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The Prosecutor's Duty to "Imperfect" Rape Victims

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I. INTRODUCTION

For five weeks, jurors heard woman after woman testify about being raped and sexually assaulted by former Oklahoma City Police Officer Daniel Holtzclaw.[1] In all, thirteen took the stand. They included Janie Ligons, a day care worker in her 50s whom Holtzclaw forced to perform oral sex after pulling her over for no legal reason;[2] Shandegreon "Sade" Hill, who described being coerced into orally copulating Holtzclaw while handcuffed to a hospital bedrail after she was arrested for being under the influence of angel dust;[3] T.M., who testified to being intimidated into fellating Holtzclaw after he found a crack pipe in her purse;[4] and A.G., an eighteen-year-old woman (seventeen at the time of the assault) whom Holtzclaw threatened to arrest on an outstanding warrant and then raped on her front porch.[5] All of the women were African American, as compared with Holtzclaw who is half white and half Japanese.[6] In addition, other than Ligons, all had criminal records or were involved with prostitution or drugs.[7]

At first, it seemed as if Holtzclaw would get away with his crimes. The Oklahoma City police did nothing when T.M. reported that an unknown officer had raped her; it was not until Ligons recounted her assault that detectives took action.[8] After realizing the two accounts were similar, they

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1. Dave Philipps, *Former Oklahoma City Police Officer Found Guilty of Rapes*, N.Y. TIMES (Dec. 10, 2015), http://www.nytimes.com/2015/12/11/us/former-oklahoma-city-police-officer-found-guilty-of-rapes.html?_r=0.

2. Matt Sedensky & Nomaan Merchant, *AP: Hundreds of Officers Lose Licenses over Sex Misconduct*, ASSOCIATED PRESS (Nov. 1, 2015, 12:00 AM), http://bigstory.ap.org/article/fd1d4d05e561462a85abe50e7eaed4ec/ap-hundreds-officers-lose-licenses-over-sex-misconduct. Although Ligons was initially called "J.L.," she has since gone public with her name. *See* Michael Martinez & Jethro Mullen, *Victims Describe Assaults by Convicted Ex-Oklahoma City Cop Daniel Holtzclaw*, CNN, http://www.cnn.com/2015/12/11/us/oklahoma-daniel-holtzclaw-verdict/ (last updated Dec. 11, 2015).

3. Sedensky & Merchant, *supra* note 2. Hill also went public with her full name. *See* Martinez & Mullen, *supra* note 2.

4. Adrianna Iwasinski, *Judge: OKC Officer Accused of Sexual Assaults Will Go to Trial*, NEWS9 (Nov. 18, 2014, 9:33 AM), www.news9.com/story/27415511/judge-okc-officer-accused-of-sexual-assaults-will-go-to-trial.

5. *See* Philipps, *supra* note 1; Kyle Schwab, *No Verdict Yet as Jurors in Holtzclaw Rape Trial Break from Deliberation Early Tuesday*, OKLAHOMAN (Dec. 7, 2015, 12:00 AM), http://newsok.com/article/5465386.

6. Sarah Larimer, *Disgraced Ex-Cop Daniel Holtzclaw Sentenced to 263 Years for On-Duty Rapes, Sexual Assaults*, WASH. POST (Jan. 22, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/01/21/disgraced-ex-officer-daniel-holtzclaw-to-be-sentenced-after-sex-crimes-conviction/?utm_term=.635d39819707.

7. Martinez & Mullen, *supra* note 2.

8. Meg Wagner, *Grandma Sexually Assaulted by Ex-Oklahoma Cop Daniel Holtzclaw Speaks Out: 'He Just Picked the Wrong Lady to Stop That Night'*, N.Y. DAILY NEWS (Dec. 11, 2015, 2:00 PM),

met with T.M., who described how Holtzclaw had driven her to multiple locations both before and after sexually assaulting her.[9] Detective Rocky Gregory saw that the described route matched Holtzclaw's automated vehicle locator, a GPS recorder installed in his patrol car.[10] The police then started combing through the automatically recorded history of names Holtzclaw had run through the system in order to check whether any had a pending case or arrest warrant.[11] The detectives looked for women Holtzclaw put through the database more than once and contacted the women under the pretense of having received a tip that they might have been sexually assaulted.[12] It was diligent policing, and it paid off. Six additional women reported that they had been raped or assaulted by Holtzclaw.[13] Once Holtzclaw was arrested, five more came forward, including the eighteen-year-old woman mentioned above, whose DNA was found on the inside and outside of Holtzclaw's uniform pants.[14]

Other than Ligons and T.M., none of the women had initially reported their assault to the police.[15] When asked why, all had a similar response. As A.G. put it, "What's the good of telling the police? What kind of police do you call on the police?"[16] Another explained, "I didn't think anyone would believe me. I'm a black female."[17] Although Holtzclaw's attorney argued that the failure to report undermined their credibility, Deputy District Attorney Lori McConnell told jurors that these women had acted just the way Holtzclaw knew they would, which is precisely *why* he preyed upon them.[18] "'[Holtzclaw] didn't choose C.E.O.s or soccer moms; he chose women he

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http://www.nydailynews.com/news/national/grandma-sexually-assaulted-ex-cop-daniel-holtzclaw-speaks -article-1.2463029.

9. *See* Adrianna Iwasinski, *Holtzclaw Victims File Civil Suit Against Oklahoma City*, NEWS ON 6 (Mar. 7, 2016, 5:45 PM), www.newson6.com/story/31408858/holtzclaw-victims-file-civil-suit-against-oklahoma-city.

10. *See* Adam Kemp & Graham Lee Brewer, *Hunted by Night: Oklahoma City Police Officer Accused of Series of Sexual Assaults*, OKLAHOMAN (Sept. 7, 2014, 12:00 AM), http://newsok.com/article/5339632.

11. *See* Matt Dinger, *Oklahoma City Police Officer Faces Trial on 36 Counts, Including Rape*, OKLAHOMAN (Nov. 18, 2014, 12:00 AM), http://newsok.com/article/5368114.

12. *See id.*

13. Marc Weinreich, *Oklahoma Police Lieutenant Faces Life Sentence as List of Alleged Victims Grows to 13*, N.Y. DAILY NEWS, www.nydailynews.com/news/national/police-lieutenant-faces-life-sentence-victims-list-grows-article-1.2000120 (last updated Nov. 5, 2014).

14. *Id.*; Adrianna Iwasinski, *New DNA Evidence Presented Against Daniel Holtzclaw*, NEWS9 (Dec. 2, 2015, 6:06 PM), http://www.news9.com/story/30653976/new-dna-evidence-presented-against-daniel-holtzclaw.

15. Nomaan Merchant & Tim Talley, *In Ex-Officer's Sex Assault Trial, Witness Stories Similar While Defense Questions Credibility*, U.S. NEWS (Dec. 2, 2015, 6:34 PM), http://www.usnews.com/news/us/articles/2015/12/02/witness-credibility-a-focus-in-ex-officers-sex-abuse-trial.

16. *Id.*

17. Kyle Schwab, *Holtzclaw Accuser Testifies She Didn't Think Anyone Would Listen Because She's Black*, OKLAHOMAN (Nov. 12, 2015, 12:00 AM), http://newsok.com/article/5460024.

18. Sarah Larimer, *Ex-Oklahoma City Cop Daniel Holtzclaw Found Guilty of Multiple On-Duty Rapes*, WASH. POST (Dec. 11, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/12/08/ex-cop-on-trial-for-rape-used-power-to-prey-on-women-prosecutor-says/.

could count on not telling what he was doing' . . . 'He counted on the fact that no one would believe them and no one would care.'"[19]

On December 11, 2015, after forty-five hours of deliberating, an all-white Oklahoma jury convicted Holtzclaw on eighteen of the thirty-six counts of rape and other charges.[20] These included those related to Ligons and A.G.[21] Six weeks later, Holtzclaw was sentenced to serve 263 years in prison.[22]

The astonishing part of the Daniel Holtzclaw case is not that an on-duty, uniformed police officer sexually assaulted numerous women[23] but rather that it was prosecuted at all.[24] If Ligons had not reported her assault, there is no reason to think that the police would have ever followed up on T.M.'s report. Even if they had, prosecutors would have been reluctant to file if the only identified victim was "an 'admitted drug user [and] prostitute.'"[25]

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19. Philipps, *supra* note 1.

20. Kyle Schwab, *Fired Oklahoma City Police Officer Is Convicted of Offenses Against Eight Victims*, OKLAHOMAN (Dec. 11, 2015, 12:00 AM), http://newsok.com/article/5466127.

21. Eliott C. McLaughlin et al., *Oklahoma City Cop Convicted of Rape Sentenced to 263 Years in Prison*, CNN, http://www.cnn.com/2016/01/21/us/oklahoma-city-officer-daniel-holtzclaw-rape-sentencing/ (last updated Jan. 22, 2016).

22. *Id.*

23. *See AP Investigation into Officer Sex Misconduct, by the Numbers*, ASSOCIATED PRESS (Nov. 1, 2015, 12:14 AM), http://bigstory.ap.org/article/f61d495bb41d47968679c5b89a9907fc/ap-investigation-officer-sex-misconduct-numbers (providing data about police officer discipline for sexual assault allegations between 2009 and 2014); *see also* Michael Daly, *She Dialed 911. The Cop Who Came to Help Raped Her.*, DAILY BEAST (Jan. 29, 2012, 3:45 AM), http://www.thedailybeast.com/articles/2012/01/29/she-dialed-911-the-cop-who-came-to-help-raped-her.html (describing a police officer who assaulted a woman after receiving a call to her home); Michael E. Miller, *2 L.A. Cops Charged with Repeatedly Raping, 'Preying on' Vulnerable Women*, WASH. POST (Feb. 18, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/02/18/2-los-angeles-police-officers-charged-with-repeatedly-raping-women-under-threat-of-arrest/ (reporting on the alleged sexual misconduct of two cops); Meg Wagner, *On-Duty Florida Cop of the Month Fired for Allegedly Raping Woman on Patrol Car Hood, Threatening Her with Arrest, Death*, N.Y. DAILY NEWS (Oct. 31, 2014, 8:07 AM), http://www.nydailynews.com/news/crime/fla-month-rapes-woman-patrol-car-hood-cops-article-1.1994103 (describing a cop who allegedly raped and assaulted a woman multiple times while on duty).

24. *See generally* Paula Mejia, *Why Cops Get Away with Rape*, NEWSWEEK (July 9, 2014, 6:12 PM), www.newsweek.com/police-sexual-assault-rape-justice-258130.

25. Jessica Testa, *How Police Caught the Cop Who Allegedly Sexually Abused Black Women*, BUZZFEEDNEWS (Sept. 5, 2014, 1:40 PM), https://www.buzzfeed.com/jtes/daniel-holtzclaw-alleged-sexual-assault-oklahoma-city?utm_term=.ea2q2YZJL#.scr1bakzq (quoting Detective Rocky Gregory); *see* Dawn Beichner & Cassia Spohn, *Modeling the Effects of Victim Behavior and Moral Character on Prosecutors' Charging Decisions in Sexual Assault Cases*, 27 VIOLENCE & VICTIMS 3, 12 (2012) [hereinafter Beichner & Spohn, *Modeling the Effects of Victim Behavior*] (finding that "prosecutors were less likely to file charges if the victim had a criminal record"); Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL'Y REV. 461, 490 (2005) [hereinafter Beichner & Spohn, *Prosecutorial Charging Decisions in Sexual Assault Cases*] (finding that "in each jurisdiction, an overtly extralegal victim characteristic (risk-taking behavior in Kansas City and the victim's moral character in Miami) emerged as a significant predictor of prosecution's decisions to file charges"); Lisa Frohmann, *Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejection*, 38 SOC. PROBS. 213, 223 (1991) (finding that prosecutors used a "woman's record of prostitution and the imminent possibility of arrest . . . to provide the ulterior motive to discredit her account").

Indeed, jurors refused to convict on charges related to T.M. even though evidence from Holtzclaw's GPS recorder corroborated her account.[26]

This Article considers the ethical obligation that prosecutors owe imperfect rape victims. By "imperfect victim," this Author means that the person has characteristics that the prosecutor believes will make the judge or jurors less likely to sympathize with or believe the victim. These characteristics will be discussed in greater detail below, but they include having a criminal record and consuming alcohol at the time of the attack.[27]

Although scholars agree that a prosecutor should not try to convict an innocent person just because the prosecutor would probably win at trial, scant attention has been paid to how a prosecutor should treat a culpable person when the prosecutor would almost certainly lose.[28] Some ethics rules suggest that prosecutors should consider the likelihood of getting a conviction.[29] But it is not clear whether the evidence should be evaluated from the perspective of a biased or impartial jury.[30] This Article contends that when victims are highly vulnerable or are otherwise unattractive to jurors, as were the women in the Holtzclaw case, prosecutors have a special obligation to take their claims "seriously."[31] This includes meeting with local police and taking a second look at allegations that might be unfounded (defined to be a different crime or not a crime at all) or just unsolved. Further, this Article argues that taking such cases to trial can have value even if there is no conviction.[32] Doing so increases the legitimacy of the criminal justice system by showing that all victims matter, and it may deter future attacks because victims will no longer be considered easy prey.

This Article will proceed as follows: It begins at a theoretical level by considering why prosecutors have the duty to "do justice" and what that duty entails. This Article then moves to the real world and discusses the ethics of prosecuting a case in which the accused seems culpable but it appears a jury would be unlikely to convict. It then argues that with particularly vulnerable victims, like those Holtzclaw terrorized, prosecutors have a duty to think less about whether they can get a conviction and more about the purposes of the criminal justice system and the prosecutor's role in enforcing the criminal laws. Finally, this Article contemplates the likely long-term effects of prosecuting (even if losing) such cases.

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26. *See supra* notes 8–10 and accompanying text (providing additional background on T.M.'s case).

27. *See* Beichner & Spohn, *Modeling the Effects of Victim Behavior*, *supra* note 25, at 19; *see infra* Section III.A.

28. *See infra* Section IV.A.

29. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION standard 3-4.3 (AM. BAR ASS'N 2015), http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html.

30. *Id.* standard 3-4.3(a).

31. *See infra* Section III.E.

32. *See infra* Section III.E.

II. THE PROSECUTOR'S DUTY TO DO JUSTICE

Authorities agree that the prosecutor has a duty to "do justice."[33] This term is so nebulous, however, as to have almost no meaning without further definition.[34] As Bruce Green put it in his seminal 1999 article, "The concept [is] protean as well as vague."[35] While conveying an important generalized value, such an imprecise term can be problematic because it gives little specific guidance to prosecutors. This is especially true for difficult decisions, such as whether to prosecute when an acquittal seems likely despite strong evidence of guilt.

A. The Traditional Approach

Green recognized the importance of understanding why prosecutors have a duty to seek justice.[36] He described two primary justifications. The first (of which the late Fred Zacharias was a primary proponent) is to "redress the gross imbalance of power between prosecutors and defense lawyers."[37] As Zacharias explained, "[T]he fear of unfettered prosecutorial power is the impetus for the special ethical obligation [to do justice]."[38] Both courts and commentators have relied on this so-called "power rationale."[39] For

33. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION & DEF. FUNCTIONS standard 3-1.2(c) (AM. BAR ASS'N 2015), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf ("The duty of the prosecutor is to seek justice, not merely to convict."); *see also* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("The United States wins its point whenever justice is done its citizens in the courts.") (quoting the inscription at the United States Department of Justice building in Washington, D.C.); Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 GEO. J. LEGAL ETHICS 1301, 1305 (1996); R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice"*, 82 NOTRE DAME L. REV. 635, 637 (2006); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 612 (1999); Samuel L. Levine, Essay, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337, 1339 (2004); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 61 (2009); Melanie D. Wilson, *Prosecutors "Doing Justice" Through Osmosis—Reminders to Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67, 85 (2008); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 46 (1991).

34. Green, *supra* note 33, at 607–10.

35. *Id.* at 608.

36. *Id.* at 618.

37. *Id.* at 625–26, 630.

38. Zacharias, *supra* note 33, at 58.

39. *See* Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 563 (2005) ("A prosecutor's duty of neutrality derives from several sources. . . . [G]iven a prosecutor's enormous power over people's lives, liberty, and reputations, as well as the limited checks on a prosecutor's discretion, a prosecutor has an extraordinary opportunity for her sympathies for a victim to influence the exercise of official discretion, entirely without review. The duty to remain neutral serves as an assurance to courts, individual defendants, and the public that a prosecutor's unreviewable discretionary choices presumably are unaffected by personal, political, or private interests.") (footnote omitted).

example, in *United States v. Van Engel*, the majority wrote, "With power comes responsibility, moral if not legal, for its prudent and restrained exercise; and responsibility implies knowledge, experience, and sound judgment, not just good faith."[40] In addition, as K. Babe Howell has pointed out, the power rationale is enshrined in the American Bar Association's (ABA) 1983 Model Rules of Professional Conduct[41] and the ABA's Prosecution Function Standards, which equate procedural fairness with justice.

The second rationale is grounded in the prosecutor's unique role as the representative of the sovereign,[42] which the United States Supreme Court noted in the influential case of *Berger v. United States*, discussed in more detail below.[43] Green also saw the prosecutor's duty as being grounded in the sovereign's "overarching objective . . . to 'do justice,'" which he saw as being part and parcel of a just state.[44] Green explained, "Doing justice comprises various objectives which are, for the most part, implicit in our constitutional and statutory schemes."[45]

Although others have also recognized that the duty to do justice requires a larger notion of community and state responsibility,[46] the simple explanation that the unmoored prosecutor is the "representative of the sovereign" has retained notable staying power.[47] For example, both the 1977 Model Code[48] and the 1983 Ethical Consideration cited it.[49] It also seems to be what commentators are referring to when they say that the prosecutor is a "minister of justice."[50] For example, the comment to Model Rule 3.8 states,

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40. United States v. Van Engel, 15 F.3d 623, 629 (7th Cir. 1993).

41. *See* K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 310 (2014) ("The emphasis on procedural justice and the guilt of individual defendants, rather than the duty to exercise discretion in the public interest, reflects the construction of the duty as flowing from the power the prosecutor wields.").

42. Green, *supra* note 33, at 625.

43. Berger v. United States, 295 U.S. 78, 88 (1935); *see also* Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC. 18 (1940) (address at Conference of United States Attorneys, Washington, D.C., April 1, 1940).

44. Green, *supra* note 33, at 634

45. *Id.*

46. *See* Howell, *supra* note 41, at 307–08.

47. Adam N. Stern, Note, *Plea Bargaining, Innocence, and the Prosecutor's Duty to "Do Justice"*, 25 GEO. J. LEGAL ETHICS 1027, 1032–33 (2012).

48. MODEL CODE OF PROF'L RESPONSIBILITY Canon 7-13 (AM. BAR ASS'N 1977) ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers . . . .") (footnote omitted).

49. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (AM. BAR ASS'N 1983) ("[A public prosecutor's] duty is to seek justice, not merely to convict. This special duty exists because . . . the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute . . . .") (footnote omitted).

50. *See* Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1513 (2000).

"A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."[51]

Despite their ubiquity, neither the "power" nor the "agent of the sovereign" rationale contain sufficient content to offer clear guidance on difficult questions, such as how a prosecutor should proceed when he is convinced that a person is culpable but knows that conviction is unlikely. Power devoid of context does not help. It tells us *why* prosecutors should be concerned with doing justice, but it does not tell us *what* justice is.[52] Although it provides some guidance on how a trial should proceed ("doing justice" under this rationale requires that prosecutors "strive for adversarially valid results"[53]), it does not guide prosecutors in the most significant power that they have, which is whether and how to charge. Not surprisingly, it fails completely in a situation like the one described above in which the defense has more power than the prosecutor, at least as measured by the likelihood of success at trial.

In 2015, the ABA's Criminal Justice Standards for the Prosecution Function were revised to provide more guidance on the charging decision. Standard 3-4.3 states, "A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice."[54] This reformulation provides significantly more direction; however, it still does not address the quandary presented in this Article. When the prosecutor considers whether "admissible evidence will be sufficient to support conviction beyond a reasonable doubt,"[55] how does he factor in juror prejudice?

Similarly, the fact that the prosecutor is the agent of the sovereign does not supply useful content. To take an extreme example, if the sovereign is North Korea, being an agent of *that* sovereign might require a prosecutor to take actions that do not equate with justice.[56] For instance, the prosecutor might be required to imprison people without the benefit of a fair trial or recommend death for committing transgressions that few would consider serious.[57] Furthermore, North Korea has such an expansive notion of

51. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2016).

52. *See id.*

53. Green, *supra* note 33, at 629.

54. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION standard 3-4.3(a) (AM. BAR ASS'N 2015).

55. *Id.*

56. *See* DO KYUNG-OK ET AL., 2016 WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA, at 62–64 (2016).

57. *Id.*

criminal culpability that a person could be considered "guilty" for the alleged misdeeds of their grandparents.[58]

Nor does calling the prosecutor a "minister of justice" solve the problem. Although it sounds lofty in a bureaucratic sort of way, the term does not provide any concrete, substantive guidance on how to act. Professor Rory Little put it best when he wrote,

> [W]ith apologies to respected "Minister of Justice" advocates, this general principle is hardly sufficient to guide prosecutors in any useful, specific way. It is all well and good to say that a prosecutor is a "minister of justice," but "justice" is individualistically, and thus unacceptably manipulably, different in the eyes of different beholders.[59]

B. The Duty to Do Justice—A More Specific Approach

This Article takes a different tack. It suggests that to understand the prosecutor's duty to do justice, two questions must be answered: (1) *Why* does the prosecutor have the duty to act justly, and (2) *What* does just prosecution entail. It is tempting for such a discussion to be sidetracked by the many serious structural problems afflicting our criminal justice system. A discussion of "just" prosecution could easily become an inquiry into how prosecutors should respond to mass incarceration and inadequate counsel for the indigent. In an effort to stay focused, this Article will make a few assumptions that this Author acknowledges are not necessarily reflected in the real world. First, it will assume that the underlying criminal law is normatively legitimate. In other words, conduct that is outlawed "should" be outlawed, and the assigned punishment is appropriately proportionate to the violation.[60] This Article will also assume that, apart from juror prejudice and unbalanced prosecutorial charging decisions (the topic of this Article), the adjudication process is fair, meaning (among other things) that the judge is impartial and that the accused has (1) competent counsel, (2) the opportunity to review the evidence against him, and (3) the right to challenge this evidence. With these assumptions out of the way, we are ready to begin.

1. Why Does the Prosecutor Have the Duty to Act Justly?

Punishment is state-inflicted pain and suffering. Unlike taxes or eminent domain, punishment is the expression of community

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58. *Id.* at 242–45. North Korea's system of guilt by association means that people are punished for the ideological and political crimes of their family members. *Id.* It includes all immediate family members and a person's children and grandchildren. *Id.*

59. *See* Rory K. Little, *"It's Not My Problem?" Wrong: Prosecutors Have an Important Ethical Role to Play*, 7 OHIO ST. J. CRIM. L. 685, 688 (2010) (footnote omitted).

60. This Article is not taking a stand on why conduct should be criminalized.

condemnation,[61] and prosecutors have the profound responsibility of deciding who can be subject to this censure and suffering. In a democracy like ours—in which individual liberty is highly valued, the government is directly elected, and citizens are, to some important degree, here by choice—the infliction of pain by the state must be legitimate. Otherwise, people would leave the country, elect new politicians to enact different laws, or resort to vigilante enforcement. Our Constitution puts further constraints on punishment through the Eighth Amendment (which forbids cruel and unusual punishment) as well as the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments.[62] Thus, even if the political process does not work as it is supposed to, the Constitution puts another obligation on prosecutors to act fairly.

2. *What Does Just Prosecution Entail?*

Legitimate prosecution[63] in a democracy requires that the state's coercive power be exercised in a balanced display of concern and respect.[64] This not only has implications for the way the state may treat the accused, but it also has implications for the use of prosecutorial discretion.[65] Just as our democracy imposes constraints on when a prosecutor may charge a defendant, so should it limit when a prosecutor may choose *not* to charge a defendant.

In a democracy, one commonly acknowledged constraint is that a person may not be prosecuted unless he is deserving of punishment. Scholars generally talk about four different justifications for punishment:[66] (1) retribution (only punish the guilty and do so proportionately to the degree that they are culpable);[67] (2) deterrence (punish to prevent future crimes by setting an example to others—general deterrence—or to the particular

61. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404–05 (1958); *see also* Joel Feinberg, *The Expressive Function of Punishment*, *in* A READER ON PUNISHMENT 73, 75–76 (Anthony Duff & David Garland eds., 1994).

62. U.S. CONST. amends. V, VII, XIV.

63. This Author is explicitly assuming that only fair or just prosecution is legitimate.

64. Although he was discussing a different kind of case, Tony Alfieri captured the essence of this argument well when he wrote, "Constitutional norms of dignity and equality are realized during investigation and trial of race cases." Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141, 1179 (2003).

65. *See* Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 375–96 (2001).

66. *See generally* SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 91–121 (9th ed. 2012); Joel Meyer, *Reflections on Some Theories of Punishment*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 595 (1968).

67. *See* IMMANUEL KANT, THE PHILOSOPHY OF LAW 194–98 (W. Hastie trans., Lawbook Exchange 2002) (1887); Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER AND EMOTIONS 179 (Ferdinand Schoeman ed., 1987).

offender—specific deterrence);[68] (3) rehabilitation (punish offenders so that they will learn from their mistakes and not offend again);[69] and (4) incapacitation (punish people so that they are unable to harm anyone else).[70] Although it is possible to have some combination of the above, culpability is a necessary preliminary component.[71] If a person did not actually commit the crime, then he should not be punished even if doing so would deter others from wrongdoing or rid the streets of a dangerous person. In other words, no matter how much society might benefit from punishing an innocent person, such punishment is impermissible.[72]

Just as only punishing people who are culpable is a necessary component of the legitimate use of state power in a democracy so is the just distribution of punishment. It would be impermissible for the state to only punish a certain segment of guilty people—for instance, (relying on stereotypes) black people who possess crack cocaine or white people who possess methamphetamine. In the kind of country that we live in—a democracy that promises equal protection of the law—the law's legitimacy hinges on the fact that it applies (at least roughly) equally to everyone. Thus, it is the responsibility of the state to hold everyone equally accountable for violating the law regardless of their skin color, how much money they have in their pocketbook, or who they know.

III. THE ETHICS OF PROSECUTING A LOSING CASE

Now that we have established the basis for a just prosecution, we can apply our findings to a very real problem—whether prosecutors should go forward when they believe they are likely to lose but they also believe the accused committed the crime. This situation presents a serious dilemma. The

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68. *See* Kent Greenawalt, *Punishment*, *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1286–87 (3d ed. 2002).

69. MICHAEL S. MOORE, LAW AND PSYCHIATRY 235 (1984).

70. *See* 4 JEREMY BENTHAM, *Panopticon Versus New South Wales*, *in* THE WORKS OF JEREMY BENTHAM 173, 194 (John Bowring ed., 1962) (1778).

71. Under a retributive theory of punishment, punishment of the innocent is forbidden. As Michael Moore explained, "A retributivist punishes because, and only because, the offender deserves it." Moore, *supra* note 67. In contrast, Jeremy Bentham justified punishment on utilitarian grounds. He wrote, "[A]ll punishment is mischief; all punishment in itself is evil. Upon the principle of utility, if it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil." Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, *in* THE CLASSICAL UTILITARIANS 162, 166 (Jeremy Bentham & John Stuart Mill eds., 1961). Some scholars have argued that justifying punishment on the ground that it maximizes happiness means that it may be permissible to punish the innocent. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 790–91 (2000). Other scholars have argued that utilitarianism would not allow punishment of the innocent. *See* Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 354 (1983) (describing how rule utilitarians avoid the problem of punishing the innocent by "presupposing that proper moral decisions must be defensible in terms of rules that can be publicly announced"); Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 211 (2001).

72. Others have made a similar point. *See* Greenawalt, *supra* note 71, at 354–55.

chief prosecutor is often elected, and even if not, she is under enormous pressure to satisfy the public. Historically, prosecutors have achieved this satisfaction by winning most cases.[73] This stress on winning profoundly affects the way prosecutors handle cases—from a reluctance to turn over exculpatory evidence to the charges they file, the manner in which they plea bargain, and the offers they make.[74] The stress also translates into a focus on "convictability."[75]

As Lisa Frohmann explained, "Concern with convictability creates a 'downstream orientation' in prosecutorial decision making—that is, an anticipation and consideration of how others (i.e., jury and defense) will interpret and respond to a case."[76] In an oft-cited article, Frohmann described her findings after spending eight months observing case processing in the sexual assault unit of a prosecutor's office in a major metropolitan area on the West Coast.[77] Frohmann recounted the tension that prosecutors feel when they believe a victim yet know that a conviction is unlikely, not because of evidentiary problems, but because prospective jurors are simply unlikely to believe the victim due to bias because she is black or poor.[78]

A. A Closer Look at the "Imperfect" Victim

A victim is "imperfect" if she does not look or act the way a "real" victim would. This might be because she was dressed too provocatively or because she did not report the crime fast enough. As Zydervelt et al. recently explained,

> Common rape myths include the belief that victims invite sexual assault by the way that they dress, their consumption of alcohol, their sexual history or their association with males with whom they are not in a relationship; the belief that many women make false allegations of rape; the belief that genuine assault would be reported to authorities immediately; and the belief

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73. *See generally* Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537 (1996).

74. *See id.* at 541; Smith, *supra* note 65, at 388–91; *see also* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52–53 (1968).

75. Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC'Y REV. 531, 535 (1997). Studies have shown that prosecutors are guided by a set of "focal concerns." *See* Darrell Steffensmeier et al., *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763 (1998). As Spohn et al. explained, "[P]rosecutors consider, not only the legally relevant indicators of case seriousness and offender culpability, but also the background, character, and behavior of the victim, the relationship between the suspect and the victim, and the willingness of the victim to cooperate as the case moves forward." *See* Cassia Spohn et al., *Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice"*, 48 SOC. PROBS. 206, 208 (2001).

76. Frohmann, *supra* note 75 (citation omitted).

77. *Id.*

78. *Id.* at 536.

> that victims would fight back—and therefore sustain injury or damage to clothing—during an assault.[79]

The power of rape myths is not mere conjecture; studies have shown that they impact mock jurors and prosecutors.[80] This Article will now discuss some of those that have been most pernicious to a rape victim's credibility.

1. Prior Sexual History

Jurors are influenced by a victim's manner of dress and sexual history,[81] and so it is not surprising that "[e]vidence of the victim's character, and specifically her chastity or lack thereof, used to be a staple of rape trials."[82] In one old but particularly egregious case, an appellate court in Texas reversed a guilty verdict because the trial judge had excluded evidence that the "general reputation of [the] prosecutrix for chastity was bad."[83] The court explained, "[T]he jury might have concluded that she sought to bestow carnal favors, which were rejected, and that, as a result, a fight ensued in which she received the injuries described in the testimony."[84]

Starting in the late 1970s, states started passing rape shield laws, which prevented jurors from considering evidence of the victim's chastity.[85] All fifty states now have some form of rape shield law.[86] The Federal Rules of Evidence, for instance, bar "evidence to prove that a victim engaged in other sexual behavior; or . . . evidence offered to prove a victim's sexual predisposition."[87]

Sometimes, though, a victim's sexual history may be admitted;[88] for instance, evidence of prior consensual sex between the victim and the defendant may be deemed relevant in determining whether it was reasonable for him to believe she consented.[89] Although this evidence may be critical

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79. Sarah Zydervelt et al., *Lawyers' Strategies for Cross-Examining Rape Complainants: Have We Moved Beyond the 1950s?*, 10 BRIT. J. CRIMINOLOGY 1, 3–4 (2016).

80. *See* Sokratis Dinos et al., *A Systematic Review of Juries' Assessment of Rape Victims: Do Rape Myths Impact on Juror Decision-Making?*, 43 INT'L J. L. CRIME & JUST. 36, 46 (2015) (conducting a meta-analysis of nine studies and finding that "rape myths have an impact on juror decision-making . . . [but] in the US the effect sizes were smaller [than the UK or Germany] but still statistically significant").

81. *See* Trent W. Maurer & David W. Robinson, *Effects of Attire, Alcohol, and Gender on Perceptions of Date Rape*, 58 SEX ROLES 423 (2008).

82. DAVID ALAN SKLANSKY, EVIDENCE: CASES, COMMENTARY, AND PROBLEMS 314 (3d ed. 2012).

83. Graham v. State, 67 S.W.2d 296, 297 (Tex. Crim. App. 1933).

84. *Id.* at 299.

85. J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 544–54 (1980).

86. *See Rape Shield Statutes*, NAT'L DISTRICT ATT'Y ASS'N (Mar. 2011), http://www.ndaa.org/pdf/NCPCA%20Rape%20Shield%202011.pdf.

87. FED. R. EVID. 412(a).

88. *See id.* r. 412(b).

89. *See id.* r. 412(b)(1)(B).

for the accused to be able to defend himself, at least one study has found that the introduction of this evidence undermines the goal of rape shield laws. Namely, researchers found that jurors who received evidence of a prior sexual relationship viewed the complainant as "less credible, more blameworthy and more likely to have consented."[90] Interestingly, Beichner and Spohn found that the victim's sexual history did not affect charging. They hypothesized that rape shield laws might explain this finding because they "preclude the introduction of sexual history evidence not deemed legally relevant to issues of consent or credibility."[91]

Similarly, although a victim's past or current history of engaging in prostitution may be barred for general character purposes, it may be admitted if it is relevant for another reason, such as if the parties disagree as to whether he paid her to have sex. In such an instance, it may be hard for jurors to accept the evidence for its limited purpose, but they may instead use it to undermine the victim's overall credibility or, even worse, to decide that they do not care whether she was raped.

2. *Prior Criminal Record*

One recent study found that prosecutors were less likely to file charges if the victim had a criminal record.[92]

3. *Consumption of Alcohol or Illegal Drugs*

Mock jurors are more likely to view a rape victim as at least partially responsible for what happened to her if she voluntarily consumed alcohol or drugs before or during the alleged incident.[93] One recent study found that it did not matter whether the drinks were spiked with alcohol or ecstasy because as one participant put it, "[D]rinks get spiked, girls know this and should take care . . . ."[94] However, these same study participants unanimously agreed that the administration of Rohypnol (known as "roofies") made any subsequent sex rape.[95]

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90. Regina A. Schuller & Patricia A. Hastings, *Complainant Sexual History Evidence: Its Impact on Mock Jurors' Decisions*, 26 PSYCHOL. WOMEN Q. 252, 334 (2002).

91. Beichner & Spohn, *Modeling the Effects of Victim Behavior*, *supra* note 25, at 19–20.

92. *Id.* at 17.

93. *See* R.A. Schuller & A.M. Wall, *The Effect of Defendant and Complainant Intoxication on Mock Jurors' Judgments of Sexual Assault*, 22 PSYCHOL. WOMEN Q. 555 (1998); Ashley A. Wenger & Brian H. Bornstein, *The Effects of Victim's Substance Use and Relationship Closeness on Mock Jurors' Judgments in an Acquaintance Rape Case*, 54 SEX ROLES 547, 552 (2006) ("Participants in the sober condition viewed the victim as significantly more credible than did those participants in both the illegal alcohol and LSD intoxication conditions, and guilty verdicts were most frequent in the sober condition.").

94. Emily Finch & Vanessa E. Munro, *Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants*, 45 BRIT. J. CRIMINOLOGY 25, 31 (2005).

95. *Id.*

Prosecutors, in turn, are less likely to file in cases where the victim has used alcohol.[96]

4. Knowing the Accused

Jurors are less likely to believe a victim who says she was raped by an acquaintance as opposed to a stranger.[97] In such a situation, she is judged as "less credible, more blameworthy, and more likely to have consented."[98]

5. Inviting the Accused to Her Residence

Prosecutors are less likely to file charges when the victim invites the accused inside her home.[99]

6. Delay in Reporting

Mock jurors are less likely to believe a victim when she delays reporting for a few days.[100] Prosecutors, in turn, are more likely to file in aggravated rape cases when reporting was prompt.[101]

7. Lack of Emotion

Victims are judged to be less credible if they were calm immediately after being raped.[102] A study found that jurors were less likely to believe a victim who did not cry when she was testifying.[103] Ironically, that same study found that jurors did not necessarily find an emotional victim more credible but instead questioned whether she was just a "good actress."[104]

Judges, however, are not influenced by a witness's emotion on the stand.[105]

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96. Beichner & Spohn, *Modeling the Effects of Victim Behavior*, *supra* note 25 (finding that "using alcohol had a significant effect on prosecutors' charging decisions, but that using illicit drugs . . . did not").

97. Regina A. Schuller & Marc A. Klippenstine, *The Impact of Complainant Sexual History Evidence on Jurors' Decisions: Considerations from a Psychological Perspective*, 10 PSYCHOL. PUB. POL'Y & L. 321, 334 (2004).

98. *Id.*

99. Beichner & Spohn, *Modeling the Effects of Victim Behavior*, *supra* note 25 (finding that "inviting the suspect to her residence . . . had a significant effect on prosecutors' charging decisions").

100. *See* Louise Ellison & Vanessa E. Munro, *Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility*, 49 BRIT. J. CRIMINOLOGY 202, 209 (2009).

101. Beichner & Spohn, *Modeling the Effects of Victim Behavior*, *supra* note 25, at 14.

102. Lawrence G. Calhoun et al., *Victim Emotional Response: Effects on Social Reaction to Victims of Rape*, 20 BRIT. J. SOC. PSYCHOL. 17 (1981).

103. *See* Ellison & Munro, *supra* note 100, at 206, 213–12.

104. *Id.* at 206, 213.

105. Ellen Wessel et al., *Credibility of the Emotional Witness: A Study of Ratings by Court Judges*, 30 LAW & HUM. BEHAV. 221 (2006).

8. Lack of Visible Injury

Studies have shown that jurors are less likely to convict if a victim did not have injuries.[106] Ellison and Munro found that verbal resistance was not enough even if the victim indicated that the reason she had not physically resisted was because she "froze" during the attack.[107] One of the participants explained, "[E]ven in a paralysed state, isn't it the body's natural reaction to put up some kind of defence?"[108] Beichner and Spohn found that prosecutors were more likely to file when there was a physical injury or evidence to support the victim's account.[109]

9. Manner of Dress

Studies have shown that people are more likely to blame the victim in an acquaintance rape situation when she was wearing a short skirt as opposed to a longer one.[110] One study found that a difference of three inches in skirt length affected whether the victim was deemed responsible.[111]

10. Race

One study found that jurors recommend a significantly harsher sentence when the victim is white as opposed to black.[112] In a recent study, Beichner and Spohn found that prosecutors are more likely to file aggravated rape cases when the victim was white and the offender was black.[113]

11. "Good" Victims

An alternative way of describing the imperfect rape victim is to portray their opposite. An experienced sex crimes prosecutor described a "good victim" as follows:

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106. Ellison & Munro, *supra* note 100, at 206.

107. *Id.*

108. *Id.*

109. Beichner & Spohn, *Modeling the Effects of Victim Behavior*, *supra* note 25, at 14.

110. *See* Jane E. Workman & Elizabeth W. Freeburg, *An Examination of Date Rape, Victim Dress, and Perceiver Variables Within the Context of Attribution Theory*, 41 SEX ROLES 261, 272 (1999); *see also* Linda Cassidy & Rose Marie Hurrell, *The Influence of Victim's Attire on Adolescents' Judgment of Date Rape*, 30 ADOLESCENCE 319 (1995).

111. Jane E. Workman & Robin L. Orr, *Clothing, Sex of Subject, and Rape Myth Acceptance as Factors Affecting Attributions About an Incident of Acquaintance Rape*, 14 CLOTHING & TEXTILE RES. J. 276 (1996).

112. Hubert S. Feild, *Rape Trials and Jurors' Decisions: A Psycholegal Analysis of the Effects of Victim, Defendant, and Case Characteristics*, 3 LAW & HUM. BEHAV. 261, 271 (1979).

113. Beichner & Spohn, *Modeling the Effects of Victim Behavior*, *supra* note 25, at 20.

> Good Victims have jobs (like stockbroker or accountant) or impeccable status (like a policeman's wife); are well-educated and articulate, and are, above all, presentable to a jury: attractive—but not too attractive, demure—but not pushovers. They should be upset—but in good taste—not so upset that they become hysterical.[114]

12. Convictability and the "Imperfect" Victim—A Case Study

A 2012 case from San Diego, California, illustrates how concerns over convictability impact the decision to prosecute when the victim is imperfect.[115] A prostitute named Jane Doe alleged that then-San Diego Police Officer Daniel Dana threatened to take her to jail if she did not have sex with him.[116] The district attorney's office charged him with rape, and a judge determined, after a preliminary hearing, that there was sufficient evidence to bind the case over for trial.[117] Despite this finding, Dana was allowed to plead no contest to a misdemeanor charge of engaging in a lewd act in public.[118] Although he faced more than fifteen years if he was convicted of the felony, Dana was sentenced to just three years of informal probation and no additional jail time.[119] Deputy District Attorney Annette Irving explained, "The people stand behind the charges as initially brought. . . . We did not have reasons to disbelieve the victim and still don't."[120] But she explained that they settled the case because of the "confidence level" regarding whether a jury would be able to unanimously agree a prostitute had been raped.[121]

B. Existing Legal Scholarship

Existing scholarship has not focused much attention on when a prosecutor is ethically obliged to prosecute. Most legal academics have written on other issues—such as the duty not to prosecute the innocent,[122] the danger that pro-victim attitudes can impair a prosecutor's duty of neutrality,[123] and the ethics of prosecuting minor crimes in areas where arrest

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114. David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1247 (1997) (quoting ALICE VACHSS, SEX CRIMES 90 (1993)).

115. *See* Greg Moran & Dana Littlefield, *Ex-Cop Pleads No Contest to Sex Change*, SAN DIEGO UNION-TRIB. (July 18, 2012, 9:31 AM), http://www.sandiegouniontribune.com/news/2012/jul/18/ex-cop-pleads-no-contest-misdemeanor-sex-charge/.

116. *Id.*

117. *See generally id.*

118. *Id.*

119. *See generally id.*

120. *Id.*

121. *Id.*

122. *See* Stern, *supra* note 47, at 1027.

123. *See* Gershman, *supra* note 39, at 559–60.

patterns demonstrate a disparate impact on racial minorities.[124] Undoubtedly, the focus on "over" prosecution addresses important issues, especially in an era of mass incarceration that disproportionately affects communities of color.[125] We are too cavalier about custody time in this country and too willing to throw away people's lives for nonviolent offenses or to hold them long after they cease to pose a danger. Yet, it is often these same over-policed communities that are under-policed as well.[126] The people prosecutors are quick to charge are often the same ones prosecutors are reluctant to defend.[127] A full scholarship account of the ethics of prosecution must focus not only on restraining prosecuting but also, in appropriate circumstances, encouraging it.

C. *Supreme Court Jurisprudence*

In *Berger v. United States*,[128] the Supreme Court discussed the prosecutor's profound responsibility as the representative of the sovereign.[129] Berger was indicted for conspiracy, and he argued that there was insufficient evidence to support the charge.[130] At trial, the prosecutor engaged in flagrant misconduct, including "misstating the facts in his cross-examination of witnesses; . . . bullying and arguing with witnesses; and, in general, . . . conducting himself in a thoroughly indecorous and improper manner."[131] Berger was convicted and argued that he should be granted a new trial.[132] The Court concluded that Berger was entitled to a new trial due to prosecutorial misconduct.[133] In an excerpt so frequently repeated that it tends to lose significance, the Court explained its rationale:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as 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. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed,

124. *See* Howell, *supra* note 41, at 287.

125. *See* Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1081–85 (2016). *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

126. *See* AM. CIVIL LIBERTIES UNION OF ILL., CHART I: JUNE–SEP 2013 PRIORITY 1 AVERAGE DISPATCH TIMES (2013), http://www.aclu-il.org/wp-content/uploads/2014/03/charts.pdf.

127. Howell, *supra* note 41, at 301–02.

128. Berger v. United States, 295 U.S. 78, 88 (1935).

129. Green, *supra* note 33, at 614.

130. *Berger*, 295 U.S. at 80.

131. *Id.* at 84.

132. *Id.* at 79–81.

133. *Id.* at 83–89.

> he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[134]

In this oft-quoted passage, the Court gave a particularly pertinent description of why a prosecutor must be just.[135] The Court explained that the prosecutor's duty is not grounded in some abstract notion of the state; rather, the prosecutor is a state actor "whose obligation to govern impartially is as compelling as its obligation to govern at all."[136] In a state such as ours, criminal prosecution is not mere gamesmanship or a pursuit for political or social gain.[137] Instead, the sovereign's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."[138]

Although *Berger* is usually read as a constraint on prosecution, it can also be read as an explanation for limits on the decision *not* to file charges.[139] Indeed, the Court specifically stated that a prosecutor is a "servant of the law," meaning he has a "*twofold* aim of which is that *guilt shall not escape* or innocence suffer."[140] Applying *Berger* to the question asked by this Article, it is clear that a prosecutor should not prosecute simply because she can win; similarly, she should not decline to prosecute because she is likely to lose.[141] Assuming the evidence is legally sufficient, juror bias is of limited relevance. Instead, "justice shall be done."[142]

D. A Prosecutor's Perspective

In 1940, then-Attorney General of the United States Robert H. Jackson gave his iconic speech describing the role of the federal prosecutor.[143] Jackson wrote that the prosecutor "has more control over life, liberty, and reputation than any other person in America."[144] This "immense power" was not the manifestation of "mere individual strength . . . but the force of government itself."[145] Like the Court in *Berger*, Jackson emphasized that the

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134. *Id.* at 88.
135. *Id.*
136. *Id.*
137. Gershman, *supra* note 39, at 562–64.
138. *Berger*, 295 U.S. at 88.
139. *Id.*
140. *Id.* (emphasis added).
141. *Id.*; *see supra* notes 28–58 and accompanying text (discussing the prosecutor's responsibility to administer justice).
142. *Id.* at 88–89.
143. *See* Robert H. Jackson, Att'y Gen. of the U.S., The Federal Prosecutor, An Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf.
144. *Id.* at 1.
145. *Id.* at 2.

prosecutor should be "animate[d]" by "the spirit of fair play and decency."[146] Thus, the measure of a successful case is not always a guilty verdict. "Although the government technically loses its case, it has really won if justice has been done."[147]

Jackson then acknowledged that one of the "greatest difficulties of the position of prosecutor" is deciding which cases to pursue.[148] There simply are not enough police and prosecutorial resources to go after every suspected crime. "What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain."[149]

Although stressing the certainty of proof would tend to argue against prosecuting cases with imperfect victims, the rest of Jackson's argument cuts the other way. If the measure of victory is not a guilty verdict and if prosecutors should choose the most flagrant cases with the greatest harm, then prosecuting rape cases with unsympathetic but highly vulnerable victims is a just thing to do.

E. The Rules

At first glance, the various rules of ethics do not help answer what the prosecutor owes the imperfect rape victim. This Author is unaware of any model rule or commentary that specifically addresses the issue raised by this Article. Indeed, although the rules clearly state that a prosecutor should consider the likelihood of conviction in determining whether to investigate[150] and file,[151] they do not provide guidance on *how* the evidence should be weighted or specifically in what direction. In other words, *how* should juror bias against a victim be considered when evaluating whether to *not* file charges?

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146. *Id.* at 3.

147. *Id.*

148. *Id.*

149. *Id.* at 4.

150. The ABA Standard for Specific Investigative Functions of the Prosecutor states, "When deciding whether to initiate or continue an investigation, the prosecution should consider: . . . the probability of obtaining sufficient evidence for a successful prosecution of the matter in question, including, if there is a trial, the probability of obtaining a conviction and having the conviction upheld upon appellate review . . . ." STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS standard 26-2.1(c)(vii) (AM. BAR ASS'N 2014), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/Pros_Investigations.authcheckdam.pdf.

151. The ABA standard on Minimum Requirements for Filing and Maintaining Criminal Charges states, "A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice." CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION standard 3-4.3(a) (AM. BAR ASS'N 2015), http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html; *see also id.* standard 3-4.3 (discussing the minimum requirements for pursuing criminal charges).

A more careful reading of the rules helps. ABA Standard 2.1(d) states, "When deciding whether to initiate or continue an investigation, the prosecutor should not be influenced by: . . . the race . . . or social or economic status of the . . . victim, unless they are elements of the crime or are relevant to the motive of the perpetrator . . . ."[152] Furthermore, Standard 3-4.4, which governs prosecutorial discretion in filing, maintaining, and dismissing charges, echoes the same language: "In exercising discretion to file and maintain charges, the prosecutor should not consider[] . . . the impermissible criteria in Standard 1.6 above."[153] That criteria includes "race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status."[154]

Although this is more likely read as a bar on prosecution (i.e., a prosecutor should not go after certain people because of traits the prosecutor may find unappealing), it could also be interpreted as a hermeneutic for other parts of the ABA Standards. In other words, when prosecutors are determining whether there is sufficient evidence to go forward, they must not consider certain traits the victim has unless they are relevant in one of *two* ways: to the elements of the crime or to the motive of the perpetrator.[155] The fact that jurors might be biased against a victim because of her race, sexual orientation, or socioeconomic status should not affect the prosecutor's decision regarding whether to prosecute.[156]

Similarly, a prosecutor's *own* implicit bias should not affect her decision either. Of course, the fact that such prosecutorial bias is unconscious makes it harder to correct, but prosecutors should be required to take the Implicit Association Test,[157] and prosecutors' offices should ensure that charging deputies are racially diverse and ideally discuss cases with one another as a check on bias.

F. Legitimate Versus Illegitimate Failures of Proof

This Article has argued that it is generally unethical for prosecutors to refrain from filing a rape case on the grounds that the jury will not believe the victim due to ethically impermissible characteristics, such as the victim's race or socioeconomic status. Yet, as a law professor and former public defender, this Author is profoundly aware that a prosecutor should not proceed when she thinks that she cannot prove her case beyond a reasonable

152. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS standard 26-2.1(d)(i).

153. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION standard 3-4.4(b).

154. *Id.* standard 3-1.6(a).

155. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS standard 26-2.1(d)(i).

156. *Id.*

157. *Overview*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/education.html (last visited Nov. 19, 2016).

doubt. Therefore, the question is when a failure of proof is legitimate and when it is not. This Article will now briefly consider this distinction.

Although it is possible that the race of the accused (or the victim) could be relevant, standing alone, race is not a legitimate factor for a prosecutor to consider. Nor is gender or socioeconomic status. In other words, if a prosecutor in Alabama is considering whether to file rape charges against a white defendant, it should be irrelevant to her decision-making process that the victim is a black woman living below the poverty line and that the accused is a prominent white businessman (or vice versa).[158] These facts are illegitimate considerations even if the prosecutor knows that prospective jurors are likely to be white and of similar socioeconomic status to the accused, thus making them more likely to find him credible.[159] These factors could become legitimate for other reasons, however, such as if the victim initially described her assailant as black[160] or the prosecutor has evidence that the victim offered to take cash in lieu of dropping the charges. These examples are outliers, however, and therefore the strong default should be that they are impermissible considerations.

Similarly, the fact that the victim is a prostitute does not constitute a reason in itself to refrain from filing a case. As explained below, many rapists target prostitutes, so the belief that a woman cannot be raped because she is a sex worker is misguided.[161] The victim's profession can be relevant for some other reason, such as if the defendant claims he paid her to have sex, which would explain why his semen was inside of her. It would also be relevant if she did not get paid because it could give her a motive to falsely accuse him of rape.

For particularly vulnerable individuals, such as sex workers, prosecutors should have a duty to conduct sufficient investigation to find whether there exists independent corroboration that the person is telling the truth. This includes meeting with local police and taking a second look at cases that might have been unfounded or left unsolved. As the Holtzclaw case illustrates, hard-working policing and investigation can lead to important corroborating evidence.[162] This is especially important when the victims are different than jurors and less likely to be believed.

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158. *See id.*

159. *See id.*

160. When she was a deputy public defender in San Diego, this Author had a case in which the complainant initially stated that he had been robbed by a black man, carjacked by a white man, and then raped by a black man. In a subsequent interview with law enforcement, the complainant's story changed, in relevant part, to being carjacked by a black man. This change in race was a significant factor in leading the prosecutor to dismiss charges in the case.

161. Melissa Farley & Howard Barken, *Prostitution, Violence, and Posttraumatic Stress Disorder*, 27 WOMEN & HEALTH 37, 41 (1998).

162. *See supra* notes 7–13 and accompanying text (describing the Holtzclaw case).

IV. RECALIBRATING SUCCESS

In the Dana case, the San Diego District Attorney's Office reduced a felony to a misdemeanor based on concerns about whether jurors would believe the victim because she was a prostitute.[163] The district attorney's office may have gotten a conviction of some crime, but what did it sacrifice in the process? For the law to be legitimate, it must be applied roughly equally, and letting someone who rapes a prostitute plead to a misdemeanor does not achieve that ideal. Furthermore, the law has an important, expressive function in that it conveys the community's sense of condemnation. Discounting a rape case because the victim is a prostitute sends a clear message that her bodily integrity is worth less. It also shirks the prosecutor's "educational role . . . in teaching the offender, jury, and community about the experience of violence and its manifold harm."[164] Sometimes, it is better to risk losing at trial than to reduce the initial charge to an offense that eviscerates the seriousness of the underlying criminal conduct and sends a message of undervaluation of the victim.

Prosecuting rape cases with unsympathetic victims has value independent of any benefits that might occur from conviction—that is, even if the state loses. Still, it is worth considering what the likely consequences might be.

A. Increased Legitimacy (Procedural Justice)

Although some believe that the threat or use of punishment shapes compliance with the law,[165] others contend that legitimacy is a more powerful force.[166] As social psychologist Tom Tyler has written, "[L]egitimacy is a feeling of obligation to obey the law and to defer to the decisions made by legal authorities."[167] In his 1990 book *Why People Obey the Law*, Tyler argued that the basis of legitimacy is procedural justice.[168] Subsequent research has described the six components of procedural justice: representation (the idea that parties believe they had the opportunity to take part in the decision-making process); consistency (similarity of treatment over time as compared with like parties); impartiality (when the legal

163. *See supra* notes 115–21 and accompanying text (discussing the Dana case).

164. Alfieri, *supra* note 64, at 1179.

165. *See* Daniel S. Nagin, *Criminal Deterrence Research at the Outset of the Twenty-First Century*, 23 CRIME & JUST. 1, 3 (1998) ("I now concur with Cook's more emphatic conclusion that the collective actions of the criminal justice system exert a very substantial deterrent effect.").

166. *See* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 235 (2008).

167. *Id.*

168. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 175–76 (2006); *see also* Tom R. Tyler & Yuen J. Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts*, *in* 5 RUSSELL SAGE FOUNDATION SERIES ON TRUSTS 7–18 (2002); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 384 (2006).

authority is unbiased); accuracy (the ability to make competent, high-quality decisions, which include the public airing of the problem); correctability (whether the legal system has a mechanism for correcting mistakes); and ethicality (when the authorities treat parties with dignity and respect).[169] Importantly, Tyler found that it was perceived fairness, not case outcome, that often most influences people's evaluation of their courtroom experience.[170] Prosecuting cases even though the victim is unsympathetic demonstrates at least two components of procedural justice: consistency and ethicality.[171] It demonstrates consistency because it treats rape victims the same regardless of their race, criminal history, or socioeconomic status. It also demonstrates ethicality by taking seriously the victimization of all persons and, by doing so, conveys that they are worthy of care and respect.[172] Furthermore, the fact that it was perceived fairness rather than case outcome that mattered more in people's evaluation of their courtroom experience helps to counter the argument that going to trial on a difficult case and losing will undermine respect for the law. There is a strong argument that prosecuting these cases will increase people's sense that the law is legitimate—because it is fair—and will thus foster law abidingness, which benefits the community as a whole.

B. Reducing Violence Against Vulnerable Individuals

Prostitutes are disproportionately at risk for being the victims of violence.[173] Farley and Barkan reported that 68% of street-level prostitutes interviewed in San Francisco had been raped since becoming prostitutes, with 48% who were raped more than five times.[174] Even more troubling, Brewer

169. *See* Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 167–69 (1997).

170. Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 LAW & SOC'Y REV. 51, 71 (1984).

171. Tyler & Huo, *supra* note 168, at 8, 82–89.

172. Frohmann voiced a similar argument in response to the decision of prosecutors not to pursue cases in which they believed the victim. Not only did non-prosecution in these instances constitute an "individual miscarriage[] of justice," but it also had "wider sociolegal significance." Frohmann, *supra* note 75, at 553. "An unintended consequence of prosecutors' decisions is to legitimize specific ideologies of race and class and contribute to the reproduction of social inequality in the criminal justice system." *Id.*

173. *See* Steven P. Kurtz et al., *Sex Work and "Date" Violence*, 10 VIOLENCE AGAINST WOMEN 357, 368 (2004) (finding that more than half of 294 female street-based sex workers in Miami were the victims of date violence in the preceding year). The increased violence faced by prostitutes has been found in studies across the world. *See* Kathleen N. Deering et al., *A Systematic Review of the Correlates of Violence Against Sex Workers*, 104 AM. J. PUB. HEALTH 42, 42 (2014) (reviewing twenty-eight studies of sex workers across the world and finding that 45%–75% experienced workplace violence in their lifetime, and 32%–55% experienced it in the last year); *see also* John J. Potterat et al., *Mortality in a Long-Term Open Cohort of Prostitute Women*, 159 AM. J. EPIDEMIOLOGY 778, 778–85 (2004) (assessing the cause-specific mortality of 1,969 prostitute women in Colorado Springs from 1967–1999 and finding that the workplace homicide rate for these women was many times higher than that for women and men employed in standard occupations that had the highest incidence of homicide in the United States during the 1980s).

174. Farley & Barkan, *supra* note 161.

et al. reported that prostitutes have the "highest homicide victimization rate of any [population] of women ever studied."[175] They conservatively estimated that "2.7% of all female homicides in the United States during the 1982–2000 period" were prostitutes.[176] It is no wonder that 68% of respondents from Farley and Barkan's study suffered from posttraumatic stress disorder (PTSD) with a mean score on an instrument measuring PTSD that exceeded that of PTSD treatment-seeking Vietnam War veterans.[177]

Such extraordinary levels of violence can be explained, at least in part, by the dehumanization of prostitutes. Lowman described the "discourse of disposal" surrounding sex workers.[178] Because they consent to sex for money, they cannot be raped, and if they are raped, it does not matter because they are not valued lives.[179] Thus, as Teela Sanders and Rose Campbell persuasively argued, it is not enough to make the environment safer for prostitutes; the way people see prostitutes must change as well.[180] "If [an] ultimate aim is to reduce violence against sex workers policy needs to address perceptions of prostitution and attitudes associated with the women who sell sex."[181] Charging cases in which men rape prostitutes can be one way of facilitating this change. It is a way of proclaiming that these men and women are of consequence—that their lives have value. And it just may change the underlying devaluation that helps drive their victimization. Even for would-be offenders who still view such individuals as less than human, prosecuting such cases can have a deterrent effect because the risk of subsequent prosecution will not be zero.

C. Limited Resources

One anticipated response prosecutors will have to this Article is that in a world of limited resources, they should direct their energy to cases they are likely to win. Frohmann found that prosecutors used this rationale when deciding not to file rape cases, even though they believed that the victim was

175. Devon D. Brewer et al., *Extent, Trends, and Perpetrators of Prostitution-Related Homicide in the United States*, 51 J. FORENSIC SCI. 1101, 1101 (2006).

176. *Id.* at 1104.

177. Farley & Barkan, *supra* note 161, at 45.

178. John Lowman, *Violence and the Outlaw Status of (Street) Prostitution in Canada*, 6 VIOLENCE AGAINST WOMEN 987, 1003 (2000).

179. *See* Jody Miller & Martin D. Schwartz, *Rape Myths and Violence Against Street Prostitutes*, 16 DEVIANT BEHAV. 1, 10–14 (1995).

180. Teela Sanders & Rosie Campbell, *Designing out Vulnerability, Building in Respect: Violence, Safety and Sex Work Policy*, 58 BRIT. J. SOC'Y 1, 15 (2007).

181. *Id.*

telling the truth.[182] Of course, limited resources are a reality.[183] Prosecutors cannot develop every case; there simply are not enough investigators, lawyers, or funds for experts.[184] Prosecutors are further constrained by external resources.[185] Defendants have the right to a speedy trial under the Sixth Amendment, which means that prosecutors may have no choice but to plea bargain or sometimes dismiss even a strong case if there are no available courtrooms, judges, or juries.[186]

Limited resources are a relevant concern in deciding which case to prosecute for similarly situated victims; for instance, an elder abuse unit can fulfill its expressive function of conveying community condemnation by choosing to proceed with the cases most likely to win. Resources become significantly less relevant, however, if they would justify excluding an entire category of victim on the grounds that their cases are "unwinnable." The case for moving forward is made even stronger when attention is paid to these victims' acute vulnerability and shocking level of victimization.

D. Prosecutors Will Improve

Although prosecutors may initially have a difficult time trying these cases, they will improve with experience. They will get better at preparing for trial and finding evidence consistent with the victim's account. Taking these cases seriously will also make it easier to locate corroborating evidence in future cases because victims will be more likely to cooperate if they believe that they will be taken seriously. Because the Federal Rules of Evidence and many analogous state rules allow propensity evidence in sex cases, prosecutors will be able to introduce the testimony of other victims,

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182. Frohmann, *supra* note 75, at 553. In 2001, Spohn et al. tested Frohmann's findings by looking at sexual assaults cleared by arrest in Miami, Florida. Spohn et al., *supra* note 75, at 207. Although they replicated Frohmann's results, in part, by finding that charging decisions were often driven by whether prosecutors thought they would win or not, they also found that at times, the conclusion that they would not win was not based on anticipated bias against the victim. *Id.* at 228–29. Instead, they found the prosecutors' decisions were based on proof problems with the case, such as if the victim failed to show up for court or recanted. *Id.* at 232–33.

183. *See* Greg Bluestein, *State Budget Cuts Clog Criminal Justice System*, NBC NEWS (Oct. 26, 2011, 2:13 PM), http://www.nbcnews.com/id/45049812/ns/us_news-crime_and_courts/t/state-budget-cuts-clog-criminal-justice-system/#.WDEO03eZORs.

184. *See* Jackson, *supra* note 143, at 4; *see also* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1542–43 (1981) ("Funding levels determine how many cases can be brought and inevitably force prosecutors' offices to give little or no attention to many chargeable crimes. Limited funding may also preclude some complex, costly investigations and prosecutions. Finally, the resources and interests of other agencies—police, courts, and correctional institutions—may limit the prosecutor's freedom of action, notwithstanding his substantial control of the docket.") (footnotes omitted).

185. Don Stemen & Bruce Frederick, *Rules, Resources, and Relationships: Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1, 54 (2013) (finding that "external resource constraints clearly affected case outcomes").

186. *Id.* at 45–54.

regardless of whether charges were ever filed.[187] This "similar crimes" evidence will make it easier to convict because jurors will be allowed to infer that because the accused did it before, he is more likely to have done it again. In effect, prosecutors are able to use unproved misconduct to fill in any holes they have in their current case.[188] For those perpetrators, such as Holtzclaw, who use the same modus operandi in committing a crime, the evidence from other victims will be admissible under an exception to the general ban on character evidence.[189]

In addition, prosecutors can and do rely on expert testimony to disprove some of the characteristics of the imperfect victim. For instance, researchers have found that many rape victims delay reporting, often for significant periods.[190] They have also found that people who are traumatized do not always express what happened to them in highly emotional terms.[191]

Furthermore, although prosecutors may call these cases unwinnable, a recent article went through a litany of cases in which defendants were found guilty even when the victims were "imperfect."[192] Indeed, this Author has seen first hand how even imperfect victims can prevail at trial. The jurors returned a guilty verdict in a rape case against this Author's client even though the victim was homeless and got into the client's car voluntarily.

E. Increased Focus on Victims in General

Recalibrating success should also mean paying more attention to what victims want. "A consensus of published studies is that sexual assault victims need to tell their own stories about their experiences, obtain answers to questions, experience validation as a legitimate victim, observe offender remorse for harming them, [and] receive support that counteracts isolation

187. *See* FED. R. EVID. 413.

188. Although propensity evidence is tempting because it increases the likelihood of conviction in what are often difficult to prove cases, this Author strongly condemns its use. Simply put, the admission of propensity evidence in sex cases is based on the false empirical assumption that sex offenders never change but instead remain dangerous over their entire lives. Second, the admission of propensity evidence increases the chances that an innocent person will be convicted because the jurors become so prejudiced against him based on the evidence of prior misconduct (which may not even be true) that they do not require the prosecutor to prove the case beyond a reasonable doubt. *See* Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795, 798–801 (2012) (criticizing the use of propensity evidence in sex cases).

189. *See* FED. R. EVID. 404(b)(2).

190. *See* Jodi Clay-Warner & Callie Harbin Burt, *Rape Reporting After Reforms: Have Times Really Changed?*, 11 VIOLENCE AGAINST WOMEN 150 (2005); Bonnie Fisher et al., *Reporting Sexual Victimization to the Police and Others: Results from a National-Level Study of College Women*, 30 CRIM. JUST. & BEHAV. 6 (2003).

191. THE TRAUMA OF SEXUAL ASSAULT: TREATMENT, PREVENTION AND PRACTICE (Jenny Petrak & Barbara Hedge eds., 2002).

192. *See* Wendy Larcombe, *The 'Ideal' Victim v Successful Rape Complainants: Not What You Might Expect*, 10 FEMINIST LEGAL STUD. 131, 138–40 (2002).

and self-blame . . . ."[193] Some researchers reported that criminal proceedings are a negative experience for victims, calling them "disruptive,"[194] "hurtful,"[195] or "suggest[ing] that [they] are frequently a source of secondary victimization for the crime victims involved."[196] Interestingly, although Campbell et al. found that 52% of victims evaluated their contact with the legal system negatively, *not* having their case prosecuted was even worse: "Victims who did not have their cases prosecuted were more likely to rate their contact with the legal system as hurtful."[197]

Others studies came to a different conclusion about the effect of legal proceedings on victim well-being. Frazier and Haney found that victims had a negative impression of the legal system,[198] but their "findings [did] not support the belief that victims experience a 'secondary victimization' due to their involvement with the criminal justice system."[199] Importantly, at least one study found that "in limited cases[,] the criminal proceedings were perceived as psychologically helpful."[200]

Because going through the adjudicatory process can be difficult, prosecutors should do what they can to make it easier. Studies have shown that victims benefit from mental health professionals, rape crisis centers, and religious communities,[201] so prosecutors should refer them accordingly. In addition, one of the largest areas of frustration for victims is not being kept informed and not having any control over the proceedings.[202] Prosecutors can help to counter these feelings by keeping victims informed of court dates and plea negotiations. Also, prosecutors can invite victims to participate in proceedings when appropriate, such as at a bail review hearing.[203] When the case goes to trial, prosecutors should arrange for victims to have support

193. Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA VIOLENCE & ABUSE 242, 246–47 (2014).

194. Patricia Cluss et al., *The Rape Victim: Psychological Correlates of Participation in the Legal Process*, 10 CRIM. JUST. & BEHAV. 342, 354 (1983) (finding that "participating in the prosecution of a rape case may be disruptive for the victim").

195. Rebecca Campbell et al., *Preventing the "Second Rape": Rape Survivors' Experiences with Community Service Providers*, 16 J. INTERPERSONAL VIOLENCE 1239, 1250 (2001).

196. *See* Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOC. JUST. RES. 313, 321 (2002).

197. Campbell et al., *supra* note 195, at 1250.

198. Patricia A. Frazier & Beth Haney, *Sexual Assault Cases in the Legal System: Police, Prosecutor, and Victim Perspectives*, 20 LAW & HUM. BEHAV. 607, 620 (1996) ("[V]ictims tended to believe that rapists have more rights than victims, that victims' rights are not protected, and that the system is unfair.").

199. *Id.* at 626.

200. Orth, *supra* note 196.

201. *See* Campbell et al., *supra* note 195, at 1250 ("Survivors overwhelmingly rated their contact with mental health professionals, rape crisis centers, or religious communities as healing . . . ."); *see also id.* at 1253 ("Consistent with the findings of other empirical studies and comprehensive reviews . . . , our results revealed that rape crisis centers are an underutilized service by victims. This is unfortunate because rape crisis centers can be effective agents in assisting victims to negotiate system contacts, providing vital crisis intervention and advocacy services.") (citations omitted).

202. *See* Frazier & Haney, *supra* note 198, at 620, 625–26.

203. *See id.* at 625–26.

persons available, and they should file pre-trial motions asking the judge to exclude evidence of the victim's dress or sexual history unless it is relevant for a permissible purpose.[204]

In some instances, even with a prosecutor doing everything she can to make sure a victim is comfortable, the victim still may not want to testify.[205] Although the prosecutor should listen to the preferences of the victim, it is important to remember, as *Berger* explained, that the prosecutor is the representative of the state.[206] This means that the prosecutor may be obliged to go to trial against a specific victim's wishes if the prosecutor believes it is necessary to ensure community safety or uphold other community values. In such an event, the prosecutor should do everything she can to make sure the victim is as supported as possible. This may mean devoting time to preparing her for trial, allowing her to have a support person while she testifies, and referring her to counseling or a support group.

Finally, the measure of a successful prosecution is *not* necessarily a long prison sentence. Prosecutors should also consider alternative processes, such as restorative justice (RJ), that increase victim power and community safety by lowering recidivism.[207] RJ has been successfully adopted for juvenile sex offenses and adult sex crimes. RESTORE is one such program that uses conferencing, a widely used RJ methodology.[208] Mary Koss evaluated

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204. *See About Victim's Rights*, VICTIMLAW, https://www.victimlaw.org/victimlaw/pages/victimsRight.jsp (last visited Oct. 1, 2016).

205. The "Domestic Violence Movement" has also grappled with how to encourage and force more domestic violence prosecution in the face of victims who may recant or refuse to testify. Some scholars, such as Cheryl Hanna, have argued that the solution is to have "hard" no drop policies in which the state goes forward regardless of the victim's preferences, even if it requires arresting the victim to force her to testify. Hanna wrote, "[T]he societal benefits gained through [mandated participation] . . . far outweigh any short-term costs to women's autonomy and collective safety." Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1857 (1996). Others, such as Donna Coker, have criticized no drop prosecution and mandatory arrest policies because they increase state control over women, especially "those women who are otherwise most vulnerable to state control: poor women, particularly poor women of color, and women who are engaged in minor crimes, *many* of which *are* directly related to battering." Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 NEW CRIM. L. REV. 801, 849 (2001) (formerly known as the *Buffalo Criminal Law Review*). Leigh Goodmark has also advocated against no drop prosecution on the grounds that it undermines victim agency and autonomy. "If we truly value the empowerment of women subjected to abuse, we should not advocate for policies . . . that deprive them of self-determination and choice." LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 134 (2012).

206. Berger v. United States, 295 U.S. 78, 80.

207. *See* Koss et al., *supra* note 193, at 247–48.

208. *See id.* In conferencing, the first meeting begins with the responsible person (otherwise known as the respondent or the accused) describing and taking responsibility for what he did and the victim describing the impact of the violation. *See id.* Family and friends of both are present for support and are given the opportunity to explain the impact of the harm. *Id.* A written redress plan is later formalized that describes "the concrete means through which the responsible person will be held accountable and remedy the impacts on victims and the community." *Id.* This can include counseling (sex offender treatment, drug and alcohol interventions, and anger management), community service, and victim restitution. A one-year supervision period is put in place to monitor the responsible person and make sure that he meets his commitments. *Id.*

RESTORE using a sample of sixty-six cases involving sex crimes.[209] Although caution is necessary due to the small sample size, the results are promising. Koss found that 63% of victims and 90% of responsible persons chose RJ; 80% of responsible persons completed all elements of their redress plan within one year; and post-conference surveys showed that in excess of 90% of all participants, including the victims, agreed that they felt supported, listened to, treated fairly and with respect, "and believed that the conference was a success."[210] Importantly, there were no incidents involving physical threats, and standardized assessments showed decreases in victim PTSD symptoms from intake to post-conference.[211]

V. CONCLUSION

Just as the prosecutor must not let improper bias impact her decision to charge an *innocent* person, so should it not impact her decision not to charge a *culpable* person. In a democracy like ours, the law's legitimacy depends on the exercise of the state's coercive power in a way that displays equal concern and respect for all of its citizens. This includes women like T.M., Jane Doe, and Sade Hill.[212] Not prosecuting a rape case when there is sufficient evidence to convict but the prosecutor fears jurors will not convict merely because the victim is a prostitute, a person of color, or both, does not just undermine the dignity and worth of the victim. It also undermines the legitimacy of the criminal justice system as a whole. Indeed, in an ironic twist, not filing because a victim is "imperfect" actually turns her into the perfect victim, virtually guaranteeing that she will be victimized again.

209. *Id.* at 248.
210. *Id.*
211. *Id.*
212. *See supra* text accompanying notes 3, 4, 116 (discussing each of these women's cases).