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**RESTRICTIONS ON LAWYERS COMMUNICATING WITH WITNESSES
DURING TESTIMONY: LAW, LORE, OPINIONS, AND THE RULE**

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Witnesses are typically permitted to meet and communicate with lawyers before and after they testify. But a difficult situation may arise when a witness talks with a lawyer at some point *during* his or her testimony, that is, before all direct and cross examination has been completed. To many people inside and outside of the legal profession, this seems suspect or just plain wrong. Old fashioned common sense suggests that witness testimony is subject to being colored, coached, or even deliberately changed as a result of consultation with a lawyer, thereby impeding the search for truth.

Although this is a basic problem inherent in all witness testimony, and the issue comes up regularly in trials, hearings, depositions, and other proceedings, there is surprisingly little authority directly on point. When this issue presents itself, practitioners and judges alike may find themselves relying on lore, conventional wisdom, and strongly held opinions instead of law. The objective of this article is to identify and explain existing Florida law that may restrict lawyers from communicating with witnesses during their testimony and to suggest strategies for dealing with this issue when it arises in practice.

The Issue

The classic scenario arises when a witness who, while testifying on cross examination at a trial or hearing, speaks with the lawyer who called the witness to the stand on direct before the cross examination has been completed. This frequently happens during lunch breaks or other casual breaks between the direct and cross examinations. If a witness talks to the lawyer who called him or her to the stand before the cross examination has been completed, the cross examining lawyer may become quite irritated and claim that something illegal, improper, or unethical has occurred.

This same issue arises in a slightly different context during civil depositions. Some lawyers believe a deponent is not allowed to speak with his or her lawyer, even during breaks, until the deposing lawyer's questioning has been completed. Anyone who has ever represented a witness in a deposition knows that deponents almost always want to talk to a lawyer during breaks, if nothing else but to gain reassurance they are doing a good job. Commonly the witness will ask things like "How am I doing?" or "Did I answer that last question before the break correctly?" Sometimes witnesses even request breaks during depositions for the specific purpose of consulting with their lawyer. Upon returning from a deposition break, it is not unusual for a witness to be asked whether he or she spoke to his or her own lawyer during the break. When this comes up, lawyers may end up spending valuable time disagreeing about the propriety of the witness consulting with the lawyer during a break.

Although this issue arises regularly in both civil and criminal litigation, there are divergent viewpoints on what restrictions, if any, the law places on lawyers communicating with witnesses during their testimony. On one side of the spectrum, some believe that witnesses are automatically sequestered by virtue of being called to testify, and it is absolutely improper for a lawyer to talk to any witness about any subject until that witness' testimony has been concluded. Others believe it is permissible for lawyers to talk to witnesses about general matters while they are testifying, but not specifically about their testimony. Some embrace a more nuanced view that it is permissible for a lawyer to talk to *a client* during the client's testimony, but it is improper for a lawyer to talk to a third-party witness. At the opposite end of the spectrum are those who believe a lawyer is permitted to talk to any witness about anything, including the witness' testimony, before, during, and after the witness has testified. Given the disparity of views, it is helpful to separate the law on this issue from lore, opinions, and conventional wisdom.

The Rule

In the American legal system, there are hundreds, if not thousands, of rules but one particular rule -- the rule of witness sequestration -- is so commonly used that it is known simply as "the rule." Even an inexperienced lawyer appearing in court for the first time usually knows to invoke the rule. The rule of witness sequestration, or exclusion of witnesses, came from common law but it is now codified in F.S. §90.616, which provides as follows:

(1) At the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony *59 of other witnesses except as provided in subsection (2).

(2) A witness may not be excluded if the witness is: (a) A party who is a natural person; (b) In a civil case, an officer or employee of a party that is not a natural person. The party's attorney shall designate the officer or employee who shall be the party's representative; (c) A person whose

presence is shown by the party's attorney to be essential to the presentation of the party's cause; (d) In a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, unless, upon motion, the court determines such person's presence to be prejudicial.¹

“The rule is designed to aid in ensuring a fair trial by avoiding the coloring of a witness' testimony by that which he has heard from other witnesses who have preceded him on the stand, thereby discouraging fabrication, inaccuracy and collusion.”² However, many assume the rule also prevents lawyers from communicating with witnesses during their testimony. Thus, by invoking the rule, many believe they have done something that prevents an opposing lawyer from communicating with witnesses during their testimony.

The plain terms of the rule preclude a witness from sitting in a proceeding and listening to other witness testimony -- it says nothing about witnesses communicating with lawyers. In addition, it has long been recognized that the rule also precludes witnesses from talking to each other outside of the courtroom about what happened in the courtroom; that is, witness A cannot tell witness B what questions were just asked and what answers were just given.³ Similarly, the rule has been interpreted to preclude a sequestered witness from reviewing a daily transcript of the proceedings.⁴

Case law has also expanded the rule to include a prohibition on witnesses talking with certain nonwitness intermediaries about their testimony.⁵ Obviously, the purpose of the rule would be defeated if an intermediary could sit in on the testimony and then relate what occurred in the courtroom to a sequestered witness. This intermediary concept is the basis for the argument that the rule prohibits lawyers from communicating with witnesses during their testimony. According to this argument, the trial lawyer is the ultimate intermediary.

Although there may be good theoretical and practical reasons for treating a trial lawyer as an intermediary for purposes of the rule, Florida case law interpreting the rule does not support this argument.⁶ For example, in *Chamberlain v. State*, 881 So. 2d 1087 (Fla. 2004), a death penalty case, the defendant claimed the prosecutor violated the rule by speaking with a state witness, a Detective Fraser, during a break in his testimony.

Detective Fraser testified after defense counsel invoked the rule of sequestration. At the conclusion of his testimony, the court excused the jury, but asked Detective Fraser to remain in the courtroom during a bench conference. Thereafter, the prosecutor briefly discussed with Detective Fraser that he was going to be recalled to testify about a July 26, 1999, bond hearing in which Chamberlain was a witness. Defense counsel objected to Fraser being recalled on the grounds that the state had

violated the rule by discussing with Fraser his potential testimony on recall during a break in the proceedings and while he was still under oath.⁷

The trial court overruled the defense objection based on the alleged violation of the rule. In affirming the trial court on this point, the Florida Supreme Court held:

The rule is designed to aid in ensuring a fair trial by avoiding the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand, thereby discouraging fabrication, inaccuracy and collusion. In this case there is no indication or allegation that Detective Fraser remained in the courtroom during the testimony of another witness, or that Detective Fraser discussed his testimony with another witness.⁸

Based on this passage from *Chamberlain*, it appears the Florida Supreme Court interprets the rule as prohibiting only two things: 1) witnesses remaining in the courtroom to hear the testimony of other witnesses; and 2) witnesses discussing their testimony among themselves prior to testifying. After reviewing the text of the rule itself, together with the existing Florida case law, it is clear that the rule does *not* prohibit lawyers from communicating with witnesses during their testimony. Those wishing to prevent opposing counsel from communicating with witnesses during their testimony must look elsewhere for support.

Rules Governing Mode and Order of Presentation of Evidence

Trial courts are given broad authority to control their proceedings under modern rules of procedure. Some have argued that these rules prohibit lawyers from communicating with witnesses during their testimony. One such rule, F.S. §90.612, provides in relevant part:

The judge shall exercise reasonable control over the mode and order of the interrogation of witnesses and the presentation of evidence, so as to: (a) facilitate, through effective interrogation and presentation, the discovery of the truth; (b) avoid needless consumption of time; (c) protect witnesses from harassment or undue embarrassment.

While this rule does not specifically prohibit lawyers from communicating with witnesses during their testimony, a reasonable argument certainly could be made that prohibiting lawyers from communicating with witnesses during their testimony would “facilitate ... the discovery of the truth.” Thus, this rule has been cited by at least one Florida court as support for an order prohibiting lawyers from communicating with witnesses during their testimony.⁹

The federal rules contain a similar provision, Fed. R. Evid. 611, which provides in relevant part:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Federal courts also have cited this rule when confronted with general witness sequestration issues.¹⁰ However, the published federal opinions do not include any cases where a federal court has held that Rule 611 specifically prohibits lawyers from communicating with witnesses during their testimony.

It is clear that these rules grant trial courts broad authority to control their proceedings, and this authority may be relied upon by a trial court to prohibit lawyers from communicating with witnesses during their testimony. Nonetheless, they do not, ***60** by themselves, prohibit lawyers from communicating with witnesses during their testimony.

Rules of Professional Conduct

Regardless of what the rules of procedure may provide with respect to this issue, some believe it is flatly unethical for a lawyer to speak with a witness before the witness' testimony has been completed. Those who subscribe to this view believe that a lawyer who communicates with a witness during the witness' testimony has engaged in an unethical act regardless of what the lawyer and witness may have discussed. Lawyer coaching is, of course, the main concern.

Although no Florida rule of professional conduct specifically addresses witness coaching, it is recognized that the general rules prohibiting lawyers from facilitating untruthful testimony are broad enough to prohibit witness coaching.¹¹ Indeed, Florida courts have recognized the fact that lawyers are ethically prohibited from coaching witnesses.¹² The U.S. Supreme Court also has recognized the danger of unethical witness coaching which may occur if a lawyer is permitted to speak with a witness prior to completion of his or her testimony.¹³

Unfortunately, the ethical rules against witness coaching are of limited usefulness as a practical matter. There is general agreement that witness coaching is unethical, but there is considerable disagreement as to the definition of "coaching" as opposed to legitimate preparation.¹⁴ It should not come as a surprise that the distinction between legitimate witness preparation and impermissible coaching is difficult to define. Even if there were an easy definition, it is difficult to prove that a lawyer coached a witness without getting into complex and time consuming attorney-client privilege issues.¹⁵

In any event, the ethical rules do *not* flatly prohibit all communication between lawyers and witnesses during the witness' testimony -- only coaching is ethically prohibited.

Common Law Authority of Courts to Control Their Proceedings

Except for a brief mention in one federal court's local rules, there appears to be nothing in Florida law directly prohibiting lawyers from communicating with witnesses during their testimony¹⁶ This does not mean that lawyers and witnesses have a right to engage in this kind of communication or that trial courts are powerless to prohibit it. Rather, case law establishes that trial courts have common law authority to control their own proceedings and courts may use this authority to prohibit this practice.¹⁷

In *Geders v. U.S.*, 425 U.S. 80, 89 (1976), the trial judge sequestered all witnesses for both prosecution and defense and before each recess instructed testifying witnesses not to discuss their testimony with anyone, including the lawyers. The U.S. Supreme Court addressed whether this restriction could be applied to a criminal defendant in light of the Sixth Amendment right to counsel. The Court began with the general proposition that “[t]he judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during, and after their testimony.”¹⁸ After confirming the fact that trial courts have the inherent authority to prohibit lawyers from communicating with witnesses during their testimony, the Supreme Court then turned to the precise issue of whether this authority was restricted when the witness in question was a criminal defendant. The Court held that the trial court could not prohibit a criminal defendant from communicating with his or her lawyer in light of a defendant's Sixth Amendment right to counsel. Thus, according to *Geders*, trial courts have the inherent common law authority to prohibit lawyers from communicating with witnesses during their testimony, as long as the witness is not the defendant.¹⁹

A review of Florida case law indicates that trial courts routinely restrict lawyers from communicating with witnesses during their testimony, usually between direct and cross examination.²⁰ In all of the reported Florida opinions, it was *assumed* that trial courts have the inherent authority to restrict lawyers from communicating with witnesses during their testimony; the typical issue on appeal is whether such an order may be applied to a criminal defendant, not whether the court had the authority to enter such an order in the first place. As such, there is little doubt that Florida trial courts have the inherent common law authority to prohibit lawyers from communicating with witnesses during their testimony, as long as the witness is not a criminal defendant.

Addressing Lawyer-Witness Communication During Testimony

Although trial courts have the inherent authority to prohibit lawyers from communicating with witnesses during their testimony, this prohibition does not automatically exist absent a court order. As previously noted, there is no rule of procedure specifically prohibiting this practice, so lawyers are free to do so as long as they do not engage in coaching. Therefore, if a litigant wishes to prohibit opposing counsel from communicating with a witness during his or her testimony, it is necessary for a trial judge to enter such an order.²¹ Depending on the judge, an order of this nature might be entered sua sponte, but in most instances it will be necessary for counsel to request such an order on a case-by-case basis.

A trial court's decision on this point is a highly discretionary matter. There are no published opinions in Florida reversing a trial court for refusing to prohibit lawyers from communicating with witnesses (other than a criminal defendant) during their testimony.²²

When seeking an order prohibiting lawyer-witness communications during the witness' testimony, counsel should be prepared to make arguments supporting their position and not simply assume the trial court will see things their way.²³ For some judges, it is obvious that lawyers should be prohibited from communicating with witnesses during their testimony. Other judges view things differently and may be reluctant to intervene.²⁴

When a court has entered an order prohibiting lawyers from communicating *61 with witnesses during their testimonies, failure of a witness, or a lawyer, to abide by it could subject one or both parties to sanctions including punishment for contempt or exclusion of such testimony at trial. But absent such an order from the trial court, there is nothing in Florida law prohibiting lawyers from communicating with witnesses during their testimony unless the communication constituted coaching.

The Criminal Defendant -- A Special Situation

As noted earlier, the U.S. Supreme Court has held that a trial court's authority to prohibit communication between a criminal defendant and his or her counsel is extremely limited. The Florida Supreme Court has ruled to the same effect.²⁵ Because of the constitutional right to counsel, a criminal defendant is entitled to speak with his or her lawyer at almost any time during a trial. That said, a criminal defendant does not have the right to discuss his or her trial testimony with his or her lawyer while actually on the witness stand.²⁶ Thus, a criminal defendant does not have the constitutional right to force a break in proceedings to speak with his or her lawyer if the trial judge is not inclined to permit it.²⁷ But under Florida law, once a recess is called, no

matter how brief, a defendant must have access to his or her attorney.²⁸ “[R]egardless of whether the recess is one hour, [30] minutes, or [10] minutes, to deny a defendant consultation with his attorney during any trial recess, even in the middle of his testimony, violates the defendant's basic right to counsel.”²⁹

When a Florida trial judge decides to enter an order restricting a lawyer from communicating with witnesses during testimony, the court must be careful to avoid applying such an order to a criminal defendant. If this should happen, a new trial may be warranted depending on the facts of the case.³⁰

Conclusion

Many well-established reasons exist for prohibiting lawyers from communicating with witnesses during their testimony. In fact, the pragmatic, common sense appeal of such a prohibition is so strong that many in the legal community assume it exists without ever consulting the applicable rules and case law. But in the absence of an order from the trial judge, a lawyer is generally permitted to talk with a witness during testimony as long as the lawyer does not cross the line into unethical coaching.

This issue arises with regularity, especially in civil depositions, yet it does not lend itself to effective appellate review. As a result, there is insufficient case law on this important topic and lawyers are left to debate the issue back and forth with little hope for a definitive resolution. This combination of factors -- a regular problem with little clarifying case law -- suggests that a new rule of evidence or procedure would be useful *62 to guide lawyers and judges as to the circumstances under which lawyers are prohibited from communicating with witnesses during their testimony. In the meantime, lawyers concerned about this issue must address the appropriateness of such a prohibition on a case-by-case basis with their trial judge. When doing so, it will be helpful to distinguish between law, lore, and personal opinions.

Footnotes

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1 In federal court “the rule” is codified in FED. R. EVID. 616.

2 *Chamberlain v. State*, 881 So. 2d 1087, 1099-1100 (Fla. 2004); *Lott v. State*, 695 So. 2d 1239, 1243 (Fla. 1997). “The practice of sequestering witnesses has been used for centuries, and it came to the United States as part of our inheritance of the common law.” *Hernandez v. State*, ___ So. 2d ___ 2009 WL 217972 (Fla. 2009). “Wigmore observed, ‘[t]here is perhaps no testimonial expedient

which, with as long a history, has persisted in this manner without essential change.” CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE, Evidence* §6241 (2006); *Gov't of the Virgin Islands v. Edinborough*, 625 F.2d 472, 473 (3d Cir. 1980) (stating that the practice of sequestration dates to Biblical times).

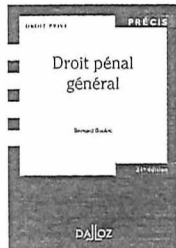
- 3 See CHARLES W. EHRHARDT, *FLORIDA EVIDENCE* §616.1 (2008) (“Although section 90.616 states that the court shall order witnesses excluded ‘so that they cannot hear the testimony of other witnesses except as provided in subsection (2),’ it seems clear that sequestration prohibits more than merely preventing a witness from hearing another person testify. Wigmore suggests that the process of sequestration also involves preventing the prospective witnesses from consulting each other and preventing them from consulting a witness who has left the witness stand.”).
- 4 *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981) (sequestered expert violated the rule by reviewing daily transcript of proceedings; expert not allowed to testify).
- 5 See *Del Monte Banana Co. v. Chacon*, 466 So. 2d 1167, 1170 (Fla. 3d D.C.A. 1985) (nonwitness “was present in courtroom, related the courtroom testimony to a sequestered witness”).
- 6 There are at least three published Florida opinions that either directly or implicitly reject the argument that the rule prohibits lawyers from communicating with witnesses during their testimony. See, e.g., *Chamberlain v. State*, 881 So. 2d 1087, 1099-1100 (Fla. 2004); *Nieves v. State*, 739 So. 2d 125 (Fla. 5th D.C.A. 1999); and *Kingery v. State*, 523 So. 2d 1199 (Fla. 1st D.C.A. 1988).
- 7 *Chamberlain v. State*, 881 So. 2d at 1099 (Fla. 2004).
- 8 *Id.* at 1099-1100 (internal quotations omitted).
- 9 See *Kingery*, 523 So. 2d at 1205 (“Our reasoning on this point attempts to give due weight to the broad discretion accorded a trial court in the conduct of a trial. See §90.612, Fla. Stat.”).
- 10 See *In re U.S.*, 584 F.2d 666 (5th Cir. 1978) (Although federal agent involved in preparation of criminal proceedings could not be excluded from the courtroom, any prejudice from such agent's presence while others were testifying could be rectified by requiring the government to present the agent's substantive testimony at an early stage of its case; however, what the court could not do is bar the agent's subsequent testimony either in government's case in chief or on rebuttal because he was not sequestered.).
- 11 The local rules for the Southern District of Florida specifically prohibit coaching witnesses in depositions. See S.D. FLA. L. R. 30.1(A)(1). THE FLORIDA BAR TRIAL LAWYERS SECTION, *GUIDELINES FOR PROFESSIONAL CONDUCT* (2008 ed.), discusses coaching during depositions in section F-8: “While a question is pending, counsel should not coach the deponent nor suggest answers, through objections or otherwise.” Witness coaching has contributed to the disbarment of at least one Florida lawyer. See *Florida Bd. of Bar Examiners Re: L.H.H.*, 660 So. 2d 1046 (Fla. 1995).
- 12 *Thompson v. State*, 507 So. 2d 1074, 1075 (Fla. 1987) (discussing the fact that an attorney is not ethically permitted to coach a client during a break in the client's cross examination); *Leerdam v. State*, 891 So. 2d 1046, 1048 (Fla. 2d D.C.A. 2004) (permitting defense counsel to consult with a client during a break in his testimony “allows defense counsel to advise, calm, and reassure the defendant without violating the rule against coaching witnesses”); *Crutchfield v. Wainright*, 803 F.2d 1103, 1110 (11th Cir. 1986) (attempting to define coaching as “improperly directing a witness's testimony in such a way as to have it conform with, conflict with, or supplement the testimony of other witnesses”); see also *Cardona v. State*, 826 So. 2d 968 (Fla. 2002) (“When a particular witness is crucial to the [s]tate's case, evidence of coaching is especially material to that witness's credibility”).
- 13 *Geders v. U.S.*, 425 U.S. 80, 89 (1976).
- 14 For a general discussion of the ethical implication of witness coaching see Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 666 (1995); and Joseph D. Piorkowski, *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of “Coaching,”* 1 GEO. J. LEGAL ETHICS 389 (1987).
- 15 *Haskell Co. v. Georgia Pacific Corp.*, 684 So. 2d 297 (Fla. 5th D.C.A. 1996) (“We recognize that the coaching of witnesses during depositions may obstruct the fact-finding purpose of discovery. We also recognize a trial court's authority to supervise the conduct of parties at depositions, but that authority may not encroach upon the attorney-client privilege.”).

- 16 The only rule addressing this issue in Florida appears to be S.D. FLA. L. R. 301(A), which states, in relevant part, as follows: The following abusive deposition conduct is prohibited: (2) Interrupting examination for an off-the-record conference between counsel and the witness except for the purpose of determining whether to assert a privilege.”
- 17 As Professor Ehrhardt notes, “[a] judge has the discretion to order a witness who is testifying not to talk with counsel during a recess in order to avoid counsel coaching the witness with respect to subsequent examination.” EHRHARDT, FLORIDA EVIDENCE §612.2 (2008). In *McDermott v. Miami-Dade County*, 753 So. 2d 729 (Fla. 3d D.C.A. 2000), a workers' compensation judge entered an order precluding a witness from communicating with her lawyer during a multi-day break in her deposition. The First District held that a provision of the workers' compensation statutes provided authority for the lower court's order.
- 18 *Geders*, 425 U.S. 80, 89 (1976).
- 19 It should be noted that the U.S. Supreme Court narrowed its holding in *Geders* 13 years later in *Perry v. Leeke*, 488 U.S. 272 (1989). In *Perry*, the court held that there was no violation of the defendant's Sixth Amendment right to counsel when he was precluded from talking to his lawyer during a 15-minute recess between his direct and cross examination. Nonetheless, Florida law, which contains a broader right to counsel, does not permit a trial court to impose the same restriction approved by the U.S. Supreme Court in *Perry*. See note 26 below.
- 20 See, e.g., *Amos v. State*, 618 So. 2d 157 (Fla. 1993); *Thompson v. State*, 507 So. 2d 1074 (Fla. 1987); *Bova v. State*, 410 So. 2d 1343 (Fla. 1982), *habeas corpus granted*, 674 F. Supp. 834 (S.D. Fla. 1987), *judgment aff'd*, 858 F.2d 1539 (11th Cir. 1988); *Leerdam v. State*, 891 So. 2d 1046 (Fla. 2d D.C.A. 2004); *Wallace v. State*, 851 So. 2d 216 (Fla. 3d D.C.A.), *review denied*, 860 So. 2d 980 (Fla. 2003), *cert. denied*, 540 U.S. 1187 (2004); *Cabreriza v. State*, 517 So. 2d 51 (Fla. 3d D.C.A. 1987); *McFadden v. State*, 424 So. 2d 918 (Fla. 4th D.C.A. 1982); *Recinos v. State*, 420 So. 2d 95 (Fla. 3d D.C.A. 1982); *Stripling v. State*, 349 So. 2d 187 (Fla. 3d D.C.A. 1977); *Crutchfield v. Wainright*, 803 F.2d 1103 (11th Cir. 1986).
- 21 *Hall v. Clifton Precision Inc.*, 150 F.R.D. 525, 531-532 (E.D. Pa. 1993), provides an interesting, and somewhat controversial, example of such an order relating to communications between an attorney and his client in a civil deposition. In *Hall* the trial judge placed severe restrictions on the client's ability to consult with his counsel during a deposition. It should be noted, however, that federal courts are not uniform in their approach to this issue; when asked to implement deposition restrictions similar to those in *Hall*, a Nevada federal court refused. See *In re Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614, 621 (D.Nev. 1998). A Florida case, *Haskell Co. v. Georgia Pacific Corp.*, 684 So. 2d 297 (Fla. 5th D.C.A. 1996), holds that communications between a client and counsel during a break in a civil deposition are protected by the attorney-client privilege, but it does not address the question of whether such communications may be restricted by the trial court.
- 22 In other jurisdictions this issue has reached appellate courts in a civil context. In these jurisdictions, “courts have struggled to define if and when a court may prohibit contact between a testifying party and his counsel during [civil] trial[s].” See Cary, *Rambo Depositions Revisited: Controlling Attorney-Client Consultations During Depositions*, 19 GEO. J. LEGAL ETHICS 367 (2006). Consequently, there are published opinions reversing trial courts that have prohibited lawyers from communicating with witnesses during their testimony and there are opinions affirming such orders. Compare *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980) (reversing trial court's order prohibiting counsel from communicating with client during overnight recess in civil trial), with *Aiello v. City of Wilmington*, 623 F.2d 845, 858 (3d Cir. 1980) (affirming order by trial judge restricting communication between counsel and his client during client's cross examination in civil trial).
- 23 As previously noted, federal trial courts are not uniform in their approach to this issue, at least with respect to restrictions on civil deposition communications. Florida trial courts are likely to approach this issue differently as well. Those advocating for restriction on communications between lawyers and witnesses will find good arguments for their position in *Hall v. Clifton Precision Inc.*, 150 F.R.D. 525, 531-532 (E.D. Pa. 1993). Those advocating against restriction on communications between lawyers and witnesses will find good arguments for their position in *In re Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614, 621 (D. Nev. 1998).
- 24 See, e.g., *Kingery v. State*, 523 So. 2d 1199 (Fla. 1st D.C.A. 1988) (trial court refused a defense request for there to be no contact between the prosecutor and state witness over lunch break). Those who find no difficulty with lawyers communicating with witnesses during their testimony might point out that the *Florida Standard Jury Instructions (Criminal)* §3.10 specifically instructs that “[i]t is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about his or her testimony.” On the other hand, this instruction may miss the mark

because it says nothing about the propriety of such communication *during*, as opposed to *before*, the witness' testimony has begun. It is interesting to note that *Florida's Standard Jury Instructions for Civil Cases* does not include a comparable instruction.

- 25 *Perry v. Leeke*, 488 U.S. 272 (1989); *Geders v. U.S.*, 425 U.S. 80 (1976); *Bova v. State*, 410 So. 2d 1343 (Fla. 1982), *habeas corpus granted*, 674 F. Supp. 834 (S.D. Fla. 1981) *judgment aff'd*, 858 F.2d 1539 (11th Cir. 1988); *Amos v. State*, 618 So. 2d 157, 161 (Fla. 1983).
- 26 *Leerdam v. State*, 891 So. 2d 1046, 1048 (Fla. 2d D.C.A. 2004) (“Federal and Florida authorities agree that a defendant does not have the constitutional right to discuss his trial testimony with counsel while that testimony is in progress.”).
- 27 *Perry v. Leeke*, 488 U.S. 272 (1989); *Bova v. State*, 410 So. 2d 1343 (Fla. 1982), *habeas corpus granted*, 674 F. Supp. 834 (S.D. Fla. 1987), *judgment aff'd*, 858 F.2d 1539 (11th Cir. 1988) (“the trial court has complete discretion in the granting of and duration of trial recesses ... however, once the court does in fact grant a recess, we find a criminal defendant must be allowed access to counsel.”).
- 28 *Amos v. State*, 618 So. 2d 157, 161 (Fla. 1993) (“[N]o matter how brief the recess, a defendant in a criminal process must have access to his [or her] attorney”).
- 29 *Leerdam v. State*, 891 So. 2d 1046, 1049 (Fla. 2d D.C.A. 2004). It should be noted that Florida and federal law differ somewhat on this issue. The Florida Supreme Court has held that the Florida Constitution provides a broader right to counsel than the U.S. Constitution. *Id.* Thus, in a federal trial, unlike a Florida trial, a defendant *could* be precluded from speaking with his or her lawyer during a brief recess. *Compare Perry v. Leeke*, 488 U.S. 272 (1989) (no violation of defendant's Sixth Amendment right to counsel when defendant was precluded from talking to his lawyer during a 15-minute recess between his direct and cross examination), *with Geders v. U.S.*, 425 U.S. 80, 87 (1976) (defendant's Sixth Amendment right to counsel violated when defendant was precluded from talking to his lawyer during an overnight recess between his direct and cross examination).
- 30 Florida appellate courts use a harmless error analysis to determine if a new trial is required in these situations. *Compare, e.g., Thompson v. State*, 507 So. 2d 1074 (Fla. 1987) (new trial granted where trial court prohibited defense counsel from communicating with client prior to cross examination), *with Leerdam v. State*, 891 So. 2d 1046 (Fla. 2d D.C.A. 2004) (new trial not warranted where trial court prohibited defense counsel from communicating with client prior to cross examination); and *Wallace v. State*, 851 So. 2d 216, 221 (Fla. 3d D.C.A. 2003), *review denied*, 860 So. 2d 980 (Fla. 2003), *cert. denied*, 540 U.S. 1187 (2004) (refusing to grant new trial when the record failed to suggest that the defendant, or counsel on the defendant's behalf, wished to confer during a mid-testimony recess in which consultation was prohibited); *Cabreriza v. State*, 517 So. 2d 51 (Fla. 3d D.C.A. 1987) (new trial not warranted).

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L'entrée en vigueur d'un nouveau Code pénal n'a pas arrêté l'ardeur du législateur.

Après les lois Perben I et II de 2002 et 2004, sont intervenues des dispositions sur le traitement et la prévention de la **récidive** (lois de décembre 2005 et août 2007). En outre, plusieurs ordonnances ont soit modifié des textes du Code monétaire et financier ou du Code de commerce, soit créé des codes nouveaux (entrée et séjour des étrangers, défense, sport...).

Le présent ouvrage en tient compte.

Les **grands principes** du droit pénal sont exposés comme, d'ailleurs, les éléments de l'infraction.

Les règles concernant l'**imputabilité** des infractions (personnes physiques, **personnes morales**, chefs d'entreprises, mineurs) font l'objet de développements spécifiques. Les causes de justification (légitime défense, état de nécessité, démente, contrainte ou erreur) sont minutieusement décrites.

Les différentes **sanctions** (peines privatives de liberté, peines privatives ou restrictives de droits, peines complémentaires et mesures de sûreté comme la **rétenion de sûreté**) sont décrites. Le choix offert au juge est très large, mais il peut en suspendre l'exécution (sursis), au besoin après un temps d'emprisonnement ferme (libération conditionnelle) ou en aménager l'exécution.

L'ouvrage comporte de nombreuses références à la doctrine et à la jurisprudence pour permettre aux praticiens (juges et avocats) et aux étudiants (chercheurs ou non) d'approfondir une question.

Bernard Bouloc est professeur à l'Université Panthéon-Sorbonne (Paris I) et vice-président de la commission Ph. Léger de réflexion sur le Code pénal et le Code de procédure pénale.

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Droit pénal général

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Droit pénal général

Bernard Bouloc

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n'est antijuridique que s'il est prohibé par la loi ou non justifié par elle, en définitive l'élément injuste se ramène à l'élément légal et se confond avec lui. Aussi, rejetant cet élément d'antijuridicité qui n'aboutit finalement qu'à la négation de l'existence de l'élément légal dans un cas d'espèce déterminé, nous examinerons seulement les deux éléments constitutifs généraux, l'élément matériel et l'élément moral, en l'absence de l'un desquels l'infraction n'existe pas.

Chapitre 1. L'élément matériel.

Chapitre 2. L'élément moral.

CHAPITRE 1

L'ÉLÉMENT MATÉRIEL

211 A la différence de la morale, qui scrute les consciences et sanctionne les mauvaises pensées et les intentions coupables, le Droit pénal qui protège la société ne réprime pas les simples idées et intentions criminelles, non plus que la résolution de commettre un délit, car elles ne troublent pas l'ordre social. Il ne les punit que lorsqu'elles se sont manifestées extérieurement par un fait ou un acte. Le fait ou l'acte extérieur par quoi se révèle l'intention criminelle ou la faute pénale constitue l'*élément matériel* de l'infraction¹. C'est, par exemple, le coup de feu ou de couteau porté à autrui (homicide), la soustraction de la chose d'autrui (vol), le fait de n'avoir pas porté secours à une personne en péril, le fait d'avoir laissé son automobile à une place où le stationnement est interdit.

Mais, si un acte est toujours requis pour qu'il y ait infraction² — (le droit français prohibant les mesures préventives avant tout délit, sauf texte particulier) — il n'est pas nécessaire que cet acte ait laissé des traces matérielles ou provoqué une conséquence nuisible. Bien qu'il n'ait pas été poursuivi jusqu'à son terme, ou qu'il n'ait pas produit de résultat délictueux (délit tenté et délit manqué) il n'en constitue pas moins l'élément matériel de l'infraction. D'après le Code pénal (art. 121-4 et 121-5) l'infraction tentée ou manquée est punissable comme l'infraction consommée. L'élément matériel consiste donc dans un fait ou un acte (Section 1) mais il ne consiste pas dans le résultat de cet acte (Section 2).

1. Pour A. C. Dana, à la simple matérialité du fait s'ajoute la substance éthique qui rattache l'infraction à son auteur pour établir l'imputabilité (cf. *supra*, n° 83). Trois critères influent alors sur les classifications : la durée, la structure et la nature de l'acte infractionnel. L'action matérielle doit être envisagée en tant qu'extériorisation d'une volonté agissante et consciente.

2. Il en est ainsi même lorsque la loi incrimine l'association ou l'entente (ex. art. 450-1 C. pén. ; art. 212-3 et art. 323-4 C. pén.) puisque la préparation de l'infraction projetée doit être « concrétisée par un ou plusieurs faits matériels ». Ces faits peuvent être des actes préparatoires (Crim. 15 déc. 1993, *Dr. pén.* 1994.131 ; Crim. 30 avr. 1996, *Bull.* n° 176, RSC, 1997, 113 obs. J. P. Delmas Saint Hilaire ; Crim. 13 mars 1997, *Bull.* n° 105 ; Crim. 26 mai 1999, *Bull.* n° 103).

SECTION 1. LA NÉCESSITÉ D'UN FAIT OU D'UN ACTE

- 212 L'élément matériel nécessaire à l'existence de l'infraction peut être soit un acte positif ou un acte négatif (action ou omission), soit un acte instantané ou un acte continu, soit un seul acte ou plusieurs actes, ce qui conduit à préciser l'élément matériel avant d'étudier la distinction des infractions fondée sur leur exécution matérielle.

§ 1. L'élément matériel : action et omission

S'il est facile de distinguer l'action ou commission de l'omission, il est plus difficile de savoir si une simple omission peut constituer un délit de commission.

A. Délit d'action ou de commission et délit d'omission

- 213 Le plus souvent, l'élément matériel réside dans un acte positif qui consiste à faire ce que la loi prohibe (tuer, blesser, voler). Le délit est alors un délit d'action ou de commission. Parfois, mais plus rarement, l'élément matériel réside dans un acte négatif qui consiste à ne pas accomplir ce que la loi commande de faire dans l'intérêt général (porter secours à une personne en péril, faire telle déclaration). C'est alors le délit d'inaction ou d'omission¹.

Le meurtre, l'assassinat, le vol, l'escroquerie, la diffamation, etc., sont des délits de commission, car ils supposent un acte positif contraire à la défense légale. Sont au contraire des délits d'omission : le défaut de déclaration d'une naissance (art. R. 645-4 C. pén.), le défaut de dénonciation d'un crime tenté ou consommé (art. 434-1 C. pén.), le défaut de paiement pendant plus de deux mois de prestations dues en raison d'obligations familiales, et résultant d'une décision judiciaire (art. 227-3 C. pén.), le fait de ne pas porter secours à une personne en péril (omission de porter secours, art. 223-6 C. pén.)² ou les contraventions prévues par l'article R. 610-5. Le législateur moderne a tendance à multiplier les infractions d'omission³.

1. Voir colloque préparatoire au XIII^e Congrès de l'AIDP sur « Infractions d'omission et responsabilité pénale pour omission » tenu à Urbino en 1982, *RID pén.*, 1984, n^{os} 3-4 ; Gössel, compte rendu des travaux du congrès sur cette question, *ibidem*, 1985, p. 481.

2. Sur les éléments constitutifs du délit d'abstention délictueuse et notamment la notion de péril, voir Poitiers, 3 févr. 1977, *D.* 1978 J., p. 34, note Couvrat et obs. Levasseur, *RSC*, 1978, *D.* 1979, p. 101 ; *adde* Cour de Besançon, 16 déc. 1975, *D.* 1976, p. 166, note Pelier ; *Crim.* 11 oct. 1978 *D.* 1979, IR, 101. V. aussi D. Mayer, « La charité mesurée de l'art. 63, al. 2 C. pén. », *JCP* 1977.I.2750 ; E. N. Montréal, « Infraction d'omission et responsabilité pénale par omission », *RID pén.* Rapport général XIII Congrès AIDP 1984, p. 473.

3. V. en particulier en matière de fraudes fiscales, l'art. 1741 CGI punissant celui qui a tenté de se soustraire frauduleusement à l'établissement ou au paiement de l'impôt... en omettant de faire

Dans tous ces cas, c'est l'omission elle-même qui constitue l'infraction et qui est punissable, quelles qu'aient été les conséquences de cette omission¹. Toutefois, pour les atteintes involontaires à l'intégrité physique, le résultat révèle les omissions antérieurement réalisées.

B. Le délit de commission par omission

- 214 Le résultat, généralement provoqué par une action positive (commission), peut parfois provenir d'une simple omission. Ainsi l'homicide et les blessures qui peuvent résulter d'un coup de revolver ou de couteau peuvent aussi avoir pour cause une négligence (homicide ou blessures par imprudence). L'homicide provoqué par omission expose-t-il son auteur aux mêmes peines que l'homicide provoqué par commission ? Entre le délit de commission et le délit d'omission existe-t-il une catégorie intermédiaire, celle du délit de commission par omission ? Si, par exemple, au lieu de tuer quelqu'un d'une balle de revolver ou d'un coup de poignard (commission), je le laisse périr en le privant d'aliments ou en ne lui en portant pas secours, alors qu'il est en train de se noyer sous mes yeux (omission), suis-je coupable d'un homicide volontaire, du fait de mon omission ? En d'autres termes, un délit de commission peut-il résulter d'une simple omission ?

Dans l'Ancien Droit, l'auteur d'une omission pouvait parfois être puni comme s'il avait accompli le fait de commission. « Qui peut et n'empêche, pêche », disait Loysel, mais cette maxime était loin d'être observée de façon générale². En l'absence d'une disposition dans le Code pénal, la jurisprudence a refusé d'assimiler l'abstention à une action et d'admettre qu'un délit de commission puisse résulter d'une simple omission. Dans l'affaire de la « séquestrée de Poitiers »³, la Cour de Poitiers a décidé que le délit de coups et blessures volontaires (anc. art. 309 et 311 C. pén.) ne pouvait pas être retenu à l'encontre des parents qui avaient laissé sans soins, dans une chambre sans air et sans lumière, une personne âgée et infirme atteinte d'aliénation mentale au point que son existence était compromise. Pour les tribunaux, l'abstention n'équivaut point à la commission, car elle ne répond pas à la définition légale de l'infraction ; en décider autrement serait raisonner par analogie, ce qui est une méthode d'interprétation interdite.

une déclaration, ou l'art. 1743 CGI punissant celui qui a sciemment omis de passer ou de faire passer des écritures dans les documents comptables : V. *Crim.* 9 janv. 1978, *JCP* 1978.IV.86 ; *Crim.* 27 févr. 1978, *Bull.* n° 75 ; *Crim.* 25 mai 1978, *Bull.* n° 166 ; *Crim.* 3 déc. 1979, *JCP* 1980.IV.69 ; *Crim.* 10 déc. 1979, *JCP* 1980.IV.82 ; *Crim.* 12 janv. 1981, *Bull.* n° 14 ; *Crim.* 19 nov. 1984, *Bull.* n° 351 ; *Crim.* 2 mars 1987, *Bull.* n° 101 ; *Crim.* 19 févr. 1998, *Bull.* n° 73. En matière de Droit pénal des sociétés, la loi du 24 juill. 1966 a également sanctionné de nombreuses omissions ; mais tel n'est pas le cas de l'abus de biens sociaux : *Crim.* 19 déc. 1973, *Bull.* n° 480, *Rev. sociétés*, 1974, p. 374, note Boulloc. V. toutefois *Crim.* 28 janv. 2004, *Bull. Joly* 2004, p. 861, *Rev. sociétés*, 2004, p. 722, note Boulloc ; D. Rebut, L'abus de biens par abstention, *D.* 2005 chron. 1290.

1. Sur la justification, V. Rassat, *Droit pénal*, n° 230.

2. Laingui, *op. cit.*, p. 118 et ss. ; Laingui, « Les adages du Droit pénal », *RSC*, 1986, p. 41.

3. André Gide, *La séquestrée de Poitiers*, 1930 ; Poitiers, 20 nov. 1901, *DP*, 1902.2.81, note Le Poittevin ; S. 1902.2.305, note Hémaré.

C'est seulement, dans les hypothèses où la loi l'a expressément prévu, que l'omission peut avoir la valeur d'une commission et exposer son auteur aux peines édictées pour le délit de commission¹. Il en est ainsi dans le cas de l'article 223-3 du Code pénal qui punit celui qui délaisse une personne non en mesure de se protéger en raison de son âge ou de son état psychique ou physique, suivant que l'abstention n'a entraîné aucun dommage, ou a entraîné une mutilation ou infirmité permanente ou la mort. Il en est de même en cas de mise en péril des mineurs (art. 227-15 C. pén.), par privation d'aliments ou de soin qui expose à sept ans d'emprisonnement, mais à trente ans de réclusion criminelle, en cas de mort de la victime.

Mais en dehors de ces cas exceptionnels², il n'y a pas de délit de commission par omission³. Ainsi, tant l'art. 63, al. 2 anc. C. pén. que l'art. 223-6 du nouveau Code pénal qui réprime l'omission de secourir une personne en péril n'a pas créé un délit de commission par omission, mais simplement un délit d'omission, puisque celui qui s'abstient de porter secours n'est pas puni comme auteur d'un meurtre ou de coups et blessures volontaires, mais comme coupable d'un délit distinct, qu'elles qu'aient été les suites de son abstention⁴.

§ 2. La distinction des infractions d'après l'élément matériel

- 215 Si l'on envisage les infractions d'après l'élément matériel, on les distingue soit d'après leur mode d'exécution matérielle, soit d'après leur résultat, soit d'après l'époque de leur constatation matérielle.

A. Distinctions fondées sur le mode d'exécution

En prenant comme base leur mode d'exécution matérielle, on peut opposer les infractions d'action ou de commission aux infractions d'inaction ou d'omission, les infractions instantanées aux infractions continues ou successives, les infractions simples ou d'occasion aux infractions d'habitude, les infractions simples aux infractions complexes.

1. V. toutefois pour des mauvais traitements à animaux : Crim. 4 déc. 2001, *Dr. pén.* 2002.38 obs. Véron.

2. Auxquels on peut ajouter les cas où la loi punit celui qui « laisse faire ».

3. Crim. 29 janv. 1936, *DH* 1936.134 ; V. cependant Crim. 27 oct. 1971, *Bull.* n° 698, *Gaz. Pal.*, 1972-I, somm. 2, pour le cas où le prévenu avait le devoir de s'opposer à ce qu'il a laissé faire ; Crim. 25 janv. 1982, *Bull.* n° 29 (omission d'écritures faussant la comptabilité). La théorie de A. C. Dana qui fait de l'imputabilité une composante de l'infraction, permettrait de justifier la répression du délit de commission par omission.

4. Le délit de commission par omission est admis au contraire en droit allemand où il a été très étudié. On le relève également en droit anglo-américain dans certains cas de « négligence criminelle » ; Comp. Levasseur, « La négligence criminelle endommageant ou menaçant l'intégrité corporelle de la personne en droit français », *Mélanges Jacques Fortin*, 1986, p. 51.

1. Infractions instantanées et infractions continues ou successives

- 216 Qu'il consiste dans une action ou une omission, l'acte qui constitue l'élément matériel de l'infraction peut être, soit un acte dont la durée est négligeable, soit un acte susceptible par sa nature de durer plus ou moins longtemps¹. Ce qui conduit à distinguer l'infraction *instantanée* et l'infraction *continue ou successive*.

a. Le principe de la distinction

- 217 **Infraction instantanée et infraction permanente** ◇ Les infractions instantanées sont réalisées par une action ou omission qui s'exécute en un instant ou dont la durée d'exécution plus ou moins longue est indifférente à la réalisation de l'infraction. C'est le cas du meurtre, du vol, des coups et blessures, de l'omission d'une déclaration imposée par la loi sous peine de sanctions pénales (étranger qui s'établit en France), de l'arrestation illégale (art. 224-1 C. pén.)². Il en est de même du délit d'usure, qui est consommé par le fait même de la convention de prêt à un taux usuraire³, de l'infraction constituée par un affichage irrégulier⁴ ou de l'usage de faux⁵, de l'abus de biens sociaux⁶, de la présentation d'un bilan inexact⁷, du détournement de correspondance⁸, du défaut de souscription d'une assurance en matière de construction⁹, du délit de favoritisme¹⁰, de la prise illégale d'intérêt¹¹ ou de l'entrave à la liberté des enchères¹².

Du moment qu'elle se réalise en un trait de temps, l'infraction est instantanée. Il importe peu que la durée entre dans ses éléments constitutifs (abandon de famille), ni même que ses effets se prolongent dans le temps

1. Comp. Lucazeau, « Le temps en Droit pénal... », *RSC*, 1990.521 ; L. Saenko, *Le temps en droit pénal des affaires*, thèse Paris I, 2008.

2. Crim. 26 juill. 1966, *JCP* 1966.II.14864.

3. Crim. 24 mars 1965, *D.* 1965.434.

4. Crim. 16 déc. 1964, *JCP* 1965.II.14086, note Schwob, *D.* 1965, somm. 74. En matière de publication de presse, il faut déterminer l'acte de première publication en France : Crim. 13 oct. 1987, *Bull.* n° 349.

5. Crim. 12 déc. 1979, *Bull.* n° 313, *JCP* 1980.IV.35 ; Crim. 19 janv. 2000, *Bull.* n° 32.

6. Crim. 28 mai 2003, *Bull.* n° 109, *Rev. sociétés*, 2003, p. 906, note Boulloc ; Crim. 8 oct. 2003, *Bull.* n° 184, *D.* 2003 AJ 2695 obs. A. Lienhard, *Rev. sociétés*, 2004, p. 155 obs. Boulloc ; Y. Mayaud, *D.* 2004, chron. 1943.

7. Crim. 18 mars 1986, *Bull.* n° 109, *Rev. sociétés*, 1987, p. 85, obs. B. Boulloc ; Crim. 31 oct. 2000, *Dr. pén.* 2001.20 obs. J. H. Robert. En matière d'abus de biens sociaux, la Cour de cassation admet, actuellement, que la prescription court de la présentation des comptes annuels, en l'absence de dissimulation (Crim. 5 mai 1997, *Bull.* n° 159 ; Crim. 13 oct. 1999, *Bull.* n° 219 ; 20 juin 2001, *Bull.* n° 164). Comp. 10 avr. 2002, *Bull.* n° 84.

8. Crim. 17 juin 1987, *Bull.* n° 254.

9. Crim. 9 déc. 1992, *Bull.* n° 412.

10. Crim. 27 oct. 1999, *Bull.* n° 238 et 239.

11. Crim. 4 oct. 2000, *Bull.* n° 287 ; Crim. 4 avr. 2001, *Bull.* n° 93 ; Crim. 10 avr. 2002, *Bull.* n° 84.

12. Crim. 5 juin 2007, *Bull.* n° 151.

(cas de la bigamie qui peut durer plus ou moins longtemps). Ainsi, le délit d'abandon pécuniaire de famille, bien qu'il suppose parmi ses éléments constitutifs le non-paiement de la pension alimentaire pendant plus de deux mois, devrait être considéré comme un délit instantané par la réalisation, puisqu'il est consommé instantanément, lorsque le délai de deux mois est expiré¹. De même, malgré les apparences, la bigamie est un délit instantané, car elle est réalisée en un instant²; seules ses conséquences ou ses suites sont liées à la notion de durée. Quant au délit de partage des produits de la prostitution, il constitue également une infraction instantanée³, comme le délit de tromperie⁴. Les auteurs⁵ ont donc introduit une complication inutile en faisant des délits, dont les effets se prolongent dans le temps (bigamie, apposition d'une affiche dans un lieu prohibé, message diffusé sur internet⁶, élévation d'une maison au-delà de la hauteur permise par les règlements, construction sans permis de construire), une catégorie particulière, celle des infractions *permanentes*. Ces infractions permanentes sont, en réalité, des infractions soumises à tous égards aux règles des infractions instantanées⁷.

218 Infraction continue ou successive ◇ C'est, en effet, par l'instantanéité de l'action ou de l'omission qui la réalise et par l'épuisement en un instant de la volonté délictueuse de l'auteur que l'infraction instantanée s'oppose à l'infraction continue ou successive. Celle-ci, à la différence de l'infraction instantanée, est constituée par une action ou omission qui se prolonge dans le temps et qui s'y prolonge par la *réitération constante de la volonté coupable de l'auteur après l'acte initial*. Ex. : le port illégal de décoration (art. 433-14 C. pén.) ; la séquestration (art. 224-1 C. pén.) — la non-représentation d'enfant (art. 227-5 C. pén.) — le recel de choses volées ou détournées

1. V. pourtant : Crim. 9 févr. 1965, D. 1965, 475 et Colmar, 20 févr. 1967, JCP 1967.II.15134, note Michaud, qui le classent dans la catégorie des délits continus successifs, car s'il prend naissance à l'expiration du délai de deux mois, il se poursuit par la volonté persistante de son auteur jusqu'au jour où il remplit ses obligations.

2. Crim. 12 avr. 1983, Bull. n° 97.

3. Crim. 17 mars 2004, Bull. n° 72.

4. Crim. 7 juill. 2005, Bull. n° 206.

5. M. Légal, reste partisan de cette sous-distinction. V. ses observations, RSC, 1972, p. 377 sous Crim. 16 déc. 1970, Bull. n° 341 et Crim. 19 mai 1971, Bull. n° 167. Comp. sur cette question : Mayaud, « Ratio legis et incrimination », RSC, 1983, n° 16.

6. Pour la Cour de cassation, la prescription court depuis la date de mise à la disposition des utilisateurs du moins pour les infractions de presse : Crim. 30 janv. 2001, Bull. n° 28 ; 16 oct. 2001 et 27 nov. 2001, Bull. n°s 211 et 246, P. Y. Gautier. « De la prescription des infractions commises sur internet... », D. 2002, chron., p. 1852. V. en revanche pour le délit de publicité illicite en faveur du tabac : Crim. 17 janv. 2006, Bull. n° 21, JCP. 2006.II.10120, note Boulloc, D. 2006, p. 1437, note Ch. Courtin.

7. Comp. : D. Mayer, « Plaidoyer pour la réhabilitation de la notion d'infraction permanente », D. 1979, chron., p. 23 et ss. ; J. Languier, « Un recul de l'infraction permanente », RSC, 1982, p. 331.

(art. 321-1 C. pén.)¹ — le délit d'insoumission aux termes des dispositions du code du service national (art. L. 321-1 CJM) — l'entrave à l'exercice des fonctions de membre du comité d'entreprise ou de délégué du personnel, lorsque cette entrave résulte du congédiement irrégulier d'un représentant du personnel² — ou l'ouverture sans déclaration préalable d'un débit de boissons³. Constituent également une infraction continue, le délit de proxénétisme⁴, le délit de détention irrégulière d'avois à l'étranger⁵, le dépôt d'ordures sur la voie publique⁶ le stationnement irrégulier de caravane⁷, une publicité illicite pour le tabac⁸ ou l'ouverture sans autorisation d'un élevage d'animaux⁹. Il en est de même pour le délit de construction sans permis de construire (art. L. 480-4, Code de l'urbanisme), car, s'il commence dès les premiers travaux, il s'accomplit pendant tout le temps où les travaux sont exécutés et, jusqu'à leur complet achèvement, chaque acte de construction *réitère* la volonté de construire sans en avoir l'autorisation. Une fois les travaux terminés, le délit apparaît permanent, car la situation illicite se continue d'elle-même¹⁰. La conservation d'un enregistrement de paroles confidentielles et celle de données informatisées constituent aussi des délits continus¹¹.

219 Infraction continuée ◇ Si le principe de la distinction de l'infraction instantanée et de l'infraction continue est simple, son application soulève parfois des difficultés. Une infraction, instantanée par sa nature, peut, en effet, présenter les caractères d'une infraction continue. Par exemple, le vol, qui consiste dans la soustraction frauduleuse de la chose d'autrui, est un délit instantané, mais il peut être réalisé par une série d'actes successifs ; il en est ainsi en cas de vol d'eau, de gaz, ou d'électricité réalisé au moyen d'un branchement direct sur les canalisations. C'est aussi le cas du serviteur infidèle qui, chaque jour, dérobe à son maître une somme d'argent¹² ou un cigare. Ces vols sont-ils instantanés ou continus ? Ils sont instantanés en ce que le premier acte commis constitue à lui seul l'infraction punissable. Mais, comme tous les actes successifs répétés forment cependant une unité tant par le dessein de l'agent que par le droit violé, on admet, malgré la pluralité

1. Crim. 17 mai 1983, Bull. n° 143. Toutefois malgré la cessation de la détention des biens, la prescription n'est pas acquise, si l'infraction d'origine n'est pas encore apparue (Crim. 6 févr. et 27 oct. 1997, Bull. n°s 48 et 352) !

2. Crim. 23 avr. 1970, JCP 1970.II.16486, note Michaud.

3. Crim. 23 janv. 1979, JCP 1979.IV.106, Bull. n° 30.

4. Crim. 29 juin 1983, Bull. n° 207.

5. Crim. 17 avr. 1989, Bull. n° 157.

6. Crim. 26 oct. 1987, Bull. n° 368.

7. Crim. 20 févr. et 30 sept. 1992, Bull. n°s 81 et 300.

8. Crim. 17 janv. 2006, Bull. n° 21.

9. Crim. 21 févr. 2006, Bull. n° 51.

10. Crim. 22 mai 1973, Bull. n° 229 ; Crim. 10 déc. 1985, Bull. n° 395 ; Crim. 18 mai 1994, Bull. n° 197.

11. Crim. 4 mars 1997, Bull. n° 83.

12. C'est le sujet d'une pièce de Labiche, « Les trente-sept sous de Monsieur Montaudouin ».

CHAPITRE 2

L'ÉLÉMENT MORAL

253 Nécessité de l'élément moral ◇ Pour que l'infraction existe juridiquement, il ne suffit pas qu'un acte matériel (élément matériel), prévu et puni par la loi pénale ait été commis, il faut encore que cet acte matériel ait été l'œuvre de la volonté de son auteur. Ce lien entre l'acte et l'auteur, que le droit anglais appelle la *mens rea* (la volonté criminelle) par opposition à l'*actus reus* (acte criminel), constitue l'*élément moral*¹. Il faut que l'élément moral se joigne à l'élément matériel (qu'il apparaisse avant ou au même moment) pour que l'infraction soit constituée².

Le législateur en effet ne punit que les conséquences antisociales d'un acte volontaire. En l'absence de volonté, en cas de force majeure par exemple, il n'y a pas d'infraction. Cela est vrai non seulement pour les infractions dites intentionnelles, telles que les crimes et la majorité des délits, mais encore pour les infractions appelées non intentionnelles comme par exemple les délits d'imprudence et la plupart des contraventions de police³.

Sans doute on a prétendu, et même jugé, que les contraventions de police étaient des infractions purement matérielles qui se trouvaient réalisées du seul fait de l'accomplissement de l'acte prohibé par la loi ou le

1. Pour quelques auteurs, l'élément moral n'est pas un élément constitutif de l'infraction, mais une condition psychologique de la culpabilité de l'auteur d'une infraction, objectivement constituée (Merle et Vitu *Traité de droit criminel*, 7^e éd., n^{os} 572 et ss. ; Comp. G. Levasseur « Étude de l'élément moral de l'infraction », *Annales de la Faculté de droit de Toulouse*, t. XVIII, fac. 1, p. 81 et ss.). Pour d'autres, une fois l'imputabilité établie, il faut rechercher si la société reproche une « réaction hostile aux règles sociales », (A. C. Dana, *Essai sur la notion d'infraction pénale*, p. 343). Quelques auteurs estiment qu'il y a essentiellement l'acte et que les aspects psychologiques intéressent la responsabilité de l'agent (Pradel, 14^e éd., n^o 461). À vrai dire, l'élément moral est bien une composante de l'infraction puisque, en son absence, le juge d'instruction est en droit de rendre une décision de non-lieu, et le juge de jugement une décision de relaxe ou d'acquiescement.

2. Dans les comportements qui se poursuivent dans le temps, et constituent des infractions successives, la *mala fides superviens* pouvait rendre délictueux à partir d'un certain moment un comportement qui jusque-là était licite. Tel était le cas pour le recel, par exemple, lorsque le détenteur apprend l'origine de la chose (Crim. 22 juin 1972, *Gaz. Pal.*, 1972.1.842 et la note, *Bull.* n^o 220 ; Crim. 15 juin 1973, *D.* 1973, IR, p. 158). Mais un revirement de jurisprudence s'est produit : Crim. 24 nov. 1977, *D.* 1978, J., p. 42, note Kehrig « L'acquéreur d'un bien mobilier ne saurait être déclaré coupable de recel, lorsque la régularité de la possession et la bonne foi impliquent la réunion des conditions d'application de l'article 2279 C. civil », c'est-à-dire lorsqu'il est propriétaire de ce bien ; on ne peut être receleur de sa propre chose. V. aussi Crim. 24 janv. 1978, *Bull.* n^o 27 ; Crim. 3 déc. 1984, *Bull.* n^o 381.

3. Sur les adages concernant la nécessité d'une volonté coupable en droit romain et sous l'ancien droit, voir Laingui, RSC, 1986, p. 38 et ss.

règlement¹. Mais la loi admet qu'une contravention puisse ne pas exister en cas de force majeure², et l'on reconnaît que les causes subjectives de non-culpabilité prévues par l'art. 122-1 à 122-3 C. pén. font disparaître l'infraction, même en cas de simple contravention.

C'est dire que l'infraction, qu'il s'agisse d'un crime d'un délit ou d'une contravention, n'est constituée et donc punissable que si un auteur a eu la volonté ou la conscience de violer la loi pénale. Cette volonté ou conscience constitue l'élément commun à toutes les infractions. C'est donc à tort que l'on parle souvent « d'infraction involontaire ». L'expression « atteinte involontaire à la vie » par laquelle le Code pénal désigne l'homicide et les blessures par imprudence (art. 221-6 et 222-19) ne signifie nullement que ces délits ne sont pas l'œuvre d'une volonté (l'acte d'imprudence a été voulu) mais seulement que leurs conséquences n'ont pas été voulues.

Toujours nécessaire à l'existence de l'infraction — tous les actes délictueux sont volontaires — la volonté n'a cependant pas toujours le même rôle, ni la même étendue³. Tantôt elle ne porte que sur l'acte lui-même ; tantôt elle porte à la fois sur l'acte et sur ses conséquences. Lorsque l'auteur a voulu l'acte et ses conséquences et qu'il a accompli l'acte pour les produire, on dit qu'il y a intention criminelle ou dol pénal (meurtre, assassinat, vol, etc.). Quand l'auteur a voulu l'acte mais sans en vouloir les conséquences, qu'il aurait dû prévoir et pu éviter, on dit qu'il y a faute pénale (atteinte involontaire à la vie ou à l'intégrité physique, la plupart des contraventions).

254 Intention et faute ◇ Cette distinction de l'intention criminelle et de la faute n'est pas nettement posée dans notre législation. Les mots « intention » ou « dol » et « faute » étaient rarement employés par l'ancien Code pénal ou les lois postérieures. On trouvait plutôt les mots « préméditation, frauduleusement, sciemment, à dessein » ou même « volontairement ». Par ailleurs, le terme « faute » ne figurait guère dans les textes ; pour désigner la faute, le législateur parlait de « maladresse, d'imprudence ou de négligence » ou « de défaut d'adresse ou de précaution » (art. 320 C. pén.). Quelquefois même, il passait complètement sous silence l'existence de l'intention ou de la faute, et c'est la jurisprudence qui indiquait si l'infraction nécessitait une faute prouvée⁴ ou une faute

1. V. à propos de la contravention de dégradation de chemins publics (anc. art. R. 34-11^o) : Crim. 7 mars 1918, S. 1921.I.89, note Roux.

2. Crim. 15 mai 1926, S. 1928.I.33, note Roux. V. pour un délit : Crim. 21 janv. 2003, *Bull.* n^o 16.

3. Sur l'élément moral en droit comparé, cf. Brosens, « L'élément moral dans les infractions et le futur code pénal belge », *Rev. dr. pén. crim.*, 1980, p. 407.

4. Depuis la loi du 29 déc. 1977 (art. 2), la Cour de cassation décide qu'en matière de fraudes fiscales (art. 1741 et 1743 CGI), il incombe au Ministère public et à l'administration, parties poursuivantes, de rapporter la preuve du caractère intentionnel soit de la soustraction soit de la tentative de soustraction à l'établissement ou au paiement des impôts : Crim. 5 juin 1979, JCP 1979.IV.263, *Rev. sociétés*, 1980, p. 106, note B. Bouloc ; Crim. 8 juin 1979, *D.* 1979, IR, 527 ;

présumée¹, ou bien si l'élément moral devait obligatoirement consister dans une intention criminelle.

Et cependant, en ce qui concerne l'élément moral, la distinction de l'intention et de la faute est si importante que plusieurs législations étrangères en ont fait la base de leur division des infractions. A la classification tripartite de notre droit, en crimes, délits et contraventions, fondée apparemment sur la peine mais en réalité sur la gravité objective de l'acte, elles ont substitué une classification bipartite, en délits (crimes et délits), c'est-à-dire infractions intentionnelles d'une part, et contraventions, c'est-à-dire infractions non intentionnelles d'autre part (C. pén. norvégien de 1902, C. pén. italien de 1930, C. espagnol de 1944). Satisfaisante pour l'esprit, cette division serait difficile à appliquer dans notre droit positif, où tous les délits ne sont pas intentionnels (il y a, en effet, des délits d'imprudence), et où il existe des contraventions intentionnelles telles le dommage volontairement causé à la propriété mobilière ou immobilière d'autrui et la contravention de coups et blessures volontaires. De plus, cette division bipartite bouleverserait notre organisation judiciaire répressive, et la compétence respective des Cours d'assises (crimes), des tribunaux correctionnels (délits) et des tribunaux de police (contraventions). Le droit français qualifiait cependant différemment les mêmes agissements selon qu'ils ont eu lieu de façon intentionnelle (auquel cas il y a crime ou délit) ou non intentionnelle (auquel cas il y a simplement contravention²).

Les rédacteurs du nouveau Code pénal ont, sur ce point, adopté une règle plus claire. Selon l'art. 121-3, « il n'y a pas de crime ou de délit sans intention de le commettre ». Le principe est donc que les infractions graves (crimes ou délits) sont naturellement intentionnelles. Toutefois, ils ont prévu, lorsque la loi en disposerait ainsi, qu'il y aurait délit en cas de mise en danger délibérée de la personne d'autrui et également en cas d'imprudence ou de négligence. Ainsi, une faute peut suffire en matière de délits. Par ailleurs, l'art 339 de la loi d'adaptation 16 décembre 1992 a entendu régler la question pour les délits matériels résultant de textes antérieurs au nouveau Code pénal. Ceux-ci ne peuvent être constitués qu'en cas d'imprudence, de négligence ou de mise en danger délibérée de la personne d'autrui. Cette disposition impose donc la constatation d'une faute pour les délits

Crim. 17 oct. 1983, *Rev. sociétés*, 1985, p. 149, note B. Bouloc ; Crim. 29 juin 1987, *Bull.* n° 269. En matière de délit d'émission de chèques sans provision, la Cour de cassation avait décidé, après la loi du 3 janv. 1975 et avant celle du 31 déc. 1991, que l'intention requise consiste dans la conscience de ce que le chèque sera impayé et dans la volonté de le laisser impayé (Crim. 3 avr. 1979, *Bull.* n° 133 ; Crim. 5 oct. 1983, *D.* 1984, p. 461). En matière de défense faite au tiré de payer (délict dit de blocage de la provision), l'intention de porter atteinte aux droits d'autrui n'existait pas s'il y avait contestation sur le montant de la créance : Crim. 13 avr. 1983, *Bull.* n° 102, *D.* 1984, p. 461, note B. Bouloc.

1. Elle faisait état, non plus d'infraction non intentionnelle, mais d'infraction matérielle, voir Crim. 28 avr. 1977, *D.* 1978, J. 149, note M.L. Rassat, (pollution des cours d'eau).

2. V. par exemple en matière de fraude (L. 1^{er} août 1905, art. 1 et ss. et 13 et ss. ; B. Bouloc, « La loi du 1^{er} août 1905 en tant qu'instrument de la sécurité du consommateur » in ouvrage collectif sur la sécurité des consommateurs, LGDJ, 1987) ; ou de circulation routière (art. L. 234-12 et R. 241 Code route : Crim. 28 févr. 1973, *Bull.* n° 101).

non intentionnels régis par des lois spéciales¹. Quant aux contraventions, elles peuvent comporter un élément intentionnel, ou une faute, mais celle-ci ne peut pas être retenue en cas de force majeure.

Il importe dès lors d'étudier, tout d'abord l'intention ou dol criminel (Section 1) la faute pénale (Section 2) et enfin la distinction des infractions intentionnelles et des infractions non intentionnelles (Section 3).

SECTION 1. L'INTENTION OU DOL CRIMINEL

255 L'intention ou dol criminel constitue l'élément moral (sans doute est-il préférable de parler d'*élément psychologique*) dans les crimes, la plupart des délits² et exceptionnellement certaines contraventions³. Cette intention ne peut évidemment se concevoir que dans la mesure où la personne est dotée de conscience ; c'est pourquoi chez le dément, la question de l'existence de l'intention ne se pose même pas. En revanche, dans l'hypothèse de la

1. Certains auteurs ont prétendu que ce texte contredirait l'art. 121-3 C. pén. et que la circulaire serait d'une obscure clarté (Soyer, *Droit pénal et proc. pénale*, 16^e éd., n° 202 à 205). A la vérité, l'art. 339, d'origine législative est une mesure d'adaptation des solutions anciennes à la loi nouvelle, et signifie qu'une faute doit être établie pour qu'il soit possible de reconnaître la culpabilité de l'agent. Saisie de ce problème à propos d'infractions jugées avant le 1^{er} mars 1994, la Cour de cassation a décidé que la constatation de la violation en connaissance de cause d'une prescription légale ou réglementaire impliquait l'intention coupable : Crim. 25 mai 1994, *Bull.* n° 203, RSC 1995, p. 97, obs. Bouloc (vente sans facture) ; Crim. 12 juill. 1994, *Bull.* n° 280 (construction) ; Crim. 28 nov. 1994, *Bull.* n° 380, RSC 1995, p. 570, obs. Bouloc (contributions indirectes) ; Crim. 14 déc. 1994, *Bull.* n° 415 (publicité trompeuse). V. aussi Crim. 25 oct. 1995, *Bull.* n° 322 ; Crim. 26 oct. 1999, *Bull.* n° 233 ; Crim. 7 janv. 2003, *Bull.* n° 1 ; Crim. 28 juin 2005, *Bull.* n° 196.

2. Bien que l'art. 121-3 C. pén. exige en principe une intention, de nombreux textes croient nécessaire de faire état de la fraude ou de l'action volontaire (V. art. 311-1, 223-5, 313-4...). En matière de publicité trompeuse, depuis la loi du 27 déc. 1973, la mauvaise foi de l'agent n'est plus exigée : Crim. 8 mars 1978, *JCP* 1979.II.19019, note Fourgoux ; Crim. 4 déc. 1978, *D.* 1979, IR, 186, note Roujou de Boubée ; Crim. 13 mars 1979, *JCP* 1979.IV.179 ; Crim. 3 janv. 1984, *Bull.* n° 450 ; Crim. 5 avr. 1995, *Bull.* n° 151.

3. Même lorsqu'elle proclame que l'élément moral d'une infraction est un dol (intention criminelle), la jurisprudence se contente parfois, en pratique, d'un comportement qui ne dépasse guère la faute d'imprudence ; tel est le cas en matière de recel, de fraudes sur la qualité de la marchandise vendue, etc. La Cour de cassation estime par ailleurs, que l'existence d'une intention coupable est implicitement contenue dans les constatations des juges du fait concernant l'élément matériel. Il en est ainsi depuis longtemps en matière de diffamation, de fraude dans les ventes (Crim. 21 juill. 1977, *D.* 1978, IR, 111, note Puech ; Crim. 11 oct. 1989, *Bull.* n° 355 ; Crim. 21 janv. 2003, *Bull.* n° 15 ; Crim. 6 avr. 2004, *Bull.* n° 86) ou le détournement dans le délit d'abus de confiance (Crim. 4 juill. 1972, *Bull.* n° 228 ; Crim. 5 avr. 1973, *Bull.* n° 177, *D.* 1973, IR, p. 113 ; Crim. 9 avr. 1973, *Bull.* n° 179, *D.* 1973, IR, p. 133 ; Crim. 16 mars 1987, *Bull.* n° 122). En matière de pollution de cours d'eau, le prévenu ne peut être exonéré que par la force majeure (Crim. 28 avr. 1977, *D.* 1978, J. 149, note M.L. Rassat, *JCP* 1978.II.18931, note M. Delmas-Marty). En matière de délits de société : V. Crim. 7 nov. 1983, *Rev. sociétés*, 1984, p. 327, note Bouloc ; mais voir : Crim. 17 oct. 1983, *Bull.* n° 246 et surtout Crim. 19 déc. 1973, *Rev. sociétés*, 1974, p. 363, note Bouloc (abus de biens sociaux), et Crim. 1^{er} mars 2000, *Bull.* n° 101 (nécessité d'établir l'intérêt personnel du dirigeant).

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Note

**“WHOSE LINE IS IT ANYWAY?”: REDUCING
WITNESS COACHING BY PROSECUTORS**

Brittany R. Cohen^{al}

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*986 INTRODUCTION

In an ideal world, human memory would be infallible and immune to suggestibility by others; human beings would have the ability to remember and relay events exactly how they occurred. Unfortunately, this is not the case. Human memory is inherently flawed and is easily altered by outside influences.

A well-known scientific study by Elizabeth Loftus and John Palmer exemplifies the ability of an outsider to influence a witness's account of an event through prompting.¹ In 1974, Loftus and Palmer showed a film of a car accident to participants who were then asked a series of questions about what they saw.² One of the questions was about the speed at which the two cars were traveling when the accident took place.³ Each participant heard this question with one of five different verbs used to describe the accident.⁴ Despite viewing the *987 same footage, the participants' accounts of the event, as evidenced by their responses to the question, were influenced by the verbs the participants heard.⁵

Loftus and Palmer's scientific experiment, in addition to many subsequent studies,⁶ demonstrates the ability to alter human memory by the use of minor suggestions. The detrimental effects of suggestibility on human memory are especially large in the criminal justice system, where a defendant's fate lies in the hands of the prosecutor handling his or her case. Prosecutors often rely heavily on what witnesses remember to achieve a guilty verdict.⁷ As a result of human memory's fallibility and vulnerability to the power of suggestion, it is relatively easy for prosecutors to wrongly influence a witness's account of events through coaching, often without realizing they are doing so. While it is important for prosecutors to interview and prepare witnesses for their testimony at trial, it is crucial that they do not cross the line by coaching their witnesses. As a consequence of witness coaching by prosecutors, the criminal system's goal of seeking justice is obstructed. Not only has witness coaching resulted in wrongful convictions of innocent people, it also has inherently undermined the justice-seeking *988 function of the criminal justice system by undercutting a defendant's right to a fair trial.

This Note will address the blurred line separating conduct by prosecutors that constitutes proper witness prepping and conduct that constitutes improper witness coaching. It will go on propose reforms to mitigate damage caused by coaching, focusing in particular on prosecutors who act unknowingly. Section I.A will explain why witness prepping is a crucial process for prosecutors, and I.B will describe the four different gradations of witness coaching. Part II will discuss

the science behind false memories and suggestibility, explaining why witness coaching is so detrimental (II.A), especially for certain vulnerable groups of people (II.B). It will then discuss factors incentivizing prosecutors to engage in witness coaching (II.C) and describe real-life effects of prosecutorial witness coaching (II.D). Part III will provide a layout of how ethics rules and case law handle this issue and will argue that existing guidance, safeguards, and sanctions are insufficient to prevent prosecutors from engaging in witness coaching. Section IV.A will discuss the proposal of a mandatory recording rule and will address the strengths and weaknesses of this reform. Finally, Section IV.B will describe new proposals for reform while focusing on options that will prevent prosecutors from unknowingly coaching their witnesses. This Part will go on to address how to handle witness testimony that may have been influenced by witness coaching.

I.

WITNESS PREPPING AND COACHING

A. Why Allow Prosecutors to Prep Their Witnesses?

“Witness prepping,” as will be used in this Note, refers to the proper interviewing and preparing of a witness by a prosecutor before trial. During this process, the prosecutor usually does the following:

discusses the witness's perception, recollection, and possible testimony about the events in question; reviews documents and other tangible items to refresh the witness's memory or to point out conflicts and inconsistencies with the witness's story; reveals other tangible or testimonial evidence to the witness to find out how it affects the witness's story; explains how the law applies to the events in question; reviews the factual context into which the witness's testimony will fit; discusses the role of the witness and effective courtroom demeanor; discusses probable lines of cross- *989 examination that the witness should be prepared to meet; [and] rehearses the witness's testimony, by role playing or other means.⁸

Witness prepping by prosecutors is considered an ethical practice; it would be unprofessional to not prepare a witness for his testimony before a trial.⁹ Within the criminal justice system, witness prepping is an important and indispensable process that enables prosecutors to achieve their role of seeking justice.

Witness prepping begins at the early stages of a case when a prosecutor initially interviews a witness. It provides a prosecutor with information about the case that he or she is pursuing or deciding whether to pursue. The initial interviews with a witness allow a prosecutor to obtain

facts about an event as well as assess the witness's memory of what occurred, which gives the prosecutor an idea of the potential testimony the witness might give at a future trial.¹⁰ In the later stages of a case, witness prepping enables a prosecutor to refresh a witness's memory as to his prior statements and to address any inconsistencies or conflicts within a witness's account.¹¹

Witness prepping also benefits the witness by allowing the prosecutor to explain how the legal process works. Witnesses are often not conversant in the workings of the legal system, and this can be intimidating. Witness prepping is valuable in that it enables a prosecutor to provide a witness with factual and legal context on how his or her testimony will likely influence the case and to explain how the applicable law pertains to the incident in question.¹² This provides a witness with a bigger picture, allowing him or her to better understand the case and the role his or her testimony will play. In addition, witness *990 preparation allows a prosecutor to rehearse a witness's testimony with the witness, which will make the witness more comfortable when testifying in court. The prosecutor can discuss effective courtroom demeanor with the witness and give the witness examples of the questions he or she may face on cross-examination. All of this practice will help willing witnesses become comfortable with testifying in court and may ease hesitant witnesses' concerns, encouraging them to come forward and testify.

Preparing witnesses can also increase fairness within the criminal justice system. Witness interviews and meetings provide prosecutors with a setting to emphasize the utmost importance of remaining truthful, both during pretrial interviews and while testifying at trial. Moreover, witness prep also provides opportunities for prosecutors to identify *Brady* or *Giglio* material that must be handed over to the defense, which will further the system's justice-seeking goals. As can be seen, witness prepping is a necessary process for prosecutors to engage in to successfully fulfill their duties. Nevertheless, the detriments of witness coaching necessitate that measures be implemented to ensure that prosecutors do not abuse the process by engaging in coaching.

B. Four Grades of Witness Coaching

While prepping witnesses, prosecutors must be careful not to cross the line into the territory of witness coaching. In contrast to proper witness prepping, “witness coaching” refers to improper conduct on behalf of a prosecutor. As used in this Note, the term “witness coaching” means conduct by a prosecutor that changes a witness's account about a particular event.¹³ Witness coaching may occur through various methods: providing a witness with crib notes or a script to use while testifying on the stand, making cringing facial expressions and throwing up one's hands in despair during rehearsal when a witness provides a bad fact for the prosecution, responding to a witness's account with statements such as “we'll lose if you say that,” and preparing witnesses together to ensure they give “consistent” *991 testimony.¹⁴ This Part will discuss four categories of conduct

that constitute different levels of witness coaching. Professor Wydick¹⁵ has established three gradations of witness coaching, which differ in their levels of intentionality and explicitness of coaching.¹⁶ In addition to Professor Wydick's three grades of coaching, I will discuss a potential fourth grade.

Grade One witness coaching occurs when a prosecutor knowingly and explicitly induces a witness to give false testimony.¹⁷ A prosecutor acts knowingly when he possesses "actual knowledge" that a witness's testimony is false. A prosecutor's knowledge may be inferred from the circumstances.¹⁸ Similarly, Grade Two witness coaching occurs when a prosecutor knowingly induces a witness to provide false testimony, but instead of acting directly, the prosecutor encourages a witness indirectly.¹⁹ A prosecutor "sends the witness a message 'between the lines' about how to tell the story. If the witness understands the message and wants to cooperate, he alters the story accordingly."²⁰ Grade Three witness coaching is just as dangerous as (if not more dangerous than) Grades One and Two witness coaching. Through Grade Three witness coaching, a prosecutor does not knowingly induce a witness to relay false testimony.²¹ Nevertheless, the communications and interactions between the prosecutor and the witness *992 influence the witness's account of events.²² While Grade Three witness coaching lacks a corrupt intent, it nonetheless obstructs justice. This prosecutorial practice is difficult to circumvent,²³ which may in fact make it the most dangerous type of witness coaching. Prosecutors need to be aware of the perils of Grade Three witness coaching, as well as the manners in which they can prevent such conduct from occurring. In this Note, particular attention will be paid to prosecutors who engage in Grade Three witness coaching, as safeguards and sanctions are unable to deter behavior that prosecutors are unaware is occurring.

Last, and a bit trickier than the first three grades of witness coaching, is what I will call Grade Four witness coaching. Through Grade Four witness coaching, a prosecutor knowingly induces a witness to alter his or her false testimony. However, in this case, the prosecutor does so with either the knowledge or a good-faith belief that the witness is mistaken or confused in his or her account of the event. Two scenarios can result from this conduct: (1) the prosecutor was correct and he or she corrects the witness's mistake or (2) the prosecutor was incorrect and he or she falsely alters the witness's account of the event. While scenario one appears to be permissible behavior that we should want to encourage, scenario two is improper conduct that we should strive to prevent. There are some factors that may affect whether "correcting" a witness will result in scenario one or scenario two. For example, the availability of irrefutable evidence such as video recordings would tend to result in scenario one, whereas having sole possession of corroborating statements made by another witness--especially a *cooperating* witness, who may have additional incentives to make a false statement²⁴--would likely give rise to scenario two. It appears that in situations in which a prosecutor possesses independent and likely irrefutable evidence that indicates that a

witness is mistaken, it would not be harmful-- and would often be beneficial--to attempt to correct the witnesses' account of events. On the contrary, where the independent evidence may or may not be accurate, it can be harmful to prompt a witness's memory.

***993** Thus, whether it is proper for a prosecutor to engage in Grade Four witness coaching likely depends on the foundation underlying the prosecutor's influence. As a fuzzy line separates proper from improper conduct, I propose that a prosecutor should refrain from altering a witness's account in either case. Instead, when such a situation arises, a prosecutor should make use of any independent evidence to refute the details in the witness's statement that he or she knows or believes to be incorrect. Furthermore, a prosecutor should utilize expert testimony on the fallibility of memory to help explain why the witness was or may have been mistaken in his or her account of the event.

II.

DETRIMENTS OF WITNESS COACHING

To understand witness coaching and why it is so dangerous, it is important to appreciate how human memory works. Amidst a legal system in which physical evidence is sparse and the majority of verdicts are based on eyewitnesses and their memory reports,²⁵ an understanding of memory and the accuracy of testimony is crucial. When a witness remembers something that did not actually occur or makes errors about essential details, unjust verdicts may be returned. This Part will discuss the science behind false memories and suggestibility, explain why witness coaching is so detrimental, and describe groups of people who are especially vulnerable to witness coaching. It will then discuss incentives that drive prosecutors to engage in coaching and illustrate real-life effects of prosecutorial witness coaching.

A. Science Behind Memory Fallibility and Suggestibility

*1. Memory Fallibility*²⁶

Scientific studies have shown time and time again that human memory is imperfect.²⁷ It is significant--and frightening-- that false ***994** memories can occur without any improper suggestive questioning.²⁸ These distortions result from “the everyday functioning of memory.”²⁹

Recent models of memory theorize that there are two types of features that are encoded during experiences: surface features and semantic features.³⁰ The two features differ in that surface features--or “verbatim traces”--are actual characteristics of events that are remembered, whereas

semantic features--or “gist traces”--are the meanings (i.e., interpretation and inference) that individuals connect with an event.³¹ Every experience has its own representation that is stored in long-term memory and becomes accompanied by certain surface and semantic features that are stored discretely.³² There are various circumstances that influence which features an individual stores and retrieves, and that ultimately affect whether that individual provides a true or false account of an event.³³

Numerous scientific experiments have been performed to determine the factors that increase and decrease spontaneous false-memory reports.³⁴ These experiments often occur as follows: the experimenter will present the participant with a list of target words. The words included in the list are all semantically related to a critical word, which is not presented in the list.³⁵ After a specified period of time, the experimenter will test the participant by either: (a) asking the participant ***995** to recall the words that were presented³⁶ or (b) asking the participant whether certain words³⁷ were provided or not provided during the original list of target words.³⁸ This is known as the Deese-Roediger-McDermott (DRM) paradigm.³⁹

Experiments using the DRM paradigm have found surprisingly high levels of false recall and false recognition.⁴⁰ In an experiment published in 1995, Henry L. Roediger III and Kathleen B. McDermott presented six twelve-word DRM lists to students, who were then asked to recall the lists and complete a recognition test that incorporated both presented and non-presented words, including the non-presented critical words.⁴¹ On the immediate free recall tests, the students falsely recalled the non-presented critical words forty percent of the time.⁴² On the later recognition tests, the students falsely recognized the non-presented critical words eighty-four percent of the time.⁴³ In a second experiment, where twenty-four fifteen-word lists were presented to students, false recall of non-presented critical words increased to fifty-five percent.⁴⁴ While this may come as a shock to many, “[t]he results reveal a powerful illusion of memory: [p]eople remember events that never happened.”⁴⁵

***996** 2. *Effect of Suggestive Interviewing Techniques*

In addition to false reports that occur spontaneously, suggestive interview techniques, which intentionally or inadvertently implant misinformation in a witness's memory, can also cause or enhance false memory reports. Suggestibility has been defined as “the extent to which individuals come to accept and subsequently incorporate post-event information into their memory recollections.”⁴⁶ Scientific experiments involving suggestibility typically occur as follows: the experimenter will show the participant an event, which is the target material (e.g., video footage of a car accident). The experimenter will then present the participant with misinformation that is

usually in the form of suggestions or “distractors” about material that was not presented, but is related to the presented material⁴⁷ (for example, “Did you see any broken glass?”). This related misinformation will either conflict with specific presented material⁴⁸ or will not conflict with specific presented material.⁴⁹ The experimenter will later test the participant's memory of the event originally shown.⁵⁰ This procedure for studying the effects of suggestion is called the “misinformation paradigm.”⁵¹

Studies on memory suggestibility using the misinformation paradigm show two primary findings: (1) true recognition rates for target material are lower when conflicting information (inconsistent distractors) has been presented during the experiment than when it has not been presented and (2) false recognition rates for distractors are higher when the distractors were presented in the experiment as misinformation than when they were not.⁵² These findings illustrate that when misinformation is presented to individuals, they remember less true information and falsely remember more of the implanted misinformation.

In practice, this means that the presentation of information by a prosecutor that is related to--but inconsistent with--a witness's actual account of events can result in the witness later failing to identify details from his or her original account and/or adding inaccurate details that have been provided by the prosecutor. For example, suppose Criminal X, without using a weapon, robbed a woman on the street. *997 Witness A observed the robbery and called the police. The police recovered a gun in a trashcan near the scene of the robbery. The gun happened to be unrelated to the robbery and connected to a different crime. The prosecutor suggests to Witness A, “You probably saw Criminal X holding that gun we found in the trash can,” an event that is undoubtedly consistent with many robberies. Later, Witness A makes a false memory report that he had seen Criminal X holding a gun during the robbery (which never actually happened), as he has a clear, detailed memory of the event but does not realize that his memory is from the context of the prosecutor's coaching, rather than the crime itself.

B. Witnesses Most Vulnerable to Suggestibility

Due to general characteristics possessed by certain people, some groups of witnesses are more vulnerable to coaching techniques than others. These groups of people include identification witnesses, child witnesses, elderly witnesses, and cooperating witnesses. It is important that prosecutors be informed about circumstances and techniques that may facilitate false memory reports by these types of witnesses in order to prevent the creation of false reports.

1. Identification Witnesses

False eyewitness identification has been found to be the most prominent cause of wrongful convictions.⁵³ Research suggests that eyewitnesses to a crime are inherently inaccurate in their identification of suspects.⁵⁴ This is well known in the legal realm.⁵⁵ While the ***998** United States Supreme Court has afforded constitutional protection for the most flagrantly suggestive identification procedures, this protection is limited.⁵⁶ As a result of these limitations, prosecutors must take measures to provide further protection and to prevent eyewitness misidentifications from producing wrongful convictions.⁵⁷

Since law enforcement agents, rather than prosecutors, are the actors who administer identification procedures, it is necessary to address the role that prosecutors should play in controlling the conduct of their law enforcement agents. Prosecutors should have a duty to ensure that their agents use proper eyewitness identification procedures. The knowing failure to prevent the use of eyewitness identification procedures that are proven to elicit false identifications should be viewed as a form of witness coaching. Moreover, prosecution offices should be obliged to notify the relevant law enforcement agency or department if they discover that an officer has used a suggestive technique. If a prosecutor is unable to control the conduct by law enforcement in any given case, he or she should be responsible for evaluating ***999** the reliability of the identification that was made, in relation to the rest of the case's evidence, to determine whether he or she should proceed with the case.⁵⁸ Furthermore, a prosecutor should have the duty to abstain from intentionally or inadvertently altering an identification witness's testimony to bolster the witness's identification, from provoking further facts to enhance the eyewitness's testimony, and from augmenting or reducing a witness's confidence or certainty in his testimony or identification.⁵⁹

2. Child Witnesses

For many years, detrimentally suggestive and leading interrogation techniques were used on children, specifically within the area of child sexual abuse.⁶⁰ The frequent use of these methods was triggered by research studies demonstrating that interviews asking children to freely recall alleged instances of sexual abuse produced inadequate information.⁶¹ While suggestive and leading questioning may yield answers, the use of these techniques on children is problematic, because evidence indicates that children are especially vulnerable to suggestive questioning.⁶² Factors that have been shown to increase children's false reports include repetition of misinformation,⁶³ high credibility of the source of information,⁶⁴ high plausibility of the misinformation, ***1000** ⁶⁵ low degree of support from the interviewer,⁶⁶ and use of anatomically detailed dolls.⁶⁷ These factors must be taken into account when interviewing child witnesses to prevent tainted testimony.

3. Elderly Witnesses

Elderly witnesses are also susceptible to witness coaching by prosecutors due to a shift in memory processes that occurs in late adulthood.⁶⁸ Specifically, there is evidence that memory processes shift from a reliance on surface features (the details of an event) toward a reliance on semantic features (the meaning of an event) during aging, which leads to a reduction in the accuracy of elderly memory reports.⁶⁹ Several studies have demonstrated that older adults are more vulnerable to misinformation than are younger adults.⁷⁰ Furthermore, older adults state higher levels of confidence when reporting false information.⁷¹ It is important to consider these scientific findings when interviewing elderly witnesses.

4. Cooperating Witnesses

Prosecutors often rely on the testimony of cooperating witnesses, especially when there is a shortage of other evidence against a defendant. ***1001**⁷² Prosecutors' great reliance on cooperators is alarming, as these witnesses are especially susceptible to coaching by prosecutors.⁷³ In addition to any inherent tendency toward suggestibility a standard witness may possess, cooperating witnesses possess a unique motive to obtain leniency in relation to their own offenses.⁷⁴ The danger stems from the fact that cooperating witnesses are aware that they will not obtain leniency if they are unable to provide the prosecutor with information that benefits the prosecution in proving its case.⁷⁵ This knowledge incentivizes cooperating witnesses to provide prosecutors with information they believe the prosecutors wish to hear.⁷⁶

In addition to possessing incentives to fabricate testimony in pursuit of leniency, cooperating witnesses have the ability to do so without exposure. Often, cooperators will lie about small details of a case that are "not readily discoverable or easily disproved" and go undetected.⁷⁷ Furthermore, prosecutors tend to believe slight lies if they are able to verify the other testimony given by the cooperating witness.⁷⁸ Cooperators may learn of favorable, but false, information from outside sources such as the media or their attorneys before conversations with the prosecution even take place.⁷⁹ They may also receive information for fabrications from prosecutors themselves during pre-trial interviews, either verbally or non-verbally, through the prosecutors' intentional or inadvertent witness coaching.⁸⁰ Examples of prosecutorial conduct that may inadvertently lead to a cooperator's ability to falsely alter his testimony include: unintentionally asking a leading question, conveying approval or dissatisfaction when the cooperator answers a question, and disclosing a fact that was unknown to the cooperator.⁸¹ As studies indicate that the testimony of these witnesses play a significant role in wrongful convictions,⁸² particular attention ***1002** must be paid to the techniques that prosecutors use to prepare cooperating witnesses to testify.

C. Why Do Prosecutors Engage in Witness Coaching?

In order to develop methods to prevent witness coaching, it is important to understand why prosecutors engage in this conduct. Despite the problems caused by witness coaching and the unethical implications of the practice, there are incentives that may be driving prosecutors to engage in this behavior, such as eliminating inconsistencies in a witness's testimony in order to strengthen the prosecution's case and obtain a conviction.⁸³ Furthermore, prosecutors may be motivated to encourage witnesses to conform their testimony to that of other witnesses in order to conceal weaknesses in the government's case⁸⁴ or embarrassing details about a witness.⁸⁵

Systematic defects also encourage witness coaching by prosecutors. The above behaviors are fueled by the existence of a perverse incentive structure, in which rewards for prosecutors are often driven by prosecution and conviction rates.⁸⁶ When prosecutors are rewarded for obtaining convictions, focus may be placed on bringing and winning cases instead of engaging in proper techniques that will yield accurate results.⁸⁷ The lack of clarity within existing ethics rules in this area provides insufficient guidance to prosecutors, further fueling ***1003** improper coaching.⁸⁸ Inadequate mechanisms exist to detect and punish prosecutors who engage in improper witness coaching.⁸⁹ Lastly, prosecutors may lack incentives to refrain from witness coaching because they remain uninformed about what constitutes suggestive techniques, or because they do not understand or believe the effect they can actually have on a witness's account of events.⁹⁰

D. The Consequences of Witness Coaching: Why Reform Is Necessary

While some prosecutors may believe it is harmless, there are countless instances in which witness coaching has devastated people's lives.⁹¹ Over the past several decades, there has been a disturbing uncovering of wrongful convictions, many of which were caused by identifications or witness testimony that had been influenced by law enforcement or prosecutors.⁹² A report by the Innocence Project documents cases throughout the country involving eyewitness misidentifications that have resulted in convictions, where the convictions were later overturned through DNA testing.⁹³ This report records 147 innocent individuals who were wrongfully convicted over the past several decades as a result of improper conduct and who each consequently lost between one and twenty-seven years of his or her life in prison.⁹⁴

***1004** Even in cases in which witness coaching does not directly lead to a wrongful conviction, a prosecutor's improper conduct undermines the goals of the criminal justice system and the prosecutor's role to seek justice. Each defendant within the criminal justice system is entitled to a fair trial, untainted by improper influence by the government. Insufficient guidance and protections

currently pervade the area of prosecutorial witness coaching; the harmful effects of witness coaching make it vital to develop measures to prevent prosecutors from coaching witnesses.

III.

LEGAL STANDARDS

The American Bar Association's Model Rules of Professional Conduct and Criminal Justice Standards, in addition to decisions by the courts, provide prosecutors with some guidance on how to prepare their witnesses. This guidance, however, is too broad and lacking in detail to provide sufficient direction to prosecutors to prevent witness coaching. Furthermore, the safeguards and remedies currently in place are inadequate to deter witness coaching.

A. Ethics Rules

The American Bar Association (ABA) has adopted the Model Rules of Professional Conduct,⁹⁵ and many states have followed suit.⁹⁶ In addition to the ABA Rules, the ABA has adopted the Criminal Justice Standards, a series of ethical standards that provide guidance specifically to practitioners within the criminal justice system.⁹⁷ I will refer to this body of guidance, taken as a whole, as the “Rules and Standards.”

While the current model ethics rules do not directly address witness coaching,⁹⁸ several of the ABA Rules and Standards tangentially address issues concerning witness coaching and will be discussed below. *1005 At the outset, it is important to note two common themes that pervade these Rules and Standards: (1) the Rules and Standards either (a) fail to prohibit unintentional (Grade Three) coaching and/or intentional coaching with good intent (Grade Four) or (b) fail to give an intent requirement at all, such that a wide array of improper conduct that should be prohibited is instead considered permissible; and (2) the Rules and Standards lack specificity on the type of conduct that constitutes improper witness coaching. As such, our current system provides insufficient guidance to prosecutors and other attorneys.

1. Rules and Standards Covering Only “Knowing” Conduct

Two model ethics rules appear to address Grades One and Two witness coaching but fail to cover Grades Three and Four. First, ABA Rule 3.3(a)(3) states that “[a] lawyer should not knowingly . . . offer evidence that the lawyer knows to be false.” The ABA defines knowingly as involving “actual knowledge of the fact in question,” which “may be inferred from circumstances.”⁹⁹ Similar to Rule 3.3(a)(3) is Standard 3-6.6, which provides guidance specific to prosecutors regarding the

presentation of false evidence.¹⁰⁰ Rule 3.3(a)(3) and Standard 3-6.6 fail to delineate the level of knowledge a lawyer must have to fulfill these requirements.¹⁰¹ A narrow interpretation of the rule and standard fails to regulate prosecutors who present testimony they do not know--but have reason to believe--has been altered through witness coaching. Moreover, regardless of the breadth of the interpretation of “knowingly,” Rule 3.3(a)(3) and Standard 3-6.6 would not touch prosecutors that inadvertently engage in Grade Three witness coaching. The exclusion of unknowing conduct from the language of this rule may encourage prosecutors to remain ignorant about the techniques they use while preparing witnesses, so as to avoid being caught under the rule or standard.¹⁰² Furthermore, Rule 3.3(a)(3) and Standard 3-6.6 would not apply to prosecutors who engage in Grade Four witness coaching, in which they present false testimony that they have knowingly altered under the good-faith belief that the witnesses have been mistaken in their accounts.

***1006** 2. *Rules Lacking an Intent Requirement*

Several ABA rules fail to provide an intent requirement and thus may arguably cover unintentional Grade Three witness coaching and intentional (but in good faith) Grade Four witness coaching, in addition to intentional Grades One and Two. However, the rules and standards lack specificity, making it unclear which precise conduct is prohibited. The rules and standards discussed below are too vague to provide prosecutors with any substantial guidance in this area.

First, Rule 8.4(c) deems it professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”¹⁰³ Here, the ABA failed to provide the requisite intent for a violation of the rule, and courts have been inconsistent in their analysis of the rule.¹⁰⁴ While it is clear that the rule captures at least knowing conduct involving “dishonesty, fraud, deceit or misrepresentation,”¹⁰⁵ more clarity is needed to give sufficient guidance to prosecutors and other attorneys.

Next, Rule 8.4(d) prohibits an attorney from engaging “in conduct that is prejudicial to the administration of justice.”¹⁰⁶ It is unclear whether witness coaching would constitute professional misconduct under ABA Rule 8.4(d) because of the rule's vague and ill-defined language.¹⁰⁷ However, a prosecutor who engages in improper witness coaching, resulting in false testimony and obstructing the criminal justice system's pursuit of the truth, likely falls within the rule's purview.¹⁰⁸ Again, however, the rule fails to provide a requisite intent and thus it is unclear whether it prohibits all four grades of witness coaching.

ABA Rule 3.4(b) appears to be the provision most directly related to witness coaching. Rule 3.4 states that “[a] lawyer shall not . . . falsify evidence, [[or] counsel or assist a witness to testify falsely”¹⁰⁹ and that “[a] lawyer shall not . . . request a person other than a client to ***1007** refrain

from voluntarily giving relevant information to another party.”¹¹⁰ Rule 3.4 implies that “a lawyer may not induce a witness to give testimony that is not solely of her own accounting or to not give testimony that is relevant to the case;”¹¹¹ however, more clarity is necessary. The rule does not address the intent necessary to establish an ethical violation,¹¹² nor does it address the specific types of conduct that are prohibited.¹¹³ The ABA has left these issues unattended.

3. A Subset of Clear, But Narrow, Standards

While a number of standards provide clearer guidance to prosecutors on how they should approach and interact with witnesses, the standards are especially narrow, applying only to either a small subset of witnesses or conduct. Thus, while providing greater guidance to prosecutors on certain conduct they must avoid in relation to certain witnesses, these standards do not extend to the vast majority of prosecutorial conduct or witnesses.

Standard 3-3.5 provides guidance to prosecutors regarding their relationships with expert witnesses.¹¹⁴ The standard has two significant parts. First, “[a] prosecutor who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert's opinion on the relevant subject,” and the prosecutor also “should explain to the expert that the expert's role in the proceeding will be as an impartial witness called to aid the fact-finders.”¹¹⁵ Second:

The prosecutor should not pay or withhold any fee or provide or withhold a benefit for the purpose of influencing the substance of an expert's testimony. The prosecutor should not fix the amount of the fee contingent upon the expert's testimony or the result in the case. Nor should the prosecutor promise or imply the prospect of future work for the expert based on the expert's testimony.¹¹⁶

***1008** This standard is helpful, as it informs prosecutors what constitutes proper and improper conduct in relation to this special type of witness. Prosecutors should explain to the expert his role as an impartial witness and should not influence the expert's testimony through payment or other action. This standard, however, is only applicable to this small subset of witnesses.

Similarly limited is Standard 3-3.4, which attempts to guide prosecutors in their relations with victims and prospective witnesses. Standard 3-3.4(c) provides, “The prosecutor or the prosecutor's agents should seek to interview all witnesses, and should not act to intimidate or unduly influence any witness.”¹¹⁷ This standard is vague, as it fails to define the act of intimidation and unduly influence of witnesses. Furthermore, Standard 3-3.4 states:

The prosecutor should be permitted to compensate a witness for reasonable expenses such as costs of attending court, depositions pursuant to statute or court rule, and pretrial interviews, including transportation and loss of income. No other benefits should be provided to witnesses unless authorized by law, regulation, or well-accepted practice. All benefits to witnesses should be documented and disclosed to the defense. A prosecutor should not pay or provide a benefit to a witness in order to, or in an amount that is likely to, affect the substance or truthfulness of the witness's testimony.¹¹⁸

This implies that a prosecutor may not encourage a victim or witness to testify to what he believes the prosecutor wants to hear, by providing him with a monetary reward. The standard, however, does not address prosecutorial conduct that will encourage a witness to alter his testimony through means other than payment.

Standard 3-3.4(g) provides that when the law so requires, a prosecutor should “advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to independent counsel,” but it also prohibits a prosecutor from advising a witness of these matters “with a purpose, or in a manner likely, to intimidate the witness, to influence the truthfulness or completeness of the witness's testimony, or to change the witness's decision about whether to provide information.”¹¹⁹ This standard indicates that a prosecutor may not influence a witness's potential testimony by threatening to prosecute that witness in the future. Again, this standard applies only to a small subset of witnesses and conduct.

***1009** Overall, the existing ABA Rules and Standards fail to draw a clear line between proper witness prepping and improper witness coaching. Moreover, the few standards that are clear on the conduct that is prohibited only cover small subsets of witnesses and conduct. These guidelines must be revised, or new guidelines adopted, to prohibit witness-coaching techniques that may improperly alter witnesses' testimony by means of the four grades of witness coaching.

B. Case Law

The sparse case law on witness prepping and coaching appears to shed some light on the vague ABA Rules and Standards. Nevertheless, the current case law on witness coaching also fails to provide sufficient guidance to prosecutors on the conduct they must avoid-- failing to distinguish between prepping and coaching. In addition to providing inadequate direction to prosecutors, courts have failed to implement proper safeguards for witness coaching.

1. Failure to Draw a Clear Line

While courts have acknowledged that there should be a line dividing proper witness prepping from improper witness coaching, they have not clearly outlined which prosecutorial conduct is proper or improper.¹²⁰ Although some courts have attempted to provide standards for what is improper, these standards are either too vague or narrow to be effective.¹²¹

a. Unclear Guidelines for Witness Prepping

It is well known that a meeting between prosecutors and government witnesses to prepare for trial does not amount to improper witness coaching.¹²² Moreover, case law suggests that rehearsal of a witness's direct testimony is permissible to prepare a witness for *1010 trial.¹²³ Courts, however, have not provided substantive guidance on what a prosecutor can and cannot do while interviewing or prepping a witness. While courts have indicated that attorneys must interview and prepare their witnesses before placing them on the stand,¹²⁴ they have failed to delve further to provide guidance as to what prosecutorial conduct is permissible and appropriate.

b. Vague Standards for Witness Coaching

While several courts have attempted to provide standards for witness coaching, they have failed to make them clear enough to be useful to prosecutors. Courts have indicated that witness coaching occurs when a prosecutor “seek[s] improperly to influence”¹²⁵ a witness's testimony. It remains unclear, however, what “seeking improperly to influence” a witness's testimony entails.

In *Geders v. United States*, the Supreme Court recognized that “[a]n attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it” and that a violation of applicable disciplinary rules “would constitute a most serious breach of the attorney's duty to the court, to be treated accordingly.”¹²⁶ The Court, however, does not go on to define what attorney conduct would constitute an attempt to improperly influence a witness's testimony.¹²⁷ Similarly, in *People v. Pulvino*, the Supreme Court of the State of New York, Appellate Division, stated that to find improper witness coaching, it is sufficient that there be “nonspeculative *1011 evidence of any improper influence exerted on” a witness.¹²⁸ The court here also fails to indicate what conduct would exert an improper influence on a witness.¹²⁹ These standards are far too vague to provide helpful guidance to prosecutors on conduct that is impermissible witness coaching. Further clarity of what conduct will “improperly influence” witnesses' testimony is needed in order to provide prosecutors with adequate guidance to avoid engaging in witness coaching.

Several Supreme Court cases provide weak insight into instances in which witness coaching may have or has occurred.¹³⁰ The cases suggest that courts may be suspicious of coaching when there is evidence that a witness's testimony has changed significantly from the witness's initial interview to the witness's testimony at trial. Though the Supreme Court may be aware that prosecutorial conduct can cross the line from proper witness prepping to improper coaching and has begun to discuss what these improper techniques might entail, it has merely touched upon the issue and has failed to give adequate guidance to lower courts and prosecutors.

c. Narrow Standards for Witness Coaching

Other courts have provided standards that are much too narrow to effectively prevent the wide array of dangerous prosecutorial conduct that may alter a witness's testimony. These standards prohibit only the most egregious conduct, such as directing witnesses to give perjured testimony or providing witness testimony that the prosecutor knows to be perjured.

***1012** In *State v. McCormick*, the court addressed witness preparation by defense counsel and found that “[n]othing improper has occurred so long as the attorney is preparing the witness to give *the witness*' [sic] testimony at trial and not the testimony that the attorney has placed in the witness' [sic] mouth and not false or perjured testimony.”¹³¹ The language the court used suggests that as long as a lawyer does not feed testimony to a witness or direct him to give perjured testimony, the lawyer has not participated in coaching. This is a very narrow definition of witness coaching, which leaves permissible a large range of conduct that can influence a witness's testimony.

Similarly, the court in *Skains v. Lockler* adopts a narrow standard of conduct constituting witness coaching. The court merely prohibited prosecutors from presenting testimony that they know to be false.¹³² The Fourth Circuit explained that attorneys owe the court a duty of candor, forbidding them from knowingly “presenting perjured testimony,” counseling or assisting witnesses to commit perjury, and failing to disclose to the court when they believe that “a non-client witness is lying on the witness stand about a material issue.”¹³³ The court, however, failed to address conduct outside of the scope of knowingly aiding or encouraging perjured testimony.

The Eleventh Circuit provided a slightly broader approach to witness coaching, by expanding the scope of what is improper beyond assisting in or promoting a witness's perjurious testimony.¹³⁴ The court defined coaching as “improperly directing witness's testimony in such a way as to have it conform with, conflict with, or supplement the testimony of other witnesses.”¹³⁵ Despite its broader reach, the court's definition is unsatisfyingly vague, as it fails to describe what conduct constitutes “improperly directing.” The court also failed to give an intent requirement, making it

unclear whether Grades Three or Four conduct are prohibited. Lastly, the court focused only on coaching that is limited to the involvement of multiple witnesses.

***1013** *2. Inadequate Safeguards Against the Effects of Witness Coaching*

In addition to failing to provide sufficient direction on how to prep witnesses, courts have failed to employ appropriate protections and remedies to deter witness coaching. This Section's discussion of remedies will be divided into two categories: remedies for instances in which coaching has been outwardly detected and instances in which coaching has remained undetected.

a. Where Coaching Is Detected

In instances in which witness coaching has been discovered, courts have done little to remedy the damage. It has been uncommon for courts to order new trials or dismiss indictments as remedies for improper witness coaching in response to claims of due process violations,¹³⁶ ineffective assistance of counsel,¹³⁷ or prosecutorial misconduct.¹³⁸ The body of case law addressing safeguards for witness coaching indicates that courts currently view cross-examination as the most appropriate solution to guard against its harmful effects.¹³⁹ In the ***1014** current state of case law, it is the role of the jury, rather than the court, to decide whether a potentially coached witness is reliable, by determining how much weight should be placed on a witness's testimony.¹⁴⁰

If cross-examination is the standard safeguard against witness coaching in cases in which coaching has been detected, how confident should we be in the accuracy of verdicts in these cases? Ultimately, the effectiveness of cross-examination in any given case will depend on the defense counsel's ability to demonstrate that coaching occurred through cross-examination¹⁴¹ and the jury's ability to consider coaching in its assessment of the witness.¹⁴²

***1015** *b. Where Coaching Remains Undetected*

Cross-examination may serve as an effective safeguard against the harmful effects of witness coaching in some instances, particularly in the most overt and egregious cases. However, in many of the more subtle cases, cross-examination will fail to reveal prosecutorial coaching.¹⁴³ There are many occasions in which it will be impossible for defense counsel to detect coaching, especially where the prosecutor and witness are themselves unaware that coaching has occurred.¹⁴⁴ Furthermore, most witness coaching occurs in a closed room with only the prosecutor and witness present, making it impossible for the defense to know about or uncover what is occurring.¹⁴⁵ It is because of these shortcomings that focus must be shifted to reforms that will reduce engagement in

witness coaching (e.g., information and training sessions) rather than those that cope with instances of witness coaching after the fact (e.g., cross-examination).

3. *Sanctions*

In addition to implementing methods to remedy damage caused by witness coaching, sanctions must be employed in order to deter prosecutors from engaging in such detrimental conduct in the first place. While sanctions currently exist for prosecutors who knowingly influence a witness's testimony, they are not especially strong methods of deterrence because coaching often remains undetected. Presently, when prosecutors knowingly engage in Grades One or Two coaching, they are theoretically subject to discipline under ABA Rules 3.3(a) and 3.4(b), and may be subject to criminal punishment for subornation of perjury.¹⁴⁶ However, it is a rare occurrence for a prosecutor--or any lawyer--to be accused of coaching through either a criminal or discipline case.¹⁴⁷ Again, most prosecutorial coaching goes undetected because it almost always occurs without others present, which makes it nearly impossible to detect.¹⁴⁸ Moreover, prosecutors who knowingly engage in overt or covert coaching are unlikely to do so with other prosecutors around or with a witness that appears likely to report it.¹⁴⁹

***1016** On many occasions, uninformed prosecutors unknowingly engage in coaching. Prosecutors who participate in Grade Three witness coaching are not subject to discipline or criminal punishment, as such conduct lacks any corrupt intent required by the ABA rules or criminal statutes.¹⁵⁰ Furthermore, punishing prosecutors for Grade Three witness coaching would likely fail to deter unknowing coaching, because these prosecutors are unaware of what they are doing while they are doing it. Again, focus must be placed on informing prosecutors of the perils of suggestive interviewing techniques and how to avoid coaching witnesses.

4. *With Insufficient Guidance, Where Should We Draw the Line?*

It is well established that prosecutors are permitted to interview and prepare their witnesses.¹⁵¹ On the opposing end, it is relatively clear that prosecutors are prohibited from presenting testimony that is known to be false,¹⁵² from seeking improperly to influence a witness's testimony,¹⁵³ and from placing false testimony in a witness's mouth.¹⁵⁴ Nevertheless, there are many areas between these two poles that the ABA and courts have left poorly defined. As the law currently stands, the majority of conduct in which prosecutors engage when equipping witnesses for trial is considered to be permissible prepping rather than improper coaching.¹⁵⁵ As a result, most of the conduct that ***1017** causes alterations in witness testimony--and that thus should be prohibited--is considered to be appropriate and common practice. The line must be shifted to include additional conduct within the scope of witness coaching. Improper witness coaching must be clearly defined, so that

prosecutors are aware of conduct from which they must refrain. A necessary reform, which will be proposed in Section IV.B below, is to describe prohibited conduct *in detail* in the ABA rules and criminal justice standards.

IV.

STRATEGIES FOR REFORM

Given the harmful effects of prosecutorial witness coaching and the likelihood that much of improper coaching will go undetected, reform in this area is necessary. There are many proponents of adopting a mandatory recording rule in which all witness interviews and meetings with prosecutors would be required to be taped.¹⁵⁶ However, this rule has several limitations and would ultimately fail to prevent the unknowing use of suggestive coaching techniques. Many instances of witness coaching arise because of a lack of education and guidance.¹⁵⁷ Accordingly, reforms must focus on providing appropriate guidance and implementing effective education programs in order to reduce unknowing occurrences of witness coaching.

A. The Recording Rule

A common proposal for reform in this area has been to record all interviews between prosecutors and potential trial witnesses.¹⁵⁸ Supporters ***1018** reason that recordings of witness interviews would reveal the use of suggestive interview techniques and any changes that occur within a witness's story over several interview sessions.¹⁵⁹ It has been argued that the exposure of witness coaching through the use of recordings would ultimately advance justice within the criminal system by reducing the likelihood of wrongful convictions.¹⁶⁰ The enforcement of a recording rule arguably may deter prosecutors from engaging in witness coaching, as prosecutors who act intentionally would face a much greater likelihood of getting caught and prosecutors who act unknowingly may think more carefully about their interview and prepping techniques.¹⁶¹

Hundreds of jurisdictions countrywide have implemented mandatory recording rules in the context of custodial interrogation, which have proven successful.¹⁶² The recording of suspect interrogations has been adopted as a practice, despite the cost of time and expenses of using the equipment, paying employees to operate the equipment and observe interrogations, transcribing and storing tapes, and preparing the tapes and copies for use in the courtroom.¹⁶³ It can be argued that the recording rule in this context should be used as a model to implement a rule for prosecutors' interviews of witnesses. However, because of the differences between these two contexts, there are various additional costs that would likely arise from implementing a recording rule in the context of witness interviews and prep that do not arise in the context of suspect interrogations.

First, it would be impractical to record all meetings between prosecutors and every potential witness; this would mean that every encounter a prosecutor has in his office with an outside person should be recorded, as that person could possibly be needed to testify as a witness in a criminal trial. This would make a prosecutor's job incredibly burdensome and would prevent him from efficiently fulfilling his duties. Nevertheless, to effectively capture coaching, it would be necessary *1019 to record every single meeting, as coaching can occur during any interaction.

Second, requiring this mandatory recording rule would be akin to requiring an open-file discovery policy regarding all government witnesses.¹⁶⁴ When an interview or meeting is documented by videotape, audiotape, or transcription, a prosecutor must disclose the recording to the defense pursuant to the Jencks Act and state discovery statutes.¹⁶⁵ While there undoubtedly are benefits to requiring prosecutors to disclose recordings of all witness meetings to the defense, there are many valid arguments for why all government materials should not automatically be disclosed. Releasing the identities of government witnesses--and, moreover, the specific testimony that the witnesses will most likely provide if the case proceeds to trial--provides defendants with the ability to harass, threaten, or even harm these individuals.¹⁶⁶ In order to maintain the functioning of the criminal justice system, it is imperative to preserve the safety of government witnesses. We would not be able to hold criminals responsible for their conduct without the help of these witnesses. It is important not to deter these individuals from coming forward and assisting the government.¹⁶⁷ In addition to the impracticality of requiring prosecutors to tape every encounter with every potential witness, an open-file discovery requirement, even if just for witness interviews and meetings, may be substantially burdensome for defense attorneys, who are already overworked and under-resourced.¹⁶⁸ Defense attorneys may have to sift through hours of recordings, which would likely require more resources than those available to most counsel.¹⁶⁹ Additionally, defense attorneys are not well versed in the science behind false memories, and it is unlikely *1020 that they would detect subtle suggestions, many of which occur through Grade Three coaching and which prosecutors themselves do not realize they are making.¹⁷⁰

Third, for ethical reasons, prosecutors will likely need to inform witnesses that their conversations will be recorded, and witnesses will likely have to consent to being recorded.¹⁷¹ A mandatory recording rule will likely deter witnesses from coming forward and testifying, as they may be hesitant to work with the prosecution if all of their meetings are to be recorded and preserved on videotape.¹⁷² Some witnesses may find videotaping to be an intrusion on their privacy and may feel uncomfortable being videotaped. If a witness is tentative about participating in a criminal case to begin with, it is probable that he or she will decline to offer helpful information to the prosecution after hearing that all conversations will be recorded and documented.¹⁷³ Moreover, as discussed above, witnesses may decline to work with the prosecution out of fear for their own safety if they

know that the defendants they are testifying against will have access to their testimony prior to trial.¹⁷⁴ Perhaps an exception could be created for witnesses who refuse to be recorded because they are either uncomfortable with being videotaped or fear for their safety. However, the creation of such an exception would likely end up swallowing the rule. If given an option, a witness would likely decline the recording. Furthermore, prosecutors who intentionally engage in coaching would likely evade the rule by presenting it in such a way that a witness will undoubtedly refuse to be recorded, or by failing to inform the witness about the rule and forging the witness's refusal.

An alternative to recording via videotape is the use of audiotape. Witnesses may view audiotaping as slightly less intrusive and intimidating, as their appearance will not be disclosed to the defendant and it ***1021** may be possible to alter a witness's voice. However, if the defendant knows the witness personally, these safeguards will end up being futile. Furthermore, audiotapes will fail to capture suggestive body language and gestures that influence testimony.

Another alternative to videotaping would be to require the recording of interviews and meetings through the mandatory taking and disclosing of notes.¹⁷⁵ This alternative, however, is just as problematic as audiotaping, as notes will not portray prosecutorial gestures and body language that may have influenced a witness's statements. Furthermore, unethical prosecutors can intentionally record false statements and ethical prosecutors can accidentally record false statements, as human error arises with note-taking.

At most, a recording rule for prosecutors' interviews of witnesses may deter bad apples from knowingly altering a witness's testimony or assisting in the provision of perjured testimony. An unethical prosecutor who wants to coach a witness is likely to engage in this conduct despite the implementation of such a rule.¹⁷⁶ These prosecutors will likely find an exception to the recording rule,¹⁷⁷ or will otherwise conceal the evidence. The implementation of a system of recording will not prevent prosecutors from inadvertently influencing witness testimony. Even if a recording rule is implemented, prosecutors will remain unaware of subtle and seemingly innocuous but harmful ***1022** techniques.¹⁷⁸ While the recording of witness interviews may have its benefits and may become more feasible in the future, this reform is currently neither the most practicable nor efficient way to create change within the system. Before resorting to a costly and burdensome recording rule, this Note proposes reforms that will attempt to reduce the number of instances of witness coaching, as well as alleviate the need for a system of detection. Ultimately, what prosecutors need is to be informed about the dangers of witness coaching and given guidance on the suggestive conduct from which they should refrain.

B. My Proposals

While the recording of witness interviews by prosecutors may serve as a potential ex post solution by allowing for the detection of witness coaching and the possibility of remedying the effects of coaching, such a requirement would prove costly and ineffective for deterrence purposes. Instead, our focus should be placed on providing prosecutors with clearer guidance on impermissible conduct, implementing education and training programs for prosecutors, and enforcing those programs. In addition to guidance and trainings, courts should adopt a test for evaluating the admissibility of testimony that appears to be influenced by coaching.

1. Clearer Guidance

The model ethics rules, specifically, those that apply to prosecutors, must be revised to provide clear guidance, and states must follow suit by revising their own ethics codes. Professor Flowers proposes the following for the Prosecution Function of the Criminal Justice Standards:

When preparing a witness to testify, whether at trial, deposition, grand jury hearing, or any other hearing, a prosecutor should refrain from any conduct that may intentionally or unintentionally encourage, assist, or request a witness to testify falsely. In considering how to prepare a witness to testify, the prosecutor should consider whether the method the prosecutor is using unintentionally conveys to the witness that he should testify to facts other than what the witness, individually, believes to be true. The prosecutor should not:

***1023** 1. discuss with a witness the law or defenses in the case before obtaining the witness's complete statement. Even after the witness has given a complete statement, in writing or orally, the prosecutor should not attempt to influence the witness's testimony by explaining the defendant's theory of what happened or the requirements of the law.¹⁷⁹

2. in a case in which identity is an issue, disclose to a witness any information about the current appearance of the defendant, unless extraordinary circumstances would require it.

3. prepare two or more witnesses together unless extraordinary circumstances would require it.

4. after the court has ordered sequestration of witnesses, disclose to a witness what previous witnesses have testified about. This would not preclude a prosecutor from asking about factual issues that have arisen based on the testimony of other witnesses but the prosecutor should not imply that other witnesses have testified differently than what the witness has previously indicated he or she would testify about.¹⁸⁰

This proposed standard provides greater guidance on what prosecutors should and should not do when interacting with a witness. The phrasing of this standard as to which conduct constitutes witness coaching is significant, as prosecutors need further specific guidance on what *not* to do.

Some beneficial additions to Flowers's proposed standard would include provisions stating that the prosecutor should not¹⁸¹:

5. ask a witness leading questions.
6. provide positive or negative feedback, or make facial or body gestures that can be inferred as feedback, after the witness has made a statement.
7. provide a witness with any additional facts about the case.
8. falsely tell a witness that pertinent items of information have been established by other evidence.
9. repeat a question again and again, after the witness has clearly answered it.
- ***1024** 10. expose a witness to evidence about which the witness will later be asked to testify.
11. ask closed-ended questions (e.g., specific, multiple-choice, or yes-no questions), unless all other means of questioning have been exhausted.¹⁸²

In addition to providing guidelines on what a prosecutor should not do, it is crucial to educate prosecutors about good interview and preparation techniques in order to help guide them toward the use of accurate techniques and away from the above suggestive techniques. The following proposed standards provide guidance to prosecutors on how to interview and prepare their witnesses, without crossing the line to improper witness coaching.

When interviewing a potential witness, a prosecutor should¹⁸³:

1. build rapport with the witness using neutral conversation and make the witness feel comfortable.¹⁸⁴
2. establish ground rules with the witness; the prosecutor should instruct the witness that the witness should always tell the truth, that the witness should not answer a question if the witness does not know the answer, and that the witness should tell the prosecutor when the prosecutor is wrong.¹⁸⁵
3. encourage the witness to freely recall the event in question.¹⁸⁶

4. assess the witness's account of events in an objective manner to ascertain how accurate and credible it is. Before the interview, ***1025** a prosecutor should learn about the witness's background and any potential motive the witness may have to lie. A prosecutor should carefully inquire into these areas, but only if it is possible to do so without implying an anticipated response.¹⁸⁷

5. ask the witness open-ended questions before closed-ended questions.¹⁸⁸

6. briefly summarize the witness's statements at the end of the interview, *using the witness's language*, and instruct the witness to correct the prosecutor if what the prosecutor says is wrong or incomplete.¹⁸⁹

When preparing a potential witness to testify at trial, a prosecutor should¹⁹⁰:

1. instruct the witness to only tell the truth as he knows it and to say if he does not remember something.¹⁹¹

2. explain to the witness how courtroom procedures will work, including where the witness will be sitting and the order in which the witness will be questioned by prosecutor and defense counsel, with the exclusion of details about the defendant such as where the defendant will be sitting and what the defendant will be wearing.¹⁹²

3. practice the witness's direct examination by formulating specific questions for trial and having the witness provide his answers. A prosecutor should encourage the witness to use his own words at all times and should only guide the witness's responses to the extent the witness is rambling, providing confusing or unclear responses, or violating the rules of evidence.¹⁹³

***1026** 4. be cautious when attempting to reconcile inconsistencies within the witness's testimony. A prosecutor may review a witness's prior statements with the witness, but should avoid this where possible. A prosecutor should refrain from providing a witness with his or her prior testimony to study,¹⁹⁴ and should never suggest to the witness what the witness should say.¹⁹⁵

5. conduct a mock cross-examination with the witness by anticipating the points defense counsel will likely focus on, including the witness's criminal background, potential motives for testifying, and discrepancies in the witness's prior testimony or statements. A prosecutor should make sure that the witness is able to explain or correct the discrepancies, but should avoid reconciling the discrepancies himself.¹⁹⁶

2. *Training Programs*

In addition to the adoption of clearer guidelines, prosecution offices on both the state and federal level should implement extensive training programs for their prosecutors.¹⁹⁷ This Section will first describe what such a training program would entail and will then discuss mechanisms that can be used to enforce these training programs within prosecution offices.

***1027** *a. The Program*

Training programs should focus specifically on teaching prosecutors how to properly prepare a witness and how to avoid impermissible conduct that may influence or alter a witness's account of events. The implementation of training programs for prosecutors should be mandatory because this issue is so important to the truth-seeking function of the criminal justice system. Focusing resources on educating prosecutors about the subtle and common, but undoubtedly avoidable, tactics that can amount to drastic changes in a witness's testimony will be an important step in reducing the occurrences of coaching.¹⁹⁸ While training sessions may not prevent coaching by prosecutors who knowingly and intentionally alter witness testimony, prosecutors who unknowingly engage in such behavior can become more cognizant of their actions. Training programs will reduce Grade Three witness coaching, including instances of coaching by prosecutors who are conscious of their conduct but are unknowledgeable or in disbelief about the grave miscarriages of justice that can result, as well as instances of coaching by prosecutors who are altogether unaware that they are engaging in suggestive behavior. Training programs will also reduce Grade Four witness coaching by educating prosecutors on how to handle cases in which they know or believe that their witnesses are mistaken in their accounts.

Training programs should be implemented in two stages: (1) for new prosecutors when they join the office and (2) for all prosecutors as part of their mandatory continuing legal education. The first stage would consist of an intensive training for entering prosecutors that would take place during their first three months in the office. These trainings would occur through lectures, demonstrations, and mock exercises led by supervising prosecutors. Individual lectures should be given pertaining to specific techniques to use and avoid when working with identification, child, elderly, and cooperating witnesses. Universal manuals should be written to elaborate on the guidance that is provided through the revised ethics rules. Furthermore, as part of the trainings, prosecutors should be taught the following method of analysis proposed by Professor Wydick, which will allow them to check the appropriateness of their questions or statements before speaking them out loud during a witness interview or preparation session:

***1028** Step One: Will my next question or statement overtly tell this witness that I want him to testify to something I know is false? If so, I could be disciplined or criminally sanctioned. If not, then--

Step Two: Will my next question or statement send a covert message to this witness that I want him to testify to something I know is false? If so, I could be disciplined or criminally sanctioned. If not, then--

Step Three: Is there a legitimate reason for my next question or statement to this witness? If there is no legitimate reason, then I should not ask the question or make the statement. If there is a legitimate reason, then--

Step Four: Am I asking the question or making the statement in the manner that is least likely to harm the quality of the witness's testimony? If not, then I should change my approach.¹⁹⁹

As an addition to the training sessions, new prosecutors should be supervised during witness interviews and preparation meetings throughout their first year in the office. Supervised witness preparation will provide new prosecutors with further guidance, allowing them to get real-life feedback and amend their practices before being sent out on their own to conduct interviews. During these meetings, the supervising prosecutor should stop the line of questioning if he sees that the junior prosecutor is embarking on a line of improper questioning. This will allow supervising prosecutors to prevent occurrences of witness coaching whenever possible. If the supervising prosecutor is unable to stop the coaching before it occurs, he should have the duty to document the behavior that occurred and disclose it to defense counsel. This will help new prosecutors become aware of their impermissible conduct, while allowing for disclosure of the suggestive behavior.

The second stage of training would be for all prosecutors through continued legal education (CLE). CLE requirements should be amended to include a specific focus on the topic of witness preparation. Prosecutors must continue trainings to refresh themselves on proper preparation techniques and suggestive tactics they must avoid. Furthermore, every office should have an expert who knows the scientific literature on memory and suggestibility intimately, is heavily trained in identifying conduct that may alter witnesses' accounts of events, is able to assess witness interviews critically, and comes in every six months to perform spot checks on the prosecutors in the ***1029** office. Continued supervision and review of prosecutors' conduct is critical.

With the mandatory enforcement of this training program in every prosecution office throughout the country, prosecutors could no longer validly plead ignorance with regard to the conduct in which they engage while interviewing and preparing their witnesses. The instances of witness coaching that prosecutors could once argue were conducted unknowingly, should now fall under a

presumption that the prosecutor in question had knowledge of his improper conduct and its harmful effects, subjecting him to discipline under the revised ethics rules.

b. Internal Enforcement

Prosecutorial Ethic Enforcement Units (PEEUs) should be created to enforce these new programs within prosecution offices. PEEUs would oversee the implementation of guidance and training programs in prosecution offices. Furthermore, these units would investigate incidents of improper witness coaching and other prosecutorial misconduct involving witnesses. The PEEUs should be modeled after the internal affairs divisions of law enforcement agencies.²⁰⁰

On the federal level, there should be a central PEEU within the Department of Justice (DOJ), with smaller branches for each district. Each branch would be responsible for overseeing and investigating prosecutorial misconduct, including improper witness coaching, within its own office and would report any problems or ethical violations to DOJ's central division. On the state level, there should be a central PEEU within each state for the state's prosecution offices. Within each county's prosecution office, an internal supervisor should be appointed to work closely with the state's PEEU.

***1030** *3. Due Process Doctrine for Witness Coaching*

In addition to the above reforms, which are designed to reduce instances of coaching, a system must be implemented to remedy detected situations of improper witness coaching that cannot be prevented by clearer guidance and training programs. This Section proposes that courts establish a doctrine modeled after the test that has been adopted for the exclusion of eyewitness identifications. While this doctrine is not perfect, it is a helpful starting point for the area of prosecutorial witness coaching, in which there is no established doctrine and very little case law.

a. Due Process and Eyewitness Identifications

In a line of cases beginning in 1967 with *Stovall v. Denno*,²⁰¹ the Supreme Court has developed a due process analysis for eyewitness identifications. Today, there exists a two-step test to determine whether eyewitness identification should be excluded.²⁰² The first step consists of an analysis as to whether the identification procedure used was “unnecessarily suggestive.”²⁰³ If the court finds that the procedure was not “unnecessarily suggestive,” the inquiry stops there and the identification will not be excluded. If the court finds that the procedure was “unnecessarily suggestive,” it will continue to the second step, which involves the court's determination of whether the identification was nonetheless reliable.²⁰⁴

b. Extension of Doctrine to Prosecutorial Witness Coaching

The above two-step test for eyewitness identifications can easily be adopted for cases in which witness coaching has potentially influenced *1031 testimony. Specifically, when presented with a defendant's challenge to the admission of witness testimony that he or she believes to be the product of witness coaching, courts should engage in the following two-step inquiry to determine whether the testimony should be admitted or excluded: (1) whether the interviewing or prepping procedure used was "unnecessarily suggestive" and, if so, (2) whether despite the use of "unnecessarily suggestive" procedures, the testimony is nonetheless reliable. The first step would rely on social scientists' expert testimony about interview and preparation techniques that are unnecessarily suggestive. The second step would be analyzed under a "totality of circumstances" test. A committee of social scientists should be created to determine a set of factors based on scientific findings that can be used to assess the reliability of witnesses' coached testimony.

CONCLUSION

Primo Levi once said, "Human memory is a marvelous but fallacious instrument. The memories which lie within us are not carved in stone; not only do they tend to become erased as the years go by, but often they change, or even increase by incorporating extraneous features."²⁰⁵ Over the past forty years, scientific research has demonstrated this quotation to be true. The malleability of human memory has significant implications for the criminal justice system, in which individuals' lives often depend on witnesses' accounts of an event. Prosecutors have the ability, whether knowingly or unknowingly, to alter witnesses' descriptions of events through improper witness coaching before cases proceed to trial. While it is crucial for prosecutors to prepare their witnesses, they must be cautious not to cross the line by engaging in improper coaching. Currently, the model ethics rules and case law provide insufficient guidance to prosecutors on which conduct is permissible and which conduct constitutes improper witness coaching. This insufficient guidance encourages prosecutors to remain ignorant in their practice.

This Note proposes several reforms to reduce unintentional and unknowing occurrences of witness coaching by prosecutors. It recommends that the ABA Criminal Justice Standards be revised to offer clearer guidance to prosecutors on what constitutes proper witness prepping and improper witness coaching. It further recommends the implementation of mandatory training programs within prosecution *1032 offices that would focus specifically on educating prosecutors about how to properly prepare witnesses and how to avoid impermissible conduct that may alter witnesses' accounts of events. It proposes the establishment of Prosecution Ethic Enforcement Units on both the federal and state levels to oversee the implementation of guidance and training programs in prosecution offices and to investigate incidents of improper witness coaching. These proposals focus on preventing prosecutors from unknowingly engaging in witness coaching, thereby reducing the amount of erroneous testimony given by witnesses. Lastly, in instances in

which witness coaching was unable to be prevented, this Note provides for the development of a due process doctrine by which defendants can challenge the admission of witness testimony that potentially has been altered, in an attempt to remedy the harmful effects of witness coaching.

Footnotes

- a1 J.D. 2015, NYU School of Law. Special thanks to Erin E. Murphy, Dr. Charles J. Brainerd, and the Honorable John Gleeson.
- 1 Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585, 585- 89 (1974).
- 2 *Id.* at 586.
- 3 *Id.* Specifically, participants were asked, “About how fast were the cars going when they [insert one of the five different verbs] each other?” *Id.*
- 4 *Id.* The verb used in the above question was one of the following: smashed, collided, bumped, hit, or contacted. *Id.* (“For example, some subjects were asked, ‘About how fast were the cars going when they hit each other?’ while others were asked, ‘About how fast were the cars going when they smashed into each other?’”).
- 5 *Id.* at 586-87. Specifically, findings showed that participants who were asked the question with the verb “smashed” answered with the highest speed, followed by participants with the verb “collided,” followed by “bumped,” followed by “hit.” Participants who were asked the question with the verb “contacted” answered with the lowest speed.
- 6 See Elizabeth F. Loftus, *Planting Misinformation in the Human Mind: A 30-Year Investigation of the Malleability of Memory*, 12 LEARNING & MEMORY 361, 361 (2005) (reviewing thirty years of scientific experiments on the “misinformation effect,” defined as “the impairment in memory for the past that arises after exposure to misleading information”); see also, e.g., Robert F. Belli, *Failure of Interpolated Tests in Inducing Memory Impairment with Final Modified Tests: Evidence Unfavorable to the Blocking Hypothesis*, 106 AM. J. PSYCHOL. 407, 413 (1993); Barbara Tversky & Michael Tuchin, *A Reconciliation of the Evidence on Eyewitness Testimony*, 118 J. EXPERIMENTAL PSYCHOL. 86, 86-91 (1989); cf. Laura L. Bowman & Maria S. Zaragoza, *Similarity of Encoding Context Does Not Influence Resistance to Memory Impairment Following Misinformation*, 102 AM. J. PSYCHOL. 249-64 (1989) (finding that misleading information does not lead to memory impairment if the original and misleading information are presented in similar contexts).
- 7 CHARLES J. BRAINERD & VALERIE F. REYNA, THE SCIENCE OF FALSE MEMORY 33 (2005) (“In legal cases, the guilt or innocence of defendants often turns on incidental details that are associated with crimes (Was it 11:30 p.m. or 11:45 p.m.? Was the temperature 65 degrees or 75 degrees? Did the robber have a tattoo on the left or the right forearm? Did the suspect touch the child on the back or on the buttocks?) rather than on the meaning of events, which is obvious to all concerned (i.e., a crime was committed).”).
- 8 Richard C. Wydick, *The Ethics of Coaching*, 17 CARDOZO L. R EV. 1, 4-5 (1995).
- 9 Richard H. Underwood, *Perjury! The Charges and the Defenses*, 36 D UQ. L. R EV. 715, 776-77 (1998); see also United States v. Rhynes, 218 F.3d 310, 319 (4th Cir. 2000) (“Thorough preparation demands that an attorney interview and prepare witnesses before they testify. No competent lawyer would call a witness without appropriate and thorough pre-trial interviews and discussion. In fact, more than one lawyer has been punished, found ineffective, or even disbarred for incompetent representation that included failure to prepare or interview witnesses.”); United States v. Tucker, 716 F.2d 576, 583 (9th Cir. 1983) (finding defense counsel ineffective for lack of sufficient interviewing of witnesses in preparation for trial); McQueen v. Swenson, 498 F.2d 207, 216-18 (8th Cir. 1974) (same); *In re Wolfram*, 847 P.2d 94, 96 (Ariz. 1993) (allowing for the suspension of an attorney, partly due to a failure to interview witnesses).
- 10 Jason Tortora, *Reconsidering the Standards of Admission for Prior Bad Acts Evidence in Light of Research on False Memories and Witness Preparation*, 40 F ORDHAM U RB. L.J. 1493, 1518 (2013).

- 11 *Id.*; see Wydick, *supra* note 8, at 3-4.
- 12 See Wydick, *supra* note 8, at 3-4.
- 13 Wydick, *supra* note 8, at 2. This definition of witness coaching is notably vague and leaves open a lot of questions about what is or is not improper. In particular, does improper witness coaching require improper intent? Is it considered improper coaching for a prosecutor to unknowingly alter a witness's testimony? Is it improper witness coaching for a prosecutor to alter a witness's account of events when the prosecutor is certain that the witness is wrong or confused about a detail? What if the prosecutor believes in good faith that the witness is mistaken? These questions will be addressed later in this Section.
- 14 Underwood, *supra* note 9, at 779-80.
- 15 Professor Richard C. Wydick has provided one of the leading academic articles on witness coaching. His article does an outstanding job of defining the term “witness coaching, and breaking up witness coaching into three understandable levels of conduct.” His article has been cited in articles, notes, and books. *E.g.*, PRISCILLA ANNE SCHWAB & LAWRENCE J. VILARDO, *THE LITIGATION MANUAL: DEPOSITIONS* 1, 38 (2006); Felicia Carter, *Court Order Violations, Witness Coaching, and Obstructing Access to Witnesses: An Examination of the Unethical Attorney Conduct that Nearly Derailed the Moussaoui Trial*, 20 GEO. J. LEGAL ETHICS 463, 468 (2007); Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 C ARDOZO L. REV. 829, 829 (2002).
- 16 Wydick, *supra* note 8, at 3-4.
- 17 *Id.* at 21-22 (“[T]he requirement of known false testimony can be met in two ways. First, the lawyer may know that the testimony is a false statement of the events in question Second, the lawyer may know that the testimony is a false statement of what the witness believes about the events in question.”). For examples of Grade One witness coaching, see *id.* at 19-22.
- 18 *Id.* at 19.
- 19 *Id.* at 25. For examples of Grade Two witness coaching, see *id.* at 30-37.
- 20 *Id.* at 30-37.
- 21 A prosecutor can unknowingly witness coach under two circumstances: (1) when a prosecutor has knowledge of the conduct in which he is engaging (i.e., suggestive line of questioning) but lacks knowledge of the harmful effects that such conduct has on a witness's testimony and (2) when a prosecutor is unaware of the conduct in which he is engaging.
- 22 Wydick, *supra* note 8, at 37; see also Harold K. Gordon, *Crossing the Line on Witness Coaching*, N.Y.L.J., July 8, 2005, at 16 (“Improper witness coaching also occurs when an attorney unintentionally causes the witness to modify his story. For example, excessive use of leading or suggestive questions during an initial witness interview may cause the witness to alter his memory to give the lawyer what the witness thinks the lawyer wants to hear.”). For an example of Grade Three witness coaching, see SCHWAB & VILARDO, *supra* note 15.
- 23 Wydick, *supra* note 8, at 4.
- 24 These unique incentives will be discussed *infra* Section II.B.4.
- 25 Mark L. Howe & Martin A. Conway, *Introduction to Special Issue Memory and the Law: Insights from Case Studies*, 21 MEMORY 545, 545 (2013).
- 26 The discussion in the ensuing Section draws heavily on my earlier, unpublished work. See Brittany Cohen, *You Can't Handle the Truth: Gist Memory Leads to Predictable False Memory Effects with Age* (May 5, 2012) (unpublished senior honors thesis, Cornell University) (on file with Cornell University Library, Division of Rare and Manuscript Collections).
- 27 See, e.g., Charles J. Brainerd & Ambrocio H. Mojardin, *Children's and Adults' Spontaneous False Memories: Long-Term Persistence and Mere Testing Effects*, 69 CHILD DEV. 1361, 1375 (1998); Valerie F. Reyna & Barbara Kiernan, *Development of Gist Versus Verbatim Memory in Sentence Recognition: Effects of Lexical Familiarity, Semantic Content, Encoding Instructions, and Retention Interval*, 30 DEV. PSYCHOL. 178, 188 (1994).

- 28 See Brainerd & Mojardin, *supra* note 27, at 1375; Reyna & Kiernan, *supra* note 27.
- 29 Charles J. Brainerd et al., *Fuzzy-Trace Theory and False Memory: Memory Theory in the Courtroom*, in FALSE-MEMORY CREATION IN CHILDREN AND ADULTS 93, 95-96 (David F. Bjorklund ed., 2000).
- 30 BRAINERD & REYNA, *supra* note 7, at 82- 83.
- 31 *Id.* at 84.
- 32 *Id.* at 84-85. Surface features (i.e., details of an event) assist in creating true memories of an event, while helping to reduce false memories of an event. Semantic features (i.e., meaning of an event) also assist in establishing true memories of an event. However, at the same time, semantic features increase the likelihood of creating memories that are consistent with the meaning of an event but are nevertheless false. *Id.* at 87.
- 33 *Id.* at 100-53.
- 34 See, e.g., Charles J. Brainerd et al., *Theoretical and Forensic Implications of Developmental Studies of the DRM Illusion*, 39 MEMORY & COGNITION 365, 365-68 (2010); Daniel R. Kimball & Robert A. Bjork, *Influences of Intentional and Unintentional Forgetting on False Memories*, 131 J. EXPERIMENTAL PSYCHOL. 116, 126 (2002); Henry L. Roediger III et al., *Factors that Determine False Recall: A Multiple Regression Analysis*, 8 PSYCHONOMIC BULL. & REV. 385, 385 (2001).
- 35 See Henry L. Roediger III & Kathleen B. McDermott, *Creating False Memories: Remembering Words Not Presented in Lists*, 21 J. EXPERIMENTAL PSYCHOL. 03, 804 (1995) (“For example, for the critical word *needle*, the list words were *thread*, *pin*, *eye*, *sewing*, *sharp*, *point*, *pricked*, *thimble*, *haystack*, *pain*, *hurt*, and *injection*.”).
- 36 This is known as a “recall” test. See Frank Haist et al., *On the Relationship Between Recall and Recognition Memory*, 18 J. EXPERIMENTAL PSYCHOL. 91, 691 (1992) (“Subjects explicitly evaluate their memory and can either retrieve items (recall) or make judgments as to whether or not items are familiar (recognition).”).
- 37 For example, a target word, a critical word, a synonym of a target word, or an antonym of a target word.
- 38 This is known as a “recognition” test. See Haist et al., *supra* note 36, at 691.
- 39 See BRAINERD & REYNA, *supra* note 7, at 92.
- 40 See, e.g., Brainerd et al., *supra* note 34, at 366-68, 376-77 (reviewing studies indicating that rates of false recall and false recognition on DRM tasks increase with the subjects' age); Roediger & McDermott, *supra* note 35, at 804, 809 (presenting two experiments indicating high levels of false recall and false recognition on DRM tasks).
- 41 See Roediger & McDermott, *supra* note 35. Critical non-presented words are words to which all of the presented words in the list are somehow semantically related. *Id.* at 804.
- 42 *Id.* at 805. It is important to note that all other non-presented words were recalled fourteen percent of the time--a low rate--indicating that “subjects were not guessing wildly in the experiment.” *Id.* at 806.
- 43 *Id.* at 806. This false recognition rate is exceedingly close to the true recognition of presented words at a rate of eighty-six percent. See *id.*
- 44 *Id.* at 809.
- 45 *Id.* at 803. For examples of factors that have been found to increase or reduce false memory rates, see BRAINERD & REYNA, *supra* note 7, at 106-54, including duration, repetition, deep and shallow processing, event distinctiveness, consolidation activity, cuing, instructions, and sleeper effects.
- 46 STEPHEN J. CECI & MAGGIE BRUCK, *JEOPARDY IN THE COURTROOM: A SCIENTIFIC ANALYSIS OF CHILDREN'S TESTIMONY* 44 (1995).
- 47 See Brainerd et al., *supra* note 29, at 97.

- 48 *See id.* at 96-97. This is known as an “inconsistent distractor.”
- 49 *See id.* This is known as a “consistent distractor.”
- 50 *See id.* at 96 (noting that the test is generally a recognition test, in which the subject is asked to accept presented terms and reject all others).
- 51 *See* BRAINERD & REYNA, *supra* note 7, at 230-31.
- 52 Brainerd et al., *supra* note 29, at 97.
- 53 *See* BRAINERD & REYNA, *supra* note 7, at 3; *see also* Bennett L. Gershman, *The Eyewitness Conundrum: How Courts, Police and Attorneys Can Reduce Mistakes by Eyewitnesses*, 81 N.Y. S.T.B.J. 24, 24, 29 (2009); Saul M. Kassin, *Eyewitness Identification Procedures: The Fifth Rule*, 22 L. & HUM. BEHAV. 649, 649 (1998); Gary L. Wells & Amy L. Bradfield, “Good, You Identified the Suspect”: Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360, 360 (1998).
- 54 A 2004 study looked at forty-eight experiments involving eyewitness identifications in which the offender was completely visible, the identifications were made at a reasonable time after the participant viewed the event, and the identification procedures used were lineup and photo spreads with four or more choices. When the offender was present in the lineup or photo spread, the participants falsely identified an innocent suspect twenty-seven percent of the time, whereas when the offender was absent from the lineup or photo spread, the participants falsely identified an innocent suspect fifty-seven percent of the time. *See* BRAINERD & REYNA, *supra* note 7, at 38-39 (citing R.N. Haber & L. Haber, A Meta-Analysis of Research on Eyewitness Line-up Accuracy (2004) (unpublished manuscript)). For further research on which identification procedures are detrimental, *see* R.C. Lindsay & Gary L. Wells, *Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation*, 70 J. APPLIED PSYCHOL. 556 (1985) (describing a study finding sequential presentations of lineups to produce fewer false identifications than simultaneous presentations); Nancy Mehrkens Steblay, *Social Influence in Eyewitness Recall: A Meta-Analytic Review of Lineup Instruction Effects*, 21 L. & HUM. BEHAV. 283 (1997) (analyzing various studies that suggest that accuracy in lineup eyewitness identifications is controlled by the type of lineup presented to the witness); Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 55 A.N.N. REV. PSYCHOL. 278, 280-89 (2003) (describing factors that have been found to influence the accuracy of eyewitness identification).
- 55 *See* *United States v. Wade*, 388 U.S. 218, 228 (1967) (“The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”); *see also* Gershman, *supra* note 53.
- 56 *See, e.g.,* Gershman, *supra* note 53, at 25 (“The due process guarantee offers only limited constitutional protection, however. Highly suggestive identification procedures often do not rise to the level of a due process violation.”); *see also* *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972) (describing the factors to consider in determining whether an identification is reliable despite the use of suggestive procedures); *Simmons v. United States*, 390 U.S. 377, 384 (1968) (holding that “each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification”); *Wade*, 388 U.S. at 237 (finding that the defendant should have had the assistance of counsel at a post-indictment lineup, that the defendant and counsel should have been informed of the upcoming lineup, and that, unless waived, counsel’s presence at lineups should be required); Gershman, *supra* note at 53, at 26, 29.
- 57 Gershman, *supra* note 53, at 25 (“For the prosecutor, this means evaluating the eyewitness’s identification with greater care and not proceeding with a case that rests on the uncorroborated testimony of an eyewitness, unless the prosecutor is personally satisfied beyond any reasonable doubt that the eyewitness is making a reliable identification.”).
- 58 *See id.* at 26 (discussing how prosecutors are in a better position than jurors to evaluate an eyewitness’s reliability).
- 59 *Id.* at 27.
- 60 *See generally* BRAINERD & REYNA, *supra* note 7, at 292-94 (discussing reasons why some researchers believe that suggestive techniques are necessary for interviewing children and raising concerns about the reliability of statements from such interviews).

- 61 *Id.* at 294-95; *see also, e.g.*, Helen R. Dent & Geoffrey M. Stephenson, *An Experimental Study of the Effectiveness of Different Techniques of Questioning Child Witnesses*, 18 B RIT. J. SOC. & CLINICAL PSYCHOL. 41, 43 (1979); Mark L. Howe, *Misleading Children's Story Recall: Forgetting and Reminiscence of the Facts*, 27 DEV. PSYCHOL. 746 (1991).
- 62 BRAINERD & REYNA, *supra* note 7, at 156-57, 296-97 (describing the Martin Preschool case in which child sexual abuse charges were brought against preschool teachers and the teachers were later acquitted because the interviews of the children were highly suggestive); Kathy Pezdek & Chantal Roe, *The Effect of Memory Trace Strength on Suggestibility*, 60 J. EXPERIMENTAL CHILD PSYCHOL. 116, 117 (1995); Kathy Pezdek & Chantal Roe, *The Suggestibility of Children's Memory for Being Touched: Planting, Erasing, and Changing Memories*, 21 L. & HUM. BEHAV. 95 (1997).
- 63 BRAINERD & REYNA, *supra* note 7, at 313-14.
- 64 *See, e.g.*, Michael P. Toglia et al., *The Suggestibility of Children's Memory: A Social-Psychological and Cognitive Interpretation*, in DEVELOPMENT OF LONG-TERM RETENTION 217 (Mark L. Howe et al. eds., 1992); Melissa K. Welch-Ross, *Interviewer Knowledge and Preschoolers' Reasoning About Knowledge States Moderate Suggestibility*, 14 C OGNITIVE DEV. 423, 431-33 (1999).
- 65 *See, e.g.*, Kathy Pezdek & Danielle Hodge, *Planting False Childhood Memories in Children: The Role of Event Plausibility*, 70 CHILD DEV. 887, 887 ((1999).
- 66 *See, e.g.*, Suzanne L. Davis & Bette L. Bottoms, *Effects of Social Support on Children's Eyewitness Reports: A Test of the Underlying Mechanism*, 26 L. & HUM. BEHAV. 185, 185 (2002).
- 67 *See, e.g.*, Maggie Bruck et al., *Children's Use of Anatomically Detailed Dolls to Report Genital Touching in a Medical Examination: Developmental and Gender Comparisons*, 6 J. EXPERIMENTAL PSYCHOL. 74 (2000).
- 68 Carlos F.A. Gomes, Brittany R. Cohen, Alisha Desai, Charles J. Brainerd & Valerie F. Reyna, *Aging and False Memory: Fuzzy-Trace Theory and the Elderly Eyewitness*, in THE ELDERLY EYEWITNESS IN COURT 137, 141-42 (Michael P. Toglia et al. eds., 2014).
- 69 *Id.* For example, “[o]lder adults usually perform worse than younger adults on tasks that require remembering detailed information (surface features), such as source memory (e.g., remembering the color and font of studied words),” “older adults have greater difficulty distinguishing events that were shown in a video from events that were shown in photographs, relative to younger adults,” and “differences between younger and older adults are larger in tasks slanted toward retrieval of precise details, such as associative memory tasks.” *Id.* at 141-42.
- 70 Tammy A. Marche et al., *Interviewing the Elderly Eyewitness*, in THE ELDERLY EYEWITNESS IN COURT, *supra* note 68, at 263, 275; *see, e.g.*, Karen J. Mitchell et al., *Source Monitoring and Suggestibility to Misinformation: Adult Age-Related Differences*, 17 APPLIED COGNITIVE PSYCHOL. 107, 116 (2003); Henry L. Roediger III & Lisa Geraci, *Aging and the Misinformation Effect: A Neuropsychological Analysis*, 33 J. EXPERIMENTAL PSYCHOL. 321, 332 (2007).
- 71 *See* sources cited *supra* note 70.
- 72 Sam Roberts, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 F ORDHAM L. R EV. 257, 259 (2005).
- 73 *Id.* at 260.
- 74 *Id.* Leniency from the prosecution may include dismissing pending charges, agreeing to a reduced sentence, or recommending to the court that it be lenient in sentencing. *Id.* at 262-63.
- 75 *Id.* at 270-71.
- 76 *Id.*
- 77 *Id.* at 271.
- 78 *Id.* at 271-72.

- 79 *Id.* at 272.
- 80 *Id.* at 273.
- 81 *Id.*
- 82 See, e.g., *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction> (last visited Nov. 15, 2015) (listing the testimony of informants and snitches as a major factor in 48 of the first 325 wrongful convictions to be overturned by the results of post-conviction DNA testing).
- 83 Gershman, *supra* note 15, at 834; see also *Kyles v. Whitley*, 514 U.S. 419 (1995) (conviction reversed on grounds that the government failed to disclose earlier statements made by a key eyewitness that were inconsistent with the testimony he provided at trial).
- 84 Carter, *supra* note 15, at 463-67 (detailing how a prosecutor provided witnesses with suggestions via email on what to include in his or her testimony in order to strengthen the government's case).
- 85 Gershman, *supra* note 15, at 836; see also *Alcorta v. Texas*, 355 U.S. 28 (1957).
- 86 See INIMAI M. CHETTIAR ET AL., BRENNAN CTR. FOR JUSTICE, REFORMING FUNDING TO REDUCE MASS INCARCERATION 1, 12 (2013), https://www.brennancenter.org/sites/default/files/publications/REFORM_FUND_MASS_INCARC_web_0.pdf.
- 87 DENNIS J. STEVENS, MEDIA AND CRIMINAL JUSTICE: THE CSI EFFECT 252 (2011) (“Additionally, a prosecutor has an incentive to win convictions because his or her success is determined by those wins, which would impact political ambitions, future elections, and financial and funding benefits.”); Nicole Flatow, *How Prosecutor Win Rates and Informants Drive Wrongful Murder Convictions*, THINKPROGRESS (May 28, 2013), <http://thinkprogress.org/justice/2013/05/28/2067671/how-prosecutor-win-rates-and-informants-drive-wrongful-murder-convictions> (“[P]rosecutors whose bonuses, promotions, and sometimes election are tied to conviction rates and prominent ‘wins’ have perverse incentives to instead score any conviction at all.”).
- 88 The insufficient ethical standards will be discussed below in Section III.A.
- 89 Courts’ failure to penalize prosecutors for witness coaching will be discussed in Section III.B.
- 90 Gershman, *supra* note 15, at 839.
- 91 See, e.g., Elizabeth Barber, *Dallas Targets Wrongful Convictions, and Revolution Starts to Spread*, CHRISTIAN SCI. MONITOR (May 25, 2014), <http://www.csmonitor.com/USA/Justice/2014/0525/Dallas-targets-wrongful-convictions-and-revolution-starts-to-spread>; Martha Neil, *Ex-Inmate Sues 7 Lawyers in Brooklyn DA’s Office, Says He Was Framed in Rabbi’s Murder*, A.B.A. J. (Feb. 16, 2011, 6:31 PM), http://www.abajournal.com/mobile/article/ex-inmate-sues_7_lawyers_in_brooklyn_das_office_says/; Marianne Salcedo, *Motivated by Innocence, Jabbar Collins Awarded \$13 Million*, P LAIN ERROR (Oct. 22, 2014, 10:56 AM), <http://floridainnocence.org/content/?tag=unreliable-witness-testimony>.
- 92 See, e.g., Barber, *supra* note 91 (describing how seventeen years after his conviction for murder and attempted murder, Richard Miles was exonerated in 2012 when the Dallas District Attorney’s Conviction Integrity Unit uncovered evidence that the case’s prosecutor had encouraged a witness to lie); Salcedo, *supra* note 91 (describing how after serving fifteen years in a New York prison, Jabbar Collins was exonerated in 2010 from his conviction for murdering a rabbi when it was revealed that the prosecutor on the case had knowingly coerced and bribed three witnesses to testify at Collins’s trial and relied on that false testimony to convict Collins).
- 93 INNOCENCE PROJECT, REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION (2009), http://www.innocenceproject.org/files/imported/eyewitness_id_report.pdf/view.
- 94 *Id.*
- 95 MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2002). While these rules were not established specifically for prosecutors, they are nonetheless applicable to all attorneys and are therefore relevant to examine.

- 96 See *Alphabetical List of States Adopting Model Rules*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Nov. 11, 2015).
- 97 See AM. BAR ASS'N, ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION AND DEFENSE FUNCTION (4th ed. 2015), http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html.
- 98 Roberta K. Flowers, *Witness Preparation: Regulating the Profession's 'Dirty Little Secret,'* 38 HASTINGS CONST. L.Q. 1007, 1010 (2011).
- 99 MODEL RULES OF PROF'L CONDUCT r. 1.0(f).
- 100 Standard 3-6.6 states that a prosecutor “should not offer evidence that the prosecutor does not reasonably believe to be true, whether by documents, tangible evidence, or the testimony of witnesses. When a prosecutor has reason to doubt the truth or accuracy of particular evidence, the prosecutor should take reasonable steps to determine that the evidence is reliable, or not present it.” ABA CRIMINAL JUSTICE STANDARDS, § 3-6.6.
- 101 Flowers, *supra* note 98, at 1013-14.
- 102 *Id.*
- 103 MODEL RULES OF PROF'L CONDUCT r. 8.4(c).
- 104 Flowers, *supra* note 98, at 1012-13 (“Courts have required knowledge, reckless disregard, and even gross or simple negligence.”).
- 105 MODEL RULES OF PROF'L CONDUCT r. 8.4(c).
- 106 *Id.* at r. 8.4(d).
- 107 Flowers, *supra* note 98, at 1013.
- 108 Carter, *supra* note 15, at 469-70.
- 109 MODEL RULES OF PROF'L CONDUCT r. 3.4(b). Concerning Rule 3.4(b):
It is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.
Id. at r. 3.4(b) cmt.
- 110 *Id.* at r. 3.4(f). This rule applies unless: “(1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.” *Id.*
- 111 Carter, *supra* note 15, at 469.
- 112 For example, is a prosecutor who unknowingly counsels a witness to testify falsely subject to discipline under Rule 3.4? How about a prosecutor who knowingly counsels a witness to alter the witness's testimony, but unknowingly assists in falsifying the witness's testimony?
- 113 For example, does a prosecutor who fails to stop a witness from testifying falsely in effect “assist” that witness to testify falsely, in violation of Rule 3.4?
- 114 ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION AND DEFENSE FUNCTION, § 3-3.5 (4th ed. 2015).
- 115 *Id.*
- 116 *Id.*
- 117 *Id.* § 3-3.4(c).
- 118 *Id.* § 3-3.4(e).

- 119 *Id.* § 3-3.4(g).
- 120 *See* *Skains v. Lockler*, No. CIV-S-06-127-LKK-CHS-P, 2009 WL 230037, at *8 (E.D. Cal. Jan. 20, 2009), *aff'd sub nom.* *Skains v. California*, 386 F. App'x 620 (9th Cir. 2010).
- 121 *See id.* (“A thorough search reveals no Supreme Court or Ninth Circuit precedent on the constitutional boundaries of witness preparation. There appear to be no clearly established standards for evaluating a prosecutor’s ‘coaching’ of witness testimony, assuming of course that the testimony is not perjured.”).
- 122 *See id.* (“It is, of course, proper for an attorney to meet with a witness in preparation for trial.”); *Nixon v. United States*, 703 F. Supp. 538, 563 (S.D. Miss. 1988) (“[P]retrial witness interviews are commonplace and are a proper method of trial preparation.”), *aff'd*, 881 F.2d 1305 (5th Cir. 1989); *State v. Earp*, 571 A.2d 1227, 1234 (Md. 1990) (“Attorneys have not only the right but also the duty to fully investigate the case and to interview persons who may be witnesses. A prudent attorney will, whenever possible, meet with the witnesses he or she intends to call.”).
- 123 *See* *Smith v. Kelly*, No. 7:07CV00536, 2008 WL 345838, at *11 (W.D. Va. Feb. 6, 2008) (“[I]t is not unusual or improper for witnesses to rehearse their direct testimony with counsel.” (citing *Daewoo Eng'g & Constr. Co. v. United States*, 73 Fed. Cl. 547, 573 (2006) *aff'd*, 557 F.3d 1332 (Fed. Cir. 2009))).
- 124 *United States v. Rhynes*, 218 F.3d 310, 319 (4th Cir. 2000) (“Thorough preparation demands that an attorney interview and prepare witnesses before they testify.”).
- 125 *Geders v. United States*, 425 U.S. 80, 81 (1976).
- 126 *Id.* Here, the Supreme Court addressed witness coaching in the context of defense counsel’s consultation with his client during an overnight recess in the trial. While this case discusses coaching by defense counsel during the trial stage, the broad principles announced are nonetheless relevant to this Note. The Court ultimately held:
To the extent that conflict remains between the defendant’s right to consult with his attorney during an overnight recess in the trial, and the prosecutor’s desire to cross-examine the defendant without the intervention of counsel, with the risk of improper “coaching,” the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel.
Id. at 80. For a discussion of whether “prosecutors and defense attorneys have different roles in witness preparation,” see *Flowers*, *supra* note 98, at 1024.
- 127 *Geders*, 425 U.S. at 80; *see also* *Flowers*, *supra* note 98, at 1010.
- 128 *People v. Pulvino*, 982 N.Y.S.2d 630, 632 (N.Y. App. Div. 2014) (citing *People v. Thompson*, 873 N.Y.S.2d 834, 836 (N.Y. App. Div. 2009)), *leave to appeal denied*, 992 N.Y.S.2d 807 (N.Y. 2014).
- 129 *See* *Smith v. Kelly*, No. 7:07CV00536, 2008 WL 345838, at *11 (W.D. Va. Feb. 6, 2008) (“Smith provides no factual support for his conclusory allegation that the prosecutor improperly influenced the victim’s testimony. It appears from the brief mention of the incident in the trial transcripts that, during the pre-trial preparation, the prosecutor merely posed the questions to be asked at trial and Smith provides the court with no evidence to the contrary.”).
- 130 *See, e.g.,* *Banks v. Dretke*, 540 U.S. 668, 673 (2004) (suggesting that witness coaching occurred when evidence indicated that the prosecution explained to a key witness how to reconcile his testimony with his prior inconsistent statements and allowed his misstatements to stand uncorrected); *Strickler v. Greene*, 527 U.S. 263 (1999) (suggesting that the testimony of the government’s main witness had been substantially altered after a series of meetings and interviews with prosecutors and law enforcement officials but not explicitly denoting what occurred as improper witness coaching); *Kyles v. Whitley*, 514 U.S. 419, 442-43 (1995) (implying that the prosecution had improperly coached an eyewitness to murder, based on suppressed evidence and changes in the eyewitness’s testimony between the murder and trial); *see also* *Gershman*, *supra* note 53, at 24, 27.
- 131 *State v. McCormick*, 259 S.E.2d 880, 882 (N.C. 1979).
- 132 *Skains v. Lockler*, No. CIVS06-127-LKK-CHS-P, 2009 WL 230037, at *8 (E.D. Cal. Jan. 20, 2009) (“The presentation of a witness’ contradictory testimony is not improper absent the prosecutor’s knowledge that the testimony is false.... There appear to be no clearly

established standards for evaluating a prosecutor's 'coaching' of witness testimony, assuming of course that the testimony is not perjured.”), *aff'd sub nom.* *Skains v. California*, 386 F. App'x 620 (9th Cir. 2010).

- 133 *United States v. Rhynes*, 218 F.3d 310, 318 (4th Cir. 2000).
- 134 *Flowers*, *supra* note 98, at 1015-16.
- 135 *Crutchfield v. Wainwright*, 803 F.2d 1103, 1110 (11th Cir. 1986).
- 136 *See, e.g.*, *United States v. Welton*, No. CR-09-00153-MMM, 2009 WL 2390848, at *3 (C.D. Cal. Aug. 1, 2009) (stating that that in order for witness coaching by a prosecutor “[t]o violate due process, governmental conduct must be ‘so outrageous that due process principles would absolutely bar the Government from invoking judicial process to obtain a conviction’” (quoting *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991))); *Skains*, 2009 WL 230037, at *8 (finding that petitioner's “vague accusations” that the prosecutor coached witnesses did not demonstrate a due process violation).
- 137 *See Lewis v. State*, No. 45A04-0811-PC-675, 2009 WL 1332523, at *4 (Ind. Ct. App. 2009) (unpublished table decision) (finding that Lewis's counsel was not ineffective in its decision to decline to hire a child interview expert to provide expert testimony indicating that the child witness's consistency in his statements confirms the conclusion that he was interviewed using suggestive questioning).
- 138 *United States v. Sayakhom*, 186 F.3d 928, 943 (9th Cir.), *amended by* 197 F.3d 959 (9th Cir. 1999) (holding that reversal on the basis of prosecutorial misconduct is “justified only if it appears more probable than not that prosecutorial misconduct materially affected the fairness of the trial”).
- 139 It appears as though courts have adopted the view that cross-examination is the proper safeguard for *all* instances of witness coaching, whether they occur during the early stages (e.g., first witness interviews) or during later stages of witness preparation. *See, e.g.*, *Kyles v. Whitley*, 514 U.S. 419, 443 (1995) (stating that a “withering cross-examination” would have raised questions from the jury and affected the verdict); *Geders v. United States*, 425 U.S. 80, 80 (1976) (“The problem of possible improper influence on testimony or ‘coaching’ can be dealt with in other ways, such as by a prosecutor's skillful cross-examination”). *But cf.* *Cardona v. State*, 826 So. 2d 968, 969 (Fla. 2002) (per curiam) (ordering a new trial where the defendant had been sentenced to the death penalty and new evidence, which the defense could have used in cross-examination, emerged indicating that a key witness had been coached by the prosecutor). This case suggests that in cases in which *new and material* evidence arises indicating that a witness has been coached and the defense was unable to conduct a proper cross-examination during the trial, a court will order a retrial. However, it might also be the case that courts may be more willing to order a new trial in death penalty cases, in which the stakes are undoubtedly greater. It is interesting to note that none of these cases address witness coaching during the very early stages of litigation. It is quite possible that coaching during early witness interviews goes more readily undetected.
- 140 *See Geders*, 425 U.S. at 80 (providing the following examples by which harmful effects of coaching can be prevented: (1) a prosecutor's skillful cross-examination to discover whether “coaching” occurred during a recess; and (2) the trial judge's (a) directing “that the examination of witnesses continue without interruption until completed,” or (b) otherwise arranging “the sequence of testimony so that direct- and cross-examination of a witness will be completed without interruption”); *United States v. Rhynes*, 218 F.3d 310, 320 (4th Cir. 2000) (stating that “if an attorney has inappropriately ‘coached’ a witness, thorough cross-examination of that witness violates no privilege and is entirely appropriate and sufficient to address the issue” (citing *Geders*, 425 U.S. at 89-90)); *Sayakhom*, 186 F.3d at 945 (“Cross-examination and argument are the primary tools for addressing improper witness coaching.” (citing *Geders*, 425 U.S. at 89-90)); *State v. McCormick*, 259 S.E.2d 880, 882-83 (N.C. 1979) (“When a witness' [sic] testimony appears to have been memorized or rehearsed or it appears that the witness has testified using the attorney's words rather than his own or has been improperly coached, then these are matters to be explored on cross-examination, and the weight to be given the witness' [sic] testimony is for the jury.”).
- 141 In instances in which witness coaching occurs at a very early stage (e.g., the first witness interview), it is very unlikely that improper prosecutorial witness coaching will be detected by or disclosed to defense counsel. Defense counsel may not be well versed in this area and may not be present during the witness interviews, making it difficult to detect subtle suggestions. *See Gershman*, *supra* note 15, at 833, 852; *Wydict*, *supra* note 8, at 22-23.
- 142 Research shows that jurors lack an understanding of how memory works. *See Howe & Conway*, *supra* note 25, at 545-46 (“Any number of surveys have found that most people have very little insight into how memory operates, and a number of authors have tried to dissuade laypeople about the many myths of memory. It is not just laypeople who are naïve when it comes to memory, but

research has established that judges, jurors, and law enforcement personnel all too often rely on ‘common sense’ notions of memory rather than scientific facts.” (citations omitted)).

143 See Gershman, *supra* note 15, at 854.

144 *Id.* at 855.

145 Wydick, *supra* note 8, at 22-23.

146 *Id.* at 21; see also 18 U.S.C. § 1622 (2013).

147 Wydick, *supra* note 8, at 23.

148 *Id.* at 23.

149 *Id.* at 23, 27.

150 *Id.* at 37.

151 See *Skains v. Lockler*, No. S-06-127-LKK-CHS-P, 2009 WL 230037, at *8 (E.D. Cal. Jan. 20, 2009) (“It is, of course, proper for an attorney to meet with a witness in preparation for trial.”), *aff’d sub nom.* *Skains v. California*, 386 F. App’x 620 (9th Cir. 2010); *Smith v. Kelly*, No. 7:07CV00536, 2008 WL 345838, at *11 (W.D. Va. Feb. 6, 2008) (“[I]t is not unusual or improper for witnesses to rehearse their direct testimony with counsel.”); *Nixon v. United States*, 703 F. Supp. 538, 563 (S.D. Miss. 1988) (“[P]retrial witness interviews are commonplace and are a proper method of trial preparation.”), *aff’d*, 881 F.2d 1305 (5th Cir. 1989); *State v. Earp*, 571 A.2d 1227, 1234 (Md. 1990).

152 See *United States v. Rhynes*, 218 F.3d 310, 318 (4th Cir. 2000) (stating that ABA Rule 3.3 “forbids an attorney from knowingly presenting perjured testimony”); *Lockler*, 2009 WL 230037, at *8 (“The presentation of a witness’ contradictory testimony is not improper absent the prosecutor’s knowledge that the testimony is false.”).

153 *Geders v. United States*, 425 U.S. 80, 87 (1976); *Flowers, supra* note 98, at 744 (“The Supreme Court, in *Geders v. United States*, recognized that the lawyer must refrain from improperly influencing a witness’s testimony but failed to define what constitutes improper ‘coaching.’”); see also MODEL RULES OF PROF’L CONDUCT r. 3.4 (AM. BAR ASS’N 2002).

154 *State v. McCormick*, 259 S.E.2d 880, 882 (N.C. 1979) (“Nothing improper has occurred so long as the attorney is preparing the witness to give the witness’ [sic] testimony at trial and not the testimony that the attorney has placed in the witness’ [sic] mouth and not false or perjured testimony.”).

155 *Flowers, supra* note 98, at 1015 (“Since the ABA Rules do not speak directly to the permitted or prohibited conduct of the lawyer when preparing a witness, ‘there remains a vast realm of conduct that could potentially be characterized as improperly seeking to influence a witness’ testimony.” (quoting Joseph D. Piorkowski, Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of “Coaching,”* 1 GEO. J. LEGAL ETHICS 389, 389 (1987))).

156 See *Roberts, supra* note 72; see also Gershman, *supra* note 15, at 861-62; George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 62 (2000) (arguing for a mandatory recording rule for pretrial ex parte communications between the government and cooperators as a prerequisite to admitting witness testimony of a compensated cooperator at trial).

157 Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 953 (1999) (“Most prosecutors simply do not understand how memory works and the reality of truth.”); see also Gershman, *supra* note 15, at 839, 843 (“Many prosecutors appear to be unaware of the extent to which they express verbally or non-verbally a genuine interest in certain facts, or communicate disappointment when the witness does not know particular facts, and thereby tip off the witness to what they want him to say. Some prosecutors are not subtle about this type of communicative message.”).

158 See Gershman, *supra* note 15, at 861-62 (arguing that “all interviews with potential trial witnesses should be electronically recorded either by audio or videotaping”); *Roberts, supra* note 72 (arguing that a recording rule should be adopted for all pretrial meetings with cooperating witnesses); *Tortora, supra* note 10, at 1536 (arguing that recording a witness’s initial account of an event can help to detect and document any changes in the witness’s testimony).

- 159 Gershman, *supra* note 15, at 862.
- 160 Roberts, *supra* note 72, at 289.
- 161 *Id.* at 293.
- 162 See, e.g., *False Confessions or Admissions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/fix/False-Confessions.php> (last visited Nov. 15, 2015) (describing the prevalence of mandatory recording of police interrogations).
- 163 THOMAS P. SULLIVAN, NORTHWESTERN UNIV. SCH. OF LAW, CTR. ON WRONGFUL CONVICTIONS, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS 1, 23 (2004), http://mcadams.posc.mu.edu/Recording_Interrogations.pdf.
- 164 Brian P. Fox, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 425, 426 (2013) (“Open-file discovery is the idea that the prosecution should provide the defense with *everything* in the prosecution’s file-- including witness statements and the names of witnesses, forensic evidence, and police reports. The defense would have access to this information without regard to the materiality of the evidence or the likelihood that the prosecution would introduce that evidence at trial.”).
- 165 Roberts, *supra* note 72, at 265-66.
- 166 Fox, *supra* note 164, at 449.
- 167 KERRY MURPHY HEALEY, DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, VICTIM AND WITNESS INTIMIDATION: NEW DEVELOPMENTS AND EMERGING RESPONSES (1995), <https://www.ncjrs.gov/pdffiles/witintim.pdf> (“Intimidation of victims and witnesses undermines the functioning of the justice system by denying critical evidence to police and prosecutors.... Prosecutors and homicide investigators are now faced with crimes in which there are numerous known witnesses--and in many cases known perpetrators--but no one is willing to testify.”).
- 168 See Fox, *supra* note 164, at 434-35.
- 169 *Id.* at 437-38, 442-43.
- 170 Gershman, *supra* note 15, at 833, 852.
- 171 It is unclear from current sources whether or not a witness would have to consent to a prosecutor’s videotaping of an interview. See 2 COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 4:15 (Robert L. Haig ed., 3d ed. 2013) (discussing the ethical canons in the State of New York that require a lawyer to obtain a nonparty witness’s consent before tape recording an interview); Carol M. Bast, *Surreptitious Recording by Attorneys: Is It Ethical?*, 39 ST. MARY’S L.J. 661, 663 (2008) (“States’ opinions as to whether it is ethical for an attorney to record a conversation without all parties’ consent have not been uniform, and the issue has spawned a great deal of discussion. At one extreme are the states that prohibit secret attorney recording as unethical and, at the opposite extreme, are the states that permit secret attorney recording; others have taken positions somewhere between the two extremes.”).
- 172 Bast, *supra* note 171, at 663 (“[M]any witnesses hesitate to speak freely if they know that their statements are being recorded verbatim.”).
- 173 *Id.*
- 174 Fox, *supra* note 164, at 430-31; Roberts, *supra* note 72, at 296.
- 175 The Jencks Act already requires the mandatory disclosing of notes at some level. 18 U.S.C. § 3500(b) (2013) (“After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.”).
- 176 See Fox, *supra* note 164, at 449-50 (“Open-file discovery would also present more subtle ways for prosecutors to frustrate defense counsel-- specifically by misleading defense counsel into incorrectly thinking that the prosecutor has turned over all of the evidence or by overwhelming defense counsel with superfluous information.”); Steven Koppell, *An Argument Against Increasing Prosecutors’*

Disclosure Requirements Beyond Brady, 27 GEO. J. LEGAL ETHICS 643, 653 (2014) (“If some prosecutors were willing to violate their constitutional obligations and put their careers at risk, mandating open file disclosure is not going to stop them from still concealing the evidence.”).

- 177 See Tim Cushing, *Why the FBI's New Interview Recording Policy Probably Won't Change Anything*, TECHDIRT (June 19, 2014), <https://www.techdirt.com/articles/20140609/10344327526/why-fbis-new-interview-recording-policy-probably-wont-change-anything.shtml> (discussing the shortcomings of a recording rule for custodial interrogations because of exceptions for unavailable or dysfunctional equipment, “public safety,” and “national security” and “intelligence, sources, or methods”).
- 178 It can be argued that each recording should be reviewed in detail by a prosecutor along with an expert on the matter in order that the prosecutor learn which of his commonly used techniques are harmful and should be avoided. However, this method is neither consistent with the purpose of the recording rule nor feasible.
- 179 It should be noted that this standard might appear to stilt the conversation and relationship between the prosecutor and the witness. Nevertheless, there are other ways for prosecutors to build rapport with witnesses. The curbing of the dangers that a reveal of the defendant's theory or the law's requirement may have on a witness's testimony ultimately outweighs the strain that may be placed on the prosecutor and witness's conversation.
- 180 Flowers, *supra* note 98, at 1026.
- 181 Many of the following additions are based on scientific findings on memory suggestions and are common examples that Drs. Charles J. Brainerd and Valerie F. Reyna have encountered in criminal cases. See BRAINERD & REYNA, *supra* note 7, at 229.
- 182 Marche et al., *supra* note 70, at 268 (“However if it is necessary to follow up with closed-ended questions in order to obtain details that have not yet been reported, interviewers must avoid using suggestive or leading questions and introducing information that has not been provided in the current interview.”).
- 183 This proposal is based on recommendations found in several different interview guidelines and are supported by scientific studies on memory and suggestibility. *Id.*; see also HOME OFFICE & DEPT OF HEALTH, *ACHIEVING BEST EVIDENCE IN CRIMINAL PROCEEDINGS: GUIDANCE ON INTERVIEWING VICTIMS AND WITNESSES AND USING SPECIAL MEASURES* (2007); Colin Clarke et al., *Interviewing Suspects of Crime: The Impact of PEACE Training, Supervision, and the Presence of a Legal Advisor*, 8 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 149 (2011).
- 184 Marche et al., *supra* note 70, at 268 (“Building rapport has a beneficial impact on interviews, with research showing that the more comfortable the interviewee feels, the more information she or he is likely to provide.”); see also RONALD P. FISHER & R. EDWARD GEISELMAN, *MEMORY-ENHANCING TECHNIQUES FOR INVESTIGATIVE INTERVIEWING: THE COGNITIVE INTERVIEW* (Charles C. Thomas ed., 1992); CLAIRE WILSON & MARTINE POWELL, *A GUIDE TO INTERVIEWING CHILDREN: ESSENTIAL SKILLS FOR COUNSELLORS, POLICE, LAWYERS & SOCIAL WORKERS* (2001)..
- 185 Marche et al., *supra* note 70, at 268; see also Debra A. Poole & Jason J. Dickinson, *Investigative Interviews of Children*, in CHILD FORENSIC PSYCHOLOGY: VICTIM AND EYEWITNESS MEMORY 157 (Robyn Holliday & Tammy Marche eds., 2013).
- 186 Marche et al., *supra* note 70, at 268 (“Free recall allows interviewees to expand on points they feel are most relevant, giving control of the interview to the interviewee. Encouraging elaboration at the beginning of the interview promotes more elaborated responses to further questioning during later stages.”).
- 187 Gershman, *supra* note 15, at 856.
- 188 Marche et al., *supra* note 70, at 268 (“There is general consensus in the scientific and professional community that open-ended questions should be used whenever possible because open-ended questioning promotes more accurate recall than specific, multiple-choice, or yes-no questions.”).
- 189 *Id.* at 268-69 (“Finally, closing the interview with a recapitulation allows for the interviewee to substantiate the interviewer's accuracy and may lead to further memory retrieval.”); see also HOME OFFICE & DEPT OF HEALTH, *supra* note 183.

- 190 This proposed standard is for prosecutors who have already interviewed and obtained the witness's account of events. It is a condensed version of Professor Gershman's proposed protocol for witness preparation based mainly on his experience as a prosecutor and includes methods that are supported by scientific findings. *See* Gershman, *supra* note 15, at 856-59.
- 191 *Id.* at 856.
- 192 *Id.* at 857.
- 193 *Id.* at 857-58. Note that Professor Gershman uses the word “rehearse,” while the proposed standard intentionally uses the word “practice.” The word “rehearse” connotes the idea of scripting the witness's testimony, which should be regarded as improper conduct.
- 194 I concede that this is a tough standard. Nevertheless, where possible, witnesses should be focused on their account of the event, rather than on what they may have said at an earlier point in time. Prosecutors must be careful when the prior witness statements that they possess have come from law enforcement's notes or forms, as law enforcement agents may make mistakes in their written recordings. Reviewing these statements with a witness could result in the witness falsely altering his or her testimony to conform to that “prior statement.”
- 195 *See* Gershman, *supra* note 15, at 858.
- 196 *Id.* at 858-59. Prosecutors must be made aware that conducting mock cross-examinations can potentially amount to instances of unknowing Grade Three witness coaching. Nevertheless, it is important for witnesses to understand how cross-examination works before being thrown on the witness stand. Thus, when conducting mock cross-examinations with witnesses, prosecutors must exercise extreme caution in their interactions and questionings. Prosecutors should be sure to emphasize to the witness that none of the questions they will ask are suggestive of how the witness should or should not answer. Prosecutors should again stress to the witness that the witness should only tell the truth.
- 197 Researchers have emphasized the importance of training interviewers and the continuation of their training over time. Marche et al., *supra* note 70, at 270; *see, e.g.*, MICHAEL E. LAMB ET AL., TELL ME WHAT HAPPENED: STRUCTURED INVESTIGATIVE INTERVIEWS OF CHILD VICTIMS AND WITNESSES (Graham Davies & Ray Bull eds., 2008); Emily S. Hill & Graham M. Davies, *Has the Quality of Investigative Interviews with Children Improved with Changes in Guidance? An Exploratory Study*, 7 POLICING 1, 2-19 (2013); Poole & Dickinson, *supra* note 185; Alexis E. Rischke et al., *Using Spaced Learning Principles to Translate Knowledge into Behavior: Evidence of Investigative Interviews of Alleged Child Abuse Victims*, 33 J. POLICE & CRIM. PSYCHOL. 58 (2011).
- 198 Wydick, *supra* note 8, at 38 (“What is needed now is a method of analysis that will give a lawyer reasonable latitude when interviewing and preparing a witness, yet will minimize the risk to the quality of the witness's testimony.”).
- 199 Wydick, *supra* note 8, at 38-39. For further elaboration on legitimate reasons for asking a question or making a statement to a witness, *see id.* at 17-18.
- 200 *See, e.g.*, OFFICE OF THE ATTORNEY GEN. OF N.J., INTERNAL AFFAIRS POLICY & PROCEDURES (2014), http://www.nj.gov/oag/dcj/agguide/internalaffairs2000v1_2.pdf (“The purpose of the internal affairs unit is to establish a mechanism for the receipt, investigation and resolution of officer misconduct complaints. The goal of internal affairs is to ensure that the integrity of the department is maintained through a system of internal discipline where an objective and impartial investigation and review assure fairness and justice.”); *Department of Internal Affairs*, SCOTTSDALE POLICE DEP'T, <http://www.scottsdaleaz.gov/police/police-chief-alan-rodbell/departement-of-internal-affairs> (last visited Nov. 15, 2015); *Houston Police Department*, CITY OF HOUS., <http://www.houstontx.gov/police/contact/iad.htm> (last visited Nov. 15, 2015); *Internal Affairs Unit*, CITY OF DURHAM, <https://nc-durham.civicplus.com/180/Internal-Affairs-Unit> (last visited Nov. 15, 2015).
- 201 *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967).
- 202 *See* *Manson v. Brathwaite*, 432 U.S. 98 (1977).
- 203 *Neil v. Biggers*, 409 U.S. 188, 198 (1972) (“Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.”).

204 *Id.* at 199-200 (determining, under the totality of the circumstances, whether an identification was reliable despite the procedure being suggestive, based on the following factors: “the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation”). While it is outside the scope of this Note, the reliability factors discussed in *Biggers* need to be updated based on recent advances in social science. *See, e.g.*, Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 468-75 (2012) (explaining how the *Biggers* Court's reliability factors for eyewitness identifications are not supported by subsequent scientific findings).

205 PRIMO LEVI, THE DROWNED AND THE SAVED 1 (Raymond Rosenthal trans., 1988).

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WITNESS COACHING BY PROSECUTORSBennett L. Gershman^{a1}

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Introduction

Witness coaching has been described as the “dark”¹ --some have even called it “dirty”² --secret of the U.S. adversary system.³ It is a practice, some claim, that more than anything else has given trial lawyers a reputation as purveyors of falsehoods.⁴ Witnesses are prepared by lawyers in private, no records are kept, and the participants do not openly discuss the encounter.⁵ If false or ***830** misleading testimony results, the only persons who know about it are the participants themselves.⁶ And the capacity of cross-examination to expose improper coaching is extremely limited.⁷

Given its controversial nature, one would expect the practice and ethics of witness coaching to have attracted close scrutiny by courts and commentators. Interestingly, however, the subject has received relatively modest attention.⁸ A handful of judicial⁹ and ethics opinions¹⁰ have discussed superficially the subject of witness ***831** preparation and coaching. Practitioner manuals typically offer general guidance on how to prepare witnesses,¹¹ and occasionally address tactical and ethical issues involved in coaching.¹² Scholarly commentary has examined the ethical limits of witness preparation, particularly by differentiating acceptable techniques from improper techniques, which promote false or misleading testimony.¹³ In addition, popular culture occasionally has dramatized the subject.¹⁴ However, despite a discrete body of literature devoted to witness preparation generally, there has been very little discussion by courts and commentators on witness preparation and coaching by prosecutors.¹⁵

The absence of critical examination of witness coaching by prosecutors is puzzling for two reasons. First, there is an increasing concern among courts, lawmakers, and commentators that some prosecutors use the adversary system not to serve truth, but for self-serving purposes.¹⁶

According to this view, the conduct ***832** of some prosecutors in investigating cases and preparing witnesses to give testimony is undertaken not to ascertain, present, and protect the truth, but rather to manipulate the truth in order to secure a conviction.

Second, there is an increasing concern--amply documented by recent reports of wrongful convictions--that the criminal justice system is seriously prone to error.¹⁷ Critics contend that these errors are attributable to defects in the adversarial trial process, mostly from incompetent representation by defense lawyers and trial errors by prosecutors.¹⁸ However, recent disclosures suggest that the origin of many, perhaps most, of these miscarriages of justice occurs before the cases actually reach the courtroom for ***833** trial. Indeed, the inability of criminal trials to produce accurate results may be attributable in many cases to techniques used by prosecutors to prepare, shape, and polish the testimony of their witnesses.

Absent any contemporaneous record of a prosecutor's pretrial interaction with witnesses,¹⁹ it is exceedingly difficult for observers to investigate the preparation process to ascertain the extent to which prosecutors or police may have improperly influenced witnesses overtly, covertly, or even unwittingly to give false or misleading testimony.²⁰ Moreover, the difficulty of analyzing the witness-preparation process is compounded by the failure of courts and prosecutors to recognize or appreciate how cognitive factors such as memory,²¹ language,²² and suggestion²³ can affect the accuracy and truth of a witness's testimony.

I. Witness Coaching--The "Dark Secret" of Prosecutorial Conduct

Given the secrecy surrounding the prosecutor's preparation of her witnesses and the inability to review the process meaningfully, it is virtually impossible to ascertain whether and to what extent witnesses have been coached by prosecutors and police to give false or misleading testimony. Nevertheless, inferences can be drawn from cases, commentary, and empirical evidence to illuminate this murky process. First, it is indisputable that some prosecutors coach witnesses with the deliberate objective of promoting false or misleading testimony. Prosecutors do this primarily to (1) eliminate inconsistencies between a witness's earlier statements and her present testimony, (2) avoid details that ***834** might embarrass the witness and weaken her testimony, and (3) conceal information that might reveal that the prosecutor has suppressed evidence.

Additionally, prosecutors have the ability, consciously or unconsciously, to strengthen the case by questions and suggestions that cause the witness to fill gaps in memory, eliminate ambiguities or contradictions, sharpen language, create emphasis, and alter demeanor. Some witnesses, moreover, are vulnerable to prosecutorial suggestions, or receptive to prosecutorial cues. Indeed, the prosecutor's interaction with the cooperating witness is a paradigmatic example of the dangers and abuses of coaching.

Finally, the absence of any contemporaneous record of the prosecutor's preparation of witnesses encourages improper coaching by hiding the process from meaningful oversight by courts or defense counsel. Without some basis to believe that coaching occurred, a court would not invoke prophylactic safeguards to detect or prevent coaching. And absent any documentation of the witness-preparation process, the defense lawyer has no basis to challenge the witness's testimony as the product of improper conduct by the prosecution.

A. Incentives for Coaching

1. Eliminate Discrepancies

A prosecutor bent on obtaining a conviction may attempt to eliminate any significant inconsistencies in a witness's testimony. Some prosecutors overtly influence their witness to alter materially an earlier, inconsistent version. In *Kyles v. Whitley*,²⁴ a capital murder case, the prosecutor elicited testimony from Isaac Smallwood, a key eyewitness who gave an extremely detailed description of the killing. Smallwood claimed he saw Kyles struggle with the victim, produce a small, black .32 caliber gun from his right pocket, shoot the victim, and then drive off in the victim's LTD.²⁵ The prosecutor argued to the jury: "Isaac Smallwood, have you ever seen a better witness [?]"²⁶

However, in a statement Smallwood made to the police shortly after the killing, which the prosecutor did not disclose to the defense, Smallwood gave a vastly different account of the crime. He told the police that he did not see the actual killing, did ***835** not see the assailant outside the victim's vehicle, and saw the assailant for the first time driving toward him in a Thunderbird.²⁷

The U.S. Supreme Court reversed the conviction because the prosecutor violated his constitutional obligation to disclose this information to the defense.²⁸ The majority opinion, however, noted how Smallwood's original story apparently had been "adjust[ed]" by the prosecutor by the time of the trial.²⁹ Disclosure of the earlier statements, the majority observed, not only would have "destroyed confidence in Smallwood's story," but also would have "rais[ed] a substantial implication that the prosecutor had coached him to give it."³⁰

A major incentive for prosecutors to use cooperating witnesses is to support an uncertain but consistent version of the facts, rather than to confirm an inconsistent version of the facts that may represent more of the truth.³¹ As an example, one writer describes a proffer session in which a cooperating witness has identified several people as being present at a meeting to distribute drugs.³² The witness fails to identify a particular individual as being present. The prosecutor,

however, firmly believes from other evidence that this person was present at the meeting. When asked specifically whether this person was present, *836 the witness repeats that he was not present. The witness is asked: “Are you telling me that [he] was not there?” The witness now knows what the prosecutor wants to hear. After a break, when the witness is asked again, he now remembers that this individual was there.

2. Avoid Embarrassing Details

Some prosecutors attempt to influence the testimony of witnesses to conceal information that might embarrass the witness and weaken the prosecutor's case. As a consequence, the witness may be coached to give testimony that may be literally true but creates a false or misleading impression, while allowing the prosecutor to avoid a charge of outright solicitation of perjury. One method of evasion is to instruct the witness to claim a lack of memory or knowledge about a question that may be embarrassing or otherwise harmful.³³ A prosecutor might reinforce this subtle message by reassuring the witness that while he has a duty to answer every question truthfully, an answer such as “I don't know” or “I don't remember” is a perfectly acceptable response when the witness is not absolutely certain of the answer.³⁴

Another strategy of concealment is to instruct the witness to answer only the question asked, and not to volunteer information.³⁵ An example is *Alcorta v. Texas*,³⁶ in which the Supreme Court reversed the defendant's murder conviction for stabbing his wife to death. The defendant admitted the killing but claimed it occurred in a fit of passion after discovering his wife, *837 whom he had already suspected of marital infidelity, kissing one Castelleja late at night in a parked car. Castelleja, the only eyewitness to the killing, testified that his relationship with the deceased had been nothing more than a casual friendship,³⁷ and that he had driven her home from work on the night she was killed.

However, during pretrial preparation, the witness told the prosecutor that he had had sexual intercourse with the defendant's wife on five or six occasions shortly before her death. This fact, if known or believed by the defendant, would have provided the defendant with a powerful motive for the killing. The prosecutor advised the witness that he should not volunteer any information about sexual intercourse but if specifically asked about it, to answer truthfully.³⁸ The prosecutor's questions at trial, as reflected in one significant colloquy, were obviously designed to allow the witness to give literally truthful answers about his relationship with the deceased while carefully avoiding the subject of his sexual conduct with the deceased.³⁹

3. Conceal Suppressed Evidence

A prosecutor may be motivated to engage in improper coaching to prevent the revelation of material information that the prosecutor did not disclose to the defense as required by due process.⁴⁰ Needless to say, a prosecutor who is predisposed to violate his constitutional and ethical obligation to disclose favorable evidence to a defendant is also capable of molding her witness's testimony to protect the nondisclosure from being *838 discovered.⁴¹ Indeed, it is arguable that every case in which a prosecutor deliberately conceals exculpatory evidence from the defense may also involve an effort by the prosecutor to coach the witness's testimony to hide the suppression.

In *Walker v. City of New York*,⁴² for example, a prosecutor almost certainly coached a cooperating witness to give false testimony to conceal from the defense information that would have undermined the witness's credibility. Walker describes a prosecutor's debriefing and preparation of a cooperating witness in an investigation of the robbery of an armored truck and murder of the truck driver. At the initial proffer session, the witness identified two individuals as having participated in the crime. The prosecutor subsequently learned, however, that one of these alleged accomplices could not have committed the crime because he was in prison on the date of the robbery. Undeterred, the prosecutor elicited testimony from the cooperator in the grand jury and at trial that did not mention a second accomplice. The decision by the Second Circuit condemned the prosecutor's failure to disclose the inconsistency. The court did not discuss the reason for the witness's failure to mention the existence of a second perpetrator, an omission that undoubtedly resulted from careful coaching by the prosecutor.⁴³

B. Cognitive Factors Facilitating Coaching

1. Memory

An extensive body of scientific literature holds that memory is highly fallible, and the process of memory retrieval and reconstruction extremely fragile.⁴⁴ The perception of an event *839 typically does not leave a single, clear image; it is heavily influenced by a variety of factors, including the manner in which the memory is sought to be retrieved.⁴⁵ Many studies describe the distorting effects of suggestive questioning.⁴⁶ Whereas witness preparation certainly can assist a witness in remembering and retrieving a truthful recollection, preparation also can distort a witness's underlying memory and produce a false recollection.⁴⁷ And because of the complex nature of memory, it may be difficult for the witness himself to distinguish between a genuine recollection of a previously unrecalled fact, and an imagined recollection based on suggestions from the interviewer.⁴⁸

Many prosecutors do not appreciate the dangers associated with retrieving a memory of an event.⁴⁹ A prosecutor, through the use of questions and suggestions has the ability to influence a

witness to remember facts and fill gaps that may be inaccurate, but which the witness may come to believe is the truth.⁵⁰ In addition, because of the prosecutor's unique status as the attorney for the government, she ordinarily is viewed by the witness as a highly ***840** knowledgeable official who can be trusted to use the facts responsibly.⁵¹ Indeed, because of the prosecutor's power and prestige, the witness may try to conform his recollection of the event to what the witness believes the prosecutor wants to hear.⁵²

Experts and courts recognize that facts are slippery, and the process of memory retrieval can be treacherous.⁵³ As Justice Stevens noted in *Nix v. Whiteside*,⁵⁴ “facts” often are highly ambiguous and uncertain. To an appellate court after a case has been tried and the evidence sifted by others, a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of clay and sand. Even a pebble that seems clear enough at first glance may take on a different hue in a handful of gravel.⁵⁵

And to experts who have studied the psychology of human memory, a witness's recollection of an event is a delicate amalgam that is retrieved, reconstructed, or imagined from this combination of clay, sand, and gravel.⁵⁶

The potential for witness coaching by prosecutors and police to alter memory is powerfully illustrated in the Supreme Court's decision in *Strickler v. Greene*.⁵⁷ In *Strickler*, a capital murder trial, a key prosecution witness, Anne Stolfus, initially told police that she had only “muddled memories” about a kidnapping in a mall, and could not identify the perpetrators, the victim, or the ***841** automobile.⁵⁸ At trial, however, Stolfus gave astonishingly detailed testimony about the event.⁵⁹ She gave a detailed description of all three perpetrators,⁶⁰ the victim,⁶¹ and even remembered the license plate number of the van.⁶² Denying the suggestion that she had learned these details from news reports, she answered, “I have an exceptionally good memory.”⁶³

The process by which Stolfus' memory improved so remarkably, however, was revealed in a series of documents prepared by a police detective, which were never disclosed to the ***842** defense.⁶⁴ These documents were based on interviews between Detective Claytor and Stolfus in which her memory continued to expand over time because, she claimed, of “the associations that [Detective Claytor] helped me make.”⁶⁵ The Supreme Court addressed whether the prosecutor violated his constitutional duty by not disclosing these statements to the defense. The Court found no violation.⁶⁶ The Court never discussed the other important question, i.e., whether the prosecutor and police encouraged Stolfus to reconstruct her memory to accord with the government's theory of guilt.⁶⁷

2. Language and Communication

Prosecutors may attempt to fill gaps by asking questions, making statements, or displaying evidence that highlights specific facts.⁶⁸ Indeed, several former prosecutors found it “disturbing” and “dangerous” that so many prosecutors gave facts to cooperating witnesses in the course of eliciting information from them.⁶⁹ Moreover, the language used by a prosecutor in communicating those facts to the witness may significantly influence the witness's responses. Experts have shown that using specific words in a question can distort a witness's recollection or recounting of an event.⁷⁰ For example, asking a witness whether ***843** he saw “a” car is much less suggestive than asking the witness whether he saw “the” car.⁷¹ Similarly, asking the witness whether a person “smashed” another's face may produce a decidedly different response than asking the witness whether a person “hit” the other person.⁷²

Prosecutors have the ability by their choice of language to telegraph to the witness specific facts that the prosecutor wants the witness to say. For example, when a witness initially is uncertain of the identity of persons who were present at a critical meeting, a prosecutor could properly try to refresh the witness's recollection by asking him whether a named person was present.⁷³ However, if the witness continues to express doubt, a prosecutor who focuses repeatedly on whether that person was present is ultimately going to convey to the witness the prosecutor's expectations and the witness eventually will get the message and say it.⁷⁴

Many prosecutors appear to be unaware of the extent to which they express verbally or non-verbally a genuine interest in certain facts, or communicate disappointment when the witness does not know particular facts, and thereby tip off the witness to what they want him to say.⁷⁵ Some prosecutors are not subtle about this type of communicative message. A prosecutor, for example, might signal to a cooperating witness, either explicitly or implicitly, that he is not helping himself by omitting certain details. According to several former prosecutors, the witness “somehow now for the first time . . . finds information that helps the government.”⁷⁶

Presuppositions or assumptions in questions also can create a false recollection. For example, after being intensively questioned by the prosecutor about whether the target of an investigation displayed a gun, the witness might acknowledge that he remembers a gun because the story has become implanted in his mind as a fact, either because he heard about it from others rather than observing it firsthand, or because the prosecutor strongly ***844** suggested the fact.⁷⁷ Asking a witness to retell an event over and over may convince the witness that his story is true.⁷⁸

There are several communicative techniques that interviewers use to shape a witness's testimony.⁷⁹ Among the most common are asking leading questions,⁸⁰ showing a witness a document to refresh her recollection,⁸¹ informing a witness of what another witness has said about the incident,⁸² and giving the witness a lecture on the consequences of saying one thing or another.⁸³

C. Dangerous Witnesses

Some witnesses are especially vulnerable to coercive or suggestive interviewing techniques. The most susceptible of these witnesses are (1) children, because of their immaturity and impressionability; (2) identification witnesses, because of the inherent unreliability of eyewitness testimony; and (3) cooperating witnesses, because of their enormous incentives to falsify or embellish.

1. Children

Some witnesses are especially vulnerable to suggestive interviewing techniques. A familiar and frequently cited example is the testimony of young children in sexual abuse cases. Many instances of wrongful convictions are attributable to the testimony of child witnesses.⁸⁴ Courts have increasingly scrutinized the reliability of the testimony of young children for coercive or ***845** suggestive pretrial interviewing techniques.⁸⁵ For example, in *Idaho v. Wright*,⁸⁶ the Supreme Court found that a child's accusation of sexual abuse was based on suggestive and leading questioning by an interrogator who had a preconceived idea of what the child should be disclosing.⁸⁷ Additionally, courts have also focused on the absence of spontaneous recall, the bias of the interviewer, the use of leading questions, multiple interviews, incessant questioning, vilification of the defendant, ongoing contact with peers and references to their statements, and the use of threats, bribes, and cajoling.⁸⁸ Courts have also noted the failure to videotape or otherwise document the initial interview session.⁸⁹

2. Identification Witnesses

Identification witnesses are among the most unreliable witnesses.⁹⁰ As noted above,⁹¹ these witnesses may adapt their testimony to what they believe accords with the prosecutor's ***846** expectations. Prosecutors may also attempt to “adjust” the testimony of these witnesses to strengthen the probative impact of their identification.⁹² These witnesses may add facts to their memory that appear to the witness to be an accurate reproduction of what the witness originally

perceived. This process of “memory adjustment” is exemplified by the testimony of Ann Stolzhus in *Strickler v. Greene*,⁹³ and Isaac Smallwood in *Kyles v. Whitley*.⁹⁴ This adjustment often involves the testimony of identifying witnesses that the prosecutor knows is factually weak or unreliable, but is presented to the jury with an aura of certainty and confidence.⁹⁵

The testimony of several eyewitnesses in the murder trial of Randall Dale Adams, memorialized in the film documentary *The Thin Blue Line*,⁹⁶ offers a dramatic commentary on the dangers of testimony of identification witnesses. Three rebuttal witnesses--Emily Miller, her husband R.L. Miller, and Michael Randall--offered critical testimony identifying Adams as the killer.⁹⁷ The *847 testimony was given confidently, with some bravado. However, as depicted in the film, these witnesses appeared to have given contrived testimony that probably was the product of coaching by the prosecutor.⁹⁸ Indeed, these witnesses' subsequent narrations of their accounts of the incident for the camera--a starkly revealing portrait that captures their venality and deception--is a devastating commentary of the artificiality of courtroom testimony and how a prosecutor's apparent coaching produced a terrible miscarriage of justice.

3. Cooperating Witnesses

The cooperating witness is probably the most dangerous prosecution witness of all. No other witness has such an extraordinary incentive to lie. Furthermore, no other witness has the capacity to manipulate, mislead, and deceive his investigative and prosecutorial handlers. For the prosecutor, the cooperating witness provides the most damaging evidence against a defendant, is capable of lying convincingly, and typically is believed by the jury.⁹⁹

*848 The prosecutor's pretrial coaching of cooperating witnesses is vulnerable to many of the potential abuses noted above. The cooperating witness is (1) easily manipulated by coercive and suggestive interviewing techniques; (2) readily capable of giving false and embellished testimony with the prosecutor's knowledge, acquiescence, indifference, or ignorance; (3) readily capable of creating false impressions by omissions or memory alterations that in the absence of any recordation or documentation eludes disclosure and impeachment; and (4) able to present his testimony to the jury in a truthful and convincing manner, which because of the nature of the cooperation process is difficult to impeach through cross-examination.¹⁰⁰

A prosecutor has a powerful incentive to accept a cooperator's account uncritically.¹⁰¹ Many prosecutors, if they are candid, will admit that in some cases they really do not know whether the cooperator is being truthful or dishonest. This is particularly the case when a prosecutor lacks evidence to corroborate the cooperator's account. Moreover, some prosecutors have a predetermined view of the facts of a case that constrains their ability or willingness to assess the

cooperator's credibility objectively. They may have a theory of the case that they developed from other evidence or from reliance on the opinion of the case agent. These prosecutors believe that theory to be true, and to the extent that the cooperator's version is inconsistent with this theory, the prosecutor may conclude that the cooperator is lying or withholding information.

Cooperators are manipulative, and some prosecutors can be easily manipulated. Some prosecutors trust their cooperators too ***849** much--one former prosecutor described the relationship as "falling in love with your rat"--and this mindset skews the prosecutor's ability to evaluate the cooperator's credibility objectively. These prosecutors may neglect to probe the cooperator's story or background intensively to uncover inconsistencies or outright lies. A recent illustration is *United States v. Wallach*,¹⁰² in which a key cooperating witness, Anthony Guariglia, gave perjured testimony about his gambling habits that the prosecutors could easily have checked but did not.¹⁰³

Moreover, some prosecutors have a cramped view of their ethical duty as ministers of justice. They believe that serving justice means getting convictions and putting bad people in jail.¹⁰⁴ This mindset may be particularly noticeable with younger prosecutors, whose experience is confined to administering the federal sentencing guidelines. These prosecutors have been described as "Guidelines babies."¹⁰⁵ They often exhibit a "mechanistic" and "hardened" view of justice.¹⁰⁶ They perceive themselves as cops, and exude a "macho" persona wherein "[t]hey don't ask what's the right thing to do. They just want the right result."¹⁰⁷

Cooperators appreciate that their value depends on giving the prosecutor "what they want to hear."¹⁰⁸ This message is "drummed into defendants at the MCC (Metropolitan Correction Center) that you have got to have good information for the government."¹⁰⁹ Many professional participants in federal criminal practice believe that the Federal Sentencing Guidelines, particularly by their ability to confer unprecedented and enormous rewards on cooperators who provide law enforcement with "substantial assistance," create ***850** a powerful incentive for cooperators to exaggerate and falsify information.¹¹⁰

Moreover, some cooperators may not even appreciate the difference between truth and untruth. Cooperators frequently come from alien environments of crime and deceit that produce a mindset, according to some prosecutors, that "[t]ruth equals what I know or what I can be caught at."¹¹¹ Cooperators do not share the prosecutor's "obsession with exact facts."¹¹² They use language in a loose, non-literal fashion that allows them to make false or exaggerated assertions that they might believe to be true. They might assume, for example, that if they have knowledge of certain information, it is immaterial how they came to learn it, whether through personal observation or based on what they may have heard.¹¹³

***851 II. Detecting and Preventing Coaching**

Detecting coaching is difficult for two reasons. First, there typically is no verbatim record or other significant documentation of the interview session. What occurs in this private encounter is known only to the prosecutor and witness. Second, cross-examination has a very limited capacity to expose improprieties in the preparation process. Preventing coaching typically rests on the integrity and sense of fairness of the individual prosecutor.

Preparation of witnesses, when done properly, is an essential means of readying the prosecutor and witness for adversarial testing. By working closely with the witness, the prosecutor is able (1) to ascertain the truth fully, fairly, and objectively, (2) present the truth, as she honestly understands it, in an accurate, fair, and effective manner, and (3) protect the truth from being discredited and distorted by adversarial attack. These truth-serving goals, while applicable to all lawyers, would seem to be most clearly applicable to prosecutors who are unique among lawyers in their ethical obligation to seek justice rather than merely gain a partisan advantage.¹¹⁴

However, for those prosecutors who do not view their role as ministers of justice, prophylactic procedures may be necessary to protect the fact-finding process from improper influences. These procedures might include: (1) a pretrial taint hearing to expose witness contamination; (2) expert testimony on memory and suggestive interviewing techniques; and (3) recording interview sessions for in camera judicial inspection.

A. Documentation

Witness preparation is done in private. Since there are no audio or video recordings of the interview process, there is virtually no way of learning precisely what transpired during the preparation session. Neither the witness, the police, nor the prosecutor will readily acknowledge improper coaching. Nor is it the practice of prosecutors or police to prepare extensive written *852 or recorded evidence of the interview that might shed light on whether the witness was coached.¹¹⁵ To be sure, documentation of the preparation process, if available, might reveal overt attempts to shape the witness's testimony. However, documentation would not expose subtle cues that might produce false or misleading testimony that are attributable to a witness's own "suggestibility," "confabulation," and "memory hardening."¹¹⁶

A prosecutor is legally required to disclose to the defense, for impeachment purposes, pretrial statements that a government witness made to the prosecutor, police, or other government agent.¹¹⁷ However, the prosecutor is able to limit the availability of such statements by a variety of tactics. First, neither the police nor the prosecutor has any legal obligation to take notes.¹¹⁸

Some agents as a matter of policy do not take notes specifically to avoid creating contradicting evidence.¹¹⁹ Some prosecutors do not *853 encourage note-taking, and occasionally even forbid government agents from taking notes.¹²⁰ According to one former prosecutor, “[t]here's a certain unconscious arrogation of power about it all.”¹²¹ Another former prosecutor stated: “[T]he office lore is don't take too many notes or figure out how to take notes so that they are meaningful to you and no one else. You don't want a complete set of materials that you have to disclose.”¹²² Prosecutors and their agents typically do not prepare extensive notes, and when they do take notes, they try to do it in a safe way that avoids disclosure.¹²³ Thus, notes of significant comments, contradictions, and inconsistencies by a government witness are exempt from disclosure unless the notes are “a substantially verbatim recital of an oral statement made by said witness to an agent of the government and recorded contemporaneously with their making of such oral statement.”¹²⁴ These notes may be withheld from the defense even if they contain significant impeachment evidence when it is shown that the notes are selections, summaries, or interpretations by the government agent.¹²⁵

Also, it is not uncommon for a government witness to be interviewed by a prosecutor after the witness has been intensively debriefed by the police. If the police do not take notes, or if they do not disclose their notes to the prosecutor, the prosecutor may never know what the witness initially told the police, whether the witness's initial account changed, or the extent to which the story was shaped or polished by police during the initial interview session. If the police employed the kinds of suggestive or coercive techniques described above, and absent any available record to document such conduct, it is unlikely that a prosecutor's *854 subsequent probing could effectively recreate the circumstances to demonstrate any improper influence on the witness's subsequent testimony. Moreover, as noted above, the witness herself may be unaware of the subtle techniques that may have influenced her testimony.¹²⁶

B. Cross-Examination

Cross-examination is assumed to be the most important adversarial safeguard to discovering the truth.¹²⁷ However, there is no empirical basis for this assumption.¹²⁸ In *Geders v. United States*,¹²⁹ the Supreme Court observed that skillful cross-examination is a vital safeguard to uncovering improper preparation and coaching of witnesses. The Court assumed that the line between ethical pretrial preparation and unethical coaching is easily defined,¹³⁰ and that interrogation of the witness by opposing counsel could disclose improper influences. However, given the subtle ways that a witness's testimony can be manipulated, it is highly unlikely that cross-examination will disclose coaching.¹³¹

First, one of the cardinal precepts of cross-examination is to avoid asking questions of which the examiner does not know the answer.¹³² Thus, lacking a factual basis to believe that a witness's memory has been manipulated, that an "I don't remember" is false or misleading, or that a failure to mention an incriminating fact is the product of improper coaching, it is unlikely that a cross-examiner would focus on the discrepancy, or be able to prepare an effective impeaching strategy about something of which he is ***855** ignorant.¹³³ Moreover, even if a witness's testimony has been improperly influenced during the coaching session, the opposing counsel would have no basis to believe that the witness's clear and convincing testimony is the product of an altered memory. Indeed, as noted above, it may often be the case that the witness herself is unaware of any improper influence.¹³⁴

Additionally, although it is commonly recognized that the testimony of a cooperating witness is inherently suspect, and that the process of preparing and coaching the cooperating witness can impair the integrity of the truth-finding process, cross-examination is made even more difficult when the cooperating witness has been carefully coached to testify that any benefit is speculative, uncertain, and contingent upon his giving truthful testimony in accordance with his cooperation agreement.¹³⁵

C. Protocol for Witness Preparation

There is nothing wrong with a prosecutor assisting a witness to give testimony truthfully and effectively. However, under their obligation to serve justice, prosecutors should be able to regulate their own conduct to insure that witnesses are not exposed to suggestive questioning that may create false or misleading testimony. Prosecutors should be trained and supervised in interviewing protocols, the vulnerabilities of certain witnesses, and the psychological literature relating to memory, language, and communication.¹³⁶

The following is a protocol for witness preparation by prosecutors. It is based largely on this writer's experience as a prosecutor. It differs in several important respects from advice contained in practitioner-oriented publications typically addressed ***856** to civil litigation attorneys.¹³⁷ In preparing a witness for testifying at trial, a prosecutor should:

1. Demand Truth

Advise the witness to tell only the truth as he knows it, not what he thinks he knows, or what someone else knows.¹³⁸ Advise the witness not to embellish facts, or fill in gaps of memory, and that if he does not remember something, to say so.¹³⁹

2. Be Objective

Evaluate the witness's story objectively to determine its accuracy and believability. Ask open-ended questions initially, and use more specific questions after the witness has given a complete account of the event.¹⁴⁰ Never put words in the witness's mouth or suggest answers.¹⁴¹ Know as much as possible about the witness's background and any interest the witness might have to falsify, and probe these areas carefully without suggesting any desired response.

***857 3. Outline Courtroom Procedures**

Explain courtroom procedures, where the witness will sit, and the order of questioning.¹⁴² Do not advise an identification witness where the defendant will be sitting.¹⁴³ Advise the witness to speak in a loud, clear voice so the jurors can hear what is being said, and to make eye contact with the jury when appropriate.¹⁴⁴ Advise the witness to sit straight, avoid distracting body language, and dress appropriately.¹⁴⁵

4. Rehearse Direct Examination

Write out direct examination questions ahead of time and rehearse specific questions with the witness.¹⁴⁶ The witness should be encouraged to use his own words whenever possible, and not to use slang or offensive expressions.¹⁴⁷ Control the witness's answers to the extent of preventing the witness from giving long, rambling narratives, and ensure that the witness does not violate rules of ***858** evidence. If tangible evidence is being introduced, show the evidence to the witness and go through the process of laying the foundation. Have the witness do whatever demonstration he will be asked to do in the courtroom.

5. Reconcile Inconsistencies

Cautiously try to reconcile the witness's testimony with other evidence. This may include prodding the witness's recollection with prior statements that the witness made, or referring to other facts in the case, including the testimony of other witnesses.¹⁴⁸ Never suggest what a witness should say, or telegraph what the witness should say, by revealing inconsistencies or weaknesses in the witness's testimony.¹⁴⁹ Review the witness's prior testimony with the witness, but do not allow the witness to read any prior testimony unless absolutely necessary.¹⁵⁰

6. Prepare Cross-Examination

Prepare for cross-examination by going through all discrepancies in the witness's prior testimony or other statements.¹⁵¹ Try to ensure that the witness can correct or explain ***859** each discrepancy. Go through a witness's criminal background and any interest the witness may have in testifying. Make sure that the witness acknowledges prior convictions and bad acts. A witness should be encouraged not to volunteer information, to limit answers as much as possible to “yes” or “no,” not to guess or embellish an answer, to make an effort to remember, and not to be afraid to acknowledge a mistake.¹⁵² The witness should be told not to look at the prosecutor during cross-examination, not to answer a question when the prosecutor stands up to object, and to answer in a positive tone if he is asked whether he spoke to the police or prosecutor about the case. A prosecutor should do a mock cross-examination with the witness to anticipate what defense counsel will likely ask.¹⁵³

D. Remedies

1. Pretrial Taint Hearing

A pretrial “taint” hearing should be required when there is some basis to believe that a witness's testimony has been improperly influenced by suggestive or coercive interviewing techniques. Such a hearing is not unusual. It has been authorized in many instances in which police or prosecutorial conduct has placed the integrity of the fact-finding process into question and there is a need for the procedural protection of a pretrial hearing to exclude from a potential prosecution the prejudicial effects of tainted evidence. Thus, pretrial hearings have been employed to determine the admissibility of in-court identification testimony because of pretrial suggestiveness,¹⁵⁴ statements of children in sexual abuse cases,¹⁵⁵ hypnotically-recalled in-court testimony,¹⁵⁶ ***860** breathalyzer evidence because of prior falsified police breathalyzer reports,¹⁵⁷ and evidence following police investigatory misconduct.¹⁵⁸

A pretrial taint hearing into the reliability of a witness's testimony based on pretrial suggestiveness should consider all relevant circumstances, including any inconsistency between a witness's statements, the interest or motivation of a witness to falsify, the presence or absence of corroboration, the nature of the corroboration, the inherent believability of the statements, the existence of any documentation of the debriefing and preparation sessions, the rewards and other inducements to testify, the scope of punishment to which a cooperating witness may be exposed in the absence of cooperation, the manner and form of the questioning, the number of interview sessions, and the person or persons present when the statements were made.

Defense counsel, in order to obtain a pretrial hearing, would have the burden initially of making some factual showing that a witness has been subjected to improper conduct by the prosecution that has caused the witness to adjust his testimony. In making its determination, a court should consider whether, under all the circumstances, the interview and preparation sessions give rise to a substantial likelihood of false, inaccurate, or misleading testimony.

2. Expert Testimony

Given the capacity of the witness-preparation process to produce false or distorted testimony, courts should allow experts in cognitive psychology to testify how memory, language, and communication can produce false, inaccurate, or misleading testimony.¹⁵⁹ Rule 702 of the Federal Rules of Evidence authorizes ***861** the use of scientific testimony by an expert to assist the jury in understanding the extent to which suggestive influences in the debriefing and coaching of witnesses may produce false or inaccurate testimony.¹⁶⁰ As now occurs with eyewitness testimony,¹⁶¹ the expert could identify the factors that influence perception and memory, the extent to which witnesses are susceptible to suggestive influences, and how pretrial interviewing techniques are likely to produce false, inaccurate, or embellished testimony.¹⁶² Contrary to the belief of many jurors, an expert could testify that there is no necessary correlation between a witness's confidence and the accuracy of her testimony.¹⁶³ Experts could also counter a belief held by some jurors that witnesses have a better memory for dramatic events.¹⁶⁴

3. Recording

To enable the defendant to challenge the veracity of the witness effectively, and a jury to assess his credibility, all interviews with potential trial witnesses should be electronically recorded either by audio or videotaping. Videotaping would be preferable to sound recording as it would depict the physical interaction and body language of the participants. The use of such a procedural safeguard is unusual, but hardly novel. Videotaping of interview sessions with child witnesses is not uncommon.¹⁶⁵ Moreover, videotaping has been used when it is important to document whether the government used unfair tactics to produce evidence, such as a defendant's confession,¹⁶⁶ or for interrogations conducted before and after hypnosis.¹⁶⁷

***862** Recording the interview session is essential to disclose the presence or extent of the different types of suggestive influences discussed above. Taping would reveal overt attempts to influence the witness's testimony by use of leading questions or other cues that alert the witness to the expected answer. Whereas recording of the sessions would not necessarily reveal whether a witness's story was a fabrication from the start, it might demonstrate whether the witness

embellished his story to please the government or filled in details to make the story more complete or persuasive, and the extent to which his story crystallized and became more confident over several interview sessions.

It may be that courts should have the authority to conduct an in camera inspection of the recording, and preclude the use of any portions that contain embarrassing or sensitive material. To be sure, a prosecutor could properly seek to preclude from disclosure statements by a cooperating witness that might compromise an ongoing investigation. A court also could limit the use of the recorded interview session to those portions that reveal that a witness is trying to please the interviewer, confabulating the story by appearing to fill in details to make the story more coherent and complete, or demonstrating memory “hardening” by appearing to suddenly and confidently remember new details.

Conclusion

The preparation of witnesses for testimony at trial is a necessary and acceptable part of the prosecutor's function. However, some prosecutors engage in conduct that goes beyond permissible trial preparation. These prosecutors either overtly, covertly or even inadvertently, cause witnesses to give testimony that is false, inaccurate, or misleading. And given that witness-coaching is done in private, there is usually no evidence of improper conduct. Therefore, the ability of cross-examination to reveal such improper conduct is extremely limited.

Coaching typically is accomplished through memory reconstruction, suggestions that improve testimony, and cues that alter testimonial language. Some witnesses such as children, identification witnesses, and cooperating witnesses are highly susceptible to coaching. These witnesses are capable of adjusting their testimony based on leading, suggestive, coercive or intimidating questions or statements. Furthermore, the prestige ***863** and power of the prosecutor enhances her ability to influence the witness's testimony improperly.

Given the potential of witness coaching to skew the fact-finding process, this Article offers several suggestions to expose improper influences and prevent false or inaccurate testimony. These include a pretrial taint hearing when there is some basis to believe that a witness has been improperly influenced, expert testimony to assist the jury in understanding the vulnerability of memory and the dangers to accurate testimony from certain types of interviewing techniques, and electronically recording witness-preparation sessions. Any or all of these recommendations, if adopted, would protect the fact-finding from overzealous conduct.

Footnotes

- a1 Professor of Law, Pace Law School; New York University School of Law, J.D.; Princeton University, B.A. The author wishes to thank Professor Ellen Yaroshefsky and the Cardozo Law Review for inviting him to participate in the Cooperating Witnesses Symposium. The author also wishes to thank Professors Lissa Griffin, Steve Goldberg, David Dorfman, and John Humbach for their helpful comments.
- 1 John S. Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277, 279 (1989) (“Witness preparation is treated as one of the dark secrets of the legal profession.”).
- 2 Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 Mo. L. Rev. 699, 740 (1998) (describing witness preparation as “The Profession’s Dirty Little Secret”).
- 3 See *State v. Earp*, 571 A.2d 1227, 1235 (Md. 1990) (explaining that a lawyer “must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses.”); In re *Eldridge*, 82 N.Y. 161, 171 (1880) (stating that a lawyer’s duty is “to extract the missing facts from the witness, not pour them into him; to learn what the witness does know, not to teach him what he ought to know.”).
- 4 See David Luban, *Lawyers And Justice: An Ethical Study* 96 (1988) (“The interviewing and preparation of witnesses is part of the ‘total war’ concept of litigation, and it is a practice that, more than almost anything else, gives trial lawyers their reputation as purveyors of falsehoods.”).
- 5 See Applegate, *supra* note 1, at 281 n.12 (“[T]rial lawyers have a tacit understanding that preparation activities are protected.”); George T. Frampton, *Some Practical and Ethical Problems of Prosecuting Public Officials*, 36 Md. L. Rev. 5, 33 (1976) (noting that witness preparation is customarily a one-on-one process with no records kept); Richard C. Wydick, *The Ethics of Witness Coaching*, 17 Cardozo L. Rev. 1, 23 (1995) (describing factors that make witness coaching difficult to expose). The practice of preparing a witness for trial is sometimes referred to as “horse-shedding,” a term said to have been coined by James Fenimore Cooper. See Gene Fowler, *The Great Mouthpiece: A Life Story of William J. Fallon* 93 (1931). According to Fowler, there were carriage sheds near the courthouse in Cooper’s day, and attorneys used these facilities to rehearse witnesses prior to trial. See also *Fikes v. Alabama*, 352 U.S. 191, 199 (1957) (Frankfurter, J., concurring) (referring to “horse-shedding” of an accused during police interrogation). Other commentators refer to “woodshedding” the witness. See, e.g., Monroe H. Freedman, *Understanding Lawyers’ Ethics* 149 (1990).
- 6 A distinction should be made between preparing a witness’s testimony, which is generally considered acceptable, and attempting to improperly influence, or “coach” testimony. See *Geders v. United States*, 425 U.S. 80, 90 n.3 (1976) (“An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it.”). Ethics codes prohibit a lawyer from falsifying evidence or assisting a witness to testify falsely, fraudulently, or perjurally. See Model Rules of Prof’l Conduct R. 3.3(a)(4) (1983) (“A lawyer shall not knowingly ... offer evidence that the lawyer knows to be false.”); *id.* at R. 3.4(b) (“A lawyer shall not ... falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.”); see also Model Code of Prof’l Responsibility DR 7-102(A)(4) (1980) (“In his representation of a client, a lawyer shall not ... [k]nowingly use perjured testimony or false evidence.”); *id.* at DR 7-102(A)(6) (“In his representation of a client, a lawyer shall not ... [p]articipate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.”); *id.* at DR 7-102 (A)(7) (“In his representation of a client, a lawyer shall not ... [c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.”). However, apart from the truism that a lawyer should not suborn perjury, neither the cases nor the codes delineate the critical and often tenuous distinction between proper and improper witness preparation. See *Earp*, 571 A.2d at 1235 (“[T]he line that exists between perfectly acceptable witness preparation on the one hand, and impermissible influencing of the witness on the other hand, may sometimes be fine and difficult to discern.”).
- 7 See *infra* notes 127-35 and accompanying text.
- 8 See Applegate, *supra* note 1, at 279 (“Even though witness preparation occurs in practically every lawsuit, it is almost never taught in law school, not directly regulated, seldom discussed in scholarly literature, and rarely litigated.”).
- 9 See e.g., *State v. McCormick*, 259 S.E.2d 880 (N.C. 1979):
It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney’s questions and the witness’ answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer.

Id. at. 882-83; see also Earp, 571 A.2d at 1227:

The question of just how far an attorney may go in preparing a witness for trial is a difficult one. It involves ethical considerations as well as the possibility of tainting a witness to the extent that due process and the necessity for reliable evidence may justify the exclusion of that witness's testimony.

Id. at 1234.

- 10 D.C. Bar Op. No. 79 (Dec. 18, 1979), reprinted in District of Columbia Bar, Code of Professional Responsibility and Opinions of the District of Columbia Bar Legal Ethics Committee 138, 139 (1991), stating:
[A] lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of testimony, and may--indeed, should--do whatever is feasible to prepare his or her witness for examination.
- 11 See, e.g., Jeffrey L. Kestler, Questioning Techniques And Tactics, §§ 9:01-9:85 (3d ed. 1999); Roberto Aron & Jonathan L. Rosner, How to Prepare Witnesses for Trial (2d ed. 1998); Daniel I. Small, Preparing Witnesses: A Practical Guide for Lawyers and Their Clients (1998); Ronald L. Carlson & Edward J. Imwinkelried, Dynamics of Trial Practice § 9.4, at 181-83 (2d ed. 1995).
- 12 See *infra* notes 136-53 and accompanying text.
- 13 See Fred C. Zacharias & Shaun Martin, Coaching Witnesses, 87 Ky. L.J. 1001 (1998-99); Wydick, *supra* note 5; Applegate, *supra* note 1; Joseph D. Piorkowski, Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of 'Coaching', 1 Geo. J. Legal Ethics 389 (1987).
- 14 Probably the most famous dramatization of witness coaching is the "lecture" in the novel, *Anatomy of a Murder*. See Robert Travers, *Anatomy of a Murder* (1958) (depicting a defense attorney who outlines for his client four possible defenses to a charge of murder, rejects three of them as inapplicable, but suggests, hypothetically, that a legal excuse might be available for a killing committed in a blind rage. He then terminates the interview, instructing his client to think about the incident). For references to coaching in the film, *The Verdict*, and the television series, *L.A. Law*, see Zacharias & Martin, *supra* note 13, at 1002-03.
- 15 But see Flowers, *supra* note 2, at 739-66. A highly effective dramatization of prosecutorial coaching is depicted in the television series, *The Practice*. A defendant is being prosecuted for murdering his wife. His defense is suicide, and circumstantial evidence strongly supports the defense. During a pretrial interview with the brother of the deceased, who believes the defendant killed his sister, the prosecutor suggests that the witness can strengthen the prosecution's case, and then "lectures" the brother on the hearsay rule, and the admissibility of statements of a present state of mind. The brother picks up on the prosecutor's obvious cue, and subsequently testifies to several devastating statements that he claims his sister made shortly before her death, describing her strong will to live, and suggesting that if anything happens to her, her husband is the cause. See *The Practice* (ABC television broadcast, Oct. 8, 2000).
- 16 For recent decisions finding that prosecutors suborned perjury, see *Boyette v. Lefevre*, 246 F.3d 76 (2d Cir. 2001); *Commonwealth of Northern Mariana v. Bowie*, 243 F.3d 1109 (9th Cir. 2001); *United States v. LaPage*, 231 F.3d 488 (9th Cir. 2000). For Congressional actions imposing ethical and civil liabilities on prosecutors, see 28 U.S.C. § 530B (1994) (codifying the "Citizens Protection Act," mandating that federal prosecutors comply with state rules of professional ethics); 18 U.S.C. § 3006A (1994) (codifying the "Hyde Amendment," imposing monetary costs on federal prosecutors for bad faith conduct). For commentary in the media, see Robyn E. Blumner, Prosecutors Should Rethink Their Goals, *St. Petersburg Times*, May 6, 2001, at 1D; Ken Armstrong & Maurice Possley, Trial & Error: How Prosecutors Sacrifice Justice to Win, *Chi. Trib.*, Jan. 10, 1999, at 3; Bill Moushey, Win at All Costs: Government Misconduct in the Name of Expedient Justice, *Pittsburgh Post Gazette*, Nov. 22, 1998, at 1.
- 17 See James Liebman et al., A Broken System: Error Rates in Capital Cases, 1973-1995, at 5 (2000) (discussing a massive study of every capital punishment case in the U.S. between 1973-1995 and documenting that the overall error rate in capital punishment system was 68 percent, and that 82 percent of all capital judgments reversed on appeal (247 out of 301) were replaced on retrial with a sentence less than death, or no sentence at all); Jim Dwyer et al., *Actual Innocence* (2000) (offering a compendium of anecdotal accounts, and legal and social science scholarship, of miscarriages of justice in American criminal trials); Death Penalty Information Center, *The Death Penalty in 1999, Year End Report*, at 1 (2000) (84 inmates on Death Row exonerated since 1973); Nat'l Inst. of Justice, U.S. Dep't of Justice, *Recommendations for Handling Applications for Postconviction DNA Testing*, at 7 (Feb. 1999) (draft report) ("[A]t least 55 convictions in the United states have been vacated on the basis of DNA results."); Nat'l Inst. of Justice, U.S. Dep't of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996) (evaluating twenty-eight cases in which DNA evidence established post-trial innocence); Hugo Adam Bedau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 *Stan. L. Rev.* 21, 36, 71 (1987) (claiming that more than 350 people

in this century have been erroneously convicted in the U.S. of crimes punishable by death; 116 of those were sentenced to death and 23 were actually executed); Alan Berlow, *The Wrong Man*, *Atlantic Monthly*, Nov. 1999, at 68 (“[S]urely the number of innocent people discovered and freed from prison is only a small fraction of those still incarcerated.”); Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 *Law & Hum. Behav.* 283, 289-92 (1988) (explaining that a study of more than 200 felony cases of wrongful conviction found misidentification to be the single largest source of error, accounting for more than half of cases that had one main cause); Marty I. Rosenbaum, *Inevitable Error: Wrongful New York State Homicide Convictions, 1965-1988*, 18 *N.Y.U. Rev. L. & Soc. Change* 807, 809 (1991) (claiming that New York State leads all states in executing the innocent, evidenced by the fact that eight New Yorkers have been executed in error).

- 18 See Liebman et al., *supra* note 17, at 5 (noting that incompetent defense lawyering accounted for 37 percent of the state post-conviction reversals of capital cases; prosecutorial misconduct accounted for 16-19 percent of all reversals).
- 19 See Frampton, *supra* note 5, at 33 (describing witness preparation by prosecutor and government witness as a one-on-one process with no records kept). Although this Article focuses primarily on the prosecutor's pretrial interaction with government witnesses, it is common knowledge that other law enforcement officials such as federal agents and state and local police officers play a critical role in influencing the witness's testimony through interviewing and debriefing the witness during the early stages of an investigation. Prosecutors have a constitutional duty to familiarize themselves with police encounters with witnesses, and to obtain from police all relevant information. See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (“[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.”). Thus, any falsification, concealment, or manipulation by police of information pertaining to statements by witnesses is attributable constitutionally to the prosecutor.
- 20 See Wydick, *supra* note 5, at 25 (describing covert methods lawyers can employ to induce a witness to give false testimony).
- 21 See *infra* notes 44-67 and accompanying text.
- 22 See *infra* notes 68-83 and accompanying text.
- 23 See *infra* notes 84-113 and accompanying text.
- 24 514 U.S. 419 (1995).
- 25 *Id.* at 442-43.
- 26 *Id.* at 444.
- 27 See *id.* at 443. Smallwood's statement, taken at the parking lot, claimed that he had not seen the actual murder and had not seen the assailant outside the vehicle. “I heard a loud [sic] pop When I looked around I saw a lady laying on the ground, and there was a red car coming toward me.” *Id.* When a police investigator specifically asked Smallwood whether he had seen the assailant outside the car, Smallwood answered that he had not; the gunman “was already in the car and coming toward me.” *Id.* Smallwood described the killer as a black teenage male with a mustache and shoulder length braided hair. Kyles had no mustache and wore his hair in a “bush” style. *Id.* at 443.
- 28 “In this case, disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable.” *Id.* at 441.
- 29 The struggle and shooting, which earlier he had not seen, he was able to describe with such detailed clarity as to identify the murder weapon as a small black .32-caliber pistol, which, of course, was the type of weapon used. His description of the victim's car had gone from a “Thunderbird” to an “LTD”; and he saw fit to say nothing about the assailant's shoulder-length hair and mustache, details noted by no other eyewitness. *Id.* at 443.
- 30 “The implication of coaching would have been complemented by the fact that Smallwood's testimony at the second trial was much more precise and incriminating than his testimony at the first, which produced a hung jury.” *Id.* at 443 n.14.
- 31 See Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 *Crim. L. Bull.* 550, 559 (1987) (“The natural inclination is not to see inconsistent or contradictory evidence for what it is, but to categorize it as irrelevant or a petty incongruity.”); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *Fordham L. Rev.* 917, 945

(1999) (“Prosecutors are convinced they have the guilty guy, then they go about seeking to convict and do not carefully look at things that are funny about their case.”). See also Applegate, *supra* note 1, at 328 (“[A] major incentive for trial preparation is to obtain support for an uncertain version of the facts and not to confirm a version of the facts that appears to represent the whole truth.”).

32 See Yaroshefsky, *supra* note 31, at 959.

33 See James M. Altman, *Witness Preparation Conflicts*, Litig., Fall 1995, at 38, 43 (“[W]itnesses often receive instructions that, if true, ‘I do not recall’ is a perfectly proper--indeed, an optimal--response to opposing counsel's thorny questions. Sometimes witnesses translate this advice, when coupled with an attorney's other statements, into a suggestion that harmful facts should not be remembered.”); Christopher T. Lutz, *Fudging and Forgetting*, Litig., Spring 1993, at 10, 11 (describing advice on lack of memory as an “all-purpose life preserver” that attorneys provide to their witnesses).

34 Literally truthful testimony is not perjurious, even if it is misleading or evasive. See *Bronston v. United States*, 409 U.S. 352 (1973). However, a false claim of lack of memory may result in a perjury conviction. See *United States v. Barnhart*, 889 F.2d 1374, 1376-80 (5th Cir. 1989) (upholding a perjury conviction for witness's testimony before a grand jury claiming lack of memory when corporate official instructed him to “get dumb” when testifying on certain matters); *Sheriff, Clark County v. Hecht*, 710 P.2d 728 (Nev. 1985) (upholding a charge of subornation of perjury for witness's testimony, pursuant to attorney's instructions, that he did not remember).

35 See Altman, *supra* note 33, at 43 (arguing that instructing a witness not to volunteer information, and to answer only the question asked, “can become part of a general strategy of concealment and evasion”).

36 355 U.S. 28 (1957).

37 *Id.* at 30.

38 *Id.* at 31.

39 The prosecutor questioned the witness as follows:
 Q. Natividad [Castilleja], were you in love with Herlinda [defendant's wife]?
 A. No.
 Q. Was she in love with you?
 A. No.
 Q. Had you ever talked about love?
 A. No.
 Q. Had you ever had any dates with her other than to take her home?
 A. No. Well, just when I brought her from there.
 Q. Just when you brought her from work?
 A. Yes. *Id.* at 30.

40 See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“We now hold that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”).

41 For examples of two recent Supreme Court cases suggesting that a prosecutor engaged in improper coaching in order to protect from disclosure his concealment of exculpatory evidence, see *Strickler v. Greene*, 527 U.S. 263 (1999); *Kyles v. Whitley*, 514 U.S. 419 (1995).

42 974 F.2d 293 (2d Cir. 1992).

43 See also *Ex parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989) (en banc). For a discussion of the apparent coaching of several witnesses with the purpose of concealing exculpatory evidence that the prosecutor had failed to disclose to the defense, see Bennett L. Gershman, *Film Review, The Thin Blue Line: Art or Trial in the Fact-Finding Process?*, 9 Pace L. Rev. 275 (1989).

44 There is a large body of psychological literature describing the vulnerability of memory. Several prominent studies include Frederick Charles Bartlett, *Remembering: A Study in Experimental and Social Psychology* (1997); Elizabeth Loftus & Katherine Ketcham, *The Myth of Repressed Memory* (1994); Israel Rosenfeld, *The Invention of Memory: A New View of the Brain* (1988); George A.

Talland, *Disorders of Memory and Learning* (1969). For a collection of recent scholarship on issues related to memory retention, retrieval, and distortion, see Yaroshefsky, *supra* note 31, at n.174.

45 See Freedman, *supra* note 5, at 152-56.

46 See *id.* at 152 (“A common misconception about memory is that it is a process of reproducing or retrieving stored information, in the manner of a videotape or a computer. In fact, memory is much more a process of reconstruction.”); Applegate, *supra* note 1, at 329 (“Memory is not like a phonograph record; the perception of an event does not leave a single, clear imprint that can be replayed precisely and at will.”); Michael Owen Miller, *Working with Memory*, *Litig.*, Summer 1993, at 10, 11 (noting that memory is not a single mental process but involves three stages of acquisition, retention, and retrieval, each of which may be “enhanced, suppressed, or distorted”).

47 See Freedman, *supra* note 5, at 156 (describing the “lawyer’s dilemma” as needing to probe a client’s memory to learn important facts, but by stressing the importance of particular facts, it may induce a client to “remember” a fact even if it did not occur); Miller, *supra* note 46, at 12 (explaining that memory retrieval is susceptible to the greatest amount of distortion).

48 See Mirjan Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. Pa. L. Rev. 1083 (1975):

During the sessions devoted to “coaching,” the future witness is likely to try to adapt himself to expectations mirrored in the interviewer’s one-sided attitude. As a consequence, gaps in his memory may even unconsciously be filled out by what he thinks accords with the lawyer’s expectations and are in tune with his thesis. Later, in court, these additions to memory images may appear to the witness himself as accurate reproductions of his original perceptions. *Id.* at 1094.

49 See Yaroshefsky, *supra* note 31, at 953 (“Most prosecutors simply do not understand how memory works and the reality of truth.”); Miller, *supra* note 46, at 11 (“[L]awyers are not memory specialists.”).

50 See Jerome Frank, *Courts on Trial* 86 (1950) (describing “inadvertent but innocent witness-coaching” attributable to competitive pressures of adversarial advocacy); Applegate, *supra* note 1, at 329 (describing that a lawyer’s adversarial posture may unintentionally produce testimony that supports the lawyer’s version of the facts, and the witness may be unaware that she is being manipulated).

51 This observation is usually made in connection with a jury’s respect for the prosecutor’s prestige and expertise, and its confidence in the prosecutor’s judgement. See *United States v. Young*, 470 U.S. 1, 18-19 (1985) (“[P]rosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence.”); *United States v. Modica*, 663 F.2d 1173 (2d Cir. 1981):

The prosecutor is cloaked with the authority of the United States Government; he stands before the jury as the community’s representative. His remarks are those, not simply of an advocate, but rather of a federal official duty-bound to see that justice is done.... [I]t may be difficult for [the jury] to ignore his views, however biased and baseless they may be. *Id.* at 1178-79. The same observation, I believe, applies to a non-hostile government witness’ perception of the prosecutor’s status and expertise.

52 See Damaska, *supra* note 48.

53 See Loftus & Ketcham, *supra* note 44, at 169 (describing how memory “grows,” rather than “fades,” because “every time we recall an event we must reconstruct the memory, and so each time it is changed--colored by succeeding events, increased understanding,

a new context, suggestions by others, other people's recollections.”); *Kyles v. Whitley*, 514 U.S. 419, 444 (1995) (“[T]he evolution over time of a given eyewitness's description can be fatal to its reliability.”).

54 475 U.S. 157, 190 (1986) (concurring opinion).

55 *Id.*

56 See *supra* note 44 for a list of prominent studies on this topic.

57 527 U.S. 263 (1999).

58 Stolfus first spoke to the police two weeks after the crime, a few days after discussing the incident with classmates at James Madison University, where both she and the victim, Leanne Whitlock, were students. See *id.* at 270. According to notes of this first interview (Exhibit 1), Stolfus told Detective Claytor that she could not identify the black female victim, nor the two white male perpetrators, but could identify the white female perpetrator. See *id.* at 274. In a letter written to Detective Claytor three days later (Exhibit 4), Stolfus states, “that she had not remembered being at the mall, but that her daughter had helped jog her memory.” *Id.* She wrote: “I have a very vague memory that I’m not sure of.” *Id.* In another note to Claytor (Exhibit 5), Stolfus described “the car,” but did not mention the license plate number. In another letter to Claytor (Exhibit 7), Stolfus thanked Claytor for his “patience with my sometimes muddled memories.” *Id.* In another note (Exhibit 8), Stolfus commented that “I totally wrote this off as a trivial episode of college kids carrying on and proceeded with my own full-time college load.” *Id.* at 275.

59 She testified to seeing the perpetrators earlier in a music store, described their appearance and behavior in detail, thought they looked “revved up” and “very impatient,” bumped into one of them, and thought she felt something hard in the pocket of his coat. See *id.* at 271. She left the store, but again encountered the threesome, one of whom bumped into Stolfus and asked directions to the bus stop. Stolfus tried to follow them “because of her concern about petitioner’s behavior,” but “lost him.” *Id.* She later saw the petitioner “tearing out of the mall entrance door and went up to the driver of the van.” *Id.* He “pounded on” the passenger window, “shook the car, yanked the door open, and jumped in.” *Id.* The victim started blowing her horn a long time, and petitioner “started hitting her.” *Id.* at 272. And he “started hitting her on the head and I was, I just became concerned and upset.” *Id.* Stolfus pulled up alongside the other car; the driver looked “frozen” and “mouthed an inaudible response.” *Id.* Stolfus started to drive away and then realized “the only word that it could possibly be, was help.” *Id.*

60 Stolfus testified that Strickler wore a grey T-shirt with a Harley Davidson insignia on it, and had “a kind of multi-layer look.” *Id.* at 270 n.5. Co-defendant Henderson “had either a white or light colored shirt, probably a short sleeve knit shirt and his pants were neat. They weren’t just old blue jeans. They may have been new blue jeans or it may have been more dressy slacks of some sort.” The woman “had blonde hair, it was kind of in a shaggy cut down the back. She had blue eyes, she had a real sweet smile, kind of a small mouth. Just a touch of freckles on her face.” *Id.*

61 She testified that this woman was “beautiful ... well dressed and she was happy, she was singing.” *Id.* at 271.

62 Stolfus stated that the license plate was West Virginia, NKA 243, which she remembered instructing her daughter to write down, and said she was able to remember the number because she used the phrase, “No Kids Alone” and “I said 243 is my age.” *Id.* at 272 n.7.

63 *Id.* at 272. Stolfus added that “I had very close contact with [petitioner] and he made an emotional impression with me because of his behavior and I, he caught my attention and I paid attention.” *Id.* at 272-73.

64 Of the eight documents either prepared by Claytor or received by him from Stolfus, it is undisputed that at least five of those documents “were known to the State but not disclosed to trial counsel.” *Id.* at 282. It is unclear whether the prosecuting attorney knew about some or all of these documents at the time he proceeded to trial. He claimed that he never saw five of the exhibits until long after trial, and that they were not in the file he made available to petitioner. *Id.* at 275. The prosecutor claimed that three of the exhibits had been in his open file, but defense counsel maintained otherwise. *Id.* at 275 n.11.

65 *Id.* at 274.

66 The majority concluded that although the prosecutor suppressed several items of favorable evidence which would have severely impeached Stolfus, *id.* at 282, there was ample other evidence of Strickler’s involvement. Therefore, the petitioner failed to demonstrate that there is a “reasonable probability” that his conviction or sentence would have been different had the Stolfus materials been disclosed. *Id.* at 296. Justice Souter, joined by Justice Kennedy, dissented, arguing that “the likely havoc that an

informed cross-examiner could have wreaked upon Stolzhus” would have been “sufficient to undermine confidence that the death recommendation would have been the choice.” *Id.* at 304.

- 67 For a critical analysis of Strickler, see Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 Fordham L. Rev. 1537 (2000).
- 68 See Yaroshefsky, *supra* note 31, at 960 (noting that many prosecutors “show evidence to a witness”).
- 69 See *id.*
- 70 See Piorkowski, *supra* note 13, at 399-402 (describing how a witness' choice of certain words can significantly affect the substantive meaning of the testimony); see also *Haworth v. State*, 840 P.2d 912, 917 (Wyo. 1992) (describing how an attorney suggested that defendant employ the word “cut” instead of “stabbed” to describe the incident).
- 71 See Wydick, *supra* note 5, at 43 (noting that using “the” tips off the witness that the questioner thinks such a fact more likely occurred, whereas using “a” keeps the questioner in a more neutral position).
- 72 See Freedman, *supra* note 5, at 155.
- 73 See *infra* notes 148-50 and accompanying text.
- 74 See Yaroshefsky, *supra* note 31, at 959-61.
- 75 See *id.* at 959 (“Prosecutors appear to be unaware of the extent to which they express, verbally and/or non-verbally, that they are disappointed that the cooperator does not know particular facts or that they express a genuine interest in information about a particular person.”).
- 76 *Id.*
- 77 See *id.* at 956-57.
- 78 See Frank, *supra* note 50, at 86 (“Telling and re-telling it to the lawyer, [the witness] will honestly believe that his story ... is true.”).
- 79 See Wydick, *supra* note 5, at 41-44.
- 80 See *infra* notes 140-41 and accompanying text.
- 81 See *infra* note 150 and accompanying text.
- 82 See *infra* note 148 and accompanying text.
- 83 See *infra* note 149 and accompanying text.
- 84 See Dana D. Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. Cal. L. Rev. 2117, 2117 n.1 (1996) (claiming that of the thirty child sexual abuse cases that went to trial in the 1980s, more than half of the convictions were reversed on appeal for tainted testimony of child witnesses); Angela R. Dunn, *Questioning the Reliability of Children's Testimony: An Examination of the Problematic Elements*, 19 Law & Psychol. Rev. 203, 203-09 (1995) (describing “widespread concern about the reliability of the child's statements” and factors affecting unreliability); Carey Goldberg, *Youths' ‘Tainted’ Testimony is Barred in Day Care Retrial*, N.Y. Times, June 13, 1998, at A6 (discussing several reversals of convictions in sexual abuse trials and increasing concern over reliability of child witnesses).
- 85 See, e.g., *Idaho v. Wright*, 497 U.S. 805 (1990); *United States v. Rouse*, 111 F.3d 561 (8th Cir. 1997); *State v. Gersin*, 668 N.E.2d 486 (Ohio 1996); *State v. Michaels*, 642 A.2d 1372 (N.J. 1994); *People v. Alvarez*, 607 N.Y.S.2d 573 (N.Y. Sup. Ct. 1993); *State v. Hulbert*, 481 N.W.2d 329 (Iowa 1992).
- 86 497 U.S. 805 (1990).
- 87 *Id.* at 826 (“We think the Supreme Court of Idaho properly focused on the presumptive unreliability of the out-of-court statements and on the suggestive manner in which Dr. Jambura conducted the interview.”).

- 88 See cases cited *supra* note 85.
- 89 See *Wright*, 497 U.S. at 812 (noting that “questions and answers were not recorded on videotape for preservation and perusal by the defense at or before trial”) (quoting *State v. Giles*, 775 P.2d 1224, 1227 (Idaho 1989)).
- 90 See *United States v. Wade*, 388 U.S. 218, 228-29 (1967) (“The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.”); Edwin M. Borchard, *Convicting the Innocent* (1932) (documenting sixty-two American and three British cases of convictions of innocent defendants); Felix Frankfurter, *The Case of Sacco and Vanzetti* 30 (1927) (“The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials.”); Jennifer L. Davenport, et. al., *Eyewitness Identification Evidence*, 3 Psychol. Pub. Pol’y & L. 338 (1997) (noting that “both archival studies and psychological research suggest that eyewitnesses are frequently mistaken in their identification”); Rattner, *supra* note 17, at 289-92 (1988) (describing a study of more than 200 felony cases of wrongful conviction that found misidentification to be the single largest source of error, accounting for more than half of the cases that had one main error); Jim Yardley, *In Death Row Dispute, A Witness Stands Firm*, N.Y. Times, June 16, 2000, at A22 (discussing recent execution of Gary Graham in Texas after years of litigation and public controversy over the accuracy of a highly questionable identification by only one eyewitness). The many recent exonerations of defendants by DNA evidence further underscores the unreliability of eyewitness testimony. See Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 Geo. J. Legal Ethics 309, 312-13 (2001).
- 91 See *supra* notes 50-52 and accompanying text.
- 92 The technique used by a prosecutor in adjusting the testimony of his identification witness probably would not be as heavy-handed as the example used by Zacharias and Martin to describe an “outrageous” instance of the promotion of perjury. See Zacharias & Martin, *supra* note 13, at 1003-04 (describing an attorney who asked a witness whether [he had] “ever known [the defendant] to be violent?” When the witness responds, “Not really,” the lawyer immediately replies, “The answer is ‘No.’”). Assuming the witness responds to the prosecutor's question by answering, “I think that the person I saw was the defendant,” it is highly unlikely that a prosecutor would reply, “The answer is it was the defendant.” A prosecutor would carefully and patiently question the witness to establish the witness's ability to recognize people and events generally, the importance to the case of the identification evidence. The prosecutor might also possibly describe the existence of other evidence implicating the defendant, and then review the witness's testimonial certainty of the identification. The prosecutor's conduct in the latter example would almost certainly not provoke the outrage produced by the earlier example.
- 93 527 U.S. 263 (1999); see *supra* notes 58-67 and accompanying text.
- 94 514 U.S. 419 (1995); see *supra* notes 24-30 and accompanying text.
- 95 Prosecutors are far better than juries at judging the reliability of identification evidence. Prosecutors know more about the case, more about the techniques of interviewing witnesses, and presumably are aware of the inherent dangers of eyewitness testimony. See Samuel R. Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. Legal Stud. 395, 446 (1987) (“There is every reason to believe that prosecutors, with more information at their disposal and more experience, are considerably better than juries at judging identification in criminal cases.”).
- 96 *The Thin Blue Line* (Miramax Films 1988); see also Gershman, *supra* note 43.
- 97 Emily Miller, waving her finger toward Randall Adams, testified: “[T]hat's the man--I saw that man! I saw Randall Adams' face just right after ... I saw the gun sticking out of the car when he shot that police officer, and that's the man.” R.L. Miller stated:

I really didn't see anything inside. It was kind of ... shadows on the window and stuff. But when he rolled down the window was what made his face stand out so He had a beard, mustache, kind of dishwater-blond hair. But like I say, when he was in court, he sure looked a lot different. Michael Randall stated that he “developed something like total recall.” However, his testimony contradicted this claim. He stated:

The officer, he walked up to the vehicle. His car was ... let me see ... I don't know if it was behind or in front, but I know he had him pulled over, and he was up to the car. I think he was up to the car. Let me think. Yeah, he was up to the car. He had to have been up to the car. He was up to the car. I didn't see no bullet. I didn't see no gunfire. Because I went on. *Id.* at 287-94.

- 98 The testimony of Emily Miller and Michael Randall was perjured, according to the Texas district court following an evidentiary hearing on Adam's application for state habeas corpus relief. See *Ex parte Adams*, No. W-77-1286-I(B) (Crim. Dist. Ct. No. 2 Dallas County) at 12-13, 15-16, *aff'd*, 768 S.W.2d 281 (Tex. Crim. App. 1989) (*en banc*). Emily Miller gave a statement to the police in which she described the assailant as "either a Mexican or a very light skinned black man." Adams is a white man. This statement was not disclosed to the defense. Emily Miller viewed a line-up in which Adams was present. She identified someone other than Adams--"I picked out a bushy-haired man." She asked a police officer whether she identified the "right man," and he told her she identified the "wrong man," and then pointed out Adams as the "right man." R.L. Miller viewed the same line-up and did not pick out Adams because "he didn't get that good a look at him." Also suppressed by the prosecutor was evidence that the Millers were motivated to accuse Adams to collect a very large reward, and the pendency of serious criminal charges against their daughter, which charges were immediately dropped after the Millers' testimony. Randall also gave false testimony. He claimed that on the night of the murder he was playing basketball at a local court until midnight, and that he was alone in his car. The court closed at 5 p.m., and Randall was cheating on his wife with a woman named Debbie, who was with him in his car. See Gershman, *supra* note 43, at 290-94.
- 99 Professor Ellen Yaroshefsky has written a groundbreaking study on the cooperation process. See Yaroshefsky, *supra* note 31. Her Article is based on interviews with twenty-five former assistant United States Attorneys in the Southern District of New York, including most of the chiefs and deputy chiefs of the criminal division from 1990 to 1999, and sixteen other defense attorneys who had experiences with the cooperation process. Professor Yaroshefsky's study contains many valuable insights into the cooperation process and the use of cooperation agreements. Her discussion raises difficult and troubling questions about how prosecutors obtain testimony from cooperators, the extent to which prosecutors and their agents actively shape and polish up this testimony, and the extent to which prosecutors knowingly rely on false and embellished testimony from cooperators. Given that her Article finds serious defects in the cooperation process in one of the most distinguished prosecutors' offices in the country, its conclusion suggests that the problem may be far more acute in federal and state prosecutors offices with a lesser commitment to truth and justice. See Fred C. Zacharias & Bruce Green, *The Uniqueness of Federal Prosecutors*, 88 Geo. L.J. 207, 238 (2000) ("[I]t may be that federal prosecutors, and the offices in which they work, take the duty [to do justice] more seriously than state prosecutors as a whole.").
- 100 The setting for the proffer session is hardly conducive to producing a neutral, objective, and accurate recollection. The setting is often tense and intimidating. Given the enormous inducements to the cooperator to give false or misleading testimony, as well as the inducements to the prosecutor to accept the cooperator's veracity, the context is inherently manipulative for both the cooperator and the prosecutor.
- 101 A prosecutor should evaluate a cooperator's story objectively, even skeptically. A prosecutor who lacks sufficient objectivity may fail to notice serious gaps in a cooperator's story, and may more readily accept an illogical or improbable account. See Gershman, *supra* note 90, at 342-47.
- 102 935 F.2d 445 (2d Cir. 1991).
- 103 *Id.* at 457 ("We fear that given the importance of Guariglia's testimony to the case, the prosecutors may have consciously avoided recognizing the obvious--that is, that Guariglia was not telling the truth.").
- 104 See *Northern Mariana Islands v. Bowie*, 243 F.3d 1109, 1125 (9th Cir. 2001) ("Although the public has an interest in effective law enforcement, and although we expect law enforcement officers and prosecutors to be tough on crime and criminals, we do not expect them to be tough on the Constitution.").
- 105 See Yaroshefsky, *supra* note 31, at 952.
- 106 See *id.* at 949.

107 *Id.* at 952.

108 See *Northern Mariana Islands*, 243 F.3d at 1109:

Never has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is not only to have the best lawyer money can buy or the court can appoint, but to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration. *Id.* at 1123.

109 Yaroshefsky, *supra* note 31, at 939.

110 Cooperators typically enter into cooperation agreements with the government. The standard agreement provides that “[i]f the [United States Attorney’s] Office determines that [the cooperator] has cooperated fully, provided substantial assistance to law enforcement authorities and otherwise complied with the terms of this agreement, the Office will file a motion with the sentencing court setting forth the nature and extent of [his] cooperation.” Daniel C. Richman, *Cooperating Clients*, 56 Ohio St. L.J. 69 n.108 (1995). The agreement allows the cooperator to testify honestly that he does not know what punishment he will receive for his cooperation. See *id.* at 97 (finding that the government prefers uncertainty in its cooperation agreements to permit witness to testify that he does not know what benefits he will receive and that his benefits are contingent upon giving truthful testimony). Plea agreements that require as a condition of enforcement that the witness give testimony consistent with statements previously given to investigating officers have been struck down as violative of due process and the search for truth. See, e.g., *State v. Fisher*, 859 P.2d 179, 183 (Ariz. 1993); *Sheriff, Humboldt County v. Acuna*, 819 P.2d 197, 200 (Nev. 1991). Agreements that are contingent on the prosecution achieving a certain result are also inconsistent with public policy. See Yvette A. Berman, *Accomplice Testimony Under Contingent Plea Agreements*, 72 Cornell L. Rev. 800, 809-12 (1987).

Cooperation agreements can be highly misleading. Their use has been criticized as “prosecutorial overkill” because they create a false impression that the prosecutor knows what the truth is, and is encouraging the cooperator to reveal the truth by offering leniency. See *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1150 (2d Cir. 1978) (Friendly, J., concurring) (“[Cooperation agreements] inevitably give jurors the impression that the prosecutor is carefully monitoring the testimony of the cooperating witness to make sure that the latter is not stretching the facts—something the prosecutor usually is quite unable to do.”). The cooperation agreement also misleads the jury by allowing a prosecutor to escape the insinuation that the cooperator's testimony is being purchased by instructing the cooperator to testify that any possible reward is contingent upon the cooperator telling the truth.

111 Yaroshefsky, *supra* note 31, at 954.

112 *Id.* at 956.

113 See *id.* at 956-57.

114 See Gershman, *supra* note 90, at 314-15. The following discussion contains several references to the preparation of witnesses by private attorneys for non-criminal proceedings. However, to the extent that a prosecutor has an ethical duty to serve justice, which is not an obligation of a private attorney, these references should not be taken to suggest that a prosecutor enjoys similar latitude in the preparation process. Indeed, my thesis is that a prosecutor's discretion to prepare witnesses is much more circumscribed than that of the private practitioner.

115 The suggestion of coaching almost always rests on inferences based on the witness's actual testimony, in conjunction with any available evidence to demonstrate that the witness's account changed after being interviewed. See *supra* notes 24-30 and accompanying text.

116 See *Rock v. Arkansas*, 483 U.S. 44, 59-60 (1987) (describing three general characteristics of hypnosis that produce inaccurate memories: suggestibility, where the witness tries to please the interviewer; confabulation, where the witness fills in details in order to make the answer more coherent and complete; and memory hardening, where the witness exhibits great confidence in both true and

false memories). These same characteristics are present in witness preparation generally. See *supra* notes 44-83 and accompanying text.

- 117 Discovery by the defense of prior statements of a witness is regulated by statute. See 18 U.S.C. § 3500(e) (1994) (the so-called “Jencks Act,” which requires disclosure of statements by witness that (1) were signed or adopted by the witness, (2) contain a substantially verbatim recital of any oral statement made by the witness and recorded contemporaneously with the making of such statement, or (3) contain any statement made by the witness to a grand jury); N.Y. Penal Law § 240.45 (McKinney 1998) (requiring disclosure of any statement made by witness which relates to subject matter of witness's testimony). Due process also requires disclosure of witness statements which relate to the witness's testimony and are materially favorable to the defendant either to impeach the witness or exculpate the defendant. See *Kyles v. Whitley*, 514 U.S. 419 (1995). The Supreme Court has not decided whether the constitutional disclosure requirement embraces materially favorable information in the prosecutor's possession which might be denominated as “work product.” See *Williamson v. Moore*, 221 F.3d 1177, 1182 (11th Cir. 2000) (suggesting that “extraordinary circumstances” might require disclosure of prosecutor's work product).
- 118 See *United States v. Bernard*, 625 F.2d 854, 859-60 (9th Cir. 1980) (“[W]e can find no statutory basis for compelling the creation of Jencks Act material Nor can we find a constitutional basis for compelling the creation of such material under Brady.”). Once notes are made, however, they may not be destroyed. See *United States v. Houlihan*, 937 F. Supp. 65, 68-69 (D. Mass. 1996) (although “there is no affirmative obligation on the part of the government to take notes ... the law is clear that the government may not destroy notes already made”).
- 119 See *Bernard*, 625 F.2d at 859 (as one agent testified: “[I]n trying to avoid contradicting facts from the interview of any defendant or any informant, it is my policy not to write down anything until I am sure the defendant or informant knows exactly what he is saying.”).
- 120 See *Yaroshefsky*, *supra* note 31, at 962.
- 121 *Id.*
- 122 *Id.* at 961.
- 123 See *id.* at 961-62.
- 124 18 U.S.C. § 3500(e)(2) (1994). In *Palermo v. United States*, 360 U.S. 343, 349-50 (1959), the Supreme Court found that Congress manifested an intention to restrict the use of such statements to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions of a lengthy oral recital. According to the Court, it would be “grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations, and interpolations.” *Id.* at 350.
- 125 See *id.* See also *Williamson v. Moore*, 221 F.3d 1177, 1183 (11th Cir. 2000) (prosecutor's non-verbatim, non-adopted notes of witness statements not admissible at trial as impeachment evidence and therefore not Jencks material); *United States v. Sasso*, 59 F.3d 341, 351 (2d Cir. 1995) (explaining that a prosecutor is not required to divulge even verbatim statements by a witness if the writer merely selected portions, albeit accurately, from lengthy oral statement); *United States v. Gross*, 961 F.2d 1097, 1105 (3d Cir. 1992) (finding that although notes occasionally contained precise phrases used by witness, such brief quotations do not qualify the notes as Jencks material).
- 126 See *supra* note 48 and accompanying text.
- 127 See 5 John Henry Wigmore, *Evidence* § 1367, at 32 (J. Chadbourne rev. ed. 1974) (describing cross-examination as “the greatest legal engine ever invented for the discovery of truth”). Of course, cross-examination can also obscure the truth. See *Damaska*, *supra* note 48, at 1094 (“Even with the best of intentions on the cross-examiner's part, reliable testimony may easily be made to look debatable, and clear information may become obfuscated.”).
- 128 See *Applegate*, *supra* note 1, at 311 (“While the adversary system touts the effectiveness of cross-examination for revealing the truth, there is little empirical support for this conclusion.”).
- 129 425 U.S. 80 (1976).
- 130 *Id.* at 89, 90 n.3.

- 131 See Zacharias & Martin, *supra* note 13, at 1010-11 (asserting that a “lawyer may so change a witness's presentation that the resulting testimony is either false or conveys an incorrect impression about the facts that cross-examination cannot counteract,” but authors do not explain how cross-examination is frustrated).
- 132 This principle is one of Professor Younger's “Ten Commandments of Cross-Examination.” See Irving Younger, *Trial Techniques* 51 (R. Oliphant ed. 1978).
- 133 For example, if a cross-examiner is unaware of, or does not believe that any deals or promises were made to the witness in exchange for his testimony, it is unlikely that an experienced cross-examiner would ask the witness about hypothetical deals or promises or whether the witness was coached to avoid mentioning the subject. See *United States v. Bagley*, 473 U.S. 667 (1985) (suggesting that since the government failed to respond affirmatively to pretrial requests by the defense for disclosure of any monetary benefits to government witnesses, it is unlikely that defense counsel would ask the witnesses whether they received benefits since counsel would reasonably expect the answer to be “no.”).
- 134 See *supra* note 116 and accompanying text.
- 135 See *supra* note 110.
- 136 For an excellent text used in law school courses on interviewing and counseling, see Robert M. Bastress & Joseph D. Harbaugh, *Interviewing, Counseling, and Negotiating* (1990). This book broadly instructs on interviewing skills, verbal and nonverbal communication techniques, probing skills, and psychological and psychosocial influences on communication.
- 137 See *supra* note 11.
- 138 Of course, no prosecutor ever really knows whether her witness is being truthful. It is important, however, to instruct the witness when necessary, and emphasize repeatedly, the importance of telling the truth. A prosecutor should explain to the witness that from a moral perspective, the oath that the witness takes requires truthful testimony, the witness may be convicted of perjury or obstruction of justice for giving untruthful testimony, and the exposure of the witness to cross-examination will render an attempt to conceal the truth difficult.
The extent to which a defense attorney is allowed to present untruthful testimony of the defendant is beyond the scope of this Article. See, e.g., *Nix v. Whiteside*, 475 U.S. 157 (1986) (finding that a defense lawyer did not provide ineffective assistance by refusing to cooperate in client's perjury).
- 139 See Patricia J. Kerrigan, *Witness Preparation*, 1999 *Tex. Tech L. Rev.* 1367, 1380 (“Let the witness know that a jury may find it more credible for a witness not to remember an incident from the past than to seem to have perfect recall of everything.”).
- 140 See Bastress & Harbaugh, *supra* note 136, at 157; Wydick, *supra* note 5, at 42-43.
- 141 The extent to which an attorney is permitted to orient a witness on the applicable law, or the attorney's theory of the case, prior to hearing the witness's initial recollection, is unclear. Compare Monroe H. Freedman, *Counseling the Client: Refreshing Recollection or Prompting Perjury?*, *Litig.*, Spring 1976 (suggesting that such conduct is unethical), with *In re Petroleum Products Antitrust Litigation*, 502 F. Supp. 1092, 1097 (C.D. Cal. 1980) (“[I]t is fully appropriate for defense counsel to refresh the recollection of the witness as to the facts, familiarize him with the relevant documents, and cause him to understand fully the company's views and attitudes concerning the litigation.”).
- 142 See Carlson & Imwinkelried, *supra* note 11, at 183 (suggesting that a lawyer show the witness the courtroom, observe some testimony, and if the courtroom is vacant put the witness on the stand to get a “perspective” and “feel” of the witness stand); Flowers, *supra* note 2, at 745 (explaining that it is appropriate to describe the courtroom and where everyone will be seated, and to take the witness to the courtroom to observe the layout); Altman, *supra* note 33, at 42 (stating that it is appropriate to instruct a witness on the basic rules of effective testimony).
- 143 See *United States v. Oreto*, 37 F.3d 739, 745 (1st Cir. 1994) (noting that it is improper for a prosecutor to advise an identification witness as to where defendant will be seated).
- 144 See David Ball, *Theater Tips and Strategies for Jury Trials* 28-30 (1994) (describing general behavioral suggestions for witnesses); James W. McElhaney, *Trial Notebook* 51-54 (3d ed. 1994) (same).

- 145 It is generally appropriate for lawyers to advise witnesses about how to dress and give suggestions on demeanor. See Carlson & Imwinkelried, *supra* note 11, at 183 (noting that some attorneys routinely videotape practice sessions and review them with witnesses to avoid negative mannerisms and promote a positive, confident demeanor); Thomas A. Mauet, *Trial Techniques* 475 (4th ed. 1996); Ball, *supra* note 144, at 323; McElhaney, *supra* note 144, at 51; J. Alexander Tanford, *The Trial Process: Law, Tactics and Ethics* 262 (1993). The extent to which the prohibition of falsification of testimony includes an attempt by an attorney to alter a witness's demeanor is unclear. See Piorkowski, *supra* note 13, at 404-05 (describing an attempt by a prosecutor to encourage the identification witness to appear confident as misconduct when the witness is only 51 percent certain that defendant was the perpetrator).
- 146 See Carlson & Imwinkelried, *supra* note 11, at 182 (recommending that attorney conduct a practice session consisting of mock direct and cross-examination).
- 147 See Altman, *supra* note 33, at 43 (citing *Haworth v. State*, 840 P.2d 912, 913-14, n.3) (“[T]here is nothing unethical about an attorney making suggestions about the witness's wording as long as those suggestions do not encourage what the attorney knows or reasonably believes is false or misleading testimony.”).
- 148 Courts and commentators suggest that there is nothing inherently wrong with attempting, even aggressively, to change a witness's initial version of the facts when the attorney believes that the version is inaccurate or incomplete. See *Resolution Trust Corp. v. Bright*, 6 F.3d 336, 341 (5th Cir. 1993). It is one thing to ask a witness to swear to facts which are knowingly false. It is another thing, in an arms-length interview with a witness, for an attorney to attempt to persuade her, even aggressively, that her initial version of a certain fact situation is not complete or accurate. Altman, *supra* note 33, at 41 (arguing that it is appropriate for an attorney to aggressively question a witness “to challenge the witness's initial recollection to persuade the witness that it is untrue and, therefore, should be changed”). But see Applegate, *supra* note 1, at 328 (“[A] major incentive for trial preparation is to obtain support for an uncertain version of the facts and not to confirm a version of the facts that appears to represent the whole truth.”).
- 149 See Miller, *supra* note 46, at 12 (“Where questions are asked, how they are prefaced, suggestions in the wording, and the content of follow-up questions may do more to determine what is retrieved than anything that occurred previously.”) But see Altman, *supra* note 33, at 42 (arguing that it is appropriate to “challenge” a witness's interpretation of facts and this “offers the witness the opportunity to modify her characterization to make it more truthful”).
- 150 But see Kerrigan, *supra* note 139, at 1379 (“Have the witness review any prior depositions they have given, discovery responses they have signed, or prior statements they have given, and consider having the witness review other relevant testimony and discovery responses.”).
- 151 See Carlson & Imwinkelried, *supra* note 11, at 182-83 (recommending that another attorney conduct the cross because “if you conduct cross and the cross is too ‘effective,’ the experience may impair your working relationship with the witness”).
- 152 See Altman, *supra* note 33, at 43 (explaining that it is proper to instruct the witness to testify to lack of memory if the witness honestly does not remember). However, the witness should be advised that an “I don't remember” may be perjurious. See *United States v. Barnhart*, 889 F.2d 1374 (5th Cir. 1989). In addition, an attorney may be suborning perjury if he counsels or suggests that a witness can safely profess ignorance even if the witness can remember the event. See, e.g., *Sheriff v. Hecht*, 710 P.2d 728 (Nev. 1985). Moreover, instructing a witness to answer only the question asked and not volunteer answers may be unethical if the strategy is designed to conceal relevant information. See, e.g., *United States v. Ebens*, 800 F.2d 1422, 1443 (6th Cir. 1986) (attorney instructs witness to avoid volunteering anything about a relevant conversation by answering the cross-examiner's question “[W]hat happened next?” with anything that happened next other than the conversation).
- 153 See Altman, *supra* note 33, at 42 (“Rehearsing a witness's testimony is a well-established professional practice.”).
- 154 See *Manson v. Brathwaite*, 432 U.S. 98 (1977).
- 155 See *State v. Michaels*, 642 A.2d 1372 (N.J. 1994).
- 156 See *People v. Hughes*, 453 N.E.2d 484 (N.Y. 1983).
- 157 See *State v. Gookins*, 637 A.2d 1255 (N.J. 1994).
- 158 See *Jackson v. Denno*, 378 U.S. 368 (1977).

- 159 Experts have been allowed to testify to psychological factors affecting the reliability of a witness's identification. See generally *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991); *United States v. Smith*, 736 F.2d 1103 (6th Cir. 1984); *United States v. Norwood*, 939 F. Supp 1132 (D.N.J. 1996); *Campbell v. People*, 814 P.2d 1 (Colo. 1991); *People v. McDonald*, 690 P.2d 709 (Cal. 1984); *State v. Chapple*, 660 P.2d 1208 (Ariz. 1983). For example, experts have testified regarding a defendant's susceptibility to government inducements to prove entrapment by showing lack of predisposition. See *United States v. Newman*, 849 F.2d 156 (5th Cir. 1988); *United States v. McLernon*, 746 F.2d 1098 (6th Cir. 1984); *United States v. Hill*, 655 F.2d 512 (3d Cir. 1981). Experts have also testified about the risk of false memory implantation on young children from improper interviewing techniques. See *State v. Sargent*, 738 A.2d 351 (N.H. 1999). Finally, experts have testified on the reliability of a defendant's confession from coercive police interviewing techniques. See *United States v. Hall*, 974 F. Supp. 1198 (C.D. Ill. 1997).
- 160 Rule 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. 702.
- 161 See *supra* note 159.
- 162 See *supra* notes 44-83 and accompanying text.
- 163 See *Miller*, *supra* note 46, at 15-16.
- 164 See *id.*
- 165 See *supra* note 89 and accompanying text.
- 166 Two states, Minnesota and Alaska, require that police interrogations of suspects be recorded on tape. See *State v. Scales*, 518 N.W.2d 587, 589 (Minn. 1994) ("In the exercise of our supervisory powers we mandate a recording requirement for all custodial interrogations."); *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985) ("Today, we hold that an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska Constitution, and that any statement thus obtained is generally inadmissible.").
- 167 See *Rock v. Arkansas*, 483 U.S. 44, 60 (1987) ("Tape or video recording of all interrogations, before, during, and after hypnosis, can help reveal if leading questions were asked.").

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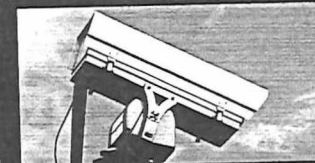
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Preface

Increasingly, law enforcement is a multi-agency activity: professionals from diverse agencies work together in the investigation of crime and the prosecution, punishment, and rehabilitation of offenders. Effective partnerships require participants to understand not only the particular language of their own organization and the common language of the law, but also that of the organizations with whom they interact.

This dictionary, produced by two writers who, between them, have over 60 years' experience in the investigation and prosecution of serious crime, both in England and Wales and overseas, draws on some entries from the *Oxford Dictionary of Law*; amended and expanded, where necessary, to meet the needs of the law enforcement community. In the main, however, the entries are entirely new and specific to that community. Its aim is to provide a clear definition of each term, together with a more detailed explanation where necessary. Key cases and statutory provisions are cited, as appropriate.

The work is designed to provide a convenient quick reference source for all those involved with law enforcement and the criminal justice system, or for those affected by or interested in those areas, but especially:

- All those involved in the prevention and investigation of crime, including: civilian and military police officers and officers of the Serious and Organised Crime Agency, HM Revenue and Customs, HM Immigration Service, National Health Service Counter Fraud, Department of Trade and Industry, Department of Work and Pensions, and the various local government Trading Standards and Environmental Health Agencies.
- All those who owe a duty to the court and whom the courts expect to have a basic knowledge of the law and legal procedure: crime scene examiners, forensic scientists and experts in other fields, and interpreters involved in both the investigative and court processes.
- Justices' clerks and legal advisers.
- Probation officers, members of Youth Offender Teams, Drug Action Teams, and Community Safety Working Groups, and others involved with the pre-sentence process and the rehabilitation of offenders.
- Those agencies and individuals responsible for the protection of children and vulnerable persons.

Not least, however, the writers have attempted to provide a key reference source for students in further and higher education and those studying for a professional or vocational qualification in subjects related to law enforcement and criminal justice.

In the last decade, the distinction between civil and criminal law has become ever more blurred, and investigators are now routinely involved in proceedings brought before the civil courts. Hence, this work encompasses such proceedings. Also included are the more common medical, firearms, and ballistic terms encountered in those fields, and particularly in expert reports. Basic criminology terms are incorporated for the benefit of those embarking on the academic study of crime and criminal behaviour.

Appendices to the work list many of the abbreviations and acronyms in common usage throughout the law enforcement community, those non-imprisonable offences that are designated as recordable, and, reflecting the crucial importance of the disclosure of unused material within the criminal process, the Code of Practice issued pursuant to s 23 of the Criminal Procedure and Investigations Act 1996 and the disclosure guidelines issued by the Attorney-General in April 2005.

Act 1987, passed to conform with the requirements of *European Community law, the producer of a defective product that causes death or personal injury or *damage to *property is strictly liable for the damage.

profit-and-loss account A *document presenting in summary form a true and fair view of the company's profit or loss as at the end of its financial year. It must show the items listed in one of the four formats set out in the Companies Act 1985. Its function is to show as profit or loss the difference between revenue generated and the expenditure incurred in the period covered by the account. See also ACCOUNTS.

profit à prendre The right to take soil, minerals, or produce (such as wood, turf, or fish) from another's *land (the servient tenement) or to graze animals on it. It may exist as a legal or equitable interest. The right may be enjoyed exclusively by one person (a **several profit**) or by one person in common with others (a **common**). A profit may exist in **gross** (i.e. existing independently of any ownership of land by the person entitled) and may be exercisable without any limit on the amount of produce taken. It may be sold, bequeathed, or otherwise dealt with. Profits existing for the benefit of the owner's land (the dominant tenement) are generally exercisable only to the extent to which the dominant tenement can benefit. They may be appurtenant, when the nature of the right depends on the terms of the grant; or *pur cause de vicinage* (Norman French: because of vicinity), in respect of cattle grazing the dominant tenement and straying onto the unfenced adjacent servient tenement. Profits may be created by express or implied grant or by statute; profits appurtenant may also arise by *prescription (or presumed grant). They may be extinguished (1) by an express release; (2) by the owner occupying the servient tenement; or (3) by implied release (e.g. through abandonment, which may be presumed through long non-use, through changes to the dominant tenement that make enjoyment of the right unnecessary or impossible, or

through an irreversible alteration of the servient tenement).

Programme Management Organization An organization set up by the banking and retail industries to coordinate the chip-and-pin project.

programme requirement A requirement that may be imposed by a court dealing with an offender aged 16 or over as part of a *community order, *custody plus order, *suspended sentence order, or an intermittent custody order. It requires the offender to participate in a systematic set of activities, accredited by the local probation board (in the case of an offender aged 18 or over) or *youth offending team for a number of days specified in the order (s 202, Criminal Justice Act 2003).

prohibited activity requirement A requirement that may be imposed by a court dealing with an offender aged 16 or over as part of a *community order, *custody plus order, *suspended sentence order, or an intermittent custody order. It requires the offender to refrain from participating in activities specified in the order (including that the offender does not possess, use, or carry a *firearm) on a day or days or during a period specified in the order. Before imposing such a requirement, the court must consult the local probation board (in the case of an offender aged 18 or over) or *youth offending team (s 203, Criminal Justice Act 2003).

prohibited degrees of relationships Family relationships within which marriage is prohibited (and, if celebrated, is void), although sexual intercourse within such a relationship may not amount to a familial *sexual offence under the Sexual Offences Act 2003. A man, for example, may not marry his grandmother, aunt, or niece; a woman may not marry her grandfather, uncle, or nephew.

prohibited weapon A weapon suitable only for use by the armed forces and having no normal function in civilian life. Prohibited weapons include automatic *firearms, weapons designed or adapted to discharge a poisonous liquid or gas, and *ammunition containing poisonous substances. It is an offence (punishable with

up to two years' imprisonment) to produce, sell, buy, or possess any prohibited weapon without the permission of the Defence Council. See also OFFENSIVE WEAPON.

prohibition notice A notice under the Health and Safety at Work Act 1974 specifying activities that, in the opinion of an inspector, involve a risk of serious personal injury, and prohibiting them until specified safeguards have been adopted.

prohibition order A *remedy in which the *High Court orders an ecclesiastical or inferior court, tribunal, or administrative authority not to carry out an *ultra vires act (e.g. hearing a case that is outside its *jurisdiction). It is available in cases in which, had the act been carried out, the remedy would have been a *quashing order, and it is governed by broadly similar rules.

prohibitory injunction See INJUNCTION.

projectile A *bullet or any other object projected by force and continuing in motion by its own inertia. A bullet is not a projectile until it is in motion. See also AMMUNITION.

prolixity Excessive length or repetitiveness in statements of case, *affidavits, or other *documents.

promise An *undertaking given by one person (the **promisor**) to another (the **promisee**) to do or refrain from doing something. It is legally binding only if contained in a contract or made by *deed.

promissory note An unconditional promise in writing, made by one person to another and signed by the maker, engaging to pay a specified sum of money to (or to the order of) a specified person or to the bearer, either on demand or at a fixed or determinable future time. Promissory notes are *negotiable instruments and many of the provisions in the Bills of Exchange Act 1882 apply with necessary modifications to promissory notes. Promissory notes are not presented for acceptance and the party primarily liable is the maker of a note. A bank note is a promissory note issued by a bank; the sum of

money mentioned on the note is payable to the bearer on demand.

promoter 1. A person engaged in the formation or *flotation of a company. A promoter stands in a *fiduciary relationship to the company; his functions may include drafting a *prospectus, negotiating preliminary agreements, instructing *solicitors, and obtaining *directors. *Solicitors, bankers, and other professionals involved in the company, but acting merely in their professional role, are not regarded as promoters. **2.** One who introduces a private *Bill.

prone Lying face down.

proof 1. The means by which the existence or non-existence of a *fact is established to the satisfaction of the court, including *testimony, *documentary evidence, *presumptions, and *judicial notice. Since most facts with which a court is concerned are not capable of being tested empirically, proof in the legal sense is quite different from proof in the context of mathematics or science. The uncorroborated evidence of one credible witness is sufficient proof for most purposes in the law. See STANDARD OF PROOF. **2. (informal)** The written statement of a prospective witness obtained by a *solicitor. A witness is said not to have **come up to proof** if he fails to testify in accordance with his proof.

proof beyond reasonable doubt The *standard of proof required in criminal proceedings. If the *jury has any reasonable (even if unlikely) doubts about the guilt of the accused, it may not convict him. It is often paraphrased by the *judge instructing the jury that they must be 'satisfied so that they are sure' of the guilt of the accused. It is disputed whether this standard is ever applicable in civil proceedings (e.g. when there is an allegation of *fraud); it is generally held that it is not. See also BURDEN OF PROOF.

proof in absence A *summary trial may take place in the absence of the defendant, under s 11 of the Magistrates' Courts Act 1980, provided that the court is satisfied that he has received notice of the proceedings and there is no good reason for his absence. In cases commenced by

proof of age

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*summons, unless the defendant has appeared on a previous occasion in answer to the summons it must be proved to the satisfaction of the court that it was served on him in 'reasonable' time before the hearing. In cases tried in the absence of the defendant, the burden remains on the *prosecution to prove its case to the normal criminal standard, whether by calling oral evidence or by reading statements served on the accused under s 9 of the Criminal Justice Act 1967. If the case is proved, the court may either proceed immediately to sentence or, in certain circumstances, it may adjourn to give the defendant notice that he should attend for sentencing or issue a *warrant for his *arrest.

In the *Crown Court, the accused must be present at the start of his *trial in order to plead. If he subsequently voluntarily absents himself by escaping from custody or by failing to surrender to *bail, then the *judge has a discretion to complete the trial and pass *sentence in his absence: *R v Jones (No 2)* [1972] 1 WLR 887.

proof of age The age of a person may be proved by *direct evidence, such as the *testimony of someone present at the person's birth, and in some cases from his appearance. It is usually proved by producing a birth certificate, under the exception to the *hearsay rule relating to statements in *public documents, and evidence that the person in question is the one referred to in the birth certificate.

proof of birth Birth is usually proved by the production of a birth certificate, which is admissible under the exception to the *hearsay rule relating to statements in *public documents, coupled with evidence identifying the person in question with the person referred to in the birth certificate.

proof of handwriting Handwriting may be proved by the *testimony of the person whose handwriting it is or by that of someone who saw him execute the *document in question. It may also be proved by the opinion of someone familiar with the handwriting of the alleged writer or by comparison with a proved

example of the writer's handwriting. Expert testimony is also admissible.

proof of marriage Legally valid evidence that a marriage was celebrated. This will usually be shown by possession of a marriage certificate and proof of identity, but may also be shown by other forms of evidence.

proof of service See SUMMONS.

propellant The chemicals which, when ignited, propel a *projectile from a weapon. See also AMMUNITION; POWDER.

property Anything that can be owned. A distinction is made between *real property (*land and incorporeal *hereditaments) and *personal property (all other kinds of property) and between *tangible property (that which has a physical existence, e.g. *chattels and *land) and *intangible property (*choses in action, including *intellectual property, and incorporeal *hereditaments). For purposes of the law of *theft, property includes all real, personal, and intangible property, although land can only be stolen under certain specified conditions. For purposes of the offences of *criminal damage, property does not include intangible property.

property in goods A right of *ownership in *chattels.

property interference The entry into or other interfering with property without the knowledge or consent of the owner for the purpose of installing listening, video, or other surveillance device. Authority must be given by a chief *police officer or equivalent in the *Serious Organized Crime Agency or *Her Majesty's Revenue and Customs. Under the Police Act 1997, proper authorization absolves those concerned from liability for *trespass, *criminal damage, or unlawful interference with wireless telegraphy.

proponent The party who bears the evidential, and in some cases the persuasive, *burden of proof in relation to an issue in *litigation.

proportionality 1. A principle of the *European Union ensuring that a legislative measure is introduced at EU level

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only when it is appropriate to have a measure at that level, and that when local *legislation is all that is needed, this will be encouraged. See also SUBSIDIARITY. 2. A central provision of the *European Convention on Human Rights. It applies particularly to the *qualified rights and where the expression 'necessary in a democratic society' is contained within the article. Whether or not such a right has been violated will depend on whether the interference with the right is proportionate to the legitimate aim pursued by that interference. Thus even if a policy that interferes with a Convention right might be aimed at securing a legitimate purpose (e.g. the prevention of crime), this will not in itself justify the violation if the means adopted to secure the purpose are excessive in the circumstances.

prorogation See PARLIAMENT.

proscribed organization An organization or association declared to be forbidden by the *Home Secretary under the Terrorism Act 2000, because it appears to be concerned with terrorist activities (see TERRORISM).

prosecution The pursuit of legal proceedings, particularly criminal proceedings. The term is also used for the party instituting the proceedings (see also PROSECUTOR). Criminal prosecutions on *indictment are in the name of the *Crown; summary prosecutions commenced by *information and *summons are in the name of an individual (see LAYING AN INFORMATION). Although a private individual may bring a prosecution (most private prosecutions are for *assault), the *Director of Public Prosecutions can intervene either to take it over or terminate it. Many government departments and other authorities have power to prosecute; e.g. the Department for Work and Pensions, and *local authorities. Under the Prosecution of Offenders Act 1985, the duty of conducting prosecutions falls principally upon the *Crown Prosecution Service. The consent of the *Attorney-General or Director of Public Prosecutions is required before proceedings may be commenced for some offences, e.g. in cases involving *official secrets. See also ARMY PROSECUTING AUTHORITY; NAVAL PROSECUTING AUTHORITY;

protected goods

REVENUE AND CUSTOMS PROSECUTIONS OFFICE; ROYAL AIR FORCE PROSECUTING AUTHORITY; SPECIFIED OFFENCE; STATUTORY CHARGING SCHEME.

prosecutor The person who institutes and/or conducts criminal proceedings on behalf of the *Crown. See also CROWN PROSECUTOR; PROSECUTION; REVENUE AND CUSTOMS PROSECUTOR.

prosecutor's statement See STATEMENT OF INFORMATION.

prospectus A *document inviting the public to invest in *shares or debentures of a *public company (see FLOTATION). The prospectus of a *listed company (called the listing particulars) must contain the information required by the *Stock Exchange; the prospectus of an unlisted company must comply with the Financial Services Act 1986.

prostitute '[A] person who on at least one occasion and whether or not compelled to do so, offers or provides sexual services to another person in return for payment or a promise of payment', as defined by the Sexual Offences Act 2003. Prostitution itself is not a crime, but various activities related to it are (see BROTHEL; CAUSING OR INCITING OR CONTROLLING PROSTITUTION; COMMON PROSTITUTE; KERB CRAWLING; SOLICITING).

protected emblems The emblems of the Red Cross, Red Crescent, and Red Lion and Sun give those authorized to bear them protection against attack in international and non-international armed conflicts. It is a *war crime under the Statute of the *International Criminal Court to attack the bearer of a protected emblem. Those entitled to bear the symbol are medical personnel and orderlies, chaplains, Red Cross and Red Crescent workers, *employees of aid organizations of neutral states. Emblems also protect buildings, vehicles, *ships, and aircraft used for medical purposes.

It is a summary offence under the Geneva Convention Act 1957 to use a red cross emblem unless authorized or on a toy when the emblem must be not more than 1.5 inches across.

protected goods (under the Consumer Credit Act 1974) *Goods that are the

subject matter of a regulated *hire purchase or *conditional sale agreement of which the *debtor is in breach, but under which he has already paid to the *creditor one-third or more of the total price of the goods, which remain in the ownership of the creditor. The creditor may not recover possession of the goods except on an order of the court, which may allow the debtor further time to pay. The restriction does not apply if the debtor has terminated the agreement.

protected person A head of state (or a member of a corporate head of state), head of government, or minister for foreign affairs, or any member of his family accompanying him; or a representative or official of a state or of an intergovernmental international organization who is entitled under *international law to special protection from personal injury or any member of his family who is also a member of his household. The Internationally Protected Persons Act 1978 incorporates into English law the provisions of the 1974 New York Convention on Crimes against Internationally Protected Persons. The Act gives jurisdiction to English courts to try those charged with committing certain serious acts against protected persons (e.g. *rape, *assault, causing *actual bodily harm, *wounding or inflicting *grievous bodily harm, *kidnapping, and certain attacks on *premises), even if the alleged acts were committed outside the UK. It also creates offences of threatening to commit any of the above acts anywhere in the world, and extends *jurisdiction to various types of attempts and assistance. It is no defence to any of these offences that the defendant did not know that the victim was a protected person.

protected state A state that, although nominally sovereign, is under the protection of another state. Usually the protected state allows the protector full control over its external affairs but retains control over its internal affairs. Examples are the Kingdom of Bhutan under the protection of India and the State of Brunei under British protection. A protected state is sometimes called a **protectorate**.

protocol 1. The original draft of a *document. **2.** An international agreement of a

less formal nature than a *treaty. It is often used to amend treaties. It may also be an instrument subsidiary or ancillary to a *convention, in which case it may deal with points of interpretation and reservations. **3.** A code of procedure. **4.** Minutes of a meeting setting out matters of agreement.

provisional liquidator A person appointed by the court to conduct the *compulsory winding-up of a company pending the appointment of a *liquidator. Either the *official receiver or a qualified *insolvency practitioner may be appointed.

proviso 1. A clause in a statute, *deed, or other legal *document introducing a qualification or condition to some other provision, frequently the one immediately preceding the proviso itself. **2.** Prior to the substitution of s 2(1) of the Criminal Appeal Act 1968 by the Criminal Appeal Act 1995, the section provided that the court should allow an *appeal if it thought that (a) the *conviction was unsafe or unsatisfactory, (b) that the *judgment of the court of *trial should be set aside on the ground of a wrong decision of any question of law, or (c) that there had been a material irregularity in the course of the trial, provided that the court could dismiss the appeal, notwithstanding that it was of the opinion that the point raised might be decided in favour of the appellant, if it was satisfied that no miscarriage of justice had occurred (known as '**applying the proviso**'). There is now a single basis for allowing an appeal, namely that the court thinks that the conviction is unsafe. However, the law in this area is presently under review.

provocation Conduct or words causing someone to lose his self-control. Provocation is not recognized as a *general defence to a criminal charge in English law, though what otherwise would have been *murder may be reduced to *manslaughter if provocation is shown (it is not, however, a defence to a charge of attempted murder).

The test for provocation is whether the acts or words involved did in fact make the defendant lose his self-control, and if

so, whether they would also have made a reasonable man in the defendant's position do the same. This is a question of fact for the jury to decide in each case. Since *Attorney-General for Jersey v Holley* [2005] 2 AC 580, a reasonable man for these purposes must be a person of the same sex and age as the defendant. Other characteristics of the defendant may only be taken in consideration in deciding the gravity of the provocation.

pseudo-photograph See INDECENT PHOTOGRAPHS OF CHILDREN.

psychopathic disorder (for the purposes of the Mental Health Act 1983) A form of *mental disorder consisting of a persistent disorder or disability of mind (which may or may not include significant impairment of intelligence) that results in abnormally aggressive or seriously irresponsible conduct and requires, or is susceptible to, medical treatment.

psychopathology Abnormal psychology.

psychosis A mental illness or disorder in which the sufferer may suffer from delusions, hallucinations, disorganized speech, or catatonia. There is considerable dispute as to whether people suffering from psychoses are more or less likely to commit crime.

psychotropic drugs *Drugs that produce mind-altering effects that may appear to be *psychosis. These drugs include *lysergic acid diethylamide, 'angel dust', and psilocin. These drugs are not addictive but produce mental disturbance, and the user may suffer from 'flashbacks' some time after the initial taking.

public Act See ACT OF PARLIAMENT.

publication 1. (in the law of *defamation) The communication of defamatory words to a person or persons other than the one defamed. In the English law of *tort, publication to at least one other person must be proved. Communication between husband and wife does not amount to publication, but communication by the defendant to the spouse of the claimant is sufficient. Dictation of a defamatory statement to a secretary or

typist is publication. Publication to persons other than the one defamed is not required in Scottish law or in criminal *libel. **2.** (in *copyright law) The issuing of reproductions of a work or edition to the public. Protection under the Copyright, Designs and Patents Act 1988 may depend on whether the work has been published. See also OBSCENE PUBLICATIONS.

public body Any body, corporate or otherwise, that performs its duties and exercises its powers for the public benefit, as opposed to private gain. Under the Local Government Act 1972, public bodies include *local authorities, *trustees, commissioners, and those who have duties to provide cemeteries and markets and act for the improvement of any place, or who have powers to issue or levy *precepts.

public company A type of *registered company that can offer its *shares to the public (compare PRIVATE COMPANY). Its *memorandum of association must state that it is a public company, that its name ends with the words 'public limited company' (or plc), and that its *authorized capital is at least the authorized minimum (£50000). It cannot do business until it has allotted shares with a nominal value corresponding with the authorized minimum. It cannot allot shares except upon payment of one-quarter of their nominal value plus any *share premium. £12500 is therefore its minimum capital. It thus may not have much wealth or substance, although many assume the contrary. Under the Companies Act 1985 an *undertaking to do work or perform services is not an acceptable *consideration for shares in a public company, and other non-cash considerations are subject to independent valuation and must be transferred to the company within five years of allotment. See also FLOTATION; STOCK EXCHANGE.

public corporation A body established to perform a public function, frequently commercial but not necessarily so (it may be social, advisory, or of any other character). Thus bodies established to manage nationalized industries are public corporations, as are such bodies as English

THE ASHGATE RESEARCH COMPANION to INTERNATIONAL CRIMINAL LAW

Critical Perspectives

Edited by WILLIAM A. SCHABAS, YVONNE McDERMOTT, NIAMH HAYES

International criminal law is at a crucial point in its history and development, and the time is right for practitioners, academics and students to take stock of the lessons learnt from the past fifteen years, as the international community moves towards an increasingly uni-polar international criminal legal order, with the International Criminal Court (ICC) at the helm.

This unique research companion takes a critical approach to a wide variety of theoretical, practical, legal and policy issues surrounding and underpinning the operation of international criminal law as applied by international criminal tribunals. The book is divided into four main parts. The first part analyses international crimes and modes of liability, with a view to identifying areas which have been inconsistently or misguidedly interpreted, overlooked to date or are likely to be increasingly significant in future.

The second part examines international criminal processes and procedures, and here the authors discuss issues such as victim participation and the rights of the accused. The third part is a discussion of complementarity and sentencing, while the final part of the book looks at international criminal justice in context. The authors raise issues which are likely to provide the most significant challenges and most promising opportunities for the continuing development of this body of law.

As international criminal law becomes more established as a distinct discipline, it becomes imperative for international criminal scholarship to provide a degree of critical analysis, both of individual legal issues and of the international criminal project as a whole. This book represents an important collective effort to introduce an element of legal realism or critical legal studies into the academic discourse.

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those actions, as well as potentially incurring aiding and abetting liability by way of tacit encouragement. But these legal duties are not the *basis* of liability; they are merely (co-)incidental. Liability of the first type depends on the initiating action that causes the harm, whereas tacit encouragement is the basis of the second type. The legal duties incumbent upon the accused may assist in understanding whether such tacit encouragement was actually given, but is not its basis.

A third and fourth type of omission *does* arise from the breach of the legal duty itself. The first of these is known in some domestic criminal systems as genuine or pure omission (*echte Unterlassungsdelikte*, *délits de pure omission*). Criminal laws sometimes require specific actions under specific conditions. Failure to respond to a summons, file a tax return, or deliver radioactive waste, are but a few examples of specific acts that domestic criminal law require to be performed.⁵³ Most obligations of this sort are specific, whereas others relate generally to the suppression of harm or crime. Some legal systems, for example, impose a duty on all citizens to rescue a person in danger, at least where they are able to do so without danger to themselves. The punishment for failing to do so varies significantly from jurisdiction to jurisdiction. Rhode Island permits a maximum prison sentence of six months; Germany, one year; France, five years; and the Northern Territory of Australia, seven years when done 'callously'.⁵⁴ The existence of such statutes are more common in civil law than common law jurisdictions, perhaps reflecting different attitudes as to the scope of criminal law in enforcing morality or the potential dangers of using criminal law to compel action according to relatively undefined conditions. These concerns, however, are largely mitigated by the limited sentences available. One is, after all, not guilty of murder merely for failing to discharge the duty to rescue; the crime of failing to rescue is understood as a separate crime and can usually be imposed even if the harm does not ensue.⁵⁵

⁵³ M Bohlander, *Principles of German Criminal Law* (Hart Publishing, Oxford 2009) 40; L Moreillon, *L'infraction par omission* (Geneva: Droz, 1993) 47–56; Pradel (n 12) 66–67; G Fletcher, *Rethinking Criminal Law* (OUP, Oxford 2000) 422–423, 585–586.

⁵⁴ Rhode Island Statutes, §11-56-1; Strafgesetzbuch §323c: 'Failure to Render Assistance: Whoever does not render aid during accidents or common danger or need, although it is required and can be expected of him under the circumstances and, especially, is possible without substantial danger to himself and without violation of other important duties, shall be punished with imprisonment of not more than one year or a fine'; French *Code pénal*, 223-6; Criminal Code of the Northern Territory Australia, s 155: 'Any person who, being able to provide rescue, resuscitation, medical treatment, first aid or succour of any kind to a person urgently in need of it and whose life may be endangered if it is not provided, callously fails to do so is guilty of a crime and is liable to imprisonment for 7 years'; D Schiff, 'Samaritans: Good, Bad and Ugly: A Comparative Law Analysis' (2005) 11 *Roger Williams U L Rev* 77.

⁵⁵ Some statutes do, however, make liability for these stand-alone crimes conditional upon the harm ensuing. F Feldbrugge, 'Good and Bad Samaritans' (1965–1966) 14 *Am J Comp L* 630, 646 (citing five European countries that require the victim to have suffered either death or serious injuries before liability arises); cf Fletcher's distinction between direct versus derivative liability: Fletcher (n 53) 586.

Duties to rescue from harm can usually apply not only to natural events, such as drowning, but also man-made threats. The duty may arise much less frequently in such circumstances because it is usually dangerous to stop a crime. Some countries therefore regulate the duty to prevent crime separately. Article 223-6 of the French *Code pénal* provides: 'Whoever voluntarily refrains from preventing a crime or a felony against bodily integrity, despite being able to do so by his own immediate action and without risk to himself or others, is punishable by five years in prison and a 75000 Euro fine.'⁵⁶ Israeli and Nigerian law allow sentences of up to two years' imprisonment for a similarly-worded offence.⁵⁷ Germany imposes a duty to report, for which a sentence of up to five years can be imposed and the general duty to rescue can give rise to a sentence of up to one year.⁵⁸ The common law crime of 'misprision of felony' was abolished in England by statute in the 1960s, although many American jurisdictions impose special duties on teachers and others to report suspected crimes against children in their care.⁵⁹ Failure to report a crime does not, in itself, make a person an accessory but nor, on the other hand, does it preclude any other form of liability that may properly be available, including accessorial liability.

The fourth, and for present purposes the most important, category of omission concerns those that are treated as equivalent to inflicting the harm by one's own act, even though the accused's conduct is entirely passive in relation to the harm arising. German doctrine calls this 'inauthentic' or 'non-genuine' omissions (*unechte Unterlassungsdelikte*),⁶⁰ and French and Spanish law describe it as *commission par omission* and *comisión por omisión*, respectively.⁶¹ No consistent term of art is used in English, although 'commission by omission' has been suggested as an appropriate term.⁶² The essential feature of this form of liability is that the passive behaviour is treated as equivalent to an action causing the harm on the basis of the non-fulfilment of a legal duty to avoid the harm.

⁵⁶ Article 223-6.

⁵⁷ Israeli Penal Code, s 262; Nigerian Criminal Code, s 515.

⁵⁸ Strafgesetzbuch §138. 323c

⁵⁹ Popular opinion in the United States was recently outraged by the case of an alleged act of sexual abuse of a boy witnessed by a former college football player weighing well over 200 pounds. Rather than immediately intervening, he allegedly merely reported the matter to his supervisor, which apparently complied with the legal obligations applicable in that State. Grand Jury Report, 6–7, <<http://www.nytimes.com/interactive/2011/11/06/sports/ncaafootball/20111106-pennstate-document.html>> last accessed 12 December 2011.

⁶⁰ K Gossel, 'Crimes of Omission' (1984) 55 *Revue Int'l de Droit Pénal* 899, 908 ('The violation of an inhibition making a crime of commission 'authentic', the cases of 'commission by omission' consequently were called non-authentic crimes of commission (*unechte Unterlassungsdelikte*): any crime of commission, including that by omission, was considered to be characterized by a violation of an inhibition'); B Schunemann, 'The Principle Governing Crimes of Omission' (1984) 55 *Revue Int'l de Droit Pénal* 879, 886, 888.

⁶¹ Boulloc (n 9) 209; J-M Silva Sanchez, 'Criminal Omissions: Some Relevant Distinctions' (2008) 11 *New Crim L Rev* 452.

⁶² Fletcher (n 53).

The doctrine is well-established in civil and common law countries alike, but there are a variety of approaches. French law is formally hostile to the doctrine on the basis that it violates the principle of legality. A notorious 1902 case from Poitiers involved a person accused of battery and homicide for intentionally or recklessly failing to care for his mentally ill brother, who was a shut-in in their mother's house. The accused was acquitted because, in the absence of active conduct, he had not committed the crime.⁶³ This approach remains good law in French doctrine, although the outcome would be quite different today because the accused could be convicted of the statutory crime of 'abandonment' of a person rendered vulnerable by age or physical or mental infirmity.⁶⁴ This reflects the strong preference in French law for dealing with such matters through the mechanism of statutorily-defined 'pure omission,' rather than 'impure omission.' A similar duty of protection is imposed on parents and 'anyone else exercising parental authority' in respect of children.⁶⁵ When death ensues, these 'pure omission' crimes carry heavy penalties: 20 and 30 years respectively. The relationships in which an 'abandonment' may occur are not expressly enumerated, but the word does at least convey that there must be a pre-existing relationship of dependence and control that, in turn, justifies criminal liability for passivity in relation to the harm.

The French insistence on the distinction between acts and omissions, and the need for legislative intervention, reflects no fetish for technicality. Imposing liability for commission by omission raises a range of questions that do not arise in respect of commission by action or pure omissions, and that require value judgments about morality, culpability and the proper scope of criminal law. Which relationships are close enough to give rise to the requisite duty to avert harm? Does it matter if someone else is in a closer relationship? Why did the omission occur? What level of diligence is required? What *mens rea* (knowledge, recklessness, full intent) needs to be proven in relation to the omission? What relieving conditions might there

⁶³ Boulloc (n 9) 209; Moreillon (n 53) 65.

⁶⁴ Art 223-3: 'Le délaissement, en un lieu quelconque, d'une personne qui n'est pas en mesure de se protéger en raison de son âge ou de son état physique ou psychique est puni de cinq ans d'emprisonnement et de 75000 euros d'amende.'; art 223-4: 'Le délaissement qui a entraîné une mutilation ou une infirmité permanente est puni de quinze ans de réclusion criminelle. Le délaissement qui a provoqué la mort est puni de vingt ans de réclusion criminelle.'

⁶⁵ Art 227-15: 'Le fait, par un ascendant ou toute autre personne exerçant à son égard l'autorité parentale ou ayant autorité sur un mineur de quinze ans, de priver celui-ci d'aliments ou de soins au point de compromettre sa santé est puni de sept ans d'emprisonnement et de 100 000 euros d'amende. Constitue notamment une privation de soins le fait de maintenir un enfant de moins de six ans sur la voie publique ou dans un espace affecté au transport collectif de voyageurs, dans le but de solliciter la générosité des passants'; art 227-16: 'L'infraction définie à l'article précédent est punie de trente ans de réclusion criminelle lorsqu'elle a entraîné la mort de la victime.' As Moreillon demonstrates, French law has also softened the impact of this approach by adopting a broad notion of 'negligent action', within which omissions are transformed into negligent conduct. Moreillon (n 53) 66-67.

be in the diverse circumstances that may arise?⁶⁶ The French reticence to resolve these questions judicially reflects a deep attachment to a particular conception of legality that should not be lightly dismissed.⁶⁷ As one commentator has observed, judges should not 'roam freely about our moral sentiments' in constructing the situations in which a failure is treated as equivalent to causing the harm.⁶⁸ The main problem raised by non-genuine omission crimes is not, as some have argued, undue interference with individual autonomy, but rather lack of certainty as to the situations in which omissions are equivalent to acts, and the conditions under which liability should be imposed in such situations. Passivity cannot be equated with action without making a host of value judgments that ought to be left to the legislator.

The English common law, in characteristic fashion, addressed these issues incrementally starting from those cases where the demands of justice appeared undeniable. Thus, it has long been accepted that a parent's failure to care for a child can satisfy the material element of homicide.⁶⁹ The intimate relationship of parent and child, and the duty of care owed by the latter to the former, eliminates many of the variables about causation, intent and voluntariness previously mentioned. The relationship, in effect, is the functional equivalent of locking a child in a room: the level of dependence and control is equivalent to the act of physical incarceration. Thus, if a child dies and there is no apparent cause other than a parent's neglect, a presumptive inference can be drawn that the omission was equivalent to an action. English case law has gradually expanded such situations beyond the parent-child context to include undertakings to provide the necessities of life to a person,⁷⁰ or creating or undertaking to control a dangerous

⁶⁶ Spain apparently recognises that adult children have some kind of duty to provide necessities of life to their parents, but does not appear to be recognised in other countries. See C Gomez-Jara Diez and L Chiesa, 'Spain' in Heller and Dubber (n 12) 61.

⁶⁷ Pradel (n 12) 68; Moreillon (n 53) 65 ('le droit pénal français est-il extrêmement attaché au principe de la légalité des délits et des peines?'); Boulloc (n 9) 210 ('Mais en dehors de ces cas [des crimes d'omission expressement définis] il n'y a pas de délit de commission par omission'); F Desportes and F Le Gunehec, *Droit pénal général* (16th edn Economica, Paris 2009) 65 ('Les actes d'omission ne peuvent être réprimés que s'ils sont expressement incriminés par un texte spécifique').

⁶⁸ G Fletcher, 'On The Moral Irrelevance of Bodily Movements' (1994) 142 *U Pa L Rev* 1443, 1449 ('My sense of the literature is that most observers are concerned about condemning the injustice of not punishing immoral omissions. There is little concern about the issue of legality in letting courts roam freely about our moral sentiments').

⁶⁹ *R v Gibbins and Proctor* (1918) 13 Cr App R 134; A Ashworth, 'The Scope of Criminal Liability for Omissions' (1989) 105 *LQR* 424, 441; Schunemann (n 60) 879, 890; Feldbrugge (n 55) 630, 649.

⁷⁰ *R v Stone and Dobinson* [1977] QB 354 (Eng CA) (finding that the two accused had undertaken to care for the sister of one of them whom they had taken in as a lodger; a conviction for manslaughter was upheld on the basis of the finding that their care for her was reckless).

situation.⁷¹ The *mens rea* required can be either intent to kill or recklessness, depending on which form of homicide is charged.

Other common law countries have relied more heavily on the legislator. The Canadian Criminal Code has codified in a presumptively exhaustive manner the special and limited situations in which commission by omission is recognised. These offences have a dual character: (i) crimes of pure omission if the harm does not ensue; (ii) commission by omission if it does. The special character of the obligations is signaled by the title of the section, as being duties 'tending to the preservation of life'. Amongst these is the obligation of heads of households, spouses, and anyone who has charge of another because of 'detention, age, illness, mental disorder or other cause' to provide the 'necessaries of life' to the dependant party.⁷² The common characteristic of such diverse situations as infancy, a debilitated spouse, and a detainee appear to be complete dependence on the one hand, and near-absolute control on the other. Breach of these prohibitions, when it 'endangers' the life or health of a person permanently, is in itself punishable by up to five years in prison as a crime of omission; homicide through commission by omission may also be charged if death ensues.⁷³

The German Criminal Code expressly permits omissions to satisfy the material element of an offence where the accused is 'responsible under law to ensure that the result does not occur, and if the omission is equivalent to the realisation of the statutory elements of the offence through a positive act'.⁷⁴ Generally speaking, the duties to act recognised by German courts concern two groups of persons: (i) caregivers, custodians or others who are expected to protect those for whom they are responsible (so-called 'Beschützergaranten'); and (ii) persons who are responsible for the control or supervision of a potentially dangerous process, activity or thing

⁷¹ A gatekeeper at a railway crossing was convicted of manslaughter for failing to close a crossing gate, which contributed to a person's death: *R v Pitwood* (1902) 19 TLR 37. The omission problem could have been avoided by characterising the gatekeeper's conduct as negligent, but in the end the issue is the same: under what circumstances does a duty of careful action arise, failure of which gives rise to criminal liability? See JC Smith, 'Liability for Omissions in the Criminal Law' (1984) 4 *Legal Stud* 88, 91 ('There is no precise borderline between acts and omissions but this is true of many other distinctions in the criminal law. When we have a case which plainly consists in liability for an omission, it is at least unhelpful and possibly dangerous to try to disguise the fact and to describe the occurrence of any act').

⁷² Criminal Code of Canada, s 215(1). The duty to spouses or household members arises only when they are 'in destitute or necessitous circumstances'. As long as the breach of duty 'endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently', the sentence may be as much as five years.

⁷³ K Roach, *Criminal Law* (4th edn Irwin Law, Toronto 2009) 107; Criminal Code of Canada, s 215(2).

⁷⁴ German Criminal Code, section 13 (official translation) <http://www.gesetze-im-internet.de/englisch_stgb/index.html> last accessed 16 December 2011.

(so-called 'Überwachergaranten').⁷⁵ This includes, for example, family members living within the same household; members of a dangerous expedition; persons with a contractual or other voluntarily assumed obligation of care for another person, such as doctors or other caregivers; persons who have created harmful situations by prior illegal conduct (so-called 'Ingerenz'); or persons who supervise enterprises that may in some way create dangers to others.⁷⁶ Some commentators have sharply criticised what they perceive as the unduly flexible and fluid approach to guarantorship in German law,⁷⁷ although there are also signs of retrenchment: a recent case determined, for example, that two co-habiting siblings were not in a guarantorship relationship *inter se*.⁷⁸

Not all legal duties in national law are duties of guaranteeship, and even those that are have carefully drawn limits. The general duty to rescue, for example, does not create a guarantorship relationship: a bystander who fails to save a drowning boy may be convicted of failing to assist as a pure omission and sentenced to a year in prison, but is not liable for murder by impure omission.⁷⁹ Husbands and wives are generally expected to protect their spouse from harm by third parties, but are not responsible for failing to stop them from committing crimes against others.⁸⁰ The relevant Spanish provision requires 'a special legal duty' as the prerequisite of commission by omission.⁸¹

⁷⁵ Moreillon (n 53) 79 (identifying eight categories of legal duty that may for the basis of commission by omission, of which four are duties to supervise particular dangers (duties emanating from one's property or possessions, from engaging in a risky activity, the illegal actions of a third party under one's control, or the duty arising from creating a dangerous situation) or to protect certain interests (duties arising from family relations, from state activities, from close community ties, or from a voluntary undertaking to protect someone from harm)).

⁷⁶ Bohlander (n 53) 43–45; Moreillon (n 53) 240–309; Schunemann (n 60) 879, 890; H Schumann, 'Criminal Law' in M Reimann and J Zekoll (eds) *Introduction to German Law* (2nd edn The Hague, Kluwer 2005) 407–408.

⁷⁷ Moreillon (n 53) 311 ('Dans d'autres situations, le droit penal n'hésite plus à dépasser les frontières qui lui ont été assignées par l'ordre juridique : devoirs du restaurateur, du locataire, du possesseur d'un instrument dangereux. Ces tendances, dictées avant tout par des considérations de pure politique criminelle doivent être rejetées, car violant les principes élémentaires de sécurité du droit. Les dérives sont flagrantes, particulièrement en droit criminel allemand, alors que l'interprétation par analogie en droit penal est proscrite par le Grundgesetz. Sur ce point, il est étonnant de constater que le droit anglais, pourtant peu attaché au principe de la légalité, répugne à faire œuvre de législateur en l'absence de normes spécifiques étendant les conditions objectives de la punissabilité'); Schunemann (n 60) 879, 890.

⁷⁸ N Foster and S Sule, *German Legal System and Laws* (3rd edn OUP, Oxford 2002) 364.

⁷⁹ A Cadoppi, 'Failure to Rescue and the Continental Criminal Law' in M Menlowe and S McCall (eds) *The Duty to Rescue, The Jurisprudence of Aid* (Aldershot, Dartmouth 1993) 95; Bohlander (n 53) 41–42 (asserting that commission by omission can arise only when 'that legislation does not provide for genuine omissions liability already'); Fletcher (n 68) 1450.

⁸⁰ See Schönke and Schröder (n 44) § 13, para 21.

⁸¹ Article 147, Spanish Criminal Code: 'Los delitos o faltas que consistan en la producción de un resultado sólo se entenderán cometidos por omisión cuando la no evitación del mismo, al infringir

One domestic situation is particularly relevant to the conduct of soldiers in relation to their duties under international humanitarian law. The statutory duties of public officials do *not* generally qualify as duties of guarantee in favour of citizens who might be harmed by a third party following a breach. The failure of a police officer to prevent crimes does *not* generally make him liable for commission by omission, no matter how egregious the circumstances. English law criminalises such failures as abuse of public office, but no cases are to be found imposing liability for the resulting crime.⁸² Not even in South Africa, where there have apparently been some shocking derelictions of duty by police officers, has such liability been imposed.⁸³ Schunemann's view of German law, to take an example of particular relevance to the context of international criminal law, is that 'the general duty of a police officer to prevent the commission of crimes does not make it possible to treat a failure to prevent the commission of a crime as equivalent to a positive act'.⁸⁴ Moreillon's exhaustive comparative review of commission by omission in Germany, Switzerland and England does not cite a single such case.⁸⁵ This is not to say that a statutory duty could not coincide with, or directly create, a close relationship of dependence and control so as to create a guarantor relationship; most statutory duties simply do not do so.

The preceding comparative analysis suggests that four different types of liability can arise from conduct that could be described as an omission. The first two types involve passivity that is, in context, equivalent to an action either because it is preceded by some action or because it tacitly encourages the crime; the latter two types arise from a culpable breach of a legal obligation to act. A failure to discharge a legal duty to act can give rise to criminal liability for the harm caused to a victim where there is a special relationship of care, control and protection. This may be described as 'commission by omission' arising from a 'culpable omission'. Some legal systems, such as France, have insisted that such liability be expressly authorised by legislation, whereas other systems have elaborated, at least to some extent, the conditions of liability through case law. The relationship of parent and child, caregiver and patient, and custodian and prisoner are three widely recognised categories of special relationship. The general principle that may be deduced from these categories of relationship is that failures to avert harm may be

un especial deber jurídico del autor, equivalga, según el sentido del texto de la Ley, a su causación.

⁸² In *R v Dytham* [1979] QB 722, a police officer whose shift was about to end witnessed an assault which ultimately led to the victim's death. Rather than intervening, the defendant went off duty, for which he was convicted of misconduct of an officer of justice, receiving a fine of 150 pounds for an offence that could have attracted imprisonment of up to two years. No charge of commission or complicity was brought against the accused, although Ashworth has argued that the law should be reformed to impose a special duty on law enforcement officers that could give rise to commission by omission. Ashworth (n 69) 455–457.

⁸³ Burchell and Milton (n 13) 196–201.

⁸⁴ Schunemann (n 60) 891. Bohlander (n 53) 42 ('the general duty of care owed by a government to its citizens does not suffice to establish a duty that entails criminal liability').

⁸⁵ Moreillon (n 53) 209–311.

deemed equivalent to an action causing harm where the accused is in a relationship of virtually total control over the victim, and the victim is totally dependent on the accused for well-being and protection.

The next section considers how international criminal law has approached the same issue, and whether any of the situations typically confronted in international cases coincide with the principle that may be derived from domestic law.

III. The Development of Culpable Omission in International Criminal Law and the Mrkšić Deviation

A form of commission by omission that is undoubtedly recognised in international criminal law is superior responsibility. Those possessing effective control over subordinates have a duty to prevent or at least punish their crimes regardless of whether the omission encourages the crime or not.⁸⁶ As the *Halilović* Trial Chamber stated, the 'omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates'.⁸⁷ Further, liability is incurred for the ultimate crime committed, not a separate crime of 'failing to diligently control one's subordinates'. This form of liability is therefore commission by omission, or 'culpable omission' as described in the previous section, although international law gives it the *sui generis* label of 'superior responsibility'. Analogous failures to control arise in domestic legal systems as, for example, when a parent fails to control a child, or when a business owner fails to diligently control a dangerous process or condition.⁸⁸

The express inclusion of superior responsibility cannot be taken to imply, as some have argued,⁸⁹ that other forms of omission liability are implicitly excluded. Superior responsibility is addressed narrowly to the situation of commanders, and defined separately from the general forms of individual criminal responsibility. Indeed, the statutes' reliance on well-known terms of art from national legal systems – including committing, instigating and aiding and abetting – suggests that omissions customarily encompassed by these concepts should also exist in international criminal law. The need to explore state practice is therefore particularly significant in respect of these general terms not only to ensure respect for the principle of *nullem crimen sine lege*, but also to adhere to the scope of liability authorised in the statutes. The legitimacy of international criminal law depends on

⁸⁶ ICTY Statute, art 7(3); ICTR Statute, art 6(3); ICC Statute, art 28.

⁸⁷ *Prosecutor v Halilović* (Judgment) IT-01-48-T (16 November 2005) para 54.

⁸⁸ Moreillon (n 53) para 225.

⁸⁹ G Boas, 'Omission Liability at the International Criminal Tribunals – A Case for Reform' in S Darcy and J Powderly (eds) *Judicial Creativity at the International Criminal Tribunals* (OUP, Oxford, 2010) 204.

anchoring the general rules of individual liability in the state practice from which these terms emerged.

International courts have, regrettably, never made any effort to articulate the state practice in respect of liability for 'culpable omission'. The first two Appeals Judgments to address the question quite properly did address omissions under the rubric of direct perpetration, not aiding and abetting. The first ever finding of culpable omission was decided *proprio motu* by the Appeals Chamber in *Blaškić*. A group of civilian detainees had been used as human shields directly in front of the accused's glass-fronted headquarters. The Appeals Chamber determined that there was no evidence to support the Trial Chamber's finding that this had been done pursuant to Blaškić's orders, but nevertheless felt that superior responsibility did not adequately capture the accused's culpability. Although finding that 'criminal responsibility generally requires the commission of a positive act', the Appeals Chamber asserted that an 'exception' arises from the legal duty 'imposed, *inter alia* as a commander, to care for the persons under the control of one's subordinates'. Two articles of the Geneva Conventions were relied upon as the basis for this duty, requiring in substance that detainees must 'at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity'.⁹⁰ The Appeals Chamber found that Blaškić was 'aware' of the condition of the detainees and yet engaged in 'an intentional omission' and a 'willful failure' to discharge this duty.⁹¹ The Trial Chamber also found that the accused's elevated 'degree of concrete influence' compelled a conviction under Article 7(1) of the ICTY Statute, rather than merely superior responsibility under Article 7(3).⁹² The Appeals Chamber commented that the Trial Chamber had been 'correct in substance' in convicting accused under 7(1), although its proper characterisation was not ordering, but rather 'perpetration of a crime of omission pursuant to Article 7(1)'.⁹³

The Appeals Chamber's reasoning in *Blaškić*, as in the case of Šljivančanin, can be criticized for failing to substantiate that the duty was analogous to a duty of guarantee, as that concept is understood in domestic law. One may also question whether it was appropriate to impute custody directly to Blaškić via his subordinates. The reasoning is nevertheless substantially more satisfactory than the 'aiding and abetting by omission' approach. Most importantly, the Appeals Chamber understood in that case that Blaškić's alleged failure to protect the prisoners had to be assessed as an alleged perpetration, with the requisite mental state of direct intent. In other words, the passive conduct must be such that it was possible to infer a guilty mind in respect of the criminal harm. No such analysis was undertaken in respect of Šljivančanin. On the contrary, Šljivančanin was convicted simply on the

⁹⁰ Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (1949) 75 UNTS 287, art 27; *Prosecutor v Blaškić* (Judgment) IT-95-14-A (29 July 2004) para 663, fn 1384.

⁹¹ *Blaškić* (Appeal Judgment) (n 90) paras 663, 668.

⁹² *Ibid* para 668.

⁹³ *Ibid* paras 663, 670.

basis that he had not discharged, or adequately attempted to discharge, the duties that were allegedly incumbent upon him in the circumstances.

The *Blaškić* approach was also followed by the Appeals Chamber in *Ntagerura*. The Prosecution at trial had contended for a far broader duty than recognised in *Blaškić*, claiming that the accused had failed in his duty under Rwandan law to 'ensure the protection and safety of the civilian population with his prefecture'.⁹⁴ This was characterised as 'omission as a principal perpetrator'. The Trial Chamber dismissed the claim on factual grounds, namely that the accused did not have adequate means or the legal authority to discharge his supposed obligation.⁹⁵ The Appeals Chamber addressed the accused's liability under the rubric of being an alleged 'principal perpetrator' for his 'culpable omission'.⁹⁶ It also addressed the Prosecution's argument that the accused's 'knowledge of such massive crimes and his inaction or silence amount to culpable omission or gross negligence or conduct that is tantamount to acquiescence in, or tacit approval of, or aiding and abetting the crimes'. The Appeals Chamber rejected that this form of passivity is encompassed by aiding and abetting:

[C]riminal responsibility for an omission, which leads to a conviction as the principal perpetrator of the crime, has to be distinguished from aiding and abetting a crime by encouragement, tacit approval or omission, amounting to a substantial contribution to the crime. In the Notice of Appeal, the Prosecution's arguments are exclusively related to the issue of criminal responsibility for an omission. The issue of Bagambiki's responsibility for aiding and abetting the crimes by his tacit approval is raised only in the Appeal Brief, without the Prosecution having first sought leave to vary its grounds of appeal. Accordingly, the Appeals Chamber declines to address this issue further.⁹⁷

The Appeals Chamber, albeit by way of pleading rules, thus excluded culpable omission from the scope of aiding and abetting. The former had been pleaded in the notice of appeal and could be entertained; the latter had not and was rejected.

The Appeals Chamber had nevertheless, even after *Blaškić*, contemplated the possibility that there might be such a thing as 'aiding and abetting by omission proper'. In *Brđjanin*, it remarked in an almost sceptical tone that 'it has so far declined to analyse whether omission proper may lead to individual criminal responsibility for aiding and abetting'.⁹⁸ The implication of this phrase is that the existence of this form of liability should not be taken for granted. In contrast, the *Orić* Appeals Chamber seems to have presumed, but without any analysis,

⁹⁴ *Prosecutor v Ntagerura* (Judgment and Sentence) ICTR-99-46-T (25 February 2004) para 658.

⁹⁵ *Ibid* para 660.

⁹⁶ *Ntagerura* (Appeal Judgment) (n 30) paras 331, 333, 335.

⁹⁷ *Ibid* para 338.

⁹⁸ *Brđjanin* (Appeal Judgment) (n 52) para 274.

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procedure, makes a dock identification.¹⁵³ In such circumstances, the judge should warn the jury of this heightened risk of a false identification.¹⁵⁴

Although it has been held that it would be wrong to apply one approach to dock identifications for minor offences and another for more serious offences,¹⁵⁵ in *Barnes v Chief Constable of Durham*,¹⁵⁶ the Divisional Court held that dock identifications were customary in magistrates' courts, in relation to driving offences at least, and that if, in every case where the defendant did not distinctly admit driving there had to be a formal identification procedure, the whole process of justice in a magistrates' court would be severely impaired. This approach was followed in *Karia v DPP*,¹⁵⁷ a case of speeding and failing to produce insurance and other documents, where the court rejected a submission that *Barnes v Chief Constable of Durham* could be distinguished on the basis that in that case the defendant had been arrested and interviewed, whereas Karia was summonsed and had had no opportunity to explain that he was not the driver.

Statements admissible as part of the *res gestae*

The common law principle of *res gestae*, which is considered in [Chapter 12](#), renders admissible all those events and statements which may be said to constitute a part of a transaction which is in issue. For example, in *R v Fowkes*¹⁵⁸ the accused, charged with murder, was commonly known, in the circumstances somewhat unfortunately it may be thought, as 'the butcher'. The son of the deceased gave evidence that he was sitting in a room with his father and a police officer, that a face appeared at the window through which a shot was fired, and that he thought the face was that of the accused. Both the son and the police officer, who had not seen the face, were allowed to give evidence that the son, on seeing the face, had shouted, 'There's Butcher'. A statement forming part of the *res gestae* is admissible at common law as evidence of the matters stated and also as evidence of consistency insofar as it confirms testimony given by the witness to the same effect. In criminal proceedings the common law rules in this regard have been preserved by the 2003 Act.¹⁵⁹ In civil proceedings, a previous statement forming part of the *res gestae* may only be adduced with the leave of the court.¹⁶⁰

Statements in documents used to refresh the memory and received in evidence

As we have seen earlier in this chapter, where a party, or his advocate on his behalf, cross-examines a witness on a document used by him to refresh his memory, and goes beyond the parts relied upon by the witness, the document may be received in evidence. As we have also seen, in civil proceedings, statements in the document are admitted as evidence of the matters stated; and the same applies in criminal proceedings, provided that the statement was made, as opposed to verified, by the witness. Where such statements are received in evidence, they may also go to the consistency of the witness.

¹⁵³ Per Lord Rodger in *Holland v Her Majesty's Advocate* [2005] HRLR 25 at [48].

¹⁵⁴ *Lawrence v R* [2014] UKPC 2.

¹⁵⁵ See *North Yorkshire Trading Standards Dept v Williams* (1994) 159 JP 383, DC.

¹⁵⁶ [1997] 2 Cr App R 505, DC.

¹⁵⁷ (2002) 166 JP 753, QBD.

¹⁵⁸ (1856) *The Times*, 8 Mar, Assizes.

¹⁵⁹ Section 118(1)4.

¹⁶⁰ See the Civil Evidence Act 1995, s 6(2)(a) (see [Ch 11](#)).

Unfavourable and hostile witnesses

The rule against a party impeaching the credit of his own witness

A party seeking to elicit evidence in support of his version of the facts in issue may call a witness who, in the witness box, fails to come up to proof or gives evidence in support of the other party's version of the facts in issue. A party thus disappointed, in order to remedy the situation, may understandably wish to change course and attack the credibility of the witness. The general rule at common law, however, is that a party is not permitted to impeach the credit of a witness he calls: the party may neither question the witness about, nor call evidence concerning, his bad character,¹⁶¹ convictions, prior inconsistent statements, or bias. In short, if the witness gives adverse evidence, the party may not turn round and cross-examine him as if he were a witness for the opposite party: 'It would be repugnant to principle, and likely to lead to abuse, to enable a party, having called a witness on the basis that he is at least in general going to tell the truth, to question him or call other evidence designed to show that he is a liar.'¹⁶²

Unfavourable witnesses

An unfavourable witness may be defined as a witness who, although he displays no hostile animus to the party calling him, fails to come up to proof or gives evidence unfavourable to the case of that party. At common law, a party is not permitted to impeach the credit of an unfavourable witness by any of the means outlined in the preceding paragraph but may call other witnesses to give evidence of those matters in relation to which the unfavourable witness failed to come up to proof. Thus in *Ewer v Ambrose*,¹⁶³ the defendant having called a witness to prove a partnership and the witness having testified to the contrary, it was held that while the defendant could not adduce general evidence to show that the witness was not to be believed on his oath, he was entitled to contradict him by calling other witnesses. If the rule were otherwise, undue importance would attach to the order in which witnesses are called. As Littledale J observed, 'if a party had four witnesses upon whom he relied to prove his case, it would be very hard that, by calling first the one who happened to disprove it, he should be deprived of the testimony of the other three'.

Hostile witnesses

A hostile witness is a witness who, in the opinion of the judge, shows no desire to tell the truth at the instance of the party calling him, to whom he displays a hostile animus.¹⁶⁴ In a civil case, it seems that a party may call a person even if he has shown signs that he is likely to be a hostile witness by refusing to make a statement.¹⁶⁵ In a criminal case, it appears that if

¹⁶¹ It appears that a party is permitted to adduce evidence of the witness's bad character where the evidence is relevant to an issue in the case but does not discredit him or his credibility in relation to the discrete issue on which he gives evidence: *R v Ross* [2008] Crim LR 306, CA.

¹⁶² Criminal Law Revision Committee, 11th Report, Cmnd 4991 (1972), para 162.

¹⁶³ (1825) 3 B&C 746. See also *Bradley v Ricardo* (1831) 8 Bing 57; cf Hamilton J in *Sumner and Leivesley v John Brown & Co* (1909) 25 TLR 745, Assizes.

¹⁶⁴ See Stephen, *Digest of the Law of Evidence* (12th edn, London, 1948) Art 147.

¹⁶⁵ See CPR r 32.9, whereby a party unable to obtain a witness statement may seek permission to serve a witness summary instead (see Ch 5).

a person refuses to assist the prosecution or court, or claims to be no longer able to remember anything, the judge has a discretion to hold a *voir dire* in order to decide whether to prevent him from being called.¹⁶⁶ However, it has also been held that the prosecution may call a person who has shown signs that he is likely to be a hostile witness, for example by retracting a statement, or making a second statement, prior to the trial.¹⁶⁷ In *R v Mazekelua*¹⁶⁸ the prosecution called a person who had shown every sign that he would be a hostile witness, had him treated as a hostile witness, and cross-examined him on the contents of a video recording of an interview that the judge had earlier ruled should not stand as his evidence-in-chief because it was not in the interests of justice for that to happen.¹⁶⁹ It has also been held that where an accused calls a witness to give evidence against a co-accused, he may, if appropriate, apply to have him treated as hostile notwithstanding that he was expected to resile from what he said previously, and the previous inconsistent statement, if proved, will be evidence of the truth of its contents under s 119 of the Criminal Justice Act 2003.¹⁷⁰

Although the question whether a witness is hostile is for the judge alone, the evidence and demeanour of the potentially hostile witness should usually be tested in the presence of the jury.¹⁷¹ It is only in very exceptional cases that a *voir dire* should be held to decide whether or not a witness who has yet to be called might prove to be hostile.¹⁷² Equally, once a witness has started to give his evidence, a *voir dire* before a decision on whether to treat him as hostile is only appropriate in exceptional circumstances, because the jury may see the witness apparently giving evidence in one frame of mind and then see a complete turn-around after events which have taken place in their absence.¹⁷³

At common law a judge may allow cross-examination of a hostile witness by the party calling him.¹⁷⁴ An application to treat a witness as hostile may be made at any time during the witness's evidence, even at the late stage of re-examination.¹⁷⁵ The judge has a discretion whether to grant leave to cross-examine and his decision will seldom be challenged successfully on appeal.¹⁷⁶ In deciding whether a witness is not merely unfavourable but should be treated as hostile, the judge may take into account the attitude and demeanour displayed by the witness, his willingness to cooperate, and the extent to which any prior statement made by him is inconsistent with his testimony. If a hostile witness gives evidence contrary to an earlier statement, or fails to give the evidence expected, the party calling him and the trial judge should first consider inviting him to refresh his memory from material which it is

¹⁶⁶ *R v Honeyghon and Sayles* [1999] Crim LR 221, CA. See also *R v Dat* [1998] Crim LR 488, CA.

¹⁶⁷ See *R v Mann* (1972) 56 Cr App R 750, CA; *R v Vibert* (21 Oct 1974, unreported), CA; and *R v Dat* [1998] Crim LR 488, CA.

¹⁶⁸ [2011] EWCA Crim 1458.

¹⁶⁹ See Youth Justice and Criminal Evidence Act 1999, s 27 (see Ch 5).

¹⁷⁰ *R v Osborne* [2010] EWCA Crim 1981. Cf, in the case of a prosecution witness, *R v Dat* [1998] Crim LR 488, CA: the prosecution should limit the damage which might occur as a result of wide-ranging cross-examination on the previous statement. Section 119 of the 2003 Act is considered at nn 188–192.

¹⁷¹ *R v Darby* [1989] Crim LR 817, CA. Cf *R v Jones* [1998] Crim LR 579, CA.

¹⁷² *R v Olumegbon* [2004] EWCA Crim 2337.

¹⁷³ *R v Khan* [2003] Crim LR 428, CA.

¹⁷⁴ It appears that the party calling the witness retains the right to *re-examine* him on any new matters arising out of cross-examination by the other party to the action: *R v Wong* [1986] Crim LR 683 (Crown Court).

¹⁷⁵ *R v Powell* [1985] Crim LR 592, CA.

¹⁷⁶ *Rice v Howard* (1886) 16 QBD 681 and *Price v Manning* (1889) 42 Ch D 372, CA.

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Laurent Moreillon

L'infraction par omission
Etude des infractions à la vie et à l'intégrité corporelle
en droits anglais, français, allemand et suisse



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L'infraction par omission

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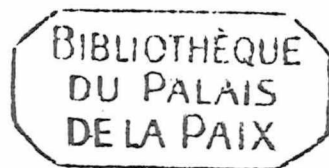
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*A Marianne,
à Matilda,*

*à Clapham, Battersea et Earlsfield
à Huna Bay, Orkney...*

«When a child, even of tender years, is caught out in some minor peccadillo, such as breaking the teapot, his common reaction will be to say "I wasn't *doing* anything...". At a very early age, children grasp the notion that if you did not *cause* a consequence, you *cannot* incur liability for it».

*Brian HOGAN, Omissions and the duty myth, in :
Criminal Law, Essays in honour of J.C. SMITH, p. 85*

commission par omission²⁰³. La jurisprudence, quant à elle, adopte une attitude plus nuancée et admet qu'il existe certaines situations d'omission tombant sous le coup de la loi pénale. Enfin, en droit anglais, il n'existe à notre connaissance aucune solution préconisée par la jurisprudence ou la doctrine : de par son côté pragmatique, le droit anglais cherche avant tout à qualifier de cas en cas les types de comportement sans s'encombrer de théories générales²⁰⁴.

1.3.3.2. La théorie de l'équivalence entre l'omission et l'action

64 A supposer que le comportement incriminé définisse une omission et non une action, il reste à déterminer à quelle condition il est punissable. Mis à part le droit français qui adopte une position nuancée, les droits anglais, allemand et suisse posent la double exigence de l'équivalence entre l'omission et l'action et de la violation d'un devoir juridique.

65 Qu'il s'agisse de droit anglo-saxon ou de droit continental, l'infraction de commission par omission définit la plupart du temps un délit matériel et non formel. En pareil cas, l'élément constitutif est matérialisé par l'existence d'un dommage. L'imputabilité ne pose guère de problèmes, s'agissant d'un délit d'action : l'auteur est punissable pour avoir adopté un comportement actif qui est à l'origine du dommage. La question est plus délicate lorsque l'infraction caractérise une omission : l'auteur n'est responsable qu'à la condition que son comportement puisse être rattaché, quantitativement et qualitativement, à une action punissable. En d'autres termes, l'omission n'est illicite qu'à la condition qu'elle équivale à une action punissable (théorie de l'équivalence).

66 A certains égards, la théorie de l'équivalence entre l'action et l'omission est très proche de l'idée de causalité entre l'omission et le préjudice. Bien que semblables, ces deux notions sont fondamentalement différentes : la théorie de l'équivalence permet de déterminer le caractère illicite d'un comportement passif. La causalité quant à elle permet de définir si seul ce comportement est à l'origine du résultat.

1.3.3.2.1. Droit anglais

67 Malgré le développement du *statutory law* et l'introduction de lois particulières telles que l'*Offences Against the Person Act 1861* et l'*Homicide Act 1957*, la notion d'homicide (*manslaughter*) ou de meurtre (*murder*) demeure à l'heure actuelle une institution de *common law*. L'infraction de commission par omis-

sion caractérise un développement spectaculaire, en droit de *common law*, de l'homicide. Elle connaît une évolution autonome, en dehors du *statutory law*. Elle demeure en conséquence une pure institution de droit prétorien.

68 La définition classique du *murder* est celle de COKE²⁰⁵. En dépit de certaines modifications qui lui ont été imposées par l'*Homicide Act 1957*²⁰⁶, elle est demeurée inchangée :

«*Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in rerum natura under the King's peace, with malice aforethought, either expressed by the party or implied by law, so as the party wounded, or hurt, etc. die of the wound or hurt, etc. within a year and a day after the same.*»

La définition de *manslaughter* (homicide simple) est identique à celle du *murder* à la différence que les termes *with malice aforethought, either expressed or implied* ne sont pas repris²⁰⁷.

69 L'acte de tuer (*killeth*) englobe, selon la doctrine et la jurisprudence, aussi bien les situations d'action que d'omission²⁰⁸. Encore s'agit-il de déterminer si l'omission équivaut à une action et viole un devoir juridique d'agir.

70 Comme nous l'avons déjà relevé²⁰⁹, le droit anglais punit essentiellement les comportements intentionnels (*wilful intention*) ou qui caractérisent une absence de scrupules (*recklessness*). Rares sont les situations de négligence tombant sous le coup de la loi pénale (*gross negligence*)²¹⁰. Dès lors, le rattachement de l'omission à l'action est fonction de l'intensité de la volonté criminelle de l'auteur. Il convient dès lors de distinguer selon que l'auteur omet délibérément d'agir ou demeure inactif à la suite d'un comportement téméraire, voire négligent.

71 Lorsque l'auteur omet délibérément d'agir, soit lorsqu'il a voulu le résultat en fermant les yeux face à un risque évident, la répression sociale est telle qu'on assimile l'omission à une action pure²¹¹. Pour certains auteurs, l'absence de mouvement, en pareille circonstance, caractérise une manifestation plus grande de la personnalité de l'auteur que l'action positive (*conscious non-motion is a*

²⁰⁵ COKE, 3 Inst. 47.

²⁰⁶ Voir le texte du § 1(1) Homicide Act 1957.

²⁰⁷ WILLIAMS, Textbook, p. 258; SMITH/HOGAN, p. 331.

²⁰⁸ SMITH/HOGAN, p. 49.

²⁰⁹ Supra, 1.2.1.3. no. 28.

²¹⁰ Infra, 2.2.1.3., no. 167.

²⁰³ Infra, 1.3.3.2.2. nos 75ss.

greater assertion of personality than casual acting)²¹². Dans l'affaire GIBBINS & PROCTOR²¹³, le *Court of Appeal* a considéré que l'attitude du père qui fermait les yeux devant les mauvais traitements infligés à sa fille par sa femme, caractérisait un *murder* et non un *manslaughter*. Cette règle est dans l'ensemble acceptée par la doctrine²¹⁴.

72 Lorsque l'inaction de l'auteur est la conséquence d'un comportement négligent et téméraire, l'assimilation de l'omission à l'action n'est admise que lorsque l'acte incriminé apparaît choquant aux yeux de la morale sociale. Comme le relève ASHWORTH²¹⁵, savoir si l'omission est punissable est une question d'interprétation de la norme au regard du respect de la protection des mœurs sociales et de la société en général : il appartient aux Juges de trouver l'équilibre de la formulation de la règle entre le respect de la légalité (interdiction d'un raisonnement par analogie) et des considérations basées essentiellement sur la réprobation générale²¹⁶. Dès lors, une simple (*mere*) omission n'est pas punissable, car ne choquant pas la société. En revanche, une omission caractérisée (*deliberate*) est assimilée à l'acte de tuer (*kill*)²¹⁷. La thèse de l'équivalence, en droit anglais, se confond pratiquement avec le jugement moral du comportement de l'auteur.

73 Quelques exemples illustreront ces principes : contrairement au droit continental, le droit anglais admet qu'il n'existe pas de devoir général de porter assistance à autrui²¹⁸. Celui qui assiste en spectateur à la noyade d'un enfant ne commet rien d'autre qu'une simple (*mere*) omission non punissable²¹⁹. En revanche, si le spectateur est le père de l'enfant, le gardien du parc ou toute autre personne chargée de la surveillance, l'attitude passive caractérise une *deliberate omission* qui, par le jeu de l'équivalence sociale, caractérise un homicide (*manslaughter*) ou un meurtre (*murder*) selon la volonté criminelle de l'auteur²²⁰. Il en va de même dans l'exemple déjà cité de l'acte d'euthanasie : celui qui déconnecte un appareil sans avoir épuisé les possibilités thérapeutiques à disposition adopte un comportement punissable qualifié de *manslaughter* ou de *murder*. En revanche, lorsque l'action s'inscrit dans un contexte de traitement

²¹² CLARKSON, *Understanding*, p. 54 et les références citées.

²¹³ Gibbins & Proctor (1918) 13 Crim. App. Rep. 134, CA.

²¹⁴ WILLIAMS, *Textbook*, 262.

²¹⁵ ASHWORTH (1989) LQR 436-437.

²¹⁶ ASHWORTH (1989) LQR 437-438.

²¹⁷ Lord PHILMORE LJ, in Lowe [1973] QB 702, 709.

²¹⁸ Sauf en matière maritime, voir supra 1.3.2.1.1. no 41.

²¹⁹ GLAZERBROOK (1960) LQR 386-387; CLARKSON, *Understanding*, 55.

désespéré, le mobile apparaît honorable et le comportement sera assimilé à une *mere omission* non punissable²²¹. Le droit américain fournit des exemples frappant sur ce point²²².

1.3.3.2.2. Droit français

74 A la différence des droits anglais, allemand et suisse, le droit pénal français ne reconnaît pas, formellement en tout cas, le délit de commission par omission.

75 Sous l'empire de l'ancien régime, le droit pénal français, profondément influencé par le droit privé, punissait aussi bien le comportement actif que passif. En responsabilité délictuelle, DOMAN²²³ rappelait déjà que «celui qui, pouvant empêcher un dommage, que quelque devoir l'engageait de prévenir, y aura manqué, pourra être tenu selon les circonstances». En droit criminel, LOYSEL admettait l'existence d'infractions de commission par omission : «celui qui n'empêche, pêche»²²⁴. Cette assimilation pure et simple de l'omission à l'action a été abandonnée en 1901 à l'occasion de la célèbre affaire de la séquestrée de Poitiers. Les faits étaient les suivants : la victime, majeure et aliénée mentale, habitait chez sa mère (veuve); son frère, chargé de s'en occuper, l'avait laissée mourir faute de soins. En première instance, le frère fut condamné pour complicité d'homicide par omission. Il fut acquitté en seconde instance par la Cour d'appel de Poitiers²²⁵ : les Juges avaient considéré à l'époque que le délit de violence (ayant entraîné la mort) exigeait un comportement actif (acte de violence) et que l'omission de soins ne pouvait de ce fait être assimilable à des «violences».

76 Cette jurisprudence a consacré le principe de la légalité des délits et des peines dans le Code de 1810²²⁶. Elle conserve aujourd'hui toute sa force, le nouveau Code pénal français du 22 juillet 1992 n'ayant pas étendu la répression pénale aux délits de commission par omission²²⁷. Aussi le droit pénal français est-il extrêmement attaché au principe de la légalité des délits et des peines²²⁸. S'agissant, en tout cas, d'infractions intentionnelles à la vie et à l'intégrité corporelle (articles 295ss aCPF et 221-1ss nCPF), il n'y a pas de place pour un délit de

²²¹ Voir les références citées à la note 180 supra.

²²² Ibidem.

²²³ Livre II, titre VIII, Section IV, § VIII.

²²⁴ LOYSEL, *Institut coutumier*, Livre VI, Titre I no. 5.

²²⁵ Dalloz, Répertoire 1902. 2. 81, note Le Poittevin.

²²⁶ Ibidem. Voir également STEFANI/LEVASSEUR/BOULOC, no 173; JEANDIDIER, p. 257.

²²⁷ Pour le code de 1810, voir notamment: MERLE/VITU I, nos 436-437; PRADEL, no 324.

commission par omission. Tout au plus le comportement intentionnel de l'auteur peut-il caractériser une non assistance à personne en danger (articles 63 alinéa 2 aCPF et 223-6 nCPF) ou, si la victime est un enfant placé sous la protection ou la garde de l'auteur, un mauvais traitement d'enfants (articles 312 aCPF et 227-15 nCPF). La question de l'équivalence entre l'action et l'omission ne se pose guère, ces deux infractions étant clairement définies par la loi.

77 La jurisprudence de la Cour de cassation est cependant nuancée, s'agissant de certains délits intentionnels. La doctrine est de plus en plus unanime à admettre qu'il existe, à côté des délits d'omission pure clairement réglementés par la loi, des délits de commission par omission²²⁹. A quelques reprises, la Chambre Criminelle a assimilé certaines omissions à des comportements actifs punissables : ainsi, l'agent de police qui laisse son collègue commettre un cambriolage se rend coupable de complicité de vol par abstention²³⁰; le fonctionnaire des douanes qui tolère des actes de contrebande de la part de tiers commet un acte de complicité par abstention à la législation sur les douanes²³¹; l'employeur qui omet de fournir certains renseignements ou qui fournit des renseignements erronés à l'inspecteur du travail se rend coupable d'obstacle à l'accomplissement des devoirs de ce dernier²³², etc.

Dans chacune de ces hypothèses, la Cour de cassation a justifié l'assimilation de l'omission à une action par l'existence d'un devoir juridique incombant à l'auteur. Incontestablement, et malgré le caractère récent de cette évolution jurisprudentielle, le droit français se rapproche de plus en plus des conceptions anglaises, allemandes et suisses.

78 S'agissant d'infractions par négligence, et plus particulièrement d'infractions à la vie et à l'intégrité corporelle (articles 319-320 aCPF et 221-6, 222-19ss nCPF), la doctrine admet également l'existence d'infractions de commission par omission²³³. Certes, telles qu'elles sont formulées, les dispositions de l'ancien comme du nouveau Code pénal français définissent plutôt un délit général d'imprudence ou de négligence, au point que l'on serait enclin à admettre que seul le comportement (actif ou passif) fautif et causal caractériserait l'infraction²³⁴. On ne doit cependant pas perdre de vue que ces dispositions recourent, comme en

droit suisse ou en droit allemand²³⁵, à des circonstances qui englobent incontestablement des cas d'omission : ainsi, le fait d'être la «cause» d'un homicide ou de lésions corporelles par négligence, de même le fait de ne pas observer les règlements et prescriptions administratives. A côté et en plus de l'infraction générale d'imprudence, la jurisprudence tend de plus en plus à admettre l'existence de situations particulières fondant pour l'auteur un véritable devoir d'agir.

Comme nous le verrons, la jurisprudence a connu une évolution importante ces dernières années dans le domaine des activités présentant un certain risque pour autrui²³⁶. A maints égards, le droit prétorien a dû définir quel type d'omission tombait sous le coup de la loi pénale.

79 A cela s'ajoute le fait que les articles 319-320 aCPF et 221-6, 222-19 nCPF présentent de nombreuses analogies avec les dispositions des articles 1382-1383 du Code civil français qui définissent la responsabilité civile de l'auteur d'un dommage²³⁷. Actuellement encore, en droit de la responsabilité civile (délictuelle ou contractuelle), la faute peut consister non seulement en un fait actif (*culpa in committendo*), mais en une simple abstention (*culpa in omittendo*)²³⁸. C'est essentiellement dans le domaine de la faute par négligence que la jurisprudence civile a le plus assimilé l'omission à l'action²³⁹.

Or, on le sait, le droit français connaît le principe de l'unité des fautes pénales et civiles d'imprudence²⁴⁰. Cette jurisprudence, rendue en 1912, est constamment appliquée par la Cour de cassation française²⁴¹, en dépit de nombreuses réserves de la doctrine²⁴². Sous l'empire du Code pénal de 1810, s'il n'y avait pas interdépendance complète de ces deux types de responsabilités²⁴³, l'unicité des

²²⁹ PRADEL, no. 324; MERLE/VITU, I no. 437; JEANDIDIER, pp. 258-259.

²³⁰ JCP 1947 II 3465.

²³¹ Cass. Crim. du 27. 10. 1971, Gaz. Pal. 1972. somm. 2; voir aussi DECOCQ, JCP 1983 I 3124.

²³² Article 631-1 Code du Travail. Voir aussi: Cass. Crim. du 27. 10. 1987, RSC 1988 p. 546, Obs. LEVASSEUR.

²³³ JEANDIDIER, pp. 258-259.

²³⁵ Voir le texte de l'article 117 CPS et du § 222 StGB.

²³⁶ Infra, 3.3.4.3. nos 461ss.

²³⁷ Voir le texte des articles 1382-1383 CCFR.

²³⁸ LE TOURNEAU, nos 2050-2051.

²³⁹ Ibidem; MAZEAUD/TUNC I no 536 et les références citées.

²⁴⁰ Voir l'arrêt de principe de la Cour de Cassation civile du 18. 12. 1912, in Sirey 1914. 1. 249; D. 1915. 1. 17.

²⁴¹ Voir notamment Cass. Civ. du 1. 12. 1930, Gaz. Pal. 1931. 1. 80; tout récemment: Cass. Civ. du 18. 11. 1986, Bull. civ. 1986 no 343, RSC 1987 p. 427, Obs. LEVASSEUR.

²⁴² Voir notamment CHAVANNE, RSC 1962 pp. 246-247; ROUX, in Dalloz-Sirey 1927. 1. 1933; VINEY, nos 156-157; JEANDIDIER, pp. 366-367.

²⁴³ En principe, l'assimilation de la faute pénale à la faute civile se limite à la faute délictuelle des articles 1382-1383 CCFR: STARCK I no 22 p. 15 et VINEY, nos 156-157. Ce dernier auteur exclut l'assimilation de la faute contractuelle ainsi que le fait de la chose ou du gardien au sens des articles 1384 al. 1er et 1385 CCFR à la faute pénale. Pour DURRY, la faute contractuelle qui

fautes pénale et civile ne pouvait être méconnue. Notamment, la jurisprudence civile ayant eu l'occasion de développer la notion d'obligation de sécurité (devoir juridique contractuel ou extra-contractuel de veiller sur la sécurité d'autrui)²⁴⁴, il ne fait aucun doute que cette tendance du droit de la responsabilité civile s'est manifestée dans le Code de 1810²⁴⁵. Le nouveau Code pénal français du 22 juillet 1992 va encore plus loin puisqu'il inscrit précisément, à titre d'élément constitutif de l'infraction d'homicide par négligence (article 221-6 nCPF) ou de lésions corporelles involontaires (article 222-19 nCPF), le *manquement à une obligation de sécurité ou de prudence*. Il s'agit incontestablement de la consécration législative de l'identité des fautes civile et pénale.

80 Ainsi, s'il n'existe pas de véritable «théorie de l'équivalence» en droit français permettant de déterminer à quelle condition l'omission peut être rattachée à une action punissable, la jurisprudence tend aujourd'hui à assimiler certaines formes d'omission de mesures de précaution à une action tombant sous le coup de la loi pénale.

1.3.3.2.3. Droit allemand

81 Des quatre systèmes de droit étudiés dans cet ouvrage, le droit allemand est de loin celui qui a connu l'évolution la plus spectaculaire. Dès la fin du XIX^e siècle déjà, la doctrine et la jurisprudence vont admettre en effet l'existence de délits de commission par omission.

82 Jusqu'en 1975, le droit allemand a développé l'infraction de commission par omission par le biais d'une jurisprudence créatrice, malgré le principe de la légalité des délits et des peines²⁴⁶. Sous l'impulsion de la doctrine, désireuse de circonscrire ce type d'infraction, le législateur allemand a introduit en 1975 dans le Code pénal allemand du 15 mai 1875 une nouvelle disposition (§ 13 StGB) définissant de façon générale ce délit. La *ratio legis* était de donner une base légale à cette infraction afin de limiter le risque d'interprétation analogique prohibée par les §§ 1 *Strafgesetzbuch* et 103 alinéa 2 *Grundgesetz*²⁴⁷. Comme nous le verrons, sur de nombreux points, le but n'a guère été atteint²⁴⁸.

négligence: DURRY, Obs. in RTDC 1974 pp. 814-815; voir aussi STARCK II nos 1724-1725 et JCP 1969 II 15937.

²⁴⁴ Infra, 3.3.4.2. nos 438ss.

²⁴⁵ Dans le même sens: LEVASSEUR Obs, in RSC 1967 pp. 451ss, sp. 452.

²⁴⁶ Voir le texte du § 1 StGB

²⁴⁷ Sur ces questions, voir infra, 4.2.5. nos 603ss.

83 Aux termes du § 13 alinéa 1 *Strafgesetzbuch*, celui qui s'abstient d'éviter un résultat, constituant un élément de l'infraction, n'est punissable qu'à la condition qu'il soit légalement tenu d'éviter la réalisation de ce résultat et que son omission équivale à la réalisation active d'un élément constitutif légal de l'acte incriminé²⁴⁹. Cette disposition pose deux conditions cumulatives qui définissent les exigences de l'équivalence de l'omission à l'action : l'équivalence entre l'effet d'un comportement (passif) et une action positive (*Handlungs- oder Bewirkung-säquivalenz*) et l'équivalence de modalités entre l'action et l'omission (*Modalitätenäquivalenz*)²⁵⁰.

84 L'équivalence entre l'effet d'un comportement (passif) et une action positive. Selon le § 13 alinéa 1 *Strafgesetzbuch*, est punissable comme auteur d'une action directe, celui qui s'abstient d'agir alors qu'il y était tenu par un devoir juridique. C'est la première condition posée par cette disposition. Le droit allemand n'assimile l'omission à l'action qu'à la condition que l'auteur, juridiquement, ait eu l'obligation d'intervenir pour empêcher un résultat causal²⁵¹. Dans ce contexte, la violation du devoir juridique caractérise l'illicéité de l'abstention.

85 L'équivalence des modalités de comportements actifs et passifs. Le § 13 alinéa 1 *Strafgesetzbuch* exige en outre que l'omission reprochée à l'auteur saisisse les éléments constitutifs d'une infraction expressément définie dans la partie spéciale du Code pénal. En d'autres termes, l'abstention, pour qu'elle soit punissable, doit pouvoir être assimilée à un comportement (actif) prohibé par le droit pénal. Ainsi l'escroquerie (§ 263 StGB) suppose une tromperie de la part de l'auteur (*Täuschung*). Son omission (par exemple, ne pas veiller à la conservation du patrimoine de la victime) ne saurait être assimilée sans autre examen à la commission active de l'infraction : encore faut-il que l'attitude de l'auteur corresponde à l'un des éléments constitutifs de l'infraction²⁵². Pour la doctrine et la jurisprudence, il s'agit de déterminer de cas en cas, en interprétant la norme, si l'omission en cause peut être assimilée à une action²⁵³. C'est dans l'examen

²⁴⁹ Nous empruntons cette traduction à ANCEL/MARX, Collection des codes pénaux européens, 1981, Tome V, pp. 320ss, sp. 331.

²⁵⁰ Sur ces questions, voir notamment RUDOLPHI, SK Bem. 16ff zu § 13 StGB.

²⁵¹ RUDOLPHI, ibidem; SCHOENKE/SCHROEDER/STREE, Bem. 2 et 4 zu § 13 StGB; DREHER/TROENDLE, Bem. 17 zu § 13 StGB.

²⁵² RUDOLPHI, ibidem; SCHOENKE/SCHROEDER/STREE, ibidem; ROXIN, JuS 1973, p. 199.

Law of Evidence

Nicola Monaghan



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admissible under s. 76(1), PACE Act 1984 as confession evidence to prove the truth of the statement.

Cross-reference

Refer to Chapter 5 on Confession evidence for a more detailed discussion of mixed statements and the admissibility of confession evidence and the rules of exclusion under s. 76(2), PACE Act 1984.

10.4.4 Unfavourable and hostile witnesses

This paragraph deals with problematic witnesses and explores the distinction between witnesses who are merely unfavourable to the case of the party calling them, and witnesses who are deemed hostile by the judge.

Unfavourable witnesses

An unfavourable witness is one who fails to 'come up to proof'. This means that the witness does not say in testimony what he was expected to say in examination-in-chief, i.e. what was in his witness statement or proof of evidence, or he may even go so far as to give evidence of the opposite of that which he was called to give. An unfavourable witness may be an honest witness who has simply forgotten the details of the matter about which he is asked, or he may be an honest but mistaken witness. We have already learnt that counsel may not generally lead a witness in examination-in-chief or cross-examine the witness on any previous inconsistent statements or his bad character. Similarly, counsel may not cast imputations on the credibility of his own witness because he adduces the evidence of that witness in order to prove that the witness is truthful and credible. On that basis, counsel may not, having called the witness, subsequently argue that the witness is not credible. Where it transpires that a witness is an unfavourable witness, counsel can do little other than hope that the testimony of any other witnesses that he calls (if indeed there are any), or other evidence in the case, prove the matters which the unfavourable witness fails to testify favourably upon. If it does, counsel will invite the jury to prefer the evidence of those witnesses that contradict the unfavourable witness.

Hostile witnesses

By contrast, a hostile witness is one who, in the opinion of the judge, demonstrates a hostile mind⁴³ in examination-in-chief, who clearly intends not to tell the truth to the court. A witness may only be deemed to be a hostile witness with the leave of the judge. A hostile witness does not come up to proof but he is not merely a mistaken or forgetful witness. Rather, a hostile witness is one who deliberately chooses to give evidence which contradicts his original witness statement or proof of evidence whether due to fear, hostility or an unwillingness to be involved in the proceedings.

⁴³ *Greenough v. Eccles* (1859) 5 CBNS 786 at 794.

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A Commentary on the Rome Statute

WILLIAM SCHABAS

OXFORD

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Drafting of the provision

The draft statute adopted by the International Law Commission did not contemplate giving the proposed court jurisdiction over false testimony or perjury. Instead, it specified that 'States Parties shall extend their laws of perjury to cover evidence given under this Statute by their nationals, and shall cooperate with the Court in investigating and where appropriate prosecuting any case of suspected perjury'.³ Similarly, the Commission does not appear to have considered the problem of contempt, aside from acknowledging to the Chambers the authority to 'maintain order in the course of a hearing'.⁴

The perspective changed somewhat in the *Ad Hoc* Committee, where it was 'widely held' that perjury should be prosecuted by the international court.⁵ The debate continued in the first sessions of the Preparatory Committee, where the two approaches were juxtaposed.⁶ A proposal by the United States was entitled 'Offenses against the integrity of the Court'. In addition to perjury, the infractions included '[i]nfluencing, impeding or retaliating against officials of the Court', '[o]bstructing the functions of the Court' and contempt.⁷ The final text adopted by the Preparatory Committee consolidated several other proposals, concluding with a *nota bene* explaining that it was not contemplated that all provisions of the *Statute* and the rules concerning the exercise of jurisdiction over 'crimes within the jurisdiction of the Court' would apply to these offences. The provision was entitled 'Offenses or acts against the integrity of the Court'.⁸

At the Rome Conference, the provision was very significantly rewritten. Its title was changed, as was its structure. The concepts in the Preparatory Committee's draft provision were divided into two articles, one dealing with offences against the administration of justice, the other with misconduct before the Court. The offence of '[s]oliciting or accepting a bribe as an official of the Court in connection with his or her official duties' was added. Also, provisions dealing with State cooperation were incorporated in the final version.⁹

Analysis and interpretation

At the *ad hoc* tribunals, what the judges have called 'contempt of court' has been prosecuted by virtue of the so-called inherent power of the institutions, as discussed above. The concept of 'contempt of court' has been described as 'an act or an omission intended to interfere with the due administration of justice'.¹⁰ The International Criminal Tribunal for the former Yugoslavia has held that '[t]he Tribunal possesses an inherent power to hold in contempt those who knowingly and wilfully interfere with the Tribunal's due

³ ILC 1994 Final Report, pp. 58–59. Also, ILC 1993 Working Group Report, p. 122.

⁴ *Ibid.*, p. 54. Also, ILC 1993 Working Group Report, p. 122.

⁵ *Ad Hoc* Committee Report, para. 183.

⁶ Preparatory Committee 1996 Report, Vol. I, paras. 287–288.

⁷ 'Proposal submitted by the United States on offences against the integrity of the Court', UN Doc. A/AC.249/WP.41. Also: Preparatory Committee 1996 Report, Vol. II, pp. 212–213. Other proposals were incorporated into draft rules of procedure and evidence: 'Working paper submitted by Australia and the Netherlands', UN Doc. A/AC.249/L.2, pp. 26–27.

⁸ Preparatory Committee Draft Statute, p. 111.

⁹ 'Report of the Working Group on Procedural Matters', UN Doc. A/CONF.183/C.1/WGPM/L.2/Add.7.

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¹⁰ *Brdanin* (IT-99-36-R77), Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, para. 15.

administration of justice'.¹¹ Although the power to prosecute is set out in one of the Rules of the *ad hoc* tribunals,¹² wherein it is described as an 'inherent power', they have considered that the power 'exists independently' of its codification.¹³

This jurisprudence provides some authority to judges at the International Criminal Court, should they confront situations that are not expressly covered by articles 70 and 71. But they will have to bear in mind that there is an important distinction between the law applicable to the International Criminal Court and that of the *ad hoc* tribunals. In the latter, the judges themselves chose to codify the contempt power in the Rules of Procedure and Evidence that they had adopted. At the International Criminal Court, however, the comparable provisions are found in the *Statute* itself. It would be a bold interpretation for the Court to deem that, whatever the terms of the *Statute*, judges are free to go beyond them because of an 'inherent power'.

Punishable acts (art. 70(1))

Acts punishable by the Court as offences against the administration of justice may be divided into three categories: those involving perjury or false testimony; obstruction of the activities of the Court; and solicitation of bribes. The terms used in the definitions are mainly derived from a proposal by the United States during the Preparatory Committee sessions,¹⁴ and no doubt have been applied and interpreted by American courts. There is no relevant precedent at the international level concerning the construction of expressions like 'corruptly influencing'.

The Court has jurisdiction to prosecute '[g]iving false testimony', to the extent that the person made an undertaking to tell the truth in accordance with article 69(1). Thus, it does not apply when witnesses testify without making the declaration, as is permitted exceptionally.¹⁵ In fact, witnesses are to be warned, prior to testifying, that they are liable to prosecution for false testimony.¹⁶ The Court may also prosecute the offence of '[p]resenting evidence that the party knows is false or forged'.

There does not appear to be much in the way of useful authority concerning perjury from the *ad hoc* tribunals. In one case at the International Criminal Tribunal for Rwanda, an offender pleaded guilty to the offence; consequently, the Trial Chamber did not analyse any legal difficulties or interpret the concept. It also noted that there had been no previous prosecutions for false testimony before either of the *ad hoc* tribunals.¹⁷ A defence lawyer was prosecuted for contempt because he 'put forward a case ... that he knew to be false in material respects'. Milan Vujin, who was counsel to Dusko Tadić, manipulated witnesses 'by seeking to avoid any identification by them in statements of their evidence of persons who may have been responsible for the crimes for which Tadić had been convicted'.¹⁸ He received a substantial fine and

¹¹ *Ibid.*

¹² Rules of Procedure and Evidence [of the International Criminal Tribunal for the former Yugoslavia], UN Doc. IT/32, Rule 77(E); Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rule 77(A); Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 77(A).

¹³ *Brđanin* (IT-99-36-R77), Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, para. 15.

¹⁴ 'Proposal submitted by the United States on offences against the integrity of the Court', UN Doc. A/AC.249/WP.41.

¹⁵ Rules of Procedure and Evidence, Rule 66(2).

¹⁶ See this *Commentary*, art. 69(1).

¹⁷ *GAA* (ICTR-07-90-R77-I), Judgment and Sentence, 4 December 2007, para. 7.

¹⁸ *Tadić* (IT-94-1-A-R77), Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, para. 160.

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in charge' to the jury. This is the point at which the jurors will be informed of the charges and told that it is for them, having heard the evidence, to determine whether the defendant is guilty or not. Under s.44 of the CJA 2003, the prosecution may apply to have a trial conducted by a judge without a jury where there is a real and present danger of jury tampering. This is an exceptional course, which happens very rarely in practice.

Normally, the defendant will be present at his trial, but the court does possess discretion to try the defendant in his absence, for example, where the defendant deliberately absconds from the trial or disrupts the trial (*R v Jones* [2003] 1 AC 1).

Criminal trials normally take place in public, but there are exceptions to this general rule. For example, where a person is charged with an offence under the Official Secrets Acts of 1911 or 1920, the public may be excluded if it would be prejudicial to national safety. Similarly, there are restrictions on the information that the press may publish. For example, under s.1 of the Sexual Offences (Amendment) Act 1992, information identifying a sexual offence complainant may not be published.

Legislation preventing the publication of the identity of rape complainants was first introduced in 1976 (Sexual Offences (Amendment) Act 1976 s.4). The 1992 Act extended this protection to victims of all types of sexual offence. In 2010, the government announced its intention to extend anonymity in rape cases to defendants (HM Government, *The Coalition: Our programme for government*, 2010, para.20). Proponents of the view that those who are accused of rape ought to remain anonymous unless and until they are convicted argue that a special stigma attaches to a rape allegation, which does not go away, even if the defendant is ultimately acquitted. Those in favour of maintaining the status quo suggest that publishing the name of a man accused of rape may encourage other of his victims to come forward. It may be that further research is needed in this area. The government's proposal to grant anonymity was ultimately abandoned on the ground that there was insufficient empirical evidence on which to base a decision to afford anonymity to those accused of rape.

13.14.1 The case for the prosecution

Once the jury has been sworn, the prosecution advocate makes an 'opening speech'. In this speech, the advocate will outline the case against the defendant so as to enable the jurors to more easily understand the evidence they will hear. Following the opening speech, the prosecution advocate 'calls' the prosecution evidence. This will involve bringing witnesses into court to give evidence that will prove the elements of the offence. Where the prosecution calls a witness, the witness is first examined in chief by the prosecution advocate. He may then be cross-examined by the defence advocate. If there are several co-defendants, the witness will be cross-examined by the advocate for each of them in the order in which the defendants' names appear on the indictment. Following all cross-examination, the witness may be re-examined by the prosecution advocate.

In general, where the prosecution serves a witness statement on the defence, the prosecution should call the witness to give live evidence. However, if the defence agrees, the prosecution may read the witness's statement instead (Criminal Justice Act 1967 s.9).

A party is only likely to serve the statement of a witness whose evidence will support his own case. The advocate will have a witness statement, or 'proof of evidence', which will contain the evidence that the witness is expected to give. The advocate will hope that the witness will 'come up to proof', i.e. give evidence in accordance with his statement. Even if the witness fails to come up to proof when giving evidence, the advocate who called the witness is not normally permitted to cross-examine the witness by asking leading questions.

As a general rule, advocates may not ask their own witness 'leading questions' in order to elicit evidence, unless the evidence to which the question is directed is not in dispute. A leading question is one that either suggests the answer to the witness or assumes the existence of facts about which the witness has not yet given evidence. For example, if one of the issues in the case is whether a car was blue, a witness may not be asked 'Was the car blue?' in examination in chief. Instead the advocate should ask 'What colour was the car?'

Unlike examination in chief, leading questions may be asked during cross-examination (*Ex parte Bottomley* [1909] 2 KB 14). The key rule in cross-examination is that the advocate must put his case to the witness to give the witness the opportunity to respond to it. However, cross-examination of a sexual offence complainant relating to that complainant's sexual behaviour on other occasions will require leave of the trial judge under s.41 of the Youth Justice and Criminal Evidence Act 1999.

Leave is not normally required before asking particular questions of a witness. Section 41 of the 1999 Act was passed to address concerns that sexual offence complainants were being questioned inappropriately about their previous sexual behaviour. These types of question could be designed to unsettle the witness, to scandalise, and to attack the victim's character, rather than to elicit the truth about what happened. The law now prevents such questioning unless it is relevant to the case.

Where the defendant has not appointed a defence advocate and is conducting his case personally, the provisions of Chapter 2 of Part 2 of the Youth Justice and Criminal Evidence Act 1999 prohibit him from personally cross-examining sexual offence complainants and certain child witnesses. The court also possesses discretion to prevent the defendant from personally cross-examining witnesses in other types of case. If the defendant declines to appoint an advocate to cross-examine the relevant witness, the court can appoint a qualified legal representative to cross-examine the witness on the defendant's behalf.

The provisions of the 1999 Act concerning cross-examination by the defendant in person provide another example of recent legislation intended to make the process of giving evidence as a witness in a criminal trial less unpleasant. The provisions were enacted in response to two widely publicised cases, in which defendants

acting in person cross-examined complainants who had made allegations of rape against them.

Following cross-examination, the advocate for the party who called a witness is entitled to re-examine the witness. Essentially, the rules that govern examination in chief also govern re-examination, but re-examination should normally only relate to matters that were raised in cross-examination (*Prince v Samo* (1838) 7 Ad & El 627).

13.14.2 Defence submissions of no case to answer

At the close of the prosecution case, the defence may make a submission of 'no case to answer'. This is a submission that no jury, properly directed, could convict on the prosecution evidence. The judge will hear submissions from both defence and prosecution advocates in the absence of the jury and will direct an acquittal if either:

- there is no evidence that the defendant committed the offence with which he is charged; or
- the evidence is so inherently weak or tenuous that, even taken at its highest, a properly directed jury could not properly convict (*R v Galbraith* [1981] 1 WLR 1039).



Example

Bob is charged with theft of a watch. One of the elements of theft which the prosecution must prove is that the property in question belonged to another person. In Bob's case, the prosecution calls no evidence to prove that the watch that was found in Bob's possession belonged to someone else. The jury should be directed to acquit Bob following a defence submission of no case to answer because there is no evidence in relation to an element of the offence with which he is charged.

13.14.3 The case for the defence

If the defendant intends to give evidence himself and call other witnesses of fact, the defence advocate may make an opening speech outlining the defence case and the evidence that will be called on his behalf (under s.2 of the Criminal Evidence Act 1898). In practice, defence opening speeches are rare. Indeed, if the defendant is to be the only defence witness, or if he does not intend to give evidence, the defence advocate is not entitled to make an opening speech.

Where the defendant does testify, s.79 of the Police and Criminal Evidence Act 1984 provides that he must be called before any other defence witnesses unless the court orders otherwise. Defence witnesses (including the defendant) are examined in chief by the defendant's advocate. They may be cross-examined by the advocate for the