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# Prosecution (is) Complex

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## Prosecution (is) Complex

Alafair Burke\*

DANIEL S. MEDWED, *PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT* (New York University Press 2012)

In July 1994, Ken Wyniemko was in a Michigan jail on misdemeanor charges when local police concluded that he resembled a composite sketch of a suspect in a rape committed three months earlier.<sup>1</sup> He was placed in a line up, and the sole eyewitness—the victim—identified him as her assailant. After she was attacked, the victim had identified the suspect as 20–25 years old. Wyniemko was 43. Semen retrieved from the victim's body was consistent with Type A blood. Wyniemko had Type O blood. With the victim's identification of Wyniemko as her attacker, prosecutors reasoned that the semen belonged not to the perpetrator, but to the victim's husband, who had Type A blood.<sup>2</sup>

Nine years later, the innocence project at the Thomas M. Cooley School of Law took Wyniemko's case. In June 2003, the State consented to DNA testing of the biological evidence. The testing revealed that the semen sample taken from the victim was a mixed sample belonging to her husband and another male source. Scientists excluded Wyniemko as a possible contributor to the sample.<sup>3</sup> On June 17, 2003, Wyniemko's conviction was overturned.

Wyniemko is just one of many real-world exoneration stories that Daniel Medwed brings to life in his captivating book, *Prosecution Complex*. Unfortunately, Wyniemko's tale is by no means anomalous. Post-conviction DNA testing has led to the exoneration of nearly three hundred defendants.<sup>4</sup> As the number of exonerations grows, we are in an era where the once unthinkable is now undeniable.<sup>5</sup> We convict the innocent. We imprison the innocent. We place the innocent on death row.

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\* Professor of Law, Maurice A. Deane School of Law at Hofstra University. I would like to thank Joshua Dressler for inviting me to write this review and Daniel Medwed for allowing me an early read of his book. I am thankful to Toni Aiello, reference librarian at Hofstra, and to Jake Davidson and William Thomas Hughes for their invaluable research assistance.

<sup>1</sup> *Profile of Kenneth Wyniemko*, THE INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Kenneth\\_Wyniemko.php](http://www.innocenceproject.org/Content/Kenneth_Wyniemko.php) (last visited Sept. 16, 2012).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Know the Cases*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/know/> (last visited August 30, 2012) ("There have been more than 300 post-conviction DNA exonerations in United States history.").

<sup>5</sup> Jennifer E. Laurin, *Still Convicting the Innocent* 90 TEX. L. REV. 1473, 1473 (2012) (reviewing BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO*).

As Medwed notes, however, Wyniemko's case is unusual among exonerations in one respect—the relative ease with which he earned his post-conviction freedom: “Inmate contacts innocence project; lawyers seek DNA testing of existing crime scene evidence; open-minded prosecutor consents; test results from the state crime lab vindicate the wrongfully convicted; and an innocent man goes free.” (P. 138.) In too many other cases, as Medwed documents, prosecutors withhold the potentially exculpatory evidence (p. 37), resist making DNA evidence available to the defense for testing (p. 97), and deny the defendant's innocence by reframing their theory of guilt in the face of exculpatory DNA evidence (p. 158.)

It is not only years after the fact that prosecutors contribute to wrongful convictions. Working through each stage of a criminal case—from the charging decision to plea bargaining to trial to post-conviction—Medwed carefully documents the myriad ways that prosecutors might convict innocent defendants or prolong their punishment. His examination reveals that many of the prosecutors who fall prey to these potential pitfalls do so not intentionally, or even because of an indifference to justice, but because of structural and cognitive impediments to neutral prosecutorial decision-making.

After providing an overview of Medwed's work, I will highlight some of the book's larger lessons for prosecutors, the wrongful convictions movement, and anyone interested in criminal justice.

## I. OVERVIEW

Following the temporal order of a criminal case, Medwed divides his book into three parts: pre-trial, trial, and post-conviction. Throughout the book, he uses real stories of exonerations to demonstrate the reasons for wrongful convictions and the role that prosecutors can play in them. He also follows a single, hypothetical case—that of a drunk driver who kills a pedestrian—to illustrate the dangers to innocence at each phase of a case. (E.g., p. 13.)

Part One of *Prosecution Complex* focuses on the ways prosecutorial decisions before trial can contribute to wrongful convictions. Prosecutors' charging decisions (Chapter 1) occur “behind the scenes” and “receive limited scrutiny.” (P. 15.) The law imposes only the low standard of probable cause, and “the grand jury serves as a rubber stamp” (p. 16) on a prosecutor's personal conclusion that probable cause exists. Moreover, because of cognitive biases, prosecutors may suffer from “tunnel vision,” or the tendency to focus only on the defendant at the expense of alternative suspects. Once the prosecutor believes that the defendant is guilty, additional cognitive biases will cause her to overestimate the value of inculpatory evidence and undervalue or explain away potentially exculpatory

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WRONG (2011)) (noting that advancements in DNA testing have caused a “collective consciousness shift”).

evidence. As a result of these legal, structural, and cognitive factors, prosecutors may charge innocent suspects.

Once the case is issued, the prosecutor's discovery decisions (Chapter 2) potentially increase the likelihood that the innocent defendant will be convicted. Although due process requires prosecutors to disclose material exculpatory evidence under *Brady v. Maryland*,<sup>6</sup> some prosecutors engage in gamesmanship,<sup>7</sup> confident that their failures to disclose are unlikely to be either discovered or punished. (Pp. 39–41.) Medwed notes, however, that “intentional *Brady* violations are the exception rather than the rule.” (P. 41.) More commonly, failures to disclose exculpatory evidence are attributable to a prosecutor's unawareness of the evidence's existence or failure to realize that the evidence is material and exculpatory. (Pp. 43–44.)

Continuing his discussion of pre-trial prosecutorial pitfalls, Medwed turns to the plea bargaining stage of a case. He handily explains how cases with the weakest evidence of guilt yield large numbers of guilty pleas. Prosecutors, convinced of the defendant's guilt and “gripped by tunnel vision,” fail to view the weakness of their evidence as an indication of the defendant's innocence. (P. 56.) Rather, they attribute the flaws in the case to poor police investigation, the defendant's interference with evidence, or “bad luck.” (P. 56.) Accordingly, they offer the most attractive plea offers in their weakest cases. Defendants, knowing that they will face a far steeper sentence if convicted at trial, may accept these sweetheart offers, despite their innocence. (Pp. 61–62.)

If the case proceeds to trial, the potential for prosecutors to contribute to wrongful convictions continues, as Medwed documents in Chapters 4 through 6. Still convinced that the defendant is guilty, the prosecutor adopts a “conviction psychology.” (P. 77.) She may question and prepare witnesses in ways that may strengthen or alter a witness's malleable recollection. (P. 81.) She may rely on the unreliable testimony of jailhouse informants (pp. 84–87) or on unreliable scientific evidence (pp. 97–98.) She may exceed the proper boundaries of closing arguments by vouching for government witnesses, offering personal opinions about the defendant's guilt, misstating the evidence, or making inflammatory comments that prejudice the jury against the defendant. (P. 105.)

Even after a case leads to a guilty plea or guilty verdict, prosecutors who are committed to doing justice should be receptive to new evidence suggesting that an innocent defendant was wrongfully convicted.<sup>8</sup> Yet Medwed demonstrates that the wrongful convictions literature is rife with tales that suggest otherwise: prosecutors who attempt to prevent defendants from accessing the evidence that could exonerate them; prosecutors who resist new DNA testing; prosecutors who adjust their theory of guilt to accommodate their weakened evidence years after trial.

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<sup>6</sup> *Brady v. Maryland*, 373 U.S. 83, 86–87 (1963).

<sup>7</sup> Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 532 (2007).

<sup>8</sup> Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 129–30 (2004).

Medwed summarizes the most common explanations for prosecutorial reticence toward post-conviction claims of innocence: cognitive bias, resource limitations, an emphasis upon finality, political concerns, and the lack of clear ethical obligations to investigate or cooperate with post-conviction innocence claims. (Pp. 127–35.)

Medwed's choice to organize *Prosecution Complex* according to the timeline of a criminal case—from charging decision through post-conviction—allows Medwed to weave in case narratives that demonstrate prosecutorial pitfalls at every phase. It also makes the book highly readable, even for lay readers who may not be familiar with criminal law terminology, the broad powers of the prosecutor at each stage of a case, or the existing literature on wrongful convictions. However, because of the choice to structure the book according to phases of a case, Medwed's observations about the biggest challenges to prosecutorial decision-making and the most significant reform suggestions are peppered throughout the book. He concludes the introduction to the book by summarizing four themes for reform:

- (1) that there should be greater transparency in most discretionary decisions made by prosecutors; (2) that courts and legislatures should raise the legal bar for prosecutors in justifying those discretionary choices; (3) that ethical rules should be more concrete and disciplinary agencies more inclined to penalize prosecutors for violating them; and (4) that prosecutors should construct internal review committees to evaluate major decisions to neutral the grave effects of cognitive bias. (P. 4.)

Few scholars or commentators interested in prosecutorial decision-making or wrongful convictions would dispute Medwed's calls for reform, and he makes a strong case for all of them in his informative and important book. Without detracting from Medwed's own summary of the principle reform-based themes of the work, I found myself most intrigued by another theme Medwed develops throughout the book: the "ongoing schizophrenia" (p. 3) that prosecutors face as they seek to balance dual roles in the criminal justice system.<sup>9</sup> As Medwed describes the prosecutor's unique responsibilities, prosecutors are supposed to "serve as zealous government advocates and neutral 'ministers of justice.'" (P. 2.)<sup>10</sup> Although no conflict should exist between the advocacy and minister-of-

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<sup>9</sup> See Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1587–88 (2003); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 887–889 (1998); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 773–77 (2001).

<sup>10</sup> See also MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2009) (noting that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); 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, 1001

justice roles, Medwed argues that at nearly every phase of a criminal case, a prosecutor's advocacy instincts trump her ability to be a minister of justice. (P. 3.)<sup>11</sup> For example, when prosecutors are expected to turn over to the defense evidence that hurts their own case, the conflict between the prosecutor's advocacy and minister-of-justice roles "peaks," increasing the chances that prosecutors will fail to disclose *Brady* material. (P. 38.) During plea negotiations, to secure certain conviction instead of risking an acquittal at trial, prosecutors might make irresistibly attractive offers in cases with weak evidence of guilt. (P. 53.) Once trial begins, the "immense pressure to gain convictions clashes with the minister-of-justice concept." (P. 79.) A "conviction psychology"<sup>12</sup> sets in (p. 77), and "[f]or many prosecutors, losing track of their prey is simply unacceptable." (P. 79.) Post-conviction, "prosecutors do not always adhere to the minister-of-justice ethos in the post-conviction arena when faced with evidence of innocence; on the contrary, many prosecutors fight these claims tooth-and-nail." (P. 126.)

Though its proposals for reform are varied, *Prosecution Complex's* description of the complexity of prosecutorial decision-making and the potential for prosecutors to contribute to wrongful convictions repeatedly looks to the tension Medwed sees between prosecutorial advocacy and justice. The remainder of this review focuses on three lessons that can be gleaned from Medwed's observations about the tensions between a prosecutor's dual roles.

## II. WHAT IT MEANS TO DO JUSTICE: PROCESS OVER INNOCENCE

Prosecutors have a well-known responsibility to act not simply as an advocate, but as a minister of justice.<sup>13</sup> A prosecutor's unique role in the system is not merely to convict, but to pursue justice.<sup>14</sup> As Medwed describes it, the tension between the prosecutor's advocacy and minister-of-justice roles creates an "ongoing schizophrenia" (p. 3) as prosecutors seek to juggle the conflicting

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(2009) (Prosecutors "must prosecute offenders and do so with vigor. At the same time, they must serve as ministers of justice charged with considering the interests of the very defendants they prosecute.").

<sup>11</sup> As Professor Medwed summarized this point in an interview, "Prosecutors are told two things: be zealous advocate and be ministers of justice. . . . It's hard for many of us, whatever our occupation, to simultaneously wear two hats. It's a very difficult thing psychologically." Ben Fulton, *Books: U. law professor is on an innocence mission*, SALT LAKE TRIBUNE, Apr. 10, 2012, available at <http://www.sltrib.com/sltrib/entertainment/53867500-81/prosecutors-justice-law-system.html.csp>.

<sup>12</sup> *Prosecution Complex* borrows the term "conviction psychology" from George Felkenes. George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 99 (1975).

<sup>13</sup> See MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2009).

<sup>14</sup> MODEL CODE OF PROF'L RESPONSIBILITY, EC 7-13 (1980) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); CRIMINAL JUSTICE STANDARDS, PROSECUTION FUNCTION 3-1.2(c) (1993) ("The duty of the prosecutor is to seek justice, not merely to convict.").

responsibilities.<sup>15</sup> Too often, he argues, the role of advocate trumps concerns about justice.

Perhaps, however, the explanation of the tension Medwed observes is more complicated than a failure to opt for one role over another. When I was a prosecutor, I truly believed that if the system worked correctly, the prosecution should always win at trial. Those sound like the words of a zealot—a prosecutor who cares more about convictions than justice. But let me explain: I believed I should always win because I believed that a prosecutor who did her job well (i.e., justly) would charge only where there was guilt beyond a reasonable doubt, and would subsequently dismiss any case if it did not continue to meet that standard while pending trial. And because I believed that good prosecutors should (and could) ensure that only the guilty were charged, I believed that zealous advocacy against those (still) charged was just. In other words, my “conviction psychology” came not because I chose my advocacy role over my minister-of-justice role in the ongoing schizophrenia I had to juggle. Instead, my conviction psychology resulted from my belief that advocacy and justice were one in the same.<sup>16</sup>

If prosecutors believe they are doing justice when they engage in zealous advocacy, Medwed’s observations about the tension between the prosecutor’s dual roles—and his argument that too many prosecutors opt for advocacy over justice—look different from this perspective. Consider, for example, the prosecutor who makes a sweetheart offer to induce a plea in a case with weak evidence. (Pp. 56–57.) One could argue that an irresistible deal evidences an indifference to justice and an overemphasis on racking up convictions and avoiding embarrassing acquittals.<sup>17</sup> However, a prosecutor who believes the defendant is guilty might view a plea, even with a significantly reduced sentence, as the most just outcome.<sup>18</sup> She makes the offer not to induce an innocent person to plead guilty, but to ensure that a guilty person does not go free. Similarly, Medwed attributes many cases of prosecutorial resistance to innocence claims to a failure of prosecutors to “adhere to the minister-of-justice ethos.” (P. 126.) But he also notes that prosecutors who believe that a defendant is guilty are likely to view evidence favorable to the defense not as an indication of innocence, but merely as a hurdle to proving guilt.<sup>19</sup>

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<sup>15</sup> Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 698 (1992); O’Brien, *supra* note 10, at 1000.

<sup>16</sup> See Stephanos Bibas, *Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?*, in CRIMINAL PROCEDURE STORIES 129, 132 (Carol S. Steiker ed., 2006) (“Though conscientious prosecutors also want to free the innocent and show mercy on sympathetic guilty defendants, at root, they see their job as convicting and punishing the guilty.”).

<sup>17</sup> See Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1151 (1998).

<sup>18</sup> See Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1987–88 (1992) (noting that plea bargaining by elected and line prosecutors can be affected by career objectives and the desire to avoid risky cases).

<sup>19</sup> See also Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1375 (1997); Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN. ST. L. REV.

However, a prosecutor who believes that the defendant is guilty, despite all protestations to the contrary, would argue that fighting the claims “tooth-and-nail” is precisely what justice requires.

So perhaps the problem prosecutors face with dual responsibilities is not the tendency to opt too frequently for advocacy over justice, but instead a failure to recognize the tension between the two roles.<sup>20</sup> Several scholars have observed that prosecutorial zealotry can result, ironically, from prosecutorial pride in their unique role as guardians of justice.<sup>21</sup> Abbe Smith, for example, has noted,

Too often prosecutors believe that because it is their *job* to do justice, they have extraordinary in-born wisdom and insight. Too often prosecutors believe that they *and only they* know what justice is.

There is an inherent vanity and grandiosity to this aspect of the prosecution role. Many prosecutors genuinely believe they are motivated only by conscience and principle. But many prosecutors come to believe they are the only forces of good in the system.<sup>22</sup>

More recently, Aviva Orenstein noted “a culture in some offices in which deputy prosecutors demonize defendants, thinking of them as subhuman, and glorify their own roles in the process, thinking of themselves as the ‘good guys.’”<sup>23</sup>

The prosecutor who equates zealous advocacy with justice does so because she equates justice with punishing the guilty and protecting the innocent. However, the justice that prosecutors are supposed to protect requires more than differentiation between the guilty and the innocent. It requires a fair process.<sup>24</sup> Take for example, the Supreme Court’s famous description of the prosecutor’s minister-of-justice role in *Berger v. United States*:

1133, 1145 (2005); Randolph N. Jonakait, *The Ethical Prosecutor’s Misconduct*, 23 CRIM. L. BULL. 550, 553–54 (1987).

<sup>20</sup> Other scholars have previously noted a tension between a prosecutor’s dual roles. See Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 608 (1999); Hoeffel, *supra* note 19, at 1140; Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399 (2006); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 48 (1991).

<sup>21</sup> Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2131 (2010) (“For many prosecutors, it is precisely the prosecutor’s duty to do justice and freedom from zealous advocacy on behalf of a client that draws them to their profession.”); Green, *supra* note 20, at 608 (noting that federal prosecutors in the Southern District of New York “[i]n some sense . . . felt that they owned the concept” of doing justice).

<sup>22</sup> Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 378–79 (2001).

<sup>23</sup> Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 423 (2011).

<sup>24</sup> Zacharias, *supra* note 20, at 49 (noting that a prosecutor’s obligation to do justice includes not only sparing the innocent from charges, but also ensuring that fair trials are provided to the guilty).



[A prosecutor's interest] is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.<sup>25</sup>

Consider each sentence in turn. The first sentence simply states that the prosecutor should do justice, without expanding on what justice means.<sup>26</sup> The second sentence supports the view that advocacy against the guilty constitutes justice: Protect the innocent, but punish the guilty—and “with earnestness and vigor” to boot (third sentence). But the final sentence arguably speaks not of guilt or innocence, but about the fairness of the process: Hard blows are fair, but foul ones are not. Is a blow only foul if struck against the innocent, or is it foul if it does not respect the process?

Justice Douglas, dissenting in *Donnelly v. DeChristoforo*, more clearly defined prosecutorial justice in terms of process rather than innocence: “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.”<sup>27</sup> As Medwed notes, prosecutors are “told to lock up criminals and protect defendants’ rights.” (P. 3, emphasis added.) That prosecutors might define justice primarily through the lens of innocence is certainly understandable in light of the rhetoric used to discuss the prosecutor’s minister-of-justice role. As Medwed himself has previously noted, the wrongful convictions movement’s use of the powerful narratives of exonerated defendants itself invites emphasis upon innocence.<sup>28</sup> Perhaps because *Prosecution Complex* is about the ways that prosecutors can convict the innocent or prolong their punishment, it is unsurprising that Medwed’s own discussion of the prosecutor’s minister-of-justice role emphasizes the protection of the innocent. But it also illustrates why prosecutors who seek to do

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<sup>25</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>26</sup> Scholars have noted the paucity of concrete rules to help define the prosecutor’s minister-of-justice role. R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to “Seek Justice”*, 82 NOTRE DAME L. REV. 635, 637–38 (2006); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 901 (2004); Zacharias, *supra* note 20, at 46.

<sup>27</sup> *Donnelly v. DeChristoforo*, 416 U.S. 637, 648–49 (1974) (Douglas, J., dissenting).

<sup>28</sup> Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1552 (2008) (summarizing criticisms of the “innocence movement” and arguing that “innocentrism” advances criminal justice discourse). See also Lawrence C. Marshall, *Litigating in the Shadow of Innocence*, 68 U. PITT. L. REV. 191, 194–95 (2006) (noting the role that wrongful convictions have played in the capital punishment movement, but arguing that “condemning the innocent is just one small part of what is wrong with the death penalty”).

justice must see themselves not only as protectors of the innocent, but also as protectors of a fair process to the guilty.<sup>29</sup>

### III. PROSECUTORIAL NEUTRALITY AND CONTRARY VOICES

Another lesson to be gleaned from *Prosecution Complex* is the importance of prosecutorial neutrality.<sup>30</sup> Even if prosecutors use a notion of justice that prioritizes protecting the innocence over protecting the fairness of the process used to convict, *Prosecution Complex* vividly demonstrates the obvious: a prosecutor's conclusion about a defendant's guilt can be wrong. Moreover, Medwed demonstrates at every turn the ways that a prosecutor's pre-existing belief that a defendant is guilty can taint prosecutorial decision-making and contribute to wrongful convictions: in charging decisions (pp. 22–24), in disclosure (p. 38), in plea bargaining (pp. 56–57), in a conviction psychology during trial (pp. 77–78), in summation (p. 109), in their ability to objectively gauge scientific evidence (p. 98), and in their resistance to post-conviction claims of innocence (p. 127).<sup>31</sup> Accordingly, a central lesson of the book is the importance that prosecutors try to remain neutral in their decision-making. Moreover, at each phase of a case, reform proposals aimed at neutralizing prosecutorial decision-making look to the participation of contrary voices.<sup>32</sup>

One form of contrary voice can come from the prosecutor herself. For example, at the charging stage, Medwed advocates changing the current, low charging standard to require more than probable cause. (Pp. 19–21.) Importantly,

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<sup>29</sup> Cf. Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1229–30 (2005) (advocating a “new front” of discourse that focuses on structural impediments to justice, such as indigent defense systems, plea bargaining practices, docket control mechanisms, and prosecutorial incentive regimes, rather than evidence-based claims of innocence).

<sup>30</sup> See generally Green & Zacharias, *supra* note 26; H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695 (2000).

<sup>31</sup> Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 492–94 (2006); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1621 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 354, 377–80 (2006); O'Brien, *supra* note 10, at 1044; 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 (2003).

<sup>32</sup> Because of the perverting effects of a prosecutor's personal belief in the defendant's guilt, I have argued that prosecutors should avoid forming a personal belief about the defendant's guilt at the charging stage and should use only an objective standard for charging. See Alafair S. Burke, *Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. 79 (2010). Medwed emphasizes the importance of including an objective standard in the charging decision, but also appears to embrace the view that prosecutors should also be “personally convinced of the defendant's guilt.” Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 338, 342 (2001) (cited by Medwed at P. 19.) Medwed does not emphasize this point in *Prosecution Complex*, so this review does not explore the debate further.

he argues not only that the standard of proof should be higher, but also that prosecutors should be required to consider “bad” facts, preventing prosecutors from ignoring problems with their cases. (P. 21.) Similarly, in the *Brady* context, prosecutors gauging the potentially exculpatory evidence should view the evidence not from their own perspective, but from the perspective of defense counsel.<sup>33</sup>

Contrary voices can also come from other prosecutors in the form of internal review committees.<sup>34</sup> Screening committees should review charging decisions in cases that contain hallmark indicators of innocence. (Pp. 21, 26.) Similarly, internal fresh look committees could be used to review disclosure decisions (p. 42),<sup>35</sup> prosecutorial reliance on informants (p. 91), and post-conviction claims of innocence (pp. 128, 135–37).<sup>36</sup> To avoid the possibility that all prosecutors approach a case with the same viewpoint, at least one member of a screening committee would serve as Devil’s Advocate. (P. 169.)

Prosecutors alone, whether individually or in groups, however, may not provide the diversity of viewpoint necessary to foster neutral decision-making. Office culture among prosecutors can be extremely cohesive and group-oriented leading to homogeneity in decision-making. Operating under a form of “groupthink,” prosecutors may be quick to reach a consensus, which in turn reinforces the perception that the shared decision is correct.<sup>37</sup> As one report on prosecutorial culture noted: “You get a mind-set that everybody’s bad, everybody’s guilty, and everything is wrong. Everybody is a liar. Everybody is

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<sup>33</sup> Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 512 (2009). See generally Charles G. Lord et al., *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1231–32 (1984).

<sup>34</sup> See, e.g., Bandes, *supra* note 31, at 493–94 (advocating “[r]eview mechanisms . . . at every level of decision-making” that should perform a critical “‘naysaying’ function”); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1620–21 (2005) (recommending that higher-level prosecutors act as a supervisory, internal check on prosecutorial decision-making); Burke, *supra* note 31, at 1621 (suggesting “fresh look” reviews by additional prosecutors); Findley & Scott, *supra* note 31, at 388 (advocating multiple levels of case review as “another check against tunnel vision”); Medwed, *supra* note 8, at 175–77 (describing internal committees to review cases resting upon the testimony of a single eyewitness and to review post-conviction innocence claims); Peter Neufeld, *Legal and Ethical Implications of Post-Conviction DNA Exonerations*, 35 NEW ENG. L. REV. 639, 641 (2001) (“Increasingly, progressive-minded prosecutors around the country are setting up their own ‘innocence projects’” and citing several examples).

<sup>35</sup> Burke, *supra* note 33, at 491.

<sup>36</sup> Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 487–90, 494 (2009); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 52–53 (2009); Medwed, *supra* note 8, at 143–44.

<sup>37</sup> See O’Brien, *supra* note 10, at 1045 (“Groupthink is the tendency of a group to converge on a single interpretation of the evidence, at which point the individual members are less likely to question the interpretation’s underlying assumptions.”); Orenstein, *supra* note 23, at 428 (“It is easy to imagine how prosecutors’ offices, with their shared mission, camaraderie, adversarial posture, and zealous desire to punish wrongdoers can easily fall into groupthink.”).

corrupt.”<sup>38</sup> To neutralize the shared worldview among prosecutors, contrary voices should also come from people outside the prosecutor’s office and outside of law enforcement.<sup>39</sup>

One obvious source for external voices is the judiciary. Throughout *Prosecution Complex*, Medwed emphasizes the importance of judicial oversight for prosecutorial decision-making. Judges could take a more active role in reviewing disclosure by prosecutors (p. 43)<sup>40</sup> and the fairness of plea bargains. (P. 65.) They could conduct pre-trial hearings to gauge the reliability of informant testimony (pp. 88–89) and scientific evidence for reliability. (P. 101.) They should monitor prosecutorial conduct during trial. (P. 112.) Input from defense lawyers and other members of the bar can help prosecutors avoid groupthink. For example, Angela Davis has proposed the use of prosecution review boards that specialize in reviewing claims involving prosecutorial decision-making.<sup>41</sup> (P. 33.)

Despite evidence that external voices help mitigate cognitive bias, prosecutorial culture continues to be insular.<sup>42</sup> The prosecutors who are handling the most serious cases are likely to have been prosecutors for many years. They tend not to be involved in bar activities outside of the prosecutor’s office.<sup>43</sup> And though many prosecutors go on to become judges or enter private practice, there is little back and forth between the prosecutor’s office and criminal defense practice. I have lost count of the number of times I have been told by students that prosecutors are reluctant to hire anyone who has done any work, even as a student, on the defense side of the courtroom.

Medwed briefly explores the possibility of privatizing prosecution by “outsourcing” prosecution work to private attorneys. (P. 145.) These lawyers would not have the same incentives to maximize convictions. Moreover, their prior work experience as defense lawyers would make them more receptive to claims of innocence.<sup>44</sup> Medwed notes, however, that this suggestion is both

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<sup>38</sup> MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS 47 (1999) (internal quotation marks omitted) (based on interviews with prosecutors across the country).

<sup>39</sup> O’Brien, *supra* note 10, at 1045–46.

<sup>40</sup> Brown, *supra* note 34, at 1636–38; Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 427–28 (1984).

<sup>41</sup> Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 463–64 (2001).

<sup>42</sup> Bruce A. Green & Alafair S. Burke, *The Community Prosecutor: Questions of Professional Discretion*, 47 WAKE FOREST L. REV. 285, 311 (2012); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 208 (1988) (noting that prosecutors tend to be surrounded by populations “who can graphically establish that the defendant deserves punishment, and who have no reason to be concerned with competing values of justice”).

<sup>43</sup> See *The Effect of State Ethics Rules on Federal Law Enforcement: Hearing Before the Subcomm. on Crim. Just. Oversight Before the Comm. of the Judiciary*, 106th Cong. 53 (1999) (prepared Statement of John Smietanka) (noting that “[t]ime, money and, to some unfortunate extent, a cultural chasm” prevent prosecutors from “meaningful participation” in bar activities).

<sup>44</sup> For more information about the role of public prosecutors in America, see Carolyn B. Ramsey, *The Discretionary Power of “Public” Prosecutors in Historical Perspective*, 39 AM. CRIM.

unrealistic and problematic because of the lack of consistency among private contract lawyers.<sup>45</sup> (P. 145.) But the benefit of diverse voices could be obtained simply if there were more opportunities for non-adversarial interactions between prosecutors and defense lawyers. The cultural separation between prosecutors and the defense bar is vast. It begins as early as law school, when aspiring attorneys' worldviews can create a self-selection process in which students who "think like" prosecutors choose one employment route, while defense-oriented students choose another.<sup>46</sup> The hiring process only deepens the self-selection that has already occurred. Many prosecutors' offices hire first from the pool of young attorneys who already worked for the office and can be reluctant to hire students who worked in a defense capacity.<sup>47</sup> And once lawyers have entered the profession on one "side" of the courtroom, it can be common for prosecutors to cross over into a more lucrative defense practice,<sup>48</sup> but few defense lawyers ultimately become prosecutors. Moreover, the prosecution culture can be homogenous and insular, cementing the worldviews that initially brought likeminded lawyers to the office.<sup>49</sup>

Prosecutors' offices could reduce "groupthink" and increase neutrality by finding ways to expose prosecutors to contrasting worldviews. Modestly, prosecutors could socialize with defense lawyers or participate in bar activities that

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L. REV. 1309 (2002); George C. Thomas III, *THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS* 190–92 (2011).

<sup>45</sup> See Sara Gurwitsch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 319–20 (2010); Hoeffel, *supra* note 19, at 1153–54.

<sup>46</sup> I am thankful to Bruce Green for raising this point. The self-selection phenomenon is apparent in a comparison of the reasons defense attorneys and prosecutors give for entering their chosen professions. Compare Felkenes, *supra* note 12 (documenting the reported reasons prosecutors choose their profession), and Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195 (2005) (studying criminal defense lawyers' motivations for choosing their profession). See also Medwed, *supra* note 8, at 139 (noting a "macro-level ideology that often draws individual attorneys to law enforcement work in the first place"); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 967 (1997) (noting "the psychological aspects of prosecutors' self-selection").

<sup>47</sup> Although I make this claim from experience as both a former prosecutor and current law professor, anecdotal evidence from law school and practice materials supports the observation. For example, a publication from Yale Law School's Career Development Office for students seeking employment in Criminal Prosecution notes, "The activity that probably best demonstrates a student's strong interest and ability [to be a prosecutor] is the prosecution externship. . . . [S]ome offices may be skeptical about applicants' commitment to working for the prosecution, especially graduates from highly-ranked law schools like Yale which are perceived as being 'liberal' or 'pro-defense.'" Criminal Prosecution, Yale Law School Career Development Office (2012–13) (on file with the Author); see also Harvard Law School, *SIZING UP THE PROSECUTION: A QUICK GUIDE TO LOCAL PROSECUTION* 11, (2010) (noting that student prosecution interns are often given interviews for permanent post-graduation jobs).

<sup>48</sup> See Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627, 627–28 (2005) (reporting that federal prosecutors were more likely to enter private practice in high-paying legal markets).

<sup>49</sup> See Felkenes, *supra* note 12; Orenstein, *supra* note 23.

bring prosecutors and defense lawyers together to discuss and work on issues relevant to criminal practice. They could also increase their hiring of former defense attorneys.<sup>50</sup> More ambitiously, prosecutors could invite current defense attorneys to serve as advisors to provide contrasting perspectives.

*Prosecution Complex* makes clear not only the importance of prosecutorial neutrality, but also the importance that individual prosecutors look beyond themselves in their quest for neutral decision-making. Objectivity comes only through exposure to multiple and diverse voices.

#### IV. THE CASE FOR TONE

Finally, as I reflected on Medwed's observations about the dual roles played by prosecutors, I realized once again the importance of the language we use when we talk about the ways that prosecutorial decisions can potentially contribute to wrongful convictions. In recent years, the scholarship on prosecutorial discretion has seen a significant narrative shift, increasingly avoiding the language of fault in describing prosecutorial conduct.<sup>51</sup> Medwed's work largely avoids the language of fault. For example, he notes that any portrayal of prosecutors as "rogue officials indifferent to the conviction of the innocent" would be "misleading" because "most prosecutors aim to do justice." (P. 5.) By generally avoiding the language of fault, *Prosecution Complex* makes an important contribution to a growing literature that explores how institutional and cognitive limitations can distort neutral decision-making by even the most well-intentioned prosecutors.

Although *Prosecution Complex* generally avoids the language of fault, Medwed does make a few off-note choices. For example, despite an announced intention not to focus on rogue prosecutors, Mike Nifong's egregious prosecutorial conduct in the Duke lacrosse case is discussed very early in the book. Moreover, Medwed's decision to organize the book by phase of the case means that his discussion of the role of disciplinary agencies and sanctions is woven throughout the book. The repeated discussion of increased punishment of prosecutors in every context potentially sends a mixed message, blurring the discussion of ethical transgressions with institutional and cognitive limitations. For example, in discussing disclosure, Medwed discusses reforms that "could address intentional misconduct *and* inadvertent lapses of judgment concerning prosecutors' disclosure obligations." (P. 39, emphasis added.) He then launches immediately into a

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<sup>50</sup> Hadar Aviram, *Legally Blind: Hyperadversarialism, Brady Violations, and the Prosecutorial Organizational Culture*, 87 ST. JOHN'S L. REV. (forthcoming 2013) (proposing to neutralize cognitive bias in prosecutors by creating a prosecutorial hiring preference for applicants with previous defense attorney experience).

<sup>51</sup> Burke, *supra* note 21; Ellen Yaroshefsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943, 1957 (2010) (describing as a "premise" of a symposium on prosecutorial disclosure as an effort to "move beyond a culture of blame to one of examination of systems for improvement").

“Carrots and Sticks” discussion, which assumes intentional conduct by prosecutors. (P. 39.)

Avoiding the language of fault is not just a matter of rhetoric. Attributing flawed prosecutorial decisions to cognitive bias and institutional limitations, rather than to bad prosecutorial values, also shapes the direction of reform. Increased enforcement of ethical rules and sanctions against prosecutors who violate them may deter wrongful conduct in prosecutors who are indifferent to justice, but other reforms are necessary to advance neutral decision-making in the most virtuous prosecutors. The language of fault may also lead prosecutors who view themselves as ethical to conclude that the message is aimed only at prosecutors who are indifferent to justice. As a consequence, they may fail to recognize the possibility that, despite their best intentions, they might unintentionally contribute to an erroneous conviction.<sup>52</sup>

Many scholars have argued that internal reform by prosecutors carries more promise than external regulation.<sup>53</sup> As Medwed demonstrates, prosecutors across the country are themselves taking the lead in implementing several of the important reforms he advocates. In Kitsap County, Washington, prosecutors use a higher standard for charging than is required by law and makes those standards transparent to the public. (P. 25.) In Philadelphia, a committee of prosecutors specializes in reviewing the most serious cases. (P. 26.) In Nassau County in Long Island, New York, for example, a committee reviews cases that rely upon the testimony of a single eyewitness. (P. 29.) In Dallas, Houston, and Manhattan, a committee is responsible for studying post-conviction innocence claims. (P. 169.) In Los Angeles, a committee vets jailhouse testimony and oversees *Brady* compliance. (P. 169.)

Although many of the suggested reforms set forth in *Prosecution Complex* must be instituted internally by prosecutors, Medwed maintains that internal regulation is not the “full answer.” To support this repeated claim, he generally relies on examples of misconduct and slips into the language of fault, where internal regulations “invariably lack teeth” (p. 30), and where disciplinary boards “have shown a striking reticence to punish prosecutors for even the most grievous errors.” (P. 31.) But this form of his argument blurs concerns about intentional misconduct, which Medwed concedes is rare, with more systemic problems among the most well-intentioned prosecutors, such as cognitive bias.

<sup>52</sup> O'Brien, *supra* note 10, at 1010 (“False convictions—the most dramatic examples of the system’s failure—often involve honest mistakes by ethical investigators and prosecutors.”).

<sup>53</sup> Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1015 (2009); Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 516 (2007) (“[P]rosecutors hold the key to moderate but meaningful reform. . . .”); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008); 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, 11 (2009) (noting, in the context of wrongful convictions, the importance of self-regulation by prosecutors).

But it is possible to advocate for external reforms without using the language of fault. Medwed accomplishes this balance nicely in his discussion of prosecutorial trial conduct. In that context, he notes that internal regulation of trial conduct may not be sufficient because “[s]ome prosecutors will get caught up in the emotionally charged final stage of a trial regardless of training, supervision, and office review.” (P. 112.) Therefore, Medwed argues, trial and appellate courts should be more willing to scrutinize prosecutorial conduct during trial. (Pp. 112–14.) Similarly, Melanie Wilson has advocated for clear instructions to guide lawyers’ communications with witnesses because an advocate’s overreaching in this context may be “inadvertent or the result of difficult judgment calls.”<sup>54</sup>

The language of fault invites prosecutors to disengage from the ongoing conversation about the causes of wrongful convictions and the possibility of prosecutorial participation in them. In contrast, discussing prosecutors as lawyers who are trying to protect innocence, but who might accidentally err, is important if the wrongful convictions movement wants to foster the participation of prosecutors. Prosecutorial participation in the study of erroneous convictions is itself a source of the diverse and contrasting viewpoints that are essential to neutralizing decisional biases. Shifting the discourse of the wrongful conviction movement from fault-based rhetoric is also more likely to persuade prosecutors to implement internal reforms.<sup>55</sup>

## V. CONCLUSION

I have offered three lessons that can be gleaned from *Prosecution Complex*’s ongoing theme that prosecutors struggle to balance their dual roles as advocates and ministers of justice. Two of these lessons are for prosecutors: 1) that the protection of justice means not only the protection of the innocent, but also the fostering of a fair process, and 2) that prosecutors can mitigate the possibility that they will contribute to a wrongful conviction by seeking out contrary voices that foster neutral decision-making. The third lesson, aimed at the wrongful convictions movement, is to avoid a language of fault, which has a tendency to focus reform efforts on intentional misconduct and to signal to virtuous prosecutors that they need not worry that they may contribute to a wrongful conviction.

This review began with a brief summary of the exoneration of Ken Winiemko and concludes with that story’s ending. By the time DNA testing cleared him of the crimes for which he was convicted, the statute of limitations had

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<sup>54</sup> Melanie D. Wilson, *Quieting Cognitive Bias with Standards for Witness Communications*, 62 HASTINGS L.J. 1227, 1231 (2011).

<sup>55</sup> See Robin Charlow, Batson “Blame” and Its Implications for Equal Protection Analysis, 97 IOWA L. REV. 1489, 1491 n.5 (2012) (“Assignment of blame and fault may be problematic in a broad range of criminal law contexts, in particular those involving prosecutors and police, since it leads to behaviors that work against desired aims.”).



already run on charging anyone else. Five years later, police identified the real perpetrator—a serial sex offender who continued to victimize in the interim. (P. 139.)

*Prosecution Complex* is a significant book that should be read by any scholar, lawyer, or layperson who cares about criminal justice. But its most essential audience is prosecutors themselves, who hold the key to the most feasible and important reforms in the prevention of erroneous convictions.