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Cover Page Footnote

J.D. Candidate, 2000, Fordham University School of Law. This Note is dedicated to my wife, Nomita, and my parents, Micaela and Frank English. I would like to thank Professor Bruce A. Green for his insight and guidance in writing this Note.

A PROSECUTOR'S USE OF INCONSISTENT FACTUAL THEORIES OF A CRIME IN SUCCESSIVE TRIALS: ZEALOUS ADVOCACY OR A DUE PROCESS VIOLATION?

Michael Q. English[*]

INTRODUCTION

Prosecutors face a dilemma when two people engage in criminal activity, but only one of the perpetrators commits the most serious offense. In some cases, the evidence clearly establishes that the most serious offense, oftentimes murder, was committed by only one person. The evidence frequently does not, however, confirm which of the suspects committed this offense. Moreover, circumstantial evidence often suggests that either suspect could have committed the offense. Thus, knowing that one of the two suspects committed the offense, prosecutors face a difficult choice: they can choose not to charge either suspect, charge only one of the suspects, or charge both suspects with the same criminal act.

In an increasing number of cases, prosecutors have chosen the third alternative and charged two suspects with the same crime knowing that only one of the suspects is in fact guilty. Most significantly, in an attempt to convict both suspects, prosecutors have argued patently inconsistent factual theories of the crime at each suspect's trial. Consider the following three cases.

1. *Thompson v. Calderon*[1]

Prosecutors charged both Thomas Thompson and David Leitch with the murder of Ginger Fleischli.[2] At Thompson's trial, the prosecutor argued that Thompson alone killed Fleischli after raping her.[3] The prosecutor called two jailhouse informants who testified that Thompson confessed to them about murdering Fleischli in order to cover up the rape.[4] The prosecutor called the two

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1. 120 F.3d 1045 (9th Cir. 1997) (en banc), *rev'd*, 523 U.S. 538 (1998).
2. *See id.* at 1055.
3. *See id.* at 1056.
4. *See id.*

informants' testimony "dispositive" and "very, very damaging" to Thompson.[5] In his closing argument, the prosecutor asserted that Thompson was solely responsible for the crime and that there was no evidence placing Leitch at the murder scene at the time of the murder.[6] A jury convicted Thompson of first-degree murder and rape, and sentenced him to death.[7]

At Leitch's trial, however, the same prosecutor argued that Leitch, not Thompson, killed Fleischli. The prosecutor called a different set of witnesses for Leitch's trial,[8] most of whom had served as defense witnesses during Thompson's trial.[9] In fact, the prosecutor had objected to these witnesses' testimony at Thompson's trial.[10] Nevertheless, at Leitch's trial these witnesses testified that Leitch had a violent disposition and a motive for killing Fleischli—she was preventing him from reuniting with his former wife.[11] In his closing argument, the prosecutor argued that Leitch was the only one who had a motive to kill Fleischli.[12] He also argued that both Leitch and Thompson were inside Leitch's apartment when Fleischli was murdered.[13] The jury convicted Leitch of second-degree murder.[14]

2. *Nichols v. Collins*[15]

During the course of a robbery at Joseph's Delicatessen and Grocery in Houston, Texas, one of the perpetrators of the robbery shot and killed Claude Shaffer, Jr., an employee of Joseph's.[16] The evidence established that Shaffer died from a single gunshot wound, but the police were unable to determine which of the two perpetrators—Joseph Nichols or Willie Williams—fired the fatal shot.[17] Before Nichols's trial, Williams pled guilty to a charge of "intentionally caus[ing] the death of [Shaffer] by shooting him with a gun."[18] At the punishment phase of Williams's trial, the prosecutor asserted that "Willie Williams is the individual who shot and killed Claude Shaffer.... [T]here is only one bullet that could possibly have done it and that was Willie Williams'[s] [bullet]."[19] A jury

5. *Id.*
6. *See id.* at 1057.
7. *See* Calderon v. Thompson, 523 U.S. 538, 544 (1998).
8. *See Thompson*, 120 F.3d at 1056.
9. *See id.*
10. *See id.*
11. *See id.*
12. *See id.*
13. *See id.* at 1057.
14. *See* Calderon v. Thompson, 523 U.S. 538, 544 (1998).
15. 802 F. Supp. 66 (S.D. Tex. 1992), *rev'd sub nom.* Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995).
16. *See id.* at 68.
17. *See* Nichols v. Scott, 69 F.3d 1255, 1259-60 (5th Cir. 1995).
18. *Nichols*, 802 F. Supp. at 72 (internal quotations omitted).
19. *Id.* at 73 (alteration in original) (internal quotations omitted).

sentenced Williams to death.[20]

Subsequently, the prosecutor charged Nichols with "intentionally caus[ing] the death of Claude Shaffer, Jr., . . . by shooting [him] with a gun."[21] During closing arguments at Nichols's trial, the prosecutor argued that "Willie could not have shot [Shaffer]. . . . [Nichols] fired the fatal bullet and killed the man in cold blood and he should answer for that."[22] The jury convicted Nichols of capital murder and, after a separate punishment phase, sentenced him to death.[23]

3. *Jacobs v. Scott*[24]

Prosecutors charged both Jesse Jacobs and his sister, Bobbie Hogan, with the murder of Etta Urdiales.[25] Jacobs had confessed to Urdiales's abduction and murder after his arrest.[26] At his trial, however, Jacobs testified that his confession was false.[27] He claimed that although he abducted Urdiales, Hogan had shot and killed her.[28] The prosecutor argued that "[t]he simple fact of the matter is that Jesse Jacobs and Jesse Jacobs alone killed Etta Ann Urdiales."[29] The jury found Jacobs guilty of capital murder and sentenced him to death.[30]

During Hogan's trial, however, the same prosecutor claimed that he had been wrong in Jacobs's trial.[31] He now argued that Hogan, not Jacobs, shot Urdiales.[32] The prosecutor called Jacobs to testify that Hogan had killed Urdiales and then argued that "I changed my mind about what actually happened. And I'm convinced that Bobbie Hogan is the one who pulled the trigger. And I'm convinced that Jesse Jacobs is telling the truth when he says that Bobbie Hogan is the one that pulled the trigger."[33] The jury found Hogan guilty of involuntary manslaughter.[34] Hogan received a sentence of ten years in prison.

In each of these cases, one prosecutor argued patently inconsistent theories of the same crime in successive trials. This tactic enabled the

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20. *See id.* at 72.
21. *Id.* (emphasis omitted) (internal quotations omitted).
22. *Id.* at 73 (alteration in original) (internal quotations omitted).
23. *See id.* at 72.
24. 31 F.3d 1319 (5th Cir. 1994); *see also* Jacobs v. Scott, 513 U.S. 1067 (1995) (denying Jacob's application for a stay of sentence of death).
25. *See Jacobs*, 31 F.3d at 1320.
26. *See id.* at 1321.
27. *See id.*
28. *See id.*
29. *Id.* at 1322 n.6 (alteration in original) (internal quotations omitted).
30. *See id.* at 1322. It is unclear whether the jury convicted Jacobs as the triggerman or as a conspirator because under the Texas statute, the jury could convict him of murder for either role. *See id.*
31. *See id.*
32. *See id.* at 1322 n.6.
33. *Id.*
34. *See id.* at 1322.

prosecutor to convict two people of a single criminal act that the prosecutor acknowledged could only have been committed by one individual.

This Note addresses the constitutional and ethical issues raised by the prosecutors' conduct in the cases described above. This Note argues that a prosecutor violates both the Due Process Clause and her ethical obligations when she argues inconsistent factual theories of a crime in successive trials without taking affirmative steps to repudiate the factual theory used in the first trial. Part I examines the prosecutor's role in the American criminal justice system. It then explores the prosecutor's charging discretion and discusses the prosecutor's constitutional and ethical limitations during trial. Part II identifies and analyzes how courts have responded to a prosecutor's use of inconsistent factual theories in successive trials. Part III argues that prosecutors violate due process when they present patently inconsistent theories of a crime in successive trials. This part asserts that this prosecutorial tactic violates the Due Process Clause because it breaches the fundamental principle of our criminal justice system that it is far worse to convict an innocent person than to let a guilty person go free. This Note contends that the risk of convicting an innocent person is so substantial when a prosecutor argues inconsistent factual theories in successive trials that such conduct cannot withstand due process scrutiny. Finally, this Note concludes that prosecutors also violate their ethical duty to "seek justice" when arguing inconsistent theories of a crime in successive trials.

I. THE PROSECUTOR'S ROLE, RESPONSIBILITIES, AND LIMITATIONS

This part begins by examining the prosecutor's role in the American criminal justice system. It then analyzes the prosecutor's charging discretion and explores whether the probable cause standard provides sufficient protection to defendants. Finally, it discusses a prosecutor's constitutional limitations at trial.

A. *The Prosecutor's Heightened Duty in the Criminal Justice System*

Prosecutors play a unique role in the administration of criminal justice.[35] Serving as the state or federal government's representative in criminal litigation,[36] prosecutors exercise almost unlimited discretion in the performance of their duties.[37] As representatives of the state or federal government, prosecutors are held to higher

35. *See* John Jay Douglass, Ethical Issues in Prosecution 1 (1988); Carol A. Corrigan, *On Prosecutorial Ethics*, 13 Hastings Const. L.Q. 537, 537 (1986).

36. *See* Joan E. Jacoby, The American Prosecutor: A Search for Identity at xv (1980).

37. *See* Douglass, *supra* note 35, at 1; *see also infra* part I.B.

standards than other trial lawyers.[38] Unlike lawyers representing individual clients, who are obligated to represent their clients zealously within the bounds of the law,[39] prosecutors are required to "seek justice."[40] This duty includes ensuring that a defendant's trial is fair and that the proceedings appear fair to the public.[41] The Supreme Court highlighted prosecutors' unique duty to ensure the fairness of the outcome of a criminal proceeding in *Berger v. United States*.[42] The *Berger* Court found that:

> [The prosecutor] 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.[43]

In order to carry out their distinct duty to "seek justice," prosecutors possess a dual role as both an advocate and a "minister of justice."[44] While this dual role is nowhere clearly defined, the ABA Model Rules of Professional Conduct assert that the dual role "carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[45] Trying to balance the quasi-judicial role of protecting the innocent and the advocate's role of pursuing convictions can be a difficult task.[46] In fact, one former prosecutor candidly described the attempt to satisfy this dual role as "ongoing schizophrenia."[47]

Faced with these seemingly conflicting roles, prosecutors must determine which role takes priority in a given situation.[48] For example, when prosecutors evaluate cases for prosecution, they

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38. *See* Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 Am. J. Crim. L. 323, 324 (1989) [hereinafter Green, *Brother's Keeper*].

39. *See* Model Code of Professional Responsibility EC 7-1 (1980).

40. Model Code of Professional Responsibility EC 7-13; *see also* Standards Relating to the Admin. of Criminal Justice Standard 3-1.2(c) (1992).

41. *See* Patterson v. Illinois, 487 U.S. 285, 301 (1988) (Stevens, J., dissenting); National District Attorneys Association, National Prosecution Standards, Standard 25.1 cmt. (1977) ("As a public prosecutor constantly in the public eye, it is imperative that the prosecutor . . . avoid even the appearance of professional impropriety."); *see also* Green, *Brother's Keeper*, *supra* note 38, at 324-25.

42. 295 U.S. 78 (1935).

43. *Id.* at 88.

44. Model Rules of Professional Conduct Rule 3.8 cmt. (1997); *see also* Standards Relating to the Admin. of Criminal Justice Standard 3-1.2(b) (stating that the prosecutor must exercise sound discretion as an administrator of justice); *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958) (addressing prosecutors' responsibilities within their dual role).

45. Model Rules of Professional Conduct Rule 3.8 cmt.

46. *See* Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. Rev. 669, 697; *see also* Douglass, *supra* note 35, at 24-25.

47. Melilli, *supra* note 46, at 698.

48. *See id.* at 697-98.

exercise their quasi-judicial role as "ministers of justice."[49] At trial, however, while not losing sight of their ongoing obligation to administer justice, prosecutors assume the role of zealous advocates in pursuit of convictions.[50] The Supreme Court confirmed the need for prosecutors to act as zealous advocates in *Marshall v. Jerrico, Inc.*[51] The *Marshall* Court held that prosecutors "need not be entirely neutral and detached."[52] Rather, the Court noted that "[i]n an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law."[53]

Nowhere is the unique role of prosecutors more apparent than at trial. Like their dual role and their "seek justice" admonition, prosecutors' trial obligations differ significantly from those of other lawyers.[54] First, prosecutors must disclose to the defense any exculpatory evidence within their possession that is material either to the defendant's guilt or punishment.[55] Second, prosecutors must disclose to the defense any material evidence within their possession that may be used to impeach the testimony of prosecution witnesses.[56] Finally, prosecutors may not intentionally avoid the pursuit of evidence merely because it will damage their case.[57]

These requirements illustrate the seriousness with which American courts regard criminal convictions. Indeed, American criminal procedure provides defendants with substantial protections to ensure that innocent people are not convicted. For example, in *In re Winship*,[58] the Supreme Court held that a criminal defendant can only be convicted when every fact necessary to constitute the crime for which he is charged is proven beyond a reasonable doubt.[59] The Court found that this high standard was "indispensable" in order to give substance to the presumption of innocence and to "safeguard men from dubious and unjust convictions."[60] Furthermore, as Justice Harlan noted in his concurring opinion in *Winship*, the beyond a reasonable doubt standard is grounded "on a fundamental value judgment of our society that it is far worse to convict an innocent man

49. *See* Jacoby, *supra* note 36, at xxii.
50. *See id.*
51. 446 U.S. 238 (1980).
52. *Id.* at 248 (internal quotations omitted) (quoting Ward v. Village of Monroeville, 409 U.S. 57, 62 (1972)).
53. *Id.*
54. *See* Model Code of Professional Responsibility EC 7-13 (1980) ("With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice . . . .").
55. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).
56. *See* Giglio v. United States, 405 U.S. 150, 154 (1972).
57. *See* Model Code of Professional Responsibility EC 7-13 (1980).
58. 397 U.S. 358 (1970).
59. *See id.* at 364 (finding the beyond a reasonable doubt standard necessary to ensure that innocent people are not condemned).
60. *Id.* at 362-64.

than to let a guilty man go free."[61]

The protections accorded criminal defendants account for the vastly different roles that the prosecutor and the defense attorney play at trial. Justice White explained these distinct roles in his concurring and dissenting opinion in *United States v. Wade*:[62]

> Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty.[63]

These distinct roles also exist because prosecutors represent the government, and as such, have no identifiable client.[64] Instead, prosecutors represent the interests of society as a whole, including the interests of the defendant as a member of that society.[65] In practice, however, the prosecutor makes decisions on behalf of the government and, in effect, defines the public interest in specific cases.[66]

This ability to define the public interest exemplifies the tremendous power that prosecutors possess. Former Attorney General and Supreme Court Justice Robert H. Jackson believed that a prosecutor has "more control over life, liberty, and reputation than any other person in America."[67] Indeed, prosecutors maintain considerable influence, if not total control, over investigations, arrests, indictments, and sentences.[68] In a recent article, Professor Gerard E. Lynch

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61. *Id.* at 372.

62. 388 U.S. 218 (1967).

63. *Id.* at 256-57 (White, J., dissenting in part and concurring in part) (footnote omitted); *see also* Alan M. Dershowitz, *Why Do Honest Prosecutors Engage in Misconduct?, Foreword* to Joseph F. Lawless, Jr., Prosecutorial Misconduct at ix, xvi (1985) ("In brief, the prosecutor is supposed to help the defendant—in a variety of ways—to secure an acquittal, especially by providing him with useful evidence; whereas the defense attorney rarely, if ever, is supposed to help the prosecutor secure a conviction.").

64. *See* Melilli, *supra* note 46, at 698.

65. *See id.*; *see also* Corrigan, *supra* note 35, at 538-39.

66. *See* Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 Fordham Urb. L.J. 607, 633 (1999) [hereinafter Green, *Seek Justice*]; Melilli, *supra* note 46, at 698.

67. Robert H. Jackson, The Federal Prosecutor (Address Delivered at the Second Annual Conference of United States Attorneys, Apr. 1, 1940), *reprinted in* 31 J. Am. Inst. L. & Criminology 3, 3 (1940).

68. *See id.*; *see also* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 Fordham L. Rev. 2117, 2124-29 (1998) (noting that prosecutors possess the unilateral authority to decide what to investigate, as well as the de facto authority to

highlights prosecutors' increasing power.[69] Professor Lynch argues that prosecutors have become de facto administrators who, because of the prevalence of plea bargaining within our criminal justice system, have the unilateral power to determine "whether an accused will be subject to social sanction, and if so, how much punishment will be imposed."[70] The Supreme Court has also acknowledged prosecutors' tremendous power and the need for prosecutors to exercise this power judiciously. In *Young v. United States*,[71] the Court found that:

> [b]etween the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice.[72]

Thus, armed with immense power and responsibility, prosecutors attempt to "seek justice" while at the same time advocating on behalf of the sovereign that they represent.

B. *The Prosecutor's Charging Discretion*

The charging decision is the heart of a prosecutor's power.[73] Prosecutors have virtually unlimited discretion to determine which cases and defendants to prosecute, as well as what charges to bring.[74] In addition, prosecutors retain the right to revisit the initial charging decision at a later date.[75] This section examines the prosecutor's charging discretion. In addition, this section explores the debate surrounding the level of certainty of a suspect's guilt that a prosecutor must have in order to charge the suspect with a crime.

1. The Prosecutor's Threshold Level of Certainty of a Suspect's Guilt

The cases described in the Introduction to this Note[76] raise questions regarding the threshold level of certainty in a suspect's guilt required for a prosecutor to charge that suspect with a crime. Furthermore, the cases raise the question of a prosecutor's alternatives when she knows that one of two people committed a

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determine the suspect's guilt or innocence and, when appropriate, sentence).

69. *See* Lynch, *supra* note 68, at 2124-29.

70. *Id.* at 2135.

71. 481 U.S. 787 (1987).

72. *Id.* at 814.

73. *See* David C. James, *The Prosecutor's Discretionary Screening and Charging Authority*, Prosecutor, Mar.-Apr. 1995, at 22, 22.

74. *See* Melilli, *supra* note 46, at 672.

75. *See id.* at 673.

76. *See supra* notes 1-34 and accompanying text.

criminal act, but is unsure which suspect to charge. Although due process[77] requires that a conviction be based on proof beyond a reasonable doubt,[78] prosecutors have no comparable requirement of certainty at the charging stage.[79] Instead, the Model Rules of Professional Conduct, the Model Code of Professional Responsibility, and the ABA Standards Relating to the Administration of Criminal Justice agree that a prosecutor need only have "probable cause"[80] to institute charges against a suspect.[81] It is important to note that these ethical codes do not purport to encompass a lawyer's full obligation, but rather establish a minimum level of conduct that lawyers cannot transgress;[82] nevertheless, these authorities uniformly conclude that probable cause is the minimum standard required to charge a suspect with a crime.

The Supreme Court has also confirmed that prosecutors need only satisfy the "probable cause" standard. As the Court stated in *Wayte v. United States*,[83] "[s]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[84] The only constitutional limitation on prosecutors is that they cannot institute charges based on an unjustifiable standard such as race, religion, or other arbitrary characteristic.[85] Thus, while the ABA ethical codes and the Constitution find that probable cause is a sufficient standard to charge a defendant, the question remains whether this standard satisfies the prosecutor's "seek justice" mandate.

2. Is "Probable Cause" Sufficient?

The probable cause standard has been the center of much debate

77. The Supreme Court found that procedural due process expresses "the requirement of 'fundamental fairness,' a requirement whose meaning can be as opaque as its importance is lofty." Lassiter v. Department of Soc. Servs., 452 U.S. 18, 24 (1981). For a more detailed discussion of the Due Process Clause, see *infra* part I.C.1.

78. *See* Jackson v. Virginia, 443 U.S. 307, 316 (1979); *In re* Winship, 397 U.S. 358, 364 (1970).

79. *See* Melilli, *supra* note 46, at 682.

80. "[P]robable cause is a flexible, common-sense standard.... [It] does not demand any showing that such a belief be correct or more likely true than false." Texas v. Brown, 460 U.S. 730, 742 (1983).

81. *See* Model Code of Professional Responsibility DR 7-103(A) (1980); Model Rules of Professional Conduct Rule 3.8(a) (1997); Standards Relating to the Admin. of Criminal Justice Standard 3-3.9(a) (1992).

82. *See, e.g.*, Model Code of Professional Responsibility Preliminary Statement ("The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.").

83. 470 U.S. 598 (1985).

84. *Id.* at 607 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

85. *See id.* at 608.

among scholars and prosecutors. Some commentators claim that the minimal requirement of probable cause does not provide a sufficient safeguard to protect suspects from the potential expense, anxiety, and embarrassment of criminal proceedings.[86] Other commentators feel that this standard accurately reflects the prosecutor's role in the criminal justice process.[87]

There are two opposing views concerning a prosecutor's role in the charging decision. The first view argues that a prosecutor's role is merely that of a conduit, one who presents the evidence that the police have obtained to the grand jury and, if the grand jury indicts the suspect, to the trial jury.[88] The second view argues that a prosecutor must be personally satisfied of a suspect's guilt before instituting charges against that suspect.[89] This section will discuss and analyze both views in depth.

a. *"Leave the Decision to the Jury"*

Some prosecutors and commentators argue that a prosecutor is obligated to leave the question of a suspect's guilt or innocence to the jury.[90] They insist that a prosecutor's role is that of an advocate and, therefore, the prosecutor should present the strongest possible case against the defendant without conducting an independent assessment of the suspect's guilt.[91] This view holds that the prosecutor is a conduit who should first present the evidence to the grand jury[92] and let the grand jury decide whether to bring criminal charges against a suspect.[93] If the grand jury decides to indict the suspect, then the prosecutor should present the evidence and let the trial jury decide the suspect's guilt.[94] According to this view, a prosecutor's decision

86. *See, e.g.*, James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521, 1525 & n.13 (1981) (arguing that prosecutors should be held more accountable for their decisions).

87. *See infra* part I.B.2.a.

88. *See infra* part I.B.2.a.

89. *See infra* part I.B.2.b.

90. *See* Thompson v. Calderon, 120 F.3d 1045, 1075 (9th Cir. 1997) (en banc) (Kleinfeld, J., dissenting) ("It is up to the jury, not the prosecutor, to decide what happened amidst a lot of lies."), *rev'd*, 523 U.S. 538 (1998); *see also* Green, *Seek Justice*, *supra* note 66, at 640 (criticizing this view of a prosecutor's role); Melilli, *supra* note 46, at 692 (same); H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 Mich. L. Rev. 1145, 1155-59 (1973) ("[W]hen [a prosecutor] is honestly unable to judge where the truth of the matter lies, I see no flaw in the conduct of the prosecutor who fairly lays the matter before the judge or jury.").

91. *See* Green, *Seek Justice*, *supra* note 66, at 640 (criticizing this view); Melilli, *supra* note 46, at 693 (same).

92. Grand jury indictments are only required in approximately one-half of the states, and in those states the requirement is generally limited to felonies. *See* Melilli, *supra* note 46, at 677.

93. *See* Green, *Seek Justice*, *supra* note 66, at 640.

94. *See id.* (criticizing this view); *see also* Melilli, *supra* note 46, at 692-93 (same).

not to institute charges against a suspect because of doubts about the suspect's guilt is an improper usurpation of the jury's role in the criminal justice process.[95]

This view of the prosecutor's charging role is misguided. First, this view discounts the prosecutor's influence over the grand jury.[96] Critics argue that grand juries serve merely as "rubber stamps" for prosecutors.[97] These critics claim that because grand jury proceedings are run by the prosecutor *ex parte*, the prosecutor exercises considerable control over grand jury decisions.[98] As one critic points out, "[a]nybody familiar with the criminal justice system knows that the grand jury does not act on its own and that the prosecutor controls grand jury action."[99] In addition, the grand jury standard is merely that of probable cause, which offers little, if any, screening of the prosecutor's decision to institute charges against a suspect in the first place.[100]

Second, this view is premised on an unfounded faith in the adversary system to determine truth.[101] This view assumes that the prosecutor should defer to the jury because the jury is in a better position to determine the defendant's guilt.[102] This view also assumes that juries will make the correct decision about the defendant's guilt.[103] Logic and experience suggest that both of these assumptions are erroneous. Experience suggests that juries and judges are sometimes wrong in their factual conclusions.[104] As one former prosecutor observed, "[f]alse testimony is sometimes believed, and accurate testimony is sometimes rejected."[105] Furthermore, despite the evidence, verdicts are sometimes influenced by the skills and personalities of the advocates.[106] In addition, juries determine a defendant's guilt based solely on the admissible evidence, whereas prosecutors have more information—including the statements of police, all the evidence collected in the investigation, and the suspect's criminal history—upon which to make their determination of the

95. *See* Melilli, *supra* note 46, at 692-94.

96. *See* Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 Fordham Urb. L.J. 513, 520 (1993); Melilli, *supra* note 46, at 677.

97. Melilli, *supra* note 46, at 677.

98. *See id.*

99. Gershman, *supra* note 96, at 520 (footnote omitted).

100. *See* Melilli, *supra* note 46, at 677.

101. *See id.* at 693.

102. *See id.*

103. *See id.*

104. *See In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (noting that the triers of fact will sometimes be wrong in their factual conclusions); *see also* Herrera v. Collins, 506 U.S. 390, 398-99 (1993) (same); Gershman, *supra* note 96, at 521 (same).

105. Melilli, *supra* note 46, at 694 (footnote omitted).

106. *See id.*

suspect's guilt.[107]

Third, charging suspects solely on probable cause without performing an independent evaluation of the suspect's guilt creates a substantial risk of injustice.[108] Charging on such a minimal standard creates too great a risk that an innocent person may be charged and potentially convicted of a crime.[109] As one commentator states, "To the extent that juries are politically motivated, succumb to inflammatory appeals, or rely on ambiguous or uncertain proof, they can convict innocent persons."[110] This risk should be unacceptable to a prosecutor, for one of a prosecutor's paramount duties is protecting innocent people from unjust convictions.[111] Additionally, if an innocent person is charged with a crime simply because the minimal probable cause standard was met, prosecutors run the risk that the true perpetrator of the crime will escape punishment.[112] These factors substantially undercut the credibility of the view that a prosecutor is merely a conduit who should present the best evidence available against a suspect. This view also ignores the fact that prosecutors have an independent responsibility to review the evidence against a suspect before deciding to bring charges.[113] When prosecutors do not perform an independent review of the evidence and instead leave the suspect's guilt entirely to the jury, they breach their professional responsibility as prosecutors.[114]

b. *Personal Certainty*

A second view of the prosecutor's role in the charging decision is that a prosecutor must be personally convinced of a suspect's guilt before bringing charges.[115] This view includes a wide spectrum of definitions of personal satisfaction of a suspect's guilt.[116] This view is premised on the belief that it is unacceptable for the prosecutor to ask jurors to find a defendant guilty beyond a reasonable doubt if the

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107. *See* Uviller, *supra* note 90, at 1156-57.
108. *See* Corrigan, *supra* note 35, at 540.
109. *See id.*
110. Gershman, *supra* note 96, at 521.
111. *See* Green, *Seek Justice*, *supra* note 66, at 640; Melilli, *supra* note 46, at 699.
112. *See* Corrigan, *supra* note 35, at 540.
113. *See id.* at 539; Gershman, *supra* note 96, at 522; Green, *Seek Justice*, *supra* note 66, at 640-41; James, *supra* note 73, at 27; Melilli, *supra* note 46, at 701 n.263.
114. *See* James, *supra* note 73, at 27 (arguing that prosecutors must not abdicate the charging discretion to others).
115. *See* Corrigan, *supra* note 35, at 539; Gershman, *supra* note 96, at 522; James, *supra* note 73, at 27; Melilli, *supra* note 46, at 701.
116. *Compare* Corrigan, *supra* note 35, at 539 (requiring that prosecutors only charge when they are "personally satisfied that the defendant is guilty"), *with* Gershman, *supra* note 96, at 522 (arguing that prosecutors must be "morally certain" of the defendant's guilt before instituting charges), *and* Melilli, *supra* note 46, at 701 (asserting that a prosecutor should not pursue cases unless "personally satisfied beyond a reasonable doubt of the defendant's guilt").

prosecutor herself has doubts about the defendant's guilt.[117] In short, this view argues that if "the 'beyond a reasonable doubt' standard is a necessary cushion against erroneous convictions by the trier of fact, then how can prosecutors, in pursuit of their obligation to 'seek justice,' impose any lower standard upon themselves?"[118]

Professor Bennett L. Gershman champions this view in a recent article.[119] Professor Gershman insists that prosecutors should engage in a moral struggle over their charging decisions rather than simply instituting charges without deliberation.[120] This moral struggle, according to Professor Gershman, should involve rigorous intellectual and emotional scrutiny.[121] Professor Gershman believes that prosecutors should bring charges only if this scrutiny "yields a conclusion that is so personally compelling that the prosecutor would not hesitate to act on that decision in vital matters affecting the prosecutor's own life."[122] He posits that such a high standard is necessary to fulfill the prosecutor's role as the "gatekeeper of justice,"[123] who has the responsibility to prevent injustice before the system has an opportunity to miscarry.[124] In short, Professor Gershman acknowledges that his "moral certainty" standard requires the same high level of confidence as the beyond a reasonable doubt standard.[125]

A prosecutor's decision to institute charges only when personally satisfied of the suspect's guilt complies with one of the underlying principles of the American criminal justice system: protecting innocent people from conviction.[126] This standard provides suspects with substantial protection against being charged with a crime that they have not committed, while at the same time allowing prosecutors to charge suspects whom they feel are truly guilty.[127] This view also accounts for the fact that the prosecutor will have more information available to her than will the jury in making an informed decision regarding the suspect's guilt. Moreover, forcing prosecutors to meet their own personal standard of guilt will alleviate the prosecutor's tendency to approach charging as a mere application of mechanical rules.[128] This intense scrutiny by the prosecutor will also lessen the

117. *See* Melilli, *supra* note 46, at 702; *see also* Corrigan, *supra* note 35, at 541.
118. Melilli, *supra* note 46, at 700.
119. *See* Gershman, *supra* note 96, *passim*.
120. *See id.* at 522.
121. *See id.* at 522 n.18.
122. *Id.*
123. *Id.* at 521.
124. *See id.* at 521-23.
125. *See id.* at 522 n.18.
126. *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (noting that there exists "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free").
127. *See* Gershman, *supra* note 96, at 522.
128. *See* James, *supra* note 73, at 22.

prosecutor's tendency to develop "conviction psychology," a syndrome characterized by excessive emphasis on obtaining convictions rather than on seeking justice.[129] Prosecutors can avoid this tendency by examining the defendant's guilt from a juror's perspective rather than from the perspective of a law enforcement official.

One implication of this view is that prosecutors would spend more time at the initial stage of the investigation to satisfy themselves of the suspect's guilt before bringing charges. Meeting such a high standard early in an investigation may prove quite taxing on prosecutors and may necessitate a restructuring of the time allocation that prosecutors' offices place on the charging decision. This time spent at the front end of investigations should prove more efficient in the long run, however, because prosecutors would not waste time with cases that normally would be dismissed at a later stage because of doubts about the suspect's guilt or lack of evidence. Most significantly, this view provides individual citizens with far greater protection from being charged with a crime that they have not committed.

Thus, there are conflicting views about what degree of certainty a prosecutor should have about a suspect's guilt before bringing criminal charges against the suspect. While these views do not reach a consensus on a new charging standard, they do suggest that the constitutional and ethical standard of probable cause should be reexamined.

C. *The Prosecutor's Ethical and Constitutional Limitations During Trial*

The cases described in the Introduction[130] raise serious questions concerning prosecutors' trial limitations. This section will first examine the due process restrictions on a prosecutor before and during trial. It will then explore the level of certainty that a prosecutor must have in order to present factual arguments at trial.

1. The Prosecutor's Due Process Limitations

The Due Process Clause[131] guarantees a defendant the right to a trial that comports with "fundamental fairness."[132] Former Supreme

129. Melilli, *supra* note 46, at 689-90 (noting that even a conscientious prosecutor can succumb to "conviction psychology" because of the high percentage of guilty pleas and high conviction rate at trial).

130. *See supra* notes 1-34 and accompanying text.

131. The Fifth and Fourteenth Amendments to the United States Constitution provide that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V; *accord id.* amend. XIV, § 1.

132. Lassiter v. Department of Soc. Servs., 452 U.S. 18, 24-25 (1981); *accord In re* Murchison, 349 U.S. 133, 136 (1955); Thompson v. Calderon, 120 F.3d 1045, 1058 (9th Cir. 1997) (en banc), *rev'd*, 523 U.S. 538 (1998).

Court Justice Douglas highlighted the importance of this right in *Donnelly v. DeChristoforo*,[133] where he asserted that "[t]hose who have experienced the full thrust of the power of government when leveled against them know that the only protection the citizen has is in the requirement for a fair trial."[134] However, the Supreme Court has found that determining what the due process requirement of "fundamental fairness" consists of in a particular situation is an "uncertain enterprise."[135] The Supreme Court has instructed that because due process cannot be precisely defined, courts must discover the meaning of "fundamental fairness" by first considering any relevant precedents and then assessing the interests at stake.[136]

In *Smith v. Phillips*,[137] a due process case involving prosecutorial misconduct, the Court held that the crux of the due process analysis is the overall fairness of the trial, rather than the culpability of the prosecutor.[138] The Court also found that the goal of due process is "not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused."[139] The Court has also stressed that judges are not free to impose their own personal notions of fairness in a due process analysis, but instead should "determine only whether the action complained of . . . violates those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency."[140]

Although due process itself remains difficult to define, the Supreme Court has identified certain principles that shed light on the constitutionality of prosecutors' conduct during trial. For example, in *Mooney v. Holohan*,[141] the Court established that a prosecutor's knowing use of false testimony violated the Due Process Clause.[142] In *Mooney*, the Court found that a prosecutor's "deliberate deception" of the Court by presenting perjured testimony was "inconsistent with the rudimentary demands of justice."[143] The Supreme Court expanded due process protection in *Alcorta v. Texas*.[144] In *Alcorta*, the prosecutor permitted a witness testifying for the State to present false testimony regarding an illicit relationship that the witness had

133. 416 U.S. 637 (1974).
134. *Id.* at 651 (Douglas, J., dissenting).
135. *Lassiter*, 452 U.S. at 24.
136. *See id.* at 24-25.
137. 455 U.S. 209 (1982).
138. *See id.* at 219.
139. *Id.* (internal quotations omitted).
140. Dowling v. United States, 493 U.S. 342, 353 (1990) (internal quotations omitted) (citations omitted).
141. 294 U.S. 103 (1935).
142. *See id.* at 112.
143. *Id.*
144. 355 U.S. 28 (1957).

with the victim.[145] This false testimony was highly prejudicial to the defendant, as it negated the defendant's claim that he killed the victim—his wife—in a fit of passion after happening upon the victim kissing the witness.[146] The Court found that by allowing the false evidence, although unsolicited, to go uncorrected, the prosecutor had violated the defendant's due process right to a fair trial.[147]

The Supreme Court further extended due process protection against prosecutorial misconduct in *Napue v. Illinois*.[148] There, the prosecutor allowed the State's primary witness to lie about the fact that the prosecutor had promised the witness a reduced sentence for his testimony.[149] The Court found that a prosecutor's duty to correct evidence known to be false applies even if the evidence goes only to the witness's credibility.[150] The Court stated that "[a] lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the [prosecutor] has the responsibility and duty to correct what he knows to be false and elicit the truth."[151]

These cases recognize that prosecutors have a special duty not to deceive the court.[152] Moreover, these cases contain an underlying premise that prosecutors have a personal responsibility to ensure that false evidence is not introduced at trial. This premise is consistent with the Supreme Court's decision in *Brady v. Maryland*.[153] In *Brady*, the court found that a prosecutor's failure to turn over evidence material to the defendant's guilt or punishment violated the defendant's due process rights.[154] Read together, *Brady* and the false-evidence cases suggest that courts have little tolerance for prosecutorial deception, whether intentional or not, that affects the trier of fact's determination of the defendant's guilt. In short, due process imposes on prosecutors an obligation to ensure that the evidence introduced at trial is, in fact, truthful. When the prosecutor fails to meet this burden, whether intentionally or not, courts have found that the defendant's right to a fair trial has been violated.[155]

145. *See id.* at 29-30.
146. *See id.* at 28-31.
147. *See id.* at 31.
148. 360 U.S. 264 (1959).
149. *See id.* at 271.
150. *See id.* at 269.
151. *Id.* at 269-70 (internal quotations omitted).
152. *See* United States v. Universita, 298 F.2d 365, 367 (2d Cir. 1962).
153. 373 U.S. 83 (1963).
154. *See id.* at 87.
155. *See supra* notes 141-51 and accompanying text; *see also* Giglio v. United States, 405 U.S. 150, 153-55 (1972) (holding that the prosecutor's failure to disclose vital evidence to the defense, whether intentional or not, entitled defendant to a new trial); Miller v. Pate, 386 U.S. 1, 7 (1967) (reaffirming the well-established principle that the Due Process Clause cannot tolerate a conviction obtained by false evidence).

2. Certainty of Facts

Although it is clear that prosecutors may not present evidence they *know* to be false, it is unclear whether prosecutors must personally believe that the evidence they introduce at trial is in fact true. Moreover, the threshold level of certainty that prosecutors must possess in order to introduce evidence at trial also remains undefined. Realistically, prosecutors can never know with absolute certainty what actually occurred during a crime, and therefore, whether the evidence that they introduce at trial is in fact truthful.[156] This reality convinces some commentators that prosecutors are entitled to remain agnostic about the veracity of the evidence presented at trial, while presenting the most inculpatory evidence against the defendant.[157]

The ABA ethical codes also suggest that a prosecutor need not be personally convinced of the truth of the evidence in order to introduce that evidence at trial.[158] While the codes prohibit prosecutors from presenting evidence that they *know* is false,[159] they nowhere require prosecutors to believe the factual arguments that they make at trial. Rather, other areas of the ethical codes suggest that the prosecutor's personal opinion is irrelevant.[160] For example, the codes clearly restrict prosecutors from expressing their personal opinions about the truth or falsity of the testimony, the guilt or innocence of the defendant, or the credibility of a witness during trial.[161] These

156. *See* Thompson v. Calderon, 120 F.3d 1045, 1071 (9th Cir. 1997) (en banc) (Kozinski, J., dissenting), *rev'd*, 523 U.S. 538 (1998).

157. *See, e.g., id.* ("I cannot see that [due process] encompasses the right to have a prosecutor who is convinced of the defendant's guilt.").

158. *See* Model Code of Professional Responsibility DR 7-102 (1980); Model Rules of Professional Conduct Rule 3.3(a)(4) (1997); Standards Relating to the Admin. of Criminal Justice Standard 3-5.6(a) (1992).

159. *See* Model Code of Professional Responsibility DR 7-102(A)(4) ("In his representation of a client, a lawyer shall not: [k]nowingly use perjured testimony or false evidence."); Model Rules of Professional Conduct Rule 3.3(a)(4) ("A lawyer shall not knowingly: offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."); Standards Relating to the Admin. of Criminal Justice Standard 3-5.6(a) ("A prosecutor should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to seek withdrawal thereof upon discovery of its falsity.").

160. *See* Model Code of Professional Responsibility DR 7-106(C)(4); Model Rules of Professional Conduct Rule 3.4(e); Standards Relating to the Admin. of Criminal Justice Standard 3-5.8(b).

161. *See* Model Code of Professional Responsibility DR 7-106(C)(4) ("In appearing in his professional capacity before a tribunal, a lawyer shall not: [a]ssert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused...."); Model Rules of Professional Conduct Rule 3.4(e) ("A lawyer shall not... state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused...."); Standards Relating to the Admin. of Criminal Justice Standard 3-5.8(b) ("The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any

prohibitions suggest that a prosecutor does not violate the ethical codes when she remains agnostic about the truth or falsity of the evidence and simply makes the most persuasive factual arguments from the evidence to prove a defendant's guilt.

Therefore, prosecutors possess virtually unfettered discretion to institute charges against a suspect once they meet the mere "probable cause" standard. The next part will discuss the ways in which courts have dealt with a prosecutor's use of inconsistent factual theories of a crime in successive trials.

II. JUDICIAL RESPONSES TO A PROSECUTOR'S USE OF INCONSISTENT FACTUAL THEORIES

The Supreme Court has not directly addressed a prosecutor's use of inconsistent factual theories of a case in successive trials. However, lower courts and an individual justice of the Supreme Court have addressed the constitutionality of this prosecutorial conduct when reviewing defendants' habeas corpus petitions;[162] consequently, these courts have focused primarily on the due process grounds necessary to overturn a state criminal conviction.[163] The lower courts have responded quite differently to this issue, disagreeing on both how to analyze the prosecutor's conduct and whether the conduct itself violates the Constitution. Some courts and individual judges have found that a prosecutor's use of inconsistent factual theories of a case in successive trials violates a defendant's due process rights,[164] while others have found it to be constitutionally permissible.[165] This part

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testimony or evidence or the guilt of the defendant.").

162. The writ of habeas corpus, recognized but not defined by the Constitution, provides for federal court review of both state and federal prisoners' claims that they are being held in violation of the Constitution. *See* U.S. Const. art. I, § 9, cl. 2 (stating that "the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"); *see also* 28 U.S.C. § 2254(a) (1994) (state prisoners); *id.* § 2255 (federal prisoners). When reviewing state court decisions, the Supreme Court has determined that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions," but rather to determine "whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Before receiving federal habeas review, however, state prisoners must satisfy a series of prerequisites, including the exhaustion of all state remedies and overcoming any procedural bars to review. *See* 28 U.S.C. § 2254(b)-(c).

163. *See infra* part II.A.

164. *See* Thompson v. Calderon, 120 F.3d 1045, 1057-59 (9th Cir. 1997) (en banc), *rev'd*, 523 U.S. 538 (1998); Drake v. Kemp, 762 F.2d 1449, 1470 (11th Cir. 1985) (Clark, J., concurring); Nichols v. Collins, 802 F. Supp. 66, 72-75 (S.D. Tex. 1992), *rev'd sub nom.* Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995). Justice Stevens also suggested that the prosecutor violated due process by presenting inconsistent factual theories of a crime in *Jacobs v. Scott*. *See* Jacobs v. Scott, 513 U.S. 1067, 1068 (1995) (Stevens, J., dissenting).

165. *See Nichols*, 69 F.3d at 1282; Jacobs v. Scott, 31 F.3d 1319, 1326 (5th Cir. 1994); State v. Roach, 680 A.2d 634, 640 (N.J. 1996).

will identify and critique the different approaches that courts have used when addressing a prosecutor's use of inconsistent theories of the same crime in successive trials.

A. *Violation of the Due Process Prohibition Against Presenting False Evidence*

In approaching a prosecutor's use of inconsistent theories of a crime in successive trials, courts have predominantly focused on the prosecutor's duty to avoid knowingly presenting false evidence at trial. One circuit court of appeals, one district court, one Supreme Court Justice, and one appellate court judge have found that a prosecutor's use of inconsistent factual theories in successive trials violates the Due Process Clause because the prosecutor knowingly presented false evidence during trial.[166] In *Thompson v. Calderon*,[167] the Ninth Circuit, sitting en banc, granted Thompson's writ of habeas corpus due to ineffective assistance of counsel during trial.[168] Furthermore, a plurality of the court found that the prosecutor's use of fundamentally inconsistent theories during the trials of Thompson and Leitch violated due process.[169] The court found that "it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime."[170] In reaching its conclusion, the court relied both on the prosecutor's duty to administer justice and the prohibition against knowingly presenting false evidence at trial.[171] Even judges who did not join the plurality on this issue found the prosecutor's conduct "unseemly"[172] and a clear violation of due process.[173]

The *Thompson* court quoted extensively from Judge Clark's concurring opinion in *Drake v. Kemp*,[174] an Eleventh Circuit case with facts remarkably similar to *Thompson*. Quoting Judge Clark, the Ninth Circuit declared that:

> [The] flip flopping of theories of the offense was inherently

166. *See Thompson*, 120 F.3d at 1057-59; *Drake*, 762 F.2d at 1470 (Clark, J., concurring); *Nichols*, 802 F. Supp. at 72-75.

167. 120 F.3d 1045 (9th Cir. 1997) (en banc), *rev'd*, 523 U.S. 538 (1998); *see supra* notes 1-14 and accompanying text.

168. *See Thompson*, 120 F.3d at 1051-55.

169. *See id.* at 1055-59. In fact, a majority of the court found that a prosecutor's use of inconsistent theories in successive trials violated due process. *See id.* at 1063. However, Judge Tashima, joined by Judge Thomas, believed that the district court should conduct an evidentiary hearing to determine whether the defendant was prejudiced by the due process violation. *See id.* at 1064 (Tashima, J., concurring).

170. *Id.* at 1058.

171. *See id.*

172. *Id.* at 1070-72 (Kozinski, J., dissenting).

173. *See id.* at 1063-64 (Tashima, J., concurring).

174. 762 F.2d 1449 (11th Cir. 1985).

> unfair. Under the peculiar facts of this case the actions by the prosecutor violate the fundamental fairness essential to the very concept of justice.
>
> The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed search for truth.[175]

The Supreme Court, however, reversed the Ninth Circuit's decision in *Thompson* because of an unrelated procedural error.[176]

Likewise, in *Nichols v. Collins*,[177] a Southern District of Texas judge found that the prosecutor knowingly presented false evidence at Nichols's trial.[178] Finding that Williams's trial had previously established that Williams fired the fatal shot, the court held that the evidence presented in Nichols's trial that Nichols had fired the fatal shot was "necessarily false."[179] The Fifth Circuit, however, reversed the district court's decision.[180]

Supreme Court Justice John Paul Stevens also highlighted the prosecutor's duty to avoid presenting false evidence in his dissent to the denial of a stay of execution in *Jacobs v. Scott*.[181] Justice Stevens found that a prosecutor's inconsistent positions in successive trials "surely raises a serious question of prosecutorial misconduct."[182] Justice Stevens called Texas's insistence on proceeding with Jacobs's execution "deeply troubling" in light of the prosecutor's repudiation of the factual theory used to convict Jacobs.[183] As Justice Stevens indicated, "[i]f the prosecutor's statements at the Hogan trial were correct, then Jacobs is innocent of capital murder."[184] Justice Stevens concluded that it would be fundamentally unfair to execute a person on the basis of a factual determination that the state has formally disavowed.[185]

The most detailed explanation of how a prosecutor knowingly presents false evidence when she argues inconsistent theories of a case

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175. *Thompson*, 120 F.3d at 1059 (quoting Drake v. Kemp, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J., concurring) (citation omitted).

176. *See* Calderon v. Thompson, 523 U.S. 538, 558 (1998) (finding that the Ninth Circuit abused its discretion when it sua sponte recalled its mandate to revisit the merits of a denial of habeas corpus relief to Thompson).

177. 802 F. Supp. 66 (S.D. Tex. 1992), *rev'd sub nom.* Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995); *see supra* notes 15-23.

178. *See Nichols*, 802 F. Supp. at 72-75.

179. *Id.* at 75.

180. *See* Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995); *see also infra* notes 201-12 and accompanying text.

181. 513 U.S. 1067, 1069 (1995) (Stevens, J., dissenting); *see also* Jacobs v. Scott, 31 F.3d 1319 (5th Cir. 1994); *supra* notes 24-34 for a complete description of the *Jacobs* case.

182. *Jacobs*, 513 U.S. at 1069.

183. *Id.*

184. *Id.*

185. *See id.*

in successive trials is found in *Drake v. Kemp*.[186] In *Drake*, the Eleventh Circuit granted habeas corpus relief to a defendant convicted of murder due to a defective jury instruction at trial.[187] Judge Clark wrote a concurring opinion to address in detail the prosecutor's presentation of inconsistent factual theories in successive trials.[188] Judge Clark found that "[t]he conclusion seems inescapable that the prosecutor obtained [the defendant's] conviction through the use of testimony he did not believe; bringing this case under the logical if not actual factual framework of *Mooney* and *Napue*."[189] Judge Clark, while acknowledging that it was not clear what the prosecutor actually believed,[190] concluded that:

> Obviously the prosecutor either believed or did not believe [the first defendant]. If he did believe him, then the prosecutor should not have prosecuted [the first defendant] or, once he decided that he believed [the first defendant's] story (if this was after [his] trial), he should have taken steps to correct the error. If he did not believe [the first defendant], then the prosecutor used testimony he thought was false in order to convict [the second defendant].[191]

Ironically, this description identifies the flaw in the conclusion that a prosecutor knowingly presents false evidence when she argues inconsistent theories of a case in successive trials. Judge Clark, like the Ninth Circuit in *Thompson v. Calderon*[192] and the district court in *Nichols v. Collins*,[193] assumed that the prosecutor either believed or did not believe the evidence. This assumption, while logical, is unsound. For, as discussed above, a prosecutor may in fact remain agnostic about the truth or falsity of the evidence and thus not *knowingly* present false evidence in either trial.[194] Therefore, remaining agnostic about the evidence and presenting the best evidence available against each defendant allows the prosecutor to avoid the constitutional and ethical prohibitions against knowingly presenting false evidence.

The New Jersey Supreme Court case of *State v. Roach*[195] illustrates

186. 762 F.2d 1449 (11th Cir. 1985).
187. *See id.* at 1461.
188. *See id.* at 1470-79 (Clark, J., concurring).
189. *Id.* at 1479 (citing Mooney v. Holohan, 294 U.S. 103, 112 (1935) and Napue v. Illinois, 360 U.S. 264, 269 (1959)).
190. *See id.*
191. *Id.*
192. 120 F.3d 1045 (9th Cir. 1997) (en banc), *rev'd*, 523 U.S. 538 (1998).
193. 802 F. Supp. 66 (S.D. Tex. 1992), *rev'd sub nom.* Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995).
194. *See Thompson*, 120 F.3d at 1071 (Kozinski, J., dissenting) ("A prosecutor, like any other lawyer, is entitled to retain skepticism about the evidence he presents and trust the jury to make the right judgment."); *see also* Dershowitz, *supra* note 63, at xiv (noting that a typical prosecutor will not deliberately suborn perjury, but may nonetheless introduce evidence despite a suspicion that the witness is lying).
195. 680 A.2d 634 (N.J. 1996).

one court's acceptance of this agnosticism. In *Roach*, the prosecutor argued that the defendant had acted as one of the gunmen in a murder.[196] In three separate trials of the co-defendants, however, the same prosecutor argued that Roach had not been one of the gunmen in the murder.[197] The court found that the prosecutor had not violated the defendant's due process rights, but rather had "properly presented different, plausible interpretations of the conflicting evidence."[198] The court concluded that:

> Within the bounds set by the available inferences to be drawn from the evidence, the prosecutor is entitled to present the strongest case against each defendant provided the State has not compromised that evidence or engaged in representations on which the courts have relied or that have prejudiced the defendant.[199]

This analysis, quite similar to the "leave it to the jury" charging philosophy discussed above,[200] recognizes that prosecutors do not necessarily *knowingly* present false evidence when they argue inconsistent theories of a case in successive trials. Instead, by remaining agnostic about the truth or falsity of the evidence, prosecutors are able to circumvent the ethical and constitutional prohibition against knowingly presenting false evidence at trial.

B. *Prosecutors Are Estopped From Presenting Inconsistent Factual Theories*

A second approach to a prosecutor's use of inconsistent factual theories in successive trials centers on the estoppel doctrine. In *Nichols*, the district court, in addition to finding that the prosecutor knowingly presented false evidence, held that the prosecutor was constitutionally estopped from using inconsistent factual theories of a case in successive trials.[201] The court determined that because only one bullet killed the victim, due process permitted only one person to be charged with firing the fatal shot.[202] Otherwise, the court feared that the State could convict an unlimited number of individuals for the very same act.[203]

The Fifth Circuit reversed the district court and found that its estoppel analysis was incorrect.[204] The court based its decision on four

196. *See id.* at 638-41.
197. *See id.*
198. *Id.* at 640.
199. *Id.*
200. *See supra* part I.B.2.a.
201. *See* Nichols v. Collins, 802 F. Supp. 66, 74 (S.D. Tex. 1992), *rev'd sub nom.* Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995).
202. *See id.*
203. *See id.*
204. *See* Nichols v. Scott, 69 F.3d 1255, 1268 (5th Cir. 1995).

factors. First, the court found that collateral estoppel[205] applied only to actions between the same parties.[206] Because Nichols was not a party in Williams's trial, he failed to meet this requirement.[207] Second, the court found that collateral estoppel did not apply because Williams's trial never established that Williams fired the fatal shot.[208] Rather, the court maintained that the jury did not determine who fired the fatal shot and that the indictment and evidence were immaterial because Williams pled guilty.[209] Third, the court found that the "obscure doctrine" of judicial estoppel did not apply to Nichols because it was not constitutionally mandated and had never been applied against the government in a criminal case.[210] Lastly, the court found that applying any form of estoppel against the State in Nichols's trial would have been an unconstitutional application of "a new rule of constitutional law not dictated by precedent existing at the time Nichols's conviction became final."[211] Thus, as the Fifth Circuit's analysis indicates, estoppel should not prohibit a prosecutor from using inconsistent factual theories in successive trials.[212]

C. *Courts Have an Independent Obligation to Maintain Fairness and Integrity*

Courts have also examined the effect that a prosecutor's use of inconsistent factual theories in successive trials has on the public's confidence in the judicial system. For example, the district court in *Nichols* pointed out that such conduct calls into question the integrity of the judicial process.[213] The court noted that "the integrity of the judicial system commands that citizens can rest assured that prosecutors are seeking truth and justice; and that when they find truth and justice they cannot seek a different truth and a different justice from the first."[214] The court's concern for the public's perception of the integrity and fairness of the judicial system

205. Collateral estoppel, also known as issue preclusion, requires that once an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. *See* Ashe v. Swenson, 397 U.S. 436, 443 (1970).

206. *See Nichols*, 69 F.3d at 1270.

207. *See id.*

208. *See id.*

209. *See id.* at 1270-71.

210. *See id.* at 1272.

211. *Id.* at 1273.

212. *See id.* at 1268-74; *see also* United States v. McCaskey, 9 F.3d 368, 378-79 (5th Cir. 1993) (refusing to apply judicial estoppel absent "egregious" conduct by the prosecution); United States v. Kattar, 840 F.2d 118, 129-30 n.7 (1st Cir. 1988) (noting that judicial estoppel has never been applied against the government in a criminal case).

213. *See* Nichols v. Collins, 802 F. Supp. 66, 74 (S.D. Tex. 1992), *rev'd sub nom.* Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995).

214. *Id.*

influenced its finding that a prosecutor violated due process by presenting inconsistent factual theories in successive trials.[215]

However, courts are not in general agreement on this point. Contrary to the district court's decision in *Nichols*, the New Jersey Supreme Court in *State v. Roach*[216] held that the prosecutor's use of inconsistent factual theories did not compromise the integrity of the courts.[217] The New Jersey Supreme Court's finding, however, does not properly consider the responsibility that courts owe to citizens to demonstrate integrity and to maintain the appearance of fairness. The United States Supreme Court has emphasized that courts have an obligation to preserve their integrity by ensuring that proceedings comport with society's notions of fairness. In *Wheat v. United States*,[218] a case dealing with potential conflicts of interest, Chief Justice Rehnquist asserted that "courts have an independent interest in ensuring that... legal proceedings appear fair to all who observe them."[219] The district court in *Nichols* properly recognized this independent interest in maintaining fairness by finding that a prosecutor's inconsistent factual arguments in successive trials violated due process.[220] If the court had allowed the prosecutor to argue inconsistent factual theories in successive trials, it would have violated its independent duty to ensure the appearance of fairness and integrity.

Moreover, on a practical level, a court's tacit approval of a prosecutor's use of inconsistent factual theories in successive trials undermines the efficacy of the criminal justice system because citizens lose faith in the court's ability to guarantee fair trials. As the district court in *Nichols* noted, a state owes a duty to its citizens to promote the goals of truth and justice.[221] When the court permits the state to breach this duty by arguing inconsistent factual theories of a crime in successive trials, citizens lose confidence in both the courts and the state.[222] This loss of credibility can be dangerous for the entire criminal justice system because the system relies on impartial citizens, serving as jurors, to decide a defendant's guilt.[223] When citizens do not have faith in the court's ability to guarantee fair trials, this system is compromised.

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215. *See id.*
216. 680 A.2d 634 (N.J. 1996).
217. *See id.* at 640.
218. 486 U.S. 153 (1988).
219. *Id.*
220. *See Nichols*, 802 F. Supp. at 74.
221. *See id.*
222. *See* Thompson v. Calderon, 120 F.3d 1045, 1071-72 (9th Cir. 1997) (en banc) (Kozinski, J., dissenting) ("Whether or not the United States Constitution allows [prosecutors] to argue inconsistent theories to different juries, it surely does not inspire public confidence in our criminal justice system for prosecutors to leave themselves open to charges of manipulation."), *rev'd*, 523 U.S. 538 (1998).
223. *See id.*

D. *Prior Inconsistent Argument is Admissible in a Subsequent Trial*

Finally, some courts have analyzed a prosecutor's use of inconsistent factual theories in successive trials as an evidentiary issue.[224] This analysis arises during the trial of the second defendant for the exact same crime for which the first defendant was convicted. In the second defendant's trial, the defendant attempts to admit the prosecutor's jury argument from the first defendant's trial as an admission of a party-opponent pursuant to Federal Rule of Evidence 801(d)(2). Under Rule 801(d)(2), a statement made or adopted by a party, or made by a person authorized by the party to make a statement concerning the subject, is admissible against that party.[225]

The admissibility of attorney statements from a prior trial stems from the Second Circuit's decision in *United States v. McKeon*.[226] In *McKeon*, the defendant's first two trials both ended in mistrials.[227] During the defense attorney's opening statement at the third trial, he made an argument that was "facially and irreconcilably at odds" with an argument that he had made during the second trial.[228] The government sought to use the defense counsel's prior inconsistent statement as a party admission under Federal Rule of Evidence 801(d)(2) to demonstrate the defendant's consciousness of guilt.[229] The Second Circuit held that prior opening statements are admissible in criminal cases under limited conditions.[230] The court found that "[t]o hold otherwise would not only invite abuse and sharp practice but would also weaken confidence in the justice system itself by denying the function of trials as truth-seeking proceedings."[231] Moreover, the court declared that the truth-seeking function of trials is subverted when parties are free to make fundamental changes in the versions of facts between trials and to conceal these changes from the

224. *See* United States v. DeLoach, 34 F.3d 1001, 1005-06 (11th Cir. 1994); United States v. Salerno, 937 F.2d 797, 811-12 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 317 (1992); United States v. GAF Corp., 928 F.2d 1253, 1261-62 (2d Cir. 1991); United States v. McKeon, 738 F.2d 26, 30-34 (2d Cir. 1984); Hoover v. State, 552 So. 2d 834, 839-40 (Miss. 1989); State v. Cardenas-Hernandez, 579 N.W.2d 678, 685 (Wis. 1998).

225. *See* Fed. R. Evid. 801(d)(2)(B)-(C).

226. 738 F.2d 26 (2d Cir. 1984).

227. *See id.* at 28.

228. *Id.* at 33.

229. *See id.* at 29.

230. *See id.* at 31-34. In order for prior statements to be admissible, three conditions must be satisfied. First, "the district court must be satisfied that the prior argument involves an assertion of fact inconsistent with similar assertions in a subsequent trial." *Id.* at 33. Second, the court must determine that "the statements of counsel were such as to be the equivalent of testimonial statements" made by the client. *Id.* Finally, the district court must determine by a preponderance of the evidence that the inference that the party seeking admission of the statements wishes to draw "is a fair one and that an innocent explanation for the inconsistency does not exist." *Id.*

231. *Id.* at 31.

trier of fact.[232]

Although *McKeon* dealt with the admissibility of defense counsel's arguments, courts have applied the same principles to admit the prior inconsistent arguments of prosecutors.[233] For example, in *United States v. GAF Corp.*,[234] the prosecution amended its bill of particulars between the second and third trials of the same defendants.[235] The defense sought to introduce the original bill of particulars as a party admission to establish weaknesses in the government's case.[236] The Second Circuit held that "if the government chooses to change its strategy at successive trials, and contradict its previous theories of the case and version of the historical facts, the jury is entitled to be aware of what the government has previously claimed, and accord whatever weight it deems appropriate to such information."[237] As in *McKeon*, the court relied on considerations of fairness and the integrity of the truth-seeking function of trials to support its decision.[238]

Furthermore, at least one court has extended the admissibility of a prosecutor's prior inconsistent statements to cases involving the successive trials of different defendants. In *Hoover v. State*,[239] the Supreme Court of Mississippi found that the arguments of a prosecutor in the previous trial of a co-indictee were admissible in the trial of another co-indictee.[240] In *Hoover*, a case very similar to *Roach*,[241] the prosecutor argued inconsistent factual theories of a shooting in successive trials.[242] After convicting the first defendant of the shooting in the first trial, the prosecutor subsequently argued that Hoover had shot the victim in Hoover's trial.[243] The court relied on the same reasoning as *McKeon* to find that the prosecutor's statements in the trial of the first co-indictee were admissible.[244]

McKeon and its progeny confirm that allowing parties to make inconsistent arguments in successive trials without alerting the jury to those inconsistencies subverts the truth-seeking function of trials.[245]

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232. *See id.* As further support for its finding, the court noted the admissibility of superseded pleadings in civil litigation as party admissions. *See id.*

233. *See* United States v. DeLoach, 34 F.3d 1001,1005-06 (11th Cir. 1994); United States v. Salerno, 937 F.2d 797, 811-12 (2d Cir. 1991) *rev'd on other grounds*, 505 U.S. 317 (1992); United States v. GAF Corp., 928 F.2d 1253, 1261-62 (2d Cir. 1991); Hoover v. State, 552 So. 2d 834, 839-40 (Miss. 1989); State v. Cardenas-Hernandez, 579 N.W.2d 678, 685 (Wis. 1998).

234. 928 F.2d 1253 (2d Cir. 1991).

235. *See id.* at 1257.

236. *See id.* at 1257-59.

237. *Id.* at 1262.

238. *See id.* at 1260.

239. 552 So. 2d 834 (Miss. 1989).

240. *See id.* at 840.

241. 680 A.2d 634 (N.J. 1996).

242. *See Hoover*, 552 So. 2d at 838.

243. *See id.*

244. *See id.* at 840.

245. *See* United States v. McKeon, 738 F.2d 26, 30-34 (2d Cir. 1984).

Moreover, these cases highlight the fundamental unfairness that would result if parties were allowed to alter their theories of a case between trials.[246] The underlying theme of unfairness that permeates *McKeon* and its progeny reveals that a defendant's due process rights to a fair trial are at stake when a prosecutor argues inconsistent theories of a crime in successive trials.[247]

While courts have used various approaches to confront a prosecutor's use of inconsistent factual theories of a crime in successive trials, part III argues that they have not yet identified the most serious aspect of this prosecutorial conduct.

III. PROSECUTORS' USE OF INCONSISTENT FACTUAL THEORIES VIOLATES THEIR CONSTITUTIONAL AND ETHICAL LIMITATIONS

This part asserts that prosecutors violate the Due Process Clause and their ethical responsibilities when they present an inconsistent factual theory in successive trials without disavowing the theory used in the first trial.

A. *Violation of In re Winship Doctrine*

Courts have thus far failed to identify the most significant and alarming aspect of the prosecutor's use of inconsistent theories in successive trials. That is, when a prosecutor argues inconsistent factual theories in successive trials, the prosecutor creates too great a risk that an innocent person will be convicted. Placing an innocent person in danger of conviction is unacceptable because our criminal justice system is based on the fundamental principle that it is far worse to convict an innocent person than to let a guilty person go free.[248] This principle, expressed by Justice Harlan in his concurrence in *In re Winship*,[249] requires that prosecutors refrain from activity that poses too great a risk of convicting an innocent person.[250] Justice Holmes illustrated this principle in *Olmstead v. United States*[251] when he said, "I think it a less evil that some criminals should escape than that the Government should play an ignoble part."[252]

When a prosecutor charges two suspects with an offense that could only have been committed by one person, and presents inconsistent theories of the commission of the offense in successive trials, the

246. *See* United States v. GAF Corp., 928 F.2d 1253, 1260 (2d Cir. 1991).
247. *See id.*; *McKeon*, 738 F.2d at 30-34.
248. *See* Patterson v. New York, 432 U.S. 197, 208 (1977); *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).
249. 397 U.S. 358, 372 (1970) (Harlan, J., concurring).
250. *See* United States v. Wade, 388 U.S. 218, 256-58 (1967) (White, J., concurring) ("Law enforcement officers have the obligation to convict the guilty and to make sure that they do not convict the innocent.").
251. 277 U.S. 438 (1928).
252. *Id.* at 470 (Holmes, J., dissenting).

prosecutor necessarily subjects one innocent defendant to conviction.[253] In this situation, the prosecutor's conduct cannot withstand due process scrutiny. As discussed above, the Supreme Court has maintained that due process is implicated only when a prosecutor's actions violate "those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency."[254] When a prosecutor argues inconsistent theories in successive trials, the prosecutor violates a fundamental conception of justice on which our criminal justice system is based; that is, the prosecutor necessarily violates the fundamental conception that it is far worse to convict an innocent man than to let a guilty man go free. Since one of the defendants is necessarily innocent of the crime charged,[255] the prosecutor has breached a fundamental tenet of our country's criminal justice system, and thus, violated the defendant's due process rights.

The prosecutor's conduct is even more troubling in cases like *Nichols*,[256] where the use of inconsistent factual arguments results in death sentences for both defendants.[257] Because the evidence established that only one person committed the most serious offense,[258] one defendant received a sentence of capital punishment for a crime that he did not commit. Although the Supreme Court has acknowledged that due process does not require that every conceivable step be taken to eliminate the possibility of convicting an innocent person,[259] a prosecutor's use of inconsistent theories at successive trials poses such a substantial risk of convicting an innocent person that it cannot be constitutionally acceptable.

Supreme Court decisions have long confirmed that prosecutors must refrain from conduct that poses too great a risk of convicting an innocent person. In *Berger v. United States*,[260] for example, the Court identified limits, albeit vague limits, to a prosecutor's conduct in pursuit of a conviction.[261] In *Berger*, the Court found that a prosecutor:

> may prosecute with earnestness and vigor—indeed, he should do so.

253. *See* Thompson v. Calderon, 120 F.3d 1045, 1071 (9th Cir. 1997) (en banc) (Kozinski, J., dissenting) ("If A and B cannot both be guilty, we then know that one innocent person has been convicted."), *rev'd*, 523 U.S. 538 (1998).

254. *See* Dowling v. United States, 493 U.S. 342, 353 (1990) (quoting United States v. Lovasco, 431 U.S. 783, 790 (1977)).

255. *See Thompson*, 120 F.3d at 1071 (Kozinski, J., dissenting).

256. Nichols v. Scott, 69 F.3d 1255 (5th Cir. 1995); *see supra* notes 15-23 and accompanying text.

257. *See Thompson*, 120 F.3d at 1072 (Kozinski, J., dissenting) ("The danger is particularly grave in capital cases, where the manipulation could well cause the execution of an innocent person.").

258. *See Nichols*, 69 F.3d at 1259-60.

259. *See* Patterson v. New York, 432 U.S. 197, 208 (1977).

260. 295 U.S. 78 (1935).

261. *See id.* at 84-89.

> But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[262]

The duty to "refrain from improper methods calculated to produce a wrongful conviction" was extended with the false-evidence cases—*Mooney*, *Alcorta*, and *Napue*—discussed above.[263] In those cases, the prosecutor's knowing presentation of false evidence, or failure to correct false evidence, created too great a risk that an innocent person would be convicted of a crime.[264] Therefore, the Supreme Court found that the prosecutor's knowing presentation of false evidence violated the defendant's due process rights.[265]

The Supreme Court's decision in *Brady v. Maryland*[266] further illustrates the principle that prosecutors must refrain from conduct that places innocent people in danger of conviction. The *Brady* court reasoned that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[267] Thus, the *Brady* court identified and prohibited prosecutorial conduct that posed too great a risk that an innocent person would be convicted.

While a prosecutor's use of inconsistent theories in successive trials is different from *Berger*, *Mooney*, and *Brady* in that the due process violation occurs because of the prosecutor's action in successive trials rather than within a single trial, the same principles that established due process violations in those cases apply here. Indeed, finding a due process violation here is simply an extension of the principles elaborated in the Court's previous due process cases. Like the situation in which a prosecutor knowingly presents false evidence or does not turn over exculpatory evidence, here the prosecutor's actions do not comport with "fundamental fairness" because the prosecutor has created too great a risk that an innocent person will be convicted. Therefore, as the courts in *Berger*, *Mooney*, and *Brady* held, the prosecutor's actions violate the defendant's due process rights.

The fact that the prosecutor is uncertain which set of evidence introduced at the two trials is in fact false does not mitigate the due process violation. On the contrary, when a prosecutor argues inconsistent factual theories of a crime, the prosecutor necessarily subjects one person to conviction for a crime that he/she did not commit. Unlike the *knowing* presentation of false evidence, where the prosecutor's subjective knowledge of the falsity is required, here

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262. *Id.* at 88.
263. *See supra* notes 141-47 and accompanying text.
264. *See supra* notes 141-47 and accompanying text.
265. *See id.*
266. 373 U.S. 83 (1963).
267. *Id.* at 87.

the prosecutor's agnosticism is irrelevant because the fact remains that one person has been falsely convicted. Under the *Winship* principle, regardless of the prosecutor's subjective intent or knowledge, the conviction of an innocent defendant violates the Due Process Clause. Therefore, agnosticism as to the truth or falsity of the evidence cannot shield prosecutors from the due process violation committed when an innocent person is convicted of a crime.

Some prosecutors may argue that they are justified in presenting inconsistent factual theories because, despite the fact that only one defendant committed the most serious offense, both defendants are guilty of crimes and pose a threat to society. This rationalization, however, does not comport with the Constitution. The Supreme Court has consistently held that the Due Process Clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which the defendant is charged.[268] The fact that the defendant may have committed another serious crime does not mitigate the injustice of convicting the defendant for a crime that he did not commit. Addressing this exact point, the Supreme Court has confirmed that "[u]nder our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar."[269] Therefore, the prosecutor's use of inconsistent theories of a crime in successive trials cannot be justified based on the theory that both defendants are deserving of punishment.

The prosecutor's duty not to create too great a risk of convicting an innocent person is even more crucial given the reality that triers of fact sometimes make mistakes. Despite the constitutional provisions in place to ensure against the risk of convicting an innocent person,[270] the reality is that the trier of fact—be it a judge or a jury—will occasionally make erroneous factual conclusions.[271] Chief Justice Rehnquist confirmed this fallibility in *Herrera v. Collins*,[272] when he pointed out that history is fraught with examples of wrongly convicted persons who later established their innocence.[273] Given the fact that the system and the people who operate the system make mistakes, the prosecutor's duty not to put an individual at risk of being mistakenly convicted becomes even more important.

B. *Prosecutors Violate Their "Seek Justice" Obligation*

In addition to violating a defendant's due process rights, a

268. *See In re* Winship, 397 U.S. 358, 364 (1970).
269. Jackson v. Virginia, 443 U.S. 307, 323-24 (1979).
270. *See* Herrera v. Collins, 506 U.S. 390, 398-99 (1993).
271. *See In re Winship*, 397 U.S. at 370 (Harlan, J., concurring).
272. 506 U.S. 390 (1993).
273. *See id.* at 415.

prosecutor's use of inconsistent theories in successive trials violates the prosecutor's ethical duty to "seek justice." While courts cannot reverse convictions on the basis of an ethics violation, they frequently highlight these violations to lend credibility to their analyses.[274] For example, both the Ninth Circuit plurality in *Thompson* and Judge Clark's concurrence in *Drake* identified the prosecutor's violation of her unique duty to "seek justice" as one of the justifications for finding that the prosecutor violated due process.[275] Moreover, the ABA ethical codes shed light on exactly how prosecutors violate the "seek justice" mandate when they present patently inconsistent theories in successive trials. The Model Code explains that the prosecutor's special duty to "seek justice" exists because "in our system of criminal justice the accused is to be given the benefit of all reasonable doubts."[276] Additionally, the Model Rules clarify that the prosecutor's unique duty to administer justice carries with it a specific obligation to see that the defendant is accorded procedural justice.[277] Professor Fred C. Zacharias offers another interpretation of the prosecutor's "seek justice" obligation.[278] Professor Zacharias argues that this obligation requires prosecutors to help restore the adversarial balance when the system breaks down, rather than exploiting the breakdown to obtain a conviction.[279]

Although the "seek justice" admonition is admittedly vague,[280] it is plainly violated when a prosecutor argues inconsistent factual theories in successive trials. This violation occurs because the prosecutor's conduct contradicts the express language of the ethical codes. First, the prosecutor violates the ABA ethical codes' explanation for the "seek justice" admonition. Contrary to the codes, a prosecutor who argues inconsistent theories of a crime in successive trials does not ensure that the accused receives the benefit of all reasonable doubt or that the defendant receives procedural justice. Instead, the prosecutor subjects the defendant to procedural injustice by charging and trying the defendant with a crime that the defendant may not have committed. Additionally, the prosecutor exploits the doubt that exists in the case, rather than giving the defendant the benefit of all reasonable doubt as the codes require. Finally, contrary to Professor

274. *See* Thompson v. Calderon, 120 F.3d 1045, 1058 (9th Cir. 1997) (en banc), *rev'd*, 523 U.S. 538 (1998); Drake v. Kemp, 762 F.2d 1449, 1478 (11th Cir. 1985) (Clark, J., concurring).

275. *See Thompson*, 120 F.3d at 1058; *Drake*, 762 F.2d at 1478 (Clark, J., concurring). *But see* State v. Roach, 680 A.2d 634, 639 (N.J. 1996) (finding that the prosecutor did not violate his duty to seek justice).

276. Model Code of Professional Responsibility EC 7-13 (1980).

277. *See* Model Rules of Professional Conduct Rule 3.8 cmt. (1997).

278. *See* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 Vand. L. Rev. 45, 46-50 (1991).

279. *See id.* at 64.

280. *See id.* at 46-50.

Zacharias's interpretation, the prosecutor's conduct does not seek to restore adversarial balance, but rather exploits the imbalance to obtain two convictions.

Second, the prosecutor's conduct violates the "seek justice" duty expressed in *Berger v. United States*.[281] *Berger*, in addition to highlighting the prosecutor's duty to administer justice, clearly established a limit to prosecutorial behavior.[282] As noted above, *Berger* established that prosecutors may not engage in "improper methods calculated to produce a wrongful conviction."[283] Clearly, *Berger* identified a fine line that exists between acceptable advocacy and impermissible conduct by a prosecutor. While unable to establish a definitive test to discern between the two,[284] the Court nonetheless maintained that certain conduct is simply unacceptable in light of the prosecutor's duty to seek justice.

Thus, according to *Berger*, a prosecutor who argues inconsistent factual theories in successive trials crosses the line from acceptable advocacy to improper conduct. This prosecutorial tactic exemplifies an "improper method" because the prosecutor has abandoned fair play and instead relied on deception and manipulation. By presenting inconsistent factual theories, the prosecutor represents two versions of the "truth" to the juries. Clearly, justice cannot tolerate two versions of the truth. Even prosecutors who believe that "seeking justice" means simply doing whatever is necessary to convict people whom they feel are guilty[285] cannot justify this conduct because here the evidence has established that only one person committed the crime. In short, this conduct is so antithetical to fair play and decency that it violates the prosecutor's duty to "seek justice."

C. *Implications of the Winship Principle on Prosecutors' Arguments*

Under the *Winship* principle, a prosecutor's presentation of inconsistent factual theories in successive trials violates due process because of the substantial risk of convicting an innocent person. The only way that a prosecutor can overcome this presumption is if, before making the inconsistent argument at a second trial, a prosecutor takes affirmative steps to repudiate the factual theory used in the first trial. Prosecutors are certainly free to change their minds about the circumstances surrounding the commission of a crime. In order to change their theory of the crime, however, prosecutors must demonstrate their good faith by taking action to rectify what they now know to be false evidence offered in the first trial.[286] The ABA Model

281. 295 U.S. 78 (1935).
282. *See id.* at 88.
283. *Id.*
284. *See* United States v. Young, 470 U.S. 1, 7 (1985).
285. *See* Zacharias, *supra* note 278, at 60 n.70.
286. *See* Thompson v. Calderon, 120 F.3d 1045, 1070-71 (9th Cir. 1997) (en banc)

Rules require a lawyer who comes to know of the falsity of evidence previously offered to take "reasonable remedial measures."[287] While this instruction is vague, a prosecutor would be expected to inform the court of the falsity of the evidence presented at the first trial and request that the court set aside the defendant's conviction.[288] This remedial measure would alert the convicted defendant to the potentially false evidence used in his conviction, as well as demonstrate that the prosecutor truly has repudiated the factual theory used in the first trial. Thus, it is only with remedial action that a prosecutor can employ an inconsistent factual theory of a crime in successive trials without committing a due process violation.

D. *Implications of the Winship Principle on a Prosecutor's Charging Decision*

The most significant implication of the *Winship* principle, however, occurs in the area of a prosecutor's charging standard. Because *Winship* prohibits prosecutors from presenting inconsistent factual theories in successive trials in order to convict two people of the same crime, prosecutors must evaluate a suspect's guilt more thoroughly at the charging stage. In cases where the evidence establishes that only one person committed the crime, prosecutors cannot charge two people with the crime and leave it to the jury to determine which defendant is guilty without violating the *Winship* principle. Because the evidence has established that only one person perpetrated the crime, one of the individuals charged would necessarily be innocent of the crime yet subject to conviction. The *Winship* principle requires that prosecutors make a choice about which suspect to charge with the crime based on the evidence available to them. For example, in *Thompson v. Calderon*, the prosecutor would have to decide before the first trial whether to charge Thompson or Leitch with commission of the fatal act. Charging both suspects with an offense that only one of them could have committed simply creates too great a risk that an innocent person will be convicted.

Furthermore, the *Winship* principle requires that prosecutors have a substantial amount of certainty about the defendant's guilt in order to file charges. As discussed in detail above, the "probable cause" charging standard is not sufficient to protect innocent defendants from

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(Kozinski, J., dissenting), *rev'd*, 523 U.S. 538 (1998). In none of the cases discussed above did any of the prosecutors take any measures to rectify the outcome of the first trial after changing their factual theory of the case at the second trial. This inaction leads one to believe that the prosecutors did not have a good faith change of heart about the factual theories of the case, but rather intended to manipulate the factual theories in order to obtain two convictions.

287. Model Rules of Professional Conduct Rule 3.3(a)(4) (1997) ("If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.").

288. *See Thompson*, 120 F.3d at 1071 (Kozinski, J., dissenting).

wrongful conviction.[289] Rather, to ensure that innocent people are not convicted, prosecutors should charge suspects only when they are personally satisfied of the suspect's guilt. If an informed prosecutor has doubts about the guilt of the accused, then there exists a serious risk that a jury may convict an innocent person. This risk is unacceptable under *Winship*. Moreover, the ABA Standards Relating to the Administration of Criminal Justice point out that a prosecutor's reasonable doubt about the suspect's guilt permits the prosecutor to decline prosecution.[290] Therefore, prosecutors should maintain a higher standard, that of personal satisfaction of the suspect's guilt, before instituting charges against a suspect.

CONCLUSION

Prosecutors violate one of the most basic tenets of our criminal justice system when they argue inconsistent factual theories in successive trials where the evidence has conclusively established that only one person committed the crime. That is, prosecutors violate the fundamental principle that it is far worse to convict an innocent person than to let a guilty person go free. This prosecutorial tactic creates too great a risk that an innocent person will be convicted because two people face conviction for a crime that only one person committed. Prosecutors cannot hide behind the shield of agnosticism and refuse to take a stand on the truth or falsity of the evidence that they present at trial. Instead, they must engage in rigorous scrutiny of the available evidence and make a reasoned judgment regarding the suspect's guilt. This scrutiny must involve being personally satisfied of the suspect's guilt before instituting charges. Otherwise, prosecutors abdicate their responsibilities and violate their ethical duties. If a prosecutor does change her mind about the facts surrounding the commission of a crime between trials of defendants, the prosecutor must renounce the factual theory used in the first trial and take appropriate measures to vacate the conviction of the first defendant. Therefore, under the *In re Winship* principle, the prosecutor's use of inconsistent factual theories in successive trials, without taking any action to renounce the former theory and conviction, is a violation of the Due Process Clause.

289. *See supra* part I.B.2.

290. *See* Standards Relating to the Admin. of Criminal Justice Standard 3-3.9(b)(i) (1992).