A SECOND CHANCE AT JUSTICE: WHY STATES SHOULD ADOPT ABA MODEL RULES OF PROFESSIONAL CONDUCT 3.8(g) AND (h)

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Prosecutors, defense attorneys, jurists, and citizens alike cringe at the thought of their fellow citizens serving criminal sentences for crimes that they did not commit. Unfortunately, evidence sometimes emerges after conviction that would exonerate the defendant. As a result, in February 2008, the American Bar Association adopted two amendments, (g) and (h), to the existing Model Rule 3.8, which governs the conduct of prosecutors. The two amendments place an affirmative duty on prosecutors to investigate "new, credible and material evidence." If the evidence creates a "reasonable likelihood" that the convicted defendant did not commit the crime, the prosecutor must "seek to remedy the conviction."

Despite the American Bar Association's recommendation, only Wisconsin has adopted the amendments to Rule 3.8. This Comment argues that states should adopt the amendments as an extension of prosecutorial duties already stipulated in the Rules of Professional Conduct.

Currently, due to the lack of an ethical requirement under most states' rules of professional conduct, prosecutors act out of their own benevolence rather than an ethical obligation when reopening questionably decided cases. Implementing Model Rules 3.8(g) and (h) would offer recourse for defendants who are currently wrongfully convicted and would require prosecutors to act in seeking justice for such defendants. Hopefully, this Comment will contribute to the ongoing debate over the professional and ethical role of prosecutors in exonerating the wrongfully convicted. While Model Rules 3.8 (g) and (h) will not resolve all wrongful

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convictions, the amendments will require prosecutors to provide a second chance for justice.

INTRODUCTION

David Bryson's nightmare began in September 1982 when he went to a local hospital in Oklahoma to receive treatment for a wound to his penis.[1] Two weeks later the wound came to the attention of law enforcement, and David was arrested for rape.[2] An Oklahoma police chemist testified at trial that the hairs found on or near the victim matched David's hair.[3] Despite his pleas of innocence, the testimony of an alibi, and an explanation that his injury was from oral sex with his girlfriend,[4] David was convicted of first-degree rape, kidnapping, and sodomy and was sentenced to eighty-five years in prison.[5] From prison, David continued to challenge his wrongful conviction, and after being incarcerated for nineteen years, DNA evidence exonerated him.[6]

It may seem ironic that science exonerated David after science helped convict him. But the science behind David's original conviction turned out to be "bogus."[7] The police chemist testified that "each person's hair was unique" and that the unique characteristics of the hair found at the scene matched David's hair.[8] Subsequent investigations revealed that, instead of conducting the microscopic hair comparisons objectively, the police chemist strove to provide results that would help detectives solve the case and obtain a conviction.[9] This abhorrent misconduct, which unfortunately impacted numerous cases,[10]

1. Bryson v. Gonzales, 534 F.3d 1282, 1283 (10th Cir. 2008).
2. Bryson v. State, 711 P.2d 932, 934 (Okla. Crim. App. 1985).
3. Bryson v. Gonzales, 534 F.3d at 1283.
4. Bryson v. State, 711 P.2d at 934.
5. Bryson v. Gonzales, 534 F.3d at 1283.
6. *Id.*
7. *Id.*
8. *Id.*
9. MARK FUHRMAN, DEATH AND JUSTICE 90 (2004). *See generally* Pierce v. Gilchrist, 359 F.3d 1279, 1283–84 (10th Cir. 2004) (noting that the police chemist had been reprimanded by various professional associations and the Oklahoma Court of Criminal Appeals for similar misconduct in several cases).
10. *See Pierce*, 359 F.3d 1283–84; *see also* Associated Press, *Wrongly Convicted Man to Receive $4 Million Settlement*, BARTLESVILLE EXAMINER-ENTERPRISE, Jan. 24, 2007, http://www.examiner-enterprise.com/articles/2007/01/24/news/state/news864.prt. Jeffrey Todd Pierce was wrongly convicted of rape due in part to testimony from the same police chemist who testified at David Bryson's trial. *Id.* He served fifteen years of a sixty-five-year prison sentence before being exonerated by DNA evidence. *Id.*

sliced twenty-one years out of the heart of David's life that he will never get back.[11]

Unfortunately, David's story is not unique. Hundreds of innocent individuals have served time in prison for crimes they did not commit.[12] While the circumstances leading to wrongful convictions are not always as egregious as those in David's case, fallibilities throughout the legal system can lead to similarly unjust outcomes. Prosecution witnesses could misidentify their alleged assailants, inaccurate forensic evidence could incriminate the wrong person, or a witness could have an ulterior motive and lie. If the prosecutor learns of information that casts doubt on the reliability of evidence or testimony before or during the trial, the prosecutor's legal and ethical responsibilities are unquestionable—the prosecutor must disclose the information to the defense.[13] However, until recently, upon conclusion of the judicial proceedings, a prosecutor possessing newly acquired exculpatory evidence was not ethically required to disclose that evidence or reopen the case.

In February 2008, the American Bar Association ("ABA") amended Model Rules of Professional Conduct ("Model Rules") Rule 3.8 to add two new subsections, 3.8(g) and (h), which impose new ethical duties on a prosecutor who learns of evidence that casts doubt on a conviction. First, when a prosecutor "knows of new, credible and material evidence creating a reasonable likelihood" that a convicted defendant is innocent of the crime, the prosecutor must "promptly disclose" such evidence to the court.[14] Furthermore, if the conviction was in the

11. *See* Scott Cooper, *Former DA Bob Macy, Ex-Forensic Chemist Joyce Gilchrist Settle Case*, OKLA. GAZETTE, June 17, 2009, http://www.okgazette.com/p/12776/a/4138/Default.aspx.

12. Innocence Project, Facts on Post-Conviction DNA Exonerations, http://www.innocenceproject.org/Content/351.php (last visited Aug. 19, 2009). *See generally* GORDON THOMAS HONEYWELL GOV'T AFFAIRS, JANUARY 2008 DNA RESOURCE REPORT (2008), http://www.dnaresource.com/documents/2008_1.pdf [hereinafter DNA RESOURCE REPORT]. A man in Dallas, Texas was exonerated after serving more than twenty-six years in prison for raping a woman. *Id.* at 3. In Philadelphia, Pennsylvania, an inmate on death row spent twenty-three years in prison before he was cleared of all murder and rape charges. *Id.* at 5. In Terre Haute, Indiana, DNA evidence exonerated one man after serving nearly twenty-five years in prison for murder. *Id.* at 9. In Fort Collins, Colorado, a man was released after spending nearly a decade in prison after being wrongfully convicted of murder. *Id.*

13. Niki Kuckes, *Prosecutors' New Ethical Duty Relating to Wrongful Convictions*, 57 R.I. B.J. 37, 37 (2008); *see also* FED. R. CRIM. P. 16(c); Brady v. Maryland, 373 U.S. 83, 87 (1963); MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2008). For a more detailed discussion of these legal and ethical obligations, see *infra* Part I.

14. MODEL RULES OF PROF'L CONDUCT R. 3.8(g) (2008).

prosecutor's jurisdiction, the prosecutor must both inform the defendant and conduct further investigation.[15] If the conviction was outside the prosecutor's jurisdiction, the prosecutor must notify the court or another appropriate authority, such as the chief prosecutor, in the jurisdiction that obtained the conviction.[16]

Second, if the information consists of "clear and convincing evidence" establishing that a convicted defendant in the prosecutor's jurisdiction did not commit the offense, the prosecutor must "seek to remedy the conviction."[17] Now that the ABA has made the landmark decision to incorporate an ethical duty to remedy wrongful convictions in the Model Rules, it is critical that states adopt amendments 3.8(g) and (h). Without state action, the rules are not enforceable ethical obligations that subject violators to disciplinary sanctions. While Model Rules 3.8(g) and (h) will not resolve all wrongful convictions, the amendments will provide many innocent defendants with a second chance at justice.

In Part I, this Comment discusses the current ethical and legal obligations for prosecutors when new, credible, and material evidence creates a reasonable likelihood that a defendant did not commit an offense. Part II details the development of Model Rules 3.8(g) and (h) and the new responsibilities for prosecutors. Part III argues that states should adopt the new Model Rules. Part IV addresses concerns that prosecutors have regarding the new Model Rules. Ultimately, this Comment argues that states should adopt the amendments to Rule 3.8 because rectifying wrongful convictions is an important societal interest. Objections to the amendments to Rule 3.8 are not compelling enough to overcome this important interest.

I. CURRENT DUTIES OF PROSECUTORS

This Part identifies legal and ethical duties already incumbent upon prosecutors. Section B of Part III demonstrates the consistency between existing prosecutorial duties and the duties imposed in Rules 3.8(g) and (h).

Currently, prosecutorial discretion regarding exculpatory evidence is limited by both constitutional and ethical obligations. A prosecutor's constitutional duty to ensure a fair trial

15. *Id.*
16. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 7 (2008).
17. MODEL RULES OF PROF'L CONDUCT R. 3.8(h) (2008).

and to disclose exculpatory evidence to the defense is well established. In *Brady v. Maryland*, the United States Supreme Court held that under the Fourteenth Amendment's due process clause, prosecutors have a constitutional duty to disclose evidence favorable to an accused.[18] Prosecutors are legally required to timely disclose exculpatory evidence when such evidence is material to guilt, innocence, or punishment, "irrespective of the good faith or bad faith of the prosecution."[19] Evidence that must automatically be given to the defense includes confessions made by persons other than the defendant, inconsistent statements given by key witnesses, witnesses' prior acts of dishonesty, and results from scientific tests that incriminate another person.[20]

Because assessing the materiality of evidence before trial can be challenging, prosecutors typically evaluate materiality in a broad sense and err on the side of divulging exculpatory evidence.[21] Material evidence must be revealed whether or not the defendant requests exculpatory evidence[22] and must be revealed in a timely manner that will enable the defendant to effectively use the evidence at trial.[23] The Supreme Court in *Brady* stated that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[24]

It is unclear, however, whether the holding from *Brady* extends to material evidence discovered after the trial that strongly suggests the innocence of a convicted defendant.[25]

18. 373 U.S. at 87; *see also* Giglio v. United States, 405 U.S. 150, 154 (1972); Smith v. Roberts, 115 F.3d 818, 820 (10th Cir. 1997) ("[T]he [prosecution's] duty to disclose is ongoing and extends to all stages of the judicial process.").

19. *Brady*, 373 U.S. at 87; *see also* United States v. Ruiz, 536 U.S. 622, 628 (2002) (stating that the Constitution's "fair trial guarantee" secures the defendant's right to receive exculpatory evidence); *Giglio*, 405 U.S. at 154.

20. Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 703 (2006); *see also* United States v. Agurs, 427 U.S. 97, 110 (1976) (establishing that no request from the defense for evidence is required).

21. Kyles v. Whitley, 514 U.S. 419, 439 (1995).

22. *Id.* at 432–33.

23. United States v. Farley, 2 F.3d 645, 654 (6th Cir. 1993); *see also* Weatherford v. Bursey, 429 U.S. 545, 559 (1997) (referencing the "prohibition against concealing evidence favorable to the accused").

24. *Brady*, 373 U.S. at 87.

25. *See* Harper v. Bohanan, No. 3:97-CV-80, 2006 WL 319029, at *12–14 (E.D. Tenn. Feb. 8, 2006) (acknowledging that defendants may have a due process right to disclosure of exculpatory evidence discovered postconviction, but finding that it was not "clearly established" in 1986).

Typically, the *Brady* rule is seen as mandating disclosure only during the trial process.[26] As the Third Circuit noted, "[the defendant] has pointed to no constitutional duty to disclose potentially exculpatory evidence to a convicted criminal after the criminal proceedings have concluded and we decline to conclude that such a duty exists."[27]

In addition to their constitutional duties, prosecutors also have ethical obligations that impact their conduct. The Model Rules prescribe baseline standards of legal ethics and professional responsibility for lawyers in the United States.[28] The Model Rules are merely recommendations and are not binding.[29] However, they have been adopted, in whole or in part, as the professional standards of conduct by the judiciaries or integrated bar associations of forty-nine states.[30] Rules adopted in a particular state are legally enforceable against the lawyers licensed in that state, and a violation of a rule can result in disciplinary action by the bar.[31]

Several of the Model Rules reinforce the Fourteenth Amendment and bind prosecutors to disclose exculpatory evidence. In particular, Model Rule 3.8 defines the prosecutor's special responsibilities and makes the duty to disclose exculpatory evidence an ethical obligation: "[t]he prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused."[32] Further, under Model Rule 3.8(a), a prosecutor is legally bound to dismiss the charges

26. *See* Peter A. Joy & Kevin C. McMunigal, *New Rules for Scientific and Exculpatory Evidence?*, CRIM. JUST., Spring 2008, at 44, 46.

27. Gibson v. Superintendent of N.J. Dep't of Law & Pub. Safety, 411 F.3d 427, 444 (3d Cir. 2005). *But see* Warney v. City of Rochester, 536 F. Supp. 2d 285, 295 (W.D.N.Y. 2008) (stating that "the fundamental principle established in *Brady* should not be ignored completely because of the belated availability of exculpatory evidence").

28. MODEL RULES OF PROF'L CONDUCT PREFACE (2008).

29. *See* ABA Model Rules of Professional Conduct, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Aug. 21, 2009).

30. *See id.*

31. For example, the Colorado Rules of Professional Conduct govern the conduct of all attorneys licensed by the Colorado Supreme Court. COLO. R. CIV. P. 251.1. A violation of the Colorado Rules of Professional Conduct constitutes professional misconduct, COLO. R. PROF'L CONDUCT 8.4(a), and is grounds for discipline, COLO. R. CIV. P. 251.5. Discipline may include suspension, censure, or admonition. COLO. R. CIV. P. 251.6.

32. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2008).

if the exculpatory evidence does not simply cast doubt on the defendant's guilt but actually substantiates his innocence.[33]

Other Model Rules and their accompanying comments support full disclosure by lawyers. For example, Comment 14 to Model Rule 3.3, which requires candor toward the court, notes that the lawyer must reveal all facts he or she "reasonably believes are necessary to an informed decision."[34] Knowingly disregarding the obligations codified in the Model Rules could constitute a violation of Model Rule 8.4, which governs professional misconduct.[35]

II. AMENDMENTS TO ABA MODEL RULE OF PROFESSIONAL CONDUCT 3.8

Rules 3.8(g) and (h), Special Responsibilities of a Prosecutor, state:

> (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
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> (1) promptly disclose that evidence to an appropriate court or authority, and
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> (2) if the conviction was obtained in the prosecutor's jurisdiction,
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> (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
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> (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

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33. MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2008) ("The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . . .").

34. MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 14 (2008).

35. *See* MODEL RULES OF PROF'L CONDUCT R. 8.4 (2008) ("It is professional misconduct for a lawyer to: (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.").

> (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.[36]

The ABA adopted Model Rules 3.8(g) and (h) against the backdrop of a fallible criminal justice process. This Part will explore the development and impact of these rules. First, the ABA developed the Model Rules by carefully incorporating feedback from attorneys practicing in a wide variety of areas. Second, in light of the collaboration of prosecutors, defense attorneys, and other lawyers, the ABA deemed the new responsibilities placed on prosecutors to be not unduly burdensome. Third, while states are currently evaluating whether or not to adopt the amendments, only one state has incorporated the amendments into its existing rules of professional conduct.

A. Development of Model Rules 3.8(g) and (h)

The path to successfully amending Model Rule 3.8 unconventionally originated at the state bar level instead of from the ABA itself. Typically, the ABA's Standing Committee on Ethics and Professional Responsibility develops new model ethics rules or amendments to existing rules and then individual states decide whether to implement the model rules in their own code of professional conduct.[37] In contrast to this top-down approach, Rules 3.8(g) and (h) originated at the state and local levels.[38] New York was the first state to address the possibility of amending its professional rules of conduct to impose additional postconviction duties on prosecutors.[39] Three factors contributed to New York's review of prosecutors' special obligations: (1) the Ethics 2000 review;[40] (2) the use of DNA evidence in exonerations; and (3) encouragement from the Innocence Project.[41]

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36. MODEL RULES OF PROF'L CONDUCT R. 3.8(g)–(h) (2008).

37. Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427, 432 (2009).

38. *Id.*

39. *See* Bruce A. Green & Ellen Yaroshefsky, N.Y. Criminal Bar Ass'n, Proposed Model Rules of Professional Conduct, Rule 3.8(g) and (h) (Nov. 7, 2006), at 1–3, http://nycrimbar.org/Members/Newsletter/2006-2007/NYS-Bar Rules-Prosecutors.pdf.

40. Kuckes, *supra* note 37, at 456.

41. *Id.* at 458–59.

First, during the Ethics 2000 review, the ABA reviewed its entire collection of model ethics rules, evaluated what the states were doing with state ethical rules, and made necessary changes to clarify and refine the Model Rules to reflect the evolving legal practice.[42] Despite criticisms that Model Rule 3.8 was inadequate, the ABA succumbed to external pressure, including criticism from the United States Department of Justice, and decided not to make any changes to Model Rule 3.8.[43] Nevertheless, the Ethics 2000 process inspired states to revisit or update state legal ethics rules, including special rules for prosecutors.[44]

Second, news coverage highlighting the exoneration of innocent defendants based on DNA evidence similarly inspired New York to review prosecutors' special obligations.[45] Third, the Innocence Project's encouragement to reevaluate prosecutors' special obligations was the final push New York needed to consider amending the Model Rules. The Innocence Project was spearheading the movement to use developments in DNA testing to free those wrongfully convicted.[46] The Innocence Project's involvement also marks another reason why Model Rule 3.8 was not modified during Ethics 2000: no group was advocating for prosecutorial ethics reform.[47] Not a single lawyer or public interest group volunteered comments criticizing Model Rule 3.8 when the Ethics 2000 Commission held public hearings across the country about its ethics review.[48]

Fast-forward to 2005 when the Professional Responsibility Committee of the Association of the Bar of the City of New York detailed its interest in amending Model Rule 3.8.[49] The committee's report determined, " '[i]n light of the large number of cases in which defendants have been exonerated . . . it is appropriate to obligate prosecutors' offices to' . . . consider 'credi-

42. *Id.* at 429.

43. *Id.* at 429–30, 439. Model Rule 3.8 was criticized for being incomplete and inadequate because it failed to comprehensively address a prosecutor's ethical obligations when investigating crime and negotiating plea bargains. *Id.* at 430. Furthermore, Model Rule 3.8 did not set clear ethical limits to a prosecutor's broad discretion to file charges. *Id.*

44. *Id.* at 429.

45. *Id.* at 458.

46. *Id.*

47. *Id.* at 437–38.

48. *Id.* at 438.

49. Green & Yaroshefsky, *supra* note 39, at 1.

ble postconviction claims of innocence.' "[50] Persuaded by the report, the New York City Bar Association proposed a rule regarding the prosecutor's obligation to the wrongfully convicted.[51] The proposal then went to the Committee on Standards of Attorney Conduct ("Standards Committee"), which consisted of a diverse assembly of legal practitioners such as prosecutors and defense attorneys as well as academics with expertise in legal ethics.[52] The Standards Committee was charged with evaluating the New York Code of Professional Responsibility in the wake of Ethics 2000.[53] Agreeing with the premise of the New York City Bar Association proposal, the Standards Committee drafted Rules 3.8(g) and (h) and then solicited comments from state and federal prosecutors, district attorneys' organizations, defense organizations, and bar associations.[54]

While some prosecutorial and defense organizations recommended drafting changes, the underlying premise that prosecutors have an ethical obligation to act when presented with evidence suggesting an innocent individual had been convicted received universal support.[55] The Standards Committee considered the drafting suggestions and then conducted further discussions with representatives of more than thirty state bar associations, prosecutor organizations, and defense organizations.[56] At the end of the discussions, the New York State Bar's House of Delegates adopted the revised Rules 3.8(g) and (h) and the accompanying comments.[57]

The reforms undertaken by the Bar of the City of New York and the New York State Bar inspired the ABA's Criminal Justice Section to recommend the ABA implement the rules into the Model Rules.[58] The ABA was receptive to the proposed

50. *Id.* (quoting The Comm. on Prof'l Responsibility, *Proposed Prosecution Ethics Rules*, 61 THE REC. OF THE ASS'N OF THE B. OF THE CITY OF N.Y. 69, 73 (2006)).

51. *Id.*

52. N.Y. State Bar Ass'n, Committee on Standards of Attorney Conduct Roster, http://www.nysba.org/AM/Template.cfm?Section=Committee_Roster3&Template=/CustomSource/CommitteeRoster.cfm&CommitteeID=COMMITTEE/A16900 (last visited May 24, 2009).

53. Green & Yaroshefsky, *supra* note 39, at 1–2.

54. *Id.* at 2.

55. *Id.*

56. *Id.*

57. *Id.*

58. *See* STEPHEN SALTZBURG, AM. BAR ASS'N CRIMINAL JUSTICE SECTION, RECOMMENDATION 105B 3–4 (2008), http://www.abanet.org/leadership/2008/midyear/sum_of_rec_docs/hundredfiveb_105B_FINAL.doc [hereinafter SALTZBURG,

rules because of the "long-standing concern among prosecutors, defense counsel, judges, and academics about the risk that any criminal justice system, even working at its best, may produce wrongful convictions, and the importance of remedying such convictions in the face of important newly discovered evidence."[59] Advocates for Model Rules 3.8(g) and (h) within the ABA felt the amendments imposed a nominal burden on prosecutors and would leave the decision of whether the evidence satisfies the "new, credible, and material" standard to the most suitable people—prosecutors.[60]

The Department of Justice—an earlier opponent to amending Model Rule 3.8—supported the fundamental principles of the amendments but was concerned about the their application as written.[61] The Department of Justice, therefore, lobbied the ABA House of Delegates to delay approving the amendments.[62] Specifically, the Department of Justice was concerned about drafting deficiencies and a lack of guidance for prosecutors on how to implement the new rules.[63] The amendments' apparent odds with finality were also of concern.[64] In February 2008, after working with the Department of Justice and the National District Attorneys Association to dispel their concerns, the ABA House of Delegates approved the amendments to Model Rule 3.8.[65] The new provisions are the most significant amendments to Model Rule 3.8 since its initial adoption in 1969 as a part of the Model Code, the predecessor to the Model Rules.[66]

RECOMMENDATION 105B] (recommending the ABA House of Delegates amend Model Rule of Professional Conduct 3.8).

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

60. *Id.* at 14.

61. Am. Bar Ass'n, SOC/CPR Joint Committee on Ethics and Professionalism, Minutes of the Meeting, § II (Feb. 9, 2008), http://meetings.abanet.org/webupload/commupload/YY100900/newsletterpubs/feb2008minutes.pdf.

62. *Id.*

63. Saltzburg, *supra* note 59, at 13.

64. *Id.* at 15. These concerns, among others, will be considered in more detail. *See infra* Part IV.

65. Saltzburg, *supra* note 59, at 13; *see also* James Podgers, *Righting Wrongs*, A.B.A. J., Apr. 2008, at 32, 32, *available at* http://abajournal.com/magazine/righting_wrongs/.

66. Kuckes, *supra* note 37, at 431–32.

B. New Responsibilities for Prosecutors Under Model Rules 3.8(g) and (h)

While the new Model Rules create additional duties for prosecutors, those duties are consistent with the responsibilities discussed in Part I that prosecutors already shoulder. Under the new Model Rules 3.8(g) and (h), prosecutors have a duty (1) to disclose new, credible, and material evidence that creates a reasonable likelihood that a defendant did not commit an offense for which he or she was convicted; (2) to conduct an appropriate investigation; and (3) to take steps to remedy a miscarriage of justice upon becoming convinced that a miscarriage occurred.[67]

Although the amendments to Model Rule 3.8 create new duties, they do not explicitly delineate each step that a prosecutor must take after discovering new evidence that triggers these new duties. The comments to Model Rules 3.8(g) and (h) require the prosecutor to examine the evidence and undertake any necessary inquiry to determine if the evidence exculpates the defendant.[68] The scope of the inquiry will depend on the circumstances.[69] Also, not every claim of innocence requires the prosecutor to reopen the case. If the prosecutor decides, based upon "independent judgment, made in good faith," that the information is not credible and material, even if such judgment is erroneous, the prosecutor need not take any further action and will not be in violation of 3.8(g) or (h).[70] Only ethics charges supported by evidence that the prosecutor in bad faith disregarded substantial evidence of innocence may be brought against the prosecutor.[71]

If the prosecutor believes the new evidence is credible and material, the prosecutor must promptly disclose the evidence to the court.[72] Also, if the defendant is represented, the prosecutor must promptly disclose the evidence to the defendant's counsel unless directed otherwise by the court.[73] If the defendant is unrepresented and cannot afford to retain counsel, the prosecutor should suggest that the court appoint counsel for

67. MODEL RULES OF PROF'L CONDUCT R. 3.8(g)–(h) (2008).
68. *Id.* 3.8 cmt. 8.
69. *Id.*
70. *Id.* 3.8 cmt. 9.
71. *See id.*
72. *Id.* 3.8 cmt. 7.
73. *Id.*

postconviction proceedings.[74] Disclosure of the evidence to the defense may be deferred where it could prejudice the prosecutor's investigation into the matter.[75] The amendments to Model Rule 3.8 apply to all prosecutors, even if the prosecutor who receives the new and material evidence of innocence was not involved with the case.[76] If the evidence comes to the attention of a prosecutor in a different jurisdiction, the prosecutor is required to notify the office that obtained the conviction.[77]

Model Rules 3.8(g) and (h) consequently do not revolutionize ethical duties for prosecutors. Rather, the amendments parallel existing prosecutorial duties designed to prevent wrongful conviction of innocent defendants. Model Rules 3.8(g) and (h) simply extend those ethical obligations to postconviction and allow prosecutors flexibility as to whether and how to pursue the exoneration of convicted defendants.

C. Survey of the Trend Among States Regarding Adoption of the Model Rules

Since the ABA approval of Model Rules 3.8(g) and (h), only Wisconsin has adopted the amendments.[78] Not even New York, where the amendments originated, has incorporated Model Rules 3.8(g) and (h) into its professional rules of conduct.[79] The New York State Bar Association House of Delegates approved the proposed rules, but the New York courts opted not to modify New York's prosecutorial ethics rule.[80] After the ABA passed Model Rules 3.8(g) and (h), committees in other states began discussing whether to adopt the amendments.

In September 2008, the Rule 3.8 subcommittee for the Colorado Supreme Court Ethics Advisory Committee unanimously recommended that Colorado adopt a modified version of

74. *Id.* 3.8 cmt. 8.
75. *See id.* 3.8 cmt. 7.
76. *Id.*
77. *Id.*
78. *In re* Amendment of Supreme Court Rules Chapter 20, Rules of Prof'l Conduct for Att'ys, No. 08-24 (Wis. June 17, 2009), *available at* http://www.legalethicsforum.com/files/rule-3.8-as-adopted-by-wisconsin-effective-july-1-2009.pdf.
79. *See* N.Y. RULES OF PROF'L CONDUCT R. 3.8, *available at* http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConduct4109.pdf.
80. Kuckes, *supra* note 37, at 455.

Model Rules 3.8(g) and (h).[81] The recommendation now awaits approval from the Colorado Supreme Court before the amendments will be incorporated into the Colorado Rules of Professional Conduct.[82] The Louisiana State Bar Association Rules of Professional Conduct Committee is currently seeking comments on Model Rules 3.8(g) and (h) and plans on reviewing the rules at its upcoming meetings.[83] Conversely, the Minnesota State Bar Association Rules of Professional Conduct Committee voted in February 2009 not to consider the amendments.[84]

One potential explanation for the delay in states' adoption of the Rules 3.8(g) and (h) amendments is that every state reevaluated its ethics rules in the wake of Ethics 2000 and about a third of the states are still in the process of completing that review.[85] However, the Ethics 2000 process highlighted that the Model Rules generally are adopted by most states and are remarkably influential in state professional conduct rules.[86] To date, California is the only state that does not have professional conduct rules that follow the format of the Model Rules.[87]

III. WHY MODEL RULES 3.8(g) AND (h) ARE NEEDED

States should adopt Model Rules 3.8(g) and (h) for three principal reasons. First, wrongful convictions occur under the current system, and 3.8(g) and (h) would provide recourse for wrongfully convicted defendants who wish to challenge their

81. John R. Webb, *Final Report of Rule 3.8 Subcommittee*, *in* MATERIALS PROVIDED TO MEMBERS OF THE COLORADO SUPREME COURT STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT 30, 30 (2008), *available at* http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Rules_of_Professional_Conduct_Committee/Vol_10-Meeting_Materials_09-0220_to_09-0508.pdf. For further discussion of the recommendations from the Rule 3.8 Subcommittee for the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct, see *infra* Part IV.F.

82. Webb, *supra* note 81.

83. Louisiana State Bar Association, Comments Sought on New ABA Model Rules 3.8(g) and (h) (Mar. 11, 2009), http://www.lsba.org/2007NewsResources/newsresources.asp?NewsID=347.

84. Minnesota State Bar Association, MSBA Rules of Professional Conduct Committee Meeting Summary (Feb. 24, 2009), http://www.mnbar.org/committees/rules/minutes.asp.

85. Kuckes, *supra* note 37, at 443.

86. American Bar Association, Facts About Model Rules of Professional Conduct, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited May 24, 2009).

87. *Id.*

convictions with new evidence. Second, the proposed rules are consistent with the current codified duties of prosecutors. Finally, the amendments are necessary to maintain public confidence in the administration of justice.

A. Wrongful Convictions Are Prevalent Under the Current System

Wrongful convictions occur at an unacceptable rate under the current system and result from a variety of circumstances. While it is difficult to determine exactly how many innocent defendants are currently incarcerated,[88] increasing numbers of exonerations suggest that wrongful convictions are a serious problem.[89] The Innocence Project nationwide has identified 241 known postconviction DNA exonerations.[90] A study of exonerations in the United States from 1989 through 2003 revealed an additional 196 exonerations that did not involve DNA evidence.[91] Furthermore, "[o]f the 6,000 people sent to death row since 1973, eighty-four of them have been exonerated."[92]

The four leading causes of wrongful convictions are (1) misidentifications, (2) non-DNA forensic analysis of physical evidence, (3) testimony of jailhouse informants, and (4) false "confessions."[93] Wrongful convictions can occur when the police, prosecutors, and juries make mistakes by depending too heavily on potentially problematic evidence that later proves faulty, such as the testimony of jailhouse informants and eye-

88. *See* Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little and New Data on Capital Cases* 2 (Univ. of Mich. Law Sch. Pub. Law, Working Paper No. 93, 2007), *available at* http://ssrn.com/abstract=996629 (noting that it is nearly impossible to gather reliable data on the frequency of false convictions).

89. *See generally* Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence*, 77 FORDHAM L. REV. 2893, 2950–51 (2009) ("Given the now undisputed fact that factually innocent people are convicted in our justice system, the risk of 'convicting the innocent' can no longer be dismissed as a remote possibility or theoretical notion.").

90. Innocence Project, *supra* note 12.

91. Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005).

92. Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 312 (2001).

93. Jones, *supra* note 89, at 2928.

witnesses.[94] According to Brandon Garrett, a University of Virginia law professor, nearly 80 percent of the known postconviction DNA exonerations were convicted principally on eyewitness testimony.[95] For example, in Baton Rouge, Louisiana, Rickie Johnson was exonerated after serving twenty-six years in prison for rape.[96] The victim had mistakenly identified Johnson as her attacker.[97] Additionally, innocent defendants are likely in prison due to Fred Zain, a West Virginia State Police forensic "expert," who is known to have falsified blood tests in as many as 133 cases.[98]

Other factors that contribute to wrongful convictions include police and prosecutorial misconduct and defense counsel incompetence.[99] For example, Tim Kennedy is serving two life sentences despite DNA tests by outside experts backing up his innocence claim.[100] Kennedy was convicted in part because of the failure of his defense counsel.[101] Kennedy's lawyer never called key witnesses and did not impeach the testimonies of several witnesses who drastically altered their stories to the benefit of the prosecution in the six years leading up to Kennedy's trial.[102]

Intentionally and unintentionally, prosecutors contribute to the problem of wrongful convictions. Prosecutorial misconduct includes misleading juries or misrepresenting evidence.[103] For example, prosecutors mislead by giving personal assurances that a witness's testimony is true, making statements to the jury that the defendant withdrew a guilty plea, asking questions designed to bias the jurors, and offering evidence

94. *See* Edward Lazarus, *Prosecutorial Resistance to Exculpatory DNA Evidence*, FINDLAW, Sep. 4, 2003, http://writ.news.findlaw.com/lazarus/20030904.html.

95. Ellis Cose, *Actual Innocence: A Death-Row Case Tests Whether Swift Justice Can Also Be Certain*, NEWSWEEK, June 29, 2009, at 25.

96. DNA RESOURCE REPORT, *supra* note 12, at 7; Press Release, Innocence Project, After 26 Years, DNA Testing Exonerates Rickie Johnson in Sabine Parish, Louisiana, Rape (Jan. 14, 2008), http://www.innocenceproject.org/Content/1117.php.

97. DNA RESOURCE REPORT, *supra* note 12, at 7.

98. Joy & McMunigal, *supra* note 26, at 45.

99. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 85 (2008). A survey of the first 200 DNA exonerations reveal that in some cases the prosecution used two or more of the types of evidence mentioned above to secure a conviction. *Id.* at 78–91.

100. Susan Greene, *Convict Coming Up for Air: DNA Tests Seem to Back Up Innocence Claim*, DENVER POST, Nov. 16, 2008, at 1B, 7B.

101. *Id.* at 1B.

102. *Id.* at 7B.

103. Gershman, *supra* note 92, at 320.

that accomplices to the present crime were convicted in another proceeding.[104]

The legal system relies on people, and people make mistakes or act on ulterior motives. No one solution will remedy all of the causes of wrongful convictions, and unfortunately, Model Rules 3.8(g) and (h) will not prevent wrongful convictions. But in a legal system frayed by error, Model Rules 3.8 (g) and (h) will ensure that those individuals whom the legal system initially failed are given a second chance for justice.

B. Model Rules 3.8(g) and (h) Are Consistent With Current Duties of Prosecutors

Model Rules 3.8(g) and (h) are consistent with current constitutional and ethical obligations for prosecutors and are within the duty to seek justice for society at large in every case.[105] The amendments will simply extend those existing responsibilities from the pre-trial and trial stages to the postconviction context as well. As previously mentioned in Part I of this Comment, Model Rule 3.8(d) already requires prosecutors to

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.[106]

Furthermore, "Rule 3.8 is intended to remind prosecutors that the touchstone of ethical conduct is the duty to act fairly, honestly, and honorably."[107] In *Imbler v. Pachtman*, the Supreme Court held that prosecutors are "bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction."[108] Hence, (g) and (h) would not

104. *Id.* at 320–21.

105. For a discussion of prosecutorial obligations under *Brady v. Maryland* and the Model Rules, see *supra* Part I.

106. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2008).

107. ILL. RULES OF PROF'L CONDUCT R. 3.8 cmt. (2001), *available at* http://www.state.il.us/court/supremecourt/rules/art_viii/artviii.htm.

108. Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976); *see also* Houston v. Partee, 978 F.2d 362 (7th Cir. 1992); Thomas v. Goldsmith, 979 F.2d 746 (9th Cir.

drastically change the ethical landscape for prosecutors; instead, they would only extend existing ethical duties to the end of the criminal process. Prosecutors should have the same duty after a criminal conviction as they do during the adjudication because it is consistent with their duty to seek justice.

Prosecutors should have a duty to disclose exculpatory evidence and reopen cases when appropriate because prosecutors are held to a different standard than other attorneys. All attorneys are bound by ethical obligations, but "[a] prosecutor has the [additional] responsibility of a minister of justice and not simply that of an advocate" seeking to win.[109] Additionally, prosecutors have the responsibility to ensure that each defendant receives procedural justice.[110] Advocating for the state's victory at all costs is not within the prosecutor's duty.[111] An inscription on the walls of the Department of Justice states that "[t]he United States wins its point whenever justice is done its citizens in the courts."[112] The success of the "justice" referenced is not limited to trial or the complainant's interests only. Likewise, the United States Supreme Court broadly described the duty of a prosecutor as

> the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[113]

Both conviction *and* exoneration fulfill the prosecutorial role of seeking justice on society's behalf.[114]

1992); Monroe v. Butler, 690 F. Supp. 521 (E.D. La. 1988) (addressing the duty of prosecutors to disclose information).

109. SALTZBURG, RECOMMENDATION 105B, *supra* note 58, at 2.

110. *Id.*; *see also* People v. Cochran, 145 N.E. 207, 214 (Ill. 1924).

111. *See* State v. Superior Oil, Inc., 875 S.W.2d 658, 661 (Tenn. 1994).

112. Brady v. Maryland, 373 U.S. 83, 87 (1963).

113. Berger v. United States, 295 U.S. 78, 88 (1935).

114. *See* SALTZBURG, RECOMMENDATION 105B, *supra* note 58, at 4 (stating that "[t]he obligation to avoid and rectify convictions of innocent people, to which the

Not only are Model Rules 3.8(g) and (h) consistent with the current duties of prosecutors, but prosecutors are in the best position to handle this obligation. Due to their position as government officials, prosecutors are provided great access to government resources.[115] "[M]ost often evidence of a wrongful conviction will come to light in a criminal investigation, and this evidence is far more likely to be uncovered by prosecutors than by defense counsel."[116] As officers of the court, when given the opportunity, prosecutors should right the wrongs caused by flaws in the judicial system.

C. Model Rules 3.8(g) and (h) Are Needed to Maintain Public Confidence in the Judicial System

Failure by states to adopt the amendments to Model Rule 3.8 could "undermine public confidence both in lawyers and our criminal justice system."[117] As mentioned in Part I, the prosecutor's duty to disclose exculpatory evidence is a critical element of the judicial system. After all, the prosecutor represents the people of the state whose principal interest in criminal proceedings is that "justice shall be done."[118] Because the changes to Model Rule 3.8 are designed to remedy injustices, the amendments should help restore public confidence in the fairness of the judicial system.[119]

Prosecutors also have a duty to protect the public by convicting the true offender. Not only will the amendments to Model Rule 3.8 help protect the rights of those wrongfully convicted, but they will "protect the public by alerting authorities that the actual perpetrator of a crime may still be at large and may never have been charged with the crime."[120] In over 25

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proposed provisions give expression is the most fundamental professional obligation of criminal prosecutors").

115. Ahmed M.T. Riaz, Rule 3.8: The Not So Special Responsibilities of Prosecutors 4 (2007) (unpublished manuscript), http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=ahmed_riaz.

116. Kuckes, *supra* note 13, at 37.

117. *See, e.g.*, Peter A. Joy & Kevin C. McMunigal, *Confidentiality and Wrongful Incarceration*, CRIM. JUST., Summer 2008, at 46, 49.

118. Kuckes, *supra* note 13, at 37.

119. N.Y. STATE BAR ASS'N, PROPOSED RULES OF PROFESSIONAL CONDUCT 157 (2008), *available at* http://www.nysba.org/AM/Template.cfm?Section=Professional_Standards_for_Attorneys&Template=/CM/ContentDisplay.cfm&ContentID=15179.

120. *Id.*

percent of the postconviction DNA exonerations, the real perpetrator was subsequently identified.[121]

Through the conviction of innocent defendants and the consequent failure to convict the actual perpetrators, prosecutors fail to serve the public they represent. As Martin Luther King, Jr. stated, "Injustice anywhere is a threat to justice everywhere."[122] Seeking justice should be the overriding objective of prosecutors, and when presented with new, credible evidence that could clear an innocent defendant, prosecutors should have a duty to act accordingly for society's welfare. "There is something basically inimical to our entire justice system if one is allowed to languish in jail when his prosecutors hold evidence that establishes he should not be there."[123]

The perception that the judicial system is indifferent to innocent people being punished for crimes they did not commit would make a mockery of the law and seriously undermine the public's trust in the judiciary and cause an already skeptical public to question the fairness of the judicial system.[124] A judicial system that addresses potential wrongful convictions instead of turning a blind eye will improve public confidence in the system. By ensuring that justice is done and prompting authorities to seek out the true offender, Model Rules 3.8(g) and (h) will help preserve public confidence in the judicial system fulfilling its purpose.

IV. DISCREDITING POTENTIAL RESISTANCE TO MODEL RULES 3.8(g) AND (h)

Despite the aforementioned benefits, opponents resist the new Model Rules 3.8(g) and (h) because of the "law of unin-

121. Barry C. Scheck, *Foreword* to AM. BAR ASS'N CRIMINAL JUSTICE SECTION, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY, at xi (Paul Giannelli & Myrna Raeder eds., 2006).

122. SCOTT CHRISTIANSON, INNOCENT: INSIDE WRONGFUL CONVICTION CASES 9 (2004) (internal quotation marks omitted).

123. Warney v. City of Rochester, 536 F.Supp.2d 285, 295 (W.D.N.Y. 2008).

124. *See* Judge Kevin Burke & Judge Steve Leben, Procedural Fairness: A Key Ingredient in Public Satisfaction (Sept. 26, 2007) (unpublished white paper of the American Judges Association), http://aja.ncsc.dni.us/htdocs/AJAWhitePaper 9-26-07.pdf. A study found that African Americans are more likely to believe that a court's outcome will "seldom" or "never" be fair. *Id.* at 18. Furthermore, African Americans have less trust in the motives of the court which translates into less acceptance of the court's decision. *Id.* When California citizens were surveyed about their perceptions of California courts, only 30 percent believed that the state courts were doing "excellent" or "very good" whereas 33 percent thought they were only "fair" or "poor." *Id.* at 9.

tended consequences"—reexamining old cases could cause more problems than the rules would remedy. Among the concerns countering adoption of Model Rules 3.8(g) and (h) are five potential arguments that criticize requiring prosecutors to reopen cases, all of which will be refuted below. First among the five criticisms is that the amendments would unduly burden prosecutors. Second, a prosecutor's time and government resources are limited and should not be allocated to examining old cases that seldom result in confirmations of innocence. Third, reopening cases could lead to the unintended injustice of freeing the guilty. Fourth, the amendments are contrary to the principle of finality and are unnecessary in light of the current safeguards. Finally, opponents cite weaknesses in the drafting of the rules. Nevertheless, these arguments against reopening old cases do not outweigh the benefits of state adoption of Model Rules 3.8(g) and (h). Concerns of time, resources, finality, and drafting must never trump society's overarching interest in achieving justice, righting wrongs, and exonerating the innocent.

A. Model Rules 3.8(g) and (h) Do Not Unduly Burden Prosecutors

Because Model Rules 3.8(g) and (h) are consistent with the current duties of prosecutors referenced in Part I and Part III, Section B, they do not impose an unfair burden on prosecutors. Former Georgia Congressman Bob Barr bluntly noted, "where there is overwhelming evidence of innocence that has not been presented, . . . [w]hat's the burden on the state, for heaven's sake, to take a day to have an evidentiary hearing?"[125]

As discussed in Part II, several prosecutors provided input during the development of Model Rules 3.8(g) and (h) so the ABA drafted the amendments with prosecutorial expertise in a way to avoid placing an unnecessary burden on prosecutors.[126] The ABA also ensured during the drafting that the proposed amendments to Rule 3.8 would not require prosecutors to defend against meritless ethics claims.[127] Finally, the ABA carefully crafted the amendments to limit the duty to disclose to

125. Cose, *supra* note 95, at 25 (internal quotation marks omitted).
126. Saltzburg, *supra* note 59, at 13.
127. *Id.*

"known" evidence and designed them to set a significant bar for the type of evidence that would create such a duty.[128]

Even under the amendments, prosecutors are free to remain appropriately skeptical about claims of innocence. The ABA Criminal Justice Section report that advocated the amendments cautioned that the amendments' intention was not to turn the ethical responsibilities of prosecutors against them.[129] The report stated,

> [w]e are confident . . . that disciplinary authorities will not assume that prosecutors ignore substantial evidence of innocence and will not burden prosecutors with the need to respond to and defend ethics charges that are not supported by specific and particular credible evidence that the prosecutor violated his or her disciplinary responsibilities.[130]

Likewise, the comments to the amendments emphasize that a prosecutor who makes a good faith judgment that evidence does not trigger disclosure obligations under the rule is protected from ethical sanctions.[131] By requiring a "good faith" judgment, prosecutors are protected from disgruntled, but truly guilty, convicts venting their frustrations through the attorney disciplinary process. Stephen A. Saltzburg, a law professor at George Washington University and chair of the Criminal Justice Section explained to the ABA House of Delegates that "[t]he rules are very simple. If prosecutors have new, credible evidence of innocence, they have to do something about it. It's not a big burden."[132] The "something" prosecutors have to do about new, credible evidence of innocence ranges from simply informing another jurisdiction about the evidence to reopening the case.[133] But the "burden" on prosecutors of reopening the case pales in comparison to a wrongfully convicted defendant's burden of lost years and discarded freedom.

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128. *Id.* at 14.
129. Podgers, *supra* note 65, at 32.
130. SALTZBURG, RECOMMENDATION 105B, *supra* note 58, at 6.
131. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 9 (2008).
132. Podgers, *supra* note 65, at 32 (internal quotation marks omitted).
133. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(g)–(h) (2008). For more on the new responsibilities for prosecutors under Model Rules 3.8(g) and (h), see discussion *supra* Part I.B.

B. Model Rules 3.8(g) and (h) Should Be Adopted Despite Time and Resource Limitations

Prosecutors nationwide grapple with how to best allocate their limited time and resources and are wary about the ratio of potential time and resources with the actual rate of wrongful convictions. Some prosecutors argue that reviews of claims of innocence are time-consuming and rarely reveal that the defendant was wrongfully convicted.[134] Others are skeptical about how many defendants really are falsely imprisoned and argue that the number of stories of wrongful convictions that make the newspapers may be misleading.[135] While meritorious postconviction claims of innocence do exist, not all claims prove to be true. For example, while the Texas Court of Criminal Appeals does not document the number of filed "actual innocence" claims, since 1994, the court has decided fewer than thirty postconviction claims of innocence.[136] Only five of these cases resulted in exonerations after the victims recanted their testimony.[137]

While time and resource limitations hamper all government agencies, such concerns should not justify the evasion of a legitimate ethical obligation. A "truly Orwellian situation in which a possibly innocent man is asked to die because that is more efficient than reexamining the facts" is unacceptable.[138] Society should not tolerate even a single innocent individual in prison, let alone an innocent person on death row, when material evidence suggests the individual was wrongfully convicted. Time and resources are spent to convict and should be used to exonerate, regardless of whether doing so would prevent the imposition of the death penalty or just repair reputational harm. The stigma of a conviction follows an individual through life, so working to clear a name is important even if the defendant has completed his or her sentence.

Indeed, despite limited time and resources, district attorney offices across the country are already finding ways to reopen cases in which a defendant may have been wrongfully

134. Jennifer Emily & Steve McGonigle, *Dallas District Attorney Steps Up Scrutiny of Cases Where DNA Can't Prove Innocence*, DALLAS MORNING NEWS, Apr. 27, 2008, http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/042708dnmetdna.3f8e99d.html.

135. *See id.*

136. *Id.*

137. *Id.*

138. Cose, *supra* note 95, at 25.

convicted. For example, prosecutors in Dallas are taking an unprecedented approach to claims of innocence.[139] Although already leading the country in DNA exonerations, in 2008, Dallas County District Attorney Craig Watkins assigned his integrity unit the task of reviewing innocence claims in non-DNA cases—cases where DNA evidence does not irrefutably prove guilt or innocence.[140] By expanding the scope of his integrity unit to investigate and determine whether the inmate in a non-DNA case deserves a new trial, Watkins has enhanced the potential for more wrongfully convicted defendants to have a second chance at justice.[141] Watkins's integrity unit identified more than twenty cases where DNA evidence could not conclusively determine guilt or innocence but where further investigation might uncover new evidence.[142] The work of district attorneys like Watkins is critical because, without the assistance of the prosecutor, convicted defendants pursuing claims of innocence often have difficulty prevailing.[143]

Another example of district attorneys finding the resources to reopen cases is the Larimer County District Attorney's Office in Fort Collins, Colorado, which reopened several old cases in light of the exoneration of Tim Masters, who was cleared of rape and murder charges following a DNA test.[144] Also, the San Diego District Attorney's Office has a policy of offering free DNA testing to inmates who claim they are innocent and who would potentially be exonerated by such testing.[145]

Given the examples above, it is clear that at least some prosecutors have already found ways to overcome the limited time and resource obstacles to determine whether postconviction innocence claims are meritorious. However, the number of potentially wrongfully convicted persons behind bars nationwide testifies that, if left to their own devices, some prosecutors are unlikely to initiate the investigations necessary for potential exonerations, preferring to hide behind the excuse of limited time and resources. Consequently, the amendments

139. Emily & McGonigle, *supra* note 134.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. Mike Hooker, *Larimer County DA Reviews DNA Evidence in Cases*, CBS4 DENVER, Apr. 3, 2008, http://cbs4denver.com/local/larimer.county.dna.2.691077.html?detectflash=false.
145. James Sterngold, *San Diego District Attorney Offering Free DNA Testing*, N.Y. TIMES, July 28, 2000, at A12.

would motivate other prosecutors to follow the lead of Dallas, Fort Collins, and San Diego prosecutors.

C. Model Rules 3.8(g) and (h) Do Not Create a "Get-Out-of-Jail-Free" Card

Opponents of Model Rules 3.8(g) and (h) also argue that reopening old cases will allow guilty convicts to have their sentences overturned because of time lapses. Witnesses may be gone or have fading memories. Evidence may have deteriorated. The original prosecutor may no longer be at the office that obtained the conviction, leaving a new prosecutor the task of learning about the old case. In some cases, these difficulties may lead to overturning a conviction that was not wrongful. For example, in Baltimore, James Owens was sentenced to life in prison for stabbing and strangling Colleen Williar in 1987.[146] After DNA tests in 2006 cleared Owens of raping Williar, his conviction for murder was thrown out.[147] Prosecutors wanted to retry Owens for murder but were unable to do so because of the death of witnesses and the deterioration and destruction of evidence.[148] Even though prosecutors were still convinced that Owens was guilty of murder, they no longer had access to sufficient evidence for a retrial.[149] For the victims, justice may not have been served. If the Rule 3.8 amendments require prosecutors to reopen old cases where evidence has deteriorated or witnesses have disappeared, the available evidence and resources may be insufficient for any conclusion, thus hindering the ability of prosecutors to hold the guilty accountable.

Deteriorating evidence is a legitimate impediment to achieving justice. Nevertheless, the potential for a guilty individual to not be held accountable does not outweigh the public's strong desire to prevent innocent individuals from suffering in prison. The English jurist William Blackstone said, "[b]etter that ten guilty persons escape, than that one innocent suffer."[150] Justice Benjamin Cardozo felt that it was better for five guilty to go free than for one innocent person to be executed and favored ten guilty going free over one innocent person be-

146. Associated Press, *DNA Frees Man in Murder Case*, DENVER POST, Oct. 16, 2008, at 5A.

147. *Id.*

148. *Id.*

149. *Id.*

150. Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997) (internal quotation marks omitted).

ing imprisoned.[151] "Benjamin Franklin thought '[t]hat it is better a hundred guilty persons should escape than one innocent person should suffer.' "[152] While the numbers differ, the sentiment is constant—society would rather a guilty person go free than have a wrongfully convicted defendant suffer in prison.

Furthermore, while deteriorating evidence may be an issue, reopening a case does not mean that a guilty defendant will automatically be exonerated. Model Rules 3.8(g) and (h) do not create a "get-out-of-jail-free" card. A district attorney's office might acknowledge that a defendant deserves a new trial because the case was tried unfairly but still believe the totality of the circumstances upholds the guilty verdict. In one such case, DNA evidence cleared Clay Chabot of rape when the DNA tests proved that his brother-in-law, who testified against him at trial, was actually the rapist.[153] Even in light of the new evidence, Mr. Chabot was not simply exonerated. Prosecutors still believed they could prove Mr. Chabot's involvement in the murder of the raped woman and commenced a new trial.[154]

D. Need for Finality Should Not Prohibit States from Adopting Model Rules 3.8(g) and (h)

Another argument against Model Rules 3.8(g) and (h) is that requiring prosecutors to reopen cases years after a conviction is upheld on appeal erases the finality of verdicts.[155] Because a statute of limitations was not included in the amendment, a concern arises that a prosecutor could be required to reopen a case regardless of how long ago the case was closed. The defendant is presumed innocent until a jury finds him guilty beyond a reasonable doubt, whereupon the presumption shifts decisively and fittingly towards guilt.[156] Once the defendant has exhausted his appeals, finality of his verdict is needed, because "a lack of finality is 'a lurking doubt.' "[157] The

151. *Id.* at 175.
152. *Id.*
153. Emily & McGonigle, *supra* note 134.
154. *Id.*
155. Saltzburg, *supra* note 59, at 15.
156. Sherry F. Colb, *Do Convicts Have a Constitutional Right to Access Crime-Scene DNA? The Supreme Court Considers the Question*, FINDLAW, Nov. 10, 2008, http://writ.lp.findlaw.com/colb/20081110.html.
157. Mark Stephens & Peter Hill, *The Role and Impact of Journalism*, *in* MISCARRIAGES OF JUSTICE: A REVIEW OF JUSTICE IN ERROR 263, 282 (Clive Walker & Keir Starmer eds., 1999).

United States Supreme Court has acknowledged the need for finality of judgments. Justice Harlan argued in *Mackey v. United States* that "[n]o one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing [that] a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation."[158] Additionally, in *Teague v. Lane*, the Court stated that "[w]ithout finality, the criminal law is deprived of much of its deterrent effect."[159]

However, the finality argument runs into difficulty because, in some cases where the proposed Model Rules apply, convicts are asking for access to new evidence that was not available at their trials.[160] For example, the technology to test DNA evidence may not have existed when they were convicted.[161] Myrna Raeder, a criminal law professor at Southwestern Law School in Los Angeles, maintains, "[w]hen you have a tool like DNA that can render definitive proof of innocence," arguing the importance of finality "is a smoke screen."[162] In September 2000, the National Commission on the Future of DNA Evidence recommended that where innocence can be proven with evidence, prosecutors should agree "to the pursuit of truth" instead of prohibiting the use of new evidence based on passage-of-time clauses in the law.[163] Barry Scheck and Peter Neufeld declared in their book, *Actual Innocence*, that "[f]inality is a doctrine that can be explained in two words when it comes to innocence tests: 'willful ignorance.' "[164]

Courts agree that "finality" should not be a bar to getting at the truth. New York courts first dealt with this matter in 1990 with regard to Charles Dabbs's 1984 rape conviction, which occurred before the availability of DNA testing and the enactment of New York's postconviction testing law.[165] Six years after his conviction, Dabbs wanted DNA testing performed on the evidence collected at the time of the crime, in-

158. Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgment in part and dissenting in part).

159. Teague v. Lane, 489 U.S. 288, 309 (1989).

160. Colb, *supra* note 156.

161. *Id.*

162. Henry Weinstein, *Many Resist DNA Testing for Inmates*, L.A. TIMES, Feb. 21, 2000, at A1 (internal quotation marks omitted).

163. *Id.*

164. BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE 319 (2003).

165. Weinstein, *supra* note 162.

cluding semen recovered from the victim's underwear.[166] The victim's identification of Dabbs and her testimony that she had not engaged in sexual relations for at least twenty-four hours prior to the attack played a key role in his conviction.[167] Prosecutors argued against testing on the grounds that the results would be speculative, that no statutory right existed, and that granting a motion would set a precedent leading to other demands for DNA testing by convicted sex offenders.[168] Nevertheless, the court ruled in favor of Dabbs, with Judge Nicholas Colabella stating that exculpatory information known to the state must be available to the defendant—and that the state must also preserve such material.[169] According to the judge, "[t]o deny Dabbs the opportunity to prove his innocence with such evidence simply to ensure the finality of convictions is untenable. Mistaken identification probably accounts for more miscarriages of justice than any other single factor."[170] The subsequent testing exonerated Dabbs.[171] Had Judge Colabella hidden behind the "finality" argument, Dabbs could still be incarcerated for a crime he did not commit. Similar rulings have been issued by courts in Indiana, New Jersey, and Pennsylvania.[172]

Allowing the notion of finality to trump justice undermines the public's confidence in the criminal justice system. The duty to act ethically should not be limited by standards governing finality of judgments. Abandoning the pursuit of justice merely for the sake of closing the file on a criminal case undermines the public's confidence by casting doubt on the reliability of the criminal justice system. It should never be too late to exonerate an innocent individual. Indeed, as stated in Section C above, Cardozo, Franklin, and others have voiced the public will that prosecutors err on the side of innocence rather than guilt. The public must know that the criminal justice system is always concerned with achieving justice, not just with winning convictions.

166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*; *see also* People v. Dabbs, 587 N.Y.S.2d 90, 93 (N.Y. Sup. Ct. 1991) (noting that, had the evidence been available at trial, Dabbs would not have been convicted).
170. Weinstein, *supra* note 162.
171. *Id.*
172. *Id.*

E. Current Safeguards Are Not Sufficient

Some opponents may argue that, because current safeguards—such as prosecutorial behavior and existing state and federal statutes—are sufficient to protect defendants, an additional ethical obligation is not necessary. As discussed in Part IV, Section B, recent DNA exonerations suggest that some prosecutors are reopening cases when presented with new evidence, even without the ethical duty to do so. Defendants also benefit from other safeguards when seeking to vacate a conviction, so arguably, an additional ethical burden on prosecutors is not necessary. Some states already have mechanisms for raising claims of newly discovered evidence of innocence. In Colorado, Rule of Criminal Procedure 35(c) provides for relief when new evidence of innocence is discovered.[173] However, postconviction review is only granted if the new evidence is discovered within three years of conviction for most felonies.[174] New Mexico's and Delaware's Rules of Criminal Procedure allow a motion for a new trial based on the ground of newly discovered evidence, but only if the motion is made within two years of the final judgment.[175]

In the federal system, Congress and the courts have placed the responsibility to remedy a wrongful conviction on the defendant. Under Federal Rule of Criminal Procedure 33(a), a defendant may move to vacate a judgment and for the grant of a new trial "if the interest of justice so requires."[176] However, such motions must be filed within three years.[177] Under 28 U.S.C. § 2255, a defendant may challenge a conviction on constitutional or other legal grounds but must do so within one year of the judgment of conviction, the occurrence of the constitutional violation, the establishment of the constitutional right, or the date that new facts were discoverable.[178]

In light of the current safeguards to aid defendants who believe that they were wrongly convicted, Model Rules 3.8(g) and (h) could be viewed as a solution in search of a problem. However, the growing number of exonerations illustrate that the problem of wrongful convictions is real and that current

173. COLO. R. CRIM. P. 35(c).
174. COLO. REV. STAT. § 16-5-403 (2008).
175. DEL. R. CRIM. P. 33; N.M. R. CRIM. P. 5-614.
176. FED. R. CRIM. P. 33(a).
177. *Id.*
178. 28 U.S.C. § 2255.

safeguards are woefully insufficient. If prosecutors have no obligation to disclose postconviction evidence to the defendant, the wrongfully convicted defendant may never have sufficient evidence to challenge the conviction. Also, the time limits in the various rules of criminal procedures are too restrictive because technology is constantly evolving. Technology that may clear an innocent man or woman may not exist today, or within the two or three years allowed by statute, but could exist five years from now. Under Model Rules 3.8(g) and (h), defendants would not be restricted to a three-year window for new evidence discovery.

Even with the current safeguards, prosecutors encounter institutional pressure to win cases and to preserve victories.[179] Elected prosecutors face political pressures to maintain high conviction rates.[180] The human impulse to avoid admitting mistakes is also a factor, especially when it could impede careers.[181] New evidence challenging a conviction may also raise questions about the thoroughness of the police investigation and the prosecution team's judgment in evaluating a case.[182] In addition, prosecutors, crime victims, and their families share the need for closure.[183] Hence, crime victims and their families may apply significant pressure on prosecutors to not admit to mistakes, thereby reinforcing reluctance to reopen cases.[184]

Nevertheless, a prosecutor's personal stake in a victory should not cause an innocent person to remain incarcerated.[185] Placing an ethical duty on prosecutors might prevent some prosecutors from closing their eyes to new evidence that may remedy a grave miscarriage of justice and free an innocent person. The imposition of consequences for ignoring new evidence would provide an additional incentive for prosecutors to disregard institutional pressures and to re-evaluate closed cases. When confronted with competing reputational pressures—the push to reopen the case and face public scrutiny for prior mis-

179. Lazarus, *supra* note 94.

180. *Id.* *See generally* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-Discovery*, 15 GEO. MASON L. REV. 257, 298 (2008) (detailing the events in the Duke lacrosse players case and speculating that the upcoming election for district attorney motivated District Attorney Nifong's failure to disclose the DNA results).

181. Lazarus, *supra* note 94.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

takes on the one hand and the risk of career-threatening disciplinary actions from the bar on the other—ideally prosecutors will seek justice and the moral right. Model Rules 3.8(g) and (h) provide an extra incentive for prosecutors to achieve justice for those wrongfully convicted and for society as a whole.

F. States Can Resolve Potential Drafting Weaknesses

Another criticism of Model Rules 3.8(g) and (h) is that they do not provide sufficient guidance to prosecutors and thus leave a lot to the discretion of prosecutors without giving them adequate notice of what is expected.[186] Critics note that key terms such as "material" and "promptly" are not defined in the amendments.[187] Other language used in the Model Rules is also vague. The phrase "seek to remedy the conviction" is so vague that it utterly fails to give notice of what is required and the "good faith" qualification in Comment 9 is not defined as "subjective" or "objective."[188]

Such criticisms, however, are easily rectified. Any drafting deficiencies in Model Rules 3.8(g) and (h) could be addressed by state bar associations before adopting the rules. The proposed rules give states sufficient flexibility to apply the rules and to formulate state-specific procedures. States can look to their case law to define key terms. For example, states could explicitly define "material" using the *Brady* definition: evidence with a reasonable probability that, had the evidence been disclosed to the defense or the fact finder, the result of the proceeding would have been different.[189] Additionally, the term "good faith" usually describes a "state of mind de-noting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation."[190]

Another potential solution to the language concerns would be that, instead of adopting Model Rules 3.8(g) and (h) as drafted by the ABA, states could follow Colorado's lead and consider adopting a modified version. The Colorado Supreme Court Standing Committee on the Rules of Professional Conduct ("Standing Committee") recommended that Colorado

186. Saltzburg, *supra* note 59, at 13.
187. *Id.* at 14.
188. *See id.* at 14–15.
189. Brady v. Maryland, 373 U.S. 83, 87 (1963).
190. Efron v. Kalmanovitz, 57 Cal. Rptr. 248, 251 (Cal. Ct. App. 1967) (citation omitted).

adopt a modified version of Model Rules 3.8(g) and (h) that addressed some concerns expressed by the Standing Committee.[191] The Standing Committee decided that, because prosecutors' law licenses may be at stake if they decide not to act when presented with new, material, and credible evidence, they are entitled to clearly defined duties and "reasonable predictability if that decision is challenged."[192] Accordingly, the Standing Committee changed what it viewed as language with vague meaning in the Model Rules.[193] Concerned that "promptly" might lead to actions taken in undo haste, the Standing Committee substituted "within a reasonable time."[194] Because the phrase "reasonable probability" is defined in more Colorado cases, the Standing Committee recommended that phrase in place of "reasonable likelihood."[195]

Finally, the Standing Committee was also worried that "seek to remedy the conviction" was too open-ended and might be interpreted to require prosecutors to do anything and everything, including asking the governor for clemency.[196] Instead, the Standing Committee believed the phrase "take steps in the appropriate court" more appropriately defined an outer limit on the obligations of the prosecutor.[197] Elsewhere, the Wisconsin District Attorney's Association, like Colorado, modified the "seek to remedy the conviction" clause in its recommendation to adopt Model Rules 3.8(g) and (h) by replacing "seek to remedy the conviction" with "notify the court where the conviction occurred and make reasonable efforts to notify the defendant."[198] While the Wisconsin Supreme Court did not ultimately adopt that recommendation, it did substitute "promptly disclose that evidence to the defendant" with "promptly make reasonable efforts to disclose that evidence to the defendant" to provide additional guidance for prosecutors.[199] Also of note and worthy of additional discussion in the future, the Colorado Standing Committee unanimously recommended that the duty to dis-

191. *See* Webb, *supra* note 81, at 30.
192. *Id.* at 33.
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 34.
197. *Id.*
198. *In re* Amendment of Supreme Court Rules Chapter 20, Rules of Prof'l Conduct for Attorneys, No. 08-24 (Wis. Sept. 19, 2008), *available at* http://www.wicourts.gov/supreme/docs/0824petition.pdf.
199. *Id.*

close exculpatory evidence should be extended to all attorneys, not just prosecutors.[200]

The Rule 3.8 amendments allow prosecutors the necessary discretion to determine which claims warrant further investigation and should not be dismissed simply for minor drafting deficiencies. State bar associations should not wait for the legislature to take action but should adopt Model Rules 3.8(g) and (h) either as written or in a modified version. Further investigation into evidence that could establish the innocence or guilt of defendants and thus achieve justice should trump the concerns of time and resource limitations, need for finality, and concerns about overly broad language.

CONCLUSION

The amendments to Model Rule 3.8 are a positive and essential step toward addressing a modern ethical challenge: the prosecutor's responsibility to remedy wrongful convictions. "[B]oth state and federal prosecutors have been held to a higher standard than other lawyers. They are charged with an overarching duty to seek justice."[201] Prosecutors should not settle for "the ultimate professional failure of disserving the paramount mission of protecting the public and achieving justice."[202] Allowing mere logistical issues or inconvenience to supersede the ethical duty to avoid wrongful convictions would undermine the ultimate goal of promoting justice. Additionally, refusing to take measures to ensure that justice is served and that the true perpetrator is punished will diminish the public's confidence in the judicial system. States should embrace an ethical obligation that would not unduly burden prosecutors and is a natural extension of their current responsibilities. Model Rules 3.8(g) and (h) are not only needed for innocent people like David Bryson, who sought medical treatment at a hospital and was convicted of rape, but also needed for the hundreds of other innocent individuals who were stripped of their freedom because of an imperfect system. All states owe it to their citizens to adopt the amendments to Model Rule 3.8 because all wrongfully convicted individuals deserve a second chance at justice.

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200. Webb, *supra* note 81, at 37.

201. Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 227 (2000) (emphasis omitted).

202. Lazarus, *supra* note 94.