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I. INTRODUCTION

It is an old saw that prosecutors have both an ethical[1] and a legal[2] obligation to "do justice." The contours of that obligation, however, are not well defined.[3] This Article addresses one particularly neglected aspect of the obligation:[4] prosecutors' ethical duty to serve justice after convictions are complete.[5]

Prosecutorial justice issues seem to arise less frequently after conviction than at trial. Prosecutorial discretion is at its height in the postconviction context because legislators and professional code drafters have not focused on postconviction issues.[6] Freed from binding legal constraints, prosecutors have avoided deep consideration of how their general obligation to serve justice might apply. Once defendants have been found guilty beyond a reasonable doubt, prosecutors' natural inclination in balancing the equities has been to sidestep defense-oriented actions.

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1. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (2004) (characterizing government officers as "minister[s] of justice"); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (2004) (stating that the prosecutor's "duty is to seek justice").

2. *See, e.g.*, Berger v. United States, 295 U.S. 78, 88 (1935) (emphasizing that the prosecutor is charged with the duty not only to seek convictions but also to see that justice is done); *accord* State v. Pelchat, 62 N.Y.2d 97, 105 (N.Y. 1984).

3. *See* Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest ?*, 41 B.C. L. REV. 789, 790 (2000) (arguing that prosecutors have a "public interest serving role"); Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 GEO. J. LEGAL ETHICS 1301, 1305 (1996) (discussing the difference between characterizing prosecutors as "ministers of justice" and requiring them to "seek justice"); Bruce A. Green, *Why Should Prosecutors "Seek Justice"*, 26 FORDHAM URB. L.J. 607, 619 (1999) (discussing "prosecutorial discretion" as a source of the obligation to "seek justice").

4. In previous works, I have addressed the concept of justice with respect to prosecutorial activities at the pretrial and trial stages and in plea bargaining. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 48, 79 (1991) [hereinafter Zacharias, *Ethics of Prosecutorial Trial Practice*] (discussing the prosecutor's ethical duty to "do justice" at trial and in pretrial activities that are interwined with the trial stage (e.g., discovery)); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1123 (1998) [hereinafter Zacharias, *Justice in Plea Bargaining*] (discussing the prosecutor's obligation to "do justice" in the context of plea bargaining).

5. Throughout this Article, I refer to postconviction obligations as those occurring after a criminal proceeding is fully finalized, including the appellate process.

6. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (stating that "[p]recisely how far the prosecutor is required to go [to see that the defendant is accorded prosecutorial justice] is a matter of debate and varies in different jurisdictions.").

Identifying and analyzing the obligation to serve justice after convictions is important precisely because so little attention has been paid to it. The American Bar Association's *Standards for Criminal Prosecutions*,[7] for example, address prosecutorial conduct at all stages through sentencing, but then stop. Although the *Standards* are designed to flesh out prosecutors' ethical obligations in more detail than the model codes, they fail to provide guidance in the very context in which prosecutors most need it.

There are at least three reasons why prosecutors are ill-equipped to analyze post-trial obligations on their own. First, as already suggested, there is little law on the subject. Few statutory requirements for prosecutorial postconviction conduct exist.[8] Ordinarily, the existence of a fair trial and appellate system will satisfy constitutional due process requirements.[9] Only rarely have judicial decisions focused on general postconviction duties, so treatises on prosecutorial conduct also have tended to ignore them.[10] Thus, from the outset, prosecutors are left entirely to personal resources in defining their post-trial role.

Second, prosecutors' incentives at the postconviction stage militate against taking action that benefits convicted defendants. Such action may involve confronting a prosecutor's own error or undermining the reputation of a colleague who erred. It means undertaking additional work that ordinarily is not required by legal requirements or the demands of supervisors. Conversely, the overwhelming workloads of prosecutors and the presumption of guilt that attaches to convicted defendants can justify inaction. As a policy matter, the reopening of a closed a case invites public distrust of the accuracy of the criminal justice system.[11]

Third, and perhaps the most important reason why prosecutors have difficulty addressing their postconviction ethical obligations, is

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7. *ABA Standards for Criminal Justice Prosecution Function and Def. Function*, Standards 3-1.1 to 3-6.2 (3rd ed. 1993).

8. These statutes are discussed *infra* notes 74 and in the accompanying text.

9. *See, e.g.*, Lockhart v. Fretwell, 506 U.S. 364, 364 (1983) (overruling postconviction relief because errors by defendant's trial counsel did not "deprive [defendant] of a trial whose result [was] unfair or unreliable" (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984))); Smith v. Phillips, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."); *cf.* Chapman v. California, 386 U.S. 18, 23-24 (1967) (distinguishing between trial errors that can be deemed harmless error because the process was essentially fair and those requiring automatic reversal).

10. *E.g.*, BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT §§ 12:12-:32 (2d ed. 1985); JOSEPH F. LAWLESS, JR., PROSECUTORIAL MISCONDUCT § 14.34-.51 (1999).

11. Of course, this factor is only significant when the reconsideration becomes, or is likely to become, public.

the complexity of identifying what it means to serve justice. On the one hand, prosecutors properly presume that convicted defendants have received a fair trial and have been punished appropriately. Thus, almost any prosecutorial reaction that maintains the status quo seems justified.[12] On the other hand, once appeals are complete, the prosecutor may be the only participant in the criminal justice system in a position to rectify a wrong. Information suggesting or probative of a wrong often is in the prosecutor's exclusive possession.[13] The prosecutor also may be the only person with the power to act, either because the requisite resources are subject to the prosecutor's domain[14] or because statutes delegate the right to reopen matters to prosecutorial discretion.[15] Prosecutors, for the most part, have been left to their own devices in determining how to balance these considerations.

Part II of this Article frames the issues by categorizing realistic scenarios that implicate a postconviction obligation to do justice. Part III discusses the limited case law addressing the subject. Part IV identifies ways that prosecutors and rulemakers might think about the issues. Finally, Part V outlines preliminary suggestions for how ethics code drafters and other regulators should begin to resolve some of the core questions.

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

Nevertheless the project is necessary, if only to raise the consciousness of prosecutors and rulemakers. Inattention to the issues leads to a baseline of prosecutorial inaction.[16] Yet the development of modern forensic technology that enhances society's ability to prove

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12. *See* Zacharias, *Ethics of Prosecutorial Trial Practice*, *supra* note 4, at 46-47 (discussing the malleability of the justice standard).

13. Some instances are discussed *infra* Part II.A. and text accompanying notes 26-39.

14. An example of this occurs when DNA evidence is in police custody and the only person that can require it to be tested and made available to a previous defendant is the prosecutor.

15. *See, e.g.*, WASH. REV. CODE § 10.73.170 (2004) (referring applications for postconviction DNA testing to prosecutors' offices).

16. *See supra* text accompanying note 11.

facts previously unprovable militates in favor of reevaluating prior convictions in more cases.

Moreover, the few scenarios in which prosecutors have acted typically have involved potentially innocent defendants. In reality, however, ethical dilemmas also arise in many situations in which culpability is not in issue, and which therefore require prosecutors to consider factors other than a defendant's blameworthiness.[17] As a consequence, prosecutors need a better framework for addressing their obligations than the prevailing decisional law and ethics codes provide.

II. WHEN ARE PROSECUTORS' POSTCONVICTION JUSTICE OBLIGATIONS IMPLICATED?

The situations in which a prosecutor must at least consider an ethical duty to help a convicted defendant fall within four overlapping categories. The prosecutor may obtain new information relevant to the conviction. The defendant or his lawyer may request specific assistance. The law may change in a pertinent way. Or the passage of time may affect the equities of the defendant's case.

There also are a few categories of situations in which prosecutors' duty to serve justice may require prosecutors either to take action *disadvantageous* to convicted defendants or neutral action that benefits victims of the crime or victims of the conviction. Ordinarily, the completion of a trial and appeal signals the end of the prosecutor's job, at least until some problem with the original proceedings surfaces. Sometimes, however, the effects of a defendant's behavior continue or the prosecutor is in a unique position to assure that certain good or bad consequences of the conviction are carried forward or avoided. The following pages set forth a series of scenarios within each of the above categories that highlight the range of quandaries prosecutors can face.

A. New Information

Several kinds of relevant new information may come into a prosecutor's possession after a conviction is complete. These include exculpatory evidence, information highlighting potential defects in the process leading to the prior conviction, and evidence made possible by the development of new technology.

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17. *See infra* text accompanying notes 26-39.

1. Exculpatory evidence

Because participants in crimes and criminal investigations tend to operate in a world of interlinked or recurring activity, prosecutors frequently receive information that relates to prior crimes. Often this information simply reconfirms the likely guilt of a defendant or the routine nature of a prior investigation. Occasionally, however, prosecutors learn information that casts some degree of doubt on prior proceedings and the resulting conviction.

Such information typically comes to prosecutors in one of three ways. A prosecutor may simply learn it accidentally in reviewing evidence or interviewing witnesses involved in a different case. A defendant, defendant's family, or defendant's lawyer may bring the prosecutor new evidence. Or, a different suspect or defendant may confess to the crime the defendant was convicted of committing, either in plea bargaining or as a means of alleviating pangs of conscience.

The way the prosecutor receives the information can affect the imperative that she act.[18] When the defendant or those allied with the defendant already have the information, they are in a position to persuade others in the process—judges, parole boards, and pardon authorities—to rely upon it. When another person confesses to the prior crime, the prosecutor shares responsibility for dealing with the information with the police, who will also be privy to the confessor's statements. In contrast, when a prosecutor simply notices information in one case file that has bearing on a prior matter, she may be in sole possession of the information. Her obligation to act on that information therefore may be heightened.

It is important to recognize that the exculpatory nature of new evidence can vary dramatically. At one extreme, new information may be so clear and persuasive that it essentially exonerates the defendant—as, for example, with a credible deathbed confession by another person that can be corroborated through physical evidence. Information at the other extreme may simply raise a question, while leaving the prosecutor convinced that the convicted defendant is guilty. It may rise to the level of exculpatory evidence under the constitutional definition of *Brady v. Maryland*,[19] or have less probative

18. This Article refers to prosecutors as female and to other actors in the process (e.g., defendants) as male.

19. 373 U.S. 83, 87 (1963) (holding that nondisclosure of exculpatory evidence violates due process when the evidence is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); *see also* Giglio v. United States, 405 U.S. 150, 153-54 (1972) (holding that the *Brady* rule encompasses impeachment evidence when there is a "reasonable likelihood [that it would] have affected the judgment of the jury" (quoting Napue v. Illinois, 360 U.S. 264, 271 (1959))); United States v. Bagley, 473 U.S. 667, 682-85 (1985) (defining

value. Whatever the quality of the information, however, once a prosecutor determines that the information is pertinent, she must at least consider whether the information should be disclosed or otherwise pursued.

2. Information relating to possible defects in the process

In the course of prosecuting subsequent crimes, prosecutors sometimes come to realize that participants in a previous defendant's case are ethically flawed. For example, a prosecutor may learn that the investigating police officers currently are corrupt or dishonest in testifying or that they engage in investigatory misconduct. She may learn that the prosecutor in the prior case or supervisory prosecutors are corrupt. She may determine either that these participants in the prior case engaged in misconduct in the prior defendant's specific matter, or she may simply learn of a pattern or course of current conduct that raises her suspicion that the law enforcement officials have engaged in misconduct generally (and therefore, perhaps, engaged in misconduct in defendant's case).

A prosecutor sometimes develops similar concerns regarding problems in evidence gathering. She may become aware of defects in routine laboratory or evidence-safekeeping procedures that could have tainted prior evidence.[20] Alternatively, she may learn facts that suggest that particular evidence introduced against a defendant was false or questionable—for example, when a regular police informant is shown to have testified falsely in other trials.

It is again important to recognize the range of suspicion that these types of information can raise. In the most troublesome scenario, a prosecutor actually will learn of a specific problem that convinces her that the trial or evidentiary process was abused in a previously convicted defendant's case. In other cases, the prosecutor may simply become aware of proof that the process or participants in the process are flawed in a current unrelated case, but in a way that causes the prosecutor to wonder whether the problem has been widespread.

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materiality as meaning "reasonable probability" that the result of the proceeding would have been different if the exculpatory or impeachment evidence had been disclosed to the defense or "a probability sufficient to undermine confidence in the outcome").

20. *See, e.g.*, Adam Liptak, *Houston DNA Review Clears Convicted Rapist, and Ripples in Texas Could be Vast*, N.Y. TIMES, Mar. 11, 2003, at A14 (describing the reaction of the Houston prosecutor's office to an audit disclosing widespread flaws in evidence gathering by the county's forensic laboratory).

3. Information available through technological developments

Consider this scenario:

> Twenty years ago, a defendant was convicted of rape based on shaky eyewitness testimony that he was the rapist. Semen samples were recovered from the victim but, at the time, DNA testing was either unavailable or prohibitively expensive. Defendant at all times has proclaimed his innocence. A different person, in custody for a different rape, now becomes a possible suspect. The samples remain available for DNA testing.

One can analyze this scenario on a variety of levels. The prosecutor may already have test results showing the presence of the alternative suspect's semen in the victim. Alternatively, the prosecutor may only have learned recently that the other person, who had some connection to the first victim, is a serial rapist. The new technology may demonstrate the convicted defendant's innocence, it may raise a realistic possibility of innocence, or it may simply be available (if the prosecutor uses it) to reevaluate the convicted defendant's culpability.[21]

These issues, of course, are not limited to DNA evidence. Over time, many varieties of scientific testing have developed or become more conclusive than they were when the conviction occurred.[22] The passage of time always produces new technological developments that defendants can claim will help establish their innocence. Unless prosecutors adopt a bright-line rule that "what's done is done," they must identify criteria for determining when these developments justify a new prosecutorial response.

B. Requests for Prosecutorial Assistance by a Defendant or Persons Associated with a Defendant

The DNA issue highlights another series of prosecutorial dilemmas regarding how prosecutors should respond to requests for assistance by convicted defendants (or persons associated with the defendants). The defendant in the rape hypothetical may ask the prosecutor to take active steps to assist him—in particular, to conduct DNA tests to determine who actually was the rapist. At least at some level, such a request is justified when the prosecutor has exclusive

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21. According to the Innocence Project, 123 convicted defendants have been exonerated through the use of DNA evidence. *See* Innocence Project, Case Profiles: Featured Cases, *at* http://www.innocenceproject.org/case/index.php (last visited Mar. 13, 2005); *see also* Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 336 (2002) (commenting that, since the late 1980s, DNA typing has been used to exonerate over one hundred defendants in the U.S.).

22. This includes such forensic developments as fingerprinting, blood-typing, paraffin-testing, and polygraphs.

control of the material in question (the semen and alternative suspect) and the convicted defendant lacks the resources to perform the investigative steps himself.

Alternative scenarios are possible, however. The defendant may simply ask the prosecutor to cooperate in, or not impede, his own investigation. He may, for example, ask the prosecutor to provide access to the preserved sample, so that defendant's expert can conduct his own tests at defendant's cost.

One can envision a variety of similar scenarios in which defendant may request active steps, minimal cooperation, or simply forbearance from interference with a convicted defendant's ongoing investigation. For example, when police involved in the defendant's case have been shown to engage in the same type of misconduct that defendant claims occurred in his case, defendant may ask the prosecutor's office to investigate the police, to make the police available for interrogation, or to open the officers' personnel files to defense investigators.

The form of defendants' requests also can vary. A request for cooperation may come to a prosecutor informally, before any litigation is initiated. Alternatively, a prosecutor may force a defendant to file a habeas corpus petition or new trial motion and then treat the request as one for discovery. Where the requested evidence is speculative, in the sense that its importance cannot be determined until investigation is undertaken, courts are unlikely to entertain discovery requests unless the defendant can offer independent new evidence establishing likely innocence.[23] The prosecutor's decision to decline cooperation initially thus can effectively prevent defense efforts to obtain the new information.[24]

Of course, defendants or their representatives may ask prosecutors for even more. Depending on the nature of the new information, a defendant may implore a prosecutor to assist the defendant actively, by joining in a motion for a new trial, seeking dismissal of a case after-the-fact, or providing favorable recommendations in parole or pardon settings. Prosecutors are almost never legally required to provide such assistance,[25] but they

23. *See* notes 45 and accompanying text.

24. *See* Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 CAL. W. L. REV. 389, 393 (2002) (arguing that "the likelihood of success [in postconviction claims] can be dramatically affected by how the government responds").

25. The main exception occurs when prosecutors make enforceable promises during plea bargaining, such as an agreement to help a defendant seek a departure from sentencing guideline limitations in exchange for cooperation. *See infra* text accompanying note 101.

sometimes provide it nonetheless. The sole source of any obligation to act is the prosecutor's general ethical duty to see that justice is done.

C. Changes in the Law

There are at least two kinds of changes in the law that can affect a convicted defendant's situation in a way that implicates prosecutorial obligations. First, the substantive law governing defendant's crime and sentence may have been amended, but not retroactively. Thus, for example, a jurisdiction might legalize marijuana use or reduce the penalty from felony to petty misdemeanor status, but not authorize the release or resentencing of persons convicted under the old law.[26] Second, statutory or decisional law governing discovery may change in a manner that would have allowed a defendant to obtain or introduce particular evidence that was denied at the time of trial.

At a minimum, these changes alter the equities surrounding the defendant's incarceration. They may also suggest that the prior conviction was unfair, though legal redress is no longer possible. The prosecutor may be in a unique position to change the defendant's situation or to provide him with access to evidence that the defendant could not force the prosecutor to produce.

D. Changes in the Equities

One can imagine numerous scenarios in which a properly convicted defendant might have an equitable claim to mercy on the part of a prosecutor. A fully rehabilitated defendant might seek a prosecutor's assistance in obtaining a parole or pardon. The world's view of the seriousness of the defendant's crime may have changed since the conviction, as in the marijuana example discussed above[27] and in cases involving consensual homosexual sodomy[28] and physician-assisted suicide.[29] The defendant may perform acts

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26. Alternatively, the range of permissible sentences, or sentences mandated under sentencing guidelines, might be amended.

27. *See supra* text accompanying note 26.

28. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986) and holding unconstitutional laws criminalizing homosexual sodomy).

29. *See, e.g.*, C. Ann Potter, Esq., *Will the "Right to Die" Become a License to Kill? The Growth of Euthanasia in America*, 19 J. LEGIS. 31, 46-50 (1993) (noting the gradual transformation of American attitudes regarding euthanasia); Deborah Sharp, *Senior Suicides to Increase as America Ages; Rate is 50% Higher than the Other Age Groups, and Baby Boomers Are Just Beginning to Gray*, USA TODAY, Feb. 20, 2003, at A3 (stating that, despite overwhelming disapproval of suicide generally, there has been growing acceptance of physician-assisted suicides); *cf.* Jeffrey Kuhner, *Ageism: The Overlooked Discrimination*, NATIONAL POST, Apr. 4,

beneficial to society that deserve acknowledgment, either morally laudable acts or acts of cooperation with police and prosecutors in dealing with the criminal conduct of others.[30] Additionally there may be equitable reasons for a defendant's release from prison to benefit third persons—as in the case of a dying spouse or child.

Typically, corrections officials, parole boards, and pardoning authorities control postconviction release. Nevertheless, prosecutors sometimes can play a role, particularly when the grounds for release are predicated on equities arising from legal issues (such as changes in prosecution policies regarding the crime for which the defendant has been convicted). Thus, prosecutors sometimes must decide whether justice requires them to take action that would help a defendant directly or that would confirm information that might support his pleas for assistance to other agencies.

E. Postconviction Proceedings Disadvantageous to Defendants

It is common for observers thinking about prosecutors' postconviction obligations to focus upon prosecutorial action that is necessary to correct flaws in prior proceedings that injured a vulnerable defendant. The opposite scenario also is plausible, however. The prior proceedings may properly have convicted a defendant but not have gone far enough in addressing his crime. Prosecutors might have a role to play in assuring that additional steps are taken.

Consider, for example, a case in which victims of criminal conduct seek civil remedies against a convicted defendant. What, if any, is the obligation of the prosecutor to provide information pertinent to a parallel civil lawsuit, a request for a future restraining order, or a demand for custody of children whose parent is incarcerated? Before conviction, a prosecutor's obligations arguably are limited by her need to preserve the sanctity of her evidence for trial and by the importance of maintaining objectivity in prosecutorial decisionmaking. Once the conviction is complete, this calculus changes. The interests of the victims may assume more importance relative to those of the defendant or the state.

Similarly, even after guilt has been firmly established and the initial sentence set, the contours of a defendant's sentence usually

2002, at A19 (describing the growing acceptance of euthanasia as a sign of declining concern for the aged).

30. Consider, for example, whether prosecutors and other law enforcement personnel should be able to compensate a prisoner who has shown signs of rehabilitation and saves the lives of hostages during a prison riot.

remain flexible. Pardon, parole, and other sentence-reduction procedures will be available. Does a prosecutor owe it to the victims or to the state to become involved in disputing a defendant's claim for mercy?

Finally, prosecutors might have a role to play in ancillary proceedings that flow from criminal convictions. Recent Supreme Court decisions, for example, have separated civil commitment of sex offenders from criminal prosecutions,[31] but they both serve the function of incapacitating defendants from committing further crimes. Likewise, registration of sex offenders after their release from incarceration is designed to deter future misconduct and protect future victims. Arguably, a prosecutor's duty to do justice encompasses at least some consideration of whether she should involve herself in such complementary proceedings, either because of her obligations to the victims or her responsibility to further the original state interests.

F. Actions Benefiting Victims of the Crime or Conviction

The previous section alluded to civil proceedings that can benefit victims or victim interests. As discussed, prosecutors at times may have some obligation to side with victims, and against the defendant, in pursuing these alternative mechanisms for redress. There are, however, other more neutral actions prosecutors might take to assist innocent persons who are victims of the initial crime or who have been injured by their relationship to the prosecution and conviction.

Must a prosecutor, for example, notify victims and witnesses of a defendant's release from incarceration?[32] Arguably, this is a job for corrections officials or police. The prosecutor, however, may have dealt most with the affected persons. She may also be the only governmental actor who has maintained contact with them.[33]

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31. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 369-71 (1997) (holding that post-incarceration "civil" commitment of a "sexually violent predator" did not constitute double jeopardy).

32. *Cf.* Pusey v. City of Youngstown, 11 F.3d 652, 657 (6th Cir. 1993) (holding that a prosecutor's failure to inform the victim's mother of possible reduction of charges against her son's killer did not deprive her of any procedural or substantive due process rights); Proposed Victims' Rights Amendment, S.J. RES. 1, 108th Cong. (2004) (proposing a constitutional amendment that would state, *inter alia*, that "[a] victim of violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused").

33. Thus, for example, the prosecutor may be the only law enforcement official who knows of victims' addresses or telephone numbers.

To the extent the prosecutor has made promises to take particular steps to victims, witnesses, or even the defendant (e.g., in plea bargaining), the potential obligation to carry through on those steps becomes more concrete.[34] Consider this range of promises and pseudo-promises:

> A prosecutor promises not to prosecute a defendant's spouse or child if he pleads guilty;[35]
>
> A prosecutor promises a defendant who is a single mother that her child will not be taken away if she pleads guilty to a misdemeanor;
>
> A prosecutor suggests that the two above results will occur, but makes no direct promise (though she is aware that the defendant understands her comments as a promise).

Only in the first situation can the prosecutor actually control the outcome. But she can influence the outcome in all three situations. Even if the prosecutor would have had no obligation to pursue those outcomes had she not induced the defendant's plea, the question arises whether her statements give rise to new or supplemental obligations.

Consider a related, but perhaps even more difficult question: does a prosecutor have any responsibility to assist persons who are injured by a defendant's incarceration? An innocent wife or children of a defendant, for example, may become homeless as a result of his conviction.

Does the answer change if the very thrust of the prosecution was to punish a parent for conduct that injured a child[36] or to remove a parent from the home?[37] Social service agencies may be available to deal with the situation, which suggests that the government's role in the postconviction matter has been assigned to someone other than the prosecutor. But the prosecutor at least may owe the affected third-

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34. *See infra* Part III.C. (citing authorities regarding plea bargaining promises).

35. *See, e.g.*, Martin v. Kemp, 760 F.2d 1244, 1245-1247 (11th Cir. 1985) (promised dismissal of charges against defendant's pregnant wife); Harman v. Mohn, 683 F.2d 834, 835 (4th Cir. 1982) (promise to dismiss a pending indictment against the defendant's wife); Allyn v. Comm'r. of Corr. Servs., 708 F. Supp. 592, 593 (S.D.N.Y. 1989) (promise to allow the defendants' daughter to plead to a reduced charge).

36. Such conduct might include child abuse or neglect.

37. In an episode of the television series *The Practice*, for example, a prosecutor insisted on criminally prosecuting Christian Science parents of a child who refused to authorize medical attention for their child because of their religious beliefs. As a result of the prosecution, both loving parents were (at least in theory) incarcerated, leaving the child homeless and parentless. *The Practice: The Cradle Will Rock* (ABC television broadcast, Oct. 20, 2002).

party the effort to make sure that the independent agency becomes properly involved, or that it can perform its functions effectively.[38]

In part, this last set of issues becomes interesting because the prosecutor's own proper conduct in convicting a defendant sometimes will have contributed to the third party's injury. Perhaps the prosecutor took the potential for injury into account when screening the case and making sentencing recommendations. The actual plight of the third party will have changed after sentencing, however, perhaps even in a way that the prosecutor did not intend.[39] The question then becomes whether new prosecutorial obligations arise.

III. THE LIMITED LAW GOVERNING PROSECUTORS' POSTCONVICTION OBLIGATIONS

Prosecutors' obligations in most of the scenarios discussed above are subject entirely to prosecutorial discretion. Prosecutors generally have no legal duty to act for or against convicted defendants or in connection with ancillary proceedings. There are, however, a few areas in which one might expect to find some law governing prosecutorial conduct—in particular, obligations with respect to (1) exculpatory or potentially exculpatory information, (2) promises prosecutors have made to defendants or third parties, and (3) the ability of prosecutors to participate, or not participate, in proceedings indirectly related to the criminal prosecutions. Surprisingly, the law is sparse even in these areas. The following subsections describe the legal landscape.

A. Procedural Background

A prosecutor who learns of even fully exculpatory evidence does not have personal authority to release a convicted defendant. The ordinary procedure for adjusting a conviction is for a defendant to bring a motion to vacate the judgment and for a new trial (with or

38. For example, a prosecutor's refusal to offer use immunity to defendants in child abuse actions typically prevents those defendants from speaking with social service agencies or family courts that must decide whether children should be removed from the defendants' custody. The defendants' cooperation, in fact, may be essential to determining what truly is in the best interests of the children.

39. The fact that a parent has injured a child once, for example, does not always mean that terminating custody is best for the child, particularly if the criminal conduct stemmed from a curable disability on the parent's part (e.g., substance abuse). Prosecutors, therefore, may incur some obligation to supervise the effects of their ongoing or completed prosecution of the parent upon ancillary custody proceedings. Often, however, prosecutors ignore those effects and artificially deem the prosecutions separate from the child-protective proceedings.

without the prosecutor's blessing).[40] Only once a court grants that motion does the prosecutor regain the discretion to dismiss or to negotiate a result that she had before conviction.[41]

The law governing motions for new trial is highly disadvantageous to convicted defendants. Many jurisdictions forbid such motions after the expiration of statutory deadlines,[42] although even these jurisdictions often find ways to allow patently innocent defendants to avoid a limitations period.[43] More importantly, petitioners must establish not only that the proffered evidence is admissible and new (i.e., was not available at the time of trial),[44] but also that the evidence, had it been available, probably would have produced a different result.[45] Although a prosecutor's consent to a

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40. *E.g.*, FED. R. CRIM. P. 33 (2003) (providing procedures for requesting a new trial); CAL. PENAL CODE § 1201.5-1202 (2003) (notes of decisions commenting on motion to vacate and new trial motions respectively); FLA. R. CRIM. P. 3.600 (2004) (providing grounds for a new trial); 725 ILL. COMP. STAT. 5/116-1 (2003) (providing rules for making a motion for a new trial); N.Y. CRIM. PROC. § 440.10 (2003) (providing procedures for making a motion to vacate).

41. *See, e.g.* Tafero v. State, 406 So. 2d 89, 94 n.11 (Fla. Dist. Ct. App. 1981) ("[T]he fact that the state agrees that a conviction should be set aside because of newly discovered evidence neither prevents the entry of the original judgment nor fosters the rule of finality."); *cf.* Holland v. State, 729 S.W.2d 366, 370 (Tex. Ct. App. 1987) (stating that the prosecutor's acquiescence to a motion for a new trial "would not have eviscerated the trial court's discretion").

42. Under federal law, new trial motions based on newly discovered evidence must be brought within three years of conviction. FED. R. CRIM. P. 33 (2003). The majority of states have adopted statutes of limitation ranging from fifteen days to three years. *See, e.g.*, MINN. R. CRIM. P. 26.04(3) (2003) (fifteen day limit); NEB. REV. STAT. § 29-2103 (2003) (3 year limit); *see also* DONALD E. WILKES, STATE POSTCONVICTION REMEDIES AND RELIEF § 1-13, at 56 (2001) (cataloguing state statutes and noting that only nine states allow defendants to seek new trials at any time); *cf.* Workman v. State, 41 S.W.3d 100, 103 (Tenn. 2001) (rejecting the application of a statute of limitations on the basis that "the [defendant's] interest in obtaining a hearing to present newly discovered evidence that may establish actual innocence of a capital offense far outweighs any governmental interest in preventing the litigation of stale claims").

43. *See, e.g.*, State v. Mooney, 670 S.W.2d 510, 515 (Mo. Ct. App. 1984) ("[T]here is authority for an appellate court, in a proper case, to grant a motion to remand a case to the trial court to enable an appellant to move for a new trial based on newly discovered evidence, after the [deadline for appellate review has expired].").

44. *See, e.g.*, U.S. v. Battle, 264 F. Supp. 2d 1088, 1208 (N.D. Ga. 2003) (considering "newly discovered evidence" because it did not exist at the time of trial); People v. Wise, 752 N.Y.S.2d 837, 847-48 (N.Y. Sup. Ct. 2002) (finding DNA evidence pertinent to a new trial motion because it was not previously available); *see also* John A. Glenn, J.D., Annotation, *What Constitutes "Newly Discovered Evidence" Within the Meaning of Rule 33 of Federal Rules of Criminal Procedure Relating to Motions for New Trial*, 44 A.L.R. FED. 13, 19 (1979) (discussing the meaning of newly discovered evidence).

45. *See, e.g.*, FLA. R. CRIM. P. 3.600 (2003) (requiring a showing that the evidence probably would have changed the verdict); LA. CODE CRIM. PROC. ANN. art 851 (2004) (requiring evidence that would "probably have changed the verdict or finding of guilty."); N.Y. CRIM. PRO. § 440.10 (2003) (requiring new evidence that would produce a verdict more favorable to the defendant); United States v. Seago, 930 F.2d 482, 491 (6th Cir. 1991) (stating that evidence not likely to produce an acquittal is insufficient to merit a new trial); United States v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980) (requiring a showing that new evidence "will probably result in an acquittal

motion for a new trial may have persuasive effect on a judge making these determinations,[46] it does not change the standard that the court must apply.[47] When a defendant and prosecutor agree that a manifest injustice occurred but jurisdictional and judicial impediments prevent access to a new trial, the only recourse may be to seek pardon or clemency from the executive branch.[48]

In some jurisdictions, procedural mechanisms exist through which defendants can use new evidence to attack their convictions or sentences,[49] but most of these are freighted with obstacles similar to those hindering new trial motions. In the federal system, collateral attacks are possible through habeas corpus statutes.[50] These require a

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upon retrial" in order to succeed on a motion for a new trial); United States v. Gonzalez, 933 F.2d 417, 448 (7th Cir. 1991) (arguing that the availability of new evidence that was "merely impeaching" was insufficient to show that the verdict would have been different and thus does not merit a new trial (quoting United States v. Van Daal Wyk, 840 F.2d 494, 500 (7th Cir. 1988))); Jones v. Texas, 711 S.W.2d 35, 37 (Tex. 1986) (stating that if new evidence is "not such as would probably bring about a different result upon a new trial, it is within [the trial court's] discretion to deny the motion [for a new trial]").

46. *See, e.g.*, State v. Hursey, 861 P.2d 615, 619 (Ariz. 1993) (overruling the trial court's refusal to follow the state's recommendation of a new trial based on the state's recognition of a prosecutor's conflict of interest); *see also* Commonwealth v. Williams, 471 N.E.2d 394, 395 (Mass. App. Ct. 1984) (reversing a conviction based, in part, on the prosecutor's request that the appeal be dealt with summarily, and noting that state "confessions of error are entitled to be given great weight"); Holly Schaffter, Note, *Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 DRAKE L. REV. 695, 720 (2002) (noting that "it has been the experience of many defense attorneys that few judges are willing to order DNA testing for a habeas petition without the consent of the prosecutors").

47. *See supra* note 45.

48. In one recent case, judicial relief was unavailable to a defendant sentenced to the death penalty after the courts denied his requests for DNA analysis of evidence pertinent to his conviction. *See* Shannon Tan, *Inmate's Allies Seek DNA Test; Analysis of Blood on Man's Shorts Could Clear Condemned Man*, INDIANAPOLIS STAR, July 24, 2003, at B04 (reporting on the necessity of DNA testing for the defendant's clemency hearing); Thomas Vanes, *Let DNA Close Door on Doubt in Murder Cases; Before a Prisoner Is Executed, Justice Often Demands That Critical Test*, L.A. TIMES, July 28, 2003, at B11 (commenting on the denial of the defendant's request for DNA analysis of evidence). A prosecutor and jurors in the defendant's case, who believed that DNA evidence might have made a difference in the decision to seek execution, joined in asking the parole board to recommend to the governor that he stay execution pending testing. Lois Romano, *Indiana Governor Delays Execution for DNA Testing*, WASHINGTON POST, July 29, 2003, at A02 (reporting governor's stay of execution "just hours after the prosecutor who had sought the death penalty as well as a juror took the unusual step of pleading with the state parole board to spare Darnell Williams").

49. *See, e.g.*, Sample v. State, 82 S.W.3d 267, 274 (Tenn. 2002) (citing Workman v. State, 41 S.W.3d 100 (Tenn. 2001) for the proposition that "due process mandate[s] an exception to the one-year statute of limitations where a petitioner in a capital case s[eeks] a writ of error coram nobis based on newly discovered evidence of actual innocence"); Reedy v. Wright, No. CL00000-23, 2002 WL 598434, at *4 (Va. Cir. Ct. Apr. 8, 2002) ("[C]ases are decided from time to time which hold that, when no other form of judicial relief is available to a prisoner who is actually innocent, *coram nobis* will fill the gap.").

50. *E.g.*, 28 U.S.C. §§ 2254, 2255 (2004) (establishing rules for writs of habeas corpus regarding prisoners in state and federal custody).

defendant to establish constitutional or other prejudice that infected the trial process with error.[51] Only a minority of federal circuits recognize the possibility of postconviction relief based solely on proof of innocence.[52]

All states have collateral attack provisions. Some jurisdictions permit collateral attacks to be used to circumvent time limitations governing the filing of new trial motions.[53] But these mechanisms typically impose the same presumptions as those in effect under the new trial statutes: defendants must establish the probability that a new trial would lead to a different result.[54]

In many jurisdictions, defendants can seek to have their sentences reduced based on new information.[55] The position of

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51. *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 400 (1993) (holding that maintaining a conviction in the face of new evidence does not in and of itself constitute a constitutional due process violation); United States v. Frady, 456 U.S. 152, 170 (1982) (requiring a showing that "that the errors at . . . trial . . . worked to [an] *actual* and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions"); *see also* DONALD E. WILKES, JR., FEDERAL POSTCONVICTION REMEDIES AND RELIEF § 4-4, at 171 (1996) (describing collateral proceedings as attacks based on jurisdictional, constitutional, or other fundamental errors). Under recent legislation, some federal collateral attacks are now subject to a one year statute of limitations. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, tit. 1, § 105, 110 Stat. 1214, 1220 (1996) (adding a one year statute of limitations for relief under 28 U.S.C. § 2255 which, prior to 1996, allowed "relief [to be ordered] at any time").

52. *See* WILKES, *supra* note 51, § 4-4 at 172 & n.13 (identifying circuits in which new proof of innocence alone can justify relief).

53. *See, e.g.*, People v. Washington, 665 N.E.2d 1330, 1336-37 (Ill. 1996) (holding that a claim of innocence based on newly-discovered evidence raises a constitutional issue under Illinois' due process clause); *accord In re* Clark, 855 P.2d 729, 749-50 (Cal. 1993) (finding a delay in filing a habeas petition to be justified when the petitioner "had good reason to believe other meritorious claims existed, and . . . the existence of facts supporting those claims could not with due diligence have been confirmed at an earlier time"); Miller v. Comm'r., 700 A.2d 1108, 1132 (Conn. 1997) (affirming the grant of a writ of habeas corpus where the "habeas petitioner has established by clear and convincing evidence that he is actually innocent"); *see also* WILKES, *supra* note 51, § 1-5 (cataloguing state provisions).

54. *See, e.g.*, Trepal v. State, 846 So. 2d 405, 438 (Fla. 2003) (Pariente, J., concurring) (imposing a requirement of likelihood that the trial would have produced a different result); Foley v. Commonwealth, 17 S.W.3d 878, 888 (Ky. 2000) (finding that new evidence regarding the victim's state of mind would not have changed the verdict); *In re* Personal Restraint of Gentry, 972 P.2d 1250, 1260 (Wash. 1999) ("[The] question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995))).

55. *See, e.g.*, People v. Dunlop, 36 P.3d 778, 780 (Colo. 2001) (holding that a resentencing court may consider new evidence); State v. Rome, 5 P.3d 515, 518 (Kan. 2000) (affirming an increased sentence by holding that a resentencing court should consider all facts existing at the time of the original sentencing, not simply what the state was aware of, regardless of whether those facts were admitted at the original sentencing hearing); State v. South, 427 S.E.2d 666, 670 (S.C. 1993) (allowing resentencing in capital cases based on newly discovered evidence that probably would have changed the original sentencing); State v. Thomas, 991 P.2d 870, 877-878 (Idaho Ct. App. 1999) (allowing a defendant to challenge a sentence as excessive in light of new

prosecutors regarding resentencing has the same impact as at the original sentencing. The right to challenge a sentence, however, typically is strictly limited to 120 days, or less, from the date a conviction becomes complete.[56]

B. The Law Governing Prosecutorial Disclosures

The procedural background just discussed illustrates that prosecutors do not unilaterally control review of defendants' convictions. As a consequence, prosecutors must often consider what legal obligations they have at least to disclose information that might help defendants seek redress on their own. Pre-conviction, prosecutors' duties are prescribed by discovery rules, none of which apply in the postconviction context, and by constitutional *Brady* requirements that sometimes mandate the disclosure of truly exculpatory evidence.

1. Exculpatory evidence

Suppose that, after conviction, [57] a prosecutor for the first time receives exculpatory evidence that fits within *Brady's* requirements in all respects.[58] Must she disclose it to the convicted defendant?

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evidence); *see also* Reeves v. State, 5 S.W.3d 41, 44 (Ark. 1999) (recognizing that ARK. CODE ANN. § 16-90-11 (2003) allows resentencing at any time to correct an illegal sentence while in custody but holding that this does not apply to claims consisting solely of a plea of innocence); WILKES, *supra* note 51, § 1-5, at 17 (identifying state provisions regarding resentencing). After the adoption of the federal sentencing guidelines, a new federal rule limited the power of federal judges to resentence. FED. R. CRIM. P. 35 (amended 1985; repealed, as to future offenses, 1987).

56. *See, e.g.*, CAL. PENAL CODE § 1170(d) (West 2003) ("[T]he court may, within 120 days of the date of commitment ... recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced."); COLO. R. CRIM. P. 35(b) (2003) (authorizing resentencing within 120 days after the sentence is imposed); KAN. ST. § 21-4603(d) (2003) (authorizing modifications of sentences within 120 days after a sentence is imposed); *cf.* FED. R. CRIM. P. 35 (1987) (pre-guidelines rule, now amended, which allowed resentencing for 120 days). Under some modern "innocence statutes," however, courts that are presented with exculpatory DNA evidence are in some cases permitted to resentence defendants at any time. *See, e.g.*, KAN. STAT. ANN. § 21-2512(a), (f)(2) (2003) (directing courts, in light of exculpatory DNA evidence in rape or murder cases, to "enter any order that serves the interests of justice, including, but not limited to" an order vacating the judgment, discharging the petitioner from custody, resentencing him, or granting a new trial); S.B. 390, 46th Leg., 1st Reg. Sess. (N.M. 2003) (enacted) (to be codified at N.M. STAT. ANN. § 31-1a-1) (Michie 2003) (authorizing courts to set aside a judgment, dismiss the charges, or order other appropriate relief); WIS. STAT. § 974.07(10) (2003) (authorizing court "to enter any order that serves the interest of justice," including vacating the sentence).

57. There is case law suggesting that the *Brady* obligations continue during the period after conviction, but before appeals are complete. *See, e.g.*, Smith v. Roberts, 115 F.3d 818, 819-20 (10th Cir. 1997) (stating that the duty to disclose continues while a direct appeal is pending); Gauger v. Hendle, No. 99 C 50322, 2002 U.S. Dist. LEXIS 18002, at *18-19 (N.D. Ill. Sept. 24,

The law on this issue is unsettled. Dicta in the Supreme Court's decision in *Imbler v. Pachtman*[59] and a few other cases[60] provide superficial support for the notion that the obligation to disclose is perpetual. But no court has directly applied *Brady* to the postconviction context, and most courts agree that *Brady*'s applicability is unsettled even with respect to the period in which direct appeals are still pending.[61] Nor has any court found any legal obligation requiring prosecutors to disclose less-than-exculpatory information—for example, information that simply suggests some corruption or defect in the conviction process.

2002) (noting that *Brady* forbids the suppression of exculpatory evidence postconviction); Monroe v. Butler, 690 F.Supp. 521, 525 (E.D. La. 1988) ("The prosecutor's duty to disclose material, exculpatory evidence continues through the period allowed by the State for post-conviction relief."), *aff'd*, 883 F.2d 331 (5th Cir. 1988), *cert. denied*, 487 U.S. 1247 (1988).

58. For purposes of this Article, there is no need to focus on the details of *Brady*'s requirements, including the elements of materiality and a timely request for information. *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 280 (1999) (refining *Brady's* materiality requirement); Kyles v. Whitley, 514 U.S. 419, 434-48 (1995) (explaining materiality); United States v. Agurs, 427 U.S. 97, 106-09 (1976) (discussing when *Brady* requires a request by the defendant for the evidence in question); *see also* Michael E. Gardner, Note, *An Affair to Remember: Further Refinement of the Prosecutor's Duty to Disclose Exculpatory Evidence*, 68 MO. L. REV. 469, 472-74 (2003) (describing the evolution of *Brady's* requirements). Nor do we need to focus on situations in which the defendant learns after conviction (and then raises in a collateral proceeding) that the prosecutor had information at a pre-conviction stage that should have been disclosed. *See, e.g.*, Monroe v. Blackburn, 476 U.S. 1145, 1147 (1986) (Marshall., J., dissenting) (arguing in favor of granting habeas relief); State v. Hughes, No. 62884, 1993 Ohio App. LEXIS 5277 (Ohio Ct. App. Nov. 4, 1993) (reversing postconviction relief that had been granted because of a prosecutor's failure to disclose exculpatory evidence prior to trial).

59. 424 U.S. 409, 427 n.25 (1976) ("[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.").

60. *See, e.g.*, Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) ("[T]he duty to disclose [exculpatory information] is ongoing."); Smith v. Roberts, 115 F.3d 818, 820 (10th Cir. 1997) (stating that the duty to disclose exculpatory information "extends to all stages of the judicial process"); Monroe v. Butler, 690 F. Supp. 521, 525 (E.D. La.), *aff'd*, 883 F.2d 331 (5th Cir.), *cert. denied*, 487 U.S. 1247 (1988) ("[N]ondisclosure is as unfair where it prevents defendant from taking full advantage of postconviction relief as it is when it results in the forfeiture of the defendant's right to a fair trial."); People v. Garcia, 17 Cal.App.4th 1169, 1179-83 (Cal. Ct. App. 1993) (quoting *Imbler* for the proposition that the duty of disclosure does not end with the completion of a trial).

61. *See, e.g., Gauger*, 2002 U.S. Dist. LEXIS 18002, at *39 ("The few cases . . . simply do not address the timing question."); Commonwealth v. Brison, 618 A.2d 420, 425 (Pa. Super. Ct. 1992) (holding on appeal that "principles of justice" necessitated a remand to allow DNA tests to be conducted); *see also* Todd E. Jaworsky, Note, *Defendant's Right to Exculpatory Evidence: Does the Constitutional Duty to Disclose Exculpatory Evidence Extend to New Evidence Discovered Post-conviction*, 15 ST. THOMAS L. REV. 245, 248-63 (2002) (arguing that the duty to disclose should be extended to the post-conviction stage); Brian T. Kohn, Brady *Behind Bars: the Prosecutor's Disclosure Obligations Regarding DNA in the Post-Conviction Arena*, 1 CARDOZO PUB. L. POL'Y & ETHICS 35, 38 (2003) (arguing that, despite contrary case law, "the obligation of prosecutors to turn over exculpatory evidence extends beyond a defendant's criminal conviction").

The cases do refer to one postconviction setting in which *Brady*'s disclosure obligation might apply. When a convicted defendant files a collateral attack within statutorily prescribed time limits and the prosecutor comes into possession of exculpatory evidence that would help the defendant establish an element of the collateral claim itself, disclosure may be required.[62] On occasion, a defendant can use this requirement as a bootstrap to obtain disclosure of exculpatory information relating to the underlying conviction. In *Thomas v. Goldsmith*,[63] for example, a federal habeas corpus petitioner sought the production of a semen sample in the prosecutor's possession to prove that he was innocent of state charges and thereby could satisfy the "manifest injustice" requirement for federal habeas corpus relief. While rejecting this broad discovery demand, the Ninth Circuit Court of Appeals held that the prosecutor was:

> under an obligation to come forward with any *exculpatory* semen evidence in its possession. See *Brady v. Maryland*, ... 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.[64]

2. The special case of DNA evidence

In recent times, the most highly publicized postconviction justice issue has been prosecutors' alleged obligation to participate in identifying DNA evidence that might exonerate defendants convicted before DNA evidence was available or widely admissible.[65] This issue

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62. *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992).

63. *Id.* at 746-48.

64. *Id.* at 749-50; *see also* Monroe v. Butler, 690 F. Supp. 521, 525 (E.D. La. 1988) (finding a *Brady* violation during the pendency of postconviction relief proceedings on the basis that "[t]he prosecutor's duty to disclose material, exculpatory evidence continues through the period allowed by the State for post-conviction relief," but denying a request for a new trial); Sewell v. State, 592 N.E.2d 705, 707 (Ind. Ct. App. 1992) (holding that exculpatory DNA evidence in the state's possession, and unavailable to the defendant at trial, is discoverable in collateral attack in order to challenge a conviction).

65. *See generally* Keith A. Findley, *Learning From Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333 (2002) (discussing the role of prosecutors in bringing to light DNA evidence to exonerate defendants convicted where DNA evidence was unavailable during their trial); Goldberg & Siegel, *supra* note 24 (same); Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and DNA Testing*, 151 U. PA. L. REV. 547 (2002) (analyzing and arguing in favor of several possible legal theories that might support access to DNA for postconviction testing); Daniel S. Medved, *The Zeal Deal; Prosecutorial Resistance to Postconviction Claims of Innocence*, 84 B.U. L. REV. 125, 129 (2004) (examining the "question of why prosecutors may turn a blind eye to postconviction allegations of innocence"). Much of the interest in the issue has been prompted by the work of the Innocence Project, which is devoted to addressing cases in which defendants have been falsely identified and convicted. *See* Innocence Project, Case Profiles, (providing examples of cases in which

is distinct from a *Brady* claim, because *Brady* involves evidence that a prosecutor knows to be both material and actually exculpatory. Genetic samples meet neither requirement until they are tested and shown to be helpful to the defense. Moreover, *Brady* requires only that prosecutors disclose information in their possession, not that they investigate or order testing that might produce exculpatory evidence (which is what persons claiming a right to DNA testing usually seek). Thus, despite the wishes of some courts and commentators to the contrary,[66] *Brady* and its progeny *alone* do not establish a prosecutorial duty to make genetic samples available for testing or to conduct DNA testing.[67]

Nevertheless, the DNA issue is *sui generis*, for a variety of reasons. First, DNA evidence often is more conclusive than other types of evidence.[68] Second, as a practical matter, recent events have suggested that the full availability and use of DNA evidence would correct a fair number of unjust convictions, particularly in cases that tend to be among the most serious.[69] Finally, because of the cost of private genetic testing, in most cases only the government has the resources to perform the tests.[70] Prosecutors' willingness to release the samples for testing and/or to authorize government testing therefore assumes particular significance.

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defendants have been falsely identified and convicted) *at* http://www.innocenceproject.org (last visited Mar. 13, 2005).

66. *See, e.g.*, Jennifer Boemer, *Other Rising Legal Issues: In the Interest of Justice: Granting Postconviction Deoxyribonucleic Acid (DNA) Testing to Inmates*, 27 WM. MITCHELL L. REV. 1971, 1984-85 (2001) (recognizing the uncertainty in the law, but citing cases that involve direct appeals and collateral attacks for the proposition that courts have applied *Brady* postconviction); Cynthia Bryant, Note, *When One Man's DNA Is Another Man's Exonerating Evidence: Compelling Consensual Sexual Partners of Rape Victims to Provide DNA Samples to Postconviction Petitioners*, 33 COLUM. J. L. & SOC. PROBS. 113, 128 (2000): ("The application of the *Brady* obligation to requests for postconviction DNA testing is potentially problematic," but asserting that courts "have granted requests for postconviction DNA testing, however, even in cases in which the prosecution raised [objections]. Thus, a Brady claim is a feasible means for requesting postconviction access to crime scene evidence"); *cf.* Kreimer & Rudovsky, *supra* note 65, at 581 n.134 (stating that "precedent supports an affirmative disclosure obligation when exculpatory evidence surfaces after conviction.").

67. *See, e.g.*, Harvey v. Horan, 278 F.3d 370, 376 (4th Cir. 2002) (rejecting a claim that DNA evidence is newly discovered evidence when petitioner had the benefit of "testing using the best technology available at the time [the] conviction became final").

68. That is, in cases in which identity was an issue.

69. *See supra* note 21.

70. *See, e.g.*, Kreimer & Rudovsky, *supra* note 65, at 561 n.49 (discussing the costs of DNA testing); Medved, *supra* note 65, at 149 ("With regard to post-conviction requests for DNA testing, moreover, the financial costs associated with such tests may concern prosecutors."); Charlotte J. Word, *The Future of DNA Testing and Law Enforcement*, 67 BROOK L. REV. 249, 251 (2001) (discussing the current and future costs of DNA testing).

a. Innocence statutes

Many states have addressed the issue of postconviction availability of genetic samples and testing through so-called "innocence" statutes.[71] The requirements of these statutes vary, many limiting applications for relief to felons.[72] All states at a minimum require applicants to show that identity was in dispute at their trial, that favorable DNA evidence would be relevant and non-cumulative,[73]

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71. By most recent count, thirty-six jurisdictions have some form of statute that addresses the issue of postconviction DNA testing. ARIZ. REV. STAT. § 13-4240 (2003); ARK. CODE ANN. §16-112-201 (2003); CAL. PEN. CODE § 1405 (2003); S.B. 164, 64th Gen. Assem., 1st Sess. (Colo. 2003) (enacted) (to be codified at COLO. REV. STAT § 18-1-411); 2003 CT. GEN. STAT. ANN. § 52-582 (West 2003); DEL. CODE. tit. 11, § 4504 (2003); D.C. CODE ANN. § 22-4133 (2003); FLA. STAT. ANN. § 925.11 (West 2003); GA. CODE ANN. § 5-5-41(c) (2003); IDAHO CODE § 19-4902 (Michie 2003); 725 ILL. COMP STAT. ANN. 5/116-3 (West 2003); IND. CODE ANN. § 35-38-7 (2003); KAN. STAT. ANN. § 21-2512 (2003); KY. REV. STAT. § 422.285 (Michie 2003); LA. CODE CRIM. PROC. ANN. art. 926.1 (West 2003); ME. REV. STAT. ANN. tit. 15, § 2137 (West 2003); MD. CODE ANN., CRIM. PROC. § 8-201 (2003); MICH. STAT. ANN. § 770.16 (Michie 2003); MINN. STAT. § 590.01 (2003); MO. REV. STAT. § 547.035 (2003); H.B. 77, 2003 Leg., 58th Reg. Sess. § 1 (Mo. 2003); NEB. REV. STAT. § 29-4120 (2003); A.B. 16, 2003 Leg., 72nd Reg. Sess. (Nev. 2003); N.J. STAT. ANN. § 2A:84A-32a (West 2003); N.M. STAT. ANN. § 31-1a-2 (2005); N.Y. CRIM. PROC. LAW § 440.30 (McKinney 2003); N.C. GEN. STAT. § 15A-269 (2003); OKLA. STAT. ANN. tit. 22, § 1371 (2003); OR. REV. STAT. § 138.510 et seq. (2003); PA. CONS. STAT. tit. 42, § 9543.1 (2003); R.I. GEN. LAWS § 10-9.1-11 (2003); TENN. CODE ANN. § 40-30-403 (2003); TEX. CRIM. PROC. CODE ANN. § 64.03 (Vernon 2003); UTAH CODE ANN. § 78-35a-301 (2003); VA. CODE ANN. § 19.2-327.1 (2003); WASH. REV. CODE § 10.73.170 (2003); WI. STAT. ANN. § 974.07 (West 2003); *see also* Goldberg & Siegel, *supra* note 24, at 396-98 (discussing the different forms of innocence statutes); Diana Kanon, Note, *Will the Truth Set Them Free? No, But the Lab Might: Statutory Responses to Advancements in DNA Technology*, 44 ARIZ. L. REV. 467, 471-90 (2002) (discussing the Illinois and New York statutes); Schaffter, *supra* note 46, at 709 (discussing limitations of state statutory remedies); Kathy Swedlow, *Don't Believe Everything You Read; A Review of Modern "Postconviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 356-87 (2002) (reviewing innocence statutes and arguing that their effectiveness is limited by traditional limitations on postconviction relief).

72. *See, e.g.*, CAL. PEN. CODE § 1405(a) (West 2003) (limiting the statute's effect to persons in custody, convicted of a felony); KAN. STAT. ANN. § 21-2512 (2003) (limiting the statute's effect to persons in custody, convicted of murder or rape); KY. REV. STAT. ANN. § 422.285 (Michie 2003) (limiting the statute's effect to persons sentenced to death for a capital offense); H.B. 77, 2003 Leg., 58th Reg. Sess. § 1 (Mo. 2003) (limiting the statute's effect to incarcerated persons serving a felony).

73. Some state courts have interpreted these requirements as foreclosing relief to defendants who confessed or pleaded guilty. *See, e.g.*, State v. Wooten, No. 87S01528DI, 2003 Del. Super. LEXIS 60, at *1-2 (Del. Sup. Ct. Nov. 24, 2003) (holding that defendant's admissions that the evidence against him was "pretty strong" and that he had committed the acts involved in a murder and kidnapping meant that testing would not result in new and non-cumulative evidence); People v. Urioste, 736 N.E.2d 706, 714 (Ill. App. Ct. 2000) (holding that when defendant "raised the question of insanity, he necessarily abandoned the question of who committed the acts charged for purposes of a section 116-3 motion"). *But see* TEX. CODE CRIM. PROC. § 64.03(b) (2003) ("A convicted person who pleaded guilty or nolo contendere in the case may submit a motion under this chapter, and the convicting court is prohibited from finding that identity was not an issue in the case solely on the basis of that plea"); People v. Rokita, 736 N.E.2d 205, 211 (Ill. App. Ct. 2000) (holding that, despite strong evidence of guilt, petitioner was entitled to DNA testing where identity was at issue at trial and the testing had the potential to

and that genetic samples are available.[74] In addition, many of the statutes impose on defendants the obligation to pay for testing unless they are indigent and, even for indigents, appropriations sometimes are unavailable for testing not directed by a prosecutor's office.[75]

The statutes typically give prosecutors a right to be heard on all of these issues.[76] Most jurisdictions that have innocence statutes vest courts with the authority to decide whether testing should be conducted, but at least one state (Washington) places exclusive jurisdiction in the hands of prosecutors' offices and the State Attorney General.[77]

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produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence).

74. Many innocence statutes include a requirement that biological evidence be preserved for a particular period of time. *E.g.*, CONN. GEN. STAT. § 54-102jj(b) (2004) (requiring biological evidence acquired during the investigation to be preserved for the term of defendant's incarceration); MD. CODE ANN., CRIM. PROC. § 8-201(i) (2003) (requiring the preservation of DNA evidence for three years after sentencing or the completion of appeals); NEB. REV. STAT. § 29-4125(1) (2003) (requiring the preservation of DNA evidence during defendant's incarceration)); N.C. GEN. STAT. §15A-268 (2003) (same); R.I. GEN. LAWS §10-9.1-11(a) (2003) (same). *But see* S.B. 164, 64th Gen. Assem., 1st Sess. (Colo. 2003) (enacted) (to be codified at COLO. REV. STAT § 18-1-411) (stating that there is no duty to preserve or liability for failing to preserve DNA evidence after conviction). Others simply authorize courts to require the preservation of evidence once an application for testing is received or require prosecutors to preserve evidence upon notification of the applicants' requests. ARIZ. REV. STAT. § 13-4240(H) (2003) (authorizing preservation orders); IND. CODE ANN. § 35-38-7-14 (West 2003) (authorizing preservation orders); KAN. STAT. ANN. §21-2512(b)(2) (2003) (requiring prosecutors to preserve evidence upon defendant's request); KY. REV. STAT. § 422.285(6) (Michie 2003) (authorizing preservation orders); MAINE REV. STAT. ANN. tit. 15, § 2138(2) (2003) (same); N.M. STAT. ANN. § 31-1a-2 (2005) (same); NEB. REV. STAT. § 29-4120(3) ("[T]he county attorney shall take such steps as are necessary to ensure that any remaining biological material that was secured by the state or a political subdivision in connection with the case is preserved pending tbe completion of proceedings under the DNA Testing Act."); 42 PA. CONS. STAT. ANN. § 9543.1(b) (West 2003) (requiring a prosecutor upon receipt of notice that defendant has filed a petition, to preserve all biological evidence); TENN. CODE ANN. § 40-30-409 (2003) (authorizing preservation orders); UTAH CODE ANN. § 78-35a-301(5) (2003) (imposing a duty upon prosecutors to cooperate in preserving evidence once a petition is filed).

75. Swedlow, *supra* note 71, at 381; *see also* N.J. Stat. 2A:84A-32a § (g)(2003) ("The costs of the DNA testing ordered pursuant to this section shall be borne by the convicted person").

76. *E.g.*, ARIZ. REV. STAT § 13-4240(B)-(C) (2003); CAL. PEN. CODE § 1405(c)(2),(e) (West 2003); FLA. STAT. ch. 925.11(2)(c) (2003); GA. CODE ANN. § 5-5-41(c)(5) (2003); IND. CODE ANN. § 35-38-7-6 (2003); KY. REV. STAT. § 422.285(2) (2003); MD. CODE ANN., CRIM PROC. § 8-201(d) (2003); MINN. STAT. §§ 590.01, 590.03 (2003); MO. REV. STAT. § 547.035(3)-(4) (2003); N.Y. CRIM. PROC. LAW § 440.30 (McKinney 2003); TENN. CODE ANN. § 40-30-405 (2003); UTAH CODE ANN. §§ 78-35a-301(5)-(6), 78-35a-303(1) (2003); VA. CODE ANN. § 19.2-327.1(C) (2003); *cf.* CAL. PEN. CODE § 1405(f)(5) (West 2003) ("The court in its discretion may consider any evidence whether or not it was introduced at trial"); MICH. STAT. ANN. § 770.16(8) (Michie 2003) (requiring courts to stay an order for a new trial pending results of retesting if the prosecutor does not agree with results that exonerate the defendant).

77. WASH. REV. CODE § 10.73.170 (2003).

Most of the modern innocence statutes allow defendants to use successful results of DNA testing as grounds for filing a motion for postconviction relief.[78] States vary widely, however, in their treatment of exculpatory results. A few statutes explicitly authorize postconviction relief even when a new trial motion would normally be time-barred.[79] Others provide broad authorization for court ordered relief.[80] In states without such provisions, it remains unclear whether a defendant can circumvent a statute of limitations on postconviction remedies.[81]

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78. *See, e.g.*, ARIZ. REV. STAT. §13-4240(K) (2003) ("Notwithstanding any other provision of law that would bar a hearing as untimely, if the results of the postconviction deoxyrihonucleic acid testing are favorable to the petitioner, the court shall order a hearing and make any further orders that are required pursuant to this article or the Arizona rules of criminal procedure"); COLO. REV. STAT § 18-1-410 (2004) (authorizing the use of DNA test results as the grounds for filing a motion for post-conviction; relief); IDAHO CODE §19-4902(e) (Michie 2003) ("In the event . . . DNA test results demonstrate, in light of all admissible evidence, that the petitioner is not the person who committed the offense, the court shall order the appropriate relief"); IND. CODE ANN. § 35-38-7-19 (West 2003) (notwithstanding any law that would bar a new trial as untimely, authorizing a court to rely upon favorable DNA testing to order the release of the defendant upon a joint petition of the defendant and the prosecutor or to order a new trial or any other relief that it deems appropriate.)

79. KY. REV. STAT. § 422.285(9) (2003); TENN. CODE ANN. § 40-30-412 (2003); *see also supra* note 76.

80. *See, e.g.*, KAN. REV. STAT. ANN. § 21-2512(f)(2)(B) (Michie 2003) (directing the court to "enter any order that serves the interests of justice, including, but not limited to," orders vacating the judgment, discharging petitioners from custody, resentencing petitioner, or granting a new trial); N.M. STAT. ANN. § 31-1a-2(H) (2005) (stating that reviewing courts "may set aside the petitioner's judgment and sentence, may dismiss the charges against the petitioner with prejudice, may grant the petitioner a new trial or may order other appropriate relief"); WIS. STAT. ANN. § 974.07(a)(10) (2003) (authorizing courts to enter any order "that serves the interest of justice," including vacating the sentence, ordering a new trial or fact-finding hearing, resentencing, or freeing the defendant from custody); *see also* IDAHO CODE § 19-4902(e) (Michie 2003) ("In the event that . . . DNA test results demonstrate, in light of all admissible evidence, that the petitioner is not the person who committed the offense, the court shall order the appropriate relief").

81. There are potential costs to defendants who rely upon innocence statutes. The genetic profile obtained from a defendant can be entered into law enforcement databases, whether or not the evidence in the defendant's particular case proves exculpatory. *See, e.g.*, IND. CODE. ANN. § 35-38-7-18(2)(b) (2003) ("If the results of the postconviction DNA testing and analysis are not favorable to the person who was convicted of the offense, the court . . . [may issue] an order requesting that the petitioner's sample be added to the Indiana database"); N.J. STAT. ANN. § 53:1-20.37 (West 2003) (authorizing the state to retain all DNA information from samples taken pursuant to New Jersey's postconviction DNA testing statute and to use the information in investigating and prosecuting other crimes); TEX. GOV'T CODE ANN. § 411.142 (Vernon 2003) (authorizing the state DNA database to include results obtained under Texas's postconviction DNA testing statute). Some jurisdictions allow unfavorable results to be forwarded to subsequent parole boards. *E.g.*, ARIZ. REV. STAT. § 13-4240(J) (2003); IND. CODE ANN. § 35-38-7-18(2)(a) (2003); KY. REV. STAT. ANN. § 422.285(8) (West 2003); UTAH CODE ANN. § 78-35a-304(1) (2003). At least one jurisdiction treats a request for testing under a postconviction statute as "a waiver of any statute of limitations in all jurisdictions as to any felony offense the person has committed which is identified through DNA database comparison." UTAH CODE ANN. § 78-35a-

b. Case law

In jurisdictions in which innocence statutes are unavailable, convicted defendants have only two options for obtaining genetic testing. They can ask prosecutors to undertake testing voluntarily (or to make samples available for testing) or they can seek judicial relief through general post-trial (e.g.,habeas corpus or new trial) mechanisms.[82] Only one state court has developed case law specifically addressing the right to obtain testing through collateral proceedings, holding that "elementary fairness" requires the state to make testing available in compelling circumstances[83] in which testing would not impose "an unreasonable burden on the state."[84] A few others have allowed petitioners for new trials to seek discovery in the form of DNA evidence.[85] However, most state courts that have addressed the issue of testing in the context of new trial motions or collateral attacks have denied relief on the grounds that the motions are time-barred[86] or that the evidence would be cumulative[87] or too speculative to overcome the presumption of guilt.[88]

302(3) (2003); *cf.* William K. Rashbaum, *New York Pursues Old Cases of Rape Based Just on DNA*, N.Y. TIMES, Aug. 5, 2003, at A1 (reporting the "John Doe Indictment Project" under which New York City law enforcement agencies will use DNA profiles to review hundreds of unresolved sex crimes in an effort to file indictments before the expiration of the statute of limitations).

82. *See supra* text accompanying note 40.

83. The court specifically referred to the situation in which:

> (a) identity of a single perpetrator is at issue; (b) evidence against the defendant is so weak as to suggest real doubt of guilt; (c) the scientific evidence, if any, used to obtain the conviction has been impugned; and, (d) the nature of the biological evidence makes testing results on the issue of identity virtually dispositive.

Jenner v. Dooley, 590 N.W.2d 463, 472 (S.D. 1999).

84. *Id.*

85. *See, e.g.*, Commonwealth v. Reese, 663 A.2d 206, 210 (Pa. Super. Ct. 1995) (citing Commonwealth v. Brison, 618 A.2d 420, 425 (Pa. Super. Ct. 1992)) (stating that "principles of justice" allow the defendant to seek after-discovered evidence in new trial proceedings); Sewell v. State, 592 N.E.2d 705, 707-09 (Ind. Ct. App. 1992) (holding exculpatory evidence DNA to be discoverable in a collateral attack challenging the conviction).

86. *See, e.g.*, Dowdell v. State, No. CR-01-0610, 2002 Ala. Crim. App. LEXIS 150, at *6-7 (Ala. Crim. App. June 28, 2002) (denying a postconviction request for testing relating to a 1986 conviction on the basis that "Alabama courts have recognized the admissibility of DNA since 1991" and that defendant's request ten years subsequently could not be excused).

87. *See, e.g.*, Whitsel v. State, 525 N.W.2d 860, 863 (Iowa 1994) (holding that, because DNA evidence was not used at trial, "obviously there was sufficient evidence to convict" the defendant); Commonwealth v. Godschalk, 679 A.2d 1295, 1297 (Pa. Super. Ct. 1996) (holding other evidence sufficient to sustain a conviction against postconviction challenge).

88. This, of course, places the defendant in the catch-22 situation in which he cannot gain access to the potentially probative DNA evidence because he cannot establish in advance tbat it would be favorable and change the result at trial. *See Dowdell*, 2002 Ala. Crim. App. LEXIS 150, at *20 (Baschab, J., dissenting) (arguing that the majority's denial of discovery means "there is no mechanism for [the defendant] to challenge his conviction based upon alleged exculpatory DNA test results").

The legal obstacles to forcing states without authorizing statutes to test, or to grant access to, genetic samples[89] place the burden of deciding when testing is appropriate squarely on the shoulders of prosecutors. Prosecutors' offices control the samples and typically have sole discretion to order government testing. In at least one jurisdiction, a district attorney's office therefore encourages petitioners for new trials to contact the individual prosecutors in charge of their cases in order to explain why they believe DNA testing

89. Professors Seth Kreimer and David Rudovsky have suggested several new legal theories upon which future courts might grant convicted defendants access to DNA evidence. *See* Kreimer & Rudovsky, *supra* note 65, at 552, 565-607. First, they rely on *Godschalk v. Montgomery County District Attorney's Office*, 177 F.Supp.2d 366, 370 (E.D.Pa. 2001)—a settled case—for the proposition that defendants might obtain injunctive relief under 42 U.S.C. §1983 on the basis that prosecutors' failure to release genetic samples violates the due process requirements of *Brady v. Maryland*. *Id.*; *see also* Bradley v. Pryor, 305 F.3d 1287, 1290-92 (11th Cir. 2002) (remanding for consideration of the §1983 claim); *cf.* Part III.B.1. (discussing the reasons why *Brady* does not directly control the postconviction DNA context). Second, Kreimer and Rudovsky make a similar argument based on an extension of *Brady* that there is a separate constitutional right to "access to evidence." Kreimer & Rudovsky, *supra* note 65, at 577-82; *see also* Dahhs v. Vergari, 570 N.Y.S.2d 765, 766-769 (N.Y. Sup. Ct. 1990) (treating an Article 78 motion as a timely motion for postconviction discovery). Most of the cases that have tested these two approaches have been rejected on procedural and substantive grounds. *E.g.*, Boyle v. Mayer, No. 02-3124, 2002 U.S. App. LEXIS 19654, at *3-4 (6th Cir. Sept. 17, 2002) (holding that defendant "has not raised a cognizable issue under § 1983 insofar as his claims do not implicate the validity of his convictions, as such claims would not rise to the level of a constitutional violation"); Kutzner v. Montgomery County, 303 F.3d 339, 340 (5th Cir. 2002) (*per curiam*) (holding that no § 1983 claim exists for injunctive relief to compel DNA testing unless conviction has already been invalidated); Harvey v. Horan, 278 F.3d 374, 380 (4th Cir. 2001), *reh'g denied*, 285 F.3d 298 (4th Cir. 2002) (denying § 1983 relief because the "proper process for raising violations of constitutional rights in criminal proceedings cannot be abandoned"); Lee v. Clark County Dist. Attorney's Office, 145 F.Supp.2d 1185, 1187-88 (D. Nev. 2001) (dismissing a § 1983 complaint as not ripe); State v. El-Tabech, 610 N.W.2d 737, 746 (Neb. 2000) (holding that the defendant could not bring a claim after the time period for a new trial had run because the jurisdictional statute specifically required proof of a federal or state constitutional violation); State v. Frazier, No. 30805884DI, 1995 Del. Super. LEXIS 474, at *14 (Del. Super. Ct. Aug. 3, 1995) (finding no interest of justice implicated where defendant did not raise due process claim in first appeal).

Kreimer and Rudovsky's third theory—that prosecutors who refuse to release genetic samples effectively bar convicted defendants' access to judicial relief within the meaning of "access to the courts" precedents—has yet to be considered, but the arguments against its viability are strong. *See* Kreimer & Rudovsky, *supra* note 65, at 568-76 (discussing the arguments). Kreimer and Rudovsky concede as much. *Id.* at 569, 587. The few cases that have focused on access to the courts by incarcerated defendants have, for the most part, centered on unreasonable actions taken by governmental officials that prevent inmates from filing claims that other litigants could file. *E.g.*, Johnson v. Avery, 393 U.S. 483, 490 (1983). In the DNA context, one would have to argue that prosecutorial refusal to provide access to genetic samples constitutes active interference with access to the courts, that it is arbitrary, and that the similar denial of access to persons not incarcerated is irrelevant to the claim.

would help prove their innocence.[90] As discussed in the following section, other prosecutors' offices have adopted programs or policies to govern the exercise of individual prosecutorial discretion.

c. Voluntary programs by prosecutors

Even in states with innocence statutes, prosecutors clearly have significant influence over the ability of defendants to access and use DNA evidence. At least one jurisdiction specifically restricts defendants' ability to apply for DNA testing to applications made to the Attorney General.[91] In states without statutes or case law providing for postconviction DNA testing, prosecutors alone control defendants' access to genetic samples and, depending on defendants' solvency, the ability to conduct tests.[92] In most of these jurisdictions, prosecutors' decisions are made on an ad hoc basis, by individual prosecutors deciding on individual requests.

In a few jurisdictions, however, prosecutors' offices have established policies or programs to govern individual prosecutors' responses to applications for DNA testing. In 2001, the San Diego County, California,[93] and the Brooklyn, New York,[94] District Attorneys' offices were the first to undertake voluntary review of convictions in a limited category of cases in which DNA evidence might prove relevant. District Attorneys in Oklahoma County,

90. *See* Mark Lee, *Serenity Now or Insanity Later?: The Impact of Post-conviction DNA Testing on the Criminal Justice System*, 35 NEW ENG. L. REV. 663, 663-664 (2001) (describing a program of the Suffolk County, Massachusetts, district attorney's office).

91. WASH. REV. CODE § 10.73.170 (2003).

92. One private organization devoted to remedying convictions through the use of subsequent exculpatory DNA evidence, The Innocence Project, sometimes underwrites the cost of genetic testing for indigent defendants. The cost of private testing can run upwards of $10,000 per case. Tan, *supra* note 48, at B04.

93. Charlie Goodyear & Erin Hallissy, *Watchdogs Turn to DNA to Prove Innocence*, S.F. CHRONICLE, Jan. 25, 2001, at A1 (noting that the San Diego program was the first of its kind). The San Diego program focuses on persons convicted before 1993, sentenced to life or indeterminate terms, who consistently have maintained their innocence. H.G. Reza, *California and the West: 12 Inmates' Cases Chosen for Review Under DNA Projects*, L.A. TIMES, Jan. 18, 2001, at A1. If a case is determined to be worthy of possible DNA testing, the convicted defendant's defense attorney is contacted. Randy Dotinga, *Prosecutors Find Few Cases for DNA Tests* (Dec. 15, 2000), *available at* http://www.dpinfo.com/DNA.htm. As of April 2002, 560 cases had been examined and two had qualified for further examination. Reza, *supra*, at A1.

94. The Brooklyn office agreed to review the cases of all persons still incarcerated who (1) were convicted of homicides, serious assaults, or sex crimes before 1996, (2) bad not confessed or acknowledged guilt, or been convicted based on overwhelming evidence, and (3) were convicted under situations in which DNA evidence would have been probative. Daniel Wise, *Brooklyn Prosecutors Find Convictions Pass DNA Tests*, N.Y. L.J., Aug. 6, 2001, at 1. As of December 2002, this program had not yet resulted in the overturning of any convictions. Sean Gardiner, *Getting It Right; Experts Eye Measures To Prevent Injustice*, NEWSDAY, Dec. 11, 2002, at A8.

Oklahoma[95] and Suffolk County, New York[96] have since established similar programs.

Following a notorious case in which DNA testing established a defendant's innocence and led to a scathing audit of the Houston Police Department's crime laboratory,[97] the Harris County District Attorney's Office commenced an investigation into *all* cases in which DNA evidence had been used to obtain convictions.[98] The Ramsey County, Minnesota District Attorney's Office has conducted a similar, but more selective, voluntary review.[99] The Orange County, California District Attorney's office developed an interactive program, under which the District Attorney and Public Defender jointly sent questionnaires to inmates in thirty-three prisons, asking whether they believe DNA evidence could prove their innocence and basing reviews of convictions upon the responses.[100]

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95. Diana Baldwin, *Inmates Offered DNA Tests*, DAILY OKLAHOMAN, Apr. 12, 2002, at A1. Under "Project Justice," the Oklahoma D.A.'s office examined 275 rape and murder cases and excluded 164 in which defendants had confessed, died, or been released or in which no DNA evidence was available for testing. It then sent qualifying inmates a letter offering the possibility of having the office conduct DNA testing. Once an offer is accepted, a six-person team consisting of prosecutors and others is charged with the task of determining whether the defendant would benefit from testing. *Id.;* Julie Delcour, *Searching for Old Truths: Prosecutors Take Lead in DNA Reviews*, TULSA WORLD, June 23, 2002, at 1.

96. The Suffolk County program responded to the adoption in 1996 of a New York "innocence statute" allowing for postconviction review of DNA evidence. Rather than waiting for inmates to make a claim of innocence, the District Attorney announced a voluntary review of the cases of 734 persons convicted before 1996 who had consistently maintained their innocence. Tina Kelley, *L.I. Prosecutor To Review Cases That DNA Tests Could Reverse*, N.Y. TIMES, Dec. 20, 2000, at B5.

97. *See* Liptak, *supra* note 20, at A14 (The audit found "that technicians had misinterpreted data, were poorly trained and kept shoddy records. In most cases they used up all available evidence, barring defense experts from refuting or verifying their results. Even the laboratory's building was a mess, with a leaky roof having contaminated evidence.").

98. As of June 2003, 369 cases had been identified for retesting by a private laboratory, with one case already resulting (with the District Attorney's support) in the exoneration and pardon of a convicted defendant. Roma Khanna, *DA Supports Move to Pardon Sutton*, HOUSTON CHRONICLE, June 28, 2003, at A1.

99. The Ramsey County office studied 116 preselected, pre-1995 cases. Jodi Wolgoren, *Prosecutors Use DNA Test to Clear Man in '85 Rape,* N.Y. TIMES, Nov. 14, 2002, at A22. Prosecutors looked specifically for instances in which the defendant had consistently maintained innocence, mistaken identity was (in the D.A.'s view) a reasonable possibility, and DNA testing could provide conclusive exonerating evidence. Paul Gustafson, *DNA Exonerates Man Convicted of '85 Rape,* MINNEAPOLIS STAR-TRIBUNE, Nov. 14, 2002, at 1A. The office identified three cases as meriting testing, but found that the genetic samples no longer were available for testing in two. The third case resulted in exoneration of a defendant convicted of rape in 1985. *Id.*

100. Strings are attached, however. Inmates requesting assistance must sign a waiver of their constitutional rights, acknowledge that any information provided or uncovered could result in charges for other crimes, and agree that any new DNA evidence about them may be entered into law enforcement databases. Memorandum from Orange County Innocence Project to Inmates Convicted in Orange County (on file with the author, attached as Appendix 2 to Heather R. Jones, *Prosecutor's Quest for Justice: Should it Continue After Conviction?*, a student paper).

Although these programs vary in their content and usefulness to defendants, they share two important characteristics. They each reflect a policy adopted by a prosecutor's office that governs how the office should respond, postconviction, to the potential availability of exculpatory DNA evidence. And they treat like cases alike, rather than leaving the decision to the fortuity of which individual prosecutor receives the request for assistance.

C. The Law Governing Prosecutorial Promises

The law governing promises prosecutors make during plea bargaining is fairly clear. If a promise is significant and a defendant raises the prosecutor's breach in a timely fashion, courts will allow defendants to retract their pleas.[101] For the most part, however, the cases have involved breaches of promises that occurred before sentencing, when courts still had an opportunity to correct errors before the convictions became finalized.

Two issues arise. First, may a defendant obtain relief for a broken promise that involves prosecutorial conduct which is to occur only after the conviction is complete? Second, may a third-party beneficiary of a prosecutorial promise (such as a family member of a defendant) take legal action to enforce that promise?

When the prosecutor has promised future governmental action that is not within her control, courts have proven loathe to enforce the promise. In *Chaipis v. State Liquor Authority*,[102] for example, a prosecutor guaranteed a defendant pleading guilty that the liquor license of his restaurant would not be revoked. When the State Liquor Authority nonetheless revoked the license, the defendant challenged that action.[103] The reviewing court concluded that, because the prosecutor and Liquor Authority were both state agents, it would be unfair to allow one to ignore promises made by the other.[104] Nevertheless, because the prosecutor exceeded her authority in making the promise, the court did not feel empowered to force the

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As of March 2003, Orange County prosecutors had reviewed the resulting 130 requests from inmates and approved 20 cases for further review by a neutral panel. H.G. Reza, *On the Law: Project Seeks to Right Wrongful Convictions*, L.A. TIMES, Mar. 7, 2003, at 2-2.

101. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 262-63 (1971) (remanding to state courts to decide whether circumstances of the case required that there be specific performance of the agreement on the guilty plea or required that petitioner be granted an opportunity to withdraw his plea of guilty on grounds that prosecutor had failed to fulfill a promise to recommend a particular sentence).

102. 375 N.E.2d 32, 34 (N.Y. 1978).

103. *Id.* at 35.

104. *Id.* at 36.

Liquor Authority's hands. Accordingly, the court simply remanded the case to the Liquor Authority's administrative processes for reconsideration.[105]

Other cases reflect similar reluctance to enforce excessive promises. On rare occasion, courts have allowed defendants to retract their pleas, even after the ordinary time for doing so has expired.[106] More frequently, however, courts have responded in the fashion of *Rise v. Board of Parole*,[107] in which the Supreme Court of Oregon declined to enforce in any way a prosecutor's promise that the parole board would treat defendant's crime leniently. Finding the prosecutor's promise *ultra vires*, the court held that it supported neither a challenge to the parole board's decision nor a judicial decision to allow the defendant to retract his plea out of time.[108]

Courts are somewhat more willing to grant relief, particularly the relief of vacating a plea agreement, when a prosecutor fails to fulfill a promise that she can, as a practical matter, carry out personally. Thus, for example, the failure to arrange for promised drug or mental health treatment has resulted in the vacating of convictions.[109] Likewise, when federal prosecutors have exhibited bad faith in failing to file substantial assistance motions seeking sentence reductions for cooperating witnesses under the federal sentencing guidelines, some courts have intervened.[110] Even with respect to such forward-looking promises, however, the courts rarely have ordered

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105. *Id.* at 37.

106. *See, e.g.*, Property Clerk v. Ferris, 570 N.E.2d 225, 228 (N.Y. 1991) (stating that, where property clerk refused to honor prosecutor's promise to release defendant's car from custody, "if the defendant was misled by the prosecutor's promise, he could move to vacate the guilty plea and be restored to his preplea position").

107. 745 P.2d 1210, 1215 (Or. 1973).

108. *Id.* at 1212-13; *see also* United States v. Tursi, 576 F.2d 396, 398-99 (1st Cir. 1978) (declining to vacate plea based on prosecutor's unfulfilled promise that defendant's son would be sentenced as a youthful offender on basis that the defendant knew the prosecutor had no power to bind the court in sentencing).

109. *See, e.g.*, Hunter v. State, 477 N.E.2d 317, 321 (Ind. Ct. App. 1985) (remanding to give the defendant an opportunity "to prove his guilty plea was tainted by a promise of [drug and alcohol] treatment which induced the plea" and thereby show that his plea lacked voluntariness); People v. Cortez, 91 Cal. Rptr. 660, 670 (Cal. Ct. App. 1970) (allowing withdrawal of plea when treatment in a hospital setting proved unworkable); *cf.* State v. Parker, 334 Md. 576, 607 (Md. 1994) (holding that where state prosecutor's promise regarding federal incarceration could not be fully carried out, the appropriate remedy was to give defendant the option of being transferred back to state authorities at the end of the federal sentence or to allow withdrawal of the plea).

110. *See, e.g.*, United States v. Torres, 33 F.3d 130, 133 (1st Cir. 1994) (stating that courts can review failures to file substantial assistance motions only when prosecutors are alleged to bave been "motivated by an *unconstitutional* purpose such as racial discrimination"), *cert. denied*, 513 U.S. 1098 (1995).

specific performance.[111] In the sentencing guideline scenario, courts also have accorded prosecutors broad discretion in determining what their promises require, so long as the prosecutors have acted in good faith.[112] The same holds true in the few available cases in which third parties have sought to enforce promises made to a defendant during plea bargaining.[113]

These precedents suggest that courts ordinarily will not impose legal obligations upon prosecutors to fulfill their promises. Moreover, it is important to note that the cases involving promises that exceed prosecutors' powers[114] do not focus on whether the prosecutor in question made reasonable efforts to fulfill the promises. The courts seem to have left the sufficiency of the prosecutorial effort for prosecutors themselves to determine. In doing so, the cases do not render the prosecutorial promises nugatory, but they do typically leave the promises for individual prosecutors to honor in good faith.[115]

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111. *But cf.* United States v. Nelson, 717 F. Supp. 682, 685 (D. Minn. 1989) (finding authority for a court to order specific performance of a plea promise).

112. *See, e.g.*, United States v. Brechner, 99 F.3d 96, 99-100 (2d Cir. 1996) (upholding a prosecutor's decision not to file a substantial assistance motion); United States v. Forney, 9 F.3d 1492, 1504 (11th Cir. 1993) (recognizing a prosecutor's discretion not to file a substantial assistance motion); United States v. Rexach, 896 F.2d 710, 713-15 (2d Cir. 1990) (upholding a refusal to file a substantial assistance motion as in good faith), *cert denied*, 498 U.S. 969 (1990); *see also* Bennett Gershman, *The Most Fundamental Change in the Criminal Justice System: The Role of the Prosecutor in Sentence Reduction*, 5 CRIM. JUST. 2, 7 (1990) (discussing the extent of prosecutors' discretion).

113. In *Northeast Motor Co. v. North Carolina State Board of Alcohol*, for example, a restaurant employee had pleaded guilty on condition that the state would not take any further action against the employee or his employer. 241 S.E.2d 727, 728-29 (N.C. Ct. App. 1978). When the Board of Alcohol Control suspended the employer's liquor license, the employer filed a civil action seeking to enjoin the suspension on the basis of the prosecutor's promise to the employee. *Id.* The Court held that, because the third-party employer had not given up any of his own rights in exchange for the prosecutor's promise, he was not entitled to specific performance. *Id.* at 730.

One might expect to find cases in which prosecutors have made promises to defendants or prospective witnesses not to prosecute, or to prosecute leniently, family members associated with the crime. Most of the cases involving such scenarios, however, focus on whether a defendant's plea is rendered involuntary because of the coercive effect of the prosecutor's threat to proceed against the family members. *See, e.g.*, Pollitte v. United States, 852 F.2d 924, 930 (7th Cir. 1988) (upholding plea conditioned on lenient treatment of defendant's wife); Herman v. Mohn, 683 F.2d 834, 837 (4th Cir. 1982) (upholding plea conditioned on dismissal of indictment against defendant's wife); *cf.* Martin v. Kemp, 760 F.2d 1244, 1247-48 (11th Cir. 1985) (holding that plea conditioned upon release of defendant's pregnant wife might be involuntary if the prosecutor had no probable cause to charge the wife); Allyn v. Comm'r of Corr. Servs., 708 F. Supp. 592, 593-94 (S.D.N.Y. 1989) (holding voluntary an agreement to plead in exchange for no prison time for defendant's daughter).

114. *See supra* text accompanying note 102.

115. *See* Ross Galin, Note, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 FORDHAM L. REV. 1245, 1283-84 (2000)

D. The Law Governing Prosecutorial Involvement in Ancillary Proceedings

Specific rules govern the involvement of prosecutors in proceedings related to their caseloads in a capacity *other than* as a lawyer for the government.[116] These rules mostly affect part-time and special prosecutors,[117] prosecutors who have left the prosecution corps,[118] and lawyers who have joined prosecutors' offices after being involved in related matters in their private practices.[119] The rules

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(discussing prosecutors' ethical obligation to fulfill promises to file substantial assistance motions).

116. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.11 (regulating government lawyers).

117. *See, e.g.*, Hopkins v. State, 429 So. 2d 1146, 1154 (Ala. Crim. App. 1983) ("a special prosecutor's employment by the victim to represent him in a civil action arising out of the same transaction as the criminal proceeding does not deprive the defendant of a fair trial"); State v. Eldridge, 951 S.W.2d 775, 776-777 (Tenn. Crim. App. 1997) ("We find the prosecutorial participation of attorneys who also represented the victim in a pending civil lawsuit arising from the same incident violated defendant's due process rights and was prejudicial to the judicial process."). For a collection of cases in which part-time prosecutors have been disciplined for participating in criminal cases on both sides or in criminal and civil actions arising from the same facts, see Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 724 n.7 (2001). *See also* Andrew Sidman, Comment, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754, 773-80 (1976) (discussing ethical problems inherent in the use of private prosecutors); Richard H. Underwood, *Part-time Prosecutors and Conflicts of Interest: A Survey and Some Proposals*, 81 KY. L.J. 1, 1-10 (1993) (surveying cases); *cf.* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 790 (1987) (holding "that counsel for a party that is the beneficiary of a court order may not be appointed to undertake contempt prosecutions for alleged violations of that order" because such counsel serve as government attorneys and must be disinterested); United States v. Time, 21 F.3d 635, 640 (5th Cir. 1994) (upholding the appointment of a criminal prosecutor to act as a special prosecutor to try criminal contempt charges against defense lawyers in the underlying criminal case).

118. *E.g.*, 18 U.S.C.A. § 207 (2003) (imposing limits on practice by former federal government attorneys); MODEL RULES OF PROF'L CONDUCT R. 1.11(a) (regulating representation by former government attorneys); *see also* Irving Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657, 659-69 (1957) (discussing the departing lawyer's obligation of loyalty to the government); Lacovara, *Restricting the Private Practice of Former Government Lawyers*, 20 ARIZ. L. REV. 369, 387-90 (1978) (discussing restrictions on the practice of former government lawyers); *cf.* Armstrong v. McAlpin, 625 F.2d 433, 443-44 (2d Cir. 1980) (approving screening of former government lawyer in a subsequent related civil matter), *vacated on other grounds*, 449 U.S. 1106 (1981).

119. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.11(c) (regulating government lawyers based on their prior practice); *see* People v. Shinkle, 415 N.E.2d 909, 910-11 (N.Y. 1980) (reversing conviction because of Chief Assistant District Attorney's former representation of defendant); *see also* United States v. Tierney, 947 F.2d 854, 865 (8th Cir. 1991) (holding that participation of prosecutor's former firm in representing the insurer of a tax fraud defendant did not require his disqualification); Wilkins v. Bowersox, 933 F. Supp. 1496, 1523 (W.D. Mo. 1996) (finding impropriety in allowing former defense counsel to proceed as a prosecutor in subsequent death penalty case), *aff'd*, 145 F.3d 1006 (8th Cir. 1998), *cert denied*, 525 U.S. 1094 (1999); *cf.* United States v. Wencke, 604 F.2d 607, 610 (9th Cir. 1979) (holding prosecutor's prior involvement in civil litigation as counsel for the S.E.C. did not require his disqualification from the criminal case); State v. Bolton, 905 F.2d 319, 321-22 (10th Cir. 1990) (not disqualifying a

typically regulate conflicts of interest, the disclosure of confidential material (either the government's or that of private parties), and the danger that prosecutors will use their office to feather their own nests or to engage in vendettas.[120] A full discussion of these regulations is beyond this Article's purview, because the Article focuses on prosecutorial obligations *per se*.

This Article has, however, noted other scenarios in which prosecutors, while still prosecutors, might become involved in complementary or supplemental proceedings—as a lawyer for the government, as a witness, or as a provider of information.[121] Whether the prosecutor should, or must, participate implicates concerns of fairness (to the defendant and victims), the benefits and costs of participation to the state, and conceptions of prosecutors' appropriate roles.

Almost no case law exists in which courts have reviewed prosecutorial participation in related ancillary proceedings. Indirectly, by according prosecutors immunity against sanctions, a few courts have recognized prosecutorial discretion to participate in parole and postconviction relief proceedings.[122] In *Mosier v. State Board of Pardons and Paroles*, for example, the court immunized prosecutors for a variety of conduct taken in connection with a convicted defendant's parole hearing, including describing aspects of the crime, characterizing defendant's personality, and submitting evidence seized in the original investigation.[123] Other courts have applied

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prosecutor because of prior representation of defendant in an unrelated matter), *cert denied*, 489 U.S. 1029 (1991).

120. *See, e.g.*, STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 378-84 (6th ed. 2002) (discussing the dangers of allowing government attorneys to engage in civil practice related to their criminal cases); Matthew S. Nichols, *No One Can Serve Two Masters: Arguments Against Private Prosecutors*, 13 CAP. DEF. J. 279, 282-83 & nn. 15-17 (2001) (discussing cases and statutes forbidding prosecutors to act as counsel in civil cases involving the same facts as a criminal case in which they have been involved).

121. *See supra* text accompanying notes 30.

122. *See, e.g.*, Johnson v. Kegans, 870 F.2d 992, 996-98 (5th Cir. 1989) (applying immunity in suit against prosecutor for opposing defendant's parole); Sinclair v. State *ex rel.* Dept. of Public Safety and Corr., 769 So. 2d 1270, 1271-73 (La. Ct. App. 2000) (according a prosecutor absolute immunity against claim that he disseminated false information during an appearance to oppose parole before the Louisiana Board of Parole); *cf.* Allen v. Thompson, 815 F.2d 1433, 1434 (11th Cir. 1987) (stating that forwarding information about appellant at the U.S. Parole Commission's request is "so intimately associated with the judicial phase of the criminal process as to cloak the prosecutors with absolute immunity from suits for damages").

123. 445 S.E.2d 535, 537 (Ga. Ct. App. 1994) (quoting Allen v. Thompson, 815 F.2d 1433, 1434 (11th Cir.1987)); *see also* Harris v. Menendez, 817 F.2d 737, 741-42 (11th Cir. 1987) (approving dismissal of complaint against prosecutor for conspiring to have defendant's probation improperly revoked); Hamilton v. Daley, 777 F.2d 1207, 1213 (7th Cir. 1985) ("Probation revocation is a criminal proceeding. Prosecutors are absolutely immune from suit for initiating a prosecution and presenting the state's case.").

identical reasoning to clemency[124] and probation revocation proceedings.[125] They have accorded the immunity both to active prosecutorial opposition to post-trial release and to prosecutors' refusal to take a position favorable to a convicted defendant.[126]

Courts have reached similar conclusions when defendants have sought to penalize prosecutors for participating in ancillary mental health proceedings.[127] Other courts have immunized the action of prosecutors who have sought civil commitment of an arrested defendant to an alcohol detox center[128] and, in one unpublished opinion, additional confinement under violent sexual offender laws for a defendant who had completed his sentence for the underlying crime.[129] Although none of these cases involve efforts to force prosecutors to join, or to prevent prosecutors from joining, ancillary proceedings,[130] the gist of the judicial grants of immunity seems to be that participation is a matter of prosecutorial discretion.[131]

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124. *E.g.*, Lucien v. Preiner, 967 F.2d 1166, 1167 (7th Cir. 1992) (immunizing a prosecutor who sent a letter opposing clemency on the basis that "a determination of executive clemency, like a parole decision, is an extension of the sentencing process" and that the "state's attorney is performing a prosecutorial duty when she helps the court ascertain the appropriate sentence for a particular defendant, and she continues to do so when defending that sentence if it is challenged").

125. *E.g.*, Cooney v. Park County, 792 P.2d 1287, 1299 (Wyo. 1990) (applying "sovereign immunity from civil liability with the exception of certain conduct for which that immunity is specifically waived").

126. *See, e.g.*, Loveridge v. Schillberg, 561 P.2d 1107, 1109 (Wash. Ct. App. 1977) (rejecting actions by defendants against prosecutors who had failed to recommend release to parole board, on the basis that the activities encompassed by the complaint were "quasi-judicial in nature").

127. In *Marczeski v. Handy*, for example, a defendant who had been found incompetent and been committed to a mental institution sued a prosecutor for supporting the commitment. 213 F. Supp. 2d 135, 136-37 (D. Conn. 2002). The federal district court dismissed the complaint on the basis that the prosecutor's actions were "intimately associated with the judicial phase of the criminal process." *Id.* at 141; *accord In re* Scott v. Hern, 216 F.3d 897, 909-10 (10th Cir. 2000) (holding in part that the prosecutor "was acting pursuant to her statutory obligation to conduct the commitment proceedings . . . and she is absolutely immune from suit concerning her actions and omissions related to the fulfillment of that obligation."); *cf.* Byrne v. Kysar, 347 F.2d 734, 736 (7th Cir. 1965) ("[I]f it be considered that [the state's attorney] acted in his official capacity as a prosecutor for the state he is afforded the same [absolute immunity] given a judge").

128. Dick v. Watonwan County, 551 F.Supp. 983, 992-93 (D. Minn. 1982).

129. Diestelhorst v. Ryan, 20 Fed.Appx. 544, 547 (7th Cir. 2001).

130. In the one case in which a prosecutor's standing to participate in civil commitment proceedings was directly challenged, the court first noted that there was no express statutory provision allowing or forbidding participation by the prosecuting attorney in tbe proceedings, but interpreted the commitment statute's designation of the prosecutor as a person entitled to notice of the potential discharge of a mentally ill or mentally retarded person as implying a right to participate. *In re* Elmore, 468 N.E.2d 97, 100-01 (Ohio Ct. App. 1983). The Court next considered a statute that provided "that a designee of the Director of Mental Retardation and Developmental Disabilities shall 'present the case on behalf of the state' except with respect to respondents found not guilty by reason of insanity, in which event the 'prosecutors shall present the evidence.' " *Id.* at 101. The court concluded that this statute did not foreclose "the

There are a few cases addressing prosecutorial participation in ordinary civil proceedings related to ongoing criminal prosecutions. One court has held directly that a prosecutor may participate in civil proceedings on behalf of the government so long as those proceedings are reasonably related to her public functions.[132] The ability of a prosecutor to act in this way, however, may depend on her statutory authority.[133] Courts also have sent mixed signals on the question of whether prosecutors may condition their decisions in criminal prosecutions on defendants' willingness to forgo parallel civil suits (e.g., against the municipality).[134] The only legal principle that seems clear is that when prosecutors may participate in civil lawsuits or civil aspects of criminal proceedings, they are subject to ordinary ethics rules governing all lawyers, including the prohibition against using

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prosecutor from attending and participating in [all types of commitment] hearings." *Id.* The court accordingly found "no error or abuse of discretion on the part of the trial court in permitting the prosecutor to participate in the proceedings and to examine witnesses and present evidence." *Id.*

131. *Cf.* State v. Williamson, 853 P.2d 56, 59 (Kan. 1993) (recognizing prosecutorial discretion to decide whether to pursue criminal prosecution or civil commitment).

132. People v. Parmar, 104 Cal. Rptr. 2d 31, 43-44 (Cal. Ct. App. 2001).

133. *See, e.g., id.* at 43 (referring to a statute assigning to the district attorney "some civil law duties"); Czajka v. Breedlove, 613 N.Y.S.2d 741, 742-43 (N.Y. App. Div. 1994) (holding that the county law, "which establishes the primary duties of a District Attorney, d[id] not explicitly grant the power to institute [a] civil suit" to compel a criminal defendant to honor her plea agreement to resign from the police force); *cf.* Michigan *ex rel.* Oakland County Prosecutor v. Dep't of Corr., 503 N.W.2d 465, 470 (Mich. Ct. App. 1993) (rejecting a prisoner's claim that because the Board of Commissioners had counsel to represent the county in civil matters, a prosecutor could not bring a civil action "to rescind a prisoner's discharge due to the Department of Correction's incorrect method of calculating good-time unless the board specifically authorized the action.").

134. In *Sassower v. City of White Plains*, for example, a federal district court found the "practice of trading retaliatory prosecutions for releases from civil liability" to be "unethical." 742 F.Supp. 157, 160 (S.D.N.Y. 1990). In contrast, *McGruder v. Necaise* agreed that this practice is "reprehensible," but nevertheless accorded absolute immunity to a district attorney who had offered to drop criminal charges against a defendant in exchange for dismissal of a civil action relating to a jail fire. 733 F.2d 1146, 1147-48 (5th Cir. 1984). Other courts have expressed a variety of opinions on the same subject. *See, e.g.*, MacDonald v. Musick, 425 F.2d 373, 375 (9th Cir. 1970) (holding that a prosecutor may not "condition a voluntary dismissal of a charge upon a stipulation by the defendant that is designed to forestall the latter's civil case"); State v. Simmelink, 668 P.2d 477, 478 (Or. Ct. App. 1983) (holding that a deputy district attorney's offer to dismiss tbe charge against a defendant in exchange for his signing a release in a related civil action against the police might have been unethical but was not enough by itself to justify dismissal of the charges); *cf.* United States. v. Andreadis, 234 F.Supp. 341, 346 (E.D.N.Y. 1964) (noting that if the government's sole purpose in conducting depositions in a civil matter was to obtain evidence for a criminal prosecution, this might constitute an abuse of process).

the threat of criminal proceedings solely for the purpose of gaining an advantage in a civil matter.[135]

Most of the cases discussed above involve prosecutors' conduct as lawyers in the ancillary proceedings. A few of the parole cases involve participation as a provider of information. Opinions detailing attempts by defendants or third parties to enlist the assistance of prosecutors as witnesses do not seem to exist. When, whether, and how prosecutors may involve themselves in secondary capacities in ancillary proceedings thus again seem to be matters that are left largely to a prosecutor's individual discretion.[136]

IV. WAYS PROSECUTORS AND RULEMAKERS MIGHT THINK ABOUT THE POSTCONVICTION OBLIGATION TO SERVE JUSTICE

Part III's analysis of prosecutors' *legal* obligations illustrates that decisional and statutory law do not provide prosecutors with much guidance for the range of postconviction scenarios this Article has identified. For the most part, courts and legislatures accord prosecutors significant discretion regarding whether to take postconviction action and in deciding what those actions should be. At the trial stage, the adversarial system serves as a touchstone for prosecutorial decisionmaking.[137] At the plea-bargaining stage, a variety of possible frameworks exist that can help provide decisionmaking standards.[138] Although standards are perhaps even more important at the postconviction stage,[139] it turns out to be more

135. *See, e.g., In re* Schake, 154 B.R. 270, 275 (D. Neb. 1993) (stating that prosecutors may not threaten to bring criminal charges for the sole purpose of gaining advantage for third parties in a bankruptcy matter because that would violate ethics standards.)

This author has not found any case law involving full-time prosecutors who have participated directly in helping victims sue criminal defendants, but there is some suggestion in the case law that prosecutors must at least inform defendants, when they know, that complaining witnesses plan to file a civil action. *See, e.g.,* People v. Wallert, 469 N.Y.S.2d 722, 724-25 (N. Y. App. Div. 1983) (holding that prosecutor had a duty at least to submit to the court the question of whether he should disclose his knowledge that the complainant in a rape prosecution was awaiting the outcome of the criminal trial before filing an $18 million damage action).

136. *Cf.* People v. Pensinger, 805 P.2d 899, 933-34 (Cal. 1991) (leaving open the possibility that the prosecutor could properly have promised a potential witness that he would intervene and try to assist him in separate child custody proceedings).

137. *See* Zacharias, *Ethics of Prosecutorial Trial Practice*, *supra* note 4, at 65 (focusing on the prosecutor's obligation to do justice given the assumptions of the adversarial system in which she is a participant).

138. *See* Zacharias, *Justice in Plea Bargaining*, *supra* note 4, at 1183 (suggesting that prosecutors can best understand their priorities in plea bargaining "by identifying the model, or theory, of plea bargaining under which they operate").

139. *See supra* text accompanying note 7.

challenging to pinpoint a governing theoretical construct. Not only does the background law fail to set parameters, but there also is no ongoing legal decisionmaking process through which boundaries for prosecutorial conduct will develop over time.

In an attempt to offer a useful analysis, this Section of this Article divides into four groups the various considerations that might be relevant to prosecutorial decisionmaking. First, there are factors that stem from prosecutors' legal obligations. Second, there is a series of potential considerations relating to defendants' blameworthiness. A third set of factors centers on the proper role of prosecutors in the postconviction decisionmaking process. Finally, there are numerous specific criteria or questions that prosecutors might need to address that do not fit within the first three categories.

At this juncture, this Article simply attempts to highlight and categorize the issues that are relevant to prosecutorial decisionmaking—sometimes noting pertinent normative arguments, but more typically avoiding prescriptions. The goal in grouping these considerations is to find a middle ground between specifying a single touchstone, or framework, for resolving postconviction justice issues and offering no guidance whatsoever. As the final section of the Article will suggest, developing the categories may help rulemakers set initial guidelines for prosecutorial decisionmaking with respect to factors within the categories. At a minimum, the categorization opens the debate regarding how the factors should be taken into account.

A. The Spirit of the Case Law

In *Imbler v. Pachtman*,[140] the Supreme Court stated that, even in the absence of any constitutional obligation to disclose exculpatory information, a prosecutor "*is bound by the ethics of his office* to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."[141] Likewise, in the cases involving prosecutorial promises in the course of plea bargaining, courts that have declined to enforce those promises have relied upon "good faith" prosecutorial efforts to achieve appropriate results.[142] The core of these decisions is that the same sense of fair play that requires particular prosecutorial conduct at the pre-conviction stage continues after conviction, but that the fact of

140. 424 U.S. 409 (1976).

141. *Id.* at 427 n.25 (emphasis added).

142. *See supra* text accompanying note 112.

conviction sometimes changes the equity calculus or limits the courts' authority to grant a legal remedy.[143]

These cases suggest that prosecutors should not view the scant precedent as obviating postconviction obligations to disclose exculpatory evidence, keep promises, and abide by other pretrial due process requirements (such as safeguarding fair access to the courts). The spirit underlying the pre-conviction law remains in effect, with the courts simply recognizing a greater measure of prosecutorial discretion. The message of the case law is that prosecutors should exercise their discretion by considering what special postconviction factors militate against implementing the ordinary fairness concerns.

It is important to note that the mere fact of conviction and the resulting presumption of guilt will not automatically control this calculation. Procedural impediments to new trials already protect the presumption, even after new evidence is uncovered or disclosed.[144] Thus, as a general matter, prosecutors need to make case-specific assessments of the underlying fairness concerns (e.g., the risk of a faulty conviction, fair access to justice, whether the prosecutor has the sole ability to facilitate a fair result) and must weigh those against the specific postconviction factors (e.g., the importance of maintaining finality, resource considerations, and the likelihood that the result is fair) that militate against prosecutorial action.[145]

B. The Issue of Defendant's Guilt

Despite the conclusion just noted, the weight prosecutors give to a prior finding of guilt does drive most postconviction decisions. This factor clearly is relevant to cases that call upon a prosecutor to revisit a defendant's conviction. Yet a prosecutor's belief in a defendant's blameworthiness may also affect that prosecutor's resolution of matters in which the defendant's culpability is not in issue. The following pages first consider the presumption of guilt from the perspective of the prosecutor deciding whether to reopen a conviction and then analyze the weight the prosecutor should attach to the presumption of guilt in other contexts.

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143. *See, e.g.*, Monroe v. Butler, 690 F.Supp. 521, 525 (E.D. La.) (equating fairness in disclosure of exculpatory evidence pre-conviction and fairness in enabling defendants to "tak[e] full advantage of post-conviction relief"), *aff'd*, 883 F.2d 331 (5th Cir.), *cert. denied*, 487 U.S. 1247 (1988); *cf.* Jaworsky, *supra* note 61, at 258 ("[T]here is no valid reason why a defendant's due process right to exculpatory evidence should end following conviction").

144. *See supra* text accompanying notes 45 .

145. *Cf.* Kreimer and Rudovsky, *supra* note 65, at 563 (questioning some prosecutors' overemphasis of administrative and finality concerns in postconviction cases involving DNA evidence).

The presumption actually encompasses two aspects. Once a defendant has been tried and has exhausted his appeals, the criminal justice system is prepared to assume both that the defendant received fair process and that the process resulted in an accurate judgment.

Most prosecutors would agree that this presumption should give way in extreme circumstances. A prosecutor who *knows for a fact* that a convicted defendant is innocent should take some action. No conception of the prosecutor's role—as an advocate, defender of the public trust, or protector of victims—would countenance the prosecutor's participation in keeping a clearly innocent person incarcerated.

In most situations, however, new information will not take a prosecutor to that level of certainty. As partisan representatives of the state, prosecutors never are required to give defendants the same benefit of the doubt that other actors in the legal system accord (e.g., through the pre-conviction presumption of innocence). Ethics rules initially allow prosecutors to proceed towards a conviction so long as they have "probable cause" to believe that a defendant is guilty.[146] Once the defendant is convicted, the criminal law shifts the presumption to one disfavoring the defendant,[147] so presumably a prosecutor also is entitled to adopt a less defendant-protective posture. The questions that remain are what that posture should be and how much emphasis prosecutors should place on it.

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146. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8 ("The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause"); *ABA Standards for Criminal Justice Prosecution Function and Def. Function*, Standards 3-3.9(a) (1977) ("A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause.").

147. Thus, for example, the presumption regarding eligibility for bail typically is reversed after conviction, while defendant awaits the results of his appeals. *See* 18 U.S.C.A. § 3143(a)(1),(b)(1)(A)-(B) (2004) (providing that a convicted defendant is not entitled to bail unless the court makes a specific finding that he is not likely to flee or to pose a danger if released, that the appeal is not for the purposes of delay, and that the appeal has substantial merit); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 12.4(d) at 661 (3d ed. 2003) ("The typical state constitutional provision guaranteeing a right to bail is limited to the time 'before conviction'"); *see also* United States v. Austin, 614 F. Supp 1208, 1211-12 (D.N.M. 1985) ("Unlike bail prior to trial, there is no common law, constitutional or statutory right to bail pending appeal"); *cf.* Aronson v. May, 85 S.Ct. 3, 5 (1964) (chambers decision by Douglas, J.) (holding that when an applicant for bail pending postconviction proceedings "has been tried, convicted, and sentenced by a court of law . . . [i]t is obvious that a greater showing of special reasons for admission to bail pending review should be required"); Landano v. Rafferty, 970 F.2d 1230, 1240-42 (3d Cir. 1992) (reversing a grant of bail pending habeas corpus review because of the absence of "extraordinary circumstances" justifying bail after conviction), *cert. denied*, 506 U.S. 955 (1992).

1. Problem one: identifying the presumption of guilt

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

Unlike with the professional rules governing the level of belief a prosecutor should maintain pre-conviction—which are based, in part, on the adversary system's conception of the prosecutor's role as advocate and the system's core assumption that fair process will correct prosecutorial misjudgments[148]—it is difficult to identify a neutral principle for selecting one of the available postconviction standards. Arguments for particular standards based on proponents' varying emphases on the competing notions that "it is important for an innocent person not to be punished," that "defendant had his chance to prove his innocence," and that "it is important to preserve the finality of legitimate convictions" are equally compelling.

Consider a few of the options. Would it make sense, for example, for a prosecutor to adopt the position that she will not take action unless new information removes her probable cause to believe that defendant is guilty? Ordinarily, the fact of a judgment of conviction alone provides probable cause, just as in the pre-conviction context an indictment by a grand jury ordinarily substitutes for a prosecutor's need to present probable cause before a defendant can be arraigned.[149] Under this postconviction standard, new information would move a prosecutor only when it eliminates the evidence that

148. *See* Zacharias, *Ethics of Prosecutorial Trial Practice*, *supra* note 4, at 56-57 ("Court-enforced constitutional safeguards . . . arguably suffice to protect the innocent"); *see also* H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1168 (1973) (cautioning that the prosecutor, in seeking to serve justice, should not "regard himself as the sole arbiter of truth and justice").

149. LAFAVE ET AL., *supra* note 147, § 15.5(a), at 770-71 (reviewing authorities to the effect that an indictment returned by a properly constituted grand jury conclusively determines the existence of probable cause); Alexander Holtzoff, *Codification of Federal Criminal Procedure*, 4 F.R.D. 275, 286 (1946) (stating that a grand jury indictment is deemed conclusive proof of probable cause).

previously existed. Supplemental contradictory evidence might increase the controversy and strengthen the defendant's arguments, but it usually cannot destroy the reason to believe that defendant *might* be guilty.

One can question this standard on several grounds. First, it does not distinguish between the two aspects of the presumption of guilt. It only considers whether the new evidence undermines the assumption that the verdict was correct, not whether the process itself was flawed.[150] That is significant for two reasons. A lack of fairness in the process may not, alone, eliminate the possibility of guilt but may infect the accuracy of the verdict. Therefore, to rely on the verdict as an accurate indicator of probable cause seems questionable. Moreover, to the extent the prosecutor's office itself was partly responsible for assuring a fair process,[151] the new information may reflect the original prosecutor's failure to screen the case properly. Adopting a stricter postconviction screening criterion may leave the system with the prosecutor's function unfulfilled.

One might conclude from this that prosecutors should distinguish between new information that simply goes to the evidence (in which case they should use the probable cause standard) and new information that calls the fairness of the earlier trial process into question. As a practical matter, well-funded defendants often will be able to produce *some* new evidence, so there is good reason to adopt a rule that imposes an obstacle to undoing convictions on factual grounds. That is the justification for judicial standards that limit the availability of new trials based on newly-discovered evidence.[152]

On the other hand, the adversarial system to some extent places the burden of ferreting out flaws in the process and untruthful evidence on defense counsel. The fact that a prosecutor learns of corruption or the fact that a witness may have lied does not automatically mean the trial itself was unfair. Prosecutors thus might be justified in adopting a middle-ground approach, asking whether defense counsel could have discovered or tested the newly received information at the time of the trial. This compromise has the virtue of according the trial process respect, but only to the extent it deserves respect. Yet the approach is prone to the criticism that the resolution of the prosecutor's postconviction quandary becomes technical or

150. The process might have been flawed, for example, because of police corruption or because of defects in the evidence-gathering process.

151. *See generally* Zacharias, *Ethics of Prosecutorial Trial Practice*, *supra* note 4 (arguing that prosecutors have a significant role to play in making sure that adversarial process is working in its intended fashion).

152. *See supra* text accompanying note 45.

game-like, looking primarily to whether the defendant had a fair opportunity to play the game rather than to the merits of whether his incarceration is factually justified.

A second reason to question reliance on a probable cause standard is theoretical. The symmetry of adopting the pre-conviction standard may honor form over substance. The justification for the low pre-conviction standard for prosecutorial action against defendants is the assumption that the adversarial process will compensate for prosecutors' errors in judgment. One cannot make the same assumption about a prosecutor's postconviction conclusions because the prosecutor may be the decisionmaker of last resort.

Consider an alternative, process-based justification: prosecutors should adopt a probable cause or even less defendant-protective standard because the burden of retrying the defendant[153] and the costs of doing so[154] present practical reasons to disfavor prosecutorial action. When the prosecutor is so certain of the defendant's innocence that she is willing to set him free, then the standard would be met. But when a prosecutor's confidence in the verdict is only shaken to the extent that she thinks a retrial might be worthwhile, a bright-line rule against retrials is warranted.

The obvious difficulty of this approach is that it is artificial. It balances practical concerns against claims to fairness. Adopting a bright-line rule risks overemphasizing the costs, particularly since they may vary dramatically from case to case.

There again is a possible middle ground. Prosecutors should consider the practical costs. But when new information calls into question the fairness of a prior proceeding, they should not accord the conviction any presumption of accuracy. Based on the evidence as they currently see it, they should exercise discretion by weighing the costs of a new trial against the likelihood that defendant will deservedly win an acquittal (according to some standard of belief). On the other hand, when the new information simply goes to the weight of the evidence in the prior proceedings, a bright-line rule makes sense because fairness considerations disappear; defendant's claim, essentially, is to a second, improved bite at the apple.

What, then, about an option at the other extreme? If new information gives a prosecutor serious doubts about a defendant's guilt, she arguably has a greater obligation to help the defendant than

153. It can, for example, be difficult to retry a defendant when witnesses have died or disappeared, memories have failed, or evidence has degraded or been lost.

154. The costs include not only the expense of retrying the defendant and the diversion of resources from other live cases, but also the loss of public respect for a system that must admit wrongdoing.

she would have had before trial. The basis for this approach is that, postconviction, the prosecutor cannot rely on a subsequent fair trial to resolve any qualms that she may have about the defendant's guilt. In effect, the buck stops with the prosecutor, because she is the final decisionmaker.

There is a strong argument supporting this approach in circumstances in which prosecutorial action would simply enable the defendant to ask another decisionmaker (e.g., a court) to act.[155] Under this scenario, the prosecutor would be playing the same role as she plays before trial; namely, allowing the main decisionmaker to hear the case, after screening the matter only to a limited extent.

The symmetry of this position is appealing. As a practical matter, however, it probably overemphasizes society's willingness to allow convicted defendants opportunities for reprieve. Society may be prepared to absorb the costs of according full adversarial process to even guilty persons who have not been convicted, but be less willing to recognize the benefits of process after-the fact. If that is the case, a more context-based standard of sympathy towards convicted defendants is more fitting.

2. Problem two: applying the presumption of guilt

Some of the conflicting arguments that have been identified arise because of the variety of new information that prosecutors can receive. Any fixed standard for the presumption of guilt will have difficulty differentiating between a prosecutor who believes that a defendant is, or may be innocent, and one who simply acknowledges for the first time that a defendant may have been wrongfully convicted under the prevailing system of law (even if perhaps guilty).[156] Even if one can identify an appropriate standard for the presumption, prosecutors still must decide how much weight to give the presumption.[157]

These issues become especially complex when the prosecutor finds herself weighing not only the practical costs of revisiting the conviction against the potential benefits to defendant, but also the societal *benefits* of taking postconviction action. Suppose, for example,

155. Prosecutorial action might consist of giving the defendant the new information or something more—for example, joining the defendant in a motion for a new trial.

156. See John Wilkins, Dumanis Supports New Trial for Convict, SAN DIEGO TRIBUNE, Aug. 5, 2004, at 1 (reporting a newly elected prosecutor's decision to reverse her office's previous decision to oppose a motion for a new trial for a person convicted twenty-one years earlier).

157. When the issue is something other than whether defendant committed the crime, it becomes even harder for the prosecutor to implement the presumption.

that a prosecutor learns of systematic police or prosecutorial corruption that may have been at play in the defendant's original case. If the prosecutor remains convinced (based on the remaining valid evidence) that defendant is guilty, a simple weighing of defendant's interests versus the societal costs of a new trial might militate in favor of avoiding action. Yet the prosecutor may recognize societal benefits, both in exposing the corruption and in demonstrating to the public that actors in the criminal justice system can recognize and rectify mistakes in the system. As with many other prosecutorial decisions, the prosecutor's obligations to multiple constituencies and multiple interests make strict and clear standards for conduct hard to identify.[158]

3. Problem three: the relevance of the presumption of guilt

a. Postconviction sentencing issues

A wholly different problem arises when the new information does not affect the prosecutor's view of defendant's guilt or the validity of the conviction, but suggests that the sentence was too harsh. This may occur, for example, when the prosecutor learns that others shared the defendant's responsibility, that the defendant was a culpable but lesser actor in the crime, that the injury to the victim was less severe than previously believed, or that the sentencing authority was biased or corrupt. Alternatively, the change in perspective may be occasioned by a non-retroactive change in the law that reflects society's view that the offense is less blameworthy than society thought at the time of its commission. The presumption of guilt alone does not resolve the questions of whether the defendant's treatment is fair and whether the prosecutor should become involved.

The resolution of these issues probably depends, in part, on whether the local jurisdiction's substantive law provides mechanisms for amending a defendant's sentence without disturbing the whole conviction. If, for example, a defendant or prosecutor can move a court for resentencing at any time based on new evidence, there is little reason for a prosecutor to view her obligations in resentencing differently than her obligations during the original sentencing

158. *See, e.g.*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.10.1, at 759-60 (1986) (discussing prosecutors' constituents); Carol A. Corrigan, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537, 538-39 (1986) (identifying various constituencies of prosecutors); Zacharias, *Ethics of Prosecutorial Trial Practice*, *supra* note 4, at 57 (same).

process.[159] She may wish to adopt some presumption against reconsidering her position in order to ensure some finality and to avoid constant requests by defendants for her assistance. On the merits, however, little justification exists for refusing to consider whether her position regarding defendant's sentence should change.

When no resentencing mechanism is available but an alternative mechanism exists that can provide some relief (e.g., parole or sentence commutation), the prosecutor must take into consideration not only the merits, but also her role in the postconviction process.[160] The prosecutor's view of defendant's likely guilt hardly seems dispositive of the issues, for a decision to withhold the new information may prevent the subsequent decisionmaker from reaching its own decision based on full facts. The scenario here seems closer to *Brady* situations, in which prosecutors must assess their own obligations to disclose in order to enable the anticipated legal process to work, than to the previously-discussed situation in which the prosecutor must decide whether to undo a completed conviction process.

The thorniest scenario, however, is the one in which no meaningful sentence amelioration process exists—for example, when defendant has been sentenced to a mandatory sentence that cannot be amended, and pardons or commutations simply are unattainable. Here, the prosecutor's only recourse may be to seek to undo the previous process, in the hope that defendant will be reconvicted but sentenced more suitably. The prosecutor's obligations to a variety of constituencies come into stark conflict: fairness to defendant seems to require a change in the status quo, criminal justice and the rights of the victim demand at least that the conviction be maintained, and the state's resource constraints militate against seeking a new trial. A plea arrangement might accommodate the countervailing concerns, but no guarantees exist that a plea bargain will be fulfilled.[161] The presumption of guilt does not help resolve the issues; one can assume for a fact that defendant is guilty without obviating the prosecutor's dilemma.

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159. As discussed earlier, most jurisdictions impose strict time limits on resentencing. However, exceptions exist. *See supra* note 56.

160. This factor will be discussed *infra* Part III.C.

161. In other words, the prosecutor may negotiate a plea package under which she agrees to support a motion to vacate the judgment and defendant agrees to plead guilty once the case is reopened, but there are no guarantees that defendant will stick to his part of the agreement once the original judgment is vacated. There is no way for the prosecutor to seek reinstatement of the judgment once defendant declines to plead guilty. *Cf.* Czajka v. Breedlove, 613 N.Y.S.2d 741, 743 (N.Y. App. Div. 1994) (holding prosecutor to be without authority to enforce defendant's promise to resign from the police force after the dismissal of criminal charges against him).

b. Postconviction justice issues having nothing to do with guilt or innocence

The sentencing scenario highlights a series of additional questions that cannot be answered simply hy identifying, or pointing to, a presumption of guilt. How should prosecutors take into account the presumption in dealing with issues unrelated to innocence—for example, where law or equities have changed the situation enough to give defendant a claim to some relief? Moreover, even when the defendant's guilt or innocence is directly pertinent, how should prosecutors take into account practical concerns that have nothing to do with the theoretical question of whether defendant's conviction was, and remains, proper? Most importantly, the passage of time may have practical ramifications for the ability of the prosecutor (and the defendant) to reproduce evidence and witnesses for any retrial: the defendant may not be as dangerous as he once was, or may have become more dangerous as a result of his incarceration; the victims' outlook may have changed over time, or they may no longer even be present; society's view of the crime also may have changed. How should the prosecutor weigh these factors, none of which bear on the defendant's actual culpability?

As hard as it may be for prosecutors to identify a workable standard for accommodating new information and finality when they have reason to question a conviction, it is even more difficult to frame a fixed standard to accommodate unrelated concerns. Encouraging prosecutors to note the difficulty and to distinguish among their reasons for action or inaction hardly advances the ball. The following Section, therefore, identifies another series of considerations relating to prosecutors' role in resolving postconviction issues that may assist prosecutors in resolving some of their dilemmas.

C. The Significance of the Prosecutors' Role

In representing multiple constituencies,[162] prosecutors are more likely to confront conflicts of interest than are lawyers who represent single clients. Prosecutors typically understand the potential conflicts at the trial stage because they face them all the time.[163] The interests of victims, the community, the defendant, law

162. *See* Zacharias, *Ethics of Prosecutorial Trial Practice*, *supra* note 4, at 57 (discussing prosecutors' constituencies).

163. For a discussion of what it means for prosecutors to act "neutrally" with respect to their multiple constituencies, see generally Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality* , 2004 WIS. L. REV. 837, 860-64 (2004).

enforcement agencies, and the judicial system frequently contradict each other. At the postconviction stage, in contrast, prosecutors may not recognize the conflicts as readily because the various constituencies ordinarily are less active, may be unrepresented, and may not even know that an issue exists. As a procedural matter, this means that the judgment of prosecutors often will be clouded without their recognizing the possibility of a conflict of interest. This, in turn, may lead them to rely too much on the presumption of guilt as a means for justifying inaction.

1. The range of conflicts of interest

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.[164] If the prosecutor was involved in the prior trial, she has an interest in protecting her track record and reputation.[165] Even if she was not involved, 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.[166] 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.[167]

Second, the interests in achieving "justice" may conflict with the interest of the prosecutor's office more generally.[168] Bringing to

164. Some of these interests are discussed in Goldberg & Siegel, *supra* note 24, at 409-10. In the end, Goldberg and Siegel assume the conclusion that prosecutors must give primary weight to three so-called "obligations" in addressing a defendant's request for the application of new scientific testing to evidence: "to promptly seek [the] fullest possible accounting of the truth," "to effect full disclosure in completed cases," and "to utilize [the] most accurate scientific methods." *Id.* at 410-12. Goldberg and Siegel do not make clear, however, why those factors should outweigh all others, even in the innocence scenarios that they discuss.

165. *See* Medved, *supra* note 65, at 134-48 (discussing psychological barriers preventing prosecutors from revisiting convictions).

166. *See generally* Ellen Yaroshefsky, *Wrongful Convictions: Is it Time to Take Prosecution Discipline Seriously?* 8 UDC L. REV. (forthcoming 2005) (reviewing empirical evidence and concluding that prosecutorial misconduct contributes to a large percentage of cases in which defendants are mistakenly convicted).

167. *See id.* at 151-59 (discussing political considerations for prosecutors who concede that a previous conviction was erroneous).

168. *See id.* at 136, 145 (discussing prosecutors' fear in cases involving DNA evidence that "postconviction exoneration of an innocent prisoner [might undermine] the credibility of the office" and interfere with obtaining cooperation of law enforcement agencies).

light flaws in a previous conviction can damage the reputation of the office, especially in instances involving misconduct. Public trust and cooperation may be affected. To the extent a prosecutor acts on information revealing misconduct by law enforcement officers, their reaction and those of their colleagues also may interfere with the prosecutor's ability to accomplish her functions in future cases.[169]

Third, a more theoretical set of potential conflicts arises with respect to the interests of the state. On the one hand, the state should wish to incarcerate, or keep incarcerated, only persons who have been properly convicted and deserve their status. On the other hand, the prosecutor may perceive a risk to the state of being sued by the defendant if the prosecutor discloses that misconduct or some other avoidable error resulted in the conviction.[170] Particularly when a prosecutor still has some belief in the defendant's guilt, the ancillary costs to the state of undoing the conviction may militate in favor of avoiding action.

A prosecutor also may perceive a state interest in avoiding having other convictions called into question. Suppose, for example, that a prosecutor discovers a problem with the state's evidence-gathering technique that may have resulted in a conviction of a defendant now provably innocent through new technology. Suppose further that the same evidence-gathering mechanism was used in all the state's prosecutions, including those of many defendants likely to be guilty. To the extent that revealing the error to free the first defendant may open the door to challenges against all convictions occurring during the period, the prosecutor is freighted with the state's conflicting interests.

2. Responding to conflicts of interests

On the one hand, noting these postconviction conflicts of interest may simply suggest that prosecutors should be cognizant of the conflicts in their decisionmaking process. Alternatively, it may suggest a bigger problem about the prosecutor's role that requires the prosecutor to determine whether she or a different actor in the justice system should decide a particular postconviction issue. On this view, the prosecutor would have to analyze a series of considerations.

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169. Prosecutors, of course, depend on the goodwill of other law enforcement officials to conduct investigations and manage their cases.

170. This dilemma can arise at the trial stage as well, when a prosecutor learns of police or other official misconduct that might justify dismissal of a case, but that also might be the basis for a lawsuit against the municipality. A few cases have addressed this issue and courts, for the most part, have found any tying of the resolution of the criminal and civil cases to be distasteful. *See supra* text accompanying note 134.

Initially, prosecutors need to ask themselves how much the legal system depends on the exercise of prosecutorial discretion in this context. At the trial stage, for example, the legal system arguably relies on prosecutors to seek justice independently of defense counsel and the courts mainly when the adversarial playing field is tilted.[171] In other circumstances, the system anticipates that the adversarial process will best produce suitable results when the prosecutor adopts a fully partisan role.[172]

Postconviction issues may arise, in whole or in part, in the context of an adversarial process. When a defendant brings a motion for a new trial, for example, a prosecutor might reasonably assume that the "justice" of defendant's position will best be determined by a clash between partisan efforts on the part of defense counsel and herself. On the other hand, when the prosecutor comes into unique possession of information that might provide the basis for a motion, but defendant has no access to that information,[173] there is no process that can substitute for action on the prosecutor's part.

Likewise, a prosecutor may need to consider whether alternative mechanisms exist for producing the "justice" in question. For example, when defendant has an equitable claim to a change in his circumstance, as in the situation when the law has reduced the penalties for his crime nonretroactively, parole and pardon proceedings may be more fitting vehicles to accomplish a remedy than prosecutorial revisitation of the conviction. In contrast, in some situations, prosecutors seem to be vested with largely exclusive discretion to seek fair results, as in the administration of real promises that courts refuse to enforce.[174]

The availability of alternative decisionmakers who can produce the same postconviction justice as the prosecutor requires the prosecutor to consider who is best suited to judge the issues in light of the potential conflicts of interest, knowledge, and familiarity with the task. In the situation involving new exculpatory evidence, for example, courts may be better suited to judging the value of the evidence—in which case it may make more sense for the prosecutor to allow the defendant to present the matter to a judge rather than simply to

171. *See* Zacharias, *Ethics of Prosecutorial Trial Practice*, *supra* note 4, at 60 (suggesting that the professional codes' requirement that prosecutors do justice at trial "must focus on cases in which the [adversarial] system itself is defective").

172. *See id.* at 60 ("[W]hen the adversary system operates in its intended fashion, competition by definition produces appropriate results.").

173. This situation may arise, for example, when a prosecutor obtains information regarding the bribery of witnesses or police officers.

174. *See supra* text accompanying note 112.

decide whether to bring a motion to dismiss on her own. In the context of new laws, the prosecutor may need to determine whether the legislature actually considered the issue of retroactivity. If so, the legislature may be the better policymaker. And where the issue is purely one of "mercy," the availability of a pardon authority and its willingness to exercise its authority in pertinent cases may appropriately lead a prosecutor to conclude that she is not the most suitable decisionmaker.

There are a variety of reasons for which prosecutors might reasonably deem it proper to defer to alternative decisionmakers even when the claim to prosecutorial decisionmaking seems relatively strong. First, prosecutors must consider the danger that their own judgment will be particularly clouded because of their conflicts of interest. Second, the alternative decisionmaker may have been assigned the particular role of making such decisions and have more experience and competence at it.[175] Prosecutors who learn information that might cause one of these alternative decisionmakers to act favorably to defendants arguably should defer to them—by making sure they receive the information—but should not prejudge their decisions by acting in their place (e.g., by moving for dismissal or a sentence reduction or by deciding not to take action and withholding the information from the defendant and the alternative decisionmakers).

Prosecutors thus may have to resolve the postconviction issues at several levels. They need to identify alternative decisionmaking mechanisms and decisionmakers. They need to assess their own roles and competence as well as the roles and competence of the alternative decisionmakers. And, not to be forgotten, they need to determine whether prosecutorial action is necessary simply to encourage the alternative decisionmakers to address the issues or to enable them to decide in an evenhanded fashion.

These questions can become especially important when a prosecutor is considering whether justice requires her to act not on a defendant's behalf, but for victims and third parties affected by the defendant's conviction.[176] In one sense, prosecutors may be the persons most familiar with the plight of victims and affected third parties and may have developed a close relationship with them through the trial process. Arguably, however, when other governmental actors are involved in assuring a just result for the victims and third persons, a

175. Parole and pardon authorities, for example, specialize in considering the equities of continued incarceration, while legislatures are charged with making the policy decisions regarding which crimes deserve particular penalties.

176. *See supra* text accompanying note 33.

prosecutor's responsibility to help victims and third persons decreases. The presence of a social service agency charged with finding a home for a child made parentless by a defendant's incarceration,[177] for example, may supplant the prosecutor's need to accept personal responsibility.[178] Likewise, the availability of victims' advocates may obviate the imperative for a prosecutor to help a victim obtain restitution or compensation. When, in contrast, a victim is not aware of the existence of compensation mechanisms, the prosecutor may be in the sole position to guide the victim. Moreover, when the resources of advocacy agencies are so stretched that they do not adequately serve their constituents, the prosecutor must recall that the victims are part of her constituency as well. She thus may need to supplement the activities of the alternative actors, at least to the extent of directing the victims to resources for obtaining assistance.

3. Prosecutors' role in ancillary proceedings

In addition to considering the availability of alternative mechanisms and decisionmakers who are wholly or partly responsible for implementing postconviction justice, prosecutors also must consider the relationship between prosecutions and parallel proceedings, including civil litigation against defendants. This Article already has noted situations in which third parties may call upon prosecutors for assistance in these parallel proceedings: for example, testimony supporting a restraining or custody order in a case involving an abusive defendant or cooperation in a damage action filed by a defendant's victim.

Ordinarily, prosecutors conceptualize civil proceedings as being independent of prosecutorial activities. But that can be a rationalization. Some proceedings truly are designed to complement, not simply parallel, a prosecution. They may be dependent upon the result of the prosecution and may rely on information in the sole possession of law enforcement authorities.

Perhaps the clearest examples of interdependent matters are civil commitment proceedings for mentally ill defendants and habitual sex offenders. These are designed to incapacitate, in much the same way as criminal prosecutions and based upon the same evidence. The

177. This scenario might arise, for example, in the case of a single mother who is convicted of child abuse.

178. However, the criminal ramifications for a parent of cooperating with the social service agency or family court sometimes prevents the parent from acting in the child's best interests. Prosecutors can help alleviate the parent's dilemma, for example, by authorizing use immunity for statements the parent might make in connection with the custody proceedings.

quandary for the prosecutor is whether the criminal law sets the boundaries for her participation (and the sanctions that she should seek against a defendant) or whether her role includes taking further action to protect society or benefit the victims or affected third parties.

There is no easy calculus here, but the prosecutor clearly has to distinguish among parallel, complementary, and supplemental proceedings. Some authorizing statutes, such as the civil commitment for sex offender laws, envision prosecutorial participation. The more that the alternative proceedings depend on prosecutorial participation, the more likely it is that society wishes prosecutors to perceive participation as part of their role.

Other civil litigation, however, may be either parallel *or* complementary in nature. Society probably does not want prosecutors to become involved routinely in lawsuits against defendants. That would consume the prosecutors' time and resources, detract from their objectivity in the criminal proceedings, and risk prosecutorial vendettas.[179] On the other hand, to the extent that the prosecutors' functions are designed, at least in part, to incapacitate defendants and protect their victims, restraining orders and the like can be a natural complement to prosecutorial decisions in the underlying criminal case.[180]

4. Responding to issues of "role"

The series of dilemmas described above suggests that the problem of the prosecutor's role is more deep-seated than a simple question of balancing countervailing factors. Personal conflicts hamstring individual decisionmaking. In expecting prosecutors to decide the issues on a case-by-case basis, society often is asking them to resolve broad policy questions (e.g., how complementary proceedings should interrelate) that they may have no capacity to resolve on any principled basis. A reasonable argument therefore can be made that some or all of these decisions should be taken out of the hands of individual prosecutors through the appointment of a neutral decisionmaker (e.g., an ombudsman or independent prosecutor),[181]

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179. These, presumably, are some of the justifications for ethics rules that forbid part-time and former prosecutors to participate in civil matters related to cases they have handled as prosecutors. *See supra* text accompanying note 93.

180. Thus, for example, the decision to offer diversion to an abusive spouse or parent might be dependent on the existence of a restraining order issued against that spouse in a separate civil proceeding.

181. *Cf.* H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1714-16 (2000) (arguing in favor of separating some of the adjudicative and advocacy functions of prosecutors).

development of an internal administrative mechanism for resolving the issues, or a legislative determination of prosecutors' role in alternative processes.

D. Specific Issues

The previous Sections have discussed broad categories of issues that affect the calculus of how to render postconviction justice. This Section considers a series of largely unrelated considerations, or questions, that prosecutors may also need to contemplate.

1. The nature of the prosecutorial decision to be made

This Article's earlier analysis of the presumption of guilt illustrated that the emphasis to be given particular factors in individual cases is subject to debate. It is worth considering how much prosecutors should take the absence of consensus into account. One might, for example, rely upon the presumption of guilt to establish a rule that prosecutors should question a conviction only when prosecutors universally, or almost universally, would agree that questioning the conviction makes sense. Allowing prosecutors to vary significantly in their approaches reflects potentially unprincipled policymaking. Because frequent correction of prior convictions may have an adverse (though perhaps deserved) effect on public respect for the justice system, prosecutors should hesitate to follow a standardless course.

For similar reasons, prosecutors probably need to consider whether solutions to particular dilemmas ought to be implemented on a systematic rather than case-by-case basis. For example, to the extent new technology becomes available to verify (or disprove) prior convictions, the question of when this technology should be used will apply to many cases. The correct resolution probably depends on a variety of factors, including expense of the technology, who is to bear the expense, the effect on evidence- gathering resources in other cases,[182] and the likelihood that injustices will be exposed. Allowing the balancing to be conducted on an ad hoc basis typically would favor represented defendants who can afford to raise the issues and offer to bear some of the expense. Prosecutors and their offices therefore

182. For example, to the extent that a police forensic laboratory is the key unit that performs DNA testing in a particular jurisdiction, its ability to perform the tests in current cases may be undermined by the need to perform tests (or even to provide the samples) in a large number of closed cases.

should consider whether decisionmaking through a general rule would lead to fairer and more evenhanded results.[183]

2. The issue of fault

This Article has not yet focused on the relevance, or irrelevance, of the degree to which prosecutors participated in causing the problem that potentially needs correction. Arguably, for example, discovery of corruption in the prosecutor's office during the earlier trial process creates an imperative for subsequent prosecutorial action because the corruption suggests that the earlier prosecutor failed to perform her initial screening functions. The subsequent prosecutor should be ready to act because the prosecutor's office is in the best position to evaluate and, if necessary, correct prosecutorial errors. If, on the other hand, one conceptualizes the issue simply as one of governmental fault, then misconduct by any branch that may have affected the outcome is equally blameworthy.

Although fault notions have resonance politically, it is unclear that they are relevant to the achievement of postconviction prosecutorial justice. Presumably, the imperative to action is the possibility, or likelihood, that action is necessary to bring about a suitable result. The frame of mind of previous governmental actors seems less important than the consequences their conduct produced.[184]

On the other hand, to the extent one conceives of the ethical obligation to do justice as a corollary of due process and fair trial cases, courts seem to have focused on fault in those contexts. Prosecutorial "misconduct" typically has played a significant role in due process decisions; mere neglect has been left to the adversarial process to resolve.[185] Imbedded in these cases is an acceptance of the

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183. This type of decisionmaking process helps account for the development within particular prosecutors' offices of programs and policies that respond to the potential availability of DNA evidence relating to older cases in which identity was in issue. *See supra* text accompanying notes 93-100.

184. *Cf.* Smith v. Phillips, 455 U.S. 209, 219 (1982) (stating that the resolution of cases of alleged prosecutorial misconduct should turn on "the fairness of the trial, not the culpability of the prosecutor").

185. *See, e.g.*, United States v. Goodwin, 457 U.S. 368, 381 (1982) (requiring a showing of actual prosecutorial vindictiveness to establish a due process violation based on prosecutorial misconduct in charging); Oyler v. Boles, 368 U.S. 448, 456 (1962) (rejecting a postconviction challenge based on discriminatory prosecution on the reasoning that defendant had failed to allege that the selective prosecution was "deliberately" based on improper criteria); *cf.* LAFAVE, *supra* note 147, § 13.4(d), at 695 (arguing that prosecutorial intent should have "no application when a defendant in a criminal prosecution is seeking dismissal of the charges against him because of the basis upon which he was selected for prosecution").

reality that society must live with some mistakes that the system inevitably will produce.[186]

3. Nonsubstantive considerations

Above, this Article alluded to a number of practical considerations that prosecutors might consider that have nothing to do with the merits of a case. Under current regimes, prosecutors must decide individually the weight, if any, to be given such factors. One could, however, easily establish societal preferences regarding some of these practical concerns through legislation, ethics rules, or administrative guidelines. Other concerns, typically those more personal in nature, are less susceptible to bright line rules.

a. Public concerns

How, for example, should a prosecutor consider the public costs of taking action that might undo a conviction or embroil the prosecutor in separate proceedings unrelated to criminal prosecution? These costs can take several forms. First, there is the expenditure of direct and indirect resources. Any significant action by a prosecutor will consume her time and, if it occasions another proceeding (e.g., a new trial), other public resources as well. Should the prosecutor ignore these practical considerations, subject them to the same resource analysis that she applies to pretrial matters, or rely upon them as significant factors in favor of deferring prosecutorial action?

Second, how should the prosecutor consider the possibility that taking action will provoke requests for similar action in other cases, some inappropriate, that also will consume resources? For example, a prosecutor's willingness to perform a DNA test with reference to a previous rape conviction inevitably will cause other defendants to seek a similar indulgence, particularly if the first result is favorable to the accused and is publicized. Unless the prosecutor and the prosecutor's office are prepared to revisit each previous conviction, it needs to establish criteria for when such requests will be honored.[187]

These two types of concerns may simply reflect the complexity of establishing an appropriate presumption of guilt, given the costs of surrendering finality in decisionmaking. Legitimate standards can be

186. As a practical matter, in cases involving intentional governmental misconduct, the outcome usually will be the same whether or not one focuses on fault. Intentional misconduct is likely to have helped produce a questionable result. The issue of fault looms larger in deciding what presumption of guilt to emphasize; if prosecutors give greater deference to questionable convictions obtained honestly, the justice calculus may change dramatically.

187. Some prosecutors' offices have done so. *See supra* text accompanying note 93.

set (through rule or internal guidelines) for whether and how individual prosecutors should consider the concerns, though the precise substance of any such standard is likely to be debatable.

What, however, of the situations in which achieving a correct result itself has costs? Correcting a wrongful conviction resulting from governmental misconduct may, for example, produce a civil lawsuit by the aggrieved defendant. In the abstract, we would like to be able to say such an eventuality is irrelevant when justice is at issue. A legislature would never incorporate it explicitly into a standard of prosecutorial conduct as a justification for avoiding a just prosecutorial act. But society might nonetheless want this factor to be considered. Should an individual prosecutor be able to add the likely costs of the lawsuit to the balance in deciding whether to proceed? Alternatively, is the prosecutor justified in extracting a promise not to sue as part of a bargain, or plea bargain, before agreeing to a dismissal?[188]

Finally, there are the costs associated with the likely public reaction to the prosecutorial decision. News of governmental misconduct that resulted systematically in unfair trials can, for example, seriously damage public trust in the criminal justice system. This can have immediate effects in terms of public cooperation with law enforcement authorities, defendants' willingness to make bargains, and the general willingness of citizens to obey the law. Conversely, however, prosecutorial agencies must take into equal account the possibility of adverse public reaction if the information becomes known and no action is taken. These considerations, again, cannot be implemented by rule both because they seem irrelevant to the issue of justice and because they are so hard to measure. Do such practical realities also signify that prosecutors should not consider them on an ad hoc basis?[189]

b. Personal concerns

There are a series of personal concerns that at one level seem irrelevant to the issue of prosecutorial justice and therefore seem like factors that we should instruct prosecutors to ignore. On deeper inspection, however, some of these factors have practical corollaries that color them with more serious justification.

For example, prosecutors presumably should not defer just action simply because it would reveal information that embarrasses

188. *See supra* note 170.

189. *Cf.* Schaffter, *supra* note 46, at 721 (noting critically that "[p]rosecutors can be partisan officials who may not be inclined to grant a request if it may be politically controversial").

themselves, colleagues or former colleagues in the prosecutor's office, or other law enforcement personnel. To the extent that taking action undermines a prosecutor's ability to perform her functions in other unrelated cases, however, she will be inclined to take such ramifications into account. Exposing police corruption may prevent the prosecutor from obtaining cooperation from even unaffected police officers. Exposing her own errors, or those of her office, may undermine her credibility in making future legal arguments.

A more frequent personal concern is the likelihood that taking action will create work for the prosecutor and, if the information reveals a systematic flaw in previous convictions, will increase the workload of the whole office. Viscerally, one might again assume that such resource concerns do not justify avoiding just conduct. However, if the additional work will undercut the ability of the prosecutor or her office to achieve just results in other cases because of a lack of resources, the concern assumes added legitimacy.[190]

A related personal concern involves the prosecutorial fear that, while a new trial might be justified because of a prior taint that does not necessarily establish innocence, the prosecutor will be unable to prove her case because of the passage of time. The presumption of innocence suggests that this should be the state's cross to bear. Yet there is something less convincing about the emphasis on the prosecutor's burden of proof when the burden could have been (and seems to have been) carried at an earlier time and only happenstance stands in the way currently.

If commentators or rulemakers were to focus on these personal concerns, they probably would conclude that the concerns do not justify consideration. Equally probably, however, prosecutors do take them into account. If society means to reject the arguments supporting them, that rejection needs to be explicit.

There is one final personal concern that seems more legitimate: the degree to which action or inaction is consistent with the prosecutor's conscience. Consider, for example, a situation in which

190. Consider, for example, an episode of the television program "*The D.A.*" in which a prosecutor agreed to a plea bargain with a corrupt judge. On the one hand, the judge should have been prosecuted for bribery and as an accessory to murder. Publicizing the judge's conduct, however, would have encouraged all defendants who had been convicted in the judge's court during his twenty-one year tenure to challenge their convictions. This, the prosecutor concluded, would have imposed insurmountable resource burdens on the District Attorney's office, which would have had to cope with the deluge of new cases without additional resources. The prosecutor concluded that a plea bargain that resulted in the resignation of the judge and the correction of the one case in which the prosecutor knew a false conviction had occurred, but which did not result in public bribery charges, best served the overall interests of justice. *The D.A: The People vs. Sergius Kovinsky* (ABC television broadcast, Mar. 19, 2004).

there is an equitable, but no legal, basis for a defendant's request for assistance. Perhaps an aged defendant has found God, can show himself to be totally rehabilitated, and can also show a special need for his release on the part of his family. Should a merciful prosecutor be able to follow her conscience and seek the defendant's release, even though hard-nosed prosecutors would perceive their duty to the law as requiring them to uphold the previous conviction and sentence? Again, absent some rule or standard identifying whether and to what extent prosecutors may take purely equitable considerations into account, the nature of postconviction justice will be ad hoc. Yet the difficulty of cataloguing all situations in which equitable claims can arise mitigates in favor of recognizing a measure of prosecutorial discretion.

4. Temporal and relational considerations

Serious temporal concerns can affect a prosecutor's willingness to reopen a case. The passage of time inevitably affects her ability, and that of the defendant, to gather evidence. Witnesses may die, disappear, or forget. Juries become dubious about witness recall, even when that recall is strong. Victims may become reluctant to cooperate.

The passage of time may influence prosecutors to side with victims and third parties, and against defendants, in other ways as well. First, to the extent the deficiency in the earlier proceeding was caused in part by an error in the prosecutor's office, the prosecutor may feel guilty about having to put victims and third parties through another ordeal. Similarly, the earlier prosecution process may have produced a relationship between the prosecutor and the victim or affected third parties that might affect the neutrality of her judgment.[191] Third, particularly when the prosecutor believes the defendant is properly incarcerated (for this or some other crime[192]), victim's rights may seem to be the only active consideration that is significant as a practical matter.[193]

These are largely psychological considerations that probably do affect prosecutors. Rules are unlikely to preempt prosecutors' reliance

191. For a discussion of the meaning of prosecutorial neutrality, see generally Green & Zacharias, supra note 163.

192. Consider, for example, the case of a serial rapist who has been prosecuted only with respect to one rape in order to avoid putting additional victims through the ordeal of a trial. In deciding whether to take steps that might undermine the single conviction, may the prosecutor take into account the interests of all the rape victims?

193. *See, e.g.*, David Meier, *The Prosecution's Perspective on Postconviction Relief in Light of DNA Technology and Newly Discovered Evidence*, 35 NEW ENG. L. REV. 657, 660 (2001) (describing the psychological difficulty of one prosecutor when confronted by the need to inform victims that postconviction relief is appropriate).

on them, even if society wished to adopt such rules. The existence of these factors may, however, militate in favor of implementing procedures that can relieve those prosecutors who are burdened with psychological influences of decisionmaking responsibility.

V. POSSIBLE REGULATORY RESPONSES TO POSTCONVICTION JUSTICE ISSUES

This Article has noted a plethora of considerations relevant to the obligation of prosecutors to serve postconviction justice. The considerations tend to be case-sensitive, often cut in opposite directions, and are susceptible to inconsistent assessments by prosecutors with differing perspectives. The following sections briefly analyze how professional code drafters might respond to these considerations and then address how other regulators might take them into account, perhaps in conjunction with new code provisions.

A. Justice Under the Ethics Codes

One option is for ethics codes to adopt an artificial framework that resolves some or all of the issues. Professional rulemakers could, for example, start with prosecutorial obligations at the trial stage and ratchet down the requirement of taking action one level because of the presumption of guilt and the costs of reconsidering a case as if it were just beginning. Thus, if a prosecutor's trial obligation would be to dismiss an indictment, the postconviction obligation might simply be to disclose the problem to the defendant or the court; a trial obligation of voluntary disclosure would be reduced to a postconviction obligation of disclosure only when disclosure is requested by the defendant; and a duty to answer a request would become no duty to act at all.

The problem with this approach is that the required prosecutorial responses do not necessarily fit the issues. The justification for prosecutorial action in the trial context may not apply postconviction because the same due process concerns may not be evident. Conversely, reducing the level of action may not be justified by temporal problems or the likelihood of the defendant's guilt. Perhaps most importantly, the solutions simply may be unrealistic given the scenarios identified in this Article.

A second option is for the codes to focus more directly on the effects of the passage of time. In other words, the rulemakers could require prosecutors to consider what their obligations would have been had the same situation arisen within the adversarial trial

process and then to consider explicitly whether and why their obligations should be different in the situation they now confront.

The appeal of this approach disappears when one considers hard cases. The postconviction setting almost always will differ significantly from the adversarial setting. There are often no alternative decisionmakers. Defendants typically have no access to the pertinent information and cannot protect their own interests. Because the postconviction setting is likely to diverge from an adversarial context, prosecutors will find themselves without guidance in differentiating their postconviction and trial obligations.

The difficulty for code drafters is the one with which we began. There is no easily identifiable, universal touchstone for defining a rule. At one level, it looks as if the drafters can do no more than offer their collective personal opinions regarding how prosecutors should react to particular situations—opinions that may be no more justifiable than those of prosecutors who disagree with the rulemakers' values.

Perhaps more is possible, however. By cataloguing the relevant considerations, this Article has focused the issues sufficiently for code drafters to begin addressing the issues. Some of the categories the Article has discussed do lend themselves to policymaking by rule or standard. The following subsections outline a few possible approaches. The resulting debate should, at a minimum, identify norms acceptable to the bar and help reduce consideration of prosecutorial dilemmas to a more manageable set of issues.

1. Substantive guidelines relating to the presumption of guilt

It would be appropriate for code drafters to select a standard for the presumption of guilt that prosecutors could apply uniformly. As in the pre-trial context, any choice is debatable. Adoption of a standard, however, at least requires an actual debate, which in turn has two beneficial effects: it is likely to lead to *a* justifiable norm; and, it identifies the competing theoretical considerations in a way that provides individual prosecutors with some illumination. In any event, the identification of a single standard will promote more consistent behavior.

As noted above, there are three generic types of presumptions that code drafters might adopt: (1) a backward-looking assessment of the level of belief the prosecutor currently has regarding the defendant's guilt; (2) a current assessment of the prosecutor's belief that the defendant is innocent; or (3) a split assessment of the

likelihood of defendant's guilt/innocence and the fairness of the process defendant received at trial.

Whatever presumption code drafters adopt, however, it is important for them to highlight that the presumption should be applied directly only to certain types of cases; most notably, those in which the defendant now has a claim to dismissal of the case. Where a defendant has a different kind of equitable claim, the drafters should take an express position on how the prosecutor's level of belief is relevant to her obligations. It is important for the drafters to make clear that prosecutorial obligations to accomplish justice do not end with questions of defendants' rights, but may also extend to achieving results that benefit victims and third parties.

2. Substantive guidelines relating to exculpatory information

In the pretrial context, ethics codes have adopted standards regarding prosecutorial disclosure of evidence that materially benefits the defense.[194] Some of these simply incorporate legal obligations while others go beyond legal requirements. There is no reason why similar standards should not develop for the postconviction setting, identifying when disclosure is required and what kinds of material must be disclosed.[195] Again, any resolution may be debatable, but a consistent standard of any form has the benefit of avoiding ad hoc decisionmaking by individual prosecutors who have incentives to avoid disclosure.[196]

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194. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8 ("The prosecutor in a criminal case shall . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense").

195. *Cf.* Lesley E. Williams, *The Civil Regulation of Prosecutors*, 67 FORDHAM L. REV. 3441, 3466 (1999) (criticizing the Model Rules of Professional Conduct for remaining "silent about a prosecutor's post-trial obligations to re-open cases when she becomes aware of uncontroverted evidence that the person convicted is innocent"); Ryan E. Mick, *The Federal Prosecutors Ethics Act: Solution or Revolution*, 86 IOWA L. REV. 1251, 1284-85 (2001) (criticizing state ethics codes for failing to address prosecutors' postconviction obligations when they discover new evidence).

196. Bruce Green has suggested that judicial committees, rather than private code-drafting groups, would be better suited for developing such rules, Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1573-80. Tbis Article takes no position on who should draft standards. To the extent, however, that the objection to specific professional rules governing prosecutors rests on the rules' potential inconsistency with judicial standards, it is important to recognize that the scenarios addressed here, for the most part, have not been—and potentially migbt never be—addressed by the courts.

3. Substantive guidelines relating to the legitimacy of practical considerations

Previously, this Article noted a series of "nonsubstantive" concerns that might bear on individual prosecutorial decisionmaking, including public, private, and temporal concerns that on the surface seem irrelevant to just decisionmaking, but on closer examination seem more justifiable.[197] Because prosecutors inevitably *will* take these considerations into account, it behooves code drafters to address their legitimacy directly.

If society wishes to classify some of them as illegitimate, only an express statement to that effect will influence prosecutors (and then only some prosecutors) to disregard them. Such statements also will ease the task of prosecutors in justifying their decisions to disregard the inappropriate considerations to colleagues and other law enforcement personnel.[198] Conversely, to the extent society wishes prosecutors to rely on the questionable considerations, that issue should be debated and resolved by an express standard, rather than remaining hidden and being addressed on an individual discretionary basis.

4. Substantive guidelines relating to specific issues and particular types of cases

Code drafters routinely must decide the level of specificity at which to address categories of ethical behavior. General rules, such as the prescription that prosecutors simply "do justice" have the benefit of covering a wide range of situations and providing a hortatory standard, but also tend to provide minimal guidance.[199] In contrast, providing solutions to specific, fact-sensitive dilemma situations controls misbehavior, but excessive specificity in regulation can mislead lawyers into believing the regulation provides answers for all situations. Being too specific in the ethics codes thus may undermine

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197. *See supra* text accompanying notes 185-194.

198. One of the functions of professional codes is to provide guidance in a clear way that enables the target lawyers to point to the codes in explaining, and justifying, their conduct to others. *See* Fred C. Zacharias, *Reconciling Professionalism and Client Interests,* 36 WM. & MARY L. REV. 1303, 1359-1360, 1370 (1995) (discussing the use of codes in discussing potential ethical issues with clients).

199. *See* Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics,* 69 NOTRE DAME L. REV. 223, 259-60 (1993) (analyzing the relationship between specificity and "role-setting").

prosecutors' readiness to engage in introspection regarding the suitability of conduct in a wide range of cases.[200]

Because of the high level of generality in the current regime governing prosecutorial obligations, there is little risk that future changes will become so detailed as to overregulate. There thus is room for code drafters to take positions regarding some of the particular issues illustrated in this Article, particularly issues that prosecutors might overlook in the absence of additional guidance. Prime candidates are situations involving postconviction obligations to victims and third parties, which prosecutors otherwise might not perceive as fitting within their functions.

B. Potential Changes Requiring Joint Action by Code Drafters, Legislators, and Other Regulators

The postconviction justice issues that this Article has highlighted cannot all be resolved through ethics rulemaking. Indeed, in some areas, it is wholly inappropriate for bar associations (populated more heavily by defense attorneys than prosecutors) to attempt to control prosecutorial behavior.[201] In other areas, professional standards that identify the conflicts of interest prosecutors face and the risks inherent in prosecutors undertaking inconsistent roles can prompt the development of supplementary legislative or administrative solutions.

1. Providing procedural fairness

There are procedural mechanisms that might minimize the conflicts of interest that prosecutors confront at the postconviction stage. To the extent that the conflicts arise from a prosecutor's personal conflicts—for example, the interest in avoiding exposure of impropriety in a case the prosecutor herself handled—the standard

200. *Id.* at 262 ("A highly specific professional requirement . . . risks stultifying lawyers' independent evaluation of appropriate responses"); *see also* Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199, 230-31 (2001) (discussing specific code provisions that, by being specific, risk leading lawyers to engage in inappropriate conduct unthinkingly).

201. *See, e.g.*, Fred C. Zacharias, *Who Can* Best *Regulate the Ethics of Federal Prosecutors Or, Who Should Regulate the Regulators?*, 65 FORDHAM L. REV. 429, 449 (1996) (arguing, in the context of no-contacts regulation, that the ABA and Department of Justice each "consists largely of one side in the regulated litigation, so each is likely to allow institutional or membership interests to dominate its substantive value choices"); Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917, 954 (1992) (noting the possible "hidden agenda" of bar regulators seeking to impose limits on prosecutorial subpoenas of attorneys).

solution of recusal can suffice. This solution is best implemented by a rule identifying grounds for recusal and a supportive internal office mechanism for shifting cases.

Many of the role problems this Article has identified are more generic, however. The potential conflicts may involve (1) the conflict between the interests of the office and defendants' rights, (2) interoffice and interagency politics, or (3) an analysis of independent state interests in avoiding exposure of error or previous governmental misconduct. The dangers lie not so much in the prosecutor's individual biases, but rather in the lack of standards by which she can choose among countervailing interests.

It may be impossible to create ethics rules that determine each of the potential problem situations, but internal mechanisms for standardizing decisionmaking and eliminating over-reliance on prosecutorial discretion probably can be established. Prosecutorial agencies might create review boards or peer review procedures to assist individual decisionmaking once a prosecutor identifies a postconviction justice issue. Prosecutors are less likely to avoid such review than in cases involving personal conflicts because they are likely to welcome assistance in resolving the dilemmas they face. In the long term, the existence of procedures also can help develop standards that will guide future decisionmaking.

Professional rulemakers can play a role in prompting the development of internal procedures. Initially, the codes can (and to some extent already do) encompass conflict of interest rules that alert prosecutors generally to situations in which they confront multiple, potentially inconsistent responsibilities. The codes, however, can do a better job of identifying specific conflict standards unique to prosecutors based, perhaps, on the conflict scenarios this Article has identified. The codes' traditional methodology of basing conflict-of-interest rules on the actions of clients and their potentially conflicting concerns has less value for prosecutors who serve a single client (i.e., the state) which itself represents an amalgam of interests.

The codes could go further. In recent years, the commentary and even some codes have emphasized rules that impose supervisory responsibility on legal organizations and their managers.[202] Numerous

202. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 5.1(a), (c)(2) (imposing responsibility on a law firm manager to institute measures to ensure professional responsibility and to prevent professional misconduct of which he is aware); *accord* N.J. RULES OF PROF'L CONDUCT R. 5.1(a), 5.3(a); *see also* N.Y. CODE OF PROF'L RESPONSIBILITY R. 1-102(A), 5-105(e) (specifically imposing requirements on a "lawyer or law firm").

scholars have proposed entity liability for ethics decisionmaking.[203] In this vein, code drafters might usefully adopt specialized rules for prosecutorial agencies that encourage independent peer or supervisory participation in postconviction decisionmaking, particularly in cases in which individual prosecutors face problems of role.

2. Providing outside input

Some postconviction justice decisions, when analyzed fairly, do not fit the unique expertise of prosecutors. This Article has noted instances in which particular issues are equitable in nature—for example, whether a change in the law or a change in circumstances justifies a modification of a previous conviction or sentence. It has identified other instances in which prosecutors must decide whether the culpable nature of the previous act of the prosecutor, the prosecutor's office, or another law enforcement agent itself merits a modification, even if the merits of the case do not.

The prosecutor's office inevitably must participate in resolving these cases because they have the pertinent information and an overview of what constitutes a significant change or true fault by law enforcement personnel. Arguably, however, judicial and citizen input are equally valuable in reaching an unbiased view of what society would consider to be an equitable solution. The legislative or administrative adoption of a mechanism for including external input —a citizen or lawyer advisory board perhaps—would serve that function.[204]

3. Providing standards for particular substantive issues

At least two categories of postconviction justice issues call for systematic resolution at a policy level, rather than resolution through the exercise of individual prosecutorial discretion. Pertinent policies

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203. *See, e.g.*, Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 1-10 (1991); Milton R. Wessell, *Institutional Responsibility: Professionalism and Ethics*, 60 NEB. L. REV. 504, 511-13 (1981); Zacharias, *Justice in Plea Bargaining*, *supra* note 4, at 1371-73; *cf.* Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 336 (2003) (arguing for a requirement of "structural supervision" within law firms); Committee on Professional Responsibility, *Discipline of Law Firms*, 48 THE RECORD 628, 638 (1993) (proposing entity liability rule for New York).

204. The notion of external input is not far-fetched or unworkable. In the DNA context, at least two prosecutors' offices already have instituted procedures through which defense counsel and neutral evaluators participate in screening cases in which postconviction action may be appropriate. *See, e.g.*, Delcour, *supra* note 95, at 1 (discussing Oklahoma County's program); Reza, *supra* note 93, at B-2 (discussing Orange County, California program).

for such cases should be implemented by legislative decision or internal administrative standards.

First, prosecutorial reactions to the availability of new evidence-gathering technology that has the potential to correct previous errors should be regularized. DNA evidence, for example, can conclusively establish the reliability or unreliability of core evidence in a range of rape, sexual assault, and other cases. The decision of whether to reevaluate the previous evidence, allow defendants to conduct DNA tests at their own expense, or treat the matter as closed should not depend on the happenstance of whether an individual prosecutor is openminded or resistant to a new result. On the other hand, numerous legitimate factors are relevant to the decision, including the likelihood of error, the burden any approach will impose on state laboratories and evidence-gathering personnel, and equality among defendants of different means. As already has occurred in some jurisdictions, it makes sense for a uniform rule weighing these considerations to be developed and subjected to public review.[205]

Second, for both resource and fairness reasons, it seems important for society to develop some notion of when prosecutors should involve themselves in ancillary legal proceedings that bear on a case in which the prosecutors' office has been involved. In part, this should be a legislative decision. To the extent a legislature envisions a statutory procedure as a direct supplement to prosecution (as in the case of parole or civil commitment for sex offenders), it should either assign to prosecutors the role of implementing the supplementary procedure or identify the extent to which prosecutors (and information in their possession) should be involved. In these situations, the statutory procedures are designed to further essentially the same state interests as criminal prosecution, so the legislature should weigh the benefits of limiting prosecutorial involvement (e.g., to maintaining prosecutorial independence and saving prosecutorial resources) against the economies of scale.

Many ancillary proceedings, however, are not similarly targeted. Damage lawsuits, custody decisions, and restraining orders, for example, may benefit victims whom prosecutions also seek to benefit, but in different respects. Information in the prosecutor's possession and the light prosecutors can shed on the civil matter may be essential to the success of the proceeding. However, the extent to which prosecutors should identify with victims is debatable, for the duty to serve justice sometimes requires prosecutors to emphasize the rights of other constituents. Prosecutorial participation in civil

205. *See supra* text accompanying note 93.

matters may be perceived by some observers as engaging in vindictive behavior and implicates the use of societal resources in ostensibly private matters.

Left to their own devices, prosecutors are likely to decide whether to involve themselves in ancillary proceedings on the basis of how sympathetic they feel to the particular person requesting assistance and how much antipathy they feel towards the defendant. Viewed objectively, however, the core of the issue should be how society wants its prosecutorial resources to be spent. Because the number and kinds of ancillary proceedings in which prosecutors might become involved are limited, it is feasible for legislatures and prosecutorial agencies to determine suitable prosecutorial conduct by policy or rule.

C. Potential Internal Changes by Prosecutors' Offices

If this Article suggests nothing else, it is clear that individual prosecutors currently lack a basis on which to recognize and resolve postconviction justice issues. Ethics rules can highlight some of these issues and identify decisionmaking criteria. Legislative and administrative policies can address and resolve other issues. Yet in the end, many of the problem situations will remain fact-sensitive. Experience and a "common law" of prosecutorial decisions will provide the most useful guidance.

Under current decisionmaking regimes, however, neither experience nor a common law are brought to bear on postconviction justice issues, for decisions are left to individual, usually short-term, prosecutors to reach on an ad hoc basis. Three possible remedies for this shortcoming spring to mind.

First, prosecutors' offices should highlight postconviction justice issues in their manuals and administrative guidelines. At a minimum, internal guidelines can accomplish as much as new code provisions in establishing principles governing the presumption of guilt and the legitimacy of specific questionable criteria. They probably can go further in at least selecting policies regarding the office's attitudes towards particular categories of cases.

Second, a prosecutor's office might assign a single prosecutor, or committee of prosecutors, to resolve or participate in deciding these issues, in much the way some law firms now assign in-house ethics specialists to review professional responsibility issues.[206] Participation

206. *See generally* Elizabeth Chambliss and David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 559 (2002) (providing an empirical study evaluating the "[a]necdotal evidence . . . that

of specialists allows these decisionmakers to develop experience and expertise, by virtue of seeing a range of postconviction justice cases. They can, ever-increasingly, bring that experience and expertise to bear in a systematic fashion.

Third, prosecutors' offices should develop an internal "common law." They simply must require that cases involving postconviction justice dilemmas be recorded by memorandum and maintained in a centralized location. This kind of recorded history can provide what currently is missing in the literature: cases and commentary regarding the issues. Over time, shared wisdom will develop.

VI. CONCLUSION

This Article has not set forth a framework, or frameworks, for resolving all the issues that fit within its purview. It has, however, set the stage for deeper consideration of a problem that previously has gone unnoticed. Part II's elaboration of the range of cases that implicate prosecutors' postconviction duties alone is significant. It should alert prosecutors to responsibilities that they often ignore. By analyzing the core considerations that make the issues difficult, Part IV should heighten prosecutors' sensitivity in resolving the issues. It should also encourage commentators, legislators, ethics code drafters, and other regulators to develop appropriate responses. Part V offers a start in that direction.

At a minimum, this Article highlights the need for attention to a serious void in the literature addressing postconviction prosecutorial conduct. By calling upon prosecutors to serve "justice," the courts and code drafters act as if that concept is one prosecutors can readily understand and implement. The failure of the ethics codes and standards even to note criteria relevant to postconviction issues demonstrates the fallacy of that assumption. If well-meaning prosecutors are to satisfy the obligations that society has placed upon them—at their peril, one might add—far more guidance is required.

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large law firms increasingly are turning to in-house ethics advisors, firm general counsel, and other specialists to manage the firm's compliance with professional regulation").

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