

**“TACKING TOO CLOSE TO THE WIND”:* THE CHALLENGE
TO PROSECUTION CLINICS TO SET OUR STUDENTS ON A
STRAIGHT COURSE**

Kyles v. Whitely, 514 U.S. 419, 439 (1995).

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A. INTRODUCTION

Clinical programs in which students work for, with, or as prosecutors are not *that* unusual. Many law schools have arrangements in which students work in the offices of local prosecutors, both state and federal, as interns assigned to a bureau or individual.¹ There, they might do the typical work of an intern, research and writing, or possibly take on more active tasks such as answering written motions, interviewing witnesses, performing field investigations, or acting as second-seat at a trial. In a few programs, students actually assume the responsibilities of the prosecution, appearing in court, negotiating dispositions and even conducting trials. The field-work supervision almost always is delegated to Assistant District Attorneys (ADAs) or Assistant United States Attorneys

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¹ Gathering information on clinics is difficult given the inclusive definitions of most programs. I surveyed law school web pages as of fall 2004 and counted any program described by the schools as including a prosecution component, whether in-house or externship. Seventy-six law schools listed some kind of prosecution clinical opportunity. Of those, sixteen seem designed to allow students to handle cases personally under the supervision of a prosecutor while the balance identify themselves as externships by offering either a specific prosecution program or by listing prosecutor's offices as available placement sites. A few programs have unique features. At Cardozo School of Law, students work full-time for a semester in the Manhattan District Attorney's Office. See http://www.cardozo.yu.edu/academic_prog/clinical_prog.asp (last visited Jan. 8, 2005). In the Prosecution Practicum at Ohio State University Moritz College of Law, students' in-court work is videotaped for review by faculty and students. See http://moritzlaw.osu.edu/centersandclinics/pros_clinic.html (last visited Jan. 8, 2005).

(AUSAs). A few schools have established more formal collaborations where an ADA is detailed to work exclusively in the clinic while the clinical teacher also may supervise the students' casework.²

Just as prosecutors often see themselves as a breed apart from other lawyers,³ prosecution clinics seem to occupy a separate space, and in many fundamental ways do not share the concerns of other client-based clinics. While the work of student prosecutors does not always resemble that of their peers in other clinics, some prosecution clinics still attempt to promote autonomy and independent judgment within the boundaries of the role. But in the context of prosecution, students also are exposed to the multifaceted responsibilities and duties of prosecution, and learn to balance the many competing interests at stake with a degree of authority, discretion and sometimes plain guts.⁴ As I learned when making a career switch

² At Brooklyn Law School, we offer several variations of this model in cooperation with three prosecution offices. See *infra* text pp. 6-9 This also is the model that has been developed at New York University (NYU) School of Law and Pace University Law School in conjunction with the Office of the District Attorney of New York County. The Manhattan District Attorney (DA) would appoint to a two-year cycle with the clinic a senior ADA whose principal responsibility was the student supervision. A faculty member taught the seminar, but the level of participation of the ADA might vary from none to full partnership in the class. In 2000-2001, I taught the Prosecution Clinic at NYU as an adjunct. For a description of her experience teaching the Pace Prosecution of Domestic Violence Clinic, see Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" If You're Trying to Put That Lawyer's Client in Jail?*, 69 F L. REV. 997 (2000).

³ See, e.g., DAVID M. NISSMAN & ED HAGAN, *THE PROSECUTION FUNCTION* xi (1982) ("The nature of the prosecutor's function in the legal system tends to isolate him from the rest of the profession and to unite him with his fellow prosecutors."). The authors assert a kind of nationwide prosecutorial mentality with a shared "gallows humor" and extol the transformation of young prosecutors into "torpedoes," using imagery such as "battles," "attacks," "skirmishes," "soldiers," and "weapons and armaments" to describe the relationship of the prosecutor to defendants, defense attorneys, and even courts. *Id.* at 1. While every specialty may have its rhetoric, the warrior seems to be their chosen self-image.

⁴ Prosecutors have many loyalties and constituencies: the victim, the police, the

from single-focus, client-centered criminal defense work to prosecution, this balancing act is difficult to master and even more difficult to sustain in the daily environment of most criminal courts.⁵

Over the years, these differences have prompted me to ask repeatedly where prosecution clinics fit in the increasingly multi-hued tapestry of clinical education. Other than providing them with undeniably exciting, timely and marketable experience, do these clinics make any kind of lasting impression on the students who become prosecutors after graduation? Does the work of the clinician in a prosecution clinic inculcate any values that might cause its graduates to become a different kind of prosecutor from someone who never participated in such a law school program? By that, I do not mean a more technically skilled lawyer, capable of trying cases more competently or behaving with greater assurance in the courtroom.⁶ What I question is whether we have any success in

court, the legal system, the community and the defendant. The classic formulation of this complex of duties is in *Berger v. United States*, 295 U.S. 78, 88 (1935):

The [prosecutor] 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 shall not escape or innocence suffer . . . [W]hile he may strike hard blows, he is not a liberty to strike foul ones.

⁵ Others have noted the challenge of the cross-over experience. See, e.g., Merton, *supra* note 2, at 998-1001; Abbe Smith, *On Representing a Victim of Crime*, in *LAW STORIES* 149 (Gary Bellow & Martha Minow eds., 1996).

⁶ Many years ago, when clinics in general were starting to move from skills-based teaching to laboratories for theory, ethics and systemic critique, prosecution clinics were described by an instructor in such a clinic as "typically focus[ing] on the practical, day-to-day aspects of the prosecutor's office" rarely offering an occasion to discuss "the ethical and social issues that the prosecutor must face . . . or the role of the prosecutor in the American judicial system." Martin H. Blesky, *On Becoming*

helping to create prosecutors whose everyday practice in the trenches reflects an entrenched commitment to a justice mission that can struggle successfully against a dominant culture that values conviction rates, discourages non-conformity and engenders cynicism.⁷ While the same questions could be asked about any area of law practice, the received wisdom about the justice pursuit of prosecutors makes the struggle against these inducements more urgent and more vital to resist.

There are extensive examples of the misbehavior of prosecutors in cases involving trial misconduct, suppression of evidence, use of false testimony, abuse of power and, in some highly publicized instances, reluctance to reassess evidence of innocence.⁸ Clinicians surely have to honestly and openly discuss this behavior. The challenge for clinicians who work

and Being a Prosecutor, 78 NW. U. L. REV. 1485, 1495 (1984). No doubt this has changed in many clinics, but those where the lion's share of the supervision and reflection is being guided by a professional prosecutor rather than an educator still may be too informed with a single perspective.

⁷ This is only the first of many generalizations I venture about prosecutor's offices and the prosecutors themselves. Of course, there is both institutional and individual diversity between and among offices. Both policy and practice in particular instances reflect this.

⁸ See generally, BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT (2d ed. 2001) (providing the most comprehensive taxonomy of misconduct). In 1999, the Chicago Tribune ran a multi-day series written by Ken Armstrong and Maurice Possley about "cheating" in homicide convictions that were overturned because prosecutors failed to disclose evidence suggesting innocence or knowingly used false evidence. See Ken Armstrong & Maurice Possley, Break Rules, Be Promoted, CHI. TRIB., Jan. 14, 1999, available at LEXIS, News Library, Chi. Trib. File.; Ken Armstrong & Maurice Possley, Prosecution on Trial in DuPage, CHI. TRIB., Jan. 12, 1999, available at LEXIS, News Library, Chi. Trib. File.; Ken Armstrong & Maurice Possley, Reversal of Fortune, CHI. TRIB., Jan. 13, 1999, available at LEXIS, News Library, Chi. Trib. File.; Ken Armstrong & Maurice Possley, The Verdict: Dishonor, CHI. TRIB., Jan. 10, 1999, available at LEXIS, News Library, Chi. Trib. File.; Ken Armstrong & Maurice Possley, True Patriot Not Quite a Shining Star, CHI. TRIB., Jan. 9, 1999, available at LEXIS, News Library, Chi. Trib. File.; see also Daniel Medwed, The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence, 84 B.U. L. REV. 125, 125-29 (2004).

with prosecution offices, either directly or by monitoring student interns, is to raise these issues with sufficient diplomacy to avoid alienating the host office and jeopardizing the clinic.⁹ In this essay, I argue that clinicians in this milieu have an even greater than usual responsibility to prepare our students for the highest level of moral and honorable practice and to plant the seeds of resistance against the pull of species adaptation that is found in the strong institutional culture of most prosecutors' offices. Certainly there is abundant literature available that provides more than enough materials for a classroom component.¹⁰ How to do this effectively is the challenge we face, and frankly one that I think we meet with mixed success. At the very least, if we do not already have an explicit goal to attempt to inspire ethical, empathic, self-conscious and individualistic prosecutors, we should. To give sustenance to this argument, I offer some organizing tools, including discussion topics and readings, to equip the prosecution clinic instructor for this charge.

Although many clinicians might cringe at the suggestion that we attempt to indoctrinate, or even influence, the future behavior of our students, preferring to allow them to find their own paths, in general, most of us are probably more directive than we would hope.¹¹ This essay argues that clinical teachers

⁹ To achieve this, among ourselves we must be candid about both the advantages and potential problems associated with these longstanding collaborations, in order to plan carefully so that students have the benefit of what often can be a vibrant setting in which to learn many basic litigation skills and to shoulder serious responsibilities. This symposium will contribute significantly to that effort.

¹⁰ See books and articles discussed *infra*, Part D.1-7.

¹¹ A personal parenthetical: Whatever the subject matter of the clinical program, whatever the precise pedagogical method, whatever the goals of case or client selection, setting or skill focus, whatever the details of credits, grades or duration, clinical teachers share an identifiable set of objectives and a fundamental approach to their mission. At the risk of being offensively reductive, after almost thirty years of mingling in the community of clinical teachers I am going to venture a truism: Clinical law professors strive to create a learning environment in which students encounter the real work and the realistic problems of lawyers, and perform

in prosecution clinics must take on an aggressive, even explicit, role in inculcating an enduring justice mission that will be strong enough to withstand the pull toward acquiescence to contrary institutional norms. In clinics where students are given as much responsibility for exercising judgment and discretion as full-fledged junior prosecutors, and where independent thinking is a goal, we cannot afford to be oblique or subtle about our teaching mission. I suspect this might be heretical to most clinical teachers, but, once again, the distinctive characteristics of prosecution may necessitate different pedagogical goals and strategies.

tasks in that context, all in a rarified environment dedicated to the students' professional development. Thus, the clinical teacher/supervisor's job is to question, to probe, to investigate, to engage, to react, to challenge, to inspire and to trust, in sum to provide the basis for launching self-critical, competent, confident lawyers. We try to offer the "ought" before the students enter the world of the "is." We attempt to show students what law practice might be like if we had none of the time or financial pressures of reality law; thus, when in the imperfect world, they can draw upon their rarified clinical lessons. Even, or maybe especially, when students intern off campus, away from our immediate supervision, we enhance their field work by engaging them in self-reflection exercises. Some clinical teachers see ourselves as role models, albeit imperfect ones. The metamorphosis from tyro to self-sufficient "expert" may not be complete until many years after graduation, but the process begins in this relatively safe, nurturing, student-centered setting. See Ass'n of Am. Law Sch., Section on Clinical Legal Education, Report of the Committee on the Future of the In-House Clinic, 42 J. LEGAL EDUC. 511 (1992); see also USER'S GUIDE FOR CLINICAL ANTHOLOGY: READINGS FOR LIVE-CLIENT CLINICS 29-82 (Alex J. Hurder et al. eds., 1999).

B. THE INHERENT CHARACTERISTICS OF PROSECUTION
CLINICS

At Brooklyn Law School (BLS), we offer extensive clinical experiences in prosecution settings. Sketching these programs provides a quick overview of the range of programs available. First, we have a classic Criminal Practice externship where students work in prosecution offices, as well as defender services and criminal justice agencies. Externships where students are supervised by ADAs or AUSAs rather than faculty members are the most common prosecution clinic arrangement.

Since 1986, we also have offered another variation of the prosecution clinic: an "in-house" clinic taught exclusively by full-time faculty members under the aegis of the Kings County (Brooklyn) District Attorney.¹² Its office, and the courts where the students appear, are within a two block radius of the law school. This clinic began after I returned to the law school from an extended leave of absence as Criminal Court Bureau Chief in that office, and is an almost mirror-image of the misdemeanor defense clinic I took as a student and taught as a new clinician. Along with my colleague Lisa Smith, a veteran of the DA's Office, we enrolled between twelve and fourteen students each year. We were allowed to select appropriate misdemeanor cases to assign the students that ordinarily would have been handled by first-year ADAs. We were appointed Special Assistant District Attorneys because only a properly appointed ADA is authorized by law to prosecute.¹³ On an almost daily basis, we would appear in Brooklyn Crimi-

¹² The only other reported example of this model is the University of Nebraska Criminal Practice Clinic. See Karen Knight, *To Prosecute Is Human*, 75 NEB. L. REV. 847, 851-52 (1996). Judging solely from the law school's current web page, however, this program now seems to be an externship. See <http://law.unl.edu/clinic.html> (last visited Oct. 29, 2004).

¹³ N.Y. COUNTY LAW § 700 (McKinney 1950)

nal Court with our students to handle every aspect of the case, from arraignment through plea negotiations and pre-trial motions, to hearings and trial. Now taught entirely by Professor Smith, this program is still an important part of our clinical curriculum and is a key feeder to post-graduate jobs with DA offices throughout the city and regionally because the students' year of misdemeanor prosecution experience makes these students very attractive candidates.¹⁴

In 2002, the law school added another non-traditional prosecution clinic to our offerings. Students work in the United States Attorney's Office (USAO) for the Eastern District of New York (EDNY) prosecuting federal "petty offenses."¹⁵ Although this clinic is not taught by full-time faculty, the law school has contracted with two senior AUSAs to supervise the work of eight students who handle all phases of the prosecution personally. The AUSAs commit many hours of their workday to the eight clinic students and also teach the seminar. Last year, students obtained two convictions after trials before federal Magistrate Judges.¹⁶

Finally, students can choose a 'boutique' appellate clinic in which they brief and argue a respondent's appeal on behalf of the Manhattan District Attorney's Office. A senior supervi-

¹⁴ At one point during her more than fifteen years at the law school, Lisa Smith took a leave of absence and then worked part-time as Special Executive Assistant-in-Charge of Domestic and Child Abuse from 1996 to 1998. As a result, she changed the emphasis of the clinic to domestic violence cases for several years. Last year, she again changed its design and created a community prosecution clinic which she describes in this symposium issue. Lisa Smith, *Community Prosecution: Can a Law School Prosecutor's Clinic Adopt This Approach?*, 74 *Miss. L.J.* 1281 (2005).

¹⁵ We consider this hybrid program to be one of our in-house clinics because the students assume all lawyering responsibilities and are closely supervised by the adjunct instructors who are selected for their understanding of and commitment to their teaching responsibilities. Students appear in District Court pursuant to local court rules.

¹⁶ See Thomas Adcock, *Law Students Are Making Federal Cases*, *N.Y.L.J.*, Jan. 23, 2004, at 16.

sor, a BLS graduate who initiated this program years ago, works with three to four students each year overseeing their written and oral advocacy. Under her supervision, and after several moots with ADAs in her office, they argue before the Appellate Division, First Department, of the Supreme Court of the State of New York, an intermediate appellate court.

All of these programs, and particularly the trial level clinics, are highly sought by the students, and offer substantial exposure to the skills (interviewing, counseling, fact investigation, oral and written advocacy) and values (competence, self-development, professional improvement) common to any clinical program, and actually provide ample opportunities to “promote justice, fairness, and morality.”¹⁷ For the moment, they are an established component of our clinical program, which itself is extensive and varied in areas of practice, types of clients represented and lawyering skills emphasized.¹⁸

Whatever the arrangement, prosecution clinics have several common features, and the aggregation of these character-

¹⁷ These are the core values identified by the “MacCrate Report.” A.B.A. SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSIONS: NARROWING THE GAP (1992).

¹⁸ A description of the entire clinical program at Brooklyn Law can be found at the BLS website. See <http://www.brooklaw.edu/academic/clinics/geninfo.php> (last visited Feb. 12, 2005). It is worth mentioning that the future of the USAO Prosecution Clinic is precarious. The federal petty offense case normally is prosecuted by an agent rather than an AUSA, and many defendants appear pro se. The origin of our program is an ironic example of the connections forged in the clinical community. For many years, the NYU criminal defense clinic handled petty offenses in the EDNY. Their clinical instructor suggested that BLS start a program largely because having a lawyer, and even better a law student, on the prosecution side would improve the experience for the NYU students. For two years, BLS and NYU law students have been adversaries, a clinical dream (or nightmare) come true as each side overworked their cases in typical clinical law student fashion! Last year, NYU almost discontinued its program. Since this would have meant that our students would litigate against the defendants directly, not an ideal situation, if NYU were to cease operations, we probably would have to as well.

istics distinguish all prosecution clinics from most other clinical programs.

1. No Independence—Multiple Overseers

Prosecution clinics are wholly dependent on a partnership with the office of the prosecutor. Although specific arrangements may be subject to some negotiation, the prosecutor's office has the final say about the types of cases students can handle and the courts in which they can appear. Most critically, it sets limits on the self-direction of the students' decision-making and discretion, and often even dictates who supervises them. This external oversight and control is not only different from the structure of other clinics, it also may well constrain the teaching and learning capabilities of the program. Because these clinics depend on the sponsorship of the prosecutor's office, clinic instructors rarely want to risk the existence of the program by deviating from office policies to approach a case too creatively or incompatibly with the office norms.¹⁹

Even the staple of clinical teaching – systemic critique – may falter when to do so challenges policies or norms negatively or skeptically. At the end of the day, the prosecutor's office may find the liabilities of the relationship outweigh the benefits, particularly in a location where other law schools compete for this resource. Finally, students may be reluctant to question openly the policies and norms of an office where they may be interviewing for post-graduate employment at the

¹⁹ In her article, Karen Knight sets forth a written memorandum of understanding between the County Attorney's Office and the University of Nebraska College of Law which delegates to the supervising faculty the "same degree of discretion with respect to case handling that any deputy in the office enjoys[.]" and that "[c]linic policies must be consistent with the policies and standards promulgated by the public prosecutor" and not "inconsistent with the educational mission of the clinic." Knight, *supra* note 12, at 867. This is an excellent precaution, possibly used by other schools also, although we have never reduced the terms of our cooperation to writing at BLS.

same time as they are taking the clinic.

2. No Client Representation—Multiple Roles

In a prosecution clinic, students do not have an identifiable client (whether an individual or an entity) so that many of the moral and ethical considerations that arise in the context of legal representation are missing. Observations about and reactions to these dilemmas often provide the richest fodder for both formal and ad hoc discussions in supervision sessions and in class. Issues of this nature actually do surface all the time for the government lawyer, particularly the public prosecutor, and can result in extremely rich and controversial discussions in the clinic seminar. But the approach of a prosecution clinic to these valuable discussions is necessarily quite different, circumscribed not only by role and policy, but also by confidentiality, security and public integrity. In addition, because most interpersonal interactions in a criminal prosecution are between the prosecutor and witnesses, whether victim, eyewitness or police officer, and sometimes the witnesses are uncooperative, unwilling and even complicit, the goals of this communication, as well as its very tone, are far from the client-centered, empathic approach that dominates clinical teaching.²⁰

²⁰ In the past, I urged a victim-centered approach to prosecution based on respect, compassion and empathy that draws on values inherent in client-centered models. Stacy Caplow, What If There Is No Client?: Prosecutors as "Counselors" of Crime Victims, 5 CLINICAL L. REV. 1, 37 (1998).

3. *No Ivory Tower—Multiple Influences*

Few clinical teachers would admit to wanting to be the exclusive influence or role model for our students. As a group, we are not competitive or territorial. On the other hand, most of us would admit that we rarely teach neutrally, but either directly or indirectly try to set our students on a path of social and self-awareness, to be caring, empathic, hardworking lawyers and individuals. Students interact with other influences all the time in school and at other jobs. Indeed, clinics in general call attention to the work of other lawyers, whether adversaries, co-counsel or judges. In an in-house clinic, with its truncated case load, those interactions may be quite limited. In contrast, by their nature, prosecution programs are located in the courthouse trenches where students work side-by-side with full-time prosecutors. There, clinic students are subjected to many more, and sometimes contradictory, influences than in the usual bell jar clinical environment where the clinical instructor's voice is often a powerful solo. This immersion provides many opportunities to observe critically a great number of situations and individuals, the fodder for rich reflection and classroom discussion. But it may also capture students, indoctrinating them with the received wisdom of the DA's office, exposing them to a dominant (and quite unselfcritical) culture, and transforming their behavior accordingly. Even if the clinical instructor offers alternative approaches, values and insights, the allure of the real world is inescapable, particularly if the student aspires to be a prosecutor.

Prosecutors see themselves as defenders of justice. Their job is stressful because of the power they wield and the consequences of the decisions they must make daily. Their multiple allegiances - to crime victims, to the court, to the public, to a justice ideal, and even to the defendants - necessitate balancing interests that few other jobs require. Even with this understanding of the difficulties of the job, some prosecutors have been known to routinely (sometimes inadvertently but

sometimes intentionally) engage in varieties of both large and small scale misconduct. Regardless of the details of the arrangement with the prosecutor's office, clinics struggle to form students' character to avoid misconduct while in law school and beyond. Their clinical teacher is a ghostly whisper in the courtroom or the precinct offering some "Remember me" advice about judgment, discretion and honor, while the much louder voices of colleagues and supervisors in the prosecutor's office are screaming, "This is the way we do things" or "It's office policy" or "What's your 'win-loss' record?"

C. BECOMING A PROSECUTOR

How do prosecutors learn this careless or even willful behavior? My years as Director of Training and my continuing contacts with colleagues who design and coordinate in-house education of ADAs in New York City provide me with an overview of local practice. Every fall, and sometimes more frequently, a group of newly appointed prosecutors are sworn in, receive credentials and begin training programs. Here in New York City, several hundred recent law school graduates attend training programs at the four main local prosecution offices (Brooklyn, Manhattan, Queens and the Bronx).²¹ While each county has its own curriculum, all train in the fundamentals. For example, at the Kings County (Brooklyn) DA's Office, the introductory training program covers the following topics in its written materials: Accusatory Instruments, Discovery and Disclosure, Suppression, Search and Seizure, Statements, Identification, Notices, Speedy Trial, Search Warrants, and Courtroom Closure.²² The contents include long outlines about doctrine, some recent decisions, office policy memos, and occasionally some practice guidelines or pointers that largely focus on the issues confronted during the early years of a prosecutor's career.²³

²¹ The New York Prosecutors Training Institute, Inc. (NYPTI), the mutual assistance and continuing legal education division of the District Attorneys

At each of these large New York City offices, new ADAs attend training sessions that run for about three weeks.²⁴ All of the programs present a mixture of practical and doctrinal materials, largely in lecture format with occasional variations. On the practical side, there are sessions on reading a rap sheet, case movement, handling a caseload and how to make a proper record in court. On the legal end, there are lectures about the law of speedy trial, substantive crimes and defenses, general and constitutional criminal procedure, and discovery. To one degree or another, the various specialized bureaus in the office provide an orientation to their respective work. The curriculum also includes some skills training. For example, the Bronx sends the group to observe at the “complaint room” and the arraignment and calendar courtrooms, and to conduct mock arraignments. In Manhattan, the group engages in complaint drafting and arraignment exercises. In Queens, the ADAs conduct mock arraignments and suppression hearings. Brooklyn training includes several courtroom advocacy and

Association, provides training and CLE for district attorneys' offices particularly when individual offices, cannot provide training programs because hiring is sporadic and the numbers of new ADAs is small. See <http://www.nysdaa.org/detail.cfm?page=5> (last visited Dec. 15, 2004). They offer a basic course, a trial skills course and advanced and/or specialized courses, most of which last three to four days. Materials on file with author.

²² Materials on file with author. In the past year or so, this office has decentralized its training so that these materials have not been updated and the overall format of the program is not uniform throughout the office. I appreciate the generosity of the Brooklyn DA's Office for sharing their materials with our students. This is evidence of the longstanding cooperative relationship we have enjoyed with that office for more than fifteen years.

²³ Materials on file with author.

²⁴ In addition to the Brooklyn materials, I have the schedules of the current training programs in Queens and those attended by my students in the NYU Prosecution Clinic who worked in the Manhattan and Bronx offices in 2000-2001. At NYU, students were expected to participate in as many training sessions as their class schedules permitted. Cardozo requires its full-semester students to attend the training program in its entirety.

plea bargaining exercises.

Each program has its own special features. The Bronx includes presentations by the attorney-in-charge of the Criminal Defense Division of The Legal Aid Society, the principal public defender, several judges, community leaders, and victim advocates. These particular sessions range from thirty minutes to one and a half hours. In Brooklyn, Manhattan and Queens, orientation includes field trips to detention facilities, central booking, a patrol car ride-along, a visit to the firing range and a tour of some neighborhoods.

These DA training sessions attempt to offer a general introduction to their respective offices and seem quite sensibly to focus on the more immediate work the new ADAs will encounter. For example, in the Bronx, they highlight issues in screening misdemeanor narcotics, domestic violence and sex offense cases, as well as vehicle, and traffic and administrative law violations. They also at least try to avoid swamping the group with information about both substantive law and areas of practice they will not encounter until they have been in the office a while, such as grand jury practice, investigations or appeals. None of the programs provide legal or skills training for trials at this early stage. Recognizing that training is an ongoing process, these topics are reserved for other formal training programs, or allowed to be learned on-the-job.

This expedient approach to training makes sense. The offices need to prepare their new generation of prosecutors to be up-and-running as soon as possible. Even if lectures on wide-ranging topics may not be the most engaging pedagogy to teach newcomers fresh from bar review courses, they certainly get a head full of the basics. In a very few weeks, neophyte prosecutors have to move with a pace and confidence that allows them to handle a caseload in court every day. Given this goal, these programs are impressive in the amount of information they pass along in such a short time period.

But a closer look reveals some shortcomings. The training schedules devote a token amount of time, at most a few hours, to one or two lectures on "the role of the prosecutor" and "pro-

fessional responsibility." Typically, a senior attorney addresses the newly minted ADAs for about an hour about these topics. Presumably the wisdom passed along is informed by that individual's experiences which, in turn, were shaped by earlier generations of prosecutors. Furthermore, an examination of the available materials from the Brooklyn DA's Office, by way of an exemplar, reveals few references to ethical rules or standards.

Take the charging decision, for example. The section on accusatory instruments discusses at great length the legal requirements for a sufficient complaint, but makes no mention of norms regarding the exercise of discretion in the charging decision, such as those promulgated by the American Bar Association's *Standards for Criminal Justice*.²⁵ Possibly some of the more obvious underlying principles do surface, such as "A prosecutor should not institute . . . criminal charges in the absence of sufficient admissible evidence to support a conviction."²⁶ But there seems to be no time allocated to allow for any serious discussion of the content of this standard, or of the criteria that might be employed to exercise discretion. Nor is there any reference to any competing norms by which to make a charging decision. For that matter, it is not evident whether any of the lectures or written materials reference ethical rules of standards found in either the *ABA Model Code of Professional Responsibility*,²⁷ the *ABA Model Rules of Professional Conduct*,²⁸ or the *National Prosecution Standards*.²⁹ A

²⁵ ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION, Standard 3-3.9 (3d ed. 1993) (hereinafter ABA STANDARDS)

²⁶ Id. at 3-3.9(a).

²⁷ MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103 (A)(1980)("A public prosecutor . . . shall not institute . . . charges when he knows or it is obvious that the charges are not supported by probable cause."). This is the rule followed in New York. N.Y. STATE BAR ASS'N, THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY (2002).

²⁸ MODEL RULES OF PROF'L CONDUCT R. 3.8 (2004) ("The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.").

²⁹ NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS 130

meaningful discussion of these standards should more than just mention the rules. It might attempt to identify subtle normative differences, apply the criteria underlying the standards to typical circumstances where an exercise of discretion might be appropriate and sensitize recent law school graduates to the enormous, and virtually unreviewable, power they now wield, even at the most basic decision making level.³⁰ There seems to be an unwarranted expectation that the momentous transition from student to someone with the ability to change the lives of others is simply a matter of information. The ease of this transformation should not be taken for granted, however. It deserves time for serious reflection about how to structure the exercise of discretion fairly, honestly and consistently.³¹

For several weeks, new ADAs are introduced to the various divisions in the office by their respective bureau chiefs and are trained by senior attorneys. This sends a very clear message. These successful people are role models and icons so

[2d ed. 1991] [43.3: "The prosecutor should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial;" 43.4: "The prosecutor should not attempt to utilize the charging decision only as a leverage device in obtaining guilty pleas to lesser charges."].

³⁰ United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 368 (1978)) ("In the ordinary case, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

³¹ I get the impression that most DA offices put a lot of faith in their hiring decisions as a screening tool, but these seem to be unreliable safeguards. Those of us whose students describe the many stages of the interviewing process know about many of the unanswerable hypotheticals about dead witnesses and terrorist cooperators that are thrown at the candidate in an effort to measure their judgment and ability to defend their position. Of course, the students at first feel that they messed up precisely because nothing seemed to be the "right" answer. Then, they hear about the questions from their friends and prepare answers which may or may not reflect their actual views. This is not the most reliable litmus test of character.

their words and perspectives really count. But, aside from describing the structure and work of their respective bureaus, there is no evidence that these individuals actually offer any kind of thoughtful or systematic consideration of the responsibility inherent in their powerful positions. The ABA *Standards* state that, "A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused."³² Do the lecturers mention the independent thinking that this standard implies? Are they encouraging autonomy or individual judgment? Or, after hearing from the leaders and stars in the office, does the training session become the first step in the homogenization process whereby prosecutors are too insecure or fearful of negative consequences either to exercise personal judgment or to try to defend a recommendation that might conflict with a supervisor?

Similar questions could be asked about any of the other stages in a criminal case in which prosecutors exercise discretion or use personal judgment to make decisions unburdened by clear legal mandates. Even the most junior prosecutors make daily decisions concerning bail requests, plea offers, and sentence recommendations. Quickly, these decisions are wholly delegated to inexperienced lawyers who, given the volume of their caseload, are supervised superficially at best. Vigilant oversight over all ADAs in a large office is impossible, thus allowing habits, expectations, attitudes and even demeanor to develop, without opportunities for feedback that might lead to change or adjustment. It is likely also that self-reflection is not a process that is even identified, let alone valued. Furthermore, since there are few effective deterrents, and even fewer sanctions, in cases of arguable or actual abuse or impropriety, most prosecutors learn that their behavior is largely self-monitored unless it is so egregious as to draw "front office" or public attention.³³

³² ABA STANDARDS, *supra* note 25, at 3-3.9(b).

³³ Prosecutors are immune from civil lawsuits for abuse or misconduct

committed during the course of the investigation or adjudication of a case. *Imbler v. Pachtman*, 424 U.S. 409, 430-37 (1976). While state prosecutors are subject to professional discipline, few examples of meaningful intervention are available. See generally, BENNETT L. GERSHMAN, *PROSECUTORIAL MISCONDUCT* § 14:12, 542-43 (2d ed. 2004); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C.L. REV. 721 (2001); *Texas Bar Goes After Tulia Prosecutor*, WASH. TIMES, Apr. 9, 2004, available at <http://washingtontimes.com/upi-breaking/20040409-094527-4610r.htm> (last visited Feb. 12, 2005) (reporting the conviction of forty-six people on narcotics charges based on evidence known by the prosecutor to be false that was developed by an undercover officer whose arrest record was known to, but not disclosed by, the prosecutor). Moreover, there is controversy over which entity has the authority to discipline federal prosecutors: the Department of Justice, the state of the attorney's admission, or the state in whose federal courts the AUSA is practicing. The literature on this topic is considerable, and beyond the scope of this essay. See, e.g., Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923 (1996); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381 (2002); Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355 (1996). Now, *The Citizen's Protection Act* has codified the question. 28 U.S.C. § 530B (Supp. 2004); 28 C.F.R. § 77.4(f) (2004).

Other potential remedies include criminal prosecutions, court sanctions (e.g., contempt), reversal (with or without identifying the individual involved) or internal discipline.

The court may direct a prosecutor to show cause why he should not be disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him. The court may also chastise the prosecutor in a published opinion. Such remedies allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant.

Bank of Nova Scotia v. United States, 487 U.S. 250, 263 (1988). A recent case exposed the justified cynicism of this course of action. A defense attorney, who won a \$5 million dollar settlement for his client who had been wrongly imprisoned in a rape case as a result of the prosecution's failure to disclose exculpatory material that would have led to acquittal, conducted a study claiming to reveal that prosecutors in the Bronx DA's office were rarely, if ever, sanctioned for their professional misconduct. Andrea Elliott & Benjamin Weiser, *When Prosecutors Err, Others Pay the Price: Disciplinary Action Is Rare After Misconduct or Mistakes*, N.Y. TIMES, Mar. 21, 2004, at 25. Publicity, of course, draws attention to problems but may not achieve any

The training materials are wholly practical and concrete. They reflect the needs of the office to have prosecutors who “will promptly start functioning as lawyers, not apprentices.”³⁴ The written materials contain no articles or other commentary about prosecutorial discretion or ethics. None of the provocative literature on race in the criminal justice system are included.³⁵ Another gap is the absence of materials related to values inherent in interviewing, negotiation and fact investigation, to name a few of the obviously relevant tasks prosecutors employ on a daily basis. For example, there appears to be no systematic consideration of honesty and deception in the conduct of discovery or plea bargaining.

Most offices treat training as an ongoing responsibility but their advanced programs tend to focus on substantive law (for example, narcotics or domestic violence), particular aspects of prosecution (for example, grand jury practice, search warrants), or trial skills in a setting that is self-perpetuating and unselfcritical. For example, the emphasis on trial skills is ironic since few cases actually survive plea bargaining to be tried, while no training seems to examine closely that plea bargaining process from either moral, ethical, or skills perspectives. The process seems foregone: the choice of discussion topics, reading materials, strategic tips and pointers and anec-

actual reform. For example, the Chicago Tribune ran a five day series covering thirty-six years of cases in which prosecutors suppressed exculpatory evidence or knowingly used false evidence. See *supra* note 8. A very modern method of surfacing misconduct is the website or blog, of which there are several dedicated to embarrassing rogue prosecutors. See, e.g., Carl E. Person, *Prosecutorial Misconduct Website—To Expose Prosecutorial Corruption and Related Loss of Constitutional Rights and Report on Relevant Cases Imposing Liability for Prosecutorial Misconduct*, available at <http://www.lawmall.com/abuse> (Oct. 6, 2004); Mark A.R. Kleiman, *The Decline of Prosecutorial Ethics*, available at http://www.markarkleiman.com/archives/crime_control_/2003/09/the_decline_of_prosecutorial_ethics.php (Sept. 1, 2003).

³⁴ Richard H. Kuh, *Careers in Prosecution Offices*, 14 J. LEGAL EDUC. 175, 179 (1961).

³⁵ See *infra* note 59.

dotal information is presented by more senior prosecutors who themselves were trained by the same method probably only a few years earlier.³⁶ Again, the instructors are drawn from within the office so, however well-intentioned and comprehensive their program design for their purposes, basically they bring to training not much more than their own knowledge, experience and perspective.³⁷

After this orientation, most novice ADAs start to appear in court, make bail arguments, engage in plea bargaining and churn the thousands of misdemeanor cases that flood the metropolitan area criminal court system.³⁸ As they gain confidence and proficiency, as they move up the ladder in the office structure, prosecutors continue their transformation.

I assume that most ADAs are hard-working, well-intentioned and begin their careers as idealists. Then, a seemingly inevitable pressure to conform grabs hold. Perhaps individuals who want to be prosecutors are susceptible to organizational thinking so that their soil is prepared for these tendencies to

³⁶ It is unlikely that seasoned prosecutors will question the values and mores they follow since to do so would undermine their identities. For that reason, collegial consultation is likely to yield little critical reaction, confirming rather than challenging long-held points of view. Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 248 (1988).

³⁷ I make this comment with all due respect for the hard work, energy, commitment and thoroughness of the people responsible for training in DAs' offices today where prosecutors receive a quality of training far superior to what was offered when I started. For example, then conventional wisdom included tips about jury selection that were distasteful, to say nothing about now being unlawful under *Batson v. Kentucky*, 476 U.S. 1712 (1986). I remember reading some materials that advised picking Con Edison workers because they were "law and order" jurors, whereas social workers were to be avoided at all cost. Despite these improvements, training and supervision could benefit from an even greater emphasis on role and role conflict. Fisher, *supra* note 36, at 257-58.

³⁸ In New York City, in the three-month period of January to March 2004, there were 23,130 felony arrests. N.Y. State Div. of Criminal Justice Servs., at <http://criminaljustice.state.ny.us/crimnet/ojsa/cj082604.htm> (last visited Dec. 16, 2004).

take root. There are undeniable pressures to analyze issues from a prosecutorial perspective that the newcomer, eager to thrive in this environment, might have trouble resisting. These pressures likely lead them to be conservative or "tough," and to take few risks in fear of actual or perceived problems. Sooner or later, many ADAs succumb to the imperatives of the adversary system. They begin to keep score of their win-loss record,³⁹ to treat defense attorneys as untrustworthy enemies, to see the world in absolute terms populated by bad guys or 'skells,' to judge people as types rather than individuals, to become fearful of being too lenient lest generosity backfire or superiors object,⁴⁰ to develop an air of arrogance or self-righteousness, to read the law in the light most conducive to prosecution and conviction rather than fairness and justice, and to become inured to the punitive and retributive quality of today's criminal justice system.

These are only a few of the attributes that characterize the metamorphosis of most prosecutors as they learn the language and mores of their environment. For some ADAs, power interferes with justice. There are simply too many examples of impropriety, misconduct and even illegality to ignore. Not everyone changes, of course, but as Professor Abbe Smith forcefully asks, given the many internal and external forces and influences at work, "Can you be a good person and a good prosecutor?"⁴¹

³⁹ "Prosecutors' idea of justice is a guilty verdict . . ." Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 284 (2001); see also Kenneth Bresler, "I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions, 9 GEO. J. LEGAL ETHICS 537 (1996).

⁴⁰ See Roscoe C. Howard, Jr., *Changing the System from Within: An Essay Calling on More African Americans to Consider Being Prosecutors*, 6 WIDENER L. SYMP. J. 139, 158-59 (2000). The author describes a situation in which a young AUSA refused to charge a defendant because the police did not have the necessary probable cause. After flouncing off to the supervisor, the detective had a tantrum, throwing the file on the floor, refusing to work with the AUSA again. *Id.*

⁴¹ Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*,

D. CAN A PROSECUTION CLINIC MAKE A DIFFERENCE?

Professor Smith answers her own question, "I hope so, but I think not."⁴² I would like to urge those of us who teach prosecution clinics, many of whose students spend years and sometimes an entire career in prosecution, to strive for a more hopeful legacy. Whether we directly supervise students or indirectly monitor their field placements, we should communicate a clear and lasting vision of the public prosecutor that endures and withstands the foreseeable pressures toward institutional acculturation. In these clinics, we have to measure to what extent our visions of justice and of the role of the lawyer, and more particularly the role of the prosecutor (often formed during our own days as prosecutors), can and should inform our supervision of the law student ADAs. Assuming that we take on this task, we also must figure out how to assure that our influence can survive the peer pressures of most prosecution offices.

While our students are under our tutelage, we can surely provide counter-examples or contrasting views, even as devil's advocate. We can intervene and try to influence their thinking by engaging them in active participant observation. While most of us see our teaching as including critique and reflection about roles and systems, here we may have to push beyond balanced examination or neutral questioning to directly challenge our students' experiences just to provide a counterweight against the very directive messages delivered by the DAs' offices. If we see at least part of our role to be teaching our students to think independently and creatively, and even more nettlesome, to question the validity of the institutional values themselves, we have to decide whether our teaching should be expressly (and, if necessary, subversively) designed to influence our students in prosecution jobs after graduation

14. GEO. J. LEGAL ETHICS 355 (2001).

⁴² Id. at 396.

when they are making choices and decisions about how to investigate, gather evidence, comply with court orders or constitutional mandates, examine witnesses, deliver summations and all of the other activities in which prosecutors engage. We should motivate them so that at their ten-year reunion, they can report a good score on their "doing justice" report card.

This activist role could be accomplished in two distinct ways. First, use readings and discussion to surface issues about role and responsibility. Assign the students challenging articles instead of, or at least in addition to, task-oriented materials such as a DA Office training materials, outlines of caselaw or even readings about advocacy skills. Require them to read all relevant ethical rules, and then articles that critique them. Pay attention to topics that are less work-centered, and therefore not as immediately useful, but more overarching, including writings about defense attorneys, race and role. For a clinician, this may sound too much like a traditional class. Normally I would not advocate that such a substantial proportion of clinic seminar time be devoted to conceptual material, but in this instance, this may be the last best opportunity for the students to engage neutrally and without professional consequences in these topics.⁴³ Second, design problems and simulations that introduce some of the standard pot holes to force the students to deal with examples of the reported missteps and misconduct of prosecutors as well as the less egregious habits that might be fostered by office culture.⁴⁴

⁴³ Frankly, I am not even sure this is possible. So many students in prosecution clinics hope for jobs in these offices that they might worry about the consequences of being overly critical of a potential future employer.

⁴⁴ For example, ADAs in New York routinely are instructed to avoid writing down information gleaned during witness interviews because these statements are discoverable at trial and might be used to impeach. N.Y. CRIM. PRO. LAW § 240.45 (McKinney 2002); *People v. Rosario*, 9 N.Y.2d 286 (1961); see also 18 U.S.C. § 3500; FED. R. CRIM. P. 26.2. This admonition always impressed me as foolish. First, so few cases are actually tried that the risk is minimal, while the loss of information due to a failure to memorialize the fact is quite likely given the typical large caseload. Also, if the witness' testimony were slightly inconsistent, a competent

Make students experience the decision making process in the tough call, and then deal with the reactions of others to their choices. Do not rely solely on the clinic's own cases since they are unlikely to raise the full gamut of issues calling for exercises of judgment, discretion or imposition of individual norms. These suggestions are hardly revolutionary, and surely are part of any well-constructed clinic curriculum. But in the context of prosecution clinics, I think the choice of materials and problems has to be even more sharply and deliberately committed to stirring, churning, confronting and challenging the hollow assumptions and cliches that most prosecutors use to describe their roles such as "seeking justice" or "public lawyer."⁴⁵ Also, since prosecution clinic instructors usually are former, or even current, prosecutors themselves a part of, or emerging from, that culture of conformity where training and supervision are task and resulted oriented, we have to work even harder to be imaginative in order to foster an enduring critical perspective.

Most clinical curricula are organized chronologically according to case development. We begin with interviewing, work through case theory and fact development, counseling, negotiation, and, in a litigation clinic at least, finish with advocacy, both written and oral. In the prosecution clinic, the road map would start with the charging decision (substantive law, interviewing witnesses, drafting) then move to plea bargaining (negotiation), pre-trial motions (procedural law, drafting) and hearings and trials (oral advocacy). There are ample readings in statutes, skills literature, and doctrinal treatises, and plenty of commercial simulation materials, as well as

prosecutor should be able to remediate the problem unless it was a substantial inconsistency, in which case the ADA should be reexamining the veracity of the witness, and perhaps the prosecutability of the case altogether.

⁴⁵ Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 835-41 (2000); Bruce A. Green, *Why Should Prosecutors "Seek Justice?"*, 26 FORDHAM L. REV. 607 (1999); Alan Vinegrad, *Prosecuting for the Public Interest*, STUDENT LAW. 17 (Mar. 2002).

materials prepared by the instructor, to fill the entire year's classroom sessions.

We surely want our students to be familiar with the legal principles central to the prosecutor's job concerning such matters as the obligation to disclose exculpatory material and racially neutral jury selection. But this approach adds nothing to the standard training an ADA ultimately will receive. Despite the risk of overload, we need to incorporate another level of discourse, even if this leads to extra class hours and readings that might seem disconnected and acontextual to the students who are busily engaging with the real world of cops, victims, defendants and judges. By third year they are exhausted by the classroom and raring to get in the trenches. And, when they return to school they only want to talk about their colorful first-time experiences. We have to resist this urge. In order to plant and fertilize the seeds of skepticism, introspection and individualism they have to return to school with all of their colorful stories and turn all of these impressions into big-picture thinking. To do this, we need to identify and then assign thoughtful readings and provocative exercises designed to have them learn not just how to be effective according to prevailing DA office norms, but how to be conscientious, critical and humanitarian. For a clinical teacher to oppose this urge for real-life experience seems contrary if not downright anti-clinical.

While I have never assigned most, and certainly never all, of the readings in the notes accompanying this section, I have read them all, as I urge all prosecution clinic instructors to do, if you have not already, just to keep ourselves teaching on a level that moves beyond the practical agenda of a training program. I have set forth below some suggested topics and the accompanying footnotes constitute a brief bibliography of articles that might serve as starting points for the prosecution clinic instructor.⁴⁶

⁴⁶ The list is not exhaustive, but rather a starting point. Fortunately, this symposium issue provides all of us the opportunity to share ideas and

1. Moral Development

Prosecution clinic students can begin the year by identifying their values. What do they individually see as the goal of their job: punishment, deterrence, incapacitation, rehabilitation? Those concepts, philosophical and abstract during the first week of Criminal Law class, by now have been buried in the pile of information and skills the students learned in Criminal Procedure and Trial Advocacy classes. And they surely will not be revisited in DA office training programs. Individual attitudes about charging decisions, plea bargaining and sentencing are informed by a personal moral philosophy, but most ADAs are functioning on too practical a level to realize what drives them. Just as some clinicians use psychological testing like the MBTI at the beginning of the semester to alert students to learning and working styles,⁴⁷ the prosecution clinic could begin with a series of fact patterns and exercises to elicit values and, if possible, a moral framework.⁴⁸

Discretionary decision-making, the core prosecution function, requires constant use of moral judgment. Ethical standards refer to personal beliefs about probable cause and guilt, but give no guidance about how to make these judgments. Can the process be anything other than personal and subjective, especially in an office where there are no published policies but decisions are based on the collective, historical wisdom of

resources.

⁴⁷ Don Peters & Martha M. Peters, *Maybe That's Why I Do That: Psychological Type Theory, the Myers-Briggs Type Indicator, and Learning Legal Interviewing*, 35 N.Y.L. SCH. L. REV. 169 (1990) (advocating the use of MBTI to enhance the learning in clinical settings); see also Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63 (1995).

⁴⁸ Bennett Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513 (1993). This is a very useful article because it contains three well-developed hypothetical charging decisions in situations of moral ambiguity.

peers? How do prosecutors learn to assess conduct, whether to treat individuals similarly or differently and on what basis, what criteria to use, how to relate to people from other cultures or who have different attitudes or goals for the prosecution?⁴⁹ Is their judgment simply informed by convention – established norms or rules – or can they engage in more diverse and inclusive moral reasoning? How can a prosecutor “do justice” without considering a host of values apart from conviction (or the more pragmatic, convictability) and punishment?

2. *The Essential Values of the Job and the Person Doing the Job*

At the beginning of the year, students can generate lists of the characteristics and core values of their vision of the prosecutor they hope to become. What might be included? Students might list discretionary decision making, truthfulness, honesty, obedience to legal principles, respect (for victims, for defendants, for rights, for other participants in the system) imagination, neutrality, fairness and diligence. By identifying these values at the outset, before their ideals are tested by the reality they encounter, students can refer to this baseline reading to compare reality to their expectations, to measure personal adaptations and to chart what events or interactions caused them to change.⁵⁰ Many useful articles written by former prosecutors – Bennett Gershman, Bruce Green, Richard Uviller – draw on their own moral development during their time on the job to describe and proscribe many issues.

⁴⁹ There is considerable literature about prosecutorial discretion. See generally Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 *UCLA L. REV.* 1, 4-9 (1971); Gershman, *supra* note 48; Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 *B.Y.U. L. REV.* 669; Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 *FORDHAM REV.* 1151 (2000).

⁵⁰ Many of the readings that might provoke introspection and discus-

3. Exploring the Honesty-Deception Continuum

sion have titles that articulate values. For example, prudent, virtuous, ethical and neutral are common adjectives. See, e.g., Leslie C. Griffin, *The Prudent Prosecutor*, 14 *Geo. J. Legal Ethics* 259 (2001); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in Passionate Pursuit*, 68 *Fordham Rev.* 1695 (2000); H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 *Mich. L. Rev.* 1145 (1973). There are many other articles that raise a host of normative issues, any one of which could stimulate provocative discussion. See, e.g., Bennett L. Gershman, *The New Prosecutors*, 53 *U. Pitt. L. Rev.* 393 (1992) (former ADA, New York County); Bennett L. Gershman, *Witness Coaching by Prosecutors*, 22 *Cardozo L. Rev.* 829 (2002); Green, *supra* note 45; Laurie Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 *Fordham Urb. L.J.* 553 (1999) (former AUSA in C.D. Cal.).

There are many occasions when prosecutors make personal moral choices because legal doctrine gives them little clear guidance and a lot of latitude without much accountability. When the law itself may be insufficiently specific about how to implement its requirements or prohibitions, the true colors of a prosecutor will be revealed. Of all the examples of such crossroads, the duty to disclose exculpatory evidence is one of the hardest roads to travel without losing sight of the core value of fairness. In law school, this duty seems crystal clear at first: disclosure is required. Every student knows about *Brady* material, even without taking Criminal Procedure.⁵¹ But Supreme Court case law permits a lot of leeway. Since the legal standards are applied post-conviction,⁵² and courts do not provide much guidance except in specific categorical instances, for example, disclosing promises to induce testimony,⁵³ prosecutors have lots of latitude to decide whether certain facts would, if known to the defense, have altered the outcome of the trial.⁵⁴ Most students do not know that various ethical rules impose much stricter obligations to disclose.⁵⁵ Nor are

⁵¹ *Brady v. Maryland*, 373 U.S. 83 (1963)

⁵² *United States v. Bagley*, 473 U.S. 667 (1985).

⁵³ The duty to disclose includes impeachment material. *Giglio v. United States*, 405 U.S. 150 (1972). Although state rules may differ and impose more demands on the prosecutor, in federal prosecutions, the Supreme Court has curtailed this obligation by refusing to require disclosure of exculpatory evidence applicable outside the trial. *United States v. Ruiz*, 536 U.S. 622 (2002) (holding no duty to disclose impeachment material before guilty plea); *United States v. Williams*, 504 U.S. 36 (1992) (holding no duty imposed by United States constitution to disclose of exculpatory evidence to grand jury). Because so few cases actually go to trial, the temptation to withhold helpful evidence in order to obtain a guilty plea is almost irresistible.

⁵⁴ Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833 (1997).

⁵⁵ MODEL RULE OF PROF'L CONDUCT, *supra* note 28, at 3.8(d), mandates a prosecutor to "make timely disclosure to the defense of all evidence or information

they aware of alternative approaches from other legal systems.⁵⁶

Forcing students to decide how to handle specific situations by providing rich and nuanced fact patterns, and enabling them to see how others might see their choices and conduct, may provide them with a conscience to honorably handle decisions in an office where disclosure may be seen as tantamount to jeopardizing the conviction, and where reversal in a universe of harmless error might seem worth risking. Years ago, a former mentor provided me with the test I found most applicable.⁵⁷ He called it the "Ouch Standard." In other words, if the reason you are considering withholding information is that it will hurt your case, then you should tell the defense even if non-disclosure actually might not be sufficiently prejudicial to warrant reversal. Our goal as teachers should be to implant the kind of advice our students never will forget.

known to the prosecutor that tends to negate the guilty of the accused or mitigates the offense . . . ". ABA STANDARDS, *supra* note 25, at 3-3.11(a), states: (a) A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged" These rules are more expansive in both scope and timing than federal constitutional law, a difference about which the students should be informed, particularly if state ethical sanctions could apply.

⁵⁶ Our students should be made aware that the U.S. system is markedly different from most other countries, and international tribunals, which require disclosure of all evidence, and certainly exculpatory evidence, pre-trial, irrespective of its probative value. See, e.g., Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons From England*, 68 *FORDHAM L. REV.* 1379 (2000); see also Rome Statute of the International Criminal Court, Art. 67(2), U.N. GAOR, 53rd Sess., U.N. Doc. A/CONF. 183/9 (1998)("[T]he prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.").

⁵⁷ My mentor was Honorable William C. Donnino, formerly Chief Executive of the Brooklyn DA's Office, who now sits as a Justice of the New York State Supreme Court (the trial court).

In order to awaken students to potential for misconduct or abuse, we can work with the established track record of prosecutors. By reviewing examples of misconduct that have been adjudicated either on the appeal of a conviction or in the occasional litigation before an ethics board, students can learn about both the inadvertent and the intentional misdeeds of prosecutors during pre-trial discovery, plea bargaining or trial. These reported decisions can be converted into problems asking, "What would you do in this situation?"⁵⁸ This provides plenty of opportunity to contrast their decisions with the conduct of the actual prosecutor. The instructor also can ascertain each student's moral barometer in comparison between the other students in the class and the group's non-situational expectations. What the student might do when confronted by the hypothetical, and the reasons given for the choice, may be glaringly different from the same considerations in reality.

⁵⁸ Often these decisions are contextual and subjective, easily defended by the prosecutor whose judgment is being challenged. See Medwed, *supra* note 8. By using real examples that resulted in either reversal or disciplinary proceedings, students can measure their instincts against the actual decision. A quick LEXIS search exposes examples of questionable conduct during pre-trial proceedings, grand jury presentations and investigations, in dealing with witnesses (coaching, isolating, berating), and at trial (witness examination, comments during summation).

4. *What Are Scholars Saying?*

After graduation new prosecutors eager to jump into the courtroom, the grand jury or the precinct gladly leave abstract, impractical scholarship and new theories about crime and criminal justice in the classroom. While it is true that some ideas may seem utopian or conceptual, the habit of critical thinking and openness to new ideas is an important routine that prosecution clinic instructors can instill by introducing some of the more current scholarship about, for example, racialized justice,⁵⁹ community prosecutions,⁶⁰ or therapeutic approaches to adjudication.⁶¹ Surely, any prosecutor, even a student hoping to be one someday, would find the proposal to use financial incentives to influence prosecutorial discretion controversial, thus prompting a spirited discussion of whether and how misconduct and abuse can be curtailed.⁶² The hallmark of clinical education is reflective practice, so we should resist the lure of the real world and insist on maintaining a symbiosis between the practical and the theoretical. This may seem an obvious observation, but we all know the excitement the cases, clients and controversies can engender and how tempting it is to divert all discussion to these events. Resist this impulse, even if it seems antithetical, in other words, anti-clinical. The long term benefits in the struggle against prosecutorial acculturation will be substantial even if not immediate.

⁵⁹ See, e.g., Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157 (1999); Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227 (2001); Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141 (2003); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998).

⁶⁰ See, e.g., Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465 (2002); Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321 (2002).

⁶¹ In New York, there are many innovative "problem-solving" courts which DA's offices have been instrumental in establishing, and generally have em-

Another strategy to raise consciousness is the promotion of student scholarship. The deeper exploration of an issue that scholarship engenders can stimulate a student to think critically and creatively about the norms and behavior of prosecutors. And, if they go on to work in a DA's office they will import a broader view of general issues as a result of their scholarship. A notable example of this phenomenon is Professor Bruce A. Green of Fordham, whose guidance is acknowledged in an impressive number of student notes on a wide range of topics relating to prosecution.⁶³

braced enthusiastically, resulting in very different approach to prosecution. See Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 *LAW & POLY* 125 (2001).

⁶² Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851 (1995). Most prosecutors would scoff at the impracticality of Professor Meares' ideas, but such a reaction makes this article all the more provocative and stimulating.

⁶³ See, e.g., Roland Acevedo, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 *FORDHAM L. REV.* 987 (1995); Rebecca B. Cross, *Ethical Deception by Prosecutors*, 31 *FORDHAM URB. L. J.* 215 (2003); Michael G. English, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 *FORDHAM L. REV.* 525 (1999); Ross Galin, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 *FORDHAM L. REV.* 1245 (2000); Lisa M. Kurcias, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 *FORDHAM L. REV.* 1205 (2000).

5. *Personal Accounts*

Many prosecutors, and even law professors or journalists taking a career detour in a prosecutor's office, have written accounts of their experiences as a means of exploring the complexities of the criminal justice system and the prosecutor's own contributions in popular literature. In general, they represent an example of reaction and reflection for our students, particularly for a clinical setting where students are required to keep journals.⁶⁴ Have students read some of these books and encourage them to critique the viewpoint, observations and conclusions of the authors.⁶⁵

⁶⁴ Journals are an accepted form of clinical pedagogy, particularly in externship programs. J.P. OGILVY ET AL., *LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL INTERNS* 97-111 (1998); J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 *CLINICAL L. REV.* 55 (1996). Imagine if a student journal could be converted into a bestseller? See, e.g., JAMES S. KUNEN, *"HOW CAN YOU DEFEND THOSE PEOPLE?": THE MAKING OF A CRIMINAL LAWYER* (1983).

⁶⁵ See, e.g., MARK BAKER, *D.A.: PROSECUTORS IN THEIR OWN WORDS* (1999); MARISSA N. BATT, *READY FOR THE PEOPLE: MY MOST CHILLING CASES AS A PROSECUTOR* (2004); GARY DELSOHN, *THE PROSECUTORS: A YEAR IN THE LIFE OF A DISTRICT ATTORNEY'S OFFICE* (2003) (The author is a reporter with the Sacramento Bee); DAVID HEILBRONER, *ROUGH JUSTICE: DAYS AND NIGHTS OF A YOUNG D.A.* (1990); GARY T. LOWENTHAL, *DOWN AND DIRTY JUSTICE: A CHILLING JOURNEY INTO THE DARK WORK OF CRIME AND THE CRIMINAL COURTS* (2003) (The author is a professor at Arizona State University Law School); JEANINE PIRRO & CATHERINE WHITNEY, *TO PUNISH AND PROTECT: A DA'S FIGHT AGAINST A SYSTEM THAT CODDLES CRIMINALS* (2003) (The author is the District Attorney of Westchester County, New York); STEVEN PHILLIPS, *NO HEROES, NO VILLAINS* (1977).

6. *Parallel Universes*

Our students need to be educated to think about how prosecutors fit into the larger picture of the other participants in the criminal justice system. Too often defense attorneys are demonized or disrespected without any real understanding about the difficulties and challenges of *their* role. Unfortunately, it seems that the level of mutual distrust and even contempt is apparent regardless of geography. Yet many adversaries actually are former classmates who have more in common with each other than with their clients, the police or crime victims. In addition to reading works by thoughtful defense attorneys,⁶⁶ the clinic offers the incomparable opportunity for incipient prosecutors to think and act like defense counsel when conducting role-plays in class.

Other differences should be highlighted as well. In any court, but particularly one in a metropolitan area, ADAs deal with people from other countries, who communicate in languages other than English and whose cultural differences may affect their ability to testify (or to testify effectively) or to understand their choices (whether as victim or defendant) or whose backgrounds may inform the actual criminal conduct. In many clinics, themes of difference and cross-cultural issues have become staple parts of the curriculum. There is ample

⁶⁶ See, e.g., Albert J. Krieger, *Why I Am a Criminal Defense Lawyer*, *STUDENT LAW.* 22 (Mar. 2002); David Luban, *Are Criminal Defenders Different?*, 91 *MICH. L. REV.* 1729 (1993); Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 *HARV. L. REV.* 1239, 1271-94 (1993); William H. Simon, *The Ethics of Criminal Defense*, 91 *MICH. L. REV.* 1703 (1993); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 *HOFSTRA L. REV.* 925 (2000); Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 *WASH. U. J.L. & POLY* 83 (2003); Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 *U.C. DAVIS L. REV.* 1203 (2004).

literature to assign.⁶⁷ Similar 'cross-cultural' education could be offered about mental illness, alcoholism, drug addition and other behaviors that play a large part in the criminal justice system.

7. Agent Provocatateur

Clinical teachers never suffer from a shortage of provocative questions designed to encourage students to think independently, imaginatively and confidently. We try to produce problem-solvers. During supervision class discussion, and in role plays, we can raise the tough questions that few full-time prosecutors ever consider in order to motivate students to develop their own answers to normative questions about role, to instill instincts that question complacency, and to encourage individuality. For example, how should prosecutorial misbehavior be treated within the DA's office? What kind of accountability should exist when misconduct occurs? By what means can an ADA develop a reputation for honesty and credibility? What adjectives would each student choose to describe themselves as prosecutors? Is it possible to achieve individualized justice in overcrowded courts? How do others experience the criminal justice system? Even if the law does not prohibit lack of candor, should prosecutors be required to tell the truth or at least not deliberately deceive an adversary? Would you let a guilty man go free to attain an abstract principle of justice? Can you defend strategic over-charging? Are there any personal values or biases that you inject into decision-making about cases? How far would you go to secure the cooperation of a recalcitrant witness?

This list, which surely asks only a few of the limitless questions that should be, but rarely are, asked by working prosecutors, is a starting point for clinicians to seize the opportunity to poke, prod and provoke our prosecution-minded

⁶⁷ Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 *CLINICAL L. REV.* 33 (2001).

students while we can. Those clinics that see their purpose as comprising more than teaching advocacy skills already ask about power, authority, boundaries, values and ethics.⁶⁸ All seventy-six schools with prosecution clinical offerings address these issues in order to launch our students on a career that will not include or suffer prosecutorial misconduct.

⁶⁸ For example, at Boston College Law School, the Prosecution Program course description asks:

What is the primary task of a prosecutor? Enforcing the law? Securing convictions? Punishing offenders? Seeking justice? Even if we agree that a prosecutor's primary task is to seek justice, will we be able to articulate a shared notion of what "to seek justice" means? One of the central challenges that students will face in this clinic will be to understand and articulate the primary task of a prosecutor and how our notions (both conscious and unconscious) of authority, role, boundary, and task affect the way we take up our role.

Boston College Law School Course Descriptions, available at <http://www.bc.edu/schools/law/services/academic/programs/curriculum/courses/list/#descriptions> (last visited Feb. 14, 2005).

8. Clinical Resources

My last observation about the challenges these clinics pose concerns their staffing. Since prosecution clinics cannot exist without the cooperation of prosecution offices, for most law schools concerned about conserving clinical education resources, the obvious and efficient decision has been to rely on externships rather than to hire full-time clinical faculty. Thus, supervision is largely in the hands of ADAs and AUSAs with only light faculty oversight. Although it is not always possible to discern who teaches prosecution clinics, on the basis of my on-line survey, I think it is fair to state that the great majority of prosecution clinics are either co-taught or wholly taught by the prosecutors themselves. This arrangement may preclude truly open, critical discussions either during supervision or in class for the same reasons discussed above.⁶⁹ There has to be more faculty involvement as either supervisors or seminar teachers in order to create a safe space for students to critically question their work, their observations of the work of others and the role of prosecutor altogether. Moreover, it takes a firm and veteran instructional hand to resist the ineluctable temptation to discuss cases and share experiences descriptively rather than critically.

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See *supra* Part B.1.

E. CONCLUSION

Clinical faculty teaching prosecution clinics must look beyond doctrine and skills. While in the clinic we need to awaken and inspire in our students the critical faculties they will need to prosecute with the highest level of self-awareness. Even more critically, we must prepare those students who go on to careers as prosecutors to resist the adaptation to office norms that allow for mindless adversarialness, and even to try to break the mold. They should not allow themselves to be viewed by their colleagues negatively, as iconoclasts or rebels; they should be thoughtful, informed and brave, arousing admiration not censure. We can encourage and push them to be "good prosecutors," as we sit as a conscience on the shoulders of our students both during law school and beyond.

