

MAKING AMENDS

Episode 3 – We As Prosecutors Have a Lot of Power

Herbert: So, I'm curious to hear you reflect on accountability. What does that mean? What does that look like? How do you kinda know it when you see it?

Adrienne: I think accountability means acknowledging what was done, and why it was done, and accepting whatever punishment you receive. And it's really hard to describe, but you know it when you see it. That you can just see it in their eyes, that they're just like, this is different for them. And they kind of understand now what they've done and how to correct that behavior, how to change that behavior going forward.

Narration: Accountability. It's a word used often when we discuss our response to violence. If a prosecutor secures a conviction for a violent crime, many of us hope that some form of accountability results. As noted here by Adrienne, a deputy district attorney for Multnomah County in Portland Oregon, accountability often means that the perpetrator sees the harm they caused, and they seek to change their behavior. Her colleague, Clayton, understands accountability in a similar fashion.

Clayton: For me, accountability is not just punishment. Accountability is recognizing the harm that you have done, and then self-reflection on how you can then move forward to not do this again, or better yourself. How can you, to the best of your ability, fix the harm that you have done?

Narration: But how commonly does this form of accountability occur after someone has committed a violent act? Are Adrienne and Clayton, as prosecutors, overseeing a process that makes true accountability a likely outcome? And how could we figure that out?

Well, one way to explore that is by asking people who are incarcerated about their experiences of being prosecuted and of serving time. And that's exactly what we want to do. In this episode, we will focus on what it's like to be prosecuted. When someone like Adrienne or Clayton decides to charge you for a violent crime, and as they seek to convict you, what does that mean for you? And does that experience of being prosecuted prompt the type of accountability that Adrienne and Clayton are seeking?

This is season two of Making Amends: The Prosecutors Go to Prison. I'm Steve Herbert. In this series, we're going to follow a group of prosecutors from Portland, Oregon who agreed to enter a prison there to engage in several conversations with six incarcerated men. Their goal was to consider crimes of violence – why they happen, what harms they cause, and how we should respond to them. What can they learn from each other, and what can we learn from listening in?

Episode Three: We As Prosecutors Have a Lot of Power

Herbert: So how did you understand the behavior of the prosecutor at the time?

Jacob: So, I think, I didn't really take into account the fact that he's trying to keep the public safe. You know, all I saw was that he was trying to put me away for life.

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Narration: I am talking with Jacob, who we met in episode one. As you may recall, he was charged with first-degree murder for the role he played in the death of a man in a park in Pendleton, Oregon. He was 17 and heavily drunk at the time.

Jacob: I guess I assumed that like he believed every one of us in the jail were guilty automatically, and that he was just gonna throw the book if he could at us and things like that. Yeah, to be defined by just one moment, you know. And I look back now and I think, I'm never defined by all my best moments or my worst. We're all, you know, made of a thousand different stories and things like that of our lives. But yeah, it felt like he wasn't taking any of that into account. Yeah, I just saw him as against me and he didn't even know me.

Narration: Because our criminal process is adversarial, any criminal charge is defined as the state versus the alleged offender. On one side, you have the prosecution. They're seeking a conviction on behalf of the state. And on the other side is the defendant. Because the prosecutors are so powerful, defendants are given several rights to try to protect themselves. As just a few examples: they are entitled to a lawyer, to a jury of their peers, and to contest any evidence that the state presents. And the prosecution is required to prove their case against the defendant beyond any reasonable doubt. So, the process appears to give the defendant a lot of power. And if the defendant is convicted, then presumably the certainty of their guilt will lead them to take accountability for their actions. At least that's the ideal.

But is this acceptance of accountability the reality? I thought it would be informative for the prosecutors to learn what the incarcerated men experienced as their cases preceded. Because I knew Jacob's story, I turned to him one morning in the circle. He quickly drew the group's attention to the number of crimes for which he was charged.

Herbert: Jacob, what was your experience? I mean, you were charged at 17. As you entered the criminal process, how did you feel approaching it?

Jacob: So at first, I felt, I was pretty young. And so like, probably everybody, I didn't understand the law, at all. It was strange, because a man named William Brown was murdered. And when they charged me, they charged me with two counts of aggravated murder, a count of first-degree murder, a count of robbery in the first degree and a count of theft in the third degree. I didn't understand how they could give me three counts of murder for one single person being murdered. You know, it felt completely like the world was against me.

Narration: This experience of being charged with multiple crimes from a single incident was shared by many of the men. In fact, it was something that Davorea wanted to learn more about. So, he asked the prosecutors directly. Leslie responded to him first, followed by Kirsten.

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Devorea: So, question: So what's the purpose of you guys charging somebody with ten different charges?

Leslie: Legally, there's notice pleading. So that means we're required to provide notice to a criminal defendant of every theory we would proceed on at trial. So a lot of the times, like, you might commit a Rob One, and there's lots of different ways to commit a Rob One, right. And so, if your conduct meets all the different ways you could do it, we're required legally, if we want to proceed on every theory at trial, to charge that charge specifically. So, it might look like count one, two, and three are all Rob One, and you only did one robbery, right? We're not saying you did three robberies. We're just saying like, at trial, we're putting you on notice. We're gonna proceed on each theory of the robbery. I don't say to myself, "I'm gonna stack the charges because, you know, that's a good idea to do." I don't even think of it as stacking.

Kirsten: Well, it doesn't get us anything. So there's a misperception that you can get consecutive sentences in that scenario. And what's happening is the jury has to be unanimous in their verdict so they—every theory that Leslie's talking about, that we could bring, they have to say, "Okay, yes, we agree that you've met your burden on this theory and we find this person guilty. We don't agree that you've met your burden on this other theory." But either way, whether they say not guilty on some or guilty on all of them, they all merge. They become a single conviction at the time of sentencing.

Herbert: So Jacob, you were charged—you described earlier of being charged multiple—you know, for multiple offenses for one thing. So I'm curious how you're absorbing what Leslie and Kirsten are telling us.

Jacob: So I agree there's a misperception about what it would mean. But yeah, so they charged me with multiple counts of murder and like I didn't understand it. But I always assumed that they were gonna just give me, you know, three life sentences if they take me to trial and all that. So I think that misconception gives a lot of—it makes people scared, so a lot more plea bargains are taken.

Narration: So, Jacob, fearing he might get multiple life sentences, took a plea bargain; he chose the sure thing of a 25-year sentence, in exchange for a plea of guilty to first degree murder. Gerard told me that he had a similar experience when he was charged with attempted murder.

Herbert: So, I'm curious about your experience with prosecutors. Can we go back to the first time you were charged? How did that work?

Gerard: It was essentially a drug deal gone bad. And I was selling weed. Somebody tried to rob me, so I shot them. And they had a conference with the DA, my attorney, and the judge. And the judge wrote "220" on the chalkboard, and sat down and started talking. And I'm looking, like what is the 220? I kept looking at that. Is that what time we're supposed to be out of here, at 2:20? And she said, "That's how much time you're facing." And I said, "220

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what?" "Months." I did the math, said, "Whoa!" Instantly my mind went to my kids, like they'll be grown.

Herbert: This is for attempted murder?

Gerard: Yeah. So, I was like, man, that's a lot. I had two assault ones, two rob twos, just a whole bunch of charges. And I don't know the law. All I know is my bail is a million dollars, so that means it's something, and there's a list of charges. So I don't know the law, I'm like, "Dang! And you said how much time?" I was guilty. So I took a plea.

Herbert: So how do you understand the fact that you got so many charges?

Gerard: I understand it to be the way the system works. Overcharging. It's just a scare tactic, to me.

Herbert: Your theory is that you got charged with so many crimes to provide you an incentive to accept the plea?

Gerard: I believe everything that I experienced while I was incarcerated that time was geared toward a plea. The whole time, the conditions in the county are far worse than any penitentiary you ever see. And everybody's telling you who's been to the penitentiary how lovely it is here and there, even the worst penitentiary. Not only that, but the time away from your family and away from real life is not as present in your mind as it was when you first came, so you kind of accepted the idea of prison. And then you just want to get it over with, man. And then you hear stories about people that went to trial and lost and got stretched out. You know, so the system is just geared toward people taking a plea. That's just the way it is.

Kirsten: The whole criminal justice system would come to a screeching halt if everybody exercised their right to trial. So there's just not enough judges and lawyers available. Over 95 percent of all criminal cases resolve with some sort of plea bargain. The offer of something less than you would be likely to get after trial to incentivize the person who's charged with taking the deal. Also, the saved expense of knowing there's not going to be any appeals, which are very costly. And then the certainty for the victims, if there are victims of a crime, that you don't have to be put through a trial, because it's very traumatic sometimes to sit through a trial. So there's a benefit to them frequently as well, if there isn't a trial.

Narration: What Kirsten said in the circle is right. Even if a criminal defendant has a right to a jury trial, they almost never exercise it. If you're a defendant, you never know how a jury trial is going to turn out. So you might just take a deal from a prosecutor; you agree to plead guilty to a lesser crime, in exchange for a shorter sentence than you would likely get if you're found guilty at trial. Recall Jacob accepting his plea deal even though he thought he deserved a lesser sentence. As Kirsten told the circle, this reality puts prosecutors in a strong position.

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Kirsten: With the plea bargain, I mean, we as prosecutors have a lot of power. Because we can look at the case, we can look at the person, we can look if there are multiple people. And so, you know, there is some ability to consider those things. Now, that does admittedly go away, largely, if you go to trial and lose. That's part of the problem with trial, that's a risk. You don't know what your fate is going to be.

Narration: In an interview with me, Kirsten made a connection between accountability and plea bargains.

Herbert: So a lot of people they use the term accountability.. And I'm just curious if that term resonates with you at all?

Kirsten: Well, um, mostly it means being held responsible for your conduct. It isn't, for me, tied so much to the sentence as it is to the guilty finding or the guilty plea. And a plea is always better, because there's just some built-in measure of accountability, right? I mean, for a family, even if they're dissatisfied with the outcome and wanted this person to be in jail forever, just hearing that person acknowledge what they did, for many people can be, be helpful, be cathartic in some small way. And, you know, going to trial and never hearing them actually express any remorse, or take accountability, take responsibility, can be maddening for people. And so for me, it's about really accepting what they've done, and acknowledging it.

Narration: What Kirsten suggests here makes sense, and may in fact occur in some instances. But Gerard suggested otherwise during one of our group conversations:

Gerard: If I admit guilt to a crime, then it's over. Let's lock him up. But as long as I'm innocent? The pleas get lighter, the closer you get to trial. So in a sense the system does inhibit accountability, because I need to hold on long as I can. And even though, in my mind, I know I did this. I need to not accept responsibility or accountability as long as I can, so I don't get locked up as long. And I think that's one of the flawed parts.

Narration: Just like Gerard, Messiah also did not end up in a place of accountability when he accepted his plea deal. That is largely because he believed that the prosecutors handling his case defined his behavior under the wrong assumption.

Messiah: They considered it a gang-related shooting. Without me even being a gang member, they considered it a gang-related shooting, which was amazing to me because I'm like, I don't get in trouble and I wasn't even living in Portland at the time. They just put me in this box, in this category of being a gang member because I was shot.

Narration: Messiah's story is a little confusing. It involves two separate shooting incidents. In the first one, he was the one who was shot. He was delivering something to an acquaintance in a part of Portland with which he was unfamiliar. He was seen by some others, who he thinks mistook him for a rival gang member. So they shot at him. He nearly lost his thumb in the process. The experience, he says, was traumatizing.

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Messiah: Some wires in me just kind of went loose in a way. To where I didn't even wanna leave the house. After I got shot, I didn't even leave the house for like a month. And I couldn't sleep. So, I'm in this paranoid state, I'm taking Xanax every day. And I'm flipping out on everybody. I'm feeling like I can't trust nobody. That just created that whole new person, that I just -- it was just scary.

Narration: In the second incident, Messiah was the shooter. He says that he was trying to purchase a used cell phone in a street-level deal. However, when he went to pull out his cash to give to the seller, another person approached him. Fearing that this other person was an accomplice of the guy who was selling the phone, Messiah thought that he was about to be robbed. Messiah pulled out the gun he was carrying, and fired a few shots as he scrambled to leave the scene.

Messiah admits that he should not have shot his gun. But also understands that he was skittish at the time.

Messiah: Me and this guy had a physical altercation. I tried to get away from him. And as soon as he chased me, I felt like he was trying to hurt me. So I just shot at him.

Narration: But Messiah was surprised in his interrogation after his arrest for shooting at this man. The questions he got were mostly about the earlier shooting.

Messiah: They cared about who shot me more than anything. They cared more about me being shot than the case at hand, that I came to prison for.

Herbert: Were they trying to get you to rat on people? I mean why, why did they care so much about the fact that you had been shot?

Messiah: Because they considered it a gang-related shooting. They basically used me getting shot as a card over my head basically. Because every time I went to court it was like a conversation of, "Look, like, you're looking at this, but it can be better. We just want to know who shot you."

Herbert: And how would you have rather it played out?

Messiah: Some type of empathy, you know? Don't come in with a hot attitude of what I did wrong, or, you know, what, what role I played in the situation. Come in and, "Are you alright? Okay we will give you a moment." You know, give me my time to process what's going on, because at that time, I felt I didn't get no time actually to really process what was going on.

Herbert: So, but they were, I assume, implying that if you give us some, a name will give you less time.

Messiah: Oh, most definitely.

Herbert: You understood that?

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Messiah: Yeah, I understood that.

Herbert: And so from that perspective, if you're not willing to play, then they're going to give you the 90 months.

Messiah: Exactly.

Herbert: So how did you feel when the conference was over?

Messiah: Uh I felt like I was it was time to go to prison, like reality was really just kicking in. Like, all right, you're on your way now, you know, time to start your next journey, next step.

Herbert: You weren't pissed off?

Messiah: I wouldn't say pissed off, I would say more so disappointed. I felt like my character was painted in a way that it shouldn't have been, as far as me trying to kill somebody. Because even to this day, even though I'm convicted of attempted murder and this robbery, I still will not tell someone that, yes, my intention was to kill this guy, even though I've already pled out to it. I'm still not going to say my intention to kill this guy because that was never my intention, you know.

Narration: So, Messiah left the plea bargaining process feeling like the prosecutors did not fully understand who he was, and what motivated his behavior. But this lack of understanding, perhaps, is another consequence of our adversarial process. And often it's the defendant who is holding back. Silence is one right that defendants often exercise. And that makes sense: any information they give to the prosecutors might be used against them. And, certainly, if they confess their guilt at the outset, then they have no bargaining power in plea negotiations.

What's called a judicial settlement conference is one place where this silence might be broken. In these conferences, prosecutors can talk directly to the defendant and explain the charges that have been filed. And it's potentially a chance for the defendant to share aspects of their story. A judge oversees these conferences, but it's not the judge who would preside over a trial, if that were to occur. The judge is there to help the defendant understand the sentence they would likely get if they go to trial and lose.

The prosecutors in the circle were very keen to understand how the incarcerated men experienced these conferences. Shannon was especially curious:

Shannon: It's one of the few areas I think in the criminal justice system where we actually get at the question of adversarial, right. That's the moment where that has an opportunity to be something else, and not entirely, but it's the closest I think we have to a collaborative part of the process. So that's why I'm so interested in it and why I'm so interested in hearing what other people's experiences are.

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Gerard: In my case, the judge wrote a large number on the chalkboard (laughter) and I kept staring at it, looking at it, like, "What's that?" And she said, "This is what you're facing." And my heart dropped. I said, "Okay, let's take the plea." Basically I made it up in my mind at that point, because the judge is supposed to be impartial

Kirsten: But they're trying to help you. And so the whole hope is that maybe that'll help you trust your lawyer more, if you have a judge explaining, "Hey, here is what I think this is what most judges might give you after trial." They have a special kind of knowledge that you might not have or maybe even the defense attorney. So at least you have that information.

Gerard: We don't see the judge as nonstate. And it's hard to even see our attorneys as non-state. We see it as us and then them.

Kirsten: Everybody's together.

Gerard: Yeah, you guys are all together.

Herbert: They're all on the same team.

Gerard: Yeah. Yeah.

Narration: In an interview with me, Adrienne admitted that she could understand why a defendant might see things in such an us-against-them fashion.

Adrienne: I think that makes sense. Especially for younger people involved in the system. Because the defense attorney is also a stranger to them. We have very good working relationships with a lot of the defense attorneys in the Multnomah County Bar. So I can imagine how terrifying it would be to come in, and have my defense attorney engaging in a conversation with the prosecutor, as if they're cordial. And so, yeah, I think that that's a reality that happens. And that's pretty terrifying, especially, you know, when we think about the various Law and Order shows that we have. And it's always defense attorney against prosecutor, and they're combating, and you can see that there's this struggle, and, you know, that defense attorney is, you know, always getting in an argument, and it's going super hard for their client. When in reality, a lot of times we are on this cordial thing, because we, you know, we work together so often, that we are friendly to each other. And, you know, is it better to be combative, so that the defendant sees that the defense attorney is going hard for them? And can trust them? Or is it better to have this cordial relationship, so we can actually exist, and, you know, coexist in the system? I don't know.

Narration: For his part, Messiah saw his conference as being all about getting to a plea deal as quickly as possible. He thinks the conversation was mostly being structured by pre-existing sentencing guidelines. He described his experience in the circle:

Messiah: When you sit there and you're having that settlement conference. It's like when we have that conversation, it's kind of pointless when there's no, there's really no set purpose for it, when there's nothing that good comes out of it. That's really not a

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settlement. That's just going off of, you know, "You don't want to go to trial do you? So let's just settle with this, what's on the grid."

Herbert: So you're just getting to a number and that's it?

Messiah: Getting to a number that's already on the piece of paper, basically.

Narration: So negotiations over plea bargains will result in a conviction and a sentence, but perhaps not much by way of accountability. What makes matters worse is what criminal defendants think they know about the process. Those who are charged with a violent crime often struggle to know where to look for advice. If they've been charged with a serious offense, then they are probably going to sit in the local jail while their case slowly grinds on. So, they'll spend lots of time talking to their peers in jail. But those peers might not be the best source of advice, as Jacob explained to the circle.

Jacob: It's weird that we don't trust our attorneys, but we're trusting all these people that we wouldn't trust to watch our dogs, you know. I mean, it's, it's like, "Why am I trusting the wrong people?" So I mean, being locked up, maybe made it harder, because then you know, you're getting this mindset from all these people who are also broken in the same ways that you're broken and all that, without a lot of access to people that are healthy.

Herbert: Josiah, what do you think?

Josiah: Same thing. When I was in county, you have to be able to teach yourself and that's not an easy thing. It takes you guys years of school, of being taught law. And you're expected as 19, 18, 17, to be able to teach yourself law, to understand. Because when you go in, especially if you get a public defender, right? For the most part, you're told by everybody in county, like, this is a public defender. They don't care. What he's looking for, he's looking for a plea to get to the next case. Especially in overcrowded places like Multnomah, where there's a lot of cases to be tried and there's just not enough time. Let's get this dude a plea, get him out. I felt like they didn't even care.

Kirsten: You know what's interesting: I hear from all of you is the lack of trust, right? There's a lack of trust in the system and a lack of trust in your lawyers, because you're all trying to become legal experts, whereas that's not your job, right? If I got to a doctor, I don't try to learn how to do a surgery. I go to the doctor and I get their opinion on how to treat this problem, "Okay, surgery, I trust you, is the way to go." You want to have control of your life. That's why people take a plea bargain, because they want to have control, and they don't want to leave it up to whomever – judge or jury.

Josiah: Or they're scared, for sure, because a lot of people in county are scared. I've met so many people that are just scared.

Kirsten: But they're scared of the unknown. They're scared of the possibility that it could be worse.

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Josiah: For the most part, when you go to county, especially if it's your first time being in trouble, you're gonna get instilled with distrust. Everybody in there, for the most part, is gonna instill you with distrust. And not a lot of us trust the justice system anyways

Narration: For her part, Shannon is often disappointed that this lack of trust prevents her from knowing as much about the defendant as she might like.

Shannon: I have sat in pleas and we go through it and I think the offer that was extended is fair. And I had some mitigation and some idea of what was going on with the facts of the case and the person. And we think we've done a good job of encompassing all of that and in agreement. And it's over, and we're off the record and the person on the other side just starts talking about their life. And it's like all of the sudden they're this completely different person in my mind, you know, and I didn't get the benefit of that before constructing this offer.

Narration: So, in our adversarial system, a strong flow of communication between prosecutor and defense is probably not going to occur, even if both sides want to resolve the case with a plea bargain. And defendants may not feel enough trust in the process to take accountability for their misdeeds.

And when it comes to those plea bargains, another key factor that can shape negotiations are what are called mandatory minimum sentences. These sentences are a key component of the policy shifts that drove mass incarceration. It used to be that judges had lots of leeway at the moment of sentencing. But that's rarely the case anymore, especially for violent crimes. Now, if you're convicted of a serious violent crime, you are very likely going to get at a set number of years. And that number is likely to be very long. Oregon is one state where that's true. And that's largely because of what's called Measure 11, an initiative voted in by the Oregon citizenry in 1994.

And the reality of those Measure 11 mandatory minimums will likely shape how your case plays out if your charged with a violent crime in Oregon. Jacob's story is again instructive here.

Herbert: So do you think the prosecutor genuinely believed that you were more culpable than you say you were?

Jacob: I don't know he necessarily believed my version or I don't know if he necessarily cared. He might have just been looking at, "This man lost his life and these two or three people are responsible for it." Measure 11 tied his hands a bit, you know. So, I mean he would've had to come down significantly in the amount of time that I was gonna do, in order to do it, you know. Because it would've went from 25 years to 10 years.

Steve: If you had been charged with...

Jacob: With, say, manslaughter.

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Steve: I see.

Jacob: Yeah, because Measure 11, 300 months was the minimum that I could get under first degree murder. Then manslaughter would have been 120 months, I think.

Steve: And there's nothing in-between.

Jacob: As far as I know, there's nothing in-between.

Narration: During one of our conversations in the circle, Adrienne drew attention to the type of discretionary power she possesses when she's deciding on a charge, and how Measure 11 can often influence the decision she makes.

Adrienne: I mean I think for me, it—when I'm issuing a case, I'm, you know, looking at that person, what their criminal history is, if they have zero criminal history and the facts are—if the facts meet a Measure 11. Let's say a Rob Two, or something like that, but it's straddling the line between a Rob Two and a Rob Three. I'm gonna kinda think twice about whether or not I'm gonna issue that Rob Three because I know a Rob Two is a mandatory minimum. I know that I'm gonna be setting this person up potentially to face 70 months hard in prison, when they have zero criminal history. So, I think it's just like, I'm kinda using my discretion—with the minimal information that I have—just trying to look at the person as holistically as possible.

Herbert: Because you realize the consequences.

Adrienne: Because I realize the consequences, yeah.

Narration: So, Adrienne will often think twice about charging someone with an offense that will mandate a long and fixed sentence under Measure 11. And she's right -- the consequences of her decisions are indeed quite significant. Mandatory minimum sentencing schemes like Measure 11 are a major reason why the United States sends more people to prison than has ever before occurred.

But what does it mean to go to prison for such a long time on a fixed sentence? How do people manage their time in prison when they've been sent away for a set number of many, many years?

Josiah: A lot of people don't do classes or programs that are measure 11, because we don't have to. The day we release is the day we release, and there's nothing that you can do about it. 8/23/24, that is my release date and there's not a damn thing you can do about it. That breeds a bad thought process.

Narration: The experience of lengthy incarceration as the result of a violent act – that's next time on Making Amends: The Prosecutors Go to Prison.