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FOREWORD: FROM THE CRUCIBLE OF CONSTITUTIONAL CRISIS

Karen R. Duncan†

...justice is truth in action.

Benjamin Disraeli

Our shared hope is that our courts are just and provide open doors to serve justice for all. This vision springs from a primordial well deep within us. If it is not imbedded in our very DNA, it is surely imbedded in our souls; it transcends party politics, photo ops, and sound bites, driving us to pursue true justice, however we each define that glorious and auspicious concept. The pursuit of justice was the seed from which this great nation emerged. The pursuit of justice was the sunshine that nurtured and provided the shelter that protected our democracy in times of stress and upheaval. As our country continues to face stress and discord, the pursuit of justice can and must remain our guiding and unifying principle. However, the pursuit of justice is in jeopardy. Our criminal justice system has reached a boiling point, fueled by short term cost-cutting and a political ambivalence, which sacrifices the pursuit of truth in our criminal justice system until such time as justice is deemed “affordable.”

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The author would like to acknowledge the discipline and dedication of Adam Pabarcus; his creativity and energy moved this volume from a good idea to an inspired reality. The author would also like to acknowledge the lifelong contribution of her parents, Leslie and Gladys Lewis, whose eight decades of community service both in word and in deed continue to touch countless lives in this state and beyond.
It is from within this crucible of Constitutional crisis that this edition was forged. For both practitioners and community members, the carefully crafted articles that follow illustrate how justice—constitutionally mandated fundamental fairness—is a complex tapestry constantly being woven by precious but contrasting threads of uniformity and discretion, predictability and responsiveness, and case by case personalized resolution, but striving for consistency blind to race or notoriety. Traversing the tightrope between uniformity and discretion, Minnesota State Public Defender John Stuart and Chief Information Officer Robert Sykora author the lead article in this volume with an analysis of the Minnesota Sentencing Guidelines. They make the case that the Minnesota Sentencing Guidelines have failed to provide “just deserts” and proportionality. They advocate for the adoption of evidence-based practices because they would not only be more effective in reducing recidivism rates, but also in reducing costs.

The next two articles focus on the Federal Sentencing Guidelines. Wes Porter draws on lessons learned in his many years as an Assistant United States Attorney and in his work with the United States Department of Justice to analyze the effects of *Booker*. He argues that the post-*Booker* norm has to result not only in increased judicial discretion, but also in providing greater predictability and informed decision making for the defendant through binding plea agreements under Federal Rule of Criminal Procedure 11(c)(1)(C). He shows that the renewed role of binding plea agreements could give rise to sentences defendants believe to be more uniform, proportional, and fair. Next, Benjamin Holley examines whether in the wake of *Booker* the use of post-crime Federal Guidelines violates the *Ex Post Facto* Clause. After presenting the Federal Circuit split on this issue, Holley concludes that the *Ex Post Facto* Clause is not violated because post-crime Guidelines do not significantly increase the likelihood of a harsher sentence.

If it is true that justice is truth in action, the converse is also true: inaction creates injustice. We live in a court system that has placed one in every eight adults in Minnesota on some kind of court supervision, according to the Pew Research Center. Yet, criminal courts are idled every day for want of additional public defenders. Is justice served for those who stand accused, for alleged victims and other witnesses, prosecutors, court staff, judges, and tax payers as the system sits paralyzed, watching wasted tax
dollars pile up while waiting for a Constitutionally required attorney for the accused? There is no vibrant democracy without access to functional courts. The third branch of government, the courts, runs lean on just two percent of the Minnesota State budget. Functional courts require skilled, dedicated lawyers to deliver justice. The most effective way to make the dollars dedicated to the criminal justice system go farther in enacting justice is to adequately fund those whose lonely and unlovable duty it is to represent more than ninety percent of the accused caught up in that system.

The articles next shift to analyzing specific issues within public defense. Susan Herlofsky and Geoffrey Isaacman tackle the perpetual problem of adequately funding public defense. They demonstrate that indigent defense requires a dedicated funding source. They promote the implementation of a five-cent tax per drink of alcohol because this would generate enough revenue to meet Minnesota’s constitutional obligations to indigent clients. Offering a different perspective, Judge Randall Slieter and Elizabeth Randa begin with the proposition that there is no “new” money for the public defense system. In order to address its long-term financial problems, the public defense system should move towards decentralization to allow for greater flexibility and efficiency in the use of existing resources. William Bernard approaches the problem by analyzing the practical difficulties involved with the implementation of the public defender eligibility standards that are used throughout Minnesota. He proposes that the procedure in determining eligibility for a public defender should be reformed to ensure stronger compliance with the statute and to make the process more efficient.

There are hazards in defining what is just only by what is deemed affordable. Does providing the wealthy with personal access to the court while the poor are heard via a depersonalized blue television screen provide equal justice? Emily Babcock and Kate Johansen take on the issue of expanding the use of interactive video teleconferencing (ITV) in Minnesota criminal proceedings. While they are optimistic about the expansion of ITV as a partial solution to an underfunded court and providing greater flexibility for all participants in criminal cases, they caution that its use could also work against the ultimate goal of administering justice fairly. However, they conclude that attorneys and judges who are mindful of the pitfalls can effectively use the benefits ITV offers.
Beyond staffing the defense table, justice requires wise counsel from those with special expertise. Christine Funk and Evan Berman observe that eyewitness identification and forensic science are both subject to error and have the distinct capacity to overcome the burden of proof beyond a reasonable doubt. As a result, they argue that legal practitioners involved in such cases should be required to have a basic competency and education in forensic science. Going from the forensic report to the coroner’s report, Julie Jonas advocates for the independence of county medical examiners from the county attorney’s office. She takes the reader through the case of Nicole Beecroft, who was convicted of stabbing to death her newborn baby over one hundred times. The case hinged on the testimony of the medical examiners: there was conflicting evidence as to whether the baby was stillborn or alive. For defendants to have an equal opportunity to present their case, medical examiners must be free to give their objective opinions.

Justice requires that people have the opportunity to work toward true rehabilitation and integration back into productive society. Robert Sykora authors a second article, in which he explores the consequences and barriers that stem from the unregulated commercial data mining of criminal justice records. He presents the problems that data mining practices cause, the current Minnesota statutes that apply, how other states address data mining, and concludes with steps Minnesota can take to better deal with commercial data harvesters and their use of data from the criminal justice system to ensure an accurate and fair use of this data.

John Mahoney and Cindy McCollum illustrate how subsequent consequences live on after completion of court ordered terms of punishment and rehabilitation. They take the story of DW and show how prior juvenile convictions are subsequently being used to enhance adult criminal charges. They show the problems that can arise when the reliability of the juvenile adjudications are called into question and conclude that such practices violate the Due Process Clause because the State must prove the fact of conviction and the reliability of the adjudication.

Defendants’ rights face further erosion by the State’s increasing invocation of “forfeiture by wrongdoing.” Jodie Carlson examines the case of State v. Jones and the issue of forfeiture by wrongdoing. She tackles the question of when a defendant’s behavior is bad enough to result in the forfeiture of the right to
counsel and concludes that the behavior must clearly attempt to manipulate or delay a trial.

Finally, Joanna Woolman analyzes the United States Supreme Court case *Padilla v. Kentucky*, which imposed the duty on criminal defense attorneys to advise their clients of the subsequent collateral consequences regarding deportation that follows a guilty plea. Direct consequences enumerated by the court at the time of sentencing are often only a part of the far reaching and long term negative effects of convictions. She advocates expanding this duty to advise to also include guilty pleas that have sanctions involving child custody, disqualification for licensing by the Department of Health and Human Services, and registration as a sex offender.

If justice is truth in action, do actions such as those evaluated in this volume support the truths our forefathers held to be self-evident? Whatever the reader concludes regarding any individual topic, these articles are a clear call to all of us to act to protect the pursuit of justice, for it is in the pursuit of greater justice that we obtain the true ideals upon which our country was founded.