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The Long Goodbye:
After the Innocence Movement, Does the Attorney-Client Relationship Ever End?

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By Lara A. Bazelon

INTRODUCTION

The impact of the Innocence Movement on the criminal justice system has been profound. Biweekly, an innocent person is set free, often after spending decades in prison. These exonerations are extensively covered by the media, searing into the national consciousness powerful images of the prisoner’s emotional reaction at the

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2 Marvin Zalman & Julia Carrano, Sustainability of Innocence Reform, 77 Alb. L. Rev. 955, 975 (2013/2014) (stating that “the increased ability to amplify its message to key political decision-makers and instrumental organizations such as the American Bar Association and state forensic science commissions are indicators the innocence projects and the Innocence Network are becoming more able to effect real change.”); The National Registry of Exoneration, MICHIGAN LAW, www.law.umich.edu/special/exoneration/Pages/learnmore.aspx at *1 [hereinafter National Registry] (stating that there were 127 exonerations in the United States in 2014, and that a total of 1,535 since 1989).

3 According to the National Registry, which is housed within the University of Michigan Law School and dedicated to promulgating “detailed information about every known exoneration in the United States since 1989,” there were 127 exonerations in the year 2014, which amounts to 2.4 each week. National Registry at 1-9.
moment of freedom and an equally powerful narrative of the long road from hopeless, unmitigated suffering to sudden and complete redemption.⁴

The Innocence Movement -- the law school clinics, non-profit organizations, religious institutions, and individual lawyers dedicated to the work of overturning wrongful convictions -- has challenged the conventional wisdom underlying the basic tenets of our criminal justice system.⁵ Exoneration after exoneration reveals bleak truths: that eyewitnesses who were one-hundred percent certain are often one-hundred percent wrong,⁶ that defendants who confess may be innocent,⁷ that police and prosecutors


sometimes fail to play by the rules,\textsuperscript{8} that defense attorneys sometimes fall down on the job,\textsuperscript{9} and that, as a result, jurors reach the wrong conclusions. Between 1989 and 2014, 1,535 men and women were wrongfully convicted and incarcerated.\textsuperscript{10}

It is not possible to absorb this fact without second-guessing the accuracy and fairness of the justice meted out in courtrooms across the United States. Gross

\textsuperscript{7} National Registry at *2 (twelve percent of wrongful convictions from 1989-2014 involved false confessions). The Central Park 5 documentary, released in 2012, explores in depth perhaps the most famous false confession case in recent memory. http://www.pbs.org/kenburns/centralparkfive. Following the rape of the woman who became nationally known as “the Central Park jogger” the New York City Police Department arrested four young black teenagers and interrogated them for hours without access to counsel to their parents. The four young men confessed, and were later tried, convicted, and imprisoned for brutal attack on the victim. http://en.wikipedia.org/wiki/Central_Park_jogger_case. Years later, when DNA recovered from the jogger’s clothing matched a known rapist who confessed to the crimes, the four men, now in their thirties, were freed. Benjamin Weiser, 5 Exonerated in the Central Park Jogger Case Agree to Settle Suit for $40 Million, June 19, 2014, http://www.nytimes.com/2014/06/20/nyregion/5-exonerated-in-central-park-jogger-case-are-to-settle-suit-for-40-million.html?_r=0.

\textsuperscript{8} National Registry at *2 (Forty-seven percent of exonerations involve official misconduct). This number includes the case of Michael Morton, an innocent man who spent twenty-five years in prison for the murder of his wife due in large part to gross misconduct by prosecutor Ken Anderson. Pamela Colloff, The Guilty Man, Texas Monthly (June 2013); http://www.theguardian.com/world/2013/nov/08/texas-prosecutor-ken-anderson-michael-morton-trial. Anderson, who went on to become a judge, was eventually indicted and convicted for his misconduct in the Morton case, and disbarred. Texas Prosecutor to Serve 10 Days for Innocent Man’s Imprisonment, http://www.innocenceproject.org/Content/Former_Williamson_County_Prosecutor_Ken_Anderson_Enters_Plea_to_Contempt_for_Misconduct_in_Michael_Mortons_Wrongful_Murder_Conviction.php


\textsuperscript{10} See supra note ___.

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miscarriages of justice occur, and they occur with some frequency. Because of the Innocence Movement, that fact is now public knowledge, and important reforms have been enacted which are designed to make the number vanishingly rare. Many are heralded and relatively non-controversial, such as the passage of laws designed to ease the burden on inmates seeking DNA testing, the decision by some police departments to reform the way that line-ups and photo spread identification procedures are conducted to

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11 Tim Bakken, *Exonerating the Innocent: Pretrial Innocence Procedure*, 56 N.Y.L. Sch. L. Rev. 837, 841-42 (2011/2012) (according to the DOJ’s Bureau of Justice Statistics on wrongful convictions, which assumes an error rate of one percent, there were 72,000 wrongfully convicted people in the United States as of 2009).


14 In 1982, Barry Scheck and Peter Neufeld founded in the Innocence Project at the Cardozo School of Law. The Innocence Project is dedicated to helping convicted prisoners prove their innocence through DNA testing. Scheck and Neufeld’s Innocence Project, which inspired the creation of numerous other Innocence Projects in other states, maintains a website that provides details about the causes of wrongful convictions, the personal stories of exonerees, and the legislation pending or enacted to bring reform to the criminal justice system. See http://www.innocenceproject.org/about/Mission-Statement.php. According to the Innocence Project’s website, “more than three hundred people in the United States have been exonerated by DNA testing, including 18 who served time on death row,” and “47 states currently provide statutory access to post-conviction DNA testing (Alaska, Massachusetts & Oklahoma do not).” http://www.innocenceproject.org/Content/The_First_250_DNA_Exonerations_Transforming_the_Criminal_Justice_System.php.
ensure greater accuracy,\textsuperscript{15} and establishment of post-conviction integrity units within prosecution offices to reexamine old cases in which there is some doubt about the defendant’s guilt.\textsuperscript{16}

There is a new reform, also propelled by the Innocence Movement, about which little is known, and which has complex, real-world repercussions that have yet to be fully explored: the addition of an “Innocence Standard” to the American Bar Association’s code of ethics for criminal defense attorneys.\textsuperscript{17} The code, known as the Defense Function

\textsuperscript{15} Some states, including Wisconsin, New Jersey, and North Carolina, have adopted eyewitness identification reforms urged by the Innocence Project and the National Institute of Justice, including the blind administration of a photo or live line up so that the officer in charge does not know the identity of the suspect; filler photographs that more closely resemble the suspect; specific instructions to the witness that the perpetrator may not be in the line-up or photo array and the investigation will go forward regardless of whether the witness picks someone; asking the witness to provide a written statement of his or her level of confidence in the identification; recording all of the identification procedures, and sequential presentation of the members of a line up or the photographs in a photo array so that the witness views them one by one and has no opportunity to make a relative comparison; i.e., that person looks the most like the suspect out of all the options. See http://www.innocenceproject.org/fix/Eyewitness-Identification.php.

\textsuperscript{16} There has been a rise in Conviction Integrity Units (CIUs), with 15 CIUs in 2014 compared to 9 in 2013, 7 in 2012, and 5 in 2011. See Exonerations in 2014, THE NATIONAL REGISTRY OF EXONERATIONS (Jan. 27, 2015) (Conviction Integrity Units are “long-term operations” run by prosecutors, “that work to prevent, to identify, and to remedy false convictions.”); Barry Scheck, New Perspectives on Brady and Other Disclosure Obligations: What Really Works?: Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models For Creating Them, 31 CARDOZO L. REV. 2215, 2217-18 (2010); Marvin Zalman & Julia Carrano, Sustainability of Innocence Reform, 77 ALB. L. REV. 955, 975 (2013/2014); Keith Swisher, Prosecutorial Conflicts of Interest In Post-Conviction Practice, 41 HOFSTRA L. REV. 181, 212 n.113 (2012).

\textsuperscript{17} The Standards for Prosecution and Defense Functions, first published in 1979, expand on the ethical obligations specific to criminal lawyers in the ABA’s Model Rules of Professional Conduct. The Fourth Edition of the Standards, which have already been adopted by the ABA’s Criminal Justice Section Council, will be submitted to the ABA House of Delegates for final approval in February 2015. Rory K. Little, The ABA’s Project to Revise the Criminal Justice Standards for the Prosecution and Defense
Standards, exhorts defense attorneys to abide by the highest ethical standards in the
defense of their clients.\footnote{18} While the American Bar Association’s Defense Function
Standards lack the force of law, their influence on ethical norms, jurisprudence, and
legislation is readily apparent: they have been adopted by the vast majority of states and
cited hundreds of times by the United States Supreme Court and lower federal and state
courts.\footnote{19}

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Functions, 62 Hastings L.J. 1111, 1112-18 (2011) (describing the “challenging and
professional absorbing” process of editing the Criminal Justice Standards for Prosecution
and Defense, which have not been revised since 1991).
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See American Bar Association Fourth Edition of the Criminal Justice Section for the
Defense Function Standards (February 2015), Standard 4-1.1 The Scope and Function of
These Standards (noting that while the Standards are “aspirational,” and descriptive of
“best practices,” rather than having the force of law, “[t]hey may be relevant in judicial
evaluation of constitutional claims regarding the right to counsel,” and are “intended to
address the performance of criminal defense counsel in all stages of their professional
work”).
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Five years after the Standards were first published in 1979, thirty-six states revised
their criminal codes to incorporate all or part of them. Martin Marcus, The Making of the
ABA Criminal Justice Standards: Forty Years of Excellence, 23 CRIM. JUST. 10, 11-12
(2009). In two landmark cases, the United States Supreme Court singled out the Criminal
Defense Standards as a critical reference point in developing and interpreting the law
relating to assessing a trial attorney’s fulfillment of the Sixth Amendment obligation to
provide the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 688
(1984) (noting that the Standards set forth “prevailing norms of practice” and “guides to
determining what is reasonable criminal defense attorney performance”); Padilla v.
Kentucky, 559 U.S. 356, 367 (2010) (stating that “[a]lthough they are ‘only guides’ and
not ‘inexorable commands’ these [ABA Criminal Justice] Standards may be valuable
measures of the prevailing professional norms of effective representation”). As Professor
Bruce Green has pointed out, “even if enforceable law does not dictate how prosecutors
should exercise charging discretion in a particular situation or whether defense lawyers
should advise clients about confidentiality obligations and associated exceptions, there is
a value to developing and articulating standards governing this conduct if a professional
consensus can be achieved. In that event, lawyers might be subject to public or
professional opprobrium for departing from professional standards.” Bruce A. Green,
Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers, 62
\end{quote}
The new Innocence Standard imposes an affirmative obligation on defense counsel “to act” upon learning of evidence that a former client may have been “wrongfully convicted or sentenced, or was actually innocent.”\(^\text{20}\) In so doing, it offers a vision of what it means to be a criminal defense lawyer that is a stark departure from traditional practice. In this new paradigm, defense counsel is a systemic advocate with ethical obligation to the truth, whose ongoing responsibilities to uncover and present that truth has no clear boundaries or end point.\(^\text{21}\) While the Innocence Standard has the laudable aim of exposing and correcting wrongful convictions, it also has the potential to

\(^{20}\) ABA Criminal Just. Defense Standard 4-9.4 (New or Newly-Discovered Law or Evidence of Innocence or Wrongful Conviction or Sentence). There is spirited debate about what “innocence” means as a legal concept. Some people distinguish between legal and factual innocence with the idea that those falling into the former category are exonerated based on constitutional or other rights violations while those falling into the latter category are “purely” innocent in that they did not commit the charged crime. See Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 456 (2001); Cathleen Burnett, *Constructions of Innocence*, 70 UMKC L. REV. 971, 975-79 (2002); William S. Laufner, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 331 n.4 (1995). These distinctions, however, obscure the fact that most exonerees, factually innocent or otherwise, are freed because of legal errors, as innocence is rarely recognized as a freestanding claim. In other words, the categorization is misleading in that it implies there is no overlap when the overlap is practically speaking, almost complete. As Keith A. Findley, the former director of the Wisconsin Innocence Project, has pointed out, “these distinctions are fundamentally meaningless in our system of justice . . . there is only one category of innocence, although how innocence is determined can vary depending on context.” Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1161 (2010-11). Newly proposed Standard 4-9.4 adheres to Professor Findley’s standard by requiring the same “duty to act,” for ethical purposes, whenever counsel discovers factual or legal evidence pointing to a former client’s “actual innocence or unlawfulness of conviction or sentence.” ABA Crim. Just. Standard Defense Function 4-9.4 (April 2013 Reporter’s Draft for Council).

\(^{21}\) Margaret Raymond, *The Problem with Innocence*, 49 CLEV. ST. L. REV. 449, 451 (2001) (stating that “we need to consider the consequences of the innocence movement for the ones left behind: the lawyers, defendants, and jurors trying to secure just outcomes in criminal cases.”).
create an ethical thicket for counsel, destabilizing the relationship between counsel and her current clients while imposing a heavy burden on an already staggering defense bar.

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

Part I sets forth the parameters of the criminal defense attorney-client relationship as it has been traditionally defined, and discusses the ways in which the new Innocence Standard would alter that traditional definition. Part II discusses the legal and moral justifications for enacting this change: the emergence of the Innocence Movement, the steady flow of exonerations that point unambiguously to the gross failure of the system to fulfill its “truth-seeking” function, and a widespread recognition that a more holistic model of representation is crucial to effective representation.

Part III argues that the Innocence Standard, while undeniably well-intentioned, fails to address the ethical implications of its “duty to act” imperative. Left unaddressed are three major potential conflicts for counsel: (1) how to “act” if the newly discovered information pointing to a former client’s innocence may cause harm to a current client,
(2) how to “act” if the newly discovered evidence went undiscovered due to counsel’s own failings during the representation, and (3) how to “act” in the ways the Standard demands while carrying an excessive caseload that makes the competent representation of current clients nearly impossible.  

Part IV offers some proposed revisions to the Innocence Standard that address the ethical and practical dilemmas outlined above while acknowledging that these suggestions in no way provide a conclusive resolution or solution to the question posed by the Innocence Standard as it is currently written: can defense counsel serve two masters: her client and the truth? In this Article, I argue that the answer to that question is no. The Standard must be rewritten to make it clear that a “duty to act” on behalf of a former, possibly innocent client is possible only when it is consistent with defense counsel’s centuries-long established role in the criminal justice system. The truth-seeking function rests with the prosecutor and the court. Placing the same burden upon defense counsel without limitations or precise definitions creates a false equivalency and endorses a model of practice that could threaten to erode the adversarial system, which, however imperfect, is what we rely upon to see that justice is done.

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

A. The New Innocence Standard

22 See infra notes.
The American Bar Association’s House of Delegates will formally adopt the Innocence Standard, which is formally known as Defense Function Standard 4-9.4, when it convenes on February 15, 2015.

The full text of the ABA’s newly created Innocence Standard states:

(a) When defense counsel becomes aware of credible and material evidence or law creating a reasonable likelihood that a client or former client was wrongfully convicted or sentenced or was actually innocent, counsel has some duty to act. This duty applies even after counsel’s representation is ended. Counsel must consider, and act in accordance with, duties of confidentiality. If such a former client currently has counsel, former counsel may discharge the duty by alerting the client’s current counsel.

(b) If such newly discovered evidence or law (whether due to a change in the law or not) relevant to the validity of the client’s conviction or sentence, or evidence or law tending to show actual innocence of the client, comes to the attention of the client’s current defense counsel at any time after conviction, counsel should promptly:

(i) evaluate the information, investigate if necessary, and determine what potential remedies are available;
(ii) advise and consult with the client; and
(iii) determine what action if any to take.

(c) Counsel should determine applicable deadlines for the effective use of such evidence or law, including federal habeas corpus deadlines, and timely act to preserve the client’s rights. Counsel should determine whether -- and if so, how best -- to notify the prosecution and court of such evidence.23

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23 ABA Criminal Just. Defense Standard 4-9.4 (New or Newly-Discovered Law or Evidence of Innocence or Wrongful Conviction or Sentence). As it applies to a current client, the obligations imposed by the new Standard are utterly consistent with defense counsel’s pre-existing duty of zealous representation. Indeed, one could argue that there is no need to spell out explicitly what is implicit, that a competent attorney, upon learning of a current client’s possible innocence, would investigate the evidence, advise the client, and determine from there what appropriate actions to take. And, at first read, the Innocence Standard’s “duty to act” as applied to a former client also seems eminently reasonable, even obvious: why wouldn’t trial counsel do everything in her power to advocate on behalf of a former client if she learns of new evidence pointing to that client’s innocence or wrongful conviction? The Innocence Movement has proven that wrongful convictions are a serious problem; making defense counsel part of the solution is one more means of solving it. The American Bar Association can also rightly point to precedent for the new Innocence Standard: it has applied to prosecutors since 2008. See ABA Model R. of Prof’l Conduct 3.8(g) and (h).
B. Established Legal and Ethical Parameters Governing the Attorney-Client Relationship in Criminal Cases

The parameters of the attorney-client relationship in criminal cases are set forth in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, which guarantee the accused the rights to counsel, due process, and equal protection of the laws.24 The Supreme Court has interpreted these rights to mean that any person accused of a felony or a misdemeanor resulting in jail time, a suspended sentence, or probation, is entitled to have the effective assistance of counsel25 at all “critical stages of a criminal prosecution after the filing of formal charges.”26

The guarantee of competent legal representation at trial continues through the disposition of the criminal case, whether by trial or plea.27 Counsel is also guaranteed on

24 U.S. Const. amends. V, VI, XIV.

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


direct appeal if the defendant is convicted. Many defendants, rich and poor, have different attorneys at the trial and appellate stages, creating two separate, clearly demarcated attorney-client relationships. In non-capital cases, the conclusion of the direct appeal marks the end of the attorney-appellate client relationship for constitutional purposes, although wealthy defendants in all likelihood will retain counsel for further appeals and habeas proceedings, and a small fraction of indigent, non-capital defendants are fortunate enough to obtain a court-appointed attorney on habeas because the reviewing judge believes that counsel is necessary.


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

30 See 28 U.S.C. § 2254 (providing that in all habeas proceedings “brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority.”). Title 18, section 3006A states that “[i]f an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed [under the statute]. The judge must conduct the hearing as soon as practicable after giving the attorneys adequate time to investigate and prepare.”
But even for this select group of defendants, the attorney-client relationship ends with the termination of the criminal case. The file is closed and sent off to storage, and defense counsel files no further pleadings, makes no further court appearances, and collects no further fees – either from the client or the court. Traditionally and for all practical purposes, the formal, advocacy-driven relationship is over. Once counsel ceases to act as the defendant’s legal representative in that defendant’s criminal case, she becomes “former counsel,” whose client is now a “former client.”

The end of the attorney-client relationship has always been more unbounded when viewed from an ethical, rather than a constitutional or action-driven, perspective. The duties of loyalty and confidentiality, for example, have long been understood to outlast, not simply the life of the case, but the life of the client and the attorney. But other than the rote obligations to file a notice of appeal and return the client’s files and property, counsel’s post-case duties are passive, fulfilled by simply saying and doing nothing.

C. Impact of the Innocence Standard

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31 For trial counsel, the case terminates after the client has been sentenced, any necessary post-trial motions have been filed and litigated, and counsel has filed a notice of appeal. ABA Defense Function Standard 4-8.1(b), 4-9.1(b)-(c). For appellate counsel, representation generally continues “through all stages of a direct appeal, including review in the United States Supreme Court.” ABA Defense Function Standard 4-9.2(g); 4-9.5(a).


33 Model Rule of Prof’l Conduct R. 1.6 (duty of confidentiality outlasts the representation); Model Rule of Prof’l Conduct R. 1.9 (duty to avoid conflicts of interest between current and former clients by not revealing information relating to a former client’s representation “except as these Rules permit or require”).
The Innocence Standard states that defense counsel has a “some duty to act” upon learning “of credible and material evidence or law tending to show actual innocence, or lawfulness of conviction or sentence. This duty applies even after counsel’s representation is ended.”34 The final paragraph concludes: “Counsel should determine applicable deadlines for the effective use of such evidence or law including federal habeas corpus filing deadlines, and timely act to preserve the client’s rights. Counsel should determine whether – and if so, how best – to notify the prosecution and court of such evidence.”35

The Innocence Standard’s imperative that a defense attorney “act” on behalf of a former client’s behalf in these complex and potentially labor-intensive ways is unprecedented. Nowhere else in the American Bar Association’s Defense Function Standards or the American Bar Association’s Model Code of Professional Conduct is counsel required to do anything on behalf of a former client, other than the rote tasks of filing a notice of appeal, returning the client’s property, and providing of the case file to the client and successor counsel.36 Counsel fulfills her unending duty of confidentiality with the ultimate non-action: remaining silent.

34 ABA Criminal Just. Standard 4-9.4(a) (Continuing Duties of Defense Counsel) (emphasis added).

35 Id. at Standard 4-9.4(c).

36 Id. at Standard 4-3.11(c), The Client’s File. The ABA’s Rules of Professional Conduct, which apply to civil and criminal lawyers alike and which have been adopted by the majority of jurisdictions in the United States, also make no mention of any affirmative duty to act by defense counsel on behalf of a former client, other than the duty to return the client’s papers and property. Model Rule of Prof’l Conduct R.1.16; see Jenna C. Newmark, The Lawyer’s “Prisoner’s Dilemma”: Duty and Self-Defense in Post Conviction Ineffectiveness Claims, 79 Fordham L. Rev. 699, 708-20 (2010) (delineating a lawyer’s ethical obligation to former clients as the duty of confidentiality, duty to return
The Innocence Standard demands more than passivity if new evidence emerges indicating the wrongful conviction of a former client. While the Standard says the duty to act can be discharged by informing the former client’s current counsel, that exit ramp will rarely be available because the vast majority of post-appeal convicted inmates have no counsel. And although the Standard does not elaborate on what “some duty to act” might involve, if the imperative is exoneration, it logically follows that it would include the same actions the Standard mandates for current counsel: “evaluate,” “investigate,” and “advise and consult with the [former] client.”

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

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37 ABA Criminal Justice Standards Committee Defense Function 4-9.4.

38 28 U.S.C. § 2254(d)(1) (1996) (“An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”); See Laurie L. Levenson, Searching for Injustice: the Challenge of Post-Conviction Discovery, Investigation, and Litigation, 87 S. CAL. L. REV. 545, 549 n.16 (2014) (“In practice, the [AEDPA] created a mountain of significant
The deadline gives rise to a number of problems that inmates must confront, the resolution of which involves careful strategic thinking and the preparation and filing of complex written pleadings. Non-capital prisoners seeking habeas relief have no right to counsel, and thus must represent themselves in all AEDPA-related proceedings unless they can afford an attorney.39 The vast majority, however, are indigent and therefore unrepresented.40 Compliance with the Innocence Standard, therefore, tasks former counsel with explaining AEDPA’s complexities to the former client.

Compliance may require significant self-education. Most state court practitioners have no reason to be familiar with AEDPA, which demands that an inmate file a federal habeas petition one year and ninety days from the date the highest state court denied the direct appeal, or one year from the date that the United States Supreme Court denied certiorari.41 This deadline may be relatively easy to calculate and apply, and for many former clients, it will have long passed by the time the new evidence surfaces.42 But the blown deadline does not discharge counsel of her responsibilities, because it may be overcome by what is known as the “innocence gateway,” an exception that allows defendants to present an untimely federal claim if it turns on evidence of actual

39 Pennsylvania v. Finley, 481 U.S. 551, 554 (1987) (holding that “the right to appointed counsel extends to the first appeal of right, and no further”).

40 Lee Kovarsky, Original Habeas Redux, 97 Va. L. Rev. 61, 88-89 (2011) (“Of the criminally confined prisoners attacking capital sentences, almost ninety-five percent were represented by counsel. By contrast, only about two percent of criminally confined, noncapital prisoners had lawyers.”)

41 Supra cite.

innocence. To comply with the Innocence Standard, defense counsel must advise former clients of the innocence gateway exception and explain how most effectively to litigate pro se so that the untimely claim has a chance of receiving due consideration. Ideally, counsel would also advise the former client to file a request for the appointment of counsel. Because that motion is so crucial, counsel should also consider helping the client with the drafting of the motion so that it has a better chance of success.

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

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43 The Supreme Court has never held that a freestanding claim of actual innocence may serve as the basis for federal habeas relief. Herrera v. Collins, 506 U.S. 390, 400-401 (1993) (“Few rulings would be more disruptive of our federal system than to allow for federal habeas review of free-standing claims of actual innocence.”). Recently, however, the Court held that, “actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, …or…expiration of the statute of limitations.” McQuiggin v. Perkins, 133 S.Ct. 1924, 1929 (2013)(citing Schlup v. Delo, 513 U.S. 298, 316 (1995)).


For these reasons, it is important for the former client to file every viable federal constitutional claim in a single petition. But at least one of those claims will not be exhausted: the newly discovered claim pointing to innocence or wrongful conviction.\footnote{Evidence of actual innocence is often newly discovered because of misconduct by the prosecution or police, false testimony by witnesses, or ineffective assistance of trial counsel, all of which are constitutionally viable grounds for habeas relief. Thus, evidence of actual innocence is often presented to federal courts through one of these vehicles. The obvious conflict presented by former counsel advising a former client to present an actual innocence claim by arguing that former counsel herself was ineffective is explored in Part ___, infra.}

If a former client has, in addition to the innocence claim, at least one other claim that the state courts have previously reviewed (and rejected), he or she will have a “mixed petition,” which contains some claims that are exhausted and some claims that are not.\footnote{Rose v. Lundy, 455 U.S. 502, 518-19 (classifying as “mixed” any federal habeas petition that contained even one unexhausted state claim).}

Therefore, counsel must also advise the former client to seek a stay from the federal district court to go back to state court and exhaust the unexhausted claims. Competently advising the former client involves familiarity with the stay-and-abey doctrine, and the ability to explain to the client how to litigate, pro se, to obtain a stay-and-abey order.\footnote{The United States Supreme Court has authorized federal district courts confronted with mixed petitions to issue a stay to allow the petitioner to return to state court to exhaust his unexhausted claims if: (1) there is good cause for the failure to exhaust, (2) the claims are potentially meritorious, and (3) there is no evidence of abusive or dilatory tactics. Rhines v. Webber, 544 U.S. 269, 277-78 (2005) (holding that when outright dismissal of petitioner’s unexhausted claims would bar petitioner from later bringing them in federal court, district courts may issue a stay-and-abeyance until sixty days after petitioner exhausts claims in state court). A further wrinkle occurs if the newly discovered innocence claim is the only claim the former client intends to present to the federal court and thus the entire petition is unexhausted. The Supreme Court has never held that Rhines stays apply to a completely unexhausted petition, but three circuit courts have applied Rhines in that context, and competent counsel should advise a former client to raise this argument. See Heleva v. Brooks, 581 F.3d 187, 191 (3d Cir. 2009); Dolis v.}
Once again, counsel should also advise the client to file a motion for the appointment of counsel and help the client with the drafting of the motion.

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

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

II.
LEGAL AND MORAL JUSTIFICATIONS
FOR THE INNOCENCE STANDARD

A. The Innocence Movement

The Innocence Standard has no accompanying commentary as of the writing of this article. Nevertheless, the intent behind the creation of the rule – to rectify miscarriages of justice -- seems clear given the American Bar Association’s 2008 decision to pass nine resolutions designed to address the problem of wrongful convictions.\(^{51}\)

The American Bar Association’s attention to the issue reflects a building national consensus that the existence of so many exonerees is the result of defects in the criminal justice system that are significant and in need of remedy.\(^{52}\) Over the last two decades, a sea change has taken place in the attention paid by lawyers to the problem of wrongful convictions, heightening public awareness of the problem and its horrific consequences.\(^{53}\) In recent years, the Innocence Movement has resulted in “widespread system reform –

\(^{51}\) Paul C. Giannelli & Myrna S. Raeder, *Achieving Justice: Freeing the Innocent, Convicting the Guilty, Report of the ABA Criminal Justice Section’s Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process*, 37 Sw. U. L. Rev. 763, 773 (2008) (drafting nine resolutions, which were adopted by the ABA House of Delegates, designed to “better ensure that individuals will not be convicted of crimes they did not commit, and to compensate those who are exonerated”) [hereinafter Giannelli & Raeder, *Achieving Justice*].

\(^{52}\) For a historical overview and comprehensive analysis of the wrongful convictions, see generally Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. Crim. L. & Criminology 825 (2011).

\(^{53}\) Elizabeth S. Vartkessian, *Legal Convictions and Social Exoneration: The Consequences of Michael Toney’s Wrongful Conviction*, 75 Alb. L. Rev. 1467, 1467–1468 (2011-12) (“In the last twenty years increasing scholarly attention has been devoted to understanding the causes and consequences of wrongful convictions.”); Kimberly A. Clow, Isabella M. Blandisi, Rose Ricciardelli & Regina A. Schuller, *Public Perception of Wrongful Conviction: Support for Compensation and Apologies*, 75 Alb. L. Rev. 1415, 1415 (2011-12) [hereinafter Clow et. al., *Public Perceptions*] (“With over 280 post-conviction DNA exonerations through Innocence Projects in the United States alone and half a dozen Commissions of Inquiry into wrongful convictions in Canada, the public may be more aware of wrongful convictions than ever before.”).
not only greater DNA collection and testing, but also reforms designed to improve police investigative procedures, to prevent prosecutorial misconduct, and to provide better funding and higher standards for capital defense, among other things.”

As the number of exonerees has soared above 1,500, Innocence Projects and other non-profit organizations devoted to freeing and compensating the wrongfully convicted has also grown in number. Social scientists, psychologists, and academics have produced a body of scholarship that establishes both the relatively high percentage of wrongful convictions and the unique and severe nature of the long-term harm suffered

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56 Zieva Dauber Konvisser, Psychological Consequences of Wrongful Convictions in Women and the Possibility of Positive Change, 5 DePaul J. for Soc. Just. 221, 230-31 (2012) (“Estimates [of wrongful convictions] range from 0.027 percent to 5 percent and include . . . 0.5 percent to 1 percent of felony convictions in the United States; 2.3 to 5 percent for the false conviction rate for death sentences from 1973-1989; and a factual error rate of 3.3-3.5 percent for capital rape-murder in the 1980s.” Professor Martin Zalman states that it is “almost certainly” the case that wrongful felony convictions, for all felonies across the United States, occur at a rate of at least between 0.5 percent and 1 percent each year. Extrapolating from about one million convictions annually, and a 40 percent conviction rate, results in 5,000-10,000 wrongful convictions and 2,000-4,000 wrongful prison sentences each year.” Martin Zalman, An Integrated Justice Model of Wrongful Convictions, 74 ALB. L. REV. 1465, 1471-73 (2010-2011) (quotation marks in original); Samuel R. Gross, Barbara O’Brien, Chen Hu, & Edward Kennedy, Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death, Proc. Nat’l Acad. Sci. (April 28, 2014), http://www.pnas.org/content/111/20/7230.full (finding that as many as 4.1% of death row inmates are innocent).
by exonerees. Conservative estimates are that between 0.5 and 1 percent of felony prosecutions result in wrongful convictions annually, for a total of between 5,000-10,000 every year. Studies of exonerees have demonstrated the devastating consequences they suffer. Like the worst kind of nightmare, a wrongful conviction is senseless and without redemptive value. Exonerees come to believe that, “the very worst thing can happen to you, and it leads to a more generalized loss of faith in society . . . and people.” Many suffer from severe mental illnesses, including PTSD and clinical depression. One noted psychologist described the suffering of exonerees as, “among the deepest despair I’ve ever encountered.”

Professor Martin Zalman has described the Innocence Movement as “characterized by innocence consciousness – the idea that innocent people are convicted

57 Interview: Craig Haney, PBS Frontline (May 1, 2003), available at http://wwwpbs.org (stating that “the wrongfully convicted have a more difficult time making sense of their experience” and experience a kind of “suffering that is impossible to make sense of . . . suffering that becomes very difficult to build from or grow out of”); Saundra D. Westervelt & Kimberly J. Cook, Framing Innocents: The Wrongfully Convicted as Victims of State Harm, 53 CRIME L. SOC. CHANGE 259, 268 (2009) (equating wrongful incarceration with a “sustained catastrophe” such as that experienced by survivors of severe abuse or prisoners of war);


60 Jennifer Wildeman, Michael Costelloe & Robert Schehr, Experiencing Wrongful and Unlawful Convictions, 50 J. OFFENDER REHABILITATION 411, 424 (2011) (measuring long-term effects of wrongful conviction on exonerees and finding that a significant number of the exonerees that participated in the study suffered from severe mental illnesses that included clinical depression, anxiety, and PTSD).
in sufficiently large numbers as a result of systemic justice system problems to require efforts to exonerate them, and to advance structural reforms to reduce such errors in the first place.”  

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

The work of the American Bar Association’s Ad Hoc Innocence Committee resulted in a series of policy recommendations, styled as nine resolutions, which were adopted by the American Bar Association’s House of Delegates in 2008. The resolutions recommended videotaping or audiotaping of police interviews with suspects; adoption of measures to improve the accuracy of line-up and photo array identifications; requirements that crime laboratories and coroners offices be accredited and follow standardized procedures; refusing to prosecute a case solely on the basis of a jailhouse informant’s testimony; increasing compensation for appointed defense counsel to promote “high quality” representation; promoting greater accountability and training for


63 Id. at 764, 773.

64 Id. at 773.
law enforcement officers; and providing more funding and training for prosecutor offices.65 More broadly, the American Bar Association adopted a resolution on “systemic remedies,” which exhorted state and federal governments to “identify and eliminate the causes of erroneous convictions.”66 One member of the committee suggested that, “[a] natural place for jurisdictions to begin to review local laws and procedures is by comparing them to newly adopted ABA innocence policies.”67

In 2008, the American Bar Association also amended Model Rule of Professional Conduct 3.8.68 This Rule, which applies only to prosecutors, now has two new subsections requiring that prosecutors take specific post-conviction actions upon learning “of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit the offense.”69 Specifically, the amended Rule directs the prosecutor to “promptly disclose that evidence to an appropriate court, and, if the conviction occurred in the jurisdiction where he or she practices, to disclose the evidence to the defendant and undertake further investigation to determine whether the defendant is, in fact, innocent.”70 If the prosecutor’s investigation establishes by “clear and

65 Id. at 773-788.

66 Id. at 787-88.

67 Id. (Executive Summary of the Ad Hoc Committee’s Resolutions, authored by Barry C. Sheck).

68 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).

69 Model Rule of Prof’l Conduct R. 3.8(g) and (h) (2008).

70 Model Rule of Prof’l Conduct R. 3.8(g).
convincing evidence” that the defendant is innocent, “the prosecutor shall seek to remedy the conviction.”\textsuperscript{71}

Finally, in mid-February of 2015, the American Bar Association will adopt a prosecutorial version of the Innocence Standard. This new Standard, formally known as Prosecution Function Standard 3-8.3, would require that prosecutors comply with preexisting Rule 3.8(g) and (h) whenever “a prosecutor learns of credible and material evidence creating a reasonable likelihood that a defendant was wrongfully convicted.”\textsuperscript{72} The second part of the standard would require the prosecutor to “reasonably and respectfully evaluate the materials and take actions that are consistent with the applicable law, rules, and the duty to do justice,” regardless of what person or entity supplied the material.\textsuperscript{73}

Given the American Bar Association’s extensive efforts to address the problem of wrongful convictions, including its revision of Model Rule of Professional Conduct 3.8, it is not surprising that the organization would continue to propose additional innovative reforms through one of its key rule-making bodies, the ABA Criminal Justice Standards Committee. The new proposed Innocence Standards for prosecutor and defense attorneys are such reforms. The ever-growing number of exonerees, and the empirical evidence of the depth and breadth of the defects in the criminal justice system that account for their existence, provide compelling reasons to embrace both of these new Standards.

\textit{B. The Holistic Model of Representation}

\textsuperscript{71} Model Rule of Prof’l Conduct R. 3.8(h) (2008).

\textsuperscript{72} ABA Crim. Just. Standard Prosecution Function 3-8.3(a).

\textsuperscript{73} \textit{Id.} at 3-8.3(b).
The Innocence Standard’s exhortation “to act” on behalf of former clients also fits neatly within the framework of holistic criminal defense, which advocates for the “whole client” outside the confines of the pending criminal case, using resources and skill-sets “beyond mere courtroom advocacy.” Practitioners of the holistic model collapse the distinction between “current” and “former” clients, helping them navigate the collateral consequences of sustaining a criminal conviction, which may include “the loss or denial of public benefits, ineligibility for employment-related licenses, a change in immigration status, damage to one’s reputation in the community, and a myriad of other problems that do not end at legal representation and disposal of the criminal case.”

During the litigation of the criminal case and long after its conclusion, defense counsel attacks the “root causes” of the client’s predicament by helping the client get access to drug treatment, benefits, childcare, psychological counseling, and employment opportunities.

More aggressive proponents of the holistic model also urge defense counsel to become involved proactively and preventatively to affect criminal law and policy, most importantly by demanding that states provide adequate funding for indigent defense.

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75 Douglas Ammar & Tosha Downey, Transformative Criminal Justice Defense Practice: Truth, Love, and Individual Rights – the Innovative Approach of the Georgia Justice Project, 31 FORDHAM URB. L.J. 49, 55-56 (2003). Under this conceptual framework, “the attorney-client relationship is only the beginning of the relationship, not the end. It does not define the boundary of the relationship.” Id. at 56. Lawyers at GJP work with social workers to aid their clients with post-conviction matters, and employ some of them in a landscaping business it owns and operates. Id. at 49-50, 56-57.

76 Cait Clarke, Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor, 14 Geo. J. Legal Ethics 401, 425-27 (2001) (describing holistic defenders as becoming “more active in the democratic process by increasing their political involvement, consensus-building
Pre-indictment, even pre-case, defense counsel are encouraged to be impact litigators involved in the “legislative, policy, and planning decisions that precede the trial.”

Defense counsel are also urged to combat the race- and class-based portrayal of clients in the media and to challenge the popular perception of criminal defendants as “guilt anyway” and beyond redemption. This is done by “reach[ing] into clients’ lives and communities,” offering educational programs designed to foster richer understanding of the client’s life story and its impact on the current criminal case.

The holistic model got a tremendous and unexpected endorsement in 2010, when the United States Supreme Court held that a criminal defense attorney had violated the Sixth Amendment’s guarantee of effective legal representation by failing to advise his client that he faced deportation by pleading guilty to transporting marijuana in exchange for a five-year prison sentence. Padilla v. Kentucky was notable, not only for

with other groups that may be unlikely allies, and trying to secure a place at the policy-making table. They engage in direct lobbying on specific criminal justice issues and organize public education campaigns.


80 Padilla v. Kentucky, 559 U.S. 356, 366 (2010). The managing attorney and director of the Bronx Defender Reentry Program described the decision as an “earthquake” that “shocked commentators and practitioners alike.” McGregor Smyth, From Collateral to Integral: The Seismic Evolution of Padilla v. Kentucky and Its Impact on Realities Beyond Deportation, 54 HOW. L.J. 795, 796-97 (2011). According to Margaret Colgate Love, the former U.S. Pardon Attorney under the Clinton Administration, “Padilla may turn out to be the most important right to counsel decision since Gideon, and the ‘Padilla Advisory’ may become as familiar a fixture of a criminal case as the Miranda warning.”
evisceration of the distinction between direct and collateral consequences, but also for its focus on the “whole client,” whose life prospects beyond the criminal case counsel was duty-bound to consider, at least within the context of deportation.\textsuperscript{81}

The Court began its opinion with a lengthy and sympathetic portrayal of the defendant, an honorably-discharged Vietnam War veteran who lived as a lawful permanent resident in the United States for forty years. Batting down the argument that the criminal defense attorney’s role was limited to advising a client about criminal penalties in the guilty plea context, the Court noted that for many people, “banishment” from one’s home was a far harsher penalty than incarceration.\textsuperscript{82} The fact that immigration law was a specialty outside of criminal defense counsel’s bailiwick was no excuse; given the high stakes of permanent exile, it was incumbent upon counsel to act in clear-cut cases by giving correct legal advice about deportation consequences, and in less clear-cut cases, to advise the client that deportation was, at least, a possibility.\textsuperscript{83}

Many have agreed with the characterization of the \textit{Padilla} decision as “the most important right to counsel decision since \textit{Gideon},”\textsuperscript{84} with far-reaching implications for the criminal defense attorney-client relationship. While this interpretation may very well

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\textsuperscript{81} \textit{Padilla}, 559 U.S. at 366.

\textsuperscript{82} \textit{Id.} at 373.

\textsuperscript{83} \textit{Id.} at PIN.

\textsuperscript{84} Colgate Love & Chin, \textit{The “Major Upheaval” of Padilla v. Kentucky: Extending the Right to Counsel to the Collateral Consequences of Conviction}, 25 Crim. Just. at 37.
be correct, it bears emphasizing that Padilla addressed current counsel’s obligations to a current client during the life of the client’s criminal case. Nowhere in the decision did the Supreme Court endorse the major tenet of the holistic model: that the attorney client relationship is unending and unbounded, with counsel’s “imagination and desire as the only theoretical limits.”

There are many reasons to embrace the holistic model of representation, which is innovative, rigorous, and often extremely effective. And there is an undeniable attraction in its recasting of defense attorneys, the red-headed stepchildren of the criminal justice system who are perceived “as sleazy and unethical, one step away from the clients they represent.” Under the holistic model, defense counsel is no longer the despised mercenary who signs on to fight for the enemy and departs at war’s conclusion to take up another equally repugnant cause. Rather, the defense attorney is a mensch whose mission is to deliver the client, not from a righteous government adversary, but from the client’s own demons, by providing access to a lifetime’s worth of aid: drug treatment,


87 Margaret Raymond, The Problem with Innocence, 49 Cleveland St. L. Rev. 449, 457 (2001) (stating that “ordinary criminal defense lawyer[s] . . . are not viewed as heroic. Far from it.”).
psychological counseling, job training, anger management, government benefits, employment, and even friendship, staying in close touch long after the criminal case is a distant memory.\textsuperscript{88}

At the same time, there are reasons to be cautious of the holistic model, even wary. Its efficacy is premised on partnerships – with social workers, judges, prosecutors, religious leaders, and community members -- whose roles in the system are different and often opposed to defense counsel’s core function. One commentator noted that the organizations that subscribe to the holistic ethos have “turned the image of the knee-jerk liberal defense lawyer on its head and have, in effect, become crime fighters themselves.”\textsuperscript{89} But defense counsel is emphatically not a “crime fighter”; that job

\textsuperscript{88} Ammar & Downey, \textit{Transformative Criminal Justice Defense Practice: Truth, Love, and Individual Rights – the Innovative Approach of the Georgia Justice Project}, 31 Fordham U.R.L.J. at 56-57. GJP lawyers view themselves as providers of “wraparound” social services and fierce advocates for clients years after the criminal case has concluded: “[o]nce released from prison or jail, we offer a variety of social services such as individual and group counseling, GED and literacy classes, monthly support dinners, and employment with our business.” \textit{Id.} at 56-57 (internal quotation marks omitted). GJP dismisses concerns raised by criminal practitioners and experts “that such amorphous boundaries cause problems in the attorney-client relationship and are beyond the scope of professionalism” as unfounded, stating, “We have found the opposite to be true. More permeable boundaries allow our clients to trust us more and begin to see us as true advocates.” \textit{Id.} at 56.

belongs to the prosecution and the police. A defense attorney’s legal and ethical
obligation is fundamentally different, and often diametrically opposed.\textsuperscript{90}

Of course, the vast majority of criminal cases result in guilty pleas that are the
result of brokered agreements between defense counsel and her adversaries. The more
collegiality and goodwill exists between the two sides, the more likely it is they will
cooperate and even collaborate on a favorable outcome for the client. But at the same
time, defense counsel must always be ready to take on prosecutors and police, and
perhaps just as importantly, to be seen as someone who embraces that challenge.\textsuperscript{91}
Defense counsel’s core mission, and to some degree, political capital, is based upon being
“a zealous advocate for his client, to lodge a strong defense in the courtroom if
circumstances so require and his client insists.”\textsuperscript{92} To be sure, practitioners of holistic
representation maintain their commitment to the adversarial model, but some have voiced
concern that a focus on holistic outcomes may divert scarce resources and leave some

\textsuperscript{90} Then, too, there is the uncomfortable fact that the holistic model is at heart paternalistic.
As one commentator wrote, this type of approach “risks condescending clients severely”
by implying that, “Because you are poor, we are not only going to defend you, we are
going to fix you.” Brooks Holland, Holistic Advocacy: An Important But Limited
welcome the kind of individualized attention and wraparound services the holistic model
provides, others however, may chafe at what they view as intrusiveness and the
presumption that the lawyer has the competence to determine not only their best legal
interests, but their best “life interests” as well.

\textsuperscript{91} Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev.
2463, 2478 (2004) (“If a lawyer is bent on plea bargaining and does so all the time, he
cannot credibly threaten to go to trial. Prosecutors will offer fewer concessions to these
lawyers’ clients because they do not have to offer more.”).

\textsuperscript{92} Kyung M. Lee, Reinventing Gideon v. Wainright: Holistic Defenders, Indigent

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lawyers unprepared to aggressively litigate “on behalf of criminal defendants who are commonly unpopular – even in the communities from which they came.”

The critique of the holistic model as potentially contradicting defense counsel’s fundamental purpose and even inhibiting counsel from carrying out her adversarial responsibilities in the courtroom is very similar to the critique of the Innocence Standard. Both the holistic model and the Innocence Standard have their genesis in expanding upon, and improving, counsel’s delivery of services under the Sixth Amendment. But in their quest to better the system, are they inadvertently subverting it? This question becomes more pointed in the face of a harsh reality: for the vast majority of lawyers who represent indigent clients, there not enough hours in the day to be a holistic attorney, much as they might like to be. This critique applies with equal force to the Innocence Standard, which may require investigative steps and legal expertise that are impracticable for the vast majority of criminal defenders. These ethical and practical complications, among others, are discussed below.

III. THE ETHICAL DILEMMAS POSED BY THE INNOCENCE STANDARD

A. The Problem with Parity

The Innocence Standards for prosecutors and defense attorneys establish an ethical parity regarding the duty to act if newly discovered evidence of innocence surfaces in an old case. While parity has surface appeal, it fails to reflect the fundamentally different nature of their respective roles. The Innocence Standard for

prosecutors simply restates a duty already imposed by the Constitution, while
underscoring the prosecutor’s ethical obligations, as previously set forth in the American
Bar Association’s Model Rule of Professional Conduct 3.8, and providing some
additional explication.  

By contrast, the new Innocence Standard for defense attorneys has no precedent
in any existing ethical rule or legal dictate. There is good reason for this discrepancy: the
new Innocence Standards mirror each other, but the roles of defense counsel and the
prosecutor do not. As representatives of the State, prosecutors “are subject to constraints
and responsibilities that don't apply to other lawyers.” Unlike defense counsel, who
represents an individual, the prosecutor represents the public writ large. Defense
counsel must advocate “zealously” on behalf of her living, breathing client; the

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94 Thomas v. Goldsmith, 979 F.2d 746, 749 (9th Cir. 1992) (holding that the state has a
duty in the post-conviction context “to turn over exculpatory evidence relevant to the
instant habeas proceeding”)(citing Brady v. Maryland, 373 U.S. 83, 87 (1963)); see also
access exculpatory evidence). It should be noted that some scholars have questioned
whether the law is settled on the question whether a prosecutor who receives Brady
material post-conviction is constitutionally obligated to disclose it to the defendant. See,
e.g., Fred C. Zacharias, The Role of Prosecutors in Serving Justice After Convictions, 58
VAND. L. REV. 171, 189-190 (2005)(stating that “no court has directly applied Brady in
the post-conviction context” but then stating “[w]hen a convicted defendant files a
collateral attack within statutorily prescribed time limits and the prosecutor comes into
possession of exculpatory evidence that would help the defendant establish an element of
the collateral claim itself, disclosure may be required”).

95 United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993)(citing Berger v. United
States, 295 U.S. 78, 88 (1935)).

96 Compare Criminal Justice Defense Standard 4-1.1 with Prosecution Standard 3-1.3.
prosecutor directs her zeal toward the abstract pursuit of the truth and the administration of justice.\(^{97}\)

It makes sense to subject a prosecutor to the obligations set forth in Model Rule of Professional Conduct 3.8 and the new prosecution Innocence Standard, because those obligations are entirely consistent with the prosecutor’s primary obligation to “serve truth and justice first.”\(^{98}\) Indeed, the prosecutor’s obligation “to act” to exonerate a wrongfully convicted person is well-established.\(^{99}\) Defense counsel, however, has no constitutional or ethical obligation to seek truth and justice; in fact, such an obligation at times would be irreconcilable with defense counsel’s core obligations. Of course, defense counsel is an officer of the court and cannot knowingly present false evidence or otherwise perpetrate a fraud.\(^{100}\) But refraining from plainly dishonest acts is not the same thing as a proactive and continuing duty to ferret out the truth on behalf of a former client.

For defense counsel, the Innocence Standard’s mandate to “act” in “some” way on behalf of a former, potentially innocent client is not so easily reconciled with counsel’s narrowly prescribed but deeply consequential role in the criminal justice system. And, as explained below, the Standard’s action-imperative with respect to former clients may conflict with defense counsel’s preexisting constitutional and ethical

\(^{97}\) Compare Criminal Justice Defense Standard 4-1.2(b) with Prosecution Standard 3-1.2(a)-(b).

\(^{98}\) Kojayan, 8 F.3d at 1323.

\(^{99}\) See, e.g., Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976) (stating that prosecutors are “bound by the ethics of [their] office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction”); (Model Code of Prof’l Conduct R. 3.8(a)-(d) (setting forth the prosecutor’s duty to disclose exculpatory and mitigating information).

\(^{100}\) ABA Criminal Justice Defense Function Standard 4-1.2(a)-(b), (d).
obligations to current clients. The moral attraction of the Innocence Standard is undeniable. The hard question is whether the Standard is justified, taking full account of the moral, legal, and practical complications.

B. Serving Two Masters

The language of the Innocence Standard is deceptively simple: “When defense counsel becomes aware of credible and material evidence or law tending to show actual innocence of a client or former client, or unlawfulness of such client’s conviction or sentence, counsel has some duty to act.”101 But what is former counsel to do if the source of “evidence” that “tends to show innocence” comes from a current client who is unwilling to let counsel share the information because the current client is the true perpetrator, is related or close to the true perpetrator, or simply unwilling to be outed as a snitch? Absent very narrowly drawn exceptions, the attorney-client privilege protects all private communications, however reasonable or unreasonable the client’s motivations for insisting on secrecy.102

101 ABA Criminal Justice Standards Committee Defense Function 4-9.4.

102 In the Matter of John Doe Grand Jury Investigation, 408 Mass. 480, 483 (1990) (“The privilege of insisting that the attorney keep confidential a client’s disclosures made to the attorney in his or her professional capacity belongs only to the client, and therefore can be waived only by the client, or in some cases, by the executor or administrator of the client’s estate.”) (internal citations omitted). In Swidler & Berlin v. United States, the Supreme Court noted the scant number of exceptions to the attorney-client privilege and expressly declined the government’s invitation to create a further exception allowing an attorney to reveal a client’s confidences after the client had died, stating that, “[a] ‘no harm in one more exception’ rationale could contribute to the general erosion of the privilege, without reference to common law principles or ‘reason and experience.’” 524 U.S. at 409-10 (1998). Existing exceptions include “the crime-fraud exception [and] the exceptions for claims relating to attorney competence or compensation.” Id. at 414 (O’Connor, J., dissenting). Some jurisdictions also provide for an exception where the client tells his attorney of his intent to commit a future crime involving serious harm or
The Innocence Standard does not address the complications facing a trial attorney caught between the warring demands of two clients, the current “confessor” client and the “former” innocent one, each with apparently co-equal claims on her duties of loyalty and zealous representation. To satisfy the demands of the innocent client, she must betray bodily injury. See, e.g., In the Matter of a John Doe Grand Jury Investigation, 408 Mass. at 486 (Nolan, J., dissenting).

103 Some might argue that this conflict is a straw man, readily resolved by the application of other Standards and the Model Rules. But only one Standard, ABA Conflict of Interest Standard 4-1.7(b), appears directly on point, and it appears to conflict with the Innocence Standard rather than clarify its application. Standard 4-1.7(b) states that “[d]efense counsel should not permit their professional judgment or obligations regarding the representation of a client to be affected by loyalties or obligations to other, former, or potential clients.” That Standard does not carve out an exception for the Innocence Standard’s “duty to act” on behalf of a possibly innocence client “even after the representation has ended.” Nor does the Innocence Standard carve out an exception for the Conflict of Interest Standard, leaving open the question of which Standard defense counsel should follow when compliance with both is impossible. Other Model Rules of Professional Responsibility refer obliquely to the possibility of such a conflict but do not resolve it. For example, ABA Model Rules of Professional Responsibility 1.9 governs counsel’s Duties of Former Clients. Rule 1.9 instructs a lawyer who has formerly represented a client in a matter not to represent a subsequent client in a “substantially related matter in which the person’s interests are materially adverse to the interests of the former client.” The Rule also states that “A lawyer who has formerly represented a client in a matter . . . shall not thereafter (1) use information relating to that representation to the disadvantage of a former client except as these Rules would permit or require with respect to a client . . . or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.” But it is hard to see how Rule 1.9 resolves counsel’s conflict. Counsel is not seeking to use information to the “disadvantage” of the former client but rather to that client’s advantage. The latter part of the rule forbids disclosure of information relating to the former representation except as permitted by the Rules – and the Proposed Standard explicitly grants that permission. The problem is not disadvantageous disclosure to the former client, it is disclosure that advantages the former client to the disadvantage of the current one. Rule 1.16 states that “a lawyer shall not represent a client, or, where representation has commenced, shall withdraw from the representation of the client, if: (1) the representation will result in violation of the rules of professional conduct or other law.” The Rule also provides that withdrawal from the representation of a current client is permissible if there will be no “material adverse effect on the interests of the client” or “any other good cause for withdrawal exists.” It is conceivable that defense counsel could seek to terminate her relationship with her current client to fulfill her innocence-obligations to her former client.
the confidences of the current client and violate what is one of the oldest and most sacrosanct privileges. To serve the current client, she must abandon the wrongfully convicted person she represented at trial, perpetuating a gross miscarriage of injustice and frustrating the truth-finding function of the court. There is nothing in the wording of the proposed standard to guide the attorney who faces this Hobbesian choice.

This scenario is not as far-fetched as it may seem. The vast majority of criminal defendants is indigent and represented by court-appointed counsel, usually a lawyer from the public defender’s office. Public defender associations operate like

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105 See, e.g., Swidler & Berlin, 524 U.S. at 413-14 (arguing that refusing to provide an exception to protect the interests of an innocent defendant “may distort the record, mislead the factfinder, and undermine the central truth-seeking function of the courts”) (O’Connor, J., dissenting); State v. Macumber, 112 Ariz. 569 (1976) (arguing that the privilege should gave way where it frustrates the constitutional right of the accused to present a defense to a criminal charge and compel the attendance of witnesses to provide relevant testimony) (Struckmeyer, V.C.J. and Gordon, J., dissenting).

106 See. e.g., United States v. Agosto, 675 F.2d 965, 969-974 (8th Cir. 1982) As described by Susan Voss, “Agosto involved an appeal of the disqualification of three attorneys who had separately represented three of the numerous codefendants in the case. One defense attorney had previously represented six grand jury witnesses, one codefendant until indicted, and another codefendant until arraigned. Id. at 971. A second defense attorney had previously represented both a potential trial witness and a codefendant at a grand jury investigation. Id. at 974. A third defense attorney had previously represented a codefendant for six years. Id. at 976.” Susan Voss, Right to Counsel, 71 Georgetown L.J. 589, 607 & n.1876 (1981-82).

107 Heidi Reamer Anderson, Funding Gideon’s Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest, 39 HASTINGS CONST. L.Q. 421, 422-23 (2012) (“Ninety-five percent of convictions are the result of plea bargains. Most defendants who
law firms, so that a client of one defender is a client of the entire office. A lawyer in a public defender’s office, therefore, carries a list of former clients that includes every individual that any other public defender in her office – past or present – has ever represented. Even in relatively small public defender offices in rural areas, the number translates into thousands of people.108

Additionally, many public defender offices see the same types of cases over and over again: for example, in jurisdictions encompassing poor urban neighborhoods, many of the defendants may be charged with shootings associated with the same rival gangs; in jurisdictions encompassing more rural areas, a large number of clients may be involved in the manufacture, distribution and use of a specific drug, such as methamphetamine.109

The repeat and interconnected nature of the offenses suggest that the chances are not


108 Gary T. Lowenthal, Successive Representation by Criminal Lawyers, 93 Yale L.J. 1, 7 (1983) (“It is not unusual for a single public defender office to represent tens of thousands of defendants each year.”).

109 Meghan Clyne, Taking It To The Streets, Philanthropy Magazine (Summer 2009) (“It’s brutal, terrifying, and on the rise. From coast to coast, gang crime ravages inner cities, destroys families, and causes whole neighborhoods to hunker down in fear. According to a federal report released earlier this year, criminal gangs now count roughly one million members—and are responsible for some 80 percent of crimes committed in American communities.”); Alan Elsner, Methamphetamine Scourge Sweeps Rural America, Jan. 29, 2005, available at www.freerepublic.com/focus/news/1331718/posts?page=71 (quoting North Dakota Attorney General Wayne Stenehjem as saying When we look at our prison population, 10 years ago nobody had even heard of it. Now 60 percent of our male inmates are users and we're building a brand new prison for female users.”); see also Stephanos Bibas, Plea Bargaining in the Shadow of Trial, 117 Harv. L. Rev. 2463, 2439-40 (2004) (describing public defenders as “high-volume repeat players in the criminal arena.”).
insignificant that defense counsel will represent a current client who belatedly reveals information that tends to exonerate a past client of her office.

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

The language of Conflict of Interest Standard 4-1.7 also appears to preclude, or at least complicate, any efforts by defense counsel to persuade the current client to allow defense counsel “to act” upon the newly discovered evidence of wrongful conviction by

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110 Wheat v. United States, 486 U.S. 153, 162-63 (1988) (stating that conflicts of interest are “notoriously hard [for defense counsel] to predict” in the pretrial stage of the proceedings); Jeff Brown, Disqualification of the Public Defender: Toward A New Protocol for Resolving Conflicts of Interest, 31 U.S.F. L. Rev. 1, 6 (1996) (“Usually, the conflict is clear in a joint representation case, but problems may arise where the issue is more nebulous, such as in cases where victims or witnesses are former or current clients of the same public defender’s office representing the accused.”).

111 ABA Criminal Justice Defense Function Standard 4-1.7(b). Normally, conflicts of interest for public defenders fall into one of four categories: (1) joint representation of co-defendants; (2) challenges by the client to the attorney’s effectiveness; and (3) cases in which a victim or witness was, or is, a client of the public defender. Brown, Disqualification of the Public Defender: Toward A New Protocol for Resolving Conflicts of Interest, 31 U.S.F. L. Rev. at 7-8.
disclosing it. If the disclosure could cause the present client or the present client’s family member or friend to be investigated and possibly charged with the crime for which the former client was convicted, the disclosure would have an obvious adverse impact on the current client’s interests. If disclosure would mean that the current client is revealed as a “snitch,” his or her life might be in real danger.112 Under any of these circumstances, it cannot be said that defense counsel would be “zealously advocating” for the current client “with courage and devotion; to ensure that constitutional and legal rights of their clients are protected,” as Standard 4-1.2 requires.113

If defense counsel “becomes aware of credible and material evidence . . . tending to show actual innocence or unlawfulness of conviction or sentence” of a former client” because of information revealed in confidence by a current client, it does not appear that defense counsel can “act” in any way without the latter’s express consent. For all the reasons described above, the current client may, wisely, refuse to give consent. Preexisting conflict of interest rules will estop defense counsel from trying to change the current client’s mind, while the long-standing constitutional and ethically imposed duty of confidentiality will prevent defense counsel from alerting the former client, the former client’s current counsel, or anyone else. In this situation, it seems that compliance with the Innocence Standard is ethically impracticable, if not impossible.

C. Self-Interest

112 See, e.g., Liza I. Karsai, You Can’t Give My Name: Rethinking Witness Anonymity in Light of the United States and British Experiences, 78 TENN. L. REV. 29, 38-44 (2011) (surveying federal cases in which witness’ were given anonymity after court determined their informant testimony placed their lives in danger).

113 ABA Criminal Justice Defense Function Standard 4-1.2(b) see also Model Rule of Professional Conduct 1.7.
A separate problem arises if the newly discovered law or evidence pointing to a former client’s innocence also points to former counsel’s incompetence. That is, what if the new, potentially exonerating information could and should have been discovered by defense counsel at the time of trial? Imagine a scenario in which a public defender, overwhelmed by a crushing caseload and facing back-to-back trials, neglects to interview an alibi witness for a client. Because defense counsel has not had the time or resources to undertake a thorough pretrial investigation of the case, counsel is unaware of the crucial nature of the testimony the witness would provide. The witness, perhaps someone with his own criminal record, is reluctant to get involved and makes no attempt to contact defense counsel. Following the client’s conviction and sentencing, the alibi witness, now conscience-stricken, comes forward, not only with an account of the defendant’s whereabouts at the time of the offense, but also with documentary proof (a cell phone video, a credit card receipt, a time-stamped parking ticket), establishing that the client was elsewhere when the crime was committed.

The failure to interview such a crucial and exonerating witness would appear on its face to be deficient performance. Given the strength of the evidence – its corroboration by documentation -- it also appears that defense counsel’s failure to present it at trial prejudiced the defendant because, had the jury heard the alibi evidence, there is a “reasonable probability that . . . the result of the proceeding would have been different. It is comforting to believe that any defense counsel would “act”

114 See, e.g. Lord v. Wood, 184 F.3d 1083, 1094 (9th Cir. 1994) (stating that the failure by defense counsel to interview witnesses who could have demonstrated the defendant’s factual innocence constitutes deficient performance).

immediately upon receipt of this information in all of the ways contemplated by the Innocence Standard. In such a clear-cut case, most probably would, without the Standard to prod them, even with the full knowledge that to stay silent and let an innocent client suffer is far worse than any professional harm that might result.

But the consequences of admitting ineffectiveness can be profoundly damaging. If a court were later to determine that this deficient performance prejudiced the former client, defense counsel’s professional reputation would suffer greatly.116 Many state bar associations will impose disciplinary sanctions on an attorney for providing ineffective assistance of counsel, ranging from a reprimand to a suspension of the license to practice law.117 With these stakes in mind, some criminal defense attorneys might balk at

116 Many published opinions concluding that a defendant suffered from ineffective assistance of counsel refer to defense counsel by name. To cite just one example, Los Angeles-based criminal defense attorney Ted Yamamoto was found to have provided ineffective assistance of counsel by the Ninth Circuit Court of Appeals in a 2002 decision, which used his name more than twenty times. Avila v. Galaza, 297 F.3d 911, 917-22 (9th Cir. 2002). Subsequently, Mr. Yamamoto was disciplined by the California state bar for the same misconduct. See www.calbar.org/members. While the Ninth Circuit opinion and state bar report are not readily accessible without access to a legal database, references to the “misconduct” that led to these finding are easy to find. The first two entries for a Google search using Mr. Yamamoto’s name are the websites www.avvo.com and the California state bar members landing page. The first sentence of the avvo entry states, “See attorney’s record of misconduct.” The first sentence of the state bar’s entry states, “Copies of official attorney discipline records are available on request.” http://www.google.com/#bav=on.2,or.r_qf&fp=9edf180b431a87c3&q=ted+yamamoto+attorney.

complying with the Innocence Standard, downplaying the significance of the new evidence or questioning its legitimacy, knowing that “a finding of ineffectiveness can cause the lawyer damage, casting a shadow on the lawyer’s reputation, undermining the lawyer’s future earning potential, and exposing the lawyer to professional discipline or a claim for legal malpractice.”  

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

Under these factual scenarios, many lawyers might determine that the evidence does not meet the Innocence Standard’s “credible and material” threshold and simply

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119 *Id.* at 69.

disregard it. While some might argue that disregarding such evidence is the right choice, sparing defense counsel the time wasted chasing frivolous claims, others might disagree, arguing that such evidence is credible and material. Prosecutors, who have been bound to follow the *Brady* Rule for more than fifty years, have a wealth of training and experience in applying the materiality standard in the context of investigating and disclosing information that may be exculpatory.\(^{121}\) By contrast, defense counsel have no training or experience in applying the materiality standard. That lack of training and experience, combined with a bias toward self-protection, suggests that defense counsel may often err on the side of inaction. To better ensure compliance with the Innocence Standard, the accompanying commentary should provide a detailed definition of material and credible. But perhaps most importantly, states and jurisdictions should consider immunizing from discipline defense attorneys who do follow through on their Innocence Standard obligation.

\textit{D. Resources}

Indigent criminal defense in this country is in crisis, and has been for decades.\(^{122}\)

Indigent defendants make up the vast majority of cases, meaning that their legal

\footnotesize{\(^{121}\) *Brady v. Maryland*, 373 U.S. 83, 88 (1963) (“We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”)

representatives are public defenders or private practitioners paid by the court, usually under a contract with a strict fee-cap.\textsuperscript{123} In many states, the cap is set so low that it precludes anything but the most minimal representation.\textsuperscript{124} Given lack of funding at both a state and federal level, many defender offices all across the country are suffering from budget cuts and lay-offs, and contract attorney fees have not risen to adjust for the cost of living or inflation.\textsuperscript{125}

In December of 2004, the American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants (SCLAID) published a groundbreaking, comprehensive study entitled \textit{Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice}.\textsuperscript{126} The report, written to coincide with the fortieth anniversary of the

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\textsuperscript{124} See infra notes \textsuperscript{123}-\textsuperscript{125}.

\textsuperscript{125} Stephanos Bibas, \textit{Shrinking Gideon and Expanding Alternatives to Lawyers}, 70 WASH. & LEE L. REV. 1287, 1291-92 (2013):

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

\textsuperscript{126} \textit{Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice},
Supreme Court’s landmark decision establishing the right to counsel in *Gideon v. Wainwright*, detailed the American Bar Association’s findings after holding four public hearings in which thirty-two expert witnesses testified about the quality of indigent legal representation in twenty-two different states.\(^{127}\)

As the name of the report suggests, the American Bar Association authors came to “the disturbing conclusion that thousands of persons are processed through America’s courts every year either with . . . a lawyer who does not have the time, resources, or in some cases inclination to provide effective representation.”\(^{128}\) *Gideon’s Broken Promise* attributed the breakdown in representation to a number of factors, including “shamefully inadequate funding” of public defender organizations and appointed counsel contract services, leaving lawyers underpaid, without the money for experts or investigators, and without the number of coworkers necessary to carry a reasonable caseload.

The report is a stunning indictment: “Taken as a whole, glaring deficiencies in indigent defense services result in a fundamentally unfair criminal justice system that constantly risks convicting persons who are actually innocent of the charges lodged against them.”\(^{129}\) The risk was not hypothetical, it was an empirical fact. And the “mounting evidence of wrongful convictions” had a “significant contributing factor”: attorneys who were unable, often because they lacked the resources, to be anything other

\(^{127}\) ABA Standing Committee on Legal Aid and Indigent Defendants (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

\(^{128}\) *Id.* at iv (Executive Summary).

\(^{129}\) *Id.* at 7.
than constitutionally inadequate.\textsuperscript{130} Although the authors of \textit{Gideon's Broken Promise} conceded that the conviction of the innocent was not solely the result of ineffective assistance of counsel, “clearly one of the best bulwarks against mistakes is having effective, well-trained defense lawyers.”\textsuperscript{131}

The fiftieth anniversary of the \textit{Gideon} decision has passed and not much has changed. Indeed, it is arguable that the problems afflicting the delivery of indigent defense services are, if anything, more dire.\textsuperscript{132} The Great Recession of 2008, combined with sequestration -- the across-the-board slashing of the federal budget -- have deepened the state and county budget cuts while creating a new crisis: the federal public defender system, once well-funded and widely known as a consistent, effective provider of counsel to the poor, was forced to lay off attorneys and staff as well as take other draconian belt-tightening measures after its funding was cut by fifty-one million dollars.\textsuperscript{133}

In light of this harsh reality, does it make sense to add an entirely new, and potentially laborious and time-consuming client base to defense counsel’s already over-

\textsuperscript{130} \textit{Id.} at 3 (citing Norman Lefstein, \textit{In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help}, 55 \textit{HASTINGS L.J.} 835, 858 (2004)).

\textsuperscript{131} \textit{Id.} (passim).


loaded plate? Of course, this client base consists of “former clients,” and, in some cases, the belated nature of the newly discovered evidence pointing to their innocence may be counsel’s fault. But is it reasonable to expect that prior counsel – blameworthy or not – has the resources and ability to “determine applicable deadlines for the effective use of such evidence or law including federal habeas corpus filing deadlines, and timely act to preserve the client’s rights”? Can other, smaller efforts counsel might make be cabined? For example, perhaps counsel believes she can discharge her duties under the Innocence Standard by calling the prosecutor and relaying the information. But what if the prosecutor responds by demanding further proof before taking any action? A defense attorney who truly believes in a former client’s innocence or wrongful conviction may feel compelled to interview witnesses, draft pleadings, and take other significant actions because the stakes are so high and there is no one else to do it. Thus, even a minimal step can commit counsel to the long mile of re-investigation and re-litigation.135

If these expectations are not reasonable, what changes can be made to the Innocence Standard to make its overarching goal of exonerating the wrongfully convicted more likely to succeed? This question, and other proposed reforms to the Innocence Standard, that are addressed in Part IV.

IV.

134 Id. at Standard 4-9.4(c).

135 Id. at Standard 4-9.4(b). While the proposed Standard also states that prior counsel can discharge the obligation “to act” by informing “current counsel (if any) to the evidence,” that option often will not exist, as the language of the Standard acknowledges. Id. at Standard 4-9.4(a). Most post-conviction defendants do not have counsel to represent them after the conclusion of their direct appeal. See supra note 26.
PROPOSED REVISIONS TO THE INNOCENCE STANDARD

In light of the legal, ethical, and practical concerns identified above, I propose specific changes to the Innocence Standard and suggest that the accompanying commentary include clarifications and explanations designed to aid defense counsel in fulfilling her obligations. The commentary must also state clearly that it is not unethical to fail to take all of the steps required by the Standard if doing so would interfere with counsel’s primary obligation to zealously represent her current clients. Interference could occur if the “duty to act” on behalf of a former client would violate counsel’s duty of confidentiality to a current client. Interference could also occur if the “duty to act,” particularly in the context of advising the former client of federal filing deadlines and other AEDPA-related issues, would be so labor intensive as to make it impossible for already overburdened counsel to provide adequate representation to current clients. To address the latter problem, I propose that the ABA develop a robust on-line training program and sample materials that defense counsel can easily download and adapt to the particular facts and circumstances of her case.

A. Modifications to the Language of the Innocence Standard

Paragraph (a) of the Innocence Standard states that, if “defense counsel becomes aware of material and credible evidence or law tending to show actual innocence of a . . . former client . . . counsel has some duty to act . . . even after the representation has ended.” The language of the Standard should be changed to replace “has some duty to act” with “may have some duty to act,” to make it clear that counsel is not per se unethical if she does not act for justifiable reasons. The Standard should go on to make clear that the duty of confidentiality always trumps the duty to act.
The Standard should also explicitly define the terms “credible and material” so that counsel has some guidance when applying these modifiers to the newly discovered evidence. Adopting the definition of “material” used by the Supreme Court in the context of the prosecutor’s disclosure obligations under the *Brady v. Maryland* line of cases seems most appropriate. Under that definition, evidence is “material” for purposes of mandatory disclosure if it “creates a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” “Credible” equates to “believable,” but believable to whom? It is important not to have credibility filtered through the lens of counsel’s already-formed opinions about an old case. Therefore, the Standard should make sure to define “credible” as worthy of belief when viewed from an objective factfinder’s perspective.

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

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

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136 The Supreme Court did not expressly define “material” in *Brady v. Maryland*. 373 U.S. at 88 (stating that a due process violation occurs where the prosecution suppresses evidence “material to guilt or punishment,” but not defining the word “material”); see also Scott E. Sundby, *Fallen Superheros and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 McGeorge L. Rev. 643, 646 (stating that “it is a little surprising to find that while the adjective ‘material’ is used to describe the evidence which is covered by [the holding in *Brady*], no new definition of what constitutes ‘material’ is given”).

confidential information. In that instance, defense counsel’s conduct is governed by Conflict of Interest Standard 4-1.7.

B. Proposed Commentary

The commentary should squarely address the remaining ethical issues the Standard puts into play: the possibility that disclosure could result in allegations of ineffective assistance of counsel, and the likelihood that many attorneys will lack the knowledge to advise former clients about the complexities of complying with federal habeas corpus filing deadlines under the AEDPA.

With respect to the ineffective assistance of counsel issue, I believe that it is appropriate for the commentary to advise state bar commissions to provide disciplinary immunity in cases in which defense counsel’s “duty to act” on behalf of a former client also reveals her own failures of advocacy in the first instance. It is counter-productive to punish defense counsel for falling on her sword to help a former client, and providing immunity will encourage more defense counsel to act on behalf of former clients, thus furthering the purpose of the Standard. My proposed commentary to address this issue reads as follows:

If the material and credible evidence or law tending to show actual innocence of a client or former client, or unlawfulness of such former client’s conviction or sentence was not previously discovered as the result of the fault or partial fault of former counsel, former counsel should reveal that fact in the course of the action he or she takes. Any potential disciplinary authority, including the state bar or any court having any involvement in the matter, should be aware of former counsel’s prompt disclosure and former counsel should be provided immunity from discipline. Other remedial measures should also be considered, such as removing counsel’s name and identifying information from public documents associated with the case.
Paragraph (c) of the Innocence Standard requires that defense counsel, “determine the applicable deadlines for the effective use of such evidence or law, including federal habeas corpus deadlines, and timely act to preserve the client’s rights.” As explained in Part I.C, this undertaking is very complicated and labor-intensive. The commentary should, therefore, set forth the deadline under the AEDPA and explain how to counsel how to calculate the correct statute of limitations filing deadline. The commentary should go on to explain how, acting pro per, the client can: (1) file a “shell” petition to meet the deadline that includes the claims that have already been decided by the state courts as well as the unexhausted innocence/wrongful conviction claim; (2) seek a stay-and-abey order from the federal court to exhaust the newly discovered claim of innocence/wrongful conviction in the state court under Rhines v. Weber; and (3) write a motion seeking the appointment of counsel.

Competently explaining each of these steps to a former client requires that counsel familiarize herself with the law governing these issues. As explained in Part I.C, most criminal defense attorneys, particularly state court practitioners, will have no familiarity with the AEDPA and will require training and other assistance in getting up to speed. The American Bar Association should play an active role in counsel’s continuing legal education in this area by providing webinars that discuss the law of federal habeas corpus and also provide “how-to” training in translating this dense doctrine into language that pro se former clients can grasp. Crucial to this task is providing defense counsel with sample materials, which she can adapt to the specific facts of her former client’s case. The materials should include an advisory letter to the former client, a sample shell petition, a sample stay-and-abey motion, and a sample motion to appoint counsel. The
American Bar Association is particularly well-suited to the task of providing this training and these materials and doing so is entirely consistent with its mission, which is to “serve as a national leader in rededicating adherence - within our profession and within all the Nation's justice systems - to the highest standards of professional conduct and competence, fairness, social justice, diligence and civility.”138

**CONCLUSION**

The very existence of the American Bar Association’s new Innocence Standard symbolizes the distance traveled by the legal profession in recognizing and responding to the terrible problem of wrongful convictions in the United States. But, as written, the Standard does not speak to the broader implications of its imperative. The forthright, simple language suggests that there is nothing controversial or even contradictory about the ethical imposition of an affirmative “duty to act” upon a trial attorney after the representation “is ended.” Yet it is both of these things. As written, the Innocence Standard suggests that defense counsel has an obligation to seek the truth when that is not and can never be her role. The absence of any mention of immunity or favorable treatment for former counsel who is at fault for the belated discovery of the new evidence will inhibit some from coming forward. And without the development of resources such as draft letters, pleadings, and CLE trainings, counsel staggering under the weight of excessive caseloads simply will not be able to comply no matter how good their intentions. The modifications and targeted commentary proposed in this Article are intended to make the Innocence Standard a better fit – ethically and practically – with

defense counsel’s all-important role in the criminal justice system. The better the fit, the
greater the likelihood of compliance by the defense bar and the achievement of the
ultimate goal: freeing the wrongly convicted.