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BELIEVE IT OR NOT: MITIGATING THE NEGATIVE EFFECTS PERSONAL BELIEF AND BIAS HAVE ON THE CRIMINAL JUSTICE SYSTEM

*Sarah Anne Mourer**

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

– Leo Tolstoy¹

I. INTRODUCTION

Anyone who has visited a courtroom or two in Florida may have noted the inscription on the wall behind the judge. It boldly states: "We Who Labor Here Seek the Truth." This Article examines both a prosecutor's and a defense attorney's personal pre-trial beliefs regarding an accused's guilt or innocence.² This analysis suggests that when an attorney holds pre-trial beliefs, such beliefs lead to avoidable bias and errors.³ This bias may alter the findings throughout all stages of the case.

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1. JAMES GLEICK, CHAOS: MAKING A NEW SCIENCE 38 (Penguin Books 1988) (1987) (referring to a quote by Leo Tolstoy as interpreted by physicist Joseph Ford).

2. See *infra* Part II.C; notes 109-11 and accompanying text.

3. See *infra* Part V. The following excerpt clarifies the meaning of the terms "bias" and "errors" as used in the article:

Bias is a systematic influence that slants the data in some direction. It is a dangerous form of error because the influence may be invisible and can lead to a consistent (reliable) but false picture of the phenomenon being studied. Errors differ from bias in that simple errors will occur at random, whereas a bias is a systematic error that skews the data.

The procedure of asking that the prosecution seek justice while having nothing more than probable cause results in the prosecutor's need to have a belief in guilt before proceeding to trial. While this belief is intended to foster integrity and fairness in the criminal justice system, to the contrary, it actually contributes to wrongful convictions. This Article closely examines the prosecutor's duty.⁴ This duty is overwhelming and obscure. In fact, the prosecutor's duty is so abstruse that, in some ways, it contradicts itself.⁵

Specifically, the prosecutor must refrain from prosecuting any charge that she knows is not supported by probable cause.⁶ Prosecutors are also charged with ensuring that the community's faith in the justice system remains intact.⁷ Further, the prosecutor is duty-bound to seek justice.⁸ Although it is important, this duty often proves to be problematic. These duties, considered together, impose the requirement that the prosecutor personally evaluate and believe in any charges brought against citizens, in the name of the State.⁹ This gives prosecutors a quasi-judicial function that runs counter to the purpose of the adversarial system, which is designed to reveal the truth.¹⁰

Noelie Rodriguez & Alan Ryave, *Systematic Self-Observation*, in 49 QUALITATIVE RESEARCH METHODS 1, 22 (Heidi Van Middlesworth et al. eds., 2002) (internal quotation marks omitted).

4. See *infra* Part II.A-B.

5. See *infra* Parts II, V.

6. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978))); see also MODEL RULES OF PROF'L CONDUCT R. 3.8 (2014) ("The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . .").

7. Ross Galin, Note, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 FORDHAM L. REV. 1245, 1268 (2000) ("As their representative in the criminal justice system, the prosecutor bears the burden of upholding public faith in the system.").

8. See *Berger v. United States*, 295 U.S. 78, 88 (1935) (discussing a prosecutor's obligation to see that justice be done).

9. Michael Q. English, Note, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 FORDHAM L. REV. 525, 536-38 (1999).

10. *Id.* at 529-30. Defense attorneys do not have a duty to believe their clients are innocent. Defense attorneys must advocate for their clients zealously and to the outermost bounds of the law, regardless of their feelings about guilt or innocence. See MODEL RULES OF PROF'L CONDUCT, Preamble and Scope paras. 2, 9 (2014) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."). Yet, on occasion, defense attorneys do develop a personal belief one way or another. They have no mandate to do so, and their ethical obligations are to defend their clients to the outermost bounds of the law irrespective of any personal beliefs. See ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION & DEF. FUNCTION 4-4.1, 4-4.1 cmt. at 182 (1993); Phyllis E. Mann, *Ethical Obligations of Indigent Defense Attorneys to Their Clients*, 75 MO. L. REV. 715, 732-35 (2010). The same problems can occur for defense attorneys at

When an attorney develops a personal belief in a defendant's guilt or innocence while investigating the merits of the case, facts and evidence discovered during the investigation will tend to be viewed and interpreted through the veil of the attorney's personal belief.¹¹ When a personal belief is held, a preference for that belief is present. As a result, decision-making and investigation may be conducted in a biased manner.

Studies show that after adopting a firm personal belief, all facts and evidence will be filtered through that belief, and any information that seems to contradict that belief will either be filtered out or reassembled in a manner that conforms to the belief.¹² Consequently, it follows that once a prosecutor or defense attorney acquires a firm opinion regarding guilt or innocence, the post-belief investigation will become biased in the direction of that belief.¹³ At this point in time, investigative findings are interpreted using the acquired bias.¹⁴ If the bias tends to support guilt, most findings will be interpreted under the glare of supporting guilt. Thus, the bias is expressed in the direction of the belief in guilt. There are times, then, when the client is innocent and the bias supporting guilt is incorrect.¹⁵ Sadly, this can often result in the conviction of an innocent person.

It is not known how frequently bias supports the wrong decision; it is only certain that bias exists and influences decision making in court.¹⁶ Therefore, the prosecutor's directive to seek justice, which requires the prosecution to personally believe in the defendant's guilt, sometimes renders the prosecutor's duty to seek justice unattainable other than by coincidence.

the trial level if they develop a pre-trial belief regarding their client's guilt or innocence. The outcome of a biased investigation by a trial level defense attorney is highly dependent upon whether the belief is in innocence or guilt. A belief in innocence resulting in the defense attorney's zealous advocacy ought to encourage the nature of the justice system. However, a belief in guilt should not matter to a defense attorney; if it does, it may result in ineffective assistance of counsel.

11. For illustration, see *State v. Saintcalle*, which explains the phenomenon further:

[W]ell-established psychological tendencies—such as confirmation bias (the tendency to look for confirmation but not falsification of our hypotheses) and selective information processing (the tendency to readily accept confirming evidence but devalue contradictory evidence)—likely entrench attorneys' preexisting biases, including closely held racial stereotypes and generalizations, and give attorneys false confidence in the effectiveness of their decisions concerning peremptory challenges.

309 P.3d 326, 364 (Wash. 2013).

12. See Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 177-84 (1998); Matthew Rabin & Joel L. Schrag, *First Impressions Matter: A Model of Confirmation Bias*, 114 Q. J. ECON. 37, 42-45 (1999).

13. See Alafair S. Burke, *Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. 79, 91-96 (2010).

14. See *id.* at 91-92.

15. See *id.* at 92-93.

16. See *id.* at 91-96.

Notably, while the prosecution's ethical standards fail to provide an explicit and clear requirement for the prosecutor's belief of guilt, the prosecutor is left with the sole discretion to determine what outcome will be just.¹⁷ Thus, it logically follows that the prosecutor is left with the sole discretion to determine the accused's guilt or innocence, whether or not she obtains any further evidence or bases her conclusion on any evidence at all. This brand of blind authority invites the prosecutor to make her decision regarding the accused's guilt based on her conscious or unconscious preconceptions and prejudices.

The authority of the prosecutor is further bolstered by the relatively low burden of proof—probable cause—required for the prosecutor to pursue a criminal charge.¹⁸ Probable cause is amongst the lowest burdens of proof in the judicial system.¹⁹ It is a far cry from assessing that a reasonable juror could find evidence of guilt sufficient beyond a reasonable doubt. If prosecutors were required to have a higher standard of evidence before proceeding to trial, their discretion would be limited and the role of their bias diminished.

Many criminal defense attorneys self-impose a requirement to personally believe that an inmate is innocent before filing a motion for post-conviction relief.²⁰ For innocence projects, the first prerequisite for representation is usually that the evidence indicating innocence is sufficient, such that it would probably result in an acquittal on retrial.²¹ In many instances, the second prerequisite is that the innocence project believes that the inmate is factually innocent.²² This personal belief standard carries the same risk of interfering with objective investigation and raises the real possibility that innocent inmates will fail to have their claims effectively heard. No attorneys, whether defense or prosecution, nor civil or criminal, indeed no humans, are immune from uncontained

17. See *id.* at 83-84.

18. See *Branzburg v. Hayes*, 408 U.S. 665, 686 (1972) (noting the probable cause standard required of a grand jury for bringing prosecution).

19. See *Burke*, *supra* note 13, at 83.

20. Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 NEB. L. REV. 1097, 1101 (2003); Ellen Yankiver Suni, *Ethical Issues for Innocence Projects: An Initial Primer*, 70 UMKC L. REV. 921, 924-26 (2002) (discussing the common models and structures of innocence projects). As the following notes, most innocence projects adopt a "belief-in-innocence" requirement for representation:

Despite the differences between law school innocence projects, however, they tend to share a common emphasis on . . . seeking the release of prisoners whom members of the project believe to be innocent of the crimes for which they have been convicted and for whom there are few other alternatives for legal representation . . .

Medwed, *supra*, at 1101.

21. See, e.g., Medwed, *supra* note 20, at 1122-23 (discussing specific evidence that an innocence project looks to when gauging innocence claims).

22. See Suni, *supra* note 20, at 925-26.

invitations to unconscious preconceptions and stereotypes. Bias in the justice system is undeniably a cause of wrongful convictions.²³ Although it may not be possible to entirely eliminate bias, steps can be taken towards its reduction. Bias in the justice system silently makes its way into the courtroom, attorney investigations, and judicial decision-making in unintended, but potent, ways.²⁴

Subjective decision-making exists in every aspect of the law. It is unavoidable. However, it can be minimized. This Article addresses one of the ways that bias and error in the judicial system can be diminished.²⁵ Additionally, this Article discusses attorney ethical standards and analyzes the conflicts that arise.²⁶ Finally, this Article proposes a revised, evidence-based standard, designed to mitigate the effect that bias may have on an attorney's decision-making.²⁷

II. PROSECUTORS' ETHICAL STANDARDS

Prosecutors have ill-defined ethical standards, making their legal obligations highly problematic. Their professional ethical requirements are not only vague, but also inconsistent. This section reviews some of the difficulties these standards create.

A. To Seek Justice

A prosecutor has the most difficult role in the justice system—to seek justice.²⁸ Prosecutors are dubbed “supreme jurors.”²⁹ Ideally, prosecutors should not only determine if the defendant is guilty, but also protect the innocent.³⁰ State criminal defendants’ right to a fair trial, guaranteed by the Fourteenth Amendment Due Process Clause, “imposes on [prosecutors] certain duties consistent with their sovereign obligation to ensure that justice shall be done in all criminal prosecutions.”³¹ The tenor of the case law discussing the role of prosecutors makes clear that prosecutors are held to the highest standard because of their unique powers and responsibilities.³² Over sixty years ago, the U.S. Supreme

23. Burke, *supra* note 13, at 93; see Hugo Adam Bedau, *Racism, Wrongful Convictions, and the Death Penalty*, 76 TENN. L. REV. 615, 619 (2009).

24. See Bedau, *supra* note 23 at 619; Burke, *supra* note 13, at 91-98.

25. See *infra* text accompanying notes 211-13.

26. See *infra* Part VII.

27. See *infra* Part IX.

28. *Berger v. United States*, 295 U.S. 78, 88 (1935).

29. Burke, *supra* note 13, at 84-85.

30. *Berger*, 295 U.S. at 88; Burke, *supra* note 13, at 85.

31. *Cone v. Bell*, 556 U.S. 449, 451 (2009) (internal quotation marks omitted).

32. See, e.g., *Berger*, 295 U.S. at 88.

Court observed that a prosecutor has responsibilities beyond that of an advocate and a higher duty to assure that justice is served:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.³³

Accordingly, in addition to “fairly present[ing] the evidence and permit[ting] the jury to come to a fair and impartial verdict,”³⁴ a prosecutor also must “properly function[] in a quasi-judicial capacity with reference to the accused . . . to see that the accused is accorded a fair and impartial trial.”³⁵ This is a difficult burden.

In short, the prosecutor’s role can be boiled down to the following functions: ascertain the strength of the evidence,³⁶ evaluate whether a jury is likely to convict the defendant,³⁷ and determine whether there is anything leading the prosecutor to doubt the evidence and question the defendant’s guilt.³⁸ In this regard, multiple individualized or situation-specific definitions of justice are unhelpful and confusing. A closer

33. *Id.*

34. Fla. Bar v. Cox, 794 So. 2d 1278, 1285 (Fla. 2001) (quoting Pendarvis v. State, 752 So. 2d 75, 77 (Fla. Dist. Ct. App. 2000)).

35. *Id.* (quoting Gonzalez v. State, 97 So. 2d 127, 128 (Fla. Dist. Ct. App. 1957)) (internal quotation marks omitted).

36. See Burke, *supra* note 13, at 84.

37. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 50 n.19 (1991) (“[D]oing justice thus requires a prosecutor to predict the appropriate result.”).

38. See ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION & DEF. FUNCTION 3-3.9(b)(i) (1993) (indicating that a prosecutor may decline to prosecute a case when she has a reasonable doubt as to the defendant’s guilt despite evidence to support a conviction). This ABA standard is unclear as to when the public good would be served if a prosecutor possessed sufficient evidence to convict an individual but declined to prosecute the case. The ABA standard reads:

The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are . . . the prosecutor’s reasonable doubt that the accused is in fact guilty

Id.

appraisal reveals that a uniform definition of justice is required if a prosecutor is to be entrusted to ensure that justice is done. Perhaps it is not as simple as convicting the guilty of the crime charged or dropping the charges if the prosecutor has doubts regarding the accused's guilt. "Justice" has been defined in the following ways: "the quality of being just, impartial, or fair;" "the principle or ideal of just dealing or right action;" "righteousness;" and "the quality of conforming to law."³⁹

Reflection on these meanings makes apparent that justice in any given situation is anything but clear. What is just, moral, or right is inevitably dependent on the personal values of those deciding the outcomes. Justice cannot accompany a bright line rule. A theory of justice that solely encompasses conviction for the guilty and release for the innocent ignores meaningful concepts such as mercy, rehabilitation, proportionality, individuality, and spirituality.⁴⁰ Among judges and scholars there is no uniformity as to what it means for a prosecutor to seek justice.⁴¹ It is opined by some that the duty to seek justice is not overly complicated because principles of justice generally overlap the standards of constitutional fairness and due process.⁴² Others maintain that to do justice is wholly dependent on the individual prosecutor's sense of morality and personal value system.⁴³ The textbook definition of "justice" inherently involves an element of "being correct" or "right."⁴⁴ This means, simply, that the outcome of the trial should be consistent with the actual facts. Therefore, if the verdict is consistent with the facts, justice will have been achieved. Consequently, for a prosecutor to determine what would be a just outcome, the prosecutor must first determine what is "correct" or "right." Thus, in the context of the criminal justice system at the trial level, the prosecutor is placed in the position of deciding whether the defendant is guilty before evidence is presented.⁴⁵ If the ethical obligation of the prosecution is to seek justice, this includes seeking appropriate punishment and determining if proceeding to trial is morally correct.⁴⁶ Without relying on an evidentiary

39. *Justice*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/justice> (last visited Sept. 2, 2015).

40. Ruth Kannai, *Preserving Proportionality in Sentencing: Constitutional or Criminal Issue*, 9 CANADIAN CRIM. L. REV. 315, 325-28 (2005).

41. Zacharias, *supra* note 37, at 48 ("The 'do justice' standard, however, establishes no identifiable norm.").

42. See Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 634 (1999).

43. See George T. Frampton, Jr., *Some Practical and Ethical Problems of Prosecuting Public Officials*, 36 MD. L. REV. 5, 8 (1976).

44. See *Justice*, *supra* note 39.

45. Burke, *supra* note 13, at 84-85.

46. Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging*

standard appropriate to convict an individual at trial, one cannot make such decisions without making a personal judgment regarding the guilt of the accused.

To make matters more complex, appended to prosecutors' obligation to do justice is the duty to uphold public faith in the judicial system.⁴⁷ Consequently, coupled with the duty to do justice, the prosecutor must consider public opinion, due process, and general issues of fairness.⁴⁸ As will be discussed below, the public's faith in the justice system has little to do with justice.⁴⁹ In part, this is a result of the fluid and individualized nature of justice. Community consensus invariably differs with regard to whether particular outcomes are just or fair. Attempts to reconcile public opinion with just outcomes are futile and would hinder a prosecutor's ability to seek fair and equitable results. Thus, the prosecutor's ethical obligations are nearly insurmountable.

B. A Prosecutor's Case Must Be Supported by Probable Cause

Pursuant to Rule 3.8 of the Model Rules of Professional Conduct, "[t]he prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause"⁵⁰ In addition to the belief intrinsically required in seeking justice, the definition of "probable cause" also logically includes a personal belief in guilt: "The requisites of probable cause for [the] prosecution are: (1) *accuser must believe accused did the act charged*; and (2) such belief must be reasonable"⁵¹ Additionally, "probable cause" is defined as "such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe or entertain an honest and strong suspicion that the person arrested is guilty."⁵²

Discretion, 20 FORDHAM URB. L.J. 513, 524 (1993).

47. Galin, *supra* note 7, at 1268.

48. *See id.* at 1269-70.

49. *See infra* Part VIII.

50. MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2014); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION & DEF. FUNCTION 3-3.9(a) (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.").

51. *Johnston v. Zale Corp.*, 484 S.W.2d 531, 534 (Tenn. 1972) (internal quotation marks omitted) (quoting *Dunn v. Ala. Oil & Gas Co.*, 299 S.W.2d 25, 27 (Tenn. Ct. App. 1956) (emphasis added)); *see Burke, supra* note 13, at 84-86.

52. *Birwood Paper Co. v. Damsky*, 229 So. 2d 514, 521 (Ala. 1969) (quoting *Hanchey v. Brunson*, 175 Ala. 236, 240 (1911)); *see also Hyman v. N.Y. Cent. R.R. Co.*, 147 N.E. 613, 615 (N.Y. 1925) ("Probable cause consists of such facts and circumstances as would have led a reasonably prudent man in like circumstances to have believed the plaintiff guilty of an intent to violate the law.").

The probable cause standard serves as the criteria that must be met to begin several stages of a criminal case: police detention; police search; arrest; incarceration resulting from a bond hearing; incarceration resulting from an adversary preliminary hearing; prosecutorial filing of charges; and prosecutorial progression to trial.⁵³ Each of these stages involves substantially different degrees of intrusion into a defendant's privacy and risks of wrongful incarceration or conviction.⁵⁴ Yet, the standard remains the same for each.

The probable cause standard is one of the lowest standards in criminal law.⁵⁵ At a bond hearing, adequate probable cause can be found if the arrest affidavit contains a narrative with facts sufficient to support each element of the crime alleged on the arrest affidavit.⁵⁶ Arrest forms are usually only one page long, and are very rarely longer than two or three pages.⁵⁷ The arrest affidavit, which serves as the sole support to hold an accused in jail while the case is investigated,⁵⁸ is written prior to any investigation by the prosecutor's office.⁵⁹ If the arrest form does not reflect one of the elements of the crime charged, the case may be

53. See, e.g., Brett Hambright, *Supreme Court: Pennsylvania Cops No Longer Need a Warrant to Search Citizens' Vehicles*, LANCASTERONLINE (Apr. 30, 2014, 10:55 AM) http://lancasteronline.com/news/local/supreme-court-pennsylvania-cops-no-longer-need-a-warrant-to/article_6a407fc6-d077-11e3-8025-0017a43b2370.html; Fiona Ortiz, *Illinois Wife-Killer Cop Pleads Not Guilty in Murder-For-Hire Plot*, REUTERS (Mar. 3, 2015), <http://www.reuters.com/article/2015/03/03/us-usa-illinois-crime-idUSKBN0LZ2F120150303>.

54. Compare Kashmir Hill, *Supreme Court Thinks DNA Collection Is Awesome, Worth the Invasion of Arrestees' Privacy*, FORBES (June 3, 2013, 6:30 PM), <http://www.forbes.com/sites/kashmirhill/2013/06/03/supreme-court-thinks-dna-collection-is-awesome-worth-the-invasion-of-arrestees-privacy> (discussing the Supreme Court's decision upholding the constitutionality of a Maryland statute authorizing DNA collection from all felony arrestees), with James C. McKinley, *Facebook Lawsuit Over Search Warrants Can Proceed, a Court in Manhattan Rules*, N.Y. TIMES, Sept. 26, 2014, at A24 (discussing a lawsuit filed by Facebook against the Manhattan district attorney's office opposing warrants authorizing the officials to search personal profiles of Facebook users).

55. See *Locke v. United States*, 11 U.S. 339, 348 (1813) ("[T]he term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation . . .").

56. See 5 AM. JUR. 2D *Arrest* § 19 (2007).

57. See FED. R. CRIM. P. 4(b)(1) (describing what is required for a federal arrest warrant); 10A AM. JUR. PLEADING AND PRACTICE FORMS *False Imprisonment* § 70 (2005) (explaining when an arrest form is fair on its face). Arizona's standard arrest warrant constitutes a perfect example of what is usually required within an arrest form. ARIZ. R. CRIM. PROC. 41, form 2(a) (2015).

58. See FED. R. CRIM. P. 4(b)(1); 5 AM. JUR. 2D *Arrest* § 19 (2007) ("An affidavit supporting an arrest warrant must provide the magistrate with sufficient information to support an independent judgment that probable cause exists to believe that the accused has committed an offense . . .").

59. See 5 AM. JUR. 2D *Arrest* § 19 (2007). This is true for the majority of state cases, but does not include federal cases where the U.S. Attorney may become involved at a much earlier time. See, e.g., U.S. Attorney's Office N. Dist. of Ga., *Criminal Division*, JUSTICE.GOV, <http://www.justice.gov/usao-ndga> (last visited Sept. 2, 2015) (discussing how the U.S. Attorneys investigate and prosecute cases).

continued for up to thirty days for the arresting officer to appear in court to testify to the elements of the crime.⁶⁰ This hearing is known as an adversarial preliminary hearing (“APH”).⁶¹ The witnesses in an APH are subject to cross-examination,⁶² and the accused may be incarcerated if mere probable cause is found.⁶³ There is no requirement for the prosecutor to believe that the accused is guilty at this stage of the proceedings. In fact, the prosecutor generally will not have any knowledge about the case at this time; therefore, a belief in the defendant’s guilt would be unfounded at this stage of the proceedings. This is because the prosecutor who attends the APH is usually a different prosecutor than the one who initially takes the witnesses’ statements (termed “pre-file statements”) when the case first arrives at the prosecutors’ office. This intake prosecutor also determines if and what charges will be filed. The “pre-file” prosecutor transfers the case to the trial attorney once she completes taking witness statements and makes her filing decision.

The legal definition of “probable cause” remains the same for each prosecutor and for each stage of the case, as there is no legal authority stating otherwise. Although it is clear that the prosecutor must believe that the defendant is guilty to proceed to trial,⁶⁴ it appears that this requirement is either ignored by the prosecutor until the time of trial, or the belief-in-guilt concept is imputed from the arresting officer at the time of arrest.⁶⁵ This leaves unanswered the role of belief-in-guilt in the equation at bond hearings, pre-trial hearings, and at any stage before the prosecution has had an adequate opportunity to appraise a defendant’s culpability through discovery and investigation. Although the evidence to arrest is minimal, no further evidence is required to proceed to seek a conviction.⁶⁶ Thus, although the definition of probable cause remains the same, there appears to be some ambiguity in its application and interpretation depending on the stage of the proceedings. Given that prosecutors’ ethical duties include seeking justice, it is counter-intuitive

60. See FLA. R. CRIM. P. 3.133(b), 3.134. For example, if on a grand theft charge, the officer did not include the value of the property, then the arrest form would lack probable cause because the element of value is missing.

61. See *id.* at 3.133(b)(1).

62. See *id.* at 3.133(b)(3).

63. See *id.* at 3.133(b)(5). This is only true if the judge does not use her discretion and grant pre-trial release or bond. The adversaries may also reach an agreement regarding the accused’s release. *Id.*

64. See Gershman, *supra* note 46, at 522.

65. Leonard R. Mellon et al., *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & CRIMINOLOGY 52, 73 (1981).

66. *Id.*

to conclude that the prosecution could ethically proceed to prosecute without a higher evidentiary standard than probable cause.

C. *Value of the Prosecution's Personal Belief Standard*

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

For example, prosecutors may overhear police officers make comments that lead them to question the defendant's guilt or otherwise become privy to information that indicates the defendant is innocent. For the most part, the prosecution's obligations established under *Brady v. Maryland*⁶⁷ and *Giglio v. United States*⁶⁸ should remedy these situations. *Brady* and *Giglio* impose on the prosecution a duty to learn and disclose to the defense all "favorable" and "material" information "known to the others acting on the government's behalf in the case, including the police."⁶⁹ *Brady* endorses the role of the prosecutor as a seeker of justice,

67. 373 U.S. 83 (1963).

68. 405 U.S. 150 (1972).

69. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995); *Giglio*, 405 U.S. at 150; *Brady*, 373 U.S. at 87. In *Brady v. Maryland*, Brady had confessed to murder, but argued that he should not get the death penalty because he did not perform the actual killing. 373 U.S. at 84. The Government did not disclose to Brady that the co-defendant admitted to performing the killing. *Id.* The Court found that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. It is often overlooked that the Court employed a fairly lenient materiality standard in *Brady*. See Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1543-44 (2010). The suppressed confession by the co-defendant also stated that Brady likewise wanted to kill the victim, but that Brady wanted to strangle the victim and the co-defendant wanted to shoot him. *Brady*, 373 U.S. at 88. Even so, the Court held that the confession would have been favorable to Brady and found a due process violation. *Id.* at 86.

In *Giglio v. United States*, a key witness testified that he and Mr. Giglio forged \$2300 in money orders, and the witness believed he "still could be prosecuted." 405 U.S. at 151. The government argued in closing that the witness "received no promises that he would not be indicted." *Id.* at 152 (internal quotation marks omitted). But, in fact, the grand jury prosecutor had, unbeknownst to the trial prosecutor, promised the witness that, if he testified before the grand jury, he would not be indicted. *Id.* The trial prosecutor denied any knowledge of the promise and, thus, denied any knowing use of false testimony. *Id.* at 152-53. The Court clarified that the *Brady* disclosure obligation does not turn on the trial prosecutor's actual knowledge of the information. *Id.* at 154-55. The Court imputed the promise of the first prosecutor to the entire office, holding that the burden should be placed on the Government to develop procedures to ensure that "all relevant information" is communicated to each lawyer who handles any case. *Id.* The Court explained that "[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [*Brady*]." *Id.* at 154 (internal quotation marks omitted). The court further expounded that reversal under *Brady* requires a finding of

stating: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."⁷⁰ *Brady* affirmed that a prosecutor should not be the "architect of a proceeding that does not comport with standards of justice."⁷¹

However, not every situation where a prosecutor is aware of information that points to innocence falls under *Brady* or *Giglio*. For example, imagine that a prosecutor interviews the arresting officer on a drug case and the officer recounts the exact same facts as he did in the last two drug cases. The officer may describe the details of the case so similarly to the previous two drug cases that the prosecutor is led to the conclusion that the officer is not truthful. However, her personal opinion that the officer is lying is not likely to fall under *Brady*, or even *Giglio*.⁷² If the prosecutor were held to a belief-in-guilt standard, she would be obligated to cease prosecuting the case. Without the personal belief standard, she would be free to proceed with the prosecution. This example epitomizes the purpose of the belief-in-guilt standard. However, this benefit fails to mitigate the damage done by the bias the belief standard may cause in the investigation and decision-making process. Furthermore, in the real world, prosecutors routinely focus on obtaining high conviction rates, seeking promotions, receiving raises, and cultivating good reputations.⁷³ Additionally, many prosecutors believe that a high conviction rate is synonymous with justice and satisfies the community's demand for convictions.⁷⁴

D. Prosecutors Fail to Adhere to Their Ethical Standards

For a variety of reasons, prosecutors often do not abide by the above discussed ethical requirements. This is not surprising given the complexities of the requirements. Furthermore, prosecutors experience a

materiality (though what "materiality" means will evolve), which is defined as a showing that the withheld evidence could "in any reasonable likelihood have affected the judgment of the jury." *Id.*

70. *Brady*, 373 U.S. at 87.

71. *Id.* at 88.

72. See Medwed, *supra* note 69, at 1541-42.

73. See Zacharias, *supra* note 37, at 58-60.

74. See M. Victoria Cole, *How Can You Sleep at Night?: Leaving a Prosecution Practice for Private Defense Work*, in *TRANSITIONING FROM PROSECUTOR TO DEFENSE ATTORNEY: LEADING LAWYERS ON ESSENTIAL STRATEGIES FOR CONSIDERING AND ADAPTING TO A NEW PROFESSIONAL PERSPECTIVE* 125, 137 (2012) ("As a prosecutor, I used to measure my success by rate of conviction."); see also Brian H. Bornstein & Sean G. McCabe, *Jurors of the Absurd? The Role of Consequentiality in Jury Simulation Research*, 32 FLA. ST. U. L. REV. 443, 454 (2005) ("[Study] results . . . suggested higher conviction rates when participants believed they were participating in a real trial . . .").

number of compelling incentives to not strictly follow their ethical guidelines.

1. Prosecutorial Incentive to Obtain Convictions

Given that prosecutors are not provided adequate ethical guidelines, evidentiary or otherwise, it becomes too easy for prosecutors to neglect their duty to do justice by genuinely believing in the defendant's guilt.⁷⁵ Personal conflict, ethical dilemmas, and moral questions stem from the personal belief standard. Since prosecutors have many incentives to proceed with trials and to seek convictions, this route is more comfortable for many prosecutors and comports with some aspects of their ethical obligations.⁷⁶ They are compelled by community and intra-office pressures to obtain convictions,⁷⁷ and they are motivated by the status, reputation, and personal feelings of success that come along with a high conviction rate.⁷⁸ Further, prosecutors are not commended for dropping cases, even when guilt is in question.⁷⁹ As discussed above, justice is an imprecise concept and highly individualized for each particular case and defendant.⁸⁰ How well a prosecutor obtains justice, and performs fairly and ethically, is difficult to gauge. Conviction rate, however, is a quantifiable aspect of trial work. Somebody wins and somebody loses. In fact, the only quantifiable measure that a prosecutor can point to that can demonstrate her success is her conviction rate. It is logical, then, that an individual prosecutor, as well as her supervisors, will measure her success by her conviction rate. However, pursuit of a high rate of conviction as the top priority is in violation of the prosecutor's obligation to seek justice.⁸¹ Often, justice will not involve a conviction. To only pursue convictions leaves justice unaddressed. Nevertheless, a high conviction rate is likely to impress the public and indicate an efficient and effective prosecutor.⁸²

75. See Burke, *supra* note 13, at 83-84; Rachel Pecker, Note, *Quasi-Judicial Prosecutors and Post-Conviction Claims of Innocence: Granting Recusals to Make Impartiality a Reality*, 34 CARDOZO L. REV. 1609, 1621, 1635 (2013).

76. See Burke, *supra* note 13, at 84-86; Zacharias, *supra* note 37, at 58-59.

77. Deborah Mostaghel, *Wrongfully Incarcerated, Randomly Compensated—How to Fund Wrongful-Conviction Compensation Statutes*, 44 IND. L. REV. 503, 506 (2011); Pecker, *supra* note 75, at 1617-18; Zacharias, *supra* note 37, at 58-59.

78. See Cole, *supra* note 74, at 137; Zacharias, *supra* note 37, at 58 n.63 ("For elected prosecutors, publicity about trial successes is essential to campaigns. For subordinated [sic] prosecutors in larger offices, promotion and internal evaluation depends largely on the ability to produce convictions.").

79. See Pecker, *supra* note 75, at 1618.

80. See *supra* Part II.A.

81. See Mostaghel, *supra* note 77, at 506; Zacharias, *supra* note 37, at 58-59.

82. See Mostaghel, *supra* note 77, at 506. Not only do convictions generally gratify the public but they satisfy the senior staff attorneys and supervisors:

Public attitude in the United States reflects a desire for the criminal justice system to be “tough on crime” and for prosecutors to secure many convictions and harsh, lengthy prison sentences.⁸³ Given that part of the prosecutor’s role is to sustain the public’s faith in the criminal justice system, methods that result in high conviction rates are likely to satisfy this obligation. Such a policy, although rewarding for the prosecutor, clearly ignores the requirements of justice.

It is no surprise that prosecutors simply seek convictions. Prosecutors are given a set of ethical rules and guidelines that are not only in opposition to each other, but unmanageable. First, prosecutors are expected to assess probable cause despite its unclear definition.⁸⁴ Second, they are expected to seek justice when the tools to ascertain a just result are not available to them prior to trial.⁸⁵ Third, they are expected to maintain public confidence in the criminal justice system.⁸⁶ Fourth, their superiors assess their performance based on the number of convictions they secure.⁸⁷ These mandates conflict with one another; to accomplish all four is simply not possible. As a practical matter, prosecutors have no choice but to concern themselves with job security, performance reviews, and promotions. Hence, prosecutors most often choose to seek the conviction.

In fact, prosecutors with higher conviction rates advance more quickly financially and to more prestigious positions within the office.

[I]ncentives within the prosecutorial system may influence prosecutors to obtain convictions. Individually, prosecutors with high conviction rates are more likely to advance on the job and so may overzealously pursue easy targets. Institutionally, district attorneys who show high conviction rates may be able to garner more resources than those who seem to be less successful.

Id. (footnotes omitted).

83. Jamien A. Arvie, *Prosecutorial Misconduct: When Justice Is Seen as a Chess Game, the Pawns of Professional Responsibility and Ethical Standards Are Sacrificed*, 40 S.U. L. REV. 185, 189 (2012) (“Today, the district attorney, an elected official, is usually faced with pressure from the public for high conviction rates and ‘tough on crime’ political platforms.”); Johnnie L. Cochran, Jr., *How Can You Defend Those People?*, 30 LOY. L.A. L. REV. 39, 40 (1996).

84. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“In the ordinary case, ‘so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.’” (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978))).

85. See Green, *supra* note 42, at 615-16. The adversarial system is the means by which justice is ascertained and the method by which truth should be revealed. The prosecutor’s mandate to seek justice would require the prosecutor to find and to know the truth in advance of the established truth finding procedure—the trial.

86. Galin, *supra* note 7, at 1268.

87. Mostaghel, *supra* note 77, at 506; see Sabrina C. Narain, *A Failure to Instill Realistic Ethical Values in New Lawyers: The ABA and Law School’s Duty to Better Prepare Lawyers for Real Life Practice*, 41 W. ST. U. L. REV. 411, 422-24 (2014).

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

2. Prosecutorial Charging Methods Reflect the Prosecutor's Lack of Belief in the Defendant's Guilt

Generally, once an arrest is made, the prosecutor's office begins the process of determining whether charges will be filed.⁸⁸ Typically, this involves interviewing the police and witnesses in what is often known as pre-file conferences.⁸⁹ Charging decisions are most often based on these interviews. In larger cities, the prosecutor who conducts the pre-file investigation is rarely the same as the trial prosecutor.⁹⁰ As a consequence of this procedure, many prosecutors who first obtain responsibility for a case at the trial level make the assumption that the police and previous prosecutors already assessed the defendant's guilt and strength of the evidence.⁹¹

A review of generally accepted prosecutorial practices would lead one to infer that prosecutors are indeed focused on obtaining a conviction irrespective of the accused's factual culpability. For example,

88. See Burke, *supra* note 13, at 86-87; see also *Standard Practices – Prosecutorial Processing Introduction*, N.Y. ST. DIVISION CRIM. JUST. SERVICES, <http://www.criminaljustice.ny.gov/stdpractices/prosec.htm> (last visited Sept. 2, 2015) (outlining the prosecutorial process for New York state prosecutors).

89. See ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION & DEF. FUNCTION 3-3.1 (1993); see also *Steps in a Criminal Case*, MONROE COUNTY, http://www.co.monroe.mi.us/government/departments_offices/prosecuting_attorney/steps_in_a_prosecution.html (last visited Sept. 2, 2015) (demonstrating how a typical investigation process will proceed). □

90. See Burke, *supra* note 13, at 98 & n.95 ("In many prosecutors' offices, initial charging decisions are made by different attorneys than the prosecutors who are responsible for case management and trial."); see also James C. Backstrom & Gary L. Walker, *The Role of the Prosecutor in Juvenile Justice: Advocacy in the Courtroom and Leadership in the Community*, 32 WM. MITCHELL L. REV. 963, 967-68 (2006) (discussing the benefits of assigning the same prosecutor from an initial charging through disposition and the unlikelihood of this occurrence in larger jurisdictions).

91. Burke, *supra* note 13, at 98 n.95; George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 112 (1975).

prosecutors routinely overcharge defendants.⁹² Overcharging is when a prosecutor is confident that the accused committed a crime, but charges the accused with a more serious crime.⁹³ The crime that the prosecutor is convinced that the defendant committed is presented to the jury as a “lesser-included offense.”⁹⁴ In this manner, a prosecutor can attempt to obtain a conviction for a more serious crime, although she harbors doubts about the sufficiency of the evidence.

Prosecutors also regularly charge defendants with multiple inconsistent charges.⁹⁵ This can occur, for example, if a defendant is arrested in possession of a stolen boat. Assume the prosecution not only has evidence that the defendant stole the boat (grand theft), but also evidence that the defendant bought the boat knowing it was stolen (dealing in stolen property), instead of stealing it himself. As a consequence, the prosecution might charge the defendant with inconsistent charges by charging the accused with both grand theft and dealing in stolen property. This is true even though it is impossible for the defendant to be factually or legally guilty of both charges with these particular facts.

Similarly, prosecutors frequently present the jury with inconsistent theories.⁹⁶ When the prosecution chooses to prosecute inconsistent theories or charges, usually in cases with co-defendants, it demonstrates that the prosecution lacks a subjective belief in at least one of the theories. This tends to be true when the theories are in tension with each other, and must be true when the theories are mutually exclusive.⁹⁷ For instance, if a husband and wife are both charged with the death of their

92. Burke, *supra* note 13, at 86-87; Felkenes, *supra* note 91, at 119.

93. Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 703-05 (2014).

94. Burke, *supra* note 13, at 86-87; Graham, *supra* note 93, at 701, 703-05. A “lesser-included offense” is “an offense necessarily included in the offense charged.” FED. R. CRIM. P. 31(c)(1); 22 MICHAEL E. ALLEN, 22 WEST’S FLORIDA PRACTICE SERIES: FLORIDA CRIMINAL PROCEDURE 753-54 (2009 ed.) (“[F]or example, [] simple battery, a first degree misdemeanor . . . is a necessarily lesser included offense of aggravated battery, a second degree felony . . .” (footnotes omitted)); see Burke, *supra* note 13, at 86. The following represents a common example of prosecutorial overcharging where the prosecutor likely is not convinced that justice would be served if the defendant was found guilty of an Aggravated Assault as opposed to a Simple Assault:

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.

Burke, *supra* note 13, at 86.

95. Burke, *supra* note 13, at 87-88.

96. *Id.*; English, *supra* note 9, at 542-43.

97. Brandon Buskey, *If the Convictions Don’t Fit, You Must Acquit: Examining the Constitutional Limitations on the State’s Pursuit of Inconsistent Criminal Prosecutions*, 36 N.Y.U. REV. L. & SOC. CHANGE 311, 314 (2012); see, e.g., *Bankhead v. State*, 182 S.W.3d 253, 254, 259 (Mo. Ct. App. 2006).

child by beating the child to death, causation becomes an issue. In such a case, the wife and the husband will likely have separate jury trials. During the wife's trial, prosecutors may place responsibility for the fatal injury on the wife. Conversely, and inconsistently, at the husband's trial, the prosecution may place responsibility for the fatal injury on the husband. Generally, other than in limited circumstances, a prosecutor may not present evidence wholly contrary to evidence presented in another proceeding. To do so is unconstitutional.⁹⁸ Plainly, the prosecutor does not embrace a belief in guilt regarding at least one of the parents. However, such a prosecutor may be comfortable with these trial tactics given her concept of justice in that particular case. This may be true if she feels that both parents morally deserve the punitive outcomes that would likely result from the most serious convictions. As discussed, justice may differ by individual, by jury, by judge, and by community. Justice, as a theory embracing truth and fairness, more often than not provides moral quandaries and predicaments. It is for this reason that our culture created procedures and policies to support the criminal justice system.

Although justice is flawed, at best, if its administrators would respect and abide by its procedural imperatives, the country would suffer far fewer injustices. It is far too easy to side-step the appropriate process in the name of justice. Prosecutorial belief in guilt and a personal version of justice often results in a disregard for the means to reach a "just" end.⁹⁹ Although, in specific circumstances, it is legal for the prosecution to provide incentives to individuals in exchange for their testimony against the accused.¹⁰⁰ These witnesses are commonly referred to as

98. See, e.g., *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J., concurring). In *Drake v. Kemp*, the State sent Drake to death row after disavowing the theory used to condemn his co-defendant Campbell in a previous trial. *Id.* at 1452, 1479. The Eleventh Circuit found that the prosecution's argument was an improper tactic. *Id.* at 1458-59. In his special concurring opinion, Judge Clark said that the prosecutorial inconsistency implicated the defendant's due process, invoking the prohibition against a prosecutor's soliciting or failing to correct evidence known by the State to be false. *Id.* at 1479. Judge Clark reasoned that the prosecutor's "theories of the same crime in the two different trials negate one another." *Id.* While acknowledging that the prosecutor's actual beliefs were impossible to discern, Judge Clark charged that the prosecutor's incompatible positions required the State's endorsement of a known falsity. *Id.* Addressing prejudice, Judge Clark concluded that the prosecutor's actions prejudiced both defendants, since the State's "flip flopping of theories" resulted in both convictions and death sentences for both men. *Id.*

99. See *supra* Parts II.A, II.D.1.

100. See *United States v. Singleton*, 165 F.3d 1297, 1298-99, 1301-02 (10th Cir. 1999); Saul Levmore & Ariel Porat, *Asymmetries and Incentives in Plea Bargaining and Evidence Production*, 122 YALE L.J. 690, 692-93 (2012). Some such incentives are as follows:

[T]he government—but not the defense—is able to reward witnesses in criminal cases with certain nonmonetary inducements, including agreements to seek reduced penalties, or even not to prosecute at all in both related and unrelated cases. If a witness is already

“snitches.”¹⁰¹ In multiple-defendant cases, prosecutors often offer several of the defendants very low plea deals in exchange for their testimony against the other defendants.¹⁰² Often, snitches may do no jail time at all, even on serious offenses such as murder.¹⁰³ Sometimes, the prosecution will recruit whoever is willing to “flip” on their co-defendant.¹⁰⁴ Often, the prosecution targets a particular individual to prosecute and actively seeks snitches to testify against him.¹⁰⁵ At times, it is clear why a particular defendant is the target; but quite often, it is a mystery why a particular individual is the focus of the prosecution. Further, it is not unusual for a defendant to be convicted of a serious offense, even murder, based solely on the testimony of snitches.¹⁰⁶ This can be true even when the snitches themselves have admittedly committed multiple murders and have lengthy records, while the accused may have little to no record at all.¹⁰⁷ It is exceedingly difficult to accept that prosecutors hold personal the beliefs based on evidence that the defendants in these circumstances are guilty.

III. DEFENSE ATTORNEYS’ ETHICAL STANDARDS

Defense attorneys, on the other hand, have the ethical responsibility to zealously advocate for their clients to the outermost bounds of the law.¹⁰⁸ This is true at all stages of a criminal prosecution, from pre-trial hearing through post-conviction.¹⁰⁹ In contrast to a prosecutor’s ethical

incarcerated, the government can offer to improve the conditions of confinement.

Id. (footnotes omitted).

101. Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 107 & n.1, 110-11 (2006).

102. See *Singleton*, 165 F.3d at 1301-02 (holding that the government may exchange leniency for testimony against a co-defendant).

103. Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 578 (1999); see also David Rennie, *Hoover Let FBI’s Mafia Snitches Get Away with Murder*, TELEGRAPH (Nov. 22, 2003, 12:00 AM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1447439/Hoover-let-FBIs-Mafia-snitches-get-away-with-murder.html> (recounting reports of allowing mafia informants lie on the witness stand about circumstances surrounding murders).

104. See Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1328-29 (2003). A defendant “flips” when he “defects” and agrees to testify for the government, in exchange for leniency in sentencing, against his codefendant, usually implicating himself in the process. See *id.*

105. See *id.* at 1395 n.325.

106. Aaron Cantú, *Ring of Snitches: How Detroit Police Slapped False Murder Convictions on Young Black Men*, TRUTH-OUT (Mar. 31, 2015), <http://www.truth-out.org/news/item/29950-ring-of-snitches-how-detroit-police-slapped-false-murder-convictions-on-young-black-men>.

107. See Natapoff, *supra* note 101, at 110-12, 125-26; Rennie, *supra* note 103.

108. See MODEL RULES OF PROF’L CONDUCT, Preamble and Scope para. 2 (2014); Mann, *supra* note 10, at 732-35; see also ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION & DEF. FUNCTION 4-1.2, 4-1.2 cmt. at 122 (1993).

109. See MODEL RULES OF PROF’L CONDUCT, Preamble and Scope paras. 2, 9 (2014).

obligations, a defense attorney's ethical mandate does not require judgment of her client's guilt or innocence.¹¹⁰ The defense attorney, therefore, enjoys a much more straightforward duty. Despite the defense attorney's unambiguous objective, defense attorneys are human and are, thus, subject to the same natural predispositions as prosecutors. The defense attorney should not reach conclusions regarding her client's guilt or concern herself with the prisoner's culpability beyond what is necessary for a full investigation of the case.¹¹¹ Nonetheless, it is natural for the defense attorney to speculate regarding her client's guilt and even develop firm beliefs regarding his guilt. Such a personally held belief in guilt risks the inadvertent or unconscious failure of the defense attorney to represent the client with enthusiasm and diligence.¹¹² This is true because pre-trial beliefs represent firm and fixed biases, and these beliefs may be inconsistent with the facts.

A. Innocence Programs

At the post-conviction stage, specifically within innocence programs, defense attorneys regularly and voluntarily adopt a "belief-in-innocence" standard.¹¹³ These innocence programs are limited representation agencies—meaning the programs will only represent or continue to represent the client as long as the client maintains his innocence and the evidence continues to support innocence.¹¹⁴ The vast majority of innocence projects also require that they believe the inmate is innocent.¹¹⁵ Innocence programs often choose to adopt a belief-in-innocence criterion in order to assure that their limited resources are

110. See ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION & DEF. FUNCTION 4-1.2 (1993) ("The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.").

111. See Robert P. Mosteller, *Why Defense Attorneys Cannot, But Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1, 63 (2010). Defense attorneys should understand "guilty" and "innocent" to be legal terms, as opposed to a measure of moral aptitude. See Terence F. MacCarthy & Kathy Morris Mejia, *The Perjurious Client Question: Putting Criminal Defense Lawyers Between a Rock and a Hard Place*, 75 J. CRIM. L. & CRIMINOLOGY 1197, 1197 n.1 (1984); see also F. Randall Karfonta, *Balancing the Scales of Justice: Training and Support Services for Appointed Criminal Defense Lawyers*, MICH. B.J., Feb. 1992, at 164, 164 ("For the criminal defense lawyer, zealous advocacy means vigorous investigation of every viable line of defense and equally vigorous presentation of defenses and mitigating circumstances.").

112. Mosteller, *supra* note 111, at 62-64.

113. Medwed, *supra* note 20, at 1101, 1103-04; Suni, *supra* note 20, at 924-26.

114. Medwed, *supra* note 20, at 1103-04; Suni, *supra* note 20, at 929.

115. See Medwed, *supra* note 20, at 1101, 1103-05; Jan Stiglitz et al., *The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education*, 38 CAL. W. L. REV. 413, 431 (2002) ("In screening each file, the students have to make two determinations: do they believe the client is innocent and can they prove it?"); Suni, *supra* note 20, at 924-26.

devoted to the most deserving of clients.¹¹⁶ Further, the belief-in-innocence mandate is often more appealing to potential donors and on grant applications.¹¹⁷ Nonetheless, even if an innocence organization maintains that representation is contingent on the organization's belief in the client's innocence, the ethical and discovery obligations of the defense remain the same.

*B. Assessing the Value of a Defense Attorney's Post-Conviction
Belief-in-Innocence Standard*

On its face, the belief-in-innocence standard has greater import for an innocence clinic. The defense attorney is not bound by the *Brady* or *Giglio* duty.¹¹⁸ Thus, if the defense attorney uncovers incriminating evidence, she is under no obligation to disclose this information to the prosecution.¹¹⁹ In fact, if she did, she would in most instances violate her ethical duties.¹²⁰ Yet, innocence programs fully expect to encounter incriminating evidence. Their clients have already been convicted of the crime, and therefore, there was necessarily incriminating evidence presented to the jury at trial. By claiming innocence, innocence program clients are often claiming the incriminating evidence from trial was false or flawed.¹²¹ Often, the clients are claiming that exculpatory evidence was not developed or presented.¹²²

Frequently, during an innocence program's investigation of a case, only additional incriminating evidence will be uncovered.¹²³ Since most

116. Medwed, *supra* note 20, at 1103-05.

117. *Id.* at 1105-06; Suni, *supra* note 20, at 929 n.38.

118. See *Giglio v. United States*, 405 U.S. 150, 154 (1972) (accentuating the responsibilities of a prosecution office because it is a government entity); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (emphasis added)).

119. Lisa M. Kurcias, Note, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1207, 1212 n.55 (2000).

120. See MODEL RULES OF PROF'L CONDUCT R. 1.6(a)-(b) (2014); Kurcias, *supra* note 119, at 1212 n.5 ("[T]he defense attorney is entitled, and may be professionally bound, to withhold material evidence . . .") (quoting MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 214 (1st ed. 1990)).

121. See Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 437-40 (2011); *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction> (last visited Sept. 2, 2015) (discussing the common causes for wrongful convictions such as eyewitness identifications, false confessions or admissions, forensic science, and informants).

122. See Orenstein, *supra* note 121, at 426-27, 437-38.

123. See *Frequently Asked Questions*, MID-ATLANTIC INNOCENCE PROJECT, <http://www.exonerate.org/contact/request-help/frequently-asked-questions> (last visited Sept. 2, 2015).

innocence programs are limited representation programs, they are under no obligation to proceed to defend a client who does not have a meritorious claim to actual innocence.¹²⁴ The representation is based both on a valid claim of innocence and the client's assertion of actual innocence.¹²⁵ Many projects use the "belief" criteria as a means to determine whether to proceed with the case when both incriminating and exculpatory evidence is present.¹²⁶ It is also used as a check to avoid filing motions where the incriminating evidence heavily and clearly outweighs the exculpatory evidence.¹²⁷

IV. THE ADVERSARIAL SYSTEM

Our adversarial system's elementary premise is that partisan advocacy representation for both sides of a case will foster the goal of justice: that the guilty are convicted and the innocent go free.¹²⁸ A criminal trial is a fact-finding process. No aspect of advocacy is more important than to marshal the evidence for each side before submission of the case to judgment. The parties in the adversarial system are not the decision-makers, although many enter the trial already decided. Should either the prosecution or defense claim to know the truth or the appropriate decision prior to a trial, justice is put at serious risk. The role of both parties is to investigate the evidence and prepare it for trial. The prosecutor is expected to be objective.¹²⁹ The concept of being "completely objective" is, to some extent, a meaningless phrase. To be 100% objective is beyond any individual's capability in a complex situation like a trial. To be entirely objective in this regard is not an achievable task. However, all participants are capable of self-observation, self-monitoring, and following the rules and procedures of litigation. It is important to underline that the adversarial system itself defines the role of each attorney participant. Each has a different role to play in the legal drama that is a criminal trial. Those roles are pre-determined and polarized. Consequently, it is clear that the structure of the judicial system and the roles of the defense and the prosecution strongly influence the pre-trial disposition of each attorney.¹³⁰ How can either the defense or prosecution exhibit the distanced objectivity toward

124. Suni, *supra* note 20, at 929.

125. *Id.*

126. See Medwed, *supra* note 20, at 1103-05.

127. See Suni, *supra* note 20, at 924-26.

128. *Herring v. New York*, 422 U.S. 853, 862 (1975).

129. See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 847-52 (2004).

130. See Orenstein, *supra* note 121, at 426-27.

the case and oneself and at the same time fully fulfill their legal responsibilities? The official doctrine for each discipline demands that they resolve a paradox; they are asked to perform an impossible task.¹³¹

It is human nature to make judgments and to speculate regarding the guilt or innocence of the accused. Yet, under the current ethical obligations, a prosecutor is directed to make a personal decision about the defendant's guilt prior to trial or any of the adversarial process.¹³² The ethical obligations of the prosecution and the voluntary guidelines adopted by many innocence programs require the parties to ascertain their opinion of the truth prior to the truth-finding process.¹³³ However, the system of justice used in the United States relies on the well-tested principle that the truth is best revealed by zealous arguments and debate by both sides of the issue.¹³⁴

In the U.S. criminal justice system, the adversarial nature of the trial is intended to reveal the truth. More specifically, in the courtroom, the procedure of cross-examination is the most effective tool for disclosing the truth.¹³⁵ The opportunity for cross-examination is protected by the Confrontation Clause of the Sixth Amendment.¹³⁶ It is through cross-examination that the believability of a witness' testimony is tested.¹³⁷ In fact, the Supreme Court has recognized that cross-examination is the "greatest legal engine ever invented for the discovery of truth."¹³⁸ Thus, it is within the courtroom that the truth is revealed. Further, cross-examination is highly contingent on the performance of the lawyers involved. Through the proper performance of a cross-examination testing the veracity of a witness, a trial attorney has the unique ability to uncover truth. Justice cannot be served when facts are inadequately developed with direct testimony, when an attorney fails to conduct a proper cross-examination, or when an attorney fails to call a witness

131. See ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION & DEF. FUNCTION 4-1.2 cmt. at 122 (1993); Zacharias, *supra* note 37, at 57-58.

132. See *supra* Part II.C.

133. See *supra* Parts II.C., III.B.

134. See *Penson v. Ohio*, 488 U.S. 75, 84 (1988) ("The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question.") (internal quotation marks omitted).

135. See *Davis v. Alaska*, 415 U.S. 308, 316 (1974); Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 586-88 (1988).

136. U.S. CONST. amend VI; *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987) ("The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process.").

137. *Davis*, 415 U.S. at 316 (defining cross-examination as "the principal means by which the believability of a witness and the truth of his testimony are tested").

138. *California v. Green*, 399 U.S. 149, 158 (1970) (internal quotation marks omitted).

because of a preconceived notion of the truth, formed prior to trial and the truth-finding process.¹³⁹

V. PROBLEMS WITH ADOPTING PERSONAL BELIEFS IN INNOCENCE OR GUILT

*"An adversary presentation [is] the only effective means for combating [the] natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known."*¹⁴⁰

A personal belief in the accused's guilt shifts the essential inquiry away from the facts and evidence, and transfers the prosecutor's attention to selecting incriminating evidence and overcoming any defense evidence.¹⁴¹ The same is true for the defense in limited representation innocence projects.¹⁴² When such defense projects develop a personal belief in the client's innocence, especially prior to the completion of case investigation, the project attorney routinely experiences great difficulty accepting that her beliefs may be wrong. When non-confirming facts or evidence arise, an attorney with a pre-existing personal belief concerning guilt or innocence views such information through a scripted veil of personal belief and is unable to evaluate the evidence clearly. The result is a high risk of either prosecuting an innocent person or, for innocence projects, failing to litigate on behalf of an innocent client. The following cognitive biases are frequently expressed when prosecutors develop personal beliefs in guilt prior to trial or when innocence program participants prematurely acquire opinions regarding inmates' guilt or innocence.¹⁴³

A. Cognitive Dissonance

Personal certainties, in the form of belief in innocence or guilt, result in self-fulfilling prophecies. Invariably, when a prosecutor, defense attorney, or any other individual embraces a personal certainty or belief, she will unwittingly wish to confirm the truth of that

139. See, e.g., *Dixon v. Snyder*, 266 F.3d 693, 704-05 (7th Cir. 2001) (holding that counsel was deficient for failing to cross examine a witness); *Pavel v. Hollins*, 261 F.3d 210, 216-17, 228 (2d Cir. 2001) (holding that defense counsel's failure to prepare a defense and call certain witnesses prejudiced the defendant).

140. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160 (1958).

141. Burke, *supra* note 13, at 91-92.

142. See Orenstein, *supra* note 121, at 425-27.

143. See *infra* Part V.

certainty.¹⁴⁴ In other words, she will construct the truth of her belief merely by virtue of her belief and her certainty. How the attorney reduces the dissonance is important.

“Cognitive dissonance” is a psychological state of mind that creates conflict resulting from incongruous beliefs and external behavior.¹⁴⁵ This cognitive state is naturally uncomfortable and leads the individual to resolve the conflict. Resolution of cognitive dissonance is one form of bias that occurs when a prosecutor (or any human) adopts a personal certainty or a belief prematurely. Studies demonstrate that individuals endeavor to reconcile their beliefs to conform to their behavior.¹⁴⁶ Therefore, because prosecutors most often proceed to prosecute cases even when they harbor doubts regarding the defendant’s guilt,¹⁴⁷ the prosecutor will “cling to the theory of guilt” in order to reduce the cognitive dissonance.¹⁴⁸ Cognitive dissonance creates a resilient hurdle to accepting any doubts regarding the defendant’s guilt. This is also true at the post-conviction level. Even when presented with uncontroverted DNA evidence indicating absolute innocence, prosecutors routinely and inexplicably maintain that defendants are guilty.¹⁴⁹

B. Selective Information Processing

When a personal belief is strongly held, the individuals will naturally protect themselves from information that is in conflict with that belief. Specifically, prosecutors demonstrate search-and-recall preferences for information that tends to confirm their belief of guilt, and “they also tend to devalue disconfirming evidence, even when presented with it.”¹⁵⁰ This phenomenon is known as “selective information processing,”¹⁵¹ and results in “people weigh[ing] evidence that supports their prior beliefs more heavily than evidence that contradicts their beliefs.”¹⁵²

144. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1594 (2006).

145. Orenstein, *supra* note 121, at 426; see also Burke, *supra* note 144, at 1596-99, 1601 (discussing the phenomenon of selective information processing and its effect on the interpretation of evidence, the resulting natural corrective measures people make to avoid the cognitive dissonance).

146. See Burke, *supra* note 144, at 1601-02.□

147. See Burke, *supra* note 13, at 86-91; Pecker, *supra* note 75, at 1617-18.

148. Burke, *supra* note 144, at 1612-13.

149. *Id.* at 1606, 1606 & n.111, 1612-13.

150. *Id.* at 1597.

151. *Id.* at 1596-99.

152. *Id.* at 1597.

C. Confirmation Bias

Confirmation bias occurs when the individual is inclined to interpret facts and evidence to support her belief, regardless of the nature of the evidence. For example, if a prosecutor firmly believes that a defendant is guilty of a rape, but no semen was found, then the prosecutor will likely make the inference that the defendant wore a condom. Conversely, if in the same case the prosecutor were convinced that the defendant is innocent of the rape, the prosecutor would likely interpret the fact that no semen was found as highly exculpatory evidence and conclude that the defendant did not penetrate the alleged victim. The same evidence can be seen as having two vastly different meanings. Two different beliefs can cause two dramatically different results for an accused individual with the same evidence.¹⁵³

D. Tunnel Vision

Tunnel vision, viewed as a subset of confirmation bias, occurs when an individual tends to disregard or minimize facts or evidence that do not support her belief or vision of the truth.¹⁵⁴ Tunnel vision naturally occurs as a consequence of an individual belief. It is a subtle and natural human tendency. Tunnel vision explains how once the police identify one suspect, contradictory evidence is dismissed or minimized.¹⁵⁵ Tunnel vision is at work when both police and prosecutors focus only on one suspect or defendant while “building a case” for prosecution. Exculpatory evidence may be ignored, and other possible culprits may not be investigated or considered. This is true even when the prosecution is directly presented with other plausible suspects or with exculpatory evidence.

E. Belief Perseverance

Belief perseverance defines “the tendency to adhere to theories even when new information wholly discredits the theory’s evidentiary basis.”¹⁵⁶ This occurs, as in the above example, when a prosecutor is

153. Orenstein, *supra* note 121, at 425-26.

154. Burke, *supra* 144, at 1604-05; Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292, 307-08 (2006); Orenstein, *supra* note 121, at 426.

155. See Findley & Scott, *supra* note 154, at 315-16.

156. See Burke, *supra* note 144, at 1599. With belief perseverance, human cognition departs from perfectly rational decision making not through biased assimilation of ambiguous new information, but by failing to adjust beliefs in response to proof that prior information was demonstrably false. *Id.*

confronted with DNA proof that reveals that the defendant could not be guilty.¹⁵⁷ When provided with similar DNA evidence, one prosecutor stated: “I have no scientific basis. I know because I trust my detective and my tape-recorded confession. Therefore, the results must be flawed until someone proves to me otherwise.”¹⁵⁸

VI. POST-CONVICTION

An attorney’s belief in innocence or guilt is firmly rooted by the post-conviction stage. Further ethical issues subsequently arise.

A. *Prosecution Adherence to Belief in Guilt*

Prosecutors are seldom quick to admit when an accused has been wrongfully convicted. Accepting that the wrong person has been imprisoned is so painful, and so at odds with the prosecutor’s core self-image, that truth must be denied or, at least, minimized. Further explained here:

Whether [a] conviction was obtained through a jury verdict or the defendant’s own guilty plea, [a] prosecutor will view [a] conviction as further evidence confirming the accuracy of her initial theory of guilt. A prosecutor’s strengthened belief in her theory will continue to taint her analysis of any new evidence

. . . The conviction of an innocent person is inconsistent with the ethical prosecutor’s belief that charges should be brought only against suspects who are actually guilty.¹⁵⁹

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

VII. ETHICAL “BELIEF” STANDARDS CONTRIBUTE TO WRONGFUL CONVICTIONS

This Article suggests that pre-trial personal belief in an accused’s guilt or innocence, on behalf of the prosecutor or defense attorney, leads

157. See *supra* text accompanying notes 147-49.

158. Sara Rimer, *Convict’s DNA Sways Labs, Not a Determined Prosecutor*, N.Y. TIMES (Feb. 6, 2002), <http://www.nytimes.com/2002/02/06/us/convict-s-dna-sways-labs-not-a-determined-prosecutor.html>.

159. Burke, *supra* note 144, at 1612-13 (footnotes omitted).

to biased decision-making and investigations.¹⁶⁰ However, it does not necessarily follow that an attorney's beliefs or biases are always wrong and result in wrongful convictions. Nevertheless, a careful appraisal of the circumstances indicates that a "belief" requirement necessarily leads to biased outcomes. Certainly, the prosecution will often be correct, perhaps even the majority of the time. However, given the staggering number of exonerations that are coming to light,¹⁶¹ and the troubling statistics indicating extensive racism and discrimination in the justice system,¹⁶² the only sensible conclusion is that the wide discretion that the "belief" standard provides attorneys is a contributor.¹⁶³

A. Ethical "Belief" Standards Allow for Racial Bias in Attorney Decision Making and Investigation

It is evident that bias resulting from prejudice and discrimination still exists in the criminal justice system. Without doubt, much of this bias is unintentional.¹⁶⁴ Irrespective of intentions, the flaws and the fissures, through which prejudice seeps into the system of justice, must be found and sealed. The low evidentiary standard of probable cause, and the wide discretion accompanied by the individual belief standard held by prosecutors (and some defense attorneys), provide an unlocked door, easily opened for inadvertent and deliberate discrimination and bigotry. As discussed above, the relevant rules of ethical conduct for prosecutors offer no formulae on which the attorney must base her beliefs.¹⁶⁵ A prosecutor is not required to justify her beliefs. In fact, a prosecutor must cease prosecution of a case if she believes the defendant is innocent, irrespective of the state of the evidence.¹⁶⁶ This necessarily results in the conclusion that a prosecutor may hold a valid and reasonable belief regarding a defendant's guilt or innocence irrespective of the state of the evidence.¹⁶⁷

160. See *supra* Parts II.C–III.B.

161. See *National Registry of Exonerations*, U. MICH. L. SCH., <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Sept. 2, 2015) ("Detailed View" subpage).

162. See BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 - STATISTICAL TABLES 7 (2013), available at <http://www.bjs.gov/content/pub/pdf/fdluc09.pdf>.

163. See Rodriguez & Ryave, *supra* note 3, at 22.

164. See JUSTICE KENNEDY COMMISSION, AM. BAR ASS'N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 54 (2004), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf.

165. See *supra* Part II.D.

166. See MODEL RULES OF PROF'L CONDUCT R. 3.8 (2014); Burke, *supra* note 13, at 83–85.

167. See John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174, 178 (stating that "regardless of the strength of the case," prosecutors should not file charges unless they

B. Ethical “Belief” Standards Result in Racial Bias

Just as in 1972, when the Supreme Court, in *Furman v. Georgia*,¹⁶⁸ overturned a number of death sentences for being discriminatorily applied, the poor and minority are still overwhelmingly sentenced to death today.¹⁶⁹ Racial bias pervades not only death penalty sentencing, but also the justice system generally.¹⁷⁰ Recent statistical analyses of the demographics of criminal defendants show that racial and gender prejudice still exists in the justice system.¹⁷¹ A 2009 study of charges and arrests for serious felonies in the seventy-five largest counties in the United States shows a strong prejudice against minorities—approximately seventy percent of the defendants charged were classified as minorities.¹⁷²

Because more than ninety percent of criminal cases never reach trial, an analysis of plea-bargaining is a helpful indicator of bias and prejudice in the system.¹⁷³ Sadly, there is widespread belief amongst the members of the legal community that whites get favorable treatment in plea-bargaining compared to minorities.¹⁷⁴ The same trend can also be seen in recent sentencing and conviction rates. In a compilation of several studies analyzing state-level data to produce estimates of the “effect of race on sentence severity,” 43.2% of estimates suggested more severe sentences for blacks, and 27.6% suggested harsher sentences for Latinos.¹⁷⁵ In a similar compilation using studies based on federal-level data, over 68.2% of estimates suggested harsher sentences for blacks, and 47.6% suggested harsher sentences for Latinos.¹⁷⁶ Generally,

“actually believe” that the defendant committed the crime and that it is “morally wrong” to continue to prosecute unless “personally convinced” of such).

168. 408 U.S. 238 (1972).

169. See *id.* at 255-57 (Douglas, J., concurring); Bedau, *supra* note 23, at 619; Karen F. Parker et al., *Race, the Death Penalty, and Wrongful Convictions*, CRIM. JUST., Spring 2003, at 48, 49-51.

170. See Marc Maurer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, HUM. RTS., Fall 2010, at 14, 14-15; Parker et al., *supra* note 169, at 49-50.

171. REAVES, *supra* note 162, at 5-7.

172. *Id.* at 7, tbl.5.

173. MINN. SUPREME COURT TASK FORCE ON RACIAL BIAS IN THE JUDICIAL SYS., FINAL REPORT 28 (1993) [hereinafter MINN. SUPREME COURT], available at http://www.mncourts.gov/documents/0/Public/Court_Information_Office/Race_Bias_Report_Complete.pdf; see Erica Goode, *Stronger Hand for Judges in the ‘Bazaar’ of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), <http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-pleadeals.html>; Pat Vaughan Tremmel, *Much Celebrated American Trial is Dying in Real Life*, NORTHWESTERN U. (Mar. 31, 2009), <http://www.northwestern.edu/newscenter/stories/2009/03/burntrial.html>.

174. See MINN. SUPREME COURT, *supra* note 173, at 28.

175. Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, in 3 CRIM. JUST. 2000, at 455, 456 exhibit 2 (2000), available at <http://www.justicestudies.com/pubs/livelink3-1.pdf>.

176. *Id.* at 455, 456 exhibit 2.

statistics on length of imprisonment suggest blacks are “more likely being disadvantaged as compared to similarly-situated whites.”¹⁷⁷ Latinos face a similar disadvantage, when compared to whites, with regard to decisions to incarcerate at the federal level.¹⁷⁸

The bias in the criminal justice system may be most evident in an evaluation of the death penalty. The following quote reviews the widely known Baldus study:

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

Why is this discrepancy still occurring? . . . [P]rejudices [can act as biases and] are often learned and incorporated . . . into a person’s behavior [at a very young age]. Unconscious bias and prejudice are the most dangerous types of error because they are outside the person’s awareness and therefore not available for attempts at conscious control and modification. Similarly, when confronted with [the incarceration or] the termination of a human’s life, each [juror, prosecutor, or defense attorney] is prone, at least in part, to react in a highly personal and sometimes biased manner.¹⁷⁹

The ethical duties that a prosecutor must grapple with necessarily encourage bias in her prosecuting or sentencing recommendation decision. This personal decision making “provides a fertile ground” for the prosecutor’s investigation and fact presentation “to reflect personal bias,” which likely explains the Baldus Study and other similar studies’ results.¹⁸⁰ The “lack of parameters and specific guidelines” available to prosecutors “leaves room for prejudicial decision-making.”¹⁸¹ There are numerous sources with definitions for “prejudice,” but it is often

177. TUSHAR KANSAL, THE SENTENCING PROJECT, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE 5 (Marc Mauer ed., 2005), available at http://www.sentencingproject.org/doc/publications/rd_sentencing_review.pdf.

178. *Id.* □

179. Sarah A. Mourer, *Forgetting Furman: Arbitrary Death Penalty Sentencing Schemes Across the Nation*, 22 WM. & MARY BILL RTS. J. 1183, 1202-03 (2014) (footnotes omitted).

180. *Id.* at 1303.

181. *Id.* □

described “as a sentiment that lacks adequate factual information to support a conclusion; an uninformed decision based on personal preconceptions.”¹⁸²

*C. Ethical “Belief” Standards Lead to
Racial Biases that Result in Wrongful Convictions*

Biases held by prosecutors about race and gender can pose a particularly dangerous threat. At the time of this writing, the Innocence Project lists 330 post-conviction DNA exonerations in United States history.¹⁸³ However, DNA exonerations only depict a small percentage of the actual wrongful convictions.¹⁸⁴ In addition, not all potential candidates are actually tested. Many accused who pled guilty or “no contest” to a crime are not eligible for DNA testing even if biological evidence exists.¹⁸⁵

The National Registry of Exonerations, a joint project of the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law, which tracks and provides information for all exonerations in the United States since 1989, lists a current total of 1652 exonerations for both DNA and non-DNA exonerations.¹⁸⁶ Of those exonerated between 1989 and December 2013, ninety-two percent were men, approximately sixty percent identified as racial or ethnic minorities, and eleven percent pled guilty.¹⁸⁷ Contributing factors, of which there can be more than one, to the wrongful convictions in the original cases include: perjury or false accusation (fifty-six percent); official misconduct (forty-six percent); mistaken witness identification (thirty-eight percent); false or misleading forensic evidence (twenty-two percent); and false confessions (twelve

182. *Id.* “‘Prejudice’ is defined from many sources as an opinion or decision made without sufficient knowledge or factual basis.” *Id.* at 1203 n.169 (citing *Prejudice*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/prejudice> (last visited Sept. 2, 2015); *Prejudice*, FREE DICTIONARY, <http://www.thefreedictionary.com/prejudice> (last visited Sept. 2, 2015)).

183. *The Cases: DNA Exoneree Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases-false-imprisonment/front-page#c10=published&b_start=0&c4=Exonerated+by+DNA (last visited Sept. 2, 2015).

184. See Comments of the Florida Innocence Initiative, Inc. at 5, *In re Amendments to Fla. Rule of Criminal Procedure 3.853(D)*, 938 So. 2d 977 (Fla. 2006) (No. SC05-1702). In Florida, for example, only ten percent of felony cases involve biological evidence that could be utilized for testing. *Id.*

185. Justin Brooks & Alexander Simpson, *Blood Sugar Sex Magik: A Review of Postconviction DNA Testing Statutes and Legislative Recommendations*, 59 *DRAKE L. REV.* 799, 860-61 (2011).

186. *National Registry of Exonerations*, U. MICH. L. SCH., <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Sept. 2, 2015) (“About Us” main page).

187. NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2013, at 9 (2014), *available at* https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2013_Report.pdf.

percent).¹⁸⁸ Strikingly, the exonerees were imprisoned for an average of ten years each.¹⁸⁹

However, available figures regarding exonerations reflect only a small fraction of wrongful convictions and innocent individuals currently jailed.¹⁹⁰ Many experts estimate that wrongful convictions may amount to as many as five percent of all convictions in the United States.¹⁹¹ To put this in perspective, in 2005 the number of convicted individuals imprisoned in state or federal prison totaled approximately 1.4 million.¹⁹² By these estimates, a staggering 70,000 of these inmates were innocent. Even conservative estimates approximate roughly 10,000 wrongful convictions per year.¹⁹³ Still, even greater numbers of innocent people are arrested “and prosecuted, though ultimately not convicted.”¹⁹⁴

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

Part of the prosecution’s obligation to seek justice is a duty to protect the public’s faith in the jury system.¹⁹⁵ Frequently, the concept of achieving a just result will be in conflict with supporting the public’s faith in the judicial system.¹⁹⁶ An obligation to satisfy the public is often independent of securing justice.¹⁹⁷ The concept of justice is often polemic and highly individualized.¹⁹⁸ Accordingly, justice is often unpopular. The community’s sentiment about justice may not change even when an outcome is the just outcome. There is no necessary relationship between what the community feels would be just and what was actually achieved by the court and jury process. The prosecutor cannot predict the public’s opinion toward the outcome of any particular

188. *Id.* at 17 tbl.6.

189. *Id.* at 9.

190. See Beth Schwartzapel & Hannah Levintova, *How Many Innocent People Are in Prison?*, MOTHERJONES (Dec. 12, 2011, 11:10 AM), <http://www.motherjones.com/politics/2011/12/innocent-people-us-prisons>.

191. ELIZABETH F. LOFTUS & JAMES M. DOYLE, *EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL* 77 (3d ed. 1997).

192. JAMES J. STEPHAN, DEP’T OF JUSTICE, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2005, at 1 (2008), available at <http://www.bjs.gov/content/pub/pdf/csfcf05.pdf>.

193. LOFTUS & DOYLE, *supra* note 191, at 77. Although some believe as many as five percent of all convictions may be wrongful, using a conservative estimate of six tenths of one percent would result in over 10,000 wrongful convictions a year. *Id.*

194. Sarah Anne Mourer, *Reforming Eyewitness Identification Procedures Under the Fourth Amendment*, 3 DUKE J. CONST. L. & PUB. POL’Y 49, 54 (2008).

195. See Galin, *supra* note 7, at 1264-66.

196. Fuller & Randall, *supra* note 140, at 1218.

197. See Arvie, *supra* note 83, at 189.

198. Galin, *supra* note 7, at 1266-67.

case or the long-term effect of that outcome on the public's faith in the justice system.

The adversarial system was designed to seek truth and justice.¹⁹⁹ The notion that the public will maintain their faith in the adversarial system if prosecutors use the public's opinion as a mere guide as opposed to a moral compass is illogical. Any confidence the public has in the criminal justice system can only be maintained if the system functions effectively. Yet, the public must have a fundamental faith in the justice system before it can function properly.²⁰⁰ If the criminal justice system does not have the confidence and support of the community, jurors, as representatives of the public, will not fulfill their role seriously and with enthusiasm.

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

Nonetheless, no feasible system, no matter how flawlessly administered, would produce fair and just results every time. This is not possible, primarily because the justice system relies on human beings to achieve fairness and justice. It is impossible to remove all human error from any complex legal procedure, like a trial. Bias and fixed predispositions cannot be entirely removed from any system or organization.²⁰¹ Accordingly, even a constitutionally faultless trial may convict an innocent person, or exonerate a guilty one.²⁰²

199. Robert Gilbert Johnston & Sara Lufrano, *The Adversary System as a Means of Seeking Truth and Justice*, 35 J. MARSHALL L. REV. 147, 154 (2002).

200. See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1387 (2003) ("Public confidence and faith in the justice system are essential to the law's democratic legitimacy, moral force, and popular obedience."); H. Patrick Furman, *Wrongful Convictions and the Accuracy of the Criminal Justice System*, COLO. LAW., Sept. 2003, at 11, 25 ("In 1789, the first year of constitutional governance of this country, George Washington wrote that he was convinced 'the due administration of justice is the firmest pillar of good government.' If people lose faith in the criminal justice system, society is greatly weakened.") (footnotes omitted).

201. See Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 185-86 (2004) ("No conceivable system of procedure can guarantee perfect accuracy.").

202. See L. Darrell Weeden, *Introduction: Race & Immigration Symposium*, 44 ARIZ. ST. L.J. 1, 2 (2012) ("An American criminal justice system that is unequal and practices racial bias violates the United States Constitution's Due Process Clause requirement for fairness and that of the Equal

IX. RECOMMENDATIONS

Given that confirmation bias, selective information processing, and belief perseverance function largely at an unconscious level, these types of biases are particularly challenging to eliminate or reduce.²⁰³ Further escalating the challenge is the quality and nature of human certainty. Studies in human behavioral psychology show that certainty—the feeling of being “sure”—is simply a sensation that results from brain mechanisms, which function independent of thought or reason.²⁰⁴ Essentially, feelings of sureness and certainty are more closely related to human emotion than an objective standard of truth. This realization becomes exceptionally frightening when considering the obvious bias and prejudice within the justice system in conjunction with the wide discretion of the prosecutor.²⁰⁵ Certainty of opinion, or belief, arises out of involuntary brain functions like love or anger.²⁰⁶ Belief functions independently from reason and, once adopted, loses capacity for modification or flexibility.²⁰⁷ Although humans feel that their beliefs and certainties are choices based in reason, they are neither choices, nor even rational thoughts.²⁰⁸

As discussed, the cognitive biases that result from cognitive dissonance stemming from belief in guilt and innocence are largely unconscious.²⁰⁹ Hence, the individual is unable to acknowledge any bias or become aware of any other negative or discriminatory emotions or feelings that may affect the individual’s certainty and decision.²¹⁰ Consequently, prosecutors and innocence projects that wish to impose similar criteria must be provided concrete guidelines unrelated to beliefs, emotions, or personal certainties when deciding whether or not to litigate a case. Currently, prosecutors are only required to have probable cause to proceed to trial.²¹¹ This is an exceedingly low evidentiary standard,

Protection Clause for racial equality.”); John W. Wesley, Note, *Scientific Evidence and the Question of Judicial Capacity*, 25 WM. & MARY L. REV. 675, 682 (1984) (“Impartiality is a function of due process, and a system that furthers bias and prejudice on the part of the fact-finder violates due process.”).

203. See *supra* Part V.

204. ROBERT A. BURTON, ON BEING CERTAIN: BELIEVING YOU ARE RIGHT EVEN WHEN YOU’RE NOT, at xi, 139 (2008).

205. See *supra* Parts II, V.

206. BURTON, *supra* note 204, at xi.

207. See *id.* at 139.

208. See *id.* at 126-27, 139.

209. See *supra* Part V.

210. See Ellen Yaroshesky, *Why Do Brady Violations Happen?: Cognitive Bias and Beyond*, NAT’L ASS’N CRIM. DEF. LAW., <https://www.nacdl.org/champion.aspx?id=28470> (last visited Sept. 2, 2015).

211. See *supra* Part II.B.

leaving much room for the prosecutor to allow herself to be guided by her own emotions and biases in her litigation decision.²¹² The prosecution should be required to meet a much higher evidentiary burden before advancing to trial. Furthermore, the prosecutor should consider all known evidence when making the decision whether to prosecute, not only admissible evidence. This is important if the prosecution is attempting to only prosecute those who are in fact guilty. An appropriate standard to be met before progressing to trial for the prosecution might be:

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

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

The project [or applicable name of innocence program] must obtain enough evidence such that, if admitted at a retrial, it would more likely than not result in an acquittal. The project should not continue representation of the inmate if the introduction of all known facts and evidence (whether admissible or not) would more likely than not fail to result in an acquittal. The [name of innocence program] must be able to defend its decision to represent or not to represent the client at all times.

The revised standard for the prosecution substantially increases the evidentiary standard that must be met *before* advancing to a trial. Under this proposed requirement, the prosecutor would need to have enough admissible evidence to convince a reasonable jury that the defendant is guilty beyond a reasonable doubt, and would need to make this determination before proceeding to trial. The beyond a reasonable doubt standard is the standard in criminal cases that prosecutors must meet *at*

212. See *supra* Part II.D.

trial to obtain a conviction.²¹³ Therefore, it makes little sense to allow prosecutors to prosecute defendants with less evidence than that which should convince a reasonable jury of guilt beyond a reasonable doubt. Certainly, most prosecutors will make this evidentiary assessment prior to trial, but there is no mandate for them to do so.²¹⁴ The prosecution does not want to lose the case and is unlikely to progress to trial with the belief that she will lose the trial.

Recall, however, that under the current scheme, the prosecutor has a firmly developed belief in the defendant's guilt. Further, she has confirmed her belief in guilt through selective thought processing and avoidance of cognitive dissonance. Consequently, her pre-trial review of the evidence almost invariably will lead to the conclusion that a reasonable jury should find the defendant guilty beyond a reasonable doubt. With less than adequate evidence, a firmly convinced prosecutor, and an often only marginally-competent defense attorney, it is simple to see how a jury could be persuaded beyond a reasonable doubt, and how wrongful convictions occur, even in constitutionally error-free trials.

Furthermore, both of the revised standards require a review of all facts and evidence, even if the known facts and evidence cannot be viewed by the jury or fact-finder. The standards suggest that, although certain evidence may be inadmissible at trial, *all* evidence should be considered by the attorney in the course of his decision-making. For example, imagine that a case with only one witness's identification of the defendant needs to be considered for trial readiness by a prosecutor. A review of the facts reveals that at an apartment complex in an impoverished neighborhood known for gang activity, two known gang members, Todd and Rod, were shot and killed. At the time of the shootings, a substantial crowd had been loitering in the area. This particular apartment complex is also known for drug activity and as a hub for drug dealing in the area. The prosecutor is aware of the apartment complex's connection to drugs and gangs, both through her communications and relations with police officers who work that area, and from prosecuting previous cases from that area. These facts are not admissible in the instant case because although they may be probative (relevant), their relevancy is outweighed by the prejudice they would likely cause.²¹⁵

Only one witness, Jimbo, from the large crowd at the complex, came forward to state that he had seen the incident. Based on Jimbo's

213. Kirby v. United States, 174 U.S. 47, 55 (1899).

214. See MODEL RULES OF PROF'L CONDUCT R. 3.8 (2014).

215. See FED. R. EVID. 403.

description, the defendant, Willis, was detained at the apartment complex only minutes after the shooting. Jimbo identified Willis during a show-up of Willis while still at the scene. A show-up occurs when only one individual is presented to a witness for a potential identification. The identification of Willis occurred while two officers detained Willis. Willis was held up against a wall of the apartment complex. He was clearly attempting to flee. Jimbo quickly stated: "That's him! He shot Todd." Jimbo stated that Willis did not shoot the other victim, Rod. The defendant was hurriedly placed in the back of a police car. When officers initially arrived at the complex, Todd was already dead, but Rod was still alive, although he was shot in the chest. Paramedics worked frantically to save him. Moments before Rod died at the scene, he gasped to the paramedics that Willis did not shoot Todd but that Jimbo shot Todd, and Willis did not do anything. Rod's statement cannot be admitted into evidence as a dying declaration hearsay exception because it does not relate to the circumstances surrounding his own death, but rather the death of Todd.²¹⁶ Yet, the prosecution must consider this fact even if it cannot be presented to the jury, as it remains relevant to the issue of Willis' guilt.²¹⁷ If the jury heard Rod's statement in combination with a suggestive yet admissible identification would they convict? In the interest of justice, and in the interest of maintaining the community's faith in the justice system, it would be deemed fair and equitable that the prosecutor consider the likelihood of a conviction if the jury knew that Rod might have testified that Jimbo shot Todd and that Willis was not involved.

X. CONCLUSION

The adversarial system is designed to uncover the truth.²¹⁸ Consequently, the courtroom motto does not say, "We Here Already Know the Truth." If an adversary adopts a personal belief regarding guilt or innocence prior to trial, it obscures the truth-seeking objective.²¹⁹ The result of this pre-trial belief can, and does, lead to wrongful convictions.²²⁰ The truth-finding objective of the justice system is, therefore, never served by pre-judgments in any legal context.²²¹ Once a prosecuting attorney adopts the belief that the defendant is guilty or innocent, this pre-judgment notion influences the way the individual

216. See FED. R. EVID. 804(b)(2).

217. See FED. R. EVID. 401. □

218. See *supra* Part IV.

219. See *supra* Part IV.

220. See *supra* Part VII.

221. See *supra* Part IV.

views facts, evidence, the defendant, and all information associated with the case.²²² This bias or “truth” wires itself into the attorney’s cognitive functioning and impacts how the prosecutor or defense attorney views any possibly exculpatory evidence as the case progresses.²²³ Any exculpatory evidence will be immediately viewed as false. As a result of the prosecutor’s predisposition to view all facts and evidence as indicating guilt, the prosecutor is no longer seeking justice, but rather is seeking a conviction.

The proposed standards may be a step in the right direction. Nonetheless, defense attorneys and prosecutors will still need to make judgments and decide if they *believe* a jury will convict or acquit. The fundamental distinction between the current mandate and this Article’s proposed standards is that, currently, a prosecutor’s belief in the defendant’s guilt need not be based on facts or evidence exceeding the baseline standard of probable cause.²²⁴ Thus, every prosecutor’s unconscious bias, even racial and discriminatory bias, is invited to come out and demolish the prosecution’s good intentions. A revised standard with higher evidentiary requirements provides a foundation for the prosecutor’s conclusions and locks the door in an attempt to keep those racial or discriminatory biases locked up in the attic.

222. See *supra* Part V.

223. See *supra* Part V.

224. See *supra* Part II.B.
