

PROTECTED LYING: HOW THE LEGAL DOCTRINE OF “ABSOLUTE IMMUNITY” HAS CREATED A “LEMONS PROBLEM” IN AMERICAN CRIMINAL COURTS

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ABSTRACT: In his famous 1970 paper that raised issues about “lemons” problems in markets in which asymmetric information places at least one party to an exchange (usually buyers) at a big disadvantage, George Akerlof wrote that if dishonesty continues, a “Gresham’s Law” situation can arise in which the bad products will drive good products out of certain markets. We apply not only Akerlof’s analysis, but also analysis from Mises (1944) and Rothbard (2004) and others, along with various theories of regulation, to show how the legal doctrine of prosecutorial immunity creates a “lemons” problem in criminal courts through moral hazard. Because prosecutors are immune both to lawsuits and most disciplinary procedures that private attorneys face when accused of misconduct, prosecutors have the incentives to hide evidence, and lie in court to gain convictions. This is especially true since convictions are important to career advancement. While criminal courts are not the same as private markets, nonetheless honest information is vital to the workings of both. Markets, however, have mechanisms for dealing with asymmetric information, both legal and economic, but the courts are much more resistant to measures used to ensure all involved parties have access to the truth. This paper examines the situation, including reasons for providing prosecutors with absolute immunity, and concludes that

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abolishing such immunity not only would result in fewer wrongful convictions, but also provide incentives for prosecutors to be more accurate in presenting evidence in criminal cases.

KEYWORDS: asymmetric information, lemons problem, Gresham's Law, criminal law, common law

JEL CLASSIFICATION: B4, H1, H4, H7, K1, K3, K4

1. INTRODUCTION

On November 4, 2009, the U.S. Supreme Court heard arguments in the *Pottawattamie County v. McGhee* case in which the High Court was to decide whether or not to overturn or modify its 1976 *Imbler v. Pachtman* decision in which it had ruled that prosecutors in criminal cases, both state and federal, are protected by absolute immunity from lawsuits for actions they may take relative to their prosecutorial duties. The prosecution in the *Pottawattamie* case allegedly fabricated evidence to convict two black teenagers of murder (Rosenzweig and Shatz, 2009), only to see the verdicts overturned after the men had served 25 years in prison.

Lynch and Shapiro (2009) write about the lawsuit that the two wrongfully-convicted men brought against Pottawattamie (Iowa) County and the prosecutors:

After the convictions were overturned for prosecutorial misconduct, McGhee and Harrington sued the county and prosecutors. The defendants in that civil suit invoked the absolute immunity generally afforded prosecutors to try to escape liability. After the Eighth Circuit ruled against them, the Supreme Court agreed to review the case. (p. 1)

According to Richey (2009), prosecutors made an especially egregious argument in their defense claiming there was "*no free-standing constitutional right not to be framed.*" (Emphasis ours) The facts of the case—that prosecutors framed innocent people in order to win a conviction—were morally repugnant to most observers. Nonetheless, then-U.S. Solicitor General Elena Kagan (before she joined SCOTUS herself) wrote in a friend-of-the-court brief in favor of the prosecutors: "A prosecutor, however, may receive absolute immunity from suit for acts violating the Constitution *in order to advance important societal values.* This Court's cases recognize a

common law tradition of immunity that ensures that prosecutors are free to carry out their work ‘with courage and independence.’”¹ (Emphasis ours)

The Supreme Court never ruled on the case, as the two men settled with Pottawattamie County before the court could act. However, had SCOTUS followed its past rulings, the prosecutors would have been protected and the defendants left with no recourse. Lithwick (2009) notes that during the proceedings, Justice Sonia Sotomayor also pointed out that neither of the two prosecutors faced any disciplinary procedures, which indicates that even the entities that allegedly serve as watchdogs against prosecutorial misconduct officially had no problems with their actions.

Pottawattamie in a broader context is hardly unusual, the claim that defendants have no “right not to be framed” notwithstanding. Recently, however, prosecutorial misconduct has come under increased scrutiny. When he served on the U.S. Ninth Circuit Court of Appeals, former Justice Alex Kozinski declared in a dissent (*USA v. Olsen*, 2013) that prosecutorial immunity provides incentives for prosecutors to violate the Supreme Court’s *Brady* ruling (1963). *Brady* requires prosecutors to turn over exculpatory evidence to criminal defendants in a timely manner. Kozinski writes:

A robust and rigorously enforced *Brady* rule is imperative because all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence. Due to the nature of a *Brady* violation, it’s highly unlikely wrongdoing will ever come to light in the first place. This creates a serious moral hazard for those prosecutors who are more interested in winning a conviction than serving justice. In the rare event that the suppressed evidence does surface, the consequences usually leave the prosecution no worse than had it complied with *Brady* from the outset. (p. 11)

As Lithwick (2009), Kozinski, and others have pointed out, prosecutors rarely are punished for misconduct, be it withholding *Brady* material or fabricating evidence. There are theoretical avenues of punishment. They include criminal prosecution of wayward prosecutors, firing offenders, or disciplining the offending prosecutor through federal or state bars. In those cases, the worst punishment

¹ Friend of the Court Brief for Petitioners, *Pottawattamie v. McGhee*, No. 08-1065.

that the bars can inflict upon an offending prosecutor is taking away the prosecutor's law license.

In rare cases, prosecutors are punished for misdeeds on the job. Two of those were related to the Duke Lacrosse Case in North Carolina, and the Michael Morton wrongful conviction in Texas; prosecutors were disbarred and served a brief time in jail. In the Duke case, prosecutor Michael Nifong brought false charges of rape and kidnapping against three members of Duke University's men's lacrosse team, claiming they had raped a stripper at a team party. The North Carolina State Bar, after investigating Nifong's conduct in the case, stripped him of his law license, and he had to resign his position as District Attorney of Durham County. (Taylor, Jr., and Johnson, 2007)

Ken Anderson withheld crucial evidence from the defense in the trial of Michael Morton, who was accused of murdering his wife. Morton served 25 years in prison before DNA evidence uncovered the actual killer, who later was convicted for the crime. For his violation of *Brady*, a judge representing the Texas State Bar made Anderson give up his law license, do 500 hours of community service, spend 10 days in jail, and pay a \$500 fine. (Ura, 2013)

Yet, these punishments meted to prosecutors are considered to be extraordinary precisely *because* they are rare. Even when prosecutors engage in serious misconduct, including subornation of perjury and withholding evidence, it is highly unlikely that they will be punished. Sullivan and Possley (2015) write that prosecutorial misconduct is widespread, but note that punishment for such wrongdoing rarely occurs, and that this problem has persisted "for many decades." Radley Balko and Tucker Carrington (2018) write about a pathologist and a dentist that for more than 20 years presented dishonest forensic testimony in thousands of criminal cases in Mississippi and Louisiana, leading to numerous wrongful convictions. However, even after the misconduct was exposed, courts in those states refuse to reopen cases in which openly-fraudulent testimony led to a large number of possibly wrongful convictions.

Balko (2013) writes that the systems of checks and balances in the courts does not work well in the age of the modern prosecutor. He writes:

... in a culture where racking up convictions tends to win prosecutors promotions, elevation to higher office and high-paying gigs with white-shoe law firms, civil liberties activists and advocates for criminal justice reform worry there's no countervailing force to hold overzealous prosecutors to their ethical obligations.

He also notes:

Prosecutors and their advocates say complete and absolute immunity from civil liability is critical to the performance of their jobs. They argue that self-regulation and professional sanctions from state bar associations are sufficient to deter misconduct. Yet there's little evidence that state bar associations are doing anything to police prosecutors, and numerous studies have shown that those who misbehave are rarely if ever professionally disciplined.

From an economic viewpoint, it is clear that the systems of incentives that prosecutors face gives them room to engage in self-interested behavior that can lead to wrongful convictions. We argue, using insights from Mises, Rothbard, and others, that the current regime of absolute immunity creates a "lemons problem" (after Akerlof, 1970) in which jurors and other decision makers in the courts receive information from prosecutors that very well might be unreliable and certainly may include outright lies. Unless a defendant has deep financial pockets and a good attorney, the untrue testimony suborned by the prosecution may never be found out.

As in marketplaces, where false or misleading information can create harm for both buyers and sellers, the integrity of the courts in criminal law depends heavily upon prosecutors and judges displaying at least some elements of a conscience and obeying the law. We argue in this paper that institutional arrangements, and especially the doctrine of absolute immunity for prosecutors, lead to information asymmetries that place the defendants at a huge disadvantage and ensure that without major scrutiny of the information presented by the prosecution, jurors and others in the court cannot make accurate assessments, which leads to wrongful convictions.

Balko (2013) seems to agree with that viewpoint:

In the end, one of the most powerful positions in public service—a position that carries with it the authority not only to ruin lives, but in

many cases the power to end them—is one of the positions most shielded from liability and accountability. And the freedom to push ahead free of consequences has created a zealous conviction culture.

We proceed in this paper in the following way:

In Part II, we examine Akerlof's 1970 paper, "The Market for Lemons," and critique his analysis employing criticisms from DiLorenzo (2011). In Section III, we examine the structures of incentives, as well as institutional arrangements that ensure that asymmetric information is built into the criminal justice system, and in Section IV, we apply economic analysis from Mises and Rothbard and others. Section V presents our conclusion.

2. AKERLOF AND INFORMATION ASYMMETRIES

Participants in market transactions often enter those transactions with unequal information, which can affect economic outcomes, something economists call asymmetric information. George Akerlof (1970) addressed how information asymmetry affects markets, citing the used car market as an example of how information asymmetry affects price in a market. According to Akerlof, in some cases, information asymmetry can eliminate a market completely, which he claims can occur even though there are buyers and sellers that could come to an otherwise mutually acceptable price for a commodity.

According to Akerlof, information asymmetry does not exist in the new car market, since neither the buyer nor seller knows with any greater probability whether or not a new car is a "lemon." However, once a car is sold and has been driven for many miles, the original buyer likely gains substantial knowledge about the car's performance—and lack thereof. He writes:

After owning a specific car, however, for a length of time, the car owner can form a good idea of the quality of this machine; i.e., the owner assigns a new probability to the event that his car is a lemon. This estimate is more accurate than the original estimate. An asymmetry in available information has developed: for the sellers now have more knowledge about the quality of a car than the buyers. But good cars and bad cars must still sell at the same price—since it is impossible for a buyer to tell the difference between a good car and a bad car. (p. 489)

This information asymmetry can cause a significant reduction in demand for used cars and a significant reduction in the price of used cars compared to new. This price is so low that the one-day owner of a previously new car cannot even receive the expected value of a new car in the used car market. Akerlof writes:

Gresham's law has made a modified reappearance. For most cars traded will be the "lemons," and good cars may not be traded at all. The "bad" cars tend to drive out the good (in much the same way that bad money drives out the good). But the analogy with Gresham's law is not quite complete: bad cars drive out the good because they sell at the same price as good cars; similarly, bad money drives out good because the exchange rate is even. But the bad cars sell at the same price as good cars since it is impossible for a buyer to tell the difference between a good and a bad car; only the seller knows. In Gresham's law, however, presumably both buyer and seller can tell the difference between good and bad money. So the analogy is instructive, but not complete. (pp. 489–490)

Akerlof argues that since this situation causes the price of used cars to drop even farther, this in turn further increases the probability that only lemons will be offered for sale in that market. What results is a vicious cycle in which dropping prices increases the probability that only lemons will be offered for sale, which further drops the prices. In the extreme, no market for used cars would exist. Akerlof extends his analysis to other examples, such as insurance.

In the insurance market for patients over 65 years old, asymmetry of information also exists. The patient knows the probability he will need insurance; the company does not. This causes the company to raise the price of insurance. But, as the price rises, there is an increased probability that only people that perceive themselves as lemons will want to buy insurance. This forces the insurance company to raise prices more, which further increases the probability that only lemons will seek to buy insurance. This is the principle of adverse selection. As the price rises, only the very sick want insurance.

The potential for dishonest dealings also causes an information imbalance in markets. The seller knows if he or she is dishonest, the buyer does not. The probability of dishonest dealings lowers the price that buyers are willing to offer. As the price falls, there is a higher probability that only dishonest sellers will participate in

the market. Therefore, the potential for dishonest dealings drives honest sellers out of the market. This is particularly true in underdeveloped countries where quality variances are greater. Asymmetric information combined with the potential for dishonesty on behalf of the sellers and huge quality variance in commodities combine to completely eliminate some markets in third world countries. This happens even though there are potential buyers and sellers who could agree on a price exclusive of the presence of dishonesty. He writes:

The presence of people in the market who are willing to offer inferior goods tends to drive the market out of existence—as in the case of our automobile “lemons.” It is this possibility that represents the major costs of dishonesty—for dishonest dealings tend to drive honest dealings out of the market. There may be potential buyers of good quality products and there may be potential sellers of such products in the appropriate price range; however, the presence of people who wish to pawn bad wares as good wares tends to drive out the legitimate business. The cost of dishonesty, therefore, lies not only in the amount by which the purchaser is cheated; the cost also must include the loss incurred from driving legitimate business out of existence. (p. 495)

His point regarding dishonesty is particularly appropriate for this paper, since it identifies a “Gresham’s Law” effect in potential markets where dishonesty dominates. Indeed, this paper says that if prosecutors are not punished when they introduce false information into a criminal court proceeding, it raises the likelihood that more dishonesty will occur and that people who are dishonest may well self-select into the profession of prosecutor.

Akerlof concludes his article by stating that there are counteracting institutions, including the offering of guarantees and brand names, which help to remove some of the information asymmetry in markets. Guarantees from the seller help eliminate the effects of information asymmetry in markets where the potential exists for dishonest dealings. Brand names or chains also provide information to the buyer about quality in locales where the buyer is unfamiliar. This explains, for example, why chain restaurants are much more frequent along interstates than family run local restaurants.

While Akerlof writes of economic transactions, there certainly is overlap into how people deal with information issues in other institutional settings. As we shall emphasize more than once,

criminal courts are not markets, and participants are not dealing in entrepreneurial situations involving uncertainty, profits, and losses. At least one party—the accused—is under duress and the exchanges are coerced, not voluntary. Yet, information is information; people act on it and those that are making decisions—no matter what the setting might be—generally prefer to be acting upon information that is accurate and truthful.

In regards to the counteracting institutions, Akerlof indicates that they generally present an effective mechanism to reducing uncertainty in economic transactions. Businesses that over time put inferior goods into the marketplace are punished by consumers, and the courts also can produce effective remedies for situations in which sellers fail to meet buyer expectations or engage in dishonest behavior. That is not true for criminal courts and prosecutors, however, as Kozinski and Balko point out. Instead, the lack of institutional remedies and the reluctance of the courts to punish prosecutors that give false information or lie in court stands in contrast to what occurs in market settings.

Government, Markets, and Asymmetric Information: DiLorenzo's Critique

DiLorenzo (2011) criticizes Akerlof's thesis, writing:

... so-called asymmetric information is a source of market failure is deeply flawed. Asymmetric information is essentially a synonym for "the division of knowledge (and labor) in society," which is the whole basis for trade and exchange and the *success* of markets. (p. 249)

Far from creating failure in markets, asymmetric information, according to DiLorenzo, is the basis for a market economy. Citing Hayek (1964), DiLorenzo notes that division of labor actually is a division of knowledge. He writes:

...*all* information about all products and services is asymmetrical in successful, capitalist economies because of the division of knowledge (and labor) in society. If we all had symmetrical information about all of the above tasks, none of the above-mentioned businesses and occupations would exist. It is neither desirable nor possible for everyone to have symmetrical information. (p. 252)

DiLorenzo, however, notes that while market processes deal with issues of asymmetric information, the same cannot be said for government:

When potential problems do arise, such as superior knowledge on the part of a used car dealer, marketplace competition provides a solution, as described above. No such solutions exist in government, however, which is where asymmetric information *is* a serious problem. (p. 253)

He cites “rational ignorance” on behalf of voters as an example of how governments operate on the basis of asymmetric information, but that there are few, if any, political remedies to rectify the problems. As we demonstrate in the next section, institutional barriers in the courts and a system of perverse incentives often lead to tragic outcomes, as people are wrongfully convicted of crimes.

3. PERVERSE INCENTIVES AND WRONGFUL CONVICTIONS

Markets have an abhorrence of ignorance, and according to Stigler (1968), “...our understanding of economic life will be incomplete if we do not systematically take into account of the cold winds of ignorance.” (p. 188) Thus, as DiLorenzo (2011) notes, market participants develop numerous mechanisms to better inform both buyers and sellers:

The Akerlof-inspired asymmetric information literature also ignores the implications of the dynamic nature of competition. If a used car dealer is known to be dishonest, he creates a profit opportunity for a competitor in doing so. In a competitive market more honest car dealers will take market share away from the less honest ones, precisely the opposite of the outcome predicted by Akerlof. (p. 253)

But while markets may punish dishonesty, government institutions—and especially the courts—seem to take the opposite approach in providing incentives for dishonest behavior and ensure that the kinds of information asymmetries that result in wrongful convictions not only are tolerated, but actually encouraged. Balko (2013) addresses the problem of prosecutorial misconduct, which he says is a major reason for wrongful convictions. As he points out, because prosecutors are rewarded for convictions—even if they are wrongful convictions—and rarely face punishment for

breaking the law, we should not be surprised that prosecutors do the latter. Writes Balko (2013):

There are a number of ways for a prosecutor to commit misconduct. He could make inappropriate comments to jurors, or coax witnesses into giving false or misleading testimony. But one of the most pervasive misdeeds is the *Brady* violation, or the failure to turn over favorable evidence to the defendant. It's the most common form of misconduct cited by courts in overturning convictions.

Brady violations come from the 1963 U.S. Supreme Court decision *Brady v. Maryland*² in which the court ruled that prosecutors are required to turn over all “favorable” or “exculpatory” evidence to the defense. Violating *Brady* ultimately brought down both Michael Nifong and Ken Anderson. However, as Balko notes, the Nifong and Anderson cases were extraordinary not necessarily for what they did, but that they happened at all. The reality in the courts is that most prosecutors—even those that have committed willful and egregious *Brady* violations—face no punishments. Writing about the *Connick v. Thompson* case in which *Brady* violations by prosecutors in New Orleans put a man, John Thompson, on death row for more than a decade before defense investigators found hidden evidence that ultimately acquitted him, Balko declares:

The particularly striking thing about that argument—that self-regulation and professional discipline are sufficient to handle prosecutorial misconduct—is that even in the specific Supreme Court cases where it has been made, and where the misconduct is acknowledged, the prosecutors were never disciplined or sanctioned. None of the prosecutors in *Pottawottamie v. McGhee* suffered professional repercussions for manufacturing evidence, for example. Neither did any of the men who prosecuted Thompson. In fact, there's a growing body of empirical data showing that the legal profession isn't really addressing prosecutorial misconduct at all.

Keenan, et. al., (2011) authored the *Yale Law Review* article that Balko references. The authors examine the *Connick* case in which the U.S. Supreme Court ruled in 2011 that although prosecutors

² *Brady v. Maryland*, 373 U.S. 83 (1963)

deliberately withheld exculpatory evidence from Thompson's defense team, the Orleans Parrish District Attorney's office could not be held liable, thus vacating a \$14 million verdict a civil jury rendered in Thompson's suit against Connick's office (Harry Connick, Sr., was the district attorney). They write:

...prosecutorial misconduct is a serious problem. A 2003 study by the Center for Public Integrity, for instance, found over two thousand appellate cases since 1970 in which prosecutorial misconduct led to dismissals, sentence reductions, or reversals. Another study of all American capital convictions between 1973 and 1995 revealed that state post-conviction courts found "prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty" in one in six cases where the conviction was reversed. Other scholars and journalists have also documented widespread prosecutorial misconduct throughout the United States.

Because the courts have limited the redress that wrongly-convicted people can receive when prosecutors have withheld exculpatory evidence or suborned perjury or engaged in other misconduct, the state bars are left to administer punishment. While state bar intervention did result in punishment for Nifong in North Carolina and Anderson in Texas, such actions by state bars are rare. As Keenan, et. al., write:

Similarly, bar discipline procedures have not proved a fruitful sanction for deterring prosecutorial misconduct. Many state bar disciplinary systems barely seem to contemplate prosecutorial misconduct as a cognizable complaint, focusing instead on fee disputes and failure to diligently pursue a client's claim.

Balko (2013) agrees, saying: "The charges against Nifong and Anderson are newsworthy precisely because they're so uncommon." In the wrongful conviction of John Thompson, for example, the only prosecutor in Connick's office disciplined by the Louisiana State Bar was a prosecutor whose role in the case was peripheral at best. The ones that actually hid evidence and lied to the courts received no punishment at all.

Gordon, Weinburg, and Williams (2003) and a 2010 *USA Today* investigation found that errant prosecutors simply are unlikely ever to be disciplined for wrongful and even illegal conduct. The

USA Today study looked at 201 cases in which federal prosecutors were judged to have engaged in misconduct. Only one prosecutor received even temporary punishment.

Writing in *Harmful Error—Investigating America’s Local Prosecutors* (2003), Gordon, Weinburg, and Williams from the Center for Prosecutor Integrity declared:

Since 1970, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges, reversing convictions or reducing sentences in over 2,000 cases. In another 500 cases, appellate judges offered opinions either dissents or concurrences in which they found the misconduct warranted a reversal. In thousands more, judges labeled prosecutorial behavior inappropriate, but upheld convictions using a doctrine called “harmless error.”

Sapien and Hernandez (2013) examined 30 cases in New York City in which appeals courts overturned convictions based upon prosecution misconduct. Of the prosecutors in those cases, only one was disciplined, Claude Stuart, losing his job and then having his law license temporarily suspended. However, for many years, according to the authors, his conduct went unchecked:

...until Stuart’s forced resignation, there were no signs that Queens District Attorney Richard Brown saw him as a problem. Instead, Stuart had garnered a string of raises, promotions, and positive performance reviews, winning a reputation as an aggressive litigator, according to records and interviews.

“We have a broken system,” said New York University legal ethics professor Stephen Gillers. “We disbar lawyers for taking two hundred dollars from a client’s escrow account, even if they return it. But there are rarely consequences for someone who has stolen someone else’s due-process rights and possibly put an innocent person in jail.”

Thus, one can say safely that the likelihood is almost zero that an American prosecutor, state or federal, will face meaningful sanctions for misconduct—even that which results in wrongful convictions of innocent people. This creates moral hazard and increases the possibility that information prosecutors present to jurors is likely to be tainted, not to mention that the lack of consequences for illegal behavior would lead dishonest people to self-select into this line of work. This “lemons problem” is made

worse, however, by the fact that prosecutors clearly are rewarded for *convictions*, not engaging in justice.

For example, in 2011, the *Denver Post* reported that former Arapahoe County District Attorney Carol Chambers paid bonuses to prosecutors in her office for convictions they won at trial.³ Although what Chambers' methods were a bit unorthodox, tying bonuses directly to a conviction rate, it is clear that prosecutors across the country are rewarded for getting convictions. Given that prosecutors are highly unlikely to be charged with misconduct no matter how egregious their conduct, one should not be surprised to see them respond positively to whatever structure of incentives exists in the legal system.

One of the problems of examining incentives in prosecutorial offices, however, is the lack of publicly-available information. Leonetti (2012) writes that prosecutors often will follow a policy of "overcharging," that is, charging a defendant with multiple crimes for a single act, or finding other corresponding charges in order to force a desperate defendant into pleading guilty instead of going to trial. In one case documented by Balko (2013), prosecutors charged one defendant with multiple counts of armed robbery, and then threatened to try each count at separate trials, which would have made an adequate defense nearly impossible, leading the defendant to go ahead and plead out.

Writing in the Wrongful Convictions blog, Phil Locke (2015) says:

...the prosecutor has no problem assembling a very long list of charges against you. The penal code has become so vast, and there are so many laws, that there's a law against practically everything. I suggest that most people are not even aware they're breaking a law when they do it, because they don't know the law exists.

Blume and Helm (2014) write that most criminal cases result in pleas, as opposed going to trial, and that often results in innocent people pleading guilty to *something* simply because they lack the resources to take charges to trial or do not have confidence that the system will work for them, and they will receive harsher

³ Fender, Jessica, "DA Chambers offers bonuses for prosecutors who hit conviction targets," *The Denver Post*, March 23, 2011.

sentences than had they just pled guilty. The plea system, Blume and Helm write, is almost completely free of judicial or legislative oversight and regulation, which makes things even more hazardous for defendants, given that prosecutors receive no sanctions for overcharging or coercing guilty pleas from innocent persons.

According to Leonetti, prosecutors engage in overcharging because they are incentivized to do so:

As opposed to seeking another way to limit prosecutorial discretion, this Article examines and evaluates an alternate cause of overcharging, one that has not received much attention from courts or in the scholarly literature: the extent to which internal personnel policies in prosecutors' offices create incentives to overcharge. Instead of focusing only on the ways in which prosecutors exercise their discretion in the criminal justice system, scholars also need to focus on the policies governing those who exercise that discretion, particularly when those policies suggest the existence of bias. Career advancement should not be the controlling factor in how charging, prosecuting, and sentencing decisions are made. (pp. 59–60)

Likewise, Balko (2013) quotes the famed criminal-defense and civil-liberties attorney Harvey Silverglate on how prosecutors are incentivized to engage in misconduct: "Publicity and high conviction rates are a stepping stone to higher office," says Silverglate. "Except in some rare cases, misconduct isn't going hurt a prosecutor's career. And it can often help," he says.

Leonetti writes:

While prosecutors have always made their reputations by winning trials, these new quantitative standards (from state and federal agencies) mean that prosecutorial success, for the explicit purposes of job evaluation and remuneration, is now measured by the number of convictions and amount of punishment, leading to reelection for district attorneys and promotion for their deputies. (p. 65)

Such forms of evaluation, she notes, leave out evaluations of unethical or illegal conduct, as they concentrate simply upon "output," with "output" meaning convictions and adjudication of cases favorable to state authorities. She adds:

Because those offices did not see training and avoiding ethics violations, errors, and disciplinary actions as relevant measures of prosecutors' performance in achieving justice, they chose to forgo this measurement. As a result, there is no data to compare how those performance measures (training, ethics violations, errors, and disciplinary proceedings) may have correlated with more traditional performance measures, such as conviction rates and the length of sentences. A strong correlation, for example, between the number of ethics violations and a prosecutor's (high) conviction rate would have been strong evidence that personnel policies that reward prosecutors for conviction rates encourage unethical behavior. (p. 65)

To give an analogy using Aklerlof's "lemons" example, the kind of prosecutorial misconduct outlined in this section and elsewhere in this paper might be compared to a used car dealer making claims about a car he sells to an unwitting customer, with the car breaking down almost immediately after the customer purchases it. When the customer complains and demands that the dealer give him a refund, the dealer refuses and turns to other employees of his business, and all of them agree that it was a good car and that the buyer should accept the results and not carp about them, and that the dealership followed all of the proper procedures for preparing the car for sale, and that it had no known defects.

Furthermore, in this particular example, the wronged buyer is prohibited from using the tort system and is told to check with government agencies that regulate used car sales. When the buyer turns to those agencies—after having discovered documented proof that the dealer knowingly lied about the car he sold—the employees of those organizations tell him that they are sorry, but that the dealer was just "doing his job" and that they will neither require the dealer to take back the "lemon" he sold nor discipline him.

It is near-impossible to imagine such a scenario in the event a car dealer sells a "lemon" to a customer. However, this was the reality that John Thompson and thousands of other wrongly-convicted people have experienced after prosecutors engaged in illegal and unethical conduct to place them behind bars. After having their freedom taken from them, sometimes for decades, they found that the judicial and law enforcement agencies so protect their employees that no meaningful redress is possible.

In the vast literature on wrongful convictions, there are some common threads, one being that prosecutors in possession of truthful evidence withheld it from the defendants and, of course, jurors and judges. Prosecutors almost always benefit personally and professionally from such actions, as it enables them to gain more convictions, and, as we have demonstrated in this paper, they usually face few or no consequences for their actions.

To make matters worse, even when the courts are made aware that prosecutors withheld evidence or engaged in fraudulent practices, they often refuse to revisit the outcomes of either guilty pleas or trials resulting in convictions. Balko and Carrington (2018) write about thousands of criminal convictions in Mississippi and Louisiana in which prosecutors used testimony from two “forensic experts,” Dr. Steven Hayne, a medical examiner, and Dr. Michael West, who claimed to be a forensic dentist.

Hayne made a number of extraordinary claims, including testifying in a trial in which he claimed that after he examined the path of the bullet wound that killed a police officer, he could tell that the bullet came from a gun in which two people pulled the trigger simultaneously. Balko (2013) explains:

In 2007, the Mississippi Supreme Court overturned the conviction of Tyler Edmonds, a 13-year-old convicted of conspiring with his sister to murder his sister’s husband. In that case, Hayne testified that he could tell by the victim’s wound pattern that two people held the gun that fired the fatal bullets—a conclusion other forensic specialists have dismissed as preposterous.

Neither Hayne nor West, whose testimony also has helped place people on death row, are now considered credible expert witnesses in the courts, but for many years, their testimony went nearly-unchallenged in Mississippi and Louisiana courts. Requarth (2018) writes:

Over the years, his “expertise” metastasized, and he proffered opinions not only on bite marks, but also on gunshot reconstruction, wound pattern analysis, fingernail scratch reconstruction, trace metal analysis, video enhancement, pour pattern analysis, tool-mark analysis, cigarette burns, arson investigations, and shaken baby syndrome. West called his ultraviolet method the “West Phenomenon” because he could see what no one else could. He matched an abrasion on a murder victim’s body

to a suspect's shoelaces. He matched a bruise on the victim's abdomen to a specific pair of hiking boots. He declared that simply by looking at a suspect's palm, he could tell that the individual had been holding a particular screwdriver several days earlier. West likened his virtuosic talents to those of violinist Itzhak Perlman and once described his error rate as "something less than my savior, Jesus Christ."

Requarth continues:

West peddled unconscionable pseudoscience in court. Typically, a bite-mark examiner would take a plaster mold of the suspect's teeth and then compare the mold to photographs of the victim's skin. If the pattern sufficiently matches up, the examiner could exclude everyone in the world except the suspect. Or at least that's how the theory goes: Bite-mark matching has never been scientifically proven. West's practices in this already-scientifically-shaky field were even more dubious. In Brewer's and Brooks' cases, as in many others, West pressed a plaster mold of the suspect's teeth directly against the victim's skin. With this method, West could have been creating the bite mark he was then claiming to have matched. In one case, West even pressed a dental mold into the hip of a comatose woman. A forensic dentist and longtime West critic posted a video of the examination on his blog. "Tampering with the evidence on the skin is likely a crime," the dentist later said. "But to create those marks on a woman who was comatose, and who hadn't given consent, is also an assault."

Despite the fact that experts from around the country have dismissed the analysis of both Hayne and West as being utterly fraudulent, Mississippi Attorney General Jim Hood—who also used Hayne's testimony when he prosecuted cases as a district attorney—refuses to revisit any of the convictions that came about (often in large part) through Hayne's testimony. (Mott, 2014) Whether or not many of these people are innocent of the crimes for which they were convicted is irrelevant to state authorities.

In concluding this section, it is clear that the problems with asymmetric information in the criminal courts are institutional in nature. The main players in the system and the ones most responsible for bringing false information into a criminal proceeding are prosecutors, who also are the most protected actors in the system, as they have almost zero accountability. In the next section, we employ analysis from Austrian economists and others to explain why the government employees and their witnesses in

criminal courts are protected to the point where even misconduct that sends innocent people to prison and death row not only goes unpunished, but the courts refuse redress to the victims of official misconduct, even leaving some of them to languish in prison.

4. BUREAUCRACY, PRIVILEGE, AND AUSTRIAN ANALYSIS

In his famous speech to a gathering of federal prosecutors in 1940, Attorney General Robert Jackson reminded his audience that their job was to do justice. He declared: "While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst." With apologies to George Stigler (1971), one suspects that such a speech from a modern U.S. attorney general to prosecutors would be met with "uproarious laughter."

Jackson continued:

Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, *it has really won if justice has been done.* (Emphasis ours)

The modern standards that the American Bar Association lays out for prosecutors show that at least some of Jackson's idealism has not disappeared. Parts (a) and (b) of Standard 3-1.2 of the ABA's Fourth Edition of the Criminal Justice Standards for the Prosecutorial Function declare:

- (a) The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court. The prosecutor's office should exercise sound discretion and independent judgment in the performance of the prosecution function.
- (b) The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by

exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.

This clearly is *not* the American criminal justice system described in sections I and III of this paper, but explaining why this is the current situation requires something much different than exhorting the players in the system to “serve the public.” If there is anything clear, the players in the system, from police to prosecutors to the judges do not serve the interests of the “public,” but rather their own interests.

Economists in the Austrian and Public Choice camps should not be surprised at this situation. Yandle (1983) wrote of his experience with the Federal Trade Commission and how oblivious its staff economists seemed to be to the problems of regulatory issues. He writes:

Not only does government rarely accomplish its stated goals at lowest cost, but often its regulators seem dedicated to choosing the highest-cost approach they can find. Because of all this, I and others in academia became convinced years ago that a massive program in economic education was needed to save the world from regulation. If we economists could just teach the regulators a little supply and demand, countless billions of dollars would be saved. (p. 13)

As he received his “education” in bureaucratic thinking, however, Yandle came to realize that the regulatory dynamic was not what he originally had imagined. He continues:

...instead of assuming that regulators really intended to minimize costs but somehow proceeded to make crazy mistakes, I began to assume that they were not trying to minimize costs at all—at least not the costs I had been concerned with. They were trying to minimize *their* costs, just as most sensible people do. (p. 13, emphasis his)

Those costs, he pointed out, included costs of making mistakes, costs of enforcement, and political costs. Those firms being regulated, he noted, also had goals that were well outside what the public perception of regulation was supposed to be. Writes Yandle:

They want protection from competition, from technological change, and from losses that threaten profits and jobs. A carefully constructed regulation can accomplish all kinds of anticompetitive goals of this sort, while giving the citizenry the impression that the only goal is to serve the public interest. (p. 13)

Most of the regulation literature focuses upon the relationship between government and private firms that government agents regulate, but while courts are entirely government entities and the analogies between the various players in the courts and those in the regulated marketplace are not exactly the same, nonetheless there are similarities. First, and most important, as McCormick and Tollison (1981) write, all of those who take part in the systems—both markets and in government—are self-interested individuals:

They (government employees and politicians) are economic agents who respond to their institutional environment in predictable ways, and their actions can be analyzed in much the same way as economists analyze the actions of participants in the market processes. (p. 5)

If one can compare the actions of prosecutors to business owners, one can apply Rothbard's analysis (2004) that individuals will seek to gain *psychic* gains and also can suffer *psychic* losses. There is one important difference, however: Should the individuals in private business—entrepreneurs and the capitalists—engage in error or disseminate false information over time, they well may suffer real economic losses, losing their own resources.

Prosecutors, on the other hand, use state-owned resources, are protected from their own personal losses by both the legal doctrine of absolute immunity and the refusal of the so-called watchdog agencies such as state bar discipline committees to hold prosecutors accountable for lawbreaking and other wrongdoing. Furthermore, their actions force *others* to use their own resources, and when prosecutors target business owners, losses and occasional bankruptcies follow.

Calton (2017) reinforces this point by likening the courts to a commons or, more specifically, a "public good" that is owned by the state, and the government players have no incentive to economize on resources financed by taxpayers. He writes:

Because the government holds a monopoly on the justice system in the United States, courtrooms are treated as public goods. For public goods, costs are socialized, so there is no *individual* cost to using this resource. From the perspective of the criminals, of course, this seems like a no-brainer—a defendant is hardly going to pay the cost of his own conviction. But the socialized costs of courtrooms remove the incentive to economize for two specific groups of people: legislators and police officers.

Calton explains that legislators can expand the criminal code to look “tough on crime” without having to use their own resources, while police gain from making more arrests, even though most of the people they collar are likely to be non-violent lawbreakers. To put it another way, the gains for the government players in the system, including police, prosecutors, judges, and lawmakers are *private* while the costs themselves are socialized.

While we use market analysis, nonetheless, we emphasize again that courts are not markets, and that plea bargain sessions are not exercises in mutual exchange. In economic exchanges, all parties involved anticipate being better off afterward, while in the courts, one party will be better off and the other will be worse off. Rothbard writes about government intervention:

On the market, . . . , *there can be no such thing as exploitation*. But the thesis of an inherent conflict of interest *is* true whenever the State or anyone else wielding force intervenes on the market. For then the intervener gains at the expense of the subjects who lose in utility. On the market all is harmony. But as soon as intervention appears on the scene, conflict is created, for each person or group may participate in a scramble to be a net gainer rather than a net loser—to be part of the intervening team, as it were, rather than one of the victims. (p.881)

Prosecutors generally are winners in their interactions with people who are accused of crimes, and given the high conviction rates and the high rates of plea bargains (that serve as convictions), prosecutors benefit well from the existing system. This does not mean that society as a whole benefits from how the courts operate, however, and when innocent people are convicted and the courts and prosecutors refuse to rectify the errors, not only are the wrongfully-convicted individuals done irreparable harm, but also family and loved ones of the victim. Furthermore, every refusal to correct

official wrongdoing that goes unpunished (and that is nearly every one of those cases) creates perverse incentives for prosecutors and judges to do more of the same.

As we have emphasized before, for all of the talk about how prosecutors “serve society,” the system is one in which many of the actors, such as prosecutors, gain individually from the system, but the benefits to others are not as clear. While it is true that most people would benefit with dangerous and violent criminals being punished and “taken off the street,” close to half of people in prison are there not for violent crimes like robbery, rape, and murder but rather for using or distributing drugs such as marijuana or cocaine. (Carson, 2018) While one can argue whether or not such substances should be legal, nonetheless usage of these substances does not necessarily post a threat to the lives and property of others.

Mises (1944) provides a number of insights into bureaucratic mind. For the purposes of this paper, we look at the “justice” system as a bureaucracy, as opposed to dealing with whether or not elected prosecutors behave differently than appointed prosecutors, a subject for later research. Commenting on the differences between private enterprise and a bureaucratic office, Mises writes:

The objectives of public administration cannot be measured in money terms and cannot be checked by accountancy methods. Take a nationwide police system like the F.B.I. There is no yardstick available that could establish whether the expenses incurred by one of its regional or local branches were not excessive. The expenditures of a police station are not reimbursed by its successful management and do not vary in proportion to the success attained. If the head of the whole bureau were to leave his subordinate station chiefs a free hand with regard to money expenditure, the result would be a large increase in costs as every one of them would be zealous to improve the service of his branch as much as possible. It would become impossible for the top executive to keep the expenditures within the appropriations allocated by the representatives of the people or within any limits whatever. It is not because of punctiliousness that the administrative regulations fix how much can be spent by each local office for cleaning the premises, for furniture repairs, and for lighting and heating. Within a business concern such things can be left without hesitation to the discretion of the responsible local manager. He will not spend more than necessary because it is, as it were, his money; if he wastes the concern’s money, he jeopardizes the branch’s profit and thereby indirectly hurts his own interests. But it is another matter with the local chief of a government agency. In spending more money he can,

very often at least, improve the result of his conduct of affairs. Thrift must be imposed on him by regimentation. (p. 46)

While no one doubts that even prosecutors face scarcity constraints (even though critics may say prosecutors have “unlimited” resources), nonetheless there is an economic calculation issue facing a defendant that prosecutors do not share. Because individuals charged with crimes are expected to pay for their own representation—or face the tender mercies of an overworked public defender that is unlikely to offer an adequate defense—they are likely to face resource problems. Prosecutors, on the other hand, are using resources of others and face a much different calculus than do defendants. Mises explains, at least in part, the process:

In public administration there is no market price for achievements. This makes it indispensable to operate public offices according to principles entirely different from those applied under the profit motive.

Now we are in a position to provide a definition of bureaucratic management: Bureaucratic management is the method applied in the conduct of administrative affairs the result of which has no cash value on the market. Remember: we do not say that a successful handling of public affairs has no value, but that it has no price on the market, that its value cannot be realized in a market transaction and consequently cannot be expressed in terms of money. (p. 47)

As Mises points out, market prices and behavior will at best impose only partial constraints upon the bureaucrat’s actions, and given that the kind of economic calculation that constrains entrepreneurs and capitalists does not fully restrain prosecutors, the system then requires restraints of another kind imposed by a political process or the whims of an administrator. However, as Yandle notes, the regulator is interested in minimizing his own costs, not to mention reluctant to limit the power of his office. In other words, there are plenty of reasons for those who either supervise the prosecutor or are able to impose discipline for prosecutorial misconduct to shirk their assigned duties, as to do so in the long run would diminish the power of the prosecutor’s office, thus reducing all of their authority.

While this paper does not advocate reform for prosecutorial offices, nonetheless it is clear that the denial of using the tort

system takes away the one remedy that one wronged by a prosecutor directly can take against his false accuser. Every other remedy—from other prosecutors charging the offending prosecutor with a crime to the state bar imposing discipline up to taking away the prosecutor’s law license—requires those who are government officials and also have a vested interest in preserving their own power and authority to do something that in the long run undermines their own power.

Such a state of affairs should surprise no one. Mises notes in *Bureaucracy* that one cannot really reform the bureaucratic institutions other than try to limit their influences. He pointed out that bureaucracies cannot run an economy with any success or replace a market. Likewise, one cannot impose “market-based” reforms upon bureaucracies; people charged with crimes cannot refuse to submit to prosecutors and the courts, and average citizens have no power over the system other than to serve on juries and, on occasion, impose their own form of “justice” through jury nullification.

By creating an atmosphere in which prosecutors nearly are invulnerable to legal accountability, the courts also have unleashed a situation in which F.A. Hayek (1944) described as one in which “the worst get on top.” Hayek—as well as Austrian economists such as Mises and Rothbard—warned that a collectivist system is more than likely to empower people who are more likely than not to abuse that power. He writes:

The principle that the end justifies the means is in individualist ethics regarded as the denial of all morals. In collectivist ethics it becomes necessarily the supreme rule; there is literally nothing which the consistent collectivist must not be prepared to do if it serves “the good of the whole,” because the “good of the whole” is to him the only criterion of what ought to be done. (pp. 146–147)

5. CONCLUSION

Twenty years ago, Bill Moushey (1998) of the *Pittsburgh Post-Gazette* introduced a 10-part series on federal law enforcement misconduct with these words:

Hundreds of times during the past 10 years, federal agents and prosecutors have pursued justice by breaking the law.

They lied, hid evidence, distorted facts, engaged in cover-ups, paid for perjury and set up innocent people in a relentless effort to win indictments, guilty pleas and convictions, a two-year Post-Gazette investigation found.

Rarely were these federal officials punished for their misconduct. Rarely did they admit their conduct was wrong.

New laws and court rulings that encourage federal law enforcement officers to press the boundaries of their power while providing few safeguards against abuse fueled their actions.

Victims of this misconduct sometimes lost their jobs, assets and even families. Some remain in prison because prosecutors withheld favorable evidence or allowed fabricated testimony. Some criminals walk free as a reward for conspiring with the government in its effort to deny others their rights.

For anyone in the Austrian or even Public Choice camps of economic analysis, none of Moushey's words are surprising. As Mises (1944) noted, for all of the idea that government employees "serve the people," the gains of employment through salaries, promotion, and prestige go to the individual government workers. Moreover, we see a "capture effect" in which those employed by government in the bureaucracies have usurped the legislative process and become virtually independent of the legislative branch, which Roberts (2000) points out accelerated during the New Deal of the 1930s, as Congress "re-delegated" many of its constitutional powers to the bureaucracies of the executive branch.

Rothbard (2004) writes that individuals act to make their "psychic revenue" greater than the "psychic costs" incurred during a particular action, and the doctrine of absolute immunity for prosecutors—and the refusal of the "watchdog" organizations to discipline prosecutors when they break the law—has the effect of lowering the real costs that they face for their actions. Likewise, their promotions, pay raises, and general prestige for "winning" in the courtroom and at the plea bargaining table falls into the "psychic revenue" category. Given that set of circumstances, perhaps one should be surprised that prosecutors ever obey the law when it comes to satisfying their *Brady* requirements.

Although this paper has dealt with the single issue of absolute immunity for prosecutors and its effects on the court systems, there is a larger area of study looking at how we observe a form of “regulatory capture” in the courts. In this case, prosecutors would “capture” the process that disciplines them, such as the state and federal bar disciplinary organizations. There exists a body of literature on regulatory capture both in and out of the Austrian tradition, and there would be rich ground for more study here.

As we noted in the previous section, the set of institutional constraints and incentives make prosecutorial abuse inevitable, and it explains the lack of desire by authorities given the power to discipline wayward prosecutors to carry out their legal duties. Because prosecutors are rarely punished for lying and presenting false evidence, along with suborning perjury, it is safe to say that the information they often present to jurors and judges is less reliable than the information given by the seller of the Akerlof used car.

While we agree that ending the legal standard of absolute immunity for prosecutors would provide for a major reform of the criminal justice system and compel prosecutors to be more truthful in their pursuit of convictions, nonetheless we also understand that the courts are unlikely to give up their self-created protections. Prosecutors, which have a strong lobbying presence both in state legislatures and in Congress, are incentivized both to illegally withhold exculpatory information in order to win cases *and* to demand continued protection for their unlawful actions, and at the present time, there is no political or administrative mechanism in existence that is likely to change the status quo. Thus, to paraphrase McCormick and Tollison (1981), we realize that at the present time, lamenting this major imperfection in the criminal justice system might be the most we can do as long as state authorities enjoy the legal monopoly to pursue their version of “justice.”

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