



Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

2010

The Conscience of a Prosecutor


David Luban

Georgetown University Law Center, luband@law.georgetown.edu

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/367>

45 Val. U. L. Rev. 1-31 (2010)

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

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

GEORGETOWN LAW

Faculty Publications



Georgetown Public Law and Legal Theory Research Paper No. 10-27
May 2010

The Conscience of a Prosecutor

Val. U. L. Rev. (forthcoming, 2010)

David Luban

Professor of Law

Georgetown University Law Center

luband@law.georgetown.edu

This paper can be downloaded without charge from:
Scholarly Commons: <http://scholarship.law.georgetown.edu/facpub/367/>
SSRN: <http://ssrn.com/abstract=1614963>

Posted with permission of the author

THE CONSCIENCE OF A PROSECUTOR
The 2010 Tabor Lecture
Valparaiso University School of Law

David Luban*

Dedicated to the memory of Fred Zacharias

This afternoon, I want to raise some very large and fundamental questions about legal ethics—questions about the role of conscience and your own moral values, and what to do if they conflict with your professional obligations. Questions about what those professional obligations are in an adversary system of criminal justice. Questions about how much a lawyer working in an organization ought to defer her own judgment to higher-ups in the organization. And questions about the prosecutor's role in our troubled system of crime and punishment.

But I am going to frame these large inquiries with a very concrete question: Should a prosecutor throw a case to avoid keeping men he thinks are innocent in prison?

Two years ago, a startling story appeared in the *New York Times*: a veteran prosecutor in New York City's D.A.'s office, Daniel Bibb, was assigned to reexamine two men's murder convictions because of new evidence.¹ After an exhaustive 21-month investigation, Bibb became convinced that they were not guilty. But he couldn't persuade his superiors to drop the cases, so he went in to the hearing and, in his words, he threw the case. "I did the best I could," he said. "To lose."²

Bibb helped defense lawyers connect the different pieces of evidence when they weren't seeing it. He made sure that the exculpatory witnesses showed up at the hearing, told them in advance what his cross-examination questions would be, and held his fire in cross. All the while, he continued to ask his superiors to drop the cases. They agreed to do so for one man, and the judge ordered a new trial for the other. At that point, Bibb said, "I'm done....I wanted nothing to do with it."³ Bibb eventually resigned – although all he had ever wanted to be is a career prosecutor.

After this startling story appeared in the *Times*, New York disciplinary authorities filed a complaint against Bibb; eventually he was cleared of disciplinary

* University Professor and Professor of Law and Philosophy, Georgetown University Law Center. My title is modeled after David Mellinkoff's 1973 classic *The Conscience of a Lawyer*, which I gratefully acknowledge. I am also grateful to Dan Bibb for extensive discussion of the case described here, as well as comments and corrections he offered to an earlier draft.

¹ Benjamin Weiser, *Doubting Case, a Prosecutor Helped the Defense*, N.Y. Times, June 23, 2008, http://www.nytimes.com/2008/06/23/nyregion/23da.html?_r=1&pagewanted=al.

² Id.

³ Id.

charges.⁴ In the meantime, he started over as a defense lawyer, which is what he is doing today.

As for the two men that Bibb thought were wrongly convicted: Olmedo Hidalgo, against whom the D.A.'s office dropped the charges, was deported to the Dominican Republic.⁵ David Lemus, who was re-tried over Bibb's objection, was acquitted by a jury and released after spending 14 years in prison.⁶ Subsequently he sued New York City for wrongful imprisonment, and the city settled for \$1.2 million.⁷ Hidalgo also sued, and reportedly settled for more than twice that amount.⁸

I. The Palladium Murder

Before turning to issues of ethics and theory, it will be useful to understand what the case was about. It involved a remarkable saga.

It began in 1990, at an East Village nightclub called the Palladium, on Thanksgiving night. A bouncer punched a man in the face and expelled him from the club. The man decided to take revenge. In the wee hours of the morning, two gunmen opened fire on bouncers standing outside the club, killing 23-year-old Mark Petersen and wounding a second bouncer.

How did police come to arrest Lemus and Hidalgo for the Palladium murder? The two men claimed that they did not even know each other; Hidalgo said he had never been to the Palladium, and Lemus said he had been there only once in his life, a year before the shooting. But both had prior arrests that got their photos into police files, and eyewitnesses picked Lemus and Hidalgo out of photo arrays that detectives showed them. At trial, the eyewitnesses were able to identify Lemus and Hidalgo.

There was one other damning piece of evidence against Lemus: he bragged to a woman named Delores Spencer that he had done the Palladium killing. She told a friend, who told the police. Police equipped Spencer with a wire and sent her to talk some more to Lemus. This is what the jury at the 1992 trial heard on the tape:

David Lemus: "If you're scared, just say you're scared."

Delores Spencer: "Why should I be scared of you?"

⁴ Benjamin Weiser, *Lawyer Who Threw a City Case is Vindicated, Not Punished*, N.Y. Times, March 4, 2009, <http://www.nytimes.com/2009/03/05/nyregion/05da.html>.

⁵ Anemona Hartocollis, *Witness Confesses in 1990 Killing, but Prosecutors Keep Pursuing Suspect*, N.Y. Times, Dec. 3, 2007, <http://www.nytimes.com/2007/12/03/nyregion/03palladium.html?pagewanted=print>.

⁶ Anemona Hartocollis, *Man Convicted in Club Death Is Acquitted at Second Trial*, N.Y. Times, Dec. 7, 2007, <http://www.nytimes.com/2007/12/07/nyregion/07palladium.html>.

⁷ *Man Awarded \$1.2 Million After Spending 14 Years Behind Bars for Wrongful Conviction*, Dec. 30, 2009, <http://bossip.com/197716/man-awarded-1-2-million-after-spending-14-years-behind-bars-for-wrongful-conviction/> (viewed April 2, 2010).

⁸ Benjamin Weiser, *Settlement for Man Wrongly Convicted in Palladium Killing*, N.Y. Times, March 31, 2009, at A19.

Lemus: “Because you know that I know that you know.” [3 short puffs].⁹

Lemus and Hidalgo’s attorney did not put on any witnesses, and the jury had little difficulty convicting the men of second-degree murder. They each drew sentences of 25 years to life.

That would have been the end of the story except for a series of coincidences. Around the same time the jury convicted Lemus and Hidalgo, New York City detective Bobby Addolorato was investigating a drug gang called C&C. One of his informants told him that two C&C members named Joey Pillot and Thomas “Spanky” Morales—not Lemus or Hidalgo—were the real Palladium shooters.

Addolorato reported what he heard to the D.A.’s office, but was told that it didn’t match the known facts. Understanding quite well that snitches sometimes lie, the detective forgot about it until 1996, four years later. By that time he was working with federal prosecutors in the C&C investigation, and they arrested none other than Joey Pillot and Spanky Morales. Joey agreed to cooperate, and his lawyer worked out what prosecutors call a “queen for a day” agreement: Joey would sing, and none of what he said could be used to prosecute him.¹⁰

Joey told the investigators that he and Morales had indeed been the real Palladium shooters. Furthermore, he gave them details that matched the facts: he remembered that his own gun had jammed and he ejected a cartridge—and police in fact found an ejected cartridge on the scene. And Morales drove a blue Oldsmobile, with a license number containing an 8 and a 1. Eyewitnesses had told police that the shooters escaped in a blue car whose license number included an 8 and a 1.

Addolorato went back to the D.A.’s office, and the result was a new hearing on the Palladium shooting. But the D.A. argued that the new information, which might well incriminate Spanky Morales, did not show that Lemus or Hidalgo were innocent—and the judge agreed. Even back at the original trial, prosecutors had raised the possibility of a third perpetrator.¹¹

Then in 2000 an inmate named Richie Feliciano read a story about the Palladium case. In early 2001 he told federal prosecutors that he had been at the Palladium that night, just a few feet away when Spanky Morales shot the bouncers. In fact, Feliciano said he was the one who drove Morales’s car away from the scene. It seemed increasingly likely that the case against Hidalgo and Lemus was a gigantic miscarriage of justice.

The two convicted men were represented pro bono by a lawyer named Steve Cohen. Cohen is a former federal prosecutor, and back in 1996 he had been present during Joey Pillot’s queen-for-a-day revelation that he and Spanky Morales had committed the Palladium murder. After going into private practice, the case

⁹ Stone Phillips & Dan Slepian, *Murder at the Palladium*, Dateline NBC, Sept. 8, 2008, available at http://www.msnbc.msn.com/id/6913736/ns/dateline_nbc-crime_reports/.

¹⁰ Hartocollis, *supra* note 5.

¹¹ Hartocollis, *Witness Confesses*, *supra* note , Dec. 7, 2007 correction.

continued to weigh on Cohen's mind, and he signed up to represent Lemus and Hidalgo pro bono. Bobby Addolorato, the police detective who first heard Joey Pillot's information, also stuck with the case for 16 years, and he was in the courtroom when Lemus was ultimately acquitted.¹²

In 2002 the District Attorney's office agreed to open a new investigation. After the Assistant District Attorney who originally prosecuted the case retired, the office assigned it to Daniel Bibb. Bibb left a message on Cohen's voicemail:

"Steve this is Dan Bibb from the Manhattan D.A.'s office. What I can tell you is that the investigation is proceeding. There are interviews happening every day of people with information relevant to the investigation. I can also tell you that the investigation is not going to take weeks, it's going to take months. If that's unfortunate for you, I apologize."¹³

In fact, Bibb's investigation took not months, but years. As Bibb describes it:

Two detectives from the Manhattan South Homicide Squad and I ultimately interviewed over 60 people in connection with the investigation. Interviews were conducted in at least fifteen states, three New York State prisons, eight federal prisons and one county jail, all of which were spread across the country.¹⁴

And, by the end of the investigation, Bibb was convinced that Lemus and Hidalgo had nothing to do with the Palladium shooting.

Then why had Lemus told Delores Spencer that he was involved? According to Lemus, it was simply a pathetic story of a punk talking big to impress a girl. Lemus wanted to show Delores Spencer that he was a tough guy and a player, not just a "knucklehead with a bus pass."¹⁵ He had seen the news about the Palladium on television, and it was the first thing that came to his mind. Here's an exchange between Lemus and *NBC Dateline* producer Dan Slepian:

Lemus: "I told her that I was at the Palladium, and there was a shootout that happened at the Palladium, and some people had got shot, and I told her that I was a part of that."

Slepian: "Why say that?"

Lemus: "I was trying to portray this image of somebody that I wasn't...There's not a day that goes by that I don't say to myself, out of all the things you could have said to Delores that day, why the Palladium? Eats you up."¹⁶

Meanwhile, we can only guess what conversations were going on between Bibb and his superiors in the Manhattan D.A.'s office, but they must have been tense

¹² Haretocollis, *Man Convicted*.

¹³ Phillips & Slepian.

¹⁴ Letter from Daniel Bibb to Alan Friedberg, Nov. 7, 2008, at 2 (copy in possession of the author).

¹⁵ Phillips & Slepian, quoting Steve Cohen.

¹⁶ Phillips & Slepian.

and difficult. Bibb, quite properly, won't talk about confidential office conversations.

Not that the D.A.'s office disagreed that Morales was the shooter. Rather, along the lines of the "third perpetrator" theory, they asked Bibb to defend the convictions and argue that all the men were in cahoots. Bibb, on the other hand, was convinced that Lemus and Hidalgo had nothing to do with Morales and Pillot.

Why not prosecute Spanky Morales? This was a question that the judge asked Bibb early in the investigation, and his answers hint at some of the disagreements that must have been going on in the D.A.'s office:

Judge Roger Hayes: "It is something that is puzzling to the court."

Bibb: "It is the subject of continuing discussion within my office."

Judge Hayes: "In other words, if your theory is correct, why is that person unprosecuted?"

Bibb: "That also has been the subject of continuing discussions in my office."¹⁷

Eventually—a few weeks before the fact-finding hearing that Bibb "threw"—Morales was arrested for his role in the Palladium homicide, and Bibb was handling the prosecution.¹⁸ Bibb explains that cases of this sort are extremely vulnerable to speedy trial motions. And indeed, when Spanky Morales was finally indicted the judge dismissed the case on speedy trial grounds approximately a year later. Because of double jeopardy, that meant Morales was safe, and could testify in David Lemus's retrial. Bibb says that he had no problem charging Morales. As he puts it: "I always thought that in a homicide it's better to prosecute and lose on a motion than not to prosecute at all. No dead body should go unpunished."¹⁹

By this time, the Palladium case had become an embarrassment to the D.A.'s office as news stories over the years had painted the convictions as a miscarriage of justice. It was embarrassing enough to become an issue in the re-election campaign of District Attorney Robert Morgenthau. Palladium was an embarrassment as well because of items that turned up in the case file. Back in 1990 when the Palladium shooting first happened, an anonymous tipster phoned a hotline to say that Spanky Morales was the shooter. For some reason, no-one ever pursued that lead, but the note was in the file. Second, Spanky's sister-in-law had told police in 1991 that Spanky was involved.²⁰ And third, four of the state's own eyewitnesses had identified Spanky from a photo array, but the notes in the file were botched. All this led Lemus and Hidalgo's attorneys to argue that the state had committed *Brady* violations by not revealing this evidence that Morales was the guilty man; but Bibb forcefully argued that prosecutors had told the defense lawyers about Morales in a

¹⁷ Phillips & Slepian.

¹⁸ E-mail from Daniel Bibb, April 27, 2010.

¹⁹ Telephone interview with Daniel Bibb, April 14, 2010.

²⁰ She went to the police because, while her husband was in the military in Iraq, Spanky – her husband's brother – raped her. Interview with Dan Bibb, April 14, 2010.

timely fashion.

Bibb was clearly less comfortable advancing the state's theory that Morales, Lemus, and Hidalgo were all involved. That's not surprising, because as we now know, Bibb was convinced that they weren't. In fact, as Bibb later told a reporter, "I came to believe that Hidalgo wasn't there. And if he wasn't there, he certainly couldn't have done it."²¹ At one point, the judge asked Bibb, "Is there any information in your possession that ties the defendants with each other or the C and C gang?" and Bibb responded "Only in the most tenuous way."²² The men had all grown up in the same neighborhood and hung out at the same bars, but there was no evidence that Lemus and Hidalgo had anything to do with the gang. "Absent that," Bibb stated, "I've been able to find no other connections."²³ Bibb elaborates:

Many of the witnesses that Lemus and Hidalgo called at the hearing were cooperating with me in the prosecution of Morales. They included at least a half dozen witnesses who Morales admitted his participation to. As I explained when we spoke, the admissions Morales made to these witnesses ... placed him in the role that Lemus was identified by the eyewitnesses as playing, that of the person hit by the bouncer and thrown out of the club. You definitely cannot have two people playing the exact same role in a crime. This is one of the reasons I was and remain convinced that Lemus was misidentified and Morales actually played that role.

For the sake of completeness, I am convinced that the four people involved in the crime were Thomas Morales aka Spanky (hit by bouncer and thrown out of the club, gunman and active shooter), Joseph Pillot aka Joey (gunman whose gun misfired), Ramon Callejas aka Peachy (third gunman who did not fire his weapon and who looks a lot like Morales) and Richard Feliciano aka Richie (employed as a distraction so Spanky could try to get back into the club to kill the bouncer who actually hit him and threw him out of the club). Lemus may very well have been there but, if he was, he was not involved. Hidalgo was not there and was most likely having Thanksgiving dinner with a friend and his friend's wife.²⁴

These are the events that led Bibb to throw the case. Contrary to news reports, he never "coached" or "strategized" with defense attorneys—by this time, Lemus and Hidalgo were represented not only by Steve Cohen but by pro bono lawyers from the law firm of Cooley Godward Kronish—but he did speak with them frequently about the "evidence I had uncovered and my view as to what the evidence meant.... On a number of occasions, when they did not understand the import of a particular piece of evidence, I explained it to them."²⁵ Bibb also made sure that "reluctant witnesses (and some were very reluctant) appeared and all the witnesses Lemus and Hidalgo called to testify on the newly discovered evidence

²¹ Weiser, *Settlement for Man Wrongly Convicted in Palladium Killing*, supra.

²² Id.

²³ Id.

²⁴ E-mail from Daniel Bibb, April 27, 2010.

²⁵ Bibb letter, at 5.

issue were prepared and testified truthfully.”²⁶ Bibb not only prepped the defense witnesses, he told them what he was going to ask them in his cross-examination. Bibb comments:

Did that feel weird? Sure it did – but not that weird, because I’ve prepared witnesses to testify a thousand times. I always tell witnesses what questions to expect from the other side. This time, I told them what questions to expect from the defense on direct, then I said “Here are the questions you’re going to get on cross.” A couple of the witnesses figured out what was going on. They asked who was going to be crossing them, and I told them that I was.²⁷

Bibb did not try to undermine the eyewitnesses in his cross-examination, although he points out that he had a reason other than throwing the case for preserving their credibility, namely that they would also be witnesses in the pending prosecution of Spanky Morales.²⁸ But basically, as he said, “I did the best I could to lose.”

Why did Bibb do it this way? Here is his own explanation:

At that point, I felt that I had a number of choices. The first was to resign. While I am sure it would have garnered a lot of press coverage, it would not have moved the matter along to a just conclusion. In fact, it most likely would have substantially delayed the matter, resulting in the continued incarceration of two innocent men. The next was insubordination, refusing to do the hearing and risk being fired. Practically speaking, neither of these was an option because I have a wife, three children, and a mortgage and college tuition to pay and could not afford to be out of work. The last was to do exactly what I did.²⁹

He adds: “In this matter I did what every prosecutor should do, worked to ensure a just result consistent with my conscience, ethical principles and the evidence.”³⁰

II. Ethics and Prosecutors

There is no doubt that what Dan Bibb did was unusual. And there is no doubt that he violated the usual role expectations of the adversary system, where lawyers never try to help the other side make their case even when they think the other side is right. But did Bibb do anything wrong?

Stephen Gillers, a nationally-renowned legal ethics expert, thought he did, and predicted that Bibb might face professional discipline. “He’s entitled to his conscience,” Gillers wrote, “but his conscience does not entitle him to subvert his client’s case. It entitles him to withdraw from the case, or quit if he can’t.”³¹ Bibb, on the other hand, said that he didn’t withdraw because “he worried that if he did not

²⁶ Id.

²⁷ Bibb interview, April 14, 2010.

²⁸ Id.

²⁹ Id. at 4.

³⁰ Id. at 5.

³¹ Weiser, *Doubting Case*, supra note 1.

take the case, another prosecutor would — and possibly win.”³² Without Bibb to persuade the admission witnesses to testify at the hearing, it seems entirely likely that that’s exactly what would have happened.

Now I have great admiration for Stephen Gillers (with whom I have co-authored), but in this case I think he was wrong. Daniel Bibb deserves a medal, not a reprimand.

Before I explain why, let’s see what the ethics case against Bibb might look like. Imagine that a private lawyer representing a private client does the same thing. She locates truthful but adverse witnesses and persuades them to testify. As a matter of fact, she reveals her cross-examination to them. Not only that, she goes beyond complying with her opponents’ discovery requests—the civil equivalent of fulfilling a prosecutor’s *Brady* obligations. She explains the significance of the evidence when the opposing lawyers don’t get it. The lawyer does it because she thinks the other side was right. And her client loses.

First, there is no question that the lawyer could and would be sued for malpractice. As for ethics violations, the lawyer could be charged with violating the requirement of competency;³³ the requirement that the client, not the lawyer, sets the goals of the representation;³⁴ the requirement of diligence (also known as “zeal,” although the Model Rules don’t use that word in their text);³⁵ and the conflict of interest provision forbidding lawyers from taking cases where the lawyer’s representation of the client will be “materially limited” by “a personal interest of the lawyer.”³⁶ Conceivably she could also be charged with using client confidences against the client’s interests, if any of her conduct was based on confidential information from the client.³⁷ And, if the lawyer kept her strategy secret from her law firm—which expected her to zealously represent the client’s position—she was engaging in deceit, which the ethics rules prohibit.³⁸

In short, the lawyer in private practice would commit a mountain of ethics violations.

All the same prohibitions apply to a prosecutor. But there is one crucial difference. Prosecutors aren’t supposed to win at all costs. In a time-honored formula, their job is to seek justice, not victory. This is a mantra that appears in all the crucial ethics documents. It appears in a comment to the current ABA Model Rules of Professional Conduct, which says, “A prosecutor has the responsibility of a

³² *Id.*

³³ ABA Model Rules of Professional Conduct, MR 1.1. Here and in the remainder of the paragraph I cite to the Model Rules rather than New York’s Code of Professional Responsibility, the operative rules in Bibb’s jurisdiction. I do so for the sake of generality and simplicity; the relevant New York rules do not differ from the Model Rules in any way that matters for the points I am raising.

³⁴ MR 1.2(a).

³⁵ MR 1.3.

³⁶ MR 1.7(a)(2).

³⁷ MR 1.8(b).

³⁸ MR 8.4(c).

minister of justice and not simply that of an advocate.”³⁹ It appears in the Model Rules’ predecessor, the ABA Code of Professional Responsibility, which says “The responsibility of a public prosecutor differs from that of the usual advocate: his duty is to seek justice, not merely to convict.”⁴⁰ The same language appears in the ABA’s Standards for the Prosecution Function.⁴¹

The ancestor of all these pronouncements is the Supreme Court’s dictum in a 1935 case, *Berger v. United States*:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. 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.⁴²

This is a very different way to think about a lawyer’s role in the adversary system than we are used to in other contexts. It’s especially different from the criminal defense attorney’s role, which most lawyers and scholars agree requires maximum zeal on the client’s behalf.⁴³ Now in one way, this stark difference between the prosecutor’s mission and the mission other advocates are assigned in the adversary system is obvious: the criminal justice system would be a travesty if a prosecutor, holding years of someone’s life in her hands, cared about nothing but notching another victory.

But I do want to call attention to the remarkable fact that the *Berger* dictum with its “seek justice not victory” formula runs entirely against the grain of popular anti-crime sentiment as well as the way people commonly think about the adversary system. In popular sentiment, criminals are bad guys, prosecutors who lock them up are good guys, and defense lawyers live under a perpetual cloud of suspicion, reflected in endless griping about lawyers who get crooks off on technicalities. Criminal defenders constantly face the question “How can you represent people like that?”—or the more sophisticated law students’ comment, “I understand why the system needs defense lawyers, but I could never do that kind of work.” As for our conventional understanding of the adversary system, it involves complete symmetry of obligation between the two sides: they are both supposed to fight as hard as they can to win.

³⁹ MR 3.8, cmt.

⁴⁰ ABA Model Code of Professional Responsibility, EC 7-13.

⁴¹ “The duty of the prosecutor is to seek justice, not merely to convict...”, Standard 3-1.2(c).

⁴² *Berger v. United States*, 295 U.S. 78, 88 (1935). Although *Berger* is the *locus classicus* of the “seek justice not victory” principle, it dates back at least to the nineteenth century. Bruce A. Green, *Why Should Prosecutors Seek Justice?*, 26 Fordham Urb. L.J. 607, 612-13 (1999)

⁴³ One prominent exception is William H. Simon, who doesn’t distinguish the criminal defender’s obligations from those of other lawyers, and whose overall view is that *all* lawyers should take the prosecutor’s “seek justice not victory” mantra as their guiding ethical principle. *The Practice of Justice: A Theory of Lawyers’ Ethics* (2000).

The “seek justice not victory” formula, coupled with the view that criminal defense requires the maximum level of zealous advocacy, presents an entirely upside down model. Now, we have asymmetrical obligations: the defender is supposed to seek victory, not justice, while the prosecutor is constrained to seek justice, not victory. Prosecutors, it seems, are simply not supposed to fight to win the way defenders are.

Admittedly, there’s a Delphic quality to “seek justice, not victory.” ‘Justice’ is a grandiose and vague word. Oliver Wendell Holmes famously said “...I hate justice, which means that I know if a man begins to talk about that, for one reason or another he is shirking thinking in legal terms.”⁴⁴ The formal ethics rules – as opposed to aspirational standards like the ABA’s Standards for the Prosecution Function – take a pretty minimalist view of the prosecutor’s obligations. Prosecutors shouldn’t proceed without probable cause, they should make a reasonable effort to ensure that the accused has been informed of his rights, they shouldn’t try to get an unrepresented person to waive rights, and they should do timely *Brady* disclosures.⁴⁵ They should not subpoena defense lawyers unless they have to.⁴⁶ And – in a rule all too often honored in the breach – they should refrain from inflammatory public comments about their cases.⁴⁷ In most jurisdictions, that’s it. These rules leave loads of leeway for prosecutors to seek victory regardless of justice without facing even a whiff of professional discipline. Fred Zacharias, in a leading scholarly article on the “seek justice not victory” formula, thinks that the “justice” prosecutors seek “has two fairly limited prongs: (1) prosecutors should not prosecute unless they have a good faith belief that the defendant is guilty; and, (2) prosecutors must ensure that the basic elements of the adversary system exist at trial.”⁴⁸ The formal ethics rules don’t even go that far.

And yet I’ve spoken with a lot of prosecutors who take “seek justice, not victory” seriously, even if they aren’t 100% confident they know exactly what it requires. At the very least, they know it means that you shouldn’t try to keep people behind bars if you think they didn’t do it.

And in 2008, the ABA House of Delegates agreed. The ABA added two Model Rules to deal with prosecutors’ obligations when new evidence suggests that they obtained wrongful convictions. One requires a prosecutor who learns of “new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted,” to disclose the evidence to the proper authorities as well as the defendant, and initiate an investigation.⁴⁹ If the evidence is clear and convincing, the prosecutor must “seek to remedy the conviction.”⁵⁰ Two prominent scholars have argued that these

⁴⁴ Letter to John C.H. Wu, 1 July 1929, reprinted in Justice Holmes to Doctor Wu 53 (1947).

⁴⁵ MR 3.8(a)-(d).

⁴⁶ MR 3.8(e).

⁴⁷ MR 3.8(f).

⁴⁸ Fred Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 Vand. L. Rev. 45, 49 (1991).

⁴⁹ MR 3.8(g).

⁵⁰ MR 3.8(h).

rules don't go far enough, because evidence that a convicted person is probably innocent should impel a conscientious prosecutor to try to remedy the injustice, even if the evidence isn't clear or convincing.⁵¹

These rules are rather new, and to date Wisconsin is the only state to adopt them.⁵² Furthermore, it seems perfectly clear that the ABA wasn't thinking of Bibb's unorthodox tactics as the way a lawyer should "seek to remedy the conviction." But what, after all, did Bibb do wrong? He persuaded reluctant witnesses to show up in court and testify (against the state). Think for a moment about the alternative. Bibb was assigned to investigate the Palladium case, and he went on an odyssey to track down the witnesses: 60 interviews, fifteen states, eleven prisons, one county jail. Once he had the evidence, he was under an obligation to turn it over to the defense if it was exculpatory—which he did.

The alternatives: don't investigate the case very well for fear you'll find out that the guys doing 25-years-to-life are innocent; or, having investigated it, don't turn over the exculpatory evidence to the defense, violating your constitutional and ethical obligations; or, having turned it over, put the defense to the difficulty of locating the witnesses and getting them to court – so, if they don't succeed, the truth stays buried. *That's* the ethical obligation of a public prosecutor?

I hope your answer is no to my rhetorical question, but it may not be. A great many lawyers think that putting the other side to the effort and expense of getting witnesses to court is exactly what the adversary system contemplates. Sometimes, people quote a line from the Supreme Court's decision in *Hickman v. Taylor*, that "a learned profession" is not supposed "to perform its functions ... on wits borrowed from the adversary."⁵³

I think the Palladium case is a good illustration of how absurd this argument is. Bibb had interviewed the witnesses and he had a relationship with them that the defense did not have. Realistically, Bibb was the only one who could get these reluctant witnesses—not all of whom were solid citizens—in front of the judge. Could he have upheld the convictions of Lemus and Hidalgo if these witnesses had not testified? Very likely. Would that have impeded the search for truth? Absolutely. Would the result have been a grotesque injustice? Bibb, who knew more about the case than anyone else, certainly thought so. Getting key witnesses onto the stand is exactly what "seek justice, not victory" required in this case, even if it meant they were hostile witnesses. If that means the defense lawyers partly relied "on wits borrowed from the adversary," so be it.

A hundred and eighty years ago, John Stuart Mill criticized jurists who look at the adversary system through "fox-hunting eyes," as if it were nothing more than "a

⁵¹ Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 Ohio St. J. Crim. L. 467, 508 (2009).

⁵² This is as of May 1, 2010. See Wisconsin Rules of Professional Conduct for Attorneys, SCR 20: 3.8(g) & (h)(Jan. 10, 2010).

⁵³ 329 U.S. 495, 516 (1947). The Court was referring specifically to discovery rules, but it set its discussion in the more general context that "a common law trial is and always should be an adversary proceeding." *Id.*

sort of game, partly of chance, partly of skill.”⁵⁴ That seems to be the Supreme Court’s outlook in *Hickman v. Taylor*, and it is also the outlook of anyone who thinks the prosecutor’s job is to stand pat and let the defense get the witnesses to testify—if they can. Years ago, when I first began studying the adversary system, I thought that if this is what lawyering in an adversary system means, it is a large strike against the adversary system. I still think so. But even if you are a bigger fan than I am of the adversary system, you should agree that standing pat in this case would have violated the prosecutor’s special responsibility to seek justice not victory.

Admittedly, it’s odd to have the prosecutor explain to the defense about how the evidence fits together, and odder still to tell witnesses what you’re planning to ask them on cross-examination. Notice something important, though: in this case, Bibb’s tactics advanced the search for truth and the protection of rights. These are precisely the two values that defenders of the adversary system argue it is there to promote.⁵⁵

In truth, Bibb’s conduct may not be so extraordinary. A former federal prosecutor tells me that it isn’t unusual for prosecutors to throw cases at the grand jury stage, because they think the case stinks but they’re under political pressure to take it to the grand jury. That’s less conspicuous than Bibb throwing the case at the hearing, but morally it’s hard to see the difference.

There is an important philosophical point lurking in the background here. One reason that some lawyers feel uncomfortable with the adage “seek justice not victory” is that there is no consensus about what “justice” is, and we have every reason to doubt that there ever will be. Philosophers who spend their lives thinking about the theory of justice don’t agree. But you don’t need a theory of justice to recognize gross injustice when you see it.⁵⁶

III. Why Should Prosecutors Seek Justice, Not Victory?

Scholars have advanced two theories for why the prosecutor’s job is to “seek justice, not victory.”⁵⁷ One points to the power differential between the state and the accused individual. The state has tremendous resources: police to investigate cases, crime labs to examine evidence, and—of course—the charging power to flip witnesses and induce plea bargains. The accused typically has an overworked defender with little or no capacity to investigate; in many cases, the accused is in jail. Even the names attached to criminal cases show the power imbalance: *State v.*

⁵⁴ 5 Jeremy Bentham, *Rationale of Judicial Evidence, Specially Applied to English Practice* 318 (1827)(Mill’s annotation).

⁵⁵ Of course, the reader may wonder whether greater cooperativeness among lawyers would enhance the search for truth and the protection of rights across a wide range of cases. That is an excellent question, and it is part of the reason that I have doubts about the adversary system. See David Luban, *Lawyers and Justice: An Ethical Study* 67-92 (1988); Luban, *Legal Ethics and Human Dignity* 19-64 (2007).

⁵⁶ This is an important lesson from Judith Shklar, *Faces of Injustice* (1992) and Amartya Sen, *The Idea of Justice* (2009).

⁵⁷ Green, *Why Should Prosecutors Seek Justice?*, *supra* note , at 625-37.

Defendant, People v. Defendant, United States v. Defendant. Because of the power imbalance, it is essential that prosecutors not take victory as their sole goal. Call this the *power theory*.

The other theory focuses not on the power imbalance between the government and the accused, but the special duty of the executive to govern justly and impartially. That is the theory in the *Berger* case, which I quoted earlier: the prosecutor “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.”⁵⁸ Call this the *sovereignty theory*.

In my view, neither theory tells the whole story. The sovereignty theory doesn’t explain why prosecutors seeking victory in an adversary contest where the defense is doing the same aren’t “governing impartially.” Why isn’t procedural justice in the adversary system all the justice that prosecutors need to seek? Surely part of the explanation is the power imbalance: giving the state most of the cards in a purely competitive contest where the only goal is victory means that it will win more often than it should. So the sovereignty theory needs the power theory to back it up—otherwise, it doesn’t adequately explain why prosecutors should seek justice not victory.

On the flip side, the power theory doesn’t explain what’s wrong with a pro-government power imbalance, which, after all, many people might think is the best way to fight crime. The answer must be that we want more of government than fighting crime: we want government to bend over backwards to achieve fairness and avoid collateral damage to the innocent in the war against crime. In other words, the power theory needs the sovereignty theory to back it up.

So the two theories really need each other. But even combining them leaves out something essential, and that is that the stakes are so much higher in criminal law than anywhere else. We have one of the world’s harshest criminal justice systems, with long sentences, draconian conditions of confinement, zero interest in rehabilitation, loss of rights to convicted felons even after they serve their time, and stigma that follows convicts forever, blighting their chances to make a fresh start. As everyone knows or should know, the United States currently has more people locked up than any nation in history, both per capita and in absolute numbers.

But the United States also has a constitution built on principles of limited government and individual rights. It’s an interesting puzzle how the same country that traditionally fears government abuse and rallies around the libertarian slogan “don’t tread on me!” can be also so addicted to harsh punishment—but this isn’t the occasion to address the puzzle, and I will simply refer you to James Whitman’s superb book *Harsh Justice*, which tries to solve the puzzle.⁵⁹

Instead, I want to emphasize that the protection of individual rights from government abuse is a key part of our political tradition, and the harshness of our

⁵⁸ 295 U.S. at 88.

⁵⁹ James Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (2003).

punishments makes the protection of rights in the criminal process a matter of life and death. That's why both the power imbalance in the criminal justice system and the government's commitment to impartiality matter so much. "Seek justice not victory" weaves together all three concerns: Prosecutors shouldn't exploit the power imbalance, they should care immensely about the rights of the accused, including the substantive right to stay out of jail when you are innocent, because of the enormously high stakes in their cases. Every good prosecutor understands that she holds years of a person's life in her hands.

Obviously, prosecutors aren't responsible for mass incarceration—they deal with criminal cases retail, not wholesale, and if legislatures keep ratcheting up punishments that is not the prosecutor's doing. But the prosecutor is the gatekeeper of the system, the one who decides which cases go from the paddy wagon to the courtroom. The prosecutor's conscience is the invisible guardian of our rights, just as the defense lawyer is the visible guardian. What made Bibb's conduct in the Palladium case so remarkable is that here the invisible guardian became visible.

IV. Is Hierarchy Process? – or, Who Decides What Justice Is?

I hope I have adequately explained why prosecutors must seek justice, not merely victory. But you may think that I've left out one crucial piece of the story: Bibb was working in a law office, and his superiors in the chain of command did not agree with him. Granted that prosecutors must seek justice, who decides what justice is? Isn't that a decision for the boss, not for an Assistant D.A.?

When I blogged about Bibb and the Palladium case in 2008, several ethics experts objected that I was ignoring the hierarchy of the D.A.'s office. John Steele, a founder of the blog *Legal Ethics Forum*, put it this way:

Suppose... a subordinate lawyer thinks that the evidence doesn't meet the high threshold a prosecutor should have before trying a defendant -- but the supervisory lawyer disagrees. ...

Should the subordinate lawyer accede to the supervisor's orders and try the case, ask to be moved to another case, resign from the organization, or secretly subvert the supervisor's orders while pretending to follow them?

The only answer I can't support is the last one. It's deceit on the supervisor, deceit on the organization, and deceit on the court.⁶⁰

Law professor Marty Lederman, now a Deputy Assistant Attorney General in DOJ's Office of Legal Counsel, agrees:

The prosecutor here was the elected Manhattan D.A., who chose to go ahead with the prosecution. ... [L]et's assume, as we must here, that the D.A. was not persuaded by Bibb, and concluded that the defendant was guilty beyond

⁶⁰ John Steele, comment on David Luban, *When a Good Prosecutor Throws a Case*, Balkinization blog, June 24, 2008.

a reasonable doubt.

At that point, Bibb is acting as an *agent* of the D.A. If he firmly believes his supervisor was wrong, Steele is correct that he can -- perhaps should -- ask to be removed from the case, or resign. If he thinks the D.A. is willfully acting unlawfully, perhaps he should even make a stink about [it] to the relevant authorities or in public.

But act as an unfaithful agent? ...This may not be an ethics violation -- but it's a violation of one's contract with the principal, a violation of agency principles, and, as you concede, a fraud on the D.A.⁶¹

And Stephen Gillers wrote this:

Morgenthau speaks for the client, the People. He was elected not Bibb. It is analogous to the CEO or Board speaking for the company....

Would David support a Bibb-like act in the next case if another assistant threw the case honestly convinced that it is what justice required, ignoring contrary instruction, and it turned out that the freed person really was factually guilty? We law professors have the luxury of living in a more or less hierarchy-free world, but in the 'real life' of big law offices, including government ones, hierarchy is process.⁶²

It would take another lecture as long as this one to fully respond to these comments, but my basic answer is very simple. I agree that if you work in an organization you should generally respect the chain of command. And if your supervisors look at the same evidence and reach a different conclusion, you should earnestly consider whether their judgment might be better or more objective than yours.

But sometimes it may happen that your certainty remains unshakeable even when you have tried as hard as you can to see it their way. And sometimes the magnitude of the injustice is intolerable. Lastly, once in a great while, nobody can stop the injustice but you. At that point, the demands of conscience, and indeed of human decency, prevail over the office hierarchy.

In the Palladium case, nobody knew the facts and evidence as well as Bibb. He had met the witnesses, he had spent hours sizing them up, he had lived with the case for two years. Of course as an abstract matter he could have read it wrong and they could have been right. But in the real world, this abstract possibility was negligible. His supervisors had no information except what Bibb gave them.

Bibb rejects the conjecture that he was an unfaithful agent, because "given our many discussions about the matter" his superiors "certainly knew the result I wanted and intended to seek."⁶³ Why his supervisors didn't follow Bibb's recommendation remains a mystery, because they aren't talking and he isn't violating the privileges that apply to his communications with his superiors. Maybe

⁶¹ Marty Lederman, comment on David Luban, id.

⁶² Stephen Gillers, comment, id.

⁶³ E-mail from Daniel Bibb, April 27, 2010.

it was bureaucratic inertia. Maybe it was reluctance to confess error. Maybe no-one wanted to be the one to step up and pull the plug on the case. What seems inconceivable is that anyone in the D.A.'s office looked at Bibb's evidence as hard as he did and concluded beyond a reasonable doubt that he got it wrong.

As for the size of the injustice: if Bibb was right, two innocent men had spent 14 years in prison for a crime they hadn't committed, and were looking at many more years. The injustice doesn't get much grosser than that.

Next, compare the magnitude of whatever wrong Bibb did by throwing the case. It isn't large. As I hope I have made clear, "throwing the case" meant that he did what he could to make sure that the witnesses testified and the truth came out. The "deceit on the supervisor," if it existed, lay in letting the supervisor believe that Bibb was going to let truthful testimony stay buried. This strikes me as a trivial sin, if it is a sin at all. The deceit on the court was nonexistent.

Finally, Bibb was almost surely the only one who could have gotten the witnesses to testify. If he withdrew, Lemus and Hidalgo would likely still be in prison. Most lawyers I've spoken with about this case instinctively think that if you can't in good conscience go forward with a case, the only ethical thing to do is withdraw. With due respect, I think this dodges the full force of the dilemma: withdrawing would simply perpetuate the injustice. There's a familiar law school joke about what students should do if they have to guess at an answer on the MPRE: when in doubt, always pick the second most ethical of the four choices. In the Palladium case, that would have been withdrawing.

The same is true of another proposed solution: Bibb should have presented the case with full adversarial vigor, but then told the judge his own personal view that the men are innocent.⁶⁴ But in this case, proceeding with full adversarial vigor would mean not talking the witnesses into testifying or, if they did testify, going after them in cross-examination to discredit what they said. Either way, the result would likely be a grave injustice.⁶⁵

V. The Socratic Ideal

This takes me to my final question, perhaps the hardest question in legal ethics. What role does conscience play in lawyer's ethics, when conscience presses one way but the professional rules press the other?

In the western philosophical tradition, the first and greatest discussion of conscience is the *Apology* of Socrates, as related by Plato. Standing accused before

⁶⁴ Melanie D. Wilson, *Finding a Happy Medium Between a Prosecutor Who Believes the Defendant Didn't Do It and a Boss Who Says That He Did*, 103 Nw. U. L. Rev. Colloquy 65, 69-70 (2008).

⁶⁵ This is quite apart from the technical problem that ethics rules forbid lawyers from stating their personal opinion of cases. MR 3.4(e). In the actual Palladium case, the judge at one point did ask Bibb what he thought, and he replied, "The position of the District Attorney is...." When the judge responded "But what do you think?" Bibb again answered, "The position of the D.A.'s office is...." Bibb interview, April 14, 2010. Presumably, his message got across.

an Athenian court, Socrates told the jurors about his *daimon*, “a sort of voice that comes to me, and when it comes it always hold me back from what I am thinking of doing, but never urges me forward.”⁶⁶ Socrates explains that his *daimon* “always spoke to me very frequently and opposed me even in very small matters, if I was going to do anything I should not.”⁶⁷ What Socrates was describing is the voice of conscience.

The basic principle of Socratic ethics is that it is worse to do wrong than to suffer wrong.⁶⁸ In the *Apology*, Socrates reminds his jurors of two episodes that nearly cost him his life. Once, when he held a public office, the Athenians wanted to put some generals on trial illegally, and Socrates was the only one to oppose them. “I thought I must run the risk to the end with law and justice on my side, rather than join with you when your wishes were unjust....”⁶⁹ On another occasion, the dictators of Athens ordered Socrates and some others to arrest a man named Leon and bring him to be illegally executed. As Socrates reminds the jury, “when we came out of the rotunda, the other four went to Salamis and arrested Leon, but I simply went home.”⁷⁰

Both times, Socrates defied public authority to avoid participating in wrongful criminal punishments. The examples no doubt infuriated his jurors, because of course Socrates was arguing that his own conviction would be unjust, and the examples were an ironic rebuke to those who were prepared to convict him.⁷¹ Ironic or not, the examples show us something crucial: *the paradigm case of conscience lies in refusing to acquiesce in the wrongful conviction of the innocent.*

Of course I am not comparing Dan Bibb to Socrates. Bibb is an unpretentious, plainspoken lawyer, and he would undoubtedly find the comparison embarrassing and absurd. Hopefully any of us would. My point is the striking fact that when Socrates wants to show his conscience at work, he picks examples where public authorities wanted him to participate in wrongful convictions. You might say that these are the original conscience cases.

Bibb was not a chronic malcontent. He was a career prosecutor who never wanted to be anything else. At one point, he said to me, “I’ve become a case. It’s the worst thing in the world—being known for just one thing. Forget all the good I did, all the prosecutions over the years, all the bad guys I put behind bars.”⁷² I didn’t quite know what to say, because of course the Palladium case was the reason I was talking with him. But I got his point, and it is an important one. Conscience isn’t the

⁶⁶ Plato, *The Apology of Socrates*, in *Plato I: Euthyphro, Apology, Crito, Phaedo, Phaedrus* 115 (H. N. Fowler trans. 1914), *31d.

⁶⁷ *Id.* at 139, *40a.

⁶⁸ Plato, *Gorgias*, *473a-475e.

⁶⁹ *Apology*, *supra* note __, at 117, *32b-c.

⁷⁰ *Id.* at 117, *32d.

⁷¹ After the jury convicted him, Socrates further infuriated the jurors by proposing that his punishment should consist of free meals for life in the city hall. *Id.* at 129, *36d. They sentenced him to death. Socrates concluded that death must not be so bad, because his conscience had not spoken to him to tell him he shouldn’t have defended himself the way he did. *Id.* at 139-41, *40a-b.

⁷² Bibb interview, April 14, 2010.

special property of moralists and saints. It isn't the property of humanitarian liberals with refined sensibilities. (Bibb let me know that he is a conservative, and prosecuting felonies is not the career choice of delicate people.) If you're lucky, you may never encounter a conscience case, although I suspect that prosecutors encounter them more often than they recognize. The test of character is whether when you do you can be stubborn enough and creative enough to rise to the occasion.