

The Thomas Willis Lambeth Distinguished Lecture

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# *Reforming Our Criminal Justice System*

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*Judge, U.S. Court of Appeals for the 9th Circuit*

*with*

**THE HONORABLE THOMAS ROSS**

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# *Reforming Our Criminal Justice System*

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*The 2016 lecture was delivered in the form of a conversation on “Reforming Our Criminal Justice System.” Guiding the discussion was Thomas Ross, President of the Volcker Alliance, President Emeritus of The University of North Carolina, and an award-winning former state Superior Court judge. Responding to Ross’s questions was Judge Alex Kozinski, a long-serving member of the United States Court of Appeals for the Ninth Circuit.*

### **The Prison System and Wrongful Convictions**

**ROSS:** Perhaps we should start by discussing the prison population and the growing evidence that many innocent people are being incarcerated.

**KOZINSKI:** I'm not really a criminal law specialist as such. But with time I have accumulated a fair amount of experience. And over the years, rather than having my faith in the criminal justice system strengthened, it has eroded. Various issues have arisen that have troubled me as I have seen them in case after case after case. I hadn't thought about criminal justice reform systematically until about a year ago, when I was asked to write an article for a criminal law issue of the Georgetown Law Review. That led me to give a number of questions some very serious thought.

Here is something that most people (including most lawyers and judges) are not aware of. We in the United States have the largest prison population in the world. We have far more prisoners than any other country. We have more prisoners than China. China has 1.6 billion people, yet it has fewer people behind bars than the United States (which has some 300 million people). The United States has 23 percent—essentially one out of four—of its people in prison or jail. When you compare us to other countries—First World countries, the kind of countries we think we are like, such as Canada, England, Germany and France—our rate of incarceration and the amount of time people spend behind bars in the United States is vastly larger and longer.

It is a bargain we have struck. And I think we have the impression that by doing this we have a society that is safer than others' societies. But that's not the case. We have less crime than we did 20 years ago. Crime has been dropping. But that has also been true in other western countries. In fact, it's been true in much of the world, particularly the First World. And if you measure it by any measure, it does not appear to me that we are safer or better off than other countries.

The American prison system is quite expensive, and that is something the taxpayers should worry about. But it is even more expensive in terms of human suffering, the human loss. If you take somebody who has committed a crime and is convicted and you have a sentence of five or six years, they may well return to their family, and their community: they made a mistake, and they go back to their lives. But if you put somebody in prison for 20 or 30 years, you don't get them back. Whatever happens to the family, whatever ties they had, are broken. The children, if there were children, they are orphans essentially. So it's a tragedy that's appearing again and again, and yet that's the policy judgment we make. And we say, "Well, if people are in fact guilty, then maybe that's justified."

Unfortunately, over the years I have come across many cases—more cases than I thought was likely—where people have been innocent, and have been proved to be innocent years later, and have been released after 15, 20, 30, and sometimes many more years in prison. And that is very troubling, because we as Americans pride ourselves on being the home of the brave and the land of the free. We pride ourselves on having a criminal justice system that bends over backwards to give every break to the defendant, to the accused, in a criminal case, the presumption of innocence. The burden of proof is on the prosecutor. The jury has to be unanimous in convicting.

I think we have the impression—I must say I had that impression when I went to law school, and for many years as a judge—that all of these layers of protection provide great assurance that if we are putting away people for a very long time, these are the right people: we are not putting away people who are innocent.

Well, I must say that in the last few years, my confidence in that system has been shaken, and I fear that in fact there is a great deal of injustice in our system, and that we are putting people away for a long time.

More often than we care to admit to ourselves, we are putting away the wrong people. I have seen too many cases of injustice of people released years later, after having spent their best years behind bars. It makes me uncomfortable. I think this

is something that ought to concern all of us. You cannot just say, “Those are the criminals. Those are people we shouldn’t worry about.” They are, of course, human beings. They are our brothers and sisters, so we should worry about them regardless. But in many ways it could be any of us. It could be any of us.

And when there is a wrongful conviction of somebody who is innocent, there is a second injustice that goes on. That is, that the true perpetrator is then left in the community and can and does commit other crimes. So if we were more careful—if the police were more careful, if we are not so quick to jump at trying to prosecute the first person that the police or the prosecutor believe is guilty, if we took more time—sometimes you would find that you have got the wrong person, and that you would then save lives and save misery by finding the right person to incarcerate.

I’m not sure of the crisis point, but I do think we are at the point, if we are a fair society, if we are a just society, if we are the kind of society we think we are, we need to take another look. We need to reconsider.

### **Rationales for Punishment**

**ROSS:** One of the questions that we often ask is, “Why do we incarcerate people? “What are the reasons we give? Historically, at least when I was in law school, the professors taught us there were four reasons we send people to prison. One was deterrence. One was rehabilitation. One was restraint, that is, to keep certain people away and keep us safe. And the fourth, which professors said wasn’t a valid reason, was retribution as a society. I would be interested in your comment about which of those four justifications you think really has value as an appropriate basis for punishment, sending people to prison, and determining the length of incarceration. Is there something about these justifications that has caused our society to incarcerate so many more people, and to drive up the maximum sentences we use? Which of these

four theories, in your view, is the real reason that drives the American approach to incarceration and that is driving our long sentences here?

**KOZINSKI:** I think all four are legitimate reasons, if they are put in perspective and are not used as exclusive reasons or given overly great influence. For example, take retribution. I realize it's controversial, and it's thought to be un-Christian or uncivilized to want to have retribution. But retribution is a genuine instinct. There is an aspect of retribution that speaks to justice. If you have done wrong, you ought to be punished for the wrong. There is a sense of justice that comes with it. And I think that's perfectly fine, so long as we recognize that when put in perspective we don't give it an undue amount of weight.

I think what happens in our system is that for historical and cultural reasons we tend to be a retributive society. As we discussed this morning, in Europe, for some minor crime or even some severe crime they give somebody five, six, seven years in prison and that's the most. Very often, some people who commit violent crimes may not commit such a crime again because the situation in which the crime occurred was unique in their eyes, and they are not particularly an ongoing danger.

Often in the United States people may think that a life sentence is not enough, perhaps even regardless of retribution, but rather because of concern for safety. And I think that's something we need to reconsider. We need to be taught and we need to rethink and remember the fact that a greater sentence doesn't necessarily give us more safety. A greater sentence is more likely to inflict serious harm on other people: that is, the family of the perpetrator. And a longer sentence exposes us and our society to incredible costs. Keeping prisoners behind bars is a significant cost: it costs \$30,000, \$35,000 or \$40,000 a year to keep one prisoner behind bars. It would be cheaper to put them in the hospital, because a hospital bed is cheaper than a prison bed.

**ROSS:** Attending college is even cheaper than that.

**KOZINSKI:** Send them to college. And of course as prisoners have longer sentences and they get older, the cost skyrockets because they become geriatric and they have all the illnesses that all of us have as we get older. All of us, including prisoners, get all sorts of ailments and we will have to take care of our prisoners because they are our wards. It doesn't get cheaper.

At the same time, studies have shown that the risk from recidivism, or the risk that people once again commit violent crimes and keep committing violent crimes, goes down with age. After about age 40, the likelihood of a convicted prisoner committing further crimes becomes fairly low. That's not 100 percent. You are going to have some other situations once in a while. But just looking at the whole spectrum of prisoners that we have, in my opinion you could easily let everybody over 40 out of all our prisons, at great savings to us and relief to them and their families, and you would not have an uptick in crime. We are not really getting a return on those other values: deterrence, incapacitation. Those values are not being served after a certain age and after a certain number of years, which are not in the double digits. So we are paying money, and inflicting pain.

We are becoming a society of prisoners. It should have an effect on our self-image as a country that we have such a large prison population. And I don't think we are getting much in return. I think we are probably getting diminishing or negative returns.

**ROSS:** I remember when we were doing our sentencing reform work in North Carolina, we had some experts come in from around the world. And it was fascinating to learn that a lot of studies show that if someone is incarcerated more than about six years, the chances of rehabilitation and reintegration into society drop off significantly. It's as if they lose their soul after a certain period of time, and lose hope, so I think that's why a lot of countries have kept the length of sentences far lower than we have in the United States.

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The judge is right. If you look at almost any distribution of criminal behavior, you see that crime begins at a pretty young age—actually, 13 or 14 years old—and shoots up very high among 18 to 20 year olds, then drops pretty precipitously when you get older. And by the time an individual is in their late thirties and forties, there are very few crimes committed. For those who do commit crimes, the crimes are usually very violent, and those involved are often repeat offenders, but there are not many of them. So it is important to look for ways to identify those who are likely to be repeat offenders and thus pose the biggest risk to our public safety. I think such analysis is the real key to making the criminal justice system work in a cost-efficient manner, because it is hugely expensive to incarcerate people for long periods of time.

In addition, as the judge points out, there is now, in this state and in many prisons around the country, a graying of our prisoners which is driving costs up even more. So it is a very significant issue. There are people who, when they look at that crime curve, say we should just lock up everybody who is 18 to 22 and we will be fine, you know. They will get over it [general laughter]. But I do think focusing on what is actually going on, using real data to solve the problems, can be quite effective.

**KOZINSKI:** What do you think about the draft?

**ROSS:** The draft?

**KOZINSKI:** Yes, you know: universal service.

**ROSS:** I think that universal service has tremendous advantages for us as a society, because it does take our highest-risk population and mandates a commitment to the country through military service or other kinds of service. I think it could be a real benefit to us in a lot of ways. But one of the side benefits probably would be fewer people committing crimes in that age group. So it is something we should perhaps consider.

**KOZINSKI:** We should think about it. Israel has universal service, even though some don't serve for religious reasons. And of course the requirement applies to men and women equally. There is a cohesion that comes out of the service, as well as lifelong relationships. There is a certain commitment to society and the people you serve that is quite desirable, and is missing elsewhere.

### **Evidentiary Problems**

**ROSS:** Let's turn to another issue regarding the unfairness of the current criminal justice system. You've recently served on an advisory panel for a White House study that focused on various kinds of evidence, and the flaws associated with some of these types of evidence. As you pointed out in your recent Wall Street Journal opinion piece, people are often transfixed by watching "CSI: Crime Scene Investigation" and similar crime shows on television, and sometimes they believe as a result that science always solves crimes, and that evidence based on science is the best kind of evidence and should not be questioned. We'd appreciate hearing more about what you learned serving with that advisory panel, as they evaluated various types of evidence and suggested ways we should proceed when doubts arise.

**KOZINSKI:** Well, the study came out in mid-September 2016. It was conducted by PCAST (the President's Council of Advisors on Science and Technology). The report was issued by the White House, by the President's Science Advisor. I was called in, along with a number of other judges as well as law professors and others who were senior advisors. And it was very thorough and incredibly well documented. It takes a hard look at seven or eight methods of forensic science that have been used in criminal trials, and it concludes that some are pretty good and others are just complete bunk.

For instance, bite marks. There are people now in prison who were put away because of a claim that the victim had a bite mark that matched the defendant's teeth. That's just pure nonsense. There is no science there. When you actually have a blind test of bite marks, they can't tell the difference between human bite marks and a dog's bite marks. They sometimes can't tell the difference between human bite marks and a flea bite that somehow is lined up to look like teeth.

Then there is hair analysis. For years and years and years, people were put away based on comparison of hair follicles. Let me make it clear there is also DNA hair testing and that's very different. I'm talking about comparisons of hair which happened before there was DNA testing. Many people were sent to prison based on testimony by so-called experts saying these are the same. It turns out they can't tell the difference between kinds of human hair. They sometimes can't tell the difference between dog's hair and human hair. It is that bad.

Other kinds of science can be very good. For example, DNA testing is pretty good when there is a single source. It's actually very reliable. When you have multiple sources, such as mixed blood or mixed semen or mixed hair follicles, that becomes more difficult, and that's more questionable. But if you have single-source DNA and tests are performed by somebody who is competent and who is careful to avoid contamination and do the test properly, the test is highly reliable. But the "if" part is not trivial. Since DNA came into common use, there have been many reports of labs where contamination has taken place, where there was carelessness and even falsifications.

So one of the recommendations of the report is that forensic science should be treated no differently than any other science. There is a need for science and for scientific proof. You ought to have protocols and procedures that scientists follow. It should be treated like a scientific experiment.

Are two things the same? You remember when you took chemistry in college? They gave you an unknown sample and a known sample, and you are supposed to

compare them and draw conclusions. They didn't tell you the answer ahead of time. So one of the recommendations was that forensic scientists ought not to be told what the police suspect. They ought to be given the evidence, and they are supposed to perform their studies blind, because that's how science is done: blind. And we have reasons for that.

Scientific forensics ought to be independent of prosecutors. They ought not to have their funding or existence or promotion decided by the people who have a stake in the controversy. There are other such recommendations which I think are entirely common sense and I think should be followed. I was disappointed to see that the Attorney General of the United States dismissed the report and said we will not be following those recommendations.

**ROSS:** I think the point you made about evidence is an important one, particularly about forensic evidence like fingerprints and hair follicles. When I was a state superior court judge, I tried many cases in which such evidence was used and accepted with certainty. That evidence is what often would lead juries to conviction. Eyewitness identification testimony also was relied upon for many, many years, but there is more skepticism now about that than was once the case.

I should note that there is someone in the audience tonight who was the victim of a terrible rape. As part of the criminal justice process, she was asked to do an eyewitness identification. Years later, it was proved by DNA evidence that she had picked out the wrong person. The wrongly convicted person was freed and exonerated, and the rape victim became a champion for identifying criminal defendants in the right way.

In North Carolina, we do require double blind testing, and the officer supervising it can't be involved in the investigation. So there are protections that have been put in place for eyewitness testimony that can make a real difference. And I think that's what the White House report is suggesting. Eyewitness evidence can be relevant and

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can be helpful, but it's not certain. It's not absolutely accurate every time, and we need to put into place appropriate protections.

**KOZINSKI:** North Carolina is in many ways on the cutting edge of criminal justice reform. And North Carolina has better criminal discovery than any other state in the country. North Carolina has open-file discovery, which means that if the prosecutor has the evidence, it has to be turned over to the defendant. And that's fair, because think about what happens in the crime scene. The police come in and they mop up everything, as they should. And so the state has a great advantage in gathering evidence. Some of the evidence is inculpatory, but some of it can be quite exculpatory. It's an entirely fair thing to do.

After bitter experience with miscarriages of justice, North Carolina responded by adopting the sort of open-file requirements on prosecutors that President Ross mentioned. I think that open-file discovery and a number of other reforms are very beneficial. The North Carolina approach is really highly commendable, and other states do not have such experience with federal prosecutions. But the difference is that North Carolina reacted rationally and commendably by actually making reforms that have made a difference. The response from other places, including I'm afraid the U.S. government, has been to resist change.

**ROSS:** One of the other changes in North Carolina has been the creation of an independent Innocence Commission that is set up specifically to review cases—often many years later—when there is new evidence that could exonerate the defendant. And I will be honest with you. I was part of the group that set up the Innocence Commission, and it's a very, very hard thing for a case to even get there, much less to actually be overturned. Yet we have had a number of cases in which the defendants have been exonerated through the Innocence Commission.

I think it's important when we are talking about this issue for no one to say, "Oh, well, those two guys up there are soft on crime because they want reform and they

want to do things right.” I don’t think that’s a fair characterization of people who want reform. People who want reform are looking for justice, and making sure the justice system works at its highest level because that’s what gives people confidence in the courts.

**KOZINSKI:** Well, no one here wants an innocent person languishing in prison. This is just not the kind of society we are. That’s not how we think of ourselves. And we certainly don’t want the guilty guy around the community doing more harm.

As technology changes, we learn more about evidence. It turns out we can often reconsider cases and set free people who have been wrongly convicted. But there have been very mixed reactions in many places, and some significant resistance to DNA testing. Sometimes legislatures have passed statutes saying, “If DNA is available, you must test,” because prosecutors have been so adamant about opposing testing. There are a number of places in the country where the prosecutors, the DAs have offices that reconsider cases to determine whether those convicted are innocent. And I think those are certainly a step in the right direction. The problem is that such offices are only as good and as aggressive as the DA himself is going to be.

For example, in New York the DAs are very aggressive about charging, and there are a number of cases that have come out of there where people have been proved to be innocent. Other places with such units have been less effective. So I think that creating an independent Innocence Commission such as has occurred here in North Carolina is a very good idea, and ought to be emulated in other states.

## Racial Dynamics in the Justice System

**ROSS:** I want to change our direction a bit, and begin to talk about race in the criminal justice system. Judge, could you say something about how race plays a role in our criminal justice system?

**KOZINSKI:** You know, it is a fact that as a society, we tend to live in neighborhoods with people who are like us. And like it or not, this is how it is. Those of us who are in the middle class live with other middle-class people. Poor people live in other parts of town. And ideally communities tend to stick together. Crime tends to arise in poor neighborhoods, and it tends to be violent crime. Such crime tends to be greater in the poor neighborhoods and in the parts of town that are occupied by minorities.

I had a case in which I put somebody in prison for 20 years. It wasn't my choice: I gave the defendant the least harsh sentence I could under the law. But here is how the case arose.

This was a case in Los Angeles in what we call the projects, low-income housing. And as it happened, everybody in the neighborhood was black. The parents of a black child called and complained to the police that they could not send their children to school without having somebody stop them and try to sell them drugs. So the police, with the help of the federal authorities with the Drug Enforcement Administration, sent in undercover agents to try to put a stop to such conduct. And this is entirely understandable. People are entitled to have police protection. They should have a safe neighborhood for their children to go to school. Crime tended to be concentrated there because there is drug activity, and you have to send police in to deal with it.

In my case, one guy who wasn't selling drugs knew how to get drugs, and he was persuaded to provide some drugs. The next thing we knew, the guy was serving a 20-year sentence. He had been living with his wife and two or three then-little children

and he was doing repair work. He had many occupations. But at least he was there, and he was trying to put food on the table and be a father to the children. But as a consequence of his involvement with drugs, the guy was taken out of the community.

I saw him, the guy who went to prison. I have been a judge long enough to actually send somebody to prison for 20 years and see them come out. And I must say he was a different person, a different guy, a shadow of himself. He was on supervised release, and that's why he came back. But he was a greatly diminished person. I asked him about his family, and about his children. The children didn't know him. His wife had left him. He was basically a shadow of a human being. We did that to him as a society. It was a very sad thing, but I understand the need for doing that. I understand the need for policing.

My concern—as I see the rise of violence in the minority communities, and the sort of reaction against it—is that the police will withdraw. I'm afraid that police officers will be afraid to go in, as a result of being afraid of possibly being charged and prosecuted. Ultimately the victims of that dynamic will be the law-abiding people who have no choice but to live in communities where there is a great deal of crime. I think we need to recognize it's a complex and difficult problem, and we don't solve the problem by pulling police off the streets and leaving these communities unprotected.

**ROSS:** In your answer, you raised several questions. One question is the influence of race on police practices. We also have been through a lot of different approaches in policing in the United States. Community-based policing was important, in my experience. In the old days, during the war on drugs, we placed police officers on the corners where we knew drug activity was occurring, and they waited for drug activity and arrested people. We put police officers out on the street, out in the neighborhood to get to know people. And even if they didn't arrest somebody, their presence ran the drugs away. Oftentimes drug dealers were just inside, but at least they weren't out on

the street anymore. This approach resulted in fewer arrests, and I think over time in safer communities.

Now we are in a situation where we are having a rash of police shootings in the United States. Oftentimes these shootings are captured on video, which would not have been possible before the widespread presence of cell phones: back then, we didn't have the chance to capture that kind of evidence on cell phones. We do now, and our awareness of such problems has been heightened. Do you see any related solutions?

**KOZINSKI:** Well, I am not an expert on policing. Nonetheless, I certainly think there are solutions, and we must have solutions. I think trying to develop trust between police and community is important. I think it's also important to realize that these issues are not necessarily interracial issues. Lots of the police are minorities themselves, and really only want what the public wants, and that is a safe environment. And we have to make it possible for them to in fact walk those streets or take themselves into the community without being attacked or fearing for their lives.

Technology brings changes, not always for the best. We are seeing things that are good: events are recorded, and that is good. But video capture of crucial events also gives them great prominence, perhaps greater prominence than they deserve, and the prominence is often selective prominence. There may well be a lot of incidents where nothing bad happens, and these incidents may not be recorded. So I am just wondering to what extent these incidents we have seen on video are really typical. When you have a dangerous environment, when you have police having to go in and deal with a dangerous environment, you will have occasional violence. And sometimes there will be mistakes made, which are not defensible. They are not commendable. Certainly better training of police is important. Better-paid and better-behaved police can be important. And efforts to bring the police into the community when they are not being called out in an emergency is important.

The problem is that when you get a “911” call, or when you get a domestic violence call, or a call about somebody with a gun, police officers are not going to be polite. I mean, this is not a time for the police to be gentle and polite. And if that’s the only time the community sees the police, that’s a skewed picture. So I do think it’s very important to have them be there at times when emergencies are not going on. Unfortunately, the result of these concerns is that there should be more police. If you want them there, just being there when there is no emergency going on, deterring by their presence, you have to provide enough funding to put police on the spot, so they have a visible presence in a non-emergency situation.

**ROSS:** I want to probe a bit further the question of influences relating to race or racial biases. Once you get past the basics of policing, you encounter pressure points in the system that need particular attention to the possibility of racial bias.

**KOZINSKI:** Well, you mentioned “bias,” and that term brings up a very negative connotation, but I think you didn’t mean it that way. I think you mean bias in the sense that the system is skewed by its nature as a result of flaws such as problems with eyewitness identifications. I think cross-racial identifications are particularly difficult, and often prone to error. It’s just the way we are. I mean, we can’t change who we are; but it tends to be this way. If we are Caucasians, we see a lot of Asians who all look alike. We see all blacks or blacks in an emergency situation in a potentially skewed way, and our recollections involving cross-racial identifications tend to be weak.

So I think that we need to take diverse experiences and characteristics into account in making charging decisions and holding lineups. We need to make sure that prosecutorial offices reflect the community in terms of race and gender and ethnicity. It is not appropriate to have police personnel of one race and the community of a different race. I think that is important. Again, that takes outreach. It takes money. And it takes commitment.

What may be most difficult is having prosecutors' offices reflect differences in gender, race and ethnicity. In some ways, all of us judges are the same. There is now an effort to have more female judges, and minorities, and diversity of all sorts. But I don't have any colleagues who are poor. I don't have colleagues who grew up in poverty. There are large differences, and that's true of lawyers in general. Most prosecutors come out of law schools, and they don't look like America: they look like middle-class America. I think it is important for prosecutors in particular—who often go on to be judges, and often defense lawyers—to be reflective of the communities where they prosecute, because there are many perspectives that you can bring from having come from that community that will inform the prosecution decisions that you make. People can be of good will and try and do a good job, but if you didn't have the experience, if you didn't have anybody you can talk to who has had similar experiences or who has lived in the community, it becomes very difficult to see things from the perspective of the person you are thinking of charging.

### **Charging and Sentencing Practices**

**ROSS:** One of the things we tried to do when I was a trial judge and attempting to reform sentencing policy in North Carolina, was to get a New York research organization to look at prosecutors' offices, and in particular their charging practices. In my experience, there were differences in the way people are charged, sometimes based on their race. And we actually got three prosecutors from different large communities around the country to allow researchers to come in and watch charging practice to see if there were differences between whites and blacks charged with possession of cocaine. If defendants were African-Americans, they often got charged with possession with intent to sell and deliver, possession of drug paraphernalia, and on and on. And the number of charges affects what happens when a defendant shows up for sentencing, both in terms of the outcome of the case and the length of the sentence.

The reason I got interested in that topic was that judges are the ones who often get blamed for the differentials in sentencing. That is, if you do an analysis of lengths of sentences, oftentimes in some jurisdiction those sentences are longer for African-Americans, and judges tended to get the blame for it. But often it might have been the underling charging practice. All these areas need more research. I will let you comment on that, judge, and then we will begin to take questions from the audience.

**KOZINSKI:** Well, I agree about the charging practices. But it starts even earlier. You saw it when you came to sentencing. The overcharging has its greatest effect at plea bargaining, because if a defendant is charged with multiple crimes and is looking to go to trial, he may feel innocent. He may think he is innocent of most of the crimes. He may think he can actually prove he is innocent, but juries are unpredictable. Trials are unpredictable. And the prosecutor will say, “Well, you know, you take a plea, you can spend four years. And if you don’t, you will never see your baby again. You know, you’ve got children at home. By the time you get out, you will be an old man and they will be adults with children of their own.” And that’s a proposition that many people simply can’t accept, and so they see the litany of charges and they say, “Look, there is some chance some jury is going to convict me of something and could convict me of everything. In that case my life is lost.” And so over-charging winds up being a huge problem.

Now that issue I place in part at the feet of the legislature. I assume North Carolina is just like every other legislature in the country, and not all that different from Congress. Congress passes a lot of laws that are quite nebulous, and that give wide discretion to prosecutors to charge. And time and time again the U.S. Supreme Court has come out years later and said, “No, this was not a crime.” You saw it recently when former Governor McDonnell of Virginia was charged, tried, and convicted. But the United States Supreme Court concluded that he had not committed a crime, because of the ambiguity of the relevant statute. Well, at least he is the

Governor of Virginia, and he had the fortitude and the resources to fight back. For every person like Governor McDonnell, there are dozens and scores of people who just can't take the risk, and don't have the resources to fight back, and so legislatures have to be more careful when passing criminal laws.

Criminal laws ought not to be written so vaguely that you find out what they mean after you are convicted. There should be clear notice to anybody about what is forbidden. We live in a free society, and we can only be free if the line between what is punishable by going to prison and what is lawful is clear to every citizen. If it's not clear, that's something that has to be made up by a prosecutor, and eventually you will find out about it years later when the Supreme Court or the highest court of the State says, "No, this is not a crime." That's no bargain, and that's not the way to live.

**ROSS:** You raise the question of overcharging and its impact on plea bargaining. What about mandatory minimum sentences?

**KOZINSKI:** Well, I'm against mandatory minimums, just as I am against elected judges. I can say that because, you know, life tenure is a wonderful thing. But I have had to impose mandatory minimums, and I have spoken out in court on other cases, not just the one case I mentioned. I haven't always felt that the mandatory minimum was the wrong sentence: there have been cases where the mandatory minimum was ten years, and I thought I probably would give the defendant about ten years anyway because the crime was pretty bad. But the mandatory minimum only comes into effect in situations when a judge thinks there is too much punishment, and the punishment is designed to tie the judge's hands. We need a system that has more respect for the judges, and lets them assess the situation and make a fair and just determination of the punishment rather than having somebody in the abstract who doesn't know the facts set a minimum. I have personally never seen a minimum sentence that I thought was necessary, and I have seen many that I thought were unfair.

### **Overburdened Courts, Overcrowded Prisons, and Risk Assessments**

**ROSS:** During the past decade we have had a number of laws enacted around the country, including “three strikes and you’re out,” and like mandatory minimums, those kinds of laws have added significantly to our problems with incarceration. On a related point, we have had questions from the audience regarding the implications for the courts. One of our questions is whether you think that our courts are overburdened. Are they overburdened? What is the state of public defense in the United States: do we have enough public defenders? Are public defenders provided with adequate resources? How do pressures on the overburdened court system affect pleas of guilty, practices of incarceration, and justice overall?

**KOZINSKI:** Well, the federal courts are certainly overburdened, some far more so than others. But I don’t think the federal courts are nearly as overburdened as the state courts. I assume that the dynamic we see in the federal system is much the same as in the state courts. Because prosecutors can’t try every case, there is a great deal of pressure to bargain, and there is pressure on the defense particularly since public defenders’ offices are understaffed. And there is some pressure now to take too many cases to trial, because prosecutors may be viewed as being non-cooperative.

Because the system simply cannot try anything like the number of cases we have, there is a great deal of pressure to settle cases. And so we have had a dwindling number of civil trials, but we also have had a dwindling number of criminal trials. It doesn’t mean there have been fewer people going to prison: they do go to prison, it’s just not after a trial.

**ROSS:** That certainly is the case in state courts where we have seen, in my experience, something like 95 percent of criminal cases resolved by plea bargains. Not many cases actually went to trial other than very serious ones. Could you speak a bit about the role of the Eighth Amendment relating to cruel and unusual punishment,

and how it might apply to the state of prisons in the United States, and their overcrowded nature in many states?

**KOZINSKI:** There is a great deal of law from the Supreme Court regarding the Eighth Amendment, so lengthy sentences by and large seldom wind up violating the “cruel and unusual punishment” clause. The Ninth Circuit Court of Appeals had a case involving a bad check that was tried, and the resulting punishment was held to be “cruel and unusual,” so that avenue is closed at least under current Supreme Court jurisprudence.

Judicial review of prison conditions, and prison litigation, actually holds more promise for challengers. We on the Ninth Circuit had a case out of California where the plaintiffs challenged the overcrowding of prisons. A three-judge court imposed a monitor who then recommended that there needed to be a significant reduction in the number of inmates or that the number of prison beds needed to be increased. The case was appealed to the United States Supreme Court and Justice Kennedy authored the resulting opinion. I recommend that people read it. If in fact prison conditions are so bad that they amount to cruelty, there should be and is an avenue of relief. But the standard of “cruel and unusual punishment” is not the same standard you would want for the baseline of a civilized society. A civilized society might expect reasonable accommodations for prisoners, exercise on a regular basis, and space in their cells where they have humane conditions. And yet we should be doing better.

**ROSS:** So as we see more and more controversy around prisoners in isolation cells and around women who may be forced to deliver babies in prison, do you see the Eighth Amendment expanding in the future to deal with this kind of situation? Could the Eighth Amendment demand more humane treatment of prisoners?

**KOZINSKI:** It certainly could, and other constitutional provisions such as due

process claims provide another opportunity for challenge. Solitary confinement is an area of practice that is highly ripe for review. Justice Kennedy spoke out on the subject in one of his opinions: not a majority opinion, but a concurrence. And he lamented the prevalence of solitary confinement. There are countless prisoners in prison security units that impose solitary confinement, and sometimes prisoners are not let out even for one hour of exercise every couple of days. And there is evidence that long-term solitary confinement can cause permanent brain damage, permanent psychosis, in prisoners. I do believe this is going to be the next cutting edge of litigation challenging prison conditions.

**ROSS:** We talked earlier about trying to better identify offenders who really create a risk to our public safety, and how incarceration can be used to restrain and incapacitate them so that we are in a better position to have a safe society. Some states use different kinds of assessments to try to predict risk in offenders. Is that something that you see as being used but also possibly challenged in the courts?

**KOZINSKI:** Prosecutors have an enormous amount of power, based on how they bargain, what they charge, and how they propose to sentence. I saw a piece recently in the news that showed that for the same crime, one prisoner (I think in Kansas) got something like 20 years in prison, while if the crime had occurred in New York City, the sentence would have been six months. In other parts of the country the sentence might have been two or three years. The differences in sentencing did not stem from the substantive law, but rather from differences in charging practices and plea bargaining. So the guy who committed the crime may simply have been in the wrong place: if he had committed the same crime in some other place, he would have still been punished if caught, but the punishment would have been drastically less. It's troubling and unfair that defendants who engage in the same conduct in different parts of the country receive very different punishments, perhaps significant incarceration or simply a slap on the wrist, depending on who the prosecutor is. And there is some

terrible unfairness about that, to think that the accident of who your prosecutor happens to be will make that much difference in your life.

### **The Role of Drugs in the Criminal Justice System**

**ROSS:** We have a couple of questions from the audience asking Judge Kozinski to give his opinion about the death penalty, stop and frisk and similar matters that might come before him. Judges typically cannot answer such questions. Let me ask one more question from the audience, however. What is your view of the role of drugs in the criminal justice system, and the impact they have on the increasing level of incarceration in this country? Could you talk with us a bit about how our society and court systems ought to deal with drugs, including both problems with addiction and with the financial incentives underlying our current drug-related problems?

**KOZINSKI:** I am old enough to remember a time before the war on drugs. I think the war on drugs was started under President Nixon. He wanted to rid America of drugs, and put those involved with drugs in prison with harsh sentences. But the associated policies haven't worked. We have more people in prison, but we are not a drug-free society by any means. If anything, the problem has gotten worse. At the same time, in Portugal and I think the Netherlands, many drugs are legal. These countries don't seem to have problems that are worse than ours.

I am not at the point of advocating decriminalization for drug offenses. But when I was in college one definition of insanity is that you keep doing the same thing when it doesn't work. We started the war on drugs 40 years ago, so we have given the experiment a chance to work. I think it's well worth taking another look and saying: Is another way better? Are we now better off than we are 40 years ago now that we have put 2.2 million people in prison—not all of them for drugs, but a very large percentage of them—on account of drugs? Maybe we ought to treat drug use more

as a public health problem than a police problem. The drug laws skew all manner of things—police searches, automobile stops, and more—and have all sorts of collateral effects on the way our law has developed.

Much of our criminal law and our law of criminal procedure, much more than you would actually expect, has focused on matters relating to illegal drugs. Have we gotten our money's worth? Is the effort we are putting into the “war on drugs” worth it? Is the harm that we are inflicting on people who get caught up in drug violations worth it? Are we getting a reasonable return on our “war on drugs”—reasonable in terms of benefits to the public—or is there more harm than these efforts are worth? I'm not sure. We need to seriously reconsider these questions. I realize that these issues are hard to address when someone is running for office, since there's not a great deal of support for lowering punishments for involvement with drugs, but I think we need to ask ourselves these questions.

**ROSS:** There are many more questions we would like to address, but we have run out of time. Thanks to our audience and to Judge Kozinski for considering these wide-ranging questions regarding reform of our criminal justice system.

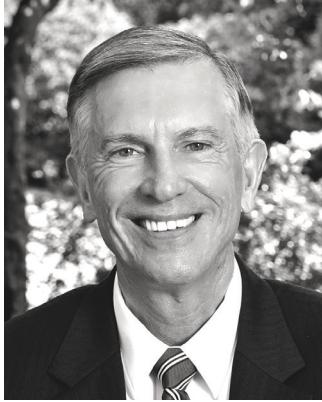
## *Alex Kozinski*



Judge Alex Kozinski is a member of the U.S. Court of Appeals for the 9th Circuit since 1985, and was its Chief Judge from 2007 to 2014. Often described as a libertarian, Judge Kozinski came to the U.S. at the age of 12 as the son of Romanian refugees and Holocaust survivors. He has written articulately and often provocatively on criminal justice reform, the death penalty, intellectual property law, and other important topics. Prior to his appointment to the appellate bench, Judge Kozinski served as

Assistant Counsel to President Reagan and from 1982 to 1985 as Chief Judge of the United States Claims Court. He served as Law Clerk to then-Circuit Judge Anthony M. Kennedy during 1975-76, and to Chief Justice Warren E. Burger during 1976-77. Judge Kozinski earned his bachelor's degree from UCLA in 1972, and a J.D. degree from UCLA Law School in 1975.

## *Thomas Ross*



Thomas W. Ross is President of the Volcker Alliance and President Emeritus of the University of North Carolina. He previously served as President of Davidson College, executive director of the Z. Smith Reynolds Foundation, director of the North Carolina Administrative Office of the Courts, and a Superior Court judge, and as lead author of North Carolina’s 1994 “structured sentencing” reforms. Among many honors, he received the William H. Rehnquist Award for

Judicial Excellence (2000), given annually to one state judge in the nation; *Governing Magazine’s* National Public Official of the Year Award (1994); the Foundation for the Improvement of Justice Award (1995); the American Society of Criminology President’s Award for Distinguished Contributions to Justice (2007); and the NC Bar Association Citizen Lawyer Award (2010). Ross earned the bachelor’s degree in political science from Davidson College in 1972, and graduated with honors from the UNC-Chapel Hill School of Law in 1975.

## *Thomas Willis Lambeth*



The Lambeth Distinguished Lecture honors Thomas Willis Lambeth, who led the Z. Smith Reynolds Foundation as its executive director for more than two decades until his retirement in 2000. Born in Clayton, North Carolina,

Lambeth graduated from the University of North Carolina in 1957 with a bachelor's degree in history, and served as Administrative

Assistant to Governor Terry Sanford and to U.S.

Representative Richardson Preyer before being

named to lead the Foundation in 1978. Described by one journalist as “the state’s do-gooder-in-chief,” Lambeth throughout his career has exemplified the qualities of personal integrity, a passionate devotion to education, democracy, and civic engagement, and wholehearted pursuit of the ideals of the public good and of progressive and innovative ways of achieving it.

During his tenure, the Reynolds Foundation awarded grants totaling more than \$260 million to address many of North Carolina’s most pressing public policy issues, particularly social justice and equity, governance and civic engagement, community-building and economic development, education, and protection of the state’s natural environment. Tom Lambeth also has made a strong personal impact on many key public policy issues in North Carolina and nationally, including leadership of the Public School Forum of North Carolina, Leadership North Carolina, the North Carolina Rural Center, and a task force of the national Institute of Medicine on the problems of people who lack medical insurance. He also has been a national leader in improving the management and effectiveness of family philanthropic foundations themselves.

*The Thomas  
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The Lambeth Distinguished Lecture was established in 2006 at the University of North Carolina at Chapel Hill by the generous gift of an anonymous donor. Presented annually, its purpose is to bring the UNC campus distinguished speakers who are practitioners or scholars of public policy, particularly those whose work touches on the fields of education, ethics, democratic institutions, and civic engagement. The Lambeth Lectureship Committee, composed of faculty, students and distinguished individuals engaged in public policy, provide overall leadership in collaboration with UNC Public Policy, College of Arts & Sciences.



*The Thomas Willis  
Lambeth Distinguished  
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