



2015

## Foreword

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### Recommended Citation

Dillard, J. Amy (2015) "Foreword," *University of Baltimore Law Review*: Vol. 44: Iss. 3, Article 2.

Available at: <http://scholarworks.law.ubalt.edu/ubl/vol44/iss3/2>

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## FOREWORD

**J. Amy Dillard\***

*Serial* may have hit a cultural sweet spot by reaching fans that love a mystery, those who are attentive to exonerations gained by Innocence Projects, and those who thrive on news from Baltimore's criminal justice system. Countless people have confided in me that they believed the prosecutor's case failed to prove guilt beyond a reasonable doubt, yet they were troubled that no one could sort out who actually killed Hae Min Lee. The search for truth is a trope employed in popular mystery novels, where the author usually gives her readers an answer by the end. Innocence Projects succeed by demonstrating that the convicted prisoner *did not* do it, and often, if DNA is a factor, as a collateral matter, point out who likely did do it. Fans of *The Wire* feel like experts on Baltimore's police department and court system, so looking for corruption and mistakes in the investigation and trial of Adnan Syed makes for a great party game. As a result, every listener wanted closure—a clear indication of whether Syed was guilty or innocent, a clear answer on who killed Hae Min Lee if Syed did not kill her, and a tidy package of the exact mistake in the criminal justice system that could be blamed and corrected in the event of a wrongful conviction. But the study of law is complex and rarely gives definitive answers.

We should accept that the criminal justice system is not infallible. Where the main issue in controversy is identity of the perpetrator, the government often finds itself relying on junk science like fingerprints and handwriting exemplars, highly-unreliable eyewitness testimony, the specter of motive, and jailhouse and accomplice snitches to bolster its case. The “science” at issue in Syed's prosecution involved an analysis of cell tower pings to triangulate the location of Syed's cell phone, and the bolstering came from Syed's friend, Jay.

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\* Associate Professor of Law, University of Baltimore School of Law; J.D., Washington and Lee University Law School; B.A., Wellesley College. I thank Professor Angela Davis for keeping me and others focused on the issue of prosecutorial discretion, and I thank all of the prosecutors who are close to my heart – Joseph Michael and Alejandra Rueda, in particular – for tolerating my pointed questions and engaging in conversation about how they exercise their discretion.

The motive was the age-old spurned lover story, swirled with racist undertones about violent, young Muslim men. And that was enough for the jury and the judge who presided over the trial.

Few people will express an acceptable margin of error in criminal convictions, though the common law allows for errors with its “proof beyond a *reasonable* doubt” standard.<sup>1</sup> On their first day of law school, most of my first-year students can recite William Blackstone’s ratio that “it is better that ten guilty persons escape than one innocent suffer,”<sup>2</sup> and all of them express a belief that the ratio is a good one. Applying these standards in a way that genuinely protects a criminal defendant is much easier when that defendant is hypothetical, and while Adnan Syed is a real person, for every listener of *Serial*, he is a hypothetical. Moreover, I hope we can appreciate the pressure on jurors to stray from the well-worn standards of the presumption of innocence, the defendant’s right to remain silent, and the government’s burden of proof while staring at a photo of the decomposing body of a seventeen-year-old girl. Lay jurors would need to be superheroes of justice to err on the side of the (probably guilty) defendant in the face of the slain innocent.

Parsing the difference between a wrongful conviction and actual innocence is the kind of exercise that makes lay people despise lawyers, but the common law does not present us with a binary. The government might engage in a prosecution of a guilty man but still lack the evidence to sustain its burden of proof beyond a reasonable doubt; hence the guilty are found not guilty. And the converse is also true—the government might engage in the prosecution of an innocent defendant with circumstantial evidence that aligns in a way that justifies the jury’s inferences to result in a proper conviction. If we are more worried about the latter than the former, we must look for trends in those proper convictions of innocent defendants and work towards addressing the issues.

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1. In my experience, prosecutors routinely explain this standard to jurors by reminding them that the burden is not proof beyond *all* doubt, and standard jury instructions from the trial judge will echo this reminder. See MD. CRIM. PATTERN JURY INSTRUCTIONS § 2:02 (2d ed. Supp. 2013) (“However, the State is not required to prove guilt beyond all possible doubt or to a mathematical certainty. Nor is the State required to negate every conceivable circumstance of innocence. A reasonable doubt is a doubt founded upon reason. Proof beyond a reasonable doubt requires such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such belief without reservation in an important matter in your own business or personal affairs.”)
  2. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*358.

Some of these trends are easy to identify, but difficult to discover. Police misconduct, such as witness tampering and mishandling evidence, systemic failures in state laboratories, and prosecutorial misconduct in failing to abide by the rules for disclosing exculpatory evidence are familiar corruptions in the criminal justice system, and courts, sometimes, offer relief to criminal defendants whose trials were overwhelmed with corruption to the detriment of due process. Softer failures, like ineffective assistance of counsel, are familiar, though once courts and legislatures started to carve out possible relief for defendants who may have suffered from ineffective assistance of counsel, the tail started to wag the dog. Criminal defense attorneys take great pride in their work, but most are quick to point out their failings and weaknesses. Falling on the sword for a client who might get relief from an ineffective assistance of counsel claim is nearly a blood-oath among public defenders. (I like to think that Christina Gutierrez, if she were with us, would have filed an affidavit confessing and amplifying her sins as Syed's lawyer.)

In most of my thinking about the flaws in the criminal justice system, I come back to wondering how prosecutors and former prosecutors reflect on their role and how their reflections might change the process for the better. In this era of near-daily exonerations, I wonder how they reflect on past prosecutions where identity was the element in controversy. With great interest, I read Marty Stroud's letter of apology for his role in the prosecution of Glenn Ford in 1984 in Louisiana.<sup>3</sup> In the letter, he acknowledges that he did not break any of the technical rules, but he admits to breaking many moral rules. He is especially remorseful about not investigating rumors about other suspects, though he had no duty to do so. The reflections of Kevin Urrick, the lead prosecutor in the Syed trial, feel much more familiar—defend, deflect, advocate for a position, and reiterate the circumstantial evidence. I suppose Mr. Urrick might take an account of himself and find no flaws in his work in the Syed case. But I have legitimate concern whether Vickie Wash, the prosecutor who handled Syed's bail hearing, thinks she was a good "minister of justice."<sup>4</sup> We know she was aware of her misrepresentations about violent Muslim men and about the

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3. A.M. "Marty" Stroud, *Lead Prosecutor Apologizes for Role in Sending Man to Death*, TIMES, <http://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063/> (last visited Mar. 30, 2015).

4. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. (2010).

categorical flight-risk of a “Pakistani” teenager because she wrote an apology letter to the judge.

Due process is the protective cloak that should support Blackstone’s formulation, but only if everyone in the courtroom is bound to insure the defendant’s due process. While the court considers whether Syed’s lawyer provided effective representation, the system as a whole might be improved by a sustained consideration on the role and power of the prosecutor.