

---

---

## TALKING ABOUT PROSECUTORS

*Alafair S. Burke\**

### INTRODUCTION

I recently saw my former law school ethics professor for the first time in fifteen years. After I reintroduced myself to her, she asked what I had been doing since graduation. I had barely gotten out the initial words—*I was a prosecutor*—before hearing her response: *Morally compromised, were you?*

I took no more offense at her gentle ribbing than intended, but the exchange made me think about the way criminal law scholars talk about prosecutors. The literature is rife with stories of prosecutors who knowingly engage in unethical behavior—who overcharge questionable cases to pressure defendants to enter guilty pleas, make prejudicial and misleading statements to both judges and juries, and, most routinely of all, withhold exculpatory evidence that might undermine their impressive conviction rates. In the prevailing narrative of the scholarly literature on wrongful convictions,<sup>1</sup> stories of bad prosecutorial decision-making in the cases against Genarlow Wilson,<sup>2</sup> the Jena Six,<sup>3</sup>

---

\* Visiting Professor, Fordham Law School; Professor of Law and Associate Dean of Faculty Research, Hofstra Law School. I would like to thank Ellen Yaroshefsky for organizing the conference that inspired this Symposium, and the editors of the *Cardozo Law Review* for inviting my contribution.

<sup>1</sup> The focus here is on the traditional scholarly literature on wrongful convictions, as opposed to the wrongful convictions movement itself, where practicing lawyers and Innocence Projects have noted the advantages of a more inclusive rhetoric. See Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin's New Governance Experiment*, 2006 WIS. L. REV. 645, 708-10 (noting the use of “the rhetoric of systemic problems and collective responsibility” by Wisconsin Innocence Project codirectors, Keith Findley and John Pray).

<sup>2</sup> Genarlow Wilson was a seventeen-year-old boy who engaged in consensual sexual contact with a fifteen-year-old girl. Prosecutors charged him with several offenses, but the jury convicted him only of aggravated child molestation, for which consent was no defense. *Humphrey v. Wilson*, 652 S.E.2d 501 (Ga. 2007); Shaila Dewan, *Georgia Man Fights Conviction as Molester*, N.Y. TIMES, Dec. 19, 2006, at A22. Scholars and commentators have widely condemned the prosecutors who appealed a court’s ruling that a ten-year sentence in the case constituted cruel and unusual punishment. See Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 305-06 (2007).

<sup>3</sup> For discussion and critique of the prosecution of six African-American high school students in Jena, Louisiana, see Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285 (2008); Andrew E. Taslitz & Carol Steiker, *Introduction to the Symposium: The Jena Six, the Prosecutorial Conscience, and the Dead Hand of History*, 44 HARV. C.R.-C.L. L. REV.

and three Duke lacrosse players<sup>4</sup> are merely high-profile examples of prosecutorial misconduct that happens every day in America's prosecutors' offices and courtrooms. What emerges from the current discourse on wrongful convictions is a language of fault—fault placed on prosecutors who fail to value justice at each turn of the proceedings.

I come to a consideration of the discourse we use to discuss prosecutors with my own perspective. I clerked for a judge who had earned a reputation as “a high-powered icon of liberalism” on the Ninth Circuit Court of Appeals.<sup>5</sup> As a prosecutor, I worked to develop non-punitive responses to community crime problems.<sup>6</sup> Since entering academic life, I have written about reforms that might improve prosecutorial decision-making and reduce prosecutorial contributions to erroneous convictions. I have been accused by more than a few of my former prosecutor colleagues of having “crossed over.” But when I am asked by current colleagues why I bother defending prosecutors, why I bother making excuses for them, why I bother arguing for reforms aimed at ethical prosecutors because so few are ethical, even I have to ask myself: Why *do* I bother? If I bristle at the language of fault, and occasionally even ponder withdrawing from encounters that subject me to it, I can only guess how the rhetoric of fault must affect current prosecutors.

Yet I do not have to guess.

Joshua Marquis, long active in the National District Attorney's Association, gives us some idea when he mocks a “conventional wisdom” permeated by the portrayal of prisons “chock-full of doe-eyed innocents who have been framed by venal prosecutors and corrupt police officers with the help of grossly incompetent public defenders.”<sup>7</sup> Although Marquis has conceded that the criminal justice system is a

---

275 (2009).

<sup>4</sup> Prosecutor Mike Nifong was disbarred for his ethical violations during the prosecution of Duke lacrosse players. The players were eventually exculpated from rape accusations and the charges against them were dismissed. See Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to “Do Justice,”* 76 *FORDHAM L. REV.* 1337, 1338-58 (2007); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 *B.U. L. REV.* 1, 11-12 (2009).

<sup>5</sup> Nina Shapiro, *Judge Betty's Revenge*, *SEATTLE WEEKLY*, Aug. 19, 2009, available at <http://www.seattleweekly.com/2009-08-19/news/judge-betty-s-revenge> (profiling Hon. Betty B. Fletcher).

<sup>6</sup> For scholarship discussing community-based prosecution, see Anthony V. Alfieri, *A Colloquium on Community Policing: Community Prosecutors*, 90 *CAL. L. REV.* 1465 (2002); Barbara Boland, *Community Prosecution: Portland's Experience*, in *COMMUNITY JUSTICE: AN EMERGING FIELD* 253-77 (David R. Karp ed., 1998); Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 *WASH. L. REV.* 985 (2003); Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 *NOTRE DAME L. REV.* 321 (2002) (same).

<sup>7</sup> Joshua Marquis, Op-Ed, *The Innocent and the Shammed*, *N.Y. TIMES*, Jan. 6, 2006, at A23.

“work in process” that needs “constant improvement,” he is unmoved by empirical evidence demonstrating the conviction of the innocent.<sup>8</sup> In fact, he finds comfort in the data, believing they establish an impressively low error rate and prove that the public “should be far more worried about the wrongfully freed than the wrongfully convicted.”<sup>9</sup> Is this prominent prosecutor’s interpretation of the problem inevitable, or could it be a consequence of his perception that wrongful conviction reformists are attempting to “delud[e] the public into believing that the police and prosecutors are trying to send innocent people to prison”?<sup>10</sup>

This Article explores the rhetoric that the wrongful conviction literature invokes to discuss prosecutors.<sup>11</sup> Separate from the empirical question of how widespread intentional misconduct is among prosecutors, this Article questions the efficacy of fault-based rhetoric in a world in which prosecutors see wrongful convictions as statistical anomalies, their antagonists (like Mike Nifong) as uncommonly bad apples, and themselves as ethical lawyers.<sup>12</sup> The wrongful conviction literature’s dominant rhetoric about prosecutors—a rhetoric of fault—is counterproductive because it alienates the very parties who hold the power to initiate many of the most promising reforms of the movement: prosecutors. Fault-based discourse is especially misplaced in the discussion of the disclosure of evidence to the defense, where reformists call upon prosecutors to disclose more evidence than the constitution or ethical regulations require. In contrast, a “no-fault” rhetoric that emphasizes how even ethical prosecutors might inadvertently contribute to wrongful convictions carries the potential to fold prosecutors into the

---

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Scholars and commentators have questioned whether the wrongful conviction literature has placed disproportional rhetorical emphasis on cases of factual innocence. *See, e.g.*, Lawrence C. Marshall, *Litigating in the Shadow of Innocence*, 68 U. PITT. L. REV. 191, 194-95 (2006) (noting the role that wrongful convictions have played in the capital punishment movement, but arguing that “condemning the innocent is just one small part of what is wrong with the death penalty”); Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1552 (summarizing criticisms of the “innocence movement” and arguing that “innocentrism” advances criminal justice discourse). Andrew Siegel has argued that the wrongful convictions movement should move to a “new front” of discourse that focuses on structural impediments to justice, such as indigent defense systems, plea bargaining practices, docket control mechanisms, and prosecutorial incentive regimes, rather than evidence-based claims, such as faulty eyewitness testimony and false confessions. Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 AM. CRIM. L. REV. 1219, 1222-30 (2005). This Article focuses exclusively on the discussion of prosecutors in the wrongful conviction literature.

<sup>12</sup> While the misconduct of disbarred prosecutor Mike Nifong has provided no shortage of material for scholars, *see supra* note 4, the National District Attorneys Association has called his handling of the rape allegations against Duke University lacrosse players “an aberration.” Laura Parker, *Trial This Week for Prosecutor in Duke Case; Mike Nifong to Face Ethics Charges*, USA TODAY, June 10, 2007, at 3A.

movement while simultaneously pressuring them to initiate self-focused reforms.

### I. WHY PROSECUTORIAL PARTICIPATION IN THE INNOCENCE MOVEMENT MATTERS

As commentators have proposed reforms intended to prevent erroneous convictions,<sup>13</sup> many have concluded that traditional litigation is often unable to reach the type of investigatory and discretionary errors that most commonly contribute to wrongful convictions.<sup>14</sup> Instead, some of the most common and potentially transformative suggestions for reform, even during the investigatory stages of a case, would either require or be assisted by prosecutorial participation. For example, scholars have suggested reducing the likelihood of false confessions through improved interrogation techniques<sup>15</sup> or the mandatory videotaping of interrogations,<sup>16</sup> reforms that are more likely

---

<sup>13</sup> Exonerations through DNA evidence have enabled lawyers to identify the factors that most commonly contribute to erroneous convictions: mistaken eyewitness interrogations, false confessions, flawed science, inadequate defense lawyering, reliance on unreliable informant evidence, and governmental error such as the failure to disclose exculpatory evidence to the defense. JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* 246 (2000) (examining exoneration cases and determining that the most prevalent contributing factors were mistaken eyewitness identifications, police and prosecutorial misconduct (including failures to disclose exculpatory evidence), flawed science, inadequate lawyering by defense counsel, false confessions, and unreliable informants); Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 542-45 (2005) (discussing factors that contribute to erroneous convictions); Robert Carl Schehr, *The Criminal Cases Review Commission as a State Strategic Selection Mechanism*, 42 AM. CRIM. L. REV. 1289, 1289 (2005) (“[L]egal scholars have identified six leading causes of wrongful conviction: police and prosecutorial misconduct, false eyewitness identification, false confession, junk science, ineffective assistance of counsel, and snitch testimony.”); The Innocence Project, *The Causes of Wrongful Conviction*, <http://www.innocenceproject.org/understand> (last visited June 25, 2010) (citing eyewitness misidentification, unreliable science, false confessions, police and prosecutorial misconduct, informant and snitch testimony, and “bad lawyering” as causes of wrongful convictions).

<sup>14</sup> See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 125 (2008) (noting that recent reforms to prevent and identify erroneous convictions “represent[] one of the most significant efforts to reform our criminal procedure in decades, and it largely has not originated in the courts”).

<sup>15</sup> See, e.g., Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 378-80 (suggesting reforms to police interrogation techniques based on Great Britain’s Police and Criminal Evidence Act). See also THE INNOCENCE COMM’N FOR VA., *A VISION FOR JUSTICE: REPORT AND RECOMMENDATIONS REGARDING WRONGFUL CONVICTIONS IN THE COMMONWEALTH OF VIRGINIA* 54-59 (2005) [hereinafter *A VISION FOR JUSTICE*], available at <http://www.thejusticeproject.org/press/reports/pdfs/17241.pdf> (providing recommendations for improving interrogation procedures to reduce risks of wrongful convictions).

<sup>16</sup> See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 958 (2006) (asserting that the videotaping of police interrogations “could improve

to be implemented with prosecutorial support. Prosecutors could also push for reforms to eyewitness identification procedures<sup>17</sup> and implement procedures to improve their reliance on informant testimony.<sup>18</sup>

A noteworthy portion of the current literature focuses not on errors during the investigatory stage of a case, but specifically on the broad discretion of prosecutors and the ways prosecutorial decision-making can affect the risk of erroneous convictions.<sup>19</sup> However, due to concerns about separation of powers, courts are typically reluctant to intrude upon prosecutorial discretion.<sup>20</sup> Accordingly, many of the reform proposals that seek to affect the exercise of prosecutorial discretion must be implemented voluntarily by prosecutors, either institutionally or individually. For example, scholars have proposed that prosecutors' offices adopt incentive systems that would measure prosecutorial performance based on ethical conduct instead of conviction rates.<sup>21</sup> They have called for increased transparency in

---

monitoring and credibility"); Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127 (2005).

<sup>17</sup> See Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 271, 301-02 (2006) (discussing prosecutor-led reforms of eyewitness identification procedures).

<sup>18</sup> See, e.g., Peter A. Joy, *Brady and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619, 632-42 (2007) (proposing ways prosecutors could improve the quality of informant testimony, including the creation of an internal handbook to guide prosecutorial discretion, the creation of guidelines to assess the reliability of jailhouse informants, and the implementation of open file discovery); Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 FORDHAM L. REV. 1413, 1448 (2007) ("Self-regulation by prosecutors of jailhouse informants can work . . ."); Melanie D. Wilson, *Prosecutors "Doing Justice" Through Osmosis—Reminders to Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67, 105-12 (2008) (recommending prosecutorial creation of a databank to track records of cooperating witnesses and the top-down creation of a culture that promotes "justice" as a means of improving the quality of prosecutorial reliance on informants).

<sup>19</sup> See generally ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 407 (2006) ("Practically speaking, the prosecutor is the first line of defense against many of the common factors that lead to wrongful convictions."); Zacharias & Green, *supra* note 4, at 17 (noting prosecutorial involvement in many of the factors that contribute to erroneous convictions).

<sup>20</sup> See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (asserting that separation of powers concerns complicate any attempts to establish a rigorous standard for obtaining discovery in selective prosecution actions).

<sup>21</sup> See Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 846 (2000) (recommending that professional advancement in prosecutors' offices "should be based on richer measures of compliance with the 'do justice' standard, rather than simply on conviction rates"); Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305, 320-21 (2001) (suggesting that prosecutors be rewarded for identifying police misconduct); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 873-

prosecutors' institutional policies and individual decisions.<sup>22</sup> They have encouraged prosecutors to adopt internal standards to guide their discretionary decision-making.<sup>23</sup> They have suggested that prosecutors create internal committees as a check on each other's decision-making<sup>24</sup> and to review questionable cases<sup>25</sup> and claims of innocence.<sup>26</sup> And perhaps no reform proposal is raised as often as the call for increased education about prosecutors' special ethical obligations,<sup>27</sup> how their decisions might contribute to erroneous convictions,<sup>28</sup> and how they can

---

75 (1995) (proposing financial incentives to reward prosecutors who avoid overcharging); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 172 (2004) (advocating incentives for prosecutors to respond to post-conviction claims of innocence).

<sup>22</sup> See Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 494 (2006) (noting that review of prosecutorial decisions "will be ineffective without transparency"); Bibas, *supra* note 16 (arguing for increased transparency throughout the criminal justice system); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 461-62 (2001) (suggesting that public disclosure of prosecutorial policies "would promote prosecutorial accountability and public confidence in the criminal justice system"); Findley & Scott, *supra* note 15, at 391 (encouraging prosecutorial transparency as a means of neutralizing cognitive bias); Medwed, *supra* note 21, at 177-78 (suggesting increased transparency in prosecutorial policies).

<sup>23</sup> See, e.g., Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 57 (1971); Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 440-41 (2007) (recommending internal case review and self-regulation by prosecutors as ways to remedy systemic problems); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1562 (1981). *But see* Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 289-96 (2004) (questioning whether internal training, oversight, and regulation by prosecutors is sufficient to regulate prosecutorial misconduct leading to erroneous convictions).

<sup>24</sup> See Bandes, *supra* note 22, at 493-94 (advocating "[r]eview mechanisms . . . at every level of decision-making" that should perform a critical "'naysaying' function"); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1620-21 (2005) (recommending that higher-level prosecutors act as a supervisory, internal check on prosecutorial decision making); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1621 (2006) [hereinafter Burke, *Improving Prosecutorial Decision Making*] (suggesting "fresh look" reviews by additional prosecutors); Findley & Scott, *supra* note 15, at 388 (advocating multiple levels of case review as "another check against tunnel vision").

<sup>25</sup> See Medwed, *supra* note 21, at 126-27 (describing internal committees to review cases resting upon the testimony of a single eyewitness); Robin Topping, *Panel Puts Justice Before Prosecution*, NEWSDAY, Jan. 8, 2003, at A21 (describing such a committee in Nassau County, New York).

<sup>26</sup> See Medwed, *supra* note 21, at 175-77 (suggesting the creation of specialized post-conviction units to review innocence claims); Peter Neufeld, *Legal and Ethical Implications of Post-Conviction DNA Exonerations*, 35 NEW ENG. L. REV. 639, 641 (2001) (noting that "increasingly, progressive-minded prosecutors around the country are setting up their own 'innocence projects'" and citing several examples).

<sup>27</sup> Medwed, *supra* note 21, at 170-71 (advocating continuing education about ethical obligations of prosecutors).

<sup>28</sup> See Bandes, *supra* note 22, at 494 ("[T]raining of both supervisory and lower level personnel must explicitly address the dynamics of tunnel vision."); Burke, *Improving Prosecutorial Decision Making*, *supra* note 24, at 1616; Findley & Scott, *supra* note 15, at 374 ("[P]rosecutors and judges should be educated about the causes of, and correctives for, tunnel vision."); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15

improve the quality of their decision-making.<sup>29</sup>

The voluntary participation of prosecutors is especially important in the area of disclosures of evidence to the defense. Current constitutional law imposes only a narrow obligation on prosecutors to disclose. Under *Brady*, prosecutors are required to disclose only evidence that is both exculpatory and material.<sup>30</sup> Even if evidence “might” affect a case’s outcome, it is not necessarily material under the Court’s due process jurisprudence.<sup>31</sup> Instead, evidence is material “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”<sup>32</sup> Ethical rules governing prosecutors go beyond *Brady* and call for disclosure of all evidence favorable to the defense.<sup>33</sup> However, the prosecutor may not realize that a piece of evidence is favorable to the defense if she does not know the defense’s theory of the case or the facts that might be known to the defense.<sup>34</sup>

---

AM. J. CRIM. L. 197, 258 (1988); Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1533-34 (2000) (advocating education regarding the role of conscious and unconscious bias in charging decisions); Thomas P. Sullivan, *Keynote Address: Reforming Eyewitness Identification*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 265, 268 (2004) (“We should also support initiatives to train detectives, prosecutors, and judges about confirmatory bias or tunnel vision, which creates the risk of wrongful charges and convictions.”); STATE OF ILL., REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT 20 (2002), available at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/chapter\\_02.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_02.pdf) (Commission Recommendation 1) (suggesting that both prosecutors and defense lawyers in capital cases receive training on the dangers of tunnel vision or confirmation bias); FPT HEADS OF PROSECUTION COMM. WORKING GROUP, DEP’T OF JUSTICE CAN., REPORT ON THE PREVENTION OF MISCARRIAGES OF JUSTICE (2004), <http://www.justice.gc.ca/eng/dept-min/pub/pmj-pej/pmj-pej.pdf> (recommending education for prosecutors about tunnel vision).

<sup>29</sup> See Burke, *Improving Prosecutorial Decision Making*, *supra* note 24, at 1618 (advocating practice of “switching sides” to neutralize cognitive bias in prosecutors); Findley & Scott, *supra* note 15, at 371-72 (advocating mechanisms to encourage counterargument throughout investigation and prosecution); Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 342, 348 (suggesting that prosecutors be trained to approach cases with “a healthy skepticism” and “to assume an active role in confirming the truth of the evidence of guilt and investigating contradictory evidence of innocence”); Medwed, *supra* note 21, at 170 (proposing increased training of prosecutors to reduce their resistance to post-conviction innocence claims).

<sup>30</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that prosecutors must disclose evidence to the defense when it is “material either to guilt or to punishment”).

<sup>31</sup> *United States v. Agurs*, 427 U.S. 97, 108-10 (1976) (rejecting such a standard).

<sup>32</sup> *United States v. Bagley*, 473 U.S. 667, 682 (1985).

<sup>33</sup> MODEL CODE OF PROF’L RESPONSIBILITY DR 7-103(B) (2004) (requiring prosecutors to make “timely disclosure . . . of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment”); MODEL RULES OF PROF’L CONDUCT R. 3.8(d) & cmt. 3 (2004) (“[A prosecutor must] make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”).

<sup>34</sup> See Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 513 (2009) [hereinafter Burke, *Revisiting Prosecutorial Disclosure*] (noting that prosecutors may not have

Accordingly, several scholars have called for open-file discovery in which prosecutors disclose all known evidence to the defense. Open-file discovery clearly goes beyond what is required by either the constitution or ethical rules.<sup>35</sup> Although many have advocated changes in the governing doctrine to make open-file discovery mandatory,<sup>36</sup> prosecutors—either individually or institutionally—can disclose more than required by law.<sup>37</sup> A growing number of offices already employ open-file discovery on their own initiative,<sup>38</sup> and many scholars have recognized that open-file disclosure is more likely to be implemented by prosecutors voluntarily than through a formal change in law.<sup>39</sup> And, as

---

the requisite knowledge to recognize the exculpatory value of evidence); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53, 147-48 (“Marginal evidence—viewed through the eyes of defense counsel—might be the key to unraveling the case and exonerating the accused.”); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 569 (noting that prosecutors may be unable to evaluate the materiality of evidence when they are unaware of the defendant’s version of events); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1393 (1991) (“A prosecutor’s lack of information about the planned defense and partisan inclinations impede her from making an accurate and objective assessment of the evidence’s effect on the outcome.”).

<sup>35</sup> *Agurs*, 427 U.S. at 109 (1976) (rejecting standard requiring prosecutors to disclose evidence that “might” affect a jury because such a standard would amount to an open-file discovery requirement).

<sup>36</sup> See Victor Bass, Comment, *Brady v. Maryland and the Prosecutor’s Duty to Disclose*, 40 U. CHI. L. REV. 112, 113 (1972) (“[T]he prosecutor’s entire file should, except in special cases, be open to defense inspection.”); Burke, *Revisiting Prosecutorial Disclosure*, *supra* note 34, at 513-14 (proposing a prophylactic rule requiring open-file disclosure to protect core due process right defined by *Brady*); James Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2145-56 (2000) (proposing federal legislation encouraging states to opt in to procedures required in capital cases, including open-file discovery); Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 262, 307-08 (2008) (emphasizing the importance of broad and concrete discovery requirements); Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1153-54 (2004) (arguing in favor of open file discovery as a prophylactic rule to protect the right to counsel).

<sup>37</sup> See *Agurs*, 427 U.S. at 108 (1976) (“[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.”).

<sup>38</sup> See Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 234 (2007); Bennett L. Gershman, *State Constitutionalization of Criminal Procedure and the Prosecutor’s Disclosure Obligations*, 18 WESTCHESTER B.J. 101, 104 n.17 (1991) (suggesting liberalization of criminal discovery rules); William Bradford Middlekauff, *What Practitioners Say About Broad Criminal Discovery Practice*, 9 CRIM. JUST. 14, 55 (1994) (reporting that approximately three quarters of federal prosecutors stated in a 1984 survey that they turn over more evidence than legally required and that forty-two percent used an open file policy); Prosser, *supra* note 34, at 593-94 (summarizing evidence showing that both individual prosecutors and numerous jurisdictions report the use of open file disclosure); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 926 n.539 (1997) (noting adoption of open-file discovery by Oklahoma prosecutors).

<sup>39</sup> See Joy, *supra* note 18, at 641 (2007) (recommending voluntary adoption of open file discovery as “[t]he surest way to meet and exceed *Brady* disclosure obligations”); Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in*

this Symposium explores, prosecutors, more than any other parties in the criminal justice system, can improve compliance with applicable disclosure guidelines—whether required by law or voluntarily implemented—by improving the disclosure process, maintaining a system and culture that values a fair process, training and supervising prosecutors accordingly, and self-policing.<sup>40</sup>

## II. THE PREVAILING RHETORIC OF FAULT

While prosecutorial participation in many of the innocence movement's most important reforms is essential, the literature on prosecutorial decision-making is dominated by a language of fault. When examining the ways that prosecutorial decisions contribute to wrongful convictions, scholars and commentators have generally attributed bad prosecutorial decisions to widespread prosecutorial "misconduct" that is symptomatic of a deeply flawed prosecutorial culture.<sup>41</sup> In the language of fault, prosecutors care more about winning their cases than serving as neutral ministers of justice.<sup>42</sup> Rather than ensure that convictions are obtained fairly and the innocent protected, prosecutors place undue emphasis on their win-loss ratios and "keep personal tallies" of their conviction rates to advance their own careers.<sup>43</sup>

---

*American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 274 (2006) (noting that "the most promising avenue" for broadening disclosure duties in the context of plea negotiations was at the level of not only statutes and rules of evidence and ethics, but also prosecutorial guidelines). *But see* Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RESERVE L. REV. 531, 544-46 (2007) (warning of the "opportunities for gamesmanship" under even open file policies).

<sup>40</sup> *See generally* Symposium, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943 (2010).

<sup>41</sup> *See* Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 734 (1998); Bennett L. Gershman, *Mental Culpability and Prosecutorial Misconduct*, 26 AM. J. CRIM. L. 121 (1998); Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1, 10-20 (1999); Andrew M. Hertherington, *Prosecutorial Misconduct*, 90 GEO. L.J. 1679 (2002); Meares, *supra* note 21, at 890 ("Prosecutorial misconduct is readily apparent to any lawyer who keeps abreast of appellate review of criminal convictions."); Medwed, *supra* note 21, at 174.

<sup>42</sup> The unusual role of the prosecutor in the criminal justice system is not that of a zealous advocate, but as a minister of justice. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2002) (stating that the prosecutor "has the responsibility of a minister of justice and not simply that of an advocate"); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (stating that a prosecutor's duty "is to seek justice, not merely to convict"); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION & DEF. FUNCTION § 3-1.2(c) (3d ed. 1993) (same).

<sup>43</sup> *See* Kenneth Bresler, "I Never Lost a Trial": *When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 541 (1996) (criticizing prosecutors who "keep personal tallies . . . for self-promotion"); *see also* Meares, *supra* note 21, at 882 (describing the "desire to 'win'" as "a central characteristic of prosecutorial culture"); Medwed, *supra* note 21, at 134 (noting "the emphasis district attorneys' offices place on conviction rates").

With a lack of “moral courage,”<sup>44</sup> prosecutors contribute to wrongful convictions because of routine “overzealousness.”<sup>45</sup>

The language of fault similarly permeates the discourse surrounding the discussion of prosecutorial disclosure of evidence to the defense. Advocates of expanded discovery rights for defendants portray prosecutors as valuing conviction rates over justice. Motivated by the accolades, bragging rights, and future career advancements that come with high win-loss records, the prosecutors described in much of the traditional *Brady* literature intentionally, knowingly, or at least recklessly withhold potentially exculpatory evidence, playing “games” with a doctrine that allows them to maximize their conviction rates by gambling with justice.<sup>46</sup> From this perspective, a critical flaw in *Brady* is the doctrine’s entrustment of the disclosure process to wily prosecutors who rationally conclude that they can withhold exculpatory evidence with impunity because the odds favor them at every stage of the process.<sup>47</sup>

Under the prevailing narrative, self-interested prosecutors know they are their own gatekeepers.<sup>48</sup> When faced with potentially exculpatory evidence, they withhold it, knowing there is little chance that the evidence will ever come to light and therefore little chance that their decision to withhold will ever be challenged.<sup>49</sup> Even in the rare

---

<sup>44</sup> See Gershman, *supra* note 29, at 350.

<sup>45</sup> See Fisher, *supra* note 28, at 204-13 (describing factors that cause prosecutors to pursue cases “overzealously”); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 458 (1992) (arguing that “the present ethos of overzealous prosecutorial advocacy” is “ingrained”); Judith L. Maute, “*In Pursuit of Justice*” in *High Profile Criminal Matters*, 70 FORDHAM L. REV. 1745, 1747 (2002) (“Overzealous prosecutors may become too closely aligned with . . . witnesses who are willing to shade or falsify their testimony in order to obtain a conviction.”).

<sup>46</sup> See Gershman, *supra* note 39 (comparing prosecutorial disclosure practices to game playing).

<sup>47</sup> See Stanley Z. Fisher, *The Prosecutor’s Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REV. 1379 (2000) (noting lack of incentives for prosecutors to ensure that police have disclosed exculpatory evidence to them); Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 715 (2006) (arguing that *Brady* invites prosecutors to “withhold with impunity” due to a “rational belief” that the appellate court will affirm the defendant’s conviction); Weeks, *supra* note 38, at 870 (arguing that *Brady* creates incentives to withhold evidence).

<sup>48</sup> See Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 393-97 (1984) (criticizing the materiality standard for entrusting prosecutors to monitor their own compliance with disclosure obligations); Stacy, *supra* note 34, at 1393 (same).

<sup>49</sup> See Brown, *supra* note 24, at 1637 (“The *Brady* rule currently works poorly because prosecutors decide both what is material and what is exculpatory. . . . [O]dds are that if a prosecutor does not disclose it, the evidence will never be uncovered.”); Capra, *supra* note 48, at 396; Findley & Scott, *supra* note 15, at 351-52 (observing that *Brady* violations are brought to light only “through some fortuity that usually occurs sometime after trial”); Gershman, *supra* note 47, at 687 (“*Brady* is . . . virtually unenforceable when violations are hidden.”); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors’ Ethics*, 55 VAND. L. REV. 381, 470 (2002) (noting that prosecutors may fail to disclose exculpatory evidence because their misconduct

event that the defense does eventually learn about the evidence, the prosecutor is unlikely to suffer any repercussions. In general, few criminal convictions are reversed on appeal.<sup>50</sup> This general trend holds true for challenges based on the government's failure to disclose evidence. A study by the Habeas Assistance and Training Project, a resource for defense attorneys, examined forty years of federal and state court cases and found only 270 cases in which convictions were reversed or new trials granted because of the government's failure to disclose evidence.<sup>51</sup> More recently, Professor Bibas examined 210 *Brady* cases decided in 2004 and concluded that fewer than twelve percent of them succeeded.<sup>52</sup> Accordingly, prosecutors who withhold exculpatory evidence can do so with confidence that a reversal of an eventual conviction is unlikely. Finally, even in the rare event that undisclosed evidence is discovered and the defendant's conviction reversed, the prosecutor finds himself in no worse position than if she had disclosed the exculpatory evidence in the first place. The Double Jeopardy Clause does not protect the defendant against a second trial, so the prosecutor can simply proceed with a retrial with the disclosed evidence available to both sides.<sup>53</sup>

---

"stands some chance of remaining secret"); Janet C. Hoefel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN. ST. L. REV. 1133, 1145 (2005) ("[B]ecause [the prosecutor] has no obligation to disclose this evidence, it may never be discovered and, therefore, will never make its way into an appeal of the conviction."); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1150 (2005) (noting the role of luck in determining whether the defense learns about withheld evidence); Meares, *supra* note 21, at 909 (noting that it is "probably fair to say that many instances of *Brady*-type misconduct are never discovered and hence never reported"); Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 FORDHAM L. REV. 1537, 1579 (2000) (noting that, in most cases, "withheld evidence will never see the light of day," thereby preventing judicial review); Stacy, *supra* note 34, at 1393.

<sup>50</sup> Scholars have noted the various reasons why appellate judges rarely reverse criminal convictions. Overwhelmed with meritless appeals and habeas petitions, affirming convictions became the habitualized norm. See Stephanos Bibas, *Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?*, in CRIMINAL PROCEDURE STORIES 129, 143 (Carol Steiker ed., 2006) [hereinafter Bibas, *Search for Innocence*] ("[J]aded judges find it hard to spot the occasional innocence needle in the haystack."); Hoefel, *supra* note 49, at 1145-46 ("[A]ppellate courts have shown themselves to be predisposed to upholding convictions"). Judges may also suffer from hindsight bias, causing them to see a conviction that has already been obtained as the inevitable conclusion of litigation. See Bibas, *Search for Innocence*, *supra*, at 143-44; Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1.

<sup>51</sup> See Richard A. Serrano, *Withheld Evidence Can Give Convicts New Life*, L.A. TIMES, May 29, 2001, at A1 (citing the Habeas Assistance and Training Project study).

<sup>52</sup> See Bibas, *Search for Innocence*, *supra* note 50, at 144-45.

<sup>53</sup> See Hoefel, *supra* note 49, at 1146 ("[A] reversal simply calls for a retrial, so that the prosecutor is put in essentially the same position he was in prior to the [*Brady*] error."); cf. Adam M. Harris, Note, *Two Constitutional Wrongs Do Not Make a Right: Double Jeopardy and Prosecutorial Misconduct Under the Brady Doctrine*, 28 CARDOZO L. REV. 931 (2006) (arguing that double jeopardy should prohibit retrial when a conviction is reversed because of a *Brady* violation); David L. Botsford & Stanley G. Schneider, *The "Law Game": Why Prosecutors*

Just as the prosecutor who gambles with the non-disclosure of exculpatory evidence to maintain a high conviction rate takes little risk with regard to her caseload, she is also unlikely to pay little price personally. As a general matter, state disciplinary bodies rarely charge prosecutors with misconduct.<sup>54</sup> Not surprisingly, then, prosecutors are rarely charged or sanctioned, even when a failure to disclose material, exculpatory evidence is subsequently discovered.<sup>55</sup> In one of the leading studies of *Brady* violations, Professor Rosen surveyed state legal disciplinary bodies across the country and found only nine instances in which proceedings had been brought based on a prosecutor's violation of his *Brady* obligations.<sup>56</sup> Of the forty-one states that responded to his survey, thirty-five reported that they had never filed a complaint against a prosecutor for violating *Brady*.<sup>57</sup> A subsequent study by Professor Weeks revealed that only seven additional proceedings based on allegations of *Brady* violations had been commenced in the following decade.<sup>58</sup> If prosecutors are unlikely to be disciplined for actual *Brady* violations, they are even less likely to be disciplined for failing to disclose evidence that falls only under their ethical requirements and not the constitutional standard of *Brady*.<sup>59</sup>

Regardless of the prevalence of prosecutorial misconduct or the inadequacy of current ethical regulations or disciplinary bodies to sanction violations,<sup>60</sup> this Article questions the productivity of the prevailing rhetoric of fault. When it uses the rhetoric of fault, the innocence movement casts prosecutors as outsiders to its cause. By treating prosecutors as "other," the language of fault invites prosecutors to resist and disengage from the study and prevention of wrongful

---

*Should Be Prevented from a Rematch; Double Jeopardy Concerns Stemming from Prosecutorial Misconduct*, 47 S. TEX. L. REV. 729 (2006) (same).

<sup>54</sup> See Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 889 (1998) (noting an "absence of disciplinary sanctions against prosecutors, even in the most egregious cases"); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 755 (2001) (noting the lack of discipline for prosecutorial misconduct).

<sup>55</sup> See Gershman, *supra* note 45, at 443-45 (noting the "failure of professional disciplinary organizations to deal with . . . misconduct"); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 730-31 (1987) (asserting that, despite widespread failures to disclose exculpatory evidence to the defense, prosecutors are rarely subject to disciplinary proceedings or sanctions based on *Brady* violations).

<sup>56</sup> See Rosen, *supra* note 55, at 730.

<sup>57</sup> *Id.* at 730-31.

<sup>58</sup> See Weeks, *supra* note 38, at 881.

<sup>59</sup> See Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1593 ("[C]ourts and disciplinary authorities do not sanction prosecutors for failing to disclose evidence as required by the rule but not by other law.").

<sup>60</sup> While the scholarly literature depicts widespread prosecutorial misconduct, Joshua Marquis of the National District Attorney's Association describes prosecutorial misconduct as "more episodic than epidemic." Laura Parker, *Court Cases Raise Conduct Concerns*, USA TODAY, June 26, 2003, at 3A.

convictions.<sup>61</sup> However, in large part because of the broad prosecutorial discretion that the rhetoric of fault often condemns, prosecutors have a tremendous amount of power to implement the institutional, cultural, and personal reforms that the innocence movement has called for.

### III. THE ROOTS OF AN ALTERNATIVE DISCOURSE

Prosecutors naturally resist the depiction of themselves as the antagonists in the stories of the wrongfully convicted. Rather than struggle against their obligations as ministers of justice, the prosecutorial culture often embraces the “do justice” ethos.<sup>62</sup> For many prosecutors, it is precisely the prosecutor’s duty to do justice and freedom from zealous advocacy on behalf of a client that draws them to their profession.<sup>63</sup> By questioning prosecutors’ commitment to justice, the rhetoric of fault challenges the very identity of prosecutors and allows prosecutors to believe that the wrongful convictions movement is focused not on them, but only on a handful of outlier rogues. As a consequence, the language of fault excludes the very actors most able to implement the movement’s reforms.<sup>64</sup>

Prosecutorial participation in reform is more likely to result from an inclusive rhetoric that recognizes that even virtuous prosecutors who strive to do justice might inadvertently err. The basis of a “no-fault” rhetoric for discourse on wrongful convictions could focus on structural and cognitive impediments to neutral prosecutorial decision-making. As an alternative to the language of fault, a no-fault rhetoric focused on impediments to prosecutorial neutrality would avoid alienating prosecutors and instead invite them to contribute, individually and collectively, to the prevention of wrongful convictions. As an example of how the use of no-fault rhetoric can alter a narrative framework, this Part discusses reasons why even ethical prosecutors might fail to

---

<sup>61</sup> See *The Effect of State Ethics Rules on Federal Law Enforcement: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 53 (1999) (testimony of John Smietanka, former prosecutor) (stating that “[t]ime, money and, to some unfortunate extent, a cultural chasm” prevent prosecutors from “meaningful participation” in bar activities).

<sup>62</sup> See Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 *FORDHAM URB. L.J.* 607, 608 (1999) (noting that federal prosecutors in the Southern District of New York “in some sense . . . felt that they owned the concept” of doing justice).

<sup>63</sup> See Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 *MARQ. L. REV.* 183, 187 (2007) [hereinafter Burke, *Prosecutorial Passion*].

<sup>64</sup> Empirical evidence suggesting that lawyers are especially resistant to feedback and hypersensitive to criticism further suggests that fault-based rhetoric is unlikely to be effective with prosecutors. Larry Richard, *Herding Cats: The Lawyer Personality Revealed*, *ALTMAN WEIL REPORT TO LEGAL MANAGEMENT*, Aug. 2002, <http://www.lawmarketing.com/pages/articles.asp?Action=Article&ArticleID=350> (reporting that ninety percent of surveyed attorneys demonstrated low “resilience” in a measure of personality traits, compared to only thirty percent for the general public).

disclose exculpatory evidence to the defense.

One structural impediment facing prosecutors is the *Brady* doctrine itself. As a standard to govern a prosecutor's pre-trial obligation to disclose evidence to the defense, the *Brady* doctrine is difficult to apply. Requiring disclosure of evidence only if it undermines confidence in the trial's outcome, the standard is phrased not from the perspective of an attorney making pre-trial decisions, but of an appellate court determining with the benefit of a trial record whether to grant post-conviction relief.<sup>65</sup> Accordingly, it requires prosecutors to imagine a the record of a trial they have not yet started, and then ask whether in hindsight the evidence at issue would undermine confidence in a resulting conviction. Although some argue that ethical prosecutors can avoid error by disclosing more broadly than required by *Brady*,<sup>66</sup> some prosecutors may be concerned that broad disclosure to advance the protection of the innocent might actually conflict with their role as ministers of justice. The prosecutor's unique role in the adversary system has a "twofold" objective: to ensure that neither "guilt shall . . . escape" nor "innocence suffer."<sup>67</sup> Although prosecutors must seek to prevent wrongful convictions, they must also "use every legitimate means to bring about a just one."<sup>68</sup> She cannot strike "foul" blows, but she may strike "hard" ones.<sup>69</sup> By expecting prosecutors to serve as discretionary gatekeepers of their own disclosure, *Brady* places prosecutors in the untenable position of trying to serve competing and sometimes inconsistent goals.<sup>70</sup>

---

<sup>65</sup> See Bibas, *Search for Innocence*, *supra* note 50, at 143 (noting that prosecutors "have difficulty forecasting before trial what evidence will in retrospect seem to have been material"); John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 471 (2001) ("It seems curious, to say the least, that a prosecutor has a constitutional obligation *before* trial to disclose a category of information that cannot be defined until *after* trial." (emphases added)); Findley & Scott, *supra* note 15, at 352 ("[T]he *Brady* test oddly imposes a retrospective analysis on decisions that must be made prospectively, pretrial."); Green, *supra* note 59, at 1592 n.101 (noting the difficulty of assessing the materiality of evidence prospectively); Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 658 (2002) (asserting that the materiality requirement results in "a somewhat odd and circular spectacle: a pre-trial obligation that is defined through speculation on a post-trial result").

<sup>66</sup> See Hoeffel, *supra* note 49, at 1142 ("If the good prosecutor were the ethical prosecutor, he would disclose to the defense all information favorable to the defense, without hesitation. . . . If in doubt, he would err on the side of disclosure."); Johns, *supra* note 34, at 147 (noting that prosecutors "can simply err on the side of caution and disclose more evidence than is actually required"); Sundby, *supra* note 65, at 660 (asserting that prosecutors are likely to disclose more than what is required "to be on the safe side and out of a sense of ethical obligation").

<sup>67</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See Susan S. Kuo & C.W. Taylor, *In Prosecutors We Trust: UK Lessons for Illinois Disclosure*, 38 LOY. U. CHI. L.J. 695, 706 (2007) ("The quest for success can affect a prosecutor's ability to objectively weigh the materiality of potentially exculpatory evidence . . ."); Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the*

Moreover, because prosecutors must make unilateral decisions about whether to disclose evidence without reciprocal discovery from the defense, they may not be able to recognize when a piece of evidence is potentially exculpatory.<sup>71</sup> Evidence that appears neutral or even inculpatory to the prosecutor might nevertheless be exculpatory in the context of evidence known only to the defense or the defense's theory of the case. For example, seeming irrelevant details might add corroboration to the defendant's version of the events.<sup>72</sup> The identity of a witness who leads the police to inculcating physical evidence might reveal that the witness has a grudge against the defendant and planted the evidence.<sup>73</sup>

The likelihood that a well-intentioned prosecutor will underestimate the exculpatory value of evidence is only heightened by cognitive biases that interfere with a neutral assessment of case evidence. In contrast to the rhetoric of fault that dominates the traditional literature on prosecutorial ethics, an emerging literature has explored the effects of bounded rationality on the decision-making of prosecutors.<sup>74</sup> Whereas prosecutors might hope and believe that they are able to assess their cases neutrally and objectively, psychological research suggests otherwise. Cognitive psychologists have convincingly demonstrated that human decision making, rather than

---

*Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337 (2004); Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999 (2009); Stacy, *supra* note 34, at 1393 (noting that prosecutors' "partisan inclinations" can impede "an accurate and objective assessment" of evidence); Andrew E. Taslitz, *Wrongful Rights*, 18 CRIM. JUST. 4, 11 (2003) ("[P]rosecutors faced with a duty to disclose material exculpatory evidence may in good faith interpret that duty narrowly, for prosecutors come to believe zealously in the guilt of those they accuse, inevitably coming to embrace the virtues of his or her own position." (internal quotation marks omitted)). The prosecutor's ability to balance her competing obligations is further undermined when most of the defendants she has charged are actually guilty, making it difficult to entertain the possibility of innocence. See Fisher, *supra* note 28, at 208 (noting that prosecutors are typically isolated from populations who might trigger empathy for defendants, while surrounded by populations "who can graphically establish that the defendant deserves punishment, and who have no reason to be concerned with competing values of justice").

<sup>71</sup> See Johns, *supra* note 34, at 147-48 ("Marginal evidence—viewed through the eyes of defense counsel—might be the key to unraveling the case and exonerating the accused."); Stacy, *supra* note 34, at 1393 (observing that a prosecutor's lack of knowledge about the defense's theory undermines her ability to assess the exculpatory value of evidence).

<sup>72</sup> See Prosser, *supra* note 34, at 569 (noting that prosecutors may fail to recognize the exculpatory value of evidence that would corroborate the defendant's version of events).

<sup>73</sup> See Burke, *Revisiting Prosecutorial Disclosure*, *supra* note 34, at 513-14 (discussing a hypothetical witness who frames a defendant).

<sup>74</sup> See generally Bandes, *supra* note 22, at 479; Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2496-2519 (2004); Burke, *Improving Prosecutorial Decision Making*, *supra* note 24; Burke, *Prosecutorial Passion*, *supra* note 63, at 195-200; Findley & Scott, *supra* note 15; Medwed, *supra* note 21, at 140-41; O'Brien, *supra* note 70; Myrna Raeder, *What Does Innocence Have to Do with It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315, 1327.

being perfectly rational, is systematically and predictably skewed by cognitive biases.<sup>75</sup> More specifically, cognitive scientists have documented the human tendency for people to interpret evidence through the lens of their existing beliefs. Because of selective information processing, people tend to accept at face value information that is consistent with their beliefs, while devaluing inconsistent information.<sup>76</sup> In the law enforcement context, scholars and commentators refer to this phenomenon in police and prosecutors as “tunnel vision.”<sup>77</sup> Once police and prosecutors believe that a suspect is guilty, their theory of guilt may taint their assessment of the case evidence, causing them unconsciously to accept inculpatory evidence without question, draw inculpatory inferences from ambiguous evidence, and disregard potentially exculpatory evidence.<sup>78</sup>

---

<sup>75</sup> See generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982); ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE (1999); RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980); STEVEN PINKER, HOW THE MIND WORKS (1999); see also Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1175 (1997) (noting that although “[c]ognitive errors and motivational distortions may press behavior far from the anticipated directions,” human behavior is not “unpredictable, systematically irrational, random, rule-free, or elusive to social scientists”).

<sup>76</sup> See, e.g., Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).

<sup>77</sup> See, e.g., Bandes, *supra* note 22, at 481; Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369, 428-29 (2009) (“Research on the causes of wrongful convictions has produced a large body of scholarship describing the problem of ‘tunnel vision,’ the unconscious cognitive biases that plague both police and prosecutors.”); Brown, *supra* note 24, at 1600 (noting that confirmation bias in police and prosecutors can distort criminal investigations); Findley & Scott, *supra* note 15, at 292; Kuo & Taylor, *supra* note 70, at 706-07 (discussing the “tunnel vision” phenomenon); Dianne L. Martin, *Lessons About Justice from the “Laboratory” of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 849 (2002) (examining evidence from Canada and Britain demonstrating the role that prosecutorial tunnel vision plays in wrongful convictions); Medwed, *supra* note 21, at 140-41 (discussing prosecutorial deference to police with tunnel vision); Raeder, *supra* note 74, at 1327 (“[T]he tunnel vision problem has been widely noted in wrongful conviction cases. Officers and prosecutors either don’t realize the significance or accuracy of exculpatory evidence or on occasion affirmatively conceal it because they are convinced of the suspect’s guilt.”).

<sup>78</sup> In earlier pieces, I have set forth in greater detail the ways that cognitive bias might alter a prosecutor’s assessment of the exculpatory value of evidence. See Burke, *Improving Prosecutorial Decision Making*, *supra* note 24, at 1607; Burke, *Revisiting Prosecutorial Disclosure*, *supra* note 34, at 496; Alafair S. Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 518 (2007) [hereinafter Burke, *Neutralizing Cognitive Bias*]. Other authors have discussed this phenomenon, as well. See Keith A. Findley, *Innocents at Risk: Adversary Imbalance, Forensic Science, and the Search for Truth*, 38 SETON HALL L. REV. 893, 899 (2008) (“[P]olice and prosecutors—as human beings—are likely, once they have identified a suspect or formed a theory of guilt, to seek confirming evidence and not seek disconfirming evidence.”); Randolph N. Jonakait, *The Ethical Prosecutor’s Misconduct*, 23 CRIM. L. BULL. 550, 552, 559 (1987) (noting a prosecutor’s “natural tendency to acquire all the evidence that inculpates the person selected as guilty while all other evidence is ignored” and that “[t]he natural inclination is not to see inconsistent or contradictory evidence for what it is, but to

Consider how these decisional tendencies might affect the prosecutor's assessment of whether to disclose evidence to the defense. Because the prosecutor believes that the defendant is guilty, she is likely to weigh the evidence against him as strong. In contrast, she is likely to view evidence that might be helpful to the defendant's lawyer as unreliable, distracting, or immaterial. As a consequence, she may conclude that the evidence is not material and exculpatory, or perhaps not even exculpatory at all.<sup>79</sup>

#### CONCLUSION

Universal cognitive bias, the prosecutor's competing dual roles, and the awkwardness of the *Brady* doctrine itself collectively provide the roots of a no-fault explanation for prosecutorial failures to disclose exculpatory evidence. No-fault rhetoric that assumes prosecutors are trying to protect innocence, but which recognizes the reasons why they might accidentally err, is more likely to activate discussion with prosecutors than fault-based rhetoric. The traditional rhetoric of fault assumes that prosecutors who contribute to wrongful convictions do so because they care insufficiently about claims of innocence and their roles as ministers of justice. Because of that rhetoric, prosecutors who view themselves as ethical might conclude that the wrongful convictions movement is either focused on a small minority of indifferent prosecutors or falsely assuming that most prosecutors are indifferent. They might disengage from the evolving study of and conversation about the prevalence and causes of wrongful convictions, further isolating themselves from contrasting viewpoints that might neutralize decisional biases. As a consequence, they may fail to recognize the possibility that, despite their best intentions, they might inadvertently contribute to an erroneous conviction.<sup>80</sup>

Shifting the discourse of the wrongful conviction movement from fault-based rhetoric is also more likely to persuade prosecutors to implement disclosure reforms. For example, a prosecutor called upon

---

categorize it as irrelevant or a petty incongruity"); Sundby, *supra* note 65, at 655 (noting that cognitive biases could impede prosecutors from recognizing materiality); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917, 945 (1999) (noting that prosecutors "get wedded to their theory and things inconsistent with their theory are ignored").

<sup>79</sup> See Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 *RUTGERS L. REV.* 1317, 1375 (1997) (arguing that a prosecutor who believes a defendant is guilty may view potentially exculpatory evidence "as a 'red herring' with which defense counsel may make mischief").

<sup>80</sup> See O'Brien, *supra* note 70, at 1010 ("False convictions—the most dramatic examples of the system's failure—often involve honest mistakes by ethical investigators and prosecutors.").

to adopt an open-file discovery policy as a means of preventing intentional *Brady* violations<sup>81</sup> might deem such a policy unnecessary, assuming that she always discloses as required. However, prosecutors who perceive the distorting influences of cognitive bias and a prosecutor's conflicting dual roles might be attracted to the clarity provided by open-file discovery.<sup>82</sup>

Finally, avoiding fault-based rhetoric may actually place more pressure on prosecutors to participate in reform than fault-based rhetoric. Whereas fault-based discourse grants ethical prosecutors license to disengage, no-fault rhetoric invites prosecutors to learn about the causes of wrongful convictions, to study how prosecutors can help prevent erroneous convictions, and to implement education programs and institutional policies to reduce the likelihood of error. As Professors Findley and Scott have observed, "tunnel vision in the criminal justice system exists not despite our best efforts to overcome these cognitive biases and institutional pressures, but because of our deliberate systemic choices."<sup>83</sup> Because of the discretion they are afforded, prosecutors have a unique power to alter those systemic choices. If prosecutors are invited to participate in reform with no-fault rhetoric, yet ignore the risks that even ethical prosecutors might contribute to wrongful convictions, they do so at their peril. A continued failure to take steps to prevent accidental error would only bolster the fault-based arguments that prosecutors currently resist.<sup>84</sup>

I began this Article with an anecdote and will close with one as well. I wrote this Article in connection with a Symposium of scholars, defense lawyers, and prosecutors to discuss their viewpoints on *Brady* and other disclosure obligations. In her opening comments, Symposium organizer Ellen Yaroshefsky implored participants to avoid what I have called here fault-based rhetoric. One of the other attendees was a prosecutor who was once my supervisor and remains my friend. The day before the Symposium, he told me he was preparing himself to be

---

<sup>81</sup> See *supra* notes 36-39 and accompanying text.

<sup>82</sup> See O'Brien, *supra* note 70, at 1035-47 (calling for less prosecutorial discretion in the disclosure process to minimize bias caused by a prosecutor's role as advocate); Findley & Scott, *supra* note 15, at 390 (advocating the expansion of criminal discovery as a means to counter tunnel vision); Richard A. Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 272-74 (advocating open discovery in criminal cases to mitigate harms caused by police and prosecutorial tunnel vision); see also A VISION FOR JUSTICE, *supra* note 15, at 67-68 (recommending open file discovery to reduce the likelihood of wrongful convictions).

<sup>83</sup> Findley & Scott, *supra* note 15, at 333.

<sup>84</sup> See Burke, *Neutralizing Cognitive Bias*, *supra* note 78, at 529-30 (noting that prosecutors' failure to take steps to mitigate the effects of cognitive bias bolsters the argument for fault-based reforms); Raeder, *supra* note 18, at 1452 ("It is time for prosecutors to take a more proactive stance to curtail practices that contribute to wrongful convictions. Strengthening their ethical policies will remind prosecutors about the values that first attracted them to public service, and help to allay the cynicism of those who think that obtaining convictions is the only *raison d'être* of their calling.").

beaten up by the defense bar and the academics for the next two days. After the first day of the Symposium, he said to me, “That wasn’t so bad.” And when the Symposium was over, he brought his materials home with him. “There’s some stuff in there I want to add to our office policy.”

No-fault rhetoric might actually work.