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# Access to Criminal Justice: Where Are the Prosecutors?

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# ACCESS TO CRIMINAL JUSTICE: WHERE ARE THE PROSECUTORS?

By: Bruce A. Green\*

## ABSTRACT

*When the organized bar talks about “access to justice,” it tends to look exclusively at civil justice and to emphasize the need for lawyers in civil cases. This overlooks criminal justice and the essential role of lawyers in working to secure it. When the organized bar promotes criminal justice, it is typically circumspect about prosecutors’ responsibility. This essay argues that the bar should take a stronger role in elaborating prosecutorial norms, particularly in the context of miscarriages of justice both on the individual and systemic levels. When people are denied access to criminal justice, the bar should ask, “Where were the prosecutors?”*

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### I. HAS “ACCESS TO JUSTICE” BEEN MISAPPROPRIATED BY THE CIVIL PRO BONO MOVEMENT?

On April 29, 2015, the press reported that the previous day “[t]housands of demonstrators marched in Baltimore . . . demanding justice.”<sup>1</sup> The demonstration followed the funeral of Freddie Gray, a twenty-five-year-old African-American man who died in police hands, his spinal cord virtually severed at the neck, after being taken into police custody, handcuffed, and driven in a police vehicle.

Justice is a fundamental national aspiration. Our Pledge of Allegiance refers to our nation as one “with justice for all.” But many

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\* Louis Stein Chair and Director, Stein Center for Law and Ethics, Fordham University School of Law. This essay was prepared for a conference, “Reconsidering Access to Justice,” at Texas A&M University School of Law, on May 1–2, 2015. My thanks to Milan Markovic for organizing the conference and inviting me to participate, and to Sherri Levine for her influential comments on an earlier draft.

1. Scott Malone, Ian Simpson & Warren Strobel, *Marchers Demand Justice, Police Reform in Baltimore*, REUTERS (Apr. 29, 2015, 7:49 PM), <http://www.reuters.com/article/2015/04/29/us-usa-police-baltimore-idUSKBN0NI1N720150429> [<http://perma.cc/3LVG-23G5>].

believe that as far as justice is concerned, they are not on the receiving end.

What is the “justice” for which Baltimore residents marched? One presidential candidate, in a policy speech responding to the demonstration, referred to *criminal* justice,<sup>2</sup> but it seems obvious that Baltimore residents seek more than that: They seek social, economic, and racial justice as well. For example, Baltimore Racial Justice Action, an organization predating the demonstrations, was founded on a commitment to “social and economic transformation with an emphasis on racial equality.”<sup>3</sup> These are all bound together when Baltimore residents ask not to be treated more harshly than others, and certainly not to fear the police, because they are African American and poor.

But “justice” often takes on a much narrower meaning when lawyers use the word. In Baltimore, for example, lawyers who market themselves as “Civil Justice Network Attorneys” offer their services at reduced fees to low- and middle-income clients in civil matters.<sup>4</sup>

The meaning of justice also tends to be narrow when the bench and bar talk about *access* to justice. For example, in Arkansas, the “Equal Access to Justice Panel” comprises lawyers who have agreed to help meet low-income clients’ civil legal needs without compensation.<sup>5</sup> In Delaware, the state bar’s Access to Justice Program encourages lawyers to do pro bono work and helps connect them with civil pro bono opportunities.<sup>6</sup> And in Washington, D.C., the Access to Justice Commission issued a report focusing entirely on civil justice, largely on low-income clients’ need for lawyers, and significantly on the need to expand lawyers’ pro bono services.<sup>7</sup>

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2. Amanda Terkel, *Hillary Clinton: “There Is Something Profoundly Wrong” in Our Criminal Justice System*, HUFFINGTON POST (Apr. 29, 2015, 11:59 AM) [http://www.huffingtonpost.com/2015/04/29/hillary-clinton-baltimore\\_n\\_7170668.html](http://www.huffingtonpost.com/2015/04/29/hillary-clinton-baltimore_n_7170668.html) [<http://perma.cc/MWR3-6YSE>] (“We have allowed our criminal justice system to get out of balance, and these recent tragedies should galvanize us to come together as a nation to find our balance again.”).

3. *About Us*, BALT. RACIAL JUST. ACTION, <http://bmoreantiracist.org/about-brja/mission> [<http://perma.cc/E9FD-ASD3>].

4. CIVIL JUST., INC., <http://www.civiljusticenetwork.org> [<http://perma.cc/Z6TX-7GU3>].

5. *Equal Access to Justice Panel*, ARK. LEGAL SERVS. P’SHIP, <http://www.arlegal-services.org/node/137> [<http://perma.cc/YSM7-VBF9>]. Similar examples abound. *See, e.g., Access to Justice Program*, DEL. STATE BAR ASS’N, <http://www.dsba.org/access-to-justice-program/> [<http://perma.cc/DT3X-MB6D>]; Eric Williamson, *Access to Justice Partnership Helps Low-Income Charlottesville Residents Navigate Legal Hurdles*, UNIV. VA. SCH. L., [http://www.law.virginia.edu/html/news/2013\\_spr/access\\_to\\_justice.htm](http://www.law.virginia.edu/html/news/2013_spr/access_to_justice.htm) [<http://perma.cc/ZP75-2RVF>].

6. DEL. STATE BAR ASS’N, *supra* note 5.

7. *Justice for All? An Examination of the Civil Legal Needs of the District of Columbia’s Low-Income Community*, D.C. ACCESS TO JUSTICE COMM’N (2008), <http://www.dcaccessjustice.org/files/CivilLegalNeedsReport.pdf> [<http://perma.cc/9QHM-FAC3>].

When judges and bar leaders talk about access to justice, as in these examples, justice generally refers to *civil* justice for low-income clients who are attempting to avoid eviction, obtain public benefits, or otherwise employ legal means to secure basic necessities. In turn, access to civil justice, for the most part, means access to *lawyers*.<sup>8</sup> Access to justice has become the banner under which the bench and bar campaign for funding for legal services in civil cases and, because there will never be adequate public and private funding for lawyers for more than a fraction of low-income clients with civil legal needs, it has also become the banner under which the bench and bar campaign to persuade lawyers to provide pro bono assistance to individuals in civil matters.

One might wonder what happened to *criminal* justice. It is surely not the case that once *Gideon v. Wainwright* gave indigent criminal defendants a right to counsel at state expense in felony trials,<sup>9</sup> the battle for criminal justice was won. And yet, the D.C. Commission almost implied as much in explaining why its study of “access to justice” focused exclusively on *civil* justice: “In criminal cases,” the Commission observed, “a defendant facing the risk of incarceration is entitled to an attorney even if he or she cannot afford one.”<sup>10</sup>

Of course, this rationale for focusing on civil justice overlooks various limitations of *Gideon* and its progeny. Scholars generally noted these limitations in marking the decision’s fiftieth anniversary.<sup>11</sup> To begin with, not everyone caught up in the criminal process has a right to counsel, and no one has a right to counsel at every stage at which they need one. Many people who cannot afford lawyers have to deal with aspects of the criminal justice system on their own.<sup>12</sup> Moreover,

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8. Much of the scholarship on “access to justice” places similar emphasis on access to lawyers. See, e.g., DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004).

9. *Gideon v. Wainwright*, 372 U.S. 335, 343–44 (1963). The right was later extended. See, e.g., *Douglas v. California*, 372 U.S. 353, 357–58 (1963) (expanding *Gideon*’s holding that indigent defendants had the right to counsel for direct appeals in state court); *In re Gault*, 387 U.S. 1, 36–37 (1967) (holding that minors accused of crimes must be afforded many of the same procedural rights in accordance with the Fourteenth Amendment as adults); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (extending *Gideon* to defendants charged with misdemeanors carrying the possibility of jail time); *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (holding that *Gideon* guaranteed the right to effective counsel).

10. D.C. ACCESS TO JUSTICE COMM’N, *supra* note 7, at 1. By comparison, the report continued, “In most civil cases, however, a person is not entitled to an attorney, even though civil legal proceedings can affect things we hold most dear—custody of our children, our physical safety, our ability to work and need for shelter, just to name a few.” *Id.*

11. See, e.g., William R. Terpening, *An Imperfect but Honorable Legacy: A Brief Survey of Cases Following Gideon v. Wainwright*, *THE CHAMPION* (Nat’l Ass’n of Criminal Def. Lawyers, Wash., D.C.), June 2012, at 60, 63; see also Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 *EMORY L.J.* 1169, 1169–70 (2003).

12. Those who are under criminal investigation but not yet arrested or charged or who have been arrested but not yet brought before a judge have no right to assigned

not everyone receives a qualified lawyer, and the constitutional remedy for substandard representation is weak.<sup>13</sup> Many courts do not honor the right to counsel at all.<sup>14</sup> And, most importantly, there is far more to “access to criminal justice” than securing a good defense lawyer.<sup>15</sup> Among the criminal justice problems currently in the national spotlight are false convictions,<sup>16</sup> racial disparities throughout the criminal process from the policing stage through prosecution and sentencing,<sup>17</sup> over-criminalization,<sup>18</sup> and over-incarceration.<sup>19</sup>

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counsel. *Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191, 211 (2008) (holding that the right to counsel attaches at initial appearance); *United States v. Gouveia*, 467 U.S. 180, 188 (1984) (stating that the right to appointed counsel does not attach until “the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment” (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972))). There is, of course, a trial and appellate right to counsel, but not for misdemeanor defendants not facing imprisonment. *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (holding that a defendant charged with a misdemeanor has no constitutional right to counsel where no prison sentence will be imposed). There is no constitutional right to appointed counsel for convicted defendants post-appeal, when they pursue other post-conviction judicial remedies, executive clemency, or relief from the collateral consequences of their convictions. *Coleman v. Thompson*, 501 U.S. 722, 755 (1991); *Hill v. Jones*, 81 F.3d 1015, 1024 (11th Cir. 1996).

13. See, e.g., Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 2 (2009) (observing that: “[s]cholars have argued that *Strickland* has created an almost ‘insurmountable hurdle for defendants claiming ineffective assistance’ and has ‘foster[ed] tolerance of abysmal lawyering.’” (first quoting Martin C. Calhoun, Note and Comment, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 427 (1988); then quoting William S. Geimer, *A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 94 (1995)); Sara Mayeux, *Ineffective Assistance of Counsel Before Powell v. Alabama: Lessons from History for the Future of the Right to Counsel*, 99 IOWA L. REV. 2161, 2164 & n.16 (2014) (citing strident critiques of the doctrine in *Strickland v. Washington*).

14. See Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150 (2013).

15. For a sobering and powerful reminder, see Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. F. 253 (2015).

16. See, e.g., Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH. L. REV. 65 (2008); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005).

17. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2012).

18. See, e.g., *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 1, 1–3 (2010) [http://judiciary.house.gov/\\_files/hearings/printers/111th/111-151-58476.pdf](http://judiciary.house.gov/_files/hearings/printers/111th/111-151-58476.pdf) [<http://perma.cc/3L58-8P6U>]; *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 1, 1–2 (2009), [http://judiciary.house.gov/\\_files/hearings/printers/111th/111-67\\_51226.pdf](http://judiciary.house.gov/_files/hearings/printers/111th/111-67_51226.pdf) [<http://perma.cc/N7EV-YU2R>]; Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 20–24 (2010).

19. See, e.g., ALEXANDER, *supra* note 17.

Thankfully, not every contemporary discussion of “access to justice” overlooks the significant, ongoing problems of criminal justice.<sup>20</sup> But lawyers and judges—and especially representatives of the organized bar—increasingly tend to appropriate the term in support of civil pro bono efforts. Yes, expanding legal services for low-income clients is important, its advocates need a rallying cry, and “access to justice” is a compelling one. And one can understand why the term would be preferred over “access to lawyers” which, for people other than lawyers, may seem self-serving. But “pro bono” is itself a good and high-minded term.

If the bench and bar choose to talk about “access to justice” instead of pro bono or access to civil justice, they should not ignore criminal justice or suggest that the constitutional right to counsel ensures access to justice in criminal cases. No one should be misled to believe that we have gone as far as necessary to secure criminal justice in this country.

## II. PROSECUTORS’ DUTY TO SEEK JUSTICE

While not necessarily invoking the concept of “access to justice,” representatives of the organized bar, such as the National Association of Criminal Defense Lawyers and the American Bar Association, do undertake a range of efforts to promote the improvement of criminal justice, as do many other not-for-profit organizations. Some of the bar’s efforts are directed at improving the substantive and procedural law and the operation of police departments, courts, and other relevant institutions. But lawyers are not neglected. Among the most im-

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20. One might consider the broader meaning given to the term by an academic-based reform organization, *see, e.g.*, NAT’L CTR. FOR ACCESS TO JUSTICE, <http://ncforaj.org> [<http://perma.cc/8ATB-GXKT>], or by the “Access to Justice Initiative” of the U.S. Department of Justice, *Access to Justice*, U.S. DEP’T JUST., <http://www.justice.gov/atj> [<http://perma.cc/GU67-BVW5>].

Another notable exception is the 2015 report of the Chief Judge of the State of New York on the state of the judiciary. Jonathan Lippman, Chief Judge of the State of N.Y., 2015 State of the Judiciary Speech (Feb. 17, 2015), *in* JONATHAN LIPPMAN, ACCESS TO JUSTICE: MAKING THE IDEAL A REALITY (2015), <http://www.nycourts.gov/ctapps/news/SOJ-2015.pdf> [<http://perma.cc/ZFG4-427W>]. Titled, “Access to Justice: Making the Ideal a Reality,” the report emphasized from the outset that access to justice is a concern in all judicial proceedings—“civil, criminal, and family proceedings.” *Id.* at 1. Further, the New York report recognized that procedural justice in judicial proceedings is intertwined with economic justice—that “rich and poor, the privileged and disadvantaged alike seek a level playing field before the courts”—and that it is likewise intertwined with racial justice and other principles of nondiscrimination—that “[a]ccess to justice means that everybody . . . regardless of race, ethnicity or orientation . . . gets his or her day in court.” *Id.* Among the report’s proposals to promote access to justice were recommendations focusing on the criminal process. These included proposals to enhance the quality of criminal defense, *id.* at 10, but the report did not focus exclusively on legal representation. It recommended grand jury reform, *id.* at 2–4, a system of courts dedicated to human trafficking cases, *id.* at 11, a new community court to address low-level criminal offenses, *id.* at 5, and legislation relating to juvenile justice, bail and wrongful convictions, *id.* at 16–17.

portant efforts have been to promote the quality of criminal defense by lobbying for better funding, by promoting better training and resources for defense lawyers,<sup>21</sup> and by encouraging pro bono representation in contexts in which the constitution does not guarantee representation, such as after a criminal appeal in death penalty cases.<sup>22</sup>

Although the organized bar has also directed efforts at improving the quality of criminal prosecutions, much of its work has focused on minimal legal and ethical standards and on prosecutors who fail to meet them. For example, while the ABA Model Rules of Professional Conduct note the prosecutor's "responsibility of a minister of justice,"<sup>23</sup> the rules themselves are narrow ranging and are meant to establish the minimum conduct required for disciplinary purposes.<sup>24</sup> The risk is that readers will equate prosecutors' duty to seek justice with their avoidance of sanctionable misconduct.

There are several possible reasons for emphasizing minimal legal and disciplinary expectations. One is that some prosecutors do not meet even these, and so the organized bar may see unethical prosecuting as the more important problem. Another is that prosecutors have their own professional associations on which they are more likely to rely to articulate high professional expectations; prosecutors tend to regard the organized bar suspiciously as an arm of defense lawyers and may not trust its standards—indeed, some prosecutors balk even at the disciplinary minimum.<sup>25</sup> Although the ABA does publish "prosecution function" standards that are said to be aspirational,<sup>26</sup> prosecutorial suspicions limit how high the bar association may set them: Prosecutors involved in the drafting process fear, to some extent legitimately, that aspirational standards will be invoked for nor-

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21. See, e.g., JON WOOL, K. BABE HOWELL, & LISA YEDID, VERA INST. OF JUSTICE, IMPROVING PUBLIC DEFENSE SYSTEMS: GOOD PRACTICES FOR FEDERAL PANEL ATTORNEY PROGRAMS (2003), [http://www.vera.org/sites/default/files/resources/downloads/Improving\\_public\\_defense.pdf](http://www.vera.org/sites/default/files/resources/downloads/Improving_public_defense.pdf) [<http://perma.cc/ZY5R-4JZ8>]; Kate Taylor, JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE (2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/system\\_overload\\_final.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf) [<http://perma.cc/ZW89-ZR89>].

22. See *Death Penalty Representation Project*, AM. BAR ASS'N, [http://www.americanbar.org/groups/committees/death\\_penalty\\_representation.html](http://www.americanbar.org/groups/committees/death_penalty_representation.html) [<http://perma.cc/WC7N-RMP7>].

23. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2015) (2002) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

24. Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1573-604.

25. See generally Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873 (2012).

26. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standards 3-1.1 to -6.2, 3-1.1 (3d ed. 1993) [hereinafter ABA STANDARDS], [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/prosecution\\_defense\\_function.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf) [<http://perma.cc/2MGT-4KBE>].

mative legal purposes. The ABA has made substantial efforts to overcome prosecutors' suspicions and invite them into the fold: Its Criminal Justice Section seeks to serve as the unified voice of the legal profession on criminal justice issues,<sup>27</sup> and in general, the bar seeks to unify the profession.<sup>28</sup> Nonetheless, the ABA might drive prosecutors away by setting high standards and even more so by publicly criticizing prosecutors for falling short of them.

Consequently, aside from specialized bar associations representing the defense side, representatives of the organized bar may be inclined to tread lightly on questions of prosecutorial conduct. The ABA has never fully elaborated criminal prosecutors' critical role in ensuring access to criminal justice not just in individual cases but systemically. To be sure, as the ABA recognizes, prosecutors should treat individual defendants fairly.<sup>29</sup> But one can envision a more demanding concept of what it means to be a good prosecutor.

The chief prosecutor is, after all, a public official.<sup>30</sup> As public officials, prosecutors are far more than just investigators and trial lawyers; they act essentially as administrators in making decisions about charging, plea bargaining and sentencing.<sup>31</sup> Beyond that, prosecutors can be an influential voice for reforming the law and legal processes.<sup>32</sup> And they can use their authority to promote broader social ends than simply deterring and punishing crimes.<sup>33</sup> A capacious vision of prosecution would capture all of this and perhaps more.

If it chose to do so, the organized bar could not only elaborate an expansive vision of prosecutors' justice-seeking role and responsibilities, but could also evaluate whether contemporary prosecutors are fulfilling that vision, toward the end of promoting national dialogue on good prosecuting as an aspect of good governance. Further, the bar need not explore and elaborate prosecutors' role in securing citizens' access to justice entirely in the abstract. There are concrete contexts in which the bar could elaborate its vision. On one side, the bar can cele-

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27. See Green, *supra* note 25, at 882.

28. See *id.* at 881–82.

29. MODEL RULES OF PROF'L CONDUCT, *supra* note 23 (stating that the responsibility of a minister of justice "carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.").

30. See, e.g., *Cox v. Hainey*, 391 F.3d 25, 35 n.4 (1st Cir. 2004) ("Prosecutors are public officials . . .").

31. See, e.g., Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

32. See Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1190–99 (2003); Bruce A. Green, *Gideon's Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336 (2013).

33. See, e.g., Bruce A. Green & Alafair S. Burke, *The Community Prosecutor: Questions of Professional Discretion*, 47 WAKE FOREST L. REV. 285 (2012).



brate prosecutors' good work in promoting justice. But it can also address the opposite by interrogating injustice.

When criminal justice goes awry, the bar should ask, "Where were the prosecutors?"<sup>34</sup> This is true both in the cases of individual injustices and in the cases of systemic injustices. It is not enough for prosecutors to avoid illegal conduct and disciplinary misconduct. It is important to identify what prosecutors should do to secure justice and avert and rectify injustice. Particularly in the context of police shootings of unarmed Black civilians, and the attendant "Black Lives Matter" movement, members of the public and media increasingly have inquired into prosecutors' responsibility for apparent criminal injustices.<sup>35</sup> But it is uncertain that the bar will follow suit.

Miscarriages of justice offer an opportunity for the legal profession to learn from the criminal justice system's mistakes.<sup>36</sup> These case studies should be used as vehicles through which the bar develops and elaborates prosecutorial norms and through which the bar seeks to influence prosecutors to live up to norms that exceed the disciplinary minimum.<sup>37</sup>

### III. PROSECUTORS' DUTY TO AVERT INDIVIDUAL INJUSTICES

Individual criminal injustices abound, both historically and in recent years. The paradigmatic criminal injustices are wrongful convictions—convictions of innocent individuals. In Texas alone, these have in-

34. The judiciary and the legal profession count on lawyers to take the lead in promoting justice and preventing injustice. For example, a quarter century ago, when bank officials' fraudulent transactions led to a "savings and loan crisis," District Judge Stanley Sporkin asked, "where . . . were the . . . attorneys when these transactions were effectuated?" *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990) (Sporkin, J.). Since then, some variant of the question, "where were the lawyers?," has echoed over the course of a succession of corporate scandals. See Dana A. Remus, *Out of Practice: The Twenty-First Century Legal Profession*, 63 DUKE L.J. 1243, 1247 n.13 (2014) (citing examples); see also Peter J. Henning, *How G.M.'s Lawyers Failed in Their Duties*, N.Y. TIMES (June 9, 2014), <http://dealbook.nytimes.com/2014/06/09/how-g-m-s-lawyers-failed-in-their-duties> [<http://perma.cc/3ZNJ-67NG>] (describing General Motors' recently-revealed failure to correct defects that it knew had led to multiple deaths).

35. See Editorial, *The Chicago Police Scandal*, N.Y. TIMES, Dec. 2, 2015, at A30, <http://www.nytimes.com/2015/12/02/opinion/the-chicago-police-scandal> [[perma.cc/HWM7-FNCN](http://perma.cc/HWM7-FNCN)] (observing that by the time a court ordered Chicago to release a video of the police officer's shooting of Laquan McDonald, "more than a year had passed since the shooting, and public confidence in the police, prosecutors and the mayor's office had been exhausted").

36. Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333 (2002).

37. The Innocence Project, for example, has made efforts to reform the law through both legislation and litigation. *Improve the Law*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/free-innocent/improve-the-law/legislative-reform> [<http://perma.cc/9E3A-3BGA>]; *Reform Through the Courts*, THE INNOCENCE PROJECT <http://www.innocenceproject.org/free-innocent/reform-through-the-courts> [<http://perma.cc/PR5C-RD55>].

cluded, most prominently, the prosecution of Cameron Todd Willingham, who was wrongly convicted and executed;<sup>38</sup> Michael Morton's case,<sup>39</sup> which led to legislative reform;<sup>40</sup> and the convictions of the individuals who were ultimately exonerated by Dallas District Attorney Craig Watkins before he was voted out of office.<sup>41</sup> But Texas holds no monopoly on injustice. In any one of these wrongful conviction cases, and others around the country, one might profitably ask, "Where were the prosecutors?"

Consider the case of a recent Alabama exoneree, Anthony Ray Hinton, who spent approximately thirty years in prison, mostly on death row, until the U.S. Supreme Court intervened.<sup>42</sup> Hinton's prosecution dates to 1985 when three restaurant managers were separately robbed and shot in Birmingham over the course of several months.<sup>43</sup> Two died, and there were no eye witnesses.<sup>44</sup> The survivor of the third shooting picked Hinton's photo out of a photo array, but other witnesses placed Hinton at his job in a warehouse at the time of that robbery.<sup>45</sup> The critical evidence against Hinton came from the state's firearms analysts who claimed to be able to discern through microscopic analysis whether a particular bullet was fired from a particular gun. They testified that the six bullets recovered from the three shoot-

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38. Maurice Possley, *Fresh Doubts over a Texas Execution*, WASH. POST (Aug. 3, 2014), <http://www.washingtonpost.com/sf/national/2014/08/03/fresh-doubts-over-a-texas-execution/>.

39. Josh Levs, *Innocent Man: How Inmate Michael Morton Lost 25 Years of His Life*, CNN (Dec. 4, 2013, 2:53 PM), <http://www.cnn.com/2013/12/04/justice/exonerated-prisoner-update-michael-morton> [http://perma.cc/DJW7-BA8M].

40. Brandi Grissom, *Perry Signs Michael Morton Act*, TEX. TRIB. (May 16, 2013), <http://www.texastribune.org/2013/05/16/gov-rick-perry-signs-michael-morton-act> [http://perma.cc/3RR2-ULFB]; see also Michael Morton Act, TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2015) (providing for broader prosecutorial disclosure in criminal cases and expanding discovery in both pretrial and post-conviction phases).

41. Gromer Jeffers, Jr., *Susan Hawk Ousts Craig Watkins in Heated Race for Dallas County DA*, DALLAS MORNING NEWS (Nov. 5, 2014), <http://www.dallasnews.com/news/politics/local-politics/20141105-susan-hawk-ousts-craig-watkins-in-heated-race-for-dallas-county-da.ece> [https://perma.cc/DK65-KADU]; see also Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 481, 494–95 (2009).

42. *Hinton v. Alabama*, 134 S. Ct. 1081 (2014); see also Byron Pitts, Adam Desiderio, Sally Hawkins, & Lauren Effron, *30-Year Alabama Death Row Inmate Uses Computer, ATMs for First Time*, ABC NEWS (Apr. 23, 2015, 8:12 PM), <http://abcnews.go.com/US/30-year-alabama-death-row-inmate-computer-atms/story?id=30532076> [http://perma.cc/FA6C-MM9J].

43. *Hinton v. State*, 548 So. 2d 547, 550 (Ala. Crim. App. 1988), *aff'd sub nom. Ex parte Hinton*, 548 So. 2d 562 (Ala. 1989), *vacated sub nom. Hinkle v. Alabama*, 134 S. Ct. 1081 (2014).

44. Corey G. Johnson, *30 Years on Death Row: A Conversation with Anthony Ray Hinton*, MARSHALL PROJECT (Apr. 9, 2015, 12:27 PM), <https://www.themarshallproject.org/2015/04/09/30-years-on-death-row-a-conversation-with-anthony-ray-hinton> [http://perma.cc/6PAY-P7MG].

45. *Hinton*, 548 So. 2d at 552.

ings were fired from the same gun—a revolver found in a search of Hinton’s home and belonging to his mother.<sup>46</sup>

Before trial, Hinton’s defense lawyer asked the court for funds to hire a defense expert to rebut the state’s forensic testimony, but the judge granted only \$1,000—not enough to hire an expert with qualifications comparable to those of the state’s witnesses.<sup>47</sup> Mistakenly believing that the judge could not award more if asked, the defense lawyer made do, hiring a low-cost, one-eyed expert who the prosecutor effectively discredited at trial based on his lackluster qualifications, his difficulty handling a microscope, and his impaired vision.<sup>48</sup> Hinton was found guilty and sentenced to death.<sup>49</sup>

Hinton maintained his innocence. Once the appeals court upheld his conviction, however, he had no right to a court-appointed lawyer and of course he could not afford to hire one. That could easily have ended Hinton’s pursuit of justice, but he was fortunate to have his case championed by the Equal Justice Initiative, directed by the legendary Bryan Stevenson.<sup>50</sup> Few convicted defendants are as fortunate.

In the years following Hinton’s conviction, the scientific community discredited the very premise of firearms analysis as used at Hinton’s trial. The National Academy of Sciences (NAS) issued a report observing that this type of analysis is subjective, has no accepted protocols, and has a fairly limited scientific basis.<sup>51</sup> In light of more current understandings, and based on their own experts’ analysis, Hinton’s new lawyers raised serious doubts about whether Hinton’s mother’s gun had fired the bullets from the three shootings as well as whether the bullets were even fired by the same gun.<sup>52</sup> They asked the state’s lawyers to reexamine the case. But the state’s lawyers were not interested.<sup>53</sup>

Doubts about the reliability of the forensic evidence standing alone provided no basis for an effective legal challenge to Hinton’s conviction. The Supreme Court has never found it unconstitutional for a state to secure a criminal conviction based on dubious forensic evidence; indeed, the Court has not found a constitutional basis to set aside a criminal conviction simply because the convicted person is in-

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46. *See Hinton*, 134 S. Ct. at 1083.

47. *Id.* at 1088.

48. *Id.* at 1085–86.

49. *Id.* at 1086.

50. *See Bryan Stevenson’s Client Released After Nearly 30 Years on Death Row*, NYU LAW (Apr. 3, 2015), <http://www.law.nyu.edu/news/bryan-stevenson-client-anthony-ray-hinton-freed-after-30-years-on-death-row> [<http://perma.cc/CF37-QJ7W>].

51. COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY., NAT’L ACAD. OF SCI., *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* 150–55 (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> [[perma.cc/CK8G-CSFY](http://perma.cc/CK8G-CSFY)]; *see also* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 28 (2009).

52. *Hinton*, 134 S. Ct. at 1086.

53. *Id.*

nocent.<sup>54</sup> But the Court *has* recognized a Sixth Amendment right to competent trial counsel.<sup>55</sup> In fact, many or most post-appeal challenges allege a denial of this right, especially in death penalty cases, where the claim is virtually required.<sup>56</sup> And so Hinton's lawyers challenged the adequacy of his trial lawyer's representation rather than simply attempting to relitigate his guilt or innocence in light of new forensic understandings.<sup>57</sup> But the suggestion of actual innocence was important in advocating the claim, which the Attorney General's Office opposed.

The nature of the legal claims that the defense can and cannot bring is essential to understanding why prosecutors largely escape blame for wrongful convictions. The bar has traditionally focused on defense lawyers as opposed to prosecutors in part because there is no right to a competent prosecution comparable to the right to a competent defense.<sup>58</sup> Most of what prosecutors do is a matter of virtually unreviewable discretion.<sup>59</sup> With the limited exception of alleged discovery violations, post-conviction legal challenges rarely bring prosecutors' role out of the shadows. This is not to say that competent prosecuting is unimportant, but just to say that it is impossible in most cases to have enough information to form a judgment about whether the prosecutor is proceeding competently and it is even harder to find an occasion on which a judge will pass judgment on a prosecutor's competence.

After a decade during which the state courts rejected Hinton's claim, the U.S. Supreme Court reviewed the case and found unanimously that Hinton's lawyer was remiss in not requesting additional funding for a better-qualified defense expert.<sup>60</sup> The Court sent the case back to the state court to decide whether Hinton was prejudiced as a result, and a state judge, finding that he was, overturned his con-

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54. *See, e.g.*, *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (assuming for argument's sake that a truly persuasive showing of actual innocence would make an execution unconstitutional).

55. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (“[T]he Court has recognized that ‘the right to counsel is the right to the effective assistance of counsel.’”) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

56. NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTRUM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 28 (2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf> (stating that 81% of capital cases studied included at least one ineffective assistance of counsel claim) [<http://perma.cc/ZY4H-D2Y2>].

57. *See Hinton*, 134 S. Ct. at 1083.

58. *See, e.g.*, Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1 (2009).

59. *See, e.g.*, Green, *supra* note 24, at 1587–91.

60. *Hinton*, 134 S. Ct. at 1083 (concluding that “Hinton’s trial attorney rendered constitutionally deficient performance”).

viction.<sup>61</sup> Both the Supreme Court decision and the ensuing state court decision were questionable from a doctrinal perspective but entirely understandable given that there was no reliable evidence proving Hinton's guilt. The state prosecutor initially scrambled around for witnesses to testify at a retrial, until a new set of state experts reexamined the forensic evidence—the gun and bullets—and reported, as the defense had maintained for years, that a match could not be made.<sup>62</sup>

Upon his release in April 2015, Hinton said, “I got news for them, everybody who played a part in sending me to death row, you will answer to God.”<sup>63</sup> Who played a part? The Supreme Court's narrative suggests laying blame at the feet of the prosecution's forensic witnesses who testified unreliably, whether knowingly or just incompetently; the trial judge who afforded inadequate funding to hire a defense expert to expose the flaws in the state's evidence; and most especially Hinton's trial lawyer who did not know or think to ask for more funding. In general, commentators have criticized defense lawyers for failing to develop the necessary expertise to challenge forensic evidence.<sup>64</sup> Conversely, some have argued that prosecutors are generally *not* to blame for wrongful convictions, at least in cases where they did not engage in affirmative misconduct, and that prosecutorial misconduct has been a material or predominant factor in a minority of exoneration cases.<sup>65</sup>

Should the prosecutors get a pass? Hinton's case provides a useful one in which to consider prosecutors' role and responsibilities. Nothing suggests that the prosecutors violated the law or otherwise engaged in prosecutorial misconduct, as conventionally understood. But, at least as a matter of good prosecuting, trial prosecutors have a duty to prevent unjust convictions.<sup>66</sup> And they have a general duty of competence, which presupposes that they will take reasonable steps to

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61. *EJI Wins Release of Anthony Ray Hinton*, EQUAL JUST. INITIATIVE (Apr. 2, 2015), <http://www.eji.org/node/1063> [<http://perma.cc/8U44-LETY>].

62. Maurice Possley, *Anthony Hinton*, NAT'L REGISTRY EXONERATIONS (Apr. 9, 2015), <https://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4669> [<http://perma.cc/CFR7-TK3F>].

63. Kim Chandler, *Prosecutors Will “Answer to God” for Putting Innocent Man on Death Row*, HUFFINGTON POST (Apr. 4, 2015, 11:59 AM), [http://www.huffingtonpost.com/2015/04/04/answer-to-god-death-row\\_n\\_7003302.html](http://www.huffingtonpost.com/2015/04/04/answer-to-god-death-row_n_7003302.html) [<http://perma.cc/GF5R-DD5A>].

64. See, e.g., Judge Nancy Gertner, *Commentary on the Need for a Research Culture in the Forensic Sciences*, 58 UCLA L. REV. 789, 790 (2011); D. Michael Risinger, *The NAS/NRC Report on Forensic Science: A Path Forward Fraught with Pitfalls*, 2010 UTAH L. REV. 225, 242.

65. Charles E. MacLean, James Berles & Adam Lamparello, *Stop Blaming the Prosecutors: The Real Causes of Wrongful Convictions and Rightful Exonerations, and What Should Be Done to Fix Them*, 44 HOFSTRA L. REV. 151, 152 (2015).

66. See, e.g., MODEL RULES OF PROF'L CONDUCT, *supra* note 23 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); see generally Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L. J. 607 (1999).

avoid convicting innocent people.<sup>67</sup> That Hinton was wrongly convicted suggests at least on the face of it that the prosecutor did not act reasonably.

For one thing, the prosecutor had a gatekeeping responsibility, as Bennett Gershman and others have discussed.<sup>68</sup> A prosecutor is not just a trial lawyer in the adversary process. The prosecutor decides whether or not a defendant will be charged with a crime. The grand jury does not have sole responsibility: It cannot initiate a prosecution without the prosecutor's assent.<sup>69</sup> Knowing the fallibility of the criminal justice system, good prosecutors should not prosecute a case unless they are reasonably convinced that the accused is guilty.<sup>70</sup> In hindsight, one might explore whether a prosecutor in good conscience could have been convinced of Hinton's guilt, or whether the prosecutor should have viewed the evidence more skeptically. For example, did the prosecutor fairly evaluate the credibility of Hinton's alibi witnesses? Did the prosecutor sufficiently scrutinize the reliability of the one eyewitness's photo identification and of the forensic testimony? Prosecutors review evidence critically when it is exculpatory or otherwise inconsistent with the prosecution's theory. Did the prosecutors examine the inculpatory evidence in the same manner?

Further, to protect against wrongful convictions, good prosecutors should not introduce unreliable evidence, even if, for disciplinary purposes, they *may* do so.<sup>71</sup> It is unfair for prosecutors to leave it to lay juries to determine the credibility of dubious evidence. A prosecutor has a gate-keeping function to assure the credibility of evidence: If prosecutors themselves do not reasonably believe testimony, they should not present it to the jury. And particularly in the case of foren-

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67. See generally Zacharias & Green, *supra* note 58.

68. See, e.g., Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 *FORDHAM URB. L. J.* 513, 521 (1992); Green, *supra* note 24, at 1587–88.

69. See, e.g., *United States v. Cox*, 342 F.2d 167, 172 (5th Cir. 1965) (concluding that “the signature of the Government attorney is necessary to the validity of the indictment and the affixing or withholding of the signature is a matter of executive discretion which cannot be coerced or reviewed by the courts”).

70. See generally Green & Yaroshefsky, *supra* note 41.

71. Cf. Jane Campbell Moriarty, “*Misconvictions*,” *Science, and the Ministers of Justice*, 86 *NEB. L. REV.* 1, 23–24 (2007) (arguing that prosecutors should be ethically restrained from introducing unreliable evidence); Myrna S. Raeder, *See No Evil: Wrongful Convictions and the Prosecutorial Ethics of Offering Testimony by Jailhouse Informants and Dishonest Experts*, 76 *FORDHAM L. REV.* 1413 (2007) (arguing for greater ethical restraint on prosecutors' use of testimony from jailhouse informants because of the informants' inherent unreliability); Zacharias & Green, *supra* note 58, at 22 (“[T]he existing specific rules do not address much of the [prosecutorial] conduct that contributes to unjust convictions. . . . For example, . . . the codes seem to allow prosecutors to offer questionable evidence unless they ‘know’ it to be false, even though exploiting unreliable evidence may lead to an unjust conviction.”). But see David S. Caudill, *Lawyers Judging Experts: Oversimplifying Science and Undervaluing Advocacy to Construct an Ethical Duty?*, 38 *PEPP. L. REV.* 675 (2011) (arguing that scientific evidence is too complex to expect prosecutors to vet its reliability).

sic evidence that a jury lacks the scientific and technical capability to evaluate, prosecutors should ensure the reliability of the testimony. Was that done by Hinton's prosecutors?

When the defense lawyer presented the best expert he could find for the money, the prosecutors attacked his qualifications, giving the misimpression that no well-qualified expert would support the defense. Good prosecutors have a duty to ensure that the criminal trial is procedurally fair<sup>72</sup>—that the defense has the ability to put the prosecution's proof to the test in an adversary proceeding.<sup>73</sup> Was it fair for the trial prosecutors to exploit the defense's lack of funding by attacking its expert's credentials in this manner?

Consider the state lawyers who defended the conviction over the course of decades, as scientific understandings evolved regarding the unreliability of firearms analysis as used in Hinton's trial. Given all we now know about wrongful convictions, shouldn't the Alabama state lawyers develop a conviction integrity process, like those in some states and localities, to review plausible claims of wrongful convictions in light of new evidence and new scientific understandings?<sup>74</sup> At some earlier point, given that Hinton's conviction rested fundamentally on the forensic evidence—the supposed match between Hinton's mother's gun and the bullets from the three shootings—didn't the prosecutors have a responsibility to reconsider state experts' trial testimony and ascertain whether it would be confirmed using contemporary forensic techniques? As Hinton put it when he was released: "All they had to do was to test the gun, but when you think you're high and mighty and you're above the law, you don't have to answer to nobody."<sup>75</sup>

And what of the state lawyers who opted vigorously to justify Hinton's conviction despite the unfairness of his trial—the absence of an adversary testing of the state's forensic testimony—because the defense lawyer did not know to ask for funding for an expert witness with credentials equaling those of the state's experts? The state's lawyers insisted implausibly that Hinton's lawyer performed just fine—an argument ultimately rejected by every Supreme Court Justice from the most moderate to the most pro-law-enforcement. And to the bitter end, through the course of the Supreme Court argument and thereafter, the state Attorney General maintained that a better-quali-

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72. MODEL RULES OF PROF'L CONDUCT, *supra* note 23 ("This responsibility [as a minister of justice] carries with it specific obligations to see that the defendant is accorded procedural justice . . .").

73. Cf. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991). See generally Green, *supra* note 66.

74. See generally Green & Yaroshefsky, *supra* note 41.

75. Jason Hanna & Ed Payne, *Alabama Inmate Freed After Nearly 30 Years on Death Row*, CNN (Apr. 3, 2015), <http://www.cnn.com/2015/04/03/us/alabama-death-row-inmate> [<http://perma.cc/E4G7-YGYB>].

fied defense expert would not have made a difference. Do prosecutors have a duty to refrain from making legal arguments that they do not reasonably believe,<sup>76</sup> and could the state lawyers here actually have believed what they were saying?

When the U.S. Supreme Court sent the case back down and an Alabama state court judge set aside Hinton's conviction, for how long should the state prosecutor have waited before owning up to the fact that there was no genuine case against Hinton?

And finally, after the courts found that Hinton had been denied a fair trial because his defense was underfunded, and after contemporary forensic experts found that there was no evidentiary foundation for a retrial, and after Hinton was released, should any of the state's lawyers have engaged in public reflection or issued a public apology? According to the *New York Times*: "The prosecutors who filed the motion to dismiss the case did not respond to messages seeking comment, and, through a spokesman, the Alabama attorney general declined to be interviewed."<sup>77</sup>

In contrast, the public recently heard from a lawyer who had prosecuted a Louisiana man, Glenn Ford, who was exonerated and freed after thirty years on death row.<sup>78</sup> The former prosecutor expressed remorse, supported a call for state compensation of Ford, apologized to Ford and his family, to the victim's family, and to the judge and jury, and acknowledged his responsibility as a prosecutor for the miscarriage of justice.<sup>79</sup> The former prosecutor had not acted unlawfully—he had not, for example, withheld exculpatory evidence. But he acknowledged that obeying the law is not the full measure of a prosecutor's ethical responsibility. He reflected:

Had I been more inquisitive, perhaps the evidence [of Ford's innocence] would have come to light years ago. But I wasn't, and my inaction contributed to the miscarriage of justice in this matter. . . . My mindset was wrong and blinded me to my purpose of seeking justice, rather than obtaining a conviction of a person who I be-

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76. See generally Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309 (2001).

77. Alan Blinder, *Alabama Man Freed After Decades on Death Row*, N.Y. TIMES (Apr. 3, 2015), <http://www.nytimes.com/2015/04/04/us/anthony-ray-hinton-alabama-prison-freed-murder.html> [<http://perma.cc/J4BM-DPRF>].

78. Matt Schudel, *Glenn Ford, Wrongfully Convicted in Louisiana Murder Case, Dies at 65*, WASH. POST (July 4, 2014), [https://www.washingtonpost.com/national/glenn-ford-wrongfully-convicted-in-louisiana-murder-case-dies-at-65/2015/07/04/0dfa3cec-2266-11e5-84d5-eb37ee8eaa61\\_story.html](https://www.washingtonpost.com/national/glenn-ford-wrongfully-convicted-in-louisiana-murder-case-dies-at-65/2015/07/04/0dfa3cec-2266-11e5-84d5-eb37ee8eaa61_story.html) [<http://perma.cc/P77H-CSPT>].

79. *Id.*; *30 Years on Death Row*, CBS NEWS: 60 MINUTES (Oct. 11, 2015), <http://www.cbsnews.com/news/30-years-on-death-row-exoneration-60-minutes> [<http://perma.cc/9TQ4-B5S2>]; A.M. "Marty" Stroud III, *Lead Prosecutor Apologizes for Role in Sending Man to Death Row*, SHREVEPORT TIMES, <http://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063/> [<http://perma.cc/6CQC-J5QW>] (publishing the prosecutor's letter to the editor supporting compensation for the wrongfully convicted and apologizing for his actions in Ford's trial).



lieved to be guilty. I did not hide evidence, I simply did not seriously consider that sufficient information may have been out there that could have led to a different conclusion.<sup>80</sup>

The former prosecutor acknowledged that he had given no thought to the defense lawyers' inexperience and lack of adequate funding, to the unfairness of trying a Black man before an all white jury, and to the use of forensic testimony that was predicated on "junk science."<sup>81</sup> He described his attitude as a prosecutor in the following terms: "In 1984, I was 33 years old. I was arrogant, judgmental, narcissistic and very full of myself. I was not as interested in justice as I was in winning."<sup>82</sup>

Prosecutors are not legally obligated to account for themselves like this when it is discovered that they secured or defended wrongful convictions. But do they have a moral obligation to do so—an obligation not only to the exonerated person but to the public, so that current prosecutors can learn from their mistakes and procedures can be adopted to reduce the risk of wrongful convictions?<sup>83</sup> The state's lawyers had a central role in putting Anthony Ray Hinton on death row for half a lifetime for crimes for which there is no reason to think he was responsible. Where are the prosecutors and why are they silent?

The Supreme Court's decision in Hinton's case might lead one to conclude that defense counsel was principally to blame for Hinton's wrongful conviction, but that seems unfair. Even assuming the defense lawyer had alerted the court to its legal authority to provide additional funds for a defense expert, it is not certain the court would have exercised its authority. Had the court done so, it is not certain that a better-credentialed defense expert would have been retained, that the prosecutor would have been significantly less effective in discrediting the better-credentialed expert, or that, even if the prosecution were less effective, the jury would have found a reasonable doubt. At every turn, the prosecutor had significantly more power to avert an injustice

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80. Stroud, *supra* note 79; see also Conor Friedersdorf, *Confessions of a Prosecutor Who Sent an Innocent to Death Row*, THE ATLANTIC (Mar. 24, 2015), <http://www.theatlantic.com/national/archive/2015/03/confessions-of-a-prosecutor-who-sent-an-innocent-to-death-row/388496> [<http://perma.cc/NZF8-3SVR>].

81. Stroud, *supra* note 79.

82. *Id.*; see also Debra Cassens Weiss, *Prosecutor: I Was "Arrogant, Judgmental, Narcissistic" in Capital Prosecution of Now-Exonerated Man*, ABA J. (Mar. 25, 2015, 8:31 AM), [http://www.abajournal.com/mobile/article/prosecutor\\_i\\_was\\_arrogant\\_judgmental\\_narcissistic\\_in\\_capital\\_prosecution\\_of](http://www.abajournal.com/mobile/article/prosecutor_i_was_arrogant_judgmental_narcissistic_in_capital_prosecution_of) [<http://perma.cc/PHE9-N8B9>]. Notably, this was an inversion of the traditional expectation of prosecutors. See MODEL RULES PROF'L CONDUCT, *supra* note 23 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

83. Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Mistakes?*, 31 CARDOZO L. REV. 2161 (2010); Green, *supra* note 66, at 637 ("[C]onsider how a prosecutor might respond upon discovering only after obtaining a conviction that the accused individual was innocent. What is the appropriate response and, in particular, what, if anything, should the prosecutor learn from the mistake?").

and to do so without reliance on any other actor—the judge, the jury, or opposing counsel.

The ABA, the National Association of District Attorneys, and other institutional representatives of the bar develop disciplinary, prudential, and aspirational standards of conduct for prosecutors.<sup>84</sup> But these institutions rarely examine the facts of particular cases to determine whether prosecutors adhered to the standards and, if so, whether the standards are adequate to avert injustices. In cases of demonstrable injustice such as Hinton's, the bar should measure the prosecutors' conduct against its standards for several purposes: to elaborate on the meaning of the standards in actual practice; to critique prosecutors' work; and to determine the adequacy of existing standards. As to the last, it is important to learn whether existing norms are up to the task of averting and correcting injustices.

#### IV. PROSECUTORS' DUTY TO AVERT SYSTEMIC INJUSTICES

Individual injustices add up. Convictions of innocent people add up, but also so do seemingly smaller injustices, such as illegal stops and frisks, denials of bail to individuals who pose no flight risk, and excessive sentences, all of which are now widely viewed as systemic problems.<sup>85</sup> To elaborate prosecutorial norms, one might look not only at individual injustices but also at systemic injustices.

Many injustices, Hinton's wrongful conviction among them, fit into a broader pattern—injustice wholesale rather than retail. In Hinton's case, the broader patterns include the misuse of forensic evidence to procure wrongful convictions.<sup>86</sup> Of course, in wrongful conviction cases such as Hinton's, which involved a criminal trial, the prosecutors have a visible and central role. But in other examples, prosecutors'

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84. NAT'L DIST. ATTORNEYS ASS'N, NAT'L PROSECUTION STANDARDS (3d ed.), <http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf> [http://perma.cc/XB78-RABJ].

85. See, e.g., Margaret Colgate Love, *Clemency is Not the Answer (Updated)*, CRIME REP. (July 13, 2015, 11:54 AM), <http://www.thecrimereport.org/viewpoints/2015-07-our-approach-to-clemency-needs-a-reset> [http://perma.cc/8U6U-4V3M]; Wade Henderson & Nancy Zirkin, *Vote Yes on H.R. 3713, the Sentencing Reform Act of 2015*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (Nov. 17, 2015), <http://www.civilrights.org/advocacy/letters/2015/vote-yes-on-hr-3713-the.html> [http://perma.cc/J6B8-4Z2S]; *Stop and Frisk in Chicago*, ACLU OF ILL., STOP AND FRISK IN CHICAGO 3, 6 (Mar. 2015), [http://www.aclu-il.org/wp-content/uploads/2015/03/ACLU\\_StopandFrisk\\_6.pdf](http://www.aclu-il.org/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf).

86. Sarah Turberville, *US Supreme Court: Hinton v. Alabama: Effective Counsel and Forensic Expertise*, NAPD NEWSLETTER (Nat'l Ass'n for Pub. Def., Frankfort, Ky.), Mar. 2014, at 13, 14, <http://publicdefenders.us/sites/default/files/NAPD%20March%202014%20Newsletter%20PDF.pdf> [http://perma.cc/H72K-WNQD]. For further examples of misuses of forensic evidence, see Kimberly Cogdell Boies, *Misuse of DNA Evidence Is Not Always a "Harmless Error": DNA Evidence, Prosecutorial Misconduct, and Wrongful Conviction*, 17 TEX. WESLEYAN L. REV. 403, 414–16 (2011); Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 172–95 (2007).

role is less obvious. Mass incarceration can be blamed on legislatures that establish drug crimes carrying high sentences;<sup>87</sup> no individual prosecutor, bringing a handful of drug cases, will see himself or herself as being responsible. Prosecutors will see themselves as even less responsible for wrongful policing practices. But that is because prosecutors tend to take too cramped a view of their role and responsibilities.

Consider Ferguson. After a Ferguson police officer, Darren Wilson, fatally shot Michael Brown, and Ferguson residents complained of pervasive racism in local law enforcement, the Civil Rights Division of the U.S. Department of Justice undertook a six-month investigation of Ferguson's law enforcement practices culminating in a 102-page report.<sup>88</sup> Federal investigators found that the Ferguson police department and courts were operating a tax-the-poor money-making scheme: Residents were issued citations for traffic offenses and other violations that they may or may not have committed, ordered to pay fines, ordered to pay penalties if they did not pay the fines, and imprisoned if they could not pay the fines and penalties.<sup>89</sup> The fines and penalties were essential to the city budget.<sup>90</sup>

The policing policy rested on pervasive unconstitutional and otherwise illegal practices, including detentions without reasonable suspicion, arrests without probable cause and with the use of excessive force, and arrests for conduct that did not violate the cited ordinance, or based on vague ordinances of questionable constitutionality, or for constitutionally protected speech.<sup>91</sup> These practices, the report found, harmed African-Americans disproportionately and were animated by racial bias.<sup>92</sup> And the Ferguson municipal court played a central role in imposing fines and issuing warrants and orders of incarceration to coerce payment, without regard to the defendants' ability to pay.<sup>93</sup>

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87. See, e.g., James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. Rev. 21, 48 (2012); Andrew E. Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 133 (2011).

88. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1 (2015), [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [hereinafter DOJ FERGUSON REPORT] [<http://perma.cc/UCQ4-VXBS>].

89. *Id.* at 2–4.

90. DOJ FERGUSON REPORT, *supra* note 88, at 2, 9; Richard Pérez-Peña, *The Ferguson Police Department: The Justice Department Report, Annotated*, N.Y. TIMES (Mar. 4, 2015), <http://www.nytimes.com/interactive/2015/03/04/us/ferguson-police-justice-department-report.html> [<http://perma.cc/J3HU-AUBF>]. For more on the effect on poor and minority communities of the practice of using jail time to coerce payment of municipal fines and penalties, see Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 HARV. C.R.-C.L. L. REV. (forthcoming 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2597908](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2597908) [<http://perma.cc/PL84-4CRD>].

91. DOJ FERGUSON REPORT, *supra* note 88, at 15, 28–31.

92. *Id.* at 62–70.

93. *Id.* at 42–62.

Few individuals caught up in this process were afforded lawyers.<sup>94</sup> This illustrates that the problem of access to counsel has not been fully resolved even in criminal cases.<sup>95</sup> The DOJ report raised concern whether individuals were being denied a legal right to assigned counsel when they were arrested and detained for nonpayment.<sup>96</sup> But the report did not explicitly address the role of another group of lawyers: the Ferguson prosecutors. It mentioned them only in passing.

The report observed that “[t]he City’s Prosecuting Attorney and her assistants officially prosecute all actions before the court,” but that in most cases that came before the courts, they just did not involve themselves.<sup>97</sup> It is not that they were unaware of what was going on, however. The report recounted an occasion when the acting prosecutor lectured the police about issuing summonses for as many violations as possible in order to maintain the “correct volume” for revenue generation.<sup>98</sup> Surely, the prosecutors had a responsibility to ensure that the city’s prosecutorial power was not used in a racist and oppressive manner but was employed only for legitimate reasons. But not only did the prosecutors abdicate their responsibility, they retaliated against the rare defendants who sought to defend themselves at trial.<sup>99</sup> They also exempted those in power. The report offered several anecdotes to illustrate the racist double-standard of Ferguson’s law enforcement practices: while African-Americans with traffic tickets were prosecuted to the hilt, prosecutors “fixed” tickets at the request of court personnel, public officials, and police.<sup>100</sup>

The story of Ferguson policing depicted in the DOJ report is about criminal injustice involving not only the punishment of some who did nothing wrong but also the punishment of many individuals excessively and for improper ends; it is a story about criminal injustice intertwined with economic and racial injustice; and it is a story of unfair process, including but not limited to denial of defense counsel. But if one digs down, it is also a story about prosecutorial indifference and complicity. As blameworthy as the police and courts clearly were, that did not absolve the prosecutors.<sup>101</sup>

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94. *Id.* at 58, 100.

95. *See supra* notes 10–14 and accompanying text.

96. DOJ FERGUSON REPORT, *supra* note 88, at 58.

97. *Id.* at 8. The Ferguson City Prosecutor should be distinguished from Robert McCulloch, the prosecutor of St. Louis County, Missouri, who presented Darren Wilson’s case to the grand jury. *See, e.g.*, Pema Levy, *Ferguson Prosecutor Robert P. McCulloch’s Long History of Siding with the Police*, NEWSWEEK (Oct. 29, 2014, 6:33 AM), <http://www.newsweek.com/2014/09/12/ferguson-prosecutor-robert-p-mccullochs-long-history-siding-police-267357.html> [<http://perma.cc/8YCM-DJ67>].

98. DOJ FERGUSON REPORT, *supra* note 88, at 11.

99. *Id.* at 43–44.

100. *Id.* at 74–75.

101. In contrast to DOJ Ferguson Report, the January 2015 report on the agreement requirements between the Montana Attorney General, the U.S. Department of Justice, and the Missoula County Attorney’s Office on the Handling of Sexual Assault

At the very least, the prosecutors should have been present. The state law made prosecutors responsible to prosecute cases before the municipal court, but except when there was a trial, the prosecutors were nowhere to be found. If, as some judges have found, defendants have a constitutional right to be prosecuted only by a disinterested prosecutor,<sup>102</sup> shouldn't defendants at minimum have a right to a prosecutor, period? If not as a constitutional matter, then as a matter of public policy it seems wrong to put prosecutorial power in the hands of the police, who are not lawyers, who are not obligated to adhere to the standards governing the professional conduct of lawyers, and who are not, by professional training and tradition, expected to exercise discretion in light of the obligation to seek justice.<sup>103</sup> Private corporations are not allowed to appear in judicial proceedings without a lawyer.<sup>104</sup> Surely, the need for public entities to appear through counsel as a general matter, and in criminal cases in particular, is at least as compelling.

Further, the prosecutors should have been personally involved in every case, making the decisions that prosecutors would be expected to make in these cases as a matter of legal judgment and professional discretion. This includes determining whether there was sufficient evidence to justify all of the initial charges, whether the charges reflected appropriate understandings of the underlying laws, and whether the charged conduct was constitutionally protected. It also includes determining whether individuals should be penalized and imprisoned for failure to pay fines or whether punishment and coercive use of imprisonment was illegal because the payments were unaffordable; whether the laws were being executed proportionately and fairly, without regard to individuals' race and economic status; and whether the entire use of police power as a revenue generating device was a misuse of that power. Ideally, prosecutors would have made these decisions consistently with a professional commitment to promote fair process, proportional punishment, and equal justice.<sup>105</sup>

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Cases is much more prosecutor-centric, mentioning prosecutors on virtually every page. See MONT. ATTORNEY GEN.'S OFFICE, QUARTERLY REPORT (Jan. 2015), <https://media.dojmt.gov/wp-content/uploads/Quarterly-Report-January-2015.pdf> [http://perma.cc/SM5F-54BK].

102. See, e.g., *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 814–15 (1987) (Blackmun, J., concurring). See generally Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85 (1992).

103. See generally Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189 (2014); Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 11 (2009); see also Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. F. 225 (2015).

104. See, e.g., *Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1385 (11th Cir. 1985) (holding that a corporation may not appear pro se but must be represented by counsel).

105. MODEL RULES OF PROF'L CONDUCT, *supra* note 23 ("This responsibility [as a minister of justice] carries with it specific obligations to see that the defendant is accorded procedural justice . . ."); see also Green, *supra* note 66.

But beyond the role of prosecutors in individual cases is their role in averting systemic injustice.<sup>106</sup> The bar and commentators have discussed the prosecutor's role as going beyond the task of investigating and trying individual cases, to include proactively promoting the community's safety and welfare, and improving the criminal law and legal process.<sup>107</sup> Many prosecutors have themselves acknowledged the need to go beyond promoting criminal law enforcement ends, to promote other social purposes, including those that may be in tension with the traditional ends of criminal punishment; that is, in part, the rationale for community lawyering, which many prosecutors and their professional associations have embraced.<sup>108</sup> Examples of systemic injustice, as in Ferguson, suggest that viewing individual criminal cases in the broader societal context—seeing the big picture—should not be an optional aspect of prosecuting, or an endeavor only for progressive or innovative prosecutors. It should be obligatory. The bar should consider whether systemic injustice reflects prosecutors' failure to live up to established standards and, if not, whether part of the problem is the standards' inadequacy.

## V. CONCLUSION

Happily, the organized bar in the United States considers itself to be in the justice business. Viewing itself primarily as a public-spirited association, not as the self-protective trade association that some portray,<sup>109</sup> the ABA in particular asserts a commitment to improving legal processes and promoting justice.<sup>110</sup> Nowadays, criminal justice needs the bar's attention every bit as much as civil justice.

If the bar's commitment to access to criminal justice is to be most credible and meaningful, it needs to examine prosecutors' role more closely and scrutinize prosecutions that go awry. When criminal injustices occur, the bar should ask—and try to answer—not only whether prosecutors caused the injustice but whether good prosecutors could have prevented it. Judges can rarely explore this question because they are largely confined to deciding issues that come before them. The national bar has the expertise, stature, objectivity, and credibility

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106. Green, *supra* note 32.

107. See e.g., ABA STANDARDS *supra* note 26, at Standard 3-1.2(d) (“It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.”).

108. See, e.g., Green & Burke, *supra* note 33.

109. See, e.g., Mark Green, *The ABA as Trade Association*, in VERDICTS ON LAWYERS 3 (Ralph Nader & Mark Green eds., 1976).

110. See Elizabeth Chambliss & Bruce A. Green, *Some Realism about Bar Associations*, 57 DEPAUL L. REV. 425 (2008).

to examine and encourage dialogue on what it means to be a good prosecutor in the twenty-first century and how well contemporary prosecutors measure up.