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## IN MEMORY OF MONROE FREEDMAN: THE HARDEST QUESTION FOR A PROSECUTOR

*Bennett L. Gershman\**

This Article honors Monroe Freedman's iconic piece on the hardest questions for a criminal defense attorney by posing the same question for prosecutors.<sup>1</sup> What is the hardest question for a prosecutor? Even this is a hard question. The thousands of federal, state, and local prosecutors in the country would give widely varying responses—discretionary charging, immunity grants, bargained pleas, unreliable witnesses, police testimony, and disclosure duties, for starters. Too, prosecutors are not a generic group. Just as some defense lawyers might recoil or be indifferent to Freedman's provocative thesis, so might many prosecutors reject or be indifferent to what this Article proposes is the hardest question for them.

For a prosecutor, the hardest question is whether the individual they are prosecuting is actually innocent.<sup>2</sup> Nobody except the accused really knows the answer. The prosecutor certainly does not, regardless of how strongly she may believe in the defendant's guilt and the credibility of the proof. This Article does not suggest that prosecutors bring people to trial they do not believe are guilty. Indeed, the notion that a prosecutor should not prosecute a person whom the prosecutor believes to be innocent seems so obvious that incorporating this precept into an ethical rule—as in the *ABA Standards for Criminal Justice: Prosecution and Defense Function*<sup>3</sup>—seems not only gratuitous but arguably insulting. No prosecutor would ever acknowledge prosecuting a person who he or

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1. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

2. See, e.g., BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 18-21 (2011) (discussing cases where convicted defendants who provided detailed and corroborated confessions were later exonerated through DNA evidence).

3. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standards 3-4.3(d) (4th ed. 2015) (“A prosecutor’s office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence.”).

she believed was innocent, although some might joke about it.<sup>4</sup> Indeed, many prosecutors would proclaim they never prosecuted an innocent person<sup>5</sup> and that claims of innocence, as Judge Learned Hand famously remarked, are a mirage,<sup>6</sup> despite the increasing numbers of exonerations<sup>7</sup>. To these prosecutors, my question is not very hard. Indeed, once committed to prosecuting a case, many prosecutors would consider the question of a defendant's innocence irrelevant and distracting.<sup>8</sup>

Of course, judging by the number of exonerations, there must be prosecutors who know they prosecuted a defendant they believed to be guilty only to discover years later that they were wrong. Some of these prosecutors, even after exoneration, might perversely refuse to believe in the defendant's innocence.<sup>9</sup> It stands to reason that, if these prosecutors by their misconduct contributed to the defendant's wrongful conviction, they would insist on the defendant's guilt.<sup>10</sup> There is, of course, no way to know how many of these prosecutors, who brought about the conviction of an innocent person, may have harbored some doubt about the defendant's guilt at the time they prosecuted the case. It is unusual—even remarkable—that a prosecutor may actually come forward years later to apologize to the person he wrongfully prosecuted, as in the case of Shreveport, Louisiana, prosecutor Marty Stroud, who sent Glenn Ford

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4. See *THE THIN BLUE LINE* (Third Floor Productions 1988) (according to the appellate attorney, Melvyn Carson Bruder, “[p]rosecutors in Dallas have said for years—any prosecutor can convict a guilty man. It takes a great prosecutor to convict an innocent man”).

5. Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 825 (2006).

6. See *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923) (“Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream.”).

7. Mike McPhate, *Record Number of False Convictions Was Overturned in 2015, Study Finds*, N.Y. TIMES, Feb. 4, 2016, at A13.

8. See, e.g., Craig Platt, *Guilt or Innocence and How Things Really Work in Criminal Cases*, SEATTLE CRIM. LAW. BLOG (Jan. 21, 2016), <http://www.seattlecriminallawyerblog.com/2016/01/guilt-innocence-things-really-work-criminal-case.html> (asserting that a prosecutor's focus is on evidence and that “guilt or innocence is largely irrelevant”).

9. See Michael Powell, *A Prosecutor Loath to Say “Not Guilty,”* N.Y. TIMES, Jan. 29, 2013, at A16 (revealing that, notwithstanding exonerations, Brooklyn District Attorney Charles J. Hynes insisted defendants were guilty); Jon Herskovitz, *Former Texas Prosecutor Disbarred for Sending Innocent Man to Death Row*, HUFFINGTON POST (Feb. 9, 2016, 4:52 AM), [http://www.huffingtonpost.com/entry/former-texas-prosecutor-disbarred\\_us\\_56b9b306e4b01d80b247af83](http://www.huffingtonpost.com/entry/former-texas-prosecutor-disbarred_us_56b9b306e4b01d80b247af83) (conveying that Charles Sebesta, a former prosecutor who was disbarred for failing to disclose evidence to the defense that an already-convicted individual admitted to him that he committed the crime and that he acted alone, said “he was being unfairly treated and that [the defendant] was justly convicted” of an arson that killed six people).

10. See Powell, *supra* note 9 (revealing the insistence of guilt where a prosecutor had refused to hand over material evidence until the jury returned its verdict); Herskovitz, *supra* note 9.

to Death Row.<sup>11</sup> In one of the most extraordinary confessions ever by a prosecutor, Stroud publicly apologized to Ford, who spent thirty years in prison, for the misery he caused Ford and his family.<sup>12</sup> Stroud described himself as a young prosecutor who was “arrogant, judgmental, narcissistic and very full of myself.”<sup>13</sup> He conceded that he was alert to the existence of exculpatory evidence that would have freed Ford but took no action to locate that proof.<sup>14</sup> He was “not as interested in justice as [he] was in winning.”<sup>15</sup> He concluded as follows: “I end with the hope that providence will have more mercy for me than I showed Glenn Ford. But, I am also sobered by the realization that I certainly am not deserving of it.”<sup>16</sup>

This Article does not discuss those prosecutors who deliberately or recklessly violate the rules to win a conviction. Such prosecutors, in their zeal to convict, have little regard for the integrity of the system of justice and their own professional responsibilities. They arrogate to themselves, without any real accountability, the awesome power to decide whether an individual should be charged, tried, and punished, and in some instances, live or die.<sup>17</sup> To these prosecutors, my question probably would be greeted with derision. These prosecutors would contend that claims of misconduct are exaggerated—that even the term “misconduct” is a misnomer—and that such conduct is nothing more than inadvertent error.<sup>18</sup> Moreover, although a substantial number of false convictions are attributable to the prosecutor’s misconduct,<sup>19</sup> the more prevalent behavior in my opinion involves bad judgment, an overarching desire to win, and an indifference to the truth. These prosecutors would not find my question a hard one.

How many prosecutors would accept responsibility for causing an innocent man to spend more than half his life in jail? After a wrongful

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11. A.M. “Marty” Stroud III, *Lead Prosecutor Apologizes for Role in Sending Man to Death Row*, SHREVEPORT TIMES (Mar. 20, 2015), <http://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063>.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standards 3-4.2, -4.3(b), -7.2 (4th ed. 2015); see also *id.* Standard 3-1.2 (establishing the “Functions and Duties of the Prosecutor”).

18. See *id.* Standard 3-1.7(j) (“A mere allegation of misconduct is not a sufficient basis for prosecutorial recusal, and should not deter a prosecutor from attending to the prosecutor’s duties.”).

19. *New Report: Prosecutorial Misconduct and Wrongful Convictions*, INNOCENCE PROJECT (Aug. 25, 2010, 2:16 PM), <http://www.innocenceproject.org/news-events-exonerations/2010/new-report-prosecutorial-misconduct-and-wrongful-convictions>.

conviction, the conventional argument by prosecutors is to point to the adversary system, the prosecutor's role in presenting evidence of guilt, and defense counsel's role in challenging that evidence.<sup>20</sup> With a judge umpiring the contest, the jury picks the winner. For those prosecutors who try to rationalize their prosecution this way, my question is not hard. Their moral conscience is clear even if throughout the investigation and prosecution they were unwilling or unable to keep an open mind, to be suspicious of their proof, to pose hard questions to the police, and to be alert to the possibility that notwithstanding the evidence of guilt, the person they were prosecuting may in fact be innocent.

Who are those prosecutors who would find my question hard? Those prosecutors who would find my question difficult view their role differently. They probably do not rely exclusively on the adversary system to produce justice. They focus less on winning convictions than on doing justice. In contrast to the arrogant and egotistical prosecutor—Marty Stroud's description of himself<sup>21</sup>—these prosecutors probably seek to pursue justice zealously with humility, courage, and integrity. These are the same qualities that Monroe Freedman would identify in describing good lawyers.<sup>22</sup> Prosecutors committed to doing justice should make moral judgments about the defendant's guilt and the quality of the evidence.<sup>23</sup> Prosecutors who would find my question hard probably embody the same qualities that Supreme Court Justice Robert Jackson identified in his famous essay in which he sought to capture the “elusive” characteristics of the “good prosecutor.”<sup>24</sup> The “good prosecutor,” in Justice Jackson's contemplation, “tempers zeal with human kindness, . . . seeks truth and not victims, . . . serves the law and not factional purposes, and . . . approaches his task with humility.”<sup>25</sup>

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20. Jim Yardley, *Man Is Cleared in Murder Case After Eight Years*, N.Y. TIMES, Oct. 29, 1998, at B1 (defending how a case was handled, a prosecutor stated, “[w]e live by an adversarial system,” in which “[o]ur job is to present evidence we believe is credible” and “[t]he defense's job is to poke holes in it,” and “[i]n a sense, the system worked, although it took some time”).

21. See *supra* text accompanying note 13.

22. See Monroe H. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 199, 205 (1978) (“[O]ne can indeed be a good lawyer and a moral person at the same time.”).

23. Not all critics believe that prosecutors can be virtuous people. I believe that Abbe Smith, Monroe Freedman's longtime collaborator, probably would not share my argument. She would maintain, as she does in her provocative essay, that prosecutors might be incapable of making moral judgments about the possibility that a defendant may be innocent. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 383-88 (2001).

24. Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 6 (1940).

25. *Id.*

I hope that those of us who were privileged to serve as prosecutors and continue to study the conduct of prosecutors would concur with Justice Jackson's description. We might even be inclined to see a difference between those persons we regard as good prosecutors and other prosecutors who view their role in a narrower, more adversarial manner. As I see it, the goal of the prosecutor is to win; the goal of the good prosecutor is to do justice. The prosecutor asks a jury to convict if the evidence is legally sufficient; the good prosecutor will not force a defendant to trial unless that prosecutor is morally convinced of the truthfulness of the proof and the defendant's guilt. A prosecutor will not search for evidence of innocence, a good prosecutor will.

Why is my question for prosecutors the hardest question of all? For any prosecutor, there exist powerful pressures that interfere with the ability or willingness to consider the possibility that the defendant may be innocent.<sup>26</sup> Any prosecutor preparing for trial almost certainly believes the defendant is guilty and has assembled sufficient proof of his guilt. Leaving aside the familiar label about a prosecutor's "conviction psychology,"<sup>27</sup> even those prosecutors who try to maintain an open mind may overestimate the strength of their case and ignore or overlook evidence that might contradict their theory and be relevant to the defendant's innocence. Moreover, any prosecutor would find it much more difficult to consider the possibility of a defendant's innocence when prosecuting a vicious crime of violence upon a victim who has been seriously—even fatally—harmed, than in the case of a victimless crime. The nature of the crime has to weigh heavily on any rational prosecutor who understandably is outraged at the offense and feels compelled to vindicate the victim's harm and protect the community. Prosecutors who promote themselves as the victim's "avenger" would be far less likely to consider the possibility that they may be prosecuting an innocent person.<sup>28</sup> But, even for prosecutors who try to maintain a more balanced and objective attitude, the pressure to convict always weighs heavily.

Nor can one overlook institutional pressures that may interfere with a prosecutor's willingness to look closely at a defendant's possible innocence. Under scrutiny by their elected boss, the media, co-workers, the police, and victims, some prosecutors will be more likely to see their

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26. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 328-29 (2006).

27. *Id.*

28. See JEANINE PIRRO & CATHERINE WHITNEY, *TO PUNISH AND PROTECT: A DA'S FIGHT AGAINST A SYSTEM THAT CODDLES CRIMINALS* 1 (2003) ("[W]e can be the avengers.").

effectiveness measured by conviction rates than on being fair.<sup>29</sup> Most, especially young, prosecutors likely believe that continued advancement in their office might be imperiled if they appear weak or pro-defendant. The relationship between prosecutors and police makes the question even harder. It may be rare that a line prosecutor has the strength or courage to stand up to a detective who is experienced, aggressive, and insists to have the right man, especially in high profile, child sex abuse, and sex crimes cases. How else can the dozen wrongful convictions in the Brooklyn District Attorney's Office, overturned because of the interrogation tactics of a rogue detective, be explained? Did the more than thirty assistant district attorneys working on those cases not know what this detective was up to?<sup>30</sup>

One could reasonably believe the question of a defendant's innocence would inescapably confront any rational and fair-minded prosecutor in any prosecution, especially one based on tenuous proof. Assume a case in which a defendant has been charged with murder, based entirely on the testimony of one eyewitness. There is no corroboration. The witness identified the defendant in the courtroom but picked out a different person at a line-up. The defendant has an alibi, and there is evidence that someone else committed the crime. Prosecutors know that one-witness identification cases are notorious for mistakes, and that most of the official exonerations based on DNA evidence are attributable to eyewitness errors.<sup>31</sup> The defendant protests his innocence. What does the good prosecutor do? There are several options: dismissal, trial, and guilty plea. If the defendant refuses to plead guilty, the prosecutor must either dismiss the case or present the evidence to a jury.<sup>32</sup> How confidently should the evidence be presented? How aggressively should the prosecutor sum up the case?

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29. Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 204-05 (1988).

30. See Sarah Maslin Nir, *Woman Exonerated in Manslaughter Case*, N.Y. TIMES, Feb. 24, 2016, at A15 (describing the conduct of retired detective, Louis Scarcella, whose interrogation tactics led to the wrongful convictions of at least a dozen people, and potentially 100 other cases that are being investigated).

31. *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction/eyewitness-misidentification> (last visited July 24, 2016) ("Eyewitness misidentification is the greatest contributing factor to wrongful convictions proven by DNA testing, playing a role in more than [seventy percent] of convictions overturned through DNA testing nationwide.").

32. The extent to which a prosecutor as an ethical matter may seek a guilty plea from a defendant the prosecutor believes may be innocent is unclear. See *Jovanovic v. City of N.Y.*, No. 04 Civ. 8437, 2006 WL 2411541, at \*2-3 (S.D.N.Y. Aug. 17, 2006) (describing a prosecutor who offered several plea deals to a defendant, who maintained his innocence and refused to plead, and then dismissed the case).

What we know about the psychology of jury decision-making suggests the more inflammatory the prosecutor's behavior, the more likely the jury will convict.<sup>33</sup>

Other examples of dubious witnesses and questionable proof make the prosecutor's dilemma palpable. Professor Ellen Yaroshefsky's discussion of the credibility of cooperating witnesses depicts these witnesses as self-interested, devious, and even incapable of understanding the difference between truth and fiction.<sup>34</sup> Prosecutors surely are aware of this phenomenon and, without any corroborative proof, face a difficult decision in relying on such witnesses. Negotiating a plea may be a safe harbor for the prosecutor. And, the vast majority of defendants do in fact plead guilty, even though some of these defendants may in fact be innocent.<sup>35</sup> But again, if a defendant refuses to plead, what recourse does a prosecutor have except to bring the case to trial or dismiss it? Without really knowing whether the cooperating witness is telling the truth, how far should the prosecutor go in endorsing his credibility?

Prosecutors faced with evidence of a confession to police, without corroboration, have an additional burden in analyzing the truth of the confession, especially when there is a claim that the police used coercive tactics.<sup>36</sup> There is an increasing body of documented cases showing that innocent persons confess.<sup>37</sup> How willing is a prosecutor to challenge the veracity of his police witnesses? Assume further investigation is unavailing; the defendant refuses to plead guilty, has an alibi, and passes a polygraph test; and there is a plausible theory a different person may be the perpetrator. Does the prosecutor dismiss the case or let a jury decide? We know juries usually side with prosecutors.<sup>38</sup> We also know juries make mistakes.<sup>39</sup>

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33. Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 324-25 (2001).

34. See Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 930, 933 (1999) (noting that the first cooperator "receives the greater benefit" and that some cooperators "embellish[] the facts, including the extent of culpability of defendants").

35. See Alex Kozinski, Preface, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xi & n.55 (2015).

36. See GARRETT, *supra* note 2, at 23-25.

37. *Id.* at 14-44 (detailing numerous examples of exonerees who falsely confessed).

38. See *United States v. Young*, 470 U.S. 1, 18-19 (1985) ("[T]he prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.").

39. See DAN SIMON, *IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS* 149, 154, 162, 172-73 (2012) (explaining a variety of reasons why jurors are often mistaken or misled).



How far should prosecutors go to investigate claims of innocence? How far should they go in looking for evidence that would impair the credibility of their witnesses? The Supreme Court has noted that “[t]he jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence.”<sup>40</sup> Some prosecutors deliberately avoid learning facts that might impair their chances of winning.<sup>41</sup> And, if the prosecutor has no direct knowledge of these exculpatory facts, and the information is in the possession of an agency that is not part of the “prosecution team,” then the prosecutor has no legal duty to look for the information, regardless of how ethically repugnant the prosecutor’s conduct might be.<sup>42</sup> Thus, in a case that hinges on the credibility of a cooperating witness, the failure of the prosecutor to seek out reports about the witness’s troubled past (including drug addiction and mental illness) may enhance the prosecutor’s chances of getting a conviction, even of an innocent person. By burying his head in the sand, the prosecutor thereby avoids the hardest question.

Those prosecutors who do not believe they have a duty to search for evidence of innocence will not find my question especially difficult. By the same token, there are many cases in which prosecutors, even in the face of compelling evidence of innocence, not only fail to question the defendant’s guilt but also make outlandish arguments to convict. The following hypothetical scenario serves as an example: A murder prosecution that hinged on the uncorroborated testimony of an eyewitness, a crack addict who claimed to have seen the defendant kill the victim late at night from her window 400 feet away.<sup>43</sup> Pending criminal charges against this witness were dismissed shortly after she made her identification.<sup>44</sup> The defendant had a powerful alibi. He was at Disneyworld in Orlando, Florida, at the time of the murder, as his family and hotel employees confirmed.<sup>45</sup> He even had a phone receipt of a call he made from the Orlando motel less than five hours before the time of

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40. *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

41. Bennett L. Gershman, *The Giuca Case, and the Prosecutor’s Willful Blindness to the Truth*, HUFFINGTON POST (Dec. 11, 2015, 8:44 AM), [http://www.huffingtonpost.com/bennett-l-gershman/the-giuca-case-and-the-pr\\_b\\_8773452.html](http://www.huffingtonpost.com/bennett-l-gershman/the-giuca-case-and-the-pr_b_8773452.html).

42. See MODEL RULES OF PROF’L CONDUCT r. 3.8(d) (AM. BAR ASS’N 2013) (“The prosecutor in a criminal case shall[] . . . make timely disclosure to the defense of all evidence or information *known to the prosecutor* that tends to negate the guilt of the accused . . .” (emphasis added)).

43. Bennett L. Gershman, *Don’t Let the Prosecutor off the Hook*, HUFFINGTON POST (June 10, 2014, 5:45 PM), [http://www.huffingtonpost.com/bennett-l-gershman/prosecutorial-misconduct-exonerations\\_b\\_5126325.html](http://www.huffingtonpost.com/bennett-l-gershman/prosecutorial-misconduct-exonerations_b_5126325.html).

44. *Id.*

45. *Id.*

the killing.<sup>46</sup> Explaining away this proof, the prosecutor argued to the jury, apparently with a straight face, that even if the defendant was in Florida, he could have flown to New York, shot the deceased, and then flown back to Florida.<sup>47</sup>

The legal and ethical framework reinforces the “hardness” of the question posed in this Article. The standard for bringing charges is probable cause,<sup>48</sup> a standard so low that criminal charges almost always override suspicions of innocence.<sup>49</sup> Under this standard, a prosecutor does not even need to think about the defendant’s innocence. Of course, many prosecutors will demand a higher standard for bringing and maintaining charges.<sup>50</sup> Maintaining charges also demands very little from prosecutors. A prosecutor must continue to reasonably believe that probable cause exists and admissible evidence will be sufficient to support the conviction.<sup>51</sup> Every situation discussed above would allow the prosecutor, as an ethical matter, to prosecute the case even if the prosecutor entertained doubts about the guilt of the defendant. Thus, if there is sufficient evidence of guilt (assuming more than the minimum proof needed legally and ethically to bring charges), the hydraulic pressures to continue the prosecution may strongly outweigh the countervailing pressures to closely examine the defendant’s claim of innocence.<sup>52</sup> And, there is always the readily available means to avoid even addressing the question of a negotiated guilty plea.<sup>53</sup> Once the centrifugal forces of prosecution take over, the case gains a momentum in which the need for closure by plea or trial is the prosecutor’s only realistic recourse and the question of a defendant’s innocence remains unresolved.

There is no easy or magical way for a prosecutor to determine whether a defendant is innocent. But, a good prosecutor at least has to

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46. *Id.*

47. *Id.*

48. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)); MODEL RULES OF PROF’L CONDUCT r. 3.8(a) (AM. BAR ASS’N 2013); ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-4.3(a) (4th ed. 2015).

49. See Sadiq Reza, *Privacy and the Criminal Arrestee or Suspect: In Search of a Right, in Need of a Rule*, 64 MD. L. REV. 755, 808 (2005).

50. See Philip Shailer, *Standard for Prosecution Is Higher than Public Realizes*, SUN SENTINEL (July 28, 2015, 8:21 PM), <http://www.sun-sentinel.com/opinion/columnists/fl-pscol-oped0729-20150728-story.html> (“While the law requires only ‘probable cause’ . . . for arrest, a much higher standard applies for proceeding with prosecution.”).

51. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-4.3(b).

52. See *supra* text accompanying notes 26-30.

53. See *supra* text accompanying notes 32, 35.

ask the question and struggle with it. A prosecutor has to be willing to keep an open mind, exercise sound judgment, master the facts, be skeptical, show courage, be humble, and use intuition gained from experience. Certain types of witnesses should be viewed with suspicion. Eyewitnesses, cooperating witnesses, and young children are especially difficult to rely on, much more so in the absence of corroborating proof. A prosecutor knows that using these witnesses always risks corruption of the truth, willfully or innocently.<sup>54</sup> Corroboration should be sought. A prosecutor has to challenge the police who interviewed the witnesses for inconsistencies. A prosecutor needs to resist both the “tunnel vision” that assumes the evidence is credible and the overly inquisitive nature that makes the case more complicated.<sup>55</sup> A good prosecutor makes no such assumptions and, instead, engages in a moral struggle approaching the case with a healthy skepticism. Further, a good prosecutor carefully evaluates the quality of the investigation. A good prosecutor reasonably has more confidence in an investigation that employs specialized resources, involves close and ongoing supervision, includes investigators with considerable experience, and proceeds with significant oversight.

A good prosecutor must examine carefully any prior encounters between witnesses and law enforcement to ascertain the existence of any improper influence. Suggestive interviewing techniques by police can harden a witness’s story, and a prosecutor may not even know about, or be able to expose any improprieties.<sup>56</sup> A prosecutor should be willing to take an active role in confirming the theory of guilt and investigating contradictory theories. Any experienced prosecutor knows where evidentiary deficiencies exist and should make an effort to uncover them. There are, of course, cases in which no firm conclusion can be reached, especially without corroborating evidence. Thus, no prosecutor can be sure that an eyewitness is reliable, that a cooperating witness is not embellishing, that an alibi witness is telling the truth, or that the police are not fabricating. If a prosecutor has significant doubts as to the guilt of the defendant after investigating, the prosecutor must have the moral courage to either decline to prosecute or, at a minimum, seek guidance from supervisors.<sup>57</sup>

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54. See Gershman, *supra* note 33, at 343, 348-50; *supra* notes 31, 34-35 and accompanying text.

55. Findley & Scott, *supra* note 26, at 329-30; see also Gershman, *supra* note 33, at 342-47 (advocating for prosecutors to “approach the preparation of a case with a healthy skepticism”).

56. Findley & Scott, *supra* note 26, at 329; see also Smith, *supra* note 23, at 392-93 (discussing the rarity of prosecutors “becom[ing] known for questioning police officers’ honesty”).

57. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEF. FUNCTION, Standard 3-4.3(c) (4th ed. 2015) (“If a prosecutor has significant doubt about the guilt of the accused or the quality, truthfulness, or sufficiency of the evidence in any criminal case assigned to

Prosecutors are not, and are not required to be, clairvoyant. They do not know the truth about a case, especially the truth about a defendant's guilt. The most that anyone can expect from prosecutors is that they use their immense powers prudently and responsibly. The hardest question they face is whether the defendant is actually innocent. For a good prosecutor, facing this question requires an intense moral and intellectual struggle. That means, at the very least, that the good prosecutor will have carefully investigated the case, vetted the evidence carefully, have confidence that the witnesses are telling the truth and are not mistaken, and be morally certain that the defendant is guilty. No more than this can be asked of any prosecutor.

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the prosecutor, the prosecutor should disclose those doubts to supervisory staff. The prosecutor's office should then determine whether it is appropriate to proceed with the case." *But see* Joel Cohen, *When a Prosecutor Doubts the Defendant's Guilt*, N.Y.L.J., Nov. 17, 2008, at 4 (discussing the ethical considerations over actions the prosecutor may take when he or she doubts a defendant's guilt); Benjamin Weiser, *Doubting Case, City Prosecutor Aided Defense*, N.Y. TIMES, June 23, 2008, at A1 (revealing that, after supervisors ordered the prosecutor to pursue a case in which he believed the defendants were innocent, the prosecutor threw the hearing by assisting the defense in tracking down witnesses, prepping them, and ensuring their credibility).