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DUTY OF OUTRAGE: THE DEFENSE LAWYER'S OBLIGATION TO SPEAK TRUTH TO POWER TO THE PROSECUTOR AND THE COURT WHEN THE CRIMINAL JUSTICE SYSTEM IS UNJUST

Ellen C. Yaroshefsky*

For decades, scholars, lawyers, and judges have spotlighted what is now recognized as a permanent state of crisis in the system of public defense in the United States.1 More than fifty years after the watershed decision in Gideon v. Wainwright declared the states must provide counsel to indigents accused of felonies,2 it is acknowledged that criminal defense systems fail to live up to the promise. The reality is grim. Funding is sorely lacking to provide even minimally adequate defense in most offices around the country.3 As celebrated Southern Poverty Law Center director Stephen Bright has observed, “[n]o constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel.”4

Defense lawyers, judges, scholars, bar leaders, and other thought leaders wring their hands about the state of Gideon fifty years after its

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1. The lack of adequate defense services is longstanding and systemic. It is properly termed a “permanent state of crisis.” Anthony C. Thompson, The Promise of Gideon: Providing High-Quality Public Defense in America, 31 QUINNIPIAC L. REV. 713, 718-23 (2013). For years, it was called a crisis but that term is a misnomer. Crisis connotes a temporary critical situation: “[a] time of intense difficulty, trouble, or danger” or “[a] time when a difficult or important decision must be made.” Crisis, OXFORD DICTIONARY, http://www.oxforddictionaries.com/us/definition/american_english/crisis (last visited July 24, 2016).


3. Thompson, supra note 1, at 724.

initial promise. Articles abound discussing this state of perpetual crisis, including the necessity for legislatures and the courts to take action to assure at least minimal funding.

Scholars explore the effect of this perpetually difficult situation on clients and certainly on defense counsel. Despite this state of affairs, public defenders, often heroic and seriously overworked, spend countless hours attempting to provide diligent and competent defense to their clients. They are zealous advocates who seek to maximize the client's dignity and autonomy. Nevertheless, the perceived necessity to trade off work on one client's case to achieve some measure of justice for clients accused of more serious crimes is a theme; they engage in triage. On virtually a daily basis, defense lawyers have very little time and bargain their ability to be competent and diligent for one client against another. Monroe Freedman argued persuasively that triage—the perceived necessity of defense lawyers trading off work on one client's case for another—is unethical. His article stirred a debate, precisely because defense lawyers believe that they have no choice in an underfunded system. Some lawyers and law offices get to the point of refusing to take new cases—properly citing their inability to provide


7. Thompson, supra note 1, at 768.


effective assistance of counsel.\textsuperscript{13} They have risked contempt of court for such compliance with ethical obligations.\textsuperscript{14}

Other academics write and discuss how one can maintain a public defense practice under these conditions on a long term basis. Can one be a career public defender?\textsuperscript{15} Can lawyers maintain their sense of upholding the dignity and autonomy of each individual client after years of the system wearing them down?\textsuperscript{16}

Particularly in the last five to seven years, popular discourse about the failings of the criminal justice system has expanded beyond Gideon’s empty promise—far beyond the crisis in funding of public defenders. Books,\textsuperscript{17} articles,\textsuperscript{18} blogs,\textsuperscript{19} TV talk shows,\textsuperscript{20} Netflix series,\textsuperscript{21} and reform organizations\textsuperscript{22} promote the view that our criminal justice system is

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\textsuperscript{13} Recently, in New Orleans, this argument came to a head. The New Orleans Public Defenders office announced that it would begin to refuse some felony cases because its workload compromised attorneys’ ability to properly represent their clients. See Richard Fausset, \textit{Suit Describes ‘Waiting List’ for Legal Aid in New Orleans}, N.Y. TIMES (Jan 15, 2016), http://www.nytimes.com/2016/01/16/us/new-orleans-public-defender-lawsuit.html. The ACLU then filed a class-action suit in Louisiana district court alleging that due to its “dysfunctional funding scheme” the Louisiana public defense system is unconstitutionally underfunded. See Class Action Complaint at 2, 10, 12, Yarls v. Burton, No. 3:16-CV-31 (M.D. La. Jan. 14, 2016).


\textsuperscript{17} See, e.g., MICHELLE ALEXANDER, \textit{The New Jim Crow: Mass Incarceration in the Age of Colorblindness} 48, 50 (rev. ed. 2012).


\textsuperscript{19} See, e.g., MARSHALL PROJECT, https://www.themarshallproject.org (last visited July 24, 2016).

\textsuperscript{20} See, e.g., Last Week Tonight with John Oliver: \textit{Bail}, YOUTUBE (HBO June 7, 2015), https://www.youtube.com/watch?v=IS5mwymTJU.

\textsuperscript{21} See, e.g., \textit{Making a Murderer} (Netflix 2015).

broken, unfair, and disproportionately targets and punishes poor people of color—primarily young black and brown men, and increasingly black and brown women. The conversation includes the lack of meaningful public defense systems, but has expanded to a view of the system as unjust—with highly publicized wrongful convictions—sometimes caused by intentional acts of prosecutorial and police misconduct. Beyond wrongful convictions, public attention is directed to unfair bail conditions, disproportionate sentencing, and overcharging by prosecutors to obtain a plea. In other words, a focus on the exercise of prosecutorial discretion that may include, but often falls short of, a constitutional violation.

This is not news to public defenders. They have complained and groused about these issues for years. A constant refrain from defense lawyers leaving a courtroom is "that was outrageous," illustrating yet another instance of a client whose interaction with the criminal justice system is a far, far cry from what the proverbial "reasonable person" might call "justice." Improvident bail decisions that will keep an indigent person in jail for a lengthy time often forcing them to plead guilty to be released, excessive charging decisions, plea


29. Thompson, supra note 1, at 718-23.

30. Id.

bargaining that is not a "bargain" in any true sense of the term and is the result of inordinate pressure upon the defendant,\textsuperscript{33} harsh sentences,\textsuperscript{34} the constant plea mill in misdemeanor court,\textsuperscript{35} and destructive collateral consequences of a conviction are all omnipresent.\textsuperscript{36} The criminal justice system results in the now-acknowledged mass incarceration of indigent black and brown people.\textsuperscript{37}

How the criminal justice system works and does not work on a daily basis is of longstanding academic and practitioner concern.\textsuperscript{38} Twenty years ago, Professor Abbe Smith recounted the student experience in her criminal defense clinic.\textsuperscript{39} The students, in their case, were "stunned to encounter [a] criminal defense nightmare"—a young client who came to court with his parents on a minor case ended up in handcuffs and carted off to jail. Professor Smith "courted contempt" for presumably disagreeing with a judge "who asserted her authority for no apparent reason except to flex her robes."\textsuperscript{41}

This is typical of the accumulated daily minor and major perceived injustices that have worn down many defenders for years. Defense work may be perceived as glamorous by some—fighting the good fight against the "system" against wrongful convictions—but it is frustrating; it "has as much frustration as glory."\textsuperscript{42} The frustration often expressed is that the prosecutor’s position or argument or the court’s decision "was outrageous."\textsuperscript{43}

This longstanding sense of unfairness and "outrage" is not necessarily of a cognizable legal wrong; it is typically not the subject of

\begin{enumerate}
\item See Graham, supra note 27, at 704.
\item See Jenny Roberts, Crashing the Misdemeanor System, 70 WASH. & LEE L. REV. 1089, 1097, 1111-12 (2013).
\item Cecelia Klingele et al., Collateral Consequences of Criminal Convictions: Law, Policy and Practice 2-7 (2013); David S. Kirk & Robert J. Sampson, Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood, 86 SOC. EDUC. 36, 38 (2013).
\item Alexander, supra note 17, at 17.
\item See Alan J. Gocha, A Call for Realism in the Justice System: Why Criminal Defense Attorneys Should Take Race into Account When Advising Clients, 28 GEO. J. LEGAL ETHICS 547, 550 (2015).
\item Id. at 732.
\item Id.
\item Id. at 727 n.23.
\item See, e.g., id. at 744.
\end{enumerate}
While there may be instances of actionable prosecutorial misconduct, most of the complaints of outrage are the daily fodder in misdemeanor courts or in the daily decisions in felony cases that ultimately result in guilty pleas. Defenders may argue vehemently inside or outside of court as to why a particular prosecutorial or judicial action is unfair, unnecessary, and unjust, but these arguments are often rejected. The defender is left to express frustration, exasperation, and mistreatment of the client to office mates and to vent with peers and friends. Systemic unfairness toward indigent defendants is an accepted proposition in most defense circles. Obviously, this view is not widely shared by prosecutors and the bench.

A current example of an "outrage," which sparked this Article—and can illustrate the proposed obligations of the prosecutor, defense lawyers, and judge—is a midnight arraignment in a New York City courtroom of a sixty-two-year-old man—call him Cy Lester—with no criminal history, not even a prior arrest. He was brought to the court by a police officer who had stopped his car while he was en route to take his elderly, nearly blind, diabetic wife to a doctor appointment. The officer arrested him while his elderly, nearly blind, diabetic wife in the passenger seat begged the officer not to because she needed his assistance. His offense? Assault: two weeks before he punched his wife in the head. A neighbor called the police, but there had been no arrest. The wife subsequently signed a statement. The man recently had hernia surgery and complications from an infection. Consequently, he stood before the court with a stomach pump and tubes protruding from his body. The pretrial Criminal Justice Agency recommended that he be released on his own recognizance. Scott, the defense lawyer, of course concurred, especially given his client's precarious physical condition. Scott contacted the wife by phone. She could not come to court but begged for the assistance of her husband and said, "I never wanted to sign that statement, but that they told me it was the only way he would not go to jail."

The prosecution requested $2000 bail. Scott argued vigorously that the indigent defendant should be released: he was recommended for release, he was not a risk of flight or of any danger to his wife, she wanted and needed him to be home, and he had no funds; Rikers Island

44. See, e.g., id. 741-44.
45. See, e.g., id. at 744 nn.98-99.
47. Id. at 800-03.
48. This is an assumed name for the attorney.
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would be inevitable and it would be dangerous for him because he would not get necessary medical care; and, so on. The argument fell on deaf ears. The court set bail at $2000 and the defendant was taken to Rikers Island. The police officer who had arrested the defendant expressed shock, as did others in the courtroom. It was, by all accounts, an unreasonable and dangerous decision.49 The defense lawyers in the court, of course, proclaimed “this is outrageous.”

In court, Scott was zealous and professional. He performed admirably. He gave the client a voice—putting himself between the client and the power of the state.50 He acted, in criminal defense parlance, as “liberty’s last champion.”51 He lost. He immediately sprang into action and appealed the bail decision. The time it took to attend to this case took him away from other clients. After hours of work, he won on appeal, perhaps saving Cy Lester from an untimely death from medical inaction. In our classic parlance about the lawyer’s role—providing diligent, competent counsel and zealous advocacy,52 he was effective. He ultimately appealed an unreasonable decision and was successful.

Scott’s conduct is the embodiment of our accepted view of advocacy: reliance upon the system’s processes and procedures to promote justice. Our due process model of competent counsel is that lawyers engage in motion practice to challenge searches, seizures, confessions, prosecutorial and police misconduct, and a wide range of constitutional and statutory violations.53 But, for Cy Lester, it was dangerous, and for Scott, his office, and the court, it was at the

49. The man became ill when unattended at Rikers Island and was taken to the hospital where he also did not receive medical care because they did not have the proper nozzles to fit his pump. The lawyer, in constant contact with the wife, secured her attendance the next day and filed a writ to have the man released. The supreme court (trial court) ordered his release. It took another eight hours after the signed order to secure his release.

50. Smith, supra note 39, at 732.


53. ABA Comm’n on Ethics & Prof’l Responsibility, Formal Op. 06-441 (2006) (discussing the obligation of lawyers who represent indigent criminal defendants when excessive caseloads interfere with competent and diligent representation); Smith, supra note 39, at 742; DNA Exonerations Nationwide, supra note 24, at 1-3. DNA exonerations show there has been constitutional and statutory violations, prosecutorial and police misconduct, and likely challenges of searches, seizures, and confessions, because otherwise the individuals would still be incarcerated.
very least a poor use of public resources and money. At worst, the system’s procedures may not be successful and the injustice will continue.

What can and should be changed to remedy the significant problems that cause lawyers to leave a courtroom in suppressed fits and spasms of anger stating “that was outrageous”? Certainly, the fundamental responsibility for causing such events (where the defense lawyer’s sense of outrage would be shared by the proverbial reasonable person) rests with the prosecution and the court. Reform organizations and individuals continue in their attempts to change and advance the administration of federal and state criminal laws such as criminal statutes, bail provisions, discovery laws, sentencing schemes, and post-conviction remedies. This Article acknowledges that this fundamental responsibility does not rest with the defense bar but nevertheless suggests the defense lawyer’s ethical obligation be amplified, when appropriate, to place the burden where it belongs: on the prosecution for acting outside of its minister of justice role and the court for failing to ensure the integrity of the system. Some consistent examples are as follows: (1) bail requested by a prosecutor and set by a judge when the proverbial reasonable person would not set bail; (2) young or infirm people sent to jail when the jail conditions have been deemed unconstitutional; and (3) when the exercise of prosecutorial discretion will result in yet another young man who grew up in poverty about to be “put through the system” for a relatively minor offense when studies demonstrate clearly that such a path will likely render him unable to complete school, get a job, vote, or lead a productive life. These are not

54. Former Chief Judge Jonathan Lippman advocated legislative change for bail statutes to ensure that defendants in misdemeanor cases presumptively be released and that the bail system is not a “parody of justice.” Judge Lippman created bail review courts in all New York City boroughs where defense counsel can appeal bail decisions, such as the one in this case. Andrew Denny, Lippman Announces Initiatives to Reform 'Broken' Bail System, N.Y.L.J. (Oct. 2, 2015), http://www.newyorklawjournal.com/id=1202738656935/Lippman-Announces-Initiatives-to-Reform-Broken-Bail-System?slreturn=20160024094839.

55. See, e.g., Criminal Justice and Law Enforcement, CATO INST., http://www.cato.org/research/criminal-justice-law-enforcement (last visited July 24, 2016); NAT’L ASS’N CRIM. DEF. LAW., supra note 22; RIGHT ON CRIME, http://rightoncrime.com (last visited July 24, 2016) (explaining the group to be the conservative organization advocating criminal justice reform). Some will argue that this demonstrates that the burden for effective case management is upon the courts, not the prosecutors or defense lawyers. This argument, however, ignores multiple roles and responsibilities to individuals, clients, and the criminal justice system.

56. See infra notes 60-62 and accompanying text; infra text accompanying notes 91-93.

57. See infra text accompanying notes 88-93, 96-1001.

58. See Kirk & Sampson, supra note 36, at 47 (providing empirical evidence that an arrest of a high school student has “severe consequences for the prospects of educational attainment”).
prosecutorial or judicial discretionary decisions readily subject to motion practice and appeal.59

This Article asks whether this sense of “outrage” should obligate the defense lawyer to take additional action in court. If so, what would that be? I argue below that, notably in light of the current discourse about a flawed or perhaps broken criminal justice system, the increased attention to the role of the prosecution as a minister of justice and to the judge, who is ethically obligated to ensure the integrity of the justice system, the defense lawyer should speak “truth to power.”60 In other words, the defense lawyer should call upon the prosecutor who has acted contrary to a robust understanding of her role as a “minister of justice” to reconsider—to change her position in light of the evidence-based data about the criminal justice system as well as the more enlightened and evolving view of the minister of justice role.61 Similarly, the defense lawyer should call upon the court to reconsider and act in accordance with Rule 1.2 of the ABA Model Code of Judicial Conduct to uphold the “integrity of the judiciary.”62


61. The commentary to Rule 3.8 of the ABA Model Rules of Professional Conduct provides:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility 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.

MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2013). Scholars have debated the scope of the minister of justice role that is more expansive than the current ethical obligation. See Kenneth Bresler, Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice, 9 GEO. J. LEGAL ETHICS 1301, 1301-05 (1996); Bennett L. Gershom, The Zealous Prosecutor as Minister of Justice, 48 SAN DIEGO L. REV. 151, 151-55 (2011); Bruce A. Green, Why Should Prosecutors “Seek Justice”? 26 FORDHAM URB. L.J. 607, 618-23 (1998); Daniel S. Medwed, The Prosecutor as a Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit, 84 WASH. L. REV. 35, 39-47 (2009); Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 VAND. L. REV. 45, 60-65 (1991).

62. MODEL CODE OF JUDICIAL CONDUCT r. 1.2 (AM. BAR ASS’N 2010); see id. Canon 1 (“A
However, both the minister of the justice role and the court’s obligation to uphold the integrity of the system are bereft of clear definition, standards, or guidelines. The minister of justice mantra has long been said to lack specificity, enforceability, and meaning throughout its history; its meaning and contours have been ill-defined and criticized as hopelessly vague and unhelpful. Nevertheless, scholars have attempted to provide meaning to aspects of prosecutorial discretionary decision-making. More than fifteen years ago, Bruce Green, tracing the history of the minister of justice concept, argued that the expansive view of the role derives from the fact that the prosecutor is a fiduciary who represents the sovereign and must make decisions for the society at large—not any individual client. Consequently, the prosecutor must represent the public interest, not simply pursue a guilty verdict conviction. Fred Zacharias concluded that prosecutors have differing obligations depending upon whether the context is litigation or the prosecutor’s broader governing role in the criminal justice system.

Within the case management (litigation) role, Zacharias argued that a prosecutor’s role is to ensure adversarial fairness so that the result is worthy of respect. Other scholars advocate that the adversarial role requires neutrality in discretionary decisions-making, empathy and honesty, and perspective to ensure a commitment that innocent persons are not wrongfully convicted.

As to the broader role, beyond individual cases, prosecutors are acknowledged to have a responsibility “in promoting a fair, reliable and
efficient criminal justice system worthy of respect.”69 Most recently, Michael Cassidy cogently argued that the prosecutor’s broader role as administrator of justice in the governing capacity—beyond its role in individual cases—imposes an ethical obligation to “pursu[e] the public interest by promoting a just system as a government official.”70 Cassidy argued that prosecutors have an ethical duty to support sentencing reform. He specified guidelines for state prosecutors “to ensure a consistent and even-handed application of mandatory minimum penalties so that line prosecutors do not abuse their substantial discretion.”71 Similarly, Angela Davis argued the prosecution has a duty to stop mass incarceration.72 This obligation as an administrator of justice should “at minimum, be concerned about prompting consistency in the application of the criminal laws, fairness in plea bargaining, protection of public safety through a reduction of recidivism, and an efficient expenditure of limited criminal justice resources.”73

This robust approach to the minister of justice role as a governing administrator of justice is premised in large measure upon an evidence-based and socially conscious analysis of the consequences of prosecutorial action in the criminal justice system. In essence, it is the composite of daily decision-making in individual cases. I argue that this framework of knowledge should inform the prosecutor’s role in case management, not only in governance. In other words, there should be a more holistic view of the role of prosecutors and—by implication—all of the actors in the system. The holistic model requires the prosecutor and the court to consider the consequences of their discretionary decision-making. The minister of justice role should include a robust sense of proportionality and decency, as well as an understanding of consequences of discretionary action.74

In great measure, this is because the discourse about the criminal justice system has reached a critical point where the obligations of all actors in our system—defense lawyer, prosecution, and judge—cannot

69. Cassidy, supra note 59, at 995; see Bresler, supra note 61, at 1301-05; Gershman, supra note 61, at 56; Zacharias, supra note 61, at 56.
70. Cassidy, supra note 59, at 994.
71. Id. at 984.
72. See Davis, supra note 28, at 27.
73. Cassidy, supra note 59, at 996.
74. See, e.g., K. Babe Howell, Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System, 27 GEO. J. LEGAL ETHICS 285, 307-08, 321 (2014) (“[B]oth the duty to do justice and the duty to promote reform are foundational duties of the prosecutor’s office and are consistent with the exercise of discretion to exclude broad categories of cases where justice and reform can be promoted more effectively by declining to prosecute cases than by prosecuting cases.”).
be cabined solely into discreet aspects of their respective roles. Evidence-based real world consequences of discretionary decisions matter in individual cases. No longer should the prosecutor in the case management role ("adversarial role") be confined to fairness in the factual contest. In other words, the acknowledged role that equates ensuring public confidence in the judicial system with fairness in prosecuting and convicting criminals while assuring that no innocent person is wrongly convicted is too narrow. It does not account for the need of the prosecutor to consider a range of factors that directly affect individuals charged with crimes. The evidence underlying the prosecutor's role to advance society broadly through policy work such as addressing mass incarceration and promoting sentencing reform is the same evidence that affects—or should affect—daily decision-making in case management. The prosecutor, as a minister of justice, needs to evaluate a case based upon the broader view of her role as a minister of justice, and the defense lawyer should call upon the prosecution to act in accordance with this role and call upon the court to ensure that the prosecution assumes responsibility for considering the consequences of the decisions. Certainly, this should be required when a reasonable perception is that the consequences are unjust. In other words, we need to incorporate our current understanding of the system's flaws, mass incarceration, and many other ills in examining the necessary and effective role of counsel. This includes the evidence-based research about all aspects of the criminal process—charging, bail decisions, plea bargaining, discovery, jury selection, and other trial-based issues, as well as sentencing, causes of wrongful convictions, implicit bias, consequences of incarceration, and other collateral consequences. That information is certainly within the wheelhouse of prosecutors' offices.

76. Id. at 216-17.
77. See, e.g., Howell, supra note 74, at 303-05.
78. Needless to say, the "reasonable perception" is subject to wide ranging interpretation and influenced by cognitive biases. Over the course of time, standards and guidelines can be developed to provide context.
80. See supra text accompanying notes 17-43.
and prosecutorial organizations that consistently sponsor wide-ranging programs about such issues. Recently, some prosecutors have used "holistic prosecution" or referred to prosecutors as "social justice advocates" in regard to a renewed role to examine the consequences of prosecutorial decision-making.

This holistic approach to the minister of justice role in case management is reflected in the 2015 revisions to the ABA Standards for Criminal Justice: Prosecution and Defense Function:

(e) The prosecutor should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction that may be applicable in individual cases or classes of cases. The prosecutor's office should be available to assist community efforts addressing problems that lead to, or result from, criminal activity or perceived flaws in the criminal justice system.

(f) The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system. The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action. The prosecutor should provide service to the community, including involvement in public service and bar activities, public education, community service activities, and Bar

81. See, e.g., Innovative Practices, ASS'N PROSECUTING ATTORNEYS, http://www.apainc.org/innovative-practices (last visited July 24, 2016) (describing how the Association of Prosecuting Attorneys, with an eye on improving public safety, has partnered with several other organizations to provide prosecutors with guidance and assistance on the new and innovative criminal justice practices available); National Center for Community Prosecution, NAT'L DIST. ATTORNEYS' ASS'N, http://www.ndaa.org/nccp_home.html (last visited July 24, 2016) (describing the National Center for Community Prosecution as involving "a long-term, proactive partnership among the prosecutor's office, law enforcement, the community and public and private organizations, whereby the authority of the prosecutor's office is used to solve problems, improve public safety and enhance the quality of life of community members").

82. The Bronx Defenders coined the term "holistic defense." Holistic Defense, Defined, BRONX DEFENDERS, http://www.bronxdefenders.org/holistic-defense (last visited July 24, 2016). It refers to providing an individual charged with a crime with a wide range of support services, both legal and social. Id. According to the Bronx Defenders, "[i]t is truly effective advocates for clients, attorneys must expand the scope of their representation to address both the collateral consequences and enmeshed penalties of court involvement, as well as the underlying issues that play a part in driving clients into the justice systems in the first place." Id.

leadership positions. A prosecutorial office should support such activities, and the office’s budget should include funding and paid release time for such activities.\(^{84}\)

No doubt, there are no clear standards that delineate the prosecutorial minister of justice role. While the longstanding and repeated quest for prosecutors’ offices to develop clearer guidelines and standards may continue to elude the criminal justice system,\(^ {85}\) certain courses of conduct—such as the aforementioned cases—may be viewed as normatively outside the realm of reasonable discretionary decision-making and, consequently, outside the minister of justice role. In other words, prosecutorial standards for the minister of justice role in case management may be elusive, but in some cases, the result for the client is so extreme that the judiciary should take the responsibility to impose and ensure an implied standard of reasonable conduct for the prosecutor as minister of justice.\(^ {86}\) Such judicial action may inspire further discussion about the need for enforceable standards.\(^ {87}\)

Defense lawyers should have an ethical obligation to act beyond the proverbial “do the very best you can as a zealous advocate for your client.”\(^ {88}\) Our system contemplates individual client-centered advocacy, maximizing the autonomy and dignity of each individual.\(^ {89}\) But, this does not fully answer the question of what a lawyer should or must do when a client’s case is the consequence of episodic or systemic injustice. Law review hand-wringing does not provide sufficient answers. Skirting

\(^{84}\) ABA Standards for Criminal Justice: Prosecution and Def. Function, Standard 3-1.2 (4th ed. 2015).

\(^{85}\) See, e.g., Green & Zacharias, supra note 68, at 896-98 (explaining that in the absence of standards and principles governing the exercise of discretion, chief prosecutors should develop and implement their own principles and subprinciples to govern decision-making in their offices); Rory K. Little, Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role, 68 Fordham L. Rev. 723, 751-60 (1999) (proposing an ethical standard that prosecutors engage in a proportionality analysis to guide their exercise of investigative discretion along with a duty to seek supervisory review and relevant training).

\(^{86}\) Some may claim that courts currently undertake such a role as a neutral evaluator of the case. Courts, however, have not assumed the responsibility of evaluating the minister of justice obligation of the prosecutor. Perhaps such an approach may induce a different result.

\(^{87}\) See, e.g., Green & Zacharias, supra note 68, at 845 (noting the importance of “advanc[ing] the dialogue regarding appropriate principles of prosecutorial decision-making”). This ethical obligation is not envisioned as a rule that gives rise to discipline, but should be the subject of standards and guidelines at this juncture.

\(^{88}\) Similar to the Prosecution Function, this ethical obligation is not currently envisioned as a rule that gives rise to discipline but as an evolving standard to guide defense lawyer conduct. See 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, 15 (2009).

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contempt by the defense lawyer may be necessary in an individual case, but it is unsatisfactory as a systemic response. The prosecution and the court need to assume greater responsibility for unjust discretionary decisions, and the defense lawyer should speak such truth to power.

Defense lawyers should be obligated to target ways in which specific prosecutorial conduct violates the minister of justice role, even if the conduct falls short of a constitutional or statutory violation. Scott should challenge the fact that requesting bail at all for Cy Lester—even if the office policy for domestic violence cases is to request bail—is unconscionable, unnecessary, unfair, and contrary to expectations of conduct in civilized society. Scott, or any defense lawyer, summoning evidence-based reports on the effects of bail should argue the reasons why the prosecutor’s recommendation is in derogation of his role as a minister of justice. The prosecutor’s discretionary decision has significant destructive consequences including certainty that the defendant will remain in jail at Rikers Island—notorious for danger to inmates and for those with mental and physical health needs—where it is known that he likely will not to get adequate care. If the prosecution is unaware of these likely consequences, the defense lawyer must point to the prosecutorial obligation to learn of such consequences. The defense lawyer should challenge the prosecutor’s failure to consider these factors, request that the prosecution reply to each of these likely consequences, and reconsider its bail recommendation. A similar argument about consequences should be made to a court—reminding the court of its role pursuant to Canon 1 of the ABA Model Code of Judicial Conduct—to ensure the integrity of the criminal system, including the consequences of its action.

90. There is a robust literature about “cause lawyering” both in individual cases and in systemic challenges. Austin Sarat & Stuart Scheingold, Cause Lawyering and the Reproduction of Professional Authority: An Introduction, in CAUSE LAWYERING, POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITY 7 (1998). “Cause lawyering” refers to a continuum of challenges including “working within professional understandings of skilled and zealous client representation . . . to make the profession live up to its own avowed ideals and to somehow stretch those ideals from the representation of individual litigants to causes.” Id. It challenges the exercise of executive and judicial power. See Richard Abel, Speaking Law to Power: Occasions for Cause Lawyering, in CAUSE LAWYERING, POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITY 86-87 (Austin Sarat & Stuart Scheingold eds., 1998). Cause lawyering scholarship does not suggest an ethical obligation of the defense lawyer to act to curb executive or judicial power. Id. at 86-87.

91. Alshuler, supra note 60, at 192-93.


93. See MODEL CODE OF JUDICIAL CONDUCT Canon 1 (Am. Bar Ass’n 2010).
The defense lawyer, of course, must speak truth to power in a professional manner. Being outraged does not give license to act outrageously. However, it does mean that the defense lawyer should draw attention to the role of the prosecutor and the role of the court in promoting an unjust system or unjust action toward the defendant.

The obligation to challenge truth to power should be part and parcel of the defense lawyer's ethical obligation to provide competent counsel. Competency should require knowledge of the consequences of prosecutorial and judicial discretionary decision-making for the individual client and the necessity to raise such issues with the court, so long as they are not inconsistent with the duty to the client. Thus, in cases where a lawyer determines that raising such issues will negatively affect the client's case, the lawyer is not bound to speak truth to power as envisioned by this Article.

It may reasonably be asked, why should defense lawyers have an added ethical responsibility when it is the executive and judicial branches that have acted outside of a reasonable person's view of appropriate conduct? A simple answer is that it is essential to challenge the exercise of prosecutorial and judicial action, and no other actor in the system can adequately and zealously undertake that responsibility. It is the role of the defense lawyer to uphold the client's constitutional rights and to be liberty's last champion. Moreover, such an obligation can serve as a sword and shield for the lawyer. The lawyer will now be empowered to challenge unjust prosecutorial and judicial action. Those lawyers who are reluctant to do so now for fear that a current challenge to a prosecutor's action will reverberate negatively for that lawyer's future clients can rely upon the fact that she has an ethical obligation to propound such arguments. This may, of course, not be effective initially, but over the course of time, a recognized obligation to speak truth to power about prosecutorial decisions hopefully will be viewed as part of

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94. This could be expressed as a comment to Rule 1.1 of the Model Rules of Professional Conduct—the duty to provide competent counsel. Model Rules of Prof'l Conduct r. 1.1 (AM. BAR ASS'N 2013). That duty is currently expressed in terms of knowledge, skill, thoroughness, and preparation. Id. It does not refer to challenges to the conduct of the prosecution or the court. Nor does the ABA Defense Function address this issue. See ABA STANDARDS FOR CRIMINAL JUSTICE: Prosecution and Def. Function, Standard 4-1.2 (4th ed. 2015).

95. Defense lawyers have increasing obligations to learn of consequences of criminal convictions. See Padilla v. Kentucky, 559 U.S. 356, 360 (2010); Paul Bennett Marrow, Limitations on the Duty to Advise: Knowing When It's Time to Say More, Not Less, N.Y. St. B.J. Mar./Apr. 2011, at 33, 34.


97. See id.
the role of defense counsel, not as a personal or political attack on the individual prosecutor. 98

The obligation also functions as a shield when a court criticizes the lawyer for speaking truth to power in challenging prosecutorial or judicial conduct. The court may be inclined to threaten the defense lawyer with contempt of court. In such case, the ethical obligation to speak truth to power operates as a shield against contempt, and the lawyer may remind the court that she is required to raise such issues.

There are other objections to imposing such an obligation. First, many defense lawyers will claim that this is a relatively meaningless obligation because it is precisely their current course of conduct; though, they might not use the minister of justice terminology or the necessity of the court to comply with the judicial conduct canons. 99 Instead, the lawyers say, they make all of the contemplated arguments and lose. Why will this be any different? Perhaps, lawyers currently challenge the prosecution and the court in this fashion—often with little result. Perhaps, at least in the short term, speaking truth to power about the prosecutor's dereliction of role will not result in any changed decisions. However, the hope is that such obligation will result in a discourse over time that will achieve some results. This truth to power obligation may reverberate in the media and the public may develop greater awareness of the robust role of the prosecutor as a minister of justice and the court's obligation to ensure the integrity of the process. Judges, defense lawyers, and prosecutors can privately and publicly discuss the consequences of such an obligation and promote standards and guidelines to provide context for such a concept. Bar committees can consider the imposition of such an ethical obligation. In other words, sustained focus upon such roles may have some impact. Over time, prosecutors and courts may respond in productive ways to an ethically based challenge to their discretionary decisions. 100 At the very least, the

98. Ethical rules function as an accepted "sword" in a range of situations. For example, prosecutors may be disturbed that a defense lawyer has vigorously cross examined a truthful witness to make it appear as if the witness is presenting false testimony. In such context, the prosecution is reminded of and typically accepts that it is the defense lawyer's ethical obligation to challenge the prosecution's case. See, e.g., John Mitchell, Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission," 1 GEO. J. LEGAL ETHICS 339, 344 (1987). Over time, prosecutors may come to accept the challenge that they have not acted in accordance with their role as minister of justice, and for those prosecutors now so inclined, will not take that challenge personally or have it reverberate against a defense lawyer's future clients.


100. Of course, the literature is replete with commentary about how prosecutors do not respond
client will have an advocate that speaks truth to power. This can only enhance the client’s view that his lawyer is a zealous advocate who combats unreasonable executive and judicial action.

Another question that could be posed: Should this duty extend to prosecutors—that is, should prosecutors be charged with challenging defense lawyers whose conduct is perceived to be beyond their proper role? To the extent that prosecutors do not currently challenge a defense lawyer whose conduct is beyond the limits of zealous advocacy, the short answer is no. The duties of prosecutors and defense counsel are not wholly comparable. The executive branch possesses the power of the state; the defense lawyer only has an obligation to zealously represent an individual and afford the client the effective assistance of counsel.

Others may question why the duty to speak truth to power should not be raised in every case. Some lawyers will argue that the entire system unfairly targets and prosecutes each of their clients, thereby requiring the lawyer to challenge the prosecutor as not acting in accordance with its role as minister of justice in every case. A similar contention may be made about nearly every judicial decision in some courtrooms. In such a case, is this not a meaningless obligation? First, those lawyers who raise this issue in every case do so in accordance with their obligation to be a zealous advocate. That is, if counsel’s judgment is that it is appropriate and advantageous for each client to raise such a claim, then counsel should do so. However, it is unlikely to be effective in all cases and may, in fact, undermine the individual client’s case if the lawyer makes such claims on a regular basis. Credibility matters. The lawyer who invokes the duty of truth to power well to challenges to their conduct. See, e.g., Bruce A. Green, Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors’ Offices Learn from Their Lawyers’ Mistakes?, 31 Cardozo L. Rev. 2161, 2174, 2177-78 (2010).

101. See Model Rules of Prof’l Conduct r. 8.3(a) (AM. BAR ASS’N 2013) (stating that attorneys have ethical obligations to report misconduct). Where a defense lawyer acts contrary to the ABA Model Rules of Professional Conduct, the prosecution will often raise the issue with a court or disciplinary authority. Id.


103. See Model Rules of Prof’l Conduct pmbl. ¶ 2, r. 1.1, 1.3. The defense lawyer does not have a comparable broad role as a minister of justice. The famous Lord Brougham statement in 1820 in Queen Caroline’s case that “an advocate . . . knows but one person in all the world and that person is his client” serves as the fundamental principle for defense counsel. Monroe H. Freedman, Idea, Henry Lord Brougham and Zeal, 34 Hofstra L. Rev. 1319, 1322 (2006) (quoting Trial of Queen Caroline 2 (1821)). Limits of zealous advocacy are imposed upon the defense lawyer in such representation. See id.

104. See Criminal Law Reform, supra note 22.

does so judiciously to advantage the client and to maximize that client’s
dignity and autonomy.  

Others may claim that any such duty to speak truth to power is a
duty upon the defense lawyer to advance the administration of justice. Such a view imposes a duty upon the defense lawyer beyond her proper role. The defense attorney has a duty only to the client and to act toward the system within the limits of zealous advocacy as set forth in ethical rules. Rule 8.4(d) of the Model Rules of Professional Conduct, which sanctions an attorney who engages in conduct that is prejudicial to the administration of justice, does not impose these additional duties upon defense lawyers to promote the administration of justice. In other words, Rule 8.4(d) is not the proper rule within which to locate the duty to speak truth to power. Certainly, the intent of the obligation is to have an impact upon the administration of justice, but fundamentally, this is not an obligation of defense counsel.

Finally, cultural change within the criminal justice system is essential if the obligation to speak truth to power is to have any cognizable effect. Prosecutors’ offices need to embrace the mantle of the holistic prosecutor who acts as a minister of justice in its most fundamental and profound sense. Executive power must be exercised wisely, judiciously, and in accordance with constitutional rights and community values. The minister of justice must develop a social justice perspective that takes consequences of criminal adjudication into account. Moreover, judges too must develop their role as the independent check on executive power to ensure the integrity of our

106. MODEL RULES OF PROF’L CONDUCT r. 1.2(a) ("[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and... shall consult with the client as to the means by which they are to be pursued."); see Erica J. Hashimoto, Resurrecting Autonomy: The Criminal Defendant’s Right to Control the Case, 90 B.U. L. REV. 1147, 1147-49 (2010); David Luban, Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It), 2005 U. ILL. L. REV. 815, 819-20 (2005).

107. See supra text accompanying note 1034.

108. MODEL RULES OF PROF’L CONDUCT r. 8.4(d) (providing that it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice”).


criminal justice system. A court is charged with being independent and acting as a check upon the factual basis for a case as well as upon just decision-making more generally.\footnote{111}

Unfortunately, this is a far cry from reality. The Spangenberg Report, noted above, found that in criminal justice systems throughout the country, "judicial oversight has become relatively meaningless, particularly in misdemeanor cases where, on average, judges give no more than three to five minutes of court time to any given case."\footnote{112} Amy Bach, who traveled the country studying misdemeanor systems, reached the conclusion shared by other observers that the courts are comprised of "legal professionals who have become so accustomed to a pattern of lapses that they can no longer see their role in them."\footnote{113} This is particularly true of the courts that do not provide a "meaningful check on executive power by acting as a truly independent actor."\footnote{114} At least part of the burden is upon the criminal defense lawyer to point out to the courts their unique and essential role to uphold the integrity of the criminal justice system.

As Gary Bellow observed long ago, "[l]awyers influence and shape the practices and institutions in which they work, if only to reinforce and legitimate them."\footnote{115} If the criminal justice system is to provide a glimmer of justice for the thousands of people brought before its courts on a daily basis, the criminal defense lawyer deserves respect for exercising the obligation to speak truth to power. Such an obligation reinforces and legitimizes the proper roles of the prosecutor and the court, and it may provide a small measure of hope that our aspirations toward a just system will slowly be observed in practice.