EMOTIONALLY CHARGED: THE PROSECUTORIAL CHARGING DECISION AND THE INNOCENCE REVOLUTION

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INTRODUCTION

Efforts to rectify wrongful convictions in the United States arguably represent a new civil rights movement for the twenty-first century.[1] Since 1989, post-conviction DNA testing has exonerated over two hundred and fifty inmates, their innocence proven beyond a shadow of a doubt through science, and at least three hundred other innocent prisoners have gained their freedom in cases lacking the magic bullet of DNA.[2] Studies of these cases reveal that specific factors tend to cause wrongful convictions in the first place. Misbehavior by prosecutors—especially involving the suppression of exculpatory evidence—has emerged as one of those factors.[3]

This Symposium directly (and commendably) tackles the problem of under-disclosure of evidence by prosecutors. Encouraging prosecutors to adhere more closely to existing disclosure rules advances the ends of fairness by boosting the capacity of the defense to prepare

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[1] *See, e.g.*, Press Release, Innocence Project, As 100th Innocent Prisoner Is Freed by DNA Tests, Innocence Network Convenes to Map the Future of "New Civil Rights Movement" in Criminal Justice, (Jan. 17, 2002), *available at* http://www.deathpenaltyinfo.org/article.php?did=280&scid=1.

[2] For a current listing of DNA exonerations in the United States, see The Innocence Project, http://www.innocenceproject.org (last visited June 25, 2010). *See also* Samuel R. Gross et al., *Exonerations in the United States, 1989-2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524, 533-35 (2005) (citing 196 non-DNA exonerations during this period, not including roughly 135 innocent defendants framed and later freed as part of the Rampart scandal in Los Angeles and in Tulia, Texas).

[3] *See, e.g.*, Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275, 276, 278, 285 (2004).

for trial. Increased disclosure can also bolster the accuracy of criminal adjudications by minimizing the risk that innocent criminal defendants will be wrongfully convicted; armed with exculpatory and other evidence, the innocent are better positioned to reject plea offers and mount solid defenses at trial. In short, more disclosure in more cases in a more timely fashion is a good idea.

Yet any discussion about prosecutorial disclosure is incomplete without paying some attention to an equally vital moment in the pretrial process: the initial decision to charge a suspect with a crime whatsoever. The mere decision to charge tends to set in motion a sequence of events that inexorably result in either a plea offer or a trial—even where the case is weak and where the prosecution has complied fully with its disclosure duties.[4] This Article grapples with the topic of prosecutorial charging decisions in light of the "Innocence Revolution."[5] Part I of the Article explores the rules and practices surrounding prosecutorial charging decisions, pointing out some of the flaws in this regime that may accidentally lead to charging innocent suspects with crimes. Part II proposes a series of modest reforms to the charging process designed to reduce the possibility that the innocent will face criminal charges at all.

I. THE CHARGING DECISION

Although the police typically initiate the criminal process by investigating alleged criminal activity and making arrests, prosecutors enjoy the largely unbridled discretion to determine what, if any, charges are actually filed against a defendant. In general, prosecutors may not file a criminal charge unless it is supported by "probable cause" to believe in the person's guilt.[6] This standard is inherently quite minimal; it only requires enough evidence for the individual prosecutor to subjectively think it is more likely than not that the person committed the crime.[7] Further diluting the intrinsic weakness of this standard are

4 *See* Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1160 (2005) ("[O]nce the process against an innocent suspect begins, there is little chance that a case will be derailed because of a lack of evidence.").

5 *See* Mark A. Godsey & Thomas Pulley, *The Innocence Revolution and Our "Evolving Standards of Decency" in Death Penalty Jurisprudence*, 29 U. DAYTON L. REV. 265, 267 (2004) ("The lessons of the Innocence Revolution begin with the realization that our system is not as accurate as we believed even 10 years ago."); Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 573 (2004) ("Spawned by the advent of forensic DNA testing and hundreds of post-conviction exonerations, the innocence revolution is changing assumptions about some central issues of criminal law and procedure.").

6 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2006).

7 In fact, it appears as if a mere fifty percent chance of guilt may suffice to justify a charging

various doctrinal rules suggesting that (1) only the government's evidence is included in this calculus without reference to the defense's claims, (2) the credibility (or lack thereof) of the government's witnesses is not worthy of consideration, and (3) legally inadmissible hearsay may be taken into account.[8]

Granted, the fact that a person *may* be charged with a crime due to the presence of probable cause does not mean that a prosecutor *must* do so. Prosecutors possess ample discretion in this area of their work, and for good reason. The need for individualized justice, the problem of "overcriminalization" in our criminal codes, and the finite resources of law enforcement agencies all augur prosecutorial discretion in crafting charges.[9] Not everyone should be prosecuted for every crime they apparently committed. Such a practice would lead to an overabundance of prosecution, drain government assets, and impose penalties for outmoded or ill-defined crimes that regrettably remain on the books.[10] Still, there must be some check on prosecutorial discretion as a matter of due process and fundamental justice, particularly to protect the actually innocent. Model ethical codes, as well as state-specific rules, offer prosecutors a modicum of guidance in deciding whether to file charges in cases where the barebones probable cause standard has been met.[11] Prosecutors are generally urged to consider the defendant's role in the crime, his background and criminal history, his willingness to aid the government in developing a case against another transgressor, and the impact on the victim in the charging determination.[12] Prosecutors should also evaluate the availability of noncriminal dispositions in their decisions and need not present all charges supported by the evidence, let alone the highest ones.[13] Several ethics codes, moreover, forbid prosecutors from "overcharging" solely in the hopes of developing

decision. *See* Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 9 (2009).

8 *See, e.g.*, R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 15 (2005).

9 *See* BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT 155-56 (2007); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 263-66 (2001).

10 *See* GERSHMAN, *supra* note 9; *see also* Griffin, *supra* note 9, at 263-64 ("[S]ome analysts have argued that prosecutors are more suited than the legislature to adapt the criminal law to new circumstances and to identify when the prosecution of certain statutes would be anachronistic.").

11 *See* Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 513 (1993) ("[Although] legal, political, experiential, and ethical considerations inform and guide the charging decision. . . . no subject in criminal law is as elusive as that of prosecutorial discretion in the charging process.").

12 *See, e.g.*, Amie N. Ely, Note, *Prosecutorial Discretion as Ethical Necessity: The Ashcroft Memorandum's Curtailment of the Prosecutor's Duty to "Seek Justice,"* 90 CORNELL L. REV. 237, 242-48 (2004); *see also* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 23 (discussing some of the reasons why prosecutors may forgo filing charges).

13 *See* Ely, *supra* note 12, at 245-48.

leverage for plea bargaining negotiations.[14] Most notably, a prosecutor's individual doubts about the guilt of the accused should be taken into account.[15] Yet for all the lofty rhetoric espoused in the canons of ethics, it remains unclear how this discretion is exercised in reality.

Charging decisions, like much of the grist of the prosecutorial mill, occur behind the scenes. This makes it difficult to gauge the degree to which prosecutors rely on suspect choices as part of their initial formulation of criminal charges.[16] Prosecutors' offices handle charging decisions in many different ways. In most jurisdictions, the chief prosecutor is elected by the public and then proceeds to appoint a number of assistant attorneys to oversee the day-to-day operations of the office. Some chief prosecutors vest almost complete charging discretion in the hands of their assistants; others establish specific charging guidelines for certain crimes and may even require assistants to seek permission from a superior before deviating from them in a particular case.[17] On the whole, however, chief prosecutors tend to give significant autonomy to line assistants in rendering charging decisions with little supervision and even less accountability.[18]

What is more, charging decisions receive limited scrutiny from those outside prosecutorial enclaves because the judicial and legislative branches normally defer to their executive branch counterparts—prosecutors—when it comes to charging crimes. Prosecutorial charging decisions are essentially exempt from judicial review on two grounds: (1) because courts lack the expertise and access to evidence to second-guess these choices,[19] and (2) due to separation of powers concerns. Simply put, judges appear hesitant to question executive department law

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[14] *See* CASSIDY, *supra* note 8, at 18-19. Scholars perceive the practice of "overcharging" to be rampant in the criminal justice system. *See, e.g.*, DAVIS, *supra* note 12, at 31 ("Prosecutors routinely engage in overcharging, a practice that involves 'tacking on' additional charges that they know they cannot prove beyond a reasonable doubt or that they can technically prove but are inconsistent with legislative intent or otherwise inappropriate.").

[15] *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION & DEF. FUNCTION § 3-3.9(b)(i) (3d ed. 1993).

[16] *See, e.g.*, Patrick J. Fitzgerald, *Thoughts on the Ethical Culture of a Prosecutor's Office*, 84 WASH. L. REV. 11, 12 (2009) ("The fact is that more of a prosecutor's important work takes place behind closed doors than in public.").

[17] *See* DAVIS, *supra* note 12, at 33-34; *see also* Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 683 (1992).

[18] *See* DAVIS, *supra* note 12, at 33-34; *see also* Melilli, *supra* note 17, at 687 (discussing how offices tend to screen cases and how, even where supervisors make an initial screening assessment, that assessment is often made quite quickly and the line assistant subsequently assigned to a case often defers to the initial evaluation).

[19] *See* CASSIDY, *supra* note 8, at 23-24. To be sure, prosecutors may not arbitrarily select a defendant for prosecution without running afoul of equal protection principles. *See* GERSHMAN, *supra* note 9, at 164-83. Similarly, defendants enjoy constitutional protections from prosecutors possessing a "vindictive" personal motive for pursuing charges against them. *Id.* at 183-206.

enforcement decisions before they reach fruition in court.[20] The legislative branch also provides meager oversight of prosecutorial charging decisions. Although in theory, legislatures participate in the charging endeavor by defining and amending criminal offenses in a particular jurisdiction, in practice, legislatures have long since abdicated responsibility for charging to prosecutors.[21] As a result, not only do prosecutors have vast discretion in determining whether to charge a person with a crime at the outset, but that discretion is subject to token judicial review and scant accountability to the legislature.

Compounding the lack of transparency surrounding initial charging decisions by prosecutors is the nature of the process through which many criminal charges ultimately make it to court. The procedure for filing formal criminal charges varies considerably from jurisdiction to jurisdiction, but shares some common features. After a person is arrested by the police, he must appear before a judge or magistrate normally within forty-eight hours to determine whether he will be released or detained pending a trial date.[22] Prosecutors in some jurisdictions file a charging document at this hearing, often referred to as an "information," that outlines the nature of the accusations based on the contents of the arrest file.[23]

In the federal system and in many states, though, criminal charges (especially felonies) must first be presented to a grand jury for indictment before proceeding to trial.[24] It is often said that the grand jury serves as a rubber stamp to validate prosecutorial charging choices rather than as a bulwark against injustice.[25] Indeed, the rules governing grand jury practice undeniably favor the prosecution. First and foremost, prosecutors dictate the flow of information to the grand jury. The bulk of a grand jury's efforts occur away from judges, defense

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[20] *See* United States v. Armstrong, 517 U.S. 456, 465 (1996); GERSHMAN, *supra* note 9, at 156.

[21] *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 743 (1996) ("In the area of charging, prosecutorial decisions—such as whether to prosecute, how long to sentence, and whether to dismiss charges—all contribute to the creation of the prosecutor as the real policy-maker within the criminal justice system. At best the legislature is a lesser partner whose role is to set the outer parameters of criminal law policy and to fund prisons.").

[22] *See* DAVIS, *supra* note 12, at 24.

[23] *Id.* The U.S. Supreme Court has not required that grand juries be convened at the state level and, accordingly, over half of the states have selected other methods for charging cases, such as the filing of informations and/or holding of probable cause hearings before judges. *See* CASSIDY, *supra* note 8, at 26.

[24] The United States Constitution provides that a criminal defendant in federal court has a right to an indictment for all "capital, or otherwise infamous crime[s]." U.S. CONST. amend. V.

[25] *See, e.g.*, Gershman, *supra* note 11, at 520 ("Anybody familiar with the criminal justice system knows that the grand jury does not act on its own and that the prosecutor controls grand jury action.").

lawyers or the media. In fact, defense counsel is typically barred from the room.[26] Second, prosecutors may present inadmissible evidence in making their case,[27] and they generally are not required to present evidence that exculpates the defendant.[28] Third, grand juries usually may issue an indictment when a bare majority of its members finds probable cause to believe in the defendant's guilt.[29] Overall, a strong presumption of deference, even correctness, for prosecutorial charging decisions animates the early stages of the criminal process and shrouds those choices in a veil of secrecy that is rarely lifted for public view.[30]

Nevertheless, dubious charging decisions involving innocent suspects do not exist purely in the world of hypothetical cases. Several high-profile prosecutorial blunders in recent years, including the notorious Duke lacrosse case, illustrate how criminal charges ostensibly based on probable cause were later revealed to be erroneous. Had the flaws in the Duke case not been revealed promptly, a handful of promising college students might have been wrongfully convicted.

The basic facts of the Duke lacrosse incident are well-known, yet still warrant a brief discussion here in order to highlight the risks posed by the rules associated with prosecutorial charging decisions. On March 13, 2006, three Duke University students hosted a party in Durham, North Carolina.[31] Most of the roughly forty students in attendance were members of the men's lacrosse team. At the request of one of the party's hosts, a local escort service dispatched two African-American exotic dancers, Crystal Gail Mangum and Kim Pittman, to the location. Pittman arrived by herself and waited quite a while before Mangum, whom she did not know well, appeared. Witnesses described Mangum as being unsteady on her feet throughout her time at the party.[32]

Shortly before midnight, the two dancers began their performance in exchange for $400 each. Mangum, still wobbly, fell to the ground. The performance evoked sexual remarks from the attendees, with one partygoer raising a broom and recommending it to the dancers for their sexual pleasure. Upset by this comment, Mangum and Pittman abruptly stopped dancing, left the room, and went toward the back of the house. They were followed by several students seeking to apologize for the

26 *See* CASSIDY, *supra* note 8, at 26-29.

27 *See id.*

28 *See* DAVIS, *supra* note 12, at 24.

29 *See* CASSIDY, *supra* note 8, at 26-29.

30 *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996).

31 The description of the incident that gave rise to the Duke lacrosse rape case stems from Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 FORDHAM L. REV. 1337, 1342-46 (2007).

32 *Id.*

broom incident and requesting a longer performance, one, in their view, more commensurate with the fee. The dancers went to the bathroom where they had left their belongings and remained there for a period of time. Some guests left at this point; others continued to decry having paid money for a brief performance. Still others were simply hanging around the house.[33]

The dancers eventually left the house and went to their car, only to return a short time later and sequester themselves in the bathroom. Within minutes, Mangum and Pittman left the bathroom and the house yet again. But, rather than returning to the car, Mangum lingered outside and seemingly engaged in an odd pattern of behavior—banging on the house door and requesting to be re-admitted, struggling to maintain her balance, attempting unsuccessfully to have coherent conversations with assorted guests, and lying on her back on the porch. One of the guests ultimately assisted Mangum to Pittman's car and, as Pittman prepared to drive off with Mangum in tow, a series of racial epithets were exchanged between Pittman and the attendees. Pittman drove off and placed a 911 call to report that a number of white men were inflicting racial barbs at bystanders.[34]

Pittman drove to a grocery store, but Mangum refused to exit the car and appeared to be unconscious. That prompted Pittman to place another 911 call and, at the direction of the police, to take Mangum to Durham Center Access where she was seen by a nurse. The nurse asked Mangum, as a matter of standard operating procedure, whether she had been raped; in response, Mangum indicated—for the first time—that she had been victimized in that fashion. She later recanted that assertion at the Duke Medical Center's emergency room before changing her mind and reviving her claim that she had in fact been raped. The police decided to treat it as a potential rape case.[35]

Durham County District Attorney Mike Nifong took charge of the case almost immediately after he learned about it in late March 2006, and began to make public statements to the media that cast the prospective defendants in a poor light. Indeed, due in part to Nifong's willingness to bask in the media spotlight, the investigation soon became a national cause célèbre fraught with racial and socioeconomic overtones. The media at first largely depicted the case as a "town-gown" affair—a sordid tale of spoiled, white student-athletes from an elite university taking advantage of an impoverished and troubled black woman. Nifong, in essence, positioned himself as the knight in shining armor riding roughshod over Duke royalty in order to right a grievous

[33] *Id.*
[34] *Id.* at 1344-45.
[35] *Id.* at 1345-46.

injustice.[36]

In early April 2006, Mangum identified three Duke lacrosse players—Dave Evans, Colin Finnerty, and Reade Seligmann—as her assailants. Some of the physical evidence corroborated Mangum's claim that she had suffered a sexual assault. The doctor who initially examined Mangum in the early morning of March 14 had detected vaginal swelling and a nurse characterized Mangum's behavior at the time as consistent with that of a victim of a sex crime. Finally, Evans's DNA was partially matched to DNA found on a fake fingernail that belonged to Mangum and that was recovered from the bathroom where she claimed the rape occurred.[37]

Based on that evidence alone, could Nifong have legitimately found probable cause to believe that a rape had happened and that Evans, Finnerty, and Seligmann were the culprits? It is quite possible. But, the addition of other evidence to the mix—most of which Nifong knew about in early April—complicates the matter. Here are the critical "bad" facts in the prosecution's case, in no particular order:

- Mangum had given a number of conflicting statements about the event;
- Her medical records revealed a history of severe mental health problems, including bipolar disorder;
- No DNA evidence from the rape kit matched the three alleged perpetrators;
- DNA from men other than any of the players was found in the rape kit;
- Pittman had at one occasion stated that Mangum's story was "a crock"; and
- In the first identification procedure, Mangum had identified Seligmann only as a guest at the party, not as a participant in the assault.[38]

Despite the conflicting evidence, Nifong proceeded to file rape charges against the three men and successfully returned indictments against all of them. Before trial, however, the North Carolina State Bar filed a disciplinary complaint against Nifong related to his pretrial statements. Nifong asked the North Carolina Attorney General's Office to take over the case while the disciplinary complaint was pending. Special prosecutors from that office began to investigate the case anew; by December, they concluded that Evans, Finnerty and Seligmann were innocent and ordered the dismissal of the charges. The state bar found Nifong guilty of serious ethical lapses stemming from his improper

[36] Nifong was sanctioned for his contribution to improper pretrial publicity. *Id.* at 1348-50.
[37] For a discussion of the evidence against the three defendants, see *id.* at 1373.
[38] *Id.* at 1372-73.

statements to the media and his failure to disclose exculpatory DNA evidence to the defense, as well as other mistakes regarding the discovery process. He was ultimately disbarred.[39]

One grave misstep by Nifong, though, never resulted in an ethical complaint: his decision to charge the three players with rape and seek an indictment in the first place. North Carolina, like many other states, provides only that a prosecutor shall "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."[40] Professor Robert Mosteller, who has studied the Duke lacrosse case extensively, considers this standard "very limited," which may explain why the state bar never made allegations against Nifong under this provision.[41] In his testimony before the Disciplinary Hearing Commission, Nifong intimated that he did not know the case lacked probable cause to pursue it. He observed that the victim's statement that a rape occurred and that the three student-athletes committed it was sufficient to get the case to a jury, irrespective of any inconsistent evidence.[42] If Nifong had been accused of improper charging by the state bar, he would likely have escaped punishment given the deferential ethical rule in this area.[43]

II. POTENTIAL REFORMS TO THE RULE REGIME GOVERNING PROSECUTORIAL CHARGING DECISIONS

Mike Nifong's outrageous choice to file criminal charges in the Duke lacrosse rape case and the state bar's reluctance, perhaps even inability, to find ethical violations for this behavior show the failings of the current rule system governing prosecutorial charging decisions. On the one hand, prosecutors deserve some freedom to strike individually-tailored charging decisions and to channel their energies to the cases they deem most meritorious. On the other hand, this freedom should not be wholly unfettered; the duty to "do justice" encompasses the obligation not to prosecute the factually innocent.[44] To mitigate the risk

39 *Id.* at 1348-64; *see also* Zacharias & Green, *supra* note 7, at 12 (praising disbarment and "meaningful sanctions" in the Nifong case as "an exceptional instance").

40 REVISED RULES OF PROF'L CONDUCT OF THE N.C. STATE BAR R. 3.8(a) (2007).

41 Mosteller, *supra* note 31, at 1368.

42 *Id.* at 1373-74.

43 *Id.* at 1372; *see also id.* at 1376 ("That Nifong knew no probable cause existed in this case is not clearly established. However, that he had abundant notice of the problematic nature of the case is undeniable.").

44 *Id.* at 1366 ("However that duty [to do justice] is defined and whatever its precise origins, all agree that the prosecutor has a special duty not to prosecute the innocent."); *see also* Melilli, *supra* note 17, at 672 ("[M]any prosecutors do, and all should, regard the possibility of charging an innocent person as 'the single most frightening aspect of the prosecutor's job.'").

that innocent defendants will suffer the taint of an unjust charge and face the prospect of a subsequent wrongful conviction,[45] there must be greater accountability for prosecutors in making initial charging decisions and greater transparency in the decision-making process itself. What reforms might result in improved accountability and transparency in the charging process? Upon reflection, two possibilities come to the fore: (1) altering the evidentiary threshold that prosecutors must overcome to file charges at the outset, and (2) spurring prosecutors to develop internal review committees equipped with "devil's advocates" to pre-screen factually weak cases.

A. *Altering the Charging Standard*

As discussed above, prosecutors in the vast majority of jurisdictions may file criminal charges so long as they believe they are supported by probable cause, a standard that many scholars have derided as woefully inadequate in filtering out the innocent.[46] One possible change to this rule entails increasing the quantum of proof from probable cause to something more, such as sufficient evidence to obtain a conviction.[47] Professor Bennett Gershman contends that "the

[45] Even where a charge does not produce a conviction, there are enormous costs inflicted upon a defendant. *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 413 (2001) ("[T]he defendant might labor under the shadow of suspicion that often lingers even after charges are dismissed or unproven."); Melilli, *supra* note 17, at 672 ("[T]he mere filing of a criminal charge can have a devastating effect upon an individual's life, including potential pretrial incarceration, loss of employment, embarrassment and loss of reputation, the financial cost of a criminal defense, and the emotional stress and anxiety incident to awaiting a final disposition of the charges.").

[46] Kenneth Melilli, for example, has condemned the probable cause standard as "little more than heightened suspicion and it is not even remotely sufficient to screen out individuals who are factually not guilty." Melilli, *supra* note 17, at 680-81; *see also* Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1584 n.53 (observing that the "'probable cause' standard is widely considered too low"). One example of an institution's choosing to hold itself to a higher charging standard is the United States Attorney's Office, the chief federal prosecutorial agency, whose office manual prescribes that "[t]he probable cause standard is . . . a threshold consideration only. Merely because this requirement can be met in a given case does not automatically warrant prosecution; further investigation may be warranted, and the prosecutor should still take into account all relevant considerations . . . ." U.S. ATTORNEYS' MANUAL § 9-27.200(B) (U.S. Dep't of Justice 1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.200; *see also* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1003 (2009) (describing how the New Jersey Attorney General drafted statewide guidelines to govern charging enhanced drug penalties).

[47] *See* Mosteller, *supra* note 31, at 1368; *see also* Mellili, *supra* note 18, at 701 ("[T]he conscientious prosecutor, in zealous pursuit of society's interest in justice, does not and should not pursue cases unless personally satisfied beyond a reasonable doubt of the defendants' guilt."); *id.* at 681-82 (discussing the standards proposed by the U.S. Department of Justice, National District Attorneys Association and the American Bar Association, each of which essentially

prosecutor should engage in a moral struggle over charging decisions, and should not mechanically initiate charges."[48] Specifically, Gershman has argued that "responsible prosecutors should be morally certain that the defendant is guilty,"[49] or that prosecutors should only proceed with charges if they are "personally convinced of the defendant's guilt."[50] Although Gershman's arguments are compelling, demanding nearly conclusive personal belief of guilt might admittedly have a downside. Among other effects, it could put too much pressure on prosecutors to work extensively as fact-finders at the front end of every criminal case, siphon off precious resources, and allow fewer cases to go to trial. Even so, lifting the standard from probable cause to a level that comes closer to approximating the evidentiary threshold for establishing guilt at trial (proof of guilt beyond a reasonable doubt) would certainly help weed out borderline cases and, with them, undoubtedly save some actually innocent suspects.

Another reform that could accompany the installation of a higher charging standard, or even prove useful under current charging norms, is to require prosecutors to weigh any exculpatory evidence, such as the defense's explanation of the events, against the incriminating facts. It strikes me as illogical that prosecutors are ethically obliged only to credit the facts implicating the suspect in deciding whether a charge is warranted. How can a prosecutor produce a genuine charging decision while artificially excising the "bad" facts from the equation?

Shifting the perspective from which probable cause is determined under the current charging standard could also reap rewards. At present, the standard in almost every jurisdiction is entirely *subjective*. As long as a prosecutor does not "know" that the charges are inadequate (namely, that they lack probable cause), she is not obliged to "refrain" from filing. This naturally creates an incentive for prosecutors to take the evidence at face level and not delve any deeper into the intricate minutiae of a case: to put the matter effectively into the jury's hands. Several commentators defend this standard on the basis that determining guilt is a jury function and that victims deserve their day in court.[51]

recommends a standard of sufficient evidence to support a conviction).

[48] Gershman, *supra* note 11, at 522; *cf.* Green, *supra* note 46, at 1589. Green proposes an intermediate standard whereby "charges should not be brought unless the prosecutor reasonably believes that the accused is guilty of the crimes charges." *Id.*

[49] Gershman, *supra* note 11, at 524.

[50] Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 338 (2001).

[51] *See, e.g.*, H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1168 (1973) (insisting that, while prosecutors should "protect the innocent," they should never serve as the "sole arbiter of truth and justice"); *id.* at 1159 ("Thus, when 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

Entrusting the resolution of guilt or innocence to the jury appeals to populist impulses and, more crassly, it allows prosecutors to shed ultimate responsibility for the outcome. The statement "the jury has spoken" is a common catchphrase after a shocking or disappointing result at trial. Although showing faith in the jury system resonates with our conception of democracy and the desire to be judged by one's peers, I have misgivings about prosecutors "passing the buck" in weak cases under the guise of populism. Juries are unreliable evaluators of guilt or innocence, as evidenced by the hundreds of documented wrongful convictions emanating from jury trials, and the deliberation room is just as often a forum for prejudice and emotion as it is a sanctuary of reasoned, dispassionate debate.[52] The irresponsibility of using populist arguments about jury deference to justify specious charging decisions is further substantiated by the reality that most matters are resolved through plea bargains and never see the inside of a trial court.[53] As repeat players in the field with access to vast sources of information, prosecutors are well-positioned to serve as front-end gatekeepers preventing weak cases from entering the litigation process at all.[54]

Accordingly, one might consider altering the focus of the probable cause test from subjective to objective: asking whether a "reasonable prosecutor" would have found probable cause to file charges. An upshot of this change would be to encourage prosecutors to examine the evidence more rigorously; lack of knowledge about the weakness of the case would no longer comprise an acceptable excuse. Several states—California, Hawaii, Illinois, Iowa, Maine, and New York—have added an objective twist to the subjective standard for evaluating charging decisions.[55] Prosecutors in those states, with minor variations, should "not institute or cause to be instituted criminal charges when [the prosecutor] knows or reasonably should know that the charges are not supported by probable cause."[56] Assuming that injecting an objective component to the probable cause formulation is a reform well-worth contemplating, the question then revolves around when a prosecutor "reasonably should know" that a charge is deficient. Should a reasonable prosecutor be required to engage in an independent

who fairly lays the matter before the judge or jury.").

52 *See, e.g.*, Melilli, *supra* note 17, at 700. Acquittal rates in the early twenty-first century have reached unprecedented lows. Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1238-39 (2008).

53 *See, e.g.*, Melilli, *supra* note 17, at 700.

54 Bennett Gershman has argued that prosecutors far too often pass responsibility for close questions on to the jury and that, instead, each prosecutor should more actively serve as "a gatekeeper of justice" given the risk of jury error. *See* Gershman, *supra* note 11, at 521.

55 *See* Mosteller, *supra* note 31, at 1367 n.140.

56 Some of those jurisdictions use the phrase "or it is obvious" instead of "or reasonably should know." *Id.*

investigation and analysis of the case in order to clear this hurdle? If so, would those efforts be redundant of those of police?

A "reasonable prosecutor" could conceivably be required to investigate the facts of each case prior to charging,[57] but crafting such a broad, wholesale obligation is impractical. Prosecutorial resources are limited; inflicting a pre-charging duty on prosecutors to investigate cases might serve mainly to burden the already-taxed coffers of these agencies and duplicate the efforts of the police.[58] Recognizing the practical flaws with a blanket prosecutorial duty to independently investigate cases in the pre-charge phase, Mosteller recommends confining this duty to "high-profile" or "problematic" cases, for instance, those akin to the Duke lacrosse case.[59] Mosteller's plan is laudable, yet it could face practical difficulties, specifically in terms of how to ascertain whether a particular case fits into this rarefied category. More worrisome is the notion that defendants in certain high-profile cases—presumably those involving wealthy or notorious parties or otherwise possessing salacious details—would receive greater protection than others. Regardless of the merits of imposing a prosecutorial duty to investigate in some form prior to charging, merely adding an objective part to the charging test would help. At a minimum, it would signal that prosecutors must critically examine the evidence, if not investigate afresh, in cases where an initial review has not given them an objectively reasonable sense of the case's strength. Charging decisions by prosecutorial ostriches who hide their head in the sand and refuse to acquire the "knowledge" that a case is wanting would no longer pass ethical muster.

For these proposed changes to the ethical rules to be effective, however, state disciplinary bodies must be willing to enforce them.[60] Sanctioning prosecutors more frequently for charging errors would likely give many prosecutors greater pause before proceeding. Greater pause, in turn, probably means a greater number of prosecutors declining to charge. Recall the Duke lacrosse case. Noticeably absent from the litany of ethical violations alleged by the North Carolina State Bar against Mike Nifong was one relating to the fundamental choice to charge the three students with rape. If there had been a realistic chance

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[57] Several scholars advocate creating some semblance of an investigative obligation for prosecutors prior to rendering a charging decision. *See id.* at 1369-70 nn.148-150.

[58] *Id.* at 1370-71.

[59] *Id.* at 1370-79.

[60] This is no easy feat. Disciplinary agencies have long displayed reluctance to chastise prosecutors for misdeeds, setting their sights instead on private lawyers. *See* Yaroshefsky, *supra* note 3, at 278-80 (discussing studies showing that prosecutorial misconduct is seldom subject to disciplinary sanction); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 722 (2001) ("Numerous commentators have reacted by noting the dearth of cases in which disciplinary authorities have sanctioned prosecutors.").

that the North Carolina State Bar would impose sanctions for misguided charging decisions, would Nifong have wavered before making this crucial decision? In other cases where flaws with the prosecution's theory were not revealed in equally timely fashion, would innocent suspects have been spared the agony of going to trial and facing conviction?[61] Inspiring disciplinary boards to investigate and discipline prosecutors for imprudent charging decisions would serve a key deterrent function and nicely complement any alterations to the rules surrounding the charging standard itself.

All told, (1) raising the evidentiary threshold for filing criminal charges from probable cause of guilt to something closer to, yet less than, proof beyond a reasonable doubt, (2) including defense evidence in the calculus, and (3) adding an objective prong to the test to deter prosecutors from acting like proverbial ostriches inclined to ignore the holes in their cases would minimize the chance that innocent defendants will be subject to criminal charges and ultimately convicted. That being said, there should be further checks at the charging stage to safeguard the innocent, one of which I will now address—the need for prosecutors to establish internal "pre-screening" committees to review inherently weak cases.

B. *Screening Committees to Review Suspect Cases*

To decrease the chance that fundamentally questionable criminal charges might technically survive even under a modified rule regime, I would propose creating a secondary review structure within each prosecutorial office: internal review committees to evaluate charging decisions in cases that contain certain hallmarks of innocence. Internal review committees are necessary because prosecutors, as well-intentioned as they may be, suffer from innately human cognitive biases that deter them from rationally reviewing the evidence against a potential suspect with the requisite equanimity and distance.[62] Prosecutors usually enter a case after the police have investigated the

[61] Prosecutorial misconduct surfaces frequently in studies as a factor in wrongful convictions. *See* Yaroshefsky, *supra* note 3, at 278 (mentioning one study by the Innocence Project that cited prosecutorial misconduct as a feature in forty-five percent of the first seventy-four DNA exonerations).

[62] Several scholars have suggested that prosecutors, like all humans, are not purely rational actors but, rather, suffer from "bounded rationality." *See* Alafair Burke, *Improving Prosecutorial Decision-Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1590-91 (2006). As Burke suggests, "[t]he potential for cognitive bias to creep into prosecutorial decision-making starts from the earliest case-screening stages, when prosecutors must determine whether sufficient evidence exists to proceed with a prosecution." *Id.* at 1603.

crime and arrested the chief suspect. The phenomenon of police "tunnel vision" has often already reared its ugly head by that point. Police tunnel vision occurs when detectives, after concentrating on a particular suspect, overestimate the evidence against that person and subconsciously disregard the possibility of alternative perpetrators or exculpatory evidence throughout the remainder of the investigation.[63] What might explain this tendency? Psychologists attribute tunnel vision mainly to a series of intrinsic cognitive biases that affect how people perceive information and how they interpret what they have perceived. In particular, Professors Keith Findley and Michael Scott suggest that the foundation of tunnel vision in the criminal justice system lies in an "expectancy" or "confirmation" bias.[64] They observe that "[w]hen people are led by circumstances to expect some fact or condition (as people commonly are), they tend to perceive that fact or condition in informationally ambiguous situations. This can lead to error biased in the direction of the expectation."[65] That is, after a person initially develops a theory about a topic, this bias may spur that individual to selectively process newfound information in a manner that confirms, rather than challenges, the original hypothesis.[66] People often not only interpret information in a fashion that reinforces a pre-existing theory, but also affirmatively seek to collect data that validates their hypothesis and avoid accumulating evidence that undercuts it.[67] Even when confronted with information that thoroughly decimates their original thesis, people may nonetheless rigidly cling to their initial viewpoint, a tendency referred to as "belief perseverance."[68] Other cognitive biases also intersect with the expectancy or confirmation bias to yield tunnel vision.[69]

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[63] *See generally* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006) (providing an in-depth, step-by-step exploration of the ways in which tunnel vision infects every phase of a criminal proceeding). For a discussion of how cognitive biases affect prosecutorial decision-making in the post-conviction context, see Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 51-53 (2009).

[64] *See* Findley & Scott, *supra* note 63, at 308; *see also* Alafair S. Burke, *Neutralizing Cognitive Bias*, 2 N.Y.U. J.L. & LIBERTY 512, 517 (2007) ("Prosecutorial tunnel vision can be viewed as the culmination of confirmation bias and selective information processing, the inclination to search out and recall information that tends to confirm one's existing beliefs, and to devalue disconfirming evidence.").

[65] *See* Findley & Scott, *supra* note 63, at 307; *see also* Burke, *supra* note 62, at 1594-96 (discussing the confirmation bias).

[66] *See* Burke, *supra* note 62, at 1596-99 (describing the concept of selective information processing).

[67] *See* Findley & Scott, *supra* note 63, at 309.

[68] Burke, *supra* note 62, at 1599-1601 (presenting the concept of belief perseverance); Burke, *supra* note 64, at 518-19 (same); Findley & Scott, *supra* note 63, at 314 (same).

[69] For instance, after a person has emerged as the chief suspect, "the hindsight bias would suggest that, upon reflection, the suspect would appear to have been the inevitable and likely

In the context of police investigations specifically, once the police embrace a particular theory of the case, the detectives may view all subsequent evidence through the lens of this expectation. Needless to say, this can produce some potentially distorted images. The flaws in the case become incidental rather than fundamental. In addition, the police may be eager to pursue avenues of investigation that substantiate their view of guilt and disinclined to explore investigative leads that support innocence.[70] Worse yet, police may discount (or even reject) exculpatory evidence that undermines their theory. All of this occurs largely on a subconscious level. It is not as if the police purposefully decide to sink the chief suspect and to ignore contrary evidence. Thus, one of the most nefarious aspects of tunnel vision is that those deepest in its throes may be those least aware of its existence.

The internal cognitive biases that give rise to tunnel vision in police detectives are aggravated by external pressures as well. Mounting calls by victims, the media, government officials, and police chiefs to make an arrest do not fall on deaf ears; detectives are mindful of the need to solve crimes, thereby signaling that the community is safe. This may affect the detectives' tactical decisions in investigating a case and processing information about the likely perpetrator.[71] By interacting closely with a crime victim, the police may also become emotionally attached to that person and his or her version of events.[72] The sheer volume of their workload may further provoke the police to channel their energies to the person they initially target as a suspect for fear of stalling the resolution of that particular case and the start of work on other pressing matters.[73] Last, but not least, the method of gauging police detective performance contributes to tunnel vision. Police investigators are usually evaluated based on their "clearance rate,"

suspect from the beginning." Findley & Scott, *supra* note 63, at 318. Hindsight bias often comes equipped with a "reiteration effect" in which a person's "confidence in the truth of an assertion naturally increases if the assertion is repeated." *Id.* at 319. Findley and Scott also point to a related bias—outcome bias—as a factor in tunnel vision. Outcome bias relates to a person's retrospective assessment about the quality of a decision; if the outcome is bad, the person might consider their previous decision as a bad one even though, of course, the outcome could not have been known at the time of the decision. *Id.* at 319-20. Burke, for her part, suggests that the "avoidance of cognitive dissonance" also informs prosecutorial decision-making. Burke, *supra* note 62, at 1601-02. That is, she posits that people "desire to find consistency between one's behavior and beliefs." *Id.* at 1601. The development of any "inconsistency between one's external behavior and internal beliefs creates an uncomfortable cognitive dissonance. To mitigate the dissonance, people will adjust their beliefs in a direction consistent with their behavior." *Id.*

70 Burke, *supra* note 62, at 1604 ("Confirmation bias will reduce the likelihood that the investigation will be directed in a manner that would yield evidence of innocence.").

71 *See* Findley & Scott, *supra* note 63, at 323-26.

72 *Id.* at 324-25.

73 *Id.* at 325; *see also* Leipold, *supra* note 4, at 1127 (discussing how deficiencies in the evidence gathering process during an investigation can lead to wrongful convictions).

namely, the percentage of reported crimes that are eventually treated as solved or, in the vernacular, "closed."[74] For obvious reasons, this standard encourages frequently overworked detectives to operate quickly to find suspects and arrest them as efficiently as possible, thus feeding into the problem of tunnel vision.

The police investigation is where tunnel vision begins and where it can generate the most damage given that all later stages of the process build upon the information obtained by the police.[75] But tunnel vision is by no means the sole province of the police within the criminal justice system. Prosecutors work closely with the police and may fall prey to a comparable form of tunnel vision at the pretrial stage, especially as they typically receive only the evidence implicating the person whom the police consider the culprit.[76] As Professor Randolph Jonakait has observed, the trial prosecutor "does not see evidence about all the possible suspects, but only the incriminating evidence concerning the defendant. Not surprisingly, the picture presented to the prosecutor almost always shows a guilty defendant."[77] This picture inevitably becomes the reference point to which prosecutors look in assessing a case, defining their expectations and laying the groundwork for tunnel vision to fester.[78] Also, studies show that the cognitive biases leading to tunnel vision are worsened where key information is hidden or absent in creating the initial expectation, as occurs in the transfer of case files from the police to prosecutors.[79] The police have the benefit of entertaining (in theory) evidence inconsistent with a suspect's guilt that surfaces during the investigation of a crime before labeling a specific person as the culprit. Access to that information is a luxury rarely afforded to prosecutors.

The very nature of the prosecutor-police relationship also produces incentives for prosecutors to take the outcome of the police investigation as a *fait accompli* and to put on intellectual blinders to the possibility of other outcomes. Prosecutors need a good working relationship with the police, one based on trust and a smattering of mutual respect, in order to do their jobs effectively. Prosecutors rely on police to investigate cases, arrest perpetrators, and track down

74 *See* Findley & Scott, *supra* note 63, at 325-26.

75 *Id.* at 295.

76 *Id.* at 327-31.

77 Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 553 (1987).

78 *See supra* notes 63-68 and accompanying text. Another problem with the "picture" contained in the police reports is that these reports often rely on "boilerplate" language that may lack the specificity required to assess the individual merits of the case. *See* Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305, 316 (2001).

79 *See* Findley & Scott, *supra* note 63, at 329-30.

witnesses; police depend on prosecutors to validate those arrests by securing convictions. By collaborating repeatedly with one another over long periods, police and prosecutors may develop a shared orientation toward "getting the bad guys" that creates a potent bond.[80] Questioning the accuracy of a police investigation may jeopardize this symbiotic (and co-dependent) relationship, not to mention imperil a prosecutor's ability to perform in future cases.[81] Research shows that failing to show group loyalty in general imposes profound costs on the perceived violator, among them, possible ostracism and outright banishment from the collective.[82] To that end, prosecutors branded as "hard" on police all too often suffer delays in gathering updates about investigations or are completely deprived of access to information.[83]

Like the police, prosecutors often interact quite closely with crime victims in the early stages of a case and may develop an allegiance to their accounts of the event.[84] Prosecutorial loyalty to victims influences decision-making in ways contrary to the interests of criminal defendants.[85] In contrast to their relationship with victims, prosecutors seldom become personally acquainted with the defendants in their cases, knowing them largely through police reports and rap sheets alone.[86] Prosecutors likely have less exposure to criminal defendants

[80] *See* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 792 (2003); *see also* DAVIS, *supra* note 12, at 23 (noting that police officers frequently recommend specific criminal charges to a prosecutor after making an arrest, and prosecutors may simply follow that recommendation in certain cases); Melilli, *supra* note 17, at 689 (noting that due to "prolonged and recurrent contact with police officers. . . . prosecutors may tend to regard police officers as their clients").

[81] *See, e.g.*, Chemerinsky, *supra* note 78, at 305; Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 144-45 (2004); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 392 (2001); *see also* DAVIS, *supra* note 12, at 39-41 (discussing how prosecutors may engage in "willful blindness" when it comes to police practices and refuse to critically examine the steps taken in the investigation).

[82] *See, e.g.*, Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 482 (2006) ("Loyalty comes with enforcement mechanisms. These include ostracism and banishment of those who breach its rules. The costs of failing to exhibit group loyalty can be considerable.").

[83] *See, e.g.*, Chemerinsky, *supra* note 78, at 305 ("For obvious reasons, prosecutors are reluctant to alienate the very officers that they must work with and rely on in their cases."); Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 536 & n.150 (1994) (noting that police utilize an array of tactics to make life difficult for a prosecutor deemed "hard on police"); Medwed, *supra* note 81, at 145.

[84] *See* Medwed, *supra* note 81, at 145-46.

[85] *See, e.g.*, Bandes, *supra* note 82, at 486; Melilli, *supra* note 17, at 689 ("Quite naturally, prosecutors may develop loyalty to victims, and that loyalty may influence the prosecutors' decisions.").

[86] *See* Medwed, *supra* note 81, at 146; *see also* Burke, *supra* note 64, at 519 ("A prosecutor who is surrounded in her daily routine only by crime victims, police officers, and other prosecutors might develop a deepened 'presumption of guilt' that can contribute to cognitive

than do the police who presumably interviewed (or tried to interview) those parties during the investigation. Having crafted a personal link to the victim and no corresponding connection with the accused, a prosecutor may naturally overrate inculpatory evidence and underrate exculpatory evidence prior to trial, to the extent that the police make any such information available. Prosecutors may, in certain circumstances, face external political pressure to proceed with a matter or otherwise fear being perceived as "soft" by refusing to pursue a tough case and take it to trial.[87] Prosecutors may also, on occasion, simply feel cynical about a particular suspect professing his innocence because they have heard similar claims countless times before, as often as not from clearly guilty suspects.[88]

For the foregoing reasons, tunnel vision often infuses a prosecutor's decision-making in screening a case for potential criminal charges. The principal effect of tunnel vision in this phase is to heighten a prosecutor's belief in the original suspect's guilt and minimize any countervailing impression that someone else may have committed the crime.[89] In extreme situations, tunnel vision may prompt prosecutors to unwittingly charge innocent suspects with crimes. Once charges are filed, what Professor Alafair Burke calls a "sticky presumption of guilt" often evolves, and prosecutors tend to interpret information revealed thereafter in accord with this presumption.[90] Consequently, the charging decision is a critical stage in the lifespan of an innocent defendant's case. A number of reforms should be considered to limit the harm wrought by prosecutorial tunnel vision at the charging stage.

First, requiring the police to disclose as much information as possible to prosecutors when transferring their case files for charging

bias."); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 208 (1988) ("[The prosecutor is regularly exposed to victims, police officers, and others] who can graphically establish that the defendant deserves punishment . . . . At the same time, the prosecutor is normally isolated from those—the defendant, his family and friends, and often, his witnesses—who might arouse the prosecutor's empathy or stimulate concern for treating him fairly."); Melilli, *supra* note 17, at 689 ("Prosecutors come to know defendants from police reports and rap sheets, and thus think of defendants only in the context of the criminal accusations.").

87 *See* Melilli, *supra* note 17, at 688.

88 *See, e.g.*, Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 92 (2009) (discussing the "signaling defect" in plea bargaining because innocent defendants are pooled with guilty defendants also claiming innocence).

89 *See, e.g.*, Bandes, *supra* note 82, at 479 ("[A] recurring theme [in wrongful convictions] is the prosecutor's tendency to develop a fierce loyalty to a particular version of events: the guilt of a particular suspect or group of suspects. The loyalty is so deep it abides even when the version of events is thoroughly discredited, or the suspect exculpated.").

90 Burke, *supra* note 62, at 1605-09 (noting how selective information processing and belief perseverance may be particularly problematic in the post-charging phase).

consideration might nip one aspect of prosecutorial tunnel vision in the bud: the fact that a prosecutor's initial theory of guilt is ordinarily based on incomplete information. Reviewing a complete file, as opposed to one tailored against the person anointed the chief suspect by the police, would aid a prosecutor in developing her theory of the case and prevent the formulation of a presumption of guilt where flaws in the case are readily apparent at an early stage.[91] It is well within the authority of a prosecutor's office to demand access to such information and some offices already do so.[92] On a more general level, achieving greater neutrality or, rather, interpersonal distance between the police and those prosecutors entrusted with the task of reviewing police arrest files with an eye toward possible criminal charges would be beneficial.[93]

Second, educating prosecutors about tunnel vision and implementing training regimens designed to quell its influence have their advantages as well.[94] Prosecutors' offices typically conduct in-house continuing legal education programs already, and adding training workshops about cognitive science is a particularly easy reform to achieve.[95] Studies suggest that urging people to articulate the specific reasons for their position and to "counter-argue"—to take the opposite stance from their argument as a role-play technique—can decrease the effect of the confirmation bias and belief perseverance.[96] But it is difficult to prompt people to counter-argue. Even more, reduction, not elimination, of tunnel vision is all that education and training offer in the best case scenario.[97]

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[91] *Id.* at 1614-15 (suggesting that providing complete information might diminish the likelihood that prosecutors will develop a theory of guilt that will trigger the host of biases, and that, in some cases, prosecutors could even become involved in investigations prior to the charging stage).

[92] *See* Findley & Scott, *supra* note 63, at 387-88; *see also* Burke, *supra* note 62, at 1615 ("[P]olice should record, preserve, and disclose to the prosecutor all evidence collected during their investigation, both inculpatory and exculpatory.").

[93] Findley & Scott, *supra* note 63, at 388 ("While it may be difficult to achieve true neutrality, it is clear that prosecutors do manage to maintain some measure of neutrality in the precharging context, because they do refuse to charge in a meaningful proportion of cases."); Melilli, *supra* note 17, at 673 ("And indeed, a substantial percentage of arrests result in either declined or voluntarily aborted prosecutions.").

[94] *See generally* Burke, *supra* note 62, at 1616-18 ("Some empirical evidence suggests that self-awareness of cognitive limitations can improve the quality of individual decision making."); *see also* Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1531-34 (2000) (advocating greater education both in law schools and within prosecutors' offices regarding discretionary decisions by prosecutors, including the charging decision).

[95] *See* Burke, *supra* note 64, at 522-23. Nevertheless, many prosecutorial educational programs are seemingly deficient in offering training about charging decisions specifically. *See* Melilli, *supra* note 17, at 686-87.

[96] *See* Burke, *supra* note 62, at 1620; Burke, supra note 64, at 523-25; Findley & Scott, *supra* note 63, at 370-71.

[97] Findley & Scott, *supra* note 63, at 371; *see also* Burke, *supra* note 62, at 1618

Education and training therefore must be buttressed with institutional changes. For instance, prosecutors could be urged to promulgate written office directives to govern individual line prosecutors in rendering charging decisions. This, in effect, would allow prosecutors to "self-regulate" by enforcing higher charging norms than those mandated by the codes of ethics.[98] To supplement written policies, some offices might even assign a disproportionately large number of veteran prosecutors to their charging division to ensure rigorous screening of police files. The New Orleans District Attorney's Office under Harry Connick's leadership is perhaps the most prominent example of an organization committed to vetting borderline cases prior to charging and only pursuing matters in which experienced supervisors believed they had an excellent chance of prevailing at trial.[99] Whereas instituting charging policies geared to a particular office has its advantages, prosecutors may be reluctant to limit their charging autonomy voluntarily.[100] Office charging guidelines, where they exist, are often devised to be as broad and flexible as possible to provide wiggle room when defendants claim violations of them.[101] More importantly, internal guidelines alone may not be enough to counteract tunnel vision.[102] Internal regulations ideally should be coupled with something else: the creation of a secondary review structure to take a

("[A]lthough education about cognitive bias may hold some potential to improve prosecutorial decision making, it is doubtful that education alone will assure prosecutorial neutrality.").

98 *See, e.g.*, Zacharias, *supra* note 60, at 762-63 (noting some of the general benefits of internal supervision and regulation within prosecutors' offices in limiting ethics violations).

99 *See* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1619-20 (2005); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 60-84 (2002). There are strong reasons why seasoned prosecutors may do a better job than their junior colleagues in making charging decisions. *See, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 903 (2009) ("Longevity of service is valuable because it makes it less likely—though does not completely eliminate the risk—that the attorney's decision will be colored by how the decision will look to prospective future employers.").

100 Bennett Gershman notes that individual prosecutorial offices are free to formulate internal guidelines to address specific types of cases, but warns that guidelines are often too general to be of much use and that "an institutional reluctance to unduly restrict their own discretion makes it even more unlikely that prosecutors would promulgate overly specific guidelines." Gershman, *supra* note 11, at 519-20; *see also* Misner, *supra* note 21, at 744 ("Attempts to convince prosecutors to publish the guidelines for making prosecutorial charging decisions . . . have generally gone unheeded. When guidelines have been drafted, they have generally been so broad as to be of little predictive value.").

101 *See supra* note 100 and accompanying text; *see also* Melilli, *supra* note 17, at 683.

102 Yaroshefsky, *supra* note 3, at 280-82 (discussing the Alberto Ramos case in the Bronx, New York, and the associated discovery of widespread misconduct within the Bronx District Attorney's Office and inadequate internal consequences for such violations as "a glaring example that internal controls to which disciplinary committees defer are ineffective").

"fresh look" at prosecutorial charging decisions.[103]

The formation of an internal review committee to evaluate charging decisions would force the prosecutor handling the case to communicate the precise reasons for her decision,[104] a process that could trigger the type of critical self-reflection necessary to curb tunnel vision. Even if the charging prosecutor remained gripped by tunnel vision despite this exercise in introspection, the members of the review committee would likely not suffer from this malady, provided of course that they had no previous exposure to the case.[105] The practice of seeking internal review of charging decisions is relatively common at the federal level, with some U.S. Attorneys' Offices requiring line prosecutors to consult supervisors and/or committees before proceeding with particular types of cases.[106] To optimize the effectiveness of such an internal review committee, at least one member should formally play the role of "Devil's Advocate" by counter-arguing and harping on the flaws in the prosecution's case.[107] The committee admittedly may struggle to conscript an employee who is willing and able to perform this duty without exhibiting too much deference to their colleagues' analyses: criticizing peers' charging decisions day in and day out is simply not an enviable task for a prosecutor.[108] For that reason, Burke has floated the idea of including non-prosecutors in advisory review committees.[109] A bipartisan committee of this nature might resemble the civilian review boards that are becoming increasingly popular mechanisms for overseeing components of police department operations.[110] Including non-prosecutors in the process would inject an

103 Findley & Scott, *supra* note 63, at 388-89; *see also* Griffin, *supra* note 9, at 262 ("Policies alone cannot promote good judgment, however. That is developed through training by more experienced prosecutors and through consultation with peers and supervisors. Accordingly, in all matters, prosecutors should test their judgment by consulting fellow prosecutors.").

104 *See* Bibas, *supra* note 46, at 1006 ("Simply having to explain and justify one's decisions disciplines prosecutors, much as writing reasoned decisions disciplines judges.").

105 *See* Burke, supra note 62, at 1621 ("Another possible method to mitigate the influence of cognitive bias on prosecutorial decision making is to involve additional, unbiased decision makers in the process. . . . A separate attorney would be able to comment on the strength of existing evidence against the defendant without the taint of a preexisting theory of guilt.").

106 *See* Findley & Scott, *supra* note 63, at 388; Fitzgerald, *supra* note 16, at 25 ("When we have complicated cases in my office, we have indictment committee meetings. During the meeting, we review the case and make sure that we can prove racketeering if we are going to charge racketeering, and look at the strengths and weaknesses of our arguments.").

107 *See* Burke, *supra* note 62, at 1620; Findley & Scott, *supra* note 63, at 388-89. Susan Bandes also recommends that "[r]eview mechanisms should exist at every level of decision-making," but cautions that "review may become simply a way of reinforcing group norms." Bandes, *supra* note 82, at 493. To avoid such reinforcement, Bandes insists there must be transparency in the form of adequate record-keeping and discovery, and that "[t]he process needs to be explicitly structured to perform a critical role" with a "naysaying function." *Id.* at 493-94.

108 *See* Burke, *supra* note 62, at 1621-22; Burke, *supra* note 64, at 527.

109 *See* Burke, *supra* note 62, at 1622-24.

110 *Id.* at 1623-24.

important element of transparency and public accountability.[111]

The formation of internal committees to review charging decisions also comports with modern trends in institutional design theory. Professor Rachel Barkow's study of the institutional design of federal administrative agencies spurred her to advocate greater "separation-of-functions" within U.S. Attorneys' Offices. According to Barkow, federal prosecutorial agencies should detach attorneys entrusted with "investigative" tasks in a particular case from those focused on subsequent "adjudicative" endeavors to better prevent abuses of power. To that end, prosecutors investigating alleged criminal activity could be barred from any involvement in the charging process.[112] Barkow's idea has particular value in the context of federal prosecutors (the focus of her study) who often engage in lengthy preliminary investigations of complex criminal activities and operate in large, hierarchical organizations. A secondary review model generally strikes me as preferable to, and more practical than, enforcing a strict separation of functions regime because it recognizes the efficiencies gained by having the same prosecutor or prosecutors involved in the investigation and charging phases of a case, especially in smaller county or local prosecutorial agencies. On balance, internal charging review committees embody many of the virtues of a rigid separation of functions system—independent assessment of a potential criminal charge by those less vested in it—without exacting too heavy an administrative toll on the average office.

The idea of housing a charging review committee within every prosecutorial office would encounter resistance. In particular, establishing a committee composed in part of non-prosecutors would face opposition from within prosecutorial ranks, impose financial burdens, and generate qualms about conflicts of interest and confidentiality.[113] More fundamentally, the small size of many prosecutorial agencies may make any sort of separate review committee infeasible in those jurisdictions.[114] And while larger offices may have the resources to form internal review committees, time pressures created by enormous caseloads in those offices accentuate the risk that the review process will be largely ceremonial.[115] But, regardless of the precise makeup of internal charging review committees and the

111 *See generally* Bandes, *supra* note 82, at 493-94 (describing the important role transparency plays in the charging process); Findley & Scott, *supra* note 63, at 391 (same).

112 *See* Barkow, *supra* note 99, at 898.

113 *See* Burke, *supra* note 62, at 1623; Burke, *supra* note 64, at 527.

114 Barkow acknowledges that "a panel of adjudicative decision makers is preferred" to counter individual biases, but suggests it might not be feasible in many offices. Barkow, *supra* note 99, at 904.

115 *See* Brown, *supra* note 99, at 1620; Melilli, *supra* note 17, at 683.

practical barriers to their creation, the general concept has much to recommend it as a tool to alleviate the effects of tunnel vision, and such committees should be implemented where possible.

It would be unwise, however, to compel internal review committees to evaluate each and every charging decision. Many routine cases in our burgeoning, unrelenting criminal justice system may not merit extensive outside evaluation.[116] In recognition of the desire for efficiency and the existence of resource constraints (both time and money),[117] committee review of charging decisions should be confined to those cases most deserving of scrutiny: in other words, those cases where the risk of a wrongful conviction is most pronounced.[118] It is not only high-profile or complicated cases that carry such a risk,[119] but also those imbued with certain characteristics found to prevail in a large swath of wrongful convictions.[120]

Indeed, empirical studies of post-conviction exonerations of innocent prisoners have isolated a distinct subset of factors that contribute most dramatically to wrongful convictions: eyewitness misidentifications, false confessions, jailhouse informants, police and prosecutorial misconduct, use of dubious forensic science, and ineffective assistance of defense counsel.[121] Eyewitness misidentification stands out as the most common variable in the conviction of the innocent, as highlighted by the Innocence Project's 2010 report concluding that such errors occurred at trial in 76% of the first two hundred and fifty exonerations achieved through post-conviction DNA testing.[122] What is more, 53% of those

116 Cookie-cutter, "buy-and-bust" drug cases where an undercover officer has purchased drugs from an oblivious seller and the "buy money" is found in the seller's possession come to mind as paradigmatic examples of cases that fail to cry out for committee review.

117 *See, e.g.*, Melilli, *supra* note 17, at 683 (observing that charging decisions "must often be made spontaneously and instinctively with infrequent opportunities for serious internal review").

118 *See* Burke, *supra* note 64, at 526 ("Fresh looks would appear to be particularly helpful in cases where some of the government's original evidence against a defendant has been undermined; a new lawyer could review the case considering only the remaining evidence, untainted by the lingering effects of belief perseverance.").

119 *See supra* notes 57-59 and accompanying text (discussing Professor Mosteller's advocacy of a prosecutorial duty to investigate "high-profile" or "problematic" cases before filing charges); *see also* Burke, *supra* note 64, at 526 ("Offices with sufficient resources could create a formal layer of internal review, at least in some limited categories of high-stakes cases, such as death penalty cases, other major crimes, or post-conviction claims of innocence.").

120 Indeed, a failing with many of the pre-existing prosecutorial charging review committees and scholarly calls for further enactment is their almost exclusive emphasis on complex cases. *See, e.g.*, Fitzgerald, *supra* note 16, at 25; Griffin, *supra* note 9, at 293 (noting how prosecutorial agencies frequently have departmental review processes for charging decisions related to capital punishment).

121 *See, e.g.*, BARRY C. SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2001) (discussing a number of systemic flaws that generate wrongful convictions, and listing reforms to protect the innocent).

122 *See* INNOCENCE PROJECT, 250 EXONERATED: TOO MANY WRONGLY CONVICTED 22-23,

misidentifications involved witnesses and perpetrators of different races, so-called "cross-racial" identifications.[123] False confessions by innocent suspects, especially juveniles and the developmentally-disabled, also take place with surprising frequency.[124] Furthermore, informants played a role in 19% of the wrongful convictions cited in the Innocence Project's report.[125] Prosecutorial reliance at trial on forensic evidence based on unsound scientific principles cropped up as a central factor in 52% of the cases studied.[126]

Although some of the chief factors that generate wrongful convictions—such as most forms of police and prosecutorial misconduct and ineffective assistance of defense counsel—are not readily identifiable prior to trial, many are. For instance, pretrial prosecutors stand in a reasonably solid position to weigh the accuracy of an eyewitness's identification. They can gauge the conditions under which the crime occurred, discern whether "cross-racial" identification is an issue, and examine the photo array and physical lineup procedures to determine whether there was a chance of suggestiveness.[127] Likewise, prosecutors can rather easily pinpoint whether the case against a suspect rests on forensic evidence and, if so, whether that evidence derives from a forensic technique susceptible to charges of inaccuracy, such as the essentially discredited field of "hair microscopy" in which forensic scientists sought to conclude through visual inspection whether a hair follicle retrieved from the crime scene matched that obtained from a suspect.[128] Ascertaining the existence of a false confession poses more of a challenge, but, at a minimum, prosecutors might critically examine statements by juvenile and mentally-deficient suspects prior to trial. And, to be sure, prosecutors are ideally situated well before trial to assess the credibility of informants that they intend to present as witnesses.[129]

On the whole, prosecutorial committees assigned to review charging decisions should steer their efforts primarily in the direction of

www.innocenceproject.org/docs/InnocenceProject_250.pdf [hereinafter INNOCENCE PROJECT] (last visited June 25, 2010).

123 *Id.* at 24-25.

124 *See* Gross et al., *supra* note 2, at 544-46.

125 INNOCENCE PROJECT, *supra* note 122, at 38-39.

126 *Id.* at 28-29.

127 *See, e.g.*, Daniel S. Medwed, *Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 358-364 (2006).

128 *See* INNOCENCE PROJECT, *supra* note 122, at 30 (mentioning that twenty-one percent of the exonerations in their study involved the use of hair microscopy at trial).

129 For example, in the Los Angeles County District Attorney's Office, an in-house jailhouse informant committee must grant prior approval of an informant's appearance at trial before a prosecutor may use that person as a witness. *See* Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 FORDHAM L. REV. 1413, 1449 (2007).

those matters containing indicia of possible eyewitness misidentifications, false confessions, and/or overreliance on shaky forensic findings. To the extent that this cohort of cases might remain too vast and thus impractical for review committees to tackle, I would suggest targeting charging decisions predicated on a "single eyewitness" and little, if any, other evidence. Those cases present the greatest hazard because of the high rate of identification error and, paradoxically, the high esteem with which jurors tend to hold eyewitness testimony.[130] A handful of prosecutors' offices have launched "single eyewitness" review committees.[131] One such committee embedded within the Nassau County District Attorney's Office in New York State at one point appraised roughly ten cases per year and dismissed two of them on average.[132] Would any innocent defendants have been convicted if charges had been filed in the cases jettisoned by the review committee in Nassau County? It is impossible to know for certain, but I strongly suspect the answer is yes.

Tunnel vision is an innate human trait and, as such, incurable. Still, its worst symptoms can receive treatment in the context of prosecutors choosing whether to charge a particular suspect with a crime. The promulgation of a secondary review committee within every prosecutor's office to take a fresh look at charging decisions in cases possessing the hallmarks of wrongful convictions would likely lead to the dismissal of especially weak cases prior to the submission of formal charges. This would go a long way toward making the impact of tunnel vision less fatal for the innocent.

CONCLUSION

At its core, the charging decision is the tipping point for a criminal case. If the prosecutor comes out against charging, then the case virtually disappears with little harm. If the prosecutor sides in favor of filing charges, the government's efforts tilt toward developing a case for trial. Once the wheels of a criminal case are set in motion toward trial, the chance of a wrongful conviction increases significantly. That is

130 For example, in an experiment involving a robbery trial, a jury found the defendant guilty eighteen percent of the time where the prosecution's case lacked an eyewitness. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 9-10 (1979). The addition of a single eyewitness to those experimental cases boosted the conviction rate to seventy-two percent. *Id.*

131 Several chief prosecutors have embarked on such a path. *See, e.g.*, Sean Gardiner, *For Them, No Justice; Bad Convictions Put 13 Men in Prison. Persistence-and Luck-Got Them Out*, NEWSDAY, Dec. 8, 2002, at A03; Robin Topping, *Panel Puts Justice Before Prosecution*, NEWSDAY, Jan. 8, 2003, at A21.

132 *See* Topping, *supra* note 131.

exactly why reforms to the rules and practices surrounding the charging decision deserve careful consideration: to stop the wheels from turning at all in weak cases.