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## Criminal Injustice in New York State

In this edition of his Civil Rights Litigation column, Ilann M. Maazel writes: New York has serious, systemic problems that require systemic reform.

By **Ilann M. Maazel** | December 15, 2021



**Ilann M. Maazel**

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Seven years ago, I wrote a column for this journal titled “How To Get Out of Jail (If You’re Innocent) (<https://www.law.com/newyorklawjournal/almID/1202675359881/how-to-get-out-of-jail-if-youre-innocent/>).” Hundreds of prisoners have since written, all seeking to vacate their convictions. We took a handful of these cases, giving me a post-conviction window into our New York state criminal justice system.

From the perspective of this civil rights lawyer, the picture is not pretty. New York has serious, systemic problems that require systemic reform. Unless otherwise indicated, what follows are general observations, not references to any specific case.

### Minimal Accountability for Prosecutors

Prosecutors have enormous power. They choose who to charge, what to charge, who gets immunity and who does not. Civilians are held accountable for criminal wrongdoing by prosecutors and then juries and courts. But who holds prosecutors accountable?

In the vast majority of cases, no one. Prosecutors enjoy absolute immunity in civil lawsuits for any conduct within their prosecutorial function. *Imbler v. Pachtman*, 424 U.S. 409 (1976). They can suborn perjury at trial. Not liable. They can intentionally fail to disclose *Brady* material. Not liable. They can violate the Constitution and deprive a defendant of a fair trial. Again, not liable.

In theory, prosecutors are not immune for criminal conduct. But in practice, who prosecutes prosecutors? Usually, no one.

As to discipline by the bar, until recently, few people brought bar complaints and even fewer complaints resulted in any meaningful discipline. This is finally beginning, if only slightly, to change.

As one example of the systemic lack of accountability, state appellate courts held that the Queens County District Attorney's office committed prosecutorial misconduct at least 41 times in the early 1990s. This misconduct included *Brady* violations, *Rosario* violations, opening and summation misconduct, violation of court orders, and a range of other legal violations. In response, I learned in a civil case we co-counseled, the office took no systemic steps to address the issue: It changed no policy, practice, or procedure; failed to change its supervision or discipline of prosecutors; and failed even to hold a meeting to discuss how to address and fix the problem. Prosecutors are elected, yet where was the accountability? If any private law firm in New York received five, much less 41, findings of misconduct by an appellate court, one would expect immediate, radical, systemic change.

## Too Many DAs Protect Convictions Rather Than Do Justice

Too many prosecutors are invested in protecting convictions, regardless of the facts or the law. Prosecutors of course have a higher duty not just to advocate zealously for the People, but to do justice. All too often, I have seen prosecutors rationalize wrongdoing by law enforcement, or rely on their instincts about a defendant's guilt rather than confront whether the defendant received a fair trial. Even more troubling, in making prosecutorial decisions, some prosecutors appear to be motivated by a desire to avoid potential lawsuits and to protect the public fisc. This is wrong: "[i]nsulation from civil liability is not the duty of the prosecutor." *Cowles v. Brownell*, 73 N.Y.2d 382, 387 (1989). "Their obligation is to seek justice and to take precautions to avoid convicting innocent individuals." *Smalls v. Collins*, 10 F.4th 117, 144 (2d Cir. 2021).

## Conviction Review Units

The DNA revolution exposed that wrongful convictions happen with alarming frequency. Our criminal justice system, because it is run by people, is fallible. Juries make mistakes. Witnesses make mistakes. Police make mistakes. What of the tens of thousands of cases that do *not* involve DNA evidence? Plainly many of those defendants are innocent as well.

Recognizing that many people may be in prison for crimes they did not commit, a number of district attorneys have, to their credit, created Conviction Review (or Integrity) Units to review cold convictions. The first question in evaluating whether a district attorney is serious about justice is: Does the DA have a CRU? The second question: What kind of CRU? Is it run by a prosecutor from that very office, or someone from outside the office? We cannot reasonably expect most prosecutors to confront their colleagues of years or decades with the brutal accusation that they put an innocent person in prison, or failed to provide a defendant a fair trial. Is the CRU run by a career prosecutor or someone with significant defense experience? Is the CRU independent of the office, at least in the investigation phase?

Every single district attorney's office in the United States should have an independent CRU, run by someone with no history in the office, preferably a non-career prosecutor.

## Whither Reasonable Doubt?

Reasonable doubt is not everything it is cracked up to be. Take, for example, one-witness, stranger identification cases. Decades of social science research tell us that people are terrible at identifying strangers, especially in the quick, stressful situations presented during most crimes. According to the National Registry of Exonerations, mistaken identifications have contributed to at least 808 wrongful convictions (<https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx>), representing 9,889 years of freedom lost.

One-witness cases that are so weak they would border on a Rule 11 violation in a civil case are today the basis for criminal convictions throughout New York state. Why is this evidence sufficient to convict a human being of a serious crime, potentially sending him to prison for life?

Our system of criminal justice tolerates weak, borderline-frivolous evidence. Worse, juries often convict based on this thin evidence, beyond a reasonable doubt. I find this appalling.

## Defense Lawyers

Another common theme: Defense lawyers are often overmatched, under-resourced, inexperienced, and/or poor lawyers. Our profession lavishes resources and talent on wealthy companies and people. This is not at all true for criminal defendants. When substantial money is on the line, civil litigants may have dozens of high-powered lawyers, backed by investigators, e-discovery vendors, jury consultants, and virtually unlimited resources. When liberty is on the line, criminal defendants are lucky even to have a single good lawyer. Isn't liberty more important than money? In our legal system, the answer is a definitive "no."

## Problems With Police

I have litigated police misconduct cases for over 20 years, but the stakes are usually higher in the wrongful conviction context: years, decades, or a lifetime in prison. In both contexts, we see *Brady* violations by police, fabrication of evidence, coercion of witnesses, physical brutality, faulty or suggestive identification procedures. Even more troubling is the willingness of many police officers to lie under oath, almost always without consequence: so-called "testilying." In theory, law enforcement officers should more scrupulously follow the law and honor the oath than other witnesses. In practice, at least in my experience, this is not the case. As Prof. Morgan Cloud put it ([http://law.emory.edu/\\_includes/documents/sections/faculty-and-scholarship/articles/cloud/1994-Dirty-Little-Secret.pdf](http://law.emory.edu/_includes/documents/sections/faculty-and-scholarship/articles/cloud/1994-Dirty-Little-Secret.pdf)), "Police perjury is the dirty little secret of our criminal justice system."

We cannot rely on prosecutors to prosecute the same officers they rely on to secure convictions of defendants. Systemic reform is needed.

## Grand Jury Immunity

New York state is in the minority of jurisdictions that provides sweeping statutory immunity to witnesses who testify before the grand jury. N.Y. CPL §190.40. If a witness testifies before a grand jury about the circumstances of a murder, and chooses not to waive immunity, that witness can never be charged with the murder. Assume the police have three suspects. The prosecutor puts two of them before the grand jury to testify against the third. From that moment, the People of the State of New York have committed to a theory of the crime, no matter what evidence is uncovered before trial, at trial, or twenty years later. If the defendant turns out to be innocent, and the two witnesses guilty, the People are powerless to bring the

guilty parties to justice, even if a video recording, or DNA, or other evidence proves the People's witnesses committed the crime and the defendant did not. A prosecutor's decision to put the wrong witness before the grand jury can foil achieving justice for the victim.

This statute creates strong disincentives for prosecutors to vacate convictions: Any prosecutor who admits the wrong person is in prison must then explain to the victim's family that the district attorney's own poor decision-making prevents the People from bringing the true perpetrators to justice.

New York needs to abandon CPL §190.40.

## Conclusion

This column is not an indictment of all prosecutors, police officers, and defense lawyers. Many do fine, sometimes extraordinary, work. But we hold our criminal justice system out as a model for the world. From search and seizure to bail, confrontation, jury trials, double jeopardy, self-incrimination, and the right to counsel, our cherished Bill of Rights focuses to a large degree on criminal justice.

That is theory. In practice, we have serious work to do. A future column will propose some ideas for badly-needed reform.

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