
**THE ZEAL DEAL: PROSECUTORIAL RESISTANCE TO
POST-CONVICTION CLAIMS OF INNOCENCE**

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INTRODUCTION

Prosecutors in St. Paul, Minnesota recently sought to vacate a 1985 rape conviction after a deoxyribonucleic acid (“DNA”) test confirmed the man’s innocence.¹ What made this event notable was not that an innocent person had been exonerated based on post-conviction DNA testing—indeed, 140 people

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¹ Paul Gustafson, *DNA Exonerates Man Convicted of ‘85 Rape*, STAR TRIB. (Minneapolis), Nov. 14, 2002, at 1A (describing the man’s exoneration); Jodi Wilgoren, *Prosecutors Use DNA Test to Clear Man in ‘85 Rape*, N.Y. TIMES, Nov. 14, 2002, at A22.

have been freed in that fashion over the last few years²—but that, for the first time, a local district attorney’s office had initiated the process that led to the exoneration rather than members of the defense team.³ Susan Gaertner, the chief prosecutor in St. Paul, 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.”⁴

To be sure, a host of individual prosecutors and entire district attorneys’ offices themselves have shown a concern for justice by attempting to remedy the problem of wrongful convictions. In addition to unilaterally reviewing post-conviction cases where biological evidence could be subjected to new forms of scientific testing,⁵ several prosecutors have tried to prevent unjust convictions on the front end by establishing committees to evaluate and

² For a current tally of DNA exonerations, see The Innocence Project, *Innocence Project Homepage*, at <http://www.innocenceproject.org> (last accessed Jan. 9, 2004) [hereinafter The Innocence Project].

³ See Wilgoren, *supra* note 1 (characterizing this as the first prosecutor-initiated exoneration in the country). In response to a December 2002 audit, which found atrocious conditions in a Houston DNA testing facility, prosecutors reviewed almost ninety cases and, in March 2003, cleared a man convicted of rape after DNA testing proved his innocence. See Adam Liptak, *Houston DNA Review Clears Convicted Rapist, and Ripples in Texas Could Be Vast*, N.Y. TIMES, Mar. 11, 2003, at A14; Nick Madigan, *Houston’s Troubled DNA Crime Lab Faces Growing Scrutiny*, N.Y. TIMES, Feb. 9, 2003, § 1, at 20. Similarly, in May 2003, the New York County District Attorney’s Office freed a man, who had spent twelve years in prison for a rape he did not commit, through New York City’s “backlog project” in which prosecutors utilize a DNA databank to re-examine past sex crimes. Robert McFadden, *DNA Clears Rape Convict After 12 Years*, N.Y. TIMES, May 20, 2003, at B1.

It is becoming increasingly common for prosecutors to take the initiative to review cases, although not necessarily to exonerate prisoners as a result. See Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 CAL. W. L. REV. 389, 394 n.21 (2002) (citing articles about prosecutor-initiated reviews); Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 557-60 (2002) (describing reviews that prosecutors have conducted in San Diego, Minnesota, and Orange County, California); Ross E. Milloy, *Some Prosecutors Willing to Review DNA Evidence*, N.Y. TIMES, Oct. 20, 2000, at A18 (describing the decision of a district attorney in Texas to review four-hundred convictions after DNA evidence exonerated a man imprisoned for almost sixteen years, and mentioning the commencement of similar reviews in San Diego and Riverside, California).

⁴ Wilgoren, *supra* note 1; see also Paul Gustafson, *DNA Tests May Help Inmates Prove Innocence; Ramsey County Is Reviewing Old Convictions to See if New Tests Might Change Outcomes*, STAR TRIB. (Minneapolis), Mar. 2, 2001, at 1B (describing Gaertner’s desire to conduct a review of old cases).

⁵ See *supra* note 3 and accompanying text (collecting instances of prosecutor-initiated reviews of DNA evidence).

possibly dismiss cases on the verge of proceeding to trial built solely upon the testimony of a single eyewitness.⁶ Some district attorneys have even implemented office-wide policies decreeing that, in specific circumstances, they will not oppose a motion for a new trial based on newly discovered evidence.⁷ Frequently, moreover, the public rhetoric and personal beliefs expressed by prosecutors condemn the idea that any district attorney would willingly permit an innocent person to languish in prison.⁸

Nevertheless, conduct by prosecutors can have a negative impact on the outcome of post-conviction innocence claims.⁹ First, in the post-conviction DNA testing context, the prosecution can affect the availability of this option by opposing the testing altogether¹⁰ or simply by stalling in turning over the

⁶ Sean Gardiner, *For Them, No Justice; Bad Convictions Put 13 Men in Prison. Persistence—and Luck—Got Them Out*, NEWSDAY, Dec. 8, 2002, at A03 (reporting that the chief prosecutor in Brooklyn implemented a rule whereby he must personally approve all felony cases in which only a single eyewitness identified the accused); Robin Topping, *Panel Puts Justice Before Prosecution*, NEWSDAY, Jan. 8, 2003, at A21 (describing the work of the One Witness Committee in the Nassau County District Attorney's Office in New York, which annually evaluates approximately ten cases that appear questionable and dismisses on average two per year).

⁷ Mark Lee, an assistant prosecutor in the Suffolk County District Attorney's Office in Massachusetts, for instance, has noted how his office adapted to advances in DNA technology by softening its stance on motions for a new trial. See Mark Lee, *The Impact of DNA Technology on the Prosecutor: Handling Motions for Post-Conviction Relief*, 35 NEW ENG. L. REV. 663, 664 (2001). Lee has observed that “[o]rdinarily, when faced with a direct appeal or a motion for a new trial, the government typically opposes such appeals or motions,” but “with respect to requests for DNA testing, the DA’s office has adopted a position that it will not oppose a defendant’s request for funds to have DNA testing performed.” *Id.* Ultimately, in Lee’s view, “[a] DNA test result that clearly exonerates a defendant should result in the Commonwealth’s assent to the motion for new trial . . .” *Id.*

⁸ See, e.g., Sean Gardiner, *Getting It Right: Experts Eye Measures to Prevent Injustices*, NEWSDAY, Dec. 11, 2002, at A08 (quoting one prosecutor as saying, “‘I have no trouble with any post-conviction remedy that tests the question of do we have an innocent person in jail’ . . . ‘[i]f you’ve got one person sitting in jail that shouldn’t be there, the system has done a terrible thing’”); Kevin P. Meenan, *DNA Resources Limited*, USA TODAY, June 26, 2001, at 12A (arguing, as president-elect of the National District Attorneys Association, that “[n]o prosecutor in America would willingly convict an innocent person or have one wrongly convicted languishing in prison”).

⁹ See Bruce Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 638 n.133 (1999) (noting that the typical prosecutorial response to post-conviction innocence claims is to deny that the newly discovered proof is legitimate and that the prisoner is innocent); see also Goldberg & Siegel, *supra* note 3, at 394-95 (“On one end of the spectrum, prosecutors have assented to, and in some cases assisted with, the locating and testing of evidence On the other end of this spectrum, prosecutors have forced defendants to engage in protracted litigation to obtain the evidence and the tests.”).

¹⁰ District attorneys often oppose testing on the grounds that it cannot prove the inmate’s innocence and is a waste of time and money. For example, prosecutors in Pennsylvania spent seven years fighting Bruce Godschalk’s request for DNA tests on the evidence related

biological evidence sought by the defense,¹¹ which is almost invariably in the possession of law enforcement.¹² Second, where post-conviction innocence claims are unrelated to DNA testing, such as those involving statements by previously unknown witnesses or confessions by the actual perpetrator,¹³ the prosecution can influence how courts will resolve the claims by deciding whether to cooperate with the defense, for instance, by joining—or at least not contesting—a defendant’s request for an evidentiary hearing based on the newly discovered evidence.¹⁴

to his conviction for two rapes. *See, e.g.,* Michael Rubinkam, *DNA Evidence Frees Man Jailed Since ‘87 in Rape of 2 Women; Prosecutor to Seek Dismissal of Charges*, PITT. POST-GAZETTE, Feb. 15, 2002, at B2. Ultimately, Godschalk sued in federal court to force the release of the evidence that was uncovered during the investigation of the crime, and DNA tests eventually exonerated him. *See id.* This case prompted *The Washington Post* to publish an editorial arguing that “[e]ven in the absence of more permissive rules, prosecutors need to be more open to testing that could undermine a verdict. You just never know when a seemingly airtight case will melt on close inspection.” Editorial, *Yet Another DNA Exoneration*, WASH. POST, Feb. 18, 2002, at A22; *accord* Kreimer & Rudovsky, *supra* note 3, at 547-52 (discussing the Godschalk case in detail).

¹¹ Short of actually refusing to turn over evidence, prosecutors can hinder defendants’ access to post-conviction testing through a variety of concrete methods. *See* Goldberg & Siegel, *supra* note 3, at 400-06. Some state post-conviction DNA testing statutes demand that applicants must still be incarcerated, signifying that the “speed of the prosecutor’s response . . . could certainly affect whether the testing can occur during the pendency of the sentence, and therefore the availability of testing under certain statutes.” *Id.* at 402. Moreover, almost every jurisdiction that authorizes DNA testing requires a showing as to the authenticity of the evidence, and, in theory, “prosecutors could demand that the defendant establish a chain of custody stretching over decades, through offices and personnel who are clearly beyond his control.” *Id.* at 403.

¹² Simply locating the existing evidence may be burdensome for defendants and defense lawyers, and may require the assistance of prosecutors. *See* Laura Maggi, *DNA Test for Inmates Elusive Despite Law; La. Fund Lacks Cash; Evidence Hard to Find*, TIMES-PICAYUNE (New Orleans), Dec. 16, 2002, at 1 (according to Emily Bolton, legal director of the Innocence Project New Orleans, the evidence could be with the clerk of the court, the Criminal Sheriff’s Office, a crime lab, or the state police, thereby making the evidence difficult for defendants to find).

¹³ Post-conviction innocence claims that do not have a DNA component may revolve around any number of other types of evidence; this evidence is often testimonial, including recantations by trial witnesses. *See* James McCloskey, *Convicting the Innocent*, 8 CRIM. JUST. ETHICS 2, 56 (1989) (observing that such claims may involve new witnesses or trial witnesses who recant their previous testimony).

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. *See, e.g.,* Goldberg & Siegel, *supra* note 3, at 393-94 (emphasizing the role the prosecutor plays in the availability of DNA testing for the defendant); Sean Gardiner, *Dynamics of Righting a Wrong: The DA’s Role in Reversals*, NEWSDAY, Dec. 10, 2002, at A35 (describing how

Not only can prosecutors theoretically affect the results of post-conviction innocence claims, but they often do so in reality. Empirical proof suggests that prosecutors have consented to DNA tests in less than fifty percent of the cases in which testing later exonerated the inmate.¹⁵ Likewise, qualitative evidence of prosecutorial indifference and, on occasion, hostility to even the most meritorious of post-conviction innocence claims is alarming.¹⁶ Some prosecutors have continued to fight these claims despite clear evidence, including DNA test results, exculpating the defendant;¹⁷ others have averted the possibility of post-conviction litigation by destroying biological evidence or urging defendants to waive their rights to the preservation of the evidence.¹⁸ Prosecutorial intransigence to setting aside the conviction of an innocent prisoner all too often wanes only after it becomes politically expedient (or even

prosecutors in Queens County, New York, actively re-investigated three murder cases during a five-year period and joined in the motions to set aside the verdicts in all three).

¹⁵ See Kreimer & Rudovsky, *supra* note 3, at 564 n.63 (mentioning data compiled by The Innocence Project at Benjamin N. Cardozo School of Law); see also Adam Liptak, *Prosecutors See Limits to Doubt in Capital Cases*, N.Y. TIMES, Feb. 24, 2003, at A1.

¹⁶ See Kreimer & Rudovsky, *supra* note 3, at 561-64 (discussing instances of prosecutorial opposition to post-conviction DNA testing); see also McCloskey, *supra* note 13, at 56 (noting that prosecutors are not only “coldly unresponsive” to post-conviction innocence claims, “but they quickly act to suppress or stamp them out”); Liptak, *supra* note 15 (“‘There is enormous resistance to these exonerations’ ‘That raises, frankly, a serious ethical question. A prosecutor’s duty is to justice, not convictions. Is it about holding onto victory? Is it about the fear of having made a mistake?’” (quoting Barry Scheck, Co-Director of The Innocence Project at Cardozo)).

¹⁷ See, e.g., James S. Liebman, *The New Death Penalty Debate: What’s DNA Got to Do with It?*, 33 COLUM. HUM. RTS. L. REV. 527, 543 (2002) (arguing that “prosecutors have become more sophisticated about hypothesizing the existence of ‘unindicted co-ejaculators’ (to borrow Peter Neufeld’s phrase) to explain how the defendant can still be guilty, though another man’s semen is found on the rape-murder victim”); Charles I. Lugosi, *Punishing the Factually Innocent: DNA, Habeas Corpus and Justice*, 12 GEO. MASON U. CIV. RTS. L.J. 233, 235 (2002). Lugosi observes:

[E]ven after DNA testing has proven the innocence of a prisoner, prosecutors refuse to accept the results and rely upon other evidence that supports guilt, or they create a new theory of how the crime occurred (never before put to the judge and jury) to justify the continued punishment of an innocent person.

Id.; see also Adam Liptak, *Prosecutors Fight DNA Use for Exoneration*, N.Y. TIMES, Aug. 29, 2003, at A1 (discussing two cases in Florida in which DNA testing proved the biological evidence could not have come from the defendants, yet prosecutors continued to challenge their innocence claims).

¹⁸ See Kreimer & Rudovsky, *supra* note 3, at 563. Oftentimes, authorities lose or destroy the evidence from a case after the defendant’s initial appeal. See Barry Scheck & Peter Neufeld, *DNA and Innocence Scholarship*, in *WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE* 241, 245 (Saundra D. Westervelt & John A. Humphrey eds., 2001) (“In 75 percent of Innocence Project cases, matters in which it has been established that a favorable DNA result would be sufficient to vacate the inmate’s conviction, the relevant biological evidence has either been destroyed or lost.”).

beneficial) to do so.¹⁹ Overall, the signs of resistance by prosecutors to legitimate post-conviction innocence claims raise troubling questions.

This article examines the question of why prosecutors may turn a blind eye to post-conviction allegations of innocence²⁰ and concludes that there are certain institutional and political barriers that deter district attorneys' offices from recognizing potentially valid innocence claims, the efforts of St. Paul's chief prosecutor and others notwithstanding.²¹ Part I analyzes the institutional culture of district attorneys' offices, evaluating whether specific aspects of how these organizations operate create an environment where resistance to post-conviction innocence claims is an accepted and pervasive cultural norm. Part II addresses the impact of politics on prosecutorial approaches to innocence claims and asserts that the bulk of district attorneys benefit politically from battling defense efforts to overturn convictions and thereby appearing "tough-on-crime."²² Finally, Part III discusses a series of reforms that might affect

¹⁹ See *infra* notes 151-237 and accompanying text. Also, in an apparent effort to save face, some prosecutors have grudgingly accepted the legitimacy of the innocence claim but still demanded that the defendant plead guilty to a lesser charge. See, e.g., William Glaberson, *Man Is Freed in Killing in Which His Brother Admitted a Role*, N.Y. TIMES, Sept. 11, 2002, at B1 (describing the defendant's guilty plea to possession of a weapon after serving thirteen years on a murder conviction and after he implicated his brother in his testimony).

In one New York City case, two men, Jose Morales and Ruben Montalvo, were exonerated when a priest and a lawyer came forward to state that another man, who later died, had confided in them and confessed to the murder at issue. John Tierney, *The Big City; Prosecutors Never Need to Apologize*, N.Y. TIMES, July 27, 2001, at B1. While prosecutors evaluated whether to re-try the case, a federal judge ordered the release of one of the men and stated that "[i]t is difficult to imagine that any reasonable jury could find Morales guilty beyond a reasonable doubt." *Id.* The state prosecutors, however, opposed bail under any circumstances, an odd result considering that Morales had received bail thirteen years before when he was facing murder charges. *Id.*

²⁰ In this article, a post-conviction innocence claim refers to any collateral attack upon the judgment of conviction, i.e., a petition for a federal writ of habeas corpus, see 28 U.S.C.A. §§ 2244, 2254 (2001), or an analogue in state court, where the defendant's main contention is that he is actually innocent. Actual innocence differs from general allegations of wrongful conviction. See, e.g., Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1346 n.92 (1997) ("Actual innocence means what it says—the defendant did not commit the crime of which he has been convicted. Wrongfully-convicted defendants may or may not be actually innocent; their defining characteristic is that their convictions were secured as a result of a material legal error.").

²¹ See *supra* notes 1-8 and accompanying text.

²² A Bureau of Justice study on prosecutors defines a chief prosecutor as "the elected or appointed attorney advocating for the public in felony cases and in a variety of generally less serious offenses." CAROL J. DEFANCES, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2001, at 2 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/psc01.pdf> (last accessed Jan. 9, 2004). Chief prosecutors are granted an assortment of titles,

prosecutorial behavior in the domain of post-conviction matters and help effectuate the oft-stated maxim of our criminal justice system that it is better for ten guilty people to go free than for one innocent person to remain in prison.²³ These proposed reforms include providing incentives and training to minimize the emphasis placed upon obtaining convictions within prosecutorial agencies, and re-thinking both the manner in which chief prosecutors campaign for office and the procedures through which they are elected.

It is impossible to know how many innocent people are currently imprisoned in this country, yet the wave of exonerations stemming from DNA testing in the last decade suggests the number is not insignificant.²⁴ Even more, these exonerations likely comprise only the tip of the iceberg. The vast majority of criminal cases lack biological evidence suitable for DNA testing²⁵ and these matters presumably contain the same proportion of flaws—erroneous eyewitness identifications, false confessions, ineffective assistance of counsel, and so forth—that led to the wrongful convictions in the cases later reversed through DNA tests.²⁶ Notably, non-DNA cases are much harder for defendants

including “district attorney,” “prosecuting attorney,” “county attorney,” “commonwealth attorney,” and “state’s attorney.” *Id.*

²³ This adage is generally attributed to either William Blackstone or Matthew Hale. *See, e.g.,* Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 EMORY L.J. 437, 482 (1996); *see also In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (stating the “fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free”).

²⁴ *See* The Innocence Project, *supra* note 2 (reporting that DNA testing has exonerated 140 people); Richard A. Rosen, *Innocence and Death*, 82 N.C. L. REV. 61, 69-70 (2003) (observing that DNA exonerations comprise “a random audit of convictions” and that “DNA testing has demonstrated beyond question that in the normal course of events, using the normal run of evidence, we convict innocent people”); *see also* Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497, 518 (1998) (estimating that “approximately 330 wrongful convictions occur around the country each year”); Givelber, *supra* note 20, at 1336-50 (discussing studies relating to the conviction of innocent people).

²⁵ *See Death Penalty Overhaul: Congressional Testimony Before the Comm. on Senate Judiciary*, 107th Cong. (June 18, 2002), at 2002 WL 20318239 [hereinafter *Death Penalty Overhaul*] (“The vast majority (probably 80%) of felony cases do not involve biological evidence that can be subjected to DNA testing.” (testimony of Barry Scheck)); Rosen, *supra* note 24, at 73 (noting “that for every defendant who is exonerated because of DNA evidence, there have been certainly hundreds, maybe thousands, who have been convicted” on comparable evidence yet whose cases lack physical evidence suitable for scientific testing).

²⁶ *See* BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2001); *see also* Stanley Z. Fisher, *Convictions of Innocent Persons in Massachusetts: An Overview*, 12 B.U. PUB. INT. L.J. 1, 62-68 (2002) (chronicling the array of factors, including unreliable informants, mistaken eyewitness identifications, withholding of evidence by prosecutors, and defense counsel exhibiting poor lawyering, that contributed to the convictions of fifteen factually innocent, now exonerated, people in

to overturn through post-conviction proceedings because of the absence of a method to prove innocence to a scientific certainty.²⁷ Thus, the 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.²⁸

I. THE INSTITUTIONAL CULTURE OF PROSECUTORS' OFFICES

A variety of institutional factors may contribute to the reluctance of some prosecutors to accept the possible validity of post-conviction innocence claims even if prosecutors should be receptive to such allegations due to their ethical obligations. Much has been written about the assorted roles that prosecutors play in the criminal justice system—as advocates obligated to enforce the law, and as impartial, quasi-judicial officers entrusted with the duty to see that justice is achieved.²⁹ The primary role of the prosecutor in American society is often referred to as that of a “minister of justice.”³⁰ Specifically, the United

Massachusetts).

²⁷ See Scheck & Neufeld, *supra* note 18, at 248-49 (discussing how and why DNA provides an element of scientific certainty, which is lacking in non-DNA cases, to support innocence claims).

²⁸ In all probability, as pretrial use of DNA evidence increases, post-conviction challenges based on DNA testing will diminish over time. See, e.g., DEFRANCES, *supra* note 22, at 1, 8 (finding that, in 2001, two-thirds of prosecutors' offices reported use of DNA evidence during plea negotiations or felony trials as opposed to about half of all offices in 1996); see also GREG W. STEADMAN, U.S. DEP'T OF JUSTICE, SURVEY OF DNA CRIME LABORATORIES 2001, at 2 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sdnacl01.pdf> (last accessed Jan. 9, 2004) (reporting that, between 1997 and 2000, the work of DNA crime laboratories soared, with a fifty percent increase in the number of subject cases and convicted offender samples received).

²⁹ See, e.g., George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 117-20 (1975) (discussing ethical concerns arising from the conflict between a prosecutor's roles as quasi-judicial officer and advocate); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 226 (1988) (arguing that “[i]n contexts characterized by reasonably effective adversary system safeguards, the zealous advocate's role is most appropriate; in contexts lacking these safeguards, the quasi-judicial role becomes more important”).

³⁰ See MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2001) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); see also ABA STANDARDS FOR CRIMINAL JUSTICE—PROSECUTION FUNCTION & DEFENSE FUNCTION § 3.12(c) (3d ed. 1993) [hereinafter ABA STANDARDS]; NAT'L PROSECUTION STANDARDS § 1.1 (Nat'l District Attorneys Ass'n, 2d ed. 1991) (“The primary responsibility of prosecution is to see that justice is accomplished.”); Goldberg & Siegel, *supra* note 3, at 393 (“No ethical prosecutor should ever oppose the pursuit of justice . . .”). Cf. Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 792-94 (2000) (discussing the public interest serving mission of prosecutors); Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 GEO. J. LEGAL ETHICS 1301, 1301-02 (1996) (observing that the phrase “minister of justice” is largely a platitude without genuine implications for

States Supreme Court has declared that the prosecutor

is the representative . . . whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.³¹

Although it is debatable whether the minister of justice model can ever truly be reconciled with the adversarial ethos of our criminal justice system,³² both the courts and the canons of professional responsibility indicate that this concept should guide prosecutorial behavior.³³ The ethical duties for such ministers of justice, moreover, do not necessarily cease after the procurement of a conviction; for example, subsequent to a conviction prosecutors are ethically obliged to disclose after-acquired or other evidence that casts doubt upon the propriety of the conviction.³⁴

Still, the general ethical obligations borne by prosecutors, grounded as they are in principles of trial and procedural fairness, are not always clear in the context of many post-conviction innocence claims—e.g., situations where a defendant may have received a fair trial yet maintains his innocence due to the post-trial discovery of new evidence.³⁵ The DNA revolution and the resulting series of exonerations have put the spotlight on prosecutors' treatment of post-conviction motions, spurring at least one set of scholars, Judith Goldberg and

prosecutorial conduct).

³¹ *Berger v. United States*, 295 U.S. 78, 88 (1935).

³² *See, e.g.,* Berenson, *supra* note 30, at 805-06 (explaining that “[t]he normative argument against the public interest . . . role for prosecutors contends that in order to preserve balance in our adversarial system and to ensure that guilty defendants are in fact convicted, prosecutors must ‘fight fire with fire’ and counter aggressive defense tactics with vigorous efforts to secure convictions”); *see also* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 *VAND. L. REV.* 45, 52 (1991) (“By including government attorneys within the general adversarial framework, the codes signal that prosecutors can achieve justice while operating within the adversary system’s rules.”).

³³ *See supra* notes 30-31 and accompanying text.

³⁴ *See, e.g.,* *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) (noting that prosecutors are ethically bound to inform authorities of any information that “casts doubt upon the correctness of the conviction”).

³⁵ *See* Goldberg & Siegel, *supra* note 3, at 395, 406-09 (arguing that the standards that apply to prosecutors during trial do not translate easily to innocence-based post-conviction challenges and that the trial standards do not encompass all post-conviction ethical obligations).

David Siegel, to propose the formation of new ethical rules for prosecutors faced with innocence-based post-conviction claims.³⁶ In particular, Goldberg and Siegel advocate that prosecutors bear obligations in these cases to (1) seek the fullest possible accounting of the truth without delay, (2) achieve full disclosure in completed cases, and (3) utilize the most accurate scientific methods.³⁷ Another team of scholars, Seth Kreimer and David Rudovsky, recently addressed the issue of access to post-conviction DNA testing and argued that ample doctrinal bases support a constitutional right to the disclosure of biological evidence by prosecutors in cases involving actual innocence.³⁸ Regardless of the precise contours of the ethical duties of prosecutors in the post-conviction arena and the doctrinal underpinnings for a right to DNA testing in specific circumstances, numerous institutional barriers appear to dissuade prosecutors, in practice, from responding to post-conviction claims in a fashion that comports with the minister of justice ideal.

A. *Professional Incentives to Obtain and Maintain Convictions*

As a preliminary matter, the vision of each prosecutor as a minister of justice—a title that continues to apply in the post-conviction sphere—may clash with the emphasis district attorneys' offices place on conviction rates. An individual prosecutor's conviction rate may provide a quantifiable method for superiors in the office to measure that prosecutor's success in an occupation where job performance, aside from anecdotal evidence, is otherwise difficult to gauge.³⁹ Prosecutors with the highest conviction rates (and, thus, reputations as the best performers) stand the greatest chance for

³⁶ *Id.* at 410-12; *see also* Green, *supra* note 9, at 640-41 (arguing that to do justice in a case where a prosecutor realizes that fabricated evidence helped him obtain a conviction, he should “re-examine the case to determine what went wrong, in order to undertake institutional and personal measures to avoid recurrences”).

³⁷ *See* Goldberg & Siegel, *supra* note 3, at 410-12.

³⁸ *See* Kreimer & Rudovsky, *supra* note 3, at 565-76 (arguing that denying defendants access to DNA evidence implicates the “right of access to the courts”). Another group of scholars has contended that procedural due process considerations based on *Matthews v. Eldridge*, 424 U.S. 319 (1976), and fairness principles require courts to display openness to “powerful claims of innocence” regardless of the expiration of any pertinent deadlines. *See generally* 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 (2003).

³⁹ *See* Fisher, *supra* note 29, at 205 (“Political pressures foster a ‘conviction psychology’ because prosecutors can easily demonstrate their ‘effectiveness’ by pointing to conviction statistics.”); *see also* Felkenes, *supra* note 29, at 114-15 (arguing that standards used to measure performance in other fields, such as salary or awards, are “inappropriate to the prosecutor,” whose salary is based primarily on seniority and to whom the public is reluctant to give awards); Goldberg & Siegel, *supra* note 3, at 409 (suggesting that a prosecutor's superiors may measure his individual success or failure by the “number of convictions” he obtains).

advancement internally.⁴⁰ Individual prosecutors may not have explicit financial incentives to procure convictions—such as receiving money for each guilty verdict⁴¹—yet the inducements are implicit in a system where promotions are contingent on one’s ability to garner convictions. Even more, citing office-wide conviction rates is a tangible means for district attorneys to tout their performance to government authorities; offices may use conviction statistics as leverage in budget negotiations, trumpeting their records of success to support demands for greater resources.⁴² Placing a premium on “winning” at the individual and office-wide levels encourages prosecutors to secure convictions in each and every trial,⁴³ a dangerous concept considering that

⁴⁰ Felkenes, *supra* note 29, at 112 (suggesting that upward mobility as a prosecutor may depend on adherence to the “conviction psychology”); *see also* Martin H. Belsky, Essay, *On Becoming and Being a Prosecutor*, 78 NW. U. L. REV. 1485, 1491-92 (1983-1984) (reviewing Nissman and Hagen’s *The Prosecution Function* and suggesting that the text “reflects an insensitivity to the unique ethical obligations of the prosecutor” and the problems deriving from a profession where “[s]uccess and reputation are measured by the ability to ‘win’”); Berenson, *supra* note 30, at 808-09 (observing that “it has been argued that because advancement and promotions within such offices are often based upon conviction rates, prosecutors will seek to maximize convictions rather than ‘do justice’”); Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL’Y & L. 305, 321 (2001) (“Promotions within the Los Angeles District Attorney’s office often include consideration of conviction rates.”); Catherine Ferguson-Gilbert, Comment, *It is Not Whether You Win or Lose, It is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 293 (2001) (“Promotions for subordinate prosecutors depend on their ‘scores’ for convictions.”).

⁴¹ *See* Kenneth Bresler, “I Never Lost a Trial”: When Prosecutors Keep Score of Criminal Convictions, 9 GEO. J. LEGAL ETHICS 537, 545 (1996). Tracey Meares has proposed the use of financial incentives, on some level, to affect prosecutorial discretion and minimize prosecutorial misconduct. *See generally* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

⁴² *See* Bennett Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 350 n.223 (2001) (noting the pressure prosecutors face to justify their budgets); *see also* Felkenes, *supra* note 29, at 116 (arguing that a prosecutor’s political success depends on justifying his use of public expenditures).

⁴³ *See* Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 388 (2001) (“In view of the institutional culture of prosecutor’s offices and the culture of the adversary system generally, it is perhaps inevitable that the overriding interest of prosecutors would be winning.” (footnote omitted)). For an appraisal of the penchant of prosecutors to emphasize winning, *see* Bresler, *supra* note 41, at 538 (“For if the goal of prosecution is justice, and not prevailing in a particular case, then it becomes absurd to equate a prosecutor obtaining a guilty verdict with ‘winning.’ The subjective virtue of justice cannot be measured by the objective result of a verdict.” (footnote omitted)). As Bresler emphasizes, the American Bar Association’s (“ABA”) *Standards for Criminal Justice* prescribe that, in determining whether to prosecute, “a prosecutor should give ‘no weight . . . to a desire to enhance his or her record of convictions.’” *Id.* at 542

oftentimes the strongest cases against defendants result in plea bargains and the weaker ones go to trial.⁴⁴

Furthermore, upon achieving a conviction, both the individual prosecutor and the office may become vested in maintaining the integrity of the conviction.⁴⁵ Simply put, prosecutors may perceive (or fear the public will perceive) the post-conviction exoneration of an innocent prisoner as undermining the credibility of the office—and the person—that prosecuted that defendant.⁴⁶ In a sense, each exoneration opens the lid further on the prosecutorial Pandora's Box, precipitating an inquiry into the factors that contributed to the wrongful conviction and an assessment of whether local prosecutors may have convicted other innocent people.⁴⁷ Indeed, some prosecutors may have reason to fear such post-mortems: exonerations have

(quoting ABA STANDARDS, *supra* note 30, § 3-3.9(d)). For a provocative response to Bresler and a defense of the importance placed on winning by prosecutors, see Thomas A. Hagemann, *Confessions from a Scorekeeper: A Reply to Mr. Bresler*, 10 GEO. J. LEGAL ETHICS 151 (1996). Hagemann argues that

after a case has been properly charged, winning matters. And, if winning matters, then we must motivate winning . . . and since we don't pay most prosecutors enough, what is the harm behind allowing them the motivation of not wanting to lose and keeping score? Or of allowing ex-prosecutors to talk about their record when their career is behind them?

Id. at 154.

⁴⁴ Gardiner, *supra* note 6 (quoting a former prosecutor who observed that, to get ahead in the office, prosecutors must win weak cases because “[a] lot of the [cases] that went to trial were dogs’ . . . ‘if it was a good case, they’d plead’ (second alteration in original)); *see also* Bresler, *supra* note 41, at 543 (“A prosecutor protective of a ‘win-loss’ record has an incentive to cut constitutional and ethical corners to secure a guilty verdict in a weak case—to win at all costs.”); Gershman, *supra* note 42, at 351 (mentioning that “a prosecutorial culture that advocates winning and maintains won-loss statistics not only discourages a critical examination of truth but encourages misconduct as well”); Randolph N. Jonakait, *The Ethical Prosecutor’s Misconduct*, 23 CRIM. L. BULL. 550, 553 (1987) (“If the prosecutor sees weaknesses in his case, his reaction is not to dismiss the case. Instead he offers a good deal to the defendant.”).

⁴⁵ Goldberg & Siegel, *supra* note 3, at 409-10 (discussing factors that affect the prosecutor’s interest in preserving a conviction).

⁴⁶ Political concerns might make district attorneys’ offices particularly wary of the publicity surrounding exonerations. *See* discussion *infra* Part II. In addition to potentially harming the credibility of prosecutors themselves, some prosecutors may be concerned about the impact exonerations may have on the integrity of the criminal justice system as a whole. *See* Kreimer & Rudovsky, *supra* note 3, 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.” (footnote omitted)).

⁴⁷ *See* Wilgoren, *supra* note 1 (explaining that prosecutors have limited interest in freeing innocent people not only because “[i]t’s obviously embarrassing, but it will also precipitate an investigation into the cause of the wrongful conviction[;] [i]t’s not just one man that is exonerated, you are calling into question hundreds of convictions” (quoting Peter Neufeld, Co-Director of The Innocence Project at Cardozo)).

occasionally revealed deliberate prosecutorial and police misconduct in procuring those convictions in the first place.⁴⁸

Taken together, these realities of life in the prosecutorial workplace—that one’s “win” rate may be determinative of future success and that both the individual prosecutor and the office as a whole have interests in maintaining convictions—have arguably led to an organizational “conviction psychology,”⁴⁹ an environment where convictions are prized above all and the minister of justice concept becomes a myth. The expectation of a conviction as the inevitable outcome of a criminal trial has become so ingrained that, in at least one prosecutor’s office, any assistant who tries a case that results in an acquittal *must* draft and file a report with the chief prosecutor.⁵⁰ Offices reveal their focus on convictions and their urge to motivate assistant prosecutors to obtain them through assorted tactics, such as by computing each attorney’s “batting average” or by putting each lawyer’s name on a bulletin board and, next to each name, affixing green stickers for wins and red ones for losses.⁵¹ For an individual prosecutor, defying the conviction-seeking mentality by dismissing charges prior to trial or seriously contemplating the post-conviction reversal of the case may, in certain circumstances and with certain bosses, serve as a death knell to career advancement within the office.⁵²

⁴⁸ See, e.g., Kreimer & Rudovsky, *supra* note 3, at 563 (observing that some exonerations have “disclosed deliberate (and in some cases criminal) police and prosecutorial misconduct in obtaining the tainted convictions”).

⁴⁹ Felkenes, *supra* note 29, at 99, 109-10 (“The majority of the prosecutors queried expressed a concern for fairness and impartiality toward persons accused of a crime. Nevertheless, nearly one-third essentially indicated that their major function is to secure convictions. . . . This exhibits what may be termed the ‘conviction psychology.’”); see also Fisher, *supra* note 29, at 207 (“The moral and political climate in an agency can foster a ‘conviction psychology’ more powerfully than can any specific policy basing promotions on an assistant’s conviction rate.”).

⁵⁰ Evan Moore, *Justice Under Fire: “Win At All Costs” is Smith County’s Rule, Critics Claim*, HOUS. CHRON., June 11, 2000, at A1 (reporting that, in Harris County, Texas, assistant district attorneys must file a written report if they lose a case).

⁵¹ See Ferguson-Gilbert, *supra* note 40, at 290 (collecting instances of competition between prosecutors for convictions); see also Maurice Possley & Ken Armstrong, *The Flip Side of a Fair Trial*, CHI. TRIB., Jan. 11, 1999, at 1 [hereinafter Possley & Armstrong, *Flip Side*] (recalling the “two-ton contest” that used to exist in the State’s Attorney’s Office in Cook County, Illinois where prosecutors raced to determine who could be the first person to convict defendants weighing that amount in total).

⁵² Ferguson-Gilbert, *supra* note 40, at 294 n.96 (recounting a telephone conversation with a former prosecutor, Kenneth Bresler, who reported being reprimanded and removed from a case after informing his superiors that he believed the defendant was innocent); see also Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 688 (observing that advancement may hinge on appearing fearless about prosecuting difficult cases, and showing doubts about a defendant’s guilt might lead other prosecutors to perceive the lawyer as scared).

B. *Psychological and Personal Barriers for Prosecutors Confronting Post-Conviction Innocence Claims*

Given the institutional culture of many district attorneys' offices, prosecutors have not only professional incentives to battle post-conviction claims of innocence, but psychological and personal reasons as well. It is hard for anybody to admit to a mistake, much less someone who may have participated in the conviction of an innocent person or whose colleague may have done so.⁵³ As members of organizations that hail convictions, moreover, prosecutors may begin to internalize the emphasis placed on conviction rates and view their win-loss record as a symbol of their self-worth.⁵⁴ Victories, in particular, can serve as an ego gratification device for trial lawyers, whose jobs hinge on the ability to display confidence before jurors and judges.⁵⁵ Evidently, the conviction psychology may take root with young prosecutors and grow stronger over time; one study demonstrated that assistant district attorneys articulating a primary focus on convictions had, on average, roughly twice as much experience as those who displayed a deep concern for justice.⁵⁶ Although this data suggests that exposure to prosecutors' offices may lead to an erosion of idealism for new attorneys,⁵⁷ more troubling perhaps is the

⁵³ See, e.g., McCloskey, *supra* note 13, at 56 ("It is human nature to resist any information that indicates that we have made a grievous mistake."); see also *supra* note 16 and accompanying text.

⁵⁴ See Ferguson-Gilbert, *supra* note 40, at 292 (discussing prosecutors' desires to get credit for a "win" and to cherish the praise of fellow prosecutors). Daniel Richman has noted that "[t]he prosecutor's interest can also be described as one in 'non-defeat,'" where a fear of losing may be a more powerful motivation than a desire to win. Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 968-69 (1997). Steven Berenson has suggested that government lawyers may feel inferior to private attorneys and, thus, may seek to prove their mettle by obtaining convictions. Berenson, *supra* note 30, at 834 ("[G]overnment lawyers sometimes feel that they need to prove themselves in the eyes of their private sector counterparts. Sometimes, this results in an undue desire to 'win' cases (as opposed to serving the public interest).").

⁵⁵ See MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS 24 (1999) ("[I]t's easy to lose sight of all that business about seeing that justice is done and to dive into the pure one-on-one competition before the spectators. . . . Ego is a powerful drive."); Hagemann, *supra* note 43, at 152 ("Good trial lawyers, including prosecutors, have big egos. They are driven to succeed—and those things are not just facts of life, they are necessary tools of the trade. A little chest-pounding, some war stories and tales of wins, losses, and won-lost records come with the territory.").

⁵⁶ Felkenes, *supra* note 29, at 111.

⁵⁷ *Id.* ("Exposure to the prosecutorial system . . . may in itself tend to mold one's perceptions and beliefs, while eroding the idealism that generally characterizes the more inexperienced prosecutor."). Felkenes suggests that "[a]dherence to 'conviction psychology' arises as much out of the imitation of superiors as out of peer group conformity. . . . The young prosecutor desirous of career stability may well exhibit 'conviction psychology' as a result of his conformity to the peer group and imitation of his superiors." *Id.* at 112. Richard Uviller, a former prosecutor, has stated that "even the best

implication that the most experienced prosecutors—those handling the highest degree felony cases—may be those most affected by the conviction psychology.

Prosecutorial responses to post-conviction innocence claims are also shaped by the macro-level ideology that often draws individual attorneys to law enforcement work in the first place: a desire to protect the public.⁵⁸ This impulse adds an element of personal morality and self-righteousness to a prosecutor's approach to her occupation.⁵⁹ Dedicated to fulfilling a mission to protect the public by fighting crime and inspired in part by self-righteousness, incoming prosecutors frequently adopt a "gung ho" persona, a mindset that finds a welcome home in district attorneys' offices.⁶⁰ Indeed, the prevalence of an aggressive, macho culture is an oft-cited feature of these agencies.⁶¹ In the past, men dominated this field⁶² and, even as the percentage of women

of the prosecutors—young, idealistic, energetic, dedicated to the interests of justice—are easily caught up in the hunt mentality of an aggressive office I know that the earnest effort to do justice is easily corrupted by the institutional ethic of combat." H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1702 (2000); see also Fisher, *supra* note 29, at 206 ("If the veterans communicate conviction-oriented values, clearly that is the strongest message we can expect young prosecutors to receive.").

⁵⁸ Felkenes, *supra* note 29, at 107 (observing that many prosecutors surveyed found public service to be their overriding motive—"[b]eing on the side of the law in the 'war on crime' and being in a position to protect society against the lawless element"); see also Maura Dolan, *A Man Consumed by His Convictions*, L.A. TIMES, Apr. 14, 1999, at A1 (quoting one prosecutor as saying that "I am sort of frightened by what I consider to be a certain talent . . . and I have chosen to use that talent to the greater public good").

⁵⁹ See Stacy Caplow, *What If There is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1, 18 (1998) ("The outraged query 'How can you defend these people?' comes from the prosecutor who sees herself a 'defender of justice,' a self-image which may lead to the injection of a large dose of personal morality and self-righteousness into the mix." (footnote omitted)); Smith, *supra* note 43, at 378 ("[T]oo often righteousness becomes *self*-righteousness. Too often prosecutors believe that because it is their *job* to do justice, they have extraordinary in-born wisdom and insight. Too often prosecutors believe that they *and only they* know what justice is." (footnotes omitted)).

⁶⁰ See, e.g., Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 949 (1999) (discussing the responses of former Assistant United States Attorneys ("AUSAs") who described some of their former peers as gung ho, law enforcement, or "true believer" types—macho lawyers who befriended agents, and could never imagine themselves as defense lawyers); see also Fisher, *supra* note 29, at 204-15 (describing the institutional pressures on prosecutors to behave "overzealously" and stating that "prosecution agencies might not actually reward the overzealous mentality, but still subtly discourage more than minimal concern for competing values").

⁶¹ See Felkenes, *supra* note 29, at 120 (stating that an overwhelming majority of prosecutors are male and that many are their parents' oldest child or only child).

⁶² See, e.g., Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. &

prosecutors climbs, a macho image persists.⁶³ A veneer of toughness, even cynicism, may be essential to survive in this culture.⁶⁴ Accepting the possible legitimacy of post-conviction innocence claims, then, might collide with this ethos; specifically, prosecutors perceived by their colleagues as amenable to entertaining post-conviction innocence claims could be dubbed “soft” on crime or sympathetic toward defendants.⁶⁵

A prosecutor motivated generally by a public service ideology may also become personally committed to the idea that the system punished the true perpetrator of a particular crime and, therefore, may struggle to accept the possibility that he convicted an innocent man, not to mention that a guilty person may remain at large.⁶⁶ As part of their training in ethics, prosecutors are told that they should believe in the probable guilt of the defendants they charge with crimes.⁶⁷ The perception, even among prosecutors, that the police only arrest guilty people in the first place reinforces the belief that the right person was charged and later convicted.⁶⁸ Commentators have observed that the phenomenon of police “tunnel vision”—whereby once the police pinpoint a chief suspect, they neglect to subject exculpatory evidence or alternative perpetrators to critical examination—has led to the arrest and eventual

CRIMINOLOGY 717, 734 (1996) (“Prosecutors are usually white males—70% of prosecutors are male and 88% of prosecutors are white, non-Hispanic.”).

⁶³ This macho image may be perpetuated, in part, through the conduct of several high-profile prosecutors renowned for their aggression. *See, e.g.*, Green, *supra* note 9, at 609 (referencing the tradition of “machismo” in the U.S. Attorney’s Office for the Southern District of New York, a tradition embodied by longstanding assistant Bill Tendy, “the quintessential tough-talking prosecutor”); Dolan, *supra* note 58 (describing a prosecutor nicknamed “Mad Dog” for his aggressive style).

⁶⁴ As Abbe Smith notes, “[i]n order not to be played for a fool, taken for a ride, considered a *sucker*—a nightmarish reputation for a prosecutor—prosecutors often become suspicious, untrusting, disbelieving.” Smith, *supra* note 43, at 384.

⁶⁵ Goldberg & Siegel, *supra* note 3, at 409 (“Prosecutors may be perceived as being ‘soft’ on crime or sympathetic towards defendants if they assist with, or fail to object to, postconviction testing.”).

⁶⁶ *Id.* (“Prosecutors may themselves be invested in the knowledge or belief that the perpetrator has been punished and the case concluded.”).

⁶⁷ Ethical rules forbid prosecutors from pursuing charges that they know are not substantiated by probable cause. MODEL RULES OF PROF’L CONDUCT R. 3.8(a) (2001); *see also* Gershman, *supra* note 42, at 309 (“Years ago, when I became a prosecutor, I was trained to believe that you never put a defendant to trial unless you were personally convinced of his guilt. This was, as I recall, the accepted ethos in our office and, I assumed, in prosecutors’ offices generally.”).

⁶⁸ *See* Felkenes, *supra* note 29, at 112 (mentioning that more than fifty percent of prosecutors surveyed did not presume that a man is innocent until proven guilty and that many believed that guilt was determined by the screening processes of the police and prosecutor prior to trial); *see also* Smith, *supra* note 43, at 384 (“Notwithstanding the legal presumption of innocence, the cultural and institutional presumption in most prosecutor offices is that *everybody is guilty*.”).

prosecution of innocent people.⁶⁹ By working closely with the police, prosecutors may begin to trust or at least defer to the detectives' judgment in the investigative aspects of the matter.⁷⁰ A mutual orientation toward "getting the bad guys" can serve as a unifying force to bridge any cultural gap that might exist between prosecutors and law enforcement agents.⁷¹ Prosecutors

⁶⁹ See, e.g., Steve Mills & John Biemer, *Ford Heights 4 Inquiry Clears Cops, Prosecutors*, CHI. TRIB., Aug. 22, 2003, at 1 (discussing the report of the special prosecutor appointed to investigate the mistakes made in the infamous "Ford Heights Four" case in Illinois and noting the report's conclusion that police "tunnel vision" contributed to the wrongful convictions). James McCloskey has observed that, given the volume of crime and the pressure to solve cases, too often

police officers take the easy way out. Once they come to suspect someone as the culprit, and this often occurs early within the investigation and is based on rather flimsy circumstantial information, then the investigation blindly focuses in on that adopted "target." Crucial pieces of evidence are overlooked and disregarded. . . .

Before too long, momentum has gathered, and the "project" now is to put it on the suspect. Any information that points to the suspect, no matter how spuriously secured, is somehow obtained; and anything that points away from him is ridiculed and twisted into nothingness.

McCloskey, *supra* note 13, at 56; see also Jonakait, *supra* note 44, at 552 (stating that, in light of limited resources and the nature of investigations, the inquiry will switch from impartial information gathering to building a case against a specific suspect resulting in "a natural tendency to acquire all the evidence that inculcates the person selected as guilty while all other evidence is ignored"). Dianne Martin has argued that the problem of "tunnel vision" is pervasive in many common law jurisdictions and comprises a major source of wrongful convictions. Dianne L. Martin, *Lessons about Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002).

⁷⁰ See Judith L. Maute, "In Pursuit of Justice" in *High Profile Criminal Matters*, 70 FORDHAM L. REV. 1745, 1747 (2002) ("Overzealous prosecutors may become too closely aligned with law enforcement personnel and forensics witnesses who are willing to shade or falsify their testimony in order to obtain a conviction."); see also Green, *supra* note 9, at 640 ("Prosecutors abdicate their responsibility to [protect innocent people from unjust convictions] when they act merely as conduits of evidence developed by the police."). For an interesting discussion of the interaction, and competing roles, of prosecutors and the police, see Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003).

⁷¹ As Richman notes with respect to prosecutors and agents, one ought not underestimate the unifying influence of a shared commitment to "getting the bad guys," hardened by the adversarial process, nurtured by mutual respect and need, and on occasion lubricated by alcohol. . . . And, as in any other organizational setting, the social relationships that can arise out of constant and routine contacts will provide a solid foundation for trust.

Richman, *supra* note 70, at 792 (footnotes omitted); see also Chemerinsky, *supra* note 40, at 315 ("Prosecutors and police feed on each other's desire to 'win' the case."). The shared commitment of the police and prosecutors to law enforcement is bolstered by the fact that prosecutors themselves play a role in training the police and offering legal advice about police conduct in criminal matters. See ABA STANDARDS, *supra* note 30, § 3-2.7(a), (b)

may also admire police officers and, therefore, may be wary of challenging their opinions.⁷²

Moreover, a prosecutor in the midst of preparing a case for the grand jury does not typically receive the evidence pointing to all potential suspects, but only the evidence incriminating a single suspect, the person on whom the police focused during their investigation and deemed culpable.⁷³ Once the prosecution files charges, the assistant district attorney may be susceptible to a phenomenon similar to that experienced by the police: putting on intellectual blinders to all evidence failing to substantiate the defendant's guilt.⁷⁴ When a jury verdict validates this form of "pre-conviction"⁷⁵ of the defendant, it may become extremely difficult ever to establish the defendant's innocence in the

(declaring that prosecutors should provide legal advice to the police with respect to police duties and functions in criminal matters, and that prosecutors should cooperate with the police to aid in training officers).

⁷² See, e.g., Yaroshefsky, *supra* note 60, at 950 ("[E]very prosecutor secretly wants to be a cop. The allure is to get the bad guys. You talk about your agent, the guy who shows you the ropes. He exudes confidence on the street." (quoting a former AUSA)).

⁷³ See Jonakait, *supra* note 44, at 553. As Jonakait explains:

The trial prosecutor preparing his case sees the fruits of . . . an investigation [that focuses on one suspect] and little else. He does not see evidence about all the possible suspects, but only the incriminating evidence concerning the defendant. Not surprisingly, the picture presented to the prosecutor almost always shows a guilty defendant.

Id.; see also Richman, *supra* note 70, at 813 ("Prosecutors are ill-equipped to second guess agency choices about tactics and targets when they lack sufficient information about the cases agencies decide to pursue and the universe of potential cases. . . . [M]uch could be done to increase the flow of investigative information to prosecutors.").

⁷⁴ Jonakait, *supra* note 44, at 559. Jonakait has described the process that leads to the "blinders" phenomenon:

[O]nce the prosecutor has decided to prosecute (i.e., once he has determined that the defendant is guilty), he will gather evidence for trial It becomes easy for the prosecutor to overlook and ignore evidence that does not fit his conception of the proper outcome. The natural inclination is not to see inconsistent or contradictory evidence for what it is, but to categorize it as irrelevant or a petty incongruity.

Id.; see also Felkenes, *supra* note 29, at 113 (stating that the preliminary views of a case become fixed conclusions—evidence that confirms the preliminary diagnosis makes a strong imprint on the mind, while evidence that runs counter to it is received with diverted attention); Yaroshefsky, *supra* note 60, at 945 ("Prosecutors are convinced they have the guilty guy, then they go about seeking to convict and do not carefully look at things that are funny about their case They get wedded to their theory and things inconsistent with their theory are ignored." (quoting a former AUSA)). Also, in recent years, prosecutors themselves have evidently played an increasingly extensive role in criminal investigations. See Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 *FORDHAM L. REV.* 723, 733-37 (1999).

⁷⁵ Felkenes, *supra* note 29, at 112 (using the phrase "pre-conviction" to describe the presumption of guilt that prosecutors sometimes mentally attribute to accused individuals).

eyes of the prosecuting lawyer.⁷⁶

The prosecuting lawyer's view of the case, in turn, can mold the parameters of the office's subsequent reaction to a post-conviction innocence claim, considering that the trial assistant is likely to be consulted regarding a post-conviction motion involving a case she handled. Admittedly, there is limited data pertaining to how prosecutors' offices across the country handle post-conviction motions administratively.⁷⁷ While it appears as though some offices have formed separate divisions to field only post-conviction motions that collaterally attack a judgment of conviction,⁷⁸ many larger prosecutorial agencies assign these motions to lawyers in the general appeals bureau.⁷⁹ Smaller offices, however, usually direct post-conviction filings to the attorney who handled the case originally;⁸⁰ this is probably a popular method of assignment nationally given that the average prosecutor's office in the United States consists of only three attorneys.⁸¹ As a practical matter, even in large

⁷⁶ See *supra* note 74 and accompanying text; see also Jonakait, *supra* note 44, at 554. As Jonakait suggests:

Because the prosecutor is convinced that the defendant is guilty, he is convinced that the right result for the trial process is a conviction. When there is an acquittal, he does not conclude that a defendant was truly innocent, but that the truth did not come out at the trial, that the verdict was wrong.

Id.

⁷⁷ The director of research at the American Prosecutors Research Institute, a non-profit group affiliated with the National District Attorneys Association, the main professional organization for prosecutors in the United States, informed me that she was not aware of any national studies analyzing how prosecutors assign post-conviction motions. Telephone Interview with M. Elaine Nugent, Director, Office of Research and Evaluation, American Prosecutors Research Institute (June 26, 2003) [hereinafter Nugent Telephone Interview].

⁷⁸ The Office of the District Attorney of the City and County of Philadelphia in Pennsylvania, for example, has established a Post-Conviction Relief Act Unit to handle all petitions submitted by defendants under that statute. See Philadelphia Information Locator Service, *Agency Information: Office of the District Attorney*, at <http://www.phila.gov/phils/Docs/Inventor/graphics/agencies/A006.htm> (last accessed Jan. 9, 2004). In the prosecutor's office for Oklahoma County, Oklahoma, one lawyer is assigned to handle all requests for post-conviction relief. See Oklahoma County District Attorney, *Organization of the Office of the District Attorney for Oklahoma County*, at <http://www.daweslane.com/organization.html> (last accessed Jan. 9, 2004).

⁷⁹ Nugent Telephone Interview, *supra* note 77 (stating her belief that post-conviction matters in large offices are usually assigned to appellate lawyers). In the Queens County District Attorney's Office in New York, for example, all post-conviction motions are handled by lawyers in the Appeals Bureau, whose workload generally consists of processing direct appeals. Telephone Interview with John Castellano, Bureau Chief, Appeals Bureau, Queens County District Attorney's Office (July 25, 2003).

⁸⁰ Nugent Telephone Interview, *supra* note 77.

⁸¹ See DEFRANCES, *supra* note 22, at 2 tbl.2 (citing that the median-sized staff in prosecutors' offices handling cases in state courts constitutes the chief prosecutor and two assistant prosecutors).

offices, such motions may be allocated—if not to the trial assistant herself—to a supervisor or a co-equal within the trial department.⁸² A prosecutor's office may also assign post-conviction motions on an ad hoc, case-by-case basis that takes numerous elements into account, including whether the defendant has already filed a direct appeal from the judgment of conviction and whether the trial lawyer who prosecuted the case is still with the office.⁸³ Although consulting the trial assistant about a post-conviction motion makes sense—that person may be in the best position to assess whether, factually, the defendant's claim of innocence seems plausible—there is an inherent problem in asking people to oversee their colleagues' or their own work.⁸⁴

Additionally, the group dynamics of working within a law enforcement agency may affect a prosecuting lawyer's vision (and treatment) of parties outside the organization. Prosecuting crimes requires teamwork, namely, reliance on a group of other lawyers, police officers, and witnesses.⁸⁵ Questioning the sanctity of a conviction, and, concomitantly, the police

⁸² In the New York County District Attorney's Office in Manhattan, all state post-conviction motions are assigned to the trial assistant who prosecuted the case. Telephone Interview with Mark Dwyer, Bureau Chief, Appeals Bureau, New York County District Attorney's Office (July 24, 2003) [hereinafter Dwyer Telephone Interview]. If that individual is no longer a member of the office, the case is reassigned to a substitute within the trial bureau. *Id.*; see also Gardiner, *supra* note 14 (mentioning that the prosecutors' offices in New York City's five counties often assign allegations of unjust convictions to the supervisor of the bureau where the trial occurred). The five boroughs comprising New York City, however, each seem to have a slightly different policy, with appellate lawyers frequently handling the cases. Dwyer Telephone Interview, *supra*.

⁸³ In the Bronx County District Attorney's Office in New York, state post-conviction motions are assigned on a case by case basis, with the litmus test being an assessment of who is in the best position to respond to the allegations—the trial assistant or an appellate lawyer. Telephone Interview with Yael Levy, Assistant District Attorney and Motion Editor, Bronx County District Attorney's Office (July 24, 2003). In that office, if the defendant has yet to file his direct appeal, then the case will likely be allocated to the trial attorney and, if the defendant has already filed his direct appeal and/or the trial assistant has left the office, then an appeals lawyer usually handles the motion. *Id.* In the Richmond County (Staten Island) District Attorney's Office in New York, post-conviction motions are assigned to the trial division if the direct appeal has not yet been submitted and to an appellate lawyer if the defendant has already filed his direct appeal. Telephone Interview with Karen McGee, Chief of Appeals, Appeals Bureau, Richmond County District Attorney's Office (July 25, 2003).

⁸⁴ Gardiner, *supra* note 14 (“There’s always a fundamental institutional problem in having somebody oversee their own work or their friends’ work.” (quoting Ron Kuby, criminal defense attorney)); see also Adam Liptak, *Prosecutions Are a Focus in Houston DNA Inquiry*, N.Y. TIMES, June 9, 2003, at A20 (reporting how the grand juries investigating the problems at Houston’s police crime lab had rejected the guidance of the district attorney’s office, noting the possibility of a conflict of interest in investigating the scandal).

⁸⁵ Smith, *supra* note 43, at 392.

investigation and lawyering activities that preceded it, is not an ideal way for an individual prosecutor to secure the cooperation and loyalty of law enforcement colleagues that may be needed in the future.⁸⁶ Prosecutors labeled as “hard” on the police may face delays in obtaining updates about investigations or be deprived of access to information altogether.⁸⁷ Thus, there are strong incentives for prosecutors to collaborate with their law enforcement colleagues—both the police and other prosecutors—and few incentives to assist members of the defense team. People outside the organization may be viewed as unworthy of extensive cooperation and courtesy; social science research indicates that people are often less cooperative in interacting with outsiders when they are performing as part of a group than when they are acting on their own.⁸⁸

With regard to the personal commitment of prosecutors to the outcome of a case, trial attorneys may also have interacted with the victims of violent crimes and may be hesitant to revisit disturbing experiences.⁸⁹ Unlike most lawyers, prosecutors have no individual client per se, but rather are charged with representing the interests of the state.⁹⁰ On a personal level, though, prosecutors may naturally develop an allegiance to—and affinity for—the crime victims in their cases, the people for whom they are seeking vindication

⁸⁶ *Id.* at 392 n.229 (noting the difficulties a prosecutor can experience without willing cooperation from the police). In his study of the Rampart police scandal in Los Angeles, Erwin Chemerinsky acknowledges the conundrum faced by prosecutors in these situations—while they are uniquely positioned to monitor police conduct, due to the close working relationship between the groups, “[f]or obvious reasons, prosecutors are reluctant to alienate the very officers that they must work with and rely on in their cases.” Chemerinsky, *supra* note 40, at 305.

⁸⁷ See Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 536-38 (1994) (describing various uncooperative tactics that police officers may use to make the job difficult for a deputy district attorney with a reputation of being “hard on police”).

⁸⁸ See, e.g., Lawrence M. Solan, *Theory Informs Business Practice: The Written Contract as Safe Harbor for Dishonest Conduct*, 77 CHI.-KENT L. REV. 87, 98-102 (2001) (describing some of the social science research, including the work of psychologist Chester Insko, relating to how people act as part of a group).

⁸⁹ Goldberg & Siegel, *supra* note 3, at 409 (stating that prosecutors work with victims of violent crimes and may become connected to the case on a more personal level, to the point where they may not want to revisit those horrific experiences).

⁹⁰ As highlighted by Stacy Caplow, “[t]he critical absence of an individual client to whom a lawyer owes allegiance and whose confidences are protected distinguishes prosecutors from most other lawyers engaged in litigation.” Caplow, *supra* note 59, at 4; see also Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 931 (1996) (observing that a prosecutor represents not a single client, but rather groups of constituencies: “the crime victims, law enforcement agencies, the prosecutor’s office’s policies and the elusive concepts of ‘truth’ and ‘justice’”).

through the prosecution of defendants.⁹¹ By contrast, prosecutors have limited personal interaction with defendants and typically only know them through police reports and rap sheets, that is, in the context of the criminal accusations against them.⁹² In any event, alerting victims to a post-conviction motion in a case is not a task cherished by prosecutors and, accordingly, one not readily undertaken for fear of evoking painful memories.⁹³ In resisting post-conviction innocence claims, prosecutors frequently mention the need for finality in the process—the need for victims to experience closure, and for lawyers to focus on their active, pressing cases.⁹⁴

⁹¹ See, e.g., Melilli, *supra* note 52, at 689 (“Quite naturally, prosecutors may develop loyalty to victims, and that loyalty may influence the prosecutors’ decisions.”). In fact, some scholars have lobbied for a victim-centered model of prosecution, particularly in the realm of domestic violence cases, through which victims’ interests and objectives are explicitly incorporated into prosecutorial decisionmaking. See Caplow, *supra* note 59, at 35-44 (proposing a collaborative relationship between the prosecutor and victims where there is greater consultation and explanation about the process, and where the victim has some involvement in the decisionmaking); Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225, 1229-31 (1996) (calling for a more subjective, case specific, and victim controlled criminal system when dealing with domestic violence cases).

⁹² Melilli, *supra* note 52, at 689 (“Prosecutors rarely speak to defendants. Prosecutors come to know defendants from police reports and rap sheets, and thus think of defendants only in the context of the criminal accusations.”). As Stanley Fisher notes, prosecutors are constantly exposed to victims, police officers, civilian witnesses, probation officers and others who can graphically establish that the defendant deserves punishment, and who have no reason to be concerned with competing values of justice. [Whereas] the prosecutor is normally isolated from those—the defendant, his family and friends, and often, his witnesses—who might arouse the prosecutor’s empathy or stimulate concern for treating him fairly.

Fisher, *supra* note 29, at 208.

⁹³ See Liptak, *supra* note 15 (“Every prosecutor dreads making a phone call to a victim after the victim thinks the case is over You’re reopening the wound.” (quoting Joshua Marquis, Co-Chairman, National District Attorneys Association’s Capital Litigation Committee)). David Meier, Chief of the Homicide Unit at the Suffolk County District Attorney’s Office in Massachusetts, has described how bad he felt for two people who were wrongly convicted of murder in Boston and later exonerated, but then noted that

it felt equally bad, and perhaps for me even worse, to go back to those same two families, sit in their living rooms, trying to explain why as a prosecutor and not as a defense attorney, I was going to tell the court and the world that the people; whom they had identified; whom the police had arrested; whom they, the victim’s family, had picked out in court; whom twelve people had found was responsible beyond a reasonable doubt for the crime; and for whom the Supreme Judicial Court had affirmed the conviction, were not the people responsible for killing their nine-year-old son or their nineteen-year-old brother.

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, 660 (2001).

⁹⁴ See, e.g., Kreimer & Rudovsky, *supra* note 3, at 561 n.50 (citing sources emphasizing the significance of finality in criminal justice decisions); Liptak, *supra* note 15 (discussing

Even for those prosecutors open to the possibility that they or members of their office may have convicted innocent people, their self-conceived role as the protector of the public and an “ends justifies the means” outlook can still serve as impediments to acknowledging the worthiness of a post-conviction innocence claim. In theory, prosecutors may justify decisions to proceed to trial with borderline cases through the rationale that the failings of the case, instead of signifying innocence, simply reflect the inability of the police to find proof: the defendant is guilty despite any holes in the actual evidence.⁹⁵ Having seen other defendants whom they believed to be guilty escape punishment,⁹⁶ prosecutors may become emotionally tied to preserving the convictions they did manage to attain. In addition, a prosecutor may believe that a defendant has committed other crimes for which he was not caught; even if he may be innocent of this particular crime, he is undoubtedly guilty of others.⁹⁷ Although, obviously, this belief should not cloud a prosecutor’s assessment of the viability of a defendant’s post-conviction innocence claim in a specific case, it may have a subconscious impact, obscuring the evaluation of the claim.⁹⁸ The goal of seeking convictions, in the opinion of some prosecutors, is to uphold the rights of the victim in the instant case and simultaneously protect the rights of prospective, future victims by imprisoning

the conflicting views on the importance of finality in light of the increasing amount of post-conviction claims of innocence). As observed by Kreimer and Rudovsky, the Supreme Court itself has consistently declared that “finality is essential to both the retributive and deterrent functions of the criminal law and to the interests of victims of crimes in obtaining closure.” Kreimer & Rudovsky, *supra* note 3, at 606.

⁹⁵ Scholars have criticized the prosecutorial tactic of offering plea bargains in weak cases, noting that prosecutors often justify these offers on the basis that the weakness of the case does not signify innocence, but rather a mere lack of proof. *See, e.g.,* Jonakait, *supra* note 44, at 554; Smith, *supra* note 43, at 391 (discussing how prosecutors come to believe that defendants to whom they make generous plea offers, even in weak cases, must be guilty of *something* and that “the deal simply reflects problems of proof, not truth”). Former AUSA Thomas Hagemann, for one, has justified his zealous pursuit of convictions as a prosecutor on the basis that “factually guilty defendants should usually lose.” Hagemann, *supra* note 43, at 153.

⁹⁶ This may occur not only when a defendant is acquitted, but also when a complaining witness drops the charges or the prosecution otherwise opts against pursuing the case due to a dearth of evidence.

⁹⁷ *See* BAKER, *supra* note 55, at 47 (quoting one prosecutor as saying that “[a]t one point I didn’t care who went to jail, because everybody was guilty of something[;] [i]t was just a matter of winning”); *see also* McCloskey, *supra* note 13, at 56 (discussing how the police may rationalize steering an investigation to a suspect with a police record “because he should be ‘taken off the streets’ anyhow”).

⁹⁸ *See* Jonakait, *supra* note 44, at 553-59 (emphasizing how subconscious beliefs and motivations affect prosecutorial decisions); *see also* Sharon Lamb, *The Psychology of Condemnation: Underlying Emotions and Their Symbolic Expression in Condemning and Shaming*, 68 BROOK. L. REV. 929, 939-48 (2003) (discussing how fear may lie at the core of the need to condemn as part of the criminal law).

the defendant—to keep the streets “safe.”⁹⁹ Releasing inmates who are schooled in the mores of jailhouse life and might have lengthy prior criminal records, even those who are innocent of the particular charge for which they were imprisoned, may run counter to the safe streets philosophy.¹⁰⁰

C. *The Needle in a Haystack Disincentive*

Irrespective of any professional, psychological, and personal barriers that prosecutors may construct against post-conviction claims of innocence, prosecutors’ skeptical stance toward such claims is understandable from the viewpoint of pragmatism: the deluge of post-conviction motions filed by prisoners each year, many of which lack merit, provides a formidable deterrent to treating each claim as potentially valid.¹⁰¹ In effect, the tidal wave of frivolous motions can drown out the viable ones.¹⁰² Numbed by the volume of motions, which are often filed pro se, prosecutors tend to take a cynical approach in coping with them.¹⁰³ Not only might a prosecutor be more

⁹⁹ See, e.g., *Prosecutors vs. the Law*, CHI. TRIB., Jan. 17, 1999, at C18 (“All I cared about was making sure the defendant would not hit the street. There ain’t no appeal if I lose.” (quoting a former Illinois prosecutor cited for misconduct)).

¹⁰⁰ See Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097, 1112 (2003) (“All other things being equal, assisting an innocent person without any prior convictions may be more palatable to the District Attorney’s Office than aiding someone who is innocent of the crime for which he is incarcerated but has an extensive criminal record.”).

¹⁰¹ Some prosecutors view post-conviction motions with plain hostility. See, e.g., Liptak, *supra* note 15. Jennifer Joyce, circuit attorney for St. Louis, “saw a ‘steady trickle’ of ‘deceitful and sadistic’ motions [where] . . . [t]he defendant knows he is guilty . . . and he wants to play the lottery.” *Id.* Joyce would like to fine defendants who request DNA tests that fail to exonerate them and has proposed adding the cost of failed tests to prison accounts or otherwise penalizing defendants by adding time to sentences and requiring failed DNA tests to be considered at parole hearings. *Id.*

¹⁰² See, e.g., Kreimer & Rudovsky, *supra* note 3, at 610 (“Prosecutors have argued that allowing access to DNA evidence will divert scarce resources from other tasks and bury prosecutors beneath a tidal wave of frivolous requests.”). In the DNA context, however, prisoners have a disincentive to file false claims of innocence; if the prisoners know that DNA testing will only substantiate their guilt, they incur the risk of undermining any legal claims they may otherwise have. *Id.*

¹⁰³ See, e.g., *Abu-Jamal’s Lawyers Claim Sabotage*, PHIL. DAILY NEWS, May 24, 2003, (Local), at 2 (quoting a prosecutor as saying, in response to the filing of a motion in a 1981 murder case that, according to the defense, could exonerate the man convicted of that crime and sentenced to death, “[w]ithout even having seen [the court document], I feel pretty confident in saying I’m not going to be very impressed by it[;] . . . [i]t’s more of the same old [thing], the same old delay tactics”); Meenan, *supra* note 8 (asserting that very few cases are overturned because of actual innocence, and arguing that DNA testing would be irrelevant in most post-conviction cases and would only add to a growing backlog of cases). Cf. *Death Penalty Overhaul*, *supra* note 25 (“[A]t least 40% of the post-conviction DNA tests performed by private and public laboratories generate evidence favorable to the inmate

dubious about the legitimacy of a specific motion given the quantity of comparable papers, but the sheer volume also makes it harder to isolate the meritorious claims, even for the prosecutor predisposed to hunt for them.

In light of this “needle in a haystack” view of innocence claims, efficiency considerations militate against prosecutors thoroughly reviewing all post-conviction motions. Frivolous claims of innocence burn up scarce resources and detract attention from the prosecution of new crimes.¹⁰⁴ Time spent by an individual prosecutor reviewing post-conviction motions signals time lost in handling her regular caseload of trials and direct appeals, an extremely taxing obligation in and of itself.¹⁰⁵ In reality, the overwhelming number of cases on the docket makes it a challenge for prosecutors to examine pending matters with a critical eye, let alone cases in which a conviction has already been procured.¹⁰⁶ Also, since district attorneys’ offices experience a high turnover rate, the prosecuting lawyer may very well have switched jobs by the time a post-conviction motion is submitted, thereby imposing added burdens on the attorney assigned to handle the case and compelled to grapple with the case’s factual intricacies.¹⁰⁷ With regard to post-conviction requests for DNA testing, moreover, the financial costs associated with such tests may concern prosecutors.¹⁰⁸

claiming innocence and demanding the test.” (testimony of Barry Scheck)).

¹⁰⁴ Liptak, *supra* note 15 (crediting Joshua Marquis, Co-Chairman, National District Attorneys Association’s Capital Litigation Committee, with this observation).

¹⁰⁵ As it is, “immense caseloads and understaffed offices . . . make careful consideration, selection, and prosecution of each case a practical impossibility.” Belsky, *supra* note 40, at 1492-93. The 2001 survey of prosecutors working in state courts conducted by the Bureau of Justice found that, in the twelve-month period preceding the study, roughly eighty-seven felony cases were closed per assistant prosecutor. *See* DEFRANCES, *supra* note 22, at 6. The study defined a closed case as “any case with a judgment of conviction, acquittal, or dismissal with or without prejudice, entered by the court.” *Id.* at 6 tbl.7.

¹⁰⁶ *See, e.g.*, Chemerinsky, *supra* note 40, at 312. As Chemerinsky explained:

In speaking to many assistant District Attorneys, I heard the constant complaint about the sheer volume of cases and how difficult it was for them to do anything but try to process them as effectively as possible. There simply wasn’t time, many said, to look into suspicions about officers and their testimony.

Id. The courts, too, suffer from the malady of time constraints in evaluating post-conviction motions. *See, e.g.*, William Glaberson, *Unbelievable Stories (Just ask the Judge)*, N.Y. TIMES, July 30, 2003, at B1 (discussing Judge Jack Weinstein’s efforts in the Eastern District of New York to review that court’s astonishing backlog of federal habeas corpus petitions).

¹⁰⁷ *See, e.g.*, Felkenes, *supra* note 29, at 105-07 (interpreting his survey, which revealed the youth and experience levels of most prosecutors, as signifying a high job turnover rate); Liptak, *supra* note 15 (citing the statement of a prosecutor, who noted that the trial assistant typically leaves the office before the post-conviction motion is filed). If the trial assistant has left the office, there might be the additional problem of asking a new lawyer to plunge into the case and gain the victim’s trust. *See supra* notes 89-94 and accompanying text.

¹⁰⁸ *See, e.g.*, Kreimer & Rudovsky, *supra* note 3, at 561 n.49 (noting the limited

In sum, the institutional culture of most prosecutors' offices values conviction rates and, in this environment, prosecutors may become wedded to maintaining convictions and resist incoming post-conviction motions based on innocence. The administrative burden generated by the abundance of such motions may create a further disincentive to treat each one as potentially viable. As a result, the individual prosecutor must overcome various obstacles if she wishes to acknowledge the validity of post-conviction innocence claims and, thus, acknowledge that the office erred.¹⁰⁹

II. UNDER PRESSURE: POLITICAL VARIABLES AFFECTING PROSECUTORIAL DECISIONS IN THE POST-CONVICTION CONTEXT

The reaction of prosecutors to post-conviction innocence claims must be viewed through the lens of politics as well as in the context of the institutional culture of district attorneys' offices described in Part I. Indeed, the institutional culture of prosecutorial agencies is determined, to some extent, by the political landscape of the particular community.¹¹⁰ Except at the federal level, virtually every chief prosecutor is elected by the public.¹¹¹ Therefore, along with the primary goal of obtaining and maintaining convictions,¹¹² a

resources of prosecutors and forensic scientists and the potentially significant fiscal impact of expanded DNA testing).

¹⁰⁹ See Green, *supra* note 9, at 642-43. Green outlined a number of such obstacles in his article:

[P]rosecutors must resist various forces that would undermine the government's other aims. At times, this may mean standing up to the police (when their investigations are inadequate), disregarding the public (when its expectations are unreasonable), and overcoming one's own self-interest or ennui. In the face of contrary pressures and expectations, both external and internal, it may take a certain amount of inner strength (or strength of character) for an individual prosecutor . . . to confess error, or to seek to overturn a conviction that was unfairly procured.

Id.; see also Gershman, *supra* note 42, at 350-54 (discussing how prosecutors must summon the moral courage to decline to prosecute certain cases).

¹¹⁰ For example, the presence of a "liberal" district attorney in San Francisco, a former defense attorney with a criminal record as a youth, may reflect the political reality of that region. See, e.g., Maura Dolan, *In Land of Liberals, D.A. Race Takes Twist*, L.A. TIMES, Dec. 13, 1999, at A3.

¹¹¹ See DEFANCES, *supra* note 22, at 2 (stating that, in 2001, all chief prosecutors working in state courts were elected, except for those in three states and the District of Columbia).

¹¹² A number of scholars have delved into the issue of prosecutorial discretion, particularly in the area of charging decisions, and posited that "conviction maximization" is not the overriding goal. See, e.g., Richman, *supra* note 54, at 966 ("It is surely simplistic to say that all prosecutors are primarily interested in maximizing convictions."). Irrespective of the motives behind their charging decisions, prosecutors have experienced increasing autonomy in this realm of their power. See Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 405-10 (1992) (asserting that "we have witnessed recently an even larger accretion of the prosecutor's charging power through legislative enactments, bold

more complex blend of variables, including political considerations and public sentiment, may affect discretionary decisions by prosecutors.¹¹³ This Part of the article will analyze how political factors often operate to discourage prosecutors from accepting the legitimacy of post-conviction innocence claims, aside from distinct situations where it is politically advantageous to do so.

A. *The Elected Prosecutor*

Chief prosecutors at the municipal and county levels normally must be elected,¹¹⁴ unlike most lawyers engaged in public service—much less private attorneys—who do not need to clear this hurdle. In general, there are no term limits for these chief prosecutors, and they typically may be elected to any number of terms.¹¹⁵ Assistant district attorneys in these agencies, although not directly subject to the electoral process,¹¹⁶ serve at the pleasure of their boss and might suffer—either through the loss of their job or a decline in status within the office—in the event of a change of regime. In larger jurisdictions, serving as the local prosecutor is a full-time position, prohibiting the chief and assistant prosecutors from maintaining a private practice.¹¹⁷ In smaller jurisdictions, the post may be a part-time one, allowing prosecutors to continue

prosecutorial initiatives, and judicial acquiescence”); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 265 (2001) (“Twenty years after the onset of the debate, prosecutorial discretion has expanded rather than contracted.” (quoting Theodora Galacatos, *The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intra-branch Conflict Over Congressional Oversight and the Exercise of Prosecutorial Discretion*, 64 FORDHAM L. REV. 587, 641-42 (1995) (footnotes omitted))).

¹¹³ See Smith, *supra* note 43, at 399 (“Prosecution is inherently political. It is impossible for prosecutors to avoid political and public pressure, and even the best sometimes cave in to it. It doesn’t matter how experienced or popular the chief prosecutor.” (footnotes omitted)).

¹¹⁴ See DEFANCES, *supra* note 22, at 2. The vast majority of states also hold popular elections for the post of attorney general. See Angela Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 57 (1998) (observing that forty-three states hold such elections). Most chief prosecutors (85%) serve districts composed of one county, although in Alaska, Delaware, and Rhode Island, criminal prosecution is primarily the function of the state attorney general. DEFANCES, *supra* note 22, at 2.

¹¹⁵ See DEFANCES, *supra* note 22, at 3 (citing that twenty percent of chief state prosecutors nationwide reported having served over fifteen years, with half of the chief prosecutors in full-time medium-sized offices having served 8.4 years or more); see also *infra* notes 280-284 and accompanying text (briefly discussing the advantages and disadvantages of imposing term limits on prosecutors).

¹¹⁶ Davis, *supra* note 114, at 57 (mentioning that state and local prosecutors hire assistant district attorneys to handle caseloads).

¹¹⁷ See Misner, *supra* note 62, at 733 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, BULLETIN: JUSTICE EXPENDITURE AND EMPLOYMENT 1990, at 1 (1993)).

to engage in private practice on the side.¹¹⁸ Recent statistics, though, show that there is a trend within the last decade toward embracing the full-time prosecutorial model in smaller jurisdictions.¹¹⁹

Federal prosecutors are appointed, yet the process surrounding their selection has political overtones.¹²⁰ The President of the United States possesses the power to appoint the Attorney General, who supervises the Justice Department,¹²¹ and to appoint United States Attorneys in each of the federal judicial districts.¹²² All of these appointees, in turn, must receive confirmation from the Senate,¹²³ which exposes their records to public scrutiny.¹²⁴ As for lower-level federal prosecutors, the Attorney General may appoint Assistant United States Attorneys for any district.¹²⁵ Accordingly, all members of a prosecutor's office—be it state, local, or federal—must be mindful of the political ramifications of their conduct in handling cases.

The paradigm of the elected state and local prosecutor surfaced during the 1820s, instigated by the wish to make prosecutors accountable to their constituents, "the People."¹²⁶ In the ensuing years, however, little has been done to provide the public with access to information about the nature of prosecutorial choices, specifically, those decisions relating to charging, plea bargaining, and sentencing.¹²⁷ The public's capacity to hold prosecutors accountable for their actions has thus become more fiction than fact.¹²⁸

¹¹⁸ *Id.* (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: JUSTICE EXPENDITURE AND EMPLOYMENT 1990, at 1 (1993)). For a discussion of some of the problems stemming from the existence of part-time prosecutors, see Richard H. Underwood, *Part-time Prosecutors and Conflicts of Interest: A Survey and Some Proposals*, 81 KY. L.J. 1 (1993).

¹¹⁹ See DEFRANCES, *supra* note 22, at 3 ("In 2001 the percentage of full-time chief prosecutors was 77% compared to 53% in 1990.").

¹²⁰ See Davis, *supra* note 114, at 57 ("Federal prosecutors are appointed, but their selection is also political.")

¹²¹ *Id.* (citing 28 U.S.C. § 503 (1994)).

¹²² *Id.* (citing 28 U.S.C. § 541(a) (1994)).

¹²³ *Id.* (citing 28 U.S.C. §§ 503, 541(a) (1994)).

¹²⁴ *Id.* ("Theoretically, the confirmation hearings provide an opportunity to inform the public of the practices and policies of a particular prosecutor since the hearings are open to members of the public, who may express their views by writing or calling their senators.")

¹²⁵ *Id.* (citing 28 U.S.C. § 542(a) (1994)).

¹²⁶ *Id.* at 57-58 (noting the irony in the fact that the government established prosecutorial elections so that the people they served could hold them accountable).

¹²⁷ *Id.* at 58 (stating that public access to information regarding prosecutorial practices has "not expanded since the 1820s").

¹²⁸ See, e.g., James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981) (discussing the expansion of prosecutorial power as problematic and suggesting the need for reform to ensure greater accountability and transparency, especially in charging decisions); see also Tierney, *supra* note 19 ("In theory, prosecutors are accountable to voters. In practice, that doesn't seem to be much of a deterrent . . .")

Instead, because few prosecutors' offices have written guidelines about their procedures and policies,¹²⁹ the electorate is usually only privy to information revealed by prosecutors themselves, or unearthed by the press, come election time.¹³⁰

Also, prosecutors are ordinarily elected during the same elections as other public officials¹³¹ and, consequently, more prominent political races may overshadow their campaigns unless the candidates take affirmative steps to catch the public's attention. Prosecutorial elections might warrant less notice than usual if the candidate is unopposed, as is often the case.¹³² Even assuming that a smattering of voters would like to learn about an individual candidate's agenda, prosecutors are not especially forthcoming with precise information; many commentators have noted that prosecutors tend to campaign on generalized themes as opposed to specific policies.¹³³

Often, particularly in recent years, the generalized campaign theme adopted by a candidate running for the office of chief prosecutor is from the tough-on-crime category.¹³⁴ Prosecutorial candidates have favored broad, non-controversial messages about public safety and their ability to maintain it, matters of concern to the vast majority of voters who see themselves primarily as prospective victims of crime rather than as potential defendants. Given that most contenders already have some experience as assistant prosecutors, candidates are apt to rely on their courtroom records to buttress their public safety message, highlighting their "wins" in notorious cases and their overall "winning" percentage.¹³⁵ Many prosecutors have political ambitions extending

(reporting the opinion of Walter Olson, a Senior Fellow, Manhattan Institute)).

¹²⁹ See Misner, *supra* note 62, at 772-73 ("[A]pproximately twelve percent of prosecutor offices currently have written prosecutorial guidelines . . ." (citing BUREAU OF JUSTICE STATISTICS, UNITED STATES DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS 5 (1993))).

¹³⁰ See, e.g., Felkenes, *supra* note 29, at 112 (noting that, because the public is not informed about the precise attitudes adopted in a prosecutor's office, they do not surface as political issues in elections).

¹³¹ See Davis, *supra* note 114, at 57 ("Prosecutors are usually elected in the same general elections as other public officials.").

¹³² See Richman, *supra* note 54, at 963 (mentioning that many elections for chief prosecutor are uncontested).

¹³³ See Davis, *supra* note 114, at 58-59 (stating that elected prosecutors typically campaign on generalized themes rather than relying on specific information regarding office policies).

¹³⁴ *Id.* at 58 ("[P]rosecutors typically run on very general 'tough on crime' themes. . . ."); Ferguson-Gilbert, *supra* note 40, at 295 (stating that prosecutors give the electorate "what they want" by conveying a "tough on crime" message). The growth of anti-crime sentiment in the United States, often traced back to the early 1980s, arguably spawned an environment where, "[b]y the 1990s, candidates from both major parties at all levels of government were competing to claim the mantle of 'toughest on crime.'" Note, *Breathing New Life into Prosecutorial Vindictiveness Doctrine*, 114 HARV. L. REV. 2074, 2087-88 (2001).

¹³⁵ See, e.g., Bresler, *supra* note 41, at 541 n.18 (citing examples of prosecutors who

beyond the district attorney's office, namely, the judicial bench or the mayoral or gubernatorial mansion, and may also broadcast their record of trial success as prosecutors when vying for these posts.¹³⁶

An added benefit of the tough-on-crime theme, especially for candidates competing for county prosecutorial seats, is that it does not necessarily signal that a prosecutor is fiscally irresponsible. While district attorneys must consider the costs of prosecuting crimes—because they largely use county funds in managing their offices¹³⁷—they need not overly concern themselves with the costs of incarceration given that, in the majority of jurisdictions, the prison system operates via state monies.¹³⁸ This “split-funding” of the criminal justice system results in both the diffusion of the financial burden between state and local budgets¹³⁹ and, in political terms for prosecutors, the evasion of wholesale blame for the expenditures required in seeking convictions and procuring severe sentences.¹⁴⁰

have used their win-loss records in campaigns); Ferguson-Gilbert, *supra* note 40, at 294-96 (describing how career advancement pressures often cause prosecutors to become engrossed in the “score keeping, conviction seeking mentality”); Richman, *supra* note 54, at 967 n.95 (noting how a prosecutor's win-loss record can often become an important issue during elections). Newspaper articles and other accounts of prosecutorial elections reveal the degree to which prosecutors focus on their trial success, particularly in high-profile cases, during campaigns. See, e.g., *District Attorney*, DENVER POST, Oct. 22, 2000, Special Section, at 47 (reporting that, when asked what makes him the best-qualified candidate, the incumbent chief prosecutor in Jefferson County answered in part that “I am a tough prosecutor[;] I have personally tried seven cases during my tenure as district attorney (three were murder cases), all with successful results”).

¹³⁶ See, e.g., Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941 (1994). Bresler describes, in particular, John K. Van de Kamp's campaign for Governor of California in 1990 where one television commercial boasted that, as District Attorney of Los Angeles County and California's Attorney General, the candidate “put or kept 277 murderers on Death Row.” *Id.* at 945 n.18 (citing John Balzar, *Van de Kamp TV Ads Focus on Death Row, Will Air Today*, L.A. TIMES, Mar. 25, 1990, at A3).

¹³⁷ See DEFRANCES, *supra* note 22, at 4 (finding that, in the state court system, “[h]alf of the prosecutors' offices received 85% or more of their funding from the county government” and “[a]bout a third of the offices relied exclusively on the county government for their budget”).

¹³⁸ Misner, *supra* note 62, at 719-20 (suggesting that most prosecutors do not consider the availability of prison space or resources because state funds are generally used to pay the expenses related to incarceration).

¹³⁹ *Id.* (arguing that the diffusion of costs creates a disincentive for prosecutors to find less costly ways to punish criminals).

¹⁴⁰ *Id.* (“As a result, the electorate does not have one official to whom it can look for leadership.”). Given the recent economic downturn across the nation, however, prosecutors and legislators alike have received greater criticism about the escalating number of inmates and the costs of their imprisonment—particularly the expense of incarcerating people for

Dwelling on one's past conquests in appealing to the public for support is viewed by some observers to be crucial to a prosecutor's electoral chances,¹⁴¹ although others have attacked this practice as unethical.¹⁴² In particular, Kenneth Bresler, a former prosecutor, has criticized the practice of identifying individual defendants sentenced to death and publicizing "body counts"—tallies of capital convictions—as part of a candidate's campaign literature and speeches.¹⁴³ The ethical issue revolves principally around the fear that when a prosecutor seeking election or re-election to public office uses such tactics, it suggests political considerations have infected the prosecutorial decision-making process.¹⁴⁴ A "chicken-or-egg" problem arises; it becomes unclear whether the prosecutor sought those convictions and harsh sentences in the hopes of campaigning on the backs of those defendants, or whether the convictions were merely an ancillary result of the prosecutor's effort to do justice.¹⁴⁵ What is clear, however, is that ethical rules forbid a prosecutor from allowing political considerations to dictate the decision to prosecute or recommend a specific punishment in a case.¹⁴⁶ Even if accusations that a prosecutor permitted political variables to affect her decisions can most likely never be substantiated, as Bresler observes, campaigning on one's "win-loss" record and notable "victories" may create an appearance that justice has been compromised.¹⁴⁷

minor offenses. *See, e.g.*, Editorial, *The Growing Inmate Population*, N.Y. TIMES, Aug. 1, 2003, at A20 ("Getting tough on crime has long been an easy way to impress voters. But with government strapped for funds, it makes no sense to spend an average of \$22,000 a year to keep people behind bars who do not need to be there.").

¹⁴¹ Ferguson-Gilbert, *supra* note 40, at 295-96 ("Campaigning on their trial success—their convictions—has been deemed by some as essential to be elected as a prosecutor.").

¹⁴² *See, e.g.*, Bresler, *supra* note 136. In essence, Bresler contends that permitting prosecutorial "politicking on the defendants they sent to death row" violates several ethical rules, including the goal to seek justice and to prevent political factors from affecting prosecutorial decisionmaking. *Id.* at 943. Bresler distinguishes between prosecutors who highlight their support for capital punishment (in his view, an acceptable campaign practice) from those who mention convicted defendants by name or present the number of executions carried out on their watch (which he deems unethical). *Id.* at 944.

¹⁴³ *Id.* at 944.

¹⁴⁴ *Id.* at 950.

¹⁴⁵ *Id.* at 949 ("Capitalizing on capital convictions in campaigns raises the question: Which came first, the decision to pursue the death penalty or the decision to pursue political advantage? The question is hard to answer, and an answer is hard to prove.").

¹⁴⁶ *Id.*; *see also* ABA STANDARDS, *supra* note 30, § 3-1.3(f) ("A prosecutor shall not permit his or her professional judgment or obligations to be affected by his or her own political . . . or personal interests."); *id.* § 3-3.9(d) ("In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved . . .").

¹⁴⁷ *See* Bresler, *supra* note 136, at 949-50 (observing that using capital convictions to achieve political success is unethical "because it demonstrates, not that a particular decision to prosecute was politicized, but that it easily could have been").

Whereas chief prosecutors are theoretically accountable to the public due to the manner in which they attain (and retain) their posts, the true extent of this accountability is uncertain. In running for election as a district attorney, candidates often convey tough-on-crime rhetoric sprinkled with references to their winning percentage and successes in high-profile cases.¹⁴⁸ The public, though, has minimal access to precise information about the rest of a candidate's decisionmaking record that is not otherwise divulged by the candidate herself.¹⁴⁹ Rather, in lieu of specific details about office policies and procedures, broad themes resonate in most elections and information about prosecutors' discretionary decisions is seldom available and seldom sought for public consumption in evaluating candidates.¹⁵⁰

B. *The Political Consequences of Post-Conviction Innocence Claims for Prosecutors*

The fact that candidates for chief prosecutor and former prosecutors seeking other public offices typically depend upon their conviction rates and track records in high-profile cases¹⁵¹ necessarily affects their approach to post-conviction claims of innocence. For a rank-and-file prosecutor anticipating a run for elected office, conceding a past mistake could undercut any tough-on-crime swagger and perhaps call into question his fitness for the position. How many innocent people has this lawyer imprisoned? If elected, will he be able to "get the bad guys"? Together with generating politically damaging questions about the candidate's competence, the exoneration of an innocent prisoner suddenly produces an unsolved crime and, hence, one more criminal at large: a development that, considering the media frenzy accompanying these cases, occurs right in front of a curious public.¹⁵²

A political incentive, therefore, exists for prosecutors to fight post-conviction innocence claims, to duke it out in the courts, so to speak. Opposing an innocence claim and letting the motion wend its way through the adversarial system not only reinforces a prosecutor's tough-on-crime message, but any political capital lost due to a subsequent vacatur of a conviction can be attributed to the system as a whole, rather than the individual prosecutor or the local district attorney's office. In non-DNA exonerations, where innocence

¹⁴⁸ See Ferguson-Gilbert, *supra* note 40, at 295-96 (describing how politicians must use their "wins," especially in the realm of capital punishment, when campaigning).

¹⁴⁹ See Davis, *supra* note 114, at 58-59 (stating that the public's access to precise information regarding prosecutorial decisionmaking is minimal and has not expanded since the 1820s).

¹⁵⁰ *Id.* (arguing that the electorate is not fully informed when voting for prosecutors).

¹⁵¹ See *supra* notes 135-136 and accompanying text.

¹⁵² Occasionally, however, the exoneration of an innocent prisoner occurs simultaneously with the discovery of the true perpetrator. See *infra* notes 207-232 and accompanying text (describing the case of Anthony Porter).

may never be proven to a scientific certainty,¹⁵³ the judge in effect becomes the one who is “soft” on crime, not the prosecution. And, in reversals deriving from DNA tests conducted pursuant to a court order, the prosecutor can argue that justice was ultimately served—that the adversarial system worked in the end. Not incidentally, post-conviction battles of attrition through the court system decrease the likelihood that cases will be overturned, particularly when the prosecution balks at subjecting evidence in its possession to DNA testing.¹⁵⁴

Finally, there may be a financial incentive for prosecutors to resist post-conviction innocence claims given the trend toward the adoption of state legislation providing compensation for the wrongfully-convicted.¹⁵⁵ Although these statutes do not expressly designate that funds used for this compensation should be drawn directly from prosecutors’ budgets,¹⁵⁶ the impact of these payouts on state coffers could conceivably have an indirect effect on the amount of money allocated to prosecutors partially dependent on state funding.¹⁵⁷

Overall, the elected nature of most chief prosecutors allows for the possibility that political factors may unduly influence decisions,¹⁵⁸ among

¹⁵³ See *supra* note 27 and accompanying text.

¹⁵⁴ See *supra* notes 9-14 and accompanying text (commenting that the prosecution may not consent to testing or may refuse to turn over biological evidence for testing). In one particularly egregious case, a law student in Kentucky found evidence from a blood stain near a broken window that, in the view of investigators, belonged to the perpetrator in an old murder case. See *Death Penalty Overhaul*, *supra* note 25. The inmate convicted of the murder, Michael Elliott, claimed that testing the blood stain would prove his innocence. *Id.* Rather than consenting to DNA tests, however, the local prosecutor asked the trial court to destroy the evidence, a request that was granted by the court. *Id.* Ultimately, the Kentucky Court of Appeals prevented the issuance of the destruction order. *Id.*

¹⁵⁵ See Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73 (1999) (discussing the existence of statutes in certain jurisdictions that explicitly provide compensation for the wrongfully-convicted, and asserting the need for additional legislation throughout the country because traditional tort and civil rights remedies are inadequate to compensate the exonerated).

¹⁵⁶ The indemnification statutes for wrongful convictions that have been enacted do not indicate that prosecutors must directly bear any of the financial brunt for compensating claimants. See Adele Bernhard, *Table: When Justice Fails: Indemnification for Unjust Conviction*, 7 U. CHI. L. SCH. ROUNDTABLE 345 (2000). The fear that damage awards could strain state budgets, in Bernhard’s view, may be one of the reasons why legislators in many states implemented caps on individual recoveries. See Bernhard, *supra* note 155, at 106.

¹⁵⁷ Although many prosecutors’ offices that handle cases in the state court system are largely dependent on county funds for their budgets, see *supra* note 137 and accompanying text, data also suggests that roughly half of these offices receive some funding from the state government and about six percent of the offices reported total financial reliance on state funding. See DEFRANCES, *supra* note 22, at 4.

¹⁵⁸ Some of the earlier analyses of elected prosecutors’ offices—the crime commissions of the 1920s and 1930s—also made this observation. See Misner, *supra* note 62, at 730-31

them, choices regarding how to respond to post-conviction claims of innocence. Prosecutors are also largely not accountable for these decisions in light of the fundamental lack of transparency of their internal decisionmaking processes.¹⁵⁹ Generally, the public only has access to information about these choices when the prosecution unilaterally opts to disclose details concerning a criminal matter or when the media, usually at the behest of a zealous and well-connected defense attorney, takes an interest in a case, transforming it into a political cause.¹⁶⁰ Since prosecutors tend to rely on their win-loss record in political campaigns where vague tough-on-crime oratory is deemed critical,¹⁶¹ revealing past errors and rectifying wrongful convictions do not appear to be politically advantageous. Exceptions to this principle, however, may lie in cases where someone else (the press, the defense) draws public attention to the case and it becomes expedient for prosecutors to intervene and salvage whatever political benefits they can.

Indeed, many of the situations where prosecutors have come forward to assent to—or at least not oppose—post-conviction innocence claims have a reactive, almost opportunistic quality to them: many prosecutors “do the right thing” in responding to these motions only when there are discernible political advantages to be accrued and/or doing otherwise could have a grave political downside. Occasionally, even in the absence of overt political pressure, prosecutors have initiated “backlog projects” to review old cases in order to ascertain whether there are any viable claims of innocence.¹⁶² Critics of these programs, though, characterize them as mere window-dressing, an attempt by district attorneys to inoculate themselves from attack by proclaiming to be open to the possibility of innocence claims while preventing outside observers from having access to the same files and undertaking a more nuanced review

(“Generally the commissions found that the elective nature of the office often led to undue political influence on prosecutorial decisions.”).

¹⁵⁹ See Davis, *supra* note 114, at 58-59 (arguing that prosecutors are not truly accountable to the electorate because information regarding prosecutorial decisionmaking is not fully available).

¹⁶⁰ See Press Release, National Association of Criminal Defense Lawyers, *Winning at Any Cost: Prosecutorial Excess Distorting America’s Justice System* (Feb. 9, 1999), available at <http://www.nacdl.org/public.nsf/newsreleases/99mn001?opendocument> (last accessed Jan. 9, 2004) (“Despite the recent spate of coverage of misconduct, prosecutorial discretion is the least-covered thing in American government The press has written a lot about bad cops, a lot about judges, but prosecutors, in the main, have only been covered through their leaks and announcements.” (quoting David Burnham, an investigative reporter)). The notion that some attorneys may be better able to grab the attention of the media than others raises disturbing fairness questions, especially for inmates who do not have the benefit of any counsel whatsoever after the exhaustion of their direct appeals.

¹⁶¹ Ferguson-Gilbert, *supra* note 40, at 295-96 (stating that some people regard campaigning on prosecutorial “wins” as essential to success).

¹⁶² See *supra* note 3 and accompanying text (identifying instances where prosecutors have taken the initiative in reviewing convictions).

of their contents.¹⁶³ In addition, tough-on-crime rhetoric by prosecutors may be music to the ears of much of the electorate, but such themes may strike a more discordant note in certain regions of the country than elsewhere.¹⁶⁴ On the whole, the receptivity of prosecutors to post-conviction allegations of innocence seems to be greatly affected by the local political climate prevailing at the time of the claim.

There are several distinct circumstances where prosecutors can reap political rewards, or bypass political potholes, by accepting the potential legitimacy of a post-conviction innocence claim. Specifically, these circumstances include: (1) a case that fascinates members of the media, and their investigative reporting presents the possibility of tainting the chief prosecutor's reputation; (2) a situation where refusing to fight the defendant's post-conviction motion affords an opportunity for a prosecutor to portray a political adversary in a bad light; (3) a case where the defendant's innocence claim is coupled with signs of the actual perpetrator's culpability; and/or (4) a situation where the defendant remains in prison, despite the exoneration, because of a sentence for an unrelated crime.

First, pressure on prosecutors to respond to innocence claims may come in the form of media exposure. A classic example of this situation is the case of Jeffrey Blake, a young Brooklyn man convicted of murder in New York state court in the early 1990s based solely on the testimony of a single eyewitness, Dana Garner.¹⁶⁵ At the outset of the Blake case, prosecutors failed to disclose information casting doubt on the witness's credibility.¹⁶⁶ Years later, due to a painstaking re-investigation of the case by Michelle Fox, the Legal Aid Society

¹⁶³ As Goldberg and Siegel have observed, many of these initiatives "rely upon prosecutorial judgments concerning which cases will ultimately receive testing." Goldberg & Siegel, *supra* note 3, at 394-95; *see also* Eric Lichtblau, *New Federal Plan for DNA Testing Is Proposed*, N.Y. TIMES, Mar. 12, 2003, at A20 (discussing Peter Neufeld's criticism of a Justice Department proposal, which includes funds to assist states in defraying the costs of post-conviction DNA testing, because the plan gives the Justice Department and prosecutors too much authority to decide who should have access to testing).

¹⁶⁴ Liberal enclaves may provide a political environment in which prosecutorial openness to post-conviction innocence claims is not a political detriment. For instance, the District Attorney of San Francisco, Terence Hallinan, is a former criminal defense lawyer who ascended to his post on a wave of liberal ideology. *See, e.g.*, Ilene Lelchuk, *D.A. Race Could Hinge on Police Indictments*, S.F. CHRON., Mar. 10, 2003, at A1 (stating that Hallinan has been referred to as the country's most progressive district attorney and that he overcame reports during his 1999 election that "his office had won convictions in only 35.5 percent of the homicide, rape, robbery and assault cases police brought to his office"); *see also supra* note 110 and accompanying text (describing the San Francisco district attorney's race in 1999).

¹⁶⁵ *See, e.g.*, Green, *supra* note 9, at 637-42 (describing the circumstances surrounding the conviction and exoneration of Jeffrey Blake).

¹⁶⁶ *Id.* at 638 ("[I]nformation, known by the authorities but not disclosed to the defense, cast doubt upon the witness's credibility.")

lawyer assigned to handle Blake's direct appeal, Garner recanted entirely and the person with whom he had previously claimed to be standing at the time of the incident denied seeing the shooting.¹⁶⁷ The local district attorney's office was initially hesitant to set aside the conviction until a *New York Times* columnist joined in Fox's efforts by writing a series of articles, scathing in their depiction of the county prosecutor's office.¹⁶⁸ It was only in response to this media coverage that the prosecution eventually agreed that the conviction should be set aside, and Blake was finally released upon the motion of the district attorney after eight years' imprisonment.¹⁶⁹

Jeffrey Blake's release is just one example of an occasion where the prosecution evidently relented and accepted the legitimacy of a post-conviction innocence claim when faced with the prospect of looking "bad" due to a public shellacking by the media.¹⁷⁰ This form of pressure is arbitrary, contingent upon the ability of the defendant (who is often litigating his claim pro se) to alert the media to his case, and the willingness of the media to listen. Even more, attempting to showcase an innocence claim through the media carries with it dangers for the defendant, including exposing his prior criminal record to dissection and possibly antagonizing judges who are wary—perhaps justifiably—of claimants who try to litigate their cases through the press.¹⁷¹

Second, prosecutors may be amenable to a post-conviction innocence claim in situations where the prior conviction occurred during the reign of a previous chief prosecutor, as in the case of Earl Truvia and Greg Bright in New Orleans.¹⁷² The two men were convicted, based upon the testimony of a single

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (acknowledging *New York Times* columnist Bob Herbert's efforts to help publicize the wrongful conviction).

¹⁶⁹ *Id.* (stating that the district attorney's motion to set aside the conviction was most likely a reaction to increased media attention).

¹⁷⁰ Several years later, with the media coverage in *The New York Times* reduced to a single paragraph in the Metro Briefing section, the United States Court of Appeals for the Second Circuit ordered the vacatur of a murder conviction where the witness who lied against Blake again served as the chief prosecution witness. *Metro Briefing New York: Manhattan: Murder Conviction Vacated*, N.Y. TIMES, June 19, 2003, at B10. The prosecutor's office in Brooklyn announced that it would retry the case. *Id.*

¹⁷¹ An analysis of the ethical and strategic issues involved in a defendant's assessment of whether to try to publicize an innocence claim through the media is beyond the scope of this article. For a discussion of journalism and wrongful convictions generally, see Rob Warden, *The Revolutionary Role of Journalism in Identifying and Rectifying Wrongful Convictions*, 70 UMKC L. REV. 803 (2002) (detailing instances where the media has either positively or negatively affected cases); see also Steve Weinberg, *A Short History of Exposing Misconduct: An Unlikely Cast of Characters Has Shone a Spotlight on Bad Prosecutors, and On Occasion Sparked Reform*, June 26, 2003, at <http://www.publicintegrity.org/pm/default.aspx?sid=sidebarsb&aid=37> (last accessed Jan. 9, 2004) (briefly surveying past efforts to publicize prosecutorial misconduct).

¹⁷² See, e.g., Michael Perlstein, *Jordan Drops Charges in 1975 Murder; Two Men Freed*

eyewitness, of murdering a teenager on Halloween night in 1975.¹⁷³ At the time, there were questions about the credibility of the witness, whom prosecutors knew to be battling drug addiction and mental illness prior to and during the trial.¹⁷⁴ Prosecutors did not, however, share this information with members of the defense team.¹⁷⁵

Many years later, the nonprofit Innocence Project New Orleans (“IPNO”) looked into the matter on behalf of Bright, intrigued by a case that lacked any motive, weapon, or physical evidence implicating the defendant, and stirred by Bright’s unwavering assertions of innocence.¹⁷⁶ IPNO ultimately filed a post-conviction motion arguing that Bright “has spent a quarter century in prison for a crime he did not commit,”¹⁷⁷ and the defense team’s efforts resulted in a reversal of his conviction in February 2002 and the ordering of a new trial.¹⁷⁸ The court also vacated Truvia’s conviction and ordered a new trial.¹⁷⁹

Harry Connick, Sr., who had served as Orleans Parish District Attorney since 1973¹⁸⁰ and was ensconced in the office at the time of the original trial, appealed the 2002 ruling, but the Louisiana Supreme Court upheld a new trial for both defendants.¹⁸¹ Undaunted, Connick vowed to re-try the case and insisted that the two men were guilty.¹⁸² Renowned for his feisty personality and law-and-order values,¹⁸³ Connick achieved notoriety for his fervent application of the death penalty as well as allegations that his office not infrequently tampered with evidence in high-profile cases.¹⁸⁴ Over the course

on Eve of Retrial, TIMES-PICAYUNE (New Orleans), June 24, 2003, Metro, at 1.

¹⁷³ *Id.*

¹⁷⁴ *Id.* (reporting that the defense, assembled by the nonprofit Innocence Project New Orleans, had shown that prosecutors knew about the eyewitness’s problems).

¹⁷⁵ *Id.* (reporting that the defense team had shown that the prosecution withheld information regarding the eyewitness’s credibility).

¹⁷⁶ Michael Perlstein, *Group Trying to Correct Courts’ Mistakes; Current Appeal Faults Lone Witness in Trial*, TIMES-PICAYUNE (New Orleans), Mar. 14, 2003, at 1 (discussing Bright’s impassioned claim of innocence, as reflected by his unwillingness to accept responsibility for the crime even when doing so could have led to a sentence commutation from the Pardon Board).

¹⁷⁷ *Id.* (quoting a petition presented on behalf of Bright).

¹⁷⁸ See Perlstein, *supra* note 172.

¹⁷⁹ *Id.* (stating that the convictions of both Bright and Truvia were vacated in 2002); accord Michael Perlstein, *Open to Appeal: Convicted Criminals Say DA Policy Change Gives Them Fair Shot*, TIMES-PICAYUNE (New Orleans), July 20, 2003, at 1.

¹⁸⁰ Gwen Filosa, *Connick Calling It Quits After 30 Years; Love Him or Hate Him, DA Shaped Law and Order in Orleans Parish*, TIMES-PICAYUNE (New Orleans), Mar. 23, 2002, at 1 (“[Connick] defeated incumbent Jim Garrison for the job of district attorney in 1973 . . .”).

¹⁸¹ Perlstein, *supra* note 172.

¹⁸² *Id.*

¹⁸³ See Filosa, *supra* note 180.

¹⁸⁴ *Id.* (describing how Connick sought the death penalty whenever possible, and noting

of his long career, Connick lobbied against almost any policy that could be perceived as a sign of prosecutorial “softness,” even plea bargaining.¹⁸⁵ In particular, prosecutors during Connick’s tenure uniformly opposed post-conviction motions as a matter of principle, and nearly all such motions provoked a fight.¹⁸⁶

In March 2002, Connick announced his retirement and, later that year, he endorsed Dale Atkins—a clerk of the Civil District Court who had worked for Connick for three years before her election as clerk—as his successor.¹⁸⁷ Soon, eight candidates began to jockey for the post of district attorney, one of whom quickly surfaced as Atkins’s main rival: Eddie Jordan, a former federal prosecutor.¹⁸⁸ Playing the role of outsider to Atkins’s insider in the campaign, Jordan highlighted his hard-nosed prosecution of former Louisiana Governor Edwin Edwards on federal corruption charges¹⁸⁹ and proclaimed his independence from political machines.¹⁹⁰ Despite the fact that Atkins outspent him by a wide margin,¹⁹¹ Jordan won the election, but only after a bitter two-

some of the allegations that surrounded Connick’s office).

¹⁸⁵ See Gwen Filosa, *Harry Bids Adieu; After 29 Years and Five Terms as Orleans Parish District Attorney, Harry Connick Sr., 76, Decides to Close His Briefcase*, TIMES-PICAYUNE (New Orleans), Mar. 28, 2002, at 1 (describing Connick’s strong belief in “law-and-order criminal justice” and his disdain for plea bargaining because of “its connotations of deal-making and the perception of prosecutorial softness”). Two scholars recently studied Connick’s opposition to plea bargaining and, on the whole, praised the prosecutor for his emphasis on pre-screening cases and only pursuing cases that had a sincere chance for success at trial. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002).

¹⁸⁶ Perlstein, *supra* note 179 (“During Connick’s tenure, defense motions were uniformly opposed on principle, nearly every post-conviction appeal or pardon request was vigorously contested.”).

¹⁸⁷ Gwen Filosa, *District Attorney Throws Weight Behind Atkins; Connick Endorses Her to Replace Him*, TIMES-PICAYUNE (New Orleans), Aug. 8, 2002, Metro, at 8; Gwen Filosa, *Jordan, Atkins to Face Off in DA Race; Connick Successor to be Selected in Nov. 5 Runoff*, TIMES-PICAYUNE (New Orleans), Oct. 2, 2002, at 1 [hereinafter Filosa, *Runoff*].

¹⁸⁸ See Gwen Filosa, *DA Race Heating Up As Primary Looms; 8 Jockeying To Stick Out In Voters’ Minds*, TIMES-PICAYUNE (New Orleans), Sept. 30, 2002, at 1 (describing the campaign efforts of both Jordan and Atkins); Filosa, *Runoff*, *supra* note 187 (recounting the results of the election in which Jordan finished first and Atkins finished second out of eight candidates).

¹⁸⁹ Filosa, *Runoff*, *supra* note 187 (“He touted his seven years as U.S. attorney and landmark cases, including successful prosecution of . . . former Gov. Edwin Edwards.”).

¹⁹⁰ Gwen Filosa, *DA Race Heats Up in Forum*, TIMES-PICAYUNE (New Orleans), Oct. 16, 2002, at 1 (noting that Jordan attributed his lack of endorsements to the fact that he was “unconnected to political circles”); Filosa, *Runoff*, *supra* note 187 (“In his first bid for elected office, Jordan said he relied on the voters instead of political machines. ‘We achieved this result without any major political endorsements, not one,’ Jordan told supporters . . .”).

¹⁹¹ Gwen Filosa, *Atkins Leading Money Race; \$84,500 Raised in Past Week*, TIMES-

person runoff with Atkins.¹⁹² Continuing to assume his outsider persona in the aftermath of the election, Jordan reiterated his reformist agenda during his inauguration speech,¹⁹³ and proceeded to fire over sixty employees a few weeks later, invoking his predecessor's wrath.¹⁹⁴ In a letter that found its way to the press, Connick blasted Jordan for beginning his administration "on a note of distrust and mean-spiritedness."¹⁹⁵

It was in this atmosphere of simmering hostility between predecessor and successor as Orleans Parish District Attorney that the Truvia-Bright case re-emerged in the summer of 2003.¹⁹⁶ On the eve of the re-trial, Jordan dropped the charges after reviewing the evidence and attacked Connick for unethical conduct;¹⁹⁷ a newspaper reporter quoted Jordan as saying that "[t]he way this case was handled by the former district attorney's administration is inexcusable. . . . This type of disregard of the disclosure rules will not be tolerated under my administration."¹⁹⁸ Jordan's decision to abandon the re-trial was heralded by members of the criminal defense bar, with Barry Scheck, Co-Director of the Innocence Project at Benjamin N. Cardozo School of Law, terming Jordan "a prosecutor with a conscience."¹⁹⁹ Scheck added that "[i]nstead of adopting the old-fashioned knee-jerk 'the-system-is-never-wrong' position, he took the time to review the facts and make a just decision."²⁰⁰

Since the resolution of the Truvia-Bright case, all indications suggest that Jordan continues to be flexible in dealing with post-conviction defense

PICAYUNE (New Orleans), Nov. 1, 2002, Metro, at 1 (comparing the campaign spending amounts for Jordan and Atkins); Gwen Filosa, *DA Race 'Wide Open' Again; 2 Hopefuls Separated by Only 8,565 Votes*, TIMES-PICAYUNE (New Orleans), Oct. 7, 2002, Metro, at 1 (stating that, before the initial primary, Atkins spent twice as much money as Jordan).

¹⁹² James Gill, *Gloves Off in Race for DA*, TIMES-PICAYUNE (New Orleans), Oct. 2, 2002, Metro, at 7; see also Filosa, *Runoff*, *supra* note 187; Gwen Filosa, *Jordan Victorious in Close Race*, TIMES-PICAYUNE (New Orleans), Nov. 6, 2002, at 1 (describing the increase of personal attacks by the candidates in the runoff, and noting that Jordan went on to win).

¹⁹³ Gwen Filosa, *City Hails Jordan in Elaborate Inauguration; New District Attorney Vows to Reform System*, TIMES-PICAYUNE (New Orleans), Jan. 14, 2003, at 1 ("Jordan said the voters had given him a mandate for change in the way the district attorney's office fights crime, and that the time has come to install new policies and strategies.").

¹⁹⁴ Gwen Filosa, *Connick, Jordan Spar Over Firings*, TIMES-PICAYUNE (New Orleans), Jan. 24, 2003, at 1 ("Jordan's abrupt firing of more than 60 employees Tuesday was 'callous and unprofessional,' Connick wrote.").

¹⁹⁵ *Id.*

¹⁹⁶ Perlstein, *supra* note 172 (illustrating Jordan's hostility toward his predecessor and describing his decision to drop the charges against Truvia and Bright).

¹⁹⁷ *Id.* ("Blasting his predecessor for withholding critical evidence . . . Orleans Parish District Attorney Eddie Jordan dropped the charges Monday on the eve of a much-anticipated retrial.").

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

motions, which Connick had previously shunned.²⁰¹ In July 2003, Jordan stated that “[w]e’re not going to be bound by the decisions of the previous administration. We don’t have a one-size-fits-all philosophy.”²⁰² Local criminal defense lawyers, however, have taken Jordan’s rapprochement with a grain of salt. In the words of one veteran public defender, “Jordan is a lot more relaxed listening to criticism of old cases because they weren’t handled under his tenure by people he hired and trained and supported. The real test will come when people from his administration get socked with these kinds of criticisms and complaints about cases handled under his watch.”²⁰³

Jordan’s decision to drop the murder charges against Bright and Truvia may indeed reflect the work of “a prosecutor with a conscience,” yet it also presented an opportunity for a new chief prosecutor to score some political points against a previous regime. That is, one cannot discount the lingering animus between Connick and Jordan as a factor in Jordan’s choice to drop the charges in the Truvia-Bright case and lambaste Connick in the media. Although Jordan stopped short of publicly stating that Truvia and Bright were innocent,²⁰⁴ this episode nevertheless shows how political considerations—specifically, the desire to harm a political foe—may be a major impetus behind a prosecutor’s decision to join the side of the defense in a post-conviction innocence case. In “doing the right thing,” Jordan also managed to give Connick what he believed was his due.

A third circumstance where prosecutors may find accepting the legitimacy of a post-conviction innocence claim politically palatable is in cases where new evidence exculpates the defendant while also *inculcating* another person. These situations may take the form of a post-conviction DNA test exonerating the defendant that concurrently results in a “hit” on a person whose genetic material is on file with a database.²⁰⁵ They may also arise when the true

²⁰¹ For instance, Jordan refused to oppose two separate post-conviction motions from prisoners seeking to modify their sentences, motions that Connick had previously fought. See Perlstein, *supra* note 179 (discussing Jordan’s refusal to oppose the post-conviction motions of both Norris Henderson and Raymond Perique, whose release Connick had strongly opposed). For an editorial by a former prosecutor criticizing Jordan’s “defense-friendly philosophy,” see Editorial, *DA’s Office is Going Too Far*, TIMES-PICAYUNE (New Orleans), July 22, 2003, Metro, at 4 (suggesting that the district attorney’s office was granting “wholesale plea bargains”).

²⁰² See Perlstein, *supra* note 179.

²⁰³ *Id.*

²⁰⁴ See Perlstein, *supra* note 172 (discussing Jordan’s decision to refrain from retrying Bright and Truvia, but failing to declare them wrongfully convicted).

²⁰⁵ Proponents of DNA testing, even defense lawyers, often hail the benefits of this technology as a crime-fighting tool just as much as it is a means to prove innocence. See, e.g., *Death Penalty Overhaul*, *supra* note 25 (Barry Scheck stating how, as a commissioner on New York State’s Forensic Science Review Board, he spent significant time training and urging law enforcement to focus on old “cold” cases that can now be solved via DNA); see also John P. Cronan, *The Next Frontier of Law Enforcement: A Proposal for Complete DNA*

perpetrator comes forward to confess, and there is evidence to corroborate that statement.²⁰⁶ Where a post-conviction innocence claim is accompanied by evidence strongly implicating another suspect, a prosecutor incurs minimal political risk in displaying openness to the claim: an innocent person is exonerated yet without the attendant creation of an unsolved crime.

A prime example of this situation is the Anthony Porter case from Illinois.²⁰⁷ Porter was convicted and sentenced to death for the 1982 double murder of a young couple, Marilyn Green and Jerry Hillard, in a park on Chicago's South Side.²⁰⁸ In the ensuing years, it was revealed that Porter was likely mentally incompetent, a detail his defense team overlooked at trial,²⁰⁹ and—largely through the efforts of David Protess and his students at Northwestern University's Medill School of Journalism—that he was innocent.²¹⁰ Protess and his students interviewed William Taylor, the prosecution's chief eyewitness at Porter's trial, and he recanted his testimony, asserting that he had falsely accused Porter under the heat of police pressure.²¹¹ The unraveling of the case against Porter, however, involved something more remarkable than a

Databanks, 28 AM. J. CRIM. L. 119 (2000) (proposing a system for the creation of a DNA databank, and discussing the benefits of increased successful convictions of violent and sex offense-related criminals and decreased erroneous convictions that would result from such a system); William K. Rashbaum, *New York Pursues Old Cases of Rape Based Just on DNA*, N.Y. TIMES, Aug. 5, 2003, at A1 (discussing the announcement by New York City officials of a plan to review biological evidence from unsolved sex crimes with the goal of indicting unidentified attackers through DNA profiles); Ronald Smothers, *Newark Sex Assaults to Be Rechecked Using DNA*, N.Y. TIMES, Oct. 9, 2003, at B5 (mentioning a New Jersey law that requires convicts' DNA to be entered into a state database, and noting the Essex County chief prosecutor's desire to begin review of unsolved crimes). Naturally, the evolution of these databases has not occurred without controversy, especially considering the privacy issues implicated by their development. See, e.g., Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 BROOK. L. REV. 127, 129-30 (2001) (analyzing both the constitutional and policy issues surrounding the expansion of DNA databank collection, and concluding that "only the DNA of convicted sex offenders and violent felons should be collected" and that the samples should be destroyed once analyzed).

²⁰⁶ See *infra* notes 207-232 and accompanying text.

²⁰⁷ *People v. Porter*, 489 N.E.2d 1329 (Ill. 1986) (affirming Porter's conviction and sentence to death for the murders of Jerry Hillard and Marilyn Green).

²⁰⁸ See, e.g., *Look Anew at this Murder Case*, CHI. TRIB., Jan. 30, 1999, at 20 [hereinafter *Look Anew*].

²⁰⁹ *Id.* ("A series of tests performed last year by a psychologist hired by his new defense team consistently put Porter's IQ at about 51 That would have rendered him marginally capable, at best, of participating in his defense.").

²¹⁰ Pam Belluck, *Class of Sleuths to Rescue on Death Row*, N.Y. TIMES, Feb. 5, 1999, at A16 ("[T]he journalism students and Mr. Protess examined court records, re-enacted the crime and tracked down witnesses. What they found suggested that another man had committed the murders.").

²¹¹ *Look Anew*, *supra* note 208.

witness recantation: mounting evidence against another suspect, Alstory Simon.²¹²

As part of their investigation in the late 1990s, the journalism students gleaned that Simon had had a dispute with one of the victims, Hillard, over the proceeds from the sale of drugs and that Simon and his wife, Margaret Inez Jackson, were with the victims on the night of the incident.²¹³ The students obtained an affidavit from Jackson, who had since become estranged from her husband, which stated that she observed Simon shoot Hillard and Green before he grabbed her arm and led her out of the park.²¹⁴ Furthermore, Walter Jackson, Margaret's nephew, executed an affidavit that described the return of his aunt and uncle to their apartment that night and how "Alstory took me aside and told me he had 'taken care of' Jerry and Marilyn."²¹⁵ Simon and his wife then fled Chicago the very next day.²¹⁶ In 1999, Protess's team interviewed Simon in Milwaukee, and Simon confessed to the crime on videotape.²¹⁷

The State's Attorney's Office immediately expressed eagerness to review the materials gathered by Protess and his students.²¹⁸ The prosecution re-investigated the case and, according to David Erickson, the First Assistant Cook County State's Attorney, "sent investigators to Wisconsin and other parts of the Midwest to confirm" the evidence procured by the defense team.²¹⁹ Upon concluding its whirlwind re-investigation, the prosecution took the initiative and filed a motion to release Porter on his own recognizance in February 1999.²²⁰ Although Porter's conviction was not formally overturned via that motion—the prosecution claimed it needed more time to investigate²²¹—the court vacated his murder conviction shortly thereafter.²²²

²¹² *Id.* (describing how Walter Jackson signed a statement from prison linking his uncle, Alstory Simon, to the double murder); Eric Zorn, *Evidence Grows That Wrong Man Is on Death Row*, CHI. TRIB., Feb. 2, 1999, Metro, at 1 (describing affidavits from different witnesses that implicate Alstory Simon as the killer).

²¹³ Zorn, *supra* note 212.

²¹⁴ *Id.*

²¹⁵ *Id.* (quoting Walter Jackson's affidavit).

²¹⁶ *Id.*

²¹⁷ See, e.g., Jon Jeter, *A New Ending to an Old Story; Journalism Students Rewrite the Case of an Innocent Man Set to Die*, WASH. POST, Feb. 17, 1999, at C01 (describing how Simon eventually admitted on camera that he shot Green and Hillard).

²¹⁸ Zorn, *supra* note 212 ("A spokesman for the Cook County state's attorney's office said prosecutors are eager to review the affidavits of Simon, Jackson and Taylor . . .").

²¹⁹ Douglas Holt & Flynn McRoberts, *Porter Fully Savors 1st Taste of Freedom; Judge Releases Man Once Set for Execution*, CHI. TRIB., Feb. 6, 1999, at 1.

²²⁰ *Id.* (mentioning that the court granted the state's motion to release Porter on his own recognizance).

²²¹ Pam Belluck, *Convict Freed after 16 Years on Death Row*, N.Y. TIMES, Feb. 6, 1999, at A7 ("Mr. Porter's conviction was not overturned today, and he is technically out on bond, because prosecutors said they needed a few more weeks to investigate.").

Even so, Porter, freed from prison after sixteen years and no longer a convicted murderer, technically remained convicted of robbery and weapons charges,²²³ and the prosecution still believed he was guilty of those other crimes.²²⁴ By the time the court vacated Porter's murder conviction, Simon had already been charged with the murders and taken into custody.²²⁵ He pled guilty to the slayings in September 1999, receiving a sentence of thirty-seven years in prison.²²⁶

In the Porter case, therefore, the prosecution suffered no net loss in its conviction rate by failing to battle his innocence with respect to the murders—in effect, Simon's conviction supplanted Porter's²²⁷—and it may have accrued some political capital through its prompt investigation and evident openness to the strength of the defense claim. Still, by insisting that Porter was guilty of the other crimes, the prosecution showed an unwillingness to admit it had completely erred; in its view, Porter deserved some part of his incarceration. The reluctance of prosecutors to dismiss the robbery and weapons charges also had a financial component to it. Under the pertinent Illinois statute, Porter would be eligible to seek compensation for the sixteen years he spent in prison due to his wrongful conviction, but the prospective recovery would be reduced dramatically if it were determined that much of that prison time stemmed from legitimate charges, i.e., the sentences that he received for the robbery and

²²² See Andrew Bluth, *Illinois Man is Finally Cleared in 2 Murders*, N.Y. TIMES, Mar. 12, 1999, at A20.

²²³ *Id.* (“Though cleared of the murder charges, Mr. Porter remains convicted of armed robbery and related weapons charges that were also heard at his 1983 murder trial.”).

²²⁴ *Id.* (“[P]rosecutors still believed that Mr. Porter was in the park that night and committed the armed robbery against the couple.”); Monica Davey, *New Bump in Porter's Rocky Road; Retrial for \$2 Holdup May Cost Him Millions*, CHI. TRIB., Sept. 14, 1999, at 1 (noting that another man, Henry Williams, had testified at Porter's 1983 trial that Porter had robbed him at gunpoint of two dollars near the park's swimming pool).

²²⁵ Bluth, *supra* note 222.

²²⁶ See Elizabeth Neff, *Milwaukeean Sentenced in Chicago Killings*, MILWAUKEE J. SENTINEL, Sept. 8, 1999, at 3 (stating that Simon was sentenced to thirty-seven years in prison for the first-degree murder of Green and fifteen years for the voluntary manslaughter of Hillard, with the sentences to be served concurrently). In December 2002, Simon retreated from his confession and claimed that he “made up” his statement. Abdon M. Pallasch & Carlos Sadovi, *Killer Backs Off Confession*, CHI. SUN-TIMES, Dec. 14, 2002, at 6 (quoting a jailhouse interview in which Simon professed his innocence).

²²⁷ Notably, since this was a murder case, there was no statute of limitations problem hindering the prosecution's pursuit of Simon. In some situations, however, the district attorney's office may be time-barred in prosecuting a new suspect even when evidence is found that exculpates a defendant and simultaneously inculpates another person. For instance, with respect to the David Sutherlin rape case in Minnesota, the authorities are time-barred from prosecuting the man whom they now believe committed the rape. See, e.g., Gustafson, *supra* note 1. Nevertheless, the chief prosecutor in St. Paul has vowed to attempt to force the suspect to be registered as a sex offender. See Wilgoren, *supra* note 1.

weapons offenses.²²⁸ In September 1999, however, the court dismissed those charges and ordered a new trial, as the judge announced that the robbery conviction was “tainted” because it was obtained at the same trial that resulted in Porter’s wrongful conviction for the murders.²²⁹ Days later, after initially vowing to re-try the case, the prosecution relented and moved to dismiss the charges altogether, purportedly on the basis that Porter had already served the probable prison term.²³⁰ The Anthony Porter saga, to a large degree, provoked Illinois Governor George Ryan to re-assess the state’s death penalty system,²³¹ a review that eventually led him to pardon four death row inmates and commute 167 death sentences to terms of life in prison in January 2003.²³²

Fourth, there may be a limited political downside for a prosecutor in agreeing to overturn a conviction when the inmate would nevertheless remain in prison by virtue of a sentence incurred for an altogether separate crime. For instance, in the aforementioned case from Minnesota involving the vacatur of an inmate’s 1985 rape conviction,²³³ the defendant, David Sutherlin, stayed in prison due to a life sentence he had received for an unrelated double murder.²³⁴ In such situations, even if the evidence leading to the inmate’s exoneration fails to inculcate another person and the crime remains unsolved, the district attorney’s office, at the very least, need not worry about any public relations

²²⁸ See Davey, *supra* note 224 (“[I]f Porter is convicted of those charges again, it likely would be more difficult to win compensation for the years he spent on Death Row.”); see also 705 ILL. COMP. STAT. ANN. 505/8(c) (West 2003) (providing that the Court of Claims shall have jurisdiction over “[a]ll claims against the State for time unjustly served in prisons of this State where the persons imprisoned shall receive a pardon from the governor stating that such pardon is issued on the ground of innocence of the crime for which they were imprisoned,” and describing the limits on possible monetary awards).

²²⁹ See Marla Donato, *Case Against Porter is Dropped; Robbery Charge Had Hung Over Ex-Inmate*, CHI. TRIB., Sept. 16, 1999, at 1 (describing the prosecution’s initial vow to retry the robbery case after the court dismissed the conviction because the robbery case was “tainted”).

²³⁰ See Monica Davey, *Porter At Last Free of All Charges*, CHI. TRIB., Sept. 21, 1999, at 1 (reporting that the prosecution chose to drop the case and determined that Porter had been incarcerated long enough); Donato, *supra* note 229 (quoting a prosecution spokesman’s statement that the prosecution “did think there was a strong case for armed robbery, (but) it was less than likely he would be jailed for that”).

²³¹ See Monica Davey, *Close Call Spurred Review; Porter’s Release Influenced Ryan to Study System*, CHI. TRIB., Jan. 13, 2003, Metro, at 1 (“Porter’s case was one of the fundamental reasons [Governor] Ryan began reconsidering the state’s death penalty system.”).

²³² Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES, Jan. 12, 2003, at 1; accord Jodi Wilgoren, *4 Death Row Inmates Are Pardoned*, N.Y. TIMES, Jan. 11, 2003, at A13.

²³³ See *supra* notes 1-4 and accompanying text.

²³⁴ See Wilgoren, *supra* note 1 (“The man convicted of the rape, David Brian Sutherlin, is serving a life sentence for a double murder committed while he was out on bail on the rape charge.”).

issues regarding the release of a person from prison and the psychological impact that the event might have on the victim.²³⁵

As discussed throughout this Part of the article, prosecutors have an array of political incentives to resist post-conviction claims of innocence. Burnishing an image as a rugged crime-fighter can prove vital to a candidate's chances, with anything undercutting that carefully-crafted image possibly fatal. These political realities have produced an environment where resistance to post-conviction claims of innocence has few political shortcomings, save the four circumstances detailed above: where the media has already taken an interest in a case, the original conviction took place during a previous chief prosecutor's regime, the newly discovered evidence inculcates the true perpetrator, and/or the defendant remains in prison because of an unrelated crime. As demonstrated by the Blake, Truvia-Bright, Porter, and Sutherlin cases, these factors are by no means mutually exclusive; a combination of them might interact to spur the prosecution to deviate from its trademark opposition to post-conviction innocence claims.²³⁶

Overall, the arbitrariness associated with the occasions where prosecutors have tempered their resistance to post-conviction innocence claims is deeply troubling in that the outcome of an individual prisoner's claim may hinge, to a great extent, on political conditions outside his control. This pattern of how prosecutors, in practice, respond to viable post-conviction claims of innocence also clashes with the ethical foundation on which prosecutorial power and discretion rests: the duty to do justice.²³⁷

III. THOUGHTS ON REFORM

Without a doubt, the idiosyncrasies of the institutional culture of district attorneys' offices and the peculiar nature of prosecutorial politics discussed in Parts I and II above do not alone account for the frequency and venom with which prosecutors often resist post-conviction motions based on innocence. Structural aspects of the criminal justice system, specifically, the perpetuation

²³⁵ See *supra* note 93 and accompanying text (describing the difficulty experienced by prosecutors in notifying victims about a post-conviction motion). Prosecutors may feel conflicted in post-conviction cases where the victim maintains that the defendant committed the crime, even when faced with DNA evidence to the contrary. Prosecutors in Houston, for example, released Josiah Sutton after a DNA test proved his innocence for a rape conviction, but they have fought Sutton's request for an unconditional pardon, partially due to the victim's continued assertion that she identified the correct man. Liptak, *supra* note 17 (stating that prosecutors have continually resisted Sutton's appeal for an unconditional pardon, and illustrating the prosecution's concern with "[calling] the victim in this case a liar").

²³⁶ For instance, media pressure likely had an effect on the prosecutorial decisions in the Blake, Truvia-Bright, and Porter cases.

²³⁷ See *supra* notes 30-31 and accompanying text (discussing the prosecutor's role as a "minister of justice" and the ethical duties attached to that role).

of the adversary model for litigating post-conviction claims²³⁸ and the systemic emphasis placed upon the concept of finality,²³⁹ surely affect how prosecutors treat such claims. By demanding that the defense bear the burden of proof at the post-conviction stage and that prosecutors assume the role of defending the conviction, the procedures through which post-conviction claims are litigated offer few motives for prosecutors to “think outside the box” and engage in creative lawyering, e.g., agree to turn over biological evidence absent a court order or consent to the holding of an evidentiary hearing.²⁴⁰ An analysis of the structural barriers to post-conviction innocence claims relating to the nature of the criminal justice system itself, however, is beyond the scope of this article. To that end, I will devote the remaining pages of this piece to a narrower topic: to help rehabilitate the ideal that prosecutors are obliged to do justice, a series of reforms should be considered regarding the institutional and political factors deterring prosecutors from recognizing the legitimacy of post-conviction claims of innocence.

A. Education

Better training and supervision of prosecutors may assist in transforming the theoretical underpinnings of their ethical obligations to do justice in the post-conviction sphere into a reality of everyday practice.²⁴¹ Incoming prosecutors

²³⁸ In theory, some prosecutors may resist suggestions to respond creatively to post-conviction innocence claims because of a belief in the fundamental importance of the adversary system in resolving criminal cases in our society. *See supra* note 32 and accompanying text (discussing the need for prosecutors to counter aggressive defense tactics with vigorous efforts to secure convictions under the adversary model).

²³⁹ The systemic concern for finality is reflected by the statutes of limitations that are often imposed on post-conviction innocence claims based on newly discovered evidence. *See, e.g.,* Liebman, *supra* note 17, at 544 (“In most states, pure innocence-based attacks on criminal convictions are legally limited to the first few weeks or months following conviction.”); Thomas et al., *supra* note 38, at 277-82 (discussing procedural rules and deadlines relating to post-conviction innocence claims, and observing that “[t]he trend is undoubtedly in the direction of finding a basis to allow powerful claims of innocence to be heard even if filed too late under the rules of procedure”). Florida’s statute regarding post-conviction DNA testing is particularly onerous: it imposed an October 1, 2003, deadline for defendants to file such requests. *See, e.g.,* Liptak, *supra* note 17.

²⁴⁰ Exacerbating the disincentive for prosecutors to engage in creative lawyering is the fact that, in some jurisdictions, post-conviction motions are filed with the original trial judge, with the effect that prosecutors may not want to “lose face” with the judge in front of whom they had tried the case. *See, e.g.,* N.Y. CRIM. PROC. LAW § 440.10 (McKinney 1994) (prescribing the power of the court in which the original judgment was made to vacate such judgment upon post-conviction motion).

²⁴¹ Ethical rules mandate that prosecutors’ offices institute effective training programs for their attorneys. *See* ABA STANDARDS, *supra* note 30, § 3-2.6; Little, *supra* note 74, at 767-69. Many scholars, however, have argued that these training programs could be improved. *See, e.g.,* Gershman, *supra* note 112, at 458 (“To be sure, better training and supervision play a significant role in fostering an atmosphere in which ethical norms are

may receive training and materials concerning their ethical duties, but these requirements are not emphasized as they work in the field over time.²⁴² Using education to reorient prosecutors toward doing justice in post-conviction innocence cases, as opposed to seeking to uphold those convictions without much reflection, would certainly be a welcome step forward. It may only be a baby step, though, given how entrenched the conviction psychology is within prosecutorial offices and the political dynamics facing prosecutors elected by the public.²⁴³

B. *Carrots and Sticks*

Training, as discussed above, must be accompanied by a blend of incentives and disincentives to impel prosecutors to keep an open mind in reviewing post-conviction claims of innocence and to consider inventive solutions in responding to them. As Erwin Chemerinsky has noted, incentives make a difference in shaping the behavior of prosecutors.²⁴⁴ In particular, Chemerinsky studied the prosecutor's office in Los Angeles and its reaction to widespread police misconduct in one precinct in the late 1990s, determining that the prosecutorial agency's policies lacked any incentives for uncovering police wrongdoing or dismissing cases because of suspicions about police activities.²⁴⁵ As part of his research, Chemerinsky repeatedly "heard from Assistant District Attorneys that they felt that they were evaluated based on their effectiveness in processing cases and gaining convictions."²⁴⁶ Observing that this form of "promotion and reward structure maximizes the incentive for

understood and practiced."); Gershman, *supra* note 42, at 353 (asserting that the "conviction mentality" is especially dangerous in a prosecutor's office that fails to train and supervise young prosecutors on basic norms of prosecution, such as the duties not to lie, use false and misleading evidence, and prosecute persons who are not clearly guilty"); Griffin, *supra* note 112, at 293 (maintaining that thorough orientation and re-training are necessary for enforcing discretionary standards); Little, *supra* note 74, at 767-69 (discussing the need for training regarding investigative discretion).

²⁴² See Chemerinsky, *supra* note 40, at 317.

²⁴³ See Gershman, *supra* note 112, at 458 (suggesting that "the present ethos of overzealous prosecutorial advocacy may be too ingrained to be appreciably affected by education and training"). Bresler suggests that prosecutors must be reminded that trials are not "zero-sum" contests and that—as reflected in certain jury charges—the government always wins, even with an acquittal. Bresler, *supra* note 41, at 538.

²⁴⁴ See Chemerinsky, *supra* note 40, at 320.

²⁴⁵ *Id.* at 320-21 (showing that promotions were tied to conviction rates and that there were few incentives for uncovering police misconduct). For additional information about this event in Los Angeles, known as the Rampart Scandal, and the failure of prosecutors to prevent such pervasive police misconduct, see Gary Williams, *Incubating Monsters?: Prosecutorial Responsibility for the Rampart Scandal*, 34 LOY. L.A. L. REV. 829 (2001). In the aftermath of the Rampart Scandal, more than one hundred convictions were reversed due to police planting of evidence and perjury. *Id.* at 840.

²⁴⁶ Chemerinsky, *supra* note 40, at 320.

prosecutors to disregard problems with police credibility that may undercut the strength of the prosecutor's case," Chemerinsky championed a reconsideration of the criteria for prosecutorial promotions to include overt recognition of attempts to identify—and rectify—those problems.²⁴⁷ More generally, changing the performance measures by which individual prosecutors are judged to entail factors other than conviction rates, such as decisions not to prosecute, would likely serve to diminish the influence of the conviction psychology within the institutional culture of prosecutors' offices.²⁴⁸

Similarly, in the realm of post-conviction matters, incentives should be re-conceived to account directly for individual efforts by prosecutors to join in or refrain from contesting legitimate post-conviction claims of innocence. For example, a prosecutor's decision to turn over biological evidence for DNA testing without litigating the case, and ultimately being ordered by the court to do so, should be lauded within the office and taken into consideration for promotion purposes in cases where the testing ultimately exonerates the inmate. In such situations, the choice to work with the defense saves time and may avoid the possibility of a flogging by the media, both of which are likely desirable from the perspective of high-ranking officials within the organization.

Creating incentives to encourage prosecutors to be responsive to the possible validity of post-conviction innocence claims, though, may not be enough: carrots should be coupled with sticks to deter prosecutors from rejecting the merits of these claims too readily. Many scholars cite the absence of effective methods of deterrence as a reason for the disturbing frequency of prosecutorial misconduct at trial, including the failure to disclose exculpatory evidence to the defense, the presentation of perjurious testimony, and improper summations.²⁴⁹ Indeed, few convictions are overturned by virtue of

²⁴⁷ *Id.* at 320-21.

²⁴⁸ See, e.g., Elizabeth Glazer, *Crime Busting and Crime Prevention: A Dual Role for Prosecutors*, 15 A.B.A. J. CRIM. JUST. 10, 15 (2001) (proposing that prosecutors should focus not on how many people they imprison, but on whether their actions helped reduce crime); see also Berenson, *supra* note 30, at 846 (stating that "career advancement in prosecutors' offices should be based on richer measures of compliance with the 'do justice' standard, rather than simply on conviction rates"); Meares, *supra* note 41, at 852-53 (arguing for the implementation of financial incentives to curb prosecutorial misconduct).

²⁴⁹ See, e.g., Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) (demonstrating that prosecutorial misconduct often goes unpunished and that potential deterrents—disciplinary charges, meaningful sanctions, removal from office, contempt citations, or the reversal of convictions—are rarely employed); Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 Sw. L.J. 965, 979 (1984) (asserting that cases of prosecutorial misconduct "provoke little or no outrage among the legal profession and very rarely result in any disciplinary investigation or sanction [which] causes one to wonder how the appearance of fairness and professionalism in the American legal system has survived"). *But see* Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 744 (2001)

prosecutorial misconduct²⁵⁰ and, in the rare incidences of reversal, the appellate court opinions invariably neglect to identify the prosecutor by name as a matter of “professional courtesy.”²⁵¹ Also, prosecutors are generally immune from civil suits relating to misconduct²⁵² and seldom, if ever, face criminal charges for their work on the job.²⁵³

Despite the platitudes asking prosecutors to do justice contained in the codes of professional responsibility, moreover, there is a conspicuous reticence on the part of disciplinary bodies to punish prosecuting lawyers for misdeeds.²⁵⁴ In fact, a 1999 study, which analyzed 326 Illinois state court convictions that were reversed on appeal for prosecutorial misconduct since 1977, revealed that only *two* prosecutors had received sanctions from the Illinois Attorney Registration and Disciplinary Commission, and nary a single prosecutor had been dismissed from the State’s Attorney’s Office.²⁵⁵ In contrast, private

(suggesting that the incidence of disciplining prosecutors is not negligible after uncovering over one-hundred cases in which prosecutors were disciplined). Yet, Zacharias also observes that disciplinary agencies do not punish prosecutors as often as private attorneys and “that, at least sometimes, bar authorities are remiss in their obligation to review prosecutorial violations of the professional rules.” *Id.* at 773.

²⁵⁰ See, e.g., Maute, *supra* note 70, at 1749 (commenting that, even when courts affirmatively find prosecutorial misconduct, the courts rarely overturn convictions). Even in those cases where courts find that the prosecutorial misconduct constituted error, the convictions still might not be overturned because of the harmless error doctrine. See, e.g., Gershman, *supra* note 112, at 429.

²⁵¹ See, e.g., Ferguson-Gilbert, *supra* note 40, at 300.

²⁵² *Id.* at 303; see also Steve Weinberg, *Shielding Misconduct: The Law Immunizes Prosecutors from Civil Suits*, June 26, 2003, at <http://www.publicintegrity.org/pm> (last accessed Sept. 22, 2003).

²⁵³ Ferguson-Gilbert, *supra* note 40, at 303 (recognizing that “[o]ut of 381 homicide convictions reversed due to prosecutor misconduct, by failing to disclose evidence or presenting false evidence to the court, not one prosecutor faced trial for the misconduct”); see also Maurice Possley & Ken Armstrong, *Prosecution on Trial in DuPage*, CHI. TRIB., Jan. 12, 1999, at 1 [hereinafter Possley & Armstrong, *Prosecution on Trial in DuPage*].

²⁵⁴ See, e.g., Maurice Possley, *Act on Prosecutor Abuses, Bar Urges*, CHI. TRIB., Jan. 19, 1999, at 3 (describing one bar association’s demand for stronger disciplinary actions against prosecutors found to have committed misconduct); see also Andrea Elliott, *Prosecutors Not Penalized, Lawyer Says*, N.Y. TIMES, Dec. 17, 2003, at B1 (reporting the allegations of a lawyer claiming to have uncovered dozens of examples of prosecutorial misconduct stemming from the Bronx County District Attorney’s Office in New York that failed to result in disciplinary action).

²⁵⁵ See Possley, *supra* note 254 (describing the Cook County Bar Association’s reaction to the lack of disciplinary action taken against prosecutorial misconduct, which included demands for firings, stronger disciplinary actions, and public access to statistics of misconduct). For information regarding this study and, more generally, the problem of prosecutorial misconduct in Illinois, see the series of articles by Maurice Possley and Ken Armstrong printed in the *Chicago Tribune* in January 1999. See Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, at 1 (describing an alarming

criminal defense attorneys are regularly disciplined.²⁵⁶ The failure to discipline prosecutors may relate to the fact that they do not have an individual client who might file a complaint alleging an ethics violation as well as the notion that prosecutors are powerful figures and, thus, bar associations may be wary of antagonizing them.²⁵⁷ Ultimately, the vagueness of prosecutorial ethical standards—such as the amorphous duty to do justice—may lie at the heart of their ineffectuality.²⁵⁸

The proposed reforms to stem the tide of prosecutorial misconduct at trial include mentioning the names of individual prosecutors in appellate court opinions involving misconduct²⁵⁹ and founding discrete prosecutor misconduct commissions aimed solely at evaluating and disciplining prosecutors.²⁶⁰ Both

number of instances in which the careers of Cook County prosecutors who committed misconduct have prospered, including three prosecutors who later became judges); Possley & Armstrong, *Flip Side*, *supra* note 51 (describing the explicit importance placed on conviction statistics in the Cook County State's Attorney's Office); Possley & Armstrong, *Prosecution on Trial in DuPage*, *supra* note 253 (recounting the misconduct that ultimately resulted in the trial of three former prosecutors and four sheriff's deputies for conspiring to obstruct justice and perjury in framing and convicting an innocent man of murder); Ken Armstrong & Maurice Possley, *Reversal of Fortune*, CHI. TRIB., Jan. 13, 1999, at 1 (discussing particular Cook County prosecutors who were well-known for misconduct and the consequences of their misconduct); Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 1 (describing a study into prosecutorial misconduct in Cook County, the reaction of courts to such misconduct, and the effects of such misconduct on defendants' lives).

²⁵⁶ See, e.g., Gershman, *supra* note 112, at 445 (explaining that the failure to discipline prosecutors with regularity "contrasts sharply with the fairly common use of disciplinary sanctions against private attorneys in civil and criminal matters").

²⁵⁷ *Id.* (commenting that the disparity between sanctions on private attorneys and prosecutors likely stems from the reality that prosecutors do not have individual clients, the fact that they are not bound by many of the ethical rules that regulate the attorney-client relationship, their power and prestige as government officers, and from recognition that prosecutors are encouraged to be zealous in reducing crime); Zacharias, *supra* note 249, at 749-50 (explaining that disciplinary boards generally rely on third party complaints before instituting an investigation into prosecutorial misconduct and boards receive fewer complaints about prosecutors because prosecutors have no clients to complain, defense attorneys generally do not want to antagonize common adversaries by instituting such claims, and criminal defendants have few resources to pursue prosecutor misconduct complaints).

²⁵⁸ Bennett Gershman has noted that these rules "are often so nebulous as to be unenforceable, which merely reinforces the institutional reluctance to enforce the rules in the first place." Gershman, *supra* note 112, at 445.

²⁵⁹ See Maurice Possley & Ken Armstrong, *Illinois Courts May End Secrecy; State's Chief Justice Wants Prosecutorial Abuses Made Public*, CHI. TRIB., Feb. 3, 1999, at 1 (reporting that Chief Justice Charles Freeman of the Illinois Supreme Court suggested that prosecutors guilty of misconduct should be identified more often by name in court opinions).

²⁶⁰ See Gershman, *supra* note 112, at 453-55 (observing that, because disciplinary bodies

of these reforms could be applied to prosecutorial misbehavior in the post-conviction context as well. In court opinions, the process of “shaming by naming” prosecutors who battle legitimate post-conviction innocence claims with excessive zeal could, on the margins, provoke assistant district attorneys to take these claims seriously and to weigh the possibility of choosing an approach other than outright attack. Likewise, establishing misconduct commissions endowed with the authority to impose sanctions in cases of extreme prosecutorial obstinacy to innocence claims could affect behavior in the long-run.

C. Administrative Reorganization

To mitigate the conflict of interest inherent in a prosecutor reviewing his own work or that of a co-equal in the office,²⁶¹ district attorneys’ offices could consider altering the manner in which they assign post-conviction motions by creating internal innocence or post-conviction units. These units might not only unilaterally review cases to ascertain the existence of any potential innocence claims, which is an increasingly common practice,²⁶² but also serve as a general repository for post-conviction motions within the office. The formation of a separate division to handle post-conviction matters in a prosecutor’s office has several benefits, not the least of which is the centralization of procedural and substantive knowledge about these types of claims. The lawyers in such a unit could become experts in this area and, accordingly, be in a better position to assess the legitimacy of a motion than would a “generalist” in the trial or appeals bureau. Moreover, establishing an innocence unit would aid defense attorneys in discussing their claims informally with the prosecution at the outset instead of simply filing a motion as an opening salvo. On a basic level, criminal defense attorneys would know the appropriate lawyers to contact, and those prosecutors, having been officially delegated the chore of handling post-conviction motions, might be keener on meeting with defense lawyers prior to the commencement of any

appear “unable or unwilling” to sanction prosecutors, “[i]t may be appropriate to consider creating a disciplinary mechanism aimed solely at prosecutors”). Angela Davis has suggested that a “Prosecution Review Board” might be more desirable than a misconduct commission. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 463-64 (2001). In Davis’s vision, the review board “would not only review specific complaints brought to its attention by the public, but it would conduct random reviews of routine prosecution decisions.” *Id.* at 463. Such a process, according to Davis, would provide for “affirmative investigations to discover bad practices, and its random nature is more likely to deter arbitrary prosecution decisions.” *Id.* at 464.

²⁶¹ See *supra* note 84 and accompanying text.

²⁶² See *supra* notes 3, 162-163 and accompanying text; see also Peter Neufeld, *Legal and Ethical Implications of Post-Conviction DNA Exonerations*, 35 NEW ENG. L. REV. 639, 641 (2001) (observing that, “[i]ncreasingly, progressive-minded prosecutors around the country are setting up their own ‘innocence projects’” and citing several examples).

litigation.

One drawback of the proposed formation of innocence wings within prosecutorial agencies, however, is that it would not thoroughly obviate the conflict of interest issue—prosecutors in the unit would still be reviewing the work of their peers or former peers in the organization. The attorneys whose work they would review might resent the thought of fellow prosecutors looking over their shoulders, second-guessing their treatment of cases; an innocence or post-conviction unit could be perceived by fellow prosecutors as an entity akin to a police internal affairs bureau, and spawn the hostility that those bureaus often engender within police departments.²⁶³ Also, in light of the small size of most prosecutors' offices,²⁶⁴ the bulk of these agencies may lack a sufficient number of attorneys to establish a separate post-conviction division. Housing post-conviction units with the state attorney general's office could be an efficient alternative to the placement of these divisions in county prosecutorial offices,²⁶⁵ and might minimize the potential for intra-organizational resentment by creating greater distance between trial and post-conviction prosecutors.

Finally, many prosecutors might resist the very idea of launching internal innocence units on the ground that it implicitly undercuts the principle, to which they often cling, that each and every prosecutor adheres to their duty to do justice. In the words of one prosecutor, "I would like to think that there is no need to establish an innocence unit or an innocence project in a prosecutor's office. On the contrary, ensuring that only the guilty are convicted is what a prosecutor should be doing, day in and day out."²⁶⁶ Notwithstanding these concerns, the creation of internal post-conviction departments where practicable would be an upgrade from the current archetypes, especially the habit of assigning innocence claims to the individual attorney who prosecuted

²⁶³ Members of a police internal affairs bureau ("IAB") and police officers that assist with IAB investigations are notoriously scorned and ostracized within police departments. See, e.g., Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 258 (1998). Chin and Wells provided a disturbing example from one department:

[A] detective who served in the Internal Affairs Division was transferred to a precinct detective squad; in his first week on the job, his colleagues "placed dead rats on his car windshield, stole or destroyed his personal property, and told him directly that he could not count on them in times of danger."

Id.

²⁶⁴ See *supra* note 81 and accompanying text (mentioning that the average prosecutor's office in the United States consists of three attorneys).

²⁶⁵ See, e.g., Utah Office of the Attorney General, *Appeals Division*, at <http://www.attorneygeneral.utah.gov/Appeals%20Division.htm> (last accessed Jan. 31, 2004) (noting that the Appeals Division of the Office of the Attorney General of the State of Utah handles all post-conviction writs).

²⁶⁶ Meier, *supra* note 93, at 657-58; see also Lee, *supra* note 7, at 666 (discussing his belief "that every good prosecutor already has an 'innocence unit' built into his or her daily habits[;] . . . every good prosecutor, as part of his or her routine investigation of a case, should subject every case to an objective, critical analysis").

the defendant in the first place.²⁶⁷

An alternative, and more radical, administrative reform would be to eliminate the role played by institutional prosecutors (and individual defense attorneys) in the process altogether by establishing an independent, bipartisan commission to review post-conviction innocence claims and refer the most meritorious of them to the courts.²⁶⁸ The United Kingdom has created such an agency, the Criminal Cases Review Commission, with admirable results thus far.²⁶⁹ Lissa Griffin, for one, has evaluated whether some form of this non-adversarial, inquisitorial model for handling post-conviction innocence claims predicated upon newly discovered evidence could be imported from across the Atlantic, and she suggests that it could.²⁷⁰

D. *Improving Political Accountability*

As indicated in Part II of this article, prosecutors suffer little, if any, political damage by combating post-conviction claims of innocence and letting motions be resolved through the adversary system, except for certain situations where the political environment is ripe for prosecutors to depart from their general tough-on-crime agenda. This signifies that, considering the vast impact that prosecutors' responses can have on the outcome of post-conviction motions,²⁷¹ there is an element of randomness to the cases where actually innocent prisoners receive justice. To mend this hole in the criminal justice system, changes to the methods through which the public receives information about prosecutorial practices—and through which prosecutors are elected—may be in order.

First, to improve political accountability, the veil of secrecy covering some of the prosecutorial decisionmaking process should be lifted. Traditionally, prosecutors have argued that exposing the inner workings of their offices and policies to the public eye would impair their effectiveness in enforcing the law.²⁷² Injecting a modicum of transparency into the activities of prosecutors, though, would strengthen public confidence in the criminal justice system in

²⁶⁷ See *supra* notes 77-84 and accompanying text.

²⁶⁸ Scholars have debated whether the adversarial model of litigation should apply at all in the post-conviction context. Lissa Griffin has praised the English method of handling post-conviction claims of innocence through the bipartisan Criminal Cases Review Commission, which analyzes post-conviction claims and refers the most valid of them to the Court of Appeal. Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1275-78 (2001).

²⁶⁹ See *id.* at 1275-92 (describing the creation of the commission and its review process, and noting that, of the first forty-nine cases referred to the Court of Appeal and heard by that court, thirty-eight resulted in quashed convictions).

²⁷⁰ *Id.* at 1302-03.

²⁷¹ See *supra* notes 9-14 and accompanying text.

²⁷² See Davis, *supra* note 260, at 461 (explaining that prosecutors "traditionally have argued that revealing their prosecution policies would hinder law enforcement efforts").

general and boost the accountability of prosecutors in particular.²⁷³ For instance, some scholars have endorsed the creation of public information departments within district attorneys' offices to offer news about their basic functions, objectives, duties, purposes, and responsibilities.²⁷⁴ The departments could provide general information about how prosecutors reach charging decisions, the grand jury process, and plea bargaining policies.²⁷⁵ By not divulging details about specific cases, and thereby not compromising ongoing law enforcement efforts, these departments could allay prosecutorial fears.²⁷⁶

Public information departments that acquaint citizens with the procedures relating to post-conviction innocence claims through community outreach could assist prospective voters in understanding how prosecutors and courts handle these cases. The public, for its part, could apply this knowledge in evaluating any information it may learn from the media about a particular case. Aware that the public has some knowledge about the complexities surrounding post-conviction innocence claims, prosecutors could be inspired to retreat from their typical tough-on-crime platform and display openness to defense allegations when warranted in specific cases.

Second, to minimize the impact of extraneous political variables on the treatment of post-conviction innocence claims by prosecutors, the rules governing the process of electing district attorneys could be modified. Part II of this article touched upon the ethical problem of a prosecutor campaigning on a high-profile conviction previously obtained by her or on her watch—did the prosecutor seek the conviction at the time of trial with the goal of later campaigning on it or did she campaign on it later because it was simply a consequence of her genuine desire to do justice?²⁷⁷ This situation causes an acute dilemma in the post-conviction arena, provoking a fear that a prosecutor who cites a specific case on the campaign trail may feel conflicted if and when that same defendant later files a post-conviction motion alleging innocence.²⁷⁸ To ameliorate this problem, prosecutors could be forbidden from ever working on the post-conviction proceedings or retrial of a conviction upon which they had directly and plainly campaigned.²⁷⁹

²⁷³ See, e.g., *id.* at 461-62 (suggesting that publicizing the implementation of prosecutorial policies “would promote prosecutorial accountability and public confidence in the criminal justice system”).

²⁷⁴ See, e.g., *id.* at 462.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ See *supra* notes 141-147 and accompanying text.

²⁷⁸ See Bresler, *supra* note 136, at 952-53.

²⁷⁹ *Id.* at 953-54 (recommending that “a prosecutor should be disqualified from handling, one, the post-conviction proceedings and, two, the retrial of a defendant whose conviction she has campaigned upon, either by identifying the defendant or including the defendant’s conviction in a body count”). Enforcing this rule might be difficult in practice given that it

Structural changes to the election process itself could also help to lower the political incentive for prosecutors to resist legitimate post-conviction innocence claims. Imposing term limits on the duration of a district attorney's stay in office,²⁸⁰ for example, could guard against the entrenchment of the conviction psychology within the office and prevent chief prosecutors from becoming attached to the maintenance of convictions dating back many years.²⁸¹ On the one hand, term limits might embolden an assortment of talented, innovative lawyers, no longer deterred by the prospect of competing against a long-time incumbent, to seek office.²⁸² These candidates, in turn, might be less wedded to traditional modes of treating post-conviction innocence claims. On the other hand, subjecting chief prosecutors to term limits could dissuade some able lawyers from ever seeking the position at all,²⁸³ and lead to the departure of many seasoned district attorneys, including officials who may have established beneficial working relationships with veteran members of the defense bar.²⁸⁴

Another possible reform might be merely changing the dates of prosecutorial elections to ensure they do not coincide with other, more

would probably require either self-regulation and/or an independent organization to provide oversight and keep track of the names that candidates refer to during their campaigns.

²⁸⁰ The Supreme Court of Colorado recently held that district attorneys in that state are subject to a limit of two terms in office as part of a 1994 state constitutional amendment providing for term limits on nonjudicial, elected county officials, among others. *Davidson v. Sandstrom*, No. 03SC287, 2004 WL 111652 (Colo. Jan. 26, 2004). Even so, the court noted that pursuant to this amendment “[t]he voters of Colorado reserved to themselves the right to modify or abolish the term limits” within a particular political subdivision. *Id.* at *10; see also Howard Pankratz, *Court OKs Term Limits for DAs[;] State Ruling Dismays Prosecutors; 13 of 22 Must Go in January 2005*, DENVER POST, Jan. 27, 2004, at A-01 (noting that the court's decision made Colorado “the first state in the nation to restrict the length of time that elected prosecutors can serve”).

²⁸¹ See DEFRANCES, *supra* note 22, at 3 (finding that the median length of service for chief prosecutors, elected or appointed, was 6.8 years but that twenty percent had served fifteen years or more and half of chief prosecutors in full-time medium-sized offices served 8.4 years or more). For an analysis of the respective advantages and disadvantages of imposing term limits on elective offices generally, which is far beyond the reach of this article, see Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. CHI. L. REV. 83 (1997), and Elizabeth Garrett, *Term Limitations and the Myth of the Citizen Legislator*, 81 CORNELL L. REV. 623 (1996).

²⁸² People contemplating running for elective office are no doubt discouraged by the propensity of voters to return incumbent candidates to political positions. See, e.g., Elhauge, *supra* note 281, at 85 (stating that, as of the mid-1990s, “voters were generally returning 90 percent of state incumbents and up to 98 percent of federal incumbents who ran for reelection”).

²⁸³ See Pankratz, *supra* note 280 (quoting Bob Miller, a former district attorney in Colorado, as saying that the eight-year term limit will deter many bright attorneys from vying for public office for fear that it may hamper their future prospects in the private sector).

²⁸⁴ *Id.* (crediting Karen Steinhauser, a law professor in Colorado, with this observation).

prominent races. Even if the overall turnout for prosecutorial elections would likely fall due to the absence of higher-profile races to lure voters, disentangling prosecutorial campaigns from the web of other elections occurring simultaneously could encourage the public to pay greater attention to the various candidates' policies and practices, including those related to post-conviction innocence claims, and consequently encourage accountability.²⁸⁵ A different option, retreating from the democratic model of electing prosecutors and returning to the appointment norm, might hinder the likelihood that a chief prosecutor's objectives will reflect the concerns of her citizenry and will probably fail to enhance accountability.²⁸⁶ Although serving as an appointed prosecutor may provide a degree of insulation from political pressures to obtain convictions, the pressure to "win" is felt acutely even in appointive prosecutorial agencies, such as the U.S. Attorney's Office.²⁸⁷

E. *Re-Evaluating the Public Prosecutor Model*

One reform that might reduce the obstacles facing prosecutors in confronting post-conviction innocence claims, albeit somewhat extreme, would be to depart from the public prosecutor model and consider privatizing the job: that is, out-source a segment of the prosecution workload to private attorneys via contracts.²⁸⁸ In Great Britain, a country renowned for its lack of rabid partisanship between prosecuting lawyers and defense counsel, there was no institutional public prosecutor until 1985.²⁸⁹ Even now, a portion of prosecutorial tasks continue to be performed by private lawyers hired to represent the Crown in court on a piecemeal basis.²⁹⁰ While plunging full-bore into the debate concerning the merits of retaining or abandoning the public prosecutor model in the United States far exceeds the scope of this article,²⁹¹ it

²⁸⁵ See *supra* notes 126-133 and accompanying text (suggesting that the lack of information provided to the public about prosecutorial policies and actions shields the district attorney and the entire office from a great deal of political accountability).

²⁸⁶ See Richman, *supra* note 54, at 961. Richman explains:

Even though a professional prosecutor residing in the jurisdiction she serves may share the concerns of its citizenry, some formal mechanism is thought necessary to ensure that the "people" have a voice in how she deploys resources in their name. That is why most state and local jurisdictions originally chose to make their chief prosecutors elected officials, and presumably why most of those offices remain elective.

Id.

²⁸⁷ See *id.* at 967-68 (referring to sources indicating that the desire to seek convictions is prevalent among U.S. Attorneys).

²⁸⁸ See Gershman, *supra* note 112, at 455-58 (discussing some benefits of outsourcing prosecutorial functions).

²⁸⁹ See Griffin, *supra* note 268, at 1264-65 (mentioning that, considering this historical context, "there has been little opportunity to establish an institutional adversarial ethos").

²⁹⁰ *Id.* at 1264.

²⁹¹ For a thorough analysis of the model of the public prosecutor over time, see Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39

is worth noting that allowing non-institutional prosecutors to participate in some prosecution functions could, in theory, have several benefits.²⁹² Most notably, it would introduce attorneys who do not have a deep-seated interest in obtaining—and maintaining—convictions into the prosecutorial process.²⁹³ Equipped with a combination of (1) no vested, institutional interest in the upholding of convictions and (2) some experience, most likely, on the other side of the fence as a defense attorney, prosecuting lawyers might display greater receptivity to the potential worthiness of post-conviction innocence claims. Formally exposing attorneys practicing criminal law to both prosecution and defense work could, at the very least, sensitize them to the quandaries facing actually innocent inmates as well as the barriers preventing prosecutors from exercising flexibility when responding to innocence claims.²⁹⁴

CONCLUSION

This article has discussed the institutional and political factors deterring prosecutors from accepting the possible legitimacy of post-conviction innocence claims and formulating creative responses to them. Now, I should qualify the observations made in this article with the caveat that many prosecutors certainly resist the conviction psychology and that individual prosecutors may possess a range of motives, including a profound commitment to doing justice.²⁹⁵ An array of prosecutorial styles may co-exist in any particular office, and the aggressive crime-fighter model can be a source of

AM. CRIM. L. REV. 1309 (2002).

²⁹² See Gershman, *supra* note 112, at 455-58 (“Such programs are laudable for several reasons. They allow private attorneys to engage in public service, they enhance the public interest by helping to more expeditiously process criminal cases, and they introduce into prosecution attorneys who do not have a vested interest in winning convictions.”).

²⁹³ See *id.*

²⁹⁴ Gershman even suggests the possibility of establishing rotations between prosecutors’ offices and public defenders’ organizations to educate and sensitize lawyers to both sides of criminal law practice. *Id.* at 457.

²⁹⁵ See Richman, *supra* note 70, at 758 (“My provisional assumption is that every prosecutor or agent is impelled by a broad variety of motives, personal and institutional, and that the salience of each motivation to each actor varies greatly.”); see also Richman, *supra* note 54, at 966-69 (describing various sources of motivation for prosecutors, which include personal ideology, the influence of long-term economic self-interest, and the psychological aspects of prosecutors’ self-selection). As Hagemann articulated:

Prosecutors work hard, if they do, for essentially three reasons: (1) they want to do the right thing; (2) having done the right thing and charged the right people, they want to convict them; in short, to win; and (3) having won, they want to be recognized—by peers, publicity, awards, supervisory slots, subsequent judicial appointments, and, in their finest hours, book tours.

Hagemann, *supra* note 43, at 152.

embarrassment and, thus, is discouraged by some district attorneys.²⁹⁶ There also seems to be an awareness within the prosecutorial ranks that conviction rates ought not serve as the sole yardstick in measuring an office's or an individual lawyer's performance.²⁹⁷ In addition, not every entering assistant district attorney anticipates a long-term career as a prosecutor; on the contrary, the data suggests that many new prosecutors view the job primarily as an opportunity for hands-on training and a stepping stone to other areas of law practice.²⁹⁸ As Stanley Fisher has observed, prosecutors aspiring to shift to private practice or a judgeship may "have an incentive to impress defense lawyers and judges with their ability to be 'fair' and 'reasonable.'"²⁹⁹ In regard to political pressures, some chief prosecutors, to be sure, operate above the political fray and are unafraid to act in a direction counter to the prevailing political winds. A number of prosecutors, moreover, undoubtedly harbor an affirmative desire to help free innocent prisoners.³⁰⁰

Nonetheless, the institutional culture of most prosecutors' offices treasures convictions, and an attorney's conviction rate may serve as a barometer of that person's stature within the organization and a key factor in determining that person's chances for internal advancement. This professional incentive for prosecutors to obtain and maintain convictions may be bolstered by profound psychological and personal bases for believing in the soundness of the verdicts and pragmatic reasons for discounting the possibility that there may be some creditable claims within the heap of post-conviction filings.

Likewise, there are a series of political incentives for prosecutors to resist post-conviction innocence claims, even potentially meritorious ones, with zeal. Candidates vying for the office of chief prosecutor typically campaign on a general tough-on-crime platform, strewn with references to their overall win-loss record and reminders about specific successes in high-profile cases.

²⁹⁶ See Fisher, *supra* note 29, at 214-15.

²⁹⁷ The American Prosecutors Research Institute is currently conducting a study to ascertain adequate performance measures for prosecutors, specifically, to uncover methods to account for decisions not to prosecute in evaluating on-the-job contributions. See Nugent Telephone Interview, *supra* note 77; see also Glazer, *supra* note 248, at 11 (stating that "[t]he focus on arrests and convictions diminishes the role that prosecutors can play as problem solvers," and observing that prosecutors should take advantage of opportunities to handle cases as part of "a broader crime reduction strategy").

²⁹⁸ See Felkenes, *supra* note 29, at 105 (finding that "a tendency exists . . . to utilize the office of the prosecutor as a training ground for legal and trial experience"); see also Richman, *supra* note 70, at 787-88 (observing that "a great many view the job [of prosecutor] as a way station, a means of acquiring human capital (litigation experience, familiarity with local legal practices and personalities) that will facilitate their representation of private clients thereafter").

²⁹⁹ See Fisher, *supra* note 29, at 215.

³⁰⁰ See, e.g., Kreimer & Rudovsky, *supra* note 3, at 555 ("For many prosecutors, the possibility of freeing wrongly convicted prisoners is as important an element of the emerging DNA technologies as the possibility of finding and convicting the guilty.").

Appearing “soft” on criminals, such as by accepting the possible validity of a prisoner’s innocence claim, detracts from that tough-on-crime rhetoric and is largely anathema to prosecutors. The major exceptions to this general rule are when political considerations suggest that openness to the innocence claim may be advantageous, which is of little consolation to the prisoner whose claim happens to surface at a time when the political stars are not so perfectly aligned.

Evaluating areas for reform and implementing suitable changes may increase the odds that actually innocent prisoners receive justice. Ultimately, however, there needs to be greater communication between prosecutors and members of the criminal defense bar about the issues raised in this article.³⁰¹ A dialogue between these traditional adversaries may help to show that, despite any differences between the two camps generally, they stand on common ground when it comes to post-conviction innocence claims: no one wins when an innocent person remains in prison. Instead of the “zeal deal,” the real deal for prosecutors and defense attorneys operating in the domain of post-conviction innocence claims should be a willingness to work together, on occasion, and a mutual recognition that actually innocent people are languishing in our prison system.

³⁰¹ Conversations between prosecutors and defense lawyers about the problems surrounding wrongful convictions are beginning to occur across the country. *See, e.g., National Briefing South: North Carolina: Trying to Protect the Innocent*, N.Y. TIMES, Nov. 28, 2002, at A33 (describing the appointment of a commission in North Carolina, composed of a prosecutor, a public defender, and judges, among others, “to review how innocent people are convicted and how to free them when it happens”).