

## PART ONE

### INTRODUCTION: ATTORNEYS' ROLES, RULES AND REGULATIONS

In connection with the readings in Part One, consider the following questions (which reflect one of the fundamental themes of this course): What is the difference between the role of criminal defense lawyer and prosecutor in our adversarial system? How might the differences in role translate into different professional obligations in the context of criminal proceedings? Which are the appropriate bodies for promulgating and enforcing professional standards for criminal prosecutors and defense lawyers?

In addition to these readings, familiarize yourself with the following:

1. ABA Model Rules of Professional Conduct, available at:

[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html)

2. ABA Standards Relating to the Administration of Criminal Justice: The Prosecution Function & The Defense Function, available at:

[http://www.americanbar.org/groups/criminal\\_justice/policy/standards.html](http://www.americanbar.org/groups/criminal_justice/policy/standards.html)

There are various compilations of professional standards which include the two listed above. Among them are Selected Standards on Professional Responsibility, (Foundation Press), and Selected Statutes, Rules and Standards on the Legal Profession (West Publishing Co.). The ABA Model Rules of Professional Conduct, or a compilation containing them, should be brought to each class. (Please note that the requirements for the course include attendance and active, informed participation in class discussions, as well as a paper relating to ethics in criminal advocacy. Informed discussion cannot occur without detailed reference to the relevant provisions of the ethics codes.)

There are various treatises and other research tools in the area of legal ethics which may provide additional guidance in connection with the paper that is required for this course. The most useful aids in connection with legal ethics in general include: Restatement (Third) of the Law Governing Lawyers; Wolfram, Modern Legal Ethics (1986); G. Hazard & W. Hodes, The Law of Lawyering: A Handbook on The Model Rules of Professional Conduct; ABA/BNA Lawyers' Manual on Professional Conduct (combining a treatise and a reporter service that is updated biweekly). With respect to ethics in criminal advocacy in particular, the most useful resources include: M. H. Freedman & A. Smith, Understanding Lawyers' Ethics; B. Gershman, Prosecutorial Misconduct; J. Hall, Professional Responsibility of the Criminal Lawyer; R.M. Cassidy, Prosecutorial Ethics. A website, [ethicsforprosecutors.com](http://ethicsforprosecutors.com), has references to opinions on prosecutorial ethics. There is also a wealth of commentary on legal ethics (including in criminal advocacy) in law reviews.

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## People v. Strauss-Kahn

On May 14, 2011, Nafissatou Diallo, a 32 year old housekeeper at the Sofitel New York Hotel, reported that Dominique Strauss-Kahn, Managing Director of the International Monetary Fund (IMF), had sexually assaulted her after she entered his suite. Physical evidence gathered at the scene established that a sexual encounter had in fact occurred. He was arrested and released on bail but initially confined to a NYC apartment. The Manhattan District Attorney's Office, led by Cyrus Vance, obtained a grand jury indictment of Strauss-Kahn, who was arraigned and pled not guilty. Strauss-Kahn's defense lawyers, William W. Taylor and Benjamin Brafman, took the position that the sexual encounter was consensual and that the accuser made a false accusation for financial gain. Meanwhile, rumors began to circulate that Strauss-Kahn had engaged in coercive encounters with others, and a purported victim brought a civil claim against him in France.

As the police and prosecutors continued the investigation, they learned the following about Strauss-Kahn's accuser (and subsequently disclosed it in a letter to defense counsel): That Ms. Diallo had made false statements on tax returns; that she lied under oath in a 2004 asylum application about her and her husband's persecution and harassment by the dictatorial regime in power in Guinea; that she was untruthful with the prosecutors about "her history, background, present circumstances and personal relationships," including about being the victim of a gang rape in the past in her native country. Additionally: "In the weeks following the incident charged in the indictment, the complainant told detectives and assistant district attorneys on numerous occasions that, after being sexually assaulted by the defendant on May 14, 2011 in Suite 2806, she fled to an area of the main hallway of the hotel's 28th floor and waited there until she observed the defendant leave Suite 2806 and the 28th floor by entering an elevator. It was after this observation that she reported the incident to her supervisor, who arrived on the 28th floor a short time later. In the interim between the incident and her supervisor's arrival, she claimed to have remained in the same area of the main hallway on the 28th floor to which she had initially fled. The complainant testified to this version of events when questioned in the grand jury about her actions following the incident in Suite 2806. The complainant has since admitted that this account was false and that after the incident in Suite 2806, she proceeded to clean a nearby room and then returned to Suite 2806 and began to clean that suite before she reported the incident to her supervisor."

While the District Attorney considered whether to continue the prosecution notwithstanding questions about Ms. Diallo's credibility, Ms. Diallo retained Kenneth Thompson to represent her with regard to potential civil charges, gave an interview to *Newsweek*, and filed civil charges. Diallo's counsel said that the suit was brought "to redress the violent and sadistic attack by defendant Strauss-Kahn on Nafissatou Diallo when he sexually assaulted" her on May 14. Strauss-Kahn's counsel responded that "we have maintained from the beginning that the motivation of Mr. Thompson and his client was to make money," and that "the filing of this lawsuit ends any doubt on that question."

Consider the following questions, and see if you can find answers in the Model Rules of Professional Conduct:

1. What is the role of the District Attorney (DA) and his office in this matter?
  - A. Was the DA obligated to bring charges based on Ms. Diallo's accusations?
  - B. Was he obligated to continue the charges, once a grand jury found probable cause?

C. If not, how convinced should the DA be that Strauss-Kahn is guilty before bringing or continuing charges?

D. If the DA believes that Strauss-Kahn is guilty, may/must the prosecutor drop the charges anyway if the prosecutor does not believe a jury would convict?

E. Suppose that the DA is convinced of Strauss-Kahn's guilt, but the assistant DA assigned responsibility for the case is not. What should the assistant DA do?

F. Were the prosecutors obliged to investigate Ms. Diallo's background and to probe her account?

G. Having done so, were the prosecutors obligated to tell Strauss-Kahn's counsel what they learned?

H. To what extent should the prosecutor explain to the public, or refrain from explaining to the public, the basis of his decisions?

2. What is the role of Mr. Strauss-Kahn's defense lawyers in this matter?

A. When they first meet with their client, should Strauss-Kahn's lawyers ask him what happened? If Strauss-Kahn tells his lawyer that he is innocent, how vigorously should they probe his account? Are they obligated to believe him? Should they insist that he be truthful with them? Is there a risk that the lawyers will later have to, or choose to, disclose what Strauss-Kahn told them? If so, what should the lawyers say about that risk?

B. If Strauss-Kahn's version is incriminating – e.g., if he admits to having coerced Ms. Diallo to have sex – should the lawyers suggest that he tell a more helpful story?

C. If the lawyers become convinced that Strauss-Kahn was guilty, may they continue to defend him? Why? May they publicly assert his innocence?

3. What is the role of Ms. Diallo's lawyers? Does it differ from that of the prosecutors or the criminal defense lawyers?

A. How convinced must Ms. Diallo's lawyers be that her account is true before bringing civil charges? If they disbelieve her, may/must they bring charges on her behalf anyway?

B. To what extent may they conduct press conferences in order to pressure the DA to maintain the charges, influence prospective jurors, or promote their own careers? Are there limits on what they may say?

C. If Ms. Diallo's lawyers meet with the prosecutors to try to convince them to maintain the charges, must they believe their own representations?

Now, reconsider the above questions in light of the readings that follow.

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## I. Early Understandings

### David Hoffman, *A Course of Legal Study* (1846); pp. 755-757

XV. When employed to defend those charged with crimes of the deepest dye, and the evidence against them, whether legal, or moral, be such as to leave no just doubt of their guilt, I shall not hold myself privileged, much less obliged, to use my endeavours to arrest, or to impede the course of justice, by special resorts to ingenuity – to the artifices of eloquence – to appeals to the morbid and fleeting sympathies of weak juries, or of temporizing courts – to my own personal weight of character – nor finally, to any of the over-weening influence I may possess; from popular manners, eminent talents, exalted learning, &c. Persons of atrocious character, who have violated the law of God and man, are entitled to no such special exertions from any member of our pure and honourable profession; and indeed, to no intervention beyond securing to them a fair and dispassionate investigations of the *facts* of their cause, and the due application of the law: all that goes beyond this, either in manner or substance, is unprofessional, and proceeds, either from a mistaken view of the relation of client and counsel, or from some unworthy and selfish motive, which sets a higher value on professional display and success, than on truth and justice, and the substantial interests of the community. Such an inordinate ambition, I shall ever regard as a most dangerous perversion of talents, and a shameful abuse of an exalted station. The parricide, the gratuitous murderer, or other perpetrator of like revolting crimes, has surely no such claim on the commanding talents of a profession, whose object and pride should be the suppression of all vice, by the vindication and enforcement of the laws. Those therefore, who wrest their proud knowledge from its legitimate purposes, to pollute the streams of justice, and to screen such foul offenders from merited penalties, should be regarded by all, (and certainly shall be by me,) as ministers at a holy altar, full of high pretension, and apparent sanctity, but inwardly base, unworthy, and hypocritical – dangerous in the precise ration of their commanding talents, and exalted learning.

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### George Sharswood, *An Essay on Professional Ethics* (1854), pp. 91-96, pp. 104-109

There is a distinction to be made between the case of prosecution and defence for crimes; between appearing for a plaintiff in pursuit of an unjust claim, and for a defendant in resisting what appears to be a just one.

Every man, accused of an offence, has a constitution right to a trial according to law; even if guilty, he ought not to be convicted and undergo punishment unless upon legal evidence; and with all the forms which have been devised for the security of life and liberty. These are the panoply of innocence when unjustly arraigned; and guilt cannot be deprived of it, without removing it from innocence. He is entitled, therefore, to the benefit of counsel to conduct his defence, to cross-examine the witnesses for the State, to scan, with legal knowledge, the forms of the proceeding against him, to present his defence in an intelligible shape, to suggest all those reasonable doubts which may arise from the evidence as to his guilt, and to see that if he is convicted, it is according to law. A circumstance the celebrated Lord Shaftesbury once so finely turned to his purpose must

often happen to a prisoner at his trial. Attempting to speak on the bill for granting counsel to prisoners in cases of high treason, he was confounded, and for some time could not proceed, but recovering himself, he said, “What now happened to him would serve to fortify the arguments for the bill. If he, innocent and pleading for others, was daunted at the augustness of such an assembly, what must a man be who should plead before them for his life?” The courts are in the habit of assigning counsel to prisoners who are destitute, and who request it; and counsel thus named by the court cannot decline the office. It is not to be termed screening the guilty from punishment, for the advocate to exert all his ability, learning, and ingenuity, in such a defence, even if he should be perfectly assured in his own mind of the actual guilt of the prisoner.

It is a different thing to engage as private counsel in a prosecution against a man whom he knows or believes to be innocent. Public prosecutions are carried on by a public officer, the Attorney-General, or those who act in his place; and it ought to be a clear case to induce gentlemen to engage on behalf of private interests or feelings, in such a prosecution. It ought never to be done against the counsel’s own opinion of its merits. There is no call of professional duty to balance the scale, as there is in the case of a defendant. It is in every case but an act of courtesy in the Attorney-General to allow private counsel to take part for the Commonwealth; such a favor ought not to be asked, unless in a cause believed to be manifestly just. The same remarks apply to mere assistance in preparing such a cause for trial out of court, by getting ready and arranging the evidence and other matters connected with it; as the Commonwealth has its own officers, it may well, in general, be left to them. There is no obligation on an attorney to minister to the bad passions of his client; it is but rarely that a criminal prosecution is pursued for a valuable private end, the restoration of goods, the maintenance of the good name of the prosecutor, of closing the mouth of a man who has perjured himself in a court of justice. The office of the Attorney-General is a public trust, which involved in the discharge of it, the exertion of an almost boundless discretion, by an officer who stands as impartial as a judge. “The professional assistant, with the regular deputy, exercises not his own discretion, but that of the Attorney-General, whose *locum tenens* at sufferance, he is; and he consequently does so under the obligation of the official oath. On the other hand, if it were considered that a lawyer was bound or even had a right to refuse to undertake the defence of a man because he thought him guilty, if the rule were universally adopted, the effect would be to deprive a defendant, in such cases, of the benefit of counsel altogether. . .

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. . . Much interest was excited some years ago in England, by the circumstances attending the defence of Courvoisier, indicted for the murder of Lord William Russell. The crime was one of great atrocity. It came out after his conviction, that during the trial he had confessed his guilty to his counsel, of whom the eminent barrister Charles Phillips, Esq., was one. Mr. Phillips was accused of having endeavored, notwithstanding this confession, to fasten suspicion on the other servants in the house, to induce the belief that the police had conspired with them to manufacture evidence against the prisoner, and to impress the jury with his own personal belief in the innocence of his client. How far these accusations were just in point of fact was the subject of lively discussion in the newspapers and periodicals of the time.

The language of counsel, on such occasions, during the excitement of the trial, in the fervor of an address to the jury, is not to be calmly and nicely scanned in the printed report. The testimony of such a witness as Baron Parke, at the time and on the spot – he, too, aware of the exact position of

Mr. Phillips – and that confirmed by Chief Justice Tindal, is conclusive. To charge him with *acting falsehood*, that is, with presenting the case as it appeared upon the testimony, earnestly and confidently, means that he did not do that, which would have been worse than retiring from his post.

The non-professional as well as professional public in England however, agreed in saying that he would not have been justified in withdrawing from the case: he was still bound to defend the accused upon the evidence; though a knowledge of his guilt, from whatever source derived, might and ought materially to influence the mode of the defence. No right-minded man, professional or otherwise, will contend that it would have been right in him to have lent himself to a defence, which might have ended, had it been successful, in bringing down an unjust suspicion upon an innocent person; or even to stand up and falsely pretend a confidence in the truth and justice of his cause, which he did not feel. But there were those on this side of the Atlantic, who demurred to the conclusion, that an advocate is under a moral obligation to maintain the defence of a man who has admitted to him his guilt. Men have been known, however, under the influence of some delusion, to confess themselves guilty of crimes which they had not committed: and hence, to decline acting as counsel in such a case, is a dangerous refinement in morals. Nothing seems plainer than the proposition, that a person accused of a crime is to be tried and convicted, if convicted at all, *upon evidence* and *whether guilty or not guilty*, if the evidence is insufficient to convict him, he has a *legal right* to be acquitted. The tribunal that convicts without sufficient evidence, may decide according to the fact; but the next jury, acting on the same principle, may condemn an innocent man. If this be so, is not the prisoner in every case entitled to have the evidence carefully sifted, the weak points of the prosecution exposed, the reasonable doubts presented which should weigh in on his favor? And what offence to truth or morality does his advocate commit in discharging that duty to the best of his learning and ability? What apology can he make for throwing up his brief? The truth he cannot disclose; the law seals his lips as to what has thus been communicated to him in confidence by his client. He has no alternative, then, but to perform his duty. It is his duty, however, as an advocate merely, as Baron Parke has well expressed it, to use ALL FAIR ARGUMENTS ARISING ON THE EVIDENCE. Beyond that, he is not bound to go in any case; in a case in which he is satisfied in his own mind of the guilt of the accused, he is not justified in going.

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**John R. Dos Passos, *The American Lawyer* (1907), pp. 140-144, pp. 153-163**

Suitors of all kinds have freely availed themselves of the opportunities to delay, or avoid, the payment of their just debts; and public opinion has not only closed its eyes to these things, but it has openly encouraged, or approved, them.

It is, therefore, not surprising, that in the course of a research into these subjects, we find that arguments have frequently been put forth, with great solemnity and earnestness, to sustain the lawyers in practices which were openly and flagrantly dishonest, and about which it would seem that no two just persons could disagree. And this criticism is not only applicable to contemporaneous history. For instance, as showing that the lawyers were in some respects no better in ancient days

than they are at the present time, it was gravely debated in the sixteenth century between the Doctor and Student: 1<sup>st</sup>, Whether a lawyer, who knew the right and legitimate heir of a property, was justified in concealing that fact and of investing another, who had no claim whatever to it, with the title to the estate; and, 2<sup>d</sup>, Whether if a lawyer knew, and had the evidence, of the payment of a debt, he was justified in concealing his knowledge, and collecting the money a second time!

The Doctor, happily for the age, was an honest man, and had no difficulty in reaching a conscientious and righteous conclusion in the premises.

But there have been, since that time, frequent discussions among lawyers and others, upon questions of legal ethics, which seem to be equally as plain and simple in their solution, by the application of the principles of common honesty, as those to which I have referred above. None more glaring can be cited than the sentiments laid down by Lord Brougham, in his defense of Queen Caroline, which have done incalculable harm and damage to youthful, designing, or resourceful lawyers. In that celebrated trial, he said:

“I once before took occasion to remind your Lordships, which was unnecessary, but there are many who may be needful to remind, that an advocate by the sacred duty which he owes his Client, knows in the discharge of that office but one person in the world, *that Client and none other*. To save that Client by all expedient means, to protect that Client at all hazards and costs to all others, and among others to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction which he may bring *upon any other*. Nay, separating even the duties of a parent from those of an advocate, and casting them, if need be, to the wind, *he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his Client's protection.*”

I heard a lawyer use this quotation in the defense of William M. Tweed—and then, to make “Ossa like a wart,” he piteously added, “I have learned to love William M. Tweed!”—which perhaps he might properly have done, but he need not have used Brougham, and his love together.

There perhaps never was language written, or spoken, which contained worse doctrine than that which I have just quoted, of Brougham, and yet it has been relied on over and over again by lawyers, to cover all kinds of dishonest practices and defenses, and the great name of Lord Brougham is still used, to sustain many ridiculous and false positions of advocates, despite the fact that, as far back as 1859, the author of those destructive and unfounded views, in a letter to Mr. Forsyth, publicly repudiated them by saying that they were used as a sort of political menace. A better defense might be, that it was the exaggeration of an impassioned advocate, defending an innocent woman whose situation called for the utmost sympathy of chivalric natures. But in any rational view it was wholly, unmitigatedly, and disastrously bad. In the discussion which ensued, men like Coleridge, whose opinion I quote, had no difficulty in discerning the proper limitations; but it exactly suited the caliber of those who were to profit by it, and it has stuck like a burr to the profession ever since. And Macaulay, in his Essay on Bacon, left it to his readers to say:

“Whether it be right that a man should, with a wig on his head, and a band round his neck do for a guinea, what without those appendages, he would think it wicked and infamous to do for an empire; whether it be right that, not merely believing, but knowing a statement to be

true, he should do all that can be done by sophistry, by rhetoric, by solemn asseveration, by indignant exclamation, by gesture, by play of features, by terrifying one honest witness, by perplexing another, to cause a jury to think that statement false.”

I deem it, therefore, important to specify some of those acts, which I think must be conceded to be clear violations of the lawyer’s duty, leaving other acts, or courses of professional conduct, to be governed by the general principles which I have endeavored heretofore to state:

(c) A Lawyer is not justified in using of resorting to dishonest means or practices in the defense of persons accused of crime.

The question whether an advocate should defend a person for a crime of which he knows, or believes, him to be guilty, has always been a favorite topic for discussion, in, and out of, the legal profession.

I do not intend to avoid the last-named issue by seeking refuge behind this third ( c ) proposition, which I have just laid down. I believe, however, that the subject, when fully understood, has less practical importance than is generally ascribed to it.

In the outset, it is necessary to clearly define, what is meant by a “knowledge or belief,” of the guilt of the accused person.

If the lawyer has personal knowledge of the crime; if he is present at, or sees, its commission, he is a witness, the same as any layman, and consequently would, for obvious reasons, be practically disqualified from acting as an advocate.

He may also derive his knowledge of a crime, from a voluntary confession, made to him by his client.

In such a dilemma, what is his duty? His mouth is closed by the law, even if he should wish to speak, because the law prevents him from disclosing information, communicated to him in his professional capacity.

Should he continue to act as the advocate in such a case? Nothing can be gained by an endeavor to answer such hypothetical or supposititious questions. They depend, largely, upon the peculiar circumstances of each case, and must be conscientiously determined by the lawyer when they arise. It may be, that there is a full, technical, case against the accused, without his confession—which fact might influence the lawyer as to one course of conduct. On the other hand, there might be a defect in the technical proof against the defendant, which the confession would supply. Should the lawyer advise his client to plead guilty? Suppose he gave such advice and the client refused to follow it? I repeat that each case must be determined as it arises, in view of its peculiar circumstances, keeping in sight the general principles which I shall hereafter, briefly, refer to.

What is, generally, meant, therefore, when the question is asked if a lawyer should defend a person accused of crime whom he “knows *or believes*” to be guilty, is, that his knowledge, or belief, is derived from sources of information which are open to everybody, and upon which men generally form and base their opinions—viz., through the Press, and from current and public report and rumor.



No important criminal act is committed, which is not quickly communicated to the public, and about which the community, and lawyers in common, do not, promptly, form an opinion.

With an opinion of guilt, based upon such sources of knowledge and belief, is a lawyer justified in defending the culprit? With this moral conviction of guilt upon his mind, has he the right to espouse such a cause?

I think there can be no grave doubt as to his complete right to do so.

The court certainly can assign counsel, to defend all cases, in which prisoners have none; and their duty, as officers of the court, would compel them to obey such orders.

The right of the lawyer, to defend persons accused of crime, rests upon broad and well-grounded principles. There must necessarily exist in every community, governed by law, exact and clear definitions of crimes, as well as certain forms and rules for the trial of offenders. These are indispensable conditions, to an intelligent, and humane, administration of criminal jurisprudence.

A person accused of crime, is entitled to demand that each, and all, of these conditions, should be satisfied, before he is convicted.

No system of criminal jurisprudence could exist, without such general rules.

While there is no doubt that, at times, the application and enforcement of these forms of criminal procedure, prevent the conviction and punishment of guilty persons, yet, upon their continuance and stability, depend the very existence of social organization.

For instance, a cold and atrocious murder may be committed, the person who committed the bloody deed discovered and arrested; and the mind of the community morally convinced of his absolute guilt; yet if all of the witnesses who had knowledge of it should die, the guilty man would go unpunished. The requirements of the law could not be met, and justice would be thwarted.

A lawyer's right and duty, are, to demand that his client, charged with crime, should be proceeded against in a legal and orderly manner, notwithstanding his own moral conviction of guilt. If the elements constituting the crime charged, are lacking; if the forms of the law are not complied with; it is his duty to urge and demand the acquittal of his client. In doing this, he performs a double duty—one to the community in preserving and upholding the forms of the law, and the other to his client.

No finer or nobler exhibition of his real duty to the State, can be imagined, than the position of the lawyer, under such circumstances.

As Erskine eloquently, almost passionately, said:

“I will for ever, at all hazards, assert the dignity, independence, and integrity of the English Bar, without which, impartial justice, the most valuable part of the English Constitution, can have no existence. From the moment any advocate can be permitted to say that he will or will not stand between the crown and the subject arraigned in the court where he daily sits to practice, from that moment the liberties of England are at an end. If the advocate refuses to

defend, from what he may think of the charge or of the defense, he assumes the character of the judge; nay, he assumes it before the hour of judgment, and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favor the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel.”

This utterance, as is known, was made in a great public case, yet the principle applies to every case where law can be invoked in behalf of a party. A lawyer can always demand that the forms of the law should be complied with and upheld.

I do not place the right of the lawyer, to defend a client, whom he believes to be guilty, upon the ground that he cannot know that his client is guilty, until his guilt has been officially and finally declared, by a court and jury, because he often does know, in the sense that he has a moral conviction of the guilt of his client, which he has derived, through the ordinary channels of information.

I place the right of the lawyer upon the ground that he is an officer of the law, and that it is his duty to see that the forms of the law are carried out, quite irrespective of individual knowledge.

The argument that the lawyer cannot know of the guilt of his client until he has been officially adjudged so, might be used with equal force by an accessory after the fact. Why could not every accessory after the fact declare, with the same reason as the lawyer, that he could not know that a crime had been committed, because the person whom he had assisted, had not been adjudged judicially guilty? In every civilized government, rules are adopted in the body of the criminal jurisprudence, to punish, severely, all persons who aid, or abet, in the commission of crime, or who, after its commission, aid, or abet, a criminal to escape detection, capture, or punishment. An accessory before, or after the fact, is recognized as almost as bad as the principal criminal.

An accessory after the fact is a person who knows a felony to have been committed, and who relieves, comforts, or assists the felon. Therefore, to make an accessory *ex post facto*, it is in the first place requisite that he knows of the felony committed. And generally any assistance whatever, given to a felon to hinder his apprehension, trial or punishment makes the assistor an accessory,—as, furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence, to rescue or protect him. And so strict is the law, where a felony is actually complete, in order to do effectual justice, that the *nearest relations* are not suffered to aid or relieve one another. If the parent assists his child, or the child the parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband receives his wife, who have any of them committed a felony, the receivers become accessories *ex post facto*. A married woman, however, does not come within this rule, because she is presumed to act under the coercion of her husband.

We see, therefore, for the maintenance of society, with what strictness and severity, the hand of the law is uplifted against those who aid, or shelter, or assist, criminals to escape their just and necessary punishment.

But the lawyer’s duty is not to aid or assist the guilty to escape—although that may be the result of his efforts—but it is to see that the forms of the law are maintained. To do this he can employ his

knowledge and experience, and all of the arts of advocacy in his attempts to acquit clients, without a resort to dishonest and covert means and practices.

If these views be correct, it would seem to follow, that the lawyer's duty, to defend a person in those cases where he has a belief, or a moral conviction, of the guilt of his client, is quite clear.

And the community cannot suffer, if he simply confines his efforts to demanding that the forms and rules of the law be carried out.

I do not believe that any real service can be rendered to the profession by pursuing this line of thought further; or in considering any more specific propositions. With a full conception of the general nature of his duties, it is with the lawyer himself to determine, whether he will aid, or defeat, justice. No special rules can be laid down, for all kinds of conditions constantly confront him.

Keeping in view that he is an officer of the court in the real meaning of the term, that a court is a place where justice is judicially administered, and the remarks of an eminent Equity Judge, Lord Langdale, that "lawyers are *ministers of justice*, acting in *aid* of the Judge before whom they practice"—the lawyer cannot go far astray, in the discharge of his duty.

In the complete performance of the latter, the lawyer becomes the most useful and important member of the community—a true patriot of his country, a faithful and intelligent representative of his client, and a useful officer of the court.

And Christopher St. Germain, the author of the immortal Dialogues between a Doctor and a Student, of the Laws of England, nearly four centuries ago, laid down in beautiful but strong language, a rule which, if it could be followed, would give us a race of ideal lawyers at once:

"As a light is set in a lantern, that all that is in the house may be seen thereby, so Almighty God hath set Conscience in the midst of every reasonable soul as a light whereby he may divine and know what he ought to do, and what he ought not to do. Wherefore, forasmuch as it behoveth thee to be occupied in such things as pertain to the law, it is necessary that thou ever hold a pure and clean conscience."

"And I counsel thee, that thou love that which is good, and fly that which is evil; that thou do to another, as thou wouldest should be done to thee; *that thou do nothing against Truth*; that thou do justice to every man as much as in thee is; and also that in every general rule of the law, thou do observe and keep equity. And if thou do thus, I trust the lantern that is in thy conscience shall never be extincted."

But this conscience, which should guide the lawyer, comes of training and education. It is not wholly innate, it doth not spring up spontaneously or by intuition; it is the result of an exact and perfect study and comprehension of the office and duties of a lawyer. It should be made the first, and most important, part of his legal education. Along with, and as part of it, the lawyer is bound by study, self-denial, and genuine hard work, at some time to master the history and science of the law itself; and then, by a course of liberal reading, he should enlarge his sympathies, and seek to eliminate from his mind all narrow prejudices of nationality, race, and creed; that his standards of men should not be the abuse of the ideal, and run into the impractical and visionary, on the one

hand, or the self-asserting, or flippant, on the other; but humane and generous, keeping in view, always, the limits fixed by nature and circumstances. All his powers, otherwise, even when accompanied by mere honesty of purpose, may become the cause of great evils.

To a man so equipped and prepared, the vision of his whole duty, is soon opened to him, in the clearest and fullest sense.

## II. The Defense Lawyer's Role

**In the Matter of John Palmieri, an Attorney**  
Supreme Court of New York, Appellate Division, First Department  
176 A.D. 58; 162 N.Y.S. 799; 1916 N.Y. App. Div. LEXIS 9060

December 29, 1916

**Opinion:** The respondent was admitted to the bar in February, 1901. The charges grow out of his conduct of the defense in the case of *People v. De Lane*, tried in the County Court of Bronx county in March, 1915. One John De Lane was indicted by the grand jury of Bronx county under [section 2460 of the Penal Law](#) for having received from one Jeanette Annette the proceeds of her prostitution. This woman had verified a complaint before the committing magistrate and had appeared before the grand jury and testified, and upon her testimony an indictment was found on October 14, 1914. Shortly thereafter, and while under detention as a witness, she made her escape and could not thereafter be discovered, although diligently sought for. Subsequently, on February 1, 1915, two other indictments were found against De Lane charging similar offenses, upon the testimony of two other women who claimed to have been present upon occasions when the Annette woman paid the proceeds of her prostitution to De Lane. Upon one of these latter indictments De Lane was put upon trial. Some time before the trial the attorney who had theretofore represented him called upon the respondent and stated that De Lane desired counsel in the case. Two interviews thereupon had between the respondent and De Lane resulted in respondent's retainer and his consent to defend him. In the course of those interviews respondent was informed that the Annette woman was the woman who had made the charges; that for some time she had been kept by the district attorney in several flats, instead of being put in the city prison or house of detention, and that thereafter she had gone to Amsterdam, N. Y., in order to keep away from the district attorney. The respondent admitted that when he asked De Lane how he knew this, the latter said: "I call her up once in a while and speak to her and she tells me all about it; in fact, I send her money." In this interview De Lane handed the respondent a copy of the indictment upon which he was to be tried, and the respondent found that her name was not upon the indictment. Up to this time respondent did not know of any prior indictment on the testimony of the Annette woman, and the respondent advised De Lane that he had nothing to fear if the Annette woman denied that she gave him any money, and he insisted that she be brought to New York. De Lane thereupon got into communication with the woman by long-distance telephone, and on the morning of March 9, 1915, which was the day upon which the trial was to be commenced, she came to the respondent's house with a suitcase in her hand and told respondent that she had just arrived from Mayfield, which is a place north of Amsterdam. Upon being questioned by respondent, she confirmed De Lane's statement to the effect that she had been kept by the district attorney in two apartments. She denied having given money to De Lane, but admitted that she had made a contrary statement to the district attorney. When asked by the respondent whether she had signed any statement to that effect, she

said, "No," and also stated that she had not appeared before the grand jury or in any other judicial proceedings. The district attorney in his opening to the jury stated: "Jeanette Annette will not be a witness here. Her two comrades or associates will be witnesses. She will not be a witness, because of the fact that after I had placed her in an apartment here in the Bronx, some one came to that apartment and asked her to go down town, a Mrs. Mancini, or a woman who calls herself Mrs. Mancini, the alleged wife of a man named Tony Rich, and a pal of a fellow named Pandolphi. She came up to the Bronx, had a whispered conversation with this girl, the girl went out with her, and the girl has never been seen since. That is how I will account for the absence of Jeanette Annette, the girl who first made the complaint in this case against De Lane, the girl with whom he lived; the girl who kept him for years here in his apartment in the Bronx."

By this statement the respondent was fully informed that the Annette woman was the complaining witness, and that the district attorney regarded her as a material witness for the prosecution if her testimony could be obtained, and also that while she had been in the custody of the district attorney she had been enticed away and that the district attorney would account for her absence by proof of this fact. The respondent objected to this statement of the district attorney. He testified in this proceeding that he regarded it as very prejudicial to have the defendant's name connected with the disappearance of this woman.

The trial proceeded, and after producing several witnesses who gave direct testimony as to the offense charged, the district attorney called two detectives who testified concerning the disappearance of the Annette woman, their search for her under the direction of the district attorney and their unsuccessful efforts to find her. These witnesses were not cross-examined by respondent because, as he testified, there was absolutely no question that the woman had disappeared.

The People then rested. The respondent made the usual motions and then asked for an adjournment until the following morning on the ground that he had not decided whether to sum up or to open in the morning. After a lengthy discussion upon this point between the court, the respondent, and the district attorney, and a short opening by the respondent, an adjournment was had until the following morning.

From the opening of respondent and his colloquy with the court, it is clear that he had not then decided to call the Annette woman. He testified that he knew that if she testified truthfully, she would have to testify as to the way in which she got to Amsterdam, that she had come back because De Lane had asked her to and that De Lane had been sending her money while she was in hiding because she needed it for her support, and that while hidden from the district attorney she was accessible to the counsel for the defendant. It is clear that if the witness were produced after the occurrences on the first day of the trial and testified truthfully as to her connection with the defendant and his counsel, the jury could have reached no other conclusion than that the defendant had to do with her disappearance. This must be borne in mind in considering what followed. Before coming to court on the second day of the trial, and at seven-thirty that morning, the respondent had another interview with the Annette woman, who was again brought to respondent's home on Ocean Parkway, Coney Island, pursuant to his request. She did not, however, appear in the court room during the morning, which was taken up with the examination of character witnesses. The respondent called her to the stand in the afternoon. When she entered the court room she was carrying a suitcase. Respondent examined her as follows: "Q. Where do you live? A. Now I have no residence at all, I don't live anywhere just at present. Q. What did you have in your hand when you came in here?" An objection to this question was sustained.

When questioned before the grievance committee as to his reasons for asking that question, respondent testified: "Q. Why did you think she brought that bag into court? A. My impression was to lend belief that she had just arrived from Mayfield, but as a matter of fact, she had arrived, I

believe, the day before." Respondent's examination of the Annette woman proceeded: "Q. Where did you come from, Miss Annette? A. Why, I just came from Mayfield, N. Y. Q. Where is Mayfield, N. Y.? A. It is up the State; just how far I couldn't tell you. Q. Is it near any great city? A. I don't know that; I couldn't tell you. Q. How did you get from Mayfield to New York? A. Why, I came down on the New York Central and Hudson River; I came down on the train last night; I came down here because I read in the paper that Mr. De Lane's case --"

So that at the very outset of her testimony this witness testified falsely to respondent's knowledge in answer to his questions. She further testified on her direct examination that she did not have to come; that nobody knew where she was to bring her here, but that she came anyway to give testimony in favor of De Lane. The essential parts of this testimony were false, to respondent's knowledge.

Upon cross-examination the reasons of the witness for coming to court were further inquired into. In answer to questions put by the court, she produced a clipping of an evening paper of the day before and testified that that was the clipping she had read in Mayfield which induced her to come to New York.

Having testified that she had taken the nine minutes past eleven train the night before from Amsterdam and arrived in New York that very morning at five minutes past five, and that no one knew she was coming to court, it became necessary for her to account for her actions from the time of her alleged arrival until her appearance in court. In her efforts to do this she was led from one lie to another, and although the falsity of her testimony is apparent, she successfully concealed from the court and the jury the fact that she had come to New York at the request of the defendant and had been in consultation with the defendant and his counsel for two days. Respondent did nothing to correct this testimony; on the contrary, his repeated attempts to emphasize the fact that the witness had appeared with a suitcase in her hand, even going so far as to have the suitcase offered and marked in evidence, were evidently made to support her testimony that she had come that day from up the State. The result finally was that when the case went to the jury, although it had been proven by witnesses, and even by the production of the testimony of the Annette woman before the grand jury, that she had on several occasions paid the proceeds of her prostitution to De Lane, her false testimony with regard to her reasons for coming to court had succeeded in so far as to conceal the actual facts. In so far as her false swearing was successful, the respondent took advantage of it in his summing up. That she had lied had become evident, and the respondent admitted it to some extent. That she had come to court pursuant to his instructions and the instructions of his client nobody knew, and the respondent took advantage of it by adopting her statements on this point and claiming credit for them, although he knew they were false. It is only necessary upon this point to recite the following statement of the respondent in his summing up to the jury: "We have got her here, and, thank God, gentlemen of the jury, that Divine Providence has brought that woman here. If it was the *Evening Journal*, I thank the *Evening Journal*. If it was anybody else -- she said it was the *Evening Journal* that she read it in, and by the way, she produced a clipping to the Judge, if I am not mistaken; isn't that right, Judge? The Court: Yes. Mr. Palmieri: Thank God, I say to the press."

The learned official referee concludes that respondent's conduct in not disclosing the false swearing of the Annette woman and insisting that credit should be given to statements made by her which he knew to be false, as above detailed, cannot be overlooked because they constitute gross professional misconduct. The able counsel for the respondent has attempted to justify this conduct upon the ground of the duty which an attorney owes to his client in a criminal case. We do not admit that counsel's obligation to the court of which he is an officer is any less stringent in a criminal than in a civil case. Subdivision 2 of [section 88 of the Judiciary Law](#) (Consol. Laws, chap. 30; Laws of 1909, chap. 35), as amended by chapter 253 of the Laws of 1912 and chapter 720 of the Laws of

1913, authorizes this court "to censure, suspend from practice or remove from office any attorney \* \* \* who is guilty of professional misconduct \* \* \* deceit \* \* \* or any conduct prejudicial to the administration of justice." The statute does not differentiate between criminal and civil proceedings. Attorneys are not admitted *eo nomine* to practice in the criminal *or* civil courts. They are admitted to all the courts of the State. They cannot divest themselves of any of their professional obligations by passing from one forum to another. We have expressed our views as to the duties and responsibilities of an attorney where false testimony has been offered to his knowledge in [\*Matter of Hardenbrook\* \(135 App. Div. 634; affd., 199 N. Y. 539\)](#); in [\*Matter of Schapiro\* \(144 App. Div. 1\)](#), and [\*Matter of Mendelsohn\* \(150 id. 445\)](#), and where statements have been made by him to deceive the court in [\*Matter of Goodman\* \(158 App. Div. 465\)](#). We cannot think that an attorney conforms to professional standards where he permits a witness procured by him, and regarded by him as highly important, to stage a play by suddenly appearing in the court room with a suitcase in her hand, and by permitting her to testify that she had just arrived on an early morning train, that no one knew of her coming, and that her attention had been called to the trial by an evening paper read in an up-state town the night before, when he knew that she had been sent for by his client, had been at his home in consultation with him in a distant part of the city each day of the trial, and, to his knowledge, was deliberately and knowingly testifying falsely. His failure to say to her on her first statement that she had just reached town that morning, "Why, are you not mistaken? Did you not come to see me yesterday?" is susceptible to the inference that he knew exactly what she was going to testify to, and his second question as to what she had in her hand when she entered the court room was to draw attention to the suitcase and add verisimilitude to her narrative. If there be any grounds for not holding respondent to a strict accountability for her false testimony, there certainly is no excuse for his adopting such false testimony in his own summing up, for which he was alone responsible. For the expression of his thankfulness to God for the intervention of Divine Providence in producing this witness, when he himself was the instigating cause by the direct instrumentality of his client, he must be held personally responsible, as attempting thereby to deceive the court and jury by thus solemnly ratifying her false testimony.

We approve of the conclusion of the learned official referee, that respondent has been guilty of gross professional misconduct. We think such conduct constituted deceit, was prejudicial to the administration of justice, and that respondent is unfit to continue the practice of the law. He is, therefore, disbarred.

(Concurrence of Scott, J., omitted)

**Dissent:** Page, J. (dissenting):

I cannot give my assent to the opinions of my brothers Clarke and Scott. A most careful and painstaking search has failed to reveal a single case in this or any other State that even remotely could be considered as a precedent for this decision. The cases cited in the opinion of the presiding justice all arise out of the misconduct of attorneys in civil actions.

The obligations of an attorney to court and client are very different in a civil and a criminal case. In a civil case an attorney is under no obligation to accept a retainer; in a criminal case, he may be assigned to defend a person whom he believes to be guilty and it is then his duty to defend. In a civil case, if it develops in the trial of the cause that his client has not a meritorious cause of action or defense, and that he has been deceived by his client and the suit is not being prosecuted or defended in good faith, he is under an obligation to so inform the court and withdraw from the cause. In a criminal prosecution, the attorney having accepted a retainer, believing in his client's innocence,

he cannot withdraw even if his client confesses his guilt and demands that the attorney continue in his defense. And if the attorney should inform the court of the confession, it would be a grave breach of his duty. The distinction between the duty of attorneys in civil and criminal cases is clearly set forth in the "Canons of Ethics" adopted by the New York State Bar Association in 1909.

"30. Justifiable and Unjustifiable Litigation. -- The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the court as to the legal merits of his client's claim. His appearance in court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

"31. Responsibility for Litigation. -- No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has a right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into court for plaintiffs, what cases he will contest in court for defendants. The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions."

Contrast these rules with rule 5: "The Defense or Prosecution of Those Accused of Crime. -- It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law."

In Sharswood's "Professional Ethics" it is stated: "Every man, accused of an offense, has a constitutional right to a trial according to law; even if guilty, he ought not to be convicted and undergo punishment unless upon legal evidence; and with all the forms which have been devised for the security of life and liberty. \* \* \* He is entitled, therefore, to the benefit of counsel to conduct his defense, to cross-examine the witnesses for the State, to scan, with legal knowledge, the forms of the proceeding against him, to present his defense in an intelligible shape, to suggest all those reasonable doubts which may arise from the evidence as to his guilt, and to see that if he is convicted, it is according to law. \* \* \* It is not to be termed screening the guilty from punishment, for the advocate to exert all his ability, learning and ingenuity, in such a defence, even if he should be perfectly assured in his own mind of the actual guilt of the prisoner." (Pp. 90-92.)

Bearing in mind that the attorney here accused was engaged in defending a person accused of a crime of which he claimed to be innocent; applying the rules of ethics of the profession which have long been recognized as applicable to the conduct of attorneys in such employment, we will review the facts which fortunately are undisputed, and having been stated in the presiding justice's opinion, need not be here repeated in detail.

The respondent was retained as counsel for the defense, definitely, on the day preceding the trial, and had no prior connection with the case. On that date he had an interview with De Lane, and was informed that the Annette woman had made the charges against De Lane; that for sometime she had been kept by the district attorney in apartments in the Bronx, not having been detained as a witness in the house of detention or confined in prison; that she had left the city and De Lane had been in communication with her and could get her to return as a witness and that she would testify in



his behalf. The respondent told De Lane to have her come down to New York. The next morning she appeared at the respondent's residence, and told him that she had never signed a statement for the district attorney; had never been a witness in any judicial proceeding nor gone before the grand jury.

Furthermore that she had never given De Lane any money and had so told the district attorney, but that he would not believe her. The presiding justice in his opinion states fully the happenings in court on the first day of the trial. In my opinion there was nothing in the conduct of the respondent which merits condemnation. If the witness had not been produced by him and had in fact been a material witness for the prosecution, it might have been argued that it would have been respondent's duty to have informed the district attorney that the witness was available, although I know of no duty that rests upon the counsel for the defendant to inform the district attorney of the whereabouts of his witnesses, especially when that information had been obtained by counsel from the accused. The district attorney had allowed the witness to remain at liberty, trusting to be able to produce her.

The witness was produced and sworn on behalf of the party in whose favor she testified. Of the purpose to produce her the district attorney had timely warning, so that he had the documentary evidence available for her cross-examination.

The learned referee has held that it was the duty of the respondent to have corrected the testimony of the Annette woman, which he knew to be false, *i.e.*, that she had left Mayfield the night before because of the fact that she had seen mention of the trial in the *Evening Journal* and that no one knew of her coming. This view seems to have been adopted by a majority of this court.

An examination of the record does not show that a question was asked by the respondent for the purpose of eliciting this testimony. The witness, in answer to the question, "How did you get from Mayfield to New York?" answered, "Why, I came down on the New York Central and Hudson River; I came down on the train last night; I came down here because I read in the paper that Mr. De Lane's case --" Here the district attorney interposed: "I submit, your Honor, the witness be told to answer questions," and the court said: "Yes, please answer questions only. Repeat the question to her." The question being repeated, she answered: "I came down on the train." The respondent did not interrogate her further as to her coming to the trial. The only other reference to the witness having come to New York that day, during the direct examination, was volunteered by the witness in response to the question of the respondent in reference to her talks with the district attorney, in which she said: "I never gave him [the defendant] a penny." Question. "Did you tell him that?" Answer. "I told him that, but he knew different; he knew lots of things and he had so many witnesses. Where are your witnesses? Bring them in and let them talk to me; these people that say he gave me money; they never seen nothing. Why don't you bring them in and let me talk to them. That is why I came here to-day; I did not have to come; nobody knew where I was to bring me here, but I came anyway." On cross-examination the district attorney went into the facts of her having left Mayfield the night before and as to the manner in which she had spent her time since her arrival. She was led into contradictions and improbable statements which demonstrated the falsity of her evidence on that point. On redirect examination the respondent did not ask any questions in relation to the matter either tending to correct the testimony in accord with the facts as he knew them, or to extricate her from the situation in which the witness had placed herself by her contradictory and improbable testimony. He left the matter, as it was, with the witness' testimony discredited for the triers of the fact to determine. Under the circumstances was he required to do more? The learned referee and the majority of the court say yes, he should further discredited the witness by showing on this collateral and immaterial matter that the witness had deliberately and knowingly testified falsely. Had he done so there can be no doubt that it would have tended strongly to have destroyed in the minds of the jury credence in her testimony on the facts in issue. Yet, being false testimony as to an immaterial fact, under the rules of law they would not have been allowed to reject her testimony as a whole. He

had not brought that fact into the case. He had presented a witness produced by his client to substantiate his defense. He had presented the evidence to the court. Without his solicitation the witness had volunteered false testimony of an immaterial fact. Bearing in mind that it was his duty to lay before the court the evidence his client claimed proved him not guilty, irrespective of his own belief, can it be held that he holds himself personally liable for the truth of the testimony of the witness, even as to collateral matters, and that he must show the falsity of such statements, or render himself liable to be disbarred? If such a rule is to be enforced few lawyers will dare to defend one charged with crime. The question would constantly be presented to their minds: Shall I betray my client or shall I take the risk of disbarment? If it had been shown in this case that the respondent had advised the giving of this testimony, or had the testimony been brought out by him, knowing as he did that it was false, I should be with the majority of the court. A lawyer's duty to his client in a criminal case does not extend to the suggestion of false testimony even on a collateral matter. But there is not the slightest evidence in the record that he suggested in any manner the giving of the testimony, and as we have demonstrated the evidence was not elicited by him.

In the course of a long summation to the jury the respondent used one phrase that, under the circumstances of the case, was inexcusable. When, however, we read the entire summation, in my opinion, it cannot be said that this was a "deliberate and emphatic adoption by the respondent \* \* \* of what he knew to be the false testimony of the Annette woman." In speaking of the two women who had appeared as witnesses for the prosecution and the Annette woman he said: "The Annette girl is a prostitute, and I am not asking you to believe the Annette girl. I believe, if you will permit me my opinion, they are three brazen hussies, if you want to know my opinion, I wouldn't believe them under oath." In that portion of his address that the offending phrase was used he said: "This woman is no white slave, in the sense that you and I understand white slaves to be. Do you believe, gentlemen of the jury, that that brazen hussey would have ever given away a dollar. \* \* \* It would have been a different case here if you had an innocent unsuspecting little girl without any experience of the world, and she was led into a life of prostitution. It would be entirely a different thing, entirely different matter, but we have got her here, and thank God, gentlemen of the jury, that Divine Providence has brought that woman here. If it was the *Evening Journal*, I thank the *Evening Journal*. If it was anybody else -- she said it was the *Evening Journal* that she read it in, and by the way she produced a clipping to the judge if I am not mistaken, isn't that right, Judge. (The Court, Yes.) Thank God, I say, to the press. " In closing, in commenting on his failure to call the defendant to the stand, he said: "I don't care how willing this defendant was to go upon the stand. I say that the prosecution in this case has failed to establish a case beyond a reasonable doubt, and it isn't worthy on the part of the defendant to contradict it. I say that by Annette's testimony, by her appearance upon the stand that there was sufficient to leave the case with you and with you alone, and the law says that a defendant has a perfect right to remain silent." This does not to my mind indicate that the respondent adopted and made his own the false testimony of the witness. Or that he presented her as a truthful witness to the jury. The phrase in which he thanked Divine Providence was unwarranted. Inspired by an excess of zeal in his client's behalf in the course of a long summation, without thought or consideration he used the phrase. In my opinion the utmost punishment that should be administered, if any, would be a censure. Disbarment carries with it the stigma that the conduct of the attorney has been such as to show him to be morally unfit to practice an honorable profession, and should be pronounced only for such practices, where clearly disclosed by the record before the court. "Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession, it is the means of support to themselves and their families. To deprive one of an office of this character

would often be to decree poverty to himself and destitution to his family. A removal from the bar should, therefore, never be decreed where any punishment less severe -- such as reprimand, temporary suspension, or fine -- would accomplish the end desired." (*Bradley v. Fisher*, 80 U.S. [13 Wall.] 335, 355.)

To my mind, my brethren have adopted a stricter rule than has ever been recognized by the courts or the profession at large. Seventy-five years ago there was a vigorous discussion in England, in the public press and in pamphlets, growing out of the defense of the murderer of Lord William Russell by a prominent barrister, Charles Phillips. Mr. Phillips had accepted a retainer, believing in the innocence of the accused. On the second day of the trial the prisoner called his attorney and Mr. Phillips to the dock and informed them that he was guilty. Mr. Phillips then said: "You will plead guilty," to which the prisoner replied: "No, and I expect you to defend me to the utmost of your ability." In this situation Mr. Phillips consulted Baron Parke, who was not sitting in the case. Baron Parke informed him that he was bound to defend the prisoner, and to use all fair arguments arising from the evidence in his behalf. The prisoner was convicted, and it afterwards transpired that the prisoner had confessed to his counsel, which led to a discussion of the duty of a lawyer under such circumstances. Thereafter Mr. Phillips was appointed a commissioner by two different lord chancellors, and the fact of Baron Parke's advice became public by one of the lord chancellors having told of a conversation that he had with Baron Parke, in which the baron had told him of his advice, and that he went into court and listened to the summation, and that Mr. Phillips' address was unexceptionable. (See appendix to Sharswood's Ethics and pamphlets issued in 1841.)

A comparison of Mr. Phillips' summation with that in the case at bar shows that Mr. Phillips went to greater lengths than did the respondent in the case under consideration. However writers on moral philosophy and ethics may have differed from that time, the legal profession have recognized the duty of the lawyer in a criminal case to defend a client whom he knew to be guilty and to give him the benefit of all his skill and ability in presenting the defense by way of evidence and argumentation. Never, until this case, has the tremendous responsibility for his utterance during a summation been suggested or imposed.

The references made above to the opinion of Mr. Justice Scott are not to the opinion handed down herewith, but to a short opinion in which he stated that "the deliberate and emphatic adoption by the respondent, in his summing up to the jury, of what he knew to be the false testimony of the Annette woman, was the precise equivalent of false swearing himself." I do not consider it necessary to rewrite this opinion to make plain the misconstruction that Mr. Justice Scott in his present opinion seeks by word and innuendo to place upon my opinion. If it will bear such construction, I have been unfortunate in the use of language. He has sought to reinforce his first ground for disbarment of the respondent, *first*, upon the suspicion that the respondent coached and instructed the witness in the false testimony she gave. If there were any evidence tending to show such conduct, I would, as I have hereinbefore stated, agree with my brethren that the respondent should be disbarred. This is not the case of a Scotch verdict of not proven, but is a charge contained in the opinion which was not theretofore in the case. It was not litigated. This charge is of a most serious nature. It imputes fraudulent practices to the attorney, and on suspicion alone. It would hardly seem necessary in a case of this character to refer to such an elementary principle of law, that fraud is never to be presumed but must be established by clear proof.

*Second*, that the fraudulent testimony was developed by the skillful questions of the respondent. In another portion of this opinion I have reproduced from the record every question that was asked by the respondent, in answer to which the witness volunteered her false statement. I submit that the answer of the witness in those particulars was irresponsible; and, further, that not a question was asked, and answered, on the direct or redirect examination that tended to develop this

false testimony.

There is a consideration, in addition to those mentioned by my brother Scott, which transcends the mere issues of this particular case, and that is: That an attorney charged with misconduct has the right to have the case determined on the record presented to the court. His case should be considered on the evidence, and not on suspicion; and determined on proof, and not on prejudice.

I do not palliate the respondent's misconduct in his summation, but I submit that a reprimand is sufficient punishment.

\* \* \*

**Note:** The state court of appeals reversed the appellate division's decision without an opinion. 221 N.Y. 611 (1917). The Court's disposition states:

"Order reversed and proceedings dismissed on the ground that the evidence does not warrant the conclusion that there was intentional misconduct on the part of the appellant justifying his disbarment upon the charge sustained by the Appellate Division."

For a discussion of Palmieri, see Bruce A. Green, *Criminal Defense Lawyering at the Edge: A Look Back*, 36 Hofstra L. Rev. 353 (2007).

## **How Can You Defend Those Crooks?<sup>1</sup>**

Jed S. Rakoff  
New York Law Journal  
September 25, 1990

ON TELEVISION, we criminal defense lawyers are not infrequently portrayed as brave and romantic figures, swashbuckling heroes in Brooks Brothers blue.<sup>2</sup> Then we turn off the tube and find that, in real life, we are more often viewed as moral degenerates.

It is bad enough that whenever we are introduced to persons of intelligence and refinement, the very first question they ask us is "How can you defend those crooks?" Their clear implication is that anyone who devotes talents and energies to helping known criminals must have sold his soul to

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<sup>1</sup> "Reprinted with the permission of the New York Law Journal, copyright 1993. The New York Law Journal Publishing Company."

<sup>2</sup> Cf. "Lawyer's Role In TV's 'Criminal Justice.'" NYLJ, Sept. 5, 1990, p. 1.

the devil. But when the same kind of sentiments are openly voiced by public prosecutors, legislators and judges, the defense of the damned becomes not only unpopular but downright dangerous. As Robert Morvillo noted in a column here last spring, "legislative, judicial and prosecutorial actions in the past several years have converted the criminal defense function into a risky, pressurized and sometimes unpleasant vocation."<sup>3</sup>

### Prevailing Attitude

The prevailing attitude toward criminal defense counsel was recently expressed by a federal prosecutor in the Southern District of New York in the course of his rebuttal summation. The proper response to defense counsel's arguments, he urged the jury, was to "forget all that, because while some people, ladies and gentlemen, go out and investigate drug dealers and prosecute drug dealers and try to see them brought to justice, there are others who defend them, try to get them off, perhaps even for high fees."<sup>4</sup> How (he implied) could such a professional prostitute be worthy of belief?

While these and similar remarks by the virtuous young prosecutor ultimately led to reversal on appeal,<sup>5</sup> views not unlike his have been publicly urged at various times by prominent lawyers ranging from Warren Burger to Ralph Nader.<sup>6</sup> And serious thinkers from Jeremy Bentham to Jerome Frank have argued that any system under which an attorney is required to advocate the innocence of a person he knows is guilty is both morally repugnant and socially destructive.<sup>7</sup>

Rather than directly respond to such challenges, some have sought to avoid the issue by maintaining that defense counsel never "really" knows whether his client is guilty or innocent, both in that his actual knowledge is imperfect and in that it is legally irrelevant (because only the jury can determine guilt). Classically, this was the argument advanced by Samuel Johnson,<sup>8</sup> and, more recently, it was the position reportedly taken by Edward Bennett Williams.<sup>9</sup> Whatever the case with Johnson, however, one suspects that Williams, as an experienced criminal defense counsel, knew better. Anyone who has practiced in this field for any length of time has encountered more than a few clients whose guilt, directly confided by client to lawyer and corroborated by the lawyer's own

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<sup>3</sup> Morvillo, "Current Risks in Being a Criminal Lawyer," NYLJ, April 3, 1990, p. 3.

<sup>4</sup> Quoted in *United States v. Friedman*, Dkt. No. 90-1010 (2d Cir., July 17, 1990), slip op. at 5643.

<sup>5</sup> *Id.*

<sup>6</sup> See Freedman, *Lawyers' Ethics In An Adversary System* (1975) at viii and 14-15 (re Burger) and at 10 (re Nader). Burger sought the disbarment of Freedman for suggesting that a lawyer might be ethically obliged to remain silent while his client committed perjury. Nader picketed Wilmer, Cutler & Pickering to protest its negotiating a favorable consent decree on behalf of General Motors.

<sup>7</sup> Bentham, in Chapter 5 of his *Rationale of Judicial Evidence* (reprinted in his *Works* at 472 ff.) goes so far as to argue that a lawyer to whom his client has confessed guilt ought to testify against him. Frank, while not going so far, argues in Chapter V of *Courts On Trial* (1949) that to continue to urge the innocence of such a client is "the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation." *Id.* at 85.

<sup>8</sup> 2 J. Boswell's *Life of Samuel Johnson* 47 (G.B. Hill ed. 1887).

<sup>9</sup> Freedman, *supra* note 5, at 51.

investigation, is "known" to counsel with at least as much certainty as, say, the names of one's parents or the legitimacy of one's birth. And to say that such knowledge is legally irrelevant is to beg the very question in issue: whether counsel possessed of such knowledge is precluded from advocating to the jury his client's innocence.

For those who would meet the challenge head-on, however, the role of defense counsel in defending the guilty can be amply justified, whether the goal be truth, justice, or the vindication of public morals.

This may seem most surprising when the goal is promoting the truth. How can making a guilty man seem innocent ever advance the truth? The answer, in part, is to consider the alternative. Those systems in which a lawyer is called upon to reveal, rather than conceal, his client's guilt have usually degenerated into systems that utterly subvert the truth. Thus, it is a tenet of most Communist legal systems that (in the words of one such criminal code) "The defense must assist the prosecution to find the objective truth in a case," including ridiculing a client's defenses where they appear to defense counsel to be untruthful and educating the guilty client to his need to accept punishment.<sup>10</sup> The next step turns out to be public confession and Gulag.

### 'To Judge Too Swiftly'

Put more directly, the defense counsel who must conform his defense to what he believes to be the objective truth becomes de facto an inquisitor, rather than an advocate. But experience suggests that the inquisitorial cast-of-mind tends to prejudice: to categorize too swiftly and assume too readily, "to reach a conclusion at an early stage and to adhere to that conclusion in the face of conflicting considerations later developed."<sup>11</sup> These all-too-human tendencies "to judge too swiftly in terms of the familiar"<sup>12</sup> can only be counteracted if counsel is honorbound to ferret out and advocate every fact and argument that can be turned to his client's benefit, regardless of whether they accord with his personal belief about his client's ultimate guilt.

This is the genius of the adversary system at work. Such a system is premised on the belief that the best way to arrive at the truth is to hear both sides of the story, subject each proponent's assertions to the vigorous criticism of the opponent, and then have neutral arbiters decide which assertions make sense. But if such a system is to work at all, it requires that those who are called upon to advocate one side's story and criticize the other's not be diverted from this essential role by their own beliefs or conclusions, however strongly held.

On this analysis, an advocate's personal beliefs regarding the ultimate issues in a case are not merely, as Dr. Johnson would have it, irrelevant to the operation of the adversary system; rather, if allowed to infect a lawyer's advocacy, they are likely to undermine the truth-ferreting effectiveness of the system itself. Thus, for the price of occasionally imposing on an advocate the difficult role of arguing the innocence of someone he believes he knows is guilty, the adversary system offers the reward of preserving the truly innocent client from prejudgment, and effective conviction, at the hands of his lawyer.

Again, it is not, as Edward Bennett Williams would have it, that defense counsel never truly knows whether her client is guilty. It is, rather, that a system that inhibits her defense of such a

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<sup>10</sup> Id. at 2.

<sup>11</sup> Fuller, "The Adversary System," in Berman (ed.), *Talks On American Law* (1961), at 39.

<sup>12</sup> Id.

client will inevitably inhibit her defense of clients she simply believes or presumes are guilty; whereas a system that requires her to vigorously defend her clients regardless of her knowledge or beliefs is far better calculated to develop the truth for those who are wrongly accused. Given the practical tendency of every system of criminal justice to assume the guilt of the accused, the importance of fostering such a tough-minded defense ethic cannot be overestimated if truth is our goal.

Our broader goal, however, is justice; and this may mean more than just ascertaining the truth. The medieval rack may have been a successful device for eliciting the truth, but no one now suggests that its use was just. Conversely, would we today regard as just a system that provides counsel for the innocent only? Yet if one is forbidden to defend an accused of whose guilt one is certain, a large number of criminal defendants will be deprived of counsel altogether.

Of course, one could narrow the group by encouraging guilty defendants never to confess or even to hint at their guilt to their attorneys, on pain of losing their lawyers or at least their effective advocacy. The rule of such a system (effectively the one advocated by Bentham) is: lie to your lawyer or lose him. Bentham's belief that such a system is calculated to promote the truth seems dubious on its face. But in any event, can such a system remotely claim to be just, when it conditions one's right to a voice and a champion on the denial of candor? One would suppose that citizens both guilty and innocent would have considerably more confidence in a system that permits them to confide their innermost secrets to their counsel without having to fear that such confidences will be turned against them.

## Upholding Due Process

Furthermore, there is more involved here than individual peace of mind and confidence in the fairness of the system, important though those be. Vigorous advocacy on behalf of every defendant, guilty or innocent, is also the surest guarantee that due process will be preserved and that the government will hold to fair and decent standards. "It aims at keeping sound and wholesome the procedures by which society visits its condemnation."<sup>13</sup> As every defense counsel knows, most of what occurs in the criminal justice system occurs out of sight of any court: at the point of arrest, at the police station, in the prosecutor's office, in the grand jury. In every place, the accused is effectively presumed guilty, and the government's word is law. Only the threat that what happens in these places will later be the subject of vigorous scrutiny by defense counsel prevents these points along the process from degenerating into star chambers or worse.<sup>14</sup> No wonder that so many of our constitutional liberties derive from criminal cases, or that criminal defense counsel so often, and rightly, lay claim to being the first line of defense in the preservation of freedom.

To defend the guilty may therefore serve the causes of both truth and justice. But for all these highfalutin' pretensions, does it still not fly in the face of conventional morality? Is there not something downright wicked in trying to get some known villain off the hook?

## Artificial View

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<sup>13</sup> *Id.* at 35.

<sup>14</sup> See generally, Mitchell, "The Ethics of the Criminal Defense Attorney --New Answers to Old Questions," 32 *Stan. L. Rev.* 293 (1980).

Such a question presupposes a narrow and artificial view of right and wrong. Even the simplest criminal case involves questions of principle and policy with broader implications than simply achieving an equitable result in the case at hand, important though that may be. Take these familiar examples:

The state says the defendant murdered her husband. The defendant says she did so only after years of physical abuse at his hands. What weight should we accord to such a defense, and what kinds of facts are relevant? Is it "moral" to convict her of murder?

The state says the defendant confessed to the rape, and offers little other proof. The defense says that the confession was coerced or, if not coerced in this case, was obtained by methods calculated to lead to coercion in other cases. If the former, is it "moral" to convict the defendant? If the latter, should the same consequences flow as if the former?

The state says there was ample probable cause to return the indictment. The defense says the indictment was returned by a grand jury selected through racially discriminatory methods. What does this mean? How is it determined? Should it be the subject of proof in the criminal case itself? What remedy follows in the criminal case if it is true? Is it "moral" to try the defendant on such a indictment?

Such examples are but simple illustrations of the clashes of moral principles and social policies that commonly arise in criminal lawsuits. They arise for two reasons:

First, they arise because, contrary to the view of the man on the street, neither justice nor morality is a fixed and known quantity in most cases. Rather, the ascertainment of what is wise and right requires careful weighing and balancing of a multitude of competing values and policies, a few of which may be obvious and many of which may only become obvious upon careful reflection.

Second, the main reason why the less-than-obvious considerations are brought to the surface is because the adversary system encourages counsel to explore every defense in law, fact and policy that may be available to his client. Were the system not so designed, the complexity, difficulty, and moral ambiguity of these situations would largely be lost to the arbiter, just as they are lost to most people confronted with such situations outside the legal system.

### Exposing Complexities

The genius of the adversary system, then, lies in its recognition that life is complex, and that incentives should be provided to bring this complexity to the surface, so that a fuller and more far-reaching justice can be achieved. Nowhere are those incentives greater than in criminal cases. In such cases, therefore, the greatest advocacy often takes the form of demonstrating that "conventional" morality must be tempered by more fundamental principles expressive of a deeper and more genuine morality.

While it would be pleasant to end this column on such an affirmative note, candor compels the addition that there are certain existing impediments to the effective operation of the adversary system in criminal cases. To begin with, the system posits that, while counsel must be entirely partial to their clients, judge and jury must be utterly objective and unbiased in deciding between them.<sup>15</sup> When it comes to criminal cases, however, too many judges evidence a blatant and continuing bias in favor of the prosecution.<sup>16</sup> While there are many reasons for this, probably the

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<sup>15</sup> See generally, Landsman, *The Adversary System* (1984).

<sup>16</sup> Mitchell, *supra* note 13, at 322-23. See also Amsterdam, "The Supreme Court and the Rights of Suspects in Criminal Cases," 45 *N.Y.U.L. Rev.* 785, 792 (1970).



most common one is that most judges believe that they have "seen it all before" and thus are unable to treat each criminal defendant afresh.<sup>17</sup> Fortunately, juries are not nearly so jaded, and the twin requirements that criminal cases be decided by a jury of 12 and that such jury be unanimous tend to substantially mitigate the judicial bias.

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

### Resources Needed

Thus, as numerous studies have suggested, one of the major reasons a large number of indigent defendants plead guilty is because they quickly ascertain that their appointed counsel cannot hope to mount a meaningful defense on their behalf, and in the absence of such a defense they face far greater imprisonment if found guilty after a trial than if they enter into an appropriate plea bargain.<sup>18</sup> Plea bargaining in such circumstances is the total antithesis of what the adversary system is all about, and, it may be inferred, not infrequently results in gross injustice.<sup>19</sup> Thus, until far more resources are poured into the public defender system, the great merits of the adversary system in promoting truth, justice, and morality in criminal cases will be lost to a great many indigent defendants and, by extrapolation, to society as a whole.

**Note:** Should criminal defense lawyers have more leeway than lawyers for civil litigants to present false or questionable testimony, to contest propositions they know to be true, and to argue propositions they know to be false? Compare William H. Simon, *The Ethics of Criminal Defense*, 91 Mich. L. Rev. 1703 (1993) (questioning whether criminal defense lawyers are ethically exceptional) with David Luban, *Are Criminal Defenders Different*, 91 Mich. L. Rev. 1729 (1993) (arguing that criminal defense lawyers are different except in the "small fraction of criminal representations involving wealthy clients and top-shelf defenders").

### **What motivates a lawyer to defend a Tsarnaev, a Castro or a Zimmerman? Washington Post Blog, July 25, 2013**

BY ABBE SMITH July 25, 2013

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<sup>17</sup> Id.

<sup>18</sup> Mitchell, *supra* note 13, at 319-20.

<sup>19</sup> Id.

*Abbe Smith is a professor of law and the director of the Criminal Defense & Prisoner Advocacy Clinic at Georgetown University and co-editor of the forthcoming “How Can You Represent Those People?”*

The trauma nurses who took care of Boston bombing suspect Dzhokhar Tsarnaev after his arrest have a straightforward explanation. “I don’t get to pick and choose my patients,” one told the Boston Globe.

The three public defenders assigned to Tsarnaev would have been similarly constrained. But what about the two prominent defense lawyers who have offered their services? Why choose to represent a man accused of turning the Boston Marathon finish line into a war zone?

Likewise, how can the lawyers representing Cleveland’s Ariel Castro fight for a man who pleaded guilty on Friday to 937 counts related to the kidnapping, imprisonment and rape of three women? And what about the attorneys for the recently acquitted but still controversial [George Zimmerman](#)? Do they really believe he is completely innocent of any wrongdoing in shooting an unarmed teen?

I have been a criminal defense lawyer for more than 30 years, first as a public defender and now as a law professor running a criminal defense clinic. My clients have included a young man who gunned down his neighbor in front of her 5-year-old daughter while trying to steal her car, a man who beat a young woman to death for failing to alert drug associates that police were coming and a woman who smothered her baby for no apparent reason. These are the kinds of cases that prompt people to ask: “How can you represent those people?” All criminal defense lawyers are asked this; it’s such a part of the criminal defense experience that it’s simply known as “the question.”

Most of us have a repertoire of stock replies about how the system can’t work without good lawyers on both sides, or the harshness of punishment, or the excessive number of people — especially minorities — locked up in this country. Capital defenders such as Tsarnaev lawyer Judy Clarke tend to cite their [opposition to the death penalty](#).

But our motivations are usually personal and sometimes difficult to articulate. I often say I was inspired by “[To Kill a Mockingbird](#).” There is no more compelling figure

than Atticus Finch defending a wrongly accused poor black man. Innocence, though, is not a chief driver for me. To the contrary, I often call my life's work "the guilty project." Criminal defense is, for the most part, defending the factually guilty — people who have done something wrong, though maybe not exactly what is alleged.

That works for me because, as it happens, I like guilty people. I prefer people who are flawed and complicated to those who are irreproachable. As legendary American lawyer Clarence Darrow put it more than 80 years ago: "Strange as it may seem, I grew to like to defend men and women charged with crime. . . . I became vitally interested in the causes of human conduct. . . . I was dealing with life, with its hopes and fears, its aspirations and despairs."

Defense lawyers try to find the humanity in the people we represent, no matter what they may have done. We resist the phrase "those people" because it suggests too clear a line between us and them. Clarke has managed to do this with some of the most notorious criminals of the past two decades, including "Unabomber" Ted Kaczynski. "Even if it's the smallest sliver of common ground, Judy's going to be able to find that," [said Kaczynski's brother, David](#). "There's no doubt in my mind that Judy saw my brother's humanity despite the terrible things he'd done."

We may even come to develop affection for our clients — as did the Boston nurses, who caught themselves [calling Tsarnaev "hon."](#) "There are very few clients I have had who I didn't like," [Miriam Conrad](#), another Tsarnaev lawyer, has said.

Criminal lawyers are sometimes accused of investing all our sympathy in our clients and having none for victims. But we are human beings; we have feelings. Over the years there has been a handful of cases that tested me: sympathetic victims, unspeakably cruel crimes, clients who seemed to lack any conscience. I once represented a young man accused of an armed rape of a recent college graduate who was an AmeriCorps volunteer. She could have been me at that age — full of passionate idealism. It was hard to face her in court. I represented a man accused of child abuse who seemed to hate everyone, especially women. I admit I derived some satisfaction from the fact that his defense lawyer, prosecutor and judge were all women — even though I did everything I could on his behalf.

The people I have in mind when I say "I like guilty people" are not those who commit acts of such depravity that it's painful to read news stories about them. I

mean the vast majority of my clients, who, for a variety of reasons, have committed crimes but who are not evil.

My car-thief client was only 16 when he killed his neighbor. He was immature and impulsive, and he'd had a hard time fitting in. He'd never been in trouble with the law, but on that day he got in trouble at school and was trying to escape his dad's wrath when he grabbed a gun to frighten his neighbor into giving him her car. Thirty years later, he still can't believe he pulled the trigger. He has grown up in prison and is more than sorry for what he did. I've been trying to get him released on parole.

My baby-killing client has no recollection of harming her 18-month-old. She accepts that she must have done it and feels regret and shame. In prison for more than 26 years, she has shown herself to be a woman of faith and service, working in the prison hospital and the Catholic chaplain's office. I took her case because she has served her sentence and been a model prisoner, yet she has been repeatedly denied parole.

My drug-dealing client knew the woman he killed — he once bought presents for her kids. He wishes he had made different choices on that day and at other points in his life. Released from prison after 20 years, he is grateful to have a second chance.

I realize this may be what every defender says: My clients, no matter what they may have done, aren't wicked. They are damaged, deprived or in distress. Their crimes can be understood as the products of awful lives, or of being young, hot-headed and lacking in judgment, or of not having the mental wherewithal to know what they were doing. There is always a story. Castro lawyers Craig Weintraub and Jaye Schlachet were typical in insisting, after meeting with their client for several hours, that he *isn't* the “monster” he had been made out to be.

If knowing our clients makes it too easy to explain how we can represent them, maybe it's better to ask whether we would represent other people's clients.

Defending Castro would be especially difficult for me. Although I have never turned down a court appointment based on the nature of the case, there are crimes I find especially abhorrent: child abductions that feature sexual abuse and hate crimes of all sorts. With its kidnapping, sexual assault and torture, Castro's is exactly the kind of case I find hard to stomach. It's distressing to read fiction about these kinds of

crimes — such as Alice Sebold’s “[The Lovely Bones](#)” or Emma Donoghue’s “[Room](#)” — let alone grapple with the real thing.

I don’t envy the lawyers representing Tsarnaev. He is young — I can understand why those nurses were instinctively kind to him — but there is overwhelming evidence that he killed, maimed and terrorized innocent people in the place where he grew up. I would want to say to him: “What the hell were you thinking?” But good defense lawyers resist the urge to pile on; it isn’t a useful way to form a relationship.

Still, there’s something about cases in which everyone is calling for blood that makes it easier to fight for people like Tsarnaev and Castro. Maybe there’s a contrarian streak in all good criminal lawyers. Frankly, the uproar over the image of Tsarnaev [on the cover of Rolling Stone](#) made me want to stand up for him — or at least for the editors of the magazine.

I confess that I gravitate more to Trayvon Martin — the young black man unfairly targeted — than neighborhood-watch volunteer Zimmerman. But that doesn’t mean I couldn’t have defended Zimmerman.

Prominent criminal lawyer Edward Bennett Williams once noted that he took on difficult cases for unpopular clients “not because of my own wishes, but because of the unwritten law that I might not refuse.” That unwritten law still motivates criminal lawyers, along with the knowledge that none of us would want to be defined by the very worst thing we ever did.

We represent “those people” because we can always find aspects of them that represent us.

### **III. The Prosecutor’s Role**

#### **Rush v. Cavanaugh**

2 Pa. 187; 1845 Pa. LEXIS 306 (Pa. 1845)

[*Rush v. Cavanaugh* is a short but complex decision reviewing a slander lawsuit, in which a lawyer sued his former client for calling the lawyer a “cheat.” The merits hinged on whether the client’s allegations were true, an issue that in turn depended on whether the lawyer’s conduct was, or was

not, consistent with his professional role. Consequently, the case gave Justice Gibson an opportunity to take a side in the debate about advocates' responsibilities. The *Rush* opinion offers a series of observations about advocates, their role, and their responsibilities, some of which are ambiguous in their meaning and implications.

*Rush* arose at a time when clients could hire lawyers to act as private prosecutors in criminal matters. Client Cavanaugh charged Crean with forgery, and attorney Rush undertook to prosecute on Cavanaugh's behalf. Early in the proceedings, however, Rush was persuaded by the testimony of a key witness that "the accusation was false." Although his client remained convinced of Crean's guilt and insisted that Rush force Crean to answer the charges, Rush withdrew the charge of forgery.

To add insult to injury, Rush insisted that he was entitled to compensation for the services that he had provided. Cavanaugh called Rush "thief, robber, and cheat." When Rush filed suit for slander, Cavanaugh renewed these accusations by entering a "plea of justification" - in other words, a claim that his allegations were true. Cavanaugh soon tried to withdraw that plea. The trial court, however, exercised its discretion to reject Cavanaugh's motion and required him to justify his accusations in the slander action. The Pennsylvania Supreme Court ultimately held that the trial court's exercise of discretion was correct, because, "by posting the plaintiff on the very record as a professional cheat, the defendant had given durability to what was originally momentary."

The key to the case, therefore, was whether Rush had acted appropriately by dismissing the private prosecution against his client's wishes and then retaining compensation for the representation. The trial court instructed the jury that if Rush was correct about the falsity of Cavanaugh's forgery charge against Crean, Rush had discretion to discontinue the prosecution.]

**Opinion:** *Feb. 26.* Gibson, C. J. -- It is settled by *Alston v. Moore*, 1 Rolle's Abr. 53, that it is actionable to call a lawyer a cheat; for though he were not indictable for cheating his client, or punishable for it by striking from the roll, it is enough to support an action for words which impute it, that they touch the business by which he gets his bread.

But the material question is, did the plaintiff violate his professional duty to his client, in consenting to withdraw his charge of forgery against Crean when before the alderman, instead of lending himself to the prosecution of one whom he then, and has since, believed to be an innocent man? It is a popular, but gross mistake, to suppose that a lawyer owes no fidelity to any one except his client; and that the latter is the keeper of his professional conscience. He is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man. But the prosecution was depending before an alderman, to whom, it may be said, the plaintiff was bound to no such fidelity. Still he was bound by those obligations which, without oaths, rest upon all men. The high and honourable office of a counsel would be degraded to that of a mercenary, were he compelled to do the biddings of his client against the dictates of his conscience. The origin of the name proves the client to be subordinate to his counsel as his patron. Besides, had the plaintiff succeeded in having Crean held to answer, it would have been his duty to abandon the prosecution at the return of the recognisance. As the office of attorney-general is a public trust which involves, on the discharge of it, the exercise of an almost boundless discretion by an officer who stands as impartial as a judge, it might be doubted whether counsel retained by a private prosecutor, can be allowed to perform any part of his duty. Certainly

not, unless in subservience to his will and instructions. With that restriction, usage has sanctioned the practice of employing professional assistants to whom the attorney-general, or his regular substitute, may, if he please, confide the direction of the particular prosecution; and it has been beneficial to do so where the prosecuting officer has been overmatched or overborne by numbers. In that predicament, the ends of justice may require him to accept of assistance. But the professional assistant, like the regular deputy, exercises not his own discretion, but that of the attorney-general whose locum tenens at sufferance he is; and he consequently does so under the obligation of the official oath. In the case before us, Mr. Rush not only acted in accordance with it, but was guided by an extremely delicate sense of propriety. Convinced by the testimony of Mr. Bacon, that the accusation was false, he did not only what every honest man would do, but what happened to be the very best thing he could do for his client -- he abandoned the prosecution for the avowed reason that it could not be supported. He did not discontinue it, as has been said; for its fate was in the hands of the magistrate, who alone was responsible for it. But the defendant offered to prove the goodness of his own character, to show that Mr. Rush ought not to have acted on Mr. Bacon's information in preference to his client's instructions. His client's character, however, was not in issue; nor was Mr. Rush bound to give credence to the instructions of a heated client, rather than to the sober testimony of a dispassionate witness. It is enough that he acted to the best of his judgment on reasonable premises; for, judging in sincerity, he would not be responsible for the accuracy of his conclusion. Besides, it was not pretended at the trial that he had judged erroneously. His relinquishment of the prosecution, then, being defensible, he was entitled to compensation for his services so far as he had gone. Had he continued to prosecute against the dictates of his conscience, he would have been entitled to nothing; and the argument here, that he was not entitled, because he did not continue, would place him on the horns of a dilemma. But his task was done when the prosecution was ended; and he was then entitled to demand a quantum meruit.

As an act of discretion, the refusal of leave to withdraw the plea of justification was entirely proper. By posting the plaintiff on the very record as a professional cheat, the defendant had given durability to what was originally momentary; and he attempted to withdraw this aggravation of the injury only, when he had effected his purpose by it. The judge, therefore, very properly prevented him from eluding the consequences of his misconduct. Besides the propriety of a discretionary act is not a subject of review in a court of error; and a defendant has not a legal right to withdraw a plea by the act of 1806, which, though it allows him to alter, allows him not to escape from responsibility incurred. And he can amend only for *informality*, when, in the opinion of the court, it will affect the merits. There was no informality here; and the judge very correctly thought that the amendment would injuriously affect the merits. There was, therefore, no ground to except.

Judgment affirmed.

**Note:** For a discussion of Rush v. Cavanaugh, see Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 *Geo. Washington L. Rev.* 1 (2005).

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**Why Should Prosecutors Seek Justice?**

Bruce A. Green

26 *Fordham Urb. L.J.* 607 (1999) [excerpt]

## Introduction

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

Three more recent disagreements serve as further illustrations. The first two relate to the application of prophylactic rules to ensure that prosecutors are nonpartisan: First, federal judges in the Eighth Circuit have sharply contested whether Kenneth Starr, in his role as Independent Counsel investigating President Clinton, has an obligation to remain politically nonpartisan and, accordingly, to avoid personal and professional conduct and relationships outside his work as prosecutor that would cast doubt on his nonpartisanship. Second, New York State district attorneys have disagreed with the state bar association's ethics committee over whether, in order to preserve their ability to exercise their authority in "an impartial, nonpartisan manner," assistant district attorneys must refrain from campaigning on behalf of incumbent district attorneys.

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

At some level, the underlying question in each of these examples is, how should prosecutors conduct themselves in light of the principle that has traditionally been thought to define the prosecutor's professional ethos: "the duty to seek justice." Rather than focusing on any particular area of conduct, this Article examines the overarching concept. Part I sketches the outlines of this concept, both historically and in its contemporary incarnation. Part II offers two reasons for asking why prosecutors should seek justice. Part III examines alternative justifications for the duty - first, that the duty derives from prosecutors' extraordinary power, and second, that the duty derives from their role on behalf of a sovereign whose own interest is in achieving justice - and explains why the second provides the more complete justification. Finally, Part IV suggests how this understanding of the defining principle of prosecutorial ethics has implications in cases where prosecutors have convicted innocent individuals, even if inadvertently.

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

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



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

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

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

To like effect were other late nineteenth-century judicial decisions in Michigan as well as California that generally dealt with what the courts considered to be prosecutorial excesses in jury argument, examining witnesses, or other trial conduct.

In the context of federal prosecutions, the thread was taken up by the Supreme Court in *Berger v. United States*, a 1935 decision on improper prosecutorial summation that Professor Charles Wolfram calls "the locus classicus of the extraordinary duties of a prosecutor." In the context of criticizing the prosecutor's conduct, the court observed:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt should not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Usually, the "duty to seek justice" has been invoked by courts in the course of admonishing overzealous prosecutors. Prosecutors and others have also invoked this concept to suggest why prosecutors should be trusted more than other lawyers, why their conduct should be scrutinized less closely, or why they can be counted on to act disinterestedly. For example, in the Supreme Court argument in *Miranda v. Arizona*, the state Attorney General thought that the prosecutor's duty to do justice helped explain why arrested suspects in the interrogation room should not be discouraged from talking to prosecutors or their investigators:

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

The professional obligation to "seek justice" places prosecutors somewhere between judges, on the one hand, and lawyers advocating on behalf of private clients, on the other. It has been understood to imply specific professional obligations that set prosecutors apart from other lawyers - obligations that have been variously described as "different," "special" and "extraordinary." For example, the ABA Model

Rules of Professional Conduct include a rule titled, "Special Responsibilities of a Prosecutor" which identifies restrictions on prosecutors exceeding those applicable to lawyers in civil litigation. Civil litigators may commence a proceeding as long as "there is a basis for doing so that is not frivolous." Criminal prosecutors, however, "shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." Lawyers in civil practice may exploit their superior skill and expertise in dealing with unrepresented adversaries, as long as their role is clear and they do not suggest that they are disinterested. Prosecutors, in contrast, must make efforts to assure that an unrepresented criminal defendant is aware of the right to counsel and has opportunities to obtain counsel, and, in dealing with unrepresented defendants, prosecutors may not seek to obtain waivers of important pretrial rights. Lawyers in the context of civil litigation have no duty to disclose evidence to the opponent except insofar as civil procedure rules and other laws require. Prosecutors, however, have an ethical obligation, independent of similar obligations imposed by the Due Process Clause, criminal procedure rules and statutes, to disclose evidence known to them that tends to exculpate the defendant or, in the sentencing context, tends to mitigate the defendant's culpability.

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

Prosecutors' offices, at least in the abstract, officially accept the existence of a duty to "do justice" which entails special responsibilities like those identified in the Model Rules. Indeed, prosecutors generally acknowledge the professional codes, with their elaboration of special prosecutorial responsibilities, as a source of guidance, if not of binding obligations with regard to prosecutorial conduct. Further, many prosecutors' offices have adopted internal guidelines establishing restraints on prosecutorial conduct in addition to those imposed by law or by ethics rules. Most notable are those contained in the United States Attorneys' Manual, which applies to federal prosecutors.

Moreover, some prosecutors not only accept that they have special ethical responsibilities, but espouse an ethos calling for particularly strict adherence to both these special responsibilities and the ethical responsibilities shared with other lawyers. This conception of a special responsibility to conform closely to the applicable professional standards is embodied in the following description of the difference between how criminal defense lawyers and prosecutors approach the rules of legal ethics: "Criminal defense lawyers play close to the line. Prosecutors play in the center of the court." While subject to criticism either as an oversimplification or as an implicit endorsement of the "sporting theory of justice" that many find objectionable, the analogy fairly captures a fundamental difference in approach toward the boundaries of proper professional behavior. When advocating on behalf of individual criminal defendants, lawyers may be, or perceive themselves to be, ethically compelled to play close to the line to serve their clients' interests. In contrast, when representing the government in criminal prosecutions, prosecutors may feel obliged to bend over backwards to avoid an appearance of improper conduct.

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### III. Justifications for the Duty

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

#### A. The Prosecutor's Power

One explanation given for prosecutors' duty to seek justice is to redress the gross imbalance of power between prosecutors and defense lawyers. As discussed below, one can scarcely question the underlying premise of this argument - that ordinarily prosecutors have far greater power than their adversaries. It is far from clear, however, that this imbalance adequately explains the prosecutor's obligation.

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

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

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

Finally, criminal prosecutors are the most powerful lawyers because, with rare exception, their offices have unchecked authority to exercise the sovereign's power on behalf of the sovereign. In this respect, criminal prosecutors are more powerful than most, if not all, lawyers representing the government in civil proceedings. Other lawyers may have tremendous influence on the decisions

their clients make, but ultimately those decisions belong to the clients. As a practical matter, the prosecutor's office makes all decisions on behalf of the government. And, much of the office's authority is delegated to the individual prosecutor. Some might say this gives prosecutors not only enormous power, but enormous freedom.

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

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

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

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

to warrant a duty to "seek justice" implying special responsibilities that apply across the board, including to prosecutorial conduct, such as trial conduct, that is essentially the same as the conduct of other lawyers.

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

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

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

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

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

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

## B. The Prosecutor's Role

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

In particular, the prosecutor represents a sovereign - in this country, typically a state or the United States. However, the prosecutor is not merely the sovereign's lawyer. The sovereign delegates most of its authority and discretion to its prosecutors. Thus, the prosecutor makes decisions that are ordinarily entrusted to a client. This is different from the relationship between a corporation's trial lawyer and the corporate officer who directs the representation, as a fiduciary on behalf of the corporation. Here, the prosecutor fills both roles, as lawyer and as government representative. In many situations, a question of prosecutorial ethics will relate not to the prosecutor's duties as the government's trial lawyer, but to the prosecutor's fiduciary duties as the government's decisionmaking representative. In this role, as would be true of any individual acting as a fiduciary on behalf of a client, the prosecutor must make decisions and otherwise act in accordance with the client's interests and objectives.

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

This understanding of the origins of the prosecutor's duty to do justice is consistent with early writings, such as Sharswood's essay, late nineteenth century state-court opinions, and the Supreme Court's Berger opinion. All of these see the prosecutor's role, rather than the prosecutor's power, as the source of the prosecutor's unique ethical obligations, including the most characteristic and well-

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

The role-based conception of the duty to "seek justice", unlike the power-based conception advocated by Professor Zacharias, might be criticized as infinitely elastic, and therefore of limited utility in guiding prosecutorial decisionmaking. The role-based conception would, however, more fully comport with the conventional view of prosecutors' special responsibilities. These would include, as Berger suggests, a heightened duty to ensure the fairness of the outcome of a criminal proceeding from a substantive perspective - to ensure both that innocent people are not punished and that the guilty are not punished with undue harshness. These would also include not only a heightened duty to ensure the fairness of the process by which a criminal conviction is attained, but also, as a corollary, a duty to avoid the public perception that criminal proceedings are unfair - hence, the duty to play in the center of the court. These responsibilities take account of the prosecutor's superior power, yet exist even where there is relative equality of resources between the prosecution and defense, as may be true in some corporate criminal prosecutions.

The role-based conception would also be consistent with special ethical obligations relating to the exercise of prosecutorial discretion - the power to decide whom to investigate, what charges to present to a grand jury, the terms of an acceptable plea bargain, the arguments to make at sentencing, and the like. These decisions are subject to little judicial oversight. Although it did not have to be so, our scheme of government assigns the principal decision making role to prosecutors, rather than to judges or, for that matter, the police. In carrying out this function, the prosecutor is less the government's trial lawyer and more the government's representative. Because prosecutors are not themselves the client, but merely representatives, they must act in accordance with the client's objectives, as reflected in the constitution and statutes, as well as history and tradition. Thus, prosecutors are expected to employ judgment and restraint in making these decisions, no matter that the principles governing the prosecutor's decisionmaking - for example, principles of equal treatment and proportionality which are unrelated to the prosecutor's superior power - may be elusive and ill-defined.

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## Conclusion

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

This is a stronger, more challenging, and more complete, conception of the duty to seek justice than the alternative, which is rooted in the prosecution's generally superior power. This is also the

understanding to which prosecutors should be more receptive, since it does not imply that they should "pull their punches" or otherwise act to level the playing field between themselves and the defense. On the contrary, it encourages their instinct to do battle. It implies, however, that prosecutors must not only battle lawbreakers, in furtherance of the government's objective of convicting the lawless. Additionally, prosecutors must resist various forces that would undermine the government's other aims. At times, this may mean standing up to the police (when their investigations are inadequate), disregarding the public (when its expectations are unreasonable), and overcoming one's own self-interest or ennui. In the face of contrary pressures and expectations, both external and internal, it may take a certain amount of inner strength (or strength of character) for an individual prosecutor to decide not to bring criminal charges or to dismiss criminal charges, to comply with procedural norms that make it more difficult to secure convictions, to confess error, or to seek to overturn a conviction that was unfairly procured. These decisions should be easier, however, when prosecutors serve in an office where the "duty to seek justice" is fairly understood and taken seriously.

**Note:** Should prosecutors be subject to more restrictive disciplinary rules than lawyers for civil litigants and criminal defendants? *See* Bruce A. Green, Prosecutorial Ethics as Usual, 2003 U. Ill. L. Rev. 1573 (2003); Kevin C. McMunigal, Are Prosecutorial Ethics Standards Different?, 68 Fordham L. Rev. 1453 (2000).



## IV. Regulation of Federal Prosecutors

### McDADE ACT 28 U.S.C. § 530B 1998

#### § 530B. Ethical standards for attorneys for the Government

(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

(c) As used in this section, the term 'attorney for the Government' includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40 [28 USCS § § 591 et seq.].

**Note:** The McDade Act was sponsored by Joseph McDade, a Pennsylvania congressman, following his acquittal of federal criminal charges, perhaps in response to his perception that the Department of Justice lawyers had acted unethically in its case against him. The Act resolved a longstanding debate about the applicability of state ethics rules to federal prosecutors, and particularly about the applicability of the “no contact” rule, which is discussed in Part Eight. In response to the McDade Act, U.S. Attorneys’ Offices were directed to designate an attorney as an ethics advisor. Federal prosecutors may also seek guidance from an office within DOJ. Are there reasons why federal and state prosecutors might be subject to somewhat different professional standards? Why should the professional standards for federal prosecutors be set by state rather than federal courts? Should there be a uniform set of standards for federal prosecutors – or, for that matter, for all lawyers appearing in federal litigation? For additional readings, see Zacharias and Green, *The Uniqueness of Federal Prosecutors*, 88 *Georgetown L.J.* 207 (2000); Green and Zacharias, *Regulating Prosecutors’ Ethics*, 55 *Vand. L. Rev.* 381 (2002).

**History:** For an earlier version of the Act, see H.R. 3396, 105th Cong. (1998).