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**ABOVE CONTEMPT?: THE ATTORNEY GENERAL,
THE COURTS, AND INFORMATIONAL OVERREACHING
IN TERRORISM PROSECUTIONS**

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**ABOVE CONTEMPT?: THE ATTORNEY GENERAL,
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Prosecutors face the continual temptation to overreach in decisions about the control of information. At each phase of a criminal proceeding, from investigation through trial, prosecutors make crucial decisions about information to disclose and highlight with courts, juries, and the public. In ordinary times, courts, defense counsel, the media, and internal sources of oversight can place some constraints, however tenuous, on the prosecutor's efforts to monopolize the management of information. However, external events, such as the attacks of September 11, 2001, can weaken these constraints, producing alarming spikes in prosecutorial power.

In times of crisis, senior law enforcement officials shift to a paradigm this Article calls "informational overreaching." Informational overreaching entails the erosion of three vital obligations: 1) showing an impartial tribunal a particularized need for restraint of or intrusion on individuals;¹ 2) sharing with the defense exculpatory evidence;² and, 3) shunning gratuitous public comments about defendants pending or during trial.³ As senior officials discount these

¹ See *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (articulating probable cause requirement under Fourth Amendment as based on "totality of the circumstances"); *Franks v. Delaware*, 438 U.S. 154, 164-72 (1978) (discussing requirements for accuracy in affidavits supporting warrant applications).

² See *Brady v. Maryland*, 373 U.S. 83 (1963).

³ See *Sheppard v. Maxwell*, 384 U.S. 333 (1966); see also Att'y Grievance Comm. of Maryland v. Gansler, 835 A.2d 548 (Md. Ct. App. 2003) (reprimanding prosecutor for improper extrajudicial comments); cf. Alberto Bernabe-Riefkohl, *Silence Is Golden: The New Illinois Rules on Attorney Extrajudicial Speech*, 33 Loy. U. Chi. L.J. 323 (2002).

obligations, they threaten the structure of checks and balances within the criminal justice system.

Taken together, the three obligations protect both equality and the rule of law. The requirement of particularity ensures that the government cannot detain or restrain people based on forbidden criteria of status, identity, or political belief.⁴ The requirement of disclosure ensures fairness within the system of adjudication, interacting with the particularity requirement to winnow out charges that target people based on invidious grounds. The requirement of public circumspection ensures that the government cannot create a climate of condemnation that prompts factfinders to draw inferences based on stereotypes instead of evidence. By eroding these obligations, informational overreaching makes government into a monolith, unchecked by the safeguards that the legal system relies upon to hold government accountable.

Two post-September 11 cases, *United States v. Koubriti*⁵ and *United States v. Awadallah*,⁶ illustrate the problems of informational overreaching by prosecutors after

⁴ See Devon W. Carbado, *Eracing the Fourth Amendment*, 100 Michigan L. Rev. 946, 946 (2002) (detailing author's own experience with discriminatory law enforcement); Dorothy E. Roberts, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. Crim. L. & Criminology 775 (1999) (analyzing problems with racial profiling in law enforcement); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 Cornell L. Rev. 1259, 1280-83 (2000) (discussing racial consequences of "stop and frisk" doctrine).

⁵ Case No. 01-80778, 2003 U.S. Dist. Lexis 22529 (E.D. Mich. Dec. 16, 2003) (issuing formal admonition to Attorney General Ashcroft for violation of court order limiting extrajudicial comments); 2004 U.S. Dist. Lexis 829 (E.D. Mich. Jan. 12, 2004) (author of allegedly exculpatory letter, withheld by prosecutors, regarding government's chief witness denied Fifth Amendment privilege in contents and circumstances of conversations with witness); cf. Richard A. Serrano, *Prosecutor in Terror Case Sues Justice Department; The Veteran of the U.S. Attorney's Office in Detroit Says Senior Federal Officials Were Publicity Hounds and Did Not Provide Support*, L.A. Times, Feb. 18, 2004, A14 (noting history of misconduct by Attorney General and his subordinates in case); John J. Goldman, *Judge Criticizes Prosecutors for Holding Evidence; A Letter Accusing a Terrorism Trial Witness of Lying Was Not Turned Over to the Defense*, L.A. Times, Dec. 13, 2003, Part 1, at 17.

⁶ 349 F.3d 42 (2d Cir. 2003).

September 11. In the *Koubriti* case, Attorney General Ashcroft first issued a public claim that the defendants had advance knowledge of the attacks, despite a court order prohibiting extrajudicial remarks. The Attorney General subsequently vouched publicly for the government's chief witness after a wilting cross-examination by defense counsel. Moreover, a line prosecutor in the case failed to turn over the defense and the court a letter that cast doubt on the chief witness's account. In *Awadallah*, the Second Circuit held that a defendant whose initial apprehension concededly constituted an illegal seizure could nonetheless be detained as a material witness merely because the defendant had *failed to come forward* after the September 11 attacks. Along with the government's efforts to detain alleged unlawful combatants indefinitely without evidentiary hearings,⁷ withhold the names of immigration detainees,⁸ monitor attorney-client conversations,⁹ and prohibit accused terrorists from gaining access to exculpatory evidence, the cases mentioned reveal a pattern of governmental excess.

In typical times, courts seek to deal with government excess under a relational

⁷ See *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), reh'g and reh'g en banc denied, 337 F.3d 335; cf. Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, 5 *Theoretical Inq. L.* 1 (2004) (presenting analysis focusing on relationship among three branches); Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, __ *B.U. L. Rev.* __ (forthcoming 2004) (analyzing courts' rule in reconciling exigency, equality, and integrity of legal system and arguing that courts should require due process protections such as a right to counsel for alleged unlawful combatants).

⁸ See *Center for Nat'l Sec. Studies v. United States Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003) (upholding government's position); cert. denied, 124 S. Ct. 1041 (2004).

⁹ Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 *Md. L. Rev.* 173 (2003); Ellen S. Podgor & John Wesley Hall, *Government Surveillance of Attorney-Client Communications: Invoked in the Name of Fighting Terrorism*, 17 *Geo. J. Legal Ethics* __ (forthcoming 2004).

paradigm.¹⁰ Courts treat prosecutors as fellow repeat-players in the criminal process, relying on shared stakes and interests to ensure appropriate conduct. In a relational approach, informal sanctions centering on the reputations of the parties are paramount, while formal sanctions are invoked infrequently. For example, courts faced with offending conduct such as a prosecutor's excessive public discussion of a pending matter will often seek to address such behavior by criticizing the prosecutor in a written opinion.¹¹ On only rare occasions will a court seek to hold a prosecutor in contempt.¹²

Reflecting this relational perspective, legal doctrines for curbing informational overreaching offer prosecutors much leeway. For example, courts rarely find that inaccuracies in affidavits supporting warrant applications require exclusion of the evidence obtained.¹³ Similarly, courts will order a new trial in response to misconduct such as excessive public discussion or failure to disclose information to the defense only on a showing of clear and

¹⁰ Cf. Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 Colum. L. Rev. 749, 799-801 (2003) (discussing interaction of local legal culture with national norms); Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 Neb. L. Rev. 251 (2000) (discussing patterns of tacit and active collaboration between courts and prosecutors); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 Vand. L. Rev. 381, 439-41 (2002) (discussing advantages of formal and informal regulation of prosecutors by courts); see also Peter Margulies, *Battered Bargaining: Domestic Violence and Plea Negotiation in the Criminal Justice System*, 11 S. Calif. Rev. L. & Women's Stud. 153, 170-71 (2001) (arguing for judicial and legislative checks on prosecutorial practice regarding sentencing of defendants such as some couriers or "mules" in drug transactions whose fear of domestic violence played role in offense).

¹¹ See Green & Zacharias, *supra* note __.

¹² *Id.*

¹³ See *United States v. Canfield*, 212 F.3d 713 (2000).

irremediable prejudice to the defendant.¹⁴

In ordinary times, this architecture of sanctions maintains the mutually dependent relationship of court and prosecutor, although defense lawyers maintain with some justice that the edifice created leaves them out in the cold.¹⁵ Times of heightened public anxiety, however, bring out pathologies in institutions designed to protect the public. In such times, senior law enforcement officials reject the tempering influence of the relational paradigm and its core value of comity between branches. Responding to broader political imperatives, senior officials re-frame law enforcement and national security discourse in the Manichaean terms of “us” versus “other.” This signaling from senior levels transforms incentives for lower-level officials such as line prosecutors, overwhelming the capacity of the informal sanctions and quiescent case law relied on by the relational paradigm. As these constraints fade, informational overreaching threatens to become the new norm of law enforcement. Frightening chapters in American history, including the persecution of dissenters during World War I,¹⁶ the Palmer Raids and subsequent deportation of “radicals” after that conflict,¹⁷ and the conduct of cases such as the

¹⁴ See *United States v. Koubriti*, Case No. 01-80778, 2003 U.S. Dist. Lexis 22529 (E.D. Mich. Dec. 16, 2003) (finding that Attorney General’s public remarks did not prejudice jury).

¹⁵ See Flowers, *supra* note __; cf. Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. Rev. 2103 (2003) (arguing that federal Sentencing Guidelines create tacit alliance between prosecutors and courts that penalizes zealous advocacy by defense attorneys).

¹⁶ See PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* (1979).

¹⁷ See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 104 (1977).

Rosenberg espionage trial during the McCarthy Era after World War II¹⁸ illustrate the dangers of this monolithic turn.¹⁹ Post-9/11 developments echo these troubling episodes.

Courts can slow informational overreaching through an institutional response – what one commentator decrying the toothlessness of case law in an earlier era envisioned as a “heightened sense of judicial activism.”²⁰ There is precedent for such a response in two strands of remedies that became salient in the 1960's. First, courts could approach pathologies in prosecutorial practices in the same way that courts have approached derelictions of duty in state, local, and country institutions such as schools, jails, and psychiatric hospitals, using equitable discretion and the threat of contempt in the service of institutional reform.²¹ Second, courts could use their

¹⁸ See Michael E. Parrish, *Revisited: The Rosenberg “Atom Spy” Case*, 68 UMKC L. Rev. 601 (2000).

¹⁹ See JAMES X. DEMPSEY & DAVID COLE, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 69-77 (1999) (discussing history of government suppression of unpopular or disfavored groups, including Vietnam-era COINTELPRO project that engaged in surveillance and infiltration of anti-war organizations and subsequent targeting of Palestinian activists).

²⁰ See Albert W. Alschuler, *Courtroom Misconduct By Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629, 654 (1972). My own work on law and terrorism has focused on institutional concerns involving courts, agencies, the legal profession, and transnational violent networks. See Margulies, *Judging Terror*, supra note _ (discussing judicial role in times of crisis); Margulies, *Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, supra note _ (noting importance of making transnational networks accountable, while preserving defense lawyer’s role as check on state power); Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, 2002 Utah L. Rev. 481 (stressing need for both flexibility and limits on power of the political branches in dealing with exigency).

²¹ See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv. L. Rev. 1015, 1029-33 (2004) (discussing use of judicial remedies to promote experimentation and innovation in public administration); cf. *Esteban v. Cook*, 77 F. Supp. 2d 1256 (S.D. Fla. 1999) (ruling that state agency had obligation under the federal Medicaid statute to help people with mobility impairments caused by conditions such as multiple sclerosis enhance their options for life and work by obtaining technologically up-to-date wheelchairs).

powers as the Supreme Court used its authority in *Miranda v. Arizona*²² – to fashion prophylactic rules that deter informational overreaching.

To achieve these goals, an institutional approach would require substantial modifications in three complementary areas of criminal procedure. First, to preserve particularity as a basis for judicial authorization of restraint or intrusion against an individual, courts would have to read the requirement in *Franks* that warrant applications be accurate to apply more rigorously to material *omissions*. Second, courts should hold that a pattern of informational overreaching in a case gives rise to a presumption of prejudice sufficient to require a new trial. Third, in considering findings of contempt or other remedies for lawyer misconduct, courts should focus on organizational integrity, not individual intent. Stressing organizational integrity would promote greater *ex ante* concern by prosecutors with the prevention of informational overreaching.

Such an institutional approach admittedly cuts against the grain of much recent Supreme Court precedent. The trend has been toward narrowing the court's equitable authority over law enforcement. Concerns about separation of powers and institutional competence²³ have lent impetus to this jurisprudential direction. The consequences of an institutional approach – new trials or dismissals of charges against persons charged with activities related to terrorism – also seem radically counterintuitive, if not downright perverse. These consequences would subject the public to a risk of catastrophic harm in order to deter misconduct by prosecutors, and provide

²² 384 U.S. 436 (1966).

²³ See *United States v. Williams*, 504 U.S. 36 (1992) (limiting exercise of judicial supervisory power in cases involving alleged prosecutorial misconduct before grand jury); cf. John Gleeson, *Supervising Criminal Investigations: The Proper Scope of the Supervisory Power of Federal Judges*, 5 J.L. & Pol'y 423 (1997) (criticizing decisions that author, a federal judge and former federal prosecutor, regards as intruding unwisely on prosecutorial decisions).

defendants, who in some cases may well be factual guilty, with a windfall out of proportion to the actual prejudice that they have experienced.

Viewed in greater depth, however, an institutional approach addresses harms that would otherwise go unremedied. This is particularly true if one views the “institution” here as being the network of practices and discourse that motivates terrorism prosecutions generally. Abuses in one case have an effect on other cases, making abuses easier to tolerate, enhancing the climate of condemnation for all defendants, and breaking down the mechanisms of accountability that hold law enforcement officials in check. Carried to their ultimate conclusion, the unchecked propagation of such images of alien terror²⁴ can have two disastrous consequences: first, a diminution in the fair trial rights and other civil liberties of groups identified as embodying a higher risk of terrorist activity, and, second, as a backlash to the first, a popular disillusion not merely with prosecutorial excesses, but also with the more careful and focused law enforcement necessary to address the genuine threats posed by violent networks such as Al Qaeda. By addressing each of these concerns, an institutional response by courts serves liberty and security.

The Article is in four Parts. Part I discusses the importance to the rule of law of checks on informational overreaching by prosecutors. Part II outlines courts’ application of the relational paradigm for dealing with informational overreaching. Part III outlines the cascade of informational overreaching triggered by senior law enforcement officials’ response to crisis. Finally, Part IV sets out an institutional response by courts.

²⁴ See David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953 (2002).

I. THE RULE OF LAW AND INFORMATIONAL OVERREACHING

The fragile system of accountability at the heart of our criminal justice system depends on sound prosecutorial practices regarding the distribution and disclosure of information. Prosecutors have a duty under the Model Rules to see that justice is done, rather than merely to engage in zealous advocacy for a particular position.²⁵ The content and scope of the duty to do justice with respect to information hinges on the audience with which the prosecutor interacts. As a general matter, the prosecutor serves justice best through candor with the court and the defendant, and restraint in communications with the public. Finding the right balance of candor and restraint helps determine the fairness of the system for defendants and targets of investigations.

Three areas of information policy are crucial. The government should, 1) show a particularized need for coercion or restraint; 2) share with the defense exculpatory evidence; and, 3) refrain from gratuitous public comments about defendants pending or during trial. I elaborate on these obligations in the following paragraphs.

Few concerns are more carefully ingrained in our system than the requirement that the government aver with particularity why a court should order the restraint or coercion of an individual. Without such a requirement, governments are free to visit their power on individuals and groups based on attributes of identity or status, such as ethnicity, national origin, religion, or

²⁵ See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(a) (a “prosecutor shall... refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause”); *United States v. Modica*, 663 F.2d 1173, 1178 (2d Cir. 1981) (noting that prosecutor is “not simply... an advocate, but rather a[n]... official duty-bound to see that justice is done”).

political belief.²⁶ Dispensing with particularity makes the government’s assertions of authority effectively unreviewable. If the government can detain an individual as an “enemy of the people,” it is unclear what evidence the target of the government can marshal to demonstrate the falsity of such an amorphous rubric. Even if the criminal law itself defines offenses with particularity, allowing detention prior to adjudication on a vague showing by the government undermines such substantive provisions.

As an example of the importance of particularity, consider the law regarding material witnesses. Courts and legislatures have long accepted that the prosecution should have the authority to hold persons as material witnesses to preserve the government’s ability to call them as witnesses at trial. Judicial decisions have also interpreted statutes to permit the government to hold people as material witnesses before grand juries, reasoning that grand juries also qualify as “criminal proceedings” requiring the preservation of relevant and material evidence of the commission of a crime.²⁷ However, courts have in the past carefully cabined this authority, requiring a particularized showing that obtaining the witness’s cooperation without a warrant is “impracticable.” Courts have even rejected evidence that might plausibly meet this standard, such as apparent attempts to avoid detection by the authorities, if the government cannot

²⁶ See *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (striking down Chicago anti-gang ordinance on vagueness grounds, while citing history of racial subordination and law enforcement overreaching that had accompanied anti-loitering statutes).

²⁷ See *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003); *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971); *In re the Application of the United States for a Material Witness Warrant, Pursuant to 18 U.S.C. sec. 3144, for John Doe*, 213 F. Supp. 287 (S.D.N.Y. 2002) (holding that federal material witness statute applied to grand jury proceedings).

demonstrate unequivocally that an individual has declined to cooperate.²⁸ The particularity requirement makes it more difficult for prosecutors to detain an apparently law-abiding individual because of broad suspicion of the individual's group, in the hope that the detention itself will "shake loose" more concrete and incriminating information.

A comparable rationale of systemic integrity also undergirds the second example of constraints on prosecutors' informational overreaching: disclosure by prosecutors of evidence that exculpates the defendant.²⁹ From an *ex post* (after the fact) perspective, the prosecutor must turn over exculpatory evidence to the defense, to offer the defense a fair opportunity to use this evidence on the defendant's behalf. A trial without such an opportunity increases the risk that the jury will base its verdict not on the evidence, but on inferences stemming from the defendant's membership in a disfavored group. Failure to turn over evidence that could have persuaded the jury of the defendant's innocence mandates a new trial. From an *ex ante* (before the fact) perspective, moreover, the obligation to disclose also requires prosecutors to base their cases on reliable evidence, instead of merely trying to leverage the public's invidious suspicions.

The third area – rules limiting pre-trial publicity – similarly stems from concern about the influence of fear and preconceptions on the legal process. However, concerns here shift to a different audience: members of the public comprising the jury pool. Because the audience shifts in this fashion, the default rule changes, too. Instead of greater disclosure, the legal system expects that lawyers preparing a case for trial before a jury will minimize public comments about

²⁸ See *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971) (holding that government failed to demonstrate impracticability of securing witness's testimony, even when police apprehended witness in location that suggested she wished to hide from federal agents).

²⁹ See *Brady v. Maryland*, 373 U.S. 83 (1963).

the case, to preserve the integrity of adjudication.

Legal rules require lawyers to strive to ensure that juries can discharge their function by viewing the evidence in the case in conjunction with the safeguards, such as cross-examination, the rule against hearsay, and so on, that the trial process imposes. A juror must be, if not free from preconceptions, at least able to obtain some distance from those preconceptions, for the whole notion of a trial to be meaningful, as opposed to merely a ratification of “conventional wisdom” about guilt or innocence abroad in the community.³⁰

Public comments by prosecutors are especially troublesome. Members of the public and of the potential jury pool or empaneled but not sequestered jury will often see the federal prosecutor as “the community’s representative... cloaked with the authority of the United States Government,” rather than as merely an attorney for a client.³¹ Remarks to the public can skew public debate, frustrating public deliberation, corrupting the jury pool,³² encouraging government

³⁰ Restraints on pretrial publicity must be tailored to honor First Amendment guarantees. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (supporting limits on pretrial publicity, but holding that Nevada rule was void for vagueness); cf. Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 *Emory L.J.* 859 (1998) (arguing that virtually all limits on pretrial publicity fail under First Amendment).

³¹ See *United States v. Modica*, 663 F.2d 1173, 1178 (2d Cir. 1981) (criticizing a prosecutor for improper vouching for a witness during trial).

³² Courts are proactive in high-profile cases in dealing with issues of pretrial publicity. For instance, see *supra* and *infra*, a court may impose a “gag order” during the pendency and conduct of a trial to bar both the prosecution and defense from discussing the merits of the case in a manner likely to influence potential jurors. In *United States v. Cutler*, a court cited a well-known criminal defense attorney for contempt based on the finding that the attorney had violated a court order by repeatedly and publicly denouncing the government’s witnesses as “liars” and making other comments before trial about evidence in the case, with the express purpose of influencing potential “veniremen.” See *United States v. Cutler*, 58 F.3d 825 (2d Cir. 1995) (upholding contempt citation against attorney for repeatedly violating gag order); see also Judith L. Maute, “*In Pursuit of Justice*” in *High Profile Criminal Matters*, 70 *Fordham L. Rev.* 1745, 1755-56 (2002) (discussing issues of pre-trial publicity); Marjorie P. Slaughter, *Lawyers and the*

overreaching, and intimidating supporters of the defendants.

To avoid such consequences, both professional codes and departmental regulations impose special obligations on prosecutors. The American Bar Association’s Model Rules of Professional Conduct require that prosecutors “refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.”³³ Federal regulations echo these sentiments. Regulations bar any “subjective observation” made by prosecutors.³⁴ They specifically discourage statements made at a time approaching or during trial.³⁵ Furthermore, they cautions against public comments regarding the credibility of witnesses or about the evidence generally.³⁶ Finally, the regulations require the permission of the Attorney General or Deputy Attorney General to release information covered by the guidelines.³⁷

Media: The Right to Speak Versus the Duty to Remain Silent, 11 Geo. J. Legal Ethics 89 (1997); cf. *Gentile v. State Bar*, 501 U.S. 1030 (1990) (upholding limits on lawyer’s use of pretrial publicity under the First Amendment but holding that particular statute was void for vagueness because it failed to provide clear safe harbor for lawyers responding to inaccurate public statements made by adversaries in the litigation); *United States v. Scarfo*, 263 F.3d 80, 95 (3d Cir. 2001) (striking down a gag order imposed on former criminal defense counsel).

³³ See Model Rules of Professional Conduct, Rule 3.8(f); cf. Lonnie T. Brown, Jr., “*May It Please the Camera,.... I Mean the Court*” – *An Intrajudicial Solution to an Extrajudicial Problem* (unpublished manuscript on file with the author) (arguing for more vigorous judicial oversight regarding extrajudicial remarks by prosecutors and defense attorneys).

³⁴ 28 CFR 50.2(b)(3)(iv).

³⁵ 28 CFR 50.2(b)(5).

³⁶ 28 CFR 50.2(b)(6).

³⁷ 28 CFR 50.2(b)(9). In addition, the United States Attorney Manual mandates “fairness and accuracy” in public comments made by federal prosecutors. See United States Attorney Manual, ch. 7, sec. 1-7.0001 (1988). The United States Attorney Manual also recommends that answers to reporters’ questions should not go beyond legal explanations of the contents of an

In sum, both constitutional and ethical strictures mandate a balance of candor and restraint in prosecutors' use of information. Unfortunately, prosecutors do not always manifest this sense of balance. The next Part outlines the courts' approach to curbing informational overreaching.

II. MANAGING PROSECUTORIAL MISCONDUCT: THE RELATIONAL PARADIGM

Most judicial responses to prosecutorial misconduct regarding the disclosure or distribution of information stem from what this Article calls a relational paradigm. This approach relies principally on informal sanctions, and disfavors legal remedies such as dismissal of charges or invocation of the contempt power. The relational approach has some virtue in addressing misconduct by line prosecutors, who have incentives to preserve their reputation with judges. Unfortunately, external pressures on prosecutors weaken these incentives, thereby undermining the core assumptions of the relational perspective.

To understand the development of the relational perspective, it is useful to think about the legal system as an institution consisting of interrelated ways of thinking, speaking, and doing.³⁸ Institutions spill over formal organizational structures, comprising “interpretive

indictment. It further requires that federal prosecutors adhere to both the “letter and spirit” of these mandates. *Id.*

³⁸ My discussion here borrows heavily from my earlier analysis in Peter Margulies, *The New Class Action Jurisprudence and Public Interest Law*, 25 N.Y.U. Rev. L. & Soc. Change 487, 497-98 (1999) (discussing institutional dimension of discourse and practice in public law litigation); cf. Peter Margulies, *Public Interest Lawyering and the Pragmatist Dilemma*, in RENASCENT PRAGMATISM: STUDIES IN LAW AND SOCIAL SCIENCE 220, 225-30 (Alfonso Morales ed., 2003) (arguing that instrumental concerns often marginalize dialogue with

communities”³⁹ with a common “set of material practices and symbolic constructions”⁴⁰ involving cognitive frameworks, rhetorics, and routines.

The history of relational agreements suggests that parties engaged in ongoing institutional relationships develop a common law for that relationship that governs their conduct with fewer transaction costs than those generated by legal intervention. In the commercial

affected parties in law reform efforts).

³⁹ See Margulies, *Public Interest Law*, supra note __, at 497; cf. BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW 148 (1997) (elaborating on Stanley Fish’s notion of a legal interpretive community, consisting of “groups of people bound together by shared knowledge, language or terminology, and often a basic corpus of ideas, beliefs, and attitudes. One becomes a member of an interpretive community by undergoing indoctrination — by learning and internalizing the shared ‘meaning system’ of the interpretive community”); Brian Z. Tamanaha, *A Pragmatic Response to the Embarrassing Problems of Ideology Critique in Socio-Legal Studies*, in RENASCENT PRAGMATISM, supra note __, at 49, 60 (“truth... is the product of a community of inquirers operating within shared practices”). This view fits within a postmodern perspective that situates human agency in a nest of practices and cognitive paths (see Kostas Vlassopoulos, *How Power Invests Itself in Institutions and Becomes Embodied in Techniques and Equips Itself with Instruments* (2013) (even as the power of a thing is defined by its use, the use of a thing is defined by its power)).

⁴⁰ See Roger Friedland & Robert R. Alford, *Bringing Society Back In: Symbols, Practices, and Institutional Contradictions*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 232, 248 (Walter W. Powell & Paul J. DiMaggio eds., 1991); cf. MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING IN THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS 214 (1998) (“Every institutional role carries with it a remarkably complex set of behavioral expectations, expectations that exist in the minds of the institution’s members”); Sue E.S. Crawford & Elinor Ostrom, *A Grammar of Institutions*, 89 Am. Pol. Sci. Rev. 582, 582 (1995) (describing institutions as “enduring regularities of human action in situations structured by rules, norms, and shared strategies, as well as by the physical world”); cf. TAMANAHA, supra note __, at 149 (discussing the “internal attitude [that] is the (phenomenological) cognitive style or framework of thought which characterizes thinking while engaging in a given practice”); Richman, supra note __ (discussing institutional dimensions of interaction between prosecutors and agents in federal law enforcement).

setting, for example, where scholars first outlined the relational model, a customer and her supplier develop a “mutual orientation... based on knowledge that the parties assume each has about the other and upon which they draw in communication and problem solving.”⁴¹ The parties’ joint stake in the flourishing of the relationship makes “voice” – communication – a more efficient appropriate initial response than “exit” – terminating the relationship or invoking the legal process – when one party feels that the other has departed from shared assumptions about appropriate conduct.⁴² While one party might gain in the short-term from undermining these assumptions for a unilateral benefit, the “‘entangling strings’ of reputation, friendship, and interdependence”⁴³ constrain such strategic behavior.

This relational view also characterizes the interaction between federal district courts and

⁴¹ See Walter W. Powell, *The Capitalist Firm in the Twenty-First Century: Emerging Patterns in Western Enterprise*, in THE TWENTY-FIRST CENTURY FIRM: CHANGING ECONOMIC ORGANIZATION IN INTERNATIONAL PERSPECTIVE 33, 59 (Paul DiMaggio ed., 2001); cf. Ian R. MacNeil, *Relational Contracts: What We Do and Do Not Know*, 1988 Wis. L. Rev. 483 (discussing legal and empirical theory of relational contracting); Stewart Macaulay, *Relational Contracts Floating in a Sea of Custom: Thoughts About the Ideas of Ian MacNeil and Lisa Bernstein*, 94 Nw. U.L. Rev. 775 (2000) (same); Robert Eli Rosen, “*We’re All Consultants Now*”: *How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 Ariz. L. Rev. 637, 646 (2002) (discussing MacNeil’s influence); see also W. Bradley Wendel, *Informal Methods of Enhancing the Accountability of Lawyers*, 54 S.C. L. Rev. 967, 972-73 (2003) (discussing reputation and credibility as values that promote responsibility among lawyers).

⁴² See Powell, *supra* note __; see generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 30-43 (1970) (discussing role of “voice” in preventing complacency within institutions). Market mechanisms and legal rules supply an implicit threat of retaliation if one party fails to meet the legitimate expectations of the other. If the supplier fails to come up with goods that are adequate, the customer can go elsewhere. The law provides default rules that govern when one party defects to realize a one-shot gain. However, most commercial relationships govern themselves satisfactorily through shared stakes and understandings about mutual interests. See MacNeil, *supra* note __.

⁴³ See Powell, *supra* note __.

prosecutors. Individual “line” prosecutors appear on an ongoing basis before federal district judges. They must act in a way that preserves their credibility and reputation, if they hope to secure the district judge’s good will in a range of determinations such as bail determinations, evidentiary rulings, and sentencing.⁴⁴ Courts in turn come to rely on the candor and professionalism of individual line prosecutors. Moreover, judges at both the trial and appellate levels have frequently served as federal prosecutors earlier in their careers.⁴⁵ Reflecting the depth of these ongoing ties, courts evaluating cases of alleged prosecutorial misconduct acknowledge the efforts of the “relatively young attorneys, seeking valuable experience as a prelude to other professional endeavors”⁴⁶ who serve as federal prosecutors, and the “high level of conduct that has traditionally characterized the office of the United States Attorney.”⁴⁷

In keeping with this relational analysis, courts tend to view informal sanctions of prosecutors as being preferable to formal sanctions. Typically, these sanctions are reputational in nature, sending the message that the court can diminish the “professional capital” that line prosecutors seek to accumulate with courts, colleagues, the legal community, and the public.⁴⁸

⁴⁴ See Green & Zacharias, *supra* note __; Flowers, *supra* note __; cf. Richman, *supra* note __ (discussing importance of reputation and credibility of institutional actors in federal law enforcement). Obviously, a judge’s view of a particular prosecutor’s trustworthiness and competence is not the sole factor on which a judge will rely in deciding a case. However, a prudent prosecutor will generally not underestimate its importance.

⁴⁵ See, e.g., the authors of Gleeson, *Supervising Criminal Investigations*, *supra* note __; Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *Fordham L. Rev.* 2117 (1998).

⁴⁶ See *United States v. Modica*, 663 F.2d 1173, 1184 (2d Cir. 1981).

⁴⁷ *Id.* at 1186.

⁴⁸ See Wendel, *supra* note __.

In most cases of possible prosecutorial misconduct, courts appeal either expressly or implicitly to the tradition of in-house mentoring in United States Attorneys' offices that imparts relational knowledge, through the "able attorneys who supervise [line-level] federal prosecutors."⁴⁹ Trial courts favor indications of disapproval of line prosecutors that may never appear in the record.⁵⁰ In cases of more serious misconduct, a judge may write an opinion criticizing the prosecutor's conduct. When the conduct is still more problematic, the court may take the extreme step of mentioning the prosecutor by name.⁵¹ More formal sanctions, including findings of contempt, imposition of fines, or other remedies, are rare in cases involving prosecutors.⁵² Legal remedies that would inure to the benefit of criminal defendants, such as the exclusion of evidence or the grant of a mistrial or a new trial, are also very difficult to obtain, often hinging on a showing of actual and direct prejudice.⁵³ Indeed, courts sometimes argue that such defendant-centered remedies are less effective than reputational sanctions in controlling prosecutorial misconduct, including the use of pre-trial publicity.⁵⁴

A relational view of prosecutor-judicial interaction provides a valuable form of accountability to prosecutors. Interaction with judges helps prosecutors do justice, tempering

⁴⁹ See *United States v. Modica*, 663 F.2d 1173, 1186 (2d Cir. 1981).

⁵⁰ See Green & Zacharias, *supra* note __.

⁵¹ See *United States v. Lopez*, 4 F.3d 1455 (9th Cir. 1993).

⁵² See Green & Zacharias, *supra* note __; Alschuler, *supra* note __, at 673-76.

⁵³ See *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (court must find prejudice against defendant in order to dismiss charges because of error in grand jury proceedings).

⁵⁴ See *United States v. Modica*, 663 F.2d 1173, 1184 (2d Cir. 1981).

zeal with compassion. For example, a regime granting judges significant discretion in sentencing would oblige prosecutors from the start of a criminal case to consider a judge's view of what is fair and equitable.⁵⁵ In this fashion, relationships between courts and prosecutors humanize the exercise of prosecutorial discretion, leavening the mechanical application of the criminal law by allowing more room for factors such as a defendant's age, socio-economic background, family obligations, or relative guilt within a criminal enterprise to shape charging decisions.⁵⁶

Courts sometimes express concern that reputational sanctions are insufficient to deter prosecutorial misconduct. One court noted that a pattern of misconduct that persists despite the application of reputational sanctions undercuts the legitimacy of the relational model.

⁵⁵ See Green & Zacharias, *supra* note __, at 439-41; Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 Fordham L. Rev. 723 (1999); Lynch, *supra* note __, at 2121; cf. Peter Margulies, *Battered Bargaining: Domestic Violence and Plea Negotiation in the Criminal Justice System*, 11 S. Calif. Rev. L. & Women's Stud. 153, 170-71 (2001) (arguing for greater prosecutorial regard for survivors of domestic violence coerced into crime by their abusers); Ian Weinstein, *Regulating the Market for Snitches*, 47 Buffalo L. Rev. 563 (1999); see generally Fred C. Zacharias, *Justice in Plea Bargaining*, 39 Wm. and Mary L. Rev. 1122 (1998) (discussing standards for prosecutors).

⁵⁶ Unfortunately, the absence of accountability for the exercise of prosecutorial discretion can also lead to abuses. See generally Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. Rev. 757 (1999) (discussing expansion of prosecutorial power yielded by expanding scope of federal criminal law); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability*, 83 Va. L. Rev. 939 (1997) (analyzing lack of accountability of federal prosecutors, and risk of enforcement based on stereotypes); cf. Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L. Rev. 13, 31-38 (1998) (discussing interplay of prosecutorial discretion and race, and arguing that prosecutors pay insufficient attention to perceived racial inequities); Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 Cornell L. Rev. 1811 (1998) (same); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 Geo. J. Legal Ethics 355, 368-72 (2001) (same).

Invocations of the reciprocity at the core of the model begin to seem like “helpless piety,”⁵⁷ reflecting “purely ceremonial”⁵⁸ recitations instead of pragmatic remedies.

This reliance on relational governance encounters further strains when external pressures shift the balance of power between court and prosecutor.⁵⁹ In recent years, the most pervasive external pressure has been the trend toward more rigid sentencing, embodied in mandatory minimums and the federal sentencing guidelines. This trend has effectively shifted power from courts, and toward prosecutors.⁶⁰ Today, the locus of discretion in a criminal case often is

⁵⁷ See *United States v. Modica*, 66 F.3d 1173, 1183 (2d Cir. 1981), citing *United States v. Benter*, 457 F.2d 1174, 1178 (2d Cir.), cert. denied, 409 U.S. 842 (1972).

⁵⁸ *Id.*

⁵⁹ This equilibrium is not an unmixed blessing. Defense lawyers, for example, have long harbored the suspicion that judges are too dependent on and solicitous of prosecutors. The very fact that a prosecutor appears often before a particular judge may encourage the judge to treat occasional misconduct leniently, at least if it appears to be isolated. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239-40 (1940) (holding that prosecutor’s statements to jury were harmless because they occurred in the course of a long trial); Alschuler, *supra* note __, at 659 (criticizing application of harmless error rule as leading to undue leniency regarding prosecutorial misconduct). Moreover, particularly in state courts, prosecutors may have some influence over which judges are nominated for appellate positions, or for openings in the federal judiciary. The defendant and defense counsel may feel frozen out of the judge-prosecutor relationship. To the extent that this is true, the relational approach may be not so much an ideal as a bare minimum that actually masks significant injustice to defendants. Inadequacies in the relational approach serve to emphasize the perils of external pressures which further enhance the leverage of prosecutors.

⁶⁰ Over time, even the guidelines develop fault lines in which individual line prosecutors, prompted by both their own misgivings over sentences that seem unduly harsh and by the public and private pronouncements to the same effect by judges, work with courts to mitigate sentences. See Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 *Am. Crim. L. Rev.* 87 (2003) (arguing that courts and prosecutors have worked to humanize sentencing regarding non-drug offenses, but that mandatory minimum sentences have frustrated such efforts in the narcotics area); cf. Frank O. Bowman, III & Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 *Iowa L. Rev.* 477, 560 (2002) (arguing that even in drug sentencing, prosecutors’ and courts’

located at the point at which a prosecutor decides to charge a prospective defendant, or place a matter before a grand jury.⁶¹ Courts have fewer opportunities to exercise discretion in sentencing. Instead of taking a range of equitable factors into account, judges often must confine themselves to approving a motion made by a prosecutor for a downward departure in the sentence imposed based on the defendant's substantial cooperation.⁶² A relational approach does far less to promote prosecutorial accountability if external pressures such as the sentencing guidelines reduce judges to the status of ministerial functionaries presiding over guilty pleas.

When prosecutors have more power, the manner in which senior law enforcement officials articulate and implement priorities becomes crucial. Senior officials can mold the institutional power they wield to preserve the dialog at the core of the relational approach. More ominously, senior officials can wield their power in ways that marginalize the courts. Concerns about national security and terrorism provide a convenient opening for officials seeking to exercise such sweeping authority. That is the focus of the next section.

III. INFORMATIONAL OVERREACHING AS PARADIGM SHIFT

In times of crisis, senior law enforcement officials reject the relational paradigm in favor of a monolithic approach to information control. Plenary control over information, rather than

perception of equities and sensitivity to local views has tempered practice). Action by both Congress and senior Justice Department officials, such as the recent restrictions on downward departures and the scrutiny of judges who authorize departures in a percentage of cases deemed too high by Congress and the Justice Department, represent efforts to stifle this return to a relational ethos.

⁶¹ See Lynch, *supra* note __.

⁶² See Weinstein, *Mandatory Minimums*, *supra* note __.

collaboration with other institutional actors, becomes the strategy of choice for both alleviating immediate risks to public safety and reaping political rewards. As the institutional signals sent by senior officials work their way down through the bureaucracy, constraints on informational overreaching by prosecutors erode, threatening constitutional values.

Official reactions to cataclysmic events such as September 11 reflect a process with some disconcerting parallels to the process that spawned the events themselves: the polarizing influence of “authenticity entrepreneurs”⁶³ who seek to purge both the organizations and the societies of the influence of “the other.” Often capitalizing on cognitively salient images of

⁶³ See Peter Margulies, *Making “Regime Change” Multilateral: The War on Terror and Transitions to Democracy*, __ U. Denver J. Int’l L. & Pol’y __ (forthcoming 2004). The model of violent entrepreneurship developed by Charles Tilly, focusing largely on non-state actors, also has relevance for analysis of public officials with access to the violent instrumentalities of the state. See CHARLES TILLY, *THE POLITICS OF COLLECTIVE VIOLENCE* 34 (2003) (discussing role of “political entrepreneurs” who “promote violence... by activating boundaries, stories, and relations that have already accumulated histories of violence; by connecting already violent actors with previously nonviolent allies; by coordinating destructive campaigns; and by representing their constituencies through threats of violence”); cf. Timur Kuran, *Ethnic Norms and Their Transformation Through Reputational Cascades*, 27 J. Legal Stud. 623 (1998) (discussing how small changes in perceptions and behavior prompted in part by signals from social and political leaders can snowball into massive political upheavals and ethnic strife); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 Stan. L. Rev. 683 (1999) (analyzing role of “availability entrepreneurs” in shaping public policy by leveraging stories and images that are cognitively salient).

I do not argue here for any form of moral equivalence between United States officials and leaders of groups such as Al Qaeda, who seek to kill massive numbers of innocents. Cf. Kanan Makiya & Hassan Mneimneh, *Manual for a ‘Raid’*, N.Y. Rev. Books, Jan. 17, 2002, at 18, 20 (discussing Al Qaeda training manual for attacks on urban centers). It is not unreasonable, however, to hold United States officials to a higher standard, which reflects concern for constitutional values. Moreover, while a state may use legally authorized force to address threats to national security, the principle of proportionality should guide such responses. Cf. Richard Falk, *Ends and Means: Defining a Just War*, *The Nation*, Oct. 29, 2001, at 11, 12 (justifying American resort to force against the Taliban regime in Afghanistan by arguing that Al Qaeda is a “transnational actor... [whose] relationship to the Taliban regime in Afghanistan [was]... contingent, with Al Qaeda being more the sponsor of the state rather than the other way around”).

trauma and loss,⁶⁴ authenticity entrepreneurs market an essentialist account of a society's origin story and core beliefs, and exploit fear of persons, groups, and discourses perceived to be "outside" those boundaries. To facilitate their work, authenticity entrepreneurs build organizations that tend to be highly hierarchical, secretive, or homogeneous.⁶⁵ The form of these institutions in turn frames the perception of both identity and grievances in a far more polarized fashion,⁶⁶ suppressing nuance, detail, and dissent. In this monolithic organizational structure, leaders send an array of signals, both tacit and express, that shape behavior by lower-level organizational actors.⁶⁷ The violent transnational network that engineered the September 11 attacks evolved from such a process. This network both counted on and received an official reaction in the United States that furthered this polarizing trend.

The top-down dynamic of authenticity entrepreneurship is evident in the Ashcroft Justice Department. Ashcroft rejects the nuances of the relational paradigm as a form of creeping corruption. He tells narratives characterized by a Manichaeian purity in which American law enforcement and security officials occupy the moral high ground, granting themselves the license

⁶⁴ See Oren Gross, *Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional?*, 112 Yale L.J. 1011 (2003).

⁶⁵ Authenticity entrepreneurs can be animated by a quest for power, a sense of mission, or sometimes by the force of their own fears. See TILLY, *supra* note __.

⁶⁶ Cf. Cass R. Sunstein, *Why They Hate Us: The Role of Social Dynamics*, 25 Harv. J. L. & Pub. Pol'y 429 (2002); Katytal, *Conspiracy*.

⁶⁷ For a discussion of signaling within organizations, see Margulies, *Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, *supra* note __, at 197-99 (discussing signaling as element of command structure within violent transnational networks); see also Erica Beecher-Monas, *Enron, Epistemology, and Accountability: Regulating in the Global Economy*, 37 Ind. L. Rev. 141, 170 (2003) (discussing signaling within corporate entities); see generally ERIC POSNER, *LAW AND SOCIAL NORMS* 19-24 (2000) (discussing dynamics of signaling behavior).

to dispense with procedural protections for persons deemed not to share those attributes. For Ashcroft, those who question the legitimacy of this license have cast in their lot with the “other.”⁶⁸

In place of a relational paradigm, the Attorney General has sought to implement a monolithic view of federal law enforcement. He insists on secrecy, for example in his refusal to make public information relating to the Justice Department’s responses to the September 11 attacks, particularly the immigration crackdown that resulted in the detention and deportation of over a thousand undocumented aliens, most of whom turned out to have nothing to do with terrorism.⁶⁹ In recent prosecutions such as a case involving the environmental activist group Greenpeace,⁷⁰ Ashcroft also seems to be pursuing a policy that is increasingly intolerant of dissent.⁷¹ Recent moves to limit plea bargaining and require charging of the most serious

⁶⁸ As Ashcroft noted in testimony before Congress, “To those who... scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists, for they erode our national unity and resolve. They give ammunition to America’s enemies, and pause to America’s friends.” Cf. Jeffrey Toobin, *Ashcroft’s Ascent*, *The New Yorker*, April 15, 2002, at 50, 53 (describing Attorney General Ashcroft’s view of his role after September 11). Ashcroft has cast this polarizing narrative in religious terms, extolling what he describes as “American” or “Judeo-Christian” values. *Id.* at 62 (noting that Ashcroft justified anti-terrorism efforts with a quote from the Old Testament that also carried what the author described as an “unmistakable message” regarding abortion: “I have set before you life and death, blessing and cursing: therefore choose life, that both thou and thy seed may live”).

⁶⁹ See *Center for Nat’l Sec. Studies v. United States Dep’t of Justice*, 331 F.3d 918 (D.C. Cir. 2003) (upholding government’s refusal to disclose information about detainees).

⁷⁰ See Adam Liptak, *Typical Greenpeace Protest Leads to an Unusual Prosecution*, *N.Y. Times*, Oct. 11, 2003, A9 (discussing Justice Department’s use of obscure 1872 law to prosecute Greenpeace).

⁷¹ This same political focus is demonstrated by the dominance in Ashcroft’s senior staff of political and ideological soulmates. See Toobin, *supra* note ___, at 53-54 (noting the presence of political operatives and absence of legal experts in Ashcroft’s inner circle, as well as

possible offense reflect this monolithic view.⁷² So do efforts to intimidate federal judges who seek to depart from the Sentencing Guidelines to better reflect the equities of a case⁷³ and overrule local United States Attorneys who decline to seek the death penalty.⁷⁴

Ashcroft's behavior is also a powerful signal to others in the Justice Department that the way to get ahead in the Department is to follow his lead, casting terrorist prosecutions as high-stakes contests of good and evil. Bureaucracies tend to react to new challenges by "satisficing," that is, engaging in behavior that involves either the least effort or the lowest potential risk of embarrassment.⁷⁵ Publicity from the Attorney General signals that casting each prosecution in stark terms, regardless of the prejudicial impact of that approach, is a convenient path to

Ashcroft's disdain for career Justice Department employees).

⁷² See Adam Liptak & Eric Lichtblau, *New Plea Bargain Limits Could Swamp Courts, Experts Say*, N.Y. Times, Sept. 24, 2003, A23.

⁷³ See Eric Lichtblau, *Justice Department to Monitor Judges If Sentences Shorter Than Guidelines Suggest*, N.Y. Times, Aug. 8, 2003, A12.; cf. David Zlotnick, *Ashcroft's War Against Federal Judges*, 57 SMU L. Rev. ___ (forthcoming 2004) (criticizing Justice Department policy).

⁷⁴ See John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When United States Attorneys Recommend Against the Death Penalty*, 89 Va. L. Rev. 1697 (2003).

⁷⁵ See Sally S. Simpson & Nicole Leeper Piquero, *Low Self-Control, Organizational Theory, and Corporate Crime*, 36 L. & Soc'y Rev. 509, 535 (2002) (discussing framing of incentives within bureaucratic organizations); MARY DOUGLAS, *Autonomy and Opportunism*, in RISK AND BLAME: ESSAYS IN CULTURAL THEORY 187 (1992) (discussing socio-economic and psychological accounts of institutional change); Paul J. DiMaggio & Walter W. Powell, *Introduction*, in THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 1, 19 (Paul J. DiMaggio & Walter W. Powell eds., 1991) (noting that, "habit must not be seen as a purely passive element in behavior, but rather as a means by which attention is directed to selected aspects of a situation, to the exclusion of competing aspects that might turn choice in another direction"); cf. Samuel Issacharoff, *Behavioral Decision Theory in the Court of Public Law*, 87 Cornell L. Rev. 671, 675 (2002) (noting that experts can engage in "groupthink" that may obscure some options and perspectives).

organizational success.⁷⁶ The result is an accelerated climate of stereotyped notions of defendants, an impatience with procedural protections on the arrest and interrogation of suspects, and an eagerness to view a broad range of activities as worthy of prosecution.⁷⁷

Signaling from senior Justice Department officials has been the catalyst for the weakening of three pillars of the rule of law regarding the control and distribution of information by prosecutors: 1) the requirement that the government show a particularized need for coercion or restraint; 2) the obligation to share with the defense exculpatory evidence; and, 3) the obligation to refrain from public comments about defendants pending or during trial that create a climate of condemnation. I discuss each development in turn, focusing first on the historical incidence of this dynamic, and secondly examining the evolution of these trends after September 11.

A. *Particularity Lost*

Past crises have led to a wholesale retreat from the principle of particularity. During World War I, for example, the government prosecuted hundreds of individuals based on a vague statute that barred interference in the war effort.⁷⁸ Violations often entailed a generalized

⁷⁶ See Simpson & Piquero, *supra* note ___, at 535 (discussing importance of perceived norms within organization in generating either illegality or compliance with law); Diane Vaughan, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 L. & Soc’y Rev. 23 (1998) (same).

⁷⁷ See Eric Lichtblau, *1996 Statute Becomes the Justice Department’s Antiterrorism Weapon of Choice*, N.Y. Times, April 6, 2003, B15 (discussing Justice Department’s prosecution of individuals who participated in Al Qaeda training camp, but demonstrated no subsequent plans to engage in terrorist activity).

⁷⁸ See Geoffrey R. Stone, *The Origins of the “Bad Tendency” Test: Free Speech in Wartime*, 2002 Sup. Ct. Rev. 411 (discussing the Espionage Act).

expression of political opposition to American involvement in the war that would clearly be protected by the First Amendment today.⁷⁹ During the “Red Scare” after World War I, the then-Attorney General, A. Mitchell Palmer, along with Palmer’s assistant, J. Edgar Hoover, accelerated the trend toward persecution of dissidents, compiling lists of tens of thousands of radicals, deporting thousands, and setting a tone that strongly influenced American legal, social, and political life for the next half-century.⁸⁰ Similarly, prosecutions during the McCarthy Era revealed a conflation of unpopular speech with illegality that would be impermissible under present law.⁸¹

⁷⁹ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); cf. GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 151-70 (1994) (discussing Hand’s pathbreaking analysis in *Masses Publishing Co. v. Patten*, 244 Fed. 535 (S.D.N.Y. 1917), reversed, 246 Fed.2d 24 (2d Cir. 1917)); Stone, *supra* note __; William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 Sup. Ct. Rev. 375, 387 (“the Espionage and Sedition Act trials during the first Red Scare anticipated later Cold War persecutions: the prosecution had no evidence that the defendants had actually committed any acts that might remotely be considered seditious (aside from their dissenting utterances), so it had to rely on party teachings. Professional informers provided their contribution... [a]ll this was justified in the name of national security”). Other aspects of the dissenters’ identity, such as immigration status, also fueled public animus. See MURPHY, *supra* note __, at 106 (noting that under immigration law passed by Congress in 1918, “any alien who advocated anarchism, syndicalism, or violent revolution – or who belonged to an organization that advocated any of these things – could be deported”)

⁸⁰ See Wiecek, *supra* note __, at 389-92.

⁸¹ In addition, outside of the criminal justice process, the government detained over a hundred thousand Japanese-Americans during World War II with no particularized suspicion that a given detainee had committed espionage or sabotage. The Supreme Court upheld this blatant use of national origin and descent as a surrogate for particularized suspicion, although it also held that detention was illegal in the conceded *absence* of suspicion. See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding government order authorizing internment of Japanese-American citizens on grounds that internment served “compelling” government interest); *Ex Parte Endo*, 323 U.S. 283, 294 (1944) (granting habeas petition for Japanese-American detainee who government acknowledged did not pose risk to national security); Patrick O. Gudridge, *Remember Endo?*, 116 Harv. L. Rev. 1933 (2003) (discussing case law); Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab*

In the present crisis, the Executive Branch has sought to weaken or evade the requirements of particularity. Immigrants and persons of Muslim, Middle Eastern, or South Asian background have been particular targets.⁸² For example, the INS detained over a thousand persons as a response to the attacks in the two years after September 11, most of these individuals being immigrants.⁸³ However, in virtually all of the cases, the government was unable or unwilling to demonstrate any link between these individuals, who ultimately seemed classic cases of persons in the wrong place at the wrong time, and terrorism.⁸⁴ The Attorney General has also indicated that he is willing to detain people for “spitting on the sidewalk” and other generic offenses, on the modest chance that they, like the hapless immigrants netted by the

Americans as “Terrorists”, 8 Asian L.J. 1 (2001) (drawing parallels between Japanese-American internment and post-September 11 measures).

⁸² See Cole, *Enemy Aliens*, supra note __ (critiquing detention of immigrants after attacks); Margulies, *Uncertain Arrivals*, supra note _ (same); Letti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575 (2002) (describing the marginalization of particular communities after September 11); Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day after September 11*, 20 Social Text 72 (2002); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. Ann. Survey Am. L. 295 (2002) (same). For a perspective from political theory, see BONNIE HONIG, DEMOCRACY AND THE FOREIGNER 33-38 (2001) (discussing “the *politics* of foreignness – the cultural symbolic organization of a social crisis into a resolution-producing confrontation between an ‘us’ and a ‘them’”) (emphasis in original).

⁸³ See Margulies, *Uncertain Arrivals*, supra note _, at 499.

⁸⁴ See *Center for Nat’l Sec. Stud. v. United States Department of Justice*, 215 F. Supp.2d 94, 98 n. 4 (D.D.C. 2002) (noting government concession that many aliens detained or deported after September 11 had no terrorist ties); rev’d on other grounds, 331 F.3d 918 (D.C. Cir. 2003); cf. Stephen J. Ellmann, *Racial Profiling and Terrorism*, 46 N.Y.L.Sch. L. Rev. 675, 724-26 (discussing lack of concrete information about terrorism yielded by government’s immigration measures); Adam Liptak, *The Pursuit of Immigrants in America After Sept. 11*, N.Y. Times, June 8, 2003, Sec. 4 at 14 (same).

INS, have some connection to terrorism.⁸⁵ As part of this retreat from particularity, when the news media and advocacy groups sought further information about detainees, the government advanced a so-called “mosaic” theory, arguing that the release of even mundane information *might* assist terrorist groups.⁸⁶ The government expressly declined to specify how and why such information could be of assistance to terrorists, or engage in a case-by-case showing of the need for non-disclosure, asserting that such a showing would itself aid terrorists.

In the law of criminal procedure, the most troubling retreat from particularity has occurred in case called *United States v. Awadallah*.⁸⁷ In *Awadallah*, the government, which had discovered Awadallah’s phone number in the trunk of a car left at Dulles Airport in Virginia by one of the September 11 hijackers, engaged in a concededly illegal search and seizure to discover information that made a case for the arrest of Awadallah as a material witness.⁸⁸

⁸⁵ See Adam Liptak, *Under Ashcroft, Judicial Power Flows Back to Washington*, N.Y. Times, Feb. 16, 2003, sec. 4, at 5 (discussing prosecutors’ broad mandate from Attorney General Ashcroft, who attributes the “sidewalk” reference to Robert Kennedy in his pursuit of organized crime); cf. *id.* (quoting officials who served under Kennedy in the Justice Department as arguing that Kennedy did not seek the broad power that Ashcroft has claimed).

⁸⁶ *Center for Nat’l Sec. Studies v. United States Dep’t of Justice*, 331 F.3d 918 (D.C. Cir. 2003) (upholding government’s refusal to disclose information); cf. *id.* at 940 (Tatel, J., dissenting) (criticizing “government’s vague, poorly explained allegations” and asserting that majority, “by filling in the gaps in the government’s case with its own assumptions about facts absent from the record... converted deference into acquiescence”); Margulies, *Judging Terror*, *supra* note _ (criticizing majority’s holding as example of dangers of undue deference to executive).

⁸⁷ 349 F.3d 42 (2d Cir. 2003).

⁸⁸ Agents seized Awadallah, a Jordanian national, in the period immediately after September 11, and questioned him for hours at the FBI’s office. After this questioning, the FBI sought a warrant to hold Awadallah as a material witness. The information in the affidavit supporting the warrant included the fact that agents had found a “box-cutter” in Awadallah’s car. *Id.* at 67. The affidavit also attested to Awadallah’s acquaintance with two of the hijackers and his interest in Osama bin Laden, but contained no further information linking Awadallah to the

Considering whether any means less restrictive than detention was “impracticable” for securing Awadallah’s testimony before a grand jury, the Second Circuit was not disturbed that the government’s affidavit supporting its application for an arrest warrant failed to disclose a number of facts. For example, the affidavit did not disclose that Awadallah had not seen one of the hijackers for over a year, had moved eighteen months earlier from the address associated with the phone number found in the trunk of the hijacker’s car, and had used a “box-cutter” found by agents in his car to install a new carpet in his apartment. Nor did the affidavit disclose that Awadallah had answered questions after his concededly illegal seizure by the FBI, and, in addition to family in Jordan, had three brothers in San Francisco, including one who was an American citizen.⁸⁹ Discounting the impact of these omissions by the government, the Second Circuit cited the fact that Awadallah had failed to come forward after the attacks to voluntarily disclose his acquaintance with two of the hijackers.⁹⁰

The Second Circuit’s holding that Awadallah’s mere failure to come forward was a sufficient factual predicate for his detention as a material witness sets a distressingly low

September 11 conspiracy, of which Awadallah seems to have been ignorant. By the end of his detention as a material witness, Awadallah “had bruises on his upper arms,” and an agent’s report indicated other injuries involving his shoulder, ankles, hand, and face. See *United States v. Awadallah*, 202 F. Supp.2d 55, 61 (S.D.N.Y. 2002).

At the conclusion of his detention, Awadallah allegedly inaccurately testified before a grand jury that he did not remember the name of one of the hijackers, although he acknowledged knowing the two men and subsequently undertook to correct the inaccuracy. The government indicted him for perjury. Awadallah moved to suppress the statements to the grand jury, and dismiss the perjury charge. The District Court granted the defendant’s motion. *Id.*; cf. *United States v. Awadallah*, 202 F. Supp.2d 82 (S.D.N.Y. 2002) (holding, in ruling that the government did not appeal, that government’s initial contact with Awadallah constituted a seizure in violation of the Fourth Amendment).

⁸⁹ *Id.* at 96.

⁹⁰ *United States v. Awadallah*, 349 F.3d 42, 70 (2d Cir. 2003).

threshold of particularity. Although the law may require that persons approached by law enforcement do not commit affirmative misrepresentations, mandating that people come forward is a departure from pervasive Anglo-American legal norms, which do not establish a generalized duty to rescue others or volunteer to assist the government.⁹¹ Without such norms, the government could detain or prosecute persons who failed to come forward with information about any offense.⁹² The amorphous nature of the failure to come forward would invite governmental reliance on invidious criteria, such as race, ethnicity, or political belief, in selecting targets.

In *Awadallah*, the government's disregard of such concerns raises the specter of informational overreaching. The government offered no evidence that Awadallah failed to come forward because of an urge to mislead law enforcement or flee the jurisdiction. Indeed, Awadallah's failure to come forward may stem from his desire to avoid the marathon interrogation by the government that ensued after his seizure – an interrogation which in conjunction with his subsequent detention produced virtually no information of use regarding the hijackers. Given Awadallah's lack of useful information, the court's mention of "the terrorist

⁹¹ See generally Restatement (Second) of Torts sec. 291 cmt. f (1965) (noting the lack of a duty to rescue under the common law); cf. Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula,"* 4 Theoretical Inq. L. 145, 238 (2003) (discussing roots of rejection of general duty to rescue in conception of freedom).

⁹² See JEFFREY ROSEN, *THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE* 107-11 (2004) (discussing perils in government attempts to use technology to monitor population for terrorist threats); cf. Linda E. Fisher, *Guilt By Expressive Association: Political Profiling, Surveillance and the Privacy of Groups* (unpublished manuscript on file with the author) (outlining dangers of government surveillance of political and religious groups after September 11).

attacks known to everyone else on the planet, and the implicit threat of future attacks,”⁹³ seems at best a non sequitur, and at worst an invocation of fear as a substitute for analysis.

Viewed in retrospect, the government’s detention of Awadallah for almost three weeks as a material witness seems designed more to produce some “hook” for prosecuting him further, despite the absence of any information linking him to the planning or execution of the September 11 attacks. Nor does the court adequately analyze why the government failed to include facts demonstrating that Awadallah was not likely to flee because of community and family ties, or why Awadallah’s responses to questioning by the government prior to his detention did not constitute “cooperation” within the meaning of the material witness statute.

The *Awadallah* decision encourages the detention and subsequent prosecution of persons whose only offense is fleeting association with wrongdoers and a failure to offer an account that fits the government’s agenda. It is understandable that government in a crisis may desire such authority. However, courts should not rush to indulge the executive’s appetites, even in a time of crisis.

B. *Pretrial Publicity*

The government has also sought to control information to a different audience – the public and prospective jurors – through extrajudicial comments regarding terrorism prosecutions. Prejudicial public comments by prosecutors are a staple of government reactions to crisis. When the public and media identify one group as the source of the crisis, such comments can drive perceptions about all defendants from that group, thereby making the government’s job easier at

⁹³ United States v. Awadallah, 349 F.3d 42, 70 (2d Cir. 2003).

trial and further eroding safeguards such as the reasonable doubt standard. Extrajudicial comments by the Attorney General also discourage internal criticism and the disclosure of information to the defense inconsistent with the theme sounded in public. Attorney General Ashcroft has resorted to this tactic, in keeping with precedent from past crises.

These precedents are not encouraging.⁹⁴ In World War I, for example, the Wilson Administration mounted a sophisticated propaganda campaign led by George Creel, a public relations executive, to discredit dissenters such as Eugene V. Debs and inflame public opinion against them. Attorney General Gregory joined in this effort, warning dissenters, “May God have mercy on them, for they need expect none from an outraged people and an avenging government.”⁹⁵ Gregory described pacifists as “physical, or moral degenerate[s],”⁹⁶ and vigorously endorsed a state bar association resolution that condemned as unpatriotic and unprofessional a lawyer’s representation of an objector to the draft.⁹⁷ Line prosecutors and juries needed little urging to “get with the program,”⁹⁸ drawing inferences on culpability of the accused

⁹⁴ See JAMES X. DEMPSEY & DAVID COLE, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* (1999) (discussing the history of government abuse of civil liberties during crises).

⁹⁵ See Geoffrey R. Stone, *The Origins of the “Bad Tendency” Test: Free Speech in Wartime*, 2002 Sup. Ct. Rev. 411, 413. Attorney General Gregory, in contrast with the present occupant of his position, subsequently became more reflective about the authority he had claimed. *Id.* However, his initial pronouncements, coupled with those of other Administration figures as well as officials at the state level and leaders of organizations, set in motion a cascade of law enforcement activity against dissidents.

⁹⁶ See MURPHY, *supra* note ___, at 192.

⁹⁷ *Id.*

⁹⁸ *Id.* at 191 (noting that “United States Attorneys [were]... eager to prosecute vigorously under... [restrictive wartime] legislation and anxious to secure convictions from juries”).

for sedition and espionage based on the mere fact of their dissent from the war effort.

The record in the McCarthy era after World War II is hardly better. In the Rosenberg “atom-spy” trial, Attorney General McGrath and FBI Director J. Edgar Hoover issued a press release that set the stage for massive and often inaccurate reporting about the case in the media.⁹⁹ The lead prosecutor in the case, Irving Saypol, assisted by the politically connected Roy Cohn, who subsequently became chief counsel to Sen. Joseph McCarthy’s Committee, capitalized on his agenda-setting ability by holding regular informal press conferences every day after the conclusion of the day’s business at trial.¹⁰⁰ The prosecution’s efforts to inflame both the public and the jury through inappropriate publicity continued throughout the trial.¹⁰¹ While the Second Circuit criticized Saypol for engaging in excessive public comments,¹⁰² the anti-Communist hysteria of the period made such reputational sanctions largely irrelevant.

Public comments by the Attorney General in the two years after September 11 converged

⁹⁹ See Attossa M. Alavi, Comment, *The Government Against Two: Ethel and Julius Rosenberg’s Trial*, 53 Case W. Res. L. Rev. 1057, 1067-68 (2003).

¹⁰⁰ *Id.* at 1067.

¹⁰¹ In his most egregious act of overreaching, Saypol during the trial announced the perjury indictment of an alleged associate of the Rosenbergs, William Perl. *Id.* Saypol explained to the media, in accounts that the jury, which was not sequestered, most probably read, that Perl was to have testified in the Rosenberg trial to corroborate a government witness. The implication, which the Second Circuit Court of Appeals later described as part of a “reprehensible” course of conduct on Saypol’s part, was that other confederates of the Rosenbergs had “gotten to” Perl, causing him to lie to the grand jury investigating the case. This kind of discussion of potential witnesses, augmented by the prosecution’s gambit of placing distinguished scientists such as Robert Oppenheimer, developer of the atom bomb, on the witness list to buttress the scientific basis for the government’s case, was part of a strategy for influencing both the public and the jury. *Id.* The defense, perhaps persuaded by Saypol’s avowals that he had not sought to influence the jury, did not ask for a mistrial.

¹⁰² See *United States v. Rosenberg*, 200 F.2d 666, 670 (2d Cir. 1952) (“such... tactics cannot be too severely condemned”).

with a general ratcheting up of prosecutors' public description of terrorism cases. Every indictment involves not merely alleged wrongdoing, but a new terrorist "cell" set to perpetrate the next September 11. When qualifications of this rhetoric occur, they occur most often after announcement of an indictment, and indeed after defendants have gone to trial or taken a plea. At sentencing, prosecutors suddenly discover that yesterday's vast terrorist conspiracy is actually a more modest bundle of conduct, much of which would not even have been illegal prior to 1996.

To consider the current dangers of public comments by prosecutors, consider *United States v. Koubriti*,¹⁰³ a Detroit case in which the government charged the defendants with "material support" of terrorist activity. The defendants were initially arrested in the weeks after September 11, because they occupied an apartment once rented by an individual whom the government was seeking in connection with ties to Al Qaeda. The defendants were allegedly in possession of a substantial number of fraudulent immigration documents not solely for their own use. They had a diagram of what the government alleged to be a United States military base in Jordan, videos of tourist attractions in the United States, and a quantity of militant Islamist literature.

The government's main witness tying these disparate pieces together was a gentleman named Yousef Hmimmsa, who admitted that he had repeatedly deceived the government. Hmimmsa was in many ways the prototype of an individual apprehended by the government in the course of clearly illegal behavior – here, the fabrication and sale of fraudulent government documents – who had powerful incentives to offer the government something – anything – that

¹⁰³ Case No. 01-80778, 2003 U.S. Dist. Lexis 22529 (E.D. Mich. Dec. 16, 2003).

might shift blame from him to others.¹⁰⁴ Hmimmsa alleged that the defendants in *Koubriti* had knowingly assisted a conspiracy to attack United States tourist sites and bases abroad.¹⁰⁵

The Detroit case revealed a pattern of public comments by senior officials that both violated a court order and entailed a substantial risk of prejudice to the defense. The judge in the case entered a gag order shortly after the arraignment, concerned about the prejudicial nature of publicity after September 11. Attorney General Ashcroft in the weeks after September 11 asserted without any support that the defendants had advance knowledge of the September 11 attacks.¹⁰⁶ The government soon after retracted these assertions,¹⁰⁷ although the retraction received less press coverage than the initial statements by the Attorney General. Conferences with the judge followed, after which the government's senior officials undertook to put in place procedures that would avoid further missteps. Subsequently, when a revised indictment was filed, prior to making this public a newspaper published a story, which circumstances suggested was a leak from a law enforcement official.¹⁰⁸ The court again remonstrated with the government.

After the trial itself commenced, Attorney General Ashcroft commented directly on the

¹⁰⁴ For more on the dynamics of informers and false testimony, see Margulies, *Domestic Violence and Plea Negotiation*, supra note __; Weinstein, *Regulating the Market in Snitches*, supra note __.

¹⁰⁵ At trial, two of the defendants were convicted of terrorism-related offenses, one was convicted of immigration fraud, and one was acquitted.

¹⁰⁶ *United States v. Koubriti*, 2003 U.S. Dist. Lexis 22529 (E.D. Mich. Dec. 16, 2003), at 17-18. One defense lawyer appeared to violate the ban, by publicly criticizing the government's witnesses as "snitches." He subsequently left the case.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 20-21.

evidence in the course of the trial, praising Hmimmsa as provided testimony of “substantial value” to prosecutors.¹⁰⁹ Ashcroft made his comments after a particularly damaging cross-examination of Hmimmsa by defense counsel. Ashcroft also described the defendants as being part of a terrorist “cell,” without using the usual qualifier, “alleged.”¹¹⁰

Ashcroft’s comments in the Detroit case demonstrate the connection between inappropriate publicity and the erosion of particularity. The prosecution had to persuade the jury to draw damaging inferences against the defendants on the basis of activity that was either innocuous, such as the possession of a videotape of tourist attractions, or explainable without reference to terrorism, such as the possession of fraudulent immigration documents. The Arab and Muslim background of the defendants provided an unspoken, albeit invidious, link between the innocuous or otherwise explainable behavior and the government’s charges.¹¹¹ Publicly describing the defendants as members of a terrorist “cell” made it easier to make that link, while camouflaging its invidious origin. Bolstering the credibility of the government’s profoundly flawed chief witness also gave members of the public and of the jury who were wary of drawing forbidden inferences something more neutral on which to hang their hats.

The *Koubriti* case also demonstrates the inadequacies of the relational approach in times of crisis. In *Koubriti*, some time after the judge indicated that he was considering appointment of an independent counsel to investigate whether the Attorney General was guilty of criminal contempt, Attorney General Ashcroft sent the judge a written apology. The Attorney General

¹⁰⁹ Id. at 32-33.

¹¹⁰ Id.

¹¹¹ See Adam Liptak, *Palmer Raids Redux: The Pursuit of Immigrants in America After September 11*, N.Y. Times, June 8, 2003, sec. 4 at 14.

described his public comments about the government’s witness in hedged and lawyerly terms, acknowledging that “statements, however brief and passing, *could have been considered...* to be a breach of the Court’s Order.”¹¹² He further described his remarks as “inadvertent” comments resulting from ill-informed drafting on the part of his staff.¹¹³

Applying the relational approach, the court admonished the Attorney General for violating the court’s order, but decided that no further fact-finding regarding possible contempt was warranted. However, the court failed to address the interaction between the Attorney General’s public vouching for the government’s witness, and the prosecution’s failure to hand over documents challenging that witness’s account.¹¹⁴ The court also failed to recognize that the form and content of the Attorney General’s apology raised far more questions than answers. For example, the Attorney General’s blaming of his staff for failing to properly draft his remarks represents a striking abdication of accountability. Whatever his staff’s role, surely the Attorney General should acknowledge personal responsibility for making public remarks, awareness of outstanding court orders, and knowledge of professional rules and departmental regulations that limit extrajudicial comments. Delegating responsibility for such matters to staff is a signal of difficulties within the institution that transcend the remedial capabilities of the relational paradigm.

C. Suppression of Exculpatory Evidence

¹¹² See *United States v. Koubriti*, 2003 U.S. Dist. Lexis 22529 (E.D. Mich. Dec. 16, 2003), at 41 (emphasis added).

¹¹³ *Id.*

¹¹⁴ See *infra* notes ___ - ___ and accompanying text.

The Detroit case also illustrates how extrajudicial comments by prosecutors interact with other forms of informational overreaching, such as the failure to disclose exculpatory evidence. Moreover, such failures feed back into our first species of informational overreaching – the erosion of particularity. Withholding exculpatory evidence in terrorism cases weakens the particularity requirement by allowing the government to exploit inappropriate inferences based on widely held views that a defendant with a particular ethnic or religious background is more likely to have committed the acts charged.¹¹⁵ Without the distraction of facts that might counter such inferences, prosecutors seeking conviction need only contend with the dutiful but bland instructions offered by the trial judge.¹¹⁶ Here, too, history offers troubling precedents.

In the World War I prosecutions, for example, the government systematically failed to reveal evidence that the dissidents charged had no knowledge of any treasonable plots against the government.¹¹⁷ In the Rosenberg “atom spy” case, the government concealed evidence that would have at least partially exculpated Ethel Rosenberg, revealing her as at best a tacit ally in the espionage conspiracy charged, not an active or even fully knowing participant.¹¹⁸

More recent cases also reveal the troubling synthesis of hyperbolic public comments and back-stage withholding of information. Consider the case of Edwin Wilson, a CIA operative

¹¹⁵ See Ahmad, *supra* note __; Johnson & Akram, *supra* note __.

¹¹⁶ Cf. Alschuler, *supra* note __ (expressing skepticism about curative power of instructions by trial judges).

¹¹⁷ See MURPHY, *supra* note __, at 107.

¹¹⁸ See Parrish, *supra* note __. Consider also the government’s failure to acknowledge in all but a handful of cases involving the internment of Japanese-Americans that the government possessed no information whatsoever indicating the participation of the detainees in sabotage or espionage. See Gudridge, *supra* note __.

convicted of trafficking in arms on behalf of Libya. Prosecutors were able to frame the debate by a publicity campaign that framed Wilson as a rogue agent. A recent court decision demonstrates, however, that Wilson may well have had government authorization for many of his allegedly criminal activities, and that the government may have willfully deceived the court by saying otherwise.¹¹⁹ Another notable example is New York’s infamous “Central Park Jogger” case, in which the prosecution, determined to respond to the public outcry about a brutal rape, ignored pervasive and material inconsistencies in the alleged “confessions” of the defendants.¹²⁰ The defendants’ status as young African-American accused of “wilding” in Central Park made them handy scapegoats for the crime, contributing to the rush to judgment.¹²¹

Moving to the post-9/11 era, the government failed to disclose significant evidence about its chief witness in the *Koubriti* case. After the trial, the line prosecutor in the case produced for the defense a letter it received before the trial from a federal prisoner stating that the government’s main witness admitted that he had fabricated his story about the defendants.¹²² The government defended its failure to disclose the letter previously, arguing that it was not material.¹²³ The court is considering whether to order a new trial.

Other cases similarly reflect the government’s reluctance to disclose evidence after

¹¹⁹ See *United States v. Wilson*, 289 F. Supp.2d 801 (S.D. Tex. 2003).

¹²⁰ See *New York v. Wise*, 752 N.Y.S.2d 837, 845-46 (Sup. Ct. N.Y. Co. 2002) (also noting discovery of new DNA evidence demonstrating that another individual had committed the crime in question).

¹²¹ See N.R. Kleinfeld, *City Reminded of Fears It Believed It Left Behind*, N.Y. Times, Dec. 6, 2002, B5.

¹²² *United States v. Koubriti*, 2004 U.S. Dist. Lexis 829 (E.D. Mich. Jan. 12, 2004).

¹²³ *Id.*

September 11. For example, in the case of accused “twentieth hijacker” Zacarias Moussaoui, the government has declined to provide the defendant with access to an Al Qaeda detainee, despite a defense proffer that the detainee could offer exculpatory information.¹²⁴ In the case of Jose Padilla, an alleged unlawful combatant currently in Pentagon custody, the government has acknowledged that other detainees providing evidence against Padilla have offered much “misinformation” to the government.¹²⁵ However, the government has argued against allowing Padilla a day in court to contest those allegations, and has declined to provide Padilla’s lawyer with any examples of the misinformation supplied by Padilla’s accuser.

IV. AN INSTITUTIONAL RESPONSE TO INFORMATIONAL OVERREACHING

Once informational overreaching gains momentum, it is very difficult to stop.¹²⁶ Narratives of exigency that drive it are notoriously difficult to question or rebut.¹²⁷ Courts that wish to deter informational overreaching in a period of crisis must act as counterweights to prosecutorial power. The requisite authority, while embedded in judicial tradition, involves an institutional turn more far-reaching than the reassuring informality of the relational approach.

The institutional approach would draw on the public law tradition of federal remedies,

¹²⁴ See *United States v. Moussaoui*, 282 F. Supp.2d 480 (N.D. Va. 2003).

¹²⁵ See Steve Fainaru, *Padilla’s Al Qaeda Ties Confirmed, Prosecutors Say*, Wash. Post, Aug. 28, 2002, A4 (quoting government as acknowledging that “some of the sources who provided information on Padilla may be trying to mislead the government”).

¹²⁶ See Kuran & Sunstein, *supra* note __ (discussing force of policy “cascades” which develop from interaction of entrepreneurship and public fears).

¹²⁷ See ROSEN, *supra* note __ (discussing belief perseverance in psychology of fear); Gross, *supra* note __ (same); Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 Yale L.J. 61, 77 (2002) (same).

under which federal courts undertook reform of state and local institutions such as jails and psychiatric hospitals.¹²⁸ It would braid this remedial strand together with the remedial element of constitutional criminal procedure, under which the courts have for decades fashioned rules for compliance with the Due Process Clause and with the Fourth, Fifth, and Sixth Amendments by prosecutors and law enforcement officials.¹²⁹ Each remedial tradition is both fluid – capable of adapting to shifting demands – and focused – capable of providing concrete guidance to multiple constituencies. To appreciate the flexibility of equitable remedies, consider *Hecht Co. v. Bowles*,¹³⁰ in which the Supreme Court noted that,

The essence of equitable jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case.

Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs...¹³¹

¹²⁸ See FEELEY & RUBIN, *supra* note __; Sabel & Simon, *supra* note __; cf. Peter Margulies, *Judging Terror in the “Zone of Twilight”: Exigency, Institutional Equity, and Procedure After September 11*, __ B.U. L. Rev. __ (forthcoming 2004) (discussing institutional approach based on remedies jurisprudence for dealing with issues such as detention of alleged “unlawful combatants”); but see ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 113-17 (2003) (critiquing public law remedies as unduly disruptive to political branches); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 Yale L.J. 27 (2003) (discussing dangers of overstepping judicial role in supervision of mass tort litigation).

¹²⁹ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹³⁰ 321 U.S. 321 (1944).

¹³¹ See *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944); see also SANDLER & SCHOENBROD, *supra* note __, at 194-95 (praising exercise of equitable discretion in *Hecht*); cf. *TVA v. Hill*, 437 U.S. 153 (1978) (holding that Endangered Species Act abrogated equitable jurisdiction, requiring issuance of injunction against construction of dam to save the endangered

Yet, while equitable jurisdiction is fluid, it can also be concrete when necessary. In certain situations, courts dealing with the “polycentric” pull of different constituencies¹³² have after extensive factfinding determined that broad standards give institutions too much room to frustrate needed reforms. In such cases, courts have issued detailed orders ordering changes in institutions such as public employers, schools, and prisons.¹³³

The remedial authority of federal courts in the domain of criminal procedure has followed a similar path. Prior to the plenary incorporation of Bill of Rights guarantees, federal courts reviewing the fairness of criminal convictions in state courts applied the Due Process Clause in a fashion that was fluid, “duly mindful of reconciling the needs both of continuity and change in a progressive society.”¹³⁴ Reflecting this fluid approach, the Court excluded evidence obtained by means that “shock[] the conscience.”¹³⁵ By the same token, when such open-textured tests provide insufficient guidance, the Court has not hesitated to require more concrete steps as a prophylactic measure. The Court’s decision in *Miranda v. Arizona*,¹³⁶ for example, requiring specific warnings to defendants in custody regarding their right to remain silent and

snail darter fish).

¹³² See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976).

¹³³ See FEELEY & RUBIN, supra note __; Sabel & Simon, supra note __, at 1029-33 (discussing interaction between fluidity and specificity in judicial decrees addressing institutional problems in mental health system).

¹³⁴ See *Rochin v. California*, 342 U.S. 165, 172 (1952).

¹³⁵ *Id.* at 172.

¹³⁶ 384 U.S. 436 (1966); cf. *Dickerson v. United States*, 530 U.S. 428 (2000) (re-affirming *Miranda*’s viability as constitutional precedent).

consult with counsel, implemented a concrete regime in response to the apparent tendency of law enforcement officials to cut corners in adhering to the more amorphous “totality of the circumstances” test then applied to the assessment of voluntariness in defendant’s confessions.¹³⁷

In both the equitable and criminal procedure realms, the balance between flexibility and formality often hinged expressly or impliedly on the likelihood that the government would overreach against particular subordinated groups. The equitable public law remedies cases often involved litigation where plaintiffs were people of color, such as the plaintiffs in the school desegregation or child welfare cases,¹³⁸ or people of limited means, such as the residents of public psychiatric facilities, prisons, and jails.¹³⁹ In the criminal procedure context, the Supreme Court has noted the special vulnerability to abusive law enforcement practices of people of color.¹⁴⁰

An institutional perspective is necessary because the remedies typical of the relational approach cannot cope effectively with the external pressures and signaling by senior officials typical of the monolithic turn. While judges can use reputational sanctions effectively with line prosecutors, such informal measures are far less effective in dealing with the behavior of senior officials, whose reputations hinge on the responses of an audience that extends well beyond the

¹³⁷ See *Miranda v. Arizona*, 384 U.S. 436, 457 (1966).

¹³⁸ See *Brown v. Board of Education*, 347 U.S. 483 (1954); cf. NINA BERNSTEIN, *THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE 59-60* (2001) (discussing racial disparities in foster care).

¹³⁹ See FEELEY & RUBIN, *supra* note __.

¹⁴⁰ See *Miranda v. Arizona*, 384 U.S. 436, 457 (1966) (noting police abuse of Latinos and African-Americans); cf. *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999) (discussing concerns about police targeting of people of color as rationale for development of “void for vagueness” doctrine).

dimensions of the courtroom. The Attorney General, for example, is a political appointee with a far wider constituency than the line prosecutor; the Attorney General's decisions deal more with shaping and satisfying the demands of national political constituencies. When the Attorney General can appeal to these constituencies for validation, mere unfavorable words from a court will not be a significant deterrent.¹⁴¹

An institutional approach is also crucial because of the interlocking character of the three brands of informational overreaching by prosecutors in terrorism cases. An institutional approach, rather than considering prosecutors as isolated legal actors and analyzing prosecutorial misconduct within discrete doctrinal pigeonholes, would recognize the links between the erosion of particularity, excessive extrajudicial comments about pending cases, and the failure to disclose exculpatory information to the defense. Each component of informational overreaching reinforces the others, making prosecutors less accountable and impairing the integrity of the justice system. Rather than bow to this trend, the institutional approach would construe misrepresentation, prejudice, and bad faith in structural terms, and tailor remedies accordingly. Only an institutional perspective can re-frame the discourse and ex ante incentives of prosecutors in times of crisis.

A. Preserving Particularity

One of the first casualties of a national security crisis is the principle that the government must provide courts with a particularized basis for searches, seizures, or detentions. In a crisis,

¹⁴¹ See supra notes ___ - ___ and accompanying text (discussing role of “authenticity entrepreneurs”).

requiring particularity as a predicate for governmental intrusion or coercion may seem quaint or even perverse. For a democracy, however, viewing particularity as an exercise in nostalgia threatens abiding values that exigency should not extinguish. Courts serve those values by preserving some meaningful threshold of particularity as a safeguard against the evils of monolithic prosecution.

Finding the right balance of particularity and exigency is crucial.¹⁴² Throughout the law, traditional standards of reasonableness have always contemplated some trade-off between the probability and gravity of harm. A showing that serious harm is possible in the near or foreseeable future will heighten requirements of due care for private actors charged with preventing harm, or grant government greater flexibility in law enforcement.¹⁴³ For example,

¹⁴² See Margulies, *Judging Terror*, supra note __; Cole, *Enemy Aliens*, supra note __, at 955.

¹⁴³ Judge Learned Hand indicated regarding the law of torts that reasonableness might require a heightened standard of care when lack of due care could cause an injury of sufficient gravity, despite a lower probability that the injury would in fact occur. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); cf. *Kiareldeen v. Ashcroft*, 273 F.3d 542 (3d Cir. 2001) (observing that the government, when making a decision to apprehend an individual suspected of plotting terrorist activity – in that case a pre-September 11 plan to bomb the World Trade Center – was entitled to consider not only the probability that an individual had engaged in such activity, but also the extent of the destruction that could have resulted); see also ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 187-96 (2002) (discussing constitutional concern with false positives, while arguing that the challenge of terrorism complicates issue); Laurence H. Tribe, *Trial By Fury: Why Congress Must Curb Bush's Military Courts*, *The New Republic*, Dec. 10, 2001, at 18, 20 (arguing that public interest requires some revision of balance between false positives and false negatives when persons who turn out to be false negatives “slaughter innocent civilians, and may well have access to chemical, biological, or nuclear weapons”); but see Ronald Dworkin, *The Threat to Patriotism*, N.Y. Rev. Books, Feb. 28, 2002, at 44, 44 (cautioning against lowering standards of proof in terrorism cases brought in courts, military tribunals, or other venues); but see Wright, supra note __ (critiquing Hand formula).

Similarly, in the law of remedies, “irreparable harm” that cannot be redressed by a subsequent monetary award justifies the issuance of an injunction, a form of relief considered

courts have suggested that a more modest showing of probable cause than the usual might govern law enforcement officers' search to discover a ticking bomb¹⁴⁴ and that the failure to give *Miranda* warnings would not compel the suppression of a defendant's statements made under interrogation in a situation posing an imminent danger to the officers' safety.¹⁴⁵ Similarly, one could argue that government investigators in the period immediately preceding September 11 were unduly reticent in seeking a warrant for the laptop of the frustrated flight school enrollee Zacarias Moussaoui, given the available evidence that Al Qaeda was considering using airplanes as bombs.¹⁴⁶

Fine-tuning the balance between particularity and exigency should not lead to the demise

extraordinary because of its assertion of control over the future conduct of an individual or entity. See *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) ("injunction is 'to be used sparingly, and only in a clear and plain case'"); DAN D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* sec. 2.1 at 27, sec. 2.5 at 57 (1973); cf. cf. DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* 5-6 (1991) (arguing that irreparable harm is no longer significant factor in awarding of equitable relief); Douglas Lichtman, *Uncertainty and the Standard for Preliminary Relief*, 70 U. Chi. L. Rev. 197, 205-10 (2003) (arguing that standard fails to address impact of uncertainty about the future on court's ability to assess irreparable harm).

¹⁴⁴ See *Florida v. J.L.*, 529 U.S. 266, 273-74 (2000) (suppressing a search based on an anonymous informant's description of an individual's appearance in routine criminal case but suggesting that information about bomb might present different set of considerations).

¹⁴⁵ See *New York v. Quarles*, 467 U.S. 649 (1984).

¹⁴⁶ See Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 Tex. L. Rev. 951 (2003) (arguing that magnitude of possible harm in Moussaoui case would have permitted probable cause finding, despite a lesser showing of probability). The nature of the threat posed by admitted Al Qaeda operatives such as Moussaoui might also justify detention, although not the virtually unreviewable confinement favored by the Bush Administration. Cf. Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 Nw. U.L. Rev. 1, 44-46 (2003) (arguing that commitment of active members of Al Qaeda to "ending innocent lives in disregard of international legal principles and any threat to their own life distinguishes them from the 'detractable' common criminal," and thereby justifies preventive detention cabined by appropriate procedural safeguards); Margulies, *Judging Terror*, supra note _ (same).

of the particularity requirement. In cases since September 11, courts have sometimes contorted logic to dispense with particularity. Courts need to be especially wary that they are not distorting doctrine to accomplish a particular result, such as ensuring the admissibility of evidence that might otherwise be excludable. This result-oriented jurisprudence has made troubling inroads since September 11. The *Awadallah* Court's citing of the defendant's failure to come forward as the principal basis for his detention is the most recent example.¹⁴⁷ Another example is the failure of the Third Circuit in *Kiareldeen v. Ashcroft*¹⁴⁸ to hold the Justice Department accountable for its delay in providing an immigration detainee with specific notice of the charges against him.¹⁴⁹

¹⁴⁷ *United States v. Awadallah*, 349 F.3d 42, 70 (2d Cir. 2003).

¹⁴⁸ 273 F.3d 542 (3d Cir. 2001).

¹⁴⁹ In *Kiareldeen*, after the Justice Department belatedly provided the detainee with specific notice of the charges against him, the detainee was able to demonstrate that immigration authorities had relied on a witness – an unfriendly ex-spouse -- who had a demonstrable bias against the immigrant and a track record of unsupported allegations, and that the latest allegations were also materially inaccurate. See *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 416-17 (D.N.J. 1999) (noting that the immigrant's ex-wife had made repeated allegations of domestic violence against him, but had failed to substantiate any of these accusations); rev'd on other grounds, *Kiareldeen v. Ashcroft*, 273 F.3d 542 (3d Cir. 2001) (denying immigrant's motion for attorney's fees and holding that the government's provision of a specific public summary of the secret evidence to the immigrant, however belated, rendered its position "substantially justified"); see also *Najjar v. Reno*, 97 F. Supp. 2d 1329, 1359 (S.D. Fla. 2000) (granting writ of habeas corpus because Immigration and Naturalization Service summarized the secret evidence against the immigrant in general and conclusory fashion, asserting without elaboration that the immigrant was involved with a terrorist organization); *Najjar v. Ashcroft*, 257 F. 3d 1262 (11th Cir. 2001) (declining to rule on secret evidence issue but affirming denial of asylum to petitioner); cf. *In re Haddam*, 2000 BIA Lexis 20 (Board of Immigration Appeals Dec. 1, 2000) (considering secret evidence, but granting claimant's request for asylum); cf. *Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting) (arguing that secret evidence "is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected"); Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 *Geo. Immig. L.J.* 51 (1999); David A. Martin, *Graduated Constitutional Protections for Aliens:*

One way to cope with the erosion of particularity is to employ a more robust interpretation of *Franks v. Delaware*¹⁵⁰ to omissions from affidavits supporting arrest warrants. The premise of *Franks* is that officials issuing warrants should act on the basis of materially accurate information. Although courts cannot expect law enforcement personnel, particularly in exigent circumstances, to exhaustively catalog all information known to them,¹⁵¹ it is reasonable to expect that they will include material information, even if it casts some doubt on probable cause. An omission can otherwise prevent the officer determining the sufficiency of the affidavit from doing her job, making law enforcement officials the unreviewable arbiters of probable cause. This kind of unreviewability is a core danger of informational overreaching.

As the District Court noted in *Awadallah*, the affidavit supporting the warrant for Awadallah's arrest as a material witness omitted several facts that were relevant to the issue of both the materiality of his potential testimony and the impracticability of securing it by less restrictive means.¹⁵² These facts, viewed in their entirety, suggest that Awadallah had no recent

The Real Meaning of Zadvydas v. Davis, 2001 Sup. Ct. Rev. 47, 68-76 (arguing that due process bars use of secret information in removal proceedings against LPR's). Margulies, *Uncertain Arrivals*, supra note __, at 503 n. 119 (discussing issues of secret evidence).

¹⁵⁰ See 438 U.S. 154, 164-72 (1978) (discussing requirements for affidavits setting out probable cause for issuance of warrants).

¹⁵¹ *Id.*

¹⁵² See *United States v. Awadallah*, 202 F. Supp.2d 55 (S.D.N.Y. 2002). Less restrictive means would have included service of a subpoena to appear before the grand jury voluntarily.

Current law also requires proof that the omissions of the official submitting the affidavit were intentional or reckless. See *United States v. Awadallah*, 349 F.3d 42, 66-68 (2d Cir. 2003), citing *United States v. Canfield*, 212 F.3d 713 (2000). The Second Circuit held that the defendant had failed to meet this standard, observing, *inter alia*, that the presence in the affidavit of a form disclaimer indicating that the affidavit did not include some facts known to law enforcement demonstrated the absence of the requisite intent. *Id.* Relying on the presence of a form disclaimer to negate intent exacerbates the problem of unreviewability that plagues the

contact with the hijackers, knew little about the hijackers' plans, had substantial incentives to stay in the country, and had responded to questioning. Disclosure of this information would have had a number of salutary consequences. It would have given the judicial officer considering the issuance of the warrant sufficient information to weigh all concerns appropriately. It would have balanced out the stereotypes of immigrants that the affidavit exploited by merely noting that Awadallah had family in Jordan. Disclosure of these facts would also have placed in context Awadallah's failure to come forward after September 11, making clear that the evidence suggested no operational connection between Awadallah and the attacks. The Second Circuit should have held that such omissions rose to the level of misrepresentation.

Holding that the law enforcement officials in *Awadallah* violated the *Franks* standard would have affirmed the importance of particularity. Since the trial court had found that the 20 days of Awadallah's confinement created a sense of disorientation that caused his misstatements of fact to the grand jury, the *Franks* analysis outlined above would also have required excluding those statements and dismissing the underlying perjury charge.¹⁵³ This result would have deprived government of the incentive to detain individuals such as Awadallah on amorphous

Second Circuit's narrow interpretation of *Franks*.

¹⁵³ This was the conclusion reached by the District Court in *Awadallah*. *Id.* The analysis of material omissions should incorporate consideration of the exigency of the situation. Suppose, for example, that the defendant in *Awadallah* had engaged in conduct closer to the conduct of Zacarias Moussaoui, whose enrollment in flight school suggested ongoing operational ties to Al Qaeda. If the government had included such facts in its affidavit supporting probable cause, any omission in the affidavit would have been immaterial, unless the fact omitted clearly and conclusively demonstrated the witness's lack of both knowledge and dangerousness (such as the government's possession of a written confirmation from a reputable air carrier attesting to its sponsorship of the witness's aviation training). Cf. Lerner, *supra* note __ (discussing *Moussaoui* case).

grounds, such as the failure to come forward, in the hope that aggressive interrogation will “press the witness unduly,... browbeat him if he be timid or reluctant,... push him into a corner,... [and] entrap [the witness] into false contradictions.”¹⁵⁴ Employing an institutional perspective would thus have arrayed the courts firmly against the second coming of “the third degree”¹⁵⁵ signaled by informational overreaching.

B. Reframing Prejudice

As courts affirm the importance of particularity, they should also re-frame prejudice. Prejudice has long been the touchstone of inquiries about the scope of judicial power to dismiss charges or order a new trial.¹⁵⁶ Focusing on prejudice seems to confer a sense of proportion on

¹⁵⁴ See *Miranda v. Arizona*, 384 U.S. 436, 443 (1966), quoting *Brown v. Walker*, 161 U.S. 591 (1896). The concurring opinion in *Awadallah* suggested an alternate basis for declining to dismiss the perjury charge: holding that Awadallah’s statements to the grand jury constituted a separate offense unrelated to his detention. *United States v. Awadallah*, 349 F.3d 42, 79-83 (2d Cir. 2003) (Straub, J., concurring). The concurrence supported this argument by noting that Awadallah had access to a lawyer on several occasions prior to his grand jury appearance. *Id.* It seems artificial, however, to find that access to a lawyer neutralized the impact of Awadallah’s concededly illegal initial seizure and interview, as well as his subsequent detention as a material witness. The Second Circuit did not dispute this, leaving undisturbed the District Court’s finding that Awadallah’s 20-day detention materially caused his inaccurate statements before the grand jury. *Id.* at 70 n. 24.

¹⁵⁵ *Miranda v. Arizona*, 384 U.S. 436, 443 (1966) (discussing abuses in custodial interrogation).

¹⁵⁶ The harmless error rule, codified at Fed. R. Crim. P. 52©), which requires that an error materially affect the defendant’s prospects at trial, applies to most errors considered on appeal. See *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-55 (1988) (discussing harmless error rule); *Arizona v. Fulminante*, 499 U.S. 279 (1991) (applying harmless error rule to admission of coerced confessions); but see *Vasquez v. Hillery*, 474 U.S. 254, 260-64 (1986) (holding that racial discrimination in grand jury selection is fundamental error that gives rise to presumption of prejudice); cf. Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Virginia L. Rev. 1 (2002) (arguing that harmless error doctrine discourages innovation in the law).

such remedies, precluding the possibility that inadvertent or isolated acts of misconduct by prosecutors will frustrate society's interest in holding persons accused of crime accountable.¹⁵⁷ However, that the narrowness of the courts' inquiry into prejudice fails to address unfairness suffered by defendants or deter prosecutorial misconduct. Responding to these problems, courts should adopt a presumption of prejudice in cases reflecting a pattern of prosecutors' noncompliance with established norms.

To consider the issue of unfairness to defendants that the traditional test fails to uncover, consider the example of pretrial publicity. Traditional methods for discovering prejudice, such as questioning jurors, are not necessarily reliable. Jurors may well be reluctant to acknowledge that they have read newspapers or encountered media reports. The nature of the questioning, which will tend to be leading (e.g., "Did you see news reports yesterday about...?"), tends to suggest a negative answer. This signaling by the questioner, however subtle and unintentional, creates a significant risk of "false negatives" – persons who respond, "No," to the question, as the questioner seems to desire, but who have in fact seen the problematic media accounts. While judges may seek to refine the sophistication of their inquiries, the problem remains. Similarly, defense counsel may have a real incentive to ferret out prejudice among jurors, but face a troublesome dilemma in deciding how vigorously to pursue this information. If defense lawyers are too probing, they end up promoting the result they fear: enhanced juror knowledge about the

¹⁵⁷ See, e.g., *Kotteakos v. United States*, 328 U.S. 750, 760 (1946) (justifying harmless error rule by noting concern with granting "fairly convicted" defendants "the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record").

problematic disclosures, and enhanced prejudice.¹⁵⁸

A further asymmetry is that publicity in a given case creates what economists call “negative externalities,” i.e., adverse consequences experienced by third parties, often based on invidious grounds. In terrorism cases, for example, extrajudicial remarks have an adverse impact not merely on the defendant in a particular matter, but on other terrorism defendants who share particular attributes, such as ethnicity or religion, with the target of the offending comments. Traditional mechanisms such as voir dire, which rely on both the candor and self-awareness of prospective jurors,¹⁵⁹ cannot erase these negative externalities. As a result, comments by prosecutors create a cascade of condemnation,¹⁶⁰ as in the World War I or McCarthy Era situations, that prejudices defendants as a group.¹⁶¹

The minimal impact of the narrow inquiry into prejudice also creates a dangerous asymmetry in prosecutors’ institutional incentives. In times of crisis, institutional pressures gravitate even more strongly than usual toward prosecutors “pushing the envelope” to gain a litigation advantage. Prosecutors, who are satisficing bureaucratic players seeking to avoid the greatest embarrassment, will often find themselves pulled away from the requirement to do

¹⁵⁸ Cf. Alschuler, *supra* note __.

¹⁵⁹ Cf. Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317 (1987) (discussing racial prejudice as unconscious, rather than intentional, phenomenon); Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 *Colum. Human Rights L. Rev.* 529, 535-45 (2003) (discussing manifestations of unconscious racism in the workplace).

¹⁶⁰ See Kuran & Sunstein, *supra* note __ (discussing dynamics of cascades that drive public policy toward extremes).

¹⁶¹ See MURPHY, *supra* note __ (discussing persecution of dissidents during World War I); Stone, *supra* note __ (same); Wiecek, *supra* note __ (discussing climate of condemnation affecting persons identified as Communists through the 1960's).

justice in high-profile cases, where promoting justice will yield little institutional benefit for them, and cutting corners creates only a small risk of some amorphous sanction such as professional discipline in the dim future.¹⁶² In contrast, where the institutional signaling from superiors condones or encourages cutting corners, prosecutors like other human beings will heavily discount future problems and focus on present rewards.¹⁶³ Success at a trial is a present goal, with immediate ramifications in terms of the prosecutor's standing with her superiors and peers, and her level of approval from the public.¹⁶⁴ Informational overreaching that serves this goal, such as extrajudicial statements praising the government's case or failure to disclose possibly exculpatory evidence, may seem imperative. Furthermore, the narrowness of the present inquiry into prejudice encourages prosecutors to "game the system," by signaling that courts will not view most transgressions as sufficiently serious to require dismissal of charges or a new trial.

¹⁶² Cf. Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 Wm. & Mary L. Rev. 2209, 2236-60 (2003) (discussing political and institutional factors that tend to broaden the scope of criminal liability under federal statutes); Richman, *Agents and Their Prosecutors*, supra note __ (discussing institutional incentives of prosecutors and other law enforcement officials); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001) (discussing convergence of interests between legislators and prosecutors that broadens scope of criminal law).

¹⁶³ See Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, in BEHAVIORAL LAW AND ECONOMICS 13, 46 (Cass R. Sunstein ed., 2000) (discussing individuals' tendency to heavily discount future costs); cf. David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q. J. Econ. 443 (May, 1997) (analyzing how individuals use "commitment mechanisms" such as insurance policies or savings plans to remedy tendency to unduly discount the future); Terry O'Donoghue & Matthew Rabin, *Doing It Now or Later*, 89 Am. Econ. Rev. 103 (March, 1999) (analyzing "present-biased preferences").

¹⁶⁴ See Alschuler, supra note __, at 668 ("If the courts would begin to exhibit a working commitment to the ideals of prosecutorial dignity and impartiality, the present volume of misconduct... could be reduced – simply because prosecutors do care about retrials and lost convictions").

Given this combination of a heightened risk of false negatives and asymmetrical incentives for prosecutors, courts should adopt a conclusive presumption of prejudice regarding a pattern of informational overreaching. The concerns animating this change dovetail with the concerns that drive cases, such as the discriminatory selection of grand jurors, where such a presumption currently applies.¹⁶⁵ In the current cases where a presumption holds, the Court has found a serious risk that the practice in question will compromise the integrity of the justice system or permit the exclusion of a particular group.¹⁶⁶ Taken together, the practices comprising informational overreaching raise similar risks, permitting the government to seek to skew the outcome of adjudication and “poison the well” of public opinion against groups the government deems to be unsafe.¹⁶⁷ A presumption of prejudice would address the heightened risk of false negatives and asymmetry in prosecutors’ incentives, encouraging prosecutors to disclose more to the defense and the court and say less to the press.

A presumption of prejudice would dictate that when a pattern of informational overreaching by the prosecution has arisen, courts would dismiss charges precipitated by the pattern, or order a new trial in response to abuses that occurred in the initial trial. Courts would view examples of informational overreaching in combination. For example, instead of undertaking a discrete analysis of issues of failure to disclose and excessive extrajudicial comments, the court would view such incidents as reflecting an institutional trend toward overreaching. Such an institutional perspective would place a priority on shaping the ex ante

¹⁶⁵ See *Vasquez v. Hillery*, 474 U.S. 254, 260-64 (1986).

¹⁶⁶ *Id.*

¹⁶⁷ See *supra* notes ___ - ___ and accompanying text.

incentives of prosecutors to deter future transgressions. Based on such an institutional analysis, a court would view the informational overreaching in *United States v. Koubriti*,¹⁶⁸ including the multiple incidents of inappropriate pretrial publicity on the part of the Attorney General and the withholding of the letter calling into question the veracity of the government's chief witness, as warranting a new trial.¹⁶⁹

A presumption of prejudice in cases involving a pattern of informational overreaching would have a useful *ex ante* effect, encouraging the prosecutor to deliberate more extensively. Such a shift to an *ex ante* institutional perspective would entail costs. If prosecutors failed to internalize the *ex ante* guidance they received, defendants whose factual guilt was not open to question might go free. The benefit of such an institutional approach, however, is that sending a clear message minimizes the chances that society will incur those costs.

The Supreme Court invoked this calculus in *Miranda*, when it abandoned the atomistic inquiry about the voluntariness of confession in favor of a clear prophylactic standard.¹⁷⁰ The Court acknowledged that there might be cases where a confession obtained in violation of

¹⁶⁸ See Case No. 01-80778, 2003 U.S. Dist. Lexis 22529 (E.D. Mich. Dec. 16, 2003) (determining that Attorney General violated court's order, but declining to initiate further proceedings to determine whether Attorney General was guilty of contempt). The *Koubriti* defendants' motion for a new trial is pending as of the time of the writing of this article. See Serrano, *supra* note __.

¹⁶⁹ Such a presumption would also entail modifying or overruling a series of precedents. See, e.g., *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (harmless error rules applies to grand jury proceedings); *United States v. Williams*, 504 U.S. 36 (1992) (judicial supervisory power does not extend to dismissing case because of alleged prosecutorial misconduct before grand jury, when alleged misconduct does not constitute violation of constitutional guarantees); cf. Kamin, *supra* note __ (arguing against utility of harmless error rule); Nicki Kuckes, *Grand Jury Independence and Other Legal Fictions* (unpublished manuscript on file with the author) (critiquing Supreme Court's view).

¹⁷⁰ See *Miranda v. Arizona*, 384 U.S. 436, 457 (1966).

Miranda was voluntary, given the totality of the circumstances.¹⁷¹ However, the Court viewed excluding a confession in such a case as salutary, in light of the Court’s overriding objective of outlawing use of the “third degree” in custodial interrogations. The Court recognized that an ex ante institutional remedy would offer much-needed clarity to both defendants and law enforcement. Indeed, as the Court recognized in re-affirming *Miranda* recently, the clarity of an ex ante perspective aids law enforcement in the discharge of its obligations, by promoting certainty and predictability.¹⁷² A presumption of prejudice in cases involving a pattern of informational overreaching would accomplish the same goal.¹⁷³

C. Requiring Organizational Integrity Instead of Subjective Good Faith

As a third and final step, an institutional approach would replace the bad faith standard for violations of court orders by prosecutors with a standard that focuses on structural safeguards. Courts considering sanctions for violations of court orders have often insisted on a “smoking gun” that demonstrates malicious intent.¹⁷⁴ However, this subjective test asks the

¹⁷¹ *Id.*

¹⁷² See *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

¹⁷³ Another important counter to informational overreaching is taking the existing standard of prejudice seriously. For a welcome step in this direction in a terrorism case, see *United States v. Moussaoui*, 282 F. Supp.2d 480, 482-87 (N.D. Va. 2003) (striking government’s notice of intent to seek death penalty and precluding introduction of evidence relating to events of September 11 in case of alleged “twentieth hijacker,” where government declined to make available to defendant person in government custody who could have provided exculpatory testimony); cf. Margulies, *Judging Terror*, supra note __ (praising ruling in *Moussaoui*, while arguing that it do not go far enough in eradicating prejudice to defendant).

¹⁷⁴ See *In re Smothers*, 322 F.3d 438 (6th Cir. 2003) (vacating finding of contempt after noting that basis for finding – legal aid attorney’s lateness for hearing – could have been accidental, inadvertent, or negligent); *United States v. Cutler*, 58 F.3d 825 (2d Cir. 1995) (citing

wrong questions of large institutions such as the Justice Department, where officials can invoke the scale of the organization to minimize their own role.¹⁷⁵ Focusing on the adequacy of structural controls against informational overreaching would reframe the analysis to promote greater accountability.

In other settings where organizations dominate, courts have promoted institutional forms of accountability. For example, the Supreme Court has indicated that corporations can defend themselves against claims that they knowingly tolerated sexual harassment of their employees by establishing procedures for dealing with sexual harassment complaints.¹⁷⁶ In the class action context, where plaintiffs' attorneys may have conflicts of interests because of the divergent situations of class members, courts have required the establishment of sub-classes to more effectively represent those disparate interests.¹⁷⁷ In the area of funding of terrorist groups,

defense attorney for contempt after repeated violations of court order limiting extrajudicial comments).

¹⁷⁵ Cf. Ted Schneyer, *Professional Discipline for Law Firms?*, 77 Cornell L. Rev. 1 (1992) (advocating entity-based approach to disciplinary issues involving participants in law firms); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. Rev. 721, 775 (2001) (suggesting appropriateness of Schneyer's approach for addressing patterns of misconduct within prosecutor's offices); see also Green & Zacharias, *supra* note __ (discussing federal courts as sources of professional discipline for prosecutors); but see Alschuler, *supra* note __, at 670-73 (viewing professional discipline imposed by traditional authorities, such as state bar association grievance committees, as ineffective tool for regulation of prosecutors); Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 17 Geo. J. Legal Ethics 1 (2002) (expressing doubts about fairness and efficacy of Schneyer's model); see generally Daryl J. Levinson, *Collective Sanctions*, 56 Stan. L. Rev. 345 (2003) (discussing history, utility, and fairness of collective sanctions in legal culture).

¹⁷⁶ See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-08 (1998) (discussing importance of a corporate sexual harassment policy as a defense to sexual harassment claims).

¹⁷⁷ See *Amchem Products, Inc. v. Windsor* 521 U.S. 591 (1997); cf. Margulies, *The New Class Action Jurisprudence and Public Interest Law*, *supra* note __.

federal statutes, regulations, and guidelines encourage charities to perform due diligence inquiries before making contributions.¹⁷⁸ Each of these structural measures creates incentives for greater organizational vigilance, and penalties for abdication of responsibility.

In addressing issues of prosecutorial misconduct, federal courts already have inherent and supervisory power to deter informational overreaching, even in the absence of willfulness or bad faith.¹⁷⁹ The touchstone for exercise of the court's inherent power is necessity.¹⁸⁰ On occasions

¹⁷⁸ See U.S. Dep't of the Treasury, *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities*, available at www.treasury.gov/press/releases/docs/tocc.pdf (emphasis in original) (for purpose of promoting compliance with Antiterrorism and Effective Death Penalty Act (AEDPA), 18 U.S.C. 2339A(b) (2002), describing prophylactic steps recommended for domestic charities regarding foreign recipients of aid, including searching the internet and other public sources of information, requiring detailed reports from recipients, requiring list of organizations which recipient assists or with which recipient does business, and when possible conducting audits of major recipients); cf. Margulies, *Uncertain Arrivals*, supra note __ (arguing that careful regulation of terrorist financing can promote organizational accountability, while cautioning against potential for government overreaching); Margulies, *Regulating Lawyers for Persons Accused of Terrorist Activity*, supra note __ (same); Cole, *Enemy Aliens*, supra note __ (expressing doubt about constitutionality of statute barring "material support" of terrorist organizations); see also *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000 (7th Cir. 2002) (upholding constitutionality of prohibition on material support); *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1135 (9th Cir. 2000), cert. den. sub nom *Humanitarian Law Project v. Ashcroft*, 532 U.S. 904 (2001) (upholding statute, while holding that certain terms were vague as applied); *Humanitarian Law Project v. Ashcroft*, Case No. 03-6107, 2004 U.S. Dist. Lexis 926 (C.D. Ca. Jan. 22, 2004) (holding vague as applied bar on "expert advice or assistance" to designated terrorist organizations in USA PATRIOT Act). Scholars have made similar arguments about the effect of liability rules on corporate responsibility. See Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 Yale L.J. 443 (2001) (arguing that multinational corporations should be held accountable for human rights violations resulting from enterprises over which they have control).

¹⁷⁹ See, e.g., *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988) (holding prospectively that court could exercise supervisory power to suppress evidence yielded by sham grand jury subpoena to represented target of investigation); *United States v. Ming He*, 94 F.3d 782 (2d Cir. 1996) (holding based on court's supervisory authority that absent express waiver, prosecutor could not "debrief" cooperating witness without counsel being present); cf. Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433 (1984) (arguing for clarification

when a lack of adequate alternative remedies makes exercise of inherent authority substantially related to the enforcement of the court's orders and the integrity of judicial proceedings, necessity can authorize exercise of this authority without a "smoking gun" that indicates the presence of bad faith.¹⁸¹

In the *Koubriti* case,¹⁸² the court could have found that the Attorney General's failure to implement workable procedures for preventing unwarranted public remarks required some form of structural relief. At the very least, the Attorney General failed to exercise appropriate supervisory responsibility over Justice Department personnel, after committing himself through his delegates to exercise such supervision.¹⁸³ Even without a finding of bad faith, the court could have held that the failure to implement sound procedures constituted sufficient evidence that the Attorney General did not view the court's order with sufficient seriousness,¹⁸⁴ and did not place a

of judicial authority and linkage of supervisory power to violation of specific constitutional and statutory provisions); Etienne, supra note __, at 2147-51 (discussing contours of supervisory and inherent power of courts); Green and Zacharias, supra note __ (same); but see Gleeson, *Supervising Criminal Investigations*, supra note __ (criticizing *Hammad* and *Ming He* as excessive and largely ineffective exercises of judicial power).

¹⁸⁰ See *Eash v. Riggins Trucking*, 757 F.2d 557, 563 (3d Cir. 1985) (noting that courts can interpret "necessity" broadly to include power that is "highly useful in the pursuit of a just result"); cf. Green & Zacharias, supra note __, at 405 (discussing judicial remedies for prosecutorial misconduct under court's inherent authority).

¹⁸¹ See *Republic of the Philippines v. Westinghouse Electric Corp.*, 43 F.3d 65, 74 n. 11 (3d Cir. 1995) (asserting that express finding of bad faith was not prerequisite for imposition of sanctions under court's inherent power).

¹⁸² See *United States v. Koubriti*, Case No. 01-80778, 2003 U.S. Dist. Lexis 22529 (E.D. Mich. Dec. 16, 2003).

¹⁸³ *Id.*

¹⁸⁴ This finding would have effectively distinguished *Koubriti* from an earlier case where a federal appeals court had vacated a contempt finding against the then Attorney General. See In

high priority on compliance.¹⁸⁵

The structural safeguards for Attorney General Ashcroft's Justice Department¹⁸⁶ could include measures that would deter future informational overreaching. The court could invoke its supervisory and inherent power to require the Attorney General to produce a report detailing the procedural history of the apparent violations, and suggesting methods in which officials could better implement Justice Department guidelines and ethical mandates in the future.¹⁸⁷

Alternatively, the court could appoint a Special Master to make recommendations to the court on this score.¹⁸⁸ Prophylactic procedures could include a requirement that the line prosecutor in a terrorism matter consult in writing with a supervisor and with a representative of the Attorney

re Attorney General, 596 F.2d 58 (2d Cir. 1979) (vacating District Court's contempt finding on grounds that Attorney General had asserted colorable legal claim of privilege regarding court's earlier order, and that court had failed to consider less intrusive means of ensuring adequate discovery for plaintiffs).

¹⁸⁵ This inference is even more compelling based on the Attorney General's very prominent efforts in other contexts to exert heightened control over decisionmaking within federal prosecutors' offices. See *supra* notes ___-___ and accompanying text (discussing Attorney General's efforts to discourage plea bargaining, increase requests for the death penalty, and report judges who made downward departures from the Sentencing Guidelines).

¹⁸⁶ For other proposals with a structural slant on prosecutorial conduct and discretion, see John Q. Barrett, *The Leak and the Craft: A Hard Line Proposal to Stop Unaccountable Disclosures of Law Enforcement Information*, 68 Fordham L. Rev. 613, 633 (1999); cf. Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. Rev. 893 (2000) (suggesting guidelines to inform exercise of discretion in cases involving federal prosecution of parents using interstate travel to evade child support obligations).

¹⁸⁷ See *In re Material Witness Warrant for Material Witness No. 38*, 214 F. Supp. 356, 363 (S.D.N.Y. 2002)

¹⁸⁸ See *Ex parte Peterson*, 253 U.S. 300, 312 (1920), cited in *Eash v. Riggins Trucking*, 757 F.2d 557, 563 (3d Cir. 1985) (noting that the court has inherent power to appoint an individual who can assist the court "in the performance of specific judicial duties").

General regarding disclosure of any material that could affect the credibility of a government witness. Regarding gratuitous pretrial publicity, the court could order that the Attorney General and subordinate Justice Department personnel pre-clear or file public statements with the court¹⁸⁹ or with relevant departmental offices, such as the Offices of Professional Responsibility or the Inspector General.¹⁹⁰

The court could also construe willfulness and bad faith with a less deferential stance toward the Attorney General. When a senior official with the resources at his disposal of the Attorney General has clear notice of a court order and nonetheless violates that order on two occasions, a finding of willfulness does not seem like much of a stretch. The Attorney General's

¹⁸⁹ See Brown, *supra* note __.

¹⁹⁰ Some structural remedies for informational overreaching might require a modification of the temporal and spatial limitations on judicial supervision of law enforcement. Usually, for example, a court's authority to order ongoing affirmative relief on the part of the prosecution terminates at the conclusion of the trial. In addition, in criminal cases a judge is usually limited to ordering relief in proceedings before him or her. In extraordinary cases, however, judges imposing affirmative relief on the prosecution have ordered that relief after trial, in order to prevent future misconduct. See *In re Material Witness Warrant for Material Witness No. 38*, 214 F. Supp. 356, 363 (S.D.N.Y. 2002) (in order to "make known the truth and deter future misconduct," court, after government moved to dismiss charges against terrorism suspect, ordered federal prosecutor to submit report on improper questioning of defendant); cf. *Willy v. Coastal Corp.*, 503 U.S. 131 (1992) (subsequent finding of lack of subject matter jurisdiction does not deprive court of power to impose sanctions under rule 11 of the Federal Rules of Civil Procedure); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (court can impose rule 11 sanctions even after a party's voluntary dismissal of an action); see also *United States v. Mechanik*, 475 U.S. 66, 69 (1986) (noting that district court, in case in which government had violated rule 6(d) of the Federal Rules of Criminal Procedure by presenting the simultaneous testimony of two government agents, "undertook to ensure future compliance with the one-witness rule by directing the Government to keep the court advised concerning compliance with Rule 6(d) in future criminal cases"). In addition, the special risk of a generalized climate of condemnation in terrorism cases, spurred by nationwide publicity, the common religious or ethnic background of the defendants, and the public's perception of an overarching national security threat may justify relief with a broader geographic scope.

mere avowals in *Koubriti* that his remarks were “inadvertent” should not be sufficient to defeat this inference. Nor does the Attorney General demonstrate the kind of clear insight into the problems of prosecutorial publicity that the court had a right to expect when he phrases his discussion of his remarks in conditional terms, describing how his “statements, however brief and passing, *could have been considered...* to be a breach of the Court’s Order.”¹⁹¹ A court’s refusal to even engage in further factfinding in this situation seems to place the Attorney General above the reach of the contempt power, able to compromise the integrity of the judicial process with impunity. Courts owe it to constitutional values to dismantle such a would-be monolith.¹⁹²

For this reason, the court in *Koubriti* should have considered at least requiring the Attorney General to personally appear in federal district court in Detroit, to show cause why the court should not hold him in contempt. The judge could have engaged in further fact-finding on

¹⁹¹ See *United States v. Koubriti*, Case No. 01-80778, 2003 U.S. Dist. Lexis 22529 (E.D. Mich. Dec. 16, 2003), at 41.

¹⁹² An institutional approach by courts would complement in-house sources of accountability already in place within the Justice Department that have addressed law enforcement excesses after September 11. For example, the Office of the Inspector General filed a report that severely criticized the government’s detention of over a thousand aliens in the months after the attacks. See Office of the Inspector General, U.S. Dep’t of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003). This report received extensive coverage in the press, and helped spur Congressional hearings into the detentions. Cf. William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 Harv. J. L. & Pub. Pol’y 665, 677-78 (2002) (discussing role of media coverage in promoting government accountability). Part of the problem with the detentions was the slowness of the Justice Department, particularly the Immigration and Nationalization Service (INS) to insist on receiving clearances from the Federal Bureau of Investigation indicating that a given detainee had no links with terrorism. See Office of the Inspector General, *supra*. The Justice Department has undertaken reform of its procedures to clear immigrant detainees in a more timely fashion and release them when appropriate. See Eric Lichtblau, *US Will Tighten Rules on Holding Terror Suspects*, N.Y. Times, June 13, 2003, A1.

such an occasion, asking the Attorney General if he was familiar with the Rules of Professional Conduct, federal regulations, and Department of Justice guidelines. Such questioning would have provided a better opportunity for the court to gauge the level of willfulness exhibited by the Attorney General, instead of restricting the judge to an optimistic reading of the lawyerly phrases in the Attorney General's guarded letter of apology. Indeed, to the extent that the letter was drafted by a lawyer or lawyers on Ashcroft's staff, the court's acceptance of the averrals made in the letter exacerbates the troubling tendency of this Attorney General to assert virtually plenary control over the Justice Department when that serves his agenda, but to shift responsibility to subordinates when confronted. An institutional approach by courts would stop this bureaucratic two-step, sending a clear message that responsibility starts at the top.

CONCLUSION

Even in ordinary times, prosecutors and law enforcement personnel benefit from the opportunity to control the disclosure, distribution, and interpretation of information. At the very beginning of an investigation, prosecutors can select the facts that support issuance of an arrest or search warrant. Later, when prosecutors draft an indictment, they can fashion a narrative that moves their agenda, and casts the defendant in a narrative of their choosing. Faced with the obligation to disclose to the defense information that may contradict or undermine that chosen narrative, prosecutors *know* what evidence they have, while the defense and the court are to a large extent dependent on the prosecutor's good will, professionalism, and commitment to doing justice.

In ordinary times, courts rely on a relational paradigm to reduce the likelihood that

prosecutors will abuse their power over information. Courts invoke a shared stake with prosecutors in the integrity of judicial proceedings. Prosecutors who flout this mutual dependence, for example through inappropriate and excessive extrajudicial comments about a pending case, receive informal sanctions such as mention in published opinions, signaling the prosecutors' imperilled status in the relationship. For line prosecutors, who are often young lawyers building reputations, such informal sanctions act as a valuable source of discipline and accountability. In this sense, the relational paradigm supplements the relatively mild case law on excesses relating to information, which often hinges on a finding of actual prejudice to the defendant or bad faith on the part of the prosecutor.

In high-profile and national security cases, prosecutors face extraordinary pressures to control the flow of information to courts, defendants, and the public. Senior officials embrace a political agenda that has little room for the nuances implicit in the prosecutor's duty to do justice. Line prosecutors respond to this new set of institutional imperatives. The result is the erosion of, 1) the requirement that the government show a particularized need for coercion or restraint; 2) the obligation to share with the defense exculpatory evidence or information directly discrediting the testimony of government witnesses; and, 3) the obligation to refrain from gratuitous public comments about defendants pending or during trial. This Article refers to this erosion of three core safeguards as informational overreaching.

The relational paradigm provides scant protection from informational overreaching. Senior officials do not view judges as a key constituency, particularly in times of crisis. The judgment and discretion of line prosecutors, tempered in ordinary times by interaction with judges, responds far more to pervasive signaling from higher-ups to keep information close to

the vest and seize every opportunity to shape the public debate. In times of crisis, therefore, the relational paradigm resembles what its critics have always viewed as a posture of “helpless piety” rather than effective regulation.

To respond to the failure of the relational paradigm in times of crisis, courts should adopt an institutional approach to curbing informational overreaching. Under the institutional paradigm, courts become a counterweight to the excess of prosecutors. Abandoning the cozy sanctions of the relational approach, the institutional paradigm seeks wholesale reform of prosecutorial practices, much as courts have reformed state institutions, such as prisons, psychiatric hospitals, and school systems. The institutional approach also draws authority and inspiration from the *ex ante* approach to deterring law enforcement misconduct that the Supreme Court modeled in *Miranda v. Arizona*.

An institutional approach has three core components. First, to affirm particularity, courts should require greater comprehensiveness in affidavits supporting the issuance of warrants. Building on *Franks v. Delaware*, the courts should require specificity, rejecting amorphous government justifications based on an individual’s failure to come forward or immigration status. Second, courts should adopt a presumption of prejudice in cases involving a pattern of governmental misconduct. A presumption reduces both the risk of residual prejudice unreached by existing mechanisms such as questioning of jurors, and the asymmetries in prosecutors’ incentives that encourage overreaching in times of crisis. Finally, the institutional approach stresses organizational integrity over mere subjective good faith, in order to encourage the development of systems of accountability within law enforcement.

An institutional approach would jettison the comfortable pieties of the relational

paradigm, and reverse long-standing trends in criminal procedure, such as the rise of the harmless error doctrine. In this sense, the institutional approach promises a path for courts that is challenging, if not quixotic. To avoid this arduous path, it is tempting to view informational overreaching as a momentary aberration. However, when systemic flaws in law enforcement jeopardize the effective and fair prosecution of terrorist cases, such quiescence is a luxury the law cannot afford. An institutional response recognizes the scope of the problem, and commits courts to protection of the constitutional values endangered by informational overreaching.