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## Should Prosecutors Be Expected to Rectify Wrongful Convictions?

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# SHOULD PROSECUTORS BE EXPECTED TO RECTIFY WRONGFUL CONVICTIONS?

by: Bruce A. Green\*

## ABSTRACT

In 2008, the American Bar Association amended the Model Rules of Professional Conduct to address prosecutors' post-conviction conduct. Model Rules 3.8(g) and (h) establish the remedial steps a prosecutor must take after achieving a criminal conviction when confronted with significant new evidence of an injustice. They require prosecutors to disclose the new exculpatory evidence and to take reasonable steps to initiate an investigation, and if clear and convincing evidence then establishes the convicted defendant's innocence, the prosecutors' office must take reasonable steps to rectify the injustice. Since then, 24 state judiciaries have adopted versions of one or both rules. Although prosecutors in those states have not reported problems with the rules, state and federal prosecutors often oppose their adoption in the remaining states, including in Texas where the model provisions have been under consideration for over a year.

Prosecutors' objections generally sound one of three themes. First, some prosecutors contest that they should be responsible for investigating and rectifying wrongful convictions. Second, some assert that because they can be counted on to rectify wrongful convictions, the rules serve no useful purpose but instead simply impugn prosecutors' ethics. Third, some insist that the rules will unduly burden them—the rules demand too much of prosecutorial time and resources; they are too imprecise; or they will provoke unfounded disciplinary complaints to which prosecutors must respond. After providing background into the rules' development, this Article examines prosecutors' objections to adopting Model Rules 3.8(g) and (h) and explains why those objections are unpersuasive.

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\* Louis Stein Chair and Director of the Stein Center for Law and Ethics at Fordham Law School. My thanks to Susan Fortney, Mike Ware, and Ellen Yaroshefsky for their helpful comments on an earlier draft; to Tori Klevan, Fordham '24, for her excellent research and editorial assistance; and to Susan Fortney for inviting me to give the presentation at Texas A&M University School of Law for which this article was prepared. Also, my thanks to the editors of this journal for their outstanding editorial assistance, including in generating the Appendix to this Article.

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I. INTRODUCTION

This Article examines a question at the intersection of criminal procedure and legal ethics: What should the rules of professional conduct tell prosecutors to do when they know that a convicted defendant is likely to be innocent or is clearly and convincingly innocent? The question is occasioned by the growing acknowledgment that despite constitutional procedures intended to make the legal process fair and reliable, innocent people are sometimes convicted and punished. The legal process makes it difficult for those wrongly punished to overturn their convictions, especially without prosecutors’ help. There is an expanding body of literature, by turns poignant and infuriating, about wrongful convictions and exonerations.<sup>1</sup> Among the many questions these stories raise is, What should we expect of our prosecutors?<sup>2</sup>

A recent account of the conviction and long-delayed exoneration of Kevin Strickland in Kansas City, Missouri, illustrates prosecutors’ range of responses to likely injustices.<sup>3</sup> Strickland was found guilty of a triple murder in 1979, asserted his innocence for decades, and finally

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1. See, e.g., LARA BAZELON, *RECTIFY: THE POWER OF RESTORATIVE JUSTICE AFTER WRONGFUL CONVICTION* (2018); VALENA BEETY, *MANIFESTING JUSTICE: WRONGLY CONVICTED WOMEN RECLAIM THEIR RIGHTS* (2022); SARAH BURNS, *THE CENTRAL PARK FIVE* (2011); KIMBERLY J. COOK, *SHATTERED JUSTICE: CRIME VICTIMS’ EXPERIENCES WITH WRONGFUL CONVICTIONS AND EXONERATIONS* (2022); JOHN FERAK, *FAILURE OF JUSTICE: A BRUTAL MURDER, AN OBSESSED COP, SIX WRONGFUL CONVICTIONS* (2016); SAUNDRA D. WESTERVELT & KIMBERLY J. COOK, *LIFE AFTER DEATH ROW: EXONEREES’ SEARCH FOR COMMUNITY AND IDENTITY* (2012); BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2014).

2. For an earlier examination of this question, see Bruce A. Green, *Access to Criminal Justice: Where Are the Prosecutors?*, 3 TEX. A&M L. REV. 515, 521 (2016), <https://doi.org/10.37419/LR.V3.I3.2> (concluding that drawing on teachings from exonerations, professional conduct rules should impose further obligations on prosecutors to avoid wrongful convictions).

3. Charles Atwell & Lindsay Runnels, *An Alliance for Justice: The Exoneration of Kevin Strickland*, CHAMPION, Apr. 2022, at 10.

won his freedom in November 2021.<sup>4</sup> The authors of the account explain that the case against him rested on the testimony of an eyewitness who was prompted by the police to name him as one of the four gunmen, the one with the shotgun.<sup>5</sup> Six months after Strickland's trial, a co-defendant pleaded guilty and, in a lengthy statement about the killings, told the court that Strickland was innocent and had been elsewhere at the time.<sup>6</sup> The co-defendant named another man, who looked like Strickland, as the man with the shotgun.<sup>7</sup> The eyewitness, who was in the courtroom that day, realized she had mistakenly identified Strickland, but the prosecutor discouraged her from trying to correct her mistake.<sup>8</sup> Three decades later, after Strickland secured a prominent law firm's help, the county prosecutor's office, now under new leadership, reinvestigated, found that reliable forensic evidence proved Strickland's innocence, and asked a court to set aside Strickland's conviction.<sup>9</sup> A Missouri judge, persuaded by the evidence of Strickland's innocence, granted the motion over the state Attorney General's opposition.<sup>10</sup> In this example, the Kansas City prosecutors who reexamined Strickland's conviction and sought to rectify his wrongful conviction responded very differently from their predecessors in the 1980s, who ignored the eyewitness's recantation, and from the Attorney General, who stood in the way of Strickland's exoneration.<sup>11</sup> Among the "important lessons" the authors draw is that a "prosecutor's oath encompasses more than ethically prosecuting those who violate the law. It also includes a responsibility to protect the innocent before, during, and after a conviction. *Normalizing the efforts*

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4. *Id.* at 10.

5. *Id.* at 11.

6. *Id.* at 12.

7. *Id.*

8. *Id.* at 17.

9. *Id.* at 15-17.

10. *Id.* at 18.

11. *See id.* at 12, 17-19. The state Attorney General took the position that the county prosecutor was abdicating her responsibility to defend the conviction, and that he therefore had to do so, significantly delaying Strickland's release. Luke X. Martin et al., *County Prosecutor Accuses Missouri Attorney General of Malpractice for Fighting Kevin Strickland's Release*, NPR: KCUR 89.3 (Nov. 24, 2021, 2:16 PM), <https://www.kcur.org/news/2021-11-24/county-prosecutor-accuses-missouri-attorney-general-of-malpractice-for-fighting-kevin-stricklands-release> [<https://perma.cc/Y8G5-Q4W7>]. Following Strickland's exoneration, the Attorney General defended his actions, stating that "we defended the rule of law," to which the county prosecutor responded, "It's such a profoundly idiotic statement." *Id.*; *see also* Jim Salter, *Kim Gardner Again Seeks to Clear Murder Conviction of Lamar Johnson*, KSKD 5, <https://www.ksdk.com/article/news/crime/kim-gardner-seeks-clear-murder-conviction-lamar-johnson/63-3b846baf-707c-450c-8cd0-abd307bb8366> (Aug. 31, 2022, 10:31 PM) [<https://perma.cc/6W9N-EJSQ>] (detailing Lamar Johnson's wrongful conviction, the catalyst of the new state law that led to Strickland's exoneration, and discussing Strickland's innocence hearing and release under the new law).

*of ethical prosecutors to correct past errors is critical to the shared goal of an accountable and accurate legal system.*"<sup>12</sup>

This leads to the questions of how to "normalize" ethical prosecutors' responsibility to correct past errors and whether professional conduct rules should serve a role.

\* \* \*

Prosecutors in the United States have enormous power—as U.S. Attorney General (and future Supreme Court Justice) Robert Jackson put it, "The prosecutor has more control over life, liberty, and reputation than any other person in America."<sup>13</sup> But prosecutors are somewhat accountable for their exercise of power, including to the courts. If prosecutors were public officials only, the principle of separation of powers might strictly limit courts' authority to regulate them, but because prosecutors are also lawyers who advocate in court, they answer to both the courts that license them and the courts before which they appear.<sup>14</sup>

Courts regulate prosecutors, in part, by adopting and enforcing professional conduct rules,<sup>15</sup> which generally draw on models drafted by the American Bar Association ("ABA").<sup>16</sup> Most of the relevant rules apply to lawyers generally, not specifically to prosecutors.<sup>17</sup> Like other lawyers, prosecutors must abide by rules governing the lawyer-client relationship, such as those that obligate lawyers to perform their work competently and to avoid conflicts of interest,<sup>18</sup> and rules regulating

12. Atwell & Runnels, *supra* note 3, at 18–19 (emphasis added).

13. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940), <https://doi.org/10.2307/1137244>.

14. For discussions of state and federal courts' authority to regulate prosecutors, see Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143 (2016), and Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381 (2002).

15. Federal legislation specifically requires federal prosecutors to comply with the professional conduct rules of the states in which they practice. See generally Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 211–15 (2000) (discussing the McDade Amendment).

16. MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2020).

17. Courts have not adopted specialized ethics codes for lawyers in different areas of practice, although there would be reasons to do so. See Bruce A. Green, *Should There Be a Specialized Ethics Code for Death-Penalty Defense Lawyers?*, 29 GEO. J. LEGAL ETHICS 527, 528–29 (2016) ("The generality of the state ethics codes poses a problem for lawyers when ethics questions that arise in specialized areas of practice are not answered adequately, clearly, or at all by any of the professional conduct rules.").

18. MODEL RULES OF PRO. CONDUCT R. 1.1, 1.7. See generally Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463 (2017) (analyzing the regulation of prosecutors' conflicts of interest); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1 (2009) (analyzing the

advocacy, such as those that forbid making false statements to the court or presenting false evidence.<sup>19</sup>

The state courts' professional codes include one multipart rule that addresses prosecutors specifically. It derives from Rule 3.8 of the Model Rules of Professional Conduct, the ABA's current set of model rules.<sup>20</sup> Titled "Special Responsibilities of a Prosecutor," Model Rule 3.8 reflects that, unlike lawyers in private practice, prosecutors have a duty to "seek justice,"<sup>21</sup> which courts recognize,<sup>22</sup> and prosecutors acknowledge.<sup>23</sup> The Comment accompanying Rule 3.8 explains that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate."<sup>24</sup> It goes on to explain that "[t]his responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent *and to rectify* the conviction of innocent persons."<sup>25</sup> The ABA has slowly and modestly expanded Rule 3.8 since 1983 when it first adopted the Model Rules.<sup>26</sup> Rule 3.8 now has eight sections—(a) through (h).

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possible application of the competence rule when prosecutors convict innocent defendants).

19. See, e.g., MODEL RULES OF PRO. CONDUCT r. 3.3(a)(1), (3).

20. *Id.* r. 3.8. For historical background, see Ellen J. Bennett & Helen W. Gunnarsson, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (9th ed. 2019).

21. This concept is codified in the Article 2.01 of Texas Rules of Criminal Procedure which provides in part: "It shall be the primary duty of all prosecuting attorneys . . . not to convict, but to see that justice is done. They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused." TEX. CODE CRIM. PROC. ANN. art. 2.01 (West 2005). For differing conceptions of prosecutors' duty to seek justice, compare Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607 (1999), with Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

22. See, e.g., *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

23. See NAT'L PROSECUTION STANDARDS, Standard 1-1.1 (NAT'L DIST. ATT'YS ASS'N 2023), [https://ndaa.org/wp-content/uploads/National-Prosecution-Standards-Fourth-Edition\\_January-2023.pdf](https://ndaa.org/wp-content/uploads/National-Prosecution-Standards-Fourth-Edition_January-2023.pdf) [<https://perma.cc/5CHJ-K57P>] ("The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth. This responsibility includes, but is not limited to, ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected."); see also Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1576 ("The distinctive rule for prosecutors reflects a well-accepted normative understanding that, in some respects, prosecutors should conduct themselves differently from other lawyers.")

24. MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1.

25. *Id.* (emphasis added).

26. See generally Green, *supra* note 23; Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427 (2009).

All state courts have adopted some parts of Model Rule 3.8, often with some modification, and several courts have added provisions of their own.<sup>27</sup> By adopting a version of Rule 3.8, state courts confirm that lawyers serving as prosecutors at all levels of government must abide by professional conduct rules, including some rules specifically tailored to their unique professional role.<sup>28</sup> Courts vary, however, in their judgment about which particular provisions should be included and what precisely they should say.<sup>29</sup>

This Article focuses on two provisions: Model Rules 3.8(g) and (h). The ABA adopted Rules 3.8(g) and (h) in 2008 to address prosecutors' post-conviction conduct, an aspect of prosecutors' work to which the innocence movement called attention. These rules establish the remedial steps a prosecutor must take after achieving a criminal conviction when confronted with evidence of an injustice. Rule 3.8(g) is triggered "[w]hen a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted."<sup>30</sup> If the conviction was obtained in the prosecutor's jurisdiction, the prosecutor who learns of new exculpatory evidence must do three things: first, "promptly disclose that evidence to an appropriate court or authority"; second, "promptly disclose that evidence to the defendant unless a court authorizes delay"; and third, "undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit."<sup>31</sup> Rule 3.8(h) is triggered when, typically at the conclusion of the post-conviction reinvestigation, the "prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit."<sup>32</sup> In that event, the rule says, "[T]he prosecutor shall seek to remedy the conviction."<sup>33</sup>

Since 2008, 24 state judiciaries have adopted versions of one or both rules.<sup>34</sup> I confess to having a personal interest in their doing so, be-

27. See Kuckes, *supra* note 26, at 443.

28. On the uniqueness of prosecutors, particularly federal prosecutors, see Zacharias & Green, *supra* note 15.

29. See Kuckes, *supra* note 26, at 444.

30. MODEL RULES OF PRO. CONDUCT r. 3.8(g).

31. *Id.* If the conviction was *not* obtained in the prosecutor's jurisdiction, the prosecutor need only "promptly disclose that evidence to an appropriate court or authority." *Id.* r. 3.8(g)(1).

32. *Id.* r. 3.8(h).

33. *Id.*

34. See ALASKA RULES OF PRO. CONDUCT r. 3.8(g) (Westlaw through Oct. 15 2022); ARIZ. RULES OF PRO. CONDUCT ER 3.8(g)-(i) (Westlaw through Jan. 15, 2023); CAL. RULES OF PRO. CONDUCT r. 3.8(f)-(g) (Westlaw through Dec. 15, 2022); COLO. RULES OF PRO. CONDUCT r. 3.8 (g)-(h) (Westlaw through Feb. 1, 2023); CONN. RULES OF PRO. CONDUCT r. 3.8(6) (Westlaw through Feb. 1, 2023); DEL. RULES OF PRO. CONDUCT r. 3.8(d)(2) (Westlaw through Feb. 1, 2023); HAW. RULES OF PRO. CONDUCT r. 3.8(c)-(d) (Westlaw through Jan. 1, 2023); IDAHO RULES OF PRO. CON-

cause I assisted in the rules' development. Together with Professor Ellen Yaroshefsky,<sup>35</sup> I initially worked with the New York State Bar Association to draft the earliest version of these rules.<sup>36</sup> We then presented the drafts to the ABA Criminal Justice Section in our collective role as co-chairs of its ethics committee and worked with prosecutors, defense lawyers, academics, and judges to revise the initial proposal. Several years after the ABA adopted the rules, Professor Yaroshefsky and I met in New York City with representatives of New York's state and federal prosecutors' offices to revise the rules for adoption in our home state, tinkering with wording over breakfast at Tom's Restaurant, the Manhattan coffee shop featured in *Seinfeld*. Drawing on this experience, I occasionally weigh in when other states' courts consider these rules. In 2018, I testified in the Michigan Supreme Court in support of the versions proposed there, which the Court then adopted.<sup>37</sup> The rules are now under discussion in Texas, and I have written and spoken in support of them.<sup>38</sup>

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DUCT r. 3.8(g)–(h) (Westlaw through Nov. 15, 2022); ILL. RULES OF PRO. CONDUCT r. 3.8(g)–(i) (Westlaw through Feb. 1, 2023); IOWA RULES OF PRO. CONDUCT r. 32:3.8(g)–(h) (Westlaw through Feb. 1, 2023); MASS. RULES OF PRO. CONDUCT r. 3.8(i)–(k) (Westlaw through Jan. 1, 2023); MICH. RULES OF PRO. CONDUCT r. 3.8(f)–(h) (Westlaw through Jan. 1, 2023); MONT. RULES OF PRO. CONDUCT r. 3.8(g)–(h) (Westlaw through Dec. 1, 2022); N.Y. RULES OF PRO. CONDUCT r. 3.8(c)–(e) (Westlaw through Mar. 15, 2022); N.C. RULES OF PRO. CONDUCT r. 3.8(g)–(h) (Westlaw through Nov. 15, 2022); N.D. RULES OF PRO. CONDUCT r. 3.8(g)–(h) (Westlaw through Jan. 1, 2023); OKLA. RULES OF PRO. CONDUCT r. 3.8(h)–(j) (Westlaw through Jan. 1, 2023); S.C. RULES OF PRO. CONDUCT r. 3.8(g)–(i) (Westlaw through Dec. 1, 2022); S.D. RULES OF PRO. CONDUCT r. 3.8(g)–(h) (Westlaw through laws of 2023 Reg. Sess. effective Feb. 1, 2023 and Sup. Ct. Rule 23-01); TENN. RULES OF PRO. CONDUCT r. 3.8(g)–(h) (Westlaw through Feb. 1, 2023); WASH. RULES OF PRO. CONDUCT r. 3.8(g), (i) (Westlaw through Jan. 1, 2023); W. VA. RULES OF PRO. CONDUCT r. 3.8(g)–(h) (Westlaw through Dec. 1, 2022); WIS. RULES OF PRO. CONDUCT SCR 20:3.8(g)–(h) (Westlaw through Jan. 1, 2023); WYO. RULES OF PRO. CONDUCT r. 3.8(f)–(g) (Westlaw through Jan. 1, 2023). For the text of these rules, see *infra* Appendix.

35. Professor Yaroshefsky is currently the Howard Lichtenstein Distinguished Professor of Legal Ethics, and until recently, she was Executive Director of the Monroe Freedman Institute for the Study of Legal Ethics at the Maurice A. Deane School of Law at Hofstra University. See Ellen C. Yaroshefsky, HOFSTRA L., <https://law.hofstra.edu/ellen-c-yaroshefsky/> [<https://perma.cc/TEZ7-9RU2>].

36. MODEL RULES OF PRO. CONDUCT r. 3.8(h).

37. See *Public Administrative Hearing*, Mich. Sup. Ct. 13–16 (Sept. 20, 2018) (statement of Bruce A. Green), [https://www.courts.michigan.gov/49bfa0/siteassets/rules-instructions-administrative-orders/public-hearing-transcriptsnotices/2018-09-20\\_public\\_hearing.pdf](https://www.courts.michigan.gov/49bfa0/siteassets/rules-instructions-administrative-orders/public-hearing-transcriptsnotices/2018-09-20_public_hearing.pdf) [<https://perma.cc/7U9W-LVJE>].

38. See Letter from Bruce A. Green, Dir., Stein Ctr. for L. and Ethics, to Comm. on Disciplinary Rules & Referenda Subcomm., (July 1, 2022), [https://www.texasbar.com/Content/NavigationMenu/CDRR/Agendas\\_Minutes/MeetingMaterialsAug2022.pdf](https://www.texasbar.com/Content/NavigationMenu/CDRR/Agendas_Minutes/MeetingMaterialsAug2022.pdf) [<https://perma.cc/D7SX-EVTE>]. This was at the invitation of a proponent of the rules, Mike Ware, who helped establish the first prosecutors' CIU in the United States and who is now executive director of Innocence Project of Texas and supervisor of the Texas A&M School of Law Innocence Project, which is part of the Texas A&M Legal Clinics. Professor Ware was a member of the subcom-



Although prosecutors frequently oppose professional regulation of their work,<sup>39</sup> the post-conviction rules were uncontroversial in the ABA. The ABA House of Delegates approved them in 2008 by a voice vote without debate.<sup>40</sup> Prosecutors from around the country involved in the ABA drafting process showed that they are not reflexively opposed to regulation. They agreed that “[i]f [they] have new, credible evidence of innocence, they have to do something about it,” and that this obligation is “not a big burden.”<sup>41</sup>

However, since 2008, some state and federal prosecutors, including in Texas, have opposed their state’s adoption of rules based on the ABA’s models.<sup>42</sup> Prosecutors’ objections can be extremely influential. In Texas, for example, the Committee on Disciplinary Rules and Referenda (sometimes “CDRR”) initially proposed robust provisions, based on Model Rules 3.8(g) and (h), requiring prosecutors who achieve a conviction but later learn of significant new evidence of innocence to investigate and, if convinced of the defendant’s innocence, to try to rectify the wrongful conviction.<sup>43</sup> In capitulation to state and federal prosecutors’ vociferous opposition, however, the CDRR then scaled back its initial proposal. Its most recent proposal is for exceedingly modest additions to the state’s prosecutorial ethics rule that essentially track existing state law.<sup>44</sup> The proposed additions would

mittee assigned to make a proposal regarding Model Rules 3.8(g) and (h) to the Texas State Bar’s Committee on Disciplinary Rules and Referenda.

39. See generally Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873 (2012).

40. James Podgers, *Righting Wrongs: ABA Ethics Amendments Confirm Prosecutors’ Duty to Disclose New Evidence*, A.B.A. J., Apr. 2008, at 32, 32.

41. *Id.* (quoting Professor Steven A. Saltzburg, who then chaired the ABA Criminal Justice Section).

42. See, e.g., Letter from Scott Brumley, Chair, Texas Dist. & Cnty. Att’y’s Ass’n Rule 3.09 Comm., to M. Lewis Kinard, Chair, State Bar CDRR (Oct. 19, 2021), [https://www.texasbar.com/Content/NavigationMenu/CDRR/Agendas\\_Minutes/MeetingMaterialsNov2021.pdf](https://www.texasbar.com/Content/NavigationMenu/CDRR/Agendas_Minutes/MeetingMaterialsNov2021.pdf) [<https://perma.cc/HR5W-7HJM>] [hereinafter Oct. Brumley Letter]; Letter from Matthew Schneider and Andrew B. Birge, U.S. Att’y’s, E. & W. Dists. of Michigan, to the J., Michigan Sup. Ct. (Aug. 30, 2018) [hereinafter Mich. U.S. Att’y’s Letter] (on file with author).

43. TEX. DISCIPLINARY RULES OF PRO. CONDUCT I. 3.09 (STATE BAR OF TEX., Proposed Rule Changes 2022), [https://www.texasbar.com/Content/NavigationMenu/CDRR/Documents1/ProposedRules\\_TDRPCConflictSpecialImputation.pdf](https://www.texasbar.com/Content/NavigationMenu/CDRR/Documents1/ProposedRules_TDRPCConflictSpecialImputation.pdf) [<https://perma.cc/8PJ8-GWU4>]. Text of the proposed rule was published in the Texas Bar Journal. Comm. on Disciplinary Rules & Referenda, *Committee on Disciplinary Rules and Referenda Proposed Rule Changes: Texas Disciplinary Rules of Professional Conduct: Rule 1.00. Terminology: Rule 1.09. Conflict of Interest: Former Client: Rule 1.10. Imputation of Conflicts of Interest: General Rule: Rule 3.09. Special Responsibilities of a Prosecutor*, 85 TEX. BAR J. 196, 202–03 (2022).

44. The latest proposed rules regarding prosecutors’ post-conviction obligations in Texas are as follows:

- (f) When a prosecutor knows of new and credible information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall, unless a court authorizes delay,

require Texas prosecutors to disclose “new and credible” exculpatory evidence following a conviction.<sup>45</sup> But Texas prosecutors would not be obligated to conduct or assist with post-conviction investigations prompted by new exculpatory evidence. Nor would they be required to take any steps to rectify clearly wrongful convictions.

Prosecutors’ objections generally sound one of three themes. First, some prosecutors contest that they should be responsible for investigating and rectifying wrongful convictions.<sup>46</sup> Second, some assert that because they can be counted on to rectify wrongful convictions, the rules serve no useful purpose but simply impugn prosecutors’ ethics. Third, some insist that the rules will unduly burden them—the rules demand too much of prosecutorial time and resources; they are too imprecise; or they will provoke unfounded disciplinary complaints to which prosecutors must respond.<sup>47</sup> After providing background into

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- (1) if the conviction was obtained in the prosecutor’s jurisdiction:
    - (i) promptly disclose that information to:
      - (A) the defendant;
      - (B) the defendant’s counsel, or if there is none, the indigent defense appointing authority in the jurisdiction, if one exists;
      - (C) the tribunal in which the defendant’s conviction was obtained; and
      - (D) a statewide entity that examines and litigates claims of actual innocence.
    - (ii) if the defendant is not represented by counsel, or if unable to determine whether the defendant is represented by counsel, move the court in which the defendant was convicted to determine whether the defendant is indigent and thus entitled to the appointment of counsel.
    - (iii) cooperate with the defendant’s counsel by promptly providing all information known to the prosecutor regarding the underlying matter and the new information.
  - (2) if the conviction was obtained in another jurisdiction, promptly disclose that information to the appropriate prosecutor in the jurisdiction where the conviction was obtained.
  - (g) A prosecutor who concludes in good faith that information is not subject to disclosure under paragraph (f) does not violate this rule even if the prosecutor’s conclusion is subsequently determined to be erroneous.
  - (h) In paragraph (f), unless the context indicates otherwise, “jurisdiction” means the legal authority to represent the government in criminal matters before the tribunal in which the defendant was convicted.

TEX. DISCIPLINARY RULES OF PRO. CONDUCT R. 3.09 (STATE BAR OF TEX., Proposed Rule Changes 2023), [https://www.texasbar.com/Content/NavigationMenu/CDRR/Published\\_Proposal/Rule309.pdf](https://www.texasbar.com/Content/NavigationMenu/CDRR/Published_Proposal/Rule309.pdf) [<https://perma.cc/BV32-GS7N>]. These proposed changes were also published in the Texas Bar Journal. Comm. on Disciplinary Rules & Referenda, *Committee on Disciplinary Rules and Referenda Proposed Rule Changes: Rule 3.09 Special Responsibilities of a Prosecutor*, 86 TEX. BAR J. 46 (2023).

45. TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT R. 3.09(f) (Proposed Rule Changes 2023).

46. For an earlier discussion of this question, see Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467 (2009).

47. For earlier discussions of this question, see, for example, Michele K. Mulhausen, Comment, *A Second Chance at Justice: Why States Should Adopt ABA Model*

the rules' development, this Article examines prosecutors' objections and explains why they are unpersuasive.

## II. THE DEVELOPMENT OF MODEL RULES 3.8(G) AND (H)

### A. *Wrongful Convictions, Exonerations, and Prosecutors' Role*

The National Registry of Exonerations records cases in which a convicted person is exonerated, meaning that after that person was convicted of a crime, "new evidence of [his or her] innocence becomes available," resulting in his or her relief from "all legal consequences" of that crime.<sup>48</sup> The Registry identifies more than 3,000 wrongly convicted individuals who have been exonerated since 1989.<sup>49</sup> Most spent many years in prison before they were freed, and a handful were exonerated posthumously.<sup>50</sup> In most cases, their criminal convictions were set aside by a court, "generally on motion by the prosecution, after new evidence of innocence emerged."<sup>51</sup> Sometimes when courts overturned exonerated defendants' convictions, prosecutors insisted on retrying them, but they were acquitted.<sup>52</sup> No one knows how often people are convicted of crimes they did not commit. But the Registry assumes that these 3,000-plus exonerated people are "the fortunate few" of the many innocent criminal defendants who have been falsely convicted.<sup>53</sup>

Wrongly convicted individuals rarely manage to obtain justice or even try. Most exonerations involve serious crimes such as murder, rape, and, increasingly, drug offenses, for which courts imposed lengthy sentences,<sup>54</sup> because those serving shorter sentences have less incentive to try to overturn their convictions and less access to help if they do.<sup>55</sup> For those who persevere, discovering sufficiently compelling evidence of innocence is an exceptional occurrence demanding

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*Rules of Professional Conduct 3.8(g) and (h)*, 81 U. COLO. L. REV. 309, 341 (2010) ("States should embrace an ethical obligation that would not unduly burden prosecutors and is a natural extension of their current responsibilities.").

48. *Glossary*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> [https://perma.cc/JH88-MT8B].

49. THE NAT'L REGISTRY OF EXONERATIONS, 2021 ANNUAL REPORT 5 (2022), <https://www.law.umich.edu/special/exoneration/Documents/NRE%20Annual%20Report%202021.pdf> [https://perma.cc/GJ69-88TU] [hereinafter 2021 ANNUAL REPORT].

50. *Browse Cases: Detailed View*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> [https://perma.cc/FT5H-6YYK].

51. SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989–2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS 8 (2012), [https://www.law.umich.edu/special/exoneration/Documents/exonerations\\_us\\_1989\\_2012\\_full\\_report.pdf](https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf) [https://perma.cc/Y2U3-87S8].

52. *Id.* at 8–9.

53. *Id.* at 2.

54. 2021 ANNUAL REPORT, *supra* note 49, at 3.

55. GROSS & SHAFFER, *supra* note 51, at 4.

extraordinarily good luck.<sup>56</sup> Even when sufficiently compelling evidence of innocence emerges, some prosecutors oppose defendants' release,<sup>57</sup> or condition their release on a guilty plea, or a nolo contendere plea, followed by a sentence to time served.<sup>58</sup> Incarcerated defendants who, although innocent, plead guilty to avoid dragging out the process, are not counted as exonerees by the Registry. The Registry acknowledges that it may misclassify a few guilty people as exonerees, but it recognizes that the criminal process mislabels an exponentially larger number of innocent people as guilty.<sup>59</sup>

Factors contributing to wrongful convictions include mistaken eyewitness identifications, false accusations, police extraction of false confessions, and false or unreliable forensic evidence.<sup>60</sup> In around 40% of the wrongful convictions, the Registry reports, there was "official misconduct."<sup>61</sup> This includes abusive investigative tactics that lead to unreliable or false evidence, but most often, it involves the concealment of exculpatory evidence by prosecutors or their investigators.<sup>62</sup>

Many people contribute to exonerations, especially those wrongly convicted individuals who persevere in seeking to clear their names and the lawyers and nonlawyers, many of whom are associated with innocence projects, who assist them.<sup>63</sup> Others with a recurring role include prosecutors, especially those staffing conviction integrity units

56. *See id.* at 4–5.

57. These prosecutors are sometimes called "innocence deniers." *See* Lara Bazelon, *Ending Innocence Denying*, 47 HOFSTRA L. REV. 393, 396 (2018). They may be seeking to preserve their office's reputation or to avoid public restitution for the wrongful conviction, or they may simply be incapable of looking objectively at new evidence of innocence. *See, e.g.*, Laurie L. Levenson, *The Problem with Cynical Prosecutor's Syndrome: Rethinking a Prosecutor's Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335 (2015) (arguing that experienced prosecutors assigned to address post-conviction claims become cynical about defendants' claims of innocence); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 130 (2004) (identifying "institutional and political barriers that deter district attorneys' offices from recognizing potentially valid innocence claims").

58. *See* GROSS & SHAFFER, *supra* note 51, at 7 (discussing pleading guilty to lesser charges factually associated with the original conviction); Gavin Lasnick, *Plea Reached in West Memphis Murders*, ARK. DEMOCRAT GAZETTE, <https://www.arkansasonline.com/news/2011/aug/19/breaking-plea-reached-west-memphis-murders/?breaking> (Aug. 19, 2011, 2:46 PM) [<https://perma.cc/ER66-VRZS>] (discussing the Alford pleas entered in the West Memphis Three case).

59. *See* GROSS & SHAFFER, *supra* note 51, at 11–17.

60. *Id.* at 40.

61. *Id.* For discussions of different types of official misconduct, *see, for example*, Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133 (2013), and Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399.

62. GROSS & SHAFFER, *supra* note 51, at 65–67.

63. 2021 ANNUAL REPORT, *supra* note 49, at 9.

(“CIUs”) in prosecutors’ offices.<sup>64</sup> Prosecutors’ CIUs around the country have contributed to around 20% of the reported exonerations, and the percentage increases annually as more prosecutors’ offices establish these units.<sup>65</sup>

As this brief account reflects, prosecutors respond to innocence claims in contrasting ways. Some prosecutors “take the view that, given the proven fallibility of the criminal process and the public aversion to wrongful punishment, they should play a vigorous role in uprooting and correcting factual error.”<sup>66</sup> Dallas prosecutor Craig Watkins adopted this role in 2007 when he established the first CIU,<sup>67</sup> and other prosecutors have since done so, including the Kansas City prosecutor who helped exonerate Strickland.<sup>68</sup> In contrast, skeptical prosecutors, like those who tried Strickland, have ignored new exculpatory evidence, and some, like the Missouri Attorney General, have frustrated or opposed innocent defendants’ efforts to seek relief.<sup>69</sup> Some prosecutors have even blocked convicted defendants from undertaking measures such as DNA testing of crime-scene evidence that might enable them to substantiate or establish their innocence claims on their own.<sup>70</sup>

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64. *Id.*; see also Green & Yaroshefsky, *supra* note 46, at 486–87 (“Prosecutors have a pivotal role with respect to motions to set aside convictions in states where judicial relief is available as well as with respect to executive clemency determinations. A court is more likely to grant relief if the prosecutor joins in a defendant’s motion to set aside his conviction based on new evidence. . . . Likewise, an executive would be most likely (although perhaps still unlikely) to issue a pardon if the prosecutor supports the application.”).

65. 2021 ANNUAL REPORT, *supra* note 49, at 3, 9.

66. Green & Yaroshefsky, *supra* note 46, at 476.

67. See generally Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y. L. SCH. L. REV. 1033 (2011–2012) (discussing Craig Watkins’s role in establishing the concept of the CIU); see also Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 37–38 (2009) (“[T]o truly effectuate the minister-of-justice goal, prosecutors should play a more active role in rectifying wrongful convictions by forming internal post-conviction ‘innocence units’ geared toward ferreting out potential wrongful convictions and assisting in presenting these cases to courts.”).

68. See Margaret Stafford, *Explainer: The Missouri Law That Led to Strickland Decision*, ASSOCIATED PRESS (Nov. 23, 2021), <https://apnews.com/article/crime-kansas-city-kansas-missouri-f73d1486d17a1884ff95ce84af75b00f> [<https://perma.cc/YZ3S-2UKQ>].

69. For another example, see Armen H. Merjian, *Anatomy of a Wrongful Conviction: State v. Dedge and What It Tells Us About Our Flawed Criminal Justice System*, 13 U. PA. J.L. & SOC. CHANGE 137 (2009–2010). Prosecutors might adopt this approach to “discourage unworthy post-conviction claims and minimize [defendants’] incentives” to manufacture false evidence or secure false recantations, or to conserve “police, prosecutorial and judicial resources, minimize the burden on witnesses and victims,” or in the belief that denying that wrongful convictions occur, “promote public confidence in the reliability of the criminal process.” Green & Yaroshefsky, *supra* note 46, at 475–76.

70. See Jodena Carbone, *Selective Testing of DNA and Its Impact on Post-Conviction Requests for Testing*, 10 RUTGERS J.L. & PUB. POL’Y 339, 358–59 (2013).

B. *Professional Conduct Rules on Prosecutors' Post-Conviction Obligations*

Model Rules 3.8(g) and (h) set forth the very minimum that prosecutors should be expected to contribute toward rectifying wrongful convictions.<sup>71</sup> These rules were the product of a lengthy drafting process, in which many prosecutors participated, beginning in 2006, when the New York City Bar evaluated numerous aspects of prosecutors' responsibilities in the wake of wrongful convictions around the country.<sup>72</sup> It concluded that rules were needed to address prosecutors' ethical responsibilities when a prosecutor becomes aware of new and material evidence that an innocent person was wrongfully convicted.<sup>73</sup> Its report prompted the New York State Bar Association to recommend professional conduct rules concerning prosecutors' post-conviction disclosure obligations that were drafted with significant input from state and federal prosecutors and representatives of the criminal defense bar.<sup>74</sup> The New York rules won widespread support from local bar associations and near unanimity in the state bar's House of Delegates.<sup>75</sup>

As an outgrowth of its three-year study of wrongful convictions,<sup>76</sup> the ABA's Criminal Justice Section took the lead in refining New York's proposed rules, building support for them, and securing the ABA's endorsement.<sup>77</sup> The ABA drafting process was inclusive and consensus-driven.<sup>78</sup> The Section's leadership was balanced between

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71. MODEL RULES OF PRO. CONDUCT r. 3.8(h)-(g) (AM. BAR ASS'N 2020).

72. Letter from Patricia M. Hynes, President, New York City Bar, to the Hon. Jonathan Lippman, C.J., New York State Ct. of Appeals (Feb. 3, 2010), <http://www.nycbar.org/pdf/report/uploads/20071856-LetterregardingRule3.8RulesofProfConduct.pdf> [<https://perma.cc/43VF-NY99>] [hereinafter Hynes Letter].

73. See The Comm. on Pro. Resp., *Proposed Prosecutorial Ethics Rules*, 61 REC. ASS'N BAR CITY N.Y. 69 (2006).

74. See Hynes Letter, *supra* note 72.

75. *Id.*

76. CRIM. JUST. SECTION, AM. BAR ASS'N, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY: REPORT OF THE ABA CRIMINAL JUSTICE SECTION'S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS, at xv (Paul Giannelli & Myrna Raeder eds., 2006).

77. See Kuckes, *supra* note 26, at 457, 460-62 ("[T]his was a ground-up reform that began at the state and local level and influenced the ABA - the opposite course from the top-down process of general ethics reform. Within the ABA, . . . [t]he change was proposed by the Criminal Justice Section, rather than the ABA's dedicated ethics committee, reflecting a new and positive approach to amending prosecutorial ethics."); see also David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 232-33 (2011) ("[P]rovisions (g) and (h) were proposed to the ABA's House of Delegates by the body's Criminal Justice Section rather than its ethics committee.").

78. See Kuckes, *supra* note 26, at 457 ("By allowing the proposal to percolate through the ranks of the criminal justice system, it gave supporters time to build consensus, refine the rules based on a breadth of experience among state and federal prosecutors, defense counsel and judges, and develop a solid ground of support for

prosecutors and defense lawyers, and the organizations with a seat at the table included the U.S. Department of Justice, the National District Attorneys Association, and the National Association of Attorneys General.<sup>79</sup> The prosecutors involved in the drafting process, and those whom they represented and with whom they consulted, mirrored the diversity of our country's prosecutors.<sup>80</sup>

There was broad agreement that prosecutors have a duty to rectify wrongful convictions—that they cannot ignore significant new evidence of innocence or let wrongful convictions stand—and that it would be beneficial to express this duty in a rule as a way for courts, the legal profession, and prosecutors themselves to express and affirm the importance of this duty.<sup>81</sup> At the same time, however, it was important to codify the principle in a way that makes sense for the diverse settings in which prosecutors work and the diverse ways in which new evidence of innocence might surface.<sup>82</sup>

For example, the drafters recognized that a prosecutor's office might learn of evidence that exonerates a defendant convicted in another jurisdiction. That occurred in a well-known New York City exoneration that began when a reliable informant told a federal prosecutor that the District Attorney's Office in Manhattan had convicted two innocent men of murder.<sup>83</sup> In that situation, the Model Rules do not expect the prosecutor who first learns the exculpatory information to investigate.<sup>84</sup> But if that prosecutor recognizes the significance of the evidence, the prosecutor should disclose the information to the court in which the defendant was convicted or to the prosecutors' office that secured the conviction so that they can take appropriate action.<sup>85</sup>

The drafters also recognized that prosecutors' offices have varying resources, and some offices might not be able to conduct an extensive reinvestigation on their own. Therefore, when prosecutors learn of new evidence showing that someone their office convicted is likely to

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the proposed change.”); Bruce A. Green, *Prosecutorial Ethics in Retrospect*, 30 GEO. J. LEGAL ETHICS 461, 473 (2017) (“Over the course of the lengthy ABA revision and adoption process, the drafters (myself among them) sought to accommodate prosecutors' concerns about wording while reminding them that the provisions were only models and could be modified by states in light of their distinctive laws, processes, and traditions.”).

79. See Green, *supra* note 39, at 881–82.

80. See *id.* at 882.

81. See, e.g., Hynes Letter, *supra* note 72.

82. See *id.*

83. See Maurice Possley, *Olmedo Hidalgo*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3295> (Sept. 26, 2019) [<https://perma.cc/5PUF-CP4U>]; see also Green & Yaroshefsky, *supra* note 46, at 467–71 (discussing the prosecutors' actions after receiving information regarding two wrongful convictions in the Palladium case); David Luban, *The Conscience of a Prosecutor*, 45 VAL. U. L. REV. 1 (2010).

84. See MODEL RULES OF PRO. CONDUCT r. 3.8(g)(2) (AM. BAR ASS'N 2020).

85. See *id.* r. 3.8(g).

be innocent, the Model Rules say, they need only “make reasonable efforts to cause an investigation.”<sup>86</sup> For example, they can try to enlist another institution to investigate, such as a statewide investigative office or a prosecutor’s office with better resources.<sup>87</sup> In these and other ways, the drafters attempted to anticipate, and accommodate, prosecutors’ legitimate concerns. At the same time, they recognized that the Model Rules are only a model and that state courts can modify them to reflect unique aspects of the state’s institutions, procedures, and priorities.

At first, it was smooth sailing for these rules. The sponsors won support from other ABA entities as well as other bar associations.<sup>88</sup> The proposed rules met no significant opposition in the ABA, not even from the U.S. Department of Justice, which is represented in the ABA House of Delegates.<sup>89</sup> After the ABA adopted the rules in 2008,<sup>90</sup> the Wisconsin and Tennessee courts quickly adopted versions at state prosecutors’ urging. The Wisconsin District Attorneys Association encouraged the Wisconsin Supreme Court to give effect to “the prosecutor’s duty to seek justice [which] not only requires the prosecutor to take precautions to avoid convicting innocent individuals but also requires action when it appears likely that an innocent person was convicted.”<sup>91</sup> The Tennessee District Attorneys General Conference likewise petitioned in support of the rules, explaining that its prosecutors are “dedicated to preventing mistaken convictions and rectifying the very few mistaken convictions that occur” and that the new rules will “set[ ] a clear standard for prosecutors and will increase confidence in our criminal justice system. In addition and just as importantly these amendments will lead to a greater understanding of the

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86. *Id.* r. 3.8(g)(2)(ii).

87. *See infra* notes 125, 152 and accompanying text. Rather than shifting responsibility to another state agency, a prosecutor’s office might conserve resources by collaborating with defense counsel in the reinvestigation. *See generally* QUATRONE CTR. FOR THE FAIR ADMIN. OF JUST., UNIV. OF PA. CAREY L. SCH., GUIDELINES FOR COLLABORATION AND ENGAGEMENT: PROSECUTORS AND DEFENSE COUNSEL WORKING TOGETHER IN JOINT POST-CONVICTION INVESTIGATIONS 5 (2022), <https://www.law.upenn.edu/live/files/12062-guidelines-for-collaboration-and-engagement> [<https://perma.cc/7WN9-H2K3>] [hereinafter GUIDELINES FOR COLLABORATION AND ENGAGEMENT] (“Joint collaboration between CIUs and defense counsel, when possible, maximizes resources, increases efficiency, and helps to ensure a smoother review process.”).

88. Stephen A. Saltzburg, *Changes to Model Rules Impact Prosecutors*, CRIM. JUST., Spring 2008, at 1, 13.

89. *Id.*; Green, *supra* note 78, at 473 (“The ABA rule drafters did not expect these provisions to meet resistance and, indeed, when they were circulated for comment, prosecutors had no substantial normative objections, only suggestions for rewording.”)

90. *See* Green, *supra* note 78, at 472–73.

91. Petition at 3, *In re* the Amend. of Sup. Ct. Rules Ch. 20 Rules of Pro. Conduct for Att’ys, No. 08-24 (Wis. Sept. 19, 2008), <https://www.wicourts.gov/supreme/docs/0824petition.pdf> [<https://perma.cc/X9HV-DLPH>].



unique role of prosecutors to seek the truth over and above winning a case.”<sup>92</sup>

The new model provisions encountered rough waters in other states, however.<sup>93</sup> Some state prosecutors catalogued problems that might arise if their state courts adopted them.<sup>94</sup> The U.S. Department of Justice, after initially proposing to refine the wording of the rules,<sup>95</sup> battled them in several jurisdictions (although not in New York).<sup>96</sup> Many state courts have found prosecutors’ objections unpersuasive,<sup>97</sup> and as of the end of 2022, 24 states had adopted one or both rules, typically with some revisions.<sup>98</sup> Happily, prosecutors in those states have not reported that the rules impede their work; none have petitioned their courts to repeal or revise the rules. Nevertheless, prosecutors in the remaining states have not necessarily taken comfort from their colleagues’ experience.<sup>99</sup>

### III. WHY ME?: PROSECUTORS’ RESPONSIBILITY TO RECTIFY WRONGFUL CONVICTIONS

It is widely agreed that because states owe it to the public to try to ferret out and rectify wrongful convictions, states must assign some institution the job of investigating innocence claims when significant new exculpatory evidence emerges and of trying to overturn clearly wrongful convictions. The Comment to Model Rule 3.8 assumes that the job belongs to prosecutors: as ministers of justice, prosecutors have a specific obligation “to rectify the conviction of innocent persons,” to which the rule gives effect.<sup>100</sup> Not everyone accepts this basic

92. Comments of the Tenn. Dist. Att’y’s Gen. Conf. at 2, *In re the Adoption of Amended Tenn. Rules of Pro. Conduct*, No. M2009-00979-SC-RL1-RL (Tenn. Nov. 30, 2009), [https://www.tncourts.gov/sites/default/files/comment-tscr8\\_rpc.pdf](https://www.tncourts.gov/sites/default/files/comment-tscr8_rpc.pdf) [<https://perma.cc/F8FT-TCUD>].

93. I am using “states” as shorthand for all government authorities: federal, state, local, and tribal.

94. See Green, *supra* note 39, at 891–93 (describing opposition of state prosecutors in Washington, who argued that the proposed rule would illegitimately expand convicted defendants’ discovery rights and trigger unmeritorious grievances, and the opposition of federal prosecutors in Tennessee, who predicted “a flood of complaints”) (second part quoting Memorandum from James R. Dedrick et al., U.S. Att’y, E., Middle & W. Dist. of Tennessee, to Mike Catalano, Clerk, Tennessee App. Cts. 5 (Dec. 14, 2009), [https://www.tncourts.gov/sites/default/files/comment-tscr8\\_rpc.pdf](https://www.tncourts.gov/sites/default/files/comment-tscr8_rpc.pdf) [<https://perma.cc/F8FT-TCUD>]).

95. Saltzburg, *supra* note 88, at 13.

96. See Kuckes, *supra* note 26, at 439 (describing Department of Justice’s efforts to influence state ethics rules, including Model Rule 3.8).

97. See *supra* note 34 (listing rules of 24 states that have adopted one or both rules).

98. See *supra* note 34. For text of these states’ rules, see *infra* Appendix.

99. See, e.g., Oct. Brumley Letter, *supra* note 42, at 4 (acknowledging that “other states may be well served by the full measure of Model Rule 3.8,” but contending that “Texas law should be based on Texas problems, issues and circumstances,” and that Model Rules 3.8(g) and (h) are unnecessary in Texas).

100. MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2020).

premise, however. Skeptics ask, Why prosecutors? Some suggest that rectifying wrongful convictions is no more the responsibility of prosecutors than of any other lawyers, while others maintain that prosecutors cannot be trusted to do the job with enough objectivity.<sup>101</sup>

A. *Prosecutors' Review of Convictions in Their Role as Ministers of Justice*

A representative of the Texas District and County Attorneys Association recently suggested that the responsibility to investigate and correct wrongful convictions, if it exists at all, should be borne equally by all members of the bar.<sup>102</sup> He characterized this as a “moral obligation.”<sup>103</sup> But it is mistaken to think that rectifying wrongful convictions is only, or primarily, a matter of personal morality rather than a professional obligation that derives from both prosecutors' role as executive branch officials and their role as lawyers.

The executive branch is committed “to the basic principle that the state should not punish innocent people,” and prosecutors are the executive branch officials who are assigned the job of upholding this principle.<sup>104</sup> Unlike their counterparts in some other countries, U.S. prosecutors are not just trial advocates; they carry out virtually all the executive branch's responsibilities relating to a criminal prosecution.<sup>105</sup> Early in the process, when they decide whether to bring criminal charges, and even after they initiate a prosecution, prosecutors have an ongoing responsibility to weed out cases of actual innocence. After securing convictions, the state has an ongoing interest in correcting mistaken convictions of innocent people, and the prosecutors' offices generally have the responsibility to serve the public interest in this way both because we generally favor allowing institutions to correct their own mistakes and because no other state agency is better

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101. Local Texas prosecutors offered another objection which is hard to categorize because it entirely misses the point of Model Rules 3.8(g) and (h). Their representative asked: “Is there a wrongful conviction out there *caused by prosecutorial misconduct* that cannot be or has not been addressed under current law and rules?” Letter from Scott Brumley, Chair, Texas Dist. & Cnty. Att'ys Ass'n Rule 3.09 Comm., to M. Lewis Kinard, Chair, State Bar CDRR, at 1 (Dec. 21, 2021) (emphasis added), [https://www.texasbar.com/Content/NavigationMenu/CDRR/Agendas\\_Minutes/MeetingSupplement.pdf](https://www.texasbar.com/Content/NavigationMenu/CDRR/Agendas_Minutes/MeetingSupplement.pdf) [<https://perma.cc/2JZ9-V4ZQ>] [hereinafter Dec. Brumley Letter]. The rules do not address only wrongful convictions caused by prosecutorial conduct, and they are not intended to remedy or sanction prosecutorial misconduct that caused a wrongful conviction; they are intended to require prosecutors to take steps to rectify wrongful convictions, regardless of the cause.

102. *Id.* at 3.

103. *Id.*

104. Green & Yaroshefsky, *supra* note 46, at 504–05.

105. See Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUST. (PROSECUTORS & POL.: A COMPAR. PERSP.) 1, 14–16 (2012), <https://doi.org/10.1086/666975> (comparing prosecutorial roles in various countries with the United States).

qualified, if any others are available, to do so.<sup>106</sup> The Supreme Court alluded to one aspect of this professional obligation in a 1976 decision, noting that prosecutors are “bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of [a] conviction.”<sup>107</sup> Likewise, investigating legitimate innocence claims to ensure that innocent people do not suffer criminal punishment is a matter of basic prosecutorial competence, wholly apart from Rule 3.8.<sup>108</sup>

Even if rectifying wrongful convictions was not intrinsic to the U.S. prosecutors’ job, courts and the legal profession could expect this of prosecutors because, as lawyers, prosecutors are “officers of the court” with a responsibility to protect the integrity of the judicial process. All lawyers have some responsibility to rectify distortions of the judicial process when they come to learn of them. Like other trial advocates, prosecutors must correct their own false statements to the court, even if innocently made, and rectify false testimony once discovered.<sup>109</sup> Courts expect even more from prosecutors given their duty to seek justice, including, at times, a duty to prevent or correct the courts’ errors.<sup>110</sup> Around 80 years ago, the Supreme Court said, “The public trust reposed in the law enforcement officers of the Government requires that they be quick to confess error when . . . a miscarriage of justice may result from their remaining silent.”<sup>111</sup> As noted in a previous article, the responsibility to correct wrongful convictions “is not significantly different from that of correcting procedural or legal error. Yet it is ultimately more important: the interest in finality is a less compelling justification for preserving convictions of people who are innocent than for preserving convictions in the face of procedural error.”<sup>112</sup>

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106. Green & Yaroshefsky, *supra* note 46, at 505 (“As the executive branch official best positioned to assess whether a convicted defendant is factually innocent, the prosecutor has primary responsibility for correcting error and abdicates this responsibility when she fails to take reasonably available measures to rectify wrongful convictions.”).

107. *Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976).

108. See Ass’n of the Bar of the City of New York Comm. on Pro. Ethics, Formal Op. 2018-2, at 1 (2018), [https://s3.amazonaws.com/documents.nycbar.org/files/FormalOpinion2018-2\\_prosecutors-post-conviction-duties-wrongful-convictions.pdf](https://s3.amazonaws.com/documents.nycbar.org/files/FormalOpinion2018-2_prosecutors-post-conviction-duties-wrongful-convictions.pdf) [<https://perma.cc/RA77-ETJS>] [hereinafter N.Y. Formal Op. 2018-2] (Investigating legitimate innocence claims “is implicit in prosecutors’ duty of competence and in their role as ministers of justice, as recognized well before New York’s professional conduct rules specifically addressed the issue.”).

109. MODEL RULES OF PRO. CONDUCT r. 3.3(a)(1), (3) (AM. BAR ASS’N 2020).

110. On prosecutors’ heightened duty of candor, see CRIM. JUST. STANDARDS, Prosecution Function Standard 3-1.4(a) (AM. BAR ASS’N 2017), [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/) [<https://perma.cc/93LG-W8H6>], and Bruce A. Green, *Candor in Criminal Advocacy*, 44 HOFSTRA L. REV. 1105 (2016).

111. *Young v. United States*, 315 U.S. 257, 258 (1942).

112. Green & Yaroshefsky, *supra* note 46, at 504–05; see also *People v. Foster*, 42 N.Y.S.2d 831, 835 (N.Y. Sup. Ct. 1943) (“[A] court has inherent power to set aside its

This is not to say that professional conduct rules cannot reasonably ask lawyers other than prosecutors to help exonerate innocent defendants when they can do so consistently with their confidentiality duty to current and former clients. Several states adopted professional conduct rules requiring lawyers to disclose new exculpatory information when it is not confidential.<sup>113</sup> But such rules differ from those establishing prosecutors' post-conviction obligations. Their rationale is different, and their scope is different. While all lawyers have responsibilities as "officers of the court" to the integrity of the legal process and to the public good, other lawyers do not have prosecutors' special responsibilities to ensure the fairness and reliability of the criminal process, and other lawyers have offsetting duties of loyalty and confidentiality to individual clients.<sup>114</sup> It is not reasonable to contend that unless all lawyers are equally obligated to rectify wrongful convictions, prosecutors should not bear this responsibility.

### B. *Prosecutors' Ability to Overcome Cognitive Biases in Reviewing Convictions*

Some argue that prosecutors cannot be objective enough to investigate innocence claims. Once a prosecutor's office wins a conviction,

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judgment procured by fraud. The same reasoning and authority should sustain the power in this Court to dismiss an indictment procured through false testimony and upon which the judgment of the court was based, and to vacate the judgment.").

113. See ARIZ. RULES OF PRO. CONDUCT ER 3.10(a)–(b) (Westlaw through Jan. 15, 2023) ("When a lawyer knows of credible and material evidence that creates a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the lawyer shall promptly disclose that evidence to the court in which the defendant was convicted and to the corresponding prosecutorial authority, and to defendant's counsel or, if defendant is not represented, the defendant and the indigent defense appointing authority in the jurisdiction.") (subject to confidentiality duty); N.C. RULES OF PRO. CONDUCT r. 8.6(a) (Westlaw through Nov. 15, 2022) ("Subject to paragraph (b), when a lawyer knows of credible evidence or information, including evidence or information otherwise protected by Rule 1.6, that creates a reasonable likelihood that a defendant did not commit the offense for which the defendant was convicted, the lawyer shall promptly disclose that evidence or information to the prosecutorial authority for the jurisdiction in which the defendant was convicted and to North Carolina Office of Indigent Defense Services or, if appropriate, the federal public defender for the district of conviction."). In some other jurisdictions, lawyers have discretion to disclose confidential information to exonerate a wrongly imprisoned individual. See, e.g., MASS. RULES OF PRO. CONDUCT r. 1.6(b)(1) (Westlaw through Jan. 1, 2023) ("A lawyer may reveal confidential information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent the wrongful execution or incarceration of another."). For discussions of whether lawyers other than prosecutors should be allowed or required to disclose information to exonerate a wrongly convicted person, see, for example, James E. Moliterno, *Rectifying Wrongful Convictions: May a Lawyer Reveal Her Client's Confidences to Rectify the Wrongful Conviction of Another?*, 38 HASTINGS CONST. L.Q. 811 (2011), and Ken Strutin, *Preserving Attorney-Client Confidentiality at the Cost of Another's Innocence: A Systemic Approach*, 17 TEX. WESLEYAN L. REV. 499 (2011).

114. See MODEL RULES OF PRO. CONDUCT r. 3.3(a)(1), (3), 1.6.

the argument goes, lawyers in the office become incapable of open-minded inquiry and analysis; their cognitive biases will be too overwhelming. Federal appellate judge Douglas Ginsburg and his law clerk elaborated on this concern in a law review article shortly after the ABA adopted Rules 3.8(g) and (h).<sup>115</sup> They acknowledged that it is “critical” to develop “an effective corrective mechanism” to the problem of wrongful convictions,<sup>116</sup> and that this would ordinarily be the prosecutor’s job because “the prosecutor . . . is supposed to be” not only “an advocate” but also “a neutral minister of justice.”<sup>117</sup> However, they doubted that a prosecutor could respond neutrally to a post-conviction claim of innocence and recommended that states assign this job to some other investigative body,<sup>118</sup> as North Carolina did when it established an Innocence Inquiry Commission,<sup>119</sup> a unique state agency whose work has led to at least 15 exonerations.<sup>120</sup>

While it is true that prosecutors hold cognitive biases,<sup>121</sup> as do other participants in the criminal process,<sup>122</sup> and that their biases may be stronger at the post-trial stage than earlier in the process, prosecutors’ offices have shown that they can overcome cognitive biases. Part of the answer is structural. While the original trial prosecutors are an important source of information, offices typically assign responsibility for the reexamination to prosecutors who were uninvolved in early proceedings and who therefore have no personal stake in the outcome.<sup>123</sup> Of course, that does not entirely eliminate the problem of

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115. Douglas H. Ginsburg & Hyland Hunt, Commentary, *The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond?*, 7 OHIO ST. J. CRIM. L. 771, 792 (2010) (“[T]he wave of DNA-based exonerations has raised awareness that the possibility of a wrongful conviction is real, and as a result has cast serious doubt upon the reliability of the adversarial process and in particular its commitment to err upon the side of acquitting the guilty rather than risk convicting an innocent.”).

116. *Id.*

117. *Id.* at 771.

118. *Id.* at 793.

119. *Id.* at 789.

120. N.C. INNOCENCE INQUIRY COMM’N, <https://innocencecommission-nc.gov/> [<https://perma.cc/LR2R-HXPU>].

121. See, e.g., Alafair Burke, Commentary, *Brady’s Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 CASE W. RESV. L. REV. 575 (2007); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012).

122. See Bruce A. Green, *Legal Discourse and Racial Justice: The Urge to Cry “Bias!”*, 28 GEO. J. LEGAL ETHICS 177, 180–81 (2015) (“We are told that implicit biases, including racial biases, may influence every player in the criminal process—police, prosecutors, defense lawyers, jurors and, of course, judges.”) (footnotes omitted).

123. See Dana Carver Boehm, *The New Prosecutor’s Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613, 634, 641; KRISTINE HAMANN ET AL., PROSECUTORS’ CTR. FOR EXCELLENCE, CONVICTION REVIEW TODAY: A GUIDE FOR PROSECUTORS 37 (2020), <https://pceinc.org/wp-content/uploads/2020/12/20201209-Conviction-Review-Final.pdf> [<https://perma.cc/UM65-NQBQ>].

cognitive bias, since these prosecutors may identify with the office's institutional interest in avoiding embarrassment by confessing error after obtaining a conviction,<sup>124</sup> and they will have a professional connection to, and sympathy for, colleagues who may have committed error. Despite this, however, prosecutors' offices, often acting through CIUs, have contributed to many exonerations.<sup>125</sup> Prosecutors' own accounts, in the years since Judge Ginsburg wrote, reflect their conviction that prosecutors' offices committed to reviewing convictions objectively can do this work, and that it is good for the office to undertake this responsibility, in part, because it contributes to a positive office culture.<sup>126</sup> Even in offices that are too small to assign innocence claims to a special unit, prosecutors can take steps to offset cognitive biases when they conduct reinvestigations,<sup>127</sup> by, for example, inviting an innocence project or members of the defense bar to assist them.<sup>128</sup>

This objection also overlooks the risk that other public agencies will have similar biases. At the outset of the innocence movement, it was assumed that innocence claims should be reviewed with fresh eyes,<sup>129</sup> but shifting responsibility from the trial prosecutors' office is no panacea. A public office, such as that of the state attorney general, which did not prosecute the case may view innocence claims too skeptically, particularly if it regularly defends the state against post-conviction claims. The office may be unmotivated to remedy an injustice for which it had no responsibility. Lacking the trial prosecutors' experience of reviewing evidence before filing charges to make a judgment about the likelihood of guilt, an attorney general's office may be less

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124. *Cf.* Ware, *supra* note 67, at 1040 ("The most cynical explanation for the resistance among prosecutors . . . is that the best way to avoid an embarrassing exoneration is to block the process that could eventually lead to one.").

125. *See supra* notes 60–62 and accompanying text.

126. *See, e.g.*, Cyrus R. Vance, Jr., *The Conscience and Culture of a Prosecutor*, 50 AM. CRIM. L. REV. 629, 632–33 (2013); HAMANN ET AL., *supra* note 123, at 5; *see also* Elizabeth Webster, *The Prosecutor as a Final Safeguard Against False Convictions: How Prosecutors Assist with Exoneration*, 110 J. CRIM. L. & CRIMINOLOGY 245 (2020).

127. *See* Boehm, *supra* note 123 (proposing a framework for prosecutors' review of innocence claims).

128. *See generally* GUIDELINES FOR COLLABORATION AND ENGAGEMENT, *supra* note 87 (discussing collaborations between CIUs and defense counsel). The CIU in the San Francisco prosecutors' office under Chesa Boudin's leadership established an innovative collaboration with lawyers outside the office. *See* Joshua Sharpe, *Chesa Boudin Created a Commission to Investigate Wrongful Convictions. Will His Replacement Keep It Going?*, S.F. CHRON., <https://www.sfchronicle.com/sf/article/chesa-boudin-innocence-commission-17301094.php> (July 15, 2022, 4:40 PM) [<https://perma.cc/H6GL-VAX6>] (discussing how the prosecutors' office established an Innocence Commission "of legal experts of varying backgrounds that works pro bono to investigate claims of wrongful convictions in the city. . . . [It is] a different model from others in that it's meant to be more independent of the District Attorney's Office. The reasoning is the notion that any prosecutors leading such a process would inevitably run into conflicts when investigating their office's own potential failures").

129. *See* Green & Yaroshefsky, *supra* note 46, at 487–95.

qualified to conduct a similar review post-conviction. A law enforcement office with no prior involvement in a case may view an innocence claim skeptically out of reluctance to accuse other lawyers of errors or misconduct or simply out of a philosophical commitment to finality.<sup>130</sup> Conversely, knowing that no institution is perfect, and viewing its responsibility to the truth as ongoing, the trial prosecutors' office may welcome the opportunity to correct, and learn from, its past mistakes.<sup>131</sup>

In practice, trial prosecutors' offices sometimes have been quicker to remedy injustices than state attorney generals' offices.<sup>132</sup> In Strickland's case and others, a state attorney general has resisted or opposed innocence claims even after the trial prosecutors' office concluded that the conviction was unjust.<sup>133</sup> This experience suggests that a philosophical commitment to seeking justice, including to rectifying wrongful convictions, can go farther than institutional detachment to overcome biases against innocence claims.

#### IV. WHO NEEDS A RULE?: WHY IT IS USEFUL TO CODIFY PROSECUTORS' MINIMUM POST-CONVICTION OBLIGATIONS

Some prosecutors assert that the proposed rules are unnecessary or redundant because prosecutors can be relied on to rectify wrongful convictions independently of any professional conduct rule.<sup>134</sup> And they see an unnecessary rule as more than a waste of ink. For example, a representative of Texas prosecutors objected that rather than reinforcing professional expectations, the addition of a "needlessly cumulative statement" sends "the implicit message that prosecutors as a lot are unscrupulous and cannot be trusted to carry out their duties in

130. See Mulhausen, *supra* note 47, at 334–36.

131. See generally Ware, *supra* note 67 (discussing how the Dallas District Attorney's Office changed its policies and practices in response to problems identified by their CIU); Joseph Ax, *Manhattan DA Speech Spotlights Integrity of Convictions*, NAT'L LEGAL NEWS FROM REUTERS, June 21, 2012, Westlaw; Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn From Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161 (2010) (discussing the importance of learning from discovery violations).

132. See, e.g., *Abdur'Rahman v. State*, 648 S.W.3d 178 (Tenn. Crim. App. 2020).

133. See Salter, *supra* note 11; Green, *supra* note 2, at 525; Bazelon, *supra* note 57, at 465.

134. See, e.g., Mich. U.S. Att'ys Letter, *supra* note 42, at pt. III ("Federal and state prosecutors in Michigan have repeatedly demonstrated their commitment to rectifying wrongful convictions. That commitment includes disclosing newly discovered evidence. It includes revisiting prior convictions. It includes remedying wrongful convictions for defendants who have gone through the proper channels. All of that is already happening. It is therefore unlikely that the proposed rules would produce any added benefits for the wrongfully convicted."); see also Green, *supra* note 78, at 473 ("The provisions basically accord with professional and judicial expectations that prosecutors will not ignore evidence of a wrongful conviction.").

accordance with law.”<sup>135</sup> However, this sort of objection misconceives both law and ethics and ignores legitimate reasons to codify prosecutors’ professional obligation to rectify wrongful convictions.

From a legal perspective, at least, Model Rules 3.8(g) and (h) are not redundant. In some states, including Texas, prosecutors are required by law to disclose significant exculpatory evidence after a conviction is obtained, but no jurisdiction explicitly requires prosecutors to initiate an investigation into significant new innocence claims or to try to set aside convictions when the defendant is clearly and convincingly innocent.<sup>136</sup> Ideally, most prosecutors will take these steps and more without a rule. But any suggestion that prosecutors will universally do so is unconvincing given the history of prosecutors around the country who have ignored compelling new evidence of innocence or even impeded defendants’ efforts to investigate and overturn false convictions.<sup>137</sup> Strickland’s case exemplifies this history.

Given the nature of professional conduct codes, the complaint that the rules impugn lawyers’ integrity rings particularly hollow. Even if the rules did nothing more than codify existing law or established practice, they would serve a conventional function. Many professional conduct rules incorporate other law by reference, codify pre-existing law, or cover essentially the same ground as existing law.<sup>138</sup> These rules could be called “redundant,” but that does not make them un-

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135. See Oct. Brumley Letter, *supra* note 42, at 2; see also Dec. Brumley Letter, *supra* note 101, at 2 (“[T]he numbers of [wrongful convictions because of prosecutorial misconduct] remain small, and Texas prosecutors are impressed with the serious consequences for failing to live up to their duties to disclose exculpatory evidence.”).

136. Barry Scheck has argued that, to some extent, this obligation is implicit in due process. See Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 748 (2017) (“[I]t is fair to say that prosecutors in every state have a post-conviction constitutional obligation to correct a wrongful conviction when they discover ‘material’ or ‘clear and convincing’ evidence of innocence.”) (relying on *Dist. Att’y’s Off. for the 3d Jud. Dist. v. Osborne*, 557 U.S. 52 (2009)).

137. See, e.g., Bazelon, *supra* note 57; Jessica Miller, *Utah’s Attorney General Is Fighting Salt Lake County over Efforts to Review Cases Where Convicts Say They Are Innocent*, SALT LAKE TRIB., <https://www.sltrib.com/news/2020/02/24/utahs-attorney-general-is/> (Feb. 24, 2020, 5:20 PM) [<https://perma.cc/JNS5-GART>].

138. The rules on the attorney-client relationship draw on, and cover much of the same ground as, contract, tort, and agency law. Advocacy rules also incorporate or restate preexisting obligations: Rule 3.1 forbids frivolous filings, as do rules of procedure; Rule 3.3(a)(3) and 3.4(b) forbid the creation or use of perjury, as does the criminal law; Rule 3.4(a) forbids “unlawfully” obstructing others’ access to evidence, drawing on obstruction of justice law; Rule 3.4(c) forbids “knowingly disobey[ing]” a court rule, as does contempt-of-court law; Rule 3.4(d) covers the same ground as procedural rules governing discovery; Rule 3.4(e) draws on judicial decisions regarding the bounds of permissible jury argument; and Rule 3.5(a) forbids seeking to influence judges, jurors or officials “by means prohibited by law.” See MODEL RULES OF PROFESSIONAL CONDUCT r. 3.1, 3.3(a)(3), 3.4(b), 3.4(a), 3.4(c), 3.4(d), 3.4(e), 3.5(a) (AM. BAR ASS’N 2020). Likewise, the rules forbidding lawyers from assisting clients in crimes or frauds, from stealing clients’ money, and from engaging in “dishonesty, fraud, deceit or misrepresentation,” overlap with criminal and tort law. *Id.* r. 8.4(c).



necessary, much less insulting to lawyers. These sorts of rules call lawyers' attention to particularly relevant legal obligations, clarify how the generally applicable law applies to lawyers, or simply authorize professional discipline on top of other potential legal remedies or sanctions when the law is violated. Rules that restate or reaffirm pre-established understandings do not imply that lawyers cannot be trusted to abide by existing obligations in the absence of a rule. While Model Rules 3.8(g) and (h) give disciplinary authorities a standard against which to evaluate prosecutors' professional conduct on the (hopefully rare) occasions when they bury or ignore significant exculpatory evidence, the rules do not presuppose that prosecutors will often transgress.<sup>139</sup>

Far from impugning prosecutors, Model Rules 3.8(g) and (h) make a positive statement to prosecutors individually and collectively by conveying that their role involves coming to the aid of innocent people who are wrongly suspected, accused, or convicted of crimes. Codifying this understanding of prosecutors' role serves several useful functions:

*First*, expressions of professional norms matter to individual lawyers, including prosecutors. . . . One of the objectives of law is expressive. Even if a professional conduct rule is never enforced, it is law—not just an aspirational standard—that has expressive force in establishing judicial and professional expectations. For prosecutors who aspire to do “the right thing”—presumably, the vast majority of prosecutors—a normative statement in the law should have some influence. . . .

*Second*, prosecutorial conduct rules may influence the culture of prosecutors' offices and the broader judicial and professional cultures within which prosecutors function. . . . [S]ome prosecutors are more open than others to the importance of reviewing new evidence of innocence and conceding when an innocent person was convicted. . . . [O]nce Model Rules 3.8 (g) and (h) are incorporated into state professional conduct codes, the rules are likely to have a more significant impact because they may be included in Continuing Legal Education programs for prosecutors in the state and in writings prepared for the state's prosecutors regarding their professional practices.

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139. Likewise, that the provisions of Model Rule 3.8 apply to only prosecutors reflects the uniqueness of prosecutors' role and responsibilities, not that prosecutors are considered particularly unethical. There are also rules that apply uniquely to lawyers representing entities, incapacitated clients, criminal defendants, and parties to matrimonial proceedings, see MODEL RULES OF PRO. CONDUCT r. 1.5(d), 1.13, 1.14, but no one would argue that these rules impugn the integrity of lawyers serving these clientele.

What is important about the provisions, from a cultural perspective, is that they give expression to the paramount importance of avoiding and correcting wrongful convictions.<sup>140</sup>

In sum, the rules contribute to prosecutors' education and socialization and to the culture of prosecutors' offices by giving concrete expression to the idea that a prosecutor's job is not to pile up convictions, as some might think, but to seek justice.<sup>141</sup>

The rules speak not only to current prosecutors but also to future ones. They inform and reassure future prosecutors, including current law students, that avoiding and rectifying wrongful convictions is an important aspect of prosecutors' job. That should assist in recruiting by making the job more attractive to those who legitimately worry about convicting innocent people. Conversely, rejecting these rules would send a negative message. New prosecutors know the ABA's view that prosecutors must rectify wrongful convictions, because they read Model Rules 3.8(g) and (h) in their required Professional Responsibility courses,<sup>142</sup> or in preparing for the required Multistate Professional Responsibility Examination. If a state court is swayed by prosecutors' objections, what will new prosecutors infer about the state's commitment to the principle that prosecutors must avoid and correct wrongful convictions?

Finally, the rules send a message to the public and to other public officials about the professional expectations for prosecutors and their work. On one hand, the rules might reassure those who are concerned that prosecutors lack a professional commitment to protecting the innocent. At the same time, the rules inform those with a misunderstanding of prosecutors' role. Rule 3.8(g) teaches that when prosecutors reexamine convictions to ensure they are not unjust, prosecutors are properly allocating public resources. Rule 3.8(h) conveys that when prosecutors move, or join in a defense motion, to set aside the conviction of someone whom they are convinced is innocent, prosecutors are not abdicating their responsibilities as advocates in the adversary process: they are fulfilling their responsibilities as ministers of justice.

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140. Bruce A. Green & Ellen Yaroshefsky, *Should Criminal Justice Reformers Care About Prosecutorial Ethics Rules?*, 58 DUQ. L. REV. 249, 273-74 (2020) (footnotes omitted).

141. This is not an unusual function of professional conduct rules. Many are meant to be enforced only in rare and extreme circumstances. For example, Rule 3.4(e), forbidding improper jury arguments, is rarely enforced in disciplinary proceedings, but serves as a reminder and caution to advocates who might otherwise cross the line. See Bruce A. Green, *Regulating Prosecutors' Courtroom Misconduct*, 50 LOY. U. CHI. L.J. 797 (2019).

142. See, e.g., RENEE KNAKE JEFFERSON ET AL., PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH 513-18 (4th ed. 2020) (addressing prosecutors' post-conviction obligations).

## V. ARE THE BURDENS TOO DEMANDING?

Prosecutors opposed to Model Rules 3.8(g) and (h) predict that these rules will excessively burden them. They anticipate, for example, that: (1) the rules will make them expend time and resources that are limited and, in some cases, entirely unavailable; (2) they will grapple with the rules' imprecise terms; and (3) they will encounter unfounded complaints to the disciplinary authorities citing these rules.<sup>143</sup>

It is often the case, however, that to serve the public interest, professional conduct rules burden lawyers either directly or indirectly. In this case, prosecutors objecting to the rules fail to explain why it would be unfair for rules to burden them to promote the public interest in freeing wrongly convicted people.

Moreover, these objections overstate the burdens that prosecutors are likely to bear. It is important to note that prosecutors offer no empirical evidence to support their predictions that the rules will significantly burden them. Their failure is noteworthy because prosecutors in 24 states functioning under one or both rules, in some cases for over a decade, seem unperturbed. Those prosecutors have not publicly reported problems. Prosecutors opposing the rules offer no hearsay accounts of problems either. In Texas, for example, the U.S. Associate Deputy Attorney General has not substantiated his dire predictions by citing the experience of federal prosecutors around the country who comply with similar rules.<sup>144</sup> No one explains why the rules would be uniquely bothersome in Texas. Of course, if they were, the judiciary could then amend or repeal them, and so courts should not be significantly deterred by prosecutors' conjecture about problems that have arisen nowhere else.

As discussed below, there are further reasons why each burden predicted by prosecutors is likely to be bearable.

A. *Are the Obligations Too Onerous?*

One objection relates specifically to the responsibility to reexamine cases when significant new evidence of innocence emerges. The complaint is that prosecutors' offices lack the necessary resources to assume this responsibility, which would presumably take resources away

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143. This is not an exclusive list. At times, prosecutors seem to be throwing spaghetti at the wall to see what sticks. *See, e.g.*, Oct. Brumley Letter, *supra* note 42, at 7 (asserting that a prosecutor's disclosure of significant exculpatory evidence relating to a conviction in another jurisdiction "may well foster distrust and resentment between constitutional officers" and "ignit[e] [a] sort of internecine conflict").

144. *See* Letter from Brit Featherston et al., Texas U.S. Att'y's, E., N., S. & W. Dists., to M. Lewis Kinard, Chairman, CDRR, at 5-6 (Apr. 5, 2022), [https://www.texasbar.com/Content/NavigationMenu/CDRR/Agendas\\_Minutes/SecondSupplement.pdf](https://www.texasbar.com/Content/NavigationMenu/CDRR/Agendas_Minutes/SecondSupplement.pdf) [<https://perma.cc/SJ2J-2TWZ>] [hereinafter Tex. U.S. Att'y's Letter].

from more important work.<sup>145</sup> At bottom, the objection raises the question of what it means for prosecutors to seek justice. Having exercised “the power to destroy others’ lives,”<sup>146</sup> shouldn’t prosecutors allocate resources to restoring innocent people’s lives? If prosecutors have enough resources to convict innocent people, one might ask, Why do they lack the resources to exonerate innocent people? Are they convicting so many innocent people that reopening cases would be overwhelming? Is reexamining a case when prosecutors learn of significant new evidence of innocence so demanding? To those who think prosecutors’ priority ought to be the public interest, objections to the proposed rules that invite these sorts of responses may seem callous.

This objection overstates what the model provisions expect of prosecutors, which is that they take reasonable steps to reexamine convictions when significant doubts about the defendants’ guilt are raised. For example, federal prosecutors in Texas complain that they lack the “resources to investigate every possible legal theory or claim of additional evidence.”<sup>147</sup> But their duty to initiate an investigation would be triggered only in the rare case when new evidence creates a “reasonable likelihood” that the office has convicted an innocent person.<sup>148</sup> That is a high bar. If evidence of innocence is not sufficiently compelling, the rule leaves the decision of whether to reexamine a case to prosecutors’ discretion.<sup>149</sup> Many prosecutors’ offices review innocence claims when new evidence is much less impactful.<sup>150</sup> That is one reason why the rule is said to establish only minimal obligations.<sup>151</sup> And even when the investigative responsibility is triggered,

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145. See Mulhausen, *supra* note 47, at 329–33; Oct. Brumley Letter, *supra* note 42, at 6 (claiming that the proposed rule “would make this task [of pursuing justice] Sisyphean, particularly for prosecutors in small[] jurisdictions”); *id.* at 7 (“[M]ost of our offices simply do not have those resources at hand, and cannot expect to have them in the foreseeable future. Indeed, many prosecutors in Texas work in single-lawyer offices.”); Tex. U.S. Att’y Letter, *supra* note 144, at 5–6 (“Federal prosecutors are not investigators and have neither the general investigative powers nor the staff or financial resources to investigate every possible legal theory or claim of additional evidence.”).

146. *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1233 (7th Cir. 1990) (holding that prosecutors had absolute immunity for allegedly fabricating evidence and making false statements), *rev’d*, 509 U.S. 259 (1993) (holding that prosecutors had only qualified immunity because they were not engaged in advocacy when the alleged improprieties occurred).

147. See Tex. U.S. Att’y Letter, *supra* note 144, at 5–6.

148. MODEL RULES OF PRO. CONDUCT r. 3.8(g) (AM. BAR ASS’N 2020).

149. As noted, prosecutors may have some duty to reexamine cases simply as a matter of competence. See N.Y. Formal Op. 2018-2, *supra* note 108.

150. See, e.g., Boehm, *supra* note 123, at 636 (“[A lack of new evidence] does not bar review of the innocence claim by the Manhattan office, as exonerating new evidence often may be uncovered over the course of an investigation.”); *id.* at 640 (“Santa Clara has participated in two exonerations in cases in which there was no new evidence or allegations of misconduct.”).

151. N.Y. Formal Op. 2018-2, *supra* note 108.

because new exculpatory evidence is so compelling, the prosecutor is expected only to act within reason.

At the same time, this objection understates the importance of prosecutors' involvement in the exoneration process. It is unrealistic to think that a convicted defendant, sitting in prison, has the resources to investigate significant new exculpatory evidence that a prosecutor might disclose. Convicted defendants, almost all of whom are indigent, have no constitutional right to appointed counsel to investigate and assert post-conviction innocent claims and no right to state funding for investigators or forensic experts of the sort to whom prosecutors' offices have access.<sup>152</sup> While there are not-for-profit organizations such as the national and state-based innocence projects that investigate some innocence claims, they can accept only a fraction of the cases that come to them because of their own limitations; they lack prosecutors' easy access to case files, evidence and investigative resources; and they are not public entities tasked with ensuring the integrity of convictions when serious doubts are raised about them.

Some prosecutors assert, however, that they just cannot do this: they have no investigative resources whatsoever and therefore cannot possibly be expected to do anything beyond disclosing new exculpatory evidence to the court or to the convicted defendant.<sup>153</sup> That might seem like an exaggeration, even coming from a prosecutor in a rural, one-lawyer office. But it seems entirely incredible coming as it does from the U.S. Department of Justice,<sup>154</sup> which oversees the Federal Bureau of Investigation, a well-resourced investigative agency. Even if a prosecutor's office does not oversee investigators, it typically

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152. See, e.g., *Parra v. State*, No. 08-13-00328-CR, 2015 Tex. App. LEXIS 6347, at \*10 (Tex. App. June 23, 2015) (recognizing that neither due process nor state statutes guarantee a right to funding for post-conviction DNA testing).

153. See Memorandum from Rick Hagen, CDRR Subcomm. Chairperson on Proposed Rule 3.09, to CDRR, at 2 (Sept. 6, 2022), [https://www.texasbar.com/Content/NavigationMenu/CDRR/Agendas\\_Minutes/MeetingSupplementSept2022.pdf](https://www.texasbar.com/Content/NavigationMenu/CDRR/Agendas_Minutes/MeetingSupplementSept2022.pdf) [<https://perma.cc/5W8T-A599>] (“The second concern expressed by prosecutors regarding the duty to investigate was the ability to do so. Simply put, the resources and funding to allow it. . . . [S]maller jurisdiction prosecutors, including offices staffed with only the elected official, credibly stated their desire to, but inability to comply with the Model Rule’s duty to investigate.”). On September 27, 2022, a subcommittee of the Texas CDRR proposed adding provisions on prosecutors’ post-conviction obligations that do not include the duties in the Model Rules to conduct or cause an investigation and to seek to remedy wrongful convictions. In addition to requiring disclosure of new exculpatory information creating a “reasonable likelihood” of the defendant’s innocence, however, the proposal would require prosecutors to move the court to appoint counsel if the defendant was not represented and to “cooperate with the defendant’s counsel by promptly providing all information in the prosecutor’s possession or under the prosecutor’s control regarding the underlying matter and the new information.” Memorandum from CDRR Subcomm. on Proposed Amends. to Texas Disciplinary Rule 3.09 to CDRR (Sept. 27, 2022), [https://www.texasbar.com/Content/NavigationMenu/CDRR/Agendas\\_Minutes/Oct2022MeetingMaterials.pdf](https://www.texasbar.com/Content/NavigationMenu/CDRR/Agendas_Minutes/Oct2022MeetingMaterials.pdf) [<https://perma.cc/MCS7-M2K4>]; see also *supra* notes 43–45 and accompanying text.

154. See Tex. U.S. Att’y Letter, *supra* note 144.

has influence. An investigative agency that conducted the investigation leading to a conviction is likely to agree to a prosecutor's request to reinvestigate to ensure that it did not make a mistake. After all, the investigators' mandate is not to convict innocent people while letting guilty people go free; it is to discover the facts—to get at the truth.

An under-funded one-lawyer office in a rural county can be resourceful in additional ways in endeavoring to “cause an investigation.” Experience shows that prosecutors' offices can marshal resources from elsewhere or prompt others to take the lead while contributing institutional knowledge and evaluating new evidence that others develop.<sup>155</sup> Strickland's case illustrates the opportunity for collaboration. The county prosecutor's office took a fresh look at evidence accumulated by lawyers from the private bar and developed by forensic experts.<sup>156</sup> In several states, although not Texas, the Attorney General's conviction review unit is available to assist under-resourced prosecutors' offices.<sup>157</sup> Prosecutors in small offices can also seek help from larger offices.<sup>158</sup> They can recruit volunteers.<sup>159</sup> In some jurisdictions, the court might have authority to appoint a special prosecutor on application of the jurisdiction's elected prosecutor, as courts typically do when the prosecutors' office has a conflict of interest.<sup>160</sup>

Given the alternative ways to satisfy the rule, prosecutors' claim that they cannot “make reasonable efforts to cause an investigation” suggests misplaced priorities. All prosecutors' offices have limited resources which prosecutors must decide how to allocate.<sup>161</sup> Having bot-

155. See Sharpe, *supra* note 128 (describing San Francisco Innocence Commission); HAMANN ET AL., *supra* note 123, at 26 (“An external advisory panel may be particularly useful for smaller prosecutor offices that may need additional expertise to evaluate a case.”).

156. Atwell & Runnels, *supra* note 3, at 10, 17, 18.

157. HAMANN ET AL., *supra* note 123, at 12 nn.13–14 (2020).

158. *Id.* at 15–16.

159. For example, in Utah, where the state legislature recently approved prosecutors' establishment of CIUs, the Salt Lake County prosecutors' office has drawn on the help of volunteers, including a former state supreme court justice. See Jessica Miller, *Salt Lake County D.A. Says Convictions for These Two Men 'Lacked Integrity' and Asks They Be Vacated*, SALT LAKE TRIB., <https://www.sltrib.com/news/2021/08/24/salt-lake-county-da-says/#:~:text=the%20Conviction%20Integrity%20Unit%20includes,works%20for%20Jordan%20School%20District> (Aug. 24, 2021, 5:36 PM) [<https://perma.cc/5887-UEP9>].

160. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 2.07(a) (West Supp. 2022) (“Whenever an attorney for the state is disqualified to act in any case or proceeding, is absent from the county or district, or is otherwise unable to perform the duties of the attorney's office, or in any instance where there is no attorney for the state, the judge of the court in which the attorney represents the state may appoint, from any county or district, an attorney for the state or may appoint an assistant attorney general to perform the duties of the office during the absence or disqualification of the attorney for the state.”); *In re Ligon*, 408 S.W.3d 888 (Tex. App. 2013) (affirming order disqualifying district attorney and appointing prosecutor pro tem).

161. See CRIM. JUST. STANDARDS, Prosecution Function Standard 3-4.4(a)(xiv), (f) (AM. BAR ASS'N 2017), [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/) [<https://perma.cc/93LG-W8H6>].

tomed our entire criminal process on our society's "fundamental value determination . . . that it is far worse to convict an innocent [person] than to let a guilty [person] go free,"<sup>162</sup> it seems reasonable for prosecutors to shift some resources to the post-conviction stage, to reexamine significant new exculpatory evidence to make sure that their office did not convict an innocent person. Doing so expresses an institutional commitment to a fair and reliable criminal process that should pervade an office's work.<sup>163</sup>

If anything, some argue, the rules expect far too little of prosecutors, not too much. As one critic notes, because Rules 3.8(g) and (h) require nothing until new evidence creates a significant likelihood of innocence, the rules "fail to impose any obligation on prosecutors to actually review the many claims of innocence that cross their desks or to give those claims anything more than a perfunctory, skeptical review."<sup>164</sup> Nor do the rules require cooperation with defense lawyers at that point. At least until the new exculpatory evidence triggers the rule, prosecutors are free to obstruct defense efforts to establish the defendant's innocence, such as defense applications to test evidence in the state's possession.<sup>165</sup> In general, professional conduct rules set a floor—the minimum expected of lawyers. Rules 3.8(g) and (h), like so many other rules, express only minimal expectations. Many prosecutors' offices around the country far exceed these rules' expectations.

### B. *Is There Too Much Uncertainty?*

Prosecutors express concern about the rules' imprecise terms.<sup>166</sup> For example, federal prosecutors in Texas protest that the terms "knows"

162. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

163. *See, e.g.*, Vance, *supra* note 126, at 633 ("When we speak of the conscience and culture of a prosecutor's office, we have learned much from . . . the work of the exoneration movement. We believe that a healthy skepticism, sound procedures, and an appreciation of [ ] what has failed in the past, are the prosecutor's best protections against the possibility of convicting the innocent, and the surest path to ensuring the integrity of convictions."). At the same time, at the pretrial stage, the possibility of later having to expend resources to investigate significant new exculpatory evidence might encourage prosecutors to conduct more thorough pretrial investigations and to be more diligent as gatekeepers in weeding out cases where the defendant's guilt is doubtful.

164. Boehm, *supra* note 123, at 623.

165. Marla L. Mitchell-Cichon, *What's Justice Got to Do with It? When the Prosecutor Has an Ethical Duty to Agree to Post-Conviction DNA Testing*, 16 W. MICH. COOLEY J. PRAC. & CLINICAL L. 95, 128–29 (2014) (Rule 3.8(g) and (h) "provides no guidance on how to respond to requests for DNA testing of crime evidence that may provide the new, credible evidence needed to establish innocence.").

166. *See, e.g.*, Oct. Brumley Letter, *supra* note 42, at 6–7 ("[N]either the proposed rule language nor its accompanying comments shed any light on the conditions or circumstances under which the triggering 'when a prosecutor knows' coalesces. . . . [T]he uncertainty of the new duties under the new proposal would be amplified by its extension to cases outside the prosecutor's jurisdiction.").

Prosecutors raise various other objections to the rules' wording that seem way off the mark. For example, they complain that a prosecutor often will not "know" that

and “evidence” are “ambiguous on several levels” and that the meaning of the term “material” is unclear.<sup>167</sup> They also question how prosecutors can be expected to distinguish between a “reasonable likelihood” of innocence, which triggers the requirement to disclose and reinvestigate, on one hand, and “clear and convincing” evidence of innocence, which calls for measures to set aside the wrongful conviction, on the other.<sup>168</sup> Like other imprecise professional conduct rules, this one poses the conceivable risk that well-intentioned lawyers either will expend effort that the rules do not actually require or that they will be sanctioned for inadvertently failing to act.

Prosecutors might address this concern by proposing Comments providing interpretive guidance or alternative wording to achieve the rules’ objectives with less ambiguity. Proponents of the rules would almost certainly accept proposed revisions in the spirit of compromise because rules establishing prosecutors’ post-conviction obligations to disclose new exculpatory evidence, to reinvestigate, and to correct wrongful convictions will serve salutary purposes regardless of how they are worded. That helps explain why states have adopted variations on Model Rules 3.8(g) and (h).<sup>169</sup> In Texas, in contrast, prosecutors’ representatives offered an alternative that would eviscerate the rule. Their proposed revision would eliminate prosecutors’ duty to re-

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exculpatory evidence is credible and material, or they will not otherwise know that evidence comes within the terms of the rules. *See, e.g.*, Tex. U.S. Att’y’s Letter, *supra* note 144, at 3. In that situation, prosecutors have no cause for concern because the rule imposes no obligations on them: the rule applies only when prosecutors “know” the character of the evidence in question—for example, that it is new and exculpatory, and that it creates a significant likelihood of a wrongful conviction. Advocates encounter an analogous situation under Rule 3.3(a)(3), which requires them to take remedial measures when they “know” their witness testified falsely. MODEL RULES OF PRO. CONDUCT r. 3.3(a)(3) (AM. BAR ASS’N 2020). That witnesses often lie without the lawyer knowing it is not a legitimate objection to the rule, unless the objection is that the rule is insufficiently demanding. Even if witnesses’ testimony is suspicious or implausible, the rule does not place lawyers in jeopardy. Unless the lawyers have knowledge, they have no obligation. The very point of the knowledge standard is to set a high bar before lawyers must act.

167. Tex. U.S. Att’y’s Letter, *supra* note 144, at 4–5.

168. *Id.* at 4. Other professional conduct rules require lawyers to apply a vague standard of proof to decide whether a fact is sufficiently likely to trigger a professional obligation. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.7(a) (explaining that a lawyer has a conflict of interest if there is a “significant risk” that the representation will be “materially limited” by the interests of another client or by the lawyer’s own interests); *id.* r. 3.6(a) (forbidding extrajudicial statements that “will have a substantial likelihood of materially prejudicing an adjudicative proceeding”); N.Y. RULES OF PROF. CONDUCT r. 7.3(a)(iv) (Westlaw through Mar. 15, 2022) (forbidding solicitation of individuals whose mental state makes it “unlikely” that they can “exercise reasonable judgment in retaining a lawyer”). Prosecutors are practiced at evaluating evidence to determine, for example, whether there is more than “probable cause” or a “reasonable doubt” and might be expected to be better than most lawyers at applying different standards of proof.

169. Mulhausen, *supra* note 47, at 339–41 (noting that other jurisdictions have drafted different language that they regarded as more definite); *see also infra* Appendix (containing the text of the rules, in all their variety, already adopted by 24 states).



examine or reinvestigate convictions when new exculpatory evidence makes it likely that the defendant is innocent; they would eliminate prosecutors' duty to seek to rectify false convictions when the defendant is clearly and convincingly innocent; and they would establish a disclosure obligation that is less demanding than Texas state prosecutors' disclosure obligation under the state's criminal procedure law.<sup>170</sup> This would cure the rules' imprecision in a radical way.

The inexactitude of Model Rules 3.8(g) and (h) is characteristic of much law, including many professional conduct rules. For example, the "knowledge" requirement, at which prosecutors take special aim, is a defined term used in many professional conduct rules.<sup>171</sup> It is included in rules to narrow their reach and to protect lawyers who unintentionally, or even recklessly, act badly. The knowledge requirement calls for lawyers to decide whether they have knowledge of something, and must therefore act, or have only a strong suspicion.<sup>172</sup> This sort of imprecision is vexing in the rare cases when the rules do not allow lawyers to err on the side of caution. For example, lawyers who know that their clients testified falsely must take remedial measures, but lawyers who have only a strong suspicion of client perjury may not do so because they must preserve their clients' confidences.<sup>173</sup>

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170. See Meeting Materials from the Meeting of the CDRR, at 000009–10 (Sept. 7, 2022), [https://www.texasbar.com/Content/NavigationMenu/CDRR/Agendas\\_Minutes/MeetingMaterialsAug2022.pdf](https://www.texasbar.com/Content/NavigationMenu/CDRR/Agendas_Minutes/MeetingMaterialsAug2022.pdf) [<https://perma.cc/CK3W-JKJE>] (proposed language for the Texas Disciplinary Rules of Professional Conduct Rule 3.09(f) and (g) by the Texas District and County Attorneys Association Rule 3.09 Committee). The proposal contained no requirement that prosecutors attempt to investigate or rectify wrongful convictions, and its disclosure requirement, as applied to lawyers in the prosecutors' office that secured the conviction, is in some respects narrower than that of Texas's Michael Morton Act, which provides that discovery in criminal cases continues post-conviction. See TEX. CODE CRIM. PROC. ANN. art. 39.14(k) (West 2018) ("If at any time before, during, or after trial the state discovers any additional document, item, or information required to be disclosed under Subsection (h), the state shall promptly disclose the existence of the document, item, or information to the defendant or the court."). A post-conviction disclosure requirement in the professional conduct rules would add to Texas prosecutors' obligations in two respects, however. First, it would require significant new exculpatory evidence to be disclosed in cases where defendants pled guilty, unlike the Michael Morton Act, which applies only to defendants convicted at trial. Second, a rule requiring post-conviction disclosure of significant new exculpatory evidence would apply to federal prosecutors, which the Michael Morton Act does not.

171. See, e.g., TEX. DISCIPLINARY RULES OF PRO. CONDUCT terminology (Westlaw through Jan. 15, 2023) (defining "knowingly," "known," and "knows"). It may be noteworthy that this *mens rea* requirement is also included in many criminal laws that prosecutors enforce.

172. See, e.g., *In re Grievance Comm. of U.S. Dist. Ct.*, 847 F.2d 57 (2d Cir. 1988) (distinguishing actual knowledge from a strong suspicion for purposes of a rule requiring a third party's fraud on the court). See generally Bruce A. Green, *Doe v. Federal Grievance Committee: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485 (1989) (analyzing the *Doe* decision).

173. For a discussion of how certain disclosure obligations put lawyers on a "knife's edge" by requiring either disclosure or confidentiality, depending on the application

When it comes to prosecutors' post-conviction obligations, however, overcompliance is not only permitted but welcome.<sup>174</sup> If it is uncertain whether the rules apply—for example, whether new evidence creates a “reasonable likelihood” of innocence<sup>175</sup>—prosecutors can err on the side of caution by disclosing the exculpatory evidence or revisiting the criminal conviction. In general, prosecutors should avoid coming “close to the line,”<sup>176</sup> and that is especially true here. Extra effort to rectify wrongful convictions is desirable because the rules set a very high threshold before requiring prosecutors to act. For example, prosecutors should disclose new exculpatory evidence to the defendant and the court even if Rule 3.8(g) is not triggered. The Supreme Court has urged prosecutors to err on the side of disclosing exculpatory information before trial,<sup>177</sup> and the same would be prudent post-conviction. Likewise, competent prosecutors should reexamine convictions when they receive significant, new exculpatory evidence even if the evidence falls slightly short of establishing a “reasonable likelihood” of innocence.<sup>178</sup>

That said, prosecutors who decline to err on the side of caution, and who seek to do just the bare minimum required by the rules, have nothing to fear from the rules' imprecision. Attorney grievance committees in this country do not pursue prosecutors who honestly misinterpret imprecise rules. On the contrary, commentators complain, grievance committees tend to ignore prosecutors' clear transgressions.<sup>179</sup> Even so, to allay prosecutors' concerns, a Comment to Rule

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of an imprecise standard, see Bruce A. Green, *Criminal Defense Lawyering at the Edge: A Look Back*, 36 HOFSTRA L. REV. 353, 391–92 (2007).

174. Imprecise professional conduct rules often presuppose that lawyers will overcomply. For instance, Model Rule 1.1 requires lawyers to “provide competent representation to a client.” MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020). The imprecision of the line between barely competent and incompetent representation is acceptable because lawyers should aim to be more than minimally competent. Likewise, for prosecutors, the vagueness of the “probable cause” standard in Rule 3.8(a), which subjects prosecutors to sanction for pursuing charges without probable cause, is tolerable because we expect prosecutors to apply a more demanding standard as a matter of self-restraint. *Id.* r. 3.8(a).

175. Lawyers make similar judgment calls under other rules, such as Model Rule 1.7, which requires them to decide whether there is a “significant risk” that their representation will be “materially limited” by their self-interest or by the interests of someone other than the client. *Id.* r. 1.7.

176. See Green, *supra* note 21, at 617 (Prosecutors' “special responsibility to conform closely to the applicable professional standards is embodied in the following description of the difference between how criminal defense lawyers and prosecutors approach the rules of legal ethics: ‘Criminal defense lawyers play close to the line. Prosecutors play in the center of the court.’”).

177. *Cone v. Bell*, 556 U.S. 449, 469–70 (2009).

178. See N.Y. Formal Op. 2018-2, *supra* note 108.

179. See SAMUEL R. GROSS ET. AL, NAT'L REGISTRY OF EXONERATIONS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT 117–20 (2020), [https://law.umich.edu/special/exoneration/Documents/Government\\_Misconduct\\_and\\_Convicting\\_the\\_Innocent.pdf](https://law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf) [<https://perma.cc/4S4E-L9N8>]; *Texas Prosecutors Who Engage in Misconduct*

3.8 says that even if a disciplinary authority determines in retrospect that a prosecutor should have taken steps under Rules 3.8(g) or (h), the prosecutor is not subject to discipline if the prosecutor determined in good faith that the obligations under the rule were not triggered.<sup>180</sup> In several states where Comments are not binding, courts incorporated this concept into the rule's "black letter."<sup>181</sup> Significantly, no other rule explicitly makes this kind of allowance for lawyers' good faith transgressions.

Finally, prosecutors who are uncertain about the meaning of the rule, and who are disinclined to err on the side of caution, have opportunities to gain greater clarity.<sup>182</sup> Like other lawyers, prosecutors can seek guidance from bar associations' ethics committees, which publish opinions offering their view of how to apply the professional conduct rules.<sup>183</sup> Perhaps because the rules' imprecision is not terribly vexing, prosecutors in the 24 states that have adopted one or both rules do not appear to be seeking guidance. Only one ethics committee, that of the New York City Bar, has published an opinion interpreting its state's counterparts to Rules 3.8(g) and (h), and that was on its own initiative.<sup>184</sup> Its opinion's principal message was that, except in the case of the "knowledge" requirement, the rules employ ordinary words that have their ordinary meaning.<sup>185</sup>

### C. *Will There Be Too Many Grievances?*

Prosecutors also predict that if Rules 3.8(g) and (h) are adopted, they will have to respond to many non-meritorious grievances from incarcerated persons who claim to be innocent.<sup>186</sup> Even if that were to occur, it is unclear whether that is a legitimate argument against the

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*Go Undisciplined*, INNOCENCE PROJECT (Apr. 5, 2012), <https://innocenceproject.org/texas-prosecutors-who-engage-in-misconduct-go-undisciplined/> [<https://perma.cc/UQ4Q-M227>] [hereinafter *Texas Prosecutors Undisciplined*] (quoting, in part, Jordan Smith, *Panel Emphasizes Need for Prosecutorial Oversight*, AUSTIN CHRON. (Apr. 6, 2012), <https://www.austinchronicle.com/news/2012-04-06/panel-emphasizes-need-for-prosecutorial-oversight/> [<https://perma.cc/8YJ8-XLAV>]).

180. MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 9.

181. *See, e.g.*, ARIZ. RULES OF PRO. CONDUCT ER 3.8(i) (Westlaw through Jan. 15, 2023); N.Y. RULES OF PRO. CONDUCT r. 3.8(e) (Westlaw through Jan. 15, 2023).

182. As the Fifth Circuit recognized several decades ago, when it dismissed a lawyer's claim that the rule forbidding "conduct that is prejudicial to the administration of justice" is unconstitutionally vague, lawyers are particularly capable of ascertaining what rules require. *See Howell v. State Bar of Tex.*, 843 F.2d 205, 208 (5th Cir. 1988) ("The regulation at issue herein applies only to lawyers, who are professionals and have the benefit of guidance provided by case law, court rules and the 'lore of the profession.'") (citation omitted).

183. *See* Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731, 736–39 (2002) (discussing the role of bar associations' ethics committees).

184. *See* N.Y. Formal Op. 2018-2, *supra* note 108.

185. *See id. passim*.

186. *See* Green, *supra* note 39, at 892–93 (discussing how federal prosecutors in Tennessee "predicted that adopting the proposed rules 'would likely cause a flood of

rules. An overwhelming number of grievances against lawyers do not result in discipline and, presumably, are unmeritorious, but lawyers often must answer them.<sup>187</sup> This is an inevitable price of attorney regulation. Rules 3.8(g) and (h) may inspire some baseless grievances—although there are no reports that they have so far—but, if so, prosecutors offer no reason to think these rules will result in more baseless grievances than other, arguably less important, rules.

On their face, these rules seem like the least likely candidates for baseless complaints. It would be hard for a convicted defendant to plausibly claim that a prosecutor ignored new evidence creating a likelihood of innocence, or clear and convincing evidence of innocence, because those are such high evidentiary hurdles. Moreover, the rules allow prosecutors considerable discretion both in evaluating evidence and in deciding what measures to take when the rules are triggered. If a convicted defendant is inclined to blame a lawyer, the more likely target is the defense counsel who owed the defendant a duty of competence at the trial stage. If significant new exculpatory evidence emerges after the conviction, a defendant gains more by blaming defense counsel for overlooking it.<sup>188</sup> Prosecutors owe defendants no obligation to seek exculpatory evidence, but defense lawyers do. Further, there is no strategic benefit to filing a grievance against a prosecutor under these rules, not even if it is well founded. If a defendant could plausibly claim that prosecutors are disregarding exculpatory evidence, that defendant has an interest in securing the prosecutor's assistance, which a grievance is unlikely to accomplish.

If a convicted defendant were inclined to grieve the prosecutor, Rules 3.8(g) and (h) would probably not be the basis. Convicted defendants have plenty of other rules to invoke, such as those forbidding the knowing use of false testimony or requiring the disclosure of exculpatory evidence at trial. It is easier to build a grievance around these rules, which have fewer elements and demand less evidence or explanation. Defendants who are nonetheless intent on complaining

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complaints from prisoners with time on their hands and animosity toward prosecutors") (footnote omitted).

187. See Bruce A. Green, *Selectively Disciplining Advocates*, 54 CONN. L. REV. 151, 170 (2022) (In New York, "disciplinary authorities engage in a winnowing process in which substantial discretion is exercised by them and, to a lesser degree, the courts, resulting in less than two percent of the complaints rising to the level of public discipline.").

188. Prosecutors have no duty to the defense to conduct an investigation to find exculpatory evidence that is not already in the state's possession, whereas defense counsel has an obligation to provide effective assistance of counsel, which generally includes conducting a competent investigation. Convicted defendants can challenge a conviction based on defense counsel's failure to locate and offer significant evidence that a competent investigation would have uncovered. See, e.g., *Wiggins v. Smith*, 539 U.S. 510 (2003) (overturning death sentence based on defense counsel's failure to investigate the client's background and discover and introduce significant mitigating evidence).

about prosecutors' indifference to their innocence can do so now in any event, invoking rules such as those forbidding "conduct that is prejudicial to the administration of justice" or requiring prosecutors to be competent.<sup>189</sup>

Besides overstating the likelihood of unwarranted complaints, prosecutors overstate the likely demands that unwarranted complaints would impose. If there is an outbreak of complaints based on Rules 3.8(g) and (h), grievance committees will probably not take them too seriously or require detailed responses. Historically, disciplinary agencies have not over-regulated prosecutors.<sup>190</sup> They typically reject complaints that are baseless on their face or that relate to a pending judicial proceeding.<sup>191</sup> If disciplinary authorities call for a response, they can be expected to accept prosecutors' credible representations. Prosecutors have no evident reason to mistrust the grievance process.

## VI. CONCLUSION

Because prosecution is highly localized in the United States, prosecutors can take differing approaches to their work.<sup>192</sup> Among the sub-

189. See MODEL RULES OF PRO. CONDUCT r. 1.1, 8.4(d) (AM. BAR ASS'N 2020).

190. See, e.g., GROSS ET. AL, *supra* note 179, at 117–20; INNOCENCE PROJECT, PROSECUTORIAL OVERSIGHT: A NATIONAL DIALOGUE IN THE WAKE OF *Connick v. Thompson* 12 (2016), [https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report\\_09.pdf](https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf) [<https://perma.cc/67RC-WZ4A>]; *Texas Prosecutors Undisciplined*, *supra* note 179; KATHLEEN M. RIDOLFI & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 (2010), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?httpsredir=1&article=1001&context=ncippubs> [<https://perma.cc/58PJ-38S9>]; QUATTRONE CTR. FOR THE FAIR ADMIN. OF JUST., UNIV. OF PA. CAREY L. SCH., HIDDEN HAZARDS: PROSECUTORIAL MISCONDUCT CLAIMS IN PENNSYLVANIA, 2000–2016, at 41 (2022), <https://www.law.upenn.edu/live/files/11857-hidden-hazards-prosecutorial-misconduct-claims-in> [<https://perma.cc/3WU7-24LA>].

191. See Green, *supra* note 187, at 167 (In New York, “[i]f the allegations are baseless on their face because the alleged conduct would not be a disciplinary violation, or if the allegations seem trivial or otherwise unworthy of attention, the staff may close the file, with notice to any complainant, or refer the complainant to another process. . . . With few exceptions, parties with complaints that relate to pending litigation are advised that the grievance committee will not consider the complaint at that time, but that the complainant may resubmit the allegations after the litigation has ended.”) (footnotes omitted).

192. See Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosure*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 269, 279 (Leslie C. Levin & Lynn Mather eds., 2012) (“Organizations operating in the same field tend to converge on similar ways of working . . . [but] [p]rosecutors' offices are something of an exception, partly because of their highly localized character. Since they are not directly in competition for business, the homogenizing pressures are much weaker.”). The progressive prosecution movement has significantly expanded the range of differences between conventional “tough on crime” prosecutors and more reform-oriented prosecutors. For discussions of progressive prosecutors, see, for example, Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719 (2020) (comparing contemporary “progressive prosecutors” with

jects on which prosecutors differ is how to respond to post-conviction innocence claims. Some are receptive to reviewing innocence claims and seeking to remedy wrongful convictions while others defend the finality of convictions and emphasize their adversarial role. Prosecutors also differ in their views about what professional conduct rules should expect of them in the post-conviction setting. In some states, prosecutors endorse Model Rules 3.8(g) and (h) or help revise them, while in others, prosecutors try to block their adoption or to eviscerate them when they are proposed.

That said, prosecutors' opposition to the post-conviction rules may say less about what they think of their responsibilities to rectify wrongful convictions than about how they view criminal procedure reform generally. Prosecutors often participate in the development of statutes and rules relating to the criminal process, and the legal profession expects them, among other lawyers, to do so.<sup>193</sup> Ordinarily, when lawyers participating in law reform activities speak on their own behalf, not representing clients,<sup>194</sup> they are expected to "leave their clients at the door"—that is, to seek objectively to improve the law,<sup>195</sup> not to promote their self-interest or the interests of their clientele.<sup>196</sup> When prosecutors address proposed laws, if they are speaking on a client's behalf, their client—the state or federal government—is one that is expected to act in the public interest. Either way, prosecutors in the law-reform setting might be expected to propose changes—whether to bail law, sentencing law, prosecutorial ethics rules, or other law within their expertise—that best serve the public interest.

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prosecutors who were part of the early 20th century progressive movement); Heather L. Pickerell, Note, *How to Assess Whether Your District Attorney Is a Bona Fide Progressive Prosecutor*, 15 HARV. L & POL'Y REV. 285 (2020) (identifying characteristic features of progressive prosecutors).

193. See, e.g., CRIM. JUST. STANDARDS, Prosecution Function Standard 3-1.2(f) (AM. BAR ASS'N 2017), [https://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition/](https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/) [<https://perma.cc/93LG-W8H6>] ("The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, [he or she] should stimulate and support efforts for remedial action."); NAT'L PROSECUTION STANDARDS, Standard 1-1.2 (NAT'L DIST. ATT'YS ASS'N 2023), [https://ndaa.org/wp-content/uploads/National-Prosecution-Standards-Fourth-Edition\\_January-2023.pdf](https://ndaa.org/wp-content/uploads/National-Prosecution-Standards-Fourth-Edition_January-2023.pdf) [<https://perma.cc/5CHJ-K57P>] ("A prosecutor should seek to reform criminal laws whenever it is appropriate and necessary to do so.").

194. When lawyers speak to lawmakers in a representational capacity, they must disclose that as a matter of candor. See, e.g., MODEL RULES OF PRO. CONDUCT r. 3.9.

195. *Id.* pmbl. ¶ 6.

196. Elizabeth Chambliss & Bruce A. Green, *Some Realism About Bar Associations*, 57 DEPAUL L. REV. 425, 426–27 (2008) ("The normative expectations are different for a lawyer working to improve the law than for a lawyer representing a client. As a client's advocate, a lawyer must zealously pursue legal objectives sought by the client without regard to the lawyer's personal views. When a lawyer serves in a non-representative capacity, by contrast, the ABA directs the lawyer to act 'without regard to the general interests or desires of clients or former clients' and to 'espouse only those changes which he conscientiously believes to be in the public interest.'") (quoting MODEL CODE OF PRO. RESP. EC 8-1, 8-4 (AM. BAR ASS'N 1980)).

But the same sorts of cognitive biases that might influence prosecutors' post-conviction review and that pervade other aspects of their work are implicated in this setting.

Almost any proposed law or rule regarding criminal defendants' procedural protections will implicate prosecutors' self-interests. Many, such as discovery laws, would make it harder for prosecutors to achieve convictions or would add to their workload. Further, prosecutors are likely to overvalue their own interests as trial lawyers in the adversary process as well as the public interest in securing convictions as compared with its interest in the fairness and reliability of the criminal process, opposing laws and rules that might make it harder to win convictions. One of the rare times when prosecutors came out in force to expand criminal defendants' procedural protections was when 23 states filed an amicus brief in *Gideon v. Wainwright*,<sup>197</sup> supporting indigent felony defendants' constitutional right to appointed counsel.<sup>198</sup> That was more than a half century ago and has not since been replicated.

Prosecutors have a particular historical antipathy to new prosecutorial ethics rules,<sup>199</sup> which, prior to Model Rules 3.8(g) and (h), prosecutors almost invariably opposed.<sup>200</sup> One obvious reason is that prosecutors value their autonomy and discretion. They do not want more oversight than they already have, and they especially do not want to have to assume regulatory burdens that other lawyers do not bear. Prosecutors who were not involved in the ABA drafting process may also assume that the defense bar captured the process and that any proposed rules serve defendants' interests. Federal and state prosecutors may not appreciate that, in fact, they have had an outsized influence over the bar and judiciary, which generally accede to them on questions of prosecutorial conduct: the in terrorem effect of prosecutors' objections to prosecutorial regulation helps explain why the ABA and state courts rarely expand Rule 3.8.<sup>201</sup>

Against this background, it is noteworthy that many prosecutors have supported Rules 3.8(g) and (h), first in the ABA and then in some individual states. That may reflect the distinctive nature of these

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197. Brief for the State Government Amici Curiae, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155), 1962 WL 115122.

198. See Bruce A. Green, *Gideon's Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336, 2339–41 (2013) (describing amicus brief joined by state Attorneys General on behalf of 23 states).

199. See Green, *supra* note 78, at 480.

200. See Green, *supra* note 39, at 904.

201. See Bruce A. Green, *Bar Authorities and Prosecutors*, in THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 309, 323 (Ronald F. Wright et al. eds., 2021) (“[U]nless it can win prosecutors’ approval, the organized Bar hesitates to propose professional conduct rules that give expression to prosecutors’ special obligations. That is in part because the Bar has been scarred by its occasional confrontations with prosecutors and in part because its ability to influence the courts is counterbalanced by that of prosecutors.”).

rules, which some of the drafters expected to be greeted like motherhood and apple pie. Whether or not prosecutors are convinced that these rules will enhance office culture and promote public confidence, the rules express basic principles with which few prosecutors publicly disagree.<sup>202</sup> At worst, one might expect prosecutors to be indifferent, since the rules do not impede their core function of investigating and prosecuting criminal cases, pose no significant disciplinary risk, and give no tactical benefit to criminal defendants. Even so, in states where the prosecutors' association opposes the rules, individual prosecutors who privately support the rules would probably be reluctant to break ranks.<sup>203</sup>

Equally noteworthy is state prosecutors' reluctance to take comfort from their counterparts' experience in other jurisdictions that have adopted versions of the rules. As discussed, prosecutors' objections are heavily reliant on predictions about problems that evidently do not arise anywhere else. This might call into question Justice Brandeis's idea of states as laboratories of democracy<sup>204</sup>: if states were truly functioning as laboratories, then at some point, after multiple states had successfully tested a law, public officials involved in the law-making process—and this includes prosecutors—would relinquish their objections. Prosecutors' indifference to other states' experience may reflect any of several things: the limited interaction among prosecutors of different states; state prosecutors' assumption that their state is unique so that there is nothing to learn from other prosecutors' experience; or the kind of preference for theory over practice that one ordinarily associates with academics. Most likely, it simply reflects a rhetorical style. Disliking the idea of additions to Rule 3.8, prosecutors will make virtually any argument against them.

Ultimately, prosecutors' opposition to the post-conviction rules is unfortunate not only because the rules are good. Prosecutors lose credibility by making weak arguments, and their credibility is important in the lawmaking process and generally. Their arguments directly call into question their commitment to their role as neutral ministers of justice in the lawmaking process and, more importantly, in the context of post-conviction innocence claims. Indirectly, prosecutors' stance against adopting rules articulating their post-conviction duties

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202. That said, perhaps some prosecutors privately disagree. They may favor a "tough on crime" approach and worry that the rules will undermine an office culture committed to that approach.

203. An interesting example of a prosecutor breaking ranks was recently on display in Utah, where the Salt Lake County prosecutor supported proposed legislation which was ultimately enacted to allow prosecutors to establish CIUs. See Miller, *supra* note 137; Miller, *supra* note 159; Jessica Miller, *Conviction Integrity Bill Moves Forward Despite Fight Between Utah Prosecutors*, SALT LAKE TRIB., <https://www.sltrib.com/news/2020/03/06/conviction-integrity-bill/> (Mar. 6, 2020, 6:47 PM) [<https://perma.cc/4TCY-9GJ8>].

204. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).



calls into question their commitment to this role generally. Prosecutors' opposition to such rules already in effect in much of the country, expressing their obligation to rectify wrongful convictions, threatens to erode public confidence in prosecutors' commitment to justice.

VII. APPENDIX: STATE RULES OF PROFESSIONAL CONDUCT  
REGARDING PROSECUTORS' POST-CONVICTION  
OBLIGATIONS<sup>205</sup>

ALASKA RULES OF PRO. CONDUCT r. 3.8(g):

**(g)** When a prosecutor knows of new and credible evidence creating a reasonable likelihood that a defendant did not commit an offense of which the defendant was convicted, the prosecutor shall promptly disclose that evidence to the appropriate court, the defendant's lawyer, if known, and the defendant, unless a court authorizes delay or unless the prosecutor reasonably believes that the evidence has been or will otherwise be promptly communicated to the court and served on the defendant's lawyer and the defendant. For purposes of this rule: (1) the term "new" means unknown to a trial prosecutor at the time the conviction was entered or, if known to a trial prosecutor, not disclosed to the defense, either deliberately or inadvertently; (2) the term "credible" means evidence a reasonable person would find believable; (3) the phrase "appropriate court" means the court which entered the conviction against the defendant and, in addition, if appellate proceedings related to the defendant's conviction are pending, the appellate court which is conducting those proceedings; and (4) the phrase "defendant's lawyer" means the lawyer, law firm, agency, or organization that represented the defendant in the matter which resulted in the conviction.

ARIZ. RULES OF PRO. CONDUCT ER 3.8(g)-(i):

**(g)** When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

**(1)** promptly disclose that evidence to the court in which the defendant was convicted and to the corresponding prosecutorial authority, and to defendant's counsel or, if defendant is not represented, the defendant and the indigent defense appointing authority in the jurisdiction, and

**(2)** if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority, make reasonable efforts to inquire into the matter or to refer the matter to the appropriate law enforcement or prosecutorial agency for its investigation into the matter.

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205. For full citations to all professional conduct rules collected in this Appendix, see *supra* note 34. Most subsection lettering and numbering in this Appendix is bolded for the ease and convenience of the reader and does not necessarily reflect emphasis in the published rules.

**(h)** When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall take appropriate steps, including giving notice to the victim, to set aside the conviction.

**(i)** A prosecutor who concludes in good faith that information is not subject to subsections (g) or (h) of this Rule does not violate those subsections even if this conclusion is later determined to have been erroneous.

CAL. RULES OF PRO. CONDUCT r. 3.8(f)–(g):

**(f)** When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

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

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

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

**(ii)** undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

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

COLO. RULES OF PRO. CONDUCT r. (g)–(h):

**(g)** When a prosecutor knows of new, credible and material evidence creating a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

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

**(2)** if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority

**(A)** disclose that evidence to the defendant, and

**(B)** if the defendant is not represented, move the court in which the defendant was convicted to appoint counsel to assist the defendant concerning the evidence.

**(h)** When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted in a court in which

the prosecutor exercises prosecutorial authority, of an offense that the defendant did not commit, the prosecutor shall take steps in the appropriate court, consistent with applicable law, to set aside the conviction.

CONN. RULES OF PRO. CONDUCT r. 3.8(6):

**(6)** When a prosecutor knows of new and credible evidence creating a reasonable probability that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall, unless a court authorizes delay:

**(A)** if the conviction was obtained outside the prosecutor's jurisdiction, promptly disclose that evidence to a court and an appropriate authority, and

**(B)** if the conviction was obtained in the prosecutor's jurisdiction, promptly disclose that evidence to the defendant, and a court and an appropriate authority.

DEL. RULES OF PRO. CONDUCT r. 3.8(d)(2):

**(d)(2)** [W]hen the prosecutor comes to know of new, credible and material evidence establishing that a convicted defendant did not commit the offense for which the defendant was convicted, the prosecutor shall, unless a court authorizes delay, make timely disclosure of that evidence to the convicted defendant and any appropriate court, or, where the conviction was obtained outside the prosecutor's jurisdiction, to the chief prosecutor of the jurisdiction where the conviction occurred . . . .

HAW. RULES OF PRO. CONDUCT r. 3.8(c)-(d):

**(c)** When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall

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

**(2)** if the conviction was obtained in the State of Hawai'i, promptly disclose that evidence to the defendant and the office of the public defender, unless a court orders otherwise.

**(d)** A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of section (c), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

## IDAHO RULES OF PRO. CONDUCT 3.8(g)–(h):

**(g)** [W]hen a prosecutor knows of new, credible material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

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

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

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

**(B)** undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

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

## ILL. RULES OF PRO. CONDUCT r. 3.8(g)–(i):

**(g)** When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

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

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

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

**(ii)** undertake further reasonable investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

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

**(i)** A prosecutor's judgment, made in good faith, that evidence does not rise to the standards stated in paragraphs (g) or (h), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

## IOWA RULES OF PRO. CONDUCT r. 32:3.8(g)–(h):

The prosecutor in a criminal case shall . . .

**(g)** when a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted,

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

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

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

**(ii)** undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

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

## MASS. RULES OF PRO. CONDUCT r. 3.8(i)–(k):

**(i)** When, because of new, credible, and material evidence, a prosecutor knows that there is a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

**(1)** if the conviction was not obtained by that prosecutor's office, disclose that evidence to an appropriate court or the chief prosecutor of the office that obtained the conviction, and

**(2)** if the conviction was obtained by that prosecutor's office,

**(i)** disclose that evidence to the appropriate court;

**(ii)** notify the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;

**(iii)** disclose that evidence to the defendant unless a court authorizes delay for good cause shown; and

**(iv)** undertake or assist in any further investigation as the court may direct.

**(j)** When a prosecutor knows that clear and convincing evidence establishes that a defendant, in a case prosecuted by that prosecutor's office, was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the injustice.

**(k)** A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obli-

gations of sections (i) and (j), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

MICH. RULES OF PRO. CONDUCT r. 3.8(f)–(h):

**(f)** When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the crime for which the defendant was convicted, the prosecutor shall:

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

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

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

**(ii)** undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant is innocent of the crime.

**(g)** When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction is innocent of the crime for which defendant was prosecuted, the prosecutor shall seek to remedy the conviction.

**(h)** A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of section (f) and (g), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

MONT. RULES OF PRO. CONDUCT r. 3.8(g)–(h):

**(g)** When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

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

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

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

**(ii)** undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

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

## N.Y. RULES OF PRO. CONDUCT r. 3.8(c)–(e):

**(c)** When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

**(1)** disclose that evidence to an appropriate court or prosecutor's office; or

**(2)** if the conviction was obtained by that prosecutor's office,

**(A)** notify the appropriate court and the defendant that the prosecutor's office possesses such evidence unless a court authorizes delay for good cause shown;

**(B)** disclose that evidence to the defendant unless the disclosure would interfere with an ongoing investigation or endanger the safety of a witness or other person, and a court authorizes delay for good cause shown; and

**(C)** undertake or make reasonable efforts to cause to be undertaken such further inquiry or investigation as may be necessary to provide a reasonable belief that the conviction should or should not be set aside.

**(d)** When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted, in a prosecution by the prosecutor's office, of an offense that the defendant did not commit, the prosecutor shall seek a remedy consistent with justice, applicable law, and the circumstances of the case.

**(e)** A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (c) and (d), though subsequently determined to have been erroneous, does not constitute a violation of this rule.

## N.C. RULES OF PRO. CONDUCT r. 3.8(g)–(h):

**(g)** When a prosecutor knows of new, credible evidence or information creating a reasonable likelihood that a convicted defendant did not commit an offense for which the defendant was convicted, the prosecutor shall:

**(1)** if the conviction was obtained in the prosecutor's jurisdiction, promptly disclose that evidence or information to (i) the defendant or defendant's counsel of record if any, and (ii) the North Carolina Office of Indigent Defense Services or, in the case of a federal conviction, the federal public defender for the jurisdiction; or

**(2)** if the conviction was obtained in another jurisdiction, promptly disclose that evidence or information to the prosecutor's office in the jurisdiction of the conviction or to (i) the de-



fendant or defendant's counsel of record if any, and (ii) the North Carolina Office of Indigent Defense Services or, in the case of a federal conviction, the federal public defender for the jurisdiction of conviction.

**(h)** A prosecutor who concludes in good faith that evidence or information is not subject to disclosure under paragraph (g) does not violate this rule even if the prosecutor's conclusion is subsequently determined to be erroneous.

N.D. RULES OF PRO. CONDUCT r. 3.8(g)–(h):

The prosecutor in a criminal case shall . . .

**(g)** when a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted:

**(1)** if the conviction was obtained outside the prosecutor's jurisdiction, promptly disclose notice of the existence of that evidence to an appropriate tribunal and prosecuting authority, and

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

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

**(ii)** undertake further investigation or cause an investigation to determine whether the defendant was convicted of an offense that the defendant did not commit.

**(h)** when a prosecutor knows of or receives clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, seek to undo the conviction.

OKLA. RULES OF PRO. CONDUCT r. 3.8(h)–(j):

**(h)** When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall within a reasonable time:

**(1)** disclose that evidence to an appropriate court and prosecutorial authority in the jurisdiction where the conviction occurred, and

**(2)** if the judgment of conviction was entered by a court in which the prosecutor exercises prosecutorial authority,

**(i)** unless a court authorizes delay, make reasonable efforts to disclose that evidence to the defendant's attorney or if the defendant is not represented by counsel to the defendant, and

- (ii)** if the defendant is not represented by counsel, move the court in which the defendant was convicted to appoint counsel to assist the defendant concerning the evidence, and
  - (iii)** request an appropriate authority to investigate whether the defendant was convicted of an offense that the defendant did not commit.
- (i)** When a prosecutor learns of clear and convincing evidence establishing that a defendant was convicted in a court in which the prosecutor exercises prosecutorial authority of an offense that the defendant did not commit, the prosecutor shall promptly notify the appropriate court and make reasonable efforts to notify the defendant's counsel and the defendant.
- (j)** A prosecutor's judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (h) and (i) of this rule, though subsequently determined to have been erroneous, does not constitute a violation of this rule.

S.C. RULES OF PRO. CONDUCT r. 3.8(g)-(i):

- (g)** When a prosecutor learns of credible, material evidence or information such that there is a reasonable probability a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
- (1)** make reasonable efforts to promptly disclose in writing that evidence or information to the defendant or, if the defendant is represented by counsel, to the defendant's counsel, unless a court authorizes delay; and
  - (2)** promptly disclose in writing that evidence or information to the chief prosecutor in the jurisdiction where the conviction was obtained.
- (h)** When a prosecutor knows of clear and convincing evidence or information establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall make reasonable efforts to seek to remedy the conviction.
- (i)** A prosecutor who concludes in good faith, measured by an objective standard, that the evidence or information is not of such nature to trigger the obligations of paragraphs (g) or (h) of this Rule does not violate those paragraphs even if the prosecutor's conclusion is later determined to have been erroneous.

S.D. RULES OF PRO. CONDUCT r. 3.8(g)-(h):

- (g)** When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

- (1)** Promptly disclose that evidence to an appropriate court or authority, and
- (2)** If the conviction was obtained in the prosecutor's jurisdiction,
  - (i)** Promptly disclose that evidence to the defendant unless a court authorizes delay, and
  - (ii)** Undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h)** When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

TENN. RULES OF PRO. CONDUCT r. 3.8(g)–(h):

- (g)** When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
  - (1)** if the conviction was obtained outside the prosecutor's jurisdiction, promptly disclose that evidence to an appropriate authority, or
  - (2)** if the conviction was obtained in the prosecutor's jurisdiction, undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- (h)** When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted in the prosecutor's jurisdiction of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

WASH. RULES OF PRO. CONDUCT r. 3.8(g), (i):

- (g)** When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the offense of which the defendant was convicted[,] the prosecutor shall:
  - (1)** promptly disclose that evidence to an appropriate court or authority, and
  - (2)** if the conviction was obtained in the prosecutor's jurisdiction,
    - (A)** promptly disclose that evidence to the defendant unless a court authorizes delay, and

**(B)** make reasonable efforts to inquire into the matter, or make reasonable efforts to cause the appropriate law enforcement agency to undertake an investigation into the matter.

**(h)** [Reserved.]

**(i)** A prosecutor's independent judgment, made in good faith, that the evidence is not of such nature as to trigger the obligations of paragraph (g) of this Rule, though subsequently determined to have been erroneous, does not constitute a violation of this Rule.

W. VA. RULES OF PRO. CONDUCT r. 3.8(g)–(h):

**(g)** When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

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

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

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

**(ii)** undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

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

WIS. RULES OF PRO. CONDUCT SCR 20:3.8(g)–(h):

**(g)** When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall do all of the following:

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

**(2)** if the conviction was obtained in their prosecutor's jurisdiction:

**(i)** promptly make reasonable efforts to disclose that evidence to the defendant unless a court authorizes a delay; and

**(ii)** make reasonable efforts to undertake an investigation or cause an investigation to be undertaken, to determine

whether the defendant was convicted of an offense that the defendant did not commit.

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

WYO. RULES OF PRO. CONDUCT r. 3.8(f)-(g):

**(f)** When a prosecutor knows of new, credible and material evidence that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

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

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

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

**(ii)** undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit, and

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