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### The Subversions and Perversions of Shadow Vigilantism

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# SHADOW VIGILANTES

HOW **DISTRUST**  
IN THE JUSTICE SYSTEM  
BREEDS A NEW KIND  
OF **LAWLESSNESS**

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 **Prometheus Books**

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### Part III

## THE SUBVERSIONS AND PERVERSIONS OF SHADOW VIGILANTISM

**T**he loss of moral credibility through perceived gross failures of justice can provoke ordinary people (chapters 8 and 9 below) and officials within the criminal justice system itself (chapter 10) to take action to force from the system the justice that the system seems reluctant to impose. And, as we will see in part IV, the manipulations and distortions of the system by which this is done—through what might be called acts of *shadow vigilantism*—commonly provoke their own distorting response, leading to a downward spiral of disillusionment and subversion (chapter 11).



## COMMUNITY COMPLICITY WITH VIGILANTES

Part II focused on the people who, frustrated with perceived failures of the criminal justice system, take the law into their own hands to impose the justice that the system is unwilling or unable to impose. But as we hinted in chapter 4, these *classic vigilantes*, as they might be called, are not the real problem. It is the reaction of the broader public that can be more troublesome.

To gain a sense of how the same vigilante impulse that inspires the classic vigilante can influence a broad cross section of the larger community, consider these two case studies.

### A FRUSTRATED NEIGHBORHOOD HIDES A KILLER

#### The Assassination of William Malcolm

In 1981 William Malcolm is living in East London with his wife and her two children, a six-year-old stepdaughter and a nine-year-old stepson. He sexually abuses both of his stepchildren on a regular basis. He is caught, and during the trial it comes to light that he has been abusing his stepdaughter since she was three years old. Malcolm is given a two-year jail term.<sup>1</sup>

Since England does not, at this time, have a pedophile registry system or laws that allow restrictions to be placed on convicted sex offenders' movements, when released in 1984, Malcolm returns to the same house and resumes life with the same two children whom he was convicted of abusing. Before the end of the year, he is again charged with abusing his stepchildren, as well as other young victims from the neighborhood;

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again he is convicted and sent to jail. Upon his second release, Malcolm moves in with a new girlfriend and her five children.

Malcolm continues to abuse children. In one instance, he tracks down a former victim who testified against him in a previous trial and rapes her again. He tells her that she is “asking for it” because she helped send him to jail.<sup>2</sup>

In 1994 Malcolm is once again charged with sexually abusing children. The charges involve thirteen different children, including children who are living with Malcolm. Among the charges are multiple instances during which children are “tied to a bed and forced to perform sex acts.”<sup>3</sup> Details of some incidents include Malcolm placing his shoeless young victim in a bedroom and then spreading carpet tacks on the floor outside the room so he can be alerted if the victim tries to escape. It is also reported that Malcolm frequently beats his victims with a belt.

Prior to prosecution for the latest charges, Malcolm undergoes a psychological evaluation, which determines that he is a sexual psychopath. The report describes him as having pedophile tendencies of a “strongly sadistic nature.”<sup>4</sup> Social workers suggest that he is “incurably psychopathic and violent.”<sup>5</sup> At trial, the judge describes the crimes as “unspeakable” but concludes that there can be no trial for the new offenses because his two previous convictions make it impossible for him to receive a fair trial.<sup>6</sup> The judge explains that victims of the offenses cannot realistically be expected to testify without mentioning previous abuses they have suffered from him and that this type of testimony will be prejudicial to the defendant. Malcolm is released from custody without restriction.

The victims and neighbors are not happy with the court’s refusal to even try Malcolm. A female victim expresses disbelief: “The judge says he is not going to get a fair trial because of his history, but surely it’s that history which proves what a dangerous man he is.”<sup>7</sup> A male victim complains, “I didn’t have a childhood. I was petrified of him.”<sup>8</sup> In court, furious cries of “kill the pervert” come from the public gallery. Upon being set free, Malcolm receives death threats.

## COMMUNITY COMPLICITY WITH VIGILANTES

Malcolm moves to a block of flats in Manor Park that overlook a common area where children frequently play. Sharing the apartment with him is his current girlfriend and her children, three of whom are under the age of six. By lying about his background, Malcolm obtains a job across the street from a primary-grade school. Residents of Manor Park are outraged when they learn that Malcolm lives there. One neighbor explains, "You can't do what he did without creating an awful lot of enemies."<sup>9</sup>

On February 18, 2000, at around 10:00 p.m., Malcolm answers the door of his flat and is shot in the face. No one else is home at the time. Neighbors rush out when they hear a gunshot and find him lying on the floor still breathing but bleeding profusely. An ambulance arrives, but Malcolm is pronounced dead on arrival at the hospital.

The case is not different from others considered previously in which vigilantes take the law into their own hands when the law shows itself unwilling to punish serious wrongdoing. But what happens next illustrates another dimension of vigilante action.

News of Malcolm's killing is greeted with jubilation. As one neighbor explains, "I'm quite happy that people like him are out of this community. I can understand quite clearly why someone would want to have him out of the way."<sup>10</sup> Another neighbor reports, "Nobody will feel sorry, except maybe his relatives. I was shocked when I heard someone had been shot on the doorstep like that, but when I heard it was him I was relieved." In fact, Malcolm's relatives are not feeling sorry about the killing. Andy, Malcolm's brother, says, "I want to shake hands with his killers. . . . He was vermin, I'm glad he is dead. . . . Our entire family wants to say how glad we are that Bill is no longer on this earth. As far as I'm concerned, my brother was lower than the rats in my barn." Malcolm's former step-daughter, now an adult, who was raped repeatedly since her earliest childhood, is ecstatic when she receives news of the killing, saying, "Hearing the animal is dead is the happiest I've ever felt." While she knows that, as one of his victims, she is a suspect in his killing, she insists that she person-

## SHADOW VIGILANTES

ally was not involved, saying, “It was none of us [but] I wish it had been me who killed him.”<sup>11</sup>

Police investigators question Malcolm’s former victims and relatives, as well as the people in the neighborhood. They run into a wall of silence. The next-door neighbor reports seeing a pair of white males of average height and average build leaving the premises after the shooting. Although the entire neighborhood seems to have known about Malcolm and has been outraged by his living there, the next-door neighbor, whose son was killed by a pedophile in 1994, claims not to have known that Malcolm had ever sexually abused children. The police are nearly certain that the neighbors know who has done the killing and that many of them have information that could help in the investigation, yet no one comes forward, and those who are interviewed do not provide information.

Months after the murder, investigators are no closer to apprehending the killer or killers. It is clear that Malcolm’s murder is a crime that the neighborhood does not want solved.

The doctrines of disillusionment, such as those illustrated in chapter 4, can spark all manner of classic vigilante action, including acts like the killing of William Malcolm. Where the criminal justice system has shown itself to be unable or unwilling to do justice and provide protection, a vigilante may be inspired to step in and take on that role. Earlier chapters are full of such cases.

But the Malcolm case illustrates a new dimension to the vigilante impulse: where people act not by taking on the task of doing justice themselves but rather by helping to protect the vigilante by refusing to help authorities in their efforts to investigate and prosecute the vigilante conduct. The community here is essentially serving as an accomplice of the vigilante, or at least an accessory after the fact, as the law might call it. They are not willing to go into the streets to do the justice, but they are willing to take the smaller, less aggressive step of refusing to help authorities, probably motivated by the same impulse that provoked the classic vigilante.

Such vigilante complicity appears in a wide range of forms, some even more public and more aggressive than in Malcolm's case.

## **AN OUTRAGED COMMUNITY COLLECTIVELY ATTACKS A BULLY AND SHIELDS HIS KILLERS**

### The Killing of Ken McElroy

A resident of Skidmore, Missouri, in the 1980s Ken McElroy is a local thief, bully, and sexual predator. He rarely holds a job but always has plenty of money from stealing anything he can get a fence to buy. He is an active livestock rustler, and as a result, for years Skidmore County has the highest incidence of cattle rustling in the state.<sup>12</sup>

McElroy's sexual preferences are for young girls between the ages of twelve and fifteen. Married three times but never faithful, he attracts one young girl after another, keeping them compliant first by attention and support in this poor rural area, then by intimidation and abuse. He fathers more than twenty children with different girls.<sup>13</sup>

If family or friends of one of the underage girls objects, McElroy responds with an aggressive intimidation campaign. In one instance, a twelve-year-old girl in eighth grade is his current target. She soon becomes pregnant, drops out of school, and moves in with McElroy. Sixteen days after their child is born, she goes home to her parents to escape McElroy's regular beatings. McElroy brings her back at gunpoint and beats her, then returns to her parents' home, shoots their dog, and burns their house to the ground. Unsurprisingly, most people are too intimidated to report McElroy to the police, and even when they do, little happens, perhaps because the police are also afraid of him.<sup>14</sup>

Whenever McElroy is charged with an offense, he arranges for one of his coon-hunting buddies to offer an alibi and works to intimidate any witnesses. In one instance, when a neighbor complains of his trespassing,

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McElroy shoots the man with a shotgun, wounding him. The wounded neighbor insists that charges be filed, but between the shooting and the trial McElroy parks outside the man's house to stare at him on nearly one hundred occasions. When the trial takes place, it plays out in the same way that previous trials have in the past: McElroy is acquitted by an intimidated jury after one of his buddies presents the usual false alibi. Free to exact revenge, McElroy shows up at the complainant's farm and shoots at him with a rifle as he drives his tractor in a field.



Fig. 8.1. Ken McElroy, killed by the people in his town, 1981.  
(Courtesy of Harry MacLean)

One episode finally brings things to a head. Some of McElroy's many children are accused of stealing from a local grocery store owned by Louis

and Bo Bowenkamp. After an argument, McElroy is refused further service and is banned from the store. As usual, McElroy engages in an aggressive response: he begins a staring vigil outside the store and outside the Bowenkamps' home. Also, as usual, the police refuse to do anything. When McElroy twice fires a shotgun at the Bowenkamps' house, they insist on filing a complaint, but nothing is done about it. McElroy returns two nights later, firing again, with the same nonaction by authorities.

On July 8, 1980, McElroy confronts Bowenkamp outside his store and shoots him with a shotgun, hitting him in the neck. McElroy is arrested and charged. Freed while awaiting trial, McElroy continues his campaign of intimidation, including threatening a minister and a local sheriff who might be witnesses against him.

Despite his usual witnesses, who swear in court that they happened to be driving by just at the moment that McElroy shot the elderly man in what they testify was self-defense, McElroy is finally convicted of second-degree assault and sentenced to two years in prison. The town's citizens breathe a collective sigh of relief. Perhaps the McElroy reign of terror is finally over.

But McElroy is released on bail pending appeal, and a hearing to consider revoking his bail is delayed repeatedly. When McElroy shows up at a local bar ranting that he will kill the Bowenkamps, the townspeople arrange a meeting to discuss how to deal with the situation and set up a watch to protect the store owners.

McElroy hears of the meeting and drives to a nearby bar, with his wife in the passenger seat. He goes inside, buys cigarettes, then climbs back into his truck and sits. A group of about forty-five people assemble. He starts the truck, then lights a cigarette. Six shots ring out from multiple directions, striking and killing McElroy. His young wife is taken from the truck to the safety of a nearby bank. The foot of the dead man has fallen onto the accelerator, and the engine roars on its way to nowhere.

Amazingly, despite the large group of people present at the time of the shooting in broad daylight, no one is able to provide information to inves-

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tigators (with the exception of McElroy's latest young wife, who was seated in the truck at the time of the shooting). A state investigation is followed by an FBI investigation ordered by the US Department of Justice. Nearly one hundred interviews of apparent witnesses and local residents are conducted, but no one seems willing to provide information to investigators.

Explains Cheryl Huston, whose elderly father had been shot by McElroy and who watched the killing of McElroy from her family's grocery store, "We were so bitter and so angry at the law letting us down that it came to somebody taking matters in their own hands. . . . No one has any idea what a nightmare we lived." The case remains unsolved.<sup>15</sup>

This sort of vigilante complicity can include not only refusing to help authorities investigate and prosecute but also publicly supporting the vigilantes, as in talking with the news media to explain their motivation and to promote their point of view.

## COMMUNITY SUPPORT FOR GROUP LAWBREAKING PROVOKED BY LESS SERIOUS WRONGS

### The Destruction of the Venice Pagodas

Venice, a neighborhood in Los Angeles, California, is known for its two-mile-long promenade along the Pacific Ocean.<sup>16</sup> The boardwalk has long attracted an eclectic mix of people, including street performers, tourists, and sun worshippers. A tourist attraction during the day, it draws a less respectable crowd at night. A series of wooden pagodas with benches along the boardwalk provide tourists and neighbors with a welcome place to sit out of the sun, but at night the same shelters serve as a prime place for local gang members to deal drugs. These structures allow dealers to hide their drugs in a place nearby so they can control the drugs without personally holding them, then signal a confederate to retrieve a certain amount once a buyer pays.

The neighborhood has repeatedly appealed to police to deal with the drug problem or at least to remove the pagodas so that the drug dealing will move to less prominent places, reducing the extent of the trade, but their pleas have no effect. Frustration builds until one local resident finally takes matters into his own hands, ramming the structures with his pickup truck until they are destroyed. With the pagodas gone, the drug dealers move away.

Over the objection of residents, the city rebuilds the seating and tables, this time constructed in concrete. The newly installed gathering areas are popular with tourists and the local merchants who sell to them, but, as expected, the shelters are once again a hit with the drug dealers, who now have a nicer location in which to deal drugs at night. As a local resident puts it, "Once the picnic tables went back in, it re-created the problem."<sup>17</sup> Although local community members regularly call the police to report the drug dealing, the police rarely respond because, in their view, there are bigger crime problems elsewhere.

Fed up with the lack of police response, local residents decide to again take matters into their own hands. One weekend in August 1994, a group of residents in ski masks arrives at the site, post a lookout for police, and take sledgehammers to the new benches. Organizers have informed the neighbors beforehand that the demolition is going to occur so that the loud demolition noises will not prompt calls to the police. Apparently, someone missed the message and called the police, but the police simply ignore the call as being of insufficient importance.

When the sun rises on Monday morning, all of the new structures have been destroyed, to the cheers of the large crowd of onlookers. Local drug dealers are unhappy with the destruction, and that same morning they send their people swarming into the local apartment buildings, demanding to know who destroyed their hangouts.

The people who demolished the benches justify their actions by citing the refusal of law enforcement to deal with the problem. As one of the perpetrators describes the group's sledgehammer escapade, "We've got

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a bunch of nineteen-year-old kids running this street. The fear is unbelievable. . . . We have the silent approval of the whole community. People were cheering—we even had a woman take a few swings.” Another resident explains, “Sometimes you have to tear the house up to get the rat out. We have complained and complained and complained to the police and they will not stop here. . . . It was intolerable.” Others who are less enthusiastic about the destruction nevertheless concede that “the guys who did this may have some legitimate complaints.”<sup>18</sup>



Fig. 8.2. Venice Beach shelters such as these were destroyed by neighbors, 1994. (Courtesy of Nan Palmero, Flickr.com)

Despite the fact that eighty or ninety people witness the demolition and that one of the perpetrators is interviewed at the time by the press, investigators can find no one willing to help them with their inquiries. As one investigator marvels, “It is just amazing to me that there were three or four people out there busting up tables and none of the residents saw

## COMMUNITY COMPLICITY WITH VIGILANTES

anything.”<sup>19</sup> Because no one in the neighborhood is willing to help, no prosecution is ever brought.

This public support for vigilantes is only one of a wide variety of ways in which the vigilante impulse can express itself in conduct short of classic vigilantism. As will become apparent in the following two chapters, these more covert expressions of the vigilante impulse can be more pervasive, more dangerous, and more destructive to justice and effective crime control than classic vigilantism ever was or could be.



## THE COMMUNITY AS SHADOW VIGILANTES

A vigilante shoots child abuser William Malcolm in the face, and the neighbors refuse to help authorities investigate. Several vigilantes shoot bully Ken McElroy while he is surrounded by a large crowd, but none of the many witnesses are willing to identify the shooters to investigators. Residents of Venice watch a group of vigilantes spend the weekend destroying the seating areas that drug dealers use to ply their trade, yet the police must read about the events in the newspaper.

The vigilante impulses that drive some people to take the law into their own hands inspire others to act in less visible ways, as with the refusal to report an offense or to help investigators. These vigilante sympathizers may not be willing to go into the streets themselves, but their subversion of effective law enforcement is commonly provoked by the same frustrations with the system that drive classic vigilantes. Rather than becoming the punishers themselves, these *shadow vigilantes*, as discussed in chapter 3, promote the same goals through a variety of other means by which they subvert or distort the criminal justice system.

Imagine that the community members watching the shooting of McElroy are sitting on a trial jury for the case. Does anyone doubt what the result would be? Or what would be the likely outcome if the killing of Malcolm reached a grand jury on which sat people from his neighborhood? The same shadow vigilante impulse that produced their refusal to assist investigators is likely to express itself when they are jurors, grand jurors, and even voters, or whenever they have an opportunity to affect the operation of the criminal justice system.

Consider, for example, the reaction of citizens, in particular jurors, to the case of “Subway Vigilante” Bernhard Goetz, discussed in chapter 3.

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The citizens on that jury refused to convict Goetz in part because they viewed his actions as an understandable, if excessive, reaction to the criminal justice system's failure to provide the safety and justice to which they believe citizens are entitled.

Goetz is by no means a unique case but rather is representative of a common phenomenon. For example, in a Minot, North Dakota, case, four men came to Jeremiah Tallman's home to confront him about an incident from earlier in the day. They exchanged angry words while standing in the entryway and were told to leave; they did leave when Tallman cocked the slide of his gun. As they walked away, one pounded on a trailer and another broke a window. Tallman then shot one of the men in the back several times, killing him. He was acquitted of all homicide and assault charges.<sup>1</sup> He hardly satisfied the legal requirements for self-defense, but jurors were particularly accommodating because they saw him as resisting aggressors.

Empirical studies show strong support among laypersons for the use of defensive force against aggressors and for the excuse of defenders who make mistakes in using defensive force. The community views on this point are dramatically different from the stated legal rules. Summarizing a series of studies, the book *Justice, Liability & Blame* concludes, "In all of these studies, the community judges that these justifications are more compelling than the legal codes are willing to grant. Respondents frequently assign no liability in cases to which the code attaches liability. Even when respondents assign liability, they typically assign considerably less punishment than would be suggested by codes."<sup>2</sup> According to a survey of judges, prosecutors, and defense attorneys, if self-defense is raised at trial, it commonly succeeds more often than any other kind of defense. The respondents in three major surveys estimated, respectively, that the defense succeeded 76 percent, 47 percent, and 46 percent of the time.<sup>3</sup>

In the Goetz case, it was the trial jury that exercised its nullification power in support of the vigilante. In other words, the jurors overlooked the law and found in favor of Goetz because they considered his subway

shootings to be understandable given the rampant crime at the time and Goetz's own previous victimization. But that kind of shadow vigilante protection of those who resist wrongdoers can be seen at nearly any point in the criminal justice process where citizens are involved.

## **GRAND JURY RELUCTANCE TO INDICT FOR THE UNLAWFUL USE OF DEFENSIVE FORCE**

### Joe Horn Shoots His Neighbor's Burglar

On November 14, 2007, Joe Horn is a sixty-one-year-old retiree living in Pasadena, Texas.<sup>4</sup> He is having a relaxing day when he looks out the window and sees two suspicious-looking men approach his next-door neighbor's house. (The two men are Diego Ortiz and Miguel de Jesus, and they are intending to rob the neighbor's house of its cash and jewelry.) Horn watches as the two men break into the house, and then he immediately dials 911.

When the operator answers, Horn reports the situation and asks, "I've got a shotgun; do you want me to stop him?" The dispatcher tells Horn to stay in his house, saying, "Ain't no property worth shooting somebody over, OK?" During the call, Horn keeps an eye on his neighbor's house as the burglars are robbing the place, and he repeatedly expresses his frustration that this type of crime is happening in his neighborhood. After the burglars finish stealing cash and jewelry from his neighbor's home, Horn sees them running out the front door. Realizing that they are going to escape with his neighbor's valuables, Horn tells the operator, "I'm gonna kill him." Despite the operator's repeated pleas to stay in the house, Horn picks up his shotgun, loads it, and steps outside the front door. As the criminals are running across his lawn, he shouts, "Move, you're dead," and when the robbers continue to run, he fires three shots and strikes them both in the back, killing them.<sup>5</sup> Horn runs back into the house and tells

## SHADOW VIGILANTES

the dispatcher what has happened. The police arrive on the scene and find the bodies but do not arrest Horn.

Authorities eventually file charges against Horn for murder. In mid-June 2008 the grand jury convenes in order to hear two weeks of testimony from witnesses, including Horn. On June 30 the jury deliberates and decides not to indict Horn. Horn is relieved that he will not have to face charges, and there are many community members who feel he acted rightly. District Attorney Ken Magidson says, "In Texas, a person has a right to use deadly force in certain circumstances to protect property . . . and that's basically what the grand jurors had to deal with." Horn's attorney, Tom Lambright, says, "Joe is not some sort of wild cowboy. He was trying to help the police. He was put in a situation where he didn't have a choice."<sup>6</sup>

The same frustration with the apparent ineffectiveness of the criminal justice system can show itself in shadow vigilante jury nullification in any case in which a defendant resists a wrongdoer and is then prosecuted by authorities. This includes not just civilian actors like Goetz but also police officers. Consider the jurors' reaction to the police beating of Rodney King.

## JURY NULLIFICATION FOR LAW ENFORCEMENT OFFICERS

### Acquittal of the Officers Who Beat Rodney King

Los Angeles in the middle to late 1980s is one of the more dangerous cities in America. The period from 1984 to 1990 is known in LA as the "crack epidemic." Crack first enters South Central LA in the early 1980s. Many children are left to grow up without parents because of addiction. Crime steadily rises.<sup>7</sup> From 1985 to 1990 the city averages nearly 2.5 murders, six rapes, and almost ninety robberies every day.<sup>8</sup>

The heavy demand for crack cocaine also helps local gangs such as the Crips and the Bloods to increase their financial strength and recruiting

power, which in turn brings an increase in gang violence. Prior to the 1980s, the gangs have had limited participation in drug trafficking. But beginning in 1983, the Los Angeles gangs and their fifty thousand members begin to get a stranglehold on the streets, taking control of the narcotics industry.<sup>9</sup> For citizens, the most dangerous time of day may be the early afternoon, when the most dangerous criminals are on the streets: armed teenagers just out of school. By 1991 crime in Los Angeles has reached its pinnacle. Police officers struggle more than ever to control the streets. Murder and violent crime rates reach all-time highs.

On the night of March 2, 1991, Rodney King watches a basketball game with friends while drinking quite a bit of alcohol in suburban Los Angeles.<sup>10</sup> When the game ends, King and his two friends decide to take the 210 Freeway into downtown LA to try and meet some girls. King drives a bit erratically, probably because his blood alcohol level is 0.19, well above the legal limit, and he has been smoking marijuana. California Highway Patrol (CHP) officers notice King's speeding and reckless driving and begin to follow him. King, who is on probation for a robbery offense, does not want to go back to prison. He hits the gas and increases his speed to 115 mph. With the CHP right behind him, the high-speed pursuit heads down the freeway.

When his vehicle is cornered, King finally stops; his two friends quickly exit the vehicle and surrender to police. King takes a more combative approach. He refuses to exit the vehicle. When he does finally exit, he begins waving at the police helicopter that is overhead. Police backup arrive in the form of three LAPD squad cars: Officers Laurence Powell and Timothy Wind in one car, Theodore Briseno and Rolando Solano in the second car, and Sgt. Stacey Koon in the third.

King's erratic, even bizarre, behavior leads the officers to believe King is on PCP (or angel dust), a drug commonly associated with violence. King grabs his buttocks in a manner that a CHP officer believes indicates that King is reaching for a weapon, so she immediately draws her gun and asks him to get on the ground. Sergeant Koon, who knows that the threat

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of violence from all parties is escalated with the presence of a gun, orders guns to be holstered. He also orders his four officers to perform a tactical “swarm” technique to subdue King without the use of weapons.

Right around the time that the physical struggle between the LAPD officers and King begins, George Holliday, the manager of a plumbing company, begins videotaping the interaction from his apartment ninety feet away. After the struggle begins and after it is clear to officers that King is resisting arrest, they fire their TASER gun twice at King, but the powerful voltage does not subdue him. He continues to wrestle, gets back up off the ground, and rushes toward the officers. Police officers start using “power strokes” against King’s limbs with their batons to subdue him, but still King continues to struggle and stand back up. Koon orders his officers to “hit his joints, hit the wrists, hit his elbows, hit his knees, hit his ankles.”<sup>11</sup> Ultimately, the LAPD inflicts nearly fifty blows and several kicks on King before dragging him on his stomach to the side of the road to wait for paramedics to arrive. King’s medical examination reveals numerous injuries, including a fractured facial bone, a broken right ankle, and multiple bruises and lacerations.<sup>12</sup>

The incident receives almost no publicity until Holliday releases his eighty-one-second videotape to a local news station two days later. CNN picks up the story, and it spreads like wildfire across the nation. The video sparks outrage among many who see it as yet another example of police brutality against a minority group. An LA poll taken soon after the tape’s release indicates that 92 percent of participants think authorities used excessive force.<sup>13</sup>

Two weeks after the incident, a grand jury indicts four officers—Powell, Wind, Briseno, and Koon—for use of excessive force. Due to the publicity surrounding the case, in July the California Court of Appeals unanimously grants the defense’s motion for a change of venue while also removing the original judge because of evidence of his bias toward the prosecution. In November a new judge decides to try the case in Simi Valley, a conservative and predominantly white city that starkly contrasts

with the makeup of Los Angeles. Nearly a year after the incident, on March 5, 1992, a jury consisting of ten whites, one Asian, and one Latino hear opening arguments from the prosecution, arguing that the use of force was excessive.

Seven weeks of testimony are presented (Rodney King never testified). The jury studies the eighty-one-second Holliday videotape. When it is all over, the jury votes to acquit.

Jurors report that they only needed one day to decide to acquit the officers of the main charges against them. However, they needed an additional six days because they remained deadlocked on the assault charge against Powell.

Many experts believe that race played a role in the jury's decision, but many of the jurors dismiss that notion. One juror points out the obvious, that the two other men in the car, both of whom are black, calmly surrendered and had no force used against them.<sup>14</sup> One female juror notes, "In my opinion, based on all of the evidence that was presented to us, it is not a racial thing. I am not unhappy with the verdict; that's the only verdict that could have been reached."<sup>15</sup>

The juror's statement suggests that, given the violent conditions in LA at the time, the jury was not afraid to give police officers some flexibility in their use of force. Jurors seemed to be giving police more power in policing the streets than the state's law would allow. Stanford constitutional law professor Gerald Gunther notes, "This jury seemed unwilling to put any decent limits on police discretion, and I think that's the flat-out bottom line on this. The beating that King took was not justified even on the assumption that he did not turn quiescent as soon as [police] stopped the car and even if they had a basis for using force in the first few blows."<sup>16</sup> Some believe the majority of the jurors had such a "reverence for police officers as guardians of the social order" that the prosecution's use of the shocking videotape may have unintentionally undermined its own case.<sup>17</sup> Some of the jurors may well have thought that the police conduct was in violation of existing law. And yet, they may have felt that the right thing to do was to acquit the offi-

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cers because the jurors were concerned that existing law did not take proper account of the need for the force nor did it give enough room for an understandable mistake in a fast-moving situation.<sup>18</sup>

This broad leeway given to police officers is reflected in the data. According to a Cato Institute study, the prosecution, imprisonment, and other sanctions of police officers occur at a much lower rate than for civilians facing similar charges.<sup>19</sup> In some cases, according to the Cato data, officers are acquitted even in the face of clear evidence such as multiple witnesses or videotape. For example, in September 2009 a Spokane, Washington, jury acquitted an officer of assault for kicking a suspect in the face, though other officers present confirmed that he had done so.<sup>20</sup> In another Washington State incident in 2010, an officer was acquitted after he was videotaped striking a fifteen-year-old girl who, when told to remove her basketball shoes, kicked toward the officer's fellow deputy.<sup>21</sup> The first trial resulted in a hung jury, while the second resulted in an acquittal.

Of course, if a case takes on a racial component—as when a white officer is perceived as using excessive force against a black citizen—racial political influences can conflict with the normal sympathy for an officer's mistake, as what occurred to some extent in the Rodney King case. On the other hand, even though the Black Lives Matter movement has done much to sensitize the public, the police officers involved even in cases that make the headlines are rarely punished. Grand juries refused to indict the officers in the killings of Eric Garner (2014), Michael Brown (2015), and Tamir Rice (2015). None of the officers involved in the killings of Freddie Gray (2016), Terrance Cruther (2016), Sylville Smith (2017), Samuel DuBose (2017), or Philando Castile (2017) were found guilty at trial. (Similarly, neighborhood watch supervisor George Zimmerman was acquitted at trial for his 2012 killing of Trayvon Martin.)<sup>22</sup>

Empirical studies confirm these public views: many people tend to be quite forgiving of mistakes made when force is used for law enforcement purposes, certainly much more forgiving than the criminal code itself,

and this even applies to citizens when acting in a law enforcement role. As one study concludes,

In general, the subjects are much more forgiving than the Code of a person's mistakes in using deadly force to affect a citizen's arrest. The Code imposes murder liability if the apprehending person kills an innocent person. A strong majority of the subjects, in contrast, impose no punishment even in the case in which the citizen kills an innocent person in trying to stop a fleeing rapist. Only in the case in which an innocent person is killed in an attempt to stop an offender fleeing from a property damage offense does a bare majority of our subjects judge punishment to be appropriate and, even then, liability is a few months rather than the murder liability that the Code provides.<sup>23</sup>

These striking results help explain why it is so easy for citizens, disillusioned with the justice failures of their criminal justice system, to justify expressing their shadow vigilante impulse through protecting those who use force against wrongdoers.

## **FRUSTRATION WITH CRIMINAL JUSTICE FAILURES AS GIVING RISE TO PRIVATE POLICING**

Shadow vigilantism among citizens also shows itself in the loss of confidence in and reduced expectations of official law enforcement, which has produced the dramatic rise in private security and neighborhood watch organizations. The 2000 National Crime Prevention Survey estimated that 41 percent of the American population lives in communities covered by neighborhood watch. The survey report concludes that "this makes Neighborhood Watch the largest single organized crime-prevention activity in the nation."<sup>24</sup> One writer describes the degree to which private entities have taken over law enforcement functions in this country: "Private security officers vastly outnumber public law enforcement officers, and spending on private security is approximately double

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the spending for public law enforcement. For the most part, this growth has all occurred within the past three or four decades—only thirty-five years ago, there were more public police officers than private security guards.<sup>25</sup>

Watch groups are not formed in neighborhoods that are content with their law enforcement situation. Neighborhood watch is a literal form of a neighborhood taking on the law enforcement role of the government.<sup>26</sup>

But as chapter 7 made clear, shifting the law enforcement function to citizens commonly creates serious problems. Recall, for example, the members of the Ranch Rescue group who used improper detention methods because they lacked the formal training that police receive. In the case of the Crown Heights Maccabees, their vigilance was effective but tended to push crime into surrounding areas rather than preventing it. Project Perverted Justice, in which an unofficial group stepped in to take on a role traditionally reserved for police detectives, had the effect of inspiring others with more extreme views to take on a similar role. Society would be better off if official law enforcement did its job and did not provoke the shadow vigilante impulse that leads to citizen enforcement.

These same difficulties that we saw in the earlier cases can occur in any situation in which citizens take on the law enforcement role, including neighborhood watch. As noted above, George Zimmerman was the neighborhood watch coordinator for his gated community in Sanford, Florida, in 2012 when he shot Trayvon Martin, a seventeen-year-old African American high school student who was temporarily staying with a family who lived in the gated community.<sup>27</sup> (Zimmerman apparently approached Martin about his presence in the area, and the contact grew into a confrontation in which Zimmerman ended up fatally shooting the unarmed Martin.) It seems unlikely that such a confrontation would have occurred if that community relied upon official rather than private policing.

The local police chief concluded that Zimmerman had a right to act in self-defense and released him. A public national uproar led to the appointment of a special prosecutor, who charged Zimmerman with second-degree murder, but on July 13, 2013, the jury acquitted Zimmerman.



Fig. 9.1. Painting of George Zimmerman, neighborhood watch volunteer who shot Trayvon Martin, 2012. (Courtesy of DonkeyHotey, Flickr.com)

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Another danger of leaving neighborhoods to fend for themselves is that their enthusiasm and newfound authority may lead to dropping any pretense of approximating professional police conduct. Some neighborhoods have gone beyond the formation of watch groups. One development is the “Glock Block,” where neighborhoods in Oregon, Texas, and Arizona advertise “We Don’t Call the Police.”<sup>28</sup>

### **POLITICIANS PROPOSE LAW-AND-ORDER LEGISLATION TO COMBAT PERCEIVED FAILURES OF JUSTICE**

But the shadow vigilante’s frustration with a criminal justice system that is seen as indifferent to the importance of doing justice plays itself out in much broader civic conduct as well. It means that politicians are provoked to support changes in criminal law and criminal adjudication that are designed to force liability and punishment from an apparently reluctant criminal justice system—even when the reform also risks doing injustice. Consider several examples of this dynamic that have had a significant effect on the American system.

#### The Abduction and Murder of Polly Klaas

In 1993 twelve-year-old Polly Klaas lives with her mother and sister in Petaluma, California, a small median-income town a few miles north of San Francisco.<sup>29</sup> She is a shy girl who is much beloved by her family and friends. Her favorite subjects at school are music and theater.

On Friday, October 1, 1993, Polly invites her two best friends over for a slumber party. The girls, who are all clarinet players, have formed their friendship in the Petaluma Junior High School band. Because it is a weekend, they are allowed to stay up late talking and playing games. As the girls begin to get tired, Polly starts to leave her bedroom to fetch the sleeping bags from the living room. When she opens the bedroom door

she is shocked to find a man standing there with a knife. He immediately threatens all three girls: if they make any noise, he will cut their throats.

Polly offers the man a box with her savings in it, fifty dollars in total, which he refuses. He tells the girls to lie on the floor and then proceeds to tie their hands behind their backs and place pillowcases over their heads. He then grabs Polly and flees. The two girls immediately work to free themselves, stepping through their tied arms, and run to Polly's mother. By 11:00 p.m. the search has begun for Polly Klaas.

The next day the community rallies behind the search efforts. Citizens form patrols that scour the forests surrounding the town. Thousands of posters of Polly are printed and displayed. Purple ribbons, Polly's favorite color, are put up all over town.

The search gains national attention as popular television shows, including *America's Most Wanted* and *20/20*, feature segments about the kidnapping. Hollywood actress Winona Ryder, a native of Petaluma, offers a \$200,000 reward for information leading to the discovery of Polly. She tells *America's Most Wanted* that she is offering the reward "because this happened in the community I was raised in."<sup>30</sup>

On November 28, almost two months after Polly was taken, a local resident is hiking around her property with friends when they stumble across disturbing items scattered around several bushes: girl's clothing, a condom wrapper, binding tape, and rags with knots in them. Fearing that these items may be related to Polly's abduction, the resident calls the police.

The police link the evidence to Richard Allen Davis. On November 30 Davis is arrested but refuses to talk about Polly. However on Saturday, December 4, he confesses to kidnapping Polly and murdering her, and he tells investigators where they can find her body. In the weeks since her abduction, Polly's family has kept a candle burning in her window. They now extinguish it.

Davis has served time on several occasions for robbery, burglary, rape, assault, and kidnapping. He was released early on parole twice, only to quickly reoffend. After his first parole he kidnapped a woman, sexu-

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ally assaulted her, was arrested, escaped from prison, kidnapped another woman, and was rearrested after breaking into yet another woman's home.<sup>31</sup> He goes to prison for that laundry list of offenses but six years later is again paroled. When released, he and a criminal partner force their way into a woman's home, threaten to kill her family, beat her, and force her to go to the bank and withdraw \$6,000. When that money runs out a few months later, they rob a bank.

In 1985 Davis is arrested again, convicted, and sentenced to sixteen years. But on June 27, 1993, he is paroled again after serving half of his sentence. In October of the same year he is standing in Polly's bedroom with a knife. Had he been required to serve his entire prison sentence, Polly Klaas would not have been within his grasp.<sup>32</sup> Davis was arrested over fourteen times and convicted of many violent offenses before he kidnapped and murdered Polly Klaas.<sup>33</sup>

Almost overnight, support builds for the passage of "three strikes and you're out" legislation, spearheaded by Michael Reynolds, whose daughter had been violently killed by a just-paroled repeat offender.<sup>34</sup>

On November 8, 1994, California Proposition 184, the Three Strikes Initiative, is on the ballot and receives an overwhelming majority with almost 72 percent support.<sup>35</sup> Outrage over the Polly Klaas case is credited with inspiring that support. The new law has mandatory harsh sentences for repeat offenders: "If a criminal has had one previous serious or violent felony conviction, the mandatory sentence for a second such conviction is doubled. After two violent or serious felony convictions, any further felony, non-violent or not, will trigger a third strike." The mandatory sentence is then even longer, typically three times the ordinary sentence, or twenty-five years.<sup>36</sup> (Prior to the bill, judges could factor in previous convictions in imposing longer sentences for repeat offenders, but doing so was not mandatory and was at the discretion of the judge.)

Within two years of Polly's death, twenty-two states followed California's lead in enacting a version of the three strikes legislation. In 1994, Colorado, Connecticut, Georgia, Indiana, Kansas, Louisiana, Maryland, New Mexico,

North Carolina, Tennessee, Virginia, and Wisconsin passed their respective laws. The next year Arkansas, Florida, Montana, Nevada, New Jersey, North Dakota, Pennsylvania, South Carolina, Utah, and Vermont followed suit.<sup>37</sup> When Massachusetts enacted its version of the three strikes law in 2012, it became the twenty-eighth state to have some form of the law.<sup>38</sup>

## **POLITICIANS PROMOTE MANDATORY MINIMUMS**

Beyond the three strikes legislation, politicians have promoted mandatory minimum sentences of all kinds. It is common for criminal statutes to specify a maximum authorized sentence for an offense, but it became politically popular to also provide a minimum sentence. This trend derives not from a single headline-making case like that of Polly Klaas but rather from a stream of what was perceived as outrageously lenient sentences—much like the dozen or so described in chapter 4 and the appendix, such as the sentence to probation and community service for the shopkeeper who shot a teenage girl in the back after wrongly accusing her of shoplifting and the sentence of a fine for the two racist men who hunted down their victim after a confrontation in a bar and beat him to death with a baseball bat.

Dissatisfaction with overly forgiving judges who were given broad discretion nurtured the mandatory minimum movement that took hold during the 1970s, initially in New York when drug and crime rates were rising.<sup>39</sup> Once begun, the movement took on substantial momentum. From 1991 to 2011 the number of mandatory minimum penalties in federal criminal law nearly doubled.<sup>40</sup> More than two-thirds of the states have mandatory minimums for drug offenses.<sup>41</sup> More than 80 percent of the increase in the prison population between 1985 and 1995 was due to drug convictions that triggered mandatory minimum sentences.<sup>42</sup>

Unfortunately, the shift to mandatory minimums essentially guarantees a regular stream of unjust sentences, some grossly so. Every offense or offender presents its own unique situation. A just sentence requires taking

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into account the seriousness of the offense, as well as the culpability and capacities of the offender. Because of the wide differences among cases, any mandatory minimum will impose an excessive sentence in some cases.

Research studies demonstrate the point. One study of laypersons' shared expectations of justice showed the dramatic conflict between the law's application of mandatory minimums in real cases and the average person's judgments about those cases. In one three strikes case, test subjects gave an offender 3.1 years; in reality, the court was required to give life imprisonment. In a cocaine case, subjects gave 4.2 years, while the court was obliged to give life without parole. In a marijuana case, the subjects gave 1.9 years, while the court was compelled to give fifteen years to life.<sup>43</sup> The unfortunate irony here is that these cases are seen as grossly unjust even by the lay public who elected the politicians who put the mandatory minimum sentencing rules in place.<sup>44</sup>

To illustrate how badly wrong the system can go with mandatory minimums generally and three strikes statutes in particular, consider the case of Shane Taylor.

### Twenty-Five Years to Life for Possessing Drugs Worth Ten Dollars

At age eleven, Shane Taylor is living on the streets of Los Angeles.<sup>45</sup> He had previously been bouncing around from house to house, often staying with friends and relatives. After a few years on the streets, he develops a methamphetamine addiction, initially out of curiosity and as a respite from his otherwise bleak life.

Around age sixteen he meets Shelly Hayes. The two begin dating and before long have fallen in love. Hayes sees the good in Taylor. Taylor in turn appreciates that Hayes does not use drugs and is trying to make a life for herself by going to night school. Taylor is drawn to that positive path. However, in 1988 he is arrested for two burglaries that he committed to feed his drug addiction and spends time in prison. Neither of the burglar-

ized homes was occupied, and Taylor took something from only one of the houses. He serves his time in prison and says he “learned [his] lesson.”<sup>46</sup> After his release, he marries Hayes, and the two begin their life together.

When Hayes tells Taylor that she is pregnant, he is overwhelmed with joy. He is certain that he wants to be a good father and to get his life together. He starts working full-time as a prep cook, earning money to support his family. His daughter, Alisha, is born into a loving home, and Taylor has never been happier. He holds a steady job, is a good husband and father, and together he and Hayes strive to raise their daughter.

In 1996 Taylor and Hayes’s brother take a small retreat together as a break from their normal hardworking lives. They drive up toward the Sequoia National Park, where they find a scenic overlook, pull over, turn on the car radio, and open a few beers. A police officer driving past also decides to pull over and see if either of the young men is underage. Unfortunately, Taylor has not quite managed to completely give up meth. The police officer finds 0.14 grams of the drug in a plastic bag tucked into Taylor’s wallet. The drugs have a street value of under ten dollars.

Taylor is convicted of illegal narcotics possession. When he shows up for sentencing a month later, Judge Howard Broadman is surprised to see him: “I never expected to see you again, frankly. I thought a lot about you. And I said, ‘Jeez, if I were him, I’d do research and find out what country didn’t have extradition laws,’ because I don’t think I’d have showed back up.”<sup>47</sup> Taylor has done what the law requires of him and is hoping to get a sentence of a year or two and treatment for his drug problem. To his shock and horror and that of his family, Taylor is sentenced to twenty-five years to life for his ten dollars’ worth of drugs. Because of his burglary and the attempted burglary more than eight years ago, the minor possession offense becomes his third strike and requires a mandatory minimum sentence.

Hayes is forced to raise their four-year-old daughter by herself, as Taylor is locked up for the foreseeable future for carrying that meth in his wallet. Years later the judge who was compelled to sentence him attempted, with the help of a private group, to get Taylor’s sentence reduced.<sup>48</sup>

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This outcome has been the case for thousands of defendants in California and other states that enacted similar—three strikes or repeat—offender legislation. Lester Wallace was a homeless man suffering from schizophrenia who had two nonviolent residential burglaries on his record. When police caught him attempting to steal a car radio, he became an early victim of the three strikes legislation in California, having committed his crime hours after the legislation came into effect. He was sentenced to twenty-five years to life. Curtis Wilkerson was sentenced to twenty-five years to life for shoplifting; his first two strikes arose from some group criminal activities he participated in more than thirteen years before. The property he was trying to steal was a \$2.50 pair of white tube socks.<sup>49</sup> Under many three strikes statutes, petty offenders are being incarcerated for long prison terms.<sup>50</sup>

Everyone—offenders and the public alike—would have been better off if this sentencing war had never begun, if the system had restrained overly lenient sentencing, perhaps with sentencing guidelines, and had never sparked the shadow vigilante impulse of voter outrage over such leniency that gave us three strikes statutes and mandatory minimums.<sup>51</sup>

The problem is we now have mandatory minimums, and, as unnecessary as they may be, getting rid of them will not be easy because politicians will worry that voting to repeal them will mark the politicians as being “soft on crime” during the next election.

We will for some time pay the price for our past sins of enacting rules and practices that produce predictable failures of justice, advertising the system’s seeming indifference to doing justice. At the very least, we can stop making things worse and begin to repair the system’s moral credibility by having the system publicly and persuasively commit itself to the importance of doing justice and to forsake trading justice away unnecessarily or for a less important benefit.

The effect of justice-frustrating sentencing in sparking the shadow vigilante impulse that stoked politicians’ calls for three strikes and man-

datory minimums can be seen in other contexts as well, in which injustice-producing legislation suddenly becomes popular. Consider other examples with similar dynamics.

## **POLITICIANS PROMOTE REDUCING THE AGE TO BE TRIED AS AN ADULT**

### Multiple Robber-Murderer Gets Five Years of Rehabilitation

Willie Bosket is a troubled child.<sup>52</sup> In third grade, he is “having problems in school like pulling fire alarms and fighting with the students and the teachers and stealing school books and materials like colored paper.”<sup>53</sup> In 1974, after several run-ins with the law, a judge sends him to Brookwood Center for Boys. He sneaks out to get drunk, skips classes, hits another boy in the eye with a poker, rapes another boy in the shower, steals cigarettes from a vending machine, and drives a truck into a social worker. After being released to a group home in Brooklyn, he quickly runs away, back to his home neighborhood of Harlem.

On a cold spring morning in 1978, Bosket, now around fourteen years old, lifts \$380 from a sleeping subway passenger. With that cash, he buys himself a .22-caliber handgun with a holster he can strap to his leg. On Sunday, March 19, 1978, Bosket is again riding the subway, looking for an easy victim to rob. In the late afternoon, around 5:30 p.m., he spots a passenger sleeping. Waiting until they are alone in the car, he nudges the man, Noel Perez, to see if he will wake easily. When there is no response, Bosket starts to remove the watch from the man’s wrist. Suddenly the passenger wakes up, startling Bosket, who draws his gun and shoots him in the head twice. As blood pools around the body, Bosket grabs the watch, some money, and a gold ring. Instead of feeling remorse about taking the man’s life, Bosket brags about what he has done to his sister, apparently emboldened by the fact that he has gotten away with murder. With no witnesses, the police are unable to identify the killer of Perez.

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Later that same week, on Thursday, March 23, Bosket, with his gun strapped to his leg and his seventeen-year-old cousin Herman by his side, sets out to make some money. Having had recent success robbing subway passengers, they head to the closest subway station in Harlem: 148th Street and Lexington Avenue. As they wait for the next train to arrive, they notice a yard worker, Anthony Lamorte, connecting cars to waiting trains. He is carrying a handheld CB radio that is worth quite a bit of money. As they approach Lamorte, he turns to face them and tells them to “get the hell out,” since the area is a restricted zone for workers only. When the youths taunt Lamorte, telling him to “come down here and make us get out,” he moves toward them.<sup>54</sup> Bosket pulls out his gun and demands the CB radio. As Lamorte turns to run, Bosket fires, hitting him in the right shoulder. Lamorte is able to reach safety and call for help, while the two young men flee.

This failed robbery does not deter Bosket and Herman. Over the next few days, they continue to rob subway passengers at gunpoint. From one man they get twelve dollars after they kick him down the stairs. Another man is shot in the hip when he resists their demands. Bosket is apprehended for shooting the man in the hip but released. With a murder and several violent assaults under his belt and no punishment, Bosket feels invulnerable.

On Monday, March 27, just over a week after his first killing, Bosket and his cousin once again go to the subway station. The car they enter is empty except for one passenger. As the train leaves the station, Bosket pulls out his gun and threatens the passenger, demanding all of his money. When the man tells them he does not have any cash, Bosket kills him. Going through the man’s pockets, Bosket finds two dollars.

Worried, the NYPD turns its full attention to investigating the subway killings. When Bosket sees a front-page newspaper article about the killings, he proudly shows it to his sister. The police eventually pick up Bosket and his cousin for questioning. They get the cousin to turn on Bosket in return for lenient treatment and charge Bosket with two counts of murder and one count of attempted murder.

Bosket, who is still not old enough to drive a car, has been in and out of the New York juvenile courts his entire life and knows that as a juvenile he is mostly protected from punishment. While being detained awaiting the hearing, he stabs another boy with a fork, hits a counselor in the face, and chokes a psychiatrist. The judge is shocked by his belligerent behavior. Despite all this, when Bosket pleads guilty to the two counts of murder and one count of attempted murder, he receives a sentence of five years' placement in the Division for Youth, the maximum allowed under current law for a juvenile. The focus for juvenile offenders is rehabilitation. Facing similar charges, an adult could have been sentenced to fifteen years to life.

Politicians are outraged. Reports of the subway killer's violent escapades throughout the media have scared people, and many are shocked to see the perpetrator receive so light a sentence, especially since rehabilitation does not seem to work for this repeat offender. Mayor Ed Koch calls Bosket a "mad-dog" murderer and complains that "it's an outrage that in this town you can kill, you can murder and you can do it a second time and not get the death penalty."<sup>55</sup> New York governor Hugh Carey tells reporters, "There was a breakdown of the system, and it is really on the doorstep of the Division for Youth. The blame is squarely on the shoulders of the department."<sup>56</sup> After stating that "this type of offender should never be allowed back on the streets," he calls legislators to Albany for a special session, during which they will radically revise the juvenile justice system.<sup>57</sup>

The Juvenile Offender Act of 1978 is passed just a month after Willie Bosket receives his five-year placement.<sup>58</sup> The act changes the New York criminal justice system's treatment of juveniles; it becomes the harshest in the country and shifts the principle of punishment away from rehabilitation to a focus strictly on protecting society. The new laws make fourteen- and fifteen-year-olds equally criminally responsible as adults for fourteen listed crimes and makes even thirteen-year-olds criminally responsible for murder.<sup>59</sup>

The defense of immaturity is no longer available for these crimes (which include kidnapping, manslaughter, arson, and burglary); a juve-

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nile will face the same punishment as an adult in the same situation.<sup>60</sup> The act, known as the Willie Bosket Law, becomes a benchmark for other states in dealing with young offenders.

From the mid-1980s to the mid-1990s the number of homicides committed by juveniles has climbed steadily all over the country. By the late 1990s it has stopped increasing but still remains a major issue, especially in cities.<sup>61</sup> During that time, many other states follow New York in lowering the age at which children can be tried as adults in criminal court.<sup>62</sup> Most states allow prosecution in adult court of juveniles who are sixteen years old or younger for some offense.<sup>63</sup>

While one can easily understand the frustration over the criminal justice system's failures in cases like that of Willie Bosket, the reaction again is to support legislation that goes too far and that now guarantees a regular stream of injustices, as the system is now required to ignore the immaturity of many offenders who deserve mitigation or excuse. To illustrate the point, consider the case of Shimeek Gridine.

### Seventy-Year Sentence for a Fourteen-Year-Old's First Offense

Shimeek Gridine, growing up in northern Florida, plays Pop Warner football and dreams of being a merchant seaman when he grows up, excited by the stories he heard of his grandfather who had chosen that career path.<sup>64</sup> Gridine works hard in school and achieves good grades. At age thirteen, his mother loses her job. Because money is tight they move to Jacksonville to live with his grandparents.

After school on April 21, 2009, Gridine, now fourteen, and his younger friend, twelve, go to the local barbershop to hang out. Gridine is going through an emotionally hard time, since two family members died in the previous weeks.

As they leave the barbershop, they notice a strange-shaped item lying under a parked car. They crouch down to investigate and realize it is a small shotgun. They pull it out, both thrilled and scared at their new dis-

covery. Just then they see a man across the alley taking the trash out of a restaurant. Thinking he is the owner, these two boys approach him with the gun and demand that he give them all the money he has.

Unamused and seemingly unafraid of the young boys, the man refuses their demands and turns to walk back into the restaurant. As he does this Gridine fires the gun, pelting the man's back, shoulder, and neck with tiny pellets. The two boys quickly run away, scared. The man is taken to the hospital and released that same day.

Gridine and his friend return to their homes and try to act as if nothing had happened. The police investigate, and the boys become nervous and agitated. Gridine tells his grandfather what he has done. Feeling very bad about it, Gridine goes to the Jacksonville Sherriff's Office with his grandfather and turns himself in.

Because he is only fourteen and has no history of violence, Gridine is hopeful that the judge will be lenient. He is charged with first-degree attempted murder, attempted armed robbery, and aggravated battery. Gridine is charged as an adult even though he is only fourteen. He pleads guilty to armed robbery on the advice of his lawyer, who is confident that he will get a much lesser sentence by doing so. Gridine elects to be tried before the judge rather than with a jury on the other charges.

Family members from as far away as New York come down to Florida for the trial to speak on behalf of the boy and to show their support. However, all of this support seems to have a negative effect on the judge, as he declares, "Because you were known to be a good kid, because you have good grades and a good family that loves you, you knew better. Therefore, for the first charge of Premeditated Attempted Murder, I sentence you to 70 years in prison. On the second charge of Armed Robbery, I sentence you to 25 years. You will serve the sentences together."<sup>65</sup> The sentence is thirty years longer than the sentence the prosecution had asked for.

The seventy-year sentence is essentially a life sentence. As Gridine's public defender points out, it extends beyond the life expectancy for an American male. A life sentence for a fourteen-year-old seems to take away

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the possibility for the youth to “demonstrate growth and maturity” and instead is a decision to simply let him rot in adult prison.<sup>66</sup>

Unfortunately, Gridine’s situation is not unique. Since the wave of harsher penalties against juveniles swept the nation, hundreds of children have found themselves tried in adult court and sentenced to long prison terms. These are not all hardened repeat offenders like Willie Bosket. For many, it was their first offense and an act of impulsiveness. In one case, a thirteen-year-old boy who was raised by an alcoholic and cocaine-addicted father who frequently watched pornography in the home went to his neighbor’s house and raped the twenty-three-year-old mother. A psychologist found that the youth had “underlying neurological problems that made him more impulsive than other juveniles his age.”<sup>67</sup> He was given a sentence of life plus twenty years.<sup>68</sup> In Nevada another thirteen-year-old was sentenced to life without parole after pleading guilty to killing the man who had been sexually molesting him.<sup>69</sup> A twelve-year-old boy in South Carolina was sentenced to sixty years in prison for killing his grandparents after they beat him and locked him in his room.<sup>70</sup>

Outrage over the system’s failure to restrain vicious sixteen-year-old repeat offender Willie Bosket led to distorting the criminal justice system so that it now gives essentially life imprisonment to immature first offenders like fourteen-year-old Shimeek Gridine. Young offenders and the public would have been better off if the system had initially taken more seriously its obligation to punish and to protect so that a Willie Bosket case would never have happened.

The best way to avoid the destructive effects of shadow vigilantism is for the criminal justice system to publicly commit itself to the importance of doing justice—giving offenders the punishment they deserve, no more and no less. With that, the system can earn back its moral credibility with the community and can avoid the downward spiral of shadow vigilantism and its distorting effects.

## CRIMINAL JUSTICE OFFICIALS AS SHADOW VIGILANTES

Chapter 3 discussed the practice of “testilying” in which police officers feel morally justified in lying in court about the circumstances of a search or seizure because they see the exclusionary rule (which disallows use of even the most reliable evidence if a court determines that the search rules are violated) as an immoral undermining of society’s obligation to fight crime and do justice. Also discussed there was the case of sexual psychopath Bill Bradford during which police played fast and loose with the court’s warrant rules because they saw no other way of effectively stopping this multiple murderer.

These two examples are symptomatic of the larger problem: officials in many if not most parts of the criminal justice system see the system’s apparent indifference to failures of justice as a moral justification for manipulating or perverting the system as needed to catch offenders and have them receive the punishment they deserve. Below is another example of subverting the search and seizure rules, followed by examples of other kinds of shadow vigilante subversions in other parts of the system.

### EXCEEDING SEARCH AND SEIZURE RULES AND TESTILYING ABOUT IT TO SUBVERT THE EXCLUSIONARY RULE

In the Columbia Heights section of Washington, DC, on the evening of November 1, 1969, five-year-old Penny Sellers and her older sister Denise visit the apartment of their grandfather Robert Dennis. Also present there is a neighbor, William Sheard, who gives the girls candy and lets them play with his puppy, as he has done in the past. Around 9:30 p.m.

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the girls have moved on to watch television in the basement apartment of a friend. Penny leaves to go back to Sheard's apartment to play with his puppy again. It is the last time her family ever sees her.

After about an hour, Penny's grandfather asks Sheard if he knows where Penny is and is told that she "had gone up the street with a man." At the grandfather's request, Sheard calls the police. The police arrive at about 11:00 p.m., having been advised to contact "a Sheard."<sup>1</sup> Upon meeting Sheard, officers are informed by him that a child is missing, that he has telephoned the police, and that he had been the last person to see the child. One hour later, police find Penny's body amid debris on the floor of a garage near the apartment building. Penny's genital area is exposed and bloody. A later autopsy reveals that she has been raped, and died due to asphyxiation from suffocation. Police also find her underpants in the alley near the garage and one of her shoes on the back porch of the house next door.

The police chief orders a lockdown of the apartment complex and for all male residents to be questioned. During the questioning, officers are to also make a visual search for blood in the open living areas of the men's apartments. Officers Shuler and Jones are assigned to question Sheard in his apartment, since he is apparently the last person to see Penny alive.

Officer Shuler knocks on the door and identifies himself as a police officer. When Sheard answers the door, the officers immediately become suspicious because Sheard has fresh scratches on his face, looks as though he has just taken a bath, is wearing fresh but heavily wrinkled clothing, and his overall behavior is odd. Believing that Sheard might hide or destroy vital evidence if they wait to get a warrant, the officers are anxious to enter and examine his apartment.

Officer Shuler advises Sheard that a small child has been killed and that Shuler and his partner, Officer Jones, would like to come inside to talk with him. Sheard later testifies that he did not authorize the officers to come into his apartment but that they simply barged in without permission. Officer Shuler testifies that Sheard was "friendly" and said,

“Come in, come in, I’d like to do all I can to find out.” Later, however, Officer Shuler testifies during a motion to suppress evidence that he does not remember exactly what Sheard had said. Officer Jones testifies, “Well, he just stepped back. And I don’t remember if he said, come in, but I was under the *impression* that we were to enter the room by his attitude.”<sup>2</sup>

After the officers enter the apartment, they observe that the room is in a state of disarray: candy is strewn about on the floor, and a large, damp, burned area is evident on the mattress of a bed. One of the officers leaves to summon their superiors, and the other conducts a plain-view search of the area—evidence that is already exposed to view is considered in “plain view” and does not require a warrant to seize it. The officer supposedly finds in plain view a pair of dark-green pants, with bloodstains, sitting on top of a hamper.

Authorities seize the pants and other evidence and take Sheard to the nearby precinct. A benzidine test reacts positively to the stain on the pants indicating that it is human blood. Additional tests of Sheard’s right hand and his penis also show positive for blood. Chemical analysis reveals that the blood on Sheard’s jacket, the dark-green slacks, the blanket and bedspread, and Penny’s dress and slip is type O blood (Sheard’s blood is type A; Penny’s was type O). Fibers from the bedspread and blanket are discovered on Penny’s dress and slip, on all of Sheard’s seized clothing, and in scrapings from the heads of both Sheard and Penny.

With the staggering amount of evidence against Sheard, a grand jury indicts him on February 2, 1970, for the rape-murder of Penny. The indictment includes four counts: felony murder, first-degree murder, rape, and taking indecent liberties with a minor. Sheard is found guilty and sentenced to concurrent terms of twenty years to life on the felony murder count and of ten to thirty years on the rape count.

The truth is that the two officers did not in fact find the critical evidence, the bloodstained pants, just sitting out in plain view. Rather, they—and perhaps even their superiors—probably made a conscious choice to exceed the search and seizure rules and to hide their violation

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because they believed it was necessary to find the rapist-murderer of a five-year-old girl and because the evidence of the crime would otherwise have been quickly destroyed by the perpetrator.

Police officers morally justify their lying in court to compensate for what they see as improper rules that regularly lead to failures of justice—complex rules that have “metastasized into a dizzying array of formalistic doctrines and sub-doctrines.”<sup>3</sup> Harvard law professor Alan Dershowitz explains, “Almost all police lie about whether they violated the Constitution in order to convict guilty defendants.”<sup>4</sup> Even police officials concede that police lying in court, especially to justify improper searches, is not uncommon.<sup>5</sup> It has earned its own label: “testilying.” The term was coined by New York City police officers apparently to help them justify in their own minds why it was different from normal lying under oath—while not legally justified, it was morally justified. “When an officer is deceptive in court, the rationale goes, he is ‘not quite lying’ but ‘not quite testifying truthfully and completely’ either. Testilying is seen as a middle ground between pure honesty and pure dishonesty.”<sup>6</sup>

One officer caught lying under oath said it was “standard procedure” and used to “counterbalance the loopholes used by drug dealers to evade the police.”<sup>7</sup> An empirical study by Myron Orfield, a professor of civil rights law, conducted in Chicago concludes that “virtually all the officers admit that the police commit perjury, if infrequently, at suppression hearings.”<sup>8</sup> (Suppression hearings are conducted to decide which evidence will be allowed to be used in trial versus which evidence must be excluded.) The study claimed that up to 76 percent of the officers surveyed had “shaded” facts in order to establish probable cause to search for evidence.<sup>9</sup> Some claim that police commit perjury in 20 to 50 percent of cases where they have to testify regarding Fourth Amendment (exclusionary rule) issues.<sup>10</sup>

Most famous among the examinations of police perjury is the 1994 Mollen Commission report on the New York Police Department: “Police

perjury and falsification is a serious problem facing the department and the criminal justice system.” Such perjury is “probably the most common form of police corruption . . . particularly in connection with arrests for possession of narcotics and guns.”<sup>11</sup>

The Mollen Commission report spoke to the reasons for the officers’ willingness to lie: “In their view, irregardless of the legality of the arrest, the defendant is in fact guilty and ought to be arrested.” It explained that the officers were frustrated with the legal rules that protected criminals from search and seizure because the rules were perceived as “unrealistic rules of law.” Officers also expressed frustration about their “inability to stem the crime in their precinct through legal means.”<sup>12</sup> They held a strong belief that perjury was acceptable because it was necessary to stem the tide of crime and because it was “‘doing God’s work’—doing whatever it takes to get a suspected criminal off the streets.”<sup>13</sup>

Other writers have made the same point: “Police view perjury as a necessary means to achieve the ends of justice. Constitutional rules—particularly the Exclusionary Rule—are viewed as technicalities that ‘let the criminal . . . go free because the constable has blundered.’”<sup>14</sup> One study found that testilying began soon after cases were dismissed under the 1961 Supreme Court holding in *Mapp v. Ohio*, which created the exclusionary rule.<sup>15</sup> To police, “there is a deep-seated disregard for what they consider to be silly little laws made by a silly little Supreme Court in a backroom far removed from the dangerous streets they are trying to bring order into.”<sup>16</sup>

Presumably, judges, like others in the system, are well aware of the testilying. Yet some may share the shadow vigilante sympathy motivating the lying and thus, while no doubt unhappy about perjury in their court, play along and accept the testimony as sufficient to justify the search or the arrest. As Alan Dershowitz reports, when officers offer perjured testimony, the judge “shakes his head in knowing frustration, but accepts the officers’ account as credible.”<sup>17</sup> A series of interviews revealed that 75 percent of judges, 100 percent of public defenders, and 65 percent

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of prosecutors “believed that judges sometimes fail to suppress evidence when they know police searches are illegal.”<sup>18</sup>

This is a sad state of affairs but in some ways a predictable development as the collection of outrageous results from the law’s “technicalities” accumulates (as in some of the cases described in chapter 4 and the appendix). As the law increasingly loses moral credibility failing to give offenders the punishment they deserve, it becomes increasingly easier for shadow vigilantes to justify the subversion of what they see as an immoral system. It is probably no coincidence that testifying is most frequently associated with satisfying the technicalities of search and seizure law. The same officer who feels comfortable lying about which side of a house’s threshold he was on when he made a drug seizure might think it abhorrent to lie about a matter related to the actual guilt or innocence of the defendant.

Just as police officers morally justify their testifying, so too do prosecutors manipulate the system out of frustration with what they see as the system’s common indifference to doing justice. This view frequently plays itself out for some prosecutors when they are presented with classic vigilantes trying to provide the justice that the system does not. Consider two examples.

## PROSECUTOR RELUCTANCE TO PROSECUTE SOME VIGILANTES

### No Prosecution of Vigilantes Who Beat a Child Rapist

Jane Doe grows up in the neighborhood of Hubbard Farms in southwest Detroit, raised by her single mother.<sup>19</sup> When Jane is eight years old her mother dies, and neighbors across the street and, in fact, the whole neighborhood pitch in to raise Jane, calling her “a daughter of the community.”<sup>20</sup> The community feels particularly protective of Jane in part because she has Down syndrome. She is often seen on her front porch, dancing and singing along with the radio.

On July 8, 2013, at age fifteen, Jane gets her first job at the local Café Con Leche. She walks the four blocks to and from work twice a week. These small shifts are a stepping-stone for Jane to gain more independence. Her employer describes her as a hard worker. Less than two weeks later, on July 17, she does not show up for the start of her shift. Her employer becomes concerned and calls her guardians, who tell him that she has already left for work. When she finally arrives at work, Jane simply tells her boss that she has been with a friend.

Later that night, Jane confides to her adopted parents that she has been raped. Ramiro Sanchez, age forty-three, approached her and asked her to come inside his apartment. Once inside, he disrobed, kissed, and raped her. He then took nude photos of her on his cell phone. After the attack, Jane quickly dressed and went to work, not knowing what else to do. Her parents immediately notify the police. They provide Sanchez's address and his description.

Jane, her parents, and the community anxiously await an investigation and charges to be pressed. It is not until two days later that a rape kit is finally administered. Several days later, on July 26, the parents are appalled to still see Sanchez walking around free. They send out a chain email through the tight-knit community describing the rape and rapist. On July 29 the community receives some reassuring news: a person reports seeing Sanchez being led out of his apartment by police. But just two days later he is released without any charges. Jane's parents are told that the investigation is ongoing, but the community sees apathy and inattention. They are angry. A fifteen-year-old daughter of their community with Down syndrome has been raped, and she needs support.

Fifteen days after the rape, on August 1, community leaders distribute flyers with a "Rapist Warning" and several pictures of Sanchez. Storefronts along the main street of the neighborhood put up the flyers in their front windows. Tensions and frustrations continue to build, and after hearing that the rape kit has not yet even been processed by the state police, the community explodes. A Facebook thread on the incident has

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a post that states the following: “attention/warning: this piece of shit u see in this flyer raped a 16 yr old girl in our neighborhood!!! . . . me personally, if i seen him, id call the cops then i would beat the shit out of him myself till the cops arrive. i hate worthless scum like this. stand up for your hood.”<sup>21</sup>

On Monday, August 5, at around 1:00 p.m. Sanchez is spotted walking along the main street. A man rides up on a bicycle, jumps off, and while beating Sanchez shouts, “You like raping little girls?” Sanchez manages to escape and runs down the street, where he is attacked by a larger group of people. The crowd kicks and beats him until police arrive. Sanchez is taken to the hospital, where he is treated for his injuries. Another post goes up on Facebook describing how “a friend of mine caught him” and claims that this was “great news for southwest detroit . . . well . . . thanks to everyone who shared the flyer and spread the word.”<sup>22</sup>

Wayne County prosecutor Kym Worthy does not seek to arrest anyone in connection with the beatings. Jerome Warfield, a member of Detroit’s civilian commission that oversees police, says, “We do understand that the neighbors were enraged.” He goes on to warn, though, that “vigilantism cannot be accepted when you’re impeding upon somebody’s rights.”<sup>23</sup> The community is torn between praising the actions of the vigilante mob that finally delivered some justice and condemning its members as criminals themselves.<sup>24</sup> Although it is clear who participated in the beatings, no charges are ever brought.

We have previously noted other examples where vigilantes were not charged. Recall George Zimmerman’s killing of unarmed teenager Trayvon Martin, discussed in chapter 9. No charges were filed by the local authorities until the national press focused on the racial aspect of the case. The same was true in the case of Bernhard Goetz unnecessarily shooting Darrell Cabey in the subway car, discussed in chapter 3, and of the beating of Rodney King in Los Angeles, discussed in chapter 9. Whatever one may think of how vigilantes should ultimately be dealt with, the

potentially controversial circumstances suggest that at least some public examination of the events would be useful. Yet prosecutors regularly forgo filing charges unless forced to do so by media attention or public outcry.

Prosecutor manipulation of the system works in reverse as well, overcharging rather than undercharging a case, where they believe the system has regularly failed in the past to give an offender the punishment he deserved. When prosecutors finally get hold of a justice-avoiding offender, it is not uncommon for them to seriously overcharge the violator's offenses or to exaggerate their claim of what constitutes an appropriate sentence, feeling justified by the system's past failures to do justice. Consider an example.

## PROSECUTORIAL OVERCHARGING TO MAKE UP FOR PAST FAILURES OF JUSTICE

### Finally Getting Something on a Career Criminal

Edward Augustine, living in New Orleans, has had numerous run-ins with the police, but they rarely end in conviction and punishment.<sup>25</sup> He has a single conviction for attempted possession of a firearm with a controlled dangerous substance. He has been through the "revolving door" of the criminal justice system many times. Police regularly arrest him on drug or weapons charges, but he will later walk back out on the street. Sometimes it is because the police are unable to find witnesses willing to testify against him. In other instances, prosecutors do not proceed because at the time they have limited prosecution resources and "higher profile" cases in greater need of their efforts.<sup>26</sup>

In 2008 the new district attorney, Leon Cannizzaro, has a different attitude. Cannizzaro makes it office policy that no case is too insignificant to try and pursue. He makes it his mission to increase the percentage of cases his office will pursue from 50 percent to 90 percent.

On January 7, 2011, a New Orleans police officer observes a car

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making an unlawful right turn at a red light. The officer turns on his lights and siren to pull the car over, but the car speeds away. The officer follows the vehicle, and as he pulls up beside it, he sees the driver, Augustine, dumping white powder out of the car window.

The officer chases Augustine for several blocks but stops when Augustine enters a one-way street. Augustine accidentally hits another vehicle. Augustine gets out of his car and flees. The officer pursues him on foot. As Augustine attempts to climb a fence in a nearby alley, the officer Tases him and places him under arrest.

Upon returning to the scene of the crash, the officer learns that Augustine has killed the passenger in the other vehicle, a college freshman who had returned home for the Christmas holidays. The officer also finds numerous packages of heroin in Augustine's possession. It also comes to light that the car being driven by Augustine has been reported missing by its owner, the mother of Augustine's girlfriend.

District Attorney Cannizzaro is unhappy that this career criminal has been allowed to pass through the system on so many occasions without facing any serious punishment. He believes that by not aggressively prosecuting earlier narcotics cases, the system was in effect "creating monsters."<sup>27</sup> He is determined to pursue Augustine aggressively to try to make up for past failings of the office.

He charges Augustine with manslaughter for causing the death in the accident, for which Augustine ultimately gets, at Cannizzaro's urging, a fifty-year sentence. Cannizzaro also charges Augustine with possession with intent to distribute illegal drugs—the drugs he dumped out the window—and, again at Cannizzaro's urging, Augustine gets an additional sentence of fifty years. While Augustine did not have his girlfriend's mother's express permission to drive her car on that occasion, the woman does not wish to press charges. Cannizzaro nonetheless adds this offense to the list and gets another twenty years added onto Augustine's sentence, for a total sentence of 120 years—a sentence several times longer than what even an intentional murder would typically get.<sup>28</sup>

In this form of shadow vigilantism by prosecutors (and judges), the officials feel morally justified in manipulating the system in order to compensate for past failures of justice.

Prosecutorial overcharging is of two sorts: vertical overcharging, in which the prosecutor charges offenses for which he or she has insufficient proof to convict, and horizontal overcharging, in which the prosecutor charges a series of overlapping offenses arising from the same criminal act.<sup>29</sup> In the latter type, prosecutors charge every offense for which a defendant might theoretically satisfy the offense definition, no matter how overlapping the offenses may be. Thus, a prosecutor might take a standard rape case—using force to compel intercourse—and add on “assault, kidnapping, gross sexual imposition, etc.”<sup>30</sup> This is made possible because most American criminal codes, in which the state’s criminal laws are collected, grow over time to have a vast collection of overlapping offenses.<sup>31</sup>

Legislatures have been constantly adding new offenses, sometimes making the code seven or eight times longer than its original form based on the Model Penal Code, but without substantially expanding the code’s coverage.<sup>32</sup> So, for example, most states now have an offense of “carjacking,” after a series of newspaper headlines about such conduct. Does anyone doubt that such conduct was already punished severely as armed robbery (as well as auto theft, kidnapping, assault, etc.)? Adding one more offense to charge was an act of potential showmanship, not criminal code improvement.

The forests of overlapping offenses exist in large part because prosecutors have politically promoted them. Prosecutors have put political muscle into supporting a constant stream of new offenses that typically are just added on top of the old ones. To protect this ability to bring multiple charges, they have repeatedly opposed criminal code reforms that would streamline codes and eliminate unnecessary overlaps. For example, in a new criminal law codification undertaken in Illinois in 2003, which had as one of its primary aims the consolidation of overlapping offenses, the recodification was ultimately blocked by the political opposition of

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prosecutors.<sup>33</sup> The prosecutors instead sponsored a new reform commission that kept the redundancies in the current code.<sup>34</sup>

Prosecutors' moral justification for excessive charging might rest on any or all of several different claims, the same sorts of claims heard from police to justify their testilying. First, the criminal justice process has so many barriers to an offender getting the liability and punishment he or she deserves that such excess is needed just to end up with something that approximates what is really deserved.<sup>35</sup> In other words, the prosecutor feels that by putting on several extra charges he is getting some insurance. That way, no matter what the court does, the defendant is less likely to escape all punishment. With this insurance policy, the defendant may not do the maximum time but he'll get some sanction. Second, it makes sense to try to get more liability and punishment than an offender deserves for the offense because, given the gross ineffectiveness of the system, the current offense may be just the tip of the iceberg of the offenses he or she has actually committed.<sup>36</sup>

Finally, many people care little if the overcharging generates undeserved liability for both present and unpunished past offenses. That is not something that ought to be a concern to prosecutors because the criminal justice system has given up any pretense about being a search for justice. It is simply a system of mutual combat between the defense counsel and prosecutors, with winners and losers, the goal of which is to always win and to never lose. Just as the defense counsel see their job as always getting the least punishment they can for their guilty clients, prosecutors, in a symmetrical fashion, should see their job as getting as much punishment as they can for guilty defendants.<sup>37</sup>

Strategic overcharging might seem to the uninitiated to be too unethical to be done openly. But the increasing game-like features of the system have dulled participants' sensibilities. Indeed, one need only look at similar manipulative conduct by federal judges before the Sentencing Reform Act of 1984 stopped the practice. Federal law at the time required that all offenders be eligible for early release by the United States Parole Com-

mission no later than after serving one-third of their sentence. Judges who were uncomfortable with this early release could, and did, short-circuit the system by simply determining the sentence they really wanted, then tripling it.<sup>38</sup> Thus, offenders would become eligible for release only after serving the full term the judges thought appropriate. Prosecutors may be making similar sorts of strategic manipulations when they overcharge.

It was in part this judicial manipulative practice that contributed to the enactment of the “truth in sentencing” provisions of the Sentencing Reform Act of 1984. People had become increasingly skeptical of the sentences that were publicly imposed because they always ended in early release. The new act requires that an offender serve at least 85 percent of the sentence imposed—an attempt to earn back some credibility for the system.<sup>39</sup>

### **WHY SHADOW VIGILANTISM IS SO DANGEROUS, MORE DANGEROUS THAN CLASSIC VIGILANTISM**

It could be argued that the manipulations and subversions inspired by shadow vigilantism—of both the official sort discussed in this chapter and the citizen sort discussed in the previous chapter—are not something that, as a practical matter, ought to be of significant concern. We can for the most part ignore these problems because they are only a minor part of the criminal justice process. But the truth is that shadow vigilantism is dramatically more damaging than classic vigilantism.

First, the effect of shadow vigilantism is less dramatic but more pervasive. Shadow vigilantism appeals not just to the unusual person or group willing to be a classic vigilante—willing to openly violate the law in serious ways—but also to more ordinary people. Many people who cannot bring themselves to commit explicit lawlessness *can* bring themselves to undermine and subvert, through noncooperation, lying, or other lower-level misconduct, a system that they see as being immorally indifferent to serious wrongdoing.

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Imagine all the neighbors in the chapter 8 cases who refused to help authorities pursue the classic vigilantes. As we asked in chapter 9, if those neighbors were sitting on a jury for the vigilantes, would they be likely to vote to acquit? If they were the grand jurors or prosecutor in the case, would they want to avoid bringing charges? If they were voting on a proposal to change the rules that led to the failure of justice, would they vote for the change and for a politician who supported the change? It seems highly likely that they would do so in all these instances. The fact that an entire neighborhood can show its willingness to succumb to a shadow vigilante impulse shows the potential sweep of the problem.

Further, shadow vigilantism is more problematic than the classic form because the criminal justice system cannot effectively deter it in the way it can classic vigilantism. The shadow vigilantes' conduct may be criminal in some cases, but it also may be only unethical or unjust or unfair in others. The failure to report a crime or to assist investigators is commonly not a crime in the United States.<sup>40</sup> And even if it is criminal, it cannot be effectively deterred. If prosecutors have no witness to the crime itself, how can they find a witness to a witness' failure to report the crime?

Even if the shadow vigilantes' actions are not morally justified (under chapter 5's rules), they may well believe that they are.<sup>41</sup> They probably see themselves in the way civil disobedience protesters might see themselves: they know that what they are doing is inconsistent with the law in spirit if not in fact, but they see the violation as morally justified by the law's own immorality in its indifference to doing justice.

Worse, while shadow vigilantism cannot be as effectively deterred as classic vigilantism can, it is at the same time even more damaging than the latter. Classic vigilantism, by operating openly, serves as a public protest against the system's failures of justice—a call to the system to correct itself. In contrast, shadow vigilantism is generally unseen: failure to cooperate with police and prosecutors, not reporting crimes when they are committed, jury nullification; improper exercise of discretion in charging, sentencing, and other criminal justice decisions; and political support

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for unjust punishment policies. It provides no public call for reform but instead seeks to remain in the shadows.

Further, shadow vigilantism introduces into the criminal justice system serious arbitrariness as well as disparity among cases. That is the level of shadow vigilantism in any given case may be unpredictable, dependent as it is on a variety of factors. That may change from case to case. The officer in one case may be testifying while the officer in an identical case may not be. A witness in one case may refuse to report a crime while the witness in another case may report it. And so on. The operation of the criminal justice system then is rendered wholly arbitrary; identical cases end in very different outcomes.

And this resulting arbitrariness and disparity only contribute in the long run to the system's reputation as being less predictable, more arbitrary, and more unjust. In other words, shadow vigilantism only serves to exacerbate the system's loss of moral credibility, which is what helped trigger the vigilantism in the first place. It invites a downward spiral of lost credibility and therefore increased subversion.

In fact, the destructive dynamic of the downward spiral is even worse than this, as the next chapter details.