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In Search of the Virtuous Prosecutor: A Conceptual Framework

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Article

In Search of the Virtuous Prosecutor: A Conceptual Framework

Stanley Z. Fisher*

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Questions about the scope and content of the duty to "seek justice" pervade prosecutorial work. Prosecutors are required to serve in a dual role: they are both advocates seeking conviction and "ministers of justice."¹ Observers have complained about a tendency on the part of prosecutors to prefer the former of these "schizophrenic"² obligations to the latter. This is commonly described as a tendency to behave over-zealously or according to a "conviction psychology."³

1. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 comment (1981) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate") [hereinafter MODEL RULES]; STANDARDS FOR CRIMINAL JUSTICE, § 3-1.1(b) (2d ed. 1980) ("The prosecutor is both an administrator of justice and an advocate. The prosecutor must exercise sound discretion . . .") [hereinafter STANDARDS]; STANDARDS, § 3-1.1(c) ("The duty of the prosecutor is to seek justice, not merely to convict.").

2. Steele, *Unethical Prosecutors and Inadequate Discipline*, 38 Sw. L.J. 965, 982 (1984).

3. Felkenes, *The Prosecutor: A Look at Reality*, 7 Sw. U.L. REV. 98, 99 (1975); Reiss, *Public Prosecutors and Criminal Prosecution in the United States of America*, 20 JURID. REV. NEW SERVICE 1, 11 (1975) ("[The prosecution] is preoccupied with a record of punishments . . .

Virtuous Prosecutor

Overzealousness allegedly causes two sorts of difficulty. First, it leads to formal "misconduct," *i.e.*, behavior which violates the law⁴ and/or professional disciplinary codes. Recently, this problem has risen to the surface of professional attention.⁵ Professor Francis Allen has concluded that "minimizing prosecutorial excesses is one of this country's great unsolved problems in criminal law administration."⁶ Scholars⁷ and appellate judges⁸ point with dismay to recurring instances of prosecutorial misconduct. They stress the courts' reluctance to reverse criminal convictions even when misconduct is egregious.⁹ Instead, courts¹⁰ generously apply doctrines of fundamental fairness,¹¹

the chief concern of the prosecutor falls on the *processing of cases rather than the doing of justice*" (emphasis in original)).

4. See, e.g., Golden, *Selling Out*, BOSTON GLOBE MAG., Aug. 24, 1986, at 37 (the case of former Assistant United States Attorney David Twomey, convicted of conspiracy to obstruct justice for leaking information to a fugitive defendant). The prosecutor's unlawful conduct will generally also constitute a disciplinary offense, but of course the reverse is rarely true: most disciplinary violations do not rise to the level of illegality.

Nor does all misconduct stem from "overzealousness." Most disciplinary cases concerning alleged prosecutorial misconduct involve such violations as embezzlement, conflicts of interest and failure to enforce the law. See Steele, *supra* note 2, at 970; Annotation, *Disciplinary Action Against Attorney for Misconduct Related to Performance of Official Duties as Prosecuting Attorney*, 10 A.L.R. 4TH 605, 610-11 (1981).

5. Observers expressing concern about the problem's existence and the inadequacy of existing remedies range from state governors (see Carey, *The Role of a Prosecutor in a Free Society*, 12 CRIM. L. BULL. 317, 323 (1976)) to radical critics (see, e.g., M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM*, 79-98 (1975); Rabinowitz, *The Prosecutor: The Duty to Seek Justice*, in VERDICTS ON LAWYERS 231 (R. Nader & M. Green eds. 1976). See also Steele, *supra* note 2, at 967 (misconduct is increasing and abuses "deliberately calculated"); Gershman, *The Burger Court and Prosecutorial Misconduct*, 21 CRIM. L. BULL. 217 (1985); B. GERSHMAN, *PROSECUTORIAL MISCONDUCT* (1987); Dershowitz, *Foreword* to J. LAWLESS, *PROSECUTORIAL MISCONDUCT* at ix (1985).

6. Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 IOWA L. REV. 311, 335 (1985).

7. See, e.g., Dershowitz, *supra* note 5, at ix ("[p]rosecutorial misconduct . . . is rampant."); J. LAWLESS, *supra* note 5, at 3 ("The ethics of the modern American prosecutor have become highly questionable.").

8. See, e.g., *United States v. Skandier*, 758 F.2d 43, 44 (1st Cir. 1985).

9. Motives aside from a reluctance to free the guilty have been suggested, including loyalty to the separation of powers doctrine (see Steele, *supra* note 2, at 967-69), and judges' sympathy for prosecutorial zealotry arising from their own earlier experiences as prosecutors. See Lawless & North, *Prosecutorial Misconduct: A Battleground in Criminal Law*, 20 TRIAL 10, 27-28 (1984).

10. One scholar has accused the Supreme Court of "refus[ing] to articulate or even require ethical standards of prosecutors" and of "encouraging prosecutorial overreaching." Gershman, *supra* note 5, at 218.

11. *Darden v. Wainwright*, 106 S. Ct. 2464, 2472-73 (1986), *reh'g denied*, 107 S. Ct. 24 (1986); *United States v. Young*, 470 U.S. 1, 15-16 (1985).

harmless error¹² and "invited response"¹³ to uphold convictions. Other controls on prosecutorial misconduct are criticized as equally ineffective.¹⁴

Critics of overzealousness state or imply a second, more fundamental complaint, having to do with underlying values and attitudes.¹⁵ In this view overzealousness is manifested in a distorted, though technically proper, exercise of permissible discretion where the prosecutor unduly prefers penal severity over other potential goals. Depending on the procedural stage and context, overzealousness might appear as undue preference for:

- prosecuting rather than dismissing a case;
- "highest and most" charging,¹⁶ *i.e.*, for charging a defendant with more, and more serious, crimes rather than fewer, less serious ones;
- interpreting substantive criminal law expansively, and procedural protections narrowly;
- winning as many convictions as possible;
- obtaining severe penalties over lenient ones.

This type of overzealousness is problematic; as it is less visible than formal misconduct, it is harder to combat.

Observers have proposed a number of measures to combat overzealousness. Some have focused on the incentives offered prosecutors.¹⁷ Thus, one writer proposed legislating financial inducements for prosecutors to act in "the public interest."¹⁸ Other critics, focusing

12. See *Skandier*, 758 F.2d at 45 (reluctantly applying the harmless error rule as required by *United States v. Hasting*, 461 U.S. 499 (1983)).

13. *Young*, 470 U.S. at 11. The Supreme Court takes defense counsel's preceding conduct into account "not to excuse [prosecutorial misconduct] but to determine [its] effect on the trial as a whole." *Darden*, 106 S. Ct. at 2472.

14. Prosecutorial misconduct rarely triggers contempt sanctions. See *Carey*, *supra* note 5, at 323 (referring to a 1973 study in New York City which found, over a twenty-five year period, no instance of a prosecutor held in contempt for courtroom misconduct in a criminal prosecution). Nor, because of prosecutorial immunity, are civil damage actions common. See *Steele*, *supra* note 2, at 984 n.12. In some jurisdictions, according to *Steele*, it is uncertain whether the separation of powers doctrine even permits enforcement of professional ethics codes against prosecutors. *Id.* at 967-69.

15. See, *e.g.*, J. LAWLESS, *supra* note 5, at 17 ("The competitive and combative nature of modern adversary proceedings . . . has changed many prosecutors from champions of justice to advocates of victory."); Felkenes, *supra* note 3, at 110-15.

16. See Alschuler, *Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85 (1968).

17. "[R]eform proposals that do not both acknowledge the effect of incentives and seek to alter them are likely to fail." J. EISENSTEIN & H. JACOB, *FELONY JUSTICE* 298 (1977).

18. Comment, *Incentives vs. Nonpartisanship: The Prosecutorial Dilemma in An Adversary System*, 1981 DUKE L.J. 311, 333-37. See also Gershman, *Why Prosecutors Misbehave*, 22 CRIM. L. BULL. 131, 143 (1986) (advocating personal liability for prosecutor "who misconducts himself with malice.").

on the prosecutor's desire to win convictions, have urged trial and appellate courts to make greater efforts to prevent and deter prosecutorial misconduct, including greater readiness to reverse convictions.¹⁹ Still others would adopt more detailed ethical standards²⁰ or stimulate the use of bar discipline by requiring investigation of prosecutorial forensic misconduct whenever it occurs.²¹

My focus in this Article is different. While I agree that both incentives and deterrents are important, I think a large part of the problem lies in our failure to give prosecutors a coherent understanding of their quasi-judicial role.²² Discussions of prosecutorial duty in the literature²³ tend to remain either on the level of broad platitudes or, when addressed to particular practices, to lack a coherent framework. In light of prosecutors' broad discretion,²⁴ and the pressures on them to

19. Allen, *supra* note 6, at 336; Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C.L. REV. 693, 737 (1987) (urging reversal of conviction when prosecutor has committed "bad faith" suppression of exculpatory evidence); Note, *Prosecutorial Misconduct: The Limitations Upon the Prosecutor's Role As an Advocate*, 14 SUFFOLK U.L. REV. 1095, 1112-13 (1980) (urging, *inter alia*, stricter "harmless error" test).

20. See THE AMERICAN LAWYER'S CODE OF CONDUCT ch. 9 (rev. draft, May 1982).

21. THE JUDICIAL RESPONSE TO LAWYER MISCONDUCT, I.12 (1984) (ABA would require trial and appellate courts to refer observed misconduct to appropriate disciplinary bodies); Rosen, *supra* note 19, at 735-36 (bar counsel's office should screen appellate cases); Steele, *supra* note 2, at 982 (proposes legislatively created "Prosecutor Grievance Council" to investigate complaints and administer sanctions; would require inquiry whenever appellate court expressly or implicitly finds prosecutor acted unethically).

22. See Aronson, *Professional Responsibility: Education and Enforcement*, 51 WASH. L. REV. 273, 313-14 (1976). Aronson argues that under the current system most prosecutors understandably choose an "adversary" approach. *Id.* at 313. "Law schools and ethics committees can advise no differently," he argues, until the Bar resolves its present ambivalence and chooses a "system model" of lawyering—one that is either "adversary-oriented" or "truth-oriented." *Id.* at 313-14, n.124. Meanwhile, Aronson maintains, we cannot coherently educate lawyers in ethics, or enforce ethical rules. *Id.* at 287-89. I disagree. I cannot imagine we would want to reduce the prosecutor's dual role to a monistic one, and I think we *can* do better at coherently educating prosecutors about their current role.

23. Although the post-Watergate years have seen an explosion of literature on professional responsibility, relatively little has been written on prosecutorial ethics. Only recently has much been written about prosecutorial ethics in general, as opposed to particular ethical issues. Some major works are M. FREEDMAN, *supra* note 5; Steele, *supra* note 2; Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145 (1973). Two treatises have recently appeared: B. GERSHMAN, *supra* note 5 and J. LAWLESS, *supra* note 5. Bennett Gershman has also written an article on standards for measuring prosecutorial misconduct, forthcoming in the AMERICAN CRIMINAL LAW REVIEW. See also Belsky, *On Becoming and Being a Prosecutor*, 78 NW. U.L. REV. 1485 (1984) (reviewing D. NISSMAN & E. HAGEN, *THE PROSECUTION FUNCTION* (1982)); Cf. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980) (discussing the ethical problems surrounding defense of a guilty and dangerous defendant).

24. Barring unlikely radical changes in our criminal justice system and the prosecutor's role within it (see Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J. 338 (1982)), prosecutors will continue to exercise broad discretion beyond the reach of agency

adopt a "conviction mentality," we have created a vacuum in which prosecutorial overzealousness and misconduct can flourish. If I am right, then the remedies are first, to define the prosecutor's role more precisely and second, to educate and support prosecutors in that role. This Article attempts to accomplish the first task and discusses one approach to the second. It draws both on academic sources (legal and philosophical) and on the prosecution experiences of my students and myself in Boston-area lower criminal courts.²⁵ A case prosecuted by one of my students raises the general issue.

The Vietnam Veteran Case

The thirty-year-old defendant was caught red-handed shoplifting from a department store. He had had a clean record until he went to Vietnam. There he won two Purple Hearts and a Presidential Citation. He also became addicted to heroin. By the time of the current offense, the defendant had an extensive criminal record, including several assaults and batteries, larcenies, and six armed robberies for which he had served time in state prison. He was paroled several months prior to his shoplifting and had not been arrested until the current incident. The student read a report from defendant's psychiatrist stating that defendant was on methadone maintenance, was seeing the doctor regularly, and was "making a great deal of progress." According to the report, a sequence of stressful events within a two-week period had triggered the current offense: the defendant's wife left him, he was fired from his job, and he was mugged.

Defense counsel asked the student if, in view of the circumstances, she would agree to dismiss or file²⁶ the charge. Rejecting that path, the student wanted to recommend a short, suspended jail term, probation, and continued drug treatment. But her instructor/supervisor disagreed. In view of defendant's criminal record, she strongly advised the student to recommend incarceration. Feeling that jail would be counter-productive for the defendant, the student resisted,²⁷ but experienced

guidelines, rules of professional conduct, disciplinary bodies, or appellate courts. See *infra* text accompanying notes 36-38, 232-34.

25. Several years ago I spent a sabbatical leave prosecuting criminal cases in the Boston-area lower courts. When I returned, I began teaching professional responsibility to students enrolled in the Boston University Criminal Law Clinical Program, some of whom prosecuted cases under supervision. In this article, I have made liberal use of materials from this program. Statements of my students are quoted without identifying the speaker to preserve anonymity.

26. "Filing" charges in Massachusetts has the effect of terminating the case without a decision on the merits, dismissal, or nolle prosequere. MASS. GEN. L. ch. 277, § 70B (West 1972).

27. In the end, she recommended probation to the judge, who was even more lenient: he continued the defendant's case without any adjudication of the charges.

considerable doubt about her role. This was exacerbated when the probation officer involved in the case mistook her for defense counsel, explaining, "I knew you said [you were a] prosecutor but . . . you were so nice that I just thought you were defense counsel, . . . you're too nice to be an ADA." Afterwards the student wrote about the case:

The major professional responsibility issue I faced was simply—*what exactly is my job as prosecutor and what did I owe this defendant?* The only²⁸ provision [of the professional responsibility rules] that guided me was the "duty to seek justice and not merely to convict,"²⁹ which is incredibly vague. This did seem to be the case where *justice* needed to be served, and there were many more competing interests than the one to convict I began thinking—*maybe I am being too nice*. Maybe I was getting too involved and shouldn't have concerned myself with defendant's record and welfare. What exactly is my job as prosecutor?³⁰

How would a "virtuous prosecutor"³¹ have acted in this student's shoes? Was she obliged to consider what disposition was "just" and to seek only that? Should she have gone after the most severe penalty she thought she could get? Was it proper, in deciding the "just" course, to consider the defendant's rehabilitative needs? How should she have reconciled the demands of "justice" for the defendant and his family with potentially conflicting demands by the victimized department store? With the demands of "justice" as formulated by the arresting police department? With anticipated reactions from media and public?

Although my student's *angst* revolved around her fear that she was acting "underzealously," her questions nicely pose the opposite question: Would a different approach have been "overzealous?" Or simply appropriate? The remainder of this Article addresses these basic questions. Part I considers what leads prosecutors to behave overzealously. I examine features of their work environment that make their "previous pursuit of the elusive Lady of Justice become . . . a faded memory."³² I then turn to definitions of the prosecutor's dual role, especially the duty to "seek justice." Part II examines current definitions of that role, including the "surrogate client" model and the

28. But see STANDARDS, *supra* note 1, at § 3-3.8(a) (instructing prosecutors to "explore the availability of noncriminal disposition, including programs of rehabilitation, formal or informal, in deciding whether to press criminal charges . . .").

29. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1980) (amended 1981) [hereinafter MODEL CODE]; see also STANDARDS, *supra* note 1, at § 3-1.1(c).

30. See *supra* note 25.

31. See Uviller, *supra* note 23. Professor Uviller's article served as the inspiration for the title of this Article.

32. Lawless & North, *supra* note 9, at 27.

"adversary stage" theory. Part III constructs a more detailed model for understanding the quasi-judicial duty. I consider questions such as: What goals other than penal severity are implied by the duty to seek "justice"? Is it sometimes, or always, proper for prosecutors to prefer penal severity to those competing goals? If so, when is that proper? With the aid of a series of tables, which I continually revise as the analysis progresses, I develop a framework for understanding, reconciling and implementing the prosecutor's dual roles. I apply the model principally to the Vietnam Veteran case, but also (more briefly) to other contexts. Finally, in part IV, I discuss the implications of this model for a prosecution agency wishing to foster virtuous conduct in its ranks.

I. INSTITUTIONAL PRESSURES TO BEHAVE "OVERZEALOUSLY"

Most writers contend that overzealousness is a widespread problem.³³ Assuming they are correct, why is this so? One can explain the phenomenon by reference to various institutional factors that foster—or fail to curb—"conviction psychology." These include the nature of prosecution agencies, the adversary system, and the system for enforcing prosecutorial ethics.

A. *The Nature of Prosecution Agencies*

Prosecution agencies in the United States are numerous and their practices, which have not been studied much,³⁴ vary according to such factors as agency size, caseload, location, organization and governmental level. Generalized descriptions are therefore hazardous, though necessary.

The prosecutor's great discretionary power is the cardinal fact of professional life. Compared to the average government lawyer serving in an administrative agency, the prosecutor's discretion is both broad and seemingly unguided by legislation. Because prosecution agencies do not generally try to control the discretion of line staff³⁵ either by

33. See, e.g., sources cited in *supra* note 7; Felkenes, *supra* note 3, at 110-11; Note, *supra* note 19, 1095-96.

34. Felkenes, *supra* note 3, at 98; McDonald, *Preface* to THE PROSECUTOR 9-12 (W. McDonald ed., 1979).

35. I recognize that the generalizations that follow do not describe the practices of many individual prosecutors and prosecution agencies. Hopefully, these generalizations do reflect the existing literature's discussion of prosecutorial practices. See *id.*

internal regulations³⁶ or by close supervision,³⁷ individual prosecutors typically exercise broad discretion, which is largely invisible and unreviewable.³⁸ The environment in which prosecutors exercise this power is shaped by both external and internal pressures. Regarding the former, Abraham Blumberg has written that “[t]he central problem of any prosecution office is its political character.”³⁹ Political pressures foster a “conviction psychology” because prosecutors can easily demonstrate their “effectiveness” by pointing to conviction statistics.⁴⁰ As Blumberg writes, “[e]veryone in the criminal court . . . genuinely feels he is being observed at all times Police, district attorneys, judges, probation officers, lawyers, and even clerks arrange their official behavior to suit the expectancies of those who will be watching.”⁴¹ Under scrutiny of the media, the police, courthouse co-workers and victims, a prosecutor is more likely to win approval for acting “tough on criminals” than for championing “fairness.”⁴²

36. The ABA has urged prosecution agencies to formulate office manuals to guide the exercise of discretion. See STANDARDS, *supra* note 1, at § 3-2.5. However, very few agencies have done so. See Thomas & Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507, 517 (1976). Whether meaningful guidelines are possible to draft is debatable. Compare K. DAVIS, DISCRETIONARY JUSTICE *passim* (1969) and Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1562-66 (1981) (both advocating adoption of internal guidelines) with L. CARTER, THE LIMITS OF ORDER, (1974) and Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971) (arguing the futility of trying to regulate most forms of prosecutorial discretion). See also *infra* text accompanying notes 232-234.

37. See L. CARTER, *supra* note 36, at 49 (“the bulk of discretionary judgments [is placed] at the bottom of the organizational hierarchy”); K. DAVIS, *supra* note 36, at 144 (noting “the complete absence of supervisory power over . . . the power to prosecute or not to prosecute.”); J. EISENSTEIN & H. JACOB, *supra* note 17, at 48, 85, 116-17, 152-54 (degree of supervision in Baltimore, Chicago and Detroit). At some levels of practice, or in politically sensitive cases, elected officials or their representatives may become more involved in case decision making. See for example, the dilemmas facing government appellate counsel in the Japanese exclusion cases, discussed in P. IRONS, JUSTICE AT WAR *passim* (1983). In this Article, however, I focus on the prosecutor’s role in run-of-the-mill state criminal cases.

38. K. DAVIS, *supra* note 36, at 144; Vorenberg, *supra* note 36, at 1523-24.

39. A. BLUMBERG, CRIMINAL JUSTICE 123 (2d ed. 1967); Felkenes, *supra* note 3, at 117 (“The fact that the D.A.’s office is political stifles expressions of social ideals. The prosecutor is supposed to prosecute and he is not expected to express sympathy for the defendants.”).

40. Alschuler, *supra* note 16, at 106 (“Conviction statistics seem to most prosecutors a tangible measure of their success.”). See also J. EISENSTEIN & H. JACOB, *supra* note 17, at 47 (“Failure to obtain the expected number of convictions jeopardizes the career prospects of the prosecutor . . . and makes both him and his staff vulnerable to public criticism”); Reiss, *supra* note 3, at 10-11. On the general tendency of bureaucrats to define success in “measures that are easily quantified and presented,” see P. RUBIN, BUSINESS FIRMS AND THE COMMON LAW: THE EVOLUTION OF EFFICIENT RULES 116 (1983).

41. A. BLUMBERG, *supra* note 40, at 87 (“The key phrase used over and over again by all [the court’s] diverse groups is, ‘Cover yourself!’”).

42. *Id.* See L. CARTER, *supra* note 36, at 83; J. EISENSTEIN & H. JACOB, *supra* note 17, at 93, 96 (Baltimore), 166-67 (Detroit) for evidence of police, media, and community pressure for

The internal climate of prosecution agencies may also promote "conviction psychology." Traditionally, assistant prosecutor jobs have been filled by beginning lawyers seeking trial experience before moving on to more lucrative private practice.⁴³ Their overall training is inadequate⁴⁴ and includes little if any formal instruction in ethics.⁴⁵ Nor have most prosecutors studied ethics in any detail in law school. Together, these characteristics—youth, inexperience and lack of instruction in ethical obligations—render prosecutors particularly vulnerable to influence by their more experienced peers. If the veterans communicate conviction-oriented values, clearly that is the strongest message we can expect young prosecutors to receive.

Counter-pressure to be "fair" exists,⁴⁶ but often pales next to pressures to demonstrate professional competence that, in turn, tends to be measured in terms of "wins," *i.e.*, "heavy" convictions and sentences.⁴⁷ Of course, not all prosecutors serve only briefly *en route* to the private sector. But those who seek careers in prosecution may feel even greater pressure to conform to conviction-oriented values than those who are just "passing through."⁴⁸ Felkenes describes the prosecutor's moral evolution:

"stern law enforcement." Police have the special power to criticize and "punish" prosecutors. J. EISENSTEIN & H. JACOB, *supra* note 17, at 54.

43. See generally Kuh, *Careers in Prosecution Offices*, 14 J. LEGAL EDUC. 175 (1961); L. CARTER, *supra* note 36, at 45. But see *infra* note 92.

44. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE COURTS 74 (1967) ("The high proportion of lawyers who become prosecutors without any prior experience in the criminal process creates a need for programs to train prosecutors. This need has long been neglected An assistant prosecutor in a typical city office learns by doing.") *Id.*

Apparently the situation has not changed in the years since the Commission's work. See L. CARTER, *supra* note 36, at 137-38; Douglass, *Continuing the Education of the Prosecutor*, in SPECIAL PROBLEMS IN PROSECUTION, 59-76 (1977); J. EISENSTEIN & H. JACOB, *supra* note 17, at 116, 148 (1977) (Baltimore, Chicago, and Detroit District Attorneys' offices all lack formal training programs for new assistants); *In the Matter of the Discipline of An Attorney*, 2 MASS. ATT'Y. DISCIPLINE REP. 110 (1980) (prosecutor disciplined for forensic misconduct in 1976 had received no training in prosecutorial duties). A recent flagrant example appears in *McCleskey v. Kemp*, 107 S. Ct. 1756, 1801 (1987) (Blackmun, J., dissenting), *reh'g denied*, 107 S. Ct. 3199 (1987). In *McCleskey*, the district attorney of Fulton County, Alabama testified that during his 18 years in office, "there were no guidelines informing the Assistant District Attorneys . . . how they should proceed" *Id.* Apparently, the only guidance given was "on-the-job training," even with respect to discretion in seeking the death penalty. *Id.*

45. See, e.g., Morrison, *Defending the Government: How Vigorous is Too Vigorous*, in VERDICTS ON LAWYERS, 231, 242, 249 (R. Nader & M. Green eds. 1976) ("[T]here is no attempt to instruct the new [assistant U.S.] attorneys about the meaning of their role or the scope of their responsibilities under law [T]raining aids focus primarily on the how-to-do-it kinds of questions.").

46. See *infra* text accompanying notes 92-93.

47. Felkenes, *supra* note 3, at 108-09, 114.

48. *Id.* at 118. See also Alschuler, *supra* note 16, at 111; McIntyre, *Impediments to Effective Police Prosecutor Relationships*, 13 AM. CRIM. L. REV. 201, 226 (1975) (career prosecutors

On the one hand he must be the aggressive state's advocate demanding strict compliance with state law, while on the other hand he is the quasi-judicial officer of the court seeking justice even for those he would prosecute. Wrestling with this perspective of himself creates an ambivalence He is torn between his image as a powerful, callous attorney and a crusader for justice The anomie resulting from his conflict may cause the prosecutor to ignore his quasi-judicial role, or he may play this role only in making the initial decision to charge. If he is forced to choose only one of the roles, it is likely that he will choose the advocate role because . . . the criterion by which his efficiency is judged is quite likely to be his conviction record.⁴⁹

A prosecutor's advancement might not literally depend on the number of "win" notches in her belt,⁵⁰ but Felkenes' assertion reflects a greater truth: prosecution agencies might not actually reward the overzealous mentality, but still subtly discourage more than minimal concern for competing values. Unless it results in reversal of the conviction, or public scandal, the prosecutor's choice to act "overzealously" can be cost-free. On the other hand, choosing a different path—for example, dismissing a case which the police want prosecuted—might "make waves."⁵¹ The moral and political climate in an agency can foster a "conviction psychology" more powerfully than can any specific policy basing promotions on an assistant's conviction rate.

are more concerned with gaining the approval of law enforcement officials than of their less committed professional colleagues); Rabinowitz, *supra* note 5, at 232 (junior prosecutors "just passing through" and those so high in the agency hierarchy as to be "above the battle" are the only ones committed to justice). But see M. HEUMANN, PLEA BARGAINING 119 (1978) ("Contrary to suggestions . . . that prosecutors develop a 'mentality' that is biased toward harsh dispositions, my data reflect . . . that prosecutors mellow over time.").

49. Felkenes, *supra* note 3, at 118-19.

50. In my limited experience as a prosecutor, I found that prosecutors were highly motivated to win contested cases and to secure adequate punishment for defendants who in the prosecutor's view deserved it. However, when I asked experienced assistants whether advancement depended upon conviction rates, they scornfully denied it. Lief Carter reports a similar lack of concern with conviction rates among junior deputies in the California prosecution agency he studied. L. CARTER, *supra* note 36, at 41, 128-29, 132. On the other hand, in one of the three cities studied by Eisenstein and Jacob, a former district attorney reportedly kept tabs on individual prosecutor's conviction rates in jury trials. J. EISENSTEIN & H. JACOB, *supra* note 17, at 116. See also Note, *supra* note 19, at 1103 n.49 (conviction rates viewed as key factor in election of prosecutors).

51. See Matthews & Marshall, *Some Constraints on Ethical Behavior in Criminal Justice Organizations*, in THE SOCIAL BASIS OF CRIMINAL JUSTICE: ETHICAL ISSUES FOR THE 80's 9-14 (F. Schmallegger & R. Gustafson eds. 1981). "[E]thical behavior in criminal justice organizations involves risk to the individual and to his organization." *Id.* at 12. The risk is loss of "efficiency" (serving organizational needs) in order to gain "effectiveness" (client service). *Id.* at 13. "[R]isk taking in organizational role performance tends to be rare, especially in cases where the individual has a 'no-risk' alternative available." *Id.* at 12-13.

B. *The Adversary System*

The adversary system itself creates strong pressures on the prosecutor to invest her energies single-mindedly in maximizing convictions and punishments. These pressures are largely legitimate.⁵² However, they can lead prosecutors to behave overzealously, using improper means to gain a conviction or ignoring evidence of innocence or mitigation. This is so for several reasons.

First, like other players in the criminal justice system, prosecutors are strongly motivated to achieve "substantive justice"—*i.e.*, where prescribed punishments are meted out to the factually guilty according to their guilt.⁵³ The more vividly the prosecutor experiences the "justice" of punishing a particular defendant, the more compelling her desire to justify the means necessary to this end.⁵⁴ Similarly, the less keenly she experiences the "injustice" that her conduct might be inflicting on the defendant, the less difficulty she will have in pursuing conviction single-mindedly. The adversary system inherently tends to bias the prosecutor against the procedural aspect of justice and in favor of its substantive aspect. In her daily routine she is constantly exposed to victims, police officers, civilian witnesses, probation officers and others who can graphically establish that the defendant deserves punishment, and who have no reason to be concerned with competing values of justice. At the same time, the prosecutor is normally isolated from those—the defendant, his family and friends, and often, his witnesses—who might arouse the prosecutor's empathy or stimulate concern for treating him fairly.⁵⁵ A system which denies the prosecutor access to

52. See *infra* text accompanying notes 128-135.

53. M. FEELEY, *THE PROCESS IS THE PUNISHMENT*, 24, 25, 70-76 (1979). Defense counsel, by contrast, are professionally obliged to help clients escape the punishment they deserve. Their primary devotion in such cases is to procedural justice. See Mitchell, *supra* note 23, at 296-99.

54. Skolnick, *Deception by Police*, 1 CRIM. JUST. ETHICS 40, 41-42 (Summer/Fall 1982); Younger, *The Perjury Routine*, 3 CRIM. L. BULL. 551 (1967).

55. The dynamics can change radically when the defendant appears *pro se*. One of our most "hard nosed" student prosecutors recently found himself plea-bargaining with a *pro se* defendant who, if convicted, would lose his driver's license and, therefore, his job. The once-faceless "defendant" was suddenly transformed into a sympathetic young man struggling to keep his new brick-laying job. In the student's words:

I found myself almost as his advocate—trying to gain permission [from my supervisor] to recommend a non-loss of license sentence My personal credibility [with the judge] was on the line but I felt it was more important to . . . keep this defendant working I was basically soft with the defendant because I had a triple role of D.A., defense counsel and advisor/middleman.

See *supra* note 25. A 1969 study showed that *pro se* defendants in the Boston lower courts received more lenient dispositions than others. S. BING & S. ROSENFELD, *THE QUALITY OF JUSTICE IN THE LOWER CRIMINAL COURTS OF METROPOLITAN BOSTON*, 51-55 (1970).

the defendant in this way is not structured to foster the prosecutor's devotion to "impartial justice."

Second, the prosecutor, having no individual client,⁵⁶ naturally tends to treat victims and police officers as clients or, at least, as spokespersons for the "public interest."⁵⁷ The adversary system fosters this tendency, both emotionally and structurally. Representing the defendant's "side," defense counsel typically tries to attack the state's witnesses and prevent punishment of the defendant. The victim, police and other state witnesses turn to the prosecutor for substantive justice. Self-restraint for the sake of fairness not only requires the prosecutor to resist her own desire for punishment of the defendant; she may also face uncomprehending resistance by the victim and/or police. Not surprisingly, prosecutors can quickly come to feel like gladiatorial champions battling on behalf of a "team" whose members extend beyond the victim⁵⁸ and police officers involved in the particular case to encompass the entire law enforcement subculture.⁵⁹

This subculture includes members at all levels of various courthouse constituencies: prosecution (from peers and superiors to clerks and secretaries), police, probation, court officers, newspaper reporters

56. See *infra* text accompanying notes 116-119.

57. McIntyre, *supra* note 48, at 219. McIntyre reports on a 1973 survey of prosecutors in which seventeen percent "strongly agreed" and twenty-eight percent "slightly agreed" that prosecutors and victims are in an attorney-client relationship. But see L. CARTER, *supra* note 36, at 67 (except for "crime control" oriented prosecutors, most deputies "felt they really had no client and did not think of themselves at all seriously as lawyers 'for the people'").

58. Pressure on the prosecutor might vary according to whether the victim or officer has influence in this network. A student prosecutor, tempted to dismiss a bad check charge initiated by an unsavory landlord against his former tenant, was intimidated when she saw that the complainant was "on a hugging basis with the court clerk."

59. Sociological studies of the police have described a "police culture." Skolnick, *A Sketch of the Policeman's "Working Personality," passim*, in JUSTICE WITHOUT TRIAL 42-70 (1966). See also Reiss & Bordua, *Environment and Organization: A Perspective on the Police*, in THE POLICE: SIX SOCIOLOGICAL ESSAYS 25-55 (1967); J. WILSON, VARIETIES OF POLICE BEHAVIOR 48-49 (1970). Writers on police-prosecutor relationships have emphasized the tensions between police and prosecutors, stemming from different organizational and career orientations. See McIntyre, *supra* note 48, *passim*. No writer has focused much on the common bonds between police and prosecutors, or on the extent to which career prosecutors share the "police culture." But see L. CARTER, *supra* note 36, at 78-84.

My own experience suggests that career prosecutors, like police officers, experience social and professional isolation, and may share other characteristics that the literature identifies as typical of the police. These latter characteristics include political conservatism (Skolnick, *supra*, at 94-95), a defensive attitude toward "outsiders" and "critics" (A. BLUMBERG, *supra* note 39, at 83), and a common "office view" of defense attorneys, judges and defendants (J. EISENSTEIN & H. JACOB, *supra* note 17, at 149-50). See D. NISSMAN & E. HAGEN, *supra* note 23, at xi: "The nature of the prosecutor's function . . . tends to isolate him from the rest of the profession and to unite him with his fellow prosecutors." Some prosecutors in my office would not go to restaurants in the Italian section of the city. I felt they had something in common with my police lieutenant friend who, at any restaurant, would only sit facing the door.

and even sympathetic judges.⁶⁰ A prosecutor leaving the courtroom after winning a guilty verdict or stiff sentence in an important case will likely receive warm congratulations from members of this network.⁶¹ One who dismisses charges against a factually guilty defendant because of insufficient evidence or some other imperative of justice will encounter, at best, condolences for her "loss." Such "losses," like "wins," are more than personal to the prosecutor; they are experienced as losses to society.⁶²

Third, the super-adversary posture of the criminal defense attorney contributes significantly to the prosecutor's perception of her own primary role as combatant. The adversary system normally creates psychological pressure on attorneys for both sides to "win" even if that requires bending, or perhaps breaking, rules that obstruct "justice" (as each partisan sees it). But the pressure on prosecutors to engage in such "zeal at the margins"⁶³ is particularly intense because of the defense attorney's special prerogative to engage in truth-defeating (and therefore, justice-defeating) tactics.⁶⁴ That prerogative operates on two levels. On the first, the defendant enjoys constitutional protections, such as the privilege against self-incrimination, which inhibit the search for truth.⁶⁵ These protections obstruct conviction of the guilty, but are easily justified.⁶⁶

On the second level, we give defense lawyers a special license to use truth-defeating trial tactics, justified by the severity of criminal

60. J. EISENSTEIN & H. JACOB, *supra* note 17, at 22, 43-53.

61. Robert Thurber's film, *Plea Bargaining: An American Way of Justice*, (Thurber Productions, Inc. 1980) contains such a congratulatory scene following conviction and imposition of a 30-year sentence on a cruel multiple offender.

62. See *supra* text accompanying notes 53-54.

63. D. LUBAN, *The Adversary System Excuse*, in *THE GOOD LAWYER* 83, 89 (D. Luban ed. 1983).

64. J. EISENSTEIN & H. JACOB, *supra* note 17, at 149-50; Dershowitz, *supra* note 5, at x-xi; Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 549-50. Of course, defense attorneys are barred from engaging in other conduct, such as making false statements to the court or presenting perjured witnesses. See MODEL CODE, *supra* note 29, *passim*.

65. Also, in some situations the ban on counsel's knowingly presenting false testimony might conflict with the defendant's right to testify or to the effective assistance of counsel. See *Lowery v. Cardwell*, 575 F.2d 727, 730-32 (9th Cir. 1978); *U.S. ex rel. Wilcox v. Johnson*, 555 F.2d 115, 120-22 (3d Cir. 1977). But see *Nix v. Whiteside*, 106 S. Ct. 988, 997 (1986) (right to assistance of counsel not violated by attorney who refused to cooperate in presenting perjured testimony). According to some, the defendant's due process rights would justify a criminal (but not civil) defendant's lawyer in hiring an actress to pose before the jury as the defendant's concerned grandmother. Austern, *Ethics*, 21 TRIAL No. 8 at 14 (Aug. 1985).

66. Arenella, *Rethinking the Functions of American Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 201-02 (1983); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 *passim* (1960).

sanctions and the usual imbalance of resources between the defendant and the state. These tactics include cross-examination to discredit a witness known to be telling the truth, exploitation of opposing party evidence known to be false, and failure to disclose or introduce material, adverse evidence.⁶⁷ Even scholars who question the morality of lawyers generally engaging in this sort of legitimate, but harmful, conduct on behalf of clients justify it with regard to the criminal defense bar.⁶⁸ But the prosecutor, enjoined to "fight fairly," is barred from using the same tactics. From her point of view, she is sent into battle with a blunted sword, while her opponent's is sharpened to a razor's edge.⁶⁹

67. Schwartz, *supra* note 64, at 550; Luban, *Calming the Hearsay Horse: A Philosophical Research Program for Legal Ethics*, 40 MD. L. REV. 451, 458 (1981) (the "false defense" hypothetical); Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 6, 12 (1975).

68. This so-called "criminal case exception" draws general approval. D. LUBAN, *supra* note 63, at 83, 91-93; Schwartz, *supra* note 64, at 551-52. But see Ball, *Wrong Experiment, Wrong Result: An Appreciatively Critical Response to Schwartz*, 1983 AM. B. FOUND. RES. J. 565, 571 and Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1540 criticizing the view that criminal defense attorneys are morally less accountable for such tactics than civil practitioners. For a different view of the "exception," see Schneyer, *id.*, at 1544-45 (describing zealousness rules as a corrective for cooperative reality, particularly in criminal defense work).

69. See Civiletti, *Prosecutor as Advocate*, 25 N.Y.L. SCH. L. REV. 1, 17-19 (1979) (discussing limitations on prosecutors). Compare STANDARDS, *supra* note 1, at § 3-4.1(c) (unprofessional for prosecutor knowingly to make false statement or representation in course of pleas discussion with the defense) with STANDARDS, *supra* note 1, at § 4-6.2(b) (defense counsel may not "knowingly make false statements concerning the evidence" during plea negotiations with the prosecution). The different wording implies recognition of greater freedom for defense counsel to lie in negotiations. The commentary to the STANDARDS does not indicate whether that was the drafter's intention.

Furthermore, prosecutors perceive that many defense lawyers enjoy another "special advantage" by engaging in blatantly unethical practices such as presenting perjured testimony (*see* L. CARTER, *supra* note 36, at 87-88 (filing motions designed to delay the proceedings); Alschuler, *supra* note 16, *passim*) and engaging in impermissible trial examinations and argument. The defendant's sole right to appeal the verdict insulates questionable defense tactics from appellate review and may give trial judges an incentive to favor the defense in evidentiary disputes. Van den Haag, *Limiting Plea Bargaining and Prosecutorial Discretion*, 15 CUMB. L. REV. 1, 9 (1984). For some, prosecutorial "overzealousness," and even "benign" police perjury, might be justified as "fighting fire with fire." Skolnick, *supra* note 54, at 42-43. But *see* United States v. Young, 470 U.S. 1, 11-13 (1985) (disapproving this practice of "fighting fire with fire"). Some prosecutors similarly justify the common judicial bias in their favor.

This asymmetry between the prosecution and defense roles at trial has led Murray Schwartz to argue that criminal proceedings are not truly "adversary." Schwartz, *supra* note 64, at 548-50. According to Schwartz, adversary proceedings postulate that the opposing lawyers "be roughly equal in their dedication to the cause of their principals and in their opposition to the cause of their opponents," and that counsel for both parties have roughly equal competence to perform their professional functions. *Id.* at 547. However, prosecutors are hampered procedurally from discovering the truth, and defense lawyers do not pursue that goal. As I shall argue (*see infra* text accompany-

C. *Our System for Enforcing Professional Responsibility*

The prosecutor's duties to act fairly and protect defendants' rights are articulated in a variety of forms, including binding disciplinary rules,⁷⁰ recommended standards of behavior,⁷¹ court opinions⁷² and bar disciplinary body rulings.⁷³ With few exceptions, the rules and standards are framed so broadly that they offer prosecutors little concrete guidance.⁷⁴ Questions about the propriety of particular behavior could be answered by internal administrative procedures,⁷⁵ published bar association advisory opinions, or judicial disciplinary opinions. But these mechanisms seldom operate to clarify the prosecutor's conflicting obligations.⁷⁶

Rather, the limits on prosecutorial zealotry are most commonly formulated by courts responding to claims by convicted defendants that the prosecutor's "misconduct" violated due process.⁷⁷ The ultimate test in such cases is not the propriety of the prosecutor's conduct, but the "fundamental fairness" of defendant's trial.⁷⁸ Because courts are understandably reluctant to reverse convictions, even if the prosecutor's conduct has been egregiously unethical, deciding questions of prosecutorial misconduct in the appellate context discourages a balanced consideration of the issues. Especially when the defendant's factual guilt seems clear, courts in these cases may strain to excuse⁷⁹ or overlook the prosecutor's questionable conduct. And even if the conduct is

ing notes 132-135), I think the prosecutor's function is usefully viewed as adversarial. But even if Schwartz was correct in theory, criminal prosecutions occur within the adversary system, are adversary in form, and are staffed by lawyers educated to function as adversaries. Naturally, then, adversary norms and forms must heavily influence prosecutorial behavior.

70. See, e.g., MODEL CODE, *supra* note 29, at DR 7-103(b); MODEL RULES *supra* note 1, at § 3.8(d) (duty to disclose exculpatory evidence to the defense).

71. See, e.g., NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS ch. 7 (1977).

72. See, e.g., cases collected in Annot. *supra* note 4.

73. See, e.g., LAWYER'S MANUAL ON PROFESSIONAL MISCONDUCT (1984).

74. For example, the scope of the prosecutor's duty under MODEL CODE, *supra* note 29, at DR 7-103(B) to disclose "evidence . . . that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment . . ." is unclear. A substantial body of case law and scholarship has explored the meaning of the analogous constitutional duty under the due process clause. See Rosen, *supra* note 19, at 733 n.144.

75. For example, training sessions, written guidelines or case supervision.

76. See Steele, *supra* note 2, at 976 (paucity of disciplinary proceedings); *infra*, text accompanying notes 233-35 (internal agency guidelines are rare and ineffective).

77. Steele, *supra* note 2, at 976-77.

78. Darden v. Wainwright, 106 S. Ct. 2464, 2472-73 (1986).

79. Appellate treatment of prosecutorial comment at trial on the defendant's failure to testify is an example. See Ayer, *The Fifth Amendment and the Inference of Guilt from Silence: Griffin v. California After Fifteen Years*, 78 MICH. L. REV. 841 *passim* (1980).

declared constitutionally improper, the conviction will stand so long as the error was "harmless."⁸⁰

Language in appellate opinions condemning prosecutorial misconduct may influence prosecutors less than the bottom line endorsement, "conviction affirmed." This is especially true because appellate opinions typically refrain from identifying prosecutors whose conduct they condemn,⁸¹ and the courts rarely refer such incidents to local bar association disciplinary bodies.⁸²

This pattern of response to alleged misconduct tempts prosecutors to equate the relevant professional responsibility requirements with the constitutional standards developed in the appellate case law. Thus the duty to "do justice" comes to be defined in terms of minimal due process, and proper prosecutorial conduct in terms of conduct consistent with a constitutionally fair trial.⁸³ Given the absence of effective forums outside the criminal process for interpreting and enforcing norms of prosecutorial ethics, this tendency seems likely to continue.

D. Conclusion

The preceding discussion suggests first, that prosecutorial "overzealousness" is widespread; and second, that it stems from various factors, including the essentially conflicting dual roles assigned to prosecutors, the vagueness of the injunction to "do justice," and a host of institutional pressures to pursue high conviction rates. The first proposition might be attacked (1) because it misrepresents the predominant climate of prosecution agencies, or (2) because it assumes some common understanding of "overzealousness" that does not, and perhaps

80. See, e.g., *United States v. Hasting*, 461 U.S. 499 (1983).

81. This is so even when courts reverse convictions because of prosecutorial misconduct. See, e.g., *Commonwealth v. Smith*, 387 Mass. 900, 907, 914, 444 N.E.2d 374, 380, 383 (1983) (Abrams, J., concurring).

82. But see *United States v. Kelly*, 543 F. Supp. 1303, 1311 (D. Mass. 1982), 550 F. Supp. 901, 902 (D. Mass. 1982) (reviewing findings of a board of bar overseers). Some bar disciplinary bodies now screen appellate opinions for instances of misconduct on their own initiative.

83. For example, almost every case and commentary regarding the prosecutor's duty to disclose "exculpatory" evidence concerns the legal and constitutional requirements. Almost no attention has been given to the appropriateness of independently construing the prosecutor's ethical duty to disclose (MODEL CODE, *supra* note 29, DR 7-103(B)). See Rabinowitz, *supra* note 5, at 233 (*Brady* rule "would be quite unnecessary if the prosecutor were genuinely interested in justice."). Perhaps more attention will be given to the prosecutor's ethical duty now that the Supreme Court has virtually emasculated the disclosure standards under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). See *United States v. Agurs*, 427 U.S. 97, 103-114 (1976); *United States v. Bagley*, 473 U.S. 667, 695-703 (1985) (Marshall, J., dissenting). But see *Rosen*, *supra* note 17, at 697 (national survey of bar disciplinary bodies discloses negligible number of disciplinary proceedings, and fewer stiff sanctions, for failure to disclose).

cannot, exist. While I think the first objection has merit, I agree only partly with the second.

The charge of rampant overzealousness is probably overstated. Some observers of prosecution agencies do describe "conviction psychology" as the norm,⁸⁴ while others paint a different picture. For example, in her study of discretion and negotiation in two California court systems, Pamela Utz describes two competing models of prosecution: the "adversary" and the "magisterial."⁸⁵ And Lief Carter suggests that the zealous "crime fighter" type is dysfunctional and a potential embarrassment to the office.⁸⁶ The sparse data at hand⁸⁷ do not support generalizations about how the "typical" American prosecutor views her role, but we know that many resist the pressures we have described.⁸⁸

Contrasting prosecutorial styles coexist, often within a single agency.⁸⁹ As in other practice contexts, each person chooses the kind of prosecutor he or she wants to be. The choice is probably influenced by many factors, including one's background, personality, education, training, and work environment.⁹⁰ We should, therefore, regard prosecutors as heterogeneous and malleable *individuals*, not as a mass of zealots.

Among the likely factors influencing a prosecutor to take seriously her duty to "seek justice," two stand out. First, there is the message communicated by the professional codes and standards, reinforced (however inadequately) by academic, judicial and professional sources. While some prosecutors treat the message merely as superficial ideology, masking their "real" goals of maximizing convictions,⁹¹ others do not. Second, the relative brevity of most prosecutors' careers⁹² makes them vulnerable to counter-pressures from outside the

84. A. BLUMBERG, *supra* note 39, at 131-37; Felkenes, *supra* note 3, at 108-09; Rabinowitz, *supra* note 5, at 231 *passim*.

85. Utz, *Two Models of Prosecutorial Professionalism*, in *THE PROSECUTOR* 99 *passim* (W. McDonald ed. 1979).

86. L. CARTER, *supra* note 36, at 68.

87. *See supra* note 34.

88. *See, e.g.*, Felkenes, *supra* note 3, at 109-10 (majority of prosecutors surveyed expressed concern for fairness and impartiality).

89. *Id.*

90. *See* Jacoby, *The Charging Policies of Prosecutors*, in *THE PROSECUTOR* 75, 77-8 (W. McDonald ed. 1979); Utz, *supra* note 85, at 114-19.

91. A. BLUMBERG, *supra* note 39, at 123.

92. An informal survey in 1975 reported the average tenure of assistant prosecutors as less than two years. McIntyre, *supra* note 48, at 225 n.34. In recent years, however, prosecution agencies have been attracting better qualified, more career-oriented recruits. *See* P. WICE, *CHAOS IN THE COURTROOM: THE INNER WORKINGS OF THE URBAN CRIMINAL COURTS* 63 (1985); Fish-

agency. Those who wish to move on to private practice or the bench have an incentive to impress defense lawyers and judges with their ability to be "fair" and "reasonable."⁹³

The second objection to my suggestion that overzealousness is widespread is that "overzealousness" (in the broad attitudinal sense, and not as manifested in objectively defined misconduct)⁹⁴ is essentially a pejorative label for legitimate prosecutorial conduct disliked by the speaker. According to this view, the prosecutor's dual role is not to be taken seriously. Society's insistence that prosecutors "seek justice" is only rhetorical window dressing: we really want them to speak like the Pope and act like Rambo.⁹⁵ I think this view is wrong, but I suspect it has widespread appeal, partly because it contains a large kernel of truth: we express the duty in such vague platitudes as to suggest it lacks any substantive content. In response to this view, I attempt to articulate the meaning and practical importance of the prosecutor's "quasi-judicial" duty in the next two parts.⁹⁶

II. THE PROSECUTOR'S QUASI-JUDICIAL ROLE: CURRENT EXPLANATIONS

The student prosecutor in the Vietnam Veteran case questioned her responsibility to "seek justice." The traditional response would lead to a consideration of prosecutorial function. Observers have described three major functions: "administrative," "quasi-judicial" and "adversary."⁹⁷ The prosecutor's "administrative" function,⁹⁸ which encom-

man, *The Social and Occupational Mobility of Prosecutors: New York City*, in *THE PROSECUTOR* 239, 253 (W. McDonald ed. 1979). It is hard to predict whether or how this trend will change the prosecution climate.

93. Alschuler, *supra* note 16, at 111.

94. See *supra* text accompanying notes 4-17.

95. Of course, "we" believe this only when the defendants are "them" and not "us."

96. Exploring this duty is worthwhile for other reasons. A deeper understanding of the prosecutor's proper role would expose claims of "overzealousness" that are based upon extravagant notions of the prosecutor's duty to "justice." Also, prosecutors who now succumb to a "conviction psychology" might not do so if they were offered a coherent alternative understanding of their role.

97. According to the STANDARDS, *supra* note 1 at § 3-1.1 comment, the prosecutor serves in three capacities: counsel for the prosecution, "minister of justice" and "administrator of justice." Albert Alschuler refers to these as "advocate," "minister of justice" and "administrator." Alschuler, *supra* note 16, at 52-53. LaFave describes four functions: trial counsel for the police, house counsel for the police, representative of the court and mirror of community opinion. W. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 515 (1980). Blumberg lists five major prosecution functions: collection agent, dispenser of justice, power broker-fixer, political enforcer and overseer of the police. A. BLUMBERG, *supra* note 39, at 133. See also J. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* xv (1980) (four principal functions); Steele, *supra* note 2, at 965 (three major functions). Of course, some of these described functions are extrinsic to criminal prosecution.

98. Steele calls this the "processing" function. Steele, *supra* note 2, at 965.

passes her obligation to the court and society to avoid unnecessary delays and backlogs,⁹⁹ is essentially instrumental. As an administrator the prosecutor manages limited resources so as to maximize the primary interests that criminal prosecutors ought to promote. These are expressed in terms of a dual role: to perform both as "zealous advocate" for the state and as a "quasi-judicial" officer ("minister of justice").¹⁰⁰

These terms, however, are by no means self-explanatory. The prosecutor's duty of "zealous advocacy" may seem readily understandable. But what do these courts, commentators and drafters of professional codes of conduct mean by "quasi-judicial" and "minister of justice"? Although nowhere explicitly defined, the prosecutor's quasi-judicial function connotes both a *procedural orientation* (the quasi-judicial role) and a *set of objectives* (the quasi-judicial values), each of which is defined in contrast to an "adversary" counterpart. Procedurally, in her *quasi-judicial role* the prosecutor acts "impartially" and judge-like; her orientation to the factual contest is neutral. This is usually contrasted to the prosecutor's *adversary role*, in which she functions as an advocate for the state and against the defendant.

In her *quasi-judicial role* the prosecutor owes allegiance to a broad set of societal values because she is bound to seek the truth and to "guard the rights of the accused as well as to enforce the rights of the public."¹⁰¹ But as *zealous advocate* she is seen as devoted to a much

99. According to Alschuler, as an administrator the prosecutor's goal is to "dispose of each case in the fastest, most efficient manner in the interest of getting [her] and the court's work done." Alschuler, *supra* note 16, at 52. See also Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52, 55 (1967) (describing prosecutor role as "calendar man"). The administrative task might also include efficient use of law enforcement and correctional resources, for example, disposing of cases so as to minimize jail overcrowding or police overtime costs. The STANDARDS include among the prosecutor's functions as an "administrator of justice" shaping the "character, quality and efficiency" of the criminal justice system. STANDARDS, *supra* note 1, at § 3-1.1 comment.

100. For example, the MODEL RULES, declare: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." MODEL RULES, *supra* note 1, Rule 3.8 comment. See also MODEL CODE, *supra* note 29, at EC 7-13 ("The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict"); STANDARDS, *supra* note 1, at § 3-1.1(c) (same language as the MODEL CODE). The judicial origin of prosecution in the United States supports the "quasi-judicial" terminology. See Goldstein, *History of the Public Prosecutor*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1286-90 (S. Kadish ed. 1983); J. JACOBY, *supra* note 97, at 19. Henceforth I shall use "quasi-judicial" and "minister of justice" synonymously.

101. STANDARDS, *supra* note 1, at § 3-1.1 comment. Compare this with Alschuler's definition of the "quasi-judicial" role as trying "to do the right thing for the defendant in view of the defendant's social circumstances or in view of the peculiar circumstances of his crime." Alschuler, *supra* note 16, at 53. In the prosecutorial immunity context, courts use "quasi-judicial" differently to refer to the functions of initiating and presenting cases—as opposed to investigative and administrative functions. See *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20, 424

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narrower range of interests and values. For example, according to Albert Alschuler, the prosecutor tries as an advocate to “maximize both the number of convictions and the severity of the sentences that are imposed after conviction.”¹⁰² The conventional opposition, then, is between loyalty to “fairness and justice” and to maximizing penal severity.

The prosecutor’s competing roles and objectives can be expressed in tabular form:

TABLE ONE

I. QUASI-JUDICIAL FUNCTION	II. ADVERSARY FUNCTION
A. Role:	
Impartial, judge-like neutrality	Zealous, adverse advocacy
B. Values/Objectives:	
Justice, truth, fairness, rights of accused	Convictions, penal severity

This dual role conception poses two basic problems. First, how should prosecutors understand the values of “fairness” and “justice” that as quasi-judicial officers they are bound to promote? Second, what is the relative scope of the quasi-judicial and adversary roles? Do prosecutors serve in both simultaneously? Or, does each role apply only to the performance of certain tasks? If the latter, how can the prosecutor know which role is appropriate to a particular task? I shall first describe the traditional view of both the nature of quasi-judicial values and the scope of the prosecutor’s two roles. I shall then propose a more detailed model for understanding the prosecutor’s dual role.

(1976) (prosecutors referred to as “quasi-judicial” officers because they exercise discretionary judgment in deciding which suits to pursue and how to conduct them in court).

102. Alschuler, *supra* note 16, at 52.

A. *Quasi-Judicial Values*

What does it mean for a prosecutor to seek "justice"? What value is she supposed to promote? The existing sources give scant guidance.

The duty to "seek justice" might be construed in a positivist sense, as merely enjoining prosecutors from violating independently articulated restrictions (whether substantive or procedural) on prosecutorial power. The message would be that while performing as an advocate, one should not violate specific ethical prohibitions, court rules, statutes, or the defendant's constitutional rights. In this view, the ethical command has no independent content.

Neither the codes of professional responsibility nor the cases contradict this view. Although the relevant American Bar Association Standards specify the duty to seek justice,¹⁰³ the codes of professional responsibility include it in hortative ethical considerations and commentary rather than in binding disciplinary rules.¹⁰⁴ Nor have courts reversed convictions or disciplined prosecutors for violating the duty to "seek justice" *per se*.¹⁰⁵ Although courts frequently condemn prosecutors for disregarding their quasi-judicial role, most if not all successful claims of prosecutorial misconduct rest upon violation of other, more specifically defined duties.¹⁰⁶ Even the two sources usually cited as authority for the duty to "seek justice"—Justice Sutherland's 1935 opinion in *Berger v. United States*,¹⁰⁷ and a 1940

103. STANDARDS, *supra* note 1, at § 3-1.1(c).

104. MODEL CODE, *supra* note 29, at EC 7-12; MODEL RULES, *supra* note 1, at Rule 3.8 comment.

105. For an overview of misconduct triggering appellate reversals see Gershman, *supra* note 5, *passim*. Regarding the misconduct that has triggered disciplinary sanctions see Annot. *supra* note 4.

106. See, e.g., *Boatwright v. State*, 452 So.2d 666, 667-68 (4th Fla. Dist. Ct. App. 1984); *Peterson v. State*, 376 So.2d 1230, 1234-35 (4th Fla. Dist. Ct. App. 1979); *Commonwealth v. Mahdi*, 448 N.E.2d 704, 712-13 (Mass. 1983); *Commonwealth v. Smith*, 444 N.E.2d 374, 378-79, 382 (Mass. 1983); *State v. Long*, 684 S.W.2d 361, 364-66 (Mo. App. 1984); *Collier v. State*, 705 P.2d 1126, 1130 (Nev. 1985); *People v. Monroe*, 480 N.Y.S.2d 259, 267-68 (N.Y. Sup. Ct. 1984); *Commonwealth v. Wallace*, 455 A.2d 1187, 1190 (Pa. 1983); *State v. Kanney*, 289 S.E.2d 485, 486-87 (W. Va. 1982); *State v. Critzer*, 280 S.E.2d 288, 289-92 (W. Va. 1981). *But see* *United States v. Bourg*, 598 F.2d 445, 449-50 (5th Cir. 1979) (reversing for "unfair" prosecutorial conduct at trial, without specifying particular violations of law or code of professional ethics); *Drake v. Kemp*, 762 F.2d 1449, 1470, 1477-78 (11th Cir. 1985) (Clark, J., concurring) (advocating reversal for prosecutor's violation of "fair play" by taking inconsistent positions in successive trials).

107. 295 U.S. 78, 88 (1935):

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and

speech¹⁰⁸ by Justice Jackson—ascribe no independent content to the duty. The prosecutor in *Berger* was guilty of various forensic misdeeds that would have been sanctionable if done by any attorney. These included, for example, misstating the facts in cross-examination and arguing his personal knowledge to the jury.¹⁰⁹ And Justice Jackson's speech attacked selective prosecutions¹¹⁰ that would have violated the equal protection clause of the Constitution. Neither Justice Jackson in his speech, nor the *Berger* Court in its opinion, addressed the duty to seek "justice" *per se* at all.

But the duty to "seek justice" implies a normative conception of the prosecutor's duty according to which "justice" has some independent meaning. Even if this duty is not enforceable as such, it need not be entirely meaningless. Its very prominence in the professional rhetoric suggests that it says something meaningful to prosecutors, at least about how to apply other, more specific norms. But what is that "something"?

Traditional definitions of the prosecutor's role side-step the question by focusing upon virtue rather than values.¹¹¹ Thus, to Justice Jackson "[t]he qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway"¹¹² In the landmark case, *Attorney General v. Tufts*, the Massachusetts high court commented on the vast powers enjoyed by district attorneys:

Powers so great impose responsibilities correspondingly grave. They demand character incorruptible, reputation unsullied, a high standard of professional ethics, and sound judgment of no mean order The office . . . is to be held and administered wholly in the interests of the people at large and with an eye single to their welfare.¹¹³

very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

108. Jackson, *The Federal Prosecutor*, 24 J. OF JUDICATURE SOC. 18 (1940) (speech delivered by Attorney General Robert H. Jackson at the second annual conference of the United States Attorneys in Washington, D.C., April 1, 1940).

109. *Berger*, 295 U.S. at 84-87.

110. "[T]he real crime [is] that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself." Jackson, *supra* note 108, at 19.

111. See *infra* text accompanying notes 173-74.

112. Jackson, *supra* note 108, at 20.

113. *Attorney General v. Tufts*, 239 Mass. 458, 489, 132 N.E. 322, 326 (1921). See also Civiletti, *supra* note 69, at 2 ("[i]n the end self-governance is the essential constraint" on prosecutorial misconduct).

In sum, the traditional discussion of quasi-judicial values begins with broad platitudes and ends with an idealized notion of the prosecutor's character.

B. The Relation Between Quasi-Judicial and Adversary Roles

The sources are somewhat more helpful regarding the scope of the prosecutor's dual roles than their content. Some commentators have suggested that the quasi-judicial role applies only to certain prosecutorial tasks. There are two leading models that take this view. The first focuses on the prosecutor's role as "surrogate client" on behalf of the public;¹¹⁴ the second upon her tasks at particular stages of the criminal process.¹¹⁵ In my view, neither model succeeds in confining the prosecutor's quasi-judicial role within neat boundaries; this role pervades prosecutorial work. But each model helps to illuminate the prosecutorial function in relation to the adversary system.

1. *The Prosecutor as Surrogate Client*—The prosecutor's role is markedly different from that of the lawyer for an individual client. The latter's task is to promote the client's lawful interest as the client defines it. The lawyer is obliged to pursue that goal zealously, subject to constraints such as legal rules, rules of professional responsibility, the lawyer's own moral principles,¹¹⁶ and the availability of time, money and other resources. In many practical contexts, we know that the principle of client autonomy and control is seriously compromised.¹¹⁷ Even so, the client does participate, however formally, in making or endorsing key decisions. But no individual client exists to tell prosecutors which interests to pursue in any given case. One might therefore view the prosecutor as "a lawyer with no client but with several important constituencies" such as the police, victims and the media.¹¹⁸ Alternatively, she might be seen as serving in a dual capacity—as surrogate for her incorporeal public client and as lawyer.¹¹⁹

114. See *infra* text accompanying notes 119-21.

115. See *infra* text accompanying notes 128-30.

116. Whether this constraint should operate, and to what extent, has been much debated. See, e.g., Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U.L. Rev. 63, 64 (1980); Schneyer, *supra* note 68, at 1529.

117. D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 143 (1974); Basten, *Control and the Lawyer-Client Relationship*, 6 J. LEGAL PROF. 7 *passim* (1981); Menkel-Meadow, *The Transformation of Disputes by Lawyers*, 1985 J. DISP. RESOL. 25, 32-34; Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 49, 64-65 (1979).

118. C. WOLFRAM, *MODERN LEGAL ETHICS* § 13.10, at 759 (1986); Attorney General v. Tufts Univ., 239 Mass. 458, 489, 132 N.E. 322, 326 (1921).

119. The MODEL CODE, uses this analogy. MODEL CODE, *supra* note 29, at EC 7-13 ("[T]he

According to the latter view, the prosecutor resembles the lawyer for the incompetent client who has no legal representative. First, she must place herself in the client's shoes and decide what the client's interest demands; then she must use her legal skills to promote that interest.¹²⁰ If the incompetent client were a tort victim, the lawyer would need to decide whether to sue the tortfeasor and for what relief, whether to settle or go to trial, whether to appeal, and so forth. A prosecutor analogously decides whether to prosecute, for what crime, and what punishment to seek. The decisions she makes in her "client" role are arguably "quasi-judicial." The public at large is "impartial" and "neutral" rather than adversary, and the public interest reflects a broad range of values and interests including, of course, truth-seeking and fairness. Once the prosecutor has, on behalf of her "client," made these decisions, she dons her "lawyer" hat and zealously pursues the goals that she has set as surrogate client. From this point on she functions as an adversary and her goal is victory.

The "surrogate model" has the advantage of emphasizing the prosecutor's responsibility for defining the public's interest before embarking on the path of zealous advocacy.¹²¹ In effect, her task as "client"

prosecutor is not only an advocate, but also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all.").

120. See MODEL CODE, *supra* note 29, at EC 7-12. Of course the prosecutor's decision-making role differs significantly from the role of attorney-guardian ad litem. Guardian decisions in the ward's "best interests" are subject to court review. 39 C.J.S. *Regulation and Supervision of Guardianship* § 7 (1976); H. TAYLOR, LAW OF GUARDIAN AND WARD 103, 142 (1935). However, prosecutors are insulated from the same review by the principle of separation of powers. *United States v. Cox*, 342 F.2d 167, 171-72 (5th Cir. 1965), *cert. denied*, 381 U.S. 935 (1965). Prosecutors also differ from attorney-guardians representing incompetent wards in "right to die" litigation, where the attorney-guardian merely aids the court in discovering the incompetent's putative preference (not "best interest") in the situation. *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 750-53, 370 N.E.2d 417, 428-430 (1970). See also *In the Matter of Mary Moe*, 385 Mass. 555, 565-67, 432 N.E.2d 712, 720 (1982). Critics have argued that the roles of attorney and guardian ad litem should not be performed by the same person, because the "two roles constitute an inherent and unavoidable conflict of interest." Harhai, *A Comparison of the Guardian/Ward and the Attorney/Client Relationship*, in NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, NATIONAL GUARDIAN AD LITEM POLICY CONFERENCE MANUAL 79 (rev. ed. 1981). To the extent that we assign both roles to individual prosecutors, the same criticism has force. In practice, prosecutors probably tend to focus their attention on their attorney role and approach their "guardian" functions unsystematically, even casually.

121. This model also has the advantage of helping the prosecutor make some sense of the otherwise ill-fitting professional responsibility codes, which generally assume the existence of a single, identifiable client. By reference to that client the lawyer can identify "outside pressures" exerted by "third party" interests. Like other lawyers, prosecutors are bound by norms of client loyalty, zeal and confidentiality, and can encounter difficulties in each area. But first, by definition, they must identify the "client" or "client interests" at stake. See generally G. HAZARD, ETHICS IN THE PRACTICE OF LAW 43-68 (1978); Lawry, *Confidences and the Government Lawyer*,

is to make public policy in the context of particular criminal proceedings. However, the model fails to guide the prosecutor in distinguishing basic, policy-setting "client" choices from those that—because they are merely "technical" or "strategic"—are for the lawyer.¹²² Even more troubling, this model suggests that when functioning as an advocate, the prosecutor can somehow define a particular litigation goal (like "conviction" or "incarceration") in isolation from the public's broader interest in justice. This conclusion would be mistaken.

To illustrate, suppose that in the Vietnam Veteran case,¹²³ the student prosecutor has decided to seek a guilty finding and probation. In the course of plea discussions, she realizes that the defense counsel is unprepared and incompetent because he seems unaware of a strong fourth amendment suppression issue that, if pursued successfully, might defeat the State's case. Should the prosecutor permit defense counsel to plea bargain anyway? Or should she alert him to the issue and/or inform the authorities of his incompetence?¹²⁴

Under the surrogate client model, the prosecutor would need first to classify the decision facing her. Is she wearing her "client" or "lawyer" hat? Adversary proceedings are under way, and this particular decision arises in negotiations between two lawyers—each seeking zealously to advance his client's interest. One might reasonably conclude that the prosecutor is acting *qua* lawyer, and therefore has no "quasi-judicial" duty to "seek justice." She need only obey the law

57 N.C.L. REV. 625, 634 (1979). Like the codes, most of the literature on professional responsibility assumes the existence of an identifiable client. See, for example, the lively debate regarding the "moral distance" between private and professional ("role differentiated") moralities discussed in D. LUBAN, *supra* note 63, *passim*. As Gerald Postema points out, the ordinary lawyer's conflict between private and professional moral obligations stems principally from his role as agent for another person—the client. Postema, *supra* note 116, at 76-77.

122. This difficulty also confronts lawyers in other practice contexts. See Speigel, *supra* note 117, at 49-52; Chused, Faretta and the Personal Defense: The Role of a Represented Defendant in Trial Tactics, 65 CALIF. L. REV. 636, 668-69 (1977).

123. See *supra* text accompanying notes 26-29.

124. Prosecutors are uniquely positioned to observe incompetent and lazy representation of defendants. Their common failure to report this behavior to the disciplinary authorities probably rests in part on their fear of treading upon the defendant's constitutional right to counsel, and in part on the same factors that explain the failure of lawyers and judges generally to report lawyer incompetence. These factors include vague standards defining competence, uncertainty about the facts, fear of inviting counter-charges and concern that reports will dampen healthy adversariness. Aside from touting the vague duty to improve the law and the administration of criminal justice (STANDARDS *supra* note 1, at § 3-1.4), the professional codes do not give the prosecutor a special obligation to ensure competent defense representation. Cf. THE AMERICAN LAWYER'S CODE OF CONDUCT, *supra* note 20, at Rule 9.9 (imposing on prosecutors a duty to advise the court promptly if they know "that a defendant is not receiving or has not received effective assistance of counsel"); MODEL RULES, *supra* note 1, at Rule 8.3 (every lawyer's duty to report certain violations of the MODEL RULES).

and specific rules of ethics. Accepting the plea in silence would not violate a constitutional right or other ethical command, so she should do so.¹²⁵

But this reasoning assumes too narrow a view of the “client” interest which the prosecutor is bound to advance. Protection of the defendant’s right to counsel is potentially an “objective” of the public client rather than a “strategic or tactical” decision for the lawyer.¹²⁶ Her plea negotiation goal is not simply to win a larceny conviction and a probationary sentence. True, she originally defined the public interest in those terms. But she did so by identifying and weighing a host of relevant public interests, including an interest in promoting procedural fairness. Once it becomes apparent that defense counsel is incompetent, the prosecutor’s decision whether to “help” the defendant is not merely a question of strategic advocacy.¹²⁷ Rather, it resurrects the previously answered question: How should the prosecutor *qua* “client” define the interest that, *qua* lawyer, she will represent? If she fails to consider whether, on balance, society “prefers” to risk losing the conviction rather than to convict someone who has not had competent counsel, then she has failed to represent her client’s interest zealously.

Whether in our hypothetical case the prosecutor should compensate for defense counsel’s apparent incompetence is unclear. What is clear is that she should treat the question seriously because she cannot succeed as a “zealous advocate” unless she identifies her client’s substantive and procedural goals. Just as a defense lawyer may have to consult his client over new developments, the prosecutor will frequently need to reconsider her litigating posture in light of new information.

In conclusion, it is conceptually useful for prosecutors to distinguish their roles as “surrogate client” and “lawyer.” But they cannot insulate their adverse “lawyer” role from the broad range of competing values appropriate to their quasi-judicial “client” role. If they do not wear both hats simultaneously, they must at least learn to switch them frequently and quickly.

125. As a practical matter, the prosecutor might choose to intervene for a strategic reason—to avoid appellate reversal of conviction on grounds of ineffective assistance of counsel.

126. See MODEL RULES, *supra* note 1, at Rule 1.2(a), 1.2(a) comment; MODEL CODE, *supra* note 29, at EC 7-7, EC 7-8; STANDARDS, *supra* note 1, at § 4-5.2(a),(b).

127. “In the exercise of one’s professional expertise, factual judgments and value judgments are inextricably bound together. Professionals are called upon to make difficult judgments in which technical competence and moral values are interwoven. . . . [T]he moral hazards of lawyering . . . cannot be overcome simply by the application of technique.” Elliston, *Ethics, Professionalism and the Practice of Law*, 16 LOY. U. CHI. L.J. 529, 533-35 (1985).

2. *The Adversary Stage Theory*—The notion that the quasi-judicial role exists in relation to particular prosecutorial tasks is reflected in Whitney Seymour's much-cited defense of prosecutorial zealousness.¹²⁸ Seymour argues the prosecutor's duty to "seek justice" applies principally in the decision to prosecute and in preparing a case for the grand jury. Deciding to prosecute is, he argues, tantamount to deciding that prosecution "is how justice will be done."¹²⁹ Once trial approaches, the prosecutor is a "full-fledged fighting advocate He must act with candor and fairness, but he must also fight for his cause. To do otherwise would be to violate his duty"¹³⁰

Seymour's argument makes sense in light of the prosecutor's role in the adversary system. The trial is Seymour's paradigm setting. There the prosecutor's conduct is subject to the constraints of an adversary forum such as a public audience, vigorous defense counsel, a judge acting as neutral arbiter. The prosecutor fulfills her duty by performing as a partisan in the adversary search for truth. By contrast, her charging decisions and grand jury work are secret and lack the adversary system's safeguards against abuse. Just as the presence of safeguards at trial frees her to take the role of a "fighting advocate" in that setting, so their absence before trial behooves her to act as a more neutral seeker of justice.¹³¹

From this argument one could draw a general principle that in adversary contexts prosecutors should behave like zealous advocates, but in contexts lacking adversary system safeguards they should assume the quasi-judicial role. This perspective overlaps partially with the "surrogate client" model. "Client" decisions are typically made in non-adversary settings like homes and offices, and at pre-adversary stages; "lawyer" decisions often occur in, and directly relate to, the adversary battle.

But like the surrogate client model, the "adversary stage" theory quickly breaks down. Even at trial we expect the prosecutor to rein in her devotion to winning. For example, she has a continuing duty to

128. Seymour, *Why Prosecutors Act Like Prosecutors*, 11 REC. A.B. CITY N.Y. 302, 312-13 (1956).

129. *Id.* at 312-13.

130. *Id.* See also J. JACOBY, *supra* note 97, at xxii ("[F]or the evaluation of his case the prosecutor assumes a quasi-judicial role. Once he has decided to accept the case for prosecution, he assumes an adversary role.").

131. Cf. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 678 (1978). Schwartz argues that the lawyer's general duty of zealous representation applies only in contested judicial matters; outside of litigation a lawyer is free to subordinate his client's lawful goals to the demands of his own conscience. *Id.* at 680.

reveal exculpatory evidence.¹³² Nor should we view the prosecutor's role at the pre-trial (or pre-charge) stages as exclusively quasi-judicial. For example, the prosecutor's decision whether probable cause exists to justify application for an arrest warrant may call for impartiality. But the decision regarding what information to include in the warrant affidavit may require strategic advocacy. Similarly, in deciding whether and how to investigate a potential defendant, what evidence to present at a probable cause hearing, or which defendants to charge with what offenses, the prosecutor should not ignore her duties as an advocate. Both roles are likely to apply at all stages of the process. A general principle of behavior strictly tied to predetermined stages of prosecution may lead either to misconduct or to incompetence in the exercise of critical prosecutorial powers.

Although the "adversary stage" theory cannot inexorably guide prosecutors to the appropriate role orientation, it offers a valuable starting point because it focuses attention on the prosecutor's role in the adversary system. This point is apparent if we think about the student prosecutor's dilemma in the Vietnam Veteran case. Should she have made her sentence recommendation as a "full-fledged fighting advocate" or as a "seeker of justice"? Under the former view, perhaps she should have pressed (within reason) for maximum severity. Under the latter, perhaps not. The defendant stood charged with larceny. Adversary proceedings were under way, and the defendant was represented by counsel. This suggests, at least on its face, that the prosecutor should have adopted the role of zealous advocate.

The "incompetent defense counsel" hypothetical discussed above¹³³ illustrates an important qualification of the adversary stage theory. Defendant has been charged, is represented by counsel, and the two lawyers are negotiating over the plea and disposition. Arguably, then, an advocate's role is appropriate. On the other hand, this stage hardly offers the safeguards of adversary trials. Plea negotiations are secret and therefore insulated from meaningful external review. Defense counsel has displayed a lack of vigor, if not blatant incompetence. The absence of *effective* adversary system safeguards should surely complicate the prosecutor's choice of role and demonstrate that her duty to promote "fairness and justice" cannot be neatly confined to particular stages of proceedings.¹³⁴ It should instead be viewed as a

132. *United States v. Bagley*, 473 U.S. 667, 675 (1985).

133. See *supra* text accompanying notes 123-24.

134. Similar reasoning justifies the prosecutor's duty to disclose exculpatory evidence to the defense.

general residual duty, supplanted from time to time, in the presence of other protections, by a narrower adversary role.¹³⁵

C. Summary

I have argued thus far that: (1) the prosecutor's quasi-judicial function connotes both an impartial role orientation and commitment to a broad set of values, including "justice"; (2) apart from general exhortations to virtue, existing sources on prosecution say little about those values;¹³⁶ (3) both the "surrogate client" model and the "adversary stage" theory help to clarify the relationship between the prosecutor's competing roles as "minister of justice" and "zealous advocate"; and (4) the quasi-judicial duty to "seek justice" is residual and pervasive. In contexts characterized by reasonably effective adversary system safeguards, the zealous advocate's role is most appropriate; in contexts lacking these safeguards, the quasi-judicial duty becomes more important.

We can amend Table One¹³⁷ to reflect the preceding discussion.

TABLE TWO

I. QUASI-JUDICIAL FUNCTION	II. ADVERSARY FUNCTION
<p style="text-align: center;">A. Role:</p> <p><i>Surrogate client</i> Impartial, judge-like neutrality</p>	<p><i>Lawyer</i> Zealous, adverse advocacy</p>

135. When defense counsel performs incompetently the prosecutor is confronted with a choice between two evils. Unless the prosecutor acts to protect the defendant she will allow an injustice to occur. But to protect the defendant she must "do the defense attorney's job." This exacts other costs. For one, it risks unwittingly interfering in sound defense tactics which only appear ill-advised. Also, when prosecutors "help out" the defense they jeopardize the systemic interest in encouraging defense lawyers to act competently and vigorously. Cf. Mitchell, *supra* note 23, at 293. Without a division of labor the adversary system's efficiency, indeed its *raison d'être*, is threatened. These concerns might outweigh society's interest in having the prosecutor step in to rescue an apparently endangered defendant. The adversary system has persuasive critics. See D. LUBAN, *supra* note 63, *passim*; Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 94-101. However, my analysis takes the system as a given. It is hard to imagine how the prosecutor could function within it if she saw her duty to justice values as primary rather than as residual.

136. But see Webb & Turow, *The Prosecutor's Function in Sentencing*, 13 LOY. U. CHI. L.J. 641 (1982).

137. See *supra* text accompanying note 102. Additions to Table 1 are italicized.

B. Setting:

*No adversary system
safeguards*

*Adversary system
safeguards*

C. Values/Objectives:

Justice, truth, fairness,
rights of accused

Convictions,
penal severity

In the next part, I shall explore the prosecutor's dual role in greater detail. Although I shall focus mainly on the student prosecutor's predicament at the sentencing stage of the Vietnam Veteran case, my model is meant to apply more broadly to the exercise of prosecutorial discretion in other contexts.

III. A MODEL FOR DECIDING THE STATE'S OBJECTIVE

The prosecutor's duty to seek "justice," hopelessly abstract, becomes concrete once she must define the state's litigating posture in a case. Should she investigate? Prosecute? What convictions and punishment should she seek? Should she appeal? These decisions require the prosecutor to resolve *normative uncertainty* by choosing among competing values. But justice cannot be done in a factual vacuum;¹³⁸ before prosecutors reach the normative questions they must resolve issues of *factual uncertainty*. Who did what to whom? We will first discuss the latter process, and then consider the normative framework within which prosecutors operate. However, as will appear, in deciding the facts prosecutors confront role choices. They must resolve normative conflicts, however subliminally, out of the view of any regulating body.

A. Deciding the Facts

We usually think of the prosecutor's fact-finding role in relation to charging discretion.¹³⁹ Depending upon the applicable standard, she

138. On the importance of factual knowledge to moral judgment, see W. FRANKENA, *ETHICS* 13 (2d ed. 1973).

139. The prosecutor's fact-finding role is discussed in Abrams, *supra* note 36, at 7-24. See also Uviller, *The Unworthy Victim: Police Discretion in the Credibility Call*, 47 *LAW & CONTEMP. PROBS.* 15, 31 (Autumn 1984) (urging recognition of legitimate police fact-finding role).

decides whether the facts give rise to probable cause, a *prima facie* case, or proof beyond a reasonable doubt that the defendant is guilty. Dispositional recommendations also assume the existence of particular facts. Thus, in the Vietnam Veteran case, the student's proposed recommendation—a short, suspended jail term, probation and continued drug treatment—rested on factual assumptions regarding the nature and circumstances of the crime, the defendant's character (as revealed in his military and criminal records), and mitigating circumstances (stressful events preceding the instant offense; defendant's progress in treatment). To the extent that these or other relevant facts are contested or unknown, the prosecutor lacks a factual basis for deciding the proper disposition. In the face of factual uncertainty, prosecutors must rely on investigation, presumptions, or some combination of the two.

In the Vietnam Veteran case the defendant's criminal record was supplemented by mitigating information supplied by defense counsel. In the student's account of the case, her acceptance of the "facts" as presented by defense counsel is striking. She failed to express even the slightest skepticism about the psychiatric report; indeed, she seemed to presume its accuracy. Prosecutors can react in several ways to mitigating facts presented by defense counsel. They can, for example, treat the information as irrelevant to their recommendation and advise defense counsel to "tell it to the judge." Or they can investigate to learn if the presented facts are accurate and complete. Finally, they (like the student) can accept the information at face value. Given defense counsel's adversary role, the last response is risky. But refusing to consider the information risks the prosecutor's credibility and effectiveness as an advocate if, as a result, she is left ignorant of critical dispositional facts. In addition, without such facts, the prosecutor cannot decide (*qua* client) what disposition to seek (*qua* lawyer). The prosecutor's appropriate response to factual uncertainty is to *inquire* and then to *assess* what is learned. This duty is parallel to defense counsel's investigative duty elaborated in the American Bar Association Standards for the Defense Function.¹⁴⁰

1. *Factual Inquiry*—Prosecutors can draw on various sources for factual information. In the Vietnam Veteran case, for example, the student might have attempted to test defense counsel's statements against

140. See STANDARDS, *supra* note 1, at § 4-4.1 (detailing defense counsel's duty to investigate facts relevant to both merits and penalty). For the investigative function of the prosecutor see STANDARDS, *supra* note 1, at § 3-3.1(a) ("A prosecutor ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts, but the prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies.").

the knowledge of the police and probation staff. She might also have sought more information about the defendant's drug treatment history and prospects from defendant's psychiatrist, and perhaps from court-affiliated clinical staff.

The prosecutor's search for the facts is constrained in at least three ways. First, there are resource limitations. In busy offices the prosecutor may have little time to investigate dispositional issues. Prosecutors rely heavily on the police for investigative services, but the police will not generally conduct dispositional investigation, and in many courts, the probation staff is too busy to do so in "minor" cases such as the Vietnam Veteran's case.¹⁴¹ Second, the prosecutor must normally rely upon defense counsel to gather and supply some of the needed information on disposition. The major reason for this is the prosecutor's lack of direct access to the defendant¹⁴² and those (like the veteran's psychiatrist) in a confidential relationship to defendant. But defense counsel may fail to provide dispositional data to the prosecutor, either because he is unwilling to do so, or because he has not acquired it himself.

The third constraint on the prosecutor's investigative function is the inherent obscurity of facts. Often the prosecutor's investigation will reveal conflicting accounts of the truth. At that point the prosecutor must decide how to regard the facts. Is the defendant the man seen fleeing from the scene, or was he home watching television, as his mother swears? Is the Vietnam Veteran staying straight on the methadone program, or did he really lose his job because he is back on heroin? In fact, is that why his wife left? If the police say that he has been involved in several thefts in the past few months, and only had the bad luck to be caught this time, should they be believed? When the facts are unclear, what should the prosecutor do?

2. *Factual Assessment and the Use of Presumptions*—One option for prosecutors, which some seem to adopt, is to reject the fact-finding

141. Ideally, pre-sentence investigations and reports should be made in most cases. Cf. FED. R. CRIM. P. 32(c) (generally requiring pre-sentence reports); STANDARDS, *supra* note 1, at § 18-5.1 (requiring reports in certain cases, including when incarceration for one year or more is possible). However, in the Massachusetts' lower courts my experience has been that reports are not routinely available. The practice varies as between federal and state courts, and among the states. STANDARDS, *supra* note 1, at § 18-5.1 comment. See also PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 11 (1967) (probation reports a "rarity" in lower courts). According to a national survey of state prosecutors, even when the probation department submits pre-sentence reports the prosecution often makes recommendations independently. See Teitelbaum, *The Prosecutor's Role in the Sentencing Process: A National Survey*, 1 AM. J. CRIM. L. 75, 78-79 (1972).

142. See MODEL RULES, *supra* note 1, at Rule 4.2 (prohibiting lawyer communications with party represented by counsel).

role. A prosecutor could say, "Whether the defendant did it is for the judge or jury to decide—it's not my job."¹⁴³ But this response only partially retreats from fact-finding. The agnostic prosecutor in such a case has already made a threshold factual judgment, *i.e.*, that probable cause (or a *prima facie* case) exists to find defendant guilty. She is only refusing to pass personal judgment on his guilt under a "preponderance" or "reasonable doubt" standard.¹⁴⁴ Similarly, at sentencing the prosecutor usually cannot avoid making some factual judgment as the premise of her recommendation.

Prosecutors could resolve factual uncertainty by presuming facts favoring guilt. Albert Alschuler speaks of the prosecutor's "working assumption of guilt."¹⁴⁵ And Pamela Utz describes San Diego charging policies as governed by a "presumption of seriousness: ambiguities or evidentiary questions unresolved at the time a case was brought in by the police were deferred to preserve the office's option to prosecute at the highest level of seriousness."¹⁴⁶

We can distinguish three types of factual presumptions of guilt. First, under the presumption of credibility, the prosecutor resolves conflicts or ambiguities in witness accounts in favor of those supporting the maximum guilt of the defendant. Second, under the presumption of seriousness the prosecutor would, for example, assume the highest property damages and most serious injuries supported by ambiguous or conflicting versions of the facts. The last type—which for lack of a better term I call the presumption of deviance—would resolve against the defendant debatable claims that his conduct conformed to community standards embedded in the criminal law.¹⁴⁷ Thus, a prosecutor apply-

143. "When a citizen whom I have no reason to doubt comes in and says, 'That's the guy,' it has to be a jury question . . . my job is to prosecute, not judge." Alschuler, *supra* note 16, at 63 (quoting a prosecutor).

144. Commentators differ about whether it is ethical to proceed absent personal belief in the defendant's guilt. Compare Uviller, *supra* note 23, at 1168 with M. FREEDMAN, *supra* note 5, at 84-88. The prevailing view, at least in the world of practice, surely permits prosecutors to do so. Alschuler reports an instance of an assistant district attorney who would not prosecute cases unless he was personally satisfied of the defendant's guilt beyond a reasonable doubt. Dubbed by his colleagues the "best defense lawyer in the office," he left the office within his first year. Alschuler, *supra* note 16, at 64 n.42. Cf. Kaplan, *The Prosecutorial Discretion—A Comment*, 60 Nw. U.L. REV. 174, 178-79 (1965). For historical interest compare ALA. ST. B. A., CODE OF ETHICS GENERAL RULE NO. 12 (1887), reprinted in *Proceedings of the Tenth Annual Meeting of the Ala. St. B. A.*, Dec. 14-15, 1887 ("The State's attorney is criminal, if he presses for a conviction when upon the evidence he believes the prisoner innocent. If the evidence is not plain enough to justify a *nolle pros.*, a public prosecutor should submit the case, with such comments as are pertinent, accompanied by a candid statement of his own doubts.").

145. Alschuler, *supra* note 16, at 64 n.42.

146. Utz, *supra* note 85, at 104.

147. See Arenella, *supra* note 66, at 197-98 (describing jury function of morally evaluating defendant's conduct).

ing this presumption would reject a defendant's disputed claim that his use of force against the victim was reasonably necessary to safeguard other legally protected rights.

Several arguments support the prosecutor's use of presumptions to avoid deciding contested facts herself.¹⁴⁸ For the prosecutor to decide issues like witness credibility or whether a defendant's use of force was "necessary" risks serious error. Many prosecutors are young and inexperienced;¹⁴⁹ their judgments might therefore be less reliable than judgments by judicial organs. Furthermore, by bringing a doubtful case the prosecutor ensures that witnesses whose testimony would support conviction will get their "day in court."¹⁵⁰ Providing a forum to victims, civilian witnesses and the police satisfies important needs including, but not limited to, the obvious political need to forestall public criticism of the district attorney's office. Maintaining public confidence in the justice system and channeling psychological tensions into a neutral forum also serve the public interest.

Finally, as an advocate for the public's interest in law enforcement, the prosecutor arguably fails if she turns a less than sympathetic ear to evidence that would advance that interest. The prosecutor works in an adversary setting. The defense counsel will make "working assumptions" of credibility, seriousness and deviance that are the opposite of those just proposed for prosecutors. The prosecutor would therefore fail in her adversary duty to present the strongest case for the public if she did not press the doubtful case.¹⁵¹

These arguments are persuasive, but if applied too rigidly, risk leading prosecutors to abdicate their ultimate duty to advance the whole range of societal interests, including the right of citizens to be free of criminal charges absent credible evidence of guilt. Given the prosecutor's largely uncontrolled discretion to set the accusation process in motion and the serious impact of that process on the defendant and

148. Using these presumptions allows a prosecutor to bring a case without personally satisfying herself of the defendant's guilt beyond a reasonable doubt. See *supra* text accompanying note 144.

149. See *supra* text accompanying note 43.

150. On the other hand, the prosecutor's decision to reduce or dismiss a charge is effectively unreviewable. Although judicial approval is normally required for the dismissal of charges the review is generally only formal. See A. GOLDSTEIN, *THE PASSIVE JUDICIARY* 14-19 (1981).

151. "[The prosecutor] does, after all, fulfill a role as advocate in a dialectic system for the divination of truth. Flawed though that system may be, the conscientious prosecutor need have no scruples to don his barrister's hat and take a doubtful matter to court." Uviller, *supra* note 23, at 1168.

society,¹⁵² the prosecutor must screen cases responsibly. Presumptions of guilt are justified only when factual issues are truly in equipoise. A prosecutor in a rape case who is neither entirely confident nor strongly doubtful of the victim's credibility is justified in prosecuting the case. But when a prosecutor strongly suspects that her witness—often a police officer¹⁵³—is lying, she cannot blithely take refuge behind a presumption of credibility. The prosecutor has a duty to confront her doubts about credibility (or "seriousness" or "deviance"). The "presumptions" must be regarded as only *prima facie* binding, and at some undefinable point, rebuttable.¹⁵⁴ In most cases, despite the risks inherent in prosecutorial "prejudgment" of facts, the prosecutor cannot responsibly abstain from that task.

In sum, the prosecutor's usual orientation should be one of special alertness to the existence of facts supporting guilt and a corresponding eagerness to seek them out. In "borderline" cases she should rely on rebuttable presumptions of guilt to resolve factual conflicts and certainties against the defendant.

We can amend Table Two¹⁵⁵ to reflect the preceding discussion.

152. Including possibly the defendant's pre-trial incarceration and loss of employment, damage to his reputation, material and emotional costs of defense, possibility of wrongful conviction, and waste of scarce crime control resources.

153. Probably the most difficult and recurring ethical dilemma for our student prosecutors arises when they suspect police witnesses of lying. Police culture justifies "white lies" for the sake of convicting factually guilty defendants. See J. EISENSTEIN & H. JACOB, *supra* note 17, at 303; Skolnick, *supra* note 54, at 55; Younger, *supra* note 54, at 551. Skolnick suggests that judicial acceptance of police deception in the investigation process "enhances moral acceptance of deception by detectives in the . . . testimonial stages . . . and thus increases the probability of its occurrence." Skolnick, *supra* note 54, at 45. For a helpful discussion of conditions under which lying is morally justifiable, see S. BOK, LYING, 81-106 (1979).

The professional codes do not clearly guide prosecutors in situations where they suspect, but do not "know," their witness's testimony is false. See MODEL CODE, *supra* note 29, at DR 7-102(4); MODEL RULES, *supra* note 1, at § 3.3(a)(4). Professor Uviller proposes that a prosecutor should not use a witness if she "has good reason to believe that [the] witness is lying about a material fact" Uviller, *supra* note 23, at 1159.

154. See *infra* text accompanying notes 208-16. For the concept of *prima facie* duties, see W. ROSS, THE RIGHT AND THE GOOD 22, 41-42 (1930).

155. See *supra* text accompanying note 137. Changes in Table 2 are italicized.

TABLE THREE

I. QUASI-JUDICIAL FUNCTION	II. ADVERSARY FUNCTION
A. Role:	
Surrogate client Impartial, judge-like neutrality	Lawyer Zealous, adverse advocacy
B. Setting:	
No adversary system safeguards	Adversary system safeguards
C. Values/Objectives:	
Justice, truth, fairness, rights of accused	Convictions, penal severity
D. Process:	
<i>Factual inquiry/ assessment</i>	<i>Presumptions of factual guilt</i>

B. The Question of Values

I have been developing a model for deciding the state's litigating posture in any particular case. I have suggested that the prosecutor must first¹⁵⁶ settle upon some working version of the relevant facts. Once she has arrived at an understanding of the facts relevant to guilt and disposition, she must decide her objective. In the Vietnam Veteran

156. To say that one "first" decides what happened and "then" what governing norms apply, is really a convenient fiction. In most if not all cases the apparent "facts" and, perhaps, therefore the relevant norms, continually change during the life of a case. See L. CARTER, *supra* note 36, at 14. In a recent well-publicized example the United States Department of Justice dismissed defense-fraud charges against General Dynamics after government investigators discovered new information. According to Criminal Division chief William F. Weld, "the facts went south, as we say in the trade." Shenon, *Justice Dept. Says It Was Wrong To Prosecute General Dynamics*, N.Y. Times, June 23, 1987, at D30, col. 1.

case, for example, assume my student prosecutor has satisfied herself that the facts supplied by defense counsel are true. Does it follow that she, on behalf of her public client, should seek probation? Or would a jail term better serve the public interest? Either choice, to be "nice" or "hard nosed," would promote some values at the expense of others. The student correctly perceived the dilemma to be governed by her "incredibly vague" role—"to seek justice and not merely to convict."¹⁵⁷ She was left with several poignant questions: "What did I owe this defendant?" "Am I becoming too involved?" Being "too nice"? "Should I have concerned myself with the defendant's record and welfare?" How should we respond?

One obvious response is that no set of guidelines or depth of insight can produce "the" correct sentence recommendation. To some extent the recommendation will depend on a prosecutor's philosophy of punishment. But even if a prosecution agency explicitly instructed its attorneys to follow a particular philosophy, applying it would not be simple.

It is one thing, and a difficult thing, to determine the punishment that is commensurate with a given crime; it is another, and a far more difficult, thing to determine the punishment that is commensurate with an offender's blameworthiness . . . [or] the costs and benefits of punishing a given offender in a certain way.¹⁵⁸

Different prosecutors with the same general approach to sentencing will disagree in particular cases. Still, it is worthwhile to construct a model recommendation process against which to view the student's approach in this case.

The process is two-fold. First, the prosecutor must become aware of the public interests bearing on her decision. Then she must weigh the competing interests and choose the best overall objective. This process serves the same function as legal counseling of an individual client; the lawyer helps the client identify (and then weigh) the advantages and disadvantages of choices in the litigation according to the client's own value system.¹⁵⁹ The prosecutor must conduct a similar inquiry regarding choices as to the ends and means of criminal litiga-

157. MODEL CODE, *supra* note 29, at EC 7-13.

158. Wertheimer, *Should Punishment Fit the Crime?*, 3 SOC. THEORY & PRAC. 403, 413 (1975).

159. See D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING*, 146-50 (1977). Cf. T. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* 21-22 (1934) (arguing the lawyer's obligation to engage in "moral conversation" with the client rather than simply to help the client clarify his own values).

tion. But she must act as both lawyer and surrogate client. In the next two sections I shall discuss first, the search for applicable norms ("normative inquiry"), and then, in the context of the Vietnam Veteran case, the process of weighing competing norms in a particular case ("normative assessment").

1. *Normative Inquiry: The Dual Role*—The student prosecuting the Vietnam Veteran wrote that incarceration "would be counterproductive for the defendant" and that "there were many more competing interests [of justice] . . . to be served . . . than the one to convict" ¹⁶⁰ But she does not articulate the competing interests and seems only partially aware of them. She needs to understand better the prosecutor's dual role, which requires her to convict (punish) ¹⁶¹ criminals and to "seek justice." I shall discuss these two goals in order.

a. "*Punishment*" and "*Justice*." If we asked "Why should we punish criminals?" then, depending on the respondent's philosophical persuasion, we would be told: "To inflict just deserts" by a retributivist, "To protect society by controlling crime" by a utilitarian, or some combination of these answers. Because utilitarians ¹⁶² and almost all retributivists ¹⁶³ accept the relevance (if not the primacy) of both

160. See *supra* note 25.

161. Of course, conviction is itself a punishment; in the remainder of this Article I shall use the more general term.

162. Mill regarded desert as a core principle of justice, ultimately justified on grounds of utility. J. MILL, *UTILITARIANISM* 41 (1861). Modern utilitarians continue to defend desert-based punishment on grounds of general utility. See, e.g., H. SIDGWICK, *METHODS OF ETHICS* 445-46 (7th ed. 1962) ("What [is desired] under the name of Ideal Justice . . . is the distribution of good and evil according to Desert. This is broadly in harmony with Utilitarianism; since we obviously encourage the production of general happiness by rewarding men for felicitic conduct . . ."); Sprigge, *A Utilitarian Reply to Dr. McCloskey*, in *CONTEMPORARY UTILITARIANISM* 261, 267-70 (M.D. Bayles ed. 1968) (the "just" and overall utilitarian punishment generally coincide). The same can be said of the economic analysts who have written about the criminal law. Some of their writings have seemed to assume that deterrence is the only goal of prosecutors, who pursue it by "maximiz[ing] the expected number of convictions weighted by their sentences, subject to a budget constraint" Landes, *An Economic Analysis of the Courts*, 14 J. L. & ECON. 61, 98 (1971). See also Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 291-92 (1983) (goal of criminal justice system to get the maximum deterrent punch out of whatever resources are committed to crime control). But more recent economic writing acknowledges that other goals, including retribution, require explanation. See Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1194-95, 1231 (1985) (disavowing the view that "efficiency is or ought to be the only social value considered by legislatures and courts in creating and interpreting the rules of the criminal law," but postponing consideration of the moral view of criminal law, while doubting that it is "as good a positive theory of criminal law as the economic."); Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, n.1 (1985).

163. See, e.g., T. HONDERICH, *PUNISHMENT: THE SUPPOSED JUSTIFICATIONS* 13, 148-49, 155 (1971); A. VON HIRSCH, *DOING JUSTICE* 73-76 (1976); McCloskey, *A Non-Utilitarian Approach to Punishment*, in *CONTEMPORARY UTILITARIANISM* 239, 257 (M.D. Bayles ed. 1968). Wertheimer,

desert and crime control, we can put aside the philosophical dispute for now and accept both as prosecutorial objectives.

The objective of inflicting "just deserts" requires or permits¹⁶⁴ punishment proportional to the defendant's culpability in committing the crime. "Crime control" objectives are promoted by punishments that deter and morally educate¹⁶⁵ the general public, and that deter, restrain and rehabilitate the individual defendant.

The prosecutor's second principal goal is "justice." The philosophical literature on this subject is both vast and contentious,¹⁶⁶ but despite the many points of controversy, most theorists agree the three core principles of justice are "equality," "respect for rights" and "desert."¹⁶⁷ *Equality* requires the prosecutor to be consistent, treating similar cases in a similar fashion.¹⁶⁸ *Respect for rights* requires the prosecutor to honor a defendant's rights. I shall call this "procedural justice."¹⁶⁹ *Just desert*, as defined above in connection with crime con-

supra note 158, at 411. But "pure" retributivists (*see infra* note 164) entirely reject crime control as an aim of punishment. *See, e.g.,* Moore, *The Moral Worth of Retribution*, in *RESPONSIBILITY, CHARACTER, AND THE EMOTIONS* 179 *passim* (F. Schoeman ed., 1987).

164. Wertheimer distinguishes three types of retributivism according to how each would set punishments: (1) on the principle of "an eye for an eye"; (2) in proportion to the gravity of the crime; (3) in proportion to gravity, less if appropriate on utilitarian grounds. The first type is not currently in favor; the second is "pure" ("strong" or "positive") retributivism; the third is "compromised" ("weak," "negative" or "teleological") retributivism. Wertheimer, *supra* note 158, at 404-05. *See also* Murphy, *Retributivism and the State's Interest in Punishment*, in *CRIMINAL JUSTICE: NOMOS XXVII* 156, 159 (J. Pennock & J. Chapman ed. 1985).

165. *See* Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L., C. & P.S. 176, 179-80 (1952) (punishment "helps to form and to strengthen the public's moral code and thereby creates conscious and unconscious inhibitions against committing crime.").

166. For an overview and an extensive bibliography see O. BIRD, *THE IDEA OF JUSTICE* (1967). Philosophical writings distinguish between "distributive" and "retributive" justice, and treat questions of just punishment under the latter head. *See* W. FRANKENA, *supra* note 138, at 48. To avoid the confusion of discussing utilitarian theories of "retributive" justice, I have ignored that distinction in the body of this Article. By citing the general agreement on the principles of justice, I do not mean to deny that there is considerable disagreement on the ethical theories giving rise to the principles. Nor do I mean to imply that most philosophers would agree on the proper resolution of particular moral dilemmas.

167. *See generally* J. MILL, *supra* note 162, at 49-51; Cohen, *Pure Legal Advocates and Moral Agents: Two Concepts of a Lawyer in an Adversary System*, 4 CRIM. JUST. ETHICS 38, 39 (1985). Regarding equality, *see* O. BIRD, *supra* note 166, at 99; Bedau, *Radical Egalitarianism*, in *JUSTICE AND EQUALITY* 168, 171 (H.A. Bedau ed. 1971) ("justice involves equality"); Rawls, *Justice as Fairness*, in *JUSTICE AND EQUALITY* 76-102 (H.A. Bedau ed. 1971). Regarding respect for rights, *see id. at passim*. On desert, *see* A. VON HIRSCH, *supra* note 163, 143-47.

168. Cohen, *supra* note 167, at 39.

169. Philosophers define justice to include respect for both legal and moral rights. *See, e.g.,* J. MILL, *supra* note 162, at 49; Cohen, *supra* note 167, at 46. For simplicity's sake I have narrowed the category to legal rights. Some refer to this as the principle of "formal" (as opposed to "substantive") justice. *See* Davis, *Sentencing: Must Justice be Even-Handed?*, in 1 LAW & PHIL. 77, 100 (1982).

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trol, requires a prosecutor to seek for a defendant the punishment (or exoneration) that he rightfully deserves. I shall call this “substantive justice.” The prosecutor’s duty to “seek justice” can therefore be defined as the duty to promote equality, procedural justice, and substantive justice.

We can amend Table Three¹⁷⁰ to show the changes in the model.

TABLE FOUR

I. QUASI-JUDICIAL FUNCTION	II. ADVERSARY FUNCTION
A. Role:	
Surrogate client Impartial, judge-like neutrality	Lawyer Zealous, adverse advocacy
B. Setting:	
No adversary system safeguards	Adversary system safeguards
C. Values/Objectives:	
<i>Justice</i> 1. [Desert/“Substantive”] 2. [Rights/“Procedural”] 3. [Equality]	<i>Punishment</i> 1. [Desert] 2. <i>Crime Control:</i> <i>deter, restrain</i>
D. Process:	
Factual inquiry/ assessment	Presumptions of factual guilt

In Table Four, “procedural justice” and “equality” are bracketed to indicate that we should regard them as constraints, rather than as ends in themselves. Prosecutors have no roving mandate to promote

170. See *supra* text accompanying note 155. Additions to Table 3 are italicized.

those values; rather, we wish them to ensure fair and equal treatment of defendants in the course of pursuing substantive justice. One might also question whether desert is a primary objective or only a constraint on the pursuit of crime control values. This question implicates the retributivist-utilitarian debate mentioned above.¹⁷¹ Depending on the answer, one would draw somewhat different conclusions about the relationship between the prosecutor's dual roles. Almost all contemporary punishment theorists agree that the governing criterion for setting punishments is crime control, while desert is merely a constraint.¹⁷² In other words, punishment should be fixed so as to maximize public protection, but may not exceed what the defendant deserves. Because this view is so widely shared, I have adopted it for purposes of this discussion, and have so indicated by bracketing "desert" in Table Four.

Finally, the goal of just desert is common to both aspects of the dual role. The principal tension between the duties to "punish" and to "do justice" is therefore between the goal of crime control, on the one hand, and the values of equality and procedural justice on the other. "Overzealousness" often takes the form of pursuing punishment without regard to the latter constraints.

b. The Moral Dimension. Until now I have been defining the dual role in terms of state interests or objectives, but this does not entirely capture the quality of prosecutorial decisions. Routine prosecutorial decisions have great moral significance inasmuch as they cause the defendant and/or others to suffer or avoid serious harm. This gives the prosecutor a corresponding moral duty that deserves examination.

How, if at all, is a prosecutor's personal morality related to her professional role? An answer can be drawn from recent discussions of the "moral distance" between the lawyer's moral duty and that of an ordinary person.¹⁷³ Does the professional role justify harmful actions that would be considered wrong outside it? Some have argued against this mutual opposition between private and professional morality. They propose, rather, an "integrated" conception, which emphasizes the role of the lawyer's own moral judgment in resolving professional dilemmas and de-emphasizes the importance of codified principles of "professional responsibility."¹⁷⁴ According to Gerald Postema,

171. See *supra* text accompanying notes 161-63.

172. See T. HONDERICH, *supra* note 163, at 148-49, 155. But retribution may be returning to fashion. See R. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 11-34 (1979); A. VON HIRSCH, *supra* note 163, 73-76; Moore, *supra* note 163, at 214-15.

173. See, e.g., Postema, *supra* note 116, 63-71; Wasserstrom, *supra* note 67, at 1-2, 9-14.

174. "[T]he moral dilemmas facing a lawyer generally cannot be reduced to a single perspective. . . . On the contrary, our concerns are characterized by a complexity and a variety which resist reduction to a uniform scale." Postema, *supra* note 116, at 67.

The principles or values provide a framework within which to work and a target at which to aim. But they do not determine decisions. Instead, we rely on our judgment to achieve a coherence among the conflicting values which is sensitive to the particular circumstances. Judgment thus involves the ability to take a comprehensive view of the values and concerns at stake, based on one's experience and knowledge of the world.¹⁷⁵

...
The primary concern is not with the definition, structuring, and delimitation of a lawyer's professional *responsibilities* (his official concerns and duties), nor with those situations in which the lawyer is to be held professionally *responsible* (i.e., liable to blame or sanction). Rather, the concern is with responsibility as a virtue or trait of character. The focus, then, is on the notion of a *responsible* person—or perhaps better, on the notion of a person's *sense of responsibility*.¹⁷⁶

Postema presents a conception of professional obligation that “integrat[es] to a significant degree the moral personality of the individual with the performance of role responsibilities.”¹⁷⁷ He implies that to be a “good lawyer” one must be a morally good person, that is, one who has a virtuous character and who acts according to proper values. For prosecutors this view is reinforced when we consider that their accepted professional duty is to “seek justice,” which implies a moral commitment.

What, then, should we require of prosecutors? Ethical theorists generally agree on the core moral virtues, which include truthfulness, benevolence, trustworthiness, moral autonomy, moral courage and finally, “justness.”¹⁷⁸ Of these qualities, the last three are especially important here. “Justness,” of course, requires loyalty to the three values defined above: equality, respect for rights and desert. “Moral autonomy” means that a prosecutor is “regularly disposed to do his *own* moral thinking . . . and then, in turn, to *act* upon his considered judgment”; “moral courage” requires that he be willing to endure substantial hardship for obeying his conscience.¹⁷⁹

175. *Id.* at 68 (footnote omitted). Cf. Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1149-50 (moral choices not simply deduced from general principles or rules).

176. Postema, *supra* note 116, at 70-71.

177. *Id.* at 83. See also Shaffer, *The Profession as a Moral Teacher*, 18 ST. MARY'S L.J. 195, 197 (1986) (“Sound ethical codes in the profession are those which depend on character.”).

178. See generally T. BEAUCHAMP & J. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 265-66 (1979); W. FRANKENA, *supra* note 138, *passim*; Cohen, *supra* note 167, at 39-41. Of course, theorists disagree on the sources and relative primacy of different principles.

179. Cohen, *supra* note 167, at 41. Of course, moral autonomy is not inconsistent with consulting others on moral questions. See *infra* text accompanying notes 208-16.

Both moral autonomy and moral courage are essential to the "moral point of view," *i.e.*, the way in which, according to ethical theorists, actors should approach moral decisions. This is "the moral way of . . . deciding what one should do, as distinct from, say, the aesthetic, legal or prudential . . . ways."¹⁸⁰ According to William Frankena:

[T]he moral point of view . . . entails (a) deciding for oneself what one should do, (b) deciding this, not by asking what one wants to do, what is to one's own advantage, or what will happen to one if one does this or that, but by some kind of consideration of what it would be like if everyone were to act likewise.¹⁸¹

Prosecutorial duty, then, implies commitment both to accepted moral virtues/values¹⁸² and to a moral reasoning process.

We can amend Table Four¹⁸³ to reflect this feature of the model.

180. Frankena, *Moral Education*, in PERSPECTIVES ON MORALITY 163, 166 (1976) ("The main question in connection with content [of moral education] is that what has to be passed on is, finally, not any particular moral rule or virtue, but an understanding of what morality is and a commitment to thinking and acting in the moral way.").

181. *Id.* at 166-67. See also W. FRANKENA, *supra* note 138, at 111-12.

182. I am treating "virtue" and "values" as equivalents. Philosophers have debated whether morality primarily consists in "doing" good things or in "being" good, *i.e.*, in cultivating good traits or dispositions. See generally T. BEAUCHAMP & J. CHILDRESS, *supra* note 178, at 261-65; W. FRANKENA, *supra* note 138, ch. 4. These writers agree that the "ethics of being" and the "ethics of virtue" are complementary perspectives. T. BEAUCHAMP & J. CHILDRESS, *supra* note 178, at 265; W. FRANKENA, *supra* note 138, at 65-7. Neither moral action guides nor virtues need be taken as primary, because "for every principle, rule, or ideal, there is a corresponding virtue, that is, a corresponding disposition to act in a certain way." T. BEAUCHAMP & J. CHILDRESS, *supra* note 178, at 265. Of course, this viewpoint validates the traditional insistence on the prosecutor's virtuous character. See *supra* text accompanying notes 103-113.

183. See *supra* text accompanying note 170. Additions to Table 4 are italicized.

TABLE FIVE

I. QUASI-JUDICIAL FUNCTION	II. ADVERSARY FUNCTION
A. Role:	
Surrogate client Impartial, judge-like neutrality <i>Morally virtuous, autonomous, courageous (moral point of view)</i>	Lawyer Zealous, adverse advocacy
B. Setting:	
No adversary system safeguards	Adversary system safeguards
C. Values/Objectives:	
Justice 1. [Desert/"Substantive"] 2. [Rights/"Procedural"] 3. [Equality]	Punishment 1. [Desert] 2. Crime Control: deter, restrain
D. Process:	
Factual inquiry/ assessment	Presumptions of factual guilt

Against this background,¹⁸⁴ let us turn to the process of normative assessment.

184. By emphasizing the importance of moral values and reasoning to prosecutorial decision-making, I do not mean to suggest either of two propositions which some might infer. The first is: "What counts in prosecutorial decisionmaking is individual moral judgment. Therefore, we can forget the importance of positive law constraints such as statutes, rules, or guidelines, and even of case supervision." On the contrary, I favor expanded controls on prosecutorial discretion. But I focus here on the exercise of discretion which now exists, and which—even assuming greater

2. *Normative Assessment*—Once the prosecutor has identified the public interests bearing on her decision, she is prepared to decide the state's litigating posture in the particular case. In the Vietnam Veteran case, the student prosecutor had a choice of dispositional recommendations ranging from dismissal (requested by defense counsel) to incarceration (urged by her supervisor).¹⁸⁵ Assuming she has satisfied herself that the facts supplied by defense counsel are true, how should she go about choosing?

I shall first discuss how a judge might go about sentencing the Vietnam Veteran.¹⁸⁶ I shall then consider whether a prosecutor should exercise her dispositional discretion any differently.

a. *Judicial Sentencing Discretion*. Most writers on discretionary judicial sentencing seem to agree on three points.¹⁸⁷ First, the process

efforts at controlling it—will probably continue to exist. See *infra* text accompanying notes 232-34. Rules and guidelines "provide a framework within which to work and a target at which to aim," but they do not determine decisions. Postema, *supra* note 116, at 68.

The second proposition is: "Prosecutors should exercise discretionary power in accordance with their personal morality, making no special allowance for their professional role. For example, if a prosecutor happens especially to value the duty of benevolence, and strongly to disapprove of imprisonment, then she should treat defendants leniently." But I am not urging "deprofessionalization" of professional roles. As Postema argues:

[T]he moral universe of a professional role characteristically is narrower than that of ordinary morality. But since the moral universe defines the range of considerations that a role agent may take into account in choosing a course of action, it is possible that otherwise relevant considerations may be effectively excluded from the agent's deliberation. Thus cases may arise in which an agent is required by his role to act without considering the full range of moral reasons before him; rather, he must consider only those moral reasons within his particular moral universe.

Id. at 71.

Just as rules and guidelines constrain the prosecutor's discretion, so does her professional role, which might dictate the inclusion or exclusion of particular values, and/or *prima facie* preference for some over others. Postema defends the "exclusionary character of professional morality" in terms of the social value of such roles, which in order to function may require a "division of social and moral labor." *Id.* at 72. In this Article I justify certain prosecutorial "exclusions" based on the needs of the adversary system. If one rejects that system's value, one will also question the exclusion. Defining the prosecutor's "moral universe," in Postema's sense, is my goal in this Article.

185. The crime of larceny "under one hundred dollars" is punishable by up to one year in jail or a fine of not more than three hundred dollars. MASS. GEN. LAWS ANN. ch. 266 § 30(1) (West Supp. 1987).

186. Building a model around the Vietnam Veteran case assumes two features of the sentencing process: First, that judges have substantial sentencing discretion; and second, that prosecutors make sentencing arguments and/or recommend specific sentences to the judge. See Teitelbaum, *supra* note 141, at 75-76 (about seventy percent of responding district attorney's offices recommend specific sentences). Of course, the practice in some jurisdictions, and some reform proposals, are otherwise. See Kuh, *Sentencing: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 62 (1975) (prosecutors should not "usurp" judicial role by recommending specific sentences).

187. Punishment goals can vary according to institutional role: the legislature's goal in enacting sentencing laws might differ from the goals of enforcement personnel such as judges at sen-

should begin with selection of a presumptive sentence (or range) based on desert, reflecting relevant aggravating and mitigating factors. Second, the presumptive penalty is subject to further mitigation on grounds unrelated to desert. Third, these nondesert clemency factors should be invoked cautiously.¹⁸⁸

Deciding first what sentence the Vietnam Veteran deserves is not simple. The maximum penalty is one year in jail. The judge might proceed by ranking the defendant's offense on a range of the "worst" and "least bad" ways in which one could commit the crime of larceny under one hundred dollars.¹⁸⁹ In this calculus the judge considers all circumstances of the crime bearing on culpability, including aggravation (e.g., helplessness of victim, abuse of trust) and mitigation (e.g., duress, necessity, provocation). We can all imagine more blameworthy larcenous acts than this one—the defendant might have stolen medicine from a sick child. But we might debate the evil of shoplifting relative to other sorts of minor theft. We might also find it difficult to weigh other circumstances bearing on culpability, such as the defendant's criminal record¹⁹⁰ (aggravating); his war heroism and drug habit that "triggered" his prior crimes (mitigating); the recent stressful circum-

tencing, prosecutors recommending dispositions or police officers deciding whether to arrest. See A. ROSS, *ON GUILT, RESPONSIBILITY AND PUNISHMENT* 61-65 (1975); H. HART, *Prolegomenon to the Principles of Punishment*, in *PUNISHMENT AND RESPONSIBILITY* 1-12 (1968); Wertheimer, *Deterrence and Retribution*, 86 *ETHICS* 181 *passim* (1975-76). Most of the literature on punishment and sentencing concerns the legislative level: philosophers debate the justifications for punishment *per se*. See A. ROSS, *supra*, at 61-65; Hart, *supra*, at 1-12. Legal scholars, criticizing the present sentencing system, argue the merits of various reforms. See, e.g., Frankel, *Lawlessness in Sentencing*, 41 *U. CIN. L. REV.* 1, 45-48 (1972). Only a few scholars, on whose work the following discussion draws, have attempted to prescribe systematically how judges should exercise their broad discretion under the current system. See Davis, *How to Make the Punishment Fit the Crime*, in *CRIMINAL JUSTICE: NOMOS XXVII*, 119 (J. Pennock & J. Chapman ed. 1985); H. GROSS, *A THEORY OF CRIMINAL JUSTICE* 448-51' (1979); Davis, *supra* note 169, at 98-103.

188. The models differ in detail but most require the judge to consider both desert and crime control in this way. See H. GROSS, *supra* note 187, at 448-51; Davis, *supra* note 169, at 100; Wertheimer, *supra* note 158, *passim*. For Norval Morris the principle of desert supplies the maximum and minimum sentence, but utilitarian principles govern the "fine tuning." Morris, *Punishment, Desert and Rehabilitation*, in *SENTENCING* 264 (H. Gross & A. von Hirsch ed. 1981). Andrew von Hirsch, by contrast, would permit departure from the principle of "commensurate desert" only in exceptional cases. See A. VON HIRSCH, *DOING JUSTICE* 125 (1976); A. von Hirsch, *Utilitarian Sentencing Resuscitated: The American Bar Association's Second Report on Criminal Sentencing*, 33 *RUTGERS L. REV.* 772, 773 (1981).

189. This description is based upon Davis, *supra* note 187, at 147-48 and Davis, *supra* note 169, at 86-97.

190. Von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 *MINN. L. REV.* 591, 608-09 (1981) argues for the retributive relevance of the defendant's criminal record. But see R. SINGER, *supra* note 172, at 67-72.

stances, *i.e.*, the loss of his job, getting mugged, and losing his wife (mitigating); and if he stole to get drugs, his diminished responsibility for this crime (mitigating).

When the judge has weighed the foregoing aggravating and mitigating factors and arrived at a presumptive sentence based on desert (for example, three months in jail), he considers whether to reduce the sentence on utilitarian grounds. This invites consideration of a host of factors bearing upon public protection, including the penalty's contribution to general deterrence and "moral education" of the public, as well as the defendant's dangerousness both short- and long-term. The penalty's rehabilitative (dis)utility would be relevant for most theorists only as it bears on the last factor, individual prevention.¹⁹¹

On the side of mitigation, defendant's progress in drug treatment, and the devastating but unlikely combination of stressful events triggering the current incident, suggest that incarceration is unnecessary to protect the public. In fact, by interfering with his therapy and employment prospects, increasing his level of stress, and returning him to a convict subculture, jail would be—to use the student's word—"counter-productive." A suspended jail term, probation and continued drug treatment would arguably better serve the public's need for protection now and in the future.

But aggravating factors also exist that, while not allowed to increase the sentence above what he deserves, might cancel out the mitigations. Some factors indicating the need for incarceration relate to general prevention, like deterrence of potential shoplifters and the moral-educative impact of a severe sentence. Individual prevention might also require a jail term because, despite defendant's progress in treatment, he has demonstrated an inability to behave when under stress. Incarceration might motivate him to greater self-control in the future. At least it will keep him out of department stores for a few months and give him time to become drug-free.¹⁹² If motivated to stay straight, he can presumably continue drug treatment while in jail.

One could rejoin by pointing out that general prevention depends more on the public perception of enforcement than enforcement itself. In such a low-visibility case, the public will not know whether the defendant was jailed or not. And there are additional costs of incarcerating the defendant, such as his suffering and that of his friends and

191. P. LOW, J. JEFFRIES, & R. BONNIE, *CRIMINAL LAW: CASES AND MATERIALS* 27 (2d ed. 1986). Most contemporary theorists oppose making rehabilitation an "aim" of sentencing. See *STANDARDS*, *supra* note 1, at § 18-2.2 comment.

192. Given the common availability of drugs in many jails and prisons, this argument is admittedly weak.

family, the cost of keeping him in jail, even the impact on correctional staff and inmates of squeezing another body into an overcrowded jail. These harms are concrete and immediate when compared to preventive benefits, which tend to be both speculative and remote.

Scholars have noted the natural tendency in sentencing to be more impressed by the costs than the benefits of penalties.¹⁹³ That is one reason why many urge caution in reducing a presumptive, deserved sentence on utilitarian grounds.¹⁹⁴ Another reason is the great difficulty of predicting the consequences to the defendant or society of any particular punishment. And a third is the eroding effect of individual clemency upon the other sentencing goals and constraints—desert, general deterrence and equality.¹⁹⁵

In deciding whether to reduce the “deserved” three-month jail sentence, a judge sentencing the Vietnam Veteran would need to weigh these competing benefits and costs, keeping in mind the danger of focusing too much on the latter. In a process he might find difficult, lonely, even agonizing, he would make the decision he thought was right.

b. The Prosecutor’s Role. The student prosecutor wanted to recommend a probationary sentence. Without judging that decision, her approach is easy to criticize. Her account¹⁹⁶ suggests that she adopted a narrow, defense-oriented view of the public interests at stake. She focused mainly on the defendant’s drug problems and the futility of jailing him. She was attuned to factors that mitigate culpability and dangerousness, but apparently oblivious to aggravations. The thought “general deterrence,” it seems, never crossed her mind.

How should she have approached the situation? Like a judge? Or more like a “zealous advocate” for penal severity?¹⁹⁷

193. See Davis, *supra* note 187, at 149; Wertheimer, *supra* note 187, *passim*. This tendency is widespread. See Moore, *supra* note 163, at 210 (examining tendency to forget the victim and direct all our compassion to the sole remaining actor—the defendant).

194. See Davis, *supra* note 187, at 149; Wertheimer, *supra* note 187, at 186 (utilitarian punishment principles appropriate only at legislative stage; utilitarian mitigation at sentencing stage undermines general deterrence, and “promotes neither justice nor utility.”). But see Morris, *supra* note 188, at 264 (desert is a “limiting principle” supplying only rough proportionality; utilitarian principles govern the “fine tuning.”).

195. These concerns, along with loss of faith in the “rehabilitative ideal,” have fueled the current national movement to restrict judicial sentencing discretion. A major effect of such reforms would be to recognize utilitarian values at the legislative level in setting penalties, but to restrict severely or eliminate judicial mitigation on utilitarian grounds at the sentencing stage. See generally STANDARDS, *supra* note 1, at §§ 18-1, 18-2, introduction and comments.

196. See *supra* text accompanying notes 26-29.

197. According to one national survey, about half the responding prosecutors who participate at sentencing take a “quasi-judicial” role, and recommend exactly the same sentence that they

(i) *Preference for Maximizing Punishment: The Use of Presumptions.* I suggested earlier, in discussing the problem of factual uncertainty, that prosecutors should employ rebuttable presumptions of factual guilt.¹⁹⁸ One could similarly argue that prosecutors should generally *prefer severity*, as expressed in presumptions favoring: (1) a "highest and most" charging policy;¹⁹⁹ (2) the maximum penalties obtainable; (3) broad construction of substantive penal laws; and (4) narrow construction of procedural protections. The Vietnam Veteran case invites consideration of the second presumption. Should a prosecutor seek the most severe penalty available?²⁰⁰

The notion that prosecutors should seek literally the maximum penalties they think they can "get" violates the principle of parsimony, which holds that punishment should not exceed what is necessary to achieve its purpose.²⁰¹ To seek (and so perhaps to win)²⁰² a one-year sentence for a defendant who, in the prosecutor's judgment, deserves only three months, or whose incarceration past three months would not benefit society, makes no sense.

Does rejection of a presumption for "maximum severity" mean that a prosecutor should recommend the same sentence she would impose as a judge? I think not, in light of the inherent arbitrariness of discretionary sentencing and the adversary context of the recommendation. Sentencing is arbitrary in the sense that the legislature typically leaves broad discretion to judges, who cannot precisely calculate the demands of desert, equality and utility.²⁰³ At best, these criteria permit a judge to isolate a range of acceptable penalties from which to choose. Within that range, the defense will surely advocate the most lenient,

would impose as a judge; the other half act as "advocates," suggesting aggravating factors to counterbalance the mitigating factors presented by the defense. Teitelbaum, *supra* note 141, at 76.

198. See *supra* text accompanying notes 145-54.

199. See Alschuler, *supra* note 16, at 85 (most prosecutors report that they regularly charge the highest and most that the evidence permits); Utz, *supra* note 84, at 106. But see STANDARDS, *supra* note 1, at § 3-6.1(a) stating that

The prosecutor should not make the severity of sentences the index of his or her effectiveness. To the extent that the prosecutor becomes involved in the sentencing process, he or she should seek to assure that a fair and informed judgment is made on the sentence and to avoid unfair sentence disparities.

200. The other presumptions are discussed *infra* at text accompanying notes 218-28.

201. Morris, *supra* note 188, at 258, 266. For retributivists, this is called the principle of proportional desert. Wertheimer, *supra* note 158, at 404-08. For utilitarians, the principle of economic deterrence. See T. HONDERICH, *supra* note 163, at 61; Wertheimer, *supra* note 158, at 404-08.

202. According to Teitelbaum, prosecutors report that their sentence recommendations significantly influence judges. Teitelbaum, *supra* note 141, at 80-82.

203. But see Morris, *supra* note 188, at 258-59, 267 (desert is inherently imprecise, but deterrence is potentially definite).

and so the prosecutor's adversary role *prima facie* obliges her to advocate the most severe. This is not the same as an unmitigated duty to "seek the maximum"; it operates only under conditions of genuine uncertainty.²⁰⁴ And it should be rebuttable when the absence or failure of adversary system safeguards makes the prosecutor's adversary stance inappropriate, such as, for example, when the defendant appears *pro se*.²⁰⁵

Furthermore, the prosecutor's adversary role obliges her, when sentencing mitigations are addressed, to articulate and defend those public interests that, but for her efforts, might not receive adequate attention. Defense counsel can be expected to minimize or ignore factors aggravating defendant's blameworthiness, as well as the community's crime control needs.²⁰⁶ He is likely to stress the disadvantages of punishing the defendant and to disregard the value of treating the defendant equally with others of equal culpability. The prosecutor should consider herself *prima facie* bound to air the other side. Only in exceptional circumstances, and after appropriate thought and consultation, should she reject that duty.²⁰⁷

(ii) *Consultation and Introspection.* The prosecutor's *prima facie* duty to argue reasons *for* sentencing the defendant to the most severe deserved punishment translates, in effect, into a presumption against mitigation. Deciding what punishment an offender deserves, and whether this presumption is overcome by considerations of compassion or utility, are accomplished by a process of consultation and introspection²⁰⁸ about each case.

Unless the case is routine and the prosecutor experienced, she will benefit from discussing with others the scope and intensity of the relevant public interests. Her consultants might include several classes of persons who can offer relevant facts and/or normative perspectives. First, she should consider the views of persons immediately involved in

204. A possible exception arises in practice before a judge who predictably "splits the difference" between prosecutorial and defense recommendations. In that circumstance, recommending a higher sentence than is believed proper is justified as a kind of strategic "puffing." But the practice sacrifices candor and risks loss of credibility and, far worse, "winning" an excessive and unjust sentence.

205. The experience related in *supra* note 55, suggests that prosecutors do modify their role in such circumstance.

206. Perhaps, as in the Vietnam Veteran case, by promoting a medical model of personal responsibility.

207. For example, a case of a seriously ill defendant or a drug-dependent defendant willing to enter residential drug-treatment. And, possibly, in the Vietnam Veteran case.

208. For a discussion of the process of consultation and introspection see S. Bok, *supra* note 153, at 90-108.

the case, such as victims, witnesses and the police.²⁰⁹ In the Vietnam Veteran case, for example, the department store's indifference to the proceedings would have a different meaning for the prosecutor's decision than their expressed alarm over a recent rash of shoplifting, treated with apparent unconcern by the courts. Of course, prosecutors ignore pressures from potentially powerful critics at their peril. "Cover Your [Rear]" is a basic rule, quickly learned. But consultation serves an important need beyond the prosecutor's political survival. If shoplifting at the victim store is in fact getting out of control (or is so perceived), the merchant community's expressed frustration with the court system's response sheds light on the relative costs of probation and incarceration.²¹⁰ General deterrent values might outweigh arguments for mitigation.

A second, obvious source of advice lies within the prosecutor's own agency: her supervisors and experienced peers. Consulting with colleagues promotes equality by revealing how similarly situated defendants have been and would be treated by others in the agency. It also exposes the prosecutor to the normative perspectives of colleagues who, over time, have themselves been exposed to the expression of diverse public concerns—by victims, defense lawyers, judges, the media and so forth. Collegial consultation is therefore invaluable but, depending upon the range of views represented in the collegial group, might yield an excessively narrow view of the public interest.²¹¹ Although it might be unwise, if not improper, to seek advice on decisions in particular cases from persons outside the office, prosecutors should actively pursue new information and perspectives bearing on the values at stake in the criminal justice process. This implies receptiveness to relevant research findings²¹² and to normative preferences expressed by all segments of the community.

209. Frequently, of course, victims and the police will press their views upon the prosecutor without being asked. See Friedman, *The Prosecutor: A Model for Role and Function*, 1978 WASH. U.L.Q. 109, 131-32.

210. Similarly, police officers familiar with the defendant and the community might be able to contribute to the prosecutor's decision on the need for a jail term in this case.

211. In a related context, Sissela Bok argues that collegial consultation tends to exclude views of those persons likely to object to the group's values. S. Bok, *supra* note 153, at 91. One might fear that office colleagues would uniformly reflect a narrow "conviction psychology," and that consultation would invariably push the prosecutor in that direction. Such pressures surely exist, and are very powerful. But their force can be overstated. See *supra* text accompanying notes 85-91.

212. Such as research on the efficacy of general deterrence, the influence of correctional measures on recidivism, and the impact of diversion programs like mediation and community service.

Consultation is important not only as a means of gathering relevant facts and perspectives, but also as an aid in the prosecutor's reasoning to a conclusion. Many problems facing prosecutors—like what punishment is “just” and “right”—are moral problems. Prosecutors should approach them from “the moral point of view.” In the Vietnam Veteran case, for example, that requires the student (subject to her supervisor's acquiescence) to exercise moral autonomy and courage. She should not worry about how others will judge her (“too soft”) or how it will affect her future; she should worry about the impact of her actions on others, and about the example she is setting for others.

Moral reasoning calls for “moral conversation,” which can occur with others or within oneself.²¹³ As Joseph Singer has written of judicial decision making:

When [they] decide cases, they should do what we all do when we face a moral decision. We identify a limited set of alternatives; we predict the most likely consequences of following different courses of action; we articulate the values that are important in the context of the decision and the ways in which they conflict with each other; we see what relevant people . . . have said about similar issues; we talk with our friends; we drink enormous amounts of coffee; we choose what to do.²¹⁴

At base these decisions are personal, deeply intuitive²¹⁵ and sometimes agonizing. However, “[i]n the moral sphere it is always, finally, up to us; nor is there anyone to whose steadier shoulders our burden of moral judgment can be shifted.”²¹⁶

c. *Summary.* Table Five²¹⁷ can now be amended to show the (constraining) principle of parsimony, the prima facie presumption of penal severity (against mitigation), and the process of moral conversation and introspection.

213. See, e.g., S. BOK, *supra* note 153, at 90-108. For an argument that judicial decision making calls for the same process as we use in making important moral decisions see Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 62 (1984).

214. Singer, *supra* note 213, at 65.

215. The prosecutor's “surrogate client” role suggests an analogy: Binder and Price maintain that clients are incapable of articulating the precise weight that they give to particular values affecting their decisions. Only by an intuitive process can a person satisfactorily weigh the relevant competing interests. D. BINDER & S. PRICE, *supra* note 159, at 149. But see Postema, *supra* note 116, at 68 (“Judgment is neither a matter of simply applying general rules to particular cases nor a matter of mere intuition. It is a complex faculty, difficult to characterize, in which general principles or values and the particularities of the case both play important roles.”).

216. Aiken, *The Concept of Moral Objectivity*, in *MORALITY AND THE LANGUAGE OF CONDUCT* 97 (H. Castaneda ed. 1963). For the view that there is an objective moral reality and, therefore, “true” and “false” answers to moral dilemmas, see Moore, *supra* note 175, at 1152. According to Moore “the anguish such dilemmas can provoke is appropriate. . . . [It] expresses our . . . conviction that the answers are not equally arbitrary and that getting it right matters.” *Id.* at 1151 n.203.

217. See *supra* text accompanying note 183. Additions to Table 5 are italicized.

TABLE SIX

I. QUASI-JUDICIAL FUNCTION	II. ADVERSARY FUNCTION
A. Role:	
Surrogate client Impartial, judge-like neutrality Morally virtuous, autonomous, courageous (moral point of view)	Lawyer Zealous, adverse advocacy
B. Setting:	
No adversary system safeguards	Adversary system safeguards
C. Values/Objectives:	
Justice 1. [Desert/"Substantive"] 2. [Rights/"Procedural"] 3. [Equality] 4. [Parsimony]	Punishment 1. [Desert] 2. Crime Control: deter, restrain
D. Process:	
Factual inquiry/ assessment <i>Normative inquiry/ assessment</i> <i>Moral conversation/ introspection</i>	Presumptions of factual guilt <i>Presumptions of penal severity/ against mitigation</i>

C. Further Applications of the Model

In this section I shall apply my model to two prosecutorial dilemmas arising in contexts different from that of the Vietnam Veteran case,

and other than sentencing. I shall not attempt exhaustive discussion of the problems; I only wish to show how the model shapes our thinking about them.

1. “*Highest and Most*” Charging: *Feticide as Murder?*—A man badly beat his pregnant ex-wife, causing the death of her viable fetus. The prosecutor could simply charge the man with the aggravated assault and battery of his ex-wife,²¹⁸ or he could add a murder charge for the death of the fetus. Most courts addressing the issue have refused to construe “person” or “human being” in traditional homicide statutes to include fetuses, while a few have approved a broader reading.²¹⁹ In a case of first impression, should the prosecutor charge murder and urge the state courts to construe the statute expansively?

According to our model the prosecutor has a prima facie duty to prefer penal severity. In the sentencing context, this translates into a prima facie duty to advocate punishment according to defendant’s desert, without mitigation. Thus the prosecutor should advocate the maximum deserved penalty within the established range for the particular offense.²²⁰

In the charging context, where the primary uncertainty relates to definition of the potential penalty range, the preference for severity might be expressed by presumptions in favor of “highest and most” charging and broad construction of substantive penal laws. As modified by the principle of parsimony, these would imply a prima facie duty to charge the most serious crime for which the defendant deserves punishment. If the evidence suggests that the feticide was intentional or reckless, this would mean a charge of murder.

The prosecutor’s place in the adversary system seems, at first blush, to require this stance. Defense counsel will nearly always argue for the “lowest and least” charges. In this case, he will forcefully urge the considerations of fair notice and separation of powers that oppose judicial application of criminal homicide statutes to feticide. If the prosecutor does not vigorously take the other side, nobody will. Therefore, the argument might run, the prosecutor should push the more serious charge and “leave it to the court.”

Bringing the murder charge is justifiable but not, I think, obligatory. I would oppose application of the two charging presump-

218. A charge of unlawful abortion might also lie. See *Hollis v. Commonwealth*, 652 S.W.2d 61, 64-68 (Ky. 1983) discussed in Comment, *Taking Roe to the Limits: Treating Viable Feticide as Murder*, 17 IND. L. REV. 1119, 1134-36 (1984).

219. See generally Note, *Judicial Recognition of Feticide: Usurping the Power of the Legislature?*, 24 J. FAM. L. 43 (1985) (discussing *Commonwealth v. Cass*, 392 Mass. 799, 467 N.E.2d 1324 (1984) and *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984)).

220. See *supra* text accompanying notes 203-05.

tions in this case for two reasons. The first reason, having to do with adversary system safeguards, applies to charge decisions generally; the second is specific to fetal homicide.

The prosecutor's preference for severity is only justified by her adversary role. By choosing to act as an adversary the prosecutor implicitly says: "I know that my duty is to do justice, not merely to convict. But in an adversary system, I serve justice best if I take an adversary role, and rely upon opposing counsel and the judge to ensure that justice will be done."²²¹ If adversary safeguards are inadequate to protect justice values in the charging context, then the prosecutor's reliance on them is misplaced.

Defense counsel's ability to protect the values threatened by a fetal murder charge is questionable. He can do nothing until the defendant is before a court. By then even counsel's successful objections would not completely undo the harm—the stigma and anxiety—caused by the charge. And if he failed to win pretrial dismissal of the charge, defense counsel might feel compelled to advise a compromise plea rather than a trial to vindicate basic rights.

My other reason has to do with the merits of this case. A judicial decision to punish feticide under traditional homicide statutes, insofar as it tends toward judicial "crime creation," controversially affects the separation of legislative and judicial powers.²²² Because such a decision might leave unclear the criminal liability of others who cause the death of fetuses—such as careless pregnant women and abortionists—it could also substantially affect law enforcement.²²³ As an elected executive official, the district attorney has a legitimate interest in encouraging or opposing such a development. Ideally, then, this question should be decided by high officials of the prosecution agency as a matter of policy, and not "automatically" by resort to a preference for severity.

221. Seymour, *supra* note 128, at 312-13.

222. The line between (legitimate) judicial interpretation which expands a criminal statute's coverage, and (illegitimate) creation of a "new" common law crime, is ill-defined. Compare *Keeler v. Superior Ct.*, 2 Cal. 3d 619, 631-32, 470 P.2d 617, 624-25, 87 Cal. Rptr. 481, 488-89 (1970) (superseded by statute) with *People v. Sobiek*, 30 Cal. App. 3d 458, 106 Cal. Rptr. 519 (1973) *cert. denied*, 414 U.S. 855 (1973) discussed in Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 226-34 (1985). Because we consider crime-definition a legislative function, the former infringes on legislative prerogatives as well as the principle of legality. Cf. Note, *supra* note 219, at 53-58.

223. The criminal law generally considers that an unborn fetus is not a person. Reform by the legislature can anticipate and confine the effects of such fundamental change more easily than can judicial action. Compare *Keeler*, 2 Cal. 3d at 644-45, 470 P.2d at 633-34, 87 Cal. Rptr. at 481, 497-98 (Burke, Acting C.J., dissenting) with CAL. PENAL CODE § 187 (West Supp. 1987) (California's post-*Keeler* legislation).

Lacking guidance from above, an assistant district attorney should approach it the same way. She might in the end decide that the public interest would best be served by applying murder statutes to feticide. But first she should weigh the full range of relevant interests, accepting that some of these might outweigh the interest in punishing the defendant as a murderer.

The same approach should be applied by the prosecutor to the next dilemma.

2. *The "Public Safety" Exception to Miranda*—A defendant attacks her conviction on the ground that the jury was permitted to consider her statement in response to police questioning, made without benefit of *Miranda* warnings.²²⁴ The questioning occurred at the arrest scene late at night near a large apartment complex where several serious crimes had been committed in the past few weeks. On the night in question, a woman whose description the defendant matched had used a kitchen knife in an attempt to kidnap a young man from the complex. Her incriminating statement was in response to the question, "Where's the knife?"²²⁵

On appeal, the prosecutor could defend admission of the statements under the "public safety" exception to *Miranda*. The argument would rest upon a broad reading of *Quarles v. New York*,²²⁶ but—particularly before a court inclined to restrict *Miranda*'s scope—would not be an implausible one. Assuming it raises an issue of first impression, should the prosecutor make the argument?

In some respects this case resembles the feticide case just discussed. The question there was whether the prosecutor's adversary role justifies presumptively broad construction of the substantive criminal

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

225. *People v. Cole*, 165 Cal. App. 3d 41, 52, 211 Cal. Rptr. 242, 248-49 (Ct. App. 1985) (applying the *Quarles v. New York*, 467 U.S. 649 (1984) rationale on facts similar to those given in the text).

226. *Quarles v. New York*, 467 U.S. 649 (1984), upheld custodial police questioning—without warnings—because it was "reasonably necessary" to avert imminent danger to the public arising from the concealed presence of a firearm in supermarket shelves. The *Quarles* emergency was stronger than here because in *Quarles* the police were certain that the dangerous object was present in the immediate area, and because that object was a loaded firearm. Neither is true in our case. Still, considering that when he was questioned Quarles was held handcuffed at gun-point by several police officers, it was the middle of the night and the store could easily have been cordoned off and searched without risk to the public, it is difficult to read *Quarles* as motivated more by a concern for public safety than by a wish to eviscerate *Miranda*. See *Quarles*, 467 U.S. at 675-77 (Marshall, J. dissenting). See also Annotation, *What Circumstances Fall Within "Public Safety" Exception to Requirement That Law Enforcement Officer Give Persons Miranda Warnings as to Federal Constitutional Rights Before Conducting Custodial Interrogation*, 81 A.L.R. 2d 990 (1986).

law; here the same question exists about a presumption in favor of narrowly construing procedural protections.²²⁷ Perhaps this question, too, should be decided by the agency leadership (or in default, by the litigating assistant) according to whether they believe that *Miranda* should be preserved. They might, or might not, decide that claims of crime control and substantive justice outweigh—in either the short or long term²²⁸—the procedural values jeopardized by expanding *Quarles*.

Stronger arguments probably favor an adversary posture here. Unlike the feticide issue, this one arises in the midst of adversary proceedings. A lower court has already admitted the evidence and convicted the defendant. Barring clear error, the appellate prosecutor should presume regularity²²⁹ and defend the state's position, relying on defense counsel to argue the many reasons why *Quarles* should be construed narrowly. A different conclusion might follow if the legal issue arose at the trial court level, rather than on appeal.

D. Summary

Application of the model outside the sentencing context reinforces several central arguments of this Article. Justice is the prosecutor's primary goal, but in contexts where adversary system safeguards function, the prosecutor has the primary duty to advance crime control values. In these contexts, the values of substantive justice, procedural justice and equality operate as vital but muted constraints.

In this part I have attempted to critique the traditional view of the prosecutor's dual role. Table Six²³⁰ is not simple, but I think it tells a more coherent tale than Table One.²³¹ I shall next consider the implications of this model for the operation of prosecution agencies.

IV. IMPLICATIONS FOR PROSECUTION AGENCIES

I have focused above on the individual prosecutor's dual role and the pressures on her to renounce quasi-judicial values in favor of pursu-

227. Actually, both cases involve the tension between substantive and procedural justice: the feticide defendant's defense would in part rely on the procedural due process right to notice.

228. See Skolnick, *supra* note 54, at 51-52 (police justify committing perjury by utilitarian calculus measuring "costs of the act of lying against the benefits [from conviction] to the crime victim and the general public"; civil libertarians use the same calculus but measure "in terms of rules protecting the long-range interests of all citizens in a system of governance, as opposed to the shorter range interests of punishing perpetrators.").

229. Prosecutors, like other government officials, should presume the validity of official actions which would result in punishment. This may overlap with, but is distinct from, the preference for severity.

230. See *supra* text accompanying note 217.

231. See *supra* text accompanying notes 102-03.

ing penal severity. In this part, I examine the implications of that discussion for prosecution agencies.

The prosecution model set forth above is meant to be normative, but I think it also describes how—at some level of consciousness—most prosecutors actually make decisions. The model asserts that even the lowliest prosecutor exercises great discretionary power over the lives of others. This, I have urged, demands a high level of individual moral responsibility. One response might be, “This is too much power for lawyers, especially young lawyers, to have. By detailed guidelines, intensive supervision and the like, we should drastically limit their discretionary power.” As discussed earlier,²³² those methods have not been much used to date. Furthermore, it is probably unrealistic to expect any change. Leif Carter, an organizational analyst, has argued that prosecutorial decision making is inherently uncontrollable by preordained rules and guidelines.²³³ In his important study of California prosecutors, he demonstrated that prosecutorial work is characterized by such uncertainty—regarding, *e.g.*, the causes of crime and the impact of penalties, the constantly changing “facts” of cases, the diverse and conflicting pressures from the work environment, the unpredictable behavior of judges, witnesses and other actors—that efforts to define and enforce uniform policies are bound to fail.²³⁴ Instead of trying to restrict prosecutors’ autonomy, Carter concludes, agencies should accept individual discretion as a “given” and adapt to it. He recommends that district attorneys should hire subordinates who, regardless of their views of the best approach to crime control, have the interest and ability to do criminal justice research and to share new knowledge with their peers. Prosecutors should be individuals committed to continual learning in an atmosphere of uncertainty, openness, and inquiry; research should be part of their job.²³⁵

Carter’s “philosopher-king” model of prosecution might be impractical, but it points in the right direction. Prosecution agencies should actively foster responsible exercise of inherent discretion by subordinates. Such an approach would differ from the current one. Most prosecutors come to the job directly from law school and stay only a few years. Typically thrown into the “pit” without adequate training or supervision, they become absorbed in mastering the knowl-

232. See *supra* text accompanying notes 35-38.

233. L. CARTER, *supra* note 36, at 11-17. Accord Utz, *supra* note 85, at 119-20.

234. L. CARTER, *supra* note 36, at 113-50. Among other causal factors, Carter cites the professional independence of prosecutors, who resist control of their professional autonomy, and whose behavior can be rewarded or punished by forces outside the agency. *Id.*

235. *Id.*

edge and techniques of survival. Unprepared technically as they are, they are even less prepared to handle their suddenly acquired power over human lives.²³⁶ Most of these neophytes come fresh from the moral fragmentation and alienation of law school, and many feel "cut away from themselves"²³⁷ even before they arrive. They are eager for someone to tell them "how to do it," a safer and less painful course than forming and asserting their own judgments, whether on matters of police credibility or—Heaven forbid—"justice." But if competent prosecution demands the integration of personal values and professional skills, then prosecution agencies must encourage prosecutors to reunite their personal and professional selves, which many learned to separate as students.²³⁸ The question is how to do this.

A suitable program would involve recruitment, training, and reinforcement. I shall discuss each of these in light of the analysis set forth in the first three parts of this Article.

A. Recruitment

Recruitment patterns, like other aspects of prosecution in this country, vary.²³⁹ Some district attorneys hire and fire assistants on merit, others favor candidates who are politically connected, and some—probably the majority—do both.²⁴⁰ To the extent that merit counts, who should be recruited?

236. This picture might be exaggerated for the large agencies, which I think tend to supervise neophyte prosecutors more closely. However, the description does apply to many agencies. Compared to most of their peers beginning law practice, prosecutors—even in the lower courts where they are apt to start—quickly get great responsibility over lives of defendants and victims.

237. Elkins, *Rites de Passage: Law Students Telling Their Lives*, 35 J. LEGAL EDUC. 27, 30-31, 44-47 (1985). Elkins and others have studied this phenomenon in first year law students. Cf. Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education*, 8 J. LEGAL REFORM 248 (1975). But, as Elkins maintains, the "split of public and private self, [although] costly and difficult to maintain, [is] carried into professional life." Elkins, *supra*, at 46.

238. In the words of one student:

In the law office your professional self is on display. I don't see anything wrong with this separation of personal and professional. So what if you have to act sort of phony to get the work done. It's all part of the game, and people have to accept it in order to function.

Elkins, *supra* note 237, at 46.

239. See PRESIDENT'S COMMISSION, *supra* note 44, at 74.

240. For example, patterns might vary according to agency size. See generally Kuh, *supra* note 33, at 181-82. In my limited experience, large urban agencies are less likely to be "political" than smaller, suburban ones. In eastern Massachusetts, political considerations seem to dominate hiring and tenure in some counties, and matter only peripherally in others. One can speculate that "all other things being equal" the son or daughter of a key legislator or big contributor to the district attorney's campaign fund would have a competitive edge in every office.

If substantial prosecutorial autonomy is inherent in our system, then certainly it makes sense to anticipate that fact in recruitment. Prosecutors, more than other lawyers, must have a strong personal sense of justice and be morally autonomous. Recruiters should pay as much attention to these qualities as to the candidate's legal skills or how her physical appearance will strike the jury.²⁴¹

Granted, qualities like "moral character" and "devotion to justice" are difficult to assess, especially under conditions of initial hiring. Also, as history suggests, such criteria can easily mask arbitrariness and discrimination in hiring.²⁴² These are serious difficulties. Yet the failure to consider these central qualities in recruitment is even more troubling. If nothing else, an agency's hiring criteria reveal its operating values and priorities to potential recruits and the community at large. Therefore, they help establish expectations for prosecutorial conduct.²⁴³

B. Training and Supervision

Careful training is obviously an essential ingredient of any program to induce proper prosecutorial conduct. This requires both orientation training for new prosecutors—which many agencies lack²⁴⁴—and follow-up training for the experienced. The scope and content of existing programs is not known, but I suspect that they tend to focus on imparting technical knowledge and skills. Such training probably covers jurisdiction, procedure, advocacy skills, sentencing rules and the correctional system—doctrinal mastery of law and technique—but no general orientation to ethics, role, or the agency's place in the criminal justice system. Familiarity with these subjects tends to be assumed. But if an agency wants prosecutors to take their dual role seriously, it should expressly orient them to it, prepare them for the conflicts they will experience, and give them a conceptual framework for conflict resolution.

An aside: the impact of campaign funding patterns on the behavior of prosecution agencies has not, to my knowledge, been studied. Who contributes to district attorney election campaigns, and what do they expect in return?

241. See L. CARTER, *supra* note 36, at 162.

242. J. AUERBACH, *UNEQUAL JUSTICE*, 40-73 (1976) (use of ethics codes to keep new immigrants out of legal profession).

243. Increasingly, it seems, prosecution agencies question job applicants about ethical dilemmas. Our students often prepare for interviews by discussing "proper" responses to problems asked previously. This process surely affects their perception of the agency's priorities.

244. See *supra* text accompanying notes 35-45.

More specifically, according to the analysis in parts II and III of this Article, training should include the following:

1. The rules of professional responsibility applicable to all lawyers in their jurisdiction, as well as the special rules and standards applicable to prosecutors and criminal defense counsel.²⁴⁵

2. The prosecutor's special duty arising from her role as "surrogate client" for the public.²⁴⁶ This would include consideration of:

a. the public interests relevant to criminal law enforcement, emphasizing both crime control and justice;²⁴⁷

b. the elements of justice;²⁴⁸

c. conflicts between the goals of crime control and justice, and among the different elements of justice;²⁴⁹ and

d. the individual's moral responsibility for resolving conflicting public interests.²⁵⁰

3. The prosecutor's *prima facie* duty, arising from her role in the adversary system, to presume factual guilt and advocate maximum severity, and the limits on that duty.²⁵¹

4. The need at times to resist pressure from the police, the public or oneself to prefer substantive justice²⁵² over procedural justice or equality.

5. The distinction between proper prosecutorial conduct and conduct which meets minimal constitutional "fair trial" standards.²⁵³

C. Reinforcement

Like other workers, professionals are socialized by peers and supervisors on the job, rather than in formal training programs. If the role expectations communicated to new prosecutors in recruitment and initial training are different from those applied in practice, the latter will prevail. Consequently, an agency must create an internal climate which reinforces the behavior it wants to foster. The means for doing so—after initial training—include case supervision, promotion and tenure review, and continuing education. The last category might encom-

245. Such as the STANDARDS, *supra* note 1 and the NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS, *supra* note 71.

246. See *supra* text accompanying notes 116-122.

247. See *supra* text accompanying notes 161-69.

248. See *supra* text accompanying notes 166-69.

249. See *supra* text accompanying notes 171-73, 187-95.

250. See *supra* text accompanying notes 173-82, 184.

251. See *supra* text accompanying notes 143-54, 193-208.

252. See *supra* text accompanying notes 52-55.

253. See *supra* text accompanying notes 70-83.

pass a wide range of measures from circulating pertinent rules and court opinions to holding workshops on ethical problems facing attorneys in the office.

A climate supportive of the prosecutor's dual role can be established by three kinds of action.²⁵⁴ First, the agency leadership should make clear that amassing convictions is not the agency's sole or highest value and that assistants can be disciplined²⁵⁵ for overzealousness as well as underzealousness. It must be clear that obedience to clear rules of professional responsibility is expected as a matter of office policy, even if no conviction is jeopardized or scandal caused. A prosecutor's knowledge that flagrant rule violations might trigger internal discipline strengthens her impulse to act properly and counters external pressures to seek conviction at all costs.

Second, the agency should create structures for identifying policy issues facing prosecutors and addressing them *on an agency level*. These issues range from broad ("What sentences should we seek in domestic violence cases?") to narrow ("Should feticide be prosecuted as criminal homicide?"), and might elicit responses of varying specificity. Policy questions should be considered and resolved in a format and at a level of agency hierarchy appropriate to the issue. For example, the feticide issue calls for a definitive response,²⁵⁶ which should probably come from the highest level of the agency. On the other hand, complex issues like sentencing policy in domestic violence cases might call for the development of internal guidelines by a broad-based group of staff, which could then be submitted for approval at the highest agency level. Such guidelines would not reveal the "right" sentence in any case, but rather direct prosecutors' attention to the relevant factors.²⁵⁷

Facilitating reference "upward" of troubling policy questions serves two major functions. First, it encourages and legitimates dialogue within the agency on recurrent issues of prosecution policy.²⁵⁸ Second, it clarifies the boundaries of prosecutorial discretion, for example, "Assistants must/may/may not charge reckless feticide as criminal homicide," or "Assistants may/may not condition dismissal of charges on defendant's waiver of civil claims against the police." Many of

254. Some agencies already do this and more. Many, it seems, do not.

255. I use "discipline" loosely to refer to the disincentives available to agencies to discourage behavior by subordinates. These include, for example, work assignments and tenure.

256. The agency might decide to leave the question to the discretion of individual prosecutors, but letting "a hundred flowers bloom" would create serious problems of inequality.

257. See, e.g., Middlesex County (Massachusetts), Domestic Violence Sentencing Guidelines (Final Draft, unpublished 1984).

258. See generally K. DAVIS, *supra* note 36, at 246.

these issues are politically sensitive and difficult to resolve. But agency heads who shrink from confronting these issues can hardly expect to inspire moral courage in their subordinates.

Finally, the agency should seek to reinforce the responsible exercise of discretion by fostering dialogue about ongoing cases. This can occur both in individual supervision and in groups.²⁵⁹ For example, one Massachusetts district attorney²⁶⁰ holds staff workshops to discuss hypotheticals (distributed in advance) raising common professional responsibility problems. He also requires assistants periodically to write him memoranda describing difficult professional responsibility issues they have recently faced and how they resolved them. Such devices can teach an approach to prosecution, rather than ethical rules or right answers. That approach requires prosecutors to be sensitive to the existence of conflicting interests and to weigh those interests in light of legal rules, agency policy and their own values. Fostering "moral conversation" about ongoing cases serves this goal by sensitizing staff to the issues, exposing them to different models of response, and legitimating conscientious efforts to identify and implement just solutions.

D. Conclusion

I have argued that:

1. Our tendency to describe the prosecutor's duty to "seek justice" in overly vague terms invites "overzealousness";
2. instilling in prosecutors a more coherent vision of their quasi-judicial duty and its relation to their duty of "zealous advocacy" would strengthen their ability to resist pressures to adopt a "conviction mentality"; and
3. agencies should reinforce the desire of their prosecutors to do justice by such devices as recruitment, training and supervision.

A critic of my argument might respond:

By the time someone graduates from law school his sense of justice is pretty well developed. It is fatuous to expect, for example, that explaining to prosecutors that "justice" consists of desert, procedural fairness and equality will tell them anything they don't already know. As Justice Jackson said, "those who need to be told would not understand it anyway."²⁶¹

259. Cf. Lee, *Ethics and the Megafirm*, 16 LOY. U. CHI. L.J. 492, 496 (1985) (advocating training programs involving "continual reexamination by the individual attorneys of their competence" as a strategy for dealing with ethical problems in large law firms).

260. District Attorney Scott Harshbarger of Middlesex County, Massachusetts.

261. See *supra* text accompanying note 112.

In one sense this point is correct. We intuitively recognize injustice, and no charts or lectures can guide us better than this recognition.²⁶² But we also know the power of the first year in law school to destroy one's moral compass. The indoctrinating power of professional role models is not less forceful. Helping new prosecutors to articulate and to act on what they already "know" is a weighty counter-force.

A second, more telling criticism of my argument concerns its practicality. "Even if one believes all three propositions stated above," argues the reader, "your suggestions are impractical. Prosecutors would resist training of this sort, and prosecution agencies, always underfunded, could not afford the necessary resources." Given current staffing practices, the resistance point is well taken. A young career prosecutor might be motivated to think, talk and agonize over justice and moral responsibility, but one who has joined the office seeking eighteen months of trial experience might only want to know about nuts, bolts, and how to avoid disbarment. The growing attractiveness of careers in prosecution offers some comfort on this score.²⁶³

The resource objection is weighty, but applies of course to almost every suggested improvement in criminal justice. Most likely, numerous agencies already practice the measures proposed here as "re-forms." As their experiences are studied and shared, we will know better what works and how much it costs.

262. On the place of emotion and intuition in moral judgment, see Moore, *supra* note 175, at 1135-36.

263. See *supra* text accompanying notes 42-47, 91. As the cover of a national magazine recently proclaimed, this is "The Age of the D.A." *The Age of the D.A.*, INSIGHT, July 6, 1987, at cover.