
PROSECUTION CLINICS: DEALING WITH PROFESSIONAL ROLE

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Today prosecutors have an extensive domain and are regarded as potentially, if not in reality, the key actor in the criminal justice system.¹

The chief objection to prosecutorial discretion is that it has traditionally been unstructured and largely uncontrolled. The result is that the individual prosecutor has, in large part, not been accountable for many of his actions either within the office, or with respect to other sources of public policy and law.²

The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged.³

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¹ William F. McDonald, *The Prosecutor's Domain*, in T. PROSECUTOR 15, 19 (William F. McDonald ed., 1979).

² John Jay Douglas, *Introduction and Overview to DISCRETIONARY AUTHORITY OF THE PROSECUTOR* 1, 1 (John Jay Douglas ed., 1977).

³ *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958).

INTRODUCTION

Extensive power, largely uncontrolled discretion, and the need to reign in partisan advocacy are three overarching issues implicit in the role of prosecutors. In theory, the criminal justice division of labor confines prosecutors to instituting criminal actions against alleged wrongdoers, while police have the power to enforce the laws through crime detection and prevention, a judge or jury decides questions of guilt, and judges determine the appropriate sentences for those found guilty. In reality, that is not how it works. Today, prosecutors decide whom to prosecute, what crimes to charge and decide, or at least greatly influence, what the sentence will be through their charging decisions, plea bargaining, or sentencing guideline choices.⁴ Depending on the jurisdiction, a prosecutor's office may direct investigative and police work, provide special services for victims and witnesses, play an active role in parole decisions, and lobby the state legislature.⁵ In the modern

⁴ Some of the power of state and federal prosecutors to control sentencing through the use of mandatory sentencing guidelines has been curtailed by recent Supreme Court decisions. See *United States v. Booker*, 125 S. Ct. 738, 756-57 (2005) (holding that the federal sentencing guidelines are not mandatory but rather advisory unless the facts necessary to enhance a sentence are admitted by the defendant or proven beyond a reasonable doubt at trial); *Blakely v. Washington*, 124 S. Ct. 2531, 2543 (2003) (invalidating state sentencing guidelines that permitted prosecutors to enhance punishments without proving to a jury the facts essential to the punishment); *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (holding that any increases in the penalty for a crime must be charged and proven beyond a reasonable doubt at trial).

⁵ See McDonald, *supra* note 1, at 17. Professor Bennett Gershman, himself a former prosecutor, notes:

As any informed observer of the criminal justice system knows, the prosecutor "runs the show." The prosecutor decides whether or not to bring criminal charges; who to charge; what charges to bring; whether a defendant will stand trial, plead guilty, or enter a correctional program in lieu of criminal charges; and whether to confer immunity from prosecution. The prosecutor effectively has the power to invoke or deny punishment, and in those jurisdictions that authorize capital punishment, the power literally over life and death.

conceptualization of the role of the prosecutor, the prosecutor wields enormous influence and power over the lives of defendants, victims, and witnesses. In some jurisdictions, prosecutors even control the court calendar, thereby affecting the schedules of defense lawyers, judges, and court personnel.⁶ And, prosecutors wield this power with very few controls on their exercise of discretion over the choices they make.

The ostensible counterbalance to the extensive power of prosecutors is the concept that prosecutors have ethical obligations that are "special,"⁷ requiring a prosecutor to "seek jus-

Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 405 n.74 (1992).

⁶ See McDonald, *supra* note 1, at 17.

⁷ Rule 3.8 of the American Bar Association (ABA) Model Rules of Professional Conduct is entitled "Special Responsibilities of a Prosecutor," and it contains six provisions that discuss a prosecutor's ethical obligations to: 1) refrain from prosecuting a charge not supported by probable cause; 2) make reasonable efforts to assure the accused has been informed of the right to counsel and opportunity to obtain counsel; 3) refrain from seeking waiver of pretrial rights from an unrepresented accused; 4) make timely disclosure of all evidence and information that tends to negate the guilt of the accused, mitigates the offense, or mitigates the sentence; 5) refrain from subpoenaing a lawyer to present evidence about a past or present client except in very limited instances; 6) refrain from making extrajudicial statements that have a likelihood of increasing public condemnation of the accused and prevent police and other law enforcement officers from making such statements. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2002) [hereinafter MODEL RULES]. The ABA adopted the Model Rules in 1983 and has amended them frequently, most recently in 2002 and 2003. See STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 4-6 (2005 ed.). The Model Rules replaced the ABA Model Code of Professional Responsibility (Model Code), which the ABA adopted in 1969 and amended in 1980. MODEL CODE OF PROF'L RESPONSIBILITY (1980) [hereinafter MODEL CODE]. Disciplinary Rule 7-103 of the Model Code contains two provisions outlining the ethical obligations of a public prosecutor or other government lawyer: 1) to refrain from instituting criminal charges not supported by probable cause, and 2) to disclose evidence to the defendant "that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." *Id.* DR 7-103.

The Model Rules greatly influence state ethics rules, with forty-three states and the District of Columbia having adopted some version of the Model Rules. See GILLERS & SIMON, *supra*, at 3. Iowa, Nebraska, New York, Ohio, and Oregon have

tice.”⁸ Unlike other lawyers who may focus on pushing a client's interests above all other interests, the prevailing belief is that prosecutors are governed by extraordinary ethical requirements that require them to act differently from criminal defense or civil lawyers.⁹ Thus, ethics rules require a prosecutor to view his or her role not as an advocate focused on winning each case, but rather as a “minister of justice” with the responsibility to ensure that each person accused of a crime “is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”¹⁰ Although these ethical proscriptions may sound meaningful, in reality the ethics rules provide little guidance to prosecutors on how to maintain professional objectivity and a concern for procedural justice above all else.¹¹ As a result, prosecutorial misconduct sometimes leads to wrongful convictions.¹² Recent studies even show that

some version of the Model Code, and California and Maine have their own rules that are not based on either the Model Code or Model Rules. *Id.*

⁸ “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.” MODEL RULES, *supra* note 7, at R. 3.8 cmt. 1.

⁹ See *infra* Part II.A.

¹⁰ MODEL RULES, *supra* note 7, at R. 3.8 cmt. 1.

¹¹ See, e.g., Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573 (noting that ethics rules provide little guidance for prosecutorial decision making); Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453 (2000) (contending that ethics rules lack specificity and provide little guidance concerning a prosecutor's duty to be an advocate or minister of justice).

¹² Grand jury and journalistic investigations reveal that prosecutorial misconduct accounts for a large number of wrongful convictions. See, e.g., Ken Armstrong & Maurice Possley, *Trial & Error: The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at C1 (reporting on a study that showed that since 1963 “at least 381 defendants nationally have had a homicide conviction thrown out because prosecutors concealed evidence suggesting innocence or presented evidence they knew to be false”); Barry Tarlow, *Some Prosecutors Just Don't Get It: Improper Cross and Vouching*, THE CHAMPION, Dec. 2004, at 55, 61 (citing a 1990 report by the Los An-

prosecutorial misconduct is a major factor for reversals in capital cases,¹³ where one might expect prosecutors to go to great lengths to assure each defendant the fairest of trials because the accused faces the most serious of punishments.

With law students entering in-house prosecution clinics and prosecution externship experiences each year,¹⁴ there are a number of questions long-overlooked concerning how law faculty teach these clinical courses and whether their students consider the special role of prosecutors. Is it necessary for clinical faculty and their students in prosecution clinics to critically examine the role of prosecutors and how prosecutors do their work? If so, what are some of the professional and ethical issues faculty should analyze with their students in prosecution clinical experiences? How can clinical faculty and

geles County Grand Jury that "prosecutors' and investigators' systematic misuse of jailhouse informers caused wrongful convictions in as many as 250 major felony prosecutions between 1979 and 1988").

¹³ In a national study of 5760 capital cases and 4578 capital appeals from 1973 to 1995, researchers found that prosecutorial misconduct was a major factor contributing to a 68% rate of reversible error. See James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995* i, available at <http://ccjr.policy.net/cjedfund/preport/finrep.pdf> (June 12, 2000). In an Illinois study of capital appeals, which showed a 66% reversal rate, prosecutorial misconduct accounted for 21% of all reversals. See Marshall J. Hartman & Stephen L. Richards, *The Illinois Death Penalty: What Went Wrong?*, 34 J. MARSHALL L. REV. 409, 423 (2001).

¹⁴ See *infra* notes 38-39 and accompanying text for a description of the prevalence of in-house and externship prosecution experiences. This Article uses the terms "prosecution clinics" or "prosecution clinical experience" to refer to in-house prosecution clinics, prosecution externship or field experiences, and hybrid prosecution clinics. "In-house" typically refers to clinics operated by law schools in which students are primarily supervised by full-time law faculty. "Hybrid" refers to clinics in which some combination of full-time faculty and lawyers from a law office not operated by the law school supervise clinic students' legal work. For the purposes of this Article, "in-house" clinics will also include possible references to hybrid clinics. Finally, this Article uses "externship" and "field placement" interchangeably to refer to clinics where practicing lawyers who are not full-time faculty supervise law students and students work out of law offices not operated by the law school.

students exam questions of the role of prosecutors in our society?

In this Article, I examine these and other issues concerning the professional role and ethics of prosecutors in the context of prosecution clinical courses. I start the investigation with a short description of the historical roots of prosecution clinics, and then discuss the duty of clinical faculty to structure prosecution clinics to reinforce ethical obligations. I proceed to analyze the role of prosecutors and highlight some issues clinical faculty should explore with their students in prosecution clinical experiences. Throughout the Article, I contend that law professors teaching students in prosecution clinics should explicitly examine the prosecutor's role in the criminal justice system both to promote the positive development of each student's professional identity and to fulfill the clinical faculty's own professional values, especially the value of striving to improve the legal profession.¹⁵

I. EXAMINING THE ROLE OF PROSECUTORS IN PROSECUTION CLINICS

Is it necessary for clinical faculty and students in prosecution clinics to critically examine the role of prosecutors and how prosecutors do their work? In order to answer this question, the following section examines the underlying goals of clinical legal education and how prosecution clinics fit into the clinical landscape.

¹⁵ See *infra* notes 47-48 and accompanying text for a discussion of professional values.

A. Historical Roots of Clinical Legal Education and Prosecution Clinics

Clinical legal education has its earliest roots in providing needed legal services to the poor, and prosecution clinical experiences do not directly fit this template. The earliest legal clinics—some started as early as the 1890s—were usually called legal dispensaries or legal aid bureaus, and involved law students working with or setting up legal aid offices.¹⁶ These earliest clinics were direct client service clinics, and commentators note that the primary impetus for early clinical legal education was “the dual goals of hands-on training in lawyering skills and provision of access to justice for traditionally unrepresented clients.”¹⁷

In order to spur the development of clinical programs, the American Bar Association (ABA) adopted a Model Student Practice Rule in 1969.¹⁸ States that did not already have a student practice rule adopted the Model Student Practice Rule in some form to authorize law students to provide client representation under the supervision of a licensed attorney.¹⁹ The Model Student Practice Rule states its purpose as assisting in “providing competent legal services for . . . clients unable to pay for such services and to encourage law schools to provide

¹⁶ See John S. Bradway, *The Nature of a Legal Aid Clinic*, 3 S. CAL. L. REV. 173, 174 (1930); Quintin Johnstone, *Law School Legal Aid Clinics*, 3 J. LEGAL EDUC. 535, 541 (1951); Robert MacCrate, *Educating a Changing Profession: From Clinics to Continuum*, 64 TENN. L. REV. 1099, 1102-03 (1997); William V. Rowe, *Legal Clinics and Better Trained Lawyers - A Necessity*, 11 ILL. L. REV. 591, 591 (1917).

¹⁷ Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 12 (2000).

¹⁸ Proposed Model Rule Relative to Legal Assistance by Law Students, 94 A.B.A. SEC. JUD. ADMIN. REP. 290, 290 (1969) [hereinafter *Model Student Practice Rule*].

¹⁹ See Joan W. Kuruc & Rachel A. Brown, *Student Practice Rules in the United States*, 68 B. EXAM'R, Aug. 1994, at 40, 40-41.

clinical instruction."²⁰ According to the ABA Section of Judicial Administration, which proposed the Model Student Practice Rule, the rule was promulgated for states to consider "in connection with the responsibility to provide legal services to all persons."²¹

The Model Student Practice Rule, however, also contains a provision authorizing students to "appear in any criminal matter on behalf of the State with the written approval of the prosecuting attorney or his authorized representative and of the supervising lawyer."²² This provision contemplates student practice on behalf of the government, and consequently endorses prosecution clinical experiences.

Clinical legal education has developed and expanded in the last several decades, and not every law school tailors all of its clinical courses to fit into the historical access to legal services model underpinning the clinical legal education movement and the stated rationale behind the ABA Model Student Practice Rule. There are some fee generating in-house clinical programs,²³ and there are externship programs that include placements in the private sector, such as corporation counsels' offices and private law firms.²⁴ In addition, there are judicial

²⁰ Model Student Practice Rule, *supra* note 18, at 290.

²¹ William M. McAllister, Report, 94 A.B.A. SEC. JUD. ADMIN. REP. 290, 290 (1969).

²² Model Student Practice Rule, *supra* note 18, at 290.

²³ See, e.g., Gary S. Laser, Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law, 68 CHI.-KENT L. REV. 243, 285 (1992) (arguing in favor of fee-generating clinics such as those used in Chicago-Kent's in-house clinical program); Patricia Pierce & Kathleen Ridolfi, The Santa Clara Experiment: A New Fee-Generating Model for Clinical Legal Education, 3 CLINICAL L. REV. 439 (1997) (describing the clinical program at Santa Clara in which fees generated by an employment law clinic help to support a criminal defense clinic).

²⁴ See, e.g., Alexis Anderson et al., Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom, 10 CLINICAL L. REV. 473, 476 n.8 (2004) (noting that some externships include private sector placements).

externship programs that are not focused on any client representation. Both judicial and prosecution clinics are clinical experiences that are not focused on direct services to clients otherwise unable to afford access to the courts,²⁵ but rather public service through working with government offices responsible for some aspect of the administration of justice.

Professor Karen Knight observes that some argue against prosecution clinics because prosecution clinics do not fulfill the "public service" of providing needed legal services to those otherwise unable to afford lawyers, and critics question whether law schools should devote resources to prosecution clinics.²⁶ Knight explains that some faculty members have raised this question, comparing the prosecution clinic at the University of Nebraska "to providing free legal services to IBM."²⁷ Knight argues, however, that prosecution clinics are "public service" because prosecutors further the public's interest by representing communities and the people who live in those communities.²⁸ Knight also maintains that prosecutors often assume the role of representing victims' interests in court, and that "[m]any victims of crime are members of traditionally underrepresented groups who are very much in need of legal assistance."²⁹

Everyone may not fully embrace Knight's rationale, but faculty and students working in prosecution clinics are performing a service for the benefit of the public – the enforcement of laws.³⁰ What fuels some of the criticisms Knight iden-

²⁵ There are no reliable data on how many in-house and externship clinics do not involve law students working on cases for clients otherwise unable to afford lawyers. More research in this area is needed to provide a complete understanding of the types of clinical programs currently operating.

²⁶ See Karen Knight, *To Prosecute Is Human*, 75 NEB. L. REV. 847, 865 (1996) ("Indeed, an argument can be made that it is inappropriate for a law school to contribute resources to the effort to 'imprison the poor.'").

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 866.

³⁰ Professor Knight states: "Whether is it [sic] more noble to repre-

tifies is that a prosecution clinic's public service departs from the historical pro bono legal service performed by most clinical programs that expand direct access to the courts for those otherwise unable to hire attorneys.³¹ In some ways, the public service of prosecution clinics is comparable to the public service of judicial externships – in both instances students are working for the public in government positions. Additionally, prosecution clinics do provide public service more so than fee-generating in-house clinics, unless the fee structure enables clients who cannot otherwise find attorneys to have legal representation,³² or private sector externships, unless the clinic students work on pro bono matters.

There is also long historical precedent for prosecution clinics, though perhaps not as long as the history of legal aid type clinics.³³ It is unclear when the first prosecution clinic was

sent the individual charged with rape or to represent the state in prosecuting him is a question of personal values and philosophy. It is, at a minimum, not ignoble to seek to bring to justice people who have criminally victimized others." *Id.* But cf. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 *GEO. J. LEGAL ETHICS* 355 (2001) (questioning whether lawyers committed to social and racial justice should be prosecutors given current political and public pressures on prosecutors). It is beyond the scope of this Article to examine the competing arguments for lawyers doing either prosecution or defense work. Examining these arguments in a clinical course can be beneficial, however.

³¹ Knight, *supra* note 26, at 865.

³² A fee-generating clinic could charge below market legal fees that are more affordable than market rate lawyer fees, or charge fees on a sliding scale based on each client's income so that low-income clients are not denied services. There may be other types of fee arrangements that fee-generating clinics can utilize to provide legal services to clients who cannot otherwise find attorneys, such as long-term payment plans, relying on cases with fee-shifting statutes that the private bar would not take, or other similar arrangements that have the net effect of expanding legal services to clients otherwise unable to afford legal counsel.

³³ The early surveys of clinical legal education programs often asked law schools to indicate whether they had "legal aid" offices or clinics. See, e.g., Quintin Johnstone, *Law School Legal Aid Clinics*, 3 *J. LEGAL EDUC.* 535 (1951) (reporting on a survey of "legal aid clinics"); Junius L. Allison, *A Survey on Legal Clinics*, 6 *STUDENT LAW.* 18 (1961) (reporting on a survey of law school "legal clinics");

started, but one commentator's claim that perhaps the first prosecution clinical program was the Harvard Student District Attorney Project, started in 1966, is probably incorrect.³⁴ A 1970-71 survey conducted by the Council on Legal Education for Professional Responsibility (CLEPR) indicates that the University of Denver College of Law may have offered prosecution externship placements decades earlier,³⁵ and Drake Law School may have placed students with prosecutors' offices in the 1950s.³⁶ By the 1971-1972 academic year, CLEPR was

Junius L. Allison, *The Legal Aid Clinic: A Research Subject*, 2 *STUDENT LAW*. 19 (1956) (describing survey results of schools with "legal aid clinics").

³⁴ Michael Ash & James A. Guest, *The Harvard Student District Attorney Project*, 13 *STUDENT LAW*. 4, 4 (1968). In 1965, Duke Law School offered a summer internship program with some faculty involvement, but apparently no academic credit, that involved students working with both appointed defense counsel and some prosecutors. See Robinson O. Everett, *The Duke Law School Legal Internship Project*, 18 *J. LEGAL EDUC.* 185, 189-96 (1965). Students received some pay, *id.* at 186, and it is unclear whether this summer program was considered a clinical program. For example, the Council on Legal Education for Professional Responsibility's (CLEPR's) definition of "clinical" included "the requirement that the students be supervised by the law school and receive academic credit for their clinical work." *COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, SURVEY OF CLINICAL AND OTHER EXTRA-CLASSROOM EXPERIENCES IN LAW SCHOOLS 1970-1971*, at vi (1971) [hereinafter *SURVEY OF CLINICAL EXPERIENCES*]. In a CLEPR survey conducted in 1970-71, several law schools listed externship programs that included prosecution placements. See generally *id.* For example, Boston University indicated that the Student Prosecutor Program had been in existence for four years, which would make its program start date either 1966 or 1967. *Id.* at 29-30.

³⁵ The University of Denver College of Law stated that its clinical program had been in existence since 1905, and that placements included prosecutor offices. See *SURVEY OF CLINICAL EXPERIENCES*, *supra* note 34, at 91-92. The survey form does not state the year the prosecution placements began. See *id.*

³⁶ In the 1970-71 survey, Drake Law School stated that some form of clinical program existed for approximately twenty years and included prosecution placements, though the start date of the prosecution placements is not stated. See *id.* at 99-100.

There may be examples of earlier prosecution clinical experiences than those listed in this Article, but there is very little literature on this topic. For readers interested in the curriculum and structure of an early prosecution externship program,

funding ten prosecution clinical programs.³⁷

Today, the Clinical Legal Educators-Interactive Directory lists nearly twenty law schools with prosecution clinics, though not all are identified as either in-house or externship clinics.³⁸ It is also difficult to know how many general externship clinics include some placements with prosecutors' offices, though it is likely that many more law schools than those the directory specifically lists as having prosecution clinics offer some prosecution clinical experiences.³⁹ Given the historical roots for

there is an article describing a pilot program involving six law schools in New York placing students in district attorneys' offices in 1968. See generally John A. Ronayne, A Summer Legal Intern Program for Law Students in District Attorney's [sic] Offices, 22 J. LEGAL EDUC. 105 (1969).

³⁷ Robert D. Bartels, Clinical Legal Education and the Delivery of Legal Services: The View from the Prosecutor's Office, in COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, CLINICAL LEGAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 190, 191 (1973) [hereinafter CLINICAL LEGAL EDUCATION FOR THE LAW STUDENT]. The Council on Legal Education for Professional Responsibility (CLEPR) is the final name of a Ford Foundation program that provided early funding for the development of clinical legal education programs. See Orison S. Marden, CLEPR: Origins and Programs, in CLINICAL LEGAL EDUCATION FOR THE LAW STUDENT, *supra* at 6-8.

³⁸ See Clinical Legal Educators-Interactive Directory at https://cgi2.www.law.umich.edu/_GCLE/index.asp (last visited Apr. 16, 2005). In addition, the directory lists other clinics with "criminal" in their titles that may include some prosecution clinics, and there is a greater number of general externship clinics listed, some of which may include students at some prosecution placements. See *id.*

³⁹ The Clinical Legal Educators-Interactive Directory does not include information on the different placements for general externship programs. See *id.* Anecdotal information gained through conversations with many faculty over the past twenty years indicates that a large number of law schools with general externship programs include placements for students in local, state and federal prosecutors' offices. Data also demonstrate that more than 14,000 students each year take externship courses. During the 2001-2002 academic year, 14,857 students took externship courses. E-Mail from David Rosenlieb, ABA Data Specialist, to Peter A. Joy (Dec. 19, 2003, 09:14CST) (stating that during the 2001-2002 academic year 14,857 students were in field placement courses) (on file with author). Without good data indicating how many of the more than 14,000 students in externship courses

and large number of prosecution clinical experiences, the question is far less whether there should be prosecution clinics, but rather how do faculty structure those clinical experiences.

*B. Duty to Structure Prosecution Clinics
to Reinforce Ethical Obligations*

Every faculty person teaching a clinical course has the duty to structure the course to reinforce the ethical obligations of clinic students, and this duty extends equally to faculty teaching prosecution clinics, criminal defense clinics, civil clinics, and non-litigation clinics such as transactional or ADR clinics.⁴⁰ For most law students, a clinical course is one of their first, if not their first, experience doing legal work. Thus, their first experiences are likely to be lasting ones and will shape their approach to the practice of law.⁴¹ If the clinic students are certified under student practice rules as student-lawyers and have primary or substantial responsibility on cases,⁴² they also are confronting the same pressures and ethical dilemmas they will face once they become lawyers.⁴³ As prosecution clinic students face the issues of defining their roles as lawyers, clinical faculty can play a critical role in the development of students' professional identities by engaging them in a process of critique, self-critique and self-reflection on their work, the work of other prosecutors working with them, and the work of defense lawyers and judges.⁴⁴

were placed in prosecutors' offices and how many students take in-house prosecution clinical courses, there is no way of knowing precisely how many students have prosecution clinical experiences each year. More research and better data collection are needed in this area. The recent efforts by Professor Hans Sinha to update data on prosecution clinical experiences is a positive step. See Hans P. Sinha, *Prosecutorial Externship Programs: Past, Present and Future*, 74 *MISS. L.J.* 1297 (2005).

⁴⁰ I have previously argued that there are at least three important reasons for faculty to structure clinical programs to reinforce ethical obligations of clinic students:

First, supervising clinical faculty have an ethical duty to ensure that all

One of the primary goals of clinical legal education is training in professional responsibility because a clinical experience provides law students with the opportunity to learn how to apply and follow the ethics rules as well as how to interact with others in their role as lawyers.⁴⁵ In developing a sense of the lawyer's role, clinic students also are exposed first-hand to how law affects people. In discussing the value of clinical legal

clinical students follow the rules of ethics. Second, holding clinic students to the same ethical standards as lawyers instills and reinforces professional values in law students. Third, clinical faculty are important role models and play an important part in teaching professional responsibility or legal ethics to clinic students.

Peter A. Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S. TEX. L. REV. 815, 834 (2004).

⁴¹ See Peter A. Joy, *The Law School Clinic as a Model Ethical Law Office*, 30 WM. MITCHELL L. REV. 35, 42-45 (2003) (explaining "[t]he law school clinic is the best place for the student to become acculturated to the ethical practice of law").

⁴² Students certified under student practice rules are admitted to the limited practice of law and are able to perform all of the essential lawyering functions, usually under the supervision of law faculty or another licensed lawyer, in the jurisdictions where they practice. Therefore, student practice rules enable certified law students to be primary lawyers or "first chair" on behalf of their clients.

⁴³ Joy, *supra* note 40, at 836.

⁴⁴ Donald Schön explains that this process of self-critique assists students in the process of learning how to learn from their experiences, a process Schön calls reflective practice or "reflection-in-action." DONALD A. SHÖN, *EDUCATING THE REFLECTIVE PRACTITIONER* 31-36 (1987).

⁴⁵ The search for a better way of instilling professional responsibility in law students was one of the major premises prompting the development of clinical legal education in the 1960s. There was a shared belief that the classroom was not effective in "inculcating professional standards, whether in the field of legal ethics or in the broader aspects of professional responsibility." Howard R. Sacks, *Education for Professional Responsibility: The National Council on Legal Clinics*, 46 A.B.A. J. 1110, 1111 (1960). The National Council on Legal Clinics (NCLC) was the original Ford Foundation program to provide funding to law school clinics, and NCLC eventually became the Council on Legal Education for Professional Responsibility (CLEPR). Barry et al., *supra* note 17, at 18-19.

education, William Pincus, former President of CLEPR, remarked that many clinic students develop “sensitivity to malfunctioning and injustice in the machinery of justice and the other arrangements of society.”⁴⁶ Engaging prosecution students in institutional critique of the criminal justice system provides the same opportunity to explore how the justice system and the law affect everyone in society.

The MacCrane Report identified four values for the legal profession, and three of the values are related to the development of the professional “self”: striving to promote justice, fairness, and morality; striving to improve the legal profession; and professional self-development.⁴⁷ Considering these values, many clinical faculty incorporate some aspect of institutional critique as one of the goals of their clinical courses.⁴⁸

Professor Linda Smith argues that students in prosecution externships should not only perform the work in their placements, but they should “behave as savvy participant-observers” and consider how the prosecutors in their offices define their roles and perform their work, such as exercising

⁴⁶ Symposium, The American Bar Association's National Conference on Professional Skills and Legal Education, 19 N.M. L. REV. 1, 103 (1989) (remarks of William Pincus).

⁴⁷ AMERICAN BAR ASSOCIATION SECTION ON 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 PROFESSION: NARROWING THE GAP 213-21 (1992) [hereinafter MACCRANE REPORT]. This ABA report is known as the MacCrane Report in recognition of Robert MacCrane, Chair of the Task Force that produced the report. See Ruthann Robson, The Zen of Grading, 36 AKRON L. REV. 303, 321 n.87 (2003).

⁴⁸ See, e.g., Carrie Menkel-Meadow, The Legacy of Clinical Education: Theories About Lawyering, 29 CLEV. ST. L. REV. 555, 572 (1980) (noting that clinical faculty are particularly well-situated to broaden our “understanding of the role of law and lawyer in society . . . by a sustained and rigorous analysis”); Stephen Wizner & Dennis Curtis, “Here's What We Do”: Some Notes About Clinical Legal Education, 29 CLEV. ST. L. REV. 673, 678-79 (1980) (noting that a clinical program can be a laboratory for examining the law and legal process and should result in efforts to reform the process).

discretion.⁴⁹ In-house and hybrid prosecution clinics also should be structured to encourage clinic students to serve as “savvy participant-observers” not only about their own work, but also about the work of their supervising faculty and other prosecutors with whom they work. The students' experiences in prosecution clinics provide them with a unique vantage point to critically examine the role of prosecutors, gain awareness of how prosecutors do their work, and consider whether reforms are necessary to promote justice and improve the legal system.⁵⁰

These guided observations by students in every type of prosecution clinic are critical to helping students understand, critique, and develop their role as prosecutors. The next section of this Article will explore the question of the prosecutor's role and highlight some issues clinical faculty teaching prosecution clinics should explore with their students.

⁴⁹ Linda F. Smith, *Designing an Extern Clinical Program: Or As You Sow, So Shall You Reap*, 5 *CLINICAL L. REV.* 527, 550 (1999).

⁵⁰ Professor Knight states that in her prosecution clinic students “are encouraged to reflect about and critique existing rules, procedures, and institutions.” Knight, *supra* note 26, at 863. She also notes: “Participation in the system gives the student a unique understanding of the obstacles to systemic reform as well as the perils of complacency.” *Id.* at 863-64.

II. UNDERSTANDING THE ROLE OF THE PROSECUTOR

Is the role of the prosecutor in our legal system special or different from other lawyers? The common understanding is that the prosecutor's role is unique – much different from the role of a criminal defense lawyer or a civil lawyer. This understanding is expressed in ethical rules and court decisions that refer to the “special responsibilities” and “extraordinary duties” of prosecutors, and admonishments that a prosecutor is a “minister of justice” and has a duty to “seek justice.”⁵¹ But, do prosecutors perform their work differently than other lawyers? And, are prosecutors insulated from the same types of criticisms levied against other lawyers? The answers to these questions are central to understanding the role of the prosecutor, and clinical faculty and students are particularly well situated to explore these and other questions about the work prosecutors perform.

A. *Prosecutors as Zealous Advocates?*

The ethics rules for prosecutors treat the prosecutor as both an advocate and as a “minister of justice.”⁵² The problem, though, is that the ethics rules do very little to describe the role of “minister of justice,” while every lawyer has an understanding of what it means to be a “zealous advocate” in our adversary system of justice.⁵³

⁵¹ See supra note 8 and accompanying text. See also Peter A. Joy & Kevin C. McMunigal, Are a Prosecutor's Responsibilities “Special”?, 20 CRIM. JUST. 58 (2005).

⁵² MODEL RULES, supra note 7, at R. 3.8 cmt. 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

⁵³ The first set of ethics rules adopted by the ABA was the 1908 Canons of Ethics, and the concept of zeal appears as Canon 15, which states:

The lawyer owes “entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,” to the end that nothing be taken or be withheld from

Perhaps the most famous example of what it means to be a zealous advocate is traced to Henry Brougham's defense of Queen Caroline before England's House of Lords in 1820.⁵⁴ In mounting a defense for Queen Caroline, Brougham suggested that he would take every step necessary to advance his client's interests even at the expense of possible damage to King George IV.⁵⁵ He stated words that appear today in most U.S. legal ethics textbooks:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to

him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense.

CANONS OF PROFESSIONAL ETHICS (1908).

The term "zealous advocate" is derived from Canon 7 of ABA's Model Code of Professional Responsibility, adopted in 1969 to replace the 1908 Canons of Professional Ethics, which states, "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." MODEL CODE, *supra* note 7, at Canon 7. The concepts of zeal and zealous representation also appear in the current Model Rules. The Preamble to the Model Rules states: "These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system." MODEL RULES, *supra* note 7, at pmb1. A comment to the rule discussing the lawyer's obligation to act with diligence provides: "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *Id.* R. 1.3 cmt. 1.

⁵⁴ ROBERT STEWART, HENRY BROUGHAM 152 (1985).

⁵⁵ *Id.* at 154.

involve his country in confusion.

The concept that a lawyer must place the interests of the client above all other interests pervades the justice system. Lawyers view themselves as zealous advocates advancing their clients' goals by any means necessary, as long as those means are legal. This norm of the legal profession involves a degree of indifference to the interests of the opposing parties and witnesses. Indifference to others, in turn, fosters a view of moral neutrality or moral non-accountability, which maintains that a lawyer acting in the role as a zealous advocate in an adversary system is just doing his or her job without regard of the interests of others. Thus, a lawyer acting on behalf of a client expects to be judged only by whether the lawyer follows the law and the rules of ethics for lawyers.⁵⁷

This zealous partisanship in the adversary system gives rise to a chief criticism about lawyers being amoral if not immoral in dealings with the rest of the world.⁵⁸ One area worthy of exploration with clinical students in a prosecution clinic is the consideration of the zealous advocacy criticism in view of the students' own approaches to prosecution as well as the approaches of the prosecutors with whom the students work. Are they partisan advocates indifferent to the interests of oth-

⁵⁶ 2 TRIAL OF QUEEN CAROLINE 3 (New York, J. Cockroft 1879).

⁵⁷ See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. Q. 1, 3-7 (1975). Professor Richard Wasserstrom describes this as role-differentiated behavior, whereby the special relationship between clients and lawyers leads lawyers to set aside various considerations, particularly moral considerations, and attempt to achieve the client's end by any means that are legal. *Id.* at 5-6.

⁵⁸ Professor David Luban has argued:

The adversary system excuse carries as a corollary the standard conception of the lawyer's role, consisting of (1) a role obligation (the "principle of partisanship") that identifies professionalism with extreme partisan zeal on behalf of the client and (2) the "principle of nonaccountability," which insists that the lawyer bears no moral responsibility for the client's goals or the means used to attain them.

DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xx (1988).

ers – particularly the interests of the accused?

Without probing how prosecutors actually perform their work, one may think that the zealous advocacy criticism, and resulting amorality or immorality, is inapplicable to the role of a prosecutor because the prosecutor does not represent a single client but rather represents the citizenry on a local, state, or federal level. In representing the interests of everyone in the community, law students are taught that a prosecutor should be concerned with the community's interest, which the ethics rules assume is procedural justice.⁵⁹ But, how does a prosecutor balance the ill-defined role of minister of justice with what the prosecutor understands to be the role of zealous advocate? Do students in prosecution clinics see this issue? And, do students in a prosecution clinic see prosecutors with whom they work act differently than other lawyers by curbing their zealous advocacy to emphasize procedural justice?

⁵⁹ The ethics rules assume that procedural justice is a societal goal and state that a prosecutor's responsibility as a minister of justice "carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." MODEL RULES, *supra* note 7, at R. 3.8 cmt. 1.

B. Prosecutors as Ministers of Justice?

The ethics rules do not define what it means to be a “minister of justice” beyond stating that a prosecutor has an ethical obligation “to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”⁶⁰ Instead, the rules define six obligations for a prosecutor: requiring probable cause before bringing charges;⁶¹ making reasonable efforts to ensure that the accused has been advised of and has the right to counsel;⁶² refraining from seeking a waiver of important pretrial rights from unrepresented defendants;⁶³ making timely disclosure of all evidence or information that tends to negate guilt or mitigate sentence;⁶⁴ refraining from subpoenaing a lawyer to give evidence about a past or present client except under limited circumstances;⁶⁵ and limiting “extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.”⁶⁶ Thus, a prosecutor may conclude that compliance with these ethical requirements fulfills the special obligations of being a prosecutor. But, are these ethical obligations for prosecutors really special?

⁶⁰ Id.

⁶¹ A prosecutor shall “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.” Id. R. 3.8(a).

⁶² A prosecutor shall “make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.” Id. R. 3.8(b).

⁶³ A prosecutor shall “not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.” Id. R. 3.8(c).

⁶⁴ A prosecutor shall:

make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Clinical faculty can explore with their students in a prosecution clinic whether these ethical obligations for prosecutors are “special” in light of ethics obligations applicable to other lawyers. For example, the requirement of probable cause for a prosecutor to file charges is not so different from the requirement that all lawyers “shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.”⁶⁷ The only exception to the requirement that a lawyer shall not controvert an issue without a basis in law and fact is that a defense lawyer may “defend the proceeding as to require that every element of the case be established.”⁶⁸ This exception advances the constitutional principles that the state must prove every element of a charged offense, the presumption of innocence, and the right against self-incrimination.⁶⁹ The probable cause standard also may be compared to the Civil Rule 11 standard that a lawyer must not bring a claim or defense unless it is well grounded in fact and “warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law.”⁷⁰

The restriction on extrajudicial comments is another duty that is not unique to prosecutors, because another ethics rule prohibits all lawyers from making “an extrajudicial statement that the lawyer knows or reasonably should know . . . will have

Id. R. 3.8(d).

⁶⁵ A prosecutor shall “not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes” the information is not protected by privilege, is essential, and “there is not other feasible alternative to obtain the information.” Id. R. 3.8(e).

⁶⁶ Id. R. 3.8(f).

⁶⁷ Id. R. 3.1.

⁶⁸ Id. This exception also applies to civil proceedings that may result in incarceration. Id.

⁶⁹ U.S. Const. amend. V (stating that “no person . . . shall be compelled in any criminal case to be a witness against himself”).

⁷⁰ FED. R. CIV. P. 11.

a substantial likelihood of materially prejudicing an adjudicative proceeding."⁷¹ Prosecutors also have the explicit duty to control statements by law enforcement personnel and employees,⁷² but this restriction is similar to ethical requirements that lawyers must ensure that employees and others "retained by or associated with a lawyer" comply with the professional obligations the lawyer has.⁷³ Another ethics rule, applicable to all lawyers, states that it is professional misconduct for a lawyer to violate the ethics rules "through the acts of another."⁷⁴ Thus, the obligation of a prosecutor with regard to public statements is very similar to the duty of criminal defense and civil lawyers.

One rule that is different for a prosecutor and a defense lawyer is the prosecution's duty to turn over exculpatory evidence to the defense.⁷⁵ This requirement, however, is less demanding than requirements for civil lawyers under modern discovery rules. In a civil matter, a party must, even without a discovery request, turn over all information and the identity of all witnesses that support any of a party's claims or defenses.⁷⁶ The civil discovery rule also permits a party to "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party" even if the information is not admissible at trial "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."⁷⁷ Thus, the only lawyers without affirmative discovery obligations to reveal some information that may be harmful to a client's case are defense lawyers, where a client's constitutional

⁷¹ MODEL RULES, *supra* note 7, at R. 3.6(a).

⁷² Id. R. 3.8(f) (stating that a prosecutor must "exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor" from making prohibited extrajudicial statements).

⁷³ Id. R. 5.3 (describing the lawyer's responsibilities to ensure that nonlawyer assistants comply with the ethics rules).

⁷⁴ Id. R. 8.4(a).

⁷⁵ Id. R. 3.8(d).

⁷⁶ See FED. R. CIV. P. 26.

⁷⁷ FED. R. CIV. P. 26(b)(1).

right against self-incrimination is implicated.⁷⁸

These examples illustrate that some of the stated ethical obligations for a prosecutor do not differ greatly than those for other lawyers, except in limited situations where the constitutional rights of the accused permit a defense lawyer to require the state to prove its case beyond a reasonable doubt and excuse the defense lawyer from turning over discovery material protected by the accused's right against self-incrimination.

The areas where the ethical obligations are truly unique usually have to do with powers unique to prosecutors. For example, prosecutors are restricted from using a grand jury subpoena to compel a lawyer "to present evidence about a past or present client" unless certain conditions are fulfilled.⁷⁹ Only prosecutors have the power to subpoena testimony before a grand jury, so the uniqueness of this ethics rule is due to the unique authority of the prosecutor. Similarly, the ethics rule states that a prosecutor shall "not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing."⁸⁰ Again, this restriction is unique to prosecutors because the prosecutor is the only lawyer who is in a position to obtain such a waiver.

Evaluating the ethical obligations of prosecutors with students in a prosecution clinic will highlight for them that a prosecutor's obligations are similar to those of other lawyers, or usually differ in areas where only prosecutors wield authority. Exposing these aspects of a prosecutor's ethical obligations, in the context of the overarching duty to seek justice, will help to illustrate that a prosecutor's truly unique or special ethical obligations are in areas where prosecutors exercise discretion. In discussing the exercise of discretion, law students in a prosecution clinic will see that their conduct normally will not be covered either by general ethics rules or the special ethics rules for

⁷⁸ See U.S. CONST. amend. V.

⁷⁹ MODEL RULES, *supra* note 7, at R. 3.8(e). See *supra* note 65 describing the limits on grand jury subpoenas for lawyers.

⁸⁰ *Id.* R. 3.8(c).

prosecutors. In these instances, the role of being a minister of justice requires a prosecutor to act as a monitor both of substantive and procedural justice in ways not expected of criminal defense lawyers or civil advocates. By asking students to consider their work and decisions, and the work and decisions of the prosecutors with whom they work, in this light, should generate critical thinking about the differences and similarities between prosecutors and other lawyers - particularly defense counsel. The next section considers the differences between prosecutors and defense counsel.

C. Comparing Prosecutors to Defense Counsel

The adversary system is, by its nature, based on a competitive rather than cooperative model. The adversary system assumes that partisan advocates will represent each side to a dispute and that the process will most often result in the best resolution of each dispute. Students entering a prosecution clinic, like lawyers becoming prosecutors, approach their work with this idea of partisanship firmly entrenched. As the foregoing discussion comparing and contrasting a prosecutor's ethical obligations with those of defense lawyers and civil lawyers reveals, the ethical standards for prosecutors are more similar than different from those applicable to other lawyers. Where the standards do differ, they differ most when we compare prosecutors to defense counsel. In addition to some of the constitutional reasons for differences between prosecutors and defense counsel, are there policy reasons to treat defense counsel differently than prosecutors?

Commentators usually agree that a person charged with a crime is at a distinct disadvantage when the resources of the state are brought to bear, and that a zealous advocate in the form of a defense lawyer is necessary to try to offset this resource imbalance.⁸¹ The logical inference derived from this jus-

⁸¹ See, e.g., Luban, *supra* note 58, at 58 (endorsing the argument that "zealous adversary advocacy of those accused of crimes is the greatest safeguard of individual liberty against the encroachments of the state");

tification of zealous advocacy by defense counsel is that a prosecutor, who usually has the resource advantage, should not be as partisan as defense counsel in some instances. Consider the following examples.

In civil litigation, one side may have superior resources than the other side, but liberal rules of discovery can overcome some of this imbalance by insuring both sides access to all of the facts and even inadmissible information that “appears reasonably calculated to lead to the discovery of admissible evidence.”⁸² In contrast, the prosecutor has access to all of the information compiled by the police and others through their investigation, as well as access to law enforcement databases closed to all others. In most criminal cases, the wealth of information available to the prosecutor leaves the prosecutor with most of the cards. Does the prosecutor share this information with defense counsel, effectively instituting an open file discovery policy, or does the prosecutor give defense counsel the bare minimum required by discovery rules and legal standards? Also, does the prosecutor withhold some exculpatory evidence until shortly before trial in order to gain a tactical advantage over defense counsel? These types of questions, implicating the exercise of discretion, help to engage clinical students in their examination of the role of a prosecutor.

A defense lawyer, even when representing an accused who may be factually guilty, has an ethical obligation to represent the client and seek an acquittal if the government's evidence is not sufficient. In contrast, a prosecutor has the unique obligation to guarantee that a defendant is only convicted upon sufficient evidence, and is also responsible to see that the accused “is accorded procedural justice.”⁸³ Because of this responsibility, the prosecutor should take special care in assembling evidence. For example, a prosecutor should be careful whenever using

Wasserstrom, *supra* note 57, at 12 (arguing that the special needs of the accused justify the aggressive, and at times amoral, approach of criminal defense lawyers).

⁸² FED. R. CIV. P. 26(b)(1).

⁸³ MODEL RULES, *supra* note 7, at R. 3.8 cmt. 1.

inducements, such as reduced charges or immunity, to gain testimony against the accused.⁸⁴ Again, the role of a prosecutor is unique in this regard because a prosecutor may offer inducements to witnesses for their testimony and defense lawyers may not.⁸⁵

Another area where a prosecutor's obligations differ from those of defense counsel is in advocacy before a fact finder, whether the judge or a jury. A defense lawyer may vigorously cross-examine a witness the defense lawyer knows to be truthful,⁸⁶ but a prosecutor may not mislead the fact finder by undermining the credibility of a truthful witness.⁸⁷ This restriction is meant to curb zealous advocacy where it may erode procedural justice for the accused. Similarly, a prosecutor may not urge the fact finder to draw an inference from the evidence the prosecutor knows to be contrary to underlying facts.⁸⁸

In many ways, these differences between prosecutors and defense counsel emphasize the prosecutor's obligation not to

⁸⁴ See generally Joel Cohen, *When Prosecutors Prepare Cooperators*, 23 *CARDOZO L. REV.* 865 (2002); Richard Uviller, *No Sauce for the Gander: Valuable Consideration for Helpful Testimony from Tainted Witnesses in Criminal Cases*, 23 *CARDOZO L. REV.* 771 (2002).

⁸⁵ Uviller, *supra* note 84, at 774-75.

⁸⁶ Cross-examination to discredit the truthful witness is a subject many commentators have addressed, and most have agreed that it is a proper tactic for defense counsel. See MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYER ETHICS* 213 (2d ed. 2002).

⁸⁷ ABA standards for prosecutors state that a prosecutor's belief that the witness is telling the truth "may affect the method and scope of cross-examination" and a "prosecutor should not use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully." ABA *STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION* Stand. 3-5.7(b) (3d ed. 1993) [hereinafter *ABA STANDARDS FOR CRIMINAL JUSTICE*]; see also Green, *supra* note 11, at 1596.

⁸⁸ "In closing argument to the jury, the prosecutor may argue all reasonable inferences from the evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury from the inferences it may draw." ABA *STANDARDS FOR CRIMINAL JUSTICE*, *supra* note 87, Stand. 3-5.8(a); Green, *supra* note 11, at 1596.

seek convictions at all costs – not to seek simply to win. When winning becomes the primary goal, investigations demonstrate that prosecutors sometimes sacrifice justice to win.⁸⁹ It can lead to overtly unethical practices, such as hiding evidence, overreaching in arguments by vouching for witnesses' testimony or sitting silent while witnesses “shave” the truth.⁹⁰ A focus on winning can also lead to what one former prosecutor calls the “dark secret” of prosecutorial conduct – unethical coaching of witnesses.⁹¹

By comparing the role of a prosecutor with that of a defense

⁸⁹ See generally Maurice Possley & Ken Armstrong, Trial and Error: The Flip Side of a Fair Trial, CHI. TRIB., Jan. 11, 1999, at N1 (reporting on the overemphasis on winning at some prosecutors' offices leading to unethical conduct).

⁹⁰ See *id.* (giving examples of unethical conduct resulting from a scorekeeping mentality by prosecutors).

⁹¹ Professor Bennett Gershman maintains:

[I]t is indisputable that some prosecutors coach witnesses with the deliberate objective of promoting false or misleading testimony. Prosecutors do this primarily to (1) eliminate inconsistencies between a witness's earlier statements and her present testimony, (2) avoid details that might embarrass the witness and weaken her testimony, and (3) conceal information that might reveal that the prosecutor has suppressed evidence.

Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 *CARDOZO L. REV.* 829, 833-34 (2002). Prior to becoming a law professor, Professor Bennett Gershman was an Assistant District Attorney in New York City for five years and a Special Assistant Attorney General for New York State for four years. See *ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AALS DIRECTORY OF LAW TEACHERS, 2003-2004*, at 549 (2003).

To support his contention, Gershman cites to several examples of each type of impermissible coaching from a number of cases, some of them capital cases, in which the resulting convictions were reversed. See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 443 n.14 (1995) (“The implication of coaching would have been complemented by the fact that Smallwood's testimony at the second trial was much more precise and incriminating than his testimony at the first, which produced a hung jury.”); *Alcorta v. Texas*, 355 U.S. 28, 30-31 (1957) (coaching witness to give literally truthful answers that avoided the subject of the witness's sexual conduct with the victim that would be embarrassing or harmful); *Walker v. City of New York*, 974 F.2d 293, 300 (2d Cir. 1992) (condemning a prosecutor's failure to disclose that a witness's testimony was inconsistent with the witness's original statement that there were two perpetrators).

lawyer, faculty and prosecution clinic students can identify the underlying obligations of a prosecutor that militate in favor of restraint in some instances in order to do justice even while seeking to convict a defendant the prosecutor believes to be guilty. Such an exploration with clinical students will help them understand the competing values in the criminal justice system, and how the exercise of prosecutorial discretion is key to the proper functioning of the justice system.

CONCLUSION

The plain text of the ethics rules provides little guidance to prosecutors, and consequently little guidance to law students in prosecution clinics. The ethics rules assume that there is something special about a prosecutor's ethical obligations, but the rules fail to address how a prosecutor should act or exercise discretion in many situations a student in a prosecution clinic may encounter. This is particularly problematic because prosecutors have extensive power and discretion. Exploring these issues with prosecution clinic students will not only help law students shape their own professional identities as prosecutors, but also engage them in a critical exploration of the professional values of striving to promote justice, fairness, and morality, as well as striving to improve the legal profession.⁹² These issues of the prosecutor's role and professional values are exactly the types of issues that clinical faculty are well-situated to explore with their students.

⁹²See *supra* note 47 and accompanying text.

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PROFESSIONAL ROLE

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