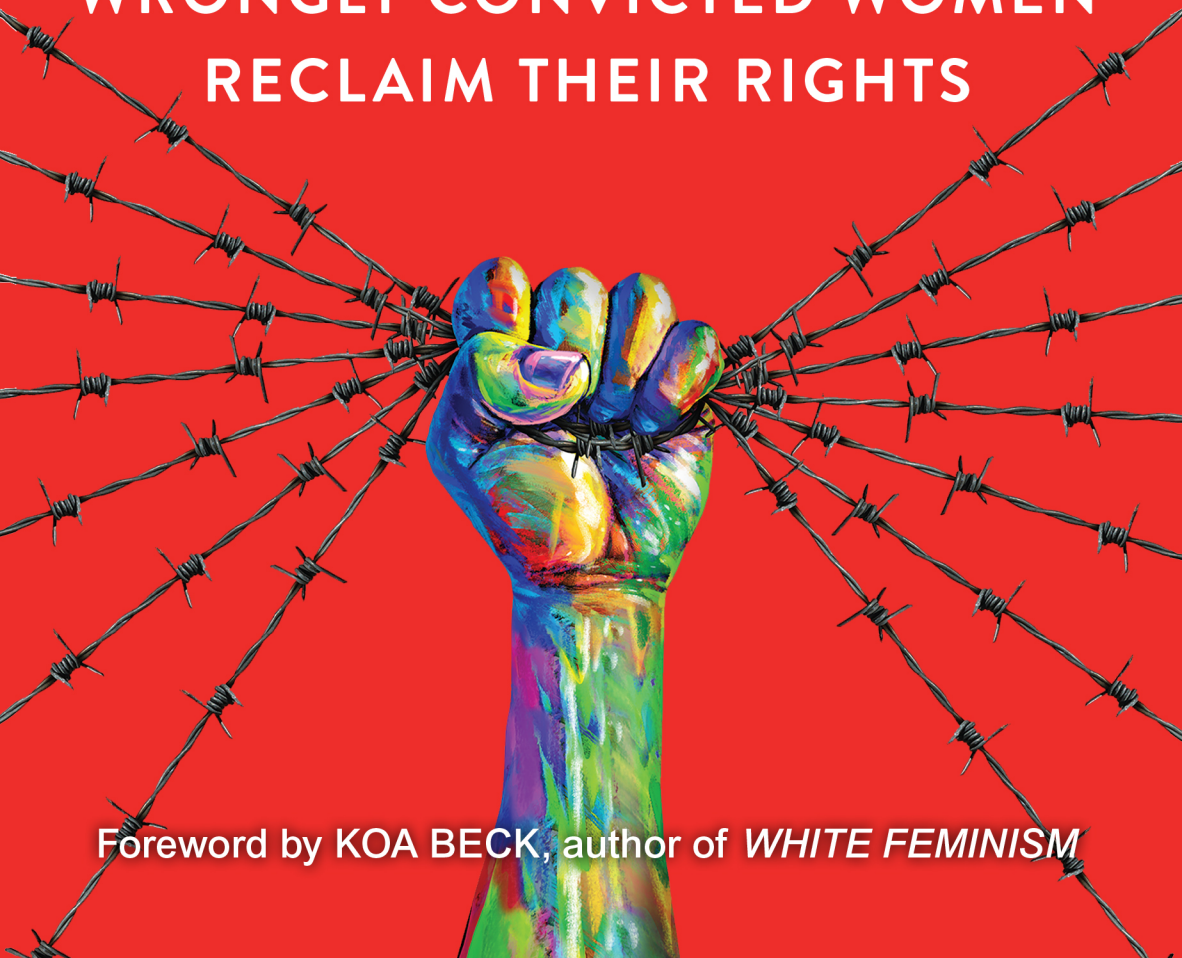


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WEST VIRGINIA INNOCENCE PROJECT

MANIFESTING JUSTICE

WRONGLY CONVICTED WOMEN
RECLAIM THEIR RIGHTS



Foreword by KOA BECK, author of *WHITE FEMINISM*

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CITADEL PRESS

Kensington Publishing Corp.

www.kensingtonbooks.com

CHAPTER 24

Prosecutorial Misconduct

I became a prosecutor because I wanted to fight for a noble cause. I believed that incarcerating offenders would stop cycles of violence against vulnerable people. Prosecutors and police are often drawn to their work by a noble cause of protecting victims.

But believing in my own noble cause also led to shortcuts: the ends justify the means. I focused on achieving my goal of public safety through incarceration, isolation, and containment. I focused on protecting survivors of violence at any cost. And I defined victims as the select people for whom society allows itself to experience compassion.

DUNN LAMPTON AND NOBLE CAUSE CORRUPTION

Dunn Lampton, District Attorney for the Fourteenth Circuit Court District, worked his way up from a town prosecutor to district attorney. Lampton's drive to obtain higher political office was well known, and indicated by his multiple attempts to win a seat in Congress.

At the time of Leigh and Tami's trial, President George W. Bush was considering appointing Lampton as the U.S. Attorney for the Southern District of Mississippi. Less than three months after Lampton convicted the two women, on September 7, 2001, President Bush appointed him as U.S. Attorney. He was only fifty-one years old at the time.

The ideal noble cause of being a prosecutor was another one of

Lampton's motivations. He was best known for prosecuting Ku Klux Klan member James Ford Seale.

In May 1964, Seale kidnapped and murdered two young Black men in Meadville, Mississippi: Henry Hezekiah Dee and Charles Eddie Moore. Seale was a working-class white man and, along with his brother and father, an active member of a militant KKK organization called the Silver Dollar Group. Seale abducted Dee and Moore when he saw them walking along a road. He forced the two men into his car by telling them that he was an FBI agent.

Seale called up other white men in the Silver Dollar Group and together they beat the men, kidnapped them in the trunk of a car, and drove over one hundred miles to the Ole River. At the riverside, the group of white men chained Dee and Moore to an engine block and to sections of railroad track rails. While Dee and Moore were still alive, the white men rowed them in a boat to the middle of the river. Then they pushed Henry Dee and Charles Moore into the water and watched them drown.

The KKK members brutally murdered Henry Dee and Charles Moore. However, when Dee's and Moore's bodies were exhumed from the river, the FBI was searching instead for three civil rights workers who went missing in Meridian, Mississippi: Michael Schwerner, Andrew Goodman, and James Chaney. Dredging the rivers of Mississippi could reveal unknown horrors of violent white supremacy.

When the FBI investigated the murders of Henry Dee and Charles Moore in 1964, Seale and his fellow Klan member Charles Edwards *admitted to the crime*. Yet in 1965, the local district attorney, Lenox Forman, filed motions to dismiss the charges against the Klansmen "in the interest of justice." This same tool of dismissal that can be used to free Black and Brown people today was used by this prosecutor on behalf of violent white Klansmen.

Nearly forty years after Moore's murder, his brother Thomas Moore fought to reopen the case. Thomas, together with journalist Jerry Mitchell, the cofounder of the Jackson Free Press Donna Ladd, and documentarian David Ridgen re-investigated the murders. Thomas had served in the Army with Dunn Lampton, who was by now the U.S. Attorney for the Southern District of Mississippi, and brought their newly discovered evidence to him. In 2007, Lampton

charged Seale with kidnapping and conspiracy in the murders of Moore and Dee. A jury convicted Seale in 2007 after his codefendant Charles Edwards testified against him in exchange for immunity from prosecution. Seale was sentenced to three life terms.

A noble cause motivated Lampton to prosecute James Ford Seale for murdering innocent Black men. It also drove him to prosecute innocent queer women for an assault that never occurred seven years earlier.

Lampton was both hero and villain. These terms clarify little.

Days after the Seale verdict, Lampton was in the Jeep accident on his muscadine grape farm that would leave him paralyzed for the rest of his life.

CARCERAL FEMINISM

I had long identified as a victims rights advocate. In college, I was on call every month for twelve-hour shifts as a Rape Victim Advocate. Armed with a pager, I'd respond to the alert that a sexual assault survivor had arrived at one of my assigned hospitals and I needed to go and be their advocate.

Sometimes the police would begin interrogating the survivor, and I had to advocate for the survivor's personal decision of whether to talk with the police or not. Sometimes the doctor or nurse, who at that time weren't all properly trained, would ask inappropriate questions or pressure the survivor. Sometimes the survivor would be a man, who felt ashamed of the assault and feared people would think he was gay.

Most of the time "my" survivor just wanted someone to hold their hand, to listen without judgment. The first and foremost thing we were taught was to tell the survivor, "It's not your fault. You did what you had to do to survive."

In the early 2000s, prosecuting and punishing rapists was seen as a form of social advocacy. Survivors had suffered through being disbelieved and ignored. Punishment was a response. When I worked for a summer in the Office of the Prosecutor in the International Criminal Tribunal for Rwanda, I felt like I was doing righteous work by assisting one of the first prosecutions of rape as genocide. This was adding weight and seriousness to assaults that were belittled or dismissed every day.

I was a carceral feminist. I thought assailants should be punished and thus deterred and prevented from ever harming someone again. Incarceration was the tool to accomplish that end.

But there's a difference between a response and a solution.

Sociologist Elizabeth Bernstein coined the term "carceral feminism" to describe the late twentieth-century growing commitment "to the carceral state as the enforcement apparatus for feminist goals." Among these feminist goals was acknowledging and protecting people who were sexually or physically abused by arresting and incarcerating alleged perpetrators. To this day, if I look to many sex crimes and domestic violence prosecutors, I see prosecutors who also oppose the death penalty, who oppose the war on drugs, and who oppose mandatory minimum sentencing. I know many of them well. They see horrible crimes that they consistently have to plead down in order to obtain any kind of conviction. But they also see how the system still ignores many survivors, and how its solution of incarceration is often only a temporary one.

PROSECUTORS AS WHITE SAVIORS

As a young prosecutor, my savior mentality was my shield from criticism. I would protect survivors from their assailants and abusers by incarcerating the perpetrators—for as long as possible. I firmly believed that I, as a prosecutor, should have all tools at my disposal. This included doing what I could to persuade survivors to testify against the defendant, including arresting survivors to guarantee they'd be at the trial. This included having total access to police and crime lab information. I decided what to disclose to the defendant and what to keep to myself.

As a prosecutor, I had the power to make some sort of accountability stick, and I thought both the rules and the survivors should bend toward my kind of accountability. Carceral accountability.

Furthermore, as a prosecutor, the idea of a defendant having equal access to crime lab information, a defendant able to see DNA results and search in a DNA database, talk with "our" lab analysts, or even ask to interrogate "our" witnesses infuriated me. As the old saying goes, when you're accustomed to privilege, equality feels like oppression.

The governing court rules made sure there was not equality in the courtroom. The governing rules of criminal courtrooms are rooted in Jim Crow.

In the 1930s, the federal government created rules to govern civil cases and criminal cases. The rules of criminal procedure were originally drafted to be just like the rule of civil procedure, with open disclosure and discovery for both parties, the ability to interrogate witnesses before trial, and both parties could discover additional information and compel any party—including the government—to disclose that information.

But the civil courtroom was mainly white litigants, while the criminal courtroom was disproportionately people of color. Southern prosecutors proposed changes to the rules of criminal procedure, concerned about ensuring their convictions of Black male defendants. They proposed and passed the rules we still have eighty years later: prosecutors can decide what information to reveal and keep hidden.

I, as the prosecutor, also had more leeway with whether to abide by the court rules. I could be late with my pleadings or filings; I could push the boundaries. I saw my control and power as natural and not worth commenting on, except to defend against any challenge. I fought against changes that would “uneven the playing field” by diminishing the power of the prosecutor. I fought to preserve the status quo in furtherance of my noble cause ideal.

PROSECUTORIAL MISCONDUCT AND NOBLE CAUSE CORRUPTION

In pursuit of a noble cause, we have a natural human tendency to lock in on how to accomplish our goal and block out all conflicting information. It’s called tunnel vision. Anyone can be susceptible to only acknowledging evidence that confirms their own idea or belief, and being unwilling to change their belief even in the face of contradicting evidence. But tunnel vision can turn into noble cause corruption.

Noble cause corruption leads to wrongful convictions. Noble cause corruption can drive prosecutors to bend the rules in their favor. One third of exonerations involve misconduct by prosecutors. Over half of exonerations involve some form of official misconduct generally. The

most common form of misconduct is when police and prosecutors hide exculpatory evidence from the defendant, called a *Brady* violation.

A perverse incentive exists for prosecutors to commit misconduct. Prosecutors can obtain a conviction by hiding evidence, and there's little risk that they'll be found out.

There's even less risk that prosecutors will face any consequences. If a court finds out, the judge frequently dismisses a prosecutor's failure to disclose evidence to the defendant as harmless error, or rules that the hidden evidence wasn't "material."

When Brandon Bernard was about to be executed, neither the U.S. Supreme Court nor President Donald Trump commuted his sentence in the final days of December 2020. Brandon was a Black teenager sentenced to death when he was eighteen years old for participating in a horrible felony murder. In her dissent from the Supreme Court's denial to stay Bernard's execution, Justice Sotomayor wrote, "If the prosecution had not committed the *Brady* and *Napue* violations Bernard alleges, there is a reasonable probability Bernard would have been spared a death sentence." Instead, the prosecutors were not held accountable, and the federal government executed Bernard—at the same time that all state governments had suspended executions because of COVID-19.

When prosecutors can hide evidence, and their noble cause corrupts their actions without check, we undermine any integrity in our system. We must ask more from prosecutors, because their duty is not to win convictions but to seek justice.

- 235 I don't have any independent:** West Deposition p. 28.
- 235 I think you should use DNA:** West Deposition pp. 36–37.
- 235 And if I was asked to testify:** West Deposition p. 38.
- 236 And for that reason:** West Deposition p. 39.
- 236 He gave me the VHS:** West Deposition p. 48.
- 236 And they didn't have:** West Deposition p. 51.
- 237 Oh yeah, I don't know:** West Deposition pp. 62–63.
- 237 Not to Mike West:** West Deposition p. 79.
- 238 You're going to need a big:** West Deposition p. 95.
- 241 Jerry Rushing took the:** (Trial Transcript, Habeas Hearing).
- 249 Prosecutors and police are often:** Steve McCartney & Rick Parent, *Ethics in Law Enforcement* (2015).
- 251 In the early 2000s, prosecuting:** Aya Gruber, *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration* (2020).
- 252 As the old saying goes:** Jordan Flaherty, *No More Heroes: Grassroots Challenges to the Savior Mentality* (2016).
- 253 The governing rules:** For a thorough history of the rules of criminal procedure and their connection to Jim Crow, see Ion Meyn, "Constructing Separate and Unequal Courtrooms," 63 *Arizona Law Review* 1 (2021).
- 253 Anyone can be susceptible:** Sherry Nakhaeizadeh, Itiel E. Dror, & Ruth M. Morgan, "The Emergence of Cognitive Bias in Forensic Science and Criminal Investigations," 4 *British Journal of American Legal Studies* 527, 529 (2015). Alafair S. Burke, "Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science," 47 *William & Mary Law Review* 1587, 1596 (2006).
- 253 Noble cause corruption leads:** Michael A. Caldero & John P. Crank, *Police Ethics: The Corruption of Noble Cause* (2014).
- 253 Over half of exonerations involve:** Nat'l Registry Exonerations, *Government Misconduct and Convicting the Innocent* (2020), www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf (last visited Sept. 24, 2021).
- 254 A perverse incentive exists:** As legal scholar Peter Joy has stated, "[prosecutors] do it to win. They do it because they won't get punished. They have done it to defendants who came within hours of being exe-

cuted, only to be exonerated.” Peter A. Joy, “The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System,” 2006 *Wisconsin Law Review* 399 (citing Ken Armstrong & Maurice Possley, “Trial & Error; How Prosecutors Sacrifice Justice to Win; The Verdict; Dishonor,” *Chicago Tribune*, January 10, 1999, at 1.). Jessica Brand, “The Epidemic of Brady Violations: Explained,” *The Appeal* (Apr. 25, 2018), theappeal.org/the-epidemic-of-brady-violations-explained-94a38ad3c800.

254 There’s even less risk: See *About, Veritas Initiative*, veritasinitiative.scu.edu/?page_id=2 (last visited July 1, 2015). See also Maurice Possley & Jessica Seargeant, “First Annual Report: Preventable Error—Prosecutorial Misconduct in California 2010,” *Northern California Innocence Project* (Mar. 2011), www.veritasinitiative.org/wp-content/uploads/2011/03/ProsecutorialMisconduct_FirstAnnual_Final8.pdf.

254 Bernard would have: *Bernard v. United States*, No. 20A110, 141 U.S. 504 (2020). (Sotomayor, J., dissenting from denial of certiorari) www.supremecourt.gov/opinions/20pdf/20a110_1972.pdf.

261 Maybe they’re experienced enough: Alexi Jones, “Reform without Results: Why States Should Stop Excluding Violent Offenses from Crim. Justice Reforms,” *Prison Policy Initiative* (April 2020), www.prisonpolicy.org/reports/violence.html; David J. Harding, “Do Prisons Make Us Safer?” *Scientific American* (June 19, 2019), www.scientificamerican.com/article/do-prisons-make-us-safer.

262 Leigh and Tami didn’t ever have: “The Court instructs the jury that to constitute possession, there must be sufficient facts to warrant a finding that the defendants, or either of them, were aware of the presence of the particular substance and were intentionally and consciously in possession of it. It need not be actual physical possession. Constructive possession may be shown by establishing that the substance involved was subject to the defendant’s domain or control” (Trial Transcript, 794–95).

265 It is simply policy: Dwayne Betts, in his poetry collection *Felon*, repeatedly writes “it is the policy” representing bureaucratic justification. Reginald Dwayne Betts, *Felon: Poems* (2019).

265 It is the punishment that: Angela Davis, *Are Prisons Obsolete?* (2003).