

PREFACE

CRIMINAL JUSTICE—OR ANY JUSTICE AT ALL—UNDER TRUMP

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INTRODUCTION

If Charles Dickens were alive today, he might have written one of the most famous opening lines in English literature with no sense of irony. Instead of “It was the best of times, it was the worst of times,” the first few words of *A Tale of Two Cities* might have read:

It was the worst of times, the *absolute worst of times*. It was the age of foolishness, it was the epoch of incredulity, it was the season of Darkness, it was the winter of despair. We had nothing before us¹

That is how I feel at the close of the first one hundred days of the Trump administration, one of the rockiest and most tumultuous starts ever to a new administration. We now have a president who “tweets” in response to every perceived slight² and then exhorts Congress not to engage in “trivial fights.”³ We have detained hundreds of rigorously vetted and properly authorized tourists and immigrants at airports for hours—and disrupted the travel plans of tens of thousands more.⁴ One after another Trump associate has been revealed to have had contact with Russians connected to Vladimir Putin at a time when, according to U.S. intelligence agencies, Mr. Putin was trying to steer the election in favor of Trump.⁵ Since assuming office, the new leader of the free world has waged perpetual war on intelligence agencies, Muslim immigrants, the federal judiciary, protesters, Barack Obama, Mexico, Austra-

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1. With apologies to CHARLES DICKENS, *A TALE OF TWO CITIES* 1 (1859).

2. Aasif Mandvi, *The Trump Tweets I Want to Read*, N.Y. TIMES (Dec. 3, 2016), <https://www.nytimes.com/2016/12/03/opinion/sunday/the-trump-tweets-i-want-to-read.html> [<https://perma.cc/9EC2-5E5P>] (noting that Trump “lashes out at the smallest perceived slight with ferocity, while praise of any kind is so intoxicating to him that he is blind to where that praise comes from”).

3. Julie Hirschfeld Davis, Michael D. Shear & Peter Baker, *Trump, in Optimistic Address, Asks Congress to End ‘Trivial Fights,’* N.Y. TIMES (Feb. 28, 2017), <https://www.nytimes.com/2017/02/28/us/politics/trump-address-congress.html> [<https://perma.cc/3VAV-3F2J>].

4. Glenn Kessler, *Fact Checker: The Number of People Affected by Trump’s Travel Ban: About 90,000*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/30/the-number-of-people-affected-by-trumps-travel-ban-about-90000/?utm_term=.eb71e1ce36f4 [<https://perma.cc/AT5F-LN9U>] (reporting that 90,000 travelers were affected overall by Trump’s January travel ban); Michael D. Shear, Nicholas Kulish & Alan Feuer, *Judge Blocks Trump Order on Refugees Amid Chaos and Outcry Worldwide*, N.Y. TIMES (Jan. 28, 2017), <https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html> [<https://perma.cc/9R47-5FVK>] (reporting about the chaos at American airports caused by Trump’s executive order banning travelers from seven Muslim countries in January).

5. Scott Shane & Andrew E. Kramer, *Trump Team’s Links to Russia Crisscross in Washington*, N.Y. TIMES (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/us/politics/trump-russia-links-washington.html> [<https://perma.cc/KQP3-ZVAZ>] (noting that Trump’s former campaign chairman Paul Manafort, a member of his national security team J.D. Gordon, former lawyer Jason Greenblatt, former national security advisor Michael Flynn, and recently confirmed Attorney General Jeff Sessions all had contact with Russians during the election).

lia, alleged voter fraud, and, above all, the media.⁶ Taking a page from George Orwell, Trump’s war is apparently “not meant to be won, it is meant to be continuous.”⁷ Taking another page from Orwell, there is little truth in Trumpville, only “alternative facts.”⁸

Trump is no better when it comes to criminal justice. His Nixonian call for “law and order” in a time of declining crime⁹ but persistent mass incarceration—the number of people held in jails, prisons, and other facilities continues to hover at around 2.2 million¹⁰—is the opposite of what thoughtful people from across the political spectrum have been urging.¹¹ His focus on the uptick of gun violence in cities like Chicago—and his baseless claim that this is happening across the country—exploit people’s (race-based) fear and anxiety.¹² His rounding up scores of people

6. Tim Wu, *How Donald Trump Wins by Losing*, N.Y. TIMES (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/opinion/sunday/how-donald-trump-wins-by-losing.html> [<https://perma.cc/F5G2-KJNS>].

7. *Id.*

8. See Travis M. Andrews, *Sales of Orwell’s ‘1984’ Spike After Kellyanne Conway’s ‘Alternative Facts,’* WASH. POST (Jan. 25, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/01/25/sales-of-orwells-1984-spike-after-kellyanne-conways-alternative-facts/?utm_term=.5cd5dc2989ca [perma.cc/73TJ-5L6J]; Sari Horwitz, *Law Professors File Misconduct Complaint Against Kellyanne Conway*, WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/law-professors-file-misconduct-complaint-against-kellyanne-conway/2017/02/23/442b02c8-f9e3-11e6-bf01-d47f8cf9b643_story.html?utm_term=.dc0a4fc6ba50 [perma.cc/SS75-6CG2] (reporting that 15 law professors filed an ethics complaint against White House Counselor, Kellyanne Conway, for “conduct involving dishonesty, fraud, deceit or misrepresentation” because of a false claim that there had been a “massacre” in Bowling Green, Kentucky and other statements).

9. See Jeet Heer, *Trump’s “Law and Order” Speech Was Full of Lies. It Just Might Work.*, THE NEW REPUBLIC (July 22, 2016), <https://newrepublic.com/article/135406/trumps-law-order-speech-full-lies-just-might-work> [perma.cc/75TV-5PNQ] (noting that crime in America has been in steep decline for 25 years and is currently near a four-decade low); see also Emily Bazelon, *Department of Justification*, N.Y. TIMES MAGAZINE (Feb. 28, 2017), https://www.nytimes.com/2017/02/28/magazine/jeff-sessions-stephen-bannon-justice-department.html?_r=0 [perma.cc/8DAN-Y2Z2] (noting that urban poverty and crime lie at the heart of the “new nationalist message,” something Trump has exaggerated, painting “inner cities” as “war zones” created and sustained Democrats).

10. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 2 (2017), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/9Q5W-7GVG>] (putting the total number of incarcerated people in the U.S. at 2.2 million, more than any other country on Earth); see also Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, PRISON POL’Y INITIATIVE (Mar. 14, 2016), <https://www.prisonpolicy.org/reports/pie2016.html> [<https://perma.cc/LC7T-M4GE>] (breaking down the incarcerated population in the U.S. by numbers in jails, state prisons, federal prisons, juvenile correctional facilities, military prisons, immigration detention facilities, and civil commitment centers, according to latest Justice Department data).

11. See generally WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 13 (2011) (examining the history of criminal justice in America and arguing that criminal punishment is a necessary but terrible tool, to be used sparingly); see also Alex Altman, *Criminal Justice Reform is Becoming Washington’s Bipartisan Cause*, TIME (Feb. 19, 2015), <http://time.com/3714876/criminal-justice-reform-is-becoming-washingtons-bipartisan-cause/> [<https://perma.cc/X5PC-TBCF>] (noting “some of the powerhouses in the conservative world” like the Koch brothers and Americans for Tax Reform are working with organizations on the left to address the broken criminal justice system, with its soaring rate of incarceration and disproportionate minority impact); Marc Levin, *Dear President Trump: Here’s How to Get Right on Crime, Part 3*, MARSHALL PROJECT (Jan. 19, 2017), <https://www.themarshallproject.org/2017/01/19/dear-president-trump-here-s-how-to-get-right-on-crime-part-3#9avpGyaG7> [<https://perma.cc/9HW6-KUPY>] (urging Trump to look to New York City, which cut its incarceration rate by 55 percent since 1996, while simultaneously reducing crime by 58 percent, as “most powerful urban example” of reducing both crime and incarceration).

12. Julie Bosman & Mitch Smith, *As Chicago Murder Rate Spikes, Many Fear Violence Has Become Normalized*, N.Y. TIMES (Dec. 28, 2016), https://www.nytimes.com/2016/12/28/us/chicago-murder-rate-gun-deaths.html?_r=0 [<https://perma.cc/5RY6-9T4L>] (noting that more than 750 people have been murdered in Chicago in 2016, a 58 percent increase over last year and the highest total since 1997); Katherine Skiba, *Trump Again Calls Out Chicago on Violence and Repeats Debunked Murder Rate Claim*, CHICAGO TRIB. (Feb. 7, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-donald-trump-chicago-crime-20170207-story.html> [<https://perma.cc/UYD3-XUNB>] (reporting that Trump singled out violence in

who have not done anything wrong—except for being in this country without formal documentation¹³—makes me worry about what will happen to those who *have*.¹⁴

Then there is President Trump’s embrace of private prisons—both for federal prisoners and immigration detainees—which has been a huge boom to that industry.¹⁵ Unsurprisingly, private prison companies overwhelmingly backed Trump for President.¹⁶

None of this bodes well for my life’s work as an indigent criminal defense lawyer and law teacher, or for racial and social justice in the United States.¹⁷

I admit I have a bias: I worked hard to elect Hillary Clinton. I worked for her in Florida, Ohio, Pennsylvania, and Virginia. I registered voters, canvassed, made phone calls, got out the vote, and engaged in “voter protection.” I admit I am still reeling from the November 2016 election of Donald J. Trump as our 45th President. The result was shocking—and remains so, even though I was not in what Michael Moore called a liberal “bubble.”¹⁸ After all, I had been out there: I had had doors slammed in my face, been yelled at on the phone, and been accosted on the street. (One man became especially unhinged at my bumper sticker that reads, “I’m from the Elizabeth Warren wing of the Democratic Party,” calling Warren a “lesbian Communist.”)

It has been a struggle to pick myself up, dust myself off, and be some kind of role model for my students, the next generation of lawyers.

One of the most distressing things about the Trump administration is its apparent hostility to lawyers, which might also be seen as hostility to people with knowledge,

Chicago in a White House meeting with sheriffs and repeated a debunked claim that the U.S. murder rate is the highest it has been in 45 years); *see also* James Forman, Jr., *Justice Springs Eternal*, N.Y. TIMES (Mar. 25, 2017), <https://www.nytimes.com/2017/03/25/opinion/sunday/justice-springs-eternal.html> [<https://perma.cc/QG4E-5N9W>] (noting Trump’s “caricature” of black neighborhoods as “killing fields in desperate need of more stop-and-frisk policing”).

13. Christine Hauser, *A Young Immigrant Spoke Out About her Deportation Fears. Then She was Detained.*, N.Y. TIMES (Mar. 2, 2017), <https://www.nytimes.com/2017/03/02/us/immigrant-daca-detained.html> [<https://perma.cc/73WF-X3R4>] (reporting that Daniela Vargas, a young immigrant who was brought to this country from Argentina when she was 7, spoke out about her deportation fears at a news conference and was then arrested and sent to a detention facility). Ms. Vargas was later released. Christine Hauser, *Woman Detained After Speaking About Deportation Fears is Released*, N.Y. TIMES (Mar. 10, 2017), <https://www.nytimes.com/2017/03/10/us/daniela-vargas-detained-daca-released.html> [<https://perma.cc/4QYU-59Q2>].

14. *See* Michael Wines, *Illegal Voting gets Texas Woman 8 Years in Prison, and Certain Deportation*, N.Y. TIMES (Feb. 10, 2017), <https://www.nytimes.com/2017/02/10/us/illegal-voting-gets-texas-woman-8-years-in-prison-and-certain-deportation.html> [<https://perma.cc/HP2F-XZG6>] (reporting that Rosa Maria Ortega, a legal permanent resident and mother of four brought to the U.S. as an infant, was sentenced to eight years in prison for voting in elections in 2012 and 2014—for Republicans).

15. *See* Betsy Woodruff, *Trump Moves to Make Private Prisons Great Again*, THE DAILY BEAST (Feb. 23, 2017), <http://www.thedailybeast.com/articles/2017/02/23/trump-moves-to-make-private-prisons-great-again.html> [<https://perma.cc/4Y35-3ZUY>] (noting Trumps reversal of the previous administration’s policy to end the use of private prisons for safety and security reasons and the plan to dramatically increase the use of private immigration detention facilities); *see also* Editorial, *Under Mr. Trump, Private Prisons Thrive Again*, N.Y. TIMES (Feb. 24, 2017), https://www.nytimes.com/2017/02/24/opinion/under-mr-trump-private-prisons-thrive-again.html?_r=0 [<https://perma.cc/9VE6-79EL>]; *cf.* Sally Q. Yates, *Phasing Out Our Use of Private Prisons*, U.S. DEP’T JUST.: JUST. BLOGS (Aug. 18, 2016), <https://www.justice.gov/opa/blog/phasing-out-our-use-private-prisons> [<https://perma.cc/6SPA-65RR>] (explaining the Obama administration’s efforts to reduce private prison use).

16. Woodruff, *supra* note 15.

17. *See generally* Bazelon, *supra* note 9 (describing the apparent bleak white nationalist vision of Trump advisor Steve Bannon and Attorney General Jeff Sessions, and expressing concern they will use the power of the Justice Department to enact their vision).

18. Michael Moore, *5 Reasons Why Trump Will Win*, MICHAEL MOORE (2016), <http://michaelmoore.com/trumpwillwin/> [<https://perma.cc/U4KB-9ATN>].

experience, ability, and a code of ethics.¹⁹ Among President Trump’s 16 cabinet appointees, only Attorney General Jeff Sessions and Secretary of Labor Alexander Acosta have law degrees. (Vice President Mike Pence also has a law degree, as do the heads of the Central Intelligence Agency, Environmental Protection Agency, and Office of Management and Budget.) This is a sharp drop from the four previous administrations, in which lawyers accounted for 40 to 70 percent of cabinet secretaries.²⁰ Moreover, in late March, 2017, the Trump administration ended the American Bar Association’s longstanding practice of evaluating nominees to the federal bench, including the Supreme Court.²¹ This occurred even though the ABA recently gave its highest rating to Judge Neil M. Gorsuch, President Trump’s Supreme Court nominee.²²

How can I temper the growing unease among many budding lawyers? What to say to students in the law clinic I direct—Georgetown’s Criminal Defense & Prisoner Advocacy Clinic—most of whom plan to become public defenders and prisoners’ rights lawyers? What to say to students in my large class on lawyers’ ethics? These students have a range of lawyerly interests—from poverty and public interest law to corporate practice and government work. But they would all like to be “good lawyers”²³ who have *something* to do with justice.²⁴

How to prepare students who came of age during the Obama administration for the abrupt about-face? How to inspire them to redouble their efforts as lawyers representing clients, officers of the legal system, and public citizens?²⁵ It might be that criminal justice—or justice for anyone at the margins—is a pipedream in these turbulent times, and we would all be wise to dial back our vision of a just society and simply try to stave off the worst. But I hope not.

MY CAREER AS A CRIMINAL DEFENSE LAWYER

I am what some might call a die-hard criminal defense lawyer. Although I was not born into the work—no one in my family was a lawyer of any kind—I came to it early. I have what one commentator calls the “mind-set, heart-set [and] soul-set” of a public defender.²⁶ I have always been drawn to people down on their luck or in trouble.²⁷ As Clarence Darrow once wrote:

19. See generally MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 1983).

20. Joe Palazzolo, *In Short Supply in Donald Trump’s Cabinet: Lawyers*, WALL ST. J. (Mar. 2, 2017), <https://www.wsj.com/articles/in-short-supply-in-donald-trumps-cabinet-lawyers-1488463200> [<https://perma.cc/3YME-GHTL>] (noting that President Trump’s preference for business and military leaders has “marginalized a group that has long gripped the levers of power in the nation’s capital: lawyers”).

21. Adam Liptak, *White House Ends Bar Association’s Role Vetting Judges*, N.Y. TIMES (Mar. 31, 2017), <https://www.nytimes.com/2017/03/31/us/politics/white-house-american-bar-association-judges.html> [<https://perma.cc/GJS2-3A6T>].

22. See *id.*

23. See generally DAVID LUBAN, *THE GOOD LAWYER: LAWYERS’ ROLES AND LAWYERS’ ETHICS* (1983) (collection of essays on the personal morality and professional ethics of lawyers); Stephen Gillers, *Legal Ethics: Can a Good Lawyer be a Bad Person?*, 2 J. INST. STUDY LEGAL ETHICS 131 (1999) (discussing the sometimes amoral role of lawyers); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001) (examining the morality of prosecution in a time of mass incarceration).

24. Cf. James Mills, *I Have Nothing to Do With Justice*, LIFE MAGAZINE, Apr. 2, 1971, at 17 (classic article on a career public defender who proudly declares he has nothing to do with “justice”).

25. See MODEL RULES OF PROF’L CONDUCT, pmb. at 1 (“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”).

26. Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 175 (1983–84).

27. See Abbe Smith, *How Can You Not Defend Those People?*, in *HOW CAN YOU REPRESENT THOSE PEOPLE?* 163–65 (Abbe Smith & Monroe H. Freedman eds., 2013) (discussing my affinity for “people in trouble”).

Strange as it may seem I grew to like to defend men and women charged with crime. It soon came to be something more than winning or losing a case . . . [It] meant more than the quibbling with lawyers and juries, to get or keep money for a client so that I could take part of what I won or saved for him: I was dealing with life, with its hopes and fears, its aspirations and despairs.²⁸

My first visit to a jail—as a high school student on a sociology class field trip—was a formative experience. We went to the Cook County Jail, now infamously known as the largest mental hospital in America.²⁹ Although it felt voyeuristic for a bunch of privileged white suburban kids to be touring the overwhelmingly African American jail, I also felt oddly at home there. When we got to the bakery, one of the inmates working there called out to us, asking whether anyone wanted a loaf of bread. The other students laughed uncomfortably, but I said, “Sure.” When he tossed me a fresh loaf, I felt honored. My mother did not share my enthusiasm and refused to serve the “prison bread” at dinner.

During college, I worked at a local legal aid office and a couple of poverty law and public interest firms. Between college and law school, I continued to work at the legal aid office through VISTA (Volunteers in Service to America, the precursor to Americorps), doing community legal education and criminal investigation (the office took “conflict cases” from the local public defender office). I loved the criminal work. There was an urgency to it; our clients’ liberty was on the line. I was helping to provide legal services to people struggling with poverty and deprivation threatened with losing what little they had.

I continued on this path throughout law school. I interned at the Center for Constitutional Rights during my first year, working on a protocol for defending battered women who kill their abusers. I was fortunate to be admitted to two full-year clinics during law school: the prison law clinic in my second year (representing prisoners in a variety of civil and criminal contexts), and the criminal defense clinic my third year (representing indigent defendants charged with misdemeanors and felonies). I did criminal defense work at the legal aid office in my college town both summers.

I became a public defender at the Defender Association of Philadelphia upon graduating from law school. My eight years in that office were the best time I ever had as a lawyer. Many of my defender colleagues remain my closest friends and are among the finest lawyers I know.

More than 25 years later, I still consider myself a public defender—just in fancier digs. Like a public defender, I spend most of my days in the local criminal court, fighting for the rights of indigent defendants, but I also get to mold students and post-graduate fellows into loyal and zealous indigent criminal defense lawyers.³⁰ The clinic offers a range of prisoner advocacy projects as well—conducting legal research and writing classes at a couple of local prisons, representing a handful of prisoners seeking parole or clemency, and providing reentry services for prisoners who get out. In a time of mass incarceration, the prison work allows students and fellows to reach out to at least some of the incarcerated. The broad clinic docket also harkens back to my own law school experience, combining prisoners and criminal defendants.

28. CLARENCE DARROW, *THE STORY OF MY LIFE* 75–76 (1934).

29. See generally Matt Ford, *America’s Largest Mental Hospital Is a Jail*, *THE ATLANTIC* (June 8, 2015), <https://www.theatlantic.com/politics/archive/2015/06/americas-largest-mental-hospital-is-a-jail/395012/> [https://perma.cc/YY7D-PAVH].

30. See generally MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* (5th ed. 2016) (treatise offering a client-centered view of lawyers’ ethics).

Trump's election changes none of this; the work is more important now. Individual resistance—putting the government to its burden of proof, challenging the conduct of law enforcement, ensuring that the disproportionately black and brown people in our criminal justice system are vigorously represented—is how criminal lawyers push back against a revived War on Crime and contribute to social and racial justice.³¹ We can engage in broader, community-based resistance if we work with allies redoubling their efforts to achieve criminal justice reform, especially on the local level.³²

I am happy to report that my students and fellows have picked themselves up, dusted themselves off and thrown themselves into their clinic work. They understand the urgency. They are learning how to persuasively argue “alternative facts”—or at least alternative evidence—at trial, when it is proper to do so.³³ They are making a difference.

THE TASKS BEFORE US ARE NOT NEW

I do not mean to suggest that our challenges as criminal defenders began with the election of President Trump. President Obama and his predecessors were hardly faultless when it came to criminal justice. I miss Obama. I miss his intelligence, eloquence, elegance, and cool. I believe history will regard him as an extraordinary President in a difficult time. Obama is the first sitting President to go inside a federal prison and talk to both prisoners and corrections officers.³⁴ He is the only President to speak of “mass incarceration” and the “school to prison pipeline.”³⁵ Obama commuted more prison sentences than the past twelve Presidents combined, a total of 1,715, including 568 life sentences.³⁶ He granted 212 pardons.³⁷ He has an understanding of the role that race has played in in shaping our criminal justice policies.³⁸

31. See Sari Horwitz, *How Jeff Sessions Wants to Bring Back the War on Drugs*, WASH. POST (Apr. 8, 2017), https://www.washingtonpost.com/world/national-security/how-jeff-sessions-wants-to-bring-back-the-war-on-drugs/2017/04/08/414ce6be-132b-11e7-ada0-1489b735b3a3_story.html?utm_term=.8247a3ff30b4 [<https://perma.cc/EVX6-CNEF>] (noting the “retro” feel of the Trump administration’s approach to crime and reporting that the Justice Department is preparing a plan to prosecute more drug and gun cases and pursue mandatory minimum sentences consistent with the national crime strategy of the 1980s and ’90s).

32. See generally Forman, *supra* note 12 (noting the election of local progressive prosecutors, the success of state ballot initiatives promoting criminal justice reforms, and the growth of the “decarceration movement”).

33. See ABBE SMITH, *CASE OF A LIFETIME 1* (2008) (“Truth is a complicated and elusive matter in criminal defense. More often than not, it is also in the eye of the beholder. One person maintains one version of events while another offers a very different account. Each is certain of what happened and can point to facts that support their truth. But facts can be unruly . . . Things are not always what they seem.”).

34. Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 813 (2017) [hereinafter Obama, *The President’s Role*].

35. *Id.* at 820.

36. See Allie Malloy & Kevin Liptak, *Obama Commutes 330 Sentences, Most in Single Day*, CNN POLITICS (Jan. 20, 2017), <http://www.cnn.com/2017/01/19/politics/obama-commutes-330-sentences-most-in-single-day/> [<https://perma.cc/HEK9-PTVY>].

37. *Id.*

38. See Obama, *The President’s Role*, *supra* note 34, at 819–20; see also Peter Baker, *Obama Calls for Effort to Fix a ‘Broken System’ of Criminal Justice*, N.Y. TIMES (July 14, 2015) <https://www.nytimes.com/2015/07/15/us/politics/obama-calls-for-effort-to-fix-a-broken-system-of-criminal-justice.html> [<https://perma.cc/HR72-9KCQ>] (reporting about President Obama’s 2015 address on criminal justice before the NAACP, in which he connected racially charged upheaval in places like Ferguson, Missouri and Baltimore, Maryland to systemic bias in the criminal justice system); Barack Obama, *Remarks by the President at the NAACP Conference*, (July 14, 2015) Speeches and Remarks, The White House, <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference> [<https://perma.cc/ZK29-U9ZJ>].

But he was not perfect. He could have done much more—as he acknowledges.³⁹ With two million individuals locked up, letting a couple thousand people out barely scratches the surface of our prison problem. What is more, he released the easy ones, a subset of what scholar Marie Gottschalk calls the “non, non, nons”—nonviolent, nonserious, non-sexual offenders.⁴⁰ The vast majority of Obama’s commutations went to nonviolent drug offenders.⁴¹

While focusing on these offenders is understandable, especially in the federal system where nearly half of all inmates are serving time for drugs,⁴² it does not get to the core problem. The reason we have mass incarceration in this country is not because we lock up too many nonviolent federal offenders, but because we lock up too many violent state offenders, and for too long.⁴³

As anyone who has spent time in a prison can attest, “violent offenders” are not all alike. Not everyone who has committed a violent crime is a dangerous person requiring endless incarceration. Many change and grow. Crime varies, too; not every murder or robbery or assault is the same. American law-breakers are surely no worse than law-breakers in other countries; we do not have to be the world leader in incarceration.⁴⁴ As former President Obama has written, “How we treat citizens who make mistakes (even serious mistakes) . . . reflects who we are as a people and reveals a lot about our character and commitment to our founding principles.”⁴⁵

Still, the responsibility we bear as criminal defense lawyers is heightened in the age of Trump. As this essay went to print, the confirmation of Judge Neil M. Gorsuch to the Supreme Court was all but guaranteed, filling the seat left open for more than a year since the death of Justice Antonin Scalia. This is depressing. What I wanted more than anything during the confirmation hearings was for a Senate Judiciary Committee member—or any member of Congress—to call Republicans what they are: *cheaters*.⁴⁶ They cheated the American people who elected President Obama to a second four-year term of office—not a three-year term—when they refused to act on his nomination of D.C. Circuit judge Merrick Garland to fill the vacancy, and they

39. See Obama, *The President’s Role*, *supra* note 34, at 855–65. (discussing the work yet to be done to reform our criminal justice system).

40. MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 165–66 (2015); Marie Gottschalk, *Raze the Carceral State*, *DISSENT* (2015), <https://www.dissentmagazine.org/article/criminal-justice-reform-minimum-sentencing-mass-incarceration> [<https://perma.cc/26YH-SLF9>].

41. See Kevin Liptak, *Obama Reducing 102 Inmates’ Sentences*, *CNN POLITICS* (Oct. 7, 2016), <http://www.cnn.com/2016/10/06/politics/obama-reducing-prison-sentences-announcement/index.html> [<https://perma.cc/BQ5X-ZZNL>]; see also David Cole, *Why Hasn’t Obama’s Clemency Initiative Helped More Nonviolent Drug Offenders?*, *THE NEW YORKER* (July 4, 2016), <http://www.newyorker.com/news/news-desk/why-hasnt-obamas-clemency-initiative-helped-more-nonviolent-drug-offenders> [<https://perma.cc/JT27-ZKW3>].

42. See John Pfaff, Op-Ed, *For True Penal Reform, Focus on the Violent Offenders*, *WASH. POST* (July 26, 2015), https://www.washingtonpost.com/opinions/for-true-penal-reform-focus-on-the-violent-offenders/2015/07/26/1340ad4c-3208-11e5-97ae-30a30cca95d7_story.html [<https://perma.cc/3ER6-6YEE>] [hereinafter Pfaff, *Focus on the Violent Offenders*].

43. *Id.* (noting that federal prisoners account for only 14 percent of the U.S. prison population and demonstrating that mass incarceration is largely a state and local problem); see also John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 *GEORGIA ST. U. L. REV.* 1239, 1247 (2012) (examining the sources of mass incarceration and finding that, since 1990, 50 percent of the growth in the state prison population is due to violent offenders).

44. *Fact Sheet: Trends in U.S. Corrections*, *THE SENTENCING PROJECT* (2017), <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/9Q5W-7GVG>].

45. Obama, *The President’s Role*, *supra* note 34, at 812.

46. But see Richard Eskow, *5 Reasons All Democrats Must Oppose Gorsuch*, *HUFF. POST* (Mar. 21, 2017), http://www.huffingtonpost.com/entry/five-reasons-for-moderate-democrats-to-oppose-neil_us_58d07dc8e4b0537abd95742d [<https://perma.cc/4DR6-ZE9L>] (calling the Republicans who blocked Obama’s Supreme Court nominee Merrick Garland “cheaters”).

cheated the Constitution.⁴⁷ Garland might not have been my first choice for the Court—I was hoping for someone more progressive on criminal justice⁴⁸—but he was a “consensus nominee,”⁴⁹ who deserved a hearing.

Gorsuch’s opinions while on the Tenth Circuit display a troubling willingness to find harmless error in cases of clear Fourth Amendment violations.⁵⁰ His predecessor Justice Scalia viewed the Fourth and Sixth Amendments as essential to individual privacy and liberty,⁵¹ and criminal defense lawyers will need to remain vigilant to ensure these liberties are not further chipped away under a new Court.

LAWYERS AS PUBLIC CITIZENS

Ordinarily, I emphasize issues relating to lawyers as advocates in my writing and teaching. This reflects my professional life as a criminal defense lawyer and my intellectual interest in the ethics of advocacy. But these are not ordinary times. Now, I find myself talking more and more about the important role lawyers play as public citizens.

The *Model Rules of Professional Conduct* explain this role:

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.⁵²

The exhortation is both modest and grand. Its modesty is the call for lawyers to do what we are trained to do: cultivate knowledge of law, improve the law, and instill confidence in the rule of law. Our role in protecting and defending the rule of law is

47. See U.S. CONST. art. II, § 2, cl. 2 (“[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . .”).

48. See Charlie Savage, *In Criminal Rulings, Garland Has Usually Sided With Law Enforcement*, N.Y. TIMES (Mar. 22, 2016), https://www.nytimes.com/2016/03/23/us/politics/merrick-garland-supreme-court-nominee.html?_r=0 [<https://perma.cc/7R3B-PP7W>] (examining Chief Judge Garland’s record deciding criminal cases).

49. Laura Reston & Emma Foehringer Merchant, *Why Merrick Garland is the Moderate’s Choice for the Supreme Court*, NEW REPUBLIC (Mar. 16, 2016), <https://newrepublic.com/article/131680/merrick-garland-moderates-choice-supreme-court> [<https://perma.cc/F99E-QCWL>].

50. See, e.g., *United States v. Benard*, 680 F.3d 1206 (10th Cir. 2012) (Gorsuch, J., dissenting) (dissenting from the majority’s holding and finding failure to suppress Defendant’s post-arrest statements to be harmless error); *United States v. Martin*, 613 F.3d 1295 (10th Cir. 2010) (holding that the officers’ seizure and search in the entryway of Defendant’s apartment complied with the Fourth Amendment).

51. See Jonathan Blanks, *Justice Scalia: Underappreciated Fourth Amendment Defender*, CATO AT LIBERTY (Feb. 15, 2016), <https://www.cato.org/blog/justice-scalia-underappreciated-fourth-amendment-defender> [<https://perma.cc/8U7N-XAW5>] (discussing Scalia’s Fourth Amendment jurisprudence); Robert J. Smith, *Antonin Scalia’s Other Legacy*, SLATE (Feb. 15, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/antonin_scalia_was_often_a_friend_of_criminal_defendants.html [<https://perma.cc/5E2P-U784>] (discussing Scalia’s Fourth and Sixth Amendment decisions).

52. MODEL RULES OF PROF’L CONDUCT, pmbl. at 6 (AM. BAR ASS’N 1983).

essential to a free society.⁵³ This modest though important duty seems suddenly urgent in the time of Trump.⁵⁴

We have a responsibility to uphold the standards of our profession, and to ensure our peers do the same. One of the standards is telling the truth—something that is particularly important for lawyers in high office.

As Rule 8.4(c) of the *Model Rules* states, “[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”⁵⁵ This is a very broad rule, as it includes conduct outside the practice of law that need not be criminal.⁵⁶ There is potential for mischief in the rule’s breadth: Generally speaking, lawyers should not face discipline for either public or private dishonesty unless the conduct calls into serious question the lawyer’s fitness for the practice of law.⁵⁷ Furthermore, lawyers, especially those in politics, have important First Amendment rights.⁵⁸

However, lawyers in public service and in the public eye have a higher obligation to avoid conduct involving dishonest, fraud, deceit, or misrepresentation than other lawyers. It is not surprising that the *Model Rules* distinguish lawyers in public office from other lawyers. The American Bar Association knows well the history of professional responsibility as an academic requirement in American law schools: following the Watergate scandal, which involved questionable—and criminal—conduct by a number of high-ranking lawyers in the Nixon administration, the ABA mandated that law students take such a course in order to graduate.⁵⁹

Already, in response to potential violations of Rule 8.4(c), ethics complaints have been filed against members of the administration.⁶⁰ Consistent with these complaints,

53. See, e.g., James Traub, *The Lawyer’s Crusade*, N.Y. TIMES (June 1, 2008), <http://www.nytimes.com/2008/06/01/magazine/01PAKISTAN-t.html> [<https://perma.cc/JR2A-DUWD>] (describing the work of Aitzaz Ahsan, the mastermind of the lawyers’ movement in Pakistan to restore democracy and the rule of law).

54. See Bridgette Dunlap, *Trump’s Open Disdain for the Rule of Law*, ROLLING STONE (Oct. 11, 2016), <http://www.rollingstone.com/politics/features/trumps-open-disdain-for-the-rule-of-law-w444093> [<https://perma.cc/2X9N-SAS6>]; Adam Liptak, *Donald Trump Could Threaten U.S. Rule of Law, Scholars Say*, N.Y. TIMES (June 3, 2016), https://www.nytimes.com/2016/06/04/us/politics/donald-trump-constitution-power.html?_r=0 [<https://perma.cc/3P39-4GW3>].

55. MODEL RULES OF PROF’L RESPONSIBILITY r. 8.4(c) (AM. BAR ASS’N 1983).

56. Cf. r. 8.4(b) (“It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects . . .”).

57. See r. 8.4, cmt. 1; see also D.C. Bar, Ethics Op. 323, *Misrepresentation by an Attorney Employed by a Government Agency as Part of Official Duties*, <https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion323.cfm> [<https://perma.cc/R3AR-SNGR>] (noting that discipline should be reserved for conduct indicating a lawyer “lacks the character required for bar membership”).

58. See generally Steven Lubet, *In Defense of Kellyanne Conway*, SLATE (Feb. 27, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/02/the_misconduct_complaint_against_kellyanne_conway_is_dangerously_misguided.html [<https://perma.cc/B4BZ-ALFD>] (arguing that a disciplinary complaint filed with the DC Bar against attorney and Counselor to the President Kellyanne Conway is misguided and threatens free speech because her misstatements were part of “robust political debate”); see also Paul Alan Levy, *First Amendment Implications of Bar Charges Against Kellyanne Conway*, PAUL ALAN LEVY’S BLOG (Feb. 23, 2017), <https://paulalanlevy.blogspot.com/2017/02/first-amendment-implications-of-bar.html> [<https://perma.cc/8VPU-JWS7>] (arguing that the complaint filed against Kellyanne Conway is a threat against the First Amendment with the potential to chill free speech).

59. See generally CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT’S MEN* (1974) (the classic account of the Watergate scandal); see also Mark Curriden, *The Lawyers of Watergate: How a ‘3rd-Rate Burglary’ Provoked New Standards for Lawyers’ Ethics*, A.B.A J. (June 1, 2012), http://www.abajournal.com/magazine/article/the_lawyers_of_watergate_how_a_3rd-rate_burglary_provoked_new_standards [<https://perma.cc/G892-TYAF>].

60. See generally Sari Horwitz, *Law Professors File Misconduct Complaint Against Kellyanne Conway*, WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/politics/law-professors-file-misconduct-complaint-against-kellyanne-conway/2017/02/23/442b02c8-f9e3-11e6-bf01-d47f8cf9b643_story.html?utm_term=.3979dd551ed5 [<https://perma.cc/KT27-ND3L>]; Kristine Phillips, *ACLU Files Ethics Complaint*

however they are resolved, we should demand a standard of honesty and objectivity from our peers. Optimally, the public should feel *reassured* by the presence of lawyers in public office; there should be a sense of confidence that lawyers will act honorably and with integrity. It is incumbent upon other lawyers to insist upon this.⁶¹

The grander, more ambitious call is to acknowledge and redress the shortcomings of the justice system and ensure access to justice to those “who because of economic or social barriers cannot . . . secure adequate legal counsel.”⁶² This has always meant that lawyers have a special responsibility to provide representation to the poor. Unfortunately, the Trump administration has little regard for this responsibility as is demonstrated by its proposal to defund the Legal Services Corporation, which provides essential legal services for the poor.⁶³ This call has special resonance to the obscene number of people behind bars in this country, many of whom have not seen a lawyer since being convicted. It also has deep resonance for refugees and immigrants seeking to come to the U.S.

One of the most inspiring moments since President Trump took office was the hundreds of lawyers and law students who headed out to international airports to represent detained Muslim travelers after the President’s January 2017 executive order banning travelers from seven largely Muslim countries.⁶⁴ These lawyers and budding lawyers were acting in the best tradition of the profession. So were the 27 lawyers from Sullivan & Cromwell who sent a letter to their former colleague Walter J. Clayton, President Trump’s nominee to become chairman of the Securities and Exchange Commission, urging him to “stand up for the legal profession” by “‘un- equivocally opposing’ the President’s executive orders and the ‘unlawful, cruel and shameful actions of this administration.’”⁶⁵ Their actions provide a template for the role we as lawyers can—and should—play in the Trump Administration.

CONCLUSION: THE IMPORTANCE OF VIGILANCE

We must all be vigilant—lawyers and nonlawyers alike. We are all *public citizens*. The future of the country—and the justice system—is in our hands.

Against Sessions Over Communications with Russian Ambassador, WASH. POST (Mar. 10, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/03/10/aclu-files-ethics-complaint-against-sessions-over-communications-with-russian-ambassador/?utm_term=.569e54f742f2 [https://perma.cc/XZJ4-3KPE].

61. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 8.3(a) (requiring a lawyer “who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness” to inform the appropriate professional authority). The *Model Rules* are, of course, “rules of reason,” which ought to not be rigidly applied. See MODEL RULES OF PROF’L CONDUCT, pmbl. at 14. I acknowledge that the 8.3 “snitch rule” is ambiguous and controversial; some may feel compelled to file complaints against fellow lawyers in high places; some may not. See, e.g., Levy, *supra* note 58 (arguing that law professors should not have filed a disciplinary complaint against Kellyanne Conway).

62. MODEL RULES OF PROF’L CONDUCT, pmbl. at 6.

63. See Alan Rappeport & Glenn Thrush, *Pentagon Grows, While E.P.A. and State Dept. Shrink in Trump’s Budget*, N.Y. TIMES (Mar. 16, 2017), <https://www.nytimes.com/2017/03/16/us/politics/trump-budget-spending-cuts.html> [https://perma.cc/LK63-WLVN] (reporting Trump’s budget would defund the Legal Services Corporation).

64. Jonah Engel Bromwich, *Lawyers Mobilize at Nation’s Airports After Trump’s Order*, N.Y. TIMES (Jan. 29, 2017), <https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html> [https://perma.cc/N5V2-BQUQ] (reporting about how, in the immediate aftermath of President Trump’s initial January travel ban, lawyers—from big firms, non-profit agencies, and law schools—went out to airports across the country to offer their services to those being detained).

65. Elizabeth Olson, *Ex-Workers at S.E.C. Nominee’s Firm Urge Him to Denounce Travel Ban*, N.Y. TIMES (Mar. 16, 2017) <https://www.nytimes.com/2017/03/16/business/dealbook/sec-nominee-travel-ban-trump-jay-clayton.html> [https://perma.cc/GK3L-LSHU].