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## **Conviction Integrity Units Revisited**

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# Conviction Integrity Units Revisited

Barry C. Scheck\*

## I. INTRODUCTION

Since 2007, when the Dallas County District Attorney's office established a Conviction Integrity Unit (CIU) that rapidly produced an unprecedented series of DNA and non-DNA post-conviction exonerations, there has been a movement among district attorney offices across the country to declare that they had formed their own CIUs, or Conviction Review Units (CRUs).<sup>1</sup> In 2016 and 2015, the National Registry of Exonerations reported both an increase in the number of CIUs formed and CIU-involved exonerations, although the vast majority of those CIU exonerations came from just two offices.<sup>2</sup> "Conviction Integrity Unit" has become

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\* Professor of Law, Benjamin N. Cardozo School of Law, Co-Director and Co-Founder of the Innocence Project. It is an honor to be selected to deliver the Bodiker Lecture. David Bodiker, his family, colleagues, and friends represent everything that is good about the brave defender community in Ohio and across America that truly strives to be liberty's last champions. Except for statements about "best practices" for Conviction Integrity Units that appear on the website of the Innocence Project, all opinions and all errors in this lecture are mine alone and should not be attributed as the official position or policy of the Innocence Project. The following is a greatly expanded written version of the 2014 David H. Bodiker Lecture on Criminal Justice I delivered at The Ohio State University Moritz College of Law on October 7, 2014.

<sup>1</sup> The term "Conviction Integrity Unit" in this article refers to a unit within a prosecutorial office that investigates, post-conviction, possible miscarriages of justice. I will discuss briefly the need for other units within a District Attorney's office to conduct internal audits, root cause analysis, sentinel reviews, or other efforts to learn from error. Sometimes offices will use slightly different names than "Conviction Integrity Unit" for the internal group that re-investigates possible miscarriages of justice. Notably, the Brooklyn or Kings County District Attorney's office uses the name "Conviction Review Unit" to refer to these two functions. *Conviction Review Unit*, BROOKLYN DIST. ATT'Y OFF., <http://www.brooklynda.org/conviction-review-unit/> [<https://perma.cc/NFX7-6MAC>] (last visited Oct. 6, 2015).

<sup>2</sup> There were 60 CIU exonerations in 2015 and 70 CIU exonerations in 2016. In 2016, 48 of the CIU exonerations (69%) were drug conviction guilty pleas from Harris County. There were 9 additional CIU exonerations in 2016 for drug crimes from other counties, 10 for homicides, and 3 for other violent crimes. The Harris County drug cases arose from late receipt of laboratory results showing the substances possessed by individuals who pled guilty for whatever reason were not, in fact, controlled substances. By the Registry's count, out of 26 CIUs known to be operating in 2015, 7 produced exonerations; out of 29 known CIUs known to be operating in 2016, 9 accounted for exonerations. The Registry defines "exonerations" as "cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence." NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015 (2016), [http://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2015.pdf](http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf) [<https://perma.cc/MHG8-KT82>]; NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016 (2017), [http://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2016.pdf](http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf) [<https://perma.cc/S4Y2-MW92>].

a brand name that has good public relations value for an elected official. But what does it really mean? Is it just a fashion accessory, a flashy but empty appellation intended to convey the idea that the office is extremely serious about correcting wrongful convictions and holding its own members accountable for errors or acts of misconduct, but really is not? Is conviction integrity nothing more than a passing fad, a nebulous slogan without real meaning that is good for propaganda purposes, but will not bring about any serious change in the way business is done in American criminal justice system?<sup>3</sup>

Or does the interest in “conviction integrity” signal something qualitatively different: a movement toward a post-conviction non-adversarial process for reinvestigating potential miscarriages of justice, which involves prosecutors, innocence organizations, and defense lawyers working together in a joint search for the truth; a recognition of ethical and ultimately constitutional obligations to disclose material evidence of innocence post-conviction; and an adoption of procedures, such as “root cause analysis”<sup>4</sup> and “sentinel review,”<sup>5</sup> that are hallmarks of a “just culture” approach to organizational management?

The jury is plainly out on those questions. The Quattrone Center for the Fair Administration of Justice at the University of Pennsylvania, with assistance from the Innocence Project, conducted a survey to gather empirical data on what district attorneys who say they have CIUs or CRUs mean by it, and what they claim to be doing. A publication of the Quattrone Center, *Conviction Integrity: A National*

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<sup>3</sup> Many defense attorneys have expressed negative views about some CIUs, believing it is better to deal directly with courts than it is to engage in a conviction integrity re-investigation. See Hella Winston, *Wrongful Convictions: Can Prosecutors Reform Themselves?*, CRIME REP. (Mar. 27, 2014), <http://www.thecrimereport.org/news/inside-criminal-justice/2014-03-wrongful-convictions-can-prosecutors-reform-themselv> [<https://perma.cc/R9RU-XYES>] (in which attorneys note that it is preferable for the defense to deal with judges rather than with CIUs due to prosecutors’ inherent conflict of interest).

<sup>4</sup> An excellent description of root cause analysis generally, and how it should be used specifically by crime laboratories in the United States, can be found in a recently approved directive recommendation from the National Commission on Forensic Science. NAT’L COMM’N ON FORENSIC SCI., *ROOT CAUSE ANALYSIS (RCA) IN FORENSIC SCIENCE* (2015), <https://www.justice.gov/ncfs/file/641621/download> [<https://perma.cc/5YWD-G8YZ>]. It should go without saying that if forensic scientists and the medical community are regularly employing RCAs as technique to learn from error, it behooves prosecutors, defenders, and judges to understand it and use it themselves.

<sup>5</sup> James Doyle provides an insightful analysis of how all stakeholder “sentinel event reviews” could be done in the criminal justice system in response to wrongful convictions, but also “near miss” acquittals and dismissals of cases that at earlier points seemed solid; cold cases that stayed cold too long; “wrongful releases” of dangerous or factually guilty criminals or of vulnerable mentally handicapped arrestees; and failures to prevent domestic violence within at-risk families. . . . In fact, anything that stakeholders can agree should not happen again could be considered a sentinel event.

James M. Doyle, *Learning From Error in the Criminal Justice System: Sentinel Event Reviews*, in NAT’L INST. OF JUSTICE, *MENDING JUSTICE: SENTINEL EVENT REVIEWS* 3–4 (2014), <https://www.ncjrs.gov/pdffiles1/nij/247141.pdf> [<https://perma.cc/J729-UGW9>].

*Perspective* by John Hollway, contains the results of that survey and recommendations for policies and practices.<sup>6</sup> Given the limitations of the data we could gather at this early stage in the development of CIUs, I think it is good work, although I am admittedly biased. This lecture and the Quattrone Center report can be viewed as complementary and co-operative publications that rely on the same interview data and have reached similar conclusions about best practices, but from different perspectives and with different emphases.<sup>7</sup> My perspective is based on more than two decades of re-investigating and litigating wrongful conviction cases as an attorney with an “innocence organization,” working with both CIUs and with District Attorney offices that did not have such units. I have been an “advisor,” formally and informally, to a number of CIUs. Inevitably, my view of the interview data and CIUs is influenced by the fact that I know most of the offices from my own cases and many of the individuals interviewed. Consequently, this article is written more from a “participant observer” viewpoint that I hope is pragmatic, candid, and sympathetic to the enterprise, leavened with a healthy skepticism based on what history teaches about the difficulty of the task. What follows is an outline and commentary on developing best practices for CIUs that can work and have worked. But to begin, I think it is important to make three observations.

First, the process a CIU uses to re-investigate possible miscarriages of justice is only one part of inter-related efforts to identify “errors,” learn from them, and create what’s known in organizational literature as a “just culture” in the office.<sup>8</sup>

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<sup>6</sup> See John Hollway, *Conviction Review Units: A National Perspective*, UNIV. OF PA. LAW SCH. (2016), <http://ssrn.com/abstract=2707809> (Public Law and Legal Theory Research Paper No. 15-41).

<sup>7</sup> Needless to say, the views expressed by John Hollway and his colleagues are their own, and the views expressed here are entirely mine and should not be attributed to them.

<sup>8</sup> In a first effort to outline the structure of “Conviction Integrity Units,” done in the context of a Cardozo Law Review Symposium on *Brady* obligations, I presented a model of how an overall “Conviction Integrity Program” might be implemented administratively in a large district attorney’s office to create a “just culture.” It included organizational and flow charts showing how a “Conviction Integrity Unit,” a group dedicated solely to the re-investigation of possible miscarriages of justice, interfaced with Bureau Chiefs, a Training Unit, and a “Professional Integrity Unit.” The Professional Integrity Unit would field complaints from inside and outside the office (from judges, defense lawyers, and the general public), identify problems, track errors, conduct root cause analyses, and develop systemic solutions to problems. There was also emphasis on short, real time “checklists,” like those used by pilots and ICU teams in hospitals and popularized by Dr. Atul Gawande. ATUL GAWANDE, *CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2009). See also Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models For Creating Them*, 31 CARDOZO L. REV. 2215, 2238–56 (2010). The CIU proposal was influenced by the discussions of the transition team for newly elected District Attorney Cyrus Vance, of which I was a member. Very useful “checklists” from the New York County CIU can be found in CTR. ON THE ADMIN. OF CRIMINAL LAW, *ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTORS’ OFFICES* app. A (2012), [http://www.law.nyu.edu/sites/default/files/up\\_load\\_documents/Establishing\\_Conviction\\_Integrity\\_Programs\\_FinalReport\\_ecm\\_pro\\_073583.pdf](http://www.law.nyu.edu/sites/default/files/up_load_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf) [<https://perma.cc/4HNG-6P2K>].

A “just culture” approach, which interestingly arose from work done in automobile manufacturing and the airline industry to prevent and learn from error, has achieved a significant foothold in the delivery of medical services since the publication of the National Academy of Science report, *To Err Is Human*.<sup>9</sup> Here is a definition of “just culture” that does a very good job of capturing succinctly many of the important ideas that are generally associated with the term in the medical context:

[Just Culture] is a defined set of values, beliefs, and norms about what is important, how to behave, and what behavioral choices and decisions are appropriate related to occurrences of human error or near misses. In a Just Culture, open reporting and participation in prevention and improvement is encouraged. There is recognition that errors are often system failures, not personal failures, and there is a focus on understanding the root of the problem allowing for learning and process improvement to support changes to design strategies and systems to promote prevention. A “Just Culture” is not a “blame-free” culture. Rather, it is a culture that requires full disclosure of mistakes, errors, near misses, patient safety concerns, and sentinel events in order to facilitate learning from such occurrences and identifying opportunities for process and system improvement. It is also a culture of accountability in which individuals will be held responsible for their actions within the context of the system in which they occurred; such accountability may involve system improvement or individual consoling, coaching, education, counseling, or corrective action. A “Just Culture” balances the need to learn from mistakes with the need to take corrective action against an individual if the individual’s conduct warrants such action.<sup>10</sup>

In the context of a district attorney or a public defender office, the development of a “just culture” will inevitably have different contours and emphases than a “just culture” in a hospital setting or a crime laboratory, although many of the same mechanisms, such as root cause analysis and sentinel review, are plainly applicable. In hospitals and crime laboratories, there are more scientific controls that can be utilized to expose errors in testing procedures and more objective feedback in terms of diagnostic errors. For example, whatever predictions were made based on imaging procedures (CT scans and MRIs) or other predictive clinical tests can be tested after surgical procedures or autopsies to get

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<sup>9</sup> INST. OF MED., *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* 155–97 (Linda T. Kohn et al. eds., 2000) (ebook).

<sup>10</sup> WASH. STATE NURSES ASS’N, *MEDICAL ERRORS AND PATIENT SAFETY* 4 (2011), <https://www.wsna.org/assets/entry-assets/Nursing-Practice/Publications/pp.errors.pdf> [https://perma.cc/N5NV-K75R].

relatively reliable evidence as to whether the predictions were right or wrong. There is also arguably more agreement about goals and the meaning of outcomes. Saving a patient's life or getting accurate and reliable test results are comparatively clear goals and outcomes as compared to a conviction or acquittal after a fair trial (the goal) that may or may not be an accurate measure of the guilt or innocence of the accused.

Even more vexing in terms of the goals being pursued and measuring the meaning of outcomes is the dismissal of charges by a prosecutor or the "voluntary" plea of guilty by a defendant: Did the prosecutor dismiss because there wasn't enough evidence of guilt, the prosecution wasn't a wise expenditure of resources, or the suspect co-operated on another case? Did the defendant plead guilty even though he or she was innocent because the risk of a mandatory minimum sentence was much too great, or because of a lack of confidence in counsel, inability to make bail, family or employment pressures, or simply because the defense did not know the state possessed undisclosed exculpatory evidence? The significance of dismissals and pleas is not only difficult to assess in real time but retroactively since there is much less of a record to examine than after a trial.

Now, twenty-seven years into an "innocence era" triggered by the advent of post-conviction DNA testing, the criminal justice system is just beginning to count its factual errors more rigorously. The feedback evidence, however, takes a long time to emerge because post-conviction exonerations often take decades. An error rate based on case outcomes has been difficult to calculate.<sup>11</sup> An error rate based on "ground truth"—that is, perfect post-conviction knowledge of who was guilty or innocent—is probably impossible. But there is no question that stakeholders in the post-DNA era now recognize that more innocent people have been convicted than anyone imagined, and the rate of error more than justifies innocence reform efforts.<sup>12</sup>

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<sup>11</sup> The most rigorous empirical studies have been done in capital cases where there is more data, more attention paid to the cases, and some ability to compare exoneration rates to non-capital homicide cases. See Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants who are Sentenced to Death*, 111 PROC. NAT'L ACAD. OF SCI. 7230 (2014) (estimating an exoneration error rate of "at least" 4.1%). Gross et al. appropriately emphasize that false convictions are obviously unknown at the time of the conviction and extremely difficult to detect after the fact such that "the great majority of innocent defendants remain undetected. The rate of such errors is often described as a 'dark figure'—an important measure of the performance of the criminal justice system that is not merely unknown but unknowable." *Id.* at 7230. See also Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 826 (2010); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 776 (2007).

<sup>12</sup> Marvin Zalman has recently canvassed the history and the literature with respect to estimating the incidence of innocents being convicted in the United States, both quantitative and qualitative efforts. See Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221 (2012). Zalman concludes that there is no plausible basis for the error rate to be below 1%, that it is probably higher, and that this is more than sufficient to justify significant commitment to "innocence reform" efforts. *Id.* at 278.

As a result of this conundrum—the system makes more factual errors than believed but has limited objective evidence to identify factual errors conclusively—I suspect that developing a “just culture” for criminal justice stakeholders, as opposed to hospitals or crime laboratories, will put greater emphasis on the need for procedural “fairness” and cognitive neutrality when conducting investigations and making decisions as well greater concern for sanctioning egregious and intentional rule breaking that violate ethical norms. Since the ability of stakeholders to be sure the system is factually accurate is inherently limited—admittedly governed by police officials, judges, and juries making somewhat subjective inferences about whether evidence from disparate sources is “probable cause,” “more likely than not,” or “proof beyond a reasonable doubt”—the perception that stakeholders themselves are fair, trustworthy, and *primarily* interested in *just* outcomes is critical to the system being regarded as legitimate.<sup>13</sup>

This leads to my second prefatory observation: Why, in 2017, are we even talking about conviction integrity units in district attorneys offices as an important arena for innocence organizations and defenders to be engaged in extensive post-conviction re-investigations of potential miscarriages of justice? Why are there not independent, well-funded government entities, modeled after the Criminal Court Review Commission in the United Kingdom (CCRC),<sup>14</sup> to re-investigate possible wrongful convictions? Why don’t we have a federal entity, or state entities, which investigate wrongful convictions like the National Transportation and Safety Board (NTSB) investigates plane crashes or train derailments, asking only “what went wrong and how can it be fixed?” Why are there not “public inquiry” tribunals with broad authority similar to those used in Canada that hold hearings and issue reports

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<sup>13</sup> This is not a call for putting a thumb on the “due process” as opposed to the “crime control” side of the scale to use the terms of Herbert Packer’s famous distinction. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 228–29 (1968). A “just culture” in a prosecutor’s office that focuses on learning from error, and a “conviction integrity program” that tries to implement it, is designed to increase the efficiency of the investigative process. In that respect, it advances “crime control” objectives. It is just another example of how reforms generated by the “innocence movement” have rendered the trade off between “due process” and “crime control” a false choice. See Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 *TEX. TECH L. REV.* 133, 140 (2008).

<sup>14</sup> The CCRC was set up in March of 1997 after the infamous Birmingham Six and Guilford Four cases, miscarriages of justice involving prosecution of the Irish Republican Army. It reviews possible miscarriages of justice in the criminal courts of England, Wales and Northern Ireland and refers appropriate cases to the appeal courts when it believes a conviction is “unsafe” and makes recommendations to improve the criminal justice system as they arise out of the cases. *Our History*, CRIMINAL CASES REVIEW COMM’N, <http://www.ccrcc.gov.uk/about-us/our-history/> [https://perma.cc/UXY6-VFVY] (last visited Feb. 28, 2017). The Commission is based in Birmingham and has about 90 staff, including a core of about 40 caseworkers, supported by administrative staff. There are twelve commissioners who aspire to be completely independent and impartial and do not represent the prosecution or the defense. *Who We Are*, CRIMINAL CASES REVIEW COMM’N, <http://www.ccrcc.gov.uk/about-us/who-we-are/> [https://perma.cc/55FM-KQBR] (last visited Feb. 28, 2017).

about miscarriages of justice, identifying causes, suggesting remedies, and even setting compensation awards to the wrongly convicted?<sup>15</sup>

Peter Neufeld, Jim Dwyer, and I began making these suggestions in February of 2000 when we laid out an “innocence reform” agenda in our book *Actual Innocence*.<sup>16</sup> Independent institutions along these lines seemed to us, and others,<sup>17</sup> an obvious response given the far greater number of exonerations, both DNA and non-DNA, that keep occurring in the United States compared to the United Kingdom or Canada. But so far, only one state, North Carolina, has made a serious effort at setting up an institution that reinvestigates cases to determine if they are wrongful convictions; most other “innocence commissions” have been reports by bar associations or state legislatures reviewing known exonerations as a basis for policy reform.<sup>18</sup>

The North Carolina Innocence Inquiry Commission was created in 2006 to function as an independent government entity.<sup>19</sup> It has reviewed 2,005 cases and

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<sup>15</sup> See MINISTRY OF THE ATT’Y GEN., EXECUTIVE SUMMARY, REPORT OF THE KAUFMAN COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (1998), [http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin\\_esumm.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/morin_esumm.pdf) [https://perma.cc/5ZS4-K8SN]; Sarah Harland-Logan, *Thomas Sophonow*, INNOCENCE CANADA, <https://www.aidwyc.org/cases/historical/thomas-sophonow/> [https://perma.cc/32JF-AKMJ] (last visited Feb. 28, 2017); COMMISSION OF INQUIRY INTO THE WRONGFUL CONVICTION OF DAVID MILGAARD (2004), [http://www.qp.gov.sk.ca/Publications\\_Centre/Justice/Milgaard/Milgaard.pdf](http://www.qp.gov.sk.ca/Publications_Centre/Justice/Milgaard/Milgaard.pdf) [https://perma.cc/LJ9H-J9PU].

<sup>16</sup> BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* app. 1 (2000). See also Barry C. Scheck & Peter J. Neufeld, *Towards the Formation of “Innocence Commissions” in America*, 86 JUDICATURE 98, 103–04 (2002); BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* 351 (2003).

<sup>17</sup> Lissa Griffin, *Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence*, 41 U. TOL. L. REV. 107, 152 (2009); Lissa Griffin, *International Perspective on Correcting Wrongful Convictions: The Scottish Criminal Cases Review Commission*, 21 WM. & MARY BILL RTS. J. 1153 (2013); Kent Roach, *The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?*, 85 CHI.-KENT. L. REV. 89 (2010); Sarah L. Cooper, *Innocence Commissions in America: Ten Years After*, in *CONTROVERSIES IN INNOCENCE CASES IN AMERICA* 197 (Sarah Lucy Cooper ed., 2014).

<sup>18</sup> See *Criminal Justice Reform Commissions: Case Studies*, INNOCENCE PROJECT (Mar. 1, 2007), <http://www.innocenceproject.org/criminal-justice-reform-commissions-case-studies/> [https://perma.cc/8WCW-CB8W].

<sup>19</sup> N.C. INNOCENCE COMM’N, [www.innocencecommission-nc.gov](http://www.innocencecommission-nc.gov) [https://perma.cc/DQL4-853H]. See Matt Ford, *Guilty, Then Proven Innocent*, ATLANTIC (Feb. 9, 2015), <https://www.theatlantic.com/politics/archive/2015/02/guilty-then-proven-innocent/385313/> [https://perma.cc/86W9-QDFN] (reviewing the Commission, its processes, and its latest successes). The Commission was set up in the wake of the Daryl Grant exoneration largely through the tireless efforts of former Chief Justice of the North Carolina Supreme Court, Beverly Lake, and Chris Mumma, Judge Lake’s former law clerk and the Executive Director of the North Carolina Center on Actual Innocence. See *Leadership*, N.C. CTR. ON ACTUAL INNOCENCE, <http://www.nccai.org/about-us/leadership.html> [https://perma.cc/2BWE-HK8E] (last visited Feb. 28, 2017).



produced 10 exonerations.<sup>20</sup> The full commission consists of eight members, an impressively diverse set of stakeholders—a prosecutor, a criminal-defense attorney, a sheriff, a superior court judge, a victims’ rights advocate, a member of the public, and two discretionary appointments. If the commission concludes there is sufficient new evidence to demonstrate “actual innocence,” it submits the case to a special three-judge tribunal. If the tribunal unanimously finds the evidence of innocence “clear and convincing,” the claimant is exonerated and immediately released.

There is much to admire in this model: The Commission is independent; it has diverse stakeholders working with each other in a non-adversarial “inquisitorial” re-investigation, a good safeguard against “cognitive bias” problems; and, most significantly, it has subpoena power. But there are also glaring problems: The Commission does not consider or pursue constitutional problems such as suppressed exculpatory evidence, prosecutorial misconduct, or ineffective assistance of counsel as factors even though they might be very relevant to assessing the reliability of the evidence as a whole, and the special tribunal will not entertain constitutional claims; there are other procedural bars that can result in good “factual innocence” evidence being ignored because it was presented, however poorly, at trial or at a post-conviction proceeding;<sup>21</sup> and the multi-layered process has proven to be cumbersome and slow. Notwithstanding these problems, an independent “innocence commission” with real investigative power remains a good mechanism to correct wrongful convictions. But it has unfortunately not yet found traction outside of North Carolina, and the chances of the model spreading are small right now, especially in comparison with the current popularity of “conviction integrity” reform. On the other hand, if “conviction integrity” reform proves to be more flash than substance, one can easily envision a few controversial cases that lead to a backlash against the idea prosecutors can be trusted to investigate themselves, and renewed efforts to establish independent entities to re-investigate potential miscarriages of justice, learn lessons from them, and supplant the function “conviction integrity” units are attempting to perform.<sup>22</sup>

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<sup>20</sup> *Case Statistics*, N.C. INNOCENCE COMM’N, <http://www.innocencecommission-nc.gov/stats.html> [<https://perma.cc/MYV7-EZN9>] (last visited Feb. 28, 2017).

<sup>21</sup> Article 2(A)(7) of the Commission Rules states there must be some “credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through postconviction relief.” See N.C. GEN. STAT. § 15A-1460(1). In contrast, the CCRC has an exception to the fresh evidence requirement for rare cases. Criminal Appeal Act 1995, ch. 35, §13(2) (Eng.). This procedural bar has been subject to criticism though. See Michael Naughton, *The Importance of Innocence for the Criminal Justice System*, in *THE CRIMINAL CASES REVIEW COMMISSION: HOPE FOR THE INNOCENT?* 17–41 (Michael Naughton ed., 2010) (criticizing CCRC for not pursuing re-investigations to determine “factual innocence” because it requires “fresh evidence” comparable to newly discovered procedural requirements in US).

<sup>22</sup> For example, the Conviction Integrity Unit in Cook County, Illinois claims ownership over several exonerations despite years of resistance from the State’s Attorney’s Office before eventually conceding in the face of overwhelming evidence of innocence. According to the National Registry of

This leads to a third and final prefatory observation: “Conviction integrity” reforms—and I am assuming here an earnest, open re-investigation unit that involves a true partnership with innocence organizations and defense counsel consonant with best practices as well as other initiatives to learn from error (root cause analysis and sentinel review)—may have a surprisingly good chance of succeeding. My optimism arises from the fact that a good CIU relies on a series of cognitive science “fixes” (what the forensic science community calls “human factor” considerations)<sup>23</sup> designed to re-orient stakeholders on how to evaluate evidence and relate to each other.

In the Introduction to *In Doubt*, his masterful critique of the psychological processes at play in the criminal justice system, Dan Simon instructs that “[u]nlike most other disciplines that are employed in the analysis of the legal system, experimental psychology operates at a granular level that enables offering direct and immediate solutions to specific problems.”<sup>24</sup> He rightly observes that many legal scholars who have addressed the lack of accuracy in the investigative process and the lack of “diagnosticity” in the adjudicatory process<sup>25</sup> tend to propose “profound institutional changes to the criminal justice process” that “run against the grain of the current Anglo-American legal culture, and would likely require deep legislative changes and perhaps also constitutional amendments.”<sup>26</sup> He calls for “pragmatism” and specific “best practices” that are “practical, feasible, and readily implementable in the short or medium term,” reforms that are targeted at law enforcement officials, lawyers, and judges that could be adopted at the departmental level, or by criminal justice stakeholders themselves, with a minimum of legislative involvement.<sup>27</sup>

Accordingly, what follows is a “granular” discussion of Conviction Integrity Unit “best practices” that is intended to facilitate productive, non-adversarial post-conviction reinvestigations and efforts to learn from errors involving multiple stakeholders. These “best practices” did not emerge from thin air. The “best practices” for a non-adversarial post-conviction re-investigation come directly from successful experiences of innocence organizations working co-operatively

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Exonerations, the State’s Attorney’s Office fought to uphold the convictions of at least six of the nine people whose exonerations they later claimed to have helped secure. See NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015, *supra* note 2, 13–14.

<sup>23</sup> *Human Factors*, U.S. DEP’T OF JUSTICE, NAT’L COMM’N ON FORENSIC SCI., <https://www.justice.gov/ncfs/human-factors> [<https://perma.cc/8A9L-JF5P>] (last visited Feb. 28, 2017); *Human Factors Subcommittee*, NAT’L INST. OF STANDARDS AND TECH., <https://web.archive.org/web/20160113070656/http://www.nist.gov/forensics/osac/hfc.cfm>.

<sup>24</sup> DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 13 (2012) [hereinafter *IN DOUBT*].

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Id.* at 13 (footnote omitted).

<sup>27</sup> *Id.* It should be noted that Simon practices what he preaches and offers specific, “granular” best practices at the end of each of his chapters. See, e.g., *id.* at 48–49.

with prosecutors in cases that led to “exonerations” as well as cases that did not. The two offices whose procedures most closely track these “best practices,” Dallas and Brooklyn, have also generated the greatest number of exonerations.

There is historical precedent for this “granular,” non-adversarial approach to “conviction integrity” that provides some basis for optimism. In 1996, Attorney General Janet Reno formed a Commission on the Future of DNA Evidence that had, as one of its principal objectives, the goal of overcoming the resistance of prosecutors and courts to the widespread use of post-conviction DNA testing to determine whether a convicted inmate requesting such a test was wrongfully convicted.<sup>28</sup> This resistance, relying on “finality” arguments and statute of limitation time bars, provided any prosecutor who would not voluntarily consent to testing a formidable basis to block testing indefinitely. Despite the insistence of at least one vociferous advocate<sup>29</sup> that the first order of business for the Commission should be adoption of model state and federal legislation that explicitly authorized post-conviction DNA testing, the Commission Chair, Chief Judge Shirley Abrahamson of the Wisconsin Supreme Court, elected to form a subcommittee of relevant stakeholders to develop best practices on when prosecutors should definitely consent to post-conviction DNA testing, when they should have discretion to refuse in borderline cases, and when they should be free to refuse in non-meritorious cases. This subcommittee of stakeholders produced a “granular” report specifically defining categories of cases where testing should go forward and checklists for each stakeholder—prosecutors, judges, defenders, crime laboratory analysts, police, and victim advocates—on exactly what they should do in such cases. In turn, this Subcommittee report, *Postconviction DNA Testing: Recommendations for Handling Requests*<sup>30</sup> was issued as the first publication of the Commission and it became a very effective instrument for innocence organizations and defense lawyers to obtain consent from prosecutors for DNA testing that could have otherwise been bottled up for years.<sup>31</sup>

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<sup>28</sup> See *National Commission on the Future of DNA Evidence*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/topics/forensics/evidence/dna/commission/pages/welcome.aspx> [https://perma.cc/DVB3-BRUA] (last visited Feb. 28, 2017).

<sup>29</sup> I was that advocate. I served as a Commissioner and a member of the planning committee for the Commission. This constitutes a formal written mea culpa to Judge Abrahamson, former Executive Director Chris Asplen, and Commissioner Ron Reinstein.

<sup>30</sup> NAT’L COMM’N ON FUTURE OF DNA EVIDENCE, NAT’L INST. OF JUSTICE, *POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS* (1999), <https://www.ncjrs.gov/pdffiles1/nij/177626.pdf> [https://perma.cc/RP7K-HP77].

<sup>31</sup> The Report identified fact patterns for Category 1 and Category 2 cases where reasonable prosecutors ought to consent to post-conviction DNA testing. *Id.* at 4–5. With the full weight of the United States Department of Justice behind the report, and a group of state prosecutors and local police officials with well-known DNA expertise (as well as “hardline” reputations) on the subcommittee, it was my experience that more prosecutors consented to testing than opposed. The voluntary compliance was, of course, heartening; the opposition, very quickly, became difficult to accept because Category 1 and 2 cases were written to be virtual “no-brainers.”

The Commission later proposed model state legislation. Eventually, all fifty states enacted some form of post-conviction DNA legislation,<sup>32</sup> and Congress did so as well by passing the Innocence Protection Act of 2001.<sup>33</sup> While many of those state statutes contained flaws,<sup>34</sup> there is no question that the “granular” recommendations of the Commission had a salutary effect because they induced a joint, non-adversarial post-conviction DNA testing process in many jurisdictions that resulted in exonerations and led to the apprehension of the real assailants. Most significantly, as part of the Innocence Protection Act, Congress also passed the Kirk Bloodsworth grant program that authorized federal funding to state and local governments for post-conviction DNA testing.<sup>35</sup> The Bloodsworth program was conceived as a way that the Commission’s vision of a non-adversarial post-conviction process could be implemented through innocence organizations and public defenders working together with police and prosecutors to find probative biological evidence, test it, and either reach agreement to vacate the conviction or let a court decide. Over the 2015 fiscal year, \$3,555,053.00 in Bloodsworth grants has been awarded and, with very few exceptions, the recipients were part of a joint post-conviction effort involving law enforcement and innocence organizations or defenders.<sup>36</sup>

Recognizing this success does not mean one should ignore or minimize the fact that a number of prosecutors spurned the Commission’s recommendations, reflexively opposed testing, and unreasonably refused to vacate convictions even

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<sup>32</sup> *Policy Reform*, INNOCENCE PROJECT, <http://www.innocenceproject.org/policy/> (last visited Feb. 28, 2017).

<sup>33</sup> Innocence Protection Act of 2001, S. 486, § 104 (2001).

<sup>34</sup> Patrice O’Shaughnessy, *NYPD Eyes Dozens of ‘Solved’ Murders: Police Say Ex-cop’s Closed Cases Questionable*, N.Y. DAILY NEWS (Aug. 5, 2001), <http://www.nydailynews.com/archives/news/nypd-eyes-dozens-solved-murders-police-ex-cop-closed-cases-questionable-article-1.917627>.

<sup>35</sup> Kirk Bloodsworth Post-Conviction DNA Testing Grant Program, 42 U.S.C. § 14136e (2004) (establishing the Kirk Bloodsworth Post-conviction DNA Testing Grant Program and authorizing appropriations of \$5,000,000 for each fiscal year from 2005 through 2009).

<sup>36</sup> *Postconviction Testing of DNA Evidence to Exonerate the Innocent Program*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/topics/justice-system/wrongful-convictions/pages/postconviction-dna-funding-program.aspx> [<https://perma.cc/T44J-CP5E>] (last visited Mar. 1, 2017) (see awards made for FY 2015). See also *Awards Made for “BJA FY 15 Wrongful Conviction Review Program: Representation of Wrongfully Convicted Defendants in Post-Conviction Claims of Innocence,”* U.S. DEP’T OF JUSTICE, <https://external.ojp.usdoj.gov/selector/title?solicitationTitle=BJA%20FY%2015%20Wrongful%20Conviction%20Review%20Program:%20Representation%20of%20Wrongfully%20Convicted%20Defendants%20in%20Post-Conviction%20Claims%20of%20Innocence&po=BJA> [<https://perma.cc/C7BF-5HNU>] (last visited Mar. 1, 2017) (noting the Wrongful Conviction Review Program grants for the fiscal year 2015); *Funding*, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, <https://www.bja.gov/funding.aspx> [<https://perma.cc/Q5PD-P892>] (last visited Mar. 1, 2017) (listing historical data for BJA grants); *Projects Funded by NIJ Awards*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/funding/awards/pages/welcome.aspx> [<https://perma.cc/2LAY-UXTE>] (last visited Mar. 1, 2017).

after court ordered post-conviction DNA testing produced powerful, exculpatory results.<sup>37</sup> Indeed, considerable scholarly attention has been focused on this striking phenomenon and the cognitive psychology that underlies cases where prosecutors “irrationally” refuse to admit error.<sup>38</sup> Truth be told, what cognitive psychology teaches about the challenges criminal investigators face from confirmation bias,<sup>39</sup> motivated reasoning,<sup>40</sup> groupthink,<sup>41</sup> commitment effects,<sup>42</sup> the coherence effect,<sup>43</sup>

<sup>37</sup> See Sara Rimer, *DNA Testing In Rape Cases Frees Prisoner After 15 Years*, N.Y. TIMES (Feb. 15, 2002), <http://www.nytimes.com/2002/02/15/us/dna-testing-in-rape-cases-frees-prisoner-after-15-years.html> [<https://perma.cc/6DPK-ZQ38>]; Andrew Martin, *The Prosecution’s Case Against DNA*, N.Y. TIMES MAG. (Nov. 25, 2011), <http://www.nytimes.com/2011/11/27/magazine/dna-evidence-lake-county.html> [<https://perma.cc/R2R2-WV2G>].

<sup>38</sup> DANIEL S. MEDWED, PROSECUTION COMPLEX 123–67 (2012); Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401 (2011); Douglas H. Ginsburg & Hyland Hunt, *The Prosecutor and Post-Conviction Claims of Innocence: DNA and Beyond?*, 7 OHIO ST. J. CRIM. L. 771 (2010); Bruce A. Green & Ellen Yaroshesky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467 (2009); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004).

<sup>39</sup> “Confirmation bias” is defined as the “inclination to retain, or a disinclination to abandon, a currently favored hypothesis.” IN DOUBT, *supra* note 24, at 23. Researchers have also identified its reciprocal, “disconfirmation bias,” which is a tendency to judge evidence that is incompatible with one’s prior beliefs as weak. *Id.* “In the context of criminal investigations, confirmation biases have been labeled *tunnel vision*.” *Id.* at 24.

<sup>40</sup> “Motivated reasoning” research “shows that people’s reasoning processes are readily biased when they are motivated by goals other than accuracy,” which can include any “wish, desire, or preference that concerns the outcome of a given reason task.” *Id.* at 25.

<sup>41</sup> Excessively cohesive groups can fall prey to “groupthink,” a phenomenon described by Irving Janis as encompassing “illusions of invulnerability, collective rationalization, belief in the inherent morality of the group, stereotypes of out-groups, pressure on dissenters, self-censorship, illusions of unanimity, and self-appointed mind-guards.” *Id.* at 29 n.98 (citing IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES (2d ed. 1982)). For an unforgettable statement that exemplifies the dangers of prosecutorial “groupthink” watch the interview and read the apology of former prosecutor Marty Stroud concerning the wrongful capital conviction of Glenn Ford in Caddo Parish, Louisiana. A.M. “Marty” Stroud III, Editorial, *Lead Prosecutor Apologizes for Role in Sentencing Man to Death Row*, SHREVEPORT TIMES (Mar. 20, 2015), <http://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063/> [<https://perma.cc/34UE-MKUC>]. Stroud says he felt “confident” Ford must be guilty because he believed Caddo Parish law enforcement simply would not indict an innocent man:

I was not going to commit resources to investigate what I considered to be bogus claims that we had the wrong man. My mindset was wrong and blinded me to my purpose of seeking justice, rather than obtaining a conviction of a person I believed to be guilty. I did not hide evidence, I simply did not seriously consider that sufficient information may have been out there that could have led to a different conclusion. . . . I did not question the unfairness of Mr. Ford having appointed counsel who had never tried a criminal jury case much less a capital one. . . . *In 1984, I was 33 years old. I was arrogant, judgmental, narcissistic and very full of myself. I was not as interested in justice as I was in winning. . . . After the death verdict in the Ford trial, I went out with others and celebrated with a few rounds of drinks. That’s sick. I had been entrusted with the duty to*

and selection bias<sup>44</sup> is, to say the least, daunting. It makes the whole notion that prosecutors could fairly re-investigate possible miscarriages of justice emanating from their own offices seem problematic on its face, especially since so many of these processes operate below the level of conscious awareness.

Nonetheless, and most important for our purposes, legal scholars and psychologists have begun to explore how the insights derived from cognitive science or “human factors” research can improve the prosecutorial decision-making process on the front end—before a plea, a conviction after trial, an acquittal, or a dismissal.<sup>45</sup> It turns out, interestingly, that the development of

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*seek the death of a fellow human being, a very solemn task that certainly did not warrant any “celebration.” In my rebuttal argument during the penalty phase of the trial, I mocked Mr. Ford, stating that this man wanted to stay alive so he could be given the opportunity to prove his innocence. I continued by saying this should be an affront to each of you jurors, for he showed no remorse, only contempt for your verdict.*

*Id.* (emphasis added).

<sup>42</sup> Escalating commitment has been identified as a factor in flawed criminal investigations and [c]ommitment has been found to increase along with increases in the actor’s responsibility for the original error, the room for concealing failure, the adversity of the outcome of the original decision, the perceived threat entailed by the exposure of the error, and the publicity of the original error. Paradoxically, the more egregious the error and the longer it has persisted, the less likely it is that it will be corrected.

IN DOUBT, *supra* note 24, at 30 (footnotes omitted).

<sup>43</sup> The “coherence effect” is a psychological phenomenon that arises when integrating evidence in complex decision making processes:

Th[e] coherence effect is driven by a bidirectional process of reasoning: just as the facts guide the choice of the preferred conclusion, the emergence of that conclusion radiates backward and reshapes the facts to become more coherent with it. This process occurs primarily beneath the level of conscious awareness.

*Id.* at 34 (footnotes omitted). When combined with other biasing factors, such as motivations and confirmatory biases, the coherence effect can dramatically sway entire cases in a particular direction. *Id.* Witnesses who fit the investigator’s theory of the case will be judged more reliable. *Id.* at 34–35. Similarly, items of evidence are not evaluated independently but according to how they fit into the mental model of the task, *i.e.*, the theory of the case. *Id.* at 35. Whether exculpating or inculpating, because of the “coherence effect” one strong item of evidence can make the entire “evidence set” appear exculpating or inculpating. *Id.*

<sup>44</sup> Selection biases include: “selective framing strategy,” the tendency to frame an inquiry in a manner that affirms the salient hypothesis; “selective exposure,” the tendency to expose oneself to information that confirms the focal hypothesis and shield oneself from discordant information; “selective scrutiny,” the tendency to scrutinize information that is incompatible with one’s conclusion, but apply lax standards to the validity of compatible information; and “selective stopping,” the tendency to shut down inquiries after having found a sufficient amount of evidence to support one’s leading hypothesis. *Id.* at 37–39.

<sup>45</sup> See Barbara O’Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1002–04 (2009); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291; Peter A. Joy, *The*

conviction integrity processes on the back end presents a much richer opportunity to build on what we are learning from cognitive science. As Barbara O'Brien points out, the tendency to seek information that confirms rather than falsifies a suspect's guilt may deviate from scientific norms about hypothesis testing and a prosecutor's role as a "minister of justice to seek the truth," but it makes perfect sense for a prosecutor who is trying to persuade, because marshaling evidence in a one-sided manner is persuasive to judges and juries. It is also easy to understand how the tendency toward confirmation and selection biases can become powerful on the front end when the majority of suspects charged are guilty and, all too frequently, underfunded defense counsel with inadequate access to the information available to the prosecution fail to put forward effective arguments to falsify the guilt hypothesis.<sup>46</sup>

Post-conviction, there is more room for a non-adversarial, dialectical approach to assessing evidence, a safer space to gather more information from all stakeholders, and a unique opportunity to learn from error and "near misses." It requires some creativity, a readiness to get beyond habitual adversarial responses, a willingness not to be hamstrung by procedural bars or doctrinal rigidity, and a focus on achieving just results.<sup>47</sup>

What follows, in italics, are Guidelines for Conviction Integrity Units the Innocence Project has posted on its website.<sup>48</sup> I will provide commentary to the Guidelines (non-italicized) that represent my opinion alone and should not be taken as any kind of official view of the Innocence Project.

The Guidelines represents an effort to put forward some principles and practical suggestions, based in part on the success of a number of Conviction Integrity programs with whom the Innocence Project and other organizations within the Innocence Network have collaborated. At this point, it is probably wise to characterize these recommendations as "guidelines" from which "best practices" can be developed because there are comparatively few CIUs fully functioning, and fewer still that have a strong track record of success, measured either by exonerations, "quality" case reviews, or formal protocols to learn from error.

The term "best practices" is much abused and should be based on evidence from a substantial and representative data set, although these "Guidelines" do have merit and are drawn from the best CIUs. There are plainly differences in what can

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*Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399.

<sup>46</sup> O'Brien, *supra* note 45, at 1037.

<sup>47</sup> See 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) for an excellent description of the instinctive reaction of "senior" prosecutors to "circle the wagons" and ways prosecutors can overcome cynicism and create collaborative working relationships with innocence organizations and defense lawyers in post-conviction CIU investigations.

<sup>48</sup> *Conviction Integrity Unit Best Practices*, INNOCENCE PROJECT, <http://www.innocenceproject.org/wp-content/uploads/2016/09/Conviction-Integrity-Unit.pdf> [<https://perma.cc/WDU8-F2E6>].

be done depending on the size of a district attorney's office and I am sure that as CIUs proliferate, and as they work collaboratively with innocence organizations and defenders, a dialogue will ensue with constructive suggestions and criticisms as to how these "guidelines" can be improved, and "best practices" for different sized offices can be formulated. In fact, these guidelines have been drafted with large to medium size offices in mind because Conviction Integrity programs began in such offices.

As the Registry of Exonerations stated in its 2015 Annual Report, out of the 2,300 district attorney offices in the United States, "[t]he three most populous counties all have CIUs (Los Angeles, Cook, and Harris); so do six of the top 10, 10 of the top 20, and 14 of the top 50."<sup>49</sup> But there are examples of collaboration even in medium size and large offices that could be helpful in smaller offices. For example, Mike Nerheim, the State's Attorney in Lake County, Illinois, created a Conviction Integrity program using lawyers from outside the county to assist in reviewing cases.<sup>50</sup> In New Orleans, the New Orleans Innocence Project and the Orleans Parish District Attorney's office developed a joint Conviction Integrity Project after co-operative efforts that led to the exoneration of Kia Stewart, but it was abandoned after a year based on lack of funding (District Attorney's position) or lack of commitment (New Orleans Innocence Project's position).<sup>51</sup> Small offices in suburban and rural areas might well want to seek the assistance of existing statewide entities such as Attorney General offices, state bar associations, Inspector General offices, innocence organizations, or other privately formed advisory groups such as the one formed in Lake County, Illinois.

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<sup>49</sup> NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015, *supra* note 2, at 13.

<sup>50</sup> See Emily K. Coleman, *Lake County State's Attorney Debate Focuses on History of Wrongful Convictions*, CHI. TRIB. NEWS-SUN (Oct. 11, 2016), <http://www.chicagotribune.com/suburbs/lake-county-news-sun/news/ct-lns-lake-county-states-attorney-debate-st-1011-20161010-story.html> [https://perma.cc/R6T5-LWQE].

<sup>51</sup> See Janet McConnaughey, *Prosecutor-Local Innocence Project Joint Work Brings Freedom*, WASH. TIMES (Apr. 13, 2015), <http://www.washingtontimes.com/news/2015/apr/13/prosecutor-local-innocence-project-joint-work-brin/> [https://perma.cc/DX8P-9AJU]; John Simerman, *Cannizzaro, Innocence Project Call it Quits on Project to Unearth False Convictions*, NEW ORLEANS ADVOCATE (Jan. 11, 2016), <http://www.theneworleansadvocate.com/news/14502358-64/cannizzaro-innocence-project-call-it-quits-on-project-to-unearth-false-convictions> [https://perma.cc/7UUU-DLZV].



## II. GUIDELINES FOR CONVICTION INTEGRITY UNITS AND COMMENTARY

### A. Individual Cases

#### 1. Case Referrals

Sources for case referrals include:

- a. *Innocence organizations*
- b. *Defense Attorneys (public defender, private defense bar)*
- c. *Internal audit of cases based on finding previous errors or instances of misconduct by police or prosecutors*
- d. *Individual prosecutors identifying cases they believe could be miscarriages of justice*
- e. *Police*
- f. *Courts*
- g. *Press*
- h. *Individuals claiming innocence, usually pro se applications*
- i. *Referrals from Forensic Science Service Providers of erroneous laboratory results or erroneous forensic examiner testimony that is potentially material to the outcome of a case.*

Two sources of case referrals deserve greater discussion: internal audits by the office itself and referrals concerning forensic science errors.

The internal audit of cases based on previous findings of error or misconduct by prosecutors or police has been, and should be, a very large source of cases as the learning from error function of Conviction Integrity programs becomes more robust. One recent example demonstrates the point dramatically.

In Brooklyn, under the administration of Charles “Joe” Hynes, Michael Baum, a lawyer from the Legal Aid Society, asked John O’Mara, head of the newly formed CIU, to investigate the conviction of David Ranta because Baum always believed his client Ranta was innocent and had been framed by a Detective Louis Scarcella in 1990.<sup>52</sup> Scarcella was a charismatic and ostensibly productive homicide detective who nonetheless had a suspect reputation among defenders. The Brooklyn CIU conducted an investigation, exonerated Ranta, and Scarcella

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<sup>52</sup> See Michael Powell & Sharon Otterman, *Jailed Unjustly in the Death of a Rabbi, Man Nears Freedom*, N.Y. TIMES (Mar. 20, 2013), [http://www.nytimes.com/2013/03/20/nyregion/brooklyn-prosecutor-to-seek-freedom-of-man-convicted-in-1990-killing-of-rabbi.html?\\_r=0](http://www.nytimes.com/2013/03/20/nyregion/brooklyn-prosecutor-to-seek-freedom-of-man-convicted-in-1990-killing-of-rabbi.html?_r=0) [https://perma.cc/Y5AE-KHAV] (“Every Christmas, Mr. Baum received a Christmas card from Mr. Ranta. ‘I never had any doubt in my mind he was innocent,’ Mr. Baum said in an interview. ‘I sleep with it every night.’ Sixteen months ago, the district attorney, promoting his newly established Conviction Integrity Unit, gave a talk to the public defenders. Does anyone, he asked, know of cases that should be re-examined? Mr. Baum raised his hand.”).

was exposed as a detective who broke rule after rule according to court filings: Scarcella and his partner kept few written records, coached witnesses, described taking Ranta's confession in a way that was, on its face, highly suspicious, and allowed two dangerous criminals to leave jail, smoke crack cocaine, and visit with prostitutes in exchange for incriminating Ranta.<sup>53</sup> The deliberate rule breaking was so flagrant, and the publicity surrounding Scarcella so intense, that the CIU immediately recognized it would have to make a major effort to audit and investigate other Scarcella cases.<sup>54</sup>

There were other reasons to believe the Ranta case was not an isolated incident but reflected a more systemic problem. It occurred in 1990, during a period when the homicide rate in Brooklyn was extremely high due, in part, to a crack epidemic and the resulting pressure on homicide detectives to clear cases. More than a decade before Hynes formed his CIU, there were exonerations in homicide cases from the same period (Jeffrey Blake, Timothy Crosby, Anthony Faison, and Charles Shephard), similar cultivation of unreliable informant witnesses by homicide detectives, and promises by the New York City Police Department and Hynes to audit the cases of police officers and district attorneys who were involved.<sup>55</sup> It seems fair to observe that if Joe Hynes had undertaken the kind of root cause analysis and sentinel review best practices advocated here when these exonerations occurred, he might have avoided many of the internal problems that led to an ignominious defeat at the polls and the tarnishing of his legacy as a reform-minded District Attorney.<sup>56</sup>

An internal review of Scarcella cases was the first order of business for the "CRU" formed by Hynes's successor, Ken Thompson. Thompson expanded the staff of the conviction integrity unit to ten experienced assistant district attorneys and three investigators, recruited a former public defender to help organize the unit as well as independent outside panels to advise him on the disposition of cases.<sup>57</sup> Thompson came to terms directly with the complexity and sheer size of the task and it helped shape his CRU, already recognized by the press as "the most profound reform that Thompson has implemented in his year as district attorney."<sup>58</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> Frances Robles & N. R. Kleinfield, *Review of 50 Brooklyn Murder Cases Ordered*, N.Y. TIMES (May 11, 2013), <http://www.nytimes.com/2013/05/12/nyregion/doubts-about-detective-haunt-50-murder-cases.html> [<https://perma.cc/XLN2-PSLU>].

<sup>55</sup> O'Shaughnessy, *supra* note 34.

<sup>56</sup> See Joaquin Sapien, *For Brooklyn Prosecutor, a Troubled Last Term, and a Trail of Lingering Questions*, PROPUBLICA (Dec. 30, 2013), <http://www.propublica.org/article/for-brooklyn-prosecutor-a-troubled-last-term-and-a-trail-of-lingering-quest> [<https://perma.cc/7ZDS-LCC2>].

<sup>57</sup> See *Conviction Review Unit*, BROOKLYN DIST. ATT'Y'S OFFICE, [www.brooklynda.org/conviction-review-unit/](http://www.brooklynda.org/conviction-review-unit/) [<https://perma.cc/7VZ3-YZT3>] (last visited Mar. 1 2017). Ron Sullivan, a former public defender in the District of Columbia and a professor at Harvard Law School, helped organize the unit, along with experienced homicide prosecutor Mark Hale.

<sup>58</sup> See Matthew McKnight, *No Justice, No Peace*, NEW YORKER (Jan. 6, 2015), <http://www.nytimes.com/2015/01/06/magazine/no-justice-no-peace.html>.

The Scarcella cases and others from the Brooklyn homicide unit during this period are illustrative of a pattern one finds in other jurisdictions, large and small. Once a homicide unit, detective, or a police department “goes bad” (has staff and/or supervisors who are engaging in deliberate rule breaking), wrongful convictions are bound to result and systematic auditing and root cause analysis is necessary. Whether it’s a narcotics detective in Tulia, Texas,<sup>59</sup> the “Rampart” precinct in Los Angeles,<sup>60</sup> or the infamous “Burge” precinct in Chicago,<sup>61</sup> to pick some comparatively recent and salient examples, cases from police units that “go bad” should be systematically reviewed as soon as possible to see if there are miscarriages of justice as well as police corruption.

Over the past four decades in New York City, there have been periodic “outbreaks” or public scandals that have led to special commissions to investigate police corruption. In 1970, due to the whistleblowing work of detective Frank Serpico and Sergeant David Durk, Mayor John Lindsay created the “Knapp Commission” which famously exposed low level (“grass eaters”) and high level (“meat eaters”) corruption and recommended extensive personnel changes in the structure of the police department.<sup>62</sup> Later, in 1992, Mayor David Dinkins appointed Deputy Mayor Milton Mollen to investigate police corruption after a

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newyorker.com/news/news-desk/kenneth-thompson-conviction-review-unit-brooklyn [https://perma.cc/3AA4-87JH].

<sup>59</sup> See NATE BLAKESLEE, TULIA: RACE, COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN, 138–57 (2005); Janelle Stecklein, *Tulia Drug Busts: 10 Years Later*, AMARILLO GLOBE NEWS (July 19, 2009), [http://amarillo.com/stories/071909/new\\_news1.shtml#.VwQ5JfkrKJA](http://amarillo.com/stories/071909/new_news1.shtml#.VwQ5JfkrKJA) [https://perma.cc/96BJ-44CS].

<sup>60</sup> See Erwin Chemerinsky, *The Rampart Scandal and the Criminal Justice System in Los Angeles County*, 57 GUILD PRACTITIONER 121 (2000), [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2161&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2161&context=faculty_scholarship).

<sup>61</sup> Jon Burge is a former Chicago Police Department detective and precinct commander who gained notoriety for torturing more than 200 criminal suspects between 1972 and 1991 in order to force confessions. Burge was convicted of perjury arising out of testimony in a civil rights case. In 2015, Mayor Rahm Emmanuel established a \$5.5 million dollar fund to compensate victims who were tortured in the Burge precinct. The Chicago Reader and Chicago Tribune have compiled histories of this remarkable saga of police abuse. See John Conroy, *Police Torture in Chicago: An Archive of Articles by John Conroy on Police Torture, Jon Burge, and Related Issues*, CHI. READER (Oct. 8, 2009), <http://www.chicagoreader.com/chicago/police-torture-in-chicago-jon-burge-scandal-articles-by-john-conroy/Content?oid=1210030> [https://perma.cc/D3ZE-2CYB]; *John Burge*, CHI. TRIB., <http://articles.chicagotribune.com/keyword/jon-burge> [https://perma.cc/98WD-M3FL] (last visited Mar. 1, 2017).

<sup>62</sup> *Knapp Commission*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Knapp\\_Commission](https://en.wikipedia.org/wiki/Knapp_Commission) [https://perma.cc/6YLY-CNAD] (last visited Mar. 1, 2017); MICHAEL ARMSTRONG, *THEY WISHED THEY WERE HONEST: THE KNAPP COMMISSION AND NEW YORK CITY POLICE CORRUPTION* (2012). The tenor of these times and the difficulties posed by the “blue wall of silence” to investigate and prosecute police corruption cases are unforgettably rendered by two great movies directed by Sidney Lumet, *Serpico* and *Prince of the City*, both based on true stories. SERPICO (Paramount Pictures 1973); PRINCE OF THE CITY (Orion Pictures 1981). Bias alert: I should disclose knowing and working with many of the principals (both lawyers and police officers) depicted in these movies.

publicized scandal involving Detective Michael Dowd, who was actively engaged in criminal activity.<sup>63</sup> The “Mollen Commission” ultimately concluded that “the corruption exposed in the Knapp Commission . . . was largely a corruption of accommodation, of criminals and police officers giving and taking bribes, buying and selling protection,” whereas the new corruption it discovered was “characterized by brutality, theft, abuse of authority and active police criminality,” fostered by supervisory problems and a breakdown in internal affairs.<sup>64</sup> What’s striking, in retrospect, is that in neither the Knapp nor Mollen Commission investigations was there a formal audit involving district attorney offices to determine whether the corrupt, rule-breaking police had also engaged in misconduct that convicted the innocent. In fact, there was a perception that the “princes of the city” (the name attached to an elite narcotics unit profiled in a book by Robert Daly<sup>65</sup> and the eponymous Sidney Lumet movie) were very effective and admired police officers, similar to Scarcella, who invariably caught the bad guys notwithstanding a ready inclination to let the ends justify the means.

The potential consequences of failing to conduct such a formal audit was brought home dramatically in 2005, when Drug Enforcement Administration agents working out of the Eastern District of New York discovered the original police file concerning the conviction of a Brooklyn postal employee, Barry Gibbs, in the home of the famous self-described “Mafia Cop” Louis Ippolito. The file was discovered after Ippolito was arrested in Las Vegas for performing a number of “hits” for organized crime with his partner Stephen Caracappa while they were working as detectives in the late 1980s and early 1990s. Ippolito and Caracappa were ultimately convicted of the murders, but while that prosecution was pending, DEA agents who were puzzled as to why Ippolito had the original Gibbs file in his home soon learned that Gibbs was represented by the Innocence Project. In fact, Gibbs had been seeking to prove his innocence for years. The agents accordingly decided to re-investigate the Gibbs case and ultimately produced exculpatory evidence showing that Ippolito had framed Gibbs for a murder to protect the real perpetrator, a member of organized crime, fabricated evidence, and coerced an eyewitness to falsely identify Gibbs at a lineup. The exculpatory evidence was turned over to the Brooklyn District Attorney’s office and Gibbs was exonerated in 2005 after serving 17 years in prison.<sup>66</sup> He subsequently brought successful civil suits against the state and city of New York.

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<sup>63</sup> CITY OF N.Y., COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, COMMISSION REPORT 1–2, exh. 1 (1994).

<sup>64</sup> See CITY OF N.Y., COMM’N TO COMBAT POLICE CORRUPTION, PERFORMANCE STUDY: THE INTERNAL AFFAIRS BUREAU’S INTEGRITY TESTING PROGRAM (2000).

<sup>65</sup> See ROBERT DALY, PRINCE OF THE CITY: THE TRUE STORY OF A COP WHO KNEW TOO MUCH (1978). Daly was a respected reporter for the New York Times who actually served two years as a Deputy Commissioner in the New York City Police Department.

<sup>66</sup> *Barry Gibbs*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/barry-gibbs/> [https://perma.cc/57EW-5375] (last visited Feb. 28, 2017).

Much can be learned from the information discovered in the course of the Gibbs litigation, but the key take-home lesson for “conviction integrity” purposes is that “innocence” audits should be conducted of the caseloads of police officers who are discovered to be guilty of criminal conduct—whether it be graft, drug abuse, or excessive force on or off the job—because there is a likelihood that deliberate rule-breaking is a slippery slope that can easily infect casework and lead to wrongful convictions. One strongly suspects that if such “innocence audits” had been systematically conducted of the caseloads of corrupt police officers involved in the investigations of the Knapp Commission, the Mollen Commission, or in other police corruption investigations across the country, many miscarriages of justice would have been discovered. Such caseload audits of corrupt police officers, as well as those, like Scarcella, who are caught engaging in misconduct to make cases, ought to be a fruitful source of cases for conviction integrity units.<sup>67</sup>

Another increasingly significant source of cases for conviction integrity units are matters that arise from forensic science service providers who seek to correct and notify criminal justice stakeholders or “customers”—the district attorneys, the courts, and the defendants and/or their counsel—of errors in their previous work. These forensic science error cases can arise from new realizations that prior test methods and testimony of analysts were scientifically flawed or from misconduct or negligence by forensic science analysts. Examples include recent reviews conducted by the Department of Justice, the FBI, the Innocence Project, and the National Association of Criminal Defense Lawyers (NACDL) of scientific errors made by FBI analysts in Composite Bullet Lead Analysis (CBLA) and microscopic hair comparison. In those reviews, which covered decades of cases, efforts were made to notify all the stakeholders, and (in the hair review cases) waive procedural bars and provide free DNA testing if the hairs could be found. Some states are also starting to conduct hair reviews because it is likely that errors made by FBI analysts were replicated by state examiners who were regularly trained by the Bureau.<sup>68</sup>

The Texas Forensic Science Commission recognized that crime laboratories had the duty to correct scientific errors of Texas fire marshals and notify stakeholders in arson cases after reviewing the arson murder case of executed inmate Cameron Todd Willingham. The Commission concluded the arson evidence in that case was scientifically “flawed” and contrary to NFPA 921, the

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<sup>67</sup> Needless to say, the criminal investigations and prosecutions of police officers should proceed on one track, whether by state or federal officials, and the retroactive “innocence audit” of the cases of corrupt police officers on a separate track by a conviction integrity unit, or, if necessary due to potential conflicts of interest, an independent outside entity. See Handling Allegations of Prosecutorial Misconduct, *infra* Section II.A.4.

<sup>68</sup> *FBI Testimony on Microscopic Hair Analysis Contained Errors in at least 90% of Cases in Ongoing Review*, INNOCENCE PROJECT (Apr. 20, 2015), <https://www.innocenceproject.org/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-of-cases-in-ongoing-review/> [https://perma.cc/RM3V-B4LY].

guidelines issued by the National Fire Protection Agency in 1992.<sup>69</sup> This, in turn, instigated a review of arson cases by the Texas Fire Commissioner and the Innocence Project of Texas, as well as attacks on old arson cases throughout the country.<sup>70</sup> Just as the adoption of NFPA 921 triggered correction of past scientific errors in arson cases, one expects that as the National Institute of Science and Technology (NIST) and the Organization of Scientific Area Committees (OSAC) review and establish new scientific standards for forensic science disciplines that were severely criticized in the 2009 National Academy of Sciences Report—particularly pattern evidence disciplines—there will be more reviews of scientific errors from methods that lacked validation or exaggerated the probative value of results.<sup>71</sup> New statutes in Texas and California clearing away procedural bars facilitate court review of such “outdated science” cases and are likely to be replicated in other states.<sup>72</sup> Conviction Integrity Units are good vehicles to review these kinds of cases because they are designed to work co-operatively with defenders and innocence organizations to review old cases to see if new evidence requires convictions to be vacated.

Large scale reviews of forensic science error cases that arise from misconduct

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<sup>69</sup> NFPA 921 is a “Guide for Fire and Explosive Investigation” that was first published by the National Fire Protection Association in 1992 and has been subsequently revised in 2014. NAT’L FIRE PROT. ASS’N, NFPA 921: GUIDE FOR FIRE AND EXPLOSIVE INVESTIGATIONS (2014). The publication of NFPA 921 in 1992 exposed the fact that there was no scientific basis to the way many arson experts had been testifying that certain factors (“alligatoring” of wood, burning under furniture, “V” shaped patterns, scouring of floors, “spider glass”) were proof that accelerant was used even if none were found in debris or proof that a fire was otherwise non-accidental. Relying on NFPA 921, five independent experts provided a report to the Texas Forensic Science concluding that the evidence supporting the capital conviction and execution of Cameron Todd Willingham was unreliable. The Commission hired its own expert who confirmed the independent experts’ report and the Commission, despite strong opposition from Governor Rick Perry, finally concluded the Willingham evidence was “flawed.” This led, in turn, to an audit of old Texas arson cases by the Texas Fire Commissioner in conjunction with the Innocence Project of Texas. See Paul Giannelli, *Junk Science and the Execution of an Innocent Man*, 7 N.Y.U. J.L. & LIBERTY 221, 241–42, 248–50 (2013).

<sup>70</sup> See Stephen J. Meyer & Caitlin Plummer, *An Arson Prosecution: Fighting Fire with Science*, 28 CRIM. JUST. 4, 8 (2014); Rachel Dioso-Villa, *Scientific and Legal Developments in Fire and Arson Investigation Expertise in Texas v. Willingham*, 14 MINN. J.L. SCI. & TECH. 817, 817–18, 840 (2013).

<sup>71</sup> On December 7, 2015, the International Association of Arson Investigators (IAAI) issued a statement endorsing the use of “multidisciplinary science review panels” to review and correct past arson cases based on unreliable or incomplete arson investigations. See INT’L ASS’N OF ARSON INVESTIGATORS, THE INTERNATIONAL ASSOCIATION OF ARSON INVESTIGATORS ENDORSES THE USE OF MULTIDISCIPLINE SCIENCE REVIEW PANELS 1–3 (2015), <http://www.fsc.texas.gov/sites/default/files/documents/Multidiscipline%20Science%20Review%20Panel%20Document%20Final.pdf> [https://perma.cc/BF9K-6N7G]. The IAAI not only recognized this duty to correct but offered to assist law enforcement with the creation of these independent panels that would include fire scientists, chemists, engineers, lawyers, or others depending on the nature of the case. *Id.*

<sup>72</sup> See TEX. CODE CRIM. PROC. ANN. art. 11.073 (West 2015); CAL. PENAL CODE § 1473(b) (West 2015).

or negligence by crime laboratory personnel have a long history, dating back to reviews of notorious “dry labbing” analysts like Fred Zain in West Virginia and Joyce Gilchrist in Oklahoma, to the recent scandal involving drug analyst Annie Dookins in Massachusetts.<sup>73</sup> Conviction Integrity Units can play a very useful role in these “forensic scandal” cases and in identifying dangerous malfunctions in relationships between forensic laboratories and courts, as demonstrated recently by the CIU within the Harris County, Texas District Attorney’s Office, whose jurisdiction encompasses Houston.

In Harris County, the crime laboratory began in 2011 to clear up a huge backlog in drug testing cases, doing confirmatory tests on cases where only presumptive tests had previously been performed. This effort led to the discovery that more than a hundred people had pled guilty to narcotics offenses even though the substances involved in those cases were not, in fact, controlled substances. When Inger Chandler, newly appointed head of the Conviction Review Unit, learned about these cases and the inconsistent responses of assistant district attorneys assigned to them, she began an organized, centralized internal audit to ferret out wrongful convictions. So far, this effort has not just led to 119 drug crime exonerations in Harris County, but there can be little doubt, as investigative journalists Ryan Gabrielson and Sander Tophar have documented: “[T]here is every reason to suspect that [there are] thousands of wrongful convictions that were based on field tests across the United States.”<sup>74</sup>

As more crime laboratories in the United States become accredited, the required reporting of “errors” and “non-conformities” will inevitably surge. Often, especially when state crime laboratories are involved, many district attorney offices will be affected, and it may make sense to develop state- or county-wide multi-stakeholder entities to review the errors in old cases. Even so, the core competencies involved in such reviews are tasks that good Conviction Integrity Units perform all the time, and it would make sense that personnel from those units would take a leading role.

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<sup>73</sup> For a review of these problems and the need to create a multi-stakeholder non-adversarial approach, see Sandra Guerra Thompson & Robert Wicoff, *Outbreaks of Injustice: Responding to Systemic Irregularities in the Criminal Justice System*, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT* (Daniel Medwed ed.) (forthcoming 2017).

<sup>74</sup> See Ryan Gabrielson & Sander Tophar, *How a \$2 Roadside Drug Test Sends Innocent People to Jail*, N.Y. TIMES MAG. (July 7, 2016), <https://www.nytimes.com/2016/07/10/magazine/how-a-2-roadside-drug-test-sends-innocent-people-to-jail.html> [<https://perma.cc/94FY-ZXTF>]; see also NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015, *supra* note 2, at 10.

## 2. Case Selection

*Criterion for selecting cases for review (any one of the following):*

- a. *Facts suggest plausible claim of innocence*
  - i. *That a defense lawyer could have found these “newly discovered” facts with the exercise of due diligence should not be a bar.*
- b. *Evidence of a constitutional violation that undermines the fairness of the proceeding (including Brady violations, ineffective assistance of counsel, unfair trials or plea agreements) that might lead to vacating a conviction.*
- c. *The “interests of justice”*
  - i. *In some jurisdictions, prosecutors and courts have explicit statutory or common law authority to vacate convictions or reduce sentences in the interests of justice. But even in the absence of explicit statutory authority, it should be emphasized that an “interests of justice” orientation or mindset of an “interests of justice” review is frequently an important factor when a CIU makes a judgment about whether relief is warranted when reconstructing what occurred in old cases where there is, as in most cases, a need to resolve issues with less than perfect information.*
- d. *The fact that a defendant pled guilty or is no longer incarcerated should not be a bar to examining cases.*

Some prosecutors may be tempted to send all post-conviction matters that involve constitutional claims, such as *Brady* violations or ineffective assistance of counsel claims, to their appeals unit even if the petitioner or their counsel raise “plausible” claims of innocence and request a CIU investigation. Similarly, some prosecutors might be tempted to narrowly limit CIUs to review just cases of “actual innocence” (cases where it appears possible to prove unequivocally that someone other than the defendant committed the crime) or matters that involve only “newly discovered evidence of innocence” (evidence that a defense attorney could not have discovered with the exercise of due diligence). It would be self-defeating and unfortunate to use such restrictive categories as initial cut-off mechanisms for a number of reasons.

First, it is impractical and invites all kinds of selection biases that make the work of identifying wrongful convictions harder rather than easier. Cases that involve the conviction of the innocent frequently have some constitutional issues lurking, whether it is suppressed exculpatory evidence (inadvertent or intentional)



by law enforcement officers or less than impressive efforts by defense counsel. It is very hard to distinguish at the outset a pure “actual innocence” case that will not potentially involve a constitutional claim—a hazard created by “selective framing.” Conversely, deciding to cease investigating a plausible claim of innocence just because there is a viable constitutional claim is a counterproductive example of the “selective stopping” bias. It runs the risk of failing to discover not only persuasive evidence of innocence, or important evidence of misconduct by anyone involved in the investigation or trial, but also finding the person who really committed the crime before that individual has an opportunity to commit another offense.

Even more vexing is the problem of trying to limit the post-conviction inquiry to just “newly discovered” evidence of innocence—evidence that defense counsel could not have discovered with the exercise of due diligence. This enterprise not only necessitates, by its nature, subjective judgments about the quality of lawyering required in a particular jurisdiction years earlier, but speculation about what could have been discovered and what the lawyer in question actually knew. Very frequently innocence cases are old, the lawyers are unavailable, and files have been lost or destroyed. Worse still, the time and effort spent on determining whether the new evidence could have been found with due diligence by the defense attorney detracts attention from what is most important: the value of the new evidence and where it can lead. This is an example of “selective exposure” bias, the tendency to expose oneself to information that confirms the focal hypothesis and shield oneself from discordant information.

A more successful framing strategy for a CIU is an “interests of justice” orientation. *If the CIU concludes there is a plausible claim of innocence*, the investigation should go forward without continually parsing the new evidence as “newly discovered,” “*Brady*,” or proof that defense counsel was ineffective.

### 3. Investigation: Information Sharing and Discovery

- a. *There should be an open exchange of information and ideas with the parties seeking relief.*
- b. *A cooperative approach, including coordination with defense lawyers or innocence organizations, is essential. For example, joint witness interviews with prosecution and defense investigators or lawyers, agreements about recording interviews, jointly planned identification procedures, joint requests to obtain information from third-parties both informally and by legal process are all measures that should be considered and have proven to be successful.*
- c. *One important way to facilitate a co-operative re-investigation is to enter into formal confidentiality agreements with defense counsel with respect to sharing information and prohibiting the disclosure*

*of that information. These agreements work best when they are time limited and require reasonable notice from the parties as to a time when either one of them will no longer be bound by the agreement. The value of these confidentiality agreements is providing assurances to both sides that neither will “sand bag” the other with surprise leaks to the press or motions to courts. While some CIUs (notably Dallas) have successfully operated informally with these understandings, formalizing the agreements is generally a good idea.*

- d. Open file*
  - i. The district attorney should provide an “open file” that includes work product.*
  - ii. All police agency files, including multiple agencies that may have been involved in the investigation, should be disclosed.*
    - 1. Reasonable exceptions should be made for danger to witnesses and other good cause, but the best practice would be to summarize what is being withheld, preserve the information, and have a record available for court review if re-investigation results in litigation. If necessary, the parties may seek court intervention through a binding protective order to facilitate the release of sensitive information.*
- e. Crime laboratory records, including but not limited to, the laboratory case file, proficiency testing, and any relevant personnel records (such as those of the analysts involved in the case) should be disclosed subject to judicial review and protective orders if there are privacy problems with respect to the disclosure.*
- f. Defense disclosures related to evidence proffered as to innocence claims or constitutional violations including work product (subject to confidentiality agreements) but excluding attorney client communications.*

The most important best practice for a robust CIU re-investigation process is an information sharing agreement between the CIU and an individual claiming innocence. The idea for these agreements arose from the unwritten rules that innocence organizations used with the Dallas CIU and other district attorneys over the years when pursuing joint, non-adversarial post-conviction investigations. The crucial take-home lesson from years of experience in this work is that an elected district attorney and the innocence organization need to be assured that neither side will prematurely go to the press with new evidence from an investigation in an effort to “sand bag” the other party. Within the culture of the criminal justice

system, prosecutors and defense lawyers are very concerned about maintaining their reputations as “straight shooters,” someone whose word and discretion can be trusted. It’s an important coin of the realm that is earned by a lawyer only after years of experience with adversaries. Unfortunately, particularly in large jurisdictions, or in instances where “strangers” are pursuing an “innocence” case in a small or large jurisdiction where they do not ordinarily practice, it helps to have specific, written understandings to supplement a good reputation.

The Brooklyn CRU has issued a template for such agreements that is very good.<sup>75</sup> The principle is that the petitioner will disclose all work product related to the new evidence that the petitioner wants the CRU to review and, in turn, the CRU will disclose its file, including work product. It should be emphasized that this agreement does not require disclosure of all attorney-client communications, but only a waiver from the client to the extent privileged attorney client information is being disclosed as part of “the investigative materials, reports, recordings, communications or other materials” relevant to the investigation of a potential wrongful conviction.

The Brooklyn CRU wisely recognized that requiring, as a pre-condition for disclosure of the prosecution’s file, disclosure of *all* privileged attorney-client communications would be a non-starter for an innocence organization or defense attorney. Some prosecutors bridle at this notion. If a defendant wants to see the entire prosecution file, including work product, they reason, then it is appropriate to require a complete waiver of the attorney-client privilege, including communications that are unrelated to the new investigative materials being proffered in the CIU re-investigation.

This is definitely a “culture clash” issue. Defense attorneys quite rightly regard the attorney-client privilege as a sacrosanct trust they cannot violate without consent from the client and strongly resist disclosure as a condition for seeing the prosecutor’s entire file, including work product. Innocent clients, they argue, will make personal, private admissions to a lawyer that would not ordinarily be made to family members or close friends, and such sensitive information should not be gratuitously shared in a CIU re-investigation. Innocent clients are often initially represented by inexperienced or less-than-competent lawyers who will keep unreliable records or prod clients for what the lawyer thinks are admissions that will set up a plea bargain. This is particularly dangerous when the innocent client suffers from mental illness, learning disabilities, or other cognitive impairments. Innocent clients, like many people in stressful situations, will tell lies to their lawyers if the client thinks it will help, or out of embarrassment. For these reasons and many more, I am sure, defense attorneys and “innocence” lawyers will simply not co-operate with any CIU that insists on a complete waiver of attorney-client privilege as a pre-condition for seeing the prosecutor’s entire file, much less as the price of entry for engaging in a CIU process.

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<sup>75</sup> See *infra* Appendix A.

On the other hand, many prosecutors instinctively believe if someone continues to publicly insist on his or her innocence, then they should have no objection to revealing attorney-client communications. Failure to do so must mean the client is hiding something incriminating, or perhaps knows the person who really committed the crime and is protecting them. “We are not interested in irrelevant attorney-client communications that might embarrass the client,” some prosecutors might suggest, “but only attorney-client communications that are relevant to the offense.” Many prosecutors may also feel, although they do not often say it out loud, that work product in their own files is information that prosecutors don’t ordinarily expect to share, and disclosing it constitutes an invasion of the prosecuting attorney’s privacy, potentially revealing embarrassing private thoughts about colleagues, witnesses, or even crime victims that the attorney never anticipated would be made public.

Given these strongly held views, the compromise solution reduced to writing by the Brooklyn CRU, following the longtime unwritten practice of the Dallas CIU, to exchange the prosecution’s entire file, including work product, for limited and relevant investigative information (including work product) proffered by the client claiming innocence, is a very good solution. There will undoubtedly be situations where the CIU reasonably asks, or a defense/“innocence” lawyer suggests, going further because there might be, for example, crucial prior consistent attorney-client statements in a file that would be helpful to resolving factual disputes. Conversely, there may be important and relevant information in the prosecutor’s file that should be shared but it might involve revealing sensitive information that could endanger the safety of witnesses. There are well-known ways of handling these situations: produce the information for *in camera* inspection by a judge or trusted third party and summarize it. Mechanisms that have proven productive pre-conviction can be usefully and creatively employed to get the best approximation of truth in the post-conviction space. Once a non-adversarial relationship of trust is developed between parties in a CIU re-investigation, it is surprisingly easy for each side to take steps they would never consider for an instant in their usual adversarial mode.

#### 4. Handling Allegations of Prosecutorial Misconduct

*Cases involving substantial, fact-based allegations of prosecutorial misconduct involving current or former members of the office should be referred to an independent authority for investigation and review. This referral should include the allegations of misconduct as well as the claims of innocence and constitutional violations.*<sup>76</sup>

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<sup>76</sup> The term “misconduct” here is defined by the American Bar Association’s Model Rule on Misconduct:

It is professional misconduct for a lawyer to:

This recommendation attempts to strike a balance between bedrock principles of recusal: a judge or a prosecutor should not act in a case where there is an actual conflict of interest or an apparent conflict that would undermine public confidence in any outcome; and the need to demonstrate that a CIU can, in fact, fairly and independently review cases from its own office.

Using a definition of “misconduct” from the ABA Model Rules provides a good, generally accepted standard for what could be grounds for a CIU recusal, but it, by no means, resolves this difficult issue. On the other hand, prosecutors across the country face similar issues all the time, and most states have some recusal procedure whereby an office will ask another prosecutor in the state, a statewide Attorney General, or a “special prosecutor,” to handle a case where there have been substantial, non-conclusory allegations of misconduct. A CIU should be sensitive to this issue and, ultimately, transparent about its decision to either send the case to an independent authority for investigation and review or a decision not to do so.

##### 5. Standard of Review

*Standards of review for assessing claims of innocence should follow state and federal statutes, common law, and constitutional precedent with an “interests of justice” orientation on the application of the law to the facts. The relevant law would ordinarily include statutes concerning new evidence of innocence: state and federal constitutional precedent concerning undisclosed exculpatory evidence, ineffective assistance of counsel, and claims of actual innocence.*

Post-conviction case law that would determine a standard of review in the typical CIU re-investigation is bound to be complicated because it potentially implicates multiple constitutional and statutory grounds, and will inevitably be state specific. While federal constitutional standards in *Brady* and its progeny provide a floor with respect to the law on suppressed exculpatory evidence, the highest appellate courts in different states will often interpret those precedents

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- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
  - (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
  - (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
  - (d) engage in conduct that is prejudicial to the administration of justice;
  - (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
  - (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

MODEL RULES OF PROF’L CONDUCT r. 8.4(a)–(f) (AM. BAR ASS’N 2015).

differently, and in some jurisdictions, state constitutional protections are explicitly more protective than federal law.

The same holds true for “ineffective assistance of counsel” precedent, with the added local complication that the standard for judging the “reasonableness” of alleged errors and omissions by local defense counsel is whether they are “outside the wide range of professionally competent assistance” in a jurisdiction “as of the time of counsel’s conduct.”<sup>77</sup> What can be safely said, however, about both *Brady* and ineffective-assistance claims is that the Supreme Court’s primary concerns in such cases is the “fairness” of the trial, and the “reliability” of the verdict. And the “materiality” standard in both kinds of cases is virtually the same: is there a “reasonable probability that, but for counsel’s unprofessional errors,” or but for undisclosed exculpatory evidence, “the result of the proceeding would have been different,” with a “reasonable probability” being defined as “a probability sufficient to undermine confidence in the outcome?”<sup>78</sup>

State statutes concerning newly discovered evidence of innocence (evidence counsel could not have discovered with the exercise of due diligence) present similar state-specific variation. Most states have either statutes or common law holdings that require that the newly discovered evidence would “probably” or “more likely than not” have changed the result at trial.<sup>79</sup> Wisconsin uses a slightly lower standard, a “reasonable probability of a different outcome,” a standard also used in some post-conviction DNA statutes.<sup>80</sup> Twelve states by statutes or case law require “clear and convincing” newly discovered evidence of innocence.<sup>81</sup> California, disturbingly, had for years by far the highest standard—the newly discovered evidence must completely “undermine the entire prosecution case and point unerringly to innocence or reduced culpability,” but thankfully as this article goes to press, new legislation has been enacted with a lower standard.<sup>82</sup>

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<sup>77</sup> *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984).

<sup>78</sup> *Strickland*, 466 U.S. at 691; *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (“The question is not whether the defendant would more likely than not have received a different verdict with the [undisclosed] evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.”).

<sup>79</sup> Justin Brooks, Alexander Simpson & Paige Kaneb, *If Hindsight Is 20/20, Our Justice System Shouldn’t Be Blind to New Evidence of Innocence: A Survey of Post-Conviction New Evidence Statutes and a Proposed Model*, 79 ALBANY L. REV. 1045 (forthcoming) (manuscripts at 13, n.72).

<sup>80</sup> *Id.* at 12.

<sup>81</sup> *Id.* at 16–17.

<sup>82</sup> See *People v. Gonzales*, 800 P.2d 1159, 1196 (Cal. 1990) for the old standard. The new standard is S.B. 1134, 2016 Leg., Reg. Sess. (Cal. 2016), just signed by Governor Brown, which states: “This bill would additionally allow a writ of habeas corpus to be prosecuted on the basis of new evidence that is credible, material, presented without substantial delay, and of such decisive force and value that it would have more likely than not changed the outcome at trial.” *Governor Brown Signs Innocence Bill*, Cal. Innocence Project, <https://californiainnocenceproject.org/2016/09/governor-brown-signs-innocence-bill/> [<https://perma.cc/L47Y-LPS2>].

Federal and state constitutional claims based on post-conviction showings of “actual innocence” are increasingly being recognized or at least “presumed” to be viable in the right case.<sup>83</sup> The case of *Herrera v. Collins*<sup>84</sup> has been frequently misread by courts and scholars as holding that a showing of “actual innocence,” by itself, cannot make out a federal constitutional claim. This is plainly wrong. There were at least six votes in *Herrera* to recognize such a claim in the appropriate case, and the Supreme Court has recently made it clear that it has not closed the door on “actual innocence” claims.<sup>85</sup> Indeed, the granting of an original writ in the Troy Davis case makes it clear that a majority exists to recognize an actual innocence claim in the right case. The remand directed the lower court to “receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner’s innocence.”<sup>86</sup>

All fifty states and the District of Columbia have now finally passed statutes establishing a post-conviction right to prove innocence through DNA testing—although this outcome required much hard work, and it’s not an altogether surprising development after more than 316 post-conviction DNA exonerations over the past twenty-seven years.<sup>87</sup> But what is truly extraordinary and far more significant is the fact that “forty-nine states and the District of Columbia now allow post-conviction claims of innocence without time limits related to the conviction date,” without a requirement of an independent constitutional violation, and without showing the petitioner was deprived of a fair trial.<sup>88</sup> As Paige Kaneb points out, this development is proof of a “modern consensus that the Eighth Amendment prohibits the continued punishment of the innocent and the Due Process Clause of the Fourteenth Amendment requires judicial review of compelling claims of innocence, irrespective of how long after conviction new evidence is discovered.”<sup>89</sup>

What is the “standard” or burden of proof for an “actual innocence” claim? In *House v. Bell*,<sup>90</sup> the Supreme Court suggested that a petitioner’s showing would have to be more persuasive than the *Schlup v. Delo*<sup>91</sup> “innocence” showing needed to overcome the procedural default of a constitutional claim. The *Schlup* standard requires the petition to show that “more likely than not, in light of the new

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<sup>83</sup> See Paige Kaneb, *Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim*, 50 CAL. W. L. REV. 171 (2014) [hereinafter *Innocence Presumed*], for an excellent analysis of this emerging trend.

<sup>84</sup> *Herrera v. Collins*, 506 U.S. 390 (1993).

<sup>85</sup> *Id.* at 194–201.

<sup>86</sup> *In re Davis*, 130 S. Ct. 1, 1 (2009).

<sup>87</sup> *Innocence Presumed*, *supra* note 83, at 202–03, 202 n.134.

<sup>88</sup> *Id.* at 202 & 203 n.140.

<sup>89</sup> *Id.* at 209.

<sup>90</sup> *House v. Bell*, 547 U.S. 518, 538 (2006)

<sup>91</sup> *Schlup v. Delo*, 513 U.S. 298 (1995).

evidence, no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that more likely than not any reasonable juror would have reasonable doubt.”<sup>92</sup> The trial court in the Troy Davis remand concluded that the standard should be “clear and convincing evidence that no reasonable juror would have convicted [the petitioner] in light of the new evidence.”<sup>93</sup> The trial court’s reasoning is persuasive and there is good reason to believe that the “clear and convincing” standard would be accepted by state courts and the legal community generally.<sup>94</sup>

The District of Columbia has passed a statute mandating that when an inmate demonstrates “clear and convincing evidence” of innocence, a conviction should be vacated and dismissed with prejudice.<sup>95</sup> Similarly, the ABA has recently adopted Rule of Professional Conduct 3.8(h) requiring that “[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.”

But even assuming “clear and convincing evidence” of innocence is likely to become a state or federal constitutional standard for vacating and dismissing a case, that will not help resolve the “difficult” or “grey area” cases frequently encountered by CIUs. The “close” or “gray area” cases ordinarily involve matters where there was no decisive new evidence, such as a DNA test on probative biological samples that could prove “actual innocence,” but there was considerable doubt about the integrity of the conviction given *all* the new evidence, the lackluster performance of defense counsel, or other issues.<sup>96</sup>

In these cases, CIUs, exercising “an interests of justice” framing strategy at the beginning of an investigation, inevitably wind up making final assessments of close cases with a similar “interests of justice” orientation. They will, for example, cumulate inferences from evidence that is “new” but might have been found through the exercise of due diligence by a reasonably competent lawyer with

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<sup>92</sup> House v. Bell, 547 U.S. at 538.

<sup>93</sup> *In re Davis*, No. CV409-130, 2010 WL 3385081, at \*45 (S.D. Ga. Aug. 24, 2010).

<sup>94</sup> It should be noted that the *de novo* consideration of the original writ in the *Davis* case embraced all evidence known at the time of the hearing, of both guilt and innocence, and was not a more limited inquiry about what the trial jury would have done, given the trial record, if it had known about the new evidence of innocence.

<sup>95</sup> D.C. CODE ANN. § 22-4135(g) (West 2012).

<sup>96</sup> The exoneration of Brandon Olebar by the King County District Attorney investigated in a non-adversarial fashion with Innocence Project Northwest is an often-cited example because it turned, to a large degree, on admissions made by the real perpetrators after the statute of limitations for the underlying offense had expired. See Lara Bazelon, *The Good Prosecutor*, POLITICO MAG. (Mar. 24, 2015), <http://www.politico.com/magazine/story/2015/03/good-prosecutors-116362> [<https://perma.cc/39K7-RZQJ>]; Mark Larson, *The Exoneration of Brandon Olebar*, MARSHALL PROJECT (Feb. 13, 2015), <https://www.themarshallproject.org/2015/02/13/the-exoneration-of-brandon-olebar> [<https://perma.cc/VNF8-9E3W>].



undisclosed *Brady* evidence that would not be enough by itself to vacate, or take into consideration the effect of an inflammatory closing argument by a prosecutor that was either provoked or insufficiently prejudicial by itself to warrant reversal. At a recent Wrongful Conviction Summit convened by the Brooklyn District Attorney bringing together CIUs from across the country,<sup>97</sup> elected district attorneys described the standards they use to make final assessments in “gray area cases”: Santa Clara CIU (“No longer have an abiding belief in the conviction”); King County, Washington (“Looking at what we now know about this case, and considering, in light of this knowledge, whether we would have charged it in the first place”); Brooklyn CIU (“A reasonable belief that the interests of justice compel relief”).

Some may be concerned that this kind of “interests of justice” orientation is too subjective, malleable, or even improperly “extrajudicial” (insufficiently tethered to case law). I understand the concern but respectfully disagree. I view this “interests of justice” orientation as a healthy, pragmatic response to the silos and strictures of post-conviction case law and discovery—in many jurisdictions, post-conviction discovery barely exists—which impede sensible consideration of *all* new evidence, new scientific knowledge, and the structural weaknesses of our system. “Interests of justice” is a good longstanding guideline for a prosecutor’s exercise of discretion in making a final assessment, and there is probably not a lot to be gained by trying to refine it further.

Kent Roach makes this point persuasively in a brilliant comparative law essay contrasting the experience of Canada and of the United States in dealing with wrongful conviction cases.<sup>98</sup> Like “newly discovered evidence” in the United States, “fresh evidence” in Canada “must be credible, potentially decisive, and not have been obtainable at trial with due diligence,” but, Roach notes, “the Supreme Court of Canada has consistently ruled that the due diligence requirement must yield where a miscarriage of justice would result.”<sup>99</sup>

The power of Canadian appellate courts to admit “fresh evidence” includes the “power to order the production of things and witnesses.”<sup>100</sup> “Appeals courts can overturn convictions not only on the basis of errors of law that are not harmless,” but because “the verdict is unreasonable or cannot be supported by the evidence or on any ground that there is a miscarriage of justice.”<sup>101</sup> The Canadian

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<sup>97</sup> I attended this “Summit on Wrongful Convictions” at Brooklyn Law School on Oct. 16–17, 2015.

<sup>98</sup> Kent Roach, *More Procedure and Concern About Innocence but Less Justice? Remedies for Wrongful Convictions in the United States and Canada*, in *WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE: CAUSES AND REMEDIES IN NORTH AMERICAN AND EUROPEAN CRIMINAL JUSTICE SYSTEMS* 283 (C. Ronald Huff & Martin Killias eds., 2013).

<sup>99</sup> *Id.* at 287–88.

<sup>100</sup> *Id.* at 288 (citing Criminal Code § 683).

<sup>101</sup> *Id.* at 288.

courts have stressed that a miscarriage of justice “can reach virtually any kind of error that renders a trial unfair in a procedural or substantive way,” and that even if:

there was no unfairness at trial, but evidence was admitted on appeal that placed the reliability of the conviction in serious doubt. . . . the miscarriage of justice lies not in the conduct of the trial or even the conviction entered at trial, but rather in maintaining the conviction in the face of new evidence that renders the conviction factually unreliable.<sup>102</sup>

Roach rightly observes that the concern of Canadian courts with miscarriages of justice “includes but is broader than” the growing concern of American courts with “actual or factual innocence.”<sup>103</sup> But it seems equally fair to note that American prosecutors, when describing why they have vacated convictions and dismissed cases after extensive CIU investigations in “close” or “gray area” cases, sound just like the Supreme Court of Canada! I think this “interests of justice” orientation is a healthy and heartening response to the welter of complex post-conviction restrictions that have arisen in the last forty years under federal and state laws (mostly in reaction to what were believed to be frivolous writs in capital cases) that are now appropriately being stressed by new scientific evidence and proof of all kinds that there are many more wrongful convictions than even the most cynical anticipated. Ultimately, Roach concludes that:

For many working in the American system, habeas corpus review and collateral attack, including the restrictions that courts have placed on such forms of review in terms of limitation periods and actual innocence requirements, may seem natural and inevitable, but understanding the Canadian system may expand the imagination. *It may also invite Americans to rethink the degree to which concerns about factual innocence and the protection of the finality of verdicts from an almost endless stream of collateral challenges may paradoxically make it difficult for those convicted in the United States to overturn their convictions on grounds of innocence.*<sup>104</sup>

I think this is a profoundly important insight, and it is time to come up with legislation, both state and federal, that provides for a limited “interests of justice” or “miscarriage of justice” safety valve that reflects what prosecutors in CIUs are beginning to do in a thoughtful and responsible way.

Finally, the conviction integrity process I have just described cannot be fairly

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<sup>102</sup> *Id.* at 288 (citing *Re Truscott* 2007 ONCA 575 para. 110).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 305 (emphasis added).

characterized as improperly “extrajudicial,” or immune from judicial review. On the contrary, at the end of a non-adversarial conviction integrity post-conviction investigation, and this point cannot be emphasized enough, there are three options:

*Option 1:* The CIU and petitioner’s advocates agree that the conviction should be vacated on constitutional grounds, on “innocence grounds” (either newly discovered evidence of innocence pursuant to a statute or pursuant to “actual innocence” as a state or federal constitutional claim), or “in the interests of justice” (if the state or federal court has such statutory or common law authority);

*Option 2:* The CIU and petitioner’s advocates agree that there is no basis for vacating the conviction; or

*Option 3:* The CIU and the petitioner agree to disagree about whether the conviction should be vacated and litigate the matter in court—except that new post-conviction proceeding will be conducted with a much better record than would ordinarily be created and more expeditiously since the disputed and undisputed issues should be evident.

Under all three of these options, there is both judicial review and the kind of transparency that will increase public confidence in the outcome of the re-investigation, whether or not it is favorable to the client claiming innocence.

## 6. Staffing

- a. *The best Conviction Integrity Units have either been run by defense attorneys working on a full-time basis or defense attorneys working on a part-time basis with substantial oversight authority for the operation of the unit. This might well be the single most important best practice to assure that the CIU runs well and is perceived as credible by the legal community and the public.*
- b. *Independent advisory boards of lawyers from outside the office to assist in assessing the cases have proven valuable.*
- c. *Different staffing solutions plainly depend on the size of the office.*
- d. *The CIU should report to and be supported by the District Attorney and executive level staff.*
- e. *Prosecutors who originally tried the case, or prosecutors who participated in the prosecution, should not re-investigate themselves.*

- f. *There should be full-time investigators assigned to the CIU.*
- g. *The CIU should have written policies and procedures for its staff.*
- h. *CIU staff should receive appropriate training for their special assignment drawing upon expertise from cognitive scientists involved in “human factor” research, as well as prosecutors and police involved in successful CIUs, innocence organizations, and the defense bar.*

As emphasized at the outset, the most difficult problem confronting a CIU is dealing with cognitive biases—confirmation bias, motivated reasoning, groupthink, commitment effects, the coherence effect, and selection bias.<sup>105</sup> Experimental literature suggests this cannot be done effectively by just asking well-intentioned career prosecutors to role-play the “devil’s advocate” for each other and raise the “innocence” hypothesis when reviewing a prior conviction from the office.<sup>106</sup> It is far more productive to choose a “devil’s advocate” whose perceptions, motives, and orientation were organically derived from being a criminal defense lawyer, or better still, a lawyer who has done “innocence” re-investigations. Having staff with a healthy mix of prosecution and defense backgrounds can create a non-adversarial but “dialectical” approach to re-investigations, and maximizes the chances that all leads will be fairly and knowledgeably pursued. The most successful CIUs (Dallas and Brooklyn) have always had at least one person in a supervisory capacity that had a strong criminal defense or “innocence” background.<sup>107</sup>

It should go without saying that the staff of a CIU, whether lawyers or investigators, former defense lawyers or career prosecutors, should be individuals who command the special respect of their colleagues as trustworthy, fair-minded individuals. Moreover, in my experience, anyone who does these kinds of re-investigations for a substantial period of time learns that the most important lesson is to be humble and just follow the evidence. We’ve all had the experience of believing someone is probably innocent who turns out to be guilty when the investigation is over, or believing someone is probably guilty and who turns out they are innocent. The truth in “innocence” work has always been more incredible than fiction, filled with unexpected outcomes, impossibly lucky coincidences, and the inevitable, chilling recognition that it can happen to anyone.

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<sup>105</sup> See *supra* notes 39–44 for definitions of these biases and citations.

<sup>106</sup> IN DOUBT, *supra* note 24, at 45–46.

<sup>107</sup> By contrast, the Cook County CIU staff does not have representation from either an innocence organization or the defense bar. See *Cook County State’s Attorney’s Office Opens Conviction Integrity Unit*, INNOCENCE PROJECT: NEWS (Feb. 3, 2012), <http://www.innocenceproject.org/cook-county-states-attorneys-office-opens-conviction-integrity-unit/> [https://perma.cc/5YTM-MFY5].

In Brooklyn, the late District Attorney Ken Thompson created an Independent Review Panel (IRP) consisting of unpaid distinguished lawyers from outside the office: two criminal defense lawyers and a Columbia Law School professor who was formerly an Assistant United States Attorney. After the CRU conducts its re-investigation in conjunction with defense counsel for the client claiming innocence and makes a written recommendation to the District Attorney, the IRP will conduct its own review of the CRU's recommendations. The IRP will ask questions, request additional information, and finally issue its own independent recommendation to the District Attorney.<sup>108</sup> Interestingly, the CRU staff likes this model because the IRP keeps them on their toes, sometimes asking questions that were unexpected and induces further investigation. Petitioners who disagree with the recommendations of the CRU get a second opportunity to present their arguments and, potentially, a favorable recommendation from the IRP to the District Attorney. This model does depend on outside counsel with adequate resources to devote the considerable time and energy necessary to conduct a fair review in what are invariably fact-intensive records.

Nonetheless, in Lake County, Illinois, a comparatively small jurisdiction that has had many problems with its police force,<sup>109</sup> and a District Attorney's office that was notorious for rejecting meritorious claims of innocence based on DNA testing,<sup>110</sup> District Attorney Mike Nerheim has built his CIU around volunteer lawyers from outside the county working pro bono to assess wrongful conviction claims. This outside panel also has access to all underlying materials and is free to suggest investigative steps.

In New York County, the CIU has had an outside Policy Advisory Panel from its formation in 2010 that offers suggestions about policy matters, but does not review individual cases. The Panel continues to include a broad range of stakeholders—a former New York City Police Commissioner, former federal and state prosecutors, former state and federal judges, academics, defense counsel, an “innocence” organization lawyer, and the head of the City's DNA laboratory.<sup>111</sup>

Speaking as a member of the Panel, I hope it is fair to say we were helpful at the beginning in making suggestions about the use of checklists and other system issues. Professor Rachel Barkow, another member of the Panel, published some of the checklists and policies the New York County CIU created in a very useful

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<sup>108</sup> Kings County District Attorney Submission, Program Materials, Summit on Wrongful Convictions, at Brooklyn Law School (Oct. 15–16, 2015).

<sup>109</sup> See Dan Hinkel, *Waukegan Police Have History of Wrongful Convictions, Abuse Allegations*, CHI. TRIB. (Oct. 30, 2015), <http://www.chicagotribune.com/news/watchdog/ct-waukegan-police-problems-met-20151028-story.html> [https://perma.cc/HY3H-2FMM].

<sup>110</sup> See Martin, *supra* note 37.

<sup>111</sup> For a list of the original Advisory Panel, see Press Release, N.Y. Cty District Att'ys Office, District Attorney Vance Announces Conviction Integrity Program (Mar. 4, 2010), <http://manhattanda.org/press-release/district-attorney-vance-announces-conviction-integrity-program> [https://perma.cc/EWX6-JXQU].

“nuts and bolts” report, entitled *Establishing Conviction Integrity Units in Prosecutor’s Offices*, that followed a “summit” she organized of all existing CIUs and other prosecutors in 2011.<sup>112</sup>

On occasion, the Advisory Panel has been consulted on emergent policy questions, such as: What should the District Attorney do about CODIS “hits” to items of evidence in cases where there have been guilty pleas or convictions? (The answer: investigate, but ultimately notify the court and defense counsel about the “hit” and results of the investigation.) However, the New York County Advisory Panel has not been involved in vetting or ratifying decisions of the CIU; it was not constructed or intended to do so. Accordingly, while it has surely helped District Attorney Vance and the CIU think through issues, and it is certainly true that the New York County, as will be discussed, has been the most creative CIU when it comes to instituting reforms to learn from error or “near misses,” the Policy Advisory Panel has had limited utility when it comes to bolstering the reputation of the CIU within the legal community as to its independence or fairness when reviewing cases because it is simply not involved.

In short, Advisory Panels can be helpful, whether the Panel reviews cases or merely advises on policy. But experience so far has shown that the best way to mitigate cognitive or institutional bias in a CIU, and increase acceptance of such a unit within the legal community and in the public eye, is to make sure CIU staff, or supervisors, include people with a criminal defense background—preferably someone who has done “innocence” work<sup>113</sup> and are independent appointees from outside the office. That was certainly the case with the Dallas CIU from the beginning to the present, and was true as well in Brooklyn.

This is not to say that experienced prosecutors who are respected and trusted individuals within an office should not be staffing a CIU, but having someone from the outside who was a defense lawyer, or a lawyer from an “innocence” organization, in a position of authority or actually running the unit, provides immediate and powerful advantages.

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<sup>112</sup> See CTR. ON THE ADMIN. OF CRIMINAL LAW, *supra* note 8. The New York County CIU has expanded its program for tracking police officers to include information about civil rights lawsuits and adverse credibility findings, and is working to include more information about internal disciplinary findings relevant to credibility, so that this information is available to prosecutors in future cases and for disclosure to defense counsel as potential impeachment material. They have begun a similar program to track civilians who have lied in prior cases.

<sup>113</sup> I am sure that soon it will make sense to say that a prosecutor who has worked in a successful CIU would meet the definition of someone who has done “innocence work.” After participating in *many* re-investigations that have led both to exonerations, confirmations of guilt, or uncertain outcomes, one develops a different perspective and a different set of ingrained expectations than the ordinary line prosecutor or defense attorney.

## 7. Transparent Results

### *Annual report detailing:*

- a. *Number and nature of cases reviewed. This includes but is not limited to:*
  - i. *Number of total applications for relief received;*
  - ii. *Number of cases where trials occurred;*
  - iii. *Number of plea cases;*
  - iv. *Number of cases where prior state or federal post-conviction applications had been filed and adjudicated;*
  - v. *Source of referrals—pro se, innocence organizations, defense bar, office initiated investigations pursuant to audits arising from prior wrongful conviction matters (audits involving individual prosecutors, police officers, or forensic techniques), press instigated, or other individuals;*
  
- b. *Outcomes of investigations. This includes but is not limited to:*
  - i. *Number of cases where a decision was made not to undertake a re-investigation;*
  - ii. *Number of cases where a re-investigation was undertaken;*
  - iii. *Number of cases where relief was granted and the nature of that relief—agree to vacate conviction, the grounds, whether re-trial was sought or a plea agreement was made; agree to dismiss and the grounds;*
  - iv. *Number of cases where investigation was undertaken, no agreement between the parties could be reached, and post-conviction litigation continues, as well as the results of that litigation;*
  - v. *Number of cases sent out for independent investigation because there was substantial, non-conclusory allegation of misconduct by a prosecutor.*

These recommendations are limited to “numbers” and do not contemplate that the CIU should be required to provide the names or the docket numbers of the cases, although that would be preferable assuming there are no privacy objections raised by petitioners, victims, or witnesses that ought to be accommodated.

Keeping track of these numbers is not only a sound quality assurance practice to help the CIU see how key indicators are trending, but it provides an important window for the public to see what the CIU is doing. One factor that jumped out, for example, in the Quattrone Center interviews with CIUs, is that some of them said they had reviewed and/or investigated hundreds of cases whereas other CIUs, in jurisdictions of comparable or much greater size (like Brooklyn), had conducted far fewer investigations. There could, of course, be many factors at play that

account for such numbers that are particular to a jurisdiction. There might be, for example, a particularly litigious and organized group of jailhouse lawyers that could create a great volume of frivolous pro se applications. On the other hand, the summary disposition of hundreds of claims, without a sensible explanation, can raise reasonable questions about the process for considering the claims and the seriousness of the re-investigation.

It should be clear, however, that a failure to find many miscarriages of justice does not necessarily mean a CIU is unfair, insincere, or incompetent. Nor does it mean that there are no miscarriages of justice in the jurisdiction. It could simply mean that the jurisdiction poses unusually intractable problems despite everyone's best efforts when trying to find evidence in old cases. But whatever the reasons, making the numbers transparent will assure the right questions are asked about the efficacy of a CIU.

*B. Learning from Errors in Wrongful Convictions or "Near Misses"*

*A District Attorney's office must not only investigate and remedy wrongful convictions, but it must also establish policies and procedures to learn from the errors identified in a CIU review (even if relief is not granted) so that the system is strengthened. Different sorts of errors uncovered in the course of understanding the causes of a wrongful conviction will require different remedial actions. "Near misses," in this context cases where a wrongful conviction almost occurred but was avoided, whether by actions of police, prosecutors, the defense, the press or any other actor, are especially good cases to study. To learn from error effectively a District Attorney's office must have the following:*

- a. A unit tasked to conduct "root cause analysis" (RCA) of errors, including errors identified by a CIU.
  - i. The office must have a written policy that details how it will do root cause analyses for any case where it is determined that there was a wrongful conviction. The policy released by the National Commission on Forensic Science provides a good model. Among other elements, the policy should require the inclusion of an external expert to ensure some objectivity in the process.*
  - ii. The office must work to remedy the root causes identified by the process, including creating a remedial/corrective action plan and a method for assessing whether the plan solves the problem.*
  - iii. A report evaluating whether the remediation efforts were successful must be made available to the public.**



- b. *For selected wrongful convictions or “near misses,” the District Attorney’s office should develop the capacity, preferably working in conjunction with an independent third party, to perform a “sentinel event,” “all stakeholder review” where it is likely that the acts of people from more than one unit of the office or more than one entity were involved.*
- c. *Retrospective reexamination of other cases with like factors (same “bad actor,” same “flawed discipline,” when indicated).*
- d. *The lessons learned and the solutions identified must be folded into ongoing training, the orientation of new staff, and policy development in the office.*

To the best of my knowledge, there is no District Attorney’s office right now, with or without a CIU, which has a formalized protocol calling for root cause analysis (RCA) of wrongful convictions, much less serious errors by prosecutors that do not result in wrongful convictions. Most accredited crime laboratories, in sharp contrast, are required to do RCAs by accrediting bodies whenever there is a serious “non-conformity.”<sup>114</sup> The National Commission on Forensic Science has adopted an excellent “Directive Recommendation” with commentary explaining how to do an RCA and the organizational literature supporting the practice.<sup>115</sup>

The “Directive” applies to Forensic Science Service Providers (FSSPs) and Forensic Science Medical Providers (FSMPs) and will likely apply to all federal laboratories very soon. Most accredited state and local crime laboratories probably do RCAs already. It naturally follows that prosecutors will soon realize that their offices, like crime laboratories, are complex organizations where error is inevitable, and learning from error in a “just culture” is necessary. Once it becomes clear to the legal community that RCAs are “event reviews,” not “performance evaluations,” that the purpose of an RCA is learning not punishment,<sup>116</sup> and they are comparatively simple and inexpensive to conduct, one would expect RCAs to become standard practice, not only in District Attorney offices, but for institutional defenders as well.<sup>117</sup>

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<sup>114</sup> INT’L ORG. FOR STANDARDIZATION & INT’L ELECTROTECHNICAL COMM’N, *General Requirements for the Competence of Testing and Calibration Laboratories*, 17025:2005(E), § 4.11.2 Cause Analysis (May 15, 2005) (“The procedure for corrective action [for non-conformities] shall start with an investigation to determine the root cause(s) of the problem.”).

<sup>115</sup> See NAT’L COMM’N ON FORENSIC SCI., *DIRECTIVE RECOMMENDATION: ROOT CAUSE ANALYSIS (RCA) IN FORENSIC SCIENCE* (2015), <https://www.justice.gov/ncfs/file/641626/download> [<https://perma.cc/PM9P-TQ56>].

<sup>116</sup> *Id.* at 7.

<sup>117</sup> The New York State Justice Task Force, convened by the Chief Judge of the State of New York in 2009 and charged with recommending reforms to eradicate the harms of wrongful

The New York County CIU, however, has recently done excellent work studying one form of a “near miss”—pre-trial “exonerations”—that could be easily replicated by other offices.<sup>118</sup> The CIU has started meeting each month with heads of “trial bureaus” and specialized departments to review any current cases where investigation led to a pre-trial exoneration, in an effort to analyze “root causes” and to “learn lessons.” They maintain a spreadsheet of the pre-trial exoneration, note any “trends or patterns,” and try to identify lessons for both the office itself and law enforcement.

One interesting trend is that in six of ten pre-trial exoneration cases reviewed so far, video surveillance footage provided significant proof that the wrong person was arrested and charged. One lesson learned from the review is that training on early and comprehensive searches for surveillance video is crucial in a metropolitan area like New York City, where there are cameras everywhere and witnesses with cellphones capable of creating surveillance video. But the CIU tried to look at “root causes” in each of the pre-trial exoneration cases, particularly mindful about what would have happened in the video surveillance “exonerations” if there had been no video discovered.<sup>119</sup>

“Sentinel event” reviews of wrongful convictions, law enforcement failures to prevent a serious crime from occurring, or potentially calamitous “near misses,” are admittedly a more expensive and complex undertaking. DOJ’s sentinel event initiative reported the results of three “beta tests” in Milwaukee, Philadelphia, and Baltimore.<sup>120</sup> In exchange for the willingness of the jurisdictions to participate in the experiment, the sentinel event review teams were promised “as much anonymity as possible, including details of the sentinel event they chose to review.”<sup>121</sup> Consequently, and most unfortunately, there’s not much substantively that can be gleaned from the report. Nonetheless, the concept of an all-stakeholder sentinel-event review, similar to what is routinely done by the National Transportation and Safety Board, is a critically important goal for stakeholders in

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convictions, issued recommendations for root cause analysis to enhance conviction integrity, including: efforts by all stakeholders, both individually and collectively, to develop procedures for conducting analyses of errors and potential solutions, regular RCA training for criminal justice professionals, and complementary state legislation. N.Y. STATE JUSTICE TASK FORCE, RECOMMENDATIONS REGARDING ROOT CAUSE ANALYSIS (2015), <http://www.nyjusticetaskforce.com/pdfs/JTF-Root-Cause-Analysis.pdf> [<https://perma.cc/NA8A-V9BC>].

<sup>118</sup> The data reported here comes from a January 20, 2016 presentation to the Conviction Integrity Program Advisory Panel by the head of the CIU, Bill Darrow, attended by District Attorney Vance and other leaders of the office.

<sup>119</sup> The CIU has found that it can be challenging to gather all the relevant facts, even in its review of *current* cases, and is considering the best way to include the police and other external sources in those reviews.

<sup>120</sup> See NAT’L INST. OF JUSTICE, PAVING THE WAY: LESSONS LEARNED IN SENTINEL EVENT REVIEWS (2015), <https://www.ncjrs.gov/pdffiles1/nij/249097.pdf> [<https://perma.cc/DQE7-ZASP>].

<sup>121</sup> *Id.* at 2.

the criminal justice system to pursue when trying to understand and learn from wrongful convictions. Patience and determination should be the order of the day. We are just at the beginning of this process.

### III. ETHICAL AND CONSTITUTIONAL OBLIGATIONS TO CORRECT WRONGFUL CONVICTIONS

Creating a CIU is not just a good idea that a diligent District Attorney might consider pursuing, but the best way to recognize the ethical and constitutional obligations to correct wrongful convictions. In 2009, the ABA adopted Model Rules of Professional Conduct 3.8(g) and (h) with strong support for the basic concept behind the rules from state prosecutors.<sup>122</sup>

As opposed to “traditional” reactions to proposed restrictions on their conduct originating from the ABA, these post-conviction “innocence” rules were perceived as part of a prosecutor’s bedrock responsibility to seek justice, and many prosecutors affirmatively assisted in writing the rules.<sup>123</sup> To date, fourteen states have adopted versions of 3.8(g) and (h) either verbatim or with small modifications.<sup>124</sup>

Rule 3.8(g) requires that whenever a prosecutor “*knows*” about “new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which [he] was convicted,” the prosecutor has an obligation to disclose the evidence to defense counsel and investigate. Rule 3.8(h) requires that if the prosecutor knows “by clear and convincing evidence” that the defendant did not commit the offense, the prosecutor shall seek to “remedy” the wrongful conviction.<sup>125</sup> What triggers post-conviction obligations under 3.8(g) and (h) is that a prosecutor “*knows*” about “material” or “clear and convincing” evidence of innocence. Consequently, it might be argued, as a purely practical matter, in a jurisdiction where 3.8(g) and (h) have been adopted, a prosecutor is better off not having a CIU because she would be less likely to “know” about “new, credible, and material” evidence of innocence, much less “clear and convincing” evidence of innocence.

I do not believe this is true. Putting aside the moral and political problem of an elected prosecutor consciously avoiding knowledge that an innocent person has been wrongly convicted, in this new “innocence” era, a prosecutor cannot

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<sup>122</sup> See Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 79 (2016); Bruce Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 889–93 (2012).

<sup>123</sup> *Id.* The only notable exception was opposition from the U.S. Department of Justice.

<sup>124</sup> AM. BAR ASS’N, VARIATIONS OF THE ABA MODEL RULES OF PROF’L CONDUCT (Sept. 15, 2016), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_5.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_5.authcheckdam.pdf) [<https://perma.cc/2CAC-AZ97>].

<sup>125</sup> MODEL RULES OF PROF’L CONDUCT r. 3.8(g) & (h) (AM. BAR ASS’N 2015).

effectively hide from a defense attorney, an innocence organization, or reporters, who proffer new evidence of innocence informally or through post-conviction motions and ask prosecutors to investigate the claim. Having an effective and credible CIU in place and ready to act is the best way—by any ethical, practical, and political calculus—for a prosecutor to respond to post-conviction claims of innocence.

It is now becoming clear that defense lawyers also have *some* ethical duties post-conviction to disclose “new, credible, and material” evidence of innocence and cooperate in investigations involving their former clients. In February 2015, the ABA approved revised Prosecution and Defense Function Standards.<sup>126</sup> These Standards are intended to be “best practices,” “aspirational,” and not a basis for professional discipline or civil liability.<sup>127</sup> But the Standards have been adopted in some form by the majority of states, influence ethical rules, and are cited frequently by state and federal courts as “valuable measures of the prevailing professional norms of effective representation.”<sup>128</sup> Standard 4-9.4 entitled “New or Newly-Discovered Law or Evidence of Innocence or Wrongful Conviction or Sentence” states that “[w]hen defense counsel becomes aware of credible and material evidence or law creating a reasonable likelihood that a client or former client was wrongfully convicted or sentenced or was actually innocent, counsel has some duty to act.”

The Commentary to this new Standard has not yet been published, but one hopes it will adopt many of the suggestions recently made by Lara Bazelon in an excellent analysis of the Standard.<sup>129</sup> Bazelon rightly points out that defense lawyers may have conflicts of interest when information that exculpates a former client could implicate a current or different former client, and conflicts that arise when an attorney may be helping prove a former client is innocent but proving his or her own ineffective assistance at the same time. She is also rightly worried that state public defenders and court-appointed counsel may lack the knowledge necessary to meet filing deadlines and other requirements necessary to preserve a client’s rights in potential state and federal post-conviction proceedings. Nonetheless, it seems clear that defense counsel has “some” ethical duty to assist

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<sup>126</sup> See AM. BAR ASS’N, ABA CRIMINAL JUSTICE STANDARDS (4th ed. 2015), [http://www.americanbar.org/groups/criminal\\_justice/standards](http://www.americanbar.org/groups/criminal_justice/standards) [<https://perma.cc/CS4F-ZMBA>].

<sup>127</sup> See AM. BAR ASS’N, ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.1(b), [http://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition.html](http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html) [<https://perma.cc/DT72-ZY8Y>]; AM. BAR ASS’N, ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4-1.1(b), [http://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition.html](http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html) [<https://perma.cc/CG9A-PQLA>].

<sup>128</sup> See *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010). See also Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10 (2009).

<sup>129</sup> See Lara A. Bazelon, *The Long Goodbye: After the Innocence Movement, Does the Attorney-Client Relationship Ever End?*, 106 J. CRIM. L. & CRIMINOLOGY 101 (forthcoming) (manuscript at 142–46), [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2764499](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2764499).

in disclosing and finding material evidence of innocence in the case of a former client and that would likely include cooperating in a re-investigation by a CIU.

Finally, it 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. This analysis relies on the Supreme Court’s recognition in *District Attorney’s Office for the Third Judicial District v. Osborne*,<sup>130</sup> of “due process” rights that arise from a “state created liberty interest” to prove innocence pursuant to a state’s newly discovered evidence of innocence statutes. Once a state enacts a newly discovered evidence statute (and all states have them), the *Osborne* court noted, “[t]his ‘state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right.’”<sup>131</sup> Admittedly, the *Osborne* court observed that a defendant who has been convicted after a fair trial “has only a limited interest in post-conviction relief,” and the State may flexibly fashion and limit procedures to offer such relief. But, as the Second Circuit recently held in *Newton v. City of New York*, whenever a municipality through its agents, servants or employees acts “intentionally or recklessly” to prevent a petitioner post-conviction from “vindicating his liberty interest” pursuant to a newly discovered evidence of innocence statute, a violation of petitioner’s Fourteenth Amendment right to due process can occur.<sup>132</sup>

In *Newton*, the petitioner tried for years to get a post-conviction DNA test under the New York statute, both *pro se* and ultimately with the assistance of the Innocence Project. On each occasion, the New York City Police Department (NYPD) reported to the courts, the Bronx District Attorney’s office, and petitioner that the evidence no longer existed. In fact, the evidence did exist and was stored in a place where it should have been all along, but due to the intentional misconduct or recklessly inadequate procedures of the NYPD, the evidence was not located until a Bronx Assistant District Attorney made extraordinary personal efforts to find it.<sup>133</sup> *Newton* was subsequently exonerated by DNA testing, and prevailed in a federal civil rights lawsuit obtaining an \$18 million verdict.<sup>134</sup> As opposed to *Osborne*, where a petitioner directly challenged the adequacy of

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<sup>130</sup> *Dist. Att’y’s Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009).

<sup>131</sup> *Id.* at 68 (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981)).

<sup>132</sup> *Newton v. City of New York*, 779 F.3d 140, 151 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 795 (2016). *Cf.* *Armstrong v. Daily*, 786 F.3d 529 (7th Cir. 2015). After extensive post-conviction litigation that led to Armstrong’s conviction being vacated based on DNA tests and other evidence in state court, the prosecutor and crime laboratory personnel could be sued for a federal civil rights violation for alleged intentional destruction of biological evidence *after* the conviction was vacated but before a re-trial. The re-trial never occurred because the indictment was dismissed based on the prosecutor’s misconduct in destroying the biological evidence and not revealing exculpatory evidence during the post-conviction proceedings.

<sup>133</sup> *Newton*, 779 F.3d at 143–44.

<sup>134</sup> *Id.* at 145.

Alaska's post-conviction DNA statute to vindicate his right to prove innocence with a DNA test, *Newton* was an as-applied challenge to the way state actors were intentionally and recklessly preventing him from proving innocence. Even though this challenge arose in the context of a federal civil rights lawsuit, there is no reason to doubt the existence of a federal or state procedural due process right to be free from intentional or reckless interference by state actors when a petitioner is trying to prove innocence pursuant to a state's newly discovered innocence statute.

In short, the *Osborne* decision has been mistakenly described by some as confirmation of the assumption that neither the *Brady* obligation to disclose exculpatory evidence, nor the prohibition in *Arizona v. Youngblood*<sup>135</sup> not to destroy potentially exculpatory evidence in bad faith, nor even the "assumed" right to prove actual innocence, survives at all after conviction.<sup>136</sup> I think this is plainly wrong and, as the *Newton* decision demonstrates, *Osborne*'s recognition of a "state created liberty interest" to vindicate claims of innocence expands the constitutional right to due process during post-conviction litigation and investigation of innocence claims.

As states adopt Rules 3.8(g) and (h), I think it will not be long before they are "constitutionalized." When a prosecutor *knows* about "material" evidence of innocence, it will be a due process violation not to disclose it, and when a prosecutor knows of "clear and convincing evidence" of innocence, a standard that is either equal to, or more demanding than, newly discovered evidence statutes in the states, it will be a due process violation not to seek a remedy for the wrongful conviction. A well-designed CIU is a prosecutor's best response to this rapidly evolving post-conviction constitutional terrain.

#### IV. CONCLUSION:

#### CONVICTION INTEGRITY UNITS AND THE PROMISE OF CREATIVE, NON-ADVERSARIAL SOLUTIONS IN THE POST-CONVICTION SPACE

It is still too early to know whether CIUs will become a permanent part of the criminal justice landscape in the United States. If they do, and emerge along the non-adversarial lines described here and applied in CIUs like those in Brooklyn and Dallas, then other reforms should naturally follow. For example, opposition to true "open file" discovery on the front end of the process will diminish once it becomes clear that in the most troubling "innocence" cases, the entire prosecution file, including work product, will be disclosed.

Similarly, the non-adversarial review of cases involving plausible innocence

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<sup>135</sup> 488 U.S. 51 (1988).

<sup>136</sup> See Brandon Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919 (2010) (arguing that contrary to early accounts *Osborne* did not reject a post-conviction right to DNA testing and that the *Osborne*'s state created "liberty interest" analysis could be expanded to protect against intentional and arbitrary interference with the post-conviction litigation process).

claims should demonstrate to both prosecutors and institutional defenders that RCAs and other “just culture” reforms ought to be adopted in the criminal justice system. This would not only improve the operation of the system as a whole, but bring about a more realistic and effective way to hold prosecutors and defense attorneys accountable. It would allow for the correction of mistakes and negligence in a non-blaming environment, and make it easier to identify attorneys who are deliberate rule-breakers and should be referred for bar discipline or even criminal prosecution. Concomitantly, these reviews would inevitably help identify other systemic problems involving police, forensic science service providers, the judiciary, and other stakeholders that require investigation and correction.

In short, there is a fundamental and important difference between the kind of granular, deep dives into problematic cases that inevitably occur in a good non-adversarial CIU investigation and the adversarial post-conviction review pursued on appeal or collateral attack.

In the traditional model, adversaries and the courts are continually narrowing the facts that need review and focusing on what will be determinative legal issues. In a CIU review, the factual record is continually expanding and the focus is on the reliability of the verdict. From this perspective, the CIU participants, both the prosecutors and defenders, literally help each other “see” more about the operation of the system. This freedom to “see” more broadly, and a shared good faith dedication to ensuring just and reliable outcomes, ought to generate new, constructive, and creative ideas beyond resolution of the individual cases. Hopefully, those who are engaged in “conviction integrity” reviews will become leaders of “integrity” reviews that embrace error reforms beyond re-examination of potential wrongful convictions.

## Appendix A.



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**DISCLOSURE AGREEMENT**

I, [REDACTED], am an attorney at law and represent [REDACTED] (hereinafter "my client") in all legal matters with regards to post-conviction remedies for the above named individual. I have been informed that the Conviction Review Unit (hereinafter "CRU") of the Kings County District Attorney's Office has opened a review and investigation of this conviction. In order for the CRU to fully investigate the conviction, I, and where necessary my client, agree to the following:

1. I agree to share any information that may be obtained or uncovered by me or any agent working on my behalf or on the behalf of my client, where such materials do not conflict with my legal and/or ethical duties with regard to my client, and to provide the CRU with copies of any such materials as soon as is practicable to aid the CRU in their investigation into the possible wrongful conviction of my client;
2. I agree to provide to the CRU, subject to the above limitations, copies of all documents, recordings or other tangible materials relating to interviews with known or potential witnesses conducted by any party on behalf of my client, including but not limited to private investigators, family members and prior defense attorneys, concerning the case for which I have requested the CRU to investigate;
3. I will speak to my client concerning waiving attorney client privilege that my client has had with any previous attorney or agent thereof concerning any investigative materials, reports, recordings, communications or other materials relevant to the investigation into the possible wrongful conviction of my client in regard to the conviction currently under investigation and, as necessary, will provide the CRU written notice of such a waiver executed by my client in order to facilitate the CRU's investigation into the possible wrongful conviction of my client;
4. In return for the above, the CRU agrees to share and provide the undersigned with copies of any materials concerning the original conviction of my client and any materials uncovered or discovered during the course of the Unit's investigation into the possible wrongful conviction of my client that the undersigned may request, including copies of all documents, recordings or other tangible materials relating to interviews with known or potential witnesses, provided that such disclosure is not legally prohibited under the provisions of CPL 190 or any other provision of law and so long as such does not, in the good faith opinion of the CRU, compromise or otherwise potentially interfere with CRU's investigation into the above matter, or jeopardize the safety of a witness, and as long as no adversarial proceeding has been otherwise instigated;



- 5. I agree on behalf of myself and my client, as well as any person working on my behalf or my client's behalf to treat as strictly confidential all materials and information, oral or written, provided to me by the CRU and understand that any public disclosure of such materials or the information contained therein shall be considered by the CRU as a violation of this agreement and may result in the CRU limiting or ceasing to share such information with the undersigned, at the sole and exclusive discretion of the CRU.

KENNETH P. THOMPSON  
Kings County District Attorney

By: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Date: \_\_\_\_\_

