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# I Got the Shotgun: Reflections on The Wire, Prosecutors, and Omar Little

Alafair Burke

*Maurice A. Deane School of Law at Hofstra University*

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# **I Got the Shotgun: Reflections on *The Wire*, Prosecutors, and Omar Little**

Alafair S. Burke\*

## **I. INTRODUCTION**

*The Wire*, although it features police and prosecutors, is not a show that sets out to be about the law or the criminal justice system. Instead, the series creator, David Simon, views *The Wire* as a critique of the excesses of unencumbered capitalism:

Thematically, it's about the very simple idea that, in this Postmodern world of ours, human beings—all of us—are worth less. . . . Whether you're a corner boy in West Baltimore, or a cop who knows his beat, or an Eastern European brought here for sex, your life is worth less. It's the triumph of capitalism over human value. This country has embraced the idea that this is a viable domestic policy. It is. It's viable for the few. But I don't live in Westwood, L.A., or on the Upper West Side of New York. I live in Baltimore.<sup>1</sup>

*The Wire* is also a show about institutions, the people trapped inside of them, and a society made static by their inaction, indifference, and ineptitude. Whether the series was exploring the drug trade, police departments, city hall, unions, or public schools, the individual actors within those systems were depicted as having little control over either the institutions or their individual fates within them. As a result, the constituencies supposedly served by those institutions continually “got the shaft.”

To say that *The Wire* is about the tolls of unmitigated capitalism and inflexible bureaucracies is not to say that the show is silent on, or indifferent to, the criminal justice system that encompasses its main characters. Perhaps because I am a former prosecutor who now teaches criminal law and procedure and writes about the discretionary decisions of law enforcement, I have a tendency to focus on the series' messages about the criminal justice system. I became especially

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\* Professor, Hofstra Law School. I am thankful to Professors Susan Bandes, Bennett Capers, Jeffrey Fagan, and David Sklansky for including me on the panel at the annual conference of the Law & Society Association that influenced this essay, and to Stephen Cheng, Sean Doherty, and Erin Mitchell for their valuable research assistance. I also want to thank David Simon for participating on the panel and for creating hours of thoughtful television viewing.

<sup>1</sup> Meghan O'Rourke, *Behind The Wire: David Simon on Where the Show Goes Next*, SLATE (Dec. 1, 2006, 2:27 PM), <http://www.slate.com/id/2154694/pagenum/all/#p2>.

intrigued by an episode in the first season in which police and prosecutors rely on the testimony of Omar Little in a murder trial, despite doubts about Omar's first-hand knowledge of the crime. This essay is a reflection on the depiction of law enforcement in *The Wire*, both generally and with respect to the single scene that first made me a *Wire* addict.

## II. REFLECTIONS ON THE LEGAL SYSTEM

Perhaps because *The Wire* was not intended to be primarily about the criminal justice system, the directness of *The Wire*'s assault on that system differentiates it from shows that are actually about law enforcement. *Law and Order*, for example, lionizes police and prosecutors, the two separate yet equally important groups that represent the people. More importantly, it largely celebrates the system in which those two actors operate. Sure, Jack McCoy was once brought up on ethical charges for hiding a material witness from the defense, but he was cleared.<sup>2</sup> ADA Serena Southerlyn also stretched ethical bounds by pretending to be a defense lawyer, but she did so to resolve a life-threatening hostage situation.<sup>3</sup> Similarly, when Detective Lennie Briscoe stretches the truth on the stand, he does so to gloss over an immaterial fact that threatens the conviction of a dangerous stalker.<sup>4</sup> For the most part though, in the world of *Law and Order*, bad guys are arrested, good guys prevail, order is restored, and justice usually prevails—all within the system. Even a more rebellious show like *The Shield* assumes that the criminal justice system is presumptively legitimate, but then explores the havoc that a rare bad apple like Vic Mackey can reap from inside of it.

*The Wire*, in contrast, does not simply nip at the grey edges of a black and white legal system that differentiates between good and evil. Instead, as it does with seemingly all bureaucracies, the show subtly asks its viewers to question the entire law enforcement enterprise. How can we trust detectives who would contemplate faking their own injuries in order to retire early?<sup>5</sup> How can we trust a judge who would let his own political ambitions affect decisions about whether to

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<sup>2</sup> See *Law & Order: Monster* (NBC television broadcast May 20, 1998); *Law & Order: Cherished* (NBC television broadcast Sept. 23, 1998).

<sup>3</sup> See *Law & Order: DR 1-102* (NBC television broadcast Jan. 30, 2002).

<sup>4</sup> See *Law & Order: Stalker* (NBC television broadcast Apr. 15, 1998). When Lieutenant Van Buren scolds Briscoe that he was "an inch away from perjury," he responds, "More like a foot, foot and a half." *Id.*

<sup>5</sup> *The Wire: Old Cases* (HBO television broadcast June 23, 2002). Detectives Mahone and Polk, two "humps" on the squad, celebrate a minor injury Mahone suffers because it will allow him to retire early. Mahone suggests that Polk throw himself down a flight of stairs to enable him to do the same. *Watching The Wire: Episode Four: Old Cases*, REVIEWS: DVD & TELEVISION, <http://rev-views.blogspot.com/2008/11/watching-wire-episode-four-old-cases.html> (last visited Mar. 6, 2011).

approve a wiretap?<sup>6</sup> How can we trust a corrections system that allows D'Angelo to be murdered and then faults his death a suicide?<sup>7</sup>

No other piece of pop culture has ever had as much to say about our nation's drug policy as *The Wire*. When D'Angelo Barksdale resists pressure to flip on his Uncle Avon, but is later murdered in custody for his perceived disloyalty, *The Wire* teaches its viewers something about the Catch-22 suffered by would-be informants and the failure of our corrections system to protect even the best-intentioned prisoners.<sup>8</sup> As soldier upon soldier in the drug dealing operation is either killed or incarcerated, only to be replaced on the same corner and in the same role, *The Wire* directly takes on the assumptions underlying our War on Drugs. Indeed, *The Wire*'s writers have expressed their distrust of prevailing legal norms publicly, embracing jury nullification in non-violent drug cases as a form of "legitimate protest."<sup>9</sup>

One way in which *The Wire* subtly calls into question the legitimacy of supposedly legitimate enterprises is by drawing narrative parallels between the drug game on the street and the rules of government and recognized institutions and bureaucracies. It is no coincidence that Avon's number two, Stringer Bell, continually applies lessons from his economics classes at the local community college to his neighborhood trade and runs meetings of his soldiers using Robert's Rules of Order. In the fifth episode of Season Two, "Undertow," Bell is worried about the operation's market share because of concerns about the reputation of its product on the street.<sup>10</sup> In a discussion with his professor, he realizes that a name change is in order after the professor invokes the example of WorldCom adopting the MCI corporate name in an attempt to ditch the stigma of its infamous accounting fraud scandal.<sup>11</sup> In a subsequent scene of the episode, *The Wire*'s writers cut to the image of a government seal for Immigration and Naturalization being removed from the wall only to be replaced by a new Department of Homeland Security sign.<sup>12</sup>

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<sup>6</sup> Judge Daniel Phelan is initially a friend to Detective McNulty and supports the use of wiretaps in a sprawling investigation of Avon Barksdale's operation. When he realizes that his authorization is costing him political goodwill, he pulls back on his support, but ultimately supports the police again by authorizing a tap on Stringer Bell's telephone. *Daniel Phelan*, WIKIA, [http://thewire.wikia.com/wiki/Daniel\\_Phelan](http://thewire.wikia.com/wiki/Daniel_Phelan) (last visited Mar. 6, 2011).

<sup>7</sup> See *The Wire: All Prologue* (HBO television broadcast July 6, 2003); *The Wire: Backwash* (HBO television broadcast July 13, 2003).

<sup>8</sup> See *The Wire: All Prologue* (HBO television broadcast July 6, 2003).

<sup>9</sup> Ed Burns et al., *Saving Cities, and Souls*, TIME, Mar. 17, 2008, at 50. Cf. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995) (advocating jury nullification in trials of African-American defendants for non-violent offenses).

<sup>10</sup> See *The Wire: Undertow* (HBO television broadcast June 29, 2003).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

## III. YOU GOT THE BRIEFCASE . . .

It is through the lens of *The Wire*'s overall challenge to recognized bureaucracies in general and to the criminal justice system in particular that I viewed one of my favorite scenes from the series, in the sixth episode of Season Two, "All Prologue."<sup>13</sup> The scene's star is Omar Little,<sup>14</sup> a self-described "rip and run" artist.<sup>15</sup> When asked to explain the meaning of that term, he says, "I robs drug dealers."<sup>16</sup> As demonstrated by his chosen profession, Omar is guided by his own moral code—"Robin Hood shit," as Bell complains.<sup>17</sup> He boasts to Detective William "Bunk" Moreland that he targets Barksdale's crew because of its practice of murdering civilians: "I ain't never put my gun on nobody that wasn't in the game."<sup>18</sup> Even Bunk has to concede, "A man must have a code."<sup>19</sup> We see Omar's code in action when he robs a shopkeeper of his drug stash but then takes the time to pay cash for a pack of cigarettes, waiting for proper change.<sup>20</sup>

In "All Prologue," Omar agrees to testify for the prosecution against a Barksdale soldier named Bird who has been charged with murdering a state witness. Omar's testimony is vengeance for Bird's involvement in the murder of his boyfriend, Brandon, whose death Barksdale ordered in retaliation for a robbery that Omar and Brandon had committed. Omar's cross-examination by drug lawyer, Maurice Levy, is one of the most memorable courtroom scenes in television:

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<sup>13</sup> The title refers to D'Angelo's comments about *The Great Gatsby*, shortly before he was murdered for trying to put his life with Avon behind him:

He's saying that the past is always with us. Where we come from, what we go through, how we go through it—all this shit matters. . . . Like at the end of the book, ya know, boats and tides and all. It's like you can change up, right, you can say you're somebody new, you can give yourself a whole new story. But, what came first is who you really are and what happened before is what really happened. And it don't matter that some fool say he different cuz the things that make you different is what you really do, what you really go through. Like, ya know, all those books in his library. Now he frontin with all them books, but if you pull one down off the shelf, ain't none of the pages have ever been opened. He got all them books, and he hasn't read nearly one of them. *Gatsby*, he was who he was, and he did what he did. And cuz he wasn't ready to get real with the story, that shit caught up to him. That's what I think, anyway.

*The Wire: All Prologue* (HBO television broadcast July 6, 2003).

<sup>14</sup> While running for president, then-candidate Barack Obama identified Omar Little as his favorite television character. Perhaps demonstrating the cautiousness that restrains political candidates, Obama felt the need to add the phrase, "[t]hat's not an endorsement." Sam Delaney, *Omar Little is the Gay Stick-Up Man Who Robs Drug Dealers for a Living in The Wire...*, THE GUARDIAN, July 19, 2008, (The Guide), at 5.

<sup>15</sup> *The Wire: All Prologue* (HBO television broadcast July 6, 2003).

<sup>16</sup> *Id.*

<sup>17</sup> *The Wire: Game Day* (HBO television broadcast August 4, 2002).

<sup>18</sup> *The Wire: One Arrest* (HBO television broadcast July 14, 2002).

<sup>19</sup> *Id.*

<sup>20</sup> *See The Wire: Home Rooms* (HBO television broadcast Sept. 24, 2006).

**Levy:** You are feeding off the violence and the despair of the drug trade. You're stealing from those who themselves are stealing the lifeblood from our city. You are a parasite who leeches off the culture of drugs . . .

**Omar:** Just like you, man.

**Levy:** Excuse me? What?

**Omar:** I got the shotgun. You got the briefcase. It's all in the game though, right?<sup>21</sup>

The most obvious comparison in Omar's cross-examination scene is between Omar and Levy, but whether intentionally or not, *The Wire*'s writers also hint at parallels between Omar and members of law enforcement. Like Omar and Levy, law enforcement can also be said to profiteer from the drug war. Individual officers benefit from the quick and easy overtime racked up from felony drug busts. In the first season, the writers depict a lazy detective's comment that cases go from "red to black" (meaning open to closed, as noted by the color of ink used to list a case on the whiteboard) "by way of green" (meaning overtime paid to officers).<sup>22</sup> Police departments also skim money from the drug trade through asset forfeiture, frequently evading local mandates that forbid the use of such assets for non-law enforcement purposes by funneling the cases to federal prosecutors through "adoption" procedures.<sup>23</sup>

But the comparison I find most subtle and intriguing is the parallel between the moral codes of Omar and the cops and prosecutors who would put him on the stand despite doubts about whether he actually saw Bird pull the trigger. By using Omar as a witness, Detective McNulty and Assistant State's Attorney Ilene Nathan, like Omar, create their own moral code. Like Omar, they decide for themselves what is right. They entrust themselves to be the arbiters of truth outside of the formal legal system.

Perhaps it is because I worked as a prosecutor and often write about prosecutorial decision making that I was so interested in an earlier scene in which McNulty brings Omar to ASA Nathan for a proffer. Nathan asks Omar to leave the room and then asks McNulty whether Omar is telling the truth. Despite her concerns, she agrees to use Omar as a government witness but on one condition—that McNulty purchase Omar proper courtroom attire, "anything with a tie."<sup>24</sup> What ultimately matters to her is that she and McNulty both know Bird is guilty. Once that determination is made—by them, not a jury—the challenge is to prove his guilt, even if it means relying on the obviously self-interested Omar.

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<sup>21</sup> *The Wire: All Prologue* (HBO television broadcast July 6, 2003).

<sup>22</sup> *The Wire: The Detail* (HBO television broadcast June 9, 2002).

<sup>23</sup> See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 40–41 (1998); Karen Dillon, *State's Forfeiture Woes Trace to Federal Officials*, K.C. STAR, May 22, 2000, at A7, available at 2000 WL 7733243 (describing how law enforcement can evade local rules for forfeiture by handing off proceedings to federal agencies).

<sup>24</sup> See *The Wire: Undertow* (HBO television broadcast June 29, 2003).

## IV. POLICE AND PROSECUTORS AS OMAR LITTLE

That prosecutors believe they are entitled to determine for themselves what is just is a point that a show like *Law and Order* makes far less subtly than *The Wire*. Consider, for example, this representative exchange between District Attorney Adam Schiff and Assistant District Attorney Ben Stone from an early episode of the former:

**Schiff:** You want the jury to ignore the evidence.

**Stone:** No, Chris and Amy [the defendants] want the jury to look at the law. I'll get the jury to look at Chris and Amy.

**Schiff:** The law's supposed to be a shield, not a sword. They're despicable, yes. But by the letter of the law, they're not guilty.

**Stone:** The legislature could never have conceived of anything like this. Wrong should not win by technicalities. You know that yourself.

**Schiff:** Get these bastards off the street.<sup>25</sup>

The beauty of the writing on *The Wire* is that the show does not hit viewers over the head. It makes its points not in a single line of dialogue or even a single scene or episode, but across the course of five seasons. We watch the evolution of Omar Little, Witness for the Government, from beginning to end—his first meeting with the skeptical but unscrutinizing prosecutor, his shopping trip with McNulty to peruse possible suit purchases for his transformation to the witness stand, his direct and cross examination, and, finally, the scene in which he is rewarded for his cooperation. Outside the courtroom, we watch the prosecutor and McNulty celebrate Bird's conviction with Omar.<sup>26</sup> As the prosecutor hands Omar a "Get Out of Jail Free" card for future use, Bird passes them in the hallway and threatens Omar's life.<sup>27</sup> Even though Omar responds by telling Bird to "think on Brandon," neither Nathan nor McNulty inquires into Omar's apparent grudge against Bird.<sup>28</sup> After Nathan is gone, McNulty finally asks Omar whether he really witnessed Bird pull the trigger.<sup>29</sup> Omar's response: "Are you really asking?"<sup>30</sup> McNulty walks away in silence.<sup>31</sup>

With the government's tactics against Bird, we see the harsher side of law enforcement's "we decide who's innocent" tendencies. But in a later episode, we see its softer side as law enforcement uses its discretion to show leniency towards

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<sup>25</sup> *Law & Order: Misconception* (NBC television broadcast Oct. 29, 1991).

<sup>26</sup> *See The Wire: All Prologue* (HBO television broadcast July 6, 2003).

<sup>27</sup> *Id.*

<sup>28</sup> *See id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *See id.*

street junkie Bubbles.<sup>32</sup> Tormented by another vagrant's assaults and robberies, Bubbles concocts a "hot shot" of heroin and sodium cyanide that he assumes his enemy will steal and then use.<sup>33</sup> Instead, Bubbles's beloved protégé Sherrod stumbles upon the tainted drugs and dies from an overdose.<sup>34</sup> Wracked with guilt (and apparently understanding the doctrine of transferred intent), Bubbles turns himself into police and confesses.<sup>35</sup> However, a sympathetic sergeant decides not to charge him, even though the decision will adversely affect the homicide unit's all-important clearance statistics.<sup>36</sup>

The joy of watching Maurice Levy cross-examine Omar is that we know as viewers that Omar does in fact have a moral code when he explains, "I ain't never put my gun on no citizen."<sup>37</sup> And like Omar, ASA Nathan also distinguishes between a true innocent and someone in the game, deciding for herself what amounts to justice. But where a self-created, Robin-Hood-style vision of justice might be admirable in a rip-and-run artist, it is not so desirable in a prosecutor.

#### V. WHY PROSECUTORS MIGHT SEE THEMSELVES AS OMAR LITTLES

A prosecutor's duty to do justice is well known.<sup>38</sup> So is the fact that some prosecutors do not live up to that obligation, and it may be tempting to attribute ASA Nathan's decision to call someone like Omar Little to the stand as an example of failing to do justice. However, an alternative explanation for that decision is that prosecutors have a peculiarly prosecutorial understanding of their do-justice mission. Bruce Green, for example, has written that because of a "tradition of machismo," it is important to the prosecutorial culture to do justice in a "muscular," "unsentimental" way.<sup>39</sup> I have used the term "prosecutorial passion" to describe a prideful, warrior-like aspect of the culture.<sup>40</sup> Prosecutors have a tendency to see their lawyering not just as a form of employment, but as a

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<sup>32</sup> See *The Wire: Final Grades* (HBO television broadcast Dec. 10, 2006).

<sup>33</sup> *The Wire: That's Got His Own* (HBO television broadcast Dec. 3, 2006).

<sup>34</sup> *Id.*

<sup>35</sup> *The Wire: Final Grades* (HBO television broadcast Dec. 10, 2006).

<sup>36</sup> *Id.*

<sup>37</sup> *The Wire: All Prologue* (HBO television broadcast July 6, 2003).

<sup>38</sup> See STANDARDS FOR CRIM. JUSTICE §3-1.2 cmt. (1993). See also MODEL RULES OF PROF'L CONDUCT R. 3.8 (2004); *Berger v. United States*, 295 U.S. 78, 88 (1935) (holding that the prosecutor carries dual obligations both to punish the guilty and to protect the innocent).

<sup>39</sup> Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 609 (1999).

<sup>40</sup> Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 187 (2007). See also Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 271, 304 (2006) (observing a prosecutorial tendency toward a "warrior mindset").



calling.<sup>41</sup>

Consider, for example, an anecdote that Professor Angela Davis shares from her days in practice as a defense attorney.<sup>42</sup> Her client was accused of rape.<sup>43</sup> He insisted that the sex was consensual and told Professor Davis that the victim-witness was deaf.<sup>44</sup> Professor Davis asked her investigator to contact the woman for a statement, but the victim's mother turned the investigator away.<sup>45</sup> Professor Davis subsequently learned from the victim's mother that the woman was incapable of speech and did not know any accepted form of sign language.<sup>46</sup> Instead, she and her mother had developed their own mode of communication.<sup>47</sup>

Meanwhile, the defendant could not make bail.<sup>48</sup> Professor Davis attempted to persuade the prosecutor to dismiss the case, arguing that the victim's inability to testify about the allegations rendered a conviction at trial impossible.<sup>49</sup> The prosecutor did not appear to dispute Professor Davis's conclusion.<sup>50</sup> Rather than arguing that he might somehow produce an admissible prima facie case at trial, the prosecutor simply stated that he was under no obligation to make his case yet and had nine months under local law within which to indict the defendant.<sup>51</sup> Predictably, at the end of the permissible nine-month period, the defendant had still not been indicted and was therefore released.<sup>52</sup> The prosecutor admitted to Professor Davis, "I know your client is guilty. At least he did nine months in jail."<sup>53</sup>

Professor Davis describes her reaction as "stunned": "When this prosecutor was unable to prove my client's guilt legally, he took it upon himself to act as judge and jury—single-handedly finding him guilty and 'sentencing' him to nine months in jail."<sup>54</sup> I am not stunned at all. Nor would I be stunned if a real-world prosecutor, like the fictional one in *The Wire*, decided to call an Omar Little to the

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<sup>41</sup> See Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1080 (2006) (reporting that colleagues at the U.S. Attorney's Office "view being a prosecutor as more of a calling than a job" and as "part of their personal identity").

<sup>42</sup> ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 27–30 (2007).

<sup>43</sup> *Id.* at 27.

<sup>44</sup> *Id.* at 28.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 29.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 27.

<sup>49</sup> *Id.* at 29–30.

<sup>50</sup> *Id.* at 30.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

stand.

Although prosecutors have an obligation to seek justice, that responsibility is nebulously defined. Moreover, there is a tendency to interpret a prosecutor's special role in the adversarial system by emphasizing prosecutorial responsibility to protect the innocent. For example, in perhaps its most famous discussion of prosecutorial ethics, the Supreme Court described the prosecutor as "in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."<sup>55</sup> Similarly, many prosecutors believe that their unique obligation to do justice morally obligates them to serve as what I have called "supreme jurors," refraining from prosecuting a defendant until they first form a personal belief in the defendant's guilt.<sup>56</sup> Although a supreme juror requirement is not explicitly mandated by law, many legal ethicists believe that the obligation flows from the prosecutor's unique role in the adversarial system.<sup>57</sup>

Similarly, the innocence movement's high-profile exonerations based on exculpatory DNA evidence<sup>58</sup> have invited us to view the aim of justice as preventing wrongful convictions, where "wrongful" means "inaccurate." In this innocence-focused model of prosecutorial virtue, prosecutors do justice so long as they refrain from prosecuting the innocent. Rather than shun this special ethical obligation, prosecutors find honor in it, often boasting about their power to charge or not to charge, based on their personal determination of what is right—meaning who is innocent and who is guilty.

The harmless error test also signals to prosecutors that outcomes matter more than processes. When prosecutors use inadmissible evidence and make impermissible arguments before the jury, the convictions they obtain are reversed on appeal only if an appellate court concludes that a fair process would have created a reasonable probability of a different outcome. The *Brady* standard explicitly links prosecutorial ethics to outcomes, requiring prosecutors to disclose exculpatory evidence "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have

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<sup>55</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>56</sup> Alafair S. Burke, *Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. 79, 79 (2010).

<sup>57</sup> See, e.g., MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYER'S ETHICS § 11.04, at 300 (2d ed. 2002) ("[C]onscientious prosecutors do not put the destructive engine of the criminal process into motion unless they are satisfied beyond a reasonable doubt that the accused is guilty."); Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 524 (1993) ("[A] responsible prosecutor should be morally certain that the defendant is guilty and that criminal punishment is appropriate."); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1588 (2003) (noting that a prosecutor's role as "'minister of justice' . . . is generally thought to imply a 'gate-keeping' function"); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 700 (1992) ("Prosecutors do not serve the interests of society by pursuing cases where the prosecutors themselves have reasonable doubts as to the factual guilt of the defendants.") (footnote omitted).

<sup>58</sup> See The Innocence Project, Know the Cases, <http://www.innocenceproject.org/know/Browse-Profiles.php> (last visited Mar. 6, 2011) (listing 258 exonerations since 1989).

been different.”<sup>59</sup> This obsession with innocence creates a model of prosecutorial justice that can justify questionable processes used to punish those who are determined (by police and prosecutors) to be non-innocents. My guess is that the prosecutor in Professor Davis’s case would defend his decision not to dismiss the charges against her client earlier by saying that he was in fact doing justice because he believed the defendant was guilty. The rules of evidence that prevented him from proving his case in court were subverting true justice—meaning punishment of the guilty and protection of only the innocent—and he followed the jurisdiction’s timing rules in a manner that served the interests of justice.

Similarly, an innocence-focused model of “justice” permits prosecutors to defend the common practice of overcharging, in which the prosecutor includes charges that are not likely to be proven at trial, either to gain leverage in plea negotiations or to give the jury a compromise verdict. If the prosecutor believes the defendant to be guilty, overcharging is a strategy to ensure that the charges of which the defendant is eventually convicted will reflect his true level of culpability, even if the defendant receives plea-bargaining consideration or jury mitigation. An overemphasis upon protection of the innocent might also explain prosecutors’ tendency to remain blissfully ignorant of questionable police tactics, so long as those tactics are unleashed only against people who deserve punishment because they are guilty and not innocent.

Or they may, as with Omar Little, accept the testimony of a cooperating witness despite doubts about its veracity, as long as they believe that the target of the testimony did in fact commit the crime.

## VI. CONCLUSION

Scholars who study prosecutorial ethics have emphasized that the model prosecutor should adopt the mindset of an “inquisitive neutral”<sup>60</sup> and “should approach the preparation of a case with a healthy skepticism.”<sup>61</sup> However, the amorphous and ill-defined concept of prosecutorial justice too frequently emphasizes outcomes over process. Prosecutors are told to protect the innocent without sufficient clarification that the mechanisms through which they should do so are the legal processes in place, not their own personal judgments about who is or is not “in the game.” Prosecutors should instead be trained to strive for neutrality, refraining from forming personal beliefs about a defendant’s guilt and working to protect the fairness of the process through which all defendants—even

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<sup>59</sup> United States v. Bagley, 473 U.S. 667, 682 (1985).

<sup>60</sup> H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1704 (2000) (asserting that prosecutors should review their cases with “the mindset of the true skeptic, the inquisitive neutral”).

<sup>61</sup> Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 342 (2001) (footnote omitted).

the guilty—are judged and sentenced. Prosecutors should not, in short, behave like Omar Little.

