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Prosecutorial Agnosticism

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I. INTRODUCTION

Most legal ethicists maintain that an ethical prosecutor should pursue criminal charges against a defendant only if the prosecutor personally believes that the defendant is guilty. The assumption is that the obligation to "do justice" encompasses a duty to act as supreme juror, scrutinizing the evidence against the defendant, not merely for sufficient proof to avoid a judgment of acquittal, but for proof that persuades the prosecutor of the defendant's guilt beyond a reasonable doubt in her own mind. As supreme jurors, prosecutors act not simply as advocates of conviction in an adversarial system but as a first and ever-present protector of the innocent, capable at any moment of declining or dismissing charges based on her own conclusions as a juror. Rather than resist this description, most prosecutors embrace it, priding themselves on their nearly unrivaled power to do justice through unreviewable compassion.

This Article challenges the prevailing assumption and argues, both descriptively and normatively, that ethical prosecutors can be agnostic about a defendant's guilt. As a descriptive matter, ethical prosecutors routinely pursue charges when they are not convinced of the defendant's guilt beyond a reasonable doubt. For example, few question a prosecutor's ability to pursue inconsistent charges in the alternative, even though in such cases the prosecutor must necessarily doubt the defendant's legal guilt on at least one of the prosecuted charges. Similarly, prosecutors must carry doubts about the defendant's legal guilt when they seek to apply a criminal statute to a unique factual situation using a novel legal theory. This Article questions why an ethical prosecutor cannot also be agnostic about the defendant's factual guilt.

As a normative matter, this Article argues that agnostic prosecutors might be better defenders of the innocent than those who pride themselves on their roles as supreme jurors. Commentators have only recently begun to explore the distorting effects of a prosecutor's personal belief in guilt on her subsequent decision making. Drawing on the cognitive science literature, this Article asks whether the protection provided to defendants by a supreme juror requirement might be

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outweighed by the adverse affects on prosecutorial neutrality once the prosecutor's belief in guilt is formed. As an initial matter, the prosecutor's case screening for guilt may not be especially protective of the defendant. Because of confirmation bias, prosecutors "testing" a hypothesis of the defendant's guilt may be likely to search the case evidence for proof confirming that hypothesis to the detriment of exculpatory evidence. Once the prosecutor forms a personal belief in guilt, that belief becomes "sticky" as selective information processing, belief perseverance, and cognitive consistency will prevent the prosecutor from revisiting her conclusion. Tunnel vision also impairs the prosecutor's ability to identify material, exculpatory evidence to which the defense is entitled under *Brady v. Maryland*, as selective information processing will cause the prosecutor to overestimate the strength of her case without the evidence at issue and to underestimate the evidence's potential exculpatory value. Finally, the prosecutor's role as a first and constant case screener may lead to cascading effects on other prosecutors, judges, and jurors, who might be less scrutinizing for reasonable doubt because of an assumption that charges are pursued only against the guilty.

By emphasizing the ways that personal beliefs can interfere with neutral decision making, this Article suggests that prosecutors might best serve justice, not as supreme jurors, but as vigilant agnostics. A call for vigilant agnosticism invites reflection on, and potentially a transformation of, the prosecutorial culture.

With the exoneration through DNA evidence of more than 250 convicted criminal defendants,[1] commentators have declared the dawn of a wrongful convictions "movement"[2] or perhaps even a "revolution."[3] In a criminal justice system founded on the premise that "it is better that ten guilty persons escape than that one innocent suffer,"[4] exoneration cases force us to acknowledge that we do

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[1] *Know the Cases: Browse the Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/Browse-Profiles.php (last visited Sept. 15, 2010) (listing 258 exonerations since 1989); *see also* JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT, at xvii (2003); Jennifer Boemer, Student Article, *In the Interest of Justice: Granting Post-Conviction Deoxyribonucleic Acid (DNA) Testing to Inmates*, 27 WM. MITCHELL L. REV. 1971, 1997–99 (2000) (discussing generally the Innocence Project).

[2] Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 125 (2008) (labeling recent efforts to prevent wrongful convictions a "movement" that "represents one of the most significant efforts to reform our criminal procedure in decades"); Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 376 (2006) (referring to a potential "New Civil Rights Movement" for the wrongfully convicted); David Feige, *The Dark Side of Innocence*, N.Y. TIMES, June 15, 2003, § 6 (Magazine), at 15 ("An entire innocence movement is afoot.").

[3] Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our "Evolving Standards of Decency" in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265, 267 (2004); Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 573 (2004).

[4] Coffin v. United States, 156 U.S. 432, 456 (1895) (quoting Blackstone as saying that "the law holds that it is better that ten guilty persons escape than that one innocent suffer").

convict innocent people.[5] As lawyers, researchers, and policy makers try to identify the factors that contribute to wrongful convictions, the discretionary decisions of prosecutors have increasingly come under fire. Many scholars have criticized a prosecutorial culture described as valuing conviction rates over truth and career advancement over justice.[6]

To improve the prosecutorial culture and decrease the likelihood of wrongful convictions, commentators have looked to the prosecutor's unique ethical obligation to lawyer, not with zealous advocacy, but with an aim to do justice.[7] Emphasizing the responsibility to do justice, scholars have called for more stringent rules, more frequent use of disciplinary proceedings against prosecutors, and increased sanctions for prosecutors who are found to have violated the rules.[8] They have also invoked the "do justice" ethical obligation to guide prosecutors' charging decisions. Whereas constitutional law requires only a showing of probable cause to justify charging a defendant, many have argued that as an ethical matter, prosecutors should be required to apply a higher bar and must be personally persuaded that the defendant is in fact guilty before filing charges. A prosecutor who operates under such an obligation would serve as an initial and ongoing supreme juror, satisfying herself as a fact finder of the defendant's guilt before subjecting the defendant to the whims of a jury. The underlying assumption is that a supreme juror requirement would prevent wrongful convictions because ethical prosecutors would be less likely to issue questionable cases at the outset and more likely to dismiss them pending trial.[9]

At the same time, commentators have also argued that the model prosecutor should evaluate her cases skeptically. Professor Uviller, for example, maintained that prosecutors should review their cases with "the mindset of the true skeptic, the

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[5] Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523 (2005); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 762 (2007); Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 237 (declaring that "we are at the beginning of an exciting new period of American criminal justice, one directly related to the acknowledgment that we convict innocent people").

[6] *See* Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 541 (1996); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 204–15 (1988); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 458 (1992); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134–36 (2004); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 58–59 (1991).

[7] *See* Berger v. United States, 295 U.S. 78, 88 (1935).

[8] *See* Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1587–88; Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 889 (1998); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 773–77 (2001).

[9] *See infra* Part II.

inquisitive neutral."[10] Similarly, Professor Gershman has written that prosecutors "should approach the preparation of a case with a healthy skepticism."[11] From this perspective, the model prosecutor is one who tests the defendant's guilt the way a scientist might subject a hypothesis to the scientific method, supporting the hypothesis by continuously and rigorously attempting to disprove it. The assumption is that prosecutors can be neutral decision makers, rationally scrutinizing their cases for potentially exculpatory evidence.

However, cognitive psychologists have established that human decision makers are neither rational nor neutral. Instead, their decision making is systematically and predictably distorted by cognitive biases and heuristics. Moreover, many of these cognitive shortcuts are triggered by people's personal beliefs. This Article examines the possibility that what I call a "supreme juror requirement" for prosecutors might undermine the kind of vigilantly skeptical decision making we should want to foster in prosecutors. Because a supreme juror requirement might trigger cognitive biases in the prosecutor's decision making, prosecutors who believe that they must be personally convinced of the defendant's guilt might be biased in their initial case screening, their handling of plea bargains, and their evaluation of potentially exculpatory evidence. Additionally, if jurors and judges believe that prosecutors have already prescreened their caseloads for innocence, they might defer to prosecutorial fact finding and perform their own functions less rigorously under a presumption of guilt. As a consequence, a supreme juror requirement for prosecutors may be more likely to contribute to wrongful convictions than prevent them.

Part II sets forth the background of a supreme juror function for prosecutors. Although no single case or rule prohibits prosecutors from charging a defendant despite personal doubts about the defendant's guilt, most ethics scholars argue, and many practicing prosecutors agree, that the duty to do justice requires prosecutors to serve as a first and supreme juror who predetermines the defendant's guilt prior to charging. Part III demonstrates that, despite a prevailing belief in a prosecutor's supreme juror role, prosecutors routinely (and often without controversy) charge defendants even when they are not personally persuaded of the defendant's guilt. Part IV then explores the potential adverse consequences of a supreme juror requirement in light of cognitive biases that are triggered by personal beliefs.

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[10] H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1704 (2000).

[11] Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 342 (2001).

II. THE DUTY

The prosecutor's well-known duty to seek justice, not simply to convict, sets prosecutors apart from other zealous advocates. According to the Supreme Court's oft-quoted decision in *Berger v. United States*, the prosecutor's responsibility

> [I]s not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.[12]

Nevertheless, there is no clear mandate either within the Constitution or ethical rules that requires prosecutors to refrain from prosecution when they carry personal doubts about the defendant's guilt.

As a constitutional matter, only a showing of probable cause is required to warrant criminal charges.[13] Probable cause is an objective standard separate from the prosecutor's personal beliefs about guilt and is not an especially demanding standard of evidence, requiring only a fair probability of guilt.[14] The ethical rules that govern prosecutors add little to this minimal requirement. The rules that specifically govern a prosecutor's charging decisions employ the same relatively low probable cause standard as the Constitution.[15] More expansive ethical rules

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[12] 295 U.S. at 88; *see also* Donnelly v. DeChristoforo, 416 U.S. 637, 648–49 (1974) (Douglas, J., dissenting) ("The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.").

[13] *See* Branzburg v. Hayes, 408 U.S. 665, 686 (1972) (observing that the grand jury has the "function of determining if there is probable cause to believe that a crime has been committed").

[14] Illinois v. Gates, 462 U.S. 213, 238 (1983) (describing probable cause as "a fair probability"); *see also* Maryland v. Pringle, 540 U.S. 366, 371 (2003) ("The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances."); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System,* 1992 BYU L. REV. 669, 680–81 ("Probable cause is little more than heightened suspicion, and it is not even remotely sufficient to screen out individuals who are factually not guilty.").

[15] *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 (2009) ("The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . . ."); MODEL CODE OF PROF'L 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 AND DEFENSE 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."); *see also* Green, *supra* note 8, at 1588 (noting that Model Rule 3.8(a) "adds nothing" to a prosecutor's charging responsibilities under law); Melanie D. Wilson, *Finding a Happy and Ethical Medium Between a Prosecutor Who Believes the Defendant Didn't Do It and the Boss Who Says That He Did,* 103 NW.

that discuss the special function of prosecutors do so only obliquely and without specific examples to guide the implementation of the prosecutor's duty to do justice.[16] For example, the comments to Rule 3.8 of the *Model Rules of Professional Conduct* provide that the prosecutor "has the responsibility of a minister of justice and not simply that of an advocate," including "specific obligations to see that the defendant is accorded procedural justice [and] that guilt is decided upon the basis of sufficient evidence."[17] The *Model Code of Professional Responsibility* and ABA standards mandate that a prosecutor's duty "is to seek justice, not merely to convict."[18]

Some legal ethicists maintain that prosecutors can "do justice" without personally forming an opinion about a suspect's guilt prior to pursuing charges. Richard Uviller is most commonly cited for this view: "[W]hen the issue stands in equipoise in his own mind, when he is honestly unable to judge where the truth of the matter lies, I see no flaw in the conduct of the prosecutor who fairly lays the matter before the judge or jury."[19] But Uviller's view is an outlier in both the scholarly and professional commentary. Despite the absence of a clear requirement that prosecutors personally believe in a defendant's guilt, most leading legal ethicists argue that a prosecutorial duty to prejudge the defendant's guilt arises from a combination of the applicable rules and the unique role of the prosecutor in our adversary system. They maintain that the duty to "do justice" encompasses a duty to act as supreme juror, scrutinizing the evidence against the defendant, not merely for sufficient proof to avoid a judgment of acquittal, but for proof that persuades the prosecutor of the defendant's guilt beyond a reasonable doubt *in her own mind.* Bennett Gershman, for example, maintains that "a responsible prosecutor should be morally certain that the defendant is guilty and that criminal punishment is appropriate."[20] Monroe Freedman and Abbe Smith

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U. L. REV. COLLOQUY 65, 68 (2008), http://www.law.northwestern.edu/lawreview/colloquy/2008/30/ (discussing ethical rules that apply only if the prosecuting attorney knows that probable cause is lacking).

[16] *See* Peter A. Joy & Kevin C. McMunigal, *Are a Prosecutor's Responsibilities "Special"?*, 20 CRIM. JUST., Spring 2005, at 58, 58; Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 FORDHAM L. REV. 1413, 1429 (2007).

[17] MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2009).

[18] MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1986); STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-1.2(c) (3d ed. 1993).

[19] H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1159 (1973); *see also* Fisher, *supra* note 6, at 230 n.144 ("The prevailing view, at least in the world of practice, surely permits prosecutors to [charge defendants when not personally convinced of their guilt]."); Zacharias, *supra* note 6, at 94 ("[P]rosecutors need not act as judges of their witness's testimony unless they are sure the witness is falsifying facts . . . .").

[20] Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 524 (1993); *see also* Gershman, *supra* note 11, at 337–38

assert that "conscientious prosecutors do not put the destructive engine of the criminal process into motion unless they are satisfied beyond a reasonable doubt that the accused is guilty."[21] Bruce Green concludes that a prosecutor's role as "'minister of justice' . . . is generally thought to imply a 'gate-keeping' function."[22] Kenneth Melilli reasons that prosecutors fail to "serve the interests of society by pursuing cases where the prosecutors themselves have reasonable doubts as to the factual guilt of the defendants."[23] Even Professor Uviller's view of the permissibility of prosecutorial agnosticism has its limits. More recently, he explained, "[t]he prosecutor should be assured to a fairly high degree of certainty that he has the right person."[24]

Rather than resist their role as supreme jurors, most prosecutors embrace it, priding themselves on their nearly unrivaled power to do justice through unreviewable compassion. As supreme jurors, prosecutors act not simply as advocates of conviction in an adversarial system but as a first and ever-present protector of the innocent, capable at any moment of declining or dismissing charges based on her own conclusions.[25] Like Professor Gershman, I can attest that when I was a prosecutor, I was told, and "never questioned," that my colleagues and I should pursue a case only when personally convinced of the defendant's guilt.[26] This was also Professor John Kaplan's experience as an Assistant U.S. Attorney: "The great majority, if not all, of the assistants felt that it was morally wrong to prosecute a man unless one was personally convinced of his guilt."[27] An early study of prosecutorial attitudes reported that many prosecutors

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(discussing a prosecutor's "duty to prejudge truth" and be "personally convinced of the defendant's guilt").

[21] MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 312 (3d ed. 2004).

[22] Green, *supra* note 8, at 1588 (noting, however, "ample room for debate" about how certain a prosecutor's assessment of the defendant's guilt must be to warrant prosecution); *see also* Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 612–18 (1999).

[23] Melilli, *supra* note 14, at 700.

[24] Uviller, *supra* note 10, at 1703.

[25] Indeed, because prosecutors have all but unreviewable power not to charge a suspect, even when sufficient evidence of guilt exists, Austin Sarat and Conor Clarke have compared the prosecutorial power *not* to prosecute to a sovereign power to exempt individuals from the valid reach of criminal law. Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 390 (2008).

[26] Professor Gershman recollects,

> Years ago, when I became a prosecutor, I was trained to believe that you never put a defendant to trial unless you were personally convinced of his guilt. This was, as I recall, the accepted ethos in our office and, I assumed, in prosecutors' offices generally. I never questioned that precept.

Gershman, *supra* note 11, at 309 (footnote omitted).

[27] John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174, 178 (1965).

believed that "once an accused reaches the trial stage, his guilt has been determined by the screening processes of the police and prosecutor."[28] More recently, Professor Mosteller deemed subjective prosecutorial determinations of guilt at least an "aspirational duty."[29] In sum, whether prosecutors are legally, ethically, or morally obligated first to make a personal determination of the defendant's guilt may not be entirely clear, but substantial anecdotal evidence suggests that prosecutors at least widely *believe* they serve as first jurors, whether legally obligated or not.

III. THE UNCERTAIN PROSECUTOR

While prosecutors widely believe that they serve a supreme juror function and should charge only those defendants whom they subjectively believe to be guilty, even ethical prosecutors routinely pursue cases despite personal doubts about the defendant's guilt. Consider, for example, the permissible prosecutorial practice of charging lesser-included offenses. In 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.[30] If the prosecutor is firmly convinced that the wall constituted a weapon, the charging decision would not appear to conflict with a prosecutor's supreme juror role. A defendant who is guilty of a more serious offense is, by definition, guilty of the lesser-included offense.[31] However, suppose the prosecutor herself is uncertain whether the wall rose to the level of a "weapon." Because charging decisions require only probable cause, she could, without constitutional impediment, file both the felony and misdemeanor assault charges, leaving it to the jury to determine which offense was appropriate. Indeed, even if the prosecutor does not believe she can prove the higher charge to a jury beyond a

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[28] George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 112 (1975); *see also* Whitney North Seymour, Jr., *Why Prosecutors Act Like Prosecutors*, 11 REC. ASS'N B. CITY N.Y. 302, 312–13 (1956) (noting that the charging "decision is reached only after we have satisfied ourselves of the defendant's actual guilt").

[29] Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 FORDHAM L. REV. 1337, 1369 (2007).

[30] *See, e.g.*, MODEL PENAL CODE § 211.1 (1985) (distinguishing between simple and aggravated assault in part based on the defendant's use of a deadly weapon). Courts have held that walls and floors can constitute the required "weapon" for felony or aggravated assault charges depending on the circumstances of their use. *See* State v. Montano, 973 P.2d 861, 862 (N.M. Ct. App. 1998) (holding that a brick wall is within the definition of a "deadly weapon"); State v. Reed, 790 P.2d 551, 551 (Or. Ct. App. 1990) (holding that a concrete sidewalk can be a "dangerous weapon").

[31] *See* Schmuck v. United States, 489 U.S. 705, 716 (1989) (applying the "elements" test to determine whether an offense is a lesser-included offense of another, which requires that the lesser offense's elements be "a subset of the elements of the charged offense").

reasonable doubt, no legal or ethical standard prohibits the prosecutor from pursuing it.[32] The prosecutor might file the higher charge to gain leverage over the defendant in plea negotiations,[33] and *Bordenkircher v. Hayes* suggests that such charging practices are permissible so long as the charges are supported by probable cause.[34]

Prosecutors also routinely charge defendants despite uncertainties about guilt when they accuse a defendant of multiple, inconsistent charges. Consider, for example, a case in which police arrest the defendant as a seller in a hand-to-hand drug transaction. After a chemical test of the powder that he sold reveals that the substance was baking powder and not cocaine, the defendant claims that he knew the drugs were "bunk." His statement, if credible, would make him guilty of theft by deception. Police, however, have other evidence suggesting the defendant believed the substance was cocaine and was himself deceived by his distributor. Based on this evidence, the prosecutor personally believes that the defendant is guilty only of attempted drug distribution and is not guilty of theft. Nevertheless, following the common practice of submitting alternative theories to a jury, the prosecutor might charge the defendant both with attempted drug distribution and theft, submitting the charges to a jury in the alternative.

Rather than frown upon such charging decisions, courts have encouraged them. For example, the New York Court of Appeals has held that depraved indifference murder is not a lesser-included offense of intentional murder. Rather, depraved indifference murder and intentional murder are inconsistent charges because an actor cannot simultaneously have the purpose to cause death and be indifferent to the risks of death.[35] However, even though the charges are inconsistent, prosecutors generally are not required to elect a theory prior to trial.

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[32] *See* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 864 (1995).

[33] Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 285–86 (2007) (noting that the Model Rules do not expressly prohibit overcharging, which may be used to gain an advantage during plea bargaining); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 271 (2001) (observing that the ethical standards in plea bargaining are "not very restrictive"); Meares, *supra* note 32, at 864–65 (discussing how plea bargaining may influence the practice of overcharging).

[34] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); *see also* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 879 (2009) (observing that *Bordenkircher* grants "prosecutors the ability to exact a heavy price on defendants who opt to take a case to trial in order to get them to plead guilty to the charge the prosecutor believes is the appropriate one"); Tung Yin, *Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines*, 83 CALIF. L. REV. 419, 463–64 (1995) (noting that *Bordenkircher* appears to permit prosecutorial overcharging).

[35] People v. Gallagher, 508 N.E.2d 909, 909–10 (N.Y. 1987); *see also* N.Y. CRIM. PROC. LAW § 300.30(5) (McKinney 2002) ("Two counts are 'inconsistent' when guilt of the offense charged in one necessarily negates guilt of the offense charged in the other.").

Instead, charges are submitted to the jury in the alternative.[36] Similarly, the Supreme Court has held that when there is sufficient evidence for a jury to find that a defendant either committed a robbery himself or subsequently received proceeds of the robbery, both charges may be prosecuted so long as the jury is instructed that it cannot convict the defendant of both inconsistent charges.[37] Whenever a prosecutor pursues inconsistent theories in the alternative, she is by definition prosecuting the defendant for at least one charge of which the prosecutor is not personally convinced of the defendant's guilt.

Finally, prosecutors also pursue charges without a personal belief in the defendant's guilt when they prosecute despite uncertainties about the reach of the criminal law. Consider, for example, the Tennessee prosecution of Wilbert Rogers,[38] who stabbed his victim with a butcher knife, penetrating his heart and causing cardiac arrest. The victim was resuscitated and initially survived but developed a condition as a result of oxygen loss to his brain. He slipped into a coma and died fifteen months later from a kidney infection, a common complication in comatose patients.[39] The state supreme court had long ago recognized the common law's year-and-a-day rule, which provided that a defendant could not be convicted of murder unless the victim died within a year and a day of the defendant's act.[40] Nevertheless, the state charged Rogers with murder, arguing that the year-and-a-day rule should be judicially abolished. Given the current state of the law, the charging attorney could not have been personally convinced that Rogers was guilty of murder. Rather than scold the prosecutor for charging the defendant despite doubts about his guilt, the Supreme Court affirmed the defendant's conviction and held that the Tennessee Supreme Court's retroactive application of its abolishment of the year-and-a-day rule violated neither the *Ex Post Facto* Clause nor due process.[41]

The prosecutor in *Rogers* was certainly not the first to proceed with criminal charges despite doubts he must have carried about the reach of the criminal law. Every time prosecutors apply criminal statutes to reach novel factual circumstances beyond those that originally motivated legislative action, they necessarily must carry doubts about the defendant's guilt under the law. Consider, for example, the recent prosecution of Lori Drew, who created a fictitious persona in MySpace to

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[36] Suarez v. Byrne, 890 N.E.2d 201, 209 (N.Y. 2008); People v. Johnson, 662 N.E.2d 1066, 1066–67 (N.Y. 1996); *Gallagher*, 508 N.E.2d at 909; *see also* N.Y. CRIM. PROC. LAW § 300.40(5) (McKinney 2002) (regarding the submission of inconsistent counts to the jury in the alternative).

[37] United States v. Gaddis, 424 U.S. 544, 550 (1976).

[38] Rogers v. Tennessee, 532 U.S. 451 (2001).

[39] *Id.* at 454.

[40] Percer v. State, 103 S.W. 780, 783 (Tenn. 1907); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *197–98.

[41] *Rogers*, 532 U.S. at 456–67.

befriend, and then criticize, one of her daughter's peers.[42] When the duped girl subsequently killed herself, federal prosecutors charged Drew with conspiracy and three misdemeanor violations of the Computer Fraud and Abuse Act.[43] Given this novel application of the law, the charging prosecutors must have carried some doubts about whether the creation of a fake MySpace profile constituted a crime. Similarly, whatever prosecutor first invoked the theory of the "honest service doctrine" to use the mail fraud statute to reach corruption by state public officials also must have proceeded despite doubts about the reach of the law.[44] Courts are able to address the boundaries of criminal statutes in large part because prosecutors frequently invoke creative legal theories to charge cases at the edges of a statute's reach.

One might argue that the above examples all involve prosecutors who were uncertain about the defendant's legal guilt as opposed to his identity as the perpetrator. In each of my examples, the prosecutor believed that the defendant who was charged was the person actually involved in the incident but was uncertain whether, or to what degree, the criminal law reached the defendant's conduct. In contrast, proponents of a supreme juror requirement might argue, prosecutors should not proceed with charges if they are not personally persuaded that the defendant was involved in the conduct that gave rise to the potential charges. Advocates of this distinction would presumably argue that prosecutors do not breach their ethical duty to "do justice" when they force a defendant to litigate legal issues before a judge and jury, so long as the prosecutor is personally confident that the defendant was factually involved in the incident.[45] A prosecutor fails to "do justice" only when she proceeds with charges despite doubts that she may have the "wrong guy."

This potential distinction between legal and factual guilt strikes me as wrong, both descriptively and normatively. As a descriptive matter, the Supreme Court's limited jurisprudence on prosecutorial ethics suggests that a prosecutor's duty to protect the innocent does not distinguish between legal and factual innocence. When the Court wrote in *Berger* about a prosecutor's duty that "justice shall be

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[42] Jennifer Steinhauer, *Woman Found Guilty in Web Fraud Tied to Suicide*, N.Y. TIMES, Nov. 27, 2008, at A25.

[43] 18 U.S.C. § 1030 (2006). The jury acquitted her of conspiracy but convicted her of the Computer Fraud and Abuse Act violations. The district court subsequently dismissed her convictions. United States v. Drew, 259 F.R.D. 449, 468 (C.D. Cal. 2009).

[44] Indeed, the Supreme Court recently restricted the reach of the mail fraud statute when the alleged object of the fraud is a deprivation of "honest services" owed by the defendant to the victims, in part because the more expansive application endorsed by prosecutors raised vagueness concerns. Skilling v. United States, 130 S. Ct. 2896, 2907 (2010); *see also* Black v. United States, 130 S. Ct. 2963, 2966 (2010).

[45] Professor Gershman has also explored the concepts of "factual truth" and "legal truth" and concluded that a prosecutor's duty to the truth applies to both. Gershman, *supra* note 11, at 311 n.6.

done,"[46] it did so not only by juxtaposing guilt and innocence[47] but also by contrasting "hard blows" with "foul ones," suggesting that a prosecutor—as a "servant *of the law*"[48]—must protect not only factual innocence but also legal fairness. Moreover, to the extent the Court has ever attempted to flesh out the prosecutor's duty to do justice, it has done so most concretely in the area of a prosecutor's duty to disclose material, exculpatory evidence to the defense.[49] In that context, the prosecutor's duty extends to evidence that is material, not only to guilt or innocence, but also to the *degree* of punishment.[50]

Perhaps one might argue normatively that it is less offensive to make an accurately identified suspect litigate the legality of his conduct than a person who may not have been involved in the underlying conduct at all. This argument carries some intuitive appeal. After all, from a moral perspective, an actor whose conduct places him even at the border of criminal law is less "innocent" than a suspect who has been wrongly identified. Whereas prosecutors should refrain from prosecuting the latter, perhaps it is not unethical to charge the former so a court can determine the precise reach of the law. However, the argument that prosecutors can ethically charge defendants whom they believe may be legally innocent, but not those whom they believe may be factually innocent, ignores criminal law's rule of legality. Every first-year law student learns the phrase, *nulla poena sine lege*: no penalty without a law.[51] Without recognition of common law crimes, America's contemporary criminal justice system criminalizes only through legislation. Accordingly, even if a defendant has been identified accurately as the actor involved in the incident, if the legislature has not criminalized his conduct, he is just as innocent under the law as a defendant who was falsely accused of being the suspect.

Any proposed distinction between legal and factual innocence also suffers from the whiff of, "he might not be guilty of this, but he's guilty of something." Perhaps a prosecutor who charges a defendant whom he believes may be legally innocent could find comfort in the defendant's wrongful, albeit not necessarily unlawful, deeds. For example, a prosecutor with personal doubts about the legal guilt of a Lori Drew could place the blame for her charging decision on Drew, who would not have to litigate her fate had she not created a false MySpace persona to harass a troubled young girl. The problem with that logic is that it might also apply to cases of factual innocence. A rape suspect might come to the attention of police because he committed similar offenses in the past. A murder suspect may

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[46] Berger v. United States, 295 U.S. 78, 88 (1935).

[47] *Id.* (explaining that a prosecutor has a "twofold aim . . . that guilt shall not escape or innocence suffer").

[48] *Id.* (emphasis added).

[49] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

[50] *See id.*

[51] *See* Sparf v. United States, 156 U.S. 51, 88 (1895).

have made threats against the victim. A hate-crimes suspect might distribute racist propaganda. Even wrongly accused suspects become suspects for a reason, and the suspects themselves often contribute to the suspicion against them. Nevertheless, they are innocent unless they committed the crimes of which they are accused, just as are those who are legally innocent.

In sum, despite the widespread belief that prosecutors only pursue charges when personally persuaded of the defendant's guilt, prosecutors routinely prosecute cases despite uncertainties about the defendant's guilt of the crimes charged.[52]

IV. THE DANGERS OF PERSONAL BELIEFS

Ethics scholars who argue that prosecutors must be personally persuaded of a defendant's guilt have done so with at least an implicit presumption that a supreme juror requirement would protect the innocent and reduce the chances of wrongful convictions.[53] Meanwhile, a separate emerging literature has begun to explore how cognitive biases and heuristics can affect the discretionary decision making of prosecutors.[54] This literature has consequences for shaping the preferred ethical rules of prosecutors. Specifically, it calls into question the desirability of a supreme juror requirement because of the distorting effects that preexisting beliefs can have upon neutral decision making.

This Section explores a supreme juror requirement's potentially adverse impacts on prosecutorial decision making. As an initial matter, if prosecutors screen cases with the goal of forming a personal belief in the defendant's guilt, "confirmation bias" might cause them to search the case evidence for proof confirming that hypothesis to the detriment of exculpatory evidence. Once the prosecutor forms a personal belief in guilt, that belief becomes "sticky" as

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[52] *See* Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 9–10 (2009) (noting the debate over the prosecutorial practice of charging two defendants with the same crime when only one at most could be guilty).

[53] *See* Gershman, *supra* note 20, at 521 (grounding the supreme juror requirement in a "gatekeeper" function in which prosecutors "prevent an injustice before the system, if left to its own devices, miscarries"); Green, *supra* note 8, at 1588 (describing a prosecutorial "gate-keeping" function to protect the innocent from prosecution).

[54] *See generally* Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 How. L.J. 475 (2006); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2496–519 (2004); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291; Medwed, *supra* note 6, at 140–42; Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV 999 (2009); Myrna Raeder, *What Does Innocence Have to Do with It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315, 1327–28.

selective information processing, belief perseverance, and cognitive consistency will prevent the prosecutor from revisiting her conclusion. Tunnel vision might also impair the prosecutor's ability to identify material, exculpatory evidence to which the defense is entitled under *Brady v. Maryland*,[55] as selective information processing will cause the prosecutor to overestimate the strength of her case without the evidence at issue and to underestimate the evidence's potential exculpatory value. Finally, the prosecutor's role as a first and constant supreme juror may lead to cascading effects in other prosecutors, judges, and jurors, who might assume that the defendant must be guilty or would not have been charged. Because of the distorting effects of a prosecutor's personal beliefs in guilt, it is possible that requiring such a belief might actually contribute to wrongful convictions rather than prevent them.

A. *Cognitive Bias in Initial Case Screening*

Accepted scientific methodology requires testing a hypothesis by attempting to falsify it.[56] Psychologists, however, have demonstrated that people do not apply the scientific method to everyday decision making. Instead, they suffer from confirmation bias, "the tendency to test a hypothesis by looking for instances that confirm it rather than by searching for potentially falsifying instances."[57] For example, in a classic demonstration of confirmation bias, subjects were shown a number series—2, 4, 6—and asked to determine the rule determining the numeric sequence.[58] They were then allowed to offer other triplets of numbers to test their hypotheses. The actual rule was simple: any three ascending numbers.[59] The subjects, however, overwhelmingly generated the more complicated theory that the sequence was comprised of multiples of two.[60] More importantly, to test that hypothesis, they offered triplets that were consistent with their theory—8, 10, 12—rather than inconsistent and therefore falsifying—8, 9, 12.[61]

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[55] 373 U.S. 83 (1963).

[56] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593 (1993) ("Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." (quoting Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of* Agent Orange *and Bendectin Litigation*, 86 NW. U. L. REV. 643, 645 (1992))); KARL R. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (5th ed. rev. 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability.") (emphasis omitted).

[57] D. Michael Risinger et al., *The* Daubert/Kumho *Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CALIF. L. REV. 1, 7 (2002).

[58] P. C. Wason, *On the Failure to Eliminate Hypotheses in a Conceptual Task*, 12 Q.J. EXPERIMENTAL PSYCHOL. 129, 130 (1960).

[59] *Id.*

[60] *Id.* at 135.

[61] *Id.*

In hypothesis-testing terms, a prosecutor who believes she serves as supreme juror will be testing her theory that the defendant is guilty. The human tendency toward confirmation bias may lead her to search the case evidence only for evidence that would confirm the defendant's guilt.[62] She may, for example, look only at the fact that an eyewitness identified the defendant without giving proper weight to the failure of two other witnesses to do so. Moreover, when given the opportunity to shape further police investigation, she might request evidence that can only further inculpate the defendant rather than disprove the working hypothesis of guilt.[63]

Researchers have increasingly identified "tunnel vision" as a contributing factor in wrongful convictions.[64] When police and prosecutors develop "tunnel vision," they focus on an individual suspect and then "filter" all information through that lens.[65] In cognitive terms, tunnel vision is an example of confirmation bias. Law enforcement searches for and emphasizes evidence of the suspect's guilt because people generally search for and emphasize evidence that is consistent with the hypothesis they are testing.[66] Moreover, a supreme juror requirement only amplifies tunnel vision by shaping the prosecutor's hypothesis. A prosecutor who believes she must sit as supreme juror will approach a case to test the theory that the defendant is guilty. Confirmation bias can then trigger tunnel vision, undermining the prosecutor's ability to view her case skeptically and search for exculpatory evidence.

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[62] Burke, *supra* note 54, at 1603.

[63] *See* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1600 (2005) (noting that confirmation bias in police and prosecutors can affect criminal investigations).

[64] GEORGE H. RYAN, STATE OF ILLINOIS, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 20–21 (2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf (identifying tunnel vision as a contributing factor in several cases in which defendants were released from death row in Illinois); FPT HEADS OF PROSECUTIONS COMM. WORKING GROUP, DEP'T OF JUSTICE, REPORT ON THE PREVENTION OF MISCARRIAGES OF JUSTICE, at i, 35–41 (2004) (Can.), *available at* http://canada.justice.gc.ca/eng/dept-min/pub/pmj-pej/pmj-pej.pdf (identifying tunnel vision as one of eight leading causes of wrongful convictions); Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 849–56 (2002) (examining evidence from Canada and Britain demonstrating the role that investigative tunnel vision plays in wrongful convictions).

[65] Findley & Scott, *supra* note 54, at 292.

[66] *See* Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 428 (2009) ("Research on the causes of wrongful convictions has produced a large body of scholarship describing the problem of 'tunnel vision,' the unconscious cognitive biases that plague both police and prosecutors."); Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 899 (2008) ("[P]olice and prosecutors—as human beings—are likely, once they have identified a suspect or formed a theory of guilt, to seek confirming evidence and not seek disconfirming evidence.").

B. *Cognitive Bias During Litigation*

Unfortunately, the cognitive picture only worsens once the prosecutor decides to proceed with charges. Cognitive research demonstrates that people are biased not only in how they search for information but also in how they store and process it, recalling and analyzing information according to their existing beliefs. A supreme juror function assures that in every case that is filed, the prosecutor has already formed a personal belief that the defendant is guilty. That pre-existing belief can give rise to the phenomena of selective information and belief perseverance.

Selective information processing is the tendency of people to readily accept information that supports their prior beliefs while devaluing contradictory evidence.[67] In a classic study of selective information processing, researchers asked subjects to evaluate two studies of capital punishment, one which purported to show that the death penalty effectively deterred crime and one purporting to show no deterrent effect.[68] From prior questioning, the researchers knew individual subjects' views on the death penalty.[69] Subjects who favored the death penalty evaluated the pro-deterrence study as more persuasive while death penalty opponents reached the opposite conclusion.[70] As a result of selective information processing, both groups of subjects reported that their pre-existing views had been strengthened, even though all of the subjects had reviewed studies using similar methodologies but reporting contradictory results.[71]

A separate but related phenomenon is belief perseverance. Whereas selective information processing describes the failure to make rational, incremental

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[67] *See generally* Craig A. Anderson et al., *Argument Availability as a Mediator of Social Theory Perseverance*, 3 SOC. COGNITION 235, 244–48 (1985); Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 J. PERSONALITY & SOC. PSYCHOL. 568 (1992); Kari Edwards & Edward E. Smith, *A Disconfirmation Bias in the Evaluation of Arguments*, 71 J. PERSONALITY & SOC. PSYCHOL. 5 (1996); Charles G. Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231 (1984); Arthur G. Miller et al., *The Attitude Polarization Phenomenon: Role of Response Measure, Attitude Extremity, and Behavioral Consequences of Reported Attitude Change*, 64 J. PERSONALITY & SOC. PSYCHOL. 561, 563–64 (1993); Geoffrey D. Munro & Peter H. Ditto, *Biased Assimilation, Attitude Polarization, and Affect in Reactions to Stereotype-Relevant Scientific Information*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 636 (1997); Norbert Schwarz et al., *Interactive Effects of Writing and Reading a Persuasive Essay on Attitude Change and Selective Exposure*, 16 J. EXPERIMENTAL SOC. PSYCHOL. 1, 5–9 (1980) (reporting that subjects found sample letters to the editor more convincing and less biased when the letters supported their own positions).

[68] *See* Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2100 (1979).

[69] *Id.*

[70] *Id.* at 2101–02.

[71] *Id.* at 2103–04.

adjustments to existing beliefs in response to new information, belief perseverance describes the tendency of people to adhere to their prior beliefs even when contradictory evidence firmly refutes them.[72] For example, in a classic display of belief perseverance, researchers gave subjects a series of what appeared to be suicide notes and asked them to guess which notes were genuine and which were fake.[73] Subjects were then given false feedback regarding their success at what was actually a dummy task.[74] Following the task, researchers fully debriefed the subjects, explaining that the feedback they were given was entirely random, predetermined, and fabricated.[75] They even showed subjects the experimenter's instruction sheets as proof that subjects were randomly assigned to their respective success rates.[76] Nevertheless, when subjects were subsequently asked how well they thought they would fare at performing the actual task of discerning between genuine and fake suicide notes, they demonstrated considerable belief perseverance. Subjects who had been told previously (and falsely) that they were successful at the task evaluated their hypothesized performance more highly than those who had been told that they were unsuccessful.[77]

A supreme juror requirement forces prosecutors to commit to a personal belief in the defendant's guilt early in the process when charges are initially filed. Because of selective information processing, the prosecutors' evaluation of additional evidence will be skewed toward further inculpation of the defendant, and the initial belief in guilt will be "sticky."[78] New evidence that appears to strengthen the prosecutor's case will be accepted at face value. Even if evidence is ambiguous, the prosecutor will interpret it through a lens of guilt. Potentially exculpatory evidence, on the other hand, might be viewed as unreliable, mistaken, or irrelevant so as not to undermine the prosecutor's existing belief.[79] Indeed, even if the exculpatory evidence proves that the defendant is innocent, belief perseverance might lead the prosecutor to continue to adhere to her initial belief in guilt.

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[72] *See generally* Craig A. Anderson et al., *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037 (1980); Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880 (1975).

[73] *See* Ross et al., *supra* note 72, at 882.

[74] *Id.*

[75] *Id.* at 883.

[76] *Id.*

[77] *Id.* at 883–84.

[78] Burke, *supra* note 54, at 1605–06.

[79] *See* Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 945–46 (1999) (noting that prosecutors believed they "get wedded to their theory and things inconsistent with their theory are ignored").

The prosecutor's personal belief that the defendant is guilty might also interfere with her ability to comply with her disclosure obligations to the defense. Under *Brady v. Maryland*, prosecutors are required by due process to disclose exculpatory evidence to the defense, but only if it is material.[80] Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[81] A reasonable probability is "a probability sufficient to undermine confidence in the outcome."[82] Although a court need not determine that the evidence, if disclosed, probably would have changed the trial's outcome, evidence is material only if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[83]

Because of the materiality standard, a prosecutor determining whether a given piece of evidence falls under her *Brady* obligation is supposed to imagine the "whole case"—even though it has not yet been tried—and then ask whether the potential exculpatory value of the evidence is sufficient to undermine confidence in a conviction obtained without the evidence's disclosure.[84] Consider the ways that the materiality standard interacts with cognitive biases in a prosecutor who personally believes that the defendant is guilty: The evaluation of the whole case will be through a lens of guilt, while evidence contradicting the defendant's guilt might be cast aside as unreliable, mistaken, or irrelevant.[85] As a consequence of cognitive biases, the prosecutor might over evaluate the strength of her case and undervalue the potential significance of exculpatory evidence. In short, she might underestimate materiality and therefore be less likely to disclose exculpatory evidence to the defense.[86]

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[80] 373 U.S. 83, 87 (1963).

[81] United States v. Bagley, 473 U.S. 667, 682 (1985).

[82] *Id.*

[83] Kyles v. Whitley, 514 U.S. 419, 435 (1995).

[84] *See* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 471 (2001) ("It seems curious, to say the least, that a prosecutor has a constitutional obligation *before* trial to disclose a category of information that cannot be defined until *after* trial."); Findley & Scott, *supra* note 54, at 352 ("[T]he *Brady* test oddly imposes a retrospective analysis on decisions that must be made prospectively, pretrial."); Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 658 (2002) (maintaining that *Brady* results in "a somewhat odd and circular spectacle: a pre-trial obligation that is defined through speculation on a post-trial result").

[85] *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1375 (1997) (arguing that a prosecutor who believes a defendant is guilty may view potentially exculpatory evidence "as a 'red herring' with which defense counsel may make mischief").

[86] Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 494–96 (2009) (exploring the ways that *Brady*'s material standard invites cognitive error); Susan S. Kuo & C.W. Taylor, *In Prosecutors We Trust: UK Lessons for Illinois Disclosure*, 38 LOY. U. CHI. L.J. 695, 706–07 (2007) ("The quest for success can affect a prosecutor's ability to objectively weigh the

The notion of prosecutors as supreme jurors can also result in a "conviction psychology."[87] As a prosecutor, I once cheerfully announced to a defense attorney friend that if the system were working properly, I should win all of my cases and she should always lose. Perhaps I only said it at the time to earn her ire, but I recall being sincere in my belief. And, as hard as it is for me to contemplate now, my belief must have resulted from a firm conviction that prosecutors not only served as supreme jurors but did so without error. Because prosecutors believe they have pre-screened for innocence, they assume every defendant facing charges must be guilty.[88]

C. *Cognitive Bias Post-Conviction*

A prosecutor's personal belief that the defendant is guilty can also continue to interfere with neutral decision making after the defendant has been convicted. If anything, the prosecutor's ability to revisit her belief in guilt will only be more difficult post-conviction. The jury's verdict will be viewed as reinforcement of the prosecutor's initial belief, strengthening her resolve.[89] In newspaper articles reporting the growing number of cases in which DNA evidence has exonerated defendants post-conviction, it is not unusual to find quotes from prosecuting attorneys who continue to insist that the defendant may nevertheless have been involved in the crime.[90] Tunnel vision, selective information processing, and

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materiality of potentially exculpatory evidence, a phenomenon referred to as 'tunnel vision' or 'confirmatory bias.'").

[87] Felkenes, *supra* note 28, at 110–12 (describing the "conviction psychology" that exists among prosecutors who believe that the initial case-screening process "effectively eliminates" the innocent from their caseloads).

[88] Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 554 (1987) ("Instead of being an agnostic on guilt, the prosecutor naturally assumes that defendants are guilty.").

[89] *See* Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 519 (2007) ("[P]rosecutors are likely to see the end results as validation of their initial theories of guilt."); Findley & Scott, *supra* note 54, at 330 ("Trials confirm those judgments about guilt because the vast majority of trials result in convictions."); Medwed, *supra* note 6, at 142–43 ("When a jury verdict validates this form of 'pre-conviction' of the defendant, it may become extremely difficult ever to establish the defendant's innocence in the eyes of the prosecuting lawyer." (footnote omitted)).

[90] *See, e.g.*, Maria Glod, *DNA Not Enough to Charge Va. Rapist: Authorities Kept Identity a Secret*, WASH. POST, Mar. 11, 2004, at B4 (quoting prosecutor as saying that he "cannot rule out" the exonerated defendant as a suspect); Bruce Lambert, *Prosecutor Will Retry Man Freed by DNA in L.I. Rape-Murder*, N.Y. TIMES, Sept. 12, 2003, at B5 (announcing prosecutor's decision to retry released defendant based on his retracted confession); Sara Rimer, *DNA Testing in Rape Cases Frees Prisoner After 15 Years*, N.Y. TIMES, Feb. 15, 2002, at A12 (quoting prosecutor as insisting that there is "no reason to doubt the validity of [the defendant's] confession" but there is not "sufficient evidence to convict him beyond a reasonable doubt, and in this business a tie goes to the defendant").

belief perseverance can all contribute to prosecutorial resistance to post-conviction claims of innocence.[91]

The prosecutor's role as supreme juror can also give rise to cognitive dissonance effects. Psychologists have demonstrated the human tendency to process information to mitigate dissonance between a person's conduct and beliefs.[92] A post-conviction claim of innocence, if true, would force the prosecutor to concede that she had failed in her screening obligations as supreme juror. To reconcile her conduct of charging the defendant with her beliefs that she is an ethical prosecutor, she might explain away exonerating evidence so she can cling to her initial theory of guilt.[93]

D. *Creating a Presumption of Guilt in Others*

Finally, the notion of the charging prosecutor as a supreme juror can also create decisional biases in other actors. If other actors in the criminal justice system believe that the initial charging prosecutor has screened the case for evidence of innocence and concluded that the defendant is guilty, they may be less independent in their own evaluations of the evidence. Analysts in the crime lab, for example, might be biased in their interpretation of ambiguous evidence because they assume that the defendant would not have been charged unless he were guilty.[94] In many prosecutors' offices, initial charging decisions are made by different attorneys than the prosecutors who are responsible for case management and trial.[95] In such an arrangement, the assigned trial prosecutor might feel

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[91] *See* Burke, *supra* note 54, at 1605–07; Felkenes, *supra* note 28, at 112–13 ("Once a defendant has been 'pre-convicted' by the prosecutor, it becomes very difficult for the accused to establish his innocence in the eyes of the prosecutor.").

[92] *See* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957); Leon Festinger & James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. ABNORMAL & SOC. PSYCHOL. 203, 203–04 (1959).

[93] Bandes, *supra* note 54, at 491 ("It is difficult to admit mistakes, and certainly difficult for a prosecutor to accept that her actions have led to the conviction of an innocent person."); Burke, *supra* note 54, at 1612–13 (explaining how the prosecutor's belief in a defendant's guilt becomes "stickier" post-conviction because of cognitive dissonance effects); Findley & Scott, *supra* note 54, at 316 ("[C]ognitive biases help explain what went wrong in many wrongful conviction cases . . . ."); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 489 (2009) ("If anything, these tendencies have an even greater impact following a conviction, given the psychological difficulty of acknowledging one's possible role in convicting an innocent person."); Jonakait, *supra* note 88, at 551 ("The honorable prosecutor simply cannot believe that he is prosecuting the blameless."); Medwed, *supra* note 6, at 140–41 (listing psychological resistance to the idea that the wrong person was convicted among various reasons prosecutors oppose post-conviction claims of innocence).

[94] Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 496–97 (2006) (discussing pro-prosecution bias in forensics analysts).

[95] In a "horizontal" model of prosecution, different attorneys handle charging and trial functions, whereas a "vertical" prosecution model entrusts the entirety of a case to a single

wedded to the initial charging lawyer's decision. Judges and jurors might also be less scrutinizing of the government's case if they believe that the prosecutor would not be pursuing charges unless personally convinced of the defendant's guilt.[96]

V. CONCLUSION

This Article pursues both modest and ambitious goals. Modestly, it explores the potential adverse effects of requiring prosecutors to form a personal belief in a suspect's guilt prior to pursuing charges. A supreme juror function is intended to protect the innocent, but the prosecutor's personal belief, once formed, might subsequently distort decision making in ways that can contribute to wrongful convictions. Because of her previous determination of guilt, the prosecutor may undervalue potentially exculpatory evidence and underestimate legitimate claims of innocence. Moreover, other decision makers may be less diligent in their own screening functions if they unconsciously defer to the prosecutor's personal determination of guilt.

More ambitiously, this Article's reconsideration of a supreme juror requirement calls upon prosecutors to reconsider how they can best serve their dual roles of punishing guilt and protecting innocence. Prosecutors take pride in their supreme juror function, finding the honor of the job in their power to charge, or not to charge, based on their personal determination of what is right.[97] However, the claim that prosecutors pursue charges only when they are personally persuaded of the defendant's guilt is largely mythical. Being transparent about that fact might enable not only prosecutors, but also other actors in the criminal justice system, to mitigate bias in their decision making, leading to greater protection of the innocent and reducing wrongful convictions.

By emphasizing the ways that personal beliefs can interfere with neutral decision making, this Article suggests that prosecutors might best serve justice, not as supreme jurors, but as vigilant agnostics. Unlike a supreme juror, a vigilantly agnostic prosecutor would resist the temptation to form a personal opinion about the suspect's guilt, neutrally evaluate both inculpatory and exculpatory evidence,

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prosecutor. Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 296 (2006). Although horizontal prosecution at least involves additional lawyers in the prosecutorial process, those lawyers might not assess the case independently if they believe the initial charging lawyer has already screened for innocence.

[96] *Cf.* Andrew F. Daughety & Jennifer F. Reinganum, *Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts*, 1 AM. L. & ECON. REV. 158 (1999) (discussing bounded rationality in judges); Kevin Jon Heller, *The Cognitive Psychology of Circumstantial Evidence*, 105 MICH. L. REV. 241, 292–94 (2006) (discussing confirmation bias in jurors); Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CALIF. L. REV. 87 (1999) (discussing bounded rationality in judicial decision making).

[97] Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 186–88 (2007) (discussing "prosecutorial passion").

and remain open-minded even in the face of overwhelming evidence. She would screen a case for signs of innocence, not just at the initial charging decision, but at every stage of the process, asking herself how evidence might be construed, not just by her, but by a "true skeptic" and "inquisitive neutral."[98] A call for vigilant agnosticism invites reflection on, and potentially a transformation of, the prosecutorial culture.

[98] Uviller, *supra* note 10, at 1704.