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THE LONG GOODBYE: AFTER THE INNOCENCE MOVEMENT, DOES THE ATTORNEY–CLIENT RELATIONSHIP EVER END?

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Inspired by the Innocence Movement, the American Bar Association has placed an unprecedented new obligation on defense counsel in the form of an "Innocence Standard." This new rule imposes an affirmative "duty to act" upon criminal defense attorneys who learn of newly discovered evidence that a former client may be innocent.

The new Standard, while well-intentioned, reconceives the traditional defense attorney function, creating an ethical parity between prosecutors and defense attorneys in wrongful conviction cases while overlooking the fact that the two sides play distinct and incompatible roles in our adversarial system. While prosecutors must to seek the truth and administer justice, defense counsel's obligation is to zealously defend her current client. The Innocence Standard has the unintended effect of potentially destabilizing that primary and paramount relationship. It may require counsel to place the interests of a former client above those of a current client. It may expose counsel to allegations of ineffective assistance

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in the representation of the former client. And, perhaps most importantly, it may require labor-intensive, complex work that will draw scarce resources away from current clients because most defense attorneys are already under-resourced and staggering under excessive caseloads.

In an ideal world, every defense attorney would embrace the work of freeing a wrongfully convicted former client, but in the real world, is it practicable to demand that they do so and fair to suggest that they are unethical if they do not?

This Article—the first scholarship to discuss the Innocence Standard—examines how the innocence movement's influential emphasis on accuracy may be eroding other important values and aims served by the adversarial process. The Innocence Standard asks defense counsel to serve two masters, her client and the truth. The creation of this dual obligation conflicts with centuries of defense tradition and decades of well-established doctrine. The truth-seeking function has traditionally rested with prosecutors, judges, and juries; defense counsel's primary obligation has always been to zealously represent her present-day client. Shifting the truth-seeking burden onto defense counsel after her representation of a client has ended threatens to erode the adversarial system, the historical loyalties of defense counsel, and the meaning of zealous advocacy.

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INTRODUCTION

The impact of the Innocence Movement on the criminal justice system has been profound, bringing into sharp relief gross injustices that previously had been all too easy to downplay or ignore.[1] Twice a week on average, an innocent person is set free, often after spending decades in prison.[2] These exonerations are extensively covered by the media, searing into the national consciousness powerful images of the prisoner's emotional reaction at the moment of freedom and an equally powerful narrative of the long road from hopeless, unmitigated suffering to sudden and complete redemption.[3]

The Innocence Movement—the law school clinics, non-profit organizations, religious institutions, and individual lawyers dedicated to the work of overturning wrongful convictions—has challenged the conventional wisdom underlying the basic tenets of our criminal justice

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[1] *See* Marvin Zalman & Julia Carrano, *Sustainability of Innocence Reform*, 77 ALB. L. REV. 955, 977–78 (2013/2014) ("The increased ability to amplify its message to key political decision-makers and instrumental organizations such as the American Bar Association and state forensic science commissions [is an] indicator[] the innocence projects and the Innocence Network are becoming more able to effect real change."); NAT'L REGISTRY OF EXONERATIONS, UNIV. OF MICH. LAW SCH., EXONERATIONS IN 2014 1 (2015), https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf [hereinafter NAT'L REGISTRY, 2014 EXONERATIONS] (stating that there were 125 exonerations in the United States in 2014 and 1,535 exonerations in the United States from 1989 to January 20, 2015).

[2] The Registry, "a project of the University of Michigan Law School, provides detailed information about every known exoneration in the United States since 1989[.]" NAT'L REGISTRY, 2014 EXONERATIONS, *supra* note 1, at 12. The authors of the 2014 Report "recorded 125 exonerations in 2014," which averages about 2.4 each week. *See id.* at 1.

[3] *See, e.g.*, John Caniglia, *Ricky Jackson and Wiley Bridgeman: Exonerated Friends Leave Prison After 39 Years Behind Bars*, CLEVELAND.COM (Nov. 21, 2014), http://www.cleveland.com/court-justice/index.ssf/2014/11/finally_exonerated_friends_lea.html; Nicole Carr, *70-Year-Old Joseph Sledge Freed After Decades in Prison*, ABC11 (Jan. 23, 2015), http://abc11.com/news/70-year-old-joseph-sledge-freed-after-decades-in-prison/488063/; Elahe Izadi, *Ohio Man Exonerated After Spending 27 Years in Prison for a Murder He Didn't Commit*, WASH. POST (Dec. 9, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/12/09/ohio-man-exonerated-after-spending-27-years-in-prison-for-a-murder-he-didnt-commit/; Michael McLaughlin, *Alstory Simon Talks About Life After Wrongful Conviction*, HUFFINGTON POST (Nov. 17, 2014), http://www.huffingtonpost.com/2014/11/17/alstory-simon_n_6155658.html; Ashley Powers, *Witness' Sister Helps Free Man Convicted in 1979 Killing*, L.A. TIMES (Nov. 7, 2013), http://articles.latimes.com/2013/nov/07/local/la-me-innocence-hearing-20131108.

system.[4] Exoneration after exoneration reveals bleak truths: that eyewitnesses who were one-hundred percent certain are often one-hundred percent wrong,[5] that defendants who confess may be innocent,[6] that police

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[4] *See* Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning From Social Science*, 7 OHIO ST. J. CRIM. L. 7, 9 (2009) ("[T]here are now almost fifty non-profit innocence projects [connected to the Innocence Movement] whose purpose is to investigate and litigate post-conviction claims of innocence as well as to propose reforms."); Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1549 (2008) ("American criminal law is undergoing a transformation due to the increasing centrality of issues related to actual innocence in courtrooms, classrooms, and newsrooms."); Andrew E. Taslitz, *Sentencing Lessons From the Innocence Movement*, 21 CRIM. JUST. 6, 6–9, 13, 15 (2006) (discussing the myriad of ways in which the Innocence Movement has impacted the criminal justice system).

Centurion Ministries—founded by Jim McCloskey, then a theology student at Princeton, because of his "personal spiritual calling"—has been advocating for the wrongfully convicted since 1980. *1980–1989: How and Why It Was Created*, CENTURION MINISTRIES, http://centurionministries.org/about-us/at-a-glance/. Its name comes from the words uttered by a Roman Centurion stationed at the Cross, who looked up at the body of Jesus Christ and said, "Surely this one is innocent." *Frequently Asked Questions*, CENTURION MINISTRIES, http://centurionministries.org/faq/. For other examples of religious organization involvement in the Innocence Movement, see Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Law System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 871 (2003).

[5] NAT'L REGISTRY OF EXONERATIONS, UNIV. OF MICH. LAW SCH., THE FIRST 1600 EXONERATIONS 11 (2015), https://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf [hereinafter NAT'L REGISTRY, 1600 EXONERATIONS] (noting that thirty-four percent of wrongful convictions from 1989 to May 18, 2015 involved mistaken eyewitness identification; however, in exonerations regarding rape convictions, mistaken eyewitness identification played a role seventy-two percent of the time); *see also* Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 563 (2002).

[6] NAT'L REGISTRY, 1600 EXONERATIONS, *supra* note 5, at 11 (noting that thirteen percent of all wrongful convictions from 1989 to May 18, 2015 involved false confessions). The Central Park Five documentary, released in 2012, explores in-depth perhaps the most famous false confession case in recent memory. CENTRAL PARK FIVE (PBS Distribution 2013), http://www.pbs.org/kenburns/centralparkfive. Following the rape of the woman who became nationally known as "the Central Park jogger," the New York City Police Department arrested five teenagers—four black and one Hispanic—and interrogated them for hours without access to counsel and, in some cases, their parents. Cookie Ridolfi & Marjorie K. Allard, *Book Review*, 43 SANTA CLARA L. REV. 1485, 1491 (2003) (reviewing GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK (2003)). The five young men confessed and were later tried, convicted, and imprisoned for the brutal attack on the victim. *Id.* Years later, when DNA recovered from the jogger's clothing matched a known rapist who confessed to the crimes, the four men, now in their thirties, were freed. Benjamin Weiser, *5 Exonerated in Central Park Jogger Case Agree to Settle Suit for $40 Million*, N.Y. TIMES (June 19, 2014), http://www.nytimes.com/2014/06/20/nyregion/5-exonerated-in-central-park-jogger-case-are-to-settle-suit-for-40-million.html?_r=0.

and prosecutors sometimes fail to play by the rules,[7] that defense attorneys sometimes fall down on the job,[8] and that, as a result, jurors reach the wrong conclusions. Between 1989 and 2015, more than 1,600 men and women were exonerated following years—often decades—of imprisonment for wrongful convictions.[9] And those are just the documented cases. In all likelihood, there are many more.[10]

It is not possible to absorb these facts without second-guessing the accuracy and fairness of the justice meted out in courtrooms across the United States. Gross miscarriages of justice occur, and they occur with some frequency.[11] Because of the Innocence Movement, the frequency of wrongful convictions is now public knowledge,[12] and important reforms

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[7] NAT'L REGISTRY, 1600 EXONERATIONS, *supra* note 5, at 11 (noting that forty-five percent of exonerations from 1989 to May 18, 2015 involved official misconduct). This number includes the case of Michael Morton, an innocent man who spent twenty-five years in prison for the murder of his wife due in large part to gross misconduct by prosecutor Ken Anderson. *See* Pamela Colloff, *The Guilty Man*, TEX. MONTHLY (June 2013), http://www.texasmonthly.com/the-culture/the-guilty-man/. Anderson, who went on to become a judge, was eventually indicted and convicted for his misconduct in the Morton case, and disbarred. Heather Saul, *Texas Prosecutor Ken Anderson Jailed for Convicting Innocent Michael Morton*, INDEPENDENT (Nov. 9, 2013), http://www.independent.co.uk/news/world/americas/texas-prosecutor-ken-anderson-jailed-for-convicting-innocent-michael-morton-8930428.html; Press Release, Innocence Project, Former Williamson County Prosecutor Ken Anderson Enters Plea to Contempt for Misconduct in Michael Mortonâ€™s [sic] Wrongful Murder Conviction (Nov. 8, 2013), http://www.innocenceproject.org/former-williamson-county-prosecutor-ken-anderson-enters-plea-to-contempt-for-misconduct-in-michael-mortonaes-wrongful-murder-conviction/.

[8] Norman Lefstein, *In Search of* Gideon*'s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 859–60 (2004); *see also Inadequate Defense*, INNOCENCE PROJECT, http://www.innocenceproject.org/causes-wrongful-conviction/inadequate-defense (last visited Oct. 10, 2015).

[9] NAT'L REGISTRY, 1600 EXONERATIONS, *supra* note 5, at 4.

[10] There is no way to know with any certainty how many wrongfully convicted men and women remain in prison today, but most scholars who study the issue believe that the known exonerees are only "the tip of the iceberg," freed through a combination of luck, persistence, good lawyering, and often DNA or forensic evidence. *See*, *e.g.*, Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 131 (2004).

[11] Tim Bakken, *Models of Justice to Protect Innocent Persons*, 56 N.Y. L. SCH. L. REV. 837, 841–42 (2011/2012). According to the DOJ's Bureau of Justice Statistics on wrongful convictions, which assumes an error rate of one percent, there were 72,000 wrongfully convicted people in the United States as of 2009. *Id.* at 843.

[12] *See* Medwed, *supra* note 4, at 1549–52; Benjamin C. Eggert & Ashley Eiler, *Trigger of Insurance Coverage For Wrongful Arrest, Prosecution and Conviction Lawsuits*, 22 COVERAGE 50 (2012), http://apps.americanbar.org/litigation/committees/insurance/articles/janfeb2012-trigger-of-insurance.html ("By some estimates, the rate of exonerations has been

designed to make the number vanishingly rare have been enacted.[13] Many are heralded and relatively non-controversial, such as the passage of laws designed to ease the burden on inmates seeking DNA testing,[14] the decision by some police departments to reform the way that line-ups and photo spread identifications are conducted to ensure greater accuracy,[15] and the establishment of post-conviction integrity units within prosecutors' offices

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rapidly increasing[.]"); Alan Berlow, *What Happened in Norfolk?*, N.Y. TIMES MAG., Aug. 19, 2007, at 36 ("[P]roclamations of innocence are no longer surprising."); Douglas A. Blackmon, *Louisiana Death-row Inmate Damon Thibodeaux Exonerated with DNA Evidence*, WASH. POST (Sept. 28, 2012), https://www.washingtonpost.com/national/louisiana-death-row-inmate-damon-thibodeaux-is-exonerated-with-dna-evidence/2012/09/28/26e30012-0997-11e2-afff-d6c7f20a83bf_story.html; Peter Dujardin, *A Closer Look at Lineups*, DAILY PRESS (Feb. 6, 2010), http://articles.dailypress.com/2010-02-06/news/10020 50086_1_wrongful-convictions-innocence-project-arthur-lee-whitfield (discussing need to "revamp" lineups due to the increased numbers of exonerations involving eyewitness misidentification).

[13] Fourteen states have adopted eyewitness identification reforms urged by the Innocence Project and the National Institute of Justice. *See Eyewitness Misidentification*, INNOCENCE PROJECT, http://innocenceproject.org/causes-wrongful-conviction/eyewitness-misidentification (last visited Oct. 10, 2015); *see also* discussion of conviction integrity units, *infra* note 16.

[14] *The First 250 DNA Exonerations: Transforming the Criminal Justice System*, INNOCENCE PROJECT, http://www.innocenceproject.org/the-first-250-dna-exonerations-transforming-the-criminal-justice-system/ (last visited June 24, 2016) ("47 states currently provide statutory access to post-conviction DNA testing (Alaska, Massachusetts & Oklahoma do not)."). In 1992, Barry Scheck and Peter Neufeld founded the Innocence Project at the Cardozo School of Law. *Our Work*, INNOCENCE PROJECT, http://www.innocenceproject.org/about/ (last visited June 24, 2016). The Innocence Project is dedicated to helping convicted prisoners prove their innocence through DNA testing. *Id.* Scheck and Neufeld's Innocence Project, which inspired the creation of numerous other Innocence Projects in other states, maintains a website that provides details about the causes of wrongful convictions, the personal stories of exonerees, and the legislation pending or enacted to bring reform to the criminal justice system. *See id.* According to the Innocence Project's website, more than 340 people in the United States have been exonerated by DNA testing, "including 20 who served time on death row." *Exonerate the Innocent*, INNOCENCE PROJECT, http://www.innocenceproject.org/exonerate/ (last visited June 24, 2016).

[15] *See Eyewitness Misidentification*, *supra* note 13. Fourteen states have adopted eyewitness identification reforms urged by the Innocence Project and the National Institute of Justice, including: the blind administration of a photo or live line-up so that the officer in charge does not know the identity of the suspect; filler photographs that more closely resemble the suspect; specific instructions to the witness that the perpetrator may not be in the line-up or photo array and the investigation will go forward regardless of whether the witness picks someone; asking the witness to provide a written statement of his or her level of confidence in the identification; recording all of the identification procedures; and sequential presentation of the members of a line-up or the photographs in a photo array so that the witness views them one by one and has no opportunity to make a relative comparison (i.e., that person looks the most like the suspect out of all the options). *Id.*

to reexamine old cases in which there is some doubt about a defendant's guilt.[16]

There is a new reform, also propelled by the Innocence Movement, about which little is known, and which may have complex, real-world repercussions that have yet to be fully explored: the addition of an "Innocence Standard" to the American Bar Association's code of ethics for criminal defense attorneys.[17]

The code, known as the Defense Function Standards, exhorts defense attorneys to abide by the highest ethical standards in the defense of their clients.[18] While the American Bar Association's Defense Function

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[16] NAT'L REGISTRY, 2014 EXONERATIONS, *supra* note 1, at 1. There has been a rise in Conviction Integrity Units (CIUs), with 15 CIUs in 2014 compared to 9 in 2013, 7 in 2012, and 5 in 2011. *See id.* at 6. CIUs are "long-term operations" run by prosecutors "that work to prevent, to identify and to remedy false convictions." *Id.*; *see also* Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models For Creating Them*, 31 CARDOZO L. REV. 2215, 2217–18 (2010); Keith Swisher, *Prosecutorial Conflicts of Interest In Post-Conviction Practice*, 41 HOFSTRA L. REV. 181, 212 n.113 (2012); Zalman & Carrano, *supra* note 1, at 975.

[17] AM. BAR ASS'N, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY, REPORT OF THE ABA CRIMINAL JUSTICE SECTION'S AD HOC INNOCENCE COMMITTEE TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS (Paul C. Giannelli & Myrna S. Raeder eds., 2006), *reprinted in* 37 SW. U. L. REV. 763, 766 (2008) (explaining that the rising tide of exonerations prompted the ABA to form an Ad Hoc Innocence Committee in 2002 to propose reforms to ensure the integrity of the criminal justice system) [hereinafter ACHIEVING JUSTICE]. This committee passed nine resolutions, *id.* at 774, and much of the committee's work is reflected in the revised Prosecution and Defense Function Standards. The Standards for Prosecution and Defense Functions, first published in 1979, are built on the ethical obligations specific to criminal lawyers in the ABA's Model Rules of Professional Conduct. *See* AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION § 4–1.1(b) (4th ed. 2015) [hereinafter DEFENSE STANDARDS], http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition-TableofContents.html ("For purposes of consistency, these Standards sometimes include language taken from the Model Rules of Professional Conduct; but the Standards often address conduct or provide details beyond that governed by the Model Rules of Professional Conduct."); AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3–1.1(b) (4th ed. 2015) [hereinafter PROSECUTION STANDARDS], http://www.americanbar.org/groups/criminaljustice/standards/ProsecutionFunctionFourthEdition-TableofContents.html. The Fourth Edition of the Standard was adopted by the ABA House of Delegates in February 2015. *See* DEFENSE STANDARDS, *supra*, Table of Contents; PROSECUTION STANDARDS, *supra*, Table of Contents. For a discussion of how the standards were revised, see Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1112–18 (2011) (describing the "challenging and professionally absorbing" process of editing the Criminal Justice Standards for Prosecution and Defense Functions, which have not been revised since 1991).

[18] *See* DEFENSE STANDARDS, *supra* note 17, § 4–1.1 (noting that while the Standards are

Standards lack the force of law, their influence on ethical norms, jurisprudence, and legislation is readily apparent: they have been adopted by the vast majority of states and cited hundreds of times by the United States Supreme Court and lower federal and state courts.[19]

The new Innocence Standard, formally adopted in February of 2015, imposes an affirmative obligation on defense counsel "to act" upon learning of evidence that creates a "reasonable likelihood" that a former client may have been "wrongfully convicted or sentenced or was actually innocent."[20]

"aspirational," and descriptive of "best practices," rather than having the force of law, "[t]hey may be relevant in judicial evaluation of constitutional claims regarding the right to counsel," and are "intended to address the performance of criminal defense counsel in all stages of their professional work").

[19] Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 11–12 (2009). By May 1979, five years after the Standards were first fully published in 1974, thirty-six states had revised their criminal codes to incorporate all or part of them. *Id.* In two landmark cases, the United States Supreme Court singled out the Criminal Defense Standards as a helpful reference point in developing and interpreting the law relating to assessing a trial attorney's fulfillment of the Sixth Amendment obligation to provide the effective assistance of counsel. *See* Padilla v. Kentucky, 559 U.S. 356, 366–67 (2010) ("Although they are 'only guides,' . . . and not 'inexorable commands,' . . . these [ABA Criminal Justice] standards may be valuable measures of the prevailing professional norms of effective representation."); Strickland v. Washington, 466 U.S. 668, 688 (1984) (noting that the Standards set forth "[p]revailing norms of practice" that act as "guides to determining what is reasonable"). As Professor Bruce Green has pointed out:

> [E]ven if enforceable law does not dictate how prosecutors should exercise charging discretion in a particular situation or whether defense lawyers should advise clients about confidentiality obligations and associated exceptions, there is a value to developing and articulating standards governing this conduct if a professional consensus can be achieved. In that event, lawyers might be subject to public or professional opprobrium for departing from the professional standards.

Bruce A. Green, *Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers*, 62 HASTINGS L.J. 1093, 1097 (2011).

[20] DEFENSE STANDARDS, *supra* note 17, § 4–9.4. There is spirited debate about what "innocence" means as a legal concept. Some people distinguish between legal (or "actual") and factual innocence with the idea that those falling into the former category are exonerated based on constitutional or other rights violations while those falling into the latter category are factually innocent in that they did not commit the charged crime. *See* Cathleen Burnett, *Constructions of Innocence*, 70 UMKC L. REV. 971, 975–80 (2002); *cf.* William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 331 n.4 (1995) (arguing that legal, actual, and factual innocence are "three conceptually distinct determinations of innocence"); Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 456 (2001) (discussing "burden of proof," factual, and legal innocence). These distinctions, however, obscure the fact that most exonerees, factually innocent or otherwise, are freed because of legal errors, as innocence is rarely recognized as a freestanding claim. *See* Lara Bazelon, *Scalia's Embarrassing Question*, SLATE (Mar. 11, 2015, 9:37 a.m.), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/03/innocence_is_not_cause_for_ex

In so doing, it offers a vision of what it means to be a criminal defense lawyer that is a stark departure from traditional practice. In this new paradigm, defense counsel is an advocate with an ethical obligation to the truth, whose ongoing responsibilities to uncover and present that truth have no clear boundaries or end point.[21] While the Innocence Standard has the laudable aim of exposing and correcting wrongful convictions, it also has the potential to create an ethical thicket for counsel, destabilizing the relationship between counsel and her current clients while imposing a heavy burden on an already understaffed and overworked defense bar.

The Innocence Standard mirrors the ethical obligations already imposed on prosecutors,[22] establishing parity between the two sides in this realm. Yet, prosecutors and defense attorneys play fundamentally different roles in our adversarial system. Prosecutors are ministers of justice who serve the truth at all costs, even if it means undermining an ongoing prosecution or seeking to vacate an old conviction. Defense counsel, on the other hand, must do everything possible within the bounds of the law to zealously represent their *current* clients, with no obligation to the truth or any duty to act affirmatively on behalf of someone they no longer represent. By expanding defense counsel's obligations to bring them more in line with those of prosecutors, the Innocence Standard may have blurred a line that should be drawn plainly in the sand.

Part I of this Article sets forth the parameters of the criminal defense attorney–client relationship as it has been traditionally defined, and discusses the ways the new Innocence Standard alters that definition. Part II discusses the historical and moral justifications for enacting this change: the emergence of the Innocence Movement, the steady flow of exonerations

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oneration_scalia_s_embarrassing_question_is.html. In other words, the categorization is misleading in that it implies there is no overlap when the overlap is practically speaking, almost complete. As Keith Findley, the former director of the Wisconsin Innocence Project, has argued: "[T]hese distinctions are largely meaningless in our system of justice . . . there is really only one functional category of 'innocence,' although how innocence is determined can vary depending on context." Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1160 (2010/2011). Newly proposed Standard 4–9.4 adheres to Professor Findley's standard by requiring "some duty to act," for ethical purposes, whenever counsel discovers factual or legal evidence pointing to a "reasonable likelihood that a . . . former client was wrongfully convicted or sentenced or [] actually innocent[.]" DEFENSE STANDARDS, *supra* note 17, § 4–9.4.

[21] *See* Raymond, *supra* note 20, at 450–51 (2001) ("[W]e need to consider the consequences of the innocence movement for the ones left behind: the lawyers, defendants, and jurors trying to secure just outcomes in criminal cases.").

[22] *See* MODEL RULES OF PROF'L CONDUCT [hereinafter MODEL RULES] R. 3.8(g)–(h) (1983).

that point unambiguously to the gross failure of the system to fulfill its "truth-seeking" function, and a recognition, among many prominent practitioners of criminal defense, that a holistic model of representation is crucial to effective representation.

Part III argues that the Innocence Standard, while undeniably well-intentioned, unfortunately fails to address the ethical implications of its "duty to act" imperative. Left unaddressed are three major potential conflicts for counsel. First, how to "act" if the newly discovered information pointing to a former client's innocence may cause harm to a current client, second, how to "act" if the newly discovered evidence went undiscovered due to counsel's own failings during the representation of the former client, and third, how to "act" in the ways the Standard demands while carrying an excessive caseload that makes the competent representation of *current* clients nearly impossible.

Part IV proposes revisions to the Innocence Standard that address the ethical and practical dilemmas it implicitly raises while acknowledging that these suggestions do not provide a conclusive resolution to the question it poses: can defense counsel serve two masters, her current client and the truth? In this Article, I argue that the answer to that question is no. The Standard must be rewritten to make clear that a "duty to act" on behalf of a former, possibly innocent client is ethical and practicable only when it is consistent with defense counsel's centuries-long established role in the criminal justice system. The truth-seeking function rests with the prosecutor and the court. Placing the same burden upon defense counsel without limitations or precise definitions creates a false equivalency and endorses a model of practice that could threaten to erode the adversarial system, which, however imperfect, is what we rely upon to see that justice is done.

I. THE NEW INNOCENCE STANDARD AND ITS RECONCEPTION OF THE ATTORNEY–CLIENT RELATIONSHIP

This section sets forth the parameters of the attorney–client relationship in the American criminal justice system as it has been understood for centuries, then explains the ways in which the ABA's new Innocence Standard would fundamentally alter those parameters.

A. ESTABLISHED LEGAL AND ETHICAL PARAMETERS GOVERNING THE ATTORNEY–CLIENT RELATIONSHIP IN CRIMINAL CASES

The parameters of the attorney–client relationship in criminal cases are

set forth in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, which guarantee the accused the rights to due process, counsel, and equal protection of the laws respectively.[23] The Supreme Court has interpreted these rights to mean that any person accused of a felony or a misdemeanor that can result in jail time, a suspended sentence, or probation is entitled to have the effective assistance of counsel[24] at all "critical stage[s] of the [criminal] *prosecution*" after the filing of formal charges.[25]

The guarantee of competent legal representation at trial continues through the disposition of the criminal case, whether by trial or plea.[26] Counsel is also guaranteed on direct appeal if the defendant is convicted.[27] Many defendants, rich and poor, have different attorneys at the trial and appellate stages, creating two separate, clearly demarcated attorney–client

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[23] U.S. CONST. amends. V, VI, XIV.

[24] Strickland v. Washington, 466 U.S. 668, 685–86 (1984). The Court has held that the Sixth Amendment right to counsel is the right to "effective" counsel, defined as a lawyer whose performance falls within "an objective standard of reasonableness" as measured by "prevailing professional norms." *Id.* at 688. Reviewing courts must approach every case with the "strong presumption" that counsel's performance was effective. *Id.* at 689. To prove otherwise, the defendant must show that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance; that is, but for counsel's unprofessional errors, there was a reasonable probability of a different result. *Id.* at 700.

[25] Kirby v. Illinois, 406 U.S. 682, 690 (1972) (plurality opinion) (quoting Simmons v. United States, 390 U.S. 377, 383 (1967)); *see also* Coleman v. Alabama, 399 U.S. 1, 9 (1970) (plurality opinion) (holding that a criminal defendant has the right to counsel at preliminary hearings); United States v. Wade, 388 U.S. 218, 236–37 (1967) (holding that a criminal defendant has the right to counsel at a pretrial line-up); Massiah v. United States, 377 U.S. 201, 206 (1964) (holding that a criminal defendant has the right to counsel at post-indictment interrogations); Hamilton v. Alabama, 368 U.S. 52, 54–55 (1961) (holding that a criminal has the right to counsel at arraignment).

[26] Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012) (noting precedent recognizes a right to counsel during plea-bargaining process); Missouri v. Frye, 132 S. Ct. 1399, 1407–08 (2012) (holding same); Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (holding that a state must, at trial, provide counsel to indigent defendants facing a term of imprisonment); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (same); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("[L]awyers in criminal courts are necessities, not luxuries."); Powell v. Alabama, 287 U.S. 45, 58 (1932).

[27] Douglas v. California, 372 U.S. 353, 357–58 (1963). The right to counsel on appeal is a Fifth Amendment right, not a Sixth Amendment right. *See* Evitts v. Lucey, 469 U.S. 387, 396 (1985) ("A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."). For a thorough discussion of the Supreme Court's right to counsel jurisprudence from *Powell v. Alabama* through *Strickland v. Washington*, see, generally, Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 13–28 (1986).

relationships.[28] In non-capital cases, the conclusion of the direct appeal marks the end of the attorney–appellate client relationship for constitutional purposes.[29] Of course, wealthy defendants in all likelihood will retain counsel for further appeals and habeas proceedings. And, a small fraction of indigent, non-capital defendants are fortunate enough to obtain a court-appointed attorney on habeas because the reviewing judge believes that counsel is necessary.[30]

Except for the select group of criminal defendants who can afford habeas counsel or are entitled to it because they were sentenced to death, the attorney–client relationship ends with the termination of the criminal case at the trial or appellate level.[31] The defendant's file is closed and sent to storage, and defense counsel files no further pleadings, makes no further court appearances, and collects no further fees—either from the client or the court. Traditionally and for all practical purposes, the formal, advocacy-driven relationship is over. Once counsel ceases to act as the defendant's legal representative in that defendant's criminal case, she becomes "former counsel," whose client is now a "former client."

The end of the attorney–client relationship has always been less circumscribed when viewed from an ethical, rather than a constitutional or

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[28] *See Douglas*, 372 U.S. at 356.

[29] RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 12.2 (6th ed. 2011) ("[A]ppointed counsel is mandatory for all indigent *capital* prisoners and becomes available even before they file federal habeas corpus petitions when, as normally is the case, they need appointed counsel to assist them in investigating and presenting claims in their petitions. In other cases, however, indigent (i.e., nearly all) federal habeas corpus petitioners commence the proceedings either without legal assistance or with only the aid of a fellow inmate or a volunteer attorney who may be unable to proceed with the case in the absence of reimbursement for costs and time spent on the case." (footnotes omitted)); *see also* McFarland v. Scott, 512 U.S. 849, 855–56 (1994).

[30] *See* 28 U.S.C. § 2254(h) (2012) ("[I]n all [habeas] proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority."); *see also id.* R. 8(c). ("If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A [adequate representation of defendants]. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare.").

[31] *See* DEFENSE STANDARDS, *supra* note 17, §§ 4–8.1, 4–9.1, 4–9.2, 4–9.5. For trial counsel, the case terminates after the client has been sentenced, any necessary post-trial motions have been filed and litigated, and counsel has filed a notice of appeal. *See id.* §§ 4–8.1(b), 4–9.1(b), (c). For appellate counsel, representation generally continues "through all stages of a direct appeal, including review in the United States Supreme Court." *Id.* § 4–9.2(h); *see also id.* § 4–9.5(a).

action-driven, perspective. The duties of loyalty and confidentiality, for example, have long been understood to outlast not simply the life of the case, but the life of the client and the attorney.[32] But other than the rote obligations to file a notice of appeal and return the client's files and property, counsel's post-case duties are passive, fulfilled by simply saying and doing nothing.[33]

B. THE NEW INNOCENCE STANDARD

The American Bar Association's House of Delegates adopted the Innocence Standard, which is formally known as Defense Function Standard 4-9.4, in February of 2015.[34] The new standard tasks defense counsel with an ethical obligation without precedent or constitutional mooring: to affirmatively act to safeguard the rights of a former client in any criminal case—even if that case had been closed for years, if not decades earlier.[35]

The full text of the ABA's Innocence Standard states:

> (a) When defense counsel becomes aware of credible and material evidence or law creating a reasonable likelihood that a client or former client was wrongfully convicted or sentenced or was actually innocent, counsel has some duty to act. This duty applies even after counsel's representation is ended. Counsel must consider, and act in accordance with, duties of confidentiality. If such a former client currently has counsel, former counsel may discharge the duty by alerting the client's current counsel.
>
> (b) If such newly discovered evidence or law (whether due to a change in the law or not) relevant to the validity of the client's conviction or sentence, or evidence or law tending to show actual innocence of the client, comes to the attention of the client's current defense counsel at any time after conviction, counsel should promptly:
>
> (i) evaluate the information, investigate if necessary, and determine what potential remedies are available;
>
> (ii) advise and consult with the client; and
>
> (iii) determine what action if any to take.
>
> (c) Counsel should determine applicable deadlines for the effective use of such evidence or law, including federal habeas corpus deadlines, and timely act to preserve

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[32] Swidler & Berlin v. United States, 524 U.S. 399, 410 (1998).

[33] *See* MODEL RULES, *supra* note 22, R. 1.9 cmt. 1 (clarifying that the duty of confidentiality outlasts the representation); *id.* at R. 1.9(c)(2) (explaining the duty to avoid conflicts of interest between current and former clients by not revealing information relating to a former client's representation "except as these Rules would permit or require").

[34] *See* DEFENSE STANDARDS, *supra* note 17, Table of Contents.

[35] *Id.* § 4–9.4(a).

> the client's rights. Counsel should determine whether—and if so, how best—to notify the prosecution and court of such evidence.[36]

C. IMPACT OF THE INNOCENCE STANDARD

The Innocence Standard states that defense counsel has "some duty to act" upon learning "of credible and material evidence or law [which] create[s] a reasonable likelihood that a client or former client was wrongfully convicted or sentenced or was actually innocent . . . . *This duty applies even after counsel's representation is ended*."[37] The final paragraph instructs counsel or former counsel to learn of any statutes of limitations that might limit the use of the evidence in a post-conviction proceeding and to act to ensure that the deadline does not run before the evidence is brought forward. The Standard also instructs present and former counsel to consider the pros and cons of informing the court and the prosecution.[38] The rule is written broadly to apply to any kind of criminal case: felony or misdemeanor, capital or noncapital.

The Innocence Standard's imperative that a defense attorney "act" on behalf of a former client in these complex and potentially labor-intensive ways is unprecedented. Nowhere else in the American Bar Association's Defense Function Standards or the American Bar Association's Model Code of Professional Conduct is counsel required to *do* anything on behalf of a former client, other than the rote tasks of filing a notice of appeal, returning the client's property, and providing the case file to the client and

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[36] DEFENSE STANDARDS, *supra* note 17, § 4–9.4. As it applies to a current client, the obligations imposed by the new Standard are utterly consistent with defense counsel's pre-existing duty of zealous representation. *See* MODEL RULES, *supra* note 22, R. 1.3 cmt. 1. Indeed, one could argue that there is no need to spell out explicitly what is implicit, that a competent attorney, upon learning of a current client's possible innocence, would investigate the evidence, advise the client, and determine from there what appropriate actions to take. *See id.* R. 1.1 cmt. 5. And, at first read, the Innocence Standard's "duty to act" as applied to a former client also seems eminently reasonable, even obvious: why would trial counsel not do everything in her power to advocate on behalf of a former client if she learns of new evidence pointing to that client's innocence or wrongful conviction? *See* DEFENSE STANDARDS, *supra* note 17, § 4–9.4. The Innocence Movement has proven that wrongful convictions are a serious problem; making defense counsel part of the solution is one more means of solving it. The ABA can also rightly point to precedent for the new Innocence Standard it has applied to prosecutors since 2008. *See* MODEL RULES, *supra* note 22, R. 3.8(g)–(h).

[37] DEFENSE STANDARDS, *supra* note 17, § 4–9.4(a) (emphasis added).

[38] *See id.* § 4–9.4(c) ("Counsel should determine whether—and if so, how best—to notify the prosecution and court of such evidence.").

successor counsel, if requested.[39] Counsel fulfills her unending duty of confidentiality with the ultimate non-action: remaining silent.

But the Innocence Standard demands more than passivity if new evidence emerges indicating the wrongful conviction of a former client. While the Standard says the duty to act can be discharged by informing the former client's current counsel, that exit ramp will rarely be available because the vast majority of post-appeal convicted inmates have no counsel.[40] And although the Standard does not elaborate on what "some duty to act" might involve, if the imperative is exoneration, it logically follows that it would include the same actions the Standard mandates for current counsel: "evaluate," "investigate," and "advise and consult with the [former] client."[41]

More specifically, the Innocence Standard obligates both current and former counsel to "determine applicable deadlines for the effective use of such evidence or law, including federal habeas corpus deadlines, and [to] timely act to preserve the client's rights."[42] This undertaking is complex and fraught. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which governs the litigation of federal habeas petitions, imposes a stringent statute of limitations on prisoners seeking to challenge their convictions through the vehicle of federal habeas.[43]

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[39] *Id.* §§ 4–3.11(c), 4–9.1(c). The ABA's Rules of Professional Conduct, which apply to civil and criminal lawyers alike and which have been adopted by the majority of jurisdictions in the United States, also make no mention of any affirmative duty to act by defense counsel on behalf of a former client, other than the duty to return the client's papers and property. MODEL RULES, *supra* note 22, R. 1.16(d); *see* Jenna C. Newmark, Note, *The Lawyer's "Prisoner's Dilemma": Duty and Self-Defense in Postconviction Ineffectiveness Claims*, 79 FORDHAM L. REV. 699, 708–20 (2010) (delineating a lawyer's ethical obligation to former clients as the duty of confidentiality and the duty to provide information). The same holds true for the American Law Institute's Restatement of the Law Governing Lawyers. *See id.*

[40] *See* Wayne E. Brucar, *Post-Conviction Petition Practice: How to Write a Successful Petition and Get Your Client a Hearing*, 26 DCBA BRIEF 22, 23 (2014) ("There is no constitutional right to counsel in Post-Conviction proceedings."), http://www.dcba.org/resource/resmgr/Brief_pdf/BRIEF_Mar2014.pdf; Edward A. Tomlinson, *Post-Conviction in Maryland: Past, Present, and Future*, 45 MD. L. REV. 927, 958 (1986) ("[T]here is no federal or state constitutional right to counsel at a post-conviction proceeding [in noncapital cases].").

[41] DEFENSE STANDARDS, *supra* note 17, § 4–9.4(b).

[42] *Id.* § 4–9.4(c).

[43] 28 U.S.C. § 2254(d)(1) (2012) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an

The habeas deadline gives rise to a number of challenges that inmates must confront, which include complying with tight filing deadlines and exhausting all federal claims in state court before seeking habeas protection. Satisfying these obligations requires careful strategic thinking and the preparation of complex written pleadings. Compounding that challenge is the fact that non-capital prisoners seeking habeas relief have no right to counsel, and thus must represent themselves in all AEDPA-related proceedings unless they can afford an attorney.[44] The vast majority, however, are indigent and therefore unrepresented.[45] Compliance with the Innocence Standard, therefore, seems to task former counsel with explaining AEDPA's complexities to the former client.

Compliance may require significant self-education for prior counsel. Most state court practitioners have no reason to be familiar with AEDPA, which demands that an inmate file a federal habeas petition no later than one year and ninety days from the date the highest state court denied the direct appeal, or one year from the date that the United States Supreme Court denies certiorari.[46] This deadline may be relatively easy to calculate and apply, and for many former clients, it will have long passed by the time the new evidence surfaces.[47] But the blown deadline does not discharge counsel of her responsibilities of the Standard, because it may be overcome by what is known as the "innocence gateway," an exception that allows a defendant to present an untimely federal claim if it turns on evidence of

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unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."); *see also* Laurie L. Levenson, *Searching for Injustice: The Challenge of Postconviction Discovery, Investigation, and Litigation*, 87 S. CAL. L. REV. 545, 549 n.16 (2014) ("In practice, [AEDPA] created a mountain of significant procedural hurdles to inmates seeking habeas relief.").

[44] *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("[T]he right to appointed counsel extends to the first appeal of right, and no further.").

[45] *See* Lee Kovarsky, *Original Habeas Redux*, 97 VA. L. REV. 61, 88–89 (2011) ("Of the criminally confined prisoners attacking capital sentences, almost ninety-five percent were represented by counsel. By contrast, only about two percent of criminally confined, noncapital prisoners had lawyers.").

[46] Levenson, *supra* note 43. Jean K. Gilles Phillips & Elizabeth Cateforis, *Federal Habeas Corpus For Trial Lawyers*, J. KAN. B.A., Jan. 2004, at 20, 22 ("There are four distinct starting points for calculating the deadline, depending on four different circumstances. The common starting point for most state inmates is 'the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.' This time period includes time the case spends on direct appeal, on petition for review before the state supreme court, and the 90 days allowed for the filing of a certiorari petition even if the petition is not filed." (footnote omitted)).

[47] Any inmate who fails to file within AEDPA's statute of limitations is considered time-barred, absent an exception. *See* McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013).

actual innocence.[48] To comply with the Innocence Standard, defense counsel seems tasked with advising former clients of the innocence gateway exception and explaining how most effectively to litigate *pro se* so that their untimely claims have a chance of receiving due consideration. Ideally, the previous counsel would also advise former clients to file a request for the appointment of new counsel. Because that motion is so crucial, the previous counsel should also consider helping former clients with the drafting of the motion so that it has a better chance of success.

For the select group of former clients within AEDPA's statute of limitations, the duty to "timely act to preserve the client's rights" will involve an even more complicated series of explanations. AEDPA demands that the timely filed federal petition be: (a) comprehensive—include every cognizable federal constitutional claim[49]—and, (b) exhausted—contain only claims that have been previously evaluated on their merits by the state courts.[50] So-called successive claims—that is, claims in petitions brought after the first petition—are almost certain to be denied as untimely.[51] And unexhausted claims are generally dismissed outright.[52]

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[48] *See id.* The Supreme Court has never held that a freestanding claim of actual innocence may serve as the basis for federal habeas relief. Herrera v. Collins, 506 U.S. 390, 400–01 (1993) ("Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence."). Recently, however, the Court held that, "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute of limitations." *McQuiggin*, 133 S. Ct. at 1928.

[49] HERTZ & LIEBMAN, *supra* note 29, § 11.3[b] ("[AEDPA] created a number of new procedural defenses and expanded others that already existed. As a result, prisoners have even more reason than before to discover and include in their initial federal habeas corpus petitions every 'colorable ground[] for relief[.]'" (footnotes omitted)); *see* 28 U.S.C. §§ 2244(b)(2)–(3), 2255(h) (2012) (barring any second or successive habeas petition unless it cites new rules of constitutional law with retroactive effect as its basis, or the factual predicate giving rise to the constitutional claim could not have been discovered at the time with due diligence); *see also* Gage v. Chappell, 793 F.3d 1159, 1164 (9th Cir. 2015).

[50] 28 U.S.C. § 2254(b)–(c) (2012); *see also* Rose v. Lundy, 455 U.S. 509, 510 (1982) (holding that § 2254 requires a district court to dismiss any habeas petition with unexhausted state court claims); Dickens v. Ryan, 740 F.3d 1302, 1317 (9th Cir. 2014) (en banc) ("A federal court may not grant habeas relief to a state prisoner unless he has properly exhausted his remedies in state court." (quoting Peterson v. Lampert, 319 F.3d 1153, 1155 (9th Cir. 2003) (en banc)).

[51] *See* HERTZ & LIEBMAN, *supra* note 29, § 28.3(e); 28 U.S.C. § 2244(b)(1); *see, e.g.*, *Gage*, 793 F.3d at 1165–66.

[52] HERTZ & LIEBMAN, *supra* note 29, § 23.1; *see* 28 U.S.C. § 2254(b)(1)(A); *see, e.g.*, Picard v. Connor, 404 U.S. 270, 275–76 (1971); Arrendondo v. Neven, 763 F.3d 1122, 1138 (9th Cir. 2014).

For these reasons, it is important for the former client to file every viable federal constitutional claim in a single petition. But at least one of those claims will not be exhausted: a claim that involves newly discovered evidence unavailable to the prisoner at an earlier date, which points to his or her innocence or wrongful conviction.[53] If a former client has, in addition to the innocence claim, at least one other claim that the state courts have previously reviewed (and rejected), he or she will have a "mixed petition," which contains some claims that are exhausted and some claims that are not.[54] Therefore, counsel must also advise the former client to seek a stay from the federal district court to go back to state court and exhaust the unexhausted claim or claims. Competently advising the former client involves familiarity with the stay-and-abey doctrine, and the ability to explain to the client how to litigate, *pro se*, to obtain a stay-and-abey order.[55] Once again, counsel should also advise the client to file a motion for the appointment of counsel and help the client with the drafting of the

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[53] *McQuiggin*, 133 S. Ct. at 1928. Evidence of actual innocence is often newly discovered not because it is "new," *per se*, but because it was withheld due to misconduct by the prosecution or police, false testimony by witnesses, or ineffective assistance of trial counsel, all of which are constitutionally viable grounds for habeas relief. *See* Bazelon, *supra* note 20. Thus, evidence of actual innocence is often presented to federal courts through one of these vehicles. *Id.* The obvious conflict presented by former counsel advising a former client to present an actual innocence claim by arguing that former counsel herself was ineffective is explored in Part III.B, *infra*.

[54] *See Rose*, 455 U.S. at 518–19 (classifying as "mixed" any federal habeas petition that contained even one unexhausted state claim).

[55] The United States Supreme Court has authorized federal district courts confronted with mixed petitions to issue a stay to allow the petitioner to return to state court to exhaust his unexhausted claims if: (1) there is good cause for the failure to exhaust, (2) the claims are potentially meritorious, and (3) there is no evidence of abusive or dilatory tactics. Rhines v. Webber, 544 U.S. 269, 277–78 (2005) (holding that when outright dismissal of petitioner's unexhausted claims would bar petitioner from later bringing them in federal court, district courts may issue a stay-and-abeyance for a reasonable time period until petitioner can exhaust all claims in state court). A further wrinkle would occur for the current counsel if the newly discovered innocence claim is the only claim the former client intends to present to the federal court and thus the entire petition is unexhausted. The Supreme Court has never held that *Rhines* stays apply to a completely unexhausted petition, but three circuit courts have applied *Rhines* in that context, and competent counsel should advise a former client to raise this argument. *See* Hyman v. Keller, 10-6652, 2011 WL 3489092, at *10 (4th Cir. Aug. 10, 2011) (applying *Rhines*'s stay-and-abey procedure where previous state court dismissal of habeas did not address unexhausted claim); Heleva v. Brooks, 581 F.3d 187, 191 (3d Cir. 2009) (finding that *Rhines* and other Supreme Court precedent allow for "protective" stay-and-abey habeas petitions, "even where only unexhausted claims are at issue"); Dolis v. Chambers, 454 F.3d 721, 725 (7th Cir. 2006) (upholding previous order to allow *Rhines* stay-and-abey procedure for unexhausted habeas petition).

motion.

As this example demonstrates, acting to preserve a past client's federal habeas rights effectively converts former counsel into current counsel, because fulfilling the Standard's mandate essentially re-institutes the original attorney–client relationship. The Standard does not address the potential ethical, legal, practical, and financial difficulties prior counsel might confront in fulfilling these post-representation responsibilities.

The impulse to impose additional ethical obligations upon the defense bar as a way of correcting wrongful convictions is understandable. There is no doubt that the wrongful conviction and incarceration of a criminal defendant is horrific and tragic for that individual and his or her loved ones. It is also undeniable that this kind of blatant injustice is abhorrent and represents the ultimate breakdown in the criminal justice system. What is contentious about the Standard is not its moral imperative but rather the heavy burden it places on defense counsel to "act" in "some" way—both defined and undefined—without taking into account the potential ethical, reputational, practical, and financial costs such actions might incur.

II. LEGAL AND MORAL JUSTIFICATIONS FOR THE INNOCENCE STANDARD

This section discusses the growing power of the Innocence Movement to effect reforms within the criminal justice system, summarizes the most prominent of those reforms, and then explores the impact of the movement on the creation of new ethical standards for prosecutors and defense attorneys.

A. THE INNOCENCE MOVEMENT

The Innocence Standard has no accompanying commentary as of the writing of this Article. Nevertheless, the intent behind the creation of the rule—to rectify miscarriages of justice—seems clear from the text and the American Bar Association's attentiveness to the problem of wrongful convictions.[56]

The American Bar Association's focus on this problem reflects a building national consensus that the existence of so many exonerees is the result of significant defects in the criminal justice system that are in need of remedy.[57] Over the last two decades, a sea change has taken place in the

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[56] *See, e.g.*, ACHIEVING JUSTICE, *supra* note 17, at 773 (describing the ABA's 2008 decision to pass nine resolutions designed to "better ensure that individuals will not be convicted of crimes they did not commit, and to compensate those who are exonerated").

[57] *See generally* Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful*

attention paid by lawyers to the problem of wrongful convictions, which in turn has heightened public awareness of the problem and its horrific consequences.[58] Conservative estimates put the number of people serving time in prison for crimes they did not commit in the tens of thousands.[59] As the number of exonerees has risen, innocence projects and other non-profit organizations devoted to freeing and compensating the wrongfully convicted have also grown in number.[60] In recent years, the Innocence Movement has resulted in "widespread systemic reform," including greater DNA collection and testing, changes to police investigative procedures, rules to prevent prosecutorial misconduct, increased funding for capital

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Convictions After a Century of Research, 100 J. CRIM. L. & CRIMINOLOGY 825 (2010) (historical overview and comprehensive analysis of a century of wrongful convictions).

[58] Kimberley A. Clow et al., *Public Perception of Wrongful Conviction: Support for Compensation and Apologies*, 75 ALB L. REV. 1415, 1415 (2011/2012) ("With over 280 post-conviction DNA exonerations through Innocence Projects in the United States alone and half a dozen Commissions of Inquiry into wrongful convictions in Canada, the public may be more aware of wrongful convictions than ever before."); Elizabeth S. Vartkessian & Jared P. Tyler, *Legal and Social Exoneration: The Consequences of Michael Toney's Wrongful Conviction*, 75 ALB. L. REV. 1467, 1467 (2011/2012) ("In the last twenty years increasing scholarly attention has been devoted to understanding the causes and consequences of wrongful convictions.").

[59] In 2015, the National Registry of Exonerations released a report called The First 1,600 Exonerations, which documented the number of men and women exonerated from January 1989 through May 18, 2015. NAT'L REGISTRY, 1600 EXONERATIONS, *supra* note 5, at 1; *see also* Medwed, *supra* note 10, at 131 (noting the lack of certainty surrounding the number of wrongfully convicted prisoners). Most wrongful conviction cases do not involve DNA or forensic evidence, which makes proving the wrongful conviction a great deal more difficult. *See* NAT'L REGISTRY, 1600 EXONERATIONS, *supra* note 5, at 2 (noting that seventy-five percent of exonerations do not involve DNA evidence). A recent study by the University of Michigan estimated that 4.1% of the death-row population is innocent. Jan Hoffman, *4.1% Are Said to Face Death on Convictions That Are False*, N.Y. TIMES (May 1, 2014), http://www.nytimes.com/2014/05/02/science/convictions-of-4-1-percent-facing-death-said-to-be-false.html?_r=0. Conservative estimates put the number of those wrongfully convicted of any felony at somewhere between two and eight percent. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty. According to the United States Department of Justice Bureau of Statistics, the United States has a prison population of approximately 1,561,500 million people in 2014. E. Ann Carson, *Prisoners in 2014*, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE (Sept. 17, 2015), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5387. Assuming a conviction rate error of two percent—a very conservative estimate—that number translates into approximately 31,200 innocent people behind bars. *See id.*

[60] *Innocence Network Member Organizations*, THE INNOCENCE NETWORK, (Oct. 4, 2015, 3:16 PM), http://innocencenetwork.org/members/ (noting the existence of over fifty organizations in the United States listed as "Innocence Projects.").

defense attorneys, and higher standards for attorneys representing these clients.[61]

The Innocence Movement has had a profound impact on the American Bar Association. In 2002, the Chair of the Criminal Justice Section convened an Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process.[62] The Ad Hoc Innocence Committee, made up of a cross-section of criminal justice experts including prosecutors, defense attorneys, judges, and law professors, spent three years researching false confessions, eyewitness identification procedures, forensic science, informants, defense counsel practices, prosecution practices, and police investigative techniques.[63]

The Ad Hoc Innocence Committee's work resulted in a series of policy recommendations, styled as nine resolutions, which were adopted by the American Bar Association's House of Delegates.[64] The resolutions, aimed at reforming police and prosecutorial procedures, recommended, among other things: videotaping or audiotaping police interviews with suspects, adopting specific procedures to improve the accuracy of line-up and photo array identifications, requiring that crime laboratories and coroner's offices be accredited and follow standardized procedures, refusing to prosecute a case solely on the basis of a jailhouse informant's testimony, increasing compensation for appointed defense counsel to promote "high quality" representation, promoting greater accountability and training for law enforcement officers, and providing more funding and training for prosecutor offices.[65] More broadly, the American Bar Association adopted a resolution on "systemic remedies," which exhorted state and federal governments to "identify and attempt to eliminate the causes of erroneous convictions."[66] One member of the committee suggested that "[a] natural place for jurisdictions to begin to review local laws and procedures is by comparing them to newly adopted ABA

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[61] Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 608 (2005); *see also* Kevin Johnson, *Exonerations Hit Record High of 125 in 2014*, USA TODAY, Jan. 27, 2015, at 5A (noting that of the 125 exonerations on record for 2014, police and prosecutors cooperated in obtaining 67 of them).

[62] ACHIEVING JUSTICE, *supra* note 17, at 766.

[63] *Id.* at 773.

[64] *Id.*

[65] *Id.* at 773–88.

[66] *Id.* at 787.

innocence policies[.]"[67]

In 2008, the American Bar Association also amended Model Rule of Professional Conduct 3.8 to significantly expand upon the prosecutor's responsibilities to turn over *Brady* material and to investigate post-conviction cases potentially involving wrongful convictions.[68] This amended Rule, which applies only to prosecutors, now has two subsections requiring that prosecutors take specific post-conviction actions upon learning "of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit [the] offense."[69] Specifically, the amended Rule directs the prosecutor to:

> [P]romptly disclose that evidence to an appropriate court or authority, and . . . if the conviction was obtained in the prosecutor's jurisdiction, [to] promptly disclose that evidence to the defendant unless a court authorizes delay, and [to] 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.[70]

If the prosecutor's investigation establishes by "clear and convincing evidence" that the defendant is innocent, "the prosecutor shall seek to remedy the conviction."[71]

Finally, in February of 2015, the American Bar Association adopted the prosecutorial version of the Innocence Standard. This new Standard, formally known as Prosecution Function Standard 3-8.3, recommends that prosecutors comply with Rule 3.8(g) and (h) whenever "a prosecutor learns of credible and material information creating a reasonable likelihood that a defendant was wrongfully convicted."[72] The second part of the standard would require the prosecutor to "develop policies and procedures to address such information[] and take actions that are consistent with applicable law, rules, and the duty to pursue justice."[73] While the Standard is technically a new standard of conduct for prosecutors, the obligations it imposes have been in place since the amendment to Rule 3.8 in 2008.[74]

Given the American Bar Association's extensive efforts to address the

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[67] *Id.* at 787–88.

[68] MODEL RULES, *supra* note 22, R. 3.8(g)–(h).

[69] *Id.* R. 3.8(g).

[70] *Id.*

[71] *Id.* R. 3.8(h).

[72] PROSECUTION STANDARDS, *supra* note 17, § 3–8.3.

[73] *Id.*

[74] *See* MODEL RULES, *supra* note 22, R. 3.8(g)–(h) (using mandatory, "shall" language to create an affirmative duty).

problem of wrongful convictions, including its revision of Model Rule of Professional Conduct 3.8, it is not surprising that the organization would continue to propose additional innovative reforms. The newly-adopted Innocence Standards for prosecutor and defense attorneys, which followed the passage of the nine resolutions proposed by the Ad Hoc Innocence Committee and the amendment to Rule 3.8, are such reforms. The ever-growing number of exonerees, and the empirical evidence of the depth and breadth of the defects in the criminal justice system that account for their existence, provide compelling reasons to embrace both of these new Standards.

B. THE HOLISTIC MODEL OF REPRESENTATION

The development of the Innocence Standard was influenced by the holistic model of representation, which is a philosophy of criminal defense that has become increasingly popular among more progressive and well-funded public defender and non-profit criminal defense organizations in the United States.[75] The Innocence Standard's exhortation "to act" on behalf of former clients fits neatly within the framework of holistic criminal defense, which advocates for the "whole client" outside the confines of the pending criminal case, using resources and skill-sets "beyond mere courtroom advocacy."[76] Below, I explain that the holistic model of representation, while undeniably admirable and effective, is impracticable in many instances because it requires resources that many criminal defense attorneys and less-well-funded public defense organizations do not have. As well, it places defense counsel in a role that is outside of her traditional adversarial function and may in some cases be at odds with it. The concomitant obligations placed on defense counsel by the Innocence Standard raise the same concerns.

Practitioners of the holistic model—primarily public defenders and law school clinics, but also some attorneys in private practice—collapse the distinction between "current" and "former" clients.[77] These lawyers, in

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[75] Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1093–94 (2004) (listing a number of organizations that use the holistic model of representation); Katherine E. Kinsey, Note, *It Takes a Class: An Alternative Model of Public Defense*, 93 TEX. L. REV. 219, 252 (2014) ("As awareness of the holistic model of representation has grown, more actors are willing to experiment with the model.").

[76] Kyung M. Lee, Comment, *Reinventing* Gideon v. Wainwright*: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 371, 387–88 (2004).

[77] *See, e.g.*, Douglas Ammar, *Georgia Justice Project Turns Lives Around Through*

addition to providing direct litigation services, navigate the collateral consequences of sustaining a criminal conviction, which may include "the loss or denial of public housing and other benefits, ineligibility for employment-related licenses, a change in immigration status, damage to one's reputation in the community, and a myriad of other problems that do not end at legal representation and disposal of the criminal case."[78] During the litigation of the criminal case and long after its conclusion, defense counsel attacks the "root causes" of the client's predicament by helping the client get access to drug treatment, benefits, childcare, psychological counseling, and employment opportunities.

Public defenders, clinical law professors, and other aggressive proponents of the holistic model also urge defense counsel to advocate for proactive and preventative criminal law and policy measures, most importantly by demanding that states provide adequate funding for indigent defense.[79] Pre-indictment, even pre-case, defense counsel are encouraged to be impact litigators involved in the "legislative, policy, and planning decisions that precede the trial."[80] Defense counsel are encouraged to combat the race- and class-based portrayal of clients in the media and to challenge the popular perception of criminal defendants as "guilty anyway" and beyond redemption.[81] This is done by "reach[ing] farther into clients' lives and communities" to foster a richer understanding of the client's life

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Aggressive Defense, Holistic Relationships, CHAMPION, Jan.–Feb. 2004 at 50 (describing his non-profit's model; charting one client's lifelong relationship with the project; and quoting Representative John Lewis as saying: "A relationship with the Georgia Justice Project is a relationship for life. You are like one big family. You are creating pockets of . . . the Beloved Community.").

[78] Douglas Ammar & Tosha Downey, *Transformative Criminal Defense Practice: Truth, Love, and Individual Rights—The Innovative Approach of the Georgia Justice Project*, 31 FORDHAM URB. L.J. 49, 55 (2003). Under this conceptual framework, "the attorney–client relationship is only the beginning of the relationship, not the end. It does not define the boundary of [the] relationship." *Id.* at 56. Lawyers at the Georgia Justice Project (GJP) work with social workers to aid their clients with post-conviction matters, and employ some of them in a landscaping business it owns and operates. *Id.* at 56–57.

[79] Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 425–27 (2001) ("[Holistic defenders become] more active in the democratic process by increasing their political involvement, consensus-building with other groups that may be unlikely allies, and trying to secure a place for the defender voice at the policy-making tables. They engage in direct lobbying on specific criminal justice issues and organize public education campaigns." (footnotes omitted)).

[80] *See* Lee, *supra* note 76, at 390–91.

[81] *See* David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 26 (1973).

story and its impact on the current criminal case.[82]

The holistic model got a tremendous and unexpected endorsement in 2010, when the United States Supreme Court held that a criminal defense attorney violated the Sixth Amendment's guarantee of effective legal representation by failing to advise his client that he could face deportation by pleading guilty to transporting marijuana.[83] *Padilla v. Kentucky* was notable for its evisceration of the distinction between direct and collateral consequences.[84] Equally important was its focus on the whole client. Defense counsel was duty-bound to consider and discuss the client's life prospects beyond the criminal case, at least within the context of deportation.[85]

The opinion was notable for its sympathetic portrayal of the defendant and its refusal to narrowly define the attorney–client relationship. The Court began its opinion with a lengthy description of the defendant, a Vietnam War veteran who "served . . . with honor" and lived as a lawful permanent resident in the United States for more than forty years.[86] Batting down the argument that the criminal defense attorney's role was limited to advising a client about criminal penalties in the guilty plea context, the Court noted that for many people, removal from the United States was potentially a far harsher penalty than incarceration.[87] The fact that immigration law was a specialty outside of criminal defense counsel's

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[82] *See* Brooks Holland, *Holistic Advocacy: An Important but Limited Institutional Role*, 30 N.Y.U. REV. L. & SOC. CHANGE 637, 639, 649 (2006) (quoting Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 125 (2004)).

[83] Padilla v. Kentucky, 559 U.S. 356, 359–60, 366, 369 (2010). The managing attorney of the Civil Action Practice at The Bronx Defenders and the Director of Reentry Net described the decision as an "earthquake" that "shocked commentators and practitioners alike." McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 796, 798 (2011). According to Margaret Love, a former U.S. Pardon Attorney under the George H.W. Bush and Clinton Administrations, "*Padilla* may turn out to be the most important right to counsel case since *Gideon*, and the '*Padilla* advisory' may become as familiar a fixture of a criminal case as the *Miranda* warning." Margaret Love & Gabriel J. Chin, *The "Major Upheaval" of* Padilla v. Kentucky*: Extending the Right to Counsel to the Collateral Consequences of Conviction*, CRIM. JUST. Summer 2010, at 36, 37.

[84] Smyth, *supra* note 83, at 796, 798, 800.

[85] *Padilla*, 559 U.S. at 366, 369.

[86] *Id.* at 359.

[87] *Id.* at 368; *see also id.* at 370–71 n.11 ("[We think] any decent attorney would inform the client of the consequences of his plea . . . [if it could result in] 'banishment or exile[.]'" (quoting Delgadillo v. Carmichael, 332 U. S. 388, 390–391 (1947))).

bailiwick was no excuse; given the high stakes of permanent exile, it was incumbent upon counsel to act in clear-cut cases by giving correct legal advice about deportation consequences, and in less clear-cut cases, to advise the client that deportation was, at least, a possibility.[88]

Many have agreed with the characterization of the *Padilla* decision as "the most important right to counsel case since *Gideon*,"[89] with far reaching implications for the criminal defense attorney–client relationship. While this interpretation may be correct, it bears emphasizing that *Padilla* addressed *current* counsel's obligations to a *current* client *during* the life of the client's criminal case. *Padilla* endorsed the holistic model of representation within the plea and trial context. But nowhere in the decision did the Supreme Court endorse the major tenet of the holistic model: that the attorney–client relationship is unending and unbounded, with counsel's "imagination and desire to help [as] the only theoretical limits."[90]

There are many reasons to embrace the holistic model of representation, which is innovative, rigorous, and often extremely effective.[91] And there is an undeniable attraction in its recasting of defense attorneys—the red-headed stepchildren of the criminal justice system who some dismiss "as sleazy and unethical, one step away from the clients they represent."[92] Under the holistic model, defense counsel is no longer the despised mercenary who signs on to fight for the enemy and departs at war's conclusion to take up another equally repugnant cause. Rather, the defense attorney is a mensch[93] whose mission is to deliver the client, not

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[88] *Id.* at 369.

[89] Love & Chin, *supra* note 83; *see also* César Cuauhtémoc García Hernández, *Criminal Defense After* Padilla v. Kentucky, 26 GEO. IMMIGR. L.J. 475, 479–80 (2012) ("*Padilla* fits within the important right to counsel line of cases that finds its roots in the infamous Scottsboro Boys case, *Powell v. Alabama*, and its modern doctrinal formulation in *Strickland v. Washington*[.]" (footnotes omitted)); Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 HOW. L.J. 693, 694 (2011) ("[*Padilla* is] monumental for ineffective-assistance [of counsel] jurisprudence[.]").

[90] Lee, *supra* note 76, at 388.

[91] Clarke, *supra* note 79, at 448–54 (describing the New York City-based Neighborhood Defender Service of Harlem and Bronx Defenders, as well as the Public Defenders Service of Washington, D.C., as practitioners of the holistic model with sterling reputations and excellent results); Lee, *supra* note 76, at 400–01, 409–14 (providing a similar description of the Community Law Office in Knoxville, Tennessee, and the Georgia Justice Project in Atlanta).

[92] Raymond, *supra* note 20, at 457 (footnotes omitted) ("[O]rdinary criminal defense lawyer[s] . . . are not viewed as heroic. Far from it.").

[93] *See In Our Words*, BE A MENSCH, http://beamensch.com/what-is-a-mensch/in-our-words/ (defining "Mensch" as "a Yiddish word meaning 'a person of integrity and honor'";

from a righteous government adversary, but from the client's own demons, by providing access to a lifetime's worth of aid: drug treatment, psychological counseling, job training, anger management, government benefits, employment, and even friendship, staying in close touch long after the criminal case is a distant memory.[94] The same might be said for the new Innocence Standard, which has prior defense counsel wearing the proverbial white hat, riding in to the rescue at the eleventh hour—long after her shift is over. The Innocence Standard emphatically rejects the idea of an attorney–client relationship that is bounded by time or similar pedestrian constraints (money, resources, legal training).

At the same time, there are reasons to be cautious of the holistic model, even wary—concerns that apply with equal force when considering the potential complications of the Innocence Standard. The efficacy of the holistic model of representation is premised on partnerships with social workers, judges, prosecutors, religious leaders, and community members—all persons who have different roles in the system and are often opposed to defense counsel's core function. One commentator noted that the organizations that subscribe to the holistic ethos have "turned the image of the knee-jerk liberal defense lawyer on its head and have, in effect, become crime fighters themselves."[95] But defense counsel is emphatically not a "crime fighter;" that job belongs to the prosecution and the police. A defense attorney's legal and ethical obligation is fundamentally different, and often diametrically opposed.[96]

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someone who "does what is right because it is right towards family, towards strangers, at home and in public").

[94] Ammar & Downey, *supra* note 78, at 57 (noting that GJP lawyers view themselves as providers of "wraparound" social services and fierce advocates for clients years after the criminal case has concluded). "Once released 'from prison or jail, [the GJP] offer[s] a variety of social services such as individual and group counseling, GED and literacy classes, monthly support dinners, and employment with [its landscaping] business.'" *Id.* at 57 (quoting Douglas B. Ammar, *Forgiveness and the Law—A Redemptive Opportunity*, 27 FORDHAM URB. L.J. 1583, 1593 (2000)). GJP dismisses concerns raised by criminal practitioners and experts "that such amorphous boundaries cause problems in the attorney–client relationship and are beyond the scope of professionalism" as unfounded, stating, "[w]e have found the opposite to be true. More permeable boundaries allow our clients to trust us more and begin to see us as true advocates." *Id.* at 56.

[95] David E. Rovella, *The Best Defense . . .*, NAT'L L.J., Jan. 31, 2000, at A1; *accord* Clarke, *supra* note 79, at 404–05 (stating that holistic defenders "see their role broadly" to include "occasionally initiating projects with police, prosecutors, and corrections officials to address specific problems facing communities.").

[96] Then, too, there is the uncomfortable fact that the holistic model is at heart paternalistic. As one commentator wrote, this type of approach "risks condescending clients

Of course, the vast majority of criminal cases result in guilty pleas that are the result of brokered agreements between defense counsel and her adversaries.[97] The more collegiality and goodwill that exist between the two sides, the more likely they will cooperate and even collaborate on a favorable outcome for the client.[98] But at the same time, defense counsel must always be ready to take on prosecutors and police, and perhaps just as importantly, to be seen as someone who embraces that challenge.[99] Defense counsel's core mission, and to some degree, political capital, is based upon being an advocate who squares off against the vast resources of the state without flinching.[100] To be sure, practitioners of holistic representation maintain their commitment to the adversarial model.[101] But some critics question whether the holistic model leaves some lawyers unprepared to aggressively litigate on behalf of clients who are despised "even in the communities from which they come," because the lawyers' default mode has become conciliatory and cooperative rather than antagonistic.[102]

The critique of the holistic model as potentially contradicting defense

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severely" by implying that: "Because you are poor, we are not only going to defend you, we are going to *fix* you." Holland, *supra* note 82, at 646. Many clients welcome the kind of individualized attention and wraparound services the holistic model provides; others however, may chafe at what they view as intrusiveness and the presumption that the lawyer has the competence to determine not only their best legal interests, but their best "life outcomes" as well. *Id.*

[97] *See, e.g.*, Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012) ("More than 90 percent of criminal cases are never tried before a jury."), http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html?_r=0; Rakoff, *supra* note 59 ("In 2013 . . . more than 97 percent of [federal criminal charges] were resolved through plea bargains, and fewer than 3 percent went to trial.").

[98] *See, e.g.*, Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 416 (2008); Jack E. Fernandez & Caroline Judge Mehta, *Criminal Cases: Representing Individual Officers and Directors*, FOR THE DEF., Jan. 2006, at 39, 41.

[99] *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2478 (2004) ("If a lawyer is bent on plea bargaining and does so all the time, he cannot credibly threaten to go to trial. Prosecutors will offer fewer concessions to these lawyers' clients because they do not have to offer more." (footnotes omitted)).

[100] *See* Holland, *supra* note 82, at 644–46.

[101] Steinberg & Feige, *supra* note 82, at 124 ("Trial skills and aggressive courtroom advocacy remain a mainstay of a [holistic model].").

[102] *See* AM. BAR ASS'N COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM 41–42 (2007) (describing the views of some in the defense bar who argue that a public defender's focus should be on the courtroom and if those "office[s] elevate[] social work and community-outreach practice institutionally, [they] risk[] professional imbalance with [their] lawyers losing focus on their core role of plea negotiation and trial litigation"), http://www.americanbar.org/content/dam/aba/migrated/cecs/secondchances.authcheckdam.pdf; *see also* Holland, *supra* note 82, at 642, 646–48.

counsel's fundamental purpose and even inhibiting counsel from carrying out her adversarial responsibilities in the courtroom is very similar to the critique of the Innocence Standard. Both the holistic model and the Innocence Standard have their geneses in expanding and improving upon counsel's delivery of services under the Sixth Amendment. But in their quest to better the system, do they inadvertently subvert it? This question becomes more pointed in the face of a harsh reality: for the vast majority of lawyers who represent indigent clients, there are not enough hours in the day to be a holistic attorney, even if they might like to be. This critique applies with equal force to the Innocence Standard, which may require investigative steps and legal expertise that are impracticable for the vast majority of criminal defenders. These complications and the ethical implications of the Standard—including the expansion of defense counsel's role from advocate to truth-seeker and attendant conflicts of interest—are discussed below.

III. THE ETHICAL AND PRACTICAL DILEMMAS POSED BY THE INNOCENCE STANDARD

A. THE PROBLEM WITH PARITY

This section discusses in more detail the ethical dilemmas that the Innocence Standard may pose. First, establishing parity in the responsibilities of prosecutors and defense attorneys incorrectly suggests that they play the same role in the system. Second, requiring defense counsel to act upon the discovery of exculpatory evidence in connection with a former client may violate her duty to a current client. Creating additional obligations to "act" on behalf of former clients may draw scarce resources away from current clients because most defense attorneys are already under-resourced despite facing excessive caseloads.

The two Innocence Standards for prosecutors and defense attorneys, adopted simultaneously, establish an ethical parity regarding the duty to act when newly discovered evidence of innocence surfaces in an old case. While parity has surface appeal, it fails to reflect the fundamentally different nature of these attorneys' respective roles. (The ABA appeared to implicitly recognize this in 2008, when it amended Rule 3.8 but did not create a related rule for defense attorneys.) The Innocence Standard for prosecutors simply restates a duty already imposed by the Constitution and underscores the prosecutor's ethical obligations under Rule 3.8, while

providing some additional explication.[103] By contrast, the new Innocence Standard for defense attorneys has no precedent in any existing ethical rule or legal dictate.

There is good reason for this discrepancy: the roles of defense counsel and the prosecutor do not mirror each other. Unlike defense counsel, who represents an individual, the prosecutor represents the public writ large.[104] Defense counsel must advocate zealously on behalf of her living, breathing client; the prosecutor directs her zeal toward the abstract pursuit of the administration of justice.[105] Because prosecutors are bound to represent the broader public and to make sure that the system is fair, they "are subject to constraints and responsibilities that don't apply to other lawyers."[106]

It makes sense to subject a prosecutor to the obligations in Model Rule of Professional Conduct 3.8 and the new prosecution Innocence Standard because those obligations are entirely consistent with the prosecutor's

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[103] *See* Thomas v. Goldsmith, 979 F.2d 746, 750 (9th Cir. 1992) (holding that the state has a duty in the post-conviction context "to turn over exculpatory evidence relevant to [an] instant habeas proceeding" when such evidence is in its possession); *see also* Arizona v. Youngblood, 488 U.S. 51, 55 (1988) (describing the constitutional right to access exculpatory evidence).

It should be noted that some scholars have questioned whether the law is settled on whether a prosecutor who receives *Brady* material post-conviction is constitutionally obligated to disclose it to the defendant. *E.g.*, Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 190 (2005) ("[N]o court has directly applied *Brady* to the postconviction context."). *But see id.* at 191 ("When a convicted defendant files a collateral attack within statutorily prescribed time limits and the prosecutor comes into possession of exculpatory evidence that would help the defendant establish an element of the collateral claim itself, disclosure may be required.").

[104] *Compare* DEFENSE STANDARDS, *supra* note 17, § 4–1.2(b), *with* PROSECUTION STANDARDS, *supra* note 17 § 3–1.2(b).

[105] *Compare* DEFENSE STANDARDS, *supra* note 17, § 4–1.2(b), *with* PROSECUTION STANDARDS, *supra* note 17, § 3–1.2(a)–(b).

[106] United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993) (citing Berger v. United States, 295 U.S. 78, 88 (1935)). The Supreme Court in *Berger v. United States* described the role of prosecutors more forcefully:

> [He] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. 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.

295 U.S. 78, 88 (1935).

primary obligation to "serve truth and justice first."[107] Indeed, the prosecutor's obligation "to act" to exonerate a wrongfully convicted person is well-established.[108] Defense counsel, however, has no constitutional or ethical obligation to seek truth and justice; in fact, such an obligation at times would be irreconcilable with defense counsel's core obligations.[109] Of course, defense counsel is an officer of the court and cannot knowingly present false evidence or otherwise perpetrate a fraud.[110] But refraining from plainly dishonest acts is not the same as fulfilling a proactive and continuing duty to ferret out the truth on behalf of a former client.

For defense counsel, the Innocence Standard's mandate to "act" in "some" way on behalf of a former, potentially innocent client is not so easily reconciled with counsel's narrowly prescribed but deeply consequential role in the criminal justice system. And, as explained below, the Standard's action-imperative with respect to former clients may conflict with defense counsel's preexisting constitutional and ethical obligations to current clients. The moral attraction of the Innocence Standard is undeniable. The hard question is whether the Standard is justified, taking full account of the moral, legal, and practical complications.

B. SERVING TWO MASTERS

The language of the Innocence Standard is deceptively simple: "When defense counsel becomes aware of credible and material evidence or law creating a reasonable likelihood that a client or former client was wrongfully convicted or sentenced or was actually innocent, counsel has some duty to act."[111] But what is former counsel to do if the source of "evidence" that "creates [the] reasonable likelihood" comes from a current client who is unwilling to let counsel share the information? This situation

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[107] *Id.* at 1323.

[108] *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976) (stating 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"); MODEL RULES, *supra* note 22, R. 3.8 (setting forth the prosecutor's duty to disclose exculpatory and mitigating information).

[109] *See* DEFENSE STANDARDS, *supra* note 17, § 4–1.2(b), (e) (stating that defense counsel's "primary duties" are "to serve as their clients' counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity" as a "professional representative" of the accused); *see also* Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 123 n.15 (1987).

[110] DEFENSE STANDARDS, *supra* note 17, § 4–1.2(b).

[111] *Id.* § 4–9.4(a).

could arise because the current client is the true perpetrator, is related or close to the true perpetrator, or is simply unwilling to be outed as a "snitch." Absent very narrowly-drawn exceptions, the attorney–client privilege protects all private communications, however reasonable or unreasonable the client's motivations for insisting on secrecy.[112] When the duty of confidentiality conflicts with the imperative of the Standard, it would appear to prohibit former counsel from doing what the Standard commands.[113]

The Innocence Standard does not address the complications facing a trial attorney caught between the warring demands of two clients, the current "confessor" client and the "former" innocent one, each with apparently co-equal claims on her duties of loyalty and zealous representation.[114] To satisfy the demands of the innocent client, she must

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[112] In the Matter of John Doe Grand Jury Investigation, 562 N.E.2d 69, 70 (Mass. 1990) ("The privilege of insisting that the attorney keep confidential the client's disclosures made to the attorney in his or her professional capacity belongs only to the client, and therefore can be waived only by the client, . . . or, in some instances at least, by the executor or administrator of the client's estate." (citation omitted)). In *Swidler & Berlin v. United States*, the Supreme Court noted the scant number of exceptions to the attorney–client privilege and expressly declined the government's invitation to create a further exception allowing an attorney to reveal a client's confidences after the client had died, stating: "A 'no harm in one more exception' rationale could contribute to the general erosion of the privilege, without reference to common-law principles or 'reason and experience.'" 524 U.S. 399, 409–10 (1998). Existing exceptions include "the crime-fraud exception [and] the exceptions for claims relating to attorney competence or compensation[.]" *Id.* at 414 (O'Connor, J., dissenting). Some jurisdictions also provide for an exception where the client tells his attorney of his intent to commit a future crime. *See, e.g.*, *John Doe Grand Jury Investigation*, 562 N.E.2d at 72 (Nolan, J., dissenting).

[113] The conflict arises within the text of the Standard, which mandates that counsel "act" on behalf of a current client and maintain her duty of confidentiality to a former client. *See* DEFENSE STANDARDS, *supra* note 17, § 4–9.4(a).

[114] *See id.* Some might argue that this conflict is a straw man, readily resolved by the application of other Standards and the Model Rules. But only one Standard appears directly on point, and it appears to conflict with the Innocence Standard rather than clarify its application. Standard 4–1.7(b) states that "Defense counsel should not permit their professional judgment or obligations regarding the representation of a client to be adversely affected by loyalties or obligations to other, former, or potential clients[.]" *Id.* § 4–1.7(b). That Standard does not carve out an exception for the Innocence Standard's "duty to act" on behalf of a possibly innocent client "even after counsel's representation is ended." *Id.* § 4–9.4. Nor does the Innocence Standard carve out an exception for the Conflict of Interest Standard, leaving open the question of which Standard defense counsel should follow when compliance with both is impossible. The Model Rules of Professional Conduct refer obliquely to the possibility of such a conflict but do not resolve it. For example, consider the rule governing a counsel's duties to former clients. MODEL RULES, *supra* note 22, R. 1.9. Rule 1.9 instructs a lawyer who has formerly represented a client in a matter not to represent

betray the confidences of the current client and violate what is one of the oldest and most sacrosanct privileges.[115] To serve the current client, she must abandon the wrongfully convicted person she represented at trial, perpetuating a gross miscarriage of justice and frustrating the truth-finding function of the court.[116] There is nothing in the wording of the proposed Standard to guide the attorney who faces this dilemma.[117]

This scenario is not as far-fetched as it may seem.[118] The vast majority

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a subsequent client in a "substantially related matter in which that person's interests are materially adverse to the interests of the former client[.]" *Id.* R. 1.9(a). Rule 1.9 also states that

> A lawyer who has formerly represented a client in a matter . . . shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client . . . or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Id. R. 1.9(c). But it is hard to see how Rule 1.9 resolves the counsel's conflict. The counsel is not seeking to use information to the "disadvantage" of the former client but rather to that client's advantage. The latter part of the rule forbids disclosure of information relating to the former representation except as permitted by the Rules, *Id.*, and the Proposed Standard explicitly grants that permission. DEFENSE STANDARDS, *supra* note 17, § 4–9.4. The problem is not disadvantageous disclosure to the former client, it is disclosure that *advantages* the former client to the *disadvantage* of the current one. Rule 1.16 states that "a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: [] the representation will result in violation of the rules of professional conduct or other law." MODEL RULES, *supra* note 22, R. 1.16(a)(1). The Rule also provides that withdrawal from the representation of a current client is permissible if there will be no "material adverse effect on the interests of the client" or "other good cause for withdrawal exists." *Id.* R. 1.16(b). It is conceivable that defense counsel could seek to terminate her relationship with her current client to fulfill her innocence-obligations to her former client on the grounds that failing to do so would violate the Innocence Standard or under the catchall "other good cause." But it is difficult to see how withdrawal would make any difference. It would not vitiate the duty of confidentiality that protects the information that has already been exchanged between the lawyer and the client whom she seeks leave to withdraw from representing.

[115] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[116] *See, e.g.*, *Swidler & Berlin*, 524 U.S. at 413–14 (O'Connor, J., dissenting) (arguing that refusing to provide an exception to protect the interests of an innocent defendant "may distort the record, mislead the factfinder, and undermine the central truth-seeking function of the courts"); State v. Macumber, 544 P.2d 1084, 1088 (Ariz. 1976) (in banc) (arguing that the privilege should give way where it frustrates the constitutional right of the accused to present a defense to a criminal charge and compel the attendance of witnesses to provide relevant testimony) (Holohan, J., specially concurring).

[117] DEFENSE STANDARDS, *supra* note 17, § 4–9.4(a).

[118] *See, e.g.*, United States v. Agosto, 675 F.2d 965, 969–74 (8th Cir. 1982). As described by Susan Voss, "*Agosto* involved an appeal of the disqualification of three attorneys who had separately represented three of the numerous codefendants in the case. One defense attorney had previously represented six grand jury witnesses, one codefendant

of criminal defendants are indigent and represented by court-appointed counsel, usually a lawyer from the public defender's office.[119] Public defender offices operate like law firms, so that a client of one defender is a client of the entire office.[120] A lawyer in a public defender's office, therefore, carries a list of former clients containing every individual that other public defenders in her office—past or present—have ever represented.[121] Even in relatively small public defender offices in rural areas, this translates into thousands of people.[122]

Additionally, many public defender offices see the same types of cases over and over again. For example, in jurisdictions encompassing poor urban neighborhoods, many of the defendants may be charged with shootings associated with the same rival gangs; in jurisdictions encompassing more rural areas, a large number of clients may be involved in the manufacture,

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until indicted, and another codefendant until arraigned. A second defense attorney had previously represented both a potential trial witness and a codefendant at a grand jury investigation. A third defense attorney had previously represented a codefendant for six years." Susan Voss, *Right to Counsel*, 71 GEO. L.J. 589, 607 n.1876 (1982) (citations omitted).

[119] Heidi Reamer Anderson, *Funding* Gideon*'s Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest*, 39 HASTINGS CONST. L.Q. 421, 422 (2012) ("Ninety-five percent of convictions are the result of plea bargains. Most defendants who plead guilty are represented by public defenders." (footnotes omitted)); Robert P. Mosteller, *Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness*, 36 N.C. J. INT'L L. & COM. REG. 319, 326 (2011) ("In the United States, over 80% of those charged with felonies are indigent.").

[120] MODEL RULES, *supra* note 22, R. 1.0(c); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 n.17 (May 13, 2006) (discussing the ethical obligations of lawyers who represent indigent criminal defendants when excessive caseloads interfere with competent and diligent representation; "for purposes of the Model Rules, a public defender's office . . . is considered to be the equivalent of a law firm").

[121] *See* MODEL RULES, *supra* note 22, R. 1.0(c).

[122] Dianne E. Courselle, *When Clinics Are "Necessities Not Luxuries": Special Challenges of Running a Criminal Appeals Clinic in a Rural State*, 75 MISS. L.J. 721, 728–29 (2006) ("One problem identified in '*Gideon*'s Broken Promise' is a 'lack of conflict-free representation' for indigent defendants. The report cites hearing witnesses from three states in which individual attorneys or attorneys in the same office sometimes represent defendants with conflicting interests. A contract public defender from Montana, for example, explained: 'Lawyers in smaller, more rural counties in Montana are neither inclined nor trained to take cases when there are co-defendants or there is a conflict with the contract public defender. One contract defender advised me that the rural nature of his practice seems to encourage conflicts.'" (footnotes omitted)); *cf.* Gary T. Lowenthal, *Successive Representation by Criminal Lawyers*, 93 YALE L.J. 1, 8 (1983) ("It is not unusual for a single public defender office to represent tens of thousands of defendants each year.").

distribution, and use of drugs, such as methamphetamine.[123] The repeat and interconnected nature of the offenses suggest that the chances are not insignificant that defense counsel will represent a client who reveals information that tends to exonerate a past client of her office.

While a public defender office will declare a conflict of interest in cases that implicate the interest of any past or present client,[124] the office may not know of the conflict of interest until the representation of the current client is underway.[125] At that point, the duty of confidentiality has attached, silencing defense counsel at exactly the point when the Innocence Standard demands that she speak out.[126] Declaring a conflict of interest and ceasing to represent the current client in order to act on behalf of the former client is explicitly precluded by the Conflict of Interest Standard 4-1.7, which provides: "[d]efense counsel should not permit their professional judgment or obligations regarding the representation of a client to be adversely affected by loyalties or obligations to other, former, or potential clients."[127]

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[123] *See* Meghan Clyne, *Taking It to the Streets*, PHILANTHROPY MAG., Summer 2009 ("It's brutal, terrifying, and on the rise. From coast to coast, gang crime ravages inner cities, destroys families, and causes whole neighborhoods to hunker down in fear. According to a federal report released earlier this year, criminal gangs now count roughly one million members—and are responsible for some 80 percent of crimes committed in American communities."); Alan Elsner, *Methamphetamine Scourge Sweeps Rural America*, REUTERS, Jan. 29, 2005, *available at* www.freerepublic.com/focus/news/1331718/posts?page=71 (quoting North Dakota Attorney General Wayne Stenehjem as saying "When we look at our prison population, 10 years ago nobody had even heard of it. Now 60 percent of our male inmates are users and we're building a brand new prison for female users[.]"); *see also* Bibas, *supra* note 99, at 2439 ("[Public defenders are] high-volume repeat players in the criminal arena.").

[124] Jeff Brown, *Disqualification of the Public Defender: Toward a New Protocol for Resolving Conflicts of Interest*, 31 U.S.F. L. REV. 1, 19 (1996) (arguing public defenders should not handle cases that would require them to attack these former clients through cross-examination or other means if they possess material information acquired from their personal representation of former clients or from the representation by the public defender office).

[125] *See* Wheat v. United States, 486 U.S. 153, 162–63 (1988) (stating that conflicts of interest are "notoriously hard [for defense counsel] to predict" in the pretrial stage of the proceedings); Brown, *supra* note 124, at 6 ("Usually, the conflict is clear in a joint representation case, but problems may arise where the issue is more nebulous, such as in cases where victims and witnesses are former or current clients of the same public defender office representing the accused.").

[126] *See* MODEL RULES, *supra* note 22, R. 1.6.

[127] DEFENSE STANDARDS, *supra* note 17, § 4–1.7(b). Normally, conflicts of interest for public defenders fall into one of four categories: (1) joint representation of co-defendants; (2) challenges by the client to the attorney's effectiveness; (3) cases in which a victim or

The language of Conflict of Interest Standard 4-1.7 also appears to preclude, or at least complicate, any efforts by defense counsel to persuade the current client to allow defense counsel "to act" upon the newly discovered evidence of wrongful conviction by disclosing it. If the disclosure could cause the present client or the present client's family member or friend to be investigated or charged with the crime for which the former client was convicted, the disclosure would have an obvious adverse impact on the current client's interests. If disclosure would mean that the current client is revealed as a "snitch," his or her life might be put in danger.[128] Under any of these circumstances, it cannot be said that defense counsel would be "zealous[ly] advocat[ing]" for the current client with "courage and devotion," as Standard 4-1.2(b) requires.[129]

If defense counsel "becomes aware of credible and material evidence . . . creating a reasonable likelihood that a . . . former client was wrongfully convicted or sentenced or was actually innocent"[130] because of information revealed in confidence by a current client, it does not appear that defense counsel can "act" in any way without the latter's express consent.[131] For all the reasons described above, the current client may, wisely, refuse to give consent. Preexisting conflict of interest rules will estop defense counsel from trying to change the current client's mind,[132] while the long-standing constitutional and ethically imposed duty of confidentiality will prevent defense counsel from alerting the former client, the former client's current counsel, or anyone else.[133] In this situation, it seems that compliance with the Innocence Standard is ethically impracticable, if not impossible.

C. SELF-INTEREST

A separate problem arises if the new evidence pointing to a former

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witness is a former client of the public defender; and (4) cases where the victim is a current client. Brown, *supra* note 124, at 7–8.

[128] *See, e.g.*, Liza I. Karsai, *You Can't Give My Name: Rethinking Witness Anonymity in Light of the United States and British Experience*, 79 TENN. L. REV. 29, 38–44 (2011) (surveying federal cases in which witnesses were given anonymity after court determined their informant testimony placed their lives in danger).

[129] DEFENSE STANDARDS, *supra* note 17, § 4–1.2(b); *see also* MODEL RULES, *supra* note 22, R. 1.7.

[130] DEFENSE STANDARDS, *supra* note 17, § 4–9.4.

[131] MODEL RULES, *supra* note 22, R. 1.6 cmt. 4.

[132] *See id.* R. 1.9.

[133] *Id.* R. 1.6.

client's innocence also points to counsel's incompetence. That is, what if the new, potentially exonerating information could and should have been discovered by defense counsel by the time of trial? Imagine a scenario in which a public defender, overwhelmed by a crushing caseload and facing back-to-back trials, neglects to interview an alibi witness for a client. Because defense counsel has not had the time or resources to undertake a thorough pretrial investigation of the case, counsel is unaware of the crucial nature of the testimony the witness would provide. The witness, perhaps someone with his own criminal record, is reluctant to get involved and makes no attempt to contact defense counsel at the time. Following the client's conviction and sentencing, the alibi witness, now conscience-stricken, comes forward with an account of the defendant's whereabouts at the time of the offense and documentary proof (a cell phone video, a credit card receipt, a time-stamped parking ticket) establishing that the client was elsewhere when the crime occurred.

The failure to interview such a crucial and exonerating witness would appear on its face to be deficient performance.[134] Given the strength of the evidence—its corroboration by documentation—it also appears that defense counsel's failure to present it at trial prejudiced the defendant because, had the jury heard the alibi evidence, there is a "reasonable probability that . . . the result of the proceeding would have been different."[135] It is comforting to believe that any defense counsel would "act" immediately upon receipt of this information in all of the ways contemplated by the Innocence Standard. In such a clear-cut case, the author believes most probably would, even without the Standard to prod them.

But the consequences of admitting ineffectiveness can be profoundly damaging. If a court were to determine that this deficient performance prejudiced the former client, defense counsel's professional reputation would suffer greatly.[136] Many state disciplinary authorities can impose

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[134] *See, e.g.*, Lord v. Wood, 184 F.3d 1083, 1094–96 (9th Cir. 1999) (stating that the failure by defense counsel to interview witnesses who could have demonstrated the defendant's factual innocence constitutes deficient performance).

[135] *See* Strickland v. Washington, 466 U.S. 668, 694 (1984) (holding that, in order to establish prejudice from ineffectiveness of counsel, a defendant must show reasonable probability that a proceeding would have been different absent "counsel's unprofessional errors").

[136] Many published opinions concluding that a defendant suffered from ineffective assistance of counsel refer to defense counsel by name. To cite just one example, Los Angeles-based criminal defense attorney Ted Yamamoto was found to have provided ineffective assistance of counsel by the Ninth Circuit Court of Appeals in a 2002 decision, which used his name more than seventy times. Avila v. Galaza, 297 F.3d 911, 919–21 (9th

sanctions on an attorney for providing ineffective assistance of counsel, ranging from a reprimand to a suspension of the license to practice law.[137] With these stakes in mind, some criminal defense attorneys might balk at complying with the Innocence Standard, downplaying the significance of the new evidence or questioning its legitimacy, knowing that "a finding that the lawyer has been ineffective can cause the lawyer damage, including casting a shadow on the lawyer's reputation, undermining the lawyer's future earning potential, and exposing the lawyer to possible professional discipline or a claim for legal malpractice."[138]

The impulse to dismiss or minimize the new evidence may not be entirely conscious. A wealth of behavioral economics research demonstrates that lawyers—like other professionals—are prone to bias when self-interest is at stake, "unconsciously focusing on evidence that supports a preordained conclusion and discounting evidence that does not fit."[139] If a few facts in the above-stated hypothetical were to change, making the newly discovered evidence less compelling, counsel's natural proclivity to "search[] for arguments that will support an already-made judgment"[140] might grow stronger, causing the likelihood that defense counsel will "act" to fall accordingly. What if, for example, the witness provided no documentation or other evidence to support the alibi? What if the witness is a parent, sibling, or spouse? Or what if the witness, while personally unattached to the client, has a significant criminal record that would be used by a prosecutor to impeach his credibility?

Under these factual scenarios, many lawyers might determine that the evidence does not meet the Innocence Standard's "credible and material" threshold, and therefore disregard it. While some might argue that disregarding such evidence is the right choice, because it spares defense counsel from chasing frivolous claims, others would conclude such

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Cir. 2002) (outlining Yamamoto's deficient performance).

[137] *See, e.g.*, *In re* Wolfram, 847 P.2d 94, 103–04 (Ariz. 1993) (in banc); The Florida Bar v. Sandstrom, 609 So. 2d 583, 584–85 (Fla. 1992); Office of Disciplinary Counsel v. McKinney, 668 S.W.2d 293, 298 (Tenn. 1984). Counsel may also fear the former client filing a lawsuit seeking damages for malpractice. *See* Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 6–7 (1995).

[138] Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 75–76 (2009) (footnotes omitted).

[139] *Id.* at 69–70.

[140] Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 818 (2001).

evidence is "credible and material."[141] Prosecutors, who have been bound to follow the *Brady* rule for more than fifty years, have a wealth of training and experience in applying the materiality standard in the context of investigating and disclosing information that may be exculpatory.[142] By contrast, many defense counsel have no training or experience in applying the materiality standard.[143] That lack of training and experience, combined with a bias toward self-protection, suggests that defense counsel may err on the side of inaction.

As of yet, no commentary to the revised Prosecution and Defense Function Standards has been written. To better ensure compliance with the Innocence Standard, I suggest that the commentary accompanying the Innocence Standard should provide a detailed definition of "material and credible." Perhaps most importantly, states and jurisdictions should consider immunizing from discipline defense attorneys who follow through

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[141] Thomas K. Maher, *Worst of Times, and Best of Times: The Eighth Amendment Implication of Increased Procedural Reliability on Existing Death Sentences*, 1 ELON L. REV. 95, 104 (2009) ("Brady requires disclosure of exculpatory evidence, and results in reversal only when the evidence that is not disclosed is material, a standard about which judges and defense counsel often disagree."); Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 448 (1984) (stating that the Supreme Court has given inadequate guidance in defining *Brady*, resulting in "unreliable and biased determinations" of what evidence must be disclosed to the defendant).

[142] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

[143] This does not hold true for all defense counsel, as some are former prosecutors. *See* Bobby G. Frederick, *Why It Matters if Your Defense Lawyer Used to be a Prosecutor*, TRIAL THEORY (Dec. 7, 2012), http://www.trialtheory.com/credibility/why-it-matters-if-your-defense-lawyer-used-to-be-a-prosecutor/ ("There are many local defense attorneys who are former prosecutors[.]"). And, of course, defense attorneys are familiar with applying the materiality standard in other contexts, i.e., in motions seeking discovery or to overturn a conviction based on a *Brady* violation. *See* Lara Bazelon, *"A Mistake Has Benn Made Here, and No One Wants to Correct It"*, SLATE MAG. (Dec. 17, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/12/the_exoneration_of_kash_register_and_the_problem_of_false_eyewitness_testimony.html (detailing the post-conviction litigation of a *Brady* claim). But many defense attorneys have no experience applying the *Brady* Rule *ex ante*—that is, looking forward in time to try to predict whether a particular piece of evidence may become "material" at some later point. *See, e.g.*, Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 543–48 (2007) (describing how a prosecutor's open-file policy can lull defense counsel into believing there has been full disclosure under *Brady* when in fact there has only been full disclosure under the local rules of discovery).

on their ethical responsibility under the Innocence Standard so that they need not fear significant damage to their professional reputation or license to practice law.

D. RESOURCES

Indigent criminal defense in this country is in crisis, and has been for decades.[144] Indigent defendants make up the vast majority of criminal cases,[145] meaning that their legal representatives are public defenders or private practitioners paid by the court, usually under a contract with a strict fee cap.[146] In many states, the cap is set so low that it precludes anything but the most minimal representation.[147] Given lack of funding at both the state and federal level, many defender offices suffer from budget cuts and layoffs, and contract attorney fees have not risen to adjust for the cost of living or inflation.[148]

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[144] AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE: A REPORT ON THE AMERICAN BAR ASSOCIATION'S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS v (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [hereinafter *GIDEON*'S BROKEN PROMISE] ("Forty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction."). A previous report authored on the adequacy of funding for indigent defense by the ABA's Standing Committee on Legal Aid and Indigent Defendants in 1983 (*Gideon*'s twentieth anniversary) reached the same conclusion. *See id.* at 7.

[145] Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 31 (1995) ("It is not uncommon for indigent defense programs to represent up to 90 percent of all criminal defendants in a given felony jurisdiction.").

[146] *See* Spangenberg & Beeman, *supra* note 145, at 32–37 (describing the different categories of indigent defense services).

[147] Stephanos Bibas, *Shrinking* Gideon *and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1291–92 (2013); *see GIDEON*'S BROKEN PROMISE, *supra* note 144, at ii.

[148] Bibas, *supra* note 147. Professor Bibas detailed the crisis these attorneys are facing:

> Appointed defense counsel are underpaid, undersupported, and overworked. They are often paid flat fees or low hourly rates subject to low caps. At a rate of, say, $50 per hour subject to a $1,000 cap, appointed counsel receives no compensation for investing more than twenty hours in taking a case to trial. These rates are often below market rates and not adjusted for inflation. They hardly suffice to cover a law firm's basic overhead, including rent and secretaries, let alone compensate counsel at anything near market rates. Funding for experts, paralegals, and investigators is scant. Caseloads are staggering and increasing far faster than the numbers of lawyers or the funding available for them.

Id. (footnotes omitted).

The longstanding problem is no secret. In December of 2004, the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants published a groundbreaking, comprehensive study of the legal representation in this area, entitled Gideon*'s Broken Promise: America's Continuing Quest for Equal Justice*—written to coincide with the fortieth anniversary of the Supreme Court's landmark decision establishing the right to counsel in *Gideon v. Wainwright*.[149] As the name of the report suggests, the authors came to "the disturbing conclusion that thousands of persons are processed through America's courts every year [] with . . . a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation."[150] Gideon*'s Broken Promise* attributed the breakdown in representation to a number of factors, including "shamefully inadequate" funding of public defender organizations and appointed counsel contract services.[151] The lack of funding left these lawyers underpaid, without the money for experts or investigators and without the number of coworkers necessary to carry a reasonable caseload.[152]

The report is a stunning indictment: "Taken as whole, glaring deficiencies in indigent defense services result in a fundamentally unfair criminal justice system that constantly risks convicting persons who are genuinely innocent of the charges lodged against them."[153] The risk is not hypothetical, it is an empirical fact.[154] Many wrongful conviction cases share a chilling similarity: the clients were represented by attorneys who were unable, often because they lacked the resources, to be anything other than constitutionally inadequate.[155] Although the authors of Gideon*'s Broken Promise* conceded that the conviction of the innocent was not solely the result of ineffective assistance of counsel, they nonetheless concluded that criminal defense attorneys who received good training and sufficient resources were crucial to preventing these kinds of injustices.[156]

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[149] *See* *GIDEON*'S BROKEN PROMISE, *supra* note 144, at ii. The report detailed the American Bar Association's findings from a series of public hearings in which thirty-two expert witnesses testified about the quality of indigent legal representation in twenty-two different states. *Id.* at iv.

[150] *Id.* at iv.

[151] *Id.* at 38.

[152] *Id.* at 16.

[153] *Id.* at 7.

[154] *See id.* at 7–28.

[155] *See id.* at 16.

[156] *See id. passim*.

The fiftieth anniversary of *Gideon* has passed and not much has changed. Indeed, it is arguable that the problems afflicting the delivery of indigent defense services are, if anything, more dire.[157] The Great Recession of 2008, combined with sequestration—the across-the-board slashing of the federal budget—have deepened state and county budget cuts while creating a new crisis. In 2013, the federal public defender system was forced to lay off attorneys and staff and take other draconian belt-tightening measures after its funding was cut by fifty-one million dollars.[158]

In light of this harsh reality, does it make sense to add a new and potentially time-consuming client base to defense counsel's already overloaded plate? Of course, this client base consists of former clients, and, in some cases, the belated nature of the newly discovered evidence pointing to their innocence may be counsel's fault. But is it reasonable to expect that prior counsel—blameworthy or not—has the resources and ability to navigate the thicket of federal filing deadlines, exhaustion requirements, and other procedural bars imposed by AEDPA?[159] And while it is possible that defense counsel can fulfill her obligations under the Standard through more limited actions, there are cases in which a great deal of effort will be required. For example, perhaps counsel believes she can discharge her duties under the Innocence Standard by calling the prosecutor and relaying the information. But what if the prosecutor responds by demanding further proof before taking action? A defense attorney who truly believes in a former client's innocence or wrongful conviction may feel compelled, under the Innocence Standard, to interview witnesses, draft pleadings, and take other significant actions because the stakes are so high and there is no one else to do it. Thus, even a single step can commit counsel to the long

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[157] *See generally* Bibas, *supra* note 147.

[158] *See* Ron Nixon, *Public Defenders Are Tightening Belts Because of Steep Federal Budget Cuts*, N.Y. TIMES (Aug. 23, 2013), http://www.nytimes.com/2013/08/24/us/public-defenders-are-tightening-belts-because-of-steep-federal-budget-cuts.html?_r=0; Press Release, The Constitution Project, Federal Criminal Justice Act Budget Cuts (July 16, 2013), http://www.constitutionproject.org/wp-content/uploads/2013/07/Fed-Indigent-Defense-Budget-Cuts-Highlights-7-16-13.pdf. In 2004, the authors of *Gideon*'s Broken Promise chose to focus on the state systems because "the federal indigent defense system . . . is considerably better funded and supported." *GIDEON*'S BROKEN PROMISE, *supra* note 144, at 51 n.6. Now that may be less true. *See* Ted Robbins, *Cutting Public Defenders Can Cost Federal Government More*, NPR (Aug. 24, 2014), http://www.npr.org/2013/08/24/214997385/sequestration-is-costly-in-public-defenders-offices (reporting that the Federal Public Defender's Office in Tucson, Arizona lost twenty-five percent of its staff as a result of the sequester).

[159] *See* DEFENSE STANDARDS, *supra* note 17, § 4–9.4(c).

mile of re-investigation and re-litigation.[160]

These expectations may be unreasonable for defense counsel who are overworked and under-resourced.[161] So what changes can be made to the Innocence Standard to make its overarching goal of exonerating the wrongfully convicted more likely to succeed? This question, and other proposed reforms to the Innocence Standard, are addressed in Part IV.

IV. PROPOSED REVISIONS TO THE INNOCENCE STANDARD

In light of the legal, ethical, and practical concerns identified above, I propose specific changes to the text of the Innocence Standard and suggest that Standard drafters include commentary that explains how defense counsel can fulfill her obligations. The commentary must also state clearly that it is not unethical to not take all of the steps called for by the Standard if doing so would interfere with counsel's primary obligation to zealously represent her current clients. Interference could occur if the "duty to act" on behalf of a former client would violate counsel's duty of confidentiality to a current client. Interference could also occur if the action called for, particularly in the context of advising the former client of federal filing deadlines and other AEDPA-related issues, would be so labor intensive as to make it impossible for already overburdened counsel to provide adequate representation to current clients. To address the latter problem, I propose that the ABA develop a robust online training program and sample materials that defense counsel can access and adapt to the particular facts

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[160] *Id.* at § 4–9.4(b). While the Standard also states that prior counsel can discharge the obligation "to act" by informing current counsel (if any) to the evidence, that option often will not exist, as the language of the Standard acknowledges. *Id.* at § 4–9.4(a). Most post-conviction defendants do not have counsel to represent them after the conclusion of their direct appeal. *See* cases cited *supra* note 25.

[161] *See, e.g.*, Tina Peng, Op-Ed., *I'm a Public Defender. It's Impossible for Me to Do a Good Job Representing My Clients*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken--its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html. Peng writes that: "The American Bar Association recommends that public defenders not work on more than 150 felony cases a year. In 2014, I handled double that." *Id.* Peng goes on to say:

> An unconstitutionally high caseload means that I often see my new clients only once in those two months. It means that I miss filing important motions, that I am unable to properly prepare for every trial, that I have serious conversations about plea bargains with my clients in open court because I did not spend enough time conducting confidential visits with them in jail. I plead some of my clients to felony convictions on the day I meet them. If I don't follow up to make sure clients are released when they should be, they can sit in jail for unnecessary weeks and months.

Id.

and circumstances of her case.

A. MODIFICATIONS TO THE LANGUAGE OF THE INNOCENCE STANDARD

In this section, I propose edits to the Innocence Standard. The first part of the Standard states that defense counsel "has" some duty to act when she becomes aware of material and credible evidence suggesting that a former client was wrongfully convicted. I would replace "*has* some duty to act"[162] with "*may* have some duty to act," to make it clear that counsel is not *per se* unethical if she does not act for justifiable reasons. The Standard should be amended to make clear that the duty of confidentiality always trumps the duty to act.

The Standard should also explicitly define the terms "credible" and "material" so that counsel has some guidance when applying these modifiers to the newly discovered evidence. Adopting the definition of material used by the Supreme Court in the context of the prosecutor's disclosure obligations under the *Brady v. Maryland* line of cases seems most appropriate.[163] Under that definition, evidence is material for purposes of mandatory disclosure "if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[164] Credible equates to believable,[165] but believable to whom? It is important not to have credibility filtered through the lens of counsel's already-formed opinions about an old case. Therefore, the Standard should define credible as worthy of belief when viewed from an objective factfinder's perspective.

In my revision, the first paragraph of the Standard would read as follows, with the revisions in italics:

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[162] DEFENSE STANDARDS, *supra* note 17, § 4–9.4(a) (emphasis added).

[163] 373 U.S. 83 (1963). The Supreme Court did not expressly define "material" in *Brady v. Maryland*. *Id.* at 87 (stating that a due process violation occurs where the prosecution suppresses evidence "material either to guilt or to punishment," but not defining the word "material"); *see also* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 646 (2002) ("[I]t is a little surprising to find that while the adjective 'material' is used to describe the evidence which is covered by the new right [from the holding in *Brady*], no definition of what constitutes 'material' is given.")

[164] United States v. Bagley, 473 U.S. 667, 682 (1985) (quoting Strickland v. Washington, 466 U. S. 668, 694 (1984)).

[165] *See, e.g.*, *Credible*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY ("capable of being credited or believed").

> (a) When defense counsel becomes aware of credible and material evidence or law creating a reasonable likelihood that a client or former client was wrongfully convicted or sentenced or was actually innocent, counsel *may have* some duty to act. *Credible evidence is evidence that an objective factfinder would find worthy of belief. Material evidence is evidence that creates a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.* This duty *may apply* even after counsel's representation is ended. Counsel must consider, and act in accordance with, duties of confidentiality. *The duty to act does not apply to former counsel if acting would require counsel to reveal privileged or confidential information. In that instance, defense counsel's conduct is governed by Conflict of Interest Standard 4-1.7.*

B. PROPOSED COMMENTARY

In this section, I suggest language for the commentary to the Innocence Standard, which has yet to be written. The commentary should squarely address the remaining ethical issues the Standard puts into play: the possibility that disclosure could result in allegations of ineffective assistance of counsel, and the likelihood that attorneys will lack the knowledge to advise former clients about the complexities of complying with federal habeas corpus filing deadlines under AEDPA. The commentary should clearly state that it is the obligation of state and federal governments to properly fund the training and hiring of additional lawyers necessary for indigent defense organizations to carry out the Standard's obligations.

With respect to the ineffective assistance of counsel issue, it is appropriate for the commentary to advise state bar commissions to provide disciplinary immunity in cases in which defense counsel's *duty to act* on behalf of a former client also reveals her own failures of advocacy in the first instance. It would be counter-productive to punish defense counsel for falling on her sword to help a former client. Providing immunity will encourage more defense counsel to act on behalf of former clients, thus furthering the purpose of the Standard.

There is no cure for the reputational injury that defense counsel will suffer if a court makes a finding of ineffectiveness. Still, eliminating the threat of suspension or disbarment will ensure that defense counsel can continue to practice law. And even if the finding is only a reprimand, it prevents defense counsel from sustaining yet another reputational blow. My proposed commentary to address this issue reads as follows:

> If the material and credible evidence or law tending to show actual innocence of a client or former client, or the unlawfulness of such former client's conviction or sentence, was not previously discovered as the result of the fault or partial fault of former counsel, former counsel should reveal that fact in the course of the action he or she takes. Any potential disciplinary authority, including the state bar or any court

> having any involvement in the matter, should be aware of former counsel's prompt disclosure and should immunize former counsel from discipline. Other remedial measures should also be considered, such as removing counsel's name and identifying information from public documents associated with the case.

Another proposed aspect of the commentary would squarely address the Standard's imperative that prior counsel determine all applicable deadlines involving the use of the newly discovered evidence, including federal filing deadlines, to ensure that the client's rights are preserved. As explained in Part I.C, this undertaking is complicated and labor-intensive. The commentary should, therefore, enumerate the applicable deadlines under AEDPA and explain how to calculate the correct date that the statute of limitations expires through providing one simple example. The commentary should explain how, acting *pro se*, the client can: (1) file a shell petition to meet the deadline that includes the claims that have already been decided by the state courts as well as the unexhausted innocence/wrongful conviction claim; (2) seek a stay-and-abey order from the federal court to exhaust the newly discovered claim of innocence/wrongful conviction in the state court; and (3) write a motion seeking the appointment of counsel.

Competently explaining each of these steps to a former client requires that counsel familiarize herself with the law governing these issues. As explained in Part I.C, most criminal defense attorneys, particularly state court practitioners, will have no familiarity with AEDPA and will require training and other assistance in getting up to speed.[166] The American Bar Association should play an active role in counsel's continuing legal education in this area by providing publicly accessible webinars that discuss the law of federal habeas corpus and also provide training in translating this dense doctrine into language that *pro se* former clients can grasp. Crucial to this task is providing defense counsel with sample materials, which she can adapt to the specific facts of her former client's case. The materials should include an advisory letter to the former client, a sample shell petition, a sample stay-and-abey motion, and a sample motion to appoint counsel. The American Bar Association is particularly well-suited to the task of providing this training and these materials. Furthermore, doing so is entirely consistent with the ABA Division of Government and Public Sector Lawyers' mission, which is to "[s]erve as a national leader in rededicating adherence—within our profession and within all the Nation's justice

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[166] *See* Edwards v. Carpenter, 529 U.S. 446, 454 (2000) (Breyer, J., concurring) ("[F]ew lawyers, let alone unrepresented state prisoners, will readily understand [the complexities of the Court's habeas corpus jurisprudence].").

systems—to the highest standards of professional conduct and competence, fairness, social justice, diligence and civility."[167]

By proposing these revisions and additions, I do not mean to suggest that the issues raised by the creation of an Innocence Standard for defense attorneys will cease to exist. I remain troubled by the specter of parity and by the potential for counsel's primary obligation—zealously defending her current client—to be burdened or diluted by a new obligation that reinstates a former attorney–client relationship. Troubling, too, is the hard reality that state and federal governments fund indigent defense services with great reluctance. Asking for additional monies may well result in a flat denial, so that defense counsel is confronted with a new obligation but no means to carry it out. It is incumbent upon the ABA to provide nationwide training for these lawyers and to forcefully advocate for additional resources.

On the other hand, the Innocence Standard has the potential to play an important role in ensuring that our criminal justice system does not put innocent people in prison. It also bears emphasizing that the Defense Function Standards promulgated by the American Bar Association are aspirational, not mandatory. The ABA is clearly right to insist that defense attorneys do their part to end wrongful convictions. Because the Standard encourages and inspires them to do so, it is a noteworthy and potentially positive development in the cannon of defense ethics.

CONCLUSION

The very existence of the American Bar Association's new Innocence Standard symbolizes the distance traveled by the legal profession in recognizing and responding to the terrible problem of wrongful convictions in the United States. But the Standard does not speak to the broader implications of its imperative. The forthright, simple language suggests that there is nothing controversial or even contradictory about the imposition of an affirmative duty to act upon a trial attorney after the representation is ended. Yet it is both of these things. As written, the Innocence Standard suggests that defense counsel has an obligation to seek the truth when that is not and can never be her role. The absence of immunity or favorable treatment for former counsel who are at fault for the belated discovery of the new evidence will inhibit some from coming forward. And without the development of resources such as draft letters, pleadings, and CLE

[167] *Mission Statement*, GOV'T & PUB. SECTOR LAW. DIVISION, AM. BAR ASS'N, http://www.americanbar.org/groups/government_public/about_us/mission.html (last visited Oct. 19, 2015).

trainings, counsel staggering under the weight of excessive caseloads simply will not be able to comply, no matter how good their intentions. The modifications and targeted commentary proposed in this Article are intended to make the Innocence Standard a better fit—ethically and practically—with defense counsel's all-important role in the criminal justice system. The better the fit, the greater the likelihood of compliance by the defense bar and the achievement of the ultimate goal: freeing the wrongly convicted.