

WHITE PAPER

**Prosecutor Ethics in
Domestic Violence and Sexual Assault Cases**



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“The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous....While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.” – Former U.S. Attorney General Robert Jackson¹

On May 24, 2012, a Los Angeles County Superior Court judge overturned the conviction of Brian Banks, convicted in 2002 for the rape of a high school classmate. Banks was exonerated after serving five years in jail when accuser Wanetta Gibson admitted on tape the allegation was a hoax.

With the benefit of hindsight, these troubling questions now come into focus:

- Given the absence of witnesses, DNA, or other forensic evidence, how did the district attorney come to the conclusion that there was probable cause to charge Banks with criminal conduct?
- During the plea-bargain negotiations, the 17-year-old Banks was told he would have to serve only another 18 months in jail if he agreed to a guilty plea. So why was he then sentenced to six *years*?
- After Banks was exonerated, why did the Los Angeles prosecutor’s office fail to charge false accuser Wanetta Gibson with perjury?

This White Paper probes whether the Brian Banks case represents a regrettable but unusual “glitch” in the system? Or does it silhouette a problem that has become endemic to our criminal justice system?

Prosecutors as Ministers of Justice

When persons envision the wheels of justice in motion, they picture a black-robed judge solemnly presiding over a prosecutor and defense attorney, a plaintiff and defendant, and impassive members of the jury.

Such a depiction may have been true a generation ago. But now the great majority of convictions are reached by means of a prosecutor-negotiated plea bargain—representing 93% of all domestic aggravated assault cases.² Prosecutors make fateful decisions whether to investigate the allegation, arrest the suspect, disclose evidence to the defense, propose the terms of a plea bargain, and make sentencing recommendations to the judge. Most important of all, prosecutors decide whether or not to charge a suspect with the crime.

Prosecutors view their role in the criminal justice system on a par with members of the judiciary. The National District Attorneys Association (NDAA), the national professional organization that represents prosecutors, boldly asserts, “The salary of the full-time chief prosecutor should be at least that of the salary of the chief judge of general trial jurisdiction in the chief prosecutor’s district.”³

Given their central position in the criminal justice system, district attorneys are called upon to play a dual role, serving both as advocates for victims as well as proponents of justice. The U.S. Supreme Court has explained:⁴

Society 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.

The ethical code of the National District Attorneys Association emphasizes that prosecutors should be “ministers of justice.”⁵ The American Bar Association Model Rules of Professional Conduct likewise state:⁶

A prosecutor has the responsibility of a *minister of justice* and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. [emphasis added]

Long-Standing Concerns

Public awareness of the problem of prosecutor error can be traced back to the late 1990s when the *Pittsburgh Post-Gazette*⁷ and *Chicago Tribune*⁸ separately ran multi-part series revealing widespread unethical prosecutorial practices.

And 2007 turned out to be a watershed year as Americans were riveted by events in the Duke University lacrosse case, eventually resulting in the North Carolina State Bar’s decision to disbar District Attorney Michael Nifong for “dishonesty, fraud, deceit and misrepresentation.”

Concerns about prosecutorial misconduct were magnified two years later when a federal judge set aside the conviction of former Senator Ted Stevens of Alaska. Announcing his decision, Judge Emmett Sullivan chastised the federal prosecutors involved in the effort: “In nearly 25 years on the bench, I’ve never seen anything approaching the mishandling and misconduct that I’ve seen in this case.”⁹

In 2010 the Northern California Innocence Project released a report identifying 707 cases of prosecutorial ethical violations over a 13-year period.¹⁰ This was one such case:

Mark Sodersten spent 22 years behind bars on a murder conviction. But in 2007 the California Court of Appeal found the district attorney who prosecuted Sodersten had withheld key evidence. The court vacated the conviction, warning that “This case raises the one issue that is the most feared aspect of our system—that an innocent man might be convicted.”

Worries about breaches of prosecutor ethics have mounted as exonerations of the wrongly convicted continue to be reported.¹¹ One analysis found misconduct by prosecutors and other officials contributed to 42% of all wrongful convictions.¹²

The problem of prosecutorial abuse is now penetrating the awareness of state lawmakers. In Texas, for example, Rep. Jeff Leach introduced a bill to establish an innocence commission with this ringing challenge: “The day for real and substantive reform has arrived and we must seize it.”¹³

In his 2013 State of the State address, New York governor Andrew Cuomo likewise commented: “Remember, this is not a numbers game for prosecutors. It’s not ‘the more convictions the better.’ A wrongful conviction protects no one. And you are still innocent until proven guilty in this system.”¹⁴

TYPES OF ETHICAL VIOLATIONS

Prosecutor malfeasance can take many forms, including abusive investigative practices, threats and other coercive tactics, lying to eyewitnesses, forensic fraud, and framing the innocent. The most common forms of prosecutorial error that are relevant to domestic violence and sexual assault cases, however, are:

1. Charging without probable cause
2. Engaging in selective prosecution
3. Concealing evidence
4. Failing to enforce perjury statutes

These problems are analyzed in the following sections.

1. Lack of Probable Cause

Now, people can be charged with virtually no evidence. . . . Prosecutors are not exercising very much discretion in their choice of cases. In certain places in the country, I think they're exercising none. -- Former sex crimes prosecutor Rikki Klieman¹⁵

Rooted in the Fourth Amendment, probable cause is a foundational concept of the American criminal justice system. According to the American Bar Association Model Rules of Professional Conduct, the first ethical rule of prosecutors is to:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause¹⁶

Lack of probable cause is particularly problematic in sexual assault cases. Not a single state now requires corroborating evidence of rape.¹⁷ This means there is no statutory requirement for DNA, witnesses, or other forensic evidence, a fact that became a stark reality for Brian Banks and his family in 2002.

This means charging decisions have come to rely heavily on the alleged victim’s “character, behavior, and credibility.”¹⁸ But what are the objective and reliable indicia of

character, behavior, and credibility? Lacking a definitive answer to this question, the viability of the probable-cause standard is called into question.

Wrongful convictions are more widespread than most persons realize. A Department of Justice-funded study of post-conviction DNA analyses in Virginia found 15% of convictions lacked a DNA match.¹⁹ It should be noted that the 15% figure underestimates the actual rate of wrongful convictions, because DNA analysis cannot exclude cases where the partners were romantically involved and the sex was consensual.

Viewed from a different perspective, about one-quarter of all cases of persons wrongfully convicted involve an allegation of sexual assault of an adult, according to the National Registry of Exonerations.²⁰ This example illustrates how prosecutor misconduct can contribute to an unjust outcome:

Damon Thibodeaux was convicted and sentenced to death in 1997 for the rape and murder of his 14-year-old step-cousin. Thibodeaux was exonerated on December 19, 2011 based on evidence that the confession was coerced by prosecutors and the alleged rape never occurred.²¹

Further eroding probable-cause requirements are so-called “no-drop” prosecution policies. No-drop was originally designed as a means to discourage accusers from withdrawing a complaint once charges had been filed.²² In practice, however, no-drop policies appear to compromise prosecutors’ ethical sensibilities by inducing them to short-circuit probable cause requirements. No-drop is commonplace, with 66% of prosecutors’ offices implementing such policies for domestic violence cases.²³

One study found 19% of victims had been threatened with incarceration or otherwise coerced by the prosecutor adhering to no-drop requirements.²⁴ No-drop prosecution is also likely to increase prosecution costs, contribute to courtroom delays, and may impose adverse consequences for victims.

2. Selective Prosecution

Men and women are equally likely to be perpetrators of domestic violence, surveys show.²⁵ Yet, females represent only 16% of defendants in domestic aggravated assault cases.²⁶ A growing body of evidence points to an important cause of this disparity: sex-selective prosecution. A recent analysis of domestic violence research concludes:

[M]ales were consistently treated more severely at every stage of the prosecution process, particularly regarding the decision to prosecute, even when controlling for other variables (e.g., the presence of physical injuries) and when examined under different conditions.²⁷

This conclusion echoes a similar analysis of federal crime cases which determined “men receive 63% longer sentences on average than women do,” even after controlling for criminal history and other factors.²⁸

In Iowa, the state Attorney General follows a categorical non-prosecution policy for female domestic violence suspects: “The prosecutors we fund are prohibited from prosecuting female cases,” according to a representative of the state Attorney General’s office.²⁹

Because it violates the Equal Protection Clause of the 14th Amendment, the U.S. Supreme Court has held that selective prosecution exists when the prosecution of a law is “directed exclusively against a particular class of persons.”³⁰ Prosecutors may not charge a person with a criminal offense based on “an unjustifiable standard such as race, religion, or other arbitrary standard,” the High Court has ruled.³¹

Prosecutors “have no constitutional authority to discriminate in their charging decisions on the basis of sex. But they do,” according to one analyst.³²

Prosecutorial overreaching and misconduct distort the truth-finding process and taint the credibility of the criminal justice system, including the outcomes they generate. – National Association of Criminal Defense Lawyers³³

3. Concealment of Evidence

The ABA Model of Rules of Professional Conduct requires the prosecutor to:

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense³⁴

State and federal criminal procedure impose similar requirements. Nonetheless, concealing exculpatory evidence has been found to be the most common form of official misconduct.³⁵

This California case reveals the harm that can result:³⁶

The Sexual Assault Response Team at Santa Clara Valley Medical Center was reported in 2010 to have withheld from defense attorneys a trove of intake forms used to evaluate sex crime victims. The discovery followed a 2009 report that the same hospital group, which operates as part of the prosecution team, had withheld 3,000 videotaped medical exams of alleged victims. The malfeasance may have resulted in dozens of wrongful convictions.³⁷

4. Failure to Prosecute Perjury

Accurate and truthful testimony is essential to upholding the integrity of the criminal justice system. But in domestic violence cases, recantations have become a veritable “epidemic.”³⁸ “Evidence suggests that 80 to 85 percent of battered women will recant some point,” according to one observer.³⁹ One former domestic violence prosecutor commented:

As politically incorrect as it is to say, many women file charges against boyfriends/spouses on a routine basis, and then recant the charges when the cases come to trial. Some of the alleged perpetrators are really guilty, and [a] very large percentage (though not majority) are not guilty of anything except making the woman in their life angry.⁴⁰

Njeri Rutledge notes, “Turning a blind eye to perjury suggests that every domestic violence victim is incapable of obeying the law or facing the consequences of her decision.” Complainants who recant for reasons other than partner coercion or severe emotional trauma should be prosecuted for perjury, the former prosecutor avers.⁴¹

But few district attorneys follow this admonition. Casey Gwinn, a leading San Diego domestic violence prosecutor, has acknowledged:⁴²

If we prosecuted everybody for perjury that gets on a witness stand and changes their story, everybody would go to jail...I would say it's in the thousands of people who take the witness stand and somewhat modify the truth.

A systematic failure to enforce the law can be viewed as evidence of professional dereliction.

Case Study: Prosecutor Mary N. Kellett

Assistant District Attorney Mary Kellett, who practiced in Hancock County, Maine, specialized in sexual assault cases. Her conduct illustrates the full gamut of unethical practices: making charging decisions without probable cause, engaging in selective prosecution, concealment of evidence, and failing to enforce perjury laws:

After a 16-year relationship with an abusive and mentally unstable woman, Vladek Filler of Maine decided to end the marital union. But Ligia Filler responded violently to the decision, punching her husband in the face, an action that was witnessed by the couple's children. On a subsequent occasion, Ligia uttered death threats that were recorded by a police squad car responding to a disturbing-the-peace call.⁴³

In a bid to gain custody of their children, Ligia then accused Vladek of marital rape. The accuser refused to undergo a sexual assault examination.

Despite a lack of probable cause, Kellett charged Vladek on five counts of Class A gross sexual assault and two counts of Class D assault. Kellett did not charge Ligia with assault..

During the trial, Kellett misled the jury during her closing arguments and engaged in other unethical practices, resulting in a judicial finding of a mistrial. This decision eventually resulted in an appeal to the Maine Supreme Judicial Court.

On September 9, 2010, the Court agreed the defense had been unfairly prejudiced by the prosecutor's actions, ruling the “State [prosecutor Kellett] had improperly encouraged the jury to use the absence of evidence regarding the marriage ending and a child custody

dispute – evidence that had been excluded based on the State’s objection – as a reason to reject Filler’s defense.”⁴⁴

Following the filing of a Grievance Complaint,⁴⁵ a panel of the Maine Board of Overseers of the Bar initiated an investigation. On April 24, 2013, the Board’s Bar Counsel sent a report to the Maine Supreme Judicial Court. The report described prosecutor Kellett’s refusal to comply with a 2008 pre-trial court order to release discovery documents and other instances of misconduct as a failure to meet her “constitutional and ethical obligations,” a shortcoming the Board termed “inexcusable.”⁴⁶

On July 16, 2013, Justice Ellen Gorman, acting on behalf of the Maine Supreme Judicial Court, issued the final determination. The 24-page report noted that Kellett did in fact suppress innocence-proving evidence and mislead the jury in her closing arguments. The document noted that “ADA Kellett agreed and admitted that her conduct in the Filler criminal prosecution was in violation of the following then applicable Maine Bar Rules: 3.1(a); 3.2(f)(4); 3.6(a); 3.7(e)(1)(i); and 3.7(i)(2).”⁴⁷ Kellett later resigned her position.

TRACING THE SOURCE

If prosecutorial bias and misconduct have become worrisome in domestic violence and sexual assault cases, how have prosecutors been induced to cast off their ethical moorings? To answer that question, we examine two entities, one a federal agency, the other a professional trade organization.

These cases reveal a similarity in the groups’ willingness to publish misleading information with potentially deleterious effects on the principle of “equal treatment under law.”

Department of Justice

In 2009 the Department of Justice published *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors, and Judges*, authored by Andrew R. Klein.⁴⁸ The preface candidly admits the report relies on “less rigorous research reports” with admittedly “questionable” research findings.

According to the Centers for Disease Control, nearly five million women and more than five million men in the United States experience some type of violence at the hands of their partners every year.⁴⁹ And female-perpetrated violence is the leading risk factor for a woman’s subsequent injury.⁵⁰

Despite this finding, *Practical Implications* claims that the annual rate of nonfatal domestic violence is 5.9 for females and 2.1 for males. These figures come from crime surveys that are widely known to be biased because most persons, especially men, don’t think of a slap or shove as a criminal act.

More troubling is how the *Practical Implications* document addresses the pivotal question, “Does prosecuting domestic violence offenders deter recidivism?” Thoughtful

scholars might attempt to tackle this question in a full-length scientific article. But the author attempts to address the issue within the space of a single page.

Klein cites five studies that found prosecution was *ineffective* in deterring further criminal abuse.^{51,52,53,54,55} He then references six studies suggesting prosecution *reduces* recidivism.^{56,57,58,59,60,61} And the author describes one study that found persons who were prosecuted and convicted were *more* likely to be rearrested than suspects who were not convicted.⁶²

On the basis of these studies, Klein reaches this conclusion: “Prosecution deters domestic violence if it adequately addresses abuser risk by imposing appropriately intrusive sentences, including supervised probation and incarceration.”

But the analysis is flawed, for three reasons:

1. The analysis conflates two related but distinct issues: the prosecutor decision to file a charge versus sentencing length.
2. The review omits consideration of which studies represent good quality vs. poor quality research.
3. Most seriously, the review fails to mention two well-known analyses of no-drop prosecution, both of which concluded mandatory prosecution had the *opposite* of the intended effect on subsequent violence:
 - “The results for prosecutor willingness [to prosecute restraining order violations] suggest that simply being willing to prosecute cases of protection order violation may aggravate already tumultuous relationships... As the willingness [to prosecute] increases by one, the expected number of white wives killed nearly doubles.”⁶³
 - Allowing victims to “drop charges significantly reduces their risk of further violence after a suspect has been arrested on a victim-initiated warrant, when compared with usual [mandatory prosecution] policies.”⁶⁴

So a more truthful conclusion would have stated, “Research on the effects of prosecution of domestic violence cases is inconclusive. Studies show aggressive prosecution and sentencing may increase, decrease, or have no effect on offender recidivism. In particular, no-drop prosecution policies may do more harm than good.”

In response, a Data Quality Act letter was sent to the Department of Justice in 2010, requesting the erroneous statements and conclusions found in *Practical Implications of Current Domestic Violence Research* be corrected.⁶⁵ The Department of Justice did not respond to the request.

National District Attorneys Association

In 2004 the DOJ Office of Violence Against Women awarded a 5-year, \$3.4 million cooperative agreement⁶⁶ to the National District Attorneys Association (NDAA), the nation's leading organization of prosecutors, district attorneys, state's attorneys, and attorneys general based in Alexandria, Virginia.

Domestic Violence Information

The website of the National District Attorneys Association lists a number of domestic violence resources and related information:

1. On its Publications page, the NDAA lists a number of publications on "Violence Against Women" -- but nothing regarding "Violence Against Men."⁶⁷
2. The NDAA publication *Domestic Violence* consistently refers to the victim as "she" and includes emotion-laden language such as "batterer."
3. The Technical Assistance/Prosecution Assistance web page lists "Violence Against Women" as one of its 10 topic areas, but does not include a "Violence Against Men" topic.⁶⁸

This information can be characterized as one-sided and misleading.

National Center for the Prosecution of Violence Against Women

The DOJ grant also supported the NDAA's National Center for the Prosecution of Violence Against Women. The Center has an ambitious and wide-ranging mission:⁶⁹

- Sponsor training programs such as the National Institute on the Prosecution of Domestic Violence and the National Institute on the Prosecution of Sexual Violence
- Publish articles, monographs, and other resources such as *The Voice* newsletter⁷⁰
- Provide case consultation for prosecutors, including "jury consultations (and the writing of jury selection questions/questionnaires), writing lines of cross-examination of defense witnesses, assisting with expert witness location and witness preparation"
- Host a database of defense experts
- Assist prosecutors in addressing the media

Not surprisingly, the National Center for the Prosecution of Violence Against Women has little to say about the prosecution of violence against men.

Department of Justice Audit

In 2010 the Department of Justice conducted an audit of the 16 federal grants awarded to the NDAA. Three of the grants totaling \$4.75 million (including the 2004 award for the National Center for the Prosecution of Violence Against Women) had been funded by the DOJ Office of Violence Against Women (OVW).

The audit of the three OVW grants identified \$998,837 in questionable, unsupported, or unallowable costs for salaries and other expenses unsupported expenditures for fringe benefits (\$449,449) and indirect costs (\$407,466).⁷¹

In its response, the NDAA concurred with the audit findings and recommendations. The NDAA agreed to reimburse the federal treasury and implement remedial procedures.⁷²

In January 2013, a letter was sent to the National District Attorneys Association requesting that the name of the National Center for the Prosecution of Violence Against Women be changed to a gender-neutral or gender-inclusive name, and materials with biased content be corrected.⁷³ A follow-up letter was sent on April 16, 2013.⁷⁴ To date, the NDAA has not provided a formal response.

Separate and Unequal

Many prosecutors have dedicated themselves to the noble pursuit of justice and truth. A number of prosecutors have taken the lead in advocating for the freedom of convicts cleared by DNA testing, establishing Conviction Integrity Units, and supporting the establishment of Innocence Commissions.

But the Brian Banks story, and many others like it, raise troubling questions. Amidst a chorus of claims of prosecutorial misconduct, many worry that prosecutors have lost sight of their ethical compass and too often dispense with fundamental notions of fairness.

This report previously highlighted the case of Mark Sodersten whose conviction was overturned by the California Court of Appeals in 2007. Unfortunately the ruling came too late; Sodersten died in prison six months before the opinion was delivered.

Such practices recall the words of former Supreme Court Justice Thurgood Marshall, who commented on differences in criminal justice outcomes for whites and blacks accused of sexual assault. In the Court's 1987 ruling, the Justice decried the fact that in Georgia, the state operated "openly and formally" separate systems of justice for white and black."⁷⁵

Over two decades later, it appears this dual system of justice is still operative, at least with regards to the adjudication of allegations of domestic violence and sexual assault.

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