.5 (3d ed. 1993) [hereinafter A.B.A. STANDARDS FOR CRIMINAL JUSTICE] (“[T]he responsibility of a lawyer in a post-conviction proceeding should be guided generally by the standards governing the conduct of lawyers in criminal cases.”).

⁸⁶ See NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS §§ 87–91 (2d ed. 1991) available at http://www.ndaa.org/pdf/ndaa_natl_prosecution_standards_2.pdf (containing no discussion of post-conviction claims).

⁸⁷ See Goldberg & Siegel, *supra* note 33, at 410 (“The postconviction phase of a criminal case presents an effective role-reversal for the respective parties. The presumptions and burdens are the reverse of those in the investigative and trial phases of a case . . .”).

⁸⁸ See *Rose v. Clark*, 478 U.S. 570, 577–78 (1986) (“Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.”). *But see* Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95 (1996) (proposing that jury trials hide the truth more than they discover it); Findley, *Innocents at Risk*, *supra* note 31 (arguing that procedural and evidentiary rules skew the system toward substantial risk of error of convicting the innocent).

⁸⁹ See *Herrera v. Collins*, 506 U.S. 390, 399 (1993) (“Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears.”); *see also* Goldberg & Siegel, *supra* note 33, at 410 (“In the postconviction context . . . [t]he defendant bears the burden of proof, and all presumptions favor the government.”); Zacharias, *supra* note 34, at 210 (“Once a defendant has been tried and has exhausted his appeals, the criminal

Some may find it surprising, but there is no federal constitutional right to be released from incarceration based on factual innocence standing alone. In *Herrera v. Collins*,⁹¹ the Supreme Court recognized that the traditional remedy for miscarriages of justice is executive clemency, not judicial redress.⁹² Courts have no inherent ability to free the innocent. In many states and federally, absent procedural error,⁹³ clemency is the exclusive remedy when newly discovered evidence establishes the convicted defendant's innocence.⁹⁴ In these jurisdictions, rectifying convictions of innocent individuals is a purely executive function with ultimate authority vested in the Governor (or, in federal cases, the President).⁹⁵ Even if a convicted defendant could convince the court of his innocence beyond all doubt, and the prosecutor agreed, the court's hands would be legally tied (absent recourse to subterfuge).⁹⁶

justice system is prepared to assume both that the defendant received fair process and that the process resulted in an accurate judgment.”).

⁹⁰ Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 175–76 (2008) (discussing DNA exonerations in the past 30 years); see sources cited *supra* note 55.

⁹¹ 506 U.S. 390 (1993).

⁹² *Id.* at 416–17. The Supreme Court stated:

Federal habeas review of state convictions has traditionally been limited to claims of constitutional violations occurring in the course of the underlying state criminal proceedings. Our federal habeas cases have treated claims of ‘actual innocence,’ not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits, even though his habeas petition would otherwise be regarded as successive or abusive. History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency.

Id.

⁹³ See, e.g., *Moeller v. Weber*, 689 N.W.2d 1, 7 (S.D. 2004) (noting that “newly discovered evidence is not a sufficient ground for habeas relief where no deprivation of a constitutionally protected right is involved”); *Bruce v. Smith*, 553 S.E.2d 808 (Ga. 2001) (indicating that their state habeas corpus statute provides relief only for a substantial denial of constitutional right under the U.S. Constitution or the Georgia Constitution).

⁹⁴ LARRY W. YACKLE, *POSTCONVICTION REMEDIES* § 7 (Thomson West 2008) (citing the availability of “remedies in thirty-five states, the District of Columbia, and Puerto Rico”); Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629 (2008) (discussing availability of state and federal judicial remedies for innocence claims); Margaret Colgate Love, *Reviving the Benign Prerogative of Pardoning*, LITIG., Winter 2006, at 25, 26 (“Pardons are granted on more than a token basis in only 13 states and are a realistically available remedy in only about half of those.”).

⁹⁵ The clemency power of the President stems from Article II, Section 2 of the United States Constitution. U.S. CONST. art. II, § 2, cl. 1 (“The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”). State clemency procedures come in a variety of forms. See, e.g., Rachel E. Barkow, Essay, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1350 (2008) (outlining that some states vest the authority solely in the governor, about two-thirds of states use an administrative board that provides the governor with advice or make decisions along with the governor, while five states vest the authority solely in a board).

⁹⁶ See Sara Rodriguez & Scott J. Atlas, *Habeas Corpus: The Dilemma of Actual Innocence*, LITIG., Winter 2008, at 35; see also *supra* text accompanying note 89.

Most states afford a judicial remedy of one kind or another⁹⁷ at least when exculpatory evidence is “newly discovered” and sufficiently reliable.⁹⁸ Several provide for judicial relief only when the convicted defendant is exonerated by DNA evidence,⁹⁹ but most make the remedy more broadly available. What must be proven varies. Some adjudications focus on whether new evidence would have raised a sufficiently serious doubt at trial.¹⁰⁰ In New York, for example, the convicted defendant must present newly discovered evidence “of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant”¹⁰¹ A judicial finding that the standard was met does not logically preclude a retrial. In other states, the defendant must show sufficiently compelling proof of innocence, in which event a retrial would presumably be foreclosed. In Texas, for example, “the applicant bears the burden of showing that the newly discovered evidence unquestionably establishes his or her innocence.”¹⁰² Elsewhere, the convicted defendant must

⁹⁷ See YACKLE, *supra* note 94, § 13 (giving an overview of the various state post-conviction procedures).

⁹⁸ *Townsend v. Sain*, 372 U.S. 293 (1963) (a federal hearing is required if there is a substantial allegation of newly discovered evidence that could not reasonably have been introduced in state court); *Schlup v. Delo*, 513 U.S. 298, 324 (1995) (“To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.”); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* 1612 (7th ed. 2004) (stating that in most jurisdictions, for a motion for a new trial to be considered, the newly discovered evidence must have been discovered after trial, could not have been discovered earlier with due diligence, is material and not merely cumulative or impeaching and would likely produce an acquittal).

⁹⁹ See DONALD E. WILKES, JR., *STATE POSTCONVICTION REMEDIES AND RELIEF HANDBOOK WITH FORMS* 7 (2008) (Ohio and Louisiana have legislated remedies when it comes to newly discovered evidence in felony cases but only when DNA tests administered under the state’s post-conviction review statute establishes innocence by a clear and convincing evidence standard.).

¹⁰⁰ See, e.g., *Downes v. State*, 771 A.2d 289, 291 (Del. 2001) (“[T]o be successful on a new trial application the defendant must establish . . . that the evidence is such as will probably change the result if a new trial is granted”); *Bean v. State*, 858 P.2d 327, 330 (Idaho Ct. App. 1993) (“[T]he proper test for determining a motion for new trial based upon recanted testimony ‘is not whether the recantation of testimony *probably would* produce an acquittal; it is whether the recantation *reasonably could* affect the outcome.’”) (citations omitted); *Taylor v. State*, 840 N.E.2d 324, 329–30 (Ind. 2006) (writing that “[n]ew evidence will mandate a new trial only when the defendant demonstrates that . . . it will probably produce a different result at retrial”) (citation omitted); *Reise v. State*, 913 A.2d 1052, 1056 (R.I. 2007) (“When conducting the analysis of an application for postconviction relief based on newly discovered evidence, . . . the applicant must establish that . . . the evidence is of a kind which would probably change the verdict at trial.”); *Clark v. State*, 434 S.E.2d 266, 267 (S.C. 1993) (“To obtain a new trial based on after discovered evidence, the party must show that the evidence . . . would probably change the result if a new trial is had”).

¹⁰¹ N.Y. CRIM. PROC. LAW § 440.10(1)(g) (McKinney 2005).

¹⁰² *Ex parte Thompson*, 153 S.W.3d 416, 417 (Tex. Crim. App. 2005) (citation omitted).

establish his innocence by clear and convincing evidence.¹⁰³ Even where a judicial remedy is otherwise afforded, time restrictions or other restrictions may make it unavailable to a particular defendant.¹⁰⁴

Executive clemency, although generally available,¹⁰⁵ is rarely granted.¹⁰⁶ Governors hesitate to second-guess the results of the criminal process.¹⁰⁷ There are many possible explanations. Governors may doubt their own ability to make a sufficiently reliable determination of innocence.¹⁰⁸ They may fear undermining

¹⁰³ See, e.g., ALASKA STAT. §12.72.020(b)(2)(D) (2008) (dictating that newly discovered evidence must “establish[] by clear and convincing evidence that the applicant is innocent”); D.C. CODE § 22-4135(g)(3) (2008) (dictating that if the movant shows his innocence “by clear and convincing evidence . . . the court shall vacate the conviction and dismiss the relevant count with prejudice”); 725 ILL. COMP. STAT. ANN. 5/122-1(a)(2) (West 2004) (In 2003 the State Legislature amended the Illinois Post-Conviction Hearing Act to authorize relief if “the death penalty was imposed and there is newly discovered evidence . . . that establishes a substantial basis to believe that the defendant is actually innocent by clear and convincing evidence.”).

¹⁰⁴ See FED. R. CRIM. P. 33 (three year time limit for motions based on newly discovered evidence). Most states dictate that a case will not be reviewed for executive clemency if appellate proceedings are not yet concluded and there are other avenues for the incarcerated defendant still available. See, e.g., *Hill v. Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993) (noting that “cases involving state competency and clemency proceedings . . . frequently are not commenced until state and federal postconviction relief have been denied and an execution date has been set.”); *In re Lindsey*, 875 F.2d 1502, 1507 (11th Cir. 1989) (allowing a clemency petition to proceed before the exhaustion of state court remedies would upset “the proper sequence, developed from concerns for federalism, for seeking collateral relief from state-court judgments in death-penalty cases”). See also Boemer, *supra* note 22, at 1980 (discussing the pitfalls to newly discovered evidence from time limits on the motion for such evidence); Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 413, 433, 437 (1999) (pointing to some states which have restrictions on types of offenses that are ineligible for pardons).

¹⁰⁵ See Elizabeth Rapaport, *Straight Is the Gate: Capital Clemency in the United States from Gregg to Atkins*, 33 N.M. L. REV. 349, 350 (2003) (“Although there are considerable variations in the clemency procedures of the states, the majority of states follow the federal model, vesting clemency power in the governor.”).

¹⁰⁶ See Barkow, *supra* note 95, at 1348 (“At both the state and federal level, grants of executive clemency have plummeted in recent decades.”); Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 717 (2005) (“[T]he executive clemency power—an oft-cited, purported panacea for the ills of wrongful convictions—is seldom exercised by government officials.”).

¹⁰⁷ See James D. Barnett, *The Grounds of Pardon*, 17 J. AM. INST. CRIM. L. & CRIMINOLOGY 490, 500 (1927) (As Governor Pierce of Oregon stated in the 1920s: “It is the function of the courts to pass upon a man’s guilt or innocence. It is not the function of the executive to again try the case before the convicted man has reached the penitentiary. . . . I do not propose to usurp the power of the courts by becoming a trial judge.”).

¹⁰⁸ See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 435 (1995) (Governors are reluctant to grant pardons because they may “feel that any sentence that survives both state and federal review is not an appropriate vehicle for exercising the power of clemency” because these processes are safeguards and affirmations of a correct conviction.).

public confidence in the criminal justice process.¹⁰⁹ Or they may fear that they will pardon a convict who will commit another crime upon release.¹¹⁰ Most obviously, political interests militate against granting pardons based on innocence, at least in the absence of countervailing media pressure.¹¹¹ Releasing convicted defendants is rarely a route to political popularity.

It is up to the executive to decide how persuasive the case of innocence must be to justify a pardon. New York State's Division of Parole website suggests that clemency is an option when "there is overwhelming and convincing proof of innocence not available at the time of conviction"¹¹² Similarly, Minnesota's guidelines hold that one should not even apply for executive clemency unless there is "some new information that the court did not consider or which makes your case unusual or extraordinary."¹¹³ These pronouncements are in no way binding on the state governors, but they do suggest the extent of the challenge facing a defendant seeking clemency based on actual innocence.

Prosecutors have a pivotal role with respect to motions to set aside convictions in states where judicial relief is available as well as with respect to executive clemency determinations.¹¹⁴ A court is more likely to grant relief if the prosecutor joins in a defendant's motion to set aside his conviction based on new

¹⁰⁹ See, e.g., Barkow, *supra* note 95, at 1354 n.101 (theorizing that executives face criticism for pardons because the "decision often amounts to second-guessing of a jury's verdict or a prosecutor's decision to seek a plea"); Yaroshefsky, *supra* note 50, at 299.

¹¹⁰ See Barkow, *supra* note 95, at 1349.

¹¹¹ See Medwed, *supra* note 106, at 717 ("Even when used, clemency may be aimed chiefly toward attaining political objectives, with any correction of injustice as a side effect."). See also MARTIN YANT, PRESUMED GUILTY: WHEN INNOCENT PEOPLE ARE WRONGLY CONVICTED 16–17 (1991) (noting that it took articles in the *Dallas Times Herald*, the *New York Times* and a *60 Minutes* segment before the Texas Governor took a good look at the case and eventually released Lenell Geter); Robert Hardaway, *Beyond a Conceivable Doubt: The Quest for a Fair and Constitutional Standard of Proof in Death Penalty Cases*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 221, 264 (2008) ("Of the clemencies granted in favor of a defendant in the past twenty years, many were granted by governors as they were leaving office."); Sam Howe Verhovek, *Gov. Bush Denies Pardon in Rape Case, Despite DNA*, N.Y. TIMES, Sept. 14, 1997, at 23 ("A lawyer for the convicted man has accused the Governor, a potential Presidential aspirant, of bending to concerns over the political fallout of pardoning a convicted rapist").

¹¹² New York State Division of Parole, Program & Resources: Restoration of Rights, Executive Clemency, <https://parole.state.ny.us/Clemency.asp> (last visited Jan. 20, 2009).

¹¹³ Criminal Justice Policy Foundation, Clemency Policy, Minnesota, <http://www.cjpf.org/clemency/Minnesota.html> (last visited Jan. 20, 2009).

¹¹⁴ After appeals are complete:

[T]he prosecutor may be the only participant in the criminal justice system in a position to rectify a wrong. Information suggesting or probative of a wrong often is in the prosecutor's exclusive possession. The prosecutor also may be the only person with the power to act, either because the requisite resources are subject to the prosecutor's domain or because statutes delegate the right to reopen matters to prosecutorial discretion.

Zacharias, *supra* note 34, at 175. See also Goldberg & Siegel, *supra* note 33, at 406–07 (discussing how prosecutors generally have in their possession many of the tools, and information, necessary for convicted innocents to obtain post-conviction relief).

evidence.¹¹⁵ Indeed, where such relief is unavailable based on factual innocence, a court might grant relief based on purported procedural error, thereby avoiding the need for executive clemency, if the defendant has a colorable claim of procedural error and a sympathetic prosecutor does not oppose the claim.¹¹⁶ Likewise, an executive would be most likely (although perhaps still unlikely) to issue a pardon if the prosecutor supports the application.¹¹⁷ Conversely, it would be exceedingly difficult to prevail over the prosecutor's opposition either in court or in the executive mansion.¹¹⁸

C. Institutional Approaches to Investigating and Evaluating Post-Conviction Evidence of Innocence

In the United States, the exercise of prosecutorial discretion to evaluate, investigate, and respond to new exculpatory evidence following a conviction is generally entrusted to the prosecutor's office in the jurisdiction in which the conviction was obtained. That raises the unavoidable problem of cognitive bias. There is a significant body of social science literature about how human judgment

¹¹⁵ See, e.g., Medwed, *Zeal Deal*, *supra* note 32, at 132 (“[T]he reaction of prosecutors to post-conviction innocence claims has had and will continue to have a great bearing on whether actually innocent prisoners receive justice.”); Zacharias, *supra* note 34, at 187 (noting the “persuasive effect” upon the judge of the prosecution’s consent to a motion for a new trial); Bob Herbert, *Justice*, at *Long Last*, N.Y. TIMES, Oct. 29, 1998, at A31 (discussing the case of Jeffrey Blake, a convicted man freed after Brooklyn District Attorney Charles Hynes joined in a motion to the Court to set aside the guilty verdict).

¹¹⁶ See Thomas III et al., *supra* note 31, at 277–81. For example, in *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984), the defendant filed a coram nobis motion in light of new evidence of prosecutorial misconduct that had come to light many years after his conviction had been upheld by the U.S. Supreme Court and he had served his probationary term. The government did not defend its prior conduct but asked the court instead to grant its own motion to dismiss the indictment. The court found the government’s motion to be untimely and granted the defendant’s motion after reviewing the relevant evidence and concluding that the government had misled the courts.

¹¹⁷ See STAFF OF HOUSE SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS, COMM. ON THE JUDICIARY, 103RD CONG., INNOCENCE AND THE DEATH PENALTY: ASSESSING THE DANGER OF MISTAKEN EXECUTIONS 18 (Oct. 21, 1993) available at <http://www.deathpenaltyinfo.org/article.php?%20scid=45&did=535> [hereinafter STAFF REPORT] (“In Nebraska, Nevada and Florida, the chief state prosecutor sits on the clemency review board.”). *But see* Verhovek, *supra* note 111 (noting that Governor Bush’s denial of a pardon was done over the support for the pardon by the district attorney and the Texas Board of Pardons and Paroles).

¹¹⁸ See, e.g., Henry Weinstein, *Prosecutor Makes Case Against Clemency*, L.A. TIMES, Feb. 7, 2006, at B3 (the reporter quotes the district attorney’s strong statements against granting clemency); Office of Governor Arnold Schwarzenegger, Press Release, Governor Schwarzenegger Denies Clemency to Convicted Murderer Michael Morales, Feb. 17, 2006, <http://gov.ca.gov/press-release/463/> (last visited Jan. 20, 2009) (detailing the governor’s rejection of this clemency request); U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEY’S MANUAL STANDARDS FOR CONSIDERATION OF CLEMENCY PETITIONS § 1-2.111 (2007), available at <http://www.usdoj.gov/pardon/petitions.htm>. (“The views of the United States Attorney are given considerable weight in determining what recommendations the Department should make to the President.”).

is skewed by psychological biases, such as “confirmation bias”¹¹⁹ and “hindsight bias.”¹²⁰ Cognitive biases account for what is popularly known as “tunnel vision,” the human tendency to evaluate evidence through the lens of one’s preexisting expectations and conclusions.¹²¹ Increasingly, scholars have written about the impact of these biases on prosecutorial and police decision making.¹²² Tunnel vision has had an obvious impact in the pretrial stage: having formed an initial judgment that a particular defendant is guilty of a crime, prosecutors and police will tend to discredit or discount the significance of new exculpatory evidence or fit it into their preexisting theory. This tendency has played a significant role in numerous wrongful conviction cases,¹²³ among the best known being the Central Park Jogger¹²⁴ and the Duke lacrosse cases.¹²⁵ Police often focus too quickly upon

¹¹⁹ This is the tendency to seek and interpret information in ways that support the person’s existing beliefs, expectations, and ideas. Findley & Scott, *supra* note 32, at 309–16 (citations omitted); Itiel Dror, *Biased Brains*, POLICE REV., June 6, 2008, at 20.

¹²⁰ Also called outcome bias, this is the tendency to interpret the outcome as a confirmation that the result was inevitable or certainly more predictable than one would initially think—i.e., the tendency to say “I knew it all along,” when one was actually unsure. Findley & Scott, *supra* note 32, at 319–22.

¹²¹ *Id.* at 307–09 (“Psychologists analyze tunnel vision as the product of various cognitive ‘biases,’ such as confirmation bias, hindsight bias, and outcome bias. These cognitive biases help explain how and why tunnel vision is so ubiquitous, even among well-meaning actors in the criminal justice system.”); Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 479 (2006) (discussing prosecutors and tunnel vision); Burke, *Cognitive Science*, *supra* note 32, at 1587, 1590–91; Medwed, *Preaching*, *supra* note 32; Michael Mello, *Certain Blood for Uncertain Reasons: A Love Letter to the Vermont Legislature on Not Reinstating Capital Punishment*, 32 VT. L. REV. 765 (2008) (discussing law enforcement tunnel vision as the cause of wrongful death penalty convictions); Donald J. Sorochnan, *Wrongful Convictions: Preventing Miscarriages of Justice: Some Case Studies*, 41 TEX. TECH. L. REV. 93, 103–07 (identifying tunnel vision as the leading cause of wrongful convictions).

¹²² See *supra* notes 32 & 34.

¹²³ For example, psychological bias has been blamed in most of the thirteen Illinois convictions studied by the state’s Commission on Capital Punishment where innocent people were sentenced to death before being exonerated. See GEORGE H. RYAN, REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT 20 (2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf. Likewise, the Innocence Commission for Virginia found that tunnel vision played a significant role in many of Virginia’s thirteen wrongful convictions, and the Canadian government made a similar finding in its official inquiries into causes of wrongful convictions. See Findley & Scott, *supra* note 32, at 293–95.

¹²⁴ After discovering an unconscious jogger who was the victim of a brutal assault and rape in the northern part of Central Park, the police focused upon boys whose behavior was suspicious because they had engaged in criminal behavior elsewhere in the park that night. After many hours of interrogation, the police obtained what were later learned to be false confessions. The boys were convicted and not exonerated until years later, when serial rapist/killer, Matias Reyes, who was arrested for a similar crime, came forward to claim responsibility for the Central Park Jogger assault, and subsequent DNA testing conclusively established his responsibility. Although an investigation by a senior prosecutor established the boys’ innocence to the satisfaction of the Manhattan District Attorney’s office, which supported the defendants’ motion to set aside their convictions, the police remained unconvinced. See MICHAEL F. ARMSTRONG ET AL., REPORT TO THE POLICE COMMISSIONER ON THE CENTRAL PARK JOGGER CASE 41 (2003), available at

a particular suspect to the exclusion of others, and prosecutors then do the same based on the police investigation.¹²⁶

If anything, these tendencies have an even greater impact following a conviction, given the psychological difficulty of acknowledging one's possible role in convicting an innocent person.¹²⁷ A prosecutor will tend to view a conviction as a confirmation that his initial charging decision was correct and will naturally discount new evidence of innocence.¹²⁸ These tendencies will be most pronounced

news.findlaw.com/hdocs/docs/cpjgr/nypd12703jgrrpt.pdf (concluding “that it is more likely than not that the defendants participated in an attack upon the jogger” after Reyes sexually assaulted her).

¹²⁵ STUART TAYLOR JR. & KC JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE 55 (2007) (discussing that, in their investigations, “[c]ops share the natural human tendency to bend new evidence to fit their preconceived beliefs rather than adjusting their beliefs to fit the new evidence”).

¹²⁶ Suggestions have been made about how to minimize the impact of cognitive biases in the criminal process. Among other things, commentators have proposed that prosecutors and police should be trained concerning the significance of cognitive biases, that their work should be made more transparent, that investigative techniques should be subject to reexamination and review, that management and supervision processes should be improved, and that prosecutorial cultures should be reformed. See, e.g., Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006) (suggesting transparency and monitoring reforms as partial solutions to improve the criminal justice process); Burke, *Invitation to Prosecutors*, *supra* note 32, at 523–28; Burke, *Cognitive Science*, *supra* note 32, at 1613–31; George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98 (1975); Findley & Scott, *supra* note 32, at 354–96; Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL’Y & L. 677, 703–05 (2000); Medwed, *Preaching*, *supra*, note 32; Medwed, *Zeal Deal*, *supra* note 32, at 169–82.

¹²⁷ Bandes, *supra* note 121, at 491 (“It is difficult to admit mistakes, and certainly difficult for a prosecutor to accept that her actions have led to the conviction of an innocent person.”); Randolph N. Jonakait, *The Ethical Prosecutor’s Misconduct*, 23 CRIM. L. BULL. 550, 551 (1987) (“The honorable prosecutor simply cannot believe that he is prosecuting the blameless.”); Medwed, *Zeal Deal*, *supra* note 32, at 142–43 (“When a jury verdict validates this form of ‘pre-conviction’ of the defendant, it may become extremely difficult ever to establish the defendant’s innocence in the eyes of the prosecuting lawyer.”).

¹²⁸ See Findley & Scott, *supra* note 32, at 316 (“[C]ognitive biases help explain what went wrong in many wrongful conviction cases Convinced by an early—although plainly flawed—eyewitness identification, police and prosecutors . . . sought evidence that would confirm guilt, not disconfirm it.”); *id.* at 320 (“Hindsight bias and outcome bias, together, should be expected to have an affirmance-biasing effect in postconviction and appellate review because the outcome of the case—conviction—tends to appear, in hindsight, to have been both inevitable and a ‘good’ decision.”); *id.* at 330 (“Trials confirm those judgments about guilt because the vast majority of trials result in convictions.”); Burke, *Invitation to Prosecutors*, *supra* note 32, at 519 (“[T]he vast majority of cases end in conviction, either by trial or more often by guilty plea. Accordingly, prosecutors are likely to see the end results as validation of their initial theories of guilt.”). Defense lawyers do not necessarily counterbalance these tendencies because they are also prone to tunnel vision, assuming their clients to be guilty and often, therefore, eschewing vigorous investigation. See also F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 211 (2002); Findley & Scott, *supra* note 32, at 331–33.

for the particular prosecutors who had responsibility for investigating and trying a case, but it will also inhere in the district attorney or other prosecutor in charge of the office that obtained the conviction, in its supervisory prosecutors, and in others who identify with the office and its work.

In both England¹²⁹ and Canada,¹³⁰ the impact of cognitive biases and other concerns about wrongful convictions resulted in the establishment of independent institutions responsible for investigating and evaluating new exculpatory evidence. In both systems, the investigation is triggered by a convicted defendant's claim of innocence and information to establish that claim. Thus, neither addresses the situation (covered by the new ABA Model Rule) where the prosecutor receives new evidence from a source other than the defendant.¹³¹

In England, claims of innocence are reviewed by the Criminal Cases Review Commission ("CCRC"),¹³² which decides whether to refer cases to an appellate court to determine whether to overturn a conviction. The judicial standard for setting aside a conviction is whether there is a "real possibility" that the conviction is "unsafe,"¹³³ which has been taken to mean that the court entertains a "lurking doubt" about the correctness of the conviction.¹³⁴ The "unsafe" standard has been construed broadly enough to lead to the reversal of convictions based on new evidence that impeaches prosecution witnesses or on new evidence of police

¹²⁹ See Criminal Cases Review Commission, How We Review Your Case, http://www.ccr.gov.uk/canwe/canwe_33.htm (last visited Jan. 20, 2009) [hereinafter CCRC]. For a detailed description of the English system, see Griffin, *supra* note 73, at 1275–92.

¹³⁰ The process is set forth in a detailed government document. CANADA DEP'T OF JUST., APPLYING FOR A CONVICTION REVIEW, available at <http://www.justice.gc.ca/eng/pi/ccr-rc/rev.pdf>.

¹³¹ For example, in the Palladium case, new evidence came from a federal government informant. See Tavernise, *supra* note 3. In the Central Park Jogger case, a defendant who had been arrested for a similar rape came forward. See Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 898 (2004). In England, the CCRC inquiry is triggered by the individual, but journalists, other individuals, or organizations such as Innocence Projects can prompt the CCRC inquiry. See Stephanie Roberts & Lynne Weathered, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission*, 29 OXFORD J. LEGAL STUD. 43 (2009).

¹³² The Commission's website provides general background information. See CCRC, *supra* note 129, at <http://www.ccr.gov.uk/about.htm> (last visited Jan. 20, 2009). The Commission was established based on the recommendation of a royal body, known as the Runciman Commission, which was assigned to study the causes of wrongful convictions following exonerations in a series of high-profile cases including, most notably, the case of the "Birmingham Six." *Id.*; David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. ILL. U. L. REV. 91, 125 (2000).

¹³³ See Griffin, *supra* note 73, at 1268. The standard is articulated in the Criminal Appeal Act, 1995, c. 19, § 2(1)(a) (Eng.) ("[T]he Court of Appeal . . . shall allow an appeal against conviction if they think that the conviction is unsafe . . .").

¹³⁴ See *id.* at 1269 (citing *R. v. Cooper*, 1 Q.B. 267 (1969)).

misconduct in a separate case.¹³⁵ The CCRC makes a referral to the court if it finds there is a “real possibility” that, if it made the reference, the reviewing court would not uphold the conviction, verdict, finding, or sentence.¹³⁶

The CCRC investigation goes through several stages. First, an initial screening is made for bare eligibility.¹³⁷ Eligible cases pass to the investigative stage, at which those deemed to have no likelihood of success are dismissed.¹³⁸ Next, the case passes to a “substantive review” stage, at which point a case manager and commission member or an independent investigating officer are assigned. In this stage, there can be independent reports on forensic evidence, psychiatric records, or other matters relevant to the case.¹³⁹ The case worker can recommend either dismissal or referral to the court of appeals, in which case a panel of three Commissioners must approve. In either case, an opinion or “Statement of Reasons” is issued.¹⁴⁰ As of August 2008, 10,978 completed applications had been filed, of which 370 were referred to and decided by the Court of Appeal, resulting in 261 convictions being set aside.¹⁴¹ In other words, about 2.5% of the convictions reviewed by the CCRC, and a remarkable 70% of those it referred to the court, were overturned based on a finding that the conviction was “unsafe.”

In Canada, convictions are reviewed by lawyers within the Criminal Conviction Review Group (CCRG) of the Department of Justice¹⁴² whose role is to ascertain whether “there is a reasonable basis to conclude that a miscarriage of justice likely occurred”¹⁴³ The review requires an application and supporting documents containing “new and significant” information that there has been a miscarriage of justice.¹⁴⁴ New information is “significant” if it is reasonably capable of belief and relevant to the issue of guilt and could have affected the

¹³⁵ *R. v. Druhan*, (unreported) (C.A. July 16, 1999), available at <http://www.bailii.org/ew/cases/EWCA/Crim/1999/2011.html>; *R. v. Twitchell*, 1 Crim. App. R. 373 (C.A. Oct. 26, 1999).

¹³⁶ See Griffin, *supra* note 73, at 1279. The “real possibility” standard is also articulated on the CCRC’s website. CCRC, Our Role (Overview), http://www.ccr.gov.uk/canwe/canwe_27.htm (last visited Jan. 20, 2009). A “real possibility” has been described as “more than an outside chance or bare possibility, but which may be less than a probability or likelihood or a racing certainty.” See *R. v. CCRC, ex parte Pearson*, 3 All E.R.498 (Q.B. 1999).

¹³⁷ This requires that the conviction be from England, Wales, or Northern Ireland, and that the applicant have exhausted the appeals process. See CCRC, *supra* note 129.

¹³⁸ See Griffin, *supra* note 73, at 1278–79.

¹³⁹ *Id.* at 1279.

¹⁴⁰ See CCRC, *supra* note 129.

¹⁴¹ See CCRC, Case Statistics: Figures to 31 July 2008, http://www.ccr.gov.uk/cases/case_44.htm (last visited Jan. 20, 2009).

¹⁴² See *supra* note 130.

¹⁴³ *Id.* at 4.

¹⁴⁴ *Id.* at 2.

verdict if it had been presented at trial.¹⁴⁵ The multi-stage investigatory process begins with a preliminary assessment of whether new and significant evidence has been presented. If so, an investigation and a detailed report follow.¹⁴⁶ The Minister of Justice receives the report along with the application and a legal memorandum from CCRG and may grant various remedies, including a new trial or new appeal proceeding, upon a determination that a miscarriage of justice likely occurred.¹⁴⁷

Only one United States jurisdiction, North Carolina, has followed suit by placing the investigation of convictions in the hands of a neutral body. Like its English and Canadian counterparts, the judicially-created North Carolina Innocence Inquiry Commission (“NCIIC”), established in August 2006,¹⁴⁸ begins with an application and proceeds in graduated stages;¹⁴⁹ however, the application may come from law enforcement officials or others besides the defendant.¹⁵⁰ An initial screening ascertains whether the applicant is claiming complete “factual innocence” based on “credible” and “verifiable” evidence that has not previously been heard.¹⁵¹ If so, the case is presented to the Executive Director, who can either examine the case personally or appoint a designee.¹⁵² The Executive Director or

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 3–4. If not, the applicant is granted one year to supplement the application. *Id.*

¹⁴⁷ *Id.* at 2.

¹⁴⁸ See The North Carolina Innocence Inquiry Commission [hereinafter NCIIC], About Us, <http://www.innocencecommission-nc.gov/ABOUTUS.htm> (last visited Jan. 20, 2009). This commission examines individual cases making it distinct from the various commissions in many states which review exoneration cases to determine the underlying causes of the wrongful convictions and make recommendations for systemic change. See, e.g., Robert Carl Schehr, *The Criminal Cases Review Commission as a State Strategic Selection Mechanism*, 42 AM. CRIM. L. REV. 1289, 1299 (2005).

¹⁴⁹ See NCIIC Rules and Procedures, art. 4(G), <http://www.innocencecommission-nc.gov/rulesandprocedures.htm> (last visited Jan. 20, 2009) (“After a th[o]rough review has been completed and the innocence claim meets the criteria set ou[t] in Article 3, the case may move into the investigation phase.”).

¹⁵⁰ *Id.* at art. 3(B) (“An innocence claim may be initiated in any reasonable manner from any person or party.”).

¹⁵¹ N.C. GEN. STAT. § 15A-1460(1) (2006). This does *not* include claims of secondary involvement or reduced culpability. Cf. NCIIC Rules and Procedures, *supra* note 149, at app. A. The screening task has been “outsourced” to the North Carolina Center on Actual Innocence, and to its Centers and students at various North Carolina law schools. See *id.* at Preamble, History of the Commission. The NCIIC’s Preamble notes that “[t]his relationship provides developmental experience for students and a cost-efficient and enthusiastic resource for the Innocence Inquiry Commission.” *Id.* In a similar manner, the Conviction Integrity Unit at the Dallas County District Attorney’s Office works with and uses the screening resources of the Innocence Project of Texas. See Dallas County District Attorney’s Office, Conviction Integrity Unit, <http://www.dallasda.com/conviction-integrity.html> (last visited Jan. 20, 2009) [hereinafter Conviction Integrity Unit].

¹⁵² See NCIIC Rules and Procedures, *supra* note 149, at art. 2(A). Notably, though anyone can initiate a claim, those initiated by a judge, victim, law enforcement officer, correction official or prosecutor get forwarded directly to Executive Director. *Id.* at art. 3(E).

designee has discretion whether to advance a case to a formal investigative stage or dismiss it.¹⁵³ Following a formal investigation, the Commission's Executive Director (or designee) presents findings to a hearing of the entire eight-member Commission,¹⁵⁴ which has subpoena power and conducts its hearing in a fact-finding rather than adversarial format.¹⁵⁵ If it finds "sufficient evidence of factual innocence to merit judicial review,"¹⁵⁶ the Commission refers the case for review by a three-judge Superior Court,¹⁵⁷ which will set aside a conviction if it unanimously determines that "clear and convincing evidence" exists of the person's innocence.¹⁵⁸ As of July 2008, the NCIIC had reviewed 135 cases, of which it formally investigated four and referred only one for judicial review.¹⁵⁹

In states other than North Carolina, discretion is left to prosecutors and the police (or other investigators) regarding whether and when to investigate new evidence of innocence.¹⁶⁰ Likewise, the prosecutor has discretion whether to assert

¹⁵³ N.C. GEN. STAT. § 15A-1467(a) (2006). The statute also empowers the Commission to "establish the criteria and screening process to be used to determine which cases shall be accepted for review." *Id.* § 15A-1466(1). It is worth noting that while 135 cases are currently in review, only 4 have proceeded to formal investigation. See NCIIC, *supra* note 148, at Case Statistics, <http://www.innocencecommission-nc.gov/statistics.htm> (last visited Jan. 20, 2009).

¹⁵⁴ See NCIIC Rules and Procedures, *supra* note 149 at art. 6(A). Members are drawn from prosecution, defense, judicial and public advocacy bodies. See *id.* at Preamble, History of the Commission.

¹⁵⁵ N.C. GEN. STAT. § 15A-1467(d) (2006).

¹⁵⁶ *Id.* § 15A-1468(c). Five of eight votes (or eight of eight if the applicant pleaded guilty) are needed to refer the case to the court. Regardless of the result, a copy of the Commission's opinion, along with findings of fact and records of the proceedings, are served on the District Attorney in the original jurisdiction. *Id.*

¹⁵⁷ *Id.* § 15A-1469. When cases are referred for further review, the North Carolina Chief Justice is charged with commissioning a three-judge panel in the Superior Court of the original jurisdiction (not to include any judge who presided previous trials or motions involving the case). The case then proceeds as an evidentiary hearing, with the District Attorney (or designee) from the original conviction representing the State, and the applicant given a right to counsel. *Id.*

¹⁵⁸ *Id.* § 15A-1469(h).

¹⁵⁹ See NCIIC, Case Statistics, *supra* note 153. The case is that of Henry Reeves, a former police officer convicted of child molestation in 2001. The case, in addition to being the first referred for review, was also the first case the Commission heard. NCIIC's Executive Director noted that subpoena power was crucial to the investigation, which in large part consisted of evidence from witnesses who had not testified at trial but later came forward. Associated Press, *State Innocence Commission Recommends First Case* (Dec. 18, 2007), available at <http://abclocal.go.com/wtvd/story?section=news/local&id=5841926&pt=print>. See also Jerome M. Maiatico, *All Eyes on Us: A Comparative Critique of the North Carolina Innocence Inquiry Commission*, 56 DUKE L.J. 1345 (2007) (comparing North Carolina and England's Commissions).

¹⁶⁰ See Zacharias, *supra* note 34, at 175 ("[O]nce appeals are complete, the prosecutor may be the only participant in the criminal justice system in a position to rectify a wrong."). As ABA Model Rule 3.8(g) reflects, not all prosecutors have investigative resources. See Rule 3.8(g), *supra* note 26 (stating that when a prosecutor learns of sufficient new evidence he should, "undertake further investigation, or make reasonable efforts to cause an investigation" into the evidence). In some jurisdictions, a prosecutor may rely primarily or entirely on the police or another investigative agency. See, e.g., A.B.A. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 85, § 3-3.1(a), at 47 ("A

to a court or executive that a conviction should be reviewed or set aside.¹⁶¹ As noted, ABA Model Rule 3.8(g) and (h), if adopted, would give prosecutors some guidance and narrow their discretion, but only to a limited extent.¹⁶² Among other things, these provisions do not say who within the prosecutor's office should conduct an investigation and make discretionary decisions. Offices may decide such questions on an ad hoc basis or establish policies and institutional structures to deal with post-conviction decision making.¹⁶³ Little information is publicly available about how prosecutors' offices respond, because little, if any, of their internal processes is exposed to public view.¹⁶⁴ But it is likely that, despite what is known about cognitive biases,¹⁶⁵ prosecutors' offices ordinarily refer new evidence to the trial prosecutor who obtained the conviction if he is still in the office, on the theory that he best knows the case and is therefore best qualified to determine the significance of the new evidence.¹⁶⁶

The one prominent exception is the work of the Dallas County District Attorney Conviction Integrity Unit ("CIU").¹⁶⁷ The newly elected District Attorney, Craig Watkins, established the unit in 2007 because Dallas had the dubious distinction of leading the country in the number of exonerations by county.¹⁶⁸ The unit's charge is to examine more than 400 cases in which DNA testing was denied by a court.¹⁶⁹ The unit, which receives legislative and private funding, is housed in the District Attorney's office but is staffed by an assistant district attorney, an investigator and a legal assistant, none of whom were

prosecutor ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts, but the prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies.").

¹⁶¹ See Goldberg & Siegel, *supra* note 33 at 394–95 (discussing the spectrum of responses a prosecutor may have to newly discovered evidence).

¹⁶² See *supra* notes 28–29 and accompanying text.

¹⁶³ See Zacharias, *supra* note 34, at 238–39 (proposing various methods by which prosecutors' offices can deal with post-conviction claims of innocence).

¹⁶⁴ See Vorenberg, *supra* note 20.

¹⁶⁵ See *supra* notes 119–123 and accompanying text.

¹⁶⁶ Medwed, *Preaching*, *supra* note 32 (pointing out biases when prosecutors review their own work or that of colleagues).

¹⁶⁷ The Dallas Conviction Integrity Unit, however, is devoted largely to DNA cases. Dallas is the first jurisdiction in the United States to have such a division set up within its District Attorney's office. See Conviction Integrity Unit, *supra* note 151.

¹⁶⁸ See Moreno, *supra* note 76.

¹⁶⁹ Conviction Integrity Unit, *supra* note 151. Prior to 2007, Texas' post-conviction statute providing for DNA testing was interpreted narrowly by the prosecution, which often argued that defendants were not entitled to post-conviction DNA testing. Of the 438 motions filed by defendants, the district attorney opposed testing in about half of those cases. Thirty-five defendants were granted DNA tests and twelve of those people were exonerated. Telephone Interview with Michael Ware, Director of the Conviction Integrity Unit (July 14, 2008) [hereinafter "Ware Interview"] (notes of interview on file with Professor Yaroshefsky).

employed by the office at the time of the convictions.¹⁷⁰ The CIU works with the Innocence Project of Texas and public defenders' offices which conduct investigations and present their findings.¹⁷¹

The unit attempts to examine all relevant convictions on a case by case basis with "a critical eye."¹⁷² Once a claim of innocence is found to meet an initial threshold of eligibility,¹⁷³ the unit seeks to make an independent determination of guilt or innocence without placing weight on the jury's determination or on considerations of finality.¹⁷⁴ The unit pursues leads with an "open or skeptical mindset."¹⁷⁵ Many cases require little more than a follow up telephone call or interview. If initial inquiries suggest that the defendant may be factually innocent, the unit conducts further investigation, and if the additional investigation suggests a "reasonable possibility that the person could be innocent," the unit fully reviews the case. If the unit is ultimately convinced that there is a reasonable possibility of innocence, it supports setting the conviction aside. If not, the unit leaves it up to the defense to seek judicial relief.¹⁷⁶ Under Texas law, the defendant must establish that, had the results of the investigation been available at the time of the trial or guilty plea, it would "unquestionably" establish his or her innocence.¹⁷⁷

III. WHEN SHOULD THE PROSECUTOR ULTIMATELY SUPPORT OR OPPOSE A CONVICTED DEFENDANT'S REQUEST FOR RELIEF BASED ON ACTUAL INNOCENCE?

Consider a case in which, as in the Palladium case, newly discovered evidence casts serious doubt on the reliability of a defendant's conviction. Suppose that the prosecutor conducts an extensive investigation that corroborates the initial new evidence but, unlike DNA testing results, the new evidence is not sufficiently reliable or probative to dispel all doubts about the defendant's guilt. The prosecutor discloses the information to the defendant, who moves for judicial relief or, if none is available, requests executive clemency. The prosecutor is

¹⁷⁰ See Conviction Integrity Unit, *supra* note 151.

¹⁷¹ *Id.*

¹⁷² See Ware Interview, *supra* note 169.

¹⁷³ The threshold standard employed by the office is "akin to the Federal 12(b)(6) one: have they stated a claim." *Id.* In other words, "have they stated a claim of innocence that does not defy the law of gravity?" *Id.* Ware noted that approximately 25% of inquiries do not state a claim because they are "gripes about the attorney, food in prison and the like." Many inquiries require us to "strain the fill in the blanks." *Id.*

¹⁷⁴ According to Ware, the unit will then look at the case "with a fresh eye We are not trying to prove things one way or the other. We have no axe to grind. We are searching for the 'factual historical truth.' We will not forego review because fifteen years ago an attorney did not discover evidence or put it on at trial. Nor will we do so because it was raised in a motion for a new trial and the trial judge was not impressed." *Id.*

¹⁷⁵ *Id.* (i.e., skeptical of the conviction).

¹⁷⁶ *Id.*

¹⁷⁷ *Ex parte* Thompson, 153 S.W.3d 416, 417 (Tex. Crim. App. 2005).

satisfied that the investigation is complete and that no significant additional evidence is likely to be found. At that point, viewing the new evidence together with the evidence available before and during the trial, the defendant's guilt seems less likely than it did to the prosecutors' office when it decided to indict the defendants and when it asked the jury to find guilt beyond a reasonable. Should the prosecutor support the defendant's efforts, oppose them, or remain neutral?

The ABA model rules suggest that, if the evidence of the defendant's innocence is "clear and convincing," the prosecutor should make reasonable, affirmative efforts to rectify the wrongful conviction.¹⁷⁸ Shy of "clear and convincing evidence," however, what should the prosecutor do? Should she oppose the defendant's efforts in order to ensure adversarial testing of the new evidence? Should she be guided by whether she would have an indictable or a triable case if she knew at the outset what she now knows? Should the test be whether she would in fact have brought an indictment if she had a complete picture at the time? Should the question be whether the trial's outcome would have differed if the jury knew then what the prosecutor knows now? Should she seek to secure the defendant's release whenever she has serious doubts about the defendant's guilt, even if she is not entirely convinced of the defendant's innocence, or only when the evidence of innocence is "clear and convincing," as the model rule suggests? These questions are important because, as previously discussed, the outcome will often turn on what position the prosecution adopts.

A. *The Relevance (or Irrelevance) of Charging Discretion*

As discussions of the Palladium case suggest,¹⁷⁹ one might instinctively look at how prosecutors exercise charging discretion—that is, how they decide whether or not to bring criminal charges at the outset—for guidance on how they should exercise discretion whether to seek to set a conviction aside in light of new exculpatory evidence. Perhaps the prosecutor should defend the conviction if, given what she now knows, she would ordinarily commence charges against an individual. Conversely, perhaps the prosecutor should seek to set the conviction aside if, given what she now knows, she would not have brought charges against an individual. As discussed below, we doubt that either is the right approach.

There is a threshold question: What does the prosecutor now know? The test presumably should not be whether the prosecutor would bring charges based only on the evidence now available to introduce at a trial. Over time, witnesses may die, witnesses' memories may fade, and other occurrences that have no relevance to guilt or innocence may similarly make it difficult or impossible to obtain a conviction.¹⁸⁰ To the extent that evidence and other information previously

¹⁷⁸ See A.B.A. MODEL RULES, *supra* note 26, at R. 3.8(h).

¹⁷⁹ See *supra* notes 1–13 and accompanying text.

¹⁸⁰ See Boemer, *supra* note 22, at 1980 (stating that a reason for time bars on innocence claims is "the recognition that memories fade, witnesses disappear"); James Herbie DiFonzo, *In Praise of*

available to the prosecution has not been discredited, it should fairly be taken into account because the fundamental question is whether an innocent person was wrongly convicted, not whether the defendant can be successfully retried. The prosecutor should engage in the tricky exercise of determining the credibility of prior evidence that is no longer available. She should consider all the credible information, currently available or not, and decide whether the evidence of guilt or innocence satisfies whatever standard the prosecutor employs.

It is doubtful, however, whether the standard employed in the charging decision should be applied to the information considered by a prosecutor post-conviction. A significant part of the problem with using charging discretion as an analogue or touchstone is that there is no uniform standard to govern the everyday determination of whether there is enough likelihood of guilt to warrant bringing charges.¹⁸¹ Beyond that, the rationales for employing various possible standards in the charging context would not be applicable to the post-conviction context (even assuming the rationales are persuasive in the charging context).

The charging decision calls for some gatekeeping to avoid prosecuting innocent individuals, but there is no agreement on how much.¹⁸² As a legal matter, the prosecution is not permitted to commence charges, whether by indictment or information, without “probable cause.”¹⁸³ State ethics rules incorporate that standard as a basis of discipline, providing that the prosecutor may not “knowingly” bring charges without probable cause¹⁸⁴—a standard that has rarely, if ever, become the subject of disciplinary proceedings.¹⁸⁵ Prosecutors might take

Statutes of Limitations in Sex Offense Cases, 41 Hous. L. Rev. 1205, 1210 (2004) (“Time fades memories, witnesses die or disappear, and documentation is destroyed or irretrievably misplaced.”).

¹⁸¹ The American Bar Association Criminal Justice Standards lists elements that prosecutors should consider in making charging decisions such as “the prosecutor’s reasonable doubt that the accused is in fact guilty.” A.B.A. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 85, § 3-3.9(i). However, the standards do not say whether a reasonable doubt should foreclose bringing a charge or if it is merely a factor. *See also* Vorenberg, *supra* note 20, at 1547 (“When prosecutors initially receive a case, they are frequently uncertain whether there is ‘probable cause’ or whatever other standard they employ as a basis for charging.”).

¹⁸² *See* Bruce A. Green, *Prosecutorial Ethics As Usual*, 2003 U. ILL. L. REV. 1573, 1588 (2003) (explaining that the gate-keeping role derives from the prosecutor’s position as a “minister of justice”).

¹⁸³ *See, e.g.*, *United States v. Barner*, 441 F.3d 1310, 1315 (11th Cir. 2006) (decision to prosecute for additional charges in superseding indictment prior to trial on merits is within prosecutor’s discretion as long as probable cause exists).

¹⁸⁴ *See* A.B.A. MODEL RULES, *supra* note 26, at R. 3.8(a) (“The prosecutor in a criminal case shall refrain from prosecuting a charge the prosecutor knows is not supported by probable cause.”).

¹⁸⁵ *See* Sandra Caron George, *Prosecutorial Discretion: What’s Politics Got to Do With It?*, 18 GEO. J. LEGAL ETHICS 739, 750 (2005) (“Indeed, with respect to enforcement of Model Rule 3.8, and the requirement that charges be brought only where there is probable cause, the courts have been reluctant to impose restrictions on prosecutorial discretion.”); Lars Nelson, *Preserving the Public Trust: Prosecutors’ Professional Responsibility to Advocate for the Electronic Recording of Custodial Interrogations*, 44 WILLAMETTE L. REV. 1, 19 (2007) (“Dismissal and reversal for probable cause fail to check prosecutors and are rare because probable cause is an easily met threshold. Even

the view that the legal/disciplinary standard of probable cause defines the full extent of their gate keeping responsibility. They might explain this minimal approach to gate keeping in any of several ways. One may take the view that it is the province of the jury, not the prosecutor, to decide on a defendant's guilt;¹⁸⁶ that the jury is better qualified to make that determination in cases where guilt is not certain;¹⁸⁷ that it would be unfair to the public and the victim (if any) to act as a roadblock to a potentially successful prosecution;¹⁸⁸ that it would waste prosecutorial resources to have to undertake a rigorous review, rather than simply accepting the evidence accumulated by the police, presenting it to the grand jury, and trying the case;¹⁸⁹ that faith should be placed in the adversary system's ability to weed out bad cases;¹⁹⁰ that prosecutors should defer to the presumed

when higher courts rebuke prosecutors, ethical sanctions rarely follow. In fact, ethical sanctions are rarely sought at all.”).

¹⁸⁶ See Nelson, *supra* note 185, at 17–18 (“The ideal system is one in which prosecutors, grand juries, and magistrate judges’ determinations of probable cause are checked by juries determining guilt beyond a reasonable doubt. However, with ninety-five percent of all convictions occurring through pleas, most probable cause determinations represent the highest threshold of guilt met.”).

¹⁸⁷ See Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (citing Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968)) (“The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor”); H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance From the ABA*, 71 MICH. L. REV. 1145, 1159 (1973) (“[W]hen the issue stands in equipoise in [the prosecutor’s] own mind, when he is honestly unable to judge where the truth of the matter lies, I see no flaw in the conduct of the prosecutor who fairly lays the matter before the judge or jury.”).

¹⁸⁸ This is especially true in the context of domestic abuse cases where “[r]esearch indicates that despite the arrests, only a small portion of domestic violence cases are prosecuted; thus, some locales have adopted ‘no drop’ policies that range from eliminating all prosecutorial discretion so that all cases are prosecuted, to less rigid assumptions of prosecution.” Nina W. Tarr, *Employment and Economic Security for Victims of Domestic Abuse*, 16 S. CAL. REV. L. & SOC. JUST. 371, 389–90 (2007).

¹⁸⁹ See Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1328 (1997) (arguing that one justification for prosecutorial discretion is that frequent prosecutorial and judicial review of charging decisions would be a waste of resources); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2124 (1998) (“[I]n all likelihood, the prosecutor simply accepts the results of the police investigation, and any process of independent adjudication occurs at the instigation of defense counsel.”). *But see In re Grand Jury Subpoena of Lynne Stewart*, 545 N.Y.S.2d 974, 977 n.1 (N.Y. Sup. Ct. 1989) (citing the famous phrase of New York Chief Judge Sol Wachtler that a Grand Jury indictment is so easy to procure that a Grand Jury would “indict a ham sandwich”).

¹⁹⁰ See Bandes, *supra* note 121, at 488–89 (“The system is built on the notion that if each adversary acts zealously on behalf of his client, the truth will come out.”); Jim Yardley, *Man is Cleared in Murder Case After 8 Years*, N.Y. TIMES, Oct. 29, 1998, at B1 (reporting the case of a man wrongly convicted of murder—the Assistant District Attorney was asked “What do you say to [this gentleman]?”—he replied “We live by an adversarial system. Our job is to present evidence we believe is credible. The defense’s job is to poke holes in it. In a sense, the system worked, although it took some time.”). *But see United States v. Serubo*, 604 F.2d 807, 817 (3rd Cir. 1979) (At the grand jury, the prosecutor “operates without the check of a judge or a trained legal adversary, and [is]

constitutional and legislative judgments that probable cause is enough to justify a prosecution;¹⁹¹ or that deference should be given to the police's judgment that the defendant is guilty.¹⁹²

Alternatively, as a matter of discretion, prosecutors may engage in slightly more rigorous gatekeeping that focuses on the strength of the trial evidence, although not on the separate question of whether the prosecutor is herself confident that the defendant is guilty. For example, the prosecutor may ask whether there is sufficient evidence for a jury to return a conviction¹⁹³ or, setting the bar higher, whether the jury is likely to convict.¹⁹⁴ This approach may be explained by the prosecution's interest in preserving resources for cases in which a conviction is likely to be obtained.¹⁹⁵ Or it may be explained by the recognition that it is unfair to punish individuals unless they are first convicted. Making defendants endure

virtually immune from public scrutiny."); DEBORAH DAY EMERSON & NANCY L. AMES, U.S. DEP'T OF JUST., *THE ROLE OF THE GRAND JURY AND THE PRELIMINARY HEARING IN PRETRIAL SCREENING* 68 (1984) (arguing that grand juries serve as a relatively weak check on prosecutorial discretion); Robert W. Gordon, *Impudence and Partnership: Starr's OIC and the Clinton-Lewinsky Affair*, 68 *FORDHAM L. REV.* 639, 642–43 (1999) (judges are also deprived of the power to check prosecutors).

¹⁹¹ Cf. Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 *HOFSTRA L. REV.* 275, 284–85 (2007) ("The low charging standard of probable cause encourages abuse of the charging power, allowing prosecutors to charge an individual in order to intimidate, harass, or coerce a guilty plea in a case in which the government cannot meet its burden of proof at trial."); Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty and the Limits of Law*, 33 *LAW & SOC. INQUIRY* 387, 397 (2008) ("[W]hile there is a constitutional standard to which prosecutors must adhere, it does not prevent the prosecutor from charging exercising [sic] selectively—even, presumably, in cases where there is probable cause to indict many similarly situated persons.").

¹⁹² See JOAN E. JACOBY, U.S. DEP'T OF JUST., *THE PROSECUTOR'S CHARGING DECISION: A POLICY PERSPECTIVE* 15 (1977) (citing cases where prosecutors merely adopt the police's determination of guilt or innocence). *But see* Vorenberg, *supra* note 20, at 1547 ("Many of the cases initiated by the police or by citizen complainants have serious flaws. . . . The most justifiable use of prosecutorial discretion is the screening out of these weak cases.").

¹⁹³ See, e.g., A.B.A. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 85, § 3-3.9(a) ("A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."); Leonard R. Mellon et al., *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 *J. CRIM. L. & CRIMINOLOGY* 52, 59–62 (1981) (discussing the use of the "legal sufficiency" standard in charging decisions).

¹⁹⁴ See NAT'L DIST. ATTORNEYS ASS'N, *NATIONAL PROSECUTION STANDARDS*, *supra* note 86, § 43.3 ("The prosecutor should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial.").

¹⁹⁵ See Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecutors*, 91 *MARQ. L. REV.* 9, 11 (2007) ("Theoretical accounts of the prosecutor's work also build on critical assumptions about the objectives of individual prosecutors. . . . Still others may be driven by organizational needs (e.g., conserving scarce resources).").

the anxiety and expense of a trial when they are likely to be acquitted is arguably a misuse of the criminal process.¹⁹⁶

Finally, prosecutors may engage in more serious gatekeeping that involves declining to prosecute certain cases even when there is a likelihood of securing a conviction. This approach can be explained by the prosecutor's concern about the risk that innocent individuals may be convicted because the criminal process is unavoidably fallible—for example, the defense may fail to expose the falsity of testimony unwittingly offered by the prosecutor or otherwise be an ineffective advocate, or the jury may overvalue eyewitness testimony, confessions or expert testimony, or undervalue the defendant's truthful testimony. The prosecutor may assume a professional obligation to take account of, and try to compensate for, this risk, given the public interest in avoiding false convictions, by essentially serving as a preliminary fact finder.¹⁹⁷ That is, the prosecutor may decline to bring charges, even in a winnable case, unless she or others in her office are convinced to some level of confidence that the defendant is guilty.¹⁹⁸

This does not simply involve substituting the prosecutor's judgment for that of the jury because the prosecutor could look not only at the trial evidence but at other available information.¹⁹⁹ Sometimes inadmissible information will confirm the prosecution's belief in guilt, such as when the court suppresses damning physical evidence. But at other times, information that will not come before the jury will weaken the prosecution's belief in the defendant's guilt. Doubts may be raised by exculpatory out-of-court statements made by now-unavailable witnesses (such as deceased eyewitnesses or accomplices who will now refuse to testify to avoid incriminating themselves). Or, while preparing witnesses to testify, the prosecutor may have doubts raised by witnesses' demeanor, the weakness of their recollections, or the equivocal nature of their accounts, even though (thanks to effective witness preparation) the witnesses can be expected to present their testimony more convincingly by the time of trial. The prosecutor may even be influenced by representations made by the defendant, or by defense counsel, even

¹⁹⁶ See John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & POL'Y 423, 425–26 (1997) (discussing the negative impact of a grand jury subpoena, an investigation, and an indictment on the defendant).

¹⁹⁷ See Ben Kempinen, *The Ethics of Prosecutor Contact with the Unrepresented Defendant*, 19 GEO. J. LEGAL ETHICS 1147, 1179–80 (2006) (arguing that prosecutors have a duty to investigate before a charging decision is made because due to the small amount of cases that go to trial, the charging decision is arguably the most important factual determination of guilt or innocence).

¹⁹⁸ See, e.g., Gershman, *supra* note 33, at 338 (“Some prosecutors . . . maintain that they would never prosecute a defendant unless they were personally convinced of the defendant's guilt.”); Kempinen, *supra* note 197, at 1180 n.110 (stating the Wisconsin prosecutors had adopted a “‘convictability-personal-belief-in-guilt’ standard”).

¹⁹⁹ See William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1101 n.46 (1988) (stating that evidentiary rules may exclude certain evidence, and that “[t]he rules presume that . . . judgments [based on this evidence] would be unreliable or inefficient; even when this is true with respect to judges and juries, however, it is often not true with respect to lawyers.”).

though there is little likelihood that the defendant will testify or that, if he does, the jury will credit him after the prosecutor's withering cross-examination.

When prosecutors demand to be personally convinced of guilt, the level of their conviction may vary. The prosecutor may be satisfied, and take a case to trial, only if she is convinced that the defendant's guilt is more likely than not, that his guilt is clear and convincing, or that his guilt is established in her mind beyond a reasonable doubt.²⁰⁰ Bennett Gershman has offered an even more rigorous standard, arguing that the prosecutor should be convinced of the defendant's guilt to a "moral certainty,"²⁰¹ although it is unlikely that any prosecutors are so demanding. Chances are that most prosecutors who act as personal gatekeepers never articulate their internal standard of proof. Prosecutors may aver that they will not prosecute defendants whom they believe to be innocent, but that elides the question whether they will prosecute when they are agnostic on the question and, if not, how certain of guilt they must be. Under this gatekeeping approach, there is also a further question of who in the prosecutor's office must be convinced of the defendant's guilt—the trial prosecutor or other prosecutor who best knows the facts, the trial prosecutor's supervisor, the district attorney herself, or some combination of these?²⁰²

As this survey suggests, one does not get very far by analogizing prosecutorial discretion post-conviction to prosecutors' charging discretion, given that approaches to the charging decision may vary so widely. Furthermore, it seems plain that the rationales at least for the minimal gatekeeping approach are not equally applicable to the post-conviction stage. Prior to trial, a prosecutor may rationalize that she is primarily a trial lawyer in an adversary process,²⁰³ that there are sufficient alternatives to prosecutorial gatekeeping to prevent false convictions, and that primary responsibility for ascertaining guilt or innocence rests

²⁰⁰ See FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 22 (1969) (stating that prosecutors are not held to a reasonable doubt standard in charging decisions, but that some hold themselves to that standard); A.B.A. STANDARDS FOR CRIMINAL JUSTICE, *supra* note 85, § 3-3.9(b)(i) ("The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are: (i) the prosecutor's reasonable doubt that the accused is in fact guilty"); *id.* § 3-3.9(c) ("A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused."); see also NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS, *supra* note 86, § 42.3(a) (stating that a prosecutor is justified in not prosecuting if he has "[d]oubt as to the accused's guilt").

²⁰¹ Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 522–30 (1993).

²⁰² See Bruce A. Green & Fred C. Zacharias, "The U.S. Attorneys Scandal" and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187, 194–200 (2008) (discussing the allocation of decision-making within a prosecutors' office).

²⁰³ See Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 691–97 (1992) (discussing reliance on the adversarial model as a justification in charging decisions).

elsewhere.²⁰⁴ After a conviction, in contrast, there is minimal post-conviction process available to which the prosecutor may defer on the question of whether an injustice was done.²⁰⁵ The prosecutor, not the judge or jury, is the key fact finder. As a practical matter, there is no one else on whom to shift responsibility.²⁰⁶

This is most obviously true when only executive clemency is available. If the prosecutor does not support an application for clemency, the application is almost certainly futile, because the prosecutor's opposition will be understood to mean that the prosecutor believes the defendant to be guilty. A governor will rarely release a defendant based on innocence when the prosecutor, who is presumably in the best position to make the judgment, is evidently not persuaded that an injustice was done. The governor will not afford an adversarial hearing at which the prosecution and defense will dispute the significance of new evidence and the governor will make an independent determination of guilt or innocence. Given the strong presumption that convictions are reliable, the governor predictably will defer to the prosecution's evident conclusion that the conviction is just, notwithstanding whatever new evidence is offered.²⁰⁷

That the prosecutor's beliefs play a pivotal role is only slightly less true when the court has authority to grant post-conviction relief. A prosecutor who is personally convinced of the defendant's innocence might nevertheless oppose a new trial motion in order to provide for adversary testing of the evidence and to shift decision making to the court,²⁰⁸ but the court will not perceive that as the basis for the prosecutor's opposition and predictably will defer to the prosecutor's seeming judgment that the defendant is guilty.²⁰⁹ Further, it will be difficult without the prosecutor's assistance to prove the defendant's innocence, because the defense will rarely have access to evidence comparable to that of the prosecution.²¹⁰ The Palladium case is an illustration. The prosecution had access

²⁰⁴ See *supra* notes 125–30 and accompanying text.

²⁰⁵ See *supra* Part II.B.

²⁰⁶ See *supra* note 112 and accompanying text.

²⁰⁷ See STAFF REPORT, *supra* note 117.

²⁰⁸ See, e.g., Medwed, *Zeal Deal*, *supra* note 32, at 129 (discussing the opposition to claims of innocence in spite of clear evidence in support). In a Texas case, DNA testing showed that someone other than the defendant was the rapist; however, the prosecutors opposed his motion for a new trial by attacking the sufficiency of the evidence and interposing two new theories of the case never used at trial. The court denied the motion. See Hilary S. Ritter, Note, *It's the Prosecution's Story, But They're Not Sticking to it: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases*, 74 FORDHAM L. REV. 825, 825–27 (2005).

²⁰⁹ See Medwed, *Zeal Deal*, *supra* note 32, at 128 n.14 (“In New York State, for example, courts summarily deny post-conviction motions with regularity. Behavior by prosecutors that signals the possible legitimacy of a particular claim may affect a judge's decision regarding whether to grant an evidentiary hearing and, accordingly, enhance the likelihood that actually innocent prisoners will be vindicated.”).

²¹⁰ See Bryant, *supra* note 55, at 122–23 (noting how procedures for newly discovered evidence claims typically presuppose that prisoners already have the exonerating evidence and noting that courts have offered mixed views on whether to grant discovery in cases where the pertinent

to imprisoned witnesses and other witnesses who were far more likely to speak with law enforcement authorities than with defense counsel.²¹¹ Evidently, the prosecutor's familiarity with some of the exculpatory evidence from having personally conducted aspects of the investigation was superior to that of defense counsel.²¹² In that case, the prosecutor made efforts to compensate for the defense's limitations and to ensure that all the relevant exculpatory evidence was presented.²¹³ In contrast, if the prosecutor assumes an adversarial stance, as she would at the trial stage, and withholds her honest judgment about the likelihood of the defendant's innocence based on her investigation of newly discovered evidence, she subverts the available procedures for correcting error and potentially deceives the ultimate decision-maker.

At the same time, the most demanding standards for the exercise of charging discretion seem equally inapt. It may seem reasonable for the prosecutor to sit as a thirteenth juror before charges are brought and decline to try a case if she has a reasonable doubt about guilt. But it would be harder to justify supporting a convicted defendant's release whenever new evidence raises no more than a reasonable doubt in the prosecutor's mind. A reasonable doubt about guilt is a far cry from a belief that a miscarriage of justice occurred because the defendant is, in fact, innocent. Such a low threshold would be administratively burdensome because it would put prosecutors in the business of constantly reevaluating cases.²¹⁴ Arguably, it would provide defendants and their counsel an incentive to game the system at the trial stage by not looking hard for exculpatory evidence that might otherwise be available.²¹⁵ Because of the double jeopardy right, this

statute is silent); Gershman, *supra* note 33, at 329 ("Because of the prosecutor's control of the evidence, he has the ability to thwart a defendant's ability to learn about favorable witnesses . . .").

²¹¹ See Tavernise, *supra* note 3 (The key witnesses and real killers were Joseph Pillot and Thomas Morales, two Bronx gang members who were incarcerated or under investigation for other charges.).

²¹² See Findley, *Innocents at Risk*, *supra* note 31, at 898–99 (discussing the systemic disparities in the ability to develop evidence); Weiser, *supra* note 1 ("Over 21 months, starting in 2003, [assistant district attorney Bibb] and two detectives conducted more than 50 interviews in more than a dozen states, ferreting out witnesses the police had somehow missed or ignored.").

²¹³ See Weiser, *supra* note 1 ("[Bibb] tracked down hard-to-find or reluctant witnesses who pointed to other suspects and prepared them to testify for the defense. He talked strategy with defense lawyers. And when they veered from his coaching, he cornered them in the hallway and corrected them.").

²¹⁴ Cf. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (whether Due Process requires a particular procedure necessitates consideration of, among other things, "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail").

²¹⁵ Cf. *Murray v. Carrier*, 477 U.S. 478, 491–92 (1986) ("Nor do we agree that the possibility of 'sandbagging' vanishes once a trial has ended in conviction, since appellate counsel might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving others for federal habeas review should the appeal be unsuccessful. Moreover, we see little reason why counsel's failure to detect a colorable constitutional claim should be treated differently from a deliberate but equally prejudicial failure by counsel to raise such a claim.").

standard would lead to defendants' release in circumstances where they could not be retried if later information dispelled the prosecutor's reasonable doubt.²¹⁶ This approach would appear to be disrespectful of the jury process and arguably put too much power in the prosecution's hands.²¹⁷ And perhaps most importantly, by definition, this standard would result in the release of a substantial number of guilty defendants for each innocent defendant who was freed.

The criminal justice system would be radically transformed if, once having convicted a defendant in a fair trial under the reasonable doubt standard, the defendant's conviction had to be constantly reevaluated to ascertain whether new information raised a reasonable doubt. Besides burdening prosecutors, closure would be denied to witnesses, victims and, indeed, to defendants.²¹⁸ There is a legitimate interest in something approximating "finality" in the criminal process,²¹⁹ which would be seriously undercut by a standard calling for prosecutors to try to secure a convicted defendant's release whenever new evidence raises no more than a reasonable doubt about guilt, rather than some genuine likelihood of innocence.

B. *Exercising Discretion in Light of the Prosecutor's Post-Conviction Role*

Our argument is that the exercise of prosecutorial discretion post-conviction must reflect three things—first, the role of the prosecutor within an executive branch; second, the executive branch's commitment to the basic principle that the state should not punish innocent people; and third, cognizance of the fact that convicted defendants are sometimes innocent. In brief, our argument is that it is a mistake in the post-conviction stage to view the prosecutor's role primarily as that of an advocate within an adversary process. In many cases, there is no adversary process available; the question of whether to grant redress is entrusted exclusively to the executive branch.²²⁰ Further, even when judicial relief is available, it is narrowly circumscribed, not because there is a public interest in making it exceedingly difficult to correct false convictions, but because the legislative intent

²¹⁶ Cf. *In re Cruz*, 129 Cal. Rptr.2d 31, 38 (Ct. App. 2003) (In the context of newly discovered evidence there is the possibility that collateral estoppel or double jeopardy would apply; however, "there [is no] authority preventing a retrial after a writ of habeas corpus is issued on the ground of newly discovered evidence . . .").

²¹⁷ See Barry Siegel, *Presumed Guilty: An Illinois Murder Case Became a Test of Conscience Inside the System*, L.A. TIMES, Nov. 1, 1992, (Magazine), at 18. (After Rolando Cruz was convicted of murder, Brian Dugan came forward and confessed. The State's Attorney refused to consider the evidence, saying, "To confess error now was to impeach a DuPage County jury and the very workings of the legal system. I believe in the integrity of the jury system.").

²¹⁸ See sources cited *supra* note 50.

²¹⁹ Goldberg & Siegel, *supra* note 33, at 409 ("In a theoretical sense, finality is necessary to maintain the legitimacy and integrity of the criminal justice system. In a practical sense, victims of violent crime seek finality as a way of promoting closure. A defendant's postconviction request for scientific tests threatens to undermine both types of finality, which adds to the resistance to such testing.").

²²⁰ See *supra* Part II.B.

is to shift principal responsibility for doing so to the executive, with the judiciary as a fallback in many jurisdictions only in crystal clear cases of innocence. As the executive branch official best positioned to assess whether a convicted defendant is factually innocent, the prosecutor has primary responsibility for correcting error and abdicates this responsibility when she fails to take reasonably available measures to rectify wrongful convictions.²²¹ This responsibility is not significantly different from that of correcting procedural or legal error. Yet it is ultimately more important: the interest in finality is a less compelling justification for preserving convictions of people who are innocent than for preserving convictions in the face of procedural error.²²²

To begin with, the state and federal government have an obligation to free innocent individuals. There is no legitimate public interest in preserving convictions of innocent defendants and continuing their confinement (much less, in capital cases, executing them). The public interest in correcting false convictions is logically as compelling as the public interest in avoiding false convictions, which finds expression in the constitutional design of the adversary process. What then is one to make of the absence of a comparable process post-conviction? The answer is simply that the constitution vests principal authority elsewhere. The constitutional authority to grant clemency is an expression of both the public interest in correcting false convictions and the executive branch's obligation to do so.²²³ Not only does the executive branch have a constitutional obligation to free the innocent, it has a moral responsibility to do so.²²⁴ Like the prosecution's obligation not to use its charging discretion arbitrarily,²²⁵ the obligation to free the innocent is not legally enforceable. But its existence is no less compelling.²²⁶ The

²²¹ See Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 151 n.35 (1971) (noting his own surprise at how many prosecutors let cases go to higher levels rather than take the opportunity to recommend clemency at an earlier stage); see, e.g., *Houston v. Partee*, 978 F.2d 362, 364–65 (7th Cir. 1992) (discussing how the prosecutors denied the existence of exculpatory evidence in their possession and how this led to the convicted defendants sitting in jail for years longer than they should have).

²²² See Friendly, *supra* note 221, at 160 (arguing that an exception should be made to finality when there is evidence that an innocent person is being punished); see also Green, *supra* note 75, at 642 (“[A]mong the sovereign’s paramount objectives are not merely to convict and punish lawbreakers but to avoid harming, and certainly to avoid punishing, innocent people.”).

²²³ See KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY AND THE PUBLIC INTEREST* 9 (1989) (arguing that “pardons are duties of justice”).

²²⁴ See Goldberg & Siegel, *supra* note 33, at 393 (“No ethical prosecutor should ever oppose the pursuit of justice, insofar as this means ensuring that an innocent person has not been convicted. To the extent that this requires disclosure or release of evidence, extant ethical precepts require this disclosure or release.”). *But see* Bakken, *supra* note 34, at 560 (“However, in the cases of innocent persons who have been convicted and sentenced but who continue to, or for the first time, claim innocence, prosecutors have no ethical duty to assist in investigating such claims.”).

²²⁵ See, e.g., *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299–1300 (9th Cir. 1992) (observing that charging or plea bargaining decisions made in an arbitrary or capricious manner may be a constitutional violation but not one for which a judicial remedy is available).

²²⁶ See *supra* note 198 and accompanying text.

ongoing executive obligation to correct error is part of what justifies punishment of convicted defendants in the teeth of constant reminders that the criminal justice process, for all the rights it affords, is fallible.²²⁷

The principal power and responsibility for correcting error—even if not the ultimate legal authority—reside in prosecutors.²²⁸ They have a de facto error-correction function. As a legal matter, and in theory, the power resides elsewhere—with the chief executive and, in some states, also with the court to a limited extent.²²⁹ But, as a practical matter, the prosecutor has the largest say.²³⁰ Neither the governor nor the court is in a position independently to investigate and evaluate new evidence. Among executive branch officials, the prosecutor is in the best position to do so, albeit with substantial assistance from the police or other investigative agencies.²³¹

Judge (then Professor) Gerard Lynch has written about the prosecutor's administrative role in the charging stage.²³² Post-conviction, the prosecutor's role, as a representative of the executive branch, should be viewed even more clearly as administrative, not adversarial.²³³ The executive's obligation is to determine for itself whether the convicted defendant is innocent or guilty, once new evidence of innocence is sufficiently compelling to warrant an inquiry. The executive's obligation is to view the question objectively, not from an adversarial stance.²³⁴ Here, the prosecution function, unlike at trial, is quasi-judicial, in the sense that the obligation is to be neutral and objective.²³⁵

There is no reason why the prosecutor's stance should be different in jurisdictions where there is a possibility of judicial relief. If the prosecutor is persuaded that the defendant has met the standard for judicial relief—either

²²⁷ See generally *Ex parte* Grossman, 267 U.S. 87, 120–21 (1925) (“Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. . . . It is a check entrusted to the executive . . .”).

²²⁸ See *supra* notes 22–23 (discussing the prevalence of false convictions).

²²⁹ See *supra* Part II.B.

²³⁰ See *supra* notes 114–18 and accompanying text.

²³¹ See sources cited *supra* note 114 (prosecutor is usually in control of potentially exculpatory evidence).

²³² See Lynch, *supra* note 189.

²³³ See *id.* at 2141–51 (arguing for the adoption of an administrative role of prosecutors into the adversarial system).

²³⁴ See generally Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837 (2004) (discussing the need for unbiased and nonadversarial decision-making by prosecutors); see also Jake Sussman, *Suspect Choices: Lineup Procedures and the Abdication of Judicial and Prosecutorial Responsibility for Improving the Criminal Justice System*, 27 N.Y.U. REV. L. & SOC. CHANGE 507, 532 (2002) (“Unlike defense counsel’s role as unequivocal advocate for an individual client, the prosecutor retains the critical responsibility of neutral inquiry into all aspects of a case.”).

²³⁵ See Green, *supra* note 75, at 643 (noting that overturning an unfairly procured conviction is easier in a prosecutorial office that understands that its duty is to “seek justice”).

because the new evidence casts doubt on the correctness of the verdict (as in New York)²³⁶ or because it unquestionably establishes the defendant's innocence (as in Texas)²³⁷—the prosecutor should not oppose such an application simply to allow an adversarial testing of the new evidence.²³⁸ Even if the judicial standard has not necessarily been met, it seems wrong for a prosecutor to oppose an application for relief if the prosecutor is sufficiently convinced of the defendant's innocence. To be sure, the prosecutor may not deceive the court by overstating the evidence of innocence. But neither should the prosecutor oppose defense efforts to rectify a wrongful conviction, once the evidence of innocence is compelling enough to persuade the prosecutor that the conviction was wrongful and should be rectified.

The key question, then, is how convinced the prosecutor must be of the defendant's innocence or how doubtful she must be of the convicted defendant's guilt to call for her to rectify an apparent injustice through whatever judicial or executive process is available.²³⁹ Our claim is that the answer is not to be found in the standard established by the legislature for judicial relief. The fact that some state courts are given a limited role does not mean that the legislature thereby intended to establish the standard for prosecutors' exercise of discretion.²⁴⁰ Prosecutors are free to seek a defendant's release independently of whether that can be achieved through the judicial process. The interest in achieving finality in the judicial process dictates the extent, if any, of courts' authority to remedy wrongful convictions.²⁴¹ It does not follow that there is an equal interest in constricting the administrative process. A legislature might set the standard high for judicial relief—or make it entirely unavailable—precisely because it wants to

²³⁶ See *supra* note 101 and accompanying text.

²³⁷ See *supra* note 102 and accompanying text.

²³⁸ See Zacharias, *supra* note 34, at 210 (“A prosecutor who *knows for a fact* that a convicted defendant is innocent should take some action. No conception of the prosecutor's role—as an advocate, defender of the public trust, or protector of victims—would countenance the prosecutor's participation in keeping a clearly innocent person incarcerated.”).

²³⁹ Prosecutors might apply a range of “presumptions of guilt”:

Prosecutors might carry forward the pre-conviction standard: they should help a defendant avoid (or void) his conviction only when they no longer have probable cause (i.e., a good reason to believe the defendant is guilty). Prosecutors might raise the standard: they should help defendant only if they no longer have any reason to believe in the validity of the conviction, not even a suspicion that defendant remains guilty. Alternatively, prosecutors might reverse the presumption to one focusing on innocence. Prosecutors might avoid defense-oriented action unless they “are almost certain,” “strongly believe,” “believe,” “have reason (or probable cause) to believe,” or “suspect” that a defendant is innocent.

See *id.* at 211.

²⁴⁰ In some cases the legislature merely has yet to consider the issue. See, e.g., *Anderson v. Gladden*, 383 P.2d 986, 991–92 (Or. 1963) (The Court refused to accept that executive clemency was the only avenue available in the case before it and suggested that further legislation was necessary to provide a framework within the current statutory post-conviction procedure.).

²⁴¹ See Goldberg & Siegel, *supra* note 33.

vest primary or exclusive authority in the executive to correct wrongful convictions. By not setting the standard, the legislature leaves standard setting to prosecutors' discretion.²⁴²

We have already suggested why it would be wrong to try to obtain a convicted defendant's release whenever there is a "reasonable doubt." At the other extreme, the new model disciplinary standard, which would require prosecutorial efforts when there is "clear and convincing" evidence of innocence, is also inapt.²⁴³ It is meant to set a disciplinary floor, and thus presupposes that prosecutors will act even when the defendant's innocence is less obvious than that. At least if the prosecutor concludes that the defendant is probably innocent,²⁴⁴ based on more complete knowledge than was available at the time of criminal proceedings, it seems intuitively right that the prosecutor should join in efforts to secure the defendant's release.²⁴⁵ Although procedurally fair in a legal sense, the trial cannot be considered procedurally fair in an ordinary sense given the absence of significant exculpatory evidence.²⁴⁶ It therefore does not disrespect the jury's role for the executive branch to give the case a fresh look when significant new evidence is found. At that point, if the executive branch, acting through the prosecutor, fairly concludes that the defendant is probably innocent, the State does not have a compelling interest to continue punishing the defendant. Whatever theoretical interest there may be in finality, it would not seem to measure up to the state interest in avoiding punishment of the innocent.

IV. IMPLICATIONS FOR INVESTIGATIONS AND OTHER PROCEDURAL MEASURES

Few prosecutors would dispute that their professional role, at least in some circumstances, includes investigating new evidence that suggests that a convicted defendant may be innocent. Doing so is sometimes necessary to enable the prosecutor to determine whether to attempt to rectify an innocent defendant's wrongful conviction. Prosecutors must assume this responsibility because convicted defendants generally lack the resources to uncover new evidence or to

²⁴² See *supra* notes 26–29.

²⁴³ See *supra* note 28 and accompanying text (the standards have not been adopted by state courts and are not legally enforceable).

²⁴⁴ Cf. Tara L. Swafford, *Responding to Herrera v. Collins: Ensuring that Innocents are not Executed*, 45 CASE W. RES. L. REV. 603, 627 (1995) ("The best standard for achieving hearings for meritorious new evidence claims is the 'probably innocent' standard, espoused in Justice Blackmun's dissent in *Herrera*.").

²⁴⁵ See *supra* note 160.

²⁴⁶ See Zacharias, *supra* note 34, at 213 ("But when new information calls into question the fairness of a prior proceeding, [a prosecutor] should not accord the conviction any presumption of accuracy.").

follow up effectively on their own.²⁴⁷ The hard questions regard what investigative steps must be taken, when and by whom.

One question is who should investigate and evaluate new evidence. Research on cognitive bias suggests that this responsibility should not be entrusted to the prosecutor who secured the conviction, and in many circumstances, should not be entrusted to that prosecutor's office.²⁴⁸ However, the Dallas County experience teaches that with appropriate leadership, structure and personnel, a large, urban office can create an independent internal unit to follow up on new evidence and to investigate post-conviction innocence claims. Similarly, smaller prosecutors' offices could pool their resources to create a unit to investigate claims from each of their counties, or they could seek the agreement of the state attorney general's office to review such claims. Where an investigation and evaluation cannot be conducted by an internal prosecutorial unit that maintains a non-adversarial and open mindset to consider the potential of a wrongful conviction, it might be preferable to adopt systems of review similar to those in England, Canada, or North Carolina, that entrust investigations and evaluations to independent bodies having internal, graduated processes for responding to new, exculpatory evidence.²⁴⁹

There are many factors relevant to whether an independent agency is preferable to an internal unit. Aside from the need to minimize the impact of cognitive bias, the culture in some prosecutors' offices does not give adequate weight to the responsibility to avoid, much less correct, unjust convictions,²⁵⁰ as is

²⁴⁷ Even prior to trial, defendants have comparatively limited resources. See Findley, *Innocents at Risk*, *supra* note 31, at 897–98. Post-conviction, they may have none at all, since there is no right to counsel after an appeal. In the Palladium case, for example, the two defendants imprisoned for murder could not have known that an informant claimed that he and a fellow gang member were responsible for the murder for which the defendants were convicted. Although the defendants were fortunate enough to have lawyers, and were exceptional in that respect, their lawyers still had nowhere near the access to witnesses and investigative resources available to the police and prosecutor. See Adele Bernhard, *Take Courage: What the Courts Can Do To Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293 (2001–2002) (discussing funding problems creating the institutionalized ineffectiveness of counsel); Tavernise, *supra* note 3.

²⁴⁸ See *supra* Part II.C.

²⁴⁹ Independent commissions such as that in North Carolina could be created on a statewide basis to consider post-conviction claims. This would require legislation or a judicial mandate and a companion budget to be effective. The office must have subpoena power and command the respect of all actors in the system. Like an Inspector General, the post-conviction unit would consult with the prosecutor who handled the case, but would be independent of that prosecutor.

²⁵⁰ The culture in some prosecutors' offices emphasizes conviction rates as the measure of prosecutorial performance. See Medwed, *Zeal Deal*, *supra* note 32, at 170. Ironically, this attitude may be particularly likely on the part of senior prosecutors, who are those most likely to be assigned to reinvestigate a case after conviction. See Felkenes, *supra* note 126, at 111–12. In other offices, the institutional culture may more readily permit a shift to an administrative model—for example, in offices in which prosecutors have taken the initiative to conduct post-conviction review of cases. See Gaertner, *supra* note 69; Goldberg & Siegel, *supra* note 33, at 394 n.21 (citing articles about prosecutor-initiated reviews).

reflected in the historical resistance in many jurisdictions to post-conviction innocence claims, or even to DNA testing that might establish innocence.²⁵¹ An independent agency can serve as a repository of knowledge about innocence claims.²⁵² Establishing an independent agency may also promote public confidence in the reliability of the criminal justice process. While trial prosecutors may be reluctant to share information about their cases or investigations with independent entities,²⁵³ in some jurisdictions, the advantages of independent offices with trained professional post-conviction investigators would outweigh the disadvantages.

On the other hand, as demonstrated by the Dallas experience, there are advantages to effective internal units within prosecutor's offices. Especially where there is an existing innocence project in the local area and the internal prosecutorial unit has established a cooperative relationship with it, that model might be preferable to an independent commission. The most effective model of post-conviction review of wrongful convictions needs further study. No matter what the model, where an individual defense lawyer or an innocence project is investigating a wrongful conviction, the prosecutor's "investigative" role should ordinarily include cooperating with the defense investigation by complying with requests to provide investigative files, evidence for testing, and other relevant information.²⁵⁴

²⁵¹ Goldberg & Siegel, *supra* note 33, at 395 (noting that some "prosecutors have forced defendants to engage in protracted litigation to obtain the evidence and the tests"); Kreimer & Rudovsky, *supra* note 46, at 561–64 (discussing cases of prosecutorial resistance to post-conviction DNA testing).

²⁵² More than 230 DNA exonerations and the growing body of knowledge about their causes and remedies point to the need for recognition of prosecutorial post-conviction review as a specialized field with unique requirements for hiring and training for attorneys and investigators. The post-conviction unit should be trained to understand the prevalence and effect of tunnel vision, the lessons from prior innocence commissions, and unique local concerns and the other significant issues in reviewing post-conviction claims. It can systematically gather information about issues unique in the jurisdiction that lead to wrongful convictions. For example, if the credibility of an individual police officer is questionable, the unit will be able to systematically use that information in other cases. Where a particular prosecutor is known to be one who fails to address inconsistencies in testimony in his cases, the independent unit can systematically utilize that knowledge as well. Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917 (1999) (quoting prosecutors about others who get wedded to their theory of the case and ignore evidence that is inconsistent with it).

²⁵³ Prosecutors have traditionally argued that "exposing the inner working of their office and policies would undermine their effectiveness" in law enforcement. Some have called for greater transparency in prosecutors' offices to improve political accountability and confidence in the process. See, e.g., Medwed, *Zeal Deal*, *supra* note 32, at 177–78.

²⁵⁴ See Medwed, *Preaching*, *supra* note 32; see also text accompanying n. 104–112 (noting the possible advantages of internal units including access to files and personnel across jurisdictions, development of expertise in the area, and potentially fostering strong relationships with innocence projects thereby solidifying cooperation in submitting claims to court).

In circumstances where the prosecutor's office can establish an effective post-conviction unit internally, the chief prosecutor should, at a minimum, assign principal responsibility for the investigation and evaluation to a prosecutor in the office who did not participate in the earlier charging and trial decisions.²⁵⁵ Investigating and evaluating new evidence post-conviction are administrative functions, not adversarial ones. Whoever engages in this work 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. The ultimate question to resolve, we have suggested, is whether the convicted defendant is probably innocent, in which event the prosecutor should take reasonable steps, to the extent available, to rectify the conviction. The prosecutors who obtained the conviction cannot easily switch hats and assume an administrative attitude.

In the Palladium case, the district attorney eventually assigned the post-conviction investigation to a senior prosecutor who had no prior involvement. But, troublingly, the district attorney or his delegated higher-ups ultimately rejected the prosecutor's recommendation that the office support the defendants' post-convictions motions in light of his conclusion that they were probably innocent. Although the district attorney, as an elected official, had ultimate responsibility for the office's decisions, he could have deferred to the recommendation, given that he had far less familiarity with the reinvestigation than the prosecutor who conducted it and was more susceptible to biases that would influence one to justify the prior conviction. In offices that conduct their own investigation of new evidence, some thought must be given to the allocation of ultimate decision making authority between the prosecutor assigned to investigate and superiors.²⁵⁶

A further question is when a post-conviction reinvestigation should commence. ABA Model Rule 3.8(g) sets a high threshold, providing that investigation need not commence until the prosecutor in the office where the conviction was obtained learns of "new, credible and material evidence creating a reasonable likelihood that" the convicted defendant is innocent.²⁵⁷ But the disciplinary standard was not intended to imply that when exculpatory evidence does not achieve that level of significance, it should be ignored. On the contrary, the rule drafters assumed that, as a matter of discretion, prosecutors would give new exculpatory evidence some level of scrutiny, often involving some initial inquiry, to determine whether the evidence is significant enough to require

²⁵⁵ See Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305, 321 (2001); Medwed, *Zeal Deal*, *supra* note 32, at 177-78; Sean Gardiner, *The Prosecutor Takes Another Look: The DA's Role in Reversals*, NEWSDAY, Dec 10, 2002; <http://xml.newsday.com/topic/ny-nypros103039840dec10,0,3307642.story> (describing how prosecutors in Queens County, New York actively reinvestigated three murder cases and moved to set aside all three verdicts).

²⁵⁶ Green & Zacharias, *supra* note 202 (discussing allocation of decision making authority in federal criminal prosecutions).

²⁵⁷ A.B.A. MODEL RULES, *supra* note 26.

disclosure to the defendant and to the court and to necessitate a more substantial reinvestigation. The Canadian and English procedures serve as examples of graduated processes; ideally, any office established to investigate new claims or evidence of innocence will similarly establish protocols.

That is not to say that every complaint from a convicted defendant deserves a reinvestigation. A threshold question is whether new exculpatory evidence has been uncovered by the prosecutor or called to his attention by the convicted defendant or another third party.²⁵⁸ No doubt, many complaints that come to a prosecutor's office do not require investigation because they do not involve a claim of innocence at all.²⁵⁹ Other complaints can be screened out immediately, or quickly, because they are frivolous on their face or because they simply reargue evidence that was presented to the jury.

Experience suggests, however, that a prosecutor who learns of new exculpatory evidence should not rule out the need for investigation based simply on the strength or nature of the trial evidence. In many cases in which defendants were eventually exonerated by DNA testing, the evidence previously appeared overwhelming,²⁶⁰ leading courts to reject claims that confessions, eyewitness identifications, forensic evidence, or informant testimony were false or unreliable or to conclude that any procedural errors were harmless.²⁶¹ The fact that the defendant pleaded guilty may be strong proof, but it should not be taken to

²⁵⁸ The Conviction Integrity Unit (CIU) in Texas views this as akin to the federal standard in civil cases for dismissal of a claim, FED. R. CIV. P. 12(b)(6). See Ware Interview, *supra* note 172.

²⁵⁹ The Texas experience indicates that at least 25% of claims had nothing to do with factual innocence and could readily be dismissed. These included complaints about judges, their attorney, and the food in prison. In a large percentage of other cases, the CIU "strains to fill in the blanks" to determine whether there is factual claim of innocence. Ware Interview, *supra* note 172. Where it is not clear whether a claim of innocence is being made, a return telephone call, conversation or letter should relatively quickly be able to resolve the ambiguity.

²⁶⁰ Garrett, *Judging Innocence*, *supra* note 55, at 61 (in exoneration cases, appellate courts held that the evidence of guilt was "overwhelming;" of the 200 DNA exonerations, only 14% of all cases were overturned on appeal; 9% were non-capital cases).

²⁶¹ *Id.* The appellate system presumes that the trial verdict is correct, and places the burden on the person convicted to demonstrate a substantial error. Doctrines of deference, while perhaps permanent fixtures of our judicial system, have often resulted in substantial shortcomings when it comes to a court's willingness—and a convicted person's ability—to investigate and consider new facts. A study of appeals filed by people who were later exonerated by DNA testing shows that claims ranging from prosecutorial misconduct to witness recantations were almost uniformly dismissed. "Far from recognizing innocence," the study notes, "courts often denied relief by finding errors to be harmless." *Id.* at 55. Moreover evidentiary rules at trial that prevent alternate theories and facts from consideration (such as limited admissibility of evidence suggesting an alternate perpetrator), the deferential view of factual guilt determinations by the jury as well as the harmless error standard all foster tunnel vision thereby preventing a careful review for factual innocence. See Findley, *Innocents at Risk*, *supra* note 31, at 898–930; Findley & Scott, *supra* note 32, at 321 ("With hindsight knowledge that a jury found the defendant guilty beyond a reasonable doubt, judges are likely to be predisposed to view the conviction as both inevitable and a sound decision, despite a procedural or constitutional error in the proceedings."); Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1.

preclude the possibility of innocence.²⁶² On the other hand, the nature of the trial evidence may suggest that reinvestigation is particularly justified. For example, it is now understood that eyewitness identifications are highly fallible,²⁶³ and that scientific tests can be less reliable than they once seemed.²⁶⁴

Similarly, experience suggests that reinvestigations should not be ruled out simply because of the nature of the new exculpatory evidence. Prosecutors tend to mistrust witness recantations, but not all witness recantations are false.²⁶⁵ Likewise, prosecutors tend to mistrust jailhouse informants who provide exculpatory (as distinguished from incriminating) evidence. But not all stories from inmates about that one prisoner who admitted to another prisoner's crime are false.²⁶⁶ Experience with false confessions (such as those in the Central Park Jogger case) suggests that confessions similarly should not be regarded as conclusive evidence of guilt.²⁶⁷

Nor should new evidence be ignored simply because it would not qualify as "newly discovered" for purposes of doctrines governing judicial review.²⁶⁸ For

²⁶² Nine of the 200 exonerations studied by Garrett have been innocent people who have pleaded guilty. See Garrett, *Judging Innocence*, *supra* note 55, at 60, 74. Some jurisdictions do not permit DNA testing where a person has pled guilty. See Garrett, *Claiming Innocence*, *supra* note 94, at 1680.

²⁶³ See *supra* note 54.

²⁶⁴ See *supra* note 55.

²⁶⁵ Two well-known DNA exonerations illustrate this. The first involved Frank Lee Smith, who was convicted of raping and murdering a child in Broward County, Florida, and sentenced to death. Five years after the conviction, a key prosecution witness who had claimed to have seen Smith outside the victim's house on the night of the attack, provided a sworn affidavit stating that she had been mistaken in her testimony and that she had these doubts at the time of the trial, but that "[t]he state attorney told me not to worry about my testimony because the man would be locked up and electrocuted the following May. He also pointed out the man's entire family to me. I was just feeling so pressured." *Smith v. Dugger*, 565 So. 2d 1293, 1296 (Fla. 1990). Smith's *habeas* petition based in part on the recantation was opposed at every step and was rejected by all the courts reviewing it, yet DNA testing ultimately proved that another man was the perpetrator. The other case involved Gary Dotson, who was convicted of aggravated rape in Cook County, Illinois, and sentenced to 25–50 years in prison. Long after his conviction, Dotson sought a new trial based upon the recantation of the complainant, who now testified that she had had consensual intercourse, and, fearing she was pregnant (and the reaction that would ensue from her legal guardians), had essentially injured herself and ripped up her clothes to make it look like a rape. Again, the recantation was disbelieved by the prosecution and reviewing courts. *People v. Dotson*, 516 N.E.2d 718 (Ill. App. Ct. 1987). Dotson was exonerated by DNA evidence only years later. See Innocence Project, *supra* note 22, at <http://www.innocenceproject.org/Content/89.php> (last visited Jan. 20, 2009).

²⁶⁶ A notorious example is Chris Ochoa who, under severe police coercion, falsely confessed and then pled guilty to a homicide. Eight years later, another inmate imprisoned for life wrote to state officials confessing to the murder. DNA testing established that this man was the perpetrator and Ochoa was eventually set free. See Diane Jennings, *A Shaken System*, DALLAS MORNING NEWS, Feb. 24, 2008, at 1A.

²⁶⁷ See *supra* note 124; Garrett, *Judging Innocence*, *supra* note 55, at 89; Richard A. Leo, POLICE INTERROGATION AND AMERICAN JUSTICE 195 (2008).

²⁶⁸ See *supra* notes 93–94 and accompanying text.

example, the fact that a defense lawyer could have discovered the new evidence by reasonable diligence does not mean that the evidence is not credible or significant enough to justify an investigation. While the failure to use the evidence may reflect the defendant's recognition that the evidence was not credible or defense counsel's recognition that the evidence was not important, it may alternatively reflect that defense counsel was simply unaware of the evidence or of its importance or that defense counsel was under-zealous.²⁶⁹ Some courts refuse to regard a co-defendant's exculpatory testimony as "newly discovered," even if the co-defendant was previously unwilling to testify and had a right not to do so,²⁷⁰ but there is no reason to take the same position in exercising prosecutorial discretion to revisit past convictions. A co-defendant's exonerating account may turn out to be corroborated and prove more consistent with other evidence than the prosecution's theory at trial.

Another question is how extensively new evidence must be investigated. It is hard to imagine hard and fast answers. Thus, ABA Model Rule 3.8(g) simply contemplates sufficient investigation to enable the prosecutor "to determine whether the defendant is in fact innocent" (or, in a jurisdiction where the prosecutor lacks investigative resources, "reasonable efforts to cause another appropriate authority to undertake the necessary investigation").²⁷¹ The extent of the investigation will vary with the circumstances.²⁷² No rational system of resource allocation would require completely reinvestigating from scratch whenever significant, new exculpatory evidence was uncovered. But on the other hand, as the Palladium case illustrates, the necessary reinvestigation will sometimes be lengthier and more extensive than the one that led to a conviction.

²⁶⁹ Stephen B. Bright, *Turning Celebrated Principles into Reality*, THE CHAMPION (Nat'l Ass'n of Crim. Def. Law.), Jan.-Feb. 2003, at 6 (discussing widespread problems of ineffective assistance of counsel); Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147 (2001) (same). Ineffective Assistance of Counsel is one of the six leading causes of wrongful convictions. Innocence Project, *supra* note 22, at <http://www.innocenceproject.org/understand/Bad-Lawying.php> (last visited Jan. 20, 2009).

²⁷⁰ See, e.g., *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir. 1992) (post-trial statement of codefendant who refused to testify at trial does not constitute newly discovered evidence); *United States v. Offutt*, 736 F.2d 1199, 1202 (8th Cir. 1984); *United States v. Dale*, 991 F.2d 819, 838-39 (D.C. Cir. 1993) ("The unanimous view of circuits that have considered the question is that [the requirement that the evidence be discovered after trial] is not met simply by offering the post-trial testimony of a co-conspirator who refused to testify at trial."). See generally Mary Ellen Brennan, Note, *Interpreting the Phrase "Newly Discovered Evidence": May Previously Unavailable Exculpatory Testimony Serve as the Basis for a Motion for a New Trial Under Rule 33?*, 77 FORDHAM L. REV. 1095 (2008).

²⁷¹ A.B.A. MODEL RULES, *supra* note 26, at R. 3.8, cmt. 7.

²⁷² For example, if an eyewitness advises the prosecutor that he is no longer certain of his identification, at least a brief discussion with the witness is warranted. If the discussion does not lead to more specific information, and the prosecutor has no other reason to question the conviction and no further leads, then the investigation might be concluded. On the other hand, the witness may state his belief that he made a misidentification more strongly and credibly, warranting a review of the file and additional inquiry.

Considerations bearing on the length and nature of the reinvestigation may include the strength and weaknesses in the underlying case, the age and capacity of the defendant,²⁷³ the lawyers and judge involved, the existing case law, the state of scientific and investigative procedures at the time of conviction, alternative suspects who were discounted early in the process, other information available to the prosecution that was not required to be produced to the defense, use of informants, and other factors.²⁷⁴

Depending on the circumstances, a prosecutor who follows leads and is open-minded may take any number of steps. He may engage in discussion with trial and appellate counsel, read the trial transcript, talk with witnesses, review the evidence, request polygraph examinations,²⁷⁵ engage his own experts or pursue other avenues to dig into the facts.²⁷⁶ Certainly, the trial prosecutor has the greatest information to offer about the case and the conviction, including information about the strengths and weaknesses in the case; whether he had questions about testimony of certain witnesses; his impression of the defendant's testimony and of the police investigation; and whether there was exculpatory information that was not deemed material and not disclosed to the defense,²⁷⁷ including whether there was evidence that another person might be the perpetrator.²⁷⁸ The prosecutor reinvestigating the case should also consider the quality of the defense counsel, given that ineffective assistance of counsel is a rampant criminal justice problem and among the leading causes of wrongful convictions.²⁷⁹

A post-conviction unit necessarily will be called upon to make difficult choices in the exercise of discretion as to the extent of any investigation, and considerations may weigh against taking potentially fruitful steps. For example, the prosecutor may have to consider whether to contact the victim, given that the process may be traumatic for the victim. If a case involves DNA, at what point should the prosecution request the victim's DNA? What about collecting the DNA

²⁷³ See Garrett, *Judging Innocence*, *supra* note 55, at 89 (empirical studies demonstrating increased risk of false convictions, notably by false confessions, for juveniles and people with mental disabilities); Gross et. al, *supra* note 23, at 544–47.

²⁷⁴ Eyewitness identification is the leading cause of wrongful convictions. See sources cited *supra* note 54. To the extent that the underlying conviction is based upon discredited or questionable eyewitness identification procedures, it should be carefully examined. This is equally true for various forensic science techniques, the method of obtaining confessions and the use of jailhouse informants.

²⁷⁵ Gershman, *supra* note 33, at 349 n.215 (suggesting that polygraphs are used by prosecutors to clear innocent suspects).

²⁷⁶ Similar procedures were used in the Palladium and Central Park jogger cases. See *supra* notes 6 & 122.

²⁷⁷ Prosecutors often mistakenly apply the appellate standard at the pretrial stage to determine whether or not they must disclose “material” exculpatory evidence. Kevin C. McMunigal, *Gilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651 (2007).

²⁷⁸ JOHN GRISHAM, *THE INNOCENT MAN: MURDER AND INJUSTICE IN A SMALL TOWN* (2006); Randall Coyne, *Dead Wrong in Oklahoma*, 42 TULSA L. REV. 209 (2006).

²⁷⁹ DWYER ET AL., *supra* note 22.

of her now-estranged husband when the victim claims that if the police contact him, he will retaliate against her? There are no simple or generic answers.

At some point, further investigation may seem unproductive and evidence must be evaluated and a conclusion drawn. Unlike in cases where defendants have been exonerated by DNA testing (i.e., *proven* to be innocent), the determination is likely to be murkier, which is why unbiased decision making is at a premium. If witnesses recant, are they truthful now or were they truthful at trial? If new witnesses are uncovered, are they credible? The question should not be whether the prosecutor is *certain* of the defendant's guilt or innocence, but how certain or uncertain and, ultimately, whether innocence is sufficiently likely to warrant taking steps to correct an apparent error.

When a prosecutor concludes that a convicted defendant is reasonably likely to be innocent, the appropriate steps may vary depending on the jurisdiction, since, as discussed, not all states afford a judicial remedy, and in those that do, the standard for relief varies. Where courts do have authority to provide relief, what is the prosecutor's role? There is no reason to approach the judicial process from an adversarial perspective, once having made an administrative determination that the defendant is probably innocent. Rather, the prosecutor should be forthright about his conclusion and ensure that the court receives the relevant, exculpatory evidence. In the Palladium case, for example, the assistance provided by the prosecutor to the defense may seem anomalous given his office's initial position that the defendants were not entitled to new trials. But given the prosecutor's conclusion that the defendants were innocent, the problem may not be that he was under-zealous but that he was over-zealous in failing to take that position in court and in formally putting the defendants to their proof.

V. CONCLUSION

We have suggested that, in exercising its discretion after obtaining a conviction, a prosecutor's office should investigate significant new evidence that suggests that the convicted defendant was innocent. If the office then concludes that the defendant was probably innocent, it should take measures, whether by supporting an application for judicial relief or by supporting a pardon application, to correct the apparent mistake. No doubt, objections can be raised to this proposal both conceptually and in its application. Chief among these would be objections about the administrative expense and burden, about the number of false claims of innocence that would be filed, about the impact of reinvestigations on victims and on the public perception, and about other purported harms that might eventuate.

It may be argued, for example, that there are too many wrongly convicted defendants. These may include not only imprisoned defendants but others who have been burdened, including those whose convictions have had a significant impact upon their access to jobs and housing or their immigration status. Further, the number of undeserving, convicted defendants who would claim innocence, pointing to new exculpatory evidence, will be a multiple of those who in fact were

innocent. It may be feared that the error-correction function—of finding the few wrongly convicted defendants—will overwhelm prosecutors’ offices.

We have chosen not to anticipate and address possible objections in the abstract, but instead propose that prosecutors’ offices proceed incrementally by establishing post-conviction review mechanisms, insuring independence from the prosecutors who handled the case, as did the Dallas district attorney’s office, and setting priorities. For example, prosecutors might begin by reviewing new evidence in death penalty cases and cases where defendants have been or will be in prison for lengthy periods of time. Experience will then show whether the demand of reviewing convictions is burdensome or manageable, and how the process can be improved and made more efficient. Experience will also provide more information about how often the ordinary investigation, trial and guilt-plea processes result in potentially false convictions, and why that occurs. Ultimately, experience will tell whether less need be done, or more should be done, to promote the reliability of the criminal justice process. If a prosecutor’s responsibility as “minister of justice” truly includes a responsibility to take “special precautions . . . to prevent *and to rectify* the conviction of innocent persons,”²⁸⁰ as the ABA—and we—believe it does, then initial efforts such as these should be taken by all prosecutors’ offices, not just an innovative few.

²⁸⁰ A.B.A. MODEL RULES, *supra* note 26, at R. 3.8, cmt. 1 (emphasis added).