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POSTCONVICTION INNOCENCE REVIEW IN THE AGE OF
PROGRESSIVE PROSECUTION

*Elizabeth Webster**

INTRODUCTION

A growing number of prosecutors are running and winning elections on criminal justice reform platforms of progressive prosecution.¹ For many of these progressive prosecutors, correcting wrongful convictions is a key platform issue.² Whereas the twentieth century prosecutor may have blocked defendants' access to postconviction DNA testing and opposed innocence claims,³ the twenty-first century progressive prosecutor is lauded for inviting

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¹ Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW360 (Apr. 7, 2019, 8:02PM), <https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor> [<https://perma.cc/5DGH-U7GU>].

² See, for example, the following district attorney campaign websites: *On the Issues*, KRASNER FOR DA, <https://krasnerforda.com/platform> [<https://perma.cc/4MVU-DBZW>] (listing “[r]eview past convictions, free the wrongfully convicted” as the second item under “[e]nd mass incarceration”); *Initiatives*, ERIC GONZALEZ FOR BROOKLYN DA, <https://www.ericgonzalez.com/initiatives> [<https://perma.cc/5KBM-G6W2>] (noting that Eric Gonzalez and Ken Thompson “created a Convictions Review Unit that has since become a model for the country”); *Issues*, *Wrongful Convictions Unit*, CHESA BOUDIN FOR DISTRICT ATT’Y 2019 (Apr. 30, 2019), https://www.chesaboudin.com/wrongful_convictions [<https://perma.cc/46PE-4JE9>] (“As San Francisco District Attorney, Chesa Boudin will: Establish a Wrongful Conviction Unit . . .”).

³ See generally Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 475 (2006) (discussing prosecutors’ reticence to reevaluate convictions even after evidence of guilt has been discredited); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 130 (2004) (discussing how the institutional culture of prosecutors’ offices and political pressures encourage prosecutors’ to resist innocence claims); Hilary S. Ritter, *It’s the Prosecution’s Story, but They’re Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNS Testing Cases*, 74 FORDHAM L. REV. 825, 827 (2005) (discussing how some prosecutors would rather invent a new theory of the crime rather than acknowledge errors discovered through postconviction DNA testing).

innocence claims and implementing a unit to review them.⁴ Legal scholarship has only recently begun to explore these developments.⁵

Much of the recent research has focused on the high-profile efforts of district attorneys implementing conviction integrity units (CIU)—also known as conviction review units (CRU).⁶ Considering the rapid rise and innovation of CIUs,⁷ this scholarly emphasis is more than justified. Still, many small to medium-sized and under resourced jurisdictions may not find it feasible to create, staff, and fund a standing CIU.⁸ Indeed, they may not have the caseload to justify one.⁹ Given the realities of limited resources and variable caseloads, how are prosecutors' offices developing standards and practices to address postconviction innocence review? What criteria are they adopting for accepting or rejecting cases to review?

I explore answers to these questions through semi-structured interviews with twenty prosecutors (nine working in conviction integrity units) who have proactively assisted with an exoneration. I

⁴ See Peter Neufeld, *Legal and Ethical Implications of Post-Conviction DNA Exonerations*, 35 NEW ENG. L. REV. 639, 641 (2001) (“Increasingly, progressive-minded prosecutors around the country are setting up their own ‘innocence projects.’”).

⁵ See, e.g., Dana Carver Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613, 617 (2014); Daniel Kroepsch, *Prosecutorial Best Practices Committees and Conviction Integrity Units: How Internal Programs Are Fulfilling the Prosecutor's Duty to Serve Justice*, 29 GEO. J. LEGAL ETHICS 1095, 1096 (2016); John Holloway, *Conviction Review Units: A National Perspective* 8, 10 (Univ. of Penn. Faculty Scholarship, Paper No. 1614, Apr. 2016); see also CTR. ON THE ADMIN. OF CRIMINAL LAW, ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTOR'S OFFICES 12 (2012) [hereinafter CONVICTION INTEGRITY PROJECT], http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecm_pro_073583.pdf [https://perma.cc/SET2-399E]; 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, 2217–18 (2010); Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 705 (2017) [hereinafter Scheck, *Conviction Integrity Units Revisited*]; Cyrus R. Vance Jr., *The Conscience and Culture of a Prosecutor*, 50 AM. CRIM. L. REV. 629, 631 (2013); Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y. L. SCH. L. REV. 1033, 1034 (2011).

⁶ See Scheck, *Conviction Integrity Units Revisited*, *supra* note 5, at 705.

⁷ See *Conviction Integrity Units*, NAT'L REGISTRY EXONERATIONS 1 (Feb. 3, 2016), https://www.law.umich.edu/special/exoneration/Documents/2.2016_Newsletter_Art2.pdf [https://perma.cc/YAJ2-B3RF] [hereinafter *Conviction Integrity Units 2016*].

⁸ See *id.* at 21 (“It should be noted, though, that many smaller state or local prosecutors' offices may lack the resources to separately staff a CRU.”); see also CONVICTION INTEGRITY PROJECT, *supra* note 5, at 8 (“While conviction integrity reforms have been implemented in larger district attorneys' offices, this Report recognizes that the majority of prosecutors' offices do not have the number of personnel or the resources that are available to larger offices.”).

⁹ See Elizabeth Webster, *The Prosecutor as a Final Safeguard Against False Convictions: How Prosecutors Assist with Exoneration*, 110 J. CRIM. L. & CRIMINOLOGY 245, 281–82 (2020) (“Prosecutors from small jurisdictions (population 500,000 or less), and medium jurisdictions (population between 500,000 and one million) generally lacked the resources or the caseload to staff a full-time CIU or even a separate appellate division.”).

examine how prosecutors adopt legal standards, how they evaluate both forensic and non-forensic new evidence of innocence, and how and when they acknowledge innocence—all in the context of the highly discretionary postconviction arena.¹⁰ Findings suggest that prosecutors have adjusted to twenty-first century expectations of postconviction justice in different ways. While some have adapted well beyond the DNA revolution,¹¹ others continue to define innocence claims as those that can be subjected to some type of postconviction forensic testing and/or that can establish the identity of the actual perpetrator.¹² Prosecutors' postconviction determinations take on special significance as DNA technology advances,¹³ outdated forensic disciplines face newfound scrutiny,¹⁴ and recantation evidence increasingly contributes to overturning known wrongful convictions.¹⁵

The interviews reported here shed light on postconviction prosecution from those in the vanguard. Results report a variety of progressive actions that prosecutors are taking to correct wrongful convictions. These include: 1) adopting an interests of justice mindset rather than requiring affirmative proof of innocence; 2) evaluating innocence claims with a broad view of what could be dispositive, not only forensic evidence like DNA and fingerprints, but

¹⁰ See Fred C. Zacharias, *The Role of Prosecutors in Serving Justice after Convictions*, 58 VAND. L. REV. 171, 173 (2005) (“Prosecutorial discretion is at its height in the postconviction context.”).

¹¹ *The DNA revolution* broadly refers to the wave of DNA exonerations leading to criminal justice system reforms. See Medwed, *supra* note 3, at 126–27, 133 (“The DNA revolution and the resulting series of exonerations have put the spotlight on prosecutors’ treatment of postconviction motions, spurring at least one set of scholars . . .”); see also Daniel S. Medwed, *Talking About a Revolution: A Quarter Century of DNA Exonerations*, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENT 2, 3–4 (Daniel S. Medwed ed., 2017).

¹² See Medwed, *supra* note 3, at 131–32.

¹³ See Keith A. Findley, *Flawed Science and the New Wave of Innocents*, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION, *supra* note 11, at 184, 186–87 (“While DNA continues to exonerate, increasingly the DNA cases push the envelope of the technology and the evidence.”).

¹⁴ See *id.* at 187 (“[T]he future of the Innocence Movement will be built to a large extent on showing that scientific evidence is frequently wrong.”); Edward J. Imwinkelried, *Debunked, Discredited, but Still Defended Revising State Post-Conviction Relief Statutes to Cover Convictions Resting on Subsequently Invalidated Expert Testimony*, 48 SETON HALL L. REV. 1095, 1099 (2018) (“In the future the courts will probably face a large number of cases in which the basis for relief is the claim that subsequent scientific research has invalidated expert testimony that contributed to the prior conviction.”).

¹⁵ See ALEXANDRA E. GROSS & SAMUEL R. GROSS, NAT’L REGISTRY OF EXONERATIONS, WITNESS RECANTATION STUDY: PRELIMINARY FINDINGS 1, 2 (2013) (finding that 250 of the first 1,068 cases in the National Registry of Exonerations database involved post-conviction recantations by witnesses or victims); Rob Warden, *Reacting to Recantations*, in WRONGFUL CONVICTIONS AND THE DNA REVOLUTION, *supra* note 11, at 106, 106.

also new witnesses and recantations; 3) conducting active reinvestigations independent of law enforcement when necessary; 4) viewing DNA, and other forensic evidence, in the larger context of the total investigation representing one piece of a puzzle rather than the sole factor in determining innocence; and 5) participating in reevaluation of past convictions featuring faulty forensic testimony and outdated forensic methods.

I begin by describing the study and explaining how findings might shed light on progressive prosecution in the postconviction stage. In Part II, I discuss progressive prosecution as it relates to the creation and rising popularity of conviction integrity units and also for prosecutors' postconviction standards of case review and dismissal. In Part III, I report some of the key points of variation between prosecutor respondents in their postconviction innocence review standards and practices. In Part IV, I analyze what this variation suggests about the future of postconviction innocence review and the challenges that twenty-first century prosecutors will face in their postconviction decision making.

I. THE PROSECUTOR INTERVIEWS

Interviews for this study were conducted between April 2016 and November 2018 with participating prosecutors who had assisted with at least one exoneration case as listed by the National Registry of Exonerations ("NRE"), an open source online database tracking US exoneration cases since 1989.¹⁶ The NRE definition of exoneration depends upon evidence of innocence, but not an explicit declaration of innocence.¹⁷ Defendants may have been pardoned, acquitted, posthumously exonerated, or had their cases dismissed by a prosecutor or a judge.¹⁸ In order to be eligible for this study, however, prosecutors must have made some proactive attempt to help bring about the exoneration. Therefore, all prosecutor respondents had either recommended that the case be dismissed, joined in a defense motion to dismiss, or recommended that the defendant receive a pardon. In addition, some prosecutor respondents initiated a reinvestigation, paid for postconviction DNA testing, publicly apologized to the defendant, and more.

¹⁶ See NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> [<https://perma.cc/P3F2-KMK6>].

¹⁷ See *Glossary*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> [<https://perma.cc/TB2J-YDFD>] (providing a precise definition of "exoneration" as applied to NRE cases).

¹⁸ See *id.*

Cases not eligible for the study would include those in which prosecutors appealed court decisions to retry a case after new evidence of innocence emerged or unsuccessfully retried the case but the defendant was acquitted. The prosecutors in this sample have all participated in pro-active dismissals, not the re-active dismissals that a prosecutor might recommend after appeals have been lost and the option to re-prosecute is no longer an option. This type of re-active dismissal would not qualify as prosecutorial assistance.

Prosecutors' conviction review efforts have extended beyond reviewing actual innocence claims as well. Some CIUs have broadened their focus to include cases of excessive sentencing, or cases in which a "serious violation of a defendant's rights" has occurred.¹⁹ While these efforts qualify as progressive prosecution, prosecutor interviewees were not asked to speak about them, therefore, this study limits its focus to only those cases featuring a claim of innocence and an exoneration as recognized by the NRE.

Prosecutor respondents come from jurisdictions all over the U.S., and of varying sizes. As is indicative of the profession,²⁰ 18 of 20 prosecutors (90%) were white and 13 of 20 were male (65%). All had at least ten years of experience as attorneys, though not necessarily in prosecution. In fact, 6 of the 20 respondents had previous experience as defense attorneys, due in part to the common practice of appointing former defense attorneys to head the district attorney's office conviction integrity unit.²¹ See full demographics for prosecutor respondents in table 1.

¹⁹ BRENNAN CTR. FOR JUST., 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 16 (2018), https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf [<https://perma.cc/T2GB-KYNV>] ("Consider extending the CRU's mandate beyond claims of actual innocence by also scrutinizing cases in which a serious violation of a defendant's rights or other miscarriages of justice may have contributed to his or her conviction.").

²⁰ See *White Men Dominate Elected Prosecutor Seats Nationwide; 60% of States have No Elected Black Prosecutors*, WOMEN DONORS NETWORK (Jul. 7, 2015), <https://womendonors.org/wp-content/uploads/2015/07/press-release.pdf> [<https://perma.cc/2AY8-TJR3>].

²¹ See Scheck, *Conviction Integrity Units Revisited*, *supra* note 5, at 738 (discussing staffing recommendations for CIUs).

Table 1. Prosecutor Respondents (N=20) (Response Rate=50%)

	N		N
Race		Career stage as an attorney	
White	18	Early (less than 10 years)	0
Non-white	2	Mid (10 to 20 years)	10
Gender		Late (more than 20 years)	7
Male	13	Retired	1
Female	7	No longer a prosecutor	2
Type		Geographic region	
Elected district attorney	5	Northeast	5
Appellate attorney	2	Midwest	5
Supervising trial attorney	4	South	6
CIU	9	West	4
Experience as opposing counsel		Jurisdiction size	
Yes	6	Small (less than 500,000)	3
No	14	Medium (500,000 to 1 million)	7
		Large (more than 1 million)	10

During sixty- to ninety-minute interviews, prosecutors were asked to speak about their office's handling of a specific exoneration case in detail. Specifically, "what evidentiary issues were under review?" Not all prosecutors chose to do so; some wished to reference a larger set of exoneration cases, for example, all of those secured under the conviction integrity unit, others refrained out of concern for potential civil litigation involving the exonerated defendant. Demographics about the fifteen cases discussed in detail appear in table 2. In addition, all prosecutors were asked about their postconviction innocence review in general, specifically, "Could you summarize the criteria that the office uses to decide how to respond to postconviction evidence of innocence?" and "Does your office have a procedure for investigating claims of actual innocence?"²²

²² The complete interview guide is available from the author upon request.

Table 2. Exoneration Cases (N=15)

	N		N
Defendant Race		Exonerating Evidence*	
White	5	DNA	7
Black	9	Non-DNA forensic	5
Hispanic/Other	1	New witness	2
Gender		Recantation	3
Male	15	Alternative Suspect identified	3
Female	0	Evidence of official misconduct	3
Offense		Contributing factor of wrongful conviction*	
Murder	10	Mistaken witness ID	7
Sexual assault	4	False confession	2
Robbery	1	Perjury or false accusation	8
Case Disposition		Official misconduct	8
Plea	2	False or misleading forensic evidence	5
Trial	13	Inadequate legal defense	1

*will not total to 15

II. PROGRESSIVE POSTCONVICTION PRACTICES IN INNOCENCE REVIEW

What does it mean for a prosecutor to be “progressive”? A series of articles addressing the topic provide guidance, but not an explicit definition.²³ Sklansky’s *The Progressive Prosecutor’s Handbook* argues that there is “no roadmap” for newly elected progressive district attorneys, but suggests that there is a mandate including racial justice, addressing and correcting wrongful convictions, greater accountability for police and prosecutors, and reducing mass incarceration.²⁴ By using the term “progressive prosecution,” I mean to refer to prosecutors embracing this mandate. I focus on progressive prosecutorial actions—namely, the progressive act of assisting a wrongfully convicted defendant in achieving their exoneration, rather than on progressive prosecutorial politics. As for a broader definition, progressive prosecutors—whether they are

²³ See, e.g., David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 653 (2017); David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 32 (2017) [hereinafter Sklansky, *Progressive Prosecutor’s Handbook*] (examining suggestion number four on page thirty-two that states “build in second looks” includes conviction integrity units); Note, *The Paradox of “Progressive Prosecution”*, 132 HARV. L. REV. 748, 751–52, 755 (2018).

²⁴ Sklansky, *Progressive Prosecutor’s Handbook*, *supra* note 23, at 26–27 (“Over the past few years, though, a growing number of chief prosecutors have won office by pledging a more balanced approach to criminal justice—more attentive to racial disparities, the risk of wrongful conviction, the problem of police violence, and the failures and terrible costs of mass incarceration.”).

established or newly elected—recognize the need for criminal justice reforms, and they seek out innovative solutions.

Traditionally, prosecutors have resisted acknowledging errors and facilitating efforts to overturn false convictions.²⁵ In a study of 260 wrongful conviction cases, Gould and Leo find that the same evidence that might compel a prosecutor to reconsider taking a case to trial would be considered insufficient evidence for postconviction relief.²⁶ They write,

Judges, prosecutors, and law enforcement are *requiring proof of another suspect's involvement or exculpatory DNA results to exonerate an innocent defendant*. Yet these same officials are willing to consider other forms of exculpatory evidence when releasing an innocent suspect following charges but prior to conviction. It is not as if the defendants are any more innocent of the crime prior to trial than after conviction. Rather, the badge of guilt conveyed by a conviction seems to make officials unwilling to consider multiple types of exculpatory evidence or actively pursue the matter on their own.²⁷

The authors identify eighteen different categories of people who played a “significant role” in bringing about the 260 exonerations; prosecutors played a significant role in only nine percent of these cases.²⁸ My own study of prosecutorial assistance from a sample of 1,610 exonerations listed by the NRE finds that prosecutors provided some level of assistance in about one-third of the cases and provided significant assistance in only eighteen percent of the cases.²⁹ Together, these findings suggest that, when confronted with new evidence of innocence, prosecutors are much more likely to either take no supportive action at all or to resist and oppose it than they are to actively pursue.

²⁵ See Bandes, *supra* note 3, 475.

²⁶ See Jon B. Gould & Richard A. Leo, *The Path to Exoneration*, 79 ALB. L. REV. 325, 332, 371 (2016).

²⁷ *Id.* at 371 (emphasis added).

²⁸ See *id.* at 343–44 (“By ‘significant role,’ we mean engaged in substantial investigation or advocacy.”).

²⁹ See Elizabeth Webster, *A Postconviction Mentality: Prosecutorial Assistance in Exoneration Cases*, 36 JUST. Q. 323, 333 (2017) (examining the complete description of the types of prosecutorial actions categorized as “minor” or “major” prosecutorial assistance).

A. *Creation and Rising Popularity of Conviction Integrity Units*

Former Dallas County District Attorney Craig Watkins received national acclaim for creating one of the first conviction integrity units in 2007.³⁰ Watkins, who was Dallas County's first African American district attorney, was successful not only for addressing the jurisdiction's legacy of wrongful convictions, but its deep-seated racial biases as well.³¹ A decade before the "progressive prosecution" movement began, Watkins was challenging assumptions of the prosecutors' role with his celebrated "smart on crime" approach.³²

Today, scholars and advocates of progressive prosecution recommend that prosecutors create a conviction integrity unit to uncover wrongful convictions.³³ Sklansky cites discovering wrongful convictions among his ten suggestions for any progressive prosecutor.³⁴ Likewise, the Fair and Just Prosecution project recommends that a "21st century prosecutor" should create a conviction review unit.³⁵

Conviction integrity units have grown increasingly popular in the past decade.³⁶ The NRE lists sixty-two currently active CIUs across the country, mostly in large jurisdictions.³⁷ This number has more

³⁰ See Elizabeth Barber, *Dallas Targets Wrongful Convictions, and Revolution Starts to Spread*, CHRISTIAN SCI. MONITOR (May 25, 2014), <https://www.csmonitor.com/USA/Justice/2014/0525/Dallas-targets-wrongful-convictions-and-revolution-starts-to-spread> [<https://perma.cc/SA4A-G6L9>]; Molly Hennessy-Fiske, *Dallas County District Attorney a Hero to the Wrongfully Convicted*, L.A. TIMES (May 8, 2012, 12:00 AM), <https://www.latimes.com/world/la-xpm-2012-may-08-la-na-dallas-district-attorney-20120509-story.html> [<https://perma.cc/YBB2-9CB6>]; see also Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 62 (2009) ("The Dallas County, Texas program may serve as the best model for other prosecutorial offices to replicate in forming internal innocence divisions.").

³¹ See Barber, *supra* note 30; *Race: Dallas District Attorney Supports Racial Justice Act for Texas*, DEATH PENALTY INFO. CTR. (Jan. 23, 2013), <https://deathpenaltyinfo.org/news/race-dallas-district-attorney-supports-racial-justice-act-for-texas> [<https://perma.cc/E6WU-P7TC>].

³² Roger A. Fairfax, Jr., *The "Smart on Crime" Prosecutor*, 25 GEO. J. LEGAL ETHICS 905, 911–12 (2012) ("Other local prosecutors have endorsed the 'smart on crime' approach as well. . . . Dallas County District Attorney Craig Watkins has received a great deal of media attention because of his work to identify cases of wrongful convictions within the jurisdiction."). See Sklansky, *Progressive Prosecutor's Handbook*, *supra* note 23, at 32.

³³ See Sklansky, *Progressive Prosecutor's Handbook*, *supra* note 23, at 32–33 (recommending that prosecutor's "build in second looks" including conviction integrity units); BRENNAN CTR. FOR JUST., *supra* note 19, at 16 (recommending the creation of effective conviction review).

³⁴ See Sklansky, *Progressive Prosecutor's Handbook*, *supra* note 23, at 32–33.

³⁵ See BRENNAN CTR. FOR JUST., *supra* note 19, at 16.

³⁶ See *Conviction Integrity Units 2016*, *supra* note 7, at 1 ("There were 24 CIUs in the United States in 2015, double the number in 2013 and quadruple the number in 2011.").

³⁷ See *Exoneration Detail List*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx> [<https://perma.cc/Q97U-MMX8>] (filter for CIU

than doubled in the past five years, when the NRE reported only twenty-four CIUs in existence in 2015.³⁸ Five years before that, there were only four.³⁹ CIUs have accomplished a lot in a short time: together, these units have exonerated 440 people,⁴⁰ launched large-scale case reviews,⁴¹ and implemented new office policies to prevent future wrongful convictions.⁴²

However, not all CIUs are doing progressive work. Some units might be better characterized as “conviction preservation units” that merely maintain the status quo.⁴³ They have been criticized as “mere window dressing[s] or public relations ploys.”⁴⁴ Others have been implemented as an empty campaign promise.⁴⁵ The NRE summarizes the situation: “In a few counties, CIUs have become important, active on-going operations. For several CIUs, it’s too early to say. And for others, we found no evidence that they have done anything much at all.”⁴⁶ Currently, the NRE lists about half of the

exonerations; archival link shows count at press time); *Conviction Integrity Units*, NAT’L REGISTRY EXONERATIONS <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> [<https://perma.cc/GB8P-FQ7G>] [hereinafter *Conviction Integrity Units*]. Jurisdictions represented include Manhattan, Brooklyn, and the Bronx, as well as Dallas, Houston, Los Angeles, Chicago, Boston, Tampa, and many more. *See id.* (as of August 4, 2020).

³⁸ *See Conviction Integrity Units 2016*, *supra* note 7 (“There were 24 CIUs in the United States in 2015, double the number in 2013 and quadruple the number in 2011.”).

³⁹ *See id.*

⁴⁰ *See Exoneration Detail List*, *supra* note 37.

⁴¹ *See* Inger H. Chandler, *Conviction Integrity Review Units: Owning the Past, Changing the Future*, CRIM. JUST., Summer 2016, at 14, 16 (writing about three Texas CIUs).

Beyond their “traditional” roles, the unit chiefs are actively involved with the Texas Forensic Science Commission, one of the guiding forces behind forensic science reform in Texas. Through that participation, the Texas units have been on the forefront of case reviews involving DNA mixture interpretation, hair microscopy, and bite marks.

Id.

⁴² *See* Ellen Yaroshefsky, *Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 343, 354–56 (2010) (highlighting the Dallas County Conviction Integrity Unit, which discovered that prosecutors had failed to disclose exculpatory evidence by reviewing wrongful conviction cases, for its changes to hiring practices to ensure better compliance with Brady obligations).

⁴³ Hollway, *supra* note 5, at 19 & n.25.

⁴⁴ *Exonerations in 2017*, NAT’L REGISTRY EXONERATIONS 15 (Mar. 14, 2018), <https://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf> [<https://perma.cc/MMU2-X5FE>].

⁴⁵ *See, e.g.*, John Simerman, *Orleans DA, Innocence Project Team to Find Unjust Convictions*, NOLA (Aug. 31, 2014, 4:28 PM), https://www.nola.com/article_38fb87ba-9fab-5f0e-9753-b6515933fe3c.html [<https://perma.cc/LX2S-L43S>]; John Simerman, *Cannizzaro, Innocence Project Call it Quits on Project to Unearth False Convictions*, NOLA (Jan. 11, 2016, 4:33 PM), https://www.nola.com/article_44ce1702-dd2b-5100-87de-f6e3e5b7c9f6.html [<https://perma.cc/LQW3-KXGC>].

⁴⁶ *See Conviction Integrity Units 2016*, *supra* note 7, at 2.

active units as having produced no recorded exonerations.⁴⁷ Therefore, simply having a CIU does not a progressive district attorney's office make. CIUs, however popular, cannot be the only metric by which to evaluate what prosecutors have accomplished in the postconviction arena.

B. Prosecutors' Postconviction Standards of Review and Dismissal for Wrongful Convictions

In evaluating postconviction reform efforts, instead of merely noting the existence of CIUs, we might look into the prosecution's willingness to review a variety of postconviction claims of innocence and their willingness to dismiss when the evidence no longer supports the conviction beyond a reasonable doubt. The prosecution's flexibility in pursuing new evidence of innocence in its various forms—whether that be a request for postconviction DNA testing, a reanalysis of forensic evidence that reflects new scientific developments, or a recantation statement—will be reflected in the prosecutors' standard to review innocence claims and to dismiss wrongful convictions. Increasingly, postconviction DNA testing plays less of a pivotal role in innocence claims; most evidence that could have been subjected to DNA testing would have been tested at the trial level already.⁴⁸ The black-and-white DNA exonerations have become less common; and, as DNA testing becomes more sensitive, it also becomes less dispositive in certain applications.⁴⁹ Therefore, greater reliance on non-DNA and even non-forensic methods of evaluating wrongful conviction claims can be anticipated.

Without the black-and-white certainty of DNA, prosecutors find themselves confronted with more grey-area cases. How should they proceed? Innocence Project Co-Director Barry Scheck argues that prosecutors should pursue conviction review even in cases that may not provide unequivocal proof of innocence (e.g., DNA).⁵⁰ Scheck and

⁴⁷ See *Conviction Integrity Units*, *supra* note 37 (as of August 4, 2020).

⁴⁸ See Findley, *supra* note 13, at 185 (“As DNA became routinely tested before trial, at least in serious crimes, the pool of cases with untested material was bound to shrink.”).

⁴⁹ See *id.* at 186 (“Post-conviction DNA testing today is more likely to produce partial profiles from degraded samples, mixed profiles from multiple contributors, and profiles from touch DNA from assorted physical items found at or near the crime scene (which, as the name suggests, might contain miniscule amounts of DNA shed by a person who merely touched the item), all of which will have varying degrees of probative value. No longer is DNA necessarily alone dispositive.”).

⁵⁰ See Scheck, *Conviction Integrity Units Revisited*, *supra* note 5, at 727 (writing in response to the Innocence Project recommendation to adopt an interests of justice mindset).

the Innocence Project argue that CIUs should adopt an “interests of justice” “orientation or mindset” when selecting cases to review.⁵¹ An interests of justice standard would allow for the discovery of wrongful convictions even in the absence of exculpatory forensic evidence or identification of the actual perpetrator.⁵² It can also allow for the exercise of prosecutorial discretion to dismiss “in the interests of justice.”

Prosecutors’ postconviction discretion to dismiss is guided by the postconviction legal standards as established through state legislative statutes, such as new evidence of innocence, actual innocence, or DNA testing statute.⁵³ However, such standards are also subjective, reflecting prosecutorial and judicial discretion, as well as assessment about the defendant’s likely guilt or innocence.⁵⁴ In a study of nineteen conviction review units, the Quattrone Center for the Fair Administration of Justice further recommends that CIUs should vacate convictions in the interests of justice.⁵⁵ The full recommendation reads, “Vacate each conviction where there is *clear and convincing evidence of actual innocence*, or where in the interests of justice, the CRU *no longer believes that the current evidence supports the conviction beyond a reasonable doubt.*”⁵⁶ These two standards, 1) clear and convincing evidence of actual innocence and 2) the failure to support the conviction beyond a reasonable doubt, represent two common approaches to assessing postconviction

[S]ome 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.

Id.

⁵¹ See *Conviction Integrity Unit Best Practices*, INNOCENCE PROJECT, <https://www.innocenceproject.org/wp-content/uploads/2016/09/Conviction-Integrity-Unit.pdf> [https://perma.cc/KXU9-SQP3] (listing a few standards of review that prosecutors might use including “Facts suggest plausible claim of innocence,” “Evidence of a constitutional violation,” or “Review is in the interests of justice”).

⁵² *Id.* at 727–28.

⁵³ See John M. Leventhal, *A Survey of Federal and State Courts’ Approaches to a Constitutional Right of Actual Innocence: Is There a Need for a State Constitutional Right in New York in the Aftermath of CPL § 440.10 (G-1)?*, 76 ALB. L. REV. 1453, 1471–72 (2012) (“State laws allow a defendant to assert his actual innocence claim via post-conviction relief statutes based on newly discovered evidence and/or DNA evidence.”).

⁵⁴ See *id.* at 1472–73.

⁵⁵ See Hollway, *supra* note 5, at 3, 72.

⁵⁶ *Id.* at 3 (emphasis added).

evidence.⁵⁷ Which standard to choose continues to be the subject of some debate,⁵⁸ the distinction rests on affirmatively demonstrating innocence versus eliminating evidence of guilt.⁵⁹

According to ABA model rules for prosecutors' postconviction behavior, "prosecutor[s] shall seek to remedy the conviction" whenever they discover "clear and convincing evidence" of innocence.⁶⁰ The "clear and convincing" standard has also been adopted by twelve state legislatures as the benchmark for vacating convictions.⁶¹ However, some legal scholars have concluded that the standard is too high.⁶² Green and Yaroshefsky argue that the ABA standard should be interpreted as setting "a disciplinary floor, and thus presupposes that prosecutors will act even when the defendant's innocence is less obvious than that."⁶³

Indeed, most states' statutes do not limit postconviction relief based on new evidence to only those cases that can provide "clear and convincing" new evidence of innocence.⁶⁴ The most popular statutory regime provides a standard of "probably" or "more likely than not" the new evidence would produce a different result at retrial.⁶⁵ In their survey of postconviction new evidence statutes, Brooks and colleagues argue that the popularity of this standard can be attributed to its ability to provide an achievable measure for innocent defendants to reach.⁶⁶ The authors explain that new evidence of innocence may not so much provide proof of innocence as to

⁵⁷ See *id.* at 40.

⁵⁸ See *id.*

⁵⁹ See *id.*

⁶⁰ ABA Model Rule 3.8(h) "Special Responsibilities of a Prosecutor" reads, "When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction." MODEL RULES OF PROF'L CONDUCT r. 3.8(h) (AM. BAR ASS'N 1983).

⁶¹ Justin Brooks et al., *If Hindsight Is 20/20, Our Justice System Should Not Be Blind to New Evidence of Innocence: A Survey of Post-Conviction New Evidence Statutes and a Proposed Model*, 79 ALB. L. REV. 1045, 1058, 1060–62 (2015) (listing thirteen states that have adopted the "clear and convincing evidence" standard and finding that the majority of states use "[p]robably" or "[m]ore [l]ikely [t]han [n]ot" a different result if the case was retried). Since publication, an additional state has changed its standard. See Scheck, *Conviction Integrity Units Revisited*, *supra* note 5, at 733.)

⁶² Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 508 (2009); Brooks et al., *supra* note 61, at 1062.

⁶³ Green & Yaroshefsky, *supra* note 62, at 508; see MODEL RULES OF PROF'L CONDUCT r. 3.8(h).

⁶⁴ See Brooks et al., *supra* note 61, at 1056, 1058, 1060.

⁶⁵ See *id.* at 1058, 1060.

⁶⁶ See *id.* at 1045, 1060 ("[T]his standard is not so high that innocent individuals are forced to establish their innocence to an unachievable degree.").

completely eliminate all evidence of guilt.⁶⁷ A variety of situations are implicated, for example: when key prosecution witnesses have recanted, a police officer or forensic analyst who testified is discredited in a different case, or new scientific understanding undermines the forensic evidence at trial. Even exculpatory DNA testing results may fail to produce clear and convincing evidence of innocence in some cases.⁶⁸ Depending on the centrality of the flawed evidence to the conviction, these developments may so weaken the prosecution's case that the jury (if they had known) would probably not have returned a guilty verdict. Yet, courts may not interpret these forms of new evidence as providing "clear and convincing evidence of actual innocence."

Adopting an interests of justice mindset allows for review and the possibility of relief in a wider variety of cases. Prosecutors adopting this mindset acknowledge the shifting postconviction landscape that calls for greater accountability for discredited police officers,⁶⁹ a new awareness of the limitations of forensic techniques that were once relied upon,⁷⁰ and the limitations of postconviction DNA testing to provide conclusive proof of innocence in some cases.⁷¹ Some states are beginning to adapt postconviction relief statutes in response to the recognition that flawed forensic analysis and testimony have

⁶⁷ See *id.* at 1062 (discussing the clear and convincing standard for evidence of innocence). "Requiring affirmative evidence of innocence prohibits courts from granting new trials in cases where the newly discovered evidence has completely eliminated all evidence of guilt." *Id.*

⁶⁸ Brooks and colleagues write,

For example, in many rape cases, where DNA testing later shows that sperm found in the victim did not come from the man convicted of the crime, prosecutors will argue that the DNA must have come from a consensual lover, or from another perpetrator committing the crime with the defendant—even when *the theory at trial was that there was only one attacker*. Under the "clear and convincing evidence of innocence" standard, however, such a scenario may well prevent courts from concluding the conviction should be reversed.

Id. at 1063 (emphasis added).

⁶⁹ See Sklansky, *Progressive Prosecutor's Handbook*, *supra* note 23, at 25, 38.

⁷⁰ See Findley, *supra* note 13, at 185; Imwinkelried, *supra* note 14, at 1120; Aviva Orenstein, *Debunked, Discredited, but Still Defended: Why Prosecutors Resist Challenges to Bad Science and Some Suggestions for Crafting Remedies for Wrongful Conviction Based on Changed Science*, 48 SETON HALL L. REV. 1139, 1142 (2018).

⁷¹ See Findley, *supra* note 13, at 186.

contributed to wrongful convictions.⁷² However, prosecutors may resist agreeing to relief in these cases based on an insistence in the defendant's guilt and/or the specter of "a tidal wave of new trial motions" in response.⁷³ In addition, prosecutors evaluating postconviction innocence claims based on their ability to identify the actual perpetrator may be discouraged by claims featuring shaken baby syndrome or arson, in which no crime may have been committed at all and therefore, no perpetrator exists.⁷⁴

Whether prosecutors adopt an interests of justice mindset or look for clear and convincing evidence of innocence determines all other case selection and dismissal decisions. Therefore, in the following description of the prosecutor interviews, I begin by reporting prosecutor respondents' statements about postconviction standards. Prosecutors differed in several respects: their standards for dismissing cases, their willingness to explore non-forensic postconviction new evidence of innocence, their framework for agreeing to postconviction DNA testing, their approach to conducting reinvestigations, and their approach to new forensic developments beyond DNA.

Through this exercise, I do not attempt to distinguish certain prosecutor respondents as progressive and others as traditional. Some expressed progressive viewpoints on some issues and more traditional viewpoints on others. Moreover, external factors such as state laws and rules regarding postconviction practice influence prosecutors' decision making, as well they should. Instead, I intend to develop a portrait of progressive prosecution in the postconviction stage by highlighting these differences and exploring what they might mean for prosecutors' responses to innocence claims in the future.

⁷² See Imwinkelried, *supra* note 14, at 1101–01 (discussing statutory changes in Texas and California).

If a prior conviction rested on expert testimony, has the later research raised such grave questions about the reliability of the testimony that the accused should receive a new trial? This question has become so pressing that several jurisdictions have recently amended their post-conviction relief statutes to address the question.

Id.

⁷³ Orenstein, *supra* note 70, at 1151–52 ("The use of a flawed science technique might have affected many cases and a tidal wave of new trial motions would overwhelm the system, particularly because old cases would be difficult to retry years later, given stale evidence and long-gone witnesses. Finally, in some cases the bad science, while wrong and unfair, does not necessarily shake the court's belief in actual guilt.")

⁷⁴ See Findley, *supra* note 13, at 187.

III. PROSECUTORS' RESPONSES TO NEW EVIDENCE OF INNOCENCE

A. *Standards of Review and Dismissal*

In reporting the results from these interviews, I explore issues that the prosecutors themselves raised as salient when assessing new evidence of innocence. Recall that prosecutor respondents have all assisted with an exoneration case in which the prosecution moved to dismiss the conviction (or joined in a defense motion to dismiss). According to the NRE definition of exoneration, some evidence of innocence must contribute.⁷⁵ Therefore, the cases described by prosecutors for this study present more than just constitutional claims of procedural error. While prosecutor respondents rarely discussed legal standards directly (e.g., “clear and convincing new evidence” or “reasonable doubt”) they did describe how their office framed the decision to dismiss. Relatedly, they volunteered their assessments of the defendant’s innocence and guilt. These remarks were notable for how prosecutors varied in the degree to which they accepted ambiguity about the defendant’s guilt or innocence.

Five prosecutors, whether for statutory or discretionary reasons, sought to conclusively prove innocence. The exoneration cases they assisted with all included exculpatory DNA testing results and/or identification of the real perpetrator. For example, Prosecutor 19 distinguished between “That evidence wasn’t enough to convict me beyond a reasonable doubt,” and, “Here’s evidence that somebody other than me did it.” Prosecutor 19 suggested that his assessment of innocence would rest on discovering the identity of the real perpetrator.

Several prosecutors who described aiming for this higher standard expressed feeling constrained by it. Prosecutors’ recommendations for postconviction relief are guided by the standards as established through state statute and by state courts.⁷⁶ In the words of CIU Prosecutor 5, “For us, since the [court] ultimately has to approve it, you need to always be mindful of ‘can you get to that burden of proof?’” Prosecutor 20 contrasted the vast discretion that prosecutors in his

⁷⁵ See *Glossary*, *supra* note 17.

⁷⁶ See, e.g., CAL. PENAL CODE § 1473(b) (Deering 2017); TEX. CODE CRIM. PROC. ANN. art. 11.073(b) (West 2015); *In re Hall*, 673 P.2d 690, 696 (Cal. 1981) (citing *In re Branch*, 449 P.2d 174, 18384 (Cal. 1969)); *Ex parte White*, 506 S.W.3d 39, 44 (Tex. Crim. App. 2016) (citing *Ex parte Harleston*, 431 S.W.3d 67, 70 (Tex. Crim. App. 2014)).

state enjoy pretrial with the constraints imposed by post-trial standards, saying “our leverage is significantly reduced.”

In contrast, several other prosecutors’ comments demonstrated their much greater postconviction discretion. For example, “If we want to get rid of a case, we can get rid of a case even after somebody’s been convicted,”⁷⁷ and, “We can dismiss just because . . . we don’t have to articulate a reason.”⁷⁸ Four prosecutors specifically described assessing whether they could retry the case, thus applying a standard that resembles the same one used in charging decisions:

“I felt that there was insufficient proof for him to be prosecuted.”⁷⁹

“What we determined from our investigation is I don’t have the evidence to go forward with a prosecution today.”⁸⁰

“We just didn’t have evidence to charge him, much less convict him.”⁸¹

“[W]ithout anything else to go on, there simply wasn’t enough.”⁸²

The assessment that prosecutors made in these cases evaluates whether they would have charged the case in the first place if they had all the facts and the benefit of the new evidence. In these examples, the assessment corresponds to an interests of justice mindset.⁸³ The decision rests more on existing evidence of guilt rather than affirmative evidence of innocence.

Among the fifteen prosecutors who responded to questions about a specific exoneration case that they had dismissed, four made a point to say that they were not convinced of the defendant’s innocence. Prosecutor 22’s response is representative: “I wasn’t saying that the defendant was innocent, I just didn’t feel comfortable saying he was guilty.” In these examples, prosecutors demonstrated that they felt compelled to dismiss a case despite ambiguity about the question of guilt or innocence. These prosecutors’ comments also reflected the available evidence used to make the legal determination. These were not shallow personal assessments—those unshakeable gut feelings

⁷⁷ CIU Prosecutor 29.

⁷⁸ CIU Prosecutor 27.

⁷⁹ Prosecutor 18.

⁸⁰ Prosecutor 23.

⁸¹ CIU Prosecutor 16.

⁸² Prosecutor 32.

⁸³ See, e.g., Hollway, *supra* note 5, at 10; Scheck, *Conviction Integrity Units Revisited*, *supra* note 5, at 727.

about a case that might reveal deeper cognitive biases. Rather, they were affirmations that the decision to dismiss had been the right thing to do in spite of the grey areas surrounding the question of actual innocence.⁸⁴

B. Evidentiary Criteria Used to Evaluate Innocence Claims

Prosecutors were asked what criteria they used to evaluate innocence claims in general and how they chose to become involved in a specific exoneration case. Eight prosecutors, all working out of CIUs, expressed broad flexibility in what they might review, for example: “A litany of things you could look into,”⁸⁵ “Factual issues that we didn’t appreciate at the time,”⁸⁶ and, “There’s no specific formula . . . it could come in many different forms.”⁸⁷

In contrast, five prosecutors spoke mainly of assessing whether innocence claims could be subjected to some type of forensic testing.⁸⁸ These prosecutors sought evidence that would have a “forensic angle”⁸⁹ or that could provide “something you can test.”⁹⁰ The different types of responses suggest a difference in approach between considering new evidence that challenges the underlying conviction and requiring new evidence that conclusively establishes innocence. Prosecutors varied in their expressed willingness to review the former as well as the latter.

While all prosecutors required some new evidence of innocence in order to proceed with an innocence claim, some were more willing to consider non-forensic evidence—for example new or recanting witnesses—than others. CIU Prosecutor 33, who helped exonerate a defendant based on new witness testimony, asserted the need for prosecutors to continue “to move forward even though there may not be a forensics angle.” She added, “That’s something that I think is going to be an area that develops over the years.”

⁸⁴ These prosecutors should not be confused with “the innocence deniers” who “delay justice and in some cases actively work against it.” Lara Bazelon, *The Innocence Deniers*, Slate (Jan. 10, 2018), <https://slate.com/news-and-politics/2018/01/innocence-deniers-prosecutors-who-have-refused-to-admit-wrongful-convictions.html> [<https://perma.cc/A2YW-UW9H>]. Prosecutor respondents proactively dismissed the conviction rather than acquiescing after unsuccessful litigation. An innocence-denying prosecutor is one who continues to assert the exonerated defendant’s guilt. Rather, these prosecutor respondents declined to assert his/her innocence.

⁸⁵ CIU Prosecutor 5.

⁸⁶ CIU Prosecutor 16.

⁸⁷ CIU Prosecutor 26.

⁸⁸ Of the remaining seven prosecutor respondents, five expressed a preference for forensic evidence, but not a requirement for it, and two could not be categorized based on their answers.

⁸⁹ CIU Prosecutor 6.

⁹⁰ Prosecutor 9.

Likewise, CIU Prosecutor 35 anticipated the decline of postconviction DNA requests in the future and spoke of his interest in reviewing claims involving discredited actors and procedures:

When we look, if we see a name that we're concerned about, if we see, certainly, a procedure that we're concerned about Now, that doesn't alone mean that every one of those cases is a wrongful conviction, but that has to be something that we look at. The same with the people involved. It's sort of tough because there's no black and white here. That's why the DNA category of cases I think is, for a lot of reasons those are some of the easier ones for us from a judgment perspective. I think as we do more and more testing and move more and more into the future, hopefully at least, I don't think we're going to see as many of those cases. Then it's going to come down to more of a judgment call.

CIU Prosecutor 35 opens the door to reviewing claims that may not yield conclusive proof of innocence. He acknowledges that such cases are not “black and white” but also suggests willingness, and a sense of obligation, to make those judgment calls.

At its most dispositive, postconviction DNA testing cases are the “easier ones,” as CIU Prosecutor 35 attests. DNA can conclusively establish innocence and even identify the actual perpetrator.⁹¹ In contrast, non-forensic evidence, and particularly recantation evidence can be “difficult,”⁹² “tricky,”⁹³ or “grey.”⁹⁴ For example, Prosecutor 34 explained, “If there were to be DNA in a case, something like that would certainly be compelling. I'm very skeptical of recantation testimony, so it doesn't weigh a whole lot on my mind.” Like Prosecutor 34, four other prosecutors juxtaposed new forensic evidence—particularly DNA—against new witness and recantation evidence. On a scale of the probative value of this new evidence, prosecutors' comments suggested a ranking with DNA evidence at the top and recantation evidence at the bottom. Recantation evidence was deemed less compelling and more subjective when compared to dispositive forensic evidence. For prosecutors reviewing innocence claims, these two forms of new evidence represented different polarities of evidentiary reliability. Prosecutor 18 explained that the

⁹¹ See Gould & Leo, *supra* note 26, at 336–37.

⁹² CIU Prosecutor 37.

⁹³ Prosecutor 18.

⁹⁴ CIU Prosecutor 16.

types of postconviction innocence claims he receives most regularly are DNA requests and recantations:

Like I say, most of these center around DNA. Obviously, the other area, which has always been around, because people years later will come forward and say, "Oh I didn't tell the truth. Here's what really happened," and they'll try to re-open up cases in that fashion. Those are really hard claims. So they've gone to court under oath and said X, Y and Z and then later they've come back to say, "Well that really wasn't really true." Gauging the veracity of people coming forward in those circumstances and their motivation just is tricky.

This prosecutor explained how recantation evidence is both common and frequently unreliable. He established DNA as the high-water mark from which recantation evidence fell short. These recantation cases may be "tricky" because they are less probative, but also because they can require more legwork to reinvestigate than DNA cases.

Furthermore, recantations were doubted by several prosecutors who expressed concerns that witnesses could be bullied into recanting. Prosecutor 23, who explained that affidavits based on recanting testimony are commonplace in his jurisdiction, feared that crediting this type of evidence may unwittingly encourage witness harassment.

I know for instance for affidavits of recanting testimony, that kind of stuff is usually non-starters. Because we all know, and you don't want to put in place, parameters that can allow victims of a crime to forever be harassed, threatened, intimidated by family members or associates of the incarcerated once the trial is finalized.

This prosecutor stressed the importance of finality in the trial and raised the possibility that exploring recantation evidence could start a precedent that might harm crime victims. His concerns were echoed by a CIU prosecutor who had himself assisted with an exoneration based largely on recantation evidence. Despite acknowledging the risks, the CIU prosecutor also recognized that recantations could be credible in certain situations, saying, "We're going to really want to probe that to figure out when they were telling

the truth.”⁹⁵ Therefore, while both prosecutors recognized the risks of recantation evidence, they differed in their willingness to explore it. Is recantation evidence a “non-starter”? Or is it something prosecutors might “really want to probe”?

C. Reinvestigating and Testing Innocence Claims

Five prosecutors described interviewing witnesses as the focal point of an active reinvestigation in cases otherwise lacking any forensic evidence. CIU Prosecutor 33 described her reinvestigation as a “subjective” process, requiring the unit to conduct interviews with new witnesses and then also seek corroboration for what the witnesses had shared. As she argued, this process of investigating non-forensic evidence is “exactly what a conviction integrity program should doing.” She compared this process to a “flow chart” in which each new piece of information continues to lead the investigator forward in new directions. As the reinvestigation continues, the process involves “weighing the new pieces of evidence versus the old pieces of evidence” and asking, “Are we starting to detract from the evidence that we had?” Prosecutor 27 describes her CIU’s process of reinvestigation in strikingly similar terms:

Most of the time, we don’t have a smoking gun of exculpatory evidence. I don’t have an alibi saying he wasn’t here. I don’t have a video of him somewhere else What you really have most of the time is our picking away at the case that convicted the person. That’s almost always what you have, is a chipping away at that, instead of the opposite. It’s very rare that you have the smoking gun of exculpatory evidence.

These two CIU prosecutors described a process of evaluating the strength of existing evidence as much as identifying new exculpatory evidence. In other words, they were aware that the reinvestigation may not establish conclusive proof of innocence yet open to the possibility that it might weaken the state’s case to the point that the prosecution would agree to dismiss. In this type of reinvestigation, the prosecution plays an active role.

Two other prosecutors’ comments suggested that they would respond to recantation statements by sending police out to interview witnesses. As Prosecutor 17 stated, his office “would conditionally

⁹⁵ CIU Prosecutor 16.

look into it.” Both Prosecutor 17 and Prosecutor 21 reported that prosecutors would not investigate new recantation evidence themselves. Rather, as Prosecutor 21 explained,

We send police out to interview the person, investigate the scene and what they’re saying, re-look at certain things They’re more familiar with the area than we were More familiar with people in the neighborhood maybe more familiar with the witnesses that are now saying that they saw something, or now recanting, change of idea, those kind of things. Sometimes they’re just in a better position to deal with it than anybody else you could send.

The practice of relying on police to reinvestigate saves prosecutors time and allows them to close the case faster. However, the police’s prior knowledge of the crime and the individuals involved can also bias them against new witnesses’ statements.⁹⁶ In such reinvestigations, there is also the risk that police will aggressively question new witnesses or threaten trial witnesses with perjury if they recant.⁹⁷ I include discussion of this practice in order to distinguish prosecutors’ active reinvestigation from this more passive process of sending police officers out to interview witnesses. An alternative to personally following up on every new postconviction lead would be to send investigators employed by the prosecutors’ office instead of asking police who may have been involved in the original investigation and at least one prosecutor spoke of doing so.

Five prosecutors focused on subjecting innocence claims to some type of forensic testing. In the clearest cut cases, these more “objective”⁹⁸ measures can provide a “smoking gun” of innocence that leads unerringly to exoneration.⁹⁹ Therefore, some prosecutors

⁹⁶ See Laurie L. Levenson, *Searching for Injustice: The Challenge of Postconviction Discovery, Investigation, and Litigation*, 87 S. CAL. L. REV. 545, 561, 574, 578–79 (2014).

⁹⁷ See *id.* at 561 (“Detectives can take very aggressive approaches when conducting their postconviction interviews of trial and potential trial witnesses. It is not uncommon for prosecution investigators to remind trial witnesses of the testimony they gave at trial and to subtly or not so subtly threaten them with perjury if they recant at the postconviction stage. Investigators also may mislead witnesses as to the purpose of their postconviction inquiries, leading them to believe that persons challenging a conviction have malicious motives in seeking a rehearing.”).

⁹⁸ Prosecutor 23: “And again, this case is different than a lot, in that most of these innocence claims now are more of subjective information that we’re talking about as opposed to objective.”

⁹⁹ See Jennifer E. Lauren, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 TEX. L. REV. 1051, 1054 (2013); see, e.g., Gould & Leo, *supra* note 26, at 336–37.

focused on forensic evidence, including DNA as the obvious preference, but also palm prints, fingerprints, and even polygraph evidence. These prosecutors' postconviction efforts centered on finding "something you can test."¹⁰⁰ If the results of the forensic analysis prove exculpatory, prosecutors have a better chance of reaching the clear and convincing standard.¹⁰¹ However, an overreliance on having something to test, even when convictions do not involve forensic evidence, may also result in reliance on outdated methods.

Although the admissibility of polygraph evidence varies by jurisdiction and seeking its admission is discouraged,¹⁰² four prosecutor respondents mentioned using or wanting to use polygraphs to test the veracity of a defendant or alternate suspect. In the words of Prosecutor 20, "I routinely suggest polygraphs." Speaking of defense attorney reservations, he added, "Not everyone is willing to submit a defendant to a polygraph. But I'm always interested." Prosecutor 9 explained that if a defendant passed the polygraph, he would invite them to file a motion for a new trial; however, he said that most of the time defendants did not want to take the polygraph, or else they took it and failed. CIU Prosecutor 6 suggested that she would like to submit a defendant to a polygraph to corroborate recantation evidence.

While most prosecutor respondents simply did not mention polygraphs, one CIU Prosecutor explicitly rejected them. His remarks highlight the limitations of polygraph testing as a tool of postconviction reinvestigation:

We don't ask people to take them, we don't rely upon them, and I think they're kind of bullshit. So the fact that somebody passed one doesn't mean anything to me, and that they failed

¹⁰⁰ Prosecutor 9: "I think how I would try and do it, is you look and see what was the evidence? Was it thin and is there a possibility that the guy may not be guilty of what he's in jail for, and if so, if there's something you can test that will answer that question."

¹⁰¹ See Yaroshefsky, *supra* note 42, at 354; Gould & Leo, *supra* note 26, at 336–37.

¹⁰² See *United States v. Scheffer*, 523 U.S. 303, 312 (1998) ("Individual jurisdictions therefore may reasonably reach differing conclusions as to whether polygraph evidence should be admitted."); Jon N. Banashek & J. Keith Collins, *Polygraph Examinations: Admissibility and Privilege Issues*, 31 COLO. LAW. 69, 69 (2002); Stephanie M. Williams, *Evidence-Polygraph Test Results Inadmissible at Criminal Trials*, 24 SUFFOLK U.L. REV. 279, 279 (1990); U.S. Dep't of Justice, *Polygraphs—Department Policy*, JUST. MANUAL § 9-13.300 (Jan. 2020), <https://www.justice.gov/jm/jm-9-13000-obtaining-evidence#9-13.300> [<https://perma.cc/F5UH-QLFY>] ("The Department [of Justice] opposes all attempts by defense counsel to admit polygraph evidence or to have an examiner appointed by the court to conduct a polygraph test. Government attorneys should refrain from seeking the admission of favorable examinations that may have been conducted during the investigatory stage . . .").

one doesn't mean a lot, either Like, if somebody said, "Hey, look, I took a polygraph, I passed it, therefore I'm not guilty," we would never consider that valid. But we also don't consider it the other way. We wouldn't say, "You failed it, therefore it's guilty."¹⁰³

Instead of relying upon polygraph evidence, CIU Prosecutor 16 described repeated interviews with a recanting victim witness as well as further reinvestigation. Ultimately, the CIU came to the conclusion that the recantation was valid, and the case was dismissed without the benefit of forensic evidence.

D. Responding to Requests for Postconviction DNA Testing

Fourteen prosecutors reported receiving postconviction DNA testing requests, and of those, six described fighting or denying these requests in certain circumstances. These six prosecutors believed that defense attorneys requested postconviction DNA testing in cases that were unlikely to yield dispositive results. Recall that as DNA testing becomes more sensitive, it will also become less dispositive in certain applications.¹⁰⁴ A couple of prosecutors defaulted to agreeing to DNA testing anyway, while others indicated that they would oppose these requests. For example, Prosecutor 6 related the experience of having postconviction DNA testing conducted on a murder victim's panties even though there was no indication that the crime was sexual in nature or that the perpetrator had touched the panties. As she explained: "I know that the recommendation is just to agree to everything, but I'll tell you my experience with that. My experience with that is now having to go to court and explain why it doesn't matter."

Other prosecutors reported receiving "random requests" for DNA testing,¹⁰⁵ questioned whether "peripheral things" should be subjected to DNA testing,¹⁰⁶ and expressed concerns that DNA testing results would be used as a "wedge issue" for retrial.¹⁰⁷ As Prosecutor 9 asked, "Are we going to test every cigarette butt found at the crime scene?" Prosecutors further cautioned that speculative

¹⁰³ CIU Prosecutor 16.

¹⁰⁴ See Findley, *supra* note 13, at 186.

¹⁰⁵ Prosecutor 21.

¹⁰⁶ Prosecutor 18.

¹⁰⁷ Prosecutor 17.

DNA testing could be used to falsely implicate an alternative suspect.¹⁰⁸

The willingness of four prosecutors to agree to speculative DNA testing provides a counter perspective. CIU Prosecutor 27 explained, “It’s not necessarily that DNA or testing is going to lead to the real killer or exculpatory/inculpatory evidence; it’s more it’s just a tool or resource to continue the investigation.” As DNA technology advances, postconviction DNA testing may be employed not just as a smoking gun to prove innocence but also as an additional tool of reinvestigation.¹⁰⁹ For an example of how DNA testing might be used as a “resource to continue the investigation,” CIU Prosecutor 33 described how her CIU investigated DNA testing results by interviewing DNA forensic experts and victim’s family members to gain a clearer understanding of the exculpatory value of the results. Therefore, some prosecutors expressed willingness to probe the dispositive nature of DNA after results were conducted and could be reinvestigated further.

In response to Prosecutor 9’s rhetorical question about testing every cigarette butt found at the crime scene, CIU Prosecutor 27 answered that yes, “we do that.” She acknowledged that “we do some ridiculous testing,” but explained that the DNA may lead to a new witness in the case, if not to an alternative suspect.

E. Reviewing Flawed Forensic Cases

Five CIU prosecutors also spoke of reviewing old cases involving faulty forensic testimony and/or outdated or discredited forensic methods, including bite mark analysis, DNA mixture interpretation, toxicology reports, hair microscopy and more.¹¹⁰ These prosecutors described doing the work in a systematic way. Prosecutors outside the context of CIUs did not mention these types of large-scale forensic reviews and indeed, they may not have had the resources to devote to them.

¹⁰⁸ CIU Prosecutor 27 related the experience of having a CODIS hit identify an individual that would have been only five years old at the time of the crime. She sighed, “They aren’t the real killer . . . because they were in kindergarten.”

¹⁰⁹ See Yaroshefsky, *supra* note 42, at 354; Gould & Leo, *supra* note 26, at 336–37.

¹¹⁰ See, e.g., Zurizadai Balmakund, *The Realities of Neurolaw: A Composition of Data & Research*, 9 U. ST. THOMAS J.L. & PUB. POL’Y 189, 204 (2015); M. Chris Fabricant & Tucker Carrington, *The Shifted Paradigm: Forensic Science’s Overdue Evolution from Magic to Law*, 4 VA. J. CRIM. L. 1, 91 (2016); Lauren McLane, *Confronting the Twenty-First-Century Marian Examination*, 82 ALB. L. REV. 949, 973 (2019); Mark Page et al., *Expert Interpretation of Bitemark Injuries—A Contemporary Qualitative Study*, 58 J. FORENSIC SCI. 664, 671 (2013).

Nevertheless, one non-CIU prosecutor stands out for having conducted an extensive non-DNA forensic reinvestigation in light of new scientific developments that challenged the original forensic interpretation in the case. In this reinvestigation, which ultimately led to dismissal, Prosecutor 23's experience is instructive. He discussed how he initially struggled to find a neutral, independent expert to review the evidence for the case, not the lab who had originally analyzed the case and not a defense expert either. He ultimately identified a "well-regarded expert in a private lab" who was "a huge help in educating us" about the forensic science and how it had changed over the years. When asked for his advice for other prosecutors, Prosecutor 23 responded,

Now there's always going to be advances in technology and science in which we look back . . . [because] we know that what they thought was accurate at the time was not. And I assume that's going to continue to happen throughout history as we advance, right? But the advice is just to look at it yourself. And continue to advocate for reform that allows us to get it right the first time.

Prosecutor 23 framed technological and scientific advancements as an ongoing, natural progression. Rather than identifying some historical moment (e.g., the discovery of DNA), as the end point of progress, he expressed the ongoing need to learn from new scientific developments and to apply them to prosecutorial decision making. He described needing to become a "quasi-expert" in the science in order to be able to make an informed decision about the case.

In contrast, Prosecutor 19 described a case involving updated interpretation of forensic evidence in an arson case as an example of an innocence claim that was denied by his office. As he explained, "It was our position that they didn't have a sufficient foundation or basis." He questioned whether a new fire examiner could make an evaluation based on old photographs of the crime scene. This stance could mean categorically rejecting arson cases for review since the charred remains of the scene are not likely to have been preserved years later. Instead, fire examiners conduct controlled experiments and study actual fires to determine if the so-called "arson indicators" used as evidence in past convictions can also occur in accidental fires.¹¹¹ Recall also that Prosecutor 19 suggested a higher standard

¹¹¹ Findley, *supra* note 13, at 200.

for innocence review, one that relied upon identification of the real perpetrator to result in an exoneration. In a wrongful arson conviction, there would be no real perpetrator if the fire was accidental.

IV. DISCUSSION AND CONCLUSION

This qualitative research study develops an emerging portrait of progressive prosecution in the postconviction stage. It reveals some of the challenges that prosecutors will face in the years to come as they work to fulfill their commitment to correcting wrongful convictions. Prosecutor interviewees were willing to not only assist with an exoneration case, but also to be interviewed at length about it. Therefore, they represent the vanguard of postconviction innocence review. Yet there is still variation in their approaches and points of disagreement and tension in making difficult postconviction decisions.

The most influential decision concerned the standards of review and dismissal for innocence claims, which also determined the types of new evidence that would be considered worthy of pursuing. Generally, prosecutor respondents preferred DNA testing, or at least some type of forensic testing, over sources of non-forensic evidence such as recantations and new witnesses. The disagreements arose over whether and how prosecutors would also pursue grey-area cases. This comparison between black-and-white cases and grey-area cases was a recurrent theme. Some prosecutors juxtaposed postconviction DNA evidence with recantation evidence. Their concern that recantations are likely to be unreliable, or worse, a result of witnesses being coerced or threatened into changing their testimony is justified. Nevertheless, recantation evidence has contributed to hundreds of exonerations,¹¹² including several assisted by prosecutor interviewees in this study. This question of how to respond to recantation evidence should become increasingly relevant for prosecutors in light of mounting evidence that perjury or false accusations is the greatest contributing factor of known wrongful convictions.¹¹³

¹¹² See Warden, *supra* note 15, at 106 (finding that 383 of the first 1,319 cases in the National Registry of Exonerations database involved post-conviction recantations by prosecution witnesses).

¹¹³ See GROSS & GROSS, *supra* note 15, at 8; Warden, *supra* note 15, at 106 (“One lesson of the DNA forensic age is that recantations of trial testimony by prosecution witnesses deserve to be taken seriously, notwithstanding time-honored dicta to the contrary.”).

Prosecutor respondents also expressed concerns about frivolous requests for DNA testing. Some described fielding “random” requests for DNA testing that they believed would not yield dispositive results. Agreeing to test everything, as a rule, could be expensive and impractical.¹¹⁴ Defense attorneys, and petitioners themselves, might request DNA testing irrationally—even when it is not in their own best interest. However, prosecutors’ assumptions about the materiality of such testing might also color their responses.¹¹⁵ For example, some prosecutor respondents regularly conducted DNA testing as part of a larger reinvestigation, while others questioned the value of testing certain items (cigarette butts, beer bottles) that they assumed to be immaterial to the crime.¹¹⁶ To help resolve these issues, prosecutors could consult with forensic experts before agreeing to testing in some cases to better assess its probative value,¹¹⁷ and/or to better understand the DNA results after testing has been conducted. District attorneys’ offices might also develop policies regarding testing and evaluating postconviction forensic evidence: when to agree to DNA testing, when to consult forensic experts, and when to review cases featuring new scientific developments.

Prosecutor respondents also disagreed about how to handle innocence claims involving new forensic evidence, such as when forensic testimony in discredited disciplines is subject to review. In some of these cases, particularly convictions based on shaken baby syndrome and arson, the forensic evidence is paramount to the question of innocence.¹¹⁸ Therefore, deconstructing the forensic evidence of guilt completely undermines the conviction—but it doesn’t necessarily provide affirmative evidence of innocence. Referring to these types of cases, Keith Findley writes: “[T]he next

¹¹⁴ See Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 1013 (2012).

¹¹⁵ See Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 341 (2016).

¹¹⁶ See, e.g., *Michael Morton*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3834> [<https://perma.cc/YA2M-EDV8>]. A classic example of this is the case of Michael Morton who was eventually exonerated when DNA testing was conducted on a bloody bandana found 100 yards from the crime scene. After five years of the prosecutors opposing this testing, a Texas court ordered it. The bandana had been dropped by the perpetrator, Mark Norwood, and contained the blood of the victim on it. Morton was exonerated in 2011. See *id.*

¹¹⁷ See Hollway, *supra* note 5, at 56. The Quattrone Center report mentions this practice of one CRU participating in their study: “[A]t least one CRU has a process in place that allows its investigators to discuss the benefits of various tests with an independent (i.e., external) forensic expert. If the expert suggests that testing would be valuable, then the CRU approves the test.” *Id.*

¹¹⁸ See Findley, *supra* note 13, at 189.

generation of innocence cases should embrace a broader definition of innocence, one that recognizes innocence where the bases for prosecution have been undermined, but ground truth is fundamentally ambiguous or inaccessible.”¹¹⁹ Just as prosecutors once denied requests for postconviction DNA testing, they may now resist innocence claims that challenge outdated forensic methods.¹²⁰ On the other hand, one prosecutor respondent in this sample spoke of assisting in just such a case. Instrumental to his process was locating a neutral expert to review the evidence. Based on his example, prosecutors and defense attorneys might anticipate coordinating a cooperative effort to locate a shared, external forensic expert.

At the same time, some prosecutor respondents searched too broadly for “something to test,” perhaps as an unanticipated byproduct of the DNA revolution.¹²¹ Prosecutors inclined to evaluate innocence through forensic methods push for testing of even non-forensic evidence—such as recantations or a defendant’s assertion of their innocence—through the use of polygraphs. Polygraph evidence continues to be inadmissible in most courts.¹²² If prosecutors want to be considered progressive, they should not rely on outdated methods.

Finally, reviewing a broader variety of claims and agreeing to relief in cases that fall short of the “clear and convincing evidence of innocence” threshold may result in prosecutors expressing less confidence in the exonerated defendant’s innocence. To this point, only two prosecutor respondents asserted their personal belief in the defendant’s innocence. At first glance, this is somewhat remarkable from a sample of prosecutors who assisted with exoneration cases. Prosecutors who profess the exonerated defendant’s innocence to the press or, even better, to the governor’s office, provide defendants with a great advantage post-exoneration.¹²³ Yet, the prosecutors’ position on actual innocence will necessarily reflect the strength of the exculpatory evidence leading to the dismissal. Whether a prosecutor

¹¹⁹ *Id.* at 187 (referring to cases featuring new scientific developments, specifically shaken baby syndrome and arson convictions).

¹²⁰ See Orenstein, *supra* note 70, at 1158 (“The institutional resistance exhibited by some prosecutors and judges in the DNA exonerations, where even clear-cut evidence of wrongful conviction was denied or explained away, predicts how many of these actors will respond to challenges based on changed science in the fields of bite marks, microscopic hair analysis, and other areas where the science has developed to discredit previous expert testimony.”).

¹²¹ See Erin Murphy, *A Tale of Two Sciences*, 110 MICH. L. REV. 909, 909 (2012).

¹²² See Adam B. Shniderman, *You Can’t Handle the Truth: Lies, Damn Lies, and the Exclusion of Polygraph Evidence*, 22 ALB. L.J. SCI. & TECH. 433, 442 (2012).

¹²³ See Elizabeth S. Vartkessian & Jared P. Tyler, *Legal and Social Exoneration: The Consequences of Michael Toney’s Wrongful Conviction*, 75 ALB. L. REV. 1467, 1485, 1488 (2012).

quietly dismisses a case in the interests of justice (due to a lack of any remaining evidence of guilt) or publicly recommends exoneration and declares the defendant's innocence, can have more to do with the case than with the prosecutor. The latter scenario differs mainly in its degree of newsworthiness. To say this does not absolve prosecutors of ever acknowledging the actual innocence of the defendants who meet that higher standard of clear and convincing evidence.

One strategy for prosecutors who resist postconviction innocence review has been to offer the defendant a postconviction plea bargain, often in the form of an Alford Plea,¹²⁴ which allows defendants to maintain innocence while pleading guilty.¹²⁵ Such dispositions may allow prosecutors to hold on to a conviction even when the available evidence might not support it.

Prosecutors may not resort to such tactics if state statutes better supported their ability to provide relief. A dozen states still require defendants to meet a clear and convincing standard in order to receive postconviction relief under new evidence of innocence statutes.¹²⁶ Indeed, some prosecutor respondents expressed feeling constrained by their states' requirements. States allowing for postconviction relief only in response to clear and convincing evidence of innocence overlook the many ways that original evidence can be fundamentally undermined: through faulty forensic evidence, outdated forensic analyses, and belated discovery of official misconduct. Ultimately, this disconnect between statutory requirements and new evidence raised through postconviction innocence claims can limit what progressive prosecutors might accomplish, even in the context of conviction integrity units.

CIUs have taken a leading role in moving postconviction justice forward. They have an advantage in the resources that they can devote to systematic case review; only CIU prosecutors reported conducting such reviews. Whether in flawed forensics or police misconduct cases, prosecutors' offices have demonstrated how

¹²⁴ See *North Carolina v. Alford*, 400 U.S. 25, 28 (1970); Megan Rose, *What Does an Innocent Man Have to Do to Go Free? Plead Guilty*, PROPUBLICA (Sept. 7, 2017, 8:00 AM), <https://www.propublica.org/article/what-does-an-innocent-man-have-to-do-alford-plea-guilty> [<https://perma.cc/B8AU-5WUX>].

¹²⁵ See Rose, *supra* note 124 (detailing the *ProPublica* and *Atlantic* investigation of cases in Baltimore City and County in which defendants with innocence claims accepted postconviction plea deals).

¹²⁶ See Scheck, *Conviction Integrity Units Revisited*, *supra* note 5, at 733.

necessary these comprehensive case reviews can be for ensuring conviction integrity.¹²⁷

Still, prosecutors working outside CIUs are showing innovation as well. Many of the progressive practices described herein—consulting with forensic experts, adopting an interests of justice mindset, conducting active reinvestigations—could be implemented by prosecutors working in a variety of contexts and in jurisdictions of various sizes.

This research study has established some of the standards and practices that distinguish progressive from more traditional prosecutorial responses in the postconviction stage. It has also broadened the sample of existing research by including prosecutors working outside of CIUs. Still, the question remains: How would a more representative sample of prosecutors approach postconviction innocence review? Future research efforts might therefore survey prosecutors' offices more broadly, including those that have taken little initiative to uncover and correct wrongful convictions. Such research can help better predict the parameters of prosecutors' continuing role in postconviction innocence review.¹²⁸

¹²⁷ See Chandler, *supra* note 41 (discussing the forensic case reviews occurring in the Texas units); Jason Meisner, *State's Attorney to Dismiss 18 Convictions Tied to Former Chicago Police Sergeant*, CHI. TRIB. (Nov. 17, 2017, 7:16 AM), <http://www.chicagotribune.com/news/local/breaking/ct-metronald-watts-cases-20171115-story.html> (reporting on the Cook County State's Attorney's Office CIU mass exoneration); Frances Robles & N.R. Kleinfield, *Review of 50 Brooklyn Murder Cases Ordered*, N.Y. TIMES (May 11, 2013), <https://www.nytimes.com/2013/05/12/nyregion/doubts-about-detective-haunt-50-murder-cases.html> [<https://perma.cc/Y2BX-2ATJ>] (reporting on the Kings County CIU case review).

¹²⁸ Among other considerations highly relevant but beyond the scope of this article include how to respond to postconviction due process appellate claims that allege innocence, see Levenson *supra* note 96, at 555, how to respond to clemency and pardon requests, see Rachel E. Barkow & Mark Osler, *Restructuring Clemency: The Cost of Ignoring Clemency and a Plan for Renewal*, 82 U. CHI. L. REV. 1, 4 (2015), how to handle postconviction allegations of prosecutorial misconduct, see David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 205 (2011), what are best practices for postconviction discovery, see Levenson *supra* note 96, at 547, how and when to communicate with victims in the postconviction stage, and more (see *Post-Conviction Resource Guide*, LEWIS & CLARK L. SCH., https://law.lclark.edu/centers/national_crime_victim_law_institute/pc-resource-guide-communicating-educating-about-rights/ [<https://perma.cc/LQ3E-9XSR>], and more).