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## Can You Be a Good Person and a Good Prosecutor?

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# Can You Be a Good Person and a Good Prosecutor?

ABBE SMITH\*

[T]he citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Robert H. Jackson, former prosecutor<sup>1</sup>

[T]he power we wielded over other people's lives made us feel as if we were the executors of morality. A word from us and a person goes free; another word and he is whisked away . . . . And we had been handed power at an age when we were not likely to understand how to use it wisely.

David Heilbroner, former prosecutor<sup>2</sup>

An endless procession of people passed before me when I was a prosecutor, and I convicted most of them . . . . One afternoon I found myself in the middle of a summation in another case — calling for the conviction of yet another scourge of society — when I realized I had forgotten the defendant's name and the charge against him.

Seymour Wishman, former prosecutor<sup>3</sup>

## INTRODUCTION

Somehow, it is understood that prosecutors have the high ground. Most people simply assume that prosecutors are the good guys, wear the white hats, and are on the "right" side.<sup>4</sup> Most law students contemplating a career in

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1. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 6 (1940). Of course, Robert H. Jackson was also a Supreme Court Justice.

2. DAVID HEILBRONER, *ROUGH JUSTICE: DAYS AND NIGHTS OF A YOUNG D.A.* 351 (1990).

3. SEYMOUR WISHMAN, *CONFESSIONS OF A CRIMINAL LAWYER* 14-15 (1981).

4. Consider, for example, Sam Waterston's character in the television show, *Law and Order* (NBC television), and the assorted female prosecutors who have played his sidekicks on the show. Or consider Sharon Lawrence, who played the prosecutor wife of Dennis Franz' Detective Andy Sipowicz on *NYPD Blue* (ABC television) for many seasons. These are upstanding people, saintly even. If they cross an ethical line from time to

criminal law seem to think this.<sup>5</sup> It could be that most practicing lawyers think this, as well.<sup>6</sup>

Prosecutors represent the people, the state, the government. This is very noble, important, and heady stuff. Prosecutors seek truth,<sup>7</sup> justice,<sup>8</sup> and the American way. They are the ones who stand up for the victims and would-be victims, the bullied and battered and burgled. They protect *all of us*.

Meanwhile, defenders are always on the defensive. In a social climate that exalts crime control over everything else,<sup>9</sup> defenders are barely tolerated.<sup>10</sup> It is sometimes hard for the public to distinguish defenders from the "scum" we represent.<sup>11</sup> We are often seen as our clients'

time it is clearly for the public good. If only Dick Tracy were a District Attorney instead of a cop, he'd be the perfect image of the prosecutor, with his square jaw and uprightness.

5. *E.g.*, HEILBRONER, *supra* note 2, at 18 (noting that as a law student, he never considered becoming a criminal defense lawyer); WISHMAN, *supra* note 3, at 9 (recalling that the judge for whom he clerked after law school encouraged him to become a prosecutor); Robert Rader, *Confessions of Guilt: A Clinic Student's Reflections on Representing Indigent Criminal Defendants*, 1 CLINICAL L. REV. 299, 301 (1994) (noting that he signed up for the criminal law clinic because he had thought about becoming a prosecutor).

6. *See, e.g.*, PAUL HOFFMAN, WHAT THE HELL IS JUSTICE: THE LIFE AND TRIALS OF A CRIMINAL LAWYER 22 (1974) ("Most lawyers consider criminal [defense] practice 'grubby.'").

7. *See generally* Bennett Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS (2001); *see also* Fred C. Zacharias & Bruce Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L. J. 207, 228 (2000) (noting that prosecutors have a greater duty of candor to the tribunal than do lawyers generally); Monroe Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L. J. 1030, 1033 (1967) (noting that the prosecutor's duty to be truthful and forthcoming requires that he or she may not withhold or suppress material evidence or suggest that a truth-telling defense witness is lying).

8. *See* STANDARDS RELATING TO THE ADMIN. OF CRIM. JUST. § 3-1.2(c) (1980) [hereinafter STANDARDS OF CRIM. JUST.] (stating that prosecutors must "seek justice [and] not merely convict"); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1981) [hereinafter MODEL CODE] ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1983) [hereinafter MODEL RULES] ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); *see also infra* notes 131-53 and accompanying text.

9. *See generally* MARC MAUER, RACE TO INCARCERATE (1999) (documenting the dramatic rise in incarceration in the United States and critically examining the politics of crime control); ELLIOT CURRIE, CRIME AND PUNISHMENT IN AMERICA (1998) [hereinafter CURRIE, CRIME AND PUNISHMENT] (examining the failed crime control policies of the past twenty-five years); JEFFREY REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON 12-50 (1998) (examining the politics of crime control); *see also* ELLIOT CURRIE, RECKONING: DRUGS, THE CITIES, AND THE AMERICAN FUTURE 148-212 (1993) (examining the failed criminal justice approach to illegal drugs and proposing a new approach).

10. *See* RICHARD POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 163-64 (1999):

I can confirm from my own experience as a judge that criminal defendants are generally poorly represented. But if we are to be hardheaded we must recognize that this may not be an entirely bad thing. The lawyers who represent indigent criminal defendants seem to be good enough to reduce the probability of convicting an innocent person to a very low level. If they were much better, either many guilty people would be acquitted or society would have to devote much greater resources to the prosecution of criminal cases. A bare-bones system for defense of indigent criminal defendants may be optimal.

11. *See* HOFFMAN, *supra* note 6, at vii (referring to the criminal defender who is "in the courts every day, handling everything from misdemeanors to murder, who has represented both the scum of the streets and the

accomplices<sup>12</sup> or, at best, their apologists. When defenders are asked, as we often are, "How can you defend those people?,"<sup>13</sup> there is an assumption that there is something wrong with "those people" and something wrong with those of us who choose to defend them. Although high profile cases usually enhance the image of prosecutors, they don't often help the public image of defenders. We are lawyers for the mob and the murderer and the molester. Too often we are seen muttering "no comment" as we stand beside clients desperately attempting to hide from view.

Defenders become accustomed to having our morals challenged; it is an occupational hazard.<sup>14</sup> We have been called all sorts of things by all sorts of people: "sleazy,"<sup>15</sup> "slick,"<sup>16</sup> egomaniacal,<sup>17</sup> hateful,<sup>18</sup> and

overlords of the underworld, who has tried both grisly homicides and 'clean' white-collar crimes, who has defended both cop-killers and killer cops . . . [and whose] clients are not all innocent."); see also *THE BIG CHILL* (Columbia Pictures 1983) (Mary Kay Place playing a former public defender: "There I was in the Philadelphia Public Defender's Office. And I mean, my clients were the scum of the earth . . . I don't know. I just didn't think they were going to be so guilty.").

12. See Yale Kamisar, Alan Dershowitz, & Peter Gabel, *The Moral Obligation of Defense Lawyers, part 1*, *TIKKUN*, July/Aug. 1997, at 8 [hereinafter Kamisar, Dershowitz & Gable, *Moral Obligation, part 1*] (contesting the magazine editor's description of Alan Dershowitz as having "hands still dripping from the blood of the victims whose assassins he protects," as "deplorable 'guilt by association' or more specifically 'guilt by client.'").

13. JAMES KUNEN, "HOW CAN YOU DEFEND THOSE PEOPLE?": THE MAKING OF A CRIMINAL LAWYER (1983).

14. See Abbe Smith & William Montross, *The Calling of Criminal Defense*, 50 *MERCER L. REV.* 443, 451 (1999) ("[O]n the whole, criminal defense lawyers are [regarded as] dishonorable or disreputable, immoral or amoral, manipulative or heartless."); see also *Reynolds Holding, It's Not a Pretty Job, but Someone Has to Do It*, *S.F. CHRON.*, Feb. 7, 1999, at 5/Z1 (quoting California criminal lawyer John Kecker: "[T]alking to civilians about criminal defense work is like pushing an oyster into the coin slot of a parking meter. It can't be done, and it makes a mess.").

15. David Barstow, *Brash Defense Lawyer Shrugs Off Attacks on Tactics in Louima Case*, *N.Y. TIMES*, June 13, 1999, at A47 (reporting that across the country, the words "sleazy" and "shameful" are being used to describe New York defense lawyer Marvyn Kornberg, who represented police officer Justin Volpe in the Abner Louima case); Steven A. Holmes, *Fame One Lawyer Can Do Without*, *WASH. POST*, Feb. 18, 1988, at A14 (noting that highly respected Washington, D.C. criminal lawyer Francis Carter has been accused of "shady" and "sleazy" behavior in connection with his representation of Monica Lewinsky in the early days of the Clinton scandal).

16. David Margolick, *A Year Later: The Simpson Case Has Permeated the Nation's Psyche*, *N.Y. TIMES*, June 12, 1995, at B8 (quoting Los Angeles defense lawyer Barry Tarlow on the effect of the O.J. Simpson case on ordinary criminal trials: "What little credibility you might have as a defense lawyer has been eroded by the image of the lawyers in [the Simpson] case. The jury will believe that you have unlimited funds and manpower and that you are too slick by half."); Michael Loftin, *Don't Abolish the CCRC*, *CHATTANOOGA TIMES*, Apr. 1, 1995, at A6 (noting the tendency of the Governor of Tennessee to blame "slick criminal defense lawyers and liberal judges" for the lack of executions in the state).

17. See Sydney H. Schanberg, *Will Chambers' Lawyer Respect Jennifer Levin?*, *NEWSDAY*, Jan. 8, 1988, at 63; see also Sydney H. Schanberg, *Chambers, Litman: Linked by Self-Absorption*, *NEWSDAY*, Mar. 25, 1988, at 91 (depicting New York defense lawyer Jack Litman as an egomaniac); Matt Sudel, *Frank Rubino's Championship Bout*, *ORLANDO SENTINEL TRIB.*, Sept. 19, 1993, at 8 (portraying a high-priced, high profile Florida defense lawyer as a self-promoting egomaniac); Barbara Walsh & Larry Kellerfort, *Sex, Videotapes — Ellis Rubin's Kind of a Case*, *ORLANDO SENTINEL TRIB.*, Sept. 15, 1991, at B1 (noting that the critics of a successful criminal defense lawyer in southern Florida call him an "egomaniac, a media hound, a man willing to create a three-ring circus to get his mug on television — even if it means sacrificing his clients."). But see Seymour Wishman, *Making a Federal Case*, *N.Y. TIMES BOOK REV.*, Sept. 27, 1987, at G20 (noting that "[a]ll successful criminal defense lawyers are egomaniacs").

18. See Gay Jervy, *Sympathy for the Devil*, *AM. LAW.*, Apr. 1987, at 128 (describing New York defense lawyer Jack Litman as a "lawyer many people love to hate" for his successful trial strategy of blaming victims).

worse.<sup>19</sup> Just listen to any radio talk show and you can hear defenders denigrated, derided, and denounced.<sup>20</sup> To many, the work defenders do is inherently disreputable.<sup>21</sup>

It doesn't matter how lofty the lawyers. Consider, for example, Senator Orrin Hatch disparaging Harvard law professor and former public defender<sup>22</sup> Charles Ogletree as a "two-bit slick lawyer."<sup>23</sup> The conduct that gave rise to Hatch's outburst was Ogletree's disclosure during the 1991 Senate confirmation hearings for Supreme Court nominee Clarence Thomas that Anita Hill had passed a

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19. See Howie Carr, *Yellow Hack Sells Out to Win Finneran's Favor*, BOSTON HERALD, Nov. 9, 1997, at 10 (columnist and radio talk show host referring to public defenders as "low-life . . . sleazy . . . bottom-feeders"); Holding, *supra* note 14, at 5/Z1 (referring to the public view of criminal lawyers as "greedy cheats" and "the devil's advocates").

20. See, e.g., Christopher Johns, *The Right to Counsel*, ARIZ. REPUB., Feb. 5, 1995, at F3 (a criminal defense lawyer sharing the common experience of defenders: "'How can you defend those people?' the caller asked. 'What if you think the person is guilty?' another wants to know. 'Those people are scum' a third caller says. Every time I'm a guest on a radio talk show or speak to an audience, someone asks those questions.'").

For a popular magazine version of this phenomenon, one need only turn to Marilyn Vos Savant's regular column in *Parade Magazine*. In a series of *Ask Marilyn* columns in 1998 and 1999, Ms. Vos Savant examined the morality of defending the guilty. At first she supports the defense of the guilty and innocent alike: "[T]he defense counsel is obligated to make the State prove that the client is guilty even if the attorney believes the client is guilty or has heard the client say, 'Yes, I did it.'" Marilyn Vos Savant, *Ask Marilyn*, PARADE MAG., Sept. 13, 1998, at 23. In the same column she notes that privately retained criminal lawyers do have a choice in whom they represent: "[U]nless the defense counsel has been appointed by the court, the attorney is not obligated to take the case. *That is, an attorney who defends a client he believes to be guilty does so willingly.*" *Id.* In a subsequent column, after printing several letters from readers responding to the previous column, Ms. Savant asks her readers what they think about the "larger question . . . Should a private attorney defend a criminal case in which he or she knows the defendant is guilty?" *Id.* Anticipating an institutional concern, Ms. Vos Savant allows that "[i]f a defendant cannot obtain representation, eventually the Court would appoint a public defender, as required by law." *Id.* In a third column, after discussing her readers' responses, and providing a break-down by answer (72% believe that an attorney should *not* defend the guilty, 25% believe an attorney *should* defend the guilty, so long as they try to get guilty clients to plead guilty, and 3% had mixed feelings), and by attorney versus non-attorney status (92% of attorneys would defend a client they knew to be guilty, 7% would not, and 1% had mixed feelings), Marilyn Vos Savant, *Ask Marilyn*, PARADE MAG., Jan. 10, 1999, at 10, Ms. Savant reports that she has changed her mind:

I pride myself on being open. To me, this means always searching for more truth, refining my opinion accordingly and moving to a better position if and when I find one . . . Before I conducted the poll, I had [believed that a criminal attorney should defend a guilty client]. Upon reading the arguments . . . however, I now [believe that] the attorney should *not* take the case . . . The defendants who appear in the criminal courts belong there.

*Id.* at 10-11. Ms. Vos Savant goes on to argue that there is a "moral difference" between "defend" and "represent." She concludes that "[a]ll guilty people should be represented; not all of them should be defended." *Id.* at 11. I thank David Luban for directing me to this source.

21. See HOFFMAN, *supra* note 6; see also William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 280 ("How can we blame laymen for their impatience with procedural safeguards when so many lawyers believe that contributing one's legal services to an unpopular or unremunerative cause is dirty, or nasty, or opprobrious?").

22. See generally Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1260-67, 1285-89 (1993) (describing his career at the Public Defender Service for the District of Columbia).

23. Michael Isikoff, *Hill's Story Said to Pass Polygraph Examination*, WASH. POST, Oct. 14, 1991, at A1.

polygraph exam.<sup>24</sup> Ogletree, one of Hill's lawyers, devised the polygraph idea in response to Thomas supporters' fierce attack on his client's character and credibility.<sup>25</sup>

The current popular culture doesn't help. The television series, *The Practice*,<sup>26</sup> although acclaimed by both viewers and critics, is mostly about the questionable ethics of defense lawyers.<sup>27</sup> There is the constant suggestion that, by definition, zealous advocacy on behalf of the accused crosses some ethical — or certainly *moral* — line. Gone are the days when defenders were heroes, the days of Clarence Darrow and Atticus Finch.<sup>28</sup> Who do we have now? Johnnie Cochran, the guy who got O.J. Simpson off.<sup>29</sup> It is not that there aren't any criminal defense

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24. *Id.*

25. JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE* 308 (1994) (quoting Ogletree saying "I thought that the polygraph would be the most pivotal thing in the hearings, because her credibility had been the focal point."); see also Peter G. Gosselin, *Hill's Friends Bolster Her Account; Hill Passed Lie Detector Test, Her Lawyers Say*, BOSTON GLOBE, Oct. 14, 1991, at 1 (noting that Ogletree hired a former FBI agent recommended by the former United States Attorney for the District of Columbia to administer the polygraph exam, and did so in order to respond to the "assault on Hill's credibility").

26. *The Practice* (ABC Television).

27. See Caryn James, *Finale? Look Out for That Cliff!*, N.Y. TIMES, May 19, 2000, at E1 (referring to a "recent episode in which Eugene (Steve Harris) wonders yet again why he defends guilty lowlives. How many times can the lawyers on *The Practice* ask that question?"). Consider the season finale for 1999-2000, in which Ellenor (Camryn Manheim) and Jimmy (Michael Badalucco) represent a deaf woman (Marlee Matlin) who is accused of murdering the man who raped and killed her seven-year-old daughter. The client maintains that she knew exactly what she was doing when she shot her only daughter's assailant and would do it again. When the client refuses a manslaughter plea, the lawyers persuade her to pursue a temporary insanity defense for which they must call an expert witness. When one psychiatrist backs out of testifying because the defendant was plainly sane at the time of the incident, the lawyers simply procure another expert. *The Practice: Life Sentence* (ABC television broadcast, May 21, 2000). While I fail to see any unethical conduct on the part of the defense in this case — there is nothing wrong with putting on a defense that does not fit squarely within a traditional conception and nothing wrong with shopping around for an expert to support the defense, see MODEL RULES Rule 1.3 cmt. ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf"); MODEL RULES Rule 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding . . . may nevertheless so defend the proceeding as to require that every element of the case be established"); MODEL RULES Rule 3.3(a)(4) ("A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false") — there is clearly an ethical question about the prosecutor's motivation in securing a conviction and a prison sentence here, as the prosecutor is told on the eve of trial that his job is on the line. MODEL RULES Rule 3.8 cmt. ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."). In the end, the jury convicts the defendant of murder in the second degree, she is automatically sentenced to life in prison, and Ellenor promises to appeal.

28. See Warren Berger, *New Life for a (Pre-O.J.) Legal Classic*, N.Y. TIMES, Oct. 12, 1997, § 2, at 34 (discussing a remake of the early 1960s television show, *The Defenders*, and noting that the criminal lawyers we saw as "heroic" thirty-five years ago are no longer regarded as such); Alyssa Katz, *The Practice*, THE NATION, Mar. 31, 1997, at 33 (referring to criminal defense as an "unfashionable career path").

29. There has been a massive amount of commentary on the public displeasure over the 1992 acquittal of O.J. Simpson for the murder of Nicole Brown Simpson and Ronald Goldman. For an entertaining and thoughtful commentary on the outcry, see Joel Achenbach, *Critique of Pure O.J.*, WASH. POST (MAG.), Mar. 19, 1995, at W26. For some television viewers, the lingering image of Johnnie Cochran comes from the NBC series *Seinfeld*, in which Cochran is parodied by a lawyer with the same initials who seems to lack both moral

heroes out there; there are plenty.<sup>30</sup> Still, the public doesn't know these heroes and doesn't think of most defenders as heroic.<sup>31</sup>

Even respected law scholars have described defenders as "amoral,"<sup>32</sup> "immoral,"<sup>33</sup> or otherwise ethically suspect.<sup>34</sup> The most generous commentators suggest that defenders "detach themselves from difficult moral questions."<sup>35</sup>

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principles and professional standards. See Caryn James, "Seinfeld" Goes Out in Self-Referential Style, N.Y. TIMES, May 15, 1998, at B1 (reviewing the final episode of Seinfeld, in which Jerry, Elaine, George, and Kramer are prosecuted for failing to intervene in a robbery and "[t]heir perfectly chosen lawyer is a Johnnie Cochran imitator called Jackie Chiles. The Cochran/Chiles character is a nihilistic self-promoter who has no problems defending the accused in this case. 'You don't have to help anybody,' he says. 'That's what this country is all about.'").

30. See Smith & Montross, *supra* note 14, at 498-509 (pointing to eight criminal defense heroes: Clarence Darrow, William Kunstler, Catherine Roraback, Terence MacCarthy, David Rudovsky, Steven Bright, Bryan Stevenson, and Sister Helen Prejean).

31. Even the recent movie, *The Hurricane* (MCA/Universal Pictures 1999), which recounts the story of former prize fighter Rubin Hurricane Carter, who spent nearly twenty years in prison for a triple murder he did not commit, didn't honor the criminal defense lawyers who worked tirelessly and without compensation on Rubin Hurricane Carter's behalf. Instead, a group of Canadians is shown as having won the day along with a young black American, now a prosecutor. See Steven Pearlstein, *But the Fighter Still Remains*, WASH. POST, Jan. 6, 2000, at C1, 9.

32. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 1-2, 7 (1975).

33. See *id.* at 1-2; see also Alan Dershowitz & Peter Gabel, *The Moral Obligation of Defense Lawyers*, part 2, TIKKUN, Sept./Oct. 1997, at 23 [hereinafter Dershowitz & Gable, *Moral Obligation*, part 2] (Peter Gabel, President of New College of California and a founder of the Critical Legal Studies movement, describing criminal defense lawyers' protection of client confidences as "morally obscene"). But see RAND JACK & DANA CROWLEY JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* 68 (1989) (a criminal lawyer noting that she is "doing a morally reprehensive act in order to get a morally positive benefit").

34. The most interesting critiques of criminal defense ethics come from progressive legal scholars. See, e.g., William Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1704-05 (1993) (asserting that criminal defense lawyers routinely engage in unscrupulous practices); Anthony Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995) (arguing that criminal lawyers perpetuate racist stereotypes); Anthony V. Alfieri, *Lynching Ethics: A Theory of Racialized Defenses*, 95 MICH. L. REV. 1063 (1997) (arguing against "racialized defenses"); DAVID LUBAN, *LAWYERS AND JUSTICE* 150-53 (1988) (suggesting it is unethical for defense lawyers to cross-examine rape complainants about sexual conduct). For a novel critique of criminal defense by a progressive legal scholar and an adherent of the "Politics of Meaning," see Kamisar, Dershowitz & Gable, *Moral Obligation*, part 1, *supra* note 12, at 8-10; Dershowitz & Gable, *Moral Obligation*, part 2, *supra* note 33, at 21-24. After arguing that criminal defense lawyers use the "amoral" legal system as a "justification for . . . doing anything they can to get their clients off even when they know or strongly suspect . . . that their clients are lying or have been guilty of acts of cruelty or brutality," Kamisar, Dershowitz & Gable, *Moral Obligation*, part 1, *supra* note 12, at 9, Gabel urges a "spiritual transformation:"

[C]riminal defense lawyers should no longer routinely participate . . . in justifying false denials of responsibility by clients who commit violent and cruel acts. If they are going to publicly represent such clients as practitioners of justice, they should manifest a compassionate moral presence and exercise compassionate moral judgment in every phase of the representation . . . [T]he lawyer must to the best of his or her ability assume responsibility for the moral consequences of [an] acquittal. Confront the client with his [crime]. Expect reciprocity for your defense of him. Consider what is likely to happen to others if he is freed and try to influence what happens . . . . Insist that he seek spiritual and psychological counseling and honestly face his terrible sin.

*Id.* at 22, 24.

35. LISA MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 140 (1987).

Much has been written about whether you can be a good person and a good defender<sup>36</sup> — that is, whether it is morally acceptable to defend people who do bad things<sup>37</sup> — and what the personal and professional dilemmas are for those who engage in such work.<sup>38</sup>

36. See LUBAN, *LAWYERS AND JUSTICE*, *supra* note 34, at 59 (“Most people . . . assume that the paradigmatic case of the morally dubious representation is the defense of the guilty criminal.”); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060, 1064-65 (1976) (noting that the “conventional paradigms in the casuistic literature deal with criminal defense lawyers”); Wasserstrom, *supra* note 32, at 6 (citing criminal defense as “the most familiar aspect of [the] role-differentiated character of the lawyer’s activity”). For a sample of scholarship on the ethics of criminal defense, see Barbara Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175 (1983-84) (examining how criminal defense lawyers defend those they know are guilty); Roger C. Cramton, *Why Defend the Guilty*, 11 CORNELL L. F. 2 (1984) (justifying the defense of the guilty); Charles Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 13-18 (1951) (discussing the ethics of defending a guilty client or taking a “bad case”); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) (examining the ethics of discrediting truthful prosecution witnesses, crediting untruthful defense witnesses, and providing legal advice that will tempt a defendant to commit perjury); John Kaplan, *Defending Guilty People*, 7 U. BRIDGEPORT L. REV. 223 (1986) (offering reasons for defending the guilty); John B. Mitchell, *The Ethics of the Criminal Defense Attorney — New Answers to Old Questions*, 32 STAN. L. REV. 294, 299-313 (examining criminal defense); Smith & Montross, *supra* note 14, at 458-90, 509-34 (offering biblical stories and teachings as support for criminal defense); Harry Subin, *The Criminal Lawyer’s “Different Mission:” Reflections on the “Right” to Put on a False Defense*, 1 GEO. J. LEGAL ETHICS 125 (1987) (critically examining the criminal defense lawyer’s role with regard to truth); Michael Tigar, *Defending*, 74 TEX. L. REV. 101, 104 (1995) (discussing the representation of “the most despised, the most endangered defendants”). Cf. Marie Ashe, “Bad Mothers,” “Good Lawyers,” and “Legal Ethics,” 81 GEO. L.J. 2533, 2537-38 (1993) (examining the morality of representing “bad mothers” and the “challenge of mediating the apparent contradictions between being a ‘good lawyer’ advocating for a ‘bad client’ and being a ‘good lawyer’ as ‘good person.’”). In scholarship on the role morality of lawyers generally, there is invariably a mention of criminal defense. See, e.g., Benjamin Allison, *A Person or a Lawyer*, 72 NOTRE DAME L. REV. 1723 (1997); Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853, 855 (1992); David Barnhizer, *Princes of Darkness and Angels of Light: The Soul of the American Lawyer*, 14 NOTRE DAME J. L. ETHICS, & PUB. POL’Y 371, 450-51 (2000); Stephen Gillers, *Can a Good Lawyer Be a Bad Person*, 84 MICH. L. REV. 1011, 1022-24 (1986); Stephen Gillers, *Can a Good Lawyer Be a Bad Person?*, 2 J. INST. STUD. LEG. ETH. 131, 143-46 (1999); Gerald Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980).

37. I have previously expressed a preference for describing criminal offenders as “people who do bad things,” Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 492 (2000), and even “people who do terrible things.” Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925 (2000). Cf. Bill Miller, D.C. Detective Receives Two-Year Term, WASH. POST, June 3, 2000, at B2 (reporting about the two-year prison sentence imposed upon a D.C. police detective with nearly thirty years of law enforcement experience, who admitted to having lied under oath about his credentials as a narcotics expert, and noting that the sentencing judge described the detective as a “good man who did a terrible thing”).

38. See Babcock, *supra* note 36, at 180-81 (describing criminal defenders’ indifference to guilt and the toll this takes); Randy Bellows, *Notes of a Public Defender*, in THE SOCIAL RESPONSIBILITY OF LAWYERS: CASE STUDIES 80 (Phillip B. Heymann & Lance Liebman, eds., 1988) (former public defender recounting the dilemmas he experienced); Phyllis L. Crocker, *Feminism and Defending Men on Death Row*, 29 ST. MARY’S L.J. 981 (1998) (discussing the dilemmas in being a feminist and defending men convicted of rape and murder); KUNEN, *supra* note 13 (former public defender exploring the role of criminal defense lawyers); David R. Lynch, *In Their Own Words: Occupational Stress Among Public Defenders*, 34 CRIM. L. BULL. 473 (1998); Michael Mello, *Death and His Lawyers: Why Joseph Spaziano Owes His Life to the Miami Herald — And Not to Any Defense Lawyer or Judge*, 20 VT. L. REV. 19 (1995) (discussing the emotional challenges of representing a client on death row); WISHMAN, *supra* note 3 (criminal lawyer examining the dilemmas of criminal defense); see

Meanwhile, almost nothing has been written about whether you can be a good person and a good *prosecutor* — that is, whether it is morally acceptable to prosecute people who do bad things.<sup>39</sup> At the heart of this question is the reality that prosecution inevitably leads to punishment, which, in recent times, means locking people up (especially *some people*) for very long periods of time,<sup>40</sup> and, with increased regularity, executing them.<sup>41</sup>

I want to turn the tables and at least *ask the question about prosecution*. I believe it is an important question.<sup>42</sup> In this Article, I will examine the morality of

also MCINTYRE, *supra* note 35, at 139-70 (examining how defenders can “sleep nights”); JACK & JACK, *supra* note 33, at 61-71 (examining moral dilemmas in lawyering, especially criminal defense). For a particularly interesting recent examination of the emotional strategies criminal lawyers employ in order to zealously defend people accused of serious crime, see SUSAN BANDES, *REPRESSION AND DENIAL IN LAWYERING* (forthcoming, manuscript on file with Author).

39. For a provocative exception, see Kenneth B. Nunn, *The Darden Dilemma Should African Americans Prosecute Crimes?*, 68 *FORDHAM L. REV.* 1473 (2000) (arguing that African Americans should not become prosecutors because of the harm the criminal justice system inflicts on the African American community); compare Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13 (1998) (arguing that with regard to race “[p]rosecutors have been given more power and discretion than any other criminal justice official, so they have a greater ability to affect change where it is needed.”).

40. See generally, MAUER, *supra* note 9, at 32-37 (examining data on state and federal inmates between 1985 and 1995, and concluding that judges are sentencing more offenders to prison and meting out longer sentences); CURRIE, *CRIME AND PUNISHMENT*, *supra* note 9, at 18-19:

Once behind bars . . . Americans tend to stay longer, which is the second reason our imprisoned population is so large . . . . After nearly a decade and a half of relentlessly stiffening sentences — a trend unmatched in most other countries, some of which have actually gone in the other direction — our comparative severity has increased substantially.

41. See, e.g., MAUER, *supra* note 9, at 77 (referring to the expansion of the federal death penalty). It might be argued that this country is currently experiencing a serious reexamination of the death penalty, in view of the extraordinary decision by Illinois Governor George Ryan to impose a moratorium on capital punishment in January 2000, Dirk Johnson, *No Executions in Illinois Until System is Repaired*, *N.Y. TIMES*, May 21, 2000, at A20 (reporting that Ryan announced that he would not proceed with any executions until he received a “100 percent guarantee” against mistaken convictions), and the New Hampshire legislature’s vote in 2000 to end capital punishment in that traditionally conservative state, see John Kifner, *A State Votes to End Its Death Penalty*, *N.Y. TIMES*, May 19, 2000, at A16 (reporting that the New Hampshire legislature became the first state to ban capital punishment since executions resumed in the 1970s). Adding fuel to the fire, a timely Columbia University study of all capital appeals from the time the Supreme Court reinstated the death penalty in 1973 through 1995 found that two out of three convictions were overturned on appeal. Fox Butterfield, *Death Sentences Being Overturned in 2 of 3 Appeals*, *N.Y. TIMES*, June 12, 2000, at A1. Pointing to several of these events as well as the emergence of DNA testing as an accepted tool in determining guilt and innocence, many believe the movement to end the death penalty has real momentum. See generally Jonathan Alter, *The Death Penalty on Trial*, *NEWSWEEK*, June 12, 2000, at 24; Mark Hansen, *Death Knell for Death Row?*, 86 *A.B.A. J.*, 40; see also Editorial, *The New Death Penalty Politics*, *N.Y. TIMES*, June 7, 2000, at A30. However, I think the death penalty is a beast not easily conquered.

42. I accept that the question I raise here — indeed the title of this Article — may offend some readers. I have chosen this title not because I have any special knowledge about what it means to be a “good person.” I am not schooled in philosophy or religion and do not hold myself out as any sort of arbiter of morality. I mean to be provocative, not preachy. The title is derived from the first sentence in Charles Fried’s seminal article on legal ethics, see Fried, *supra* note 36, at 1060 (“Can a good lawyer be a good person?”), and Stephen Gillers’ oft-cited article, *Can a Good Lawyer Be a Bad Person?*, *supra* note 36. See also Jack & Jack, *supra* note 33, at 112

prosecution. First, I will explore the context of criminal lawyering at the millennium and what it means to prosecute under current conditions. Then, I will discuss whether it is possible to do “good” in this context — that is, whether a well-intentioned prosecutor can temper the harsh reality of the criminal justice system — in view of the institutional and cultural pressures of prosecutor offices. I will conclude by answering the question I pose in the title of this Article and addressing some likely objections.

## I. THE CONTEXT: LOCK ‘EM UP AND THROW AWAY THE KEY

A child is telling you about the bus ride that she takes to see her father, far from New York City, in one of the huge state prisons. She speaks of the mixture of emotions that she feels — for him, herself, her mother. Then Shentasha, who is sitting there beside you, lowers her defenses and describes the rides that *she* takes to see *her* father as well. Then another child adds her contribution, and an older boy adds his; you realize with dismay that this is one thing all the children at this table have in common.

Jonathan Kozol<sup>43</sup>

If we look squarely at the present state of crime and punishment in America . . . it is difficult to avoid the recognition that something is terribly wrong; that a society that incarcerates such a vast and rapidly growing part of its population — but still suffers the worst violent crime in the industrial world — is a society in trouble, one that, in a profound sense, has lost its bearings.

Elliot Currie<sup>44</sup>

[The prosecutor] wields the most terrible instruments of government.

Felix Frankfurter<sup>45</sup>

## THE JAILING OF AMERICA

In the past two decades, this country has turned to imprisonment like never before.<sup>46</sup> As of December, 1999, more than two million people were behind

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(“Good in this context is not judged by an objective, external moral measure. The good lawyer is the person who abides by lawyers’ rules: the good person is the person who lives by the axioms of personal morality.”)

43. JONATHAN KOZOL, *ORDINARY RESURRECTIONS* 153 (2000).

44. CURRIE, *CRIME AND PUNISHMENT*, *supra* note 9, at 8.

45. *Martin v. Merola*, 532 F.2d 191, 196 (2d Cir., 1976) (Lumbard, J., concurring) (quoting Felix Frankfurter, *Letter to the Editor*, N.Y. TIMES, Mar. 4, 1941).

46. See MAUER, *supra* note 9, at 1 (noting that the U.S. prison population has risen 500 percent in the past three decades, that between 1985 and 1995 a new prison opened every week, and that the rate of incarceration in this country “represent[s] a societal use of incarceration that [is] virtually unique by world standards”); CURRIE, *CRIME AND PUNISHMENT*, *supra* note 9, at 3 (“Over the past twenty-five years, the United States has built the largest prison system in the world. But despite a recent downturn in the crime rate, we remain far and away the most violent advanced industrial society on earth.”); Fox Butterfield, *Punitive Damages: Crime Keeps on Falling; but Prisons keep on Filling*, N.Y. TIMES, Sept. 28, 1997, at D1 (noting that California and Florida spend

bars,<sup>47</sup> an increase of 3.4% from the year before.<sup>48</sup> In the past ten years, the incarcerated population has grown at an average rate of 5.7% a year,<sup>49</sup> resulting in a rise in the total number of people in custody by 711,818 inmates, the equivalent of 1,607 new inmates a week.<sup>50</sup> Between 1990 and 1999, the rate of incarceration has increased from 1 in every 218 residents of the United States to 1 in every 147 residents.<sup>51</sup>

There is no other developed nation that compares to the United States when it comes to locking up its residents.<sup>52</sup> The United States is second only to Russia in its rate of incarceration.<sup>53</sup> The rate of incarceration in this country is six to ten times higher than that of other comparable industrialized nations, such as England, France, Germany, and Switzerland.<sup>54</sup>

Incarceration rates are so high — largely due to sentencing for drug offenses,<sup>55</sup> but also because of increased severity in sentencing,<sup>56</sup> the

more money sending people to prison than to college and North Carolina has sentencing guidelines based on a computer model showing the number of prison beds available much like a hotel reservation system).

47. BUREAU OF JUSTICE STAT., U.S. DEP'T OF JUSTICE, PRISONERS IN 1999, 1 (Aug. 2000); see also Peter Slevin, *Growth in Prison Population Slows*, WASH. POST, Apr. 20, 2000, at A34 (reporting that the nation's prison population increased by 1,122 inmates a week in 1999).

48. BUREAU OF JUSTICE STAT., U.S. DEPT. OF JUSTICE, PRISONERS IN 1999, 1 (Aug. 2000). The increase in 1999 is the smallest annual growth rate in the prison population since 1979. *Id.* at 1, 3.

49. *Id.* at 2. Between 1990 and 1999, the federal prison population grew at an average annual rate of 8.8%, the state prison population at 6.0%, and the local jail population at 4.6%. *Id.* at 2.

50. BUREAU OF JUSTICE STAT., U.S. DEPT. OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 1999, 2 (Apr. 2000).

51. *Id.* at 1, 3. These figures do not include the estimated 100,000 juveniles in adult facilities, see Peter Slevin, *Life After Prison: Lack of Services Has High Price*, WASH. POST, Apr. 24, 2000, at A1, nor do they include the hundreds of thousands of juveniles detained in juvenile facilities. See also OFFICE OF JUV. JUST. AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE COURT STATISTICS 1996, 8 (reporting that 320,900 juveniles were detained in delinquency cases in 1996).

52. See MARC MAUER, *AMERICANS BEHIND BARS: U.S. AND THE INTERNATIONAL USE OF INCARCERATION 1995* (The Sentencing Project ed., 1997) (reporting that the U.S. rate of incarceration is six to ten times the rate of Western European nations); see also Fox Butterfield, *Number in Prison Grows Despite Crime Reduction*, N.Y. TIMES, Aug. 10, 2000, at A10 (noting that there are 690 prisoners per 100,000 U.S. residents, which is six times the rate in Canada and Australia and five times the rate of any country in the European Union). The United States has 5% of the world's population, but 25% of its prisoners. Jennifer Gonnerman, *Two Million and Counting*, VILLAGE VOICE, Feb. 29, 2000, at 56.

53. See MAUER, *supra* note 9, at 19; MAUER, *supra* note 52, at 1.

54. See MAUER, *supra* note 9, at 21-23; MAUER, *supra* note 52; see also CURRIE, *CRIME AND PUNISHMENT*, *supra* note 9, at 15 (noting that as the American incarceration rate has quadrupled in the past three decades there have been modest increases in England, France, and the Netherlands and decreases in Germany and Sweden). The incarceration rate for women in some American states is greater than the overall rate in most western European countries — for example, Oklahoma imprisons its female population at a rate higher than that for women and men in England or France). *Id.* at 15.

55. See MAUER, *supra* note 9, at 32; see also Anthony Lewis, *Abroad and at Home: Breaking the Silence*, N.Y. TIMES, July 29, 2000, at A13 (noting that the Justice Policy Institute found that ten times more Americans are in prison for drug offenses today than in 1980); Slevin, *supra* note 47, at A34 (noting that the typical federal drug sentence grew from twenty-six months in 1990 to forty-two months in 1997).

56. See CURRIE, *CRIME AND PUNISHMENT*, *supra* note 9, at 46 (noting that the time offenders are likely to serve in prison has risen with "stunning rapidity" in recent years, and that among newly committed state prison

abolition of parole,<sup>57</sup> and other “reforms” such as “truth in sentencing”<sup>58</sup> — that the prison system has become an industry of its own.<sup>59</sup> And by all accounts, these are boom times for the “prison-industrial complex.”<sup>60</sup>

We look to prisons as the answer to a host of complex social problems borne of poverty,<sup>61</sup> inequality,<sup>62</sup> isolation,<sup>63</sup> and drugs.<sup>64</sup> There is no mystery about the demographics of who is incarcerated in this country or the path that leads most

inmates, the estimated minimum time to be served rose from an average of thirty-one months in 1985 to forty-three months in 1995); Slevin, *supra* note 51, at A1 (reporting that the average jail stay was twenty-seven months in 1997 compared to twenty-two months in 1990).

57. See BUREAU OF JUSTICE STAT., U.S. DEPT. OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS 3 (1999) (noting that fourteen states have abolished parole board release for all offenders); see also New York Times New Service, *Longer Terms Boost U.S. Prison Population; Tougher Sentencing Laws Cited*, CHICAGO TRIB., Jan. 11, 1999, at 7 (reporting that the number of all types of prisoners who were eligible for release from state prison and who were actually released fell from 37% in 1990 to 31% in 1996).

58. See generally BUREAU OF JUSTICE STAT., U.S. DEPT. OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS (1999); MARC MAUER, AM. CORRECTIONAL ASS'N, THE TRUTH ABOUT TRUTH IN SENTENCING (1996); see also Robyn Meredith, *Halfway Houses Are Casualties of a Michigan Sentencing Law*, N.Y. TIMES, Aug. 21, 1999, at A7 (noting that truth-in-sentencing laws were part of the Republicans' 1994 *Contract With America*, and require that prisoners serve at least 85% of the sentence they receive).

59. See CURRIE, CRIME AND PUNISHMENT, *supra* note 9, at 21 (“The prison has become a looming presence in our society to an extent unparalleled in our history — or that of any other industrial democracy. Short of major wars, mass incarceration has been the most thoroughly implemented government social program of our time.”); THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 93-94 (Stephen R. Donziger ed., 1996) [hereinafter THE REAL WAR ON CRIME] (describing prison expansion as a “rural growth industry” and noting that small towns throughout the country compete to be the site of new prisons). In a complicated economic climate, with job loss in various industries, prison employment opportunities are steady and rising. See Butterfield, *supra* note 46, at D1 (“Since 1990 alone, the number of prison and jail guards nationwide has increased by about 30 percent, to more than 600,000.”); *Morning Edition* (NPR radio broadcast, May 27, 1997) (reporting that employment in the prison industry has increased 30%, while employment in manufacturing has declined).

60. REAL WAR ON CRIME, *supra* note 59, at 63; see generally *id.* at 63-98 (discussing “fear, politics and the prison-industrial complex”).

61. See CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS 181-89 (1992) (discussing the link between poverty and violent crime); REIMAN, *supra* note 9, at 29 (“We know that poverty is a source of crime . . . and yet we do virtually nothing to improve the life chances of the vast majority of the inner-city poor. They are as poor as ever and . . . [t]he gap between rich and poor [has] worsened.”).

62. See DAVID COLE, NO EQUAL JUSTICE 16-62 (1999) (examining law enforcement as it relates to race and class); ELLIOT CURRIE, CONFRONTING CRIME: AN AMERICAN CHALLENGE 144-79 (1985) [hereinafter CURRIE, CONFRONTING CRIME] (examining the connection between racial and economic inequality and crime); ANDREW HACKER, TWO NATIONS 179-98 (1992) (discussing the link between race and crime); MAUER, *supra* note 9, at 118-41 (discussing African Americans and the Criminal Justice System); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993) (examining the social effects of continuing racial segregation); REAL WAR ON CRIME, *supra* note 59, at 99-129 (discussing racial inequality and criminal justice).

63. See CURRIE, CRIME AND PUNISHMENT, *supra* note 9, at 80-161 (discussing ways to prevent crime, like meaningfully addressing child abuse and neglect, early intervention for children at risk, investing time and attention in adolescents headed for trouble, as well as acknowledging and redressing social exclusion and deprivation).

64. See MAUER, *supra* note 9, at 142-61 (examining the war on drugs and the African American community).

would-be prisoners to prison. They are the deprived,<sup>65</sup> the afflicted,<sup>66</sup> and the forgotten.<sup>67</sup> And they are disproportionately non-white.<sup>68</sup>

Among the tangible harms caused by massive imprisonment is the spread of disease and poor health. The conditions of confinement in our jails and prisons — overcrowding,<sup>69</sup> inadequate ventilation,<sup>70</sup> physical and sexual abuse,<sup>71</sup> poor medical systems<sup>72</sup> — have led to the spread of infectious diseases among inmates and those with whom they come into contact.<sup>73</sup> As of 1992, there were more than 48,000 tuberculosis cases reported in the state and federal prison systems.<sup>74</sup> Because of the dramatic escalation in the incarceration of drug offenders — many of whom use intravenous drugs, share needles, and exchange sex for drugs — the rate of HIV infection in prison is nearly thirteen times that of the non-prison population.<sup>75</sup> Those unlucky enough to be ill in prison receive horrible medical care, if they receive treatment at all.<sup>76</sup>

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65. See *supra* notes 61-62. Although economic deprivation is strongly associated with crime, it is increasingly difficult to separate poverty from race in this country, because blacks are consistently at the bottom of the socio-economic ladder. As Elliot Currie notes:

Given America's racial history, it is difficult to sort out exactly how much of the variations in rates of serious crime reflect inequalities of class versus those of race. Where both historical and current forces have kept some minorities disproportionately trapped in the lowest reaches of the economy, the distinction between economic and racial inequality itself is in danger of being uselessly abstract. On balance, however, the evidence suggests that in the United States the effects of class and race on criminal violence . . . are inextricably intertwined.

CURRIE, CONFRONTING CRIME, *supra* note 62, at 149.

66. See *id.* at 182-221 (examining the link between family violence and crime).

67. See *id.* at 104-17 (examining the experience of "marginal youths" in "disadvantaged communities" who are chronically unemployed and underemployed and disproportionately commit crime).

68. See *infra* notes 87-120 and accompanying text.

69. THE REAL WAR ON CRIME, *supra* note 59, at 45 (noting that three out of four prisoners in the U.S. are confined in overcrowded facilities "where the living space for two people is the size of a walk-in closet").

70. *Id.* at 53; MAUER, *supra* note 9, at 181.

71. THE REAL WAR ON CRIME, *supra* note 59, at 45 (noting the frequent incidence of physical and sexual abuse in prison and reporting that "almost one-quarter of all inmates are victims of a sexual assault each year during incarceration").

72. MAUER, *supra* note 9, at 181.

73. *Id.*

74. THE REAL WAR ON CRIME, *supra* note 59, at 53. In New York City, for example, a drug-resistant form of tuberculosis emerged in 1989, with 80% of all cases being traced to jails and prisons. MAUER, *supra* note 9, at 181. The Rikers Island jail still has one of the highest TB rates in the country. *Id.* at 181-82. Conditions may be even worse in the nation's capital. See Serge F. Kovaleski, *D.C. Finds Dangers in Ailing Jail*, WASH. POST., Sept. 17, 2000, at A1 (reporting that the D.C. jail has suffered a "severe deterioration in health and environmental conditions" and that vermin are rampant in cellblocks and kitchen areas).

75. MAUER, *supra* note 9, at 182; THE REAL WAR ON CRIME, *supra* note 59, at 53 (estimating the rate of AIDS infection in prison as fourteen times higher than that outside of prison and noting that New York recently committed \$250 million to treat the growing population of AIDS-infected prisoners).

76. See Katherine E. Finkelstein, *Bronx Hospital to Drop Its Rikers Contract*, N.Y. TIMES, Mar. 1, 2000, at B3 (reporting that the medical care provider at Rikers Island had failed to meet thirteen of thirty-five performance standards, including basic asthma care, HIV testing, and infection control for sexually transmitted diseases, and referring to an investigation by the Manhattan District Attorney into five inmate deaths); see also Edward Wong,

It is easier to calculate the number of inmates with physical health problems than those with mental health problems.<sup>77</sup> No doubt the number of mentally ill prisoners is sizable and growing.<sup>78</sup> Sometimes the mentally healthy become less mentally healthy after a period of incarceration.<sup>79</sup> For the mentally ill who are incarcerated, meaningful psychiatric treatment is next to nonexistent.<sup>80</sup>

There is no question that a term of imprisonment can seriously impair an inmate's future ability to obtain and hold a job. Many people who serve time in prison already have a marginal relationship to legitimate employment; ousting them from the work force and failing to provide training or work experience that reflects current workplace needs all but guarantees a dismal employment future.<sup>81</sup>

There is also the day to day reality of life in prison, the ordinary humiliations and indignities and horrors.<sup>82</sup> In our thirst for more and more prisons, our

*Guard's Family to Sue Over Care at Rikers*, N.Y. TIMES, Feb. 5, 2000, at B4 (reporting that the family of a prison guard who had a fatal heart attack is suing New York City, alleging that the incompetence of health care workers at the Rikers Island clinic — they failed to insert a respiratory tube in the guard's lungs, placing it instead in his stomach — caused his death).

77. See CURRIE, CRIME AND PUNISHMENT, *supra* note 9, at 33 (noting that the vast majority of the mentally ill in jail or prison were not receiving psychiatric treatment at the time of arrest and that many first learn they have a mental illness in the criminal justice system). For a penetrating, first-hand analysis of the complicated relationship between family dysfunction, mental illness and violence by a psychiatrist who directed a state prison for the "criminally insane," see JAMES GILLIGAN, VIOLENCE (1996).

78. See CURRIE, CRIME AND PUNISHMENT, *supra* note 9, at 33-34 (noting the growing role of jails and prisons as a substitute mental health care system). Currie speculates that the number of seriously mentally ill inmates in jails and prisons may be twice that in state mental hospitals. See *id.* at 34. He states that, in California, an estimated 8 to 20% of state prison inmates and 7 to 15% of jail inmates are mentally ill. See *id.* at 33-34. He notes that the Los Angeles County jail system, where over 3,000 inmates are receiving psychiatric services, is "the largest mental institution in the United States." See *id.* at 34.

79. See, e.g., Wilbert Rideau, *The Sexual Jungle*, in LIFE SENTENCES 77 (Wilbert Rideau & Ron Wikberg eds., 1992) (recounting the tale of an inmate who was brutally raped by fourteen men because he refused to become the "old lady" of one, and his subsequent mental breakdown).

80. See, e.g., Nina Bernstein, *Jury Focused on Law, Not the Mental Health System*, N.Y. TIMES, Mar. 23, 2000, at B6 (noting that mental health advocates estimate that there are 5,600 seriously mentally ill people incarcerated in New York State prisons receiving "minimal" treatment).

81. See MAUER, *supra* note 9, at 182. Based on a study of incarcerated youth, one economist concluded that imprisonment causes a 25% loss in future work hours, and hence future earnings. *Id.*

82. The ordinary humiliations run the gamut, including lack of basic necessities. See Kovaleski, *supra* note 74, at A1 (noting that inmates at the D.C. Jail routinely resort to washing their clothes and sheets in cell toilets because the laundry machines have been broken for nearly a year); Stephen C. Fehr, *D.C. Jail's Medical Costs Under GAO, Hill Scrutiny*, WASH. POST, June 30, 2000, at B1 (noting that as recently as five years ago, the D.C. Jail lacked eating utensils and toilet paper). There is a growing body of literature by prisoners that illustrates the horrors of prison life. For a sample, see JACK HENRY ABBOTT, IN THE BELLY OF THE BEAST: LETTERS FROM PRISON (1981); RUBIN "HURRICANE" CARTER, THE 16TH ROUND: FROM NUMBER 1 CONTENDER TO NUMBER 45472 (1974); MUMIA ABU-JAMAL, LIVE FROM DEATH ROW (1995); WILBERT RIDEAU & RON WIKBERG, LIFE SENTENCES (1992); SOL WACHTLER, AFTER THE MADNESS: A JUDGE'S OWN PRISON MEMOIR (1997). For an intimate account of prison life by a journalist who spent a year as a prison guard, see TED CONOVER, NEWJACK: GUARDING SING SING (2000).

“race”<sup>83</sup> to build them and fill them, no one seems to want to acknowledge what occurs<sup>84</sup> — and what fails to occur<sup>85</sup> — within them.

### DISPROPORTIONATE IMPACT ON AFRICAN AMERICANS

As inner city areas have become more isolated from the social and economic changes happening elsewhere, unprecedented numbers of African American men have become entangled in the criminal justice system.<sup>86</sup> By the mid-1990s, half of the nation’s prisoners were African American even though they comprise only 13% of the general population.<sup>87</sup> No one who works in the criminal justice system could fail to notice that our jails and prisons have become repositories for young black men.<sup>88</sup> As one researcher starkly put it: “[F]or African American males, the rates of incarceration can only be described as catastrophic.”<sup>89</sup>

Indeed, the data paint a bleak reality: 11% of African American males in their twenties and early thirties were incarcerated as of mid-1999.<sup>90</sup> On any given day,

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83. See generally MAUER, *supra* note 9.

84. See TED CONOVER, *supra* note 82, at 171:

You feel it along the walls inside, hard like a blow to the head; see it on the walls outside, thick, blank, and odorless; smell it in the air that assaults your face in certain tunnels, a stale and acrid taste of male anger, resentment, and boredom. You sense it all around in the pointed lack of ornamentation, plants, or reason for hope — walls built not to shelter but to constrain.

85. The prison boom has not been accompanied by a commitment to provide social or rehabilitative services for prisoners. 57% of jail inmates were under the influence of alcohol or drugs at the time they committed their offense, 65% of state prisoners did not complete high school, and 33 % of jail inmates were unemployed prior to entering jail. See THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PRISONERS, Oct. 2000 [on file with Author]. However, very few prisoners receive drug or alcohol treatment or counseling, and fewer still participate in educational programs or vocational training programs. See Robert Worth, *A Model Prison*, ATL. MONTHLY, Nov. 1, 1995, at 38 (discussing the current trend to cut back on education, drug, and vocational programs in prisons); Wendy Kaminer, *Federal Offense*, ATL. MONTHLY, June 1, 1994, at 102 (“The hopeful notion that prisons might rehabilitate people has long been dismissed as naive, displaced by a belief in retributive justice and the demand that prisons serve as places of near permanent exile.”). Instead, the trend may be to charge inmates for room, board, and medical expenses. See Francis X. Clines, *Rooms Available in Gated Community: \$20 a Day*, N.Y. TIMES, July 10, 2000, at A14 (reporting that “[t]he county jailers of Kentucky are eagerly preparing to levy room, board and medical charges on inmates under a pay-your-way practice that dates to medieval England but is finding fresh life in America, the global leader in incarceration.”).

86. See MAUER, *supra* note 9, at 124; see also MICHAEL TONRY, MALIGN NEGLECT, RACE, CRIME, AND PUNISHMENT IN AMERICA (1995).

87. See MAUER, *supra* note 9, at 124 (stating that 17% of prisoners are Hispanic; see also *id.* at 119 (noting that the percentages of both African American and Hispanic inmates are “far out of proportion to their numbers in the general population.”)).

88. See *id.* at 118 (“A walk through nearly any courtroom or prison in the United States reveals a sea of black and brown faces.”).

89. MAUER, *supra* note 9, at 19.

90. U.S. DEPT. OF JUST., BUREAU OF JUST. STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 1999 (Apr. 2000), at 1. The report notes that, by comparison, 4% of Hispanic males and 1.5% of white males in their twenties and early thirties were in prison or jail.

one in fourteen adult black males is locked up in a prison or jail.<sup>91</sup> One in three black males between the ages of twenty and twenty-nine is under some form of criminal justice supervision, either in prison or jail, or on probation or parole.<sup>92</sup> In some cities, including our nation's capital, *one in two* young African American men are under the control of the criminal justice system.<sup>93</sup>

The picture of the future is equally harrowing: Three out of ten African American baby boys will grow up and spend some time in prison.<sup>94</sup> A black boy born in 1991 stands a 29% chance of being imprisoned at some point in his life, compared to a 16% chance for a Hispanic boy and a 4% chance for a white boy.<sup>95</sup>

Although the number of African American women in prison is substantially less than that of African American men, the trends are troubling. From 1985 to 1995, there was a 204% growth in the number of African American women in federal and state prisons compared to the 143% increase for black males and the 126% increase in the overall prison population.<sup>96</sup>

Sadly, the situation in the juvenile justice system is no better. A 2000 study conducted by an initiative that included the Youth Law Center and the National Council on Crime and Delinquency found that minority youth are more likely than whites to be arrested, detained in jail, tried, convicted and given long prison terms.<sup>97</sup> Here, too, African Americans seem singled out for punishment. Although blacks under the age of eighteen make up only 15% of their age group, young blacks account for 44% of those detained in juvenile jails, 46% of all juveniles tried in adult criminal courts, 40% of those sent to juvenile prisons, and 58% of all juveniles confined in adult prisons.<sup>98</sup> When white youth and African American youth are charged with the same crimes, African Americans with no prior history of institutionalization are six times more likely to be incarcerated in public facilities than white youth with the same background.<sup>99</sup> Latino youth with

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91. MAUER, *supra* note 9, at 124.

92. *Id.* at 124-25.

93. See ERIC LOTKE, *HOBLING A GENERATION: YOUNG AFRICAN AMERICAN MALES IN WASHINGTON, D.C.'S CRIMINAL JUSTICE SYSTEM FIVE YEARS LATER 1* (Nat'l Ctr. on Inst. & Alternatives 1997) (finding that between 1992 and 1997 the percentage of young African American men who were under criminal justice control rose from 42% to 50%); JEROME G. MILLER, *HOBLING A GENERATION: YOUNG AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM OF AMERICA'S CITIES: BALTIMORE, MARYLAND 1* (Na'l Ctr. On Inst. & Alternatives 1992) (finding that 56% of African American males, eighteen to thirty-five years old, were in jail, in prison, on probation, on parole, awaiting trial or sentencings, or had arrest warrants out for them on any given day in Baltimore). These figures are so high, they "challenge . . . our identity as a free society." LOTKE, *supra*, at 10.

94. MAUER, *supra* note 9, at 124-25.

95. *Id.* at 125.

96. *Id.*

97. See generally EILEEN POE-YAMAGATA & MICHAEL A. JONES, *AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF MINORITY YOUTH IN THE JUSTICE SYSTEM* (Building Blocks for Youth, Apr. 2000). Although minority youth are one-third of the adolescent population in this country, they comprise nearly two-thirds of youth in detention. *Id.* at 2-3, 9-10.

98. *Id.* at 9-13.

99. *Id.* at 20.

no prior detention experience are three times more likely to be incarcerated in state facilities than whites.<sup>100</sup> The implications of these findings — and the message we are sending to our nation's youth — are profound.<sup>101</sup>

The virtual banishment of an entire generation of black males has widespread social consequences. It is not simply a criminal justice problem, it is a *civil rights* problem: The legal gains African Americans have made in this country are seriously threatened by the current incarceration rate.<sup>102</sup> And yet, in our rush to get these people off the streets, no one except for a handful of criminal justice researchers is willing to *pause* and contemplate these consequences.<sup>103</sup> Unfortunately, the situation is getting worse, not better.<sup>104</sup> In the face of what we know

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100. *Id.* White youths charged with violent offenses are incarcerated for an average of 193 days after trial, blacks for 254 days, and Latinos for 305 days. Whites charged with drug offenses are detained for an average of 144 days, blacks for 235 days, and Latinos for 306 days. *Id.* at 21.

101. See Fox Butterfield, *Racial Disparities Seen as Pervasive in Juvenile Justice*, N.Y. TIMES, Apr. 26, 2000, at A1 (quoting Hugh B. Price, president of the National Urban League: "[T]his report leaves no doubt that we are faced with a very serious national civil rights issue, virtually making our system juvenile injustice.") [emphasis added].

102. See Robert L. Wilkins, *Setback for D.C. Justice*, WASH. POST, June 5, 2000, at A17 (quoting from a study by the Leadership Conference on Civil Rights: "Current disparities in criminal justice threaten fifty years of progress toward equality . . . . Criminal justice reform is a civil rights challenge that can no longer be ignored."); see also JONATHAN KOZOL, *AMAZING GRACE: THE LIVES OF CHILDREN AND THE CONSCIENCE OF A NATION* 147 (1995) (noting that prisons, schools, and churches are the three most racially segregated institutions in our nation).

103. See MAUER, *supra* note 9, at 11, 24 (noting that "any consideration of an actual reduction in the absolute size of the prison population is virtually absent from public policy discussion," and urging an alternative crime control policy that does not threaten to " 'criminalize' virtually all African American communities").

104. See generally HUMAN RIGHTS WATCH, *PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS* (May 2000) [hereinafter *PUNISHMENT AND PREJUDICE*] (documenting enormous racial disparities in the imprisonment of drug offenders in the U.S.); see also *id.* at 1 (reporting that black men are sent to state prison for drug offenses at a rate that is 13.4 times greater than that of white men even though whites use illegal drugs at five times the rate of blacks). What ought to be regarded as a "national scandal," is instead a source of pride for some policy-makers. See Steven A. Holmes, *Race Analysis Cites Disparity in Sentencing for Narcotics*, N.Y. TIMES, June 8, 2000, at A16 (quoting Ken Roth, executive director of Human Rights Watch). See also MAUER, *supra* note 9, at 11 (referring to the "permanent state of mass incarceration" and noting that proponents of expanded imprisonment point to the falling crime rate to justify the current rate of incarceration). Whatever the motivation, there can be no question that this country is pursuing criminal justice policies which have a devastating impact on African American communities:

It is difficult to assess the extent to which racial bias or sheer indifference to the fate of black communities has contributed to the development and persistence of the nation's punitive anti-drug strategies. Certainly the emphasis on penal sanctions in the fight against drugs cannot be divorced from longstanding public association of racial minorities with crime and drugs. Cocaine use by white Americans in all social classes increased in the late 1970s and early 1980s, but it did not engender the "orgy of media and political attention" that catalyzed the war on drugs in the mid-1980s when smokable cocaine in the form of crack spread throughout low income minority neighborhoods that were already seen as dangerous and threatening. Even though far more whites used both powder cocaine and crack cocaine than blacks, the image of the drug offender that has dominated media stories is a black man slouching in an alleyway, not a white man in his home.

about the race-based nature of crime control we continue to embrace policies that perpetuate the problem.<sup>105</sup>

To add to the symbolic loss of citizenship that banishment implies, there is actual loss. Across the nation, criminal disenfranchisement laws have led to the loss of voting rights for millions of Americans.<sup>106</sup> Considering the importance of suffrage to the history of the civil rights movement in this country,<sup>107</sup> the racial impact of these laws is deeply troubling.<sup>108</sup> Thirteen percent of African American men nationwide have lost the right to vote as the result of criminal convictions,<sup>109</sup> a rate that is seven times the national average.<sup>110</sup> In eight states — Alabama, Florida, Iowa, Mississippi, New Mexico, Virginia, Washington, and Wyoming — one in four black men is permanently disenfranchised.<sup>111</sup>

The sheer number of incarcerated African American men — seven percent of all adult black males are locked up on any given day<sup>112</sup> — creates difficulties for African American families and communities that are at once immense and immeasurable. One effect of the incarceration epidemic is the declining number of marriageable men in the African American community,<sup>113</sup> and consequent

105. This is so even in the District of Columbia, where the African American political leadership knows the costs of these policies. *See* Wilkins, *supra* note 102, at A17 (noting that the Washington, D.C. City Council is poised to abolish parole for all felony offenses, eliminate all rehabilitative programs for youthful offenders charged with violent crimes, and lengthen other sentences).

106. *See* Somini Sengupta, *Felony Costs Voting Rights for a Lifetime in 9 States*, N.Y. TIMES, Nov. 3, 2000, at A18 (reporting that a 2000 study by two criminologists found that 4.2 million Americans can not vote because of felony disenfranchisement laws). THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1-2 (Oct. 1998). Forty-six states and the District of Columbia deny the vote to all convicted prisoners. Thirty-two states also disenfranchise felons on parole, twenty-nine states disenfranchise felons on probation, and in fourteen states, ex-offenders who have fully served their sentences are prohibited from voting for life. *Id.* at 1. It is important to note that no other democratic country in the world denies as many citizens in either absolute or proportional terms the right to vote because of convictions. *See id.*

107. *See* Sengupta, *supra* note 106, at A18 (“The political implications of disenfranchisement can be significant . . . especially in close races . . . [b]ecause most felons are likely to be poor and members of racial minority groups.”); JACK GREENBERG, CRUSADERS IN THE COURTS 354-62 (1994) (describing the background to the Voting Rights Act of 1965).

108. *See generally* George Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 U.C.L.A. L. REV. 1895 (1999); *see also* MAUER, *supra* note 9, at 186 (“[N]ot only are criminal justice policies resulting in the disproportionate incarceration of African Americans; imprisonment itself reduces black political ability to influence these policies.”).

109. *See* THE SENTENCING PROJECT, *supra* note 106, at 1-2.

110. *Id.* at 2.

111. *Id.* at 2, 8-11. In two of these states, Alabama and Florida, almost one in three black men is disenfranchised. *Id.* at 8.

112. *See* MAUER, *supra* note 9, at 183. This figure reflects data for 1995 and might well be higher now. Additionally, because of the cycling of offenders in and out of the system over time, the size of the population affected by incarceration is far greater than is in prison or jail at any particular moment. *See id.*

113. *See id.* at 183.

"family disruption."<sup>114</sup> Another is the loss of stigma of jail and prison,<sup>115</sup> and the trend of the children of offenders to follow in their parents' footsteps.<sup>116</sup>

The impact of rising incarceration on the next generation of children has been exacerbated by the growing number of women being sentenced to prison,<sup>117</sup> three fourths of whom are mothers.<sup>118</sup> Altogether, an estimated 1.5 million children have parents in prison.<sup>119</sup>

### IMPLICATIONS FOR PROSECUTORS

Prosecutors and would-be prosecutors must acknowledge *who it is* they are seeking to lock up and for *what*. They must acknowledge that those who are locked up remain there for longer and longer periods of time, no matter the circumstance: drug users and drug sellers, first-time offenders and those who have been in trouble before, the violent and nonviolent. Although prosecutors are not responsible for the conditions that spawn crime,<sup>120</sup> the criminal laws

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114. *Id.* at 184. One researcher found that when there are fewer males in a community, they have greater "sexual bargaining power and hence the likelihood of . . . single-parent families." David T. Courtwright, *The Drug War's Hidden Toll*, ISSUES IN SCI. & TECH. 71 (Winter 1996-97). Courtwright cited to the work of two sociologists who analyzed census data from 171 countries and found that gender ratios are a strong predictor of family disruption and violence. *Id.* at 77. Based on Courtwright's conclusions, Mauer identified a terrible chain of events nearly impossible to alter: "[F]amily disruption increases crime, which leads to greater numbers of prisoners, which leads to more family disruption, and so on — a vicious cycle for all concerned." MAUER, *supra* note 9, at 184.

115. See MAUER, *supra* note 9, at 182; see also KOZOL, *supra* note 102, at 36-37:

[A] young black woman who grew up in one of New York City's ghetto neighborhoods . . . says that [her younger brother] dropped out of high school and now wanders through the city with a beeper and a friend whose nickname, she reports, is Tragedy.

"My brother's head is so close-shaven," she says, "it's almost bald."

Her brother tells her, "This is how everyone is cutting their hair." The name of the hairstyle, he explains, is "25 Years to Life."

She asks him, "Like in prison? This is how you want to wear your hair?"

"You don't have to be in jail to be in prison," he replies.

*Id.*

116. See KOZOL, *supra* note 102, at 185:

[F]or children whose parents are imprisoned, feelings of shame, humiliation, and a loss of social status may result. Children begin to act out in school or distrust authority figures, who represent the people who removed the parent from the home. Lowered economic circumstances in families experiencing imprisonment also leads to greater housing relocation, resulting in less cohesive neighborhoods. In far too many cases, these children come to represent the next generation of offenders.

117. *Id.* at 185 ("From 1980 to 1995, the number of women in prison increased by 417%, compared to a 235% increase for men."). The increased rate of incarceration of women is largely due to the war on drugs. As of 1991, one third of women in state prisons were drug offenders, compared to one fifth of male inmates. *Id.*

118. *Id.* Two-thirds have children under the age of 18. *Id.*

119. *Id.*

120. See *supra* notes 61-67 and accompanying text.

that unfairly penalize conduct engaged in by some citizens and not others,<sup>121</sup> the race-based nature of law enforcement,<sup>122</sup> diminished constitutional protection from race-based law enforcement,<sup>123</sup> or racism in American

121. The most obvious example is mandatory federal sentencing statutes that punish crack cocaine offenses much more harshly than powder cocaine offenses: Possession of 5 grams of crack cocaine and 500 grams of powder cocaine result in the same five year mandatory sentence. 21 U.S.C. § 841(b)(1)(B) (1994); see also MARC MAUER, *THE CRISIS OF THE YOUNG AFRICAN AMERICAN MALE AND THE CRIMINAL JUSTICE SYSTEM* 8 (1999). In 1995-96, 86% of persons charged in federal court with crack cocaine offenses were African American, but fewer than 30% of those charged with powder cocaine offenses were African American. *Id.* For commentary on the crack cocaine/powder cocaine dispute, see generally COLE, *supra* note 62, at 141-46; RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 364-86 (1997); David A. Sklansky, *Cocaine, Race and Equal Protection*, 47 STAN. L. REV. 1283 (1995); see also PUNISHMENT AND PREJUDICE, *supra* note 104.

122. See generally COLE, *supra* note 62; Angela A. Davis, *Race, Cops and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997); David A. Harris, *The Stories, The Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296 (2001); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271 (1997); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956 (1999). In his trenchant examination of the role of race and class in criminal justice, David Cole rejects the notion that race-based law enforcement is about a few bad cops. Rather, he says, "our criminal justice system . . . is in fact predicated on the exploitation of inequality." COLE, *supra* note 62, at 5.

123. There can be no question that in the past three decades constitutional criminal procedure has increasingly favored the government over the accused. See generally Christopher Slobogin, *Having It Both Ways: Proof That the U.S. Supreme Court is "Unfairly" Prosecution-Oriented*, 48 FLA. L. REV. 743 (1996). In addition to everything else, the Fourth Amendment — the constitutional guarantee that the poor, nonwhite, and otherwise inherently suspect will not live in a police state — is hanging by a thread. See, e.g., *Illinois v. Wardlow*, 528 U.S. 119 (2000) (flight plus high crime area held sufficient to support reasonableness of stop); *Wyoming v. Houghton*, 526 U.S. 295 (1999) (passenger's purse may be searched if police have probable cause to search car); *Minnesota v. Carter*, 525 U.S. 83 (1998) (no legitimate expectation of privacy for invited guest in an apartment); *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357 (1998) (federal exclusionary rule does not bar introduction of evidence seized in violation of Fourth Amendment at parole revocation hearing); *Whren v. United States*, 517 U.S. 806 (1996) (pretextual stops do not violate the Fourth Amendment if probable cause otherwise exists); *Florida v. Bostick*, 501 U.S. 429 (1991) (no seizure occurred when armed narcotics officers surrounded interstate bus passenger and requested consent to search bag); *California v. Hodari D.*, 499 U.S. 621 (1991) (no seizure occurs even if police chase if suspect fails to submit to authority); *Alabama v. White*, 496 U.S. 325 (1990) (anonymous tip corroborated by minimal independent police work is sufficient to provide reasonable suspicion to make investigatory car stop). But see *J.L. v. Florida*, 529 U.S. 266 (2000) (unanimous Court limits *White* to its facts and finds that police lacked sufficient basis for a stop and frisk where they received an anonymous tip describing a black youth with a gun).

Fueled by the "war on drugs," the Supreme Court seems bent on expanding police powers, notwithstanding the rising number of complaints about racial bias in stops and searches. See generally David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237 (1994). For a rare comment by a member of the Court expressing concern about race and policing, see *Wardlow*, 528 U.S. at 133, n.8 (Stevens, J., dissenting) ("[S]ociety as a whole is paying a significant cost in infringement of liberty by these virtually random stops."). Justice Stevens went so far as to explicitly note that African Americans may tend to fear police more than whites. *Id.* at 682, n. 7. Interestingly, in contrast to the public outcry four years ago when Federal District Judge Harold Baer observed that citizens in some minority neighborhoods might reasonably fear the police, Justice White's observation has received little attention. See *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), *aff'd*, 201 F.3d 116 (2d Cir. 2000).; see also Iver Peterson, *States Are Split on Whether Flight is Reason Enough for a Search*, N.Y. TIMES, Jan. 13, 2000, at A29

society generally,<sup>124</sup> prosecutors routinely validate and perpetuate this sorry state of affairs.<sup>125</sup>

Prosecutors uphold the banishment of a generation of African American men simply by playing their role in the context of today's criminal justice system. The government has devoted an arsenal of resources to a mean-spirited and misguided criminal justice policy that has literally stolen hope for the next generation from entire communities.<sup>126</sup> There is no redemption under this policy, no belief that people who have done wrong could ever rise above their pasts and contribute something of value. There is only the prison cell. It is the role of the prosecutor, the *government's lawyer*, to carry out these policies.<sup>127</sup>

The most mundane prosecutorial duties maintain the current regime: charging decisions, plea offers, disclosure of evidence, pretrial and trial advocacy, and sentencing arguments.<sup>128</sup> This is so for prosecutors who see themselves as mere players in an imperfect system, hard-working government lawyers just trying to do their jobs.<sup>129</sup> Because of the context in which they are practicing, even prosecutors who claim to be concerned about racial and social justice are helping to lock up scores of young black men for years.<sup>130</sup>

I believe there are moral implications to choosing sides in this context. The only question is whether well-intentioned prosecutors — prosecutors who are

(noting the "political ruckus" provoked by Baer's decision). Unfortunately, Justice Stevens' view was not reflected in the majority decision in *Wardlow*.

124. See Brent Staples, *How a Black Man's Wallet Becomes a "Gun,"* N.Y. TIMES, Mar. 12, 2000, at 14 (commenting on the Amadou Diallo case: "The root of the problem is the tendency of white police officers — and white Americans generally — to associate blackness with criminality.").

125. See Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 448 (1992) ("[T]he American prosecutor, owing to a variety of social and political factors, has emerged as the most pervasive and dominant force in criminal justice."); Davis, *supra* note 39, at 18 (stating that prosecutors have "more power than any other criminal justice officials"); Charles P. Buany & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 477 (1976) (describing the prosecutor as "the single most powerful figure in the administration of criminal justice").

126. See Lewis, *supra* note 55, at A27 ("Imagine a country, a democracy, with a domestic program that is increasingly costly and socially disruptive. The problem it is supposed to solve has actually grown worse over the years.").

127. See Gershman, *supra* note 125, at 393.

128. *Id.* at 395 (arguing that "as the prosecutor's investigating, charging, convicting, and sentencing powers have escalated, the 'inherent inequality' between the prosecutor and the defendant has intensified, making the adversary system almost obsolete.").

129. See William Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1707 (1993) (characterizing prosecutors as "a small number of harassed, overworked bureaucrats"). *But see* David Luban, *Are Defenders Different?*, 91 MICH. L. REV. 1729, 1730-48 (1993) (rejecting Simon's depiction of prosecutors as empirically unsupported and arguing that prosecutors have an enormous advantage over defenders in resources, procedure, legitimacy, and bargaining power). Kenneth Nunn suggests that prosecutors do not want to recognize the role they play in perpetuating an unjust system. See Nunn, *supra* note 39, at 1497.

130. See Paul Butler, *Starr Is to Clinton as Regular Prosecutors Are to Blacks*, 40 B.C. L. REV. 705, 708-14 (1999) (noting the role that prosecutors play in perpetuating racial injustice); Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1679 (1996) ("[E]mpirical studies consistently demonstrate that race does indeed affect prosecutorial decisions."); Nunn, *supra* note 39, at 1492-97 (arguing that racial bias is present at every stage of a criminal prosecution).

“conscientious,”<sup>131</sup> “prudent,”<sup>132</sup> and socially-conscious<sup>133</sup> — can make enough of a difference to overcome this context.

## II. THE CORRUPTION OF GOOD INTENTIONS

[Your] true purpose is to convict the guilty man who sits at the defense table, and to go for the jugular as viciously and rapidly as possible . . . You must never forget that your goal is total annihilation.

Senior prosecutor lecturing his fellow prosecutors<sup>134</sup>

Case law says that the object of selecting a jury is to get one that's competent, fair, and impartial. Well, that's ridiculous. You're not trying to get that. If you go in there thinking you're some noble civil libertarian, you'll lose. You're

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131. MONROE FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 236 (1990). For an example of a conscientious prosecutor, see ARTHUR L. LIMAN, *LAWYER* 39-53 (1998). In one passage, Liman recalls his discomfort with harsh federal drug laws which resulted in a long mandatory minimum sentence for a minor drug dealer:

While I knew he'd broken the law, I didn't believe for a minute that he was a drug kingpin, or even a regular dealer; he was just an addict who'd sold a minor quantity of narcotics to a government agent to support his habit. Samuels needed treatment for his addiction, and help getting and keeping a job, a lot more than he needed a long jail sentence. Most defendants in his position would have pleaded guilty to a less serious charge and agreed to cooperate, but Samuels had nothing to bargain with, no information the government wanted.

There's little a prosecutor can do in such a case. Because the law required that the judge impose a sentence no less than the specified minimum, sentencing was largely a formality. Typically in such cases the prosecutor would say nothing at all, but when the day arrived for Samuels to be sentenced, I couldn't remain silent. Having prosecuted him, I now felt somehow responsible.

*Id.* at 41.

132. Leslie Griffin, *The Prudent Prosecutor*, 14 *GEO. J. LEGAL ETHICS* 259 (2001); see also James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 *HARV. L. REV.* 152 (1981) (offering a model of prosecution based on restraint of power); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 *FORDHAM L. REV.* 1695 (2000).

133. See WISHMAN, *supra* note 3, at 10. Wishman became a lawyer out of a concern for “the poor and underdog,” and “an acute, albeit intuitive, sense of injustice.” *Id.* at 7. He took a job as a prosecutor because he believed “the best way to become a good [defense lawyer] was to spend a few years prosecuting first.” *Id.* at 9-10. Wishman expresses the ambivalence that many socially-conscious prosecutors feel:

Although I firmly believed that society required criminal laws to protect itself, I could not put aside my belief that the acts of a criminal, horrendous as they often were, were usually caused by factors or events beyond the control of the “criminal.” And the thought of an inhumane penal system raised in my mind, and more so in my heart, the gravest doubts about the whole system of justice.

*Id.* at 8-9. I use the term “socially-conscious” broadly, to include all those who want to make the world a better place. See generally ROBERT COLES, *THE CALL OF SERVICE* (1993); see also *id.* at xxiii (quoting Dorothy Day: “There is a call to us, a call of service — that we join with others to try to make things better in this world.”). For an exploration of more overtly political lawyering or “cause lawyering,” see AUSTIN SARAT & STUART SCHEINGOLD, *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (1998). For an example of cause lawyers, see GREENBERG, *supra* note 107 (recounting the work of the NAACP Legal Defense and Educational Fund in the civil rights movement).

134. MARVIN FRANKEL, *PARTISAN JUSTICE* 32 (1980) (quoting Maurice Nadjari).

there to win, and the only way to do that is to get jurors that are unfair and likely to convict.

Training tape in a prestigious prosecutor's office<sup>135</sup>

At one point I didn't care who went to jail, because everybody was guilty of something. It was just a matter of winning. I just had to win.

Former prosecutor<sup>136</sup>

### THE DUTY TO SEEK JUSTICE AND THE TENDENCY TOWARD SELF-IMPORTANCE

Ethical standards, rules, and codes all proclaim that the central duty of prosecutors is to "seek justice [and] not merely . . . convict."<sup>137</sup> This overarching and "rigorous"<sup>138</sup> duty, which has been recognized for well over a century,<sup>139</sup> requires that prosecutors "do the right thing,"<sup>140</sup> not merely the easy or popular thing. It is a righteous exaltation, a call to rise above the Machiavellian, win-at-all-costs nature of ordinary law practice.<sup>141</sup> While these same standards, rules, and codes also acknowledge the multiple roles of prosecutors as "administrators of justice,"<sup>142</sup> "advocates,"<sup>143</sup> and "officers of

135. Jack McMahon, *Fear of a Black Jury*, HARPER'S MAG., July 2000, at 26 (quoting *How to Pick a Jury*, a training tape made by former Philadelphia prosecutor Jack McMahon, who unsuccessfully sought election as District Attorney of Philadelphia in 1994).

136. MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS 47 (1999).

137. See STANDARDS OF CRIM. JUST., *supra* note 8. The duty to seek justice is premised on prosecutors' extraordinary powers and their role as "the representative not of an ordinary party to a controversy, but of a sovereign 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." *Berger v. United States*, 295 U.S. 78, 88 (1935). See also Bruce Green, *Why Should Prosecutors "Seek Justice?"*, 26 FORDHAM URB. L.J. 607, 612-14, 625-37 (discussing the ethical duty of prosecutors to seek justice above all else).

138. Zacharias & Green, *supra* note 7, at 238

139. *Id.* at 227.

140. DO THE RIGHT THING (40 Acres & a Mule Filmworks 1989) (Spike Lee's provocative film exploring racial animosity on a sultry day in a New York neighborhood). In an 1854 essay, George Sharswood distinguished prosecutors from other lawyers and described the broad responsibility of prosecutors to do the right thing: "The office of the Attorney-General is a *public trust*, which involves in the discharge of it, the exertion of an almost boundless discretion, by an officer who stands as impartial as a judge." HON. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 94 (F.B. Rothman 5th ed. 1993) (1854) [emphasis added].

141. See, e.g., WILLIAM H. SIMON, THE PRACTICE OF JUSTICE 7 (1998) ("The core principle of the Dominant View [of lawyering] is this: the lawyer must — or at least may — pursue any goal of the client through any arguably legal course of action and assert any nonfrivolous legal claim.").

142. See STANDARDS OF CRIM. JUST. § 3-1.2(b) (referring to the prosecutor as an "administrator of justice"); MODEL RULES Rule 3.8 cmt. (referring to the prosecutor as a "minister of justice" and noting that the prosecutor's responsibility includes "see[ing] that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."); MODEL CODE EC 7-13 (requiring a prosecutor to be "fair to all").

143. See MODEL RULES Rule 3.8 cmt. (referring to the prosecutor as an "advocate"); STANDARDS OF CRIM. JUST. § 3-1.2(b) (referring to the prosecutor as an "advocate"); MODEL CODE EC 7-13 (noting that the prosecutor is "an advocate" as well as a representative of the "sovereign"); see also DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 322 (1995) (noting that "[p]rosecutors have dual roles as advocates and ministers of justice").

the court,”<sup>144</sup> the duty to seek justice is the chief and abiding ethic, marking prosecution as a grand and noble vocation, unlike any other.<sup>145</sup>

But, what does it mean to be both an advocate and an administrator of justice?<sup>146</sup> How does one balance these competing and sometimes inconsistent obligations?<sup>147</sup> And how much do prosecutors actually care about — or even think about — their competing duties, especially when they are immersed in a case? The reality is most don’t.<sup>148</sup>

And what does it mean to “seek justice”? The concept could not be more ambiguous and subject to multiple interpretations.<sup>149</sup>

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144. See STANDARDS OF CRIM. JUST. § 3-1.2(b) (“The prosecutor is an administrator of justice, an advocate, and an officer of the court.”).

145. See generally Zacharias & Green, *supra* note 7, at 225-45 (discussing the ways in which prosecutors — especially federal prosecutors — have a different and “higher obligation” than other lawyers); see also Fred Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991); H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145 (1973).

146. See Green, *supra* note 137, at 625-37 (comparing a “power-based” conception of the duty to seek justice with a “role-based” one, revealing very different notions of the balance between adversarial advocacy and doing justice). The prosecutor’s role as an “officer of the court,” which also applies to defense lawyers, poses a less direct conflict to the role of advocate and is less worthy of commentary.

147. See *Handford v. United States*, 249 F.2d 295, 296 (5th Cir. 1957): (“A United States District Attorney carries a double burden. He owes an obligation to the government, just as any attorney owes an obligation to his client, to conduct his case zealously. But he must remember also that he is the representative of a government dedicated to fairness and equal justice to all.”); see also Green, *supra* note 137, at 609 (noting that there were “cross-cutting themes” in a prosecution office that embraced the duty to seek justice, including a “tradition of machismo, of the prosecutor as aggressive trial lawyer facing down the lawbreaking adversary”); HEILBRONER, *supra* note 2, at 284 (“We were judges of sorts, but also advocates — roles that were in some sense incompatible.”).

148. See Randolph N. Jonakait, *The Ethical Prosecutor’s Misconduct*, 23 CRIM. L. BULL. 550 (1987) (arguing that well-intentioned, otherwise “ethical” prosecutors engage in “unconscious” misconduct); see also HEILBRONER, *supra* note 2, at 286 (“[P]rosecuting did not lend itself easily to analysis or reform. Keeping pace and some degree of perspective took all my energy.”); BAKER, *supra* note 136, at 49 (quoting a prosecutor):

I look at being a prosecutor as a lot like being on an assembly line. The new case comes into my desk and lands in the in-box. It’s my job to take it out of the in-box, put a nut on the end of the screw, throw it into the out-box, and move on to the next one. There’s not a lot of variation in that. The line prosecutors who are in the courtroom every day — they’re carrying a hundred cases apiece or two hundred or more. They just got to get the job done.

But see Green, *supra* note 137, at 609 (former prosecutor noting the challenge his office faced in “reconcil[ing] the ideal of ‘doing justice’ with the image of the strong prosecutor — to conceptualize ‘doing justice’ in muscular, and unsentimental, terms, so that a prosecutor could ‘do justice’ without appearing weak.”).

149. Gershman, *supra* note 125, at 445 (“[T]he standards regulating prosecutorial behavior — i.e., to “seek justice” — are often so nebulous as to be unenforceable, which merely reinforces the institutional reluctance to enforce the rules in the first place.”); Zacharias, *supra* note 145, at 45 (noting the ambiguity of the ethical standard to “seek justice”).

Moreover, what prosecutor doesn't think that he or she is "seeking justice,"<sup>150</sup> doing "right,"<sup>151</sup> or doing "good"?<sup>152</sup> Perhaps this sense of righteousness is a good thing; it might reflect awareness on the part of an individual prosecutor that he or she is *obliged* to be righteous, no matter the competing impulses.<sup>153</sup> But too often righteousness becomes *self-righteousness*.<sup>154</sup> Too often prosecutors believe that because it is their *job* to do justice, they have extraordinary in-born wisdom and insight.<sup>155</sup> Too often prosecutors believe that they *and only they* know what justice is.<sup>156</sup>

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150. See HEILBRONER, *supra* note 2, at 284 (noting his admiration for prosecutors who try year after year to do justice).

151. BAKER, *supra* note 136, at 52 (quoting a prosecutor: "Prosecutors believe they are doing the right thing . . . . You're completely sure that what you're doing is the right thing all the time, and you have this great belief. You're serving God and country.").

152. *Id.* at 43 (prosecutor commenting, "I don't know if I decided I was going to be the knight on the white horse coming into town and clearing up the streets, but I felt that I was doing good, that I was getting major, violent troublemakers out of the community and trying to make the community a better place."); see also H. RICHARD UVILLER, *VIRTUAL JUSTICE* 153 (1996):

The eager, idealistic young prosecutors consider themselves the true champions of the hurt, the abused, and the helpless — the victims of crime — and, with their shining "quasi-judicial discretion," they take seriously their obligations to a just result. I glimpse my youthful self in this picture, of course, and for several years as a prosecutor I took my sword and cape to court to meet the challenge of duel-by-jury, trying — not very successfully — to cultivate the role traits of combat courage, fact skepticism, and moral conviction.

153. See, e.g., CHRISTOPHER DARDEN, *IN CONTEMPT* 81 (1996) ("There are few things I feel more strongly about than a prosecutor's duty to work only those cases he believes in."). See also LIMAN, *supra* note 131, at 57 (former federal prosecutor stating that he "never ha[d] to prosecute a case [he] didn't believe in").

154. Wendy Kaminer, *Games Prosecutors Play*, *THE AM. PROSPECT*, Sept.-Oct. 1999, at 20 ("The majority of prosecutors, police officers, and federal law enforcement agents are probably fair, ethical, and even compassionate public servants. But arrogance, self-righteousness, and a tendency to push people around are occupational hazards in law enforcement."); see also Maura Dolan, *A Man Consumed by his Convictions*, *L.A. TIMES*, Apr. 14, 1999, at A1 (quoting a California prosecutor: "I am sort of frightened by what I consider to be a certain talent [I have] . . . and I have chosen to use that talent to the greater public good. Criminal defense is not for the public good."); BAKER, *supra* note 136, at 48 (young prosecutor noting the temptation to become self-righteous). Defenders frequently complain about the self-righteousness of prosecutors. See BAKER, *supra* note 136, at 133 (quoting a public defender: "[Prosecutors] are so self-righteous. They have the cures for society's ills, and the cure usually consists of hammering everybody in sight for every infraction."); UVILLER, *supra* note 152, at 153 ("To the defense Bar . . . this attitude [of moral conviction] translates as arrogance, overlaid on righteous rigidity.").

155. See BAKER, *supra* note 136, at 28-29:

Of all the criminals I've prosecuted, the guys who look the most like what they do are child sexual abusers. You get them into court, and you feel like saying to the jury, "Look at this guy. Need I say more?" You don't have to worry about systems of proof, because what you have is an eight-year-old kid who comes up there and says, "He put his thing in my thing and it hurt." No jury is going to say, "Oh no, the kid's a liar."

But see Carey Goldberg, *Getting to the Truth in Child Abuse Cases: New Methods*, *N.Y. TIMES*, Sept. 8, 1998, at F1 (discussing the prosecution of the Amirault family for child sexual abuse in a suburban Boston day care center and the psychology of children's "suggestibility"); Daniel Goleman, *Studies Reveal Suggestibility of Very Young as Witnesses*, *N.Y. TIMES*, June 11, 1993, at A1 (reporting on research showing that investigative methods in child sex abuse cases are often unduly suggestive).

156. This also seems to be the propensity of other executive actors. See, e.g., Frank Bruni & Jim Yardley, *With Bush Assent, Inmate is Executed*, *N.Y. TIMES*, June 23, 2000, at A1 (reporting that upon Gary Graham's

There is an inherent vanity and grandiosity to this aspect of the prosecution role.<sup>157</sup> Many prosecutors genuinely believe they are motivated only by conscience and principle.<sup>158</sup> But many prosecutors come to believe they are the only forces of good in the system.<sup>159</sup>

The reality is that justice is an elusive and difficult concept. Most defenders recognize this on a daily basis.<sup>160</sup> Wise prosecutors do, too.<sup>161</sup> Justice, like many an abstract notion, is in the eye of the beholder. It can mean one thing in one case and something totally different in another. Ethical standards are turned on their heads, however, when prosecutors claim with confidence to have a special understanding of the meaning of justice.

execution in Texas, Governor George W. Bush "somerberly stated his belief that 'justice is being done' "). Graham, whose trial lawyer had a reputation for being incompetent, was convicted of murder on the basis of a single witness's identification testimony. Governor Bush's assertion about justice came on the heels of a 5-4 vote by the United States Supreme Court not to stay the execution. *Id.* Graham was the 135th person to be executed in Texas in the five years since Bush took office. *Id.*

157. See BAKER, *supra* note 136, at 134 (referring to the "personal vanity" of some prosecutors and the "contempt" they feel for those they prosecute).

158. See LIMAN, *supra* note 131, at 41 (" 'Arthur can't control his conscience,' they would say. What's more, they were right."); DARDEN, *supra* note 153, at 81:

Defense attorneys don't have th[e] luxury [to stand on principle]. They *have* to defend guilty people. If they only defended innocent people, there would be only a handful of criminal defense lawyers (which might not be a bad world). But prosecutors — if they are honorable and if they haven't become too cynical — can go to work every day and honestly say their job is to seek justice.

But see BAKER, *supra* note 136, at 79 (quoting a prosecutor: "Ultimately, prosecutors don't see themselves as the conscience of the community. They see themselves as having a job to do, needing to win to keep that job, and go on to bigger and better things.").

159. A young prosecutor against whom I tried a child abuse case seemed to hold this view. She and I were engaged in a rather heated exchange over a defense request for a continuance in order to investigate a mid-trial *Brady* disclosure. The *Brady* disclosure was that the twelve-year-old complainant had made several "unsubstantiated allegations of sexual abuse" against others. I attempted — in as unpatronizing a way as possible — to explain the importance of finding out whether, in fact, the complainant was the unfortunate *victim* of repeated abuse or was instead someone who *had a habit of falsely accusing people of sexual abuse*, and what the obligation of the defense lawyer is under these circumstances. The prosecutor cut me off, proclaiming, "It is my obligation to protect the victims of child abuse." Then she paused ever so briefly and offered a clarification: "It is my obligation to protect the people of the United States of America." I wanted desperately to offer words of comfort: "God, you must be exhausted. I mean, at every moment, there's someone in the United States who needs protecting; I don't know how you get any sleep." But I held my tongue. She was young and enthusiastic. Perhaps this is an anomaly, an example of youthful exuberance. But such rectitude and self-importance felt familiar.

160. The title of one defender's memoir about life as a criminal trial lawyer, "*What the Hell is Justice?*," makes this plain. HOFFMAN, *supra* note 6.

161. See generally Green, *supra* note 137 (former prosecutor thoughtfully discussing the enormous and complex prosecutorial responsibility to do justice); see also HEILBRONER, *supra* note 2, at 284 (noting the "infinitely complex reality" of criminal law practice); LINDA FAIRSTEIN, *SEXUAL VIOLENCE: OUR WAR AGAINST RAPE*, 217-30 (1993) (depicting the complexity of criminal justice through a discussion of witnesses who make false reports of rape and sexual assault).

## THE TENDENCY TOWARD NARROWNESS AND CYNICISM

Prosecutors have a tendency to see things as black and white, right or wrong, guilty or not guilty. There is little interest in the various shades of grey that color most people's lives.<sup>162</sup> Both as interpreters and enforcers of the law, prosecutors have a preference for the literal over the figurative, for *what* happened over *why* it happened, for the trees over the forest.<sup>163</sup>

To prosecutors, the record is everything: police reports, criminal records, chemical analysis, physical evidence, documentary evidence. This is the stuff you can put your hands on; it speaks for itself. The fact that the record may not tell the whole story, or that there is another story altogether, is a complicating detail to be dealt with at trial or sentencing.<sup>164</sup>

Most prosecutors believe that if someone breaks the law, he or she ought to be prosecuted.<sup>165</sup> Individual accountability is everything.<sup>166</sup> Individual circumstances, the forces that cause an event to happen, and the broad context of the

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162. See, e.g., ALICE VACHSS, *SEX CRIMES* 215 (1993) ("When I was a defense attorney, I wore all white for summations, so the jury would think of innocence. When I became a prosecutor, I switched to black and white. I wanted to tell the jury that that's what it was — black and white. No gray areas. No excuses.").

163. See, e.g., BAKER, *supra* note 136, at 167 (defense attorney describing the "dichard" prosecutor: "It doesn't matter what kind of a person is involved or if there has been an injustice or not. It's just, 'If he's arrested, he's got to be guilty and I'm going to nail him.'").

164. See generally JANET MALCOLM, *THE CRIME OF SHEILA MCGOUGH* (1999) (examining the prosecution of Sheila McGough, a criminal lawyer convicted of conspiring with a client to defraud investors). In the book, Malcolm concedes that the record looks bad for McGough. *Id.* at 24-25. But she came to believe that McGough was an unwitting victim of an unscrupulous client and vindictive prosecutors. *Id.* at 6-7. For a scathing critique of Malcolm's book as inaccurate and overwrought, see Richard A. Posner, *In the Fraud Archives*, *THE NEW REPUBLIC*, Apr. 19, 1999, at 29.

165. See LIMAN, *supra* note 131, at 41 ("Like most young prosecutors, I was fervently convinced that anyone who violated the law deserved to be vigorously prosecuted."). Liman tells a story about prosecuting a bar owner in New York for serving diluted whiskey. This is a violation of the federal law because it deprives the government of tax revenue. After the jury convicted the defendant and the judge sentenced him to a suspended sentence, the judge scolded Liman for prosecuting the case: "'Mr. Liman,' he admonished me, 'the next time you want undiluted whiskey, go to a liquor store, not a bar.' " *Id.* at 41-42. See also *Morrison v. Olson*, 487 U.S. 654, 732 (1988) (Scalia, J., dissenting) ("The notion that every violation of law should be prosecuted . . . is an attractive one . . . . The reality is, however, that it is not an absolutely overriding value.").

166. See, e.g., JUDGE BURTON S. KATZ, *JUSTICE OVERRULED: UNMASKING THE CRIMINAL JUSTICE SYSTEM* 230 (1997) (former "liberal prosecutor" proclaiming: "If a man commits a crime, I believe that he is responsible for his crime — not his mommy and daddy, not racism, not an abusive spouse, not recovered memories of childhood abuse, not his potty training."); VACHSS, *supra* note 162, at 81 (concluding that rape is a "choice . . . as uncomplex as: want it . . . take it."). I think this is an overly simplistic approach to complicated questions about legal and moral responsibility. See generally Abbe Smith, *Criminal Responsibility, Social Responsibility, and Angry Young Men: Reflections of a Feminist Criminal Defense Lawyer*, 21 N.Y.U. REV. L. & SOC. CHANGE 433 (1994) (examining individual and social responsibility for crime and arguing that evidence of social disadvantage should be heard at trial); see also GILLIGAN, *supra* note 77 (psychiatrist who worked with violent and criminally insane prisoners for 25 years examining the roots of violence); GITTA SERENY, *CRIMES UNHEARD* (1998) (examining why children kill by recounting the story of eleven-year-old Mary Bell, who murdered two small boys in England in 1968); ROBERT J. SAMPSON & JOHN H. LAUB, *CRIME IN THE MAKING* (1993) (analyzing data on juvenile offenders and arguing that social factors are a chief cause of delinquency and crime).

matter only clutters things up.<sup>167</sup> If the law is sometimes harsh, this is the responsibility of those who make the law, not those who enforce it.<sup>168</sup>

This tendency to see things in black and white may be related to prosecutors not having clients. Prosecutors represent the government,<sup>169</sup> not a flesh-and-blood client. They represent an abstract entity, not someone with frailties, weaknesses, vulnerabilities. Although some prosecutors claim to be “representing victims” — and some prosecutors may develop close bonds with some victims — the relationship between prosecutors and alleged victims is a complicated one, not fairly analogized to the lawyer-client relationship.<sup>170</sup> The reality is that alleged victims are prosecution *witnesses*, not clients.<sup>171</sup>

Defenders, on the other hand, undertake the representation of *people* in all their ugliness and splendor. We represent clients who have made mistakes, who have problems, and who may have done some terrible things — but who didn’t arrive at that point from nowhere.<sup>172</sup> In order to effectively represent a client, a lawyer

167. A friend who practices law in New York had a client with a minimal record and a borderline IQ who was charged with possession of just over a half pound of marijuana in his home. Unfortunately, the quantity made the offense chargeable as a felony. Before the case went to the grand jury, my friend approached the assigned prosecutor to discuss a pre-indictment plea. She began to describe her client’s mental disability, his long-time marijuana use — he was a “pothead,” not a dealer — when the prosecutor cut her off. “All I need to know about your client,” he said, “is that he is about to be an indicted felon.” Telephone interview with Judith Levin, July 16, 2000. Cf. BAKER, *supra* note 136, at 137 (defense lawyer noting, “It does not make any difference to many [prosecutors] what the mitigating circumstances are. Everybody has their own story, their own reasons for what they’ve done.”).

168. *But see* UVILLER, *supra* note 152, at 157 (noting that, “for the most part, those who seek the post of public prosecutor believe in the penal laws of the jurisdictions they will serve.”).

169. LIMAN, *supra* note 131, at 57 (“A federal prosecutor is an advocate too, of course, but his client is the United States.”).

170. *See generally* THE ACCUSED (Paramount Pictures 1989) (film based on a 1983 gang rape in a New Bedford, Massachusetts, bar, in which the prosecutor, played by Kelly McGillis, and the victim, played by Jodie Foster, navigate their relationship in the criminal justice system).

171. BAKER, *supra* note 136, at 78:

Prosecutors say “oh yes, we represent the victims.” But victims to most prosecutors are more of an obstruction, a thorn in the side. It’s somebody they have to deal with. A large majority of prosecutors believe that their decisions are much more important than the stupid decisions that some victim would come up with about what needs to occur. When the victim says, “Look, I don’t think you need to do this. I want to drop the charge,” the prosecutor says, “The crime belongs to the state.”

But when the victim says, “I really want to prosecute. Please don’t plea-bargain in this case,” the prosecutor changes his attitude and says, “I have so many cases. We can’t prosecute them all, and I might lose this case.”

172. *See* Bella English, *Looking Horror in the Eye*, BOSTON GLOBE, July 27, 2000, at F1-2 (quoting forensic psychologist David Lisak, who works with prisoners on death row: “I don’t ever deny the horror of what these men have done. What I do is just bring in some of the other horrors that in most cases are linked to the crime. It’s all part of the whole truth . . . . Most people don’t commit horrendous crimes without profoundly damaging things having happened to them.”). Defenders attempt to portray this “whole truth” every day. *See generally* Ogletree, *supra* note 22 (examining the motivations of defenders); Abbe Smith, *Rosie O’Neill Goes to Law School: The Clinical Education of The Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1 (1993) (examining the lawyering issues that arise in criminal defense).

must understand the client in all his or her complexity and make an effort to walk in the client's shoes.<sup>173</sup> The best lawyers are those who are able to "submerge" themselves in the client<sup>174</sup> — at least for a time.<sup>175</sup>

The ability to submerge oneself in another is related to the capacity for empathy.<sup>176</sup> In the context of criminal law practice, empathizing with the client — connecting with and embracing the client no matter what he or she is alleged to have done, and no matter whether he or she is guilty or innocent — can be difficult.<sup>177</sup> It requires both generosity<sup>178</sup> and the suspension of judgment.<sup>179</sup> It also requires acknowledging the random nature of good and bad fortune in life.<sup>180</sup>

But prosecutors are in the business of *judging*, of upholding standards, of exacting penance. To prosecutors, luck is irrelevant. People make choices. The humility and liberation that defenders experience when they connect with a client may be antithetical to what prosecutors need to do.<sup>181</sup> Compassion, while laudable, may not be something prosecutors can afford on a regular basis.<sup>182</sup>

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173. See Ogletree, *supra* note 22, at 1271-75 (discussing empathy as a central motivation of defenders); Smith, *supra* note 172, at 15-27 (discussing the lawyer-client relationship and "difference").

174. David Barnhizer, *Princes of Darkness and Angels of Light: The Soul of the American Lawyer*, 14 NOTRE DAME J.L., ETHICS, & PUB. POL'Y. 371, at 429 (2000). Barnhizer describes the lawyer-client relationship plainly, yet eloquently: "The lawyer's obligation is to use his or her professional talents on the client's behalf to achieve the client's wishes, not to advance the lawyer's. This submergence of self in another's interests is at the heart of the lawyer's oath-bound obligation. Not all people can accept this obligation."

175. Too much submergence may be a problem if the lawyer loses the ability to exercise independent professional judgment. See generally MALCOLM, *supra* note 164. However, the boundaries of a lawyer-client relationship may be negotiated in a variety of ways. See Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 517-21 (2000) (discussing lawyer-client boundaries in the representation of an innocent client).

176. See Ogletree, *supra* note 22, at 1271-75; see also Jane Aiken, *Teaching "Justice, Fairness and Morality,"* 4 CLINICAL L. REV. 1, 30-46 (1997) (recounting the process through which students in a law clinic representing people with HIV came to empathize with clients).

177. See generally BANDES, *supra* note 38.

178. See MCINTYRE, *supra* note 35, at 168 (quoting a public defender):

179. See *id.* (a public defender recalling his first murder case: "I liked the shooter. He was a real nice guy.").

180. See KUNEN, *supra* note 13, at 9 (young defender acknowledging that he is "lucky" to be affluent and privileged).

181. Concerning the liberation of the prosecutor's role, see UVILLER, *supra* note 152, at 157 ("Prosecutors have no clients. This is a liberating, even exhilarating, position for a lawyer to be in. Professional decisions are not dictated by the personal, parochial preferences of the client. And prosecutors are rarely shackled by fidelity to objectives they find morally repugnant."); but see BAKER, *supra* note 136, at 48 (young prosecutor noting that "a little bit of humility goes a long way, because you're making life-changing decisions for people . . . I know I have power and discretion, but I hope that I always approach people with the knowledge that individuals are not perfect, that people make mistakes, and that I am not perfect, either.").

182. A fellow in Georgetown's E. Barrett Prettyman Fellowship program recounted the following court experience:

I had a bond review hearing yesterday for a client who has everything going for him: no prior arrests, in school, and great supportive parents who live together, are co-president of the

Perhaps to compensate for the lack of knowledge that comes from working closely with clients, prosecutors often act as if they have heard it all before no matter how inexperienced they may be.<sup>183</sup> Too often, a prosecutor's immediate reaction to an alternative version of the facts — an exonerating or mitigating circumstance, or simply a different perspective — is to reject it.<sup>184</sup> What defender hasn't begged, pleaded, explained, or cajoled, only to be told, "I don't buy it, counselor."<sup>185</sup>

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neighborhood association and treasurer of the church, etc. I wanted the prosecutor to meet them before the judge took the bench in the hopes that it might soften him into not opposing my client's release from the halfway house. So I told the prosecutor all about my client and how he'd never been arrested and was in school and how the halfway house wasn't letting him go to school, and then I said, "And these are his parents here," and I motioned to his parents who were sitting in the first row about 2 feet away from us. And instead of shaking their hands, or even saying hi, the prosecutor . . . became nervous, he turned away and sort of nodded to me, and it was very clear that he wanted NOTHING to do with these parents. I guess you could say it's not his job to talk to the parents and it might put him in an awkward position if he ends up arguing for their son's detention, but to me it seemed like he might have been unconsciously (or consciously) thinking, "It is much easier for me to do my job well if I just think of this person as 'defendant charged with [carrying a pistol without a license]' and I don't know anything about his circumstances."

Memorandum from Ty Alper to Abbe Smith (July 19, 2000) [on file with Author]. Cf. BAKER, *supra* note 136, at 79 (prosecutor noting that he lost the ability to "feel," "care," and consider "human consequence" as a prosecutor). The loss of compassion and inability to regard defendants as human beings undermines the virtue of prosecutorial power. See *id.* at 48:

[T]he paranoia that lumps all defendants together as one big smelly animal cancels out the one real power a prosecutor wields: the discretion to offer clemency. Although more and more of their decision making powers are being taken away by statute in many states and the political and media pressure to be "tough on crime" is extremely intense, prosecutors still have the power and the obligation to look at each individual case and decide for themselves if this particular defendant deserves some consideration, some compassion . . . . Losing sight of the good in people may be the prosecutor's ultimate crime against his profession and the people he serves.

183. *Id.* at 149 (defender remarking, "In my office, we say that arrogance and ignorance are the faithful comic sidekicks of the young prosecutor. They're just so damn sure of themselves.").

184. See UVILLER, *supra* note 152, at 155 (noting that the "most earnest efforts [by defenders] are met with only polite scorn" from prosecutors).

185. Examples abound. Recently, a post-graduate fellow in Georgetown's criminal justice clinic attempted to negotiate a dismissal of a marijuana possession case in the Superior Court for the District of Columbia. The government's evidence was that a United States Capitol Police Officer had found a tiny amount of marijuana in the accused's purse when she attempted to enter the gallery of the House of Representatives. Upon being confronted with the evidence, the accused told the officer the same thing she has steadfastly told us: She is from New Mexico and had come to Washington, D.C., because her boyfriend, an elected official, was meeting with members of Congress. She had never been to our nation's capitol and was eager to see the sights. She is thirty-six years old, has no criminal record of any kind, and had never been arrested before. She also has never used marijuana and tested negative for drug use by the court's pretrial services agency. Unfortunately, a few days before her trip east, the accused had been summoned to a local road block where her teenage daughter had been stopped and found in possession of marijuana. The arresting officer knew the accused and had called her in lieu of taking formal police action. He had

For many prosecutors, cynicism takes over in both style and substance. In order not to be played for a fool, taken for a ride, considered a *sucker* — a nightmarish reputation for a prosecutor — prosecutors often become suspicious, untrusting, disbelieving.<sup>186</sup> Notwithstanding the legal presumption of innocence, the cultural and institutional presumption in most prosecutor offices is that *everybody is guilty*.<sup>187</sup>

At its best, there is a clarity and consistency in a narrow, letter-of-the-law approach and perspective of prosecutors; if the focus is on the act and not the actor there is less opportunity for prejudice or unfairness.<sup>188</sup> At its worst, however, there is a kind of moral fascism.<sup>189</sup>

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given the evidence to her, whereupon she had thrown it in her purse and promptly forgotten about it. She never would have blithely submitted to a search of her purse had she remembered having put the marijuana there. Although we acknowledged the peculiarities of the police officer returning the marijuana, we nonetheless found this story compelling. The Assistant United States Attorney did not. The sole question for the prosecutor was whether they could prove the elements of possession, not whether a law-abiding citizen who had done a foolish, unthinking thing should have to travel from across the country to face criminal charges that probably never should have been brought and for which she would at most receive probation.

186. See, e.g., BAKER, *supra* note 136, at 115 ("I had a drug case where I was really disgusted. The defense attorney involved has gone on to become a 'civil rights' lawyer — at least, that's what he thinks. In my case, he was saying, 'The police are doing horrible things to black folks! They're arresting everybody, blah, blah, blah. How could you persecute this poor man?' "); see also *id.* at 47 ("A healthy skepticism is a basic part of training in the law, but another prosecutor sees his job as magnifying skepticism into a numbing cynicism."); *id.* at 149 ("The larger the city, the more cynical the prosecutors are.").

187. *Id.* at 47 (quoting a prosecutor; "You get a mind-set that everybody's bad, everybody's guilty, and everything is wrong. Everybody is a liar. Everybody is corrupt.").

188. See Vorenberg, *supra* note 132, at 1554-57 (noting that the chief evil of broad prosecutorial discretion is that the "least favored members of the community . . . will be treated most harshly").

189. See generally David Denby, *The Idiot and the Adonis*, THE NEW YORKER, Jan. 24, 2000, at 94 (reviewing Errol Morris' documentary film, *Mr. Death: The Rise and Fall of Fred A. Leuchter, Jr.*, which explores the career of an expert in the methods of execution who later became a famous Holocaust denier). Leuchter's literal, narrow approach to his work reminds Denby of the Congressional prosecutors who sought to remove President Clinton from office for his affair with Monica Lewinsky, and suggests a familiar prosecution mold:

He is . . . a man who can see that four straight lines joined at right angles make a rectangle. What he can't see is the ground that the rectangle lies on or the relation of rectangles to circles, triangles, or trapezoids. In other words, he's an American of a very familiar sort. Watching him, I thought of the more fanatical of the President's congressional enemies during the Lewinsky scandal, the Hutchinsons and Barrs and McCollums, who were crestfallen when the rest of the country persisted in regarding the mess in human, rather than legal, terms. Leuchter represents the extremes of legalism, scientism, moralism — of any one-eyed activity that rules out as much evidence as it takes in.

*Id.* at 95.

## THE PARADOX OF DISCRETION

Many commentators have noted the discretionary power of prosecutors.<sup>190</sup> Prosecutors have the power to direct investigations,<sup>191</sup> define the crime to be charged,<sup>192</sup> affect punishment both in plea offers and sentencing arguments,<sup>193</sup> and decide whether or not to prosecute at all.<sup>194</sup> Indeed, this power is an enormous draw for many would-be prosecutors.<sup>195</sup> The well-intentioned believe they will have the power to do good, to make a difference,<sup>196</sup> or, at the very least, to moderate the excesses of the system.

The truth is most prosecutors have very little discretion. For newer prosecutors and those at the lower levels in an office, there is often little autonomy and independence.<sup>197</sup> This is not necessarily different for more experienced prosecu-

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190. See, e.g., Freedman, *supra* note 7, at 1034 ("The prosecutor has enormous and unique discretion in defining the particular crime, affecting the punishment, and even deciding whether to prosecute at all."); Gershman, *supra* note 125, at 395-423 (noting the ways in which the prosecutors' investigative, charging, convicting, and sentencing power has grown); Vorenberg, *supra* note 132, at 1523 ("If accumulation of power is success, prosecutors have done well"); Davis, *supra* note 39 (arguing that prosecutors have the power to change the criminal justice system). Robert H. Jackson, who served as Attorney General under President Roosevelt before being appointed to the United States Supreme Court in 1941, recognized prosecutors' "immense power to strike at citizens." Jackson, *supra* note 1, at 3 (1940). Jackson was not merely being rhetorical:

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial.

*Id.*

191. See Gershman, *supra* note 125, at 395-401 (discussing the trend of prosecutors becoming increasingly involved in investigations).

192. *Ball v. United States*, 470 U.S. 856, 859 (1985) (recognizing that prosecutors have broad discretion in charging decisions); see also Gershman, *supra* note 125, at 409 (arguing that the most extreme example of prosecutorial discretion is in charging decisions in capital cases).

193. Freedman, *supra* note 7, at 1034.

194. *Id.*; see also Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 718 (1996); Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699 (1998).

195. See Green, *supra* note 137, at 628 (noting that the delegation of authority to individual prosecutors gives them "enormous freedom" along with "enormous power").

196. BAKER, *supra* note 136, at 237 (prosecutor commenting, "I make a difference for the community. I really do.").

197. Nunn, *supra* note 39, at 1507.

tors.<sup>198</sup> As often as not, there is someone higher up in the office hierarchy who must be consulted before a prosecutor can act.<sup>199</sup>

There are some cases in which prosecutors, no matter how experienced, often have no discretion at all. Cases alleging assault on a police officer are a prime example.<sup>200</sup> High profile cases are another.<sup>201</sup> However, sometimes prosecutors abdicate — or at best share — their discretionary authority even in ordinary cases.<sup>202</sup>

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198. It has been my experience as a defense lawyer who has practiced in Pennsylvania, New York, Massachusetts, Maryland, and the District of Columbia, that all prosecutors, no matter how experienced or able, have limited discretion. Junior prosecutors handling misdemeanors — cases that are less serious, often involve offenders with minimal records, and ought to be dealt with as flexibly as possible, *see* STANDARDS OF CRIM. JUST.: THE PROSECUTION FUNCTION § 3-3.9(ii) (prosecutor may consider “the extent of the harm caused by the offense” in determining whether to prosecute) — can often do *nothing* without the approval of a supervisor. In the District of Columbia, for example, a prosecutor assigned to a misdemeanor case cannot even *recommend* diversion. This is the sole province of the prosecutor who runs the diversion program. In my experience, many a senior prosecutor trying homicides or other serious felonies has been equally unable to act without the approval of a supervisor.

199. BAKER, *supra* note 136, at 84 (“In the past, I had complete discretion to do whatever I wanted to do on the case. If it was a big case, I wouldn’t just do something stupid without consulting with the state attorney’s office and the state attorney himself, but now in the system virtually no prosecutor has discretion to do anything without some approval from higher up the food chain.”).

200. BAKER, *supra* note 136, at 73:

We don’t have the discretion to *not* file on resisting an officer with violence. If the police officer makes that determination, we are compelled to go forward with that. That is a decision made by the state attorney for this area. I don’t think it’s uncommon or unusual to just our office. I think it’s pretty much across the board that the state does that. But the bottom line is that some of the guys who are making these decisions about that charge are borderline officers, with a year or two experience. It’s not like I started doing this yesterday and their discretionary function supersedes mine. That’s chaffing.

Some commentators suggest that police have more power than they should in a wide range of cases. *Id.* at 164 (former prosecutor noting that even though prosecutors are supposed to be a check on police power, and be the “first line of defense for the civil rights of the citizens,” the police increasingly dictate which cases to prosecute).

201. *See id.* at 165 (former prosecutor commenting):

I don’t see how you can do your job as a D.A. and worry about what the news service is going to say about you. The tenor of the times is, “Throw them in jail and throw away the key if you can’t kill them.” Really. The more times you get them in jail, the more popular you are. If you decide on occasion that somehow this case needs a different approach, a different kind of attention, some mercy needs to be exercised here, you almost don’t have the power to do that anymore. That was a luxury, I guess, that existed when I was in the D.A.’s office. My bosses had been around for a long time; their decisions were not challenged the way decisions are challenged now. Now, if you make an unpopular decision, the mayor’s after you, the governor is after you. It’s a whole different change in tone. I think that’s too bad.

202. *See id.* at 135 (quoting a judge):

A D.A. will appear before me now and say, “Judge, I can’t take a plea because I’ve got to get the approval of the complaining witness.” “You’re the D.A.,” I say. “It’s your responsibility.” But sometimes unless they get approval from the complaining witness and unless they think it’s going to

Although prosecutors have discretion to go forward with a prosecution and may decline to prosecute for any number of reasons,<sup>203</sup> there is generally not a lot of soul searching about the decision to prosecute. Too often, prosecutors decide *not to decide* and cede responsibility to the fact-finder.<sup>204</sup> This is an especially troubling occurrence.<sup>205</sup>

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look okay in the press, they may refuse to make a decision. These factors influence what kind of offers they make. It influences their dispositions of cases, and sometimes it influences the kinds of cases they bring — which ones are tried and which ones are not.

*See also id.* at 83 (quoting a former prosecutor):

[Y]ou have to take into consideration everybody that's involved in a case whenever you're the prosecutor. You're not free just to make any old decision that you'd like to make. What I always did is reach my own independent conclusion about how a case should be handled, and then I would talk to the police officers involved in the case, talk to the victims, and anybody else who might have some input, to see if we had a consensus of opinion about how the case should be handled, and most of the time you do.

203. *See* STANDARDS OF CRIM. JUST: THE PROSECUTION FUNCTION § 3-3.9(b):

The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense; (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
- (iv) possible improper motives of a complainant;
- (v) reluctance of the victim to testify;
- (vi) cooperation of the accused in the apprehension or conviction of others; and
- (vii) availability and likelihood of prosecution by another jurisdiction.

204. *See, e.g.,* BAKER, *supra* note 136, at 82:

I've taken some cases that are real borderline. Spouse-abuse cases. The victim recants. I try them anyway. I get a misdemeanor conviction. What can you do? Every other day they're in here filing fucking charges, and then they're back in love again. I said, "Fuck them, I'll try them anyway. If I lose, I go back to my office. If you lose, you're going to prison." Sometimes, I figure, you might as well roll the dice.

205. Unfortunately, I have witnessed many examples of this behavior, too many to count. In one memorable case there was compelling evidence that the perpetrator of a serious physical assault was someone other than the defendant. The case carried a mandatory minimum prison sentence of five years. After discussions with the prosecutor — and disclosure of more defense evidence than is usually my practice — the prosecutor conceded that he did not know who committed the crime. However, instead of declining to prosecute, he shrugged and said, "Let's just let the jury decide."

When prosecutors *do* have power, they too often abuse it.<sup>206</sup> They throw their weight around to show defense lawyers who is the boss. They throw their weight around to show defendants that they are prosecutor, judge, and jury rolled into one.<sup>207</sup> They throw their weight around because they *can*.<sup>208</sup>

### WINNING

In view of the institutional culture of prosecutor's offices and the culture of the adversary system generally,<sup>209</sup> it is perhaps inevitable that the overriding interest of prosecutors would be winning.<sup>210</sup> This is so notwithstanding the prosecutor's

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206. See Butterfield, *supra* note 41, at A1 (reporting that two out of three death penalty convictions in the U.S. were overturned on appeal because of ineffective assistance of counsel, prosecutorial misconduct, and police overreaching); see also Ken Armstrong & Steve Mills, *Death Row justice derailed*, CHI. TRIB., Nov. 14, 1999, at 1 (reporting that in order to win a death sentence, prosecutors in Illinois have routinely failed to disclose exculpatory evidence, engaged in racial discrimination during jury selection, exaggerated the criminal backgrounds of defendants, lied to jurors about the possibility of parole, and browbeat jurors by telling them if they failed to send the defendant to the death chamber they will have violated their oaths and "lied to God").

207. See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968-69) (arguing against the plea bargaining system because prosecutors wield all the power and too often their personal interests control); see also BAKER, *supra* note 136, at 79 ("As a prosecutor, I don't want to be a bully . . . . But I am trying to set some parameters. I'll give you a deal if you don't bust my ass. You start taking a bunch of depositions, filing a bunch of motions — fuck you.").

In court, all the prisoners come out in shackles. Mostly, in this courtroom, they were to the left of the judge. I'm on the opposite side of the courtroom. His lawyer comes up to me and starts asking me for an offer on him. I said, "If he's not willing to take the offer I've already made, then I'm going to take him to trial. And I'm going to give him the max." The guy read my lips from across the room.

*Id.* at 87-88.

208. See Kaminer, *supra* note 154, at 23 (discussing the prosecution of Clarence Aaron, a twenty-three-year-old African American college student with no criminal record, who was sentenced to three concurrent life sentences without the possibility of parole for being the "chauffeur" in a conspiracy to distribute crack cocaine). Aaron's alleged co-conspirators all cooperated against Aaron and received lesser sentences, even though Aaron's role in the conspiracy was relatively minor and his co-conspirators all had prior records. The "kingpin" of the operation is serving only a twelve-year sentence, two of those involved received sentences of less than five years, and one received no jail time. The U.S. Attorney who oversaw the prosecution of the case was satisfied with the outcome and unconcerned that the government witnesses all had incentives to lie and may have been "more culpable" than Aaron. "[T]hey helped solve the case," the prosecutor remarked. "We try to go up the ladder . . . to the big fish. But sometimes you've got the big fish and you need to come down the ladder." *Id.* But, it is not at all clear that Aaron was prosecuted as aggressively as he was because of his placement on any "ladder." As Kaminer notes, "[I]n [the prosecutor's] view, Aaron was appropriately punished for refusing to cooperate and demanding a trial: he suffered the consequences of his own 'arrogance.' From this perspective, innocence (or negligible guilt) is hardly relevant. *What matters is not offending the prosecutor.*" *Id.* [emphasis added].

209. For an interesting exchange about the limits and strengths of the adversary system, compare Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996) (criticizing the adversary system and calling for a reexamination of its premises) with Monroe Freedman, *The Trouble with Postmodern Zeal*, 38 WM. & MARY L. REV. 63 (1996) (disagreeing with Menkel-Meadow, but praising her article as an example of effective adversarial advocacy).

210. See generally Kenneth Bresler, "I Never Lost a Trial:" When Prosecutors Keep Score of Criminal Convictions, 9 GEO. J. LEGAL ETHICS 537 (1996) (critically discussing the phenomenon of prosecutors keeping

ethical obligation to embrace justice over winning,<sup>211</sup> or the ambiguity of what it means to “win.”<sup>212</sup>

There is a courthouse saying — known by anyone who has ever practiced criminal law — that expresses the ethos of winning over everything else in a grisly, sardonic way: “Any prosecutor can convict the guilty. It takes real talent to convict the innocent.”<sup>213</sup> This would be just another cheap (but clever) shot about prosecutors if there weren’t so many cases in which prosecutors *have proudly convicted the innocent* and refused to back down even upon compelling proof that the conviction was wrongful.<sup>214</sup>

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score of their “wins”); Jonakait, *supra* note 148, at 553 (“The prosecutor has become an advocate seeking a conviction.”); *see also* BAKER, *supra* note 136, at 24:

Whether they are willing to admit it to themselves or not, [prosecutors] like the hand-to-hand combat that jury trials involve. Even though a trial isn’t supposed to be a sport with winners and losers, it’s easy to lose sight of all that business about seeing that justice is done and to dive into the pure one-on-one competition before the spectators. No matter how idealistic the young prosecutor, it doesn’t take many bouts in the courtroom where he is bloodied by a sharp defense attorney or a demanding judge to make him yearn to draw a little blood from the opposition. Ego is a powerful drive.

*See also id.* at 24 (“It soon seems clear to the new guy that the only way he’s ever going to move on to the more challenging cases — and the only way he’s going to squeeze the maximum amount of money out of the state to feed his family and his psyche — is to win as many cases as he can.”); *id.* at 46 (noting the “constant pressure to win cases” and to maintain high conviction rates in prosecutor offices); *id.* at 82 (prosecutor commenting: “I’d tell you if I lost a case, but mostly I win them and mostly I should.”). Some commentators have argued that there is nothing wrong with this, that prosecutors should chiefly act as zealous advocates. *See, e.g.,* Uviller, *supra* note 145, at 1159.

211. *See* Ken Armstrong & Steve Mills, *Gatekeeper Court Keeps Gates Shut*, CHI. TRIB., June 12, 2000, at 1 (quoting a Texas prosecutor who came to believe he helped convict the wrong man of capital murder, a man who remains on death row: “I know some prosecutors in this world for whom a conviction is everything . . . . But our job is to do justice.”).

212. *See* Bresler, *supra* note 209, at 540 (noting the nebulousness of “winning” for both prosecutors and defendants).

213. The remark has been attributed to a state prosecutor. *See also* Gershman, *supra* note 125, at 456 (offering a slightly different version: “Any prosecutor can convict a guilty man; it takes a great prosecutor to convict an innocent man.”) (quoting from defense attorney Melvyn Bruder in Transcript, *THE THIN BLUE LINE*, at 40 (Third Floor Productions, Inc. 1988)).

214. *See* BARRY SCHECK, PETER NEUFFELD & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* xvi (2000) (referring to the “emphatic belief” of prosecutors in the correctness of their accusations “even in the face of undeniable evidence of innocence”); *id.* at 87 (recounting a prosecutor’s sudden shift to a conspiracy theory in the face of DNA evidence showing that someone other than the man convicted of rape and murder had committed the crime); Green, *supra* note 137, at 638 n. 133:

When — as has occurred increasingly often with the advent of DNA evidence — exculpatory evidence is discovered sometime after a criminal conviction, prosecution witnesses recant, or the prosecution’s proof is otherwise thrown into doubt, the typical prosecutorial response is denial: denial of the possibility that the new proof is legitimate, and denial of the possibility that the convicted defendant is in fact innocent.

*See also id.* at 637–42 (discussing the case of Jeffrey Blake, who was imprisoned for eight years for a crime he did not commit, and the prosecution’s tepid response to proof of innocence). Blake was convicted of murder in New York on the testimony of a single eyewitness, whom the government knew to be not wholly credible. The

It is not just the big, high profile cases — too frequently capital cases — that create pressure on prosecutors to win. The same pressure is present in ordinary, run-of-the-mill cases. The pressure is both external, the result of the inherently political nature of prosecution,<sup>215</sup> and internal, the result of policies relating to salary and promotion.<sup>216</sup>

The desire to win inevitably wins out over matters of procedural fairness, such as disclosure.<sup>217</sup> It is remarkable from the standpoint of both fairness and *efficiency* how reluctant most prosecutors are to provide meaningful discovery in advance of trial,<sup>218</sup> and how little the situation has changed in the past forty years.<sup>219</sup> The concealment of exculpatory evidence by prosecutors remains a serious problem.<sup>220</sup>

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witness subsequently recanted. After initial resistance, the district attorney's office succumbed to media pressure and agreed that Blake's conviction should be reversed. Yet, the prosecutor who tried the case apparently felt neither shame nor remorse. When asked by a reporter what he would say to Jeffrey Blake, the prosecutor responded: "We live by an adversarial system. Our job is to present evidence we believe is credible. The defense's job is to poke holes in it. In a sense, the system worked, although it took some time." *Id.* at 638. Green is critical of this response and urges prosecutors to be mindful of the "overarching aim [of] preventing the punishment of innocent people" implicit in the duty to "seek justice." *Id.* at 642. *Cf.* SCHECK, NEUFFELD, & DWYER, *supra*, at 237-38 (an "anguished" prosecutor who convicted an innocent man and sent him to prison for seven years trying to come to terms with what happened: "Maybe I was too willing to believe what the law-enforcement officers told me. Maybe I got caught up in the sense that the prosecutor and the investigators are all on the same team. Maybe we ought to be more challenging of their assertions."); *see also* Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 *FORDHAM URB. L.J.* 513, 530 (1993) (arguing that prosecutors should not criminally charge a person unless they are morally certain of his or her guilt).

215. *See* Roberta K. Flowers, *A Code of Their Own: Updating the Ethic Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 7 *B.C. L. REV.* 923, 931 (1996) ("Consider the constituencies that the prosecutor must appease: the crime victims, law enforcement agencies, the prosecutor's office's policies and the elusive concepts of 'truth' and 'justice.'").

216. Prosecutors do not advance by declining to prosecute. They advance by accumulating an impressive trial record. *See* Gershman, *supra* note 7.

217. *See generally* Brennan, Jr., *supra* note 21, (arguing that without full discovery, indigent defendants are placed at a serious disadvantage in preparing for trial and the entire criminal justice system suffers); Gershman, *supra* note 125, at 449 (recommending expanded discovery by the defense as a way to equalize the balance of power).

218. In all the courthouses in which I have practiced, minimal discovery is the norm. Ironically, the worst jurisdiction of all is the Superior Court of the District of Columbia, the trial court in the nation's capital, which operates under the federal rules of criminal procedure. *See* D.C. SUP. CT. R. CRIM. P. 16. There have been a few exceptional prosecutors — one of whom basically handed over his entire file in a homicide — but, by and large, prosecutors choose adversarial advocacy over procedural fairness when it comes to discovery.

219. *See* Brennan, *supra* note 21.

220. *See generally* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 *N.C. L. REV.* 693 (1987) (documenting the continuing problem of prosecutors failing to disclose exculpatory evidence); *see also* Gershman, *supra* note 125, at 451-53 (recounting cases of prosecutorial misconduct involving prosecution concealment of evidence, and noting that although the cases he describes are "shocking . . . they are neither unique nor aberrational . . . [but instead] represent a recurring and largely unsolved problem in American criminal litigation."). Gershman, a former prosecutor, notes that "[m]any prosecutors I know, and have known, behave with consummate fairness. To these prosecutors, doing justice is what makes their public service meaningful. However, these anecdotal references, while reassuring, should not be taken to suggest that misconduct is aberrant." *Id.* at 456; *see also* Kaminer, *supra* note 154, at 22-23 (calling

The desire to win takes over and corrupts the plea negotiation process as well.<sup>221</sup> There is no other explanation for the frequent, troubling occurrence of prosecutors making generous plea offers when a case is weak.<sup>222</sup> The practice is troubling because it puts pressure on innocent people to plead guilty and avoid the cost and uncertainty of a trial.<sup>223</sup> No doubt, prosecutors come to believe that the defendants to whom they make such offers are guilty of *something*, and the deal simply reflects problems of proof, not truth.<sup>224</sup>

A prosecutor's desire to win also prevails over reservations about the harshness of sentencing guidelines, mandatory minimums, recidivist statutes, and longer prison terms generally. Whether prosecutors simply become numbed by the *numbers*, no matter how high they are, or actually believe in the sentences they urge, they often seem untroubled by unfairness.<sup>225</sup>

### THE LONELY AND DIFFICULT LIFE OF THE WHISTLE-BLOWER

For the idealistic would-be prosecutor who intends to do things differently and resist the corrupting influences, the road ahead may be hard. It takes courage,

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prosecutorial misconduct "endemic," and pointing to the concealment of exculpatory evidence and the tolerance or encouragement of perjury); Jonakait, *supra* note 148, at 562 (calling prosecutorial misconduct "rampant").

221. See generally Alschuler, *supra* note 206.

222. See Jonakait, *supra* note 148, at 553-54:

If the prosecutor seeks weaknesses in his case, his reaction is not to dismiss the case. Instead, he offers a good deal to the defendant. From the prosecutorial standpoint, the most irresistible deals will, naturally, come in the weakest cases — a half a loaf will be better than none. The good deal is often irresistible, and the defendant pleads guilty. Others see a danger that innocent people may be admitting guilt as a result, but the honorable prosecutor cannot reach that conclusion. He cannot believe that he is playing a role in convicting innocent people. Instead, what the "objective" facts teach him is that even when he has a weak case, defendants are still guilty. Therefore, the prosecutor naturally tends to view weaknesses in his case not as possible indicators of innocence but merely as a possible failure of proof.

223. The worst instance of this was a "shaken baby syndrome" child abuse case I once had. The charge carried a lengthy mandatory minimum prison sentence upon conviction. The prosecution's case consisted of ambiguous, circumstantial evidence against my client, who babysat for the victim. Investigation had revealed that the victim's aunt was the likelier perpetrator; she was the victim's guardian, had her hands full with several of her own children, and was known for her quick temper. As the prosecutor became more and more unsure of his case, he offered a deal: My client could plead guilty to a misdemeanor in exchange for probation. I was outraged. Such an offer would only pressure my client to plead guilty. She was a single mother with two children of her own. She would not risk going to prison and losing her children. If the prosecutor believed that my client was guilty of the abuse that was alleged, my client ought to be sent away for a long time. But if the prosecutor *doubted* my client's guilt, he ought to dismiss the charges. Fortunately, the prosecutor's superior eventually intervened and did precisely that.

224. See Jonakait, *supra* note 148, at 554.

225. See, e.g., BAKER, *supra* note 136, at 113 (prosecutor matter-of-factly stating that "[u]nfortunately, court is not always fair for the defendant.").

"strength of character,"<sup>226</sup> and a willingness to endure a certain amount of loneliness in order to "do justice" in any meaningful sense.<sup>227</sup>

But a prosecutor cannot really stand *alone* and effectively prosecute. Prosecution is a team effort. Prosecutors have to rely on other prosecutors, police officers, other law enforcement personnel, and a variety of witnesses in order to do their job.<sup>228</sup>

The prosecutor who becomes known for questioning police officers' honesty, or worse, for dismissing cases or seeking sanctions against lying cops is not going to get a lot of police cooperation in his or her other cases.<sup>229</sup> Unfortunately, too many prosecutors go the other way: They unwittingly collude with lying and abusive police officers by allowing cases to go forward that should not.<sup>230</sup> The typical instance is the defendant who is beaten by the police but is charged with assaulting an officer and resisting arrest.<sup>231</sup>

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226. Green, *supra* note 137, at 643.

227. As Green notes:

[P]rosecutors must resist various forces . . . . At times, this may mean standing up to the police (when their investigations are inadequate), disregarding the public (when its expectations are unreasonable), and overcoming one's own self-interest or ennui. In the face of contrary pressures and expectations, both external and internal, it may take a certain amount of inner strength (or strength of character) for an individual prosecutor to decide not to bring criminal charges or to dismiss criminal charges, to comply with procedural norms that make it more difficult to secure convictions, to confess error, or to seek to overturn a conviction that was unfairly procured.

*Id.*

228. See BAKER, *supra* note 136, at 28:

A year after I got there, I'm doing what you do to get ahead as a lawyer: In office politics, I was making sure I was well loved. Wasn't trying to piss off anybody. Also, I was doing things that get prosecutors ahead, like being beholden to cops. Going out there riding with them, paying attention to their cases, calling them up. Prosecuting stuff that they'd never had prosecuted before. That's how you deal with cops.

*Id.*

229. See Freedman, *supra* note 7, at 1036 (discussing the problem of prosecutors condoning the covering up police perjury, brutality, and unlawful searches and seizures). As Freedman notes:

The difficulty here stems from the fact that the prosecutor has special problems in his relationship with the police. They must work together closely and constantly. The prosecutor's job can be made extremely onerous if he does not have willing cooperation from the police, both in investigating and presenting evidence in court. As a consequence, the prosecutor sometimes finds himself compelled either to present charges against members of the police department for brutality or perjury — which impairs cooperation — or to condone or cover up police crime — which is unethical.

*Id.* See also BAKER, *supra* note 136, at 164 (defense lawyer commenting on how frightened prosecutors appear to be of the police: "Oh God, I've got to placate the cops at every juncture.").

230. See Freedman, *supra* note 7, at 1037-38 (discussing prosecutions that are brought to discourage citizens from making complaints against the police).

231. See *id.* This is a common occurrence in criminal court, familiar to any public defender.

Some well-intentioned would-be prosecutors genuinely believe they are going to grapple with the problem of police perjury,<sup>232</sup> by recognizing it when it arises, declining to prosecute the cases infected by it, and seeking appropriate sanctions for the offending officer. Then, why is it that in eighteen years of law practice I have yet to encounter a single prosecutor who even *acknowledges the possibility* of police perjury in a case? If police perjury is as widespread as it is believed to be, why is it that prosecutors never encounter it?<sup>233</sup>

This point about police perjury cannot be overemphasized. Much attention is paid to the question of client perjury in criminal defense,<sup>234</sup> but there is little concern about the ways in which prosecutors routinely tolerate perjury.<sup>235</sup> While

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232. For legal scholarship on the routine nature of police perjury, *see generally* Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311 (1994); Stanley Z. Fisher, "Just the Facts, Ma'am: Lying and the Omission of Exculpatory Evidence in Police Reports, 28 NEW ENG. L. REV. 1 (1993); Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 83 (1992). For reports by three major commissions on a range of police misconduct, including perjury, *see* COMMISSION REPORT OF THE CITY OF NEW YORK COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT (1994) (Mollen Comm'n Report); REPORT OF THE BOSTON POLICE DEPARTMENT MANAGEMENT REVIEW COMMISSION (1992) (St. Clair Comm'n Report); REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991) (Christopher Commission Report). As the Mollen Commission Report states:

Police perjury and falsification of official records is a serious problem facing the . . . criminal justice system — largely because it is often a "tangled web" that officers weave to cover for other underlying acts of corruption or wrongdoing . . . [T]he practice of police falsification in connection with . . . arrests [for drugs and guns] is so common in certain precincts that it has spawned its own word: "testifying."

Commission Report of the City of New York Comm'n to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department (1994) (Mollen Comm'n Report), *supra*, at § 4, p. 36.

233. Maybe there are more prosecutors out there than I am aware of who regularly call police officers on misconduct. *See, e.g.*, BAKER, *supra* note 136, at 75 (prosecutor commenting, "Being a prosecutor and being a liberal are not contradictory. In fact, I think all prosecutors should be liberal. If they are, we'll have better police work. If they do a fucked-up search and you tell them that it is, or that their behavior is not the sort of behavior you're going to push in court for law enforcement personnel, they'll quit doing it."). I am doubtful. The adversarial role runs deep and seems to come with blinders. *See id.* at 73 (prosecutor commenting, "When I was a defense lawyer, I used to think all police officers were liars, and now I find that there are only a few. Most of them are pretty straight-up and do a good job.").

234. *See generally* Harry Subin, *The Criminal Lawyer's "Different Mission: Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1975). *See, also*, GEOFFREY C. HAZARD, JR., ET AL., *THE LAW OF LAWYERING* 351-88 (2d ed. Supp. 1998); ANDREW KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 151-207 (3d ed. 1989); STEPHEN GILLERS & NORMAN DORSEN, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 543-67 (2d ed. 1989); RICHARD H. UNDERWOOD & WILLIAM H. FORTUNE, *TRIAL ETHICS* 400-06 (1988); MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980); Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1051, 1055-59 (1975).

235. *See, e.g.*, Simon, *supra* note 34, at 1711 n. 15 (noting in a footnote that police perjury is a "widespread police and prosecutorial response to strict federal court decisions on search-and-seizure issues"). *But see* MONROE FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 91-93 (1975). For a discussion of the routine nature of police perjury, *see* ALAN DERSHOWITZ, *THE BEST DEFENSE* (1982).

there is at least an argument for defense tolerance of client perjury,<sup>236</sup> there is no good justification for prosecutor tolerance of police perjury. It may be that in order to be a prosecutor you must be willing to call lying cops to the stand. Any prosecutor who disputes this is either naive or dishonest.

Many well-intentioned prosecutors also believe that their presence alone will ensure fairness and decency. If they are in the courtroom, none of the horrible inequities or indignities that sometimes befall the poor and forsaken will happen. Yet, again, why have I never encountered — or even heard of — a single prosecutor who has come forward to halt a trial in the face of plainly incompetent defense counsel? The right to competent counsel is central to every other right of the criminally accused,<sup>237</sup> and the denial of that right threatens the foundation of adversarial justice.

Surely, prosecutors have an ethical obligation to do something — and not just take advantage — when they encounter a plainly ineffective defense lawyer.<sup>238</sup> There are instances of incompetent, drunk, hung-over, and sleeping lawyers representing the indigent accused in every courthouse in the country, but there is never any mention of the other institutional actors who are present doing anything about it.<sup>239</sup> The prosecutor clearly knows what is going on — among

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236. See Monroe Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) (arguing that it is more important to maintain client confidences than to prevent perjury).

237. See MONROE FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 13 (1990) ("[T]he right to counsel is 'the most pervasive' of rights, because it affects the client's ability to assert all other rights." (citing Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8, (1956))).

238. See STANDARDS OF CRIM. JUST: THE PROSECUTION FUNCTIONS § 5 (1993) ("[I]t is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public."); *Handford v. United States*, 249 F.2d 295 (5th Cir. 1957) (noting that a prosecutor "owes a heavy obligation to the accused . . . of fairness," an obligation "so important that Anglo-American law rests on the foundation: better the guilty escape than the innocent suffer."); see also Flowers, *supra* note 214, at 931 (noting the prosecutor's obligation in the face of ineffective assistance of counsel); Freedman, *supra* note 7, at 1039-40 (discussing the problem of prosecutors failing to advise the court about ineffective assistance of defense counsel); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice*, 44 VAND. L. REV. 45, 66-74 (1991) (discussing the prosecutor's responsibility to "do justice" when opposing counsel is ineffective).

239. See generally Stephen Bright, *Counsel for the Poor: The Death Penalty Not for the Worst Crime, But for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (discussing the pervasiveness of deficient representation of indigent defendants in capital cases); Butterfield, *supra* note 41, at 1 (reporting that, since 1973, 68% of capital convictions have been overturned on appeal, and 37% of the reversals were due to incompetence by defense counsel); see also Sara Rimer & Raymond Bonner, *Texas Lawyer's Death Row Record a Concern*, N.Y. TIMES, June 11, 2000, at A1 (reporting about Texas lawyer Ronald G. Mock, who may be responsible for more people on death row than any lawyer in the country and who bragged about flunking criminal law as a law student); Steve Mills, Ken Armstrong, & Douglas Holt, *Flawed trials lead to death chamber*, CHICAGO TRIB., June 11, 2000, at 1 (reporting that 43 of the attorneys who defended the 131 people executed under Governor George W. Bush had been sanctioned for misconduct by the State Bar of Texas and others were "convicted felons . . . and attorneys who were inexperienced or . . . inept"). In the case of Gary Graham, who was executed on June 22, 2000, and whom Mock represented, there are serious questions about the conduct of both the prosecutor and the judge. The guilt phase of Mr. Graham's trial lasted only two days, during which Mock did not challenge the testimony of the single eye-witness who claimed to have seen the defendant at the scene, and did not call at least

those of us who labor in criminal court, everyone knows who the terrible lawyers are, the lawyers who make you cringe and thank your lucky stars that you're not the poor schlub being represented by them — why don't they at least approach the bench and make a record of the incompetence they observe?<sup>240</sup>

From a narrow perspective of *winning*, the convictions obtained here are just fine. Most of the defendants are probably guilty anyway, and, so long as the prosecutor is otherwise "ethical," what difference does it make that defense counsel is lacking? After all, the constitutional requirement of effective assistance of counsel doesn't require that defense counsel be *good*.<sup>241</sup> But this is

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two other witnesses who would have discredited the eye-witness's testimony. Mock's reasoning was that he "knew in his gut" that none of the witnesses could help the defense, and he did not even bother to interview the other eyewitnesses because he wrongly believed that if he called them to testify it would have allowed the prosecution to disclose to the jury Mr. Graham's other convictions. The prosecutor who tried the case conceded that Mock was wrong about the law. *Id.* at 22.

There is a cartoon entitled, "Do Poor Defendants in Bush's Texas Get Incompetent Counsel? Does Anyone Care?" that says it all. In a courtroom, the judge and prosecutor look on impassively as a rumpled, disheveled defense lawyer says, "Hey . . . If I'm competent enough for the Governor of Texas, I ought to be competent enough for my bloodthirsty bum of a client." There is a sheet of paper with tic-tac-toe on top of the defense table, and a bottle of alcohol below. The client is clutching his head in horror. *See Danziger's View*, BOSTON GLOBE, June 14, 2000, at A22.

240. For an interesting, soul-searching discussion of this question, *see generally* Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" If You're Trying to Put That Lawyer's Client in Jail?*, 69 *FORDHAM L. REV.* 997(2000); *see also* Stanley Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 *AM. J. CRIM. LAW.* 197, 222-23 (1988). I discussed this question with an experienced federal prosecutor in Washington, D.C., who was prosecuting an indigent undocumented immigrant I came to represent in an attempted murder case. There had been a previous trial, at which my client had been represented by a notoriously inept lawyer, which, by sheer fortuity, had ended in a mistrial. Reading the trial transcript was a painful experience. Although the defendant had no prior criminal record and the case raised a serious question of self-defense — my client had multiple stab wounds — previous counsel had failed to confront the government witnesses on key matters, including their possession of a gun and broken bottle, and had locked the defendant into a poor (clearly unprepared) account of the incident. I asked the prosecutor, who was fair-minded in his dealings with me, whether he had any misgivings about the previous trial in view of the competence of counsel. He seemed chagrined and agreed that he preferred to face a better caliber adversary. Still, he said, the previous lawyer "wasn't that bad." *Cf.* BAKER, *supra* note 136, at 117 (prosecutor commenting about an experience with a defense lawyer who had put little effort into a case: "It [was] a shame [but] [w]hat happened wasn't injustice.").

Of course, judges are also implicated when trials proceed with incompetent defense lawyers. One can only wonder at the cultural and institutional pressures that lead judges to allow the likes of Ronald Mock to defend people accused of serious crime. *See supra* note 238. Such sham justice ought to offend anyone schooled in the law.

241. *See generally* Strickland v. Washington, 466 U.S. 668 (1984) (establishing the minimal constitutional requirements for effectiveness); *see also* United States v. Cronin, 466 U.S. 648 (1984) (unanimous court finding that young, inexperienced counsel — who was given only twenty-five days to prepare for a complex, serious case — was not ineffective); Brown v. Harris, 1999 U.S. Dist. Lexis \*6409 (N.D. Ca.) (suggesting that it is constitutionally acceptable for defense counsel to sleep from time to time during an attempted murder trial); Burdine v. Johnson, 2000 WL 1610328 (vacating decision that counsel who slept during "substantial portions" of a capital murder trial was presumptively ineffective and remanding to determine whether counsel's sleeping was at a critical stage of the trial). For proponents of crime control, effective counsel is a hindrance. *See* POSNER, *supra* note 10.

the sort of thing that strikes at the heart of our system of justice, raising questions about its legitimacy. These are also the convictions that stick.<sup>242</sup>

Would-be heroic prosecutors should acknowledge how difficult it is to be a whistle blower.<sup>243</sup> Glory is rare and fleeting for those who blow the whistle on co-workers, associates or powers-that-be in most settings; instead, there is resentment and hostility.<sup>244</sup> The righteous are as often shunned as embraced.<sup>245</sup> Most people want to do well and be accepted, whatever the setting. It is especially difficult for prosecutors with ideals *and* ambition to resist the pressure to adapt, conform, and be part of the team.<sup>246</sup>

## CONCLUSION

I have never yet tried a case where the state's attorney did not say that it was the most cold-blooded, inexcusable, premeditated case that ever occurred. If it was murder, there never was such a murder, If it was robbery, there never was such a robbery. If it was a conspiracy, it was the most terrible conspiracy that ever happened since the Star Chamber passed into oblivion. If it was a larceny, there never was such a larceny.

Clarence Darrow<sup>247</sup>

My answer to the question, "Can You Be a Good Person and a Good Prosecutor?", is now probably evident. But, let me say it plainly and then attempt to address some of the objections to my position. My answer is both harsh and tempered: I hope so, but I think not.

My position is rooted in this time and place. We live in an extraordinarily harsh and punitive time, a time we will look back on in shame. The rate of incarceration in this country, the growing length of prison terms, the conditions of confinement, and the frequency with which we put people to death have created a moral crisis.

242. See Jason Blair, *The Lawyers Live to Fight Again*, N.Y. TIMES, June 5, 2000, at WK 3 (noting that poor legal representation rarely leads to reversal of a conviction).

243. See generally PETER MAAS, SERPICO (1973) (recounting N.Y. police officer Frank Serpico's battle against police corruption); see also SILKWOOD (20th Century Fox 1983) (Mike Nichol's classic film about a worker's struggle to disclose the dangers of the nuclear power industry); THE INSIDER (Touchstone Films 1999) (film about a whistle-blower in the tobacco industry).

244. See Green, *supra* note 137.

245. See MAAS, *supra* note 241 (describing Serpico's ostracism from his colleagues); Jerome Skolnick, *Code Blue: Prosecuting Police Brutality Requires Penetrating the Blue Wall of Silence*, THE AM. PROSPECT, Mar. 27-April 10, 2000, at 49 (quoting police officer Bernard Crawley in testimony before the 1993 Mollen Commission in New York: "[I]f a cop decided to tell on me his career's ruined.").

Even in the Abner Louima case, in which police officer Justin Volpe went way beyond his own peers' notion of reasonable force when he shoved a broom handle into the Haitian immigrant's rectum, the officers who came forward and testified against Volpe were not heralded as heroes. See generally Tom Morganthau, *Justice for Louima*, NEWSWEEK, June 7, 1999, at 42; see also Jack White, *The White Wall of Silence*, TIME, June 7, 1999, at 63 (noting that the three officers who came forward against Volpe took their time in doing so).

246. See Nunn, *supra* note 39, at 1506 ("Once in the office, the Black prosecutor might be subject to significant social pressure to conform and 'be one of the team.'").

247. CLARENCE DARROW, ATTORNEY FOR THE DAMNED 27 (Arthur Weinberg, ed. 1957).

Although, arguably, all those who work in the criminal justice system have something to do with its perpetuation and legitimacy, prosecutors are the chief legal enforcers of the current regime.

My respect and fondness for my prosecution-bound students accounts for my “hope.” By and large, their intentions are pure and they are headed into prosecution with greater awareness and sensitivity than most.<sup>248</sup> My admiration for the handful of prosecutors I have faced who embody the qualities extolled by Justice Jackson also allow me some hope.<sup>249</sup>

On the other hand, I am neither comforted nor persuaded by the argument that one honorable prosecutor can do more good than ten zealous defenders.<sup>250</sup> Under current conditions, I believe that an influx of skilled, committed defenders into the criminal justice system — especially in underserved areas — would have a much more beneficial effect than an influx of comparable prosecutors.

To students who ask, “Isn’t it better to have someone like me in a position of power than someone else,” my response is yes, of course.<sup>251</sup> But I have heard former students complain about the limits on their power, how many people they have to answer to, and how they feel strait-jacketed by office policy and protocol.<sup>252</sup> And I have seen the role consume the person.<sup>253</sup>

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248. Although I take special pleasure in my students who become public defenders, I believe that participation in a criminal defense clinic is invaluable to prospective prosecutors. The experience of connecting with a client accused of crime, of being on the other side of prosecution discovery and disclosure practices, of having police officers, prosecutors, and judges as adversaries is a useful and humbling backdrop for prosecution. My concern is that even the most poignant and powerful experiences fade with time and the adoption of a different professional role.

249. See Jackson, *supra* note 1.

250. This is so notwithstanding the fact that some people I admire greatly espouse this view. See, e.g., FREEDMAN, *supra* note 234 (stating that a “conscientious prosecutor” can do more good than a criminal defense lawyer); but see *id.* (noting that a prosecutor “can also do more harm”).

251. A peculiarly striking example is Lesra Martin, who as a youngster was instrumental in sustaining and vindicating former prize fighter Rubin Hurricane Carter, who spent nearly twenty years in prison for a triple murder he did not commit. Martin is now is a prosecutor in British Columbia and believes that he is “in a unique position to make sure that wrongful convictions don’t happen.” Pearlstein, *supra* note 31, at C9.

252. A former student, who applied to both defender offices and prosecution offices, and is now an Assistant District Attorney in the Bronx, expressed this view in a telephone conversation a year after he had been a prosecutor. The student was particularly concerned about racism in the criminal justice system and the disproportionate incarceration of young black males. He said he “takes some ribbing” for his political views and felt frustrated that he was doing nothing to stem the tide of incarceration in the low level street crimes he was prosecuting. He was hoping things would change as he gained experience and standing in the office.

253. At a former student’s wedding, I chatted with another former student, who, as a law student, had been very defense-oriented. She had been an investigator for a public defender office before law school and had worked at public defender offices during law school summers. After law school, she worked for several years as an associate in a law firm, and had recently left private practice to become a federal prosecutor. She was prosecuting narcotics cases exclusively. When I asked her how she liked it, she fairly *gushed*, “I love it.” It could be that she felt this way in comparison to law firm practice, that she enjoyed being in court, or liked the culture of public service over that in private practice. But it seemed a peculiar response given her previous orientation and the central role of drug prosecutions in the incarceration frenzy. She expressed no reservations and seemed to feel no self-consciousness about her change of heart. Maybe she just liked winning. See Associated Press, *Federal Crime Data Show a High Conviction Rate*, N.Y. TIMES, June 1, 2000, at A21 (reporting that 87% of

There is the question of working for unorthodox, independent-minded, or "progressive" prosecutors. On the state level, students point to Manhattan District Attorney Henry Morgenthau,<sup>254</sup> Bronx District Attorney Robert Johnson,<sup>255</sup> San Francisco District Attorney Terence Hallinan,<sup>256</sup> and more recently Austin Travis County (Austin), Texas District Attorney Ronnie Earle.<sup>257</sup> On the federal level, they point to the various United States Attorneys' offices known for integrity.<sup>258</sup>

Whatever the merits of these offices and others like them, the reality is that they are responsible for filling the nation's jails and prisons with poor people who commit street crimes. Some chief prosecutors are against the death penalty — certainly a laudable position — but capital cases are a tiny minority of cases prosecuted. Some chief prosecutors take strong stands against hate crimes, violence against women, and child abuse — other laudable positions — but prosecutors do not prosecute only *guilty* racists, rapists, and child abusers.<sup>259</sup> Even if they are guilty, must the answer always be a prison cell?

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defendants charged in federal court were convicted in 1998, and 71% of those convicted were sentenced to prison). Apparently, it is easy for lawyers to be consumed by their professional role and to adopt the perspective that goes along with role. *See generally* JACK & JACK, *supra* note 33; *see also* Joseph P. Fried, *Reconciling Two Sides of a Legal Career*, N.Y. TIMES, June 25, 2000, at NE27 (former prosecutor Bradley D. Simon noting that he gained a "different perspective" when he became a criminal defense lawyer, and he now "care[s] very much" about many of his clients and worries about them facing long prison terms, a "prospect Mr. Simon finds starker now than when he was working to send people there.").

254. *See* Henry Morgenthau, *What Prosecutors Won't Tell You*, N.Y. TIMES, Feb. 7, 1995, at A25 (criticizing the death penalty as vengeful and unjust).

255. *See* Juan Gonzalez, *Bronx D.A. a Profile in Courage*, N.Y. DAILY NEWS, Apr. 2, 1999, at 32 ("Bronx District Attorney Robert Johnson has never been one to walk with the crowd."); Jack Newfield, *Law, not fame, is DA Johnson's religion*, N.Y. POST, Apr. 11, 1999, at 7 (describing Johnson's "serene" and "down-to-earth" approach to prosecution); Jorge Fitz-Gibbon & Paul Schwartzman, *DA's strong stand typical*, N.Y. DAILY NEWS, Mar. 21, 1996, at 28 (describing Johnson's deeply felt opposition to the death penalty).

256. *See* Mark Stricherz, *Hallinan Toward Trying Juveniles as Adults*, S.F. EXAMINER, June 6, 2000, at A8 (reporting that Hallinan, "who has called himself America's most progressive district attorney," decried the national trend to prosecute juveniles as adults at the National Juvenile Justice Summit in Washington, D.C.).

257. *See* Ross E. Milloy, *A Texas Prosecutor Who Seeks Evidence of Innocence*, N.Y. TIMES, Oct. 21, 2000, at A9 (describing Earle as "an anomaly, a soft-spoken prosecutor, more prone to discuss values than vengeance" and reporting about his decision to review 400 convictions after DNA evidence cleared a man who had been in prison for sixteen years).

258. *See, e.g.,* Green, *supra* note 137, at 607-08 (noting the "proud tradition" of the United States Attorney's Office for the Southern District of New York, which is known "for probity, for integrity, for judgment."). Many would say the same thing about the United States Attorney's Office for the District of Columbia under Eric Holder, or the United States Attorney's Office for the Eastern District of Massachusetts under Donald Stern. Bruce Green, a former Southern District prosecutor notes, however, that there is a tendency to idealize one's alma mater: "[I]n the eyes of a former prosecutor from any generation, it [i]s almost axiomatic that the office began to go downhill on the very day that the particular lawyer left it for private practice." *Id.* at 609.

259. Sometimes they are innocent. When they are not, even those who commit these terrible crimes are, to a great extent, victims of their own violent upbringing. *See generally* GILLIGAN, *supra* note 77.

Prosecution is inherently political.<sup>260</sup> It is impossible for prosecutors to avoid political and public pressure,<sup>261</sup> and even the best sometimes cave in to it.<sup>262</sup> It doesn't matter how experienced or popular the chief prosecutor.<sup>263</sup>

Then there is the question of civil rights prosecutors, environmental prosecutors, public corruption prosecutors. I don't know about these; in many regards they fall outside the scope of my argument, as they are not locking up poor, black street criminals. It may be that these prosecutors are contributing to social justice by showing those who abuse positions of power — brutal police officers and prison guards, corporate polluters, and corrupt officials — that they cannot act with impunity.<sup>264</sup>

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260. See generally Lars-Erik Nelson, *Reno: Getting It From All Sides*, THE NATION, June 26, 2000, at 19 (examining the non-stop political controversies which have occurred during Janet Reno's tenure as Attorney General).

261. See BAKER, *supra* note 136, at 33 (former chief prosecutor commenting, "The political side of being a D.A. was always difficult for me.").

262. See, e.g., A. Clay Thompson, *The D.A. Debate*, S.F. BAY GUARDIAN, Oct. 20, 1999 (discussing the progressive community's growing disillusionment with the tenure of San Francisco D.A. Terence Hallinan). In his analysis of Hallinan's performance as district attorney, Thompson acknowledges that Hallinan is "perhaps the most progressive big-city prosecutor in America," with his strong public stand against the death penalty, refusal to push for third-strike felony convictions in many cases, support for diversionary programs, and commitment to resources for the juvenile justice system. *Id.* However, he reveals that, in 1996, Hallinan rejected a request for life in prison without the possibility of parole in a child murder case. See *id.* He also cites criticism of Hallinan's handling of a major environmental case, and his failure to go after landlords unlawfully evicting tenants in order to profit from rising rents. But see *id.* (quoting Dan Macallair of the Center on Juvenile and Criminal Justice: "We've got half as many people going to prison — he's instituted some *major* changes . . . . There's no other D.A. that's done what he's done.").

Hallinan is not the only progressive prosecutor who is susceptible to political pressure. See Alan Finder, *Upstate Prosecutors Often Turn to Death Penalty*, N.Y. TIMES, Jan. 1, 1999, at A1 (reporting that notwithstanding Morgenthau's opposition to the death penalty, the Manhattan District Attorney's office has instituted capital prosecutions).

263. See, e.g., Jane Fritsch & David Rohde, *Another Confessed in Killing, But 2 Men Remain in Prison*, N.Y. TIMES, July 25, 2000, at A1 (reporting about a New York case in which two men were sentenced to life in prison for a murder they did not commit, and the resistance of the Manhattan District Attorney's office to acknowledge or remedy the situation); Jane Fritsch, *Evidence of Innocence Can Come Too Late for Freedom*, N.Y. TIMES, July 30, 2000, at WK3 (noting Manhattan D.A. Robert Morgenthau's reluctance to provide immunity to a witness whose testimony cannot otherwise be obtained and who would exonerate the two men who have been in prison for seven years); see also BAKER, *supra* note 136, at 81 (prosecutor commenting):

What you get with these veteran prosecutors is they learn to politically survive. They do a lot of cases, but they pick the cases that nobody can ever say is bad. No one is ever going to toss you out of your job for prosecuting a guy for first-degree murder, cocaine, or screwing a child.

*Id.*

264. See, e.g., MICHAEL L. BENSON & FRANCIS T. CULLEN, *COMBATING CORPORATE CRIME: LOCAL PROSECUTORS AT WORK* 148 (1998) (quoting an environmental prosecutor: "I've prosecuted maybe fifty murderers, and I've never deterred the street murderer once. I've probably prosecuted one industrial murderer and I think we've deterred a whole lot of people, at least woke them up."); *id.* at 183 (quoting an environmental prosecutor: "When they read in the paper that somebody went to jail for an environmental crime, whether it's a one-man company . . . or a multinational corporation, and a vice-president ended up going to jail and had a felony conviction on his record, they sit up and take notice.").

Yet, these prosecutors are susceptible to the same corrupting influences as other prosecutors<sup>265</sup> — perhaps more so because of the self-evident nobility of their pursuit<sup>266</sup> — and the same political pressures.<sup>267</sup> And they are certainly not *challenging* the criminal justice crisis in our midst.

Let me be clear that I am not advocating the end of law enforcement, the abolition of prosecutors, or the dismantling of the adversary system. I understand the need for prosecutors and other law enforcement officers. I believe in the adversary system. I also acknowledge that not everyone is suited to be a defender,<sup>268</sup> and may not be able to do represent the accused with the requisite devotion and zeal. I am saying to those who are committed to social and racial justice: Please don't join a prosecutor's office.

There is much important work to be done, work that can make a difference in peoples' lives.<sup>269</sup> Lawyers have enormous privilege: They have the power, knowledge, and access so many others lack.<sup>270</sup> Fortunately, there is a wide range of meaningful, interesting legal work. Those with an interest in prosecution should think hard about prosecuting under current conditions and appreciate the moral implications of such a choice.

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265. See *supra* Part I.

266. See BENSON & CULLEN, *supra* note 262, at 152 (quoting an environmental prosecutor):

If he goes out and dumps PCB's on somebody else's land in the middle of the night and [some regulator] catches him, the first thing he's going to want to do is be real cooperative . . . . So we want that guy. It's not enough just to take him and get him to clean it up. We want to prosecute this guy in court and ask for prison because he's endangered the lives of citizens in the water supply and everything else.

267. Working for the Justice Department when Robert Kennedy was Attorney General in the 1960s was no doubt a different experience from working there when Edwin Meese was Attorney General in the 1980s. Being a civil rights prosecutor under Presidents Reagan and Bush was no doubt a different experience from being a civil rights prosecutor under President Clinton.

268. Sometimes there is a deeply felt, intuitive sense about the side one "belongs" on. See KUNEN, *supra* note 13, at 14 ("[f]or reasons psychological, political, or both, being a prosecutor did not appeal to me, so criminal defense was the only way to go."). On the other hand, many students headed for prosecution have changed their minds after being in a criminal defense clinic.

269. See, e.g., Stephen Wizner, *Rationing Justice*, 1997 ANN. SURV. AM. L. 1019, 1024 ("Poverty is the most pressing and pervasive social problem in American society, and therefore we need to make poverty a major legal issue.").

270. See generally Aiken, *supra* note 175.