

2. Blind Denial

It didn't take long after I left the prosecutor's office and began litigating innocence cases for me to see firsthand the levels of extreme psychological denial to which prosecutors and police often succumb to avoid admitting that they convicted an innocent person. One of my first innocence cases, which eventually resulted in my first exoneration, was that of Clarence Elkins, who was in prison for raping and murdering his mother-in-law and assaulting and raping his niece in Barberton, Ohio, in June 1998.

Elkins's mother-in-law, Judy Johnson, had been attacked by an intruder in her living room in the middle of the night. The scene left behind was from a horror movie. The perpetrator raped and violently beat her, leaving a bloodbath over the floors and walls surrounding her body. He then went into a bedroom and beat and raped Elkins's six-year-old niece and Johnson's granddaughter, Brooke Sutton, leaving her for dead as well. But Brooke fortunately survived. After she regained consciousness the next morning, she told police that the attacker "looked like" her Uncle Clarence, but this soon became "it *was* my Uncle Clarence." Even though Brooke had only seen the attacker in the dark for a few seconds—and while under great stress—before he knocked her unconscious, the police immediately arrested Clarence and charged him with rape and murder before performing any other investigation. Although Elkins had a clean record and an alibi—witnesses placed him more than thirty minutes away from Johnson's house at the time of the murder—based on the questionable testimony of a child, the state of Ohio sought the death penalty against Elkins. The jury rejected the death penalty but convicted Clarence, and he was sent away to prison for life.

Clarence screamed his innocence when he was arrested, during his trial, and for years thereafter from his prison cell.

In 2005, my team at the newly formed Ohio Innocence Project heard those screams and took over the case to have DNA testing performed on the crime scene evidence. As a result of advances in DNA testing since the time of Elkins's trial, the lab was able to find male DNA on the swabs taken by the coroner from Johnson's vaginal cavity after her murder. This DNA did not belong to Elkins. Since Johnson was not sexually active at the time of her murder, any male DNA inside her vaginal cavity had to have come from the man who raped and murdered her. Moreover, the same unknown man's skin cells were found on Brooke Sutton's panties, which the perpetrator removed after knocking her unconscious so he could proceed to rape her. Only the actual killer could have deposited his DNA inside Johnson's vaginal cavity and on Brooke's panties on the night of the attack. And since that DNA didn't match Elkins, it logically meant that he was 100 percent innocent of the crimes.

I assumed when our DNA test results came back that the prosecutors would drop the charges against Elkins and set him free, and then begin looking for the true killer. After all, it was clear that Elkins was innocent and that therefore a cold-blooded killer was still loose on the streets. I was new to postconviction innocence work, and I was naïve. So I was very surprised when the prosecutors pushed back and insisted that Elkins was still guilty. And they didn't just push back, they fought with anger and venom and with ridiculous arguments that simply didn't make any sense.

The prosecutors responded to our DNA evidence by arguing that Elkins, despite the brutality of the attack, somehow must not have left any of his DNA anywhere at the crime scene. The male DNA we found during our testing, they said, must have been put there by some sort of innocent contamination that occurred before or after the crime. They suggested—hold on to your hat here—that perhaps a male juror during Elkins's original trial had opened up the evidence bags when no one was looking and, for example, rubbed his hands over Brooke's filthy, bloody panties, putting his DNA all over them in the process.

But the prosecutors didn't have any evidence that this incredibly far-fetched scenario had actually taken place. They didn't have, for example, an affidavit from a male juror—or any other man—saying he had opened the evidence bags and placed his DNA all over the evidence. Indeed, the prosecutors were just making this up. And their theory was flatly contradicted not only by common sense but by the actual evidence in the case. The envelope containing Johnson's vaginal swabs had remained sealed throughout Elkins's trial. The "chain of custody" documents showed that the envelope had been properly sealed and preserved from the time the vaginal swabs

were first collected at the coroner's office right after the murder occurred until the time that the swabs were DNA tested years later. The seal had never been improperly broken. And there was no way possible that a male juror or anyone else could have placed his DNA on the vaginal swabs *through* the properly sealed envelope.

To counter this inconvenient fact, the prosecutors threw out other bizarre arguments, suggesting for example that the male DNA found in Johnson's vaginal cavity could have come from Johnson shaking hands with some unknown man earlier in the day that she was murdered, thereby getting male DNA on her hands, and then Johnson masturbating or otherwise touching the inside of her vagina with her own hands, causing this man's DNA to rub off inside her vagina in the process. Wow! And the prosecutors couldn't explain how, if this were true, the man who shook Johnson's hand somehow got his DNA on Brooke's panties.

At our 2005 hearing to free Clarence, the prosecutors presented these silly arguments in court with passion and conviction. In fact, despite the clear evidence of innocence that our DNA testing had uncovered, the lead prosecutor continued to refer to Elkins as "the rapist Clarence Elkins." At one point when making his arguments to the court, for example, he stopped, pointed at Elkins sitting next to me in his orange jumpsuit and shackles, and dramatically called him this. After all the indignity that Elkins had suffered from being wrongfully convicted and imprisoned for so many years, I was amazed that he could sit there so coolly while this prosecutor continued to refer to him that way after DNA testing had already demonstrated his innocence. But he somehow endured it with grace.

When I spoke in court and explained the DNA test findings to the judge, the lead prosecutor and his second-chair prosecutor would roll their eyes and let out one exasperated sigh after another. During each break in the courtroom proceedings, the lead prosecutor and I would have cameras and microphones stuck in our faces as soon as we walked out into the hallway. He would always insist that Elkins was absolutely guilty, and that this DNA stuff was all smoke and mirrors.

The certainty in his voice, and his level of confidence in his position, blew my mind. To me, it was like the prosecutor standing up in court and arguing with great emotion and passion that the moon is made of cheese. I began asking myself questions that I would end up asking myself many times in future innocence cases when seeing similar reactions from prosecutors: Does this prosecutor realize his arguments don't make sense and he's just putting on an act for political reasons, or does he really believe what he's saying? Is he lying? Is he evil, trying to keep an innocent man in

prison? Or is he just not very smart and truly doesn't understand the DNA test results? Which is it, stupidity or evil?

But years later, after hearing other prosecutors take similar positions in other cases, I eventually knew my answer. The prosecutor *did* believe what he was saying. He wasn't putting on an act. And he wasn't evil. Because Elkins's innocence conflicted with everything he had internalized for years about the system to which he had dedicated his life, he was in a form of psychological denial that prevented him from evaluating the evidence objectively. He literally could not mentally or emotionally accept the truth.

In Elkins's case, it turned out that the judge was in denial too. Despite the weakness of the prosecution's argument and the clarity of our DNA evidence, she denied our motion to free Elkins, meaning that he would have to spend the rest of his life in prison.

So in desperation, the investigation continued. Elkins's then-wife Melinda, and private investigator Martin Yant, who had been trying to find the true killer, soon identified a strong suspect—an individual named Earl Mann. Mann had a history of violence, and had been living two doors down from Judy Johnson at the time of the crimes. He even looked quite a bit like Elkins. We learned that in 2005 Earl Mann was serving time for other crimes in the same prison as Elkins. Out of thirty prisons in Ohio, Elkins and Mann ended up not only in the same prison but in the same cellblock.

In an ironic twist of fate, Elkins was able to collect one of Mann's cigarette butts in prison and mail it to our DNA lab. The lab confirmed that Earl Mann's DNA matched the unknown man's DNA from Johnson's vaginal cavity and Brooke's panties. But even after subsequent testing of Earl Mann's blood confirmed the same result, the prosecutors still didn't want to believe that Clarence was innocent. It took an eventual confession from Mann, and the heroic intervention of Ohio Attorney General Jim Petro on Elkins's behalf, for the prosecutors to finally capitulate and agree to exonerate Elkins.¹ In December 2005, Clarence Elkins walked out of prison a free man. Not long after, Earl Mann pleaded guilty, and is now serving life in prison for the rape and murder of Judy Johnson and the assault and rape of Brooke Sutton.

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In my work as an innocence lawyer, I have seen good people—prosecutors and police officers—callously commit what I would call “acts of evil.” In using the phrase “good people,” I recognize that the line between good and evil is thin and that no person is all good or all bad. We are complicated creatures, and I do not intend to engage in a philosophical debate about the

coexistence of good and evil in the human condition. Rather, I use this phrase in the everyday sense to refer individuals who do not suffer from some sort of personality disorder, like sociopathy, but rather, are typical everyday people who, for the most part, try to do the right thing and try not to unnecessarily cause catastrophic pain to others through their actions.

In that sense, I have seen prosecutors and police—who I think are generally “good people,” commit egregious acts of evil. In case after case where we have developed strong evidence that our client is an innocent person suffering in prison, police and prosecutors have denied our claims in knee-jerk fashion without even looking closely at the evidence, and have made intellectually dishonest arguments in court to keep the innocents suffering in prison. And sometimes judges have gone along with them.

Indeed, of all the psychological phenomena I have observed over the past twenty-five years from my seat as a prosecutor turned innocence advocate, the most fascinating one for me has been the fervent denial that I have witnessed far too often from those deeply invested and imbedded in the system. Many of these people will admit in the *abstract* that innocent people are *sometimes* convicted and sent to prison for crimes they didn’t commit. They have all read the newspapers and seen stories on exonerations of prisoners; in 2015 and 2016, these exonerations occurred in this country at a rate of about three per week. But when a specific case is presented to them that their office was involved with many years earlier, they invariably say that *this* case is not one of those where an innocent person was convicted, no matter the evidence.

It reminds me of public surveys about the U.S. Congress. When asked whether Congress is doing its job, the public gives it very low marks, often as low as a 10 percent approval rating. But when the public is asked whether *their* congressperson is doing a good job, the public hands out high marks, often exponentially higher than those for Congress as a whole.² But if each specific congressperson is doing a great job according to his or her constituents, how can Congress as a whole be viewed so poorly? Because the public thinks that it’s always “other people’s congresspersons” who are stinking the place up. In like fashion, law enforcement officials who will admit that wrongful convictions sometimes occur firmly resist the notion that any of the defendants *they* convicted are innocent.

As Professor Daniel Medwed has stated in his book *Prosecution Complex*, prosecutors succumb to denial “to avoid ‘facing the unfaceable’”—that the inmate might be innocent. He added, “Denial may lead prosecutors to behave in a churlish fashion, even after an official declaration of innocence, by refusing to apologize or engaging in petty behavior

that strains the bounds of logic.”³ One could say the same about police. In some instances, denial manifests itself in prosecutors forcing exonerees through vengeance retrials, even though no evidence of guilt remains.⁴ The foreperson of the jury in the vengeance retrial of exoneree Derrick Deacon said after his jury acquitted him, “There was no case. There was never a shred of evidence against Derrick Deacon. Why did they try him a second time if he’s been in jail for 24 years?”⁵

A phrase has been adopted in the innocence movement to describe the theories that police and prosecutors will sometimes adopt to avoid facing reality: the *unindicted co-ejaculator*, which is a play on the phrase *the unindicted co-conspirator*, a legal term common in American courtrooms. In its simplest form, this notion arises when a man has been convicted years earlier of raping a woman and the woman’s testimony is that she was not sexually active before the rape and that only one man committed the rape. Then, when DNA test results come back years later showing that the DNA of the convicted man does *not* match the semen collected after the rape, prosecutors change their story and say that there must have been *two* rapists. They maintain that the defendant committed the rape but that he must have done it with someone else, and that this unknown man—the “unindicted co-ejaculator” (though prosecutors don’t use that term)—was the one who left his semen behind. The defendant raped her too, he just didn’t ejaculate.

In other cases, police and prosecutors may dig in their heels and insist over and over—without any evidence—that the DNA test results obtained from the prosecutor’s own state lab *must* be wrong; that an error must have occurred somewhere in the testing process.⁶ But if prosecutors were using DNA test results from their own lab to try to *convict* someone, they would treat such a suggestion from the defense as ludicrous.

I can’t count the number of times in innocence cases I have sat in the courtroom and listened to prosecutors espouse theories like this, when I have wanted to stand up and say to the judge and everyone in the audience, “Wait a minute. Are these people serious? Is this some kind of a joke? Is there a hidden camera around here somewhere? Am I on TV? Am I on Mars? Am I losing my mind? Because if I’m hearing this right, either they’re crazy or I’m crazy.” Of course, I never say this, but the temptation sometimes arises again when I see the judge nodding along with the prosecutor’s bizarre arguments. This extreme, mind-blowing level of denial that I have seen in cases like this left me scratching my head so much that I decided to dive into the psychology behind it, which ultimately led me to

write this book. I was so bewildered by what I was seeing that I had no choice but to turn to psychology for answers.

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In my career as an innocence lawyer, I have had case after case where my client has suffered in prison long after the evidence proved them innocent. We develop a strong case for innocence and present it in court, but the client remains in prison because the prosecutors fight back with frivolous theories like the “unindicted co-ejaculator” theory or the “masturbating grandmother” theory in the Elkins case. And while my office has eventually freed many of these clients, most of them suffered in prison for many additional years after the evidence of innocence first surfaced because of this type of reaction from law enforcement and courts. And I have cases now where my clients have been proven innocent by DNA testing but still remain in prison after years of litigation. The collective state of denial in these cases has stretched beyond the prosecutors and trial judges, through the appellate courts and beyond. Although we have a better chance of an objective hearing the farther away we get from the prosecutor’s home field, finding an open-minded judge down the road is a crapshoot. There’s no guarantee that an innocent person will ever find justice, even with strong evidence of innocence on his side. Such is the level of denial that we too often see in our system.

I have visited these innocent clients in prison and been shaken by their anguish and agony over missing their children, or not being present when their mothers and fathers passed away. My client Nancy Smith, who we eventually freed many years later with strong evidence of innocence, was like a bear caught in a leg trap whenever I visited her in prison, in a constant state of agitated pain—mentally tortured, really. Nancy had been a bus driver for a daycare center in Elyria, Ohio. After intense media coverage of an alleged daycare molestation case in another state in the early 1990s, copycat claims of child molestation began popping up at daycare centers all across the country. A common thread in these cases was that many of these daycare centers, as in Nancy’s case, were funded by Head Start, a federal program that offered deep pockets for the alleged victims’ families, or otherwise offered opportunities for rich civil settlements. As in Nancy’s case, many of the families that made allegations in these cases later received multimillion-dollar settlements. These cases are now known collectively as the “Daycare Hysteria Cases,” and it is widely believed that many of the individuals charged in these cases are innocent, and many have

been exonerated.⁷ Indeed, the Daycare Hysteria Cases were a modern-day witch hunt, like the Salem witch trials. But I digress.

In Smith's case, the parents of the children, who later received millions in settlements, alleged that on a particular day, Smith did not deliver their three- and four-year-old children to daycare after picking them up in the morning, but instead took them to a strange house where Nancy and her "boyfriend" molested the children before taking them home at the end of the day. The children changed their stories repeatedly before trial, and their stories involved wild accusations such as Nancy and her boyfriend making them drink urine and sticking them with needles. Child-abuse experts who have studied cases such as this will tell you that stories of this nature are a red flag. When children have not actually been abused, and are too young to understand sex or what real sexual molestation typically looks like, they will often give bizarre and incredible answers to questions like, "What bad things did they do to you?"

Years after Nancy was convicted and sentenced to prison, evidence surfaced that all of the children were marked present at school on the day the alleged abuse happened. In addition, Nancy had an adult bus aide on her bus that day, who later verified that the wild tales didn't happen—the kids had been dropped off at school and taken home at the end of the day. Moreover, between dropping the children off in the morning and taking them home at the end of the day, Nancy always went to a second job. Work records showed that she was present at her second job on the day in question. A video of the children being interviewed by police also surfaced, which demonstrated that the children had been coached by their parents to incriminate Nancy and her alleged accomplice. Although it's hard to believe, Nancy's attorney at trial did no investigation and didn't bother to call the bus aide as a witness or investigate to find any of the documents that would have proven her innocence. Nancy spent nearly fifteen years in hell as a result of the allegations, while the accusing families got rich. After the evidence of innocence surfaced, Nancy was released in 2009, and the farce of her case was later depicted on an hour-long episode of *Dateline NBC*.⁸

But long before she was freed, back when the odds of her exoneration seemed a remote dream, I visited her in prison. To this day I have never witnessed a person in deeper emotional pain than Nancy Smith was that day. She was in utter agony over not being present to raise her four children. After she was wrongfully convicted, her younger children had been passed around from relative to relative, as Nancy had been a single parent. Her children had not had sufficient stability over the years, and one child had developed serious psychological problems and addiction issues as a result.

And there was nothing she could do to help them. She was so confused as to why this was happening to her that she couldn't sit still when she spoke. Her whole body shook and she cried so hard that I could barely understand what she was saying to me. She was in a state of nonstop, extreme mental torture.

On my drive home from the prison that day, I thought about the horrible injustice she faced—having to remain in prison and away from her children even though the evidence of her innocence was now strong. The reality of her mental torture was so overwhelming that it made me feel physically ill. The pressure I felt to free her—which at the time early in the investigation seemed like a longshot—made me pull my car over to the side of the road because I thought I was going to vomit.

I have had many sleepless nights over other cases. And that's just what I have experienced as a lawyer. I cannot imagine the pain and anguish that the innocents themselves and their families have suffered.

The mother of Dean Gillispie, a man we eventually proved innocent and freed in 2011, told me shortly after we took over her son's case in 2003, "This is the first time since Dean was kidnapped by the state of Ohio that our family has been able to enjoy Christmas. Just knowing that someone is listening, and that someone else is finally taking up the fight with us, made it feel a little like Christmas." But by 2003, she and her family had already experienced twelve Christmases without her son. And they would have to go through eight more Christmases before we finally brought Dean home as a free man. In fact, Dean had to spend an additional three years in prison after we had collected the evidence demonstrating his innocence simply because of the resistance from the prosecutors and the trial judge, who were as appallingly close-minded as the prosecutor in the Elkins case.

When I look at these cases, I see police officers, prosecutors, and judges who took unreasonable and intellectually dishonest positions that stripped innocent people of their freedom and caused tremendous human suffering for entire families. These acts could be considered acts of evil. But, as I will explain below, I believe that these actors in our criminal justice system are normal, good people. Indeed, if they *were* evil, then one would have to conclude that a high percentage of police officers and prosecutors in our system are evil, because so many of them react in this way to postconviction innocence claims. But they're not evil. They're just normal, regular people. They are the kind of people who would help an old man cross the road, or who would shovel the snow from a sick neighbor's driveway. They're the type of people who get invited to speak to high school civics classes, and talk to the students about our great system of justice. Everyone thinks they're wonderful, and the kids in the class want to grow up to be like them. Then they go back to their offices and

commit acts of heartbreaking, callous injustice in cases like these because they are operating under a bureaucratic fog of denial.

Three psychological factors combine to cause good people to create this kind of “evil” outcome in our criminal justice system: cognitive dissonance, administrative evil, and dehumanization.

COGNITIVE DISSONANCE

Cognitive dissonance is a psychological phenomenon that can cause us to push aside or deny information that conflicts with our most deeply held beliefs.⁹ The theory holds that humans cannot maintain two conflicting beliefs for long because it causes great internal discomfort or dissonance. To resolve the feelings of dissonance, we must take action to alleviate the conflict, which often means that we hold fast to the belief that is most important to our psyche, while subconsciously moving ourselves into a state of denial about the competing belief.¹⁰ And in many cases, we don’t just deny the information that conflicts with the belief that we have chosen to maintain, but, in order to make ourselves feel better about our initial feelings of discomfort, we strongly lash out against the competing belief, convincing ourselves that it is dead wrong and must be soundly defeated. We rationalize that our most important belief is absolutely correct, and then overcompensate for that rationalization by lashing out against the competing belief to soothe the internal discomfort that appeared when our deep belief was first challenged.

Many who supported the Nazi party in Germany during World War II eventually came to realize that their political party was committing mass genocide against the Jews and other targeted groups. For most, I’m sure, that realization caused initial feelings of dissonance. They loved the political party that was giving them a deep sense of self-worth by lifting Germany up as a world power, but they also knew that genocide was immoral. At that point, faced with beliefs that were in tension with one another, they had a choice. They could leave the Nazi party and not participate in its activities. But this could mean making great personal or professional sacrifices, which many were not willing to make. Or they could keep participating in the party but put their heads in the sand and convince themselves that the genocide wasn’t actually happening, but rather was nothing more than wild rumors propagated by the enemy. Or, to make themselves feel better about what their beloved country was doing, they could go “all in” and aggressively adopt the ideology of the party, convincing themselves that killing Jews was the morally right thing to do in the circumstances and defensively lashing out against anyone who suggested otherwise.

While some Germans left the party, and some even chose to heroically save Jews, many chose to either deny what was happening or overcompensate by aggressively adopting the party's position regarding the "Final Solution." The closer they were in the hierarchy to the concentration camps, the harder it was for them to deny what was taking place, so the more likely they were to go "all in" in order to internally justify their actions and avoid dissonance.

Humans engage in cognitive dissonance about more mundane matters as well. If we smoke, we know that it is bad for our health. We can't continue to smoke while simultaneously stressing out about the health consequences—that's an intolerable situation that our subconscious will not allow us to maintain for long. So we must do something to resolve the dissonance. One option is that we can quit smoking, which of course some do. Others continue to smoke but rationalize away the dissonance. They may adopt the mantra that they will quit soon and thus won't suffer of any of the health effects associated with long-time tobacco use. They perpetuate this mantra that they will "quit soon" year after year, decade after decade, even though to any objective observer it eventually becomes clear that they will never quit. Or they convince themselves that if they quit smoking they will gain weight, which brings with it health risks like diabetes that they decide are greater than the risks associated with smoking. "Diabetes runs in my family," they will say, "and smoking is the only thing that keeps me thin. I unfortunately have to pick my poison. I don't have a choice."

Or they might convince themselves that they enjoy smoking so much that it outweighs the health risks. "Why would I want to live ten years longer if I'm not enjoying myself in the meantime," they tell themselves. "Smoking calms me down, and makes my life enjoyable. I can't concentrate at work when I'm not smoking. I'm a better person when I smoke. I'd rather have a pleasant shorter life than a longer life filled with constant stress and worry about health issues. I need to just cut myself a break and chill out."

Many decades ago, the father of the cognitive dissonance theory, psychologist Leon Festinger, infiltrated a cult whose members had been convinced by their leader that the world was going to end that year on December 21 at midnight. Members of the cult who followed their leader to a specified location at the end of time would be picked up by a spaceship and saved, they believed. Many of them sold their homes and gave away all of their possessions, believing they would not need them in outer space.

Festinger wanted to know how the group would react when the prophecy didn't come to pass. At midnight, nothing happened. No spaceship appeared, and the world didn't end. By two o'clock in the morning, the

group was becoming very tense. At a quarter to five, however, the leader suddenly received a new prophecy and announced that God had decided to spare the world because of the faith and adherence of this little cult. Their impressive showing of faith, the leader claimed, had changed God's mind. As Festinger predicted, members of the cult were enthralled and now believed in their leader more than ever before. With exhilaration, they called the press to report the miracle, and began proselytizing with renewed vigor about the miracle they had been fortunate enough to witness.¹¹

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As I've said, I believe that the vast majority of police and prosecutors are good people. They go into law enforcement to help others. To make the world a better place. To stop crime and provide a voice for the victims of crime, and to fight for justice. They internalize their fight for good, and it becomes an essential part of their self-identity and psyche. They naturally buy into the notion that their colleagues around them express: "We are the good guys, who put our lives on the line for the safety of others." And it's true. Law enforcement personnel have dedicated their lives to the public good. Many prosecutors, for example, are lawyers who could earn much more money in private practice but choose to make less in order to serve the public good.

When these individuals first entered the criminal justice system many years earlier, it appeared to be an impressive machine that had been honed and tweaked over the many decades of its existence to near-perfection by the intellect, wisdom, and hard work of the generations before them, tracing back to our nation's founding fathers. They had been fortunate to become a part of it, to be shown its ways, and to eventually carry the torch for the next generation. And through their careers, they each invested their lives in the system, believing deeply and proudly that they were contributing to something that was both noble and greater than the sum of its parts—bigger than any one person. And from that belief they formed part of their identity and sense of noble self-worth.

So, as developments both in the innocence movement and the field of psychology have called into question some of the basic assumptions at the core of the system, these individuals have often reacted with defensiveness, if not great hostility. When someone has suggested in a particular case that an innocent person may have been wrongfully convicted, they've denied it, often coming up with outlandish theories as to why the defendant is guilty—despite, as we have seen, DNA test results clearly demonstrating innocence. Or when someone has suggested that system-wide reforms are

necessary—like those to make eyewitness identification or forensics more reliable—they often scoff and continue carrying out their work the way it’s always been done, refusing to hear or even consider the proposed reforms.

Of course, when someone comes along and says, “Your office convicted an innocent man and sent him to prison for thirty years, while the true perpetrator stayed out on the street and raped and killed three women because of your mistake,” it is naturally difficult to accept. It could cause intolerable dissonance. It conflicts with everything those in the system believe about themselves and the system to which they have dedicated their lives and have attached their sense of self-worth.

So when they hear this, they have a choice. They can objectively examine the claim to determine if it is true. But that is very difficult for most humans to do. Instead, many instinctively have a knee-jerk reaction. They refuse to examine the new evidence critically and come up with outlandish theories in order to maintain their deep-seated beliefs about the system’s fairness. And they react with anger toward those who are challenging their beliefs and their identity. When told that the criminal justice system is systemically flawed and needs to be overhauled and reformed in many respects, they react with similar defensiveness and indignation.

Professor Daniel Medwed, who served as an innocence lawyer earlier in his career, spoke to my class and described the shock he felt when he first witnessed this psychological phenomenon at work. In his first case as an attorney for an innocence organization in New York, his team developed overwhelming evidence that their client was innocent. He told his students, “This evidence is very strong. The prosecutors are all reasonable people and just want to reach the right answer. We won’t need to file a motion in court to free our client, we’ll just go meet with the prosecutors and show them our evidence, and I’m sure they’ll agree with us and set him free.” But he was wrong. And naïve. And he lacked an understanding of human psychology, just as I did when I first entered this line of work. The reaction from the prosecutors, and the way they spun the new evidence in ridiculous ways to avoid conceding innocence, shocked Medwed. The prosecutors’ reactions fascinated Medwed so much that he went on to focus his later scholarly career as a law professor on the psychology behind such reactions, writing several articles on the subject and eventually publishing *The Prosecution Complex*.

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We have a law in Ohio, as in all other states, that requires police and prosecutors to turn over biological crime-scene evidence for DNA testing in

postconviction cases if certain legal requirements are met. In probably more than a hundred Ohio Innocence Project cases, my office has sought DNA testing through this statute on behalf of an inmate claiming innocence. In my early years doing this work, I would call up the prosecutor's office in question and say, "This inmate wrote us and says he's innocent. We looked up the case and it seems there should be DNA we could test to find out if he's telling the truth. Will you consent to release the DNA so we can get it tested? We'll pay for the testing. If you consent, we won't have to waste time litigating the issue in court."

The answer was almost always "No." I then would stress, "We're not saying he's innocent yet. I'm just saying there is DNA we could test that will give us the answer, and it doesn't cost you anything, so why can't we just test it?" Still the answer would almost always be "No." One prosecutor said to me during such a call, "The name of your program—Ohio Innocence Project—bothers me. How did you come up with that name? It's insulting. I get it—you're representing these people and you want to get them off. But none of these people are actually innocent, of course."

So now, years later, unless we are dealing with one of a few counties in Ohio that I have learned will sometimes consent to the testing, we don't even bother calling and asking. We just file a motion in court saying that our client is entitled to DNA testing under Ohio's DNA law, knowing it's going to be opposed aggressively by the prosecution.

When I talk about this during speeches, members of the public always ask, "Why won't the prosecutors consent to the DNA testing?" The only answer I can provide is that they're in such denial, and are so confident that any person their office has ever convicted is guilty, that they see it as a silly waste of time. But this defensive attitude not only is unjust, it wastes tons of taxpayer money. Indeed, when we're forced to fight for testing in court, it often takes years of litigation, tying up precious court time and resources in the process.

In one case, after getting a request for DNA testing from an inmate, I contacted the local prosecutors and asked them for consent to test the DNA in his case. I told them we would pay for the testing. Although there was plenty of biological material that could easily determine whether the inmate's claims of innocence were true, the prosecutors refused to consent. So we had to litigate the matter in court. After extensive litigation the trial court denied our motion, despite the fact that it was pretty clear the inmate was entitled to testing under Ohio's DNA law. A year or two later, once we got the case away from the prosecutor's home court, an appellate court found that the trial court judge had "abused his discretion" in denying testing under Ohio's

DNA law. So the case was remanded back down to the trial court with an order to submit the biological material to a lab for DNA testing.

The DNA testing went forward, and it confirmed the inmate's guilt. This is not an uncommon occurrence for those of us in the innocence movement. We, of course, cannot know when first seeking testing whether an inmate is innocent or not. We simply want to find out by testing the DNA. I tell my students that a DNA test result confirming guilt is the best answer one could hope for. I tell them, "If you're sitting around hoping that an innocent person is in prison, while the real perpetrator is out committing more crimes, you're sick." So when we got the test results back confirming this inmate's guilt, I was nonplussed. I was happy that we got a definitive answer. I did in that case what we always do with such test results—I moved to dismiss the DNA motion and end our representation of the inmate.

Typically, when we file such a motion after a client is confirmed guilty, the prosecution files a written motion agreeing, and the trial court enters an order ending the matter without the prosecutors or the defense attorneys having to come to court. It's all done in writing through the mail or, more recently, through electronic filings. But in this case, once we filed our motion to dismiss, the prosecutors filed a motion saying they wanted to have a hearing in court to discuss the matter further. I was confused by this request. It seemed like a waste of time. Everyone was in agreement that the DNA testing confirmed the inmate's guilt and the matter should be quickly resolved, so why did we need to waste time coming to court to discuss whether the motion should be dismissed? Nevertheless, out of courtesy, I did not oppose this curious request.

The night before the hearing in court, a reporter I had gotten to know fairly well called me and said something to the effect of, "The elected prosecutor himself is coming to court tomorrow, instead of just his assistant prosecutors, and he's having this hearing because he wants to blast the Ohio Innocence Project for wasting taxpayer money and taking up their time and the court's time for a guilty rapist. He's alerted the media so that we'll all be there tomorrow to get the story. I'm just giving you a heads-up."

After I got off the phone, I contacted the prosecutor's office and reminded them of my earlier offer to pay for the DNA testing without having to litigate, pointing out that we could have confirmed the inmate's guilt years earlier with no cost to taxpayers. But since they had refused to consent to the free testing back then, a lot of time and money had been wasted. In other words, the waste of taxpayer money was the prosecution's fault.

The next morning before the court hearing, the reporter called me back and said, "They've called off the media. The elected prosecutor is no longer

coming. He's just sending one of his minions." The hearing lasted about sixty seconds and was a nonevent. It too was a waste of time. But not only had the prosecution's resistance to DNA testing wasted taxpayer money by requiring several years of litigation before the testing finally went forward, the prosecutors were so hostile to the DNA testing motion that they were chomping at the bit to publicly embarrass the Ohio Innocence Project for allegedly wasting taxpayer money on behalf of a guilty inmate. They pulled back from doing so only because they had been reminded that the waste of taxpayer money was no one's fault but their own.

Any lawyer in the innocence movement could provide example upon example where prosecutors fought back against innocence claims with a closed-minded attitude and denials that anyone their office had convicted could possibly be innocent. I've already provided numerous examples in this book. Here's another one. It occurred when I was still new to this line of work and still somewhat naïve.

The Ohio Innocence Project had a client, Rico Gaines, who had been convicted of murder based primarily on questionable eyewitness testimony. Years later, after Rico had spent many years in prison, the prosecution's star witness recanted, explaining that his testimony at trial had been wrong.

I now know that's typically not enough to win an innocence case. When the prosecution's witnesses recant years later, it doesn't move the needle for the courts. The courts simply assume that the "guilty murderer" or his family members pressured the witnesses to recant.

But in this case we had more than that. A man who lived on the street where the murder occurred contacted us and said he had seen the shooting. He was near the street at the end of his driveway when he saw and heard a dispute between several people on the street in front of him, and ducked down behind his car and peeked around to watch as the shots were fired. He saw the murder happen right in front of him. He not only knew that our client had not been involved, but he could identify the shooters as shady characters from his neighborhood who had a reputation for crime and violence.

He explained that he had been afraid to come forward at the time of the original trial because he had teenage children in the house and didn't want to put them at risk by testifying against such unsavory characters. But now his kids were grown and gone, and he had learned from the newspapers that the true culprits were imprisoned for other crimes. So he no longer feared for the safety of himself or his children. This new witness was not a friend of our client, and had no apparent motive to lie.

In addition, ballistics reports showed that the murder could not have happened the way the prosecution alleged at trial through their snitch

witnesses. The reports corroborated what this new witness was saying about how the murder went down.

We contacted the prosecutors and informed them of this new evidence. We told them that we would give them access to the new witness, and they could even polygraph him if they wanted. They declined. They didn't want to meet or polygraph our witness. So we had the witness polygraphed ourselves, and he passed. Although I know polygraphs are not particularly reliable, we sometimes use them for our witnesses anyway because a positive result can on occasion help sway prosecutors. But because we couldn't get anywhere with the prosecutors, we filed a motion in court to exonerate Rico based on this new evidence.

After our motion was filed, the prosecutors contacted us and said they'd changed their minds. They would like to meet the new witness and see for themselves if he was telling the truth, they now said. Excited that the case was maybe going somewhere and that the prosecutors seemed willing to examine it with an open mind, we called up the witness and made arrangements for him to go to the prosecutor's office for an interview. When he arrived, however, they didn't interview him. Instead, they placed him under arrest for a series of unpaid, delinquent traffic tickets. They booked him and put him through the entire arrest process. This witness had to call his church and ask his pastor to pull money together from other church members to pay all of his outstanding tickets so that he could be released. Once his account was paid, the prosecutors sent him on his way.

The message was clear—the prosecutors were not, in fact, going to approach the case with an open mind, but would use any means available to them to intimidate the witness from testifying at our upcoming exoneration hearing.

We eventually were able to free Rico from a life sentence after he had spent nine years in prison. But the prosecution, as in so many other innocence cases, denied the prisoner's innocence at every turn without once making a good-faith effort to be objective or to seek the truth.

Although there are, of course, exceptions, this sort of behavior from prosecutors in postconviction innocence cases is considered the norm. When I tell these stories during speeches, the public becomes confused. They repeatedly ask me, "Why would the prosecutors do this? Don't they want the just result?" "Don't they want the truth?" They look at me like they don't believe me. So I was glad when the public could finally see a clear example of this sort of recalcitrance in the Netflix docu-series *Making a Murderer*. In 1995, when Steven Avery was in court fighting to overturn his wrongful conviction for the rape and assault of Penny Beerntsen, a

prosecutor from a neighboring county called the sheriff's department in charge of Avery's case and informed them that a man they had just arrested, Gregory Allen, had confessed to committing the rape. But the officer who took this call not only failed to disclose it to the court or Avery's lawyers, he didn't even write it down. He told a few supervisors about it and they all then blew it off.

Years later, after Avery was finally exonerated through DNA testing that proved Allen was the actual perpetrator, the Wisconsin Attorney General's Office commenced an investigation, at which time the sheriff's department finally documented this phone call from years before.

Why did they fail to take action when the call first came in? Because of a form of psychological denial. There was no doubt in their minds that Avery was guilty of attacking Penny Beersten, so the phone call was irrelevant to them. Or, more precisely, they suffered from cognitive dissonance and it conflicted with their belief in Avery's guilt, so they shoved it aside. Human beings have a very hard time changing their minds once the die is cast. One psychological study shows that gamblers at a race track who have already placed their bet on the pending race (and thus can't go back) are far more confident that they have made the right choice than gamblers who have picked their horse but are still waiting in line to place their bets.¹² There's something about putting your money down that causes your mind to harden. Once prosecutors and police have obtained a conviction, they have put their money down. They have placed their bet, and there is no going back.

. . .

I suffered from this problem to some degree myself as a prosecutor. Here's just one example. For two or three years when I was a prosecutor I spent a lot of time with a particular cooperating "snitch." He was someone we had arrested who then "flipped" and became an informant for us to work time off his sentence. (Informants plead guilty to the crime they were arrested for committing, and then agree to delay their sentencing for sometimes up to several years until their period of cooperation ends. And then they get leniency at sentencing depending on how helpful they were to law enforcement during their period of cooperation.) I met frequently with this informant as I prepared him for his potential testimony in various trials. I found him to be quite intelligent and funny. And he seemed quite honest. We developed a good working relationship. I liked him. On one occasion, for a reason I can't remember, I made a passing reference to his confession—how he had confessed in the back of the squad car when first arrested a few years earlier. When I mentioned his confession, he snickered.

I said, "What? Why did you laugh?" He said, "I did the crime, but I didn't confess in the squad car like Detective — said. He just made that up. I couldn't believe it when my lawyer showed me his report about my confession. It doesn't matter, I was gonna plead guilty anyway. I'm not gonna fight something I did."

To say that a detective fabricated a confession is a serious allegation that must be examined closely. But at the time, I just brushed off his comment as nonsense and didn't give it a second thought. It seemed ridiculous to me. So I just changed the subject. But when I look back at it now, I know that this informant had no motive to lie. He had admitted to the crime and pled guilty years before, and had become an informant right away. Why would he make up a story about a fabricated confession two or three years later? It could start an investigation that might force him to make accusations against one of the detectives he was now working with, and who would have a lot of influence over the length of prison sentence he would eventually receive when his cooperation period ended. So he had a strong incentive *not* to lie about that. And it's not like the informant had an agenda to bring up the confession with me because he wanted to start a beef. The topic came up by happenstance and in passing, and I was the one who brought it up. The informant was nonchalant about the whole thing, and he allowed me to quickly change the subject.

And when I think back, I remember that before we first arrested this informant I had put a lot of pressure on that detective to get a confession. I told him that the case would be tough and that since he always seemed to be able to get people to confess I really hoped he could "work his magic" and get a confession from this guy as well.

And because I swept the informant's allegation under the rug, I didn't determine if there were any pending cases involving disputed confessions obtained by this detective. I'm sure any defense attorney handling such a case would have liked to know that evidence existed that the detective who had just ostensibly obtained a disputed confession from her clients may have, on at least one prior occasion, fabricated a confession. It didn't even occur to me to make such an inquiry. The first time it occurred to me was when I recalled this incident while I was writing this chapter. Just like the officer in *Making a Murder* who took the call that Gregory Allen had confessed to the rape for which Steven Avery was serving time, I thought it was ridiculous misinformation that didn't deserve a second thought.

Although to this day I don't know whether the informant was telling the truth about the allegedly fabricated confession, I do know that I blew off his allegation because of cognitive dissonance. I swept it under a mental rug

because it didn't coincide with my beliefs about the system. And I believe that if I had brought it up to my supervisors and asked what should be done, they likely would have blown it off as well. No internal investigation would have commenced. Indeed, I might have been *chastised* for being gullible enough to take an informant's word over a police officer's word. We believe a snitch when he gives us information that helps us send someone to prison for life, but when he challenges our basic beliefs about the system, his allegations are promptly denied as nonsense without a closer look.

. . .

As an innocence lawyer, I am constantly frustrated by how police departments in Ohio stonewall my office's request for police files. When we start working on a case, the first thing we do is send the police department in question a public records request, under Ohio's public records law, to get the original police file so we can evaluate how the investigation was conducted and what evidence was collected. When my office first started doing this work, from 2003 until about 2009, we routinely received the police files in response. But after a few highly publicized exonerations, many police departments stopped turning their files over to us. Sometimes they just ignored our letters. Or when they responded, they didn't send the file but instead sent a letter claiming that the investigation was still ongoing, which relates to one of the exceptions under the public records law. They claimed the investigation was ongoing even in cases where our client had been convicted decades previously. So there was no way, in reality, the investigation was actually still open. This all happened in a manner that made it seem orchestrated, as many departments across Ohio started behaving this way at exactly the same time. It's like they all agreed at a statewide meeting of some sort that they might be able to stop the Ohio Innocence Project from getting so many exonerations if they agreed to stop turning over their files to us. One of the clinical professors working in my office, Donald Caster, eventually had to sue the Columbus Police Department under the public records law to try to create some new precedent that would end this chicanery. We won that lawsuit in 2016.

I now think back to when I was a prosecutor and received my first public-records request in one of my old cases. I was told by supervisors that I had to call some federal office in Washington DC to learn what I was supposed to do. I made the call. The person on the other end said something to the effect of, "If you can assert that the investigation isn't closed, then just say that and don't turn over the file. For example, if there is any suggestion in the file that your defendant may have committed the crime with someone else, and there wasn't enough evidence to arrest that person, or you

didn't pursue that other person at the time, then you can honestly say the investigation is still open. It is possible that someday someone will walk into your office and give you enough evidence to arrest that other person." Even though I wasn't working on the case anymore, and hadn't thought about the case for years, I thought of an unlikely scenario that allowed me to assert that the case wasn't completely closed, as I was instructed, and then never thought about the case again. It didn't bother me one bit. I was glad I had such an easy avenue to stop the "bullshit."

. . .

Cognitive dissonance has fueled an aggressive backlash against proposed changes in the forensic sciences in recent years. As the innocence movement, psychological research, and new breakthroughs in science have exposed fallacies in many areas of forensics (as I will discuss in depth later), those who make their livings in these fields have lashed out at those offering new ideas as if they were heretics in the fourteenth century challenging the Church's sacred truths.

Take the field of shaken baby syndrome (SBS). For the past two decades, hundreds if not thousands of people in this country have been convicted based on a medical theory that we now know is invalid and can lead to wrongful convictions. This medical theory stated that if a dead or severely injured infant is reported to the hospital with three specific symptoms—bleeding in the retinas of the eyes, bleeding under the dural matter of the brain (subdural hematoma), and brain swelling—then the baby had to have been shaken by a caretaker. Only intense shaking, the theory went, could cause those three symptoms to be present at the same time. So if a parent or a babysitter called 911 when an infant lost consciousness, and it was later determined that those three symptoms were present, whoever was caring for the infant at the time would be charged and likely convicted of murder (or assault if the baby lived) for allegedly shaking the baby.

We now understand, however, that various conditions and illnesses can cause these three symptoms. "Short falls"—such as falling off a couch or diaper-changing table—can cause these symptoms as well in some circumstances. Accordingly, many individuals charged with murder under this theory have been acquitted in recent years, if they have had the funds to pay for medical experts to dispute the prosecution's experts espousing the shaken baby syndrome theory. And several people who were previously convicted under this theory have since been exonerated after spending years in prison, if they were lucky enough to have an independent-thinking judge examine the medical literature with an open mind.¹³ But many

convicted under this theory remain in prison. And many of them may be entirely innocent.

These new developments have caused quite a reaction among some pediatricians who made their living testifying for the prosecution in these cases. They have lashed out with venom at the doctors and neurosurgeons who have suggested that the original shaken baby syndrome theory could be wrong. Rather than responding on the merits of the issues, they have at times made the doctors questioning the status quo feel threatened. One doctor who challenged the status quo was even charged with perjury in a case after he testified for the defense, but he was ultimately acquitted. In the UK, Dr. Waney Squier, one of the world's leading neuropathologists, who was once a believer in SBS, was disciplined in 2016 for declaring under oath her belief that SBS is an improper diagnosis in many cases.¹⁴ In response, a group of more than twenty leading pathologists and other leaders in this field from around the world published the following editorial:

We are concerned that Dr. Waney Squier, perhaps Britain's foremost scientist in the field of pediatric neuropathology, who has been a consultant at the John Radcliffe hospital for 32 years, was struck off the medical register by a General Medical Council panel on Monday, based on her testimony in so-called shaken baby syndrome (SBS) cases. She was accused of various things, including showing too little respect for the views of her peers.

Every generation has its quasi-religious orthodoxies, and if there is one certainty in history it is that many beliefs that were firmly held yesterday will become the object of knowing ridicule tomorrow. Whether this will be the fate of SBS, time will tell. However, the case of Dr. Squier follows another troubling pattern where the authorities inflict harsh punishment on those who fail to toe the establishment line.

It is a sad day for science when a 21st-century inquisition denies one doctor the freedom to question "mainstream" beliefs. It is a particularly sad day for the parent or carer who ends up on the wrong end of another doctor's "diagnosis" that an infant was shaken, when the child may have died from entirely different, natural causes.¹⁵

The merits of this debate and the reactions of prosecutors and the medical establishment are captured perfectly in the documentary film *The Syndrome*. Anyone interested in this issue should watch this fascinating documentary to see cognitive dissonance on full display and the paltry level of discourse of the medical establishment when responding to claims that they may have had it wrong all these years. For example, in the film, a doctor invested in this field plays his guitar and leads the audience at a shaken baby syndrome conference in a karaoke-style sing-along of the

following satirical lyrics, to the tune of “If I Only Had a Brain” from the *Wizard of Oz*:

I will say there is no basis, for the claims in shaking cases,
My opinion’s in demand.
Though my theories are outrageous, I’ll work hard to earn my wages
If I only get ten grand.
I could be an honest person, say abuse, of this I’m certain
Like Oz across the land.
But my wallet says it’s needin’ so I’ll say it’s all rebleedin’
If I only get ten grand.
Oh, I will tell you why the State’s proof is not there,
Make my claims for causes that are very rare,
No proof for them, why should I care?
I don’t care what other docs say, I will claim they’re short falls always,
Professing on the stand.
Bleeding bad within the brain, or say I’ll not abuse again
If I only get ten grand.
Other things cause bleeds in eyes, confessions are all lies,
I’m like a one-man band.
Anecdotes do not make science, research has no reliance
If I only get ten grand.
Oh, I will tell you why the State’s proof is not there,
Make my claims for causes that are very rare,
No proof for them why should I care?
I’m attacked by many critics, but defense guys like to get us
Cause I support their plan.
They’ll decry me as a chorus, I don’t care my skin’s not porous
Cause I always get ten grand. I want to get ten grand.
I really need ten grand.

When defenders of the original SBS theory have responded on the merits, it usually involves a claim that the theory must be true because some of the individuals arrested for shaking an infant later confessed to doing so. The confessions, they say, prove the theory right. This highlights the problem with the medical profession incorporating fields outside of their area of expertise into their medical diagnosis. It is apparent that these doctors do not fully understand the phenomenon of false confessions, to be discussed later in this book. That’s not surprising, because most of the public does not understand the phenomenon of false confessions, including many judges, unless they have studied the psychological literature and have seen it play out in the courtroom. They also do not understand that a parent who just lost a child—perhaps the worst horror that could happen in one’s lifetime—are extremely vulnerable to false confessions. This is particularly true when

they are told by the police that a confession is the only way that they might be able to receive leniency and someday reunite with their other children, or when they are told that, unless they confess, their spouse is going to take the fall for shaking the child.

Thus, with SBS, an incorrect medical theory may lead to a false confession. The false confession is then used to validate the incorrect medical theory in a circular feedback loop.

The forensic establishment has pushed back with similar close-minded vitriol to criticism of bite mark evidence. The only two independent agencies that have thoroughly examined this type of forensic evidence have issued reports that are quite damning. In a 2009 report, the prestigious National Academy of Sciences demonstrated the deeply ingrained problems with bite mark evidence, and the Texas Forensic Science Commission in 2016 ruled that there should be a moratorium on the use of this evidence in the state of Texas.¹⁶ In response, the American Board of Forensic Odontology (ABFO) has fought back, and its supporters “have waged, aggressive, sometimes highly personal campaigns to undermine the credibility of people who have raised concerns,” the *Washington Post* observed.¹⁷ Supporters of the status quo have, among other things, filed troublesome ethics complaints against odontologists who have dared to question the establishment.¹⁸

In 2015, the ABFO conducted a study intended to demonstrate the reliability of bite mark evidence and to silence its critics. However, the study failed miserably. The thirty-nine forensic odontologists who participated gave at times wildly divergent views on the hundred cases included, showing the subjective and arbitrary nature of this “science.” Professor Paul Gianelli, a member of the National Academy of Sciences, called the results “disturbing” but “not surprising,” adding, “There have been a number of cases over the years in which one bite mark analyst testified that a mark was a human mark, while another testified it was something entirely different, for example a bug bite, or an indentation from a belt buckle.”

But the most curious outcome of the ABFO’s study has been its efforts to suppress its own results. Concerned sources within the ABFO told the *Washington Post* that the organization’s leadership was “shocked” and “reeling from” the results of its own study, and tried to cancel the panel at an upcoming conference at which the results were supposed to be announced. The panel ultimately went forward, but the presenters from the ABFO downplayed the significance of the study, criticizing the organization’s own methodology in the study as flawed. And even after the study exposed deep fallacies in bite mark science, the ABFO encouraged its members to continue testifying about this “science” in courtrooms.

The ABFO ultimately decided not to publish or release its study. Paul Gianelli said in response, "If this were truly a science-based organization, I would not only expect them to be extremely troubled by the results of this study, I would expect them to want to publish the results. And sooner rather than later, so they could be considered in any pending criminal cases in which bite mark evidence is a factor."¹⁹ Prosecutors who continue to support bite mark evidence have sometimes reacted with similar defensiveness, if not outright dishonesty.²⁰

This type of reaction toward those who challenge the status quo has been evident outside the forensic sciences as well. In 2012, a Louisville detective informed the Kentucky Innocence Project (KIP) that a man he had interrogated had confessed to a murder for which one of the KIP's clients was in prison. But the detective's superiors were not pleased that he had disclosed this information to what they believed was a defense-oriented organization. The detective alleged that he was demoted as a result, and internal police department emails obtained by the media demonstrated that the police department was angry with him, saying he should have treated it as a "confidential matter" and should not have "stuck his nose" into the case. The detective ultimately won a \$450,000 whistleblower settlement against the city of Louisville for the retaliatory actions that he suffered as a result of his actions.²¹

In 2009, a Kansas City inmate named Robert Nelson sought DNA testing to prove his innocence, but was denied by the court. He refiled his motion in 2011 asking the court to reconsider, but his motion was rejected again, this time because he had not used the proper form such motions require under the Kansas DNA statute. Nelson's sister then reached out to the court and asked to be provided with a motion from another inmate's case so that Nelson could have a proper template to follow. When she called, she reached court clerk Sharon Snyder, who provided her with a sample motion from another inmate's case that had been successful. The motion Snyder provided to Nelson's sister was a public document, not confidential. Nelson then filed his motion for a third time, this time following the correct procedure, and he was successful. The DNA testing went forward and proved him innocent, and he was exonerated after spending three decades in prison for a rape he didn't commit. But after the court learned that Snyder had shared a publicly available document with Nelson's sister, she was fired. Snyder was only nine months away from being eligible for retirement at the time.²² On national television, Nelson later called Snyder his "Angel," and Snyder said that, despite being fired, she was not sorry for helping Nelson out and would "do it again."

ADMINISTRATIVE EVIL

Good people will typically act with goodness when acting alone. When acting alone, our internal moral compass is our only guide and the only thing to which we are beholden. But problems of cognitive dissonance and denial are magnified exponentially when good people are part of a large bureaucracy, like the criminal justice system, that marches in lockstep according to predetermined policies and procedures. In a large bureaucracy, individuals are just cogs in the wheel doing what they're "supposed to do." No single person can be seen as the cause of any single injustice. Rather, responsibility is defused. The "system" is responsible, not the individuals.

Because the actors in a bureaucracy are beholden to its policies and procedures—the "party line"—they are conditioned not to check or even consider their internal moral compasses as they would when acting alone. And because everyone around them is following the same policies and procedures, they have a stilted sense that, if they are following them and doing what they are told to do, they are doing what is right. In other words, in large bureaucracies the practices and procedures of the group become the guiding lights and replace the internal moral compasses of individuals.

This phenomenon has been called "administrative evil." It is the process that allowed "good" German people to participate in the Holocaust as cogs in a large wheel. As one professor of organization studies has said:

The prevailing cultural context in the modern age, with its emphasis on technical rationality, has enabled a new and dangerous form of evil. The Holocaust was the signal event marking the emergence of administrative evil, but the tendency toward administrative evil, as manifested in acts of dehumanization and genocide, is deeply woven into the identity of professions in public life. The common characteristic of administrative evil is that ordinary people, within their normal professional and administrative roles, can engage in acts of evil without being aware that they are doing anything wrong. Under conditions of moral inversion, people may even view their evil activity as good.²³

Numerous psychological experiments performed in the 1960s and 1970s demonstrated that ordinary people will commit callous acts of cruelty, when following rules and regulations as part of a group or in a bureaucratic setting, that they wouldn't commit when acting alone. In one famous study, Professor Stanley Milgram set out to demonstrate that Americans would not engage in cruel acts of evil when following instructions from an authority figure, as did the German people during World War II. Subjects in the experiment, conducted in a laboratory at prestigious Yale University, were told that they were participating in a memory experiment and would be

acting as “teachers” under the supervision and instruction of a white-lab-coated “scientist.” The teachers were told that their goal was to help other subjects—“learners”—to improve their memories.

With the “scientist” watching and providing instructions, the subjects were told to read a series of word pairs to the learners, who were confederates of Milgram, for the learners to parrot back from memory. When a learner recited the pairs correctly, the teachers were to simply acknowledge the correct answer. But if a learner made a mistake, the teachers were to administer an electric shock by flipping a switch on an elaborate console in front of them. Each time a learner made a mistake, the intensity of the shock would increase. Failing to provide an answer also counted as an incorrect answer that would result in a shock. There were thirty different shock levels on the console, starting at 15 volts and going up in 15-volt increments to 450 volts. Each level of shock had a different name on the console, with the highest levels saying “very strong shock,” “intense shock,” “extreme intensity shock,” “danger: severe shock,” and finally, ominously, “XXX.”

The teachers could not see the learners, as they were in an adjacent room, but they could hear the learners, as the door between the two rooms was left open. Before the experiment started, the teachers were taken into the adjacent room and strapped to the electrodes on the learners’ chair and given a shock at the 45-volt setting so they could get a sense of what the shock would feel like at one of the lowest levels. Although the 45-volt shock was not a dangerous level, it was enough to get someone’s attention.

Unbeknownst to the teachers, the learners were actors, and the shocks they received never went above 45 volts, even when a teacher turned the switch to higher levels. The learners were told to grunt audibly at 75 volts, to complain that they were in pain starting at 120 volts, and to start begging for release at 150 volts. At 270 volts, they were told to start screaming as if in intense pain. Between 300 and 330 volts, the learners were told to no longer respond to the questions, but to simply scream in agony when the shocks came. At 330 volts, they were told to be unresponsive to both the questions and the shocks, as if they were unconscious or dead.

Milgram anticipated that the teachers would resist increasing voltage levels, so he instructed the scientist to engage in predetermined “prods.” The first two times a teacher expressed hesitation, the scientist was instructed to simply say, “Please continue.” After that, the scientist was instructed to say, in order, “The experiment requires that you continue,” “It is absolutely essential that you continue,” and “You have no other choice, you must go on.” If the teacher continued to balk after receiving this final instruction, the experiment was terminated.

Before going forward with the experiment, Milgram asked a number of people, including psychiatrists, graduate students, undergraduates, and middle-class residents of New Haven, Connecticut, what they thought the outcome of the experiment would be. Every single person in the survey predicted that all teachers except a few sociopaths—more than 99 percent—would break off the experiment early on and would refuse to give anything beyond the lowest level of shocks to the learners. This comported with Milgram's own predictions.

The results of the experiment surprised everyone. More than 60 percent of teachers went all the way to 450 volts, well past the point where the learners had seemingly lost consciousness and might be considered dead. Milgram then repeated the experiment but modified it such that several teachers participated together in administering shocks as a group. In that scenario, 100 percent of the teachers administered shocks up to the maximum 450 volts.

Milgram had assumed, like those he had surveyed before the experiment, that American subjects would not allow the voltage to increase beyond minor levels. His plan was to perform the experiment on American subjects and then perform the same experiment in Germany. He hypothesized that, unlike Americans, Germans would follow the instructions to dangerous high-voltage levels, thus proving that something about German culture conditioned Germans to follow authority and bureaucratic instructions as they did during the Holocaust. But because the Americans fared so poorly, he didn't bother repeating the experiment in Germany.

Milgram's results mirror those of the famous "Stanford prison experiment," which was conducted in the basement of the Stanford psychology department. In this experiment, Professor Philip Zimbardo screened male student subjects for "normal" personality characteristics, finding eighteen subjects that did not exhibit particularly aggressive or passive dispositions. The eighteen young men were paid to participate for two weeks in what he called a "prison experiment," but Zimbardo assured them that they would be well cared for and not abused. He divided the men into two groups—nine prisoners and nine guards—and created an environment and infrastructure where the guards had to lead the prisoners through two weeks of typical prison life, enforcing rules and keeping the prisoners in line as would guards in a typical prison.

Although the experiment was slated to last for two weeks, Zimbardo was forced to cut it off after six days because the guards steadily and collectively slid down a path of sadistic discipline and abuse. Each day, the guards became more aggressive and abusive while the prisoners became more

sullen and passive. By the sixth day, Zimbardo had been forced to release five of the prisoners because of depression and extreme anxiety. By that time, the guards had forced the prisoners to do such degrading things as defecate into buckets that were never emptied, to repeatedly chant filthy songs, and to clean toilets with their bare hands.

The Milgram and Stanford experiments could not be performed today because of the ethical guidelines enforced by human subject review boards that have proliferated in the past few decades. But they demonstrate the morality-stripping effects of bureaucratic hierarchy, obedience to authority figures, and group pressures. I doubt that many individuals in our society, if they had access to a device that administered shocks as in the Milgram experiment, would use such a device on their friends, family or neighbors. The idea would be abhorrent to them. They would never do it when acting alone, when their only guideline would be their internal sense of morality.

But when normal people are placed in a bureaucratic setting where doling out pain is part of the accepted structure, and are told to inflict pain, most do so without blinking. Why? Because in a bureaucratic hierarchy with authority figures above them and preset guidelines and procedures for individuals to follow, they think of their actions not as their own but as the actions of the institution to which they belong, and to which they have assigned great prestige. They defer to those in authority and to the institution. Each cog in the wheel has been conditioned to follow procedures and rules that have been set by the institution, and thus they do not follow their internal moral compass in the way they would if acting alone. The “power of the individual’s conscience is very weak relative to that of legitimized authority in modern organizations.” The “guiding value in most organizations is compliance with legitimized authority. Or, put another way, doing the right thing is almost always what is deemed good for the organization.”²⁴ As one expert on organizational studies has said:

Because administrative evil is typically “masked,” no one has to accept an overt invitation to commit an evil act, because such invitations are almost never made. Rather, it may come in the form of an expert or technical role, couched in appropriate language, or it may even come packaged as a good and worthy project (moral inversion). Evil then occurs along another continuum: from acts that are committed in relative ignorance to those that are knowing and deliberate acts of evil (masked and unmasked). Individuals and groups can engage in evil acts without recognizing the consequences of their behavior, or when convinced their actions are justified or serve the greater good. Administrative evil falls within this range of the continuum, where people engage in or contribute to acts of evil without recognizing that

they are doing anything wrong. Typically, ordinary individuals are simply acting appropriately in their organizational roles—in essence, just doing what those around them would agree they should be doing—and at the same time, participating in what a critical and reasonable observer, usually well after the fact, would call evil.²⁵

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I am a Woody Allen fan. Each of his movies has a plot, of course, which often includes a moral lesson. But Woody's characters frequently make passing comments, unrelated to the main plot, that infuse his films with other ideas important to Woody's moral universe. In the film *Hannah and Her Sisters*, one of Woody's characters explains to another character that he has been watching television all night, and adds, "You missed a very dull TV show on Auschwitz. More gruesome film clips, and more puzzled intellectuals declaring their mystification over the systematic murder of millions. The reason they can never answer the question 'How could it possibly happen?' is that it's the wrong question. Given what people are, the question is 'Why doesn't it happen more often?'"

I relate deeply to that comment, although I would modify it. I would change the last sentence to say, "The real question is: 'Why are we so blind to the fact that we commit injustices against each other every day because of the same bureaucratic mindset that we saw in Nazi Germany?'" Indeed, our society's primary "take away" lesson from the Holocaust is that we can't let it happen again. That, of course, is a paramount goal. But the problem is that we view how the Germans behaved during the Holocaust as an aberrational moment in history. It is that aberrational moment—and only that moment—that must be avoided in the future, we say. In reality, though, the bureaucratic mindset that allowed the Holocaust to happen exists all around us at all times, causing injustices that, while not on par with the Holocaust, are profoundly unjust nonetheless within their micro-context. By seeing the Holocaust only as a great aberration and failing to see how that mindset operates in smaller ways on a daily basis throughout our bureaucratic institutions, we are not learning as much as we could from that horrific period in history.

When prosecutors and judges cause great human suffering by blindly refusing to consider evidence of innocence, objectively speaking they commit acts of evil. But I am convinced that none of them see it that way. And, again, I don't think that they are bad people. Instead, I believe they are normal people just going about their business as they have been instructed to do—trying to shoot down the claims of the "bad guys" that come before them—without ever reflecting on their own morality or looking at the

issue outside of the bureaucratic framework that they have been conditioned to follow. And they do this because they are human. They do what I believe nearly all of us would do in similar situations.

DEHUMANIZATION

The problems of cognitive dissonance and administrative evil proliferate in the criminal justice system in part because actors in the system systematically dehumanize criminal defendants. Dehumanization “is a psychological process whereby opponents view each other as less than human and thus not deserving of moral consideration.”²⁶ Dehumanization is all around us, and is visible whenever and wherever humans systematically punish other humans through a bureaucratic apparatus. In times of war, for example, each side in the conflict dehumanizes the other. During World War II, Nazis dehumanized Jews; and Americans dehumanized “Japs,” spreading dehumanizing propaganda and placing those of Japanese descent in internment camps. In colonial times, slave owners dehumanized Africans.²⁷ Racism in any form involves dehumanization.

In like fashion, police officers and prosecutors (and, to some extent, judges) are part of a bureaucratic structure whereby they are in some sense at war and are required to routinely inflict great pain and punishment on other human beings, including when they “deserve it” in some moral sense. And their psyches allow them to do so more easily by seeing those they punish as akin to “enemies.” This alleviates dissonance. Criminal defendants become stereotyped as “evil,” “guilty,” “all the same,” and not worthy of individual attention.²⁸

Furthermore, the criminal justice system moves along at a great pace, with millions of cases coming and going at all times. Judges, police officers, prosecutors, and defense attorneys handle thousands of cases over their careers, with the human beings at their mercy veritably whizzing by. Before long, these system actors come to see criminal defendants as commodities—each an anonymous, faceless file with an assigned number, sitting in a file cabinet in their offices. To those files they apply the practices, customs, and bureaucratic rules and regulations that they have been taught, without really considering the files as human beings, or sufficiently considering whether the rules and regulations need to be adjusted on a case-by-case basis to reach the most humane results. It’s an assembly-line mentality, each actor just a cog in the wheel applying bureaucratic rules in cookie-cutter fashion without thinking deeply about the impact of those rules and regulations.

I received my offer to work at the federal prosecutor's office in New York City when I was working at a large New York City law firm. A memo was circulated around the firm announcing my departure and why I was leaving. Because the U.S. Attorney's Office is a very prestigious place for a young attorney to work, I received hearty congratulations from the lawyers of the firm, including many who had spent time as prosecutors in that office prior to joining the firm.

One lawyer who had previously worked in that prosecutor's office didn't seem very happy for me, though. When others congratulated me in the hallway, she had an unsettled look on her face and then walked away without saying anything. I assumed maybe she didn't know what the group had been talking about. So I went to her office and said, "Hey, did you see I'm going to the U.S. Attorney's Office? I know you used to work there." She said, "Yes," without enthusiasm. I said, "Didn't you like it?" She said that she did at the time, but after she got some distance, she didn't like what the experience did to her. I asked what she meant. She said, "It made me a harsh, judgmental person. I dehumanized people. It took me a long time after I left to shake off that mentality. Maybe it's okay for some people, but in retrospect I realized it didn't really fit me."

Because I was excited about my new job, I shrugged off her comments. I then launched into the job with great enthusiasm, and did it well. I served for several years, handling high-level felonies of various sorts. Many received national media attention. I won awards. But now, years later, and having served on the defense side in the meantime, I know what she was talking about. And a part of me knew it even while I was a prosecutor.

Indeed, we clearly dehumanized defendants in my prosecutor's office. They were categorized as "the other." We each had so many cases that we often mixed up the names of our defendants. I went to court on more than one occasion and used the wrong name—I spoke about another defendant's case instead of the one that was before the judge at that time—before realizing my mistake. That was not an uncommon occurrence in my office. Defense lawyers did the same thing. The defendants were just case files to us. They were just interchangeable parts in the bureaucratic game we played. It didn't matter what their names were, nor did anything else specific to them as human beings. All that mattered were the facts of their cases and the standard set of rules we were supposed to apply to them.

In my office, we used the phrase "bad guy" to signal that our defendants were "others" upon whom we were to inflict punishment and apply our bureaucratic customs and practices, without individualization. I recall one instance early in my prosecutorial career when I presented a plea deal to

my supervisor in a particular case. My supervisor wanted to make sure I wasn't being too soft, so he asked me what my defendant had done to get himself in trouble. I told him. He responded, "He's a *bad guy*—you can't give him that deal." Whenever the phrase "bad guy" was used—which was invariably in every case—it meant, "Don't be such a softy and do what you're supposed to do—hammer him." We were the good guys. They were the bad guys. Bad guys weren't worthy of nuanced thoughts outside of the preset rules and regulations that we were supposed to apply to them in assembly-line fashion. It was very black and white.

When this dehumanizing mentality goes to extremes, it perpetuates things like the "two-ton contest," in which prosecutors in Chicago competed to see who could be the first to indict "four thousand pounds of flesh." The contest resulted in prosecutors going after the heaviest defendants they could find.²⁹ While no one that I know of in my prosecutor's office engaged in anything like a "two-ton contest," I can relate to the mentality, because I lived it. Criminal defendants are nothing more than "things," "commodities," and "bad guys," and the whole process is a bureaucratic game.

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In one of my cases as a prosecutor, a group of teenagers hijacked a postal truck and stole thousands of dollars from it. The truck's daily route went from post office to post office around New York City at the end of each day to pick up the cash and money orders that the post offices had collected throughout that day. By the end of each day, it typically contained tens of thousands of dollars. The teens hijacked the truck with semiautomatic assault weapons, forced the driver to drive behind an abandoned building, fired a gun into the air, and then stuck the hot, smoking barrel into the driver's mouth, making him cough and choke. At gunpoint, they told him to unlock the safe. They then absconded with the money.

I was assigned the case after the initial arrests and bail hearings, so I didn't know what any of the defendants looked like when I took over the case. To me, the case was just a file. The defendants were just numbers. Shortly after I took over the case, lawyers for two of the teens reached out to me and said their clients would like to plead guilty and testify against the others in exchange for leniency. However, the attorney for another defendant, who I'll call Ward, made clear that his client was not going to plead and planned to go to trial. So I met with the two teenage defendants who wanted to cut a deal, had them plead guilty, and signed them up as cooperators to testify against Ward.

The process of preparing these teens to testify against Ward was very tedious and time-consuming. They were in custody, so each time I worked with them on their testimony they had to be brought to my office by U.S. marshals and then returned to jail when I was done. They had grown up in the projects, deprived and without much parental involvement or emphasis on education. So, when practicing their testimony and asking a question like, "What happened next," I would often get an incomprehensible answer. Such was the state of their education and inability to express themselves clearly.

In order to make them good witnesses, I had to spend an inordinate amount of time working with them. I had to teach them how to tell a story in a clear, linear fashion. I had to teach them, for example, that if they used five different "he's" in a single sentence, the jury would get confused. Indeed, if left to their own devices, they might answer the question "What happened next?" like this: "First, they said let's go at four, and then he called me and said let's wait longer, and then she came over and looked at my beeper for a minute and then agreed with him, and then he agreed too, and then we all decided to go get some food first, and then he finally said okay I'm ready." They needed to slow down and use proper names, I told them, rather than "he," "they," and "we," so that jurors could follow the story. Also, they used so much street slang that it was hard to understand them. So I had to teach them how to talk in a way that jurors could comprehend. But they were so accustomed to their way of speaking that it was like pulling teeth to get these lessons to sink in.

So over the months leading up to Ward's trial, I had to spend day after day with these two teenagers preparing their testimony. Through that time, I grew very fond of them. Despite their limited education, they were very smart. And aspects of their personalities were very kind and charming. I quickly came to believe that they were essentially "good" people, who had just grown up under extremely difficult circumstances, with little positive guidance and few good role models, and had made some bad choices as a result.

I became protective of them, even paternalistic. I wanted them to succeed in life after the case was over. So I tried to give them the life lessons that they had never received at home. I discussed philosophical issues with them, and tried to get them to focus on what they were going to do with themselves after the case was over. And they were so young that they touched my heart as naïvely innocent. For example, one of the teenagers would get exhausted after a few hours of trial preparation, so I would sometimes let him watch his favorite show—the cartoon *Spider-Man*—in the conference room during our afternoon breaks. He had to watch the show with a U.S. marshal in the room.

I decided pretty early on that I was going to fight for them at their sentencing, and get them as little prison time as possible, so that they could move past this experience and do all the positive things in their lives that I had talked to them about doing.

That was very different than how I viewed their co-defendant Ward. As I prepared for his trial, I became more and more convinced that he was the ringleader of the hijacking, and that he was a depraved individual who was spiraling out of control at the time of the crime. I was sure that if we didn't get a conviction, it was just a matter of time before he actually killed someone. I hated him for that. When preparing for trial, he was my enemy and the one that I needed to take down for the betterment of society. I pictured him as a very tough, mean, evil person. I had placed the "enemy image" on him—the image that we placed on all such people who we were targeting for punishment.

Shortly before the trial started, the judge called us in to resolve the final pretrial motions. Ward was brought to court for this proceeding in a prison jumpsuit with handcuffs and shackles. This was the first time I had seen him. And I couldn't take my eyes off him. I believe he was eighteen at the time, but he could have passed for fourteen. He was a kid. He was physically small. He had a baby face. He looked scared to death but he tried to hide it. At this hearing, he sat at the defendant's table next to his lawyer and pretended to understand what was going on, nodding emphatically when the judge or his attorney said various things, and then hurriedly scribbling down notes on a notepad like he was writing down something important and playing a key role in his defense. Yet his demeanor was quite innocent, naïve, and scared, just like my cooperating witness's when he told me that *Spider-Man* was coming on and nervously asked if he could watch it.

And what really killed me was that no one was there for him. That was very unusual, as most defendants have family and friends who show up at all the court proceedings for moral support. Ward, on the other hand, though just a kid, didn't have a single person—not even a parent—there in the courtroom to support him. From that fact alone, I knew what kind of life he had had. I knew he had lived the same kind of deprived life as had my two cooperating witnesses for whom I had hope and had tried to take on a fatherly role.

The sharp contrast between how I had pictured Ward and how he actually appeared in all his humanity made me feel disoriented and very uncomfortable. Although I had never allowed myself to feel this way toward a criminal defendant, for some reason I felt very sad for him. After the hearing was over, I went back to my office and closed the door. I was shaken. I felt like I had been kicked in the gut. I choked back tears for a good

ten minutes, pacing in my office and ignoring my ringing phone. I couldn't stop thinking about how he was exactly like my two cooperating witnesses who I had grown so fond of, and how no one had been present in courtroom to support him. He, like my cooperating witnesses, no doubt had good qualities. Indeed, my witnesses were best friends with this kid and had grown up with him. They had all raised each other in the projects because no one else was there to raise them.

But I knew intellectually that Ward deserved to be punished for his crime. And I had a job to do. My job was to punish him—to try to send him to prison for the thirty years that the crime called for. So I tried to shake off my reaction to him at the hearing and move forward. But I couldn't completely shake it. The trial started, and it wasn't fun for me like most trials were when my competitive juices flowed. I was internally conflicted and continued to feel empathy for him because no one was there to support him. Each morning, I almost prayed that someone would be there in the courtroom for him, but no one ever materialized.

So when one of my witnesses didn't provide the helpful testimony that I anticipated she would, I looked for an excuse to cut a deal and walk away from the case. Even though I probably still could have gotten convictions on all counts, I told my supervisor of the problem that had arisen and sought permission to offer Ward ten years in prison instead of the thirty years he was looking at if he were convicted on all counts. In talking with my supervisor, I probably oversold the depth of the problem in my case to ensure that my deal would be approved. My supervisor approved the deal, and Ward took it. He went away to prison for ten years.

I then fought to get the smallest sentences possible for my two cooperating witnesses. I don't remember their sentences, but they were minimal, perhaps two years in prison. A few years later, I saw one of them in the hallway of the courthouse after he was released from prison. He had come back to the courthouse to check in with his parole officer. He told me that he had turned his life around, had received his high school degree in prison, and was now in college on a baseball scholarship. It made me feel good. It was a success story. But I wondered whether, if Ward had made the decision to cooperate in exchange for leniency, he too would now be in college on his way to a successful life.

I knew that I had made a fatal mistake as a prosecutor. I had grown fond of my cooperating witnesses—I had humanized them—and through that process I had humanized Ward. And once that happened, I couldn't perform my job as I was supposed to. Rather, I cut a perhaps unnecessary deal that gave Ward tremendous leniency. In passing the criminal laws that Ward

had violated, Congress—and the people who elected their representatives—had decided that thirty years in prison was the appropriate sentence for Ward’s crime. But I didn’t want to inflict that level of punishment on him. Because I had humanized him, I put my own personal feelings over the bureaucratic rules, in effect allowing my feelings to trump the very laws I was supposed to follow.

I don’t know for sure, but I don’t think that any prosecutors in my office ever had to choke back tears in their office over the humanity of a criminal defendant. If so, it wasn’t talked about. Ever. No one talked about defendants in a humanizing manner. And I didn’t talk about my feelings toward Ward with anyone but my wife.

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I never allowed what happened in the Ward case to happen again. And so, after working to get myself back into the prosecutorial mindset, I reacted with shock and indignation when a judge complained to my supervisor that I had jubilantly celebrated after inflicting punishment on a defendant in another case. In that case, it was almost Christmas. The jury had come back with its guilty verdict at about 5:30 in the afternoon, just after our office Christmas party had started in the law library of our office. Several federal judges were in attendance at the party. With a fellow prosecutor who had tried the case with me, and a band of FBI agents who had worked on the case with us, I came bounding into the Christmas party yelling, “We won! Conviction on all counts, baby!” as everyone at the party lined up to give us high fives, with glasses of Christmas punch in their other hands.

It didn’t occur to me that our celebration was inappropriate—that’s what we always did when we won a case. Indeed, in another case, after the jury returned a guilty verdict early one evening, the NYPD detective on the case drove my fellow prosecutor and me across town to have a celebratory dinner. His sirens were blaring and his lights flashing, making rush-hour traffic stop as we cut through red lights and crowded Manhattan intersections as if we were rushing to a crime scene. My fellow prosecutor and I laughed our heads off in the back seat of the squad car, giddy from the victory.

But while most of the judges in our building, I think, would not have given a second thought to our Christmas party celebration, one of them was deeply offended. He wrote a note to my supervisor complaining about my conduct and saying something to the effect of, “A criminal conviction is not something to celebrate. It’s necessary, but criminal defendants are people too, and it is a gut-wrenching experience for their families. Reacting with jubilation is not appropriate for such a somber event. No one wins in the

criminal justice system." When this note came in, my supervisor read it aloud to a bunch of us standing around, and we thought it was crazy. "What a jerk," we said. "Who does he think he is?" "What a clueless a-hole," we laughed. Of course, I was not told to refrain from such celebrations in the future. It was an accepted part of our culture.

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A few years ago, the Ohio Supreme Court overturned on appeal the exoneration of one of our clients, Nancy Smith. She is the woman I described earlier in this chapter who had been wrongfully convicted of child sexual molestation and was in such agony while she was in prison because she was separated from her four children. After she was exonerated and released, she had been able to reestablish relationships with her now-grown children, and was spending her time joyously babysitting all her grandchildren while their parents worked during the day.

The Ohio Supreme Court did not take issue with the merits of Smith's exoneration; rather, the court overturned it on a technical ground, saying that the trial court that exonerated her did not have the jurisdiction to do so in the manner in which it had been done. This meant that Smith would have to go back to prison immediately. We had grounds to potentially correct the error, and could continue to litigate to have her exoneration reexecuted in a proper manner, but such litigation could take a year or two, or even longer, and Smith would have to go back to prison until she was reexonerated in a manner that passed legal muster. And there was no guarantee that she would be exonerated again—there is always a risk of unexpected obstacles along the way, or new judges with different views taking over the case. Going back to prison, even if she might be reexonerated later, was an intolerable and unimaginable nightmare to Smith.

After the Ohio Supreme Court ruled, the prosecutors were apparently worried that Smith would be fully exonerated again at some point. So they offered her a deal. Each of the various counts of child molestation she had been convicted of carried a few years in prison. The prosecutors offered to exonerate her of some of the charges, but leave intact the charges that justified the number of years she had already spent in prison before her first exoneration. So under this deal, she would have already served all the time required for the convictions that would remain intact. The rest of the charges would be dismissed. To take this deal that would ensure she would never go back to prison, Smith had to agree to give up all appeals of the charges that would remain intact, and agree never to sue any public officials or departments over her wrongful conviction.

This was a torturous choice for Smith. She could continue to fight for complete vindication, but she would have to go back to prison in the meantime, and immediately. Since she simply could not imagine going back to prison, she had no choice but to take the deal.

The courtroom was packed with Smith's family on the day the court proceeding was held to finalize the deal. Everyone was in absolute agony, not sure if she was making the right decision. Indeed, either choice was intolerable—it was truly a choice between two evils.

The reason I'm telling this story, however, is because of the way the judge conducted himself that day. The judge who had exonerated Smith a couple years earlier had recused himself from the proceeding, so a visiting judge from a nearby county took his place for the day. Apparently completely oblivious to the human suffering in the room, the judge walked out into the courtroom and immediately cracked a joke. Pretending like he didn't know the courtroom would be full of cameras, he ran his fingers through his hair and laughed aloud, saying cutely, "If I had known there were going to be all of these cameras here today, I would have gotten myself a haircut." When his joke was met with silence, he quickly scanned the courtroom as if he were surprised that he had not received a round of hearty, approving laughter from the peanut gallery. He then continued through the thirty-minute proceeding in a similar way, nonchalant and, in my opinion, hamming it up for the cameras in a joking, light-hearted fashion.

Although there is technically nothing "wrong" with this judge acting in the manner that he did that day, I tell this story to illustrate what I saw as a complete incongruity between the actual human suffering in the courtroom and the oblivious, dehumanizing manner in which the judge apparently saw the whole affair. It was like watching a doctor crack jokes while telling a patient and his family that he has six weeks to live.

And I know how the judge saw it. He saw the proceeding as I did when I was a prosecutor. It was just another day at the office, where he had to deal with another anonymous, faceless defendant—just another file on his docket to which he was to apply his bureaucratic rules without awareness of the humanity around him.

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In my innocence work, I have tried on occasion to break through the institutionalized dehumanization to help prosecutors see my clients and their families as suffering human beings. But it has never worked. I tried this unsuccessfully in Dean Gillispie's case, for example. A little background on Dean's case is necessary here.

Dean had been arrested and convicted in 1991, when he was twenty-five, for raping three women. The serial rapist in the case had a distinct modus operandi. He abducted the women in broad daylight in public parking lots, flashing a badge and posing as a police officer and claiming the women had stolen something in a nearby store, and then forced them at gunpoint to drive their cars to an isolated area—behind a building or into the woods. Once there, he dropped his pants and forced them to perform oral sex on him. He said very specific things to his victims during the rapes, like, “I work as a contract killer for the CIA,” “I’m from Corpus Christi, Texas, and Columbus, Ohio,” and, “I do this because I was molested by my grandfather when I was twelve.” The victims described him as having a dark tan, wearing a medallion on a chain around his neck, a smoker, blonde or light brown hair with a reddish tint, and acne along his jaw line, among other characteristics. The victims worked with the police to create a composite sketch, which was plastered on posters all over the Dayton area.

Two years passed with the crimes unsolved before Dean was arrested. At the time he was arrested, Dean had a lot of friends, no criminal record, and a good job with a bright future. He was from a hard-working middle-class family in Dayton, with no criminal history. It’s fair to say that Dean was popular and loved by many. But Dean had made enemies with management personnel at his factory job over union disputes. Serious enemies. And after one dispute when tempers flared high, one of his supervisors took Dean’s factory employee photograph and went to the police department investigating the unsolved rapes and said, “This guy Dean looks like the rapist on the wanted posters.” The wanted poster had been on the wall at the factory for two years prior to this, but the supervisor did not try to implicate Dean until after things really heated up between them.

According to what the jury heard at trial, the rookie detective in charge of the case at the time put Dean’s photograph in a line-up with photographs of five other men, and all three victims identified Dean as the rapist. Then they identified him at trial. There was no other evidence against Dean but the identifications of the three victims. No forensics. Nothing. At trial, Dean had an alibi—witnesses testified that he had been in Kentucky camping with friends on a weekend when two of the rapes had occurred, and one of them even had the trip recorded in a diary. But the prosecutor told the jury Dean’s friends were covering for him. Despite the fact that Dean has fair skin and burns rather than tans, had gray hair since high school, couldn’t wear a chain or medallion around his neck due to thick chest and neck hair, didn’t smoke, didn’t have acne along his chin line at any time, and his other physical characteristics contradicted the victims’ original descrip-

tions of the rapist in many other ways, the jury convicted him. Indeed, as I'll discuss later, despite the unreliability of human memory and eyewitness identification testimony (which the criminal justice system has not fully recognized yet), when three rape victims take the stand, cry, and assert with great emotion that they are "positive" the defendant is the man who raped them, it is nearly impossible for a defendant to overcome it in the courtroom. Dean was sent to prison for twenty-two to fifty-six years.

After Dean served twenty years in prison, my office cleared him in two different courts on two different grounds. First, our investigation revealed that the jury had been misled about how the case against Dean started. We tracked down the original detectives on the case—the detectives who had the case when it was cold, before the rookie detective who arrested Dean took over the case. These experienced detectives told us that Dean's work enemy—his supervisor—had tried to implicate Dean earlier when they were still in charge of the case. But the two detectives investigated Dean and very easily eliminated him as a suspect. In addition to Dean not matching the physical description given by the victims, one of the victims had called in a few days after writing her initial police report and said she forgotten to include the fact that she saw the waist and inseam size of the perpetrator's pants on a tag along the outside belt line when he dropped his pants and made her get down on her knees to perform oral sex on him. When this call came in, the detectives wrote a new, shorter report about the pants size of the perpetrator and put it in the file. As soon as Dean's work enemy brought Dean's name forward as a potential suspect, they looked up Dean's height and weight in the Department of Motor Vehicles records, and could see that there was no way Dean could ever fit into pants of that size. They also were experienced enough to recognize when a person was trying to implicate someone from a vendetta, and it was clear to them that Dean's supervisor was implicating Dean out of spite, so palpable was his hatred. So they wrote up a report eliminating Dean as a suspect and placed it in the case file.

Both detectives then left the department—one moving to Florida and the other to Arizona—and the rookie detective took over the cold case. By coincidence, the rookie detective just happened to be friends with Dean's work enemy, and their families had known each other for years. Dean's work enemy then brought Dean's photograph back over to the police department for another bite at the apple with a more sympathetic ear. The earlier reports written by the previous detectives eliminating Dean as a suspect then disappeared from the file, as did all information in the file exonerating Dean—such as the report with the perpetrator's pants size—and the rookie detective went forward as if Dean was a new suspect. He got the victims to identify

Dean in the photo line-up. At trial, the jury never learned what had really happened, and didn't have all the facts. Neither did Dean's defense attorney. Based on testimony from the two original detectives in the case, a federal judge threw out Dean's conviction in 2011 and he was freed.

Our investigation also revealed who likely committed the rapes. An anonymous tip came in implicating another suspect. A thorough investigation by my office demonstrated that the named suspect had a history of flashing a badge and posing as a police officer to commit crimes, including abducting women. He also was known to tell people that he was a contract killer for the CIA, was from Texas and Columbus, and that he had been molested by a male family member when he was twelve—just like the rapist. According to witnesses who knew him well, he tanned deeply in the summer (the rapes occurred in August), smoked, had light brownish hair with a reddish tint, and wore chains and medallions in the late 1980s when the rapes occurred. By examining his arrest record and talking to former girlfriends who had called 911 on him at one time or another in the past, we learned his sexual preference is for oral sex exclusively. When his partners requested intercourse, he was unable to perform.

For our hearing in state court, we created a chart to illustrate the similarities between this suspect and the rapist. On the right is half of the perpetrator's face from the victims' composite sketch made in 1988. On the left is half of this suspect's face from a photo taken in 1990. We merged the two half-faces together for comparison purposes (see fig. 1).

After we presented this evidence in state court, Dean's conviction was thrown out a second time, this time on the ground that the jury likely would have acquitted Dean had it been made aware of the powerful new evidence implicating this alternative suspect.

Now back to the point about my attempts to get prosecutors to see my clients as human beings rather than numbers in a file. After the evidence of Dean's innocence first surfaced and while Dean was still in prison, I asked for a meeting with the prosecutors to convince them not to oppose Dean's upcoming parole request. I wasn't asking them to exonerate Dean yet, but merely not to oppose his parole so that he could be released from prison while we litigated his potential exoneration. After I spent about an hour presenting my evidence of innocence, which included the police misconduct in the case, the elected county prosecutor said in a huff, "What I am supposed to do about this? I thought you just wanted us to not oppose his parole? Why are you telling me all this stuff about alleged innocence and police misconduct that has nothing to do with parole?" I wanted to respond, "For one, you could investigate the police misconduct." As the case pro-


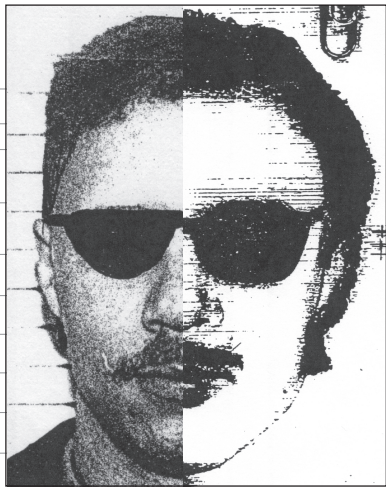


 (Photo in 1990)		◀ Perpetrator (Composite sketch in 1988)
1. Gets very dark tan in summer		1. Described as having dark tan in summer when crimes occurred
2. Hair blonde or light brown with a red tint		2. Hair blonde or light brown with a red tint
3. Distinctive, authoritative voice		3. Distinctive, authoritative voice
4. Worked at Lebanon Correctional; would go drinking in Dayton area (had DULs there)		4. Was intoxicated in the Dayton area
5. Fetish for oral sex exclusively; has trouble performing vaginal intercourse		5. Forced his victims to perform oral sex on him (seemed to have no interest in intercourse)
6. Claimed to be contract killer by profession		6. Claimed to be contract killer by profession
7. Claimed he was molested by male family member at age 11 or 12		7. Claimed he was molested by male family member at age 11 or 12
8. Claimed to be from Columbus and Texas		8. Claimed to be from Columbus and Texas
9. Used fake name "Roger" for his brother		9. Used name "Roger" when committing rapes
10. Often wore chain with medallion in the late 80s		10. Wore chain with medallion when committing rape
11. Pretended to be law enforcement officer (flashed CO badge) to brazenly take advantage of strangers and commit crimes	<p> incriminating comments about the case when interviewed by OIP; after claiming to know nothing about Gillispie's "rape case,"  asked how the "ladies" described the perpetrator; seemed obsessed with the case and whether police were re-opening it.</p>	11. Pretended to be law enforcement officer (flashed a badge of some sort) to brazenly take advantage of strangers and commit crimes

FIGURE 1. Comparison of victims' composite sketch of perpetrator and image of alternative suspect in the Dean Gillispie case. From Dean Gillispie court files.

ceeded in the years that followed, this prosecutor's office not only opposed Dean's exoneration, but it did nothing about the police misconduct, even after the federal judge threw out Dean's convictions on that basis.

In any event, at the end of that hour meeting, the assistant prosecutor who had tried Dean's case to the jury years earlier told me that I was too late—that he had already sent a letter to the parole board opposing Dean's release on parole. He showed me the letter. It was very short. In one part it said something to the effect of, "It is true that Dean Gillispie has passed polygraphs, but this is only because he is such a depraved sociopath that he can trick a polygraph."

This sentence really jumped out at me because I knew that the prosecutor didn't really know Dean but had only seen him in court. He had never talked to Dean. I knew that he was only capable of seeing Dean as an "enemy," as I initially saw Ward and all similar defendants I was trying to send to prison. Anyone who actually knows Dean, however, knows that he is one of the smartest, warmest, and most unselfish people they have ever met. Which is why he is loved by so many. Dean had become my friend by that time through my many prison visits, and I had grown to love and respect his family and empathize with their suffering. I knew at the time

that the prosecutor's stilted view of him not only was dead wrong but was that of an institutionalized bureaucrat who couldn't see past the dehumanizing stereotype he used for all people he inflicted with great punishment.

As we stepped out into the hallway after the meeting, I said to this prosecutor, "I'm going to give you an offer that I bet no defense lawyer has ever given you. Before you make such a statement about another person, don't you think you should get to know him first? So I'm gonna let you go visit him in prison, without my presence, and spend as much time as you'd like asking him questions and getting to know him. Sit with him for hours and look into his soul. After that, tell me if you still think he's a sociopath. Since we're dealing with the freedom of another human being, please consider making an effort to have some sort of basis for your opinion." The prosecutor seemed a bit surprised or rattled by this offer, and quietly responded that he would think about it.

A few days later, I followed up with an email with the same offer but got no response. After more time passed, I explained my offer to one of the original detectives on the case, Steven Fritz, who was sympathetic to Dean's case because had informed us of the police misconduct. Fritz had worked for years with the prosecutor in question, knew him well, and thought he was a good person. Fritz said he would talk to the prosecutor and try to get him to visit Dean in prison. Later, Fritz told me that after he emailed the prosecutor and asked him why he hadn't responded to my invitation. The prosecutor had emailed back saying something to the effect of, "Never talk to me about this subject again."

Looking back on it, the prosecutor's response doesn't surprise me. Again, prosecutors are conditioned to dehumanize, and meeting with Dean would have gone so far against the bureaucratic norms that my offer must have seemed bizarre. But his response reflects the unbending ethos of our criminal justice system.

. . .

Fighting injustice as an innocence lawyer is at times a frustrating and depressing job. The public sees only the Kodak moments on the news when we celebrate joyously with a newly freed inmate after a big win. When that happens, people call us "heroes" on our Facebook pages. But the reality is that constantly fighting a system that refuses to admit mistakes, dehumanizes our clients, and fights to keep innocents in prison is exceptionally draining and demoralizing. Particularly when working on a case where the evidence of innocence is strong but the prosecutors oppose the exoneration motion and the courts go along with them. My office has many clients now

who we believe are innocent, and we have the evidence to prove it, but our clients remain behind bars. In some of these cases the evidence of innocence is overwhelming, including DNA test results.

A few years ago, a class of our Ohio Innocence Project law students made OIP T-shirts for their group. On the back they put a picture of a person wearing boxing gloves fighting a giant glacier. That's because the students realized pretty quickly that we fight a system that, like a glacier, is hard to move. I've had attorneys leave my office because of burnout and the psychological stress of fighting such a wall of resistance. Those who stay for the long haul must constantly pick each other up and give each other pep talks to remain focused and continue the battle.

One day after we found out that we lost a case for which we had amassed very strong evidence of innocence, the entire office was deflated. The students who had worked so hard on the case were in shock and crying. I sent the students and Jennifer Bergeron, the OIP attorney on the case, the following email, which I include to demonstrate how we deal with such demoralization:

Jennifer, Emily and Sean,

I know that you were very upset about the loss today. You guys did everything you could. There aren't many feelings worse than experiencing raw injustice so up-close and personal. It is hard to take. After I would visit Nancy Smith in prison, with her emotions so raw from missing her children, I would try to keep from throwing up the whole drive home. The injustice and pain was sickening, and I had lost time and time again and seemingly couldn't do anything to fix her situation.

I am so sorry how it turned out. As you know, the fight isn't over, and Al will continue to have the best fighting for him. It comes down to the luck of the draw—which judge you have, which makes it that much more upsetting.

I learned through time from doing this for so long that even when we lose for someone like Al, the mere fact that someone stood up for him has unbelievable value to his life and to humanity as a whole. Imagine the difference if you were Al and no one ever listened, or no one ever believed in you, and you had to spend the rest of your life in prison without anyone ever acknowledging that an injustice had been done to you, or without anyone ever saying you are worth fighting for.

But Al, in contrast, has had a group of smart, educated and caring people who were complete strangers come to him and not only believe in him, but work tirelessly for years for him. And the fact that it was such an uphill battle—and everyone knew it was a long shot from the beginning—made the fact that you joined him in the fight that much more meaningful. As Ricky Jackson said to us in jail the night before he

was released, just having good, talented people say, “You matter to me, and I’m going to do everything I can for you” in some way rekindled his faith in humanity. It meant the world to him, even if it didn’t result in his freedom. I know that others feel the same way, and although I don’t know Al, I do know that he is a thoughtful person and no doubt feels that way too. Reaching out and fighting for another human being who no one else will fight for has incredible value in and of itself.

Years ago after we started working on Dean Gillispie’s case, his mother said to me one January, “This Christmas was the first year since Dean got locked up that I enjoyed Christmas. Just knowing someone else believes in us and is willing to take up the fight in some way changed things for me.” If we had never won Dean’s case, I would always know that we had provided a human service to Dean and his family just by showing them that someone was willing to acknowledge what happened and stand with them.

My favorite line from *To Kill A Mockingbird* is when Atticus is talking to his kids and says something like, “I don’t want you to get the idea that real courage is a big man with a gun. Courage is when you’re licked before you start, but you start anyway, and you see it through to the end because it’s the right thing to do.”

If it was easy to win these, anyone could and would do this type of work. The real value, and the real courage, is doing something because it’s right even if it has a high chance of ending in gut-wrenching injustice. Few will do that job, which is why it is so much more important to humanity in the long run. A lot of people tried to save Jews in WWII but failed—the Jews they were hiding were discovered and killed and so were the good people who tried to hide them. But even though they failed at what they were doing, and the Jews they were trying to save were executed, if people like that didn’t exist our species would suck. People like that make us all better. They’re heroes, even though they didn’t accomplish their goal and ended in an epic fail.

This isn’t WWII, but it’s a little piece of injustice that matters just as much to this person. Thanks for fighting for Al, and filling that important void that no one else would fill.

—Mark

CONCLUSION

I close this chapter with excerpts of a letter written by former prosecutor Marty Stroud. When Stroud was a young man, he prosecuted Glenn Ford for murder and sent him to death row. Ford spent thirty years on death row in Louisiana before being fully exonerated in 2014. Immediately after he was exonerated and released, Ford took ill with cancer, and he died not long

after in 2015. During his short period of freedom before his death, the state of Louisiana fought Ford's claim for compensation, ultimately prevailing and keeping Ford from receiving a dime. While Ford was still alive, the editorial board of the *Shreveport Times* published an editorial urging Louisiana to compensate him. In response, Stroud sent the following letter to the newspaper:

This is the first, and probably will be the last, time that I have publicly voiced an opinion on any of your editorials. Quite frankly, I believe many of your editorials avoid the hard questions on a current issue in order not to be too controversial. I congratulate you here, though, because you have taken a clear stand on what needs to be done in the name of justice.

Glenn Ford should be completely compensated to every extent possible because of the flaws of a system that effectively destroyed his life. The audacity of the state's effort to deny Mr. Ford any compensation for the horrors he suffered in the name of Louisiana justice is appalling.

I know of what I speak.

I was at the trial of Glenn Ford from beginning to end. I witnessed the imposition of the death sentence upon him. I believed that justice was done. I had done my job. I was one of the prosecutors and I was proud of what I had done.

Members of the victim's family profusely thanked the prosecutors and investigators for our efforts. They had received some closure, or so everyone thought. However, due to the hard work and dedication of lawyers working with the Capital Post-Conviction Project of Louisiana, along with the efforts of the Caddo Parish district attorney's and sheriff's offices, the truth was uncovered.

Glenn Ford was an innocent man. He was released from the hellhole he had endured for the last three decades.

There was no technicality here. Crafty lawyering did not secure the release of a criminal. Mr. Ford spent 30 years of his life in a small, dingy cell. His surroundings were dire. Lighting was poor, heating and cooling were almost non-existent, food bordered on the uneatable.

Nobody wanted to be accused of "coddling" a death row inmate.

But Mr. Ford never gave up. He continued the fight for his innocence. And it finally paid off.

And yet, despite this grave injustice, the state does not accept any responsibility for the damage suffered by one of its citizens. The bureaucratic response appears to be that nobody did anything intentionally wrong, thus the state has no responsibility. This is nonsensical. Explain that position to Mr. Ford and his family. Facts are stubborn things, they do not go away.

At the time this case was tried there was evidence that would have cleared Glenn Ford. The easy and convenient argument is that the

prosecutors did not know of such evidence, thus they were absolved of any responsibility for the wrongful conviction.

I can take no comfort in such an argument. As a prosecutor and officer of the court, I had the duty to prosecute fairly. While I could properly strike hard blows, ethically I could not strike foul ones.

Part of my duty was to disclose promptly any exculpatory evidence relating to trial and penalty issues of which I was made aware. My fault was that I was too passive. I did not consider the rumors about the involvement of parties other than Mr. Ford to be credible, especially since the three others who were indicted for the crime were ultimately released for lack of sufficient evidence to proceed to the trial.

Had I been more inquisitive, perhaps the evidence would have come to light years ago. But I wasn't, and my inaction contributed to the miscarriage of justice in this matter. Based on what we had, I was confident that the right man was being prosecuted and I was not going to commit resources to investigate what I considered to be bogus claims that we had the wrong man.

My mindset was wrong and blinded me to my purpose of seeking justice, rather than obtaining a conviction of a person who I believed to be guilty. I did not hide evidence, I simply did not seriously consider that sufficient information may have been out there that could have led to a different conclusion. And that omission is on me.

Furthermore, my silence at trial undoubtedly contributed to the wrong-headed result.

I did not question the unfairness of Mr. Ford having appointed counsel who had never tried a criminal jury case much less a capital one. It never concerned me that the defense had insufficient funds to hire experts or that defense counsel shut down their firms for substantial periods of time to prepare for trial. These attorneys tried their very best, but they were in the wrong arena. They were excellent attorneys with experience in civil matters. But this did not prepare them for trying to save the life of Mr. Ford.

The jury was all white, Mr. Ford was African-American. Potential African-American jurors were struck with little thought about potential discrimination because at that time a claim of racial discrimination in the selection of jurors could not be successful unless it could be shown that the office had engaged in a pattern of such conduct in other cases. And I knew this was a very burdensome requirement that had never been met in the jurisprudence of which I was aware.

I also participated in placing before the jury dubious testimony from a forensic pathologist that the shooter had to be left handed, even though there was no eyewitness to the murder. And yes, Glenn Ford was left handed.

All too late, I learned that the testimony was pure junk science at its evil worst.

In 1984, I was 33 years old. I was arrogant, judgmental, narcissistic and very full of myself. I was not as interested in justice as I was in winning. To borrow a phrase from Al Pacino in the movie "And Justice for All," "Winning became everything."

After the death verdict in the Ford trial, I went out with others and celebrated with a few rounds of drinks. That's sick. I had been entrusted with the duty to seek the death of a fellow human being, a very solemn task that certainly did not warrant any "celebration."

In my rebuttal argument during the penalty phase of the trial, I mocked Mr. Ford, stating that this man wanted to stay alive so he could be given the opportunity to prove his innocence. I continued by saying this should be an affront to each of you jurors, for he showed no remorse, only contempt for your verdict.

How totally wrong was I.

I speak only for me and no one else.

I apologize to Glenn Ford for all the misery I have caused him and his family.

I apologize to the family of Mr. Rozeman [the victim] for giving them the false hope of some closure.

I apologize to the members of the jury for not having all of the story that should have been disclosed to them.

I apologize to the court in not having been more diligent in my duty to ensure that proper disclosures of any exculpatory evidence had been provided to the defense.

Glenn Ford deserves every penny owed to him under the compensation statute. . . .

I now realize, all too painfully, that as a young 33-year-old prosecutor, I was not capable of making a decision that could have led to the killing of another human being. No one should be given the ability to impose a sentence of death in any criminal proceeding. We are simply incapable of devising a system that can fairly and impartially impose a sentence of death because we are all fallible human beings.

I end with the hope that providence will have more mercy for me than I showed Glenn Ford. But, I am also sobered by the realization that I certainly am not deserving of it.³⁰

This poignant letter captures the tunnel vision, cognitive dissonance, administrative evil, and dehumanization that affected Ford's trial and post-exoneration compensation battle. Stroud was able to recognize these psychological factors, and see the system's resistance from a different angle, in part perhaps because of his character, but also because he had spent many years away from the prosecutor's office before Ford was exonerated. Stroud has spoken to my class via Skype, telling my students that most of his former colleagues in his prosecutor's office—particularly those that never

left law enforcement—did not share the views that he expressed in this letter. I can understand the prosecutor mentality. I certainly saw things in a different light as time passed after I left my prosecutor's office—things that I could not have seen while I was still there. As one police officer has said, reflecting back on his actions he now regrets, and the mentality he had as a police officer, "Getting away from the job really freed up my mind."³¹ Upton Sinclair once observed, "It is hard to get a man to understand something when his salary depends on him not understanding it."³²

We resist justice and fairness in some instances because we are human. Humans act differently, and less justly, when they are part of a large system that diffuses responsibility and creates certain bureaucratic mindsets. Such behavior is inevitable to some degree, and sometimes even necessary, particularly for those whose job it is to routinely inflict punishment on other human beings. There is no doubt that we must protect our hearts from the pain that we must sometimes inflict.

But we must learn that there are times when we must step out of these roles, and out of such mindsets, for true justice to prevail. May Marty Stroud's words and example begin to show us the way.