

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

2014

The Prosecutor's Contribution to Wrongful Convictions

Bennett L. Gershman

Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Bennett L. Gershman, The Prosecutor's Contribution to Wrongful Convictions, in *Examining Wrongful Convictions: Stepping Back, Moving Forward* 109 (Allison D. Redlich et al., eds. 2014), <http://digitalcommons.pace.edu/lawfaculty/962/>.

This Book Chapter is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

Chapter Seven

The Prosecutor's Contribution to Wrongful Convictions

Bennett L. Gershman, *Pace University*

Introduction

A prosecutor is viewed by the public as a powerful law enforcement official whose responsibility is to convict guilty people of crimes. But not everybody understands that a prosecutor's function is not only to win convictions of law-breakers. A prosecutor is a quasi-judicial official who has a duty to promote justice to the entire community, including those people charged with crimes. Indeed, an overriding function of a prosecutor is to ensure that innocent people do not get convicted and punished. The Supreme Court observed in the famous passage in *Berger v. United States* (1935) that a prosecutor's dual responsibility is that "guilt shall not escape or innocence suffer" (p. 88).

Despite the heavy burden placed on prosecutors to ensure that justice is afforded to all accused, empirical and anecdotal evidence strongly demonstrates that prosecutors—by overt misconduct, exercise of bad judgment, or simple carelessness—have been responsible for causing the convictions of hundreds, perhaps thousands, of innocent persons. The media regularly report stories of innocent people being released after spending many years in prison for a crime they did not commit. In many of these instances, there is powerful evidence that the wrongful conviction was attributable directly, or indirectly, to errors or misconduct by prosecutors. According to the National Registry of Exonerations (as of September, 2013), 1,162 defendants in the U.S. have been exonerated since 1989, and prosecutorial misconduct has been a significant factor in more than one-third of these erroneous convictions.

It should be intuitively obvious that given the preeminent role played by the prosecutor in the U.S. criminal justice system, the heaviest responsibility for ensuring that only guilty people are convicted lies with the prosecutor. More than any other government official, a prosecutor possesses the greatest power to take away a person's liberty, reputation, and even a person's life. The irresponsible use of this power, as noted above, can have tragic results.

A prosecutor is constitutionally and ethically mandated to promote justice. The prosecutor is even considered a "Minister of Justice" who has a constitutional, statutory, and ethical duty to ensure that a defendant is convicted on the basis of reliable evidence in proceedings that are fair. Nevertheless, some prosecutors deviate from these rules and engage in conduct that distorts the fact-finding process and produces erroneous convictions. Indeed, if a prosecutor is motivated to zealously win a conviction by any means, and engages in conduct that either intentionally or carelessly undermines the integrity of the fact-finding process, the prosecutor inescapably will bring about the conviction of a defendant who is actually innocent.

Stepping Back: A Brief Historical Perspective

Prosecutors historically have exercised enormous power with very little oversight or accountability over the use of that power. The absence of significant checks has created broad opportunities for abuse. Commentators have routinely bemoaned the frequency and flagrancy of misconduct by prosecutors. Dean Roscoe Pound (1930) more than eighty years ago decried the “number of new trials for grave misconduct of the public prosecutor” and the “abuse and disregard of forensic propriety which threatens to become the staple in American prosecutions” (p. 187). The legal literature over the years has contained titles such as “Improper Conduct of Prosecuting Attorneys,” “Remarks of Prosecuting Attorney as Prejudicial Error,” “Appeals to Race Prejudice by Counsel in Criminal Cases,” and “Shall Prosecutors Conceal Facts.”

The most famous documentation of misconduct by prosecutors was contained in the 1931 Report by the National Commission on Law Observance and Enforcement, popularly known as the Wickersham Commission, which systematically documented widespread abuses by U.S. prosecutors and the adverse impact of the misconduct on the administration of criminal justice. Examples of the misconduct committed by prosecutors, and the consequences to the fair administration of justice, are described in the sections below. Perhaps the most serious consequence of the misconduct, according to the Report, is “the conviction of the innocent.”

Indeed, the question at the time of the Report, and thereafter, as to whether innocent persons were convicted of crimes was neither abstract nor hypothetical. The well-known study by Professor Edwin M. Borchard (1932), *Convicting the Innocent*, documented sixty-five cases of convictions of innocent defendants drawn from a much larger number of erroneous criminal convictions of innocent people. The most prominent causes of erroneous convictions, Borchard found, and this is similar to the findings today, were mistaken identifications and witness perjury.

Moreover, there is little doubt that the Supreme Court’s famous articulation of the prosecutor’s special obligation to ensure that “justice shall be done” in the 1935 *Berger* decision was influenced by then-Canon 5 of the Canons of Professional Ethics of the American Bar Association (1908), which stated: “The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.” Nevertheless, despite legal and ethical norms designed to encourage prosecutors to pursue justice rather than convictions, empirical studies since 1935 have documented serious and pervasive misconduct by prosecutors. And while courts have continued to bemoan their inability to make prosecutors play by the rules, there is little evidence that courts, lawmakers, or professional disciplinary bodies have demonstrated a willingness or capacity to impose sanctions on prosecutors for committing misconduct.

Significance of a Prosecutor’s Mental Culpability

In analyzing the nature, extent, and reasons for a prosecutor’s wrongful or negligent conduct, it is often unclear whether a prosecutor is motivated by a good faith desire to convict a person the prosecutor honestly believes is guilty, or a bad faith desire to win a conviction at all costs regardless of whether the defendant is actually guilty. Prosecutors often argue that even if they may have deviated from a rule, the violation was not willful, but attributable to mistake, inadvertence, or the pressure of the trial. Courts usually do

not address whether a prosecutor's violation of a rule was deliberate or inadvertent; nor do courts typically ask whether a prosecutor was motivated to bring about the conviction of a person whom the prosecutor believed may have been innocent. These questions almost always are incapable of resolution. First, trying to divine a prosecutor's intent or motivation is virtually impossible. Moreover, seeking to discover a prosecutor's intent to engage in misconduct, or her indifference to the truth, is in fact irrelevant. As one court put it, "It hurts the defendant just as much to have prejudicial blasts come from the trumpet of the angel Gabriel" (*United States v. Nettl*, 1941, p. 930).

It is also noteworthy that a prosecutor's conduct in causing an innocent person to be convicted does not require a finding that the prosecutor engaged in any misconduct. Some violations, as noted below, have a considerable bearing on whether an innocent defendant may be found guilty. To be sure, conduct that distorts the fact-finding process and manipulates the fact-finder's evaluation of the proof frequently plays a significant role in the conviction of an innocent person. But even absent any wrongful conduct, a prosecutor's conduct may contribute to an erroneous conviction merely by the prosecutor's failure to scrutinize carefully the quality of his proof and to examine closely the reliability and credibility of his witnesses. Thus, even absent wrongful conduct, a prosecutor may be exercising poor judgment in allowing a tenuous case to go forward to trial. Indeed, if a prosecutor after closely examining his proof is not morally certain of a defendant's guilt, then the prosecutor has abdicated his responsibility to protect innocent persons from being wrongfully convicted and punished.

With respect to a prosecutor's mindset in preparing to go to trial, every prosecutor probably believes that the defendant is guilty and probably has assembled what he believes to be sufficient evidence to prove the defendant's guilt. However, it is not unusual that given an intensive investigation of a case, there may be evidence in the prosecution or police files that contradicts the defendant's guilt, or at least raises a significant doubt. How should a prosecutor view this contradictory proof? Studies show that a prosecutor predisposed to believe in the defendant's guilt and seeking to win a conviction may likely view contradictory evidence as false, irrelevant, or unreliable, and certainly not sufficient to cause the prosecutor to rethink the theory of prosecution or cause the prosecutor to hesitate to take the case to trial. Experts in cognitive psychology maintain that prosecutors ordinarily make professional decisions based on their personal beliefs, values, and incentives, and these psychological forces may lead a prosecutor to make decisions, even unintentionally, that are inconsistent with promoting justice (Findley & Scott, 2006). These studies question whether prosecutors are able to maintain the neutrality and objectivity that is needed to protect innocent persons against a wrongful prosecution, and suggest that these psychological biases impede rational decision-making.

A prosecutor seeking to win a conviction is likely to overestimate the strength of her case and underestimate the probative value of evidence that contradicts or undermines her case. For example, studies show that too many prosecutors exhibit a so-called "tunnel vision" whereby they ignore or dismiss evidence that might contradict the defendant's guilt (Bandes, 2006); a "confirmation bias" that credits evidence that confirms the prosecution's theory and discounts evidence that contradicts that theory (Burke, 2006); "selective information processing" that weighs evidence that supports one's belief more heavily than evidence that contradicts those belief; "belief perseverance" that describes a tendency to adhere to one's chosen theory even though new evidence comes to light that completely undercuts that theory's evidentiary basis; and "avoidance cognitive dissonance" under which a person tends to adjust her beliefs to conform to her behavior.

Impairing the Integrity of the Fact-Finding Process

The prosecutor dominates the fact-finding process in several ways. First, the prosecutor has a virtual monopoly of the proof, superior access to and knowledge of the facts that are used to convict a defendant, and the ability to shape and present those facts to the fact-finder in the most persuasive way. To be sure, as a legal and ethical matter a prosecutor must have confidence in the reliability of his evidence before bringing charges, and before presenting the evidence to a jury. However, as noted above, a prosecutor typically is confident in the accuracy of his evidence, whether or not that confidence is justified. Moreover, as the representative of the government, the prosecutor before the jury is cloaked with considerable prestige and respect, and therefore has a unique power to affect a jury's evaluation of the facts. Juries may view the prosecutor as a "Champion of Justice," a heroic figure who can be trusted to use the facts and make arguments in a fair and responsible manner.

The types of conduct by prosecutors that contribute to wrongful convictions usually fit into several well-recognized categories. They include concealing evidence that may prove a defendant's innocence, presenting evidence of an identification witness that is unreliable, eliciting testimony from an accomplice, informant, or jailhouse "snitch" that is false, offering testimony by a police witness that is false and inaccurate, presenting testimony in child sexual abuse cases that is untruthful or exaggerated, and presenting scientific evidence that is fraudulent or erroneous.

The following sections describe examples of misconduct by prosecutors that distort the fact-finding process and interfere with the jury's ability to decide a case fairly and rationally.

Prosecutors' suppression of favorable evidence. A prosecutor's failure to disclose favorable evidence to the defense that may either exculpate a defendant or undermine the truthfulness or reliability of prosecution witnesses is one of the leading causes of wrongful convictions (Garrett, 2011). Under the landmark case of *Brady v. Maryland* (1963), a prosecutor's failure to disclose favorable evidence that is material to guilt or punishment, regardless of the reason, and regardless of the prosecutor's good or bad faith, violates due process. The kinds of proof that are principal bases for wrongful convictions—erroneous eyewitness identifications, cooperation deals with witnesses, and flawed scientific evidence—often have been suppressed by prosecutors and only many years later have been discovered. For example, after an exoneration based on DNA evidence, it may be revealed that the identity of the real perpetrator was known to the police from the beginning but never disclosed to the defendant. The U.S. Supreme Court has ruled in several cases that prosecutors were guilty of suppressing material evidence, and it is reasonably clear in some of these cases that the defendant was wrongfully convicted.

It is difficult to estimate the number of defendants who have been wrongfully convicted because of a prosecutor's suppression of exculpatory evidence. It appears that apart from errors relating to incompetent defense counsel, the most frequent basis for wrongful convictions has been prosecutorial suppression of exculpatory evidence. According to one study, out of 133 known exonerations that resulted in a written decision by a court, 14 defendants, or just over 10%, resulted in relief based on a violation of *Brady* (Garrett, 2008). A study of all exonerations in Massachusetts shows that 12 of 33 cases, or over 36%, involved a *Brady* violation (Fisher, 2002).

Cases involving mistaken eyewitness identifications are perhaps the most dramatic examples of the impact of a prosecutor's violation of *Brady* on the conviction of an innocent person. Suppressed evidence by the prosecutor showing that the witness may

have been mistaken ranges from evidence that the police initially suspected another person committed the crime, to an eyewitness's initial failure to identify the defendant, to an eyewitness's positive identification of someone else as the perpetrator. Most recently, in *Smith v. Cain* (2012), the Supreme Court reversed a murder conviction because the prosecutor suppressed a police officer's notes revealing that the only eyewitness initially told the police that he could not identify any of the perpetrators, did not see their faces, and "would not know them if he saw them."

Suppression of exculpatory scientific evidence has resulted in the conviction of innocent persons. For example, in the widely reported Texas case of Michael Morton, an innocent man who was wrongfully convicted of murdering his wife in 1987 and who spent 26 years in prison, the prosecution suppressed evidence of a bloody bandana discovered behind his home on the day of the murder which contained DNA that would have excluded Morton and identified the real killer. In *Connick v. Thompson* (2011), a wrongful conviction of murder in which the defendant spent 18 years in prison, the prosecution failed to disclose to the defense that a scientific analysis of a piece of the victim's clothing stained with the perpetrator's blood showed that it did not match the blood type of the defendant.

Suppression of evidence that could be used to impeach prosecution witnesses is commonplace. Prosecutors are notorious for failing to disclose immunity deals with key witnesses that would suggest to a fact-finder that the witness was giving false or misleading testimony as a quid pro quo (Garrett, 2011). Prosecutors have failed to reveal that a witness's incriminating testimony came about only after the witness was hypnotized. Prosecutors also have failed to disclose recorded statements of key witnesses indicating that they planned to frame the defendant.

Prosecutors' use of unreliable testimony. Some witnesses are indispensable to secure convictions of guilty persons, such as eyewitnesses, children, cooperating witnesses, and scientific experts. By the same token, however, these witnesses are notorious for skewing the fact-finding process and causing erroneous convictions, not necessarily because of a prosecutor's misconduct, but because a prosecutor has not carefully vetted the witness's story. Too often police and prosecutors interview these witnesses with insufficient attention to details, contradictions, and inconsistencies. Moreover, these witnesses may be unusually vulnerable to coercive or suggestive interviewing techniques. It is often unclear whether these witnesses have actually been "coached" to give a false or exaggerated account of the event, or through subtle interviewing techniques have shaped their stories to accord with what they believe the police and prosecutors want to hear.

Identification witnesses. Identification witnesses are among the most unreliable witnesses. Misidentification is the single largest source of error in wrongful conviction cases (Garrett, 2011). Many prosecutors do not appreciate the dangers associated with eyewitnesses, and the difficulties associated with retrieving a witness's memory of an event and reconstructing that memory. Prosecutors in interviewing such witnesses and preparing them for testifying may assist the witness in remembering the event and retrieving a truthful recollection. But a prosecutor's actions also may distort a witness's underlying memory and produce a false recollection. A prosecutor in preparing an eyewitness's testimony has the ability to influence a witness to remember facts and fill in gaps that may be inaccurate, but which the witness may come to believe are the truth. Moreover, because of the prosecutor's special status, he is often viewed by the witness as an expert who is highly knowledgeable of the facts, and will use the facts responsibly. Indeed, some witnesses may even try to shape their stories to what they believe may accord with the prosecutor's expectations.

Some prosecutors may even attempt to adjust the testimony of eyewitnesses to strengthen the impact of their identification, and an erroneous conviction. For example, in *Kyles v. Whitley* (1995) a capital murder case, the prosecutor presented testimony from the key eyewitness who gave an extremely detailed account of the killing. However, in a statement the witness gave to the police shortly after the killing, the witness gave a vastly different account of the crime (which the prosecution never disclosed to the defense), stating he did not see the actual killing, nor did he remember many of the details that he testified to at trial. The Supreme Court reversed the conviction based on the prosecutor's nondisclosure, but implied that the witness's account had been "adjusted" by the prosecutor for the trial, and that the prosecutor had "coached" the witness's new story. Other instances of eyewitness memory adjustments by prosecutors reasonably lend themselves to procuring wrongful convictions.

Child witnesses. The testimony of child witnesses is especially vulnerable to manipulation by prosecutors. A familiar instance is the testimony of young children in sexual abuse cases. Indeed, numerous instances of wrongful convictions are attributable to the testimony of child witnesses (Garrett, 2011). Courts have increasingly scrutinized the testimony of young children for coercive or suggestive conduct by interviewers in preparing these witnesses for trial. For example, in *Idaho v. Wright* (1990), the Supreme Court found that a child's accusation of sexual abuse was based on leading and suggestive questioning by an interrogator who had a preconceived idea of what the child should be disclosing.

Prosecutors in seeking a conviction may present the testimony of children without sufficient scrutiny of the truth of their stories and the techniques used to elicit their testimony. Prosecutors have often failed to carefully probe the accuracy of the accounts of child witnesses, and have not been sufficiently attentive to factors that might shed light on the truthfulness of the child's account, such as the absence of spontaneous recall, the bias of the interviewer, the use of leading questions, multiple interviews, incessant questioning, vilification of the defendant, ongoing contact with peers and references to their statements, and the use of threats, bribes, and cajoling. Courts have also criticized the prosecutor's failure to videotape or otherwise record the initial interview session.

Cooperating witnesses. Cooperating witnesses are probably the most dangerous prosecution witness of all. No other witness has such an extraordinary incentive to lie. No other witness has the capacity to manipulate, mislead, and deceive law enforcement officials. No other witness is capable of lying so convincingly and yet be believed by the jury. Wrongful convictions are replete with instances in which cooperating witnesses gave false testimony that was critical to the verdicts (Garrett, 2011).

A prosecutor has a powerful incentive to seek out and accept a cooperator's account uncritically. Moreover, as noted above, a prosecutor often has a predetermined view of the facts of a case that may inhibit the prosecutor from scrutinizing the cooperator's account objectively. If a prosecutor has a theory of the case that has been developed from other evidence, or from the opinions of the investigators, the prosecutor is more apt to accept the cooperator's version uncritically. If the cooperator deviates from the prosecutor's theory, the prosecutor may conclude that the cooperator is lying or withholding information.

Cooperators are manipulative people, and their testimony may impair the integrity of the fact-finding process to such a degree that innocent persons are caught in the web of the cooperator's lies. Some prosecutors have a mindset that serving justice means putting people in jail and may tend to rely heavily on the cooperator's account. Moreover, some prosecutors are easily manipulated by cooperators, and therefore do not examine the cooperator's account objectively. If a prosecutor neglects to probe a cooperator's story or

background sufficiently to uncover inconsistencies or outright lies, then the cooperator's testimony may be perjury, and help produce an unjust conviction. Also, some cooperators may not even know the difference between truth and untruth, and a prosecutor who fails to intensively probe the cooperator's story invites false testimony. Cooperators often come from environments of crime and deceit that may make an understanding of truth ambiguous. Cooperators may not have a prosecutor's concern with exact facts, and may use language in a loose and non-literal fashion that encourages them to make exaggerated assertions that they may believe are the truth.

Scientific and forensic experts. Prosecutors' use, and misuse, of scientific evidence has been one of the principal causes of wrongful convictions, particularly in death penalty cases (Garrett, 2011). Prosecutors may present—through the testimony of an expert witness whom the prosecutor claims to be trustworthy—an opinion linking the defendant to the crime, when in fact the proof may be erroneous or fraudulent. Prosecutors in many cases have concealed from the defense evidence that would have discredited the expert's opinion, and distorted the evidence to make it appear reliable, often with tragic results. Prosecutors have elicited fraudulent testimony, erroneous and prejudicial conclusions without any factual basis, and opinions that appear to be based on a valid scientific theory but are really the expert's speculation and conjecture. They also have attempted to bolster the expert's credibility by exaggerating the expert's background and experience, and by giving the jury personal assurances that the expert is credible and reliable.

Prosecutors know that juries ordinarily view experts with heightened respect, and give considerable weight to their opinions. In contrast with other types of witnesses, the expert is usually viewed by the jury with an aura of special reliability and trustworthiness. Moreover, the expert usually possesses impressive credentials that reinforce the jury's trust in the expert's opinion. Further, the expert is usually adept at presenting his or her testimony skillfully and persuasively, and in language that jurors can understand. Finally, the expert's conclusions almost always interlock with other evidence in the case and reinforce and corroborate the prosecution's theory of guilt. More than any other witness, the expert probably has the greatest capacity to mislead the jury. And in tandem with a prosecutor who aggressively seeks a conviction, the expert can provide the testimony that virtually secures that conviction.

Fraudulent and erroneous scientific evidence has included fingerprints planted at the scene of the crime, faked autopsies in death penalty cases, fabricated breathalyzer readings in intoxicated driving cases, and perjured testimony by experts making hair and blood comparisons. Prosecutors have also presented as trustworthy the testimony of scientific experts that contained false, exaggerated, and erroneous conclusions that lacked a scientific basis. Numerous instances of so-called "junk science" have been presented by prosecutors as reliable and used to win convictions. Some of these pseudo-experts are notorious for promoting bogus opinions.

Moreover, because of the secretive nature of pre-trial preparation, the manner in which a prosecutor is able to shape, manipulate, and even manufacture the expert's testimony is virtually impossible to prove. It is intuitively obvious, however, that the relationship between prosecutors and their experts is mutually reinforcing often not in the service of truth but to win a conviction. Many experts display a pro-prosecution bias, especially those employed by law enforcement agencies (Giannelli, 1997). Many of these experts are notorious for manufacturing testimony to fit the prosecution's theory of guilt. By the same token, prosecutors routinely seek out experts who will support the prosecution's theory of guilt, and reject experts who might display more independence (Faigman, et al., 2002).

Manipulating the Jury's Decision-Making

A prosecutor has a special duty not to mislead the fact-finder or attempt to manipulate a jury's ability to review the evidence fairly and dispassionately. The opportunity for a prosecutor to mislead the fact-finder and manipulate the verdict inheres in virtually every phase of the criminal trial. Misleading conduct can even rise to the level of a due process violation when it involves the knowing use of false evidence, or when the prosecutor's conduct renders the trial fundamentally unfair. The risk that an innocent person may be convicted because of such tactics is evident.

False, misleading, and inflammatory tactics. The prosecutor's deliberate use of perjured testimony violates due process, may result in an unfair trial, and may even result in the conviction of an innocent person. Even non-deliberate conduct that elicits perjured testimony is a due process violation if the prosecutor should have known about the perjury. A prosecutor also commits misconduct when she uses fraudulent physical evidence or creates false impressions from the evidence, such as asking questions without a factual basis, or insinuating that the defendant has a criminal background and a propensity to commit crimes.

A prosecutor also undermines the integrity of the trial and risks convicting an innocent person by referring to matters outside the record and misrepresenting the record. Thus, courts have rebuked prosecutors and in some cases reversed convictions for allusions to private conversations with witnesses or the defendant; references to evidence that had been excluded; insinuations that issues of fact have previously been authoritatively determined; or comments that dilute reasonable doubt and the presumption of innocence.

Prosecutors can also misrepresent the record by making false or exaggerated claims that can mislead the jury into convicting. In the well-known case of *Miller v. Pate* (1967), a prosecutor committed reversible misconduct by misrepresenting in a rape and murder trial that undershorts belonging to the defendant were stained with the young victim's blood, when the prosecutor well knew that the stains were paint. Prosecutors have also made false assertions that an object in the defendant's possession was the murder weapon, that the defendant's fingerprints were found at the crime scene, and that the defendant failed an intoxication test.

In addition, appeals by prosecutors to a jury's fears, passions, and prejudices are a common tactic to manipulate the fact-finder and may produce an erroneous verdict. Such conduct often appears deliberately calculated to impair a defendant's right to a fair trial. For example, prosecutors have introduced inflammatory physical evidence, have elicited inflammatory testimony containing irrelevant racial and sexual innuendos, and have engaged in other inflammatory conduct designed to prejudice the jury.

Prosecutors are forbidden to use arguments calculated to inflame the passions and prejudice of the jury. However, they also know that such arguments are much more effective than restrained and objective remarks, and some may be willing to assume the risk that an appellate court will find the conduct not severe enough to warrant a reversal when the remarks are viewed in black and white in the appellate record. Thus, prosecutors use a litany of colorful and abusive rhetoric to denigrate the defendant, and some courts give the prosecutor considerable latitude in such disparaging comments. Prosecutors also make arguments calculated to incite among jurors feelings of fear, anger, and revenge. Exhortations to join the War on Crime, predictions of the dire consequences if jurors do not convict, and exploitations of the jury's sympathy for the victim to incite feelings of anger and retaliation can sufficiently inflame a jury to result in the conviction of an innocent person.

Prosecutors use other tactics to inflame, such as insinuating that the defendant has murdered, threatened, and bribed potential witnesses. Appeals to a jury's prejudices and stereotypes also may undermine the accuracy of a verdict, such as appeals to racial, national, religious, gender, wealth, and patriotic biases. Prosecutors can also make other arguments that can mislead a jury into convicting, such as comments on a defendant's failure to testify, call witnesses, and engage in other constitutionally protected activity. Finally, a prosecutor can mislead the jury when she makes a personal endorsement of the strength of the case, the credibility of witnesses, and the defendant's guilt.

Unfair attacks on defendant's character. Prosecutors in many of the cases in which innocent persons were wrongfully convicted sought to prejudice the jury's assessment of the evidence by attacking the defendant's character. This tactic usually works. The prejudicial impact of a defendant's criminal or sordid background on a jury can be devastating. Studies show that when a defendant's criminal record is known and the prosecution's case is weak, the chances of acquittal are far less likely (Kalven & Zeisel, 1966). Prosecutors are well aware of the prejudicial effect on jurors, and even though courts attempt to confine such evidence to a proper purpose, prosecutors often find ways to expose a defendant's bad character to the jury.

For example, prosecutors in cross-examining a defendant might use a defendant's criminal record not for the proper purpose of showing untruthfulness but to insinuate guilt by suggesting a predisposition to commit crimes. Prosecutors violate rules regulating cross-examination by including inflammatory details in their questions, especially when the prior crimes are for violent acts, or by portraying the defendant as a dangerous, sinister, or undesirable person. However, if a defendant does not take the witness stand, a prosecutor is forbidden to introduce evidence of the defendant's criminal record. Prosecutors use a variety of tactics to circumvent this prohibition by introducing evidence that the defendant used aliases, was pictured in police "mug shots," had police criminal identification numbers signifying a prior arrest, and through other ways that depict the defendant as a sinister character. Prosecutors also try to prove a defendant's guilt by showing that the defendant may have associated with other criminals and courts sometimes have reversed convictions because of this tactic.

Unfair attempts to bolster credibility. A prosecutor can mislead a jury into giving a witness's testimony greater believability by artificially inflating the credibility of that witness before it has been attacked. This technique is referred to as bolstering, and its use may obstruct a juror's rational analysis of the facts and the witness's credibility, and potentially result in an erroneous verdict. Prosecutors do not know whether a witness is giving truthful testimony, yet they might either expressly or impliedly assure jurors that a witness is telling the truth. The personal endorsement of a witness's credibility by a prosecutor is improper, first, because of the exalted position a prosecutor occupies in the eyes of the jury and the weight a juror may give to the prosecutor's assurances, and second, because it may create the impression that the prosecutor possesses other information outside the record of the trial that supports the assertion that the witness is telling the truth.

Prosecutors also subvert this anti-bolstering rule by eliciting testimony from witnesses, particularly experts, to endorse or validate the credibility of other witnesses, who may be victims or eyewitnesses. The danger, of course, is that jurors often rely heavily on the testimony of experts. Thus, if an expert offers an opinion that validates a witness's truthfulness, or implicitly endorses the witness's truthfulness by suggesting that the witness is a member of a class of persons who are trustworthy, or asserting directly that the complainant has in fact been victimized, the jury may give that witness's testimony added weight. Appellate courts monitor this practice, and convictions in child sexual abuse,

domestic violence, rape, and drug prosecutions have been reversed because of improper testimonial interference by experts.

Prosecutors employ other tactics to enhance a witness's credibility. Prosecutors have attempted to bolster the credibility of police officers by pointing to awards for heroism; referring to witnesses successfully passing a polygraph test; eliciting testimony that an informant has always been truthful; suggesting that a cooperation agreement with a witness was prepared only after the prosecutor believed the witness; giving the jury the misleading impression that the prosecutor is monitoring the cooperating witness to make sure he tells the truth; deliberately introducing inadmissible and prejudicial hearsay to support a witness's testimony; manipulating a witness's invocation of a privilege; instructing a prosecution witness to testify while holding a Bible; and having a child witness sit on the prosecutor's lap while testifying.

Moving Forward

As we have seen, prosecutors by overt misconduct or the failure to scrutinize with sufficient care the quality of their evidence and the reliability of their witnesses do in fact contribute to the conviction of innocent persons. Assuming, quite properly, that prosecutors seek to avoid such miscarriages of justice, what actions can prosecutors take to prevent the conviction of an innocent person? There are several ways that prosecutors' offices can reduce the risk that an innocent person will be convicted.

First, prosecutors' offices should implement ongoing education and training programs that identify the best practices to insure against wrongful convictions. Such programs should emphasize the best practices for interviewing, assessing, and presenting in court the testimony of the kinds of witnesses who have been most responsible for erroneous convictions—eye-witnesses, children, cooperators, and experts. This training might focus on issues such as problems of misidentification, how to deal with inconsistent and contradictory statements, how to evaluate alternative perpetrator evidence, how to deal with uncharged criminal conduct, how to deal with drug, alcohol, or medical issues that might interfere with a witness's accurate accounting, and any bias or interest that the witness may have.

Education and training should emphasize compliance with *Brady v. Maryland* (1963) and *Giglio v. United States* (1972), including the use of checklists to review the various types of evidence that need to be closely scrutinized for possible exculpatory and impeachment information, such as prior inconsistent statements, cooperation agreements, criminal background evidence, and evidence bearing on a witness's motive to lie. Prosecutors' offices should also be trained on working with police departments and individual police officers who might be in possession of information that may need to be disclosed to the defense. Some police officers might not be aware of their constitutional obligations under *Brady-Giglio*, and prosecutors should be trained to assist the police in understanding their constitutional obligations and carrying out their duties properly and effectively.

Second, prosecutors' offices should adopt policies to enhance the reliability of the fact-finding process. One such policy would be to maintain an "open file" discovery system whereby the entire file of a case is routinely made available to the defense well in advance of trial. Under such an open-file approach, materials that are critical to defense discovery, including a list of prosecution witnesses, statements of these witnesses, summaries of statements made by witnesses, and relevant police reports, are turned over to the defense early in the case. Moreover, an open file policy that discloses every relevant item in the prosecution's case to the defense may offer a better chance of the prosecutor complying with his *Brady-Giglio* disclosure obligation than a more restrictive discovery approach.

Indeed, by using an open file discovery system, a prosecutor would not have to assume the risk of making a mistake in evaluating the materiality of certain evidence. Under an open file policy, the evidence would be disclosed regardless of materiality. Additionally, an open file system would protect the integrity of the process in the event a new prosecutor who may be unfamiliar with the evidence enters the case and needs to make a relatively quick decision on whether to take a plea, go to trial, or seek a dismissal. Finally, an open file discovery policy would enhance a prosecutor's reputation for transparency and fairness, and foster in judges and defense lawyers a sense of trust and reduce occasions for contentious discovery litigation.

Third, prosecutors' offices should also create databases for identifying and tracking *Brady* and *Giglio* information relating to key witnesses such as informants, police, and experts who may have testified for the government in the past and may testify in future cases. For example, if a prosecutor intends to call as a witness a police officer, the prosecutor could enter his name in the database, locate previous cases in which he may have testified, or previous investigations in which he may have been involved, to see if he has been cited for false or erroneous testimony, or other questionable conduct. The same type of vetting could be done with informants, expert witnesses, and virtually any other witness, including even eyewitnesses. Indeed, some eyewitnesses have testified in several different and unrelated prosecutions, raising serious questions about their reliability.

Fourth, prosecutors' offices should establish programs to investigate post-conviction claims of actual innocence. Indeed, several prosecutors' offices have created "Conviction Integrity Units" or "Second-Look" bureaus to investigate such claims of actual innocence in closed cases. The creation of these bureaus is consistent with a prosecutor's ethical duty to "do justice." Procedures could be established to assess claims critically based on the kinds of allegations made. For instance, claims with strong indicia of actual innocence might be given investigative priority, such as claims of misidentification, perjury by informants and cooperators, witness recantations, and allegations of newly discovered evidence. The standard for reviewing claims of actual innocence should not be unduly restrictive, but should allow for flexibility in deciding which cases to investigate, especially where a claim is made that is plausible and contains specific factual allegations that can be investigated.

Finally, to reduce the risk of wrongful convictions prosecutors should establish protocols with police department to become involved in the investigation earlier to assist police in protecting the integrity of the investigation from mistakes, especially constitutional mistakes. Prosecutors should work with police departments to establish training and education programs in the areas that are most often cited as causes for wrongful convictions—false confessions, use of informants, and *Brady* and *Giglio* disclosure violations. Indeed, since *Brady* violations occur when police fail to disclose exculpatory information to prosecutors, it is important for prosecutors to educate police on the nature of *Brady* information and the importance of disclosing such information. Prosecutors could also educate police on best practices for videotaping confessions, and using identification procedures to protect against misidentification, such as double-blind lineups, where the officer conducting the lineup does not know the identity of the suspect, and sequential lineups, in which persons are presented to the witness one at a time rather than all at once.

Conclusion

Prosecutors have a constitutional and ethical obligation to ensure that innocent people do not get punished. A prosecutor is a minister of justice with virtually unlimited discretion

to charge a person with a crime, and advocate for that person's conviction and punishment. As the number of exonerated defendants continues to grow, however, it becomes increasingly clear that prosecutors, either by affirmative acts of misconduct, or a failure to carefully and responsibly scrutinize the quality of the evidence, sometimes do contribute to defendants' wrongful convictions.

However, reining in prosecutorial excesses that produce wrongful convictions is a difficult task. Prosecutors typically believe that defendants are guilty, and aggressively seek to convince juries to return guilty verdicts. Most prosecutors would probably claim that they never convicted an innocent person. But such a claim is not surprising. Studies show that a prosecutor's personality and mindset may lead him or her to discount evidence supporting the defendant's innocence as erroneous or unreliable. This attitude of denial simply reinforces the possibility that a prosecutor may pursue a conviction against an innocent person even though substantial evidence points away from guilt. Unless prosecutors become more sensitive to the perilous situation facing defendants who are actually innocent, and to the kinds of dangerous witnesses and ambiguous evidence that have been responsible for producing miscarriages of justice, and unless they are able to discipline themselves to be skeptical and open-minded regarding the sufficiency of the proof, the likelihood is that many more innocent people routinely will be convicted.

References

- American Bar Association (1908). *ABA canons of professional ethics*. Chicago, IL: American Bar Association. Retrieved from http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.pdf-17k-2013-03-02.
- American Bar Association (1993). *Standards for criminal justice: Prosecution function and defense function* (3rd ed.). Chicago, IL: American Bar Association.
- Bandes, S. (2006). *Loyalty to one's convictions: The prosecutor and tunnel vision*. *Howard Law Journal*, 49, 475–494.
- Bedau, H. A. & Radelet, M. L. (1987). Miscarriages of justice in potentially capital cases. *Stanford Law Review*, 40, 21–90.
- Berger v. United States*, 295 U.S. 78 (1935).
- Borchard, E. M. (1932). *Convicting the innocent: Errors of criminal justice*. New Haven, CT: Yale University Press.
- Brady v. Maryland*, 373 U.S. 87 (1963).
- Burke, A. S. (2006). Improving prosecutorial decision-making: Some lessons of cognitive science. *William and Mary Law Review*, 47, 1587–1633.
- Cassidy, H. M. (2013). *Prosecutorial ethics* (2nd ed.). St. Paul, MN: West Academic.
- Center on the Administration of Criminal Law (2002). *Establishing conviction integrity programs in prosecutor's offices: A report of the Center on the Administration of Criminal Law's Conviction Integrity Project*.
- Connick v. Thompson*, 131 S. Ct. 1350 (2011).
- Faigman, D. L., Kaye, D. H., Saks, M. J., Sanders, J. (2002). *Science in the law: Forensic science issues*. St. Paul, MN: West Group.
- Findley, K. A. & Scott, M. S. (2006). The multiple dimensions of tunnel vision in criminal cases. *Wisconsin Law Review*, 2006, 291–397.
- Fisher, S. Z. (2002). Convictions of innocent person in Massachusetts: An overview. *Boston University Public Interest Law Journal*, 12, 1–72.
- Garrett, B. L. (2008). Judging innocence. *Columbia Law Review*, 108, 55–142.

- Garrett, B. L. (2011). *Convicting the innocent*. Cambridge, MA: Harvard University Press.
- Gershman, B. L. (1998). Mental culpability and prosecutorial misconduct. *American Journal of Criminal Law*, 26, 121–164.
- Gershman, B. L. (2001). The prosecutor's duty to truth. *Georgetown Journal of Legal Ethics*, 14, 309–354.
- Gershman, B. L. (2002). Witness coaching by prosecutors. *Cardozo Law Review*, 23, 829–863.
- Gershman, B. L. (2003). Misuse of scientific evidence by prosecutors. *Oklahoma City University Law Review*, 28, 17–41.
- Gershman, B. L. (2012–2013). *Prosecutorial misconduct* (2nd ed.). Eagan, MN: Thomson Reuters.
- Giannelli, P. C. (1997). Essay: The abuse of scientific evidence in criminal cases: The need for independent crime laboratories. *Virginia Journal of Social Policy & the Law*, 4, 439–478.
- Giglio v. United States*, 405 U.S. 150 (1972).
- Idaho v. Wright*, 497 U.S. 805 (1990).
- Joy, P. A. & McMunigal, K. C. (2009). *Do no wrong: Ethics for prosecutors and defenders*. Chicago, IL: American Bar Association.
- Kalven, Jr., H. & Zeisel, H. (1966). *The American jury*. Boston, MA: Little, Brown and Company.
- Kamisar, Y., LaFave, W. R., Israel, J. H., King, Nancy, Kerr, O. S., & Primus, E. B. (2012). *Modern criminal procedure* (13th ed.). Eagan, MN: West.
- Kyles v. Whitley*, 514 U.S. 419 (1995).
- Medwed, D. S. (2012). *Prosecution complex: America's race to convict and its impact on the innocent*. New York, NY: NYU Press.
- Miller v. Pate*, 386 U.S. 1 (1967).
- National Commission on Law Observance and Enforcement (1931).
- Pound, R. (1930). *Criminal justice in America*. New York, NY: Henry Holt and Company.
- Simon, D. (2012). *In doubt: The psychology of the criminal justice process*. Cambridge, MA: Harvard University Press.
- Smith v. Cain*, 132 S. Ct. 627 (2012).
- United States v. Nettl*, 121 F.2d 927 (3d Cir. 1941).
- Weinberg, S. (2003). *Breaking the rules: Who suffers when a prosecutor is cited for misconduct?* Center for Public Integrity. Retrieved from <http://www.publicintegrity.org/2003/06/26/5517/breaking-rules>.
- Yaroshefsky, E. (1999). Cooperation with federal prosecutors: Experiences of truth telling and embellishment. *Fordham Law Review*, 68, 917–964.