

2012

Prosecutorial Conflicts of Interest in Post-Conviction Practice

Keith Swisher

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/hlr>



Part of the [Law Commons](#)

Recommended Citation

Swisher, Keith (2012) "Prosecutorial Conflicts of Interest in Post-Conviction Practice," *Hofstra Law Review*: Vol. 41: Iss. 1, Article 7.
Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol41/iss1/7>

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

PROSECUTORIAL CONFLICTS OF INTEREST IN POST-CONVICTION PRACTICE

*Keith Swisher**

Prosecutors, our ministers of justice, do not play by the same conflict of interest rules. All other attorneys should not, and cannot, attack their prior work in transactional or litigation matters; nor should other attorneys unquestionably represent clients in matters in which the attorneys themselves face disciplinary, civil, or criminal liability. When prosecutors have likely convicted an innocent person, however, prosecutors are asked to review their own prior work objectively and then to undo it. But they understandably suffer from a conflict between their duty to justice and their duty to themselves—their duty to seek the release of the innocent person and their interest in avoiding embarrassment and liability for themselves and their offices. After this Article shows a variety of ways these conflicts cause problems, the Article demonstrates that these problems can be solved or mitigated by simply restructuring the post-conviction review process.

* Associate Professor of Law, Phoenix School of Law; LL.M., Harvard Law School; J.D., B.S., Arizona State University. I owe many thanks to Bruce Green, Larry Hammond, Mark Harrison, Karen Wilkinson, and Ellen Yaroshefsky for their comments on this Article (or a related project discussed below) and to Stephanie Pitel for her excellent research assistance. All errors, in fact or opinion, are mine.

I.	INTRODUCTION	182
II.	THE CONFLICT: ATTACKING OR DEFENDING ONE'S OWN WORK	184
III.	THE CONSEQUENCES OF CONFLICTS: DENY, DEFEND, AND DEVOLVE	192
	A. <i>The Perfect Prosecutor: Avoiding Mistakes by Denying Them</i>	194
	B. <i>An Unhealthy Fear of Civil Liability</i>	202
	C. <i>Prosecutors Are the Regulators, Not the Regulated</i>	204
	D. <i>Defendants, Not Prosecutors, Should Seek Justice</i>	205
IV.	THE CURE: CONFLICTS COUNSEL	207
V.	CONCLUSION	215

I. INTRODUCTION

What if someone you understandably believe to be guilty—say, Ted Kaczynski, Adam Lanza, or Scott Peterson—is actually innocent? That would be incredibly hard to believe.¹ What if, further, you were the one who prosecuted and obtained the conviction? That would be even harder to believe.² What if (last one) you were also supposed to review the new evidence objectively and promptly undo the conviction? That would be still harder to believe and to do,³ and it would be a glaring conflict of interest. With no offense intended to the many good prosecutors who have, to their horror, convicted an innocent person, those same

1. See, e.g., Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 FORDHAM L. REV. 1453, 1483 (2007) (citing Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 319); Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 425 (2011) (“[W]e tend to view [being wrong] as rare and bizarre—an inexplicable aberration in the normal order of things. . . . [I]t leaves us feeling idiotic and ashamed.” (second alteration in original) (quoting KATHRYN SCHULZ, BEING WRONG: ADVENTURES IN THE MARGIN OF ERROR 5 (2010)) (internal quotation marks omitted)).

2. See, e.g., Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 488-90 (2009) (“A prosecutor will tend to view a conviction as a confirmation that his initial charging decision was correct and will naturally discount new evidence of innocence.”).

3. See, e.g., Orenstein, *supra* note 1, at 402-03. Professor Aviva Orenstein noted: Rather than portraying prosecutors as megalomaniacal abusers of the adversary system who will protect their win-loss ratios at any cost, a theory of denial posits that they simply cannot face the fact of a wrongful conviction or its implications for the entire system of justice. Ironically, a prosecutor’s desire to do justice and the prosecutor’s self-image as a champion of justice render the fact of wrongful conviction particularly painful. As a result, some prosecutors go to incredible lengths to deny the obvious rather than face the fact that the justice system failed and they may have contributed to that failure.

Id.

prosecutors should not be the ones asked to reevaluate and to overturn their own work. This short Article's primary purpose is to show and solve this "conviction conflation."

Wrongful convictions are perhaps the gravest ethical tragedy in our criminal justice system.⁴ Not only is an innocent person plucked from society and forced to rot in prison for no reason—shattering the promise to both him and the rest of us that we would let ten guilty defendants go free to avoid convicting an innocent one⁵—the guilty person is out walking the streets and potentially committing further serious crimes. Wrongful convictions are thus a tragedy, but they should not be surprising. Any repetitive human endeavor will produce mistakes—including and perhaps particularly prosecution.

We now know for certain that those mistakes have occurred: innocent people are sometimes sent to prison, even death row.⁶ If we look only at DNA-testing cases, there have been 302 exonerations to date, and the vast majority of those wrongfully convicted are minorities.⁷ Since these cases were exposed, the problem of wrongful convictions has not been miraculously cured.⁸

4. Along with two co-petitioners, I have petitioned the Arizona Supreme Court, requesting that the court amend the Arizona Rules of Professional Conduct to include the recent amendment to Model Rule 3.8, which provides prosecutors with much-needed guidance in handling post-conviction claims of innocence. *See infra* Part III. Because I was the principal author of the petition and reply, I have borrowed liberally from those documents for this work.

5. *See* *Am. Pepper Supply Co. v. Fed. Ins. Co.*, 93 P.3d 507, 509 (Ariz. 2004) (noting the belief that "it is far worse to convict an innocent [person] than to let a guilty [person] go free" (quoting *In re Winship*, 397 U.S. 358, 373 (1970)) (internal quotation marks omitted)). *See generally* Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173 (1997) (noting that most state and federal formulations of the Blackstone maxim conclude that it is "better" to let one, ten, some, or many guilty persons escape than to convict one innocent person).

6. *See Innocence and the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/innocence-and-death-penalty> (last updated Jan. 22, 2013) (describing 142 death row exonerees to date); *Know the Cases: Innocence Project Case Profiles*, INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited Feb. 7, 2013).

7. Each year brings new exonerations. *See Innocence and the Death Penalty*, *supra* note 6 (listing DNA exonerations by year); NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Feb. 7, 2013) (documenting over 1000 exonerees, the majority of whom are minorities, from 1989 to present). An additional 1100 people have been exonerated in groups (resulting from twelve major law enforcement scandals). Samuel R. Gross & Michael Shaffer, *Nat'l Registry Exonerations, Exonerations in the United States, 1989 – 2012*, at 80-90 (May 2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (last visited Feb. 7, 2013).

8. *See generally* D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007) (estimating a 3 to 5% wrongful conviction rate for capital rape-murders); *see also* Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 832-36 (2010) (summarizing several studies).

Instead the innocent-but-convicted person's plea for exoneration is, as a matter of course, referred back to the very prosecutorial office that convicted him in the first place.⁹ He begs, in essence, for error correction. His wrongful conviction is an unmitigated tragedy, but his request for review creates an unmitigated conflict of interest, or so I argue. That is, the same prosecutorial office that made the mistake is being asked to evaluate and to turn against its own work. In this work, I show not only the conflict in theory, which is the somewhat simple part, but also the way in which the conflict has actually and negatively affected the just treatment of wrongful conviction cases. As exposing wrongful convictions has not miraculously cured the problem, however, I labor under no misimpression that exposing this glaring conflict of interest will miraculously cure this additional problem. My hope, instead, is that the exposure will nudge forward some existing, effective, and implementable solutions to the conflict.

Part II identifies and examines the conflict of interest. Part III describes prosecutors' suboptimal reactions to, and review of, new exculpatory evidence and post-conviction claims of innocence. Finally, Part IV offers three ways to cure or mitigate the conflict, thereby improving post-conviction review.

II. THE CONFLICT: ATTACKING OR DEFENDING ONE'S OWN WORK

The prosecutor's personal "conviction" in obtaining a "conviction" ordinarily is an asset to the prosecutor and the community—when the prosecutor gets it right. When the prosecutor gets it wrong and, consequently, an innocent (or at least a less-guilty) person is in prison, however, the prosecutor will likely be asked to reconsider the conviction.¹⁰ When other lawyers are asked to turn against their own work, they typically must tell the client to obtain another lawyer.¹¹ Their obligation to their former client—and to themselves—prohibits them from pursuing the matter.¹² After a transactional attorney drafts a

9. An empirical study of these referrals does not accompany this brief Article; I therefore must note that the process in the various jurisdictions may vary from my textual statement, which I believe to be the norm in the first (and sometimes last) instance.

10. Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 179-81 (2005) [hereinafter Zacharias, *The Role of Prosecutors*].

11. See Charles W. Wolfram, *Former-Client Conflicts*, 10 GEO. J. LEGAL ETHICS 677, 696-98 (1997).

12. Professor Charles W. Wolfram has wisely explained the rationale for the prohibition. In addition to the possibility of inserting or exploiting weaknesses in the lawyer's own work for the later benefit of another client (a situation unlikely in this context), several reasons support the prohibition:

Lawyer's attack on her own work would deprive Client One[, the former client,] of

contract, for example, she cannot later challenge the contract on behalf of another client or herself.¹³ Likewise, if a litigator achieves a settlement or judgment, he ordinarily cannot later attack it on behalf of another client or himself.¹⁴ In a similar vein, criminal defense (and other) attorneys generally cannot represent clients when (1) the attorneys' conduct or work product is in issue or (2) a significant incentive exists

significant value . . . for which Client One paid Lawyer substantial fees. At the simple level of fair exchanges, it would seem perverse and wasteful to permit Lawyer to destroy the very value that Lawyer was paid to create. For reasons such as those, the *Restatement*, agreeing with the decisions, independently and explicitly precludes later adverse representation by a lawyer, even in the absence of a substantial relationship, when the later representation would entail an attack on the lawyer's own work.

A reverse twist illustrates another possible aspect of the attack-own-work prohibition. Client Two[, the current client,] also has a potential problem. Client Two, after being fully informed, might conclude that it would be risky to retain Lawyer. Successful attack would make Lawyer appear incompetent in the earlier representation, or even treacherous. To avoid such an appearance, Lawyer may be less than diligent in aiding Client Two.

Id. at 698 (footnotes omitted).

13. See, e.g., *Exterior Sys., Inc. v. Noble Composites, Inc.*, 175 F. Supp. 2d 1112, 1117 (N.D. Ind. 2001) ("In simple terms, Attorney Gillard's current client is suing the successor to her former client on a contract she created on behalf of her former client. This conflict, separate from any other potential conflicts, is sufficient to warrant disqualification of Gillard."); *Franklin v. Callum*, 782 A.2d 884, 887 (N.H. 2001) ("[T]he defendants contend that Fulton is disqualified under Rules 1.9 and 1.10 because Gardner, as the Project's former counsel, drafted agreements forming the Project and because the claims of her current client, the plaintiff, require the application and interpretation of those agreements in litigation against the Project. We agree."); *In re Taylor*, 67 S.W.3d 530, 533 (Tex. Ct. App. 2002) ("Filer—the lawyer with the Naman firm who did the estate planning work, prepared the agreement, and acknowledged that the firm represented Barbara—is disqualified from representing any of the multiple parties to the agreement . . . in a dispute among those clients in regard to that matter."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 132(1) & cmt. d(ii) (2000) (prohibiting attorneys from attacking their own prior work even if no confidential information would be compromised in doing so).

14. See *Sullivan Cnty. Reg'l Refuse Disposal Dist. v. Town of Acworth*, 686 A.2d 755, 758 (N.H. 1996) ("[E]ven in the absence of any confidences, an attorney owes a duty of loyalty to a former client that prevents that attorney from attacking, or interpreting, work she performed, or supervised, for the former client."); cf., e.g., *Price v. Price*, 733 N.Y.S.2d 420, 422-23 (App. Div. 2001). In *Price*, the court disqualified the entire firm because:

[t]he same firm charged with the obligation to protect plaintiff's interests in the negotiations culminating in the signing of the prenuptial agreement will be put in the untenable position of arguing that it abjectly failed in its efforts to protect those interests. The material consideration is not the credibility of a particular lawyer but the general reputation of the firm. No matter which member of the firm appears in the divorce action on plaintiff's behalf, it will be necessary to attack the adequacy of the representation provided to her during the course of negotiations in order to overcome the presumption that her interests were protected.

Id.

for the attorneys to soft-pedal the clients' claims to avoid liability.¹⁵ Prosecutors, however, are special in this regard.¹⁶

When a prosecutor achieves a wrongful conviction, the prosecutor will likely be asked later (1) to reevaluate that work objectively and (2)

15. See, e.g., *United States v. Ziegenhagen*, 890 F.2d 937, 940-41 (7th Cir. 1989) (finding an "actual conflict of interest" for a defense attorney to be put in a position in which his duty to his current client, a criminal defendant, might require the attorney to challenge a conviction he had previously obtained against the client while serving as a prosecutor). Similarly applicable situations include representing clients in ineffective assistance of counsel claims involving the attorney's own conduct and in civil or criminal matters while a bar complaint, legal malpractice claim, or criminal investigation is ongoing. For example:

[a] court found that reversal of Mathis's conviction could expose Schofield[, his attorney,] to liability for his part in the delay since Mathis would have spent years in prison on an erroneous conviction; affirmance, on the other hand, would have served Schofield's interest in avoiding discipline or damages, because it would have allowed the conclusion that the delay, although egregious, had been harmless.

Mathis v. Hood, 937 F.2d 790, 795-96 (2d Cir. 1991) (affirming "the judgment of the district court based on its conclusion that Mathis's attorney had an actual conflict of interest sufficient to undermine its confidence in the outcome of the appeal, a conflict that established a per se violation of Mathis's right to effective assistance of counsel"). In another circuit case, the court concluded that, when a witness accused an attorney of criminal conduct:

[t]his created an actual conflict and likely affected [the attorney]'s performance in four ways: he could not call himself as a witness to refute [the] accusations but his cross-examination included much of his own unsworn testimony, he cross-examined [the witness] in an unseemly and emotional manner, he did not question [his client] about [the witness's] accusation on direct, and he could not pursue a plea bargain that might implicate himself.

Mannhalt v. Reed, 847 F.2d 576, 583 (9th Cir. 1988). In a final example, a court found that:

[a]s an alleged wrongdoer in the action, the accused had a strong interest in defending the propriety of his conduct to protect his professional reputation. Additionally, although, as the accused emphasizes, Fischer did not name the accused in his action against Tel-Ad, the accused nevertheless also had a personal and financial interest in avoiding any personal liability to Fischer for his actions as Fischer's supervisor.

In re Kluge, 66 P.3d 492, 499 (Or. 2003). To be sure, some of these conflicts may effectively be cured if the attorney first obtains informed consent from all affected clients. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2012) ("[A] lawyer may represent a client if . . . each affected client gives informed consent, confirmed in writing."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 122, 132; Colorado Bar Ass'n Ethics Comm., Formal Op. 113 (2005) (concluding that, when the lawyer determines that the lawyer's own interests may materially limit the representation, continued representation is permissible "only if the lawyer 'reasonably believes the representation will not be adversely affected' and the client consents after consultation").

16. See Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 228-33 (2000) (noting that prosecutors have been permitted to behave differently than other lawyers in several areas, including investigations, witness compensation, and conflicts of interest). With respect to conflicts of interest in particular, the authors accurately observed:

Conventional bar association wisdom is that prosecutors and other government lawyers have a greater obligation than other lawyers to avoid conflicts of interest. Government lawyers may have a special obligation to 'avoid the appearance of impropriety' because of the importance of preserving public trust in the operation of government. Yet, judicial decisions apply conflict of interest rules less restrictively to prosecutors than to other lawyers.

Id. at 233 (footnote omitted).

to undo the conviction the prosecutor earlier secured.¹⁷ Thus, if a prosecutor followed the same rules as other lawyers, the prosecutor—and colleagues otherwise involved in the conviction—presumably could not undertake the matter.¹⁸ The prosecutor, however, is a “minister of justice,” and as such, she has no duties to any tangible former client restraining her from reevaluating and challenging her previous work.¹⁹

17. See Green & Yaroshesky, *supra* note 2, at 496 (citing MODEL RULES OF PROF'L CONDUCT R. 3.8(h)) (“The ABA model rules suggest that, if the evidence of the defendant's innocence is ‘clear and convincing,’ the prosecutor should make reasonable, affirmative efforts to rectify the wrongful conviction.”).

18. Perhaps there is some equality in what appears, at first blush, to be unequal duties. Private attorneys (and also many other government lawyers) can seek informed consent to undertake the representation notwithstanding the conflict. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4). Prosecutors, in contrast, typically have no client from whom they could request informed consent. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.10.1 (1986). Professor Wolfram noted:

The office of prosecutor can best be conceptualized as a lawyer with no client but with several important constituencies.

. . . .

The emotionally satisfying statement is that the client of every prosecutor is the public. A less emotive but more realistic conceptualization is that prosecutors in a position to make policy decisions should regard the public as their client, while prosecutors in subordinate roles should regard their superiors in the office as the effective client for matters on which office policy has been set or specific directions given, unless a superior directs a subordinate lawyer to violate the law or the professional rules.

Id. Without the typical notion of client, at least three options emerge: (1) discover and require a substitute for informed client consent (e.g., informed consent from the division chief); (2) permit the prosecutor to undertake the representation without any substitute; or (3) prohibit the representation. Effectively adopting option (2), the drafters of the ethical rules have apparently solved the conundrum by falling back on the “minister of justice” command; in other words, the prosecutor needs no informed consent or the rough equivalent, but her conduct must always be in the interests of justice. See MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1; NAT'L PROSECUTION STANDARDS Standard 8-1.8 & cmt. (Nat'l Dist. Attorneys Ass'n 2009); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-1.3 & cmt. (1993).

19. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, [and] that guilt is decided upon the basis of sufficient evidence”); see also *Berger v. United States*, 295 U.S. 78, 88 (1935). The Court in *Berger* noted that prosecutors have special obligations as:

representative[s] not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Id. at 88. The National District Attorneys Association provides another example. See NAT'L PROSECUTION STANDARDS Standards 1-1.1, 1-1.2. The National Prosecution Standards note that:

[U]nlike other lawyers, a prosecutor does not represent individuals or entities, but society as a whole. In that capacity, the prosecutor must exercise independent judgment in reaching decisions while taking into account the interest of victims, witnesses, law enforcement officers, suspects, defendants and those members of society who have no direct interest in a particular case, but who are nonetheless affected by its outcome.

Id. Standard 1 cmt.

Justice, at least in theory, is flexible enough to work backward. “Justice” is always the prosecutor’s (means and) ends, and if justice now calls for the opposite result (e.g., an exoneration), the prosecutor must pursue it. To the extent that anyone in practice has even analyzed the issue under the ethical rules, this is apparently where the analysis stopped. But the preceding analysis has missed the crux of the conflicts problem.

The serious conflict is between justice and the prosecutor’s personal interest. The prosecutor has an interest, however subconscious or short-sighted, in not attacking her previous work product. She (and her office) spent months or years advocating positions and filing documents seeking to secure the person’s conviction. It creates a significant conflict of interest to ask that prosecutor, and arguably even that office, to undo it.²⁰

The American Bar Association (the “ABA”) Model Rules of Professional Conduct (the “Model Rules”)²¹ have been generally clear on this point: “[A] conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests.”²² Similarly, “[t]he lawyer’s own interests should not be permitted to have an adverse effect on representation of a client.”²³ The Model Rules get even clearer: “[I]f the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.”²⁴ The former client conflicts rules also analogously prohibit a

20. See, e.g., Zacharias, *The Role of Prosecutors*, *supra* note 10, at 218. Professor Fred C. Zacharias wrote:

Postconviction justice issues can raise several types of conflicts that are different in nature than standard trial-level conflicts among multiple constituencies. First, when new information calls a previous conviction into question, a prosecutor’s personal interests are often implicated. If the prosecutor was involved in the prior trial, she has an interest in protecting her track record and reputation.

Id. (footnote omitted); cf. Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 75-76 (2009) (noting the “direct clash between duty and self-interest” when a “defense lawyer has been accused of ineffective assistance of counsel and is called upon to testify about decisions made during representation”).

21. MODEL RULES OF PROF’L CONDUCT (2012).

22. *Id.* R. 1.7 cmt. 8.

23. *Id.* R. 1.7 cmt. 10. Model Rule 1.7(a)(2), which is essentially in place in virtually every state, prohibits all representations in which a lawyer’s actions would be “materially limited” by the lawyer’s own interests. *Id.* R. 1.7(a)(2); see *Alphabetical List of States Adopting Model Rules*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Feb. 7, 2013). In certain situations, however, the lawyer can effectively cure the conflict by seeking informed consent from the applicable client(s). See MODEL RULES OF PROF’L CONDUCT R. 1.7(b)(4).

24. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 10. *A fortiori*, a prosecutor accused of a non-frivolous claim of prosecutorial misconduct should not be in charge of investigating and evaluating that claim. See, e.g., Laurie L. Levenson, *Post-Conviction Death Penalty Investigations*:

prosecutor's change in direction: "a lawyer . . . who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction."²⁵ As with other lawyers, these Model Rules generally bind the prosecutor: "Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee . . . is subject to" the conflict rules."²⁶

Case law, in addition, prohibits the conflicts by analogy.²⁷ A prosecutor-turned-criminal-defense attorney cannot later attack a conviction s/he obtained: "[T]he lawyer's attack on his or her own work will be suspiciously under-motivated, for obvious reasons of professional pride in having acted competently to obtain the conviction in the first instance."²⁸

Moreover, although not black-letter ethical prohibitions, national ethical guidelines have been designed specifically for prosecutors. The ABA, for example, has developed standards governing the prosecution function, and those standards caution against personal interest conflicts of interest.²⁹ Furthermore, the National District Attorneys Association (the "NDAA"), "the oldest and largest organization representing criminal prosecutors in the world," has its own standards, which tell the prosecutor to "excuse himself or herself from any investigation, prosecution, or other matter where personal interests of the prosecutor would cause a fair-minded, objective observer to conclude that the prosecutor's neutrality, judgment, or ability to administer the law in an objective manner may be compromised."³⁰ Although this standard

The Need for Independent Investigators, 44 LOY. L.A. L. REV. S225, S246-47 (2011).

25. MODEL RULES OF PROF'L CONDUCT R. 1.9 cmt. 1; *see also* Allied Realty of St. Paul, Inc. v. Exch. Nat'l Bank of Chi., 408 F.2d 1099, 1101 (8th Cir. 1969) (disqualifying former federal prosecutor from later representing plaintiffs in a matter that he had investigated while he was still a prosecutor). This authority is only analogous, however, because ordinarily the prosecutor has not switched employment; thus the prosecutor's client, in a general sense, remains arguably the same.

26. MODEL RULES OF PROF'L CONDUCT R. 1.11(d) (referring the prosecutor to Model Rules 1.7 and 1.9). Imputed disqualification of the other prosecutors in the same office, however, is not the norm. *See, e.g., id.* R. 1.11 cmt. 2 ("Because of the special problems raised by imputation within a government agency, [the rule] does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.").

27. *See, e.g., United States v. Ziegenhagen*, 890 F.2d 937, 940-41 (1989).

28. Wolfram, *supra* note 11, at 699-700 (citing *Ziegenhagen*, 890 F.2d at 940-41).

29. *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-1.3(a) (1993) ("A prosecutor should avoid a conflict of interest with respect to his or her official duties."); *id.* Standard 3-1.3(f) ("A prosecutor should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests."); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmts. 8, 10 ("The lawyer's own interests should not be permitted to have an adverse effect on representation of a client.").

30. NAT'L PROSECUTION STANDARDS Standard 1-3.3(d) (Nat'l Dist. Attorneys Ass'n 2009);

designedly does not permit precise, universal application, a “fair-minded, objective observer” would at least take serious issue with our current system. That system presumes that the very person or office committing the prejudicial error of convicting and imprisoning an innocent person will fairly reevaluate and then seek to overturn its own error.³¹ Absent some procedural protections (as proposed below), the objective observer would much more likely conclude that the prosecutor should recuse herself from the review.

This all makes sense—on paper. Prosecutors are not even permitted to proceed in cases in which a relative will be the opposing lawyer or an important witness or a relative’s conduct will be in issue.³² Prosecutors’ own conduct, then, presents an even more “material limitation.”³³

NDAA’s Mission, NAT’L DIST. ATTORNEYS ASS’N, http://www.ndaa.org/ndaa_mission.html (last visited Feb. 7, 2013). This recusal standard is very similar to the standard for judges. See, e.g., *Liteky v. United States*, 510 U.S. 540, 548 (1994) (“Quite simply and quite universally, recusal [is] required whenever ‘impartiality might reasonably be questioned.’”); Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 357-58 (2010).

31. See, e.g., Orenstein, *supra* note 1, at 405 (quoting Zacharias, *The Role of Prosecutors*, *supra* note 10, at 174, 218-19) (“[R]eexamining a conviction ‘may involve confronting a prosecutor’s own error or undermining the reputation of a colleague who erred.’ A prosecutor may be particularly reluctant to raise questions when the ‘new information reflects prior prosecutorial misconduct,’ could hurt the office politically, or engender a lawsuit.” (footnotes omitted)); see also Steven A. Krieger, *Why Our Justice System Convicts Innocent People, and the Challenges Faced by Innocence Projects Trying to Exonerate Them*, 14 NEW CRIM. L. REV. 333, 350 (2011) (“[T]he current prosecutor may be the same individual who ‘successfully’ convicted the defendant initially. We cannot expect the prosecutors to instantly change their minds, as this would require some degree of admission of fault pertaining to the original prosecution, and no one is particularly good at admitting mistakes.” (footnote omitted)).

32. See, e.g., *People v. Doyle*, 406 N.W.2d 893, 897-98 (Mich. Ct. App. 1987); NAT’L PROSECUTION STANDARDS Standard 1-3.3(c); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-1.3(g); see also State Bar of Arizona Comm. on the Rules of Prof’l Conduct, Formal Op. 01-12 (2001) (“Where [a public defender and a law enforcement officer are in an intimate relationship and] are both involved in a case, and the Officer is expected to testify, in most, if not all, cases a non-waivable conflict will exist.”). Standard 3-1.3(g) of the *Standards for Criminal Justice: Prosecution Function* states:

A prosecutor who is related to another lawyer as parent, child, sibling, or spouse should not participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer. Nor should a prosecutor who has a significant personal or financial relationship with another lawyer participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer, unless the prosecutor’s supervisor, if any, is informed and approves or unless there is no other prosecutor authorized to act in the prosecutor’s stead.

STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-1.3(g).

33. See MODEL RULES OF PROF’L CONDUCT R. 1.7; cf. *United States v. Prantil*, 764 F.2d 548, 552-53 (9th Cir. 1985) (disqualifying prosecutor because his involvement in the underlying issues made him a material witness and questioning his ability to remain and appear objective in such circumstances). Psychologically, it is difficult for attorneys to identify and evaluate their conflicts objectively. For instance, Professor Tigran W. Eldred noted that:

Prosecutors who ignore this conflict of interest—and particularly prosecutors whose conduct is or will be in issue in a habeas petition or civil rights action—should face disqualification motions.³⁴

The office, as well, hired that prosecutor, supported that conviction, and, at the top, has a head who presumably would rather not admit that prejudicial error. An office, moreover, is essentially a collective of, hopefully, cooperating and collegial individuals. Thus, assigning the case to the prosecutor's colleague down the hall will only attenuate, not eliminate, the conflict.³⁵ That colleague is part of the collective—the “office”—and will be resistant, both consciously and subconsciously, to embarrass or attack the public work of the office or the individual

[R]esearch demonstrates that, just as cognitive heuristics and biases systematically cause deviations from full rationality, so too a set of motivations causes systematic deviations from full ethicality and professional responsibility when conflicts of interest are present. Professionals often believe falsely that they will not be corrupted by conflicts of interest, yet in reality they are subject to the same unconscious biases toward self-interest and self-worth as everyone else. The results are errors in judgment, both in predicting whether conflicting interests will have an influence on decisions and when reflecting upon whether a conflict influenced decisions previously made. Like all cognitive biases, these errors occur below the level of consciousness, invisibly infecting the decision-making process but leaving no trail.

Eldred, *supra* note 20, at 67-72 (footnotes omitted).

34. See *United States v. Heldt*, 668 F.2d 1238, 1275-77 (D.C. Cir. 1981) (“Given the need to promote the appearance of justice, a trial court on timely motion should disqualify a prosecutor from participating in a criminal action when he has a personal conflicting interest in a civil case.”); *cf.* *Maiden v. Bunnell*, 35 F.3d 477, 480-81 (9th Cir. 1994) (noting that courts should scrutinize “whether the attorney will, in the present case, be required to undermine, criticize, or attack his or her own work product from the previous case”); *United States v. Ziegenhagen*, 890 F.2d 937, 940-41 (7th Cir. 1989) (noting the “actual conflict of interest” when a defense attorney might need to challenge a conviction he had previously obtained as a prosecutor); *Prantil*, 764 F.2d at 552-53 (disqualifying prosecutor because his involvement in the underlying issues made him a material witness and questioning his ability to remain and appear objective in such circumstances).

35. Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 51-53 (2009) [hereinafter Medwed, *The Prosecutor as Minister of Justice*]. In particular, Professor Daniel S. Medwed noted:

Even when petitions are distributed to other lawyers in the office, the status quo bias probably persists. Studies show that individuals within the same profession or organization frequently respect the decisions of their cohorts due to the power of “conformity effects,” a desire to act in line with a peer. A person may be particularly reluctant to alter a colleague’s decision where that colleague had access to greater information at the time of the preceding decision.

Id. at 53 (footnote omitted). Professors Green and Yaroshefsky similarly observed:

A prosecutor will tend to view a conviction as a confirmation that his initial charging decision was correct and will naturally discount new evidence of innocence. These tendencies will be most pronounced for the particular prosecutors who had responsibility for investigating and trying a case, but it will also inhere in the district attorney or other prosecutor in charge of the office that obtained the conviction, in its supervisory prosecutors, and in others who identify with the office and its work.

Green & Yaroshefsky, *supra* note 2, at 489-90.

prosecutor.³⁶ Thus, although the ordinary rules of imputation do not apply to prosecutorial offices, and although the conflict is less intense, a personal conflict may reside in many or all prosecutors in the same office.

Notwithstanding these on-paper conflicts, the discussion to this point has been relatively abstract—both in that prosecutors rarely seem to follow these rules as written and in that I have raised relatively few specific examples of the conflict. Below I cite several vivid examples that might show, at least speculatively, that these conflicts of interest are actually prejudicing the quest for justice.

III. THE CONSEQUENCES OF CONFLICTS: DENY, DEFEND, DEFY, AND DEVOLVE

My recent journey into the minds, or at least the rhetoric, of certain prosecutors has perhaps revealed some evidence of these conflicts in action. To be sure, much of the evidence below is circumstantial. But if even half of it is accurately descriptive—and I would assume at least half of it is because the evidence primarily comes straight from top prosecutors' mouths—it is cause for restructuring prosecutorial offices to avoid or mitigate the conflicts outlined above.

Following the adoption of the Model Rules nearly thirty years ago, the Arizona Rule of Professional Conduct³⁷ governing prosecutors has remained virtually identical to the corresponding Model Rule.³⁸ In 2008, however, the ABA adopted a significant amendment to the Model Rule (the "Amendment").³⁹ This critical Amendment, in short, gives guidance

36. See, e.g., Zacharias, *The Role of Prosecutors*, *supra* note 10, at 218. Professor Zacharias wrote:

Even if [the prosecutor] was not involved [in securing the conviction], questioning the prior conviction may damage her relationship with a colleague (or former colleague) who was involved or friends of that colleague, particularly when new information reflects prior prosecutorial misconduct. She must also protect her relationship with her supervisors, who may have an interest in avoiding adverse public reaction if the new information is revealed; postconviction issues tend to be highly publicized and can affect a district attorney's hopes for reelection.

Id. (footnote omitted).

37. ARIZ. RULES OF PROF'L CONDUCT (2010) (codified at ARIZ. SUP. CT. R. 42).

38. See ARIZ. SUP. CT. R. 42. Compare ARIZ. RULES OF PROF'L CONDUCT ER 3.8, with MODEL RULES OF PROF'L CONDUCT R. 3.8 (2007), and MODEL RULES OF PROF'L CONDUCT R. 3.8 (2006), and MODEL RULES OF PROF'L CONDUCT R. 3.8 (2005).

39. See Stephen J. Saltzburg, *Report to the House of Delegates*, 2008 A.B.A. SEC. CRIM. JUST. REP. 105B, at 1-2, available at http://www.americanbar.org/content/dam/aba/migrated/leadership/2008/midyear/sum_of_rec_docs/hundredfiveb_105B_FINAL.doc; see also Daniel S. Medwed, *Prosecutorial Ethics in the Postconviction Setting from A to Zacharias*, 48 SAN DIEGO L. REV. 331, 333-34 (2011) [hereinafter Medwed, *Prosecutorial Ethics*] (discussing the 2008 Amendment to Model Rule 3.8).

to prosecutors in discharging their ethical responsibilities when they learn of new and probative evidence that an innocent person has likely been wrongfully convicted.⁴⁰ In particular, it requires prosecutors to disclose to the court and the defendant “new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted” and to “undertake further investigation.”⁴¹ Furthermore, “[w]hen a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.”⁴² Because prosecutors had little post-conviction ethical guidance before this Amendment, because wrongful convictions are damning marks on the criminal justice system, and because the Amendment requires action only in rare cases,⁴³ one might not expect major resistance to incorporating this important Amendment into Arizona law. One would be wrong.

Along with Larry Hammond and Karen Wilkinson,⁴⁴ I drafted and submitted a petition to the Arizona Supreme Court, formally asking it to adopt the ABA’s Amendment.⁴⁵ Once a petitioner submits such a rule-

40. See Saltzburg, *supra* note 39, at 4-6.

41. MODEL RULES OF PROF’L CONDUCT R. 3.8(g) (2012).

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

43. The Amendment’s standard for action is very high. The standard not only requires “knowledge” of “new, credible and material evidence” (each defined terms) but also requires that such evidence create a reasonable “likelihood” that the person is actually innocent of the offense. See MODEL RULES OF PROF’L CONDUCT RR. 1.0(f), 3.8(g); Green & Yaroshefsky, *supra* note 2, at 471-72 (noting that this high standard for action sets only a “bare minimum” and suggesting that prosecutors should go above and beyond it). I thank Professors Green and Yaroshefsky, two of the chief architects of the Amendment in both the ABA and New York, for their input, from which the petition and this work benefitted appreciably.

44. Larry Hammond is a longtime criminal practitioner, adjunct professor, and founder of the Arizona Justice Project, and Karen Wilkinson is an assistant federal public defender for the District of Arizona. *Justice Project Founder Larry Hammond Receives the Morris Dees Justice Award*, 2 JUST. PROJECT Q., no. 2, at 6, 6 (Dec. 2010), available at http://www.azjusticeproject.org/newsletters/jp_quarterly_v2i2.pdf.

45. See Petition to Amend ER 3.8 of the Arizona Rules of Professional Conduct, No. R-11-0033 (Ariz. Nov. 2, 2011), available at <http://apps.supremecourt.az.gov/aacc/appella/ASC%5CR%5CR110033.pdf>. Largely through Mark Harrison’s efforts, three retired chief justices of the Arizona Supreme Court, two former Arizona attorneys general, and one prominent retired trial court judge filed a public comment in support of the petition and the Amendment. See Comment of Lawyers in Support of Petition to Amend ER 3.8 of the Arizona Rules of Professional Conduct, *In re* Petition to Amend ER 3.8 of the Ariz. Rules of Prof’l Conduct (Rule 42 of the Ariz. Rules of Supreme Court), No. R-11-0033 (Ariz. May 4, 2012) [hereinafter Comment of Lawyers in Support of Petition], available at http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/154533830471.pdf. The petition also provoked, however, opposing comments from the Department of Justice and the largest state prosecutorial offices and organizations. See Arizona Prosecuting Attorneys’ Advisory Council’s Comments to Petition to Amend Arizona E.R. 3.8, Rule 42, Rules of

change petition, the Arizona Supreme Court generally opens up a public comment period for several months.⁴⁶ This is where the conflicts can be seen, or so I suggest. I have identified several prosecutorial arguments contained in publicly filed opposing comments, and related reactions, that suggest (but do not necessarily prove) that the conflicts of interest identified above affect prosecutors.⁴⁷ These four arguments are: (A) a belief that no problems exist in prosecutors' pre- and post-conviction treatment and review of evidence; (B) a fear of civil liability for reviewing and investigating wrongful conviction claims; (C) a belief that prosecutors cannot or should not be regulated in this area; and (D) a belief that defendants, not necessarily prosecutors, should seek justice post-conviction. These arguments are addressed in order below.

A. *The Perfect Prosecutor: Avoiding Mistakes by Denying Them*

In reaction to the proposed Amendment, several prosecutorial offices took the debunked position that no problems exist in Arizona.⁴⁸

the Supreme Court at 2, *In re* Petition to Amend ER 3.8 of the Ariz. Rules of Prof'l Conduct (Rule 42 of the Ariz. Rules of Supreme Court) [hereinafter APAAC's Comments to Petition], available at http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1521395889729.pdf; Comment of the Pima County Attorney at 1, *In re* Petition to Amend ER 3.8 of the Ariz. Rules of Prof'l Conduct (Rule 42 of the Ariz. Rules of Supreme Court), No. R-11-0033 (Ariz. May 21, 2012), available at http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1521355799229.pdf; Comments of the U.S. Attorney's Office for the District of Arizona at 1-2, *In re* Petition to Amend ER 3.8 of the Ariz. Rules of Prof'l Conduct (Rule 42 of the Ariz. Rules of Supreme Court), No. R-11-0033 (Ariz. May 20, 2012) [hereinafter Comments of the USAO], available at http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1520143461871.pdf.

46. See ARIZ. SUP. CT. R. 28 (detailing the procedure to petition for new ethical and other rules).

47. On a broader scale, Professor Green has recently been through a similar journey in prosecutorial rhetoric and resistance, and he has persuasively written about it—and its implications—in a very recent article. See generally Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873 (2012) (“To the extent that prosecutors’ inflammatory anti-regulation rhetoric reflects genuine belief, it seems likely that the belief is atavistic, vestigial, unexamined, and shaped by the continued utility of exaggerated rhetoric as an advocacy tool.”). He notes, among other interesting predictions, that unnecessary resistance might lead to a prosecutorial culture dangerously dismissive of ethical regulation and might also lead to a loss of credibility. See *id.* at 902-03. Somewhat similarly, in Arizona’s ongoing experiment in evolving ethical regulation of prosecutors, not only have some prosecutorial offices advanced virtually every conceivable argument against change, they have often set their arguments in general or vague language without citations to legal authority. See, e.g., APAAC’s Comment to Petition, *supra* note 45, at 3 (asserting separation of powers concerns without a single supportive citation); Comment of the Pima County Attorney, at 2-3 (asserting vagueness, immunity, burden, and so on, with only a single citation in the entire comment).

48. Reply to Prosecutors’ Comments in Opposition of Adopting ABA’s Amendments to Model Rule 3.8 at 3, *In re* Petition to Amend ER 3.8 of the Ariz. Rules of Prof'l Conduct (Rule 42 of the Ariz. Rules of Supreme Court), No. R-11-0033 (Ariz. June 30, 2012) [hereinafter Reply to Prosecutors’ Comments], available at http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/173233644554.pdf; see APAAC’s Comment to Petition, *supra* note 45, at 2 (“First and foremost,

Other prosecutorial offices took similar positions when opposing the Amendment in other states.⁴⁹ Arizona indeed contains many excellent prosecutors. But even if Arizona is generally better than other states in this and related respects, which is an empirically untested proposition, “ministers of justice” should still welcome ethical guidance in this area; they currently have almost none.⁵⁰ Furthermore, Arizona is actually not

there is simply no evidence that Arizona prosecutors fail to disclose post-conviction information that could have changed the outcome of a case.”); Maricopa County Attorney’s Comments to Petition to Amend ER 3.8, Arizona Rules of Professional Conduct at 3, 5-6, *In re* Petition to Amend ER 3.8 of the Ariz. Rules of Prof’l Conduct (Rule 42 of the Ariz. Rules of Supreme Court), No. R-11-0033 (Ariz. May 18, 2012) [hereinafter Maricopa County Attorney’s Comments], available at http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/152125143012.pdf (“The Krone case proves that prosecutors will act appropriately when newly discovered evidence shows a convicted defendant did not commit the crime.”). The Petition, Reply, and all of the opposing comments are available on the Arizona Supreme Court’s Rules Forum. See *Court Rules Forum: Subject: R-11-0033 Petition to Amend ER 3.8, Rule 42, Arizona Rules of the Supreme Court*, ARIZ. SUPREME COURT, <http://azdnn.dnnmax.com/AZSupremeCourtMain/AZCourtRulesMain/CourtRulesForumMain/CourtRulesForum/tabid/91/view/topic/forumid/7/postid/1530/Default.aspx> (last visited Feb. 7, 2013).

49. See, e.g., Memorandum from Jenny A. Durkan, U.S. Attorney, W. Dist. of Wash., U.S. Dep’t of Justice, to Clerk of the Supreme Court of the State of Wash. 2 (Apr. 28, 2011), http://www.courts.wa.gov/court_Rules/proposed/2010Dec/RPC3.8/US%20Department%20of%20Justice.pdf [hereinafter Memorandum from Washington State U.S. Attorney] (arguing, on behalf of the U.S. Department of Justice, that the problems lacked evidence); Memorandum from Karen L. Loeffler, U.S. Attorney, Dist. of Alaska, U.S. Dep’t of Justice, to Deborah O’Regan, Exec. Dir., Alaska Bar Ass’n 2 (Jan. 15, 2010), <http://alaskabar.org/servlet/download?id=1572> [hereinafter Memorandum from Alaska U.S. Attorney] (arguing, on behalf of the U.S. Department of Justice, that the problems lacked evidence); Memorandum from Florence T. Nakakuni, U.S. Attorney, Dist. of Haw., U.S. Dep’t of Justice, to the Honorable Justices of the Haw. Supreme Court 11, 18 (Oct. 3, 2011), <http://hsba.org/resources/1/HRPC/FINAL/Comment%20from%20US%20Attorney-District%20of%20Hawaii.pdf> [hereinafter Memorandum from Hawaii U.S. Attorney] (arguing, on behalf of the U.S. Department of Justice, that the problems lacked evidence). See generally Testimony of Scott Burns, Executive Director, National District Attorneys Association (NDAA) (July 18, 2012), <http://www.judiciary.senate.gov/pdf/12-7-18BurnsTestimony.pdf> (claiming that prosecutors have only a one-ten-thousandth-of-one-percent error rate).

50. Reply to Prosecutors’ Comments, *supra* note 48, at 3. The prosecutorial offices claimed that the Arizona Supreme Court had already given them sufficient guidance through one passing sentence. See Comments of the USAO, *supra* note 45, at 2-3; Maricopa County Attorney’s Comments, *supra* note 48, at 3; see also Memorandum from André Birotte, Jr., U.S. Attorney, Cent. Dist. of Cal., Laura E. Duffy, U.S. Attorney, S. Dist. of Cal., Joseph P. Russoniello, N. Dist. of Cal. & Benjamin B. Wagner, U.S. Attorney, E. Dist. of Cal., to Bd. Of Governors, State Bar of Cal. 7 (June 14, 2010), <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=iF6nQZSKO5A%3D&tabid=2161> [hereinafter Memorandum from California U.S. Attorneys] (arguing that existing rules and regulations conflict with the amendment). But as we noted in our filings:

[T]he entire discussion . . . consists of the following sentence: “The Court of Appeals found, and the State acknowledges, an ethical and constitutional obligation to disclose clearly exculpatory material that comes to its attention after the sentencing has occurred, see *Brady*, 373 U.S. at 87, 83 S.Ct. 1194 (setting forth requirement to disclose clearly exculpatory material), and we affirm that the State does bear such a duty.”

Reply to Prosecutors’ Comments, *supra* note 48, at 8 (quoting in part *Canion v. Cole*, 115 P.3d 1261, 1262 (Ariz. 2005)). The court then went on to distinguish the issue. Reply to Prosecutors’

perfect. Although the point of the Amendment is not to react to a problem peculiar to Arizona (rather, it is a documented problem in every state), of course Arizona has problems. Both the fact that top prosecutors do not believe that problems exist and the example problems I list below show a conflict between their duty to justice and their (sometimes subconscious) duty to themselves and their offices.

If no problems actually exist in practice, we can hardly fault prosecutors for failing to worry or change. But problems exist at every level. "First, a recent study of Arizona appellate opinions between just 2004 and 2008 revealed [twenty] cases of prosecutorial misconduct."⁵¹

Comments, *supra* note 48, at 8; see *Canion*, 115 P.3d at 1262-63. The prosecutorial offices also cited *Thomas v. Goldsmith*, whose:

entire relevant discussion . . . is contained in a few general sentences: "[W]e believe the state is under an obligation to come forward with any exculpatory semen evidence in its possession. We do not refer to the state's past duty to turn over exculpatory evidence at trial, but to its present duty to turn over exculpatory evidence relevant to the instant habeas corpus proceeding."

Reply to Prosecutors' Comments, *supra* note 48, at 8-9 (alteration in original) (citations omitted) (quoting *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992)). Furthermore, as the court noted, the petitioner in *Thomas* knew what evidence might exculpate him and specifically requested it from both the state and court. Reply to Prosecutors' Comments, *supra* note 48, at 8-9; see *Goldsmith*, 979 F.2d at 749. Many potential exonerees, however, do not know the specific nature of the potentially exculpatory evidence. Reply to Prosecutors' Comments, *supra* note 48, at 9. See generally KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009, at 36-37 (2010), available at http://law.scu.edu/ncip/file/ProsecutorialMisconduct_BookEntire_online%20version.pdf.

Preventable Error reports:

It is impossible to know how many *Brady* violations occur—by their nature they involve evidence that is hidden from the defense. But a study of all 5,760 capital convictions in the United States from 1973 to 1995 found that the suppression of evidence by prosecutors was responsible for 16 percent of reversals at the state post-conviction stage.

RIDOLFI & POSSLEY, *supra*, at 37 (citing James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1846, 1850 (2000)). Finally, the opposing comments also failed to mention that the Supreme Court has subsequently limited *Goldsmith*'s holding. Reply to Prosecutors' Comments, *supra* note 48, at 9; see *Stewart v. Cate*, No. 05cv1059-BTM, 2010 WL 1687671, at *2 (S.D. Cal. Apr. 21, 2010) (citing *Dist. Attorney's Office for the Third Judicial Circuit v. Osborne*, 557 U.S. 52, 67-69 (2009)) ("[T]he holding in *Goldsmith* that *Brady* applied in such a situation was specifically rejected by the United States Supreme Court in *Osborne*.").

51. Reply to Prosecutors' Comments, *supra* note 48, at 4; *Prosecutorial Oversight Forum: Court Findings of Prosecutorial Error and Misconduct in Arizona 2004-2008*, PROSECUTORIAL OVERSIGHT, <http://www.prosecutorialoversight.org/about-the-issue/court-findings-of-prosecutorial-error-and-misconduct-in-arizona-2004-2008> (last visited Feb. 7, 2013); Maurice Possley, *Viewpoints: Prosecutorial Conduct Exposed in Arizona*, CRIME REP. (Apr. 26, 2012, 4:19 AM), <http://www.thecrimereport.org/viewpoints/2012-04-prosecutorial-conduct-exposed-in-arizona>.

Moreover, the study relied on only appellate opinions, which grossly understate the error rate. See *Prosecutorial Oversight Forum*, *supra*. In addition, *Preventable Error* notes:

About 97 percent of felony criminal cases are resolved without trial, almost all through guilty pleas. Moreover, findings of misconduct at the trial court level that are not reflected in appellate opinions cannot be systematically reviewed without searching

Consistent with this evidence, national studies disprove the notion that prosecutors (unlike other humans) act perfectly. The most common causal factors that appear in all exonerations include perjury or false accusation (51%) and official misconduct (42%), and “[t]he most common serious form of official misconduct is concealing exculpatory evidence from the defendant and the court.”⁵²

Second, Arizona has been the source of several specific examples of both prosecutorial misconduct and egregious error, both pre- and post-conviction.⁵³ The top prosecutor in Phoenix, the Maricopa County Attorney, nevertheless suggested that prosecutors already act without error in post-conviction settings. The only particular evidence proffered to prove that fact, however, was the high-profile case of Ray Krone; the Maricopa County Attorney argued that his office had commendably addressed Krone’s post-conviction case.⁵⁴ The County Attorney also

every case file in every courthouse in the state. And of course, the number cannot capture cases of prosecutorial misconduct that were never discovered (for example, failure to disclose exculpatory evidence) or appealed (due, for example, to lack of resources or ineffective counsel).

RIDOLFI & POSSLEY, *supra* note 50, at 2-3 (footnote omitted); *see also* SAMUEL R. GROSS & MICHAEL SHAFFER, NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012, at 67 (2012), *available at* http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (“Misbehavior is rarely advertised. If misconduct is not uncovered in litigation or by journalists, we don’t know about it. As a result, our data underestimate the frequency of official misconduct . . .”).

52. Reply to Prosecutors’ Comments, *supra* note 48, at 5; GROSS & SHAFFER, *supra* note 50, at 40, 65–66. “It should be noted that official misconduct includes police misconduct, in addition to prosecutorial misconduct.” Reply to Prosecutors’ Comments, *supra* note 48, at 5 n.8; *see* GROSS & SHAFFER, *supra* note 51, at 40, 66–67. It should also be noted that the term “prosecutorial misconduct” is arguably overused. ABA House of Delegates Resolution 100B (Aug. 9–10, 2010), www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (urging states to adopt the terminology of “error” to describe unintentional violations of criminal defendants’ rights and “misconduct” to describe intentional violations).

53. *See, e.g., In re Peasley*, 90 P.3d 764, 772–73, 779 (Ariz. 2004) (disbarring prosecutor because he permitted false testimony in a capital prosecution); Maurice Possley, *Carolyn June Peak*, NAT’L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3528> (last visited Feb. 7, 2013) (documenting a dismissed murder charge because the original prosecutor in the case had failed to turn over to the defense “more than 30 witness interviews, more than two dozen investigative reports as well as records of subpoenas issued by [that prosecutor]”); *see also infra* note 62 (discussing the recent disbarment of the former Maricopa County Attorney and two top deputy prosecutors).

54. *See* Maricopa County Attorney’s Comments, *supra* note 48, at 5 (“The Krone case proves that prosecutors will act appropriately when newly discovered evidence shows a convicted defendant did not commit the crime.”); *id.* (“Upon receiving this evidence, the State moved in April 2002 to dismiss the charges with prejudice and release Krone from custody.”); *id.* at 7 (“The Krone case is proof that prosecutors do take appropriate action.”). Krone had been branded “The Snaggletooth Killer,” whose crooked teeth formed the prosecution’s primary evidence against him. *See State v. Krone*, 897 P.2d 621, 622, 624 (Ariz. 1995); Jack Chin, *Extreme Makeover for “The Snaggletooth Killer,”* CRIMPROF BLOG (Nov. 19, 2004), http://lawprofessors.typepad.com/crimprof_blog/2004/11/extreme_makeove.html. The prosecution claimed that Krone’s teeth

later suggested that prosecutors have only a one-ten-thousandth-of-one-percent error rate.⁵⁵ These arguments were alarming for at least two reasons: (1) the arguments revealed a troubling logical fallacy: that because the office did it right once, it has done and will do it right every time; and (2) the arguments were wrong: The office had strongly opposed DNA testing in Krone's case.⁵⁶ After the county attorney's office lost that unnecessary opposition (but succeeded in significantly delaying Krone's release from prison), moreover, the office took six additional weeks to allow the innocent Krone a conditional release from prison and two months to move to vacate the conviction.⁵⁷ Furthermore, "by that time the press had already started asking questions about Krone's innocence, which might have increased the attention and speed with which the [county attorney's office] treated the matter."⁵⁸

Third, unique problems persist in post-conviction settings. For example, an "analysis of 182 cases in which prosecutors could consent to a motion to vacate convictions *following DNA exoneration* revealed that

matched a bite mark on the victim. *See Krone*, 897 P.2d at 622. Krone spent years in prison (including death row) for a murder he did not commit, while the actual murderer remained free to commit additional crimes. *See Chin, supra*. Krone was evidentially freed, becoming the 100th DNA exoneree and a guest on Extreme Makeover. *See* Press Release, Death Penalty Info. Ctr., 100th Death Row Exoneree Freed in Arizona: DNA Evidence Vindicates Man Wrongfully Convicted of 1991 Murder (Apr. 9, 2002), <http://www.deathpenaltyinfo.org/node/518>; *Chin, supra*. Today, among other things, he speaks nationally about his nightmarish experiences with our criminal justice system. *See Ray Krone*, WITNESS TO INNOCENCE, http://witness-to-innocence.org/view_stories.php?Ray-Krone-23 (last visited Feb. 7, 2013).

55. Bill Montgomery, *ER 3.8 Amendment: Prosecutor Position*, ARIZ. ATT'Y, April 2013 (forthcoming) (citing Testimony of Scott Burns, Executive Director, National District Attorneys Association (NDAA) (July 18, 2012), [http://www.judiciary.senate.gov/pdf/12-7-18Burns Testimony.pdf](http://www.judiciary.senate.gov/pdf/12-7-18Burns%20Testimony.pdf)).

56. Reply to Prosecutors' Comments, *supra* note 48, at 7 & n.13. The opposition overstated the existing evidence and unnecessarily resisted DNA testing. *See* Response to Petition for DNA Testing, *State v. Krone*, No. CR 92-00212 (Ariz. Super. Ct. Mar. 23, 2001), available at http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/173233646158.pdf (arguing that "the evidence strongly supports the jury's finding of guilt," "[n]one of the scientific methods used to analyze the evidence in this case have been found invalid or unreliable," "the nature of the evidence . . . does not 'make testing results on the issue of identity virtually dispositive,'" and the evidence might not be "in a condition which would allow for DNA testing").

57. Reply to Prosecutors' Comments, *supra* note 48, at 7; *see* Minute Entry at 1-2, *State v. Krone*, No. CR 1992-000212 (Ariz. Super. Ct. July 12, 2001), available at <http://www.courtminutes.maricopa.gov/docs/Criminal/072001/m0368508.pdf>; Minute Entry at 1-2, *State v. Krone*, No. CR 1992-000212 (Ariz. Super. Ct. Apr. 8, 2002), available at <http://www.courtminutes.maricopa.gov/docs/Criminal/042002/m0604448.pdf>.

58. Reply to Prosecutors' Comments, *supra* note 48, at 7; *see, e.g.*, Beth DeFalco, *DNA May Free 1st Arizonan Inmate Convicted Twice in Murder*, ARIZ. REPUBLIC, Apr. 5, 2002, at A1; Beth DeFalco, *Doubts Plagued Trials in '91 Killings*, ARIZ. REPUBLIC, Apr. 8, 2002, at B1; Beth DeFalco, *Hearing Set on DNA Evidence Convicted Man Remains in Prison*, ARIZ. REPUBLIC, Apr. 6, 2002, at B1.

12% did not consent.”⁵⁹ Moreover, “almost 20% of prosecutors initially opposed DNA testing.”⁶⁰ Indeed, all arguments plus the kitchen sink have been raised to attempt to stop DNA and other post-conviction testing.⁶¹ Although some prosecutors intentionally cross the line of reason,⁶² largely subconscious biases likely influence or cause these

59. Reply to Prosecutors’ Comments, *supra* note 48, at 6 (citing BRANDON L. GARRETT, CONVICTING THE INNOCENT, WHERE CRIMINAL PROSECUTIONS GO WRONG 230 (2011) [hereinafter GARRETT, CONVICTING THE INNOCENT]); see also Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 557-60 (2002) (recounting prosecutors’ positive and negative attitudes toward DNA testing). See generally BRANDON L. GARRETT, DATA ON HOW EXONEREES OBTAINED DNA TESTING [hereinafter GARRETT, EXONEREES DATA], available at http://www.law.virginia.edu/pdf/faculty/garrett/judging_innocence/exonerees_postconviction_dna_testing.pdf (identifying each exoneree against whom prosecutors opposed a motion to vacate the conviction). Although 12% is not necessarily horrible, it does show a problem in prosecutors’ post-conviction behavior in a significant number of cases; a problem not even acknowledged in the opposing comments. Reply to Prosecutors’ Comments, *supra* note 48, at 6 n.9.

60. Reply to Prosecutors’ Comments, *supra* note 48, at 6; GARRETT, CONVICTING THE INNOCENT, *supra* note 59, at 227. See generally GARRETT, EXONEREES DATA, *supra* note 59 (identifying each exoneree against whom prosecutors opposed postconviction DNA testing).

61. The arguments range from expected to shocking:

Prosecutors have sought to narrowly constrain the availability of postconviction DNA testing, citing financial concerns, the need for finality in the criminal justice system, the need to protect the system of plea bargaining, and the specter of a wave of frivolous requests.

Resistance to DNA testing is sometimes couched in sporting metaphors or grounded in an unshakable belief in the accuracy of the guilty verdict. Prosecutors have attempted to induce defendants to waive their rights to the maintenance of DNA evidence and have sought to destroy DNA evidence that might exonerate incarcerated defendants.

While many prosecutors who refuse testing may be sincerely concerned with administrative issues or finality, other factors may color some decisions. DNA exonerations have disclosed deliberate (and in some cases criminal) police and prosecutorial misconduct in obtaining the tainted convictions. Further, to the extent that DNA exonerations reveal systemic flaws in the criminal justice system (e.g., faulty eyewitness identifications, false confessions, ineffective defense counsel, and unethical police or prosecutors), some prosecutors may believe that exonerations undermine the credibility of the system. The State of Virginia has opposed making DNA evidence available for testing that might exonerate two men the State has already executed. . . . [I]f the testing proved exculpatory, argued the prosecutor, it “would be shouted from the rooftops that the [C]ommonwealth of Virginia [had] executed an innocent man.”

Kreimer & Rudovsky, *supra* note 59, at 561-64 (second and third alterations in original) (footnotes omitted).

62. For example, few would forget the Duke Lacrosse case, in which the prosecutor convinced the lab to provide an incomplete report leaving out results excluding the accused players and then maintained to the court that the incomplete report was actually complete. See Aronson & McMurtrie, *supra* note 1, at 1474-75. Arizona was recently in the spotlight for arguably analogous misconduct. Our former Maricopa County Attorney, Andrew Thomas, and two of his go-to deputies prosecuted frivolous criminal and civil cases against judges and county officials. See, e.g., Terry Carter, *The Prosecutor on Trial: Ex-Maricopa County Attorney Faces Disbarment for Political Acts*, A.B.A. J., April 2012.

sometimes-frivolous reactions.⁶³

Even after the post-conviction testing reveals that the defendant likely did not commit the crime, some prosecutors shift their theory of the crime to render the test result consistent with guilt. The mind can be a dangerous thing. It is hard to square the exculpatory test results with the prosecutor's firm belief in guilt; the mind pushes for new theories to harmonize this inconsistency. These new theories can be, charitably, outlandish:

Illinois prosecutor, Michael Mermel, has on at least three occasions pursued an original conviction for rape after the DNA excluded the accused. In two such cases, the victims were young children and the alternative explanations for the presence of semen in their bodies offered by Mermel were disturbing. In one case, Mermel suggested that the eleven-year-old was sexually active; in another, he suggested that the semen, which did not match the accused, may have entered an eight-year-old's body as she played in the woods where . . . she was later found and where the prosecutor claimed some couples go to have sex.⁶⁴

Other prosecutors' questionable reactions include: (1) introducing an unidentified accomplice to explain the presence of another man's semen on a rape victim despite no mention of an accomplice in the confession or the victim's statement;⁶⁵ (2) charging a "promiscuous"

63. For example:

[one] bias, the reiteration effect—where confidence in the truth of an assertion naturally increases if the assertion is repeated—makes it increasingly difficult over time for police and prosecutors to consider alternative perpetrators or theories of a crime. . . . [B]iases, especially belief perseverance, are responsible for prosecutorial resistance to the possibility of innocence before a DNA test, and even after a DNA test excludes the suspect as the perpetrator.

Aronson & McMurtrie, *supra* note 1, at 1483 (citing Findley & Scott, *supra* note 1, at 313, 319). Moreover, Professors Keith A. Findley and Michael S. Scott noted:

Burke explains that a prosecutor's belief in guilt strengthens after a jury returns a guilty verdict, and this belief continues to taint the prosecutor's analysis of any new evidence submitted by the defense postconviction. Evidence conflicting with this belief in guilt results in cognitive dissonance on the part of a prosecutor. Because the conviction of an innocent person is inconsistent with the ethical prosecutor's belief that charges should be brought only against suspects who are actually guilty, the ethical prosecutor seeks to avoid cognitive dissonance by clinging to the original belief in guilt, refusing to believe that she took part in a wrongful conviction.

Id. (footnote omitted) (citing Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1612-13 (2006)).

64. Orenstein, *supra* note 1, at 414-15 (footnote omitted).

65. Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1017 n.70 (2009) (quoting James S. Liebman, Comment, *The New Death Penalty Debate: What's DNA Got to Do with It?*, 33 COLUM. HUM. RTS. L. REV. 527, 543 (2002)) (arguing that

victim with acquiring DNA excluding the defendant when she engaged in consensual sex before the rape;⁶⁶ (3) claiming DNA on an eight-year-old's underwear could have come from any surface because the underwear rode above her low-cut pants;⁶⁷ and (4) reasoning that, although the defendant was male, the female DNA in the saliva from a bite mark might have come from a friend's tears.⁶⁸ In addition to reinventing the theory or attacking the credibility of the victim, another problematic (and hopefully isolated) reaction is attacking the credibility of students working on innocence cases.⁶⁹

"prosecutors have become more sophisticated about hypothesizing the existence of 'unindicted co-ejaculators' . . . to explain how the defendant can still be guilty, though another man's semen is found on the rape-murder victim").

66. On "promiscuous" victims, Professor Orenstein noted:

Although the DNA testing, which was performed eleven years after the trial, indicated that an unknown man was the source of the semen, and the DNA of the semen and on the cigarette matched that unknown man, the Texas Court of Criminal Appeals denied Criner's motion for a new trial. The court accepted the State's two new theories of the crime: (1) that Criner could have been wearing a condom during the assault or have failed to ejaculate, or (2) that the semen resulted from the victim's having engaged in consensual sex prior to her murder. As to this new second theory, the prosecution argued that it was likely because the victim was known to have been promiscuous and probably had consensual sex with someone else before the rape. "Had she been pure and virginal, yes, the DNA test would have been more definitive," the prosecutor said.

Orenstein, *supra* note 1, at 414 (citing Bob Burtman, *Hard Time*, HOUS. PRESS (Sept. 10, 1998), <http://www.houstonpress.com/1998-09-10/feature/hard-time/>).

67. On low-cut pants, Professor Orenstein noted:

Tyler Sanchez, who is developmentally disabled, was accused of molesting an eight-year-old girl, a crime to which he confessed after a seventeen-hour interrogation, which Sanchez claims was coerced. The male skin-cell DNA on the girl's underwear matched her father and an unknown male—not Sanchez. District Attorney Carol Chambers justified her continuing prosecution of the case: "With the low-cut jeans that girls wear, [the eight-year-old victim] could have picked up anyone's DNA off any surface her panties touched while they may have been riding up above her pants."

Id. at 415 (footnote omitted) (quoting Susan Greene, *District Attorney Turns Blind Eye to DNA Evidence*, DENVER POST, Feb. 21, 2010, at B-01). The DA continued to theorize:

Other potential sources of the DNA, according to Chambers, were "the back of her chair at school, a restaurant, the couch at home that someone else had been sitting on, a bus seat, someone's toilet seat if she did not pull them down far enough—there are many ways to get unknown DNA on clothing. Another kid could have snapped the elastic on her underwear—kids do that sort of thing."

Id. at 415 n.72.

68. *Id.* at 415-16.

69. See *id.* at 417. In one situation:

Anita Alvarez, a Chicago prosecutor, has reacted to an exoneration investigation by attacking the integrity of the Innocence Project at Northwestern University. As part of her response to the assertion of a prisoner's innocence, she has issued subpoenas and otherwise sought to investigate the students working at the Innocence Project at Northwestern. Her investigation's focus has moved beyond the facts of the prisoner's case and includes a leaked internal prosecution memorandum with false defamatory information about students from a thirteen-year-old case, subpoenaing the students'

In light of the above examples and studies, the prosecutors' pronouncements that no problems exist are wrong. The above examples independently show the conflict of interest operating on prosecutors' behavior. But the public pronouncements also suggest a subtler problem. If we assume that the prosecutors acted in good faith in making these pronouncements, the pronouncements suggest that prosecutors do not fully understand that they themselves make mistakes in this context. Perhaps they believe that it might happen in other jurisdictions—but not in theirs. Such good-faith-but-incorrect beliefs are a macrocosm of what happens in meritorious post-conviction cases. Some prosecutors just do not believe that they could have made such a mistake; the prosecutors, after all, used witnesses, trusted law enforcement agents, and juries or plea acceptance procedures. Indeed, they used themselves, either in the first person or in the collegial deputy district attorney down the hall—and both of whom are good people.

B. *An Unhealthy Fear of Civil Liability*

The fear of liability, civil or otherwise, can create a conflict of interest in the prosecutors and even in their offices.⁷⁰ Prosecutors' recent opposing comments to the Model Rule 3.8 Amendment, if taken seriously, evidence a deep-seated fear of civil liability in the post-conviction context.⁷¹ As a preliminary matter, this fear is legally unprecedented in this context. In fact, the Supreme Court partially justifies the grant of broad civil immunity to prosecutors on the very basis that prosecutors are subject to professional disciplinary rules.⁷² Thus, because "a prosecutor stands . . . amenab[le] to professional discipline by an association of his peers[, this fact] undermine[s] the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime."⁷³ And this strong immunity has been specifically

grades, and making unsubstantiated claims that student investigators bribed and flirted with witnesses.

Id.

70. See Zacharias, *The Role of Prosecutors*, *supra* note 10, at 227; *supra* Part II.

71. See Comment of the Pima County Attorney, *supra* note 45, at 2-3; Comments of the USAO, *supra* note 45, at 4-6; Maricopa County Attorney's Comments, *supra* note 48, at 7.

72. See *Connick v. Thompson*, 131 S. Ct. 1350, 1361-63 (2011) (suggesting that, because prosecutors are subject to professional discipline, there is little reason to impose civil liability for failing to train subordinate prosecutors on their disclosure obligations); *Imbler v. Pachtman*, 424 U.S. 409, 428-29 (1976).

73. *Imbler*, 424 U.S. at 429. In addition, Scope 20 of the Model Rules states, in relevant part: Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been

applied to the post-conviction context.⁷⁴ Finally, the ABA Amendment includes commentary assuring that a prosecutor's erroneous-but-good-faith judgment about the merits of post-conviction evidence is not an ethical violation.⁷⁵

For personal interest conflicts purposes, however, it does not matter that the prosecutors' fear is objectively unreasonable in most cases;⁷⁶ if the fear would materially limit the prosecutors' actions, it is a conflict.⁷⁷

breached. . . . The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

MODEL RULES OF PROF'L CONDUCT Scope 20 (2012).

74. See *Warney v. Monroe Cnty.*, 587 F.3d 113, 125 (2d Cir. 2009) (noting that, because disclosing exculpatory evidence post-conviction pursuant to Model Rule 3.8(g) and (h) is part of the prosecutor's "advocacy function," prosecutors are entitled to absolute immunity). The court justified this immunity precisely because it did not want prosecutors fearing personal liability:

Moreover, the availability of absolute immunity in [the post-conviction] context will likely encourage prosecutors in the future to seek exculpatory information post-trial. . . . Prosecutors facing tough choices as to whether or not to seek exculpatory information post-conviction should not have to fear personal liability in the event that issues are raised later as to the evaluation and disclosure of what is learned during the pendency of post-conviction proceedings. Such a peril would be an incentive to avoid exculpatory inquiries.

Id. at 126.

75. See MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 9.

76. See, e.g., APAAC's Comments to Petition, *supra* note 45, at 3 (citing no legal support for its immunity propositions); see also Memorandum from Louise Ing, President, Haw. State Bar Ass'n, to Chief Justice Mark. E. Recktenwald, Supreme Court of Haw. 11 (Oct. 31, 2011), available at <http://hsba.org/resources/1/HRPC/FINAL/Final%20letter%20to%20CJ%20re%20HRPC.pdf> (expressing prosecutors' similar fear that the amendment might jeopardize their civil immunity). Our petition had previously shown the prosecutors that no cases impose civil liability on prosecutors for investigating their mistakes (and indeed, existing case law suggests that civil immunity is a privilege bestowed in part because prosecutors are still subject to ethical rules). The Maricopa County Attorney's Office (which handles the felony prosecutions in Phoenix) cited two cases to support its position that the duty to investigate will subject prosecutors to civil liability, but neither addressed these circumstances at all. See Maricopa County Attorney's Comments, *supra* note 48, at 7 (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993); *State v. Superior Court*, 921 P.2d 697, 700 (Ariz. Ct. App. 1996)). Rather, in *Buckley*, the Court stated: "Respondents have not cited any authority that supports an argument that a prosecutor's fabrication of false evidence during the preliminary investigation of an unsolved crime was immune from liability at common law, either in 1871 or at any date before the enactment of § 1983." See *Buckley*, 509 U.S. at 275. Similarly, in *Superior Court*, the court observed: "As to the discovery violation, it is clear that absolute immunity applies, since the conduct of discovery is both quasi-judicial and within the prosecutor's authority." *Superior Court*, 921 P.2d at 701 (concluding that only prosecutor's statements to the press were not protected by absolute civil immunity).

77. See *supra* Part II (discussing the personal interest conflicts rules). Indeed, deeply held religious and moral beliefs can lead to a disqualifying conflict of interest; obviously those beliefs are not fully dependent on proof, legal or otherwise. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.10 cmt. 3; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 125 cmt. c (2000).

The prosecutors' stated fear suggests that it will indeed limit their actions on justice's behalf. Taking them at their word, then, we can see the conflict.

C. Prosecutors Are the Regulators, Not the Regulated

Several prosecutorial offices took the explicit or implicit position that courts cannot regulate prosecutors.⁷⁸ This position is outdated and largely meritless for two reasons:⁷⁹ (1) "the courts regulate prosecutors—qua prosecutors—in analogous contexts quite frequently,"⁸⁰ and (2) "as a general matter, prosecutors are legally and appropriately subject to ethical regulation"—as are all other attorneys.⁸¹ Both state and federal prosecutors can be, and are, regulated.⁸²

78. See APAAC's Comments to Petition, *supra* note 45, at 3 ("Prosecutors cannot be ordered to investigate.").

79. The U.S. Attorney's Offices in Alaska, California, Hawaii, and Washington also challenged the investigation requirement and to some extent regulation generally. See Memorandum from California U.S. Attorneys, *supra* note 50, at 6; Memorandum from Washington State U.S. Attorney, *supra* note 49, at 4; Memorandum from Alaska U.S. Attorney, *supra* note 49, at 4; Memorandum from Hawaii U.S. Attorney, *supra* note 49, at 15; see also Green, *supra* note 47, at 890-93 (describing the opposition by certain prosecutors to adoption of the Amendment in Tennessee and Washington). The proposed amendment, of course, did not actually require investigation, as noted again below.

80. Reply to Prosecutors' Comments, *supra* note 48, at 11; see, e.g., FED. R. CRIM. P. 16; ARIZ. R. CRIM. P. 15.1 (requiring various disclosure obligations on the state on penalty of sanction); MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (prohibiting prosecutions without probable cause); *id.* R. 3.8(e) (imposing limitations on prosecutors' ability to subpoena lawyers); *id.* R. 3.8(f) (imposing limitations on prosecutors' pretrial public statements). The Arizona ethical rules have contained the same prosecutorial requirements for years. See ARIZ. RULES OF PROF'L CONDUCT ER 3.8(a), (d), (e), (f) (2010).

81. Reply to Prosecutors' Comments, *supra* note 48, at 11-12.

82. *Id.* at 12 (footnotes omitted). The Arizona Supreme Court (as an example of other state high courts) long ago established its inherent authority to regulate lawyers, including sitting county attorneys. *Id.* at 12 n.27; see *In re Bailey*, 248 P. 29, 30 (Ariz. 1926). The court in *In re Bailey* noted that:

whenever a practitioner by his conduct shows that he no longer possesses the qualifications required for his admission, he may be deprived of the privilege theretofore granted him, and such deprivation may be either under the authority of a statute prescribing the cause therefor, and the manner of procedure, or the court of its own inherent power may act.

Id.; see also *McMurchie v. Super. Ct. of Yavapai Cnty.*, 221 P. 549, 551 (Ariz. 1923). The court in *McMurchie* noted:

The assumption that the court's jurisdiction is limited to the express provisions of this statute is based upon totally false premises. All courts exercising general and common-law jurisdiction possess the inherent right to require lawyers practicing at their bar to so conduct themselves that they shall neither bring reproach upon their profession nor in any way impede the due administration of justice. This is a right not derived from statute, nor held at the will of the Legislature. It is essential to the orderly administration of justice.

Id.; see 28 U.S.C. § 530B(a) (2006) ("An attorney for the Government shall be subject to State laws

The opposition “specifically argued that the [c]ourt cannot, or at least should not, impose on [prosecutors] a duty to investigate.”⁸³ As a preliminary matter, however, the proposed amendment did not require investigation: prosecutors could choose to investigate (which they might want to do at a minimum to make sure that the actual criminal is not out committing additional crimes) or more simply “make reasonable efforts to cause an investigation.”⁸⁴ More importantly for present purposes, “[i]t is neither dangerous nor burdensome to prosecutors to request that the local police department or FBI investigate the matter in light of ‘new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted.’”⁸⁵ The prosecutorial offices’ strong resistance to this duty suggests “that certain prosecutorial offices would not make that phone call or send that letter in the absence of an ethical rule requiring it.”⁸⁶

That is troublingly apathetic behavior, at least when the offices have received non-frivolous evidence of a wrongful conviction. It is admittedly unclear to what extent this anti-regulation and apparently apathetic attitude creates a conflict in specific cases, but it suggests both a predisposition not to honor the clear role of “minister of justice” and a resistance to continuous improvement.

D. Defendants, Not Prosecutors, Should Seek Justice

The prosecutorial offices revealed other evidence suggesting (but not necessarily proving) that some prosecutors within those offices might be predisposed not to seek justice post-conviction; rather, they suggested that the wrongfully convicted defendants should seek justice on their own. The prosecutorial offices effectively “argue[d] that existing laws already [adequately] protect[ed] wrongfully convicted

and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”).

83. Reply to Prosecutors’ Comments, *supra* note 48, at 12; see APAAC’s Comments to Petition, *supra* note 44, at 3; Comments of the USAO, *supra* note 45, at 6-7.

84. Reply to Prosecutors’ Comments, *supra* note 48, at 12; see MODEL RULES OF PROF’L CONDUCT R. 3.8(g); Saltzburg, *supra* note 39, at 5-6. In light of these legally meritless but apparently sincere fears of forced investigations, “[we even] added a sentence [to the Petition] making this fact doubly clear: ‘if the prosecutor makes a reasonable effort to cause an investigation, it is not necessary for the prosecutor personally to conduct an investigation.’” Reply to Prosecutors’ Comments, *supra* note 48, at 12-13.

85. Reply to Prosecutors’ Comments, *supra* note 48, at 13.

86. *Id.*

defendants.”⁸⁷ But the cited “‘panoply’ of existing protections, such as habeas corpus, . . . [is notoriously difficult,] and . . . often impossible[,] to navigate successfully without ‘new, credible, and material’ evidence or the like.”⁸⁸ Furthermore, “the argument presume[d] that the [probably] innocent defendant knows of [this] exculpatory evidence in the first place”⁸⁹ At base, the prosecutorial offices were “simply burden-shifting the executive branch errors onto criminal defendants, some of the least powerful people in the state.”⁹⁰ Furthermore, as the studies and evidence above suggest, “prosecutors often fight post-conviction relief reflexively and zealously—even in close cases.”⁹¹

At a minimum, this argument suggests (but again does not prove) callousness toward wrongful convictions, because the suggested remedies are notoriously slow and often fail.⁹² It might also suggest that certain prosecutorial offices are unlikely to review proactively non-frivolous claims of wrongful conviction. The “minister of justice” pre-conviction seems to become “bored of justice” post-conviction.

In sum, these untoward prosecutorial responses to ethical regulation in the post-conviction context seemingly provide some evidence of the significant conflicts of interest identified in Part I. This theoretical and actual conflict can be cured, however, as discussed below.

87. *Id.*; see APAAC’s Comments to Petition, *supra* note 45, at 2 (“Arizona law provides a panoply of post-conviction remedies for defendants who believe there is error in their convictions.”); Comment of the Pima County Attorney, *supra* note 45, at 3 (citing ARIZ. R. CRIM. P. 32); Comments of the USAO, *supra* note 45, at 4 (citing 28 U.S.C. §§ 2241, 2254–55); Maricopa County Attorney’s Comments, *supra* note 48, at 5 (citing ARIZ. REV. STAT. ANN. § 13-4240 (2010); ARIZ. R. CRIM. P. 32).

88. Reply to Prosecutors’ Comments, *supra* note 48, at 13-14; see, e.g., ARIZ. R. CRIM. P. 32.1(e) (requiring for relief “newly discovered material facts [that] . . . probably would have changed the verdict or sentence”).

89. Reply to Prosecutors’ Comments, *supra* note 48, at 14 (“For example, an inmate locked up in prison with no attorney, no money, and no legal education, has few resources to ‘discover’ new evidence and file a timely, complete, and persuasive habeas petition.”).

90. *Id.*

91. *Id.*

92. *Id.*

IV. THE CURE: CONFLICTS COUNSEL

Few prosecutors (or other humans) are actually bad apples.⁹³ Their offices just have bad structure in post-conviction matters. Rather than demand that prosecutorial offices adopt structures enabling optimal decision-making when they review post-conviction claims, however, the ABA and the NDAA have effectively urged a different solution: “muscle through” the conflict.⁹⁴ In other words, both influential organizations have officially suggested that prosecutors should just suppress the conflict and act better in cases in which prosecutors have likely convicted the wrong person. Although this approach is simplistically understandable and better than the previous state of nearly zero regulation, it misses a greater opportunity: structural change. After explaining the “muscle through” (or “just stop it”) approach of the ABA and NDAA, I turn to three structural changes that would each improve post-conviction review. These changes are consistent with the more modern, effective, and comprehensive way to approach legal ethics: focus less on individual decisions in discrete cases and more on the structure in which decisions will be made.⁹⁵

The recent, and otherwise laudable, changes to both the ABA and NDAA ethical rules are directed primarily at the individual “prosecutor.”⁹⁶ These new rules correctly tell the prosecutor to disclose

93. See, e.g., Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 400; see also *infra* note 95 (citing literature on structural or situational forces influencing behavior). Professor Peter A. Joy argued:

My thesis is that prosecutorial misconduct is not chiefly the result of isolated instances of unprincipled choices or the failure of character on the part of some prosecutors. Rather, prosecutorial misconduct is largely the result of three institutional conditions: vague ethics rules that provide ambiguous guidance to prosecutors; vast discretionary authority with little or no transparency; and inadequate remedies for prosecutorial misconduct, which create perverse incentives for prosecutors to engage in, rather than refrain from, prosecutorial misconduct. These three conditions converge to create uncertain norms and a general lack of accountability for how prosecutors view and carry out their ethical and institutional obligations.

Joy, *supra*.

94. MODEL RULES OF PROF'L CONDUCT R. 3.8(g)–(h), R. 3.8 cmts. 7-8 (2012); NAT'L PROSECUTION STANDARDS Standard 8-1.8 & cmt. (Nat'l Dist. Attorneys Ass'n 2009).

95. See, e.g., William H. Simon, *The Past, Present, and Future of Legal Ethics: Three Comments for David Luban*, 93 CORNELL L. REV. 1365, 1372-75 (2008) (“If in practice judgment is swamped by the pressures of circumstance, perhaps we should spend less time focusing on judgment and more on circumstance. In particular, we should be studying and teaching about how practice can be structured in ways that make for ethically better decisions.”). See generally PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2007) (documenting the heavy impact of “situational forces” on human misbehavior).

96. The ABA rule, for instance, tells the “prosecutor”—if the conviction was obtained in their “jurisdiction”—to investigate or cause an investigation and, if clear and convincing evidence

exculpatory evidence, to look into likely cases of wrongful convictions, and if the prosecutor got it wrong, to seek the release of the wrongfully imprisoned person. The rules fall short, however, in their apparent addressee:⁹⁷ they tell the conflict-infected prosecutor to go against human psychology by objectively reviewing and publicly admitting the mistakes of their own, their close colleagues, and their offices. The NDAA National Prosecution Standards⁹⁸ (the “Standards”) vividly illustrate this “muscle through” approach. The Standards first acknowledge that fairly evaluating an innocence claim may constitute “the greatest challenge a prosecutor will have to face, especially in a situation where the evidence, after being reasonably evaluated, indicates that a mistake has been made.”⁹⁹ It is the “greatest challenge,” but one that must be overpowered: “the prosecutor must put aside concerns of personal embarrassment and pride, the possible embarrassment to law enforcement, and any other factors that would deter him or her from seeing that justice is accomplished.”¹⁰⁰

establishes that an innocent person has been convicted, to remedy the conviction. *See* MODEL RULES OF PROF’L CONDUCT R. 3.8(g)–(h). Although the “prosecutor” in the jurisdiction of conviction need not be the conflicted prosecutor, her colleagues, or supervisors, the implication is there, and the issue is, at a minimum, not helpfully addressed in the rule or the accompanying official commentary. *See id.* R. 3.8. cmts. 7–8.

The NDAA guidance refers also simply to the “prosecutor”:

When the prosecutor is satisfied that a convicted person is actually innocent, the prosecutor should notify the appropriate court . . . and the defense attorney or the defendant . . . and seek the release of the defendant if incarcerated. If the prosecutor becomes aware of material and credible evidence which leads him or her to reasonably believe a defendant may be innocent of a crime for which the defendant has been convicted, the prosecutor should disclose . . . such evidence to the appropriate court and . . . to the defense attorney or to the defendant

NAT’L PROSECUTION STANDARDS Standard 8-1.8.

97. To be sure, the rules are flexible enough to permit less-conflicted “prosecutors” to review the post-conviction matter. Perhaps a fairer characterization, then, is that the ABA and NDAA simply paid insufficient attention to the ideal addressee. Elsewhere, however, the ABA has arguably implied that the conflicted prosecutor should indeed handle the matter. *See* STANDARDS FOR CRIMINAL JUSTICE: POSTCONVICTION REMEDIES Standard 22-1.3(b) (1986) (“The legal officer with primary responsibility for responding to an application for postconviction relief should be an officer with responsibility for the administration of criminal justice, such as the attorney general, or the local prosecutor who represented the government in the original prosecution.” (emphasis added)).

98. NAT’L PROSECUTION STANDARDS (Nat’l Dist. Attorneys Ass’n 2009).

99. *Id.* Standard 8-1.8 cmt.; *cf. id.* Standard 8-1.6 (“The prosecutor shall not assert or contest an issue on collateral review unless there is a basis in law and fact for doing so. The basis should not be frivolous . . .”); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-3.11(c) (1993) (“A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution’s case or aid the accused.”).

100. NAT’L PROSECUTION STANDARDS Standard 8-1.8 cmt. It is empirically questionable how well humans can muscle through their own conflicts, even when ethical rules command it. *See* Eldred, *supra* note 20, at 72–77 (noting that, in light of the existing empirical studies, “there is little reason to believe that the governing [ethical] rules will be able to check the unconscious pull of self-

Although both the ABA and NDAA had a good goal in mind, their means are incomplete. A more complete, and likely more effective, approach would have more particularly described who or what should be (and should not be) reviewing these claims. From a conflicts perspective, the rules should be subsequently amended to include such an approach. Three alternative approaches follow, and they essentially range from better to best:

Approach I: The prosecutor¹⁰¹ should not be the sole reviewer or decision-maker in evaluating evidence that a person may have been wrongfully convicted;

Approach II: The prosecutorial office should create a separate unit within the office to evaluate evidence that a person may have been wrongfully convicted;¹⁰² or

Approach III: The prosecutorial office should refer evidence that a person may have been wrongfully convicted to another prosecutorial office or independent agency for evaluation.

Before elaborating a bit on the above improvements, a global clarification is in order: In each iteration, the prosecutor¹⁰³ would remain vitally important, of course; she knows the case—the witnesses, the agents, the file, and more. Her cooperation is, therefore, essential.¹⁰⁴ But in each iteration, she would not be making or exercising clout over the evaluation of the evidence and disposition.

interest”).

101. The term “prosecutor” means any prosecutor in the office who participated personally and substantially in the prosecution, appeal, or collateral review proceedings. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.11(d)(2) (adopting a similar, long-standing test in a different conflicts context).

102. *See* NAT’L PROSECUTION STANDARDS Standard 1-3.4. Standard 1-3.4 under the Standards states:

Each prosecutor’s office should establish procedures for handling actual or potential conflicts of interest. These procedures should include, but are not limited to: a. The creation of firewalls and taint or filter teams to ensure that prosecutors with a conflict are not improperly exposed to information or improperly disclose information; and b. Methods to accurately document the manner in which conflicts were handled to ensure public trust and confidence in the prosecutor’s office.

Id.; *see also* Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2250-51 (2010) (discussing best practices for such a unit).

103. *See supra* note 101 (defining “prosecutor” for these purposes).

104. To be sure, there is danger in permitting the prosecutor to play any role, but protecting the subsequent reviewer from the prosecutor’s preconceived theories and perspectives would be almost impossible (in that those theories and perspectives would already be memorialized in the record). *See* O’Brien, *supra* note 65, at 1046 (citing José H. Kertstholt & Aletta R. Eikelboom, *Effects of Prior Interpretation on Situation Assessment in Crime Analysis*, 20 J. BEHAV. DECISION MAKING 455, 457-64 (2007)) (describing a study finding “knowledge of the primary investigators’ theory of the case influenced the independent analysts—despite their expertise and mandate to be objective”).

Approach I (the “better” approach) is the simplest and most flexible. It cures the direct conflict by ensuring that the conflicted prosecutor is neither the sole reviewer nor ultimate decision-maker in the post-conviction matter.¹⁰⁵ Although the approach of the *United States Attorneys’ Manual* (the “Manual”)¹⁰⁶ is unduly limited to prosecutorial “misconduct,” the Manual roughly follows this innovation: “Before any pleading or other document concerning any non-frivolous allegation of serious misconduct is filed, whether in the district court or on appeal, it must be reviewed by a supervisor who is not implicated by the allegation,” and “[a] Department attorney who is found to have engaged in misconduct shall not represent the United States in litigation concerning the misconduct finding, unless approval is obtained from the responsible United States Attorney or Assistant Attorney General.”¹⁰⁷

Approach I is attractively flexible; every other detail is left to the prosecutorial office, in light of its priorities, resources, existing structure, and other variables. At a minimum, though, the office should publicly praise and otherwise incentivize the designated reviewers who challenge the integrity of likely wrongful convictions.¹⁰⁸ Although many obstacles will remain for such prosecutors, it would help.¹⁰⁹ Approach I,

105. Orenstein, *supra* note 1, at 444–45 (citing Zacharias, *The Role of Prosecutors*, *supra* note 10, at 237–38). Professor Orenstein noted:

[D]esignating an experienced decisionmaker who did not play a role in the original prosecution . . . would have the benefit of cultivating expertise as well as allowing the necessary emotional neutrality and distance to enable the responsible individual to analyze the issue dispassionately and to combat cognitive bias, tunnel vision, and denial.

Id. (footnotes omitted); see also Eldred, *supra* note 20, at 80 n.179 (“Research indicates that distancing the person with conflicting duties from the decision on whether a conflict exists is the best way to reduce the impact of the conflict . . .”).

106. U.S. Dep’t of Justice, *United States Attorneys’ Manual* (1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

107. *Id.* § 1-4.130(A)–(B), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title1/4mdoj.htm#1-4.130.

108. See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 172 (2004) [hereinafter Medwed, *The Zeal Deal*]. Professor Medwed noted:

[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.

Id.

109. Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 CAL. W. L. REV. 389, 409 (2002). Judith A. Goldberg and Professor David M. Siegel noted:

There are individual and institutional pressures that may deter prosecutors from cooperating with a defendant’s request for postconviction testing. For instance, the

nevertheless, is detrimentally limited in that it does nothing to ensure that the reviewers or decision-makers are professionally distanced from the prosecutor herself; indeed, they could be in the same unit, division, or hallway.¹¹⁰ It also does little to improve prosecutorial incentives, which typically are set to convict, not reverse, and it does little to grant prosecutors some relief from their oft-overcrowded caseloads while they are reviewing these claims.

Approach II (the “better still” approach) would therefore create a separate unit within the prosecutorial office.¹¹¹ This approach is inspired by and essentially the same as Dallas County’s so-far effective

individual prosecutor faces institutional and public pressure to maintain the integrity of a conviction. The number of convictions obtained may be a measure of a prosecutor’s individual success or failure. Prosecutors may be perceived as being “soft” on crime or sympathetic towards defendants if they assist with, or fail to object to, postconviction testing. On a personal level, prosecutors may have worked with victims and investigators of horrific crimes, and may be loathe to reopen unsettling experiences. Prosecutors may themselves be invested in the knowledge or belief that the perpetrator has been punished and the case concluded.

Id. (footnote omitted) (citing 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, 292 (2001)); see also Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 107-08 (1991). Professor Zacharias noted:

Practical and institutional incentives reinforce this natural tendency [toward winning and advocacy in trial practice]. Government lawyers compete with each other for promotion and recognition. Prosecutors who restrain themselves may convict at a lower rate and thus appear less competent to their superiors. An ethical prosecutor’s productivity may decline as well. Some of the actions necessary for “doing justice” may delay trials. Reporting ineffective defense counsel will provoke hearings. Providing previously undisclosed information will lead to defense motions. Because the ethical prosecutor consequently will process fewer cases, she may damage her reputation with a production-oriented bench. To the extent her actions highlight poor performance by defense counsel, her relationship with the bar also may deteriorate.

Id. at 108.

110. See Green & Yaroshefsky, *supra* note 2, at 509 (“Research on cognitive bias suggests that this responsibility should not be entrusted to the prosecutor who secured the conviction, and in many circumstances, should not be entrusted to that prosecutor’s office.”). For similar reasons—including lack of objectivity—the post-conviction investigation should generally not be assigned exclusively to the original investigator. See Laurie L. Levenson, *Post-Conviction Death Penalty Investigations: The Need for Independent Investigators*, 44 LOY. L.A. L. REV. S225, S240 (2011) (“Currently, no court rules or ethical codes govern the assignment of investigators to post-conviction cases. Out of habit, prosecutors routinely use the same agent who originally investigated the criminal charge, even when the post-conviction allegations involve claims of police misconduct and misleading identification procedures.”). A similar problem can exist for the original judge. See, e.g., Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 699 (2005) (“[M]any new trial motions and post-conviction petitions premised on newly discovered non-DNA evidence are directed to the trial judge who handled the case originally” even though “it is only human nature for people to struggle when asked to reexamine their own work.”).

111. See Medwed, *The Prosecutor as Minister of Justice*, *supra* note 35, at 62-66.

Conviction Integrity Unit.¹¹² The separate unit would report directly to the district attorney, county attorney, or first assistant and would exist primarily to review post-conviction innocence and injustice claims, including claims of prosecutorial misconduct.¹¹³ In these ways, the unit would boast a measure of independence and would be incentivized to reverse injustice, not merely to convict.¹¹⁴ The separate unit would also have the inside advantage—the prosecutor, the other players, and the file would be both accessible and known commodities.¹¹⁵ Of course, “the inside advantage” is also a disadvantage when it comes to conflicts and bias within that office.¹¹⁶ Moreover, in cases of widespread misconduct, for example, the unit’s location within the same office might be

112. See generally Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y.L. SCH. L. REV. 1033 (2012). Mike Ware noted that since the unit’s creation:

there have been thirteen DNA exonerations in Dallas County (for a total of twenty-two), as well as four non-DNA exonerations and three defendants who obtained post-conviction relief because of *Brady* violations discovered during CIU investigations. In addition, ten previously unknown actual perpetrators have been identified through investigations initiated by the CIU.

Id. at 1041 (footnote omitted).

113. See Scheck, *supra* note 102, at 2251; Ware, *supra* note 112, at 1034. These units might be gaining momentum:

[T]he idea of creating prosecutorial postconviction units has become increasingly popular. Dallas County prosecutor Craig Watkins created a Conviction Integrity Unit in July 2007 staffed by a senior deputy chief, a full-time assistant district attorney, an investigator, and a legal assistant. The division took on a review of over 400 DNA cases and also pledged to evaluate every case—DNA and non-DNA—where evidence identifies a perpetrator other than the defendant. During its first two years in operation, Watkins’s unit helped to exonerate at least *eight* inmates convicted in Dallas County. New York County District Attorney Cyrus R. Vance Jr. announced the launch of a comparable program in March 2010. Led by an experienced assistant district attorney, the program will include a panel of ten prosecutors to assess cases and office practices as well as a group of outside experts to offer advice on policy matters.

Medwed, *Prosecutorial Ethics*, *supra* note 39, at 334 & n.17 (footnotes omitted) (citing James C. McKinley Jr., *Cleared, and Pondering the Value of 27 Years*, N.Y. TIMES, Aug. 13, 2010, at A12) (“Patricia Lykos became the chief prosecutor in Houston, Texas, in 2008 and instituted a postconviction review unit. . . . As of August 2010, that squad had helped to release three wrongfully convicted inmates.”).

114. See Scheck, *supra* note 102, at 2250-51 (observing pointedly several key characteristics of a successful unit). For example, the unit should have the full and public support of the office’s head prosecutor, independence, and positive relationships with innocence projects and public defender offices. See *id.*

115. See Medwed, *The Zeal Deal*, *supra* note 108, at 175-76.

116. See *id.* at 176-77 (discussing the advantages and disadvantages of creating internal innocence and post-conviction units and noting that “[o]ne 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”).

disqualifying.¹¹⁷ Finally, the office might not have the size to accommodate a separate unit practically and effectively.¹¹⁸

Approach III (the “best” approach), in light of Approach II’s weaknesses, would appoint a separate prosecutorial office or innocence commission to review claims of innocence (and perhaps prosecutorial misconduct).¹¹⁹ For example, the attorney general’s office would review claims involving the district or county attorney’s office and vice versa.¹²⁰ This approach would completely cure the conflicts by removing not only

117. See, e.g., NAT’L PROSECUTION STANDARDS Standard 1-3.4 cmt. (Nat’l Dist. Attorneys Ass’n 2009) (“If [conflicts screening methods within the office] are or are likely to be ineffective, the chief prosecutor should seek a qualified special prosecutor and offer appropriate assistance.”); see also *State v. Stenger*, 760 P.2d 357, 360 (Wash. 1988) (disqualifying prosecutor’s office because prosecutor had previously represented the defendant and instead of being screened, the prosecutor participated in the early stages of the prosecution).

118. See Green & Yaroshefsky, *supra* note 2, at 509. Professors Green and Yaroshefsky noted: [T]he Dallas County experience teaches that with appropriate leadership, structure and personnel, a large, urban office can create an independent internal unit to follow up on new evidence and to investigate post-conviction innocence claims. Similarly, smaller prosecutors’ offices could pool their resources to create a unit to investigate claims from each of their counties, or they could seek the agreement of the state attorney general’s office to review such claims.

Id. Professor Medwed similarly noted:

[I]n light of the small size of most prosecutors’ offices, 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, and might minimize the potential for intra-organizational resentment by creating greater distance between trial and post-conviction prosecutors.

Medwed, *The Zeal Deal*, *supra* note 108, at 176 (footnotes omitted).

119. See Green & Yaroshefsky, *supra* note 2, at 509. Professors Green and Yaroshefsky noted: Where an investigation and evaluation cannot be conducted by an internal prosecutorial unit that maintains a non-adversarial and open mindset to consider the potential of a wrongful conviction, it might be preferable to adopt systems of review similar to those in England, Canada, or North Carolina, that entrust investigations and evaluations to independent bodies having internal, graduated processes for responding to new, exculpatory evidence.

Id. Further, Judge Douglas H. Ginsburg and Hyland Hunt noted:

[T]he prosecutor’s evaluation of the defendant’s claim of innocence, and his decision to act upon that evaluation, can make a substantial difference to the defendant’s chance of obtaining relief. The difficulty of requiring an adversarial actor to play this kind of non-adversarial role after conviction has prompted one American state and a few other countries to turn to alternative models.

Douglas H. Ginsburg & Hyland Hunt, *The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond?*, 7 OHIO ST. J. CRIM. L. 771, 788 (2010).

120. Arizona has a noteworthy arrangement along these lines: “The [Arizona] Justice Project, in a unique partnership with the Attorney General’s Office and the Arizona Criminal Justice Commission, recently received a grant from the National Institute of Justice for post-conviction DNA testing of forcible rape, murder, and non-negligent homicide cases that might demonstrate actual innocence.” *The Arizona Justice Project: Helping Inmates with Wrongful Convictions*, ARIZ. JUST. PROJECT, <http://www.azjusticeproject.org/project> (last visited Feb. 7, 2013).

the prosecutor but also the entire affected office. It would put an objective and disinterested office in charge of reviewing mistakes or misconduct. Appointing similar “special prosecutors” and creating other conflicts procedures, moreover, are well-established innovations in other contexts.¹²¹ The Approach’s critical distance, however, does pose a downside in that access to the prosecutor, the other players, and the file will present possible challenges.¹²² It is imperative, therefore, that both a rule and a practice of inter-office cooperation are in effect.¹²³ Although the cooperation challenge is surmountable, this deeply (re)structural approach itself can be insurmountable. Certain states’ constitutions, resources, and political tides, as examples, likely limit the ability to create or empower a separate office to conduct these reviews.¹²⁴

But a do-nothing approach is, by far, the worst. If insurmountable challenges preclude Approach III, the prosecutorial office should adopt Approach II, and failing that, Approach I (or a customized variant of any of the Approaches). Any of the three approaches would markedly mitigate conflicts of interest when prosecutorial offices must review claims of innocence or prosecutorial misconduct. The only wrong choice would be to continue to address strong conflicts of interest with an inherently conflicted structure—or no structure at all.

121. See, e.g., *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206, 1207 (Cal. 1981) (citing *D’Amico v. Bd. of Med. Exam’rs*, 520 P.2d 10, 20 (Cal. 1974)) (“There is no question that at such time as he believed a potential conflict existed, the Attorney General could, as he did, properly withdraw as counsel for his state clients and authorize them to employ special counsel.”); NAT’L PROSECUTION STANDARDS Standard 1-3.5. In particular, Standard 1-3.5 states, in relevant part:

Where an actual or potential conflict of interest exists that would prevent the prosecutor’s office from investigating or prosecuting a criminal matter, the prosecutor’s office should appoint, or seek the appointment of, a “special prosecutor” or refer the matter to the appropriate governmental authority, as required by law. Under those circumstances where a special prosecutor is appointed[,] . . . [t]he special prosecutor should be . . . perceived as having sufficient detachment from the prosecutor’s office so as not to be influenced by any actual or potential conflict; . . . [and] [s]ubject to the need to avoid the appearance of a conflict, a chief prosecutor and his or her assistants and staff should give all appropriate assistance, cooperation, and support to a special prosecutor.

Id.

122. See *supra* text accompanying notes 115-16.

123. See, e.g., NAT’L PROSECUTION STANDARDS Standard 1-3.5; *id.* Standard 2-4.5 (“The office of the prosecutor and the office of the state attorney general, where separate and distinct entities, should cooperate whenever practicable in the furtherance of justice.”).

124. See, e.g., Steven W. Perry & Duren Banks, *Prosecutors in State Courts, 2007 – Statistical Tables*, in U.S. DEP’T OF JUSTICE, NATIONAL PROSECUTORS SURVEY [CENSUS], 2007, at 1, 2, 4 tbl.2 (2012), available at http://www.icpsr.umich.edu/cgi-bin/file?comp=none&study=33202&ds=1&file_id=1079790. Seventy-four percent of “prosecutors’ offices served districts with a population of less than 100,000 residents.” *Id.* “In full-time offices serving fewer than 100,000 residents, on average, offices included one chief prosecutor, three assistant prosecutors, one victim advocate, one legal services staff, one investigator, and three support staff.” *Id.*

V. CONCLUSION

Everyone makes mistakes. Notwithstanding suggestions to the contrary, prosecutors have indeed made, and will continue to make, mistakes in both pre- and post-conviction practice. What counts is how we handle those inevitable mistakes: whether we make improvements to avoid and correct the inevitable mistakes of the future. To err is human, and that is why we subject ourselves to regulation—especially when we are in positions as powerful and important as prosecutors. To eliminate or mitigate the conflicts of interest currently enduring in post-conviction practice would be an improvement. Undoubtedly, other solutions exist to cure these conflicts of interest beyond the three simple solutions proposed in this Article, but these three structural solutions have precedent and efficacy to commend them. “Conviction confliction” can indeed be cured.
