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COMMENTARY

THE VIRTUOUS PROSECUTOR IN QUEST OF AN ETHICAL STANDARD: GUIDANCE FROM THE ABA

*H. Richard Uviller**

AMONG his other endeavors, the public prosecutor strives to maintain an upright stance in the stained halls of criminal justice. He correctly senses that the people demand more of him than diligent, workmanlike performance of his public chores. Virtue is the cherished ingredient in his role: the honorable exercise of the considerable discretionary power with which our legal system has endowed his office. Daily, the ethical fibre of the prosecutor is tested—and through him, in large measure, the rectitude of the system of justice.

Discerning and articulating the elusive strains of ethical imperatives therefore seems a worthy task. And, accordingly, a special project of the American Bar Association (ABA) not long ago formulated a number of canons, while a few commentators have contributed observations underscoring the importance of the ethical exercise of discretion by the powerful public prosecutor. But there is little danger that one more submission will overcrowd the field.

Here, I shall discuss only three of the many ethical problems along the prosecutor's way: selective prosecution, prejudgment of credibility, and conflict of interest. While perhaps not the hardest questions, I think they are both important and perplexing. Also, they are united by a common element. In different ways, each concerns the real or imagined impact of factors extraneous to the strictly legal assessment of a criminal case. And each has received the attention of the ABA project with less than completely gratifying results.

I. SELECTIVE PROSECUTION AND DIFFERENTIAL JUSTICE

At first encounter, the widely supported brief for uniformity in the enforcement of the criminal laws appears to need little argumentation. To most, the proposition "Equal justice under law,"

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chiseled on the courthouse pediment, is both elegant and self-evident. Indeed, this slogan expresses for many the quintessence of the American system of justice. Yet, the phrase is fundamentally deceptive. While wide or irrational disparities in treatment are deplorable, equality in the sense of uniformity in result is neither the fact nor the ideal in the system of justice. A given piece of human behavior, described grossly by statute as a crime, does not and should not generate an automatic and standardized response from police, juries, or judges. Nor should we expect an indiscriminated prosecutorial reflex. To some degree, justice requires regard for the differentiating characteristics of a particular crime or criminal.

Differential justice flows from both necessity and option. Among necessities, I count the low resolving power of even the most resourceful policemen. And of the relatively few offenders caught, evidentiary deficiencies require the release of many who are probably guilty. Then, too, in many jurisdictions swelling dockets exacerbate the disparity in result between the defendant who is convicted after trial and the one who tenders an expeditious guilty plea.

Some of these realities of differential justice undoubtedly mark flaws in the system. But the essential defect is to be found, I think, not so much in the fact that some offenders go unwhipped—or less severely whipped—as in the wanton, almost random, manner in which the necessitated differentialities are bestowed. I perceive scant therapy in the ministrations of the criminal law, and I cannot believe that its ineffectiveness can be assigned to insufficient use. Reduction, then, in the impunity ratio is not the principal objective; rather, we should try to shift the process of differentiation from blind necessity to the intelligent exercise of discretionary option. From the decision to arrest through the choice of sentence, particular circumstances of the offense and individual characteristics of the offender should exert influence, as indeed they do when the opportunity occurs. And we should accept the consequence of a reasonable disparity in result for superficially similar crimes in the interest of the flexibility inherent in justice.

Among those entrusted with critical discretionary options in the American system of criminal justice, the public prosecutor occupies a pre-eminent place. Daily, the prosecutor decides whether to prosecute and selects the grade of criminality to which a defendant may offer his guilty plea (contributing, perhaps, an important voice on the matter of punishment as well). More importantly, he is entrusted

with the decision whether and how persistently to investigate a person or condition in the effort to make a criminal case. While these options are rarely his exclusively, he may be regarded as the central impetus in the state's resort to, and choice of, criminal sanctions. The decision is a virtually inescapable responsibility for the dutiful prosecutor. The police may bring him cases, other agencies may conduct investigations with criminal consequences, and the court or grand jury may be the arbiter of some of his decisions, but the prosecutor's impact on the course of the case is so great that it is fitting to turn to him to answer for the multiple discriminations in his ordinary exercise of options.

To refine the ethical ingredient in the use of discretion, let us exclude from consideration those easy cases in which the prosecutor declines to prosecute the untenable case or proceeds with an artificially inflated one. We concern ourselves only with the case fit and scaled for legitimate prosecution, where its creation, pursuit, or abandonment is motivated by purposes extraneous to its legal merit.

Professor Monroe H. Freedman, who gave us his candid, provocative, and unorthodox responses to "The Three Hardest Questions" confronting defense counsel,¹ uses a blunter instrument to probe prosecutorial ethics.² As deftly as he defended defense counsel, so roundly does he prosecute prosecutors. He facilitates his object by mainly addressing instances of clear and blatant misuse of power, such as overcharging to "coerce" a guilty plea, deliberately suppressing proof or introducing false evidence, concealing police perjury, or retaliating with criminal charges against the civilian who complains of police abuse. However, he also attacks—with little supporting analysis—the prosecutor who singles out a target for determined prosecution. Citing Al Capone and James Hoffa as the victims of overzealous prosecution, he decries "prosecutions that are directed at individuals rather than at crimes."

The ethical standard so casually suggested by Professor Freedman is somewhat baffling. What does he mean by a prosecution directed against an individual? Does he mean that in deciding where to investigate or how vigorously to prosecute, the district attorney should have no regard for the personal characteristics of the actual or potential defendant? Surely, he does not argue that in deciding on the

1. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

2. Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L. REV. 1030 (1967).

acceptability of a lesser plea, the prosecutor should pay no heed to whether the offender is a novice or a seasoned professional, treating all cases alike according to the deed that was done. But if the prosecutor may ethically take the background or reputation of the defendant into consideration in electing an appropriate disposition, why not in fixing his investigative sights? Would the ban on individuals as targets preclude the decision to devote prosecutorial energy to discovering evidence of a crime committed by a known underworld loanshark? Or would Professor Freedman only countenance a prosecution of such a target for usury, regardless of the evidence of other reprehensible conduct unearthed by the investigation? Why does Professor Freedman find it less honorable (as he seems to) for the prosecutor to select for his attention one of many violators of the same penal provision than to choose one of many different crimes for specially vigorous pursuit? Apparently, a prosecutor who cracked down relentlessly on gambling, pot-smoking, or prostitution (directing his attention to crimes, not individuals) need fear no censure from Professor Freedman, even though he did nothing about street muggings or corruption and was motivated solely by his own personal antipathy to vice.

If the prosecutor may (as he must) rank his targets according to some system of priorities, the ethical problem would seem to inhere in the assumptions that determine the order. The most recent, authoritative, and exhaustive treatment of the proper discharge of the prosecution function is the *ABA Standards Relating to The Prosecution Function and The Defense Function*, compiled by a distinguished advisory committee, chaired during most of its working life by the man who became Chief Justice Warren E. Burger. Several of the standards speak to and around the discretionary options properly a part of the prosecutor's role. The most specific of these is standard 3.9, which reads as follows in the Approved Draft:

3.9 Discretion in the charging decision.

(a) It is unprofessional conduct for a prosecutor to institute or cause to be instituted criminal charges when he knows that the charges are not supported by probable cause.

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;
- (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
- (iv) possible improper motives of a complainant;
- (v) reluctance of the victim to testify;
- (vi) cooperation of the accused in the apprehension or conviction of others;
- (vii) availability and likelihood of prosecution by another jurisdiction.

(c) In making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his record of convictions.

(d) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in his jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(e) The prosecutor should not bring or seek charges greater in number or degree than he can reasonably support with evidence at trial.

The thrust of this formulation (as more fully expounded by the draftsmen in their commentary) is (1) "The prosecutor ordinarily should prosecute if after full investigation he finds that a crime has been committed, he can identify the perpetrator, and he has evidence which will support a verdict of guilty," and (2) "It is axiomatic that all crimes cannot be prosecuted even if this were desirable." The commentary proceeds to a forthright stand in favor of selective prosecution. The prosecutor is told that he "must adopt a first-things-first policy"; he is reassured that he is "not neglecting his public duty or discriminating among offenders" by eschewing "mechanical application of the 'letter of the law'" in favor of a "flexible and individualized application of its norms." In view of this clear position, we need not be troubled by a nasty persistence of apparent inconsistency when, in the same breath, the commentators recite several extra-evidentiary factors to guide prosecutorial selectivity, while advising prosecution of charges "warranted by the evidence." The text may be comfortably taken to say, simply, that a charge unwarranted by the evidence should never be lodged, but that an individualized selection may be made from among several charges of differing gravity, all of which are supported by evidence. Nor do the draftsmen rule out ethically refusing to prosecute altogether

a well-founded charge, despite some intimation to the contrary in the first proposition noted above.

The plain purpose of standard 3.9, then, is to provide guidance to prosecutors in deciding whether and to what extent to prosecute a supportable charge. While some of the suggested factors are interesting in themselves,³ and some omissions are odd,⁴ over all the formulation stands as a satisfactory collation of mitigating elements which may move a conscientious prosecutor to block or ameliorate the full force of a penal law.

Yet, the standards leave me with an uneasy feeling that the issue has not been squarely met. The reason for my disquiet, I think, is that the proponents of the standards embrace the principle of unequal justice (if they will forgive the use of that abrasive term) upon a consideration of only the easy side of the question: leniency and mitigation. Few, looking at the meritorious case in which the prosecutor has interposed a discretionary choice to spare the deserving offender the full harshness of the law's penalty, would call the result unjust. However, the standards leave two related questions to resolution largely by negative pregnant.

First, are we to read the standards to require that the ethical prosecutor turn resolutely away from any contrary impulse and prosecute to the fullest extent any hapless soul who falls into his hands without sufficient mercy points? Are the cases, for example, in which the prosecutor agrees to a lesser plea to be regarded as exceptional, specially warranted deviations from his ethical duty to let the legislative will be done? Let us remember that the legislature, in defining crimes and their degrees—with commensurate punishments—necessarily conceived of aggravated instances, prescribing maximum sanctions suitable for the worst cases in the range embraced by the crime category. May not the prosecutor, like the judge, consider most cases to be less than the worst manifestations of the conduct described by law and recommend lenient or alternative treatment of the offender accordingly? If so, what we need from those who would voice ethical criteria are standards that inform the prosecutor when he

3. A notable example is "possible improper motives of a complainant." ABA STANDARDS § 3.9(b)(iv).

4. For example, the text of standard 3.9 does not mention the offender's youth and clean background as a potential mitigating factor, although standard 3.8(a) recommends that the "prosecutor should explore the availability of non-criminal disposition . . . especially in the case of a first offender." The comment expands on this alternative. The commentary to standard 3.9(b), however, does state that "the offender's age, prior record [and] general background . . . require the prosecutor to view the whole range of possible charges"

should treat a case as unworthy of reduced penalty: In which instances should the full fury of the law be expressed by the ethical prosecutor? Here, on the ugly side, we may expect to find the unjust effects of personal prejudice, anger, inappropriate moralism, and similar unhealthy extraneous considerations counterpointing those that might impel the prosecutor toward leniency. Properly drafted, then, the standard should imply no preference for either full or moderated prosecutions, but rather suggest the appropriate factors for consideration in making the choice.

Second, the standards fail to address the question that worries Professor Freedman: When should the prosecutor pursue a selected target, seeking evidence for prosecution? Standard 3.1(a) simply states that the prosecutor "has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies." Passing with wonder, but without comment, the implied deference to "other agencies" which the section's limitation imposes on the prosecutor, we discern no guidance for the exercise of this "affirmative responsibility." Perhaps it is enough for some jurisdictions to call upon the prosecutor to bend his investigative efforts to every case of suspected crime, regardless of the girth of the reed of suspicion or the nature of the crime or criminal to be pursued. But for others, surely, the decision to investigate—that is, to undertake the long, arduous task of building a case when no clear evidence pokes through the surface—must, by necessity, be selective, and it requires one of the more significant exercises of discretion in the prosecutor's arsenal. Do the framers of the standards agree with Professor Freedman that it is unethical for the prosecutor to decide to investigate a person because he suspects that the person is engaged in one of a variety of criminal activities, and to seek to make a case against him for any crime he can support with evidence? Do the ethics of the choice dictate a prior resolve to investigate certain activity, *qua* activity, to catch whoever might be involved in it? If the framers feel—as I do—that the distinction between these two is an artificial one, unwarranted by any rational policy, then how should the prosecutor select his target, be it crime or criminal?

Once the target is selected, it is not difficult for the honest district attorney to justify the chase. All criminal enterprises of any complexity, and particularly the subterranean, are dangerous to the social ease of the community. So the prosecutor, relentlessly dogging the corrupt official or agency, the reputed mafia captain, or the burglary, or car-theft, or narcotics "ring," may readily defend his

decision to seek evidence for a prosecution. Little favor will be found by those voices which seek to brand the chase as "harassment" or "persecution" of citizens who have not yet given cause for arrest. True, the techniques of such prosecutorial investigation produce protest from some quarters; electronic surveillance, infiltration by spies and informers, and the patient compilation of "innocent" data are not favored police activities in a free society. But, at least when the quarry whom the responsible prosecutor is pursuing lacks political charisma, the effort to catch him is commonly thought to be the commendable enterprise of a dynamic public official. Yet, the process of selection, the method by which the prosecutor decides to go after this target while letting that one escape his diligent efforts, must be a discretionary matter of some ethical consequence.

As a matter of ethics, the problem sounds to me in tones of motivation. It is less important to me that a prosecutor spends his efforts bringing to bar a notorious pimp, while doing nothing to discover evidence of police corruption, than why this election was made. If a plea to the reduced crime of manslaughter is accepted by the prosecutor from a defendant who murdered a clerk during a holdup, while in another case the prosecutor offers no lesser plea to a man who kills a cop who interrupted a robbery, the important question is why the prosecutor insists on the full measure of guilt for the cop-killer and not for the clerk-killer. The ethical objective, it seems to me, is to keep the exercise of this important discretionary power of the prosecutor free of improper motivation.

I recognize the significance of my disparagement of objective consequences. Unequal results are unequal regardless of the motivation of the official who achieved them. But if Robert Kennedy, as Attorney General, was convinced that the Teamsters Union, and Hoffa in particular, was destructive to trade unionism and a powerful, dangerous, and gangster-ridden force in the economy of the nation, would not his pursuit of Hoffa seem more ethical than if (as Freedman hypothesizes) Kennedy resolved to imprison Hoffa in revenge for a trivial personal insult and brought the armies of the Justice Department against him on that account? The prosecutor who senses the outrage of his constituency against the aggressive and unsightly hordes of prostitutes infesting the streets may ethically respond by stricter application of valid laws against prostitution. More questionable, it seems to me, is the same campaign waged by the prosecutor as self-appointed custodian of community morality, impelled by personal distaste generated by his own values. I do not

suggest that the honorable prosecutor be the slave of his electorate. Indeed, in many matters his duty clearly lies in the defiance of community pressures. But, within the confines of law, I would rather see his discretion guided by an honest effort to discern public needs and community concerns than by personal pique or moralistic impertinence.

It may be argued, with some merit, that my distinction is as artificial as Freedman's, and far less workable than the measured advice of the ABA standards. What prosecutor in his senses would admit to being motivated by personal pique? What action could not be rationalized as a good faith effort to discern community needs? And what possible scheme of enforcement of professional canons could hinge on the purity of official motivation? Once again, are we lawyers not acting the part of disingenuous moralists, teasing ourselves with chimeras of fancied rectitude? Perhaps; it is a charge with a familiar sting. Perhaps it is not enough to reply that the announcement of professional ethics is not, in the main, a practical endeavor. Perhaps it is unpersuasive to argue that unenforced, or unenforceable, ethical canons occupy a useful place in the system of law.

Let us frankly acknowledge that justice in the criminal process and the rectitude of its administrators are both largely a matter of myth. (I use myth in the anthropological sense, as a community belief which, whether true or not, is necessary for the functioning of some institution of that community.) We need faith in our legal institutions, and it helps to define the nature of our expectations. Whether the precision and accuracy of that definition can contribute to its realization is, of course, a matter of the most theoretical speculation. But is it not conceivable that by stating the nature of our demand with care we may encourage the institution to respond along the same beam? Essentially, then, I am neither seeking to conceal the weaknesses of the structure beneath a gloss of pious mythology, nor am I confident in the expectation that formulation produces compliance. Rather, I hope here only to describe what I believe to be the root of ethical comportment. And if it be said that prosecutors claim to be moved in the exercise of their discretion by public purposes only, then I am less concerned with detecting their deception than I am gratified to discover that the rationalization evidences adherence to the precept that public compassion, not private moralism, counts.

It might be noted that paragraphs (c) and (d) of standard 3.9 ap-

pear to hint at the motivational basis of ethical conduct, advising the prosecutor to disregard stray thoughts of his political future. Although they are in what seems to me to be the correct vein, these ideas are nonetheless poorly framed. Paragraph (c) seems to say two quite different things at once: Contemplating the personal or political advantage of a sturdy conviction ratio, the conscientious prosecutor should neither (1) prosecute merely because he feels he has a sure winner, nor (2) decline to prosecute because he fears an adverse verdict. When the word "merely" is properly stressed, there can be little doubt of the wisdom of the first injunction. The second, however, is open to some question. Of course, when put as it is in paragraph (c), it is easily swallowed; declining to prosecute a losing case is hardly commendable when done solely for the prosecutor's selfish advantage of a high conviction rate. But paragraph (d) (rather superfluously) amplifies the theme: At least in cases involving "serious threat to the community," the prosecutor should not be deterred by prior experience reflecting juror sentiment against prosecuting the act in question. While it may be hard to imagine a measurable tendency of jurors to acquit on such "serious" charges, the prosecutor who heeds such experience despite his personal outrage may be according proper respect to community sentiment. The prosecutor, for example, may regard pornography or marihuana or public protest as seriously threatening, but I suggest he would do well in the exercise of his discretion if he tempered his efforts in accord with the public sentiment—contrary to his own—which may be reflected in prior jury acquittals for crimes of those sorts.

Thus, I think I would recast the substance of paragraphs (a), (b), (c), and (d) of standard 3.9 along the following lines:

(a) It is unprofessional conduct for the prosecutor to prosecute charges for which there is insufficient supporting legal evidence.

(b) The prosecutor should affirmatively seek the evidence to support a prosecution where, in his judgment, the well-being of the community is seriously threatened by illegal enterprise or by the criminal activities of an identifiable person or persons, notwithstanding the fact that such crime or criminal has thus far escaped detection or arrest.

(c) The prosecutor is obliged neither to seek evidence, nor to prosecute all charges supported by legal evidence, nor to prosecute such charges to the fullest extent allowed by the law. In deciding whether and to what extent to investigate or to prosecute such charges, the prosecutor, disregarding personal advantage or inclination, should consider

- (i) prevailing community sentiment toward the offense in question;
- (ii) mitigating or aggravating circumstances of the criminal event;
- (iii) appropriate features of the defendant's background and criminal propensity; and
- (iv) the cooperation of the defendant in the apprehension or conviction of others for crimes of equal or greater gravity.

II. PREJUDGING CREDIBILITY

Our system of justice provides for a fact finder. A rather elaborate process has been devised to enhance the accuracy of that divining mechanism. Although far from infallible, it is still believed by many to be the best design yet conceived. And the prime function of that official fact finder, be it judge or jury, is to determine credibility. To what extent should the prosecutor, in the performance of his proper role, assume a supervening truth-detecting responsibility?

As with any good lawyer anticipating trial, the prosecutor should seek to learn the stories of as many witnesses as he can find. And when presented with inexact, incomplete, or conflicting accounts, as is commonly the case, I do not suppose he can be censured for encouraging witnesses to try to improve their memories and get their stories "straight." But, as every trial lawyer knows, obtaining a coherent account of a set of events is a long way from forming a personal judgment of the truth of the matter reported. Some defense counsel I know studiously avoid taking that large and difficult step to private judgment. They correctly feel no obligation to judge credibility. And they may feel their enthusiasm for their task would be dampened by a private assessment of the case. Assuming that, as an advocate, the prosecutor experiences a similar disinclination, is he impelled by the ethical commands of his special role to seek a personal evaluation of the truth?

While ABA standard 3.9(a) condemns in its strongest terms the prosecutor who institutes or causes to be instituted criminal charges when he knows them to be unsupported by "probable cause," paragraph (b)(i) of the same standard suggests that the prosecutor may decline to prosecute a case when he himself entertains a "reasonable doubt that the accused is in fact guilty."

The matter is somewhat complicated by paragraph (e), which injects, subcutaneously, a third standard of certitude in the charging decision. On its surface, paragraph (e) instructs the prosecutor not to "bring or seek" charges greater in number or degree than he can

"reasonably support with evidence at the trial." The term "reasonably support" may occasion some mystification, which the commentary seeks to explain. The paragraph, we are informed, is addressed exclusively to permissible multiplicity and gravity of charges at the point of accusation, providing the prosecutor's ethical escape from an imputation of harassment or the untoward acquisition of leverage for future plea negotiation. In this context, the commentary paraphrases the provision: "hence, he [the prosecutor] may charge in accordance with what he then believes he can establish as a prima facie case." With this enlightenment, the rather awkwardly expressed phrase "can reasonably support with evidence at trial" may be read: "can reasonably expect that at the time of trial—despite evaporation, suppression, or other misfortune—he will be able to support with legally sufficient evidence."

The standard of probable cause does not require exacting judgment from the prosecutor, for it does not entail great certainty concerning the underlying truth of the matter; "probable cause" may be predicated on hearsay, and, indeed, does not even import a substantial likelihood of guilt. Like probable cause, the prima facie standard takes little account of credibility questions, but it is a significantly more demanding criterion, satisfied only by (1) "legal" (*i.e.*, admissible) evidence (2) sufficiently complete to establish every element of the crime in question, credence aside. So the standard countenances accusation on no greater certitude than the belief warranting arrest (probable cause), but the prosecutor should not "overcharge," that is, he should not accuse of more than he reasonably anticipates he will be able to support with legally sufficient evidence. Read together, then, the trio of provisions sounds like this: The prosecutor *must* abjure prosecution without probable cause, *should* refuse to charge without a durable prima facie case, and *may* decline to proceed if the evidence fails to satisfy him beyond a reasonable doubt.

The interesting part of the standard is the suggestion that if the prosecutor, imagining himself in the seat of a juror, would not vote for a verdict of guilty, he may decline to present the matter to the system's designated fact finder. I have heard prosecutors, as a matter of personal conscience, take this notion as an ethical imperative. "I never try a defendant," so runs the credo, "unless I am personally convinced of his guilt beyond a reasonable doubt." Or, for some: "beyond any doubt." Realistically, the prosecutor figures that, inflamed by the brutal facts of the crime or for some other reason, the jury may overlook the basis for the doubt which nags his own judg-

ment. And he could not sleep at night having contributed to the conviction of a man who might just possibly be innocent. Of course, in reaching this extra-judicial judgment, the prosecutor will allow himself to consider relevant items which might be excluded from trial evidence. Nor would his refusal to prosecute the case necessarily mean he would decline to recommend the acceptance of a guilty plea, for the confession which normally accompanies the plea may remove the prosecutor's doubt.

Yet withal, the prosecutor's conscientious stand represents a notable modification of our system of determining truth and adjudicating guilt. At the least it creates a new subtrial, informal and often *ex parte*, interposed between the determinations of the accusing and judging authorities.

Can there be any objection to the prosecutor's transformation of the standard's "may" into a personal "must"? A defendant, of course, can only benefit from this additional safety procedure, and its adoption may move the prosecutor to more diligent and painstaking pretrial investigation, including an open-minded search for persuasive defense evidence. This latter effort comports nicely with the familiar injunction duly intoned by standard 1.1(c): "The duty of the prosecutor is to seek justice, not merely to convict." From these features it may appear that the standards should have placed this burden of internal persuasion on the prosecutor in every case. I think not.

A concrete, commonplace example may illustrate the operation of the precept and flesh out our appraisal of its wisdom. Practitioners know too well a sticky item: the one-eye-witness-identification case. For instance, an elderly white person is suddenly grabbed from behind in a dimly lit vestibule by a black youth who shows a knife and takes the victim's wallet. The entire incident occupies thirty seconds. Some days later, the victim spots the defendant in the neighborhood and has him arrested by the nearest policeman. Although the prosecutor presses him hard, the victim swears he has picked the right man. There is nothing unusual about the defendant's appearance, the victim never saw him before the crime, and he admits he does not know many Negroes personally, but his certainty cannot be shaken. He insists that in those few moments of terror his attacker's face was "indelibly engraved on his memory." The defendant may have an alibi: his mother will testify that at the time of the crime he was at home watching television with her (not evidence readily credited). And that is the entire case.

Many prosecutors, I think, would concede that as jurors they would hesitate to vote "guilty" on this evidence. His sincerity unmistakable, the victim might well be correct in his identification of the defendant; perhaps it is more likely than not that the defendant is the perpetrator. And juries regularly convict in such cases. But since he knows the fallibility of identification under such circumstances, the basis for reasonable doubt is clear to the prosecutor.

Should the ethical prosecutor refuse to put this sort of evidence before the jury, withhold from the regular fact-finding process the opportunity to decide the issue? Indeed, should the conscientious prosecutor set himself the arduous task of deciding whether in this instance the complainant is right? If it is his duty to do so, how does he rationally reach a conclusion? For this purpose, are his mental processes superior to the jurors' or the judge's? Or may he—should he—abstain from prejudging the case and simply pass the responsibility to those who cannot escape it?

Let us take the problem in a somewhat different, equally common form. The defendant, let us assume, is charged with the illegal possession of a quantity of narcotics. There is little doubt of his guilt; indeed, he is ready to plead guilty. However, he claims that the drug was obtained by an illegal search of his automobile and should therefore be suppressed. The police officer insists that he retrieved the bag of drugs after the defendant abandoned it by throwing it from the window of the vehicle at the officer's approach. Now, the prosecutor knows that some drug carriers do try to divest themselves of the contraband when approached by police, but he also knows that many police seek to escape the strictures of the exclusionary rule by reciting an abandonment to cover an illegal search and seizure.⁵ Despite his general suspicion, however, the prosecutor has no reason to believe that the case in question is based on false testimony. Moreover, he has every reason to believe that on the ultimate issue of the defendant's guilt, justice will be done. What is his ethical course?

I confess I have no clear release from the prosecutor's predicament. I recognize as laudable the taking of one more precaution to avert the horror of convicting an innocent person. Yet, on balance, I

5. In fact, prosecutors have become so concerned about this variety of police perjury that the New York County District Attorney recently joined with defense counsel in an unsuccessful attempt to have the New York court of appeals shift the burden of proof to the state when abandonment is asserted in reply to a motion to suppress contraband drugs. *People v. Berrios*, 28 N.Y.2d 361, 270 N.E.2d 709, 321 N.Y.S.2d 884 (1971).

do not believe the prosecutor must—or should—decide to proceed only in those cases where he, as a fact finder, would resolve the issue for the prosecution.

Where the prosecutor, from all he knows of the case, believes that there is a substantial likelihood that the defendant is innocent of the charge, he should, of course, not prosecute. Similarly, if he has good reason to believe that a witness is lying about a material fact, he should not put the witness on the stand, and if his case falls without the witness' testimony he should dismiss it regardless of whether inadmissible evidence persuades him of the culpability of the defendant. Short of these grounds for declining prosecution on the merits, I deem the ethical obligations of the prosecutor satisfied if he makes known to the court, or the defense, discovered adverse evidence and defects of credibility in witnesses.

Thus, when the issue stands in equipoise in his own mind, when he is honestly unable to judge where the truth of the matter lies, I see no flaw in the conduct of the prosecutor who fairly lays the matter before the judge or jury. He need not vouch for his cause implicitly, as he may not explicitly. Nor should he lose sleep over his reliance upon the device that the system has constructed for the task of truth-seeking, inexact though he knows it to be. Although the prosecutor's discretionary powers may be important, and his detached and honorable presence vital, he is not, after all, the sole repository of justice. Thus, I do not believe that the system is served by canons which overplay the prosecutor's "quasi-judicial" role. He is, let us remember, an advocate as well as a minister of public justice, and the due discharge of his many obligations of fair and detached judgment should not inhibit his participation in what is, for better or worse, essentially a dialectic process. In our well-guided efforts to imbue the system with flexibility and personal qualities of sympathy, we need not sacrifice the values which may yet inhere in the design of controlled contention.

III. CONFLICT OF INTEREST

To say that the prosecutor need have no compunction in resorting to adversary methods of fact finding is not to define his role as purely barristerial. On this side of the Atlantic, at least, the prosecutor operates within a public responsibility transcending the adversarial considerations of any particular case. His power is considerable, his obligations general, and we therefore demand of him

—as we do of other flag-bedecked authorities—a strong conscience and a hand free of the possible influence of extraneous and inappropriate loyalties. The moral injunction against conflicting interests is founded on a well-warranted mistrust of ministers and a sound appreciation of the inaccessibility of the many inchoate factors shaping the decisions of the powerful. Rather than examining his overt conduct or inaction, we demand that our only-human servant eschew temptation.

The identification and articulation of those lures which, in fact or in appearance, imperil duty is a challenge to the most resourceful draftsman. Of the several formulations directly or indirectly instructing the prosecutor in the ethical imperatives of his calling, none (to my mind) has come close to dealing clearly or comprehensively with the problem of conflicting interests. The Approved Draft of the *ABA Standards Relating to The Prosecution Function*, published in March of 1971, contains a supplement recommending some alterations in the formulations previously promulgated in tentative form. In the main, the proposed amendments take account of a sister study published in the interim—the ABA Code of Professional Responsibility. Standard 1.2 of the Tentative Draft of the *Standards Relating to The Prosecution Function* spelled out some examples of the appearance or reality of a conflict of interest. The Approved Draft supplement, however, deletes this short list because, as the commentary explains: “it carries the misleading implication that it is exhaustive. It may appropriately be regarded, instead, as commentary.” In place of the omitted specifications, standard 1.2(a) now incorporates by reference unspecified definitions of “unprofessional conduct” (a term signifying conduct subject to discipline) in the Code of Professional Responsibility. Unfortunately, however, not much of direct bearing can be found in the Code, for these canons are mainly addressed to the private practitioner and speak almost exclusively in terms of duty to “client.” There may be some who insist that there is a single body of ethical precepts binding the bar in general, its public as well as its private sectors. Yet, there is little to be gleaned from this Code of the peculiar responsibilities of the prosecutor and his particular temptations. The peculiar nature of the prosecutor’s ethical constraint stems from the power in his hands, rather than from obligations of fealty to the interests of a client. Since this plentiful well of official corruption passes virtually unnoticed by the Code, we must continue to look for advice in the Tentative Draft of the *Standards Relating to The Prosecution Function*, even though

the ABA's initial recommendations have now been demoted to mere commentary.

The meagre effort of the Tentative Draft ignores a species of conflict of interest sufficiently toxic to be cited in the Code relating to private practitioners: the implied conflict arising from a pecuniary stake in the outcome. Contingent enrichment also offends our notions of decency when it appears among the robed participants in the process. Heavily contributing to the rejection of a recent judicial candidate was his broker's purchase of a negligible quantity of stock in a corporation whose fortunes might have been affected by a case in litigation before the judge in question. So, too, the prosecutor may be expected to shun financial interests which might be affected by matters within his office. Perhaps, little of the local prosecutor's work alters the financial condition of any enterprise in which he is likely to own a share. Yet, it is surely well to advise prosecutors to avoid investment (for example) in taverns or construction and maintenance firms contracting with the local government, for we would not want his investigative or prosecutorial ardor cooled by the prospect of financial loss.

But let us not fall into the sweet naiveté of the economists' uncluttered view of human motivation. Man is not moved by bread alone. Is not the ideal of personal detachment from the cause as seriously jeopardized by the prosecutor's relationship, friendship, or prior association with victim, witness, defendant, or adverse counsel? The litigating bar of most communities is small and frequently friendly. The prosecutor (particularly if well chosen) is likely to be associated professionally or socially with some of the others in the group. The bar prides itself that friends can be diligent adversaries. But now one of the friendly combatants is a public official besides. Should we be concerned that his duty may conflict with the interests of friendship or the residue of prior association?

Looking again to the ABA standards, *faute de mieux* we must rely on the Tentative Draft. Standard 1.2(a)(b)(i) of the *Standards Relating to The Prosecution Function* warns the prosecutor to avoid the appearance or reality of a conflict of interest which may arise when "a law partner or other lawyer professionally associated with the prosecutor or a relative appears as, or of, counsel for a defendant." In such a case, the commentary counsels, the prosecutor should go so far as to recuse himself and make arrangements to be supplanted by another lawyer in accordance with the principles of standard 2.10, which calls for procedures for the supersession and

substitution of prosecutors upon "a public finding that this is required for the protection of the public interest." This means, one supposes, that when the prosecutor's cousin Max files a notice of appearance for the young man accused of joyriding, the prosecutor should appeal to the governor to find that his continued conduct of the prosecution would be inconsistent with the public interest. The suggestion takes the conscientious prosecutor a fair distance to claim the spotless mantle of Caesar's spouse. Then, too, consider the suspected criminal relentlessly pursued by the energetic young prosecutor through arduous investigation. What easier way to get the hot breath of the law off his neck than to retain cousin Max (who is, of course, under no ethical obligation to refuse the handsome fee tendered). Substituted counsel for the state may have less determination and certainly less experience in the matter.

Standard 1.2(b)(ii) of the ABA Tentative Draft also sees the debilitating conflict arising when "a business partner or associate or a relative has any interest in a criminal case, either as a complaining witness, a party or as counsel." Passing the reiterated ban on the appearance of cousin Max for the defense, this curious provision might be thought to augment a ban upon pecuniary interest held by the prosecutor himself, but for the omission of any such reference in the standards. In essence, the provision advises withdrawal of the prosecutor when either an associate in some business enterprise or a relative of the prosecutor is the victim, the defendant, or a lawyer in a criminal prosecution. The emotional ties of commercial or blood relationship presumably disqualify the prosecutor for his official role. I suppose a prosecutor need hardly be told that it is unseemly for him to prosecute his mother or to try the man who raped his daughter. But one might wonder whether he is similarly disabled when the lawyer with whom he owns real estate appears to defend a client in a matter wholly unrelated to their joint property interest.⁶

The final example of a conflict of interest cited in standard 1.2 occurs when "a former client or associate is a defendant in a criminal case." This formulation is the sole allusion to the threat of the persistence of previous ties. And it is deemed perceptible only when the bond runs to a defendant. Clearly, the prosecutor should not prosecute a former client on a new charge. Whether or not their prior confidential relationship accorded the prosecutor knowledge of the defendant's activities, few would doubt the impropriety of a person's

6. To quibble, one might also question whether an attorney for a criminal defendant has an "interest" in the case in the same sense as a "party" or victim.

former counsel appearing in the role of his present prosecutor. For somewhat different reasons, it is equally clear that the prosecutor should not control the case against a former associate, whether the nature of the association was commercial or legal (the distinction being mysteriously dropped in this clause). The difficulty of enumerating types of terminated associations (*e.g.*, teammates on a college varsity squad, fraternity brothers) is obvious, but it might be asked why disqualification arises only when the former associate appears in the role of defendant. If emotional ties disqualify the prosecutor when his present partner appears as the complaining witness in a street crime, can it be said that such bonds were severed when their business or legal unit was dissolved?

Another oddity is apparent when the entire provision is read in conjunction with standard 2.3(b), which calls for the prosecutor to function as a full-time official. Obedience to this wise directive would obviate the major portion of the conflict of interest section, for the full-time prosecutor has neither law partners nor business associates. The prosecutor, obedient to the standards as a whole, need recuse himself only when a relative is involved as a witness, "party," or defense counsel, or when a former client or associate is a defendant.

In all, the provision seems ill conceived and awkwardly drawn. Concededly, a hard choice must be made in framing ethical standards. The formulation must be either broad and open, in which case it is indefinite and difficult to enforce, or it must be detailed and specific, in which case it is long but rarely complete. But however the choice is made, the language should address the essence of the conduct regulated. Here, the draftsmen initially chose the approach of specific enumeration. Yet it is clear that they failed to describe the virus against which they sought to immunize. Thus, they have at the same time covered too much and too little, requiring recusal on trivial and illusory conflicts, while omitting many serious dangers to the prosecutor's impartiality. The latter flaw, at least, they subsequently recognized—but failed to cure. Even in the limited area of personal associations and relationships with described categories of individuals who enter the process in various capacities the standard falters. It fails to offer guidance over the range of potentially troublesome conflicts which may confront the prosecutor striving for an ethically upstanding posture.

Here (for illustrative purposes) I boldly submit another alternative formulation:

Art. X: Conflict of Interest

- X.1. It is unprofessional conduct for a prosecutor to participate personally in any phase of a criminal investigation or prosecution in which he knows or reasonably anticipates that a member of his immediate family is or will be
- (a) the defendant,
 - (b) the victim,
 - (c) a witness,
 - (d) counsel for the defendant,
 - (e) counsel for any witness or interested party, or
 - (f) the judge.
- X.2. It is unprofessional conduct for a prosecutor to participate personally in any phase of a criminal investigation or prosecution unless he reasonably believes that his judgment will be entirely unaffected by
- (a) any financial or pecuniary interest held by the prosecutor or by any member of his immediate family in any business or enterprise which he reasonably believes might be involved in or materially affected by the case in question;
 - (b) any consanguinal, marital, professional, or commercial association, past or present, with any person who is or might reasonably become involved in the case in any capacity; or
 - (c) any obligation to or association with any person or organization which has had or may have any material influence upon the course of his professional career and which is involved in or materially affected by the case in question.
- X.3. The prosecutor should decline to participate personally in, or if appropriate, should request the appointment of an independent special prosecutor to relieve him of responsibility for the prosecution of
- (a) any matter in which he believes that, for any articulable reason, he would be unable to maintain proper professional detachment; or
 - (b) any matter in which the public is likely to believe that the prosecutor labors under conflicting interests, obligations, or sentiments which would impair his proper professional detachment.

The first of my provisions (X.1) is the simplest. It subjects to professional discipline any prosecutor who takes a personal part in a case in which a close relative is involved in any capacity. Where parents, offspring, spouse, or siblings are players, the prosecutor must

have no part in the affair. This is not to say, of course, that a prosecutor may not ably try a case witnessed by his spouse. But who can doubt the public discomfort occasioned by the spectacle of the prosecutor enmeshed in public litigation with, against, or before a member of his immediate family. Indeed, such is the real as well as apparent danger to detachment that it might well be argued that shifting responsibility for prosecution to a colleague or subordinate does not rinse away the conflict. Yet, I hesitate to command the prosecutor to summon special counsel, unaffiliated with his office, in every instance of this kind. I would prefer to advise the appointment of a special prosecutor only in those cases specified in the last of my proposals (X.3). Likewise, I utilize a somewhat different test in the case of relatives more distant than members of the prosecutor's immediate family.

A variety of interests, relationships, and obligations might affect the judgment of a prosecutor and cause him to distort the attention appropriate to the merits of a given matter. Because of their diversity and uncertain effects, I deem it impossible to enumerate these factors in a rule calling for automatic disassociation of the prosecutor. Yet, they can, I think, be described with comprehensible particularity in three categories, as attempted in my second provision (X.2). Here appear the pecuniary interests (overlooked by the ABA standards), together with the personal loyalties which might interfere with official disinterest. Nor can I ignore that common source of influence which may be the most pernicious of all: political ambition. But in this area, it seems to me, the prosecutor should be enjoined from participation only when he reasonably believes that the interest or association may distract him. The aggressive and dedicated prosecutor, resolved to conduct a vigorous prosecution of a leader in the political apparatus that elected him, should not be discouraged from participation in the case. So, too, there should be no automatic disqualification of the prosecutor who wishes to pursue a case against a corporation in which his brother owns stock. Similarly, the prosecutor who, in good faith, would dismiss a charge against a defendant represented by his former law partner, should not be deterred from his proper decision.

In section X.2 the self-appraisal by the prosecutor of the potential conflict is not entirely subjective. That is, the prosecutor who feels himself free of conflicting considerations must justify that feeling by an objective criterion of reasonableness. The question becomes, could a prosecutor with an attachment of this particular sort reason-

ably be deemed free in using his professional judgment? I do purport, here, to consider actual freedom of judgment, rather than the possible public imputation of fettered will. Yet, where such public disapproval is reasonable, it should coincide with the standard utilized. And where unreasonable, I simply choose to ignore it for the moment, to be regarded again further on in section X.3(b).

My final provision (X.3) is exhortative, advising either personal abstention, or, where appropriate, the drastic remedy (recklessly relied upon in all conflicts by the ABA standards) of calling for a specially appointed replacement in any case where, reasonably or not, the prosecutor feels his detachment disabled. A similar exhortation is tendered where the prosecutor has grounds for anticipating a public belief (justified or not) that the prosecutor is ensnared by a debilitating conflict. It can only be hoped that a prosecutor, threatened by a loss of public confidence and sensitive to his political interests, will respond to this advice by electing the option of disassociation.

Appended to my hasty draft must be a candid acknowledgment of the obvious: formulae have their painful limitations. I do not for a moment suppose that my short treatise can teach prosecutors to thread their way, above suspicion, among the reaching thorns of emotional predisposition. A complaining friend or editorial writer can affect the judgment of a prosecutor pondering the way of justice in a drug case, introducing a conflict of interest as real and potent as the appearance of his Aunt Martha as the victim in a burglary. Even the most respectable official purpose (*e.g.*, to "clean up this town") may conflict with his professional appraisal of a prostitution arrest. No prosecutor is free of influences. His judgment of a case, his decision whether or how vigorously to prosecute a particular case, is necessarily compounded of many factors other than the cold legal assessment of its merits. And we expect predisposition on his part. We cannot (and perhaps should not) attempt to instruct him in the avoidance of all such claims on his judgment. Nor can we hope that a manual of avoidances, no matter how explicit or extensive, can entirely dispel public suspicion, for the public distrust of officials is, in large part, undifferentiated and deeply set.

Yet, if we are going to ask our prosecutors to assume a noble and upstanding position in the judicial process, I suppose we must make the most refined gesture possible to inform them and their constituents wherein we deem the prosecutor threatened by unacceptable erosion of his dispassion.

IV. CONCLUSION

Our system for the processing of criminal cases cannot fairly be faulted for its failure to reduce the incidence of criminal behavior. But the general disillusionment with the criminal process, from the outside and from within, is a matter for considerable regret. For, *inter alia*, we do count upon this system, awkward as it may be, to gratify our need to believe that our government is capable of playing a creditable part in the drama of justice. The myth of legal competence serves our faith in orderly existence, and to the extent that the criminal process has become a clumsy spectacle bitterness and cynicism, infecting players as well as public, become as serious a threat to the system as the original causes of its distress.

The prosecutor stands center stage in the process. His role is complex. He seeks the assurance of a sense of dignity in his part. He needs to feel that his role is not mere empty posturing in an ancient morality play that has long since lost its impact and pace. Among the sources of dignity, he discovers the maintenance of an upright presence in his mantle of office. At least, he can temper zeal with integrity. Thus the matter of official and professional responsibility—ethics—becomes a concern of special importance to the prosecutor. And, of course, we share his desire to play a worthy part in the process, whatever may be its other woes.

In the endeavor to describe the upright conduct required of a prosecutor, a major project has recently been completed by a prestigious committee of the ABA. Considering three major ethical problems, however, I find but scant aid in the formulations of that effort. Indeed, in none of the areas considered here am I confident that the articulated standards confront the real dilemmas.

Dimly, I perceive a mind neither tempted nor distracted from the appropriate guides to the proper employment of his considerable discretionary powers to be crucial to the prosecutor's proper stance. I am unable to formulate or rank the recommended considerations for his aid and our reassurance. However, we can try to warn him against the dangers to his freedom of choice and to announce wherein his detachment might become publicly suspect. He should shun cases in which his loyalties may be, or may be thought to be, divided between duty and personal affection or advantage. In regarding factors extraneous to the merits of a particular case, moreover, he should be wary of the effect on his judgment of personal prejudice and should endeavor, instead, to discern the dictates of public concern. And,

finally, while his ministerial obligations to protect the innocent against unjust conviction require the prosecutor to sift and evaluate evidence, I do not recommend that he regard himself as the sole arbiter of truth and justice. He does, after all, fulfill a role as advocate in a dialectic system for the divination of truth. Flawed though that system may be, the conscientious prosecutor need have no scruples to don his barrister's hat and take a doubtful matter to court.

But perhaps we lawyers are overly concerned with the punctilious definition of misconduct, exaggerating our need for the false comfort of a neat code of honor and rectitude. After all, chivalry, as even Don Quixote eventually learned, is no panacea.