

Fordham Urban Law Journal

Volume 26, Issue 3

1998

Article 6

Why Should Prosecutors “Seek Justice”?

Bruce A. Green*

*Fordham University School of Law

Copyright ©1998 by the authors. *Fordham Urban Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ulj>

Why Should Prosecutors “Seek Justice”?*

Bruce A. Green

Abstract

This article discusses how prosecutors should conduct themselves in light of the principle that has traditionally been thought to define the prosecutor’s professional ethos: “the duty to seek justice.” Part I sketches the outlines of this concept, both historically and in its contemporary incarnation. Part II offers two reasons for asking why prosecutors should seek justice. Part III examines alternative justifications for the duty—first, that the duty derives from prosecutors’ extraordinary power, and second, that the duty derives from their role on behalf of a sovereign whose own interest is in achieving justice—and explains why the second provides the more complete justification. Finally, Part IV suggests how this understanding of the defining principle of prosecutorial ethics has implications in cases where prosecutors have convicted innocent individuals, even if inadvertently.

KEYWORDS: justice, history of justice, George Sharswood, prosecutor power, fred zacharias

*Louis Stein Professor of Law, Fordham University School of Law. From 1983 to 1987, the author was as an Assistant United States Attorney in the Office of the United States Attorney for the Southern District of New York, where he served as Chief Appellate Attorney in 1987.

WHY SHOULD PROSECUTORS “SEEK JUSTICE”?

Bruce A. Green*

When I came to the United States Attorney's Office in 1983, it became apparent that this was an office with a proud tradition. The office expressed pride in its past in various ways: for example, new assistants were provided Emory Buckner's biography¹ and the office's walls were arrayed with photographs of former United States Attorneys and criminal division chiefs. Senior lawyers in the office served as a link to its past. But because lawyers generally left the office within a few years after fulfilling their three-year commitment, there were not many of these “senior” lawyers around and, with the exception of one, they were really not very senior. Bill Tandy was, of course, the exception. He was the one prosecutor who had served in that office in the decades of the 50s, 60s and 70s. He was, thus, the bridge to, and symbol of, the office's past. He was the embodiment of the office's great tradition, of which new prosecutors strived to be worthy.

The precise nature of the office's great tradition was somewhat elusive, however. To be sure, the office had its rituals — for example, on his or her first morning in the office, the young and, at least in my case, disoriented lawyer was “sworn in” by the United States Attorney and congratulated by his or her new colleagues. But these rituals, as well as the various training sessions on complaints, grand jury practice, evidence, sentencing, and the like, tended to look forward, not backward. Even so, one would eventually infer that, even though the personnel of the office might have changed over time, as did the identity of investigators and judges, and in some ways the criminal law and procedure itself, there was something essential that the office was committed to achieving and preserving.

Aspects of this tradition included a reputation for excellence, skill and success. But the high esteem in which the office sought to be held by judges and the public involved more than this. The office was particularly jealous of its reputation for probity, for integrity,

* Louis Stein Professor of Law, Fordham University School of Law. From 1983 to 1987, the author was as an Assistant United States Attorney in the Office of the United States Attorney for the Southern District of New York, where he served as Chief Appellate Attorney in 1987.

1. MARTIN MAYER, EMORY BUCKNER (1968).

for judgment. It was important that its acts appear to be well motivated, that it's lawyers' word be trusted. All of this and more was captured by the concept that prosecutors in the office had a "duty to do justice."

In some sense, Southern District prosecutors felt that they owned the concept. It certainly set us apart from the defense lawyers with whom we interacted. But, in some ways, at least in the early 1980s, we felt, no doubt arrogantly, that it distinguished us from other prosecutors, perhaps even other federal prosecutors, as well. We felt as if we defined the term — which of course we didn't — or at least gave it new, or special, meaning. In fulfilling this duty, we preserved the office's great tradition (or, in failing to fulfill it, we risked tarnishing the office's reputation).

The source of the duty was never identified, however. Thus, what might be accepted by many as an article of faith might be viewed skeptically by some. Nor, for that matter, was the duty ever precisely defined. The concept was protean as well as vague. It assumed different meanings in different contexts, meanings that one could only infer. One incarnation related to our exercise of discretion — how to decide, for example, whether to charge a guilty individual or defer prosecution, or what terms of a plea bargain should be acceptable. In this context, "doing justice" meant seeking to achieve a "just," and not necessarily the most harsh, result. In the trial context, the concept seemed to mean something else, however. It had something to do with fidelity to the fairness of the process — the idea that, if the trial was a fair one, then even when the jury acquitted a defendant whom we were convinced was guilty, justice was done. Sometimes the concept was implicit in the way a senior lawyer worked through a hard question with a new prosecutor: What, she might ask, was the right thing to do? For those who were believers, doing justice was an animating principle; it was the office's life blood, often silent, unseen, taken for granted.

Some lawyers outside the office took an interest in seeing that its traditions were preserved. These included federal district judges who were former federal prosecutors. They reminded prosecutors of their duty to do justice, sometimes when they expressed concern about the prosecutor's conduct, but often (perhaps to the consternation of defense counsel) when they credited the prosecutor's representations or assumed (absent an indication to the contrary) that the prosecutor was complying with his or her procedural obligations and acting in good faith. At times, although their purpose in doing so was not necessarily quite so disinterested, defense lawyers who

were alumni of the office also reminded prosecutors of their duty to seek justice. More than other defense lawyers, they might be willing to proceed on the basis of oral understandings, or even tacit ones.

These interactions showed why it was important for the office to preserve its reputation. They provided evidence of how new prosecutors, who were not known personally to judges and defense lawyers, nevertheless received the benefit of the office's reputation, and how they were able to work more easily and effectively as a result. Indeed, even when prosecutors erred or overreached, they often benefitted from serving in an office that was identified with the tradition of doing justice. For example, excesses in jury argument were often perceived to be good-faith, youthful indiscretions (which they were), rather than acts of intentional wrongdoing, as they might have appeared.

At the same time, however, lawyers outside the office sometimes expressed skepticism about whether its traditions were being adequately maintained. Indeed, in the eyes of a former prosecutor from any generation, it was almost axiomatic that the office began to go downhill on the very day that the particular lawyer left it for private practice. Of course, there were good reasons for someone viewing the office with detachment (or, as in the case of a defense lawyer, from the other side) to be skeptical. As important as the concept of "doing justice" may have been, there have always been cross-cutting themes in the prosecutor's office. Most significantly, there was a tradition of machismo, of the prosecutor as aggressive trial lawyer facing down the lawbreaking adversary. As Jerry Lynch has noted, this was a tradition which Bill Tandy, the quintessential tough-talking prosecutor, embodied more than anyone.²

The office's challenge was, thus, to reconcile the ideal of "doing justice" with the image of the strong prosecutor—to conceptualize "doing justice" in muscular, and unsentimental, terms, so that a prosecutor could "do justice" without appearing weak. For a young Bill Tandy, this may have been easy. No one would have thought him weak. Besides, "doing justice" would have been conceptualized in narrower terms in his formative, pre-Miranda years, requiring prosecutors to tell the truth and keep their word, but allowing them to be less concerned about procedural niceties. For a contemporary assistant, however, it may be more difficult to reconcile the professional ideal with the public image of the prosecutor. There is therefore a greater need to give content to the federal prosecutor's

2. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2117 (1998).

professional obligations. As a starting point, this Article examines the origins of the ideal underlying the prosecutor's obligations.

Introduction

Is the professional ethos of public prosecutors different from that of other lawyers? If so, to what extent are public prosecutors therefore obligated to conduct themselves differently from other lawyers? There are no universally accepted answers to these questions. Even though lawyers have undertaken the task of representing public entities in the prosecution of criminal charges for many years, the ethical implications of this task remain contested. Now familiar, and well over a decade old, are the battles over how prosecutors exercise their investigative authority — in particular, whether ethical rules should restrain prosecutors when they seek to issue grand jury subpoenas to criminal defense lawyers³ or when they seek to question defendants and other represented persons, or permit investigators to do so, without the knowledge and permission of the person's lawyer.⁴

Three more recent disagreements serve as further illustrations. The first two relate to the application of prophylactic rules to ensure that prosecutors are nonpartisan: First, federal judges in the Eighth Circuit have sharply contested whether Kenneth Starr, in his role as Independent Counsel investigating President Clinton,

3. See, e.g., *Whiteside v. U.S. District Court for The District of Rhode Island*, 53 F.3d 1349 (1st Cir. 1995); *Baylson v. Pennsylvania Supreme Court Disciplinary Board*, 975 F.2d 102 (3d Cir. 1992); *United States v. Klubock*, 832 F.2d 664 (1st Cir. 1987); *Stern v. Supreme Judicial Court for the Commonwealth of Massachusetts*, 184 F.R.D. 10 (D. Me. 1999); *United States v. Colorado Supreme Court*, 988 F. Supp. 1368 (D. Colo. 1998); see generally MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(f) (1983) [hereinafter MODEL RULES]; Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291 (1992); Peter C. Sheridan, *Grand Jury Subpoenas to Criminal Defense Attorneys: Massachusetts Restrains the Federal Prosecutor through an "Ethical" Rule*, 2 GEO. J. LEGAL ETHICS 485 (1988).

4. See MODEL RULES Rule 4.2; Cramton & Udell, *supra* note 3; Neals-Erik William Delker, *Ethics and the Federal Prosecutor: The Continuing Conflict Over the Application of Model Rule 4.2 to Federal Attorneys*, 44 AM. U. L. REV. 855 (1995); Bruce A. Green, *A Prosecutor's Communications With Represented Defendants: What Are the Limits?*, 24 CRIM. L. BULL. 283 (1988); F. Dennis Saylor, IV & J. Douglas Wilson, *Putting a Square Peg in a Round Hole: The Application of Model Rule 4.2 to Federal Prosecutors*, 53 U. PITT. L. REV. 459 (1992); Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460, 470-80 (1996) [hereinafter Green, *Whose Rules of Professional Responsibility Should Govern Lawyers*] (describing controversy leading to promulgation of regulation by Department of Justice to govern communications with represented persons).

has an obligation to remain politically nonpartisan and, accordingly, to avoid personal and professional conduct and relationships outside his work as prosecutor that would cast doubt on his nonpartisanship.⁵ Second, New York State district attorneys have disagreed with the state bar association's ethics committee over whether, in order to preserve their ability to exercise their authority in "an impartial, nonpartisan manner," assistant district attorneys must refrain from campaigning on behalf of incumbent district attorneys.⁶

The last illustration is the most significant, although the disagreement is less sharply drawn: recent press accounts have described cases in which innocent individuals were convicted of serious crimes, including capital murder. The press has characterized the problem as widespread and has generally attributed the problem to prosecutorial excesses. Local prosecutors have disagreed about who is to blame and have defended themselves as vigorous advocates.⁷

At some level, the underlying question in each of these examples is, how should prosecutors conduct themselves in light of the principle that has traditionally been thought to define the prosecutor's professional ethos: "the duty to seek justice." Rather than focusing on any particular area of conduct, this Article examines the over-

5. *Compare* *In re Starr*, 986 F.Supp. 1159, 1166-68 (Eisele, J., dissenting), and *In re Starr v. Mandanici*, 152 F.3d 741, 746 n. 15 (8th Cir. 1998) (McMillan, J.) with *Mandanici*, 152 F.3d at 751 (Beam, J., concurring).

6. Drawing on prior opinions dealing with restrictions on prosecutors' campaign activities, the New York State Bar Association's Committee on Professional Ethics ("Committee") issued an opinion in 1995 concluding that assistant district attorneys must refrain from actively campaigning for the incumbent district attorney. N.Y.S. Bar Association Comm. on Professional Ethics, Formal Op. 675 (1995). The New York State District Attorneys Association ("Association"), disagreeing with the opinion, met with the committee thereafter in an effort to persuade the committee to reconsider its opinion. After considering the Association's views, the committee nevertheless adhered to its earlier opinion and issued a new one elaborating on its earlier views. N.Y.S. Bar Association Comm. on Professional Ethics, Formal Op. 683 (1996) [hereinafter Formal Op. 683]. Unconvinced, the Association subsequently amended its code of conduct specifically to authorize assistant district attorneys to campaign for the incumbent. See N.Y. State District Attorneys Association, Code of Conduct for Political Activity (rev. July 1996) ("District Attorneys and Assistants shall not . . . [e]ndorse candidates, except that Assistant District Attorneys shall be permitted to engage in political activity in support of the re-election of the District Attorney by whom they are employed.")

7. See *'Cowboy Bob' Ropes Wins — But at Considerable Cost*, CHI. TRIB., Jan. 10, 1999, sec. 1, at 13 (Oklahoma prosecutor, accused of routine misconduct, reportedly responded: "It's my obligation as district attorney to present the evidence in the light most favorable to the state. The people are entitled to have a D.A. who argues their position very vigorously.").

arching concept. Part I sketches the outlines of this concept, both historically and in its contemporary incarnation. Part II offers two reasons for asking why prosecutors should seek justice. Part III examines alternative justifications for the duty — first, that the duty derives from prosecutors' extraordinary power, and second, that the duty derives from their role on behalf of a sovereign whose own interest is in achieving justice — and explains why the second provides the more complete justification. Finally, Part IV suggests how this understanding of the defining principle of prosecutorial ethics has implications in cases where prosecutors have convicted innocent individuals, even if inadvertently.

I. The "Duty to Seek Justice": A Historical Outline

The literature of the legal profession refers to the prosecutor's duty to "seek justice"⁸ or "do justice,"⁹ a professional ideal that analogizes prosecutors to judges and distinguishes prosecutors from other lawyers. The concept dates back well over a century. For example, in the 1854 essay¹⁰ on which the American Bar Association later based its first code of ethics,¹¹ George Sharswood wrote: "The office of the Attorney-General is a public trust, which involves in the discharge of it, the exertion of an almost boundless discretion, by an officer who stands as impartial as a judge."¹² For this reason, while a lawyer defending a man accused of a criminal

8. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 [hereinafter MODEL CODE] ("The responsibility of the public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict."); ABA Standards Relating to the Administration of Criminal Justice, Standard 3-1.2(C) [hereinafter ABA STANDARDS] ("The duty of the prosecutor is to seek justice, not merely to convict."); see also MODEL RULES Rule 3.8 cmt. ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

9. See Sheri Lynn Johnson, Symposium, *Batson Ethics For Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 505 (1998); Michael Herz, "Do Justice!": Variations on a Thrice-Told Tale, 82 VA. L. REV. 111 (1996); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991); see also Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 4 (1940) ("Although the government technically loses its case, it has really won if justice has been done.").

10. HON. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (F.B. Rothman 5th ed. 1993) (1854). The *Essay* was first published as A COMPEND OF LECTURES ON THE ARMS AND DUTIES OF THE PROFESSION OF LAW, DELIVERED BEFORE THE LAW CLASS OF THE UNIVERSITY OF PENNSYLVANIA. See Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Code*, 6 GEO. J. LEGAL ETHICS 241, 243 (1992).

11. CANONS OF ETHICS, 33 ABA REP. 575 (1908); see also Pearce, *Rediscovering the Republican Origins of the Legal Ethics Code*, *supra* note 10.

12. SHARSWOOD, *supra* note 10, at 94.

offense should “exert all his ability, learning, and ingenuity, in such a defence, even if he should be perfectly assured in his own mind of the actual guilt of the prisoner,”¹³ a lawyer should never prosecute “a man whom he knows or believes to be innocent.”¹⁴

Courts in the same period expressed a similar understanding, characterizing public prosecution as a quasi-judicial role and envisioning this role as the wellspring of a prosecutor’s professional obligations. The Michigan court in 1872, in language that seems only slightly outdated,¹⁵ wrote:

The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner’s guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community.¹⁶

To like effect were other late nineteenth-century judicial decisions in Michigan¹⁷ as well as California¹⁸ that generally dealt with what

13. *Id.* at 92.

14. *Id.* at 93.

15. This is principally because of the lack of gender neutrality.

16. *Hurd v. People*, 25 Mich. 404, 415-16 (1872).

17. *See, e.g., People v. Cahoon*, 50 N.W. 384 (Mich. 1891).

Zeal in a prosecuting attorney is entitled to the highest commendation, but that zeal must be exercised within proper limits In criminal cases the prosecuting attorney is a public officer, acting in a quasi-judicial capacity. Juries very properly regard him as unprejudiced, impartial, and non-partisan; and insinuations thrown out by him regarding the credibility of witnesses for the defense are calculated to prejudice the defendant.

Id. at 385. *See also Meister v. People*, 31 Mich. 99, 101-06 (1875) (The prosecutor’s “position is one involving a duty of impartiality not altogether unlike that of the judge himself.”); *Weller v. People*, 30 Mich. 16, 22-23 (1874) (“[A] public prosecutor is not a plaintiff’s attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty . . .”).

18. *See, e.g., People v. Lee Chuck*, 20 P. 719 (Cal. 1889).

We have been called upon many times to caution, sometimes to rebuke, prosecuting officers for the overzealous performance of their duties. They seem to forget that it is their sworn duty to see that the defendant has a fair and impartial trial, and that he be not convicted except by competent and legitimate evidence. Equally with the court the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust. We make due allowance for the zeal which is the natural result of such a legal battle as this, and for the desire of every lawyer to win his case, but these should be overcome by the conscien-

the courts considered to be prosecutorial excesses in jury argument, examining witnesses, or other trial conduct.

In the context of federal prosecutions, the thread was taken up by the Supreme Court in *Berger v. United States*,¹⁹ a 1935 decision on improper prosecutorial summation that Professor Charles Wolfram calls “[t]he locus classicus of the extraordinary duties of a prosecutor.”²⁰ In the context of criticizing the prosecutor’s conduct, the court observed:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereign 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 very definite sense the servant of the law, the twofold aim of which is that guilt should 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.²¹

Usually, the “duty to seek justice” has been invoked by courts in the course of admonishing overzealous prosecutors. Prosecutors and others have also invoked this concept to suggest why prosecutors should be trusted more than other lawyers, why their conduct should be scrutinized less closely, or why they can be counted on to act disinterestedly.²² For example, in the Supreme Court argument

tious desire of a sworn officer of the court to do his duty, and not go beyond it.

Id. at 723. See also *People v. Tufts*, 139 P. 78 (Cal. 1914).

It is to be regretted that prosecuting counsel, in the heat of contest and in the desire for victory, sometimes forget that the function of a district attorney is largely judicial, and that he owes to the defendant as solemn a duty of fairness as he is bound to give to the state full measure of earnestness and fervor in the performance of his official obligations.

Id. at 81.

19. 295 U.S. 78 (1935).

20. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 760 (1986).

21. *Berger*, 295 U.S. at 88.

22. See David A. Sklansky, *Starr, Singleton, and the Prosecutor’s Role*, 26 *FORDHAM URB. L.J.* 509, 538 n.138 (1999); ABA Committee on Ethics and Professional Responsibility, *Formal Op.* 342 (1975); *Miranda v. Arizona*, *LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW* 63, 864-66 (Phillip B. Kurland et al. eds., 1975) [hereinafter *LANDMARK BRIEFS AND ARGUMENTS*].

in *Miranda v. Arizona*,²³ the state Attorney General thought that the prosecutor's duty to do justice helped explain why arrested suspects in the interrogation room should not be discouraged from talking to prosecutors or their investigators:

Our adversary system, as such, is not completely adversary even at the trial stage in a criminal prosecution because . . . the duty of the prosecution is not simply to go out and convict, but it is to see that justice is done. In my short time, I have gotten as much satisfaction out of the cases in which I was compelled to confess error in a case where a man had been deprived of his rights of due process as I got satisfaction out of being upheld in a tight case in court.²⁴

The professional obligation to "seek justice" places prosecutors somewhere between judges, on the one hand, and lawyers advocating on behalf of private clients, on the other.²⁵ It has been understood to imply specific professional obligations that set prosecutors apart from other lawyers — obligations that have been variously described as "different,"²⁶ "special"²⁷ and "extraordinary."²⁸ For example, the *ABA Model Rules of Professional Conduct* include a rule titled, "Special Responsibilities of a Prosecutor" which identifies restrictions on prosecutors exceeding those applicable to lawyers in civil litigation.²⁹ Civil litigators may commence a proceeding as long as "there is a basis for doing so that is not frivolous."³⁰ Criminal prosecutors, however, "shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."³¹ Lawyers in civil practice may exploit their superior skill and expertise in dealing with unrepresented adversaries, as long as their role is clear and they do not suggest that they are

23. 384 U.S. 436 (1966).

24. LANDMARK BRIEFS AND ARGUMENTS, *supra* note 22, at 864.

25. See, e.g., ABA STANDARDS Standard 3-1.2(b) ("The prosecutor is an administrator of justice, an advocate, and an officer of the court."); see also Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 933-34 (1996).

26. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 215 (1990) ("This is not to say that the prosecutor's ethical standards are 'higher,' but only that they are different as a result of the prosecutor's distinctive role in the administration of justice.").

27. See MODEL RULES Rule 3.8 (entitled "Special Responsibilities of a Prosecutor"); MODEL CODE EC 7-13 (referring to the prosecutor's "special duty").

28. WOLFRAM, *supra* note 20, at 760.

29. MODEL RULES Rule 3.8.

30. *Id.* Rule 3.1.

31. See *id.* Rule 3.8(a). See also *Town of Newton v. Rumery*, 480 U.S. 386, 413 (1987); *State of New Jersey v. Kinder*, 701 F. Supp. 486, 490 n.5 (1988).

disinterested.³² Prosecutors, in contrast, must make efforts to assure that an unrepresented criminal defendant is aware of the right to counsel and has opportunities to obtain counsel,³³ and, in dealing with unrepresented defendants, prosecutors may not seek to obtain waivers of important pretrial rights.³⁴ Lawyers in the context of civil litigation have no duty to disclose evidence to the opponent except insofar as civil procedure rules and other laws require.³⁵ Prosecutors, however, have an ethical obligation, independent of similar obligations imposed by the Due Process Clause, criminal procedure rules and statutes, to disclose evidence known to them that tends to exculpate the defendant or, in the sentencing context, tends to mitigate the defendant's culpability.³⁶

The disciplinary rules, however, do not fully consider how prosecutors' duty to seek justice may translate into different or more demanding professional obligations: Indeed, the rules barely scratch the surface. For the most part, the standards of conduct established by the disciplinary provisions relating to prosecutors are derived from constitutional decisions relating to prosecutors' exercise of their authority and, thus, would apply independently of the ethical rules. They do not address many areas of prosecutorial conduct, especially areas where prosecutors have discretion under the constitution and other law.³⁷ Although the disciplinary provisions have been supplemented by standards set forth in judicial decisions on an ad hoc basis³⁸ as well as by unenforceable standards adopted by the ABA,³⁹ these, too, are incomplete.

Prosecutors' offices, at least in the abstract, officially accept the existence of a duty to "do justice" which entails special responsibilities like those identified in the Model Rules. Indeed, prosecutors

32. See MODEL RULES Rule 4.3.

33. See *id.* Rule 3.8(b).

34. See *id.* Rule 3.8(c). See, e.g., *Hood v. State*, 546 N.E.2d 847, 849-50 (Ind. App. Dist. 1989) ("Here, not only did the State plea bargain with an uncounseled defendant, it also made the uncounseled defendant's waiver of his right to counsel as a condition of the plea agreement.").

35. See MODEL RULES Rule 3.4(a), (c) & (d). An exception is where the lawyer comes to learn that he has offered false evidence. See *id.* Rule 3.3(a)(4).

36. See *id.* Rule 3.8(d). See, e.g., *Kyles v. Whitley*, 514 U.S. 419 (1995).

37. See FREEDMAN, *supra* note 26, at 215-36.

38. See Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 75 (1995) (prosecutors are subject to ethical rules set forth by courts on an ad hoc, case-by-case basis pursuant to each court's supervisory authority) [hereinafter Green, *Policing Federal Prosecutors*].

39. See ABA STANDARDS Standard ch.3; see generally, Green, *Policing Federal Prosecutors*, *supra* note 38.

generally acknowledge the professional codes, with their elaboration of special prosecutorial responsibilities, as a source of guidance,⁴⁰ if not of binding obligations with regard to prosecutorial conduct.⁴¹ Further, many prosecutors' offices have adopted internal guidelines establishing restraints on prosecutorial conduct in addition to those imposed by law or by ethics rules. Most notable are those contained in the *United States Attorneys' Manual*, which applies to federal prosecutors.⁴²

Moreover, some prosecutors not only accept that they have special ethical responsibilities, but espouse an ethos calling for particularly strict adherence to both these special responsibilities and the ethical responsibilities shared with other lawyers.⁴³ This conception of a special responsibility to conform closely to the applicable professional standards is embodied in the following description of the difference between how criminal defense lawyers and prosecutors approach the rules of legal ethics: "Criminal defense lawyers play close to the line. Prosecutors play in the center of the court." While subject to criticism either as an oversimplification or as an implicit endorsement of the "sporting theory of justice" that many

40. 28 C.F.R. § 45.735-1 ("[A]ttorneys employed by the Department should be guided in their conduct by the Code of Professional Responsibility of the American Bar Association"). The provision was not updated following the ABA's adoption of the *Model Rules* in 1983.

41. See National District Attorneys Ass'n, National Prosecution Standards, Standard 1.5 (2d ed. 1991) ("At a minimum, the prosecutor should abide by all applicable provisions of the Rules of Professional Conduct or Code of Professional Responsibility as adopted by the state of his jurisdiction."); *id.* Standard 6.2 cmt. ("The prosecutor's obligation to comply with the ethical code and rules of his jurisdiction is a fundamental and minimal requirement.").

42. See UNITED STATES DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, Tit. 9 (Aspen Publishers 1987). See generally Ass'n of the Bar of the City of New York, Committee on Criminal Law, *Establishing Ethical Standards for Federal Prosecutors and Defense Lawyers*, 49 THE RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 21 (1994) [hereinafter *Establishing Ethical Standards*].

43. Judicial decisions also suggest that prosecutors have a duty greater than that of other lawyers to play fair. See, e.g., *People v. Payne*, 593 N.Y.S.2d 675 (N.Y. App. Div. 1993).

We begin with the by now familiar rubric that the function of the prosecutor is not merely to obtain a conviction. The prosecutor "[is] charged with the responsibility of presenting competent evidence fairly and temperately, not to get a conviction at all costs."

That responsibility is not a meaningless truism; it is a paramount value. It is embedded in our sense of due process and fair play. Although our adversarial system of justice is not a game, it has rules, and it is unfortunate when a prosecutor, whose sworn duty it is to uphold those rules, plays fast and loose with them.

Id. at 677 (citations omitted).

find objectionable,⁴⁴ the analogy fairly captures a fundamental difference in approach toward the boundaries of proper professional behavior. When advocating on behalf of individual criminal defendants, lawyers may be, or perceive themselves to be, ethically compelled to play close to the line to serve their clients' interests.⁴⁵ In contrast, when representing the government in criminal prosecutions, prosecutors may feel obliged to bend over backwards to avoid an appearance of improper conduct.

II. The Source of the Responsibility: Why Ask?

Perhaps because the idea that prosecutors should "seek justice" is so well ingrained, courts, commentators and prosecutors themselves rarely ask why. This question deserves further attention, however, because, as discussed below, the answer may inform the perennial debate within the profession about how prosecutors should go about seeking justice: the justifications for the duty may inform its scope. Of equal importance, the answer may affect how zealously prosecutors seek justice: the persuasiveness of the justifications for the duty may influence the degree to which prosecutors accept the duty to seek justice, not simply as an abstract proposition, but as a principle influencing how they approach their daily work.

A. How to Seek Justice

One reason to ask why prosecutors should seek justice is to give meaning to a phrase that might otherwise seem to be an entirely empty vessel.⁴⁶ Drawing insight into the justifications for the duty enhances the prospect for constructing an understanding of "doing justice" that adds something to the substance, and not just the vocabulary, of discussions about the scope and limits of prosecutors' ethical responsibilities in both the narrow and broad senses.

In the context of investigating and prosecuting criminal cases, prosecutors face a barrage of decisions that may be said to have ethical implications in either of two senses. First, prosecutorial conduct may implicate "legal ethics" in the narrow sense of poten-

44. See, e.g., Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1055-56 (1975).

45. See Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687, 708-11 (1991); see also Roberta K. Flowers, *What You See is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 728 (1998) and accompanying footnotes [hereinafter Flowers, *What You See is What You Get*].

46. See Zacharias, *supra* note 9, at 103-13.

tially being subject to legal rules that have been (or arguably should be) adopted by courts or other appropriate bodies to control lawyers' professional conduct.⁴⁷ These legal rules may include "ethics rules" (i.e., disciplinary provisions of an applicable set of rules of professional conduct), but, for the most part, as noted earlier, the law applicable to prosecutors' conduct (what one might call the "law of lawyering" for prosecutors) derives from the due process clause and other constitutional provisions. Thus, when references are made to "prosecutorial misconduct," what is often meant is constitutional misconduct, such as a failure to disclose exculpatory evidence or the knowing use of false testimony.

Second, prosecutorial conduct may implicate ethics in the broader sense of involving what a prosecutor should do in situations where the law offers a choice. In other words, what are the most desirable ways to exercise "prosecutorial discretion," when is an exercise of discretion unfair or unwise, and when does the prosecutor engage in an "abuse of discretion" (albeit, one that may not be subject to any sanction or remedy). For the most part, these kinds of questions are not squarely answered by legal provisions, judicial decisions or disciplinary rules. Often, they are not asked. When considered, they are not necessarily identified as ethical questions by prosecutors.

Nonetheless, questions of prosecutorial ethics, particularly in the broader sense, are pervasive. For example, in the course of a press conference or in the context of public filings, to what extent is it appropriate for a prosecutor to make allegations of wrongdoing against an individual who has not been charged with a crime?⁴⁸ With respect to criminal investigations, what principles should guide the prosecutor's decisions about whom to investigate,⁴⁹ whom to charge with a crime,⁵⁰ what charges to bring and where to

47. For a general discussion about the implication of 'legal rules', see John M. Burkoff, Symposium, *Prosecutorial Ethics: The Duty Not "To Strike Foul Blows"*, 53 U. PITT. L. REV. 271 (1992).

48. See, e.g., *Aversa v. United States*, 99 F.3d 1200 (1st Cir. 1996) (holding that federal prosecutor's statements to the press were inappropriate but that the prosecutor was immune from civil liability for defamation); *United States v. Smith*, 992 F. Supp. 743 (D.N.J. 1998) (Assistant United States Attorney violated confidentiality provision of Federal Rule of Criminal Procedure when she included grand jury material in sentencing memorandum and released said memorandum on internet.).

49. See, e.g., *United States v. Van Engel*, 15 F.3d 623, 629 (7th Cir. 1993) (finding that the United States Attorney's Office launched an investigation "on meager grounds" against the lawyer of an individual under investigation in the office); see also FREEDMAN, *supra* note 26, at 216-17.

50. See Kenneth J. Melilli, *Prosecutorial Discretion In An Adversary System*, 1992 B.Y.U. L. REV. 669, 671-97 (1992).

bring them,⁵¹ and to what extent are prosecutors obligated to seek exculpatory evidence?⁵² In making charging decisions, how certain must the prosecutor be of the defendant's guilt (for example, may a prosecutor's office separately charge two defendants with an act that only one of them could have committed, and leave it to the jury to determine whether to convict either or both)?⁵³ In the pre-trial context, what principles should govern the prosecutor's plea bargaining position⁵⁴ and to what extent should prosecutors deal candidly with the defense lawyer in plea negotiations (for example, should the prosecutor disclose the death of a key witness)?⁵⁵ In the trial context, must a prosecutor ferret out and present evidence

51. See, e.g., *Freedberg v. United States Dep't of Justice*, 703 F.Supp. 107, 110 (D.D.C. 1988).

Simultaneous criminal prosecutions of the same individual for the same offense in four separate federal judicial districts, however, cannot possibly be consistent with Due Process Successive prosecutions are somewhat less constitutionally dubious The Court is not persuaded, however, that successive federal prosecutions in obscenity cases for mailings of the same matter are consistent with the Double Jeopardy clause of the Fifth Amendment.

Id.

52. See *Commonwealth of Massachusetts v. Donahue*, 487 N.E.2d 1351 (Mass. 1986) (holding that prosecutor was obligated, even absent a court order, to respond to defendant's request for exculpatory materials in possession of Federal Bureau of Investigation by either seeking cooperation of appropriate federal authorities, or, if prosecutor had good-faith reason for refusing to do so, informing defendant of that refusal).

53. See *Thompson v. Calderon*, 120 F.3d 1045, 1057-59 (9th Cir. 1997) ("From these bedrock principles, it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime."); see also *Jacobs v. Scott*, 31 F.3d 1319, 1324-26 (5th Cir. 1994).

54. See, e.g., *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299 (9th Cir. 1992), *rev'd on other grounds*, 27 F.3d 439 ("Given the significance of the prosecutor's charging and plea bargaining decisions, it would offend common notions of justice to have them made on the basis of a dart throw, a coin toss or some other arbitrary or capricious process."); *Bourexis v. Carroll County Narcotics Task Force*, 96 Md. App. 459, 625 A.2d 391 (1993) ("We reject, therefore, the notion that, because no individual defendant has a constitutional right to insist upon the offer of a plea bargain, police officers and prosecutors can engage in categorical discrimination based on 'arbitrary classifications.'"); Bruce A. Green, "Package" Plea Bargaining and the Prosecutor's Duty of Good Faith, 25 CRIM. L. BULL. 507 (1989).

55. See, e.g., *People v. Rice*, 69 N.Y.2d 781, 782, 505 N.E.2d 618, 619, 513 N.Y.S.2d 108, 109 (1987) (prosecutor's misconduct in deliberately misleading defendant's counsel into believing that a potential witness was still alive constituted a serious violation of his duties as a lawyer and a prosecutor); see also *People v. Jones*, 44 N.Y.2d 76, 375 N.E.2d 41, 404 N.Y.S.2d 85 (1978).

that a government witness may have committed perjury?⁵⁶ Must a prosecutor intervene when the defendant is represented by an incompetent lawyer or by a lawyer whose advocacy may be impeded by a conflict of interest?⁵⁷ May prosecutors properly make legal or factual arguments that, although non-frivolous, clearly deserve to be rejected?⁵⁸ Are there limits to how prosecutors may prepare their witnesses to testify at trial or to the inducements that may be given to witnesses in connection with their testimony?⁵⁹ Must prosecutors protect individuals from threats of physical harm that occur because of their role as witnesses?⁶⁰ Finally, in the post-trial context, what principles should govern the prosecutor's sentencing position?⁶¹ When, and in what manner, may prosecutors criticize

56. See *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991) ("Indeed, if it is established that the government knowingly permitted the introduction of false testimony reversal is 'virtually automatic.'") (citations omitted).

57. See, e.g., MONROE H. FREEDMAN, *LAWYERS ETHICS IN AN ADVERSARY SYSTEM* 88-89 (1975); Zacharias, *supra* note 9, at 66-74.

58. See, e.g., *United States v. Eason*, 920 F.2d 731 (11th Cir. 1990) (the government intentionally introduced offending evidence then contended that its admission in evidence was harmless error).

59. See *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999).

Our conclusion in no way permits an agent of the government to step beyond the limits of his or her office to make an offer to a witness other than one traditionally exercised by the sovereign. A prosecutor who offers something other than a concession normally granted by the government in exchange for testimony is no longer the alter ego of the sovereign and is divested of the protective mantle of the government.

Id. at 1302.

60. See, e.g., *Ochran v. United States*, 117 F.3d 495, 504 (11th Cir. 1997) (holding that prosecutor's decision not to inform witness of threats and possible harm did not fall within discretionary function exception); *Wang v. Reno*, 81 F.3d 808, 816-20 (9th Cir. 1996) (government has constitutional duty to protect person it creates special relationship with, or when it affirmatively places that person in danger).

61. See, e.g., Jonathan DeMay, Note, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 *FORDHAM URB. L.J.* 767 (1999).

the outcome of the case?⁶² May prosecutors write books about their experiences or sell the movie rights?⁶³

Discussions of questions such as these are not well informed by the phrase "seek justice," because of its vagueness. Standing alone, the injunction points in many directions. It might be taken to imply a posture of detachment characteristic of that assumed by judges, and quite apart from that ordinarily assumed by advocates, particularly in the trial context.⁶⁴ It might imply an obligation of fairness in a procedural sense.⁶⁵ Or, it might imply a substantive obligation of fairness — for example, an affirmative duty to ensure that innocent people are not convicted.⁶⁶

The injunction may even point in contradictory directions. "Doing justice" may be distinguished from imparting "mercy" (as it has

62. See, e.g., *Matter of Westfall*, 808 S.W.2d 829 (Mo. en banc 1991) (punishing a prosecutor for making a statement to the press concerning the "convoluted logic" of a judicial ruling to "arrive at a decision that [the judge] personally likes").

Lawyers must execute their professional responsibilities ethically and pursuant to rules, carefully considered, in order to ensure the confidence of both litigants and the public. Statements by a lawyer impugning the integrity and qualifications of a judge, made with knowledge of the statements' falsity or in reckless disregard of their truth or falsity, can undermine public confidence in the administration and integrity of the judiciary, thus in the fair and impartial administration of justice.

Id. at 836.

63. See, e.g., *Penguin Books USA Inc. v. Walsh*, 929 F.2d 69 (2d Cir. 1991); N.Y.S. Bar Association Comm. on Professional Ethics, Formal Op. 606 (Jan. 11, 1990).

64. See, e.g., *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 802-7 (1987) (discussing the importance of a disinterested prosecutor in order to avoid potential conflicts of interest). But see Bruce A. Green, *The Ethical Prosecutor and the Adversary System*, 24 CRIM. L. BULL. 126, 129 (1988) ("A prosecutor is not supposed to be neutral and detached. It is not the prosecutor's duty to present both sides of a criminal case. Nor is it the prosecutor's duty to urge the jury to draw inferences in favor of the defendant."); Zacharias, *supra* note 9, at 51-52 (stating that in the trial context, "doing justice" cannot mean presenting facts to the jury in a disinterested fashion).

65. See *infra* notes 112-112 and accompanying text.

66. See *infra* notes 122-126 and accompanying text. The conviction of innocent people has always been and continues to remain a subject of concern and controversy. Recently, the *Chicago Times* and the *Pittsburgh Post-Gazette* have each published a series of special reports documenting the conviction of innocent people and the individual prosecutor's role in that conviction. See Ken Armstrong & Maurice Possley, *Trial and Error* (pts. 1-5), CHI. TRIB., Jan. 8, 9, 11, 13, 14, 1999; Bill Moushey, *Win At All Costs: Government Misconduct in the Name of Expedient Justice*, (pts. 1-10), PITTSBURGH POST-GAZETTE, Nov. 22, 23, 24, 29, 30, Dec. 1, 6, 7, 8, 13, 1998; see also; Bob Herbert, *In America Justice Confounded*, N.Y. TIMES, Dec. 31, 1998, at A19; Michelle Fox, *A String of Legal Aid Losses, Interrupted*, N.Y. TIMES, Dec. 9, 1998, at B2.

been in the judicial context),⁶⁷ thereby connoting strict adherence to the letter of the law. Alternatively, “doing justice” may imply exercising prosecutorial discretion to ensure that convicted defendants do not suffer unduly harsh treatment at the hands of the law. Thus, a prosecutor may be said to have “done justice” by not bringing criminal charges that were legally supported by the evidence but which would have resulted in disproportionately harsh punishment given such considerations as the insignificance of the wrongdoing, the defendant’s prior exemplary conduct, or the defendant’s frail physical condition.⁶⁸

Furthermore, if the injunction to “seek justice” in itself provides scant guidance about what is expected of prosecutors in a general sense, it provides no guidance whatsoever with respect to the details of a prosecutor’s special responsibilities.⁶⁹ At best, courts presently employ the admonition to “seek justice” to underscore or punctuate the point that a prosecutor acted without adequate restraint.⁷⁰ Rarely, if ever, does it provide much insight into hard questions about the scope of proper prosecutorial conduct.⁷¹ Greater insight might be gained, however, if one examined these questions in light of the underlying justifications for the duty to seek justice.

67. See Jeffrie Murphy, *Mercy and Legal Justice*, 4 SOC. PHIL. & POL’Y 1 (1987), excerpted in *THE RESPONSIBLE JUDGE* 149 (John T. Noonan, Jr. & Kenneth I. Winston eds., 1993).

68. For example, *ABA Standards* Standard 3-3.9(b)(iii) recognizes the appropriateness of not presenting charges that are supported by the evidence when the authorized punishment is disproportionate to the particular offense or offender.

69. See, e.g., *United States v. Bautista*, 23 F.3d 726, 731-32 n.8 (2d Cir. 1994) (indicating that general injunctions regarding prosecutor’s responsibility give no guidance with regard to the propriety of a prosecutor’s communications with a witness during an adjournment of the witness’s testimony).

70. See, e.g., *United States v. Murrah*, 888 F.2d 24, 26-28 (5th Cir. 1989) (holding that prosecutor’s opening statement improperly referred to evidence that was never produced, and prosecutor’s closing argument included an unsubstantiated charge that the defendant and/or his counsel hid a witness); *State v. Collin*, 441 A.2d 693, 697 (Me. 1982) (“The State concedes . . . that the prosecutor misstated the contents of [the] treatise and further admits that the attempt to inform the jury of a California decision was wrong. There is no doubt that the prosecutor’s misstatement of [the] treatise and his attempt to introduce clearly inadmissible testimony were improper.”); *State v. Long*, 684 S.W.2d 361, 365 (Mo.App. 1984) (holding that a “prosecutor’s closing argument was knowingly, intentionally and blatantly an effort to bias and prejudice jury, where it substituted jurors for victim, and where it was founded, in part, on matters admittedly not in evidence”).

71. See, e.g., *McGuire v. Nevada*, 677 P.2d 1060 (Nev. 1984); *In re Lindsey*, 810 P.2d 1237 (N.M. 1991). While both of these cases concerned egregious prosecutorial conduct, neither of the opinions provided insight about what proper prosecutorial conduct should entail and how the duty to “seek justice” applied.

B. How Zealously to Seek Justice

The second reason to ask why prosecutors should "seek justice" is that the persuasiveness of the answer may affect how zealously prosecutors live up to their responsibility. This is a matter of particular contemporary concern. As Sam Dash recently observed in the context of reflecting on the work of the office of Independent Counsel Kenneth Starr, prosecutors do not take this responsibility seriously enough.⁷² Consequently, prosecutors sometimes resist the notion that they should be subject to a whole host of special responsibilities that are derived from the general duty to seek justice. Two perceptions may have contributed to their resistance.

First is the perception that, ethics aside, prosecutors play the game by different and more difficult rules. In particular, prosecutors must prove guilt beyond a reasonable doubt. Thus, not only must they play within the center of the court, but they must win many more points to capture the game. While this perception is unfair because it overlooks various distinct advantages afforded prosecutors,⁷³ it nevertheless persists.

Second is the perception on the part of many prosecutors that the ethical lines are drawn differently, and more permissively, for criminal defense lawyers, and that when criminal defense lawyers do cross the line, more often than not they get away with it.⁷⁴ This perception is part of the imperative for a recent Department of Justice initiative.⁷⁵ In every United States Attorney's Office, at least one lawyer is now designated and trained as an ethics expert. The expert's responsibilities include not only training other prosecutors with respect to the propriety of their own conduct, but also advocating for stricter enforcement of ethics rules when they appear to be violated by defense lawyers.⁷⁶

72. See Dash Urges Renewal of Counsel Law, Explains Decision to Quit as Starr's Advisor, 15 ABA/BNA LAWYER'S MANUAL ON PROF. CONDUCT 47, 48 (Feb. 17, 1999).

73. See *infra* notes 80-88.

74. See *infra* notes 76-78 and accompanying text.

75. See Daniel Klaidman, *Prosecutorial Abuse New Target of Reno Plan; New Training, Plus Help for Line Lawyers Deemed Falsely Accused*, LEGAL TIMES, Sept. 12, 1994, 1; see also 10 ABA/BNA LAWYERS' MANUAL ON PROF. CONDUCT 312 (1994) [hereinafter 10 LAWYERS' MANUAL].

76. See 10 LAWYERS' MANUAL, *supra* note 75, at 312.

At least in the area of conflicts of interest, prosecutors have not seemed hesitant to call into question the propriety of criminal defense lawyers' conduct. See generally Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest*, 16 AM. J. CRIM. L. 323 (1989) [hereinafter Green, *Her Brother's Keeper*]. Accusations of unethical conduct in the course of

Prosecutors' dissatisfaction with respect to the rules of ethics, however, is not primarily a function of how leniently the rules are applied to defense lawyers. Rather, the principal concern centers on how strictly the rules are applied to prosecutors: how constricting the rules appear to be in themselves, and how vigorously they appear to be enforced. On rare occasion, prosecutors have publicly vented their frustration at what they perceive to be a double standard, as when the California attorney general's office, in an appellate brief attempting to justify a prosecutor's gross breeches of decorum at trial, asked whether "only the prosecutor, as the 'glorified' representative of the People, can commit misconduct."⁷⁷

The state prosecutor's question stands in counterpoint to the idea that prosecutors play "in the center of the court." It suggests the fragility of the "seek justice" ethos, especially when prosecutors find themselves in the rough-and-tumble context of a criminal trial. A better understanding of the reasons for seeking justice, if sufficiently compelling, can bolster prosecutors' commitment to the principle and to the attendant "special responsibilities."

III. Justifications for the Duty

Two justifications have been advanced most often for the prosecutor's duty to seek justice. The first is rooted in the prosecutor's power; the second is rooted in the prosecutor's professional role as representative of the sovereign.⁷⁸ The latter, it is suggested, is the traditional one, the more complete one, and that one that best explains ordinary intuitions about the nature of prosecutors' special ethical obligations.⁷⁹

A. The Prosecutor's Power

One explanation given for prosecutors' duty to seek justice is to redress the gross imbalance of power between prosecutors and de-

criminal proceedings, however, present the risk that false accusations will undermine the relationship between defense counsel and the defendant. *See, e.g.,* *United States v. Jones*, 900 F.2d 512, 519 (2d Cir. 1990) (prosecutor's accusations of misconduct against defense counsel prompted an ineffective assistance of counsel claim). Accusations leveled in front of the jury raise an additional problem: they may induce the jury summarily to reject defense counsel's arguments. *See United States v. Murrah*, 888 F.2d 24, 27 (5th Cir. 1989) ("[T]he prosecutor may not challenge the integrity and ethical standards of defense counsel [before the jury] unless the prosecutor has certain proof of an offense and the matter is relevant to the case being tried.").

77. *People v. Kelley*, 142 Cal.Rptr. 457, 466 (Cal. Ct. App. 1978).

78. *See infra* notes 80-129 and accompanying text.

79. *See infra* Part III.B.

fense lawyers. As discussed below, one can scarcely question the underlying premise of this argument — that ordinarily prosecutors have far greater power than their adversaries. It is far from clear, however, that this imbalance adequately explains the prosecutor's obligation.

Prosecutors are the most powerful lawyers for three principal reasons. First, they represent the most powerful client: the sovereign. Even on the local level, and certainly on the federal level, the government is a client "whose resources . . . can be matched by few if any adversaries."⁸⁰ Prosecutors wield not only superior financial resources but also the human resources of police departments or other investigative agencies. Moreover, the typical adversaries are among society's most powerless. With rare exception, criminal defendants are individuals, not institutions. The overwhelming majority are indigent and, thus, having been brought into the criminal justice process by the state, remain entirely dependent on the state for the resources to defend themselves.⁸¹ And, in the criminal setting, these individuals — facing the possible loss of liberty, and occasionally their lives — are at their most vulnerable.⁸²

Second, in the realm of criminal prosecutions, the sovereign exercises especially vast powers. These include:

[T]he power, on behalf of the grand jury, to compel the production of evidence and the attendance of witnesses at ex parte grand jury proceedings; the power to apply for search warrants, arrest warrants and authorization to conduct wiretaps; the power to grant individuals immunity from prosecution in exchange for their assistance in a criminal prosecution; the power to seek an order compelling witnesses to testify before the grand jury or at a criminal trial in exchange for a promise that their testimony will not be used against them; the power to initiate criminal proceedings (including deciding whom to charge and which charges to bring); and the power to forego or dismiss some criminal charges in exchange for a guilty plea to others. These powers afforded the government are ordinarily denied to all others within society and are generally denied even to the State in other legal settings.⁸³

80. Formal Op. 683, *supra* note 6, at 3.

81. See Abbe Smith, "Nice Work If You Can Get It": "Ethical" Jury Selection In Criminal Defense, 67 FORDHAM L. REV. 523, 545 (1998).

82. For a discussion of how an awareness of this inequality of power may inform the development of legal doctrine in the criminal context, see Bruce A. Green & Daniel Richman, *Of Laws and Men: An Essay on Justice Marshall's View of Criminal Procedure*, 26 ARIZ. STATE L.J. 369 (1994).

83. Formal Op. 683, *supra* note 6, at 3.

Finally, criminal prosecutors are the most powerful lawyers because, with rare exception, their offices have unchecked authority to exercise the sovereign's power on behalf of the sovereign. In this respect, criminal prosecutors are more powerful than most, if not all, lawyers representing the government in civil proceedings.⁸⁴ Other lawyers may have tremendous influence on the decisions their clients make, but ultimately those decisions belong to the clients.⁸⁵ As a practical matter, the prosecutor's office makes all deci-

84. Lawyers representing the government in civil proceedings typically (although perhaps wrongly) view the agencies they represent as their client for purposes of allocating decision-making. As a result, they have a tendency to view their ethical responsibilities as essentially the same as those held by lawyers for private clients. This view finds support in the professional literature. See, e.g., ABA Standing Comm. on Ethics and Prof. Responsibility, Formal Op. 94-387 (Sept. 26, 1994) (government lawyer has no ethical duty to refrain from filing civil suit known to be time-barred or to inform opposing counsel that the statute of limitation period has expired); see generally William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOWARD L.J. 539 (1986) (suggesting that the demands of the adversary system may play a role in confusing the duties of government lawyers); Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of Federal Government Lawyers: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991).

Even on the civil side, however, government lawyers may be held to an ethical standard different from, and in some ways more demanding than, the standard to which attorneys for individual clients are held. For example, as Judge Mikva observed in *Freeport-McMoRAN Oil & Gas Co. v. F.E.R.C.*, 962 F.2d 45, 47 (D.C. Cir. 1992), with regard to the ethical duties of lawyers for the Federal Energy Regulatory Commission:

A government lawyer "is the representative not of an ordinary party to a controversy," the Supreme Court said long ago in a statement chiseled on the walls of the Justice Department, "but of a sovereign whose obligation . . . is not that it shall win a case, but that justice shall be done" (citation omitted). The Supreme Court was speaking of government prosecutors in *Berger*, but no one, to our knowledge . . . has suggested that the principle does not apply with equal force to the government's civil lawyers. In fact, the American Bar Association's Model Code of Professional Responsibility expressly holds a "government lawyer in a civil action or administrative proceeding" to higher standards than private lawyers, stating that government lawyers have "the responsibility to seek justice," and "should refrain from instituting or continuing litigation that is obviously unfair."

Id. (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935); MODEL CODE EC 7-14). See also *In re Lindsey*, 158 F.3d 1263, 1273 (D.C. Cir. 1998); *Clancy v. Ebel*, 705 P.2d 347, 350 (Cal. 1985) (suggesting that governmental lawyer's duty of neutrality should extend to civil actions so that parties are not harassed, and unjust results are not reached).

85. See, e.g., William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984) (contrasting "the established professional vision" of the lawyer-client relationship with a "Critical vision" that "envisions the lawyer as having at least a moderate degree of autonomy in the conduct of her work and the client as at least moderately dependent on or vulnerable to the lawyer"); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 623 (1985) ("[T]he critical ques-

sions on behalf of the government.⁸⁶ And, much of the office's authority is delegated to the individual prosecutor.⁸⁷ Some might say this gives prosecutors not only enormous power, but enormous freedom.⁸⁸

At various times, prosecutors, judges and commentators have identified the prosecutor's power as the source of the prosecutor's unique ethical posture. For example, Robert H. Jackson, while he was serving as Attorney General,⁸⁹ addressed this issue during a conference of United States Attorneys. Jackson described individual prosecutors' "immense power to strike at citizens,"⁹⁰ which, he argued, demanded of prosecutors a dedication to "the spirit of fair play and decency" and a "dispassionate, reasonable and just" attitude.⁹¹

Judicial decisions equating prosecutors' special responsibilities with their special power typically involve claims of prosecutorial misconduct.⁹² For example, in a case dealing with the prosecution's

tion is not by what right do lawyers impose their views, but by what right do they evade the responsibility of all individuals to evaluate the normative implications of their acts?").

86. See Zacharias, *supra* note 9, at 57 & n.55 (citing authorities).

87. See MODEL CODE EC 7-13.

88. *People v. Kelley*, 75 Cal.App.3d 672, 690, 142 Cal. Rptr. 457, 467 (1978) (noting that a stricter standard of conduct for the prosecutor as opposed to defense counsel is justified by the greater freedom and the responsibilities that prosecutors have).

89. Robert H. Jackson served as Attorney General under President Roosevelt. His appointment to the Supreme Court came in 1941 after years of loyal and effective advocacy. In 1945, while on the Court, Jackson served as chief U.S. prosecutor at the Nuremberg war crimes trials at the conclusion of World War II. He remained on the Court until his death in 1954.

90. See Jackson, *supra* note 9, at 3. Jackson explained:

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentations of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.

Id.

91. *Id.* at 3-4.

92. See, e.g., *People v. Zimmer*, 51 N.Y.2d 390, 393, 414 N.E.2d 705, 707 (N.Y. 1980) (observing that the prosecutor's mission "to achieve a just result" is "more than noble sentiment[]," and that to enable prosecutors to carry out their responsibilities fairly and impartially they are granted wide latitude in the allocation of resources and

unwarranted investigation of a criminal defense lawyer, a panel of the Seventh Circuit observed: "The Department of Justice wields enormous power over peoples' lives, much of it beyond effective judicial or political review. With power comes responsibility, moral if not legal, for its prudent and restrained exercise; and responsibility implies knowledge, experience, and sound judgment, not just good faith."⁹³ To like effect, in the course of reproaching a United States Attorney's Office for improper conduct, a federal district court opined that "[p]ower should always be accompanied by responsibility for its exercise."⁹⁴ The point is that special power implies special responsibilities: prosecutors appropriately would assume extraordinary professional responsibilities, different from those assumed by other lawyers, because prosecutors possess power far exceeding that of all other lawyers.

In a 1991 article, Fred Zacharias more fully elaborated the view that "the fear of unfettered prosecutorial power is the impetus for the special ethical obligation" to "do justice."⁹⁵ He reasoned that "[t]he drafters [of ethics codes and internal guidelines] reasonably expect that, as [a] symbol of . . . criminal justice, prosecutors should not take undue advantage of their built-in resources."⁹⁶ In his view, "the scope of the 'do justice' rule" is determined by this theoretical justification considered together with practical concerns.⁹⁷ Accordingly, at least in the trial context, "doing justice" means neither disinterested advocacy⁹⁸ nor a responsibility for achieving "accurate outcomes" or "factually correct results" (i.e., for protecting against the conviction of innocent defendants).⁹⁹ It requires only that prosecutors "strive for adversarially valid results,"¹⁰⁰ that is, results that are the product of an adversary process that has not broken down. The question then becomes: when is a prosecutor taking "undue" — as opposed to appropriate — advantage of superior resources? Zacharias's answer is: when the prosecutor causes or exploits break-downs in the adversary process. The prosecutor's "ethical role in preserving adversarial process"¹⁰¹ might in-

broad discretion, amounting to "more control over individuals' liberty and reputation . . . than [is vested] in perhaps any other public official").

93. *United States v. Van Engel*, 15 F.3d 623, 629 (7th Cir. 1993).

94. *United States v. Jones*, 983 F.2d 1425, 1433 (7th Cir. 1993).

95. Zacharias, *supra* note 9, at 58.

96. *Id.* at 59.

97. *See id.* at 60.

98. *See id.*

99. *See id.*

100. *See id.*

101. *See id.* at 68.

clude, for example, a duty to intervene when defense counsel's performance is substandard,¹⁰² to avoid using the prosecution's superior resources to impede defense counsel's access to information,¹⁰³ to seek to correct, or at least not exploit, judicial bias,¹⁰⁴ or to avoid relying on inadmissible evidence.¹⁰⁵

The power-based conception of the prosecutor's duty to "seek justice" endorsed by Zacharias and others seems hard to challenge to the limited extent that it implies "special responsibilities" relating to those powers that only prosecutors possess, such as the power to bring criminal charges or to employ the grand jury. Ethical limits placed on lawyers with respect to other, superficially analogous activities, such as the filing of civil charges or the issuance of subpoenas in other proceedings, do not adequately account for the ways in which the prosecutor's conduct may be far more harmful. However, one might be skeptical insofar as the prosecutor's special power is thought to warrant a duty to "seek justice" implying special responsibilities that apply across the board, including to prosecutorial conduct, such as trial conduct, that is essentially the same as the conduct of other lawyers.

The prevailing view among practitioners is almost certainly that lawyers may appropriately exploit their power and that of their clients.¹⁰⁶ To be sure, this perspective has been challenged thoughtfully by legal scholars such as William Simon,¹⁰⁷ David Luban¹⁰⁸ and Robert W. Gordon,¹⁰⁹ who argue that lawyers for clients in civil matters assume special responsibilities when their client's power far outmatches that of their adversary. But, in representing a civil client, most believe a lawyer may fairly take advantage of superior resources, knowledge or skill, or other imbalances in

102. *See id.* at 66-74.

103. *See id.* at 74-85.

104. *See id.* at 85-88.

105. *See id.* at 88-102.

106. *Cf.* DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* 135 (1994) ("Over the last century, the principles of neutral partisanship have grown more dominant.").

107. *See* William Simon, *Ethical Discretion in Lawyering*, 101 *HARV. L. REV.* 1083, 1090, 1123-25 (1988) (arguing for a discretionary approach to lawyering that requires lawyers to take actions that will promote justice).

108. *See* DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 65-66 (1988).

109. *See* Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 *MD. L. REV.* 255, 258-66 (1990) (defending a system which requires lawyers to integrate the public interest into their practice of law).

power, as long as the lawyer acts within the law and the ordinary rules of professional conduct.¹¹⁰

Aligning themselves with the prevailing view, many prosecutors would resist the notion that special ethical responsibilities derive from their superior power. They would argue that their resources and procedural powers are given to them for a reason: to prosecute criminals. Indeed, their responsibility is to do whatever is necessary and proper to fulfill their obligation to the public to convict the guilty. Their special power is not to be apologized for, or diluted, but to be used effectively toward that end. The notion that ethical obligations should be assumed as a way of leveling the playing field between prosecutors, on one hand, and targets and defendants, on the other, would strike them as odd. Indeed, insofar as ethical restrictions imposed by courts interfere with prosecutors in carrying out criminal investigations and prosecutions, prosecutors might see it as their responsibility to invoke whatever power they may have to avoid such ethical restrictions.¹¹¹

One might also argue that the prosecutor's superior power is an unsatisfactory justification for the duty to "seek justice" given conventional intuitions about the nature of prosecutors' special responsibilities. On one hand, special responsibilities assumed by prosecutors in the trial context would not be easily explained by the power-based conception; that conception would warrant extremely limited responsibilities in the trial context, because the prosecution and defense play on a relatively even field, so there is comparatively little need to redress procedural imbalances. On the other, the power-based conception would seem to call for broad responsibilities in the investigative context, where the procedural imbalance is stark; yet, prevailing ethical norms, if anything, allow prosecutors more leeway than other lawyers while serving as investigators.

In the trial context, for example, prosecutors are thought to have a special obligation of candor that is not easily justified by a power-based conception of "seeking justice." It is acceptable for criminal

110. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 614 (stating that as long as the lawyer's conduct is lawful, "it is morally justifiable").

111. That is precisely what the Department of Justice did in August 1994, when it adopted the regulation on communications with represented parties. For the first time, it invoked the power to promulgate administrative regulations — a power entrusted only to the sovereign — as a way of avoiding compliance with an ethical rule. See 28 C.F.R. § 77 (1998); see generally Green, *Whose Rules of Professional Responsibility Should Govern Lawyers*, *supra* note 4.

defenders (and, in all likelihood, for advocates in civil proceedings) to cross-examine opposing witnesses in an attempt to discredit testimony known to be truthful or to argue to the jury inferences that are supported by the evidence but known to be untrue.¹¹² Prosecutors, however, have a special responsibility not to do so.¹¹³ One would have to strain to explain this special responsibility if “seeking justice” is envisioned exclusively or predominantly as a check on abuses of superior power, since prosecutors have no unfair advantage within the context of the trial process that must be redressed in this manner.¹¹⁴ Rather, this duty of candor seems to be rooted in a conception of “seeking justice” as involving a sense of procedural fairness or fidelity to the truth that exists even though the defense has the procedural advantage of the “reasonable doubt” standard and that would survive even if the prosecution and defense were evenly matched.¹¹⁵

In contrast, prosecutors are at an enormous advantage in the investigative context (which, to be fair, Professor Zacharias does not explore). A conception of “seeking justice” explained by the prosecutor’s superior power and resources would therefore seem to warrant far greater limits than are conventionally placed on other lawyers in analogous circumstances. Yet, in the investigative con-

112. See FREEDMAN, *supra* note 26, at 214.

113. See *United States v. Universita*, 298 F.2d 365, 367 (2d Cir. 1962) (the prosecutor “has a special duty not to mislead” the jury and “should . . . never make affirmative statements [to the jury] contrary to what [he] knows to be . . . [true]”); *United States v. Lusterino*, 450 F.2d 572, 574-75 (2d Cir. 1971) (prosecutor may not knowingly “participate[] in allowing a false picture to be painted” for the jury); FREEDMAN, *supra* note 26, at 214.

114. Prosecutors and defendants play by essentially the same rules at trial. One exception is that only prosecutors have authority to seek immunity for witnesses, and thereby obtain testimony in a manner unavailable to the defense. The defense, on the other hand, has control over the testimony of the most important witness—the defendant. Moreover, prosecutors have the burden of proof beyond a reasonable doubt, which goes far to redress the advantages prosecutors have in gathering evidence.

115. Other examples of prosecutors’ greater obligation of candor and fair dealing in the trial context arise in connection with the obligation to refrain from offering inadmissible evidence and to refrain from making erroneous legal arguments. Prosecutors are expected to act far more cautiously than other lawyers. See, e.g., *United States v. Forrest*, 17 F.3d 916, 919-20 (6th Cir. 1994) (prosecutor failed to take adequate steps to ensure that witness did not refer to defendant’s criminal record); *United States v. Eason*, 920 F.2d 731, 736 (11th Cir. 1990) (reversing a conviction because the government deliberately introduced evidence of defendant’s prior conviction); see also *United States v. Chu*, 5 F.3d 1244, 1249 (9th Cir. 1993) (prosecutor should have stipulated to meeting with witness; “the government has the obligation to see that all evidence relevant to a case is presented, even if unfavorable to its position”).

text, few special restraints are imposed on prosecutors.¹¹⁶ Moreover, prosecutors are ordinarily considered to be free of many restraints that are imposed on other lawyers who are gathering evidence in connection with litigation. For example, deceit is more acceptable when employed by prosecutors — at least when they are acting through investigative agents — than when employed by other lawyers in litigation.¹¹⁷ Yet a power-based conception would seem to impel just the opposite understanding — namely, that to compensate for prosecutors' superior investigative powers and resources, prosecutors should be held to a higher standard of candor in dealing with those whom they investigate.

B. The Prosecutor's Role

A different source of the duty to seek justice is the prosecutor's professional role. A lawyer serving in the role as criminal prosecutor is distinguished by the identity of the client, the amount of authority delegated to the lawyer to act on behalf of the client and the nature of the client's interests and ends in the criminal context. Taken together, these considerations make prosecutors different from other government lawyers and from lawyers for even the most powerful private clients.

In particular, the prosecutor represents a sovereign — in this country, typically a state or the United States. However, the prosecutor is not merely the sovereign's lawyer. The sovereign delegates most of its authority and discretion to its prosecutors.¹¹⁸ Thus, the prosecutor makes decisions that are ordinarily entrusted to a client.

116. *See, e.g.*, *United States v. Gillespie*, 974 F.2d 796, 801 (7th Cir. 1992) ("Few restraints protect targets appearing before grand juries . . .").

117. It would be unremarkable if a prosecutor sent out an undercover agent to pose as a drug buyer in order to gather evidence against drug dealers, whereas courts might well disapprove of a civil litigator sending an investigator to engage in a similar deception. *See, e.g.*, *Monsanto Co. v. Aetna Casualty Surety Co.*, 593 A.2d 1013 (Del. Super. Ct. 1990). Similarly, ethics authorities disagree about whether, as a general rule, lawyers and their subordinates may tape-record others without their knowledge. *See, e.g.*, *New York County Lawyers' Ass'n* No. 696 (Sept. 1993); *ABA Comm. on Ethics and Prof. Responsibility*, Formal Op. 337 (1974); *N.Y.S. Bar Ass'n Comm. on Prof. Ethics*, Formal Op. 328 (1974); *Ass'n of the Bar of the City of New York Op.* 80-95 (1980); *Okla. Legal Ethics Op.* No. 307 (1994); *Attorney M v. Mississippi Bar*, 621 So.2d 220 (Miss. Sup. Ct. 1992). Authorities are in agreement, however, that prosecutors may do so when they act through their investigative agents. Thus, there is room to argue that, at least in some contexts, prosecutors ought to be exempt from ethical restraints that apply to lawyers generally.

118. In states in which the prosecutor (e.g., the state's attorney or the district attorney) is elected, the elected prosecutor's authority to act on behalf of the sovereign is constitutionally derived. Elected prosecutors, in turn, delegate much of their authority to assistant prosecutors.

This is different from the relationship between a corporation's trial lawyer and the corporate officer who directs the representation, as a fiduciary on behalf of the corporation. Here, the prosecutor fills both roles, as lawyer and as government representative. In many situations, a question of prosecutorial ethics will relate not to the prosecutor's duties as the government's trial lawyer, but to the prosecutor's fiduciary duties as the government's decisionmaking representative. In this role, as would be true of any individual acting as a fiduciary on behalf of a client, the prosecutor must make decisions and otherwise act in accordance with the client's interests and objectives.

With respect to the criminal law, a sovereign's overarching objective in this country (although not necessarily everywhere) is to "do justice." The prosecutor, as a representative of the state, must serve this objective and "do justice." Doing justice comprises various objectives which are, for the most part, implicit in our constitutional and statutory schemes. They derive from our understanding of what it means for the sovereign to govern fairly. Most obviously, these include enforcing the criminal law by convicting and punishing some (but not all) of those who commit crimes; avoiding punishment of those who are innocent of criminal wrongdoing (a goal which, as reflected in the "presumption of innocence," is paramount in importance); and affording the accused, and others, a lawful, fair process. Additionally, most would agree, the sovereign has at least two other aims. One is to treat individuals with proportionality; that is, to ensure that individuals are not be punished more harshly than deserved. The other is to treat lawbreakers with rough equality; that is, similarly situated individuals should generally be treated in roughly the same way. Sometimes these various objectives are in tension. It is the prosecutor's task, in carrying out the sovereign's objectives, to resolve whatever tension exists among them in the context of individual cases.

This understanding of the origins of the prosecutor's duty to do justice is consistent with early writings, such as Sharswood's essay, late nineteenth century state-court opinions, and the Supreme Court's *Berger* opinion. All of these see the prosecutor's role,

In the federal context, however, it might be argued that, although the Attorney General's "client" is the government, the President (acting in an official capacity) has constitutional authority to make decisions on behalf of the government in criminal cases. Whether or not this is entirely so, as a practical matter the Attorney General has authority (delegated by the President or otherwise derived) to make decisions on behalf of the government in virtually all criminal cases, and in turn delegates much of that authority to United States Attorneys and Department of Justice officials.

rather than the prosecutor's power, as the source of the prosecutor's unique ethical obligations, including the most characteristic and well-accepted obligation: to refrain from prosecuting an innocent person. These writings identify the prosecutor as essentially the surrogate for a client, the sovereign, whose ends are to ensure the fairness and reliability of both the criminal justice process and the outcomes of that process. The role, as thus described, is often characterized as "quasi-judicial." Latter day writings take a consistent view. The Code of Professional Responsibility cites this professional role — and not the prosecutor's superior power — as the principal justification for the duty to "seek justice,"¹¹⁹ as does some commentary.¹²⁰ Contemporary state court opinions continue to characterize prosecutors as quasi-judicial officers.¹²¹

The role-based conception of the duty to "seek justice", unlike the power-based conception advocated by Professor Zacharias, might be criticized as infinitely elastic, and therefore of limited utility in guiding prosecutorial decisionmaking. The role-based conception would, however, more fully comport with the conventional view of prosecutors' special responsibilities.¹²² These would include, as *Berger* suggests, a heightened duty to ensure the fairness of the outcome of a criminal proceeding from a substantive perspective — to ensure both that innocent people are not punished¹²³

119. See MODEL CODE EC 7-13.

This special duty [to seek justice] exists because: (1) the prosecutor *represents the sovereign* and therefore should use restraint in the discretionary exercise of government powers, such as the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all.

Id. (emphasis added).

120. See, e.g., Flowers, *What You See Is What You Get*, *supra* note 45, at 728-33; FREEDMAN, *supra* note 26, at 213, 215 ("Special ethical rules are appropriate for prosecutors because the role of the prosecutor is significantly different from that of other lawyers."). This is not to say, however, that the prosecutor's superior power is irrelevant. As Professor Freedman notes, part of the prosecutor's role is to wield the government's formidable power — e.g., the power to decide whom to charge and what charges to bring — and some of the prosecutor's unique responsibilities therefore relate to the prosecutor's exclusive discretion to exercise that power. *Id.* at 213.

121. See *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976); *State v. Chambers*, 524 P.2d 999, 1002 (N.M. Ct. App. 1974); *State v. Moss* 376 S.E.2d 569, 574 (W.Va. 1988).

122. See generally Green, *Her Brother's Keeper*, *supra* note 76, at 323-25.

123. See, e.g., *Handford v. United States*, 249 F.2d 295 (5th Cir. 1957).

A United States District Attorney carries a double burden. He owes an obligation to the government, just as any attorney owes an obligation to his client, to conduct his case zealously. But he must remember also that he is the representative of a government dedicated to fairness and equal justice to all and, in this respect, he owes a heavy obligation to the accused. Such

and that the guilty are not punished with undue harshness.¹²⁴ These would also include not only a heightened duty to ensure the fairness of the process by which a criminal conviction is attained,¹²⁵ but also, as a corollary, a duty to avoid the public perception that criminal proceedings are unfair¹²⁶ — hence, the duty to play in the center of the court. These responsibilities take account of the prosecutor's superior power, yet exist even where there is relative equality of resources between the prosecution and defense, as may be true in some corporate criminal prosecutions.

The role-based conception would also be consistent with special ethical obligations relating to the exercise of prosecutorial discretion — the power to decide whom to investigate, what charges to present to a grand jury, the terms of an acceptable plea bargain, the arguments to make at sentencing, and the like. These decisions are subject to little judicial oversight.¹²⁷ Although it did not have to be so, our scheme of government assigns the principal decision making role to prosecutors, rather than to judges or, for that matter, the police. In carrying out this function, the prosecutor is less the government's trial lawyer and more the government's repre-

representation imposes an overriding obligation of fairness so important that Anglo-American criminal law rests on the foundation: better the guilty escape than the innocent suffer.

Id. at 296.

124. *See, e.g.*, *United States v. Jones*, 983 F.2d 1425, 1433 (7th Cir. 1993) (“the prosecutor's duty is to seek the fairest rather than necessarily the most severe outcome”).

125. *See Donnelly v. DeChristoro*, 416 U.S. 637, 648-49 (Douglas, J., dissenting) (“The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and to give those accused of crime a fair trial.”).

126. *See Patterson v. Illinois*, 487 U.S. 285, 301 (1998) (Stevens, J., dissenting); National District Attorneys Ass'n, National Prosecution Standards, Standard 25.1, cmt. (1977) (“As a public prosecutor constantly in the public eye, it is imperative that the prosecutor . . . avoid even the appearance of professional impropriety.”); *see generally* Bruce A. Green, *Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule Be Eliminated in New Jersey — Or Revived Everywhere Else?*, 28 SETON HALL L. REV. 315 (1997).

127. *See, e.g.*, *Bordenkircher v. Hayes*, 434 U.S. 357, 368 n.2 (1978) (deferring to the prosecutor's exercise of discretion in initial charging decisions); *United States v. Robertson*, 15 F.3d 862, 875-77 (9th Cir. 1994) (Reinhardt, J., concurring) (stating that a prosecutor's exercise of discretion is generally unreviewable); *United States v. Van Engel*, 15 F.3d 623, 631 (7th Cir. 1993) (“The decision to conduct a criminal investigation is not subject to judicial review unless invidious criteria such as race or religion infect the decision.”); *United States v. Redondo-Lemos*, 955 F.2d 1296, 1299 (9th Cir. 1992), *on remand*, 817 F. Supp. 812 (D. Ariz. 1993), *rev'd on other grounds*, 27 F.3d 439 (1994) (“Prosecutorial charging and plea bargaining decisions are particularly ill-suited for broad judicial oversight.”).

sentative.¹²⁸ Because prosecutors are not themselves the client, but merely representatives, they must act in accordance with the client's objectives, as reflected in the constitution and statutes, as well as history and tradition. Thus, prosecutors are expected to employ judgment and restraint in making these decisions, no matter that the principles governing the prosecutor's decisionmaking — for example, principles of equal treatment and proportionality which are unrelated to the prosecutor's superior power — may be elusive and ill-defined.¹²⁹

IV. Implications of a "Role-Based" Duty to Seek Justice: Learning From Mistakes

Suppose that prosecutors embrace their responsibility, as representatives of the sovereign, to carry out the sovereign's objective of achieving justice. Does this really have implications for how prosecutors do their job and, in particular, how they respond to questions of ethics (in either the broad or narrow sense)? The answer is, it does. It matters how prosecutors understand their role and whether or not they conceive that their duty to seek justice derives from their role, and not only their power.

By way of illustration, consider how a prosecutor might respond upon discovering only after obtaining a conviction that the accused individual was innocent. What is the appropriate response and, in particular, what, if anything, should the prosecutor learn from the mistake?

These questions were raised, but not fully explored, at the symposium on "The Changing Role of the Federal Prosecutor,"¹³⁰ in the context of the case of Jeffrey Blake. Blake was convicted in state court of murder based on testimony of single individual

128. Outside the context of government representation, there are examples of how these roles may either be divided among two individuals or vested in a single lawyer. For example, the roles of guardian ad litem and trial lawyer in cases involving incapacitated clients may be assigned to two different individuals or to a single lawyer. See Bruce A. Green, *Lawyers as Nonlawyers in Child-Custody and Visitation Cases: Questions From a "Legal Ethics" Perspective*, 73 IND. L.J. 665 (1998).

129. See generally ABA STANDARDS Standard 3-3.9; Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968-69) (arguing against the plea bargaining system because it depends too heavily on the personal interests of prosecutors); Sarah Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383 (1976); Wayne R. Lafave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970) (discussing the broad range of discretion by prosecutors in determining whether to proceed with trial or negotiate a plea).

130. See generally Symposium, *The Changing Role of the Federal Prosecutor, In Memory of William Tandy*, 26 FORDHAM URB. L.J. 347 (1999).

claiming to be an eyewitness to the shooting.¹³¹ Blake's alibi at the time, although strong, was apparently discounted by the prosecution; information, known by the authorities but not disclosed to the defense, cast doubt on the witness's credibility; and a woman whom the witness said was with him at the time of the shooting was never interviewed. Years later, the witness recanted his testimony and his companion denied having seen the shooting.¹³² When Blake sought to set his conviction aside, however, the district attorney's office was initially resistant.¹³³ However, the Legal Aid Society's efforts to free Blake were eventually joined by those of a *New York Times* columnist, Bob Herbert, who wrote a series of articles describing the wrongful conviction.¹³⁴ No doubt in response, the district attorney eventually agreed that Blake's conviction should be set aside, and Blake was released after eight-years' imprisonment on the motion of the district attorney.

When the assistant district attorney was asked in the end, "What do you say to a Jeffrey Blake?," he reportedly replied, "We live by an adversarial system. Our job is to present evidence we believe is credible. The defense's job is to poke holes in it. In a sense, the system worked, although it took some time."¹³⁵ At least one panelist at the symposium found the assistant district attorney's response unsatisfactory.¹³⁶ Yet, it would seem to be consistent with the conception of the prosecutor's duty to "seek justice," if that duty is thought to derive exclusively from the prosecutor's superior power. That is because, in this situation, there was nothing to indicate that the prosecutor's office unfairly exploited its superior power. Thus, as the prosecutor's response might have been reframed, "The fault for the defendant's erroneous conviction lies not with the prosecu-

131. See Herbert, *supra* note 66.

132. See *id.*

133. Perhaps this should not have been surprising. When — as has occurred increasingly often with the advent of DNA evidence — exculpatory evidence is discovered sometime after a criminal conviction, prosecution witnesses recant, or the prosecution's proof is otherwise thrown into doubt, the typical prosecutorial response is denial: denial of the possibility that the new proof is legitimate, and denial of the possibility that the convicted defendant is in fact innocent. See, e.g., *Houston v. Par-tee*, 978 F.2d 362 (7th Cir. 1992). See also *supra* note 66 and accompanying text.

134. See Bob Herbert, *In America: Justice Delayed*, N.Y. TIMES, July 30, 1998, at A21; *In America: A Case of Lies*, N.Y. TIMES, Aug. 2, 1998, at D15; *In America: Justice At Long Last*, N.Y. TIMES, Oct. 29, 1998, at A31; *In America: Justice Con-founded*, N.Y. TIMES, Dec. 31, 1998, at A19.

135. Jim Yardley, *Man Is Cleared In Murder Case After 8 Years*, N.Y. TIMES, Oct. 29, 1998, at B1.

136. See *Panel Discussion: The Regulation and Ethical Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 737, 740 (1999).

tor, but with the defense lawyer or the adversary system. Prosecutors play by the same rules as other lawyers at trial. They have no advantage. Their job is to work as vigorously as possible to convict those charged with a crime. It is up to the defense lawyer to uncover the perjury during his investigation or to reveal it during his cross-examination of the government witnesses. And, it is up to the jury to decide who is telling the truth.”

This response seems unsatisfying for several reasons, all of which turn on the prosecutor’s distinctive role. First, it overlooks the prosecutor’s responsibility for making decisions about whom to charge with a crime. Prosecutors cannot entirely blame the adversary process for bad results when they themselves are responsible for deciding whom to bring within the adversary process. Second, not only does this response fail to account for the inequality of resources between parties in the criminal process,¹³⁷ more importantly, it fails to take account of the ordinary limitations of the adversary process even in cases where there is relative equality of resources. For example, the idea that the defense lawyer is supposed to uncover perjury erroneously assumes that cross-examination is generally an effective tool for exposing witnesses’ deliberate falsehoods.¹³⁸ Even if one were to assume that the adversary process works in most cases, no one would proclaim it infallible. Probably alone among clients in litigation, the prosecutor’s client takes as an objective seeing that the results of the adversary process are correct in *all* cases. Thus, the prosecutor has a responsibility, in representing the sovereign, to strive to ensure that justice is done retail, not just wholesale.

One can imagine several alternative defenses to the Blake prosecution, these based on an erroneous or incomplete understanding of the prosecutor’s role. One response might be: “The police be-

137. Jed S. Rakoff, *How Can You Defend Those Crooks*, N.Y. L.J., Sept. 25, 1990, at A3.

The proper working of the adversary system posits, if not equality of talent among advocates, at least a minimal level of competence and resources below which the advocate never falls. But the truth is that there are many hacks practicing criminal law and, even more common, a great many competent lawyers whose resources are not remotely adequate to mount a serious defense, either because their clients cannot afford such a defense or because (in the case of indigents) the state is unwilling to pay for such a defense.

Id. See also Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993).

138. Cf. *United States v. Wade*, 388 U.S. 218, 235 (1967) (“though cross-examination is a . . . safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability”).

lieved at the time that Blake was guilty. The job of the prosecutor's office, which it carried out, was to be a zealous advocate of this position." Viewing the job this way, the prosecutor would never review the evidence objectively or skeptically. From the outset and forever thereafter, the prosecutor would view the evidence just as the police view it, in the light most favorable to the accusations made by the police (just as a private client's trial lawyer might present the evidence in the client's favor). The obvious problem with this defense of the prosecution is that the client was not the police department, but the State of New York. Further, the police were not charged with responsibility for making prosecutorial decisions on behalf of the State, the prosecutors were.

Another possible response would be: "The police developed the evidence. The prosecutors' job, which they carried out, was to present the evidence and let the jury decide." The prosecutor, in this version, is essentially a ministerial agent, a conduit who takes the evidence obtained by the police and presents it to the grand jury and, if the grand jury indicts, to the trial jury. Under this conception, like the previous one, the prosecutor will not be required independently to assess the evidence and to determine whether a prosecution should be brought. This conception ignores that, as the State's representative in the criminal context, the prosecutor cannot serve as a mere conduit, but is charged with an affirmative responsibility to carry out the State's objectives. These include, as previously discussed, an objective that is at least as important as convicting the guilty, namely, protecting innocent people from unjust conviction. Prosecutors abdicate their responsibility to carry out this objective when they act merely as conduits of evidence developed by the police.

Finally, a prosecutor might have made the following response to the Blake case: "The prosecutor's office believed Blake was guilty, and therefore it was proper for the office to prosecute him as it did." This is the least objectionable defense, because it implicitly acknowledges that prosecutors cannot accept the judgment of the police that an individual is guilty: Prosecutors have the power, freedom and responsibility to make decisions for the sovereign in the criminal context.¹³⁹ Therefore, as Bennett Gershman has de-

139. As noted earlier, this authority is typically delegated to individual prosecutors by, e.g., the appointed United States Attorney (whose authority is delegated by an appointed Attorney General) or the elected District Attorney. *See supra* note 118. The question of whether and when the Attorney General or a District Attorney is

scribed, prosecutors must serve as “gatekeepers.”¹⁴⁰ They must satisfy themselves of an individual’s guilt as a precondition to determining that the conviction of an individual is an end to be sought on behalf of the state or the federal government.

So far, so good. But the response that “the prosecutor’s office believed Blake was guilty” begs the question of how the prosecutor came to this belief. To carry out the sovereign’s paramount objective — to prevent the prosecution of innocent persons — prosecutors have an affirmative, independent responsibility to review the evidence and, if necessary, seek additional evidence. How extensive is this responsibility? And, was it carried out in the Blake case? It is not enough to say that “the prosecutor’s office believed Blake was guilty.” One must be able to say that this belief was justified.

Suppose, however, one understands the prosecutor’s professional role to be that of a surrogate for a client whose obligation is to govern justly and fully accepts the conception of “seeking justice” that this quasi-judicial role seems to imply. What, then, is the appropriate response for a prosecutor who has secured a conviction based on evidence that later turns out to be fabricated? Ideally, it would include a commitment to reexamine the case to determine what went wrong, in order to undertake institutional or personal measures to avoid recurrences. Was there a failure of the investigative or charging function? Would it have been possible to ascertain, through reasonable measures, that the principal witness’s account was false (for example, were there clues given by the witnesses but ignored by the prosecutor prior to trial)? Were there inducements offered by the prosecution without good reason or techniques of witness preparation that increased the likelihood of false testimony?¹⁴¹

From a public perspective, these are important questions for a prosecutor to consider after convicting someone on the basis of false evidence, or even after wrongfully convicting someone in a

answerable to someone else is an interesting one, but one which, as a practical matter, has no significance to most prosecutors.

140. See Bennett L. Gershman, *A Moral Standard for the Prosecutor’s Exercise of the Charging Discretion*, 20 *FORDHAM URB. L.J.* 513, 530 (1993) (arguing that prosecutors should not bring criminal charges unless they are morally certain of the defendant’s guilt).

141. See *Panel Discussion: The Regulation and Ethical Responsibilities of Federal Prosecutors*, *supra* note 136, at 758-9 (remarks of Robert E. Precht).

circumstantial case on the basis of true but incomplete evidence.¹⁴² Their importance might be recognized by a prosecutor whose idea of "seeking justice" means making decisions on behalf of a client for whom one overarching aim is preventing the punishment of innocent people. These questions are far less likely to be raised, however, by prosecutors for whom "seeking justice" is explained solely by the need to avoid the unfair exploitation of government power. Nor are they likely to be considered by prosecutors who think of the police rather than the sovereign as their client, who view themselves as ministerial agents rather than as representatives vested with discretion and charged with responsibility to act in furtherance of the sovereign's objectives, or who fail to recognize that among the sovereign's paramount objectives are not merely to convict and punish lawbreakers but to avoid harming, and certainly to avoid punishing, innocent people.

Conclusion

This Article does not offer a new understanding of the prosecutor's duty to seek justice, but rather, a reminder of the traditional understanding. That is, a prosecutor is a representative of, as well as a lawyer for, a government entity that has several different, sometimes seemingly inconsistent, objectives in the criminal context. Of these, convicting and punishing lawbreakers is only one, and it is no more important than others, such as avoiding the punishment of innocent people and ensuring that people are treated fairly. As the government's surrogate, the prosecutor's job is to carry out all these objectives and resolve the tension among them.

This is a stronger, more challenging, and more complete, conception of the duty to seek justice than the alternative, which is rooted in the prosecution's generally superior power. This is also the understanding to which prosecutors should be more receptive, since it does not imply that they should "pull their punches" or otherwise act to level the playing field between themselves and the defense. On the contrary, it encourages their instinct to do battle. It implies, however, that prosecutors must not only battle lawbreakers, in furtherance of the government's objective of convicting the lawless. Additionally, prosecutors must resist various forces that would undermine the government's other aims. At times, this may mean standing up to the police (when their investigations are inad-

142. Thus, similar questions might be asked when a criminal case is dismissed or a conviction is overturned because the evidence is legally insufficient for a jury to convict, or even when a criminal trial results in a jury verdict of acquittal.

equate), disregarding the public (when its expectations are unreasonable), and overcoming one's own self-interest or ennui. In the face of contrary pressures and expectations, both external and internal, it may take a certain amount of inner strength (or strength of character) for an individual prosecutor to decide not to bring criminal charges or to dismiss criminal charges, to comply with procedural norms that make it more difficult to secure convictions, to confess error, or to seek to overturn a conviction that was unfairly procured. These decisions should be easier, however, when prosecutors serve in an office where the "duty to seek justice" is fairly understood and taken seriously.

