

## ENDING INNOCENCE DENYING

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*Prosecutors, the most powerful actors in the criminal justice system, also have the most difficult job: they must be “ministers of justice.”<sup>1</sup> A prosecutor’s core mission is to vindicate the truth, rather than strive to “win” by accumulating a track record of convictions. When evidence comes to light suggesting that a wrongful conviction has occurred, a prosecutor’s ethical obligation requires admitting to a terrible mistake and working to undo it. Many conscientious prosecutors accept this responsibility and confess to their errors, but too many do not. They insist, in the face of overwhelming evidence to the contrary, that wrongfully convicted people are in fact guilty. These prosecutors actively work to delay justice. Some are so committed to adhering to the original mistake that they fail to prosecute the actual perpetrators.*

*Much has been written about how to change the culture that leads to prosecutors’ reflexive doubling-down on wrongful convictions: public shaming in judicial opinions, more rigorous ethical training in law school and on the job, and sharper oversight by state bars. These measures are necessary, but they are insufficient. To curtail innocence denying, the narrative must change about what it means to be a “good prosecutor,” historically defined as a tough-on-crime-fighter whose overriding goal is to obtain and preserve convictions. This mindset pits a prosecutor’s self-interest in getting and preserving guilty verdicts*

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† Portions of the case descriptions in Part II were adapted from the Author’s previous work in *Slate*. See Lara Bazelon, *The Innocence Deniers*, SLATE (Jan. 10, 2018, 11:30 AM), <https://slate.com/news-and-politics/2018/01/innocence-deniers-prosecutors-who-have-refused-to-admit-wrongful-convictions.html> [hereinafter Bazelon, *Innocence Deniers*].

1. MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2016) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”).

against his or her ethical obligations, which require confessing error and reversing course where credible evidence of innocence exists.<sup>2</sup>

The explosion of interest in wrongful conviction cases, narrated as true-crime stories in podcasts, documentaries, and other media, has begun to erode the power of the traditional narrative. The public is now better informed about the ethical obligations of prosecutors and the consequences of violating these obligations. This, in turn, has led to the election of reform-minded candidates who defeated innocence-denying incumbents by running on progressive platforms, including a commitment to revisiting wrongful conviction cases.

In this Article, I argue that these “good prosecutor” stories can be woven into a coherent and compelling meta-narrative that can help put an end to innocence denying. When the new exoneration narrative becomes predominant, prosecutors who embrace their ethical obligations and correct miscarriages of justice will have everything to gain because the voters will see them as courageous and just. Innocence deniers, by contrast, will be rendered unelectable.

## I. INTRODUCTION

Prosecutors, the most powerful actors in the criminal justice system,<sup>3</sup> also have the most difficult job: they must be “ministers of justice.”<sup>4</sup> In *Berger v. United States*,<sup>5</sup> decided in 1935, the Supreme Court famously declared that the prosecution’s ultimate goal “is not that it shall win a case, but that justice shall be done.”<sup>6</sup> A prosecutor, the Court wrote, “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.”<sup>7</sup> The ethical complexities and psychological difficulties of this

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2. *Id.* r. 3.8(g)–(h).

3. DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 2 (2012) (“Prosecutors are the most powerful players in the criminal justice system, capable of determining who should be charged and with what crimes.”); see also Lawton P. Cummings, *Can an Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139, 2146 (2010) (“Prosecutors wield enormous power. They possess almost unfettered discretion in certain key decisions, such as who to charge for what crime, whether to seek the death penalty, and whether to permit a plea.” (footnote omitted)).

4. MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1.

5. 295 U.S. 78 (1935).

6. *Id.* at 88.

7. *Id.*

truth-seeking imperative<sup>8</sup> arise most pointedly in the second instance, where a wrongful conviction has occurred.<sup>9</sup>

The government brings cases it believes are supported by proof beyond a reasonable doubt.<sup>10</sup> When defendants plead guilty or are convicted following a trial, it appears that the prosecutors got it right, such that their mission to seek the truth and obtain justice are aligned with the case outcome. But after nearly two thousand recorded exonerations, it is undeniable that all too often prosecutors get it wrong, so that truth and justice are perverted.<sup>11</sup> Innocent people confess<sup>12</sup> and accept guilty pleas.<sup>13</sup> Innocent people get convicted after fundamentally flawed trials where crucial facts were withheld by law enforcement, faulty forensic evidence was introduced as infallible, witnesses lied or made mistakes, and defense attorneys provided ineffective assistance of counsel.<sup>14</sup> When evidence comes to light suggesting that a miscarriage of this magnitude has occurred, a prosecutor's ethical obligation—"justice shall be done"—requires admitting to terrible mistakes and working to

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8. See, e.g., MEDWED, *supra* note 3, at 3 ("How did bloodlust become a prerequisite for working as a prosecutor, at least in that office? The very source of prosecutorial uniqueness—the dual role of advocate and servant of justice—may be part of the answer, causing an 'ongoing schizophrenia' about how to balance these responsibilities.")

9. See MODEL RULES OF PROF'L CONDUCT r. 3.8(h) ("When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.")

10. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-4.3(b) (AM. BAR ASS'N, 4th ed. 2015) ("After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.")

11. See *Exonerations in 2016*, NAT'L REGISTRY EXONERATIONS 3 (Mar. 7, 2017), [https://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2016.pdf](https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf) ("[T]he National Registry of Exonerations has recorded 1,994 known exonerations in the United States since 1989 (as of February 26, 2017).") Jon B. Gould and Richard A. Leo wrote that "[v]irtually no one denies the existence of wrongful convictions, while the several studies on this question cap the estimates at around 3% to 5% of convictions." Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 832 (2010) (footnote omitted).

12. *The First 1,600 Exonerations*, NAT'L REGISTRY EXONERATIONS 11 tbl. 5 (2015), [https://www.law.umich.edu/special/exoneration/documents/1600\\_exonerations.pdf](https://www.law.umich.edu/special/exoneration/documents/1600_exonerations.pdf) (finding that thirteen percent of wrongful convictions involve false confessions).

13. According to the National Registry of Exonerations, of the 166 people exonerated in 2016, seventy-four pleaded guilty. *Exonerations in 2016*, *supra* note 11, at 7.

14. Lisa Kern Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 WASH. & LEE L. REV. 165, 196 (2016) (citing BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 205 (2011)) (noting Brandon Garrett's finding that thirty-two percent of DNA exonerations involved claims of ineffective assistance of counsel); *The First 1,600 Exonerations*, *supra* note 12, at 11 tbl. 5 (finding that forty-five percent of the first 1600 exonerations involved official misconduct, twenty-three percent involved false or misleading forensic science, fifty-five percent involved false testimony, and thirty-four percent involved mistaken witness identifications).

undo them.<sup>15</sup> Many conscientious prosecutors accept this responsibility and confess error. Too many do not.<sup>16</sup>

There is a select but significant class of prosecutors who are innocence deniers. “They are Democrats and Republicans from red, blue, and purple states”; some are men, some are women.<sup>17</sup> They are also racially and ethnically diverse, although white men—who comprise the majority of prosecutors in the U.S. at the federal, state, and local levels—predominate.<sup>18</sup> What innocence deniers have in common is a mindset.<sup>19</sup> They insist, in the face of overwhelming evidence to the contrary, that wrongfully convicted people are in fact guilty.<sup>20</sup>

These prosecutors do not “do justice” as the Supreme Court defines it and as their ethical obligations require. Instead, they delay justice, and in some cases, actively work against it. When a prisoner is exonerated by a lower court, these prosecutors double and triple down, filing appeal after appeal. Or they indict and prosecute the exoneree all over again, sometimes under a wildly different theory at the expense of time and resources that should be used to pursue the actual perpetrator.<sup>21</sup> They may also threaten endless legal challenges to wring “no contest” pleas from innocent prisoners in exchange for time-served sentences.<sup>22</sup> The prisoners, desperate to be free, accept these Faustian bargains, which brand them convicts for life and allow prosecutors to proclaim their guilt and the state to deny them compensation. Some prosecutors are so committed to adhering to their original mistake that they fail

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15. *Berger v. United States*, 295 U.S. 78, 88 (1935); *see also Imbler v. Pachtman*, 424 U.S. 409, 427 n.25 (1976) (“[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.” (citations omitted)).

16. Mark Godsey, a former prosecutor and current director of the Ohio Innocence Project, described the “extreme, mind-blowing level of denial” by prosecutors who refused to concede, in the face of overwhelming evidence, that his clients were innocent. MARK GODSEY, *BLIND INJUSTICE: A FORMER PROSECUTOR EXPOSES THE PSYCHOLOGY AND POLITICS OF WRONGFUL CONVICTIONS* 1, 14-15 (2017); *Mark A. Godsey*, U. CINCINNATI C.L., <https://law.uc.edu/education/faculty/mark-godsey.html> (last visited Feb. 3, 2019).

17. Bazelon, *Innocence Deniers*, *supra* dagger note.

18. *See* Amita Kelly, *Does It Matter that 95 Percent of Elected Prosecutors Are White?*, NPR (June 8, 2015, 4:59 PM), <https://www.npr.org/sections/itsallpolitics/2015/07/08/420913118/does-it-matter-that-95-of-elected-prosecutors-are-white>; Emma Wilkinson, *Study Reveals Severe Lack of Diversity in Elected Prosecutors*, NBC NEWS (July 7, 2015, 3:16 PM), <https://www.nbcnews.com/news/nbcblk/study-reveals-severe-lack-diversity-elected-prosecutors-n388121> (reporting that seventy-nine percent of elected prosecutors are white men).

19. GODSEY, *supra* note 16, at 17-18.

20. *Id.* at 9-12 (describing the arduous, years-long effort to free Clarence Elkins, even after DNA evidence conclusively pointed to another man as the rapist and murderer).

21. *See infra* Part II.A.

22. *See, e.g., infra* Part II.A.1, 4.

to prosecute the actual perpetrators, even when there is evidence to convict them.<sup>23</sup>

To curtail innocence denying, it is necessary to change the narrative about what it means to be a good prosecutor. The dominant narrative, which has long held sway in the U.S., posits that a good prosecutor must be an aggressive crime fighter whose success is measured by a win-loss ratio.<sup>24</sup> This narrative pits a prosecutor's self-interest in getting and preserving guilty verdicts against his or her ethical obligations, which require confessing error and reversing course in the face of credible evidence showing defendants' possible innocence.<sup>25</sup>

In recent years, a counter-narrative has taken a tentative foothold: a good prosecutor is a protector of the innocent and a crusader for truth.<sup>26</sup> In this narrative, self-interest and ethical obligations align.<sup>27</sup> When this counter-narrative assumes its rightful position in the public consciousness as the highest ideal to which a prosecutor can aspire, innocence denying will become increasingly rare and eventually politically untenable.

There is evidence to suggest that the counter-narrative is gaining momentum. As of 2017, 269 innocent people have been released through the cooperative efforts of prosecutors assigned to conviction integrity units or conviction review units, known as CIUs or CRUs respectively.<sup>28</sup> These units, set up at the discretion of the county's chief prosecutor, are designed to take an objective look at old cases where there is evidence suggesting that a terrible injustice occurred.<sup>29</sup> The most successful

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23. See, e.g., *infra* Part II.A.5.

24. GODSEY, *supra* note 16, at 40-41.

25. MEDWED, *supra* note 3, at 130.

26. Lara Bazelon, *The Good Prosecutor*, POLITICO MAG. (Mar. 24, 2015), <https://www.politico.com/magazine/story/2015/03/good-prosecutors-116362> (describing the decision of King County, Washington prosecutor Mark Larson to free Brandon Olebar from prison because it was "undoing a decision that we did not believe was sound. It also just felt like the right thing to do."); *The Passion of Ken Cuccinelli*, NEWSMAX MAG. (Feb. 2012), [https://www.newsmax.com/ken\\_cuccinelli\\_biography](https://www.newsmax.com/ken_cuccinelli_biography) (chronicling then-Attorney General Kenneth Cuccinelli's crusade to free Thomas Haynesworth, who had been wrongfully convicted of three separate rapes; Cuccinelli sided with Haynesworth's attorneys from the Innocence Project when he argued the case to the Virginia Court of Appeals).

27. Justin Jouvenal, *Cuccinelli Tries to Help Convicted Felon Haynesworth Clear His Name*, WASH. POST (Sept. 27, 2011), [https://www.washingtonpost.com/local/cuccinelli-tries-to-help-convicted-felon-haynesworth-clear-his-name/2011/09/27/gIQA3QFG3K\\_story.html?noredirect=on&utm\\_term=.31ed97c98653](https://www.washingtonpost.com/local/cuccinelli-tries-to-help-convicted-felon-haynesworth-clear-his-name/2011/09/27/gIQA3QFG3K_story.html?noredirect=on&utm_term=.31ed97c98653) ("[Attorney General] Cuccinelli said he sees no conflict between his support for Haynesworth and his [hard right] politics. 'The proper conservative is careful about the exercise of government power — even judicial power.'").

28. *Exonerations in 2017*, NAT'L REGISTRY EXONERATIONS 12 (Mar. 14, 2018), <http://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf>.

29. *Id.* at 2.

CRUs have turned their leaders into heroes, with a few even attaining national prominence.<sup>30</sup>

The success of these units attests to the growing power of the good prosecutor narrative. On the contrary, the innocence-denying prosecutors who have been toppled from power offer a cautionary tale.<sup>31</sup> Their ousters, while not solely attributable to innocence denying, nevertheless drive home the message that irrationally insisting on an innocent person's guilt does not pay off at the ballot box.<sup>32</sup>

This Article argues that, through media exposure that educates and informs the public, "good prosecutor" stories can be woven into a coherent and compelling meta-narrative.<sup>33</sup> Doing so requires a shift in the traditional exoneration narrative, whereby the wrongfully convicted person and a team of fierce advocates must battle the system—first and foremost, the prosecutor—for years to prevail.<sup>34</sup> In this narrative, the exoneree and his advocates are heroes and the prosecutors are villains.<sup>35</sup> The story is important because it educates the public about innocence-denying prosecutors and arguably shames some prosecutors into changing their ways.<sup>36</sup> But more than shame is needed—it is also important to highlight and elevate the work of prosecutors who do the right thing. In the new exoneration narrative, the prosecutor fights to free the wrongfully convicted person alongside his or her advocates and rightfully shares in the hero acclaim.<sup>37</sup>

The good prosecutor story has been told, but too infrequently. When the new exoneration narrative becomes dominant, prosecutors who embrace their ethical obligations and correct miscarriages of justice will have everything to gain because the voters will see them as courageous and just.<sup>38</sup> When innocence deniers, by contrast, are exposed and called to account, public condemnation will follow and they will face a choice: correct course or be rendered unelectable.<sup>39</sup>

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30. See *infra* Part IV.A.

31. See *infra* Part IV.B.

32. See *infra* Part IV.B.

33. See *infra* Part V.A.

34. See *infra* Part II.A–B.

35. See James R. Acker, *The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free*, 76 ALB. L. REV. 1629, 1709–11 (2013) (suggesting a variety of reforms to the criminal justice system to protect the innocent, and noting that the implementation of those reforms have been met with "considerable resistance" from those who believe that "measures enacted to safeguard the innocent must also invariably or often serve to shield the guilty" (footnote omitted)).

36. See, e.g., *infra* Part IV.B.3.

37. See *infra* Part IV.A.

38. See *infra* Part V.A–B.

39. See *infra* Part IV.B.1–2.

## II. DEFINING INNOCENCE DENYING AND ASSESSING ITS IMPACT

Simply opposing an exoneration effort does not make a prosecutor an innocence denier. Some exoneration claims are bogus and others are murky, requiring rigorous legal testing to be proven conclusively. Increasingly, conscientious prosecutors are working collaboratively with defense attorneys to reinvestigate innocence claims, keeping an open mind and doing the right thing in the end.<sup>40</sup> Innocence denying is qualitatively different. It is extreme. It involves an irrational, counterfactual refusal to admit that a wrongfully convicted person is innocent despite overwhelming evidence that points to innocence.<sup>41</sup> Innocence-denying prosecutors are not uncommon,<sup>42</sup> and their conduct contributes to the ruination of lives.<sup>43</sup> Their conduct also runs contrary to their fundamental ethical obligation, which is to seek justice.<sup>44</sup> In addition, innocence denying poses a risk to public safety by allowing the actual perpetrator to remain at large.<sup>45</sup>

### A. *Who is an Innocence Denier? Six Variations on a Theme*

An innocence denier is a prosecutor who: (1) re-prosecutes a wrongfully convicted person under a theory that is irreconcilable with the argument advanced in connection with the original conviction; (2) indicts and prosecutes for perjury and without good cause witnesses who testify favorably on behalf of a wrongfully convicted person in a post-conviction proceeding; (3) appeals a judicial decision to vacate a

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40. See *Exonerations in 2017*, *supra* note 28, at 2 (“There were 33 CIUs in the United States in 2017, more than double the number in 2013 and more than six times the number in 2011. Forty-two CIU-exonerations took place in 2017. Overall, CIUs have helped secure 269 exonerations from 2003 through 2017; more than 80% occurred since 2014.”).

41. Bazelon, *Innocence Deniers*, *supra* dagger note.

42. GODSEY, *supra* note 16, at 24 (“Any lawyer in the innocence movement could provide example upon example where prosecutors fought back against innocence claims with a closed-minded attitude and denials that anyone their office had convicted could possibly be innocent.”); Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 402-03 (2011) (“[S]ome prosecutors go to incredible lengths to deny the obvious rather than face the fact that the justice system failed and they may have contributed to that failure.”).

43. GODSEY, *supra* note 16, at 17 (“When I look at these cases, I see police officers, prosecutors, and judges who took unreasonable and intellectually dishonest positions that stripped innocent people of their freedom and caused tremendous human suffering for entire families.”).

44. See *supra* text accompanying notes 3-7.

45. According to the Innocence Project, 362 people have been exonerated by DNA evidence since 1989. *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states> (last visited Feb. 3, 2019). The group has identified 158 actual perpetrators in those cases who went on to commit “150 additional violent crimes, including 80 sexual assaults, 35 murders, and 35 other violent crimes while the innocent sat behind bars for their earlier offenses.” *Id.*

conviction multiple times over a period of years and threatens re-prosecution; (4) threatens to re-prosecute an exoneree knowing he or she lacks proof beyond a reasonable doubt unless the exoneree accepts a no contest plea for time served; (5) continues to publicly proclaim that a wrongfully convicted person is guilty and advocates against his or her compensation by the state; or (6) declines to indict the individuals that the evidence strongly suggests are the actual perpetrators.

### 1. Philadelphia County District Attorney R. Seth Williams

In 1991, the Philadelphia District Attorney's Office charged twenty-year-old Anthony Wright with capital murder for the rape and stabbing death of a seventy-seven-year-old woman.<sup>46</sup> The case against Wright turned, in part, on a purported confession written by the police, which Wright signed.<sup>47</sup> Wright, who is African-American, maintained from the beginning that he signed the document only after the interrogating officers, who were white, threatened to “‘rip [his] eyes out’ and to ‘skull-fuck’ him . . . .”<sup>48</sup> Convicted in 1993, Wright was sentenced to life in prison without the possibility of parole.<sup>49</sup>

In 2005, Innocence Project lawyers Nina Morrison and Peter Neufeld took on Wright's case, petitioning the trial court for DNA testing.<sup>50</sup> The Philadelphia District Attorney, Lynne Abraham—known as the “Queen of Death” for the number of capital punishment verdicts she amassed under her tenure<sup>51</sup>—fought Wright's request in the state's trial and intermediate appellate courts, arguing that Wright's “confession” rendered him ineligible for DNA testing.<sup>52</sup> In 2010,

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46. LARA BAZELON, *RECTIFY: THE POWER OF RESTORATIVE JUSTICE AFTER WRONGFUL CONVICTION* 47 (Rakia Clark ed., 2018); Telephone Interview with Anthony Wright (June 15, 2017) (on file with author); Paul Solotaroff, *The Trials of Tony Wright: How DNA Exonerated Convicted Murderer*, *ROLLING STONE* (Mar. 2, 2015, 1:57 PM), <https://www.rollingstone.com/culture/culture-news/the-trials-of-tony-wright-how-dna-exonerated-convicted-murderer-99926>.

47. Solotaroff, *supra* note 46.

48. Victor Fiorillo, *After DNA Exoneration, Anthony Wright Sues City and Police*, *PHILA. MAG.* (Sept. 21, 2016, 3:22 PM), <https://www.phillymag.com/news/2016/09/21/dna-exoneration-lawsuit-anthony-wright> (alteration in original).

49. Maurice Possley, *Anthony Wright*, NAT'L REGISTRY EXONERATIONS (Aug. 26, 2016), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4970> [hereinafter Possley, *Anthony Wright*].

50. Fiorillo, *supra* note 48; Alicia Maule, *Anthony Wright Shines in His Freedom After 25 Years Wrongly Convicted*, *INNOCENCE PROJECT* (Aug. 24, 2016), <https://www.innocenceproject.org/wright-shines-freedom>.

51. Ed Pilkington, *America's Deadliest Prosecutors: Five Lawyers, 440 Death Sentences*, *GUARDIAN* (June 30, 2016, 12:01 AM), <https://www.theguardian.com/us-news/2016/jun/29/us-deadliest-prosecutors-death-penalty-five-attorneys-justice-system> (internal quotation marks omitted).

52. *See Commonwealth v. Wright*, 935 A.2d 542, 546-47 (Pa. Super. Ct. 2007), *rev'd*, 14

Abraham, a white Democrat and the city's first female district attorney, retired.<sup>53</sup> She was replaced by R. Seth Williams, the city's first African-American district attorney, who ran on a platform of criminal justice reform.<sup>54</sup> But Williams maintained Abraham's position.<sup>55</sup> In 2011, after a five-year legal battle, the Pennsylvania Supreme Court sided with Wright.<sup>56</sup> The DNA evidence from the rape kit was tested in 2013 and came back as a match to a deceased drug addict named Ronnie Byrd.<sup>57</sup>

When Wright's attorneys presented the DNA evidence to the Philadelphia District Attorney's Office, Williams responded with a decision to re-try the case, citing "considerable and compelling evidence" of Wright's guilt.<sup>58</sup> When Shannon Coleman, the grand niece of the victim, learned the news, she was appalled.<sup>59</sup> Believing in Wright's innocence, she met with a top deputy in Williams's office and started a Change.org petition to protest, calling the re-prosecution "a travesty."<sup>60</sup> Nearly 40,000 people signed the petition, from countries as far away as Israel.<sup>61</sup>

But Williams pressed ahead, and in August 2016, the Philadelphia District Attorney's Office went to trial under a different theory of the crime.<sup>62</sup>

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A.3d 798, 817-18 (Pa. 2011).

53. See *Lynne M. Abraham*, ARCHER, <https://archerlaw.com/attorneys/lynne-m-abraham> (last visited Feb. 3, 2019); Teresa Masterson, *New DA to Tackle "Black Genocide"*, NBC PHILA. (Jan. 4, 2010, 5:55 PM), <https://www.nbcphiladelphia.com/news/politics/New-DA-To-Tackle-Black-Genocide-80655937.html>.

54. Jeremy Roebuck, *The Federal Case Against Seth Williams Explained*, PHILA. INQUIRER (June 19, 2017), <http://www.philly.com/philly/news/crime/seth-williams-corruption-trial-explainer-20170619.html>.

55. However, in its brief to the Pennsylvania Supreme Court, Williams's Office did "concede[] . . . that the Superior Court was wrong to adopt a *per se* rule barring a convicted defendant who gave a confession, subsequently deemed legally voluntary, from asserting actual innocence . . . in order to obtain DNA testing . . ." *Wright*, 14 A.3d at 808.

56. *Id.* at 817-18.

57. Solotaroff, *supra* note 46.

58. *Id.* (internal quotation marks omitted).

59. BAZELON, *supra* note 46, at 183-84; Telephone Interview with Shannon Coleman (June 18, 2017) (on file with author).

60. BAZELON, *supra* note 46, at 184-85 (internal quotation marks omitted); see also Shannon Coleman, *District Attorney: Release Anthony Wright*, CHANGE.ORG, <https://www.change.org/p/district-attorney-release-the-man-wrongly-convicted-of-murdering-my-aunt> (last visited Feb. 3, 2019).

61. BAZELON, *supra* note 46, at 184-85; Coleman, *supra* note 60 (indicating 39,230 as the total number of supporters of Coleman's petition).

62. Emily Rolen, *Philadelphia Reaches \$9.85 Million Settlement with Man Who Spent 25 Years in Prison for Crime He Didn't Commit*, PHILLY VOICE (June 6, 2018), <https://www.phillyvoice.com/anthony-wright-settlement-philadelphia-wrongfully-convicted-25-years-prison>; Joseph A. Slobodzian, *D.A. Takes Another Shot at Overturned Murder Conviction from 1993*, PHILA. INQUIRER (Feb. 29, 2016, 3:01 AM) <http://www.philly.com/philly/news/2016>

In 1993, relying on Wright's recanted confession, [prosecutors] . . . argued that he acted alone. Twenty-five years later, . . . [they] told the jury that Wright and Byrd—who had no known connection to one another—committed the rape, robbery, burglary, and murder together. Under the state's new theory, Wright raped and murdered the victim and Byrd also raped her, [perhaps] anally and vaginally, . . . after she was dead.<sup>63</sup>

It took the jury five minutes to acquit Wright on all of the charges.<sup>64</sup> Innocence Project co-director Peter Neufeld, who was part of Wright's legal team, called the prosecutors' actions "unconscionable and unacceptable."<sup>65</sup> But Williams doubled down. In a statement, the District Attorney's Office insisted that Wright was guilty and that "[t]he verdict only shows that the jury did not find that his guilt was proven beyond a reasonable doubt."<sup>66</sup>

On September 20, 2016, Wright filed a federal lawsuit arguing that the City of Philadelphia owed him an unspecified amount of damages due to police misconduct and malicious prosecution.<sup>67</sup> On June 6, 2018, the city settled the case, paying Wright \$9.85 million.<sup>68</sup>

Williams also fought to preserve the conviction of James Dennis, who was convicted of robbery and murder and sentenced to death.<sup>69</sup> Manuel Santiago and Frank Justrzembski, the detectives who extracted Wright's false confession and planted evidence, were also involved in Dennis's case.<sup>70</sup> A federal trial judge ordered a new trial for Dennis, citing multiple *Brady*<sup>71</sup> violations in which the State had withheld exculpatory evidence.<sup>72</sup> Williams, however, "was not shamed by the

0229\_D\_A\_takes\_another\_shot\_at\_overtured\_murder\_conviction\_from\_1993.html?arc404=true.

63. Lara Bazelon, *Pennsylvania's Shame*, SLATE (Oct. 12, 2016, 5:45 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/10/how\\_did\\_pennsylvania\\_s\\_criminal\\_justice\\_system\\_fail\\_this\\_profoundly.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/10/how_did_pennsylvania_s_criminal_justice_system_fail_this_profoundly.html); see also Slobodzian, *supra* note 62.

64. Paul Solotaroff, *Finally Free: Inside Tony Wright's Murder Exoneration*, ROLLING STONE (Aug. 29, 2016, 8:53 PM), <https://www.rollingstone.com/culture/culture-news/finally-free-inside-tony-wrights-murder-exoneration-250694>.

65. Joseph A. Slobodzian & Tommy Rowan, *25 Years Later, Freed by DNA Evidence: 'It's the Greatest Day of My Life'*, PHILA. INQUIRER (Aug. 23, 2016, 12:54 PM), [http://www.philly.com/philly/news/20160824\\_Philly\\_jury\\_deliberating\\_in\\_retrial\\_of\\_91\\_rape\\_murder\\_of\\_Nicetown\\_woman\\_77.html](http://www.philly.com/philly/news/20160824_Philly_jury_deliberating_in_retrial_of_91_rape_murder_of_Nicetown_woman_77.html).

66. *Id.*; see also Marc Bookman, *Three Murders in Philadelphia*, SLATE (May 12, 2017, 5:58 AM), [http://www.slate.com/articles/news\\_and\\_politics/trials\\_and\\_error/2017/05/three\\_murders\\_in\\_philadelphia\\_in\\_the\\_early\\_1990s\\_and\\_three\\_men\\_who\\_didn.html](http://www.slate.com/articles/news_and_politics/trials_and_error/2017/05/three_murders_in_philadelphia_in_the_early_1990s_and_three_men_who_didn.html).

67. Complaint & Jury Demand at 29-37, *Wright v. City of Philadelphia*, No. 2:16-cv-05020-GEKP (E.D. Pa. Sept. 20, 2016) [hereinafter *Wright's Complaint*] (on file with author).

68. Rolen, *supra* note 62.

69. Bookman, *supra* note 66.

70. *Id.*

71. *Brady v. Maryland*, 373 U.S. 83 (1963).

72. *Dennis v. Wetzel*, 966 F. Supp. 2d 489, 518 (E.D. Pa. 2013); see also *Brady*, 373 U.S.

revelation that his office had hidden important evidence. Rather, he was emboldened, condemning the district court's 'acceptance of slanted factual allegations.'<sup>73</sup> Williams appealed to the Third Circuit, which ruled in a 9-4 en banc decision that Dennis was entitled to a new trial.<sup>74</sup> Faced with the possibility of a retrial, Dennis subsequently pleaded no contest and was released after serving twenty-five years in prison.<sup>75</sup>

## 2. Orleans Parish County District Attorney Leon Cannizzaro

Jerome Morgan was eighteen when he was convicted of the 1993 murder of a fellow teenager in New Orleans, Louisiana.<sup>76</sup> The victim, Clarence Landry III, died after shots were fired at a sweet sixteen party in a downtown hotel ballroom where Morgan was also present.<sup>77</sup> Hakim Shabazz and another teenager were wounded but survived.<sup>78</sup> The gunman immediately fled the scene and was chased unsuccessfully by Landry's friend, Kevin Johnson.<sup>79</sup>

Johnson ruled out Morgan when police showed him a photo array several weeks after the crime.<sup>80</sup> But Shabazz identified Morgan as the shooter, and four months after that, the police brought Johnson back for a second look.<sup>81</sup> At that point, Johnson changed his story and identified Morgan as the gunman.<sup>82</sup> Based on these two identifications, Morgan was convicted of second-degree murder.<sup>83</sup> In 1994, a judge sentenced Morgan "to serve his natural life at hard labor in the Department of Corrections."<sup>84</sup>

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at 87.

73. Bookman, *supra* note 66.

74. *Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 311-12 (3d Cir. 2016).

75. Jon Schuppe, *To End Decades on Death Row, Inmate Makes an Agonizing Choice*, NBC NEWS (Dec. 24, 2016, 11:24 AM), <https://www.nbcnews.com/news/us-news/end-decades-death-row-inmate-makes-agonizing-choice-n699561> [hereinafter Schuppe, *To End Decades on Death Row*].

76. Maurice Possley, *Jerome Morgan*, NAT'L REGISTRY EXONERATIONS (June 1, 2016), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4908> [hereinafter Possley, *Jerome Morgan*].

77. *Id.*

78. See Affidavit of Hakim Shabazz at 1 (May 10, 2011) (on file with author); Possley, *Jerome Morgan*, *supra* note 76.

79. Affidavit of Kevin Johnson at 1 (Feb. 1, 2012) (on file with author).

80. Transcript of Evidentiary Hearing at 14, 21, 23-24, *State v. Morgan*, No. 367-809 (La. Dist. Ct. Oct. 10, 2013) (on file with author).

81. *Id.* at 24; Affidavit of Hakim Shabazz, *supra* note 78, at 1-2; Affidavit of Kevin Johnson, *supra* note 79, at 1; Transcript of Evidentiary Hearing, *supra* note 80, at 24.

82. Affidavit of Kevin Johnson, *supra* note 79, at 1; Transcript of Evidentiary Hearing, *supra* note 80, at 24.

83. Docket Master at 1-2, *State v. Morgan*, No. 367809 (La. Dist. Ct. May 9, 2017) (on file with author).

84. *Id.* at 2.

In 2001, the Innocence Project of New Orleans (“IPNO”), which represented Morgan post-conviction, also uncovered evidence that the ballroom had been sealed within minutes of the shooting and that Morgan had been locked inside, making it impossible that he was the fleeing gunman.<sup>85</sup> Prosecutors had that evidence all along but never turned it over to the defense.<sup>86</sup>

In 2011 and 2012, respectively, Shabazz and Johnson recanted their identifications.<sup>87</sup> But Orleans Parish District Attorney Leon Cannizzaro, a white Democrat who took office in 2008, continued to insist that Morgan was guilty and fought his release.<sup>88</sup> (Morgan, Landry, Shabazz, and Johnson are all Black.)<sup>89</sup> Following an evidentiary hearing, a trial judge overturned Morgan’s conviction in 2014.<sup>90</sup> At that point, he had served twenty years.<sup>91</sup> Cannizzaro unsuccessfully opposed Morgan’s release on bail, then appealed to the state’s intermediate appellate court seeking to reinstate his conviction.<sup>92</sup> “When that effort failed, he appealed again, this time to the state’s highest court.”<sup>93</sup> He also indicted Shabazz and Johnson for perjury<sup>94</sup> and then argued that his office should be allowed to introduce Shabazz and Johnson’s recanted trial testimony as neither man would agree to take the stand at Morgan’s retrial given the perjury indictments hanging over their heads.<sup>95</sup> The Louisiana Supreme Court ruled against Cannizzaro, holding that the State “may not rely on [sic] these discredited unreliable identifications.”<sup>96</sup> Cannizzaro’s office also went after IPNO attorneys Emily Maw and Kristin

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85. *Jerome Morgan*, INNOCENCE PROJECT NEW ORLEANS, <https://ip-no.org/what-we-do/free-innocent-prisoners/client-profiles/jerome-morgan> (last visited Feb. 3, 2019); Possley, *Jerome Morgan*, *supra* note 76.

86. Possley, *Jerome Morgan*, *supra* note 76.

87. See Affidavit of Hakim Shabazz, *supra* note 78, at 2; Affidavit of Kevin Johnson, *supra* note 79, at 1.

88. Bazelon, *Innocence Deniers*, *supra* dagger note.

89. *Id.*

90. Transcript of Evidentiary Hearing, *supra* note 80, at 1; Possley, *Jerome Morgan*, *supra* note 76.

91. Possley, *Jerome Morgan*, *supra* note 76.

92. Bazelon, *Innocence Deniers*, *supra* dagger note; Helen Freund, *After 20 Years at Angola, New Orleans Man Granted New Trial Goes Home*, NOLA.COM (Feb. 6, 2014, 2:36 PM), [https://www.nola.com/crime/index.ssf/2014/02/after\\_20\\_years\\_at\\_angola\\_new\\_o.html](https://www.nola.com/crime/index.ssf/2014/02/after_20_years_at_angola_new_o.html).

93. Bazelon, *Innocence Deniers*, *supra* dagger note.

94. John Simerman, *Orleans District Attorney Leon Cannizzaro Prosecuting Witnesses Who Recanted in 20-Year-Old Murder Case*, NEW ORLEANS ADVOC. (Mar. 14, 2015, 10:43 AM), [https://www.theadvocate.com/new\\_orleans/news/article\\_d91d3056-a662-5671-ab8a-6c620c663a6c.html](https://www.theadvocate.com/new_orleans/news/article_d91d3056-a662-5671-ab8a-6c620c663a6c.html).

95. Ken Daley, *State Supreme Court Ruling Appears to Gut Cannizzaro’s Case in Retrial of Jerome Morgan*, NOLA.COM (May 19, 2016), [https://www.nola.com/crime/index.ssf/2016/05/state\\_supreme\\_court\\_ruling\\_app.html](https://www.nola.com/crime/index.ssf/2016/05/state_supreme_court_ruling_app.html).

96. *State v. Morgan*, 194 So. 3d 591, 591-92 (La. 2016).

Wenstrom, arguing that they should be removed as Morgan's counsel for coercing false recantations from Johnson and Shabazz.<sup>97</sup> The judge dismissed the request as "outrageous."<sup>98</sup>

"In May 2016, two weeks before Morgan's scheduled retrial," the Orleans Parish District Attorney's Office finally dismissed the charges, "saying the high court's ruling had tied its hands. Cannizzaro professed deep sorrow for the victim's family," stating: "What is most disappointing to me about this entire incident is that, as [the victim's mother] lays in bed dying of cancer, the justice for which she worked so hard to obtain is ripped from her fingers and she is helpless to stop it."<sup>99</sup> Maw, who had stayed in close contact with Landry's parents throughout the case, called Cannizzaro's statement "dishonest and preposterous."<sup>100</sup>

The Orleans Parish District Attorney proceeded with the perjury charges against Shabazz and Johnson.<sup>101</sup> On January 30, 2017, a judge acquitted both men.<sup>102</sup> On May 26, 2017, Morgan filed a federal civil rights lawsuit against the Orleans Parish District Attorney's Office and the New Orleans Police Department seeking damages, alleging that the named parties in the lawsuit "maliciously prosecuted Mr. Morgan in violation of his rights under the Constitution of the United States."<sup>103</sup>

Jerome Morgan's case is not the only exoneration case that Cannizzaro has fought for years; he used similar tactics against Robert Jones, who was finally exonerated on January 26, 2017, following wrongful convictions in 1996 for an infamous 1992 crime spree in New

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97. John Simerman, *Judge Dismisses 'Outrageous' Claim by Orleans DA's Office in Jerome Morgan Murder Case*, NEW ORLEANS ADVOC. (Apr. 26, 2016, 1:33 PM), [https://www.theadvocate.com/new\\_orleans/news/article\\_0c6e2c7f-ea28-5dbc-be18-0a4b7231c219.html](https://www.theadvocate.com/new_orleans/news/article_0c6e2c7f-ea28-5dbc-be18-0a4b7231c219.html).

98. Bazelon, *Innocence Deniers*, *supra* dagger note (internal quotation marks omitted).

99. *Id.* (alteration in original) (internal quotation marks omitted); *see also* Ken Daley, *DA Cannizzaro's Office Halts Prosecution of Jerome Morgan, Ending Decades-Long Case*, NOLA.COM (May 27, 2016), [https://www.nola.com/crime/index.ssf/2016/05/da\\_cannizzaros\\_office\\_halts\\_pr.html](https://www.nola.com/crime/index.ssf/2016/05/da_cannizzaros_office_halts_pr.html); *D.A. Backs Away from Retrying Exonerated Man for 1993 Murder*, LA. WEEKLY (May 30, 2016), <http://www.louisianaweekly.com/d-a-backs-away-from-retrying-exonerated-man-for-1993-murder>.

100. Bazelon, *Innocence Deniers*, *supra* dagger note (internal quotation marks omitted); *see also* BAZELON, *supra* note 46, at 170.

101. John Simerman, *Controversial Perjury Case Brings War of Words Between Orleans DA, Councilman Jason Williams to Courtroom*, NEW ORLEANS ADVOC. (Jan. 27, 2017, 4:36 PM), [https://www.theadvocate.com/new\\_orleans/news/courts/article\\_0c1c5d12-e4e1-11e6-b0be-7b12c3f6f312.html](https://www.theadvocate.com/new_orleans/news/courts/article_0c1c5d12-e4e1-11e6-b0be-7b12c3f6f312.html).

102. Ken Daley, *Witnesses Who Recanted in Jerome Morgan Case Found Not Guilty of Perjury*, NOLA.COM (Jan. 30, 2017), [https://www.nola.com/crime/index.ssf/2017/01/witnesses\\_who\\_recanted\\_in\\_jero.html](https://www.nola.com/crime/index.ssf/2017/01/witnesses_who_recanted_in_jero.html).

103. Complaint at 2, *Morgan v. Connick*, No. 2:17-cv-05319-JTM-MBN (E.D. La. May 26, 2017) [hereinafter *Morgan's Complaint*] (on file with author).

Orleans's French Quarter.<sup>104</sup> Jones has also filed a federal civil rights lawsuit seeking money damages.<sup>105</sup> Cannizzaro has also gone after other defendants' lawyers, investigators, recanting witnesses, and reluctant witnesses in court by accusing them of committing crimes.<sup>106</sup>

### 3. San Bernardino County District Attorney Michael Ramos

In 1993, the San Bernardino County District Attorney's Office charged William Richards with the gruesome murder of his wife, Pamela.<sup>107</sup> Although the couple had marital problems, the evidence against William Richards was "circumstantial" and "heavily contested."<sup>108</sup> On the night of the murder, Richards clocked out from work at 11:03 PM, then drove forty-five miles to get home.<sup>109</sup> Even assuming he exceeded the speed limit by twenty miles per hour, police estimated Richards couldn't have arrived home before 11:47 PM, giving him no more than eleven minutes to brutalize his wife before he called 911 at 11:58 PM to report she was dead.<sup>110</sup>

The State's first three attempts to convict Richards were not successful: two juries could not reach a verdict, and a mistrial was declared in a third trial after the judge recused himself following jury selection.<sup>111</sup> At the fourth trial, new expert testimony was introduced: A dentist, Norman Sperber, told the jury that the bite mark photographed on Pamela's hand was consistent with Richards's teeth and that the bite mark was so unusual as to be found in just one to two percent of the

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104. Maurice Possley, *Robert Jones*, NAT'L REGISTRY EXONERATIONS (Feb. 24, 2017), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5096> [hereinafter Possley, *Robert Jones*].

105. Complaint at 42, 45, *Jones v. Cannizzaro*, No. 2:18-cv-00503 (E.D. La. Jan. 16, 2018) [hereinafter *Jones's Complaint*] (on file with author).

106. Radley Balko, Opinion, *Report: New Orleans Prosecutors Threatening Witnesses with Fake Subpoenas*, WASH. POST (Apr. 26, 2017), [https://www.washingtonpost.com/news/the-watch/wp/2017/04/26/report-new-orleans-prosecutors-threatening-witnesses-with-fake-subpoenas/?noredirect=on&utm\\_term=.fc80cb603002](https://www.washingtonpost.com/news/the-watch/wp/2017/04/26/report-new-orleans-prosecutors-threatening-witnesses-with-fake-subpoenas/?noredirect=on&utm_term=.fc80cb603002); Emily Maw, Opinion, *DA's Own Choices Are Draining His Office of Resources for Prosecution*, NOLA.COM (Feb. 5, 2017, 6:31 AM), [https://www.nola.com/crime/index.ssf/2017/02/orleans\\_da\\_budget.html](https://www.nola.com/crime/index.ssf/2017/02/orleans_da_budget.html); Matt Sledge, *Recanting Witness in 1999 Superdome Murder Gets 5-Year Sentence for Perjury*, NEW ORLEANS ADVOC. (Apr. 16, 2018, 5:00 PM), [https://www.theadvocate.com/new\\_orleans/news/courts/article\\_5658166c-41b2-11e8-adbf-a345d12859e1.html](https://www.theadvocate.com/new_orleans/news/courts/article_5658166c-41b2-11e8-adbf-a345d12859e1.html).

107. *In re Richards (Richards II)*, 371 P.3d 195, 196-97 (Cal. 2016); Maura Dolan, *Murder Conviction Reversed in 23-Year-Old Case That Turned on a Bite Mark*, L.A. TIMES (May 28, 2016, 3:05 AM), <http://www.latimes.com/local/lanow/la-me-ln-court-bite-mark-20160527-snap-story.html>.

108. *Richards II*, 371 P.3d at 197, 210.

109. *Id.* at 202-03.

110. *Id.* at 198, 202, 210.

111. *Id.* at 197.

population.<sup>112</sup> Richards was convicted and sentenced to life in prison in 1997.<sup>113</sup>

Richards's case caught the attention of the California Innocence Project ("CIP"), which filed a motion for DNA testing on December 5, 2002 on the paving stone and cinder block found near Pamela's body and a hair found underneath her nails.<sup>114</sup> The San Bernardino County District Attorney's Office, led by Michael Ramos, opposed the motion.<sup>115</sup> Ramos, who was first elected in November 2002, was a Republican and San Bernardino's first Hispanic district attorney.<sup>116</sup> He was known for his tough-on-crime stance. A prosecutor with a national profile, Ramos held powerful positions in the National District Attorney's Association ("NDAA") and ultimately was elected president of the organization.<sup>117</sup> He was widely believed to have higher political aspirations, eyeing the State Attorney General's Office.<sup>118</sup>

When DNA results came back in 2007, they excluded Richards.<sup>119</sup> A year later, the dentist recanted his testimony, stating he had "no degree of certainty" about his earlier conclusion, and adding that, with regard to Richards, "I have essentially ruled [him] . . . out."<sup>120</sup> In 2009, a trial judge overturned William Richards's conviction, finding that the prosecution's case had been vitiated because "the new evidence pointed unerringly to petitioner's innocence."<sup>121</sup>

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112. *Id.* at 201-02; Jordan Smith, *California Supreme Court Overturns Murder Conviction Based on Flawed Bite-Mark Evidence*, INTERCEPT (May 27, 2016, 9:15 AM), <https://theintercept.com/2016/05/27/california-supreme-court-overturns-bill-richardss-murder-conviction-based-on-flawed-bite-mark-evidence>.

113. *Richards II*, 371 P.3d at 197.

114. Jan Stiglitz, *View from the Trenches: The Struggle to Free William Richards*, 73 ALB. L. REV. 1357, 1359-60 (2010); E-mail from Jan Stiglitz to Author (Jan. 30, 2019, 4:17 PM) (on file with author).

115. Stiglitz, *supra* note 114, at 1360; Bazelon, *Innocence Deniers*, *supra* dagger note.

116. Bazelon, *Innocence Deniers*, *supra* dagger note.

117. Press Release, San Bernardino Cty. Dist. Attorney's Office, Dist. Attorney Mike Ramos Met with Attorney Gen. Jeff Sessions to Push Pub. Safety and Victims' Rights (Mar. 28, 2017), <https://web.archive.org/web/20170613155158/http://www.sbcountyda.org/Newsroom/PressReleases/2017/DistrictAttorneyMikeRamosmetwithAttorneyGeneralJeffSessionstopushpublicsafetyandvictims%E2%80%99rights.aspx>.

118. Jeff Horseman, *Here's Why Mike Ramos Wants to be Appointed California Attorney General*, PRESS-ENTERPRISE (Nov. 15, 2016, 6:28 AM), <https://www.pe.com/2016/11/15/heres-why-mike-ramos-wants-to-be-appointed-california-attorney-general>.

119. Stiglitz, *supra* note 114, at 1361-62.

120. *Id.* at 1368 (internal quotation marks omitted); *see also id.* at 1362.

121. *In re Richards (Richards I)*, 289 P.3d 860, 868 (Cal. 2012); *William Richards Released on June 21, 2016!*, CAL. INNOCENCE PROJECT, <https://californiainnocenceproject.org/read-their-stories/william-richards> (last visited Feb. 3, 2019).

Another seven years of legal dueling followed.<sup>122</sup> In May 2016, the California Supreme Court ruled unanimously to overturn Richards's conviction, holding: "[I]t is reasonably probable that the false evidence presented by Dr. Sperber at petitioner's 1997 jury trial affected the outcome of that proceeding."<sup>123</sup>

Although the DNA pointed to someone else, the recanted bite mark testimony had been thrown out, the timeline did not jibe, and there was no other evidence, Ramos announced his intent to prosecute Richards for a fifth time.<sup>124</sup> Ramos also demanded that Richards post a \$100,000 bond to be released pending trial.<sup>125</sup> The judge let Richards out on his own signature.<sup>126</sup> On June 20, 2016, CIP filed a motion to dismiss the case, arguing that the prosecution was "indicative of ulterior motives and vindictiveness."<sup>127</sup>

Eight days later, Ramos's office finally dismissed the murder charge while maintaining that no final decision had been made.<sup>128</sup> In 2017, Richards filed a civil rights lawsuit against, inter alia, the County of San Bernardino, two sheriff's deputies, one sergeant, one detective, and three criminalists, seeking unspecified damages for "actions . . . that were deliberate, reckless, wanton, cruel, motivated by evil motive or intent, done in bad faith, and/or involved callous indifference" for the truth.<sup>129</sup>

#### 4. Pima County Arizona District Attorney Barbara LaWall

Louis Taylor, who is African-American, was sixteen years old when Tucson police detectives in Pima County, Arizona, arrested him in 1970 on the suspicion that he deliberately set a fire that burned down a landmark hotel, killing twenty-eight people.<sup>130</sup> Police focused on Taylor

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122. *William Richards Released on June 21, 2016!*, *supra* note 121.

123. *Richards II*, 371 P.3d 195, 211 (Cal. 2016).

124. Jordan Smith, *After 23 Years and Four Trials, Prosecutors Finally Dismiss Charges Against Bill Richards*, INTERCEPT (June 28, 2016, 4:44 PM), <https://theintercept.com/2016/06/28/after-23-years-and-four-trials-prosecutors-finally-dismiss-charges-against-bill-richards>.

125. Bazelon, *Innocence Deniers*, *supra* dagger note.

126. Smith, *supra* note 124.

127. Motion to Dismiss Charges for Insufficiency of the Evidence (Pen. Code, § 995), Vindictive Prosecution, and Suggestion to Dismiss in the Interests of Justice (Pen. Code, § 1385) at 2, *People v. Richards*, No. FVI00826 (Cal. Super. Ct. June 20, 2016) [hereinafter Richards's Motion to Dismiss] (on file with author).

128. Bazelon, *Innocence Deniers*, *supra* dagger note.

129. Plaintiff's Complaint for Damages at 2-4, 23, 35, *Richards v. County of San Bernardino*, No. 5:17-cv-00497-SJO-SP (C.D. Cal. Mar. 16, 2017) [hereinafter Richards's Complaint] (on file with author).

130. *Freed Prisoner Louis Taylor on Pioneer Hotel Plea: "I Had No Choice"*, CBS NEWS (Apr. 3, 2013, 3:14 PM), <http://www.cbsnews.com/news/freed-prisoner-louis-taylor-on-pioneer->

even though he had helped to fight the blaze and had voluntarily gone to the stationhouse as a witness.<sup>131</sup> For nine hours, detectives interrogated Taylor—who was a juvenile—without his parents or an attorney present.<sup>132</sup> Despite enormous pressure, he did not confess.<sup>133</sup> An all-white jury convicted Taylor, based in large part<sup>134</sup> on forensic testimony by an expert named Cyrus Holmes, who testified that the fire had to be arson.<sup>135</sup> Taylor was sentenced to life in prison.<sup>136</sup>

After Taylor had been incarcerated for more than forty years, five nationally renowned arson experts,<sup>137</sup> led by John Lentini, re-examined the evidence in the case, applying the *2011 National Fire Protection Association 921, Guide for Fire and Explosion Investigations* (“NFPA Guide”),<sup>138</sup> which “is the foremost guide for” “scientific-based investigation and analysis of fire and explosion incidents.”<sup>139</sup> In 2012, Lentini and his colleagues issued an exhaustive report finding that Holmes’s purported expert methods were proven scientifically unsound and without factual basis.<sup>140</sup>

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hotel-plea-i-had-no-choice [hereinafter *I Had No Choice*]; *60 Minutes: Arizona’s Pioneer Hotel Fire Re-Examined* (CBS television broadcast Mar. 31, 2013) [hereinafter *Hotel Fire Re-Examined*], <https://www.youtube.com/watch?v=UKecVbSwKKw>.

131. *Hotel Fire Re-Examined*, *supra* note 130.

132. *Id.*; *Man Convicted in Pioneer Hotel Fire Deaths, Louis Taylor, Now a Free Man After 40 Years*, CBS NEWS (Apr. 3, 2013, 10:39 AM), <https://www.cbsnews.com/news/man-convicted-in-pioneer-hotel-fire-deaths-louis-taylor-now-a-free-man-after-40-years> [hereinafter *Man Convicted*].

133. *Man Convicted*, *supra* note 132.

134. The state’s only other expert at trial was R.B. Slagel, the Chief of the Fire Prevention Division of the Tucson Fire Department. Chief Slagel’s report that “this was a deliberate, man-made fire, with malicious intent,” was not backed up by any evidence. INNOCENCE PROJECT ARSON REVIEW COMM., REPORT ON THE PEER REVIEW OF THE EXPERT TESTIMONY IN THE CASE OF *STATE OF ARIZONA V. LOUIS C. TAYLOR* 16 (2012) [hereinafter LENTINI REPORT] (on file with author). According to the Lentini Report, Chief Slagel “seems only to be restating the findings of Mr. Holmes and did not provide any basis for his conclusions.” *Id.*

135. Petition for Post-Conviction Relief at 8, 30, *State v. Taylor*, No. A-19672 (Ariz. Super. Ct. n.d.) [hereinafter *Taylor’s Petition*] (on file with author). Based on his “depth of char measurements,” Holmes concluded that “the fire had at least two areas of origin” and thus “were separate and independent occurrences that could only have been a product of arson . . .” *Id.* at 8; *see also I Had No Choice*, *supra* note 130.

136. *I Had No Choice*, *supra* note 130.

137. LENTINI REPORT, *supra* note 134, at 21-22 (listing the credentials of the authors of the Arson Review Committee Report).

138. NAT’L FIRE PROT. ASS’N, NFPA 921 GUIDE FOR FIRE AND EXPLOSION INVESTIGATIONS (2011) [hereinafter NFPA GUIDE].

139. NFPA 921: *Guide for Fire and Explosion Investigations*, NAT’L FIRE PROT. ASS’N, <https://www.nfpa.org/codes-and-standards/all-codes-and-standards/list-of-codes-and-standards/detail?code=921> (last visited Feb. 3, 2019); *see also* LENTINI REPORT, *supra* note 134, at 9, 12, 15, 24-25; NFPA GUIDE, *supra* note 138; *Hotel Fire Re-Examined*, *supra* note 130.

140. LENTINI REPORT, *supra* note 134, at 3, 12-15.

Holmes, meanwhile, stuck to his trial testimony that the fire was arson,<sup>141</sup> but he had revealed himself to be a racist whose bigotry appeared to have played a role in his investigation.<sup>142</sup> In a videotaped deposition in 2012, Holmes testified that:

Blacks at that point [when Taylor was arrested], their background was the use of fire for beneficial purposes. In other words, they were used to clearing lands and doing cleanup work and things like that and fire was a tool. So it was just a tool for them. In other words, you're comfortable with it. And if they get mad at somebody, the first thing they do is use something they're comfortable with. Fire was one of them.<sup>143</sup>

Pima County Prosecutor Barbara LaWall, a white Democrat who was first elected in 1996, directed the Tucson Fire Department to conduct its own re-investigation.<sup>144</sup> In 2013, Wayne Cummings, an investigator with the City of Tucson Fire Department, released a forty-two-page report.<sup>145</sup> He found that the fire could have been an accident<sup>146</sup> and ultimately concluded: “Due to the lack of an exact point of origin determination and the lack of elimination of all accidental fire causes, a fire cause determination is not possible reviewing the material provided to me.”<sup>147</sup>

LaWall did not dispute Cummings's conclusions, telling *60 Minutes*: “Well, nobody can say for sure whether it was [arson] or

141. Memorandum in Support of Stipulated Finding on Post-Conviction Relief and Plea Agreement at 8-9, *State v. Taylor*, No. A-19672 (Ariz. Super. Ct. Apr. 1, 2013) [hereinafter *Prosecution's Memorandum*] (on file with author).

142. See *Hotel Fire Re-Examined*, *supra* note 130; *I Had No Choice*, *supra* note 130.

143. *Hotel Fire Re-Examined*, *supra* note 130.

144. *Id.*; see also Caitlin Schmidt, *Longtime Pima County Prosecutor Faces Democratic Primary Challenger*, TUCSON.COM (June 18, 2016), [https://tucson.com/news/local/govt-and-politics/elections/longtime-pima-county-prosecutor-faces-democratic-primary-challenger/article\\_4ee0b3b7-8f07-5e37-97b6-2e8754f27af1.html](https://tucson.com/news/local/govt-and-politics/elections/longtime-pima-county-prosecutor-faces-democratic-primary-challenger/article_4ee0b3b7-8f07-5e37-97b6-2e8754f27af1.html).

145. WAYNE CUMMINGS, CITY OF TUCSON FIRE DEPARTMENT FIRE INVESTIGATOR ORIGIN AND CAUSE REPORT 2 (n.d.) (on file with author) (stating that, in reaching his conclusions, Cummings relied upon “studying and reviewing audio, video, electronic, and paper-based documentation that was obtained from the archived records of the Tucson Fire Department, Tucson Police Department, and the Pima County Attorney's Office”); Kim Smith, *Cause Unclear in '70 Hotel Fire, New Probe Finds*, TUCSON.COM (Mar. 7, 2013), [https://tucson.com/news/local/crime/cause-unclear-in-hotel-fire-new-probe-finds/article\\_4cf5337d-39e6-50f6-ac66-355f3cc6d104.html](https://tucson.com/news/local/crime/cause-unclear-in-hotel-fire-new-probe-finds/article_4cf5337d-39e6-50f6-ac66-355f3cc6d104.html).

146. CUMMINGS, *supra* note 145, at 40 (“Potential accidental sources of the fire ignition in this incident could include an electrical malfunction or discarded smoking materials. In 1970, several studies indicate[d] that approximately 40% of American citizens smoked. This statistic is also supported by the presence of metal ashtrays mounted between the elevator doors in the guest room hallways. Hotel guest room photographs illustrate that ashtrays and smoking materials were common.”).

147. *Id.* at 42.

whether it wasn't."<sup>148</sup> Nevertheless, LaWall promised to fight to preserve Taylor's conviction all the way to the U.S. Supreme Court unless Taylor pleaded no contest to twenty-eight counts of murder in exchange for a sentence of time served.<sup>149</sup>

Taylor, who had professed his innocence for four decades, saw no way out.<sup>150</sup> At the age of fifty-eight, the prospect of spending "another minute, another hour, another decade" in prison was unbearable.<sup>151</sup> He took the deal, pleading no contest and stating afterwards: "I had no choice."<sup>152</sup> LaWall offered a memorandum to the court providing a series of "facts" to support the case that Taylor was guilty, relying on the opinion of the discredited and disgraced Holmes.<sup>153</sup>

Taylor's decision to take the deal had severe consequences. He was ineligible for transitional housing and other services.<sup>154</sup> Potential landlords were scared off by the liability implications of renting to someone with arson convictions.<sup>155</sup> He was barred from seeking official vindication in the form of a pardon or certificate of innocence.<sup>156</sup> After Taylor filed a federal civil rights lawsuit seeking compensatory damages from Pima County and the City of Tucson for racial discrimination and withholding evidence in 2015,<sup>157</sup> LaWall's office also used his no contest pleas to argue that the law "bars Taylor's claim for

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148. *Man Convicted*, *supra* note 132.

149. *I Had No Choice*, *supra* note 130 ("Attorney Ed Novak explained outside court that Taylor chose to accept the deal instead of remaining in prison for an indefinite amount of time. He said prosecutors promised to fight the case all the way to the Supreme Court if he chose to seek a new trial.").

150. *Id.*

151. *Id.*

152. *Id.*

153. Prosecution's Memorandum, *supra* note 141, at 8-9. LaWall's deputy, Rick Unklesbay, wrote to the court:

The State's original trial expert, Cy Homes [sic], was also provided to the defense for a deposition. The expert still practices arson investigation and testifies in State and Federal Court in California. Cy Holmes maintains his original finding that the fire was intentionally set and is, in fact, arson. Mr. Holmes was questioned in detail recently by defendant's attorneys and testified that based on his experience at the time, as well as the experience gained in the field over the last 40 years, his opinion remains the same.

*Id.*

154. Kimberly Matas, *Year of Freedom After 4 Decades Behind Bars Difficult for Louis Taylor*, TUCSON.COM (May 11, 2014), [https://tucson.com/news/blogs/police-beat/year-of-freedom-after-decades-behind-bars-difficult-for-louis/article\\_595cb493-574d-5d50-a3de-06e3d1741ce4.html](https://tucson.com/news/blogs/police-beat/year-of-freedom-after-decades-behind-bars-difficult-for-louis/article_595cb493-574d-5d50-a3de-06e3d1741ce4.html).

155. *See id.*

156. *I Had No Choice*, *supra* note 130.

157. Patrick McNamara, *Discrimination Suit Filed over 1970 Pioneer Fire Trial*, TUCSON.COM (Feb. 4, 2015), [https://tucson.com/laestrella/ciudad/discrimination-suit-filed-over-pioneer-fire-trial/article\\_58b765a0-0b7b-5648-b2b9-d488d201e494.html](https://tucson.com/laestrella/ciudad/discrimination-suit-filed-over-pioneer-fire-trial/article_58b765a0-0b7b-5648-b2b9-d488d201e494.html).

compensatory damages.”<sup>158</sup> The judge adopted LaWall’s argument in dismissing Taylor’s key claims for compensation.<sup>159</sup> In January 2019, a divided panel of the U.S. Court of Appeals for the Ninth Circuit upheld the ruling, which foreclosed the possibility that Taylor would receive any money from the state.<sup>160</sup> “We take no pleasure in reaching this result,” the majority wrote.<sup>161</sup>

Taylor became homeless.<sup>162</sup> In July 2017, he was arrested by Tucson police for committing an armed robbery.<sup>163</sup> “He had nothing,” one of his longtime lawyers told a reporter, “other than what supporters would give him now and then.”<sup>164</sup>

##### 5. Wayne County Michigan Prosecuting Attorney Kym Worthy

Davontae Sanford was fourteen years old when he confessed to murdering four people in a drug house in Detroit, Michigan’s east side.<sup>165</sup> Left alone with detectives in a late-night interrogation, Sanford, who is African-American, says he broke down after being told he could go home if he gave them “something.”<sup>166</sup> On the advice of a lawyer whose license was later suspended for misconduct,<sup>167</sup> Sanford pleaded guilty in the middle of his March 2008 trial and received a sentence of thirty-nine to ninety-two years in prison.<sup>168</sup>

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158. Pima County’s Motion for Reconsideration at 9, *Taylor v. Pima County*, No. 4:15-cv-00152-RM (D. Ariz. Feb. 29, 2016) [hereinafter *Prosecution’s Motion Against Taylor*] (on file with author).

159. *Taylor v. Pima County*, No. 4:15-cv-00152-RM slip op. at 2-3 (D. Ariz. June 1, 2016).

160. *Taylor v. County of Pima*, 913 F.3d 930, 936 (9th Cir. 2019).

161. *Id.*

162. Carmen Duarte & Curt Prendergast, *Louis Taylor, 4 Years After Freedom from Pioneer Hotel Fire Case, Accused of Armed Robbery*, TUSCON.COM (July 14, 2017), [https://tucson.com/news/local/louis-taylor-years-after-freedom-from-pioneer-hotel-fire-case/article\\_93843f70-e86b-50d8-b55a-f619fe1a8456.html](https://tucson.com/news/local/louis-taylor-years-after-freedom-from-pioneer-hotel-fire-case/article_93843f70-e86b-50d8-b55a-f619fe1a8456.html).

163. *Id.*

164. *Id.*

165. J. Weston Phippen, *How an Innocent Teenager Confessed to Murder*, ATLANTIC (June 10, 2016), <https://www.theatlantic.com/news/archive/2016/06/davontae-sanford/486290/>; *Report: Davontae Sanford’s Initial Statements to Police*, DETROIT NEWS, <http://apps.detroitnews.com/projects/davontae-sanford-road-to-freedom/davontae-sanford-initial-police-statement.htm> (last visited Feb. 3, 2019) [hereinafter *Davontae Sanford’s Statement*].

166. Bazelon, *Innocence Deniers*, *supra* dagger note.

167. George Hunter, *Former Detroit Police Official Accused of Perjury in ‘07 Homicides*, DETROIT NEWS (May 20, 2016, 11:30 PM), <https://www.detroitnews.com/story/news/local/detroit-city/2016/05/20/police-charges-quadruple-slayings/84687378> [hereinafter Hunter, *Police Official Accused of Perjury*].

168. Maurice Possley, *Davontae Sanford*, NAT’L REGISTRY EXONERATIONS (July 19, 2016), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4913> [hereinafter Possley, *Davontae Sanford*].

Sixteen days after Sanford was sentenced, a hitman named Vincent Smothers told the police he had carried out twelve contract killings, including the four Sanford had pleaded guilty to committing.<sup>169</sup> Smothers explained that he had worked with an accomplice, Ernest Davis, and he provided a wealth of corroborating details to back up his account.<sup>170</sup> Smothers told police where they could find one of the weapons used in the murders; the gun was recovered and ballistics matched it to the crime scene.<sup>171</sup> He also told the police he had used a different gun in several of the other murders, which ballistics tests confirmed.<sup>172</sup> Once Smothers's confession was corroborated, it was clear Sanford was innocent. Smothers made this point explicitly in [a twenty-six-page sworn statement], emphasizing that Sanford hadn't been involved in the crimes "in any way."<sup>173</sup>

But Smothers and Davis were never charged for the Runyon Street murders.<sup>174</sup> Neither was Leroy Payne, the man Smothers alleged had paid him to commit the murders. Instead, Smothers pleaded guilty to the other eight killings.<sup>175</sup> Davis, who was never prosecuted, was convicted of an unrelated felony in 2013.<sup>176</sup>

Neither the Detroit Police Department nor the Wayne County Prosecutor's Office, which has jurisdiction over Detroit, ever informed Sanford's attorneys that Smothers confessed to the Runyon Street murders.<sup>177</sup> When that information was leaked in 2009,

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169. Affidavit of Vincent Smothers at 1, *People v. Sanford*, No. 07-015-018-01-FC (Mich. Cir. Ct. Mar. 6, 2015), <http://apps.detroitnews.com/projects/davontae-sanford-road-to-freedom/Vincent-Smothers-Affadavit.htm>.

170. Sarah Kaplan, *A Hit Man, a Teenager and a Case of Dueling Confessions in a Brutal Murder*, WASH. POST (Apr. 16, 2015), [https://www.washingtonpost.com/news/morning-mix/wp/2015/04/16/a-hit-man-a-teenager-and-a-case-of-dueling-confessions-in-a-brutal-murder/?noredirect=on&utm\\_term=.4ff815b5ec5a](https://www.washingtonpost.com/news/morning-mix/wp/2015/04/16/a-hit-man-a-teenager-and-a-case-of-dueling-confessions-in-a-brutal-murder/?noredirect=on&utm_term=.4ff815b5ec5a).

171. Bazelon, *Innocence Deniers*, *supra* dagger note.

172. *Id.*

173. Affidavit of Vincent Smothers, *supra* note 169, at 1; Nadya Labi, *The Hit Man's Tale: How an Honors Student Became a Hired Killer*, NEW YORKER (Oct. 15, 2012), <https://www.newyorker.com/magazine/2012/10/15/the-hit-mans-tale>. "Through his attorney, Payne has denied" that he was involved in the Runyon Street murders. Bazelon, *Innocence Deniers*, *supra* dagger note; see also Kate Wells, *Leroy Payne, a State Police Murder Suspect, Has "Left Town," His Lawyer Says*, MICH. RADIO (June 24, 2016), <http://www.michiganradio.org/post/leroy-payne-state-police-murder-suspect-has-left-town-his-lawyer-says>.

174. Hunter, *Police Official Accused of Perjury*, *supra* note 167.

175. *Detroit Hit Man Pleads Guilty to 8 Murders, Tells Police 'I Kill People for Money'*, NOLA.COM (June 7, 2010, 10:52 PM), [https://www.nola.com/crime/index.ssf/2010/06/detroit\\_hit\\_man\\_pleads\\_guilty.html](https://www.nola.com/crime/index.ssf/2010/06/detroit_hit_man_pleads_guilty.html).

176. George Hunter, *Killing Case in Limbo Year After Sanford's Release*, DETROIT NEWS (Aug. 29, 2017, 11:58 PM), <https://www.detroitnews.com/story/news/local/detroit-city/2017/08/29/detroit-homicide-charges/105101110> [hereinafter Hunter, *Case in Limbo*].

177. See Bazelon, *Innocence Deniers*, *supra* dagger note.

Sanford's attorneys sought to reverse his conviction on the basis of actual innocence.<sup>178</sup>

Wayne County Prosecuting Attorney Kym Worthy, a Black Democrat who was first elected in 2004, opposed this effort.<sup>179</sup> After Sanford prevailed in the Court of Appeals, Worthy's office appealed to the Michigan Supreme Court.<sup>180</sup> In 2014, the court sided with Worthy, ruling that actual innocence was not a valid reason to withdraw a guilty plea.<sup>181</sup>

In 2015, attorneys for Sanford filed a motion for post-conviction relief, and the Michigan State Police began to reinvestigate the case.<sup>182</sup> One year later, the State Police issued a 114-page report detailing compelling evidence that Smothers and Davis were guilty, that Sanford was innocent, and that Detroit's Deputy Police Chief James Tolbert had lied to convict Sanford.<sup>183</sup> It was at that point, nine years into Sanford's incarceration, that Worthy finally agreed to his release, but only on account of Tolbert's misconduct.<sup>184</sup> She continued to insist that Sanford was guilty, pointing to his discredited confession.<sup>185</sup> The State Police recommended bringing perjury charges against Tolbert and murder charges against Smothers and Davis.<sup>186</sup> Worthy declined in all three

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178. *People v. Sanford*, No. 291293, 2013 WL 5379673, at \*2 (Mich. Ct. App. Sept. 26, 2013), *vacated*, 844 N.W.2d 725 (Mich. 2014).

179. Bazelon, *Innocence Deniers*, *supra* dagger note.

180. *Sanford*, 844 N.W.2d at 725; *Sanford*, 2013 WL 5379673, at \*10.

181. *See Sanford*, 844 N.W.2d at 725.

182. Defendant's Memorandum in Support of Motion for Relief from Judgment at 15, *State v. Sanford*, No. 07-015-018-01-FC (Mich. Cir. Ct. Apr. 15, 2015) [hereinafter *Sanford's Motion*]; Possley, *Davontae Sanford*, *supra* note 168.

183. *See* MICH. STATE POLICE, HOMICIDE INVESTIGATION 33, 36-38, 85, 109, 114 (2016), [http://mediad.publicbroadcasting.net/p/michigan/files/201606/msp\\_investigation\\_davontae\\_sanford\\_optimized.pdf?\\_ga=2.84010769.900416446.1514467613-1207159706.1509808423](http://mediad.publicbroadcasting.net/p/michigan/files/201606/msp_investigation_davontae_sanford_optimized.pdf?_ga=2.84010769.900416446.1514467613-1207159706.1509808423); Kate Wells, *Report Suggests Detroit Police Failures Put Innocent Kid in Prison*, MICH. RADIO (June 17, 2016), <http://www.michiganradio.org/post/report-suggests-detroit-police-failures-put-innocent-kid-prison>.

184. *See* Diane Bukowski, *Davontae Sanford is Free After 9-Year Battle for Justice*, VOICE DETROIT (June 8, 2016), <http://voiceofdetroit.net/2016/06/08/davontae-sanford-is-free-after-9-year-battle-for-justice>; Jim Schaefer, *Kym Worthy Defends Waiting Years to Release Innocent Davontae Sanford*, DETROIT FREE PRESS (June 9, 2016, 12:20 PM), <https://www.freep.com/story/news/local/michigan/detroit/2016/06/09/prosecutor-defends-actions-davontae-sanford-case/85646230>; *see also* Fox 2 News Detroit, *Prosecutor Worthy's Press Conference After Davontae Sanford Freed from Prison*, YOUTUBE (June 9, 2016), [https://www.youtube.com/watch?time\\_continue=2991&v=\\_yKvExMwZ-A](https://www.youtube.com/watch?time_continue=2991&v=_yKvExMwZ-A).

185. Hunter, *Case in Limbo*, *supra* note 176.

186. Hunter, *Police Official Accused of Perjury*, *supra* note 167; Kate Wells, *Former Officer in Davontae Sanford Case Won't Be Charged for Perjury*, MICH. RADIO (July 12, 2016), <http://www.michiganradio.org/post/former-officer-davontae-sanford-case-wont-be-charged-perjury>.

cases.<sup>187</sup> “In reference to her office’s handling of Sanford’s case, Worthy has said, ‘I don’t know what we could have done differently . . . .’”<sup>188</sup>

In July 2017, Sanford filed a civil suit under Michigan’s wrongful compensation statute.<sup>189</sup> Just four months later, the state attorney general conceded that Sanford was innocent and entitled to compensation, but noted that Worthy’s office “has been consulted and disagrees . . . .”<sup>190</sup> On December 21, 2017, the judge awarded Sanford \$408,356.16.<sup>191</sup>

David Moran, the director of the Michigan Innocence Clinic and Sanford’s lead attorney, stated that Worthy’s office has fought his efforts to free clients with compelling innocence claims in half a dozen other cases.<sup>192</sup> One of Moran’s clients was Lamarr Monson, who was convicted of the 1996 murder of a twelve-year-old girl and sentenced to thirty-to-fifty years in prison.<sup>193</sup> Monson, who like Sanford, is Black, claimed he was tricked into signing a false confession which stated that he stabbed the victim to death.<sup>194</sup> Indeed, the confession made little sense: the medical examiner determined that the cause of death was not stabbing, but rather blunt force trauma to the head.<sup>195</sup>

Twenty years later, Moran and his students examined the object that the medical examiner had identified as the likely murder weapon, a ceramic toilet lid used to bludgeon the victim.<sup>196</sup> The lid was covered with bloody fingerprints, which had never been tested.<sup>197</sup> The Michigan

187. Hunter, *Case in Limbo*, *supra* note 176; Wells, *supra* note 186.

188. Bazelon, *Innocence Deniers*, *supra* dagger note; Schaefer, *supra* note 184.

189. Complaint at 1, 8-9, Sanford v. Michigan, No. 17-000220-MP (Mich. Ct. Cl. July 26, 2017) [hereinafter Sanford’s State Complaint] (on file with author).

190. Defendant State of Michigan’s Answer to Complaint at 8-9, Sanford v. Michigan, No. 17-000220-MP (Mich. Ct. Cl. Nov. 6, 2017) [hereinafter State of Michigan’s Answer] (on file with author).

191. Stipulated Order of Judgment at 1-2, Sanford v. Michigan, No. 17-000220-MP (Mich. Ct. Cl. Dec. 21, 2017) (on file with author); George Hunter, *Mich. to Pay \$408,000 to Wrongly Convicted Detroit Teen*, DETROIT NEWS (Jan. 5, 2018, 12:13 PM), <https://www.detroitnews.com/story/news/local/detroit-city/2018/01/05/michigan-pays-wrongly-convicted-teen/109181248> [hereinafter Hunter, *Michigan to Pay \$408,000*].

192. Bazelon, *Innocence Deniers*, *supra* dagger note; *see also* Telephone Interview with David Moran, Dir., Mich. Innocence Clinic (Mar. 14, 2017) (on file with author).

193. Maurice Possley, *Lamarr Monson*, NAT’L REGISTRY EXONERATIONS (Aug. 26, 2017), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5192> [hereinafter Possley, *Lamarr Monson*].

194. Dave Bartkowiak, Jr., *Case Dismissed Against Lamarr Monson, Who Was Convicted of Detroit Girl’s 1996 Murder*, CLICK ON DETROIT (Aug. 25, 2017, 11:19 AM), <https://www.clickondetroit.com/news/case-dismissed-against-lamarr-monson-who-was-convicted-of-detroit-girls-1996-murder>.

195. Possley, *Lamarr Monson*, *supra* note 193.

196. *Id.*

197. Jermont Terry & Derick Hutchinson, *Lamarr Monson, Convicted of Killing 12-Year-Old in 1996, Released on Bond After 21 Years*, CLICK ON DETROIT (Feb. 1, 2017, 6:22 PM), <https://www.clickondetroit.com/news/lamarr-monson-convicted-of-killing-12-year-old-in-1996->

State Police found that all the fingerprints matched a man named Robert Lewis, who was living in the same building as the victim at the time of the murder.<sup>198</sup>

Worthy's office fought to preserve Monson's conviction during an evidentiary hearing in late 2016.<sup>199</sup> On January 30, 2017, a judge granted Monson a new trial, and he was subsequently released on bond.<sup>200</sup> Worthy stated that her office sought to delay the retrial so it could conduct an additional investigation.<sup>201</sup> Two homicide investigators were dispatched to interview Lewis, who denied committing the murder.<sup>202</sup> Worthy found Lewis's denials convincing: "His statements were consistent with the evidence that was available in the case," she said.<sup>203</sup>

Seven months later, in August 2017, a few weeks before Monson's retrial, Worthy's office finally dismissed the case.<sup>204</sup> But Worthy stated that her decision not to re-prosecute Monson was not based on her belief that he was innocent but instead was "[d]ue to the destruction of evidence, issues surrounding the way the police obtained Monson's confession and the passage of time . . . ."<sup>205</sup> Lewis was never charged.<sup>206</sup>

Sanford and Monson have both filed separate federal civil rights lawsuits, naming as defendants the City of Detroit and the Detroit Police Department, and seeking unspecified damages for the misconduct that resulted in their wrongful convictions.<sup>207</sup>

## 6. Passaic County District Attorney Camelia Valdez

In 1996, Eric Kelley and Ralph Lee, two young African-American men, were convicted and sentenced to life in prison for robbing and

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released-on-bond-after-21-years.

198. *Id.*

199. See George Hunter, *Man Gets New Trial After Bloody Print Doesn't Match*, DETROIT NEWS (Jan. 30, 2017, 1:39 PM) <https://www.detroitnews.com/story/news/local/detroit-city/2017/01/30/lamarr-monson-new-trial-detroit/97248444>.

200. Candice Williams, *After 20 Years, Inmate Freed for New Trial*, DETROIT NEWS (Feb. 1, 2017, 9:30 PM), <https://www.detroitnews.com/story/news/local/detroit-city/2017/02/01/lamarr-monson/97377774>.

201. Telephone Interview with Kym Worthy, Prosecutor, Wayne Cty., Mich. (Oct. 30, 2017) (on file with author).

202. *Id.*

203. *Id.*

204. Bartkowiak, *supra* note 194.

205. *Id.*

206. Bazelon, *Innocence Deniers*, *supra* dagger note.

207. Complaint and Demand for Trial by Jury, *Monson v. City of Detroit* at 4, 25-27, 39, No. 2:18-cv-10638-LJM-SDD (E.D. Mich. Feb. 23, 2018) [hereinafter *Monson's Complaint*] (on file with author); Complaint and Jury Demand, *Sanford v. City of Detroit* at 2-4, 6, 45, No. 2:17-cv-13062-DML-RSW (E.D. Mich. Sept. 18, 2017) [hereinafter *Sanford's Federal Complaint*] (on file with author).

murdering a video store clerk in Paterson, New Jersey.<sup>208</sup> The medical examiner determined that the victim died of multiple stab wounds.<sup>209</sup> Left behind at the crime scene was a green plaid cap.<sup>210</sup> A video store customer who interacted briefly with the perpetrator ultimately identified Lee and said he had been wearing the green plaid cap.<sup>211</sup> Kelley, who has severe intellectual deficits,<sup>212</sup> confessed and implicated Lee, who also confessed.<sup>213</sup> Both men recanted, saying that their inculpatory statements were based on information provided to them by the police.<sup>214</sup> The murder weapon and the stolen goods were never found.<sup>215</sup>

In 2008, Vanessa Potkin, an Innocence Project attorney representing Kelley, and Paul Casteleiro, an attorney from Centurion Ministries representing Lee, sought DNA testing on the green plaid cap using more sophisticated methods than were available at the time of the trial.<sup>216</sup> The Passaic County Prosecutor's Office, which has jurisdiction over Paterson, opposed the motion.<sup>217</sup> It took two years of litigation to obtain a court order to have the DNA testing performed.<sup>218</sup> The results came back in 2014: DNA on the hat did not belong to either Kelley or Lee.<sup>219</sup> When the sample was uploaded to the Combined DNA

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208. State v. Kelley, No. A-1266-17T3, 2018 WL 1247248, at \*1-3, \*6, \*10 (N.J. Super. Ct. App. Div. Mar. 12, 2018) (noting that Kelley and Lee were tried separately but that the evidence in both cases was "largely the same").

209. *Id.* at \*2.

210. *Id.* at \*2, \*4.

211. *Id.* at \*2, \*4; Editorial, *Passaic Prosecutor's Refusal to Reinvestigate This Murder is Malpractice*, STAR-LEDGER (Aug. 8, 2017), [https://www.nj.com/opinion/index.ssf/2017/08/passaic\\_prosecutors\\_refusal\\_to\\_reinvestigate\\_this.html](https://www.nj.com/opinion/index.ssf/2017/08/passaic_prosecutors_refusal_to_reinvestigate_this.html) [hereinafter Editorial, *Passaic Prosecutor's Refusal*].

212. *Kelley*, 2018 WL 1247248, at \*13. At the post-conviction evidentiary hearing, forensic psychologist Michael O'Connell testified that Kelley had suffered a traumatic brain injury from a car accident in 1998, that he received disability benefits, and that his mother was his designated payee because "he was found to be incapable of handling his own money." *Id.* at \*12.

213. *Id.* at \*3-4, \*7.

214. *Id.* at \*6, \*9; S.P. Sullivan, *2 Men Confessed to the Murder. Their DNA Tells Another Story.*, N.J. ADVANCE MEDIA (Aug. 3, 2017), [https://www.nj.com/news/index.ssf/2017/08/two\\_nj\\_men\\_confessed\\_to\\_murder\\_can\\_dna\\_set\\_them\\_fr.html](https://www.nj.com/news/index.ssf/2017/08/two_nj_men_confessed_to_murder_can_dna_set_them_fr.html).

215. *Kelley*, 2018 WL 1247248, at \*4.

216. See Telephone Interview with Vanessa Potkin, Dir. of Post-Conviction Litig., Innocence Project (Feb. 13, 2017) (on file with author); see also *Kelley*, 2018 WL 1247248, at \*1 (stating that the motion for retesting was finally granted in 2010).

217. Interview with Vanessa Potkin, *supra* note 216.

218. *Id.*

219. *Kelley*, 2018 WL 1247248, at \*11; Maurice Possley, *Eric Kelley*, NAT'L REGISTRY EXONERATIONS (Apr. 18, 2018), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5306> [hereinafter Possley, *Eric Kelley*].

Index System (“CODIS”),<sup>220</sup> the FBI’s database, it matched a man named Eric Dixon.<sup>221</sup>

At this point, the top prosecutor for Passaic County was Camelia M. Valdes, a Latina Democrat who had been appointed to the position in 2009.<sup>222</sup> Potkin and Casteleiro asked Valdes’s office to provide Dixon’s rap sheet and other documents relating to his criminal history.<sup>223</sup> One of Valdes’s prosecutors refused, calling it “combat.”<sup>224</sup> Potkin and Casteleiro once again approached prosecutors from Valdes’s office, this time to ask if they wanted to interview Dixon together.<sup>225</sup> They were told no.<sup>226</sup> An investigator working for Potkin and Casteleiro found Dixon and interviewed him alone.<sup>227</sup> “This is police work,” Potkin said, “and we were the ones doing it.”<sup>228</sup> When Potkin and Casteleiro obtained the documents through a public records request, they learned that, three years before the store clerk’s killing, Dixon had been convicted of robbing another Paterson business by holding a knife to the owner’s throat and threatening to kill her.<sup>229</sup> After serving a prison sentence for that crime, Dixon had been released.<sup>230</sup> He returned to the Paterson area shortly before the video store clerk’s murder.<sup>231</sup>

Although the test results matching Dixon’s DNA to the DNA found on the hat came back in 2014, Valdes’s office never told the Paterson Police Department, and nothing was done to investigate Dixon.<sup>232</sup> Testifying at an evidentiary hearing on January 4, 2017, the lead detective, Richard Reyes, stated under oath that he was hearing the news

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220. CODIS is a database that stores the profiles of more than fifteen million “known criminals.” *Kelley*, 2018 WL 1247248, at \*10.

221. *Id.* at \*11.

222. *Administration*, PASSAIC CTY. N.J., [http://www.passaiccountynj.org/government/elected\\_and\\_appointed\\_officials/passaic\\_county\\_prosecutor/administration.php](http://www.passaiccountynj.org/government/elected_and_appointed_officials/passaic_county_prosecutor/administration.php) (last visited Feb. 3, 2019).

223. Interview with Vanessa Potkin, *supra* note 216.

224. Telephone Interview with Vanessa Potkin, Dir. of Post-Conviction Litig., Innocence Project (Nov. 14, 2017) (on file with author) (internal quotation marks omitted).

225. Interview with Vanessa Potkin, *supra* note 216.

226. *Id.*

227. *State v. Kelley*, No. A-1266-17T3, 2018 WL 1247248, at \*11 (N.J. Super. Ct. App. Div. Mar. 12, 2018).

228. Interview with Vanessa Potkin, *supra* note 216.

229. *See Kelley*, 2018 WL 1247248, at \*15; Interview with Vanessa Potkin, *supra* note 216.

230. *Kelley*, 2018 WL 1247248, at \*15.

231. *Id.*

232. Transcript of Proceedings at 71-72, 76, *State v. Lee*, No. 93-10-1183-I (N.J. Super. Ct. Law Div. Jan. 4, 2017) (on file with the author); S.P. Sullivan, *Murder Case Quietly Dropped After DNA Raises Doubts. What Took So Long?*, N.J. ADVANCE MEDIA (Apr. 7, 2018), [https://www.nj.com/news/index.ssf/2018/04/after\\_dna\\_raised\\_doubts\\_prosecutors\\_dropped\\_the\\_mu.html](https://www.nj.com/news/index.ssf/2018/04/after_dna_raised_doubts_prosecutors_dropped_the_mu.html) (“‘The state has had these DNA results since end of 2014 showing that somebody else committed the crime,’ says Vanessa Potkin. . . .”).

for the first time in court that day.<sup>233</sup> Asked by Casteleiro whether he would have charged Dixon in 1996 had he known of the DNA match, Reyes answered: “[T]hat’s not any kind of conclusive evidence.”<sup>234</sup>

On September 15, 2017, the trial court vacated Kelley’s and Lee’s convictions and released them on bail.<sup>235</sup> Valdes’s office responded by appealing the judge’s decision as a “clear abuse of discretion” and filing an emergency application—which was unsuccessful—to have their bail revoked.<sup>236</sup>

On March 18, 2018, the unanimous three-judge panel of the appellate division of the New Jersey Superior Court upheld the decision to grant Kelley and Lee new trials, stating: “Our affirmance rests fundamentally on the substantial evidence of Dixon’s potential third-party guilt that was revealed through the DNA retesting.”<sup>237</sup> The court went on: “[W]e cannot turn a blind eye to the revelation and the probability that defendants, who have been incarcerated since 1996, would have been acquitted.”<sup>238</sup>

Three weeks later, Valdes’s office dismissed the murder and robbery charges against Kelley and Lee during a court appearance in connection with their retrial.<sup>239</sup> In a public statement, Valdes stated that a retrial “would not be in the interests of justice,” but emphasized that no judge had ever found that Kelley and Lee were actually innocent.<sup>240</sup> Valdes’s office deflected questions about whether it would investigate Dixon.<sup>241</sup> Kelley, Lee, Potkin, and Casteleiro were caught by surprise, having prepared to spend the day in court litigating pretrial motions.<sup>242</sup>

## *B. The Impact of Innocence Denying*

### 1. The Wrongfully Convicted

The wrongfully convicted have been compared to survivors of war who have experienced unrelenting psychological trauma.<sup>243</sup> Many have

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233. Transcript of Proceedings, *supra* note 232, at 71-72.

234. *Id.* at 74-75; *Kelley*, 2018 WL 1247248, at \*13, \*15 (“Former police detective James L. Trainum . . . testified . . . as a defense expert. . . Trainum noted it was unusual that the police were currently doing nothing to investigate Dixon. He believed that this continued disinterest in Dixon further exemplified the ‘tunnel vision’ in this case.”).

235. *Kelley*, 2018 WL 1247248, at \*18.

236. *Id.* (internal quotation marks omitted).

237. *Id.* at \*20.

238. *Id.* at \*24.

239. Sullivan, *supra* note 232.

240. *Id.*

241. *See id.*

242. *Id.*

243. *See* Adrian T. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME

lost decades of their lives to prison, forcibly and senselessly separated from spouses, parents, children, friends, work, and the pleasures, great and small, of daily life on the outside. Anthony Wright served twenty-five years; James Dennis served twenty-five years; Jerome Morgan served twenty years; Robert Jones served twenty-three years; William Richards served twenty-three years; Louis Taylor served forty-two years; Davontae Sanford served nine years; Lamarr Monson served twenty years; Eric Kelley and Ralph Lee each served twenty-four years—a collective total of 235 years in prison.<sup>244</sup>

It is hard to overstate the devastation of decades lost in prison when the punishment was entirely undeserved.<sup>245</sup> Speaking to PBS's *Frontline*, Craig Haney, a professor of psychology at the University of California-Santa Cruz, said that exonerees experience “the deepest despair I’ve ever encountered” because they feel “a profound loss of faith in the institutions of the society, a loss of confidence in the society itself.”<sup>246</sup> Whereas the guilty have “the opportunity to try to put that experience [of prison] in some coherent framework,” for the wrongfully convicted, “[i]t is irrational suffering. It’s suffering without meaning, without justification.”<sup>247</sup>

Many exonerees were assaulted, raped, and terrorized; some spent years in solitary confinement.<sup>248</sup> Some are full of anger and fear while lacking the tools to express themselves because they had learned to stifle their emotions in order to survive.<sup>249</sup> They have no ready access to

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& JUST. 1, 21-28 (2005).

244. Jones’s Complaint, *supra* note 105, at 2; Monson’s Complaint, *supra* note 207, at 27; Morgan’s Complaint, *supra* note 103, at 10-11; Richards’s Complaint, *supra* note 129, at 1; Sanford’s Federal Complaint, *supra* note 207, at 2; Prosecution’s Motion Against Taylor, *supra* note 158, at 9; Wright’s Complaint, *supra* note 67, at 1; Complaint at 1, *Dennis v. City of Philadelphia*, No. 2:18-cv-02689-ER (E.D. Pa. June 27, 2018); Richard Cowen, *Eric Kelley and Ralph Lee Case Puts Spotlight on Wrongful Convictions*, NORTHJERSEY.COM (Apr. 11, 2018, 7:44 PM), <https://www.northjersey.com/story/news/passaic/paterson/2018/04/11/eric-kelley-and-ralph-lee-case-puts-spotlight-wrongful-convictions/507557002>.

245. Interview: *Craig Haney*, PBS (May 1, 2003), <https://www.pbs.org/wgbh/pages/frontline/shows/burden/interviews/haney.html>.

246. *Id.*

247. *Id.*

248. Dwayne Dail was twenty years old in 1989, when he was sent to prison for raping a young girl, a crime he did not commit. Mandy Locke, *Bittersweet Liberty: Dwayne Dail Struggles to Adapt to Life Outside Prison and Bond with His Son*, NEWS & OBSERVER (Dec. 9, 2014, 12:00 AM), <https://www.newsobserver.com/news/local/crime/article10354619.html>. “I was prey,” he said. *Id.* Raped countless times, “Dail quickly learned how sex is swapped in prison.” *Id.* “Beatings were negotiated and rendered based on connections.” *Id.* Kirk Odom spent twenty years in prison for a rape and robbery he did not commit. Spencer S. Hsu, *A Record Award — \$9.2 Million — for Wrongful Imprisonment*, WASH. POST, Feb. 28, 2015, at B2 (reporting that Odom was raped in prison, contracted HIV, and attempted suicide).

249. Sandra D. Westervelt & Kimberly J. Cook, *Coping with Innocence After Death Row*, 7

services that can help them re-acclimate to society: no parole officer or other legally guaranteed support system in place to help them find work and a place to live.<sup>250</sup> The road to obtaining money from the state, if that is even possible, can be long and arduous.<sup>251</sup> Some exonerees die within a few years of their release, from health problems that went untreated in prison, substance abuse, accidents, or involvement in violent crimes.<sup>252</sup> Darryl Hunt, an exoneree whose story became an HBO film, *The Trials of Darryl Hunt*, was freed in 2005 after spending nineteen years in prison for a rape and murder he did not commit.<sup>253</sup> The victim, Deborah Sykes, was a young white woman.<sup>254</sup> Hunt was nineteen years old and African-American.<sup>255</sup> His trial was racially charged and, in prison, he faced constant death threats from white supremacists.<sup>256</sup> Hunt received compensation from the State, got married, and gained a national reputation as a criminal justice advocate.<sup>257</sup> But he remained haunted, became addicted to drugs, and suffered from depression.<sup>258</sup> In 2016, Hunt committed suicide.<sup>259</sup>

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CONTEXTS 32, 34, 36 (2008) (reporting on a study of eighteen exonerated death row prisoners and finding that some self-isolate or “numb[] themselves emotionally”).

250. Jennifer L. Chuniyas & Yael D. Aufgang, *Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted*, 28 B.C. THIRD WORLD L.J. 105, 110-12 (2008).

251. See Jeffrey S. Gutman, *An Empirical Reexamination of State Compensation for the Wrongfully Convicted*, 82 MO. L. REV. 369, 401-03 (2017). However, some statutes are relatively generous, providing high five-figure amounts for every year of imprisonment, as well as access to education, counseling, and health services; other states cap the total amount as low as \$25,000, regardless of the length of the sentence. See *id.* at 393, 396, 401-02 nn.180-83.

252. Matthew Clarke, *Tragic Justice: Wrongfully Convicted Prisoners Die Shortly After Exoneration*, PRISON LEGAL NEWS (Mar. 9, 2017), <https://www.prisonlegalnews.org/news/2017/mar/9/tragic-justice-wrongfully-convicted-prisoners-die-shortly-after-exoneration>. In March 2014, a Louisiana man named Glenn Ford was exonerated after serving twenty-nine years in solitary confinement on death row. Bruce Weber, *Glenn Ford, Spared Death Row, Dies at 65*, N.Y. TIMES, July 3, 2015, at B14, <https://www.nytimes.com/2015/07/03/us/glenn-ford-spared-death-row-dies-at-65.html>. Ford, an African-American man, was falsely convicted of killing an older white man by an all-white jury. *Id.* He left prison in poor health, diagnosed with lung cancer that had spread to his bones and spine, and died a year later. See *id.*

253. *Darryl Hunt*, NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3314> (last updated Nov. 6, 2016); Phoebe Zerwick, *The Last Days of Darryl Hunt*, ATAVIST, <https://lastdays.atavist.com/the-last-days-of-darryl-hunt> (last visited Feb. 3, 2019).

254. *Darryl Hunt*, *supra* note 253.

255. *Id.*

256. BAZELON, *supra* note 46, at 137, 164; Farai Chideya, *Darryl Hunt's Fight for Freedom*, NPR (Apr. 24, 2007, 9:00 AM), <https://www.npr.org/templates/story/story.php?storyId=9798617>; Zerwick, *supra* note 253; Telephone Interview with Mark Rabil, Director of Innocence & Justice Clinic, Wake Forest Univ. Sch. of Law (Mar. 7, 2017) (on file with author).

257. Zerwick, *supra* note 253.

258. *Id.*

259. Max Blau, *Tragedy of Darryl Hunt: How Exonerated Man Came to Take His Own Life*,

## 2. The Victims

“The original crime victims are forced to relive the worst experience of their lives with the knowledge that the actual perpetrator was never caught, or was caught far too late, after victimizing more people.”<sup>260</sup> Some crime survivors “unwittingly played a role in the wrongful conviction because they mistakenly identified the innocent person as the attacker . . . .”<sup>261</sup> For these victims, their re-traumatization is “compounded by confusion and overwhelming guilt.”<sup>262</sup>

“The victim’s family members, whose lives were forever altered by the rape, assault, or murder of a loved one, are left to watch as stricken bystanders.”<sup>263</sup> For many, the news comes as a shock because “they were

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GUARDIAN (Mar. 19, 2016, 8:20 AM), <https://www.theguardian.com/us-news/2016/mar/19/darryl-hunt-exonerated-self-inflicted-gunshot>; Zerwick, *supra* note 253.

260. BAZELON, *supra* note 46, at 94; *see also* Dan S. Levey, *Wrongfully Convicted: A No-Win Situation for the Victim*, 52 DRAKE L. REV. 695, 696-97 (2004) (describing the “incredible spiral” crime victims experience when they learn the wrong person was convicted because “it catapults them back into a system they thought was long behind them” and which was designed to provide “judicial closure”); David L. Teibel, *Man Gets 24 Years in '83 Child-Sex Case*, TUCSON CITIZEN (Aug. 20, 2002), <http://tucsoncitizen.com/morgue2/2002/08/20/104810-man-gets-24-years-in-83-child-sex-case> (stating that the victim’s sister, upon learning that an innocent man had spent seven years in prison for sodomizing her brother, told the court “I spent most of my life and wasted most of my life hating [the wrong person]”).

261. BAZELON, *supra* note 46, at 94; *see also* JENNIFER THOMPSON-CANNINO, RONALD COTTON & ERIN TORNEO, *PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION* 211-17 (2009) (recounting Thompson’s horror and shame when she learned of her mistaken identification); Jeanne Bishop & Mark Osler, *Prosecutors and Victims: Why Wrongful Convictions Matter*, 105 J. CRIM. L. & CRIMINOLOGY 1031, 1033 (2015) (“[C]onvicting an innocent person creates yet another victim of the real perpetrator’s crime—the person wrongfully convicted—and casts the original victim into the uncomfortable role of perpetrator.”); Lara Bazelon, *Justice After Injustice*, SLATE (Sept. 30, 2015, 5:02 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2015/09/restorative\\_justice\\_for\\_false\\_convictions\\_crime\\_victims\\_and\\_exonerated\\_convicts.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2015/09/restorative_justice_for_false_convictions_crime_victims_and_exonerated_convicts.html) [hereinafter Bazelon, *Justice After Injustice*] (reporting on Janet Burke’s devastation when she learned of her mistaken identification of Thomas Haynesworth); *infra* note 265 (describing the Haynesworth case and Burke’s reaction to the news that Haynesworth was exonerated).

262. BAZELON, *supra* note 46, at 94. Michelle Mallin was a college student in Texas when she was raped in 1985. *Victim in Texas Rape Exoneration Recalls Case*, HOUS. CHRON. (Sept. 14, 2014), <https://www.houstonchronicle.com/news/houston-texas/houston/article/victim-in-texas-rape-exoneration-recalls-case-5755444.php>. She mistakenly identified the rapist as Timothy Cole. *Id.* In 2008, DNA testing revealed that the rapist was a man named Jerry Wayne Johnson. *Id.* Cole died in prison before his name was cleared. *Id.* The state court judge who handled the case after the DNA testing was conducted stated: “This has just devastated her life. . . . I just don’t know how she can overcome the grief and sorrow that she feels.” *Id.*

263. Christy Lucas Sheppard, whose cousin, Debbie Sue Carter, was raped and murdered in 1982, was devastated to learn that the two men convicted of the crimes were innocent. BAZELON, *supra* note 46, at 100-01. She stated in a May 14, 2016 interview: “From the victim’s standpoint it’s no longer your case. It’s the state’s case. For the rape victim, her body isn’t even her body anymore; it’s a piece of evidence. Even the name of the case belongs to the perpetrator. Debbie was literally erased.” *Id.*

not alerted beforehand by law enforcement.<sup>264</sup> “They too relive the trauma, this time in isolation, because the exoneration process is not concerned with their suffering.<sup>265</sup> Many feel ignored, cast aside, and, like the exonerees, without the resources to cope with overwhelming and wildly conflicting emotions.”<sup>266</sup> Some learn, to their horror, that the true perpetrator went on to commit other horrific crimes and feel a sense of profound guilt and responsibility.<sup>267</sup>

### 3. The Risk to Public Safety

According to the Innocence Project, 362 people have been exonerated by DNA evidence since 1989.<sup>268</sup> The group has identified 158 actual perpetrators in those cases who went on to commit “150 additional violent crimes, including 80 sexual assaults, 35 murders, and 35 other violent crimes while the innocent sat behind bars for their earlier offenses.”<sup>269</sup> The Innocence Project tracks only DNA exonerations.<sup>270</sup> When non-DNA wrongful conviction cases are included, the number of victims increases. The Better Government Association and the Center on Wrongful Convictions examined eighty-five wrongful conviction cases in the State of Illinois between 1989 and 2010 and concluded that the actual perpetrators went on to commit nearly 100 additional documented crimes.<sup>271</sup>

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264. BAZELON, *supra* note 46, at 94; *see also* Telephone Interview with Christy Sheppard (June 21, 2015) (on file with author) (recounting that she and her family learned the details of the exoneration of Ron Williamson and Dennis Fritz, the two men convicted of murdering her cousin, in the courtroom on the day that they were exonerated).

265. Janet Burke was raped at the daycare center where she worked early in the morning on January 3, 1984. Bazelon, *Justice After Injustice*, *supra* note 261. Burke mistakenly identified the rapist as Thomas Haynesworth. *Id.* So did three other women who were assaulted around the same time period. *See id.* Burke testified against Haynesworth, who was convicted of her rape, two other rapes, and sentenced to seventy-four years in prison. *Id.* In 2009, the police came to Burke’s home to tell her that DNA evidence exonerated Haynesworth and that the actual rapist was a man named Leon Davis, Jr. *Id.* Burke experienced a wave of emotions: denial, nausea, panic, fear. *Id.*

266. BAZELON, *supra* note 46, at 94-95; *see also* Bazelon, *Justice After Injustice*, *supra* note 261.

267. *See, e.g.*, BAZELON, *supra* note 46, at 99; Telephone Interview with Sarah (June 26, 2016) (on file with author) (describing how, after learning that DNA evidence exonerated Thomas Webb, the man she mistakenly identified as her rapist, the police informed her that the true rapist was a man named Gilbert Duane Harris, and stating “I can’t lay the blame on anyone but myself”).

268. *DNA Exonerations in the United States*, INNOCENCE PROJECT, <https://www.innocenceproject.org/dna-exonerations-in-the-united-states> (last visited Feb. 3, 2019).

269. *Id.*

270. *New National Database Reveals Nearly 900 Exonerations*, INNOCENCE PROJECT, <https://www.innocenceproject.org/new-national-database-reveals-nearly-900-exonerations> (last visited Feb. 3, 2019).

271. John Conroy & Rob Warden, *A Tale of Lives Lost, Tax Dollars Wasted and Justice Denied*, MUSLIM OBSERVER (June 23, 2011), <http://muslimobserver.com/a-tale-of-lives-lost-tax-dollars-wasted-and-justice-denied>.

The scholar James R. Acker provided detailed narratives in twenty cases of wrongful conviction across a number of jurisdictions where the true perpetrator went on to rape, rob, and murder other innocent people.<sup>272</sup> Four of these cases—twenty percent—involved innocence denying by prosecutors.<sup>273</sup> Acker wrote:

The capsule descriptions offered in the twenty cases discussed in this article are hopelessly inadequate to capture the devastation worked on the lives of those known victims. They also are incapable of even hinting at the pain and suffering experienced by the multitude of unknown victims of offenders who have escaped justice in cases resulting in the wrongful conviction of others.<sup>274</sup>

#### 4. The Loss of Confidence in the Integrity of the System

Wrongful convictions undermine the confidence in the integrity of the criminal justice system.<sup>275</sup> For those who participated unwittingly in some way—as witnesses, jurors, or law enforcement acting in good faith—the impact is direct and visceral. They feel guilty, horrified, and angry at the system that betrayed them.<sup>276</sup> If the exposure and correction of the wrongful conviction is prolonged by prosecutorial innocence denying, these secondary actors can lose faith in the system entirely.<sup>277</sup>

When Peter Forcelli worked as a New York City Police Department detective, he was assigned to investigate the 1995 murder of a former police officer who had been shot while trying to stop a robbery carried out by multiple men.<sup>278</sup> Two eyewitnesses identified the same man from a selection of mug shots: Edward Garry.<sup>279</sup> There was no other evidence against Garry, but at the time, Forcelli said, “identification was like the gold standard.”<sup>280</sup> The Bronx District Attorney’s Office prosecuted Garry, who was convicted in 1997 and sentenced to twenty-five years

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272. Acker, *supra* note 35, at 1636-705.

273. *Id.* at 1644-45, 1667, 1669, 1685, 1687. Those cases involve the exonerations of Kennedy Brewer, Jeffrey Deskovic, the Dixmoor Five, and the Central Park Five—a total of twelve men who languished for additional years in prison due to the refusal by prosecutors to agree to their release once the evidence of their innocence became overwhelming. *See id.* at 1645, 1668, 1685, 1688; *see also infra* text accompanying note 349; *infra* App. A.

274. Acker, *supra* note 35, at 1711.

275. *See* Stephanie Clifford, *An Ex-Cop’s Remorse*, NEW YORKER (Oct. 24, 2016), <https://www.newyorker.com/magazine/2016/10/24/an-ex-cops-remorse> [hereinafter Clifford, *An Ex-Cop’s Remorse*].

276. *See, e.g.*, BAZELON, *supra* note 46, at 3-4; Clifford, *An Ex-Cop’s Remorse*, *supra* note 275.

277. *See infra* text accompanying notes 289-93.

278. Clifford, *An Ex-Cop’s Remorse*, *supra* note 275.

279. *Id.*

280. *Id.*

to life, based on the testimony of the two eyewitnesses and a jailhouse informant.<sup>281</sup> Forcelli was rewarded with a Detective of the Month honor.<sup>282</sup>

Two decades later, new evidence came to light, including a confession from two of the perpetrators who helped to identify the shooter as a man named Steven Martinez, who looked very similar to Garry.<sup>283</sup> The Bronx District Attorney's Office continued to insist that Garry was guilty and, according to his lawyers, fought his release "tooth and nail."<sup>284</sup> Forcelli said: "I was irate, like, How is this guy still in jail? This isn't really very gray."<sup>285</sup>

In 2017, a Bronx judge overturned Garry's conviction, citing "evidence of possible third-party culpability [that] was exculpatory in nature . . ."<sup>286</sup> But Bronx County District Attorney Darcel Clark continued to insist that Garry was guilty.<sup>287</sup> In 2018, Clark's office retried Garry for the murder.<sup>288</sup> Forcelli, "increasingly furious with a system that seemed unable to correct a mistake," testified for the defense, and the jury acquitted Garry after deliberating for less than thirty minutes.<sup>289</sup> Garry's father told a reporter that the prosecutors "were blind to the 'damage' they'd done to Garry and his family. 'Will he be able to be normal again? He's been in the cage for twenty-three years. I don't think so.'"<sup>290</sup>

Forcelli is not alone in his frustration, anger, and disbelief at innocence-denying prosecutors. After Anthony Wright's retrial, the forewoman told the media: "I'm angry that this case was ever re-tried, but thrilled that we were able to release Tony from this nightmare of

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281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.* (internal quotation marks omitted).

285. *Id.*

286. Stephanie Clifford, *A Break, but No Freedom Yet, for a Bronx Man Convicted in a Shaky Murder Case*, NEW YORKER (Mar. 24, 2017), <https://www.newyorker.com/news/news-desk/a-break-but-no-freedom-yet-for-a-bronx-man-convicted-in-a-shaky-murder-case> [hereinafter Clifford, *No Freedom Yet*].

287. *Id.* ("So why has the D.A.'s office dug its heels in on this case? Its fierce opposition to clearing Garry's name illustrates a difficulty inherent in seeking justice for wrongful convictions: the offices that seek convictions are, years later, the same ones tasked with fairly assessing whether they might have been wrong.")

288. Stephanie Clifford, *After Decades in Prison, Edward Garry is Finally Cleared of a Murder He Didn't Commit*, NEW YORKER (Feb. 6, 2018), <https://www.newyorker.com/news/news-desk/after-decades-in-prison-edward-garry-cleared-of-a-murder-he-didnt-commit> [hereinafter Clifford, *Edward Garry Cleared*].

289. *Id.*

290. Clifford, *No Freedom Yet*, *supra* note 286.

twenty-five years.”<sup>291</sup> Before the trial, Shannon Coleman, the victim’s grandniece, wrote in an email to one of the top prosecutors in the Philadelphia District Attorney’s Office, pleading with her to dismiss the charges:

It is my understanding that as a prosecutor you have an ethical responsibility to only take to trial cases that you believe in beyond a reasonable doubt. (The charging standard should be the prosecutor’s reasonable belief that the charges can be substantiated by admissible evidence at trial.) You told me more than once during our conversation that you had doubt!<sup>292</sup>

Jurors have spoken publicly about their anguish at having participated, however unwittingly, in a wrongful conviction, expressing disillusionment and rage at learning that the system is unfair and unreliable.<sup>293</sup> The refusal by prosecutors to admit to miscarriages of justice and their fight against efforts to correct them only compounds the anger, trauma, mistrust, and loss of faith the jurors—along with the original crime victims, family members, and other stakeholders in the system, such as Forcelli—experience.

### 5. The Financial Costs

Thirty-two states and the District of Columbia have statutes that provide for monetary compensation for the wrongfully convicted.<sup>294</sup> Lawsuits filed by exonerees alleging police and prosecutorial misconduct and demanding compensation for the emotional, physical, and financial devastation of their confinement have resulted in seven-figure verdicts and settlements.<sup>295</sup> In seventeen documented cases of

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291. Solotaroff, *supra* note 64.

292. E-mail from Shannon Coleman to Jennifer Selber, Assistant District Attorney (July 15, 2016, 11:03 PM) (on file with author).

293. Carol Bohls, Velma Diamond & Liz Roland, *Jurors Regret Convicting Innocent Man*, HOUS. CHRON. (Apr. 19, 2009, 5:30 AM), <https://www.chron.com/opinion/outlook/article/Jurors-regret-convicting-innocent-man-1723076.php> (describing their votes to convict two innocent men and stating “[w]e still share with family and friends the resounding negative impact this experience has had on our lives and our opinions of the criminal justice system”); D’Shean Kennedy, *I Sent an Innocent Man to Prison*, MARSHALL PROJECT (Feb. 22, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/02/22/i-sent-an-innocent-man-to-prison> (describing his “sunken feeling” when he learned that Kia Stewart, the man he convicted, was innocent, and stating “I was overwhelmed, and sad for Kia”).

294. Gutman, *supra* note 251, at 388, 439-40 tbl. 1.

295. See, e.g., Emily Alpert Reyes & Matt Lait, *L.A. to Pay \$24 Million to Two Men Imprisoned for Decades After Wrongful Murder Convictions*, L.A. TIMES (Jan. 19, 2016, 7:43 PM), <http://www.latimes.com/local/lanow/la-me-ln-wrongful-convictions-20160119-story.html> (reporting that the Los Angeles City Council paid exoneree Kash Delano Register \$16.7 million to settle his federal civil rights lawsuit filed after he served thirty-four years for a murder he did not commit and \$7.6 million to exoneree Bruce Lisker to settle his federal rights lawsuit after determining “that

innocence denying by prosecutors throughout the U.S., exonerees were awarded more than \$68 million under state compensation laws after bringing lawsuits that either settled or resulted in favorable jury verdicts.<sup>296</sup>

In Texas, for example, exonerees are entitled to \$80,000 for every year of wrongful imprisonment.<sup>297</sup> Over a twenty-five-year period, the State paid nearly \$94 million to 101 innocent men and women who had spent years, and sometimes decades, in prison.<sup>298</sup> In some of those cases—for example, the wrongful conviction of Michael Morton—innocence denying by prosecutors greatly extended the length of the incarceration.<sup>299</sup> According to the study by the Better Government Association and the Center on Wrongful Convictions, “Illinois reported that city, county, and state funds totaling \$155.9 million had been paid through 2010 to exonerees through settlements and judgments reached in lawsuits,” and that the number was expected to nearly double when similar pending litigation was resolved.<sup>300</sup>

Then there are the costs the taxpayers bear for locking up innocent people. According to a 2012 study conducted by the Vera Institute of Justice, the average cost of incarcerating a single prisoner for one year

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taking the cases to trial could be even more financially devastating”).

296. See Lara Bazelon, *Seventeen Cases of Denied Innocence*, SLATE (Jan. 10, 2018, 11:30 AM), <https://slate.com/news-and-politics/2018/01/innocence-deniers-seventeen-cases-of-prosecutors-fighting-exoneration.html> [hereinafter Bazelon, *Seventeen Cases of Denied Innocence*]. The monetary settlements for the individuals who were compensated can be found on the exoneration pages kept for each individual by the National Registry of Exonerations. NAT'L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Feb. 3, 2019). It is important to note that these seventeen cases “are just a few of the times that prosecutors have fought tooth and nail against exonerations.” Bazelon, *Seventeen Cases of Denied Innocence*, *supra*; see also *infra* App. A (documenting additional financial judgments).

297. *Wrongfully Convicted Get \$80,000 a Year in Texas*, NBC NEWS, [http://www.nbcnews.com/id/32692576/ns/us\\_news-life/t/wrongly-convicted-get-year-texas/#.XC0ezqeZPs2](http://www.nbcnews.com/id/32692576/ns/us_news-life/t/wrongly-convicted-get-year-texas/#.XC0ezqeZPs2) (last updated Sept. 4, 2009).

298. Johnathan Silver & Lindsay Carbonell, *Wrongful Convictions Have Cost Texans More than \$93 Million*, TEX. TRIB. (June 24, 2016, 6:00 AM), <https://www.texastribune.org/2016/06/24/wrongful-convictions-cost-texans-over-93-million>.

299. Michael Morton spent twenty-five years in prison after he was falsely convicted for the murder of his wife. Pamela Colloff, *The Innocent Man, Part Two*, TEX. MONTHLY (Dec. 2012), <https://www.texasmonthly.com/articles/the-innocent-man-part-two> [hereinafter Colloff, *The Innocent Man, Part Two*]. Texas prosecutors fought efforts by the Innocence Project to exonerate him for years. *Id.* Anthony Graves was falsely convicted of murder and sentenced to death. Brian Rogers & Cindy George, *Texas Sets Man Free from Death Row*, HOUS. CHRON. (Oct. 27, 2010, 5:30 AM), <https://www.chron.com/news/houston-texas/article/Texas-sets-man-free-from-death-row-1619337.php>. When his sentence was vacated in 2006, Texas prosecutors decided to retry the case, then dismissed the charges in 2010 following a reinvestigation. *See id.*

300. Acker, *supra* note 35, at 1708 (citing Conroy & Warden, *supra* note 271).

was \$31,286.<sup>301</sup> In some states, the yearly cost is far higher. In New York City, it is \$167,731,<sup>302</sup> and in California, it is \$75,560—or, as the Associated Press put it, more than the cost of a year’s tuition at Harvard University.<sup>303</sup>

Eight of the ten men featured in Part II.A of this Article have filed federal civil rights lawsuits.<sup>304</sup> Kelley and Lee, who were more recently exonerated, are likely to do the same.<sup>305</sup> The City of Philadelphia settled with Wright for nearly \$10 million,<sup>306</sup> and the State of Michigan has paid Sanford more than \$400,000 under its wrongful compensation statute.<sup>307</sup> Based on the jury verdicts and settlements in similar cases, when these lawsuits are resolved, it is likely that the monetary damages will soar.<sup>308</sup> Acker has written that additional costs, which include “psychological counseling, education job-training, and other post-release services; and the property damage, medical and mental health care expenses, and lost wages suffered by the victims of the true offenders’ new crimes . . . must surely total in the hundreds of millions or billions of dollars when aggregated.”<sup>309</sup>

### III. THE DOMINANT NARRATIVE OF THE TOUGH-ON-CRIME, WIN-AT-ALL-COSTS FIGHTER

Why does innocence denying happen? While there are many explanations, the misalignment between a prosecutor’s truth-seeking mission, as set forth in the code of ethics, and a prosecutor’s incentives as a political actor provides fertile ground for innocence denying to take root.

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301. Marc Santora, *City’s Annual Cost Per Inmate is \$168,000, Study Finds*, N.Y. TIMES, Aug. 24, 2013, at A16, <https://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html> (noting that the Vera Institute used data from the forty states that participated in the study).

302. *Id.* (citing a 2013 study conducted by the Independent Budget Office).

303. *At \$75,560, Housing a Prisoner in California Now Costs More than a Year at Harvard*, L.A. TIMES (June 4, 2017, 8:30 AM), <http://www.latimes.com/local/lanow/la-me-prison-costs-20170604-htmlstory.html>.

304. *See supra* note 244 (listing the federal civil rights lawsuits filed by the exonerees).

305. *See* Possley, *Eric Kelley*, *supra* note 219 (stating that both Kelley and Lee have filed notices of intent to sue the City of Paterson).

306. Rolen, *supra* note 62.

307. Hunter, *supra* note 191.

308. *See* Bazelon, *Seventeen Cases of Denied Innocence*, *supra* note 296. The monetary settlements for the individuals who were compensated can be found on the exoneration pages kept for each individual by the National Registry of Exonerations. NAT’L REGISTRY EXONERATIONS, *supra* note 296.

309. Acker, *supra* note 35, at 1708-09 (footnotes omitted).

### A. The Tough-on-Crime Prototype

In 1935, the U.S. Supreme Court famously stated that prosecutors must be ministers of justice who are equally committed to protecting the innocent and holding the guilty accountable.<sup>310</sup> The late Supreme Court Justice William O. Douglas invoked that long-settled precedent nearly forty years later, stating: “The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.”<sup>311</sup>

A prosecutor’s duty to be “a minister of justice” is codified in the ethical rules, including the American Bar Association’s (“ABA”) Model Rules of Professional Conduct,<sup>312</sup> which “[s]tate bar associations either adopt or adapt.”<sup>313</sup> The ABA’s Model Rule of Professional Conduct 3.8 sets standards for prosecutors to abide by in exercising their discretion, using their investigative power, disclosing evidence, publicly commenting on cases, and observing the constitutional rights of the accused.<sup>314</sup> In 2008, the ABA added sections (g) and (h) to Model Rule 3.8, which address a prosecutor’s post-conviction responsibilities.<sup>315</sup> Section (g) requires prosecutors to “promptly disclose,” to the court and to the defendant, “new, credible and material evidence creating a reasonable likelihood that a convicted defendant” is innocent, and to undertake additional investigation into the newly discovered evidence.<sup>316</sup> Section (h) obligates “a prosecutor [who] knows of clear and convincing evidence” of a defendant’s innocence to “seek to remedy the conviction.”<sup>317</sup> Sections (g) and (h) have been adopted, with some variations, by seventeen states, and an additional five states are considering its adoption.<sup>318</sup>

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310. *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[A prosecutor’s] interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done.”).

311. *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting).

312. MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2016).

313. Tiffany Cox Hernandez, Shannon N. Cunningham & Joycelyn M. Pollock, *A Closer Look at Prosecutor Misconduct and Good Faith Error*, 53 CRIM. L. BULL. 61, 64 (2017).

314. MODEL RULES OF PROF’L CONDUCT r. 3.8(a)–(h).

315. *Id.* r. 3.8(g)–(h); Michele K. Mulhausen, *A Second Chance at Justice: Why States Should Adopt ABA Model Rules of Professional Conduct 3.8(g) and (h)*, 81 U. COLO. L. REV. 309, 316-19 (2010).

316. MODEL RULES OF PROF’L CONDUCT r. 3.8(g).

317. *Id.* r. 3.8(h).

318. AM. BAR ASS’N, CPR POLICY IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROF’L CONDUCT: RULE 3.8 (g) AND (h) 1 (2017), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_8\\_g\\_h.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_8_g_h.authcheckdam.pdf); see also David L. Hudson, Jr., *Innocence Awareness: Some States Now Require All Attorneys to Report Wrongful Convictions*, ABA J., Sept. 2017, at 24.

But many prosecutors would rather be known for accumulating a long track record of convictions than for vindicating the innocent.<sup>319</sup> Mark Godsey, now the director of the Ohio Innocence Project, spent several years working as a self-described “hard-nosed prosecutor” in the United States Attorney’s Office for the Southern District of New York—one of the country’s most elite offices.<sup>320</sup> When Godsey switched roles and began representing convicted prisoners whom he believed to have credible claims of innocence, he encountered knee-jerk opposition by state prosecutors whom he believed to be engaging in innocence denying.<sup>321</sup> Godsey began to reflect on his prosecutorial career, concluding: “I engaged in this same type of conduct and had the same mindset that I now know causes tragic injustices.”<sup>322</sup> Godsey later wrote a book, *Blind Injustice*, in which he explored the factors that cause prosecutors—on both state and federal levels—to deviate from their roles as ministers of justice.<sup>323</sup>

There is a rich literature that plumbs the psychological depths of innocence denying, which Daniel Medwed in his book *Prosecution Complex* ascribes to: “(1) cognitive biases; (2) resource constraints; (3) concerns for finality; (4) political realities; and (5) the lack of firm ethical obligations.”<sup>324</sup> Godsey lists the “[t]hree psychological factors [that] combine to cause good people to create this kind of ‘evil’ outcome in our criminal justice system: cognitive dissonance, administrative evil, and dehumanization.”<sup>325</sup> Alafair Burke has described how some prosecutors refuse to let go of their original theory of guilt, even after new evidence has eviscerated it, because processing the horror of participating in or perpetuating a wrongful conviction is simply too much to bear.<sup>326</sup> Aviva Orenstein has theorized that some offices fall prey to “*groupthink*,” which she defines as “a dynamic within an organization whereby members of a deeply cohesive group ‘minimize conflict and reach consensus’” without allowing their viewpoints to be subjected to critical analysis or opposing ideas.<sup>327</sup>

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319. See, e.g., Jane Campbell Moriarty, “*Misconvictions*,” *Science, and the Ministers of Justice*, 86 NEB. L. REV. 1, 23 (2007) (“[P]rotecting the innocent from conviction does not stand on equal footing with convicting the guilty—it is doubtful that any elected prosecutor campaigned on the notion of cases he did not prosecute.”).

320. GODSEY, *supra* note 16, at 3; Mark A. Godsey, *supra* note 16.

321. GODSEY, *supra* note 16, at 9.

322. *Id.* at 3.

323. See, e.g., *id.* at 76-77 (describing the competitive atmosphere of prosecutor’s offices).

324. MEDWED, *supra* note 3, at 127.

325. GODSEY, *supra* note 16, at 18.

326. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1612-13 (2006).

327. Orenstein, *supra* note 42, at 427 (quoting *Groupthink*, WIKIPEDIA,

I argue that the major motivating factor underlying innocence denying, which operates both at a conscious and subconscious level, is the intense pressure prosecutors feel to “win,” which has traditionally been defined as accumulating a long track record of convictions.<sup>328</sup> Overwhelmingly, prosecutors strive to appear “tough on crime.”<sup>329</sup> The vast majority of prosecutors are elected, and the tough-on-crime image is a winning message with the voters.<sup>330</sup> The public expects swift justice, with the perpetrators arrested, prosecuted, convicted, and sent away in short order.<sup>331</sup> Success in many prosecutor offices is defined by one’s win-loss ratio and the sheer number of convictions obtained overall.<sup>332</sup> Jack McMahon, who worked as a prosecutor in Philadelphia from 1978 until 1990, stated in an interview:

I fell into this psychological position of everything on the other side of the table is evil and everything on my side of the table is good. I lived and breathed it 24/7. . . . What passes for success is winning. I moved up rapidly within the trial division because I was winning. I got into major crimes, into homicides, because I won. The guys who didn’t win, they didn’t go to homicide. . . . The theoretical premium is justice but the real premium is winning and at times, winning at all costs so justice gets lost at times.<sup>333</sup>

Although federal prosecutors are not elected, but rather appointed, Godsey wrote of feeling the same pressure at the U.S. Attorney’s Office,

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<https://en.wikipedia.org/wiki/Groupthink> (last modified Dec. 12, 2018)).

328. See, e.g., Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 806 (2003) (“District attorneys, who are often elected, campaign on winning high-profile convictions and favorable win-loss ratios.”); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 882-83 (1995) (hypothesizing that “the prosecutorial culture centered on winning can be redirected toward self-restraint” if prosecutors were paid to do justice by obtaining convictions “under proper conditions”); David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 669 (2017) [hereinafter Sklansky, *Changing Political Landscape*] (“Prosecutors . . . lobbied for stiff mandatory penalties—both to burnish their political credentials as crime fighters and because their jobs were easier when they could use the threat of long prison sentences to coerce guilty pleas.” (footnotes omitted)); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 390 (2001) (“It is not just the big, high profile cases — too frequently capital cases — that create pressure on prosecutors to win. The same pressure is present in ordinary, run-of-the-mill cases.”).

329. MEDWED, *supra* note 3, at 142 (“[Prosecutors] fear that the public will construe prosecutorial openness to innocence claims as being soft on crime.”).

330. GODSEY, *supra* note 16, at 66-67 (internal quotation marks omitted).

331. *Id.*

332. See Sandra Caron George, *Prosecutorial Discretion: What’s Politics Got to Do with It?*, 18 GEO. J. LEGAL ETHICS 739, 752 (2005).

333. Telephone Interview with Jack McMahon, Defense Attorney (June 28, 2016) (on file with author).

where he was surrounded by competitive colleagues and supervisors.<sup>334</sup> To get ahead, it was important to be “aggressive with your cases” and to be seen as a “prosecutor’s prosecutor.”<sup>335</sup> He continued: “If you lost more than a case or two in a short time period, people would start questioning your competence or dedication.”<sup>336</sup>

The tough-on-crime platform is an easier brand to promote than vindicator-of-innocence.<sup>337</sup> Conceding a person’s innocence means conceding a mistake—often a terrible cascade of mistakes—or worse, admitting to incompetence, rule-breaking, and even corruption.<sup>338</sup> Prosecutors associate this kind of *mea culpa* with weakness and incompetence.<sup>339</sup> As Medwed notes, “[c]onceding a past mistake could dull a chief prosecutor’s tough-on-crime shine, and perhaps even call into question his fitness for the post. How many *other* innocent folks has this person put away? Is he capable of getting the bad guys?”<sup>340</sup> So long as “winning” is defined as increasing one’s conviction rate and “losing” is defined as opening the prison gates (if only to release an innocent person), the incentives to engage in innocence denying will remain.<sup>341</sup>

### *B. Affirmation of Prototype in the Election of Donald Trump and the Appointment of Jeff Sessions as Attorney General*

Today, innocence denying is sanctioned at the highest levels of government, starting with the current President of the United States.<sup>342</sup> For more than twenty years, Donald J. Trump has stood fast in insisting on the guilt of the five Black and Latino teenagers who were convicted of raping and nearly killing a young white woman known as the Central Park jogger in New York City in 1989.<sup>343</sup> The evidence against the defendants, who became known as the Central Park Five, was based on confessions they claimed were coerced—they had inculcated themselves

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334. GODSEY, *supra* note 16, at 76.

335. *Id.* (internal quotation marks omitted).

336. *Id.*

337. *See* MEDWED, *supra* note 3, at 130.

338. *See id.*

339. *Id.*

340. *Id.*

341. *See id.*; *see also* Jonathan Simon, *Beyond Tough on Crime: Towards a Better Politics of Prosecution*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 250, 265-66 (Máximo Langer & David Alan Sklansky eds., 2017) (arguing that some prosecutors have adopted a mentality that elevates fairness above cultivating a tough-on-crime image).

342. *See infra* text accompanying notes 358-67.

343. Amy Davidson Sorkin, *Donald Trump and the Central Park Five*, NEW YORKER (June 23, 2014), <https://www.newyorker.com/news/amy-davidson/donald-trump-and-the-central-park-five>.

after being interrogated for hours without a parent or lawyer present and denied food and sleep.<sup>344</sup>

After their arrests, Trump, then a celebrity real estate developer, took out full-page ads in four New York City newspapers clamoring for the return of the death penalty.<sup>345</sup> The claims by the Central Park Five that their confessions were false fell on deaf ears. In 1990, the Manhattan District Attorney's Office secured convictions against all of them.<sup>346</sup>

Eleven years later, Kharey Wise, one of the defendants, met an inmate named Matias Reyes in prison.<sup>347</sup> Reyes confessed to Wise that he alone had raped and beaten the Central Park jogger, a detailed and accurate confession that was corroborated when semen from the rape kit proved a match to Reyes.<sup>348</sup> The Central Park Five were exonerated in 2002 after serving a collective forty years in prison.<sup>349</sup>

In 2014, New York City settled a lawsuit brought by the Central Park Five for \$41 million, roughly \$1 million for each year that each man had spent behind bars.<sup>350</sup> Trump wrote an op-ed calling the settlement "a disgrace" and asserting that the exonerees "do not exactly have the pasts of angels," despite the fact that none of them had been arrested before.<sup>351</sup>

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344. Sarah Burns, Opinion, *Why Trump Doubled Down on the Central Park Five*, N.Y. TIMES (Oct. 17, 2016), <https://www.nytimes.com/2016/10/18/opinion/why-trump-doubled-down-on-the-central-park-five.html> (describing the interrogations). See generally Sean Piccoli & Michael Gold, *Literary Group is Chided for Honoring 'Central Park Five' Prosecutor*, N.Y. TIMES, Nov. 29, 2018, at A21.

345. Burns, *supra* note 344.

346. Scott Neuman, *'Central Park 5' Win \$40 Million from NYC for False Convictions*, NPR (June 20, 2014, 3:14 PM), <https://www.npr.org/sections/thetwo-way/2014/06/20/323996355/central-park-5-win-40-million-from-nyc-for-false-convictions>; Piccoli & Gold, *supra* note 344.

347. Sorkin, *supra* note 343.

348. *Id.*

349. *Id.*

350. Stephen Rex Brown, *Sen. Jeff Sessions Praises Donald Trump's 1989 Ad Calling for Death Penalty Against Central Park Five*, N.Y. DAILY NEWS (Aug. 18, 2016, 6:49 PM), <http://www.nydailynews.com/new-york/sen-sessions-praises-donald-trump-central-park-5-controversy-article-1.2756902>; Sorkin, *supra* note 343. The exonerees also received an additional \$3.9 million from the State of New York. Leonard Greene & Trevor Boyer, *Exonerated, but Not Free: Raymond Santana, Jr., One of the Central Park 5, Cannot Escape His Past*, N.Y. DAILY NEWS (July 20, 2018, 6:00 PM), <http://www.nydailynews.com/new-york/nyc-crime/ny-metro-santana-centralpark-20180720-story.html>.

351. Donald Trump, Opinion, *Donald Trump: Central Park Five Settlement is a 'Disgrace'*, N.Y. DAILY NEWS (June 21, 2014), <https://www.nydailynews.com/new-york/nyc-crime/donald-trump-central-park-settlement-disgrace-article-1.1838467>; see also Greene & Boyer, *supra* note 350; Sorkin, *supra* note 343. Trump was joined in his outrage by the Manhattan District Attorney's Office, which had secured the convictions and publicly stated that "the settlement was a mistake." Greene & Boyer, *supra* note 350.

Campaigning for the presidency in October 2016, Trump tripled down, invoking the defendants' discredited confessions and saying: "The fact that that case was settled with so much evidence against them is outrageous."<sup>352</sup> Trump's disavowal of the established innocence of the Central Park Five made national headlines.<sup>353</sup> Ken Burns, who made a film about the case, tweeted in response: "Apparently Mr. Trump is unfamiliar with the concept of wrongful conviction."<sup>354</sup>

Then-U.S. Senator Jeff Sessions, a Republican from the State of Alabama and one of Trump's earliest and most vocal supporters, heralded Trump's remarks as evidence that Trump was the candidate who would bring back law and order to America's streets.<sup>355</sup> Asked about Trump's infamous 1990 "bring back the death penalty" advertisements, Sessions had nothing but admiration.<sup>356</sup> He marveled: "How many people in New York, that liberal bastion, were willing to do something like that?"<sup>357</sup>

In Trump's inaugural address on January 20, 2018, he hewed to his tough-on-crime theme, decrying the lawlessness that had "stolen too many lives," and promising: "This American carnage stops right here and stops right now."<sup>358</sup> After Trump was elected, he nominated Sessions to be the Attorney General of the United States.<sup>359</sup>

Once installed in his post as the nation's top law enforcement officer, Sessions disbanded the National Commission on Forensic Science ("NCFS"), "a roughly 30-member advisory panel of scientists, judges, crime lab leaders, prosecutors and defense lawyers" established by the Obama Administration in 2013.<sup>360</sup> The NCFS's mission was to

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352. Steven A. Holmes, *Member of 'Central Park 5' Blasts Trump*, CNN (Oct. 7, 2016, 6:36 PM), <https://www.cnn.com/2016/10/06/politics/reality-check-donald-trump-central-park-5/index.html>.

353. See, e.g., Benjy Sarlin, *Donald Trump Says Central Park Five Are Guilty, Despite DNA Evidence*, NBC NEWS (Oct. 7, 2016, 6:07 PM), <https://www.nbcnews.com/politics/2016-election/donald-trump-says-central-park-five-are-guilty-despite-dna-n661941> ("Wading into a racially-charged case from his past, Donald Trump indicated that the 'Central Park Five' were guilty, despite being officially exonerated by DNA evidence decades after a notorious 1989 rape case.").

354. Holmes, *supra* note 352.

355. David Nakamura, Philip Rucker & Elise Viebeck, *3 Security Picks Signal Trump is Holding Hard Line*, WASH. POST, Nov. 19, 2016, at A1; Gregory Krieg, *Sessions: Case of Central Park 5, Later Exonerated, Shows Trump's Dedication to 'Law and Order'*, CNN, <https://www.cnn.com/2016/08/18/politics/jeff-sessions-donald-trump-central-park-five-death-penalty/index.html> (last updated Nov. 18, 2016).

356. Brown, *supra* note 350.

357. *Id.*

358. President Donald J. Trump, *The Inaugural Address* (Jan. 20, 2017).

359. Nakamura et al., *supra* note 355.

360. Spencer S. Hsu, *Sessions Moves to Shut Down Partnership on Forensic Science Standards*, WASH. POST, Apr. 11, 2017, at A9 [hereinafter Hsu, *Sessions to Shut Down*

closely examine the basis for forensic expert testimony that had proved faulty and led to wrongful convictions.<sup>361</sup> The members were tasked with issuing standards to guide lab technicians, experts, and prosecutors to reduce the number of cases where evidence was improperly analyzed, not disclosed, or described to the jury in misleading ways that overstated its significance.<sup>362</sup> Innocence movement advocates and many scientists decried Sessions's decision. Suzanne Bell, a professor of chemistry and forensic investigative science and former member of the NCFS, wrote that returning oversight of faulty forensic practices to the Department of Justice was a mistake: "We need a science agency—equally and completely free from both defense and prosecutorial pressures—to address the scientific issues in forensic science."<sup>363</sup> Peter Neufeld, the co-founder of the Innocence Project, stated that Sessions "has literally decided to suspend the search for the truth. . . . As a consequence innocent people will languish in prison or, God forbid, could be executed."<sup>364</sup> Hard-line prosecutors celebrated.<sup>365</sup> Michael Ramos, the president of the National District Attorney's Association—the same prosecutor who had fought the release of exoneree William Richards after his conviction was found to have been based on discredited

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*Partnership*].

361. See *id.*; Bridgette Dunlap, *Jeff Sessions is Keeping Junk Science in America's Courts*, ROLLING STONE (Apr. 13, 2017, 5:24 PM), <https://www.rollingstone.com/politics/politics-features/jeff-sessions-is-keeping-junk-science-in-americas-courts-194492>.

362. See Hsu, *Sessions to Shut Down Partnership*, *supra* note 360 (reporting that Sessions "would not renew" the commission for another term). NCFS was created in the wake of a number of DNA exonerations where prosecutors had relied on expert forensic testimony to secure the original conviction. For example, prosecutors had experts testify that a hair found at the crime scene, when examined under a microscope, had a high likelihood of matching a hair from the defendant when in fact there was no scientific basis for that testimony. See Spencer S. Hsu, *FBI Admits Errors at Trials*, WASH. POST, Apr. 19, 2015, at A1; see also Alan Pyke, *Sessions Relaunches Obama-Era Forensics Review Months After He Shuttered It*, THINK PROGRESS (Aug. 8, 2017, 9:04 AM), <https://thinkprogress.org/sessions-relaunches-obama-era-forensics-review-months-after-he-shuttered-it-bfca916a0afc> ("[The Department of Justice] found that FBI experts had overstated the reach of hair and fiber forensics to juries in hundreds of cases over a matter of decades, including in more than two dozen death penalty cases."). Other forensic evidence that has been called into question or discredited outright includes bite mark and ballistics evidence. Dunlap, *supra* note 361.

363. Suzanne Bell, *Jeff Sessions Doesn't Understand the Necessity of Science*, SLATE (Apr. 20, 2017, 10:00 AM), [http://www.slate.com/articles/health\\_and\\_science/science/2017/04/the\\_dangers\\_of\\_killing\\_the\\_national\\_commission\\_on\\_forensic\\_science.html](http://www.slate.com/articles/health_and_science/science/2017/04/the_dangers_of_killing_the_national_commission_on_forensic_science.html).

364. Hsu, *Sessions to Shut Down Partnership*, *supra* note 360 (internal quotation marks omitted).

365. See Erin E. Murphy, Opinion, *Sessions is Wrong to Take Science Out of Forensic Science*, N.Y. TIMES (Apr. 11, 2017), <https://www.nytimes.com/2017/04/11/opinion/sessions-is-wrong-to-take-science-out-of-forensic-science.html>.

bite-mark evidence<sup>366</sup>—trumpeted the decision as a victory for law enforcement.<sup>367</sup>

In August 2017, Sessions announced the formation of a Forensic Science Working Group (“FSWG”), which he said would continue the work of the NCFS.<sup>368</sup> But unlike the NCFS, which was led by independent scientists and held public meetings, Sessions’s new agency was “an internal Department [of Justice] working group” helmed by a prosecutor.<sup>369</sup> The FSWG has not issued any new standards to ensure the reliability of forensic testimony given by government experts in criminal cases and prevent wrongful convictions, which is the project that NCFS had embarked upon when Sessions declined to renew its charter.<sup>370</sup>

### C. Historical Lack of Consequences for Innocence Deniers

Innocence denying rarely has negative consequences.<sup>371</sup> To the contrary, many innocence deniers receive awards, accolades, and opportunities to ascend to higher posts in the criminal justice system hierarchy. A look at the biographies of the innocence-denying prosecutors featured in Part II.A proves the point.<sup>372</sup>

In 2017, Wayne County Prosecuting Attorney Kym Worthy was named to *Essence Magazine*’s “Woke 100 List” to honor her efforts to “blaz[e] trails for equal rights and inclusion for Black people in America.”<sup>373</sup> Worthy received this recognition despite her refusal to

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366. See *supra* Part II.A.3.

367. Spencer S. Hsu, *Science Organizations Renew Call for Independent U.S. Committee on Forensics*, WASH. POST (June 29, 2017), [https://www.washingtonpost.com/local/public-safety/science-organizations-renew-call-for-independent-us-committee-on-forensics/2017/06/28/3ab8cdea-5b6a-11e7-9b7d-14576dc0f39d\\_story.html?utm\\_term=.95877a484dac](https://www.washingtonpost.com/local/public-safety/science-organizations-renew-call-for-independent-us-committee-on-forensics/2017/06/28/3ab8cdea-5b6a-11e7-9b7d-14576dc0f39d_story.html?utm_term=.95877a484dac) (stating that Ramos “rejected the idea that law enforcement conflicts of interest contributed to gaps in standards and research” and “hailed the end” of the NCFS).

368. Pyke, *supra* note 362.

369. *Id.*

370. See *id.* Trump fired Sessions shortly after the midterm elections in 2018. Peter Barker, Katie Benner & Michael D. Shear, *Jeff Sessions is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES, Nov. 8, 2018, at A1. His successor, William Barr, was confirmed in February 2019. David Shortell, *William Barr Confirmed as Attorney General*, CNN (Feb. 14, 2019, 1:44 PM), <https://www.cnn.com/2019/02/14/politics/william-barr-senate-confirmation-vote/index.html>.

371. See Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2130 (2010) (“Just as the prosecutor who gambles with the non-disclosure of exculpatory evidence to maintain a high conviction rate takes little risk with regard to her caseload, she is also unlikely to pay little price personally.”).

372. See *supra* Part II.A.

373. Lauren N. Williams et al., *Essence Presents ‘Woke 100 Women’*, ESSENCE MAG. (Apr. 18, 2017), <https://www.essence.com/news/woke-100-women>.

acknowledge the innocence of Davontae Sanford and Lamarr Monson, both of whom are Black.<sup>374</sup>

San Bernardino District Attorney Michael Ramos was elected president of the National District Attorney's Association in July 2016, several months after the California Supreme Court overturned the false conviction of William Richards, which Ramos had fought for years to preserve.<sup>375</sup>

Pima County Prosecutor Barbara LaWall, who extracted a no contest plea from Louis Taylor, proudly touts her Minister of Justice Award from the Criminal Justice Section of the ABA and boasts that she has also been honored by "other organizations for consistently adhering to the principles of ethical and just prosecution . . . ."<sup>376</sup>

In the fall of 2014, Orleans Parish District Attorney Leon Cannizzaro received the Director's Award for Distinguished Service to the Law Enforcement Community.<sup>377</sup> The honor, bestowed by then-FBI Director James Comey at a ceremony in Washington, D.C., came several months after Cannizzaro appealed the overturning of Jerome Morgan's false murder conviction.<sup>378</sup>

In 2016, Passaic County District Attorney Camelia Valdes, who steadfastly denied the innocence of Eric Kelley and Ralph Lee, received the Latina Attorney of the Year Award from the Hispanic National Bar Association at its annual conference dedicated to "[e]mpowering [l]eaders."<sup>379</sup> Valdes was among a handful of honorees that the organization decided to honor for "serv[ing] as . . . role models to us all."<sup>380</sup>

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374. See *supra* Part II.A.5.

375. Jordan Smith, *California Supreme Court Overturns Murder Conviction Based on Flawed Bite-Mark Evidence*, INTERCEPT (May 27, 2016, 9:15 AM), <https://theintercept.com/2016/05/27/california-supreme-court-overturns-bill-richardss-murder-conviction-based-on-flawed-bite-mark-evidence>; Michael A. Ramos, *San Bernardino County District Attorney*, SAN BERNARDINO CTY. DIST. ATTORNEY'S OFFICE, <http://www.sbcountyda.org/AboutDARamos/AboutDistrictAttorneyMichaelRamos.aspx> (last visited Feb. 3, 2019).

376. Letter from Barbara LaWall, Pima Cty. Attorney, Pima County Attorney's Office, to Matt Redle, Chair, Criminal Justice Council of ABA (Oct. 26, 2016) (on file with author).

377. Ken Daley, *FBI Director to Honor New Orleans and Baton Rouge Anti-Gang Task Forces*, NOLA.COM (Sept. 17, 2014), [https://www.nola.com/crime/index.ssf/2014/09/new\\_orleans\\_baton\\_rouge\\_prosec.html](https://www.nola.com/crime/index.ssf/2014/09/new_orleans_baton_rouge_prosec.html).

378. See *id.*; see also Possley, *Jerome Morgan*, *supra* note 76.

379. Jerry DeMarco, *National Group Names Passaic Prosecutor Valdes 'Latina Attorney of the Year'*, NORTHERN HIGHLANDS DAILY VOICE (Aug. 5, 2016), <https://northernhighlands.dailyvoice.com/police-fire/national-group-names-passaic-prosecutor-valdes-latina-attorney-of-year/675937>; see *supra* Part II.A.6.

380. *Id.*

Before his criminal conviction and political downfall, Philadelphia District Attorney R. Seth Williams was awarded a prestigious Rodel Fellowship at the Aspen Institute, given annually to twenty-four of the country's "most promising political leaders."<sup>381</sup> Williams received the award in 2010, in the midst of his battle to prevent Anthony Wright from obtaining access to DNA testing.<sup>382</sup>

To end innocence denying, the system must stop rewarding the prosecutors who do it and properly condemn their actions. At the same time, the system must honor the prosecutors who help to exonerate the wrongfully convicted because they are fulfilling their obligation to seek justice.<sup>383</sup> As Medwed wrote: "The practical and political realities need to change if the minister-of-justice ideal is to achieve even a modest foothold in the post-conviction turf."<sup>384</sup> In recent years, there have been stirrings of reform, albeit tentative and concentrated in just a few jurisdictions. The strongest indication that the political and practical realities may be changing is the rise of the number of CIUs within prosecutor offices which are designed to re-examine cases of claimed wrongful convictions and exonerate those who have credible claims of innocence. The impact of these units is discussed in the next section.

#### IV. THE RISE OF THE COUNTER-NARRATIVE

##### *A. Conviction Integrity Units: Prosecutor as Truth-Seeking Hero*

According to a report released by the National Registry of Exonerations in 2018, a total of 269 innocent people have been released through the cooperative efforts of prosecutors assigned to CIUs or CRUs.<sup>385</sup> These integrity units, set up at the discretion of the county's chief prosecutor, are supposed to take an objective look at old cases where there is credible evidence of a possible wrongful conviction.<sup>386</sup>

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381. Miriam Hill, *Seth Williams Selected for Fellowship*, PHILA. INQUIRER (Dec. 17, 2010, 2:47 PM), [https://web.archive.org/web/20101222001949/http://www.philly.com/philly/blogs/heard\\_inthecourtroom/williams.html](https://web.archive.org/web/20101222001949/http://www.philly.com/philly/blogs/heard_inthecourtroom/williams.html); see also *Aspen Institute-Rodel Fellowship Class of 2010*, ASPEN INST., <https://www.aspeninstitute.org/programs/rodel-fellowships-public-leadership/aspen-institute-rodel-fellowship-class-2010> (last visited Feb. 3, 2019).

382. Hill, *supra* note 381; see also *Aspen Institute-Rodel Fellowship Class of 2010*, *supra* note 381; *supra* Part II.A.1.

383. See Simon, *supra* note 341, at 258 (explaining that prosecutors who adhere to the traditional "tough on crime" model are finding themselves "increasingly out of alignment" with new generations of voters and "may find themselves facing suddenly competitive races").

384. MEDWED, *supra* note 3, at 132.

385. *Exonerations in 2017*, *supra* note 28, at 12.

386. *Id.* at 11-12 & n.3; see also JOHN HOLLWAY, CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE 10 (2016) [hereinafter HOLLWAY, QUATTRONE REPORT].

Texas has been a role model when it comes to CIUs. The first one, established by former Dallas District Attorney Craig Watkins in 2007, had a hand in more than two dozen exonerations.<sup>387</sup> To ensure that the unit was truly independent, Watkins, an African-American Democrat who campaigned on a platform of criminal justice reform, hired a well-respected criminal defense attorney, Mike Ware, to run it.<sup>388</sup>

In 2014, the CIU in Harris County, Texas, overseen by white female Republican District Attorney Devon Anderson,<sup>389</sup> uncovered scores of old cases in which defendants had pleaded guilty to crimes that did not occur.<sup>390</sup> In many cases, the county had obtained a narcotics conviction based on field tests performed by police officers, a method so unreliable as to “routinely misidentify everything from Jolly Ranchers to soap to cat litter as illegal drugs,” according to the National Registry of Exoneration’s report.<sup>391</sup> When results from the crime laboratory—which trickled in long after the cases had concluded—proved the items seized from these defendants were innocuous, the CIU took the legal steps necessary to undo the convictions.<sup>392</sup> At last count, the total number of such crimes had risen to 133.<sup>393</sup> In 2016, Anderson was unseated by Kim Ogg, a white Democrat who has made her commitment to the CIU clear.<sup>394</sup> Speaking at a criminal justice forum in February 2018, Ogg said

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387. HOLLWAY, QUATTRONE REPORT, *supra* note 386, at 14; Jennifer S. Forsyth & Leslie Eaton, *The Exonerator*, WALL ST. J., <https://www.wsj.com/articles/SB122669736692929339> (last updated Nov. 15, 2008); *see also Exonerations in 2017*, *supra* note 28, at 12. *But see* Elizabeth Barber, *Dallas Targets Wrongful Convictions, and Revolution Starts to Spread*, CHRISTIAN SCI. MONITOR (May 25, 2014), <https://www.csmonitor.com/USA/Justice/2014/0525/Dallas-targets-wrongful-convictions-and-revolution-starts-to-spread> (stating that Watkins started the CIU in 2006).

388. HOLLWAY, QUATTRONE REPORT, *supra* note 386, at 14; Forsyth & Eaton, *supra* note 387.

389. Josie Duffy Rice, *Do Conviction Integrity Units Work?*, APPEAL (Mar. 22, 2018), <https://theappeal.org/do-conviction-integrity-units-work-a718bbc75bc7/>; *see also* Devon Anderson, BALLOTPEdia, [https://ballotpedia.org/Devon\\_Anderson](https://ballotpedia.org/Devon_Anderson) (last visited Feb. 3, 2019).

390. *See* Radley Balko, Opinion, *Faulty Drug Field Tests Bring False Confessions, Bad Convictions*, WASH. POST (Feb. 11, 2016), [https://www.washingtonpost.com/news/the-watch/wp/2016/02/11/faulty-drug-field-tests-bring-false-confessions-bad-convictions/?noredirect=on&utm\\_term=.5121360957a3](https://www.washingtonpost.com/news/the-watch/wp/2016/02/11/faulty-drug-field-tests-bring-false-confessions-bad-convictions/?noredirect=on&utm_term=.5121360957a3).

391. *Exonerations in 2016*, *supra* note 11, at 9 (reporting that, “[i]n 94 of all 140 drug crime exonerations in Harris County,” the initial arrests were based on “‘field tests’ that indicated the presence of controlled substances”).

392. *Id.* at 8-9.

393. *Exonerations in 2017*, *supra* note 28, at 5 (listing the total number of drug possession exonerations, from 2015 to 2017, that were the results of faulty lab tests).

394. *See* Meagan Flynn, *In Hotly Contested District Attorney’s Race, Ogg Defeats Anderson*, HOUS. PRESS (Nov. 8, 2016, 10:41 PM), <https://www.houstonpress.com/content/printView/8932062>; Rice, *supra* note 389; *see also Prosecutors and Wrongful Convictions: ‘Pay Now or Pay Later’*, CRIME REP. (Feb. 20, 2018), <https://thecrimereport.org/2018/02/20/prosecutors-and-wrongful-convictions-pay-now-or-pay-later> [hereinafter *Prosecutors and Wrongful Convictions*].

“we’re responsible for cases forever, and to ensure the integrity of convictions forever.”<sup>395</sup> In 2017, Ogg’s CIU exonerated ten people.<sup>396</sup>

Perhaps the best-known CRU was run by Kenneth Thompson, the first African-American district attorney of Brooklyn, New York.<sup>397</sup> Thompson, a Democrat who took office in 2013, served only three years before dying of cancer in October 2016.<sup>398</sup> But in that short time, he built a remarkable record.<sup>399</sup> Thompson told his top deputy, Eric Gonzalez, to reach out to Ronald Sullivan, Jr., a Harvard Law School professor and former public defender, to design a unit staffed by prosecutors who would independently investigate credible claims of innocence, publicly admit to mistakes and misconduct, and adopt practices designed to avoid wrongful convictions in the future.<sup>400</sup> In its first year, the unit freed ten people.<sup>401</sup> At the time of Thompson’s death, the total stood at twenty-three.<sup>402</sup> After Thompson’s death, Gonzalez then ran for Thompson’s seat in 2017 and won, with an endorsement from the *New York Times* which noted that he “took the lead” in making the CRU a success.<sup>403</sup> Within weeks of taking office, Gonzalez agreed to the exoneration of Innocence Project client Mark Denny, who served nearly thirty years in prison after he was falsely convicted of rape and robbery.<sup>404</sup>

Sharen Wilson, the top prosecutor for Tarrant County, Texas, hired Dawn Boswell, a lawyer with extensive criminal defense experience, to

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395. *Prosecutors and Wrongful Convictions*, *supra* note 394 (internal quotation marks omitted).

396. *Exonerations in 2017*, *supra* note 28, at 5.

397. Alan Feuer, *Brooklyn Prosecutor Dies After Disclosing Cancer*, N.Y. TIMES, Oct. 10, 2016, at A1, <https://www.nytimes.com/2016/10/10/nyregion/ken-thompson-brooklyns-first-black-district-attorney-dies-at-50.html>.

398. *Id.*

399. See Jon Schuppe, *Brooklyn District Attorney Ken Thompson’s Death Leaves Exoneration Movement Mourning*, NBC NEWS (Oct. 11, 2016, 7:23 AM), <https://www.nbcnews.com/news/us-news/brooklyn-district-attorney-ken-thompson-s-death-leaves-exoneration-movement-n663966>.

400. Ronald S. Sullivan, Jr., *Opinion, How Brooklyn’s Conviction Review Unit Became a National Model*, KINGS COUNTY POL. (Aug. 25, 2017), <https://www.kingscountypolitics.com/op-ed-brooklyns-conviction-review-unit-became-national-model> (noting that the findings of the CRU are reviewed by an Independent Review Panel, consisting of “three attorneys who are unaffiliated with the office”).

401. Schuppe, *supra* note 399.

402. Sullivan, *supra* note 400.

403. Editorial, *Eric Gonzalez for Brooklyn District Attorney*, N.Y. TIMES (Sept. 4, 2017), <https://www.nytimes.com/interactive/2017/09/04/opinion/editorials/Eric-Gonzalez-for-Brooklyn-District-Attorney.html>; see also *Brooklyn Man Exonerated After Nearly Three Decades in Prison; Declared “Actually Innocent” by Brooklyn D.A. Conviction Review Unit*, INNOCENCE PROJECT (Dec. 20, 2017), <https://www.innocenceproject.org/brooklyn-man-exonerated-after-nearly-three-decades-in-prison-declared-actually-innocent-by-district-attorney-offices-conviction-review-unit> [hereinafter *Brooklyn Man Exonerated*].

404. *Brooklyn Man Exonerated*, *supra* note 403.

run her new CIU.<sup>405</sup> Wilson, a white Republican, took office in January 2015.<sup>406</sup> In 2016, the Tarrant County CIU cooperated with the Innocence Project in reinvestigating the case of John Earl Nolley.<sup>407</sup> That reinvestigation turned up a bloody palm print that did not match Nolley's, as well as evidence that prosecutors had failed to turn over information that cast doubt on the credibility of witnesses, including a jailhouse informant.<sup>408</sup> After Wilson's office agreed that the conviction was tainted, a state court judge overturned the conviction, and Nolley was released on bond in May 2016.<sup>409</sup> In 2018, the Texas Court of Criminal Appeals upheld the findings of the trial judge.<sup>410</sup> Wilson told the media: "The Nolley case is a clear example of how, by addressing individual cases, CIUs can institute real reform and best practices for future cases."<sup>411</sup>

There are now thirty-three CIUs in prosecutor offices across the U.S.<sup>412</sup> The effectiveness of the individual units, however, varies significantly.<sup>413</sup> Eighty-four percent of CIU-related exonerations came from just four offices: Harris County, Dallas County, Kings County (Brooklyn), and Cook County (Chicago) in Illinois.<sup>414</sup> Those jurisdictions use best practices: the units report directly to the top echelon of the office, are kept separate from the appellate and habeas units, employ former defense attorneys, and cooperate with opposing counsel to conduct a thorough and fair-minded reinvestigation.<sup>415</sup>

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405. Dawn Boswell, *Tarrant DA Examines Claims of Innocence, Wrongful Convictions*, STAR-TELEGRAM (Mar. 18, 2016, 6:19 PM), <https://www.star-telegram.com/opinion/opn-columns-blogs/other-voices/article66982412.html>; Dawn Boswell, INNOCENCE NETWORK, <https://innocencenetwork2016.topi.com/speaker/dawn-boswell-fqslm> (last visited Feb. 3, 2019).

406. Sharen Wilson, BALLOTPEDIA, [https://ballotpedia.org/Sharen\\_Wilson](https://ballotpedia.org/Sharen_Wilson) (last visited Feb. 3, 2019).

407. Mitch Mitchell, *Bedford Man Feels 'Blessed' After Being Freed from Prison*, STAR-TELEGRAM (May 17, 2016, 10:44 AM), <https://www.star-telegram.com/news/local/community/fort-worth/article78065517.html>.

408. *With Consent of the Tarrant County District Attorney, Texas Court Frees Man Who Served 19 Years of a Life Sentence for Murder*, INNOCENCE PROJECT (May 17, 2016), <https://www.innocenceproject.org/texas-court-frees-man-served-19-years-life-sentence-murder>; see also Mitchell, *supra* note 407.

409. Mitchell, *supra* note 407.

410. Mitch Mitchell, *Fort Worth Man Spent 19 Years in Prison. Now a Court Has Overturned His Conviction*, STAR-TELEGRAM (May 9, 2018, 10:19 PM), <https://www.star-telegram.com/news/local/community/fort-worth/article210805229.html>.

411. *Id.* (internal quotation marks omitted).

412. *Exonerations in 2017*, *supra* note 28, at 11.

413. *Conviction Integrity Units Grow; Few Exonerations*, CRIME REP. (Mar. 23, 2018), <https://thecrimereport.org/2018/03/23/conviction-integrity-units-grow-few-exonerations> (noting that twelve conviction review offices "have never exonerated a single person").

414. *Exonerations in 2017*, *supra* note 28, at 12.

415. See HOLLWAY, QUATTRONE REPORT, *supra* note 386, at 23-26; Barry Scheck,

In some cases, the low number of exonerations is not surprising. For example, in Tarrant County, the unit is new to the work and is located within a smaller office.<sup>416</sup> But many CRUs have been dismissed as “mere window dressing,” or what the scholar John Hollway calls “‘Conviction Review Units in Name Only,’ or ‘CRINOs.’”<sup>417</sup> Under Seth Williams, the Philadelphia District Attorney’s Office’s CRU was a CRINO. It opened to much fanfare in 2014,<sup>418</sup> but attempts by innocence advocates to have the CRU take a hard look at their clients’ cases were ignored.<sup>419</sup> More than two years after the CRU opened, it had not exonerated a single person, causing the *Philadelphia Inquirer* to run a searing exposé with the headline: “Justice on Hold: To Philly DA’s Conviction Review Unit, No One is Innocent.”<sup>420</sup>

As discussed in the next section, the exposure of innocence denying and appointment of new leadership at the top has led to the overhaul of Philadelphia’s CRU.<sup>421</sup> Meanwhile the number of such units nationwide continues to increase, with three new units opening in 2017.<sup>422</sup> The growing support for CIUs suggests an evolving perception and shifting narrative of what it means to be a good prosecutor. Effective CIUs receive favorable coverage in the media, giving the heads of these offices valuable political capital and a record on which to run for reelection.<sup>423</sup> Prosecutors who reflexively oppose reexamining false convictions, by contrast, may see themselves challenged by ambitious reform-minded candidates with “high-profile cases of error . . . held up as proof of a DA’s lack of competence (if not lack of morals).”<sup>424</sup>

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*Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2250-51, 2253 (2010).

416. See *Criminal Division*, TARRANT CTY., TEX., <http://access.tarrantcounty.com/en/criminal-district-attorney/criminal-division.html?linklocation=Divisions&linkname=Criminal%20Division> (last visited Feb. 3, 2019) (stating that the Criminal Division of the Tarrant County District Attorney’s Office has 135 attorneys on staff); Mitchell, *supra* note 410 (reporting that the Tarrant County CIU opened in 2015); see also *Exonerations in 2016*, *supra* note 11, at 13 (“Three CIUs began their operations in 2016 and need time to get underway.”).

417. HOLLWAY, QUATTRONE REPORT, *supra* note 386, at 5 (“A skepticism prevails that some CRUs are units conducting ‘Conviction Review In Name Only,’ or ‘CRINOs.’ This skepticism is fueled by CRUs that lack the independence, flexibility, and transparency that is described herein.”).

418. Chris Palmer, *Justice on Hold: To Philly DA’s Conviction Review Unit, No One is Innocent*, PHILA. INQUIRER, [http://www.philly.com/philly/news/20161120\\_To\\_Philly\\_s\\_Conviction\\_Review\\_Unit\\_no\\_one\\_is\\_innocent.html?arc404=true](http://www.philly.com/philly/news/20161120_To_Philly_s_Conviction_Review_Unit_no_one_is_innocent.html?arc404=true) (last updated Nov. 18, 2016).

419. *Id.*

420. *Id.*

421. See *infra* text accompanying notes 430-35 (describing Larry Krasner’s revitalization of the Philadelphia CRU).

422. *Exonerations in 2017*, *supra* note 28, at 11.

423. HOLLWAY, QUATTRONE REPORT, *supra* note 386, at 14.

424. *Id.*

There is a striking diversity among prosecutors who have transparent, effective CRUs. They are Republicans and Democrats, men and women, Caucasian, Latino, and African-American, and they hail from different parts of the country. This diversity signals that CRUs have appeal across race, gender, party, and geographical lines.<sup>425</sup> Tying the practice of vindicating innocence to a “good prosecutor” narrative challenges the truism that conceding error is weakness. As ethical obligations continue to pay political dividends, more prosecutors may embrace their minister of justice role. Conversely, the more innocence-denying prosecutors are exposed and depicted as “bad prosecutors,” the more likely it is that the electorate will view them as craven and undeserving of the power that was entrusted to them.

### B. The Comeuppance Narrative

#### 1. Seth Williams Replaced by Larry Krasner

Seth Williams, the Philadelphia District Attorney who re-prosecuted Anthony Wright after DNA evidence pointed definitively to another man, was forced to withdraw his bid for reelection in February 2017 after becoming mired in a series of scandals.<sup>426</sup> One of the

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425. Other successful CRUs exist in Cook County, Illinois (thirty-three exonerations since 2012); Lake County, Illinois (three exonerations since 2013); Ventura County, California (three exonerations since 2013); and Cuyahoga County, Ohio (two exonerations since 2014). *Exonerations in 2017*, *supra* note 28, at app. tbl. A. Kim Foxx, the Cook County State’s Attorney, is a Black woman and a Democrat. Hal Dardick & Matthew Walberg, *Kim Foxx Declares Win in Cook County State’s Attorney’s Race*, CHI. TRIB. (Nov. 8, 2016, 10:51 PM), <https://www.chicagotribune.com/news/local/politics/ct-cook-county-states-attorney-kim-foxx-election-met-1109-20161108-story.html>. Michael Nerheim, the Lake County State’s Attorney, is a white male Republican. Bob Susnjara, *Nerheim Wins Lake County State’s Attorney Race*, DAILY HERALD, <https://www.dailyherald.com/article/20161108/news/161108877> (last updated Nov. 9, 2016). Gregory Totten, the District Attorney for Ventura County, is a white male Republican. Tracy Wilson, *Party Politics Enters Race for D.A.*, L.A. TIMES (Jan. 29, 2002), <http://articles.latimes.com/2002/jan/29/local/me-forum29>; *see also Gregory D. Totten*, VENTURA CTY. DIST. ATT’Y, <https://www.vcdistrictattorney.com/mission/team> (last visited Feb. 3, 2019). Michael O’Malley, the District Attorney for Cuyahoga County, is a white male Democrat who defeated the incumbent, a white male Republican, in 2017. *See Michael O’Malley, Candidate for Cuyahoga County Prosecutor, March 2016 Primary Election*, NEWS-HERALD (Mar. 2, 2016), [https://www.news-herald.com/news/ohio/michael-o-malley-candidate-for-cuyahoga-county-prosecutor-march-primary/article\\_a5ddd84e-4d49-5204-bef7-b07bfc2eaed8.html](https://www.news-herald.com/news/ohio/michael-o-malley-candidate-for-cuyahoga-county-prosecutor-march-primary/article_a5ddd84e-4d49-5204-bef7-b07bfc2eaed8.html); *O’Malley Beats Out McGinty for Cuyahoga County Prosecutor*, CLEVELAND 19 NEWS (Mar. 16, 2016, 8:29 AM), <http://www.cleveland19.com/story/31481496/omalley-beats-out-mcginty-for-cuyahoga-county-prosecutor>.

426. Holly Otterbein, *Does D.A. Williams’ Withdrawal Mean Philly Democrats are Finally Learning?*, PHILA. MAG. (Feb. 10, 2017, 1:06 PM), <https://www.phillymag.com/news/2017/02/10/seth-williams-district-attorney-race>. Less than two months later, the United States Attorney’s Office for the Eastern District of Pennsylvania brought a twenty-three-count indictment against Williams on charges that included bribery, extortion, and

candidates running to replace Williams was Larry Krasner, a former federal public defender and career civil rights attorney who had never prosecuted a criminal case and firmly opposed the death penalty.<sup>427</sup> When announcing his candidacy, Krasner promised to “decarcerate,” saying: “We have to get people out of jail. . . . I have heard more times than I care to count jokes [by prosecutors] around the notion that someone is actually innocent.”<sup>428</sup> The system, he said, was set up to abuse both defendants and victims, who were too often “manipulated to press for the prosecutors’ goals rather than theirs, and very often they have not been made whole.”<sup>429</sup>

Krasner won the Democratic primary and easily defeated his Republican opponent in November 2017.<sup>430</sup> In February 2018, Krasner appointed Patricia Cummings to head the CRU.<sup>431</sup> Cummings, the former head of the CRU in Dallas County, was “perhaps best known for her successful effort to free Michael Morton” in the infamous Texas innocence-denying case that led to the disbarment and jailing of Morton’s prosecutor, Ken Anderson.<sup>432</sup> On May 15, 2018, under Cummings’s leadership, the Philadelphia District Attorney’s Office filed

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fraud. Steve Almasy, *Philadelphia DA Indicted on Bribery, Fraud Charges*, CNN, <https://www.cnn.com/2017/03/21/us/philadelphia-da-corruption-charges/index.html> (last updated Mar. 22, 2017). Williams subsequently pleaded guilty to one of the counts and was sentenced to five years in prison. *Ex-Philadelphia District Attorney Seth Williams Sentenced to 5 Years in Prison*, ABC ACTION NEWS (Oct. 25, 2017), <https://6abc.com/fmr-da-seth-williams-sentenced-to-5-years-in-prison/2561107>; Jeremy Roebuck, *Irate Judge Gives Ex-Philly DA Seth Williams 5-Year Sentence in Bribery, Corruption Case*, PHILA. INQUIRER (Oct. 30, 2017, 8:59 AM), <https://www.christiansinpublicservice.org/blog/ltcentergtirate-judge-gives-ex-philly-da-seth-williams-5-year-sentence-in-bribery-corruption-caselt/centergt>.

427. Alice Speri, *Meet Philadelphia’s Progressive Candidate for DA: An Interview with Larry Krasner*, INTERCEPT (May 16, 2017, 4:22 PM), <https://theintercept.com/2017/05/16/meet-philadelphias-progressive-candidate-for-da-an-interview-with-larry-krasner>; *How Prosecutors Can Help End Mass Incarceration, with Larry Krasner: Podcast & Transcript*, NBC NEWS (July 10, 2018, 6:06 AM), <https://www.nbcnews.com/think/opinion/how-prosecutors-can-help-end-mass-incarceration-larry-krasner-podcast-nca890126>.

428. Dave Davies, Opinion, *Krasner Jumps into Philly DA Race*, WHY? (Feb. 8, 2017), <https://why.org/articles/krasner-jumps-into-philly-da-race> (internal quotation marks omitted).

429. *Id.* (internal quotation marks omitted).

430. John Kopp, *Progressive Larry Krasner Easily Wins Philly’s District Attorney Race*, PHILLY VOICE (Nov. 7, 2017), <https://www.phillyvoice.com/krasnergrossman-story> (reporting that Krasner stated “this movement is not going away” in his victory speech).

431. Christopher Moraff, *New Philadelphia DA Larry Krasner Hits Reset on the Office’s Troubled Conviction Review Unit*, MEDIUM (Feb. 15, 2018), <https://medium.com/in-justice-today/new-philadelphia-da-larry-krasner-hits-reset-on-the-offices-troubled-conviction-review-unit-acc2c14412b4>.

432. *Id.*; Brad Stutzman, *Anderson Gives Up Law License, Gets 10 Days in Jail*, STATESMAN (Nov. 14, 2013, 12:01 AM), <https://www.statesman.com/news/20131114/anderson-gives-up-law-license-gets-10-days-in-jail>; see also *Michael Morton*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/michael-morton> (last visited Feb. 3, 2019).

a motion conceding error in the case of Dontia Patterson.<sup>433</sup> Patterson, whose murder conviction had been vacated in March, was exonerated on May 16, 2018.<sup>434</sup> Krasner's office conceded "egregious" prosecutorial misconduct and characterized Patterson as "probably innocent," railroaded by a case "lacking in integrity."<sup>435</sup>

## 2. Michael Ramos Replaced by Jason Anderson

Michael Ramos, the San Bernardino County prosecutor who filed charges against William Richards, ran for his fifth term in 2018.<sup>436</sup> His opponent, Jason Anderson, was a former prosecutor turned criminal defense attorney.<sup>437</sup> Although Ramos locked up the endorsements of most major law enforcement organizations,<sup>438</sup> the race was "hotly contested."<sup>439</sup> In addition to the negative publicity that Ramos received in the Richards case, he came under fire for what Anderson called his "wrongful political prosecution" of three former public officials and a fourth man for public corruption.<sup>440</sup> All four men insisted that they were innocent.<sup>441</sup> Three of the defendants were acquitted, and prosecutors dismissed charges against the fourth after the jury was unable to reach a verdict, citing "unresolvable witness issues."<sup>442</sup> In a post-trial interview,

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433. Christine Hauser, *Philadelphia Man Freed After Serving 11 Years for Murder He Did Not Commit*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/us/dontia-patterson-philadelphia.html>.

434. *Id.*

435. *Id.* (internal quotation marks omitted).

436. Joe Nelson, *San Bernardino County DA Seeks Fifth Term in Office; His Opponents Vow "Much Needed" Change*, SAN BERNARDINO SUN (Feb. 24, 2018, 8:00 AM), <https://www.sbsun.com/2018/02/24/san-bernardino-county-da-seeks-fifth-term-in-office-his-opponents-vow-much-needed-change> [hereinafter Nelson, *DA Seeks Fifth Term*]; *supra* Part II.A.3.

437. Joe Nelson, *Colonies Corruption Case Cast Shadow, Big Money in San Bernardino County DA Race*, SAN BERNARDINO SUN (May 15, 2018, 5:37 PM), <https://www.sbsun.com/2018/05/15/big-money-backing-san-bernardino-county-district-attorneys-opponent-in-heated-campaign-race> [hereinafter Nelson, *Big Money in DA Race*].

438. Nelson, *DA Seeks Fifth Term*, *supra* note 436.

439. Shea Johnson, *Anderson Upends Ramos' Fifth Term Bid for District Attorney*, DAILY PRESS (June 5, 2018, 8:19 PM), <http://www.vvdaily.com/news/20180605/anderson-upends-ramos-fifth-term-bid-for-district-attorney>.

440. Nelson, *Big Money in DA Race*, *supra* note 437.

441. Joe Nelson, *Those Accused — and Acquitted — in Colonies Corruption Must Now Pick Up the Pieces*, SAN BERNARDINO SUN (Sept. 30, 2017, 11:51 AM), <https://www.sbsun.com/2017/09/30/colonies-trial-fiasco-leaves-formerly-accused-picking-up-pieces-in-aftermath> [hereinafter Nelson, *Those Acquitted in Corruption Case*].

442. Joe Nelson, *Rancho Cucamonga Developer Files \$50 Million Federal Lawsuit Against San Bernardino County, State Prosecutors*, SAN BERNARDINO SUN (Apr. 3, 2018, 2:29 PM), <https://www.sbsun.com/2018/04/03/rancho-cucamonga-developer-files-50-million-federal-lawsuit-against-san-bernardino-county-state-prosecutors> (quoting one defendant's attorney as saying: "You don't get to destroy a part of someone's life by manipulating evidence and eliciting false testimony as both the DA and Attorney General did in this case and then just walk away." (internal quotation

one juror stated that the defendants were “railroaded” and that “[c]oming up with that not guilty verdict was one of the proudest things I’ve ever done.”<sup>443</sup>

While the *San Bernardino Sun*, the county’s largest newspaper, endorsed Ramos, it printed a rebuttal to the endorsement to run on June 2, 2018, three days before the election.<sup>444</sup> The opinion writer—me—wrote:

Ramos is not a minister of justice. His cultivation of a tough-on-crime persona has led to a win-at-all-costs mentality. . . . Ramos is incapable of admitting, in the face of overwhelming evidence, that some of [his] . . . suspects are actually innocent, and some of his cases are misguided vendettas.<sup>445</sup>

Ramos waged a hard-fought battle, characterizing himself “as a tough-on-crime prosecutor, touting conviction numbers . . . .”<sup>446</sup> But in the end, the voters in a conservative county were unpersuaded: Anderson won with nearly fifty-three percent of the vote.<sup>447</sup> Anderson promised the voters that “he will make sure the facts in any case can prove guilt beyond a reasonable doubt before his office files criminal charges.”<sup>448</sup>

### 3. Kym Worthy’s Reckoning

Kym Worthy’s serial innocence denying resulted in a slew of negative press coverage.<sup>449</sup> In July 2017, Worthy announced that the

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marks omitted)); *see also Colonies “Corruption” Case Unravels*, INLAND EMPIRE BUS. DAILY (Mar. 18, 2017), <http://iebusinessdaily.com/colonies-corruption-case-unravels> (detailing the perjury of a key witness).

443. Nelson, *Those Acquitted in Corruption Case*, *supra* note 441 (internal quotation marks omitted).

444. Lara Bazelon, *District Attorney Michael Ramos Is a Roadblock to Justice*, SAN BERNARDINO SUN (June 1, 2018, 6:00 PM), <https://www.sbsun.com/2018/06/01/district-attorney-michael-ramos-is-a-roadblock-to-justice>.

445. *Id.*

446. Johnson, *supra* note 439.

447. *Id.*

448. Nelson, *Big Money in DA Race*, *supra* note 437.

449. *See, e.g., Tresa Baldas, Battler for the Wrongly Convicted Will Join Wayne County Prosecutor’s Office*, DETROIT FREE PRESS (Nov. 13, 2017, 7:21 PM), <https://www.freep.com/story/news/local/michigan/wayne/2017/11/13/wrongly-convicted-prosecutors-office-integrity-unit/859893001> (reporting that the Wayne County CIU was created in the wake of “some recent high-profile cases that garnered negative publicity for Detroit police and local prosecutors”); Gus Burns, *Wayne County Prosecutor Kym Worthy Criticized by National Audience After Highers Brothers Dateline NBC Special*, DETROIT NEWS (Apr. 16, 2014), [https://www.mlive.com/news/detroit/index.ssf/2014/04/wayne\\_county\\_prosecutor\\_kym\\_wo\\_17.htm](https://www.mlive.com/news/detroit/index.ssf/2014/04/wayne_county_prosecutor_kym_wo_17.htm) (reporting reaction from viewers to Worthy’s comments that the exonerated brothers were guilty as “[s]ickening” and “a shame”); Allan Lengel, *Lengel: Slate Magazine Slams Prosecutor Kym Worthy as an ‘Innocence Denier’*, DEADLINE DETROIT (Jan. 10, 2018, 3:10 PM), [http://www.deadlinedetroit.com/articles/19084/lengel\\_slate\\_magazine\\_slams\\_prosecutor\\_kym\\_wort](http://www.deadlinedetroit.com/articles/19084/lengel_slate_magazine_slams_prosecutor_kym_wort)

Wayne County Prosecutor's Office would be re-opening its moribund CRU, which had been disbanded in 2013 due to lack of funding.<sup>450</sup> In November 2017, Worthy hired as the head of the unit Valerie Newman, an appellate attorney who came from the State Appellate Defender Office and had previously represented Davontae Sanford.<sup>451</sup> Worthy also hired three other lawyers and two investigators.<sup>452</sup>

Since Worthy's CIU formally opened in January 2018,<sup>453</sup> it has agreed to vacate three wrongful convictions. On March 28, 2018, Worthy issued a press release stating that she was dismissing the murder charges against Richard Phillips, who spent more than forty years in prison for a murder he did not commit "based primarily on the false testimony of the main witness in the case."<sup>454</sup> Phillips had been free on bond, pending retrial since December 2017, when a judge threw out his conviction.<sup>455</sup> In acknowledging Phillips's innocence, Worthy stated that her office had conducted a thorough reinvestigation and determined that "[t]he system failed him."<sup>456</sup> On August 15, 2018, Worthy's CIU exonerated Aaron Salter, who was convicted of murder in 2003, stating that the case was "based primarily on mistaken identification by the main witness" and that Worthy would not oppose his request for compensation.<sup>457</sup> The same day, the CIU agreed to vacate the double-murder conviction of Ahmed Mubarez who spent fifteen years in prison because "newly discovered evidence . . . warrants relief."<sup>458</sup>

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hy\_as\_an\_innocence\_denier (discussing Davontae Sanford and reporting that the decision to have a CIU "might help Worthy get off the innocence deniers list"); Jessica Pishko, *Kym Worthy Refuses to Admit Fault, Again*, APPEAL (Aug. 29, 2017), <https://theappeal.org/kym-worthy-refuses-to-admit-fault-again-118f9a2133b0> (describing Worthy's defense of how her office handled the Sanford and Monson cases as "wishy-washy behavior").

450. Ed White, *Kym Worthy Adding Staff to Review Convictions*, DETROIT NEWS (July 14, 2017, 12:09 PM), <https://www.detroitnews.com/story/news/local/wayne-county/2017/07/14/kym-worthy-conviction-review/103691136>.

451. Oralandar Brand-Williams, *Worthy Names Head of New Conviction Integrity Unit*, DETROIT NEWS (Nov. 13, 2017, 11:45 AM), <https://www.detroitnews.com/story/news/local/wayne-county/2017/11/13/wayne-county-prosecutor-conviction-integrity-unit/107650874>.

452. White, *supra* note 450.

453. Press Release, Wayne Cty. Prosecutor's Office, Prosecutor Kym Worthy Dismisses Homicide Charges Against Richard Phillips (Mar. 28, 2018), <https://www.waynecounty.com/elected/prosecutor/press-release-march-28-2018-pros-worthy-dismisses.aspx>.

454. *Id.*

455. *Id.*

456. *Id.*

457. George Hunter & James David Dickson, *Wrongly Convicted Man Released After Nearly 15 Years in Prison*, DETROIT NEWS (Aug. 15, 2018, 12:42 PM), <https://www.detroitnews.com/story/news/local/wayne-county/2018/08/15/wrongly-convicted-man-released-aaron-salter/997669002>.

458. Stipulated Order Vacating Convictions and Sentences and Remanding Custody of

It is arguable, given Worthy's innocence-denying history, that her new commitment to righting wrongful convictions is founded more on pragmatism than principle, but what cannot be disputed are her results. Few CRUs have been so productive in their first year of existence. The contrast between Worthy's innocence-denying conduct in the Sanford and Monson cases and her public acceptance of the wrongful convictions of Phillips, Salter, and Mubarez is dramatic.<sup>459</sup> Whether Worthy's apparent conversion is temporary or permanent remains to be seen and may depend, in part, on whether it redounds to her political benefit through positive media coverage that helps to correct the negative image some voters may hold.

## V. CEMENTING THE COUNTER-NARRATIVE AS THE REAL STORY OF THE GOOD PROSECUTOR

### A. *The Power of True Crime Stories to Captivate and Educate the Public*

While true crime stories have been an entertainment and educative force since the late 1990s,<sup>460</sup> in recent years the genre has exploded in popularity by using a dizzying array of creative formats that are widely shared on social media.<sup>461</sup> The unparalleled ability of writers, filmmakers, talk show stars, and podcast hosts to narrate gripping, in-depth accounts of wrongful convictions has been a powerful force in educating the public about abuses of prosecutorial power.<sup>462</sup> As Bruce Green and Ellen Yaroshefsky have written, the discussion about

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Defendant to the Wayne County Sheriff's Department at 1, *People v. Mubarez*, No. 01-3529, (Mich. Ct. App. Aug. 15, 2018).

459. Compare *supra* Part II.A.5 (discussing the Sanford and Monson cases), with *supra* text accompanying notes 454-58 (discussing the Phillips, Salter, and Mubarez exonerations).

460. See Rob Warden, *The Revolutionary Role of Journalism in Identifying and Rectifying Wrongful Convictions*, 70 *UMKC L. REV.* 803, 804 (2002) (noting that, "The Thin Blue Line," a 1988 documentary by Errol Morris, "played a significant role in popularizing the wrongful-conviction genre both on television and in print.>").

461. See Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 *NOTRE DAME L. REV.* 51, 103-07 (2016) ("The Catalytic Role of Information Technology"); Kathryn Schulz, *Dead Certainty: How "Making a Murderer" Goes Wrong*, *NEW YORKER* (Jan. 25, 2016), <https://www.newyorker.com/magazine/2016/01/25/dead-certainty> (noting that the "canon has grown considerably" and listing *Serial*, a podcast, and documentary series *The Jinx* and *The Staircase* as examples).

462. See Green & Yaroshefsky, *supra* note 461, at 104-07 (writing that this kind of media has the power to "build on judicial writings and influence future public and judicial opinion"); Susan Simpson, *The Unlikely Role of True Crime Podcasts in Criminal Justice Reform*, *QUARTZ* (Oct. 14, 2017), <https://qz.com/1101889/the-unlikely-role-of-true-crime-podcasts-in-criminal-justice-reform> (stating that the ability of true crime podcasts to actively engage the audience "can result not only in real changes for the individual cases that are covered, but also fosters awareness and support for broader transformations in criminal justice legislation and policy").

prosecutorial ethics and conduct is no longer confined to a legal and academic elite: “Citizen journalism has allowed interested individuals to employ press tools to inform one another. . . . As a result, there is more discourse and there are more participants in the conversation.”<sup>463</sup>

Some of these wrongful conviction stories feature a prosecutor who has denied a defendant’s innocence or engaged in other actions that seemed designed to thwart the search for the truth.<sup>464</sup> As the miscarriage of justice becomes manifest in the unfolding story, the public sympathizes with the wrongfully convicted protagonist and feels outrage and indignation at the unfair treatment to which he or she was subjected.<sup>465</sup> Although most prosecutorial misconduct goes unpunished,<sup>466</sup> that is not true for a smattering of high-profile cases in which public condemnation and a demand for accountability can quickly follow upon the disclosure of misdeeds.<sup>467</sup>

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463. Green & Yaroshefsky, *supra* note 461, at 105.

464. *See id.* at 104-07; *The First 1,600 Exonerations*, *supra* note 12, at 11 (reporting that forty-five percent of wrongful convictions involved official misconduct).

465. *See* Katie Dallas, *The Man Who Found Katy Perry Is on a Mission to Fix America’s Justice System*, GLOB. CITIZEN (Jan. 25, 2018), <https://www.globalcitizen.org/en/content/jason-flo-m-podcast-wrongful-conviction>; *infra* text accompanying notes 474-88.

466. Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1076-79 (2009) (explaining that judges name prosecutors in only a small fraction of cases); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 172-73 (2004) (“[A]ppellate court opinions invariably neglect to identify the prosecutor by name . . . .”); Lorraine Morey, *Keeping the Dragon Slayers in Check: Reining in Prosecutorial Misconduct*, 5 PHX. L. REV. 617, 621-26 (2012) (detailing specific cases in which appellate courts reversed convictions because of prosecutorial misconduct without naming the offending prosecutor).

467. Two notorious cases in recent memory involve the condemnation, prosecution, and disgrace of Michael B. Nifong and Ken Anderson. In 2006, Nifong, then the elected district attorney for Durham, North Carolina, indicted three Duke University lacrosse players for raping a stripper who had danced at a team party. Shaila Dewan, *Duke Prosecutor Jailed; Students Seek Settlement*, N.Y. TIMES (Sept. 8, 2007), <https://www.nytimes.com/2007/09/08/us/08duke.html>; Duff Wilson, *2 Duke Lacrosse Players Indicted in Rape Case*, N.Y. TIMES (Apr. 17, 2006), <https://www.nytimes.com/2006/04/17/sports/sportsspecial1/2-duke-lacrosse-players-indicted-in-rape-case.html>. Nifong withheld crucial DNA evidence that exculpated the players, leading the state attorney general to conclude that the lacrosse players were innocent and Nifong was a “rogue prosecutor.” Dewan, *supra* (internal quotation marks omitted). The North Carolina State Bar brought charges against Nifong and disbarred him. *Id.*

Ken Anderson, once the district attorney for Williamson County, Texas, and a former Texas Prosecutor of the Year, charged Michael Morton for the brutal murder of his wife in 1986. Raymond Bonner, *Reversal of Fortune: A Prosecutor on Trial*, PROPUBLICA (Apr. 29, 2013, 11:49 AM), <https://www.propublica.org/article/reversal-of-fortune-a-prosecutor-on-trial>; Pamela Colloff, *The Innocent Man, Part One*, TEX. MONTHLY (Nov. 2012), <https://www.texasmonthly.com/politics/the-innocent-man-part-one> [hereinafter Colloff, *The Innocent Man, Part One*]. Morton was convicted in 1987 and sentenced to life in prison, a conviction Anderson obtained by withholding crucial exculpatory evidence. Bonner, *supra*; Colloff, *The Innocent Man, Part One, supra*. In 2011, after the Innocence Project demanded the retesting of a bloody bandana found 100 yards from the crime scene, it came back matching the victim’s blood

Increasingly, these cases are no longer seen as isolated freakish anomalies, but rather as part of an institutional culture that can be changed.<sup>468</sup> With the public's seemingly unquenchable thirst for true crime sagas comes a pile up of stories about truth-thwarting prosecutors and a growing outrage that, in some jurisdictions, is leading to reform.<sup>469</sup>

The media's power to change the narrative about what it means to be a good prosecutor holds true even when it is not clear that the defendants are factually innocent. What matters is that the prosecutor engaged in perfidy, resulting in an unfair and fatally flawed conviction. Perhaps the best-known example is *Making a Murderer*, the 2015 Netflix ten-part documentary by filmmakers Laura Ricciardi and Moira Demos chronicling the wrongful convictions of Steven Avery and his sixteen-year-old nephew, Brendan Dassey.<sup>470</sup>

In 2006, Avery and Dassey were arrested in Manitowoc County, Wisconsin for the rape and brutal murder of a young woman named Teresa Halbach.<sup>471</sup> In 2007, Avery was convicted of first-degree murder and possession of a firearm by a felon and sentenced to life without the possibility of parole.<sup>472</sup> Dassey, who was convicted in a separate trial of first-degree murder, mutilation of a corpse, and sexual assault, was sentenced to life in prison.<sup>473</sup>

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and that of the true attacker. Bonner, *supra*; Michael Morton, *supra* note 432. Morton's attorneys demanded that a special prosecutor investigate Anderson and a special Court of Inquiry was convened. Bonner, *supra*. At the end of the process, the judge ruled that Anderson had broken state law and committed perjury by lying to the court. Jeremy Heallen, *Former Texas Judge Jailed, Disbarred for Hiding Evidence*, LAW360 (Nov. 8, 2013, 7:03 PM), <https://www.law360.com/articles/487677/former-texas-judge-jailed-disbarred-for-hiding-evidence>. Anderson was arrested, convicted, and sentenced to serve ten days in jail. *Id.* His license to practice law was revoked and he resigned his judgeship. *Id.*

468. See Green & Yaroshefsky, *supra* note 461, at 107.

469. See *infra* Part IV.B; see also David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 26 (2017) [hereinafter Sklansky, *Prosecutor's Handbook*] (“[A] growing number of chief prosecutors have won office by pledging a more balanced approach to criminal justice—more attentive to racial disparities, the risk of wrongful conviction, the problem of police violence, and the failures and terrible costs of mass incarceration.”).

470. *Making a Murderer* (Netflix original series Dec. 18, 2015).

471. *Id.*

472. State v. Avery, 804 N.W.2d 216, 221 (Wis. Ct. App. 2011); Christie Thompson, *Penny Beerntsen, the Rape Victim in 'Making a Murderer,' Speaks Out*, MARSHALL PROJECT (Jan. 5, 2016 7:15 AM), <https://www.themarshallproject.org/2016/01/05/penny-beernten-the-rape-victim-in-making-a-murderer-speaks-out#.J34NWrbWK>.

473. State v. Dassey, No. 2010AP3105-CR, 2013 WL 335923, at \*2 (Wis. Ct. App. Jan. 30, 2013); Robert Barnes, *Supreme Court Won't Hear the Case of Brendan Dassey, Sentenced to Life as a Teen and Featured in 'Making a Murderer'*, WASH. POST (June 25, 2018), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-wont-hear-the-case-of-brendan-dassey-a-teen-sentenced-to-life-and-featured-in-making-a-murderer/2018/06/25/6f97336e-787c-11e8-93cc-6d3beccdd7a3\\_story.html?utm\\_term=.adc85e4856fd](https://www.washingtonpost.com/politics/courts_law/supreme-court-wont-hear-the-case-of-brendan-dassey-a-teen-sentenced-to-life-and-featured-in-making-a-murderer/2018/06/25/6f97336e-787c-11e8-93cc-6d3beccdd7a3_story.html?utm_term=.adc85e4856fd).

*Making a Murderer* became an overnight sensation. Within thirty-five days of its release, nearly twenty million people in the U.S. had seen it.<sup>474</sup> Using interviews and footage from the trials and post-conviction proceedings, the filmmakers raised disturbing questions about the conduct of the police and the prosecution in both trials.<sup>475</sup> After watching the series, many people believed that Avery had been framed and Dassey had been coerced into giving a false confession.<sup>476</sup>

Much of the public's ire was directed toward veteran Calamet County District Attorney Ken Kratz, who served as a special prosecutor in both trials.<sup>477</sup> Kratz came under fire for a series of pretrial press conferences he held, in which he made "salacious and inflammatory" statements about Avery and Dassey that were not supported by the evidence and could have prejudiced the jury pool.<sup>478</sup> Scorn deepened when the documentary revealed that Kratz was forced to resign from his position in disgrace in 2010 after a victim in a domestic violence case provided sexually harassing text messages from Kratz, who was prosecuting her abuser.<sup>479</sup>

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474. Amelia McDonnell-Parry, *'Making a Murderer' One Year Later: Everything You Need to Know*, ROLLING STONE (Dec. 16, 2016, 7:14 PM), <https://www.rollingstone.com/culture/culture-news/making-a-murderer-one-year-later-everything-you-need-to-know-123669>.

475. *Id.* ("Each episode more infuriating than the last, the series cast a bright light on issues of police and prosecutorial corruption and raised significant questions about the veracity of Avery and Dassey's convictions.")

476. See, e.g., *Nearly 1 in 4 Wisconsin Adults Believe Manitowoc Co. Framed Steven Avery, Survey Says*, TMJ4 (May 12, 2017, 11:12 AM), <https://www.tmj4.com/news/local-news/nearly-1-in-4-wisconsin-adults-believe-manitowoc-co-framed-steven-avery-survey-says> (stating that twenty-two percent of Wisconsin adults, when surveyed, said it was at least "probably true" that the evidence against Avery was fabricated (internal quotation marks omitted)); see also Shannon Coleman, *District Attorney: Release Anthony Wright*, CHANGE.ORG, <https://www.change.org/p/district-attorney-release-the-man-wrongly-convicted-of-murdering-my-aunt> (last visited Feb. 3, 2019); Michael Seyedian, *Free Brendan Dassey*, CHANGE.ORG, <https://www.change.org/p/president-of-the-united-states-free-brendan-dassey-46cbf6b6-538a-4b0e-a043-7a56b06b54b1> (last visited Feb. 3, 2019) (listing 93,057 people who petitioned for Dassey's release, and citing Dassey's "false imprison[ment] for a crime that he was coerced into confessing" as one of the reasons for giving him a "new trial at the very least," if not a complete exoneration).

477. John Ferak, *Who's Who in the Steven Avery Case*, POST CRESCENT (Dec. 22, 2015, 7:12 PM), <https://www.postcrescent.com/story/news/2015/12/22/whos-who-steven-avery-case/77763356>; Kaitlin Reilly, *What Happened to 'Making a Murderer' Prosecutor Ken Kratz? He Has Allegedly Had Some Legal Troubles of His Own*, BUSTLE (Dec. 29, 2015), <https://www.bustle.com/articles/131264-what-happened-to-making-a-murderer-prosecutor-ken-kratz-he-has-allegedly-had-some-legal-troubles>.

478. John Ferak, *Legal Experts Blast Avery Prosecutor's Conduct*, POST CRESCENT (Jan. 15, 2016, 10:17 AM), <https://www.postcrescent.com/story/news/local/steven-avery/2016/01/15/kratzs-pretrial-behavior-called-unethical/78630248> [hereinafter Ferak, *Legal Experts Blast Avery Prosecutor's Conduct*].

479. Reilly, *supra* note 477.

Kratz, who went into private practice following his resignation, was inundated by the opinions of furious *Making a Murderer* watchers, who left a stream of angry reviews on his Yelp page decrying his unethical behavior.<sup>480</sup> Kratz resigned his prosecutorial post before *Making a Murderer* aired, but the sweeping condemnation that followed suggested that, had the sexting scandal not derailed his career, he likely would have had difficulty getting reelected. More importantly, the exposure of Kratz's unethical behavior in the public square—including trial tactics designed to win rather than ensure that Avery and Dassey received fair trials—had consequences beyond Kratz's personal and professional shaming. It sparked a national conversation about the abuse of prosecutorial power and the importance of adhering to “minister of justice” ethics.<sup>481</sup> Among the active participants in that conversation were millions of non-lawyers who otherwise might not have thought the topic was interesting or relevant to their lives.<sup>482</sup>

*Making a Murderer* and the wildly popular true-crime podcast *Serial*,<sup>483</sup> which documented the wrongful conviction of Adnan Syed for the murder of his ex-girlfriend, inspired subsequent variations on the same theme: “citizen journalists” using wrongful conviction cases to expose systemic flaws in the criminal justice system, including the abuse of prosecutorial power.<sup>484</sup>

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480. Tamera Griffin, *People Are Writing Scathing Yelp Reviews for the Prosecutor from ‘Making a Murderer’*, BUZZFEED NEWS (Dec. 26, 2015, 12:22 PM), <https://www.buzzfeednews.com/article/tamerragriffin/people-are-writing-scathing-yelp-reviews-for-the-prosecutor>; see also Reilly, *supra* note 477 (stating that Kratz became a defense lawyer following his resignation).

481. See Ferak, *Legal Experts Blast Avery Prosecutor’s Conduct*, *supra* note 478; Keith A. Findley, *Commentary: The Lessons from ‘Making a Murderer’*, CHI. TRIB. (Jan. 18, 2016, 8:57 AM), <http://www.chicagotribune.com/news/opinion/commentary/ct-making-a-murderer-steven-avery-lessons-20160118-story.html>.

482. See Paul Tassi, *Why ‘Making a Murderer’ Is Netflix’s Most Significant Show Ever*, FORBES (Jan. 3, 2016, 11:48 AM), <https://www.forbes.com/sites/insertcoin/2016/01/03/why-making-a-murderer-is-netflixs-most-significant-show-ever/#170fc77c326a>. After *Making a Murderer* aired, Dean Strang and Jerome Buting, Steven Avery’s lawyers, went on an international tour to have conversations about the criminal justice system with a broad audience. Amanda Meade, *Making a Murderer Attorneys on the Role Poverty Plays in Wrongful Convictions*, GUARDIAN (Apr. 26, 2016, 3:22 AM), <https://www.theguardian.com/culture/2016/apr/26/making-a-murderer-attorneys-poverty-wrongful-convictions>.

483. By December 23, 2014, the end of its first season, an estimated forty million people had downloaded the *Serial* podcast. Amy Roberts, *The ‘Serial’ Podcast: By the Numbers*, CNN, <https://www.cnn.com/2014/12/18/showbiz/feat-serial-podcast-btn/index.html> (last updated Dec. 23, 2014).

484. See Elisabeth Garber-Paul, *Beyond ‘Serial’: 10 True Crime Podcasts You Need to Follow*, ROLLING STONE (July 22, 2016, 8:50 PM), <https://www.rollingstone.com/culture/culture-lists/beyond-serial-10-true-crime-podcasts-you-need-to-follow-93729>; Richard Martin, *Case of ‘Serial’ Subject Adnan Syed Heads to Maryland’s Highest Court Thursday. Here’s What You Need to Know.*, BALT. SUN (Nov. 29, 2018, 1:35 PM), <https://www.baltimoresun.com/news/maryland/>

Podcasts are not the only medium for the message that prosecutorial power needs closer scrutiny because its abuse leads to unjust outcomes. *The Last Defense*, a seven-part ABC documentary series that aired in June and July 2018, told the stories of two death row prisoners who had steadfastly maintained their innocence and claimed that prosecutorial misconduct infected their case outcomes.<sup>485</sup> The comedian John Oliver, who hosts HBO's hit show *Last Week Tonight with John Oliver*, recently combined satire and outrage to shine a spotlight on the role of innocence denying in a nearly twenty-minute-long segment called "Prosecutors," which aired on August 5, 2018 and has been viewed by more than 4.6 million people as of January 7, 2019.<sup>486</sup> Oliver dug into specific wrongful conviction cases where prosecutors had thwarted the search for justice to underscore the importance of public education and accountability at the ballot box.<sup>487</sup> "[P]rosecutors have the ability to ruin lives in a second," he told his audience, "so we need to find out who our DAs are and get a sense of the policies and priorities that they're carrying out where we live."<sup>488</sup>

The podcasts, documentaries, and informed comedic takedowns discussed here are but a few examples of the ways in which the media, responding to consumer demand, has played a vital role in raising public awareness. With the public engaged so intently with these issues, win-at-all-costs prosecutors who show indifference to their ethical obligation to seek justice can find themselves out of a job, replaced by reformers.

### B. Electing Progressive Prosecutors

Beginning with the election of Kings County District Attorney Kenneth Thompson in 2013, a growing number of reformers have sought to unseat incumbent district attorneys known for their unrelentingly tough-on-crime stance at the expense of the poor, people of color, and those who were wrongfully prosecuted.<sup>489</sup> These challengers argued that the incumbents' focus on appearing maximally punitive resulted in the unnecessary, expensive incarceration of low-

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crime/bs-md-adnan-syed-court-of-appeals-20181127-story.html.

485. See James Poniewozik, *Review: 'The Last Defense' Aims to Open Once-Shut Cases*, N.Y. TIMES (June 12, 2018), <https://www.nytimes.com/2018/06/12/arts/television/the-last-defense-review-viola-davis-abc.html> (describing the disturbing tactics employed by prosecutors against one of the prisoners and describing the other's case as telling "a more depressingly familiar story" of a faulty "system [that] rigidly resists admitting any possible mistakes").

486. Last Week Tonight, *Prosecutors: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Aug. 5, 2018), [https://www.youtube.com/watch?v=ET\\_b78GSBU](https://www.youtube.com/watch?v=ET_b78GSBU).

487. *Id.*

488. *Id.*

489. See Sklansky, *Changing Political Landscape*, *supra* note 328, at 651-71.

level offenders and pretrial detainees, the sanctioning of police and prosecutorial misconduct, and a hostility to credible claims of wrongful conviction.<sup>490</sup>

In addition to the previously described successful campaigns by Larry Krasner in 2017 and Jason Anderson in 2018 to replace innocence-denying prosecutors Seth Williams in Philadelphia and Michael Ramos in San Bernardino, California,<sup>491</sup> there has been a steady trickle of similarly themed victories in jurisdictions across the country.<sup>492</sup> While it is important to underscore that none of these were single issue races, one crucial plank in the reformers' platforms was a commitment to revamp an existing but ineffective CRU, to create such a unit where none existed, or, at the least, to promise greater accountability and transparency in the reexamination of wrongful conviction cases.<sup>493</sup> Notably, most of the successful candidates were able to amplify their message with five-to-six figure donations from George Soros, the liberal wealthy billionaire who made it his mission to replace regressive prosecutors with reformers.<sup>494</sup>

In a high-profile victory in the spring of 2016, Kim Foxx defeated Anita Alvarez, the incumbent state attorney for Cook County, Illinois, in the Democratic primary and cruised to victory in November.<sup>495</sup> Alvarez was known as a tough-on-crime crusader and, during her two terms in

490. *Id.* at 670 (“The recent spate of elections in which prosecutors have won office by promising not toughness, but criminal justice reform—more scrutiny of the police, more vigilance against wrongful convictions, less aggressive patrolling of minority neighborhoods, or some mixture of these changes—suggests we should be skeptical of the idea that the contemporary politics of criminal justice have an inexorable logic.”); Christopher Connelly, *For Criminal Justice Advocates, Change Starts at the Bottom of the Ballot*, KERA NEWS (Mar. 1, 2018), <http://www.keranews.org/post/criminal-justice-advocates-change-starts-bottom-ballot> (describing a national campaign for a “paradigm shift” in which prosecutors “seek justice, whether that’s a conviction or not charging someone” (internal quotation marks omitted)).

491. *Supra* Part IV.B.1–2.

492. Joseph Neff, *How Prosecutor Reform Is Shaking Up Small DA Races*, MARSHALL PROJECT (May 1, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/05/01/how-prosecutor-reform-is-shaking-up-small-da-races>.

493. *See infra* text accompanying notes 495, 500–05, 512–18 (progressive prosecutor races).

494. Scott Bland, *George Soros’ Quiet Overhaul of the U.S. Justice System*, POLITICO (Aug. 30, 2016, 5:25 AM), <https://www.politico.com/story/2016/08/george-soros-criminal-justice-reform-227519> (quoting one activist as saying “I think people are waking up to the untapped potential for intervention in these seats to really change the day-to-day realities of criminal justice” (internal quotation marks omitted)).

495. Hal Dardick & Matthew Walberg, *Kim Foxx Declares Win in Cook County State’s Attorney’s Race*, CHI. TRIB. (Nov. 8, 2016, 10:51 PM), <https://www.chicagotribune.com/news/politics/ct-cook-county-states-attorney-kim-foxx-election-met-1109-20161108-story.html>; Stephanie Lulay & Erica Demarest, *Anita Alvarez Loses, Concedes State’s Attorney’s Race to Kim Foxx*, DNAINFO (Mar. 16, 2016, 3:09 PM), <https://www.dnainfo.com/chicago/20160315/little-village/anita-alvarez-faces-tough-primary-fight-from-kim-foxx-after-laquan-shooting>.

office, gained a reputation for hostility toward wrongful conviction claims.<sup>496</sup> In 2012, Alvarez gave an interview on *60 Minutes* defending the convictions of three teenage boys who had falsely confessed to the rape and murder of a fourteen-year-old girl.<sup>497</sup> When asked to explain the DNA evidence, which matched the DNA of an adult male who was a convicted rapist, Alvarez said it was possible he wandered by and had sex with the victim after she was dead.<sup>498</sup>

While Alvarez's defeat in 2016 was largely ascribed to her bungling of the investigation and charging of a police officer in the fatal police shooting of an unarmed Black teenager, she was also viewed as "a lock-'em-up prosecutor from a bygone era."<sup>499</sup> Foxx, by contrast, "ran as a reformer on the issues of wrongful prosecutions and police reform . . . ."<sup>500</sup> In an interview with the *Chicago Sun-Times* shortly after taking office, Foxx said that she was determined to revitalize Alvarez's CIU, which was viewed as unreceptive to claims involving police or prosecutorial misconduct.<sup>501</sup> In her first year in office, Foxx obtained two voluntary dismissals and exonerated fifteen men and, including fifteen who claimed to have been set up by a corrupt police sergeant.<sup>502</sup> Foxx also reversed Alvarez's opposition and agreed to vacate the convictions of two men who claimed to have been framed by a different police detective.<sup>503</sup> She also stated that she would not be retrying

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496. See Mick Dumke et al., *The Trials of Anita Alvarez*, BETTER GOV'T ASS'N (Sept. 16, 2015, 12:00 PM), <https://www.bettergov.org/news/the-trials-of-anita-alvarez>; Eric Zorn, *Anita Alvarez's Further Prosecutorial Offenses*, CHI. TRIB. (Mar. 11, 2016, 5:45 PM), <https://www.chicagotribune.com/news/opinion/zorn/ct-alvarez-laquan-rekia-koschman-foxx--perspec-0313-md-20160311-column.html>.

497. *60 Minutes: Chicago: The False Confessions Capital* (CBS television broadcast Dec. 9, 2012), [https://www.youtube.com/watch?v=YSo\\_9Xo\\_78E](https://www.youtube.com/watch?v=YSo_9Xo_78E).

498. *Id.*

499. Dumke et al., *supra* note 496; see also Zorn, *supra* note 496.

500. Megan Crepeau, *After Momentous Week, Prosecutor Kim Foxx Says 'We Have to Right Wrongs'*, CHI. TRIB. (Nov. 20, 2017, 6:50 AM), <https://www.chicagotribune.com/news/local/breaking/ct-met-kim-foxx-wrongful-convictions-20171117-story.html>.

501. Andy Grimm, *Kim Foxx Planning to Revamp Cook County Wrongful-Conviction Unit*, CHI. SUN-TIMES (Mar. 15, 2017, 2:29 PM), <https://www.chicago.suntimes.com/news/kim-foxx-planning-cook-county-wrongful-conviction-unit-revamp>.

502. Patrick Elwood et al., *All Charges Dismissed Against 15 Men in Largest Exoneration in Cook County*, WGN9 (Nov. 16, 2017, 12:07 PM), <https://wgntv.com/2017/11/16/cook-co-states-attorney-to-dismiss-18-convictions>; Gregory Pratt, *Two Chicago Men Freed from Prison After DNA Tests Prompt Retrials*, CHI. TRIB. (Nov. 21, 2017, 6:25 AM), <https://www.chicagotribune.com/news/local/breaking/ct-met-two-inmates-freed-20171117-story.html>.

503. Curtis Black, *Kim Foxx Reverses Stance on Convictions Tied to Notorious Cop*, CHI. REP. (Apr. 12, 2017), <https://www.chicagoreporter.com/kim-foxx-keeps-up-defense-of-disgraced-cop-reynaldo-guevara>.

them.<sup>504</sup> *Chicago Tribune* columnist Eric Zorn wrote that “the public should trust that [Foxx is] more interested in justice than victory or vindication” and predicted that the voters’ “trust will pay dividends. Socially. Legally. Politically.”<sup>505</sup>

One year earlier, Scott Colom pulled off an unexpected victory in the sixteenth Judicial District in east-central Mississippi, which encompasses four counties and approximately 400,000 people.<sup>506</sup> Colom, a thirty-two-year-old African-American Democratic candidate, defeated Forrest Allgood, the white incumbent who ran as an Independent and held the position for twenty-five years.<sup>507</sup> During his time in office, Allgood had become infamous for his innocence denying, relying on discredited bite-mark testimony to convict two different men of two murders of little girls.<sup>508</sup> When DNA testing exonerated one of the men in 2001, Allgood fought his release for an additional seven years.<sup>509</sup> In 2008, the DNA from both cases was uploaded to a national criminal database and found to match the same man, who subsequently admitted to committing both of the crimes.<sup>510</sup> Allgood also secured convictions against two teenagers that were later thrown out by the Mississippi Supreme Court based on faulty science.<sup>511</sup>

Colom, who received more than \$700,000 from a political action committee (“PAC”) funded by Soros,<sup>512</sup> criticized Allgood for contributing to the problem of mass incarceration with a stance of “basically lock up everybody for as long as possible.”<sup>513</sup> Colom

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504. *Id.*

505. Eric Zorn, *Good on Ya, Kim Foxx, for Righting Old Wrongs*, CHI. TRIB. (Nov. 16, 2017, 4:25 PM), <http://www.chicagotribune.com/news/opinion/zorn/ct-perspec-zorn-foxx-exonerations-memo-1117-20171116-story.html>.

506. Leon Neyfakh, *How to Run Against a Tough-on-Crime DA—and Win*, SLATE (Nov. 12, 2015, 12:25 PM), [http://www.slate.com/articles/news\\_and\\_politics/crime/2015/11/district\\_attorneys\\_scott\\_colom\\_proves\\_you\\_can\\_run\\_against\\_a\\_tough\\_on\\_crime.html](http://www.slate.com/articles/news_and_politics/crime/2015/11/district_attorneys_scott_colom_proves_you_can_run_against_a_tough_on_crime.html).

507. *Id.*

508. Radley Balko, Opinion, *Election Results: One of America’s Worst Prosecutors Lost Last Night, but One of Its Worst Attorneys General Won*, WASH. POST (Nov. 4, 2015), [https://www.washingtonpost.com/news/the-watch/wp/2015/11/04/election-results-one-of-americas-worst-prosecutors-lost-last-night-but-one-of-its-worst-attorneys-general-won/?noredirect=on&utm\\_term=.95bd17a81321](https://www.washingtonpost.com/news/the-watch/wp/2015/11/04/election-results-one-of-americas-worst-prosecutors-lost-last-night-but-one-of-its-worst-attorneys-general-won/?noredirect=on&utm_term=.95bd17a81321); *see infra* text accompanying notes 622-27.

509. Balko, *supra* note 508.

510. *Id.*

511. *Id.*; Radley Balko, *Another Mississippi Outrage: Young Mother Faces Life in Prison for Stillborn Child*, WASH. POST (Mar. 19, 2014), [https://www.washingtonpost.com/news/the-watch/wp/2014/03/19/another-mississippi-outrage-young-mother-faces-life-in-prison-for-stillborn-child/?utm\\_term=.f75d1dbafc79](https://www.washingtonpost.com/news/the-watch/wp/2014/03/19/another-mississippi-outrage-young-mother-faces-life-in-prison-for-stillborn-child/?utm_term=.f75d1dbafc79).

512. Nick Tabor, *What if Prosecutors Wanted to Keep People Out of Prison?*, N.Y. MAG. (Mar. 27, 2018), <http://nymag.com/daily/intelligencer/2018/03/what-if-prosecutors-wanted-to-keep-people-out-of-prison.html>.

513. Neyfakh, *supra* note 506.

advanced the view that prosecutors “out-toughing each other” to win elections was an old approach that led to unjust outcomes.<sup>514</sup> The voters agreed, electing Colom by a wide margin.<sup>515</sup> In 2018, Colom began collaborating with the director of the University of Mississippi School of Law’s Innocence Project to open a CRU to examine “dozens of murder convictions from Allgood’s tenure,” including other bite mark cases.<sup>516</sup>

In 2017, Soros-backed candidate Kim Ogg defeated her Republican opponent to become the District Attorney in Harris County, Texas, on a reform platform and with a promise to continue the work of the CIU.<sup>517</sup> In 2018, two African-American reform candidates funded by Soros unseated incumbent district attorneys in Durham, North Carolina and Ferguson, Missouri.<sup>518</sup>

It bears emphasizing that these newly-elected reformers are a tiny fraction of the approximately 2400 prosecutors nationwide.<sup>519</sup> Eighty-five percent of prosecutors run for reelection unopposed.<sup>520</sup> While some of the reformers represent major cities in populous counties and therefore exert outsized influence, they are still a minority.<sup>521</sup> The infusion of money from Soros and other liberal PACs was crucial to their victories. If law-and-order groups can match these donations, future races may be more difficult for like-minded candidates to win. Nor is the movement to elect progressive prosecutors on a clear trajectory. In June,

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514. *Id.*

515. See Sklansky, *Changing Political Landscape*, *supra* note 328, at 657 (stating that Colom won the election with 53.9% of the vote).

516. Tabor, *supra* note 512.

517. Emily Barone, *The Wrongly Convicted: Why More Falsely Accused People Are Being Exonerated Today than Ever Before*, TIME, <http://time.com/wrongly-convicted> (last visited Feb. 3, 2019); Josh Siegel, *The ‘Staggering’ Campaign of Liberal Billionaire George Soros to Swing Local Prosecutor Elections*, DAILY SIGNAL (Dec. 19, 2016), <https://www.dailysignal.com/2016/12/19/the-staggering-campaign-of-liberal-billionaire-george-soros-to-swing-local-prosecutor-elections>.

518. Virginia Bridges, *Deberry Defeats Incumbent to Win Race for Durham County District Attorney*, HERALD-SUN (May 8, 2018, 8:04 PM), <https://www.heraldsun.com/news/politics-government/elections/article210725259.html>; Joel Currier, *Wesley Bell Ousts Longtime St. Louis County Prosecuting Attorney*, ST. LOUIS POST-DISPATCH (Aug. 8, 2018), [https://www.stltoday.com/news/local/govt-and-politics/wesley-bell-ousts-longtime-st-louis-county-prosecuting-attorney/article\\_5b2134b8-f204-5e20-9572-e59cacbb0aed.html](https://www.stltoday.com/news/local/govt-and-politics/wesley-bell-ousts-longtime-st-louis-county-prosecuting-attorney/article_5b2134b8-f204-5e20-9572-e59cacbb0aed.html).

519. See Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, ATLANTIC (May 18, 2016), <https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252>.

520. Matt Ferner, *Wave of Progressive Prosecutors Strike Out in California Primaries*, HUFFINGTON POST (June 6, 2018, 4:01 PM), [https://www.huffingtonpost.com/entry/progressive-prosecutors-california-primaries\\_us\\_5b117d36e4b010565aabc778](https://www.huffingtonpost.com/entry/progressive-prosecutors-california-primaries_us_5b117d36e4b010565aabc778).

521. See Sklansky, *Prosecutor’s Handbook*, *supra* note 469, at 26 (“District attorney races focused overwhelmingly on the candidates’ characters, not on questions of policy, and to the extent that policy questions were discussed, the debate often sounded like a bidding war: which candidate would call for the highest sentences and the most aggressive policing?”).

reform candidates, some of whom obtained PAC money, lost their bids to topple incumbent prosecutors throughout California, losing races in Sacramento, Alameda, and San Diego counties.<sup>522</sup>

What these races do show, however, is that the standard tough-on-crime message is no longer a sure winner with voters and that candidates with a track record of innocence denying—Ramos, Alvarez, and Allgood—may be particularly vulnerable to a credible challenger with a “minister of justice” message.<sup>523</sup> The public, fascinated by true crime stories of wrongful conviction, has a greater understanding of prosecutors’ power and ethical obligations. Their outrage when prosecutors fall short creates a receptivity to a reform message grounded in “doing justice” rather than “lock ‘em up.”

The election of reformers, in turn, may also have a ripple effect. Kym Worthy, who will not face a challenger until 2020,<sup>524</sup> fundamentally altered her approach to wrongful conviction claims in 2017.<sup>525</sup> Her establishment of a robust CRU followed a raft of negative publicity about her innocence denying.<sup>526</sup> It also came after the elections of Krasner, Ogg, and Foxx, who won on progressive platforms in populous jurisdictions with diverse constituencies similar to her own.<sup>527</sup> It is too early to tell whether the movement to elect prosecutors with a “do justice” message will gain momentum or falter. The resolution of that question may turn on the continued funding of insurgent campaigns and whether the reformers are able to succeed in office. But if the good prosecutor narrative becomes synonymous with the exoneration of the wrongfully convicted, it seems logical to conclude that the “minister of justice” ideal will become smart politics rather than seeming like a risky strategy.

## VI. CONCLUSION

A small but select group of prosecutors are innocence deniers, irrationally refusing to admit that a wrongful conviction has occurred in the face of overwhelming evidence that it has occurred. These men and women violate their fundamental ethical obligation to seek justice. Their

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522. Abbie Vansickle & Maurice Chammah, *California Voters Reject Prosecutor ‘Reformers’*, MARSHALL PROJECT (June 6, 2018, 3:10 PM), <https://www.themarshallproject.org/2018/06/06/california-voters-reject-prosecutor-reformers>.

523. See *supra* text accompanying notes 491-516.

524. *Kym Worthy*, BALLOTPEDIA, [https://www.ballotpedia.org/Kym\\_Worthy](https://www.ballotpedia.org/Kym_Worthy) (last visited Feb. 3, 2019).

525. See *supra* text accompanying notes 450-59.

526. See *supra* note 449 and accompanying text.

527. See *supra* text accompanying notes 491, 495, 517.

innocence denying imposes steep psychological and financial costs, re-traumatizing exonerees and the original crime victims, angering other criminal justice stakeholders, undermining confidence in the integrity of the system, and resulting in multi-million-dollar judgments borne by the taxpayers.<sup>528</sup>

Innocence denying is enabled by the traditional “tough-on-crime” narrative, which for decades has equated prosecutorial success with accumulating and preserving the maximum number of convictions at any cost. Ending innocence denying requires a paradigm shift in which a good prosecutor is someone who vindicates the innocent and punishes only the guilty. Although this definition of a good prosecutor aligns perfectly with the “minister of justice” mandate embedded in the ethical rules and U.S. Constitution,<sup>529</sup> until recently, it has been viewed as politically risky because conceding error might be associated with weakness or incompetence.

But in recent years, reform-minded prosecutors have upended that trope, campaigning on a platform that acknowledges the problem of wrongful convictions and promises to address it.<sup>530</sup> This reform effort has been possible in part because of an infusion of donations from liberal PACs, but also because of a heightened civic engagement with local prosecutor races.<sup>531</sup> The awakening to the importance of the prosecutor’s role has come about in no small part because of citizen journalists, whose narration of true crime wrongful conviction stories has sparked outrage and a demand for change. That change is visible in the recent election of “good prosecutor” candidates who have successfully unseated “tough-on-crime” incumbents.<sup>532</sup> It is too early to know whether the election of a few reformers is a sign of a seismic change or a blip on the tough-on-crime radar screen. But the message of reform is more likely to stick if the media continues to expose innocence denying and laud prosecutors who help exonerate the wrongfully convicted for their adherence to their fundamental ethical obligation to be “ministers of justice.”<sup>533</sup>

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528. *See supra* Part II.B.

529. *See, e.g.*, U.S. CONST. amends. V, XIV; MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2016).

530. *See supra* Part V.B.

531. *See supra* Part V.B.

532. *See supra* Part V.B; *see also supra* text accompanying notes 483-88.

533. MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1.