

Coaxing, Coaching and Coercing: Witness Preparation by Prosecutors Revisited

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I. INTRODUCTION

Witness preparation is a staple of good trial practice for prosecutors. A single ineffective or unprepared witness might imperil an otherwise airtight case. Interviewing witnesses before trial allows prosecutors to gauge the strength and factual basis of their case, determine the sequence of the presentation, and alert witnesses about evidentiary rules to prevent them from revealing prejudicial information.¹ The failure to prepare witnesses could even violate a cardinal principle of legal ethics: the duty of competence.²

Yet there is a line between readying witnesses for trial and coaching them in a way that perverts their testimony. As the Supreme Court proclaimed more than 40 years ago, “[a]n attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it.”³ This boundary can be hard to discern. And for prosecutors, the most powerful players in our criminal justice system, the inability to toe this line can lead to the conviction of innocent defendants.⁴

At one end of the spectrum of impropriety, prosecutors may not counsel witnesses to testify falsely—despite incentives to occasionally do so.⁵ This conduct exposes the lawyer to possible disciplinary sanctions and jeopardizes the

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¹ DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 80 (2012).

² *Id.* See Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 29 (2009).

³ *Geders v. United States*, 425 U.S. 80, 90 n.3 (1976). As the New York Court of Appeals proclaimed more than a century ago, “[an attorney’s] duty is to extract the facts from witnesses, not pour them into him; to learn what the witness does know, not to teach him what he ought to know.” *In re Eldridge*, 82 N.Y. 161, 171 (1880).

⁴ See discussion of the Fernando Bermudez case *infra* notes 17–40.

⁵ Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV., 829, 833–34 (2002) (suggesting that prosecutors might coach witnesses with the aim of encouraging false testimony “primarily to (1) eliminate inconsistencies between a witness’s earlier statements and her present testimony, (2) avoid details that might embarrass the witness and weaken her testimony, and (3) conceal information that might reveal that the prosecutor has suppressed evidence”); see also *id.* at 834–38 (elaborating on these incentives).

integrity of any subsequent conviction.⁶ Similarly, prosecutors may not push witnesses to testify a particular way, a technique known as “horseshedding” that dates back to the nineteenth century.⁷

At the other end of the spectrum, it may be difficult to excise all traces of coaching from a witness preparation session. It is not unusual for a witness to rehearse her direct testimony with an attorney before trial, especially if the witness is vulnerable or nervous about taking the stand.⁸ But these sessions provide openings to veer into dubious ethical territory. A smile or nod by a prosecutor could convey to a witness that a fact warrants emphasis at trial.⁹ Likewise, a frown or shaking of the head could send the opposite message. If that behavior occurs, has the prosecutor crossed the line? Must a prosecutor offer no feedback whatsoever during a witness interview?

Consider certain word choices and questioning methods too.¹⁰ Suppose a prosecutor asks a witness whether “the person you saw seemed drunk?” Does the word “drunk” have a negative connotation that could taint the witness’s recollection of the event and prejudice any ensuing testimony? The phrase “inebriated” or “intoxicated” might appear more neutral, but are prosecutors ethically required to use bland terminology?

Bennett Gershman has thought deeply about these issues, as is his wont. Using his 2002 article on the topic of witness coaching as a launching pad,¹¹ this article will take a renewed look at the ethics of witness preparation by prosecutors. This look is warranted because of what we now know about the role played by prosecutors in convicting innocent defendants, a phenomenon that was only

⁶ The Supreme Court has held that the failure of prosecutors to correct the false testimony of a government witness, when they knew the testimony to be false, comprises a constitutional violation. *Napue v. Illinois*, 360 U.S. 264, 264 (1959). This error, however, does not necessarily produce a reversal because of the harmless error doctrine. See Andrew Cohen, *Getting Away with Perjury: If a Witness Lies, Whose Job Is It To Say So?*, THE MARSHALL PROJECT (Oct. 30, 2017), <https://www.themarshallproject.org/2017/10/30/getting-away-with-perjury> (June 27, 2018).

⁷ This term was popularized by the novelist James Fenimore Cooper, who described how lawyers would prepare witnesses in carriage sheds near courthouses. See Gershman, *supra* note 5, at 829 n.5. In the modern lexicon, observers sometimes use the phrase “woodshedding” (or simply “coaching”) to describe this behavior. See MEDWED, *supra* note 1, at 80 n. 22.

⁸ *Smith v. Kelly*, Civ. Action No. 7:07CV00536, 2008 WL 345838 *11 (W.D. Va. 2008) (“Rehearsing was especially appropriate in this situation where the witness was young, a rape victim, and mentally disabled.”).

⁹ See Gershman, *supra* note 5, at 838–44 (describing the subtle ways in which preparation techniques can alter a witness’s recollection of an event and/or shape that witness’s future testimony).

¹⁰ *Id.* at 842–43. See also Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 4 (1995) (“For instance, the questioner’s choice of verbs to describe two cars coming into contact (for example, “hit” vs. “smashed”) can influence the witness’s testimony about how fast the cars were actually going.”).

¹¹ See generally Gershman, *supra* note 5. I will also draw on the work of other pioneering scholars. See, e.g., Roberta K. Flowers, *Witness Preparation: Regulating the Profession’s ‘Dirty Little Secret,’* 38 HASTINGS CONST. L.Q. 1007 (2011); Wydick, *supra* note 10.

beginning to surface at the time of Gershman's piece.¹² The National Registry of Exonerations, which compiles up-to-date statistics on wrongful convictions in the United States, documented 139 exonerations in 2017. Of those cases, a record total—84—involved official misconduct, principally by police and prosecutors. More than half of those incidents occurred in homicide cases.¹³ Witness coaching is one of several types of prosecutorial errors that crop up in documented cases of wrongful conviction, in addition to failing to turn over exculpatory evidence and delivering improper closing arguments.¹⁴ Jailhouse informants and other cooperating witnesses who agree to testify in exchange for leniency, immunity, or a different benefit might be particularly susceptible to witness coaching because of the incentives to please prosecutors—and have testified in many wrongful conviction cases.¹⁵

In Part II of the article, I elaborate on the manner in which witness preparation by prosecutors can morph into unethical behavior, highlighting the case of my former client Fernando Bermudez. Next, in Part III, I analyze the assortment of ethical rules and standards that could apply to thwart witness coaching. In Part IV, I entertain various reform proposals to curb this behavior in practice. Professor Gershman has called witness coaching one of the “dirty secrets” of prosecutorial practice.¹⁶ I hope to continue in the Gershmanian tradition of bringing such secrets to light and striving to cleanse the profession of these tactics.

II. FAILING FERNANDO

The case of Fernando Bermudez illustrates how flawed witness preparation and examination techniques by prosecutors can taint a trial and, when compounded by the failure to adequately disclose evidence of pretrial interviews, produce a miscarriage of justice. The case revolved around a murder stemming from an altercation between two teenagers in New York City. Specifically, one night in August 1991, an African American named Raymond Blount punched a sixteen-

¹² As one reason for taking a closer look at witness preparation by prosecutors back in 2002, Gershman noted “there is an increasing concern—amply documented by recent reports of wrongful convictions—that the criminal justice system is seriously prone to error.” Gershman, *supra*, note 5 at 832.

¹³ *Exonerations in 2017*, NAT'L REGISTRY OF EXONERATIONS (2018), <https://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf>.

¹⁴ See Bruce A. Green, *Prosecutorial Ethics in Retrospect*, 30 GEO. J. L. ETHICS 461, 462 (2017) (observing how recent attempts “to hold prosecutors more accountable” have been “fueled in part by the innocence movement, which has shown how prosecutorial misconduct leads to wrongful convictions . . .”). See generally MEDWED, *supra* note 1.

¹⁵ See, e.g., ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* (2009).

¹⁶ See Gershman, *supra* note 5, at 829 n. 2 (citing Roberta K. Flowers, *What You See is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 740 (1998)).

year old Puerto Rican, Ephraim “Shorty” Lopez, in the face at a nightclub.¹⁷ Shortly thereafter Lopez approached another man, told him about the assault, and signaled in Blount’s direction. Outside the club, the man asked Lopez to point out his assailant. Lopez did. The man then sidled up to Blount and shot him to death. Those events are largely undisputed. The identity of the shooter, however, remained much in dispute for nearly two decades.¹⁸

A presentation of the complete—and torturous—procedural history of the case exceeds the scope of this article. Here are the highlights. After the shooting, the police assembled a group of teenage eyewitnesses and asked them to provide a description of the shooter. Based on that description, the detectives showed the witnesses a series of photographs. In a bizarre procedure, the witnesses sorted through the pictures together.¹⁹ Ultimately, they identified the alleged shooter in a photo depicting Fernando Bermudez, a Dominican in his early twenties who went by the nickname “Most.”²⁰

The police then interviewed Lopez. In several written statements, Lopez described the shooter as a Puerto Rican man from his neighborhood named Lou or “Wool” Lou (at the time “wool” was a term used for crack cocaine in cigarette form).²¹ Lopez later made a videotaped statement to New York County Assistant District Attorney James Rodriguez, reiterating that the shooter was known to him as Lou or “Wool” Lou and insisting he did not recognize the nickname “Most.”²² Lopez even mentioned the name “Luis.”²³ Nevertheless, Bermudez was charged with murder, and the case proceeded to a trial posture.

Lopez’s statements were not disclosed to the defense until the eve of trial, far too late to permit Bermudez’s defense attorney to make much use of them to either

¹⁷ See *People v. Bermudez*, No. 8759/91, 2009 WL 3823270, (N.Y. Cty. Ct. Nov. 9, 2009); See *Bermudez v. City of New York*, 790 F.3d 368 (2d Cir. 2015); MEDWED, *supra* note 1, at 82–83.

¹⁸ MEDWED, *supra* note 1, at 82.

¹⁹ Detectives [brought in seven witnesses, and] asked this group of witnesses collectively to describe the shooter. The witnesses said he was a 16-to-26-year-old Hispanic man approximately 5’11” and weighing around 165 pounds. Detective Lentini then brought the witnesses several drawers’ worth of photographs of prior arrestees that matched this description. The witnesses went through the photographs together while engaging in conversation with each other. At one point, Velasquez took a photograph of Bermudez out of one of the drawers and showed this photograph to several other witnesses, remarking that Bermudez looked cute. Velasquez gave the photograph of Bermudez to Detective Lentini, and the police officers immediately ended the procedure despite the fact that the witnesses had not yet looked through all of the photographs.

Bermudez, 790 F.3d at 371.

²⁰ MEDWED, *supra* note 1, at 82.

²¹ *Id.*; *Bermudez*, 2009 WL 3823270, at *3–6.

²² See *Bermudez*, 2009 WL 3823270, at *3.

²³ Judge Cataldo observed that, “[h]aving reviewed the videotape of Mr. Lopez’s interrogation myself, I heard Mr. Lopez’s reference to Luis, although it was muffled and not easily discernable. It could have been mistaken for another repetition of Lou.” *Id.* at *7.

impeach Lopez on the stand or embark on a fact investigation.²⁴ What is more, Lopez appeared at trial under a cooperation agreement that provided he would not be charged with a crime related to the shooting if he testified in the Bermudez case.²⁵ And Lopez did cooperate, offering a narrative that only vaguely resembled his pretrial account. Lopez identified Bermudez as the “Woolu” who committed the murder. When asked directly by ADA Rodriguez whether he knew the shooter’s true name, Lopez denied it. Rodriguez stayed mum—neglecting to correct the record, despite his involvement in the pretrial process in which Lopez labeled the shooter “Lou,” “Luis,” and “Wool Lou.” It is fair to say that Rodriguez’s omission, coupled with the delayed disclosure of the pretrial statements, altered the course of the case by depriving the defense of access to a key lead about the identity of the actual perpetrator. As Judge John Cataldo explained years later:

[T]here was a substantial change in Mr. Lopez’s knowledge of the shooter’s name between the time of the videotaped statement and his subsequent trial testimony. Initially the shooter had a name, Lou. His nickname was rationally explained. Lou sold “wools,” a form of crack, so they called him Wool Lou. However, at trial the shooter became Woolu.²⁶

Armed with Lopez’s trial account, Rodriguez developed the argument that Bermudez was “Woolu,” a drug dealer who sold “wools” in a park on West 92nd Street in Manhattan near where Lopez lived. In fact, Bermudez—again, of Dominican descent—lived with his family 100 blocks north of that location in the Inwood neighborhood.²⁷ Apparently persuaded by the prosecution’s narrative, crafted through the testimony of Lopez and that of four other young eyewitnesses whose statements were tainted by the flawed identification procedures, the jury found Bermudez guilty of murdering Blount.²⁸

After the verdict, a private investigator hired by Bermudez’s family learned that Lopez had a friend, Luis Munoz, who went by the street name “Wool Lou” and had recently fled New York. The investigator passed this information along to the police who, in turn, consulted with Rodriguez. All the ADA did to pursue this avenue of investigation was obtain a copy of Munoz’s criminal history.²⁹ On the cusp of sentencing, the defense team moved for a new trial based on Munoz’s possible involvement. Unconvinced of the merits of this claim, in September 1992

²⁴ *Id.* at *6–7.

²⁵ *Id.* at *8.

²⁶ *Id.* at *6.

²⁷ *Id.* at *7–8.

²⁸ *See Bermudez*, 790 F.3d at 372.

²⁹ *Id.*

the judge denied the motion and sentenced Bermudez to a prison term of 23 years to life.³⁰

The case against Bermudez collapsed in the years after his incarceration. For one thing, the teenage eyewitnesses who testified against him at trial each recanted their testimony.³¹ Even more, in 2007 the District Attorney's investigator located and interviewed Munoz for the first time. It turned out that Munoz not only had the nickname "Wool Lou" and left the jurisdiction right after the Blount murder, but also: (a) shared Lopez's Puerto Rican heritage, (b) lived near Lopez's grandmother, and (c) looked like Bermudez.³² These discoveries spurred prosecutors to concede that Munoz, not Bermudez, was the "Wool Lou" implicated in the shooting.³³ Bermudez was freed in November 2009.³⁴

If during the trial, Assistant District Attorney Rodriguez had revealed Lopez's prior references to "Lou," "Luis" and "Wool Lou," would the defense have found Munoz earlier and prevented a miscarriage of justice? We will never know. What we do know is that Judge John Cataldo overturned Bermudez's conviction in part because of the failure of Rodriguez to correct Lopez's false testimony—a misstep that violated the defendant's right to due process of law.³⁵

I was a member of the legal team affiliated with the Second Look Program at Brooklyn Law School that worked on the Bermudez case in the early 2000s. We lost a federal habeas corpus petition after a grueling evidentiary hearing and did not see a clear path forward to exoneration thereafter.³⁶ Fortunately, another squad of attorneys had better vision. They succeeded by returning to state court and convincing Judge Cataldo of the problems with the conviction.³⁷

I have become friends with Bermudez since his release and often reflect on the horrors of his experience. During those moments of reflection, I tend to dwell not on Efrain Lopez's perjury, the tunnel vision exhibited by the police in homing in on Bermudez, the odd eyewitness identification procedure, or even the unconscionable delay in disclosing evidence of the pretrial interviews to the defense, all of which contributed to the tragedy. Instead I focus on the actions of the trial prosecutor: James Rodriguez. The record shows that he neglected to correct Lopez's mistaken testimony, but that begs the question of *how* Lopez reached that stage. What happened during the run-up to trial? What exchanges occurred between Rodriguez and Lopez during the gap between his pretrial

³⁰ *Id.*

³¹ *Id.* at 373.

³² *See Bermudez*, 2009 WL 3823270, at *6; MEDWED, *supra* note 1, at 82–83.

³³ *See Bermudez*, 2009 WL 3823270, at *8.

³⁴ *See, e.g.*, John Eligon, *Man Jailed for '91 Murder Is Cleared by Judge*, N.Y. TIMES, Nov. 12, 2009, at A23.

³⁵ *See Bermudez*, 2009 WL 3823270, at *15–16.

³⁶ *See Bermudez v. Portuondo*, No. 00-4795, 2004 U.S. Dist. LEXIS 5427, at *139 (S.D.N.Y. Mar. 29, 2004).

³⁷ *See MEDWED*, *supra* note 1, at 83.

interrogation and his trial appearance? As noted above, Lopez testified under a cooperation agreement: an understanding he would not be charged with any crime related to the murder if he appeared for the prosecution. Implicit in that arrangement was the idea that Lopez would testify *against* Bermudez. To what extent did Rodriguez underscore that message during pretrial witness preparation sessions?³⁸ Prosecutors typically examine potential cooperators quite rigorously before entering into an agreement in order to assess what they will say in court.³⁹ Was Lopez coaxed, coached, or coerced to omit any references to “Lou” or “Luis” on the stand?

I admire the legal doctrine holding that prosecutors violate due process when they present testimony they know (or should know) is false.⁴⁰ That principle can yield a new trial and rectify an injustice. See Exhibit A, Fernando Bermudez. In my remaining pages, though, I would like to explore a related issue. How can we detect and prevent prosecutors from improperly influencing witnesses during pretrial preparation sessions and, in the process, helping to generate, inspire or validate that false testimony?

III. THE ETHICAL REGIME GOVERNING WITNESS PREPARATION

Before analyzing how to detect and prevent witness coaching, it is important to discuss the array of ethics rules and standards that steer prosecutorial conduct in this area. Even though the Supreme Court has admonished prosecutors to “respect” the ethical line between discussing testimony and improperly influencing

³⁸ As Gershman notes, “studies describe the distorting effect of suggestive questioning. Whereas witness preparation certainly can assist a witness in remembering and retrieving truthful recollection, preparation also can distort a witness’s underlying memory and produce a false recollection.” Gershman, *supra* note 5, at 839. See also Wydick, *supra* note 10, at 9–13.

³⁹ Ellen Yaroshefsky has described the process of developing a cooperation agreement in the federal system as follows:

Once a defendant decides to enter the cooperation process, the defendant and her lawyer meet with government counsel and, typically, the agents involved in the case. The initial debriefing gives the government a sense of whether the cooperator has useful information. Depending upon the importance and strength of the case, the government may decide to meet with a defendant again even where it believes that the defendant has utterly lied. Typically, there are a number of debriefing sessions prior to the government making a decision that the defendant should be signed up for a cooperation agreement.

Once a cooperator obtains an agreement, his role varies by the nature of the case. In most cases, the cooperator is expected to agree to testify and, if necessary, will spend considerable time with the assistant handling the case.

Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917, 930 (1999).

⁴⁰ The Supreme Court has held that the failure of prosecutors to correct the false testimony of a government witness, when they knew the testimony to be false, comprises a constitutional violation. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). See also *People v. Savvides*, 1 N.Y.2d 554, 557 (1956) (“A lie is a lie, no matter what its subject and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.”).

it, the Court has neglected to map its boundaries, relegating this responsibility to the field of legal ethics.⁴¹ Many states have adopted large swaths of the American Bar Association's Model Rules of Professional Conduct in structuring their own ethics codes, so those provisions will form the basis of this discussion.⁴²

The Model Rules do not expressly cover witness preparation by prosecutors.⁴³ General concepts govern this topic instead. All lawyers must engage in "competent" representation, which encompasses adequate preparation.⁴⁴ In all their activities, including witness interviews, attorneys must avoid participating in "dishonesty, fraud, deceit, or misrepresentation" as well as "conduct that is detrimental to the administration of justice."⁴⁵ These amorphous prohibitions are insufficient to grapple with the threat of witness coaching, especially situations where suggestive interview tactics produce false testimony that the prosecutor—let alone the judge or defense counsel—might not immediately recognize as fraudulent or detrimental to justice.

Attorneys also may not "knowingly" present false or perjurious testimony, and lawyers are obliged to notify the tribunal when they become aware they have done so.⁴⁶ The mental state of knowledge is a high bar, indicating that lawyers might not be held accountable under this provision if they are merely reckless or negligent in putting forth the flawed testimony.⁴⁷ Beyond the ethical rules that guide all attorneys, only a few apply solely to prosecutors: most notably Rule 3.8, which covers the "special responsibilities of a prosecutor," yet does not directly address witness preparation.⁴⁸ Rather, the provisions are largely hortatory, urging prosecutors to embrace their minister-of-justice duty.⁴⁹

⁴¹ See *Geders v. United States*, 425 U.S. 80, 90 (1976).

⁴² MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2016).

⁴³ Flowers, *supra* note 11, at 1010–16.

⁴⁴ *Id.* at 1010; see also ABA MODEL RULE OF PROF'L CONDUCT R. 1.1 (AM. BAR ASS'N 2016).

⁴⁵ See Flowers, *supra* note 11, at 1011–15; ABA MODEL RULE OF PROF'L CONDUCT R. 8.4 (AM. BAR ASS'N 2016).

⁴⁶ See Flowers, *supra* note 11, at 1011–12; ABA MODEL RULE OF PROF'L CONDUCT R. 3.3–3.4 (AM. BAR ASS'N 2016).

⁴⁷ See Flowers, *supra* note 11, at 1012 (noting that "lawyers who unintentionally or unknowingly encourage false testimony may not be directly regulated by the ethical rules").

⁴⁸ See generally Peter A. Joy & Kevin C. McMunigal, *Different Rules for Prosecutors*, 31-Fall CRIM. JUST. 3, 49 (2016). See also MEDWED, *supra* note 1, at 80–84 (discussing the ethical rules that govern prosecutorial examination and preparation of witnesses).

⁴⁹ I have written extensively about the minister-of-justice concept. See, e.g., Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 36 (2009). In a recent article, Eric Fish suggests that the "dual role" of prosecutors—that of advocate and minister of justice—should be modified to emphasize the latter. Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1425 (2018).

To be fair, one subsection of Rule 3.8 does require prosecutors to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.”⁵⁰ This rule theoretically serves as a check on witness coaching, in the sense that prosecutors are obliged to turn over inconsistent or exculpatory witness statements as potential impeachment material that “tends to negate” the defendant’s guilt. But in practice, without a separate rule requiring prosecutors to document pretrial witness statements, there may be nothing to disclose. Worse yet, prosecutors may be incentivized to engage in plausible deniability and ignore any problems with witness statements that crop up during pretrial preparation sessions.

Given the holes in the rules themselves, some scholars have looked to the ABA Criminal Justice Standards for guidance.⁵¹ Adopted a half century ago, the ABA Standards are “aspirational,” they do not carry the force of disciplinary rules.⁵² Even so, they offer insight into how the nation’s leading ethicists perceive of prosecutorial responsibilities—and how prosecutors should behave in an ideal world. The standards applicable to the Prosecution Function were revised in 2015,⁵³ and contain a number of features that relate to witness preparation and examination.

First, the Standards insist that prosecutors have a “heightened duty of candor.”⁵⁴ The Standards also clarify that, in the context of witness testimony, “[t]he prosecutor should not offer evidence that the prosecutor does not reasonably believe to be true When a prosecutor has reason to doubt the truth or accuracy of particular evidence, the prosecutor should take reasonable steps to determine that the evidence is reliable, or not present it.”⁵⁵ If a prosecutor learns during a trial “that false evidence or testimony has been introduced by the prosecution, the

⁵⁰ ABA MODEL RULE OF PROF’L CONDUCT R. 3.8(d) (AM. BAR ASS’N 2016).

⁵¹ ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION (4th ed. 2015). For an example of scholarship that looks to the Rules and Standards for guidance in evaluating constraints on prosecutorial behavior, see Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467 (2009).

⁵² ABA STANDARDS, *supra* note 51, at Standard 3-1.1(c); Flowers, *supra* note 11, at 1012.

⁵³ ABA STANDARDS, *supra* note 51.

⁵⁴ ABA STANDARDS, *supra* note 51, at Standard 3-1.4(a). What that means is:

[t]he prosecutor should not make a statement of fact or law, or offer evidence, that the prosecutor does not reasonably believe to be true, to a court, lawyer, witness, or third party, except for lawfully authorized investigative purposes. In addition, while seeking to accommodate legitimate confidentiality, safety or security concerns, a prosecutor should correct a prosecutor’s representation of material fact or law that the prosecutor reasonably believes is, or later learns was, false, and should disclose a material fact or facts when necessary to avoid assisting a fraudulent or criminal act or to avoid misleading a judge or factfinder.

Id. at Standard 3-1.4(b).

⁵⁵ *Id.* at Standard 3-6.6(a).

prosecutor should take reasonable remedial steps.”⁵⁶ The nature of those remedial steps varies depending on whether the witness is on the stand.⁵⁷

Second, the Standards provide that a prosecutor may interview most routine government witnesses alone, i.e., without a “third party observer.”⁵⁸ Yet “when the need for corroboration of an interview is reasonably anticipated, the prosecutor should be accompanied by another trusted and credible person during the interview.”⁵⁹ In particular, “[t]he prosecutor should avoid being alone with any witness who the prosecutor reasonably believes has potential or actual criminal liability, or foreseeably hostile witnesses.”⁶⁰

Third, the Standards contain robust provisions that reinforce Rule 3.8(d)’s command that prosecutors disclose any material that tends to negate guilt. The applicable Standards even go beyond the Rule to specify that a prosecutor “diligently seek to identify” this type of information that is “in the possession of the prosecution or its agents,”⁶¹ and that the duty to “identify, preserve, and disclose” this information is ongoing throughout the case.⁶² The Standards also offer an expansive vision of the material that must be disclosed, including information that tends to “impeach the government’s witnesses or evidence.”⁶³

Finally, the Standards impose a duty on prosecutors to report and respond to misconduct. Office policy “should require internal reporting of reasonably suspected misconduct to supervisory staff within the office, and authorize supervisory staff to quickly address the allegations.”⁶⁴ If a prosecutor believes a colleague is about to engage in misconduct, she should intervene and attempt to dissuade the person from doing so. In the event such an effort falls short, that lawyer should report the colleague’s behavior to a “higher authority” in the office, even the chief prosecutor.⁶⁵ If the chief prosecutor neglects to react appropriately, the lawyers should reveal the matter to figures outside the office.⁶⁶

The pertinent ABA Model Rules and Criminal Justice Standards strike the right chord overall, although they could be augmented. At the turn of this century, the ABA embarked on a revision process to better align the Model Rules with their

⁵⁶ *Id.* at Standard 3-6.6(c).

⁵⁷ The Standards provide that “[i]f the witness is still on the stand, the prosecutor should attempt to correct the error through further examination.” In contrast, “[i]f the falsity remains uncorrected or is not discovered until the witness is off the stand, the prosecutor should notify the court and opposing counsel for determination of an appropriate remedy.” *Id.*

⁵⁸ *Id.* at Standard 3-3.4(f).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at Standard 3-5.4(a).

⁶² *Id.* at Standard 3-5.4(b); See also *id.* at Standard 3-5.4(d).

⁶³ *Id.* at Standard 3-5.4(a).

⁶⁴ *Id.* at Standard 3-1.12(a).

⁶⁵ *Id.* at Standard 3-1.12(b).

⁶⁶ *Id.* at Standard 3-1.12(c).

state counterparts and grapple with unresolved questions. As Niki Kuckes has noted, “[i]nsofar as prosecutorial ethics are concerned, however, the Ethics 2000 process was a grave disappointment to many observers.”⁶⁷ The ABA kept Rule 3.8 intact despite serious pitfalls in its coverage.⁶⁸ Amending ethics codes at the ABA and state levels—for instance, modifying the “knowledge” requirement to make it easier to sanction prosecutors for presenting false testimony—would serve as a step toward reducing witness coaching.⁶⁹

Even without further refinements, the disdain for unethical prosecutorial behavior rings through loud and clear in the existing rules and standards. Prosecutors, those erstwhile ministers of justices, have a higher burden of candor than the average lawyer whose actions lack the imprimatur of government approval and the capacity to punish people. To their credit, the ethics rules seek to discourage prosecutors from presenting fraudulent testimony; encourage them to correct the record when their witnesses testify in a deceitful fashion; have third-party observers in the room during preparation sessions with key witnesses; mandate the pretrial disclosure of information that tends to negate the defendant’s guilt; and trumpet the virtues of chief prosecutors who possess sound ethical compasses and monitor subordinates closely.⁷⁰

If these rules and standards were readily enforceable, they could help deter witness coaching by prosecutors on the front end or punish blatant violators on the back end. James Rodriguez had better watch out. But regrettably, that is not the case. The standards on their own are toothless—they serve as guideposts, not requirements. And, when it comes to the rules themselves, state disciplinary agencies seldom hold prosecutors accountable for clear violations. Disciplinary actions against prosecutors comprise a tiny fraction of those filed against criminal defense lawyers and civil practitioners.⁷¹ Bar associations rarely even sanction prosecutors who are cited for misconduct in judicial opinions. According to one study, only two prosecutors out of 326 convictions overturned on the grounds of official misconduct in Illinois eventually faced discipline.⁷² Prosecutorial offices

⁶⁷ Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. L. ETHICS 427, 429 (2009).

⁶⁸ *Id.* at 429–30. See also Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1586 (“Although [the Ethics 2000 Commission] added some explanatory comments and consolidated two of the existing disciplinary provisions of Rule 3.8, it made no substantive changes to these provisions, despite some discussion of doing so. Nor did it identify any new prosecutorial obligations or restrictions.”).

⁶⁹ State reforms to prosecutorial ethics may offer more reason for optimism. For instance, Massachusetts prohibits prosecutors from “intentionally avoid[ing] pursuit of evidence because the prosecutor believes it will damage the prosecution’s case or aid the accused.” MASS. R. PROF. CONDUCT R. 3.8(j). See Kuckes, *supra* note 67, at 451–56 (discussing innovative state ethics rules).

⁷⁰ See ABA STANDARDS, *supra* note 51; MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2016).

⁷¹ MEDWED, *supra* note 1, at 31.

⁷² *Id.* at 31 n.109.

also are not known for their vigorous self-policing, especially in the absence of firm obligations to do so.⁷³

Therefore, while beefing up the ethics rules and standards that apply to prosecutors might marginally reduce improper witness preparation and examination, it is unlikely to have much impact without reimagining how disciplinary bodies and other regulatory actors operate. Some scholars in the field, have expressed optimism about this possibility. Bruce Green and Ellen Yaroshefsky, for instance, have detected a “regulatory shift” in which “[s]lowly and sporadically, courts and other regulators have become more receptive to allegations of prosecutorial misconduct, more inclined to initiate inquiries into these allegations, and somewhat more willing to afford remedies and impose punishment.”⁷⁴

But even if bar associations choose to enforce ethics rules more strictly against prosecutors, and courts become more vigilant, a fundamental problem would remain. How can one detect missteps in an area of practice—witness preparation—that takes place in the interstices between formal appearances, often in secret and without any duty to memorialize the encounter, let alone record it accurately? Indeed, as Gershman observed many years ago, solutions to witness coaching should target detection as well as prevention.⁷⁵

IV. REFORMS

With Gershman’s template in mind, I will now engage in a thought experiment about remedies geared toward detecting improper witness preparation and examination by prosecutors, then those aimed at prevention. The two objectives are not mutually exclusive. Enhanced detection will inevitably lead to greater prevention. But dividing them in this manner represents a sound organizing principle, not to mention homage to Gershman.

A. *Detection*

1. Pretrial Taint Hearings

Gershman has suggested that jurisdictions allow for pretrial hearings—or midstream hearings during a trial—in which a judge outside the presence of the jury evaluates witness interviews and determines whether a person’s testimony is “tainted” due to improper preparation techniques by the prosecutor.⁷⁶ Such hearings are not uncommon when concerns are raised about potentially unreliable

⁷³ See *infra* notes 103–16.

⁷⁴ Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 53 (2016).

⁷⁵ Gershman, *supra* note 5, at 851–59.

⁷⁶ *Id.* at 859–60.

evidence.⁷⁷ Defense counsel could bear the responsibility of making a *prima facie* case about the need for a hearing, and in Gershman's view the judge "should consider whether, under all the circumstances, the interview and preparation sessions give rise to a substantial likelihood of false, inaccurate or misleading testimony."⁷⁸

This proposal holds promise, particularly with some tweaks. Although it makes sense for defense attorneys to carry the initial burden, they might not be well-positioned to identify the tainted testimony. Take the Bermudez case. Without ample time to scour through the records of the pretrial interviews, defense counsel was at a disadvantage in recognizing the significance of Lopez's references to "Lou," "Luis," and "Wool Lou." Regardless of any discovery delays, defense attorneys usually do not interview every key prosecution witness beforehand,⁷⁹ which would be the best method to pinpoint and counteract potentially deceitful testimony.

I would recommend finding ways to motivate defense lawyers to interview critical prosecution witnesses prior to trial.⁸⁰ That would bolster the quality of the defense performance in general, the ability of counsel to thwart improper preparation and examination tactics by prosecutors, and the chances of making out a *prima facie* case at a taint hearing. As a backup measure, judges should have the power to order a taint hearing *sua sponte*, even absent a defense motion, say, when the judge's past dealings with the particular prosecutor or witness have given her cause for concern.

⁷⁷ *Id.* at 859.

⁷⁸ *Id.* at 860. *See also* MEDWED, *supra* note 1, at 84.

⁷⁹ For one thing, pretrial investigation by defense attorneys is often lackluster, and may involve only limited interviews with potential witnesses. *See, e.g.,* Adele Bernhard, *Ineffective Assistance of Counsel and the Innocence Revolution: A Standards-Based Approach* 226–45, in *WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: TWENTY-FIVE YEARS OF FREEING THE INNOCENCE* (Daniel S. Medwed, ed., 2017). Even defense counsel keen on conducting a robust investigation might not be privy to the names of all the prosecution witnesses. *See, e.g.,* George C. Thomas, III, *Two Windows into Innocence*, 7 *OHIO ST. J. CRIM. L.* 575, 591 (2010) ("You might think that every jurisdiction requires the prosecution at least to tell the defendant who will testify against him. But you would be wrong. Twenty states and the federal government have no formal requirement that the prosecutor disclose his witness list."). Even when defense attorneys take the initiative to interview prosecution witnesses, they might be thwarted because the government has discouraged those witnesses from speaking with them.

⁸⁰ This issue is beyond the scope of this Article, although my instinct is that greater disclosure of prosecution witness lists, increased training of public defenders and funding for pretrial investigation could provoke defense counsel to engage in more extensive pretrial interviewing, provided there is the political will to allocate resources accordingly. Courts could also be more vigilant in finding counsel ineffective for neglecting to conduct interviews. For a discussion of certain litigation strategies aimed at encouraging effective assistance of counsel, see David Rudovsky, Gideon and *The Effective Assistance of Counsel: The Rhetoric and The Reality*, 32 *LAW & INEQ.* 371 (2014).

2. Memorialization

Even if defense lawyers interview the chief prosecution witnesses before trial, they might not catch every inconsistency or dishonest statement. Government witnesses understandably might be cagey, guarded or evasive during these sessions. Statutory discovery rules and Supreme Court precedent help level the playing field by requiring that prosecutors disclose all pretrial witness statements prior to trial that could serve as fodder for impeachment on cross-examination.⁸¹ But that presupposes prosecutors have actually documented those statements and kept them in the file. And there is good reason to think that presupposition is wrong. Neither prosecutors nor police are legally obliged to take notes.⁸² Rumors abound of office policies that *discourage* note-taking, in part to avoid creating impeachment material, or that generate notes in a form that escapes disclosure.⁸³

In light of this situation, a number of scholars have recommended that states require police and prosecutors to record every pretrial interview with a witness.⁸⁴ Those witness statements, in turn, should be discoverable by the defense as possible impeachment material.⁸⁵ The type of memorialization envisioned under these proposals ranges from written transcription to audio or video recording. Video recording seems ideal, as it would capture subtle cues, like body language, that show whether coaching has occurred even without more explicit verbal indicators.⁸⁶ To safeguard against the disclosure of sensitive and/or embarrassing information, courts could inspect the recordings and limit their use.⁸⁷

Robert Mosteller suggests that recording “first drafts” of conversations with witnesses is essential because it allows for the tracking of shifts in the witness’s account over time.⁸⁸ But there are practical problems. Must the police record

⁸¹ See, e.g., Gershman, *supra* note 5, at 852 n. 117.

⁸² In the absence of legislation or rules requiring that prosecutors record witness interviews, should judges take it upon themselves to encourage note-taking and/or seek disclosure of information about witness preparation sessions? Former federal judge John Gleeson has discussed the pressures that judges face to supervise often young and inexperienced prosecutors. See Hon. John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J. L. & PUB. POL’Y 423 (1997).

⁸³ *Id.* at 452.

⁸⁴ See, e.g., Gershman, *supra* note 5, at 861–62; MEDWED, *supra* note 1, at 83–84; Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing “First Drafts,” Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519, 560 (2009).

⁸⁵ Mosteller is especially adamant about requiring memorialization for informants: people who cooperate with the government in exchange for some benefit. See generally Mosteller, *supra* note 84. See also Sam Roberts, Note, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches*, 74 FORDHAM L. REV. 257 (2005).

⁸⁶ Gershman, *supra* note 5, at 861–62.

⁸⁷ *Id.* at 862.

⁸⁸ See Mosteller, *supra* note 84, at 564–69.

every conversation as part of the investigative phase, long before a formal case takes shape? Could such a rule give potential witnesses cold feet and yield fewer leads for law enforcement?⁸⁹ These are legitimate questions, although the benefits of detecting witness coaching and clamping down on misleading testimony seem worth the cost.

Given these concerns as well as political realities—fears about hamstringing police investigations too much—perhaps a compromise is fitting. States could implement different recording requirements for the police as opposed to prosecutors considering they normally enter a case at different stages. That is, require prosecutors to record all interviews with witnesses, while demanding that the police just take written notes.⁹⁰ A risk of course is that the police notes may omit salient details and those omissions will be hard to catch.

Another concern revolves around the consequences of failing to record an interview. Suppose a prosecutor is required to record a witness interview but produces no tape during discovery and claims the machine malfunctioned. Further assume there are no means of verifying this story. What remedy, if any, is appropriate?

An adverse inference instruction to the jury might be effective and serve as an incentive for prosecutors to comply with their duties. These instructions convey that (a) a party to the action has not produced certain evidence, despite obligations to do so, and (b) the jury may infer that this evidence would have harmed the party's case had it been presented. One of the “oldest and most venerable remedies’ for spoliation,”⁹¹ adverse inference instructions are a popular tool to address the loss or destruction of evidence in federal court.⁹² According to Judge Shira Scheindlin and her law clerk Natalie Orr, these instructions “can serve multiple functions: punishing wrongful conduct, deterring future conduct, and restoring the adversary balance of the proceeding.”⁹³ Restoration of the adversary balance is particularly apt in the witness preparation realm, an arena where the threat that prosecutors will dodge their recording obligations and engage in witness coaching undermines the capacity of counsel to mount a vigorous defense.

At bottom, pretrial taint hearings and memorialization requirements could boost the odds that either defense counsel or the court will detect improper witness

⁸⁹ *Id.* at 565–66.

⁹⁰ One exception to this: I would recommend the videotaping of all police interrogations with those suspected of committing the crime so as to protect against “false confessions.” *See, e.g.,* Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 *DRAKE L. REV.* 619, 622–24 (2004). In addition to recording “first drafts” of statements by informants, Mosteller also proposes tweaks to note-taking requirements. *See* Mosteller, *supra* note 84, at 566.

⁹¹ Shira A. Scheindlin & Natalie M. Orr, *The Adverse Inference Instruction after Revised Rule 37(E): An Evidence-Based Proposal*, 83 *FORDHAM L. REV.* 1299, 1299 (2014).

⁹² *Id.* *See also* Commonwealth v. DiGiambattista, 813 N.E.2d 5176, 533 (Mass. 2004).

⁹³ Scheindlin & Orr, *supra* note 91, at 1300.

preparation by prosecutors. And detection will likely deter prosecutors from witness coaching at the outset. But if prevention is the main goal, then additional reforms are necessary.

B. Prevention

1. Calling Out Wayward Prosecutors by Name

Prosecutorial misconduct can take many forms beyond witness coaching. Major categories of error include failing to disclose exculpatory evidence⁹⁴ and making incendiary closing arguments.⁹⁵ Even when those missteps lead to a reversal of a conviction,⁹⁶ however, appellate courts hardly ever identify the culprits by name. One study of forty-five federal convictions overturned due to improper prosecutorial summations found that appellate courts named the individual prosecutor at fault in only six opinions.⁹⁷ Another study of 707 documented prosecutorial misconduct cases in California determined that courts identified the prosecutors about 10 percent of the time.⁹⁸

Why do appellate courts afford such deference to prosecutors? For one thing, it could be a matter of professional courtesy extended to quasi-judicial officers who must make tough decisions, choices that could be complicated by the prospect of having their mistakes broadcast publicly. A less honorable explanation could be affinity. Many judges are former prosecutors possibly inclined to give their successors the benefit of the doubt.⁹⁹

Whatever the reason, the hands-off approach taken by appellate judges to identifying individual perpetrators of prosecutorial misconduct does not impede (and may enable) this behavior. Could the opposite tack—identifying individual prosecutors by name—diminish the rate of witness coaching? Some prosecutors may anticipate future careers as defense lawyers. Making an effective transition requires maintaining a good reputation in the criminal bar writ large or else

⁹⁴ See, e.g., Jason Kreag, *The Jury's Brady Right*, 98 B.U. L. REV. 345, 355–58 (2018).

⁹⁵ See, e.g., Daniel S. Medwed, *Closing the Door on Misconduct: Rethinking the Ethical Standards that Govern Summations in Criminal Trials*, 38 HASTINGS CONST. L.Q. 915, 918–20 (2011).

⁹⁶ MEDWED, *supra* note 1, at 109–10 (describing how the “harmless error doctrine” reduces the number of cases overturned on the basis of prosecutorial misconduct).

⁹⁷ MEDWED, *supra* note 1 at 111 (citing Paul J. Spiegelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115, 119, 169–70 (1999), <https://lawrepository.ualr.edu/cgi/viewcontent.cgi?article=1009&context=appellatepracticeprocess>).

⁹⁸ *Id.* (citing KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, 50 (2010), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1001&context=ncipubs>).

⁹⁹ *Id.*

referrals from and collaborations with defense attorneys will be few and far between. Other prosecutors may envision a long-term stint in a district attorney's office, conceivably with ambitions for higher political office. Consider the old adage that "AG" stands for "Almost Governor."¹⁰⁰ These hopes for career advancement could be dashed by exposing their misconduct. As an added bonus, outing misbehaving prosecutors in a public forum could spur disciplinary bodies to look more closely at what happened.¹⁰¹

Assuming appellate courts remain reluctant to identify errant prosecutors, maybe another constituency should take on this task of "shaming by naming." Adam Gershowitz has proposed that law schools establish "Prosecutor Misconduct Projects" in which law students cross-reference appellate opinions with trial transcripts in order to locate the names of prosecutors found to have committed misconduct.¹⁰² Armed with that information, the students could post the information online, highlighting repeat offenders.¹⁰³ The existence of this treasure trove could aid courts in spotting repeat offenders and holding "recidivists" accountable.¹⁰⁴

To the best of my knowledge, no one has implemented Gershowitz's idea on an institutional level. Recall the name of the prosecutor in the Fernando Bermudez case. Affixing a name to the conduct not only serves a deterrent purpose, but also humanizes the issue. James Rodriguez—not some nameless, faceless prosecutor—contributed to Bermudez's wrongful conviction. Even if prosecutorial decisions are influenced by institutional factors and systemic pressures, acts of misconduct are the byproduct of individual choices. The key, then, is to craft reforms aimed at changing the prosecutorial decision-making calculus.

2. Self-Policing by Prosecutors

Much of this article, and indeed much of the scholarship in this area, focuses on external solutions. These solutions aim to inspire courts, disciplinary agencies, defense lawyers, even law students to better regulate prosecutors and thereby prevent misconduct. Yet several academics have extolled the virtues of internal

¹⁰⁰ See, e.g., Ben Wieder, *Big Money Comes to State Attorney-General Races*, THE ATLANTIC, (May 8, 2014), <https://www.theatlantic.com/politics/archive/2014/05/us-chamber-targets-dems-in-state-attorney-general-races/361874/>. ("First, the joke is that 'AG' stands for 'almost governor' in the 43 states where they are elected, as many go on to higher elected office.")

¹⁰¹ MEDWED, *supra* note 1, at 115–16. See also Lara Bazelon, *For Shame: The Public Humiliation of Prosecutors by Judges to Correct Wrongful Convictions*, 29 GEO. J. LEGAL ETHICS 305, 305 (2016).

¹⁰² *Id.*

¹⁰³ MEDWED, *supra* note 1, at 116.

¹⁰⁴ See, e.g., Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2086–2101 (2016) (describing how the collection of what Crespo calls "systemic facts" can allow for better monitoring and regulation of prosecutors).

oversight by prosecutors themselves.¹⁰⁵ The argument for internal regulation goes something like this. First, most prosecutors want to do the right thing and achieve justice. Second, prosecutors are in the best position to oversee and modify their activities to realize the justice ideal because most of their decisions occur behind-the-scenes where they alone enjoy access. Third, individual line prosecutors might respond more favorably to their peers, and to the objective of upholding office values, than to the demands of outsiders.¹⁰⁶ We have seen positive instances of self-regulation. Some prosecutors' offices have instituted controls to restrain attorney behavior, such as layers of supervision, training programs and disciplinary processes;¹⁰⁷ adopted higher evidentiary thresholds for charging cases than those contained in the rules of ethics;¹⁰⁸ volunteered to engage in "open file" discovery practices;¹⁰⁹ set up internal review committees to evaluate the reliability of jailhouse informants¹¹⁰ and eyewitnesses;¹¹¹ and formed post-conviction innocence units devoted to ferreting out potential wrongful convictions in their jurisdictions.¹¹²

I applaud prosecutor offices that have taken regulatory steps to encourage best practices and identify the bad ones, especially those that combat unconscious biases. The academic literature has examined how cognitive biases can shape decisions made by even well-meaning prosecutors.¹¹³ Tunnel vision—or in

¹⁰⁵ See, e.g., Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009); Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119 (2012). For a discussion of the possible benefits of internal regulation in the context of disclosure duties under *Brady v. Maryland*, see Ellen Yaroshefsky, Foreword, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943 (2010); Symposium, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 2011–29 (2010); Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1551–53 (2010).

¹⁰⁶ For a prominent article trumpeting the benefits of internal regulation by prosecutors, see Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008) ("We believe that the internal office policies and practices of thoughtful chief prosecutors can produce the predictable and consistent choices, respectful of statutory and doctrinal constraints, that lawyers expect from traditional legal regulation. Indeed, we believe that internal regulation can deliver even more than advocates of external regulation could hope to achieve.").

¹⁰⁷ MEDWED, *supra* note 1, at 25–26.

¹⁰⁸ *Id.*

¹⁰⁹ *See id.* at 46–47.

¹¹⁰ *See id.* at 90–91.

¹¹¹ *See id.* at 29 n. 100.

¹¹² See, e.g., Daniel Kroepsch, Current Development, *Prosecutorial Best Practices Committees and Conviction Integrity Units: How Internal Programs are Fulfilling the Prosecutor's Duty to Serve Justice*, 29 GEO. J. LEGAL ETHICS 1095 (2016).

¹¹³ See, e.g., Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Alafair S. Burke, *Neutralizing Cognitive Bias*, 2 N.Y.U. J.L. & LIBERTY 512 (2007); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006); Dianne L. Martin,

scholarly parlance the “expectancy or confirmation bias”¹¹⁴—can lead prosecutors to latch onto a particular theory of a case and cling to it even in the face of contradictory evidence, a phenomenon known as “belief perseverance.”¹¹⁵ Studies indicate that setting up internal training workshops and systems of checks and balances can counteract these biases. One example is to ask prosecutors to articulate the reasons for a decision to other people and then produce counter-arguments during a role-playing exercise.¹¹⁶

But I am mindful of the limitations of self-policing. They include the risk that internal regulation will be viewed as a panacea to the various ills associated with prosecutorial decision-making and the difficulties in enforcing self-imposed norms of behavior.¹¹⁷ Unlike many civil law countries, the United States lacks a prosecutorial culture of “tight bureaucratic controls.”¹¹⁸ Without any mechanism for outsiders to monitor the effectiveness of internal regulation, much less a means of enforcement, it may be impossible to gauge whether self-policing measures work. That said, internal regulation could curb some witness coaching—provided that defense lawyers, judges, and observers remain skeptical about prosecutorial claims that their houses are in order.

3. Carrots

In this article, I have emphasized reforms designed to expose, regulate, and/or punish unethical prosecutors: an assortment of “sticks,” so to speak, to beat back misconduct. Alafair Burke has noted that I, along with others in the field, occasionally lapse into the “language of fault,” rhetoric that may go unheard by prosecutors.¹¹⁹ It is a valid point. Assigning blame overlooks how the realities of the prosecutorial enterprise can prompt good people to make bad choices. Prosecutors are often overworked and underpaid, with incentives to process cases

Lessons about Justice from the “Laboratory” of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence, 70 UMKC L. REV. 847 (2002).

¹¹⁴ See generally Findley & Scott, *supra* note 111.

¹¹⁵ See MEDWED, *supra* note 1, at 22 n. 54.

¹¹⁶ *Id.* at 25.

¹¹⁷ *Id.* at 30–31 (describing flaws of internal discipline), *id.* at 47–48 (discussing problems with “open file” discovery).

¹¹⁸ Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUST. 395, 402–03 (2017) (noting that “internal bureaucratic tools—training, articulated standards, and internal review of recorded individual decisions—all strengthen the concept of the prosecutor’s job as a neutral quasi-judicial officer. The end result, in theory, produces prosecutorial decisions that are more consistent with one another and more consistent with the values embodied in the criminal code.”). In contrast, “[i]n the United States, the archetypal role of a prosecutor rejects the apolitical, bureaucratic concept of the role found elsewhere in the world.” *Id.*

¹¹⁹ Alafair Burke, *Prosecution (Is) Complex*, 10 OHIO ST. J. CRIM. L. 703, 715–16 (2013).

quickly and obtain a high conviction rate.¹²⁰ Few enter this line of work with the ambition of acting unethically, and instead seek the intangible rewards of preserving public safety, vindicating the interests of victims, and other noble objectives.¹²¹ In line with this logic, many prosecutors who make unethical decisions do so inadvertently, drawn astray by a blend of practical, professional and psychological factors.¹²²

Stephanos Bibas has floated some potential “carrots” aimed at encouraging prosecutors to fulfill the minister-of-justice goal. He suggests chief prosecutors should de-emphasize the importance of gaining convictions, and in the process remove incentives to take shortcuts and/or cross ethical boundaries to “win” cases. He advises a variety of techniques:

1. Tout the concept of doing justice;
2. Praise line assistants who dismiss cases due to insufficient evidence;
3. Award promotions for reasons other than high conviction rates; and
4. Give clout to internal ethics gurus who are expected to guide other prosecutors.¹²³

Offices could also formally recognize prosecutors who excel during internal training programs, for instance, regarding non-suggestive interviewing tactics.¹²⁴ These proposals all have merit. Instilling a culture of honest and diligent behavior within prosecutors’ offices would go a long way toward preventing witness coaching, especially in conjunction with a handful of sticks wielded internally and externally.

V. CONCLUSION

Bennett Gershman’s article on witness coaching is just one example of his groundbreaking scholarship. His proposals have stood the test of time. Although it may be cold comfort to Fernando Bermudez, implementing the reforms raised in this article could better detect and prevent improper witness preparation and examination in the future. Ideally, these changes could dissuade prosecutors from behaving as James Rodriguez did so many years ago, a singular example of unethical behavior that provides a window into what is likely a larger problem that lurks in the opaque corners of the criminal justice system.

¹²⁰ See MEDWED, *supra* note 1, at 57 n. 22 (citing statistics indicating that “the average state assistant prosecutor closes about ninety felony cases per year”).

¹²¹ See, e.g., MEDWED, *The Zeal Deal*, *supra* note 49, at 139–42.

¹²² This is a major thesis in my book. See MEDWED, *supra* note 1.

¹²³ See Bibas, *supra* note 105, at 997–1000, 1007–9.

¹²⁴ See, e.g., Wydick, *supra* note 10, at 41–44 (underscoring the importance of training prosecutors in the art of interviewing).