Believe it or Not: Mitigating the Negative Effects Personal Belief and Bias have on the Criminal Justice System

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"I know that most men, including those at ease with problems of the greatest complexity, can seldom accept even the simplest and most obvious truth if it be such as would oblige them to admit the falsity of conclusions which they have delighted in explaining to colleagues, which they have proudly taught to others, and which they have woven, thread by thread, into the fabric of their lives."

Tolstoy

Anyone who has visited a courtroom or two may have noted the inscription on the wall behind the judge. It boldly states: “We Who Labor Here Seek the Truth.” This article examines the prosecutor’s and defense attorney’s personal pre-trial beliefs regarding the accused’s guilt or innocence. This analysis suggests that when an attorney does hold pretrial beliefs, such beliefs lead to avoidable bias and errors. These biases may alter the findings throughout all stages of the case.

The procedure asking that the prosecution seek justice while having nothing more than probable cause results in the prosecutor’s need to have a belief in guilt before proceeding to trial. While this belief is intended to foster integrity and fairness in the criminal justice system, to the contrary, it actually contributes to wrongful convictions. This article closely examines the

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2 “Errors differ from bias in that simple errors will occur at random whereas a bias is a systematic error that skews the data. Bias is a systematic influence that “slants” the data in some direction. It is a dangerous form of error because the influence may be invisible and lead to a consistent (reliable) but false picture of the phenomena being studied.” Rodriguez, Noelle, and Ryave, Alan. Qualitative Research Methods Series 49 Systematic Self Observation. Pg. 22, Sage University Papers, 2002.
prosecutor’s duty. This duty is overwhelming, and obscure. In fact, the prosecutor’s duty is so abstruse that in some ways it contradicts itself.

Specifically, the prosecutor must refrain from prosecuting any charge that the prosecutor knows is not supported by probable cause. Prosecutors are also charged with ensuring that the community’s faith in the justice system remains intact. Further, the prosecutor is duty-bound to seek justice. Though it is important, this duty often proves to be problematic. These duties, together, impose the requirement that the prosecutor personally evaluate and believe in any charges brought against citizens, in the name of the State. This gives prosecutors a quasi-judicial function that runs counter to the purpose of the adversary system, which is designed to reveal the truth.

When an attorney develops a personal belief in a defendant’s guilt or innocence while investigating the merits of the case, facts and evidence discovered during the investigation will

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3 See United States v. Armstrong, 517 U.S. 456, 464 (1996) (“In the ordinary case, ‘so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.’”) (quoting Bordenkircher v. Hayes, 434 U.S. 357 (1978)); see also Model Rules of Prof’l Conduct R. 3.8 (“The prosecutor in a criminal case shall… refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”)

4 See Ross Galin, Above the Law: The Prosecutor’s Duty to Seek Justice and the Performance of Substantial Assistance Agreements, 68 Fordham L. Rev. 1245, 1268 (2000) (“As their representative in the criminal justice system, the prosecutor bears the burden of upholding public faith in the system.”).

5 See Berger v. United States, 295 U.S. 78, 88 (1935) (discussing a prosecutor’s obligation to see that “justice be done”).

6 Defense attorneys do not have a duty to believe their clients are innocent. Defense attorneys must advocate for their clients zealously and to the outermost bounds of the law, regardless of their feelings about guilt or innocence. (See Model Rules of Prof’l Conduct, Preamble and Scope (2014) (“As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”)). Yet, on occasion defense attorneys do develop a personal belief one way or another. They have no mandate to do so and their ethical obligations are to defend their clients to the outermost bounds of the law irrespective of any personal beliefs. The same problems can occur for defense attorneys at the trial level if they develop a pre-trial belief regarding their client’s guilt or innocence. The outcome of a biased investigation by a trial level defense attorney is highly dependent upon whether the belief is in innocence or guilt. A belief in innocence resulting in the defense attorney’s zealous advocacy ought to encourage the nature of the justice system. However, a belief in guilt should not matter to a defense attorney; if it does it may result in ineffective assistance of counsel.
tend to be viewed and interpreted through the veil of the attorney’s personal belief. When a personal belief is held, a preference for that belief is present. As a result, decision-making and investigation may be conducted in a biased manner.

Studies show that after adopting a firm personal belief, all facts and evidence will be filtered through that belief, and any information that seems to contradict that belief will either be filtered out or reassembled in a manner that conforms to the belief. Consequently, it follows that once a prosecutor or defense attorney acquires a firm opinion regarding guilt or innocence, the post-belief investigation will become biased in the direction of that belief. At this point in time, investigative findings are interpreted using the acquired bias. If the bias is supporting guilt, most findings will be interpreted in the context of supporting guilt. Thus, the bias is expressed in the direction of the belief in guilt. There are times, then, when the bias supporting guilt is incorrect and the client is innocent. Sadly, this can often result in the conviction of an innocent person.

It is not known how frequently bias supports the wrong decision, it is only certain that bias exists and influences decision making in court. Therefore, the prosecutor’s directive to seek justice, which requires the prosecution to personally believe in the defendant’s guilt, sometimes renders the prosecutor’s duty to seek justice unattainable, other than by coincidence.

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7 See State v. Saintcalle, 178 Wash. 2d 34, 104 (2013) (“[W]ell-established psychological tendencies—such as confirmation bias (the tendency to look for confirmation but not falsification of our hypotheses) and selective information processing (the tendency to readily accept confirming evidence but devalue contradictory evidence)—likely entrench attorneys’ preexisting biases, including closely held racial stereotypes and generalizations, and give attorneys false confidence in the effectiveness of their decisions concerning peremptory challenges.”)

8 Id.
Notably, while the prosecution’s ethical standards fail to provide an explicit and clear requirement for the prosecutor’s belief in guilt,\(^9\) the prosecutor is left with the sole discretion to determine what outcome will be just. Thus, it logically follows that the prosecutor is left with the sole discretion to determine the accused’s guilt or innocence whether or not she obtains any further evidence or bases her conclusion on any evidence at all. This brand of blind authority invites the prosecutor to make her decision regarding the accused’s guilt based on her conscious or unconscious preconceptions and prejudices.

The authority of the prosecutor is further bolstered by the relatively low burden of proof of probable cause required for the prosecutor to pursue a criminal charge. Probable cause is amongst the lowest burdens of proof in the judicial system. It is a far cry from assessing that a reasonable juror could find evidence of guilt sufficient beyond a reasonable doubt. If prosecutors were required to have a higher standard of evidence before proceeding to trial, their discretion would be limited and the role of bias diminished.

Many criminal defense attorneys self-impose a requirement to personally believe that an inmate is innocent before filing a motion for post-conviction relief.\(^{10}\) For innocence projects, the first prerequisite for representation is usually that the evidence indicating innocence is sufficient such that it would probably result in an acquittal on retrial. In many projects, the second prerequisite is that the innocence organization believe that the inmate is factually innocent. This personal belief standard carries the same risk of interfering with objective

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\(^9\) The prosecutor is only instructed to seek justice and have enough evidence to attain the probable cause benchmark. See Model Rules of Prof’l Conduct R. 3.8 (2014).

\(^{10}\) Daniel S. Medwed, Actual Innocents: Considerations in Selecting Cases for A New Innocence Project, 81 Neb. L. Rev. 1097, 1101 (2003) (“Despite the differences between law school innocence projects, however, they tend to share a common emphasis on... seeking the release of prisoners whom members of the project believe to be innocent of the crimes for which they have been convicted and for whom there are few other alternatives for legal representation...”); Ellen Yankiver Suni, Ethical Issues for Innocence Projects: An Initial Primer, 70 UMKC L. Rev. 921, 925-26 (2002) (discussing the common models and structures of innocence projects.).
investigation and raises the real possibility that innocent inmates will fail to have their claims effectively heard. No attorneys, whether defense or prosecution, or civil or criminal, indeed no humans, are immune from uncontained invitations to unconscious preconceptions and stereotypes. Bias in the justice system is undeniably a cause of wrongful convictions.\textsuperscript{11} Although it may not be possible to entirely eliminate bias, steps can be taken towards its reduction. Bias in the justice system silently makes its way into the courtroom, attorney investigations, and judicial decision-making in unintended but potent ways.\textsuperscript{12}

Subjective decision-making exists in every aspect of the law. It is unavoidable. However, it can be minimized. This article addresses one of the ways that bias and error in the judicial system can be diminished. Additionally, this article discusses attorney ethical standards and analyzes the conflicts that arise. Finally, this article proposes a revised, evidence-based standard that is designed to mitigate the effect that bias may have on an attorney’s decision-making.

**PROSECUTORS’ ETHICAL STANDARDS**

1. **To Seek Justice:**

A prosecutor has the most difficult role in the justice system – to do justice.\textsuperscript{13} Prosecutors are dubbed “supreme jurors.” Ideally, prosecutors should not only determine if the defendant is guilty but protect the innocent as well.\textsuperscript{14} “The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, imposes on States (prosecutors) certain duties consistent with their sovereign obligation to ensure ‘that justice shall

\textsuperscript{12} See id; see also ); Karen F. Parker, Mari A. DeWees, Michael L. Radelet, Race, the Death Penalty, and Wrongful Convictions, Crim. Just., 49 (2003). 
\textsuperscript{13} Berger, 295 U.S. at 88. 
\textsuperscript{14} See id; see also Alafair S. Burke, Prosecutorial Agnosticism, 8 Ohio St. J. Crim. L. 79 (2010).
be done’ in all criminal prosecutions.”\textsuperscript{15} The tenor of the case law discussing the role of prosecutors makes clear that prosecutors are held to the highest standard because of their unique powers and responsibilities. Over sixty years ago, The United States Supreme Court observed that a prosecutor has responsibilities beyond that of an advocate and a higher duty to assure that justice is served:

\begin{quote}
The United States Attorney is the representative not of an ordinary party to a controversy, but 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.... 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.\textsuperscript{16}
\end{quote}

Thus, a prosecutor has a duty not only “to fairly present the evidence and permit the jury to come to a fair and impartial verdict,”\textsuperscript{17} but also to “properly [function] in a quasi-judicial capacity with reference to the accused... to see that the accused is accorded a fair and impartial trial.”\textsuperscript{18} This is a difficult burden.

In short, the prosecutor’s role can be boiled down to the following functions: ascertain the strength of the evidence, evaluate whether a jury is likely to convict the defendant, and determine whether there is anything leading the prosecutor to doubt the evidence and question the defendant’s guilt. In this regard, multiple individualized or situation-specific definitions of

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\textsuperscript{16} Berger, 295 U.S. at 88.
\textsuperscript{17} Pendarvis v. State, 752 So.2d 75, 77 (Fla. 2d DCA 2000).
\textsuperscript{18} Gonzalez v. State, 97 So.2d 127, 128 (Fla. 2d DCA 1957); see also The Florida Bar v. Cox, 794 So. 2d 1278, 1285 (Fla. 2001).
justice are unhelpful and confusing. A closer appraisal reveals that a uniform definition of justice is required if a prosecutor is to be entrusted to insure that justice is done. Perhaps it is not as simple as convicting the guilty of the crime charged or dropping the charges if the prosecutor has doubts regarding the accused’s guilt. “Justice” has been defined in the following ways:

1) the quality of being just, impartial, or fair
2) the principle or ideal of just dealing or right action
3) righteousness
4) the quality of conforming to law\textsuperscript{19}

Reflection on these meanings makes apparent that justice in any given situation is anything but clear. What is just, moral, or right is inevitably dependent on the personal values of those deciding the outcomes. Justice cannot accompany a bright line rule. A theory of justice that solely encompasses conviction for the guilty and release for the innocent ignores meaningful concepts such as mercy, rehabilitation, proportionality, individuality, and spirituality. Among cases and scholars, there is no uniformity as to what it means for a prosecutor to seek justice. It is opined by some that the duty to seek justice is not overly complicated because principles of justice generally overlap the standards of constitutional fairness and due process.\textsuperscript{20} Others maintain that to do justice is wholly dependent on the individual prosecutor’s sense of morality and personal value system.\textsuperscript{21} The textbook definition of “justice” inherently involves an element of “being correct” or “right”. This means, simply, that the outcome of the trial should be consistent with the actual facts. Therefore, if the verdict is consistent with the facts, justice will have been achieved. Consequently, for a prosecutor to determine what would be a just outcome,
the prosecutor must first determine what is “correct” or “right.” In the context of the criminal justice system at the trial level, the prosecutor, therefore, is placed in the position of deciding whether the defendant is guilty before evidence is presented. If the ethical obligation of the prosecution is to seek justice, this includes seeking appropriate punishment and determining if proceeding to trial is morally correct. Without relying on an evidentiary standard appropriate to convict an individual at trial, one cannot make such decisions without making a personal judgment regarding the guilt of the accused.

To make matters more complex, appended to prosecutors’ obligation to do justice is the duty to uphold public faith in the judicial system. Consequently, coupled with the duty to do justice, the prosecutor must consider public opinion, due process, and general issues of fairness. As will be discussed infra, the public’s faith in the justice system has little to do with justice. In part, this is a result of the fluid and individualized nature of justice. Community consensus invariably differs with regard to whether particular outcomes are just or fair. Attempts to reconcile public opinion with just outcomes are futile and would hinder a prosecutor’s ability to seek fair and equitable results. Thus, the prosecutor’s ethical obligations are nearly insurmountable.

2. Case must be Supported by Probable Cause:

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22 See Galin, supra note 3, at 1268.
23 Id.
Pursuant to Model Rules of Prof Conduct R. 3.8 (2009), “The prosecutor in a criminal case shall… refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause…” 24

In addition to the belief intrinsically required in seeking justice, the definition of “probable cause” also includes a personal belief in guilt. The requisites of “probable cause” for the prosecution are: (1) Accuser must believe accused did the act charged; (2) such belief must be reasonable. 25 Additionally, “probable cause” is defined as:

...such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty. 26

The probable cause standard serves as the criteria that must be met to begin several stages of a criminal case, including: police detention, police search, arrest, incarceration resulting from a bond hearing, incarceration resulting from an adversary preliminary hearing, prosecutorial filing of charges, and prosecutorial progression to trial. Each of these stages involves substantially different degrees of intrusion into a defendant’s privacy and risks of wrongful incarceration or conviction. Yet, the standard remains the same for each.

The probable cause standard is one of the lowest standards in criminal law. 27 At a bond hearing, adequate probable cause can be found if the arrest affidavit 28 contains a narrative with

24 See Also Model Code of Prof Responsibility DR 7-103(A) (1986) (“A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.”); Standards for Criminal Justice: Prosecution Function 3-3.9(a) (3d ed. 1993) (“A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause.”).
26 Birwood Paper Co. v. Damsky, supra, 285 Ala. at p. 134, 229 So.2d at p. 521. See also, Hyman v. New York Cent. R. Co., 240 N.Y. 137, 143 (1925) (“Probable cause consists of such facts and circumstances as would have led a reasonably prudent man in like circumstances to have believed the plaintiff guilty of an intent to violate the law.”).
27 See Locke v. United States, 11 U.S. 339, 348 (1813) (“[T]he term ‘probable cause,’ according to its usual acceptation, means less than evidence which would justify condemnation.”).
facts sufficient to support each element of the crime alleged on the arrest affidavit. Arrest forms are usually only one page long and are very rarely longer than two or three pages.\textsuperscript{29} The arrest affidavit, which serves as the sole support to hold an accused in jail while the case is investigated, is written prior to any investigation by the prosecutor’s office.\textsuperscript{30} If the arrest form does not reflect one of the elements of the crime charged\textsuperscript{31} the case may be continued for up to 30 days for the arresting officer to appear in court to testify to the elements of the crime. This hearing is known as an adversarial preliminary hearing (‘‘APH’’). The witnesses in an APH are subject to cross-examination, and the accused may be incarcerated if mere probable cause is found.\textsuperscript{32} There is no requirement for the prosecutor to believe that the accused is guilty at this stage of the proceedings. In fact, the prosecutor generally will not have any knowledge about the case at this time; therefore a belief in the defendant’s guilt would be unfounded at this stage of the proceedings. This is because the prosecutor who attends the APH is most often a different prosecutor than the one who initially takes the witnesses’ statements (termed ‘‘pre-file statements’’) when the case first arrives at the prosecutor’s office. This intake prosecutor also determines if and what charges will be filed. This ‘‘pre-file’’ prosecutor transfers the case to the trial attorney once she completes taking witness statements and makes her filing decision.

The legal definition of ‘‘probable cause’’ remains the same for each prosecutor and for each stage of the case. There is no legal authority stating otherwise. Although it is clear that the

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\textsuperscript{28} See 5 Am. Jur. 2d Arrest § 19.
\textsuperscript{29} Arizona’s standard arrest warrant is a perfect example of what is usually required in an arrest form. 7 Ariz. Legal Forms, Crim. Proc. § 41.0 Form 2(a) (2d ed.); see also Fed. R. Crim. P. 4 (describing what is required for a federal arrest warrant); 10A Am. Jur. Pl. & Pr. Forms False Imprisonment § 70 (explaining when an arrest form is fair on its face).
\textsuperscript{30} This is true for the majority of state cases and is not inclusive of federal cases where the U.S. Attorney may become involved at a much earlier time.
\textsuperscript{31} For example, if on a grand theft charge, the officer did not include the value of the property, then the arrest form would lack probable cause because the element of value is missing.
\textsuperscript{32} This is only true if the judge does not use discretion and grant pretrial release or bond. The adversaries may also reach an agreement regarding the accused’s release.
prosecutor must believe that the defendant is guilty to proceed to trial, it appears that this requirement is either ignored by the prosecutor until the time of trial, or the “belief in guilt” concept is imputed to the arresting officer at the time of arrest. This leaves unanswered the role of “belief in guilt” in the equation at bond hearings, pretrial hearings, and at any stage before the prosecution has had an adequate opportunity to appraise a defendant’s culpability through discovery and investigation. Although the evidence to arrest is minimal, no further evidence is required to proceed to seek a conviction. Thus, although the definition of probable cause remains the same, there appears to be some ambiguity in its application and interpretation depending on the stage of the proceedings. Given that prosecutors’ ethical duties include seeking justice, it is counter-intuitive to conclude that the prosecution could ethically proceed to prosecute without a higher evidentiary standard than probable cause.

3. Value of the Prosecution’s Personal Belief Standard

As the current ethical obligations stand, a personal belief requirement for prosecutors does serve a valuable function. There are a variety of situations where a prosecutor may have enough evidence to prove guilt but does not have a personal belief in guilt. The process of seeking justice requires the belief of guilt at some point prior to the filing of charges and bringing an accused to trial.

For example, prosecutors may overhear police officers make comments that lead them to question the defendant’s guilt or otherwise become privy to information that indicates the defendant is innocent. For the most part, the prosecution’s Brady and Giglio obligations should remedy these situations. Brady and Giglio impose on the prosecution a duty to learn and disclose to the defense all “favorable” and “material” information “known to the others acting on

the government’s behalf in the case, including the police.”  

Brady endorses the role of the prosecutor as a seeker of justice stating, “society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.” Brady affirmed that a prosecutor should not be the “architect of a proceeding that does not comport with standards of justice.”

However, not every situation where a prosecutor is aware of information that points to innocence falls under Brady or Giglio. For example, imagine that a prosecutor interviews the arresting officer on a drug case and the officer recounts the exact same facts as he did in the last two drug cases. The officer may describe the details of the case so similarly to the previous two drug cases that the prosecutor is led to the conclusion that the officer is not truthful. However, her personal opinion that the officer is lying is not likely to fall under Brady or even Giglio. If

35 Brady confessed to murder but argued that he should not get the death penalty because he did not perform the actual killing. The Government did not disclose to Brady that the co-defendant admitted to performing the killing. “[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Id. at 87. “Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.” Id. at 87. It is often overlooked that the Court employed a fairly lenient materiality standard in Brady. The suppressed confession by the co-defendant also stated that Brady likewise wanted to kill the victim, but that Brady wanted to strangle the victim and the co-defendant wanted to shoot him. Even so, the Court held that the confession would have been favorable to Brady and found a due process violation. In Giglio v. United States, 405 U.S. 150 (1972). Key witness testifies that he and Mr. Giglio forged $2300 in money orders, and that witness believes witness “still could be prosecuted,” Id. at 151; and Government argues in closing that witness “received no promises that he would not be indicted.” Id. at 152. But, in fact, grand jury prosecutor had, unbeknownst to trial prosecutor, promised witness that if he testified before grand jury he would not be indicted. The trial prosecutor denied any knowledge of the promise and thus any knowing use of false testimony. The Court clarifies that the Brady disclosure obligation does not turn on the trial prosecutor’s actual knowledge of the information. The Court imputed the promise of the first prosecutor to the entire office, holding that the burden should be placed on the Government to develop “procedures” to ensure that “all relevant information” is communicated to each lawyer who handles any case. Id. at 154. The Court clarifies that impeachment information falls under Brady: “When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [Brady].” Id. at 154. The court clarifies that reversal under Brady requires a finding of materiality (though what “materiality” means will evolve), which is defined as a showing that the withheld evidence could “in any reasonable likelihood have affected the judgment of the jury.” Id. at 154 (internal quotation and citation omitted).

36 Brady, 373 U.S. at 87.
37 Id.
the prosecutor were held to a “belief-in-guilt” standard, she would be obligated to cease
prosecuting the case. Without the personal belief standard, she would be free to proceed with the
prosecution. This example exemplifies the purpose of the “belief-in-guilt” standard. However,
this benefit fails to mitigate the damage done by the bias the belief standard may cause in the
investigation and decision-making process. Further, in the real world, prosecutors routinely focus
on obtaining high conviction rates, seeking promotions, raises, and good reputations.\textsuperscript{38}
Additionally, many prosecutors believe that a high conviction rate is synonymous with justice
and satisfies the community’s demand for convictions.\textsuperscript{39}

4. Prosecutors Fail to Adhere to their Ethical Standards

a. Prosecutorial Incentive to Obtain Convictions

Given that prosecutors are not provided adequate ethical guidelines, evidentiary or
otherwise, it becomes too easy for prosecutors to neglect their duty to “do justice” by genuinely
believing in the defendant’s guilt. Personal conflict, ethical dilemmas and moral questions stem
from the personal belief standard. Since prosecutors have many incentives to proceed with trials
and to seek convictions, this route is more comfortable for many prosecutors and comports with
some aspects of their ethical obligations. They are compelled by community and intra-office
pressures to obtain convictions, and they are motivated by the status, reputation, and personal
feelings of success that come along with a high conviction rate.\textsuperscript{40} Further, prosecutors are not

\textsuperscript{38} See supra note 6.
\textsuperscript{39} See 2012 WL 3058447 (ASPATORE), 9 (“As a prosecutor, I used to measure my success by rate of conviction”);
see also Brian H. Bornstein & Sean G. McCabe, Jurors of the Absurd? The Role of Consequentiality in Jury
Simulation Research, 32 Fla. St. U.L. Rev. 443, 454 (2005) (“Kaplan and Krupa’s results also suggested higher
conviction rates when participants believed they were participating in a real trial…”).
\textsuperscript{40} See id; Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44
Vand. L. Rev. 45, FN 63 (1991) (“For elected prosecutors, publicity about trial successes is essential to campaigns.
For subordinate prosecutors in larger offices, promotion and internal evaluation depends largely on the ability to
produce convictions.”).
commended for dropping cases, even when guilt is in question. As discussed supra, justice is an imprecise concept and highly individualized for each particular case and defendant. How well a prosecutor obtains justice, and performs fairly and ethically, is difficult to gauge. Conviction rate is a quantifiable and countable aspect of trial work. Somebody wins and somebody loses. The only quantifiable attribute that a prosecutor can point to that can demonstrate her success and quality is conviction rate. It is logical then that an individual prosecutor, as well as her supervisors, will measure her success by her conviction rate. However, pursuit of a high rate of conviction as top priority is in violation of the prosecutor’s obligation to seek justice. Often, justice will not involve a conviction. To only pursue convictions leaves justice unaddressed. Nevertheless, a high conviction rate is likely to impress the public and indicate an efficient and effective prosecutor.41

Public attitude in the United States reflects a desire for the criminal justice system to be “tough on crime” and for prosecutors to secure many convictions and harsh, lengthy prison sentences.42 Given that part of the prosecutor’s role is to sustain the public’s faith in the criminal justice system, methods that result in high conviction rates are likely to satisfy this obligation. Such a policy, although rewarding for the prosecutor, clearly ignores the requirements of justice.

It is no surprise that prosecutors simply seek convictions. Prosecutors are given a set of ethical rules and guidelines that are not only in opposition to each other, but unmanageable.

41 Deborah Mostaghel, Wrongfully Incarcerated, Randomly Compensated-How to Fund Wrongful-Conviction Compensation Statutes, 44 Ind. L. Rev. 503, 506 (2011) (“[l]nterests within the prosecutorial system may influence prosecutors to obtain convictions.23 Individually, prosecutors with high conviction rates are more likely to advance on the job and so may overzealously pursue easy targets. Institutionally, district attorneys who show high conviction rates may be able to garner more resources than those who seem to be less successful.”).
42 See Jamien A. Arvie, Prosecutorial Misconduct: When Justice Is Seen As A Chess Game, the Pawns of Professional Responsibility and Ethical Standards Are Sacrificed, 40 S.U. L. Rev. 185, 189 (2012) (“Today, the district attorney, an elected official, is usually faced with pressure from the public for high conviction rates and ““tough on crime” political platforms.”); see also Johnnie L. Cochran, Jr., How Can You Defend Those People?, 30 Loy. L.A. L. Rev. 39, 40 (1996); 6 No. 3 Crim. Prac. Guide 2;
First, prosecutors are expected to assess probable cause despite an unclear definition of probable cause. Second, they are expected to seek justice when the tools to ascertain a just result are not available to them prior to trial. Third, they are expected to maintain public confidence in the criminal justice system. Fourth, their superiors assess their performance based on the number of convictions they secure. These mandates conflict with one another. To accomplish all four is simply not possible. As a practical matter, prosecutors have no choice but to concern themselves with job security, performance reviews, and promotions. Hence, prosecutors most often choose to seek the conviction.

In fact, prosecutors with higher conviction rates advance more quickly both financially and to more prestigious positions within the office. These prosecutors also gain more respect from both their seniors and the newer prosecutors. Not only do prosecutors with higher conviction rates obtain promotions more rapidly, but, due to their superior professional statuses, they have better access to coveted resources, such as investigators, experts, and funding. Given the substantial pressures to obtain convictions, prosecutors’ offices typically acquire a “conviction psychology” such that it has become difficult for defense attorneys to discuss with prosecutors alternative resolutions to trial because defense attorneys have internalized the view that the prosecutor must be uncompromising and conviction-oriented.

b. **Prosecutorial Charging Methods Reflect the Prosecutor’s Lack of Belief in the Defendant’s Guilt**

Generally, once an arrest is made, the prosecutor’s office begins the process of determining whether charges will be filed. Typically, this involves interviewing the police and witnesses in what is often known as pre-file conferences. Charging decisions are most often based on these

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43 The adversary system is the means by which justice is ascertained and the method by which truth should be revealed. The prosecutor’s mandate to seek justice would require the prosecutor to find and to know the truth in advance of the established truth finding procedure – trial.
interviews. In larger cities, the prosecutor who conducts the pre-file investigation is rarely the same as the trial prosecutor. As a consequence of this procedure, many prosecutors who first obtain responsibility for a case at the trial level make the assumption that the police and previous prosecutors already assessed the defendant’s guilt and strength of the evidence.\textsuperscript{44}

A review of generally accepted prosecutorial practices would lead one to infer that prosecutors are indeed focused on obtaining a conviction irrespective of the accused’s factual culpability. For example, prosecutors routinely overcharge defendants. This occurs when a prosecutor is confident that the accused committed a crime but charges the accused with a more serious crime. The crime that the prosecutor is convinced that the defendant committed is presented to the jury as a “lesser-included offense.”\textsuperscript{45} In this manner, a prosecutor can attempt to obtain a conviction for a more serious crime although she harbors doubts about the sufficiency of the evidence.

Prosecutors regularly charge defendants with multiple inconsistent charges. This can occur, for example, if a defendant is arrested in possession of a stolen boat. The prosecution has evidence that the defendant stole the boat (grand theft), but the prosecution also has evidence that the defendant bought the boat knowing it was stolen instead of stealing it (dealing in stolen property). As a consequence, the prosecution might charge the defendant with inconsistent charges by charging the accused with both grand theft and dealing in stolen property. This is

\textsuperscript{44} See George T. Felkenes, The Prosecutor: A Look at Reality, 7 Sw. U. L. Rev. 98, 112 (1975).
\textsuperscript{45} A “lesser-included offense” is “an offense necessarily included in the offense charged.” Fed. R. Crim. P. 31, 22 Fla. Prac.; Criminal Procedure § 18:14 (2014 ed.) (“[F]or example... simple battery, a first degree misdemeanor pursuant to section 784.03(1)(a), Florida Statutes (2009), is a necessarily lesser included offense of aggravated battery, a second degree felony pursuant to section 784.045(1)(a)(2), Florida Statutes (2009).”); see Burke, supra note 12, providing an example of “an assault case in which the defendant struck the victim’s head against a wall, the prosecutor might charge the defendant with two levels of assault: a more serious charge on the theory that the wall, as used, constituted a “weapon,” and also a lesser-included offense that does not require use of a weapon.”
true even though it is impossible for the defendant to be factually or legally guilty of both charges with these particular facts.

Similarly, prosecutors frequently present the jury with inconsistent theories. When the prosecution chooses to prosecute inconsistent theories or charges, usually in cases with codefendants, it demonstrates that the prosecution lacks a subjective belief in at least one of the theories (this tends to be true when the theories are in tension with each other, and must be true when the theories are mutually exclusive).\textsuperscript{46} For instance, if a husband and wife are both charged with the death of their child by beating the child to death, causation becomes an issue. In such a case, the wife and the husband will likely have separate jury trials. During the wife’s trial, prosecutors may place responsibility for the fatal injury on the wife. Conversely and inconsistently, at the husband’s trial, the prosecution may place responsibility for the fatal injury on the husband. Generally, other than in limited circumstances, a prosecutor may not present evidence wholly contrary to evidence presented in another proceeding. To do so is unconstitutional.\textsuperscript{47} Plainly, the prosecutor does not embrace a belief in guilt regarding at least one of the parents. However, such a prosecutor may be comfortable with these trial tactics given her concept of justice in that particular case. This may be true if she feels that both parents morally deserve the punitive outcomes that would likely result from the most serious


\textsuperscript{47} See, e.g. Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985). In Drake v. Kemp, the State sent Drake to death row after disavowing the theory used to condemn his co-defendant Campbell in a previous trial. Court found that the prosecutorial inconsistency implicated the defendant's DP Invoking the prohibition against a prosecutor's soliciting or failing to correct evidence known by the State to be false, Judge Clark reasoned that the prosecutor's “theories of the same crime in the two different trials negate one another.” While acknowledging that the prosecutor's actual beliefs were impossible to discern, Judge Clark charged that the prosecutor's incompatible positions required the State's endorsement of a known falsity. Addressing prejudice, Judge Clark concluded that the prosecutor's actions prejudiced both defendants, since the State's “flip flopping of theories” resulted in both convictions and death sentences for both men.
convictions. As discussed, justice may differ by individual, by jury, judge, and by community. Justice, as a theory embracing truth and fairness, more often than not provides moral quandaries and predicaments. It is for this reason our culture created procedures and policies to support the criminal justice system.

Although justice is flawed at best, if its administrators would respect and abide by its procedural imperatives the country would suffer far fewer injustices. It is far too easy to side step the appropriate process in the name of justice. Prosecutorial belief in guilt and a personal version of justice often results in a disregard for the means to reach a “just” end. Although completely legal, in most instances and in specific circumstances, the prosecution may provide incentives to individuals in exchange for their testimony against the accused. These witnesses are commonly referred to as “snitches.” In multiple defendant cases, prosecutors often offer several of the defendants very low plea offers in exchange for their testimony against the defendant. Often, snitches may do no jail time at all, even on serious offenses such as murder. Sometimes, the prosecution will recruit whoever is willing to “flip” on their co-defendant. Often, the prosecution targets a particular individual to prosecute and actively seeks “snitches” to testify against him. At times, it is clear why a particular defendant is the target. Conversely, quite often it is a mystery why a particular individual is the focus of the prosecution. Further, it is not unusual for a defendant to be convicted of a serious offense, often murder, based solely on

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48 See United States v. Singleton, 165 F.3d 1297, 1298-1302 (10th Cir. 1999); see also Saul Levmore, Ariel Porat, Asymmetries and Incentives in Plea Bargaining and Evidence Production, 122 Yale L.J. 690, 692-93 (2012) (“[T]he government--but not the defense--is able to reward witnesses in criminal cases with certain nonmonetary inducements, including agreements to seek reduced penalties, or even not to prosecute at all in both related and unrelated cases. If a witness is already incarcerated, the government can offer to improve the conditions of confinement.”).

49 See Singleton, 165 F.3d at 1301 (holding that the government may exchange leniency for testimony against a codefendant).

50 A defendant “flips” when he “defects” and agrees to testify for the government, in exchange for leniency in sentencing, against his codefendant, usually implicating himself in the process. See Neal Kumar Katyal, Conspiracy Theory, 112 Yale L.J. 1307, 1312 (2003).
the testimony of snitches. This can be true even when the snitches themselves have admittedly committed multiple murders and have lengthy records while the accused may have little to no record at all. It is exceedingly difficult to accept that prosecutors hold personal the beliefs based on evidence that the defendants in these circumstances are guilty.

**DEFENSE ETHICAL STANDARD**

1. **Generally**

   Defense attorneys, on the other hand, have the ethical responsibility to zealously advocate for her client to the outermost bounds of the law. This is true at all stages of a criminal prosecution, from pretrial hearing through post-conviction. In contrast to a prosecutor’s ethical obligations, a defense attorney’s ethical mandate does not require judgment of her client’s guilt or innocence.\(^{51}\) The defense attorney, therefore, enjoys a much more straightforward duty. Despite the defense attorney’s unambiguous objective, defense attorneys are human and subject to the same natural predispositions as are prosecutors. The defense attorney should not reach conclusions regarding her client’s guilt or concern herself with the prisoners’ culpability beyond what is necessary for a full investigation of the case.\(^ {52}\) Nonetheless it is natural for the defense attorney to speculate regarding her client’s guilt and even develop firm beliefs regarding his guilt. Such a personally held belief in guilt risks the inadvertent or unconscious failure of the defense attorney to

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\(^{51}\) See ABA Standards for Criminal Justice, Prosecution Function & Defense Function (3d ed. 1993) 4-1.2 (“To serve as the accused’s counselor and advocate with courage and devotion and to render effective, quality representation.”).

\(^{52}\) Defense attorneys should understand “guilty” and “innocent” to be legal terms, as opposed to a measure of moral apt. (See Terence F. MacCarthy, The Perjurious Client Question: Putting Criminal Defense Lawyers Between A Rock and A Hard Place, 75 J. Crim. L. & Criminology 1197 (1984)); see also F. Randall Karfonta, Balancing the Scales of Justice: Training and Support Services for Appointed Criminal Defense Lawyers, Mich. B.J., 2-92, at 164 (“For the criminal defense lawyer, zealous advocacy means vigorous investigation of every viable line of defense and equally vigorous presentation of defenses and mitigating circumstances.”).
represent the client with enthusiasm and diligence. This is true because pre-trial beliefs represent firm and fixed bias and may be inconsistent with the facts.

2. Innocence Programs

At the post-conviction stage, specifically within innocence programs, defense attorneys regularly and voluntarily adopt a “belief in innocence” standard. These innocence programs are limited representation agencies; meaning the programs will only represent or continue to represent the client as long as the client maintains his innocence and the evidence continues to support innocence. The vast majority of innocence projects also require that they believe the inmate to be innocent. Innocence programs often choose to adopt a “belief in innocence” criterion in order to assure that their limited resources are devoted to the most deserving of clients. Further, the “belief in innocence” mandate is often more appealing to potential donors and on grant applications. Nonetheless, even if an innocence organization maintains that representation is contingent on the organization’s belief in the client’s innocence, the ethical and discovery obligations of the defense remain the same.

3. Value of a defense post-conviction “Belief in Innocence” standard

On its face, the “belief in innocence” standard has greater import for an innocence clinic. The defense is not bound by Brady or Giglio. Thus, if the defense attorney uncovers incriminating evidence, she is under no obligation to disclose this information to the prosecution. In fact, if she did, she would be in violation of her ethical duties. Yet, innocence programs fully

53 See Medwed & Suni, supra note 8; see also Jan Stiglitz, Justin Brooks, Tara Shulman, The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education, 38 Cal. W.L. Rev. 413, 431 (2002) (In screening each file, the students have to make two determinations: do they believe the client is innocent and can they prove it?).
54 See Medwed, supra note 8 at 1103-1104.
55 See id; Suni, supra note 8 at 925-27.
expect to encounter incriminating evidence. Their clients have already been convicted of the crime, and therefore, there was necessarily incriminating evidence presented to the jury at trial. Innocence Program clients are claiming innocence and often claim the incriminating evidence from trial was false or flawed. Often the clients are claiming that exculpatory evidence was not developed or presented.

Frequently, during an innocence program’s investigation of a case, only additional incriminating evidence will be uncovered. Since most innocence programs are “limited representation” programs, the program is under no obligation to proceed to defend a client who does not have a meritorious claim to actual innocence. The representation is based on a valid claim to innocence and the client’s assertion of actual innocence. Many projects use the “belief” criteria as a means to determine whether to proceed on the case when both incriminating and exculpatory evidence is present. It is also used as a check to avoid filing motions where the incriminating evidence heavily and clearly outweighs the exculpatory evidence.

THE ADVERSARY SYSTEM

The premise of the adversary system is that partisan advocacy representation for both sides of a case will promote the goal of justice: that the guilty be convicted and the innocent go free. A criminal trial is a fact-finding process. No aspect of advocacy is more important than to marshal the evidence for each side before submission of the case to judgment.56 The parties in the adversary system are not the decision-makers, although many enter trial decided.57 Should either the prosecution or defense claim to know the truth or the appropriate decision prior to a trial, justice is put at serious risk. The role of both parties is to investigate the evidence and prepare it

57 The judge or the jury are the decision-makers.
for trial. The prosecutor is expected to be objective. The concept of being “completely objective” is, to some extent, a meaningless phrase. To be 100% objective is beyond any individual’s capability in a complex situation, like a trial. To be entirely objective in this regard is not an achievable task. However, all participants are capable of self-observation, self-monitoring and following the rules and procedures of litigation. It is important to underline that the adversary system itself defines the role of each attorney participant. Each has a different role to play in the legal drama that is a criminal trial. Those roles are pre-determined and polarized. Consequently, it is clear that the structure of the judicial system and the roles of the defense and the prosecution strongly influence the pre-trial disposition of each attorney. How can either the defense or prosecution exhibit the distanced objectivity toward the case and oneself and at the same time fully articulate their legal responsibilities? The official doctrine for each discipline demands that they resolve a paradox; they are being asked to perform an impossible task.

It is human nature to judge and to speculate regarding the guilt or innocence of the accused. Yet, as the current ethical obligations stand, a prosecutor is encouraged, and even mandated, to make a personal decision about the defendant’s guilt prior to trial and prior to the adversarial process. The ethical obligations of the prosecution and the voluntary guidelines adopted by many innocence programs require the parties to ascertain their opinion of the truth prior to the truth-finding process. However, the system of justice used in the United States relies on the well-tested principle that the truth is best revealed by zealous arguments and debate by both sides of the issue.

58 See supra note 8.
59 See Penson v. Ohio, 488 U.S. 75, 84 (1988) (“The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is ‘best discovered by powerful statements on both sides of the question.’”).
In the U.S. criminal justice system, the adversarial nature of the trial is intended to reveal the truth. More specifically, in the courtroom, the procedure of cross-examination is the most effective tool for disclosing the truth. The opportunity for cross-examination is protected by the Confrontation Clause of the Sixth Amendment.\(^6\) It is through cross-examination that the believability of a witness’ testimony is tested.\(^6\) In fact, the Supreme Court has recognized that cross-examination is, “…the greatest legal engine ever invented for the discovery of truth.”\(^6\) Thus, it is within the courtroom that the truth is revealed. Further, it is highly contingent on the performance of the lawyers. Through the proper performance of a cross-examination to test the veracity of a witness, a trial attorney has the unique ability to uncover truth. Should inadequate facts be testified to on direct, should the attorney fail to conduct a proper cross-examination, should a witness fail to be called, all due to a preconceived notion of the truth formed preceding trial, prior to the truth-finding process, then justice, per se, cannot be served.

PROBLEMS WITH ADOPTING PERSONAL BELIEFS IN INNOCENCE OR GUILT

An adversary presentation is the only effective means for combating the natural human tendency to judge too swiftly in terms of the familiar that which is not fully known.\(^6\)

A personal belief in the accused's guilt shifts the essential inquiry away from the facts and evidence and transfers the prosecutor’s attention to selecting incriminating evidence and overcoming any defense evidence. The same is true for the defense in limited representation

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\(^6\) See Kentucky v. Stincer, 482 U.S. 730, 736 (1987) (“The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process.”).

\(^6\) See Davis v. Alaska, 415 U.S. 308, 316 (1974) (defining cross-examination as “the principal means by which the believability of a witness and the truth of his testimony are tested.”).


innocence projects. When such defense projects develop a personal belief in the client’s innocence, especially prior to the completion of case investigation, the project attorney routinely experiences great difficulty accepting that her beliefs may be wrong. When non-confirming facts or evidence arises, an attorney with a pre-existing personal belief concerning guilt or innocence views such information through a scripted veil of personal belief and is unable to evaluate the evidence clearly. The result is a high risk of either prosecuting an innocent person or, for innocence projects, failing to litigate on behalf of an innocence client. The following cognitive biases are frequently expressed when prosecutors develop personal beliefs in guilt prior to trial or when innocence program participants prematurely acquire opinions regarding inmates’ guilt or innocence.

1. Cognitive Dissonance

Personal certainties, in the form of belief in innocence or guilt, result in self-fulfilling prophecies. Invariably, when a prosecutor, defense attorney, or any other individual embraces a personal certainty or belief, she will unwittingly wish to confirm the truth of that certainty. In other words, she will construct the truth of her belief merely by virtue of her belief and certainty. How the attorney reduces the dissonance is important.

Cognitive dissonance is a psychological state of mind that creates conflict resulting from incongruous beliefs and external behavior.64 This cognitive state is naturally uncomfortable and leads the individual to resolve the conflict. Resolution of cognitive dissonance is one form of bias that occurs when prosecutors (or any human) adopt a personal certainty or belief

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prematurely. Studies demonstrate that individuals endeavor to reconcile their beliefs to conform to their behavior. Therefore, because prosecutors most often proceed to prosecute cases even when they harbor doubts regarding the defendant’s guilt, the prosecutor will change their opinion toward guilt in order to reduce the cognitive dissonance. Cognitive dissonance creates a resilient hurdle to accepting any doubts regarding the defendant’s guilt. This is also true at the post-conviction level, even when presented with uncontroverted DNA evidence indicating absolute innocence. Prosecutors routinely and inexplicably maintain that defendants are guilty, even in the face of DNA evidence.

2. Selective Information Processing

When a personal belief is strongly held the individual will naturally protect themselves from information that is in conflict. Specifically, prosecutors demonstrate search-and-recall preferences for information that tends to confirm their belief of guilt. They also tend to devalue disconfirming evidence, even when it is presented. This phenomenon is known as selective information processing. As a result of selective information processing, people weigh evidence that supports their prior beliefs more heavily than evidence that contradicts their beliefs.

3. Confirmation Bias

\[65\text{ Id.}\]
Confirmation bias occurs when the individual is inclined to interpret facts and evidence to support her belief, regardless of the nature of the evidence. For example, if a prosecutor firmly believes that a defendant is guilty of a rape but no semen was found, then the prosecutor will likely make the inference that the defendant wore a condom. Conversely, if in the same case the prosecutor were convinced that the defendant is innocent of the rape, the prosecutor would likely interpret the fact that no semen was found as highly exculpatory evidence and conclude that the defendant did not penetrate the alleged victim. The same evidence can be seen as having two vastly different meanings. Two different beliefs cause two dramatically different results for an accused individual with the same evidence.

4. Tunnel Vision

Tunnel vision, viewed as a subset of confirmation bias, occurs when an individual tends to disregard or minimize facts or evidence that does not support her belief or vision of the truth. Tunnel vision naturally occurs as a consequence of an individual belief. It is a subtle and natural human tendency. Tunnel vision explains how once the police identify one suspect, contradictory evidence is dismissed or minimized. Tunnel vision is at work when both police and prosecutors focus only on one suspect or defendant while “building a case” for prosecution. Exculpatory evidence may be ignored; other possible culprits are not investigated or considered. This is true

even when the prosecution is directly presented with other plausible suspects or with exculpatory evidence. ..

5. **Belief Perseverance**

Belief perseverance is the tendency to adhere to theories even when new information wholly discredits the theory’s evidentiary basis. With belief perseverance, human cognition departs from perfectly rational decision making not through biased assimilation of ambiguous new information, but by failing to adjust beliefs in response to proof that prior information was demonstrably false. This occurs, as in the above example, when a prosecutor is confronted with DNA proof that reveals that the defendant could not be guilty. One prosecutor is known to have stated when provided with similar DNA evidence: "I have no scientific basis. I know because I trust my detective and my tape-recorded confession. Therefore the results must be flawed until someone proves to me otherwise." 68

**POST-CONVICTION**

1. **Prosecution Adherence to Belief in Guilt**

Prosecutors are seldom quick to admit when an accused has been wrongfully convicted. Accepting that the wrong person has been imprisoned is so painful and so at odds with the prosecutor's core self-image that that truth must be denied, or at least minimized. Whether the conviction was obtained through a jury verdict or the defendant's own guilty plea, prosecutors view a conviction as further evidence confirming the accuracy of her initial belief of guilt. The prosecutor's belief in her theory will continue to distort her analysis of any new evidence. The conviction of an innocent person is inconsistent with the ethical prosecutor's belief that charges should be brought only against suspects who are actually guilty. To avoid cognitive dissonance,

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the prosecutor must maintain a theory of guilt post-conviction, no matter what exculpatory evidence she faces. Post-conviction, if she agrees that the inmate is innocent, she must accept responsibility for the conviction of an innocent person.

**ETHICAL “BELIEF” STANDARDS CONTRIBUTE TO WRONGFUL CONVICTIONS**

This article proposes that pre-trial personal belief in an accused’s guilt or innocence, on behalf of the prosecutor or defense attorney, leads to biased decision-making and investigations. However, it does not necessarily follow that the attorneys’ beliefs or biases are always wrong and result in wrongful convictions. Nonetheless, a careful appraisal of the circumstances indicates that a “belief” requirement necessarily leads to biased outcomes. Certainly, the prosecution will often be correct, perhaps even the majority of the time. However, given the staggering number of exonerations that are coming to light, and the troubling statistics reflecting extensive racism and discrimination in the justice system, the only sensible conclusion is that the wide discretion that the “belief” standard provides attorneys is a contributor.⁶⁹

1. **Ethical “Belief” Standards Allow For Racial Bias In Attorney Decision Making And Investigation**

   It is evident that bias resulting from prejudice and discrimination still exists in the criminal justice system. No doubt much of this bias is unintentional. Irrespective of intentions, the flaws and fissures through which prejudice seeps into the system of justice must be found and sealed. The low evidentiary standard of probable cause and the wide discretion accompanied by the individual belief standard held by prosecutors (and some defense attorneys) provides an unlocked door, easily opened for inadvertent and deliberate discrimination and bigotry. The

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relevant rules of ethical conduct for prosecutors offer no formulae on which the attorney must base her belief. Prosecutors are not required to justify their beliefs. In fact, the model rules require the prosecution to cease the prosecution of a case if she believes the defendant is innocent, irrespective of the state of the evidence. This necessarily results in the conclusion that a prosecutor may hold a valid and reasonable belief regarding a defendant’s guilt or innocence “irrespective of the state of the evidence”.

2. Ethical “Belief” Standards Result In Racial Bias

Just as in 1972, when Supreme Court held in *Furman v. Georgia*, 408 U.S. 238, 260 (1972), that the death penalty was being discriminatorily applied, today, the poor and minority are still overwhelmingly sentenced to death. Racial bias pervades not only death penalty sentencing, but the justice system generally. Recent statistical analyses of the demographics of criminal defendants show that racial and gender prejudice still exists in the justice system. A recent 2009 study of charges and arrests for serious felonies in the 75 largest counties in the US shows a strong prejudice against minorities: approximately 70% of the defendants charged were classified as minorities.

More than 90% of criminal cases never reach trial, therefore, analyses of plea-bargaining is a helpful indicator of bias and prejudice in the system. Sadly, there is widespread belief amongst the members of the legal community that Caucasians get favorable treatment in plea-bargaining

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70 See supra note 7.
71 See John Kaplan The Prosecutorial Discretion – A comment, 60 Nw. U.L. Rev. 174, 178 (1965) (stating that “regardless of the strength of the case,” prosecutors should not file charges unless they “actually believe” that the defendant committed the crime and that it is “morally wrong” to continue to prosecute unless “personally convinced” of such).
The same trend can also be seen in recent sentencing and conviction rates. Of forty studies published between 1980 and 2005, 32 analyzing state-level data and 8 analyzing data from the federal system, 43.2% suggested more severe sentences for African Americans, and 27.6% suggested harsher sentences for Latinos at the state level. In federal court, over 68.2% suggested harsher sentences for blacks, and 47.6% suggested harsher sentences for Latinos. “At the federal level, the statistics pointed to blacks more likely being disadvantaged as compared to similarly-situated whites regarding the length of imprisonment. Compared to whites, Latinos at the federal level face a greater disadvantage concerning the decision to incarcerate rather than the sentence length decision.”

The bias in the criminal justice system may be most evident in an evaluation of the death penalty. In 1983, over a decade after Furman was decided, a group of researchers performed a study to assess potential bias in the Georgia death penalty system. This study has come to be known as the Baldus study. Its findings were unmistakable, in that death sentences were being given in a highly prejudiced manner. The study found that black defendants who kill white victims have a much greater chance of being given the death penalty than do white defendants that kill black victims with generally equal mitigators and aggravators. Further, more than twenty independent studies around the nation, as recently as 2008, have reached similar conclusions. Baldus found that the odds of being executed were 4.3 times greater for

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76 See id.
77 Id at 5.
78 Furman, 408 U.S. 238
79 See supra note 24.
defendants who killed whites than for defendants who killed blacks.\textsuperscript{81} Regrettably, the results of the Baldus study did not lead to improvements in capital sentencing structures or controlling personal bias in death penalty proceedings. From 1976 to 2003, people of color have accounted for a disproportionate forty-three percent of the total executions in the United States. While white victims account for nearly half of all murder victims, a whopping eighty percent of all death penalty cases involve white victims. Additionally, as of 2002, a grand total of twelve people were executed in cases where the defendant was white and the victim black. Conversely and disturbingly, 178 black defendants have been executed for the murder of white victims.\textsuperscript{82}

Why is this discrepancy still occurring? Prejudices can act as biases and are often learned and incorporated into a person’s behavior at a very young age. Unconscious bias and prejudice are the most dangerous types of error because it is outside the person’s awareness and therefore not available for conscious awareness, control or modification. Similarly, when jurors, prosecutors, or defense attorneys are confronted with incarceration or the termination of a human being’s life, each individual is prone, at least in part, to react in a highly personal and sometimes biased manner. The ethical duties that prosecutors must grapple with necessarily encourage bias in her prosecuting or sentencing recommendation decision. This brand of personal decision-making provides a fertile ground for the prosecutor’s investigation and fact presentation to reflect personal bias and may account for many of the results seen in the Baldus Study and similar studies. The lack of parameters and specific guidelines for the prosecutor leaves room for prejudicial decision-making. Prejudice is defined as a sentiment that lacks

\textsuperscript{81} See \textit{supra} note 24. The Baldus study also found that 1) defendants who kill white victims receive the death penalty in 11\% of cases, 2) defendants who kill black victims receive the death penalty in 1\% of cases, 3) the death penalty was given in 22\% cases of a black defendant and a white victim, 4) the death penalty was given in 8\% cases of a white defendant and a white victim, 5) the death penalty was given in 1\% of cases of a black defendant and a black victim, and 6) the death penalty was given in 3\% of cases of a white defendant and a black victim.

adequate factual information to support a conclusion; an uninformed decision based on false assumptions.  

3. Ethical “Belief” Standards Lead To Racial Bias That Result In Wrongful Convictions

Bias about race and gender, held by prosecutors, can pose a particularly dangerous threat. At the time of this writing, the Innocence Project lists 317 post-conviction DNA exonerations in US history. However, DNA exonerations only depict a very small percentage of the actual wrongful convictions, as only ten percent of felony cases involve biological evidence that could be utilized for testing. In addition, not all of the ten percent are actually tested. Many accused who plead guilty or “no contest” to a crime are not eligible for DNA testing even if biological evidence exists.

The National Registry of Exonerations, a joint project of the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law which tracks and provides information for all exonerations in the US since 1989, lists a current total of 1,403 for both DNA and non-DNA exonerations. Of those exonerated between 1989 and March 2014, 92% were men, 60% were minorities, and 10% pled guilty. Contributing factors include (cases often have multiple factors): Perjury or False Accusation (56%); Official Misconduct (46%); Mistaken Witness Identification (37%); False or Misleading Forensic Testimony (21%); and不足

85 Comments of the Florida Innocence Initiative, Inc. at 5, In re Amendment to the Florida Rules of Criminal Procedure, Rule 3.853, No. SC05-1702 (Fla. amended/adopted Sept. 21, 2006).
Evidence (22%); False Confessions (12%). Strikingly, the exonerees were imprisoned for an average of 10 years each.\textsuperscript{88}

However, available figures regarding exonerations reflect only a small fraction of wrongful convictions and innocent individuals currently jailed. Many experts estimate that wrongful convictions may amount to as many as five percent of all convictions in the US.\textsuperscript{89} To put this in perspective, in 2005 the number of convicted individuals imprisoned in state or federal prison totaled approximately 1.3 million.\textsuperscript{90} By these estimates, a staggering 65,000 of these inmates were innocent. Even conservative estimates approximate 10,000 wrongful convictions per year.\textsuperscript{91} Still, even greater numbers of innocent people are arrested and prosecuted, though ultimately not convicted.

**PROBLEMS FOR PROSECUTORS TO SEEK JUSTICE AND MAINTAIN COMMUNITY FAITH IN THE JUSTICE SYSTEM**

Part of the prosecution’s obligation to seek justice is a duty to protect the public’s faith in the jury system. Frequently the concept of achieving a just result will be in conflict with supporting the public’s faith in the judicial system. An obligation to satisfy the public is often independent of securing justice. The concept of justice is often polemic and highly individualized. Justice is often not popular. Similarly, the community’s sentiment about justice may not change when an outcome is the ‘just’ outcome. There is no necessary relationship between what the community feels would be just and what was actually achieved by the court.

\textsuperscript{88} Id.
\textsuperscript{89} ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 4-1 (3d ed. 1997).
\textsuperscript{91} Although some analysts believe as many as five percent of all convictions are wrongful, using a conservative estimate of six tenths of one percent would result in over 10,000 wrongful convictions a year. ELIZABETH F. LOFTUS & JAMES M. DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL § 4-1 (3rd ed. 1997).
and jury process. The prosecutor cannot predict the public’s opinion toward the outcome of any particular case or the long-term effect of that outcome on the public’s faith in the justice system.92

The adversary system was designed to seek truth and justice. The notion that the public will maintain their faith in the adversary system if the prosecution uses the public’s opinion as her guide as opposed to her moral compass is illogical. Any confidence the public has in the criminal justice system can only be maintained if the system functions effectively. The public must have a fundamental faith in the justice system before it can function properly.93 If the criminal justice system does not have the confidence and support of the community, jurors, as representatives of the public, will not fulfill their role seriously and with enthusiasm.

Is it improper to place the burden of maintaining public confidence on the prosecution alone? Not only is such a burden impossible, but the responsibility to insure that the community continues to embrace the justice system lies in the hands of all who labor within the justice system, from bailiffs to judges. This responsibility requires each individual to conduct themselves ethically and within the rules of their jurisdiction. Should such a criminal justice utopia occur, presumably the public would maintain a strong support and faith in the justice system because it would function as it was meant to function. Undoubtedly, if those who comprise the criminal justice system simply followed the rules as it pertained to their function,


93 See Stephanos Bibas, Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas, 88 Cornell L. Rev. 1361, 1387 (2003) (“Public confidence and faith in the justice system are essential to the law’s democratic legitimacy, moral force, and popular obedience.”); see also H. Patrick Furman, Wrongful Convictions and the Accuracy of the Criminal Justice System, Colo. Law., September 2003, at 11, 25 (“In 1789, the first year of constitutional governance of this country, George Washington wrote that he was convinced “the due administration of justice is the firmest pillar of good government.”196 If people lose faith in the criminal justice system, society is greatly weakened.”).
justice, generally defined as fairness, equity, and truth, would be revealed untold times more
often than it is currently.

Nonetheless, no system, no matter how flawlessly administered, would produce fair and just
results every time. This is not possible, primarily because the justice system relies on human
beings to achieve fairness and justice. It is impossible to remove all human error from any
complex legal procedure like a trial. Bias and fixed predispositions cannot be entirely removed
from any system or organization.\footnote{See Lawrence B. Solum, Procedural Justice, 78 S. Cal. L. Rev. 181, 185 (2004) (“No conceivable system of
procedure can guarantee perfect accuracy.”).} Accordingly, even a constitutionally faultless trial may
convict an innocent person, or exonerate a guilty one.\footnote{John W. Wesley, Scientific Evidence and the Question of Judicial Capacity, 25 Wm. & Mary L. Rev. 675, 682
(1984) (“Impartiality is a function of due process, and a system that furthers bias and prejudice on the part of the
L.J. 1, 2 (2012) (“An American criminal justice system that is unequal and practices racial bias violates the United
States Constitution’s Due Process Clause\footnote{9} requirement for fairness and that of the Equal Protection Clause\footnote{10} for racial equality.”).}

RECOMMENDATIONS

Given that confirmation bias, selective information processing, and belief perseverance
function largely at an unconscious level, these types of bias are particularly challenging to
eliminate or reduce. Further escalating the challenge is the quality and nature of human certainty.
Studies in human behavioral psychology show that certainty, i.e. the feeling of being “sure”, is
simply a sensation that results from brain mechanisms, which function independent of thought or
reason. Essentially, the feeling of sureness and certainty is more closely related to a human
emotion than an objective standard of truth. This realization becomes exceptionally frightening
when considering the obvious bias and prejudice in the justice system in conjunction with the
wide discretion of the prosecutor. Certainty of opinion, or belief, arises out of involuntary brain
functions like love or anger. Belief functions independently from reason and, once adopted,
loses capacity for modification or flexibility. Although humans feel that their beliefs and certainties are choices based in reason, they are neither choices nor even rational thought.\textsuperscript{96}

As discussed, the cognitive biases that result from cognitive dissonance stemming from belief in guilt and innocence are largely unconscious. Hence, the individual is unable to acknowledge any bias or become aware of any other negative or discriminatory emotions or feelings that may affect the individual’s certainty and decision. Consequently, prosecutors and innocence projects that wish to impose similar criteria must be provided concrete guidelines unrelated to beliefs, emotions, or personal certainties when deciding whether to litigate a case. Currently, prosecutors are only required to have probable cause to proceed to trial. As discussed, this is an exceedingly low evidentiary standard, leaving much room for the prosecutor to allow herself to be guided by emotion and bias in her litigation decision. The prosecution should be required to meet a much higher evidentiary burden before advancing to trial. Furthermore, the prosecutor should consider all known evidence when making the decision whether to prosecute, not only admissible evidence. This is important if the prosecution is attempting to only prosecute those who are in fact guilty. An appropriate standard to be met before progressing to trial for the prosecution might be:

\textbf{A defendant may only be prosecuted for a crime for which the prosecution obtains enough admissible evidence such that a reasonable jury should find the defendant guilty beyond a reasonable doubt. Further, the prosecution may not prosecute any defendant if all of the known facts and evidence (whether admissible or not) were introduced at trial would likely fail to result in a conviction for the crime charged. A prosecutor must be able to defend his/her charging decision with facts and evidence at all times}

Similarly, for post-conviction innocence projects, a reasonable standard that should be met before filing a motion for post-conviction relief might be:

\textsuperscript{96} See Robert A. Burton, On Being Certain: Believing You Are Right Even When You’re Not.
The project [or applicable name of innocence program] must obtain enough evidence such that if admitted at a retrial would more likely than not result in an acquittal. The project should not continue representation of the inmate if the introduction all known facts and evidence (whether admissible or not) would more likely than not fail to result in an acquittal. The [name of innocence program] must be able to defend its decision to represent or not to represent the client at all times.

The revised standard for the prosecution substantially increases the evidentiary standard that must be met before advancing to a trial. Under this proposed requirement, the prosecutor would need to have enough admissible evidence to convince a reasonable jury that the defendant is guilty beyond a reasonable doubt and make this determination before proceeding to trial. This is the standard in criminal cases that prosecutors must meet at trial to obtain a conviction. Therefore, it makes little sense to allow prosecutors to prosecute defendants with less evidence than that which should convince a reasonable jury of guilt beyond a reasonable doubt. Certainly, most prosecutors will make this evidentiary assessment prior to trial although there is no mandate for them to do so. The prosecution does not want to lose the case and is unlikely to progress to trial with the belief that she will lose the trial.

Recall, however, under the current scheme, the prosecutor has a firmly developed belief in the defendant’s guilt. Further, she has confirmed her belief in guilt through selective thought processing and avoidance of cognitive dissonance. Consequently, her pretrial review of the evidence almost invariably will lead to the conclusion that a reasonable jury should find the defendant guilty beyond a reasonable doubt. With less than adequate evidence, a firmly convinced prosecutor, and an often marginally competent defense attorney, it is simple to see

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97 What’s more is that, unfair as the process is, Strickland v. Washington, 466 U.S. 668 (1984) places undue difficulty onto the defendant in proving ineffective assistance of counsel, which means that, incompetent or not, the defendant will likely have no recourse against sub-par representation. See State v. Aplaca, 74 Haw. 54, 67 (1992) (discussing the burden the Strickland test puts on defendants).
how a jury could be persuaded beyond a reasonable doubt and how wrongful convictions occur, even in constitutionally error-free trials.

Furthermore, both of the revised standards require a review of all facts and evidence even if the known facts and evidence cannot be viewed by the jury or fact-finder. The standards suggest that, although certain evidence may be inadmissible at trial, all evidence should be considered by the attorney in the course of his decision-making. For example, imagine that, as a prosecutor, a case with a one witness’ identification of the defendant needs to be considered for trial readiness. A review of the facts reveals that at an apartment complex in an impoverished neighborhood known for gang activity, two known gang members, Todd and Rod, were shot and killed. At the time of the shootings, a substantial crowd had been loitering in the area. This particular apartment complex is also known for drug activity and even as a hub for area drug dealing. The prosecutor is aware of the apartment complex’s connection to drugs and gangs through her communications and relations with police officers who work that area and by prosecuting previous cases from that area. These facts are not admissible in the instant case because although they may be probative (relevant), their relevancy is outweighed by the prejudice they would likely cause.

Only one witness, Jimbo, from the large crowd at the complex, came forward to state that he had seen the incident. Based on Jimbo’s description the defendant, Willis was detained at the apartment complex only minutes after the shooting. Jimbo was shown a show-up of Willis while still at the scene. A show-up occurs when only one individual is presented to a witness for a potential identification. The identification of Willis occurred while two officers detained Willis. Willis was held up against a wall of the apartment complex. He was clearly attempting to flee. Jimbo quickly stated: “That’s him – he shot Todd”. Jimbo stated that the Willis did not shoot the
other victim – Rod. The defendant was hurriedly placed in the back of a police car. When officers initially arrived at the complex, initially Todd was already dead, but Rod was still alive, although he was shot in the chest. Paramedics worked frantically to save him. Moments before Rod died at the scene he gasped to the paramedics that Willis did not shoot Todd but that Jimbo shot Todd and Willis did not do anything. Rod’s statement cannot be admitted into evidence as a dying declaration hearsay exception because it does not relate to the circumstances surrounding his own death, but the death of Todd.98 Yet, the prosecution must consider this fact even if it cannot be presented to the jury, as it remains relevant to the issue of Willis’ guilt. If the jury heard Rod’s statement in combination with a suggestive yet admissible identification would they convict? In the interest of justice, and in the interest of maintaining the community’s faith in the justice system, it would be deemed fair and equitable that the prosecutor consider the likelihood of a conviction if the jury knew that Rod might have testified that Jimbo shot Todd and that Willis was not involved.

CONCLUSION

The adversary system is designed to uncover the truth. Consequently, the courtroom motto does not say, “We Here Already Know the Truth”. If an adversary adopts a personal belief regarding guilt or innocence prior to trial, it obscures the truth-seeking objective. The result of this pretrial belief can and does lead to wrongful convictions. The truth-finding objective of the justice system is therefore never served by prejudgments in any legal context. Once a prosecuting attorney adopts the belief that the defendant is guilty or innocent, this prejudgment influences the way the individual views facts, evidence, the defendant himself, and all information associated with the case. This bias, or “truth”, wires itself into the attorney’s

98 Fed. R. Evid. 804
cognitive functioning and impacts how the prosecutor (or defense attorney) views any possibly exculpatory evidence as the case progresses. Any exculpatory evidence will be immediately viewed as false. As a result of the prosecutor’s predisposition to view all facts and evidence as indicating guilt, the prosecutor is no longer seeking justice, but rather is seeking a conviction.

The proposed standards may be a step in the right direction. Nonetheless, defense attorneys and prosecutors will still need to make judgments and decide if they believe a jury will convict or acquit. The fundamental distinction between the current mandate and this article’s proposed standards is that currently prosecutors’ belief in the defendant’s guilt need not be based on facts or evidence exceeding the baseline standard of probable cause. Thus, every prosecutor’s unconscious bias, even racial and discriminatory bias, is invited to come out and demolish the prosecution’s good intentions. A revised standard with higher evidentiary requirements provides a foundation for the prosecutor’s conclusions and locks the door in an attempt to keep those racial or discriminatory biases locked up in the attic.