**Criminal Law 2.0 - Why the US Justice System Really Isn’t Just**

[Criminal Law 2.0, Why the US Justice System Really isn’t Just by The Hon. Alex Kozinski a judge on the U.S. Ninth Circuit. Here is an experienced, seasoned, knowledgable justice system “insider” who has “figured it out.” And not only has he figured it out, but he also has some very good ideas about fixing the problems, or at least some of them.]

Although we pretend otherwise, much of what we do in the law is guesswork. For example, we like to boast that our criminal justice system is heavily tilted in favor of criminal defendants because we'd rather that ten guilty men go free than an innocent man be convicted' There is reason to doubt it, because very few criminal defendants actually go free after trial. Does this mean that many guilty men are never charged because the prosecution is daunted by its heavy burden of proof? Or is it because jurors almost always start with a strong presumption that someone wouldn't be charged with a crime unless the police and the prosecutor were firmly convinced of his guilt? We tell ourselves and the public that it's the former and not the latter, but we have no way of knowing. They say that any prosecutor worth his salt can get a grand jury to indict a ham sandwich. It may be that a decent prosecutor could get a petit jury to convict a eunuch of rape.

The "ten guilty men" aphorism is just one of many tropes we assimilate long before we become lawyers. How many of us, the author included, were inspired to go to law school after watching Juror #8 turn his colleagues around by sheer force of reason and careful dissection of the evidence? If that's what the law's about, then I want to be a lawyer! I thought to myself. But is it? We know very little about this because very few judges, lawyers and law professors have spent significant time as jurors. In fact, much of the so-called wisdom that has been handed down to us about the workings of the legal system, and the criminal process in particular, has been undermined by experience, legal scholarship and common sense. Here are just a few examples:

**1. Eyewitnesses are highly reliable.** This belief is so much part of our culture that one often hears talk of a "mere" circumstantial case as contrasted to a solid case based on eyewitness testimony. In fact, research shows that eyewitness identifications are highly unreliable." especially where the witness and the perpetrator are of different races. Eyewitness reliability is further compromised when the identification occurs under the stress of a violent crime, an accident or catastrophic event-which pretty much covers all situations where identity is in dispute at trial. In fact, mistaken eyewitness testimony was a factor in more than a third of wrongful conviction cases." Yet, courts have been slow in allowing defendants to present expert evidence on the fallibility of eyewitnesses; many courts still don't allow it. Few, if any, courts instruct juries on the pitfalls of eyewitness identification or caution them to be skeptical of eyewitness testimony.

**2. Fingerprint evidence is foolproof.** Not so. Identifying prints that are taken by police using fingerprinting equipment and proper technique may be a relatively simple process, but latent prints left in the field are often smudged and incomplete, and the identification process becomes more art than science. When tested by rigorous scientific methods, fingerprint examiners turn out to have a significant error rate. Perhaps the best-known example of such an error occurred in 2004 when the FBI announced that a latent print found on a plastic bag near a Madrid terrorist bombing was "a 100 percent match" to Oregon attorney Brandon Mayfield. The FBI eventually conceded error when Spanish investigators linked the print to someone else.

**3. Other types of forensic evidence are scientifically proven and therefore infallible**. With the exception of DNA evidence (which has its own issues), what goes for fingerprints goes double and triple for other types of forensic evidence:

Spectrographic voice identification error rates are as high as 63%, depending on the type of voice sample tested. Handwriting error rates average around 40% and sometimes approach 100%. False-positive error rates for bite marks run as high as 64%. Those for microscopic hair comparisons are about 12% (using results of mitochondrial DNA testing as the criterion).

Other fields of forensic expertise, long accepted by the courts as largely infallible, such as bloodstain pattern identification, foot and tire print identification and ballis¬tics have been the subject of considerable doubt. Judge Nancy Gertner, for example, has expressed skepticism about admitting expert testimony on handwriting'' ca¬nines.'? Ballistics and arson.'? She has lamented that while "the Daubert-Kumho standard [for admitting expert witness testimony] does not require the illusory perfection of a television show (CSI, this wasn't), when liberty hangs in the balance and, in the case of the defendants facing the death penalty, life itself-the standards should be higher ... than [those that] have been imposed across the country.

Some fields of forensic expertise are built on nothing but guesswork and false common sense." Many defendants have been convicted and spent countless years in prison based on evidence by arson experts who were later shown to be little better than witch doctors. Cameron Todd Willingham may have lost his life over it.

**4. DNA evidence is infallible.** This is true to a point. DNA comparison, when properly conducted by an honest, trained professional will invariably reach the correct result. But the integrity of the result depends on a variety of factors that are, unfortunately, not nearly so foolproof: the evidence must be gathered and preserved so as to avoid contamination; the testing itself must be conducted so that the two samples being compared do not contaminate each other; the examiner must be competent and honest. As numerous scandals involving DNA testing labs have shown these conditions cannot be taken for granted, and DNA evidence is only as good as the weakest link in the chain.

**5. Human memories are reliable.** Much of what we do in the courtroom relies on human memory. When a witness is asked to testify about past events, the accuracy of his account depends not only on his initial perception, but on the way the memories are recorded, stored and retrieved. For a very long time, it was believed that stored memories were much like video tape or film-an accurate copy of real-word experience that might fade with the passage of time or other factors, but could not be distorted or embellished.

Science now tells us that this view of human memory is fundamentally flawed. The mind not only distorts and embellishes memories, but a variety of external factors can affect how memories are retrieved and described. In an early study by cognitive psychologist Elizabeth Loftus, people were shown videos of car accidents and then questioned about what they saw. The group asked how fast the cars were going when they "smashed" into each other estimated 6.5 mph faster than the group asked how fast the cars were going when they "hit" each other. A week later, almost a third of those who were asked about the "smash" recalled seeing broken glass, even though there was none.

This finding has troubling implications for criminal trials where witnesses are questioned long and hard by police and prosecutors before the defense gets to do so-if ever. There is thus plenty of opportunity to shape and augment a witness's memory to bring it into line with the prosecutor's theory of what happened. Yet with rare exceptions, courts do not permit expert testimony on human memory. For example, the district judge in the Scooter Libby case denied a defense motion for a memory expert, even though the key issue at trial was whose recollection of a 4-year-old telephone conversation should be believed. At least one member of the jury that convicted Libby lamented the lack of expert testimony on the subject. And a key witness in that case recently suggested in her memoirs that her memory may have been distorted by the prosecutor's crafty questioning.

Given the malleability of human memory, it should come as no surprise that many wrongful convictions have been the result of faulty witness memories, often manipulated by the police or the prosecution.

**6. Confessions are infallible because innocent people never confess**. We now know that this is not true. Innocent people do confess with surprising regularity. Harsh interrogation tactics, a variant of Stockholm syndrome, the desire to end the ordeal, emotional and financial exhaustion, family considerations and the youth or feeble-mindedness of the suspect can result in remarkably detailed confessions that are later shown to be utterly false.

**7. Juries follow instructions.** This is a presumption-actually more of a guess that we've elevated to a rule of law. It is, of course, necessary that we do so because it links the jury's fact-finding process to the law. In fact, however, we know very little about what juries actually do when they decide cases. Do they consider the instructions at all? Do they consider all of the instructions or focus on only some? Do they understand the instructions or are they confused? We don't really know. We get occasional glimpses into the operations of juries when they send out questions or someone discloses juror misconduct, and even then the information we get is limited. But we have no convincing reason to believe that jury instructions in fact constrain jury behavior in all or even most cases. And, because the information we get from inside the jury room is so limited and sporadic, experience does little to improve our knowledge. Looking at 100 black boxes is no more informative than looking at one.

**8. Prosecutors play fair.** The Supreme Court has told us in no uncertain terms that a prosecutor's duty is to do justice, not merely to obtain a conviction. It has also laid down some specific rules about how prosecutors, and the people who work for them, must behave-principal among them that the prosecution turn over to the defense exculpatory evidence in the possession of the prosecution and the police. There is reason to doubt that prosecutors comply with these obligations fully. The U.S. Justice Department, for example, takes the position that exculpatory evidence must be produced only if it is material. This puts prosecutors in the position of deciding whether tidbits that could be helpful to the defense are significant enough that a reviewing court will find it to be material, which runs contrary to the philosophy of the Brady/Giglio line of cases and increases the risk that highly exculpatory evidence will be suppressed. Beyond that, we have what I have described elsewhere as an "epidemic of Brady violations abroad in the land," a phrase that has caused much controversy but brought about little change in the way prosecutors operate in the United States.

**9. The prosecution is at a substantial disadvantage because it must prove its case beyond a reasonable doubt.** Juries are routinely instructed that the defendant is presumed innocent and the prosecution must prove guilt beyond a reasonable doubt, but we don't really know whether either of these instructions has an effect on the average juror. Do jurors understand the concept of a presumption? If so, do they understand how a presumption is supposed to operate? Do they assume that the presumption remains in place until it is overcome by persuasive evidence or do they believe it disappears as soon as any actual evidence is presented? We don't really know.

Nor do we know whether juries really draw a distinction between proof by a preponderance, proof by clear and convincing evidence and proof beyond a reasonable doubt. These levels of proof, which lawyers and judges assume to be hermetically sealed categories, may mean nothing at all in the jury room. My own experience as a juror certainly did nothing to convince me that my fellow jurors understood and appreciated the difference. The issue, rather, seemed to be quite simply: Am I convinced that the defendant is guilty?

Even more troubling are doubts raised by psychological research showing that "whoever makes the first assertion about something has a large advantage over everyone who denies it later." The tendency is more pronounced for older people than for younger ones, and increases the longer the time-lapse between assertion and denial. So is it better to stand mute rather than deny an accusation? Apparently not, because "when accusations or assertions are met with silence, they are more likely to feel true."

To the extent this psychological research is applicable to trials, it tends to refute the notion that the prosecution pulls the heavy oar in criminal cases. We believe that it does because we assume juries go about deciding cases by accurately remembering all the testimony and weighing each piece of evidence in a linear fashion, selecting which to believe based on assessment of its credibility or plausibility. The reality may be quite different. It may be that jurors start forming a mental picture of the events in question as soon as they first hear about them from the prosecution witnesses. Later-introduced evidence, even if pointing in the opposite direction, may not be capable of fundamentally altering that picture and may, in fact, reinforce it. And the effect may be worse the longer the prosecution's case lasts and, thus, the longer it takes to bring the contrary evidence before the jury. Trials in general, and longer trials in particular, may be heavily loaded in favor of whichever party gets to present its case first-the prosecution in a criminal case and the plaintiff in a civil case. If this is so, it substantially undermines the notion that we seldom convict an innocent man because guilt must be proven to a sufficient certainty. It may well be that, contrary to instructions, and contrary to their own best intentions, jurors are persuaded of whatever version of events is first presented to them and change their minds only if they are given very strong reasons to the contrary.

**10. Police are objective in their investigations**. In many ways, this is the bedrock assumption of our criminal justice process. Police investigators have vast discretion about what leads to pursue, which witnesses to interview, what forensic tests to conduct and countless other aspects of the investigation. Police also have a unique opportunity to manufacture or destroy evidence, influence witnesses, extract confessions and otherwise direct the investigation so as to stack the deck against people they believe should be convicted. And not just small-town police in Podunk or Timbuktu. Just the other day, "[the Justice Department and FBI formally acknowledged that nearly every examiner in an elite FBI forensic unit gave flawed testimony in almost all [of the 268] trials in which they offered evidence against criminal defendants over more than a two-decade period before 2000." Do they offer a class at Quantico called "Fudging Your Results To Get A Conviction" or "Lying On The Stand 101''? How can you trust the professionalism and objectivity of police anywhere after an admission like that?

There are countless documented cases where innocent people have spent decades behind bars because the police manipulated or concealed evidence, but two examples will suffice:

In 2013, Debra Milke was released after 23 years on Arizona's death row based entirely on a supposed oral confession she had made to one Detective Saldate who was much later shown to be a serial liar. 50 And then there is the case of Ricky Jackson, who spent 39 years behind bars based entirely on the eyewitness identification of a 12-year-old boy who saw the crime from a distance and failed to pick Jackson out of a lineup. At that point, "the officers began to feed him information: the number of assailants, the weapon used, the make and model of the getaway car."

For some victims of police misconduct, exoneration comes too late: Mark Collin Sodersten died in prison while maintaining his innocence. After his death, a California appellate court determined that Sodersten had been denied a fair trial because police had failed to turn over exculpatory witness tapes. It posthumously set aside the conviction, which no doubt reduced Sodersten's time in purgatory.

**11. Guilty pleas are conclusive proof of guilt**. Many people, including judges, take comfort in knowing that an overwhelming number of criminal cases are resolved by guilty plea rather than trial. Whatever imperfections there may be in the trial and criminal charging process, they believe, are washed away by the fact that the defendant ultimately consents to a conviction. But this fails to take into account the trend of bringing multiple counts for a single incident-thereby vastly increasing the risk of a life-shattering sentence in case of conviction as well as the creativity of prosecutors in hatching up criminal cases where no crime exists and the over criminalization of virtually every aspect of American life. It also ignores that many defendants cannot, as a practical matter, tell their side of the story at trial because they fear being impeached with prior convictions or other misconduct. And, of course, if the trial process is perceived as highly uncertain, or even stacked in favor of the prosecution, the incentive to plead guilty to some charge that will allow the defendant to salvage a portion of his life, becomes immense" If the prosecution offers a take-it-or-leave-it plea bargain before disclosing exculpatory evidence, the defendant may cave to the pressure, throwing away a good chance of an acquittal.

**12. Long sentences deter crime. In the United States**, we have over 2.2 million people behind bars. Our rate of approximately 716 prisoners per 100,000 people is the highest in the world, over 5 times higher than that of other industrialized nations like Canada, England, Germany and Australia. Sentences for individual crimes are also far longer than in other developed countries. For example, an individual convicted of burglary in the United States serves an average of 16 months in prison, compared with 5 months in Canada and 7 months in England. And the average prison sentence for assault in the United States is 60 months, compared to under 20 months in England, Australia and Finland.

Incarceration is an immensely expensive enterprise. It is expensive for the taxpayers, as the average cost of housing a single prisoner for one year is approximately $30,000. A 20-year sentence runs into something like $600,000 in prison costs alone. Long sentences are also immensely hard on prisoners and cruel to their families, as it's usually very difficult for a prisoner to re-integrate into his family and community after very long prison sentences.

We are committed to a system of harsh sentencing because we believe that long sentences deter crime and, in any event, incapacitate criminals from victimizing the general population while they are in prison. And, indeed, the United States is enjoying an all-time low in violent crime rates, which would seem to support this intuition. But crime rates have been dropping steadily since the 1990s, and not merely in the United States but throughout the industrialized world.'' Our intuition about harsh sentences deterring crime may thus be misguided. We may be spending scarce taxpayer dollars maintaining the largest prison population in the industrialized world, shattering countless lives and families, for no good reason. As with much else in the law, the connection between punishment and deterrence remains mysterious. We make our decisions based on faith.

What I have listed above are some of the reasons to doubt that our criminal justice system is fundamentally just. This is not meant to be an exhaustive list, nor is it clear that all of these uncertainties would, on closer examination, be resolved against the current system. But there are enough doubts on a broad range of subjects touching intimately on the integrity of the system that we should be concerned. The National Registry of Exonerations has recorded 1576 exonerations in the United States since 1989. The year 2014 alone saw a record high of 125 exonerations, up from 91 the year before, and there is reason to believe the trend will continue. Certainly the significant number of inmates freed in recent years as the result of various innocence projects and especially as a result of DNA testing in cases where the convictions were obtained in the pre-DNA era, should cause us to question whether the current system is performing as effectively as we've been led to believe. It's no answer to say that the exonerees make up only a minuscule portion of those convicted. For every exonerated convict, there may be dozens who are innocent but cannot prove it.

We can be reasonably confident that the system reaches the correct result in most cases, but that is not the test. Rather, we must start by asking how confident we are that everyone of the 2.2 million people in prisons and jails across the country are in fact guilty. And if we can't be sure, then what is an acceptable error rate? How many innocent lives and families are we willing to sacrifice in order to have a workable criminal justice system? If we put the acceptable error rate at 5 percent, this would mean something like 110,000 innocent people incarcerated across the country. A 1 percent error rate would mean 22,000 innocent people-more or less the population of Nogales, Arizona-wrongly imprisoned. These numbers may seem tolerable unless, of course, you, your friend or loved one draws the short straw.

Do we know how these numbers compare to the actual error rate? We have no idea. What we have is faith that our system works very well and the errors, when they are revealed, are rare exceptions. Much hinges on retaining this belief: our self image as Americans; the pride of countless judges and lawyers; the idea that we live in a just society; confidence in the power of reason and logic; the certainty that none of us or our loved ones will face the unimaginable nightmare of unjust imprisonment or execution; belief in the incomparable integrity and accuracy of our system of justice; faith that we have transcended medieval methods of conviction and punishment so that only those who are guilty are punished, and their punishment is humane and proportionate. There are, we are convinced, no Edmond Danteses and no Chateau d'ifs in America today.

But what do we really know? We must reject out of hand the idea that the number of actual exonerations represents all of those who have been wrongly convicted. Convicted prisoners wishing to gain release on grounds of innocence face formidable hurdles. To begin with, they are in prison and thus unable to pursue leads the police might have missed; they have to rely on someone on the outside to do it, and that's often difficult or impossible to accomplish. A prisoner's access even to his counsel is severely restricted once he's incarcerated. A loyal friend or relative might do it, but friends and even relatives often abandon defendants who are convicted, no matter how much they may protest their innocence. A few prisoners may obtain the help of an innocence project, but the work is labor-intensive, resources are scarce and manpower is limited, so innocence projects engage in triage, focusing on the most promising cases. Of course, it's often difficult to tell whether a case is promising until you look closely at it, so a promising case can easily be overlooked.

But the biggest problem is that new evidence is hard-and often impossible-to find. If it's a physical crime, police secure the crime scene and seize anything that looks like it could be relevant. The chance of going back years later and picking up new clues is vanishingly small. The trick then is to get whatever evidence the police have, assuming they didn't destroy it or release it once it was clear that it wouldn't be used at trial. If the crime is non-physical, such as fraud, child pornography or computer hacking, the police seize all the relevant computers, hard drives and paper records (including any exculpatory evidence the suspect may have there) and may well discard them after the conviction becomes final. For a brief period, DNA evidence helped exculpate defendants who were convicted in the pre-DNA era but DNA often cannot help identify the true perpetrator because no sample of DNA was found or collected from the crime scene. A prisoner has to be exceedingly lucky to collect enough evidence to prove his innocence; most cannot hope to meet that standard. I think it's fair to assume-though there is no way of knowing-that the number of exculpations in recent years understates the actual number of innocent prisoners by an order, and probably two orders, of magnitude.

Wrongful convictions are not merely unjust to the prisoner and his family, they often result in another injustice or series of injustices: When an innocent man is convicted, a guilty man is left free and emboldened to victimize others. The Michael Morton case provides a good example. Morton was convicted in 1987 for the 1986 beating murder of his wife. Twenty-five years later he was exonerated when DNA evidence pointed to another man, Mark Norwood, who was eventually convicted of killing Mrs. Morton. However, Norwood has now been charged with the similar beating-death of another woman, Debra Baker; that murder was committed a year after Morton was convicted of his wife's murders. Norwood is awaiting trial for the Baker murder. Had police continued to investigate the Morton murder instead of shutting down the investigation once they decided that Michael Morton was the culprit, Debra Baker might still be alive.

There's another question the answer to which we must be reasonably confident: Of those that are guilty, can we be sure that substantial numbers are not spending far more time behind bars than is justified? The question of how much time prisoners spend behind bars is no less important than that of whether only the guilty are being locked up. The ability to pick up the threads of one's life after three to five years in prison is quite different than after fifteen, twenty or twenty-five years. Aside from the brutalizing and often dehumanizing effect of long-term imprisonment. an inmate who is released after a lengthy prison term simply does not return to the same world he left behind: Children grow up; spouses find other partners; friends and acquaintances forget; job prospects disappear; life and work skills deteriorates. Shorter sentences also reduce the consequences of wrongful convictions. While no time behind bars can be justified for someone who is innocent, we must be especially careful before imposing life-altering sentences.

By any measure, the United States leads the world in incarceration. In absolute terms, it has more prisoners than any other country. With just 5 percent of the world's population, we have almost a quarter of the world's prisoners" China, with nearly 20 percent of the world's population, has 16 percent of the world's prisoners. Incarceration rates were not always this high in the United States. For the first three-quarters of the twentieth century, the rate was well under 250 per 100,000. Then, starting around 1980, incarceration rates started rising sharply with the advent of the war on drugs, mandatory minimum sentences and three-strikes laws.

The difference in incarceration rates cannot be explained by higher crime rates in the United States. Crime rates here are roughly equivalent to Canada and in many categories lower than other countries. And the crime rate has been dropping in the United States, as in many other industrialized nations. Yet, U.S. sentences are vastly, shockingly longer than just about anywhere else in the world.

There are reasons to doubt whether the length of prison sentences in this country is just. Although elected officials, regardless of party affiliation and political leaning, seem to favor Draconian sentences, and the public seems to support them in the abstract, it's unclear how much popular support they enjoy when applied to individual defendants. U.S. District Judge James Gwin of Ohio reported on an informal study he conducted involving 22 jury trials. He asked the jurors who had convicted the defendant to write down what each thought was the appropriate sentence. Judge Gwin found that the jurors' recommended sentences were significantly lower than those recommended by the Sentencing Guidelines: "In several cases, the recommended median Guidelines r nge was more than 10 times greater than the median jurors' recommendation. Averaged over more than 20 cases, jurors recommended sentences that were 37% of the minimum Guidelines recommended sentences and 22% of the median Guidelines recommended sentences.

Whether we are incarcerating the right people and for an appropriate length of time are important questions to which we do not have very good answers. We are taught early in our schooling that the criminal justice system is tilted heavily in favor of defendants, resolving all doubts in their favor. Movies and television reinforce this idea with countless stories of dedicated police and prosecutors bringing guilty people to justice. or of acquittals of the innocent because of the efforts of a dedicated lawyer or investigator. Our educational system spends little time pondering the fate of those unjustly convicted or those wasting their lives behind bars because of a punishment that far outstrips whatever evil they were convicted of committing. No Dumas, Hugo or Zola has risen among us to foment public sympathy to the plight of the unjustly imprisoned.

Lawyers and judges are inculcated with the notion that the system works well and there is nothing to worry about. And perhaps it's true. But there are far too many uncertainties for us to be complacent. Criminal trials as we know them were developed centuries ago at a time when life and technology were very different. The process has remained essentially unchanged since time out of mind. While we have much experience with the process, we know very little about how well it works. We tell ourselves that the system works, and we really believe it, but this is largely based on faith. When all is said and done, we have only a guess.

Below I offer some suggestions on how the system might be improved and validated. I do not suggest how these changes are to be implemented: Some may require legislation; others a change in judicial practices; still others constitutional amendments. Nor do I insist that all my suggestions be implemented immediately. Some may deserve closer attention, and some should be delayed while others are accelerated. There may well be good reasons that my suggestions are unworkable, and perhaps others will come up with better ones. If my proposals raise controversy and opposition, leading to a spirited debate, I will have achieved my purpose.

**A Juries matter.** They obviously matter in the relatively few cases that are actually tried to them, but they also matter in the multitude of cases that are pled or settled. To the extent the jury is viewed as an unpredictable, erratic force, it increases the uncertainty of the outcome and thus considerably raises the stakes for the parties, especially criminal defendants. If a prosecutor can make a credible case that a jury might return a verdict calling for life without parole, he is very likely to extract a plea deal involving a "mere" 15- or 20-year sentence.

Most judges, especially trial judges, express satisfaction with the operation of the jury system. I've heard judges say that they seldom or never think juries reach the wrong outcome. I am skeptical of such claims. To begin with, judges don't know any better than anyone else what is the correct verdict in a case. The most they can say is that they would have reached the same verdict as the jury. But judges are not usually called upon to make findings when they are presiding over a jury trial; their function is to determine whether there is sufficient evidence to support a guilty verdict, a process which presupposes that the prosecution's witnesses are believed by the trier of fact. This is a very different and much less rigorous process than figuring out who's lying and who's telling the truth, and I doubt that judges routinely go through that process in parallel with the jury. I certainly don't.

Actual observation of behavior in the jury room is rare, but it does exist. As cameras have become smaller and less obtrusive over the last quarter century, we've had several instances where we have been able to observe jury-room behavior. The results are not particularly reassuring.

There is at least one case of documented jury nullification, with every juror expressing the belief that the defendant was guilty yet acquitting him nevertheless. In another case, jurors misconstrued the judge's denial of their request for a certain transcript to mean that they were not entitled to any transcripts from the trial. And in a high profile murder trial, one juror experienced aggressive pushback for expressing skepticism of the defendant's guilt because the medical examiner had switched her diagnosis from accidental drug overdose to homicide only after listening to a tape recording where the defendant said "I got away with it." The juror asked the judge (unsuccessfully) to excuse her from the jury because she was uncomfortable with being pressured, and eventually voted with the majority to convict the defendant while protesting that she was doing so in a "bullied manner." Worse still, in deliberations after the penalty phase of the trial, a different juror expressed a complete change of heart from the jury's guilty verdict the day before, emphatically maintaining that she never believed the defendant committed one of the two murders of which he was convicted. In short, even with the camera rolling, jurors compromised on verdicts, allowed personality conflicts to interfere with the deliberations, and oversimplified the judge's instructions.''

Anecdotal accounts tend to support this view. I always debrief my jurors after they return a verdict (I've never had a hung jury) and try to get them to talk about what happened in the jury room. Some of the comments seem entirely rational, but much of what jurors describe looks like a fun-house mirror reflection of Twelve Angry Men. There was one case I remember where the jury acquitted despite what I thought was an iron-clad prosecution case. I was a bit shocked and entirely puzzled about what had happened. When I debriefed the jury, I got somewhat muted responses from most of the jurors but one gentleman, who turned out to be the foreman, had very strong views. He thought the government was wasting taxpayer money in prosecuting this defendant who had been caught red-handed with a suitcase full of some 10,000 Ecstasy pills just imported from Europe. The foreman was a large man and quite vociferous-almost belligerent-about it. Of course, during voir dire I had asked the usual questions about whether any of the panel members had philosophical objections to our drug laws, and he had answered in the negative. The reality was different; he had strong objections to the war on drugs and managed to pull the jury with him.

That one strong personality can dominate the jury room is consistent with my own experience. I've sat on two (state) juries. One of the cases was not close by any measure, but the other one hinged on the testimony of a single witness, as there was no physical evidence whatsoever. The police had not even managed to recover a large bag of coins that the accusing witness claimed he had handed over to the defendant during a store holdup, even though the defendant was apprehended within 20 minutes of the robbery, just a couple of blocks away. Having been elected foreman, I spoke after everyone of my fellow jurors had expressed the view that the defendant was guilty. I reminded my colleagues of the prosecution's heavy burden of proof and questioned whether the complaining witness's identification could be trusted given the missing coins. If the defendant was, in fact, the perpetrator, he couldn't have spent a bag of assorted coins in the time it took to apprehend him, and he couldn't easily have hidden it when he saw the police approaching. And wouldn't he have gotten much farther from the scene of the crime if he were carrying a bag of stolen coins? One by one, all but one of the other jurors switched their votes to acquit. The one exception proved impossible to budge so we eventually asked the judge to declare a mistrial, which he did.

The simple truth is that our confidence in juries’ rests largely on faith, and our processes are not designed to help us improve the functioning of the jury because there is no systematic feedback mechanism to help us figure out what works and what doesn't. I've recently suggested that we introduce cameras into the jury room and I will not rehash the arguments I've advanced in support. Suffice to say that viewing what juries do in actual cases will give us a much better understanding of jury behavior and provide valuable information for different techniques in presenting evidence, instructing juries and jury management. Seeing what juries do in actual cases can also ameliorate or eliminate the endless speculation about which trial errors are harmless and which are prejudicial. Why shoot in the dark when a man's liberty or life is at stake? The same is true where there is a claim of improper juror conduct. In such circumstances, the trial judge will hear conflicting accounts about what happened in the jury room. Wouldn't it be better to see and hear what actually transpired?

Videos of jury deliberations could be sealed and preserved for viewing by researchers only after the case is final. Or they could be made available to the trial judge and a reviewing court as needed to resolve questions involving the jury's conduct. Or they could be made available to the lawyers immediately after the verdict. Disclosure could be implemented incrementally over time and rolled back if the process is found to interfere with the jury's function. But we need to get a close look as to what's going on in the jury room before we can even begin the process of meaningful reform.

In the meantime-or in addition I offer the following suggestions for reform:

**1. Give jurors a written copy of the jury instructions**. Jury instructions are often lengthy and difficult to follow. Jurors are expected to absorb them by listening, which is probably the worst way to learn new and complex subject matter. Many judges try to ameliorate this problem by sending a copy of the instructions into the jury room when the panel retires to deliberate, but some judges refuse to do so. It should be reversible error for a judge to fail to send a full set of jury instructions with the jury when it retires to deliberate. Pre-instructing the jury on key concepts and giving them those instructions in writing is also a good idea.

**2. Allow jurors to take notes during trial and provide them with a full trial transcript.** Most judges now allow note-taking and provide writing materials for the jury to use, but a minority refuse to do so. This should be reversible error. Consulting notes during deliberations is immensely useful when the jurors' memories differ as to what a witness has said. Forcing jurors to rely on their recollections alone exacerbates the distorting memory effects discussed above. In fact, I would go a step farther and give jurors transcripts of the proceedings to consult during deliberations. This was not possible when transcripts had to be transcribed laboriously by hand. But real-time transcripts are now pretty much standard and available for the judge and lawyers to consult while the trial is going on. I can see no justification for keeping jurors in the dark.

**3. Allow jurors to discuss the case while the trial is ongoing.** Most jury trials now start with a stern admonition that jurors not discuss the case until they are sent out to deliberate. It's unclear why we do this except that we've always done it that way.'" When I served as a juror, this restriction seemed unnatural and counterproductive. My guess is that it exacerbates the distorting effects of memory. Allowing jurors to discuss what they've heard could give them a chance to express doubts and to remind each other of the need to keep an open mind.

**4. Allow jurors to ask questions during the trial.** I've been doing this for some years in civil cases and it seems to work well. I ask jurors to put any questions in writing and hand them up to me. I then share these questions with the lawyers and let one or both use them during their examinations. Other techniques are possible, including having jurors pose questions to the witnesses directly and letting the lawyers follow up in light of the answers.

**5. Tell jurors up-front what's at stake in the case.** In most jurisdictions, jurors in non-capital cases are not told what the likely punishment will be if the defendant is convicted. In fact, we tell jurors not to consider punishment in deciding guilt. I don't understand why this is appropriate. In making most life decisions, we consider the consequences in determining how much effort to put into deciding and the degree of confidence we must feel before we go forward. Whether to get married or have a risky operation obviously requires a greater psychological commitment than choosing between Starbucks and Peets. Jurors should be told the gravity of the decision they are making so they can take it into account in deciding whether to convict or acquit. As representatives of the community where the defendant committed his crime, the jury should be allowed to make the judgment of whether the punishment is too severe to permit a conviction. Having to confront the jury with the severity of the punishment they are seeking to extract may well deter prosecutors from using overcharging as a bargaining tool.

**6. Give jurors a say in sentencing.** Except for capital cases, we have turned our sentencing process over entirely to experts and professionals. We have mandatory minimums, sentencing guidelines, probation officers and judges at all levels involved in the decision, but we studiously ignore the views of the very people who heard the evidence and are given the responsibility to determine guilt or innocence while reflecting the values of the community in which the offense occurred. This is a system only a lawyer could love. Jurors should be instructed on the range of punishments authorized by law and, if they find the defendant guilty, entrusted to weigh in on the appropriate sentence within that range. And I would make that the absolute upper limit of what punishment the judges actually impose, overriding any sentencing guidelines, mandatory minimums or their own considered judgment.

**B. Prosecutors hold tremendous power**, more than anyone other than jurors, and often much more than jurors because most cases don't go to trial. Prosecutors and their investigators have unparalleled access to the evidence, both inculpatory and exculpatory, and while they are required to provide exculpatory evidence to the defense under Brady, Giglio, and Kyles v. Whitley, it is very difficult for the defense to find out whether the prosecution is complying with this obligation.

Prosecutors also have tremendous control over witnesses: They can offer incentives-often highly compelling incentives-for suspects to testify. This includes providing sweetheart plea deals to alleged co-conspirators and engineering jail-house encounters between the defendant and known informants. Sometimes they feed snitches non-public information about the crime so that the statements they attribute to the defendant will sound authentic. And, of course, prosecutors can pile on charges so as to make it exceedingly risky for a defendant to go to trial. There are countless ways in which prosecutors can prejudice the fact-finding process and undermine a defendant's right to a fair trial.

This, of course, is not their job. Rather, as the Supreme Court has held, "[A prosecutor] is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." All prosecutors purport to operate just this way and I believe that most do. My direct experience is largely with federal prosecutors and, with a few exceptions, I have found them to be fair-minded, forthright and highly conscientious." But there are disturbing indications that a non-trivial number of prosecutors-and sometimes entire prosecutorial offices engage in misconduct that seriously undermines the fairness of criminal trials. The misconduct ranges from misleading the jury, to outright lying in court and tacitly acquiescing or actively participating in the presentation of false evidence by police.

Prosecutorial misconduct is a particularly difficult problem to deal with because so much of what prosecutors do is secret. If a prosecutor fails to disclose exculpatory evidence to the defense, who is to know? Or if a prosecutor delays disclosure of evidence helpful to the defense until the defendant has accepted an unfavorable plea bargain, no one will be the wiser. Or if prosecutors rely on the testimony of cops they know to be liars, or if they acquiesce in a police scheme to create inculpatory evidence, it will take an extraordinary degree of luck and persistence to discover it-and in most cases it will never be discovered.

There are distressingly many cases where such misconduct has been documented but I will mention just three to illustrate the point. The first is United States v. Stevens, the prosecution of Ted Stevens, the longest serving Republican Senator in history. Senator Stevens was charged with corruption for accepting the services of a building contractor and paying him far below market price-essentially a bribe. The government's case hinged on the testimony of the contractor, but the government failed to disclose the initial statement the contractor made to the FBI that he was probably overpaid for the services. The government also failed to disclose that the contractor was under investigation for unrelated crimes and thus had good reason to curry favor with the authorities.

Stevens was convicted just a week before he stood for re-election and in the wake of the conviction, he was narrowly defeated, changing the balance of power in the Senate. The government's perfidy came to light when a brave FBI agent by the name of Chad Joy blew the whistle on the government's knowing concealment of exculpatory evidence. Did the government react in horror at having been caught with its hands in the cookie jar? Did Justice Department lawyers rend their garments and place ashes on their head to mourn this violation of their most fundamental duty of candor and fairness? No way, no how. Instead, the government argued strenuously that its ill-gotten conviction should stand because boys will be boys and the evidence wasn't material to the case anyway.

It was only the extraordinary persistence and the courageous intervention of District Judge Emmet Sullivan, who made it clear that he was going to dismiss the Stevens case and then ordered an investigation of the government's misconduct that forced the Justice Department to admit its malfeasance-what else could it do -and move to vacate the former senator's conviction. Instead of contrition, what we have seen is Justice Department officials of the highest rank suffering torn glenoid labrums from furiously patting themselves on the back for having "done the right thing."

The second case comes from my own experience. The defendant was Debra Milke, who spent 23 years on Arizona's death row after a conviction and sentence obtained in 1990 based on an oral confession she supposedly made to Phoenix police detective Armando Saldate Jr. as a result of a 20-minute interrogation. No one was present in the room with Milke except Saldate, who refused to record the session, despite his supervisor's admonition that he do so. When the session ended, Saldate came out with nothing in writing-not even a Miranda waiver-and claimed Milke had confessed; Milke immediately and steadfastly denied it. The jury believed Saldate, but what the prosecution failed to disclose is that Saldate had a long and documented history of lying in court; he also had a serious disciplinary infraction bearing on his credibility: He had sought to extort sex from a lone female motorist and then lied about it when she reported the incident. It is not difficult to imagine that a jury may have been skeptical of Saldate's testimony that Milke confessed, had it known about his track record. But the Maricopa County District Attorney's office did not disclose this information, although it was party to many of the proceedings where Saldate had been found to be a liar.

The evidence remained hidden for two decades until an unusually dedicated team of lawyers and investigators spent hundreds of hours digging through all of the criminal prosecutions in Maricopa County during the era when Saldate had been an investigator. It winnowed down those cases and focused on those where Saldate provided evidence. And the state doggedly refused to turn over Saldate's disciplinary record until forced to disgorge it by an order of the district judge who considered Milke's federal habeas petition.

After we vacated the conviction and gave Arizona a chance to re-try Milke, the Arizona Court of Appeals barred any re-trial in an opinion so scathing it made the New York Times. The Court of Appeals described the "long course of Brady/ Giglio violations in this case" as a "flagrant denial of due process" and "a severe stain on the Arizona justice system"-one that it hoped would "remain unique in the history of Arizona law." The Arizona Supreme Court recently denied the state's petition for review so the Court of Appeals decision stands. Maricopa County Attorney Bill Montgomery lamented that "[the denial of [the] petition for review is a dark day for Arizona's criminal justice system.

The third case is unfolding as I write these words. It involves the prosecution in Orange County of Scott Dekraai, who was convicted of having shot several people at a hair salon and is facing a capital penalty-phase trial. The prosecution presented evidence from a jailhouse informant, Fernando Perez, whom Dekraai had purportedly confessed to. It turns out that Perez was a serial informant who had presented similar confessions. Defense counsel challenged the informant, and Superior Court Judge Thomas Goethals ordered the prosecution to produce evidence bearing on this claim. He eventually found that the Orange County District Attorney's office had engaged in a "chronic failure" to disclose exculpatory evidence pertaining to a scheme run in conjunction with jailers to place jailhouse snitches known to be liars near suspects they wished to incriminate, effectively manufacturing false confessions. The judge then took the drastic step of disqualifying the Orange County District Attorney's office from further participation in the case. But this result came only after public defender Scott Sanders "wasted two years uncovering government misconduct, time that he could have spent preparing Dekraai's defense against the death penalty. Pulling an elephant's teeth is surely easier than extracting exculpatory evidence from an unwilling prosecution team.

These cases are hardly unique or isolated. But they illustrate that three ingredients must be present before we can be sure that the prosecution has met its Brady obligations under the law applicable in most jurisdictions. First, you must have a highly committed defense lawyer with significant resources at his disposal. Second, you must have a judge who cares and who has the gumption to hold the prosecutor's feet to the fire when a credible claim of misconduct has been presented. And, third, you need a great deal of luck, or the truth may never come out. The misconduct uncovered in the Milke and Dekraai cases seems to implicate many other cases where criminal defendants are spending decades in prison. We can only speculate how many others are wasting their lives behind bars because they lacked the right lawyer or the right judge or the luck needed to uncover prosecutorial misconduct.

While most prosecutors are fair and honest, a legal environment that tolerates sharp prosecutorial practices gives important and undeserved career advantages to prosecutors who are willing to step over the line, tempting others to do the same. Having strict rules that prosecutors must follow will thus not merely avoid the risk of letting a guilty man free to commit other crimes while an innocent one languishes his life away, it will also preserve the integrity of the prosecutorial process by shielding principled prosecutors from unfair competition from their less principled colleagues.

Here are some potential reforms that would help achieve these goals:

**1. Require open file discovery.** If the prosecution has evidence bearing on the crime with which a defendant is being charged, it must promptly turn it over to the defense. North Carolina adopted such a rule by statute after Alan Gell was convicted of murder and sentenced to death, even though the prosecution had statements of 17 witnesses who reported to have seen the victim alive after Gell was incarcerated evidence that the prosecution failed to disclose until long after trial. Three years after its passage, the law forced disclosure of evidence that eventually exonerated three Duke lacrosse players who were falsely accused of rape-and led to the defeat, disbarment and criminal contempt conviction of Durham District Attorney Mike Nifong. Prosecutors were none too happy with the law and tried hard to roll it back in 2007 and again in 2012, but the result was an even stronger law that applies not only to prosecutors but to police and forensic experts, as well it should.

A far weaker law was proposed by several U.S. Senators following the disgraceful prosecutorial conduct during the Stevens case. The law would require prosecutors to disclose all information "that may reasonably appear to be favorable to the defendant." Despite support from both Democrats and Republicans, the bill has made no progress toward passage because of steadfast opposition from the U.S. Department of Justice. In his 2012 Preface to these pages. Attorney General Eric Holder voiced a strong commitment to ensuring compliance with Brady and related discovery obligations, but all of the measures he mentions leave prosecutors in charge of deciding what evidence will be material to the defense-something they cannot possibly do, because they do not know all the potential avenues a defense lawyer may pursue, and because it's not in their hearts to look for ways to help the other side. If the Department of Justice wants to show its commitment to justice, it should drop its opposition to the Fairness in Disclosure of Evidence Act and help get it passed into law.

**2. Adopt standardized, rigorous procedures for dealing with the government's disclosure obligations.** For reasons already explained, enforcing the government's obligations is critical to achieving a level playing field in criminal cases. But policing this conduct is exceedingly difficult for the simple reason that "Brady violations ... almost always defy detection. The cops know it. The prosecutors know it. The defense and the defendant have no idea whether Brady material exists. Open file discovery would go a long way toward ameliorating the problem, but not far enough. The prosecutor's file will generally contain what the police and investigators consider to be inculpatory evidence; a great deal might be left out that is unhelpful to the prosecution. Yet the government's disclosure obligation extends to information that is in the hands of investigators and places an affirmative obligation on prosecutors to become aware of exculpatory evidence that is held by others acting on the government's behalf. Ensuring that the government complies with this obligation can't be left up to individual prosecutors. Rather, prosecutorial offices must establish firm policies to ensure compliance.

This does happen from time to time. For example, in 1990, Chief Assistant United States Attorney Mary Jo White of the Eastern District of New York, Chief of the Criminal Division Bill Muller and Chief of the Narcotics Unit David Shapiro, among others, issued a detailed, thoughtful 27-page memorandum analyzing the govern¬ment's disclosure obligation at the time and recommending procedures to be followed when dealing with informants and other government witnesses. One of those recommendations was that the office maintain, and provide to the defense, "information about every case in which an informant has testified as an informant or a defendant, including the district or state in which the proceedings took place, the docket numbers and transcripts, where possible ... and statements by a judge referring to a witness's truthfulness and any allegations of double dealing or other misconduct."

The memo contained other similarly enlightened recommendations, disclosing a firm commitment to complying with the spirit, not merely the letter, of Brady and its progeny. Some years later, in 1999, a similar set of procedures was adopted by the United States Attorney's Office in the Northern District of California in a manual drafted by one of the authors of the ED NY memo who had moved there and served as head of the Criminal Division. But, according to a lawyer who left the office in 2002, the manual was disregarded by the new U.S. Attorney.

Compliance with the government's disclosure obligations cannot be left to the political vagaries of 93 U.S. Attorneys' offices and the countless District Attorneys' offices across the country. Instead, the U.S. Justice Department and the justice department of every state must ensure compliance by setting standards and meaningfully disciplining prosecutors who willfully fail to comply. If they will not do it on their own, Congress and the state legislatures must prod them into it by adopting such standards by legislation.

**3. Adopt standardized, rigorous procedures for eyewitness identification.** North Carolina leads the way, once again, with the Eyewitness Identification Reform Act, which does just that. It provides in relevant part that lineups "shall be conducted by an independent administrator"; individuals or photos shall be presented to witnesses sequentially, with each individual or photo presented to the witness separately"; the eyewitness must be instructed that he "should not feel compelled to make an identification"; "at least five fillers shall be included in a [photo or live] lineup, in addition to the suspect"; and live identification procedures must be recorded on video. This law, too, came as a result of a huge miscarriage of justice when Jennifer Thompson-Cannino mistakenly identified Ronald Cotton as her rapist. He spent 11 years in prison before he was exonerated by DNA evidence. The cases involving mistaken eyewitness identification are legion.

**4. Video record all suspect interrogations.** The surprising frequency of false confessions should make us deeply skeptical of any interrogation we cannot view from beginning to end. Suspects are frequently isolated and pressured in obvious and subtle ways, and when the process ends we often have very different accounts of what happened inside the interrogation room. In those circumstances, whom are we to believe? Most of the time, the judge and juries believe the police. There may have been a time when we had to rely on such second-hand reports, but technology has now made this unnecessary: Video recording equipment is dirt cheap, and storage space for the resulting files is endless. No court should ever admit a confession unless the prosecution presents a video of the entire interrogation process from beginning to end.

It appears that change is underway. Just last year, the Justice Department reversed its century-old prohibition against recording interrogations and adopted a policy "establish [ing] a presumption that the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and the United States Marshals Service (USMS) will electronically record statements made by individuals in their custody.

**5. Impose strict limits on the use of jailhouse informants**. In response to a devastating report on jailhouse informants issued by the Los Angeles County grand jury in 1990, the county adopted procedures that required the approval of a committee before informants could be used. The use of informants consequently plummeted. Even still, the practice of using jailhouse informants as a means of detecting and perhaps manufacturing incriminatory evidence has continued in California. Serial informants are exceedingly dangerous because they have strong incentives to lie or embellish, they have learned to be persuasive to juries and there is no way to verify whether what they say is true. A man jailed on suspicion of a crime should not be subjected to the risk that someone with whom he is forced to share space will try for a get-out-of-jail-free card by manufacturing a confession.

**6. Adopt rigorous, uniform procedures for certifying expert witnesses and preserving the integrity of the testing process**. There is an effort underway to do this at the federal level. A 30-member commission headed by the Justice Department and comprised of forensic scientists, researchers, prosecutors, defense attorneys and judges was founded two years ago with the goal of "improving the overall reliability of forensic evidence after instances of shoddy scientific analysis by federal, state and local police labs helped convict suspects.”

However, the Justice Department recently made the unilateral decision that "the subject of pre-trial forensic discovery-i.e., the extent to which information regarding forensic science experts and their data, opinions, methodologies, etc., should be disclosed before they testify in court-is beyond the 'scope' of the Commission's business and therefore cannot properly be the subject of Commission reports or discussions in any respect. This prompted the resignation of commission member Judge Rakoff, who criticized the decision as "a major mistake that is likely to significantly erode the effectiveness of the Commission" and a reflection of "a determination by the Department of Justice to place strategic advantage over a search for the truth. He elaborated: "A primary way in which forensic science interacts with the courtroom is through discovery, for if an adversary does not know in advance sufficient information about the forensic expert and the methodological and evidentiary bases for that expert's opinions, the testimony of the expert is nothing more than trial by ambush.

Judge Rakoff's noisy resignation had its desired effect: Two days later, the Justice Department reversed its decision to bar the commission from considering issues related to pre-trial forensic discovery. Judge Rakoff subsequently returned to the commission, which is now in the process of preparing recommendations for the Attorney General. But why should the Justice Department have to be buffaloed into doing the right thing?

**7. Keep adding conviction integrity units.** We know that there are innocent people languishing in prison, but figuring out who they are is very difficult-more so if the prosecution, which has control of whatever evidence there is, is fighting you tooth and nail. That turns out to be a common response from prosecutors confronted with evidence that they may have obtained a wrongful conviction. A separate unit within the prosecutor's office, with access to all the available evidence, and with no track record to defend, may be the best chance we have of identifying wrongfully convicted prisoners. More than a dozen such offices have been established across the country and more are being added. This trend needs to continue and escalate. Better yet, there might be a federal agency to investigate the problem of questionable state convictions. This would reduce the bias that one state agency might have in favor of another.

In addition, state and federal law ought to be revised to give convicted defendants full access to DNA and other evidence in the possession of the prosecution. We have repeatedly witnessed the appalling spectacle of innocent defendants spending many years fighting to obtain the evidence that would eventually exonerate them. Michael Morton spent six additional years in prison because District Attorney John Bradley worked very hard to block Morton's requests for DNA testing. And Anthony Ray Hinton spent more than fifteen years in prison fighting for the right to test evidence that eventually set him free. Bruce Godschalk lost seven years; Frank Lee Smith died in prison waiting for DNA testing that eventually proved his innocence.

There is no justification for withholding evidence that might set an innocent man free from unjust imprisonment. Whatever impediments have been interposed to prevent access to such evidence to convicted defendants and those working on their behalf ought to be summarily removed by legislation giving them full and swift access to all evidence in possession of the government. Most states now have laws allowing post-conviction access to DNA testing, but many are restrictive in practice for example, denying requests from inmates who originally confessed to the crime or imposing a deadline of one year after conviction to file a request. Nebraska's statute, however, serves as a good example to emulate. It provides:

[A] person in custody pursuant to the judgment of a court may, at any time after conviction, file a motion, with or without supporting affidavits, in the court that entered the judgement requesting forensic DNA testing of any biological material that: (a) Is related to the investigation or prosecution that resulted in such judgment; (b) Is in the actual or constructive possession or control of the state or is in the possession or control of others under circumstances likely to safeguard the integrity of the biological material's original physical composition; and (c) Was not previously subjected to DNA testing or can be subjected to retesting with more current DNA techniques that provide a reasonable likelihood of more accurate and probative results.!"

The statute further provides that DNA tests must be performed in a nationally accredited laboratory, that the county attorney must submit an inventory to the defense and to the court of all evidence secured by the state in connection with the case.

**8. Establish independent Prosecutorial Integrity Units.** In my experience, the U.S. Justice Department's Office of Professional Responsibility (OPR) seems to view its mission as cleaning up the reputation of prosecutors who have gotten themselves into trouble. In United States v. Kojayan, we found that Assistant United States Attorney Jeffrey Sinek had misled the district court and the jury. The district judge, who had trusted the AUSA, was so taken aback with the revelation that he barred further re-prosecution of the defendants as a sanction for the government's misconduct. OPR investigated and gave the AUSA a clean bill of health. And no Justice Department lawyer has yet been sanctioned for the Stevens prosecution despite the clear evidence of willful misconduct. Prosecutors need to know that someone is watching over their shoulders-someone who doesn't share their values and eat lunch in the same cafeteria. Move OPR to the Department of Agriculture, and institute similar independent offices in the 50 states.

**C. Judges,** especially trial judges, can do a great deal to ensure that prosecutors comply with their constitutional obligations, that only reliable evidence is presented to juries, that juries are properly instructed and that the trial is generally fair. There has been an avalanche of exonerations in recent years, many of them of people who spent half a lifetime or more behind bars and in everyone of those cases there was some sort of proceeding-usually a trial, sometimes a plea-where a judge let an innocent man be convicted and sent him to prison or death row. When such cases are reported, the trial judge is always given a pass, as if he were merely a bystander who watched helplessly while an innocent man had his life ripped away from him. I don't buy it. Any judge that inexperienced or incompetent has no business presiding over anything more significant than small claims court. In criminal cases, judges have an affirmative duty to ensure fairness and justice, because they are the only ones who can force prosecutors and their investigators and experts to comply with due process.

Other than being vigilant, compassionate and even-handed, there are specific measures trial judges can take to ensure fairness in criminal proceedings and avoid the conviction of innocents.

**1. Enter Brady compliance orders in every criminal case.** The Brady rule is in many ways the ultimate guarantor of fairness in our criminal justice system. This is because police have unparalleled access to the evidence in criminal cases-both inculpatory and exculpatory. Once a crime is reported and police are on the scene, they can secure the area and prevent anyone from touching anything until they are done. They have control of what evidence is sent out for forensic testing; they talk to witnesses and get their impression before anyone else does. Police and prosecutors, working together, can lean on witnesses by threatening prosecution or offering leniency. If there is evidence helpful to the defense, it will generally wind up in the possession of the police; if witnesses have made helpful statements in their initial contact with investigators (as happened in the Stevens case) that information will be in the sole possession of the prosecution. A defense investigator or lawyer plowing over the same territory after the police have done their job will generally find the scene denuded of clues and witnesses who are skittish and laconic.

*Brady* and its progeny therefore impose important obligations on prosecutors, obligations that are too frequently ignored. In case after case where an innocent person is exonerated after many years in prison, it turns out that the prosecution failed to disclose or actively concealed exculpatory evidence. But Brady is not self-enforcing; failure to comply with Brady does not expose the prosecutor to any personal risk. When Judge Sullivan discovered that the prosecutors in the Stevens case had obtained their conviction after failing to disclose exculpatory evidence, he appointed a special counsel, DC attorney Henry Schuelke III, to independently investigate the prosecutors' conduct. Schuelke determined that the lawyers had committed willful Brady violations but that the court lacked the power to sanction the wrongdoers because they had not violated any court-imposed obligations.

The solution to this problem is for judges to routinely enter Brady compliance orders, and many judges do so already. Such orders vary somewhat from judge to judge, but typically require the government to turn over, when received, documents and objects, reports of examinations and tests, expert witness opinions and all relevant material required by Brady and Giglio. Entering such an order holds prosecutors personally responsible to the court and will doubtless result in far greater compliance.

**2. Engage in a Brady colloquy.** This procedure was proposed by Professor Jason Kreag in an article published last year in the Stanford Law Review Online and it strikes me as a good idea. The details are outlined in Professor Kreag's article but the general idea is that, during pretrial hearings and before a defendant enters a guilty plea, the trial judge would have a conversation with the prosecutor on the record, asking him such questions as, "Have you reviewed your file ... to determine if [it] include[s] information that is favorable to the defense?" and "Have you identified information that is favorable to the defense, but nonetheless elected not to disclose [it] because you believe that the defense is already aware of the information or the information is not material? There is nothing like having to face a judge on the record to impress upon lawyers the need to scrupulously comply with their profes¬sional obligations. But the questions must be sufficiently specific and detailed to avoid the mantra, "We're aware of our Brady obligations and we've met them."

**3. Adopt local rules that require the government to comply with its discovery obligations without the need for motions by the defense.** The prosecution need not present Brady evidence unless the defense asks for it, usually by motion. This seems sort of silly because the defense obviously wants whatever exculpatory evidence the prosecution might have. Surprisingly, few courts have rules that obviate the need for criminal discovery motions. I'm aware of only a dozen or so federal courts that have local rules either stating that the defense doesn't need to make a formal discovery motion, or requiring the government to disclose Brady/Giglio material within a specific time frame, without mentioning a defense motion.

An example of such a rule is Eastern District of Washington Local Criminal Rule 16(a), which was adopted just last year. The rule requires the government to make available within 14 days of arraignment: (1) all of the defendant's oral and written statements, the defendant's prior record, documents and objects and expert witness opinions that are in the government's "possession, custody or control or which may become known ... through due diligence"; (2) information from an "electronic eavesdrop, wiretap or any other interception," as well as "the authorization for and information gathered from" a tracking device or video/audio recording used during investigations; (3) "search warrants and supporting affidavits"; (4) information regard¬ing whether physical evidence intended to be offered in the government's case in chief was seized without a warrant; and (5) photographs used in any photo lineup, as well as information obtained from any other identification technique. Rule 16(a)(6) is a catchall clause that requires the government to "[a]dvise the defendant's attorney of evidence favorable to the defendant and material to the defendant's guilt or punishment to which defendant is entitled pursuant to Brady and United States v. Agurs."187 I have no idea why this isn't part of the Federal Rules of Criminal Procedure, but it should be.

**4. Condition the admission of expert evidence in criminal cases on the presentation of a proper Daubert showing.** As Judge Nancy Gertner has pointed out on numerous occasions courts in criminal cases routinely admit expert evidence lacking the proper foundations and sometimes amounting to little more than guesswork. Few defense lawyers challenge the reliability of expert evidence because few trial judges grant requests for Daubert hearings. And appellate courts affirm such denials under a very generous abuse of discretion standard. With the mounting number of wrongful convictions based on faulty expert evidence in such diverse areas as arson and shaken baby syndrome, courts must be far more rigorous in enforcing Daubert before allowing experts to testify in criminal trials. Failure to hold a Daubert hearing where the reliability of expert evidence has been credibly challenged should be considered an error of law, as should the refusal to allow a defense memory expert where the case turns on conflicting recollections of past events.

**5. When prosecutors misbehave, don't keep it a secret**. Defense lawyers who are found to have been ineffective regularly find their names plastered into judicial opinions, yet judges seem strangely reluctant to name names when it comes to misbehaving prosecutors. Indeed, judges seem reluctant to even suspect prosecutors of improper behavior, as if they were somehow beyond suspicion. For example, the district judge in the Kojayan case, discussed above, could have obviated the appeal and the entire sordid episode by forcing the Assistant U.S. Attorney to answer a simple question: "Did Nourian have a plea agreement with the government?" Defense counsel urged the judge to ask the question but to no avail. It was not until the oral argument before our court that the AUSA was compelled to disclose that fact:

 [Q]: Was there a cooperation agreement?

AUSA: Well, your honor, that is not something that's in the record.

[Q]: I understand. Was there a cooperation agreement?

AUSA: There was an agreement with the Southern District of New York and [Nourian], yes.

Naming names and taking prosecutors to task for misbehavior can have magical qualities in assuring compliance with constitutional rights. In Baca v. Adams, a panel of our court dealt with a case where both the California trial court and the California Court of Appeal concluded that a prosecutor lied on the stand, but nonetheless deemed the error harmless. During our questioning, we asked the Deputy Attorney General arguing the case whether the lying prosecutor and another untruthful witness had been prosecuted for perjury or otherwise sanctioned. The answer, of course, was that they had not been. We then suggested that, in resolving the case, we would write an opinion naming those who had misbehaved and the failure of the state authorities to take any actions against them. The video of that oral argument made its way to the blogosphere and has been viewed over 24,000 times.

Not surprisingly, three weeks afterwards, the California Attorney General wrote confessing error and requesting that we remand to the district court with instructions that it grant a conditional writ of habeas corpus. The incident, by the way, illustrates the importance of providing video access to court proceedings. It is far easier to hide an injustice from public scrutiny if only the judge and a few lawyers know about it.

Judges who see bad behavior by those appearing before them, especially prosecutors who wield great power and have greater ethical responsibilities, must hold such misconduct up to the light of public scrutiny. Some of us regularly encourage prosecutors to speak to their supervisors, even the United States Attorney, to ensure that inappropriate conduct comes to their attention, with excellent results. If judges have reason to believe that witnesses, especially police officers or government informants, testify falsely, they must refer the matter for prosecution. If they become aware of widespread misconduct in the investigation and prosecution of criminal cases, a referral to the U.S. Department of Justice for a civil rights violation might well be appropriate.

**D. Miscellaneous:** On March 8, 2015, A.M. "Marty" Stroud III, a Shreveport lawyer and former state prosecutor, published a remarkable piece in the Shreveport Times reflecting on the case of Glenn Ford, who spent 30 years on death row after being convicted of murder and sentenced to death in 1984. Ford was released after the state disclosed evidence proving his innocence. Stroud offered a public apology for his conduct in the case. It is well worth reading in full, but here is the gist of it:

At the time this case was tried there was evidence that would have cleared Glenn Ford. The easy and convenient argument is that the prosecutors did not know of such evidence, thus they were absolved of any responsibility for the wrongful conviction.

I can take no comfort in such an argument .... Had I been more inquisitive, perhaps the evidence would have come to light years ago .... My mindset was wrong and blinded me to my purpose of seeking justice, rather than obtaining a conviction of a person who I believed to be guilty. I did not hide evidence, I simply did not seriously consider that sufficient information may have been out there that could have led to a different conclusion. And that omission is on me.

I did not question the unfairness of Mr. Ford having appointed counsel who had never tried a criminal jury case much less a capital one. It never concerned me that the defense had insufficient funds to hire experts ....

The jury was all white, Mr. Ford was African-American. Potential African-American jurors were struck with little thought about potential discrimination .... I also participated in placing before the jury dubious testimony from a forensic pathologist that the shooter had to be left handed .... All too late, I learned that the testimony was pure junk science at its evil worst.

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

What is remarkable about Stroud's statement is not that he gained a conviction and death sentence for a man that turned out to be innocent. Or that that man spent three decades caged like an animal. That kind of thing is all too common. Nor is there anything unusual about the confluence of errors that led to the wrongful conviction failure to uncover exculpatory evidence, inexperienced defense lawyers, race-based jury selection, junk science, and a judge who passively watched the parade and sat on his thumbs. The same goes for a prosecutorial attitude of God-like omniscience and unwillingness to entertain the possibility that the wrong man is being prosecuted. These things happen all the time in case, after case, after case.

What is unusual-unique really-is Stroud's willingness to accept personal responsibility for the calamity he helped inflict on Glenn Ford and his family-his willingness to embrace this as his personal failure, not just an unfortunate failure of the system. Most prosecutorial attitudes run the gamut from "that's why they put erasers on pencils" to "they must be guilty of something." Everyone else in the system, starting with trial judges, absolves himself of personal responsibility when a heinous failure occurs. We could do with a lot less of that.

In a sense, however, the system is responsible because it places a great deal of power and responsibility in young, ambitious lawyers, like Stroud, who have every incentive to close their eyes to the possibility of innocence, to testifying by police, to bogus experts and to suggestive eyewitness identification procedures. A prosecutor certainly does not help advance his career by providing to the defense evidence that his star witness made a statement directly contrary to his testimony before the police started leaning on him-as happened in the shameful prosecution and wrongful conviction of Senator Stevens. Faced with a remote possibility of being found out, and the likelihood that nothing bad will happen even if they are, many prosecutors will turn a blind eye or worse. And that's how miscarriages of justice happen.

Some of the suggestions above will help ameliorate the problem, but there are some other reforms that require either legislation, a ruling by the Supreme Court, action by parties not involved in the criminal justice process or a constitutional amendment. These may be more difficult to achieve, but here they are nonetheless:

**1. Abandon judicial elections.** Professor Monroe Freedman made the case for the unconstitutionality of elected state judges in his succinct monograph, The Unconstitutionality of Electing State Judges. He relied on the separate opinions of Justices O'Connor and Ginsburg in Republican Party of Minnesota v. White, citing Justice O'Connor's opinion for "studies showing that judges who face elections are far more likely to override jury sentences of life without parole and impose the death penalty. The difficulty confronting any judge who faces an election is compounded by the well-known practice of prosecutors enlisting one of their own to oppose a judge that they consider to be pro-defense. And in at least 19 states, lawyers may also "paper" or "affidavit" a judge by filing a peremptory challenge to disqualify a judge they deem "prejudiced" against their interests, without having to submit any explanation or proof of prejudice. This tactic can be used en masse to effectively preclude a judge from hearing any criminal cases, and is precisely what appears to be happening to the judge in Orange County who removed the District Attorney's office from a high-profile case because of repeated instances of misconduct. While many, perhaps, most judges resist the pressure and remain impartial, the fact that they may have to face the voters with the combined might of the prosecution and police groups aligned against them no doubt causes some judges to rule for the prosecution in cases where they would otherwise have ruled for the defense.

**2. Abrogate absolute prosecutorial immunity.** In Imbler v. Pachtman,208 a divided Supreme Court held that prosecutors are absolutely immune from damages liability for misconduct they commit when performing the traditional activities of a prosecutor. Imbler was not a constitutional ruling; the Court was interpreting 42 U.S.c. § 1983. And it was certainly not a result compelled by the language of the statute; section 1983 says nothing about immunity. Rather, Imbler reflected a pure policy judgment that prosecutors needed complete freedom from liability in order to properly discharge their functions. Writing for himself and two others, Justice White would have adopted a more limited immunity rule that would have held prosecutors liable for certain kinds of deliberate misconduct such as willfully failing to disclose Brady and Giglio evidence.

Under Imbler, prosecutors cannot be held liable, no matter how badly they misbehave, for actions such as withholding exculpatory evidence, introducing fabricated evidence, knowingly presenting perjured testimony and bringing charges for which there is no credible evidence. All are immune from liability. A defense lawyer who did any such things (or their equivalents) would soon find himself disbarred and playing house with Bubba. The Imbler majority seemed reassured by the possibility that rogue prosecutors will be subject to other constraints:

We emphasize that the immunity of prosecutors from liability in suits under [§] 1983 does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.

This argument was dubious in 1976 and is absurd today. Who exactly is going to prosecute prosecutors? Despite numerous cases where prosecutors have committed willful misconduct, costing innocent defendants decades of their lives, I am aware of only two who have been criminally prosecuted for it; they spent a total of six days behind bars.

There have been a few instances of professional discipline against prosecutors, though even that has been much less than against similarly-situated private lawyers. By and large, however, professional organizations are exceedingly reluctant to impose sanctions on prosecutors for misconduct in carrying out their professional responsibilities. Sidney Powell's book, Licensed to Lie, illustrates exhaustively the futility of getting bar disciplinary boards to impose professional discipline for misconduct committed in the course of criminal prosecutions.

Despite this dismal track record refuting the bland assurances of the Imbler majority that prosecutors will be subject to other forms of control, even if damages lawsuits are not available, the Court has reaffirmed Imbler on numerous occasions. Most recently, in its unanimous opinion in Van de Kamp v. Goldstein the Court denied compensation to the petitioner, Thomas Goldstein, who had spent 24 years in prison based on the testimony of notorious jailhouse snitch Edward Fink. Prosecutors used Fink as a utility infielder in numerous cases, and he somehow always managed to testify that the defendant had confessed. Unmoved, the Court held the prosecutors and their supervisors were all protected by absolute immunity and Mr. Goldstein can pound sand.

What kind of signal does this send to young prosecutors who are out to make a name for themselves? I think it signals that they can be as reckless and self-serving as they want, and if they get caught, nothing bad will happen to them. Imbler and Van de Kamp should be overruled. It makes no sense to give police, who often have to act in high pressure situations where their lives may be in danger, only qualified immunity while giving prosecutors absolute immunity. It is a disparity that can only be explained by the fact that prosecutors and judges are all part of the legal profession and it's natural enough to empathize with people who are just like you. If the Supreme Court won't overrule Imbler and Van de Kamp, Congress is free to do it by amending 42 u.s.c § 1983.

**3. Repeal AEDPA § 22S4(d).** Prior to AEDPA taking effect in 1996, the federal courts provided a final safeguard for the relatively rare but compelling cases where the state courts had allowed a miscarriage of justice to occur. One of the better known examples of this is the case of Ron Williamson, who in 1994 was just 5 days away from being executed for a murder of which he was eventually cleared by DNA evidence. He was saved when U.S. District Judge Frank Seay entered a stay of execution that began a process culminating in Williamson's exoneration. The case is described in depth in John Grisham's non-fiction book, The Innocent Man.

The federal court safety-value was abruptly dismantled in 1996 when Congress passed and President Clinton signed the Antiterrorism and Effective Death Penalty Act. Hidden in its interstices was a provision that has pretty much shut out the federal courts from granting habeas relief in most cases, even when they believe that an egregious miscarriage of justice has occurred.

We now regularly have to stand by in impotent silence, even though it may appear to us that an innocent person has been convicted. Not even the Supreme Court may act on what it believes is a constitutional violation if the issue is raised in a habeas petition as opposed to on direct appeal. There are countless examples of this, but perhaps the best illustration is Cavazos v. Smith the case involving a grandmother who had spent 10 years in prison for the alleged shaking death of her infant grandson-a conviction secured by since-discredited junk science. My court freed Smith, but the Supreme Court summarily reversed (over Justice Ginsburg's impassioned dissent) based on AEDPA.225

AEDPA is a cruel, unjust and unnecessary law that effectively removes federal judges as safeguards against miscarriages of justice. It has resulted and continues to result in much human suffering. It should be repealed.

**4. Treat prosecutorial misconduct as a civil rights violation.** The U.S. Justice Department seems ready enough to pursue charges of civil rights violations in cases where police have engaged in physical violence. but far more reluctant to pursue misbehaving prosecutors. But prosecutors can wreck and take lives just like police, and their actions are often far more premeditated than those of officers who may over-react to a belligerent suspect. And when a prosecutorial office uses known liars as jailhouse snitches, or presents evidence from cops they know are prone to fabricate evidence or conduct suggestive lineups or eyewitness identifications, they are committing civil rights violations with dire consequences for their victims. It is precisely such alternative enforcement mechanisms that the Supreme Court hypothesized in Imbler in deciding to give prosecutors absolute immunity. One can only hope that the U.S. Department of Justice will reconsider what appears to be its policy against investigating prosecutorial misconduct in criminal cases as potential civil rights violations.

**5. Give criminal defendants the choice of a jury or bench trial**. Under current law, either the defendant or the prosecution can insist on trying the case before a jury. Conventional wisdom is that defendants prefer juries because it only takes one juror to hang, but experienced defense lawyers know that some kinds of cases can best be tried before a judge-particularly where a defendant wishes to testify but fears impeachment with prior misdeeds. The prosecution has many institutional advantages, not the least being that they get to go first and thus have their theory of the case laid out before the defendant can present any evidence at all. I would think it fair to let the defendant get the choice of judge or jury. Because the government has no constitutional right to a jury, but the defendant does, there should be no constitutional impediment to such a rule.

And while I'm at it, I'd amend Federal Rule of Evidence 609(a) (and its state analogues) to preclude impeachment of a criminal defendant testifying on his own behalf with evidence of his past criminal convictions. Too many defendants are put to the grim choice of either telling their side of the story and having the jury hear of their prior misdeeds, or standing mute and seeming to acquiesce in the prosecution's case. If the defendant lies, a skilled prosecutor will trip him up on cross; there is no need to paint him as a monster before the jury.

**6. Conduct in depth studies of exonerations.** The recent spate of exonerations, especially those obtained by DNA evidence, gives us a window as to what can go wrong in our criminal justice system. It is an important database that ought to make us doubt the supposed infallibility of our criminal justice process. But it can also be a rich source of useful information about why criminal prosecutions go wrong, why police focus on a single innocent suspect, why prosecutors pursue cases without asking hard questions about whether the defendant is truly guilty and why judges and juries are so badly misled in so many cases. This should not be a matter left to academia, although much good work is done there now. Far better, though, if the federal government devoted, say, the cost of one aircraft carrier to analyze and dissect these cases and try to figure out what went wrong and what we can do better in the future. Thus far, the government has only made such an inquiry into a handful of cases. This effort needs to be expended on a much larger scale, because even a single wrongful conviction is one too many.

**7. Repeal three felonies a day for three years.** Professor Tim Wu of Columbia Law School recounted a "darkly humorous game" played by Assistant U.S. Attorneys in the Southern District of New York:

 [Someone would name a random celebrity-say, Mother Theresa or John Lennon. It would then be up to the junior prosecutors to figure out a plausible crime for which to indict him or her. The crimes were not usually rape, murder, or other crimes you'd see on Law & Order but rather the incredibly broad yet obscure crimes that populate the U.S. Code like a kind of jurisprudential minefield: Crimes like "false statements" (a felony, up to five years), "obstructing the mails" (five years), or "false pretenses on the high seas" (also five years). The trick and skill lay in finding the more obscure offenses that fit the character of the celebrity and carried the toughest sentences.

A big reason prosecutors have so much leverage in plea negotiations is that there are many laws written in vague and sweeping language, inviting prosecutorial adventurism. It is thus difficult for individuals charged with a crime to know how to defend themselves and to gauge the likelihood of being acquitted.

Even if ultimately vindicated, the process of being charged itself takes a massive toll. Arthur Andersen, guilty of no crime according to the Supreme Court, nevertheless was put out of business, leaving its 85,000 employees world-wide without jobs. Senator Stevens lost his Senate seat even though his prosecution was riddled with misconduct and the Justice Department eventually dismissed all charges. The list of lives and businesses ruined by baseless prosecutions is long. And, in the words of George Will, "as the mens rea requirement withers when the quantity and complexity of laws increase, the doctrine of ignorantia legis neminem excusatignorance of the law does not excuse-becomes problematic. The regulatory state is rendering unrealistic the presumption that a responsible citizen should be presumed to have knowledge of the law. Repealing a thousand vague and over-reaching laws and replacing them with laws that are cast narrowly to punish morally reprehensible conduct and give fair notice as to what is criminal may not solve the problem altogether, but it would be a good start.

Conclusion: 'Nuff Said, Alex Kozinski