PROSECUTION COMPLEX

AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT

DANIEL S. MEDWED

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For Howard Medwed who taught me to love the law;
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and Sharissa Jones, the love of my life.

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Justice Felix Frankfurter once wrote that "all systems of law . . . are administered through men and therefore may occasionally disclose the frailties of men." The same principles apply to law professors. Any errors in this book come from my frailties alone.

Contents

Introduction

James Giles served ten years in prison for a vicious rape he did not commit because prosecutors failed to provide the defense with evidence suggesting that a different James Giles was at fault. David Wong endured seventeen years in the penitentiary for a murder he did not commit because prosecutors relied on a dishonest jailhouse informant who received a recommendation for parole in exchange for his testimony against Wong. Bruce Godschalk wasted fifteen years of his life incarcerated for two sexual assaults he did not commit. He spent seven of those years fighting prosecutors just for the chance to subject the biological evidence retrieved from the crime scenes to deoxyribonucleic acid (DNA) testing. These three men are not the only criminal defendants who have suffered the horror of wrongful conviction due to choices prosecutors made in their cases. Why does this happen, and how can it be avoided?

I have wrestled with these questions for nearly fifteen years, ever since I accepted a job as a public defender with the Legal Aid Society of New York City. My later work helping inmates pursue post-conviction claims of innocence as assistant director of the Second Look Program at Brooklyn Law School fueled my interest in prosecutorial behavior and its impact on the innocent. Now, as a professor with some distance from the daily rigors of law practice, this book is my attempt to answer these questions.

Prosecutors and Wrongful Convictions

Since 1989 post-conviction DNA testing has exonerated more than 250 prisoners, and at least 300 other inmates with powerful innocence claims have gained their freedom.[1] But there is reason to think that these exonerations are the tip of a much larger innocence iceberg. Biological evidence suitable for DNA testing exists in only 10 to 20 percent of criminal cases; even then, it is often lost, degraded, or destroyed before any attempt to conduct post-conviction testing.[2] Without the magic bullet of DNA, prisoners struggle to

overturn cases because of the difficulties involved in finding nonscientific evidence of innocence after trial and convincing skeptical judges that this evidence raises doubts about the accuracy of the verdict. As Professor Samuel Gross once put it, "the true number of wrongful convictions is unknown and frustratingly unknowable."[3]

What we do know is that specific factors cause these miscarriages of justice in the first place.[4] Prosecutorial behavior has emerged as one of those factors, a finding that clashes with our vision of the American prosecutor. Prosecutors in the United States are public officials who charge individuals with crimes and litigate those matters in court. They represent "the People" of their jurisdictions, not crime victims. Unlike defense attorneys, whose sole task is to champion their clients' interests, prosecutors are quasi-judicial officers equipped with a dual obligation. They must serve as zealous government advocates and neutral "ministers of justice." As portrayed by courts, ethicists, and Hollywood filmmakers, prosecutors committed to justice never lose a case so long as the outcome is fair.[5]

Various rationales support the idea that prosecutors should carry the weighty minister-of-justice burden on top of their advocacy responsibilities. Prosecutors are the most powerful players in the criminal justice system, capable of determining who should be charged and with what crimes. The duty to serve as a minister of justice is designed to limit abuse of this power and to compensate for the imbalance of resources that so often places the defense at a disadvantage. Demanding more of prosecutors than of other lawyers also fosters greater confidence in the legitimacy and accuracy of the criminal justice system. Anointing prosecutors as ministers of justice, in short, makes many of us feel better about the chance that justice will occur in the end.[6]

Yet reliance on "justice" as the main yardstick of prosecutorial behavior is dangerous. Few tangible rules bind prosecutors beyond the amorphous duty to do justice.[7] Even where specific rules exist—such as those concerning the evidence prosecutors must turn over to the defense before trial—courts and ethics committees seldom punish prosecutors for violating them.[8] Small wonder that the minister-of-justice ideal has not adapted flawlessly into practice.

Indeed, the idealistic image of the prosecutor as minister of justice masks a less glowing truth. Consider the following anecdote. Several years ago one of my students had a job interview with a prosecutors' office. The interview seemed to be going well until the interviewer asked whether my student had "tasted blood" in the courtroom. Silence reigned, until the interviewer

explained that he wanted to hire lawyers who had already tasted blood and liked it.[9] How did bloodlust become a prerequisite for working as a prosecutor, at least in that office?

The very source of prosecutorial uniqueness—the dual role of advocate and servant of justice—may be part of the answer, causing an "ongoing schizophrenia" about how to balance these responsibilities.[10] Prosecutors are told to lock up criminals and protect defendants' rights. Although no tension should exist between a prosecutor's advocacy and minister-of-justice duties, the role of zealous advocate often takes precedence. Professional incentives and psychological pressures in most prosecutorial offices are linked with the advocate's goal of earning convictions. This creates an institutional "prosecution complex" that animates how district attorneys' offices treat potentially innocent defendants at all stages of the process—and that can cause prosecutors to aid in the conviction of the innocent.[11]

That prosecutors sometimes contribute to wrongful convictions is troubling. Even assuming that the error rate in the criminal justice system hovers around 1 percent of felony cases, a figure smaller than many scholars estimate, that means thousands of innocent people live behind bars.[12] These cases represent far more than a series of individual nightmares; they offend our core values. Protecting the innocent is a pillar of Anglo-American criminal law, as reflected by English legal commentator William Blackstone's famous eighteenth-century maxim that it is far better to let ten guilty people go free than to convict a single innocent person.[13] The conviction of an innocent defendant also compromises public safety. By getting it wrong at the outset, the true culprit is free to commit other crimes.[14]

The Structure of the Book

This book explores the role that prosecutors play in convicting innocent defendants and prolonging their incarceration. The book is divided into three parts that correspond to the key phases of a criminal case: pretrial, trial, and post-conviction. Each part begins with a representative story of a wrongful conviction, followed by chapters that fuse case narratives with evaluations of the rules and biases that permit prosecutors to assist in these injustices.

Part 1 focuses on how prosecutorial conduct before trial may result in wrongful convictions. Judicial decisions and ethical rules give prosecutors discretion to charge people with crimes, disclose evidence in their possession, and offer plea bargains. Social scientists have shown that cognitive

biases may lead prosecutors early on to develop "tunnel vision" about a particular case and interpret even exculpatory evidence in a fashion that confirms their perception of the suspect's guilt.[15] Once tunnel vision becomes entrenched, a prosecutor's minister-of-justice duties all too often fade into the background and present few obstacles on the path to conviction.

Part 2 concerns prosecutorial tactics at trial that contribute to wrongful convictions. If plea bargaining negotiations falter, prosecutors normally direct their efforts toward achieving a successful outcome at trial. The upshot is that many trial prosecutors develop a "conviction psychology,"[16] an affliction that promotes the use of aggressive strategies. These strategies include the presentation of witnesses who lack credibility, the introduction of dubious forensic scientific evidence, and unfair comments on the evidence in closing arguments.

Part 3 looks at the issue of prosecutorial resistance to innocence claims after trial. Stories of post-conviction prosecutors behaving defensively fill the annals of criminal law, even when inmates put forth strong new evidence of innocence. On many occasions prosecutors confronted with the likelihood of a wrongful conviction have concocted revised theories of the case that bear scant resemblance to the approach at trial to rationalize the continued imprisonment of the defendant.[17]

Each part offers thoughts on possible reforms to add substance to the minister-of-justice concept. A number of sources shape and control prosecutorial behavior. Courts provide a check on prosecutors through constitutional doctrine and judicial opinions. Legislatures enact statutes, some of which relate to the election of chief prosecutors. Legal ethics fall into two categories that apply to prosecutors: rules and standards. Ethical rules are binding; a lawyer's violation of them may lead to disciplinary action. Ethical standards are nonbinding resolutions intended to offer guidance and encourage best practices. Prosecutors also regulate their own work through internal norms, policies, and practices.

My suggestions for reform consider all these sources. Though my recommendations vary in each section, four themes prevail: (1) that there should be greater transparency in most discretionary decisions made by prosecutors; (2) that courts and legislatures should raise the legal bar for prosecutors in justifying those discretionary choices; (3) that ethical rules should be more concrete and disciplinary agencies more inclined to penalize prosecutors for violating them; and (4) that prosecutors should construct internal review committees to evaluate major decisions to neutralize the grave effects of cognitive bias.

One theme I do not develop in much detail, despite its periodic appearance throughout the book, relates to racial bias in prosecutorial decision making. The issue of race permeates every aspect of the American criminal justice system. Other scholars have discussed this topic more capably than I ever could,[18] and I fear that any effort to cover it comprehensively here, short of a monograph-length discourse, would be incomplete.

The goal of this book is not to portray prosecutors as rogue officials indifferent to the conviction of the innocent. Such a portrayal would be misleading.[19] For that matter, drawing any generalizations about the behavior of American prosecutors, some thirty thousand strong in more than two thousand separate offices,[20] is a challenge. What seems safe to say is that most prosecutors aim to do justice, but only some hit that target consistently. This book seeks to explain and change this state of affairs.

PART I

Fair Play?

Prosecutorial Behavior Prior to Trial

State of Texas v. James Curtis Giles

Around midnight on August 1, 1982, three African American men armed with guns broke into a North Dallas apartment and terrorized the occupants. After raping a pregnant white woman, the men robbed her husband. The assailants then dragged the woman outside to a nearby field where they raped her again. It was a shocking act of brutality that local police officers did not want to go unpunished. Fortunately they had a good lead. The rape victim recognized one of her attackers as an acquaintance named Stanley Bryant who lived in her neighborhood. But the police were unable to interview Bryant before he fled Texas after the attack, and they had almost no information about the other perpetrators. The victim could only describe them in general terms, one as tall and lean and the other as short and stocky.[1]

The investigation languished for several weeks until law enforcement received a tip that "James Giles" was one of the participants in the North Dallas assault. Following up on that clue, the police discovered that a man named James Curtis Giles had a criminal record and lived thirty miles away. The twenty-eight-year-old Giles was married with a child and earned his living as a construction worker. A month after the incident, the police showed the victim and her husband an array of six photographs of men who matched the description of the perpetrators. Although the husband failed to identify anyone initially from these pictures, the woman pointed out Giles as one of her assailants, the "tall one."[2]

The case against Giles went to trial in June 1983 based on the identification. During the victim's testimony about her traumatic experience, she repeated her identification of Giles. She insisted that when she saw his photograph she was "absolutely positive that it was him."[3] She never viewed a live lineup in the case. In fact, her first in-person identification of Giles occurred

during trial when the defendant was the only African American in the courtroom except for a bailiff.[4]

Giles claimed he was with his wife during the time of the North Dallas incident. His wife corroborated this alibi on the witness stand. The jury nonetheless found Giles guilty of aggravated rape, and the judge sentenced him to thirty years in prison. The foreperson later explained that the jury agonized over the case but put tremendous stock in the identification.[5]

The conviction of James Giles was suspect from the start. The vicitim declared that Giles's face was inches away from her during the assault, a salient detail that reinforced the strength of her identification. But she never mentioned that her attacker had gold teeth—and Giles had two of them displayed prominently during the summer of 1982. Although police detectives denied committing any misconduct during the photo lineup procedure, a rumor surfaced that the victim had learned the name "James Giles" from a neighbor and that the police directed her to his photo.[6]

Information gathered during a police interrogation of Stanley Bryant in Indiana cast further doubt on Giles's guilt. In May 1983, two weeks before Giles's trial, the Dallas police discovered that Bryant had been arrested in Indianapolis for an unrelated crime. Dallas Detective Carol Hovey consulted with the lead prosecutor in the Giles case, Mike O'Connor, and asked police officials in Indianapolis to interrogate Bryant about the events of August 1, 1982. Indianapolis detectives obtained two statements from Bryant in which he confessed to the North Dallas crimes. Bryant attributed the entire incident to a dispute over drugs, and cited two teenagers named "Michael" and "James" as his accomplices. He described his friend Michael as the taller of the two and gave detailed information about him, including his telephone number. Bryant noted that James was a short, muscular teen who ran in the same circles. Indeed, a younger James Giles—James Earl Giles (a.k.a., "Quack")—was a known criminal associate of Bryant's who lived across the street from the victim. Bryant's wife provided a statement to the police supporting her husband's account.[7]

Dallas prosecutors withheld Stanley Bryant's statements implicating "Michael" and "James" from the defense, even though the government is required to disclose such evidence as a matter of federal constitutional law. In 1963 the U.S. Supreme Court ruled in *Brady v. Maryland* that, before trial, prosecutors must turn over all evidence that is favorable to the defense and material to guilt or punishment.[8] It does not matter whether the evidence is in the hands of the assigned prosecutor; information possessed by the police is imputed to the prosecution for *Brady* purposes.[9] Stanley Bryant's statements—as well as those of his spouse—were undeniably favorable to