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### NEUTRALIZING COGNITIVE BIAS: AN INVITATION TO PROSECUTORS

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With the number of criminal defendants exonerated by DNA evidence nearing the two hundred mark,<sup>2</sup> and with multiple states flirting with death penalty moratoriums in part to avoid killing the innocent,<sup>3</sup> we appear to stand at a milestone in our treatment of claims by criminal defendants that they have been wrongly convicted. Some commentators have declared the dawn of a new “movement” to support claims of innocence.<sup>4</sup> Others have gone so

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<sup>2</sup> Death Penalty Information Center, *Innocence and the Death Penalty*, <http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited February 21, 2007) (listing 198 exonerations since 1989).

<sup>3</sup> Executions have been suspended in Illinois and New Jersey, and in California on a *de facto* basis despite a failed legislative attempt to impose a formal moratorium. Carolyn Marshall, *California Assembly Sidelines a Moratorium on Executions*, N.Y. TIMES, Jan. 20, 2006, at A12. In addition, the prior governor of Maryland issued a moratorium in that state, but it was rescinded by the current governor. Jennifer McMenamain, *Glendening says state still needs moratorium*, BALT. SUN, Jan. 12, 2006 at 1B. Moratorium legislation has been introduced in several other states.

<sup>4</sup> As one commentator claimed, “An entire innocence movement is afoot.” David Feige, *The Dark Side of Innocence*, N.Y. TIMES MAG., June 15, 2003, at 15. The Innocence Project, whose work lies behind so many DNA exonerations, has declared a “new civil rights movement.” The Innocence Project, *As 100th Innocent Prisoner Is Freed by*

far as to call the movement a “revolution.”<sup>5</sup> Regardless of what we call this moment, Richard Rosen is undoubtedly correct when he observes that we potentially “are at the beginning of an exciting new period of American criminal justice, one directly related to the acknowledgment that we convict innocent people.”<sup>6</sup>

One notable aspect of this burgeoning movement is its attempt to bring into the fold the prosecutors who are frequently depicted as part of the wrongful conviction problem, rather than its solution. Traditionally, prosecutorial decision making has been studied through a lens of fault, blame, and intentional wrongdoing.<sup>7</sup> Consistent with this lens, those who have studied the downsides of broad prosecutorial discretion have blamed bad prosecutorial decisions on overzealousness,<sup>8</sup> flawed cultural and individual values,

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*DNA Tests, Innocence Network Convenes to Map the Future of “New Civil Rights Movement” in Criminal Justice*, Jan. 17, 2002, <http://www.deathpenaltyinfo.org/article.php?did=280&scid=1>. See also Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 376 (2006) (arguing that the narratives of wrongfully convicted defendants are essential “if the lessons from recent exonerations are to instigate a “New Civil Rights Movement” for the twenty-first century).

<sup>5</sup> See Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our “Evolving Standards of Decency” in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265, 267 (2004); Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 573 (2004).

<sup>6</sup> Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 237 (calling this an “Age of Innocence”).

<sup>7</sup> See, e.g., Kenneth Bresler, “I Never Lost a Trial”: When Prosecutors Keep Score of Criminal Convictions, 9 GEO. J. LEGAL ETHICS 537, 541 (1996) (criticizing prosecutors who “keep personal tallies ...for self-promotion”); James Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2072-97 (2000) (discussing the potential for prosecutorial misconduct throughout the evolution of a death penalty case); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 890 (1995) (“Prosecutorial misconduct is readily apparent to any lawyer who keeps abreast of appellate review of criminal convictions.”).

<sup>8</sup> E.g., Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 204-15 (1988) (describing factors that cause prosecutors to pursue cases “overzealously”); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 458 (1992) (arguing that “the present ethos of overzealous prosecutorial advocacy” is “ingrained”); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134 (2004) (attributing the lack

and a lack of moral courage.<sup>9</sup> The collective impact of this fault-based narrative is the depiction of prosecutors as dogmatic adversaries of innocence, wholly abandoning their ethical obligations as neutral advocates of justice.<sup>10</sup> In contrast, much of the narrative recently emerging from the growing innocence movement appears focused on persuading prosecutors of their importance in this new movement, not as adversaries, but as equal partners in the prevention of wrongful convictions.

Professor Rosen reminds prosecutors of what should be obvious when he observes, “[i]n the criminal justice system, neither side wins when an innocent person is convicted.”<sup>11</sup> Accordingly, “It is important for prosecutors and police officers to be willing to acknowledge the possibility that mistakes are made in individual cases. There are even more compelling reasons for prosecutors and police officers to join others . . . in a cooperative effort to find remedies for the causes of wrongful convictions.”<sup>12</sup>

Striking a similar chord in his important article on prosecutorial resistance toward post-conviction claims of innocence, Professor Daniel Medwed encourages cooperation between prosecutors and defense counsel, noting:

A dialogue between these traditional adversaries may help to show that, despite any differences between the two

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of prosecutorial support for post-conviction claims of innocence in part to “the emphasis district attorneys’ offices place on conviction rates”).

<sup>9</sup> E.g., Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 350 (2001) (noting that prosecutors who lack “moral courage” pose a danger to innocent defendants); see also Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 57-60 (1997) (advocating ad hoc invocation of moral judgment).

<sup>10</sup> Prosecutors are not only obligated to act as advocates to enforce the law, but are also entrusted to ensure that justice is met. See MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2001) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”). Cf. Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 792-94 (2000) (discussing the public interests served by prosecutors).

<sup>11</sup> Rosen, *supra* note 6, at 287.

<sup>12</sup> *Id.* at 288.

camp generally, they stand on common ground when it comes to post-conviction innocence claims: no one wins when an innocent person remains in prison. Instead of the "zeal deal," the real deal for prosecutors and defense attorneys operating in the domain of post-conviction innocence claims should be a willingness to work together, on occasion, and a mutual recognition that actually innocent people are languishing in our prison system.<sup>13</sup>

In addition to these calls for prosecutorial cooperation, there has been increased attention to the possibility that unintentional cognitive biases can play at least as large a role in wrongful convictions as intentional prosecutorial misconduct. A growing literature seeks to attribute poor prosecutorial decision making to a set of information-processing biases that we all share, rather than exclusively to ethical or moral lapses. From this perspective, prosecutorial resistance to defense claims of innocence can be viewed as deep (and inherently human) adherences to the "sticky"<sup>14</sup> presumptions of guilt that result from various forms of cognitive bias that can impede the neutrality of prosecutors throughout their handling of a case.<sup>15</sup>

My goal in this Essay is to suggest that reforms framed around a cognitive understanding of prosecutorial decision making present an opportunity for prosecutors themselves to counter the traditional fault-based narrative and to become partners in the

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<sup>13</sup> Medwed, *supra* note 8, at 183.

<sup>14</sup> Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. AND MARY L. REV. 1587, 1607 (2006) (explaining that prosecutor's beliefs about guilt might be "sticky" in that they persevere even when the underlying evidence is undermined).

<sup>15</sup> See generally Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 479 (2006); Darryl K. Brown, *The Decline of Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1600 (2005); Burke, *supra* note 14; Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 316; Medwed, *supra* note 8, 140-41; Myrna Raeder, *What Does Innocence Have to Do with It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315, 1327.

emerging movement to prevent wrongful convictions. That goal turns out to be both modest and audacious. While some reform proposals are sweeping, controversial, and either impractical or cumbersome to initiate, the focus of this Essay will be on more modest proposals that should be relatively uncontroversial and whose implementation rests entirely within the province of prosecutors, either as individual practices or as institutional policies. However, by focusing on modest, prosecutor-initiated reforms, the Essay flirts with the bold by throwing down a challenge to prosecutors actually to pursue these strategies. If prosecutors hold the key to moderate but meaningful reform and yet do nothing, the innocence movement will inevitably – and justifiably – retreat from a model of cooperation and return entirely to fault-based explanations for wrongful convictions and their accompanying reforms.

### I. Prosecutors and Cognitive Bias

Before turning to strategies for improving prosecutorial decision making, let us briefly consider some of the ways that cognitive bias might impede a prosecutor's neutrality throughout her handling of a case.<sup>16</sup> Consider, for example, the ways in which the phenomenon known as confirmation bias could affect a prosecutor's initial charging decision.<sup>17</sup> Because confirmation bias leads in-

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<sup>16</sup> A number of recent articles provide a more comprehensive treatment of the ways in which cognitive bias can shape prosecutorial decisions. See, e.g., Bandes, *supra* note 15 (discussing prosecutorial tunnel vision); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2496-2519 (2004) (exploring the ways bounded rationality can affect both prosecutors and defendants in plea bargaining); Findley & Scott, *supra* note 15, at 316 (examining the effects of tunnel vision on prosecutors). I previously set forth several of the points raised here in Burke, *supra* note 14.

<sup>17</sup> Confirmation bias is the tendency of people, when they are testing the validity of a theory, to favor information that confirms the theory over disconfirming information. See generally PETER C. WASON & PHILIP N. JOHNSON-LAIRD, *PSYCHOLOGY OF REASONING: STRUCTURE & CONTENT* (1972); ZIVA KUNDA, *SOCIAL COGNITION: MAKING SENSE OF PEOPLE* 112-18 (1999); Joshua Klayman & Young-Won Ha, *Confirmation, Disconfirmation, and Information in Hypothesis Testing*, 94 PSYCHOL. REV. 211 (1987); Mark Snyder & William B. Swann, Jr., *Behavioral Confirmation in Social Interac-*

dividuals to seek out and prefer information that tends to confirm whatever hypothesis they are testing, a prosecutor reviewing a file to determine a suspect's guilt would be inclined to look only for evidence that supports a theory of guilt.<sup>18</sup> For instance, the prosecutor might emphasize that a defendant confessed to the crime yet ignore evidence that might undermine the reliability of that confession.<sup>19</sup>

Those who have studied wrongful convictions note that a leading cause of error is "tunnel vision," in which investigators and prosecutors hone their sights on one suspect, and then search for evidence inculpatory him, to the neglect of exculpatory evidence or the consideration of alternative suspects.<sup>20</sup> Prosecutorial tunnel vision can be viewed as the culmination of confirmation bias and selective information processing, the inclination to search out and recall information that tends to confirm one's existing beliefs, and to devalue disconfirming evidence.<sup>21</sup> As a result of confirmation bias,

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*tion: From Social Perception to Social Reality*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 148 (1978); Mark Snyder & Nancy Cantor, *Testing Hypotheses About Other People: The Use of Historical Knowledge*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 330 (1979); Peter C. Wason, *Reasoning About a Rule*, 20 Q. J. EXPERIMENTAL PSYCHOL. 273 (1968).

<sup>18</sup> Findley & Scott, *supra* note 15, at 316 (summarizing cases in which law enforcement "sought evidence that would confirm guilt, not disconfirm it"); Brown, *supra* note 15, at 1600 (noting the effect that confirmation bias can have on both police and prosecutorial "fact-development decisions").

<sup>19</sup> Burke, *supra* note 14, at 1603-04.

<sup>20</sup> Findley & Scott, *supra* note 15, at 292; Raeder, *supra* note 15, at 1327 ("[T]he tunnel vision problem has been widely noted in wrongful conviction cases. Officers and prosecutors either don't realize the significance or accuracy of exculpatory evidence or on occasion affirmatively conceal it because they are convinced of the suspect's guilt."); STATE OF ILL., REPORT OF THE GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT 20, Commission Recommendation 2 (2002), [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/chapter\\_02.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_02.pdf) (noting dangers of tunnel vision); FPT Heads of Prosecution Committee, *Report of the Working Group on the Prevention of Miscarriages of Justice* (2005), at <http://canada.justice.gc.ca/en/dept/pub/hop/>.

<sup>21</sup> See, e.g., Craig A. Anderson, B. Lynn New & James R. Speer, *Argument Availability as a Mediator of Social Theory Perseverance*, 3 SOC. COGNITION 235, 244-48 (1985); Kari Edwards & Edward E. Smith, *A Disconfirmation Bias in the Evaluation of Arguments*, 71 J. PERSONALITY & SOC. PSYCHOL. 5 (1996); Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979); Charles

prosecutors first search for evidence tending to confirm an initial suspect's guilt. Once an opinion of guilt is formed, selective information processing comes into play, causing the prosecutor to weigh evidence that supports her existing belief more heavily than contradictory evidence. Because of selective information processing, the prosecutor will accept at face value any additional evidence supporting the initial theory of guilt, while ignoring or undervaluing potentially exculpatory evidence.<sup>22</sup>

Contributing further to the stickiness of a prosecutor's guilt beliefs is the phenomenon of belief perseverance, in which people adhere to their beliefs even when the evidence that initially supported the belief is proven to be incorrect.<sup>23</sup> In many of the recent exoneration cases, for example, prosecutors have continued to insist that the exonerated defendant is guilty, even when exculpatory DNA evidence undermines the government's initial case.<sup>24</sup> This

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G. Lord, Mark R. Lepper, & Elizabeth Preston, *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231 (1984); Arthur G. Miller et al., *The Attitude Polarization Phenomenon: Role of Response Measure, Attitude Extremity, and Behavioral Consequences of Reported Attitude Change*, 64 J. PERSONALITY & SOC. PSYCHOL. 561, 563-64 (1993); Geoffrey D. Munro & Peter H. Ditto, *Biased Assimilation, Attitude Polarization, and Affect in Reactions to Stereotype-Relevant Scientific Information*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 636 (1997).

<sup>22</sup> Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 559 (1987) ("The natural inclination is not to see inconsistent or contradictory evidence for what it is, but to categorize it as irrelevant or a petty incongruity."); James McCloskey, *Convicting the Innocent*, 8 CRIM. JUST. ETHICS 2, 56 (1989) (noting "a natural tendency to acquire all the evidence that inculpates the person selected as guilty while all other evidence is ignored"); Medwed, *supra* note 8, at 140 (noting that "once the police pinpoint a chief suspect, they neglect to subject exculpatory evidence or alternative perpetrators to critical examination"); Ellen Yaroshefsky, *Cooperation With Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 945 (1999) (noting that prosecutors "get wedded to their theory and things inconsistent with their theory are ignored").

<sup>23</sup> Craig A. Anderson, Mark R. Lepper & Lee Ross, *Perseverance of Social Theories: The role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037 (1980); Lee Ross, Mark R. Lepper & Michael Hubbard, *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880, 882 (1975).

<sup>24</sup> For example, after Earl Washington was exonerated after serving seventeen years for murder and rape, the prosecutor insisted that he still could not "rule out" Washington as a suspect. Maria Glod, *DNA Not Enough to Charge Va. Rapist; Authorities*

seemingly inhumane stubbornness can be viewed instead as a very human example of belief perseverance.<sup>25</sup>

Sticky beliefs in guilt might be particularly difficult to shake given that prosecutors live in a world that constantly reinforces their perceptions that the defendants charged in their cases are all guilty. A prosecutor who is surrounded in her daily routine only by crime victims, police officers, and other prosecutors might develop a deepened “presumption of guilt” that can contribute to cognitive bias.<sup>26</sup> Moreover, the vast majority of cases end in conviction, either by trial or more often by guilty plea. Accordingly, prosecutors are likely to see the end results as validation of their initial theories of guilt.<sup>27</sup> At the same time, they are infrequently challenged by evidence to the contrary.<sup>28</sup>

Ironically, entertaining the possibility of innocence might be particularly difficult for ethical prosecutors, especially post-conviction. Most prosecutors believe they have an ethical obligation to pursue charges only against those suspects who are actually guilty.<sup>29</sup> Accordingly, for an ethical prosecutor, the avoidance of

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*Kept Identity a Secret*, THE WASH. POST, Mar. 11, 2004, at B4. See Eric M. Freedman, *Earl Washington's Ordeal*, 29 HOFSTRA L. REV. 1089, 1101 (2001) (detailing the history of the Washington case). See generally Sara Rimer, *DNA Testing in Rape Cases Frees Prisoner After 15 Years*, N.Y. TIMES, Feb. 15, 2002, at A12 (prosecutor stating in the face of exonerating DNA evidence that there is “no reason to doubt the validity of [the defendant’s] confession”); Bruce Lambert, *Prosecutor Will Retry Man Freed by DNA in L.I. Rape-Murder*, N.Y. TIMES, Sept. 12, 2003, at B5 (announcing prosecutor’s decision to retry released defendant on the basis of his retracted confession).

<sup>25</sup> Findley & Scott, *supra* note 15, at 315 (“The belief perseverance phenomenon is apparent in many of the wrongful conviction cases.”).

<sup>26</sup> See Bandes, *supra* note 15, at 487 (noting that prosecutorial relationships affect prosecutorial loyalties); Fisher, *supra* note 8, at 208 (noting that prosecutors are typically isolated from populations who might trigger empathy for defendants, while surrounded by populations “who can graphically establish that the defendant deserves punishment and who have no reason to be concerned with competing values of justice”).

<sup>27</sup> See Findley & Scott, *supra* note 15, at 330.

<sup>28</sup> *Id.* (noting that prosecutors receive little feedback inconsistent with their initial assessments of guilt).

<sup>29</sup> See generally MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 219 (1990) (“[C]onscientious prosecutors do not put the destructive engine of the criminal proc-



cognitive dissonance can be a powerful motivation to adhere to guilt beliefs, lest she admit to herself the difficult truth that she may have charged—and perhaps even convicted—an innocent person.<sup>30</sup>

## II. Prosecutor-Implemented Debiasing Strategies

Many reforms aimed at the prevention of wrongful convictions are based on a fault-based model of explaining prosecutorial decisions. Through a fault-based lens, commentators have called for “carrot and stick”<sup>31</sup> reforms intended to incentivize prosecutors to do justice and deter them from wrongdoing, such as more stringent ethical rules directed at prosecutors,<sup>32</sup> restrictions on prosecutorial discretion,<sup>33</sup> and increased sanctions by courts and bars against prosecutors who violate ethical rules or abuse their discretion.<sup>34</sup>

More recent reform proposals have gone beyond a fault-based paradigm and focus instead on the mitigation of cognitive bias among prosecutors. Some of these suggestions, however, cannot be implemented by prosecutors alone. For example, to decrease the likelihood of wrongful convictions due to prosecutorial cognitive bias, scholars have suggested changes in the ways prosecutors are elected;<sup>35</sup> increased disclosure of information from police to

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ess into motion unless they are satisfied beyond a reasonable doubt that the accused is guilty.”).

<sup>30</sup> Bandes, *supra* note 15, at 491.

<sup>31</sup> Medwed, *supra* note 8, at 171-75 (discussing use of “sticks,” not just carrots, to incentivize good prosecutorial conduct).

<sup>32</sup> Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1587-88 (2003).

<sup>33</sup> See, e.g., Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 460-64 (2001); Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1325-26 (1997).

<sup>34</sup> Gershman, *supra* note 8, at 455 (1992) (suggesting creation of specialized body for considering disciplinary claims against prosecutors); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 889 (1998) (noting an “absence of disciplinary sanctions against prosecutors, even in the most egregious cases”); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001).

<sup>35</sup> Medwed, *supra* note 8, at 178-80.

prosecutors;<sup>36</sup> changes to the constitutional standard governing the disclosure of evidence to the defense;<sup>37</sup> reliance on an inquisitorial model of fact-finding;<sup>38</sup> and prophylactic measures to enhance the accuracy of the forms of evidence that can often lead to wrongful convictions, such as confessions<sup>39</sup> and eyewitness testimony.<sup>40</sup> All of

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<sup>36</sup> Burke, *supra* note 14, at 1616; Findley & Scott, *supra* note 15, at 387-88.

<sup>37</sup> Findley & Scott, *supra* note 15, at 390 (advocating the expansion of criminal discovery as a means to counter tunnel vision); Bennett L. Gershman, *State Constitutionalization of Criminal Procedure and the Prosecutor's Disclosure Obligations*, 18 WESTCHESTER B.J. 101, 104 n.17 (1991) (suggesting liberalization of criminal discovery rules); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541; 594-613 (suggesting reforms to broaden criminal discovery); Rosen, *supra* note 6, at 272-74 (advocating open discovery in criminal cases to mitigate harms caused by police and prosecutorial tunnel vision). *See also* Innocence Comm'n for Va., *A Vision for Justice: Report and Recommendations Regarding Wrongful Convictions in the Commonwealth of Virginia* 67-68 (2005), available at <http://www.thejusticeproject.org/press/reports/pdfs/17241.pdf> (recommending open file discovery to reduce the likelihood of wrongful convictions).

While many would argue that the decision regarding what evidence to disclose to the defense rests entirely within a prosecutor's discretion, despite the limits of a prosecutor's minimally required constitutional obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), I list the disclosure of evidence as a reform that is not wholly within a prosecutor's prerogative. The prosecutor's duty to do justice involves dual, and sometimes paradoxical, aims "that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935). *See also* Bandes, *supra* note 15, at 483 (noting the tension between a prosecutor's dual roles). It is a prosecutor's duty not only "to refrain from improper methods calculated to produce a wrongful conviction," but also "to use every legitimate means to bring about a just one." *Berger*, 295 U.S. at 88. Accordingly, some prosecutors would argue that to disclose evidence to the defense beyond what is required by *Brady* is a failure to use all legitimate means to secure a conviction and therefore undermines a prosecutor's law enforcement obligations. From this perspective, it is the courts' obligation, not an individual prosecutor's, to determine the "legitimate means" that are permissible.

<sup>38</sup> Findley & Scott, *supra* note 15, at 396 (suggestion the creation of external commissions authorized to review post-conviction claims of innocence using inquisitorial powers); Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1302-03 (2001) (suggesting creation of commission to review post-conviction claims of innocence similar to England's bipartisan Criminal Cases Review Commission); Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 142-51 (1996) (suggesting that the inquisitorial trial system may have truth-seeking advantages over the adversarial system).

<sup>39</sup> *See, e.g.*, Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006) (noting that "videotaping police interrogations ... could improve monitoring and credibility"); Findley & Scott, *supra* note 15, at 377-80 (suggesting reforms to police interrogation techniques based on Great Britain's Police

these reform proposals involve doctrinal or institutional changes whose implementation would appear either unlikely or at least to require some involvement by courts or other non-prosecutorial actors. This Essay, in contrast, focuses on relatively modest debiasing strategies that could be implemented immediately and entirely by prosecutors, either individually or at a supervisory or institutional level.

### A. Education

Some empirical evidence suggests that education can potentially mitigate bias, especially if the education focuses on the cognitive processes that can lead to bias.<sup>41</sup> It is not surprising, therefore, that commentators have continually called for increased prosecutorial training regarding the dangers of cognitive bias.<sup>42</sup> This is an especially easy reform for prosecutors to institute. Most prosecutors' offices already conduct internal educational sessions

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and Criminal Evidence Act); Thomas Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127 (2005); Innocence Comm'n for Va., *supra* note 37, at 54-59 (recommendations for improving interrogation procedures to reduce risks of wrongful convictions).

<sup>40</sup> See, e.g., Findley & Scott, *supra* note 15, at 346-48 (arguing that the doctrinal standard governing the admissibility of eyewitness identification evidence is "particularly susceptible to the kinds of cognitive biases that underlie tunnel vision"). See also Innocence Comm'n for Va., *supra* note 37, at 36-42 (recommendations for eyewitness identification procedures).

<sup>41</sup> RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 191 (1980) ("The effectiveness of a variety of procedures for discrediting information may also depend on their capacity to make subjects aware of some of the processes underlying the perseverance of their beliefs.").

<sup>42</sup> Bandes, *supra* note 15, at 494 ("training of both supervisory and lower level personnel must explicitly address the dynamics of tunnel vision"); Burke, *supra* note 14, at 1616; Findley & Scott, *supra* note 15, at 374 ("prosecutors and judges should be educated about the causes of, and correctives for, tunnel vision"); Fisher, *supra* note 8, at 258; Medwed, *supra* note 8, at 170-71 (advocating continuing education about ethical obligations of prosecutors); Thomas P. Sullivan, *Keynote Address: Reforming Eyewitness Identification*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 265, 268 (2004) ("We should also support initiatives to train detectives, prosecutors, and judges about confirmatory bias or tunnel vision, which creates the risk of wrongful charges and convictions.").

for their lawyers to comply with state bar requirements of continuing legal education. Prosecutors' offices could readily supplement existing programs with additional training about the various forms of cognitive bias and the dangers they present for prosecutorial decision making.

Unfortunately, the empirical evidence also suggests that cognitive bias is stubborn, and that education is an unlikely panacea.<sup>43</sup> Accordingly, prosecutors should couple education about cognitive biases with training about debiasing strategies that could be either incorporated into daily practice by individual prosecutors, or institutionalized as a matter of office policy.

### B. Debiasing Through "Cavern Vision"

Social scientists have found that both induced counterargument and exposure to opposing views can reverse the effects of cognitive bias.<sup>44</sup> Relying in part upon this empirical evidence, the emerging literature about prosecutorial cognitive bias emphasizes the importance of checks on a prosecutor's decision making. If tunnel vision contributes to wrongful convictions, then exposure to a diversity of views that challenge presumptions of guilt should prevent them. Prosecutors could develop this type of neutralizing

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<sup>43</sup> Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 5; Findley & Scott, *supra* note 15, at 371; Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 32 (Daniel Kahneman et al. eds., 1982).

<sup>44</sup> Craig A. Anderson & Elizabeth S. Sechler, *Effects of Explanation and Counterexplanation on the Development and Use of Social Theories*, 50 J. PERSONALITY & SOC. PSYCHOL. 24, 27-29 (1986) (finding that subjects' generation of counterarguments reversed the effects of bias-induced beliefs); Lord, Lepper & Preston, *supra* note 21, at 1231 (finding that both induced counterargument and exposure to materials making opposing possibilities more salient helped mitigate both confirmation bias and selective information processing). See generally Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 133 n. 207 (summarizing the empirical literature and concluding that "asking or directing experimental subjects to consider alternative or opposing arguments, positions, or evidence has been found to ameliorate the adverse effects of several biases").

“cavern vision” in three ways: individually, through self-checking role-playing as one’s own Devil’s Advocate; collectively, through the use of internal review processes; and institutionally, by submitting prosecutorial decision making to external review.

### 1. Devil’s Advocacy

Empirical evidence suggests that cognitive bias can be mitigated when people are forced to articulate arguments that contradict their existing beliefs.<sup>45</sup> Accordingly, individual prosecutors could attempt to neutralize their decision making by regularly “switching sides” on their files and reviewing cases from the perspective of defense counsel.<sup>46</sup> Applied to lawyers, the practice of counterargument not only serves as a debiasing strategy, but also amounts to the good lawyering skill of acting as one’s own Devil’s Advocate. To neutralize confirmation bias, a prosecutor reviewing a file should not only look for evidence supporting the defendant’s guilt, but also scrutinize the case with the eye of a defense attorney searching for reasonable doubt. To mitigate selective information processing, the prosecutor should not simply accept evidence that

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<sup>45</sup> Joel Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL’Y & L. 677, 691 (2000) (concluding that belief perseverance can be reduced if people articulate arguments in support of contrary beliefs); Lord, Lepper & Preston, *supra* note 21, at 1239 (“In two different domains of social judgment, biased assimilation of new evidence and biased hypothesis testing...the cognitive strategy of considering opposite possibilities promoted impartiality.”) (internal citations omitted); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 188 (1998) (suggesting that the articulation of counterarguments can mitigate individuals’ overconfidence in their own judgments).

<sup>46</sup> Burke, *supra* note 14, at 1618 (advocating practice of switching sides); see also Findley & Scott, *supra* note 15, at 371-72 (advocating institutionalization of mechanisms to encourage counterargument throughout investigation and prosecution); Michael J. Saks & D. Michael Risinger, *Baselines, The Presumption of Guilt, Admissibility Rulings, and Erroneous Convictions*, 2003 MICH. ST. L. REV. 1051, 1056-57 (noting that others have previously argued that investigators could neutralize their “presumption of guilt” by testing theories of guilt using the scientific method of searching for contradictory evidence).

appears inculpatory; instead, she should force herself to articulate any basis for skepticism. Similarly, she should not just assume that seemingly exculpatory evidence is fabricated or unreliable; she should force herself to anticipate its value to the defense.

Counterargument could be particularly effective in exoneration cases to mitigate prosecutorial belief perseverance. In many exoneration cases, prosecutors have adhered to their original guilt assessments by clinging to any remaining evidence that is consistent with the defendant's guilt, even after the exonerating evidence has called part of the government's original case into question. For example, regardless of newly available, exculpatory DNA evidence that undermines the physical evidence offered against the defendant at trial, a prosecutor might still point to the defendant's confession to argue that the defendant is guilty.<sup>47</sup> The rational question, of course, is not whether *some* evidence exists that is merely consistent with the defendant's guilt, but rather whether the remaining available evidence—in its totality, including exculpatory evidence—is sufficient to support charges. Using the practice of counterargument, a prosecutor might avoid belief perseverance by working through possible alternative explanations for any remaining evidence of guilt, such as the possibility that the defendant gave a false confession.

## 2. Internal Reviews

Although individual prosecutors can attempt to provide their own checks on cognitive bias, an additional method of injecting neutrality into prosecutorial decision making is to involve additional, potentially less biased prosecutors in the decision making process.<sup>48</sup> A “fresh look” by attorneys unassociated with initial sticky charging decisions may dilute the biasing effects of selective

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<sup>47</sup> See examples, *supra* note 24.

<sup>48</sup> Findley & Scott, *supra* note 15, at 388 (advocating use of multiple levels of case review as “another check against tunnel vision”); Bandes, *supra* note 15, at 493-94

information processing and belief perseverance.<sup>49</sup> Fresh looks would appear to be particularly helpful in cases where some of the government's original evidence against a defendant has been undermined; a new lawyer could review the case considering only the remaining evidence, untainted by the lingering effects of belief perseverance. A fresh-look attorney would also be in a better position to bring neutrality to a defendant's claim of innocence, because she would have less of a stake in avoiding the cognitive dissonance of having charged or convicted an innocent person.

Internal fresh-look reviews could occur either formally or informally. Offices with sufficient resources could create a formal layer of internal review, at least in some limited categories of high-stakes cases, such as death penalty cases, other major crimes, or post-conviction claims of innocence.<sup>50</sup> For lesser-stake cases, or in offices that lack the resources to institutionalize internal review, even the encouragement of informal counterargument might be productive. Informal debate in which colleagues serve as mock adversaries would serve both to hone attorneys' advocacy skills and to mitigate the effects of cognitive bias.<sup>51</sup>

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(advocating "review mechanisms . . . at every level of decision-making" that should perform a critical "naysaying function").

<sup>49</sup> See Burke, *supra* note 14, at 1621 (suggesting "fresh look" reviews by additional prosecutors); Brown, *supra* note 15, at 1620-21 (recommending that higher-level prosecutors act as a supervisory, internal check on prosecutorial decision making).

<sup>50</sup> Medwed, *supra* note 8, at 175-77 (suggesting the creation of specialized post-conviction units to review innocence claims); Peter Neufeld, *Legal and Ethical Implications of Post-Conviction DNA Exonerations*, 35 NEW ENG. L. REV. 639, 641 (2001) ("increasingly, progressive-minded prosecutors around the country are setting up their own 'innocence projects'" and citing several examples); Brendan Riley, *Innocence Project Urges DNA Test Changes in Nevada Crime Cases*, Associated Press, Mar. 18, 2002 ("Some Nevada prosecutors have their own 'innocence projects' to re-examine old capital cases for errors.").

<sup>51</sup> Findley & Scott, *supra* note 15, at 389 (noting that even "informal discussions and debates among peer prosecutors regarding serious, complex and borderline cases can help reduce the risk that tunnel vision will negatively affect prosecutorial decision-making").

### 3. External Transparency

Although prosecutors can try to serve as one another's Devil's Advocates, they may ultimately feel pressure to conform their opinions to their colleagues.<sup>52</sup> Accordingly, a final method of checking prosecutorial cognitive bias is to introduce external checks on prosecutor decision making. This could be accomplished indirectly by increasing the transparency of prosecutorial decisions that usually take place behind closed doors.<sup>53</sup> For example, Professors Angela Davis and Daniel Medwed have each recommended the creation of prosecutorial public information offices to disclose prosecutorial policies and increase prosecutorial accountability.<sup>54</sup>

More controversially, prosecutors could also submit to direct external checks on their decision making by permitting outsiders such as judges, civil practitioners, and defense attorneys to review their discretionary conduct. Although prosecutors might balk at any outside review that threatens the broad discretion they legitimately enjoy,<sup>55</sup> I have previously suggested that fresh look committees could serve in an entirely advisory capacity and only over extremely limited factual questions, thereby preserving the full scope of prosecutorial discretion.<sup>56</sup> Such a committee might be

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<sup>52</sup> See generally SOLOMON E. ASCH, *SOCIAL PSYCHOLOGY* (1952) (reporting that subjects adopted incorrect positions to conform to others); Leonard Berkowitz & Nigel Walker, *Laws and Moral Judgments*, 30 *SOCIOMETRY* 410, 415-22 (1967) (finding that subjects' approval of conduct conformed to peers).

<sup>53</sup> See generally Bandes, *supra* note 15, at 494 (noting that review of prosecutorial decisions "will be ineffective without transparency"); Bibas, *supra* note 39 (arguing for increased transparency throughout the criminal justice system); Findley & Scott, *supra* note 15, at 391 (advocating increased transparency as a means of neutralizing cognitive bias).

<sup>54</sup> Davis, *supra* note 33, at 461-62 (suggesting that public disclosure of prosecutorial policies "would promote prosecutorial accountability and public confidence in the criminal justice system"); Medwed, *supra* note 8, at 177-78 (advocating transparency in prosecutorial policies, including the creation of public information offices, as a method of improving political accountability).

<sup>55</sup> See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (discussing the judiciary's reluctance to impede on prosecutorial discretion).

<sup>56</sup> For example, a fresh look committee might offer an opinion regarding the strength of the evidence in an individual case or the potential exculpatory value of evidence



modeled after the civilian review boards that increasingly monitor police in limited capacities, but do not dictate a department's general policing strategies.<sup>57</sup>

### Conclusion

A cognitive explanation for prosecutorial decision making is desirable for two separate reasons. Most obviously, it helps to shape the direction of reform by demonstrating the importance of debiasing strategies, rather than simply instituting reforms directed at intentional misconduct.<sup>58</sup> Moreover, by avoiding the language of fault, a discursive shift toward a cognitive explanation for prosecutorial decision making holds more promise for including prosecutors in the growing dialogue about the prevention of wrongful convictions.<sup>59</sup>

Emerging recently from that dialogue has been a narrative trend that increasingly depicts prosecutors as victims of cognitive accidents as opposed to purposeful or reckless wrongdoers. Professor Medwed, for example, has criticized the institutional culture of prosecutors' offices for prioritizing conviction rates, but emphasizes that "many prosecutors certainly resist the conviction psychology and that individual prosecutors may possess a range of motives,

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that is in question. Limited consulting roles such as these would not interfere with the broader policy questions that generally justify deference to prosecutorial discretion, such as a jurisdiction's enforcement priorities or its allocation of resources. Burke, *supra* note 14, at 1623. Cf. Davis, *supra* note 33, at 463-64 (2001) (advocating the creation of Prosecution Review Boards to review complaints against and review the discretionary decisions of prosecutors).

<sup>57</sup> See generally David H. Bayley, *Community Policing: A Report from the Devil's Advocate*, in COMMUNITY POLICING: RHETORIC OR REALITY 225, 236-37 (Jack R. Greene & Stephen D. Mastrofski eds., 1988); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 665 (1997).

<sup>58</sup> Burke, *supra* note 14, at 1632; see also Bandes, *supra* note 15, at 485 (noting that "the cognitive biases which undergird many of the problems with the decision-making process are poorly captured by concepts of fault and intentional misconduct").

<sup>59</sup> Burke, *supra* note 14, at 1633.

including a profound commitment to doing justice.”<sup>60</sup> Similarly, Professors Keith Findley and Michael Scott describe the problem as “pressures on prosecutors that can cause them to act in ways that subvert justice, whether intentionally or, as is more often the case, unintentionally.”<sup>61</sup> Professor Susan Bandes has noted that while some of the prosecutorial behavior leading to wrongful convictions “involves lying, deliberately withholding evidence, and other bad faith behavior, . . . [m]uch of it . . . involves prosecutors simply trying to do their job as they see it.”<sup>62</sup> She dismisses explanations of “fault and blame” as “counterproductive,” and suggests an alternative focus on “the systemic institutional causes of tunnel vision,” even for the “conscientious prosecutor.”<sup>63</sup>

This Essay has sought both to shape the direction of reform and to involve conscientious prosecutors in the ongoing innocence dialogue by focusing on debiasing strategies that can be implemented entirely within the province of prosecutors, either as individual practice or as institutional policy. In doing so, I hope to encourage prosecutors to accept the olive branch extended to them by the innocence movement’s current narrative trend. Moreover, I hope to persuade prosecutors that they have only a limited opportunity to do so.

Despite heightened awareness about the role that tunnel vision has played in recent wrongful convictions, it is still uncommon for prosecutors to receive any education about cognitive bias or the ways in which it can affect prosecutorial decision making.<sup>64</sup> And despite repeated calls for reforms in the ways by which prosecutors are evaluated for promotion, most prosecutors’ offices continue to emphasize conviction rates in measuring an attorney’s worth.<sup>65</sup>

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<sup>60</sup> Medwed, *supra* note 8, at 181.

<sup>61</sup> Findley & Scott, *supra* note 15, at 295.

<sup>62</sup> Bandes, *supra* note 15, at 479.

<sup>63</sup> *Id.* at 485.

<sup>64</sup> See Findley & Scott, *supra* note 15, at 333 (noting that law enforcement is rarely trained in the dangers of tunnel vision).

<sup>65</sup> See Berenson, *supra* note 10, at 846 (asserting that “career advancement in prosecutors’ offices should be based on richer measures of compliance with the ‘do justice’

Prosecutors cannot simply ignore the problems that can contribute to wrongful convictions and expect others to continue to depict them as noble attorneys who sometimes make mistakes. As Findley and Scott recently observed, “tunnel vision in the criminal justice system exists not despite our best efforts to overcome these cognitive biases and institutional pressures, but because of our deliberate systemic choices.”<sup>66</sup> And many of those systemic choices, as I have noted in this Essay, can be altered only by prosecutors, particularly those with the authority to shape their institutions.

In contrast, outsiders hold the keys to many of the reforms that are shaped by fault-based initiatives.<sup>67</sup> For example, state bar organizations could enact more stringent rules to limit the discretion of prosecutors. They could bring more charges and impose greater sanctions against prosecutors who are involved in overcharging, nondisclosure of exculpatory evidence, or wrongful convictions. Courts could be less deferential to the broad discretion that prosecutors currently enjoy. Prosecutors would presumably oppose all of these outsider-initiated, fault-based reforms. However, reformists will be left with few other alternatives if prosecutors do not accept the opportunity to disprove the traditional fault-based narrative by taking steps to improve their own decision making.

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standard, rather than simply on conviction rates”); Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL’Y & L. 305, 320-21 (2001) (demonstrating that promotions for prosecutors were tied to conviction rates, which rewards prosecutors for ignoring police misconduct, and proposing alternative incentives); Meares, *supra* note 7, at 853 (proposing financial incentives for prosecutors to charge defendants accurately); Medwed, *supra* note 8, at 172 (arguing that performance standards for prosecutors should consider both conviction rates and an attorney’s decisions not to prosecute).

<sup>66</sup> Findley & Scott, *supra* note 15, at 333.

<sup>67</sup> See *supra* notes 31-34 and accompanying text for a discussion of fault-based reforms.