

Fall 2010

The Conscience of a Prosecutor

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Recommended Citation

David Luban, *The Conscience of a Prosecutor*, 45 Val. U. L. Rev. 1 (2010).

Available at: <https://scholar.valpo.edu/vulr/vol45/iss1/1>

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Lecture

THE CONSCIENCE OF A PROSECUTOR

David Luban*

Dedicated to the memory of Fred Zacharias

In this lecture, I want to ask some very large and fundamental questions about the role of conscience and a lawyer's own moral convictions, and what to do if they conflict with the lawyer's professional obligations. I also want to ask what those professional obligations are for prosecutors in an adversary system of criminal justice. Finally, I shall raise questions about whether a lawyer working in an organization ought to defer her judgment to higher-ups in the organization.

But I am going to focus these large inquiries through 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 District Attorney's ("D.A.'s") office, Daniel Bibb, was assigned to reexamine two men's murder convictions because of new evidence.¹ The men had been in prison for more than a decade, and the new evidence showed that they might be victims of a horrible case of mistaken identity, as defense lawyers and a tenacious police detective had maintained for years. After an exhaustive twenty-one-month investigation, Bibb became convinced they were not

* University Professor and Professor of Law and Philosophy, Georgetown University Law Center. This article is an expanded version of the Tabor Lecture that I delivered at Valparaiso School of Law in April 2010. 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. After I had posted an earlier version of this article on SSRN and Berkeley Electronic Press, one of the defense lawyers, Steve Cohen, contacted me and gave me his perspective on the case, which I have incorporated into the present version. I am very grateful to him for taking the time to write and talk with me. Thanks as well to Professors Bob Condlin, Bruce Green, Deborah Rhode, Brad Wendel, and Melanie Wilson for comments on the earlier version. In the summer of 2010, I presented a version of this paper to the Aksaray (Turkey) Bar Association as part of a legal ethics conference organized by the bar associations of Ankara and Aksaray as well as the University of Ankara. I wish to thank Professors Ioanna Kuçuradi and Gülriz Uygur for discussions of the case, as well as Professor Tomo Morigiwa for his helpful comments.

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=all [hereinafter Weiser, *Doubting Case*].

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guilty. But he could not 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," Bibb said, "To lose."²

As he explained to the reporter, Bibb helped defense lawyers connect the different pieces of evidence. He persuaded exculpatory witnesses to testify, 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.³ At that point, Bibb said, "I'm done . . . I wanted nothing to do with it."⁴ Bibb eventually resigned—although he had been happy with his career as a prosecutor.

After this startling story appeared in the *Times*, New York disciplinary authorities filed a complaint against Bibb; eventually he was cleared of disciplinary charges.⁵ Currently, Bibb is in private practice.

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.⁶ David Lemus, who the D.A.'s office re-tried over Bibb's objection, was acquitted by a jury and released after spending fourteen years in prison.⁷ Subsequently, he sued New York City for wrongful imprisonment, and the city settled for \$1.2 million.⁸ Hidalgo also sued, and reportedly settled for more than twice that amount.⁹ Their lawsuits were based on powerful proof that the police detective investigating the crime had from the very beginning ignored evidence that another man, Thomas "Spanky" Morales, was the real shooter. When new evidence of mistaken identity surfaced later, the D.A.'s office compounded the error by dragging its feet and defending

² *Id.*

³ *People v. Lemus & Hidalgo*, 2005 N.Y. Misc. LEXIS 3611, at *1 n.1, *83 (Sup. Ct. N.Y. County Oct. 25, 2005).

⁴ Weiser, *Doubting Case*, *supra* note 1.

⁵ Benjamin Weiser, *Lawyer Who Threw a City Case Is Vindicated, Not Punished*, N.Y. TIMES, Mar. 5, 2009, at A23, available at <http://www.nytimes.com/2009/03/05/nyregion/05da.html> [hereinafter Weiser, *Threw a City Case*].

⁶ 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> [hereinafter Hartocollis, *Witness Confesses*].

⁷ 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> [hereinafter Hartocollis, *Man Convicted*].

⁸ *Man Awarded \$1.2 Million After Spending 14 Years Behind Bars for Wrongful Conviction*, BOSSIP, Dec. 30, 2009, <http://bossip.com/197716/man-awarded-1-2-million-after-spending-14-years-behind-bars-for-wrongful-conviction/>.

⁹ Benjamin Weiser, *Settlement for Man Wrongly Convicted in Palladium Killing*, N.Y. TIMES, Mar. 31, 2009, at A19, available at <http://www.nytimes.com/2009/03/31/nyregion/31palladium.html> [hereinafter Weiser, *Settlement*].

the convictions.¹⁰ From the defense point of view, Bibb's assignment to reinvestigate the case came far too late, and his moral dilemma arose because he was instructed to defend convictions in the face of overwhelming evidence of innocence that defense lawyers had developed over many years. In the opinion of defense lawyer Steven Cohen, "Frankly, there was no[t] a prosecutor in the DA's Office who could have preserved those convictions."¹¹ Cohen rejects the view that Bibb threw the case, because "by the time we got to a hearing the result was all but pre-ordained."¹²

Bibb disputes Cohen's view that his investigation was unnecessary; he points to several key witnesses whose evidence he developed.¹³ In any case, even if the result of the hearing was a foregone conclusion, that would not make Bibb's dilemma less real. He was still ordered to defend convictions of men that he was sure were innocent; in that situation, no one can afford to think that their own actions are irrelevant. But that is getting ahead of the story.

I. THE PALLADIUM MURDER

Before turning to issues of ethics and theory, it will be useful to understand the facts of the case. 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 and returned with friends and guns. In the wee hours of the morning, two of the gunmen opened fire on bouncers standing outside the club, killing 23-year-old Mark Petersen and wounding a second bouncer.¹⁴

How did police come to arrest Lemus and Hidalgo for the Palladium murder? The two men claimed they did not even know each other; Hidalgo said he had never been to the Palladium, and Lemus said he

¹⁰ See *People v. Morales*, 2006 N.Y. Misc. LEXIS 2812, at *12-15 (Sup. Ct. N.Y. County Sept. 22, 2006) (laying out the history of the investigative and prosecutorial efforts). Judge Bonnie Wittner's opinion certainly was that the investigative and prosecutorial efforts were botched. *Id.*

¹¹ E-mail from Steven M. Cohen to author (June 2, 2010, 07:49 PM) (on file with author).

¹² *Id.*

¹³ See E-mail from Daniel Bibb to author (Aug. 11, 2010, 05:18 PM) (on file with author) [hereinafter Bibb E-mail, 5:18] (mentioning witnesses Eddie Troche, Mike Colomer, Darrell Gray, and Danila "Sanchez" Troche); E-mail from Daniel Bibb to author (Aug. 11, 2010, 01:57 PM) (on file with author) [hereinafter Bibb E-mail, 1:57] (mentioning Troche, Colomer, and Gray).

¹⁴ Stone Phillips & Dan Slepian, *Murder at the Palladium: Were Two Men Wrongly Convicted in New York Nightclub Case?*, DATELINE NBC (Sept. 8, 2008, 9:06:58 PM ET), http://www.msnbc.msn.com/id/6913736/ns/datetime_nbc-crime_reports/.

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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 led to eyewitnesses picking them out of photo arrays that detectives showed them. At trial, multiple eyewitnesses were able to identify Lemus and Hidalgo.¹⁵

There was one other damning piece of evidence against Lemus: he bragged to a woman named Delores Spencer that he had committed the Palladium killing. She told a friend who told the police. Police had Spencer tape subsequent phone calls with Lemus.¹⁶ 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?"

Lemus: "Because you know that I know that you know." [3 short puffs]¹⁷

Lemus and Hidalgo's attorney did not put on any witnesses, and after a day's deliberation, the jury convicted the men of second-degree murder. They each drew sentences of 25 years to life.¹⁸

That might have been the end of the story except for a series of coincidences. Around the time the jury convicted Lemus and Hidalgo, New York City detective Robert Addolorato was investigating a Bronx drug and extortion gang called C&C.¹⁹ 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.²⁰

Addolorato reported what he heard to the Manhattan D.A.'s office but was told that it did not match the known facts.²¹ Understanding

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *People v. Morales*, 2006 N.Y. Misc. LEXIS 2812, at *8-10 (Sup. Ct. N.Y. County Sept. 22, 2006).

²⁰ *Id.*

²¹ Herein lies a story. At the time of the murder, an anonymous caller told Manhattan police that "Joey" and "Spanky" were the shooters. Jane Fritsch & David Rohde, *In the Face of Evidence – A Special Report; Another Confessed in Killing, But 2 Men Remain in Prison*, N.Y. TIMES, July 25, 2000, at B6, available at <http://www.nytimes.com/2000/07/25/nyregion/face-evidence-special-report-another-confessed-killing-but-2-men-remain-prison.html>.

Victoria Garcia, the investigating detective matched the nickname "Spanky" to a man named Franky Figueroa, but excluded him as a suspect when she discovered that he was incarcerated the night of the shooting. *Morales*, 2006 N.Y. Misc. LEXIS 2812 at *3-4. Lemus seemed like a far more obvious suspect, because of his boast to Delores Spencer that he had done the shooting. Detective Garcia followed up on Lemus, and "Spanky" dropped through the cracks.

quite well that snitches sometimes lie, Detective Addolorato let it drop 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. Pillot agreed to cooperate, and his lawyer worked out what prosecutors call a “queen for a day” agreement: Pillot would sing, and none of what he said could be used to prosecute him.²²

Pillot told the investigators that he and Morales were indeed the real Palladium shooters. Furthermore, he provided details that matched the facts: he remembered that his own gun had jammed and that he ejected a cartridge—and police in fact found an ejected cartridge on the scene.²³ Additionally, 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 1.²⁴

Addolorato went back to the D.A.’s office, and, after some initial resistance, the D.A. agreed to a new hearing on the Palladium shooting: a so-called “440 hearing,” referring to section 440.10(g) of the New York Code, which provides for motions to vacate a judgment when new evidence is discovered. 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.²⁵ Even back at the original trial, prosecutors had raised the possibility of a third perpetrator.²⁶ Justice Gold found Pillot’s claim that he and Morales were the sole perpetrators “entirely unworthy of belief.”²⁷

Then, in 2000, an inmate named Richie Feliciano read a news story about the Palladium case.²⁸ 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. Feliciano had been the “mediator” attempting to defuse the conflict between Morales and the bouncers—or perhaps the decoy distracting the bouncers.²⁹ In fact, Feliciano said he was the one who drove Morales’s car away from the scene. It seemed

²² Hartocollis, *Witness Confesses*, *supra* note 6.

²³ *Id.*

²⁴ *Morales*, 2006 N.Y. Misc. LEXIS 2812 at *9.

²⁵ *Id.* at *10–12.

²⁶ Hartocollis, *Witness Confesses*, *supra* note 6, Dec. 7, 2007 correction.

²⁷ *People v. Lemus & Hidalgo*, 2005 N.Y. Misc. LEXIS 3611, at *20 (Oct. 25, 2005).

²⁸ Interview with Steven Cohen (July 24, 2010). Cohen indicated that Feliciano read the *New York Times* article by Fritsch and Rohde cited *supra* at note 21. *Id.*

²⁹ Cohen Interview, *supra* note 28. The description of Feliciano as a mediator is Cohen’s. Bibb believes that Feliciano’s role in the Palladium shooting was to distract the bouncers. E-mail from Daniel Bibb to author (Apr. 27, 2010, 4:05 PM) (on file with author).

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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 was present during Joey Pillot's queen-for-a-day revelation that he and Spanky Morales had committed the Palladium murder. As Cohen explains it, his initial interest as a prosecutor

was not that two innocent men were in jail, but that we wanted to use Joey as a witness in the C&C prosecution. I was concerned that we would need a state plea agreement as well as a federal agreement, because we couldn't fold the Palladium murder into a RICO charge.³⁰

But the Manhattan D.A.'s office rebuffed Cohen when he and Addolorato alerted them about Pillot's confession. When Cohen went into private practice as a litigator at the New York law firm Kronish Lieb Weiner & Hellman (now Cooley Godward Kronish), the case continued to weigh on his mind. "This is the only case I left behind that keeps me up at night, that plays on my conscience," Cohen told a reporter in 2000.³¹ After Lemus's mother began calling him, Cohen agreed to represent Lemus and Hidalgo pro bono.³² Addolorato, the police detective who first heard Joey Pillot's information, also stuck with the case for sixteen years, and he was in the courtroom when Lemus was ultimately acquitted.³³ In Cohen's view, Addolorato was the true hero in the Palladium case.³⁴

Word of Feliciano's admission soon got to Cohen and to Lemus's trial lawyer, Eric Sears; as Cohen observes, the New York City criminal bar is a small world.³⁵ In 2003, they went back to the Manhattan D.A.'s office and spoke with ADA Stephen Saracco, the head of the Cold Case Unit who had argued the state's side at the 440 hearing. Cohen urged Saracco that it was time for a new trial. Saracco asked, "Are you saying that these guys are actually innocent, or that they have a right to a new trial?" Cohen replied that they were actually innocent.³⁶ Saracco agreed to open a new investigation, which he thought would take six weeks and

³⁰ *Id.*

³¹ Fritsch & Rohde, *supra* note 21.

³² Cohen Interview, *supra* note 28.

³³ Hartocollis, *Man Convicted*, *supra* note 7.

³⁴ Cohen Interview, *supra* note 28.

³⁵ *Id.*

³⁶ *Id.*

lead to a new 440 hearing.³⁷ But Saracco retired, and the D.A.'s office assigned the investigation 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.³⁸

In fact, Bibb's investigation took not months, but years. Bibb describes the investigation as follows: "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."³⁹ 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 talking big to impress a woman. He was twenty-two years old at the time, and Spencer was thirty—a married mother of three children who, in Lemus's words, "liked the gangster type and thugs."⁴⁰ Lemus wanted to show Spencer that he was a tough guy and a player, not just a "knucklehead with a bus pass."⁴¹ He had seen the news about the Palladium shooting on television, and it was the first thing that came to his mind. Here is an exchange between Lemus and *NBC Dateline* producer Dan Slepian, whose special on the Palladium case gave it a national profile:

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."

³⁷ Affirmation of Eric M. Sears at ¶13, *People v. Lemus & Hidalgo*, 2005 N.Y. Misc. LEXIS 3611 (Sup. Ct. N.Y. County Oct. 12, 2004), available at http://www.cooley.com/files/tbl_s5SiteRepository/FileUpload21/837/14_eric_affirmation.pdf.

³⁸ Phillips & Slepian, *supra* note 14.

³⁹ Letter from Daniel Bibb to Alan Friedberg, Departmental Disciplinary Comm., N.Y. Sup. Ct. App. Div. 2 (Nov. 7, 2008) (on file with author) [hereinafter Bibb Letter].

⁴⁰ Fritsch & Rohde, *supra* note 21.

⁴¹ Phillips & Slepian, *supra* note 14.

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Slepian: "Why say that?"

Lemus: "I was trying to portray this image of somebody that I wasn't."

....

Lemus: "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."⁴²

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 and difficult. Bibb, quite properly, will not talk about confidential office conversations.

The D.A.'s office did not dispute that Morales was the shooter. Rather, along the lines of the third-perpetrator theory, they told 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 the judge asked Bibb, 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."⁴³

Bibb explains that cases in which prosecutors delay indictment are extremely vulnerable to speedy trial and due process motions, and by this time the D.A.'s office had collected significant evidence against Morales in the Palladium case for many years.⁴⁴

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Cf.* *People v. Singer*, 376 N.E.2d 179 (N.Y. 1978). In *Singer*, the court stated that: An untimely prosecution may be subject to dismissal even though, in the interim, the defendant was not formally accused, restrained or incarcerated for the offense. Thus the State due process requirement of a prompt prosecution is broader than the right to a speedy trial guaranteed by statute and the Sixth Amendment.

Id. at 186 (citations omitted).

Bibb says that he personally had no problem charging Morales, and in fact he was pushing for the indictment.⁴⁵ 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.”⁴⁶ Presumably others in the office disagreed because they concluded that the indictment would be dismissed.

Finally—a few weeks before the new 440 hearing—police arrested Morales for his role in the Palladium homicide, and Bibb drew the assignment to prosecute him.⁴⁷ As the D.A.’s office foresaw, when Spanky Morales was finally indicted the judge dismissed the case on a so-called *Singer* speedy trial motion.⁴⁸ Because of double jeopardy, Morales was safe and could testify in David Lemus’s retrial. Defense attorney Cohen believes that the reason the office finally indicted Morales is obvious: his apparent guilt was going to come out in a matter of months at Lemus’s and Hidalgo’s 440 hearing, and it would look awful if prosecutors had allowed Morales to go unindicted.⁴⁹

The Palladium case was already an embarrassment to the D.A.’s office as news stories over the years, including Dan Slepian’s *NBC Dateline* special, had painted the convictions as a spectacular miscarriage of justice.⁵⁰ 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. First, as mentioned earlier, back in 1990 an anonymous tipster phoned a hotline to say that Spanky Morales was the shooter.⁵¹ No one ever pursued that lead, but the note was in the file. Second, soon after the shooting, Morales’s sister-in-law told police that Spanky was involved.⁵² Third, three of the state’s own eyewitnesses had identified Morales from a photo array.⁵³ However, Police Detective Victoria Garcia

⁴⁵ Bibb E-mail, 5:18, *supra* note 13.

⁴⁶ Telephone Interview with Daniel Bibb (Apr. 14, 2010).

⁴⁷ Bibb E-mail, *supra* note 29.

⁴⁸ *People v. Morales*, 2006 N.Y. Misc. LEXIS 2812, *27 (Sup. Ct. N.Y. County Sept. 22, 2006).

⁴⁹ Cohen Interview, *supra* note 28.

⁵⁰ See Phillips & Slepian, *supra* note 14 (“Fourteen years after the Palladium murder, it’s up to the judge to decide did these men get a fair shake from the system. Should they be set free? Those are questions that weigh heavily on all those who have been drawn into the case.”)

⁵¹ See *supra* note 21.

⁵² See Bibb Interview, *supra* note 46 (explaining that Morales’s sister-in-law went to the police out of anger because, while her husband was in the military in Iraq, Spanky—her husband’s brother—raped her).

⁵³ *People v. Lemus & Hidalgo*, 2005 N.Y. Misc. Lexis 3611, *39 (Sup. Ct. N.Y. County Oct. 25, 2005).

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explained that she did not write a report about the photo array or a wanted card for Morales because it would weaken the state's case against Lemus and Hidalgo.⁵⁴ It seemed that the police had bungled the investigation and then ignored evidence in its own files.

All this led Lemus's and Hidalgo's attorneys to argue that the state had committed *Brady* violations by not revealing the evidence showing that Morales was the guilty man. Here, however, Bibb was not inclined to play along with the defense. In his own words, he "fought the *Brady* allegations tooth and nail," cross-examining Lemus's attorney, Eric Sears, for two full days.⁵⁵ Bibb argued that prosecutors told the defense lawyers about Morales in a timely fashion, and the defense withdrew that portion of their *Brady* claim.⁵⁶ Thus, whatever ways Bibb "threw the case," admitting police misconduct was not one of them.

Bibb was clearly less comfortable advancing the state's theory that Morales, Lemus, and Hidalgo were all involved. That is not surprising because, as we now know, Bibb was convinced that they were not. "I came to believe that Hidalgo wasn't there. And if he wasn't there, he certainly couldn't have done it."⁵⁷ At one point, the judge asked Bibb, "Is there any information in your possession that ties the defendant with each other or the C and C gang[?]" and Bibb responded "Only in the most tenuous way."⁵⁸ 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."⁵⁹ 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

⁵⁴ *Id.* at *34-35. Garcia testified:

It's not in the best interest of the NYPD to put a wanted card on a possible perp[etrator]. . . . I know from experience that once you do that, if he was the right guy, and I agree that that is what the case is here, you would have lost the case, right there, it would have been over.

Id.

⁵⁵ Bibb Letter, *supra* note 39, at 5.

⁵⁶ *People v. Lemus & Hidalgo*, 2005 N.Y. Misc. Lexis, at *41-*42.

⁵⁷ Weiser, *Settlement*, *supra* note 9.

⁵⁸ Phillips & Slepian, *supra* note 14.

⁵⁹ *Id.*

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 [the] 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.⁶⁰

These are the tangled 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's firm Cooley Godward Kronish but also by pro bono attorneys from Dickstein Shapiro—but he did speak with them 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."⁶¹ Gordon Mehler, one of Lemus's lawyers, confirmed Bibb's account when he told a reporter that "If I make a mistake in my interpretation of what he said, he'll correct me If there's a piece of evidence that [bore] on another piece of evidence I'm talking about, he'll remind me of it. That's not something that a prosecutor typically does."⁶² 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 issue were prepared and

⁶⁰ Bibb E-mail, *supra* note 29.

⁶¹ Bibb Letter, *supra* note 39, at 5.

⁶² Weiser, *Doubling Case*, *supra* note 1.

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testified truthfully.”⁶³ 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.⁶⁴

Bibb did not try to undermine the eyewitnesses in his cross-examination. Both he and Cohen point out that he had a pragmatic reason for preserving their credibility; namely, that they would also be witnesses in his pending prosecution of Spanky Morales.⁶⁵ But according to Bibb, his basic motive was that he wanted to lose.

Cohen disputed that Bibb “shot over the heads of the enemy”:⁶⁶

[T]he notion that the ADA “threw the case” is not accurate and belied by [Bibb’s] conduct at the hearing and the positions he took before the judge. Frankly, there was no[t] a prosecutor in the DA’s Office who could have preserved those convictions. To suggest otherwise does a disservice to the men and woman, esp[ecially] Detective Addolorato, who worked so hard to see justice done.⁶⁷

Cohen nevertheless agrees that Bibb went through a genuine crisis of conscience, and adds: “I did come to like and respect Dan Bibb. He was an honorable person caught in a terrible situation.”⁶⁸

How adversarial was Bibb? He and Cohen disagree. Steven Cohen writes, “While Dan may want to believe that he ‘threw the case’, it sure didn’t look or feel that way in the courtroom.”⁶⁹ Bibb responds: “I

⁶³ Bibb Letter, *supra* note 39, at 5. Bibb names Eddit Troche, Mike Colomer, and Darrell Gray (a.k.a. Darrell Campbell) as reluctant witnesses. Bibb E-mail, 1:57, *supra* note 13.

⁶⁴ Bibb Interview, *supra* note 46.

⁶⁵ Bibb Letter, *supra* note 39, at 5; Cohen E-mail, *supra* note 11.

⁶⁶ Cohen Interview, *supra* note 28.

⁶⁷ Cohen E-mail, *supra* note 11.

⁶⁸ *Id.*

⁶⁹ *Id.*

would beg to differ. He has nothing to base his opinion on other than the hearing. He has never seen me try a case other than the hearing.”⁷⁰

However, Bibb acknowledges that:

[T]here were also some standard adversarial positions I had to take to satisfy my supervisors who were getting daily copies of the transcript delivered to them all the while knowing that the judge would rule in their favor. Some of those positions were taken half-heartedly and I knew the judge (who knows my courtroom take no prisoners style well) would realize that.⁷¹

Why did Bibb handle the case the way he did? Here is his own explanation, in a letter to bar disciplinary authorities:

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.⁷²

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.”⁷³ Bibb recalls the events leading to his decision:

Up until the day I was ordered to do the hearing I was confident that I would prevail in my efforts and that there would never be a hearing. I truly believed that common sense would prevail. . . . The day I was ordered to do the hearing was the worst day of what was then a 22 ½ year career as a prosecutor. After I left work that day I called a friend who is a civil engineer (and knows

⁷⁰ Bibb E-mail, 1:57, *supra* note 13.

⁷¹ Bibb E-mail, 5:18, *supra* note 13.

⁷² Bibb Letter, *supra* note 39, at 4.

⁷³ *Id.* at 5.

about the criminal justice system only what he sees on TV) and got together for a 'few' drinks with him. . . . I mulled over and discussed with my pal resigning in protest, refusing to walk into the courtroom and letting them fire me or throwing the hearing. . . . I decided then that's what I would do. That was in the first week of April 2005, a few weeks before the hearing began.⁷⁴

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."⁷⁵ Bibb, on the other hand, said that he didn't withdraw because "he worried that if he did not take the case, another prosecutor would – and possibly win."⁷⁶

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 minimally complying with her opponents' discovery requests—the civil counterpart to minimally fulfilling a prosecutor's *Brady* obligations. She points out connections between pieces of evidence to the opposing lawyers. The lawyer does it because she thinks the other side was right, and her client loses.

There is no question that the lawyer could and would be sued for malpractice. As for ethics violations, the lawyer could be charged with several: violating the requirement of competency;⁷⁷ the requirement that

⁷⁴ Bibb E-mail, 1:57, *supra* note 13.

⁷⁵ Weiser, *Doubting Case*, *supra* note 1.

⁷⁶ *Id.*

⁷⁷ MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002). Here and in the remainder of the paragraph I cite to the Model Rules rather than New York's Code of Professional

the client, not the lawyer, sets the goals of the representation;⁷⁸ the requirement of diligence (also known as “zeal,” although the Model Rules do not use that word in their text);⁷⁹ 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.”⁸⁰ 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.⁸¹ 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.⁸²

In short, the lawyer in private practice would face a mountain of ethics charges.

All the same prohibitions apply to a prosecutor, but there is one crucial difference: prosecutors are not 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: “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”⁸³ It appears in the Model Rules’ predecessor, the ABA Code of Professional Responsibility: “The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”⁸⁴ The same language appears in the ABA’s Standards for the Prosecution Function.⁸⁵

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

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.

⁷⁸ *Id.* R. 1.2(a).

⁷⁹ *Id.* R. 1.3.

⁸⁰ *Id.* R. 1.7(a)(2).

⁸¹ *Id.* R. 1.8(b).

⁸² *Id.* R. 8.4(c).

⁸³ *Id.* R. 3.8 cmt.

⁸⁴ MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1980), available at <http://www.abanet.org/cpr/mrpc/mcpr.pdf>.

⁸⁵ AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3-1.2(c) (3d ed. 1993) (“The duty of the prosecutor is to seek justice, not merely to convict.”).

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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.⁸⁶

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 is especially different from the criminal defense attorney's role, which most lawyers and scholars agree requires maximum zeal on the client's behalf.⁸⁷ Now in one way, this stark difference between the prosecutor's mission and the mission assigned to other advocates 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 point out 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 by definition bad guys, prosecutors who lock them up are, for that reason, good guys, and defense lawyers live under a perpetual cloud of suspicion, reflected in endless griping about clever lawyers who get crooks off on technicalities. Criminal defenders constantly face the question "[h]ow can you represent people like that?"—or the more sophisticated law student's version, "I understand why the system needs defense lawyers, but personally I could never do that kind of work." As for our conventional understanding of the adversary system, it envisions complete symmetry of obligation between the two sides: they are both supposed to fight as hard as they can to win.

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

⁸⁶ *Berger v. United States*, 295 U.S. 78, 88 (1935); see also Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 *FORDHAM URB. L.J.* 607, 612-13 (1999). Although *Berger* is the *locus classicus* of the "seek justice not victory" principle, it dates back at least to the nineteenth century. *Id.*

⁸⁷ William H. Simon is a prominent exception who does not distinguish the criminal defender's obligations from those of other lawyers and whose overall view is that *all* lawyers should be guided, like prosecutors, by the ethical principle of seeking justice not victory. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (2000).

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 is a delphic quality to the “seek justice not victory” formula. 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.”⁸⁸ 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 should not proceed without probable cause, they should make a reasonable effort to ensure that the accused has been informed of his rights, they should not try to get an unrepresented person to waive rights, and they should do timely *Brady* disclosures.⁸⁹ They should not subpoena defense lawyers unless they have to.⁹⁰ And they should refrain from inflammatory public comments about their cases—a rule all too often honored in the breach.⁹¹ In most jurisdictions, that is the extent of their ethical obligations. These rules leave loads of leeway for prosecutors to seek victory regardless of justice, without facing even a whiff of professional discipline. As Bibb notes, “I could have done a lot of things both inside and outside the courtroom that would have been perfectly legal and ethical to frustrate their [the defense lawyers’] efforts. The fact is that I didn’t do them”⁹²

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.”⁹³ The formal ethics rules do not go even that far.

And yet I have spoken with a lot of prosecutors who take “seek justice not victory” seriously, even if they are not 100% confident they know exactly what it requires. At the very least, as Zacharias’s first point indicates, they know you should not try to keep people behind bars if you think they didn’t do it.

In 2008, the ABA House of Delegates agreed. The ABA added two Model Rules to deal with prosecutors’ obligations when new evidence

⁸⁸ Letter from Oliver Wendell Holmes to John C.H. Wu (July 1, 1929), in JUSTICE HOLMES TO DOCTOR WU: AN INTIMATE CORRESPONDENCE, 1921-32, at 53 (1947).

⁸⁹ MODEL RULES OF PROF’L CONDUCT R. 3.8(a)-(d) (2008).

⁹⁰ *Id.* R. 3.8(e).

⁹¹ *Id.* R. 3.8(f).

⁹² Bibb E-mail, 1:57, *supra* note 13.

⁹³ Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 49 (1991).

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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 to initiate an investigation.⁹⁴ If the evidence is clear and convincing, the prosecutor must “seek to remedy the conviction.”⁹⁵ Two prominent scholars have argued that these rules do not 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 is not clear and convincing.⁹⁶

These rules are rather new, and to date only three states have adopted them.⁹⁷ Furthermore, it seems perfectly clear that the ABA was not thinking of Bibb’s unorthodox tactics as the way a lawyer should “seek to remedy the conviction.”⁹⁸ 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: sixty interviews, fifteen states, eleven prisons, one county jail.⁹⁹ 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 will find out that the men 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 the defenders do not succeed, the truth stays buried. *That* is the ethical obligation of a public prosecutor?

I hope your answer to my rhetorical question is no, 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

⁹⁴ MODEL RULES OF PROF’L CONDUCT R. 3.8(g).

⁹⁵ *Id.* R. 3.8(h).

⁹⁶ Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 508 (2009).

⁹⁷ *E.g.*, DEL. LAW. RULES OF PROF’L CONDUCT R. 3.8(d)(2) (2010); WIS. RULES OF PROF’L CONDUCT FOR ATTORNEYS, SCR 20: 3.8(g)–(h)(2010); *see also* COLO. R. CIV. P. app. ch. 18–20 (omitting the duty to initiate an investigation and thus establishing a slightly weaker duty than in ABA Model Rules of Professional Conduct 3.8(g) and (h)).

⁹⁸ MODEL RULES OF PROF’L CONDUCT R. 3.8(h).

⁹⁹ Bibb Letter, *supra* note 39, at 2.

Court's decision in *Hickman v. Taylor*, that "a learned profession" is not supposed "to perform its functions . . . on wits borrowed from the adversary."¹⁰⁰

I think the Palladium case is a good illustration of how absurd this dictum is. Bibb persuaded reluctant witnesses—not all of whom were solid citizens—to testify truthfully.¹⁰¹ Would not doing so have impeded the search for truth? As I noted above, Steve Cohen believes that the favorable result in the 440 hearing was "pre-ordained,"¹⁰² but Bibb responds, "I am sure you know that nothing is pre-ordained in the criminal justice system."¹⁰³ It really doesn't matter who is right. Bibb feared a grotesque injustice—otherwise he had no motive to hold his fire any way—and for a lawyer facing such a situation, thinking the result is pre-ordained is a luxury you cannot afford, whether or not it is true. Getting key witnesses onto the stand is exactly what was required to seek justice not victory in this case.

One hundred and eighty years ago, John Stuart Mill criticized jurists who looked at the adversary system through "fox-hunting eyes," as if it were nothing more than "a sort of game, partly of chance, partly of skill."¹⁰⁴ That fox hunter's outlook seems to be the Supreme Court's 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 is odd to have the prosecutor discuss with the defense how the evidence fits together, and odder still to tell witnesses what he plans to ask them on cross-examination. Notice something important, though: in this case, Bibb's tactics advanced the search for truth and the

¹⁰⁰ 329 U.S. 495, 516 (1947) (Jackson, J., concurring). 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.*

¹⁰¹ Bibb Interview, *supra* note 46. Cohen doubts that Bibb had a better relationship with the witnesses than he did, after his many years working on the case. Cohen Interview, *supra* note 28. Bibb, however, disagrees. Bibb E-mail, 1:57, *supra* note 13.

¹⁰² Cohen E-mail, *supra* note 11.

¹⁰³ Bibb E-mail, 1:57, *supra* note 13.

¹⁰⁴ 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 317-18 (Mill annot.) (1827).

protection of rights. These are precisely the two values that defenders of the adversary system argue it is there to promote.¹⁰⁵

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

An important point is lurking in the background here. One reason 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 there ever will be. Philosophers who spend their lives thinking about the theory of justice don't agree about whose theory is right. But you do not need a philosophical theory of justice to recognize gross injustice when you see it. Our sense of injustice is more basic, less controversial, and less dependent on philosophical arguments than propositions about justice.¹⁰⁶ "Avoid injustice" might be a more useful imperative than "seek justice," even if it is less catchy and less inspirational. It is probably what prosecutors actually do when they take "seek justice not victory" seriously.

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.¹⁰⁷ 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,

¹⁰⁵ Of course, the reader may wonder whether greater cooperation 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, *LEGAL ETHICS AND HUMAN DIGNITY* 19-64 (2009) [hereinafter LUBAN, *LEGAL ETHICS*]; DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 67-92 (1988).

¹⁰⁶ JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* (1990); see also AMARTYA SEN, *THE IDEA OF JUSTICE* ix, 21 (2009) (asserting that "prevention of manifest injustice" is more important than seeking perfect justice). Roberto Unger once wrote about the "basic, common experience in modern society . . . of being surrounded by injustice without knowing where justice lies"—an acknowledgment that our sense of injustice is keener than our understanding of justice. ROBERTO MANGABEIRA UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 175 (1976); see also STUART HAMPSHIRE, *INNOCENCE AND EXPERIENCE* 106 (1989) (arguing that even though people cannot agree on a theory of the good, everyone can recognize the great evils). Hampshire writes, "every population of intelligent persons should be a patchwork of minorities in the pursuit of deviant conceptions of the good, held together by a shared respect for fairness." *Id.* at 132.

¹⁰⁷ Green, *supra* note 86, at 625-37.

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. 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 on 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.”¹⁰⁸ Call this the *sovereignty theory*.

In my view, neither theory tells the whole story. The sovereignty theory does not explain why prosecutors, seeking victory in an adversary contest where the defense is doing the same, are not governing impartially. Why isn’t procedural justice within in the adversary system all the justice 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 even when the defense would prevail in a more even context. So the sovereignty theory needs the power theory to back it up—otherwise, it does not adequately explain why prosecutors should seek justice not victory.

Conversely, the power theory does not explain what is wrong with a pro-government power imbalance, which, after all, many people think is the best way to fight crime. The answer must be that we want more from 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.

In short, each theory needs the other. But even combining them leaves out something essential: the stakes are so much higher in criminal law than anywhere else. We have one of the world’s harshest criminal justice systems, with lengthy sentences, draconian conditions of confinement, little if any 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

¹⁰⁸ *Berger v. United States*, 295 U.S. 78, 88 (1935).

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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 is an interesting puzzle how the same country that traditionally fears government abuse and rallies around the libertarian slogan “don’t tread on me!” can at the same time be so addicted to harsh punishment – but this is not the occasion to address the puzzle.¹⁰⁹

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 punishments makes the protection of rights in the criminal process a matter of life and death. That is why the power imbalance in the criminal justice system and the government’s commitment to impartiality are so important. “Seek justice not victory” weaves together all three concerns. Prosecutors should not exploit the power imbalance, and 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 these cases. Every good prosecutor understands that she holds years of a person’s life in her hands.

Obviously, prosecutors are not responsible for mass incarceration – they deal with criminal cases retail, not wholesale, and legislatures’ addiction to ratcheting up punishments is not the prosecutor’s fault. 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 to this point, I have left out one crucial piece of the story: Bibb was working in a law office, and his superiors in the chain of command disagreed with him. Granted that prosecutors must seek justice, who decides what justice is? Isn’t that a decision for the boss rather than an Assistant D.A.?

¹⁰⁹ For an ambitious attempt at an explanation, see generally JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003) (tracing the difference between U.S. and European penal practices to a different cultural approaches to egalitarianism).

When I blogged about Bibb and the Palladium case in 2008, several ethics experts objected that I was wrong to ignore 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.¹¹⁰

Law professor Marty Lederman, a former Deputy Assistant Attorney General in the Department of Justice'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 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

¹¹⁰ John Steele, Comment to *When a Good Prosecutor Throws a Case*, BALKINIZATION (June 24, 2008, 6:37 PM), <http://balkin.blogspot.com/2008/06/when-good-prosecutor-throws-case.html>.

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of agency principles, and, as you concede, a fraud on the D.A.¹¹¹

And Stephen Gillers wrote this:

Morgenthau speaks for the client, the People. He was elected not Bibb. It is analogous to a 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.¹¹²

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—at any rate a decent organization—you should generally respect the chain of command. And if your supervisors reach a different conclusion than you about the same evidence, 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, no prosecutor 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 might have read the evidence wrong and his supervisors might have been right. But in the real world, this abstract possibility was negligible. His supervisors had little or nothing to go on except the

¹¹¹ Marty Lederman, Comment to *When a Good Prosecutor Throws a Case*, BALKINIZATION, (June 25, 2008, 7:36 AM), <http://balkin.blogspot.com/2008/06/when-good-prosecutor-throws-case.html>.

¹¹² Stephen Gillers, Comment to *When a Good Prosecutor Throws a Case*, BALKINIZATION, (June 25, 2008, 8:34 PM), <http://balkin.blogspot.com/2008/06/when-good-prosecutor-throws-case.html>.

information that Bibb gave them plus the facts that the defense lawyers and Detective Addolorato had compiled over the years.

Bibb rejects the accusation that he was an unfaithful agent, because “given [their] many discussions about the matter” his superiors “certainly knew the result [he] wanted and intended to seek.”¹¹³ Why his supervisors did not follow Bibb’s recommendation remains the great mystery of the Palladium case. Maybe 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. Cohen suspects that decision makers in the office regarded defense efforts as a personal attack on the D.A.’s office and the legendary district attorney Robert Morgenthau.¹¹⁴ 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 Lemus and Hidalgo were the killers.

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

Next, consider 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 Bibb did what he could to make sure that the reluctant witnesses testified and the truth came out. And he refrained from discrediting the truthful witnesses in cross-examination. The wrong, in other words, consisted almost entirely of improving the search for truth. 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 feared that no other prosecutor could have or would have gotten all the witnesses to testify. If he withdrew, Lemus and Hidalgo might still be in prison. Most lawyers I have spoken with about this case instinctively think that if you cannot 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: what if withdrawing would perpetuate the injustice? There is 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.

¹¹³ Bibb E-mail, *supra* note 29.

¹¹⁴ Cohen Interview, *supra* note 28.

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Of course, if Steve Cohen is correct, no prosecutor could have defended the Lemus and Hidalgo convictions, and Bibb could have safely withdrawn. Bibb did not see it that way; “he worried that if he did not take the case, another prosecutor would—and possibly win.”¹¹⁵ Moreover, Bibb’s previously quoted letter points out that withdrawing would have caused further delays and left Lemus and Hidalgo in prison longer.¹¹⁶ Finally, withdrawing from a case receiving intense media scrutiny would have been tantamount to revealing the sharp split between Bibb and his superiors, and he may have concluded that that would do more damage to his office than the course he actually pursued.¹¹⁷

Alternatively, Bibb might have presented the case with full adversarial vigor, but then told the judge his own personal view that the men were innocent.¹¹⁸ But in this case, proceeding with full adversarial vigor would mean not persuading the witnesses to testify or, if they did testify, going after them in cross-examination to discredit what they said. Either way, the result might have been a grave injustice.¹¹⁹ In any event, it strikes me as odder than what Bibb did for a lawyer to discredit new exculpatory evidence as strongly as possible, present a closing statement arguing that the evidence supports the convictions (as full adversarial vigor requires), but then assert a personal belief—based, presumably, on the same evidence—that the men are innocent.

The basic problem with viewing hierarchy as process is that organizations, including good organizations, can malfunction badly. The record of the Palladium case, reviewed in the published judicial opinions as well as numerous news stories, shows astonishing resistance to the truth in the police and the D.A.’s office stretching over many years. Detective Garcia had information that Morales and Pillot were the shooters virtually from the beginning of the investigation but did not properly memorialize it. The D.A.’s office repeatedly rebuffed Detective

¹¹⁵ Weiser, *Doubling Case*, *supra* note 1.

¹¹⁶ Bibb Letter, *supra* note 39, at 4.

¹¹⁷ Bibb also makes clear that with bills to pay he did not want to leave his job, which would have been the inevitable outcome of a withdrawal that embarrassed the D.A.’s office. *Id.* This, of course, is not a justification for choosing the course of action he did, but it is a perfectly understandable excuse.

¹¹⁸ See Melanie D. Wilson, *Finding a Happy and Ethical Medium Between a Prosecutor Who Believes the Defendant Didn’t Do It and the Boss Who Says That He Did*, 103 NW. U. L. REV. 65, 69–70 (2008) (proposing that prosecutors present the opinions of their office to the court but then offer their own independent perspective).

¹¹⁹ In the Palladium case, the judge at one point did ask Bibb what he thought, and he replied, “[t]he position of the District Attorney is” Bibb Interview, *supra* note 46. Then the judge responded “[b]ut what do you think?” *Id.* Bibb again answered, “[t]he position of the D.A.’s office is” *Id.* Presumably, his message got across.

Addolorato and, later, Cohen. At the first 440 hearing, the office pressed the third-shooter theory, despite the lack of evidence of any connection between Lemus, Hidalgo, and Morales. Steve Cohen points to “years of Detective Addolorato (who was still then with the NYPD), the defense team and Dan Slepian (from Dateline NBC) amassing evidence demonstrating that the wrong men were in jail, of producing that evidence to the Manhattan DAs office, of watching as the evidence was ignored, [and] of being subjected to unwarranted and inexcusable delay.”¹²⁰ Cohen believes that even the assignment of Dan Bibb to reinvestigate the case as thoroughly as he did was a delaying tactic by the D.A.’s office.

What explains the evident dysfunction in a generally impressive office? Cohen provides background about why the D.A.’s office was originally resistant to his information about Joey Pillot’s confession: there was a long-standing rivalry between the D.A.’s office and the Eastern and Southern Districts’ U.S. Attorney’s offices (and, he adds, the FBI). “The complexity was that we [the U.S. Attorney’s office] were bringing gang cases [when Cohen was involved in the federal investigation of C&C]. Manhattan thought we were treading on their turf; they had the expertise—and in part they were right about that. We had resolved this friction in the Bronx, but not in Manhattan.”¹²¹ Then, over the years, as the injustice to Lemus and Hidalgo became greater, it became harder rather than easier for the office to admit error or incompetence—a familiar psychological dynamic in which people become invested in their own earlier decisions.¹²²

Cohen writes, “During my years dealing with the Palladium case, I was continually reminded of the work of Stanley Milgram and Philip Zimbardo, the social scientists who conducted obedience experiments. Unfortunately, (I fear) what might be learned from this tragedy is missed time and again.”¹²³ The experiments he refers to are classics of social psychology, studying the dynamics by which structures of authority and role undermine moral judgment.¹²⁴ In Milgram’s obedience experiments,

¹²⁰ Cohen E-mail, *supra* note 11. The author corrected minor typos in this quote from the e-mail, which Cohen wrote on a Blackberry.

¹²¹ Cohen Interview, *supra* note 28.

¹²² See Jonathan L. Freedman & Scott C. Fraser, *Compliance Without Pressure: The Foot-in-the-Door Technique*, 4 J. PERSONALITY & SOC. PSYCHOL. 195 (1966) (describing one version of this phenomenon, called the “foot-in-the-door” effect of which Freedman and Fraser’s is the classic experiment).

¹²³ Cohen E-mail, *supra* note 11.

¹²⁴ For discussions of psychological obedience studies, see generally STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (Perennial 2004) (1974); ARTHUR G. MILLER, *THE OBEDIENCE EXPERIMENTS: A CASE STUDY OF CONTROVERSY IN SOCIAL SCIENCE* (1986); Philip G. Zimbardo, *A Simulation Study of the Psychology of Imprisonment Conducted at*

subjects ordered to administer escalating, possibly lethal electrical shocks to other subjects (who were actually confederates of the experimenter – and the shocks were fake) found it very hard to break off. Indeed, two-thirds of them went all the way to the highest voltage. Milgram's explanation was that "if he breaks off, he must say to himself: 'Everything I have done to this point is bad, and I now acknowledge it by breaking off.' But if he goes on, he is reassured about his past performance."¹²⁵ This may well have been the psychology in the D.A.'s office. Even if hierarchy is process, it can be a terribly flawed process: good when it works, but incapable of self-correction when it does not.

V. THE SOCRATIC IDEAL

I now turn 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.¹²⁶ Standing accused before an Athenian court, Socrates told the jurors about his *daimon*, "a sort of voice that comes to me, and when it comes it always holds me back from what I am thinking of doing, but never urges me forward."¹²⁷ Socrates explained 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 . . ."¹²⁸ 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.¹²⁹ 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

Stanford University, STANFORD PRISON EXPERIMENT, <http://www.prisonexp.org/> (last visited July 28, 2010) (discussing the Stanford Prison Experiment). Zimbardo's more recent book discusses the Stanford Prison Experiment as well as other relevant studies in social psychology. PHILIP G. ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* (2008). For my analysis of these and other experiments relevant to organizational pathologies, see DAVID LUBAN, *LEGAL ETHICS*, *supra* note 105, at 239–97.

¹²⁵ MILGRAM, *supra* note 124, at 149.

¹²⁶ *The Apology*, in PLATO, *EUTHYPHRO · APOLOGY · CRITO · PHAEDO · PHAEDRUS* 61–146 (G.P. Goold ed., Harold North Fowler trans., Harvard Univ. Press rev. ed. 1990) (1914).

¹²⁷ *Id.* at 115.

¹²⁸ *Id.* at 139.

¹²⁹ *Gorgias*, in PLATO, *LYSIS SYMPOSIUM GORGIAS*, 247–533 (G.P. Goold ed., W.R.M Lamb trans., Harvard Univ. Press rev. ed. 1983) (1925).

when your wishes were unjust”¹³⁰ 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”¹³¹

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 about to convict him.¹³² 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 illustrates 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 liked his job and believed in its value. Bibb let me know that he is a conservative with a strong law and order bent. Cohen describes Bibb as the kind of prosecutor who did not habitually resolve borderline judgments in a defendant’s favor. Bibb may well have gone into the Palladium investigation inclined to defend the convictions if the evidence of innocence was less than clear. That would explain why his investigation was so long and thorough—from Cohen’s standpoint, longer than it needed to be, given the amount of evidence the defense had already amassed showing that Morales and Pillot were the true culprits and had nothing to do with Lemus and Hidalgo.¹³³ As a veteran of the office who had worked with Stephen Saracco in the Cold Cases Unit, Bibb knew about the Palladium case, and he was obviously familiar

¹³⁰ *Apology*, *supra* note 126, at 117.

¹³¹ *Id.*

¹³² *Id.* at 129. 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.* 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 should not have defended himself the way he did. *Id.* at 139–41.

¹³³ See Cohen Interview, *supra* note 28 (“From my perspective, two-thirds of the interviews were unnecessary, on issues that weren’t germane.”). Bibb responds that the only way he could know that was to do the interviews. Bibb E-mail, 1:57, *supra* note 13. Bibb acknowledges that he had completed the most important interviews in 2003, and had already concluded that Lemus and Hidalgo deserved a new trial. *Id.*

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with the office's many years of stubbornness. It must have been much harder for Bibb to accept that he was being ordered to defend the indefensible than a non-prosecutor outsider, faced with the same evidence, might find plausible. What matters is that, in the end, Bibb was bigger than the role his office assigned him.

Cohen remarks, "No doubt, the experience of representing the [D.A.'s office] was emotional torture for ADA Bibb (as well as humiliating), and I am certain that ADA Bibb had a crisis of conscience at some point shortly before the hearing."¹³⁴ As mentioned earlier, Bibb decided to throw the case in April 2005, a few weeks before the hearing, but, as he relates it, his conclusions about the case developed much earlier:

As far as my "crisis of conscience" goes, I came to believe that the convictions should be set aside and the indictments dismissed (but not necessarily in their innocence) by the end of 2003. Most of the important witnesses had been interviewed by then, especially Troche and Gray. . . . In July 2003 . . . I told [Cohen] what Troche said and offered my opinion that Spanky's admissions to Troche placed him in the role Lemus played and, therefore, called into question the identifications of Lemus. . . .
. . . . I argued as much in the many meetings with my supervisors beginning in 2004. I really began to forcefully argue my beliefs in a meeting with my direct supervisor in April 2004.¹³⁵

Cohen remarked to me that Bibb's demeanor at the hearing showed signs of strain that reminded him of Stanley Milgram's experimental subjects, who visibly struggled with the dilemma of whether to obey orders that are obviously harmful to an innocent person. Bibb agrees that he was under considerable strain:

And as far as stress goes, I can't even begin to describe it. I'd been in courtrooms sitting across from guys who were multiple murderers, trying to get a jury to convict him [sic] of all those homicides and didn't feel any stress whatsoever. This was just different. When I think back on it I sometimes wonder (as does my wife) how I

¹³⁴ Cohen E-mail, *supra* note 11.

¹³⁵ Bibb E-mail, 1:57, *supra* note 13.

survived the whole mess. If I had it to do over again I think I would just quit the office or refuse to do the hearing. Being out of work would have been a hell of a lot less stressful.¹³⁶

At one point, Bibb remarked 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."¹³⁷ I did not 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 is not the special property of moralists and saints. It is not the property of humanitarians with refined sensibilities—prosecuting felonies is not the career choice of delicate people. If you are 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.

¹³⁶ Bibb E-mail, 5:18, *supra* note 13.

¹³⁷ Bibb Interview, *supra* note 46; *see also* Bibb E-mail, *supra* note 29 (describing recent experiences where strangers identify him because of his connection to the case).