Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He Is Sworn to Protect

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"I am not interested in power for power's sake, but I'm interested in power that is moral, that is right and that is good."[1]

"Mistrust all in whom the impulse to punish is powerful."[2]

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1. Martin Luther King, Jr.
2. Friedrich Nietzsche.

I. INTRODUCTION

Every day, all across America, prosecutors charge people with crimes that the criminal justice system is not sufficiently funded to handle. Most of the accused are indigent citizens forced to rely on the services of over-burdened public defenders. In a system that lacks the resources to resolve these cases at trial, or even to spend the requisite capital at the pretrial stage, prosecutors have found creative ways to process the vast majority of these cases without the expense associated with providing the accused actual justice. With an ever-expanding list of behaviors and actions deemed criminal, and increasingly harsh sentencing options for these offenses, prosecutors are able to put pressure on most criminal defendants to give up many of their most fundamental constitutional rights and plead guilty to avoid potentially Draconian outcomes. While many prosecutors see this as a cheap and effective way to justly punish wrongdoers, this course of action has largely replaced our reliance on principles of justice such as the right to counsel, the right to trial by jury, and the role of an independent judiciary determining a punishment that fits the crime. By undermining basic principles of justice so crucial to our legal system, one might ask whether this way of handling criminal cases is antithetical to the prosecutor's critical role as minister of justice. This Article seeks to answer the question whether a prosecutor, armed with the discretion to charge a crime that he knows cannot be justly resolved due to resource limitations, may ethically proceed with the prosecution when doing so frequently results in unjust outcomes. Consider the following dilemma confronting many poor people accused of crimes in this country and the lawyers who represent them:

Imagine you are a public defender in a system with crushing caseloads and too few resources—in short you are a public defender in America. It is your turn to handle "first appearance court," which means you will take on the representation of all recent arrestees who qualify for a public defender.[3] You are in court when you receive the list of your new clients. For each client you are given a one-page police report setting forth the allegations against the client. Each report contains the barest of facts—just enough to make out the

3. In America more than eighty percent of all people charged with crimes are indigent. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006).

allegation. You know from experience that these reports almost never include facts that might help establish a defense, even when known to the officer preparing the report. Today you have twenty new clients. It is 10:00 a.m. and initial hearings begin at 1:00 p.m. You know that once initial hearings begin things move pretty quickly as the judge is anxious to get through the docket. Therefore, you only have a few minutes to meet with each client and will not have an opportunity to talk further once court starts.

In one of your cases you are appointed to represent Mr. Jones, who is charged with robbery. As you read the police report it seems to raise more questions than it answers. The allegation is that Mr. Jones robbed the complaining witness on the street at 3:00 a.m. after the complainant decided to go for a walk because he could not sleep. The report indicates that Mr. Jones allegedly took ten dollars from the complainant at knifepoint. The complainant immediately reported the robbery to an officer, and Mr. Jones was arrested ten minutes later. There is no indication that either money or a knife was found on your client at the time of his arrest. The complainant positively identified Mr. Jones as the man who robbed him. You recognize the area where the robbery occurred as a block notorious for drug activity. You also note that the complainant's address is about a mile from the scene of the alleged robbery. You know that robbery carries a potential sentence of twenty years in your jurisdiction. Before you go to talk to your new clients, the prosecutor tells you she will offer Mr. Jones a plea to attempted robbery if Mr. Jones will take the plea at the initial hearing this afternoon. The prosecutor will not oppose a term of probation. The plea will be off the table once the hearing ends. You have an investigator call Mr. Jones's wife and learn that they have two young children, they live in government-subsidized housing, and Mr. Jones works for the county as a trash collector. You know that with a felony conviction, Mr. Jones will likely be evicted from his apartment and will possibly lose his government job. This is all you have time to learn about Mr. Jones and the case when you sit down to talk to him.

When you meet Mr. Jones and tell him what he is charged with he looks surprised. He insists he never robbed anyone. He tells you that the complainant is a known neighborhood crack addict. Mr. Jones says he was on his way home after playing pool with some friends when the complainant approached him and two other men. The complainant gave one of the men ten dollars to find him a "rock." The man took the money. Mr. Jones says at that point he just kept walking. Ten minutes later he was arrested.

You explain the plea offer and tell him he has to decide in the next three hours. Mr. Jones has a lot of questions. What about the fact that he didn't have any money or a knife when he was arrested? Can you talk to other people who were out there who can confirm his story? Is it not unbelievable that the complainant would go for a walk a mile from his home in a drug

infested area at three in the morning? Did the police search the complainant to see if he had drug paraphernalia on him to show what he was really doing out there? What are his chances of being convicted? If he takes the plea how will that impact his housing situation? His job?

You cannot answer these questions, but you know Mr. Jones deserves these answers before having to make such an important life decision. You wish you could find out some of these answers before 1:00 p.m. but you have nineteen other clients to see. If you do not eat lunch you can give each client nine minutes, and you are already approaching fifteen minutes with Mr. Jones. Mr. Jones will have to make this decision without the answers to these questions.[4]

This scenario is one of several used by The Southern Public Defender Training Center ("SPDTC")[5] to help its lawyers develop strategies to best provide client-centered representation[6] in systems that render it impossible to live up to one's constitutional and ethical obligations to each client. It is unconscionable that public defender trainers have to design programs to help lawyers navigate a system that makes it impossible to provide the representation each client deserves, but it is the reality for poor people accused of crimes in many American courthouses.[7] Frequently prosecutors

4. The National Association of Criminal Defense Lawyers studied the prevalence of this "meet 'em and plead 'em" system in the context of misdemeanors. Robert C. Boruchowitz, Malia N. Brink & Maureen Dimino, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS 31 (Apr. 2009), *available at* nicic.gov/Library/023721.

> In many jurisdictions, cases are resolved at the first court hearing, with minimal or no preparation by the defense. Misdemeanor courtrooms often have so many cases on the docket that an attorney has mere minutes to handle each case. Because of the number of cases assigned to each defender, "legal advice" often amounts to a hasty conversation in the courtroom or hallway with the client.
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> Frequently, this conversation begins with the defender informing the defendant of a plea offer. When the defendant's case is called, he or she simply enters a guilty plea and is sentenced. No research of the facts or the law is undertaken. This process is known as meet-and-plead or plea at arraignment/first appearance.

Id.

5. The Southern Public Defender Training Center ("SPDTC") trains and supports new public defenders across the South to both raise the standard of representation in the region immediately and to groom a generation of public defender-leaders to help drive reform efforts in the future. Much of the focus is on how to teach lawyers values fundamental to the role of the public defender, and provide them with strategies for maintaining those values, in environments that pressure lawyers to abandon those values and process people cheaply and efficiently.

6. Client-centered representation requires that the lawyer work to ensure the client is empowered to make important decisions about his or her life by ensuring the client have the information and advice necessary to do so. It emphasizes the lawyer's duties of loyalty to the client, zealous advocacy, thoroughness and preparedness, and communication. It requires that the lawyer always act with the client's stated interests in mind, consistent with prevailing legal and ethical constraints. To learn more about this model as taught at SPDTC see, Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161 (2009).

7. Some experts involved in indigent defense reform might argue that we should never attempt to train public defenders to represent people in environments in which they cannot possibly live up to their ethical and constitutional obligations. The argument goes that no responsible public defender should agree to provide representation if they are unable to meet these fundamental duties. The countervailing argument is that these environments are predominant in America and that if committed, conscientious defenders are not trying to raise the standard of representation in these places, the void will be filled by defenders who are

use "exploding" plea offers, offers that expire if not accepted in a very short time, to pressure defendants to resolve cases quickly and cheaply. This is a feature of a broken criminal justice system.

In this example the defender is placed in an impossible position—and her client in an even worse one. She knows her client is entitled to have her investigate, seek discovery, and conduct research to understand how a variety of legal issues might impact Mr. Jones's case. She knows she needs time to research how a conviction might impact other factors so important to her client, like his housing, employment, and parental status. But she also knows that if she takes the time needed to do these things, the client will lose the option of the plea offer. All she can do is advise Mr. Jones of the services to which he is entitled from his lawyer and the fact that he will give that up if he takes the plea. She can discuss the potential punishments that each course of action brings, while explaining that she has no information at this point to help the client assess how likely he is to succeed at trial. Should Mr. Jones accept the plea, she can try to make a record highlighting her ineffectiveness by laying out all of the things she did not have time to do and the advice she did not have time to provide given the exploding plea offer.[8] What she cannot do is give the client the representation he deserves.

In the world envisioned by those who drafted and later defined clauses of our Constitution and Bill of Rights, Mr. Jones would have the robust assistance of a lawyer with the time and resources required to provide the necessary representation. The facts necessary to determine guilt would be weighed and decided by a jury. The appropriate punishment, should there be a need for one, would be decided by a neutral judge after evaluating aggravating and mitigating circumstances. This is not that world.

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perfectly willing to facilitate the status quo. In this world, reform will never occur and some clients will be deprived better representation, even if only marginal. The SPDTC strives to equip lawyers with the tools and strategies to incrementally raise the standard of representation in challenging environments while working to change attitudes about what their clients deserve. While a long-term strategy, this defender-driven solution can change expectations, and therefore the quality of representation, in many places. Of course there may be some jurisdictions where the caseload and resource challenges are so great, and the attitudes about what poor defendants deserve so entrenched, that even the most committed and talented lawyer will not make a difference. In a jurisdiction where the lawyer can literally make no difference, and where to practice necessarily means giving into the status quo, this author would agree that a conscientious lawyer should not practice. However, this author is of the view that a committed group of lawyers can make a difference in most environments, and can incrementally usher in change, when well-trained and supported.

8. The lawyer may say something like, "Your Honor, there are some important lines of investigation I have not had a chance to pursue given the time frame of this plea offer." Or, she may say, "Your Honor, I fear there may be potential collateral consequences in light of the fact that my client lives in government-subsidized housing, has children, and works for the county, but I have not had time to explore what those may be." This is an attempt to give the client some recourse should he later learn information that would have caused him to make a different decision. When discussing this course of action with young public defenders one also has to consider the extent to which making such a record may cause the judge to refuse to accept the plea offer, something that may frustrate the client's desires. The lengths to which the lawyer might go to make this record should obviously be informed by the likelihood of undermining the plea deal the client desires to take. Of course, even without this record, post-conviction counsel should be able to establish all of the things to which the client was entitled that the lawyer did not have a chance to do.

One cannot look at the details of the case without wondering how the public defender should appropriately respond to this seemingly impossible challenge.[9] But it is not only the role of the public defender that needs to be addressed here. This hypothetical case study should also be part of a training curriculum for prosecutors who are responsible for thinking about much more than the outcome of any given case. For it is their job to ensure that justice is served in each case they consider prosecuting. In addition to wondering how a conscientious defense lawyer responds, hopefully the reader also asks, "How can a prosecutor committed to ensuring that justice is done put the accused in this position?"

Unfortunately, the prosecutor's response in this case—to attempt to force a speedy resolution by coercing a plea—is one routinely employed by many prosecutors in a criminal justice system that is overburdened and under-resourced. It is the response of a prosecutor office that is more focused on conviction rates than the quality of the case resolution; has lost sight of the humanity of the people it prosecutes; and has minimized the import of the fundamental protections that are the foundation of democracy. It is a response that has helped to create the greatest threat to our criminal justice system, but that is sadly accepted by the professionals who preside over that system. In short, it has become a part of the culture of criminal justice for our most vulnerable citizens.

The unjust system described above is the result of societal pressure to be tough on crime without a commitment to provide the required resources to do so consistent with justice. The ethical prosecutor should refuse to charge cases that the system is not funded to handle responsibly. But, before we can expect prosecutors to respond to these pressures in accordance with their ethical duty, we will need to develop a strategy to change the value system that drives many prosecutor offices. Only when prosecutors learn to embrace values consistent with justice will they respond to systemic challenges in a way that lives up to American ideals.

In Part II of this Article, I examine the responsibility of the American prosecutor to serve as a minister of justice and explore what that means in the context of the American criminal justice system. I argue that justice in America is less about the outcome of any given case than it is about the process that allows us to arrive at that outcome. I then argue that as a minister

9. This scenario would disturb a person unless one has become so accustomed to the existing system that he or she is no longer fazed by it. In three previous articles, I argued that the toxic culture of indigent defense that has developed in this country can cause those who practice in it to come to accept substandard representation as adequate. I propose a defender-driven model for changing the values fundamental to public defense as a way to begin to transform this toxic culture. *See* Rapping, *supra* note 6; Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177 (2008) [hereinafter Rapping, *Directing the Winds of Change*]; Jonathan A. Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. PA. J.L. & SOC. CHANGE 331 (2010) [hereinafter Rapping, *National Crisis, National Neglect*].

of justice, the prosecutor is duty-bound to do nothing that would undermine any of the components of the American criminal justice system that ensure justice is done.

In Part III, I argue that our society has become increasingly punitive, as legislators have given prosecutors more and more tools with which to charge, prosecute, and punish wrongdoers. These influences have put pressure on the prosecutor to stray from his or her primary role of minister of justice.

In Part IV, I argue that these influences have led to a far greater increase in the number of cases the system is expected to handle than there have been resources devoted to support the expansion. This caseload crisis poses the greatest threat to our system of justice. I then argue that nearly unlimited discretion in the prosecutor's ability to charge crimes and negotiate pleas, supplemented by a bail system that is overly oppressive to indigent defendants, has given the prosecutor the power to efficiently process people through the system in a manner inconsistent with justice.

In Part V, I argue that this problem is exacerbated during hard economic times. I further argue that all of these factors have led many prosecutors to embrace a value system inconsistent with their ethical obligations, internalizing undemocratic and inhumane values to justify the harsh, often unjust, treatment of alleged wrongdoers as a way of pushing cases through the under- resourced system. I argue that getting prosecutors to shift their focus from the quantity of cases prosecuted to the quality of justice the system is equipped to provide will require a change in a misguided set of values and cultural norms that has become accepted in our system of justice. I then offer a model to effect this transformation.

II. THE ROLE OF THE PROSECUTOR IN THE AMERICAN CRIMINAL JUSTICE SYSTEM

A. The American Prosecutor as "Minister of Justice"

Unlike lawyers who are duty-bound to advocate for the interests of one client, the American prosecutor has a unique obligation to our country's legal system. More than merely an advocate, the prosecutor is charged with serving as a "minister of justice." While the criminal defense attorney's role in promoting the administration of justice is through the loyal and zealous representation of the accused,[10] the prosecutor has a broader obligation to

10. *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 804 (1987) ("Indeed, . . . the highest claim on the most noble advocate [is] fidelity, unquestioned, continuing fidelity to the client."); Nix v. Whiteside, 475 U.S. 157, 189 (1986) (Central to the work of any criminal defense attorney is the duty to provide the "zealous and loyal [representation] required by the Sixth Amendment."); Strickland v. Washington, 466 U.S. 668, 688, 692 (1984) (The lawyer's "duty of loyalty [to the client is] perhaps the most basic of counsel's duties," and from this "derive[s] the overarching duty to advocate the defendant's cause."); *see also* AM. BAR ASS'N, THE DEFENSE FUNCTION, Standard 4-1.2(b) (1993), *available at* http://www.

ensure that justice is done. This duty is reinforced through jurisprudence,[11] codes of professional conduct,[12] and standards of the profession.[13]

While the prosecutor as minister of justice is a concept foundational to our system of criminal justice, the term itself is vague and lacks precise definition by the aforementioned authorities.[14] This imprecision has left prosecutors to define their role as they see fit. Law schools have largely failed to help the future prosecutor understand his or her duty beyond that of advocate,[15] and once practicing, the prosecutor is rewarded for his or her "win-rate."[16] The result is often a "conviction psychology" in which the prosecutor comes to see that his or her "primary function is to secure convictions."[17] To this prosecutor, "the admonitional obligation to 'seek justice' . . . [is equated] with obtaining convictions."[18] While scholars have struggled with a precise understanding of its practical meaning,[19] the mandate to "do justice" must clearly be measured by something other than the prosecutor's conviction rate, since, as our introductory example demonstrates, the consequences of the "conviction rate" criterion too often leads to unjust results. Thus, in the seminal case of *Berger v. United States*,[20] the U.S. Supreme Court made clear that

> [the prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as

americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_toc.html (last visited June 8, 2012) ("The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.")

11. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (stating that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair"); Berger v. United States, 295 U.S. 78, 88 (1935) (stating that the prosecutor's duty is "not that it shall win a case, but that justice shall be done.").

12. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8, cmt. 1 (2010) (stating that prosecutors are "minister[s] of justice"); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1981) (stating that prosecutors must "seek justice").

13. *See* AM. BAR ASS'N, PROSECUTION FUNCTION, Standard 3-1.2(c) (1993), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html#1.2 (last visited June 8, 2012) ("[T]he duty of the prosecutor is to seek justice, not merely to convict.").

14. *See* Bruce Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 623 (1999) ("[I]f the injunction to "seek justice" in itself provides scant guidance about what is expected of prosecutors in a general sense, it provides no guidance whatsoever with respect to the details of a prosecutor's special responsibilities."); *see also* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 113 (1991) (arguing that the failure of professional codes to better define the amorphous concept of justice leaves much to the interpretation of the prosecutor).

15. Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669, 686.

16. *See* Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 289–92 (2001); *see also* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 287 (2011) (noting that "prosecutors typically make their reputations by trying cases and winning those trials").

17. Melilli, *supra* note 15, at 690.

18. *Id.*

19. *See generally* Green, *supra* note 14; Zacharias, *supra* note 14.

20. 295 U.S. 78 (1935).

> its obligation to govern at all; *and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done*.[21]

Certainly, the prosecutor also serves as an advocate, but only when doing so serves the greater duty to seek justice. That the prosecutor's duty to seek justice trumps his or her role as advocate is continually reinforced by the courts. In the seminal case of *Brady v. Maryland*,[22] the Court made clear that the prosecutor's greater duty to seek justice is rooted in our Constitution. Evoking the Due Process Clause, the Court declared:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts."[23]

The prosecutor is duty-bound to ensure the accused is treated fairly. Therefore, the prosecutor is charged with providing defense counsel information that can be used to discredit the state's witnesses, such as prior inconsistent statements, even when doing so will likely make it more difficult to convict a defendant the prosecutor believes to be guilty.[24] Likewise, the prosecutor must reveal that evidence may have been obtained through unconstitutional means, even when doing so risks the suppression of reliable, inculpatory proof needed to convict a guilty person.[25] Should a prosecutor provide immunity to a witness so that the witness will be able to testify against a defendant, the prosecutor must disclose that information to defense counsel despite the fact that doing so will be used to undermine the witness's credibility.[26]

By serving as illustrations of how a prosecutor is duty-bound to share information with the defense, even when doing so will hamper his or her ability to convict, these examples demonstrate that the prosecutor's duty to seek justice trumps his role as an advocate and that the concept of justice the prosecutor is charged with pursuing means something other than convicting factually guilty people at all costs. In the words of Robert H. Jackson, former Supreme Court Justice and Chief Prosecutor at the Nuremberg trials, "Although the government technically loses its case, it has really won if justice has been done."[27]

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21. *Id.* at 88 (emphasis added).
22. 373 U.S. 83 (1963).
23. *Id.* at 87.
24. *See* Smith v. Cain, 132 S. Ct. 627, 629 (2012). The Court reinforced the standard under which the prosecution has a duty to disclose impeachment evidence, making clear that it need not prove innocence but need only to "undermine confidence in the outcome of the trial." *Id.* (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995) (internal quotation marks omitted). In doing so the Court reversed Smith's murder conviction based on the state's failure to disclose prior statements by the lone eyewitness that undermined the strength of his identification. *Id.*
25. *See* Zacharias, *supra* note 14, at 79–80.
26. *See* Giglio v. United States, 405 U.S. 150, 154–55 (1972).
27. Robert H. Jackson, Attorney General of the United States, Address at The Second Annual

Justice in the American criminal justice system focuses on the process, not the outcome.[28] According to Ninth Circuit Chief Judge Alex Kozinski, "[N]ot following the rules is the injustice . . . . Following the rules, and having reasonably concrete rules to follow is how justice is done."[29] That this concept of justice must guide the prosecutor is supported by the Rules of Professional Conduct, which make clear that the prosecutor has "specific obligations to see that the defendant is accorded procedural justice."[30] Scholars of prosecutorial ethics have also understood the concept of justice as one tied to procedural rules.[31] This notion of the primacy of process over outcomes is repeated throughout our nation's jurisprudence.[32] So what is the

Conference of United States Attorneys: The Federal Prosecutor (Apr. 1, 1940) (transcript available at http://www.justice.gov/ag/aghistory/jackson/1940/04-01-1940.pdf).

28. At its most extreme, the concept of justice as process-focused has caused some famous Supreme Court Justices to be nonplussed about the possibility of executing an innocent person when the process had been seemingly followed. In the now famous case of Troy Anthony Davis, the Georgia man executed despite an abundance of evidence undermining the reliability of his conviction, Justice Antonin Scalia expressed, "This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is 'actually' innocent." *In re* Davis, 130 S. Ct. 1, 3 (2009).

When asked whether he thought justice had been done in the case of Nicola Sacco and Bartolomeo Vanzetti, two Italian immigrants executed by the state of Massachusetts in 1927 following politically-charged proceedings rife with anti-immigrant undercurrents, Justice Oliver Wendell Holmes said, "The image of justice changes with the beholder's viewpoint, prejudice or social affiliation. But for society to function, the set of rules agreed on by the body politic must be observed—the law must be carried out." MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 10 (4th ed. 2010) (citing LIVA BAKER, THE JUSTICE FROM BEACON HILL 608 (1991)).

29. FREEDMAN & SMITH, *supra* note 27, at 13 (citing Jeffrey Cole, *My Afternoon with Alex: An Interview with Judge Kozinski*, 30 LITIGATION 6 (2004)) (internal quotation marks omitted).

30. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2010), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/comment_on_rule_3_8.html (last visited June 8, 2012).

31. *See* Green, *supra* note 14, at 608 ("In the trial context ['doing justice'] . . . had something to do with fidelity to the fairness of the process—the idea that, if the trial was a fair one, then even when the jury acquitted a defendant whom we were convinced was guilty, justice was done."); Zacharias, *supra* note 14, at 53 n.29 (noting that "[c]onduct is permissible to the extent it furthers the ends of the system— not just vindicating the innocent and convicting the guilty, but doing so within procedural constraints that promote factual accuracy, completeness, and fairness").

32. *See* Hurd v. Michigan, 25 Mich. 405, 416 (1872).

> The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community.

Id.; *see also* California v. Lee Chuck, 20 P. 719, 723 (Cal. 1889).

> We have been called upon many times to caution, sometimes to rebuke, prosecuting officers for the overzealous performance of their duties. They seem to forget that it is their sworn duty to see that the defendant has a fair and impartial trial, and that he be not convicted except by competent and legitimate evidence. Equally with the court the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust. We make due allowance for the zeal which is the natural result of such a legal battle as this, and for the desire of every lawyer to win his case, but these should be overcome by the conscientious desire of a sworn officer of the court to do his duty, and not go beyond it.

Id.; *see also* California v. Tufts, 139 P. 78, 81 (Cal. 1914).

process that is so fundamental to the notion of American justice? In the next section we explore this question by placing it in its proper historical context.

B. Defining "Justice" in the American Criminal Justice System

The men who drafted the American Constitution understood the importance of ensuring written legal limits on the power of government and of procedural protections designed to secure citizen's substantive rights. It was a lesson learned from nearly 600 years of history, in both England and colonial America. Beginning with the Magna Carta,[33] the first time in English history that written legal limits were placed on the king, England had a long tradition of struggle to ensure that individual rights were protected from the abuses of the Crown. From this document comes the American ideal that concepts such as due process and the right to a jury trial are fundamental to the notion of justice.[34] In adopting these concepts, the Founding Fathers codified their belief in the humanity of each citizen and his or her right to be treated with fairness.

While the Magna Carta began the tradition of defining substantive rights in written documents, the development of the writ of habeas corpus[35] in the late sixteenth century introduced a procedural mechanism to ensure that English subjects' rights were protected against the abuses of the king.[36] This procedural protection was understood to be necessary against a Crown that routinely pronounced laws that abridged its subjects' rights and imprisoned

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> It is to be regretted that prosecuting counsel, in the heat of contest and in the desire for victory, sometimes forget that the function of a district attorney is largely judicial, and that he owes to the defendant as solemn a duty of fairness as he is bound to give to the state full measure of earnestness and fervor in the performance of his official obligations.

Id.; *see also* New York v. Payne, 593 N.Y.S.2d 675, 677 (N.Y. App. Div. 1993).

> We begin with the by now familiar rubric that the function of the prosecutor is not merely to obtain a conviction. The prosecutor "[is] charged with the responsibility of presenting competent evidence fairly and temperately, not to get a conviction at all costs."
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> That responsibility is not a meaningless truism; it is a paramount value. It is embedded in our sense of due process and fair play. Although our adversarial system of justice is not a game, it has rules, and it is unfortunate when a prosecutor, whose sworn duty it is to uphold those rules, plays fast and loose with them.

Id. (internal citations omitted).

33. *See* IRA GLASSER, VISIONS OF LIBERTY: THE BILL OF RIGHTS FOR ALL AMERICANS ch. 1 (1st ed. 1991). The Magna Carta, Latin for "Great Charter," was agreed upon in 1215. For an excellent summary of the development of those principles fundamental to the American Constitution dating back to the Magna Carta, see *id.*

34. *See id.* (citing relevant clauses of the Magna Carta: Clause 39 reads "No freeman shall be taken, imprisoned, outlawed, exiled, or in any way harmed, nor will we [i.e., the Crown] proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land," while Clause 40 reads, "To no one will we sell, to no one will we deny or delay, right or justice."); *see also* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 596–97 (2009).

35. *See* GLASSER, *supra* note 33, at 25. The writ of habeas corpus required the jailer to produce the prisoner so that a court could determine the legality of his detention. Presumably the court would be sufficiently independent of the Crown to be able to decide this issue fairly.

36. *See* Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1367–68 (2010).

those who disobeyed. One famous example is when, in 1626, King Charles decided to finance the English military through forced loans from his subjects. Those without money were required to allow soldiers to live in their homes. When some knights, descendants of the landed barons, refused, claiming the king had no authority to tax without approval of Parliament, they were imprisoned. The knights sought to challenge their imprisonment by seeking a writ of habeas corpus. But when the knights' case was reviewed by the Court of Kings bench, a forum that was not independent from the Crown, the Court upheld the right of the king to imprison subjects by "special command."[37]

The Court essentially nullified all rights by allowing the king to exceed legal limits on his power when he deemed it necessary. In turn Parliament rebelled, ultimately passing the Petition of Right, placing strict limits on the king's power.[38] The Petition of Right reinforced the notion that the rule of law was supreme and that it was necessary to have written legal limits on governmental power. As subsequent kings continued to try to expand their powers beyond written limits, revolutionary fervor increased. The result was a strengthened right to habeas corpus,[39] the Glorious Revolution of 1688–89, and the English Bill or Rights in 1689.[40]

Based on the English experience, colonists came to the New World with a healthy distrust of the power of the king. As the king's representatives did his bidding in the colonies, that distrust of power came to also include all government agents. Justice in early America was focused on protecting the individual against the excesses of government. The colonists understood that a government unchecked led to tyranny. One early event that helped refine this idea was the passage of the Stamp Act, a law taxing colonists to pay for the British army.[41] To enforce the Act, the British government used writs of assistance, allowing agents to enter people's homes at will, even without evidence of a violation, to search all belongings for contraband. To prosecute violations, the Act gave jurisdiction to admiralty courts, which operated without juries and without regard for many procedural rights. The colonists resented being deprived of fundamental rights to which all English citizens were entitled. Based on their knowledge of both the English and American experiences, colonists understood that power always overreaches if unchecked. They came to see unchecked power and liberty as naturally antagonistic.[42]

37. *See* GLASSER, *supra* note 33, at 25 (referring to Darnell's Case from 1627).
38. *Id.* at 26–27.
39. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 557 (2004) (discussing Habeas Corpus Act of 1679).
40. *See* Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 239 (1983); Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 872 (1994).
41. *See* GLASSER, *supra* note 33, at 29.
42. *See id.* at 31.

When the colonists devised the American system of government, they insisted on the obligation of the government to protect individual liberties, again insisting on the humanity of all accused. Colonists sought to limit all government power and developed a Bill of Rights that would serve to protect the rights of the minority against an oppressive government representing the will of the majority.[43] In the context of criminal justice, the means of protecting its citizens against the excesses of the government included trial by jury, a judiciary independent from the executive branch, and a host of procedures with which the government must comply before depriving any citizen of his liberty. It came to be understood that those protective procedures could only be meaningfully secured through the representation of counsel. This historic English experience taught American colonists about the "voracious persistence with which government power seeks to avoid the legal limits that secure our rights."[44] The Constitution, and accompanying Bill of Rights, would serve as a bulwark against this threat. Three features of the American system of procedural safeguards that are the most essential to protecting the people from the despotic inclinations of government include the right to counsel, trial by jury, and an independent judiciary.

Fundamental to our system of justice is the notion that before one may be deprived of liberty by the government, the fight must be fair. The accused must have the opportunity to prepare a defense, to challenge the allegations, and to ensure that basic rights are protected in the process. As the Supreme Court made clear in the seminal case *Powell v. Alabama*,[45] none of these values can be realized without a lawyer "skill[ed] in the science of law."[46] In every criminal case a lawyer must have the time and skill to undertake essential preparatory tasks such as conducting investigation, seeking discovery, and researching and litigating pretrial motions.[47] A lawyer must be available to protect the accused's "fundamental rights," i.e., those constitutional rights deemed "essential to a fair trial."[48] Every protection the

43. *See id.* at 41.

44. *See id.* at 27.

45. 287 U.S. 45 (1932).

46. *Id.* at 69. The court discussed the importance of counsel as follows:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Id. at 68–69.

47. *See* Rapping, *supra* note 6, at 169–70.

48. Gideon v. Wainwright, 372 U.S. 335, 343–44 (1963). In addition to the right to counsel and to trial by jury, which are discussed more fully in this Article, included among these fundamental rights are the

Framers viewed as foundational to our system of justice is at risk without counsel to ensure their protection.

In addition to having a lawyer to protect the accused's most basic rights, the Framers viewed the right to trial by jury as "an inestimable safeguard against the corrupt or overzealous prosecutor."[49] Our forefathers' experience in England left them fearful of the unchecked power of government.[50] As Professor Paul Butler reminds us:

> The Constitution was written by men who were very suspicious of the power of government. Prosecutors were viewed as a necessary evil, but the framers didn't trust them much. Thus the right to trial by jury was guaranteed in the Bill of Rights.[51]

"The criminal jury remains one of the nation's most vital democratic institutions, enabling ordinary citizens to block tyrannical action by government."[52] This sacred right was recognized as "inherent and invaluable to every [colonist]"[53] and is enshrined in both the body of our Constitution and the Sixth Amendment of the Bill of Rights.[54] In finding the right to trial by jury in a criminal case to be fundamental to our system of justice, the Supreme Court made clear in *Duncan v. Louisiana*,[55] although the government has the power to accuse an individual of wrongdoing, a jury ultimately must decide whether such allegations are warranted. This buffer between the accused and a prosecutor hell-bent on securing a conviction serves as a "barrier[] . . . against the approaches of arbitrary power."[56] In short, justice in America depends on the assignment of members of the community to be the final arbiter of guilt or innocence.[57]

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rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized, to be free of compelled self-incrimination, to a speedy and public trial, to confront opposing witnesses, and to compulsory process to secure witnesses for one's defense. *See* Duncan v. Louisiana, 391 U.S. 145, 148–49 (1968) (laying out the rights held to be fundamental).

49. *Duncan*, 391 U.S. at 156.

50. *See* Nancy J King, Duncan v. Louisiana*: How Bigotry in the Bayou Led to the Federal Regulation of State Juries*, *in* CRIMINAL PROCEDURE STORIES 261, 276–77 (Carol S. Steiker ed., 2006) (quoting *Duncan*, 391 U.S. at 155–56).

51. PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 61 (2009).

52. King, *supra* note 50, at 261.

53. *Duncan*, 391 U.S at 152. As the Court articulated in *Duncan*:

> Among the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765—resolutions deemed by their authors to state "the most essential rights and liberties of the colonists"—was the declaration: "That trial by jury is the inherent and invaluable right of every British subject in these colonies."

Id. (citations omitted).

54. U.S. CONST. art. III, § 2 provides, "The trial of all crimes, except in cases of Impeachment shall be by Jury . . . ." The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI.

55. 391 U.S. 145 (1968).

56. *Duncan*, 391 U.S. at 154 (citing Thompson v. Utah, 170 U.S. 343, 349-50 (1898)).

57. *See* Williams v. Florida, 399 U.S. 78, 100 (1970) ("[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.").

While the jury is an essential component of a justice system devised by men who harbored a "profound mistrust of government,"[58] it alone was not seen as providing sufficient protection to the individual in the criminal justice arena. Another critical safeguard was the separation of powers doctrine. This doctrine carved out a critical niche in our criminal justice system for the judicial branch. The fundamental role of an independent judiciary to our system of justice is reflected in our devotion to separation of powers and preserved in the text of our Constitution.[59] At "the heart of our constitutional scheme, [the separation of powers doctrine] enables the judiciary to perform this role fearlessly, effectively, and independently."[60]

The Framers "recognized that '[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[61] Separation of powers was meant to prevent the accumulation of power before it occurred.[62] "The Framers recognized that the criminal process is particularly ripe for abuses and carefully crafted a system to minimize that possibility."[63] Within constitutional limits, the legislative branch has the authority to define criminal conduct. The executive branch, through its prosecuting agents, maintains the discretion to charge an individual criminally. The jury's role is to adjudicate guilt. "The judge's role is to sentence individuals who have been convicted by a jury based on his discretion and experience."[64] This thoughtful balance helps to ensure that no branch of government is able to "subvert popular sovereignty and individual liberty."[65]

Each of these protections—the right to counsel, the right to trial by jury, and an independent judge responsible for resolving legal disputes and determining punishment—is an essential component of America's justice system. Each makes it harder for the prosecutor to arbitrarily secure convictions and mete out punishment and makes clear that justice in America is about much more than convicting and punishing. Justice is determined by how faithful the system is to the process so important to our constitutional democracy. Understanding this history helps us to understand the role of the prosecutor in this system of justice. It allows us to see that, in the words of

58. Hans H. Grong, *Toward a Robust Separation of Powers: Recapturing the Judiciary's Role at Sentencing*, 92 MINN. L. REV. 1584, 1600 (2008).

59. Burkeley N. Riggs & Tamera D. Westerberg, *Judicial Independence: An Historical Perspective*, 74 DENV. U. L. REV. 337, 338 (1997) ("Article III of the United States Constitution preserves the independence of judges in their decision making process.").

60. Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 671 (1980).

61. Grong, *supra* note 58, at 1600 (citing THE FEDERALIST NO. 47 at 307–08 (James Madison) (Robert Scigliano ed., 2000)).

62. *Id.* at 1600–01 (citing THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 121 (William Peden ed., 1982)).

63. *Id.* at 1601 (citations omitted).

64. *Id.* at 1603 (citation omitted).

65. *Id.* at 1601 (citation omitted).

legal scholar Fred Zacharias, "the fear of unfettered prosecutorial power is the impetus for the special ethical obligation [to do justice]."[66] Given this special obligation, the prosecutor must ensure that he or she does nothing to undermine the protective force of these safeguards; for in doing so he or she would be violating his or her oath to do justice and failing to uphold the human rights of the accused.

III. LAYING THE GROUNDWORK FOR THE PROSECUTOR'S DILEMMA

The procedural safeguards discussed above are part of a legal system designed to balance society's interest in law enforcement against its interest in protecting the individual from the excesses of government. It is a system that places significant hurdles before the government when it seeks to prosecute and punish its citizens. It is clear from how the Framers struck this balance that they were willing to forgo the punishment of some factually guilty people in order to ensure that no innocent person fall victim to an overzealous prosecutor.[67] There is a price we pay for these protections. Not only do they make it harder for the government to punish, but they also require a greater investment in resources to do so. It is costly to ensure an accused is sufficiently prepared for trial and that his or her rights are protected. It is also costly to provide jury trials and to invest in an independent judge to fairly resolve issues in the case and, if necessary, determine the just punishment. In short, justice is not cheap. It follows that the more cases that are brought into the system, the more society must spend to ensure we live up to our standards of justice. Expanding the workload in the criminal justice system without correspondingly increasing resources, as has been the case in recent years, makes it impossible to ensure justice is done in every case. As a result, it has become more difficult to live up to the ideals that form the foundation of our legal system. This Part looks at some of the factors that have led us to this result and explores why we allowed it to happen.

A. Modern American Attitudes Toward Crime

In his thoughtful examination of America's criminal justice system, *The Collapse of American Criminal Justice*, the late Professor William J. Stuntz tells us that

> [f]or most of our history . . . the government officials who administer the justice system, along with the voters who elect them, have behaved as though criminal

66. Zacharias, *supra* note 14, at 58.

67. English jurist William Blackstone famously said, "Better that ten guilty persons escape, than that one innocent suffer." This ratio has become known as the "Blackstone ratio." *See* Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997).

> punishment were sometimes necessary but always dangerous, something to be done sparingly and avoided when there is a plausible excuse for doing so.[68]

This attitude toward crime and punishment is appropriate for a country built by men who harbored a long-standing distrust of overreaching government. However, "in the last decades of the twentieth century" these attitudes changed.[69] Over the past thirty years, we have gravitated toward the position that "a healthy criminal justice system should punish all the criminals it can."[70]

Stuntz helped to explain this new punitive national attitude by examining how politicians used crime to galvanize voters in the last part of the twentieth century.[71] Before the 1960s, he explained, conservative politicians were either "indifferent . . . or mildly libertarian in their attitudes toward criminal defendants."[72] For "[c]riminal punishment is an especially intrusive form of government regulation," something inconsistent with conservative values.[73] But in the 1960s conservative governors figured out how to use crime to their advantage. Crime was increasing and Supreme Court decisions that expanded individual rights were portrayed by conservatives as the result of liberal judges coddling criminals. Also at this time there was increasing social unrest as African Americans fought the power structure in an effort to secure basic civil rights. In this environment, skillful politicians seized the opportunity to create a new enemy.[74]

Attacking the Johnson administration for its pro-civil rights stances, Barry Goldwater, during his 1964 presidential campaign, used the riots associated with the civil rights movement, and the growing fear of an over-stated rise in black crime, to warn voters: "Choose the way of the [Johnson] Administration and you have the way of mobs in the street."[75] In Alabama, where racial tensions were at a peak, Governor George Wallace used crime to focus on "black criminals, and . . . the liberal white judges who allegedly protected them," telling an audience in 1968: "If you walk out of this [hall] tonight and someone knocks you on the head, he'll be out of jail before you're out of the hospital, and on Monday morning they'll try the policeman instead of the criminal."[76] Although Goldwater and Wallace overtly used the politics

68. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 55 (2011).

69. *Id.*

70. *Id.* at 56; *see also* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005) (describing an environment of expanding crimes and harsher punishments in the last quarter of the twentieth century).

71. STUNTZ, *supra* note 68, at 236-41. In her book *The New Jim Crow*, Professor Michelle Alexander also shows how politicians tied the politics of race and crime together to effectively appeal to white voters resentful of racial progress. *See* MICHELLE ALEXANDER, THE NEW JIM CROW (2010).

72. STUNTZ, *supra* note 68, at 236.

73. *Id.*

74. For an excellent discussion of how Southern politicians put a black face on crime and used "law and order" discourse to play on widespread racist sentiments, see ALEXANDER, *supra* note 71, at 20–57.

75. *Id.* at 41.

76. STUNTZ, *supra* note 68, at 236.

of race and crime, Ronald Reagan used a more subtle approach in his bid for the governorship in California. Describing "[o]ur city streets [as] jungle paths after dark," Reagan used "tough-on-crime rhetoric . . . to draw blue-collar Democrats across the partisan aisle."[77] In a period of "[r]ising crime, falling punishment, and liberal Supreme Court decisions protecting criminal defendants' procedural rights," Reagan identified "a new set of swing voters: blue-collar whites."[78]

As this strategy proved more and more effective, politicians across the political spectrum began to follow suit. Liberal Democrats adopted the politics of crime as a means to attract support. Then-Governor Bill Clinton made the decision, during the 1992 Democratic primaries, to go back to Arkansas and oversee the execution of a mentally disabled black man named Ricky Ray Rector.[79] Rector had so little understanding of what was happening to him that he requested that he be allowed to save his dessert until a later time.[80] "After the execution Clinton remarked, 'I can be nicked a lot but no one can say I'm soft on crime.' "[81]

Stuntz described Rector as Clinton's likely answer to George Bush's use of Willie Horton—the furloughed Massachusetts inmate who raped and murdered a woman in her home—to defeat Michael Dukakis in the 1988 presidential election.[82] It seemed to prove that "the powerful psychological themes that were exploited in the Horton ad had become mainstays in the politics of hysteria."[83] Politicians had certainly learned the effectiveness of fanning the flames of our fear of crime.[84] Stuntz believed these arguments

77. *Id.* at 237.

78. *Id*.; *see also* ALEXANDER, *supra* note 71, at 42 (arguing that conservative politicians successfully used law and order politics to bring working-class whites, who resented racial reforms, to the Republican Party).

79. STUNTZ, *supra* note 68, at 240.

80. ALEXANDER, *supra* note 71, at 55. This story is the subject of a 1993 article titled "Death in Arkansas." Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 105.

81. ALEXANDER, *supra* note 71, at 55.

82. STUNTZ, *supra* note 68, at 240; *see* ALEXANDER, *supra* note 71, at 53 (Alexander points to the racial implications of the Willie Horton strategy (Horton was a dark-skinned black man and his victim was white) as evidence that politicians continued to use law and order politics as a way to appeal to white Americans' racial fears).

83. Craig Haney, *Politicizing Crime and Punishment: Redefining "Justice" to Fight the "War on Prisoners,"* 114 W. VA. L. REV. 373, 407 (2012).

84. In his article "The Overcriminalization Phenomenon," Professor Erik Luna agrees that politicians have learned to pander to a fearful voting populace:

> Conventional wisdom suggests that appearing tough on crime wins elections regardless of the underlying justification, if only to provide another line on the résumé or potential propaganda for a grandstanding candidate, while it is difficult to recall a single modern politician who came into office on a platform of decriminalization or punishment reduction. As any competent political strategist knows, fear of crime can drive voters to the polls, and just as importantly, the potential benefits to powerful interest groups can fill campaign coffers. By contrast, individuals and organizations who oppose further augmentation of the penal code, including members of the criminal defense bar and civil liberties groups, can usually be ignored at virtually no political cost to those seeking elected office.

Luna, *supra* note 70, at 719–20.

work because frightened voters are inundated through the media with images of "open-air drug markets and the latest gang shootings."[85]

Psychology Professor Craig Haney, who studies the intersection of psychology and the law, sheds light on this connection, arguing that "[a] common media technique [during this period] relied on egregious criminal cases that were depicted graphically and emotionally and were misleadingly offered up as illustrative of widespread and excessive leniency that was said to pervade the criminal justice system."[86] Thus, he quotes, " 'Each case, its horrible details played over and over again for a period of days or weeks, affirmed a growing belief about the threat of random violence to decent people who do nothing wrong and about the incompetence of the authorities to deal with it.' "[87] Reflecting on public reaction, Haney posits that "[t]hese 'horror stories' were typically blamed on liberal judges and 'soft-on-crime' politicians, presumably the same ones who had worked to privilege the civil rights of undeserving minorities over those of hardworking middle-Americans."[88] He concludes, "It was part of the powerful emotional base upon which the demand for tougher criminal laws and harsher prison sentences was founded."[89] "Commentators critical of this technique dubbed it the 'politics of hysteria.' "[90]

And it was not just the news that increasingly portrayed criminals as evil and unredeemable. Fictional programming, arguably more influential on public sentiment, also increasingly demonized crime and criminals. In fact, as Professor Elayne Rapping shows in her insightful work *Law and Justice as Seen on TV*, as politicians began to embrace law and order politics, so too did the media change its depiction of those who live outside the law and the lawyers who represent them.[91] Gone were the days of Bonnie and Clyde, Cool Hand Luke, Atticus Finch, and Perry Mason. The new heroes included prosecutors and police from *Law and Order*, *Miami Vice*, and *CSI.* Throughout the media there was a new face on crime. Lawbreakers were no longer likable figures like Butch Cassidy and The Sundance Kid. They were now "evil alien beings, for whom no recourse seems possible except total expungement from the social order."[92] Rapping sums up the message of the 1980s and beyond: "Lock 'em up quick . . . before they come and get your Momma."[93]

85. STUNTZ, *supra* note 68, at 241.
86. Haney, *supra* note 83, at 404.
87. *Id.* at 404–05.
88. *Id.* at 405.
89. *Id.*
90. *Id.*
91. ELAYNE RAPPING, LAW AND JUSTICE AS SEEN ON TV 254 (2003).
92. *Id.*
93. *Id.*

With the media keeping us ever-frightened of a perceived epidemic of increasingly horrendous crimes, and politicians steadily fanning these fears while claiming to be the toughest law and order candidates, crime had secured its place atop the list of national concerns by the end of the twentieth century.[94] A new and alarmist view of crime had become entrenched in the national consciousness, making it inevitable that the legal system would adopt a dehumanizing value system.

B. The Expanding Power of the Prosecutor

As politicians became more and more attuned to the rising fear of crime and the growing thirst for punishment, they responded by providing law enforcement officials more tools with which to punish. One tool was the continued evolution of an ever expanding criminal code that outlaws more and more conduct. A second was the broadening of criminal liability that takes away many of the decisions that were previously left to the jury. A third was an increasingly harsh sentencing structure that takes much of the discretion away from judges. As a result, "[e]very year, additional crimes, increased punishments, and novel applications of the criminal justice system enter U.S. jurisprudence."[95] To better understand how these factors impact the administration of justice, we will look at each in turn.

At the time the Framers first cobbled together the protections so central to our criminal justice system, relatively little conduct was criminalized. Early American criminal law, handed down from English common law and defined by judicial decisions, included core crimes such as murder, manslaughter, rape, robbery, arson, assault, kidnapping, burglary, and larceny.[96] But during the nineteenth century, legislators codified these crimes, along with new ones beyond the scope of common law. As "legislators, [rather than judges], became the system's chief lawmakers," America's criminal codes grew.[97] This process continued throughout the nineteenth and twentieth centuries,[98] and as more and more crimes were sub-divided into multiple offenses, the amount of conduct subject to criminal

94. *See* E.J. Dionne, Jr., *The 1988 Elections; Bush Is Elected by a 6–5 Margin with Solid G.O.P. Base in South; Democrats Hold Both Houses: How the Poll Was Taken*, N.Y. TIMES, Nov. 9, 1988, http://www.nytimes.com/1988/11/09/us/1988-elections-bush-elected-6-5-margin-with-solid-gop-base-south-democrats-hold.html?pagewanted=all&src=pm. ("One voter in five said punishment of criminals was among the issues that mattered most[,] a remarkably high proportion for a Presidential election.").

95. Luna, *supra* note 70, at 703.

96. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001).

97. STUNTZ, *supra* note 68, at 260.

98. In Illinois, during the past century-and-a-half, the number of provisions in the criminal code increased from 131 to 421. During the similar period in Virginia, the number grew from 170 to 495. In Massachusetts, the number increased from 214 to 535. Meanwhile, during a similar time period, the federal code's criminal provisions jumped from 183 to 643. *See* Stuntz, *supra* note 96, at 513–14.

liability skyrocketed.[99] In *The Overcriminaliztion Phenomenon*, Professor Erik Luna cites sources indicating that the "body of federal law has now swelled to more than four thousand offenses that carry criminal punishment, [and that similar expansion has occurred] at the state level."[100]

Not only has the sheer number of crimes increased, but in many instances the definition of what constitutes criminal behavior has broadened. As Professor Stuntz points out, one of the most important examples of this is the broadening of the intent required to be held criminally liable.[101] Traditionally, in order to convict an accused of a crime the government had to prove that he or she acted with wrongful intent, or a "guilty mind."[102] However, that requirement has largely been abandoned as courts have allowed legislators to require only the much broader concept of general intent. In the large majority of criminal cases, "[t]he defendant is guilty if he intended his physical acts [which violate the] conduct terms of a criminal statute, [regardless of whether he intended the harmful result]."[103] Because many crimes now do not require evidence that the accused meant to do anything wrong, as long as he meant to engage in the proscribed conduct, it is much easier for a prosecutor to secure a conviction.

In addition to making it much easier to prove intent in many circumstances, legislatures have also broadened various crimes in other ways. One example is the crime of rape. Under the common law definition, rape requires both lack of consent from the victim and the use of force by the accused.[104] These are two distinct elements. However, some jurisdictions have essentially eliminated the force requirement.[105] For example, the New Jersey Supreme Court determined that the legislature intended that force could be proven through the unauthorized act of penetration, i.e., penetration coupled with lack of consent.[106] Other examples include legislatures that have diluted or eliminated the requirement that robbery be committed by force, that burglary require a violent entry, or that fraud include tangible loss to the victim.[107] Broad conspiracy statutes and an expansion of accomplice liability are available to prosecutors to hold people accountable for crimes in which they played a very minor role.[108] Frequently, this definitional

99. The outlawed behavior ranges from the serious to the trivial. *See generally* Luna, *supra* note 70; Stuntz, *supra* note 96.

100. Luna, *supra* note 70, at 713.

101. STUNTZ, *supra* note 68, at 260–62.

102. *Id.* at 260.

103. *Id.* at 262.

104. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *210 (1769). Under the common law rape was defined as "the carnal knowledge of a woman forcibly and against her will." *Id.*

105. *See In re* M.T.S., 609 A.2d 1266 (N.J. 1992). For a discussion of how rape has been redefined with respect to the force element see Timothy W. Murphy, *A Matter of Force: The Redefinition of Rape*, 39 A.F. L. REV. 19 (1995); *see also* STUNTZ, *supra* note 68, at 263.

106. Murphy, *supra* note 105, at 22–24.

107. *See* STUNTZ, *supra* note 68, at 262.

108. *See* Stuart P. Green, *Thieving and Receiving: Overcriminalizing the Possession of Stolen Property*,

broadening is accompanied by an expansion of the number of offenses proscribed for similar conduct.[109]

While the list of crimes has grown, and the conduct that qualifies for discipline for many has broadened, potential penalties have also become more Draconian. During the latter part of the twentieth century, sentencing policy shifted away from the rehabilitative ideal that had largely driven criminal justice policy since the nineteenth century.[110] A landscape that featured indeterminate sentencing systems and parole schemes, giving judges and prison officials the ability to take into account the unique circumstances of the person and to tailor sentences and release plans accordingly, was replaced with one that was far more retributive—one that focused on the crime and not the offender.[111] During the 1970s, the philosophical justification for imprisonment shifted from rehabilitation to incapacitation.[112] This shift was one of the consequences of the "tough on crime" political rhetoric of the preceding decade and the accompanying shift in the media portrayal of those brought into the criminal justice system.

Although the Framers saw an independent judiciary as critical to guarding against an oppressive criminal justice system, now "soft on crime" judges came to be seen as a threat to public safety.[113] The climate was ripe for a transition to a more punitive approach that limited judicial discretion.[114]

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14 NEW CRIM. L. REV. 35 (2011); Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217 (2000); *see also* Audrey Rogers, *Accomplice Liability for Unintentional Crimes: Remaining Within the Constraints of Intent*, 31 LOY. L.A. L. REV. 1351 (1998).

109. Professor Stuntz provides that as the requirement that force be proven to establish the crime of rape has been watered down, the number of crimes that can be charged for sexual assault has expanded. A century ago, "the law of sexual assault contained three offenses: rape (sex by force), assault with intent to commit rape, and statutory rape (sex with an underage victim)." STUNTZ, *supra* note 68, at 263–64. Today, for example, California's penal code includes sixteen offenses relating to "coercive sexual conduct." *Id.*

110. *See* Haney, *supra* note 83, at 392.

111. *Id.*

112. *Id.* at 381.

113. *See* United States v. Bayless, 913 F. Supp. 232 (S.D.N.Y. 1996). This case gives a stark example of public hostility toward a judge, U.S. District Court Judge Harold Baer, Jr., exercising his discretion to protect constitutionally-given individual rights, and the chilling effect such sentiment can have on judicial independence. Judge Baer suppressed drugs and a confession after finding that the police lacked the requisite suspicion to stop and search Carol Bayless's car. The decision created a public firestorm with then "Senate Majority Leader and Republican Presidential candidate Robert Dole criticiz[ing] then President Clinton for appointing 'liberal judges who bend the laws to let drug dealers go free' and called for Baer to be impeached." *New York Federal Judge Reverses Decision in Controversial Drug Case; Clinton, Dole Had Threatened to Ask for Resignation, Impeachment*, NEWSBRIEFS (Apr. 1996), http://www.ndsn.org/april96/bayless.html.

President Clinton responded by criticizing Baer's ruling and announcing his regret for appointing Baer to the bench. Less than three months after his initial ruling, Judge Baer succumbed to pressure and reversed his ruling. *See* United States v. Bayless, 921 F. Supp. 211 (S.D.N.Y 1996).

114. To be sure, there were also liberal criticisms of judicial discretion, including charges that sentencing disparity disproportionately had a negative impact on racial minorities and poor defendants. *See* Haney, *supra* note 83, at 389. But the driving force behind limiting judicial discretion was the image of the "pro-defendant" judge. As Professor Haney notes:

> As politicians succeeded in raising the overall level of fear and anger over crime, and capitalizing on the "tough on crime" policies they offered in response, there was increasingly hostile public reaction to any criminal justice policies that smacked of leniency or restraint (no matter how

Three key features of this new approach included determinate sentences, mandatory minimum prison terms, and sentencing enhancements for a variety of factors, punishments obviously appropriate for criminal defendants viewed as inhuman monsters.

Throughout the 1970s and 1980s legislators began restricting judicial discretion though more structured sentencing systems.[115] Under these "determinate" or "fixed" schemes, legislators set the sentences that attached to each crime much more narrowly, often defining the factors that must be considered in fashioning a sentence and the weight to be given each. By 2007, seventeen states, the District of Columbia, and the federal government promulgated sentencing guidelines that made each sentence so formulaic that the human element—with respect to both the judge and the offender—was largely removed from consideration.[116] These schemes were often coupled with "truth in sentencing" laws, which eliminate parole and other programs that allow for early release.[117]

To the extent that these new sentencing schemes left the judge any discretion, it was frequently limited because of the codification of mandatory minimum terms for certain crimes. When an offender is convicted of a crime carrying a mandatory minimum sentence, a judge cannot override the mandatory term when appropriate regardless of the individual circumstances of the offense or the defendant. This is what led to the fate of Kemba Smith, and countless other women punished for the sins of the men they loved. At the age of twenty-four, a pregnant Smith pled guilty to conspiracy to distribute crack cocaine. While she knew her boyfriend sold drugs, she had no idea he was "the leader in a $4 million crack cocaine ring and one of the FBI's 15 Most Wanted."[118] Smith unsuccessfully tried to leave this abusive relationship several times over its four-year course. She did not sell drugs herself but she benefitted from his income as a drug dealer. She admitted her minor role, but because of mandatory minimum sentencing, received 24.5 years in prison with no possibility of parole.[119]

Smith had no prior record, yet the judge had no discretion to reduce her sentence for the crime to which she pled guilty. However, another common feature of recent sentencing schemes, which also limits judicial discretion,

promising or effective). As a result, the amount of pain administered by the criminal justice system was consistently ratcheted upwards and widely distributed on an unprecedented scale.

Id. at 394.

115. *Id.*

116. *See* RICHARD G. SINGER, CRIMINAL PROCEDURE II: FROM BAIL TO JAIL, EXAMPLES AND EXPLANATIONS 296 n.20 (2nd ed. 2008).

117. *Id.* at 297.

118. *Kemba Smith*, SENTENCING PROJECT, http://www.sentencingproject.org/detail/feature.cfm?feature_id=1 (last visited, June 8, 2012).

119. After spending six-and-a-half years in prison, Smith was granted clemency by President Clinton. *Id.* For other stories of offenders receiving unjustly harsh sentences under mandatory minimum sentencing laws, see FAMILIES AGAINST MANDATORY MINIMUMS, http://www.famm.org (last visited June 8, 2012).

comes from provisions allowing enhanced sentences under certain circumstances. Perhaps the most common of these are recidivist statutes, laws providing for enhanced sentences for repeat offenders. Under these statutes mandatory sentences are based on the offender's criminal history, rather than the severity of the charged offense, and can often lead to Draconian sentences following conviction of relatively minor crimes.

Consider the case of William James Rummel.[120] In 1973, Rummel was charged with obtaining $120.75 by false pretenses, a felony in Texas, punishable by a sentence of not less than two nor more than ten years.[121] Rummel had two prior convictions at the time of his arrest: fraudulent use of a credit card to obtain $80 nine years earlier and passing a forged check in the amount of $28.36 four years earlier.[122] Texas had a recidivist statute that read, "[W]hoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."[123] Based on this statute, and his two prior convictions, Rummel was convicted and given a life sentence for the 1973 theft.[124] Unlike Kemba Smith, Rummel was not so severely punished because he was convicted of behavior deemed particularly egregious, but rather because of his past infractions.[125]

Similar recidivist statutes have led to life sentences for people convicted of stealing a bicycle,[126] a slice of pizza,[127] three golf clubs,[128] and nine video tapes.[129] In Louisiana, a third conviction for simple possession of marijuana could land a person in prison for twenty years,[130] and last year, after receiving probation for three prior marijuana convictions, thirty-five-year-old Cornell Hood II was sentenced to life without the possibility of parole after being convicted of attempting to possess and distribute marijuana.[131] In addition to enhancements for prior convictions, numerous other enhancements exist in both federal and state systems.[132]

120. Rummel v. Estelle, 445 U.S. 263 (1980).
121. *Id.* at 266.
122. *Id.* at 265–66.
123. *Id.* at 264 (citing TEX. PENAL CODE ANN. § 12.42(d) (West 1974) (internal quotation marks omitted)).
124. *Id.* at 266.
125. *See id.*
126. *See* Michael Vitiello, *Reforming Three Strikes' Excesses*, 82 WASH. U. L.Q. 1, 2 (2004).
127. *Id*.
128. Ewing v. California, 538 U.S. 11, 18 (2003).
129. Lockyer v. Andrade, 538 U.S. 63, 66 (2003).
130. LA. REV. STAT. ANN. § 40:966(E)(3) (2011).
131. Ramon Antonio Vargas, *Fourth Marijuana Conviction Gets Slidell Man Life in Prison*, TIMES-PICAYUNE (May 9, 2011, 11:56 AM), http://www.nola.com/crime/index.ssf/2011/05/fourth_marijuana_conviction_ge.html.
132. *See* 18 U.S.C. § 924(c) (2006) (increasing sentence for any person who "uses or carries" a firearm "during and in relation to a crime of violence or drug trafficking crime"); ALA. CODE ANN. § 13A-5-13 (1994) (mandating a fifteen-year enhancement when felony is proven to be motivated by "the victim's actual or perceived race, color, religion, national origin, ethnicity, or physical or mental disability"); 18 PA. CONS. STAT. ANN. § 6317 (West 1997) (creating a crime for the delivery or possession with intent to deliver any

As fear of crime, and of those accused of committing it, has more deeply penetrated national consciousness, legislators have responded by providing prosecutors more tools with which to punish criminals: more crimes from which to choose, broader criminal liability, and tougher sentencing schemes.[133] This thirst for a more punitive approach is a reflection of a national shift away from concern for individual rights and toward a call for more government control of the criminal justice arena. It is a shift that would concern the men who founded our constitutional democracy, a shift which, if not managed carefully, threatens our very concept of justice. For while conscientious prosecutors may use these powerful tools in a manner consistent with justice, they also provide opportunities to circumvent important procedural protections in an effort to mete out swift and severe punishment to the prosecutor tempted to do so. In the next section we will examine how prosecutors have responded to this shift in an effort to understand whether they have lived up to, or abdicated, their critical role in our system of justice.

IV. THE PROSECUTOR'S DILEMMA: RESPONDING TO THE CLIMATE OF FEAR

This new criminal justice landscape, with its expansive criminal codes and intense pressure to appear tough on crime, presented a dilemma for the prosecutor committed to the pursuit of justice. The message from the voters seemed clearly to demand more prosecutions and harsher sentences. With many more crimes available to target a greater array of conducts, and broader definitions of crimes significantly narrowing the range of defenses available to the accused, the job of securing convictions was made easier. But the resources necessary to ensure that justice was not sacrificed were not provided in the rush to prosecute and convict.[134] The prosecutor in this new era thus has a difficult choice: to refuse to prosecute more cases than the system can handle justly in the face of pressure to do otherwise or to bring cases without regard for resources in order to satisfy society's increasingly punitive appetite, regardless of the fact that it will jeopardize the protections that define justice. For many, the pressure to seek convictions has trumped the duty to serve justice. While the prosecutor has the power to control the number of cases

controlled substance within a certain distance of a school, college, university, recreation center, playground, or on a school bus); UTAH CODE ANN. § 76-3-203.1(b) (2011) (increasing the minimum jail time for persons who commit certain offenses "in concert with two or more persons").

133. Professor Luna points out that, as politicians continue to misuse "crime and punishment as concepts and the criminal justice system as an institution[,] . . . . [e]very augmentation provides officials a new legal instrument to apply against members of the so-called 'criminal class.' " Luna, *supra* note 70, at 712.

134. Gershowitz & Killinger, *supra* note 16, at 263–64 (explaining that over the past few years criminal filings have "skyrocketed" while many large prosecutors' offices have had to reduce staff); *see also* Backus & Marcus, *supra* note 3, at 1046–53 (discussing the funding challenges confronting indigent defense systems across the country).

that enter the system, most have failed to exercise that power responsibly. The result is a crippled criminal justice system.

A. The Caseload/Budget Imbalance: The Greatest Threat to Justice

We have a caseload crisis in America's criminal justice system. Both prosecutors and public defenders are responsible for far more cases than they can competently manage. No single factor has more seriously undermined the pursuit of justice in America. In this section we will look at how this problem impacts the ability of both the prosecutor and the defender to play their roles in serving justice.

1. Caseloads and Prosecutors

Undoubtedly, prosecutors are given immense responsibility in our criminal justice system to ensure justice is done at every stage of a case.[135] They must decide whether to initiate criminal proceedings and, if so, what the appropriate charges will be. They have to continually gather and process new information about each case and take the time to reevaluate prior decisions based on newly-learned data. They need to responsibly consider their obligation to share information with the defense in a way that balances their responsibility to the defendant with that of society at large. And, throughout the life of each case, they must oversee the process ensuring that the ends of justice are served. Clearly, they cannot fulfill these responsibilities without careful attention to each person whose life and liberty is on the line, but many prosecutors do not have the time to live up to this obligation.

In many jurisdictions, prosecutors charge far more cases than they can responsibly handle. "Prosecutors often have hundreds of open felony cases at a time [with] multiple [serious felony] cases set for trial on any given day."[136] In some, they "handle more than one thousand felony cases per year."[137] In a recent study, University of Houston Law Center Professor Adam Gershowitz and Harris County (Houston) Assistant District Attorney Laura Killinger teamed up to study the caseload crisis from the perspective of its impact on large prosecutor offices.[138] Their findings would be shocking even to a lawyer experienced in the practice of criminal law.

In Houston, prosecutors with roughly two years' experience handle about 500 open cases at any given time and about 1,500 throughout a single

135. *See* Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 714 (1999) (arguing that "[m]odern prosecutors have enormous authority in every phase of a criminal case"); *see also* Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171 (2005) (arguing that the prosecutor's obligation to justice extends beyond sentencing and includes post-conviction).

136. Gershowitz & Killinger, *supra* note 16, at 263.

137. *Id*. at 262–63.

138. *See generally id.*

year.[139] In Chicago, the average felony prosecutor handles about 300 cases at a time and between 800 and 1,000 in a year.[140] In Philadelphia, "prosecutors working in the Major Trials Unit or the Family Violence Sexual Assault Unit have open caseloads of 250 cases."[141] In Las Vegas, in 2009, ninety prosecutors handled nearly 800 cases each.[142] With caseloads this high, the prosecutor who works fifty hours a week for fifty weeks per year will be able to devote between 1.66 and 3.125 hours to each case per year.[143] This includes time to meet with witnesses, review police files, engage in the charging process, consider legal issues critical to the just resolution of the case, meet with defense counsel, handle in-court hearings, and many other obligations. Obviously, some of these cases result in a trial, an undertaking that takes anywhere from hours to weeks. This seriously cuts into the time available for all other cases.

Because so many prosecutors have neither the time to give every case the attention it requires, nor the guidance from equally overburdened senior lawyers to ensure things are not being overlooked,[144] they routinely "run afoul of their constitutional obligations and commit inadvertent prosecutorial misconduct."[145] When prosecutors charge more cases than they can responsibly handle, the people who suffer most are those who most depend on the protections of the system, the accused.[146] The consequences can be severe. Prosecutors may not be able to focus on each defendant as an individual with a unique set of circumstances, making it impossible to ensure that none be treated more severely than he or she deserves.[147] Cases that should be immediately dismissed may linger, often causing the accused to remain jailed pretrial longer than necessary.[148] Evidence of innocence may be overlooked as the harried prosecutor "scramble[s] to be ready for trial at the last minute."[149] And innocent people may plead guilty to crimes they did not commit because it is the only way they can get out of jail.[150] Beyond these problems, this system also deprives the accused of the effective assistance of counsel so critical to combatting these systemic breakdowns. We will now look at the price of overburdening defense counsel.

139. *Id.* at 271.
140. *Id.* at 271–72.
141. *Id.* at 272.
142. *Id.*
143. This range assumes 2,500 work hours per year (50 hours x 50 weeks), and annual caseloads ranging from 800 to 1,500.
144. Gershowitz & Killinger, *supra* note 16, at 263.
145. *Id.* at 282.
146. *Id.* at 263.
147. *Id.* at 280–81.
148. *Id.* at 286.
149. *Id.* at 284.
150. *Id.* at 290.

2. Caseloads and Defenders

As the Supreme Court declared in 1932, the right to be heard is meaningless if the accused lacks "the guiding hand of counsel at every step in the proceedings against him."[151] No other right is as fundamental to the person accused of a crime as the right to counsel, for it is this right that protects all others.[152]

The accused relies on his or her lawyer to investigate the facts; to research the law; to file and litigate motions; to consult with the accused throughout the process; to explain the legal system and developments in the case; to negotiate with the prosecution; to use professional skill and experience to select a jury; to contest the prosecution's case; to present whatever evidence there is in defense of the charges; if there is a conviction, to present evidence about the life and background relevant to sentencing; and to advocate persuasively on behalf of the client throughout the process.[153]

Each of these is an important component in ensuring justice, and none could be realized without the meaningful right to counsel.[154] Unfortunately, most poor people in this country accused of a crime will never have a lawyer able to adequately protect these rights, because most indigent defenders are forced to take on far more cases than they can competently handle. No problem facing indigent defense today is more important than that of unmanageable caseloads.

In 1973, concerned about the ability of lawyers for the poor to help ensure justice for their clients, the National Advisory Commission on Criminal Justice Standards and Goals ("NAC") set forth caseload limits for public defenders. Under these guidelines, no attorney should handle more than 150 felonies, 400 misdemeanors, 200 juvenile cases, or 25 appeals in a year.[155] These standards remain largely aspirational today, as public defenders routinely exceed these limits.

Almost thirty years after the NAC standards were drafted, juvenile public defenders in Clark County, Nevada, had caseloads of nearly 1,500 per year.[156] A 2003 report in Minnesota revealed public defenders typically handling more than 900 cases each per year.[157] Before recent reform efforts

151. Powell v. Alabama, 287 U.S. 45, 69 (1932).

152. *See* Stephen B. Bright, *The Right to Counsel in Death Penalty and Other Criminal Cases: Neglect of the Most Fundamental Right and What We Should Do About It*, 11 J.L. SOC'Y 1, 3 (2010).

153. *Id.*; s*ee also* Rapping, *supra* note 6, at 165.

154. Having competent counsel is not only essential to prepare and present the defense, it also allows the lawyer to bring information to the prosecutor's attention to help ensure that justice is achieved in the case. For example, by sharing information an overworked prosecutor may not have time to gather, a competent lawyer can help avoid unjust and unnecessary pretrial detention and the possibility of a wrongful conviction.

155. AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 5, n.19 (2002), *available at* http://www.sado.org/fees/tenprinciplesbooklet.pdf.

156. Backus & Marcus, *supra* note 3, at 1055.

157. *Id* at 1055–56.

in both Georgia and Louisiana, each state had counties that were typical of nationwide systems that provide indigent defender contracts to lawyers who maintain a private practice. Journalist Amy Bach recently wrote about Robert Surrency, a typical contract public defender in Georgia who handled nearly 1,500 cases in a four-year period.[158] In pre-Katrina New Orleans, a young part-time public defender named Rick Tessier represented 418 defendants during the first eight months of 1991.[159] He had at least one serious case set for trial for every trial date during that period. To provide assistance, the office had three investigators responsible for investigating the more than 7,000 cases the office took on each year.

The consequences of this problem are dramatic. In order to handle his crushing caseload, Robert Surrency adapted to a practice in which he did not investigate his cases or spend significant time meeting with his clients.[160] Despite this lack of information, Surrency routinely pled dozens of clients in a single court session without any negotiation on their behalf.[161] Of the 418 clients he represented in the first two-thirds of 1991, Rick Tessier entered 130 guilty pleas at arraignment, with no opportunity to engage in investigation or legal research.[162] Each of Tessier's clients was routinely incarcerated thirty to seventy days before he met with them, with no lawyer to seek a reasonable bond and secure their release.[163] Obviously Surrency and Tessier had been working in cultural environments that failed to see the basic humanity of defendants and so enabled the swift often unjust pursuit of convictions over justice.

Similarly, Samuel Moore spent thirteen months in a Crisp County, Georgia, jail without seeing a judge after being arrested for loitering. During this time the loitering charges were dismissed, but no one told Moore, who was not released until an investigator with the Southern Center for Human Rights, a non-profit organization, began looking into the matter. At the time of his release there was no legal basis to hold him. Through all this, Moore never saw his appointed counsel.[164]

In Montana, Jimmy Ray Bromgard was convicted of the rape of a young girl. The state's case was based largely on the testimony of the state's forensic expert who claimed hair found at the scene matched Bromgard's. His lawyer did no pretrial investigation, filed no pretrial motions, did not give an opening statement, and did not prepare for closing arguments. The lawyer did not offer an expert to refute the State's unreliable hair microscopy expert

158. AMY BACH, ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT 14 (2009).
159. Louisiana v. Peart, 621 So. 2d 780, 784 (La. 1993).
160. *See* BACH, *supra* note 158, at 14–17.
161. *Id.* at 14–15.
162. *Peart*, 621 So. 2d at 784.
163. *Id.*
164. Bright, *supra* note 152, at 12.

and never filed an appeal. Bromgard spent fourteen-and-a-half years in prison before being exonerated.[165] This is just one example of the many innocent people exonerated through the work of the Innocence Project whose wrongful convictions could have been avoided had they had competent counsel.[166]

One public defender in Rapides Parish explained the fallout from the caseload problem to the judge hearing the case of her client charged with murder: "[I]f you divide the number of hours in a day by the number of cases . . . , I would be allowed . . . to devote eleven minutes . . . to each of the Public Defender files that I have . . . . [I]t's just not humanly possible for me to do that."[167]

It is unquestionable that the criminal justice system is taking on more cases than it can handle. It is equally obvious that this imbalance takes a terrible toll on the accused and undermines our entire system of justice, a problem that is only exacerbated during hard economic times.[168] The prosecutor in this environment must decide whether to slow down the inhumane processing of people or to sponsor an unjust system. As we will explore next, prosecutors have been given the tools to take either course of action. The question is whether they have used those tools in a manner consistent with their role as minister of justice.

B. The Prosecutor's Response to the Caseload Crisis

1. The Power of the American Prosecutor: Prosecutorial Discretion and the Guilty Plea

No player in the criminal justice system has more power to control whether cases enter the system and how they are resolved than the prosecutor.[169] He or she enjoys complete discretion in deciding whether to bring charges, who to bring charges against, and what charges to bring.[170] These decisions are largely unreviewable by the courts,[171] and the system

165. *See* Profile of Jimmy Ray Bromgard, INNOCENCE PROJECT, http://www.innocence project.org/Content/Jimmy_Ray_Bromgard.php (last visited June 8, 2012).

166. *See Understand the Causes—Bad Lawyering*, INNOCENCE PROJECT, http://www.innocenceproject. org/understand/Bad-Lawyering.php (last visited June 8, 2012) ("The failure of overworked lawyers to investigate, call witnesses or prepare for trial has led to the conviction of innocent people.").

167. Backus & Marcus, *supra* note 3, at 1055 (citing Louisiana v. Bell, 896 So.2d 1236, 1240 (La. Ct. App. 2005)) (internal quotations omitted).

168. Gershowitz & Killinger, *supra* note 16, at 266 (noting that "tough economic times over the past few years have only made [the caseload problem] worse").

169. The extent to which prosecutors enjoy tremendous discretion, and the power it gives them in our criminal justice system, has been the subject of much scholarly literature. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996); Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387 (2008).

170. *See* DAVIS, *supra* note 169, at 12; *see also* STUNTZ, *supra* note 68, at 121.

171. DAVIS, *supra* note 169, at 14–15 (citing Wayte v. United States, 470 U.S. 598, 607 (1985)).

lacks any meaningful standards governing how prosecutors exercise their vast discretion.[172] As a result, prosecutors, who are elected in most states,[173] must answer only to the voting public. However, this check on prosecutorial power exists only in theory, as, in practice, prosecutorial decisions are largely shielded from public view.[174]

However, to the extent that voters do exert pressure on prosecutors, public opinion, shaped largely by the media's representation of the criminal justice system, may be inconsistent with constitutional principles fundamental to justice.[175] As the public comes to view the Constitution as a document that allows "bad guys" off on "technicalities," and threatens public safety, it has little interest in holding the prosecutor to his or her duty to justice. In fact, quite the opposite is true, as the public learns to cheer for aggressive law enforcement tactics to counteract the "defendant-friendly" law of the land. Where the burgeoning cost of incarceration might otherwise cause the public to more realistically evaluate its desire for increasingly punitive policies,[176] the structure of the criminal justice system has kept voters from bearing the cost of these choices as prosecutors are elected at the local level while the cost of incarceration is largely borne by the state.[177]

This unchecked discretion to make charging decisions, coupled with an ever-expanding criminal code, broader criminal liability, and harsher sentences, gives the prosecutor unprecedented power over citizens. It has become relatively easy for the prosecutor to seek and secure criminal convictions and ensure those condemned pay dearly. As a result, the prosecutor eager to respond to the public thirst for quick convictions and punitive sentences becomes a destructive force in our criminal justice system. Given a public eager to convict and largely unaware of the dangers and realities of prosecutorial conduct, and the many forces enabling it, the system depends on the trust that prosecutors understand their duty to ensure justice is done. That trust has proven to be misplaced.

172. *Id.* at 15–16.

173. Prosecutors are elected in all but four states and the District of Columbia. *Id.* at 10–11.

174. *See id.* at 5; *see also* BACH, *supra* note 158, at 260 (arguing that "[v]oters know almost nothing of the critical decisions related to plea bargaining and sentencing, and even less about the far more arcane process of charging defendants"); Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 123 (2011) (arguing that voters have "woefully insufficient information about their local prosecutors when they vote in prosecutor elections").

175. *See* Susan Bandes & Jack Beermann, *Lawyering Up*, 2 GREEN BAG 6 (2d ed. 1998). In *Lawyering Up*, the authors provide examples of how the media, reflecting public attitudes about criminal justice, frequently portrays heroic police who have little use for the Constitution. The authors discuss one episode of *Law and Order* in which a seasoned detective coerces a confession from a suspect. When a naïve younger detective asks about the practice, the wiser man replies, "In the case of a murderer like this who's gonna walk, I leave my gun and my jewelry outside with the Constitution." *Id.* at 8.

176. According to Russell M. Gold, in 2009 the number of inmates in state prisons and local jails reached nearly 2.2 million, with annual cost per inmate estimates reaching as high as $62,595 per year. Gold cites a study that estimates the annual 2008 cost of all state prisons (not including local jails) to be $44 billion. *See* Gold, *supra* note 174, at 69.

177. *See* STUNTZ, *supra* note 68, at 254.

To fully appreciate the extent to which many prosecutors routinely undermine basic precepts of justice, one must understand another area in which prosecutors enjoy almost unfettered discretion: the plea process. Not only does the prosecutor alone decide whether to inject more cases into the system through charging decisions, he or she can largely control how these cases are resolved through plea bargaining. The Supreme Court made the power of the prosecutor in this context clear when it decided *Bordenkircher v. Hayes*.[178]

In that case Paul Lewis Hayes was indicted in Kentucky for the offense of uttering a forged instrument in the amount of $88.30, an offense punishable by a term of two to ten years. The prosecutor offered to recommend a sentence of five years if Hayes pled guilty to the charge in the indictment. The prosecutor also threatened to return to the grand jury and seek an indictment under the Kentucky Habitual Offender Act, which would subject Hayes to a mandatory life sentence based on two prior felony convictions[179] if Hayes did not plead guilty and "save[] the court the inconvenience and necessity of a trial."[180] Hayes rejected the plea offer and the prosecutor made good on his threat. Hayes was convicted and sentenced to life imprisonment. The Court reinforced its unwillingness to interfere with the exercise of prosecutorial discretion and ceded to the prosecutor the obligation to ensure justice is served, while recognizing "that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse."[181]

Bordenkircher was meant to send a dual message to prosecutors: that the Court affords them great deference in how they manage the criminal justice system and that the burden rests with the prosecutor to ensure discretion is exercised justly. The danger of *Bordenkircher* is that to the prosecutor driven by a conviction psychology, the case will be seen as offering judicial approval of the prosecutor's use of his overweening power to coerce guilty pleas. Hayes was given a life sentence for trying to unlawfully obtain less than ninety dollars. The prosecutor in *Bordenkircher* almost certainly did not think the result was just; his use of the habitual offender law was meant to force Hayes to take the plea offer. But he had made a threat, and his failure to follow through would likely undermine his ability to negotiate pleas in the future.[182] Certainly, after *Bordenkircher*, defendants will be reluctant to call a prosecutor's bluff, even when faced with an unjust plea offer. For the

178. 434 U.S. 357 (1978).

179. Hayes had a 1961 conviction for detaining a female, a lesser included offense of rape, for which he served five years, and a 1970 conviction for robbery, for which he served a term of probation. *Id.* at 359 n.3.

180. *Id.* at 358.

181. *Id.* at 365.

182. *See* William J. Stuntz, Bordenkircher v. Hayes*: Plea Bargaining and the Decline of the Rule of Law*, *in* CRIMINAL PROCEDURE STORIES, *supra* note 50, at 354.

prosecutor so inclined, the Court's decision in *Bordenkircher* serves as permission to use coercive tactics to deprive the accused his or her day in court. The tools discussed earlier in this Article provide much of the ammunition.

As more human behaviors become subject to criminal liability, with many codified crimes overlapping, a single incident typically violates a half dozen or more prohibitions.[183] Because a prosecutor can use a single criminal episode involving multiple offenses to threaten to pursue all charges possible, he or she can significantly raise the defendant's potential sentence.[184] When one further considers potential sentencing enhancements and mandatory minimums for many crimes, the prosecutor can make the cost of going to trial incredibly steep. With broader criminal liability making it more difficult to defend against any given charge, the risk of being found guilty is much greater. As charges are harder to defend against, the prosecutor can create a substantial bargaining chip to coerce a plea by overcharging in order to make the cost of losing at trial much greater. [185] That this is an intentional attempt to undermine a foundational component of our justice system is supported by Timothy Lynch, the Director of the Criminal Justice project at the Cato Institute, who says, "[G]overnment officials have deliberately engineered the system to assure that the jury trial system established by the Constitution is seldom used."[186]

2. More Firepower: Excessive Bail and the Indigent Defendant

An additional trend in our criminal justice system further gives the prosecutor leverage to coerce a person into pleading guilty: the growing use of bail to hold poor people pending trial. As states have trended away from releasing defendants on their own recognizance pending trial and instead setting bond, the number of accused citizens who are forced to remain in jail awaiting trial has skyrocketed.[187] Four out of five people accused of crimes are indigent,[188] and many cannot raise even a modest amount to secure their release pretrial. As a result, a person accused of a relatively minor offense can remain in jail for months because he or she does not have the money to

183. *See* Stuntz, *supra* note 96, at 507.

184. *Id.* at 519–20.

185. "Overcharging" refers to the practice of tacking on additional charges in order to give the prosecutor additional leverage in the plea bargaining process.

186. *See* Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 10, 2012, http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html?_r=1.

187. *See Important Data on Pretrial Justice*, THE NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE (2011), http://www.pretrial.org/Presskit/NSPJ%20Fact%20Sheet%2003%20-%20Important%20Data%20on%20Pretrial%20Justice.pdf.

188. *See* Backus & Marcus, *supra* note 3, at 1034.

post bail. National Public Radio produced an exposé on the bail problem. Through it we met Shadu Green.[189]

Green was charged with a series of misdemeanors stemming from a traffic stop. The police claimed he became belligerent. Green contends that it was the police who were the aggressors. He was entitled to his day in court, but it would cost him. The court set bail at $1,000. A bondsman agreed to post the bail if Green paid a non-refundable $400 fee. Green did not have it.

Green had another way out of jail; the prosecutor offered him a plea bargain that would allow him to go home. He maintained his innocence and refused, stating in an interview that he understood what a conviction would mean to his job prospects as a twenty-five-year-old black man. But refusing the plea cost him dearly. He was jailed for six weeks, during which time he lost his apartment, his job, and six weeks with his daughter. After continuing to demand his right to a trial for a month-and-a-half, he found himself on the verge of giving in. Fortunately, before he did, his daughter's mother was finally able to raise the money to have him released. The story makes clear that had Green not made bond, he would have pled guilty to crimes he insists he did not commit. Once released, pleading guilty was no longer a consideration. Green's story is not unusual. As the NPR story explains, there are over a half-million people nationally in this predicament on any given day.[190]

In cases in which the prosecutor requests bail, he or she directly contributes to the high cost to the accused of going to trial. When the prosecutor is further removed from the bail determination, he or she nevertheless exercises his or her discretion in deciding the extent to which he or she will use pretrial detention to coerce a plea. Either way, the evolution of a bail system that makes the cost of going to trial very expensive for our poorest citizens provides the prosecutor even more leverage to pressure an accused into forgoing his or her right to trial. For the prosecutor who understands *Bordenkircher* as an invitation to coerce people into taking plea offers "by any means necessary," the system gives ample ammunition with which to do so.

189. Laura Sullivan, *Inmates Who Can't Make Bail Face Stark Options*, NPR NEWS (Jan. 22, 2010), http://www.npr.org/templates/story/story.php?storyId=122725819.

190. According to the NPR story:

> More than a half-million inmates are facing this choice on any given day in the nation's jails. Most are nonviolent defendants charged with petty crimes. They're not considered a threat to society or likely to flee. But it will cost taxpayers $9 billion a year to feed, house and clothe them.

Id.

3. Bringing a Machine Gun to a Knife Fight: Plea Bargaining and the Efficient Processing of People

Now that we understand the systemic caseload burden, and the criminal justice landscape it has engendered, we will look at how many prosecutors have dealt with a system that asks them to exact more justice than it is willing to pay for. A common response has been to acquiesce to the unfunded demand for more prosecution and to find ways to process more and more cases as cheaply as possible. As discussed above, the modern American criminal justice system provides ways for the prosecutor primarily interested in the inexpensive processing of many cases to do so.[191] Unfortunately, far too many have embraced that path, making many of the fundamental rights guaranteed in the Bill of Rights theoretical "for the overwhelming majority of people hauled into courtrooms across America."[192] And the overwhelming majority, of course, are those citizens most likely seen as unworthy of much concern, much less respect.

A recent *New York Times* article discusses this problem, noting that "the process has become coercive in many state and federal jurisdictions, forcing defendants to weigh their options based on the relative risks of facing a judge and jury rather than simple matters of guilt or innocence."[193] According to Rachel Barkow, a law professor who studies the way prosecutors use their power, "Legislators want to make it easy for prosecutors to get the conviction without having to go to trial . . . . [a]nd prosecutors who are starved for resources want to use that leverage."[194] She concludes that this creates a system that is designed to punish people "who have the nerve to go to trial."[195]

The stories of Orville Wollard and Shane Guthrie demonstrate this point. Wollard's ordeal began when "he fired his registered handgun into his living room wall to scare his daughter's boyfriend out of the house after he repeatedly threatened his family."[196] Although Wollard claimed he was only trying to protect his family, the prosecutor charged him with aggravated assault. Wollard refused a plea offer of five years' probation and went to trial. Because of the prosecutor's charging decision, Wollard was convicted and sentenced to a mandatory term of twenty years. At sentencing the judge, who had no choice but to impose the twenty years, told Wollard, "If it weren't

191. Stuntz argues that while mass incarceration is certainly costly, the cost is neither borne by the prosecutor nor the voters who elect him or her. Coercing many pleas might save money for counties that would otherwise have to pay for more lawyers and bear the cost of trials, costs that would likely come in the form of voters' tax dollars. The cost of this process, increasing prison populations, is borne by the state primarily responsible for paying for prisons. *See* STUNTZ, *supra* note 68, at 254.

192. Alexander, *supra* note 186.

193. Richard Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES, Sept. 25, 2011, http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html?_r=1&pagewanted=all.

194. *Id.*

195. *Id.*

196. *Id.*

for the mandatory minimum aspect of this, I would use my discretion and impose some separate sentence."[197]

Shane Guthrie was accused of beating his girlfriend and threatening her with a knife. The prosecutor offered him a plea for two years in prison. Guthrie, maintaining his innocence, rejected the offer. The prosecutor responded by filing a more severe charge carrying a mandatory life sentence.[198] One thing the *New York Times* article makes clear is that these developments in the plea bargain system have forced many defendants to give up their right to trial.[199] Based on available data, the ratio of pleas to trial for state-court felony cases nearly doubled between 1986 and 2006.[200] In the federal system, following the imposition of harsher sentencing laws in the 1980s, the percentage of criminal cases taken to trial fell from almost fifteen percent to less than three percent in 2010.[201] The ratio of acquittals at trial to guilty pleas entered in federal court fell from 1 in 22 thirty years ago to 1 in 212 in 2010.[202]

These figures represent a significant shift in the way criminal cases are being resolved. But one has to wonder if justice is being served by this improved efficiency. How, one might ask, is justice served by incarcerating Wollard for twenty years when the prosecutor's initial assessment of the case led to the conclusion that probation was the appropriate result? Similarly, when the prosecutor initially determined that a fair sentence for Guthrie was two years, how can a mandatory life sentence be consistent with justice?

While the *New York Times* article highlights the prosecution strategy of using a more expansive criminal code and tougher sentencing laws to coerce guilty pleas, the perverse system of pretrial detention illustrated in Shadu Green's case provides another opening for the prosecutor inclined to resolve cases quickly and cheaply. As the NPR piece makes clear, all across America judges impose bail in ways that discriminate against poor people. Whether a person is detained pretrial, largely becomes a function of whether they can afford the bond. With so many indigent people accused of crimes, Green's situation is far from isolated. There are numerous examples of the way prosecutors use this unfair bail system as the foundation of a strategy for dealing with the caseload problem. This was precisely the situation illuminated in a 2009 opinion piece in the *Houston Chronicle*.[203]

197. *Id.*

198. *Id.*

199. The *New York Times* article refers to data collected from nine states since the 1970s that shows that "fewer than one in 40 felony cases now make it to trial . . . when the ratio was about one in 12." *Id.* It adds, "The decline has been even steeper in federal district courts." *Id.*

200. *Id.*

201. *Id.* (citing data from the State University at Albany's Sourcebook of Criminal Justice Statistics).

202. *Id.*

203. Robb Fickman, *Judges Must Act to End Jail Overflow*, HOUS. CHRON., Aug. 9, 2009, http://www.chron.com/opinion/outlook/article/Judges-must-act-to-end-jail-overflow-1747232.php#page-2.

In it, Robb Fickman, a past president and Board member of the Harris County Criminal Lawyers Association, sheds light on the connection between the crushing caseloads of Houston prosecutors and their use of pretrial detention to clear court dockets.[204] Fickman describes how the Harris County system of excessive bonds, resulting in over 11,000 men and woman held in jail on any given day, forms the foundation of what he calls the "Harris County Plea Mill." After describing how these bonds are used to detain Houstonians accused of minor offenses, he explains how prosecutors prey on those too poor to make bond. Understanding that the accused is between a "rock and a hard place," with an overburdened lawyer who has little time to devote to his client, the prosecutor offers to allow the defendant to plead immediately and receive a shorter sentence or set the case for trial in the future and serve more time than the plea offer while waiting to fight the case.[205] Fickman concludes:

> The result is as predictable as it is revolting. On a daily basis . . . indigent defendants take the deal. They plead guilty, without regard to their actual innocence or guilt. They plead guilty to get out of jail sooner rather than later. They come in court chained together and in keeping with the lowest form of human processing, they engage in mass pleas of guilty.[206]

Although presiding over coerced pleas en masse is surely inconsistent with the duty to seek justice, it is far from uncommon. Stephen Bright refers to this feature of the system as "meet 'em and plead 'em,"[207] and describes how it works in some of the more resource-challenged jurisdictions. First a group of arrestees is brought to court all together and herded into the courtroom "dressed in orange jumpsuits and handcuffed together."[208] An overworked, court-appointed lawyer, who frequently has never met his "clients" before, walks down the line conveying the prosecutor's plea offer. The lawyer has little time to do more than ensure the accused that if he rejects the plea offer and requests a trial, the penalty will be far more severe. By the time the judge takes the bench, the lawyer invariably announces that the group is accepting guilty pleas. The judge then formalizes the pre-determined outcome. The "meet 'em and plead 'em" is driven by resource limitations that force defense lawyers to acquiesce to processing cases. It is made possible because the accused are made acutely aware that they have no other choice. But it can only exist with a prosecutor willing to take advantage of these systemic shortcomings and agreeing to preside over the injustice.

When an opportunity to avoid pretrial detention hinges on one's willingness to give up the right to trial, the result can be anything but just.

204. *Id.*; *see also* Gershowitz & Killinger, *supra* note 16.
205. *See* Fickman, *supra* note 203.
206. *Id.*
207. Bright, *supra* note 152, at 16–17.
208. *Id.*

Consider Shirley Johnson and Gail Chester, both from Gulfport, Mississippi. Ms. Johnson was arrested for attempting to take about $200 worth of quarters from a slot machine into which she had not put any tokens. Unable to afford her $100 bond, she sat in jail for eight months without an attorney visit, before pleading guilty and receiving a sentence of time served.[209] Gail Chester, accused of shoplifting, sat in jail for nearly thirteen months before she saw a lawyer. After nearly fourteen months in jail, she eventually pled guilty to a misdemeanor and was sentenced to time served.[210] Certainly for both of these women, lengthy pretrial detentions weakened whatever determination they had to have a trial.

In case the coercion applied by the threat of a severely increased prison term, or oppressive pretrial detention, is not enough, many prosecutors exert additional pressure in the form of an "exploding" plea, or a one-time offer that is only available for a limited period of time.[211] Using this tactic, the prosecutor can place the accused in a high-pressure situation in which he or she is forced to consider the plea offer without the time necessary to make an informed decision. Because defense counsel frequently does not have the time to investigate, seek discovery, or litigate motions, he or she is rendered unable to serve as an effective advisor.[212] In this sense the exploding plea offer routinely deprives the accused of his or her full right to counsel before making this vital decision. This is precisely the situation that confronted the defendants in the notorious Postville, Iowa, meatpacking plant raid.

On the morning of May 12, 2008, hundreds of Immigration and Customs Enforcement ("ICE") agents raided the Agriprocessors meatpacking plant and arrested 389 Latino workers.[213] They shackled the workers and transported them to a sixty-acre cattle fairground that had been set up as a makeshift detention center and court.[214] Eighteen defense lawyers were appointed to represent over 270 of the accused who were charged with violations relating to their working without proper documentation.[215] The U.S. Attorney's

209. NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS 9 (Feb. 2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf.

210. *Id.* at 3.

211. *See* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1160 (2011) (arguing that supervising prosecutors should "ride herd on line prosecutors to prevent high-pressure tactics such as exploding [plea] offers."); Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1281–82 (2008) (noting that exploding plea offers are "standard tools in most prosecutors' plea-bargaining arsenal"); Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 242–43 (2007) (discussing the psychological pressure an exploding plea offer puts on the accused).

212. Sometimes prosecutors make plea offers that are contingent on the defendant waiving important rights like demanding a preliminary hearing, seeking discovery, or filing motions.

213. For more information about the Postville raids see Amailia Greenberg & Shanti Martin, *How ICE Threatens the Ethical Responsibilities of Key Players in Worksite Raids: Postville Study*, 16 HUM. RTS. BRIEF 16 (2008); *Written Statement for a Hearing on Immigration Raids: Postville and Beyond*, ACLU (2008), http://www.aclu.org/files/images/asset_upload_file428_36231.pdf.

214. *See* Greenberg & Martin, *supra* note 213.

215. *Id.* at 18.

Office gave the defendants seven days to accept an exploding plea offer that would dismiss the charge of aggravated identity theft, which was punishable by a mandatory two-year prison sentence.[216] In return the defendants had to agree to leave the country and relinquish any rights to immigration relief.[217] Within four days, all 270 defendants accepted the deal. Given the "compressed time period" within which to work, their lawyers did not have the time to investigate and advise them of available options or to help them understand the consequences of their decisions.[218]

As the Postville cases reveal, "exploding [plea] offers that expire before defendants have had a meaningful opportunity to confer with counsel or to litigate colorable suppression motions . . . convey a disregard for the defendants' legal rights," and are inconsistent with the concept of procedural justice so fundamental to our legal system.[219] Yet they are routinely used by overworked prosecutors seeking creative ways to clear their dockets.

Today, more than ninety-five percent of all criminal cases are resolved through guilty pleas.[220] Our legal system, which now leaves so many little option but to plead guilty, has evolved because so many prosecutors take advantage of one or more of the following structural realities: (1) a more expansive criminal code, harsher sentences, and broader criminal liability; (2) excessive bail schemes that often leave poor people with no choice but to accept a plea in exchange for freedom; and (3) overburdened court appointed lawyers who have neither the time nor resources to adequately prepare for trial or advise their clients. For the prosecutor who takes as given the unmanageable number of cases in an underfunded system, and who views his or her obligation as securing as many convictions as possible, taking advantage of these features might seem to be effective law enforcement. But this prosecutor has a misunderstanding of what justice truly means and his or her duty to achieve it. As argued above, justice is about a process designed to ensure that every accused person has a sufficiently resourced and qualified defense lawyer available to ensure fundamental rights are protected, a jury able to evaluate the evidence and determine whether the accused is guilty, and an independent judge with the authority to ensure sentences fit crimes.

When the prosecutor addresses the caseload crisis by processing more cases more cheaply, he or she undermines fundamental principles of law and fails to fulfill the constitutionally mandated role of minister of justice. How should an ethical prosecutor respond to this? The answer is not difficult. He or she should refuse to charge any more cases than the system is equipped to handle consistent with principles of justice. Why have so few prosecutors

216. *Id.* at 16.
217. *Id.*
218. Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1301 (2010).
219. Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 430 (2008).
220. *See* STUNTZ, *supra* note 68, at 7.

responded in a manner consistent with their ethical obligation? This answer is more complicated. These questions will be discussed in the next section.

V. THE ETHICAL USE OF PROSECUTORIAL DISCRETION DURING HARD ECONOMIC TIMES

A. To Be "Tough on Crime" or Ethical?: The Prosecutor's Dilemma During Hard Economic Times

New Orleans found itself in a constitutional crisis in February 2012. Several months earlier, the Orleans Parish District Attorney's Office and the Orleans Public Defender's Office ("OPD"), along with municipal and state courts, appealed to the city council for more money to handle an increasing workload.[221] New felony cases in New Orleans jumped thirty-one percent between 2008 and 2011 as the DA's office elected to charge eighty-five percent of all cases brought to its attention.[222] Over the last two years, as the DA's office was busy charging more cases, Orleans Chief Public Defender, Derwyn Bunton, had been warning city officials of the emergency, threatening to have to refuse to take on more cases.[223] But the joint plea for funding fell on deaf ears.

Now, in an office where public defenders were already handling roughly twice the number of cases recommended by national standards,[224] the OPD found itself faced with a budget shortfall of about one million dollars (more than ten percent of its $9.5 million budget).[225] As a result, it had to lay off twenty-seven employees, including twenty-one lawyers—nearly a third of the public defenders on staff.[226] For an office representing approximately eighty percent of criminal defendants in New Orleans,[227] and already working overtime to try to provide its clients the representation they deserve, it could no longer continue to absorb the crushing caseload. As a result, 543 people accused of crimes, ranging from misdemeanors to murder, found themselves

221. John Simerman, *Public Defender Layoffs Could Gum Up the Works at New Orleans Criminal Court*, TIMES-PICAYUNE (Feb. 2, 2012, 11:00 PM), http://www.nola.com/crime/index.ssf/2012/02/public_defender_layoffs_could.html.

222. *Id.*

223. *See* Laura Maggi, *N.O. Public Defenders Office Says It Will Refuse New Murder and Rape Cases Due to Council Budget Cuts*, TIMES-PICAYUNE (Dec. 3, 2009, 7:37 AM), http://www.nola.com/crime/index.ssf/2009/12/orleans_parish_public_defender.html.

224. *See Public Defenders Back Off of New Cases*, NEW ORLEANS NEWS (Mar. 5, 2010, 6:31 PM), http://www.wdsu.com/news/22757902/detail.html. According to this 2010 news report, due to budget shortfalls public defenders in Orleans Parish were handling an average of 300 felonies per year, twice the national and state standards. *Id.*

225. Brendan McCarthy, *New Orleans Public Defender's Office Warns of Layoffs*, TIMES-PICAYUNE (Jan. 19, 2012, 7:00 AM), http://www.nola.com/crime/index.ssf/2012/01/new_orleans_public_defenders_o.html.

226. Simerman, *supra* note 221.

227. *See id.*

without lawyers.[228] Many of these citizens were jailed.[229] Anyone could see the crisis that the system was heading toward. There was no money available, yet cases continued to be pumped into an overloaded system. The District Attorney's Office had been on a charging binge without regard for the scarcity of resources available leaving the OPD, crippled by staff cuts due to underfunding, unable to do its job effectively.

The consequences of this strategy have not only crippled the OPD's ability to properly represent its clients, but have also left district attorneys unable to fulfill their obligations to justice. In an editorial published in the *New Orleans Times Picayune*, former Louisiana Supreme Court Justice Pascal Calogero, Jr. laments the frequency with which prosecutors in New Orleans engage in misconduct.[230] He points out that "favorable evidence was withheld from nine of the 36 (25 percent) men sentenced to death in Orleans Parish from 1973–2002," and that it continues today.[231] This troubling statistic cannot be blamed on a handful of rogue prosecutors, but is the predictable result of "a system that heavily incentivizes the winning of convictions at any cost,"[232] and disregards the important role of defense attorneys in adequately representing clients and so achieving true justice.

The New Orleans experience is but one illustration of how prosecutors frequently fail to take systemic budgetary concerns into consideration when exercising their charging discretion. When we look at caseloads that make it difficult for prosecutors to avoid engaging in unintentional misconduct, it is important to understand that through their discretionary charging decisions, prosecutors create this challenge for themselves. In turn, they create untenable situations for an overburdened public defender office without the same ability to control its caseload.[233] By charging more cases than the system can handle, the prosecutor's office drives the caseload crisis.

Because most prosecutors are elected, there is pressure to cater to a public that both applauds aggressive law enforcement but is also averse to paying for increased government budgets. This creates an incentive to charge

228. John Simerman, *Judge Taps New Orleans Noteworthies to Handle Criminal Cases*, TIMES-PICAYUNE (Feb. 15, 2012, 7:46 AM), http://www.nola.com/crime/index.ssf/2012/02/judge_taps_new_orleans_notewor.html.

229. *See id.* For example, in Judge Arthur Hunter's courtroom, which is the focus of *Judge Taps New Orleans Noteworthies to Handle Criminal Cases*, nine of the thirty-two defendants left lawyerless were detained. *See id.*

230. Pascal Calogero, Jr., *We Need Reforms to Increase Confidence in the Justice System*, TIMES-PICAYUNE (Feb. 29, 2012, 9:31 AM), http://www.nola.com/opinions/index.ssf/2012/02/we_need_reforms_to_increase_co.html.

231. *Id.*

232. *Id.*

233. *See* Josh Bowers, *Physician, Heal Thyself: Discretion and the Problem of Excessive Prosecutorial Caseloads, a Response to Adam Gershowitz and Laura Killinger*, 106 NW. U. L. REV. COLLOQUY 143, 143 (2011) (noting that unlike public defenders, prosecutors can control their caseloads). *See generally* Rapping, *National Crisis, National Neglect*, *supra* note 9 (explaining structural challenges to public defender attempts to control their caseloads).

cases despite a lack of resources and then find ways to get those cases through the system more cheaply. The solution is inevitably to coerce defendants to accept plea bargains. While this strategy may appeal to the public, it does violence to the prosecutor's obligation to justice. This approach moves us perilously close to a system in which juries no longer play a role in determining whether the accused violated the law, and neutral judges cease to be the forums for deciding how to fashion a sentence that best serves all societal interests. It leaves the defense lawyer impotent to ensure that the defendant's fundamental rights are protected. It ignores the procedural justice central to our notion of fairness. As former Justice Calogero argues, one of the things our system promises is a "fundamentally fair trial . . . [and if this promise is] not met, the criminal justice system itself falls into disrepute and may eventually be disregarded."[234]

Because it costs money to ensure that the requisite procedural protections are available for each case the prosecutor elects to charge, there is a budgetary limit imposed in considering the number of cases the system can justly handle. The prosecutor is the lone entity able to determine how many cases the system will be forced to handle and assess how much justice the system can afford. Although he or she may want to charge every alleged law breaker, if there is only funding to prosecute half the accused consistent with our principles of justice, the prosecutor has a choice to make. He or she can use his or her discretion to choose the fifty percent of cases most worthy of prosecution and pursue them in a just manner, or he or she can force more than half through the system and risk undermining justice. By analogy, assume the public demanded that 500 miles of public state highway be built but the legislature only provided enough funding to safely construct one-fifth of the project. The state could build 100 miles of highway consistent with safety standards or build 500 miles of highway, none of which is sound enough to protect its travelers. No responsible government would opt for the latter. Yet, we do this every day in America's criminal justice system as prosecutors try to force cases into a criminal justice system insufficiently funded to handle the caseload. As with the highway example, every case is jeopardized.

While the prosecutor has been given the power to undermine these protections by overcharging and coercing guilty pleas, he or she also has the authority to refuse to contribute to this system. Prosecutorial discretion enables him or her to refuse to charge more cases than the system can justly handle: to simply tell the legislature and the public that if it will not sufficiently fund the criminal justice system, he or she will not contribute to injustice. Although this course of action requires a strong sense of justice and

234. Calogero, Jr., *supra* note 230.

political courage, it is what we should expect from those who play such an important role in our justice system. Unfortunately, for many, the pressure to seek convictions trumps the duty to serve justice. The next section explores the reason why.

B. The Connection Between Values and Prosecutorial Ethics:Understanding Organizational Culture

So, what is a young law-and-order minded prosecutor to do when crime is a major public concern but the system is underfunded? When one considers the highway analogy, the answer is obvious: to be true to his or her ethical responsibility and mandate to pursue justice by refusing to take on more cases than it is possible to handle. So why do so many prosecutor's offices clearly charge more cases than can be responsibly handled? It is because these offices have been shaped by a culture that is inconsistent with fundamental values of justice.

Scholars of organizational development have long understood the importance of culture to both understanding and changing organizations. However, it is a concept that has not been widely discussed in the context of criminal justice. Although this author has studied the role of culture in transforming dysfunctional public defender offices,[235] its role in driving prosecutor's offices to perpetuate systemic injustice has not been considered in depth.

Any first-year law student could understand that it is impossible for prosecutors who are forced to carry caseloads like those described above to protect fundamental constitutional principles. They could instantly recognize that the use of the plea bargaining process to churn these cases through the system is certain to lead to miscarriages of justice. But many of those same students, should they become prosecutors, will participate in this routine themselves. This is not necessarily because they care little about ethics. While some may, most are unaware of the contradiction between their ideals and their practice. Apart from hearing the vague admonition while in law school that a prosecutor is duty-bound to seek justice, the young prosecutor probably never had an opportunity to consider what that concept means. He or she then likely joined a prosecutor's office that equates justice with conviction rates and values those who can use all tools available to efficiently process cases. Chances are he or she spent his or her formative years as a prosecutor guided by a set of cultural values inconsistent with protecting the principles discussed in Part II above.[236]

235. *See generally* Rapping, *supra* note 6; Rapping, *Directing the Winds of Change*, *supra* note 9; Rapping, *National Crisis, National Neglect*, *supra* note 9.

236. For an in-depth discussion of and the theory behind the relationship between organizational culture and the quality of the delivery of indigent defense services, see Rapping, *Directing the Winds of Change*, *supra* note 9.

Organizational development theorists define culture as "[that] set of basic tacit assumptions about how the world is and ought to be that a group of people share and that determines their perceptions, thoughts, feelings, and, to some degree, their overt behavior."[237] These assumptions, which might also be thought of as attitudes or mind-sets, inform a world-view that is so taken for granted that when asked why one holds it he or she might respond, "I don't know, 'that's [just] how things are done around here.' "[238] Such are the internalized assumptions driving the practice of many prosecutors. But because assumptions drive behavior, they help us understand how these prosecutors contribute to the injustices that define our criminal justice system. However, because their conduct is reflected in their assumptions about how the world should work, they are largely unable to appreciate that they are doing anything wrong. Amy Bach coined the term "ordinary injustice" to describe this cultural phenomenon, which she says "results when a community of legal professionals becomes so accustomed to a pattern of lapses that they can no longer see their role in them."[239]

The prosecutor's assumptions are formed by the values of the system within which he or she works. As he or she embraces these values, functions in accordance to them, and ultimately internalizes them, they define his or her assumptions. At that point he or she becomes part of the existing culture.[240] Therefore, the conduct described in this Article provides examples of how cultural forces in the criminal justice arena shape the attitudes of the prosecutors operating within it and, ultimately, determine their view of justice.

Consider the example of a young prosecutor named Paul Butler.[241] He came out of law school with a strong respect for civil liberties.[242] As a black man from the south side of Chicago, the disproportionate impact mass incarceration had on African Americans was not lost on him. He believed in "redemption and second chances."[243] He started his career as a prosecutor in Washington, D.C., critical of the criminal justice system, yet believing he

237. Edgar H. Schein, *Three Cultures of Management: The Key to Organizational Learning*, 38 MIT SLOAN MGMT. REV. 1, 11 (1996), *available at* http://www.harvardmacy.org/Upload/pdf/Schein%20 artilce.pdf.

238. *See* Rapping, *Directing the Winds of Change*, *supra* note 9, at 202.

239. BACH, *supra* note 158, at 3.

240. Organizational culture theorists help us understand the relationship between values and culture. As an individual is introduced to a new set of values he or she begins to operate in accordance with them. If these values help the individual achieve success in the environment within which he or she operates, he or she will begin to embrace them. As these values become internalized, they become his or her assumptions. When a group of people operates under a shared set of assumptions, culture is created. *See* Rapping, *Directing the Winds of Change*, *supra* note 9, at 204–05.

241. Paul Butler is now a Professor of Law at The George Washington School of Law. His experience as a prosecutor is the subject of *Let's Get Free: A Hip-Hop Theory of Justice*. *See* BUTLER, *supra* note 51.

242. *See id.* at 101.

243. *Id.*

could "change the system from the inside."[244] He had a healthy idea of what it meant to seek justice.

But soon Butler's concerns about civil liberties and second chances gave way to a belief that his job was "to send as many people to jail as [he] could."[245] He went from seeing the young men he prosecuted as inherently redeemable to something less than human as he honed his skill at convincing juries that "[the defendant] on trial was a piece of garbage."[246] He came to the job with a "progressive" attitude toward criminal justice,[247] but he soon found himself joining the other prosecutors who measured their prosecutorial prowess by the speed with which a guilty verdict was handed down by the jury[248] and referred to young black defendants in Washington, D.C., as "cretins" and "douche bags."[249] It was only after he was falsely accused of a crime, and prosecuted by the very office in which he worked, that he came to see clearly that the office culture was inconsistent with his idea of justice. He left after recognizing that he had not changed the system; the system had changed him.

Tom Breen was also a product of the prosecutor's office in which he worked. He began his career in the Cook County State's Attorney's Office in Illinois, a place where overzealousness was a virtue.[250] It was an "intense" office in which fellow prosecutors competed to secure convictions, and a chart tallying wins and losses hung on the wall.[251] The lawyers saw themselves in "a highly charged battle" of "[g]ood against evil."[252] The opponents were not only the "criminals" but also the lawyers who represented them and the judges who, at times, stood in the way of winning.[253] Rather than respecting the procedural protections built into the system, the Chicago prosecutors saw them as creating an unfair advantage for the "bad people" they prosecuted. Many felt "it was better to push the bounds of the law and be slapped down by the appellate courts than to stick to the rules and lose."[254] According to one former state's attorney, "There was definitely a saying at the office that you can't be reversed on the appeal if you don't win at the trial."[255]

244. *Id*.
245. *Id.* at 105.
246. *Id.* at 104.
247. *Id.* at 105.
248. Butler describes returning from court to "whoops and high fives" as he dramatically announced his trial victories and shares how he would feel "especially studly" if he could add that the "jury deliberated less than thirty minutes." *Id.* at 116.
249. *Id.* at 116.
250. *See* BACH, *supra* note 158, at 194–97(describing Breen's office).
251. *See id.* at 195.
252. *Id.* at 196.
253. *Id.* at 197.
254. *Id.*
255. *Id.*

It was a "win-at-all-costs"[256] atmosphere with no time to be "critical of the methods" used in the process.[257]

The culture of the office was facilitated by the dehumanization of the people it prosecuted. For example, in her book *Ordinary Injustice*, Amy Bach describes a ritual known as the "two-ton contest" in which "some prosecutors competed to see who would be first to convict defendants weighing a total of four thousand pounds."[258] To facilitate this sport, defendants would be weighed on a scale behind the courtroom—a routine the lawyers jokingly called "niggers by the pound."[259]

Tom Breen was one of the office's stars. A young, talented, highly effective prosecutor, he quickly made a name for himself. Four years into his tenure, he was assigned the high publicity rape and murder of a nine-year-old girl named Lisa Cabassa. Breen charged two seventeen-year-olds with the crime: Michael Evans and Paul Terry. Despite considerable problems with the evidence, using aggressive tactics Breen and his co-counsel eventually secured convictions of the two boys.[260]

Breen subsequently left the prosecutor's office to become a respected member of the defense bar. Once removed from the office culture, Breen began to understand the Cabassa case in a different, more objective light. He questioned the verdicts and shared his doubts with Professor Larry Marshall at the Center for Wrongful Convictions at Northwestern University School of Law. This put in motion a series of events that eventually led to Evans's and Terry's exonerations and pardons. DNA proved their innocence but not before each spent twenty-seven years incarcerated. But it took Breen leaving the state's attorney's office to enable him to objectively evaluate the problems with the evidence in the case. Despite the fact that Breen's actions righted a grave injustice, he was ostracized by many of the members of the law enforcement community to which he once belonged. Airing its dirty laundry was seen by some as a greater wrong than the wrongful conviction of two teenage boys.[261] Even Breen's original co-counsel in the case found it easier to hypothesize a new theory consistent with Evans's and Terry's guilt than to accept that they had made a mistake.[262]

These are but two examples of the power of organizational culture and its impact on prosecutor's offices. They, along with the other anecdotes used

256. *Id.*
257. *Id.* at 195.
258. *Id*. at 197.
259. *Id.*
260. *See id.* at 191–256; *see also Michael Evans and Paul Terry*, CENTER FOR WRONGFUL CONVICTIONS, NORTHWESTERN LAW BLUHM LEGAL CLINIC, http://www.law.northwestern.edu/cwc/exonerations /ilEvansTerrySummary.html (last visited June 8, 2012).
261. *See* BACH, *supra* note 158, at 243–46.
262. Despite DNA evidence excluding Evans and Terry as contributors to the semen found inside Lisa Cabassa, Breen's former co-counsel Terry Ekl suggested that maybe Evans and Terry were present but that a third man ejaculated inside the victim, a theory never previously considered. *See id.* at 242.

throughout this Article, help us understand that many prosecutor offices are driven by a set of values that undermine the procedural protections fundamental to justice. Four values in particular have helped to shape a culture that makes it difficult for many prosecutors to live up to their ethical obligations: (1) prioritizing convictions as the goal of the prosecution, (2) dehumanizing those accused of crime, (3) lacking sufficient respect for procedural protections, and (4) viewing defense attorneys as obstacles to justice as opposed to essential components of it. These values influence prosecutor offices with varying degrees of subtlety. In fact, most prosecutors may be unaware of the extent to which any or all of these values impact their performance. We will discuss each of these values in turn.

1. Prioritizing Convictions as the Goal of the Prosecution

As we have seen, prosecutor offices are often competitive environments. When prosecutors vie with one another to see who can obtain the most convictions or the fastest jury verdicts, the institutional pressure to "win" is obvious. But prosecutors also face more subtle pressures to equate "[t]he admonitional obligation to 'seek justice' . . . with obtaining convictions."[263] In an article expounding on his years as a federal prosecutor, Kenneth Melilli explains how prosecutors come to know and sympathize with crime victims and develop close working relationships with police officers. The prosecutor frequently comes to see himself as being on the same team as the police and victims, and as representing the victim him or herself. This makes it difficult to make decisions that may hurt the prosecution's case, even when the facts indicate that it would be just to do so.[264] Melilli explains that because most prosecutor offices fail to provide meaningful training in prosecutorial ethics, these "institutional influences" can cause even the most conscientious prosecutor to adopt a "conviction psychology."[265] Melilli's observations reflect organizational culture at work.

2. Dehumanizing Those Accused of Crime

Well-known anti-death penalty activist Sister Helen Prejean famously said that "people are more than the worst thing they have ever done in their lives."[266] Her years of ministering to death row inmates taught her this valuable lesson about humanity. While people sometimes do bad things, they are nevertheless sons and daughters, mothers and fathers, brothers and sisters.

263. Melilli, *supra* note 15, at 690.
264. *See id.* at 689.
265. *Id.* at 690.
266. *Quotations from Helen Prejean*, GOODREADS.COM, http://www.goodreads.com/quotes/show/129660 (last visited June 8, 2012).

They may be cooks, sanitation workers, artists, or hairdressers. They are whole human beings with a lifetime of experiences that shape and define them. Yet prosecutors rarely get to know the people they prosecute, except through police reports and rap sheets.[267] He or she becomes the drug dealer, thief, illegal immigrant, or batterer. This helps explain how a socially conscious law graduate like Paul Butler could become a prosecutor who thought of defendants as "garbage," "cretins," and "douche bags" or how the Chicago state's attorneys about whom Amy Bach writes could so callously participate in the "two-ton contest."

Dehumanizing the accused in this way makes it easy to be punitive and greatly minimizes the cost of making a mistake that might inflict unwarranted human suffering. It becomes easier, for example, to process 389 Latino workers, herded into a cattle fairground, and coerce them into accepting plea offers that will have them deported without any regard for how productive and law-abiding they have been in the past or whether they have small children who will be left parentless, as the Postville prosecutors did so effortlessly. Just as developing sympathies toward the victim can influence the prosecutor's objectivity, so too can becoming desensitized to the humanity of the accused. When the prosecutor who drives the case becomes personally invested in the concerns of the victim and in maintaining a good relationship with the police who have a stake in the prosecution—yet sees the accused only in dehumanizing terms—it is less likely justice will be served.

3. Lacking Sufficient Respect for Procedural Protections

Obviously, for the prosecutor who equates securing a conviction with his or her duty to justice, there is an incentive to disregard any procedural protection that appears inconsistent with that goal. The conflict between securing a conviction and ensuring that procedural protections are respected tends to lead prosecutors to give short shrift to the latter.[268] The result is the tendency to justify behavior that objectively runs afoul of the prosecutor's duties. Melilli credits this cultural phenomenon with influencing prosecutors to improperly withhold exculpatory evidence or to subtly manipulate evidence to secure a conviction.[269] Butler describes the pressure to "adopt pinched interpretations of the Constitution and individual rights."[270] According to Butler, "one of [the prosecutor's] primary functions . . . is to make the judge and jury believe the police."[271] He gives an example: "When the cops say that Kwame consented to the search of his backpack, and Kwame says he

267. Melilli, *supra* note 15, at 689.
268. *Id.* at 690.
269. *Id.*
270. BUTLER, *supra* note 51, at 102.
271. *Id.*

didn't consent, your job is to prove that Kwame is lying."[272] Obviously, if the prosecutor sees the police as his or her teammates and Kwame as "a piece of garbage," he or she more easily feels relieved of the obligation to objectively evaluate the evidence. Rather than understanding that he or she may be helping to cover up evidence of a constitutional violation, the prosecutor is mollified by his or her worldview that the police are the good guys and the accused always lies.[273]

4. Viewing Defense Attorneys as Obstacles to Justice as Opposed to Essential Components of It

Arguably no right is more essential to upholding our system of justice than the right to counsel, for without it no other rights can be protected.[274] Therefore, no prosecutor can live up to his or her duty to justice without a deep respect for, and commitment to, this most fundamental right. Yet, rather than viewing the right to counsel as venerable, many prosecutors see defense counsel as a hindrance. Because of this view, these prosecutors are more likely to welcome an adversary who falls short of his or her duty to provide effective assistance of counsel rather than to try to correct the injustice. A recent conversation I had with a close friend who is a public defender in Mississippi provides an example. My friend was watching a trial in which it was evident that the defense attorney was unprepared and incapable of providing his client a zealous defense. The prosecutor easily used the lawyer's ineffectiveness to the state's advantage. The prosecutor later joked with my friend about how easy it was to take advantage of the lawyer's incompetence. While this prosecutor's response to an inept adversary violates her obligation to "do justice,"[275] it is certainly not an isolated one. In fact, precisely because of conviction psychology, many prosecutors would find nothing wrong with this prosecutor's response. Rather than being concerned that an actor whose role has such an impact on the administration of justice is failing miserably, the prosecutor sees this systemic shortcoming as something that is fair game to exploit.

More troubling than the prosecutor who exploits an incompetent adversary is one who acts in a way calculated to invite ineffective representation. This is precisely what happened in New Orleans when the Orleans Public Defenders sought to provide Troy Harris with zealous

272. *Id.*

273. Butler also discusses the pressure prosecutors face to support an officer he or she has doubts about absent some actual proof of the officer lying. Given the culture of the criminal justice system, Butler shares that it is easier to "go along to get along" than to "get the cop mad at you for believing some defendant over him." *Id.* at 13.

274. *See* Bright, *supra* note 152, at 3.

275. *See* Zacharias, *supra* note 14, at 66–74 (discussing the prosecutor's ethical role when confronting inadequate defense counsel at trial).

representation after he was accused of raping a young family member. A twenty-two-year-old OPD investigator, fresh out of college, sought to talk to the twelve-year-old complainant and her eight-year-old sister, who allegedly witnessed the incident. The investigator left a message for the girl's mother, fully identifying herself and asking for a meeting to discuss the allegations.[276] The mother returned the call and expressed her desire not to have the investigator interview her daughters. Two weeks later, the investigator decided to make a second attempt. When she arrived, the children were in the care of neighbors. The investigator introduced herself to the neighbors, and the two girls willingly spoke to her. The girls' mother, who was asleep when the interviews began, woke up, saw the girls talking to the investigator, and informed the prosecutor of the interviews and her earlier communication with the investigator. Despite the fact that the defense is constitutionally and ethically obligated to investigate and interview witnesses,[277] that there existed no authority prohibiting the interview of a minor without parental consent, and that the girls willingly talked to the investigator, the prosecutor's response was to charge the investigator with kidnapping and issue a warrant for her arrest.[278] Less than a week after this incident, the district attorney's office had the investigator arrested in court, handcuffed, and led out of the courthouse.

Given how far the prosecution had to go to make an allegation that required that the investigator acted with unlawful intent,[279] the defense community saw the charge as an attempt by the district attorney's office to "chill" zealous defense representation.[280] The district attorney's reaction was particularly troubling, because the OPD was still in the early stages of a reform effort following an era in which it routinely failed to conduct investigations and otherwise live up to its constitutional obligations to the people it represented.[281] In the midst of trying to raise the standard of representation in what had until recently been one of the nations' worst public defender offices, OPD staff could ill afford to have to worry about the threat

276. The account of the investigator's attempts to interview the witnesses in Mr. Harris's case comes from the subsequent contempt proceeding transcript in the case of Louisiana v. Green, No. 487-993 (La. Crim. Dist. Ct., July 15, 2009).

277. *See* Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 665–66 (1986) (noting that "[c]ourts have long recognized that 'effective assistance refers not only to forensic skills but to painstaking investigation in preparation for trial' ").

278. The relevant definition of the crime of simple kidnapping in Louisiana is "[t]he intentional taking, enticing or decoying away, for an unlawful purpose, of any child not his own and under the age of fourteen years, without the consent of its parent or the person charged with its custody." Simple kidnapping carries a penalty of up to five years in prison. LA. REV. STAT. ANN. § 14:45 (2011).

279. *See id.*

280. *See* Gwen Filosa, *Investigator for N.O. Public Defenders Jailed on Kidnapping Charge*, TIMES-PICAYUNE (July 16, 2009, 6:54 AM), http://www.nola.com/news/index.ssf/2009/07/orleans_da_public_defenders_il.html.

281. *See* Rapping, *Directing the Winds of Change*, *supra* note 9, at 194–95.

of this abusive use of power by its adversary. That the charges against the investigator were intended to undermine effective representation is further supported by the fact that all charges were dropped five months later.[282]

Once understood, the four values discussed above can clearly be seen as contributing to an organizational culture that encourages prosecutors to participate in, and even drive, a system that routinely undermines important principles of justice. When a prosecutor prioritizes winning above all else, comes to see the accused as less than human, fails to respect procedural protections, and/or devalues the role of defense counsel, his or her attempts to practice in accordance with his or her ethical obligations can be compromised. These forces help forge a mindset that drives prosecutors to charge more cases than the system can handle and then undermine procedural protections in an effort to resolve them efficiently. Through his or her broad discretion in the charging process, the prosecutor is the lone actor capable of regulating the number of cases in the criminal justice system. The prosecutor can prioritize the most serious crimes but refrain from charging more cases than the system can justly handle. The prosecutor alone can resolve the greatest threat to justice: the caseload crisis. But until their offices' organizational culture is transformed, most prosecutors will continue to be influenced by pressures inconsistent with justice. Therefore, criminal justice leaders must consider how to transform this tainted culture.

C. Transforming Culture: Changing Values That Drive Prosecutors

Because an organization's culture is ultimately a function of the values it embraces and the degree to which its employees adopt them, those who lead prosecutors' offices must be committed to values consistent with justice and devise strategies to ensure their staff adopt them.[283] With this in mind, chief prosecutors' primary obligations are to understand their offices' role in promoting justice and to be willing to resist pressures to succumb to values that undermine that obligation.[284] Once a reform-minded leader is at the helm, he or she must of course have a strategy for transforming an organizational culture tainted by the undemocratic values discussed above. This is precisely the problem I previously studied in the context of the

282. *See* Gwen Filosa, *Charges Dropped Against City Investigator in Child Rape Case*, TIMES-PICAYUNE (Jan. 9, 2010, 1:07 PM), http://www.nola.com/crime/index.ssf/2010/01/charges_dropped_against_city_i.html.

283. *See generally* Rapping, *Directing the Winds of Change*, *supra* note 9 (discussing the role of leadership in driving cultural transformation in the context of public defender offices). Because most chief prosecutors are products of a criminal justice system shaped by values inconsistent with justice, policy makers should invest in leadership training to help these leaders reevaluate the values driving their respective offices.

284. This is obviously going to be more difficult for the prosecutor who is elected if the public values are inconsistent with principles of justice. In these jurisdictions, it is particularly important that the prosecutor office be involved in an education campaign to help reshape public values about these principles and the role of the prosecutor in upholding them.

corrupted culture in many public defender offices. In *You Can't Build on Shaky Ground*, I laid out a defender-driven theory of change that involves public defender leaders identifying values fundamental to the role of the public defender, then engaging in "values-based recruitment, training, and mentoring" to groom a generation of public defender staff that internalize, and act on, these values.[285] I introduced the Southern Public Defender Training Center ("SPDTC"), an organization that is putting this theory into practice by building partnerships with public defender offices that embrace a shared value-system, and working with them to forge a community of public defenders who are raising the standard of representation in their respective jurisdictions.[286] As these young defenders become future indigent defense reform leaders, they will transform a culture that has badly served poor people accused of crimes.[287] This model is equally applicable to any effort to transform a dysfunctional culture in prosecutors' offices.

SPDTC training integrates a curriculum of sessions that focus on three areas of education: knowledge, skills, and values. All three areas are also important components of a training program for young prosecutors. For the student interested in criminal law, the first two are taught in law school to varying degrees, often depending on the extent to which pertinent electives supplement the core curriculum. The third area is almost certainly not sufficiently explored beyond a basic course in professional responsibility. Yet, it is an appreciation for relevant values, and the ability to remain true to them when confronted with challenges, that will have the greatest impact on how well a young prosecutor lives up to his or her obligation to ensure justice is done.[288]

285. *See* Rapping, *supra* note 6, at 161.

286. The SPDTC began with sixteen lawyers from two offices. By August 2012 we expect to have brought approximately 200 lawyers into our community from over thirty offices across thirteen states. Thanks to a joint grant from the Department of Justice to SPDTC and Equal Justice Works to pilot this model beyond the South through an initiative called the Public Defender Corps, this community now includes public defenders from New York, Pennsylvania, and West Virginia, as well as Southern offices in Alabama, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. *See* Rapping, *National Crisis, National Neglect*, *supra* note 9, at 351.

287. In January 2012, SPDTC launched its Graduate Program to begin the process of developing the lawyers who graduated from the initial three-year program into leaders of the indigent defense reform movement.

288. That a misguided set of values can corrupt even the most elite prosecutor offices is demonstrated by a scathing report recently released on the behavior of federal prosecutors in the case against former Alaskan Senator Ted Stevens. Notice of Filing of Report to Hon. Emmet G. Sullivan, *In re* Special Proceedings, (2011) (Misc. No. 09-01098) (EGS) *available at* http://www.wc.com/assets/attachments/Schuelke%20Report.pdf. In a display of prosecutorial misconduct that led to U.S. District Court Judge Emmet G. Sullivan overturning Stevens's convictions, *The Washington Post* reported that "[f]ederal prosecutors and agents concealed key evidence, suffered a collective memory lapse that strains credulity and were hampered by internal politics, poor supervision and a crushing deadline." Del Quentin Wilber & Sari Horwitz, *Prosecutors Concealed Evidence in Ted Stevens Case, Judicial Investigators Find*, WASH. POST, Mar. 15, 2012, http://www.washingtonpost.com/local/crime/prosecutors-concealed-evidence-in-ted-stevens-case-report-finds/2012/03/15/gIQAJ5GNFS_story.html. Attorney General Eric Holder responded by "impos[ing] sweeping new training courses on thousands of federal prosecutors to remind them of their legal obligations." Carrie Johnson, *Report: Prosecutors Hid Evidence in Ted Stevens Case*, NPR NEWS (Mar. 19, 2012), http://www.npr.org/2012/03/15/148687717/report-prosecutors-hid-evidence-in-ted-stevens-case.

Within the first few weeks on the job, the young prosecutor will probably encounter a number of situations that will test his or her value system and, depending on how the lawyer responds, help shape it. Because the early years are the most formative, how the young lawyer responds in these circumstances will help determine the type of prosecutor he or she becomes. Some challenges will test how he or she balances the desire to secure a conviction against his or her obligation as minister of justice. For example, imagine a young woman was raped while jogging in the park. She provides a very general description of her attacker. Within ten minutes the police detain a suspect and bring him to the young woman for confirmation while she is being treated for injuries at the crime scene. She positively identifies the man as her attacker. While driving the suspect to the police station, in response to police questioning, the suspect admits that he raped the victim.

Now imagine you are a new prosecutor assigned to this case. You learn that the accused is a suspect in several other rapes but that there has never been enough evidence to charge him. However, you are confident about the strength of this case, which seems straightforward until you realize that the suspect's confession will probably be inadmissible at trial because the police did not advise him of his Fifth Amendment rights before questioning him.[289] You nevertheless believe the case is still strong based on the victim's identification. However, when you talk to the victim, while she assures you she now is confident that the defendant was the rapist, she admits that at first she was not certain. She further admits that the more she plays back the image of the police walking the suspect toward her the day of the rape, the more confident she becomes that he was her attacker. The victim further tells you that she was very hesitant to even tell you about her initial uncertainty because she did not want you to doubt her identification. She is positive the defendant is the rapist. She just tells you these things because she trusts you and counts on you to make sure the defendant does not rape another woman.

Another issue to consider is the relationships among police officers or other prosecutors. Prosecutors frequently work with the same officers and there is a strong sense of loyalty between prosecutors and police in many law enforcement communities. These effective working relationships can be damaged if the prosecutor is seen as siding with a criminal over his or her colleagues. Imagine being the new prosecutor handling a drug case. You are in the courthouse preparing for a hearing on a defense motion to suppress the drugs as having been seized pursuant to an illegal search. The defense argues that the arresting officer detained the defendant for no reason and found the drugs while searching his pockets. The officer claims in his incident report

289. *See* Miranda v. Arizona, 384 U.S. 436, 492 (1966) (holding that the police are required to advise a suspect of his or her rights to remain silent and to consult with a lawyer before questioning).

that the defendant had the drugs in his hand and seeing the officer shoved them into his pocket. The officer claims the basis of the initial detention was that he recognized the drugs while they were in the defendant's hand. As you are walking to the courtroom you overhear the arresting officer admitting to a fellow officer that he did not actually see the defendant with drugs in his hand. No one else is around when you hear this and the officers have no idea that you were in the vicinity. When the arresting officer testifies, his version is consistent with his police report.

Other issues might involve the degree to which the young prosecutors are resistant to pressure to dehumanize those whose lives are most impacted by their decisions: the accused. Now imagine you are the new prosecutor and you are having lunch with several of the more experienced prosecutors in the office when one begins to regale the group with a reenactment of his scathing cross-examination of the defendant in a recent trial. He begins by mocking the defendant's lack of education and poor English, which invites much laughter from the group. He then begins to refer to the defendant as a "worthless scumbag." Soon others are joining in with equally derisive remarks about the men and women they have prosecuted.

How the new prosecutor responds to each of these scenarios, and allows them to shape his or her mindset, will determine the type of prosecutor he or she becomes. Prosecution leaders ignore the values that underlie these hypotheticals at their own peril. If chief prosecutors are going to transform dysfunctional offices and, ultimately, make the system more just, they must first identify the values they want to shape the organizational culture they envision. These should include, at a minimum, (1) prioritizing process over conviction rate, (2) understanding the accused as "whole" human beings and giving appropriate weight to positive characteristics and mitigating circumstances, (3) respecting procedural safeguards, and (4) respecting the role of defense counsel. These values should then form the basis of recruitment, training, and mentorship development.

An effective recruitment strategy is a critical component of any organization's success.[290] Just as in the business world, criminal justice organizations should be guided by a vision consistent with the goals of the system, and the recruitment strategy should focus on identifying applicants whose attitudes reflect desired values.[291] In the context of a prosecutor's office, the chief should design interview questions that help identify candidates who are receptive to these values.[292] For example, the interviewer might pose to the candidate one or more of the hypothetical scenarios set out

290. *See, e.g.*, EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 260–61 (4th ed. 2010) (discussing the vital role that recruitment and hiring play in transforming organizational culture).

291. *See* Rapping, *supra* note 6, at 176.

292. For a discussion of values-based recruitment in the context of public defense, see *id.* at 175–77.

above in order to gauge how receptive the applicant is to the organization's value system. Using the rape scenario the interviewer can discuss with the candidate how he or she might balance the duty to disclose exculpatory information with the desire to secure a conviction. By adjusting the facts, the interviewer can explore the quality of evidence the candidate believes warrants disclosure and whether the risk to the conviction is so great that it might trump the duty to disclose. This scenario not only provides insight into the applicant's understanding of the *Brady* doctrine but also, more generally, the extent to which he or she possesses a win-at-all-costs attitude.

Using the drug scenario, the interviewer can explore the extent to which the candidate understands the prosecutor's role as one in which he or she is obligated to reveal the officer's deception.[293] This scenario also allows for a discussion of the real world pressures that prosecutors face to look the other way when unjust, but widely-accepted, practices occur and allows the interviewer to assess the candidate's commitment to resisting those influences.

The dehumaniziation scenario provides an opportunity to measure the extent to which the candidate finds the posited situation troubling. By probing a bit, the interviewer can evaluate the applicant's attitudes toward the diverse range of people she will interact with as a prosecutor. This challenge also sheds light on the degree to which the prospective prosecutor will defer to others as opposed to becoming a leader who will help usher in a new office value system.

These same organizational tenets should then be reinforced through training that not only teaches legal skills and knowledge but includes a heavy focus on values.[294] Role-play exercises should be used to force the new lawyer to work through ethical dilemmas in simulated environments. The three scenarios above might form the basis of simulations that require the young prosecutor to work through each challenge. Others might be added as well. The young prosecutor might hypothetically learn, on the morning of trial, that the officer who seized a critical piece of evidence may have done so in violation of the Fourth Amendment. The potential violation does not impact the reliability of the evidence, the defense lawyer has not filed a suppression motion, and the potential violation will never otherwise be revealed. In a simulated courtroom exercise, trainers can explore whether the new prosecutor would reveal the information and, if so, how.

In addition to ongoing values-based training, the new prosecutor should receive values-based mentorship.[295] As discussed in *You Can't Build on*

293. *See* Napue v. Illinois, 360 U.S. 264, 269 (1959) (holding that the due process clause is violated when a prosecutor knowingly allows false testimony to contribute to a conviction).

294. *See* Rapping, *supra* note 6, at 177–79 (discussing values-based training in the context of public defense).

295. *See id.* at 179–80 (discussing values-based mentorship in the context of public defense).

Shaky Ground, values-based mentoring should touch on four areas: (1) assisting the mentee to address challenges to her ability to practice in accord with the desired values; (2) working with the mentee to ensure that she properly prepares and litigates each case; (3) serving as a role model for how to uphold the expected standards; and (4) helping the mentee to remain inspired and enthusiastic about the work being done.

"With respect to the first [area], ... [t]he mentor should push the mentee to recognize challenges, and brainstorm strategies for addressing them consistently with the lessons taught through values-based training."[296] Regarding the second area, the mentor should review the mentee's case preparation with an eye toward issues that involve the identified values. As for the third area, by serving as a senior co-counsel the mentor can model how to practice consistently with the desired values. Finally, the mentor should look for ways to encourage and inspire the new lawyer to live up to the principles espoused. Leadership should not shy away from exposing prosecutors to victims of injustice so they learn to see them as human beings and so resist unethical behavior toward them. Hearing from speakers like Kemba Smith or Jimmy Ray Bromgard can be powerful ways to keep prosecutors focused on justice. Mentors should help identify similar stories and share them with young prosecutors.

The connection between prosecutors who hold values inconsistent with their ethical obligations and the perpetuation of a system that willingly processes human beings without regard for important principles of justice is obvious. While one could devote much more time to discussing this process, when a chief prosecutor understands the values fundamental to justice and the need to create an office culture shaped by them, the use of values-based recruitment, training, and mentoring, can help begin the process of transformation. Until prosecution leaders commit to changing organizational cultures formed by the existing corrupted values, our most promising future prosecutors will either leave the profession or learn to conform to the dysfunctional system.[297] As a result, those who remain will not be committed to serving justice and will simply reproduce the "tough on crime" conviction mentality inherent in an environment with limited resources. They will continue to charge cases without the funding to ensure they are resolved justly, falling back on their ability to coerce guilty pleas to ensure convictions are obtained efficiently. The result will be injustice.

296. *Id.* at 179.

297. This problem of "culture" is precisely what makes Professor Paul Butler ask the question: "Should Good People Be Prosecutors?" *See* BUTLER, *supra* note 51, at 101.

VI. CONCLUSION

Being a prosecutor in today's criminal justice system requires a clear understanding of what justice means, a commitment to ensuring it is realized, and the courage to stand up to pressures weighing against the principles that form its foundation. This is a tall order in a climate in which systemic forces push prosecutors to efficiently pursue convictions. As politicians, the media, and the public have pushed harsher responses to crime, prosecutors are expected to act more punitively. An office culture that promotes a conviction psychology, dehumanizes the accused, and minimizes the importance of procedural safeguards and the right to counsel influences prosecutors to disregard their ethical obligation to justice. Prosecutors have been given more tools with which to deprive the accused of fundamental protections in the form of more crimes, broader criminal liability, and harsher sentences. And they have been given the power to use their nearly limitless discretion to efficiently resolve cases. The invitation has proven too tempting for most to turn down.

Across the country prosecutors charge far more cases than the system is resourced to handle and use their power in the plea bargaining arena to coerce the accused into forgoing fundamental rights designed to ensure just outcomes. Without public awareness of this threat to our democracy, there is no pressure on policymakers to adequately fund the criminal justice system. As long as prosecutors are willing to continue charging cases and coercing guilty pleas, the injustice will mount. The burden to ensure that justice is done falls to the prosecutor. If he or she is to live up to his or her ethical obligation to safeguard justice, he or she must refuse to take any more cases than the system is resourced to handle properly. If either the prosecutor's office or the defense bar are not funded sufficiently to live up to their respective roles in our justice system, the ethical prosecutor will use his or her discretion to prioritize those cases that should be handled in light of the resources available and refuse to charge any others.

Because the organizational culture in many prosecutors' offices is shaped by values inconsistent with justice, leaders in the field must begin the process of transforming those environments. Chief prosecutors who embrace values consistent with justice should use values based recruitment, training, and mentoring to drive this process. Once prosecutors come to appreciate the meaning of justice in our system, embrace values consistent with it, and display the courage to act on those values, we will move toward a more just system consistent with the intent of the Framers. Alternatively, those charged with upholding justice will continue to take the lead in undermining it.