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Prosecutorial Ethics in the Postconviction Setting from A to Zacharias

DANIEL S. MEDWED*

I tried out for my high school’s varsity football team when I was sixteen years old. I remember waiting in line to obtain my equipment. The head athletic trainer, a gruff New Englander, doled out secondhand gear to me—scuffed pads suitable for a junior with a slim build and equally slim chances to make the squad. The trainer asked for my name. I mumbled “Medwed” in response. The trainer then penned “Medway” on a piece of masking tape and put it on the front of my helmet. Perhaps hindsight has led me to embellish this next part, but I recall that a moment of silence followed, a pregnant pause when our eyes met, the trainer glaring, challenging me to say something. And much to my shame I remained silent.

After that embarrassing experience—and, yes, I was eventually cut from the team—I vowed that from that point on I would promptly correct people who misspelled or mispronounced my surname. It may sound trite, but I viewed this promise as a symbolic assertion of my identity and self-belief. It reflected my desire to prove I belonged on all kinds of varsity fields, whether a college classroom, a criminal courtroom, or the battleground of academia.

Flash forward nearly twenty years. In 2004, I published an article regarding the phenomenon of prosecutors resisting postconviction claims

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of innocence by prisoners. 1 My thesis was that a range of institutional, professional, and psychological factors all too often lead prosecutors to turn a blind eye to viable claims. 2 Although the article did not focus on ethical issues, I cited Fred Zacharias’s work, most notably his excellent 2001 primer on the professional discipline of prosecutors. 3 I also sent Fred a copy of my reprint when it came out. Fred wrote back with several reprints of his own—the first of many similar exchanges during the next five years—and his opening salutation was “Dear Professor Medved.” I blanched. Nevertheless, thrilled that a scholar of Fred’s ilk seemed keen on corresponding with me, I neglected to remedy this, even after he cited my work in a 2005 law review article as that of “Medved.” 4 Again, I did not correct him, in part, because that law review article was such a sterling contribution to the field of prosecutorial ethics that I no longer cared.

That 2005 article, The Role of Prosecutors in Serving Justice After Convictions, 5 represented an unprecedented attempt to apply the amorphous “minister of justice” concept to the complexities of postconviction litigation and investigation. Although scholars had previously touched on aspects of the ethical issues facing prosecutors in the postconviction sphere, 6 no one had comprehensively and systematically explored it until Fred turned his agile mind to this important topic. Upon rereading the article in preparation for this essay, I was struck by the thoroughness of Fred’s research, the soundness of the article’s structure, and the equanimity with which he approached hot-button issues.

After outlining some of the reasons why the topic had received so little attention—the absence of case law on point, the lack of incentives for prosecutors to take action to help convicted defendants, and the ambiguity surrounding what justice means after a conviction has become final 7—Fred set his sights on the various scenarios in which a prosecutor’s duty to do justice might be implicated after conviction. In particular, Fred analyzed the ways in which an ethical prosecutor should

2. Id. at 130–31.
5. See generally id.
7. Zacharias, supra note 4, at 174–75.
respond (1) to the discovery of new information that casts doubt on the
accuracy of the underlying conviction and (2) to overtures by the
defense seeking assistance from prosecutors in investigating or
potentially overturning a conviction.8 Fred astutely suggested that ethics
codes adopt standards governing prosecutorial disclosure of evidence
after conviction that resemble those applicable prior to trial.9 As for
postconviction ethical matters in general, he recommended that “a
prosecutor’s office might assign a single prosecutor, or committee of
prosecutors, to resolve or participate in deciding these issues.”10

Fred’s suggestions have gone beyond the realm of theory and gained
some traction in practice over the past few years. First, the Model Rules
of Professional Conduct and the related commentary were amended in
February 2008 to clarify that prosecutors should take “special
precautions... to prevent and to rectify the conviction of innocent
persons.”11 Now, when “a prosecutor knows of new, credible and
material evidence creating a reasonable likelihood that a convicted
defendant did not commit an offense of which the defendant was
convicted,” that attorney must act by “promptly disclos[ing] that evidence to
an appropriate court or authority.”12 If the original conviction occurred
within the prosecutor’s jurisdiction, the prosecutor has an added
responsibility to “undertake further investigation, or make reasonable
efforts to cause an investigation, to determine whether the defendant was
convicted of an offense that the defendant did not commit.”13 Where
that evidence rises to the level of “clear and convincing” evidence of
innocence, not just a reasonable likelihood, prosecutors under Model
Rule 3.8 must do more: “[T]he prosecutor shall seek to remedy the
conviction.”14 Five states have already adopted either slightly modified

8. Id. at 176–81.
9. Id. at 232.
10. Id. at 238. I had championed a similar concept in my 2004 article and was
tickled pink when Fred echoed this refrain. See Medwed, supra note 1, at 175–77.
11. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2010). For a discussion of
these amendments, see Daniel S. Medwed, The Prosecutor as Minister of
Justice: Preaching to the Unconverted from the Post-Conviction Pulpit, 84 Wash. L.
12. MODEL RULES OF PROF’L CONDUCT R. 3.8(g) (2010).
13. Id.
14. Id. R. 3.8(h). At least one observer believes these amendments are “the most
important additions to Rule 3.8 since the adoption of the Model Code in 1969,” Niki
or identical versions of this rule, and a number of other states are considering adoption.  

Second, the idea of creating prosecutorial postconviction units has become increasingly popular. Dallas County prosecutor Craig Watkins created a Conviction Integrity Unit in July 2007 staffed by a senior deputy chief, a full-time assistant district attorney, an investigator, and a legal assistant. The division took on a review of over 400 DNA cases and also pledged to evaluate every case—DNA and non-DNA—where evidence identifies a perpetrator other than the defendant. During its first two years in operation, Watkins’s unit helped to exonerate at least eight inmates convicted in Dallas County. New York County District Attorney Cyrus R. Vance Jr. announced the launch of a comparable program in March 2010. Led by an experienced assistant district attorney, the program will include a panel of ten prosecutors to assess cases and office practices as well as a group of outside experts to offer advice on policy matters.

The bottom line is that The Role of Prosecutors in Serving Justice After Convictions displayed both tremendous insight and foresight. It will likely stand as the seminal piece on the topic of postconviction prosecutorial ethics for years to come. Medwed or Medved, I intend to refer to this masterpiece until I hang up my scholarly helmet.

15. Colorado, Delaware, Tennessee, and Wisconsin have each passed slightly modified versions of Model Rules 3.8(g) and (h), and Idaho has adopted the identical language. See Delaware Rules of Prof’l Conduct R. 3.8(d)(2) (2010); Idaho Rules of Prof’l Conduct R. 3.8(g)–(h) (2010); American Bar Association: CPR Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct: Rule 3.8(g) and (h), http://www.abanet.org/cpr/pic/3_8_g_h.pdf (last visited Feb. 22, 2011); see also Michele K. Mulhausen, Comment, 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, 321, 328–39 (2010).

16. See Medwed, supra note 11, at 62.


18. Medwed, supra note 11, at 63.


20. Id.