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Recommended Citation
R. Michael Cassidy. "Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice."." *Notre Dame Law Review* 82, (2006): 635-698.

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CHARACTER AND CONTEXT: WHAT VIRTUE THEORY CAN TEACH US ABOUT A PROSECUTOR'S ETHICAL DUTY TO "SEEK JUSTICE"

*R. Michael Cassidy**

> When it comes right down to it, of course, there is no institutional substitute for personal integrity.[1]
>
> —H. Richard Uviller

INTRODUCTION

Almost forty years ago, Monroe Freedman rocked the field of legal ethics with his provocative and highly controversial article *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*.[2] Professor Freedman taught us that stating ethical rules in the form of "salutary generalities" does little to assist a lawyer in confronting practical problems in context,[3] particularly in the field of criminal litigation where a defendant's personal liberty is at stake and constitutional protections for the accused are paramount to the truth finding function of the courts.[4]

Like Freedman, my goal in this Article is to discuss three difficult

* Associate Professor, Boston College Law School. I thank my colleagues Judy McMorrow, Ray Madoff, and Paul Tremblay for their thoughtful comments on an earlier draft, and my students Joshua Gallitano, Martha Wilson-Byrne, and Robert Frederickson for their capable and energetic research assistance.

1 H. RICHARD UVILLER, THE TILTED PLAYING FIELD: IS CRIMINAL JUSTICE UNFAIR? 66 (1999).

2 Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). Professor Freedman addressed the following three issues in this 1966 article: whether it is proper for a criminal defense attorney to cross-examine a witness who he knows to be telling the truth; whether it is proper for a criminal defense attorney to put a witness on the stand when he has reason to know that the witness will commit perjury; and whether it is proper for a criminal defense attorney to give his client legal advice when he has reason to believe that such legal advice will tempt the client to commit perjury. *Id*. at 1469.

3 *Id.* at 1470; *see id.* at 1484 ("[I]t is precisely when one tries to act on abstract ethical advice that the practicalities intrude, often rendering unethical the well-intended act.").

4 *Id.* at 1471, 1482.

ethical problems confronted in criminal practice. But unlike Freedman, I intend to address these controversies from the perspective of the criminal prosecutor. Specifically, when is it proper for a prosecutor to offer charging or sentencing concessions to an accomplice in order to secure the accomplice's testimony against a codefendant? When, if ever, may a prosecutor impeach a defense witness who the prosecutor believes has testified truthfully, and how should this cross-examination be conducted? And finally, how should a prosecutor react at trial when opposing counsel appears to be advocating ineffectively on behalf of his client?

These three quandaries are particularly challenging for prosecutors, for at least two reasons. First, neither the Model Rules of Professional Conduct nor the American Bar Association's *Standards Relating to the Administration of Criminal Justice* provide meaningful guidance on these questions. Moreover, the resolution of these issues is highly dependent both on the specific factual context in which the questions arise and the prosecutor's resolution of a variety of competing tensions at play in the particular case. Nonetheless, I will argue that these dilemmas are indeed questions of ethics, and that ethical reasoning can help guide us to a solution. This brings me to a second goal of the Article, which is to discuss how this philosophy of virtue ethics may help us think about difficult questions of professional responsibility for public prosecutors.

The three questions I will address in this Article fall squarely within the interstices of professional regulation of lawyers. Model Rule 3.8 (entitled "Special Responsibilities of a Prosecutor") does not purport to answer any of them.[5] As one commentator has lamented, Model Rule 3.8 "barely scratch[es] the surface"[6] of a prosecutor's unique responsibilities.[7]

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5 MODEL RULES OF PROF'L CONDUCT R. 3.8 (2004).

6 *See* Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 616 (1999).

7 Model Rule 3.8 contains proscriptions relating to pre-trial conduct, the threshold for commencing criminal charges, and publicity. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8. These proscriptions really are not "ethical" rules at all—they set a floor of minimally acceptable behavior by describing actions that a prosecutor may not take ("prohibitions"). *See, e.g.*, *id.* R. 3.8(a) (prosecutor may not prosecute without probable cause); *id.* R. 3.8(b) (prosecutor may not obtain from unrepresented accused waiver of pretrial rights); *id.* R. 3.8(c) (prosecutor may not subpoena attorney to grand jury to give information about past or present client except in limited circumstances). For areas where the Rules describe the actions that a prosecutor must take, see *id.* R. 3.8(d) (prosecutor must make reasonable efforts to assure that accused has been advised of right to counsel); *id.* R. 3.8(e) (prosecutor must make timely disclosure of exculpatory evidence). Of course, prosecutors must adhere to the more general professional norms applicable to all members of the bar (e.g., being candid with the tribunal in compliance with Rule 3.3; acting without a conflict of interest in compliance with Rule 1.7(a)(2); acting with competence and diligence in compliance with Rules 1.1 and 1.3). But these rules, like Model Rule 3.8, are not grounded in *moral*

Buried within the comments to this rule, however, is one generalized standard that may provide a starting point for our inquiry. Comment 1 to Model Rule 3.8 states that "[a] prosecutor has the responsibility of a *minister of justice*, and not simply that of an advocate."[8] This language, emanating from a 1934 Supreme Court opinion,[9] is echoed in the American Bar Association's Criminal Justice Standards: "The duty of the prosecutor is to *seek justice*, not merely to convict."[10]

The legal profession has left much of a prosecutor's day-to-day decisionmaking unregulated, in favor of this catch-all "seek justice" admonition.[11] But what does it mean to "seek justice" if you are a public prosecutor? "Justice" is an example of a highly generalized axiom of behavior—it does not set forth permissible and impermissible conduct, and it does not set out criteria for how prosecutors are supposed to determine what is just.[12] "The reality is that justice is an elusive and difficult concept."[13] "[W]hat prosecutor doesn't think that he or she is 'seeking justice' . . . ?"[14] Justice might mean several overlapping but different things simultaneously; for example, it might mean safeguarding the substantive and procedural rights of the accused,[15] exhibiting general "fairness" to others (including not only the defendant but also the victim and other witnesses),[16] showing consistency in decisionmaking,[17] or

reasoning; rather, they were enacted to ensure the efficiency of the legal system and to foster judicial outcomes worthy of respect. Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 973 (1987) (arguing that model rules "eschew descriptions of morals" in favor of regulations without ethical content). Elsewhere, Shaffer has written that what the American legal system calls ethics "are traffic regulations that make professional intercourse efficient and keep professional practice at least . . . within the boundaries set by the criminal law." THOMAS L. SHAFFER, FAITH AND THE PROFESSIONS 131 (1987).

8 MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2004) (emphasis added).

9 Berger v. United States, 295 U.S. 78, 88 (1934).

10 CRIMINAL JUSTICE STANDARDS COMM., AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE Standard 3-1.2(c) (3d ed. 1993) [hereinafter ABA CRIMINAL JUSTICE STANDARDS] (emphasis added).

11 *See* Green, *supra* note 6, at 616.

12 Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 256 (1993). Another commentator has labeled the seek justice mandate "hopelessly abstract." Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 227 (1988).

13 Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 379 (2001).

14 *Id.* at 378.

15 Fisher, *supra* note 12, at 236–37.

16 *See* JOHN RAWLS, A THEORY OF JUSTICE 111–14 (1971) (equating justice with fairness towards others).

promoting public safety.[18] This admonition does not provide prosecutors with any real guidance on how to act in particularly complex areas. At best, "[i]ts vagueness leaves prosecutors with only their individual sense of morality to determine just conduct."[19] At worst, it allows prosecutors to rationalize any response to an ethical dilemma by arguing that their chosen conduct increases the likelihood of conviction and incarceration of a guilty person.

In light of the amorphous "seek justice" standard, there have been a number of proposals put forth by commentators to better channel prosecutorial discretion. Bruce Green has argued that Model Rule 3.8 needs to be expanded to reach more discretionary decisionmaking by prosecutors.[20] He and Fred Zacharias have also argued that prosecutor's offices across the country need to articulate and publicize office policies and principles of decisionmaking to guide the discretion of individual attorneys.[21] The late Richard Uviller has suggested that functions within the prosecutor's office should be split between quasi-judicial functions (investigation, case evaluation, and plea bargaining) and adversarial functions (litigation) in order to ensure that the pressures of the adversarial process do not corrupt the independence of a prosecutor's judgment.[22] Both Stanley Fisher and Leslie Griffin have argued in favor of better training and closer supervision of prosecutors.[23]

My point in this Article is not to quibble with any of these recommendations; all of them have merit, and, with the exception of the call for stronger rules,[24] many of them are now being implemented in

17 *See* H.L.A. HART, THE CONCEPT OF LAW 158 (1961) (equating justice with treating like cases alike).

18 For a utilitarian theory of justice focusing on maximizing the common good, see JOHN STUART MILL, UTILITARIANISM 242–64 (George Sher ed., 2001).

19 Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 48 (1991).

20 *See* Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1590; Green, *supra* note 6, at 616.

21 Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 897.

22 *See* H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1716 (2000).

23 *See* Fisher, *supra* note 12, at 257; Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 262 (2001).

24 In the 2002 amendments to the Model Rules, the ABA affirmatively decided to "leave questions of prosecutorial conduct for another day," partly because it anticipated strenuous objections from the Department of Justice, and partly because the Ethics 2000 Commission contained no members currently serving as prosecutors. Bruce A. Green, *Prosecuting Means More Than Locking Up Bad Guys*, LITIG., Fall 2005, at 12, 16.

prosecutor's offices across this country.[25] My point is that in a largely discretionary system, none of these suggestions—taken either alone or collectively—will insulate criminal defendants from the potentially ruinous decisions of overzealous prosecutors. The scholarly discourse about prosecutorial ethics to date has been missing an important element—a focus on the *character* of individual prosecutors making discretionary decisions.

Following the Clinton impeachment there has been a rising national debate about the character of our country's leaders.[26] This debate has rekindled interest in what kind of people we want our public officials to be.[27] To date, however, the public discourse on the subject of character has greatly outpaced the scholarly literature. While legal ethicists such as Thomas Shaffer and Reed Loder have examined issues of professional responsibility through the lens of virtue ethics,[28] there has been little scholarly discussion of how this field of philosophy might inform our understanding of prosecutorial discretion. Prosecutors are leaders in our criminal justice system who wield a great deal of power to affect the day-to-day lives of our citizens. It is past time we devote serious attention to the character of the individuals making these important decisions.

Beginning with the ethics of Aristotle and building on the work of modern philosophers such as Alasdair MacIntyre[29] and Bernard Williams,[30] I intend in this Article to examine the virtues expected of a public prosecutor. After a brief review of virtue ethics and its contribution to moral reasoning, I will analyze each of the three "hard" questions of prosecutorial ethics I posed above. In each of these situations, how would a virtuous prosecutor approach the problem? How might a focus on virtue

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25 *See, e.g.*, Panel Discussion, *Criminal Discovery in Practice*, 15 GA. ST. U. L. REV. 781, 794–95 (1999) (comments of Judge Gerrilyn G. Brill) (discussing training programs in effect at many prosecutor's offices with respect to discovery); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1023–24 (2005) (discussing Washington state prosecutorial guidelines for charging and plea bargaining); *cf.* TEX. RULES OF PROF'L CONDUCT R. 309(a) (2005) (broadening Model Rule 3.8 by prohibiting prosecutor from *threatening* criminal charges without probable cause).

26 *See* Kenneth L. Woodward, *What is Virtue*, NEWSWEEK, June 13, 1994, at 38, 38.

27 Gary Watson, *On the Primacy of Character*, *in* IDENTITY, CHARACTER, AND MORALITY 449, 462 (Owen Flanagan & Amélie Oksenberg Rorty eds., 1990) (citing a "renewal of interest" in the ethics of virtue).

28 *See* Reed Elizabeth Loder, *Integrity and Epistemic Passion*, 77 NOTRE DAME L. REV. 841, 841–42 (2002) ("Virtue and character, subjects long out of fashion in moral philosophy and even ordinary life, have enjoyed a rather sparkling revival despite the longstanding preoccupation in ethics with principles to guide action."); Thomas L. Shaffer, *On Living One Way in Town and Another Way at Home*, 31 VAL. U. L. REV. 879, 889–90 (1997).

29 *See* ALASDAIR MACINTYRE, AFTER VIRTUE 6–22 (2d ed. 1984).

30 *See* BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 1–29 (1985).

(and particularly the Aristotelian virtues of courage, fairness, honesty, and prudence) contribute to the analysis of these three ethical dilemmas?

Any attempt to regulate how prosecutors should "act" in certain highly contextualized and nuanced situations by developing more specific normative rules is unworkable. Prosecutorial discretion would be better constrained in these areas by focusing on what type of character traits prosecutors should possess or strive to acquire. Only after we answer the critical preliminary question of who we want our public prosecutors to "*be*" can we possibly hope to discern what we expect our prosecutors to "*do*." In the concluding Part of the Article, I will demonstrate that a renewed emphasis on character and virtue has direct implications for how prosecutor's offices should be structured and organized in this country, and how individual prosecutors working within these offices should aspire to conduct their professional lives.

I. VIRTUE ETHICS: ARISTOTLE AND BEYOND

Legal theorists typically distinguish between two types of moral theories—deontological and consequentialist.[31] Deontologists such as Immanuel Kant posit that we must look to prior principles in order to decide upon a moral course of action.[32] One can deduce these prior principles (or moral truths) by asking whether one would be happy living in a world where everyone behaved as proposed. If the answer is no, then one has a duty not to behave that way. The categorical imperative—"the moral law according to which one should act only on principles that one can accept everyone's acting upon"[33]—provides the source of the duty to determine right action. In a deontological ethical system, the right is prior to the good; good outcomes will be achieved if everyone behaves according to their rights and responsibilities.[34]

A consequentialist moral theory looks at the outcome of human decisions. A course of action is morally proper if it increases human happiness (pleasure) and improper if it increases human suffering (pain).[35]

31 Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2395 (1990).

32 IMMANUEL KANT, *Metaphysical Foundations of Morals*, *in* THE PHILOSOPHY OF KANT 154, 164–67 (Carl J. Friedrich ed., Carl J. Friedrich & James C. Meredith trans. 1993).

33 Roger Crisp, *Modern Moral Philosophy and the Virtues*, *in* HOW SHOULD ONE LIVE? 1, 7 (Roger Crisp ed., 1996).

34 *See* James F. Keenan, *Proposing Cardinal Virtues*, 56 THEOLOGICAL STUD. 709, 714–15 (1995).

35 JEREMY BENTHAM, *Article on Utilitarianism*, *in* DEONTOLOGY 293–96 (Amnon Goldworth ed., 1983).

Determining a proper course of action requires an actor to weigh the social utility and disutility of his conduct to determine whether it produces, on balance, beneficial consequences.[36] Although a so-called "rights-utilitarian" would concede that respect for individual rights and human autonomy is a value that contributes to aggregate social welfare,[37] even this more finely calibrated form of consequentialism would allow an actor to violate the rights of certain individuals in order to protect the rights of many others.[38]

Approaching professional ethics from either a purely deontological perspective or a purely consequentialist perspective presents several problems.[39] To paraphrase Bernard Williams, if someone needs to rationalize saving his wife from a burning building on background principles [either deontological (duty) or consequentialist (maximizing happiness and minimizing pain)] he is having "one thought too many."[40] Values and principles alone cannot determine proper outcomes, because moral judgment is not just about arriving at appropriate answers—or what Gerald Postema facetiously termed "getting our moral sums right."[41] Moral judgment is also about nurturing the appropriate attitudes and reactions to the situations in which individuals find themselves.[42] For

36 Wells, *supra* note 31, at 2395.

37 *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28–33 (1974) (distinguishing what he terms a "utilitarianism of rights" theory, which has minimizing rights violations as one goal of a utilitarian calculus, from other utilitarian theories which view rights as side constraints to the goal of maximizing happiness, thus constraining goal directed behavior even if it would lead to a net social benefit).

38 *See* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required: Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 737–39 (2005).

39 One critique of deontological moral theory is that an individual actor may misconstrue rules, or may misprioritize norms reflected in the rules. "It may be futile to search for a general reductive method or a clear set of priority rules to structure our basic concerns. There is always likely to be a significant gap between general practical theory and actual decision and practice." Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 67 (1980). One critique of utilitarian moral theory is that it would permit an actor to treat another individual as a means towards societal ends, rather than an autonomous end in himself. *See* IMMANUEL KANT, *Fundamental Principles of the Metaphysic of Morals*, *in* KANT'S CRITIQUE OF PRACTICAL REASON AND OTHER WORKS ON THE THEORY OF ETHICS 1, 55–57 (Thomas Kingsmill Abbott trans., London: 6th ed., rev. 1898). For example, a purely utilitarian theory of prosecutorial ethics may permit an actor to encourage police perjury or withhold exculpatory evidence from the accused, if he reasonably believed that such actions would go undetected and would maximize social welfare by leading to the conviction of a highly dangerous and guilty defendant.

40 BERNARD WILLIAMS, *Persons, Character and Morality*, *in* MORAL LUCK 1, 18 (1981).

41 Postema, *supra* note 39, at 68.

42 *Id.*

these reasons, it is critical to approach problems of professional ethics from a perspective that recognizes the importance of character.[43]

A focus on character may help to bridge the gap where both deontological and utilitarian reasoning fail. For example, there is an important difference between "being truthful," which is a good character trait, and "not telling lies," which is a rule.[44] One might violate the proscription on lying in certain compelling circumstances without being an untruthful person (e.g., lying about whether Anne Frank and her family are hiding in your attic in order to protect them from arrest by the Nazi forces).[45] Deontological reasoning simply fails to provide meaningful guidance in that situation. Moreover, to be an authentically truthful person one must at times speak honestly, even if it might cause great pain to others. Cheating on your tax return is wrong, even where it is necessary to finance a life-saving medical procedure for a family member. In this situation, purely utilitarian forms of moral reasoning may also fail us. These examples illustrate that if lawyers are expected to be honest throughout their professional activities, they must be taught to prize the truth, and not simply admonished "not to lie."[46]

Virtue ethics is a teleological philosophy rooted in the classical humanism of Aristotle.[47] The course which a moral agent takes is directed

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43 *Id.* at 70.

44 Shaffer, *supra* note 28, at 890. In discussing the gap between rules of professional responsibility and ethical conduct, Thomas Shaffer has noted that the character Atticus Finch in Harper Lee's novel *To Kill a Mockingbird* was a person who prized honesty, but was willing to lie to protect vulnerable Boo Radley from certain ruin. "[L]ying to protect Boo Radley is the sort of thing Atticus would do," notwithstanding that he is an honest man. Thomas L. Shaffer, *The Gentleman in Professional Ethics*, 10 QUEEN'S L.J. 1, 30 (1984).

45 This hypothetical is reminiscent of Ronald Dworkin's distinction between principles and rules. Rules are absolute. If two rules conflict, one of them is not a valid rule. Principles have varying degrees of weight and importance, and at times may conflict with one another. When two principles intersect, in order to resolve the conflict the actor must take into account the relative weight and purpose of each. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22–28 (1978).

46 Rosalind Wursthouse, *Normative Virtue Ethics*, *in* HOW SHOULD ONE LIVE?, *supra* note 33, at 19, 27.

47 Although Aristotle's views have been justifiably criticized because his politics were exclusionary (for example, he did not think that slaves or women—non-members of the polis—could aspire to lead a flourishing life), we do not need to agree with those particular views in order to take seriously his theories of character, reason, and human nature. Aristotle's theories reflect the historical and political situation in ancient Greece, and may certainly be adjusted to fit changing times. *See* Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 329, 372–73 (1994); Susan Moller Okin, *Feminism, Moral Development, and the Virtues*, *in* HOW SHOULD ONE LIVE?, *supra* note 33, at 211, 211–16.

toward a "telos," or goal.[48] But unlike consequentialist theories such as utilitarianism, where the ultimate goal of human action is maximizing happiness, the "telos" for a virtue ethicist is individual human flourishing.[49] The concept of the good is prior to the concept of the right, but what is good is determined by intrinsic human excellence rather than external outcomes.[50]

Aristotle emphasized the sort of person we must become if we want to live a good life.[51] Virtue is acquired through practice. Repetition of virtuous actions will lead to virtuous character (habit), which in turn will lead to more virtuous action. Just as men "become builders by building houses," they become just persons by practicing just actions and self-controlled persons by practicing self control.[52] Only by putting the virtues into practice does the good become integrated in our character.[53] An action is right if it is in conformity with the virtues, and improper or unethical if it is contrary to the virtues.[54]

The proper threshold question for virtue ethicists is thus not "what should one do?" but "what kind of person should one be?" Only when we answer that question can we possibly hope to discern what to do.[55] Whereas deontological theories are concerned with universal principles or rules (what is "right"), virtue ethics is concerned with the goal of becoming a good person.[56] "[G]oodness conveys the agent as striving out of love to realize the right."[57] For a virtue ethicist, "how it is best or right or proper to conduct oneself is explained in terms of how it is best for a human being to be."[58] Virtue ethics makes the characteristics of a good person the focus of analysis, "on the assumption that one who is good is likely to do the

48 MACINTYRE, *supra* note 29, at 148; *see* OXFORD DICTIONARY OF PHILOSOPHY 22, 362 (Simon Blackburne ed., 2005).

49 MACINTYRE, *supra* note 29, at 185; *see* James F. Keenan, *Virtue Ethics: Making a Case as it Comes of Age*, 67 THOUGHT 115, 123 (1992). Aristotle's term "eudaimonea," is usually translated to mean "happiness," "flourishing," or "becoming an excellent human being." ARISTOTLE, NICOMACHEAN ETHICS bk. VII, ch. 12–14, at 204–08 (Christopher Rowe trans., Oxford 2002); *see* WILLIAM J. PRIOR, VIRTUE AND KNOWLEDGE 146, 149 (1991); James W. Perkins, *Virtues and the Lawyer*, 38 CATH. LAW. 185, 198 (1998).

50 Watson, *supra* note 27, at 450, 461.

51 ARISTOTLE, supra note 49, bk. II, ch. 1, at 111–12.

52 *Id.*

53 *See* GERMAIN GRISEZ, CHRISTIAN MORAL PRINCIPLES 55 (1983).

54 Watson, *supra* note 27, at 458.

55 Crisp, *supra* note 33, at 7.

56 *See* Robert Araujo, *The Virtuous Lawyer: Paradigm and Possibility*, 50 SMU L. REV. 433, 452 (1997); Keenan, *supra* note 49, at 120.

57 Keenan, *supra* note 49, at 121.

58 Watson, *supra* note 27, at 451.

right thing in most situations."[59]

It is important to distinguish virtue from two related but distinct concepts: value and honor. Values are about personal preference (I might prefer fame to money, leisure time to material goods, or friendship to autonomy). Virtues, on the other hand, are internal dispositions of character or mind that lead to human excellence.[60] The virtues exert control on our external preferences, but they are both prior and superior to our value systems.

Virtue is also distinct from honor. Honor is often equated with status—the social prestige, accolades, and privilege that come from having a good reputation.[61] Honor is not a virtue because it depends on the approval of others—"the gossip of the town and the judgment of circumstantial elites."[62] We honor others only because they have done something to merit the honor.[63] Character, by contrast, comes from within, and is directed at helping us to become our best selves rather than attaining the approval of others. For Aristotle, honor was at best only a goal secondary to virtue.[64]

Individuals are not born with virtue, but they are born with the capacity to learn the virtues through nurturing and training. Aristotle believed that we are not by nature either good or evil, although we may have tendencies toward one pole or another.[65] During childhood and adolescence we acquire good or bad dispositions through the process of rewards and discouragement.[66] A student of virtue performs virtuous acts, makes them a habit (integration), and then approaches particular situations by combining intellect and character through the process of practical wisdom, which will be discussed later in this section.[67] Once moral virtues become habitual dispositions and are coupled with reason, they allow the individual "to [choose] freely the just and beautiful action[]."[68]

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59 Loder, *supra* note 28, at 842 n.1.

60 Lawrence B. Solum, *A Tournament of Virtue*, 32 FLA. ST. U. L. REV. 1365, 1375 (2005).

61 *See* Peter Berger, *On the Obsolescence of the Concept of Honor*, *in* REVISIONS: CHANGING PERSPECTIVES IN MORAL PHILOSOPHY 172, 177 (Stanley Hauerwas & Alasdair MacIntyre eds., 1983) ("The concept of honor implies that identity is essentially, or at least importantly, linked to institutional roles.").

62 Thomas Shaffer, *The Profession as a Moral Teacher*, 18 ST. MARY'S L.J. 195, 248 (1986).

63 MACINTYRE, *supra* note 29, at 116.

64 *Id.*

65 ARISTOTLE, *supra* note 49, bk. II, ch. 1, at 111–12.

66 *See* JONATHAN JACOBS, ARISTOTLE'S VIRTUES 112 (2004).

67 ARISTOTLE, *supra* note 49, bk. VI, ch. 11, at 185–86.

68 Richard Bodeus, *Aristotle*, *in* THE COLUMBIA HISTORY OF WESTERN PHILOSOPHY 52, 67 (Richard W. Popkin ed., 1999).

Aristotle classified the virtues into two distinct categories: the moral virtues and the intellectual virtues.[69] The moral virtues are those virtues that perfect the part of the soul which can be controlled or influenced by rationality.[70] Aristotle emphasized eleven moral virtues: temperance, courage, industriousness, generosity ("magnanimity"), pride, good temper ("mildness"), truthfulness, friendliness, modesty, justice, and pleasantness (being "ready witted").[71] The intellectual virtues, for Aristotle, are those virtues that perfect the part of the soul which itself reasons, that is, the virtues that shape the capacity to reason. The five intellectual virtues are understanding (intuition), science, theoretical wisdom (philosophy), craft (the art of production), and practical wisdom.[72]

In the thirteenth century, St. Thomas Aquinas synthesized Aristotelian philosophy and Christian tradition in his treatise *Summa Theologica*.[73] For Aquinas, virtue is one of the necessary means by which a person is led to his perfection;[74] that is, achieving the beatific vision and coming to know God.[75] Aquinas agreed with Aristotle on what he termed the "human" virtues (both intellectual and moral) but added to Aristotle's framework the "theological" virtues of faith, hope, and charity.[76] Moreover, Aquinas grouped Aristotle's natural virtues into what he termed the four "cardinal" virtues—prudence, justice, temperance, and courage.[77] Aquinas saw all of Aristotle's other moral virtues as subsumed or grouped within one of these four cardinal virtues.[78]

In a grouping reminiscent of Aquinas, modern virtue ethicist Alasdair MacIntyre has seized upon justice, courage, and honesty as the most important virtues for individuals striving to be responsible moral agents.[79]

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69 PRIOR, *supra* note 49, at 156.

70 ALASDAIR MACINTYRE, A SHORT HISTORY OF ETHICS 64 (1998).

71 ARISTOTLE, *supra* note 49, bk. II, ch. 5–9, at 115–22; *id.* bk. IV, ch. 3, at 148–51; *id.* at 307 (table).

72 JACOBS, *supra* note 66, at 131; *see* ARISTOTLE, *supra* note 49, bk. VI, ch. 3, at 178–79.

73 THOMAS AQUINAS, SUMMA THEOLOGICA (Fathers of the English Dominican Province trans., Benzinger Bros. 1974).

74 *Id.* pt. I-II, q. 79, art. 4; *id.* pt. I-II, q. 56, art. 1.

75 *Id.* pt. I-II, q. 3, art. 8.

76 *Id.* pt. I-II, q. 58, art. 3 at 835; *id.* pt. I-II, q. 62, art. 3 at 852–53.

77 *Id.* pt. I-II, q. 61, art. 2, at 847.

78 *Id.* pt. I-II, q. 61, art. 3, at 847.

79 MACINTYRE, *supra* note 29, at 191. In *After Virtue*, MacIntyre criticizes as "emotivist" all contemporary moral debates. *Id.* at 18–22. MacIntyre believes that the assertion that something is the "right thing to do" is nothing more than expression of approval or disapproval of that conduct. *Id.* at 19–20. According to MacIntyre, debates between rights and utility, or freedom and equality, can have no rational end because they rest on different premises of what is good. *Id.* at 21. MacIntyre believes that utilitarian and

For the purposes of this Article, I intend to analyze these three key virtues identified by MacIntyre, in addition to the "cornerstone" Aristotelian and Thomistic virtue of practical wisdom (or "prudence"). I will discuss what it means for a prosecutor to possess the virtues of justice, courage, honesty, and prudence. And, in particular, I will examine how these virtues may shape the conduct of a prosecutor confronted by the three hard ethical questions posed at the beginning of this Article.

Before I begin the discussion, let me first define the four key virtues that will be the focus of my argument:

Justice. Aristotle identified justice as the "complete virtue," and spent all of Book V of *Nicomachean Ethics* discussing what it means to be a just person.[80] Aristotle distinguished between universal justice—which is the complete or perfect virtue ("kratiste")—from particular justice, which is a moral virtue on par with courage, temperance, etc.[81] Universal justice is concerned with law abidingness and compliance with rules.[82] Particular justice—the context in which I will use the term throughout this Article—is concerned with right relations towards others.[83]

For Aristotle, particular justice is the virtue by which a person "lives in right relation with his neighbor."[84] Individuals must recognize each other's existence and their right to co-exist. Justice occurs where there is reciprocity, that is, where "every person renders to one another those concerns which each has for the self."[85] Aristotle believed that justice was closely related to friendship. One can have friendship for pleasure, for advantage, or for good. The best and highest form of friendship is a friendship of the third variety. Where individual *A* is concerned for individual *B* for *B*'s own sake, rather than for the result accruing to *A*, *A* essentially recognizes *B* as another self.[86] Justice is the virtue that prompts

deontological arguments are morally incoherent, and the emotivist picture of the self has no social content because the rationality of judgment lies in the reasonableness of the starting premise. *Id.* at 12–15. MacIntyre argues that the key to leading a virtuous life is *intelligibility*; we are all authors of our own narratives, and intelligibility (the reasons for our choices) is the key link between action and the narrative of our life. *Id.* at 209. An intelligible narrative account makes sense of one's decisions. *Id.* at 209–10. For MacIntyre, the only kind of coherent narrative that links birth to death is a quest for the good. *Id.* at 186–91.

80 ARISTOTLE, *supra* note 49, bk. V, at 158–76; PRIOR, *supra* note 49, at 168.

81 DAVID O'CONNOR, VIRTUE AND COMMUNITY 8 (1985).

82 *Id.* at 23.

83 *Id.*

84 JEAN PORTER, THE RECOVERY OF VIRTUE, 31–32 (1990); *see* ARISTOTLE, *supra* note 49, bk. V, ch. 1, at 158–60.

85 Araujo, *supra* note 56, at 442.

86 *See* ARISTOTLE, *supra* note 49, bk.VIII, ch. 3, at 210–12.

me to act for the sake of another's well being, rather than just my own.[87]

Bernard Williams equated the Aristotelian notion of justice (justice "in the particular") to "fairness."[88] According to Williams, an unjust person is one who is "not . . . affected or moved by considerations of fairness."[89] The vice of injustice is seen as "settled indifference" to others.[90] For the remainder of this Article, I will adopt Bernard Williams's construction of justice as fairness, and use the term "fairness" as a synonym for justice to avoid the obvious tautology that would result from attempting to identify the contours of a prosecutor's duty to "seek justice" with reference to this cardinal virtue.

Courage. Courage is the virtue that enables an individual to do what is good notwithstanding harm, danger or risk to themselves.[91] For Aristotle it was the mean between cowardice and false confidence, or "boldness."[92] Alasdair MacIntyre saw courage as related to care and concern for others: "If someone says that he cares for some individual, community or cause, but is unwilling to risk harm or danger on his, her or its own behalf, he puts in question the genuineness of his care and concern."[93] Similarly, Reed Loder has captured the virtue of courage as the ability to "[w]ithstand[] pressure, even at some personal sacrifice."[94] With respect to the conduct of public officials, the virtue of courage is also implicated in the willingness to sacrifice short term benefits for longer range goals; that is, courage may enable a prosecutor, legislator or judge to "strike a proper balance between the immediate demands and concerns of the public and the long-range public good."[95]

Honesty. Aristotle recognized the importance of being truthful in speech and action.[96] For Aristotle, the excess of truthfulness was boastfulness and the deficiency of truthfulness was "self deprecation," with the virtue of honesty being the mean between these two vices.[97] In giving these examples, Aristotle clearly was focusing on truthfulness as important

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87 PRIOR, *supra* note 49, at 174–75.

88 BERNARD WILLIAMS, *Justice as Virtue*, *in* MORAL LUCK, *supra* note 40, at 83, 90.

89 *Id.* Williams disagreed with Aristotle that all injustice was motivated by "pleonexia"—the desire for more for oneself. *Id.* at 91. Williams thought that injustice could result from multiple motives, or from no motives at all. *Id.* at 93.

90 *Id*. at 93; *see also* Loder, *supra* note 28, at 860 (observing that one aspect of integrity involves "[r]especting other people and having concern for their interests").

91 ARISTOTLE, *supra* note 49, bk. III, ch. 9, at 137–38.

92 *Id.* bk. II, ch. 7, at 118–20; MACINTYRE, *supra* note 29, at 117–18.

93 MACINTYRE, *supra* note 29, at 192.

94 Loder, *supra* note 28, at 846.

95 Marie A. Failinger, *Can a Good Judge Be a Good Politician? Judicial Ethics from a Virtue Ethics Approach*, 70 MO. L. REV. 433, 466 (2005).

96 ARISTOTLE, *supra* note 49, bk. IV, ch. 7, at 155.

97 *Id.* bk. II, ch. 7, at 118–20.

to an individual's self assessment.[98] But this virtue also has important implications for an individual's assessment of external facts. Thomas Shaffer characterized the virtue of honesty as "tolerance for ambiguity."[99] A person is honest if he is comfortable with incongruity, and is willing to accept circumstances and other people for the way they are, rather than feeling the need to make them consistent with his own predispositions. An honest person is thus open to evidence that discredits his own ideas or world view.[100]

Prudence. Prudence, or "practical wisdom," is the one intellectual virtue which Aristotle also considered to be a moral virtue. In fact, Aristotle treats practical wisdom as the "keystone of all virtue."[101] Ethical judgment ends in action for Aristotle through the process of practical wisdom, or "phronesis."[102] For Aristotle, the moral virtues are those characteristics of the soul that allow us to desire and to select good ends.[103] But practical wisdom is the virtue that allows us to take aim and decide on a course of action to achieve these good ends.[104] Practical wisdom enables one to act at the time "when one should," "in the way one should," and "for the reasons one should."[105]

In Aristotle's view, the gap between priority rules and action is bridged by the virtue of practical wisdom.[106] Arriving at the ability to know and recognize what is good cannot be accomplished without this intellectual virtue. All choice involves consideration and deliberation of the alternatives.[107] Practical wisdom is the ability to deliberate well—to recognize and perceive proper ends, and then to select those means that are likely to achieve such ends.[108] Deliberation toward *any* end is cleverness; deliberation toward a *good* end is practical wisdom.[109]

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98 Also focusing on the integrity of an individual's internal self assessment, Gabriele Taylor has argued that hypocrisy and self deception are two specialized vices of dishonesty, because they allow an individual to deceive himself about his authentic constitution. Gabriele Taylor, *Integrity*, *in* THE ARISTOTELEAN SOCIETY 143, 144–47 (Supp. LV 1981).

99 Shaffer, *supra* note 44, at 33.

100 *See* Loder, *supra* note 28, at 856.

101 MACINTYRE, *supra* note 70, at 74.

102 ARISTOTLE, *supra* note 49, bk. VI, ch. 5, at 179–80; *id.* at 455 (word list); *see* Solum, *supra* note 60, at 1385.

103 ARISTOTLE, *supra* note 49, bk. VI, ch. 13, at 189.

104 *Id.* bk. VI, ch. 12, at 187.

105 *Id.* bk. II, ch 6, at 117.

106 *Id.* bk. VI, ch. 13, at 188.

107 ARISTOTLE, *Eudemian Ethics*, *in* 2 THE COMPLETE WORKS OF ARISTOTLE 1922, 1942 (Jonathan Barnes ed., 1984).

108 ARISTOTLE, *supra* note 49, bk. VI, ch. 13, at 189; *see* DANIEL MARK NELSON, THE PRIORITY OF PRUDENCE 42–43 (1992); PRIOR, *supra* note 49, at 178.

109 Philippa Foot, *Virtues and Vices*, *in* VIRTUE ETHICS 105, 109 (Stephen Darwall ed.,

Aristotle recognized that in certain situations the moral virtues may be in conflict (for example, courage may point in one direction and temperance in another).[110] However, Aristotle believed that practical wisdom was the key to discerning a proper course of action in those instances where the virtues might conflict.[111] What might be cowardice in one situation might be courage in another. For Aristotle "[t]he virtues of character are unified through practical wisdom."[112] "Virtuous action cannot be specified without reference to the judgment of a prudent man."[113] This emphasis on context is distinctly Aristotelian.[114] To be a virtuous person requires "sensitivity to the salient features of [particular] situations," and not merely the capacity to apply or follow explicit rules.[115]

Practical wisdom involves a three-step process—deliberation,

2003).

110 Crisp, *supra* note 33, at 17. St. Thomas Aquinas, unlike Aristotle, believed that the natural virtues were unified. *Id.* Alasdair MacIntyre criticizes Aquinas's account of the unity of the virtues, and suggests that different ethical outcomes are possible for two virtuous actors. A conflict in virtues does not just come from defect in character. MACINTYRE, *supra* note 29, at 197. It is possible for two virtuous actors to apply practical wisdom and to come to two different conclusions, although frequently practical wisdom will lead them to view competing claims the same way in context. *Id.* at 200.

111 ARISTOTLE, *supra* note 49, bk. VI, ch. 13, at 189; *see also* Lorie M. Graham, *Aristotle's Ethics and the Virtuous Lawyer*, 20 J. LEGAL PROF. 5, 15 (1995) (discussing the need to integrate practical reason to attain complete virtue).

112 JACOBS, *supra* note 66, at 124.

113 MACINTYRE, *supra* note 70, at 66.

114 Aristotle recognized that one person's virtue is not commensurate with another's, and that some people are more capable than others. The degree of the strength in each one's life "depends on the gifts each one has." Keenan, *supra* note 49, at 122. Thus "to the extent one strives as best one can, one is good." *Id.* Each person may pray for the absolute good to come within his grasp, but what he should be actively pursuing is the good he can obtain. *See* Bodeus, *supra* note 68, at 68. Modern virtue theorists such as Alasdair MacIntyre and Rosalind Hursthouse use these parts of Aristotelian theory to support relativistic claims on moral reasoning. *See* Rosalind Hursthouse, *Normative Virtue Ethics*, *in* HOW SHOULD ONE LIVE?, *supra* note 33, at 19, 35. Modern virtue ethicists thus admit the possibility of cultural relativism—for example, different cultures have different notions of truthfulness. *See* Robert Wachbroit, *A Genealogy of Virtues*, 92 YALE L.J. 564, 576 (1983). MacIntyre, like Wachbroit, recognized that different societies emphasize different virtues over time. Virtues may vary across traditions, but within traditions virtue theory could lead individuals to moral right. *See* MACINTYRE, *supra* note 29, at 193 (noting that virtuous "practices . . . might flourish in societies with very different codes; what they could not do is flourish in societies in which virtues were not valued").

115 Crisp, *supra* note 33, at 17. Aristotle did not argue that every moral decision involves intense intellectual effort and a long period of deliberation. On the contrary, Aristotle believed that a person of the highest level of moral achievement often could deliberate quickly, because he is able to operate more from habit than anguished self examination. ARISTOTLE, *supra* note 49, bk. VI, ch. 9, at 184.

judgment, and decision.[116] It is a dialectic rather than a purely deductive approach.[117] Individuals who possess the virtue of practical wisdom are reflective;[118] they are willing and able to deliberate well about what it means to pursue the good in a particular circumstance.[119] A person who is good at deliberation combines both compassion (the power of generating feelings for potential outcomes, even those that affect others rather than himself) and detachment (the power to moderate or confine those feeling in balancing interests and making decisions between alternatives).[120] The prudent lawyer is able both to identify the salient features of particular situations, and then to synthesize the multiplicity of concerns at stake.[121]

In *The Common Law Tradition*, Karl Llewellyn argued that a judge's habits guide his method of interpretation and judicial reasoning.[122] In assessing what it means to be an impartial jurist, Llewellyn described the following attitude: "an idea of effort, of self denying labor, toward patience, toward understanding sympathy, toward [a] quest for wisdom in the result."[123] This depiction of the judicial thought process was essentially a celebration of the Aristotelian virtue of practical wisdom.[124] In many of their tasks, prosecutors perform quasi-judicial functions that require them to step out of a purely adversarial role.[125] That is, in certain areas of decisionmaking we expect prosecutors—like judges—to be impartial in assessing the propriety of potential courses of action, and to come to a decision only after careful and balanced deliberation about the public interest.[126]

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116 Perkins, *supra* note 49, at 200.

117 Amélie Oksenberg Rorty, *Introduction* to ESSAYS ON ARISTOTLE'S ETHICS 1, 2–3 (Amélie Oksenberg Rorty ed., 1980).

118 Loder, *supra* note 28, at 854.

119 CYNDI BANKS, CRIMINAL JUSTICE ETHICS 235–40 (2004); *see also* Scott FitzGibbon, *Marriage and the Ethics of Office*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 89, 107 (2004) (arguing that choice, consideration, and deliberation can only properly arise from a self-governing character).

120 ANTHONY KRONMAN, THE LOST LAWYER 74 (1993).

121 In his seminal 1993 book, Anthony Kronman lamented that good judgment is a trait of character no longer nurtured by the legal profession, either in the way we educate law students, the way we mentor and develop young lawyers in practice, or the way we structure and organize law firms. *Id.* at 165.

122 KARL N. LLEWELLYN, THE COMMON LAW TRADITION 53 (1960).

123 *Id.* at 47.

124 KRONMAN, *supra* note 120, at 217.

125 *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.10.1, at 759 (1986) (recognizing that the prosecutor's dual role of convicting the guilty and protecting the innocent "leaves the office much nearer that of a judicial officer than that of partisan advocate"); Fisher, *supra* note 12, at 236–38.

126 *See* Maria Collins Warren, *Ethical Prosecution: A Philosophical Field Guide*, 41 WASHBURN L.J. 269, 270 (2002).

How does an emphasis on practical wisdom differ from the so-called "new casuistry" approach to legal ethics? Casuistry has been defined as a "particularized, context-driven method" of ethical decisionmaking,[127] whereby one extrapolates from the principles underlying an ethical rule, and then determines the right course of action in gray areas by giving full consideration to the details of the situation and the motives and circumstances of the various actors involved.[128] But as proponents of new casuistry recognize, the proper exercise of casuistry requires not only attention to and reflection on the particulars of a concrete ethical dilemma, but also a form of expertise. Casuistry is not just going with your best "hunch" or intuition. Those who are successful at casuistry as a form of moral reasoning are those that have developed the wisdom necessary to develop considered moral judgments.[129] Casuistry and virtue theory thus share an emphasis on the importance of practical wisdom and experience. Where casuistry and virtue theory diverge, however, is on the issue of what personal attributes of the decisionmaker apart from wisdom (and perhaps the other intellectual virtues such as the ability to listen attentively and to reason) are necessary to considered moral judgment. Unlike casuistry, virtue ethics looks inward and emphasizes the importance of the good *character* of the decisionmaker.[130] For Aristotle and other virtue ethicists, a person's character is akin to the muscles of an athlete; successful performance in any particular endeavor depends not only on attention to the external circumstances of the contest, but also on conditioning and development of the inner self.

I will now turn to the three ethical questions I posed at the beginning of this Article. A close scrutiny of the context in which such decisions are made can help explain why real life pressures often obscure a commitment to ethical judgment. In the criminal justice system, prosecutors must contend with multiple actors with competing claims in the drama—including the victim, police officers, the defendant, and other witnesses. The prosecutor must also maintain good working relationships with numerous stakeholders in the system—including the judge, other court personnel, law enforcement agencies, and informants. Prosecutors face

127 Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489, 492 (1999).

128 *See* Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1697–98 (1991) ("Ethical systems emerge from this network of relationships when we seek to resolve and explain our resolutions of the quotidian dilemmas that we encounter in the complex, nuanced, temporal context in which they arise. This ethical theory, then, responds to the experiences central to daily personal situations and requires reflection on such situations to develop moral consciousness.").

129 Tremblay, *supra* note 127, at 522.

130 For a further discussion of the differences between casuistry and virtue ethics, see *infra* note 293 and accompanying text.

external political pressure from a concerned public and the press, and internal pressures from a boss who is typically an elected public official. Dynamic pressures within the criminal justice system also affect a prosecutor's ability to do his job properly; daunting workloads and under-funded offices typically allow prosecutors little time to make nuanced decisions in particular cases. Finally, every decision is riddled with epistemological problems; although prosecutors must make factual assessments quickly and constantly, they seldom have all the information needed to make difficult choices. In light of these myriad tensions and limitations, I will demonstrate that rules of professional responsibility do not and *cannot* direct moral action in any of the three complex areas I will describe. However, a renewed focus on virtue (and particularly the virtues of fairness, courage, honesty, and prudence) can provide meaningful guidance for conscientious prosecutors striving to do what is right.

II. THE PROBLEM OF THE TURNCOAT ACCOMPLICE

Assistant United States Attorney Thomas Marks is prosecuting three individuals charged with distributing a large quantity of cocaine (five kilograms) and conspiracy. The defendants were arrested after a so-called "reverse sting" operation, whereby an undercover officer sold five kilograms of cocaine to the defendants for $75,000. When one of the defendants handed the undercover officer the money and took possession of the cocaine, the undercover officer gave the surveillance team a signal, and they moved in to effectuate the arrests of all three individuals.

Under the federal sentencing guidelines, each defendant is facing a minimum mandatory term of imprisonment of ten years. Each defendant played a somewhat different role in the transaction and the negotiations leading up to the exchange. Defendant #1 appeared to law enforcement to be the primary ringleader of the enterprise; each of the meetings to discuss the transaction occurred at his used car business, and he played the largest role in negotiating the price, quantity, and other terms of the sale. According to DEA agents and their informants, Defendant #1 is the leader of an organization that moves approximately twenty kilograms of cocaine per month and then launders the proceeds through the car dealership. Defendant #2 appeared to be another key player in the enterprise, acting as Defendant #1's lieutenant. During negotiations for the sale of cocaine he made several inculpatory statements (captured on tape) indicating his knowledge of the cocaine business and his plans to package and resell the drugs. Defendant #2 has no prior criminal record. Defendant #3 acted primarily as a lookout during the transaction. The government clearly has enough to convict Defendant #3 of drug trafficking on an accomplice theory (he

drove the other two defendants to the scene of each prior meeting, and on the date of the sale frisked the undercover officer when he walked into the used car business and then stood guard by the door). However, the DEA does not think Defendant #3 was a substantial player in the enterprise.

Defendant #1 and Defendant #2 have no prior criminal records. Defendant # 3 has a significant prior record of violent crime—including convictions for assault and battery with a dangerous weapon, domestic violence, firearm possession, and stalking. He has served two separate terms in state prison.

The lawyer for Defendant #2 approaches AUSA Marks and informs the prosecutor that his client is willing to testify against Defendants #1 and #3 in exchange for a dismissal of the distribution count and a recommendation of a short jail term on the conspiracy count.

Should the prosecutor pursue such a deal?

Given that well over ninety percent of criminal cases are resolved by plea bargains,[131] it is somewhat surprising that plea bargaining in criminal cases is almost completely unregulated as a matter of professional responsibility. On the particular subject of granting leniency to a codefendant in exchange for cooperation, neither the text of Model Rule 3.8 nor the ABA's Criminal Justice Standards provide any direction whatsoever to conscientious prosecutors searching for guidance. The scholarly literature is similarly unhelpful. While much has been written both on the repercussions to a defendant when the government enters into a cooperation agreement with an accomplice witness[132] and the procedures that must be followed,[133] the more fundamental issue of *when* it is ethically appropriate to grant leniency in exchange for cooperation has received little academic attention.[134]

One might legitimately ask whether cooperation agreements present an "ethical" issue at all. Assuming that an accomplice seeks to obtain leniency by agreeing to testify against a codefendant, the decision of whether or not to allow him to do so certainly implicates issues of trial strategy. Will the accomplice's testimony be believed by the jury? Does

131 *See* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH 233 (2003).

132 *See, e.g.*, Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1, 40–57 (1992).

133 *See, e.g.*, R. Michael Cassidy, *"Soft Words of Hope:"* Giglio*, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1141 (2004) (outlining safeguards that must be followed after reaching a cooperation agreement).

134 *See* Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337, 1350 (2004).

the government need the testimony to firm up its case against the remaining defendants? Will it likely force a plea from the principal defendant, thus sparing the government the expense of a trial? These are all strategic questions related principally to the issue of whether bargained-for testimony will make the government's case stronger against other defendants.

The decision whether to enter into a cooperation agreement with an accomplice witness also implicates issues of public policy. How dangerous and morally culpable is the accomplice? Would public safety be compromised if he or she were spared jail time in exchange for cooperation? When the prosecutor makes an agreement with an accomplice in exchange for testimony, he is making an implicit decision that the societal benefits to be achieved from convicting a more culpable actor outweigh the costs associated with granting leniency to a confederate. Climbing "up the chain" of a criminal enterprise by using a smaller fish to catch a bigger fish may serve the public interest by assuring retribution against the most serious actor. "If you are going to try the devil, you have to go to hell to get your witnesses."[135]

But does striking a deal with an accomplice in exchange for cooperation implicate the *ethics* of the prosecutor? I submit that that it does, for at least three reasons. First, offering leniency to an accomplice witness in exchange for cooperation gives the witness a powerful incentive to fabricate his testimony in order to curry favor with the government.[136] Accomplices have a natural incentive to minimize their own involvement in the enterprise and to exaggerate the responsibility of others.[137] Offering them a "deal" in exchange for cooperation against cohorts magnifies this incentive, because the accomplice implicitly understands that he is being granted leniency only because the government believes that he is less culpable than other defendants. The witness is thereafter subtly coaxed—if

135 State v. Sims, 588 S.E.2d 55, 64 (N.C. Ct. App. 2003).

136 *See* Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 932 (1999). In *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999), the Tenth Circuit ruled that a promise not to prosecute an accomplice in exchange for his cooperation against others was an offer of a thing "of value" in exchange for testimony in violation of the federal anti-gratuity statute. *Id.* at 1350–51. "The judicial process is tainted and justice cheapened when factual testimony is purchased, whether with leniency or money." *Id.* at 1347. This ruling was later reversed by an *en banc* opinion of the Tenth Circuit, in which the court concluded that Congress did not intend to limit the "sovereign prerogative" of the government in making plea bargains by using the term "whoever" in the federal anti-gratuity statute. *Singleton*, 165 F.3d at 1311.

137 *See* Steven M. Cohen, *What is True? Perspectives of a Former Prosecutor*, 23 CARDOZO L. REV. 817, 822 (2002).

not explicitly coached—into relating a version of facts consistent with that view of the criminal hierarchy.[138] This implicates the prosecutor's obligation of candor to the tribunal, and his responsibility not to put a witness on the stand when the prosecutor knows or it is obvious that the witness will perjure himself.[139]

Second, in certain circumstances it may be fundamentally immoral to offer a favorable deal to an accomplice solely due to his access to critical information. Where the accomplice has assisted in a heinous act (e.g., a brutal child murder), does any amount of cooperation against confederates warrant a reduction in the deserved punishment? Allowing a defendant to "buy" his way out of punishment with future cooperation may in certain circumstances undermine the retributive and deterrent purposes of the criminal law.

Finally, pegging punishment to cooperation may also lead to situations where codefendants who are more deeply involved in the criminal enterprise (and therefore likely to have greater access to crucial information) are treated more favorably than lower-level accomplices, notwithstanding that the mid-level-player-turned-witness is more morally blameworthy.[140] If we accept the premise that bargained-for outcomes in criminal cases should at least bear some relationship to the defendant's level of culpability, cooperation deals at times can lead to morally skewed results.[141]

Notwithstanding these ethical implications of accomplice bargaining, there are very few systemic checks on a prosecutor's discretionary decision to offer leniency in exchange for cooperation. The Supreme Court has taken the position that the Due Process Clause of the Fifth Amendment is not violated where the government uses bargained-for testimony from an accomplice witness at a criminal trial.[142] The Court adheres to the view

138 *See* Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers of Prosecutorial Leniency and Immunity Deals*, 23 CARDOZO L. REV. 875, 884 (2002).

139 *See* MODEL RULES OF PROF'L CONDUCT R. 3.3, 3.4 (2004).

140 *See* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 212 (1993) (citing cooperation paradox with minimum mandatory penalties, which can lead to harsh penalties for relatively minor players with no information to offer the government).

141 *See, e.g.*, Marcia Chambers, *When Law Prevents Justice*, NAT'L L.J., Mar. 11, 1991, at 13.

142 Lisenba v. California, 314 U.S. 219, 227 (1941). However, some circuits have taken the position that due process safeguards may be violated where the prosecutor conditions an offer of leniency on testimony leading to the conviction of a named individual. *See* United States v. Peters, 791 F.2d 1270, 1300–01 (7th Cir. 1986); United States v. Dailey, 759 F.2d 192, 199 (1st Cir. 1985). *See generally* United States v. Cervantes-Pacheco, 826 F.2d 310, 313 (5th Cir. 1987) (discussing per se rule of exclusion of testimony where the government

that three primary safeguards in this area—disclosure by the prosecutor to defense counsel of any promises, rewards, and inducements made to the witness,[143] the right of defense counsel to cross-examine the witness for bias,[144] and the judge's obligation to instruct the jury that they should evaluate an accomplice's testimony with caution[145]—are together sufficient to protect the defendant from potential unfairness.

Democratic processes similarly provide very little check on a prosecutor's decision to "flip" an accomplice. Most prosecutors on the state and local level are elected officials.[146] While the news media may sometimes question the wisdom and fairness of deals made with accomplice witnesses,[147] the public does not seem to react to such news accounts with alarm or dismay, at least at the voting booth. It is exceptionally rare in this country for an incumbent prosecutor to be voted out of office.[148] The electorate may assume that cooperation agreements are inappropriate subjects for lay scrutiny, because the prosecutor has access to behind-the-scenes information not available to the average citizen. Or, high-profile convictions that follow accomplice bargaining may foster public perception of prosecutorial competence and zeal.

On the question of "how much" of a discount to award to a cooperating accomplice, courts too are reluctant to intrude on what they perceive to be the prosecutor's executive prerogative,[149] notwithstanding that ultimate sentencing authority rests with the court.[150] Issues of the value of cooperation and the importance of the testimony to law enforcement objectives are considered particularly ill-suited to judicial review.[151] Where the government seeks to dismiss some or all of the

compensated the witness).

143 Giglio v. United States, 405 U.S. 150, 154–55 (1972).

144 Hoffa v. United States, 385 U.S. 293, 311 (1966).

145 *Id.* at 312.

146 William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533–34 (2001).

147 *See, e.g.*, J.M. Lawrence, *Hit Man May Hit Street: Prosecutors Go Easy on Martorano*, BOSTON HERALD, May 14, 2004, at 4; Harvey A. Silverglate, Op-Ed., *Disturbing Steps by Prosecutors*, BOSTON GLOBE, Feb. 14, 2004, at A15.

148 *See* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 152–53 (2004) (noting that incumbent prosecutors seeking reelection in this country are often unopposed, and that "the public's capacity to hold prosecutors accountable for their actions has thus become more fiction than fact").

149 *See* The Whiskey Cases, 99 U.S. 594, 603 (1878); United States v. Gonzalez, 58 F.3d 459, 462–63 (9th Cir. 1995).

150 *See* Cohen, *supra* note 137, at 820.

151 *See* H. Richard Uviller, *No Sauce for the Gander: Valuable Consideration for Helpful Testimony from Tainted Witnesses in Criminal Cases*, 23 CARDOZO L. REV. 771,

charges against an accomplice as a reward for favorable testimony, courts are relatively powerless to deny such a motion.[152] Where the government offers to recommend a reduced sentence on the crimes charged against the accomplice, it is rare for a judge to second guess the prosecutor's discretion and deny the requested leniency.[153] As one commentator has noted about the federal sentencing system, "Congress has authorized and the [sentencing] commission has implemented, a system in which the determination of whether a 'substantial assistance' discount is to be granted is left solely to the unreviewed discretion of the prosecutor."[154]

Attorney conduct rules also provide little constraint in this area. State rules of professional responsibility in effect in most jurisdictions preclude a lawyer from paying a "fact witness" (i.e., a nonexpert) a fee *for testifying*, or conferring a reward on a witness based on the *content* of his testimony.[155] But prosecutors are savvy enough to avoid these direct

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779–80 (2002).

152 Under Federal Rule of Criminal Procedure 48(a), "leave of court" is required before the United States Attorney may dismiss an indictment. In *Rinaldi v. United States*, 434 U.S. 22 (1977), the Supreme Court recognized that this leave of court requirement altered the common law rule that prosecutors have unfettered authority to issue a nolle prosequi; however, the Court ruled that this requirement was designed primarily to protect the defendant against "prosecutorial harassment," such as charging, dismissing, and recharging. *Id.* at 29 n.15. The Court in *Rinaldi* expressly reserved judgment on the issue of whether a trial court may ever deny an *uncontested* motion to dismiss. *Id.* However, several circuit courts subsequent to *Rinaldi* have ruled that a district court may deny an uncontested to motion to dismiss under Rule 48(a) only where dismissal is clearly contrary to manifest public interest, such as where "the prosecutor appears motivated by bribery, animus towards the victim, or a desire to attend a social event rather than trial." *In re* Richards, 213 F.3d 773, 787 (3d Cir. 2000) (citing United States v. Hamm, 659 F.2d 624, 630 (5th Cir. 1981)); *see also In re* United States, 345 F.3d 450, 453 (7th Cir. 2003) (reviewing authorities and stating that no federal appellate court has ever upheld a district court's denial of an uncontested motion to dismiss).

153 *See* Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 125–28 (1994).

154 David Boerner, *Sentencing Guidelines and Prosecutorial Discretion*, 78 JUDICATURE 196, 200 (1995). Under the federal sentencing guidelines, a judge may sentence an offender below the designated sentencing range for a particular offense if the prosecutor files a motion acknowledging that the defendant "provided substantial assistance" in the investigation or prosecution of another. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2005). It is rare for the federal courts to refuse a downward departure after the government has filed a substantial assistance motion. *See* United States v. Organek, 65 F.3d 60, 63 (6th Cir. 1995); *see also* United States v. Nicholson, 231 F.3d 445, 451 (8th Cir. 2000) (affirming the district court's downward departure despite the defendant's nearly contemptuous behavior).

155 MODEL CODE OF PROF'L RESPONSIBILITY DR 7-109(c) (1980) ("A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case."); MODEL RULES OF PROF'L

prohibitions, by conditioning an offer of leniency on the witness's divulgence of truthful information and cooperation with the investigation and prosecution of others, rather than on the precise content of future testimony.[156]

If there is any ethical check on this aspect of prosecutorial discretion, it must be gleaned from the "minister of justice" admonition of Rule 3.8. Yet this directive arguably may point in opposite directions with respect to cooperating accomplices, depending on the facts of the case and the context of the bargaining. Justice may demand that the "big fish" be convicted; if the accomplice's testimony allows the government to break a difficult case, then perhaps it has promoted, rather than impeded, justice. After all, the prosecutor cannot prevent the act that has already been committed; perhaps the most he can do is assure that all responsible parties are brought to justice for their roles in the enterprise.[157] However, justice may also demand that the cooperating accomplice pay a sufficient price for his misdeeds; granting too great a discount to him in exchange for cooperation may result in the accomplice escaping appropriate punishment. Overly generous cooperation agreements may also impede justice in the case of remaining codefendants by promoting perjured testimony at their upcoming trials.

Every decision whether to "flip" an indicted co-conspirator requires a contextual assessment of the strengths and weakness of the case, the relative culpability of the codefendants, the credibility of the accomplice and whether his testimony can be corroborated, the prior criminal records of both the accomplice and the other codefendants, and a balancing of law enforcement priorities and resources. The U.S. Attorney's Manual—a nonbinding policy manual for federal prosecutors issued by the Department of Justice—summarizes the factors that a prosecutor should consider in determining "whether a person's cooperation may be necessary to the public interest."[158] Section 9-27-620 of this manual suggests that a prosecutor should weigh all relevant considerations, including:

> 1. The importance of the investigation or prosecution to an effective program of law enforcement;
>
> 2. The value of the person's cooperation to the investigation or prosecution; and
>
> 3. The person's relative culpability in connection with the offense or offenses

CONDUCT R. 3.4(b) (2004); *id.* cmt. 3 ("The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying . . . ."); *see also* United States v. Singleton, 165 F.3d 1297, 1313–14 (10th Cir. 1999) (quoting MODEL RULES OF PROF'L CONDUCT R. 3.4 cmts. 1, 3).

156 *See* Saavedra v. Thomas, No. 96-2113, 1997 WL 768288, at *1 (10th Cir. Dec. 12, 1997); Cassidy, *supra* note 133, at 1137–38.

157 *See* Levine, *supra* note 134, at 1366.

158 U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION § 9-27.620 (1993).

> being investigated or prosecuted and his/her history with respect to criminal activity.[159]

While this summary is a useful guidepost, obviously it would be both ineffectual and unenforceable as an ethical norm, because highly subjective determinations such as relative value and relative culpability are each components of the overall equation.

These are the sort of difficult decisions that even the most seasoned prosecutors lose sleep over, particularly in cases involving violent crimes such as murder or rape.[160] Although most cooperation decisions are subject to internal checks within a prosecutor's office—such as obtaining a supervisor's approval before a substantial assistance motion may be filed or an indictment may be dismissed[161]—these safeguards only bump an individual discretionary decision to a higher level of scrutiny; they do not eliminate prosecutorial discretion altogether. Whether any prosecutor—trial attorney or supervisor—appropriately recognizes and synthesizes the multifarious factors at stake is dependent upon the internal moral compass of the decisionmaker. That, in turn, depends on the presence or absence of virtue.

What might the virtues teach us about an ethical approach to this dilemma? First, a prosecutor must have courage to hold out for an appropriate disposition from any accomplice who seeks to leverage cooperation in exchange for leniency. Courage is the virtue that reinforces an actor's will to take appropriate action notwithstanding potential adverse consequences.[162] Cooperation deals are usually commenced with the codefendant providing a nonbinding "proffer" of information to police officers, which reveals information in the codefendant's possession which

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159 *Id.* § 9.27.620.

160 *See* Andrea Estes, *Black Leaders: Hit Man Deal Shows System Favors Whites*, BOSTON HERALD, Sept. 29, 1999, at 16 (discussing how U.S. Attorney agonized over whether to make cooperation agreement with mafia hitman); *see also* Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 559 (1999) (explaining that difficulties in exercising discretion come "in evaluating those factors that are not defined by statute, including the severity of the crime, the defendant's role in the crime, the defendant's past and possible future cooperation, injury to the victim, complexity in trying the case and the likelihood of success").

161 *See, e.g.*, Memorandum from John Ashcroft, Attorney Gen., Dep't of Justice, to All Fed. Prosecutors, Regarding Policy on Charging of Criminal Defendants (Sept. 22, 2003), *available at* http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm [hereinafter Ashcroft Memorandum]. The Ashcroft Memorandum requires federal prosecutors to charge the "most serious, readily provable offense" committed by the defendant, subject to certain exceptions (including where "substantial assistance" has been provided by the target and prior approval of a designated supervisor has been obtained). *Id.*

162 KRONMAN, *supra* note 120, at 145.

may be useful to the government's investigation.[163] In exchange for this proffer, the government typically promises not to use any information obtained during the proffer interview against the codefendant, should future negotiations break down.[164] After the proffer is completed, the prosecutor then evaluates the accomplice's information and begins negotiations with defense counsel about what consideration will be offered by the government in exchange for the accomplice's testimony. The defense attorney's opening demand might be wholly inappropriate given the nature of the crime and the magnitude of his client's involvement (e.g., "My guy will not testify unless you dismiss the trafficking charge and let him plead guilty to conspiracy with a suspended sentence."). A prosecutor must have the courage to say no and mean it; that is, he must be willing to try the case *without* the accomplice's cooperation, rather than obtaining his assistance at an exorbitant price. Only when a defendant accurately senses that the prosecutor is willing to risk an acquittal by going to trial against all of the codefendants on less than airtight evidence does the defendant have any incentive to agree to a disposition of the charges on reasonable terms.

This problem also implicates the virtue of honesty. First, any reduced charge which is negotiated with the accomplice should fairly reflect the gravity of the offense. Allowing the accomplice to plead guilty to a wholly artificial charge gives the public a false sense both of what occurred on the street and what is occurring in the court. For example, a defendant charged with trafficking in five kilograms of cocaine might be allowed to plead guilty to conspiracy to traffic in cocaine if his cooperation is deemed critical to the government's case. But should that same defendant be allowed to plead guilty to possession of cocaine for personal use? If the prosecutor is to be accountable at all to the public, plea agreements should not be fashioned to allow a defendant to plead guilty to a crime which is wholly inconsistent with the truth. Factual, rather than fanciful, dispositions are important not only for public confidence, but also to support the work of other stakeholders in the criminal justice system. Probation records enable law enforcement officials to accurately assess an individual's level of dangerousness should the same defendant later be a suspect in another criminal matter. Rap sheets which contain bogus dispositions are of little use to police officers, probation officers, or judges in later proceedings. For each of these reasons, the U.S. Attorney's Manual appropriately emphasizes that reduced charges against a cooperating witness in federal court should bear some reasonable relationship "to the nature and extent of [the defendant's] criminal conduct" and should have

163 *See* Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 15 (2003).

164 *Id.*

"an adequate factual basis."[165]

Honesty is critical to this decision in another important respect. A virtuous prosecutor will be cautious about giving the accomplice too great an incentive to lie, and will build safeguards into the plea bargaining process to protect against perjury. One way prosecutors typically attempt to promote truth rather than falsity is to corroborate key details of the accomplice's version of events with physical evidence, or with testimony from nonbiased witnesses. In the absence of some such corroboration, the prosecutor cannot be confident that the accomplice is not falsely implicating others in exchange for leniency.[166] Of course, this insistence on corroboration presents an anomaly; if every detail of the codefendant's version of events could be independently corroborated, there would be no need to bargain for his cooperation in the first instance. In most situations, the value of an accomplice's testimony increases in *inverse* proportion to the information already in possession of the prosecutor; that is, accomplice cooperation is needed precisely because there are certain facts that cannot be proven without his testimony.[167] Nevertheless, one of the key factors the prosecutor must assess in determining whether to enter into a cooperation agreement with an accomplice is the reliability of the witness's story. This can only be tested if some aspects of the accomplice's version of events are corroborated in important respects.[168] In performing this credibility assessment, the prosecutor must view one of his primary responsibilities as acting as an agent of the truth.

A prosecutor striving for honesty can also structure the plea negotiations with the accomplice in a manner that promotes truth rather than falsehood. One common way to promote honesty is to condition the government's offer of leniency on the accomplice's obligation to tell the truth, and to give the government an express escape clause under any written agreement if the accomplice commits perjury.[169] The witness then appreciates that if he lies on the witness stand his deal with the government is canceled, and he may be punished not only for the offenses originally charged but also for the crime of perjury. Of course this check, while necessary, is not in and of itself sufficient to prevent accomplice fabrication. Perjury by an accomplice might be difficult to detect and prove; actors enmeshed in a criminal enterprise might be able to lie

165 U.S. DEP'T OF JUSTICE, *supra* note 158, § 9-27.430.

166 Many states have statutes in effect prohibiting the conviction of a defendant solely on the basis of uncorroborated testimony from an accomplice. *See* Hughes, *supra* note 132, at 31.

167 Cohen, *supra* note 137, at 822.

168 *See* John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174, 183 (1965).

169 Simons, *supra* note 163, at 17–19.

convincingly precisely because they know better than law enforcement officers which facts are independently verifiable and which are not.[170]

Other methods of structuring the plea negotiations can also help to promote truthful testimony. First, the prosecutor during the negotiation process should take care not to "horseshed" the witness into relating a particular version of events consistent with the prosecutor's theory of the case. Where the government withholds promises of leniency during initial interviews with the accomplice (e.g., "I don't believe you," "You are lying," "I know your partners distributed more cocaine than that," etc.), the prosecutor is sending a message that a deal will be struck with the accomplice only when he relates a version of facts more inculpatory of codefendants. This can lead to fabrication by desperate accomplices looking to curry favor with the government. Professor Ellen Yaroshefksy interviewed twenty-five former prosecutors on the subject of accomplice cooperation, and concluded that many prosecutors and criminal investigators approach witness interviews with rigid theories of guilt, causing them to 1) signal to cooperating witnesses what testimony is expected, and 2) fail to dig deeply for inconsistencies that might rebut this preconceived theory.[171] Due to the overwhelming pressure on an accomplice to please and to conform, perhaps the spirit—if not the express text—of the Model Code's antiperjury provision[172] should be construed to prohibit a prosecutor from affirmatively coaching an accomplice witness during proffer sessions.[173]

The prosecutor can also promote honesty by ensuring that defense counsel for the codefendants has the tools necessary to cross-examine any accomplice in order to expose bias or fabrication. This requires 1) having police officers or agents memorialize interviews with accomplices in writing, in order to allow for discovery of the witness's statements as they evolve and change over time;[174] and 2) disclosing all promises of leniency

170 Yaroshefsky, *supra* note 136, at 921.

171 *Id.* at 952–55.

172 MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (2004) ("A lawyer shall not . . . counsel or assist a witness to testify falsely . . . .").

173 Ross, *supra* note 138, at 886–88.

174 *Id.* at 888. *Compare* 18 U.S.C. § 3500 (2000) (obliging federal prosecutor to disclose at trial all written statements made or adopted by witness, or all "substantially verbatim" records of oral statements made contemporaneously with the interview), *with* Strickler v. Greene, 527 U.S. 263, 281–82 (1999) (requiring prosecutor to turn over prior inconsistent statements by witness, whether written or oral, if they are constitutionally material). Many prosecutors discourage investigative agents from writing official reports of accomplice witness interviews during the early stage of the proffer process because they anticipate that the witness's story will change over time and they do not want to create discoverable material. John G. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797, 1836 (2001). Some courts are beginning to respond to such

to the accomplice witness, whether formal or informal, written or oral.[175]

Fairness is also an important consideration that should motivate a virtuous prosecutor structuring plea negotiations with an accomplice witness. I have already discussed issues of fairness with respect to the victim (in terms of the honest selection of charges against a cooperating accomplice) and with respect to those defendants who will proceed to trial (in terms of full disclosure of exculpatory *Giglio* material). What about fairness to defendants who may want to cooperate with the government, but may have little useful information to provide? One concern with prosecutorial discretion in this area is the so-called "cooperation paradox"; that is, defendants who are more deeply enmeshed in the criminal milieu may be better able to leverage leniency for themselves than lower-level players.[176] Should a prosecutor enter into a deal with a mid-level player in exchange for his cooperation that results in the mid-level player serving less time in prison than a lower level player? In the hypothetical posed at the beginning of this Part, would the prosecutor be fulfilling his obligation as a "minister of justice" if Defendant #2 (the "lieutenant") served less time in prison than Defendant #3 (the "bodyguard")? Is the difference in their criminal records, coupled with the helpful testimony of the lieutenant, sufficient to justify such a disparity?

This tension between equity among codefendants in particular cases and sentencing uniformity across cases with respect to similar crimes is particularly acute where the defendants are charged with offenses carrying a minimum mandatory sentence. In those situations, for example, a federal judge has almost no discretion to impose a sentence on the defendant that is more lenient than the legislature has specified *unless* the defendant has provided substantial assistance.[177] Suppose in my hypothetical that the

intentional reticence in generating reports by requiring production of interview notes taken by law enforcement agents, whether or not they are formalized. *See* United States v. Sudikoff, 36 F. Supp. 2d 1196, 1202 (C.D. Cal. 1999) (ordering discovery of government's notes and summaries of statements made by cooperating witness during interviews); *cf.* Spicer v. Roxbury Corr. Inst., 194 F.3d 547, 556 (4th Cir. 1999) (finding that oral prior inconsistent statement during proffer session was impeachment material which should have been disclosed).

175 Cassidy, *supra* note 133, at 1171; *see also* Giglio v. United States, 405 U.S. 150, 154 (1972) (indicating that due process requires disclosure of promises, rewards and inducements to government witnesses).

176 Schulhofer, *supra* note 140, at 211–13.

177 In federal court, 18 U.S.C. § 3553(e) (Supp. III 2003) allows the judge to impose a sentence below the statutory minimum where the government makes a motion for a lower sentence on the basis of the defendant's substantial assistance in the investigation or prosecution of others. *See also* 18 U.S.C. § 3553(f) (2000) (giving judge discretion to deviate from minimum mandatory sentences called for in certain specified sections of the Controlled Substances Act even in the absence of substantial assistance if defendant has

bodyguard had no prior criminal record, and was willing to cooperate against his two codefendants but could provide little inside information about the organization not already available to the prosecution from other sources. Does justice demand that Defendant #3 still go to jail for ten years?

A virtuous prosecutor concerned about inequities flowing from the "cooperation paradox" has two possible options, both of which should be seriously considered in the interests of fairness. First, a prosecutor who legitimately believes that a lower level defendant has in good faith submitted to an interview with law enforcement and attempted to cooperate, but simply has little useful information to provide, could nonetheless credit the defendant for "substantial assistance" notwithstanding that his information was of little practical use to the government.[178] Ultimate determinations on cooperation should be made

only minor criminal record, the crime did not involve the use of a weapon, violence or serious bodily injury, the defendant played a minor role in the organization, and the defendant truthfully provided to the government prior to sentencing "all information and evidence the defendant has concerning the offense").

178 A government's "substantial assistance" motion in the federal system does not give the defendant a right to a downward departure. This motion is merely a precondition to a judge exercising discretion to depart from the sentencing guidelines. The ultimate decision of whether to depart and by how much to depart rests with the sentencing judge. *See* United States v. Casiano, 113 F.3d 420, 429–30 (3d Cir. 1997); United States v. Damer, 910 F.2d 1239, 1241 (5th Cir. 1990). For examples of situations where federal prosecutors have filed a substantial assistance motion and the trial court has nonetheless refused to allow a downward departure, see United States v. Busekros, 264 F.3d 1158, 1160 (10th Cir. 2001) (refusing to review ruling that defendant did not provide government "with any useful information"); United States v. Organek, 65 F.3d 60, 63 (6th Cir. 1995) (finding that sentencing court did not abuse its discretion in declaring that it was "not at all convinced" that willingness to testify against others if necessary was sufficient to warrant a substantial assistance departure). Professors Nagel and Schulhofer have criticized the wide latitude given to prosecutors in determining whether a defendant has provided substantial assistance, because this decision allows for biased judgments that may undercut the Federal Sentencing Guidelines' goal of uniformity:

> The problem with such equity judgments is that they are made by individual prosecutors without regard to the nationally set sentencing rules, thereby introducing sentencing disparity and compromising the uniformity and certainty goals of the guidelines. Further, such individually made equity judgments open the door to race, gender, and social-class bias, notwithstanding the good intentions of individual AUSAs hoping to "save" sympathetic defendants.

Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 535–36 (1992). My argument here is that the inevitable tension between uniformity among defendants across the system and fairness to individuals in particular cases militates in favor of some discretion. *See* Amie N. Ely, Note, *Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum's Curtailment of the*

based on the defendant's degree of involvement in the criminal enterprise and his willingness to assist in the investigation of others, not on mere *access* to information. Access to information is a double-edged sword that points as much toward aggravation as toward mitigation in terms of culpability. Whether the prosecutor can conscientiously represent to the court that the defendant has provided substantial assistance should turn on the cooperating defendant's efforts and good faith. If the government fairly perceives that during a proffer session an accomplice was feigning ignorance in order to protect others, then a substantial assistance departure would not be warranted.

Even where a lower-level defendant has not provided substantial assistance to the government, prosecutors striving for fairness may nonetheless structure their sentencing recommendations with respect to all of the defendants in a way that attempts to avoid inequity. Where the charges do not implicate a mandatory sentence, the prosecutor has flexibility to craft equitable sentencing recommendations for all defendants. Where the indictment charges an offense carrying a minimum mandatory sentence, concerns for fairness might prompt the prosecutor in appropriate situations to dismiss the indictment pending against the lowest level defendant, allowing him to plead guilty to a lesser offense not carrying a mandatory term of imprisonment.[179] A virtuous prosecutor will appreciate that a harsh minimum mandatory sentence for a low-level player in a criminal enterprise may sometimes result in *injustice* where a mid-level player has "flipped," and will thus take steps necessary to avoid that result.

To summarize, accomplice bargaining encourages prosecutors to view witnesses in instrumental terms; that is, as means to secure convictions against other defendants. The government's widespread reliance on this

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Prosecutor's Duty to "Seek Justice,*"* 90 CORNELL L. REV. 237, 248–49 (2004). If substantial assistance were narrowly defined, a prosecutor would have no power to alleviate the injustices that can result from the cooperation paradox discussed above. Certain individual United States Attorney's offices have enacted office guidelines constraining a prosecutor's discretion in making the "substantial assistance" determination, such as requiring that 5K1.1 motions be approved by a committee, requiring that a defendant earn a 5K1.1 departure by engaging in covert activity, or requiring that the defendant's assistance lead to the indictment of additional individuals. *See* Lee, *supra* note 153, at 125–28. To date, however, these policy enactments have been isolated, and there have been no efforts on a national level to eliminate altogether a prosecutor's discretion to file a substantial assistance motion.

179 For federal prosecutors, the requirement of the Ashcroft Memorandum that the prosecutor charge the "most serious, readily provable offense" may foreclose this option in the absence of substantial assistance. *See* Ashcroft Memorandum, *supra* note 161. For an attack on the Ashcroft directive and a spirited argument that a prosecutor's ethical obligation to "seek justice" assumes the existence of charging discretion, see Ely, *supra* note 178, at 250–51.

practice leads prosecutors to view convictions as objectives paramount to other values in the criminal justice system, such as accuracy, equity, and procedural fairness. This dynamic tends to obscure and at times obstruct ethical decisionmaking. My goal in this Part has been to demonstrate that a prosecutor who is attentive to the virtues of honesty, courage, fairness, and prudence will be better equipped to make difficult ethical choices about whether to offer leniency to a charged accomplice in the first instance, and about structuring a cooperation agreement and an ultimate sentence in order to promote true and fair results.

III. THE PROBLEM OF THE "APPARENTLY" TRUTHFUL DEFENSE WITNESS

Assistant District Attorney Jack Jones is prosecuting a defendant charged with assault and battery. The defendant is accused of beating the victim during a barroom brawl, causing substantial bodily injury.

The victim claims that he and the defendant entered into an argument while watching a football game one afternoon in a sports bar. Insults were traded, and the argument became heated. According to the victim, the defendant pushed him, at which point the victim tried to punch the defendant to protect himself, but missed. The defendant then pounced on the victim and severely beat him, causing a broken nose, two black eyes, and lacerations on the face.

Defendant claims self-defense. Defendant testifies that the victim started the fight by pushing the defendant off of his bar stool and by threatening him with a beer bottle. Who started the fight (and with what level of force) are the key issues in the case.

The defendant calls as a witness the bartender who was on duty at the time of the fight. Although the bartender did not witness the start of the physical altercation (he was serving patrons at the other end of the bar and his back was turned to the defendant and the victim at the time the fight started) he did hear some of the argument leading up to the fight. The bartender testifies on direct examination that the victim was drunk and belligerent, and that he was repeatedly insulting the defendant (including calling him derogatory names such as "moron" and "loser").

The prosecutor knows that the bartender has previously been convicted of receiving stolen property. Should the prosecutor impeach the bartender with this prior conviction on cross-examination?

A lawyer's duty of candor to the tribunal precludes him from offering testimony that he knows to be false.[180] However, when an advocate

180 MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2004).

impeaches a truthful witness on cross-examination he is not "offering" false evidence. He is discrediting testimony that has already been offered. Discrediting truthful testimony is not the equivalent of affirmatively presenting a false fact, although it certainly has a similar effect because it points the finder of fact away from truth and toward falsehood. The uneasy tension between two professional obligations—the duty of candor to the tribunal and the duty of vigorous advocacy on behalf of a client[181]—has led to heated debate about when it is ethically appropriate to impeach a truthful witness.[182]

Most scholars now agree that it is ethically appropriate, if not ethically required, for a criminal defense attorney to impeach a truthful witness.[183] However, these same commentators diverge on how they reach this widely-shared view. Some rest their argument on the presumption of innocence and the criminal defense lawyer's duty to insure that the government has met its burden of proof beyond a reasonable doubt.[184] Others suggest that the right to cross-examine a truthful witness grows out of the criminal defense lawyer's access to confidential information from his client, and the burden on the attorney-client relationship that would be imposed if defense counsel was required to forego cross-examination based on facts revealed to him in confidence.[185] Still other commentators argue that this latitude stems from the criminal defense attorney's duty of zealous advocacy, and the possible inference of guilt a jury might draw against a criminal defendant if counsel were to fail to vigorously cross-examine a government witness.[186] While not adopting any one of these three rationales to the

181 *Id.*; *see also id.* R. 1.1. Comment 2 to Rule 3.3 underscores this tension by recognizing that "[a] lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force."

182 *See* Robert P. Lawry, *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 DICK. L. REV. 563, 577–78 (1996). For an argument that in civil cases an attorney's duty of candor to the tribunal outweighs that attorney's duty of zealous advocacy during cross-examination, see WOLFRAM, *supra* note 125, § 12.4.5, at 650–51.

183 Lawry, *supra* note 182, at 577–78 (summarizing authorities).

184 David G. Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493, 1494 (1966); Warren E. Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 14–15 (1966). This position has come to be known as the "Burger-Bress" argument in support of allowing a criminal defense attorney to impeach a truthful witness.

185 Freedman, *supra* note 2, at 1474–75.

186 *See* David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER 83, 92 (David Luban ed., 1984) ("The goal of zealous advocacy in criminal defense is to curtail the power of the state over its citizens. We want to handicap the state in its power even legitimately to punish us."); *see also* United States v. Wade, 388 U.S. 218, 257–58 (1967) (White, J., concurring in part and dissenting in part) (arguing that the criminal defense attorney's mission bears little relation to the "search for truth.").

exclusion of others, the American Bar Association has agreed that a criminal defense attorney may properly impeach a truthful witness.[187] In its *Criminal Justice Standards*, the ABA states that "[d]efense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination."[188]

But what about the *prosecutor's* obligation in this situation? Few of the rationales for recognizing a criminal defense exception to a duty of candor during cross-examination support allowing a prosecutor to undermine the credibility of a person the prosecutor reasonably believes has testified truthfully. The prosecutor bears the burden of proof in criminal cases; his obligations point toward establishing reliable evidence, rather than discrediting it. The prosecutor does not have an individual client who can provide him with confidential information. Moreover, the prosecutor has a moral obligation as a minister of justice to try to ensure that the innocent are not convicted.[189] Inviting the jury to disbelieve relevant truthful testimony may increase the risk of an erroneous verdict. Finally, reasonable jurors may expect that a representative of the government will conduct himself with less partisanship than a private attorney;[190] thus, it may be less likely that a juror will draw a negative inference against the state's case from the government's failure to cross-examine a witness than it may from the same omission by defense counsel. Each of these differences may point to an obligation on the part of the prosecutor to observe greater restraint in cross-examination than the criminal defense attorney.[191] On these grounds, both Bruce Green and Samuel Levine have independently concluded that it is "clearly" unethical for a prosecutor to impugn the credibility of a witness known to be telling

187 One reference in the comments to the ABA Criminal Justice Standards (albeit in the section discussing the prosecution function) might suggest that the ABA found the Burger-Bress "burden of proof" argument most compelling in enacting Standard 4-7.6. "In this regard, it is believed that the duty of the prosecutor differs from that of the defense lawyer, who on occasion may be required to challenge known truthful witnesses of the prosecution in order to put the State to its proofs." ABA CRIMINAL JUSTICE STANDARDS, *supra* note 10, Standard 3-5.7 cmt.

188 *See id.* Standard 4-7.6(b).

189 Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 321–23 (2001) (arguing that the prosecutor has a legal and ethical duty to promote truth and to refrain from conduct that impedes the truth).

190 *Cf.* Berger v. United States, 295 U.S. 78, 88 (1935) (suggesting that ethical missteps by a prosecutor may influence the jury more than analogous ethical missteps by a defense attorney because of the jurors' comparative expectations about the two roles).

191 The Supreme Court has stated that a public prosecutor, as a servant of justice, has an obligation not to present false evidence or engage in other trial methods "*calculated to mislead the jury*." *Id.* at 85 (emphasis added).

the truth.[192]

While at first blush this imperative seems sound—especially in light of the "minister of justice" mandate of Rule 3.8—the Green/Levine conclusion may be both overly facile and overly broad. It is overly facile because it is rare for a prosecutor to "know" that a witness is telling the truth. In the hypothetical described above, does the prosecutor "know" that the victim was drunk and prompted the barroom altercation with the defendant through the use of belligerent language? The prosecutor may have no reason to disbelieve the bartender's version of events in this regard, but that does not mean the witness's narrative is *known* to be true. Even if the prosecutor is privy to extrajudicial facts that supported the bartender's testimony, the prosecutor does not necessarily know the truth of these facts, because he was not present at the scene of the crime. For example, let us imagine that two other eyewitnesses interviewed by the police at the scene of the crime, but presently unavailable to testify, support the theory that the victim was drunk and belligerent at the time of the fight. These two other bar patrons interviewed by the police may be lying, or each might harbor some form of bias against the victim. What we have here is a problem of epistemology. A prosecutor's belief in the truth of a fact may vary by degree, but his "knowledge" of that fact is seldom absolute.[193]

Furthermore, Professor Green's and Professor Levine's resolution of this difficult issue may be overly broad because it fails to distinguish between general forms of impeachment and specific forms of impeachment. A general form of impeachment suggests that the witness is an untruthful person (e.g., impeachment with prior acts of dishonesty or reputation for dishonesty, impeachment with prior conviction, etc.)[194] and provides the jury with a reason to disregard all of the witness's proffered testimony if it chooses to do so. A specific form of impeachment (e.g., an

192 Green, *supra* note 20, at 1596; Levine, *supra* note 134, at 1345; *see also* WOLFRAM, *supra* note 125, § 12.4.5, at 650–51 (arguing that while there is general agreement that defense counsel may attempt to persuade a jury to disbelieve a witness known to be truthful, it is clear that prosecutors should not be permitted to do the same).

193 Imagine a criminal case where the defendant presents an alibi defense through a relative (e.g., the defendant's cousin testifies that he was with the defendant at a restaurant having dinner on the night and time of the alleged crime). The cousin produces a credit card record that reveals a charge at the same restaurant on the night in question. Even with this paper record, the prosecutor does not "know" that the cousin has testified truthfully. Someone else may have used his credit card at the restaurant, or the cousin may have dined at the restaurant with another guest. Now suppose that there was a security camera in operation at the restaurant. The videotape shows two diners matching the general description of the defendant and his cousin (age, sex, race, height), but the picture is grainy. Even then, the prosecutor does not "know" that the cousin is telling the truth.

194 *See, e.g.*, FED. R. EVID. 608(b), 609.

impeachment with a prior inconsistent statement on the same topic)[195] invites the jury to disbelieve one part of the witness's testimony. It is rare in criminal cases for a witness to testify to only one salient fact. Telling a prosecutor that he may not "impugn the credibility"[196] of a truthful witness fails to distinguish between circumstances where the witness testifies to only one fact, or testifies to several facts. In the latter circumstances, it fails to answer the question whether a prosecutor is ever warranted in attempting to undermine a *portion* of a witness's testimony through a *general* form of impeachment.

The ABA Criminal Justice Standards shed very little light on this difficult issue. Standard 3-5.7(b) provides as follows: "The prosecutor's belief that the witness is telling the truth does not preclude cross-examination, but may affect the method and scope of cross-examination. A prosecutor should not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully."[197] This standard accomplishes little beyond stating what should by now be obvious; when a prosecutor *knows* that a witness is telling the truth he should not attempt to discredit that testimony, but where he simply *believes* that the witness is telling the truth he may cross-examine the witness.[198] The ABA standard fails to recognize the wide gulf in most cases between the extremes of knowledge and belief, and thus provides little ethical guidance for the conscientious prosecutor striving to do what is just. Even more significantly, it does not offer any distinction between general and specific forms of impeachment, suggesting instead that the "method" of cross-examination rests solely in the discretion of the individual prosecutor.

This may be a situation where rules simply fail us. Even if Standard 3-5.7 were enacted in some fashion as a component of ABA Model Rule 3.8, it would be largely unenforceable. Fashioning limits to the scope of a prosecutor's cross-examination based on the state of mind of the prosecutor would be destined for failure, because such subjective knowledge or belief is rarely provable as an objective matter in later professional disciplinary proceedings.

195 *See, e.g.*, FED. R. EVID. 613.

196 Levine, *supra* note 134, at 1345.

197 ABA CRIMINAL JUSTICE STANDARDS, *supra* note 10, Standard 3-5.7(b).

198 The National District Attorneys Association guidelines for prosecutors (The "National Prosecution Standards") take a position on this issue similar in its vagueness to ABA CRIMINAL JUSTICE STANDARDS, *supra* note 10, Standard 3-5.7. Section 77.6 states that "Counsel should not misuse the power of cross-examination or impeachment to ridicule, discredit, undermine, or hold the witness up to contempt, if counsel *knows* the witness is testifying truthfully." NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS § 77.6 (2d ed. 1991) [hereinafter NATIONAL PROSECUTION STANDARDS] (emphasis added).

Character is essential to a prosecutor's nuanced assessment of the facts and circumstances of particular cases in this area. Rather than asking the question what prosecutors should "do" in this situation, perhaps we should change the focus and inquire into what types of people we want them to be. In particular, the virtues of courage and fairness might help guide prosecutors in discerning an appropriate course of action when faced with the question of whether to cross-examine an apparently truthful witness.

First, the prosecutor should be courageous enough to forego cross-examination entirely wherever he perceives that this course of action is in the best interest of justice. Sometimes the hardest phrase for any lawyer to utter in a courtroom is "No questions, Your Honor." Hollywood depictions of withering cross-examinations in criminal cases have become ingrained in our consciousness. The lawyer is perceived as gladiator, and the citizens of Rome enter the coliseum expecting to witness bloodshed. Prosecutors may feel that if they forego cross-examination, they run the risk of being viewed as weak—not only by the jurors, but also by any law enforcement colleagues in the courtroom observing the trial. Government lawyers must resist this pernicious attitude. Prosecutors who flex their muscles in the courtroom solely for the purpose of posturing in front of the jury have lost sight of the critical difference between their role and the role of criminal defense counsel. Moreover, a prudent and courageous prosecutor understands that sometimes the decision not to cross-examine a witness is a sign of integrity and strength rather than weakness. The phrase "No questions, Your Honor" can be a display of confidence that signals to the jury that the facts testified to by the witness are wholly consistent with the government's theory of its case.

Potential unfairness toward the witness should also be an omnipresent concern. A prosecutor must be cognizant of the tremendous power of cross-examination, and how it may feel as a witness to have one's credibility and integrity questioned in a public forum. Experiencing the courtroom from the point of view of the "other" might help the prosecutor shape the scope and content of his cross-examination, if cross-examination is conducted at all. The Model Rules of Professional Conduct prohibit an attorney during representation of a client from using means that "have no substantial purpose other than to embarrass, delay, or burden a third person."[199] Cross-examination that attempts to show that the witness is lying on a critical matter certainly serves a "substantial purpose," because it

199 MODEL RULES OF PROF'L CONDUCT R. 4.4(a) (2004). Comment 1 to Rule 4.4 suggests that testing the government's proof is a "substantial purpose" justifying cross-examination by a criminal defense attorney. "Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client . . . ." *Id.* R. 4.4 cmt. 1.

assists the jury in deciding contested facts. But what about general forms of impeachment that are used to impeach a witness only on minor details of the witness's testimony? For example, impeachment with a prior conviction or a prior act of dishonesty may not only be embarrassing to the witness, it may be unnecessary where the prosecutor believes the witness has testified truthfully during a large portion of his narrative, and only desires to impeach him on minor details (such as his perception of time, distance, etc.). By using a sledgehammer where a scalpel may suffice, the prosecutor may not be pursuing a "substantial purpose" within a fair reading of Rule 4.4.

Witnesses who are subpoenaed to testify in criminal cases undoubtedly arrive at court with the expectation that they will be vigorously and searchingly cross-examined by defense counsel. However, they have a right to expect something different from their government representatives. The National District Attorneys Association has stated that "[t]he interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness."[200] Prosecutors who play the role of gladiators on cross-examination for little purpose other than to embarrass or intimidate the witness risk undermining the public's confidence in the criminal justice system, and offending the very citizens the government depends upon to step forward with critical information.

While it may be impossible to formulate a workable rule that provides both guidance and flexibility in this area, a few general principles emerge from the foregoing discussion. First, a prosecutor's mere belief that the witness is telling the truth should never preclude cross-examination. The very purpose of an adversary proceeding is to have the truth revealed through the crucibles of direct and cross-examination. Prosecutors need not substitute their personal feelings or gut hunches for the possible conclusions of the jury.[201] On the other hand, prosecutors frequently have access to extrajudicial evidence that the jury will never hear, including statements from witnesses unavailable to testify at trial, information from confidential informants, and other forms of inadmissible hearsay. What the prosecutor can reasonably conclude happened in the case is influenced not only by facts provable in court, but also by information contained in the investigatory file. Perhaps a workable principle that bridges the wide gap between "knowledge" and "belief" is that a prosecutor should not undermine the credibility of a witness on a factual point where the

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200 NATIONAL PROSECUTION STANDARDS, *supra* note 198, § 77.6 cmt.

201 "[A] prosecutor is not required to substitute personal opinion for the available fact-finding processes of the trial . . . ." ABA CRIMINAL JUSTICE STANDARDS, *supra* note 10, Standard 3-5.7 cmt.

prosecutor firmly believes that no reasonable juror, in possession of the same information known to the prosecutor, could reasonably conclude that the fact is untrue. A "firm belief" standard—taking into account both the evidence produced at trial and any extrajudicial information in possession of the prosecutor—might adequately respect both the jury's ultimate role as factfinder and the prosecutor's moral responsibility as an agent of the truth. In my hypothetical above, if the prosecutor firmly believes that the bartender is telling the truth about the victim's intoxication and belligerence, he should not raise the issue of the witness's prior conviction on cross-examination because this would serve no legitimate purpose other than to embarrass and to misleadingly discredit the witness.

This analysis still begs the question of whether there should be any distinction between specific and general forms of impeachment, an issue left completely unaddressed by ABA Criminal Justice Standard 3-5.7. It would make no sense to advise a prosecutor that when a witness has testified truthfully in part and deceptively in part the prosecutor may not engage in a general form of impeachment.[202] If, as the law presumes, a prior act of dishonesty or a prior conviction is probative of credibility, it is no *less* probative on this point simply because the witness has testified to several subject matters rather than to just one. Even the most inveterate and accomplished liar is capable of telling the truth on occasion when it suits his purpose. Perhaps the appropriate safety valve here is not in limiting cross-examination, but rather in limiting closing argument. The virtues of honesty, fairness, and courage suggest that a prosecutor who engages in a general form of impeachment of a witness who he believes has testified truthfully in part but untruthfully in part should refrain from arguing in his summation that the witness is unworthy of belief in all respects; rather, he should argue only that the witness's character for dishonesty should lead the jury to disbelieve identified parts of the witness's testimony. In this manner, the prosecutor avoids urging the jury to discredit testimony that the prosecutor has strong reason to believe is true.[203]

202 The pertinent National District Attorneys Association standard states that "[t]he credibility of any witness may be alluded to by a showing of any prior conviction." NATIONAL PROSECUTION STANDARDS, *supra* note 198, § 77.6. This standard suggests that a general form of impeachment may be warranted even where the prosecutor believes the witness is testifying truthfully as to certain matters and untruthfully as to others.

203 Providing the jury with reasons not to believe a truthful witness may be as misleading to the jury as urging it to believe false testimony. *Cf. In re* Dreiband, 77 N.Y.S.2d 585, 585–86 (N.Y. App. Div. 1948) (upholding disciplinary sanction against prosecutor for "knowingly using false testimony of People's witness in summation").

IV. THE PROBLEM OF THE INCOMPETENT DEFENSE ATTORNEY

Assistant District Attorney Susan Smith is prosecuting a defendant charged with armed robbery. The defendant allegedly stole an elderly woman's purse at knifepoint as the victim was coming out of an automatic teller machine (ATM) kiosk. The victim picked the defendant out of a group of mug shots at the police station several hours after the incident, and is able to identify him at trial. The defendant has several prior convictions on his record, including felony convictions for larceny by false pretenses and distribution of heroin, and several misdemeanor convictions for shoplifting.

The defendant is represented at trial by attorney Jay Sullivan, appointed counsel. Prior to trial, Sullivan moves to suppress the photo identification. After a hearing on this motion, it is denied by the court. Sullivan's trial strategy is to 1) question the victim's opportunity to get a good view of her attacker (it was admittedly dark outside the kiosk and the incident lasted only a matter of several seconds), and 2) to present an alibi defense. The defendant testifies on his own behalf at trial that he was having Sunday dinner at his cousin's house at the time of the alleged robbery. Defendant is impeached by the prosecutor on cross-examination with the prior convictions.

The prosecutor is concerned about the competence of defense counsel. Attorney Sullivan appears to the prosecutor outside of the courtroom to be very harried, disorganized, and suffering from stress. Although he litigates a nonfrivolous motion to suppress in the case, he does not appear to have adopted a trial strategy beneficial to his client. There are several inconsistencies between the victim's trial testimony and the account of the incident she gave to police officers reflected in a written report (concerning the time of the incident, the clothing worn by the attacker, the precise location on the street that the robbery took place, etc.). Attorney Sullivan does not raise these inconsistencies on cross-examination of the victim, relying instead exclusively on issues pertaining to the victim's opportunity to get a good look at the perpetrator's face. Moreover, Attorney Sullivan does not put any witnesses on the stand to support defendant's alibi defense other than the defendant himself, who Sullivan should have anticipated would have been subject to a stinging impeachment.

Forty years after the Supreme Court guaranteed indigent persons the right to appointed counsel when charged with serious crimes, the promise of *Gideon v. Wainwright*[204] remains largely unfulfilled in our country. With disturbing frequency, criminal defendants plead guilty to crimes or are convicted following trial after being represented by an attorney who

204 372 U.S. 335 (1963).

does not have the time, the ability, the resources, or the inclination to provide meaningful and competent representation. A recent report from the American Bar Association supports this sobering conclusion: "Too often the lawyers who provide defense services are inexperienced, fail to maintain adequate client contact, and furnish services that are simply not competent, thereby violating ethical duties to their clients under rules of professional conduct. Meanwhile, judges . . . routinely accept legal representation in their courtrooms that is patently inadequate."[205] This recent ABA study cited inadequate funding, poor training, lack of resources for investigative and expert services, and grossly excessive caseloads as factors contributing to the pervasive problem of ineffective representation by criminal defense lawyers.[206] While this problem is not limited to appointed counsel, studies suggest that it is more acute in this area.[207] Indigent defendants, unlike paying clients, cannot fire their lawyer and hire someone more competent when they are displeased with the services of their attorney.[208]

What should a conscientious prosecutor do when faced with a scenario such as that outlined above? Not surprisingly, neither the Model Rules of Professional Conduct nor the ABA Criminal Justice Standards address a prosecutor's responsibilities when confronted with incompetent defense counsel. If there is an answer to be gleaned from professional norms, it must start with a prosecutor's obligation to seek justice.[209] On the one hand, the prosecutor must be concerned with fundamental fairness toward the defendant, who may either 1) be innocent, 2) be guilty of a lesser crime, or 3) be factually guilty, but capable, with more effective counsel, of securing an acquittal based on reasonable doubt. In addition, the prosecutor who suspects incompetence on the part of his opponent has an

205 ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, GIDEON'S BROKEN PROMISE, at iv–v (2004).

206 *Id.* at 7–19; *see also* Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1178 (2003) (calling the problem a "national epidemic of neglect").

207 *See* DAVID COLE, NO EQUAL JUSTICE 78–79 (1999). A 1999 study in Harris County, Texas showed that of 30,000 annual felony filings, 58% of defendants with appointed counsel were sentenced to jail or prison, compared to 29% of defendants who retained private counsel. Bob Sablatura, *Study Confirms Money Counts in County's Courts*, HOUSTON CHRON., Oct. 17, 1999, at A1. To adjust for sentencing and conviction patterns over a wide variety of crimes, the study also looked at one single felony charge for the same period (first time possession of less than one gram of cocaine) and determined that 57% of those defendants with court-appointed counsel were sentenced to jail or prison, while only 25% of those defendants with private counsel were sentenced to serve time. *Id.*

208 Green, *supra* note 206, at 1175.

209 ABA CRIMINAL JUSTICE STANDARDS, *supra* note 10, Standard 3-1.2(c); *see* MODEL RULES OF PROF'L CONDUCT R. 3.8. cmt. 1 (2004).

institutional interest in protecting the resources of his office and the appellate courts from ineffective assistance of counsel claims later raised on appeal, which will tie up the system and lead to unnecessary litigation.

On the other hand, the prosecutor might personally be ill-equipped to separate incompetent lawyering from legitimate trial strategy, especially if he has never served in the defense role himself. In the hypothetical described above, the defense attorney may have deliberately chosen not to cross-examine the victim with a prior inconsistent statement for fear of being perceived by the jury as "beating up" on a sympathetic elderly woman. Defense counsel may be unable to call a witness to support the defendant's alibi due to pragmatic considerations, such as substantial material in the cousin's background to impeach him as a witness. Moreover, the defense counsel might have access to privileged information from the defendant that affects his tactical decisions in the case, but that is unknown to the prosecutor.

Can a prosecutor realistically be expected to distance himself from his adversarial role in order to assist a defendant whom he perceives is being inadequately represented? The prosecutor, like the defense attorney, has a client (society) and an ethical obligation to represent his client's interests vigorously.[210] While society certainly has an interest in providing fair trials to the criminally accused, society also has a compelling interest in seeing that guilty persons are punished and prevented in the future from preying on law abiding citizens. It is difficult to see how a prosecutor could continue to function effectively in a trial setting (particularly in closing argument and in cross-examination) if he viewed his *primary* responsibility during adversarial proceedings as assuring the defendant a level playing field.[211]

Unfortunately, Sixth Amendment safeguards are inadequate to prevent the injustices that can and do occur when a criminal defendant is poorly represented.[212] In *Strickland v. Washington*,[213] the Supreme Court enunciated a two-part test for evaluating ineffective assistance of counsel claims under the Sixth Amendment. First, the defendant must show that counsel's performance was deficient; that is, that counsel made errors so

210 *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

211 *See* Hobot v. McGuiness, No. 96-CV-4324 FB, 1998 WL 642705, at *8 (E.D.N.Y. Sept. 16, 1998) (ruling that prosecutor had no constitutional duty to notify the court of existence of report that defense counsel had neglected to use at trial); Fisher, *supra* note 12, at 226 n.135.

212 *See* Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 177–78 (2001).

213 466 U.S. 668 (1984).

serious that in effect he was not functioning as "counsel" at all for Sixth Amendment purposes. Second, defendant must show that this deficient performance prejudiced the defendant; that is, that the outcome of the trial would likely have been different but for the mistakes of counsel. The defendant must make both of these showings to demonstrate a constitutional violation.[214]

To evaluate counsel's performance under the first prong of *Strickland*, the standard for attorney performance is that of an ordinarily fallible lawyer.[215] The Court has stated that judicial scrutiny of counsel's performance must be highly deferential to the lawyer because it is too tempting in hindsight for a defendant to second-guess counsel's efforts after an adverse judgment.[216] The defendant must overcome the presumption that the counsel's performance under the circumstances might be considered sound trial strategy.[217] To overcome this presumption, "the defendant must show that counsel's representation fell below an objective range of reasonableness."[218]

Under the second prong of the *Strickland* test, the defendant must show that counsel's deficient performance prejudiced his defense.[219] This prong requires more than a showing that counsel's errors had some *conceivable* effect on the outcome of the proceeding, because virtually every act or omission could meet that test.[220] "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional

214 *Id.* at 687–90.

215 *Id.*

216 *Id.* at 689.

217 *See id.*

218 *Id.* at 688.

219 *See id.* at 692. In *United States v. Cronic*, 466 U.S. 648 (1984), decided the same day as *Strickland*, the Supreme Court stated that in rare circumstances ineffective assistance can be presumed without inquiry into whether it could have been a strategic decision or whether it prejudiced the case. *Id.* at 659–60. But the Court ruled that the facts of *Cronic*—where inexperienced counsel was appointed to represent the defendant in a highly complex mail fraud case only twenty-five days before trial—did not warrant a presumption of prejudice. *Id.* at 659. The justification of a per se approach is that the likelihood of prejudice is so high that case-by-case inquiry is not worth the cost. *See Strickland*, 466 U.S. at 692. In *Strickland,* the Court mentioned a defense counsel laboring under a conflict of interest as one example where the Court would be willing to find per se ineffective assistance of counsel. *Id.* Subsequent to *Strickland* and *Cronic*, the federal courts have been willing to find prejudice per se in only very limited circumstances. *See, e.g.*, Tippins v. Walker, 77 F.3d 682, 684 (2d Cir. 1996) (defense counsel slept through the trial); United States v. Novak, 903 F.2d 883, 884 (2d Cir. 1990); *see also* Geders v. United States, 425 U.S. 80, 88–89 (1976) (finding prejudice per se under Sixth Amendment where the court interferes with defendant's representation by ordering counsel not to consult with client during overnight recess).

220 *See Strickland*, 466 U.S. at 693.

errors, the result of the proceeding would have been different."[221] The Court in *Strickland* defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome."[222] The defendant must thus show a breakdown in the adversarial process that makes the result unreliable.[223]

If the ineffective assistance of counsel standard under *Strickland* were sufficient to capture all situations where the defendant was actually prejudiced by his counsel's incompetence, perhaps there would be no reason to impose any ethical duty on prosecutors to react to (or rectify) poor defense lawyering. In those circumstances, the risk of reversal on appeal might itself be a sufficient incentive to prompt governmental vigilance. But the *Strickland* standard is so narrow that reversals of convictions for ineffective assistance of counsel are very rare.[224] First, there is a presumption that counsel was competent, and defendant bears the burden on appeal of proving otherwise.[225] Second, defense counsel's conduct will be measured against the conduct of a *reasonable* attorney, not a perfect or highly competent attorney, and the Court has expressly defined an objectively reasonable attorney as someone who makes mistakes.[226] Third, the defendant must convince the court that the result would have been different had he been represented by more competent counsel;[227] in light of the Court's stated interest in upholding the finality of convictions, proving what a hypothetical jury might have done under different circumstances is exceedingly difficult, especially where the government's evidence of guilt is compelling. Looking backward after trial to assess whether counsel's deficiencies led to an unjust conviction "overlooks that the trial itself is a creature of counsel's performance."[228] The appellate court is analyzing a record *created* by allegedly incompetent counsel; the conviction may appear to rest on strong or overwhelming evidence of guilt precisely because defense counsel failed to properly cross-examine government witnesses or failed to pursue exculpatory evidence. It is particularly difficult to show in hindsight that *omissions* by defense counsel made a difference, because there it is a question not of what the lawyer did

221 *Id.* at 694.

222 *Id.*

223 *Id.* at 687.

224 *See* Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2068 (2000); *see also Tippins*, 77 F.3d at 690 (finding ineffective assistance of counsel only because counsel slept every day at trial).

225 *Strickland*, 466 U.S. at 687.

226 *Id.* at 688.

227 *Id.* at 694.

228 Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an* Ex Ante *Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 275 (1997).

badly, but rather of what he neglected to do at all.[229] For each of these reasons, an "ineffective assistance [claim] is easily alleged but almost impossible to prove."[230]

In *Gideon,* some members of the Court invoked concepts of fundamental fairness in joining the decision to provide indigent criminal defendants with the right to appointed counsel.[231] But since *Strickland,* the Court's focus in Sixth Amendment jurisprudence has shifted away from considerations of fairness to considerations of reliability; that is, the constitutional assurance of counsel is violated only where the defendant's lawyer committed errors so serious that the result of the proceeding cannot be considered sound.[232] This shift in emphasis has been critical.[233] Appellate courts will reverse a conviction on the grounds of ineffective assistance only where they are convinced that more competent counsel would have made a difference in the outcome of the case. This approach is akin to validating the results of a track meet on the grounds that the claimant would have lost the race anyway—notwithstanding that the losing runner was provided unequal access to equipment, coaching, and training facilities, and was required to start the race ten yards behind his opponent. If gross disparities led to an unfair contest, how can one say with confidence that the outcome would not have been any different with a more level playing field?

Certainly the prosecutor is not alone in shouldering responsibility for policing the adequacy of defense services. The judge, too, has an obligation to seek justice, and a far more neutral role in the trial process than the government advocate.[234] The primary responsibility to ensure a level playing field should rest with the judge, rather than with the prosecutor. Several commentators have called upon trial judges to play a more active role in spotting and remedying defense incompetence when it occurs, as a way to make up for the perceived deficiencies of appellate review under *Strickland*.[235] But judicial vigilance alone will not relieve

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229 Green, *supra* note 206, at 1188.

230 Dripps, *supra* note 228, at 284.

231 Gideon v. Wainwright, 372 U.S. 335, 349 (Harlan, J., concurring).

232 *Strickland*, 466 U.S. at 687.

233 *See* Dripps, *supra* note 228, at 279.

234 *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3 (2004).

235 *See, e.g.*, Galia Benson-Amram, *Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases*, 29 N.Y.U. REV. L. & SOC. CHANGE 425, 429–30 (2004) (placing burden on the court to remedy ineffectiveness before it gets to appeal, and arguing that the presumptive prejudice standard of *Cronic* should be followed where defense counsel is "egregiously ineffective" at trial and the court fails to inquire of defendant whether he is satisfied with his representation); Green, *supra* note 206, at 1194 (arguing that judges should inquire more deeply about defendant's

prosecutors of the need to act in certain extreme circumstances, because certain forms of defense incompetence will be imperceptible to the judge. The prosecutor is more familiar with the facts of the case than the judge, and thus will be more sensitized to weaknesses in the government's case that the defense attorney fails to exploit (exculpatory evidence, prior inconsistent statements, etc.). The prosecutor may also have had dealings with the defense attorney outside the courtroom that give rise to suspicions of unpreparedness or incompetence (e.g., witnessing tremors or glassy eyes that raise the suspicion of substance abuse, or hearing the defense counsel confuse the facts of defendant's case with those of another client during plea discussions). The prosecutor may also be aware of a conflict of interest on the part of the defense counsel that would not be apparent to the judge.[236] Closer scrutiny by trial judges of defense performance may reduce the acuity of this ethical dilemma for public prosecutors, but it cannot eliminate the problem altogether.

The professional obligation of lawyers to report ethical misconduct by fellow attorneys to state licensing authorities is also an inadequate check on defense incompetence in criminal cases. Today, all states but Kentucky and California have mandatory reporting rules fashioned in whole or in part on ABA Model Rule 8.3 and its predecessor, ABA Model Code provision DR-1-103(A).[237] But this reporting obligation—often derisively termed the "snitch rule"—is one of the most "underenforced, and possibly unenforceable" mandates in all of legal ethics.[238] Attorneys have trouble determining when opposing counsel's inattention or poor performance rises

satisfaction with defense counsel and defense counsel's efforts on client's behalf during change of plea colloquy, and should refuse to accept plea if unsatisfied); Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 970–78 (2004) (arguing that we should move from a paradigm of judges as passive umpires to the paradigm of judges as active umpires, enabling them to ask questions of a witness to lay the foundation for the admission of evidence, or raise legal issues that the parties missed).

236 *See* United States v. Hedrick, 500 F. Supp. 977, 983 (C.D. Ill. 1980) (noting that prosecutor has obligation as minister of justice to call to the court's attention a possible conflict of interest presented by defense counsel representing codefendants).

237 Nikki A. Ott & Heather F. Newton, Current Development, *A Current Look at Model Rule 8.3: How Is It Used and What Are Courts Doing About It?*, 16 GEO. J. LEGAL ETHICS 747, 755 (2003).

238 *Id.* at 747. Indifference, fear of damaged reputation among colleagues, and concern over the time and energy it will take to follow through with a bar disciplinary report all combine to make the reporting obligation found in DR 1-103(A) and its successor Rule 8.3 one of the most "widely ignored" attorney conduct rules. *See* WOLFRAM, *supra* note 125, § 12.10, at 683.

to the level of an ethical violation.[239] Moreover, many states follow Model Rule 8.3(a) and provide that the ethical infraction observed must raise a "*substantial question* as to that lawyer's honesty, trustworthiness, or fitness as a lawyer *in other respects*" before an obligation to report is triggered.[240] Prosecutors who confront a defense lawyer performing inadequately in a particular matter might attribute it to poor preparation on that specific case, and may have little basis for concluding that such inattentiveness has spilled over to the other areas of his practice. In addition, state snitch rules often are unclear on how strong a lawyer's suspicion of ethical wrongdoing must be before a duty to report is triggered.[241] For each of these reasons, there is scarce authority under Rule 8.3 for imposing a duty on prosecutors to report incompetent defense counsel.[242] More fundamentally, however, the "snitch rule" cannot possibly protect a criminal defendant from the harsh consequences of an incompetent trial attorney, because the professional obligation of the prosecutor under Rule 8.3 is to report defense counsel to the bar disciplinary authority *after* the triggering event, *not* to the court before whom the ethical lapse occurs.[243] A defendant may be convicted and sent to prison as a result of the errors of defense counsel; the snitch rule—leading at most to a post-conviction professional censure—cannot possibly remedy this unfairness.

Several scholars have addressed the issue of whether and when a prosecutor has an ethical obligation to intervene to address ineffective defense lawyering, but they have come to markedly different conclusions.[244] While recognizing that codes of professional conduct fail

239 *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004) ("A lawyer shall provide competent representation to a client.").

240 *See id.* R. 8.3(a) (emphasis added); WOLFRAM, *supra* note 125, § 12.10, at 684 (arguing that the "substantial question" provision of Rule 8.3 is vague and indefinite).

241 *See* Ott & Newton, *supra* note 237, at 751 (noting that most courts interpreting the word "knowledge" in Rule 8.3 have equated knowledge with "substantial basis for belief").

242 *See* Ariz. Comm. on the Rules of Prof'l Conduct, Formal Op. No. 98-02 (1998) (stating that where a criminal defense lawyer files affidavit of ineffectiveness on appeal of criminal conviction, the appellate prosecutor has ethical obligation under Rule 8.3 to report this ineffectiveness to bar overseers if the appellate claim raises a "substantial" issue of trial counsel's honesty, trustworthiness, or fitness to practice law); *cf. In re* Riehlmann, 891 So. 2d 1239, 1249–50 (La. 2005) (ordering public reprimand of prosecutor for violation of Rule 8.3, where prosecutor had learned that a prosecutorial colleague had suppressed exculpatory blood evidence in an armed robbery case and failed to report it).

243 *See* MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (requiring report to "appropriate *professional* authority") (emphasis added).

244 Monroe Freedman was perhaps the first academic to address this ethical issue. *See* Monroe H. Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030 (1967). In that article Freedman discussed the prosecutor's responsibility when confronted with ineffective counsel, but only briefly. Freedman concluded that because "the job of the prosecutor is not necessarily to convict, but to see that justice is done" a

to define a prosecutor's ethical obligations in this complex area, Fred Zacharias has argued that the obligation to seek justice at a minimum obliges a prosecutor to preserve the basic requirements of an adversarial system.[245] Zacharias identified an efficient adversarial system as a key element of the justice mandate, because our system relies upon the adversarial process to ensure procedural fairness.[246] But Zacharias argued that the adversarial justice system breaks down most noticeably "when a criminal defense attorney does not even roughly match the prosecutor's talents or fails to represent his client's interests."[247] Effectively, that produces a proceeding that is a one-sided contest.[248] In those situations, according to Zacharias, the prosecutor's responsibility as a "minister of justice" requires him to attempt to "restore adversarial balance," that is, to disavow zeal and instead promote procedural fairness.[249]

In constructing this argument, Zacharias imagined three levels of substandard defense performance: 1) defense counsel makes no serious effort in defense of his client whatsoever, because he has no trial skills, is drunk, or is senile; 2) defense counsel performs, but he performs very badly by failing to ask important, relevant questions of witnesses on cross-examination or by relying on an incoherent theory; and 3) defense counsel presents adequate direct and cross-examinations and generally performs aggressively, but he neglects to file a meritorious suppression motion or fails to object to damaging questions from the prosecutor.[250] In the first scenario, Zacharias was confident that the prosecutor has witnessed a Sixth Amendment violation and therefore has an ethical obligation to undertake remedial steps to preserve the integrity of the trial process, such as

prosecutor cannot sit idly by and allow defense counsel to render inadequate assistance. *Id.* at 1032. Freedman highlighted some of the tactics prosecutors have engaged in to actually *exploit* the situation where incompetent counsel represents the defendant, such as seeking a judicial forum where defense counsel is more likely to overlook the defects in the prosecutor's case, putting favorable comments about defense counsel in the prosecutor's closing argument in an effort to insulate a conviction from successful attack on appeal, and structuring a plea agreement in order to give the appearance that defense counsel has performed adequately on behalf of his client when in fact the case was overcharged from the beginning. *Id.* at 1040–41. Freedman illustrated the seriousness involved in a prosecutor's ethical obligations by highlighting examples of unethical conduct in the face of defense ineffectiveness, but he offered no solution to the question of how bad a defense attorney's conduct must be before a prosecutor has a duty to intervene, or exactly what form this intervention should take.

245 Zacharias, *supra* note 19, at 46–48.

246 *Id.* at 49.

247 *Id.* at 66.

248 *See id.*

249 *See id.* at 64.

250 *Id.* at 68–69.

notifying the judge or filing a motion to disqualify counsel.[251] But for the second two scenarios (occurring far more often), Zacharias was far more tentative in both his approach and in his proposed solutions. Zacharias appeared to accept the conclusion that as long as the defense lawyer stays within "the wide range of professionally competent assistance" the prosecutor has no responsibility to act whatsoever.[252] Where the defense counsel's performance clearly falls below this acceptable range of conduct, the prosecutor should remedy the adversarial breakdown by either notifying the judge or by remonstrating with defense counsel and encouraging him to either improve his performance or withdraw.[253] Among these two options,[254] Zacharias reluctantly concluded that reporting lax opposition to the court is the most appropriate remedy whenever the prosecutor is "convinced of defense counsel's inadequacy."[255] But Professor Zacharias failed to explain how a prosecutor can ever become so "convinced," given that 1) the prosecutor is engaged in an adversarial role of his own, and 2) the prosecutor seldom is in the best position to perceive the reasons behind defense counsel's choices.

Vanessa Merton recently analyzed this same thorny ethical dilemma, but arrived at a conclusion very different from that of Fred Zacharias. Approaching the problem from the perspective of a supervising attorney

251 *Id.*; *see also* 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, 341 (1989) (arguing that a prosecutor has a duty to intervene whenever defense counsel is acting with a conflict of interest or is providing *constitutionally* ineffective assistance).

252 Zacharias, *supra* note 19, at 69.

253 Zacharias advances and rejects a third possibility: that a prosecutor could remedy poor performance by defense counsel by "pulling his punches" and providing less than vigorous advocacy on behalf of the state. Zacharias properly rejects this response, because rather than improving the adversarial process, this approach eliminates the adversarial process completely. *Id.* at 70. Zacharias similarly rejects "helping" the defense counsel by introducing testimony favorable to the defendant, recognizing this as a subset of prosecuting less vigorously. *See id.* at 71–72. While hypothetically the prosecutor could remain within the adversarial role by simultaneously eliciting defense information from witnesses while continuing to argue *against* the significance of this evidence, Zacharias argues that prosecutors would find it very difficult to do this without breaking up the flow of their own presentations, and that even if they did the mere mention of a possible defense argument is not the equivalent of arguing in favor of its strength. Moreover, if prosecutors routinely exercised the option of eliciting information favorable to the defense, in the long run this may reduce the adversarial nature of trials because some defense counsel may come to rely on such assistance and therefore become even less vigilant. *Id.* at 71.

254 Zacharias recognized the huge practical difficulties of the remonstration approach. *Id.* at 72. Confronting an attorney about his own incompetence or lack of attention to a case would certainly be a delicate conversation that many attorneys would be unable to handle in a productive fashion, even if they were willing to undertake it in the first instance.

255 *Id.* at 71, 74.

presiding over a law student prosecution clinic, Merton concluded that an ethical duty to remedy defense inadequacies is impractical to impose in practice.[256]

At the outset, Professor Merton professed that her initial inclination when analyzing an ineffective assistance of defense counsel situation would have been to err on the side of fairness and seek to protect the rights of the defendant.[257] However, Merton poignantly recounted an egregious case of ineffective counsel which arose for her student prosecutors, where she could not bring herself to insist that they do just that.[258] While observing her students during a pretrial conference in a domestic violence case, Merton witnessed egregious behavior by the defense counsel that created an ethical dilemma about how the prosecutors should proceed.[259] Specifically, the defense counsel met with the student prosecutors showing no knowledge about the facts of the case, his client's name, or even the charges against him. Defense counsel had failed to return phone calls from the student prosecutors, and had coupled this rudeness with making a racial slur against one of the prosecutors at their first courtroom introduction. Counsel clearly had not communicated with his client about the underlying nature of the charge or the client's objectives. Compounding this ignorance, he inadvertently waived the attorney-client privilege and allowed his client to speak to the prosecutors in the courtroom corridor, making damaging admissions.[260] Defense counsel thus single-handedly converted a possible dismissal into a solid case by inducing his client to provide a full confession, without ever having spoken to his client beforehand.[261]

Faced with defense counsel's utter lack of competence, Professor Merton and her student prosecutors faced the dilemma of whether to intervene, and if so how? Merton realized that the defendant could not afford a better attorney, and that his rights were being violated by the lack of competent representation. Ethically, she believed that they should take action by warning defense counsel about the consequences of his actions, or by alerting the trial judge and asking for a disqualification. But the prosecution team was also faced with a terrified and beaten victim, a dangerous defendant, and a belligerent and confrontational defense counsel

256 Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" if You're Trying to Put that Lawyer's Client in Jail?*, 69 FORDHAM L. REV. 997, 1047–53 (2000).

257 *Id*. at 1001.

258 *Id*. at 1002.

259 *See id.* at 1008–17.

260 *See id.* at 1005–17.

261 *Id.* at 1014.

who would not be open to assistance, let alone criticism.[262] Merton's assessment of the scholarly literature, including Fred Zacharias's article discussed above,[263] bolstered her instinct that an ethical duty on the part of the prosecutors may have existed in light of the "seek justice" mandate; however, when faced with a real life situation of incompetent counsel, she struggled to find an answer about how best to act upon such a duty.[264] Merton was disturbed by the possible effects on professionalism in commenting on the reputation or abilities of opposing counsel,[265] voicing concern about the "ethics war" that could be triggered if prosecutors routinely acted upon a perceived duty to report defense inadequacies to the presiding judge.[266] Also, Merton questioned whether an individual prosecutor—as part of a public office—realistically has the power to take remedial action in individual cases without a supervisor's approval, often not obtainable in the thick of action.[267] Finally, Merton viewed "reporting" as typically ineffective—trial judges are unlikely to remove counsel, and even if they do, the system cannot guarantee that replacement counsel will be any better or more prepared.[268] Merton reluctantly concluded that although it may be warranted as a matter of discretion, there is no ethical *requirement* to remedy defense lapses absent a clear constitutional violation under *Strickland*. Justifiably, she remains worried that there is a gap between commitment to ethical principles in the abstract, and specific performance in accord with that principle in the context of particular cases.[269]

Considering the practical obstacles Merton recounts so skillfully, perhaps it is not surprising that few prosecutors, if any, ever take steps to rectify defense ineffectiveness.[270] The Rules are imprecise, and tensions pulling in the opposite direction abound. One reason that scholars have struggled with this ethical dilemma—and that rulemakers have totally ignored it—is that the only clear answer to the problem may be "it depends." *Whether* a prosecutor needs to intervene in the face of incompetent counsel will likely depend upon 1) how flawed the

262 *See id.* at 1017–18, 1040–41.

263 *See supra* notes 245–55.

264 Merton, *supra* note 256, at 1041–44.

265 *Id.* at 1039.

266 *Id.* at 1042.

267 *Id.* at 1043.

268 Merton imagines her students reporting the conduct of defense counsel to the trial judge, and the judge responding "'Let me get this straight—you got an airtight, dead-on, all-bases-loaded confession, IN the presence of counsel, and now you're complaining?'" *Id.* at 1041.

269 *See id.* at 1004.

270 *See* Smith, *supra* note 13, at 396.

representation is; 2) how serious the consequences to the defendant are (e.g., is defendant facing a felony conviction and jail time, or only a first offense misdemeanor); 3) whether the defendant is represented by appointed or retained counsel;[271] and 4) how perceptible the flawed lawyering may be to the presiding judge. Assuming that the prosecutor decides that *some* intervention is necessary, he then faces the equally complex issue of how best to address the problem. The answer to this question will likely depend upon 1) the stage of the case in which the incompetence arises;[272] 2) the prosecutor's prior experience with the defense counsel (e.g., a familiarity with defense counsel's work habits and personal style may give the prosecutor a reason to believe or disbelieve that private remonstration with the attorney will be effective in addressing the deficiency); and 3) the prosecutor's assessment of the judge's willingness to intervene if the problem is brought to his attention.

Rather than focusing on rules and remedies, what if we changed the focus of our inquiry for a moment and asked what type of *person* we want our public prosecutors to be? We can begin by identifying the *wrong* reasons for standing by and doing nothing in this situation. One impediment to prosecutors taking action when faced with incompetent defense counsel may be lack of courage—they may fear losing the case, or fear being perceived as weak by colleagues in law enforcement if they step back from their adversarial role and advocate, even momentarily, for the interests of the defendant. Professor Merton's very honest account of her inability to act on a perceived ethical duty in this regard seems to suggest precisely such a failure; she recalls fearing that both the judge and higher-ups in the District Attorney's office would react negatively to such a suggestion by an individual student prosecutor who acts as a guest in the prosecutor's office.[273] Another impediment to ethical action may be a lack of commitment to fairness—what Bernard Williams calls a "settled

271 As argued *supra* note 207 and accompanying text, where the defendant has the financial resources to retain private counsel, he has more leverage over the services rendered and more ability to discharge the attorney if necessary.

272 If the perceived incompetence occurs prior to a change of plea, the court's voluntariness colloquy with the defendant—if thoroughly conducted—may provide some assurance that there is a factual basis to the plea and that the defendant is satisfied with his counsel's representation. If the perceived incompetence occurs well in advance of trial, the government may assent to a motion for a continuance and thereby give the defense attorney more time and incentive to prepare. *See* Stuard v. Stewart, 401 F.3d 1064, 1067 (9th Cir. 2005) (recognizing that the prosecutor wisely advocated with the court for more time for defense counsel to prepare, in order to preserve the record from a challenge that defendant was forced to choose between effective assistance of counsel and his right to a speedy trial).

273 Merton, *supra* note 256, at 1042.

indifference" to the interests of others.[274] Prosecutors may be incapable of seeing the defendant as an "other" worthy of respect, and thus disinclined to take any action designed to further the defendant's interests. If we expect prosecutors to both recognize and protect a defendant's constitutional right to competent counsel, we need them to be attentive in the first instance to these virtues of fairness and courage.

Perhaps the paramount virtue needed in this situation is the virtue of prudence, or practical wisdom. A prudent prosecutor must be able to recognize and synthesize the multiplicity of concerns at stake.[275] There are many legitimate interests pointing in the direction of doing nothing—such as a hesitance to interfere with deliberate but opaque choices made by defense counsel, a practical concern for the prompt resolution of cases, and a hesitance to poison the atmosphere of the courtroom by publicly accusing another lawyer of incompetence. But a prudent prosecutor will also recognize that taking an ostrich-like approach to serious ineptitude may not avoid a clash of these interests; sometimes it may only defer them. If the defendant is sentenced and incarcerated, he may later challenge his conviction on appeal claiming ineffective assistance of counsel.

This may be the most intractable of my three ethical dilemmas. It is not simply a question of the prosecutor perceiving his role too narrowly. The problem also stems from epistemological failures (i.e., the prosecutor having insufficient expertise and information to separate deliberate tactical decisions from incompetence) and systemic failures beyond the prosecutor's control (i.e., lack of resources). If the defense attorney's incompetence is so egregious that it clearly violates *Strickland*, we do not need an ethical rule to spur meaningful government action, because where the incompetence is both gross and apparent, the prosecutor will be motivated by self-interest to preserve the conviction from successful attack on appeal. Where ethical judgment is paramount is where the defense attorney's representation is flawed, but just one iota *above* the impoverished constitutional standard. How should a prosecutor behave when the defense attorney's representation is within this zone of (mis)conduct?

In light of the myriad contexts in which this problem may arise, it is impractical to fashion a clear set of priority rules that will address all of the factors discussed above and still give meaningful guidance to prosecutors. The best we could possibly hope for is a statement somewhere in the comments to Rule 3.8 that a prosecutor has an obligation to take proactive measures to protect the defendant's right to counsel (either remonstration with the attorney or notification to the judge) when the prosecutor

274 WILLIAMS, *supra* note 88, at 93.

275 KRONMAN, *supra* note 120, at 74.

perceives that the defense attorney's representation fails the first prong of the *Strickland* test; that is, when counsel's performance falls measurably below the range of conduct expected of a reasonably competent attorney.[276] It makes no sense to invite a prosecutor to take action only when the prosecutor perceives that *both* prongs of *Strickland* are satisfied, because under the second prong of *Strickland* the appellate court is looking backward at the trial to assess the reliability of the result. It would be unworkable to ask a prosecutor to speculate about a future appellate court's assessment of the reliability of a proceeding that has not yet concluded. At most, such an approach would invite prosecutors to intervene or not intervene to protect defendant's right to counsel based solely upon the prosecutor's individual assessment of the government's evidence. Ensconced in their adversarial role in the thick of trial, it may simply be asking too much of prosecutors to objectively assess the weaknesses of their own case.

My point in this Article, however, is not to recommend insertion of some vague and passing reference to the first prong of *Strickland* somewhere in the comments to Model Rule 3.8. That would be both ineffectual and unenforceable.[277] My point is different. If we recognize that a prosecutor's decisions in this area are contextually driven, this reality magnifies, rather than trivializes, the importance of virtue. Prosecutors should *care* about the quality of defense services rendered to the accused, and should not retreat like tortoises into the shell of their prosecutorial role. As a profession, however, we cannot be confident that prosecutors will even recognize this as an ethical problem—much less take personal ownership of it—unless the prosecutor is a person of fairness and honesty. We certainly cannot predict that a prosecutor will have the personal fortitude to intervene in any fashion unless they are persons of courage. And we cannot possibly expect prosecutors to be able to identify creative and effective ways to address the incompetence of their adversaries in particular cases unless they have developed the virtue of prudence.

276 Strickland v. Washington, 466 U.S. 668, 687–88 (1984).

277 Model Rule 3.8(d) contains a requirement that prosecutors disclose evidence to the defense that "tends to negate the guilt" of the accused. This ethical norm is patterned after the constitutional duty to disclose exculpatory evidence under the Due Process Clause of the Fourteenth Amendment. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963). Yet bar disciplinary authorities rarely discipline prosecutors for failing to fulfill their ethical duty to disclose exculpatory evidence, preferring instead to defer to the judicial branch's enforcement of analogous constitutional norms on appeal from conviction. *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 703 (1987).

CONCLUSION

"[C]haracter might help us survive the corruption of our codes." [278]

—Thomas Shaffer

A prosecutor's duty to act as a minister of justice is not a "supererogatory"—the term ethicists often use to describe voluntary action which promotes the good.[279] Comment 1 to Rule 3.8 attempts to make clear that the justice norm is mandatory rather than hortatory, by emphasizing that a prosecutor has a "*responsibility*" to seek justice.[280] However, this message is obscured both by the placement and context of the "justice" directive. By dressing up certain minimum conduct rules within Rule 3.8 as ethical requirements, and then burying the "justice" exhortation in a later comment to the Rule, the drafters may be sending the signal that this conduct is optional rather than mandatory. This is a mistake. The responsibility to seek justice is an admonition with ethical content that demands serious moral reflection.

Those who struggle with rules "know well the limits of rule-making and rule implementation."[281] As the drafters of the Model Rules recognized, "no worthwhile human activity can be completely defined by legal rules."[282] There is room for both specific rules and general norms in ethics codes, depending on their purpose.[283] Forcing lawyers to act in a particular way and setting forth discipline when they fail to follow that requirement is the goal of specific rules. Causing lawyers to reflect on their roles and internalize duties is more appropriately left for general norms.[284] In this "rules versus standards" debate, both sides have valid claims. Standards can be amorphous and unenforceable. Rules may cause the regulated community to see minimal compliance as ethical behavior, rather than a floor below which their conduct may not fall.

With respect to the three hard questions of prosecutorial ethics I have discussed in this Article, it may be impossible to be any more precise in our

278 SHAFFER, *supra* note 7, at 172. Shaffer argues that workable ethical codes in the professions are those that depend on character, and that ethical codes in which that dependence is not implicit are corrupting. *Id.* at 113. In this Article I have argued that dependence on the character of prosecutors is implicit in the "minister of justice" mandate of Rule 3.8.

279 Perkins, *supra* note 49, at 198.

280 MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2004) (emphasis added).

281 Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3, 5 (2005).

282 MODEL RULES OF PROF'L CONDUCT Scope para. 16 (2004).

283 Zacharias, *supra* note 12, at 224.

284 *Id.* at 228–34.

professional code than the "seek justice"[285] standard. As I have argued, the variety and complexity of factual contexts in which these three ethical dilemmas arise belie any attempt at further specificity. The "seek justice" mandate may be the most workable and appropriate standard for prosecutorial decisionmaking in each of these areas if it in fact encourages prosecutors to view their roles broadly and to be reflective about their obligations.[286]

Nonetheless, the choice between enacting more specific rules and leaving it to elected and appointed prosecutors to develop office policies to guide the discretion of staff attorneys (accompanied with appropriate training and supervision) does not exhaust the range of available alternatives. The call for development of office policies[287] will at most help inform individual lawyers about the various factors to consider in making highly contextualized decisions. Because there will always be gaps between practical theory and actual decisions in practice, it will be difficult to agree on a "general reductive method or a clear set of priority rules" to structure certain basic ethical decisionmaking.[288] Moreover, office policies are not self-executing—they must be implemented by individuals, in real situations, in real time, amidst public and institutional pressure to secure a conviction.

Professional norms are hollow without reference to the moral aspirations and sensitivities of individual actors working within their framework. Absent a development of the moral self, prosecutors will not be willing or able to discern any ethical content to the "seek justice" admonition. "The honesty and skill to discern what is right" lies in the virtues.[289] Virtue cannot be taught in law school (although the conversation and the practice can certainly begin in law school, particularly in a clinical setting).[290] It also cannot be commanded by rules. "One of the main impetuses for the recent resurgence of interest in ethics of

285 ABA CRIMINAL JUSTICE STANDARDS, *supra* note 10, Standard 3-1.2(c).

286 *See* Levine, *supra* note 134, at 1346. Levine likened the "seek justice" mandate to the similarly broad directive in the Jewish tradition to "'in all of your ways acknowledge God,'" *id.* at 1340 (quoting *Proverbs* 3:6), and concluded that "it may be not only helpful but perhaps necessary to consider the prosecutor's ethical duties through guidelines articulated in broad principles such as the provision requiring that the prosecutor seek justice." *Id.* at 1346.

287 *See, e.g.*, Green & Zacharias, *supra* note 21, at 897 (arguing that unless and until the profession agrees upon a coherent definition of neutrality, chief prosecutors should identify and make available for public scrutiny principles that will govern the decisions made by their offices).

288 Postema, *supra* note 39, at 67.

289 Perkins, *supra* note 49, at 189.

290 David Luban, *Epistemology and Moral Education*, 33 J. LEGAL EDUC. 636, 644 (1983).

virtue . . . is the sense that the enterprise of articulating principles of right has failed."[291] The advantage of virtue theory is that it provides a noncynical response to this failure of codification.[292]

Some critics will argue that fairness, courage, honesty, and prudence are concepts only slightly less abstract than the duty to "seek justice." They will criticize my approach for substituting one set of highly generalized standards for another.[293] While I concede that the key virtues I have identified might not lead a prosecutor to one *right* decision in every situation,[294] they can help prosecutors filter out the *wrong* reasons for acting. The joint talismen of fairness, courage, honesty, and prudence might serve as anchors to help prosecutors guard against moral drift in their practice of law. Moreover, a renewed focus on the virtues might promote a culture of thoughtful decisionmaking in the prosecutorial community, thus providing individual prosecutors with the intestinal fortitude necessary to resist both institutional pressures and the unscrupulous direction of other actors within the system.

My focus on virtue leads me to three final recommendations and one observation about professionalism within prosecutor's offices. First, chief prosecutors and hiring managers should seek to hire young attorneys who either possess or have the capacity to develop the virtues of courage, honesty, fairness, and prudence. This is not to say that other attributes are not important to success as a prosecutor—including, of course, intelligence, energy, and trial advocacy skills. But these latter attributes are often given inordinate weight in the hiring process, to the detriment of the virtues,

291 Watson, *supra* note 27, at 454.

292 *Id.* at 453–54.

293 My colleague Paul Tremblay has lamented the "slipperiness" of virtue ethics. Tremblay, *supra* note 127, at 510. In the debate between virtuists and casuists, a casuist might claim that virtue ethics does not produce a concrete "answer" to moral dilemmas, and provides only "meager guidance" for practitioners confronting ethical conflicts in real life situations. *Id.* at 510, 520. While I agree that virtue theory will not always reveal to a conscientious moral actor one proper course of conduct, it certainly helps to separate better decisions from worse ones. Even more significantly, however, acting from a proper motive is ultimately more important for a virtue ethicist than doing the so-called "right thing," assuming that there is ever one such a result. Keenan, *supra* note 49, at 117. Finally, casuistry is not as concrete and definitive a form of ethical reasoning as its supporters might suggest. Not all actors are equally capable of recognizing abstract principles in paradigm cases, and then applying these maxims to what they perceive are analogous situations. Tremblay, *supra* note 127, at 517–19 (suggesting that such a method can provide for the resolution of ethical dilemmas with "*probable* certitude") (emphasis added). What virtue theory offers that casuistry does not is an explanation of how moral agents can better equip themselves internally to make informed ethical choices. *See supra* notes 127–30 and accompanying text.

294 *See supra* note 110.

which may be viewed as softer variables and thus more difficult to assess. Chief prosecutors should ask questions during the interview process that attempt to draw out a candidate's *character,* or what Philippa Foot refers to as the "disposition of [one's] heart."[295] They can do so by asking hypothetical questions that are designed to test whether honesty, fairness and prudence are qualities likely to be compromised by the lawyer in the face of competing pressures. Hiring managers should also look for experiences in the candidate's background that may have helped shape his or her virtues during formative periods of the candidate's life—such as leadership displayed on unpopular causes, service to the poor and marginalized in society, a track record of being able to make difficult decisions in complex situations, etc.

My second recommendation is directed at individual prosecutors themselves, particularly at young prosecutors just beginning their careers. New prosecutors should be very careful about whom they pick as role models in their offices. When young lawyers join a prosecutor's office they should seek guidance from more experienced lawyers whom they believe exhibit the virtues of courage, fairness, honesty, and prudence. Aristotle recognized that to understand the nature of good judgment in political affairs we must identify those who have it, watch what they do, and listen to what they have to say.[296] Good character comes from living in communities where virtue is encouraged (families, churches, schools and, I would argue, some professional environments) and then *modeling* the behavior of others.[297] "[T]here is no way to possess the virtues except as part of a tradition in which we inherit them and our understanding of them from a series of predecessors . . . ."[298] When confronting difficult decisions in the course of investigation or litigation of criminal cases, prosecutors should seek advice from the lawyers in the office whose judgment they respect and admire, not necessarily those who have the highest conviction rates or the greatest public stature.[299]

My third recommendation is that managers in prosecutor's offices should not place young and inexperienced attorneys in positions where they need to make broad and difficult discretionary decisions.[300] Deliberation is

295 Foot, *supra* note 109, at 108.

296 ARISTOTLE, *supra* note 49, bk. VI, ch.11, at 186.

297 Shaffer, *supra* note 28, at 883; *see* STANLEY HAUERWAS, *The Self as Story*, *in* VISION AND VIRTUE: ESSAYS IN CHRISTIAN ETHICAL REFLECTION 68, 76 (1974).

298 MACINTYRE, *supra* note 29, at 127.

299 *See* Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 546 (1996).

300 At least two of the three hard ethical questions addressed in this Article (structuring deals to accomplice witnesses and rectifying the effects of ineffective assistance of counsel) are more likely to arise in felony cases rather than misdemeanor cases routinely prosecuted

not something that everyone does equally well. According to Aristotle, the young are particularly handicapped in exercising the virtue of prudence due to their lack of practical experience over time.[301] Prosecutor's offices should thus be scrupulous in their decisions of who to promote and when to promote them. Conviction rates and the ability to "move" cases should not be the sole keys to advancement as a prosecutor. Promotion should be granted only after a lawyer has demonstrated a capacity for honesty, courage, fairness, and above all prudence. Senior managers can identify these prosecutors through the fruits of their labors; that is, their demonstrated capacity to exercise discerning judgment in difficult situations.

Finally, my analysis leads me to one cautiously optimistic observation about the professional life of prosecutors. As elastic and amorphous as the "seek justice" obligation may seem, it can be a source of professional inspiration and satisfaction for virtuous prosecutors who take it seriously. Abbe Smith has asked the question whether a "Good Person [Can Be] a Good Prosecutor" and has concluded, rather provocatively, that he cannot.[302] "It is especially difficult for prosecutors with ideals *and* ambition to resist the pressure to adapt, conform, and be part of the team."[303] According to Smith, the temptation to win at all costs, or at least to adopt a win at all costs mentality, is simply too great to be neutralized by the good intentions of prosecutors working within the system. I must respectfully disagree—not only because I know many good people who are also good prosecutors, but also because I know from firsthand experience that it is possible to resist many of the temptations brought upon prosecutors to cut corners, including pressure from the police, the public, and a daunting workload.

The reality is that people of integrity might find more personal satisfaction and source of inspiration in criminal prosecutions than in adversarial roles where they must fulfill third personal demands of clients.

in the district or municipal courts of this country, because the factual allegations are more complex and the consequences to the defendant more grave. I would argue that even the third dilemma (whether to impeach a witness the prosecutor believes is testifying truthfully) tends to arise more in serious felony cases. The more serious the case, the greater access the prosecutor will have to detailed investigative reports from the police, reciprocal discovery from the defendant, and grand jury testimony. In these cases the prosecutor will be in a better position to reach an informed judgment prior to cross-examination about whether or not a defense witness is testifying truthfully.

301 ARISTOTLE, *supra* note 49, bk. VI, ch. 11, at 186; *see also* KRONMAN, *supra* note 120, at 41 ("The young, [Aristotle] says, are handicapped by their lack of experience and on the whole deliberate less well than those who have seen more of life.").

302 Smith, *supra* note 13, at 378–79.

303 *Id.* at 396.

A lawyer who cannot defend his activities as consistent with first person values is forced to "'live one way in town and another way [at] home.'"[304] Daniel Markovits has recently argued that the commonly observed "crisis in the legal profession" is caused by exclusively role-based solutions to the problems of ethics.[305] The principal thesis of contemporary legal ethics is the "adversary system excuse"; that is, that a lawyer must prefer his client's interests over his own, and therefore must at times do things that he personally perceives as abhorrent or immoral.[306]

Bridging the gulf between third personal and first personal ethical ideals may be easier for prosecutors than most lawyers, because 1) they are not constrained by duties to live clients, and 2) they can imbue the open-ended "seek justice" mandate with their own values, thus avoiding harsh conflict between their personal and professional lives.

Over twenty years ago, Anthony Kronman described the lawyer-statesmen role as "an ideal of character" which is "capable of offering . . . deep personal meaning to those who view their professional responsibilities in its light."[307] While Kronman was pessimistic about whether the lawyer-statesmen ideal could be revived in light of the realities of modern law practice and trends toward specialization in legal education, he acknowledged that this construct of professionalism may continue to exist in pockets of practice:

> Individuals, perhaps, may find a way to honor this ideal in their own careers. But increasingly, I fear, they will be able to do so only by . . . *searching out the cracks and crevices in which a person devoted to the ideal of the lawyer-statesmen may still make a living in the law.*[308]

Criminal prosecutions may be one such "crack[] or crevice[]" where individuals can still practice law without doing violence to their personal ideals, assuming they are willing to interpret the "seek justice" mandate as more than a mere platitude. If they are to succeed, however, a renewed

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304 *See* Shaffer, *supra* note 28, at 879 (quoting HARPER LEE, TO KILL A MOCKINGBIRD 267 (1960)).

305 Daniel Markovits, *Legal Ethics from the Lawyer's Point of View*, 15 YALE J.L. & HUMAN. 209, 290 (2003).

306 *Id.* at 211, 216. Markovits describes a profession where lawyers are able to justify their morally troubling actions in impartial terms based on duties to third parties, but they cannot simultaneously "cast them as components of a life [they] can happily endorse." *Id.* at 225. Markovits encourages us to adopt a greater focus on personal integrity rather than role fulfillment in discussions of legal ethics. *Id.* at 224. "[E]ach person continues to need to identify specifically with his own actions, to see them as contributing to his peculiar ethical ambitions in light of the fact that he occupies a special position of intimacy and concern—of *authorship*—with respect to his own actions and life plan." *Id.*

307 KRONMAN, *supra* note 120, at 362.

308 *Id.* at 7 (emphasis added).

emphasis on the virtues will be critical to promoting and preserving their moral integrity.