

Fall 2015

Prosecutors and Victims: Why Wrongful Convictions Matter

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Recommended Citation

Jeanne Bishop and Mark Osler, *Prosecutors and Victims: Why Wrongful Convictions Matter*, 105 J. CRIM. L. & CRIMINOLOGY (2015).
<https://scholarlycommons.law.northwestern.edu/jclc/vol105/iss4/8>

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PROSECUTORS AND VICTIMS: WHY WRONGFUL CONVICTIONS MATTER

JEANNE BISHOP* & MARK OSLER**

Often, discussions of wrongful convictions focus almost entirely on the wrongfully convicted and ignore two important constituencies: prosecutors and crime victims. Both constituencies have unique connections to wrongful convictions and should be recognized as potentially powerful allies for change. Prosecutors are deeply committed to justice and to the outcomes of their cases; they can help identify and correct wrongful convictions and introduce policies to avoid wrongful convictions in the first place. Wrongful convictions matter to crime victims because convicting the wrong person leaves the real perpetrator free to commit more crimes, creates a new, innocent victim, and drains resources that could be devoted to victim services. The authors argue for a broader recognition of the strong interest prosecutors and crime victims have in avoiding wrongful convictions and a more robust role for both stakeholders in the discussion.

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INTRODUCTION

At the symposium held to celebrate the work of Rob Warden,¹ there was a singular and moving moment in which Warden was thanked by those exonerated through his work with students. They stood as living witnesses not only to a problem, but to a solution—and to the power of one man’s vision.

The dialogue about wrongful convictions naturally focuses on men and women like those who stood up that day as our hearts caught in our throats: those who are consigned to years in prison or even to a solemn promise of death despite the grievous errors that led to their convictions and sentences. Too often, though, our examination of the harm done by wrongful convictions starts and ends with the wrongfully convicted themselves. In the end, wrongful convictions matter, too, though, both to prosecutors and to crime victims—or at least they should. By ignoring these constituencies, advocates against wrongful convictions bypass groups that could be powerful allies for change. Just as importantly, by ignoring these interests to favor a simpler narrative, prosecutors and victims may both undermine the credibility of the criminal law process and miss out on a wholeness of heart that comes only with recognition of fuller and more complex realities.

In this article, we explore the complex interactions that prosecutors and victims have with wrongful convictions and ask that they be included in this important discussion.

For prosecutors, the motive to avoid wrongful convictions is at once deep and complicated. It is difficult to admit we are wrong; it is even more difficult when the thing we were wrong about was public and at the center of our work. Yet, that is what we are asking prosecutors to do when we ask them to work with those investigating a possible wrongful conviction. It is a right and fair thing to ask, because the integrity of convictions is in the ultimate interest of prosecutors, who need the public—as voters, jurors, and witnesses—to believe in and support their work.

¹ Press Release, Hilary Hurd Anyaso, Northwestern Univ., *Paying Tribute to an Advocate for the Wrongly Convicted* (May 5, 2014), <http://www.northwestern.edu/newscenter/stories/2014/05/paying-tribute-to-an-advocate-for-the-wrongfully-convicted.html>.

Part of prosecutors' resistance to working with those investigating wrongful convictions comes from the deep emotional commitment they have to the convictions they have obtained. This commitment is a result of their role as the party obtaining the conviction. But it is also a result of the criminal process itself. For those who bring the accusations of society, a mistake can have a terrible human cost. The implications of being *wrong* as a prosecutor—that someone will spend years in prison because of your error—is nearly unthinkable. The nature of this sobering task, inherent to the weight of judgment, explains both why prosecutors should care about wrongful convictions and why they sometimes hide exculpatory evidence or cling to a conviction even after it has been proven wrongful.²

Despite this deep conflict, prosecutors must be part of the coalition to address wrongful convictions if the movement is to have a broad and deep impact. Harnessing the inherent integrity of prosecutors to serve the cause of avoiding wrongful convictions can be remarkably powerful, as shown by Dallas County District Attorney Craig Watkins and others. To spread this movement, other elected DAs must be convinced of the crucial interest of justice that is served by identifying wrongful convictions.

The impact of wrongful convictions on crime victims and their families is similarly complex. Wrongful convictions matter to crime victims and, in cases of murder, to the families of victims, for three reasons. First, locking up the wrong person means that the real perpetrator has escaped justice and remains free to commit a similar crime and harm someone else. Second, convicting an innocent person creates yet another victim of the real perpetrator's crime—the person wrongfully convicted—and casts the original victim into the uncomfortable role of perpetrator. Lastly, the money spent to compensate those who have been wrongfully convicted—often, rightly so, in the millions of dollars—could be spent aiding victims and their survivors, whose needs include counseling, restitution for damage done, and a host of other resources.

This article takes a step toward understanding the complicated interaction between prosecutors, crime victims, and bad outcomes. It pays tribute to Rob Warden, someone who has worked with both prosecutors and victims in an effort to correct injustices and who has inspired us all to consider these relationships more closely. He understands the importance of each player in the drama of criminal law and cares deeply about the process as a whole. Our conviction that each part of the machine must be taken out

² Aviva Orenstein, *Facing the Unfaceable: Dealing with Prosecutorial Denial in Postconviction Cases of Actual Innocence*, 48 SAN DIEGO L. REV. 401, 408-417 (2011) (noting continued flaws in access to DNA evidence by prisoners such as "insurmountable hurdles" imposed by statute and resistance from prosecutors to consent).

and examined is an effort to reflect his meticulous focus and clear vision.

I. WRONGFUL CONVICTIONS AND THE SOUL OF A PROSECUTOR

A. THE COMMITMENT OF THE ACCUSERS

As Professors,³ we teach often-difficult lessons: how to evaluate a grieving widow as a potential witness, how to analyze photos of dead and damaged bodies objectively, and how to assess the relevance of facts that are often shocking. One of the more difficult lessons we instill, though, is earthy and troubling: That all of criminal law is tragedy. Every bit of it is tragedy. When a prosecutor wins a case, it does not undo the crime; no one has ever been un-raped or un-murdered by a prosecutor. The best prosecutors can hope for is to avoid such outcomes in the future through incapacitation, deterrence, or rehabilitation.⁴ It is difficult to be the person who is ground through the machinery of criminal law, but it is difficult and wearing to be the gears as well.⁵

Prosecutors who are doing their job right cannot avoid that raw human tragedy. They see, close up, the harm suffered by victims. They see the humanity of the accused and the pain that imprisonment will surely cause him, his family, and all who depend on him. Doing that well, though—and with eyes wide open to the compounding tragedy all around—can, and should, be emotionally draining. Taking on both the tragedy of the crime and the tragedy of its consequences exacts a price; it tears at the soul, a pain that must be private.

Piled on top of the heavy weight of tragedy and judgment for a conscientious prosecutor is the repulsive cost of being wrong. Being a prosecutor is comparable to being a surgeon, whose smallest slip-up can lead

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⁴ The same is true for defense attorneys. If their work leads to an acquittal for a guilty man or woman, there is a tragedy in that, and when an innocent person is acquitted, the rips and tears left by a brutal process are left behind on all involved. A guilty verdict's tragedy is most obvious of all.

⁵ Beyond the scope of this article is the cost of such tragedy-processing on other actors. For example, consider the reality of death penalty jurors. They are plucked from their lives, paid \$40 a day, *Texas Uniform Jury Handbook*, STATE BAR OF TEX., <http://www.dallascourts.com/juryinfo.asp?juryinfo=txjury> (last visited Sept. 27, 2015), and then expected to be able to look at a person in being—a living man or woman standing before them—and tell them that they should die.

to death. For prosecutors, a mistake can lead to that same result (in death penalty states), or to a lesser but still terrible wrong: the lengthy incarceration of an innocent person. It is this element that must lead to the total commitment that some prosecutors have to their cases and convictions; the alternative to being right is too awful to consider.

Adding to that commitment is the process itself. Consider the full scope of a case before too harshly condemning a prosecutor's commitment.⁶

First, an investigator brings the case to the prosecutor. This initial meeting is often a sales pitch: The agent wants the prosecutor to take the case he has been working on. If it is declined, after all, the work so far will have been for naught. The relative ages and experience of the prosecutor and the investigator can further amplify this dynamic. It isn't unusual for the prosecutor to be new and young and the investigator to be a grizzled veteran⁷—and it can be quite convincing to face a man twenty years your senior who has a gun. If the prosecutor agrees to take a case against a specific defendant, it isn't just a commitment to the case; it is a commitment to that investigator.⁸

From there, the prosecutor takes the case to the grand jury.⁹ She will face those twenty three people and explain why, exactly, the named defendant should face trial, conviction, and punishment.¹⁰ This is another commitment to the people in that room.

Next, the prosecutor must deal with the defense attorney, who is trying to negotiate a plea or even convince the prosecutor to drop the case. If she stands firm, seeking a conviction and a tough sentence, this is yet another promise she has made, now to an adversary she will likely face again.

After that is trial. The prosecutor will argue to the jury, facing them and pointing at the defendant while describing his wrongs. This is a public and

⁶ The day-to-day dynamic described here is not one of the traditional explanations for prosecutorial reluctance to cooperate with reexamination of cases. According to Aviva Orenstein, those explanations include finality and cost, structural incentives, fear of disrupting expectations and operations, a hyper-adversarial culture, and the personality profile of those attracted to the profession of prosecuting criminals. Orenstein, *supra* note 2, at 420–24.

⁷ Jeanne Bishop has viewed this situation first-hand on more than a few occasions.

⁸ It will be in the best interests of the line prosecutor to win and keep the good graces of the investigator, so that the prosecutor will continue to get good cases and the respect of the law enforcement partners she is counting on in court and on the street.

⁹ The federal system and some, but not all, states require felonies to be charged by a grand jury. The criminal grand jury rule is one of only three not to be incorporated from the Bill of Rights into the Fourteenth Amendment's Due Process requirements for the states. Suja A. Thomas, *Nonincorporation: The Bill of Rights After McDonald v. Chicago*, 88 NOTRE DAME L. REV. 159, 162 (2012).

¹⁰ Fed. R. Crim. P. 6.

thrilling moment: the essence of what we think of when we imagine criminal law or see it depicted in movies or television shows. The prosecutor in those moments shows no uncertainty; she can't. She is staking her own word on the outcome she is urging those jurors to create.

Finally, sentencing is at hand. Now the prosecutor will describe the precise punishment that should be meted out. It is here that she will stand just a few feet from the condemned and lay out what should happen to him: how many years of his life should be taken, and how that extinguishment of freedom (or life) should take place. That, perhaps, is the biggest commitment of all, bigger than the commitment already made to the investigator, to the grand jury, to the defense attorney, to the trial jury, and to herself; now she is making a promise to the one person who will bear the price she exacts.

Why are we surprised, after all of this, that prosecutors have a strong commitment to the conviction and sentence they have won?

And committed they are—sometimes, too committed. In some instances this commitment leads to concealing evidence that cuts against their case,¹¹ and other times it results in a refusal to accept that a convicted man is innocent, even when he has been cleared by DNA evidence.¹² This is not a new phenomenon: The over-committed prosecutor is literally Biblical. Jesus's prosecutor, Caiaphas, faced conflicting evidence¹³ and a sympathetic defendant who literally spoke in riddles.¹⁴ Frustrated, he remains committed to the case, telling the jury: "He has blasphemed! Why do we still need witnesses? Look, you yourselves have just heard the blasphemy! What is your verdict?" all delivered while tearing his clothes.¹⁵ The setting is ancient, but the reality of the overly-committed prosecutor lives on.

B. SOLVING THE PROBLEM OF PROSECUTORIAL OVER-COMMITMENT TO EXISTING CONVICTIONS

Prosecutors have two obvious interests in identifying wrongful convictions. First, they are pledged to the cause of justice,¹⁶ and the

¹¹ For example, the prosecutors of Senator Ted Stevens, in a very public case, still withheld exculpatory evidence from the defense. Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES, Apr. 7, 2009, at A1.

¹² Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOWARD L. J. 475, 476 (2006).

¹³ *Matthew* 26:60, *Mark* 14:56–59.

¹⁴ *Matthew* 26:64.

¹⁵ *Matthew* 26:65–66.

¹⁶ The commitment of prosecutors to the vague notion of "justice" allows for a stark distinction between theory and practice, of course. Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted From the Post-Conviction Pulpit*, 84 WASH.

conviction and sentencing of an innocent person is contrary to that role. Second, wrongful convictions—and especially those in which prosecutors resist reexamination—threaten the respect that the public holds for the criminal justice system.

Pulling against these interests, of course, are the commitments to a conviction described above. The over-commitment of prosecutors to existing convictions too often causes a specific problem relating to wrongful convictions: an unwillingness on the part of some prosecutors to release retained evidence or reopen consideration of a conviction once it has come under question.¹⁷ Rob Warden, in his own work, often had to battle this dynamic.¹⁸

Not all prosecutors suffer this reluctance, though. One notable leader in this area has been former Dallas District Attorney Craig Watkins.¹⁹ Watkins took the remarkable step of proactively reviewing cases from his office that had relied on DNA evidence—even where the defendant had never asked for such a review.²⁰ Watkins, whose own great-grandfather was executed by the state of Texas,²¹ created a “Conviction Integrity Unit” whose work has led to thirty three claimed exonerations.²²

Watkins is not the only (or the first) District Attorney willing to reopen old cases or broaden the use of DNA,²³ though he may be the most prominent.²⁴ The underlying moral imperative is clear and compelling:

L. REV. 35, 39–47 (2009).

¹⁷ Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 547–554 (2002); Orenstein, *supra* note 2, at 408–17.

¹⁸ See Rob Warden, *An Ideological Odyssey: Evolution of a Reformer*, 105 J. CRIM. L. & CRIMINOLOGY (forthcoming 2015) (*passim*).

¹⁹ While the authors admire Watkins’ work regarding reexamination of capital convictions, they have been critical of his other actions in the past. Mark Osler, *A Watkins Supporter Laments Leadership Shortcomings*, DALL. MORNING NEWS (Jan. 4, 2011), <http://www.dallasnews.com/opinion/latest-columns/20110104-mark-osler-a-watkins-supporter-laments-leadership-shortcomings.ece>.

²⁰ Yamiche Alcindor, *Man’s Exoneration Makes History*, USA TODAY, July 25, 2014, at 3A.

²¹ Molly Hennessy-Fiske, *Pursing Justice in a Flawed System*, L.A. TIMES, May 8, 2012, at A1.

²² Craig Watkins, *The Issues*, CRAIGWATKINS.ORG, <http://www.craigwatkins.org/issues/> (last visited May 12, 2015).

²³ Kreimer & Rudovsky, *supra* note 17, at 557.

²⁴ At the federal level, United States Attorney General Eric Holder took steps to allow better use of DNA, including the reversal of a Bush-era rule that allowed prosecutors to seek a waiver of future DNA testing from defendants. Jerry Markon, *Holder Will Reverse Bush-era DNA Policy*, WASH. POST, Nov. 18, 2010, at A4.

Prosecutors should resist the natural commitment to an established conviction that the process creates in cases where a wrongful conviction might have occurred.

Sometimes unnoticed is a dynamic that made Watkins' efforts much easier: He was reviewing cases brought by his predecessors.²⁵ The Conviction Integrity Unit was begun only months after Watkins took office²⁶ and prominently undid the work of the District Attorneys Watkins had fought for years as a defense attorney.²⁷ In an important way, Watkins was not admitting his own mistakes, but those of others.²⁸ The dynamics of commitment described in the preceding section did not apply to him; in fact, he had been on the opposite side. Here, we ask of prosecutors something even deeper and braver: that they systemically allow reexamination of their own work as well as those of prosecutors who preceded them.²⁹

Of course, that difficult task is even more complex than it might at first appear. The interest in having convictions be factually true rests generally on prosecutors as a group, but the consequences for an *individual* prosecutor who obtained a wrongful conviction can be harsh—e.g., one can expect that those who hide evidence or fudge the facts at trial will be sanctioned or fired.³⁰ We cannot change that incentive at the level of the wrongdoing prosecutor, so the practical moral imperative to ensure convictions are substantiated must rest with the head of the office.³¹ That officer of justice must admit when his office discovers individual mistakes to maintain the

²⁵ Those predecessors included the legendary law-and-order DA Henry Wade, who served for thirty-six years and is the “Wade” in *Roe v. Wade*. Wolfgang Saxon, *Henry Wade, Prosecutor in National Spotlight, Dies at 86*, N.Y. TIMES, Mar. 2, 2001, at B8.

²⁶ Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y. L. SCH. L. REV. 1033, 1040–41, n.21 (2011/2012).

²⁷ Chris McGreal, *US Law: Seeking Justice in a State that Likes Execution More than Exoneration: Texas's First Black DA is Concentrating on Putting Right Old Wrongs in Dallas*, THE GUARDIAN, Apr. 21, 2010, at 27.

²⁸ Many of those others had been hostile to him, too. The great majority of the prosecutors in his office had actively campaigned for his opponent in the first election he won. Dana Carver Boehm, *The New Prosecutor's Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence*, 2014 UTAH L. REV. 613, 630 (2014).

²⁹ It should be noted that Watkins' efforts are not formally limited to the review of his predecessors' work; the fact that it is his predecessors' cases being reviewed is a function of his being relatively new to the office.

³⁰ Or the consequences might be deeply emotional. One of the prosecutors involved in the Ted Stevens case committed suicide after the hidden evidence was uncovered and the scandal became public. Charlie Savage, *Prosecutor Who Pursued Stevens Case Kills Himself*, N.Y. TIMES, Sept. 28, 2010, at A19.

³¹ In most cases, this will be the elected District Attorney.

public's respect for the law and protect the legitimacy of the remainder of that office's work.

That imperative—of supporting work that may undermine the reputation of an individual prosecutor for the greater good of the office and the public—does not rest easily with the instinct chief prosecutors may have to “protect their people.” In other words, when the wrongful conviction advocates come calling, the value of loyalty often conflicts with the value of honesty. Despite the costs, the value of honesty should win out, and chief prosecutors should take that risk. Their oath is to the Constitution and to the public, not to protect those who work beneath them who may have done injustice.

How do we get chief prosecutors to support review of suspect convictions, then? The answer can't just be new law and ethical rules. Certainly, new laws such as the federal Innocence Protection Act of 2004³² and the near-universal adoption of DNA-access laws are good things.³³ So are ABA Model Rules of Professional Conduct 3.8(g) and (h), which place an affirmative duty on prosecutors to consider new evidence and seek to remedy wrongful convictions.³⁴ But it is structure that creates uniform justice. At least two new structures of process should be considered.

First, within prosecutors' offices themselves, tiered review systems should be implemented. In a tiered review system, extending the review process to include supervisors or others would help to avoid the resistance that line prosecutors have to reconsideration of convictions. Dana Carver Boehm has done an excellent job of setting out what a strong tiered structure might be, tracking in part the measures taken by Craig Watkins and others.³⁵ Boehm's excellent work provides a wonderful template for action.

Second, independent commissions should be created to review suspect convictions. Bruce Green and Ellen Yaroshefsky compellingly point to the examples of Canada, England, and North Carolina in establishing such commissions.³⁶ Such independent bodies provide appropriate institutional counterweights to prosecutorial intransigence; at the same time, though, these

³² The Innocence Protection Act of 2004 is a federal law that, in part, promotes the use of DNA testing by the states and established a grant program to help the states improve capital defense systems. 42 U.S.C. § 14163–14163e (2012).

³³ Orenstein, *supra* note 2, at 408.

³⁴ MODEL RULES OF PROF'L CONDUCT r. 3.8; *see also* Michele K. Mulhausen, *A Second Chance at Justice: Why States Should Adopt ABA Model Rules of Professional Conduct 3.8(g) and (h)*, 81 U. COLO. L. REV. 309, 315–16 (2010).

³⁵ Boehm, *supra* note 28, at 646–68.

³⁶ Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 490–93 (2009).

bodies operate best when prosecutors share the same interest in uncovering innocence and other forms of wrongful convictions.

We ask a lot of prosecutors. They are charged with carrying society's burden of accusation in the interest of safety and justice—a burden that can exact a high emotional cost. Asking them to examine their own work for error may seem like piling on, but in the end it is necessary if the project as a whole, this machinery for managing grave tragedy, is to hold together in the public eye and the private conscience.

II. WRONGFUL CONVICTIONS AND THE SOUL OF VICTIMS

A. THE COMMITMENT OF THE VICTIMS

No one chooses to be a crime victim: A perpetrator chooses his victim or victims—and, in the case of murder, a victim's survivors—who are involuntarily attached to the crime and the criminal against their will.

For this reason, victims start out in the process that follows the crime—the investigation and potential arrest, charging and prosecution of the perpetrator—in a vulnerable position. As victims move forward in that process, often that sense of powerlessness only increases.³⁷

Victims have little or no say in how law enforcement conducts its investigation or which theories, leads, or suspects it pursues. Victims are often not informed of potential suspects and learn the identity of the person arrested only after the fact of the arrest. Prosecutors, not victims, decide what legal charges to bring.³⁸ And prosecutors are often reluctant to share with victims much of the evidence that makes up the case, such as witness statements, police reports, or grand jury testimony setting out that evidence in detail.

Prosecutors may consult victims about certain limited aspects of the case, such as whether to reduce a criminal charge or offer a plea bargain to the defendant.³⁹ But for the most part, prosecutors make it clear to victims that it is not their case; they can offer opinions, but cannot make ultimate decisions about the handling or disposition of the case.⁴⁰

That puts victims in an extraordinary position of dependence and trust

³⁷ See Karen L. Kennard, *The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 CALIF. L. REV. 417, 417–18 (1989).

³⁸ See Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259, 1264 (2011).

³⁹ Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 324 (2007).

⁴⁰ See Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 283 (2003).

in relation to prosecutors. That trust and dependence starts from the earliest moment. After a crime has been committed, victims give information about the crime to law enforcement—but then assume a mostly passive role. If a perpetrator is not caught immediately after the crime, victims wait to hear if an arrest has been made. Once a suspect is arrested, victims wait to be summoned to testify at a preliminary hearing or grand jury hearing; to be notified if a plea bargain is being contemplated; or to testify at trial. They live in the hope and belief that the government is working hard and doing its best to find and bring to justice the person who committed the crime against them.

When law enforcement arrests a suspect, prosecutors assure victims that this is the person believed to have committed the crime. They dole out information to the victims supporting that theory—information the prosecutors have control over, and to which victims may have no access at all. When Jeanne Bishop asked the lead Assistant State's Attorney in her sister's murder case if she could see certain documents in the case, for instance, the Assistant State's Attorney told her, flatly, "No."

When a plea or trial finally comes, victims have the opportunity to see the prosecutor championing their cause, arguing for them, advocating for punishment for the person who hurt them. Victims identify with that man or woman who is on their side. They are bound to those prosecutors by gratitude.

Why are we surprised, after all of this, that victims are committed to the convictions and sentences prosecutors have obtained in their cases? The trauma to victims is all the worse when the convictions obtained in their cases turn out to be wrong.

B. THE PROBLEM OF WRONGFUL CONVICTIONS FOR VICTIMS

A particularly painful example of prosecutorial intransigence in the face of wrongful convictions, and its impact on victims' families, is the case of the decades-old murder of eleven year old Jeanine Nicarico in DuPage County, Illinois.⁴¹ The tragic case starkly demonstrates the reasons wrongful convictions are so damaging to crime victims and, in the case of murder, to their survivors.

On February 25, 1983, in Naperville, Illinois, Jeanine Nicarico was too sick to go to school and stayed home alone.⁴² Her older sister came home from school to find the house empty.⁴³ Two days later, Jeanine's body was

⁴¹ Donald Sevener, *A Capital Blunder*, CHI. READER, July 27, 1989, section 1 at 1.

⁴² Christy Gutowski, *Family and Friend Have Say*, DAILY HERALD, Oct. 7, 2009, section 1, at 1.

⁴³ *Id.*

found about seven miles from her home, along a prairie path.⁴⁴ She had been blindfolded, sexually assaulted and clubbed to death.⁴⁵

Police arrested two men, Rolando Cruz and Alejandro Hernandez.⁴⁶ They were each convicted of the crime and sentenced to death.⁴⁷ While their cases were pending, the actual killer—Brian Dugan—confessed.⁴⁸

Because the wrong men had been arrested for Jeanine's rape and murder, Dugan had been free to go on to commit a series of equally heinous crimes: the rape and drowning of twenty seven year old nurse, Donna Schnorr, in July, 1984;⁴⁹ three additional sexual assaults and other crimes;⁵⁰ and the murder of seven-year-old Melissa Ackerman in June, 1985.⁵¹

Dugan was arrested the same month Melissa Ackerman's body was found.⁵² He confessed to the murders of Schnorr and Ackerman and told prosecutors in an unofficial confession that he alone had committed the crime which had sent Cruz and Hernandez to death row, describing his attack with details not known to the public.⁵³

Prosecutors balked at the notion that the two men they had convicted were innocent.⁵⁴ Dugan was now facing the death penalty for the Schnorr and Ackerman murders and was attempting to plead guilty to a number of other crimes in exchange for life in prison instead, so prosecutors thought Dugan was "only trying to up the ante for his plea bargain," and were entirely

⁴⁴ Ted Gregory & Art Barnum, *Killer Making Case for His Own Death*, CHI. TRIB., Oct. 18, 2009, section 1 at 16.

⁴⁵ Art Barnum, *Brian Dugan's Confession to Killing Jeanine Nicarico is Read in Court*, CHI. TRIB., Oct. 15, 2009, section 1, at 11.

⁴⁶ Nat'l Registry of Exonerations, *Rolando Cruz*, UNIV. OF MICHIGAN LAW SCH., <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3140> (last visited Apr. 18, 2015).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ John Kass, *Dugan Plea Stirs up Dark Images of Past*, CHI. TRIB., July 29, 2009, section 1, at 2.

⁵⁰ Thomas Frisbie, *Probably the Coldest Human I Ever Met*, CHI. SUN-TIMES, Nov. 30, 2005, at 9.

⁵¹ Art Barnum, *Jury Hears From Slain Girl's Friend; Cruz Visits Court*, CHI. TRIB., Oct. 22, 2009, section 1 at 10.

⁵² Christy Gutowski, *Finally, a Confession: Dugan Says He and He Alone Killed Nicarico*, DAILY HERALD, July 29, 2009, section 1, at 6.

⁵³ Tom Pelton, *Turow Trying to Win New Trial for Hernandez in Nicarico Murder*, CHI. TRIB., Jan. 4, 1995, section 2 at 1.

⁵⁴ Nat'l Registry of Exonerations, *Alejandro Hernandez*, UNIV. OF MICHIGAN LAW SCH., <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3292> (last visited Apr. 18, 2015).

skeptical of the confession.⁵⁵ The Nicarico family followed suit, holding a press conference in April 1987 to reject Dugan's account and reaffirm their belief that Cruz and Hernandez had murdered Jeanine.⁵⁶

Cruz had been tried, convicted, and sentenced to death twice; the Illinois Supreme Court overturned both convictions for procedural reasons.⁵⁷ Cruz was acquitted at his third trial in 1995;⁵⁸ charges against Hernandez were dropped later that year.⁵⁹ The real killer, Brian Dugan, pled guilty in the Nicarico case in July 2009.⁶⁰ Even after that plea, prosecutors refused to say unequivocally that Dugan had acted alone and that Cruz and Hernandez were innocent and had been wrongfully convicted.⁶¹

Seven law enforcement officials who had pursued the cases against Cruz and Hernandez were indicted on charges that they had conspired to send one of the men, Cruz, to prison.⁶² Specifically, the trial focused on the prosecutors' false allegation that, on the eve of his trial, Cruz confessed to them that he had a "vision" of the crime that included details only the killer would know. They were acquitted.⁶³ Before their trial, the Nicarico family said they planned to sit in the gallery with the prosecutors' families.⁶⁴ "When you lose a loved one, it's one of the most horrendous things in your life," Jeanine's mother, Pat, told a reporter. "These [prosecutors] are the people who showed sensitivity. They helped us."⁶⁵

⁵⁵ Donald Sevener, *A Capital Blunder*, CHI. READER, July 28, 1989, section 1 at 1.

⁵⁶ Kevin Klose, *The Nicaricos Speak Out; Slain Girl's Parents Say 2 Convicted Are Guilty*, WASH. POST, Apr. 15, 1987, at G1.

⁵⁷ *Timeline of Nicarico Murder Investigation, Trials*, DAILY HERALD (Oct. 5, 2009), <http://prev.dailyherald.com/story/?id=308727>.

⁵⁸ *Police Perjury and Jailhouse Snitch Testimony Put Rolando Cruz on Death Row*, NW. UNIV. CTR. ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/rolando-cruz.html> (last visited Apr. 18, 2015).

⁵⁹ *Police Perjury and Jailhouse Snitch Testimony Put Alejandro Hernandez on Death Row*, NW. UNIV. CTR. ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/alejandro-hernandez.html> (last visited Apr. 18, 2015).

⁶⁰ Don Babwin, *Brian Dugan Pleads Guilty to 1983 Rape and Murder of Jeanine Nicarico*, HUFFINGTON POST (Aug. 28, 2009), http://www.huffingtonpost.com/2009/07/28/brian-dugan-pleads-guilty_n_246509.html.

⁶¹ Art Barnum, *Keep Dugan Story Out of Trial, Nicarico Prosecutors Urge Judge*, CHI. TRIB., Aug. 31, 1989, section 2 at 8.

⁶² Maurice Possley & Ken Armstrong, *Prosecution on Trial in DuPage*, CHI. TRIB., Jan. 12, 1999, section 1 at 1.

⁶³ Andrew Bluth, *Prosecutor and 4 Sheriff's Deputies Are Acquitted of Wrongfully Accusing a Man of Murder*, N.Y. TIMES, June 5, 1999, at A9.

⁶⁴ Possley & Armstrong, *supra* note 62.

⁶⁵ *Id.*

Cruz and Hernandez and a third co-defendant settled a federal civil rights lawsuit with DuPage County in September 2000 for \$3.5 million.⁶⁶ Every aspect of the initial miscarriages of justice in the Jeanine Nicarico murder case illustrates why wrongful convictions matter to victims.

1. Wrongful Convictions Allow the Real Perpetrator to Escape Justice and Remain Free to Harm Another Victim

Convicting the wrong person leaves the actual offender on the streets and thus able to commit more crimes. All the while that Rolando Cruz and Alex Hernandez were imprisoned for a crime they did not commit, the real perpetrator—Brian Dugan—was free to commit a sickening string of abductions, rapes, and murders.

In a comprehensive study of the impact of wrongful convictions on victims funded by the United States Department of Justice,⁶⁷ crime victims in wrongful conviction cases reported feeling guilty for the additional crimes the actual offender was able to commit while free.⁶⁸ In fact, the Innocence Project has documented forty seven rapes and nineteen murders committed by perpetrators who remained at large because someone else had been wrongfully convicted of their crimes.⁶⁹ One victim told interviewers, “I felt like I had kept a rapist on the streets . . . and failed the city. I failed everybody, and that was a burden that I put on myself and kept it there for probably the next eight years.”⁷⁰

2. Wrongful Convictions Create a New, Innocent Victim—the Wrongfully Accused—and Cast Victims in the Role of Perpetrator

The Nicarico family had been led to believe that Rolando Cruz and Alex Hernandez were the cold-blooded killers of their child. In fact, Cruz and Hernandez were victims of a false accusation.

In the U.S. Department of Justice-funded study of victim experiences of

⁶⁶ Ted Gregory, *DuPage Ready To Settle Cruz Prosecution Suits: \$3.5 Million For 3 Men In Nicarico Murder Case Called 'Go-away Money'*, CHI. TRIB. (Sept. 22, 2000), http://articles.chicagotribune.com/2000-09-22/news/0009220227_1_board-members-prosecutors-rolando-cruz.

⁶⁷ ICF INCORPORATED, *STUDY OF VICTIM EXPERIENCES OF WRONGFUL CONVICTION, Acknowledgments* (2013), <https://www.ncjrs.gov/pdffiles1/nij/grants/244084.pdf> [hereinafter STUDY].

⁶⁸ *Id.* at 45.

⁶⁹ Peter Modafferri, *When the Guilty Walk Free: The Role of Police in Preventing Wrongful Convictions*, POLICE CHIEF MAG. (Oct. 2010), http://www.policchiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2212&issue_id=102010#4.

⁷⁰ STUDY, *supra* note 67, at 45.

wrongful conviction,⁷¹ the authors quote one victim, “For [several] years, I had been quite comfortable with my role as the victim. When the exoneration happens, that exoneree becomes the victim, and I, the rape victim, become the offender. The roles switch, and it’s a role you don’t know what to do with.”⁷²

Another victim said that when she learned the wrong person had been convicted of assaulting her, “I was a mess. I was absolutely hysterical [and] distraught. This was way worse than being attacked . . . This was horrible because . . . now I was a perpetrator.”⁷³

3. The Cost of Wrongful Convictions Drains Resources Which Could Be Spent Aiding Crime Victims

Wrongful convictions can be hideously expensive, squandering resources that could be better devoted to serving the needs of crime victims. The county that prosecuted Rolando Cruz and Alex Hernandez spent millions of dollars to settle the men’s lawsuit for the lost years of their lives on death row. The State of Illinois spent hundreds of thousands of dollars to compensate the men for the time spent in custody when they were, in fact, innocent.

When former Illinois Governor George Ryan established a commission to study the death penalty, that body specifically did *not* consider the costs of the sentence.⁷⁴ But some of the authors of the substantial, detailed report brought it up anyway, observing that in murder cases, victims’ families often do not receive the services they need, that the horrific effects of their loved ones’ death can plague them for years after the event, and that, therefore, the cost of the death penalty to the State was indeed relevant.⁷⁵

Jeanne Bishop observed the dramatic interplay of costs and resources up close when a death penalty attorney called to ask for some help, not for his client, but for the mother of his client’s victim, who opposed the death penalty for her daughter’s killer. The lawyer represented a man who had stabbed his wife to death, leaving his three children without their mother. He was arrested and charged with the murder. The State sought the death penalty.

The mother of the female murder victim took guardianship of the three

⁷¹ *Id.* at iv.

⁷² *Id.*, at v.

⁷³ *Id.* at 44.

⁷⁴ OFFICE OF THE GOVERNOR OF ILL., REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT 11 (2002), http://illinoismurderindictments.law.northwestern.edu/docs/Illinois_Moratorium_Commission_complete-report.pdf (“[I]nitiating research in [the cost] area seemed unwise.”).

⁷⁵ *Id.* at 10–11.

grandchildren. She was sixty five years old. She had a medical condition that made it difficult for her to see, so that driving was dangerous. She lived in a small apartment on Chicago's South Side.

She was retired and had insufficient income to raise her grandchildren, who needed counseling, a bigger home, and money for college.

She did not want the death penalty for her daughter's killer; the grandmother opposed the death penalty based on her religious faith. She told prosecutors that what she really needed was counseling for her grandchildren, a bigger apartment, scholarship money for the children, and a ride to and from court. The cost of fulfilling her request would have been modest compared to the average cost of a death penalty case in Illinois, which was close to \$2 million at the time.⁷⁶

Prosecutors turned a deaf ear to that request. They told her that this was not her case; it was a case brought on behalf of the People of the State of Illinois.⁷⁷

Similarly, wrongful convictions can be vastly expensive. For instance, a seven-month joint investigation by the Better Government Association and the Center on Wrongful Convictions, tracking the cost of wrongful convictions between 1989 and 2010, found that those costs totaled \$214 million.⁷⁸ Nearly three-fourths of this sum comes from settlement awards and judgments (often taxpayer dollars); however, incarceration costs, court of claims costs, and lawyer fees are also included in this total.⁷⁹ Wrongful convictions in California within about the same time period cost approximately \$129 million.⁸⁰

The cost of wrongful convictions affects victims. Government budgets are a zero sum game. Spending money on one thing means less money for something else. The money spent to compensate people who were locked up for crimes they did not commit could be devoted instead to programs and services that could help crime victims like that struggling grandmother recover from injury and loss.

⁷⁶ DEATH PENALTY INFO. CTR., COSTS: COUNTIES USE ILLINOIS CAPITAL LITIGATION FUND TO COVER HIGH COSTS OF THE DEATH PENALTY (2007), <http://www.deathpenaltyinfo.org/node/2155>.

⁷⁷ See, e.g., *People v. Cochran*, 145 N.E. 207, 214 (Ill. 1924) ("The state's attorney in his official capacity is the representative of all the people.").

⁷⁸ John Conroy & Rob Warden, *A Tale of Lives Lost, Tax Dollars Wasted and Justice Denied*, BETTERGOV.ORG (June 18, 2011), http://www.bettergov.org/investigations/wrongful_convictions_1.aspx.

⁷⁹ *Id.*

⁸⁰ CAL. INNOCENCE PROJECT, *Wrongful convictions have cost California taxpayers \$129 million*, <http://californiainnocenceproject.org/2012/10/wrongful-convictions-have-cost-ca-taxpayers-129-million/> (last visited Apr. 18, 2015).

CONCLUSION

Criminal cases are a complex web of overlapping tragedies, all of which are compounded when a conviction is unsound. Though we too often think of victims and prosecutors as simple tools in the interest of societal retribution—the prosecutor as advocate and the victim as emotional witness—their true roles are deeper and more complex. Both are part of a process that systemically deepens their emotional commitment to a conviction, and that emotional commitment makes it harder to undo wrongful convictions. That dynamic of retrenched commitment that won't brook challenging facts is one of the criminal process's most tragic flaws.

In whole, we must recognize the strong interests that prosecutors and victims have in avoiding wrongful convictions and seek to encourage a more whole and true role for them in the drama of prosecution and review. Rob Warden's vision won't be realized until the humanity of victims and prosecutors becomes a part of that deepest search for truth: a search that recognizes mistakes.

