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Above the Law

On the Prospects of Prosecutorial Reform

BY CHRISTOPHER KETCHAM

Prosecutors are a dangerous bunch. They are the most powerful players in the criminal justice system, directly responsible for insuring consequences for those who break the law. Yet when prosecutors break their own rules, they face no consequences. They are protected by obscure legal doctrines that grant them absolute discretion for the cases they bring and almost absolute immunity for their conduct in prosecuting those cases.

As a result they are free to deceive judge, jury and defendant. They can hide evidence, fabricate evidence, distort facts, engage in cover-ups, pay for perjury, threaten witnesses, lie in summation. They can frame the innocent at will. Among the reasons they lie and cheat is that the public demands toughness against criminals, a toughness signified by convictions, the more the better. More convictions justifies bigger budgets; more convictions means job security. Among the products of this hard work is that the United States now has the largest prison population in the world.

Ken Thompson, the first African-American district attorney of Brooklyn, is unusual among prosecutors in that he boasts not about the people he has put away but about those he has freed. When I met with him last year, he told me the story of how he came to exonerate David McCallum, who was 16 years old at the time of his arrest. McCallum was charged in 1985 with kidnapping and killing a Brooklyn man named Nathan Blenner. His alleged accomplice was William Stuckey, also a teenager and, like McCallum, an African-American. Both teenagers confessed to the murder after a series of violent interrogations with New York City police detectives. But there was no forensic or eyewitness evidence linking them to the killing, and their videotaped confessions contradicted each other. Both immediately recanted. Brooklyn prosecutors chose to bring the case to trial.

After taking office in 2014, unseating one of the most notoriously corrupt DAs in Brooklyn history, Charles J. Hynes, Thompson began a review of the case. McCallum and Stuckey had maintained their innocence over the course of decades in prison. Thompson, who once worked as an assistant prosecutor at the Department of Justice, started with the low-hanging fruit: the videotapes. “We’ve never seen anything like it,” he told me. “The confessions were so short, so perfunctory. The two boys sort of blamed each other. It was as if they were told, ‘Just say you were there and you can go home.’” He concluded

that the confessions were false and that the preponderance of evidence showed the men were innocent. Prosecutors, he said, should never have pursued the case.

David McCallum was released in October 2014 after 29 years behind bars, and Thompson met with him minutes before his exoneration hearing. His intent, he said, was to apologize “on behalf of prosecutors everywhere.” He keeps a picture of McCallum on the wall of his office. It shows McCallum’s niece hugging him when he came out of court on the day of his release. “I saw that picture in the Associated Press, and I wanted it because that says it all, the emotion in her face,” Thompson told me. “It reminds me that this is not a game. These are human beings. We can never completely heal guys like David McCallum. 29 years.” Thompson shook his head. He noted that William Stuckey did not live to see justice done. He died in prison in 2001, and was exonerated posthumously.

Thompson, who lives in Brooklyn with his wife and two children, ran for office inspired by the execrable record of his predecessor. Charles Hynes had spent 24 years as Brooklyn DA and presided over what appeared to be hundreds of questionable convictions. One of the many people Hynes wrongfully convicted, Jabbar Collins, who served 16 years in prison for a murder he did not commit, filed a federal civil rights suit against Hynes following his release in 2010 after a New York state judge determined he was innocent. The suit, settled in 2014 with a \$13 million judgment for Collins, charged that prosecutors in Brooklyn repeatedly engaged in “fraudulent, deceptive, and literally criminal acts” as part of an “unlawful policy” that Hynes “ratified” through “indifference and/or tacit approval.” Thompson campaigned with a vow to clean up what he called the “evil” that Hynes had spawned.

The problem of wrongful convictions is so important to Thompson that last October he convened at Brooklyn Law School a summit of reform-minded prosecutors from around the country to discuss what could be done about it. The conference, the first of its kind, was closed to the press, but Thompson allowed me to sit in. The attendees included district attorneys from California, Texas, and Ohio, along with a hundred or so assistant DAs from various jurisdictions. Thompson, who is soft-spoken and reserved, opened the event with a short speech. “Wrongful convictions undermine the integrity of our criminal justice system,” he said. “It is my hope we will have frank discussions during this conference about whether there is a need for prosecutors to create mechanisms to review old convictions.”

The only remarkable thing about the event was that prosecutors were discussing the problem. The National Registry of Exonerations, a project of the University of Michigan Law School, estimates that 42 percent of wrongful convictions in recent years have been the product of “official misconduct” by prosecutors and police. In a study of 124 death-row exonerations from 1973 to 2007, Richard Moran, a professor of sociology and criminology at Mount Holyoke College, con-

cluded that two-thirds of these wrongful convictions resulted from “intentional, willful, malicious prosecutions.”

Thompson has suggested a simple, if problematic, solution. Prosecutors, he told the district attorneys gathered in Brooklyn, need to reform themselves. The way to do so is an entirely new invention in criminal justice: a conviction review unit (CRU), operated inside DA’s offices, to examine the conduct in past convictions.

The remarkable speed of Thompson’s CRU—since its establishment in April 2014 it has issued 20 exonerations – has garnered him national attention, and was part of the reason for the packed auditorium at Brooklyn Law School. “The CRU since Ken Thompson was elected has set a standard that is far higher than any other conviction review unit I know of,” Samuel Gross, co-founder and editor of the National Registry of Exonerations, told me. “The scale of the operation, the types of cases they’re dealing with, the attentiveness to each case—it is a big deal. What’s happening in Brooklyn is very impressive.”

Thompson is part of a nascent movement among DAs elected in recent years who claim they can self-regulate. Spurred on by reform groups critical of the status quo, 24 county prosecutor offices since 2007 have established CRUs. There are now review units operating in Detroit, Denver, Baltimore, Philadelphia, Cleveland, Washington DC, Phoenix, and Los Angeles. Partly as a result of their work, exonerations nationwide reached an all-time high in 2014, at 125, a 37 percent increase over 2013.

“The fact these units are popping up is miraculous in the bigger picture,” says Pamela Cytrynbaum, executive director of the Chicago Innocence Center, which investigates wrongful convictions. “They have real, material meaning in the discussion nationwide about the depth and breadth of the brokenness of the criminal justice system.” At the October conference in Brooklyn, Ron Sullivan, a Harvard professor of law hired by Thompson to set up the CRU, told the auditorium, “We might say the zeitgeist is moving across the country, depositing conviction review units.”

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On June 27, 1958, a Maryland man named John Brady and his accomplice Donald Boblit attacked and kidnapped a man whose car they planned to steal. Boblit hit the victim over the head with the butt of a shotgun, and then dragged the unconscious man to a rural field, where Boblit strangled him. When Brady and Boblit were caught and charged for the murder, Boblit confessed that he, not Brady, had committed the murder. Brady had stood by and watched. But prosecutors did not allow the jury to hear that confession at Brady’s trial. Brady, like Boblit, was convicted and sentenced to death, the jury having no knowledge that Brady did not in fact commit the murder. On appeal, his lawyer demanded a retrial based on the newly discovered evidence.

Brady appealed, and his case made it to the Supreme Court. The justices, in 1963, issued a decision that would

become a landmark in criminal justice. Creating an entirely new due process right. *Brady v. Maryland* mandated that all exculpatory evidence in the prosecution’s possession now had to be shared with the defense. “Brady is a rule of fundamental fairness,” says Bennett Gershman, a law professor at Pace University and a leading expert on prosecutorial misconduct. “It is the quintessential rule embodying the prosecutor’s role as a minister of justice.” The Brady opinion described the prosecutor as the “architect” of a trial and established the constitutional duty to build the “legal edifice” so that the defendant is fairly treated.

The conduct prohibited by the Brady rule has broadened over the years. If a prosecutor presents unreliable, inadmissible, fraudulent, or misleading evidence, if he hides or fabricates evidence, or lies in court in any way that prejudices the defendant, or suborns perjury by a witness, he has violated Brady.

Brady violations are rampant. Consider the most extraordinary recent example in California’s Orange County, where Superior Court Judge Thomas M. Goethals, a former prosecutor, was forced last year to disqualify the entire prosecutorial staff in the DA’s office—all 250 lawyers—from participation in a capital murder trial following revelations that the office had systematically violated Brady by suppressing exculpatory evidence in three dozen separate cases.

In 2014, Judge Alex Kozinski, a justice of the United States Court of Appeals for the Ninth Circuit, noted in an opinion that Brady violations “have reached epidemic proportions.” Kozinski cited as a random sampling some 27 separate federal and state criminal cases between 2003 and 2013 in which prosecutors were found to have broken the rule.

What prompted Kozinski’s ire was the federal prosecution of Kenneth Olsen, a Washington State man who was convicted in 2003 of producing ricin, a deadly toxin, with the goal of using it as a weapon. Olsen proclaimed his innocence, saying he was motivated only by “an irresponsible sense of curiosity” about “strange and morbid things” and had no intention of deploying the poison. Exculpatory evidence supporting Olsen’s defense, however, never made it before the jury—because the assistant U.S. attorney assigned to his case suppressed it, violating Brady. “I wish I could say that the prosecutor’s unprofessionalism here is the exception,” wrote Kozinski. “But it wouldn’t be true.”

There is no regulatory system to police this kind of misconduct. The American Bar Association’s Standards for Criminal Justice, the United States Attorneys’ Manual, and the National Prosecution Standards of the National District Attorneys Association all promulgate rules of good behavior, including adherence to Brady. But these rules are aspirational. State bar associations rarely act when apprised of misconduct. The Center for Prosecutor Integrity reports that less than 2 percent of cases of prosecutorial misconduct over the past 50 years resulted in any public sanction. From 1997 to 2009, a mere 1 percent of California prosecutors

facing formal misconduct charges suffered any professional consequences.

Defendants should not look to judges for help. “Many judges were once prosecutors and don’t want to rock the boat,” Gershman tells me. “Many judges see prosecutors as doing God’s work. Many judges are scared of prosecutors. And many just sit there passively, sometimes not even realizing what’s happening in their courtrooms.” He describes the general lack of safeguards as “one of the most shameful examples of cowardice and inaction by the supposed protectors of the ethics of the profession.”

In the Olsen case, despite the evidence of intentional misconduct, the 9th Circuit majority upheld the conviction, with Kozinski dissenting. The decision of the majority, wrote Kozinski, sent “a clear signal to prosecutors that, when a case is close, it’s best to hide evidence helpful to the defense, as there will be a fair chance reviewing courts will look the other way, as happened here.” He added that “prosecutors don’t care about Brady because courts don’t *make* them care.”

That there are no real punishments for prosecutors, no matter how bad the misconduct, is entrenched in U.S. law. The Supreme Court in *Imbler v. Pachtman* (1976) ruled that individual prosecutors acting in an official capacity cannot be held liable by the defendants they wrongly convict. Prosecutors, said the court, are insulated “absolutely” from civil litigation. The court defended this absolute immunity by arguing that prosecutors need to be free of the threat of being prosecuted themselves for the “vigorous and fearless” performance of their duties.

The justices admitted that “such immunity leaves the genuinely wronged criminal defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty.” (What the justices should have said in the decision, to clarify their position, is this: *Dear wrongfully convicted person, you will never get justice against the bastard who ruined your life, and we the Supremes are fine with that.*)

Theoretically, a wrongfully convicted defendant can still pursue charges, not against a specific prosecutor but against the *office* of the prosecutor. In 2011, however, the Supreme Court narrowed this avenue of redress as well. The DA’s office, said the court in *Connick v. Thompson*, cannot be held accountable for failing to adequately train prosecutors on the basis of a single violation. Instead, the plaintiff must prove that a “culture of misconduct” exists within the DA’s office. Exactly how many violations constitute a culture of misconduct is unknown, as the court did not draw a line in the sand.

If absolute immunity makes the prosecutor untouchable, absolute discretion liberates him to wield the law however he chooses. The district attorney decides who to charge, what to charge, and whose crimes he will ignore. These decisions happen in secret, outside any public scrutiny. Discretion has long been a source of worry. The 1931 National Commission on Law Observance and Enforcement concluded that abso-

lute discretion amounted to “something like a royal dispensing power,” with the prosecutor “the real arbiter of what laws shall be enforced,” his decisions rendered “on grounds nowhere recorded and quite unascertainable.” The findings are as valid today as they were 85 years ago. Angela J. Davis, a ferocious critic of prosecutors who spent 12 years as a lawyer at the D.C. Public Defenders Service and who is now a professor of law at American University, goes so far as to assert that the charging decision is “the most important prosecutorial power.” It is also, she says, “the strongest example of the reach of prosecutorial discretion.”

Prosecutors routinely overcharge to strike fear into a defendant, overwhelm defense lawyers’ resources, and produce extreme leverage to force a plea and avoid trial. An estimated 95 percent of all criminal convictions in state courts are the result of plea bargaining – a process, Davis notes, “controlled entirely by the prosecutor.” (And the information prosecutors use to force pleas is exempt from the Brady rule.) Jed Rakoff, a US District Court judge, writes that the “prosecutor-dictated” plea bargain system creates “such inordinate pressures [that it has] led a significant number of defendants to plead guilty to crimes they never actually committed.”

It may be that prosecutors—not cops, judges, or lawmakers—are to blame for the stunning increase in the prison population since the 1990s. John Pfaff, a professor of law at Fordham Law School, observes that since 1994 “prison growth appears to be driven primarily by a single factor: prosecutors’ decisions to file felony charges.” While the number of arrests, arrests per crime, prison admissions per felony filing, and time served have all been flat or falling, the number of defendants who end up in felony court has skyrocketed.

Pfaff admits that he can’t explain why prosecutors have become more aggressive, or why Brady violations have been skyrocketing. “The reason I don’t have an answer is actually pretty important,” he told me in an email. “Because we have almost no data on what prosecutors do. We have detailed data on crimes and arrests and on who enters prison and for how long. But there’s no equivalent for prosecutors. It’s hard to figure out *why* they act the way they do because we don’t really have much data on *what* they do or *how* they do it.”

It’s a stunning fact that the most important and powerful player in the criminal justice system is the least understood by policy analysts.

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When Ken Thompson took office in 2014, one of his first phone calls was to Dallas County District Attorney Craig Watkins. He wanted advice on reviewing past convictions. Elected in 2007, Watkins was a Democrat who had been a career criminal defense attorney. He had embarked on a bold program of reform, with the novel idea to establish a special investigative branch within the DA’s office dedicated to the review of misconduct that had led to wrongful convictions. He called it a conviction integrity unit, and he asked a veteran

Dallas defense lawyer named Mike Ware to head it. “The humor in the office before Watkins came in was that ‘Anyone can convict a guilty person. It takes real talent to convict an innocent person,’” Ware told me.

The nation’s longest-serving district attorney, Henry Wade, who had ruled Dallas County for 36 years, prosecuting Jack Ruby and defending his office as the Wade in *Roe v. Wade*, had left his mark with an ethos of “convict at all costs.” He retired in 1986, famously without ever losing a case that he prosecuted personally. Out of 30 death sentences that he demanded, he got 29. Wade’s successors, said Ware, had “kept the ball rolling, and changed nothing. Dallas County always had this terrible reputation.”

There was not a single county in the nation that had a conviction integrity unit when Watkins took office. “We had no template to base it on,” said Ware. “I’d never known any DA’s office to even use the term ‘conviction integrity.’ What Craig wanted to do was revolutionary.” When Ware left the office to return to private practice in 2011, Watkins replaced him with another well-known Dallas defender, Russell Wilson, who told me that Watkins reiterated the need for “someone from the outside to come in who is less susceptible to the biases of prosecutors.” Watkins himself had never served as a prosecutor, and no DA had ever won the seat in Dallas without some experience putting away criminals. “His perspective of law enforcement was totally different from the guys who come up as prosecutors aligned with law enforcement,” Wilson told me. “His perspective as a defender was seeing people wrongfully convicted.”

Watkins began with an audit of every request for post-conviction DNA testing in the Dallas County DA’s database. The unit was financed at \$360,000 annually, and its staff was small: one prosecutor, one investigator and one paralegal, but with access to the resources of the 250 prosecutors in the office. Watkins made the incredible move of partnering with the Innocence Project of Texas, opening the entirety of his files to the group’s lawyers, and backed them with subpoena power to conduct investigations. “The goal was more than conviction review, it was really to begin to reform the criminal justice system,” Watkins told me. “Our system is broken. Prosecutors have the power to change things and they don’t. I always thought that I had a dual role. Convict the guilty and free the innocent.”

Within six months he had ordered a review of more than 400 cases, some of them dating to the 1970s. “It was very risky politically,” said Ware. “The police were going to hate us for it. The victims’ groups were going to hate us. But as we started doing it, it got popular support.” There were glowing profiles of Watkins on *60 Minutes*, in the *New York Times* – the *Times* proclaimed that his arrival signaled “an end to the old ways” – and in the *Dallas Morning News*, which named Watkins its Man of the Year in 2008. “What Craig did that was really different,” Ware told me, “was that instead of looking at

these cases as embarrassments and outliers, he showed up in court, he shook the exoneree’s hands, he didn’t hide from the exonerations the way other DAs in previous administrations had. He brought a different culture to the exonerations themselves.”

By 2014, when Watkins lost his seat after two terms, his CIU had reviewed over a thousand cases and issued 33 exonerations. Prior to the Watkins administration, the DA’s office during its entire history had presided over just seven exonerations. Watkins’ successor, a former assistant prosecutor named Susan Hawk, who ran as a tough-on-crime Republican, vowed to carry on the work of the CIU, but took more than six months to appoint a new chief for the unit. “I’m not going to comment on the current administration,” Watkins told me, “except that they seem to have a very different view than I did.” He noted that Hawk, in her bid to oust him, had the support of the Dallas Police Association. “We were looking at police officers and their conduct,” said Watkins. “Maybe they supported my opponent because they thought their jobs would be a little easier.”

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Like Watkins, Ken Thompson brought in an outsider to run his review unit. Ron Sullivan had spent several years at the DC Public Defenders Office, taught at Yale and Harvard, and worked in New Orleans at the Orleans Parish defenders office sorting out the post-Hurricane Katrina mess, when thousands of innocent defendants had been jailed, records were lost, and the defenders office was, as he described it, “in shambles and needed to be reformed.”

The CRU that Thompson inherited from his predecessor, Charles Hynes, consisted of one prosecutor when it was established in 2011 and one investigator who had other duties, and none of its personnel were provided an additional budget or resources. There were over a hundred murder convictions from the Hynes era that needed review. Sullivan proposed a massive expansion. Thompson pressed the New York City Council for \$500,000 in annual funding, and added another \$600,000 from his coffers. The unit would now have 10 full-time prosecutors and three detective investigators doing nothing but conviction review. Sullivan had studied Watkins’ Dallas model and wanted “to move beyond Dallas.”

First, he conceptualized a notion of wrongful convictions broader than those involving proof of “actual innocence.” In cases of actual innocence, the evidence, often DNA-related, showed that the defendant could not have committed the crime. “To go beyond actual innocence, we started looking at cases where the conviction is so corrupted by due process violations that the interests of justice compel the DA to vacate,” Sullivan told me. Convictions shown to be rife with Brady violations, for example, could “no longer carry the imprimatur of the office.”

Next, he established an independent review panel, comprised of three attorneys outside the DA’s office, to examine

the evidence in cases under review and offer recommendations to the office. The IRP would not be paid by the Brooklyn DA; the attorneys volunteered their time.

The panel included Bernard Nussbaum, the former White House counsel to Bill Clinton, who was part of the Congressional team that investigated Watergate; Jennifer Rodgers, a former top prosecutor at the Justice Department; and Gary Villanueva, who worked as an assistant district attorney in the 1980s under Hynes's predecessor, DA Elizabeth Holtzman. "The CRU does the investigation," Thompson told me, "but the same information that the CRU looks at we also give to the IRP. And if the independent panel wants more information, they contact the CRU, and the CRU gives them that information. This is not something we take lightly."

Perhaps the most important development under Thompson has been the extension of the CRU to non-homicide cases. When I sat down with him last year, Thompson told me the story of Michael Wate, who was convicted of burglary in 1987. "He came to this country from Barbados as a young man," Thompson said. "He got a job here in Brooklyn working in an apartment building as a security guard. And he would see a woman come down at night who lived in the building and get into her car and, apparently, go to work." One night she came down and her car was missing. She accused Wate of stealing it. He denied the crime, and quit the job at the building.

"A couple months later that same woman accused him of burglarizing her apartment," Thompson said. "He was put on trial, and he testified in his own defense. His grandmother and other relatives testified that he was home with them at the time of the burglary. But he was convicted, sentenced to 18 months. He did his 18 months, got out."

Thompson received a letter from Wate last year claiming that because of the conviction 27 years ago he was now facing deportation back to Barbados. He was 50 years old, married, with four daughters, and was now a grandfather. He had no criminal record beyond the single conviction. Thompson's CRU prosecutors interviewed him and found him credible. They examined the trial transcript, and noted that the supposed victim had left Brooklyn and moved to Atlanta.

"My prosecutors, without me telling them to do it, got on a plane and flew down to Georgia," Thompson told me. "They drove an hour to this woman's home with the transcripts and talked to her about what happened back in 1987. To make a long story short, this woman admitted that she fabricated the charges against Mr. Wate. And that convinced me that I could not just focus on murder cases."

Ron Sullivan says that the rate of wrongful convictions is likely higher in non-homicide cases, where the representation at trial is not as robust. "And with plea bargaining, we have a lot of incidents where people admit to things they didn't do," he said.

"Hopefully the number of cases under review over time will reduce," said Sullivan. "It may take a while. Ken is trying

to learn from past mistakes." Thompson is incorporating the lessons of the CRU into the training of new lawyers, with the idea that if line prosecutors understand the causes of past wrongful convictions, they will learn to recognize the warning signs in cases now before them. Questionable eyewitness identification, for example. Unreliable scientific evidence. Unreliable confessions. Use of jailhouse informants. Or viable alternative suspects that were never investigated. Or exculpatory evidence that goes overlooked. "Last year, I trained the new class," said Sullivan. "The lesson we impart is: Take Brady seriously."

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In the audience at the October summit was a 63-year-old criminal justice activist named Bill Bastuk, who in 2008 was falsely indicted on charges of rape. Bastuk had worked in public service for close to 35 years, as a legislative aide in the New York State assembly and then as a county legislator and town councilman. "I had no idea what prosecutors can do to your life before this happened," he told me. The teenage girl who accused him kept diary entries that suggested the rape charge was invented, but the prosecutor withheld this information until it was discovered by his defense team. The prosecutor proceeded with the case. The trial took two weeks, the jury found Bastuk not guilty, but in the process he had spent \$150,000 in legal fees, taken out a second mortgage, undergone forced psychological evaluation, spent a night in jail, and become a pariah in a community where he was once a respected figure. Bastuk was so horrified at watching prosecutors in action that he founded a nonprofit called It Could Happen to You, whose goal is to pass legislation in New York that for the first time in state history could curb prosecutorial power.

Bastuk was skeptical that Conviction Review Units constitute serious reform. "These units are fine as far as they go," he told me. "We still need systemic procedures to stop the misconduct from happening. That can't be done by these units." Phil Locke, an advisor to the Ohio Innocence Project and Duke University's Wrongful Convictions Clinic, noted the fatal deficiency of the CRU model: They operate entirely at the prosecutor's discretion. "Conviction review units are totally contained within the office, and the prosecutor has total control over which case he'll review and which ones he won't," Locke told me. "That's not really in the spirit of what we're supposed to be doing in reviewing cases."

"My personal opinion," he said, "is that CRUs are politically motivated and self-serving. It's the fox guarding the henhouse problem. They'll cherry-pick the cases, overturn the obviously worst ones, thump their chests about all the good being done. And I would be very surprised if they overturned a conviction that involved a currently sitting member of that prosecutors' office. Over time, I think we'll see that CRUs will be disbanded, and the reasoning we'll hear for this is, 'We've cleaned up, we've fixed the problem, and we don't need this in the future.'"



Former DA Charles J. Hynes. Photo: Metropolitan Transportation Authority / Patrick Cashin.

Advocates of CRUs say the metric for their effectiveness is the number of exonerations they are issuing. By this measure, some units appear to be do-nothing operations. Charles Hynes's review unit accomplished very little during its three years: 14 cases reviewed, and 2 exonerations. And the number of individual CRUs, now at 24 nationwide, is paltry. There are roughly 2,330 county prosecutors in this country.

A more effective way to tackle the problem of wrongful convictions is to address the root cause: discretion and immunity, the unfettered freedom of prosecutors to choose which cases to go after, and to avoid the consequences of their errors and misdeeds. "We need to pass laws that remove the shield of prosecutorial immunity and that make prosecutors accountable for misconduct," Locke told me. Sanctions, he said, should include jail time. Unethical prosecutors need to be perp-walked and thrown in the cages they love to put others in. "Until that happens, nothing fundamental will change."

Bill Bastuk's group has drafted legislation for the creation of a Commission on Prosecutor Conduct in New York State, which Bastuk sees as an initial step toward structural reform. The commission, the first of its kind in the nation, would have a sweeping regulatory mandate. It would investigate allegations of prosecutorial misconduct that lead to wrongful convictions and indictments, and it would have the power to sanction or suspend a prosecutor and recommend removal.

The bill's sponsors include Sen. John DeFrancisco, a conservative upstate Republican and former ADA, and

Assemblyman Nick Perry, a liberal Democrat out of Brooklyn. It has been endorsed by the New York State Defenders Association, the state's Association of Criminal Defense Lawyers, the Legal Aid Society, the state Catholic Conference, the United Teachers, and the AFL-CIO. The sole organization lobbying to kill the bill is the District Attorneys Association of the State of New York. "DAASNY has been swarming the legislature," says Bastuk.

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One of the cases that Thompson's CRU investigated was that of a 32-year-old Brooklyn man named John Charles Giuca, whose arrest and trial on murder charges in 2005 became a tabloid sensation. Prosecutors claimed that Giuca was the head of a petty Brooklyn gang called the Ghetto Mafia, and that he had ordered one of his lieutenants to "get a body" for the gang. The victim, gunned down on the street by a friend of Giuca's, was a college football star named Mark Fisher. Convicted on second degree murder charges and sentenced to 25 years to life, Giuca appealed, maintaining his innocence. His lawyer, Mark Bederow, filed a 75-page petition to Thompson in 2014 calling the evidence against his client "false, flimsy, incompatible and now thoroughly discredited."

Bederow hired Bennett Gershman to advise on the appeal. Gershman read the trial transcripts, exhibits, grand jury testimony, the investigative documents, and the sworn recantations of the three principal prosecution witnesses against Giuca. The case hinged on the testimony of a jailhouse in-

formant who had reason to lie, who was later proven to be unreliable, but whose problematic history was suppressed by the prosecutor in the case.

Gershman offered a harsh assessment of that prosecutor, an assistant under Charles Hynes, Anna-Sigga Nicolazzi, who had never lost a case. In the Giuca prosecution Nicolazzi had run roughshod over the Brady rules, according to Gershman. “By her distortion, subversion, and suppression of evidence, and improper arguments to the jury,” he wrote in an April 2014 letter to Thompson, “ADA Nicolazzi undermined Mr. Giuca’s right to a fair trial, and corrupted the integrity of the jury’s verdict.” Nicolazzi, he wrote, used “misleading, deceptive, and inflammatory tactics,” and “displayed a cynical disregard for the truth.” Gershman called the case “one of the most serious issues of prosecutorial misconduct that I have encountered recently.”

The *People v. Giuca* seemed a prime example of the need, as Sullivan described it, to go beyond seeking proof of actual innocence to examine the corruption of due process. But Thompson upheld the conviction last year, saying there was no evidence of Giuca’s innocence, that his trial was fair, and that justice had been done. Sullivan told me, “We absolutely stand by our decision.” He added that Thompson’s independent review panel had found no problems with the Giuca prosecution.

Giuca filed another appeal in New York state court, which was denied in June. He is still in prison. Anna-Sigga Nicolazzi remains as one of Thompson’s top homicide assistants. She now stars as herself on a reality show on the Discovery Channel called “Did He Do It?”

I asked Gershman about Thompson’s review of the Giuca case. “I think Thompson has done an extraordinary job with his CRU. But he has failed to do the right thing in the Giuca case. Why? Maybe one of his star prosecutors, who has promoted herself publicly in TV, used every resource available to her to put pressure on him not to touch the case.”

Gershman took to the Huffington Post to castigate the New York state judge, Danny Chun, who, true to the model of judicial cowardice and inaction, backed DA Thompson in upholding the Giuca conviction last June. “Once again, John Giuca’s bid for a new, and much fairer, trial than he had in Brooklyn ten years ago has been frustrated after an evidentiary hearing in which the prosecution’s star witness admitted he lied at Giuca’s trial and the prosecution’s misconduct was further exposed as a brazen effort to hide the truth from the jury,” wrote Gershman. “None of this appeared to matter to Judge Danny Chun, who bought every argument the prosecution made, however absurd and unsupported by law, to send Giuca back to prison.”

Bederow, Giuca’s attorney, wrote me in an email that “the Giuca decision was wrong on so many levels. It is especially disappointing given that we are only beginning to realize how many trials have been tainted by the use of unreliable jail-

house informants whose testimony was propped up by withholding Brady material. We’ve all watched with admiration as the Brooklyn judiciary and DA Thompson have restored much of the damage that occurred under the Hynes administration. But until John Giuca is granted a new trial – a fair trial – that work will never be completed.”

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Whatever the reason for Thompson’s Giuca decision, it points directly at the problem of unaccountable power. We have to trust Ken Thompson to do the right thing—and that’s about as far as the reform goes. There was no discussion at the October conference about structural reform, no call for an end to absolute immunity and absolute discretion, no outcry over the corrosive plea bargain game, no concern for the practice of overcharging, no demand that prosecutors face criminal liability for lawlessness in court, no concern that we have concentrated massive unaccountable power in a single branch of government. Even the guiding figure in the CRU movement, Craig Watkins, doesn’t see the need for regulation. “A prosecutor needs immunity to do his job without worrying about oversight,” Watkins told me. “If you have the right person that’s in office, who has the morality, who wants to make sure the criminal justice system works, you don’t need external review.”

Half a century ago, Supreme Court Justice Robert Jackson, who prosecuted the Nuremberg Trials, made a similar argument. “A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power,” he said, “and the citizen’s safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.” Ron Sullivan put this same sentiment another way. “The Supreme Court has been crystal clear that the Constitution doesn’t constrain decision-making and discretion by prosecutors,” he told me. “Absent that, the change has to come from people of good will insisting that the guilty and the guilty alone should be prosecuted and punished.”

With all due respect to Jackson, Watkins, Sullivan et al, this is idealistic stupidity. It runs counter to the system of separation of powers designed to prevent the democracy from degenerating into tyranny. That system is predicated on a realistic if dark assessment of human nature. Men in power can’t be trusted to be sensitive or sportsmanlike or truth-seeking or kind or humble or full of good will. What drives a prosecutor are the all-too-human traits: a desire for advancement, the building of reputation, the winning of status in his field. We ignore his humanness at our peril. **CP**

-with additional reporting by Aidan Coffey

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