

left law enforcement—did not share the views that he expressed in this letter. I can understand the prosecutor mentality. I certainly saw things in a different light as time passed after I left my prosecutor's office—things that I could not have seen while I was still there. As one police officer has said, reflecting back on his actions he now regrets, and the mentality he had as a police officer, "Getting away from the job really freed up my mind."³¹ Upton Sinclair once observed, "It is hard to get a man to understand something when his salary depends on him not understanding it."³²

We resist justice and fairness in some instances because we are human. Humans act differently, and less justly, when they are part of a large system that diffuses responsibility and creates certain bureaucratic mindsets. Such behavior is inevitable to some degree, and sometimes even necessary, particularly for those whose job it is to routinely inflict punishment on other human beings. There is no doubt that we must protect our hearts from the pain that we must sometimes inflict.

But we must learn that there are times when we must step out of these roles, and out of such mindsets, for true justice to prevail. May Marty Stroud's words and example begin to show us the way.

3. Blind Ambition

I practiced as a prosecutor in the federal system. In the federal courts, judges are appointed for life by the president of the United States. They never have to run for reelection or solicit campaign donations. They don't have to worry about getting the endorsement of the local police union or the prosecutor's office for their next campaign. While individual federal judges I appeared before sometimes had reputations for being somewhat "pro-defense" or "pro-prosecution," you never got the sense that the judges behaved in certain ways because of external political pressure. Rather, they tended to act according to their own compasses—their own idiosyncratic beliefs about right and wrong, fairness and morality.

When I left the federal prosecutor's office and founded the Ohio Innocence Project in my home state, and started appearing routinely in front of elected state judges, I experienced culture shock. In some cases I had a hard time telling the difference between the prosecutor and the judge. I was told before I started by attorneys working for innocence organizations in other states, "You likely won't get a fair shake in many cases until you get the case away from the local judge who is politically entrenched with the local prosecutor, even if they're not in the same political party. You'll probably lose in the prosecutor's home court, even if the evidence of innocence is strong. But you *might* eventually get justice later the farther you get away from the local judge and the local prosecutor, like at some higher appellate court or, most probably, in federal court once you take the case to federal habeas review." After years of experience and seeing this phenomenon at work firsthand over and over again, I now unfortunately have to pass this advice on to others. And while I have admittedly encountered some elected judges who appear immune to such political pressures, and have the courage to remain truly independent no matter the cost, many

if not most seem determined to side with the prosecution whenever they can, even if it means bending the law or the facts a bit to do so.

In one of my first innocence cases that went to court, the case of Chris Bennett, which I litigated with the OIP cofounder John Cranley, the elected judge was visibly hostile from the get-go both to us and to any evidence of innocence we presented. Bennett had been convicted of driving a van drunk and causing an accident that killed his friend, who was the only other person in the van with Bennett. The van crashed on a country road, and when the police arrived Bennett was sitting in the driver's seat with a head injury and in a semiconscious state. His friend's body was draped over the engine console that protruded between the two front bucket seats, and his legs stretched onto the passenger side floor. Based on no investigation whatsoever and nothing more than the position of the two occupants when they arrived (and the fact that Bennett's blood test showed he was highly intoxicated), the police arrested Bennett and charged him with aggravated vehicular homicide. In the hospital, Bennett was diagnosed with amnesia from the head injury; he couldn't remember anything about the crash, including who was driving. Unable to defend himself, he pled guilty and was sent off to prison.

Bennett wrote to us from prison and said his memory had started returning to him in snippets. He remembered being in the passenger seat and bracing himself for the crash. Because he remembered crashing into the windshield, Bennett said if we could find the totaled van, his blood and DNA would be imbedded in the cracks of the smashed windshield on the passenger side of the van, proving he was not the driver. Even though many months had passed from the time of the crash and our receipt of Bennett's letter, one of my law students, Mary Macpherson, was able to find the van sitting in a junkyard scheduled to be demolished the following week. We went to the junkyard, found the van, and were astonished to see that the spiderweb cracks in the windshield were still caked in dried blood, with large amounts of what appeared to be human hair imbedded in the cracks as well. Subsequent DNA testing of the hair and blood confirmed Bennett's story. His DNA was all over the passenger side of the van, including his blood and clumps of hair at the point of impact on the windshield directly in front of the passenger seat, while none of his DNA was found on the driver's side.

But our students went further and conducted the investigation that the police or defense attorney never did. They knocked on doors along the country road where the crash occurred. In the house nearest to the location of the crash, they found a man who said he heard the crash and found the van before anyone else arrived, including the police. When he arrived, Bennett was sitting in the *passenger* seat unconscious with his arm hanging

out the passenger side window, and Bennett's friend appeared dead on the floor between the two seats in the same position where the police later found him. After a moment, Bennett regained semiconsciousness, tried to stand up, and then stumbled over his friend's body into the driver's seat where the police later found him. Even though he was attending to Bennett's injuries when the police arrived, neither the police or the defense attorney ever bothered to ask him what he saw as the first responder. This new witness gave us a sworn affidavit.

We took this new evidence to court to try to free Chris Bennett. But the judge seemed to greatly resent what we were trying to do. For the first two days of the hearing, he gave me the cold shoulder but was friendly and warm with the prosecutors. When John and I presented our evidence he often just sat on his bench and appeared to read briefs from other cases. He even took phone calls from the bench as we presented evidence, bending down so you could just see only the top of his head. But you could see that he was holding a phone up to his ear and whispering into it. Not just for a few minutes here or there, but for long stretches of time.

Although we presented strong evidence of Chris Bennett's innocence at that three-day hearing, including the DNA test results, the judge ultimately issued a decision denying our motion to exonerate Bennett. His decision didn't even mention the DNA test results—he just ignored any evidence that was inconvenient for the result he apparently wanted. Fortunately, the advice I had been given by other innocence attorneys around the country ultimately proved true in that case, as we eventually won Bennett's case in a higher court once we got away from the politics of the prosecutor's home field and reached more objective judges.

What struck me about the judge in the Chris Bennett case was not just his cold behavior toward us or the way he flatly refused to fairly consider the evidence. What struck me the most was how he treated the prosecutors. Even though when the case started we had filed a motion to exonerate Bennett that included hundreds of pages of evidence demonstrating Bennett's innocence, the judge granted the prosecutors' repeated requests for delays in filing their response. In fact, after we filed our motion, the prosecutors sought and received six straight motions for delay before finally responding to our motion to exonerate Bennett. This delayed the case for month after month while Bennett sat in prison waiting for his day in court.

At one point during this string of delay motions, I asked for a status conference to explain to the judge that we had an innocent man sitting in prison who deserved to have his case heard in a timely fashion. When I made this argument to the judge in a teleconference, he said, "Are you

suggesting that *my* prosecutors are trying to unfairly delay the case?" He emphasized the word "*my*" and drew it out. And that was how he spoke of the prosecutors throughout the remainder of the case. Whenever I made any suggestion that the prosecutors were delaying or engaging in other activity that wasn't entirely justified, he called them "*myyyyyy* prosecutors," and would say, "Are you suggesting *myyyyyy* prosecutors would do that?" I wanted to say, "Judge, they're not *your* prosecutors. You don't own them, and they don't own you. You represent the judicial branch. They represent the executive branch. The two branches are supposed to be separate and independent. You aren't on the prosecutor's team."

When we got Bennett's conviction overturned after getting the case away from the prosecutor's home court, an appellate court found that the judge had abused his discretion and ignored relevant evidence in denying Bennett's motion. But Bennett sat in prison for an extra year or two as a result of this judge's actions. As one of my first cases in a court with elected judges, I couldn't believe the way the judge had acted. I had never seen anything like it.

In Dean Gillispie's case, discussed in depth in the last chapter, when we filed our motion to exonerate and free Dean from prison, the judge in the case was rumored to be considering a future run for mayor of Dayton, Ohio, the city where the case was being decided. Dean had been convicted many years earlier, but had always maintained his innocence, and our investigation turned up strong evidence of it. My co-counsel was Jim Petro, who had just left his position as attorney general (AG) of Ohio and was now in private practice while kicking around the idea of running for governor of Ohio. Petro was one of the few politicians I had encountered at that time who was open to the idea that the system sometimes convicts innocent people, and I had worked closely with him when he was AG of Ohio. Indeed, AG Petro had helped to free one of my clients, Clarence Elkins, when the local prosecutors and the judge in Akron, Ohio, had refused to exonerate Elkins even after DNA testing proved him innocent. Petro used his bully pulpit as the AG of Ohio to pressure the local prosecutors into doing the right thing, ultimately resulting in Elkins's exoneration and release. Immediately upon leaving office and entering private practice, Petro called me and said he wanted to volunteer as co-counsel on some Ohio Innocence Project cases. I asked him to help out with Dean Gillispie's case, and he agreed.

Petro had a history with the judge in Gillispie's case. Prior to serving as AG, Petro had been the auditor of Ohio, and the judge, prior to taking the bench, had served as the county auditor in Dayton, which required him to work closely with Petro. Because the judge and Petro were both politically

active, the two had occasion to speak now and then. Petro told me that during these conversations the judge always expressed fascination and surprise that he would represent Gillispie, who had been convicted of multiple rapes, while preparing to run for governor. After one such conversation, Petro said to me, "We of course didn't talk about the Gillispie case directly, but he commented how brave he thinks I am, and how surprised he is that I'm considering a run for governor and that I would, at the same time, represent someone in prison who had been convicted of such horrendous crimes."

When Petro reported such conversations to me, he didn't necessarily take it as a good or bad sign. I, however, feared that it was a bad sign, that the judge was politically attuned to the fact that it would be very difficult to take the side of a convicted rapist while running for governor of Ohio—or running for mayor of Dayton, for that matter. I knew that Petro was a rare bird and didn't care about such things. Petro only wanted to do what his conscience told him was right. But I believed that Petro was a maverick in a small minority of politicians.

And my fears turned out to be true. Before leaving the bench to run for mayor, the judge did everything in his power, in my opinion, to defeat our attempts to exonerate and free Dean, ignoring the evidence and spinning it any way he needed to reach the result he wanted. We ultimately got the judge's decision reversed twice on two different grounds—once on appeal in state court and once again in federal court. The reviewing courts found that the judge had unreasonably applied the law and abused his discretion as a judge. As a result, Dean was eventually exonerated and freed after spending twenty years in prison for rapes he didn't commit. But the obstacles that this judge put in his way had cost Dean more than three additional years of his freedom.

Although the judge in Dean's case seemed biased against our attempts to free Dean from day one, one particular incident stands out. Here a little more case background is needed.

As I said before, Dean's case involved police misconduct. He was freed when a federal judge found that important evidence for the defense—including a report that the rapist wore pants of a size that Dean could not have fit into—had been lost or destroyed by the police and never turned over to the defense prior to Dean's trial. One of our other claims of police misconduct involved Dean's alibi. On a weekend when two of the rapes had occurred, Dean had been camping out of state with a large group of friends. Although his friends testified at his trial to this fact, and one of them even had a diary showing that Dean had been with them out of state that weekend, Dean's defense team had never been able to find any receipts at the

campground to back this up. We had reason to suspect, however, that when the investigation first began so many years earlier, the detective in charge of the investigation, or someone else in his department, had beaten Dean's defense team to the campground and had taken the receipts before Dean's team ever got a chance to collect and review them. At trial, though, the detective testified that no one from his police department ever went to the campground and took the receipts.

After it became known in the press that the Ohio Innocence Project was looking into Dean's case, we were told through the grapevine that a law enforcement official from Dayton had information that could be helpful to us, and was willing to meet with us. Upon meeting him, he told us that the detective in Dean's case had admitted to him after Dean's trial that he or someone from his department actually *had* gone to the campground and taken the receipts. But this police officer was reluctant to sign an affidavit, expressing his fear of personal and professional repercussions for crossing the blue line and testifying against another officer. He had come forward, he said, simply because he wanted us to know the truth. "Keep digging," he told us, "you're on the right track."

After this meeting, I had several more conversations with this police officer in which he expressed these same fears, and continued to say he wouldn't sign an affidavit for fear of crossing the blue line. As I continued to push, he started claiming that his memory of the conversation with the detective had suddenly faded (even though he had just recently told us that his memory on this point was very strong, with 100 percent certainty). So I got one of my students who had been present at the original meeting to write an affidavit about what this officer had told us, attaching the notes he had taken during the meeting. I also wrote up my own affidavit about what the officer had said. When I filed the affidavits in court, the prosecution filed a response with an affidavit from this police officer in which he claimed that the student's notes of the meeting were inaccurate. He also said that our affidavits contained fabrications. The officer further claimed that I had tried to get him to sign a defense affidavit that contained falsehoods. In other words, he was now suggesting, in essence, that he had never said those things to us about the police getting the campground receipts.

What the prosecution didn't know when they had this police officer draft his affidavit, however, was that I had previously recorded two of my final conversations with the police officer on the sly. I knew from experience that, once we publicly exposed what he had told us, he would be under great pressure from law enforcement to deny it and call us liars. So, anticipating this, I wore a wire in one meeting with him and had a recording device set up for a

subsequent phone conversation. And my recordings showed that the officer was misleading in his carefully worded affidavit filed by the prosecution. For example, in his affidavit the officer claimed that he didn't want to sign the defense affidavit because, in essence, it was not true or accurate. But in the last conversation I had with the officer, which was recorded, he said he wanted to be subpoenaed to testify for Dean rather than sign an affidavit, because that way it would make it look like he was being *forced* to cooperate with the defense, which would give him political "cover." He said he wanted to "do the right thing," despite "county politics," and would "let the chips fall where they may." That was, of course, before the prosecution got to him.

So I filed a response with the judge that included discs containing the recorded conversations. The law enforcement officer was, in my opinion, caught red-handed in a misleading cover-up. But the judge in Dean's case, who was about to run for mayor, did nothing about it. He did not even grant us a hearing. He denied our motions, meaning that Dean would have to finish out his prison sentence for a possible thirty-six more years.

But what is most interesting is what happened next. Immediately after he denied all our motions and the case went to higher courts, the judge asked for a phone conference with the prosecution and the defense. When I learned of the scheduled phone conference, I was confused. The case was over before this judge. He was done with it. He had denied our claims and we were now moving on to higher courts. Why did the judge want to talk to the parties in the case now? This was most unusual. The only thing I could think of was that the judge was concerned about the police officer's troublesome affidavit and wanted to know what the prosecution was going to do about it. But I knew better than that. Given the hostility that the judge had shown toward our efforts to exonerate Dean, I doubted that could be the reason.

The phone conference consisted of the judge, myself, Jim Petro, and the prosecutors. When it started, the judge said something to the effect of, "I asked for this call because I have evidence of a federal crime sitting on my desk. Professor Godsey secretly recorded a police officer without his consent, which is a federal crime. So I am alerting the parties that I am sending this evidence—the recordings—from my case file to the federal prosecutor's office in Dayton for investigation and possible prosecution of Professor Godsey." An awkward silence then ensued, until Jim Petro said, "Judge, that's not a federal crime. And it's entirely legal in Ohio." The judge then asked the prosecutor, "Is that true?" The prosecutor said it was not a federal crime, or any kind of crime at all, as far as he knew. The judge then hemmed and hawed, muttering a bit inaudibly to himself, and then said something

to the effect of, "Oh, well I think it might be, I guess I'll have to look into it some more . . . Bye." And he hung up the phone.

I never heard anything again from this judge about my alleged federal crime.

It bears underscoring: This judge, the same judge who was overturned on appeal for abusing his discretion and unreasonably applying the law when denying Dean's claims and thereby forcing Dean to languish in prison for three additional years, had sitting on his desk evidence that a police officer had made problematic statements under oath in a sworn affidavit filed in his court. The affidavit could, in my opinion, possibly even have resulted in a perjury prosecution against the police officer. But the judge was so aligned with law enforcement, and had so lost his independence and neutrality, in my opinion, that his concern was not the misconduct of this police officer, but whether he could cause a bogus federal prosecution to be brought against the defense attorney who had the audacity to secretly record a police officer and catch him in misconduct. To this day, nothing has ever happened to the officer who filed the troublesome affidavit. The judge went on to lose his race for mayor.

. . .

The public believes that the American criminal justice system is structured to favor the accused. Defendants are privileged with numerous constitutional rights, such as the right to remain silent, the right to a speedy trial, the right to an attorney even if they can't afford one, and the right to call witnesses in their defense and to cross-examine the prosecution's witnesses. They are presumed innocent until proven guilty, and the prosecution has the burden of proving the defendant's guilt beyond a reasonable doubt. The defense doesn't have to prove anything.

I have heard many judges and prosecutors over the years paint a picture of police and prosecutors as calm, rational actors, under no pressure to solve any particular case, who just want to fairly and objectively develop a case against the perpetrator so that they can obtain justice for the victims, but who are unfairly hampered in that effort because the odds that are so steeply stacked against them.

The reality, however, is anything but this. Police and prosecutors are under great pressure to solve heinous crimes and hold someone accountable for them. In doing so, they must show determination and aggression to identify suspects and steely resolve to convict them. The fact that most prosecutors in this country are elected, and the public wants prosecutors

who are "tough on crime," creates a pressure to solve, arrest, and convict. As a result, the calm, "just the facts, ma'am" detective or prosecutor often depicted on television is too often a myth. Their jobs are competitive, they are judged on their success rates, and they are under pressure to obtain convictions in order to move up.

Elected judges experience political pressure as well. The vast majority of defendants in this country charged with serious crimes like murder or rape have their cases adjudicated by judges who will someday have to face reelection. Although it is difficult to measure how elections affect judges, and few judges will admit—to others or even to themselves—that the election process causes some judges to tilt in favor of appearing "tough on crime," many lawyers who practice before elected judges, particularly defense attorneys, perceive that it often does. And statistics back this up. Particularly in jurisdictions where both the prosecutors and the judges are elected, the two branches of government, executive and judicial, often appear to march together with a self-congratulatory focus on obtaining convictions while appearing "tough on crime" in a competitive, showy fashion, with each official trying to one-up the other. Politics makes it a game, it seems, and it's a game they must play well to succeed.

Defendants and defense attorneys, on the other hand, operate at a great disadvantage. The vast majority of defendants cannot afford to hire a team that matches what the prosecution has at its disposal—such as investigators to hit the streets and interview all the witnesses, and unlimited "experts" from a state crime lab to analyze the evidence and come up with seemingly slick CSI-type theories to support their theory of the case. The most that the typical defendant gets is an attorney—often appointed by the court—with little funds for bells and whistles like investigators or experts. At trial, the defense attorney usually has to take the prosecution's evidence at face value, without building his or her own case to challenge the prosecution's theory, and is limited to cross-examining the prosecution's various witnesses. Money for experts is granted to defendants by the courts in some cases, but funds are limited in each jurisdiction and funds for investigators are even more difficult to come by. Thus, defendants are often at a competitive disadvantage unless they are very wealthy. And the one thing defendants *are* always given—an attorney—is too often an overworked and underpaid public defender or appointed counsel who has so many cases she can't possibly give each client a fair shake.

The result is a system that is structurally imbalanced in favor of convictions.

JUDGES

I've told some stories above about judges who appear too close to law enforcement to remain fair and neutral, but one doesn't have to believe me to see that elected judges too often lose their objectivity and become part of the prosecution team. And I'm not just talking about the highly publicized incidents where judges are caught doing such things as text messaging helpful tips to prosecutors during a trial.¹ Indeed, the evidence is everywhere. If you live in any of the thirty-nine states where judges are elected, you will see the evidence on your television screen during election years.² In Cincinnati, where I live, if one judged only by the commercials in judicial election seasons, one would not be aware that our Constitution separates the judicial and the executive branches so that they can provide checks and balances on one another. My county prosecutor is the most sought-after endorser of judges and would-be judges, appearing on commercials and flyers of his preferred candidates running for judge and touting them as "tough on crime" in emotional pleas. One radio ad in the 2015 election cycle, for example, had our county prosecutor exclaiming over serious-sounding background music that a particular candidate "squared off against the worst criminals in Cincinnati as a prosecutor," and assured the public that this candidate wouldn't be afraid to do it again as a judge.

Many judicial candidates cozy up with the local prosecutor, and want his or her endorsement, for a reason: because it works. It's important politically for the candidates. And if a judge makes a decision on the bench that will cause him or her to lose the prosecutor's endorsement in the next election, that can be tantamount to political suicide. As former Justice Oliver Diaz of Mississippi admitted, "Judges who are running for reelection do keep in mind what the next 30-second ad is going to look like."³ Even U.S. Supreme Court justices have recognized the political realities elected judges face that can lead them to align with their local prosecutor in order to appear tough on crime, noting that statistics show a correlation between election periods and case outcomes favoring the prosecution.⁴ One Supreme Court opinion quotes an elected judge acknowledging this problem: "Let's face it. We're human beings."⁵ And former chief judge of the Alabama Supreme Court Sue Bell Cobb agreed, saying, "Judges would have to be saints to ignore the political reality. And judges aren't saints."⁶

A recent Arkansas Supreme Court electoral race is illustrative. An ad praised appellate Judge Robin Wynne for "refusing to allow technicalities to overturn convictions." Another attacked Wynne's opponent, defense attorney Tim Cullen, by claiming that he had called child pornography "a

victimless crime," which was a distortion of one of Cullen's defense briefs in a case. Over ominous footage of an empty playground, a mother's voice said, "Tell that to the thousands of victims robbed of their childhood." Cullen lost. He later opined, "If I were a criminal defendant, I would be concerned about Justice Wynne's fairness based on campaign ads that he benefited from."⁷

In a 2015 segment on HBO's *Last Week with John Oliver*, host John Oliver played some clips from the election cycle that year in which various judicial candidates flexed their pro-prosecution muscles.⁸ An ad from the campaign of North Carolina Supreme Court Justice Paul Newby, for example, had actors in black car-burglar outfits running from Newby's election signs while a man played a banjo and sang, "There's a judge they call Paul Newby, he's got criminals on the run. Paul's steely stare's got 'em running scared, and he'll take 'em down one by one. . . . Paul Newby (*strum, strum strum*) . . . tough but fair . . . (*strum, strum, strum*) . . . Paul Newby (*strum, strum strum*) . . . criminals best beware."

Next, Oliver screened an ad for former Alabama Judge Kenneth Ingram, which touted his tough-on-crime credentials and boasted how he came down hard on a particular murderer, while a voiceover exclaimed: "Without blinking an eye, Judge Kenneth Ingram sentenced the killer to die." Next up was a reelection commercial for Michigan Judge Paula Manderfield, which reenacted a courtroom scene where she sat at her bench, looked out at the camera with a steely gaze, and said, "My privilege is to sentence you to life in prison without the possibility of parole," and then harshly banged the gavel. Host John Oliver appropriately quipped, "Wait. It's your privilege? At best it's your duty! There are some jobs where that kind of occupational relish is inappropriate." Oliver next aptly commented: "The problem with an elected judiciary is that sometimes the right decision is neither easy nor popular. And yet campaigns force judges to look over their shoulder on every ruling. And while political attack ads can be aggressive, judicial attack ads can be downright horrifying."

He then played an attack ad against Illinois Justice Thomas Kilbride in which dark silhouettes of three imprisoned convicts (played by actors) were shown. Each convict took a turn stepping forward and talking about his crime. The first said, "I was convicted of stabbing my victims with a kitchen knife." The next said, "Of shooting my ex-girlfriend and murdering her sister in front of our child." The third said, "Of sexual assault on a mom and her ten-year-old daughter." He then chuckled and added, "Then I slashed their throats." While Justice Kilbride's picture appeared on the screen overlaying the image of the three criminals, the first convict said, over ominous

background music, "On appeal, Justice Thomas Kilbride sided with us." The second convict then added, "Over law enforcement or victims."

Oliver noted that none of the three inmates were actually set free by Judge Kilbride but that Kilbride merely had had, on appeal, the audacity to question the procedures used in their trials, which was his job. But, as Oliver went on to point out, there is no room for nuance in judicial campaigns, which is why, he added, you don't see judicial bumper stickers that say things like: "Justice is complicated, requiring a sublimation of our basic instincts that, while difficult, is the only thing that separates us from the anarchy of beasts. KILBRIDE 2015!" Norman Reimer, executive director of the National Association of Criminal Defense Lawyers, has observed, "Constitutional rights of the accused persons are often the road kill in these judicial campaign wars. Our freedom and our constitutional rights depend on judges who have the courage to be fair and impartial. It's a real problem if they know every ruling is likely to become fodder in a campaign."⁹

Numerous studies show that judicial elections force judges to favor the prosecution in courtroom cases in order to appear tough on crime come reelection time. Trends in given jurisdictions are relatively easy to track. In past decades, judicial campaigns were low-budget, low-profile affairs, with attack ads—or advertising of any sort—fairly uncommon. But Supreme Court decisions loosening the ethical rules on judicial campaigning and deregulating campaign contributions in the last two decades have increasingly turned judicial elections into expensive and politically charged affairs.¹⁰ Money spent on advertising, bringing with it the attack ads and pro-prosecution commercials we see today, has increased gradually in the past twenty years, to the point where these ads are now a ubiquitous part of the election landscape. And one can track the trends in judicial rulings as judicial elections have become more politicized and judges or would-be judges have been forced to fret about how their tough-on-crime credentials will play out in television ads and mailed flyers.

A 2013 study from the Center for American Progress, a nonpartisan think tank in Washington, focused on thousands of judicial rulings in four states: Illinois, Washington, Mississippi, and Georgia. The study found that as more campaign cash flowed into the judicial election process in these states, which resulted in ads like the ones discussed above, judicial rulings clearly trended in favor of the prosecution. The most evident bumps came in election years. The report concluded that as "campaigns become more expensive and more partisan, the fear of being portrayed as 'soft on crime'

is leading courts to rule more often for prosecutors and against criminal defendants."¹¹

In 2015, the Brennan Center for Justice, an institute at NYU Law School, issued a report entitled *How Judicial Elections Impact Criminal Cases*.¹² The report analyzed decades of data and synthesized findings from ten prior empirical studies on the same subject matter from various institutes and scholars. Thus, the Brennan Report is the most comprehensive paper to date on the impact that the judicial election process is having on the criminal justice system. The report starts by noting that 94 percent of felony cases—and 99 percent of rape cases and 98 percent of murder cases—are prosecuted in state as opposed to federal judicial systems. Eighty-seven percent of state judges across the country face judicial elections, which occur in thirty-nine states. Thus, the vast majority of persons charged with felonies in this country—well above 90 percent—have their cases adjudicated by judges facing reelection campaigns if they wish to continue on the bench.

The Brennan Report points out that television advertising has "become a staple" in judicial elections, and that most of this advertising focuses on criminal justice, either portraying the candidate as tough on crime or his or her opponent as soft on crime. In the 2013–14 election years, 56 percent of all judicial advertising fit this model, up from just 33 percent a few years earlier. Notably, the ads were often misleading. The report's finding includes the following observations:

- As television advertising increases in a given jurisdiction, rulings in favor of criminal defendants decrease.
- Elected judges hand down stiffer sentences in serious cases as they get closer to election day.
- Over the previous fifteen years, death sentences were overruled on appeal 26 percent of the time in jurisdictions with appointed judges, but only 11 percent of the time in jurisdictions with a competitive judicial election process.

In his segment on HBO, John Oliver noted another important aspect of all of this: much of the funding for judicial campaigns that are making judges increasingly pro-prosecution is supplied by big business or super PACs, rather than by people who have a stake in the criminal justice process, like prosecutors or police unions or representatives of crime victims. The commercial with the banjo player supporting North Carolina Judge Paul Newby was sponsored by a super PAC that is funded by, among others, tobacco

company RJ Reynolds. And the attack ad against Illinois Justice Thomas Kilbride featuring the three convicts bragging about their heinous crimes was sponsored by a super PAC funded by corporations like Coca-Cola and John Deere.

Coca-Cola and RJ Reynolds do not, of course, particularly care if a judge they support is tough on crime or not. These companies want judges on the bench who will favor their business interests and who will know when these corporations' cases come before them that they owe their jobs and their future reelections to these corporations and super PACs. In other words, the corporations just hope to influence the judges for their business interests. But they also know that crime is what sways the public, so they use criminal justice themes to support judges they want on the bench, or to drive off judges who won't sufficiently further their corporate interests.¹³

Without a doubt, running for judicial election is highly political, and success depends acutely on fundraising and, for many judges, portraying themselves as "tough on crime." As Ohio Supreme Court Justice Paul Pfeifer candidly admitted to the *New York Times*, "I have never felt so much like a hooker by the bus station in any race I've ever been in as I did in a judicial race."¹⁴ Former Texas Supreme Court Chief Justice Wallace Jefferson told *The Atlantic* shortly after leaving the highest judicial position in the state of Texas: "It is a broken system. We shouldn't have partisan elections. . . . I think fundraising undermines the confidence in a fair and impartial judicial system. So I would change it completely if I were king."¹⁵

Judges who got on the bench by cozying up to the local police chief or prosecutor for those all-important endorsements know that if they do anything on the bench that seriously ticks off the police and prosecutors, they risk losing those endorsements at reelection time. But more important, judges know that if they issue a ruling that can be spun during a later election as "soft on crime" in a misleading sound bite, they are giving ammunition not just to their election opponents but to the big money and super PACs if these deep pockets decide that some other candidate would do a better job of supporting business interests.¹⁶ And even judges who sit on lower courts, like trial courts, where big money and super PACs tend not to focus so much, know their decisions will be subjected to scrutiny and attack if they are ambitious and ever want to move up the ladder to play on the fields where the corporations and big money routinely play.

Now, not all elected judges seem to be influenced by elections. Some have a reputation for being entirely independent. I could name several in Ohio, such as Michael Donnelly in Cleveland and Steven Dankof in Dayton, who eventually took over Dean Gillispie's case from the aforementioned

judge who stepped down to run for mayor of Dayton. After taking over, Dankof courageously stood up to pressure from local prosecutors and tossed out Dean's case. But even judges who have ruled in favor of inmates making postconviction innocence claims have made interesting comments that reflected their awareness of this problem. An attorney who worked for another innocence project told me that she ran into a judge in the hallway of the courthouse after he ruled in favor of her client, and the judge reportedly made a comment to the effect of, "I already got a call from the media about this, because the prosecutors have gone on the offensive. I can't talk to the media, but when they call you you're going to explain why this was the right result, aren't you? You've got my back, right?" I ran into another judge at a social event while my client's motion was pending before him. I didn't discuss the case with the judge, but he looked at me at one point and said, "You know, they're going to try to hang me if I rule for your guy." This judge ended up ruling for my client regardless of his fear of being hanged, and in doing so demonstrated quite a bit of courage. These comments show, however, that even some judges who resist the pressure to rule for the prosecution are aware at some level that doing so puts them in an awkward position that is against their self-interest.

Talk to any criminal defense lawyer in a state with elected judges, and unless he or she is one of the defense lawyers who have lain down and become part of the political process, the lawyer will tell you stories of cases where the judge, seemingly because of the political realities, walked in lockstep with the prosecution to furnish the conviction the prosecution wanted. In fact, it's sadly considered the norm. When I have a new innocence case in a distant part of the state of Ohio, I always ask local defense attorneys from that part of the state about the judge assigned to my case. Defense lawyers know how to describe a biased judge, because it's the same routine most of the time and they're used to talking about the bias in the system. It's part of the common language. "Your judge is unfortunately like most of the others," is the typical response. "You're not going to get anywhere if the prosecution opposes your motion." They know this before they even hear about the details of my case. And then I go on to experience the judge firsthand, and inevitably learn why the defense attorneys had that opinion.

When a judge is considered fair and neutral, on the other hand, it's spoken with hushed excitement by the defense lawyer: "Actually, you know, she's a pretty fair judge. She actually tries to be neutral. She'll actually read your briefs. She's pretty independent of the prosecutor and is not afraid to do the right thing. You got real lucky with her." The lawyer telling me this will inevitably sound like I just found a four-leaf clover! He or she is excited

to tell me how little the defense lawyer jabbed—a fair judge who will actually study the briefs, look at the case objectively, and rule according to the law and facts, even if it upsets law enforcement in the process. What a rarity! What a treat! The public undoubtedly thinks that having a fair and neutral judge would be expected—the norm—and not like finding the proverbial needle in a haystack. But that, unfortunately, is not the case.

I recently gave two out-of-state speeches to large audiences in which I mentioned the possible effect that the election process could have on judges. After each speech, I was immediately confronted by an angry elected judge waiting to speak to me the second my speech ended. The first judge was so upset that she started talking before she even reached me, yelling out to me from down the hallway as she approached, “How about a fair presentation, professor!” When I asked her what she meant, she said she was very offended by my comment that elections could cause judges to bend toward the prosecution. She said, “I had my whole staff with me here today, and that was embarrassing. And it’s not true.” I chatted with her for a good fifteen minutes, and by the end got the sense that she was offended because she really does try to be independent and not allow such factors to sway her. She gave several examples in which she had ruled for a defendant despite feeling intense pressure from the prosecution and public. I told her that my comment was not meant to apply to every judge, and that if it’s not true, as she claimed, then elected judges have a perception problem, because most defense attorneys believe it is true. I told her that I’ve even had conversations with federal judges who have scoffed at the notion that elected state judges are not influenced in favor of the prosecution. It seems that everyone believes this but elected state judges and prosecutors.

After my next speech in another state a week later, a judge came up to me and was so angry he was literally shaking. It looked like his head was going to explode. He strode up to me aggressively, wagged his finger in my face, and threatened, “You better be careful.” I was taken aback at being confronted in such a combative manner by someone I didn’t know, and didn’t even know was a judge, and asked what he was talking about. He said angrily, “Your comments about elected judges were not well taken by me and the other judges in the audience. They were not at all appreciated.” I was confused when he said this, because I didn’t remember even mentioning elected judges in my speech. It certainly wasn’t in my outline for the speech. But then I remembered that I had been asked by a member of the audience whether elections affect judges, and I had said, “Yes, in many instances I think they can—judges have to worry about the next election and many need to have the endorsement of law enforcement.” That had been the extent of my

comments on the subject. I tried to engage this judge in the same type of conversation I had had with the judge the week before, but he was too angry to even converse. Afterward, I wondered why he was so sensitive. After all, I thought, I’m just a law professor. And I’m from another state. Why does he care so much about what I think? And my comment was so innocuous. But I no doubt had touched a very sensitive nerve with this judge.

Maybe these judges were so upset because they truly weren’t swayed by elections and were sick of hearing that they’re biased. Or maybe they were so upset because my allegation was true—they “doth protest too much, methinks,” as Shakespeare wrote in *Hamlet*. It’s admittedly hard to tell just how much facing reelection causes judges to favor the prosecution. While defense attorneys report a general bias toward the prosecution in most cases, and I have seen it close-up many times myself, sometimes to ridiculous extremes, such bias could stem from other sources. Most judges were prosecutors before going on the bench and thus often have a prosecutorial mentality by nature.¹⁷ Judges can also suffer from confirmation bias and tunnel vision just like other actors in the system. They are often in denial about the problems in the system, and have been part of the system for so long that they can’t even see the problems. But even if a judge doesn’t care about political realities, or is so entrenched that he or she doesn’t really need to worry about reelection, they’ve often become hardened and biased through time. That’s the way the system seems to shape many of them.

POLICE AND PROSECUTORS

Most prosecutors in this country, and most sheriffs, are elected. Thus, they face the same pressure as elected judges to appear tough on crime. Studies have shown that the desire to appear tough on crime for the sake of reelection affects the decisions prosecutors make on a daily basis,¹⁸ as their decisions have “politically charged ripple effects.”¹⁹ But police and prosecutors have additional layers of pressure that judges don’t feel. Office politics, and the desire for internal advancement, create a pressure to solve cases and convict. And the more difficult the case—in other words, the more that evidence of innocence exists for a defendant to exploit at trial—the more a conviction serves as a feather in the police officer’s or prosecutor’s hat. “Wow,” their colleagues say when a detective or prosecutor wins a tough case, “He even won *that* case. That was a tricky one.” All police officers and prosecutors naturally want to be the heroes in their offices.

Police and prosecutors also have budgetary pressures. In many police and prosecutors’ offices, the budget for the following year depends in part on

the number of arrests and convictions they obtained the preceding year. So running up the numbers ensures that their budget will increase—or at least not be cut—in the following year.

And police officers and prosecutors frequently suffer from confirmation bias and tunnel vision. The “competitive enterprise of ferreting out crime,” in the words of the U.S. Supreme Court, would naturally cause any person to lose objectivity at times. Both office and political pressures contribute to this mindset, and move police and prosecutors to take on a “tough on crime” persona, pushing aggressively toward convictions in cases where a calmer, more objective approach might be better advised.

. . .

I know the internal pressures on police and prosecutors all too well, having spent many years in a prosecutor’s office. Simply put, there is great atmospheric pressure to win cases and to appear tough and aggressive. Everyone in my office was ambitious and competitive. Everyone wanted to look good. Everyone cared about his or her reputation. Everyone wanted to advance. If you loafed around and were not aggressive with your cases, you would not gain a reputation for being a strong “prosecutor’s prosecutor.” If you lost a case, people would talk. If you lost more than a case or two in a short time period, people would start questioning your competence or dedication. So we all did our best to make sure that didn’t happen.

The pressure to look good created a catchphrase, fashioned after a former prosecutor in my office whom I’ll call “Schmidt.” The legend was that before each of his trials, he would tell everyone in the office how the evidence in his case was weak, and how winning would be a longshot. He would appear stressed out and in agony over this awful upcoming trial that he was sure to lose. He would go on and on about the strength of the defense witnesses, and how he had so little to work with. In reality, he made these claims even when his evidence was strong. He did this, the legend goes, so that when he won everyone would think he had pulled a rabbit out of a hat. Everyone would think he must be some highly skilled wizard of a prosecutor to have won such a tough case.

So when any prosecutor in my office started talking about how the evidence in his or her upcoming trial was weak, or how the defense’s evidence of innocence was strong, they would be accused of “Schmidtizing” their case. This reflected the competitive nature of the office, and how the cases where the defense had a lot of evidence of innocence in its favor—the tough cases—were the cases prosecutors wanted to win the most so they would look good in front of their colleagues.

If someone lost a trial—meaning, God forbid, the defendant was acquitted, which didn’t happen very often—it was spoken about in hushed terms behind closed doors. Everyone wanted to know, “Did she screw up?” “What happened?” It was embarrassing to the prosecutor. I was once asked by my supervisor to take over a case from another prosecutor and try it before a jury just a few weeks before the trial was to start because the prosecutor on the case had just lost a jury verdict in another case. Her looming trial was seen as particularly difficult, with a risk of acquittal. My supervisor asked me to take it over from her because he thought that losing two cases in a row might devastate her self-esteem and could even cause her to leave her office. He needed to give her something easy—a sure thing—to help her “get back on the horse.” I was instructed not to tell anyone why I was taking over the case, and an excuse relating to scheduling conflicts was made up for office consumption.

In other words, the pressure to win was so high that losing two in a row was understood as potentially a morale crusher. As Daniel Medwed, a leading scholar on the psychological pressures faced by prosecutors, notes in his book *The Prosecution Complex*, prosecutors may “treat their win-loss record as a sign of self-worth,” and “become dependent on those [win] outcomes to bolster their confidence.”²⁰ Medwed observes more broadly:

A host of institutional, political, and psychological forces converge to pressure prosecutors to strive for convictions at trial. In an occupation where job performance is difficult to gauge, prosecutors are often evaluated based on their individual conviction rates. Stories abound of supervisors using motivational devices to push trial prosecutors to secure convictions. Examples include publicizing individual conviction rates in the form of batting averages or listing attorneys on a bulletin board with strikers next to each name, green for wins and red for losses.²¹

Medwed points out that one prosecutor’s office offered financial bonuses for high conviction rates, and another required written reports to supervisors in the case of an acquittal explaining “what went wrong.”²²

. . .

In the prosecutor’s office where I worked, as in many others, our budget each year was determined in part by the number of indictments we handed down the year before. I started in the office around the end of July, and our fiscal year ended on September 30. I was told when I started that new prosecutors like myself had one primary job until that date: indict as many cases as we could to improve our statistics by then. But since none of us new

prosecutors had our own cases yet, we were handed files from more senior prosecutors to indict their minor cases that otherwise might not be indicted because the more senior prosecutors were too busy. And many of these cases were passed down to us for no reason other than that an additional indictment would give our stats a boost.

For example, if a senior prosecutor had a major case involving some serious crime, and the defendant fled the jurisdiction after the charges were brought and was on the lam, we would be handed the file to indict him again on what's called "bail jumping"—failing to show up in court and fleeing instead. But there was no real need for this. If the guy was eventually caught, he would still have to face the music on the murder charge or whatever his original serious charge was for. The bail-jumping indictment would be so minor in comparison that it might be ignored or negotiated away once he was caught. But indicting him for bail jumping helped our stats.

And if veteran prosecutors had other cases that they hadn't gotten to in the fiscal year because they were too busy with more important cases, or because the cases were weak and kept being pushed to the back burner in favor of stronger cases, we would indict those cases too if we thought we could get them past the grand jury and eventually get convictions. Thus, in the months of August and September, my office created an indictment machine, where we would push as many cases as we could from senior prosecutors down to junior prosecutors, and then through the grand jury—not because they really needed to be indicted for policy reasons but because we needed the stats. Simply put, if it weren't for the stats, I believe many of these cases likely would never have been indicted. It's not that decisions were made to indict people who we thought were innocent. That's not it at all. But some indictments that probably would never occur in the regular course of business were made to happen because of stats. People got indicted, or had extra charges added, for what amounted to budgetary reasons in the end.

So I spent my first two months in the prosecutor's office presenting case after case to the grand jury and getting my indictments like I was on an assembly line. I was new to the job and wanted to impress, so I did as I was told and pushed through as many indictments as I possibly could.

At one point in the aftermath of my indictment mania, I realized that I had messed up one of the cases. To the best of my recollection, I missed the deadline on the statute of limitations by a day or two, meaning the charge was defective and couldn't be corrected. But I remember that after I realized my mistake and knew I was going to have to dismiss the charges, I spoke to one of my supervisors and told him about it. (I had several immediate supervisors, several assistant criminal division chiefs who acted as supervisors,

and other supervisors for some specific cases.) The supervisor in question told me to write a memo outlining my mistake and why the charges had to be dismissed. The memo had to be approved by various supervisors up the chain and ultimately by the U.S. attorney, our boss. I wrote the memo and apologized for my mistake, and in part to provide an excuse for myself, I said in the memo that I had made the mistake because I had indicted the case during the crazy "September indictment crunch," when I was handed so many cases to indict that I couldn't be as careful as I ordinarily tried to be.

A few days later, I was called into the supervisor's office. On his desk sat my memo, and I could see that someone—presumably one of the supervisors up the chain who had to approve the dismissal of charges—had circled where I had written "September indictment crunch." This person had also written a note in the margin next to that circle that said, "???" I said about this. The supervisor asked me, "Why did you write this?" I said because I indicted this case during the time when I was given a million cases and told to indict as many of them as I possibly could. He said, "That's not true. There is no indictment crunch around here. You weren't told that." But I knew that he had told me that himself many times. And it wasn't just me. It was apparent that all the new prosecutors who had started in the summer like me had been instructed to do the same thing. In fact, the "September indictment crunch" was so well known and understood in our office at the time I was there that I had written those words innocently, not knowing it would cause a problem. I was new, and the last thing I wanted to do was get on someone's bad side.

I just said, "OK, I'm very sorry, I didn't know," and left the room. But I got the message. And the message was clear—we don't talk about any "indictment crunch," or any pressure to improve our stats, and we certainly aren't stupid enough to put something like that in writing.

...

But the reality is that stats are an ongoing pressure for many police and prosecutors. A 2015 lawsuit filed by several NYPD police officers against their department alleged that, although the NYPD claimed publicly that arrest statistics were not part of an officer's performance evaluation, the NYPD was nevertheless informally keeping statistics and basing requests for things like vacation-time approval, shift changes, and even promotions on these "arrest quotas." The lead plaintiff discussed the pressure to make arrests that this policy created, saying, "When it comes to the end of the month, and I need that number . . . Dude, it's your neck or mine."²³ That "dude" being the person who was arrested. Another NYPD officer, who was not part of this

lawsuit, told the media: "Our primary job is not to help anybody, our primary job is not to assist anybody, our primary job is to get those numbers and come back with them." He added, "I'm not going to keep arresting innocent people, I'm not going to keep searching people for no reason, I'm not going to keep writing people for no reason, I'm tired of this."²⁴

And it's not just New York City where this practice exists: it is part of the police landscape across the country, even though many departments deny it.²⁵ In response to the above lawsuit, the NYPD denied it kept arrest stats, despite what its officers were claiming. My prosecutor's office would likely have denied the pressure to make indictments as well, or at least would probably have given some politically attuned answer, if questioned about it. But even in a police department or prosecutor's office that doesn't have an official policy of keeping stats, there is no question that those who bring in a large number of arrests or convictions are viewed more favorably. And those who routinely do it in the "tough" cases are viewed the most favorably. The pressure is always there, regardless of whether a tally sheet is distributed at the end of the month.

. . .

And then there are pressures to toe the party line due to fear of harming personal and professional relationships. Police officers and prosecutors are of course friends with others in law enforcement. Close relationships develop over time. Standing up and confronting someone who you feel is not doing the right thing can lead to personal and professional repercussions. In the Gillispie case, discussed in the last chapter, the detective who refused to sign an affidavit exposing the misconduct of a fellow officer cited this very reason. I remember he said at one point something to the effect of: "This past weekend I was at a barbecue. Everyone there was in law enforcement. They are my best friends. My wife is best friends with the wives of the other officers. If I sign an affidavit like this, that's all history." I understood what he meant.

There were two occasions in my prosecutorial career when I said "no" to a fellow law enforcement officer on an important matter, and I suffered both times. The first was when I declined a case from the DEA because I felt that they had violated the Fourth Amendment in stopping and searching a suspect. (They ended up finding drugs during the search.) I declined the case not out of some sort of philosophical support for the Fourth Amendment, or because I was worried about the drug dealer's constitutional rights, but because I felt that any judge would throw the case out and I didn't want to waste my time working on a guaranteed loser. The DEA agents disagreed

with my analysis and threw a fit. They went up the ladder and had their boss complain to my boss, and then asked for a meeting with my boss to see if they could get my decision overruled. But my boss agreed with me. (This may have been, in part, because she also felt pressure to "have the back" of one of her prosecutors.)

After that, the agents from that division of the DEA tried to make my life hell in any way they could. Petty stuff. Like once when I was on trial and had been too busy to sign subpoenas that the DEA agents wanted me to sign, one of them came into the courtroom while I was questioning a witness on the stand and waved the unsigned subpoenas around in the air while pointing at them and making angry faces. The judge was legally blind and couldn't see what was going on. But it was obnoxious and a huge distraction. The jury stopped listening to me and started watching the DEA agent, trying to figure out what was going on. The FBI agent working on the trial with me had to stand up and escort the DEA agent out of the courtroom. He later joked that he wished he could have punched the DEA agent in the face right then and there. That's just one example. The DEA agents from this particular unit continued to pull stunts like that throughout my prosecutorial career because I had had the audacity to decline one of their cases.

In another case, a federal agent who had become a very good personal friend over the years because we worked on several difficult cases together brought a new case to me that he had worked on very hard for a long time. He had excitedly talked to me about the case for months before our meeting, as he was building the case, and I knew he was proud of his work on it. The case involved my friend going undercover, with some degree of danger involved, and recording conversations between himself and a suspected Mafia goon. Eventually, my friend recorded the Mafia goon agreeing to commit a crime. So we had potential conspiracy and attempt charges against him.

When I listened to the taped conversations between my friend and the Mafia goon, however, I got a sick feeling. It was clear to me that the goon, if arrested, would have a very strong entrapment defense. Entrapment is when a defendant can prove that the undercover agent pressured or talked him into committing the crime. And when I listened to the tapes, that's what I heard. So I knew I had to decline the case. Not because I was worried about the Mafia goon's rights, but once again, because I wasn't about to put months and months of work into a case that I was bound to lose. And with the entrapment defense, a judge can't dismiss the case before trial. Rather, it is up to the jury to decide if a defendant was entrapped. This meant that if I approved my friend's case I was going to have to go through all the work of preparing for and putting on a trial, likely only to lose.

I mulled it over and procrastinated as long as I could but eventually had to deliver the bad news. I told my friend I was declining the case due to possible entrapment. He was furious and stormed out of the room. Once again, his agency tried to get my decision overruled by my superiors, but I prevailed. To make a long story short, my friend not only stopped bringing cases to me but he never spoke to me again. Ever. The friendship was over. Period. That was, needless to say, a very painful experience. He had been one of my best friends in law enforcement.

I tell these stories to illustrate that personal relationships and peer pressure play a role in compliance. A twenty-five-year veteran of the Philadelphia PD has written: "Peer pressure will often trump common sense. This was why cops, just like crime organizations, protected their own by keeping their mouths shut. If you want to be a part of 'the team,' if you want to feel safe and know that you have support in dangerous situations, if you want to feel secure in your job and not have supervisors and commanders harass you, then you keep your mouth shut no matter what indiscretion you witness or hear about other officers."²⁶ A law enforcement official must think long and hard before standing up to someone else in law enforcement about an important matter when personal and professional relationships are on the line. Although I can name two occasions in which I said "no" anyway, I have no doubt that such relationships at times cause law enforcement officials to agree to things they shouldn't. It's human nature.

* * *

Some might be surprised to learn that I have generally found Republicans to be easier to work with on innocence matters than Democrats. This goes for judges, prosecutors, and legislators alike. I'm painting with a broad brush here, and of course there are exceptions to the rule. But the two county prosecutors who have fought back the hardest in our innocence cases, and who have exhibited the most close-minded vitriol time and time again, are Democrats from heavily Democratic counties. The prosecutor who has been the most reasonable to work with is Ron O'Brien, a Republican from Columbus, Ohio. Some of the most reasonable judges my office has appeared before have been Republicans. Many of the most unreasonable, like the trial judge in Dean Gillispie's case mentioned earlier, were Democrats.

From about 2007 until 2010, I spent a significant percentage of my time in the state capital of Columbus educating state senators and representatives about the need to pass our innocence reform bill, which finally became law in 2010. This bill had many components, including expanded access to DNA testing for inmates claiming innocence, eyewitness identification

reforms, police interrogation reforms, and a requirement that the police save and properly preserve the DNA collected from crime scenes in certain cases like murder and rape cases. I generally found the strongest supporters for our bill among the Republican ranks. Those who held up the bill at various stages, on the other hand, and who tried their best to defeat it, were Democrats.

My theory is that Democrats are generally viewed by the public as "soft on crime" and thus have a Napoleon complex about crime issues. They feel they have to go above and beyond to show the public how tough they can be on crime issues. Republicans, on the other hand, have fewer insecurities about the matter. The public gives Republicans the benefit of the doubt on issues relating to crime, and thus Republican politicians feel they can be more reasonable as they have less to prove. Whatever the reason, I'm not the only one in the innocence movement who has noticed this discrepancy. Many innocence leaders from other states have reported to me the same observation.

DEFENSE ATTORNEYS

It is not uncommon for a murder prosecution to cost the state millions of dollars.²⁷ While other types of cases often cost the prosecution less, the state has nearly unlimited resources at its disposal to prosecute its cases, with a host of investigators and state crime labs to help it. But when it comes to funding the cost of a proper defense, the reality tends to be quite different. The public often sees only the celebrity trials, where defendants like Michael Jackson or O.J. Simpson are able to hire an expensive defense team that allows them to wage a somewhat fair head-to-head match with the prosecution. But that kind of defense rarely occurs in the real world. Most criminal defendants are given a public defender, or court-appointed attorney working on contract with the local public defender's office, who is grossly underpaid and so overloaded that he or she has little time to devote to any given case.

The Netflix docu-series *Making a Murderer* did an excellent job depicting this problem. One of the two defendants in the case of the murder of Teresa Halbach, Steven Avery, was able to afford two top-notch defense attorneys who were on top of the case from start to finish, and who assembled an impressive team of experts and investigators, because Avery had recently settled a civil case for \$400,000 for his wrongful conviction of the rape of Penny Bernstein. He was able to dump that money into his defense in the Teresa Halbach case. But the other defendant in the Halbach case, Brendan Dassey, had no money and was left with a court-appointed attorney, Len Kachinsky,

who sold him down the river by assuming his client was guilty and admitting as much to the media before doing any investigation or even bothering to meet his new client. Kachinsky then allowed his sixteen-year-old cognitively impaired client to be interrogated by the police without him being present in the interrogation room. The difference in the quality of representation for the two defendants was striking. While the rare criminal defendant who has significant wealth is able to mount the type of quality defense that many in the public believe is routine, many of the rest are left with the Len Kachinskys.

The structural imbalance between the prosecution and the defense bar has been widely reported. In any given year, one can find media reports from all across the country in which public defenders, who represent 80 percent of those charged with crimes in this country,²⁸ complain that they simply are unable to do their jobs due to underfunding and overloaded dockets.²⁹ In fact, in several jurisdictions the ACLU has filed suit against public defender offices because they are unable to operate effectively, depriving their clients of their constitutional right to adequate counsel. These lawsuits, or threats of such lawsuits, are common.³⁰ But nothing ever changes. In Missouri, the state's head public defender became so exasperated by the governor's refusal to adequately fund his department that he used an obscure law to appoint the governor, a licensed attorney, to represent an indigent defendant.³¹ Of course, the governor refused the assignment. But this maneuver reflects the frustration that public defenders feel around the country.

Many public defenders are forced to carry dockets two or three times the number of cases that the American Bar Association recognizes as the maximum.³² In New Orleans, for example, public defenders are so overloaded that they are able to devote an average of just seven minutes of work on each misdemeanor case.³³ Seven minutes! In 2016, the public defender's office in New Orleans had the courage to refuse to take new felony cases for serious crimes, as the lawyers were so overloaded that they simply didn't have time to provide an appropriate defense in each case.³⁴ In 2017, five public defenders from New Orleans appeared on a segment of *60 Minutes* and declared their belief that they have represented innocent clients who have gone to prison because they lacked the time and resources to defend them properly.³⁵

But this problem is not limited to New Orleans. It occurs across the United States on a daily basis.³⁶ One court-appointed public defender in Detroit, Bob Slameka, has made no bones about giving his clients only what the state pays for. Because he is not reimbursed for accepting collect calls from his clients in prison, he simply doesn't accept them. "My God, [the

collect calls] run about how much money and you don't get paid for that stuff. Nothing," he said. He has been reprimanded sixteen times by the Michigan Supreme Court for failing to perform his minimum duties, but the courts continue appointing him to cases. One of his clients, Eddie Joe Lloyd, was later proven innocent and exonerated after spending seventeen years in prison for a crime he didn't commit. Slameka admitted he never even met with Lloyd or accepted his calls, explaining, "I did the best I could given what I had. That's all I could do."³⁷

Many public defenders in this country work on a freelance basis. They are independent contractors who accept appointments from the local public defender's office or the courts. But because the pay is so low for each case, they are forced to take on a great number of cases to keep their practices afloat, or to spend more of their time on their privately retained cases, which pay much better. But because they can't possibly handle a huge number of cases in a professional manner, or can't afford to spend too much time on their low-paying appointed cases, they convince their indigent clients to plead guilty early on to get as many cases out of the way as possible, and do little to no work on the rest. It's a volume business, one where the indigent defendants are often deprived of the attention of an attorney.³⁸

I know this firsthand. My wife is a contract public defender in Cincinnati. For felony cases, she is paid \$45 an hour. For any felony case where the client pleads guilty, her fee is capped at ten hours, or \$450. If a plea occurs after some litigation takes place, like an evidentiary hearing to suppress evidence, then the cap is fifteen hours, or \$675. If she takes a case to trial, her fee is capped at around \$1,200. Her basic office expenses and overhead at her office downtown, when she had one, were what you would expect. To cover this overhead and make a profit that would net her a livable income—say \$60,000 a year—she would have to take so many cases that she couldn't possibly afford to do much work on any of them. One complicated felony case, if it goes to trial, should take months of an attorney's full-time attention to properly and fully prepare. And when retained cases come in the door, business interests require the attorney to give those cases priority and push the low-paying appointed cases to the back burner.

But because I make a livable income sufficient for both of us, and because my wife is passionate about the problem of indigent defense in this country, she decided to do it the right way—to give each client the best defense she could muster. So after a few years of renting office space downtown, she downgraded her office space and started taking only the small number of cases each year that will allow her to do thorough legal research and fully understand each case before she goes to court. She gives each client her full

attention and builds the best defense she possibly can, although, except in rare cases, she still does not have funds for experts or investigators, which of course are a necessary part of a good defense.

As a result, she has made not much more than the cost of her overhead expenses, like liability insurance, office supplies, and courthouse parking. So she essentially makes an unlivable wage but chooses to do so because she is passionate about the cause and is fed up with the inequities in the system. I don't know any other defense attorney who does this. But her example shows that if an attorney wants to provide the appropriate attention to each case, and will not accept doing less, then it will be difficult for him or her to stay afloat under the current system unless he is one of the lucky few who have a booming business of rich retained clients, or who is married to someone who earns a living wage. So many attorneys in her shoes do what Bob Slameka in Detroit does—take the number of cases needed to make a living and then fail to provide every client with a proper defense.

This is the reality for most appointed public defenders, the norm.³⁹ And it's not any better for attorneys who work full-time in a public defender's office for a set annual salary. They are handed so many cases that they simply can't do an adequate job. As one public defender recently wrote in the *Washington Post*:

It's impossible for me to do a good job representing my clients. . . . Because we don't have enough lawyers on staff, the week I passed the bar in 2013, I began representing people facing mandatory life sentences on felony charges. . . . An unconstitutionally high caseload means that I often see my clients [only once]. It means that I miss filing important motions, that I am unable to properly prepare for every trial, that I have serious conversations about plea bargains with my clients in open court because I did not spend enough time conducting confidential visits with them in jail. I plead some of my clients to felony convictions on the day I meet them.⁴⁰

URIES

juries are not the great equalizer. Even when the defendant is innocent, jurors often see a trial that is one-sided because the prosecution has all the resources, has the access to all the evidence, and holds all the cards. Also, the jurors come to the courtroom with their own biases. Although there is a theoretical presumption of innocence, jurors typically think, "The police, the prosecutors, and all these fancy experts know a lot more than me. This is what they do for a living. Why would they waste all this time if the guy

didn't do it? And the prosecution is adamant that this guy did it. I'm just a person off the street. Who am I to question these good, hardworking professionals?"

Professor Keith Findley, a leading criminal justice scholar, has opined:

The presumption [of innocence] is under constant assault from jurors' natural assumption that if someone is arrested and charged with a crime, he or she must have done something wrong. It is also vulnerable to the media frenzy around high-profile cases, the fear-driven politics of crime, and the highly punitive nature of our culture and the innate cognitive processes that produce tunnel vision and confirmation bias.

Indeed, research suggests that the presumption of innocence exists more in theory than reality. In studies, mock jurors predict a 50 percent chance of voting to convict—before hearing any evidence. Other research shows that while simulated jurors initially assign low probabilities of guilt, they abandon the presumption of innocence promptly as prosecution evidence is introduced.⁴¹

And then there's the natural human reaction, particularly when dealing with heinous crimes, to think: "If the guy *probably* committed this rape, even if there is some doubt, how can I possible let him back on the street to do it again? I'd be responsible for his next victim. I couldn't live with myself. Someone I know could be his next victim, and then what? And the prosecution is sure he did it, and they know more than me. Plus, an acquittal would devastate this poor victim and her family. She was so distraught during her testimony and her entire family was in agony throughout the trial. What about justice for them? How can I possibly acquit this guy when it looks like he *probably* did it? It's better to be safe than sorry."

Veteran federal appellate Judge Alex Kozinski, appointed by President Reagan, agrees that the presumption of innocence is a myth: "Juries are routinely instructed that the defendant is presumed innocent and the prosecution must prove guilt beyond a reasonable doubt, but we don't really know whether either of these instructions has an effect on the average juror. Do jurors understand the concept of a presumption? If so, do they understand how a presumption is supposed to operate? Do they assume that the presumption remains in place until it is overcome by persuasive evidence or do they believe it disappears as soon as any actual evidence is presented? We don't really know."⁴² Judge Kozinski suggests that, from his many years on the bench, it does not appear to him that jurors truly embrace the presumption of innocence. This is partly due to psychology, he suspects. It is well understood in the psychological literature that "whoever makes the first assertion about something has a large advantage over

everyone who denies it later." Because the defense presents its case after the prosecution—often days or weeks after the prosecution in longer, more complicated felony trials—it may be that "jurors start forming a mental picture of the events in question as soon as they first hear about them from the prosecution witnesses," Kozinski writes. "Later-introduced evidence, even if pointing in the opposite direction, may not be capable of fundamentally altering that picture and may, in fact, reinforce it," due to the confirmation bias that has set in by that time.

And in many cases, Kozinski points out, the defense doesn't put on its own case, as it's not required to do so. Yet, "when accusations or assertions are met with silence, they are more likely to feel true." He concludes: "It may well be that, contrary to instructions, and contrary to their own best intentions, jurors are persuaded of whatever version of events is first presented to them and change their minds only if they are given very strong reasons to the contrary."

When I was a prosecutor in Manhattan, our jury pools were selected from all counties within the jurisdiction of our federal district, which was known as the Southern District of New York. Some of these regions are urban, like Manhattan and the Bronx. Others are suburban or rural, like Westchester, Rockland, and Putnam counties. But our juries for each case were all from a single county—the counties were not commingled. When a trial commenced, therefore, you learned that you had a jury from the Bronx, for example, or perhaps a jury from Rockland County. And the county from which you drew your jury completely affected your view of the case. Juries from the rural or suburban counties were known to be pro-law enforcement; juries from Manhattan and the Bronx more sympathetic to criminal defendants and sometimes suspicious of the police. Prosecutors would groan if they drew a Bronx jury but sigh in relief if they drew a Putnam County jury. In a tough case that drew a Bronx or Manhattan jury, therefore, a prosecutor was more apt to offer a better pretrial deal to the defendant than she might if she drew a jury from a rural or suburban region. While this is perhaps not surprising, it demonstrates the degree of arbitrary variance in attitude from jury to jury.

And juries, unfortunately, do not always take their jobs seriously or understand the meaning of proof "beyond a reasonable doubt." In the Dean Gillispie case, for example, discussed throughout this book, the jury voted 8-4 in favor of acquittal on a Friday afternoon and reported to the judge that they were deadlocked. After being told they would have to work through the weekend if they didn't reach a resolution, they came back with a guilty verdict shortly thereafter. God forbid, they couldn't miss their golf

outings or soccer carpools on Saturday morning. Gillispie's convictions were later tossed out and he was freed, but only after he spent twenty years in prison.

That said, I have told many that in postconviction innocence cases like Clarence Elkins's or Gillispie's, where new evidence proves my client innocent after he has served many years in prison, I would much rather have a jury decide my client's fate than an elected judge. Jurors get the human emotion and deeply feel the unfairness. They are not jaded by politics or hardened from years on the bench. At trial, I think the jurors' bias works in favor of the prosecution, as I have said, where the crime is fresh and raw and jurors think, "Why would the prosecution and police waste their time on an innocent person?" But in the postconviction context, the sympathy factor for someone who has already been in prison for many years and now has strong evidence of innocence, I believe, would often work in favor of the defense. By the time of a postconviction innocence motion, the crime and all the emotion it brings with it are now often decades in the past, and the public has seen and cheered for the many exonerated men and women the media has documented walking out of prison in the past few decades. Unfortunately, I do not have the option of choosing a jury, as the law says that these exoneration motions must be decided by the same elected judge who convicted my client years earlier. Convincing an elected judge to admit that a terrible mistake happened in his or her courtroom is usually a steep hill to climb.