

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

2001

The Prosecutor's Duty to Truth

Bennett L. Gershman

Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Bennett L. Gershman, The Prosecutor's Duty to Truth, 14 *Geo. J. Legal Ethics* 309 (2001), <http://digitalcommons.pace.edu/lawfaculty/128/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

The Prosecutor's Duty To Truth

BENNETT L. GERSHMAN*

INTRODUCTION

Years ago, when I became a prosecutor, I was trained to believe that you never put a defendant to trial unless you were personally convinced of his guilt. This was, as I recall, the accepted ethos in our office and, I assumed, in prosecutors' offices generally.¹ I never questioned that precept. Some years later, however, I had an opportunity to test it when I prepared to go to trial in a robbery case. The defendant, a twenty-year-old black man, was accused of robbing at gunpoint a seventy-seven-year-old white man in a housing project. The complainant identified the defendant from photographs and later picked him out from a lineup containing two other persons, one of whom was a police officer known to the complainant. There was no other evidence.

In readying the case for trial, I learned that the defendant had been getting into trouble ever since he had dropped out of high school. He had been arrested several times, but the charges had been dismissed. He had acquired a reputation with the Housing Police, who frequently picked him up for questioning. He had been convicted of robbery two years earlier and had served three months in prison. Several days after he came home, the Housing Police picked him up again in connection with the present robbery. He had been in jail for the past fourteen months awaiting trial.

I was concerned about the reliability of the identification. In addition to the suggestive lineup, the complainant's initial description of the defendant — he told the police that his assailant was about five feet four inches tall — differed markedly from the defendant's actual height of six feet two inches. I interviewed the complainant and questioned him closely. He was an intelligent man who gave a convincing account of the event. A jury, I thought, would probably believe him. I went to the vestibule where the crime occurred; it was well-lit, a circumstance supporting the accuracy of the identification. I talked to the janitor who had initially called the police and to several tenants. I learned nothing useful. The defendant's lawyer protested his client's innocence, but offered no alibi. Lacking

* Professor of Law, Pace Law School. I would like to thank Adele Bernhard, David Dorfman, Steven Goldberg, Vanessa Merton, John Humbach, Steven Zeidman, and especially Lissa Griffin, for their thoughtful comments.

1. I served as an Assistant in the Office of Frank S. Hogan, District Attorney for New York County, from 1966 to 1972, and as a Special Assistant Attorney General in the Office of Maurice H. Nadjari, Deputy Attorney General for New York State, from 1973 to 1976.

corroboration of the complainant's identification and aware of the inherent dangers of eyewitness identifications, I suggested that the defendant take a lie detector test. He passed.

The day before trial, I asked the complainant to come to my office. I asked him to look at a series of about twenty photographs of similarly appearing males that I spread out on my desk. I had the investigator place two photographs of the defendant in the array. I left my office, asking the complainant to examine the photographs carefully and pick out the man who robbed him. When I returned five minutes later, he had selected a photograph of someone else; he was sure that was the person. I asked him to do it again. Again he picked out someone else. I thanked him. I explained to him that I could not prosecute the case. As I recall, he seemed to understand. My bureau chief concurred. I prepared a motion to dismiss, which the judge, expressing some reluctance, granted.²

Some years later, now a law professor, and increasingly exposed to academic perspectives on the ethical responsibilities of "virtuous" prosecutors,³ I was surprised to learn that several of these commentators believe that it is not the prosecutor's function to make a personal evaluation of the truth; it is the jury's function.⁴ Offering a hypothetical one-eyewitness-identification case strikingly similar to my own robbery case, one influential author asked rhetorically how a conscientious prosecutor could ever rationally reach the "extra-judicial judg-

2. The case is reported in Joel Dreyfuss, *An Innocent Man's 14 Lost Months*, N. Y. POST, June 3, 1971, at 5.

3. See H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance From the ABA*, 71 MICH. L. REV. 1145 (1973); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197 (1988). See also Bruce A. Green, *Why Should Prosecutors "Seek Justice?"*, 26 FORDHAM URB. L.J. 607 (1999); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

4. The seminal article is Uviller, *supra* note 3, at 1159 ("[W]hen the issue stands in equipoise in his own mind, when he is honestly unable to judge where the truth of the matter lies, I see no flaw in the conduct of the prosecutor who fairly lays the matter before the judge or jury"). But see H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1703 (2000) ("The prosecutor should be assured to a fairly high degree of certainty that he has the right person."). See also Fisher, *supra* note 3, at 230 n. 144 ("The prevailing view, at least in the world of practice, surely permits prosecutors to [proceed absent personal belief in the defendant's guilt]."); Zacharias, *supra* note 3, at 94 (suggesting that "prosecutors need not act as judges of their witness's testimony unless they are sure the witness is falsifying facts"). For contrary views, see MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 88 (1975) (criticizing Professor Uviller's approach and maintaining that "[a] prosecutor should be professionally disciplined for proceeding with prosecution if a fair-minded person could not reasonably conclude, on the facts known to the prosecutor, that the accused is guilty beyond a reasonable doubt."); John Kaplan, *The Prosecutorial Discretion - A Comment*, 60 NW. U.L. REV. 174, 178 (1965) (discussing his experience as an Assistant United States Attorney, the author states: "The great majority, if not all, of the assistants felt that it was morally wrong to prosecute a man unless one was personally convinced of his guilt."); Whitney North Seymour, Jr., *Why Prosecutors Act Like Prosecutors*, 11 REC. A.B. CITY N.Y. 302, 312-13 (1956) (noting that the "decision [to prosecute] is reached only after we have satisfied ourselves of the defendant's actual guilt").

ment” that the witness is unreliable.⁵ The prosecutor’s ethical obligations are satisfied, according to this view, if he apprises the court or defense counsel of adverse evidence or defects in the truthfulness of his witnesses.⁶

My unease with this agnostic approach might have remained dormant were it not for recent events and disclosures that invite, if not compel, a re-examination of the question of the prosecutor’s obligation to the truth. It has always been my belief that the prosecutor, more than any other government official, possesses the greatest power to take away a person’s liberty or life at his discretion.⁷ Also, it is

5. See Uviller, *supra* note 3, at 1157-58 (“Indeed, should the conscientious prosecutor set himself the arduous task of deciding whether in this instance the complainant is right? If it is his duty to do so, how does he rationally reach a conclusion? For this purpose, are his mental processes superior to the jurors’ or the judge’s?”).

6. See *id.* at 1159. In this Article, I make no pretense to try to grapple with the epistemological meaning of “truth.” See SISSELA BOK, *LYING* 5 (1989) (“‘Truth’ – no concept intimidates and yet draws thinkers so powerfully. From the beginnings of human speculation about the world, the questions of what truth is and whether we can attain it have loomed large.”). My reference to “truth” in criminal law includes two separate concepts – the “factual truth” and the “legal truth.” See Mirjan Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1084-87 (1975) (discussing difference between factual truth, which includes external facts derived from witness’s sensory experience and internal facts relating to aspects of defendant’s knowledge and volition, and legal truth, which includes the need to assess the external and internal facts in light of the legal appropriate standard). For purposes of my discussion, factual truth includes all of the operative facts probative of the historical criminal event, including external and internal facts; legal truth is the legal consequence of those facts. Neither of these truths, of course, is ever free of ambiguity or obscurity, even in the best circumstances. It is rarely possible for a prosecutor or anyone else to ever know the “whole truth,” but a prosecutor should have some degree of confidence in the factual and legal truth of his case before proceeding to trial. The focus of this Article is to assess the level of confidence that a prosecutor should possess before proceeding with a case.

So, for example, in a murder case, factual truth would include all of the facts and circumstances relevant to the defendant’s act of killing. Some of these facts may be unknown or disputed, such as whether the defendant had been drinking prior to the encounter, whether he carried a gun with him or went home to retrieve it, and whether the victim attacked him first. The critical factual question would be the defendant’s mental state at the moment of the killing: did he kill from rage, from drink, in self-defense, or from a premeditated design? Only an answer to the latter question would determine the legal truth, namely, whether the defendant is guilty of first degree murder, some lesser degree of homicide, or not guilty. The prosecutor’s duty to truth embraces both the factual and legal truth.

For recent illustrations of problems encountered by prosecutors in ascertaining the truth, see James Sterngold, *Nuclear Scientist Set Free After Plea in Secrets Case*, N.Y. TIMES, Sept. 14, 2000, at A1 (judge accuses prosecution of presenting false and misleading evidence that defendant engaged in conduct that posed threat to national security); Katherine E. Finkelstein, *Prosecutors Detail Evidence Leading to Suspect’s Release*, N.Y. TIMES, July 27, 2000, at B3 (noting that despite defendant’s confession and two eyewitness identifications, prosecutor claims police arrested wrong man); Kevin Sack & David Firestone, *Tough Times for Prosecutor In an Atlanta Murder Trial*, N.Y. TIMES, June 7, 2000, at A20 (recounting how the prosecution against professional football star Ray Lewis crumbled as witnesses changed stories); Alan Feuer, *Officer’s Role in Louima Case Elusive, Even After Verdicts*, N.Y. TIMES, Mar. 8, 2000, at B1 (describing the “frustrating sense that the truth – cold and hard and clean – remains elusive” after two federal trials of three New York City police officers charged with assaulting a prisoner, Abner Louima, and then attempting to cover up their misconduct); see also *United States v. Volpe*, 62 F. Supp. 2d 887 (E.D.N.Y. 1999) (denying motion to set aside verdict in Louima case based on factual insufficiency).

7. See *Young v. United States*, 481 U.S. 787, 813 (1987) (“Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual.”); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1555 (1981) (“Giving prosecutors the power to invoke or deny

becoming increasingly clear that the criminal justice system often miscarries, almost always with tragic results.⁸ Numerous documented instances of wrongful convictions, particularly in death penalty cases, have heightened concern about the ability of the criminal trial process to produce truthful results.⁹ The Governor of Illinois recently called for a moratorium on executions after thirteen men on death row were proven innocent.¹⁰ Of the 6,000 people sent to death row since 1973, eighty-four of them have been exonerated.¹¹ According to a U.S. Department of Justice report, at least fifty-five defendants who were convicted and incarcerated for lengthy periods have been exonerated by DNA evidence.¹² A

punishment at their discretion raises the prospect that society's most fundamental sanctions will be imposed arbitrarily and capriciously and that the least favored members of the community – racial and ethnic minorities, social outcasts, the poor – will be treated most harshly.”). There is a vast amount of scholarship on the prosecutor's exercise of discretion. *See, e.g.*, ABRAHAM GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA* (1981); FRANK W. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* (1970); Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970); Charles Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960); *see also* Bennett L. Gershman, *A Moral Standard For the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L. J. 513, 513 (1993) (“[N]o subject in criminal law is as elusive as that of prosecutorial discretion in the charging process.”).

8. *See, e.g.*, JAMES LIEBMAN, JEFFREY FAGAN & VALERIE WEST, *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995*, at 5 (2000) (conducting a massive study of every capital punishment case in U.S. between 1973-1995 that documents that the overall error rate in capital punishment system is 68%, and that 82% of all capital judgments reversed on appeal [247 out of 301] were replaced on retrial with a sentence less than death, or no sentence at all); JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE* (2000) (providing a compendium of anecdotal accounts, and legal and social science scholarship, of miscarriages of justice in American criminal trials); *The Death Penalty in 1999: Year End Report*, DEATH PENALTY INFORMATION CENTER 1 (2000) (listing eighty-four inmates on Death Row exonerated since 1973); Marty Rosenbaum, *Inevitable Error: Wrongful New York State Homicide Convictions, 1965-1988*, 18 N.Y.U. REV. L. & SOC. CHANGE 807, 809 (1991) (claiming that New York State leads all states in executing the innocent; eight New Yorkers have been executed in error); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 36-37, 71 (1987) (claiming that more than 350 people in this century have been erroneously convicted in the U.S. of crimes punishable by death; 116 of those were sentenced to death and twenty-three actually were executed); Alan Berlow, *The Wrong Man*, THE ATLANTIC MONTHLY, Nov. 1, 1999, at 68 (“[S]urely the number of innocent people discovered and freed from prison is only a small fraction of those still incarcerated.”).

9. *See* Berlow, *supra* note 8. *See also* WILLIAM T. PIZZI, *TRIALS WITHOUT TRUTH* 3 (1999) (describing American trial system as structurally flawed by badly overemphasizing winning and losing and undervaluing truth); Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95 (1996) (suggesting that trials are just as likely to hide or corrupt truth as to discover truth).

10. *See* Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1. Legislation that would halt executions are pending in twelve other states. *Id.*

11. *See The Death Penalty in 1999: Year End Report, supra* note 8.

12. *See Recommendations for Handling Applications for Postconviction DNA Testing*, NAT'L INST. OF JUST., U.S. DEP'T OF JUST. (Draft Report), at 7 (Feb. 1999) (“[A]t least fifty-five convictions in the United States have been vacated on the basis of DNA results.”). *See also* Edward Connors et al, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, NAT'L INST. OF JUST., U.S. DEP'T OF JUST. (1996) (evaluating twenty-eight cases in which DNA evidence established post-trial innocence). Congress is presently considering legislation that would mandate free DNA testing on application of a convicted defendant of any biological material in the government's possession related to the prosecution. *See* S. 2073, 106th Cong. (2000). One local District Attorney has begun a policy of offering free DNA testing to prison

recent study reported that convictions in 381 homicide cases nationwide have been reversed because prosecutors concealed evidence suggesting the defendants' innocence or presented evidence they knew to be false.¹³ Misidentifications, false confessions, false testimony of informants and jailhouse "snitches," police perjury, and untruthful allegations of child sexual abuse are among the most frequently cited contributors to wrongful convictions.¹⁴

Curiously, despite extensive documentation of erroneous convictions, widespread prosecutorial abuses that contribute to wrongful convictions, and a plethora of academic literature on the ethical responsibilities of prosecutors,¹⁵ there has been little discussion of the prosecutor's legal and ethical duty to truth.¹⁶ As I hope to demonstrate, the prosecutor has a legal and ethical duty to promote truth and to refrain from conduct that impedes truth. The courts have explicitly recognized the existence of this duty,¹⁷ and have implicitly recognized

inmates who claim they were wrongfully convicted and would be exonerated by such testing. See James Sterngold, *San Diego District Attorney Offering Free DNA Testing*, N.Y. TIMES, July 28, 2000, at A12.

13. See Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win*, CHICAGO TRIBUNE, Jan. 10, 1999, at 3.

14. See DWYER, NEUFELD & SCHECK, *supra* note 8; Bedau & Radelet, *supra* note 8, at 57 tbl. 6 (listing coerced or false confessions responsible for erroneous convictions in forty-nine out of 350 miscarriages of justice in potentially capital cases); Dana D. Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. CAL. L. REV. 2117, 2117 n.1 (1996) (claiming that of the thirty child sexual abuse cases that went to trial in the 1980s, more than half of convictions were reversed on appeal for tainted testimony of child witnesses); Arye Rattner, *Convicted But Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283, 289-92 (1988) (describing a study of more than 200 felony cases of wrongful conviction that found misidentification to be the single largest source of error, accounting for more than half of cases that had one main cause). The role of prosecutorial misconduct in contributing to miscarriages of justice is also well-documented. See LIEBMAN, FAGAN & WEST, *supra* note 8, at 5 (noting that prosecutorial suppression of evidence accounted for 16% to 19% of reversible errors); Armstrong & Possley, *supra* note 13, at 2 (claiming 381 homicide cases were reversed because prosecutors concealed evidence suggesting defendants' innocence or presented evidence known to be false); Rosenbaum, *supra* note 8, at 809 ("[A] substantial number of the wrongful convictions we have found in New York resulted from prosecutorial misconduct."); Bedau & Radelet, *supra* note 8, at 57 (asserting that fifty of the 350 wrongful convictions resulted from prosecutorial suppression of exculpatory evidence or other overzealous prosecution).

A significant contributor to wrongful convictions is the poor quality of defense lawyering. See, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not For the Worst Crime But For the Worst Lawyer*, 103 YALE L. J. 1835 (1994); Dirk Johnson, *Shoddy Defense by Lawyers Puts Innocents on Death Row*, N.Y. TIMES, Feb. 5, 2000, at A1.

15. A recent Westlaw search turned up 178 law review articles in the last five years about prosecutorial ethics and fourteen law review symposia addressing that subject.

16. *But see supra* notes 3-4 and accompanying text. See also DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 633 (1998) (inquiring into appropriate standard of proof to guide prosecutors); Ellen Yaroshfsky, *Cooperation With Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 953-57 (discussing attitudes of former federal prosecutors toward truth as "overriding concern" but "elusive"); David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509, 528-31 (noting failure of Justice Department to assign as a "relevant consideration" in determining whether to enter into plea agreement with defendant the prosecutor's "degree of confidence that the witness will testify honestly," and criticizing academic commentators for largely neglecting discussion of "how prosecutors should exercise the discretion they actually have.").

17. See *infra* note 38.

this duty by reversing convictions when a prosecutor engages in conduct that undermines the search for truth.¹⁸

The prosecutor's duty to the truth arises from several sources. The most important source is the prosecutor's role as a minister of justice.¹⁹ In this role, the prosecutor has the overriding responsibility not simply to convict the guilty but to protect the innocent.²⁰ The duty to truth also derives from the prosecutor's constitutional obligation not to use false evidence or to suppress material evidence favorable to the defendant.²¹ The duty to truth also arises from various ethical strictures that require prosecutors to have confidence in the truth of the evidence before bringing or maintaining criminal charges.²² The duty is found as well in the prosecutor's domination of the criminal justice system and his virtual monopoly of the fact-finding process.²³ More than any other party in the criminal justice system, the prosecutor has superior knowledge of the facts that are used to convict the defendant, exclusive control of those facts,²⁴ and a unique ability to shape the presentation of those facts to the

18. See *infra* Parts II(A), II(B), and II(C).

19. See *Berger v. United States*, 295 U.S. 78, 88 (1935) (“[The prosecutor’s] interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”). See also MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8, cmt. 1 (1983) [hereinafter MODEL RULES] (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1981) [hereinafter MODEL CODE] (“The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”); STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-1.2(c) (Am. Bar Ass’n 3d ed. 1993) [hereinafter ABA STANDARDS] (“The duty of the prosecutor is to seek justice, not merely to convict.”).

20. See ABA STANDARDS, *supra* note 19, cmt. at 3-1.2 (“[I]t is fundamental that the prosecutor’s obligation is to protect the innocent as well as to convict the guilty.”).

21. See *infra* Part II(B) and Part II(C).

22. See *infra* notes 164-70 and accompanying text. Some statutes explicitly require that attorneys be truthful. See, e.g., GA. CODE ANN. § 15-19-4 (1982) (noting the duty of attorneys to employ in litigation “such means only as are consistent with truth and never seek to mislead the judges or juries by any artifice or false statements of the law”).

23. See YALE KAMISAR, WAYNE R. LA FAVE, JEROLD H. ISRAEL, & NANCY KING, MODERN CRIMINAL PROCEDURE 1205 (9th ed. 1999) (describing prosecutor’s domination of criminal justice system, including investigative manpower of police, investigative legal authority of grand jury and grand jury’s subpoena power, early arrival on scene by police when evidence is fresh, and natural inclination of witnesses to cooperate with police and refuse to cooperate with defense); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 809 (6th ed. 2000) (“[T]he prosecutor has become the most powerful office in the criminal justice system.”); BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 4:1 (2D ED. 1999) (“The prosecutor decides whether or not to bring criminal charges; who to charge; what charges to bring; whether a defendant will stand trial, plead guilty, or enter a correctional program in lieu of criminal charges; and whether to confer immunity from prosecution.”).

24. Although there is no constitutional right to discovery in a criminal case, see *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977), federal and state discovery statutes allow the defense limited access to information in the prosecutor’s possession. See FED. R. CRIM. P. 16; N.Y. CRIM. P. L., § 240.20. However, it is commonly recognized that a defendant’s access to information in the prosecution’s possession is extremely limited. See Andrew E. Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal For Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709, 709-13 (1999) (“Pre-trial discovery in criminal cases is extraordinarily limited.”); Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U. L. REV. 651, 652 (1999) (“defendant’s criminal discovery is limited”).

fact-finder.²⁵ Finally, the prosecutor, in his role as representative of the government, has a unique power to affect the evaluation of the facts by the fact-finder, who inevitably views the prosecutor as a special guardian and thus a warranter of the facts — an expert who can be trusted to use the facts responsibly.²⁶

Part I of this Article discusses the prosecutor's duty to refrain from conduct that impedes the search for truth.²⁷ A prosecutor may impede the truth-finding process in several ways: (1) distorting the truth by attacking the defendant's character, misleading and misrepresenting facts, and engaging in inflammatory conduct;²⁸ (2) subverting the truth by making false statements and presenting false evidence;²⁹ (3) suppressing the truth by failing to disclose potentially truth-enhancing evidence or obstructing defense access to potentially truth-enhancing evidence;³⁰ and (4) other truth-disserving conduct that exploits defense counsel's misconduct and mistakes³¹ and prevents introduction of potentially truth-serving defenses.³² Part I also discusses the prosecutor's affirmative duty to assist the defense in discovering the truth through discovery rules³³ and by conferring immunity on potentially truthful defense witnesses.³⁴

25. See *infra* notes 198-201 and accompanying text.

26. See *United States v. Young*, 470 U.S. 1, 18-19 (1985) ("prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence"); *Berger*, 295 U.S. at 88 ("It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations [to serve justice] which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."); *United States v. Modica*, 663 F.2d 1173, 1178-79 (2d Cir. 1981) ("The prosecutor is cloaked with the authority of the United States Government; he stands before the jury as the community's representative. His remarks are those, not simply of an advocate, but rather of a federal official duty-bound to see that justice is done . . . [I]t may be difficult for [the jury] to ignore his views, however biased and baseless they may in fact be.").

27. The search for truth is generally regarded as the touchstone for the adversary system. See *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) ("[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence."); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1372 (1991) ("The theme of accurate adjudication lies at the very heart of the Burger and Rehnquist Courts' vision of constitutional criminal procedure."); Thomas L. Steffen, *Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble*, 4 UTAH L. REV. 799, 804 (1988) ("Simply stated, truth is the *sina qua non* of justice. If justice is to have meaning beyond that of a hollow shibboleth, it must reflect a wise and fair application of truth."); Gary Goodpaster, *Criminal Law: On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 118 n.1 ("Most adversary system critiques assume that truth-finding is the purpose of the adversary system and challenge it from that point of view."). But see Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1134 (1982) ("But if the central goal is truth-seeking, why should the prosecutor, with his greater resources and access to witnesses, not have the responsibility for putting all the evidence on the table, including that which is favorable to the accused?").

28. See *infra* notes 48-56 and accompanying text.

29. See *infra* notes 57-102 and accompanying text.

30. See *infra* notes 103-23 and accompanying text.

31. See *infra* notes 124-35 and accompanying text.

32. See *infra* notes 136-43 and accompanying text.

33. See *infra* notes 144-55 and accompanying text.

34. See *infra* notes 156-61 and accompanying text.

Part II of this Article discusses the source and nature of the prosecutor's duty to prejudge the truth. As explained in Part II, this duty is based on various legal, ethical, and practical considerations that require a prosecutor, in effect, to preempt the jury's determination by making an informal adjudication of the defendant's guilt and the credibility of witnesses.³⁵ Part II also discusses the methodology used by a prosecutor in making this prejudgment – by examining facts skeptically, rigorously testing the hypothesis of guilt, and having the moral courage to decline prosecution when not personally convinced of the defendant's guilt.³⁶ Finally, Part II describes how an aggressive commitment to truth, rather than an agnostic approach to truth, will create a prosecutorial culture that is more compatible with the prosecutor's role as a minister of justice.

Part III of the Article concludes that a prosecutor has both a negative duty to refrain from conduct that impedes the search for truth and an affirmative duty to protect and promote the search for truth. A prosecutor who proceeds with a case without being personally convinced of the defendant's guilt violates these duties and creates an unacceptable risk that an innocent person will be convicted.³⁷

I. DUTY NOT TO IMPEDE THE TRUTH

The courts have recognized that, as a minister of justice, a prosecutor has a special duty not to impede the truth.³⁸ That duty has been recognized implicitly in cases where courts have reversed convictions when the prosecutor engaged in

35. See *infra* notes 162-87 and accompanying text.

36. See *infra* notes 188-226 and accompanying text.

37. See FREEDMAN, *supra* note 4, at 88 (“[A] prosecutor should be professionally disciplined for proceeding with prosecution if a fair-minded person could not reasonably conclude, on the facts known to the prosecutor, that the accused is guilty beyond a reasonable doubt.”).

38. See *Berger*, 295 U.S. at 88 (noting that a prosecutor has “duty to refrain from improper methods calculated to produce a wrongful conviction”); *Thompson v. Calderon*, 120 F.3d 1045, 1058 (9th Cir. 1997) (en banc) (noting that a prosecutor “has the unique duty to ensure fundamentally fair trials by seeking not only to convict, but also to vindicate the truth and to administer justice”), *rev'd on other grounds*, 523 U.S. 538 (1998); *United States v. Duke*, 50 F.3d 571, 578 n.4 (8th Cir. 1994) (prosecutor has “duty to serve and facilitate the truth-finding function of the courts”); *Davis v. Zant*, 36 F.3d 1538, 1548 n.15 (11th Cir. 1994) (“prosecutors have a special duty of integrity in their arguments”); *United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993) (“lawyers representing the government in criminal cases serve truth and justice first”); *United States v. Myerson*, 18 F.3d 153, 162 n.10 (2d Cir. 1994) (“the prosecutor has a special duty not to mislead”) (quoting *United States v. Universita*, 298 F.2d 365, 367 (2d Cir. 1962)); *Walker v. City of New York*, 974 F.2d 293, 301 (2d Cir. 1992) (prosecutor has “duty not to lie”).

By contrast, it is generally agreed that defense counsel's ethical duty to represent his client zealously includes an affirmative duty to impede the search for truth. See *United States v. Wade*, 388 U.S. 218, 256-258 (1967) (“defense counsel has no comparable obligation to ascertain or present the truth If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course.”) (White, J., concurring); JAMES KUNEN, HOW CAN YOU DEFEND THOSE PEOPLE? THE MAKING OF A CRIMINAL LAWYER 30 (1983) (“defense attorney's job is to keep the truth from coming out, or to keep the jury from recognizing it if it does.”); FREEDMAN, *supra* note 4, at 75 (“[T]here are situations in which it may be proper for the attorney to give the client legal advice even though the attorney has reason to believe that the advice may induce the client to commit perjury.”); Goodpaster, *supra* note 27, at 123 n.15 (“Scholars support the

conduct that distorted, subverted, or suppressed the truth. In *Berger v. United States*,³⁹ the seminal case defining the prosecutor's legal and ethical role as a minister of justice, the Supreme Court implied that the prosecutor's duty to serve justice includes the avoidance of conduct that deliberately corrupts the truth-finding process.⁴⁰ The prosecutor's conduct, both in presenting evidence and argument to the jury, was characterized by the Court as an "evil influence" that was "calculated to mislead the jury."⁴¹ The misconduct during the evidence phase included: misstating facts during cross-examination; falsely insinuating that witnesses said things they had not said; representing that witnesses made statements to him personally out of court when no proof of this was offered; pretending that a witness had said something which he had not said and persistently cross-examining him on that basis; and assuming prejudicial facts not in evidence. The prosecutor's closing argument contained remarks that were "intemperate," "undignified," and "misleading,"⁴² including assertions of personal knowledge, allusions to unused incriminating evidence, and ridiculing of defense counsel.⁴³

The prosecutor's tactics in *Berger* are familiar examples of how a prosecutor can corrupt the fact-finding process. The following sections amplify *Berger's* critique. They offer a typology of conduct by prosecutors that distort, subvert, suppress, and otherwise impede the search for truth. To the extent that courts view the central function of a criminal trial as deciding the question of the defendant's factual guilt,⁴⁴ the courts routinely condemn prosecutors for engaging in conduct that impedes that determination and have reversed convictions when the prosecutor's conduct sufficiently undermined the accuracy

practitioners' view that the defense attorney's aim is not truth or fairness, but the most favorable outcome possible for his or her client.").

39. 295 U.S. 78 (1935).

40. The Court condemned the prosecutor's commission of "foul blows" that were "calculated to produce a wrongful conviction." *Id.* at 88.

41. *Id.* at 85. The Court reproduced excerpts from the trial record to illustrate the magnitude of the prosecutor's misconduct, and criticized the trial judge for failing to issue a "stern rebuke" or take other "repressive measures." *Id.*

42. *Id.* at 85.

43. Justice Sutherland capped his discussion of the prosecutor's misconduct with this oft-quoted passage on the role of the prosecutor:

[He] 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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. 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.

Berger, 295 U.S. at 88.

44. *See supra* note 27.

of the guilty verdict.⁴⁵ On the other hand, courts have tolerated other truth-disserving conduct by prosecutors in order to protect adversarial integrity and prosecutorial discretion.⁴⁶ There are also occasions when a prosecutor's duty to the truth includes an affirmative duty to assist a defendant in discovering the truth.⁴⁷

A. DISTORTING THE TRUTH

One way a prosecutor violates the duty to truth is by deliberately distorting the evidence. Prosecutors do this in several ways: attacking a defendant's character without a valid evidentiary purpose; misleading the jury and misrepresenting the facts; and inflaming the passions and prejudices of the jury.

1. ATTACKING DEFENDANT'S CHARACTER

Character proof, as every trial lawyer knows, is one of the most dangerous types of evidence.⁴⁸ The capacity of proof of a defendant's criminal past to skew the jury's proper evaluation of the truth has been documented.⁴⁹ By insinuating that a defendant's criminal background makes it more likely that he committed the present crime, the prosecutor encourages the jury to find the defendant guilty based on speculative, confusing, and inflammatory considerations.

The danger of this tactic is illustrated in Judge Cardozo's classic opinion in *People v. Zackowitz*.⁵⁰ The defendant, a young optician regularly employed with no criminal history, shot a man to death on a Brooklyn street corner who

45. Truth-impeding misconduct does not necessarily invalidate a guilty verdict. After misconduct has been established, a reviewing court considers the probable impact of the violation on the verdict. The evaluation of prejudice occurs in one of four principal contexts: (1) harmless error analysis for preserved constitutional violations, *see Chapman v. California*, 386 U.S. 18, 24 (1967) (conviction reversed unless prosecutor demonstrates that error harmless beyond reasonable doubt); (2) harmless error analysis for preserved unconstitutional violations, *see Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946) (conviction reversed if defendant demonstrates that error had "substantial influence" on the verdict or leaves one in "grave doubt" whether it had such effect); (3) plain error analysis for both constitutional and unconstitutional violations when the violation was not objected to, *see United States v. Olano*, 507 U.S. 725, 734-35 (1993) (reversal justified only if error is "obvious," "affect[s] substantial rights," and "seriously affect[s] the fairness integrity or public reputation of judicial proceedings."); and (4) collateral review of preserved constitutional violations, *see Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993) (unconstitutional *Kotteakos* standard applicable to evaluate constitutional error on habeas corpus review).

46. *See infra* notes 124-43 and accompanying text.

47. *See infra* notes 144-61 and accompanying text.

48. *See* 1 JOHN HENRY WIGMORE, EVIDENCE § 57 (1904) ("The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot help operating with any jury, in or out of court.")

49. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 160 (1966) (when a defendant's criminal record is known and the prosecution's case has weaknesses, the defendant's chances of acquittal are 38%, compared to 65% otherwise).

50. 172 N.E. 466 (N.Y. 1930).

had insulted his wife. The killing was not disputed. The central question was the defendant's state of mind. From the evidence, the jury was free to choose from a range of culpable mental states. Judge Cardozo explained how the jury's delicate analysis could be (and was) manipulated by prosecutorial overreaching:

With only the rough and ready tests supplied by their experience of life, the jurors were to look into the workings of another's mind, and discover its capacities and disabilities, its urges and inhibitions, in moments of intense excitement. Delicate enough and subtle is the inquiry, even in the most favorable conditions, with every warping influence excluded. There must be no blurring of the issues by evidence illegally admitted and carrying with it in its admission an appeal to prejudice and passion.⁵¹

The conviction was reversed because throughout the trial the prosecutor repeatedly sought to portray the defendant as a man of dangerous propensities who, because of those qualities, was more likely to kill with a premeditated design than a man of irreproachable character.⁵²

Prosecutors employ a variety of tactics to unfairly impugn a defendant's character.⁵³ They accomplish this directly through proof of prior criminality,⁵⁴ by innuendo during the examination of witnesses about the defendant's crim-

51. *Id.* at 467.

52. The prosecutor elicited proof that the defendant owned several guns and other weapons, none of which were alleged to have been used in the killing, to suggest that the defendant was a "desperate type of criminal, a criminal affected with a murderous propensity." *Id.* at 468. As in *Zackowitz*, courts are especially sensitive to insinuations of bad character as skewing the fact-finding process, and convictions are often reversed. *See, e.g.*, *United States v. Polasek*, 162 F.3d 878 (5th Cir. 1998) (prosecutor offers evidence that defendant associated with persons who were convicted of similar fraudulent behavior); *United States v. Heidebur*, 122 F.3d 577 (8th Cir. 1997) (prosecutor offers evidence of defendant's molestation of stepdaughter); *United States v. Sumner*, 119 F.3d 658 (8th Cir. 1997) (prior sexual assaults); *United States v. Murray*, 103 F.3d 310 (3d Cir. 1997) (prior murder); *United States v. Frederick*, 78 F.3d 1370 (9th Cir. 1996) (prior similar sexual crimes); *United States v. Cudlitz*, 72 F.3d 992 (1st Cir. 1996) (prior arson); *People v. Terry*, 728 N.E.2d 669 (Ill. App. Ct. 2000) (prosecutor insinuates that defendant was member of gang that was dealing drugs); *Chumbler v. Commonwealth*, 905 S.W.2d 488 (Ky. 1995) (deviant sexual behavior).

53. This is not to say that evidence of a defendant's criminal past may not be used to prove guilt. Such evidence is often relevant and admissible as an aid in arriving at the truth. Prosecutors have broad leeway to use a defendant's criminal background for a proper purpose, such as impeachment, *see* FED. R. EVID. 608(b), 609, or when relevant to an issue in the case, such as intent, motive, identity, knowledge, opportunity, common scheme or plan, or absence of mistake. *See* FED. R. EVID. 404(b).

54. Common techniques include seeking to impeach the defendant's testimony by asking about prior convictions bearing no relationship to credibility, misrepresenting the nature or seriousness of the convictions, or insinuating that prior guilt is a basis for inferring present guilt. For discussion of the prosecutor's misuse of prior convictions, *see* BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 2-5(c), at 164-66 (1997).

inal past,⁵⁵ and by proving that the defendant associates with undesirable persons.⁵⁶

2. MISLEADING AND MISREPRESENTING

Misleading conduct distorts the search for truth by confusing the jury's rational view of the evidence.⁵⁷ The potential for a prosecutor to mislead inheres in virtually every phase of the trial, from offering evidence, questioning witnesses, making comments, and presenting arguments.⁵⁸ Since the jury is likely to place great trust in the prosecutor as the embodiment of law enforcement, the prosecutor's ability to mislead the jury is greatly enhanced.⁵⁹

Familiar types of misleading conduct include questions that attempt to create in the jurors' minds damaging and prejudicial innuendos without any basis in fact,⁶⁰ personal assurances that the witness is telling the truth,⁶¹ allusions to the

55. Common techniques include eliciting testimony that witnesses identified the defendant from "mug books" in police files, introducing police reports containing the defendant's criminal identification number, proving that the defendant used aliases or variations of his surname to insinuate prior involvement with law enforcement, or eliciting testimony containing the unmistakable inference that the defendant is a prior felon. *See, e.g.,* *Dunnigan v. Keane*, 972 F. Supp. 709 (W.D.N.Y. 1997) (prosecutor elicits identification testimony from witness who tells jury that he was defendant's parole officer). For discussion of the prosecutor's indirect references to the defendant's character, *see* GERSHMAN, *supra* note 54, § 2-5(d), at 166-67.

56. Prosecutors try to insinuate a defendant's guilt by proving that he associates with other persons who are involved in criminal activity. *See* *United States v. Polasek*, 162 F.3d 878 (5th Cir. 1998) (prosecutor elicits that defendant who was accused of falsifying odometer readings on vehicle titles had previously done title work for several other car dealers who were subsequently convicted of odometer fraud); *People v. Terry*, 728 N.E.2d 669 (Ill. App. Ct. 2000) (prosecutor insinuates that defendant was member of gang that was dealing drugs and that shooting occurred on block where there was frequent drug dealing). *See* GERSHMAN, *supra* note 54, § 2-5(b), at 162-64.

57. A prosecutor has "a special duty not to mislead." *See Myerson*, 18 F.3d at 162 n.10 (quoting *United States v. Universita*, 298 F.2d 365, 367 (2d Cir. 1962)).

58. Misleading conduct is so pervasive that it defies neat categorization. Such conduct can range from using a distorted chart that inaccurately depicts the organization of a drug conspiracy, *see* *United States v. Taylor*, 210 F.3d 311 (5th Cir. 2000), to "staging" a courtroom identification by coaching witnesses about the seating arrangements in the courtroom, *see* *United States v. Oreto*, 37 F.3d 739 (1st Cir. 1994), to eliciting on cross-examination that a defense expert had previously testified for the defense in several notorious and highly publicized murder cases, *see* *State v. Blasus*, 445 N.W.2d 535 (Minn. 1989), to making deliberately false statements to mislead the jury. *See, e.g.,* *United States v. Donato*, 99 F.3d 426 (D.C. Cir. 1997); *Davis v. Zant*, 36 F.3d 1538 (11th Cir. 1994); *Kojayan*, 8 F.3d 1315; *Walker*, 974 F.2d 293; *United States v. Elizondo*, 920 F.2d 1308 (7th Cir. 1990). For a discussion of a prosecutor's use of false and misleading evidence and misrepresentations, *see generally* GERSHMAN, *supra* note 54, § 2-4, at 143-61.

59. *See supra* note 26.

60. Prosecutors have insinuated without any supporting proof that the defendant has a criminal record, *see* *Thompkins v. Cohen*, 965 F.2d 330 (7th Cir. 1992), a sordid background, *see* *United States v. Hughes*, 658 F.2d 317 (5th Cir. 1981), and engaged in criminal conduct similar to the crime presently charged. *See* *United States v. Cudlitz*, 72 F.3d 992 (1st Cir. 1996). *See also* GERSHMAN, *supra* note 54, § 2-4(c)(2), at 147-48.

61. *See* *United States v. Gallardo-Trapero*, 185 F.3d 307 (5th Cir. 1999) (prosecutor asks rhetorically whether government agents would risk careers by getting on witness stand and committing perjury); *United States v. Dispoz-O-Plastics, Inc.*, 172 F.3d 275 (3d Cir. 1999) (prosecutor insinuates that he has information confirming that witnesses told the truth); *United States v. Francis*, 170 F.3d 546 (6th Cir. 1999) (prosecutor insinuates that

validation of a witness's credibility by experts,⁶² attempts to bolster a witness's credibility by references to a witness's willingness to take a polygraph test,⁶³ proof that accomplices or codefendants were convicted,⁶⁴ forcing defense witnesses to characterize the testimony of prosecution witnesses as false,⁶⁵ references to a witness's prior invocation of a privilege to refuse to testify,⁶⁶ and references to withdrawn guilty pleas.⁶⁷

Reversible misconduct also can take the form of comments, questions, and arguments that misleadingly suggest that a defendant's reliance upon his constitutional rights is evidence of guilt. For example, a prosecutor unconstitutionally misleads the jury when he tries to impeach a defendant who has offered at trial an innocent explanation for his conduct by insinuating that the defendant's failure to tell the police the exculpatory account after being given *Miranda* warnings following his arrest suggests that his testimony was a fabrication

he was not willing to deal with cooperating witness until he believed her story). See GERSHMAN, *supra* note 54, § 2-8(c)(1), at 190-91.

62. It is improper to elicit expert testimony that endorses the credibility of the complaining witness, See *United States v. Charley*, 189 F.3d 1251 (10th Cir. 1999) (improper to elicit from pediatrician an unqualified opinion that girls were sexually abused), that expresses an opinion on the defendant's guilt, see *State v. Leggett*, 664 A.2d 271 (Vt. 1995) (opinion that complaining witness was telling the truth), or that the defendant is guilty of abuse. See *Smith v. State*, 674 So.2d 791 (Fla. Dist. Ct. App. 1996) (opinion that defendant is guilty of abuse). See GERSHMAN, *supra* note 54, § 5-4(i), at 334-36.

63. It is error to elicit testimony that the defendant failed a lie-detector test, see *United States v. Brevard*, 739 F.2d 180 (4th Cir. 1984), a key witness passed the test, see *People v. Daniels*, 650 N.E.2d 224 (Ill. App. Ct. 1995), a witness was administered the test, see *State v. Kilpatrick*, 578 P.2d 1147 (Kan. Ct. App. 1978), and a witness was willing or unwilling to take the test. See *United States v. Martino*, 648 F.2d 367 (5th Cir. 1981). See also GERSHMAN, *supra* note 54, § 2-4(c)(4), at 148-49.

64. See *United States v. Carraway*, 108 F.3d 745 (7th Cir. 1997); *Cudlitz*, 72 F.3d 992; *United States v. Blandford*, 33 F.3d 685 (6th Cir. 1994); *United States v. Mitchell*, 1 F.3d 235 (4th Cir. 1993). Courts typically allow prosecutors to introduce testimony of guilty pleas of co-conspirators who testify for the government to explain the context for their cooperation. See *United States v. Mejia*, 82 F.3d 1032 (11th Cir. 1996); *United States v. Gambino*, 926 F.2d 1355 (3d Cir. 1991). See also GERSHMAN, *supra* note 54, § 2-4(c)(6), at 150-51.

65. See *United States v. Akitoye*, 923 F.2d 221, 224 (1st Cir. 1991) ("It is not the place of one witness to draw conclusions about, or cast aspersions upon another witness's veracity. The 'was-the-witness-lying' question framed by the prosecutor in this case was of that stripe. It should never have been posed."). The prejudice is aggravated when a defendant in order to maintain his innocence is forced to characterize the testimony of police officers as lies. *United States v. Sanchez*, 176 F.3d 1214 (9th Cir. 1999); *United States v. Fernandez*, 145 F.3d 59, 64 (1st Cir. 1998); *United States v. Richter*, 826 F.2d 206 (2d Cir. 1987). See also GERSHMAN, *supra* note 54, § 2-4(c)(7), at 151.

66. Such questions are usually irrelevant, and can distort the jury's evaluation of the witness's credibility by suggesting that the witness was hiding the truth. See *Grunewald v. United States*, 353 U.S. 391 (1957) (improper to ask witness whether he invoked Fifth Amendment privilege before grand jury). See also GERSHMAN, *supra* note 54, § 2-4(c)(8), at 151.

67. See FED. R. EVID. 410; FED. R. CRIM. P. 11(e)(6). It is usually reversible error for a prosecutor to introduce evidence that a defendant had previously entered and withdrawn a guilty plea in the same case. See *Standen v. Whitley*, 994 F.2d 1417 (9th Cir. 1993). It is improper for a prosecutor to cross-examine a defendant about a previously entered and withdrawn guilty plea. See *Kercheval v. United States*, 274 U.S. 220 (1927). See also GERSHMAN, *supra* note 54, § 2-4(c)(5), at 150.

concocted specially for the trial.⁶⁸ A prosecutor similarly engages in unconstitutionally misleading behavior when he asks a jury to conclude that a defendant is guilty because he failed to testify.⁶⁹ Prosecutors also try to mislead by asking the jury to draw inculpatory conclusions from a defendant's assertion of other rights, such as obtaining an attorney following his arrest,⁷⁰ refusing to allow the police to conduct a search,⁷¹ or relying on other rights.⁷²

A prosecutor also distorts the jury's analysis of the facts when he deliberately encourages the jury to draw false or exaggerated conclusions by misrepresenting

68. See *Doyle v. Ohio*, 426 U.S. 610, 617 (1976) (fundamentally unfair for prosecutors to use a defendant's post-arrest silence after receiving *Miranda* warnings as a basis for impeachment because such silence is "insolubly ambiguous" and it is therefore misleading for a prosecutor to suggest that it shows a guilty mind). However, it is not misleading for a prosecutor to impeach a defendant with his post-arrest silence after the defendant tries to give the jury the impression that he cooperated with the police. *Id.* at 619 n.11. See, e.g., *United States v. Reveles*, 190 F.3d 678 (5th Cir. 1999) (no violation where prosecutor elicited evidence of defendant's post-arrest silence for purpose of rebutting defendant's claim that he stood ready to cooperate all along). See also GERSHMAN, *supra* note 54, § 2-7(a), at 180-83.

69. See *Griffin v. California*, 380 U.S. 609 (1965) (unconstitutionally misleading for prosecutor to ask jury to infer guilt based on defendant's decision not to testify on theory that if defendant was innocent and had nothing to hide he would have testified). Courts closely scrutinize unambiguous references to a defendant's failure to testify. See, e.g., *United States v. Hardy*, 37 F.3d 753, 757 (1st Cir. 1994) ("They're still running and hiding today. The time has come for them to stop running and stop hiding."). Prosecutors therefore try to suggest the point more subtly, by using words such as "uncontradicted," "unexplained," "undenied," and other rhetorical devices. See, e.g., *United States v. Roberts*, 119 F.3d 1006, 1015 (1st Cir. 1997) (prosecutor commits "egregious" misconduct by "rhetorical flourishes" designed to focus jury's attention on defendant's failure to testify); *United States v. Skandier*, 758 F.2d 43, 44 (1st Cir. 1985) (court criticizes U.S. Department of Justice brochure of instructions to United States Attorneys advising that it is proper to tell jury that "evidence is 'uncontradicted' or 'unrefuted' in a nondefense case."). See also GERSHMAN, *supra* note 54, § 2-7(b), at 183-84.

70. See *United States v. McDonald*, 620 F.2d 559 (5th Cir. 1980); *United States v. Liddy*, 509 F.2d 428, 443 (D.C. Cir. 1974); *State v. Palenkas*, 933 P.2d 1269 (Ariz. Ct. App. 1996); *People v. Collins*, 528 N.Y.S.2d 41 (N.Y. App. Div. 1988). See also GERSHMAN, *supra* note 54, § 2-7(d), at 185-86.

71. See *United States v. Thame*, 846 F.2d 200 (3d Cir. 1988); *United States v. Rapanos*, 895 F. Supp. 165 (E.D. Mich. 1995), *rev'd*, 115 F.3d 367 (6th Cir. 1997); *State v. Palenkas*, 933 P.2d 1269 (Ariz. Ct. App. 1996). *But see* *United States v. Dozal*, 173 F.3d 787, 793 (10th Cir. 1999) (reasoning that the prosecutor properly introduced proof of the defendant's refusal to consent to a search "not to impute guilty knowledge to [defendant], but for the proper purpose of establishing dominion and control over the premises where a large part of the cocaine was found"); *United States v. McNatt*, 931 F.2d 251 (4th Cir. 1991) (explaining that the prosecutor's comment on the defendant's refusal to consent to a warrantless search of his vehicle was a fair response to the defendant's claim that contraband was planted by police). See also GERSHMAN, *supra* note 54, § 2-7(d), at 185-86.

72. See *State v. Shinn*, 704 A.2d 816 (Conn. App. Ct. 1997) (holding that the prosecutor impermissibly burdened the defendant's right to testify by insinuating that the defendant testified only because he believed the government's case was so strong that he had to give the jury a story for otherwise he would have been found guilty); *State v. Cassidy*, 672 A.2d 899 (Conn. 1996) (holding that the defendant's right of confrontation was violated when the prosecution commented that the defendant's presence at trial allowed him to "doctor up" his testimony after hearing testimony of other witnesses), *overruled by* *State v. Alexander*, 755 A.2d 868, 874-75 (Conn. 2000) (holding that prosecutor violated no federal constitutional rights by commenting on defendant's presence at trial and accompanying opportunity to fabricate or tailor his testimony). *But see* *Portuondo v. Agard*, 529 U.S. 61 (2000) (holding that the prosecutor did not violate the federal constitution by arguing to the jury that the defendant's testimony should be disbelieved because his presence at trial gave him unique opportunity to tailor his testimony to that of all the other witnesses).

the evidence,⁷³ or by alluding to facts claimed to be known by the prosecutor but not revealed during the trial.⁷⁴ The potential to mislead is especially enhanced because the prosecutor's prestige and standing as a law enforcement expert make his representations presumptively reliable.⁷⁵ Thus, prosecutors have alluded to unproved private conversations with witnesses or the defendant,⁷⁶ gratuitously explained why evidence could not be introduced,⁷⁷ suggested that facts were already authoritatively determined,⁷⁸ and referred to unused inculpatory evidence.⁷⁹

73. *See, e.g.*, *Miller v. Pate*, 386 U.S. 1 (1967) (misrepresenting the facts to connect the defendant to the murder of a young girl by arguing that the defendant's undershorts were stained with blood although the prosecutor knew they were actually stained with paint); *United States v. Cheska*, 202 F.3d 947 (7th Cir. 2000) (explaining that the prosecutor falsely represented that government informant had convicted twenty-three other people); *Paxton v. Ward*, 199 F.3d 1197 (10th Cir. 1999) (concluding that the prosecutor struck a "foul blow" when he misrepresented that the defendant failed to refute the government's version of events when he knew that the defendant had been officially cleared of charges after he passed a polygraph test). *See also* GERSHMAN, *supra* note 54, § 2-4(d)(2), at 154-55.

74. *See, e.g.*, *United States v. Maddox*, 156 F.3d 1280 (D.C. Cir. 1998) (describing how the prosecutor told the jury what uncalled witnesses would have said regarding what happened to crucial evidence); *State v. Evans*, 593 N.W.2d 336 (N.D. 1999) (explaining that the prosecutor bolstered informer's identification by stating, without basis in evidence, that the identification was recorded on tape); *State v. Hughes*, 969 P.2d 1184 (Ariz. 1998) (stating the prosecutor's argument that the expert changed his opinion after being hired by defense and that another expert fabricated the diagnosis in exchange for money from the defense); *Commonwealth v. Kelly*, 629 N.E.2d 999 (Mass. 1994) (mentioning the prosecutor's argument that the police officers would not put their pensions on the line by testifying falsely, although there was no evidence to show what impact the false testimony would have on their pensions). Prosecutors occasionally make opening arguments that refer to matters that are not provable or that the prosecutor does not prove. Convictions are reversed when the prejudice is serious and the prosecutor acted in bad faith. *See United States v. Thomas*, 114 F.3d 228, 248-49 (D.C. Cir. 1997) (concluding that the prosecutor's failure to prove an assertion in the opening statement that the defendant committed another murder was severe misconduct and potentially prejudicial but that there was no evidence of bad faith); *Alexander v. State*, 509 S.E.2d 56 (Ga. 1998) (holding that the prosecutor's false promise in the opening statement to prove a fact without any subsequent attempt to introduce evidence supporting the alleged fact requires a reversal unless the prosecutor makes an affirmative showing of good faith). *See also* GERSHMAN, *supra* note 54, § 2-4(d), at 152-57.

75. *See supra* note 26 and accompanying text.

76. For private conversations with witnesses, *see United States v. Wiley*, 534 F.2d 659 (6th Cir. 1976); *United States v. Hoskins*, 446 F.2d 564 (9th Cir. 1971). For private conversations with the defendant, *see United States v. Brown*, 699 F.2d 585, 593 (2d Cir. 1983); *People v. Vann*, 388 N.Y.S.2d 902 (N.Y. App. Div. 1976).

77. *See United States v. Flores-Chapa*, 48 F.3d 156 (5th Cir. 1995) (explaining that the prosecutor made an allusion to evidence that had previously been excluded); *People v. Eanes*, 350 N.Y.S.2d 718 (N.Y. App. Div. 1973) (stating that the prosecutor explained why a confidential informant could not be found).

78. Prosecutors have been criticized for suggesting that the same evidence produced at trial had previously been presented to a grand jury that returned an indictment, *see United States v. Lewis*, 423 F.2d 457 (8th Cir. 1970), that other trial juries had voted favorably on a witness's credibility, *see Wiley*, 534 F.2d 689, that another trial jury had voted unfavorably on a witness's credibility, *see United States v. Mitchell*, 1 F.3d 235 (4th Cir. 1993), and that if the evidence was insufficient the judge would have dismissed the charges. *See United States v. Sullivan*, 919 F.2d 1403 (10th Cir. 1990). *See also* GERSHMAN, *supra* note 54, § 2-4(d)(1), at 152-54.

79. *See Berger v. United States*, 295 U.S. 78, 87 (1935) (explaining that the prosecutor claimed inability to elicit identification proof because "that is the rules of the game, and I have to play within those rules"); *Snipes v. United States*, 230 F.2d 165 (6th Cir. 1956) (stating that the prosecutor claimed that he could have brought forty counts instead of one count); *People v. Emerson*, 455 N.E.2d 41, 45 (Ill. 1983) (explaining that the prosecutor stated that "we can't tell you everything [defendant] did after his arrest and he knows it. Maybe when this is over

3. INFLAMMATORY CONDUCT

A prosecutor's appeals to the jury's fears, passions, and prejudices can seriously distort the fact-finding process and produce an erroneous verdict.⁸⁰ A jury typically is instructed to analyze facts objectively and not to allow emotional factors to influence its determination. By eliciting inflammatory testimony, presenting gruesome physical evidence, or engaging in unduly impassioned oratory, a prosecutor can manipulate the jury's prejudices and distract them from objectively assessing the proof.⁸¹

Inflammatory tactics defy neat categorization.⁸² Typical instances include namecalling;⁸³ appeals to law and order;⁸⁴ insinuations that the defendant

I will tell you what he did when he was arrested."); *People v. Webb*, 417 N.Y.S.2d 92 (N.Y. App. Div. 1979) (stating that the prosecutor asserted that certain witnesses were not called because their testimony would have been repetitive).

Misstatements of law also can lead the jury to draw false conclusions. *See United States v. Alex Janows & Co.*, 2 F.3d 716 (7th Cir. 1993) (misstating the law of reasonable doubt); *Mahorney v. Wallman*, 917 F.2d 469 (10th Cir. 1990) (misstating the law of presumption of innocence); *United States v. Yancy*, 688 F.2d 70, 72 (8th Cir. 1982) (misstating the rules of evidence); *United States v. Hammond*, 642 F.2d 248, 249-50 (8th Cir. 1981) (misstating the law of criminal intent); *United States v. Trapnell*, 638 F.2d 1016, 1026 (7th Cir. 1980) (misstating the burden of proof); *United States v. Berry*, 627 F.2d 193, 200 (9th Cir. 1980) (misstating the attorney-client privilege).

Also misleading are prosecutorial comments on the consequences of the jury's verdict. Such comments lessen the jury's sense of responsibility about the seriousness of its verdict. *See GERSHMAN, supra*, note 54, § 2-4(d)(3), at 155-57. Prosecutors have referred to potential punishment, *see Darden v. Wainwright*, 477 U.S. 168 (1986) (explaining that the prosecutor told the capital sentencing jury that a life sentence never really means life), the existence of sanctions other than incarceration, *see Fryson v. State*, 301 A.2d 211 (Md. App. 1973) (explaining that the prosecution would place the defendant on probation if found guilty), and the availability of corrective procedures in the event the jury makes a mistake, such as appeals, writs of error, pardons, and executive clemency. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985) (quoting the prosecutor's argument to the capital sentencing jury that any death sentence would be reviewed for correctness by the state supreme court).

80. *See ABA STANDARDS* Standard 3-5.8(c) ("The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.").

81. *See GERSHMAN, supra* note 54, § 2-6, at 167-80.

82. *See, e.g., United States v. Hands*, 184 F.3d 1322 (11th Cir. 1999) (introducing in narcotics trial six photographs depicting graphic evidence of spousal abuse); *Territory of Guam v. Shymanovitz*, 157 F.3d 1154 (9th Cir. 1998) (introducing irrelevant testimony of defendant's reading habits to portray him as a deviant homosexual); *United States v. Payne*, 2 F.3d 706 (6th Cir. 1993) (referring in postal theft prosecution to the plight of poor children, pregnant women, and diaperless babies; corporate layoffs; and Christmastime); *People v. Blue*, 724 N.E.2d 920 (Ill. 2000) (displaying the actual bloodied and brain-splattered uniform of a murdered police officer on a headless torso mannequin).

83. *See, e.g., Kincaid v. Sparkman*, 175 F.3d 444, 445 (6th Cir. 1999) (insinuating improperly that the defendant was a "professional burglar"); *United States v. Francis*, 170 F.3d 546, 552 (6th Cir. 1999) (referring improperly to the defendant as a "liar" and "con man"); *United States v. Cannon*, 88 F.3d 1495, 1502-03 (8th Cir. 1996) (referring to the defendants as "bad people"). *See also GERSHMAN, supra* note 54, § 2-6(b)(1), at 170-71.

84. A prosecutor's appeals to law and order distort the fact-finding process by introducing irrelevant, irrational, and inflammatory elements that prevent calm and dispassionate appraisal of the evidence. *See, e.g., United States v. Gainey*, 111 F.3d 834, 836 (11th Cir. 1997) ("A jury cannot appropriately reason that a particular defendant is guilty based on media reports of rampant drug use coupled with the fact that the defendant is accused of a drug crime. The prosecutor's comment in this case draws upon widespread community fears about drugs, and implies that those fears can or should inform the process of assessing Gainey's guilt. In other words,

threatened witnesses;⁸⁵ appeals to racial, ethnic, religious, and national prejudices;⁸⁶ appeals to wealth and class biases;⁸⁷ and appeals to jurors as parents.⁸⁸

B. SUBVERTING THE TRUTH

In addition to distorting the jury's evaluation of the truth, a prosecutor can subvert the truth through lying outright, presenting false evidence, and allowing false evidence to remain uncorrected.⁸⁹ A prosecutor's own false statements are a paradigmatic example of the prosecutor's corruption of the truth-seeking function of a trial.⁹⁰ Equally subversive of truth is a prosecu-

the reference invites the jury to judge the case upon standards and grounds other than the evidence and law of the case, and is thus objectionable and improper."); *Blue*, 724 N.E.2d at 937 (holding that the prosecutor's exhortation to the jury to send a message to all police that the jury supported them, from the "superintendent to the newest rookie," was a transparent play on the jury's sympathy and loyalty to law enforcement). *See also* GERSHMAN, *supra* note 54, § 2-6(b)(2), at 171-73.

85. Insinuating that a witness has been murdered, threatened with harm, or bribed, seriously distorts the fact-finding process by inviting the jury to speculate as to why a witness died, or did not testify, or testified poorly. It also suggests to the jury that the prosecutor's insinuation is based on confidential information in the investigative file that was not introduced in evidence. This type of argument violates ethical rules on several grounds. It "misleads the jury," *see* ABA STANDARDS Standard 3-5.8(b), it constitutes an "argument calculated to inflame the passions and prejudices of the jury," *id.* 3-5.8(c), and it "diverts the jury" by "injecting issues broader than the guilt or innocence of the accused." *Id.* 3-5.8(d). *See also* GERSHMAN, *supra* note 54, § 2-6(b)(3), at 174.

86. Such arguments distort the fact-finding process by appealing to bigotry and base stereotypes. *See, e.g.,* *Bains v. Cambra*, 204 F.3d 964 (9th Cir. 2000) (discussing the prosecutor's assertion that all Sikh persons are irresistibly predisposed to violence when a family member has been attacked); *United States v. Richardson*, 161 F.3d 728, 736 (D.C. Cir. 1998) (concluding that the prosecutor's argument that "we don't all look alike" was a blatant use of racial stereotyping to counter the defense counsel's argument on misidentification); *Cannon*, 88 F.3d at 1503 ("[B]y twice calling the African-American defendants 'bad people' and by calling attention to the fact that the Defendants were not locals, the prosecutor gave the jury an improper and convenient hook on which to hang their verdict."); *Carter v. Rafferty*, 826 F.2d 1299 (3d Cir. 1987) (indicating that the prosecutor in a highly publicized murder case involving Ruben "Hurricane" Carter argued, without any support in evidence, that killings were racially motivated). *See also* GERSHMAN, *supra* note 54, § 2-6(b)(4), at 175-76.

87. *See, e.g.,* *Sizemore v. Fletcher*, 921 F.2d 667 (6th Cir. 1990) (faulting the prosecutor for insinuating that the defendant could afford to buy justice through the use of expensive exhibits and multiple defense attorneys); *United States v. Stahl*, 616 F.2d 30, 32 (2d Cir. 1980) (describing the prosecutor's misleading portrayal of the case involving a businessman charged with bribery as one "about money, tremendous amounts of money" and "Park Avenue offices"). *See also* GERSHMAN, *supra* note 54, § 2-6(b)(7), at 178.

88. The appeal to jurors as parents of young children can seriously distort the fact-finding by suggesting that if the defendant is acquitted, those children might be his next victims. *See* GERSHMAN, *supra* note 54, § 2-6(b)(8), at 178-79.

89. *See* GERSHMAN, *supra* note 54, § 2-4(b), at 144-46.

90. *See, e.g.,* *United States v. Donato*, 99 F.3d 426 (D.C. Cir. 1996) (falsifying the amount of money that the defendant would have gained from having her car stolen); *United States v. Forlorma*, 94 F.3d 91 (2d Cir. 1996) (showing that the prosecutor falsely asserted that the suit found in a bag containing heroin fit the defendant); *Davis v. Zant*, 36 F.3d 1538 (11th Cir. 1994) (explaining that the prosecutor falsely stated that the key government witness had not confessed to the murder); *Kojayan*, 8 F.3d 1315 (prosecutor falsely tells jury that absent witness could have refused to testify); *Walker*, 974 F.2d 293 (prosecutor falsely claims that no line-up had taken place).

tor's deliberate introduction of perjured testimony.⁹¹ In *Mooney v. Holohan*,⁹² the Supreme Court held that a prosecutor violated due process when the prosecutor introduced false evidence that a defendant committed a murder. The Court stated: "[D]eliberate deception of court and jury by the presentation of testimony known to be perjured . . . is inconsistent with the rudimentary demands of justice"⁹³ Truth is corrupted, according to the Court, whether the prosecutor actively solicits the false evidence, or fails to issue a correction after false evidence has been received.⁹⁴ Also, truth is corrupted whether the false evidence relates to a substantive issue or solely to a witness's credibility.⁹⁵

Introducing false physical evidence is similarly condemned because it has the same capacity to subvert the fact-finding process. False physical evidence has included paint-stained clothing falsely claimed by a prosecutor to be stained with the victim's blood,⁹⁶ a chart falsely depicting the organization of a drug distribution conspiracy,⁹⁷ guns falsely linked to an arms smuggling conspiracy,⁹⁸ documents falsely purporting to be official records contradicting the defendant's testimony,⁹⁹ and other fraudulent physical items.¹⁰⁰

A prosecutor also subverts the truth-finding process when he takes irreconcilably inconsistent positions to obtain convictions against several defendants for

91. A prosecutor's use of perjured testimony, although analytically distinct from issues of suppression of evidence, *see infra* notes 103-14 and accompanying text, is frequently discussed as a component of the broader rule of nondisclosure of evidence. *See United States v. Agurs*, 427 U.S. 97, 103 (1976).

92. 294 U.S. 103 (1935).

93. *Id.* at 112. *See Pyle v. Kansas*, 317 U.S. 213 (1942); *United States v. Alzate*, 47 F.3d 1103 (11th Cir. 1995); *United States v. Kelly*, 35 F.3d 929 (4th Cir. 1994). *See also GERSHMAN, supra* note 54, § 2-4(b), at 144-46.

94. *See Alcorta v. Texas*, 355 U.S. 28, 30 (1957) (indicating that the prosecutor failed to correct witness's false testimony that he was not having affair with the defendant's wife, which allegedly provoked the defendant to kill his wife). A prosecutor's actual awareness of the false testimony is irrelevant if the prosecutor "should have known" about the falsity. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) (examining the situation created by the promise of immunity made by a prosecutor in grand jury attributing to the trial prosecutor's unawareness of the promise).

95. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

96. *See Miller v. Pate*, 386 U.S. 1 (1967).

97. *See United States v. Taylor*, 210 F.3d 311 (5th Cir. 2000).

98. *See United States v. Kessler*, 530 F.2d 1246 (5th Cir. 1976).

99. *See United States v. Steele*, 91 F.3d 1046, 1051 (7th Cir. 1996) ("reprehensible" for prosecutor to wave piece of paper while cross-examining witness to falsely suggest that paper was official record contradicting witness's story).

100. *See McKinnon v. Carr*, 103 F.3d 934, 936 (10th Cir. 1996) ("egregiously improper" for prosecutor in rape case to display to jury pair of handcuffs having no connection to case); *People v. Canada*, 550 N.Y.S.2d 392 (N.Y. App. Div. 1990) (prosecutor seeks to introduce hammer into evidence even though he knew it had nothing to do with case).

the same crime,¹⁰¹ or changes the theory of the prosecution in the middle of the trial.¹⁰²

C. SUPPRESSING THE TRUTH

Because of early access to crime scenes and other evidence and superior investigative resources,¹⁰³ prosecutors have a unique ability to acquire evidence that may be inconsistent with the prosecutor's theory of the case or favorable to the defense.¹⁰⁴ To the extent that a prosecutor has exclusive knowledge and control of such evidence, the prosecutor can obstruct the defendant's access to it and thereby impede the discovery of the truth.¹⁰⁵ For this reason, courts have condemned the prosecutor's suppression of materially favorable evidence, or obstruction of defense access to potentially exculpatory evidence.¹⁰⁶

101. See *Jacobs v. Scott*, 513 U.S. 1067 (1995) (finding violation of due process for prosecutor to take inconsistent positions on defendant's role as killer) (Stevens, J., dissenting from denial of certiorari); *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000) (finding a violation of due process for prosecutor to maintain irreconcilably inconsistent theories to secure convictions against two defendants in prosecutions for same offenses arising out of same event); *Thompson v. Calderon*, 109 F.3d 1358 (9th Cir. 1996) (stating that a prosecutor is forbidden to pursue wholly inconsistent theories of a case at separate trials), *rev'd on other grounds*, 523 U.S. 538 (1998).

102. See *People v. Calandra*, 565 N.Y.S.2d 467 (N.Y. App. Div. 1991) (prosecutor's mid-trial change in theory of the prosecution deprived defendant of due process requirement of fair notice of charges).

103. See *supra* notes 23-25 and accompanying text.

104. The prosecutor's monopoly of information presupposes that police investigators record fully and accurately the information they acquire, and then reveal that information to the prosecutor. To be sure, a prosecutor, "has a duty to learn any favorable evidence known to others acting on the government's behalf in the case, including the police." See *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995). Nevertheless, there is no correlative duty on the part of the police to impart such information to the prosecutor. See Stanley Z. Fisher, "Just the Facts, Ma'am:" *Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 N. ENG. L. REV. 1, 53 (1993) (maintaining that police operate independently of prosecutors, answer to different constituencies, and may not reveal to prosecutors exculpatory information). See also Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons From England*, 68 *FORDHAM L. REV.* 1379 (2000) (proposing amendments to ethics codes to require prosecutors to learn of exculpatory evidence known to police and to provide guidance on implementing responsibility). Needless to say, even the most scrupulous prosecutorial oversight of police record-keeping will fail to uncover police misconduct in framing innocent suspects. See Matt Lait & Scott Glover, *Rampart Case Takes on Momentum of Its Own*, *L.A. TIMES*, Dec. 31, 1999, at A1 (describing police scandal involving fabrication of evidence and framing of innocent suspects).

105. A prosecutor's duty to truth is the same whether he subverts truth by introducing false testimony or other evidence, see *supra* notes 89-102 and accompanying text, or whether he impedes the discovery of truth by preventing the defendant's access to favorable evidence. See Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 *STAN. L. REV.* 1133, 1151 (1982) ("In terms of truth-seeking, there is frequently no real difference between the jury's hearing perjury and its failing to hear significant favorable evidence.").

106. See *GERSHMAN*, *supra* note 23, at §§ 5:1-5:21. The prosecutor's suppression of evidence is among the principal causes of wrongful convictions. See *supra* note 14.

1. NONDISCLOSURE OF POTENTIALLY TRUTH-ENHANCING EVIDENCE

A prosecutor has a constitutional and ethical duty to disclose favorable evidence to the defense that has the potential to illuminate the truth.¹⁰⁷ The constitutional duty was enunciated in *Brady v. Maryland*.¹⁰⁸ The ethical duty requires a prosecutor to make timely disclosure to the defense of all evidence or information that tends to negate the guilt of the accused or mitigate the offense or sentence.¹⁰⁹ The prosecutor's constitutional duty has been interpreted by the courts more narrowly than its ethical counterpart, and consequently affords prosecutors greater leeway to suppress evidence without legal accountability.¹¹⁰ Under the constitutional rule, a prosecutor is obligated to disclose only evidence that is materially favorable to the defense, meaning evidence whose suppression would seriously impede the search for truth.¹¹¹ Moreover, under the constitutional rule, the evidence must be admissible; favorable information that is not admissible ordinarily is not disclosable.¹¹² Additionally, under the constitutional rule, a prosecutor can safely avoid disclosure if the evidence is cumulative of evidence already disclosed.¹¹³ Finally, a defendant's knowledge of the undisclosed evidence, or ability with reasonable diligence to acquire such evidence, usually relieves the prosecutor of his obligation.¹¹⁴

107. Nonconstitutional discovery rules also impose on prosecutors disclosure obligations independent of the duty under *Brady*. By denying access to potentially truthful evidence through violations of discovery rules, a prosecutor can similarly interfere with the search for truth. See GERSHMAN, *supra* note 106, at § 5:22.

108. 373 U.S. 83, 87 (1963) ("suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.").

109. See MODEL RULES Rule 3.8(d); MODEL CODE EC 7-13(3); ABA STANDARDS Standard 3-3.11.

110. Professional discipline of prosecutors for suppression of evidence is so infrequently invoked that it rarely functions as a credible and meaningful deterrent to misconduct. See Armstrong & Possley, *supra* note 13, at 3; Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987).

111. See *United States v. Bagley*, 473 U.S. 667, 682 (1985) (nondisclosed 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."). See also *Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (amplifying *Bagley* standard, stating that the question is not whether the defendant would more likely than not have received a different verdict with the evidence but whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.").

112. See *Wood v. Bartholomew*, 516 U.S. 1, 5 (1995) (polygraph evidence showing that key prosecution witness lied would not have been admissible and therefore prosecutor not required to disclose information under *Brady*). But see *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999) ("inadmissible evidence may be material if the evidence would have led to admissible evidence."); *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1198 (C.D. Cal. 1999) (determining proffers and statements made by accomplice witness while negotiating plea agreement to fall within *Brady* rule as long as information "would have led to admissible evidence.").

113. See *United States v. Avellino*, 136 F.3d 249, 257 (2d Cir. 1998) (deeming undisclosed items of impeachment evidence aimed at government's key witness cumulative and non-material when defendant's character already effectively attacked).

114. See *Johns v. Bowersox*, 203 F.3d 538, 545 (8th Cir. 2000) ("no suppression if defendant could have learned of the information through reasonable diligence . . . [n]or can there be suppression when the defendant and the State have equal access to the information."). The extent to which information possessed by other

2. OBSTRUCTING ACCESS TO POTENTIALLY TRUTH-ENHANCING EVIDENCE

Because of the prosecutor's control of the evidence,¹¹⁵ he has the ability to thwart a defendant's ability to learn about favorable witnesses, or to locate and call such witnesses once they are known.¹¹⁶ Denying access to potentially favorable witnesses may violate not only the defendant's general due process right to a fair trial but the more specific guarantee contained in the Sixth Amendment's right to compulsory process.¹¹⁷

A prosecutor can interfere with a defendant's right to present witnesses in various ways: deporting illegal aliens before a defendant has had the opportunity to interview them;¹¹⁸ hiding witnesses and frustrating defense attempts to locate them;¹¹⁹ instructing witnesses not to talk to defense counsel;¹²⁰ and threatening defense witnesses with perjury or other substantive crimes if they testify.¹²¹ Prosecutors who have engaged in such conduct have compounded the obstruction

governmental officials is imputed to the prosecutor is unsettled. *See* Giglio v. United States, 405 U.S. 150, 154 (1972) (information possessed by one prosecutor in office imputed to all other prosecutors); United States v. Steinberg, 99 F.3d 1486 (9th Cir. 1996) (information possessed by police officers who investigated case imputed to prosecutor); United States v. Wood, 57 F.3d 733, 738 (9th Cir. 1995) (information possessed by other government agencies involved in investigation imputed to prosecutor). *But see* United States v. Morris, 80 F.3d 1151 (7th Cir. 1996) (prosecutor not charged with knowledge of information in possession of government agencies that are not investigative arms of prosecutor and have not participated in investigation); United States v. Moore, 949 F.2d 68 (2d Cir. 1991) (prosecutor not responsible for information possessed by investigative agencies of other jurisdictions, even though such agencies might be part of joint task force investigating same criminal activity).

115. *See supra* notes 23-25 and accompanying text.

116. Aside from denying defense access to witnesses, a prosecutor can also deny access to evidence by failing to preserve potentially exculpatory evidence. Typical examples of unpreserved evidence include erased videotapes, crime scene evidence, clothing worn by the defendant, blood, sperm, and urine samples, and destroyed handwritten notes of police interviews with witnesses. *See* GERSHMAN, *supra* note 54, § 2-2(c), at 131-33.

117. *See* Alan Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974) (arguing that rule of *Brady v. Maryland* is grounded less on general notions of due process fairness than on Sixth Amendment right to compulsory process to obtain exculpatory witnesses). *See also* GERSHMAN, *supra* note 54, § 2-3, at 133-43.

118. *See* United States v. Valenzuela-Bernal, 458 U.S. 858, 873 (1982) (although prosecutor caused witnesses to be deported before defense counsel had opportunity to interview them, no due process violation shown unless defendant makes "plausible showing" that testimony of deported witnesses would have been "favorable," "material," and "not cumulative," or that prosecutor's conduct in removing witnesses from country was deliberately undertaken to deprive defense of opportunity to interview him).

119. *See* United States v. Gonzales, 164 F.3d 1285 (10th Cir. 1999) (prosecutor, in violation of court order, intentionally misleads court and defense counsel concerning knowledge of witness's whereabouts); *People v. Avery*, 377 N.E.2d 1271 (Ill. App. Ct. 1978) (prosecutor holds witness in custody instead of allowing him to speak to defense counsel).

120. *See* ABA STANDARDS Standard 3-3.1(d) ("A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give."). Convictions have been reversed because prosecutors instructed witnesses not to talk to defense counsel. *See* Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966); *State v. Burri*, 550 P.2d 507 (Wash. 1976); *State v. Hammler*, 312 So.2d 306 (La. 1975); *State v. Harr*, 194 S.E.2d 652 (W. Va. 1973).

121. *See* United States v. Golding, 168 F.3d 700 (4th Cir. 1999) (prosecutor threatens to charge witness with weapons possession if he testified); *United States v. Vavages*, 151 F.3d 1185 (9th Cir. 1998) (prosecutor

to a witness's potentially truth-enhancing testimony by advising the jury that the witness's absence indicates the falsity of the defendant's story,¹²² or by calling the jury's attention to the defendant's failure to present exculpatory witnesses.¹²³

D. OTHER TRUTH-DISSERVING CONDUCT

Thus far, we have examined a prosecutor's duty to truth in the context of prosecutorial conduct that deliberately impedes the search for truth without any countervailing governmental interest except a desire to win the case. There are other occasions, however, when a prosecutor engages in what appears to be adversarially correct behavior that nonetheless impedes the search for truth.¹²⁴ As examples, a prosecutor is allowed to some extent to exploit defense counsel's misconduct and mistakes, and to make legally proper objections to the defendant's presentation of potentially truth-enhancing evidence. The prosecutor's conduct, although adversarially correct, may seriously impede the search for truth.¹²⁵

1. EXPLOITING DEFENSE COUNSEL'S MISCONDUCT AND MISTAKES

There is no clear legal or ethical duty on the part of a prosecutor to assist defense counsel to perform effectively.¹²⁶ There are occasions when a prosecutor, in responding to defense counsel's misconduct, or seeking to take advantage of defense counsel's mistakes, may vindicate the interest in adversarialness at the expense of truth.

threatens to withhold favorable plea bargain if witness testified); *State v. Finley*, 998 P.2d 95 (Kan. 2000) (prosecutor threatens to charge defendant's girlfriend with felony murder if she testified on defendant's behalf).

122. *See Golding*, 168 F.3d 700 (prosecutor drives witness off stand by threats and then argues that witness's absence indicates falsity of defendant's story).

123. *See Vavages*, 151 F.3d 1185 (prosecutor drives alibi witness off stand by threats of perjury charges and then emphasizes in closing argument defendant's failure to present any witnesses except his small children to support his alibi defense).

124. The adversary trial is the commonly accepted device for discovering the truth. *See supra* note 27.

125. A recent television documentary described how some prosecutors refuse to allow new testing of DNA evidence, even in situations where there exists compelling evidence of the defendant's innocence and the strong probability that DNA testing could prove his innocence. Although the prosecutor's conduct is technically correct from an adversarial standpoint, the conduct is subject to criticism as inconsistent with the prosecutor's role as a minister of justice. *See FRONTLINE, The Case for Innocence*, PBS Productions, Jan. 10, 2000. Congress is considering legislation that would require courts to order free DNA testing at a defendant's request despite a prosecutor's objection. *See supra* note 12.

126. *But see* FREEDMAN, *supra* note 4, at 88-89 (arguing that prosecutor has ethical duty to advise court when defendant is denied effective assistance of counsel, as well as duty not to deliberately take advantage of incompetent defense lawyering); Zacharias, *supra* note 4, at 68-74 (suggesting possible prosecutorial options, including prosecuting less effectively, introducing favorable testimony on the defendant's behalf, and encouraging defense counsel "to shore up his performance."). A prosecutor for tactical reasons may decide to assist defense counsel not as an aid in discovering truth but in order to protect his case against a post-conviction claim by the defendant that his counsel was constitutionally ineffective.

Under the “fair reply” or “invited response” doctrines, a prosecutor is allowed to respond to improper conduct by defense counsel in order to equalize the positions of both sides and remedy unethical defense behavior.¹²⁷ Although truth may be impeded when a prosecutor attempts to “fight fire with fire,” courts typically preserve adversarial fairness by allowing prosecutors considerable leeway to retaliate.¹²⁸ But while prosecutors may appropriately neutralize improper defense conduct, courts usually draw the line when prosecutors attempt to rely on the misconduct as a springboard to launch affirmative attacks upon the defendant.¹²⁹ Such attacks often take the form of character attacks, distortions of the truth, and inflammatory conduct.¹³⁰

The extent to which a prosecutor should be allowed to exploit defense mistakes, as opposed to deliberate defense misconduct, is less clear. Opening the door to a damaging response is one of the risks of trial litigation. Courts usually allow prosecutors an opportunity to respond when the defense opens the door to a sensitive area.¹³¹ However, courts also find misconduct when the prosecutor’s response goes too far and seriously endangers fact-finding accuracy. For example, in *Berryman v. Morton*,¹³² a robbery prosecution, defense counsel sought to demonstrate that the police investigation was not thorough by asking the lead detective on cross-examination why he did not try to locate the defendant

127. See *United States v. Young*, 470 U.S. 1, 11 (1985); *United States v. Tasto*, 586 F.2d 1068 (5th Cir. 1978); *Reynolds v. State*, 505 S.W.2d 265 (Tex. Crim. App. 1974).

128. See *United States v. Robinson*, 485 U.S. 25, 32 (1988) (prosecutor’s explicit reference to defendant’s failure to testify not improper since it was a “fair response” to defense counsel’s argument that the government would not let defendant tell his side of the story); *Darden v. Wainwright*, 477 U.S. 168, 182-83 (1986) (“the idea of ‘invited response’ is used not to excuse improper comments, but to determine their effect on the trial as a whole”; although *Darden*’s trial was “not perfect,” neither was it “fundamentally unfair”); *Young*, 470 U.S. at 12, 17, 19 (although not condoning prosecutor’s improper response to defense counsel’s argument, Court advises lower courts to examine prosecutor’s conduct in context, including defense counsel’s “opening salvo,” the jury’s “understanding” of the prosecutor’s responsive purpose, and the evidence of guilt).

129. Some courts have interpreted *Young*’s discussion of the invited error doctrine to mean that a prosecutor may neutralize improper defense arguments but may not rely on them as a springboard to launch affirmative attacks upon the defendant. See *United States v. Morgan*, 113 F.3d 85 (7th Cir. 1997); *United States v. Josleyn*, 99 F.3d 1182 (1st Cir. 1996); *United States v. Molina-Guevara*, 96 F.3d 698 (3d Cir. 1996).

130. See, e.g. *United States v. Collicott*, 92 F.3d 973 (9th Cir. 1996) (defense opens door by improperly impeaching witness with prior consistent statements but prosecutor’s response constituted damaging character attack that went well beyond simply meeting impeachment); *United States v. Tham*, 665 F.2d 855 (9th Cir. 1981) (defense counsel opens door to circumstances of defendant’s prior acquittal but prosecutor improperly responds by insinuating that acquittal resulted from corruption); *Middleton v. United States*, 401 A.2d 109 (D.C. 1979) (prosecutor uses redirect examination to respond to defense counsel’s improper insinuation by engaging in gratuitously inflammatory conduct).

131. See *Brown v. United States*, 356 U.S. 148, 157 (1958) (“[B]y her direct testimony [defendant] had opened herself to cross-examination on the matters relevantly raised by that testimony”); *United States ex rel. Walker v. Follette*, 311 F. Supp. 490, 495 (S.D.N.Y. 1970) (“where as a matter of trial strategy a defendant himself decides to open up a sensitive area – whether because he hopes to draw the sting out of the prosecution’s case or because he mistakenly believes he has nothing to fear – he cannot expect the same measure of protection from cross-examination as when the prosecution initiates the inquiry.”).

132. 100 F.3d 1089 (3d Cir. 1996).

earlier. Seizing the opportunity, the prosecutor elicited on redirect examination that the reason for the detective's inaction was that the defendant was the principal suspect in a separate homicide-robbery investigation.¹³³ The prosecutor could have corrected defense counsel's false insinuation that the investigation was not thorough in a much less inflammatory fashion.¹³⁴ In addition, rather than exploiting defense counsel's imprudent conduct, a responsible prosecutor might have alerted defense counsel or the court to the problem so that gratuitous damage to the truth could have been avoided.¹³⁵

2. OBJECTING TO POTENTIALLY TRUTH-SERVING EVIDENCE

Prosecutors routinely object to alibi evidence where no advance notice has been given,¹³⁶ evidence of a rape victim's prior sexual history where no advance notice has been given,¹³⁷ and other evidence that although factually relevant is legally incompetent.¹³⁸ In contrast to a prosecutor's adversarial conduct that deliberately and unjustifiably impedes the search for truth, the prosecutor's conduct in seeking to exclude potentially truth-enhancing evidence based on a technically correct procedural or substantive ground is

133. *Id.* The trial court declared a mistrial.

134. The prosecutor could have elicited from the witness the existence of an ongoing investigation, without going into the precise subject matter.

135. Prosecutors have also been criticized for enforcing procedural default rules to prevent defense counsel from raising meritorious claims that counsel through neglect failed to preserve. Such failures by defense counsel are often highlighted in death penalty litigation. The prosecutor's refusal to waive procedural dereliction, while legally correct, is ethically questionable when there exists a serious and potentially meritorious constitutional issue relevant to the defendant's guilt or punishment. *See* Bright, *supra* note 14, at 1872-77.

136. *See* Taylor v. Illinois, 484 U.S. 400 (1988) (courts may exclude alibi testimony as a sanction for willful noncompliance with discovery rules). A prosecutor's objection to alibi evidence for defense counsel's willful noncompliance with discovery rules is more justified than seeking preclusion for defense counsel's innocent noncompliance, particularly when alternative remedies are adequate to protect the government's interests. *See id.* at 413 (preclusion may be abuse of discretion when alternative remedies are "adequate and appropriate"). For cases suggesting that preclusion should not be ordered when defense counsel's discovery violation was not in bad faith, *see* Anderson v. Groose, 100 F.3d 543, 547 (8th Cir. 1996); United States v. Levy-Cordero, 67 F.3d 1002 (1st Cir. 1995); Bowling v. Vose, 3 F.3d 559 (1st Cir. 1993). *But see* United States v. Portella, 167 F.3d 687, 705 n.16 (1st Cir. 1999) (court suggests that preclusion of evidence justified even in absence of willful misconduct); Tyson v. Trigg, 50 F.3d 436 (7th Cir. 1995) (no abuse of discretion to preclude defense from calling witnesses for non-willful violation of discovery order); United States v. Johnson, 970 F.2d 907, 911 (D.C. Cir. 1992) (bad faith "an important factor but not a prerequisite to exclusion"). *See* GERSHMAN, *supra* note 54, § 5-3(d), at 320-22.

137. *See* Michigan v. Lucas, 500 U.S. 145 (1991) (permissible to exclude evidence based on defense counsel's violation of discovery rule); United States v. Rouse, 111 F.3d 561, 569 (8th Cir. 1997) (prosecutor's objection to defense use of arguably relevant evidence of past sexual conduct upheld for defense counsel's failure to give timely notice).

138. *See* Green v. Georgia, 442 U.S. 95, 97 (1979) (violation of due process where prosecutor objected at capital sentencing proceeding on hearsay ground to introduction by defendant of witness's exculpatory out-of-court statement, despite "substantial reasons existed to assume [the statement's] reliability," and despite fact that prosecutor considered witness sufficiently reliable to use his testimony to secure death sentence against co-defendant).

legally justified. However, to the extent that a prosecutor also occupies the quasi-judicial role of a minister of justice, his invoking procedural or evidentiary rules to bar potentially relevant evidence is less clear. The issue has received scant commentary. Indeed, cases that discuss the prosecutor's effort to exclude potentially truth-promoting evidence address exclusively the defendant's constitutional right to present a defense.

Thus, in several decisions of the Supreme Court, the prosecutor's invocation of procedural or evidentiary rules to prevent the introduction of potentially exculpatory evidence, although adversarial correct, resulted in a violation of the defendant's constitutional right to fair trial.¹³⁹ In *Chambers v. Mississippi*,¹⁴⁰ for example, due process was violated when the prosecutor relied on state evidentiary rules to prevent the defense from introducing compelling proof that another person was guilty of the murder. In *Rock v. Arkansas*,¹⁴¹ the Sixth Amendment was violated when the prosecutor relied on a state evidence rule to prevent the defendant from giving testimony in her own behalf. And in *Washington v. Texas*,¹⁴² the Sixth Amendment was violated when the prosecutor relied on a state evidentiary rule to prevent one co-defendant from testifying for another defendant.¹⁴³

E. ASSISTING THE DEFENSE IN DISCOVERING THE TRUTH

Quite apart from the negative duty to avoid truth-disserving conduct discussed above, there is the more difficult question of the prosecutor's affirmative duty to advance the search for truth. Does a prosecutor have an obligation to assist a defendant in testing the authenticity of the evidence that the prosecutor plans to use against him? Or, does the prosecutor have an obligation to grant immunity to

139. This is not to suggest that the prosecutor's conduct is ethically improper. The point, simply, is that the prosecutor's conduct as an advocate disserves the search for truth. This is merely another way of critiquing the role of the adversary system as an effective device to discover the truth.

140. 410 U.S. 284 (1973).

141. 483 U.S. 44 (1987).

142. 388 U.S. 14 (1967).

143. For a more troubling instance of a prosecutor's invocation of rules of evidence to prevent the introduction of arguably relevant proof, see *United States v. Scheffer*, 523 U.S. 303 (1998), where the Supreme Court upheld the exclusion of polygraph evidence that the defense sought to admit to demonstrate the defendant's truthfulness. The prosecutor objected to the admission of the evidence at trial, after he suggested that the defendant submit to a polygraph test to verify his claim of innocence and made the arrangements for the administration of the test. And although the defendant passed the test, the prosecutor argued to the jury that the defendant was a liar. See *United States v. Scheffer*, 44 M.J. 442, 444 (C.A.A.F. 1996) ("He lies. He is a liar. He lies at every opportunity he gets and he has no credibility. Don't believe him."). Moreover, as noted by Justice Stevens in dissent, the prosecutor's contention that polygraph evidence is notoriously unreliable is inconsistent with the government's extensive use of polygraphs to make vital security determinations. *Scheffer*, 523 U.S. at 324 (1998) ("The military has administered hundreds of thousands of such tests and routinely uses their results for a wide variety of official decisions.") (Stevens, J., dissenting).

defense witnesses who have potentially material testimony to offer but refuse to testify on grounds of self-incrimination?

1. ASSISTING THE DEFENSE IN OBTAINING EXCULPATORY EVIDENCE

Although a defendant has no right to embark on an investigative fishing expedition,¹⁴⁴ several courts have recognized an obligation on a prosecutor to allow a defendant to test the authenticity of the prosecution's evidence against him.¹⁴⁵ The rationale for this duty has been grounded on the *Brady* doctrine, on the theory that depriving a defendant of access to evidence that might establish his innocence is just as much a suppression as if the exculpatory evidence existed and was suppressed;¹⁴⁶ on fundamental fairness, which forbids a prosecutor from denying a defendant the means necessary to conduct an effective defense and to cross-examine witnesses against him;¹⁴⁷ and on a reciprocal discovery rule, under which a defendant should be allowed the same opportunity to determine the probative value of the prosecution's evidence against him as a prosecutor has in determining its inculpatory character.¹⁴⁸ As a unanimous Supreme Court said in *Wardius v. Oregon*,¹⁴⁹ declaring unconstitutional a state alibi statute that made no provision for reciprocal discovery for the defendant:

Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, it does speak to the balance of forces between the accused and his accuser We do not suggest that the Due Process Clause of its own force requires Oregon to adopt [discovery] provisions. But we do hold that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street. The State may not insist that trials be run as a "search for truth" so far as defense witnesses are concerned, while maintaining "poker game" secrecy for its own witnesses.

In line with these principles, courts have required prosecutors to permit a defendant access to evidence for inspection and testing¹⁵⁰ (and to allow other investigative procedures, such as a line-up¹⁵¹) where the defendant shows that the

144. *United States v. Agurs*, 427 U.S. 97, 111 (1976).

145. *See* *Barnard v. Henderson*, 514 F.2d 744 (5th Cir. 1975); *People v. White*, 358 N.E.2d 1031 (N.Y. 1976); *Warren v. State*, 288 So.2d 826 (Ala. 1973).

146. *See* *Henderson*, 514 F.2d 744; *State v. Koennecke*, 545 P.2d 127 (Or. 1976).

147. *See* *State v. Boettcher*, 338 So.2d 1356 (La. 1976); *Warren*, 288 So.2d 826.

148. *See* *Evans v. Superior Court*, 522 P.2d 681 (Cal. 1974).

149. 412 U.S. 470, 474-75 (1973).

150. *See* *Henderson*, 514 F.2d 744 (permitting ballistics tests of murder weapon and bullet); *White*, 358 N.E.2d 1031 (permitting chemical tests of narcotics). *But see* *People v. Bell*, 253 N.W.2d 726 (Mich. Ct. App. 1977) (no due process right to conduct independent scientific examination of evidence).

151. *See* *United States v. Ravich*, 421 F.2d 1196 (2d Cir. 1970); *Berryman v. United States*, 378 A.2d 1317 (D.C. 1977); *Boettcher*, 338 So.2d 1356; *Evans*, 522 P.2d 681. There is no constitutional right to a line-up. *See* *United States v. Kennedy*, 450 F.2d 1089 (9th Cir. 1971); *People v. Calinda*, 372 N.Y.S.2d 479 (N.Y. Sup. Ct. 1975).

evidence is material to the outcome of the case and a reasonable likelihood exists that the results will be favorable. Thus, when the outcome of a narcotics prosecution depends upon the identification of a prohibited substance whose nature is subject to differing expert opinions, courts ordinarily permit a defendant, with appropriate safeguards, to test the substance for weight and composition.¹⁵² Similarly, courts will order a prosecutor to permit an independent ballistics examination by a defendant's expert when the defendant can show that items of evidence such as a weapon or bullets are material to the case and that his own examination is necessary to refute the prosecution's expert.¹⁵³ Courts have also required prosecutors to provide the defense with other investigative assistance, such as the opportunity to conduct a psychiatric examination of prosecution witnesses,¹⁵⁴ or to aid in locating informants who might provide favorable evidence to the defendant.¹⁵⁵

2. REFUSING TO IMMUNIZE POTENTIALLY TRUTHFUL DEFENSE WITNESSES

Prosecutors have broad authority to grant immunity to witnesses in exchange for their truthful testimony, and the prosecutor's discretion in using that power is virtually unfettered.¹⁵⁶ The power can be abused, particularly when its use has the effect of seriously distorting the truth-finding process.¹⁵⁷ The prosecutor's immunity-granting power can undermine the search for truth when the defense

152. See *White*, 358 N.E.2d 1031; *Warren*, 288 So.2d 826.

153. See *Henderson*, 514 F.2d 744; *Koennecke*, 545 P.2d 127.

154. See *Ballard v. Superior Court of San Diego County*, 410 P.2d 838 (Cal. 1966).

155. See *United States v. Fischel*, 686 F.2d 1082 (5th Cir. 1982); *People v. Goliday*, 505 P.2d 537 (Cal. 1973).

156. Statutes typically authorize a prosecutor's formal grant of immunity to a witness. See, e.g., 18 U.S.C. §§ 6002, 6003 (2000); N.Y. CRIM. P. L. § 50.20. Absent statutory authority, prosecutors have no inherent authority to grant witnesses immunity from prosecution. See *Munn v. McKelvey*, 733 S.W.2d 765, 769 (Mo. 1987) ("[T]he general rule is that a prosecutor is not empowered, solely by virtue of his office, to confer immunity upon a witness."). Immunity is the quid pro quo to compel a witness to answer questions. See *United States v. Mandujano*, 425 U.S. 564 (1976). For Independent Counsel Kenneth Starr's controversial use of immunity, see *Sklansky*, *supra* note 16; David Stout, *Starr Drops All Charges Against Two Women*, N.Y. TIMES, May 26, 1999, at A28.

The extent to which prosecutors may offer other benefits to witnesses in exchange for their testimony has generated considerable attention in the courts and the media. In *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), a panel of the Tenth Circuit found that by entering into such deals, federal prosecutors violated 18 U.S.C. § 201(c)(2), the federal anti-gratuity statute, by "offer[ing] or promis[ing] anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial." Some courts followed the panel's decision. See, e.g., *United States v. Lowery*, 15 F. Supp.2d 1348 (S.D. Fla. 1998) (finding violation of statute and ordering suppression of witness's testimony). Most courts considering the question strongly disagreed with *Singleton*. See *United States v. Haese*, 162 F.3d 359 (5th Cir. 1998); *United States v. Ware*, 161 F.3d 414 (6th Cir. 1998). The Tenth Circuit, upon rehearing *en banc*, reversed the panel decision, finding that to apply the statute to the U.S. government acting in its sovereign capacity would be "patently absurd." See *United States v. Singleton*, 165 F.3d 1297, 1300 (10th Cir. 1999) (en banc).

157. See *United States v. Westerdahl*, 945 F.2d 1083 (9th Cir. 1991); *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980); *United States v. DePalma*, 476 F. Supp. 775 (S.D.N.Y. 1979); *People v. Chin*, 490 N.E.2d 505 (N.Y. 1986). See also *United States v. LaCoste*, 721 F.2d 984, 987 (5th Cir. 1983) ("reprehensible

wishes to call a witness who has potentially important testimony to offer but refuses to testify on grounds of self-incrimination, but who asserts that he will testify under a grant of immunity. Although courts typically defer to the prosecutor's refusal, there may be exceptional situations when a prosecutor has a duty to grant immunity.

Where a defense witness is available to testify and the proffered testimony is material, clearly exculpatory, not cumulative, and not available from any other source, some courts balance the prosecutor's interest in maintaining control of his immunity-granting power against the defendant's due process interest in a fair trial and avoiding a wrongful conviction.¹⁵⁸

Additionally, a prosecutor's one-sided and discriminatory use of the immunity-granting power may so distort the fact-finding process as to require granting immunity to defense witnesses. This suggestion of reciprocal immunity might arise if the prosecutor built his case by securing the testimony of one eyewitness to a crime by granting him immunity but then declining to confer immunity on another eyewitness whose testimony would be favorable to a defense.¹⁵⁹

Finally, immunity has been used to remedy a prosecutor's distortion of the fact-finding process by threatening to bring criminal charges against witnesses if they testify for the defense. Although it may be difficult to determine whether a prosecutor is acting permissibly or not when he warns potential defense witnesses of the consequences of their testimony,¹⁶⁰ prosecutors may act at their peril when they issue warnings that serve no valid law enforcement purpose other than to disable the defense from securing favorable evidence to prove the truth of the defense.¹⁶¹

conduct" for prosecutor to refuse to stipulate to conversation with potential defense witness who refused to testify).

158. See *United States v. Chitty*, 760 F.2d 425 (2d Cir. 1985) (holding that due process requires granting of immunity to defense witnesses to safeguard defendant's right to essential exculpatory testimony and right to compulsory process); *United States v. Turkish*, 623 F.2d 769, 778-79 (2d Cir. 1980) (balancing prosecutor's refusal to present claim that witness a potential defendant against defendant's claim that testimony from witness is clearly material, exculpatory, and not cumulative); *Virgin Islands*, 615 F.2d 964 (judicial immunity available when immunity properly sought, witness is available to testify, proffered testimony is both essential and clearly exculpatory, and no strong governmental interests countervail against an immunity grant). See also GERSHMAN, *supra* note 54, § 2-3(c)(2), at 141.

159. See *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978) (prosecutor denies immunity to defense witness with "deliberate intention of distorting the judicial fact-finding process"); *Earl v. United States*, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966) (suggesting that defendant could be deprived of fair trial by prosecutor's uneven use of immunity-granting power); *United States v. DePalma*, 476 F. Supp. 775, 781 (S.D.N.Y. 1979) (prosecutor's denial of immunity to defense witnesses while building case through immunity grants to government witnesses denied defendant fair trial).

160. See *supra* notes 121-23 and accompanying text.

161. See *United States v. Morrison*, 535 F.2d 223, 229 (3d Cir. 1976) (after prosecutor's threats caused defense witness to withhold testimony, court reversed and directed that upon retrial, a judgment of acquittal would be ordered unless prosecutor conferred immunity on witness); *People v. Shapiro*, 409 N.E.2d 897, 905 (N.Y. 1980) (after prosecutor's threats drove defense witnesses from stand, court authorized new trial only if prosecutor extended immunity to those witnesses).

II. DUTY TO PREJUDGE TRUTH

A. SOURCE AND NATURE OF DUTY TO PREJUDGE TRUTH

Although not articulated in judicial decisions, a prosecutor's duty to truth embraces a duty to make an independent evaluation of the credibility of his witnesses, the reliability of forensic evidence, and the truth of the defendant's guilt.¹⁶² This duty arises from the same sources as discussed earlier:¹⁶³ the prosecutor's role as a minister of justice to protect innocent persons from wrongful convictions; the constitutional rule that forbids the use of false evidence and the suppression of materially favorable evidence; the ethical rules that require a prosecutor to have confidence in the truth of the criminal charge; the prosecutor's superior knowledge and control of the evidence; and the prosecutor's unique power to influence the fact-finder's determination.

The ethical codes require that a prosecutor have some level of confidence in the accuracy of his case before going forward with the prosecution.¹⁶⁴ However, the codes are deficient regarding the degree of confidence and how it should be achieved. The codes employ several different but ultimately insufficient formulations to guide the prosecutor. First, a prosecutor should not institute or continue to prosecute a charge if it is not supported by "probable cause."¹⁶⁵ Second, a prosecutor may decline to prosecute if he has a reasonable doubt that the accused is in fact guilty.¹⁶⁶ Third, a prosecutor should not be compelled by his supervisor to prosecute a case in which he has a reasonable doubt about the guilt of the

162. A prosecutor's duty to evaluate the truth of his case is distinct from a judgment as to whether a jury is likely to convict. The Justice Department's Principles of Federal Prosecution appear to suggest that the probability of conviction outweighs the prosecutor's personal judgment as to the truth of his case. See UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.220(B) (1987) (a prosecutor ordinarily may initiate or recommend prosecution "if he/she believes that the person's conduct constitutes a Federal offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction," and "no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty."). See also Sklansky, *supra* note 16, at 528 (claiming that Justice Department guidelines appear to encourage the mindset of prosecutors that "it is not their job to judge the truth of testimony, only how it will play in the courtroom.").

163. See *supra* notes 19-26 and accompanying text.

164. See MODEL RULES Rule 3.8(a) ("The prosecutor in a criminal case shall: refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause"); MODEL CODE DR 7-103(A) ("A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he or she knows or it is obvious that the charges are not supported by probable cause."); ABA STANDARDS Standard 3-3.9(a) ("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.").

165. *Id.*

166. See ABA STANDARDS Standard 3-3.9(b)(i) ("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: (i) the prosecutor's reasonable doubt that the accused is in fact guilty"). Neither the *Model Rules* nor the *Model Code* provide any guidance as to whether a prosecutor may decline to prosecute an existing charge, and the standard for exercising that discretion.

accused.¹⁶⁷ Fourth, a prosecutor should not prosecute a case in the absence of sufficient admissible evidence to support a conviction.¹⁶⁸

The probable cause standard is not very demanding.¹⁶⁹ As the commentary to the ABA *Standards* explains, probable cause is substantially less than sufficient admissible evidence to sustain a conviction.¹⁷⁰ It allows a prosecutor considerable room for error in bringing a charge. Moreover, the reference in the *Standards* to the reasonable doubt test is ambiguous. Standard 3-3.9(b)(i) allows a prosecutor to decline to prosecute if he entertains a reasonable doubt about the defendant's guilt, but the Standard does not require such action. The commentary to the ABA *Standards* refers to "the obvious reasonable doubt test," but provides no further guidance on the extent to which this test should influence a prosecutor's decision to prosecute.

In practice, the standard of confidence apparently varies widely. Some prosecutors, including many with whom I worked and with whom I have been acquainted over the years, maintain that they would never prosecute a defendant unless they were personally convinced of the defendant's guilt.¹⁷¹ Other prosecutors contend that even if they are not personally convinced of the defendant's guilt, they would let the jury decide the issue.¹⁷² Several academic commentators, although lacking empirical data to support their claim, have

167. See ABA STANDARDS Standard 3-3.9(c) ("A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused."). Neither the *Model Rules* nor the *Model Code* offer any guidance on this issue.

168. See ABA STANDARDS Standard 3-3.9(a) ("A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."). Interestingly, the standards of the National District Attorneys Association are more demanding, stating that a prosecutor is justified in not prosecuting if she has "doubt as to the accused's guilt." See NATIONAL PROSECUTION STANDARDS Standard 42.3(a) (Nat'l Dist. Attys. Assoc'n 2d ed. 1991).

169. See FREEDMAN, *supra* note 4, at 85 ("Probable cause, of course, may be based upon hearsay and may be satisfied by even less than a substantial likelihood of guilt"); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669, 680-81 ("An ethical prerequisite of probable cause is essentially meaningless. Probable cause is little more than heightened suspicion, and it is not even remotely sufficient to screen out individuals who are factually not guilty.").

170. See ABA STANDARDS Standard 3-3.9(a) cmt. ("A probable cause standard, which is substantially less than sufficient admissible evidence to sustain a conviction, is sufficiently minimal that a prosecutor should not err in deciding whether the quantum of evidence is adequate to institute criminal proceedings."). Of course, the commentary neglects to add that under this standard a prosecutor must "know" that the charges are not supported by probable cause, a subjective test that is virtually impossible to prove. See FREEDMAN, *supra* note 4, at 86 ("Thus, for practical purposes, there is no ethical limitation imposed upon the prosecutor's discretion under the *Standards*.").

171. Uviller, *supra* note 3 and accompanying text. Professor Uviller opines that adopting such a position "represents a notable modification of our system of determining truth and adjudicating guilt." See Uviller, *supra* note 3, at 1157. Professor Uviller begs the question. It is my thesis, and that of others, that our "system of determining truth and adjudicating guilt" in fact assumes the interposition of the prosecutor to lessen the risk of jury error.

172. See *supra* note 3 and accompanying text. Many prosecutors with whom I have been acquainted over the years embrace this position. For a prosecutor's candid reiteration of this view after the exoneration of an innocent man who was wrongfully prosecuted and spent eight years in jail, see Jim Yardley, *Man is Cleared In Murder Case After Eight Years*, N.Y. TIMES, Oct. 29, 1998, at B1 (prosecutor defends handling of case, stating:

argued that notwithstanding the ethical mandate to serve justice, a prosecutor is allowed to proceed even though he lacks a personal belief in a defendant's guilt.¹⁷³ Some commentators have even argued that if the proof of guilt and non-guilt is in "equipoise" – meaning, I take it, that the prosecutor harbors a substantial doubt of the accused's guilt – the prosecutor should nevertheless let a jury decide the case.¹⁷⁴

Whatever the prevailing view, there are compelling reasons why a prosecutor should not proceed with a case unless he is personally convinced, beyond a reasonable doubt, of the factual truth of his case – that his witnesses are truthful and accurate – and of the legal truth – that the evidence proves the defendant's guilt of the crime charged beyond a reasonable doubt.¹⁷⁵ First, the prosecutor is much better qualified than the jury at judging the factual and legal truth of a case.¹⁷⁶ The prosecutor knows much more about the case than the jury could ever

"We live by an adversarial system. Our job is to present evidence we believe is credible. The defense's job is to poke holes in it. In a sense, the system worked, although it took some time.").

173. See *supra* note 4 and accompanying text.

174. See Uviller, *supra* note 3, at 1159 ("[W]hen the issue stands in equipoise in his own mind, when he is honestly unable to judge where the truth of the matter lies, I see no flaw in the conduct of the prosecutor who fairly lays the matter before judge or jury"). However, how does a conscientious prosecutor in such a case "fairly lay the matter before the jury?" How does the prosecutor cross-examine defense witnesses? Does the prosecutor vigorously cross-examine the defendant, or his alibi witness, to try to confuse them, or make them appear unsure or indecisive, even though the prosecutor has some reason to believe they are telling the truth? Some witnesses can be easily discredited. Where a defendant presents his mother as his alibi witness, a prosecutor need only ask one question: "Would you lie for your son?" Discrediting a disinterested and believable alibi witness is another matter. A prosecutor should never allow himself to be placed in a position of having to impeach a truthful witness to rehabilitate the testimony of an unreliable witness. Further, how does the prosecutor argue the case to the jury? Does he attempt to persuade the jury that the defendant's guilt has been proved beyond a reasonable doubt even though he himself is not sure? What, in other words, would constitute a fair presentation of the case when the prosecutor is personally doubtful of the defendant's guilt? And, in the end, is manipulating the truth proper behavior for a "minister of justice?"

175. I recognize that in many cases when a prosecutor has a reasonable doubt about a defendant's guilt, or there is some other impediment to a successful conviction, a prosecutor will avoid putting the defendant to trial by agreeing to recommend a guilty plea. The ethical codes do not address this situation. See ABA STANDARDS Standard 3-3.9 cmt. (noting "continuing disagreement among prosecutors" on the issue but taking no position). To be sure, a defendant's willingness to admit guilt may remove the prosecutor's personal doubt. See Uviller, *supra* note 3, at 1157. However, the potential for prosecutorial abuse is manifest. See Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 59 (1968) (referring to a Chicago prosecutor who stated: "When we have a weak case for any reason, we'll reduce to almost anything rather than lose."). In my judgment, it is ethically proper for a prosecutor who entertains a reasonable doubt about a defendant's guilt to entertain a plea agreement that has been voluntarily offered by defense counsel. It is quite another matter for the prosecutor to try to persuade an unwilling defendant to accept a reduced plea to a crime that the prosecutor either doubts the defendant committed, or knows he cannot prosecute because of evidentiary weaknesses. The latter situation is ethically improper.

176. See David Kocieniewski, *Attempted Murder Charge Dropped Against Trooper*, N.Y. TIMES, Oct. 25, 2000, at B6 (prosecutor drops charges after two new witnesses came forward to support defendant's claim of self defense, notwithstanding criticism from community that jury should have allowed to decide merits of charge). *But see* Uviller, *supra* note 3, at 1158 ("Indeed, should the conscientious prosecutor set himself the arduous task of deciding whether in this instance the complainant is right? If it is his duty to do so, how does he rationally reach a conclusion? For this purpose, are his mental processes superior to the jurors' or the judge's?").

know. The prosecutor has more information about the background of witnesses and the defendant, and the availability of other admissible and non-admissible evidence. The prosecutor has spent more time studying the evidence than the jury, has more experience than the jury in judging the credibility of particular witnesses,¹⁷⁷ and has acquired an expertise in specialized areas of prosecution that the jury lacks.¹⁷⁸

A prosecutor's informal adjudication of guilt is more trustworthy than that of a jury for another reason. A prosecutor can maintain a neutral and objective view of the evidence more readily than a jury. Empirical studies suggest that a jury's view of the evidence can be readily influenced by a variety of prejudicial, non-evidentiary factors.¹⁷⁹ Ironically, a prosecutor who entertains a significant doubt

177. See, e.g., Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 446 (1987) ("There is every reason to believe that prosecutors, with more information at their disposal and more experience, are considerably better than juries at judging identification in criminal cases."). Juries often are disproportionately affected by graphic evidence or unduly vulnerable to inadmissible or prejudicial evidence. See *infra* note 179. A prosecutor's mindset of neutrality makes him much better suited to analyze facts objectively and impartially. See H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695 (2000) (arguing that a prosecutor must possess an open, neutral frame of mind in order to make a careful and objective evaluation of the credibility of witnesses and the reliability of other evidence). See also *infra* notes 188-226 and accompanying text (discussing how prosecutor implements duty to truth). The danger, of course, is that a prosecutor may strongly believe in the defendant's guilt, or succumb to the pressure to win the case, and consequently not evaluate his case with the requisite degree of impartiality and objectivity. See Yaroshefsky, *supra* note 16, at 945 (according to a former federal prosecutor: "Prosecutors are convinced they have the guilty guy, then they go about seeking to convict and do not carefully look at things that are funny about their case."); Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 554 (1987) ("Instead of being an agnostic on guilt, the prosecutor naturally assumes that defendants are guilty.").

178. Most prosecutors would readily acknowledge that they are far more better qualified than jurors to evaluate the reliability of eyewitnesses, the credibility of cooperating witnesses, the truthfulness of police witnesses, and the suggestibility of child witnesses. For these observations I naturally rely on my own experience as a prosecutor, interviews with former prosecutors and defense attorneys, acquaintance with judges and other personnel in the criminal justice system, as well as familiarity with legal and social science literature on criminal prosecution. The following sources are useful critiques of prosecutors offices and the day-to-day work of prosecutors in both urban and rural settings. These sources often, but not always, support my own hypotheses about a prosecutor's expertise in "sizing up" a case and evaluating the truthfulness and accuracy of his witnesses. See MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS (1999); JAMES STEWART, THE PROSECUTORS (1987); JOAN E. JACOBY, THE AMERICAN PROSECUTOR; A SEARCH FOR IDENTITY (1980); LEIF H. CARTER, THE LIMITS OF ORDER (1974); George T. Felkenes, *The Prosecutor: A Look At Reality*, 7 SW. U.L. REV. 98 (1975).

179. See REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, INSIDE THE JURY 232 (1983) (inadmissible evidence and stricken testimony has impact on jurors' decision-making); Judy Platania & Gary Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Argument in Capital Trials*, 23 LAW & HUM. BEHAV. 471 (1999) (juries exposed to improper prosecutorial statements in closing argument recommended death penalty significantly more often than those not exposed to statements); Thompson, *Inadmissible Evidence and Juror Verdicts*, 40 J. PERSONALITY & SOC. PSYCHOL. 453 (1981) (finding jury more likely to consider inadmissible evidence favoring defense than prosecution); Thomas A. Pyszczynski & Lawrence S. Wrightsman, *The Effects of Opening Statements on Mock Jurors' Verdicts in Simulated Criminal Trial*, 11 J. APPLIED SOC. PSYCHOL. 301 (1981) (suggesting that jurors unduly affected by prosecutor's strong opening presentation of evidence); Bobby J. Calder, Chester A. Insko & Ben Yandell, *The Relation of Cognitive and Memorial Processes to Persuasion in a Simulated Jury Trial*, 4 J. APPLIED SOC. PSYCHOL. 62 (1974) (finding

about the truth of his case may impress a jury with the strength of the case merely by virtue of his decision to prosecute. Juries trust prosecutors; they are impressed by the prosecutor's prestige and expertise.¹⁸⁰ Indeed, jurors may reasonably assume that a case would not be brought in the first place if the prosecutor harbored any doubt, and may even assume that additional evidence probably exists to support the hypothesis of guilt.¹⁸¹ Two generalizations reinforce the danger of letting juries decide a questionable case: juries usually reach a verdict and that verdict usually is guilty.¹⁸²

Moreover, a jury trial under the best circumstances is a last resort; it is an expensive and infrequently used mechanism to try to resolve a dispute that the parties are unable to settle voluntarily.¹⁸³ To allow a jury to second-guess a prosecutor's determination that a reasonable doubt exists may be an unreasonably expensive use of judicial resources that could be better expended on more meritorious prosecutions. Thus, when a prosecutor has made a careful and objective determination that a reasonable doubt exists, there is nothing left for a jury trial to accomplish except to reaffirm the prosecutor's determination by conferring the community's stamp of approval on that judgment, or to second-guess the prosecutor's decision. But as noted above, there is no reason to expect that a jury will find the truth when a prosecutor remains in doubt.¹⁸⁴

Finally, a fundamental value in the U.S. criminal justice system is that it is preferable to acquit a guilty defendant than to convict an innocent defendant.¹⁸⁵ Given the extensive documentation of wrongful convictions,¹⁸⁶ and the concomitant need to minimize that risk, it is most protective of this value if a prosecutor assumes the role of an informal gatekeeper of the truth to screen doubtful cases from the jury.¹⁸⁷

that the more arguments counsel raises with respect to different substantive arguments offered, the more jury will believe in that party's case); Stanley Sue, Ronald E. Smith & Cathy Caldwell, *The Effects of Inadmissible Evidence on the Decisions of Simulated Jurors - A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOL. 345 (1973) (finding direct correlation between influence of inadmissible evidence and strength of prosecutor's case so that inadmissible evidence most prejudicial when prosecutor's case is weak).

180. See *supra* note 26.

181. In fact, some prosecutors try to make this point explicitly by insinuating that additional, unused evidence exists to prove the defendant's guilt. Convictions are often reversed for such misconduct. See GERSHMAN, *supra* note 54, § 2-8, at 186-93.

182. See HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* 55-63 (1966).

183. As it is, under the draconian regime of the federal sentencing guidelines, the prevalence of federal criminal trials is becoming increasingly infrequent. See Yaroshefsky, *supra* note 16, at 933 n.69 (estimating that only three percent of indictments are tried in New York's federal southern district; ninety seven percent are plea dispositions).

184. See *supra* notes 175-78 and accompanying text.

185. See *In re Winship*, 397 U.S. 358, 372 (1970) ("a fundamental value determination in our society [is] that it is far worse to convict an innocent man than to let a guilty man go free.") (Harlan, J., concurring).

186. See *supra* notes 8-14 and accompanying text.

187. This is not to suggest that prosecutors currently are remiss in not screening doubtful cases. Prosecutors typically decline to prosecute substantial numbers of cases. Of the 98,454 criminal suspects charged from Oct. 1, 1995 through Sept. 30, 1996, thirty-three percent declined for the prosecution. See Bureau of Justice

B. IMPLEMENTING THE DUTY TO PREJUDGE THE TRUTH

To meet his constitutional and ethical obligations, a prosecutor should evaluate his proof according to the following precepts. First, a prosecutor should approach the preparation of a case with a healthy skepticism concerning the evidence collected. Second, a prosecutor should be willing to subject the hypothesis of guilt to rigorous testing. Third, a prosecutor should have the courage to decline prosecution if he entertains a reasonable doubt of the defendant's guilt.

1. SKEPTICISM

A prosecutor should approach the preparation of a case with a healthy skepticism.¹⁸⁸ He should not assume that his witnesses are telling the truth, the forensic evidence is accurate, and the defendant is guilty. Only by maintaining the attitude of a true skeptic can a prosecutor insure the validity of the hypothesis of guilt and be able to exclude reasonable hypotheses of innocence.¹⁸⁹ A prosecutor's preliminary analysis will likely be influenced by the quality of the investigation. A prosecutor might reasonably assume that more serious cases such as homicides and drug-trafficking conspiracies will probably command greater investigative resources and be investigated more thoroughly by the police than routine burglary or assault cases. And a prosecutor might reasonably place greater confidence in the accuracy of an investigation that employs specialized resources, involves close and ongoing supervision, includes investigators with

Statistics, U.S. Department of Justice, *Compendium of Federal Justice Statistics, 1996*, 16 (1998). The point of this Article is to explain the ethical basis for the prosecutor's screening function, and how the prosecutor should exercise that function.

188. See Uviller, *supra* note 177, at 1703 ("[T]he prosecutor should approach the case handed to him with a working degree of suspicion. The good prosecutor - like any good trial lawyer - is skeptical of what appears patent to others, and curious concerning details that seem trivial to the causal observer."). The extent to which prosecutors approach a case with a skeptical mindset is unclear. See Yaroshefsky, *supra* note 16, at 945-47 (several former federal prosecutors stated: "[Some prosecutors] get wedded to their theory and things inconsistent with their theory are ignored;" "[A]dditional probing makes the case more complicated and sometimes more difficult to prevail so people ignore such facts;" "[I]n high profile cases, the pressures and mindset of some prosecutors make it less likely that the government will carefully examine lies by its cooperators"); Jonakait, *supra* note 177, at 554 ("Instead of being an agnostic on guilt, the prosecutor naturally assumes that defendants are guilty.").

189. A difficult problem might arise in prosecuting several defendants together who though jointly involved in the crime, have markedly different degrees of culpability. A prosecutor might reasonably conclude that one of the defendants has only limited involvement in the case, or the prosecutor might entertain a reasonable doubt of his guilty involvement. However, the prosecutor might also reasonably anticipate that this defendant might falsely "take the weight" for the other defendants if his case was prematurely dismissed. A prosecutor could attempt to "lock in" the person's testimony either by immunizing him and obtaining his sworn grand jury testimony, or through a plea disposition and an appropriate plea colloquy that limits his ability to manipulate the process. *But see* Kaplan, *supra* note 4, at 179-80 ("[A] far lower degree of belief in guilt (or perhaps even none at all) seemed to be required when the question was whether the subject under consideration should be joined as a co-defendant with one whom the prosecutor did believe to be guilty.").

considerable experience and selective caseloads, and involves significant oversight by prosecutors.¹⁹⁰

In judging the quality of the proof, a prosecutor is aware of the risk to truth from the testimony of certain kinds of witnesses, and has a special responsibility to insure that their testimony is truthful. These notoriously unreliable witnesses include identification witnesses,¹⁹¹ young children,¹⁹² and cooperating witnesses such as informants, accomplices, and so-called "snitches."¹⁹³ The vast majority of wrongful convictions are attributable to the testimony of these witnesses.¹⁹⁴ The testimony of these witnesses share common risks to the truth; they pose

190. The structure of some prosecutors offices provides an added reason why prosecutors must be skeptical, and alert to credibility or evidentiary defects. For example, the practice in some prosecutors offices of horizontal assignments to bureaus instead of vertical assignments to specific cases might impair communication among prosecutors about defects in a case until the case is being readied for trial. Defects may not be as easily discovered if different prosecutors are assigned to different functions such as initial screening, grand jury presentations, plea negotiations, and trial work. And mistakes once made may become increasingly difficult to correct as the case moves further through the prosecutor's office on its way to trial. See CARTER, *supra* note 178, at 129-130 ("degree to which segmentation of work on a case prevented the discovery of weaknesses" and "discouraged the deputies from learning about the mistakes they made."). Additionally, the practice in some prosecutors offices of assigning new or inexperienced prosecutors to screen new cases, or assigning these prosecutors to present cases to a grand jury, risks creating at an early stage serious legal and factual errors. See Felkenes, *supra* note 178, at 100, 105 (prosecutors are generally young lawyers who utilize the office of the prosecutor as a training ground for legal and trial experience).

191. See EDWIN M. BORCHARD, *CONVICTING THE INNOCENT* (1932) (documentation of sixty-two American and three British cases of convictions of innocent defendants); FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* 30 (1927) ("The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials."); Jennifer L. Davenport, Steven D. Penrod, & Brian L. Cutler, *Eyewitness Identification Evidence*, 3 *PSYCHOL. PUB. POL'Y & L.* 338 (1997) ("both archival studies and psychological research suggest that eyewitnesses are frequently mistaken in their identifications"); Rattner, *supra* note 14, at 289-92 (claiming that misidentification is the single largest reason for wrongful convictions); Gross, *supra* note 177, at 396 ("eyewitness unreliability is the unmistakable conclusion of a vast quantity of psychological research").

The recent execution of Gary Graham in Texas came after years of litigation and public controversy over the accuracy of a highly questionable identification by the only eyewitness. See Jim Yardley, *In Death Row Dispute, A Witness Stands Firm*, *N.Y. TIMES*, June 16, 2000, at A22.

192. See Angela R. Dunn, *Questioning the Reliability of Children's Testimony: An Examination of the Problematic Elements*, 19 *LAW & PSYCHOL. REV.* 203, 203-09 (1995) (describing "widespread concern about the reliability of the child's statements" and factors affecting unreliability); Carey Goldberg, *Youths' "Tainted" Testimony is Barred in Day Care Retrial*, *N.Y. TIMES*, June 13, 1998, at A6 (discussing several reversals of convictions in sexual abuse trials and increasing concern over reliability of child witnesses).

193. See Yaroshefsky, *supra* note 16, at 918 ("[R]isk that cooperators will provide false evidence is a longstanding, well-documented concern"); Daniel C. Richman, *Cooperating Clients*, 56 *OHIO ST. L.J.* 69, 97 n.98 (1995) ("the incentives for the defendant to give 'truthful' testimony may also lead him to give a false account that he believes - correctly or not - the government would prefer to hear."); Christine J. Saverda, *Accomplices in Federal Court: A Case for Increased Evidentiary Standards*, 100 *YALE L.J.* 785, 787 (1990) ("The fact that accomplice testimony is presumptively unreliable has never been disputed."); Evan Haglund, *Impeaching the Underworld Informant*, 63 *S. CAL. L. REV.* 1405, 1412-17 (1990) (providing several dramatic illustrations of informant frame-ups).

194. See *supra* note 14 and accompanying text.

special dangers of falsehood and mistake of which the prosecutor is aware but the jury is not.¹⁹⁵

Additionally, a prosecutor should take a hard look at prior encounters between witnesses and the police to ascertain the presence and extent of any improper influence. Courts have not been especially vigilant over suggestive interviewing techniques of witnesses, leaving it up to the adversary process to expose improprieties.¹⁹⁶ Even assuming highly skilled defense counsel able to test the accuracy and truthfulness of the prosecution's proof – a basic postulate of the adversary system's effectiveness¹⁹⁷ – the process necessarily malfunctions when the prosecutor is able to control and shape the information that enters the process and eliminate or polish up information that is detrimental to his case.¹⁹⁸ Among

195. These risks include inherent weaknesses in eyewitness testimony, *see* *United States v. Wade*, 388 U.S. 218, 228-29 (1967) (noting degree of improper suggestion contributing to misidentification); Gross, *supra* note 177, at 432 (“juries are not particularly good at evaluating eyewitness testimony and determining its accuracy and are not exceptionally careful about convicting defendants on the basis of eyewitness evidence.”), inevitable fabrications from suggestive interviewing techniques with children, *see* *Idaho v. Wright*, 497 U.S. 805, 812-13 (1990) (noting “blatantly leading questions,” “interrogation was performed by someone with a preconceived idea of what the child should be disclosing,” and failure to preserve interview on videotape); *State v. Michaels*, 642 A.2d 1372, 1383 (N.J. 1994) (noting coercive and suggestive interviewing techniques, bias of interviewer, asking leading questions, multiple interviews, incessant questioning, vilification of defendant, ongoing contact with peers and use of their statements, use of threats, bribes, and cajoling, and failure to videotape or otherwise document interview sessions), and the capacity of informants, accomplices, and “snitches,” to manipulate the truth. *See* Yaroshefsky, *supra* note 16, at 921 (“a cooperator can manipulate the details of the events without arousing much, if any, suspicion and still be believable to a jury”). Various prophylactic procedures have been established to minimize potential impediments to the truth from these witnesses. Procedures include cautionary instructions, *see* *Cool v. United States*, 409 U.S. 100, 103 (1972) (cautionary instruction regarding testimony of accomplice a “commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity.”); *On Lee v. United States*, 343 U.S. 747, 757 (1952) (encouraging courts to give juries “careful instructions” to scrutinize informant’s motivation for testifying); *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972) (leading case requiring cautionary instructions emphasizing dangers of eyewitness identifications), corroboration requirements, *see* N.Y. CRIM. P. L. § 60.22 (requiring corroboration of testimony of accomplice); GA. CODE ANN. § 24-3-53 (requiring corroboration of confession), and use of expert witnesses. *See* *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991) (allowing expert testimony on reliability of eyewitness identification); Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCHOL. PUB. POL’Y & L. 909 (1995) (arguing that testimony by research psychologists about eyewitness testimony is necessary to provide jurors education and perspective about eyewitness testimony).

196. For commentary on the practice and ethics of witness preparation and witness coaching, *see* Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1 (1995); John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277 (1989); John D. Piorkowski, Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of “Coaching.”* 1 GEO. J. LEGAL ETHICS 389 (1987).

197. *But see supra*, note 14.

198. For egregious examples of prosecutorial manipulation of a witness’s testimony, *see* *Kyles v. Whitley*, 514 U.S. 419, 442-43 (1995) (eyewitness told police he did not see struggle and shooting, but at trial “describe[d] with such detailed clarity” the struggle and shooting that it “rais[ed] a substantial implication that the prosecutor had coached him to give it.”); *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992) (after cooperator identifies Walker and another person named Givens as participants in a felony murder, prosecutor learns that Givens was in jail at time of robbery; at trial, cooperator identifies Walker without mentioning Givens). *See also* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1042 (1975) (discussing partisan manipulation of evidence). There are additional dangers when a prosecutor brings a case to trial involving the testimony of witnesses in whom the prosecutor lacks confidence. In order to counter

the common dangers are excessive coaching,¹⁹⁹ failure of the interviewer to take notes in early interview sessions until the witness “has got the story straight,”²⁰⁰ and the discredited practice of destroying notes.²⁰¹

Prosecutors should be especially alert to any motive a witness might have to falsify. This caution applies not only with respect to cooperating witnesses, such as informants and accomplices, but also to witnesses who do not appear to have any interest in the outcome of the case.²⁰² The practice in some prosecutors' offices of “polishing up” questionable witnesses does serious damage to the pursuit of the truth. Some police and prosecutors engage in Pygmalion-like

inevitable and unforeseeable defense attacks on her witness's credibility, even the most conscientious prosecutor may need to make arguments that impress a jury but disserve the truth. A prosecutor may argue that an eyewitness's confidence bespeaks accuracy, even though the prosecutor knows that such contention is misleading. *See* Steven Penrod, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL'Y & L. 817, 817 (1995) (research study demonstrating how witness confidence “a dubious indicator of eyewitness accuracy”). A prosecutor may argue that an accomplice is telling the truth because he signed a cooperation agreement to do so, even though the prosecutor knows that such contention is misleading. *See* *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1150 (2d Cir. 1978) (characterizing prosecutor's use of cooperation agreement as “prosecutorial overkill,” observing that the prosecutor often has no way of knowing whether the witness is telling the truth or not and that “the promise in the cooperation agreement adds little to the truth-telling obligation imposed by the oath.”) (Friendly, J., concurring). A prosecutor may argue that a child witness's credibility has been validated by an expert, even though the prosecutor knows that such contention is improper. *See* *Smith v. State*, 674 So.2d 791, 793 (Fla. Dist. Ct. App. 1996) (reversible error for prosecutor to elicit from expert that child had been abused). And a prosecutor may argue that a confession is reliable because if the police witness was fabricating he could have lost his pension, even though the prosecutor knows that such an argument is improper. *See* *Commonwealth v. Kelly*, 629 N.E.2d 999 (Mass. 1994) (argument that police officers would not put their pension on line by testifying falsely improper).

199. *See* Bennett L. Gershman, *Coaching Cooperators*, CARDOZO L. REV. (2001) (forthcoming) (describing how prosecutors overtly, covertly, and unintentionally coach false and misleading testimony from cooperating witnesses); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 110-11 (1992) (describing how some prosecutors “steer” police testimony by presenting witness with alternative scenarios, advise police witness of what testimony is needed, and tell police to “toughen up” certain aspects of their testimony); Damaska, *supra* note 6, at 1094 (“During the sessions devoted to ‘coaching,’ the future witness is likely to adapt himself to expectations mirrored in the interviewer's one-sided attitude. As a consequence, gaps in his memory may even unconsciously be filled out by what he thinks accords with the lawyer's expectations and are in tune with his thesis. Later, in court, these additions to memory images may appear to the witness himself as accurate reproductions of his original perceptions.”).

200. *See* Yaroshefsky, *supra* note 16, at 961-62 (several former federal prosecutors stated that they rarely took notes in initial sessions with cooperating witnesses; according to one former prosecutor, “office lore is don't take too many notes or figure out how to take notes so that they are meaningful to you and no one else. You do not want a complete set of materials that you have to disclose.”).

201. *See* *United States v. Riley*, 189 F.3d 802 (9th Cir. 1999); *United States v. Harrison*, 524 F.2d 421 (D.C. Cir. 1975).

202. *See* ROBERT D. HARE, *WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US* (1999) (an estimated one percent of the population are pathological liars); Kristin Choo, *Perjury With Conviction: Lawyers Can Use Strategic Tactics At Trial to Expose Pathological Liars on the Witness Stand*, A.B.A. J., June, 1999, at 71 (discussing wrongful prosecution of Jeffrey Blake, convicted of a double murder on basis of testimony of Dana Garner, a psychopathic liar whose bizarre and uncorroborated testimony should have been scrutinized more carefully by prosecutors). According to defense counsel, the prosecutor was told by a family member that Dana Garner was a pathological liar, but took no action. Telephone interview with Michelle Fox, Esq., attorney for Jeffrey Blake (Mar. 7, 2000).

attempts to “make over” witnesses who have serious credibility problems, and then hide information that would expose the deficiencies.²⁰³ One of the more notorious examples is the testimony by jailhouse “snitches” who claim that defendants spontaneously made full confessions to them under the most incredible circumstances but are presented at trial to look like public-spirited citizens doing their duty to truth and justice.²⁰⁴

A skeptical prosecutor endeavoring to fulfill his duty to truth encounters one of the hardest problems when he suspects that a police officer is lying.²⁰⁵ Prosecutor offices in New York City encountered this problem several years ago in litigating so-called “dropsy” cases, in which police officers, in order to avoid constitutional strictures on searches and seizures, testified that defendants dropped, or abandoned, gambling or narcotics paraphernalia under circumstances that made such furtive conduct appear incredible. Many prosecutors believed the police version to be contrived, challenging the officer directly: “Do you expect me to believe that?” The police, not surprisingly, maintained the truthfulness of their account, and prosecutors had no way to disprove the claim.²⁰⁶

A dilemma with stakes far higher than the “dropsy” phenomenon confronts a prosecutor in a murder case that has been “solved” by an uncorroborated confession. Prosecutors are aware that fraudulent confessions are one of the

203. See *supra* notes 196-201 and accompanying text.

204. See DWYER, NEUFELD & SCHECK, *supra* note 8, at 126-58; Ted Rohrlich & Robert W. Stewart, *Jailhouse Snitches: Trading Lies For Freedom*, L.A. TIMES, Apr. 16, 1989, at 1.

205. See H. RICHARD UVILLER, *TEMPERED ZEAL* 115-16 (1988) (“most police officers” view police perjury as “natural and inevitable”); David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 457 (1999) (“Judges, prosecutors and defense attorneys report that police perjury is commonplace, and even police officers themselves concede that lying is a regular feature of the life of a cop.”); Joe Sexton, *New York Police Often Lie Under Oath, Report Says*, N.Y. TIMES, Apr. 22, 1994, at A1 (reporting on official inquiry into police corruption); Irving Younger, *The Perjury Routine*, THE NATION, May 8, 1967, 596-97 (“Every lawyer who practices in the criminal courts knows that police perjury is commonplace.”). Commentators have suggested that prosecutors commonly suspect police of fabrication but do not take any action to correct it. See Orfield, *supra* note 199, at 109-10 (suggesting that “prosecutors frequently either tolerate or, more rarely, encourage police perjury at all steps in the process;” one-half of the prosecutors interviewed believe that prosecutors “knew, or had reason to know, more than 50% of the time when police fabricated evidence in case reports”). Commentators differ about the willingness of prosecutors to criticize police conduct. See JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 193-197 (3d ed. 1994) (noting that some prosecutors are “not at all reluctant to criticize police actions” and “it is indeed the policy of the office to educate police.”); JACOBY, *supra* note 178, at 110 (“the prosecutor often distrusts and questions the actions and motives of the police.”). *But see* CARTER, *supra* note 178, at 84 (“[E]mpathy, uncertainty, the necessity of maintaining trust, and the fear of criticism encouraged some prosecutors to become advocates for the police and discouraged most prosecutors from screening out aggressively the errors they perceived in police practices.”).

206. Some prosecutors actually dismissed cases when the scenario was too farfetched, and one office sought unsuccessfully a judicial remedy in the appellate courts. See *People v. Berrios*, 270 N.E.2d 709 (N.Y. 1971) (unsuccessful attempt by New York County District Attorney to seek procedural remedy in New York Court of Appeals that would shift the burden of proof to the prosecutor when police testify that drugs were voluntarily abandoned). See also Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 698 (1996) (given “widespread willingness among police to lie on the stand,” author proposes that police be required to submit to polygraph examination when outcome of suppression hearing depends on credibility).

principal causes of wrongful convictions.²⁰⁷ Not all cases of fraudulent confessions are readily capable of exposure.²⁰⁸ A prosecutor faces a serious dilemma when based on experience and instinct he strongly suspects that a confession is false but cannot prove it and there is no corroborative evidence. What is the prosecutor to do in such a case? Should the prosecutor remain neutral, and trust the adversary process to expose the truth?

There is no easy answer to this question. It may be the hardest question facing a prosecutor who seeks the truth.²⁰⁹ A prosecutor in such case should be suspicious, and should rigorously test the hypothesis of guilt.²¹⁰ The presence or absence of corroborating evidence is obviously critical to a determination of the truth.²¹¹ And if after such investigation a prosecutor still harbors a reasonable doubt, he must decline to prosecute.

207. See Mark Hansen, *Untrue Confessions*, A.B.A. J., July, 1999, at 50 (quoting Michael McCann, Milwaukee's district attorney: "[A]ny experienced prosecutor knows that [false confession] can, and sometimes does, happen"). See also STATE OF NEW YORK, COMMISSION OF INVESTIGATION, *An Investigation of the Suffolk County District Attorney's Office and Police Department* 55 (1989) ("astonishingly high" number of homicide prosecutions involving confessions (94 percent) "provokes skepticism regarding Suffolk County's use of confessions"); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 455 (1998) (research depicting "numerous examples of highly probable false confessions"); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L.L. REV. 105, 111 (1997) (finding that "standard interrogation methods are likely to produce false confessions in a small but significant number of cases [and] these cases are particularly likely to lead to miscarriages of justice."). One of my earliest recollections as a prosecutor was learning that my bureau chief was instrumental in exonerating a defendant charged with murdering two young women by proving that the police instigated him to falsely confess, and then suggested the details of his confession. The prosecutor was able to demonstrate that several critical details in the confession were factually implausible, and that other assertions of the defendant were to inaccurate facts of which the police who obtained the confession were aware. See Jack Roth, *Hogan Clears Whitmore In Two East Side Murders*, N.Y. TIMES, Jan. 28, 1965, at 1. The Supreme Court cited the case in a footnote in the *Miranda* decision to support its assertion that interrogation practices produce false confessions. See *Miranda v. Arizona*, 384 U.S. 436, 455 n.24 (1966).

208. Requiring that police interrogations be recorded on tape, as required by Alaska and Minnesota, might curb the incidence of false confessions. See *State v. Scales*, 518 N.W.2d 587, 589 (Minn. 1994) ("In the exercise of our supervisory powers we mandate a recording requirement for all custodial interrogations."); *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) ("Today, we hold that an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska Constitution, and that any statement thus obtained is generally inadmissible.").

209. For federal prosecutors, the credibility of so-called "cooperators" may be more problematic than the credibility of federal law enforcement agents. See Yaroshefsky, *supra* note 16, at 959 (quoting a former federal prosecutor as stating that "embellished testimony" by cooperating witnesses "is the dirty little secret of our system").

210. See *infra* notes 212-21 and accompanying text.

211. Corroborative proof is obviously crucial to resolving defects or contradictions in the evidence. See Yaroshefsky, *supra* note 16, at 932 ("Virtually all former AUSAs emphasized corroboration as the key factor in assuring cooperator truthfulness."). Several state jurisdictions require corroboration of an accomplice's testimony for a legally sufficient case. See *e.g.*, N.Y. CRIM. P. L. § 60.22; CAL. PENAL CODE § 1111. Federal law does not require corroboration. See *Caminetti v. United States*, 242 U.S. 470, 495-96 (1917). Rules requiring corroboration of the testimony of complainants in sexual abuse cases have been abolished. See Anderson, *supra* note 14, at 2122.

2. RIGOROUSLY TESTING HYPOTHESIS OF GUILT

In addition to being skeptical of the facts, a prosecutor should be willing to assume an active role in confirming the truth of the evidence of guilt and investigating contradictory evidence of innocence.²¹² As in the robbery case discussed earlier, only by such active involvement can a prosecutor confirm the truth, reconcile contradictions, and expose serious deficiencies that suggest that the defendant may be innocent.²¹³ A prosecutor preparing a case hinging on eyewitness identification should be conversant not only with legal authority but with social and psychological literature on memory and the accuracy of eyewitness identification.²¹⁴ Being knowledgeable and resourceful are indispens-

212. See Yaroshefsky, *supra* note 16, at 940 (noting that former federal prosecutors reported “numerous instances where facts were not uncovered due to lack of investigation.”). For recent instances of prosecutors failing to be alert to defects in the investigation, see Sack & Firestone, *supra* note 6, at A20 (describing “disintegration” of prosecutor’s murder case against football star Ray Lewis mostly for failing to conduct adequate investigation into credibility of witnesses); Jim Yardley, *Man Is Cleared in Murder Case After Eight Years*, N.Y. TIMES, Oct. 29, 1998, at B1 (describing prosecutor’s failure to carefully investigate credibility of key witness). The extent to which prosecutors should be charged with a duty to uncover police fabrication of evidence depends on the relationship between a prosecutors office and the police department. See James Sterngold, *Police Corruption Inquiry Expands in Los Angeles*, N.Y. TIMES, Feb. 11, 2000, at A16 (reporting that one hundred cases may have been tainted by planted evidence, false testimony, and other police abuses); *Former State Trooper Explains Why He Fabricated Evidence*, N.Y. TIMES, Apr. 16, 1993, at B5 (describing scandal in upstate New York in which state troopers repeatedly falsified fingerprint evidence). The often close relationship between prosecutors and police make detection of police fabrication unlikely. See *supra* notes 199-205 and accompanying text. To be sure, contaminated crime scenes, lost or destroyed evidence, questionable identification procedures, and suggestive interviewing techniques impede the assembling of a factually accurate and complete case. The robbery case with which this article began was impaired from the start by questionable identification procedures, police prejudice of the defendant’s guilt, and a serious discrepancy between the complainant’s description and the defendant’s appearance.

213. Some prosecutors are unwilling to aggressively investigate their cases to confirm the truth. See Yaroshefsky, *supra*, note 16, at 945 (recounting that former federal prosecutors stated: “Prosecutors are convinced they have the guilty guy, then they go about seeking to convict and do not carefully look at things that are funny about their case;” “They get wedded to their theory and things inconsistent with their theory are ignored.”); Jonakait, *supra* note 177, at 559 (“The natural inclination is not to see inconsistent or contradictory evidence for what it is, but to categorize it as irrelevant or a petty incongruity.”); Louis M. Seidman, *The Trial and Execution of Bruno Richard Hauptmann: Still Another Case That “Will Not Die,”* 66 GEO. L. J. 1, 12 (1977) (prosecutor’s “unwarranted confidence . . . was maintained by the simple expedient of ignoring or, if necessary, distorting evidence that did not conform to the thesis being propounded.”). In the prosecution of Jeffrey Blake, the prosecutor failed to interview an eyewitness who could have corroborated the informant’s account. Telephone interview with Michelle Fox, Esq., attorney for Jeffrey Blake (Mar. 7, 2000).

214. There is an increasing body of scientific literature on human memory, with specific application to recall of information by crime victims and witnesses. See Yaroshefsky, *supra* note 16, at 953 n.174 (listing various research studies describing how people actually construct memories from experience and phenomena that influence recall). As with any able trial lawyer, a prosecutor should be conversant with information that affects the credibility of her witnesses. Many prosecutors are unwilling to confront such issues, either because they of a mindset that “truth is elusive,” or a simplistic, “linear attitude about the truth.” See Yaroshefsky, *supra* note 16, at 953. Prosecutors generally know much more than juries about the dangers of eyewitness identification, and this expertise enables prosecutors to make an informed judgment on the reliability of their proof. See Gross, *supra* note 177, at 424, 438-40 (describing several instances in which prosecutors took the initiative to exonerate defendants who had been mistakenly identified by eyewitnesses).

able qualities in prosecuting difficult cases such as those involving sexual assault, child abuse, and domestic violence.

Studies suggest that many prosecutors use polygraph examinations effectively to clear innocent suspects or as a basis for further investigative action.²¹⁵ Prosecutors occasionally administer lie detector tests to defendants and witnesses.²¹⁶ Using polygraph tests to attempt to exonerate a defendant is effective only if a prosecutor is institutionally capable of undertaking the corrective action of dismissing the case in the event the witness fails the test.²¹⁷

A prosecutor should always be concerned with representations by defense counsel that a client is innocent. These claims are made sparingly so as not to impair an attorney's credibility.²¹⁸ Testing the proof with a hard "second-look" is not only conducive to establishing the truth, but also is in the prosecutor's self-interest as an advocate. Closely questioning his witnesses – even subjecting them to the kind of vigorous cross-examination they might be subjected to by skilled defense counsel at trial – also serves the dual interests of assuring that the prosecution accords with the truth and preparing the witness for a potentially difficult courtroom interrogation.

Contradictory or inconsistent evidence must be carefully tested. First, by failing to consider inconsistent evidence, the prosecutor forms an unwarranted confidence in the defendant's guilt that might prevent him from taking further steps to ascertain whether continued prosecution is justified.²¹⁹ Indeed, one of the major factors in unraveling errors in cases of mistaken identification has been the willingness of prosecutors to notice evidence that another person may in fact be the perpetrator.²²⁰ Second, a prosecutor who minimizes the significance of contradictory evidence will probably not be alert to his *Brady* obligation to

215. See CARTER, *supra* note 178, at 123 (describing policy in one prosecutors office of "willingness to dismiss a case when polygraph examination indicated the suspect's innocence," and agreement between prosecutors and defense counsel "that if suspect failed the test he would plead guilty rather than take the case to trial."); Gross, *supra* note 177, at 422, 438-39 (discussing relative importance of polygraph evidence either in clearing suspects or encouraging further investigation).

216. See *id.* at 422 (noting reasonable accuracy of polygraph testing, but also that at least seven defendants were prosecuted and convicted despite fact that they passed pretrial polygraph tests). Prosecutors also employ the threat of taking a polygraph test as a means of testing a witness's sincerity. A prosecutor can employ the test without being constitutionally required to disclose to the defense the results. See *Wood v. Bartholomew*, 516 U.S. 1, (1995) (polygraph results showing that key prosecution witness lied not admissible at trial and therefore not *Brady* evidence requiring disclosure).

217. See *infra* notes 222-26 and accompanying text.

218. See CARTER, *supra* note 178, at 85 ("[T]he prosecutor adjusts to cues from the defense attorney, the most important of which is the defense attorney's trustworthiness."). In a recent federal prosecution of a wrongfully accused defendant, a highly experienced defense attorney refrained from making such representation to the prosecutor, apparently based on his belief that prosecutors hear such claims so often that it falls on deaf ears. Telephone interview with Philip Weinstein, Esq. (Nov. 20, 2000). See Benjamin Weiser, *Right Name, Wrong Man on Trial, Prosecutors Admit*, N.Y. TIMES, Jan. 22, 2000, at B3.

219. See Yaroshefsky, *supra* note 16; Jonakait, *supra* note 213.

220. See Gross, *supra* note 177, at 424 n. 93, 438-39.

disclose this evidence to the defense.²²¹ Both of these consequences impair the integrity of the truth-finding function of the trial and increase the chances that an innocent defendant may be convicted.

3. MORAL COURAGE TO DECLINE PROSECUTION

This leads to the final quality of a prosecutor intent on serving truth: moral courage.²²² Such courage is possible only in an office that encourages prosecutors to be ministers of justice. Prosecutors' offices that instill such an ethos encourage prosecutors to discuss openly and critically with supervisors and colleagues the kinds of issues discussed in this Article. Prosecutors should be encouraged to evaluate a case critically with colleagues and supervisors to decide whether a prosecution should be undertaken in view of questionable proof and the availability of alternative prosecutorial options.

A prosecutor's moral courage to judge the truthfulness of a witness may be influenced by institutional considerations that discourage either critical evaluation or the ability to take appropriate action. Prosecutors' offices that are heavily influenced by conviction statistics – both to project a tough law-and-order image and for leverage in budget negotiations – will probably maintain close supervision over individual decision making by assistants, and principled decisions that might be perceived as inconsistent with a strong crime-fighting image may be discouraged.²²³ It is much more likely in such a setting that a possibly innocent defendant will be required to accept a generous plea offer on the eve of trial rather than that the prosecutor will dismiss a case in which he lacks confidence.²²⁴

221. See *supra* notes 103-14 and accompanying text.

222. Just as the annals of criminal law are replete with instances of prosecutorial abuses resulting in miscarriages of justice, so are they filled with examples of heroic prosecutors actively bent on correcting injustices. For commentary on moral judgment as affecting discretion, see Anthony v. Alfieri, *Prosecuting Race*, 48 DUKE L. J. 1157, 1242-45 (1999) (discussing prosecutorial invocation of "moral norms" to guide discretion); Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 57-60 (1997) (advocating exercise of moral judgment on "ad hoc basis").

223. See CARTER, *supra* note 178, at 107 (county's control of prosecutor's budget allocation "made it wise [for prosecutor] to conform" to county's criticism of unresolved cases of welfare fraud); Felkenes, *supra* note 178, at 116 ("[Prosecutor's] future in politics depends very much on his justification for the public expenditures used to support his office. The office of the district attorney is under a self-imposed pressure to justify its budget."). There is anecdotal evidence that some prosecutors offices stifle principled decision-making. See Felkenes, *supra* note 178, at 117 (according to one young prosecutor, "his freedom to do what he believes to be right is restricted by the position he holds as prosecutor"); Alschuler, *supra* note 175, at 64 n.42 (discussing instance of assistant who would not prosecute a case unless he was personally satisfied of the defendant's guilt beyond a reasonable doubt. Denigrated by colleagues as the "best defense lawyer in the office," he left the office after his first year).

224. See *supra* note 175. By contrast, prosecutors who need not be as responsive to community pressures are better situated to make politically unpopular but prosecutorially correct choices. These prosecutors are less concerned about acquittals or dismissals than elected prosecutors. Although federal prosecutors offices are usually insulated from political or community pressures, the issue of whether to bring a federal civil rights

Even good prosecutors who strive to do the right thing may discover that their quest to do justice suddenly conflicts with the rigorous demands of the adversary system. The temptation for a prosecutor to believe that his job is to win is always present for people trained in the adversarial ethic.²²⁵ Nevertheless, prosecutors should resist the temptation. The remarks of Attorney General and later Supreme Court Justice Robert H. Jackson should be the enduring ideal:

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.²²⁶

C. PROMOTING A CULTURE OF TRUTH

A prosecutorial culture embodying the qualities described by Justice Jackson would undoubtedly encourage prosecutors to judge truth aggressively. By contrast, a prosecutorial culture that advocates winning and maintains won-loss statistics not only discourages a critical examination of truth but encourages misconduct as well.²²⁷ Commentators are able to offer only tentative conclusions as to how particular prosecutors and prosecutors' offices approach decision-making.²²⁸ Such conclusions are based on personal

prosecution following an acquittal in state court is an unusual instance of a federal prosecutor responding to strong community pressures to prosecute a case in federal court that would ordinarily remain in the state court. See Amy Waldman, *Diallo Family Meets With Justice Officials to Press for Federal Prosecution of Officers*, N.Y. TIMES, Mar. 3, 2000, at B4. The extent to which a prosecutor is obliged to consider the victim's interests may influence how critically he analyzes the case and his willingness to proceed in a doubtful case. Federal prosecutors ordinarily have no individual complainants to whom they must justify their conduct, and who might arguably attempt to limit the fair but unpopular exercise of discretion. Moreover, the availability of capital punishment can be highly distortive of the truth to the extent that political or institutional considerations override an impartial and objective judgment of the truth. See Bennett L. Gershman, *The Thin Blue Line: Art or Trial in the Fact-Finding Process?*, 9 PACE L. REV. 275 (1989) (describing how desire to solve police officer's murder overrode careful analysis of the proof).

225. See Kenneth Bresler, "I Never Lost a Trial:" When Prosecutors Keep Score of Criminal Convictions, 9 GEO. J. LEGAL ETHICS 537, 541 (1996) (unprofessional for prosecutors to "keep tallies and reveal them in various contexts: political campaigns, interviews with journalists, resumes, cocktail parties and other opportunities for self-promotion"); Felkenes, *supra* note 178, at 109 (prosecutor's "working environment caus[es] him to view his job in terms of convictions rather than the broader achievement of justice").

226. See Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 6 (1940).

227. See Bresler, *supra* note 225, at 543 ("A prosecutor protective of a 'win-loss' record has an incentive to cut constitutional and ethical corners to secure a guilty verdict in a weak case - to win at all costs"); Bennett L. Gershman, *Why Prosecutors Misbehave*, 22 CRIM. L. BULL. 131, 133 (1986) (prosecutorial misconduct occurs so often because "it works").

228. Prosecutors are reticent about discussing certain aspects of their work. See BAKER, *supra* note 178, at 14 (prosecutors interviewed "made a point of keeping the content positive and 'safe;'" "Their political instincts dictate a canny caution when speaking to anyone even vaguely identified as a working member of

experiences, available studies of prosecutors' offices, interviews of ex-prosecutors, anecdotal information, and professional and popular literature. Many prosecutors apparently do not view their role as including a duty to the truth.²²⁹ These prosecutors are influenced to some degree by political pressures from the community and the victim, and approach a case with a mostly uncritical, deferential view of the evidence. These prosecutors focus almost exclusively on winning the case either through a guilty plea or a guilty verdict.²³⁰ Because of political or institutional constraints, these prosecutors may be fearful of offending police, victims, or superiors by appearing to be too defense-minded.²³¹ This type of mindset, however, is incompatible with loyalty to the truth. The following statement by a local prosecutor following the dismissal of a controversial murder case in which an innocent defendant spent eight years in jail is not atypical: "We live by an adversarial system. Our job is to present evidence we believe is credible. The defense's job is to poke holes in it. In a sense, the system worked, although it took some time."²³²

the media.""). Consider the recurring and vexing problem of the prosecutor's violation of his duty to disclose exculpatory evidence. It would be useful for systemic and remedial purposes to learn why so many prosecutors choose not to disclose evidence of which they are aware and which is favorable to the accused. See STEWART, *supra* note 178, at 207-08 (account of dilemma faced by prosecutor in "CBS Murders" case in deciding whether to disclose arguably exculpatory statement). There may be a myriad of explanations for the prosecutor's nondisclosure, some innocent and some venal. Do prosecutors recognize that the evidence constitutes *Brady* material? Do they rationalize nondisclosure by resorting to doctrinal exceptions? Or are they simply acting in bad faith? Violations cannot be for lack of training or supervision since the *Brady* rule is as embedded in the prosecutorial culture as any rule of criminal procedure. The most an observer can do is speculate on the reasons. It would seem that empirical studies might be able to illuminate this critical area of prosecutorial discretion. Unless a prosecutor faces tough questions from a critical judge at trial or during an appellate argument, or from a lawyer in the context of civil litigation, see *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), an observer is hard-pressed to penetrate the prosecutor's mind to learn the reason for the dereliction.

229. These prosecutors, by implication, would argue that even if they have a duty to the truth, that duty has been satisfied by virtue of their confidence in the defendant's guilt. See CARTER, *supra* note 178, at 154 (prosecutors maintain that they "almost never 'get the wrong man.'"); Felkenes, *supra* note 178, at 112 ("Many [prosecutors] believe that once an accused reaches the trial stage, his guilt has been determined by the screening process of the police and prosecutor, which they believe effectively eliminates the innocent, thereby allowing only the guilty to proceed through the system."). But see Gershman, *supra* note 224, at 275 (according to defense attorney Melvyn Bruder: "Prosecutors in Dallas have said for years, 'Any prosecutor can convict a guilty man; it takes a great prosecutor to convict an innocent man.'").

230. See BAKER, *supra* note 178, at 46 (prosecutor describes "constant pressure to win cases, to keep the office statistics of 'guilty as charged' climbing from one political season to the next."); CARTER, *supra* note 178, at 128 (most deputy prosecutors felt their supervisor "particularly concerned himself with developing good office statistics"); Felkenes, *supra* note 178, at 109, 112 (one-third of prosecutors interviewed believed "their major function is to secure convictions;" many believed that "once an accused reaches the trial stage, his guilt has been determined by the screening processes of the police and prosecutor.").

231. See *supra* notes 223-24 and accompanying text.

232. See Yardley, *supra* note 172, at B1 (statement of Assistant District Attorney who prosecuted Jeffrey Blake for a double murder, despite obvious deficiencies in the credibility of the key prosecution witness).

Because of politics, institutional pressures, adversarialness, self-righteousness, and arrogance, these prosecutors may sincerely believe that defendants probably are guilty, will tend to overlook or ignore exculpatory hypotheses, and will place winning a case above any other litigation value.²³³ This “conviction mentality” is especially dangerous in a prosecutors’ office that fails to train and supervise young prosecutors on basic norms of prosecution, such as the duties not to lie, use false and misleading evidence, and prosecute persons who are not clearly guilty.²³⁴

Other prosecutors’ offices, by contrast, view their role as embracing a duty to the truth.²³⁵ These prosecutors are less responsive to community pressures or the influence of crime victims and are consistently skeptical about the evidence and resourceful enough to test and retest the validity of the hypothesis of guilt and have the moral courage to refuse to prosecute a case in which they lack personal confidence of the defendant’s guilt. These prosecutors are animated by a credo that to be a good prosecutor “requires commitment to absolute integrity and fair play; to candor and fairness in dealing with adversaries and the courts; to careful preparation, not making any assumption or leaving anything to chance; and to never proceeding in any case until convinced of the guilt of the accused or the correctness of one’s position.”²³⁶

CONCLUSION

As I have tried to show, a prosecutor has an affirmative duty to pursue the truth even when assuming the advocate’s role. Most of the time, and rightly

233. Contributing to an adversarial mentality may be the practice in large state and local prosecutors offices of hiring assistants directly out of law school. These young men and women, who lack prior professional experience, are suddenly endowed with awesome power, and have virtually unfettered discretion to exercise their power soundly or irresponsibly. *See* *United States v. Kojayan*, 8 F.3d 1315, 1324 (9th Cir. 1993) (referring to a federal prosecutor’s serious misconduct, court notes “great danger in ‘untrained lawyers wielding public power,’” quoting Stephen Gillers, *Under Color of Law*, ABA J., Dec. 1992, at 121).

234. *See Kojayan*, 8 F.3d at 1324 (“What we find most troubling about this case is not the AUSA’s initial transgression, but that he seemed to be totally unaware he’d done anything at all wrong, and that there was no one in the United States Attorney’s office to set him straight.”).

235. Because prosecutors offices are so very different, there has been relatively little discussion over the extent to which a “prosecutorial culture” can be identified, and whether there exists a “federal prosecutorial culture” that is different from a “state or local prosecutorial culture.” *But see* Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 238 (2000) (“it may be that federal prosecutors, and the offices in which they work, take the duty [to do justice] more seriously than state prosecutors as a whole”). Many academic commentators, particularly those who have served as Assistant United States Attorneys, when they write about issues in criminal prosecution typically confine their discussion to the federal prosecutorial system.

236. *See* STEWART, *supra* note 178, at 354-55 (quoting Whitney North Seymour, U.S. Attorney for the Southern District of New York).

so, the good prosecutor, after careful analysis and active preparation, will have no reasonable doubt of a defendant's guilt and may appropriately pursue the case vigorously and fairly. When he is not sure of the truth, and has a reasonable doubt, he should attempt to resolve the doubt. If he is unable to do so, and no alternative course of action is reasonably available, then the only proper course is to dismiss the case, however difficult that action might be. Insisting on prosecuting the case presents an unacceptable risk that an innocent person will be convicted.