PROSECUTORIAL CRIMES AND CORRUPTION: THE (WHITE) ELEPHANT IN THE COURTROOM

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"*I became a prosecutor because I hate bullies. I stopped being a prosecutor because I hate bullies.*" - Paul Butler[1]

INTRODUCTION

I cringe whenever I hear someone smugly say, "Everyone in prison says he's (or she's) innocent." With few exceptions, these people have never worked with prisoners and are speaking from a place of sheer ignorance. I have worked with prisoners for over forty-five years, and my experience is that most of them own their crimes. And even when the sentence is longer and harsher than their white counterparts,[2] black prisoners suck it up and do the time.

But what about wrongfully convicted citizens—the actual *innocent* ones? Who are they, and how did they get entrapped in the prison industrial complex? How were they executed with scant or conflicting evidence against them?

While there is legitimate and overwhelming evidence of the questionable role of police in the systematic and dramatic increase in the U.S. prison population,[3] the prosecutor's office becomes a trap door for the thousands of citizens who get thrown on its doorstep. This article will explore the corruption and criminality that is fostered by the very system that includes the word "justice" in its moniker.

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1. PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 23 (2009).

2. David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 296 (2001).

3. Bruce L. Benson et al., *Police Bureaucracies, Their Incentives, and the War on Drugs*, 83 PUB. CHOICE 21, 22, 26 (1995).

I. REDEFINING PROSECUTORIAL MISCONDUCT

I believe there is a mistaken belief by the public—even by prosecutors themselves—that the job of a prosecutor is mainly to vigorously prosecute defendants.[4] I prefer to side with the American Bar Association: "The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."[5] I would also add they should be truth seekers. The prevailing view by those interacting with and victimized by the system is that prosecutors seek neither justice nor the truth.

I have all but ceased using the term "prosecutorial misconduct." The phrase totally minimizes the harm done by corrupt prosecutors and their practices. Misconduct is a term best used to describe a fourth-grader who throws a spitball across the classroom. The emotional, psychological, and financial harm done to wrongfully accused, convicted, or imprisoned citizens and their families is both inexcusable and incalculable. I prefer to use the term "prosecutorial aggression." It may be harsh, but in cases where prosecutorial corruption has led to death either by the state or by another inmate while wrongfully incarcerated, I have also accused rogue prosecutors of conspiracy to commit murder. If a layperson encouraged or participated in the planning or act of murder or attempted murder of a citizen, he or she would be charged accordingly based upon the law.[6]

Missouri has exonerated thirty-nine men and women.[7] I have varying levels of involvement with all of the St. Louis wrongful conviction cases of African Americans. I see the devastating impact upon their families—missing the bonding with their children, unable to participate in families gathering from births to funerals, the crushing of unfulfilled dreams, etc.

There will be some who say that it is the actions of a few bad apples in police departments or prosecutors' offices who shatter public trust. I assert that it's not about the atrocities of a few but the complicity of the many that is the real problem. It's also about the incestuous relationship between police and prosecutors to engage in immoral, unethical, and criminal behavior that must

4. *See* Steve Weinburg, *Breaking the Rules: Who Suffers When a Prosecutor Is Cited for Misconduct?*, CTR. FOR PUB. INTEGRITY (June 26, 2003, 12:00 AM), https://www.publicintegrity.org/2003/06/26/5517/breaking-rules [https://perma.cc/KE9G-9SGG].

5. *Criminal Justice Standards for the Prosecution Function*, A.B.A., http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html [http://perma.cc/6HYP-3FPW].

6. *See, e.g.*, MO. REV. STAT. § 562.014 (2016) (conspiracy); MO. REV. STAT. § 565.020 (2016) (first degree murder); MO. REV. STAT. § 562.012 (2017) (attempt).

7. *Browse the National Registry*, THE NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/pages/browse.aspx?View={B8342AE7-6520-4A32-8A06-4B326208BAF8}&FilterField1=State&FilterValue1=Missouri [http://perma.cc/BAL4-ALRZ].

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be continually exposed. Law and order must be restored in these two departments because the corruption goes deep and wide.

II. THE ROAD OF INJUSTICE

Orange County, California Superior Court Judge Thomas Goethals made the shocking decision in 2015 to remove all 250 of the county's prosecutors from any involvement in the murder case of Scott Dekraai.[8] Dekraai is at the center of one of the deadliest mass killings in the county's history.[9] Because of the numerous violations plaguing the prosecutor's office, Judge Goethals was forced to protect Dekraai's due process and avoid any prosecutorial trickeries that would jeopardize the case.[10] This is hardly a scenario of one bad apple; it sounds like the whole barrel is rotten.

In a 2016 publication, the National Registry of Exonerations reported a record year of exonerations in 2015.[11] This registry is a project of the University of California Irvine Newkirk Center for Science & Society, University of Michigan Law School, and Michigan State University College of Law and has cited 2,006 people who have been freed.[12] The belief is that there are tens of thousands of wrongful convictions each year.[13] Professor Samuel Gross and other legal colleagues have developed a formula that suggests that 4.1% of death row inmates are wrongfully sentenced.[14]

I want to focus on two men who swore an oath to uphold the law but did nothing of the sort. One is a Chicago cop who came into the police department with a military background in Vietnam and rose up the ranks. The other was a local prosecutor whose long reign of terror caused pain and suffering for many victims and their families. Theirs is a lengthy history of abuse of their authority

8. Editorial, *Dishonest Prosecutors, Lots of Them*, N.Y. TIMES (Sept. 30, 2015), http://www.nytimes.com/2015/09/30/opinion/dishonest-prosecutors-lots-of-them-in-southern-calif.html?_r=0 [http://perma.cc/BG4C-BHVD].

9. Eugene W. Fields et al., *Seal Beach Shootings: 8 Slain in O.C.'s Deadliest Mass Killing*, THE ORANGE CTY. REG., http://www.ocregister.com/articles/business-321651-medical-beach.html [http://perma.cc/MV4F-CJQ4].

10. Dahlia Lithwick, *You're All Out*, SLATE (May 28, 2015, 1:38 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/05/orange_county_prosecutor_misconduct_judge_goethals_takes_district_attorney.html [http://perma.cc/HM7D-RZQS].

11. THE NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015, at 1 (2016), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf [http://perma.cc/YQP3-K3YT].

12. *About Us*, THE NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/pages/about.aspx [http://perma.cc/9PXH-P6D6] (number of exonerees recorded as of March 31, 2017).

13. Marvin Zalman, *Qualitatively Estimating the Incidence of Wrongful Convictions*, 48 CRIM. L. BULL. 221, 225 (2012).

14. Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROCEEDINGS OF THE NAT'L ACAD. OF SCI. 7230, 7230 (2014).

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with scant culpability. I intend to illuminate how police and prosecutors engage in a twisted form of justice.

Former Chicago Police Commander Jon Burge is infamous for heading up the torture ring of white detectives who employed tactics like those used at Abu Ghraib prison to get confessions.[15] For approximately twenty years, black male suspects were subjected to electric shock, suffocation tactics, cigarette burns, mock executions, and beatings.[16] Burge's reputation at Area 2 police station was no secret, yet Chicago prosecutors proceeded with cases that they knew were based upon forced confessions coming out of these hell-holes.[17]

In 2003, Republican Governor George Ryan (a proponent of the death penalty) emptied Illinois' death row when it was soundly established that corrupt and illegal tactics were a factor in all the cases.[18] Citing the "demon of error" in the state's capital punishment system, Governor Ryan pardoned four death row inmates and commuted the sentences of the remaining 167 to life in prison.[19] This at least gave those who had claims of innocence a fighting chance to prove their cases, which they wouldn't have received had they been executed. The subsequent exposé shone a bright light on practices long perpetrated in the dark by a system in distress. Ryan's moratorium on the death penalty led to its abolishment in 2011.[20]

Flint Taylor is one of the founding partners of the People's Law Office in Chicago.[21] The office has defended many victims of Chicago police torture and has battled with the department as well as the Fraternal Order of Police for decades.[22] Taylor was the attorney for two of Burge's torture survivors who

15. Amy Goodman, *Alleged Chicago Torturer's Overdue Day in Court*, COMMON DREAMS (May 26, 2010), https://www.commondreams.org/views/2010/05/26/alleged-chicago-torturers-overdue-day-court [http://perma.cc/FWK6-QPF2]; Flint Taylor, *Jon Burge, Torturer of Over 100 Black Men, Is Out of Prison After Less Than Four Years*, IN THESE TIMES (Oct. 2, 2014), http://inthesetimes.com/article/17213/jon_burge_torture_chicago_has_not_paid_for_his_crimes [http://perma.cc/47KM-KFBA].

16. Goodman, *supra* note 15; Taylor, *supra* note 15; Flint Taylor, *To Catch a Torturer: One Attorney's 28-Year Pursuit of Racist Chicago Police Commander Jon Burge*, IN THESE TIMES (Mar. 30, 2015), http://inthesetimes.com/article/17794/to-catch-a-torturer-one-attorneys-28-year-pursuit-of-racist-chicago-police [http://perma.cc/E6M7-X629].

17. Taylor, *supra* note 16; *History*, CHICAGO TORTURE JUST. MEMORIALS, www.chicagotorture.org/history [http://perma.cc/4H33-UZ6G].

18. Ariane De Vogue & Barbara Pinto, *Illinois Abolishes Death Penalty; 16th State To End Executions*, ABC NEWS (Mar. 9, 2011), http://abcnews.go.com/Politics/illinois-16th-state-abolish-death-penalty/story?id=13095912 [http://perma.cc/RSN8-FA86]; Jodi Wilgoren, *Citing Issues of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES (Jan. 12, 2003), http://www.nytimes.com/2003/01/12/us/citing-issue-of-fairness-governor-clears-out-death-row-in-illinois.html [http://perma.cc/5SNJ-A9YH].

19. Wilgoren, *supra* note 18.

20. De Vogue & Pinto, *supra* note 18.

21. Taylor, *supra* note 15.

22. *Id.*

were exonerated from death row and filed lawsuits against their judicial assailants.[23]

As discussed in his article *To Catch a Torturer: One Attorney's 28-Year Pursuit of Racist Chicago Police Commander Jon Burge*, Taylor's introduction to Jon Burge happened in 1987 when Andrew Wilson, convicted of killing a cop, contacted the People's Law Office to represent him in a lawsuit he had filed against Burge.[24] Taylor likened the sadistic Burge to a "Nazi war criminal"[25] and said this about who had knowledge of Burge and his henchmen:

> Burge's torture is now well established by a mountain of evidence that has been assembled over nearly three decades in the teeth of an unremitting official cover-up that has implicated a series of police superintendents, numerous prosecutors, more than 30 police detectives and supervisors, and, most notably, Richard M. Daley, first as the State's Attorney of Cook County, then as Chicago's long-serving Mayor, in a police torture scandal that had spanned the more than 40 years that I had been a lawyer at the People's Law Office.[26]

Additionally, in my book *Ferguson is America: Roots of Rebellion*, I referenced some of the torture tactics used by Burge—like the "Bell Telephone Hour."[27] The tactics and documentation of deep corruption were part of a report by Michael Goldston who was an investigator in the police department's Office of Professional Standards.[28]

Taylor and his office were maligned in the media by Burge and his influential supporters. The attorney also received threats on his life.[29] Just as they had been done during Burge's career, his bullying tactics were upheld and defended during his perjury trial.[30] The statute of limitations had long passed for most of his victims to file criminal charges.[31] The minor charge of perjury finally put Burge behind bars for a mere few years.[32]

23. *See* Taylor, *supra* note 16.

24. *Id.*

25. *Id.*

26. *Id.*

27. JAMALA ROGERS, FERGUSON IS AMERICA: ROOTS OF REBELLION 106–07 (2015).

28. *Id*.

29. *See* Taylor, *supra* note 16.

30. Jeremy Gorner, *Former Chicago Police Cmdr. Jon Burge Released from Home Confinement*, CHI. TRIB. (Feb. 13, 2015), http://www.chicagotribune.com/news/chi-jon-burge-police-torture-released-20150213-story.html [http://perma.cc/QEC5-R2AM].

31. *Id.*

32. *Id.*

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Released in 2014, Burge now lives comfortably off his $4,000 monthly pension in Apollo Beach, Florida.[33] The ex-felon leaves in his wake hundreds of victims and their families.[34] His reign of terror has already cost the City of Chicago nearly $100 million in legal costs and settlements.[35]

In 2016, the Chicago City Council made good on its 2015 promise of reparations to some of Burge's victims—too little, too late.[36] Fifty-seven of them received $100,000 for their emotional and physical abuse.[37] The timing was suspect; the payoffs came a week after the Baltimore uprising stemming from the police murder of Freddie Gray.[38]

Not much else has been done to corral the violent nature of the Chicago Police Department. Empty promises keep landing with a thud on Chicago's black residents. When the African American community forced the release of the videotaped murder of seventeen-year-old Laquan McDonald, the chilling footage showed the black teen being shot sixteen times by police.[39] It graphically contradicted the original account by police that they were acting in self-defense.[40]

Not surprisingly, Mayor Rahm Emanuel was accused of withholding the videotape until after his re-election.[41] It did not help his credibility when records showed that Emanuel also had been briefed on what the McDonald video would reveal before he proposed that the City Council agree to a five million dollar settlement to the McDonald family a week after his re-election—before there was any filing of a civil suit by the family.[42] This appeared to be a pre-emptive payoff to quell a restless and distrustful Black community.

33. *Id.*; Leonora LaPeter, *Torture Allegations Dog Ex-Police Officer*, ST. PETERSBURG TIMES (Aug. 29, 2004), http://lawreport.org/ViewStory.aspx?StoryID=409 [http://perma.cc/KW9Y-GU3R].

34. *Burge Reparations Resolution*, CITY OF CHICAGO, https://www.cityofchicago.org/city/en/depts/dol/supp_info/burge-reparations-information.html [http://perma.cc/UN8G-FX3Y].

35. Gorner, *supra* note 30.

36. Fran Spielman, *Chicago Pays $5.5M in Reparations to 57 Burge Torture Victims*, CHICAGO SUN TIMES (Jan. 4, 2016), http://chicago.suntimes.com/politics/chicago-pays-5-5m-in-reparations-to-57-burge-torture-victims/ [http://perma.cc/7MZV-23K9].

37. *Id.*

38. *Id.*

39. *Dash-Cam Video Released Showing Laquan McDonald's Fatal Shooting*, NBC CHICAGO, http://www.nbcchicago.com/news/local/Police-Release-Disturbing-Video-of-Officer-Fatally-Shooting-Chicago-Teen-352231921.html [http://perma.cc/9HQ4-V8L6].

40. *Id.*

41. Jeff Coen & John Chase, *Top Emanuel Aides Aware of Key Laquan McDonald Details Months Before Mayor Says He Knew*, CHI. TRIB. (Jan. 14, 2016), http://www.chicagotribune.com/news/local/politics/ct-rahm-emanuel-laquan-mcdonald-shooting-met-20160113-story.html [http://perma.cc/4RV2-KGFJ].

42. *Id.*

The existence of police torture and terror, along with a complicit system, is not an isolated phenomenon. Most urban cities can point to a Jon Burge-like figure in its ranks.[43] Most cities can also point to a hostile police department, resistant to any reforms.[44] The efforts of the Fraternal Order of Police to block any measures of accountability have been relentless and, so far, successful.[45]

Closer to home in Missouri, one notorious Nels Moss stands out in the line-up of corrupt prosecutors. Moss died of natural causes in 2015, but the impact of his prosecutorial aggression prevails.[46] He showed up posthumously as a runner-up in *America's Top Five Deadliest Prosecutors: How Overzealous Personalities Drive The Death Penalty.*[47] The report was released in 2016 by the Fair Punishment Project in recognition of the fortieth anniversary of the landmark death penalty case *Gregg v. Georgia*.[48]

The report extensively examines the records of five prosecutors who, collectively, are responsible for 440 death sentences or approximately one out of seven people currently languishing on death row.[49] They racked up convictions regardless of innocence or guilt.[50] When Lynne "Queen of Death" Abraham,[51] Joe Freeman Britt, Robert "Cowboy" Macy,[52] and Johnny Holmes retired, the rate of death sentences in their counties dropped dramatically.[53] Donnie "Dr. Death" Myers's retirement at the end of 2016 is likely to have the same effect.[54] They enjoy several titles and tributes to their dastardly deeds.

43. *See, e.g.*, *Shielded from Justice: Police Brutality and Accountability in the United States*, HUMAN RIGHTS WATCH, http://pantheon.hrw.org/legacy/reports98/police/toc.htm [http://perma.cc/3QQS-7Q64].

44. *See, e.g.*, *id.*; Jonathan M. Smith, Op-Ed., *Police Unions Must Not Block Reform*, N.Y. TIMES (May 29, 2015), http://www.nytimes.com/2015/05/30/opinion/police-unions-must-not-block-reform.html?_r=0 [http://perma.cc/SYB3-Y8U5].

45. Smith, *supra* note 44.

46. FAIR PUNISHMENT PROJECT, AMERICA'S TOP FIVE DEADLIEST PROSECUTORS: HOW OVERZEALOUS PERSONALITIES DRIVE THE DEATH PENALTY 21 (June 2016), http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf [http://perma.cc/26U2-QCK5]; *Nels Carlos Moss Jr. Obituary*, ST. LOUIS POST-DISPATCH (Feb. 12, 2015), http://www.legacy.com/obituaries/stltoday/obituary.aspx?pid=174125037 [http://perma.cc/CLJ7-8T94].

47. FAIR PUNISHMENT PROJECT, *supra* note 46, at 19–20.

48. *New Report Finds Prosecutors Who Sought Death Penalty Most Frequently Had High Rates of Misconduct*, FAIR PUNISHMENT PROJECT (June 30, 2016), http://fairpunishment.org/new-report-finds-prosecutors-who-sought-death-penalty-most-frequently-had-high-rates-of-misconduct/ [http://perma.cc/BE5K-JT7P]; Gregg v. Georgia, 428 U.S. 153 (1976).

49. These five prosecutors include Joe Freeman Britt from North Carolina, Bob Macy from Oklahoma, Donnie Myers from South Carolina, Lynne Abraham from Pennsylvania, and Johnny Holmes from Texas. FAIR PUNISHMENT PROJECT, *supra* note 46, at 3, 5, 8, 11, 14, 16, 18.

50. *See id.* at 3, 6, 9, 12, 14, 16.

51. *Id*. at 14.

52. *Id*. at 8.

53. *Id.* at 3.

54. FAIR PUNISHMENT PROJECT, *supra* note 46, at 3, 11.

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For example, Britt holds the objectionable record of "deadliest prosecutor in America" in the Guinness Book of World Records.[55] One third of his death penalty cases were tainted by prosecutorial aggression.[56]

In the company of this villainous crew is Nels Moss, who worked tirelessly to also stack up murder convictions. Despite his fanatical career, he only made it to number eight on the elite list of deadliest prosecutors.[57] It wasn't from lack of trying.

Moss joined the St. Louis city prosecutor's office in 1968 where he was mentored by top prosecutor George Peach.[58] Peach's career abruptly ended after a 1992 tawdry bust in a hotel with an undercover cop posing as a prostitute.[59] It seems that while Peach was leading his lengthy, self-righteous campaign against pornography and prostitution, he was using money from a department slush fund for his extracurricular sexual activities.[60] Peach was accused of embezzling thousands from the fund.[61] Worse, he also stole money from a victims' fund that operated out of the Circuit Attorney's office.[62]

Peach denied any wrongdoing from the onset.[63] He could have taken the high road, man up, and ask for public forgiveness. Even when the preponderance of evidence was presented, Peach tried to spin the facts of the case.[64] For almost two decades, he had been untouchable, and his arrogance was just one of his many character flaws.

In the end, the tough prosecutor, who once boasted that he didn't accept plea deals, accepted his own plea deal to avoid seven years in prison for each felony charge.[65] Presiding Judge James McHenry said he didn't see any need to send Peach to prison.[66]

For large swaths of the African American community, Peach was feared and loathed.[67] His racial bias was prevalent in his unforgiving, harsh sentences to the black suspects and defendants. His contempt for black people went

55. *Id.* at 5.

56. *Id.* at 7.

57. *Id*. at 20.

58. Weinburg, *supra* note 4.

59. Michael D. Sorkin & Louis J. Rose, *Peach Took $1,500 Meant for Office Fund; Records Refute His Claim That He Deposited Check*, ST. LOUIS POST-DISPATCH, July 16, 1992, at 1A.

60. Michael D. Sorkin & Louis J. Rose, *Peach Pleads Guilty to Six Theft Counts; He Will Avoid Prison Term Under His Plea Agreement*, ST. LOUIS POST-DISPATCH, Jan. 9, 1993, at 1A.

61. Michael D. Sorkin & Louis J. Rose, *Peach Gets Probation, No Jail Time*, ST. LOUIS POST-DISPATCH, Feb. 20, 1993, at 1A.

62. *Id.*

63. Sorkin & Rose, *supra* note 59.

64. *Id.*

65. Sorkin & Rose, *supra* note 61.

66. *Id.*

67. George E. Curry, *Peach Attacked Over 'Ape' Remark*, ST. LOUIS POST-DISPATCH, March 27, 1980, at 1A.

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beyond his office. He once referred to Senator J.B. "Jet" Banks, a high-ranking black elected official, as an "ape."[68] The comment was deemed as a racist attack by black state lawmakers and St. Louis civic leaders.[69]

The special prosecutor in the Peach case was no stellar prosecutor himself. Kenny C. Hulshof also has a problematic history as a prosecutor. In at least thirteen murder cases, defense attorneys complained about prosecutorial aggression by Hulshof and his office.[70] Almost half were overturned or thrown out.[71] The judges who overthrew the murder convictions of Mark Woodsworth, Josh Kezer, and Dale Helmig issued stinging criticisms of the prosecutor who went on to use the conviction notches on his belt to get the rural Congressional seat in Missouri's Ninth District.[72]

The depth of Peach's hypocritical lifestyle was revealed when it was reported that his alias as a john was none other than the name of one his wrongfully convicted victims—Larry Johnson.[73] Johnson was exonerated in 2002 with the help of the Innocence Project after serving eighteen years for a rape he did not commit.[74] This feat was made more difficult because of the obstruction by the Circuit Attorney's office to access DNA evidence.[75] Not only did the police department and prosecutor attorney block efforts, other government offices were encouraged not to cooperate with retrieval of the evidence.[76] The Project was forced to file suit to get evidence needed to free their client.[77]

This is one of many examples of the cancerous relationship between police, prosecutors, and all those in between and around. It was also a vivid illustration of how all the governmental entities will join forces to prevent justice from happening.

Moss admired Prosecutor Peach. He longed to occupy the position of the St. Louis Circuit Attorney. When the opportunity to run for the office arose in 1992, he faced off with two other assistant prosecutors in the office.[78]

68. *Id.*

69. *Id.*

70. Tony Rizzo, *Questions Surround Kenny Hulshof's Tactics in Murder Prosecutions*, KANSAS CITY STAR (Aug. 20, 2011), http://truthinjustice.org/hulshof-questions.htm [http://perma.cc/6T7S-VY7K].

71. *Id.*

72. *Id.*

73. Michael D. Sorkin & Louis J. Rose, *Peach OK'd Motel In '88 For Alias 'Larry Johnson'*, ST. LOUIS POST-DISPATCH, Jul. 16, 1992, at 4A.

74. *Larry Johnson*, INNOCENCE PROJECT, http://www.innocenceproject.org/cases/larry-johnson/ [http://perma.cc/4QGZ-SNPW].

75. *Id.*

76. *Id.*

77. *Id.*

78. Tim Poor, *9 Candidates Vie To Replace Peach As City's Prosecutor*, ST. LOUIS POST-DISPATCH, Jun. 21, 1992, at 4B.

Observers felt that Moss separated the cases of the four co-defendants in the Chain of Rocks Bridge rape and murder to elevate his profile.[79] Moss used the media to sensationalize the case involving Julie and Robin Kerry, two white co-eds, and the black youth suspects.[80] The sole white defendant became the state's star witness and was not certified as an adult as the other black juvenile had been.[81]

Moss lost the circuit attorney's race to Dee Joyce-Hayes.[82] She was fully aware of Moss's devious practices but admitted being powerless to do much with him except to relegate him to the homicide unit.[83] Joyce-Hayes didn't want Moss to have "much contact with impressionable young assistant circuit attorneys."[84] Like the other circuit attorneys before her, she did little to sanction Moss's behavior.[85]

I've worked on the defense campaign for Reggie Clemons since 1991 and led the community fight for a new trial. Close up, I saw how Moss twists the truth and manipulates evidence. The courtroom sophistry of Moss during the trials was unbelievable. His antics should have resulted in a mistrial, but he was repeatedly only slapped on the wrist. At one point, he compared Clemons to Charles Manson.[86] As we know from watching TV courtroom dramas, this is a highly effective tactic. The prosecutor says something incriminating or out of order. The defense attorney objects. The judge sustains the objection and tells the jury to disregard the statement. Humans are incapable of unhearing a statement. For most jurors, the statement is firmly planted in their unconsciousness—just the way the prosecutor intended.

In 2009, the Missouri Supreme Court appointed Judge Michael Manners as the special master to review the case.[87] Reggie's tortured confession and Brady violations by Nels Moss were at the center of Judge Manners' findings.[88] The

79. *See* IAMWE7, *Borrowed Time 30Min Version. . .Part Two*, YOUTUBE (Nov. 21, 2012), http://www.youtube.com/watch?v=KJWA2WHpgHU [http://perma.cc/3UEM-KAFR].

80. *See* justiceforreggie, *Borrowed Time Promo*, YOUTUBE (Apr. 15, 2009), http://www.youtube.com/watch?v=R49X6AV82zo [http://perma.cc/V3HX-J6TC].

81. *See* IAMWE7, *Borrowed Time Ep 3*, YOUTUBE (Sept. 28, 2011), http://www.youtube.com/watch?v=ltTy1mVLsLc [http://perma.cc/9PKT-SNT5].

82. Weinburg, *supra* note 4.

83. *Id.*

84. *Id.*

85. *Id.*

86. Clemons v. Luebbers, 212 F. Supp. 2d 1105, 1125–26 (E.D. Mo. 2002).

87. Rachel Lippmann, *Clemons Will Face New Trial for 1991 Chain of Rocks Murders*, ST. LOUIS PUBLIC RADIO (Jan. 25, 2016), http://news.stlpublicradio.org/post/clemons-will-face-new-trial-1991-chain-rocks-murders#stream/0 [http://perma.cc/5NBP-E438].

88. *See id.*; Justice for Reggie Campaign, *Press Statement on Judge Manners' Findings in Reggie Clemons Case*, NAT'L COAL. TO ABOLISH THE DEATH PENALTY (Aug. 6, 2013), http://www.ncadp.org/blog/entry/press-statement-on-judge-manners-findings-in-reggie-clemons-

court overturned the conviction in 2015; the Circuit Attorney decided to retry Clemons in January 2016.[89]

The Center for Public Integrity exposed Nels Moss in several articles by Steve Weinburg.[90] In *Breaking the Rules*, Weinburg recounts that, of some twenty-four cases, judges reversed convictions or declared a mistrial in seven of those cases.[91] There were seventeen other findings of legal chicanery.[92] Judges found that Moss had committed prosecutorial error but often allowed the trial to continue leading to convictions of the defendants.[93] He did a lot of damage in his thirty-three-year career as a prosecutor.

The Center has done some of the most exhaustive investigations of prosecution errors to date. The 2003 report cited the following examples of prosecutorial misconduct after analyzing over 11,000 appellate rulings:

- "making inappropriate or inflammatory comments in the presence of the jury";
- "introducing or attempting to introduce inadmissible . . . or inflammatory evidence";
- "[m]ischaracterizing the evidence or the facts of the case to the court or jury";
- "excluding jurors on the basis of race, ethnicity, gender or some other discriminatory grounds";
- "making improper closing arguments";
- "hiding, destroying or tampering with evidence, case files or court records";
- "[f]ailing to disclose exculpatory evidence";
- "[t]hreatening, badgering or tampering with witnesses";
- "[u]sing false or misleading evidence";
- "[h]arassing, displaying bias toward, or having a vendetta against the defendant or defendant's counsel (including selective or vindictive prosecution, which includes instances of denial of a speedy trial)"; and
- "[i]mproper behavior during grand jury proceedings."[94]

case [http://perma.cc/ZTQ3-D8BJ]; Brief for Petitioner at 1, State *ex rel.* Clemons v. Larkins, No. SC90197 (Mo. Nov. 4, 2013).

89. Lippman, *supra* note 87; Joel Currier, *St. Louis Prosecutor Says State Should Take Over Case in Chain of Rocks Murders*, ST. LOUIS POST-DISPATCH (Dec. 28, 2016), http://www.stltoday.com/news/local/crime-and-courts/st-louis-prosecutor-says-state-should-take-over-case-in/article_e76ead7c-b563-525b-aff3-ad6bb2b41dba.html [http://perma.cc/ZS6K-6VSD].

90. *See* Weinburg, *supra* note 4; Steve Weinburg, *Is Overhaul of the Criminal Justice System Needed?*, CQ PRESS (Apr. 17, 2009), http://library.cqpress.com/cqresearcher/document.php?id=cqresrre2009041702 [http://perma.cc/7PPY-GGKH].

91. Weinburg, *supra* note 4.

92. *Id.*

93. *Id.*

94. *Id.*

Nels Moss was guilty of all of the above. A separate book can be written about all of Moss' violations, maybe a couple of volumes.

The troubling findings are just the tip of the iceberg of those suffering at the hands of police and prosecutors. Yet, neither sanctions nor criminal actions against either have been commensurate with their transgressions. For too long, automatic immunity was given to prosecutors to ostensibly preserve the integrity of the office, to protect it from political interference. It's time to take away this undeserving shield.

III. CHANGING TIDES

In the last thirty years or so, legal support nonprofits, watchdog groups, and social justice organizations have made valiant attempts to expose the atrocities being perpetrated by the so-called justice system.[95] The proliferation of investigative reports and documentaries, along with the powerful voices of the innocent, have also helped to shine a spotlight on the topic.[96] There have also been countless studies from groups inside and outside of the system detailing the prevalence of corruption.[97] Their collective labor has made it all but impossible to ignore the elephant in the courtroom of a toxic and failing justice system—the rogue prosecutor.

Even trying to assess the financial costs of wrongful convictions is a challenge. There needs to be a national and comprehensive study on the cost of trial prosecutions, prison stays, and appeals, but there's little interest in doing so. After all, we're only talking about the lives of the poor, mentally challenged, and people of color. The way the prison industrial complex operates devalues their lives and criminalizes their existence.

At least one group has attempted to isolate the spiraling costs of wrongful conviction settlements. The Better Government Association (BGA) estimates that the state of Illinois had paid out $253 million in settlements since 1989 with pending cases totaling another $300 million.[98] *The High Costs of*

95. *See, e.g.*, *About*, INNOCENCE PROJECT, http://www.innocenceproject.org/about/ [http://perma.cc/M85L-6GU4]; *About Us*, CTR. FOR PROSECUTOR INTEGRITY, http://www.prosecutorintegrity.org/info/about/ [http://perma.cc/8RWG-34LS].

96. *See, e.g.*, BETTER GOV'T ASS'N & CTR. ON WRONGFUL CONVICTIONS, *Special Investigation: The High Costs of Wrongful Convictions*, BETTER GOV'T ASS'N (June 18, 2011), http://www.bettergov.org/news/special-investigation-the-high-costs-of-wrongful-convictions [http://perma.cc/59VR-JG3V].

97. *See e.g.*, Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989-2012*, NAT'L REGISTRY OF EXONERATIONS 73, (June 22, 2012), https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf [http://perma.cc/6DFR-7K87].

98. Kari Lydersen, *Wrongful Conviction Costs Keep Climbing*, BETTER GOV'T ASS'N (Apr. 8, 2013), http://www.bettergov.org/news/wrongful-conviction-costs-keep-climbing [http://perma.cc/22HW-Z8XT].

Wrongful Convictions was an investigation that looked at the cumulative impact of police, prosecutorial, and forensic failures in Illinois from 1989–2010.[99] The study illuminated the use of faulty eyewitness testimonies, false confessions, and ineffective counsel that resulted in eighty-five innocent men and women serving more than 926 years at a price tag of $18.5 million.[100]

BGA conducted the study with the Center on Wrongful Convictions (CWC) at the Northwestern University School of Law in a 2011 investigation.[101] CWC is no stranger to the topic as they receive over 3,000 inquiries each year from inmates across the country and have been instrumental in the exoneration of twenty-three innocent men and women in Illinois.[102]

The lack of accountability is troubling. The Center for Prosecutor Integrity acknowledges that of the studies over the past fifty years, little or no sanctions of prosecutors occurred.[103] Less than two percent of the thousands of exoneration cases resulted in some type of discipline.[104] Not only is there is no incentive to do right if you're hell-bent on doing wrong, there's no punishment if you get caught red-handed.

The most disturbing part about the widespread corruption of prosecutors is not only the lack of accountability—it is the resistance of the system to correct itself, to make their victims whole. Prosecutors and their offices regularly refuse to participate in any redress of victims.[105] Of all the victims I worked with, the system never so much as gave them an apology for snatching their lives. Even in the face of proven deception, prosecutors will maintain they did no wrong, furthering erosion of the public trust. Even in the face of exonerations, prosecutors will often hold on to the original guilty verdict.

The Organization for Black Struggle worked on the case of Ellen Reasonover for a decade before it got the attention of Centurion Ministries (CM), a New Jersey-based group who fights for people like Reasonover being railroaded by the system.[106] She was convicted of murdering a gas station

99. BETTER GOV'T ASS'N & CTR. ON WRONGFUL CONVICTIONS, *supra* note 96.

100. *Id.*

101. *Id.*

102. *Id.*; *About Us*, CTR. ON WRONGFUL CONVICTIONS, www.law.northwestern.edu/legalclinic/wrongfulconvictions/aboutus/ [http://perma.cc/3NSZ-HNNH]; *Meet Our Freed and Exonerated Clients*, CTR. ON WRONGFUL CONVICTIONS, www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations [http://perma.cc/C2FF-7KKR].

103. *Key Facts*, CTR. FOR PROSECUTOR INTEGRITY, www.prosecutorintegrity.org/key-facts [http://perma.cc/8WES-JTZU].

104. *Id.*

105. Gross & Shaffer, *supra* note 97, at 11.

106. *Ellen Reasonover*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3564 [http://perma.cc/YV5J-46X8].

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attendant and was one jury vote away from receiving the death penalty.[107] When a judge overturned her sentence of fifty years without parole in 1999, St. Louis County Prosecutor, Bob McCullough, stated publicly that he believed Reasonover was still guilty and that his office would keep the murder case open—indefinitely.[108] That's just pure evil.

As committed as they are, groups like Centurion Ministries, the Innocence Project, the People's Law Office, and the various law schools cannot keep pace with the numbers of potential wrongfully convicted. These groups, which have become the salvation of the justice system, all have long waiting lists.

Invaluable work has been done to expose corrupt prosecutors. The irrefutable evidence must now lead us to sweeping reforms. There have been attempts to criminalize prosecutors' behavior with little success.[109] It's time to accelerate the campaign to treat these judicial perpetrators as criminals. We are not talking about minor, honest mistakes here.

IV. RECOMMENDATIONS

I believe there are three critical areas that must be implemented if we want to see corruption put in check and mass incarceration halted.

First, we must end the death penalty. The abounding number of intentional errors is incompatible with its finality. The work of death penalty opponents has certainly shifted the narrative. Polls show support for the death penalty is waning with the fewest executions carried out this year than in the last twenty-five years.[110] The number of exonerations from death row have also added to the public discourse on ending the death penalty. The application of the death penalty in this country has proven to be driven by race and class.

Second, we must recruit and retain more prosecutors of color. In a groundbreaking study, the Women Donors Network explored the relationship between race, gender, and criminal justice.[111] Their *Justice for All*?* report showed that ninety-five percent of elected prosecutors are white and seventy-

107. *Id.*

108. Safir Ahmed, *Free at Last*, RIVERFRONT TIMES (Aug. 4, 1999), http://www.riverfronttimes.com/stlouis/free-at-last/Content?oid=2476232 [http://perma.cc/8EU2-37YA]; *see Overturned Conviction Frees Woman After 16 Years—Prosecutor Says He Won't Refile Murder Charges*, SEATTLE TIMES (Aug. 4, 1999), http://community.seattletimes.nwsource.com/archive/?date=19990804&slug=2975534 [http://perma.cc/FQ4S-L6CG].

109. Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, And The System That Protects Them*, HUFFINGTON POST (Aug. 5, 2013), http://www.huffingtonpost.com/2013/08/01/prosecutorial-misconduct-new-orleans-louisiana_n_3529891.html [http://perma.cc/DF6T-9KTN].

110. *Fact about the Death Penalty*, DEATH PENALTY INFO. CTR. (Dec. 9, 2016), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf [http://perma.cc/54MX-9GW8].

111. *Justice for All*?*, WOMEN DONORS NETWORK, http://wholeads.us/justice/wp-content/themes/phase2/pdf/key-findings.pdf [http://perma.cc/LXC6-UREQ].

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nine percent are white men.[112] Further, about sixty percent of states have no elected black prosecutors.[113] This is more than just about racial disparity; this is about lived experiences and understanding the reality of those forced into the criminal justice system.

Third, if we believe that prosecutors are more powerful than judges and the police as implied in *Justice for All*?*, then a set of national accountability measures must be put in place.[114] For example, when a prosecutor has committed three deliberate errors (constituting a pattern), it should trigger an investigation with recommendations for both rehabilitation (bias training, etc.) and sanctions (reprimand, disbarment, loss of pensions, etc.). Prosecutors or the public should no longer view prosecutors as untouchable or above the law. Those who breathe, feel, and see the judicial system daily—attorneys, judges, clerks, etc.—should be in the vanguard of any transformational efforts.

CONCLUSION

In the communities where I organize, there is little respect for law enforcement—from the police to prosecutors and judges—because of their history of occupation and criminal behavior. My focus on Jon Burge and Nels Moss in this article was to underscore the scale of criminality and corruption by the very people who are sworn to serve and protect. The Department of Justice's investigation into Ferguson, Missouri uncovered its brazen racial profiling and court exploitation.[115] Since it is our tax dollars that are paying for the façade that denies citizens equal justice under the law, we are compelled to stand up for justice and fairness. If our society doesn't get a firm handle on this spiraling situation, lawlessness in the streets will meet lawlessness in the courts.

And that, my friends, is anarchy—not a civilized democracy.

112. *Id.* at 1.

113. *Id.* at 2.

114. *Id.*

115. U. S. DEP'T OF JUST. CIV. RIGHTS. DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4, 8, 11 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf [http://perma.cc/K8ZQ-D5ZL].