Loyalty to petrified opinion never yet broke a chain or freed a human soul in this world--and never will.---Mark Twain

In the past several years, both the criminal justice system and the public at large have become increasingly aware of the possibility of wrongful convictions in criminal cases. Much of this awareness has been the product of the advent of DNA evidence that has led to some high profile exonerations, a number of them freeing people who had been on death row. Most criminal cases, however, do not produce biological evidence amenable to DNA testing. A number of wrongful convictions have surfaced through other means. One particularly disturbing theme that recurs in many of these cases is the refusal of prosecutors to concede that the wrong person was convicted, even after a defendant's exoneration.

This refusal is highly troubling for a host of reasons. For the defendant, who may have spent years in prison or even on death row, it deprives him of the simple apology to which he is entitled. It also deprives the public at large of an apology--for the failure to pursue the real culprit, who in many cases has been left to commit additional crimes; for the misdirection of public resources; and, in general, for participating in a miscarriage of justice.

But, there are more pragmatic problems as well. First, the refusal to accept that an injustice occurred is often preceded by the refusal to admit to problems with the case or to remain open to additional evidence during the investigative stage of the case. Second, as Chicago Tribune investigative reporters Maurice Possley and Steve Mills found, "[when] faced with unresolved murder cases, police and prosecutors rarely revisit the original crime or pursue avenues of investigation and suspects that have emerged during the often-long lifetimes of the cases." They found that in about half the cases in which DNA testing had freed a convicted inmate, authorities did not follow up by submitting a genetic profile of the suspected perpetrator to the national DNA database. The reporters found that one reason for the authorities' refusal to submit DNA profiles from exoneration cases was that they "had difficulty believing the wrong person was convicted." Consider the following stories:

The story of Ronnie and Dale Mahan was one of several reported in Mills' and Possley's landmark Chicago Tribune series on wrongful convictions. Prosecutors in Jefferson County, Alabama still believe the Mahan brothers are guilty of abduction and rape, though both men were released from prison and granted a new trial after DNA tests excluded them as sources of the semen recovered after the assault. When the DNA tests came back, the prosecutors, in preparation for the retrial, asserted that the rapist had not ejaculated, and that the semen belonged to the victim's husband. When DNA tests excluded her husband as well, the victim claimed for the first time that she had had sex with her boyfriend that day. When hair samples (which may exclude a suspect though
not decisively implicate one), proved inconsistent with her boyfriend's, the Mahan brothers were released. [FN14] When the victim refused to testify, prosecutors had no choice but to drop the case, but they did not consider the brothers exonerated. [FN15] One of the prosecutors said, "These sons of bitches are guilty as sin. There's no question in my mind. This is not a case of innocence . . . These two bastards are guilty. I just can't prove it." [FN16]

In the case of Rolando Cruz, who spent ten years on death row for the rape and murder of Jeanine Nicarico before eventually being acquitted of the crime, another man --Brian Dugan-- first confessed to the crime the year of Cruz's conviction. [FN17]

The chronology of the Cruz case [FN18] depicts a prosecution team that developed a theory of the case relatively early in their investigation and remained loyal to that theory throughout the initial investigation and three retrials, even in the face of numerous challenges to its veracity. It also illustrates the intensity and nature of the pressures that might contribute to such unswerving loyalty.

This was a classic "heater" case. [FN19] A ten-year-old girl was taken forcibly from her home in an affluent Chicago suburb, sexually assaulted multiple times, brutally murdered, and left face down in the mud. [FN20] Police were under tremendous pressure to solve the case, but their progress was slow. It was, as Scott Turow described, the sort of case in which "police often become prisoners of their own initial hunches." [FN21] The DuPage County, Illinois State's Attorney faced a tough re-election race, in which his challenger criticized his investigation. [*478] [FN22] The parents of victim Jeanine Nicarico emerged as a strong and vocal presence, forming a close alignment with the prosecution and ultimately sharing in the prosecution's enormous investment in their theory of the case. [FN23] Cruz was convicted. [FN24] Two months later, Brian Dugan confessed for the first of several times to committing the crime alone. [FN25]

The remainder of the saga included the refusal of prosecutors to believe Dugan's confession, to permit its introduction at Cruz's first trial, or to grant Dugan the immunity from a death sentence that he requested before he would make a formal statement. [FN26] It also included the resignation of several principals in the investigation, including two prosecutors, on the grounds that they could not in good conscience participate in prosecuting Cruz. [FN27] Cruz was acquitted in 1995 on his third retrial. [FN28] In November 2005, ten years after Cruz's acquittal, twenty years after his initial conviction, and nearly twenty years after Dugan's first confession, Brian Dugan was indicted for the murder of Jeanine Nicarico. [FN29] Following Dugan's indictment, the State's Attorney repeatedly refused . . . to offer . . . [the] simple declaration . . . [that] Brian Dugan and Brian Dugan alone abducted, raped and murdered . . . Jeanine Nicarico. . . . Instead he alluded vaguely to "others [who] may be legally responsible" for Jeanine's murder, declined to offer a theory of the crime and defended previous controversial investigations in the case as having been "done in good faith by honest and ethical professionals." [FN30]

As Turow, who had defended Cruz's co-defendant Alex Hernandez, remarked, "As a psychological phenomenon, this is an incredible case. . . . What this case is about is the inability of human beings to admit mistakes." [FN31]

These cases, and others like them, encompass a broad spectrum of prosecutorial behavior. Some of this behavior involves pretrial conduct, such as investigative work, determination of charges, and [*479] preparing a case for trial. [FN32] Some involves decisions made after conviction, in the face of strong evidence that the wrong person had been convicted. [FN33] Some involves lying, deliberately withholding evidence, and other bad faith behavior; [FN34] and some involves acts of remarkable courage. [FN35] Much of it, however, involves prosecutors simply trying to do their job as they see it, [FN36] and this may be the most disturbing prospect of all.

The recurring theme of these cautionary tales--and the dynamic on which this Essay will focus--is the prosecutor's tendency to develop a fierce loyalty to a particular version of events: the guilt of a particular suspect or group of suspects. This loyalty is so deep it abides even when the version of events is thoroughly discredited, or the suspect ex-
culpated. It results in a refusal to consider alternative theories or suspects during the initial investigation, or to accept
the defendant's exoneration as evidence of wrongful conviction. This Essay will explore the nature of that loyalty-
 Its roots, the possible sources of its tenacity, and some of its consequences. The Essay will begin with an examina-
tion of the concept of loyalty. It will discuss how philosophers have focused on certain vexing ambiguities arising
from the notion of loyalty, specifically its relationship to morality and the question of whether it describes an intern-
 al state or an external or relational dynamic. These ambiguities are highly relevant to the ensuing discussion of loy-
 alty among prosecutors. The second part will make this connection explicit by exploring the divided loyalties of the
prosecutor within the complex group dynamics-- emotional, social and political--of the prosecutor's office. The third
part will consider the prosecutor's divided loyalties as one aspect of a larger issue of divided loyalties inherent in the
adversary system, specifically the lawyer's loyalty to her own client as well as to pursuing justice. The fourth part
will place these conflicts, inherent in both the prosecutor's role and the adversary system in general, in the still
broader context of loyalty to one's beliefs. It will draw on psychological insights, particularly from the field of cog-
nitive neuroscience, to suggest that the tendency to form loyalties to one's own beliefs is deeply ingrained, even
when those loyalties may conflict with truth, justice, or other values. The concluding section suggests that progress
will be made when the tenacity of these psychological mechanisms is recognized, and prosecutors' offices begin to
institutionalize mechanisms to ameliorate and counteract them.

I. LOYALTY AND ITS AMBIGUITIES

Before turning to the questions of loyalty facing prosecutors, it is necessary to consider some definitional issues
about the concept of loyalty itself. Although emotions are often thought of as internal and acontextual, some emotions
 cannot exist without an object. It is difficult to conceive of loyalty in the absence of some person, group or institution as the
object of that loyalty. Loyalty takes shape in a societal, or at least relational, context. Although it is something we feel or
determine internally, inchoate loyalty is not a very coherent concept. It may be possible to feel loyalty that has no outward manifestations. For example, one could be a Cubs fan in one's heart but never do anything to show it. In general, however, people associate the feeling of loyalty with actions taken in its furtherance. Yet this tension between the internal and the external is a central puzzle about loyalty. It is one of those traits that people consider a virtue in itself and associate with an individual's moral upright-
ness. But, as philosopher R.E. Ewin succinctly summarizes the central conundrum,

It is clear that there are examples of good and bad loyalty. But what is it that makes for the goodness or badness
of the loyalty: is it something extrinsic or something intrinsic to it? If we take the first line, we seem to miss
something that simply is morally significant about loyalty itself; but if we take the second, we face the seem-
ingly intractable problem of accounting for how, in the case of a bad loyalty, loyalty 'misattaches' itself to the wrong
object . . . this puzzle is deepened by the fact that to some extent, at least, loyalty requires us to suspend our own in-
dependent judgments about its object. Ewin argues that loyalty has virtuous aspects independent of the worth of its object. There is value in the willingness to stick with a group and to put its welfare over one's own. Yet, as he of course recognizes, group loyalty can go terribly wrong.

No doubt things were simpler in primitive societies. Philosopher Robert A. Hinde observes that "early in human
evolution when groups were small, cooperation was essential for survival and family and group loyalties were nearly
coincident, facilitating group integrity." As he notes, loyalty in such groups served a highly pragmatic role. It is worth noting that this form of loyalty also lacked the core requirement Ewin enumerated above--it did not re-
quire putting the group's goals above one's own, because they were the same goals. Perhaps the trait should not be
called loyalty at all in such circumstances, or perhaps the definitional ambiguity is worth exploring. Hinde argues that a virtue like loyalty may begin as a facilitator of pragmatic ends but later acquire moral status. As he stated, "Basic psychological propensities leading to the maintenance and integrity of groups are paralleled by moral precepts and sometimes by law."
I want to emphasize two salient points from the above brief discussion of loyalty, both relevant to the examination of why prosecutors develop what is often called "tunnel vision" [FN48] about their cases. First, it is difficult to separate the moral status of loyalty from the psychological mechanisms that shape it. People adopt and choose to live by moral standards for complex reasons, and these reasons *482 emerge and develop in a societal context, not in a vacuum. [FN49] Cognitive theorists increasingly understand moral judgment to be closely intertwined with both emotion and social judgment. [FN50] Whether employed for valuable social ends or for unthinkable evil, [FN51] loyalty is shaped and continually reinforced in a social context, through psychological mechanisms. [FN52] It permits the avoidance of betrayal, conflict, and rupture of the social fabric. [FN53] Whether or not this avoidance is morally beneficial, it feels much better than betrayal or conflict feel, to both the loyal person and the object. It not only promotes avoidance of these unpleasant consequences, but it also promotes pleasant ones: the satisfactions of teamwork, shared goals, approval, and even rewards for good behavior. [FN54] Loyalty comes with enforcement mechanisms. These include ostracism and banishment of those who breach its rules. [FN55] The costs of failing to exhibit group loyalty can be considerable. [FN56]

Second, and implicit in the first point, if there is a distinction between the internal and external aspects of loyalty, it is a highly porous one. Individual goals and institutional goals have various incentives to coalesce. An institution will tend to attract those who share its goals, and perhaps even certain personality traits. [FN57] Those who survive and thrive are likely to internalize and adopt as their own not only the goals of the organization but its internal culture, beliefs, and ways of thinking about problems. [FN58] Information that threatens this mutually beneficial symbiosis may be warded off at a very early stage in an *483 individual's thought process. [FN59] Though people are constantly faced with difficult choices between individual and group loyalty, there is a way in which institutional norms colonize consciousness itself so that such choices become less and less likely to arise.

II. THE PROSECUTOR'S LOYALTIES

The prosecutorial role is one that, by definition, requires divided loyalties. It is commonly said that prosecutors serve a dual role. In the Supreme Court's well-known characterization:

The . . . [prosecutor] is the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor ---indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. [FN60]

The duty to act as a zealous advocate and the duty to act as a minister of justice are not contiguous; some tension between them seems inevitable. [FN61] The dual role, some argue, is "anchored in a contradiction." [FN62] Prosecutors are "expected to be neutral, independent ministers of justice," but at the same time they face intense pressure to procure convictions. [FN63] It is a commonplace that the desire to obtain convictions has become the driving force for most prosecutors. [FN64] It is likely, though, that the binary opposition between the obligation to *484 seek justice and the institutional imperative to convict fails to capture the complex nature of the competing loyalties facing prosecutors.

The prosecutor's role is an interesting amalgam of broad, nearly unreviewable discretion and intense external pressures. [FN65] Many of the pressures at work operate in other institutional settings as well, but some are peculiar to prosecution. At the most concrete level, the prosecutor works within a particular institutional environment, which will generate explicit procedures, but will also transmit implicit institutional expectations. [FN66] Generally, the conviction rate will constitute the basic yardstick of an office's efficacy, and those who contribute to that rate will advance. [FN67] Although there are variations among offices, the focus on conviction rate in general, and convic-
tions in high profile cases in particular, is heavily influenced by external pressures. [FN68] Many of these pressures are political, generated by the need for re-election, the need for governmental funding, [FN69] and the often vocal concerns of the community or particular advocacy groups, such as victims' rights groups. [FN70] Such pressures overlap with garden-variety bureaucratic influences, such as the desire to maintain the reputation of the agency, or at least its most prominent agents, even in the face of scandal. [FN71]

This amalgam poses complex questions for the individual prosecutor. Assuming a prosecutor who wants to perform her job well and has every intention of operating in good faith, where do her loyalties lie, and how will they affect her willingness to admit error? [FN72] Since an overriding goal is to encourage prosecutors whose primary loyalties include a commitment to justice-- rather than prosecutors who will neither derail a wrongful prosecution nor rethink a wrongful conviction--to what extent do these loyalties need to be reconsidered?

*485 This Essay suggests a focus on the prosecutor who intends to act in good faith, not because prosecutors never act in bad faith, [FN73] but because the focus on fault and blame is in many respects counterproductive. As I have discussed in detail elsewhere, the focus on fault and blame deflects attention from the systemic institutional causes of tunnel vision. [FN74] In addition, it is a particularly unhelpful focus where, as here, the problem is a failure to act, a failure to consider alternative scenarios, or a failure to reconsider erroneous conclusions. Such inaction is usually a collective effort, based on deeply entrenched bureaucratic incentives and very difficult to trace to individuals, since inaction is achieved largely through deflection of responsibility. [FN75] Finally, as I will discuss shortly, the cognitive biases which undergird many of the problems with the decision-making process are poorly captured by concepts of fault and intentional misconduct. [FN76]

For the conscientious prosecutor, as for any conscientious actor, there will be conflicting loyalties. But the question I want to address here is how deep certain of those loyalties go. That is, to what extent do they shape the prosecution's world view and with what effect on the prosecutor's ability to weigh institutional loyalty against conflicting values?

A. The Duty to Do Justice and Act as a Zealous Advocate

Turning to the question of a prosecutor's conflicting loyalties, the most salient conflict, as discussed above, is that between the duty to do justice and the duty to act as a zealous advocate. [FN77] There are situations in which the tension between these two goals seems clear and where conscience clearly dictates a choice for justice. This was the position in which prosecutor Mary Brigid Kenney found herself when she examined the appellate case file of Rolando Cruz. She came to believe that the record "reeked of politics and prosecutorial misconduct by . . . authorities intent on winning, not reaching the truth." [FN78] She explicitly wrestled with the question of whether to place her judgment over that of the entire trial system. Furthermore, she faced the prospect of causing additional pain to the Nicarico family. She resolved *486 these doubts by attempting to work within the system, asking her superiors to confess error. When it became obvious that this would not occur, she made the decision to resign. [FN79]

More often, matters are not nearly so clear. For the prosecutor who wishes to be loyal to her institution, but also to uphold justice, the role of minister of justice is simply too abstract to dictate conduct on its own. [FN80] The duty to ensure that "justice shall be done," [FN81] particularly for a prosecutor whose client is the state or the people, [FN82] will take on more concrete meaning in the context of the relevant institutions: the prosecutor's office, in particular, and the criminal justice system, in general. [FN83] That is, justice will take shape not in accordance with idealized notions of prosecution and criminal justice, but in light of the actual workings of the agencies in which the prosecutor operates.

Commitment to broad principles is an important source of guidance and job satisfaction, but it is rarely a sufficient one. [FN84] The abstractions of the prosecutorial role become more concrete and manageable in the context of the actual people with whom the prosecutor works: including the victims and their families who depend on her, the po-
lice officers she depends on, the colleagues with whom she works closely, and the supervisors whose good opinion
she seeks. The person whom the prosecutor does not get to know intimately is the defendant. [FN85] As Stanley
Fisher observes,

In her daily routine, [the prosecutor] is constantly exposed to victims, police officers, civilian witnesses, probation
officers and others who can graphically establish that the defendant deserves punishment and who have no reason to
be concerned with competing values of justice. At the same time, the prosecutor is normally isolated from those-
the defendant, his family and friends, and often, his witnesses—who might arouse the prosecutor's empathy or stim-
ulate concern for treating him fairly. [FN86]

*487 In short, the prosecutor will establish relationships, develop empathy, [FN87] and build loyalties in ways that
are bound to affect her conception of justice, and how it is best served. This is not to suggest that she will decide to
jettison the broad ideal of justice in favor of personal affinities, but rather that the requisites of justice itself will ap-
pear different. These perceived requisites may well have an effect on her understanding of whether, for example, a
closed case ought to be reopened based on conflicting evidence.

B. The Ideal of Justice

The ideal of justice is malleable enough to encompass some subtle—or not so subtle—shifts that bring it into closer
alignment with these loyalties. For example, the notion of truth itself may shift; the prosecutor may come to believe
that she knows the truth of what occurred, and that the effect of various procedural requirements is to prevent the
truth from coming out. This is the culturally entrenched notion of the law enforcement officer as guardian of the
truth in the face of bureaucratic hyper-technicalism, [FN88] a notion that is very much a part of the prevalent pro-
secution ethic. [FN89] Similarly, the notion of representing "the people" may take concrete form in a determination
to keep bad people off the streets and away from the victims she feels responsible for protecting, [FN90] even at the
expense of other values. [FN91] This tradeoff may arise from a desire to maintain the working relationships that en-
able the prosecutor to do her work, or from a determination to protect the reputation of the agency itself so that it can
continue to do its important work. [FN92]

*488 In an excellent article examining prosecutorial resistance to post-conviction claims of innocence, Professor
Daniel Medwed offers a helpful analysis of some of the psychological barriers to consideration of these claims.
[FN93] He notes a number of ways in which the requisites of the prosecutor's office may affect not only the operat-
ive definition of justice for the institution itself, but the individual prosecutors' internal conceptions of justice. He
notes that "prosecutors may begin to internalize the emphasis placed on conviction rates and view their win-loss re-
cord as a symbol of their self-worth." [FN94] He also describes a number of ways in which the institutional culture
reinforces the notion that the "system punished the true perpetrator of a particular crime," [FN95] and that to ques-
tion this is to impugn the integrity of colleagues as well as to call one's own integrity into question. [FN96] The pro-
secutor may begin with a presumption of guilt, [FN97] and she may later become certain that she and her colleagues
must have been right all along. Her loyalty to her version of events may preclude her from even considering the sig-
nificance of countervailing values.

In many particulars, the dynamics described here, and their impact on the prosecutor's loyalties, are unique to the
prosecution's peculiar role, as both investigator and trial attorney, as both advocate and guardian of the public in-
terest, and as both officer of the court and political actor. However, many of these dynamics are a product of the ad-
versary system. More broadly still, they are explicable in terms of the psychological and social structures through
which people process and act upon information.

III. THE IMPACT OF THE ADVERSARY SYSTEM

A. The Adversary System and Justice

The focus of this Essay is on the ways in which the adversary system promotes loyalty to particular ideas at the expense of concern for larger questions of justice. The most obvious way in which it does so is by dividing up the truth function. The system is built on the notion that if each adversary acts zealously on behalf of his client, the truth will come out. [FN98] This notion creates both a problem and an escape hatch for the prosecutor. The problem is that the defense attorney's only duty is to act zealously on behalf of her client (or at least that is the perception), whereas the prosecutor has dual duties, one of which may seem to hamper her from acting as zealously as she might need to in order to effectively counter the defense. [FN99] As Stanley Fisher points out, the adversary system also creates the conditions through which the prosecutor comes to think of her clients not as "the people" in the abstract, but as the victims and the police. [FN100] Thus, she wants to win in order to vindicate their interests, and, of course, she just flat out wants to win. [FN101] The structure of the adversary system, the bureaucratic incentives, and the psychological rewards and pressures are all aligned to establish that imperative. [FN102] The adversary system also seems to provide an escape hatch from this dilemma. By parceling out the search for justice--two adversaries acting zealously, with a judge or jury making the final determination--it seems to permit the diffusion and displacement of responsibility. The defense subscribes to the notion that it should do its best to win; the determination of guilt is for the trier of fact. [FN103] The prosecutor loyal to keeping bad guys off the street, protecting victims, and all the other particular aspects of justice discussed above may come to believe that the obligation to truth will be safeguarded by the system in general. And once the trier of fact has determined guilt, the prosecutor may unduly rely on this determination to excuse her own responsibility to reconsider the possibility of a wrongful conviction. [FN104] It is common for prosecutors to point to a jury verdict or judicial ruling as evidence that the right person was convicted. [FN105] For example, when Brian Dugan confessed to killing Jeanine Nicarico, a crime for which Rolando Cruz was already on death row, DuPage County *490 State's Attorney James Ryan refused to consider this new evidence. [FN106] As he later explained, "To confess error now was to impeach a DuPage County jury and the very workings of the legal system. I believe in the integrity of the jury system." [FN107] Unfortunately, a jury verdict cannot absolve the prosecutor of responsibility for wrongful convictions, since prosecutors have access to investigative matter, and in fact they themselves play a role in investigating. [FN108] Thus, as in the Cruz case, prosecutors may possess information which the trier of fact is either unaware of or cannot place in the proper context. [FN109] Nevertheless, these divisions of labor are part of the system, and, given human nature, amenable to abuse.

B. Loyalty to Beliefs

The adversary system encourages lawyers to seek out information that is helpful to their position, to interpret it in a way that helps their position, and to present it, within ethical bounds, in the best possible light. [FN110] It also encourages them to build alliances with their own clients and those who can help their case, and to isolate themselves from (or perhaps even adopt negative attitudes toward) [FN111] those on the opposing side. It does not, on its face at least, encourage lawyers to close themselves off to conflicting evidence or claims of justice. [FN112] I have elsewhere considered the emotional strategies that might make empathy with those on the opposing side difficult. [FN113] The question here is: how do prosecutors become so attached to particular ideas of guilt that they cannot or will not rethink them?

*491 I have suggested that there are institutional incentives not to rethink a conviction, [FN114] and that individual prosecutors may begin to see the world in a way that conforms to these incentives. In this way, what begins as a possible conflict in loyalties--loyalty to colleagues, to the police, to victims, to the institution--versus loyalty to one's conscience or one's role as a minister of justice--becomes reframed to ameliorate the conflict. As one commentator put it: "[Prosecutors] modify their conceptions of work in order to reduce the cognitive dissonance between what they would like to do and what they can." [FN115] This is a common strategy of moral disengagement: "detrimental
conduct is made personally and socially acceptable by portraying it in the service of valued social or moral purposes." [FN116]

Prosecutors may begin with an assumption that the suspect would not have been arrested unless he was guilty, [FN117] and that assumption will affect the way they filter and assess all subsequent information. [FN118] Cognitive dissonance is one such filter. [FN119] It is difficult to admit mistakes, and certainly difficult for a prosecutor to accept that her actions have led to the conviction of an innocent person. [FN120] It may be easier to deny the possibility. A recent article on prosecutorial decision-making reviewed some of the cognitive biases that might contribute to prosecutors' inability to admit errors of this magnitude. [FN121] The author discussed confirmatory bias (the favoring of confirming over disconfirming information); selective information processing (the motivation to defend one's beliefs in the face of conflicting evidence), and belief perseverance (the tendency to adhere to theories even when they are discredited). [FN122] These contribute to the "sticky presumption of guilt" [FN123] at the charging stage. Once a jury verdict "validates this form *492 of pre-conviction," [FN124] any conflicting information faces a high bar indeed.

Findings from cognitive science suggest that people are not entirely aware of the extent to which their initial templates, beliefs, and expectations influence their ability to evaluate evidence. [FN125] These beliefs and expectations act as a filter for evidence, guiding the way in which evidence is assessed. As one article on cognitive neuroscience explained:

Evidence consistent with one's beliefs is more likely to recruit neural tissue associated with learning and memory, whereas evidence inconsistent with one's beliefs is more likely to invoke neural tissue associated with error detection and conflict monitoring. [FN126]

In short, "people are more likely to attend to, seek out and evaluate evidence that is consistent with their beliefs, and ignore or downplay evidence that is inconsistent with their beliefs." [FN127] This filtering occurs at a very early stage in cognitive processing. As psychologist Anthony Greenwald describes the process, it is not so much a cognitive defense through self-deception, but a "cognitive defense by knowledge avoidance." [FN128] He uses the evocative analogy of junk mail to explain the way this avoidance works: "one need not know specifically what is inside the envelope to judge that it should be discarded." [FN129] That is, we may turn away threatening information without ever examining its contents.

*493 IV. CONCLUDING THOUGHTS

The goal of this short Essay is not to propose solutions to the problems of prosecutorial tunnel vision and their effect on wrongful convictions. There is a rich scholarly literature on the subject of prosecutorial reform. [FN130] The goal is simply to suggest that reforms will be most effective when they take into account the actual dynamics at work. As Jeffrey Rachlinski and Cynthia Farina argue, "bad public policy occurs when decision-making structures and protocols fail to counteract human cognitive limitations." [FN131] To the extent that rules, protocols, and proposals for reform seek to address intentional misconduct by prosecutors, they will be relevant to only a small part of the problem.

Loyalty to a particular version of events may develop at a very early stage, and may prove mightily resistant to reconsideration. A complex mix of psychological, social, and moral factors contributes to this dynamic. Loyalties, cognitive biases and emotional commitments are here to stay; they are part and parcel of the human condition. The goal is to identify those that have pernicious effects. The prosecutor's inability to reconsider a suspect's guilt should certainly be placed in that category.

The problem may be addressed on a number of levels. Institutional directives should be made clearer and more concrete, and institutional culture and incentives should be addressed. Review mechanisms should exist at every level of decision-making.
Two caveats are in order, however. First, review may become simply a way of reinforcing group norms. [FN132] The process needs to be explicitly structured to perform a critical role, or what my colleague *494 Andrea Lyon calls a "naysaying" function. [FN133] Second, review will be ineffective without transparency. Rules governing record keeping, record sharing and discovery must strive to ensure that a full investigative record exists and is accessible for review. Finally, training of both supervisory and lower level personnel must explicitly address the dynamics of tunnel vision. These dynamics can be better understood, they can be flagged, and perhaps, with sufficient will and sufficient knowledge, we can correct for them.

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[FN3]. See Barry Scheck et al., Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted (2000).


[FN5]. See Scheck, supra note 3.

[FN6]. See, for example, id. at 85, for a discussion of the case of Robert Miller, in which police focused on him as a suspect despite evidence implicating Ronald Lott, who continued to commit similar murders during the investigation of Miller. Likewise, Brian Dugan, who confessed to the crime for which Rolando Cruz was convicted, continued to abduct and rape young girls while Cruz sat on Death Row. Barry Siegel, Presumed Guilty: An Illinois Murder Case Became a Test of Conscience Inside the System, L.A. Times, Nov. 1, 1992.


[FN8]. Id.

[FN9]. Id.


[FN12]. Id.

[FN13]. Id.

[FN14]. Id.
[FN15]. Id.
[FN16]. Id.

[FN18]. There are several case citations, since Rolando Cruz's conviction was reversed twice before he was eventually acquitted. See, e.g., People v. Cruz, 121 Ill. 2d 321 (1988); People v. Cruz, 1992 Ill. LEXIS 221 (1992); People v. Cruz, 162 Ill. 2d 314 (1994). Cruz also had two codefendants, Alejandro Hernandez and Stephen Buckley. Charges against Buckley were dropped in 1987. Hernandez had two trials, and his second conviction was overturned by the Illinois Appellate Court in 1995. Rozek, supra note 17.


[FN20]. Rozek, supra note 17.


[FN22]. Rozek, supra note 17.

[FN23]. Siegel, supra note 6.

[FN24]. Id.

[FN25]. Id.

[FN26]. Id.

[FN27]. Id.

[FN28]. Id.

[FN29]. Id.


[FN31]. Siegel, supra note 6.

[FN32]. See, e.g., Rozek, supra note 17 (discussing problems with physical evidence and confessions in Cruz case).

[FN33]. See, e.g., Zorn, supra note 30 (discussing failure to reconsider Cruz case in light of Brian Dugan's confession).

[FN34]. In the Cruz case, seven law enforcement officers and lawyers were indicted for conspiring to deny Cruz a fair trial. All were acquitted. See Rozek, supra note 17; see also James Liebman, The Overproduction of Death, 100 Colum. L. Rev. 2030, 2083-97 n. 160 (discussing bad faith behavior by prosecutors).

[FN35]. See, e.g., Siegel, supra note 6 (discussing Mary Brigid Kenney and other investigators or prosecutors connected with the Cruz case who resigned as acts of conscience).

[FN36]. See, e.g., id. (discussing DuPage County State's Attorney Tom Knight, who still maintains he "would not

[FN37]. Arlie Russell Hochschild, The Managed Heart: Commercialization of Human Feeling 202-03 (1983) (discussing how our understanding of emotion is obstructed by the assumption that it "can have an independent presence or identity within a person through time").


[FN40]. Solomon, supra note 38, at 2.

[FN41]. See, e.g., The Boy Scout Oath, which lists loyalty as one of twelve virtues scouts should possess: Loyal: A Scout is true to his family, Scout leaders, friends, school and nation.

[FN42]. Ewin, supra note 39, at 403.

[FN43]. Id. at 419.

[FN44]. Id. at 411 (discussing, inter alia, loyalty to the Nazi party).


[FN47]. Hinde, supra note 45.

[FN48]. See, e.g., Report of the Governor's Commission on Capital Punishment, George H. Ryan, Governor, April 15, 2002 at 21 (a State of Illinois publication) (discussing that tunnel vision "results in the officer becoming so focused upon an individual or incident that no other person or incident registers in the officer's thoughts") [hereinafter Ryan Commission Report].


[FN52]. See Bandura et al., supra note 49.
[FN53] Zdaniuk & Levine, supra note 46, at 503.

[FN54] Id.

[FN55] Hinde, supra note 45.

[FN56] See, for example, the stories of several former members of the current Bush administration, including former terrorism czar Richard A. Clarke, Richard A. Clarke, Against All Enemies: Inside America's War on Terror (2004), and former Treasury Secretary Paul O'Neill, Ron Suskind, The Price of Loyalty: George Bush, the White House, and the Education of Paul O'Neill (2004).

[FN57] See infra note 102.

[FN58] Zdaniuk & Levine, supra note 46, at 503.

[FN59] See text accompanying notes 125-29.


[FN65] See Fisher, supra note 64, at 204-05.

[FN66] Id. at 204-07.

[FN67] See, e.g., Medwed, supra note 4, at 135.


[FN72] And, getting back to the definitional issues, which of her actions should actually be classified as loyal? To the extent the ends of the organization always coincide with her personal ends, her actions in furtherance of those ends may be classified as self-interested rather than loyal. Ewin, supra note 39, at 412.
[FN73]. See Liebman, supra note 34, at 2082-97 (discussion of prosecutorial bad faith).

[FN74]. Bandes, Patterns of Injustice, supra note 71, at 1328-30.

[FN75]. Id. at 1330-31.

[FN76]. See infra text accompanying notes 117-129.

[FN77]. See Fisher, supra note 64, at 198.

[FN78]. Siegel, supra note 6.

[FN79]. Id.

[FN80]. See Bruce Green, Why Should Prosecutors "Seek Justice?," 26 Fordham Urb. L. J. 607, 608 (1999) (calling the duty to do justice "protean as well as vague").


[FN82]. Medwed, supra note 4, at 145 (pointing out that unlike most lawyers, prosecutors have no individual client per se, but are charged with representing the interests of the state).

[FN83]. Id.


[FN85]. Medwed, supra note 4, at 145.

[FN86]. Fisher, supra note 64, at 208.

[FN87]. See Bandes, Patterns of Injustice, supra note 71, at 1319-20 (discussing selective empathy). See generally Raymond Paternoster, Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination, 18 Law & Soc'y Rev. 437 (1984) (arguing that the race of victims is significantly related to a prosecutor's decision to seek the death penalty and that selective empathy provides one explanation for this discriminatory effect).

[FN88]. See Susan Bandes & Jack Beermann, Lawyering Up, 2 The Green Bag 5, 6 (1998) (discussing television's role in perpetuating this view); see also Bandes, Patterns of Injustice, supra note 71, at 1326 (discussing the "Dirty Harry" syndrome).


[FN90]. Medwed, supra note 4, at 139.

[FN91]. This orientation may extend beyond simply convicting those the prosecutor is convinced committed the crime. As Medwed argues, "a prosecutor may believe that a defendant has committed other crimes for which he was not caught; even if he may be innocent of this particular crime, he is undoubtedly guilty of others." Id. at 147.

[FN92]. Id. at 136.
He points, for example, to the culturally ingrained belief that the police only arrest guilty people, which is exacerbated by the prosecutor's own lack of access to all the investigative materials, and to the effects of the prosecutorial ethic which forbids her from bringing charges she does not believe are based on probable cause. Id. at 140 n. 67.

Johnson, supra note 62, at 164.


See Fisher, supra note 64, at 210-11 (discussing defense license to use truth defeating tactics and general perception of an imbalance between the prosecution and defense roles). But see Bandes, Repression and Denial, supra note 84 (discussing the ethical debate about the limits on the defense role).

Fisher, supra note 64, at 208-11.

Medwed, supra note 4, at 138.

In addition, there is the question of the kinds of personalities that tend to be attracted to the practice of law in general and prosecuting in particular. See Medwed, supra note 4, at 138.


Medwed, supra note 4, at 142-43.

Id.

Siegel, supra note 6.

Id.

See Rory K. Little, Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role, 68 Fordham L. Rev. 723 (1999) (discussing the prosecutor's role in investigating crime).

In Steve Bogira's wonderful book Courtroom 302, for example, he tells the story of a police officer who, in investigating a murder case, concluded that the suspect, who had been charged with a capital crime, was the wrong man. He brought this information to the prosecutor who supervised felony review for the county, and this prosecutor sent him away, failed to follow up, and failed to inform the trial prosecutors. The suspect was convicted. See Steve Bogira, Courtroom 302 168-69 (2005).

Landsman, supra note 98, at 179-80.

See, e.g., Johnson, supra note 62, at 170 (prosecutors may deal with their job partly by blaming, belittling and badmouthing offenders); see also Bogira, supra note 109, at 69 (describing "two-ton contest" in which prosecutors race to be the first to convict four thousand pounds of defendants, and also describing racial epithet by which
the game was known).

[FN112]. See, e.g., Ill. Ct. R. P. 3.3.

[FN113]. See generally Bandes, Repression and Denial, supra note 84.

[FN114]. These incentives should not be nearly so strong when a suspect's probable guilt is questioned prior to trial, but many of the same dynamics exist, including the conflict with police and victims or their families, and in heater cases, the often intense political pressures to stay the course.


[FN117]. Medwed, supra note 4, at 147.

[FN118]. See, e.g., id. at 142.


[FN120]. Id.

[FN121]. Id.

[FN122]. Id.

[FN123]. Id.

[FN124]. Medwed, supra note 4, at 142.

[FN125]. Jonathan A. Fugelsang & Kevin N. Dunbar, A Cognitive Neuroscience Framework for Understanding Causal Reasoning and the Law, 359 Phil. Transactions Royal Soc'y London B 1749, 1749-54 (2004). Obviously these are generalizations, and people vary enormously (though certain professions likely attract certain types of personalities). One interesting study looked at the "repressor personality style," which it characterized as "engaging less frequently in reflective, internally focused cognition in favor of a more superficial, externally focused perceptual cognition." It found that repressors were very good at warding off information at the point of encoding: "By selectively narrowing the focus of their attention to non-threatening information, repressors would be less likely to process, and subsequently recall, threatening information." George A. Bonanno & Hoorie I. Siddique, Emotional Dissociation, Self-Deception, and Psychotherapy, in At Play in the Fields of Consciousness: Essays in Honor of Jerome L. Singer 255 (Jefferson A. Singer & Peter Salovey eds., Lawrence Erlbaum Associates 1999).

[FN126]. Fugelsang & Dunbar, supra note 125, at 1749-54.

[FN127]. Id. at 1751.


[FN129]. Id.

[FN130]. See, e.g., Zacharias, supra note 61, at 230-39; see also Peter J. Henning, Prosecutorial Misconduct and
Constitutional Remedies, 77 Wash. U. L.Q. 713 (1999); Tracey L. Meares, Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives, 64 Fordham L. Rev. 851 (1995); Medwed, supra note 4; Fisher, supra note 64; Davis, supra note 64. In addition, several commissions have tackled aspects of the issue of wrongful convictions, though the topic deserves a good deal more attention. See, e.g., The Ryan Report, supra note 48; Keith A. Findley, Learning from our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions, 38 Cal. W. L. Rev. 333 (2002) (discussing several such commissions).


[FN132]. Conversation with Chuck Weiselberg, Professor of Law, U.C. Berkeley School of Law (Boalt Hall) (Sept. 28, 2006).

[FN133]. Lyon gives the example of the felony review unit in a local prosecutor's office, which treats its function, not as determining whether to bring charges, but as determining what level of charges to bring. Conversation with Andrea Lyon (Aug. 25, 2005).

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