The Conscience of a Prosecutor

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Two years ago, a startling story appeared in the *New York Times*: a veteran prosecutor in New York City's D.A.'s office, Daniel Bibb, was assigned to reexamine two men's murder convictions because of new evidence. After an exhaustive 21-month investigation, Bibb became convinced that they were not guilty. But he couldn't persuade his superiors to drop the cases, so he went in to the hearing, and, in his words, he threw the case. "I did the best I could," he said. "To lose."

Bibb helped defense lawyers connect the different pieces of evidence when they weren't getting it. He made sure that the exculpatory witnesses showed up at the hearing, told them in advance what his cross-examination questions would be, and held his fire in cross. All the while, he continued to ask his superiors to drop the cases. They agreed to do so for one man, and the judge ordered a new trial for the other. At that point, Bibb said, "I'm done. . . . I wanted nothing to do with it." Bibb eventually resigned—although all he had ever wanted to be is a career prosecutor.

After this startling story appeared in the *Times*, New York disciplinary authorities filed a complaint against Bibb; eventually he was cleared of disciplinary charges. In the meantime, he started over as a defense lawyer, which is what he is doing today.

As for the two men that Bibb thought were wrongly convicted: Olmedo Hidalgo, against whom the D.A.'s office dropped the charges, was deported to the Dominican Republic. David Lemus, who was retried over Bibb's objection, was acquitted by a jury and released after spending 14 years in prison. Subsequently he sued New York City for wrongful imprisonment, and the city settled for \$1.2 million. Hidalgo also sued and reportedly settled for more than twice that amount.

Should a prosecutor throw a case to avoid keeping men he thinks are innocent in prison?

The Case

The case began in 1990, at an East Village nightclub called the Palladium, on Thanksgiving night. A bouncer punched a man in the face and expelled him

from the club. The man decided to take revenge. In the wee hours of the morning, two gunmen opened fire on bouncers standing outside the club, killing 23-year-old Mark Petersen and wounding a second bouncer.

How did police come to arrest Lemus and Hidalgo for the Palladium murder? The two men claimed that they did not even know each other. But both had prior arrests that got their photos into police files, and eyewitnesses picked Lemus and Hidalgo out of photo arrays that detectives showed them.

There was one other damning piece of evidence against Lemus: he bragged to a woman named Delores Spencer that he had done the Palladium killing. She told a friend, who told the police. Police sent Spencer back to Lemus, wearing a wire, and he repeated his boasts. The jury had little difficulty convicting the men of second-degree murder. They each drew sentences of 25 years to life.

That would have been the end of the story except for a series of coincidences. Around the same time, New York City detective Bobby Addolorato was investigating a drug gang called C&C. One of his informants told him that two C&C members named Joey Pillot and Thomas "Spanky" Morales—not Lemus or Hidalgo—were the real Palladium shooters.

Addolorato reported what he heard to the D.A.'s

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office, but was told that it didn't match the known facts. Understanding that snitches sometimes lie, the detective forgot about it until four years later. By that time he was working with federal prosecutors in the C&C investigation, and they arrested none other than Joey Pillot and Spanky Morales. Joey told the investigators that he and Morales had indeed been the real

Palladium shooters. Furthermore, he gave them details that matched the facts.

The result was a new hearing on the Palladium shooting. But the D.A. argued that the new information, which might well incriminate Spanky Morales, did not show that Lemus or Hidalgo were innocent—and the judge agreed. Even back at the original trial, prosecutors had already raised the possibility that there had been a third perpetrator at the Palladium.

Then in 2000 an inmate read a story about the Palladium case. In early 2001 he told federal prosecutors that he had been at the Palladium that night, just a few feet away when Spanky Morales shot the bouncers. In fact, he was the one who drove Morales's car away from the scene. It seemed increasingly likely that the case against Hidalgo and Lemus was a gigantic miscarriage of justice.

In 2002, the District Attorney's office agreed to open a new investigation and assigned it to Dan Bibb. Bibb's investigation lasted almost two years. He interviewed over 60 people in at least fifteen states, three New York State prisons, eight federal prisons, and one county jail. Notably, eyewitnesses now told Bibb that they had

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picked Morales and Pillot out of the photo array—a fact that never came out at the original trial. By the end of the investigation, Bibb was convinced that Lemus and Hidalgo had nothing to do with the Palladium shooting.

Then why did Lemus tell Delores Spencer that he was involved? According to Lemus, it was simply a pathetic story of a punk boasting to impress a girl. Lemus had seen the news about the Palladium on television, and it was the first thing that came to his mind when he wanted to show Spencer that he wasn't merely (in his words) "a knucklehead with a bus pass."

The D.A.'s office did not disagree that Morales was the shooter. Rather, they asked Bibb to defend the convictions and argue that all the men were in cahoots. Bibb, on the other hand, was convinced that Lemus and Hidalgo had nothing to do with Morales and Pillot. As Bibb later told a reporter, "I came to believe that Hidalgo wasn't there. And if he wasn't there, he certainly couldn't have done it."

Here is how Bibb viewed his choices at this point:

The first was to resign. While I am sure it would have garnered a lot of press coverage, it would not have moved the matter along to a just conclusion. In fact, it most likely would have substantially delayed the matter, resulting in the contin-

ued incarceration of two innocent men. The next was insubordination, refusing to do the hearing and risk being fired. Practically speaking, neither of these was an option because I have a wife, three children, and a mortgage and college tuition to pay and could not afford to be out of work. The last was to do exactly what I did.

He adds: "In this matter I did what every prosecutor should do, worked to ensure a just result consistent with my conscience, ethical principles and the evidence."

Right or Wrong?

There is no doubt that what Dan Bibb did was unusual. And there is no doubt that he violated the usual role expectations of the adversary system, where lawyers never try to help the other side make their case even when they think the other side is right. But did Bibb do anything wrong?

Stephen Gillers, a nationally renowned legal ethics expert, thought he did, and predicted that Bibb might face professional discipline. "He's entitled to his conscience," Gillers said, "but his conscience does not entitle him to subvert his client's case. It entitles him to withdraw from the case, or quit if he can't." Bibb, on the other hand, said that he didn't withdraw because "he worried that if he did not take the case, another prosecutor would—and possibly win." Without Bibb to persuade the eyewitnesses to testify, it seems entirely likely that that's exactly what would have happened.

I believe that Professor Gillers is wrong: Daniel Bibb deserves a medal, not a reprimand.

Before I explain why, let's see what the ethics case against Bibb might look like. Imagine that a private lawyer representing a private client does the same thing. She locates truthful but adverse witnesses and persuades them to testify. She reveals her cross-examination to them. She explains how the evidence fits together when the opposing lawyers don't get it. The lawyer does it because she thinks the other side was right. And her client loses.

First, there is no question that the lawyer could and would be sued for malpractice. As for ethics violations, the lawyer could be charged with violating the requirement of competency; the requirement that the client, not the lawyer, sets the goals of the representation; the requirement of diligence (also known as "zeal"); and the conflict of interest provision forbidding lawyers from taking cases where the lawyer's representation of the client will be "materially limited" by "a personal interest of the lawyer."

All the same prohibitions apply to a prosecutor. But there is one crucial difference. Prosecutors aren't supposed to win at all costs. In a time-honored formula, their job is to seek justice, not victory. This is a mantra that appears in all the crucial ethics documents. The ancestor of these pronouncements is the Supreme

Court's dictum in a 1935 case, *Berger v. United States*:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he 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.

This is a very different way to think about a lawyer's role in the adversary system from what we are used to in other contexts. It's especially different from the criminal defense attorney's role, which most lawyers and scholars agree requires maximum zeal on the client's

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behalf. Now, in one way, this stark difference between the prosecutor's mission and the mission other advocates are assigned in the adversary system is obvious: the criminal justice system would be a travesty if a prosecutor, holding years of someone's life in her hands, cared about nothing but notching another victory.

Nevertheless, our conventional understanding of the adversary system involves complete symmetry of obligation between the two sides: they are both supposed to fight as hard as they can to win. In the criminal justice system we have asymmetrical obligations. Prosecutors, it seems, are simply not supposed to fight to win the way defenders are.

Some might object to standards that require the pro-law-enforcement side to fight with one hand tied behind its back. Why shouldn't prosecutors be just as adversarial as defenders? The Palladium case helps us answer this question. What, after all, did Bibb do wrong? He persuaded reluctant witnesses to show up in court and testify (against the state). Think for a moment about the alternative. Bibb was assigned to investigate the Palladium case, and he went on an odyssey to track down the witnesses. Once he had the evidence, he was under an obligation to turn it over to the defense if it was exculpatory—which he did.

The alternatives: don't investigate the case thoroughly for fear you'll discover that the guys doing 25-years-to-life are innocent; or, having investigated it, don't turn over the exculpatory evidence to the defense, violating your constitutional and ethical obligations; or, having turned it over, put the defense to the difficulty of locating the witnesses and getting them to court—so, if they don't succeed, the truth stays buried. *That's* the ethical obligation of a public prosecutor?

Lawyers steeped in the adversary system agree with Professor Gillers that if Bibb couldn't play his assigned role, he should withdraw from the case, not throw it. But that overlooks the unique position Bibb found himself in. Bibb had interviewed the witnesses and he had a relationship with them that neither the defense nor a substitute prosecutor would have. Realistically, Bibb was the only one who could get these reluctant witnesses—not all of whom were solid citizens—in front of the judge. Without those witnesses, would the judge have ordered a new trial? Almost certainly not. Would withdrawing have impeded the search for truth? Absolutely. Would the result have been a grotesque injustice? Bibb, who knew more about the case than anyone else, certainly thought so. In this case, Bibb's tactics advanced the search for truth and the protection of rights. These are precisely the two values that defenders of the adversary system argue it is there to promote.

"Seek Justice, Not Victory"

Scholars have advanced two theories for why the prosecutor's job is to "seek justice, not victory." One points to the power differential between the state and the accused individual. The state has tremendous resources: police to investigate cases, crime labs to examine evidence, and—of course—the charging power to flip witnesses and induce plea bargains. The

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accused typically has an overworked defender with little or no capacity to investigate; in many cases, the accused is in jail. Even the names attached to criminal cases show the power imbalance: *State v. Defendant*, *People v. Defendant*, *United States v. Defendant*. Because of the power imbalance, it is essential that prosecutors not take victory as their sole goal. Call this the *power theory*. The other theory behind "seek justice, not victory" focuses not on the power imbalance between the government and the accused, but the special duty of the executive to govern justly and impartially. Call this the *sovereignty theory*.

In my view, neither theory tells the whole story. The sovereignty theory doesn't explain why prosecutors seeking victory in an adversary contest where the defense is doing the same aren't "governing impartially." Why isn't procedural justice in the adversary system all the justice that prosecutors need to seek? Surely part of the explanation is the power imbalance:

The death of Socrates
(Painting by Jacques-Louis David, Creative Commons Attribution)

giving the state most of the cards in a purely competitive contest where the only goal is victory means that it will win more often than it should. So the sovereignty theory needs the power theory to back it up—otherwise, it doesn't adequately explain why prosecutors should seek justice not victory.

On the flip side, the power theory doesn't explain what's wrong with a pro-government power imbalance, which, after all, many people might think is the best way to fight crime. The answer must be that we want more of government than fighting crime: we want government to bend over backwards to achieve fairness and avoid collateral damage to the innocent in the war against crime. In other words, the power theory needs the sovereignty theory to back it up.

So the two theories really need each other. But even combining them leaves out something essential, and that is that the stakes are so much higher in criminal law than anywhere else. We have one of the world's harshest criminal justice systems, with long sentences, draconian conditions of confinement, zero interest in rehabilitation, loss of rights to convicted felons even after they serve their time, and stigma that follows convicts forever, blighting their chances to make a

fresh start. The United States currently has more people locked up than any nation in history, both per capita and in absolute numbers.

But the United States also has a constitution built on principles of limited government and individual rights. The protection of individual rights from government abuse is a key part of our political tradition, and the harshness of our punishments makes the protection of rights in the criminal process a matter of life and death. That's why both the power imbalance in the criminal justice system and the government's commitment to impartiality matter so much. "Seek justice not victory" weaves together all three concerns: prosecutors shouldn't exploit the power imbalance, they should care immensely about the rights of the accused, including the substantive right to stay out of jail when you are innocent, because of the enormously high stakes in their cases.

Obviously, prosecutors aren't responsible for mass incarceration—they deal with criminal cases retail, not wholesale, and if legislatures keep ratcheting up punishments that is not the prosecutor's doing. But the prosecutor is the gatekeeper of the system, the one who decides which cases go from the paddy wagon to

the courtroom. The prosecutor's conscience is the invisible guardian of our rights, just as the defense lawyer is the visible guardian. What made Bibb's conduct in the Palladium case so remarkable is that here the invisible guardian became visible.

Chain of Command

I hope I have adequately explained why prosecutors must seek justice, not merely victory. But you may think that I've left out one crucial piece of the story: Bibb was working in a law office, and his superiors in the chain of command did not agree with him. Granted that prosecutors must seek justice, who decides what justice is? Isn't that a decision for the boss, not for an Assistant D.A.? If you work in an organization, you

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should generally respect the chain of command. And if your supervisors look at the same evidence and reach a different conclusion, you should earnestly consider whether their judgment might be better or more objective than yours.

But sometimes it may happen that your certainty remains unshakeable even when you have tried as hard as you can to see it their way. And sometimes the magnitude of the injustice is intolerable. Lastly, once in a great while, nobody can stop the injustice but you. At that point, the demands of conscience, and indeed of human decency, prevail over the office hierarchy.

In the Palladium case, nobody knew the facts and evidence as well as Bibb. He had met the witnesses, he had spent hours sizing them up, he had lived with the case for two years. Of course as an abstract matter he could have read it wrong and his superiors could have been right. But in the real world, this abstract possibility was negligible: the fact is that everything Bibb's superiors knew about the Palladium case came from him. As for the size of the injustice: if Bibb was right, two innocent men had spent 14 years in prison for a crime they hadn't committed, and were looking at many more years. The injustice doesn't get much grosser than that. And as we've seen, only Bibb was in a position to do anything about it.

The Role of Conscience

This takes me to my final question, perhaps the hardest question in legal ethics. What role does conscience play in lawyers' ethics, when conscience presses one way but the professional rules press the other?

In the western philosophical tradition, the first and greatest discussion of conscience is the *Apology* of Socrates, as related by Plato. Standing accused before an Athenian court, Socrates told the jurors about his *daimon*, "a sort of voice that comes to me, and when it comes it always hold me back from what I am thinking of doing, but never urges me forward." Socrates explains that his *daimon* "always spoke to me very frequently and opposed me even in very small matters, if I was going to do anything I should not." What Socrates was describing is the voice of conscience.

The basic principle of Socratic ethics is that it is worse to do wrong than to suffer wrong. In the *Apology*, Socrates reminds his jurors of two episodes that nearly cost him his life. Once, when he held a public office, the Athenians wanted to put some generals on trial illegally, and Socrates was the only one to oppose them. "I thought I must run the risk to the end with law and justice on my side, rather than join with you when your wishes were unjust. . . ." On another occasion, the dictators of Athens ordered Socrates and some others to arrest a man named Leon and bring him to be illegally executed. As Socrates reminds the jury, "when we came out of the rotunda, the other four went to Salamis and arrested Leon, but I simply went home."

Both times, Socrates defied public authority to avoid participating in wrongful criminal punishments. The examples show us something crucial: *the paradigm case of conscience lies in refusing to acquiesce in the wrongful conviction of the innocent.*

Conscience isn't the special property of moralists and saints. Bibb was not trying to emulate Socrates, and he was not trying to make a point. At one point, he said to me, "I've become a case. It's the worst thing in the world—being known for just one thing. Forget all the good I did, all the prosecutions over the years, all the bad guys I put behind bars." If we're lucky, we may never encounter a conscience case, although I suspect that prosecutors encounter them more often than they recognize. The test of character is whether when we do we can be stubborn enough and creative enough to rise to the occasion.

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Sources: Benjamin Weiser, "Doubting Case, A Prosecutor Helped the Defense," *N.Y. Times*, June 23, 2008, http://www.nytimes.com/2008/06/23/nyregion/23da.html?_r=1&pagewanted=all; Benjamin Weiser, "Settlement for Man Wrongly Convicted in Palladium Killing," *N.Y. Times*, March 31, 2009, at A19; Stone Phillips and Dan Slepian, "Murder at the Palladium," *Dateline NBC*, Sept. 8, 2008, available at <http://www.msnbc.msn.com>

/id/6913736/ns/dateline_nbc-crime_reports//; Letter from Daniel Bibb to Alan Friedberg, Nov. 7, 2008; *Berger v. United States*, 295 U.S. 78, 88 (1935); Bruce A. Green, "Why Should Prosecutors Seek Justice?," *Fordham Urban Law Journal* 26 (1999); Plato, *The Apology of Socrates*, in Plato I: *Euthyphro, Apology, Crito, Phaedo, Phaedrus* (H. N. Fowler trans. 1914).

Google and the Cyber Infiltration

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In mid-January of this year, Google threatened to pull its business out of China unless China lifted filters of its search engine results that resulted in censorship of so-called "sensitive content." At the end of March, having obtained no concession from the Chinese government to back down on its draconian online censorship, Google acted on its threat by closing down its www.google.cn search engine, but diverting all searches on that page to www.google.hk, so that Mainland Chinese doing a Google search could continue to get results in the Chinese language. (Though google.hk is not filtered, all web contents found by Mainland Chinese users are universally filtered for "sensitive" materials.) The motives behind Google's decision are likely complex. But whatever its motives, Google may have done some good by spotlighting and picking a fight with cyber censorship and cyber infiltration. Google and other foreign Internet technology corporations should have protested a long time ago, even at the cost to their own profit, and should never have accepted censorship as a precondition for entering the Chinese market.

Many Americans may not know that Google's search engine in China, www.google.cn, very likely had accepted ethically compromising conditions set by Chinese authorities to filter "sensitive" words, thus contributing to upholding the Chinese government's Great Fire Wall to block Chinese users' access to open information online. An easy test could be performed to demonstrate how much information had been censored by google.cn. A user outside the Great Fire Wall could search for words such as "Tiananmen incident," or "Falun Gong," on both google.cn and google.com.

One would see two very different pages of search results. In volume, the google.com search produces 10-15 times more results than google.cn does. In content, predictably, the results out of google.cn are one-sided, reflecting the government's point of view. It is difficult for Chinese users to link directly to google.com and gmail (which is hosted outside China); connecting from China is either very slow or not accessible. And like all websites outside the country, once opened in China, google.com's search results are subjected to censorship—politically sensitive contents would also be filtered and some pages are blocked.

Engaging in self-censorship by filtering information that the Chinese government wants to block from users in China is a seriously questionable practice. Google has projected an *ethical* image of doing business about itself. Google wants to be known for its commitment to promoting online free communication and open information. Its corporate motto is "Do no harm." Any such ethical commitment comes with strings attached—that it should not be set aside for purposes of convenience or other (ethically irrelevant) gains such as market strategies. The generality and consistency requirements of ethical commitments mean that Google should never have entered China by accepting censorship as a precondition.

One plausible argument for entering the Chinese market even if it means obeying ethically compromising local regulations is this: Internet companies will get a significant market share of the world's largest pool of potential users, 1.3 billion. This will not only enable American companies to make a profit, but also