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Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?

Fred C. Zacharias

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Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?

*Fred C. Zacharias**

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* Visiting Professor, University of San Diego School of Law. B.A., Johns Hopkins University, 1974; J.D., Yale Law School, 1977; LL.M., Georgetown University Law Center, 1981. The Author deeply appreciates the help of numerous colleagues who reviewed and commented on various incarnations of this Article. They include Professors Gerald Caplan, Kevin Clermont, Steven Hartwell, James Henderson, Sheri Johnson, David Luban, Beth Nolan, Gary Simson, William Simon, Lynn Stout, Chuck Wolfram, and Lawrence Zacharias.

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I. INTRODUCTION

Codes of professional responsibility take a very different approach to civil and criminal trials. In civil litigation, the codes presume that good outcomes result when lawyers represent clients aggressively.¹ In criminal cases, the codes do not rely as fully on competitive lawyering. They treat prosecutors as advocates, but also as "ministers" having an ethical duty to "do justice."²

Although the special prosecutorial duty is worded so vaguely that it obviously requires further explanation, the codes provide remarkably little guidance on its meaning.³ In effect, code drafters have delegated to prosecutors the task of resolving the special ethical issues prosecutors face at every stage of trial.⁴ Is a prosecutor free to seek a jury biased against the defendant? If a prosecutor becomes convinced at trial that defense counsel is overmatched because of limited resources, what

1. Aggressive representation, however, is subject to the codes' limited constraints on excessive lawyer conduct. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.1-3.3 (1983) [hereinafter MODEL RULES] (providing limits on specific types of aggressive advocacy); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1981) [hereinafter CODE] (noting that "[t]he duty of a lawyer . . . is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations") (footnotes omitted).

2. See MODEL RULES, *supra* note 1, Rule 3.8 comment (1) (stating that government lawyers are "minister[s] of justice"); CODE, *supra* note 1, EC 7-13 (providing that government lawyers must "seek justice"); see also ABA Joint Conference on Professional Responsibility, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958) [hereinafter ABA Joint Conference] (noting prosecutor's "dual role"); Defoor, *Prosecutorial Misconduct in Closing Argument*, 7 NOVA L.J. 443, 448 (1983) (citing prosecutor's "semi-judicial position" under Florida law); cf. Note, *Role of the Prosecutor: Fair Minister of Justice with Firm Convictions*, 16 U. BARR. COLUM. L. REV. 295, 297 (1982) (discussing Canadian prosecutor's minister of justice role). Throughout this Article, I refer to "the codes" as a shorthand for the many state professional rules that model themselves after the two ABA codes. See *supra* note 1. Virtually all states have adopted the general approach of one of the model codes and have accepted the "do justice" standard for government lawyers.

3. The duty to "do justice" applies to all government attorneys, but takes on its most dramatic significance in criminal prosecutions. This Article's discussion is confined to the criminal context.

4. Richard Danzig points out that it is not unusual for code drafters to write general ethical proscriptions and leave it to others to define them. See Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 628-29 (1975). Thus, for example, the Uniform Commercial Code proscribes "unconscionable" contracts, assuming that someone (e.g., courts and tradesmen) will give meaning to unconscionability. Danzig dubiously notes that the premise of such rules is "that values have an objectively ascertainable existence and a near universal acceptance and thus can be judicially discovered." *Id.* at 629. As this Article discusses, the professional codes' requirement that prosecutors "do justice" has no universally accepted meaning and does not lend itself to easy interpretation.

are the prosecutor's options? Should she⁵ help a defendant whose lawyer is incompetent? What should she do if she believes the judge incorrectly has restricted counsel's ability to present a defense? In her own presentation, may she legitimately invite the jurors to draw false inferences from the facts? How emotional a summation may she make in her effort to sway the jury toward conviction?

The interpretive literature is no more helpful than the codes in resolving these and other ethical trial issues raised by the "do justice" admonition. Scholars have focused exclusively on constitutional requirements and on issues relating to prosecutorial policy at the pretrial and sentencing stages.⁶ Moreover, judges seem intent on limiting their own role in defining appropriate trial conduct by prosecutors. Courts have declined to strengthen legal and constitutional controls, based in part on the belief that independent professional regulation best constrains prosecutorial behavior.⁷

5. To avoid confusion, throughout this Article I refer to the prosecutor in the female gender. For balance, I treat the other actors in the process (e.g., judges, defense counsel, witnesses, and defendants) as male.

6. These are, of course, areas in which the exercise of prosecutorial discretion is more evident than in the trial context. Scholars have attempted to develop guidelines and models for what prosecutors should do in charging, plea bargaining, and (to a limited extent) sentencing. See authorities cited *infra* note 19. When addressing trial conduct, however, authorities have looked only to the constitutional issues raised by prosecutorial misconduct, such as whether emotional summations violate due process, and whether selection of jurors on the basis of race violates equal protection. See *infra* notes 219-21, 230, 235 and accompanying text. Most commentators fail to recognize that prosecutors' ethical obligations may differ from their constitutional responsibilities.

Even when courts and commentators have addressed the prosecutor's subconstitutional trial obligations, they have shared the codes' tendency to speak in lofty, but undefined, "justice" terms. Consider, for example, the oft-quoted passage from *Berger v. United States*, 295 U.S. 78 (1935): "[The prosecution's interest] is not that it shall win a case, but that justice shall be done. . . . [The prosecutor] may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones." *Id.* at 88; see also J. DOUGLASS, *ETHICAL ISSUES IN PROSECUTION* 7-20 (1988) (quoting various famous but generalized formulations of the "prosecutor must do justice" concept); Frampton, *Some Practical and Ethical Problems of Prosecuting Public Officials*, 36 MD. L. REV. 5, 7 (1976) (discussing prosecutor's role as administrator of the criminal justice system); cf. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 633 & n.16 (1972) (arguing that "the prosecutor should be afforded less leeway in his courtroom conduct than the defense attorney").

7. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 428-29 (1976). As the Court of Appeals for the Second Circuit noted in *United States v. Hammad*, 846 F.2d 854 (2d Cir. 1988):

The Constitution defines only the "minimal historic safeguards" which defendants must receive rather than the outer bounds of those we may afford them. In other words, the Constitution prescribes a floor below which prosecutions may not fall, rather than a ceiling beyond which they may not rise. The Model Code of Professional Responsibility, on the other hand, . . . is designed to safeguard the integrity of the profession and preserve public confidence in our system of justice. . . . Hence, the Code secures protections not contemplated by the Constitution.

Id. at 859 (citations omitted); see also *United States v. Hasting*, 461 U.S. 499, 506-07 (1983) (reversing on grounds of harmless error appellate court's exercise of "supervisory authority" to control repeated prosecutorial misconduct); *Smith v. Phillips*, 455 U.S. 209, 221 (1982) (warning courts

The codes' failure to define prosecutors' ethical obligations at trial has significant costs. As "professionals," prosecutors probably are capable of exercising discretionary judgment in a manner consistent with general norms of behavior.⁸ The "do justice" standard, however, establishes no identifiable norm. Its vagueness leaves prosecutors with only their individual sense of morality to determine just conduct.⁹ Some will decide that justice lies in conviction at all cost;¹⁰ others will bend over backwards to vindicate defendants' rights—in the process underestimating their obligation to the community to assure that criminals are convicted.¹¹ The result is inconsistent trial practice, both within a single prosecutor's case load and among lawyers in the prosecution corps.

This vagueness also undermines professional discipline of prosecutorial misconduct. Commentators decry the alternative policing mechanism—appellate reversals for failure of due process or for violations of defendants' individual rights.¹² Constitutional appeals neither guide prosecutors who overestimate their obligations to defendants nor effectively rein in overaggressive attorneys.¹³ Yet the lack of enforceable

of appeal not to correct prosecutorial misbehavior in state courts absent a specific constitutional violation).

This Article does not focus on alternative mechanisms that might be effective in controlling prosecutorial behavior. Modified constitutional standards could work. Legislators also might adopt specific fines or sanctions for specific prosecutorial acts, perhaps in the vein of Rule 11 of the Federal Rules of Civil Procedure. Additionally, courts might use their supervisory and contempt authority more expansively to deter misconduct. It is beyond this Article's scope to compare the relative merits of such remedies. Rather, the Article starts from the premise that ethical rules are intended to be a primary constraint and that code drafters want them to be effective.

8. See Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090-1113, 1131-35 (1988).

9. See Frampton, *supra* note 6, at 8 ("more often than not, the prosecutor is thrown back on his own subjective values").

10. See Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U.L. REV. 98 (1975) (empirical study showing tendency of prosecutors toward "conviction psychology").

11. See Adlerstein, *Ethics, Federal Prosecutors, and Federal Courts: Some Recent Problems*, 6 HOFSTRA L. REV. 755, 758 (1978) (community's interests are disserved when prosecutors favor undeserving persons).

12. See, e.g., Alschuler, *supra* note 6, at 631 & n.8; Singer, *Forensic Misconduct by Federal Prosecutors—and How It Grew*, 20 ALA. L. REV. 227 (1968).

13. Reversal for misconduct is rare. See Alschuler, *supra* note 6, at 631 (noting the infrequency of reversals for prosecutorial misconduct in Texas courts despite large number of claims); see also Gershman, *The Burger Court and Prosecutorial Misconduct*, 21 CRIM. L. BULL. 217, 218 (1985) (recent Supreme Court decisions "evinced a consistent, unyielding philosophy of judicial permissiveness toward prosecutorial excesses"). Courts are loath to set guilty defendants free. See Carey, *The Role of a Prosecutor in a Free Society*, 12 CRIM. L. BULL. 317, 323 (1976) ("courts, understandably reluctant to free a guilty criminal, accept the prosecutor's pleas that the error was harmless"); Celebrezze, *Prosecutorial Misconduct: Quelling the Tide of Improper Comment to the Jury*, 35 CLEV. ST. L. REV. 237, 238 (1987) ("courts are placed in the uncomfortable position of condemning the prosecutor's behavior while affirming the conviction"). Constitutional limits on conduct do not encompass all unethical behavior. See *Hammad*, 846 F.2d at 858 (describing the limited relationship between constitutional and ethical standards); Frampton, *supra* note 6, at 8

ethical standards, together with discipliners' natural hesitation to interfere with governmental actors, has prevented disciplinary bodies from sanctioning prosecutors for violating the professional codes.¹⁴

This Article attempts to clarify the sense of justice to which the codes refer. It concludes that "justice" has two fairly limited prongs: (1) prosecutors should not prosecute unless they have a good faith belief that the defendant is guilty; and, (2) prosecutors must ensure that the basic elements of the adversary system exist at trial. The Article goes on to identify the building blocks of the adversary system and explains how referring to them can help prosecutors, discipliners, and rulemakers¹⁵ develop the ethics of prosecutorial trial conduct.

The Article's interpretation of the codes' "justice" terminology is not intended to provide a touchstone for judicial enforcement.¹⁶ Defin-

(noting the failure of court decisions and codes to address the difficult ethical decisions prosecutors must make). The constitutional standards themselves are circumscribed by the harmless error rule. *See, e.g., Chapman v. United States*, 386 U.S. 18 (1967) (applying the harmless error rule to prosecutorial misconduct in closing argument); *cf. Mause, Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 553-54 (1969) (suggesting the need for an automatic reversal rule for some forms of prosecutorial misconduct).

Scholars also have noted that, because appellate decisions do not impact directly on offending prosecutors, the decisions may have little effect on prosecutorial behavior. *See, e.g., Genson & Martin, The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is It Time to Start Prosecuting the Prosecutors?*, 19 LOY. U. CHI. L.J. 39, 56 (1987); *Steele, Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 976 (1984); *cf. Adlerstein, supra* note 11, at 757-58 ("No single prosecution is worth the loss of credibility and status that will attend the dismissal of a case for even an unwitting breach of standards") (footnote omitted); *Alschuler, supra* note 6, at 646-47 (noting reasons why reversals "might influence prosecutors more than . . . police officers").

14. *See C. WOLFRAM, MODERN LEGAL ETHICS* § 13.10.2, at 761 n.49 (1986) ("discipline is rarely visited on prosecutors"); *Alschuler, supra* note 6, at 670-73 (discussing the failure of bar grievance committees to discipline prosecutors); *Carey, supra* note 13, at 323 (citing a 25-year New York study disclosing no instances "where a prosecutor had been held in contempt for professional misconduct" and noting equal rarity of disciplinary sanctions); *Genson & Martin, supra* note 13, at 56 (study finds only one case in which a court "imposed disciplinary sanctions against a prosecutor for forensic misconduct"); *Gershman, supra* note 13, at 224-25 (instances of discipline are "astonishingly low"); *see also In re Rook*, 276 Or. 695, 706, 556 P.2d 1351, 1357 (1976) (noting that this case was the first in the United States involving a charge of ethical violation in plea bargaining). Though disciplinary committees infrequently sanction ordinary lawyers, the occasional disciplinary actions serve notice that the rules have force and develop their meaning.

15. This Article refers, throughout, to the professional "codes" and "code drafters." Much of the discussion about the codes applies equally to internal standards of conduct adopted by prosecutorial agencies, at least to the extent that these standards rely on "justice" terminology. My references to code drafters thus should be read, when appropriate, as referring also to the promulgators of administrative standards for prosecutorial behavior.

16. It is important to recognize that the ethical rule requiring prosecutors to "do justice" is not coextensive with legal standards for prosecutorial behavior. When courts discuss justice in the context of constitutional fair trial requirements, they focus on a separate norm. Judges may take the professional codes into account in determining the process due. *Cf., e.g., MacArthur v. Bank of New York*, 524 F. Supp. 1205 (S.D.N.Y. 1981) (referring to professional codes in deciding civil motion to disqualify opposing counsel). But courts carefully have avoided treating all deficiencies in trials as giving rise to enforceable claims by defendants that their rights have been violated. *See*

ing the ethical standard, however, should help prosecuting attorneys react to ethical dilemmas they confront in trial practice. On a larger scale, it will enable federal agencies and local district attorneys offices to provide guidance for their staffs in training programs and in establishing internal norms. Spelling out the meaning of the "do justice" rule also may provide a somewhat improved basis for professional discipline when individual prosecutors overstep their bounds.

Perhaps more importantly, the Article highlights a need for precise ethical directives, either through formal rules or, when flexibility is desirable, rebuttable presumptions.¹⁷ The presence of a high-minded but overly general "justice" rule masks the difficulty of regulating prosecutorial trial conduct. By analyzing how the prevailing rule works in specific trial scenarios, the Article demonstrates that even a well-interpreted "do justice" standard may fall short. The Article suggests abandonment of that sweeping formula and provides a framework rulemakers can use to develop more specific, coherent ethical rules.

II. THE MEANING OF JUSTICE IN THE CONTEXT OF ADVERSARIAL TRIALS

One obvious concern underlying the prosecutor's special ethical duty is to prevent punishment of innocent defendants.¹⁸ At the charging, plea bargaining, and sentencing stages, the heart of the codes' mandate to do justice seems clear: the prosecutor should exercise discretion so as to prosecute only persons she truly considers guilty, and then only in a manner that fits the crime.¹⁹ Many codes reinforce the prosecutor's

Berger, *The Supreme Court and Defense Counsel: Old Roads and New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 114 (1986) (discussing courts' resistance to "constitutionalization" of trial errors). Sometimes due process requires more of prosecutors than the ethical "do justice" rule, and sometimes it requires less.

17. See Simon, *supra* note 8, at 1132 (discussing expression of rules as rebuttable presumptions). In referring throughout this Article to new "rules" that code drafters might promulgate, I do not intend to suggest rigid provisions. For some areas of prosecutorial conduct, strict instructions to prosecutors might be appropriate; in other areas, presumptions or more general standards of appropriate conduct may be more useful because of the variety of issues that prosecutors face. The references to new "rules" merely allude to provisions that provide significant guidance on how prosecutors should behave in particular categories of situations.

18. The codes incorporate the notion that government lawyers should decline or limit prosecution at the pretrial stage if a particular defendant is patently innocent. See, e.g., CODE, *supra* note 1, DR 7-103(A) (a prosecutor "shall not institute . . . criminal charges when he knows or it is obvious that the charges are not supported by probable cause"); accord MODEL RULES, *supra* note 1, Rule 3.8(a).

19. In the pretrial context, doing justice thus requires a prosecutor to predict the appropriate result. See, e.g., Berger v. United States, 295 U.S. 78, 84 (1935). Prosecutors play a similar "judging role" in recommending sentences and in considering whether newly discovered evidence justifies a new trial. See Felkenes, *supra* note 10, at 110 (securing "release of the innocent" is one of the prosecutor's "major functions"); Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1168 (1973) (noting that the prosecutor's obligations "to protect the innocent . . . require the prosecutor to sift and evaluate evidence," but

general obligation with specific rules limiting pretrial conduct along these lines.²⁰

Once a case reaches trial, this duty is no longer very meaningful. The prosecutor already has made her good faith determination that the defendant is guilty.²¹ Unless some unexpected development makes her reconsider her conclusion, she may pursue a conviction.²² Thus, in extending the prosecutor's justice obligation to the trial stage, the codes almost by definition intend a higher obligation than simply avoiding unjustified prosecutions. The American Bar Association (ABA) proposed specific standards for trial conduct in the 1970s, but these standards were not adopted in the later Model Rules.²³ All modern codes are silent on the meaning of justice at trial.²⁴

Reputable scholars have advanced the proposition that the adversary system is ineffective in producing accurate verdicts.²⁵ Interpreting the codes from that perspective, one might assume that "doing justice"

not to "regard himself as the sole arbiter of truth and justice").

20. See, e.g., MODEL RULES, *supra* note 1, Rule 3.8 (listing limited ethical obligations of a prosecutor); CODE, *supra* note 1, DR 7-103(A) (limiting the prosecutor's ability to institute unsupported criminal charges), DR 7-103(B) (mandating the disclosure of exculpatory evidence).

21. I do not focus here on the precise standard for the prosecutor's determination. Arguably, she may need only to decide that the evidence warrants bringing the case to a jury for determination. Most prosecutors, however, go further; they satisfy themselves that the particular defendant is the person who committed the crime. See authorities cited *infra* note 259.

22. Occasionally, prosecutors develop doubts about the merits of their case in the middle of trial. This may occur either because of newly discovered evidence that arises independently or in the defendant's presentation, or because the preexisting evidence suddenly appears less trustworthy. When this occurs, the prosecutor, of course, must take into account the same justice considerations she initially considered at the pretrial stage.

23. The ABA's attempt to construct formalized, comprehensive rules is found in ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION (1971). The ABA updated these standards in 1979. See ABA STANDARDS, *infra* note 131. The membership declined to incorporate those rules into the subsequent Model Rules, probably because of a perceived difficulty in anticipating all ethical questions that prosecutors may face, a recognition that anything but a general rule would have to be drafted carefully, and a sense that the lack of a coherent theory justifying the rules would render each rule subject to dispute by special interest lobbies.

24. The *Model Rules of Professional Conduct* and the *Model Code of Professional Responsibility* list a few pretrial responsibilities that carry over to the trial stage: (1) a prosecutor must refrain from prosecuting unsupported charges, MODEL RULES, *supra* note 1, Rule 3.8(a); CODE, *supra* note 1, DR 7-103(A); (2) a prosecutor must assure that the defendant has had an opportunity to exercise procedural rights, MODEL RULES, *supra* note 1, Rules 3.8(b), (c); and (3) a prosecutor must make some disclosures of information, MODEL RULES, *supra* note 1, Rule 3.8(d); CODE, *supra* note 1, DR 7-103(B). Both codes also limit public statements by prosecutors and defense attorneys, see MODEL RULES, *supra* note 1, Rule 3.6; CODE, *supra* note 1, DR 7-107(A), but neither elaborates on the prosecutor's special obligations to do justice at the trial stage.

25. See, e.g., S. LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 36-37 (1984) (explaining why the adversary system cannot be justified as a mechanism for determining "truth"); Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 549-50 (noting the inability of the adversary system to work in criminal cases because of an inherent inequality of resources between the parties).

requires prosecutors to temper their zeal. One can hypothesize open-minded prosecutors who present facts neutrally and encourage courts and jurors to emphasize defendants' procedural rights. These idealized government attorneys constantly would reevaluate the strength of their case. They would adjust the content and force of each evidentiary presentation to further the outcome that they believe the jury should reach on the current state of the evidence.

It is beyond the scope of this Article to discuss whether adversarial theory is essentially flawed, whether the image of prosecutorial nonpartisanship is realistic, or whether prosecutors and all other lawyers have uncodified obligations to bring about socially beneficial results.²⁶ For our purposes, it suffices to recognize that the noncompetitive approach to prosecutorial ethics is inconsistent with the professional codes' underlying theory. The codes are concerned specifically with structuring adversarial practice. They do not exempt prosecutors from the requirements of zealous advocacy. Reading the cursory "do justice" language as a denunciation of competitive fact-finding therefore would create an internal contradiction.

By including government attorneys within the general adversarial framework, the codes signal that prosecutors can achieve justice while operating within the adversary system's rules. Government trial lawyers, like defense counsel, influence jury verdicts through effective lawyering. Better performance makes conviction more likely, regardless of the defendant's guilt or innocence.²⁷ That reality is consistent with the core of the adversary process: advocates are meant to do their best.²⁸ To the extent prosecutors temper advocacy on the basis that adversarial contests routinely produce poor outcomes, they call into question the essential assumptions of the very system the rules codify.

26. In his seminal article on ethical discretion in lawyering, William H. Simon posits that the ability to exercise ethical discretion is implicit in being a professional. *See generally* Simon, *supra* note 8; *see also* Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellman*, 90 COLUM. L. REV. 1004, 1018-35 (1990) (supporting author's previously proposed "conception" of lawyers as "moral activists"). Simon argues that private lawyers and prosecutors should (and do) adjust the nature of their advocacy depending on context. Simon, *supra* note 8, at 1090. This Article does not focus on that contention, but rather seeks to determine how the prevailing codes *require* prosecutors, in particular, to act. Absent an expressed intention to depart from the adversarial approach that governs the codes, the do justice requirement should be interpreted in light of adversarial norms.

27. The prosecutor's skill at any stage of the proceedings may contribute to the conviction of an innocent defendant. The ability to persuade a jury through argument or examination depends only in part on the evidentiary ammunition at the prosecutor's disposal. Guilty verdicts represent the cumulative effect of the strength of the evidence and the persuasiveness of the prosecutor's presentation throughout the trial.

28. When advocates combat each other, the system presumes that truth and fairness will result and that courts will learn of and protect against violations of defendants' rights.

“Justice” must have a special interpretation in the context of the adversary system. Read as a whole, the codes suggest an adversarial view of justice rather than a separate, outcome-oriented ideal.²⁹ Only with this orientation could code drafters realistically expect prosecutors to be able to do justice and still act as aggressive trial advocates.³⁰ To identify the content of the adversarial justice approach, the following sections compare the rules that govern most lawyers—civil attorneys and defense counsel—and consider why the professional codes treat prosecutors differently.

A. *The Adversary System's General Approach to Lawyer Ethics*

All United States jurisdictions incorporate adversarial process as a basic foundation of their professional responsibility codes. Lawyers' paramount duties are to their clients: attorneys must pursue client interests zealously,³¹ remain loyal at all times,³² and maintain client secrets.³³ The different jurisdictions adopt a variety of constraints on lawyer behavior,³⁴ but these are narrow and specific.³⁵ For the most

29. See D. LUBAN, *LAWYERS AND JUSTICE* 50 (1988) (“the law of procedure defines and delimits the lawyer's role [and] it is to this body of law that the lawyer [arguably] owes her primary allegiance . . .”). Adversary theory rests on notions of competition between the parties. Yet an adversary process is not, at least in the ideal, a no-holds-barred battle to victory or defeat. Conduct is permissible to the extent it furthers the ends of the system—not just vindicating the innocent and convicting the guilty, but doing so within procedural constraints that promote factual accuracy, completeness, and fairness. Cf. Note, *Restraining the Overly Zealous Advocate: Time for Judicial Intervention*, 65 *IND. L.J.* 445, 447 (1990) (arguing that the “role of lawyer as zealous advocate” can be limited without “wholesale abandonment of the adversarial ideal”).

30. Intuition suggests that we should be able to identify this special form of justice. Most prosecutors' ideal trial would consist of more than simply obtaining a “correct” verdict—that is, convicting a defendant whom the prosecutor believes to be guilty. Even a prosecutor consumed by conviction psychology would agree that she cannot always be certain of guilt. Typical lawyers justify their participation in convicting potentially innocent defendants in close cases through the notion that the defendants receive a “fair trial.” The least troubling case is one in which a defendant is well represented, the trial has been fought hard, the judge's rulings have upheld the defendant's rights, and the jury nonetheless has found for the prosecution. In contrast, a prosecutor is unlikely to feel that she has contributed to justice when she overwhelms the defense by virtue of superior trial skills and tactics.

31. See *MODEL RULES*, *supra* note 1, Rule 1.3 comment (providing that a lawyer should act “with zeal”); *CODE*, *supra* note 1, EC 5-1 (providing that a lawyer's judgment “should be exercised . . . solely for the benefit of his client”), EC 7-1 (providing that a lawyer's duty is “to represent his client zealously”).

32. See *MODEL RULES*, *supra* note 1, Rule 1.7 comment (“loyalty is an essential element in the lawyer's relationship to a client”); *CODE*, *supra* note 1, EC 5-1 (emphasizing the duty of loyalty).

33. See *MODEL RULES*, *supra* note 1, Rule 1.6 (dealing with the preservation of confidentiality); *CODE*, *supra* note 1, DR 4-101 (same).

34. For example, lawyers may not commit fraud upon a person or tribunal, *MODEL RULES*, *supra* note 1, Rule 3.3; *CODE*, *supra* note 1, DR 7-102(B), assert frivolous legal arguments, *MODEL RULES*, *supra* note 1, Rule 3.1; *CODE*, *supra* note 1, DR 7-102(A)(2), or disobey court orders to reveal information, *CODE*, *supra* note 1, DR 4-101(C)(2).

35. The obligation to avoid “fraud upon a person or tribunal,” for example, may be limited

part, the assumption is that aggressive, competitive lawyering, guided exclusively by client interests, produces appropriate results.

This emphasis on adversary process stems initially from the view that legal combat is the best method for arriving at truth.³⁶ Partisan advocacy enables judges and juries to see controversies from the litigants' perspectives;³⁷ it ensures that fact finders will not overlook obscure but relevant information.³⁸ A point-counterpoint method of proceeding also helps achieve unprejudiced adjudication. Empirical evidence suggests that once a judge or fact finder adopts a bias—tentatively decides an issue in favor of one party—it becomes difficult to change that opinion.³⁹ By introducing dispute at each stage of the proceedings (for example, through cross-examination and counter-arguments), adversarial presentation tends to keep tribunals uncommitted until all the evidence is in.⁴⁰

Nevertheless, as David Luban⁴¹ and other commentators⁴² have

by the lawyer's duty to maintain privileged and confidential information. See CODE, *supra* note 1, DR 7-102(B)(1). Likewise, the prohibition against asserting frivolous legal arguments is weakened through a "good faith" provision. See MODEL RULES, *supra* note 1, Rule 3.1; CODE, *supra* note 1, DR 7-102(A)(2). The duty to submit to court orders is tempered by the obligation of zealous representation, see *supra* note 31, which requires the lawyer to contest such orders if doing so is in the client's interests.

36. Arguably, the adversary system parallels the methodology of hard science, in which scientists expose their conclusions to peers who attempt to discredit the findings. A point-counterpoint process ferrets out erroneous positions and keeps the proponents of a theory on their toes.

37. See S. LANDSMAN, *supra* note 25, at 4 (adversary system "affords the decision maker the advantage of seeing what each litigant believes to be his most consequential proof"); Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 35 (H. Berman rev. ed 1971) ("The judge cannot know how strong an argument is until he has heard it from the lips of one who has dedicated all the powers of his mind to its formulation").

38. See Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030 (1967).

39. See Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 399-401 (1972) (empirical study which concludes that the adversarial system moderates effect of initial biases).

40. See *id.* at 401; see also Fuller, *supra* note 37, at 44 ("[t]he arguments of counsel hold the case . . . in suspension between two opposing interpretations . . . [so] there is time to explore all of its peculiarities and nuances"); G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 121 (1978) ("psychology of decision making" suggests that "it is better to have conflicting preliminary hypotheses and supporting proofs presented by the parties so that the judge's mind can be kept open until all the evidence is at hand").

41. Luban, *The Adversary System Excuse*, in THE GOOD LAWYER: LAWYERS' RULES AND LAWYERS' ETHICS 83, 92 (D. Luban ed. 1983) [hereinafter THE GOOD LAWYER] ("the adversary system is justified, not because it is a good way of achieving justice, but because it is a good way of hobbling the government and we have political reasons for wanting this").

42. See, e.g., S. LANDSMAN, *supra* note 25, at 36-37 (noting that "truth" is an unrealistic objective of the adversary system); Donagan, *Justifying Legal Practice in the Adversary System*, in THE GOOD LAWYER, *supra* note 41, at 123, 126 (suggesting that the adversary system is not justifiable on the basis of truth-seeking, but rather as a means of ensuring human dignity);

pointed out, law's version of adversary process may not be an effective method for achieving accurate verdicts.⁴³ The view that a process of contradiction alone exposes truth is counter-intuitive and, at least in some circumstances, simply wrong.⁴⁴ Proponents of adversariness therefore have looked to alternative justifications to support the system.

One rationale is that adversary process assures procedural fairness, including assertion of all the parties' rights.⁴⁵ Aligning attorneys solely with their clients' interests creates an incentive for lawyers to be active⁴⁶ and to take full advantage of the law's protections.⁴⁷ Ensuring that the parties' views are presented—even if extreme—may make the parties feel as if the legal system has treated them evenhandedly.⁴⁸ Not only is that sense of fairness an independent "good," but ultimately, it helps some litigants accept even unfavorable results.⁴⁹

Proponents also argue that the system is an efficient mechanism for resolving disputes. Adversarial process causes lawyers to frame and narrow the issues for the fact finder⁵⁰ and creates a system of checks and balances. The attorneys keep an eye on one another and on the judge to make sure that they all perform their assigned roles in proper and ethi-

Saltzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L. REV. 647, 651-54 (1986) ("The American adversary system is misdescribed as a search for truth").

43. Unlike science, the law "proceed[s] by advancing conjectures that the [proponent] knows to be false and then using procedural rules to exclude probative evidence." Luban, *supra* note 41, at 94. The scientific dialogue remains a cooperative process in which the scientific community is prepared to seek agreement.

44. *Id.*; cf. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1134 (1982) ("if the central goal is truth-seeking, why should the prosecutor . . . not have the responsibility for putting all the evidence on the table . . .?").

45. See, e.g., A. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 117 (1980) (noting that the virtue of the adversary system is not to obtain "truth," and discussing other explanations for the system); G. HAZARD, *supra* note 40, at 129 (the "real value of [the] adversary system . . . [may be] its contribution to the ideal of individual autonomy"); Alschuler, *supra* note 6, at 637 ("the adversary system reflects an intelligent division of labor in marshaling relevant evidence . . . [It] does not rest upon the proposition that truth is most likely to emerge"); Edwards, *Professional Responsibilities of the Federal Prosecutor*, 17 U. RICH. L. REV. 511, 532 (1983) (the adversary criminal trial is an "expression of social values of fairness . . . representing the vindication of individual liberties").

46. See G. HAZARD, *supra* note 40, at 133 ("the trial lawyer can become completely immersed in his own lawsuits, to the point where they become his identity and their outcome the sole criterion of his professional stature"); S. LANDSMAN, *supra* note 25, at 4 (the structure of the adversary system "encourages the adversaries to find and present their most persuasive evidence").

47. See Luban, *supra* note 41, at 98.

48. See G. HAZARD, *supra* note 40, at 121-22 (noting the argument that the adversary system gives a party a "sense of involvement and control in the decision procedure"); J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE* 73 (1975) (empirical study comparing adversary and inquisitorial systems and finding that parties in the adversary system are more satisfied overall, think they are "treated more humanely and with greater dignity," and believe adversary procedure to be relatively fair).

49. See C. WOLFRAM, *supra* note 14, § 10.1, at 565.

50. *Id.* § 10.1, at 566.

cal fashion.⁵¹

When the various justifications for the adversary system are considered as a whole, one can see that the "justice" it strives for has several elements. Ascertaining the true facts is not the only or paramount goal. Fairness and respect for client individuality play an equal part, even though full assertion of client rights may interfere with truth-seeking. Efficient fact-finding also is an important objective.

B. *How Prosecutors Fit Within the Adversarial Scheme*

To the extent that the adversary system works according to theory, government lawyers promote justice by playing the same role at trial as private advocates. They contribute to truth by defending their own factual hypotheses and contesting those of their opponents. Prosecutors help courts assess defendants' rights; the claims of defendants' champions must be contested to determine their validity. Prosecutors also enhance the efficiency aspects of the process by acting adversarially. By challenging defense counsels' positions at every step, prosecutors force defenders to remain vigilant and to frame the issues clearly for proper adjudication.

At one level, the prosecutor thus helps achieve the appropriate systemic results—does adversarial justice—simply by performing as an aggressive advocate. In the context of an adversarial model of adjudication, even prosecutors who develop "conviction psychology"⁵² seem justified; ordinarily it is not up to a lawyer to act contrary to her side's interests.⁵³ Having proceeded to trial, the prosecutor represents the community's interest in conviction.⁵⁴ Court-enforced constitutional

51. See Luban, *supra* note 41, at 101-02 (describing a checks-and-balances justification for adversarial process and arguing that it fails on moral and effectiveness grounds).

52. See, e.g., Felkenes, *supra* note 10, at 121 (empirical study suggesting that many prosecutors develop "conviction psychology"); Singer, *supra* note 12, at 227-29 (discussing reasons for prosecutorial emphasis on obtaining convictions).

53. Cf. Uviller, *supra* note 19, at 1159 (cautioning against "overplaying" prosecutors' quasi-judicial role and urging that prosecutors act primarily as zealous advocates).

54. As a practical matter, both prosecutors and the public expect zeal from the criminal justice arm of the government. Defendants have their attorneys. These attorneys take full advantage of the trial process, including the manipulation of legal technicalities. Prosecutors have the job of evening out the battle. As one former Assistant United States Attorney states:

[A]s trial approaches and we see justice fighting a losing battle as the evidence is whittled away, we become more and more aggressive in our protection of the case that we believe to be right. Finally, at trial, when false issues are injected, unfair attacks are made on the witnesses, or perjured testimony is given by a defendant trying to lie his way out of a just conviction, the prosecutor becomes the most zealous champion of justice you can imagine. He is then a full-fledged fighting advocate; and he should be. . . . His job is now to fight fairly and firmly with all his might to see that truth and justice prevail.

Seymour, *Why Prosecutors Act Like Prosecutors*, 11 REC. A.B. CTRY N.Y. 302, 313 (1956); see also Saltzburg, *supra* note 42, at 651, 656 (taking the position that the differences between the roles of

safeguards (such as the beyond-a-reasonable-doubt standard) arguably suffice to protect the innocent.

The notion that a prosecutor sometimes should refrain from acting as a pure advocate stems from the fact that she has no single client.⁵⁵ The prosecutor is simultaneously responsible for the community's protection, victims' desire for vengeance,⁵⁶ defendants' entitlement to a fair opportunity for vindication,⁵⁷ and the state's need for a criminal justice system that is efficient and appears fair.⁵⁸ Described accurately, the prosecutor represents "constituencies"—and several of them at one time.⁵⁹

This multirepresentation is significant for the structure of prosecutorial ethics. Private lawyers confronting ethical dilemmas usually find themselves torn between promoting a single client's goals and safeguarding their own professional or moral self-interest. The disciplinary rules resolve these conflicts largely by casting trial lawyers as agents who must champion client interests, subject only to narrow limits on extreme behavior.⁶⁰

Prosecutors, in contrast, face conflicts among their constituents' in-

prosecutors and defense counsel are "overstated" and "misdescribed" and that the prosecution should present the "strongest argument" for conviction); Uviller, *supra* note 19, at 1159, 1168 (arguing that the prosecutor should act as advocate as long as she "fairly lays the matter before the judge or jury" and that zealous prosecutors "fulfill a role as advocate in a dialectic system for the divination of truth"); Vess, *Walking a Tightrope: A Survey of Limitations on the Prosecutor's Closing Argument*, 64 J. CRIM. L. & CRIMINOLOGY 22 & n.2 (1973) (the prosecutor's "primary duty is to earnestly and vigorously present the government's case, using every legitimate means to bring about a conviction").

55. See, e.g., Edwards, *supra* note 45, at 513 (explaining that the prosecutor makes decisions that the client ordinarily would make); Frampton, *supra* note 6, at 7 (stating that the prosecutor is "the lawyer and the client rolled into one"); Freedman, *supra* note 38, at 1033 (noting that there are fewer constraints on prosecutorial ethics because the prosecutor represents no private client).

56. Victims also may have an interest in venting their pain by being heard and in obtaining closure to an unpleasant experience.

57. See Defoor, *supra* note 2, at 448 (discussing the prosecutor's duty to mitigate guilt under Florida law).

58. See Corrigan, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537, 538-39 (1986) (stating that the prosecutor speaks for police, victim, defendant, defendant's family, those who care about the defendant, and citizens as a whole). The community interests include vindicating a potentially tyrannical grand jury process through which the government accuses citizens and forces them to defend their conduct, promoting respect for the law, and legitimizing the criminal justice system in the community's eyes.

59. See C. WOLFRAM, *supra* note 14, § 13.10.1, at 759 (describing the prosecutor's "constituents"); Vess, *supra* note 54, at 22 & n.1 (the defendant is a "member of the prosecutor's broad constituency"); see also Defoor, *supra* note 2, at 448 (noting the prosecutor's obligations to the court and jurors).

60. See Simon, *supra* note 8, at 1085 (discussing traditional "libertarian" ideal in which "the only ethical duty distinctive to the lawyer's role is loyalty to the client"); Luban, *supra* note 26, at 1015 (noting that standard conception of lawyer as nonaccountable advocate for clients remains prevalent in the context of criminal defense and "large-firm" practice).

terests as well as between constituent and personal interests. Code drafters could have used an agency analysis to shape prosecutorial ethics. The rules simply could state which constituent's interests take precedence in particular situations.⁶¹ The decision not to codify priorities reflects the drafters' sense that prosecutors' multirepresentational role requires an independent framework for governing prosecutorial conduct.⁶²

The framework that the drafters have chosen consists primarily of the "do justice" rule. The prosecutor's relative independence provides a theoretical justification for the rule's departure from adversarial norms. As discussed above, drafters committed to the adversary system would not expect the advocate for the prosecution routinely to disavow zeal. But because a prosecutor need not focus exclusively on a single client's interests, her role in promoting the system's goals of procedural fairness and efficient fact-finding becomes more dominant. The code envisions limited circumstances in which she can temper her competitive spirit, yet still contribute to results that the adversary system deems appropriate.

While prosecutorial autonomy helps justify a less adversarial framework, the fear of unfettered prosecutorial power is the impetus for the special ethical obligation. The prosecutor's freedom from client control gives rise to vast discretion. That, in turn, creates a risk that prejudice or self-interest will govern her decisions. She may arbitrarily favor one defendant, or type of defendant, over others. Alternatively, because her success is measured by her conviction rate,⁶³ she may be

61. For example, the codes easily could inform prosecutors that their first obligation at trial is to represent the victims aggressively. At the other extreme, if the drafters wanted prosecutors to act less than adversarially on the basis that defendants' interests are primary, the codes could instruct prosecutors to use only facts that they know to be true and to present them evenhandedly. Under this approach, it would make sense to differentiate priorities, depending on the stage of proceedings at which the prosecutor appears.

62. William Simon recently has challenged the traditional client-centered ethical norms, arguing that all lawyers should have as a basic consideration "whether assisting the client would further justice." Simon, *supra* note 8, at 1085. Interestingly, Simon rests his argument partly on the codes' requirement that prosecutors "do justice." In his view, this duty illustrates that giving lawyers ethical discretion is not unworkable and does not necessarily give rise to arbitrary ethical decisions. *Id.* at 1090.

Although I agree with the premise that doing justice can be consistent with the role of lawyers in an adversary system, I perceive significant practical constraints on a generalized "do justice" principle. As Simon himself recognizes, private lawyers would have difficulty obeying a justice standard because of the conflict with their duty to clients. *See id.* at 1114, 1123. I am also more skeptical than Simon about the value of an abstract principle for prosecutors. This Article seeks to define prosecutors' obligations precisely because, in practice, prosecutors either have ignored the mandate to "do justice" or have implemented it haphazardly.

63. For elected prosecutors, publicity about trial successes is essential to campaigns. For subordinato prosecutors in larger offices, promotion and internal evaluation depends largely on the ability to produce convictions.

tempted to ignore the rights of defendants, victims, or the community in order to obtain pleas or guilty verdicts.

Moreover, the prosecutor benefits from unique prestige and symbolic power. Because she represents the community, she commonly carries more influence with juries than attorneys allied solely with individual clients.⁶⁴ The prosecutor can rely on jurors' natural instincts to be protected against crime. She can draw upon jurors' tendencies to believe that persons a grand jury singles out for prosecution probably are guilty.⁶⁵

Finally, a prosecutor enjoys practical advantages over her adversaries. She benefits from the state's hefty investigative and litigation resources.⁶⁶ Through the police and grand jury, she monopolizes the ability to coerce testimony and obtain cooperation in the investigation of crimes.⁶⁷ The literature is replete with discussions of ways in which a prosecutor can misuse her singular tools.⁶⁸

The fear of prosecutorial abuses thus explains why code drafters have chosen to adopt a "do justice" obligation. The drafters reasonably expect that, as the symbol of fair criminal justice, prosecutors should not take undue advantage of their built-in resources. Prosecutors who overreach undermine "confidence, not only in [their] profession, but in

64. See Alschuler, *supra* note 6, at 632 ("a prosecutor usually benefits [before the jury] from his association with . . . law enforcement"); Civiletti, *The Prosecutor As Advocate*, 25 N.Y.L. SCH. L. REV. 1, 20 (1979) (a federal prosecutor "carries with him the institutional credibility of the Department of Justice").

65. Civiletti, *supra* note 64, at 20.

66. See Kutak, *The Adversary System and the Practice of Law*, in *THE GOOD LAWYER*, *supra* note 41, at 172, 177.

67. *Id.*

68. The list of potential abuses is endless. For example, a prosecutor may gain a tactical advantage at trial by referring to her decision to grant immunity to prosecution witnesses. See Note, *Accomplice Testimony and Credibility: "Vouching" and Prosecutorial Abuse of Agreements to Testify Truthfully*, 65 MINN. L. REV. 1169, 1170-76 (1981); cf. Note, *Prosecutor's Refusal to Grant Immunity to Defense Witness Remains Unreviewable*, 19 WASHBURN L.J. 144, 146 & n.19 (1979) (noting that prosecutorial decisions, such as a refusal to grant immunity to a defense witness, are not subject to judicial review). The prosecutor may use her charging, plea bargaining, and sentencing discretion to extract pleas or agreements from defendants not to exercise certain rights, see generally Schwartz, *The Limits of Prosecutorial Vindictiveness*, 69 IOWA L. REV. 127 (1983) (proposing prophylactic procedure to limit prosecutorial vindictiveness), or may threaten to institute prosecution to obtain concessions that she could not obtain through criminal proceedings. See Trowbridge, *Restraining the Prosecutor: Restrictions on Threatening Prosecution for Civil Ends*, 37 ME. L. REV. 41, 57-62 (1985) (arguing for ethical limits on this practice). At the initial stage, she may initiate a prosecution when a fair evaluation of the evidence does not warrant prosecution. See, e.g., Johnston, *The Grand Jury—Prosecutorial Abuse of the Indictment Process*, 65 J. CRIM. L. & CRIMINOLOGY 157 (1974) (discussing whether prosecutors should be required to disclose exculpatory information to grand juries); Vaira, *The Role of the Prosecutor Inside the Grand Jury Room: Where is the Foul Line?*, 75 J. CRIM. L. & CRIMINOLOGY 1129 (1984) (discussing prosecutor's role at the indictment stage); Note, *Prosecuting Attorney Generally Not Obligated to Discover and Present Evidence Favorable to the Defense*, 11 RUT.-CAM. L.J. 359 (1980) (same).

government and the very ideal of justice itself."⁶⁹

The nature of the prosecutor's unique power also suggests that the duty takes on special meaning at the trial stage. Aspects of prosecutorial power—such as the unusual influence over jurors—come into play solely at trial. Confining the codes' requirements to instituting and maintaining prosecutions in good faith thus would understate the drafters' concerns.⁷⁰ The "do justice" rule may not contemplate half-hearted advocacy, but it clearly addresses the use of techniques that tilt trials toward convictions in an unfair way.⁷¹

To fix the scope of the "do justice" rule, one must consider its theoretical justification and underlying practical concerns in tandem. It would be reading too much into two words—"do justice"—to conclude that the rule embodies a counter-traditional theoretical conception of prosecutors as nonadversarial lawyers. The paradigm of the prosecutor as an unaligned "minister of the system" makes sense in the trial context only if it targets situations in which competitive fact-finding will not produce results that are "acceptable" within the meaning of the adversary system. Yet we have seen that when the adversary system operates in its intended fashion, competition by definition produces appropriate results. The "do justice" rule, therefore, must focus on cases in which the system itself is defective—in which defendants are not tried in accordance with the system's basic, structural elements.

Interpreting prosecutors' obligation to do justice with reference to "adequate adversarial process" rather than "accurate outcomes" helps identify when prosecutors should depart from an advocate's stance: prosecutors must strive for *adversarially valid* results rather than *factually correct* results. This systemic approach also defines limits to prosecutors' ethical duty. The codes assign prosecutors a special role within the system because prosecutors are unencumbered by client ties. It follows that the codes accord prosecutors leeway to repair flaws in the process, but impose no general duty to help defendants win.

C. *Defining the Prosecutor's Duty to Do Justice at Trial*

The key to understanding this adversarial interpretation of justice is to identify the essential elements of adversarial process and isolate

69. ABA Joint Conference, *supra* note 2, at 1218.

70. One could interpret the "do justice" provision simply as authorizing prosecutors to determine who is potentially guilty and then to do whatever is necessary to convict. But that interpretation seems inconsistent with the provision's lofty language. No reputable commentator has argued that government attorneys are wholly unconstrained in their quest for victory.

71. Cf. D. LUBAN, *supra* note 29, at 62 (noting that adversary theory's emphasis on protecting criminal defendants' rights "can only be understood as attempts to prevent the state from obtaining even justified convictions by unacceptably invasive means").

ways in which they may fail. When the system breaks down in a significant respect, the codes can no longer expect competition to achieve adversarially appropriate results. If the evidence is in conflict, an ethical prosecutor cannot rationalize a conviction simply on the ground that the trial is fair.⁷²

Most commentators would agree that proper operation of the adversary system rests on several basic premises. The system's underlying theory is to make outcomes a contest and to place the fates of contestants in the hands of champions. The system necessarily presumes that the competing attorneys will be roughly equivalent in quality⁷³ and possess a similar level of resources with which to pursue the litigation.⁷⁴ Counsel are expected to represent their clients' interests actively in order to maximize the law's protection of their clients' rights.

These premises do not mean that the parties and their champions must be equal in all respects.⁷⁵ Inevitably, two sides to litigation will begin with different information, strategies, and methods of pursuing victory. Still, a fair joust requires some parity of representation.

Perhaps equally important, the system makes several assumptions about the procedures through which the contest will be determined. The tribunal must be neutral.⁷⁶ Because the adversaries themselves are the means for focusing the issues and evidence, most commentators also agree that the fact finder or adjudicator should be a passive participant in the trial.⁷⁷ A "highly structured forensic procedure" must give each party an equal opportunity to present his version of the facts and law.⁷⁸ The tribunal must reach a conclusion based solely on the issues and evidence presented by the parties.⁷⁹

These building blocks of the adversary system define the meaning of the codes' directive that prosecutors "do justice." If a major element or premise of the system is absent in a particular case, the trial is un-

72. See *id.* at 79 ("You cannot argue that the adversary system works because it is self-checking, since it is self-checking only if it works").

73. See Schwartz, *supra* note 25, at 547 (opposing representatives "should be roughly equal in their ability to perform their professional functions").

74. See Frankel, *From Private Fights Toward Public Justice*, 51 N.Y.U. L. REV. 516, 518 (1976) (the system fails when parties' resources are unequal); Kutak, *supra* note 66, at 177 (noting that rules limiting prosecutors' freedoms stem partly from states' unique resources); see also Levin v. Katzenbach, 363 F.2d 287, 290, 291 (D.C. Cir. 1966) (noting that the "fair administration of criminal justice" requires a prosecutor's disclosure of evidence to avoid rendering criminal trial a game in which "the one with the greater resources [is] the 'winner'").

75. See Schwartz, *supra* note 25, at 547 (the system does not require total parity "because only in rare cases will the parties be equal in their presentational ability").

76. See S. LANDSMAN, *supra* note 25, at 2-4.

77. See, e.g., *id.* at 2-3.

78. See *id.* at 4-6.

79. See C. WOLFRAM, *supra* note 14, § 10.1, at 564.

likely to produce an appropriate result. Unless some noncompetitive mechanism safeguards the system, the divergence from the core expectations may undermine valid competitive adjudication.⁸⁰ This concept of failed adversarial justice provides the one approach to ethical prosecutorial trial behavior that is consistent with the thrust of the codes: to do justice, prosecutors must help reestablish the essential adversarial balance that is missing or has been lost.

Of course, adversarial process can fail equally in civil and criminal settings. Private and government lawyers seem to play a similar role with respect to adversarial imbalance. It is therefore important to highlight why code drafters perceive the prosecutor's unique attributes as justifying a special obligation to adversarial justice.

Consider a case in which a judge deprives one party of an opportunity to present the facts by cowing defense counsel into avoiding relevant lines of questioning.⁸¹ Arguably, the trial does not satisfy the adversary system's design. The premises of a passive tribunal and an equal opportunity to put forth a case may be lacking. The litigant's capacity to obtain a systemically appropriate result is at risk.

At the trial level, at least, the injured party may have little recourse. Yet in a civil case, the professional codes do not oblige the opposing attorney to limit the possibility of an unfair outcome. The codes' commitment to client-centered lawyering exacerbates the private attorney's natural tendency to win at all costs; the injured party alone carries the burden of correcting errors.⁸² Though specific rules counteract counsel's excesses,⁸³ the codes require or allow him to treat the full assertion of client interests as paramount to truth and fairness.⁸⁴

80. Few fail-safes exist at the trial level. The system relies largely on appeals to correct tainted verdicts. Yet appeals are time consuming and expensive. Even if used, they often are an inadequate remedy because appellate courts have created significant procedural obstacles to success—most notably, the harmless error rule. See *supra* notes 7, 13 and accompanying text. Because appellate courts rely exclusively on written records, it is difficult for them to identify errors that stem from the demeanor or attitudes of lawyers, judges, or jurors. The courts do not encourage extrinsic proof on these matters because of their administrative interest in preserving finality of verdicts.

81. For a discussion of this and other examples of judicial interference and an explanation of why appellate remedies are inadequate to safeguard the system's intended operation, see *infra* notes 176-83 and accompanying text.

82. See S. LANDSMAN, *supra* note 25, at 5 ("the rough-and-tumble of adversary procedure exacerbates the natural tendency of advocates to seek to win by any means available").

83. See *id.*

84. See, e.g., D. LUBAN, *supra* note 29, at 11 ("When acting as an advocate, a lawyer must, within the established constraints on professional behavior, maximize the likelihood that the client will prevail"); CODE, *supra* note 1, DR 7-101(A)(1) ("A lawyer shall not intentionally [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law . . . , except as provided by DR 7-101(B)") (footnotes omitted). *But cf.* MODEL RULES, *supra* note 1, Rule 1.3 comment (1) ("However, a lawyer is not bound to press for every advantage that might be

In the criminal context, a prosecutor reasonably can be expected to view the judicial interference differently. Ordinarily, she must compete actively because aggressive lawyering furthers the adversary system's goals of even-handed and efficient fact-finding. But in cases like the hypothetical, the likelihood of achieving these goals is either threatened or absent altogether. Free of client-centered concerns, the prosecutor has no reason to seek advantage from the systemic breakdown, other than a personal desire to win.⁸⁵ She best serves her function by stepping out of the pure advocate's role.

The prosecutor's unique prestige helps justify holding her to a higher ethical responsibility. In the hypothetical scenario, practical considerations might prevent a private attorney from taking advantage of the court's one-sided attitude. The attorney reasonably may fear that the jury will perceive him to be bullying the opponent. In contrast, because a prosecutor starts out with an aura of respectability, she can get away with more.⁸⁶ Practical limitations do not restrain her conduct to the same extent.

The prosecutor's resource advantages also weigh in favor of making her rectify the system's failure. By virtue of her access to the grand jury and her relationship with law enforcement agencies, the prosecutor has an institutional identity that helps her deal with the hypothetical judge's conduct. The judge can do without a private attorney's affection and, consequently, may retaliate for the attorney's attempt to challenge him. In contrast, the judge needs the prosecutor's goodwill almost as much as the prosecutor needs his. The court must have the cooperation of the prosecutor's office to manage the criminal justice system; offending one prosecutor may offend them all. Within limits,⁸⁷ the nature of

realized for a client"). In many instances, lawyers must sublimate their own sense of morality to serve the demands and interests of clients. See, e.g., Held, *The Division of Moral Labor and the Role of the Lawyer*, in *THE GOOD LAWYER*, *supra* note 41, at 60, 67-78 (discussing lawyer role differentiation in specific contexts); Luban, *supra* note 41, at 87 ("all litigators have had cases where, in their heart of hearts, they wanted their client to lose or wished that a distasteful action did not need to be performed [under the ethical rules]"); Zacharias, *Rethinking Confidentiality*, 74 *IOWA L. REV.* 351, 372-74 (1989) (discussing role differentiation in the context of confidentiality requirements in situations in which the lawyer wants to disclose client information for moral reasons).

85. Prosecutors, of course, are expected to do a good job for the state, the victims, and defendants. But that general obligation differs from a duty of particular loyalty to one constituent. Likewise, victim satisfaction and desire for revenge are not "client interests" within the codes' meaning.

86. In some cases, the opposite might be true. In other words, some jurors might start from the perspective that the prosecution is oppressive and take particular offense when the prosecutor takes advantage of the opportunity that the judge offers in the hypothetical. In deciding whether a rule is justified, however, the drafters must look at probabilities; more often than not, jurors will attribute respectability to the state's conduct.

87. As a repeat performer in the courtroom, the prosecutor, of course, must take extra care to

the prosecutor's office as the institution in charge of law enforcement resources thus enables individual prosecutors to serve as checks on failures elsewhere in the system.

Hence, viewed from the code drafters' adversarial perspective, "justice" does take on special meaning for government attorneys. The codes impose a different duty to role differentiate than they impose on private lawyers.⁸⁸ Once a prosecutor determines the prosecution should proceed, her function is to advocate the defendant's guilt. But when the system breaks down, she at least temporarily must set aside her view that the defendant should be convicted.⁸⁹ Her role is not to help him win, yet neither may she passively accept systemically faulty outcomes. As a "minister" of the system, the codes require her to help restore adversarial balance.⁹⁰

This model of prosecutorial ethics is appealing on several grounds. Perhaps most significantly, it makes theoretical sense. It reconciles the reality of modern prosecutions with the discussions of prosecutorial ethics found in the cases, commentary, and disciplinary rules.⁹¹ This reconciliation is consistent with our intuitive sense of what constitutes a fair trial: one in which an innocent defendant has a full opportunity for vindication, but in which the prosecutor aggressively seeks to convict the

avoid offending the judge. That does not change the reality that she is on more equal footing with the judge than is private counsel. To manage his courtroom, the judge must curry the prosecutor's favor as well the other way around.

88. See *supra* note 2 and accompanying text.

89. As noted above, some prosecutors interpret the codes' mandate to "do justice" as sanctioning the opposite of role differentiation; in each case prosecutors should do what they think is right. See J. DOUGLASS, *supra* note 6, at 38 ("notwithstanding the aid provided by 'written tablets' handed down from 'on high,' prosecutors must largely rely on their own understanding, integrity and compassion"). For many, that reduces the mandate to a creed of attempting to convict the guilty at all costs.

90. In attempting to identify the proper ethical roles for prosecutors and other counsel, Stephen Saltzburg forecasts the model developed in this Article:

[T]he interdependence of the lawyer's role and the functioning of the adversary system is obvious. Lawyers should and must determine how to behave by examining the system in which they are asked to work. If the lawyers analyze the system incorrectly and develop behavior patterns that are inconsistent with the goals of the system, they may impair the operation of the system.

Saltzburg, *supra* note 42, at 649.

William Simon, arguing for "ethical discretion" on the part of all lawyers, suggests a somewhat similar approach. First, he says lawyers must adopt a "[general] style of representation that will . . . best contribute to just resolutions." Then they must "watch for indications that some premise underlying [their] judgment that the style is a good one does not apply in the particular case. . . . The lawyer should respond to such circumstances by taking reasonably available actions that help restore the reliability of the procedure." Simon, *supra* note 58, at 1098. Simon, however, would go a significant step further by imposing on the lawyer a responsibility clearly not intended by any existing code: lawyers should "make [their] own judgment[s] about the proper substantive resolution and take reasonable actions to bring it about." *Id.*

91. See *supra* note 6.

guilty.

Structuring prosecutorial ethics upon the foundation of the adversary system also has practical benefits. It provides a somewhat more concrete basis for resolving ethical dilemmas than do bare conceptions of justice.⁹² Moreover, it suggests behavior that leaves intact the adversarial theory underlying the bulk of the ethical codes. The prosecutorial duty to step out of the advocate's role is triggered by factors—case-by-case breakdowns in adversarial assumptions—that do not call into question the system's operation in the ordinary case. As a matter of legal interpretation and faith in the system, it is preferable to avoid reading the codes' "do justice" mandate as a general admission that the system does not work.

Nevertheless, in considering how prosecutors should satisfy the mandate to pursue adversarial justice in specific cases, one must keep in mind the malleability of the underlying standard. Adding an adversarial gloss to the "do justice" language clarifies the codes' intent. But the gloss itself is subject to wide interpretation, perhaps according more latitude to prosecutors than even well-meaning "professionals" should have.⁹³ The inherent flexibility of "do justice" provisions, however interpreted, keeps them from effectively guiding prosecutorial behavior at trial.⁹⁴ The adversarial framework discussed in this Article thus may work better as a blueprint for writing new rules than as a measure of particular conduct under the old rules.

III. ACHIEVING JUSTICE WHEN ADVERSARIAL PREMISES FAIL

Let us assume that the codes' intent is to require prosecutors to pursue adversarial justice and that the mandate to "do justice" is the only guide for ethical trial conduct. Precisely how should a well-intentioned prosecutor determine when adversariness in the trial process has broken down? What steps should she take in response?

To answer these generic questions—or to see how the codes' general approach to prosecutorial ethics fails to provide answers—one must analyze the significance of each adversarial premise and discuss specific trial situations in which a breakdown may occur. The analysis illustrates the primary benefits of the adversarial justice interpretation: it provides some structure for ethical decision making by individual prosecutors; as a theoretical construct for use in revising the codes, it offers drafters a far better framework than abstract fairness notions. At the same time, the analysis highlights the difficulty of enforcing a vague

92. Specific illustrations are considered *infra* Part III.

93. See *supra* note 26 and accompanying text.

94. See *infra* Part IV.

"do justice" concept and shows why drafters should consider more precise provisions.

A. *Inequality of Adversaries and Resources*

1. Poor or Lax Defense Counsel

Adversarial justice breaks down most clearly when a criminal defense attorney does not even roughly match the prosecutor's talents or fails to represent his client's interests. Four factors can account for a mismatch: Defense counsel simply may be a bad or indolent lawyer; counsel may be incapacitated in the particular case (for example, by illness, alcohol, or distractedness); he may be rendered ineffective by lack of time or resources to prepare; or government and court actions may constrain counsel's effectiveness (for example, by timing an indictment or trial to limit counsel's opportunity to defend).

Other than prosecutorial intervention, only two powers exist to counteract a one-sided contest: The market for legal services and judicial oversight. Market forces help assure competent defense counsel. Reputation prevents some clients from engaging poor or inactive attorneys. Nevertheless, in some locales, the small size of the criminal bar and minimal compensation for defense work so restrict the supply of lawyers that clients have no choice. Elsewhere, bad lawyers continue practicing by obtaining appointments to represent indigent clients who have no power of counsel selection.⁹⁵ Even if judges eventually cease appointing these lawyers and drive them from the field,⁹⁶ in the meantime they continue to practice and to harm clients.

Legal safeguards also are inadequate. Judges have authority to disqualify defense counsel or reverse convictions in cases in which counsel provides "ineffective assistance."⁹⁷ But in practice, this standard pro-

95. See, e.g., *Morris v. Slappy*, 461 U.S. 1 (1983) (rejecting right to appointed counsel of choice).

96. Practical and institutional considerations may prevent judges from blackballing particular attorneys. Some judges simply may not recognize poor lawyering or specific aspects of poor lawyering. Others may prefer unaggressive attorneys who pose less of a threat of obtaining appellate reversals of the judge's decisions. For the sake of convenience or from a misplaced sense of fairness, some courts simply may distribute appointments equally among all eligible counsel or use an objective standard, such as seniority on the appointments list.

97. See, e.g., *Evitts v. Lucey*, 469 U.S. 387, 397 (1985) (a right to appointed counsel implies a right to effective counsel). If fully enforced, this standard would satisfy the requirements of adversarial justice because an "effective" defense attorney, by definition, provides the rough equivalence of counsel that the system requires. From time to time, the United States Supreme Court has cast the requirement of effective assistance of counsel in terms of adversarial principles. See, e.g., *United States v. Cronin*, 466 U.S. 648, 656-57 (1984) ("if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated"). Generally, however, the Court has limited itself to that aspect of adversarial procedure that seeks accuracy in verdicts. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("[t]he benchmark for judging any claim of

vides minimal protection against incompetent and inactive lawyers.⁹⁸ Appellate courts have exhibited an institutional reluctance to reverse convictions on ineffectiveness grounds.⁹⁹ Judges are loath to second-guess lawyer strategy. They ordinarily do not let defendants introduce extrinsic proof of ineffectiveness. Perhaps most importantly, appellate judges define the range of reversible error largely with reference to a single goal of the adversarial system: obtaining correct, truthful verdicts.¹⁰⁰

Consequently, neither the market nor judicial review encompasses the function that the codes assign prosecutors in reacting to unequal contests.¹⁰¹ Ineffective assistance of counsel appeals catch some of the

ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result").

98. The shortfalls of the ineffectiveness doctrine have been well documented. *See generally* Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 141-63 (6th ed. 1986); Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); Berger, *supra* note 16, at 65-66; Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181 (1984); Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633, 642-49 (1980). Even if a court is willing to intervene, relief ordinarily occurs only at the appellate stage, after the state has incarcerated the defendant. More importantly, absent an objection by the defendant, it may be difficult for trial or appellate courts ever to discover instances of ineffective assistance. *See, e.g.,* Cuyler v. Sullivan, 446 U.S. 335, 346-47 (1980) (absent special circumstances, courts need not initiate inquiry into propriety of counsel's representation of multiple clients). Untutored defendants and those who rely on their counsel for advice are unlikely to volunteer objections. Conduct such as inadequate investigation or advice, though theoretically actionable, is unlikely to come to the court's attention. *See, e.g.,* *Strickland*, 466 U.S. at 691 (recognizing inadequate investigation as possible grounds for reversal); *accord* United States v. Decoster, 624 F.2d 196, 209 (D.C. Cir. 1976) (en banc).

99. *See, e.g.,* Foster v. Illinois, 332 U.S. 134, 139 (1947) (noting the Supreme Court's fear of "opening wide" the prison doors); *People v. Martin*, 210 Mich. 139, 141, 177 N.W. 193, 193 (1920) (discussing the difficulty of appellate courts in determining "whether the course pursued by [defense counsel] . . . was the best means of promoting his defense"); *see also* Berger, *supra* note 16, at 65-66 & n.289 (discussing reasons for the reluctance of courts to reverse); Waltz, *Inadequacy of Trial Defense Representation As a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289, 303 n.86 (1964) (same). Indeed, the Supreme Court has cautioned that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689.

100. A defendant raising a sixth amendment claim must show not only deficient performance by counsel, but also a "reasonable probability that . . . the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In contrast, the adversarial system is not geared only, or even primarily, to achieving accurate results. *See supra* subpart II(A). As William Genego notes: [Defense counsel's] role is not, however, to see that his or her client received a fair trial and that a just outcome resulted. The attorney's role is to do everything ethically proper to see that the client receives the most favorable outcome possible—whether or not it produces an outcome which society considers just.

Genego, *supra* note 98, at 200 (footnote omitted); *accord* Berger, *supra* note 16, at 94 ("The lawyer . . . has an overriding obligation to try to obtain *advantageous* results for the client, whether or not those results are either 'just' or 'reliable' in any sense intended by the Court").

101. *Strickland*, 466 U.S. at 668, is a case in point. The Supreme Court recognized a defendant's right to a "reasonably competent attorney." Yet it affirmed the conviction in a case in which, out of a "sense of hopelessness," defense counsel failed even to inquire into the availability of character witnesses and psychiatric evidence that might have mitigated the death penalty. *Id.* at

most egregious defense performances, but do not assure adversarial justice in the routine case. Most failures of representation fall to an alternative remedial scheme, one in which prosecutors' minister of justice personae play a part.¹⁰²

In considering the prosecutor's ethical role in preserving adversarial process, the limits to the notion of equal representation should be kept in mind. A district attorney cannot react every time an opponent seems relatively weak. In every case, one attorney is less qualified and less vigorous than the other. The adversary system necessarily tolerates a range of inequality.¹⁰³

The constitutional minimum of a "reasonably competent attorney" or an attorney providing counsel within "the wide range of professionally competent assistance" is a realistic standard.¹⁰⁴ It becomes relevant to the prosecutor's ethical obligation because courts of appeal enforce the standard inadequately.¹⁰⁵ Because a defendant's own trial lawyer is unlikely to vindicate the right to "reasonably competent" counsel, the even-handed operation of the adversary system is at risk. A defendant's claims will not be presented fully unless the prosecutor or trial judge intervenes.¹⁰⁶

Consider three levels of substandard defense performance:

1. Defense counsel makes no serious effort to present a competent defense because he has no trial skills, is drunk, or is senile.
2. Defense counsel performs, but very badly. He relies on a legal theory that the

698-700. The Supreme Court was troubled by the prospect of reversing a decision whose outcome might have been the same had defense counsel been more active. *Id.* at 699-700. The Court thus attributed the affirmance to counsel's "strategic" decision. *Id.* at 691, 699. Looking at the matter from the prosecutor's perspective at the trial level, however, a true adversary had no excuse for failing to follow leads. "Washington had everything to gain and nothing to lose. . . ." Genego, *supra* note 98, at 197.

102. See *Imbler v. Pachtman*, 424 U.S. 409, 427-29 (1976) (citing the "do justice" provision of the *Model Code of Professional Responsibility* and noting that "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers").

Vivian Berger points out that *Strickland* did not assure high quality counsel, in part because the Court was "necessarily expounding the Constitution"; problems arising from counsel inequality and other breakdowns in the adversarial scheme "largely resist constitutionalization." Berger, *supra* note 16, at 114. In contrast, a prosecutor's ethical obligations stem from a nonconstitutional source.

103. See Babcock, *supra* note 44, at 1163 (the adversary system depends "on contestants of fairly balanced strength").

104. *Strickland*, 466 U.S. at 687, 690.

105. The institutional reluctance to overturn convictions and the difficulty of evaluating lawyer performance from a written record have kept appellate courts from fully implementing the quality requirement. See *supra* notes 97-100 and accompanying text.

106. Cf. Schwarzer, *supra* note 98, at 649-69 (discussing the role of the trial judge in dealing with incompetence); Waltz, *supra* note 99, at 301 (noting judicial tolerance for ineffective performance); Comment, *Federal Habeas Corpus—A Hindsight View of Trial Attorney Effectiveness*, 27 LA. L. REV. 784, 787 (1967) (trial judges have a duty to ensure defense counsel's effectiveness).

prosecutor knows to be poor and fails to ask important, relevant questions.

3. Defense counsel's direct and cross-examinations are satisfactory and make it appear that counsel is performing aggressively. Yet the prosecutor realizes that counsel has not investigated the facts, has neglected to file potentially winnable suppression motions, and, without any apparent tactical justification, has failed repeatedly to object to harmful questions.

In the first two hypotheticals, the trial judge may be aware of defense counsel's inadequacy. The judge's duty to correct ineffective representation mitigates the prosecutor's responsibility. If, however, the judge does not notice—or chooses to ignore—the deficiency, the prosecutor squarely confronts an ethical dilemma: she believes the defendant should be convicted, but knows he is not receiving “adversarial justice.” The ethical prosecutor must recognize that her familiarity with the facts puts her in a particularly good position to recognize substandard lawyering early in the case.¹⁰⁷ Reacting to incompetent defense representation before a verdict is rendered may preserve the integrity of the trial process in a way that appeals cannot.

What, then, does the codes' mandate tell the prosecutor to do? Initially, she must determine whether adversarial justice requires any action at all. When a defendant receives essentially no representation, as in the first hypothetical scenario, the clear thrust of the “do justice” requirement is that the prosecutor must undertake remedial steps.

In the second case, the answer is not so obvious; the adversarial justice approach merely informs the prosecutor of the considerations she should take into account. Suppose the prosecutor knows her key witness would offer information helpful to the defense if counsel asked appropriate questions. In some instances, representation by a lawyer who asks ineffective questions becomes as bad as, or worse than, having no lawyer at all. But in general, “doing justice” does not require a prosecutor to help defense counsel frame winning cross-examination. If she can conclude that counsel's questioning fits within the “wide range of professionally competent assistance,”¹⁰⁸ she plays within the rules by letting counsel resolve the strategic choices.¹⁰⁹ Adversarial principles

107. See Genego, *supra* note 98, at 190-91 (discussing the failure of courts to adopt and enforce standards for ineffectiveness, and noting the feeling of some judges that they are “unqualified to establish mandatory duties for the defense of criminal cases because they ha[ve] no experience in providing such representation”).

108. *Strickland*, 466 U.S. at 690. Under *Strickland*'s new “reasonable competence” standards, failure to examine can rise to the level of ineffectiveness. Previously, courts were unwilling to reverse on that basis alone. See Waltz, *supra* note 99, at 323 (“no American criminal case can be unearthed in which the failure to cross-examine, without more” resulted in reversal); see, e.g., *Wilson v. State*, 268 Ala. 86, 91, 105 So. 2d 66, 70 (1958) (failure to cross-examine chief prosecution witness or present any defense witnesses is not ineffective representation).

109. Any other result would require prosecutors to make unmanageable judgment calls concerning the quality of each opponent. That, in turn, would significantly disrupt the system's ability to address a large and constant case load.

alone do not tell the prosecutor how to make that determination.

When one analyzes the third hypothetical, adversarial justice notions are again useful, but not dispositive. Consider the defense counsel who fails to object to questions that are prejudicial, but of doubtful admissibility. Alternatively, suppose that counsel does not file a suppression motion that would help if successful, but would leave the defense no worse off if it fails. Because there is no plausible tactic behind counsel's inaction, the adversarial process seems to be failing; the system depends upon *active* counsel who maximize protection of the defendant's rights.¹¹⁰ "Doing justice" requires the prosecutor at least to consider whether she is in a unique position to perceive and remedy the systemic breakdown before a one-sided trial results.¹¹¹

That leaves the question of remedy. In each scenario, the prosecutor could balance defense counsel's performance by prosecuting less effectively. Prosecuting weakly, however, does not repair the defects in adversarial justice; it eliminates adversariness altogether. Reduced ad-

110. Implicit in all of the examples discussed in this Article is the assumption that the defendant will suffer if the prosecutor takes no action. Clearly, a prosecutor's duty to adversarial justice would not require her to step out of role for de minimis or unimportant injuries that the defendant may incur.

111. If the argument for pretrial suppression of key evidence is strong and no strategic reason appears for counsel's failure to file a motion, counsel arguably has provided ineffective assistance of counsel. *See, e.g., United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976) (failure to file motion to suppress fruits of illegal search constitutes ineffective assistance), *cert. denied*, 434 U.S. 844 (1977); *People v. Ibarra*, 60 Cal. 2d 460, 465-66, 386 P.2d 487, 491, 34 Cal. Rptr. 863, 867 (1963) (same). But the limited possibility of appellate reversal on grounds of ineffectiveness of counsel does not adequately safeguard the process. Courts have hesitated to reverse failures to suppress trustworthy information on the grounds that its admission does not lessen the accuracy or "justice" of the verdict. *See, e.g., Edwards v. United States*, 256 F.2d 707, 709 (D.C. Cir. 1958); *People v. Washington*, 41 Ill. 2d 16, 22-23, 241 N.E. 425, 428-29 (1968).

Similarly, evidentiary matters arising in trial rarely result in reversal absent an objection. Counsel usually will be considered effective as a whole, even though he did not make objections actively; his conduct is accorded a "presumption" of competence. *Strickland*, 466 U.S. at 689 (defense counsel's failure even to seek character evidence or psychiatric evaluation was a "plausible strategic choice"); *see also United States v. Clayborne*, 509 F.2d 473, 479 (D.C. Cir. 1974) (failure to cross-examine key witness, attributable largely to lack of pretrial preparation, held "tactical decision" immune from reversal on appeal); *United States v. Katz*, 425 F.2d 928, 931 (2d Cir. 1970) (counsel's sleeping during trial not grounds for reversal). Courts occasionally reverse significant trial errors despite the absence of objections. *See, e.g., People v. Blevins*, 251 Ill. 381, 392-93, 96 N.E. 214, 219 (1911) (reversing trial court despite failure to object to key inadmissible evidence because defense counsel was "inexperienced" and "ill-equipped" to handle the case). This approach, however, is "studiously restricted to situations where defense counsel is intrinsically handicapped and overmatched." *Waltz, supra* note 99, at 321.

The trial judge, of course, also may take steps to remedy defense counsel's deficiency. But two factors put the prosecutor in a better position to act. First, having thought about the questioning in advance, the prosecutor is more likely than the judge to notice defense counsel's failure to object. Second, the judge may feel constrained from interfering in the questioning on the court's own motion; as a rule, judges are expected to remain passive participants in a trial. *See supra* notes 76-77 and accompanying text.

vocacy may even the contest, but not consistently with the goals underlying the ethical duty to act.

Alternatively, the prosecutor personally could make up for defense counsel's inadequacies. If counsel's failures arise early in the trial, the prosecutor's own witness examinations might introduce favorable testimony on the defendant's behalf.¹¹² Similarly, the prosecutor could incorporate arguments for the defense in her own summation. When counsel fails to object or file motions, the prosecutor can raise the issues *sua sponte*.

Helping the defendant is a subset (or at least a close cousin) of "prosecuting less effectively." At first glance, it seems equally inappropriate, for it appears to create a nonadversarial proceeding. Yet the core of adversary theory is that the tribunal should hear a strong case for both parties; it is not crucial which attorney puts the raw evidence on the table. In the hypothetical scenarios, the key is whether the prosecutor who helps the defendant is still able to present her own side effectively. If she can elicit defense information while arguing against its significance, the prosecutor maintains her role as an advocate.¹¹³

In most cases, however, even ethical prosecutors will find it necessary to resist the option of assisting defendants. A prosecutor's mere mention of a defense argument often will not emphasize adequately the position's strength.¹¹⁴ Conversely, prosecutors may be unable to ask defense-oriented questions or raise defense claims without breaking up their own presentations and appearing equivocal. Moreover, if prosecutors exercise the option frequently, defense counsel will come to rely on prosecutorial assistance. They may become lazy or avoid introducing evidence because, tactically, the evidence will have more impact in the midst of the prosecutor's presentation. In the long run, a prosecutorial routine of presenting defense arguments would reduce the adversarial nature of trials.

Thus, in situations in which a prosecutor is convinced of defense counsel's inadequacy—such as in hypotheticals (1) and (3)—the codes

112. A problem of timing haunts this remedy. In her initial direct examinations, the prosecutor will not yet know of counsel's failure to elicit information on cross or of counsel's failure to present evidence in rebuttal. To present the information on her own, the prosecutor may have to reopen her presentation and recall witnesses. This procedure often would require the court's permission. As a practical matter, a prosecutor may undermine her own case by presenting rebuttal testimony that exclusively favors the defense.

113. Cf. Simon, *supra* note 8, at 1098 (by "attempt[ing] first to improve the reliability of the procedure, [the lawyer] respects the traditional premise that the strongest assurance of a just resolution is the soundness of the procedure that produced it").

114. Cf. *United States v. Decoster*, 624 F.2d 196, 208 (D.C. Cir. 1976) (en banc) (noting with displeasure the possibility that prosecutors occasionally might "oversee defense counsel's conduct at trial—to ensure against reversal").

suggest that she should seek an alternative approach that would undo the inequality without undermining her own presentation. Initially, she may attempt a simple solution: encourage defense counsel to shore up his performance or, if he can no longer repair past mistakes, to withdraw from the trial.

If defense counsel refuses or is incapable of effectuating a remedy on his own, the prosecutor must take a stronger step. The action that best furthers the duty to ensure adversarial equality is to report counsel's inadequate performance to the trial court, either by motion to disqualify counsel or simply by telling the judge.¹¹⁵ Like most private attorneys, prosecutors will hesitate to point fingers at other members of the guild.¹¹⁶ That hesitation, however, does not detract from the remedy's appropriateness. Indeed, professional codes universally rely on lawyers to police each other, despite the reality that lawyers view and apply most reporting obligations with distaste.¹¹⁷ Interpreting the "do justice" provision as requiring prosecutors to watchdog defense counsel is consistent with both the spirit of modern professional regulation and the prosecutor's dual role.¹¹⁸

115. See *Wheat v. United States*, 486 U.S. 153 (1988) (prosecutors have standing to raise the issue of defense counsel's competency in order to preserve the administration of criminal justice); see also M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 88-89 (1975) (arguing that the prosecutor must advise the trial court of defense counsel's ineffectiveness); Freedman, *supra* note 38, at 1039-41 (same).

116. See Olsson, *Reporting Peer Misconduct: Lip Service to Ethical Standards is Not Enough*, 31 ARIZ. L. REV. 657, 665 (1989) ("Lawyers not only find reporting a peer for misconduct distasteful, but characterize those who report as somehow traitorous to their profession"). The likelihood that the prosecutor will need to deal with counsel in the future creates an additional disincentive to reporting.

117. Indeed, prosecutorial failure to report ineffective defense representation to the Bar in some cases already may violate the modern codes. See CODE, *supra* note 1, DR 1-103(A) (requiring prosecutors to report ineffectiveness rising to the level of ethical misconduct or reflecting unfitness to practice law).

118. A duty to highlight substandard defense performance can lend itself to tactical abuse. See, e.g., *Wheat*, 486 U.S. at 166, 170-72 n.3 (Marshall, J., dissenting) (prosecutor moved to disqualify the defendant's counsel for conflict of interest under circumstances in which the government itself may have manufactured the conflict).

Motions to disqualify opposing counsel on ethical grounds have become common in civil litigation. As Judge Gurfein noted in *J.P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357 (2d Cir. 1975): "[T]he attempt by an opposing party to disqualify the other side's lawyer must be viewed as a part of the tactics of an adversary proceeding. As such it demands judicial scrutiny to prevent literalism [in applying ethical rules] from possibly overcoming substantial justice to the parties." *Id.* at 1360 (Gurfein, J., concurring).

Judges are aware of the potential tactical benefits of motions to disqualify and can discount those motions appropriately, as they have done in the civil context. See, e.g., *Kroungold v. Triester*, 521 F.2d 763, 766 (3d Cir. 1975) (affirming trial court's refusal to disqualify counsel named as witness by opponent); *Zions First Nat'l Bank v. United Health Clubs, Inc.*, 505 F. Supp. 138, 140 (E.D. Pa. 1981) (requiring "clear-showing" of the need for disqualification); *Rice v. Baron*, 456 F. Supp. 1361, 1370 (S.D.N.Y. 1978) (noting that disqualification motions are subject to "particularly strict judicial scrutiny" because they are prone to tactical abuse); *Freeman v. Kulicke & Soffa*

It is important to remember that the duty considered thus far stems from an ethical rather than a constitutional mandate. Courts will not reverse a conviction based simply on an individual prosecutor's failure to satisfy the codes. Yet to the extent that some prosecutors take their professional obligation seriously, a practice of reporting inadequate performance would have beneficial effects for defendants. Most significantly, it would soften the impact of legal rules requiring defendants to raise ineffective assistance objections at the trial level.¹¹⁹ By highlighting defense counsel's failures, a prosecutor who "reports" brings potential problems to a defendant's attention.¹²⁰ Similarly, reporting alerts trial judges to hidden ineffectiveness at a time when the judges can remedy the deficiency efficiently.¹²¹ If circumstances warrant, a judge can replace an incompetent lawyer, provide additional resources, or order counsel to take steps that would improve his performance.

Even when the deficiency is patent, as in the example of the nonperforming counsel, action by the prosecutor prevents the judge from ignoring the inadequate performance. Informed of the prosecutor's observations, a judge typically would have to hold a hearing on the effectiveness issue.¹²² The hearing alone will improve the adversarial balance by creating a record for appeal (presumably by different, competent counsel). Concomitantly, a trial judge's failure to hold a

Indus., 449 F. Supp. 974, 977-78 (E.D. Pa. 1978) (imposing burden on the party moving to disqualify to show that disqualification is necessary). Moreover, prosecuting attorneys have incentives not to abuse the disqualification remedy. Because they appear before the same judges on a regular basis, any pattern of improper reporting can cost them hard-earned goodwill. Cf. *Wheat*, 486 U.S. at 163 (Court defers to trial court supervision of motions to disqualify).

119. See, e.g., *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980) (imposing on defendants who have not objected to multiple representation at trial the additional requirement of showing an "adverse effect").

120. In theory, a prosecutor's failure to report an ineffective opponent alone might constitute grounds for reversal. If defense counsel's performance truly undermined adversarial fact-finding, the defendant arguably was denied due process. The Supreme Court, however, implicitly has rejected this argument by establishing independent standards for reversing convictions on ineffectiveness grounds. A breach of ethical rules by itself does not establish a due process violation. Additional elements, such as "actual prejudice," are essential to fifth and sixth amendment claims. See *supra* notes 7, 13 and accompanying text. By the same token, because ethical codes govern prosecutorial behavior even before the verdict stage, the constitutional elements do not set the standards for ethical prosecutorial conduct.

121. The Supreme Court has focused on defendants' objections (or failures to object) to create incentives to bring matters to the attention of trial courts and thus to enable the courts to correct potential errors. See *Cuyler*, 446 U.S. at 347 ("trial courts necessarily rely . . . upon the good faith and good judgment of defense counsel" to raise problems). Trial courts, nonetheless, must question improprieties when they know or "reasonably should know" of them. *Id.* A prosecutorial reporting requirement often would obviate the need for a speculative appellate inquiry into what the trial court should have known.

122. In a case involving a claim of ineffectiveness, a court may see fit to appoint special counsel *ad litem* to litigate the issue on the defendant's behalf.

hearing after being put on notice eases the defendant's ability to obtain appellate review of counsel's performance.¹²³

As a practical matter, it may be unrealistic for code drafters to expect prosecutors to highlight instances of unequal adversariness.¹²⁴ Yet reporting lax opposition is the remedy most consistent with the codes' vision of prosecutorial ethics. The prosecutor who reports adopts only a limited nonadversarial role: she raises an objection for the defendant when the system cannot rely on defense counsel. She thereby exposes the adversarial imbalance to trial and appellate review and allows the defendant's rights, if any, to be vindicated. The prosecutor then can revert to an advocate's posture, without having abandoned advocacy on any issue related to the merits.

2. Unequal Resources

a. General Considerations

Ordinarily, adversaries need not help opponents prepare for trial.¹²⁵ With few exceptions, state law does not force prosecutors to assist the defense, suggest lines of investigation, or provide work product.¹²⁶ Due

123. Compare *Holloway v. Arkansas*, 435 U.S. 475, 485 (1978) (trial court *must* investigate timely objection to multiple representation) with *Cuyler*, 446 U.S. at 346-47 (absent objection, appellate court ordinarily will not disturb trial judge's decision not to interfere with multiple representation).

124. See generally *Olsson*, *supra* note 116, at 657 (noting the ineffectiveness of reporting requirements throughout the codes and encouraging better use and enforcement of those requirements).

125. This section considers prosecutorial conduct in the course of investigation and discovery because it often overlaps the trial. Most litigators consider information gathering and trial practice to be inexorably intertwined. What the lawyer knows and what he hopes to find out determine his tactics and the resulting verdicts.

126. See *State v. Tune*, 13 N.J. 203, 209-14, 98 A.2d 881, 884-86 (1953) (explaining reasons for limited criminal discovery). See generally Y. KAMISAR, W. LAFAYE & J. ISRAEL, *supra* note 98, at 1114-26 (discussing current state of criminal discovery); W. LAFAYE & J. ISRAEL, *CRIMINAL PROCEDURE* § 19.3(a), at 725-30 & nn.4-7 (abr. ed. 1985) (discussing debate over criminal discovery); Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279 (advocating greater criminal discovery). A discussion of the criminal discovery that states should require is beyond this Article's scope. I accept as a given that states have limited mandatory disclosure and that courts impose some duty to provide exculpatory information. This Article considers only what additional information prosecutors should disclose voluntarily because of the "do justice" obligation.

Most states have specific rules requiring routine disclosure by prosecutors. Largely because of limitations on reciprocal discovery, the rules generally are narrow in scope. See, e.g., *State v. Hughes*, 104 Ariz. 535, 538, 456 P.2d 393, 396 (1969) (finding no duty to point out evidence favorable to the defendant); *Bryant v. State*, 268 Ind. 498, 499-500, 376 N.E.2d 1123, 1124-25 (1978) (upholding refusal to perform paraffin test sought by defense); *State v. Urrego*, 41 Ohio App. 2d 124, 126, 322 N.E.2d 688, 689 (Ct. App. 1974) (the state "need not gather evidence for the accused"). Prosecutors who disclose too much risk creating an imbalance in resources in favor of the defense. See, e.g., D. LUBAN, *supra* note 29, at 51 (discussing how the adversary system "explains why ruthless behavior [by counsel] is considered acceptable or even necessary"); Adlerstein,

process decisions require prosecutors to give defendants information only if it is exculpatory,¹²⁷ material,¹²⁸ and requested by the defense.¹²⁹ Prosecutors have no constitutional obligation to obtain evidence on the defense's behalf.¹³⁰ Nevertheless, the codes' adversarial justice standard requires prosecutors to consider whether they sport a resource advantage that creates an imbalance or prevents a fair adversarial joust.¹³¹

supra note 11, at 758 ("The execution of [the prosecutor's duty to convict the guilty] may be thwarted by defendants who, if given too much information[,] . . . can suborn perjury or endanger and intimidate witnesses, as well as fabricate evidence").

127. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (requiring disclosure upon request of "evidence favorable to [the] accused"); see also Note, *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004, 1006 (1986). The constitutional disclosure obligation flows from the notion that disclosure of exculpatory information is the best method for assuring that the prosecution does not secure convictions through the use of false evidence. See *Miller v. Pate*, 386 U.S. 1 (1967).

128. The definition of "materiality" has spawned much litigation. The Supreme Court has concluded that even impeachment evidence may be material. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). Generally, though, the Court has applied a flexible standard that depends on the specificity of defense counsel's request for information. See *United States v. Agurs*, 427 U.S. 97, 103-04 (1976); see also *Babcock*, *supra* note 44, at 1143. After a prosecutor's refusal to disclose, the issue on appeal seems to have become whether the defense can show "a reasonable possibility that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985) (Blackmun, J., separate opinion); see also *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987) (noting that *Bagley* established new standards for the materiality determination).

129. When the defense fails to make a specific request for exculpatory materials or requests only generally "all *Brady* material," courts rarely find that a failure to disclose violates due process. See *Agurs*, 427 U.S. at 106.

130. See, e.g., *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (good faith failure to preserve medical samples for defense testing does not violate due process); *California v. Trombetta*, 467 U.S. 479 (1984) (government has little or no duty to preserve evidence for possible use by defense). A few courts have imposed limited constitutional obligations on prosecutors to cooperate with the defense. See, e.g., *Evans v. Superior Court*, 11 Cal. 3d 617, 625, 522 P.2d 681, 686-87, 114 Cal. Rptr. 121, 126 (1974) (defense entitled to lineup). Some jurisdictions require prosecutors to let the defense conduct scientific tests of physical evidence in the prosecution's hands. See Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 98, at 1162 and cases cited therein; Oparil, *Making the Defendant's Case: How Much Assistance Must the Prosecutor Provide?*, 23 AM. CRIM. L. REV. 447, 459-69 (1986) and cases cited therein. But most discovery statutes only require prosecutors to disclose information in their immediate possession or control. See Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 98, at 1117-18 (discussing scope of "control").

A small minority of jurisdictions have adopted rules that require prosecutors to call to the stand witnesses who have evidence favorable to the accused. See Note, *Duty of the Prosecutor to Call Witnesses Whose Testimony Will Help the Accused to Establish His Innocence*, 1966 WASH. U.L.Q. 68 and authorities cited therein; see also Oparil, *supra*, at 473-80 (discussing arguments in favor of prosecutorial "duty to assist the defendant"). These rules for the most part are historical anomalies, see Note, *supra*, at 71-73, and run counter to the ordinary conception of adversarial prosecutions.

131. Some model codes explicitly require prosecutors to disclose liberally. See, e.g., STANDARDS RELATING TO THE ADMINISTRATION OF JUSTICE, Standard 3-3.11 (1979) [hereinafter ABA STANDARDS]. But generally these either have not been adopted or depend on mutual discovery that may violate defendants' right against self-incrimination. See, e.g., NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS, Standards 13.1-13.5 (1977) [hereinafter NDAA

Prosecutors' offices rarely have manpower advantages that would undermine adversarial equality.¹³² But they do have material resources unavailable to the defense. The ability to employ police as investigators, use grand jury subpoena power to force cooperation of witnesses, time indictments, consult the government's vast forensic services and computer records, and appeal to jurors' natural fear of crime all contribute to prosecutorial effectiveness. One former United States Attorney General has stated: "I know of no prosecutor who thinks that, in this balance [of resources relating to] the advocate's art, [s]he is the loser."¹³³

Were it true that prosecutors routinely have overwhelming advantages, one would have to question the viability of the adversary system as a means for adjudicating criminal cases.¹³⁴ The system, however, builds in countervailing advantages for the defense. The presumption of innocence, the reasonable doubt standard, the defendant's right to remain silent, and the ability to demand exculpatory evidence from the government, to name a few, help maintain a fair adjudicative balance.¹³⁵

STANDARDS] (imposing similar discovery obligations upon prosecution and defense, including disclosure of the defendant's statements); cf. *Williams v. Florida*, 399 U.S. 78, 81-82 (1970) (upholding some reciprocal discovery requirements). *But see* MODEL RULES, *supra* note 1, Rule 3.8 comment (noting that individual jurisdictions have adopted the ABA Standards). *See generally* Nakell, *Criminal Discovery for the Defense and the Prosecution: The Developing Constitutional Considerations*, 50 N.C.L. Rev. 437 (1972) (discussing limits of acceptable discovery requirements against the defense); Van Kessel, *Prosecutorial Discovery and the Privilege Against Self-Incrimination: Accommodation or Capitulation*, 4 HASTINGS CONST. L.Q. 855 (1977) (same); Westen, *Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense*, 66 CALIF. L. REV. 935 (1978). In deciding whether and how to disclose, a prosecutor must consider factors other than the defendant's need for information. *See, e.g.*, *United States v. Tolliver*, 569 F.2d 724, 729 (2d Cir. 1978) (noting that because no discovery system could assure total access to the government's case without risking danger to witnesses and suborning of perjury, "there must be some ultimate reliance on the ethics of the prosecutor"). To protect witnesses and the integrity of the prosecution, the prosecutor may call on court intervention or seek restrictions on the use of discovered materials.

132. Unlike large civil litigation firms that "paper-to-death" undermanned opponents, a prosecutor's office that assigns multiple lawyers to a single case also assigns them other responsibilities. Cf. ABA Comm'n on Professionalism, ". . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 3 (1986) (discussing the "scorched earth" strategy of [civil] litigation"); Brazil, *Civil Discovery: How Bad Are the Problems?*, 67 A.B.A. J. 450-52 (1981); Flegal, *Discovery Abuse: Causes, Effects, and Reform*, 3 REV. LITIG. 1, 21-22 (1982).

133. Civiletti, *supra* note 64, at 20.

134. Indeed, Murray Schwartz suggests that the "manifest inequality in resources between the average defendant and the state [have] necessitat[ed] a drastic change of the structural rules to assure that there is some constraint on the ability of the prosecution to work its will without significant challenge." Schwartz, *supra* note 25, at 549. He thus concludes that the essential postulates regarding equality in the adversary system do not apply to criminal trials. *Id.* at 550; *see also infra* note 274.

135. Most of defendants' constitutional privileges hinder, rather than enhance, the search for truth. David Luban states, "We want to handicap the state in its power even legitimately to punish

In interpreting prosecutors' duty to "do justice" under the ethical codes, it therefore is not enough to note that prosecutors have special resources. Indeed, without them the prosecutors themselves might be unable to compete as equals. In insisting that parties be roughly equivalent, the adversarial system intends that each side have access to key information and the means to find it. How the parties focus their respective time and resources before and during trials is a tactical choice that the theory of adversarial justice leaves to counsel.¹³⁶

We already have noted that an imbalance in resources can undermine a criminal defense lawyer's ability to perform.¹³⁷ For example, if counsel cannot devote adequate time to the defense—either because of an overwhelming case load or the timing of the indictment¹³⁸—his theoretical ability to prepare for trial becomes meaningless. Under these constraints, even a good lawyer may render poor or ineffective assistance. The prosecutor faces the same quandary and has the same responses that are available in the "unequal adversary" context.¹³⁹

Inequality of resources can impede the system's ability to produce valid results in other ways. The fear that the government will develop an informational monopoly is one reason why code drafters impose an occasional duty on prosecutors to step out of the competitive role.¹⁴⁰ The government's exercise of its unique ability to investigate and conscript witnesses and information itself can deprive the defense of adequate access to information.¹⁴¹ When the government's use of resources

us. And so the adversary system is justified, not because it is a good way of achieving justice, but because it is a good way of hobbling the government. . . ." Luban, *supra* note 41, at 92; *see also* Schwartz, *On Making the True Look False and the False Look True*, 41 Sw. L.J. 1135, 1139-40 (1988) (discussing reasons for constitutional and evidentiary obstacles to truth-seeking).

136. A few courts have sanctioned a prosecutor's good faith failure to disclose exculpatory information on the grounds that defense counsel may not have been diligent in discovering the evidence and that the defendant "should not suffer for the mistakes of his counsel." *United States v. Poole*, 379 F.2d 645, 649 (7th Cir. 1967). *But see* *Evans v. Kropp*, 254 F. Supp 218, 220-21 (E.D. Mich. 1966) (failure to disclose psychiatrist's report recommending competency hearing failed to satisfy due process). But absent extreme circumstances involving a risk of prosecution based on false evidence, *see* *Miller v. Pate*, 386 U.S. 1, 7 (1967), courts ordinarily have not questioned counsel's tactical decisions.

137. *See supra* notes 75, 87 and accompanying text.

138. Prosecutors can impose one-sided time constraints by conducting their own lengthy investigation at the grand jury stage and then using "speedy trial" arguments to oppose postindictment delay.

139. *See* *Babcock, supra* note 44, at 1142 (contending that the less the system requires prosecutors to disclose, the more carefully it must assure adequate defense counsel).

140. *See infra* notes 154-75 and accompanying text.

141. *See* *Simon v. Gray*, 356 F. Supp 265, 270 (E.D. Wis. 1973) (finding prosecutorial disclosure necessary to offset "the imbalance in resources"); *cf.* *United States v. Miranne*, 688 F.2d 980, 987 (5th Cir. 1982) (noting that due process disclosure requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), are "based upon a realization of the vast resources of the prosecutor"), *cert. denied*, 459 U.S. 1109 (1983).

impedes the defense's ability to obtain evidence or significantly increases the investigative effort that the defense must undertake, it crosses the line from balancing the contest to making it unfairly one-sided.¹⁴²

For example, through their institutional involvement with undercover investigators and informants, prosecutors effortlessly learn relevant details about police conduct or misconduct.¹⁴³ In contrast, defense counsel often have no reason to suspect such details exist. Absent a prosecutorial duty to disclose, the defense must investigate in the dark simply to keep up with the prosecution—wasting limited resources in the process. The undesirable alternative is to forego all investigation on the subject.

Similarly, the defense usually does not have the means to match police searches for evidence.¹⁴⁴ Even if defense counsel could send out an equivalent investigative team, the government's own search probably would undermine the defendant's: witnesses initially approached by the state typically become willing to cooperate with the prosecution but not with the defense.¹⁴⁵

By the same token, the prosecution routinely employs forensic services that defendants cannot reproduce. This occurs either because the defendants cannot afford competitive experts or, as in the case of FBI laboratories, because the government has a virtual monopoly on the expert service in question.¹⁴⁶ Even competent, well-intentioned defense lawyers may be deprived of access to information or may find themselves overwhelmed by the standard of investigation and preparation

142. Similar issues may arise in a prosecutor's exercise of pretrial power, such as seizure of the defendant's assets. While the ostensible reason for the action may be to protect the government's interest in the defendant's property, it can have the side effect of undermining the defense. See generally Cloud, *Forfeiting Defense Attorneys' Fees: Applying an Institutional Role Theory to Define Individual Constitutional Rights*, 1987 Wis. L. Rev. 1; Note, *Drug Proceeds Forfeiture and the Right to Counsel of Choice*, 43 VAND. L. REV. 1377 (1990).

143. Police misconduct may justify suppression of evidence even if the underlying facts are not exculpatory *Brady* information. See *infra* note 148 and accompanying text.

144. Police investigations, for example, may depend on a door-to-door search for witnesses. Resources available for defense investigation rarely permit such an elaborate effort to obtain even critical evidence.

145. The reasons may include the witness's identification with the prosecution, dislike for a person the government has targeted as a defendant, fear of all criminals, and prosecutorial or police suggestions that the witness should not cooperate. Unlike the prosecution, which can overcome witness reluctance through its grand jury subpoena power, defense counsel have no means of forcing noncooperative witnesses to share information.

146. See, e.g., *Hicks v. State*, 256 Ga. 715, 724-26, 352 S.E.2d 762, 774-75 (court denies defense access to full neurological examination requested by defense psychiatrist despite the prosecution's reliance on its own partial neurological examination), *cert. denied*, 482 U.S. 931 (1987). *But cf.* *People ex rel. Gallagher v. District Court*, 656 P.2d 1287, 1290-91 (Colo. 1983) (court upholds the defendant's right to demand particular method of trace metal testing).

that the prosecution sets.

b. Applications of the "Do Justice" Rule

Let us analyze how the requirement of adversarial justice works in some common unequal resource scenarios.¹⁴⁷ Consider a case involving access to information:

The arresting officers tell the district attorney that they observed the defendant engage in a drug transaction after their supervisor had directed them to patrol the general area in which it occurred. Such an assignment was routine for them. The prosecutor later discovers that other officers had illegally wiretapped a codefendant's telephone, learned when and where the transaction would occur, and told the supervisor. The arresting officers were unaware of this information.

The prosecutor concludes that if the defense files the appropriate motion to suppress, the court probably, but not certainly, would suppress all the information about the transaction.¹⁴⁸ But defense counsel has no reason to suspect the wiretap and files no motion.

Even without mandatory discovery rules,¹⁴⁹ the district attorney might feel constrained to disclose the wiretap information, to avoid relying on the fruits of the illegal surveillance, or to dismiss the case.¹⁵⁰

147. In each scenario, we may assume that the prosecuting attorney believes in the defendant's guilt. Accordingly, absent the professional codes' mandate, a prosecutor could justify winning at all cost.

148. Depending on the circumstances surrounding the wiretap's installation, the government might be able to take advantage of the expanding good faith exception to the exclusionary rule. See *United States v. Leon*, 468 U.S. 897, 920 (1984) (good faith reliance on warrant justifies illegal search). If the illegality stems from a failure to follow regulatory procedures, rather than a constitutional violation, the fruits may not be suppressible. See *United States v. Caceres*, 440 U.S. 741, 755-57 (1979) (fruits of illegal IRS surveillance not suppressed). The defendant may have standing only to challenge a wiretap of his own phone or, at a minimum, his own conversations. See *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (rejecting standing for persons without "legitimate expectation of privacy" in invaded area); cf. *United States v. White*, 401 U.S. 745, 749 (1971) (plurality opinion) (defendant has no reasonable expectation that other party to conversation will not record or transmit conversation to other listeners).

149. For purposes of this analysis, let us take as a given that the applicable procedural discovery rules do not require disclosure of the wiretap and that the police witnesses will not cooperate voluntarily with the defense. Local rules often require disclosure of wiretaps, but only if the government intends to introduce the contents of the taped conversations into evidence. See, e.g., FED. R. CRIM. P. 16(a)(1)(C) (mandating disclosure of tangible objects "intended for use . . . as evidence"); cf. *United States v. Terry*, 702 F.2d 299, 312 (2d Cir.) (treating tape recordings as covered by Rule 16), cert. denied *sub nom. Giuppone v. United States*, 464 U.S. 992 (1983); see also FED. R. CRIM. P. 16(a)(1)(C) (objects must be disclosed if "material to the preparation of [the] defense"). Due process considerations probably would not require disclosure of the wiretap because its content is not "exculpatory" (i.e., it does not suggest the defendant is innocent), and because defense counsel made no request for the information. See *Brady*, 373 U.S. at 87.

150. Such an intuition formed the bases for several recent episodes of the television program *L.A. Law*, in which the prosecutor, Grace Van Owen, was guilt-stricken by her failure to disclose that a witness who had overheard a jailed defendant confess was a government informant. Prosecutor Van Owen, however, may have had a higher disclosure obligation than our hypothetical attorney because the confession was more clearly excludable and because she relied directly on the evidence illegally seized.

Yet the model codes do not include any express ethical directive to do so. Because the information does not tend to negate the defendant's guilt, the codes do not require disclosure.¹⁵¹ In relying on the arresting officers' observations, the district attorney will not use false information¹⁵² nor perpetrate a fraud upon the court.¹⁵³ Only the "do justice" rule is relevant to the prosecutor's ethical decision of whether she should remain silent, disclose, or take more drastic steps.

Referring to the adversary system's premises helps the prosecutor identify what the codes' justice requires. If she hides the wiretap information, the defendant still has a full opportunity to present evidence and be judged according to an impartial, structured forensic process. The defendant remains represented by active and presumably competent defense counsel. Yet viewing the situation fairly, the prosecutor probably must recognize that counsel lacks access to key information;¹⁵⁴ the information is uniquely in the government's possession and counsel has no reason to believe it exists. The prosecutor who endeavors to achieve adversarial justice should conclude that defense resources do not even roughly match her own. The premise of rough equality of advocacy fails.

This reasoning also would determine the remedy. The hypothetical district attorney's obligation is simply to rectify the imbalance in resources—the failure of the adversarial process. Because she still can support the admissibility of the arresting officers' testimony, there is no reason to forfeit the evidence voluntarily. Nor do adversarial principles require dismissal of the charges. The police department's misconduct in installing and hiding an illegal wiretap may justify administrative or judicial sanctions, but once in the open, does not bear on the adversarial search for truth.¹⁵⁵ Informing the defense of the wiretap suffices

151. See MODEL RULES, *supra* note 1, Rule 3.8(d); CODE, *supra* note 1, DR 7-103(B) (both mandating disclosure of information that tends to negate the guilt of the defendant).

152. See MODEL RULES, *supra* note 1, Rule 3.4(b).

153. See *id.* Rule 1.2(d); CODE, *supra* note 1, DR 7-102(A).

154. See generally *supra* note 136 and accompanying text.

155. Change the hypothetical slightly:

Assume that the buyer of the drugs was a police informant. The District Attorney is confident that the informant would have alerted the police of the transaction had the police not already known.

Here, the District Attorney is on firmer ground in believing that his evidence is admissible. Arguably, the illegally seized information would have been "inevitably discovered." See *Nix v. Williams*, 467 U.S. 431, 443-44 (1984) (adopting the "inevitable discovery" rule). If the buyer already had begun the process of informing the police, the information may have had an "independent source." See *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (describing the "independent source" rule). Yet the ethical analysis remains the same. The key is neither whether the defendant is guilty nor whether the prosecutor's arguments will win. The role-differentiated prosecutor must look beyond results, beyond achieving correct verdicts, to assure that the adversarial joust is fair. She still must disclose the information.

to rectify the system's fault.¹⁵⁶

Similar but less conclusive reasoning applies when the government's investigative resource advantage comes to the fore. For example, may prosecutors exercise control over key witnesses? As a constitutional matter, most jurisdictions forbid directly instructing witnesses not to cooperate with the defense.¹⁵⁷ But there is no clear rule forbidding a prosecutor to advise a witness truthfully of the negative consequences of cooperating¹⁵⁸ or to request that the witness allow the prosecutor to be present at interviews.¹⁵⁹

The prosecutor who looks to the ethical codes' express terms again finds little guidance: the prosecutor need disclose only information "known to the prosecutor that tends to negate guilt"¹⁶⁰ and avoid "unlawfully obstruct[ing] another party's access to evidence."¹⁶¹ Under the

156. Consider the next step: The hypothetical District Attorney discloses the existence of the wiretap, but defense counsel neither requests details nor files a motion to suppress. At this point, the prosecutor's analysis of her obligations should change focus. The problem of unequal resources has been solved. But another potential failure of the process may be evident: defense counsel's failure actively to pursue suppression of key evidence may rise to the level of inadequate representation.

The prosecutor has an obligation to consider possible tactical explanations for counsel's conduct, perhaps to discuss the matter with him, and ultimately to consider reporting counsel's errors to the court. Again, however, the remedy must fit the reasons that trigger the prosecutor's ethical obligations. The prosecutor's duty is not to assure the defendant's victory, but merely to preserve the boundaries for an adversarial joust.

157. See, e.g., *IBM v. Edelstein*, 526 F.2d 37, 41-44 (2d Cir. 1975) (per curiam) (reversing trial judge's instruction to witnesses that they speak to defense counsel only with a stenographer present); *Gregory v. United States*, 369 F.2d 185, 187-89 (D.C. Cir. 1966) (reversing conviction on due process grounds for prosecutor's instruction to witnesses not to speak with the defense); *State v. York*, 291 Or. 535, 539-43, 632 P.2d 1261, 1263-65 (1981) (relying on DR 7-103(B) to conclude that the prosecutor may not "order or advise a witness not to speak to the defense attorneys"); *Lewis v. Court of Common Pleas*, 436 Pa. 296, 303, 260 A.2d 184, 188 (1969) (advice not to talk held improper). A few jurisdictions statutorily prohibit such conduct. See *People v. Peter*, 55 Ill. 2d 443, 450-51, 303 N.E.2d 398, 403-04 (1973) (discussing Illinois rule), *cert. denied*, 417 U.S. 920 (1974).

158. Compare *United States ex rel. Trantino v. Hatrak*, 408 F. Supp. 476, 481-82 (D.N.J. 1976) (emphasizing that a witness's right to refuse cooperation is not equivalent to instruction to remain silent), *aff'd*, 563 F.2d 86 (3d Cir. 1977), *cert. denied*, 435 U.S. 928 (1978) with *York*, 291 Or. at 541, 632 P.2d at 1264 (holding it improper to advise witnesses of consequences and that "it would be better if they didn't say anything").

159. See, e.g., *State v. Reichenberger*, 182 N.W.2d 692, 695-96 (Minn. 1970) (approving this procedure on the limited facts of the case).

160. MODEL RULES, *supra* note 1, Rule 3.8(d) (emphasis added); accord CODE, *supra* note 1, DR 7-103(B).

161. MODEL RULES, *supra* note 1, Rule 3.4(a) (emphasis added); see also CODE, *supra* note 1, DR 7-109(B) (forbidding only advising a witness to hide or leave the jurisdiction).

The ABA Standards relating to the prosecution function suggest that obstructing communication between the defense and witnesses is "unprofessional conduct." ABA STANDARDS, *supra* note 131, Standard 3-3.1(c). The Standards, however, do not suggest a rationale for this prosecutorial obligation, and, indeed, impose the same duties upon the defense. *Id.* Standard 4-4.3(c). The ABA explicitly declined to incorporate the standards into the subsequent Model Rules. See J. DOUGLASS,

adversarial approach to the "do justice" rule, however, the prosecutor must consider also whether hindering witness cooperation in a lawful, truthful manner is consistent with adversarial truthseeking. The answer to that question varies with different situations.

Suppose, first, that a witness is the sole observer of a crime and that defense counsel either does not know of the witness's existence or cannot identify him. Under constitutional standards, the prosecutor need not mention the witness unless the witness's information is exculpatory.¹⁶² As a matter of adversarial justice, however, the prosecutor cannot reasonably conclude that the defense has equal access to information or that the joust can be fair.¹⁶³

Now suppose that defense counsel knows the witness's identity. The witness asks the prosecutor what he should do when the defense seeks an interview. If the witness is subject to the prosecution's control, advice not to cooperate with the defense cuts off defense counsel's *opportunity* to get information.¹⁶⁴ To avoid creating an imbalance in the parties' access to facts, the prosecutor may need to forbear pressing the advantage.¹⁶⁵

supra note 6, at 64 (noting that the *ABA Standards* were "readily available" to the Kutak Committee, but that "very little from the standards are included in the Model Rules").

162. See *supra* note 127 and accompanying text.

163. Cf. *Wainwright v. Jackson*, 390 F.2d 288, 294 (5th Cir. 1968) (granting habeas corpus on due process grounds for prosecution's failure to disclose a statement made by the sole eye-witness and noting the prosecution's "special access to [the] witness[]").

164. In the case of experienced witnesses, advice may not even be necessary. Police, for example, may adopt a policy of noncooperation that can be overcome only if the prosecutor takes affirmative steps to neutralize the policy. See *United States v. Fink*, 502 F.2d 1, 5 (5th Cir. 1974), *rev'd on other grounds sub nom. Geders v. United States*, 425 U.S. 80 (1975); *United States v. King*, 368 F. Supp. 130, 131 (M.D. Fla. 1973). Particularly when police have exclusive information, the adversarial notion of equal access to information may require the prosecutor to assist the defense.

165. Consider also a situation in which the prosecution has engaged the services of an expert witness whom the defense cannot afford to counteract. The judicial position seems to be that due process entitles defendants only to limited free expert assistance. See, e.g., *Hicks v. State*, 256 Ga. 715, 724-26, 352 S.E.2d 762, 774-75 (denial of neurologist's assistance requested by defense psychiatrist), *cert. denied*, 482 U.S. 931 (1987); cf. *Ake v. Oklahoma*, 470 U.S. 68, 77, 85 (1985) (defendant entitled to psychiatrist's assistance because it is a "basic tool[] of an adequate defense" and necessary to provide "meaningful access to the judicial process"). A prosecutor who plans to rely heavily on an expert, knows that the subject matter is open to dispute, and is aware that defense counsel wants, but cannot afford, expert assistance may have an ethical obligation to rectify the imbalance. Cf. *Schindler v. Superior Court*, 161 Cal. App. 2d 513, 520-21, 327 P.2d 68, 73-74 (Ct. App. 1958) (state improperly encouraged pathologist not to cooperate with the defense). Depending on the nature of the dispute, the prosecutor may conclude that a fair adversarial contest requires the state to provide the defense with funds for its own expert. In other situations, assuring free access to and the cooperation of the state's witness may rectify the imbalance. Compare *Warren v. State*, 288 So. 2d 826, 830-31 (Ala. 1973) (defense constitutionally entitled to independent testing of seized narcotics) with *People v. Bell*, 74 Mich. App. 270, 275, 253 N.W.2d 726, 729 (Ct. App. 1977) (opportunity to cross-examine prosecution's scientist satisfies due process).

If we amend the hypothetical to consider the truly neutral witness, the prosecutor's role in doing justice becomes more problematic. She may not create obstacles to the defense investigation by volunteering advice that cooperation would be foolish. Yet as the lawyer for the state, she may have to respond to the witness's request for advice.¹⁶⁶ On the one hand, a prosecutor's neutral explanation that a witness's statements are assailable in cross-examination—just as previous statements to the prosecution are subject to attack—does not seem to upset the adversarial balance.¹⁶⁷ On the other hand, an explanation phrased to deter cooperation indeed may undermine the defense's ability to use its own investigative resources.¹⁶⁸

Finally, suppose that there are many witnesses to the crime, some cooperating with the prosecution and others with the defense. The prosecutor justifiably may conclude that the defense has access to the information necessary to prepare an adequate defense.¹⁶⁹ Advising a prosecution witness of the drawbacks of speaking with defense counsel may result in some surprises for the defense at trial. Yet the level of uncertainty society approves of in the trial process is more a question of procedural discovery rules than ethics; surprise alone does not undermine the premises of adversarial justice.¹⁷⁰

This analysis distills the core considerations the codes require the prosecutor to take into account in assessing trial resources. A prosecutor need not undertake defense counsel's job of gathering ammunition. But her responsibility to the codes' vision of justice sometimes requires her to provide information or forensic services that discovery rules would not guarantee.¹⁷¹ When defense counsel seeks key assistance that is otherwise unobtainable, the prosecutor owes it to the system to facili-

166. See, e.g., *State v. Watkins*, 40 Wis. 2d 398, 402-03, 162 N.W.2d 48, 50 (1968) (prosecutor's accurate response to witness's inquiry cannot be basis for reversal).

167. Cf., e.g., *United States v. Nardi*, 633 F.2d 972, 977 (1st Cir. 1980) (holding that neutrally imparted information regarding witness's options does not violate due process); *United States v. White*, 454 F.2d 435, 438-39 (7th Cir. 1971) (same); *United States v. King*, 368 F. Supp. 130, 131 (M.D. Fla. 1973) (same).

168. See *United States v. Rich*, 580 F.2d 929, 933-34 (9th Cir. 1978) (emphasizing the prosecutor's duty of "strict neutrality" in advising witnesses).

169. Cf., e.g., *State v. McLain*, 125 N.W.2d 764, 769-70 (Iowa 1964) (failure of the prosecution to disclose exculpatory physical test is not unfair because defense was aware of other reports and witnesses who would testify to the same facts).

170. Drafters of discovery rules or professional codes, for independent reasons, could promulgate disclosure requirements designed to eliminate surprise. See *infra* notes 271-72 and accompanying text. My point is simply that the possibility of unexpected testimony, by itself, does not violate the adversary system or an adversarially oriented ethical provision.

171. See *Jackson v. Wainwright*, 390 F.2d 288, 294 (5th Cir. 1968) (noting a "weakness in the adversary system . . . arising (sometimes) from the prosecution's superior resources and special access to information and witnesses").

tate a complete trial record.¹⁷² Similarly, she must share key information that defense counsel has no reason to believe exists.¹⁷³ The adversarial interpretation of "justice" underscores the notion that when competent defense attorneys lack the tools to offer a vigorous case, despite their best efforts, the tribunal is deprived of information that should be available in a competitive process.¹⁷⁴

The examples also illustrate why code drafters committed to competitive fact-finding would tolerate prosecutorial assistance even though it may enhance a defendant's case. The prosecutor who equalizes resources—like the prosecutor who highlights ineffective defense representation¹⁷⁵—remains competitive. She still forcefully advocates the government's case. The codes' ideal looks only to whether both adversaries present their own evidence and contest the opponent's evidence in an aggressive way.

Nonetheless, this discussion again highlights the grey areas inevitable in a generalized justice approach to ethics. A government lawyer clearly need not disclose all information in her possession nor honor all defense demands for assistance. Under the adversarial model, if defense counsel has alternative means to obtain particular information or develop particular trial resources, he ordinarily is left to his own devices. But a prosecutor often will find it difficult to determine whether reasonable alternatives exist. A defendant's failure to seek key information may stem from defense counsel's incompetence, his inability to imagine

172. In assessing her obligation, the prosecutor must keep in mind the difference between disclosing initially and reversing a conviction for failure to disclose. Most of the standards set by case law arise from the latter context. An appellate court may hesitate to reverse and thereby cause a retrial or acquittal, even though the court may believe that disclosure would have been the better avenue. An ethical prosecutor, in deciding whether to disclose, must focus on whether adversarial equality mandates disclosure, rather than whether nondisclosure would result in reversal.

173. Because of the Supreme Court's emphasis on defense counsel's request for relevant discovery, questions of ineffective representation often merge with disclosure issues. In *Evans v. Kropp*, 254 F. Supp. 218 (E.D. Mich. 1966), for example, the court granted habeas corpus relief on two separate grounds: The prosecutor's failure to disclose fully a psychiatric evaluation of the defendant, and defense counsel's ineffectiveness in failing to pursue the information that was disclosed. *Id.* at 222; see also *Babcock*, *supra* note 44, at 1167 (suggesting that current weak standards of effectiveness combined with limitations on discovery undermine adversary system).

174. This framework similarly aids the prosecutor in deciding *how* she may act, when she does act. May the prosecutor, for example, suggest to a witness that she speak with the defense counsel only in the prosecutor's presence? The answer probably should be a negative, for such an interview may require defense counsel to avoid questions that would divulge strategy. In an adversarial world, this scenario may provide the prosecution with a nonreciprocal advantage that would undermine the contest. On the other hand, adversarial justice does not give defense counsel license to trick or intimidate witnesses. A prosecutor legitimately may suggest to a witness that the witness tape the interview or ask a chaperone to be present in the event he later wishes to dispute what occurred. In the case of a witness who is afraid, the prosecutor may seek protections to keep the witness's identity from the defendant, while allowing counsel access.

175. See *supra* notes 115-24 and accompanying text.

that the information exists, or his strategic choice not to waste time and effort. Similarly, a defendant's demand for tangible assistance from the prosecution may represent a tactical effort to create an appellate record, a desire to avoid spending defense resources, or a bona fide inability to match the prosecution's own level of preparation. Directing prosecutors who must distinguish these situations to a flexible reference point like "equal adversariness" provides limited guidance—far less than would rules specifying when prosecutors must supplement defense resources. The adversarial framework supplies only one small piece of the puzzle: an ethical obligation arises at the point assistance becomes necessary for the system to follow its adversarial design.

B. Failure of the Process Itself

1. Biased and Overactive Tribunals

A major element of adversarial justice is the opportunity of both parties to present evidence and persuade a neutral, passive decision maker.¹⁷⁶ Ordinarily, flaws in the decision-making process are self-correcting. A judge who forecloses an advocate's presentation, interferes too actively in the proceedings, or acts in a biased manner is subject to appellate review. The injured party's trial advocate is in a position to object and make a sound record for appeal.¹⁷⁷ Prosecutors exposed to the same judicial conduct as defense counsel typically have no duty to act because counsel can maintain the adversarial balance on his own.

Yet occasions arise in which a defense lawyer does not cure defects in the process. He may be unaware of the fact finder's bias or inappropriate action. In other situations, defense counsel may feel so intimidated that he fails in his obligation to challenge the proceedings.

Though the first scenario presents prosecutors with a distasteful task, it poses few ethical quandaries. The professional codes already state that prosecutors, like all lawyers, must report judicial or juror bias¹⁷⁸ or out-of-court activities (for example, *ex parte* communica-

176. See *supra* notes 76-79 and accompanying text.

177. Indeed, the reporters abound with appellate claims of judicial misconduct. See, e.g., *Quercia v. United States*, 289 U.S. 466 (1933) (improper comments by trial judge); *United States v. Harding*, 335 F.2d 515 (9th Cir. 1964) (same); *Williams v. United States*, 93 F.2d 685 (9th Cir. 1937) (frequent interruptions creating impression of bias).

178. See, e.g., MODEL RULES, *supra* note 1, Rule 8.3(b) ("A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct . . . shall inform the appropriate authority"); CODE OF JUDICIAL CONDUCT Canon 2(B) (1972) [hereinafter JUDICIAL CODE] (forbidding judges to allow relationships to influence judicial conduct); see also *Commonwealth v. Stewart*, 449 Pa. 50, 295 A.2d 303 (1972) (Roberts, J., concurring) (prosecutor required to disclose juror's relationship to victim); cf. *Smith v. Phillips*, 455 U.S. 209, 216-17 (1982) (requiring showing of actual bias for reversal on appeal from prosecutor's failure to disclose possible juror bias); CODE, *supra* note 1, DR 1-103(B) (requiring lawyers to disclose judicial misconduct upon request of au-

tions).¹⁷⁹ If the prosecutor's daily interaction with the court creates an interpersonal relationship that predisposes a judge to favor the prosecutor, the codes require recusal of one or the other.¹⁸⁰

What, though, is the prosecutor's responsibility when she knows that defense counsel is aware of inappropriate judicial behavior, but has not counteracted it? Judges can persuade or intimidate lawyers into curtailing their presentations, withdrawing objections, or submitting to rulings that harm their clients. Some lawyers who challenge judicial conduct are silenced by threats of contempt.¹⁸¹ Does "doing justice" require that a prosecutor either intervene or avoid taking advantage of the judge's behavior?

Judicial intimidation ordinarily becomes part of the record and is grounds for an appellate court to excuse defense counsel's failure to raise objections. Yet the appellate remedy does not substitute for prosecutorial pursuit of justice, because the appellate court focuses on different considerations than the prosecutor. In assessing a trial judge's conduct, the appellate court looks first to the likelihood that the defendant would have won the case;¹⁸² rarely will the court be able to conclude from a paper record that, overall, judicial intimidation prevented the defendant from receiving a fair trial. Moreover, an appellate court probably would consider the intimidation relevant primarily on the narrow issue of whether counsel's failure to raise an objection regarding particular rulings precludes an appeal of the rulings.¹⁸³ Substantive

thorized investigatory tribunal).

179. See, e.g., MODEL RULES, *supra* note 1, Rule 3.5(b) (forbidding ex parte contacts); CODE, *supra* note 1, DR 7-110(B) (same); JUDICIAL CODE, *supra* note 178, Canon 3(A)(4) (same).

180. See, e.g., JUDICIAL CODE, *supra* note 178, Canon 3(C)(1)(a) (requiring recusal because of personal bias); cf. Steele, *supra* note 13, at 973 ("Violations of DR 7-110(B) are a gross affront to the delicate balances required to maintain the equilibrium of the adversary system"). At a minimum, these potential grounds for bias must be disclosed to the adversary in order to create a record on the issue of procedural fairness. See, e.g., JUDICIAL CODE, *supra* note 178, Canon 3(D) (presenting option of consent to continued participation).

To posit that the ethics of the situation are clear is not to say that prosecutors can implement the duty without difficulty. Most prosecutors develop relationships with judges, but can rationalize favorable rulings on grounds other than favoritism. The codes, however, clearly call upon both judge and lawyer to make a judgment about whether the adversarial prerequisite of a neutral and passive fact finder actually exists. See Steele, *supra* note 13, at 972 ("Frequently, the assignment of a prosecutor to one particular judge can lead to a team-member kind of rapport . . . that facilitates violations of DR 7-110").

181. Cf. *United States v. Ah Kee Eng*, 241 F.2d 157, 161 (2d Cir. 1957) ("fortunately . . . counsel continued to object" despite the judge's disparagement).

182. See *Chapman v. California*, 386 U.S. 18 (1967) (establishing the "harmless error" doctrine). See generally Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 990 (1973) (discussing problems with the doctrine).

183. See generally C. WRIGHT, 3A FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D § 856 (1982) (discussing the plain error rule); Waltz, *supra* note 99, at 307 (identifying courts that have relaxed "orthodox principles of appellate review when confronted by a record made by an ama-

grounds for reversal still must appear on the record.

At the initial trial level, the adversarial justice interpretation of the codes requires the ethical prosecutor to consider different issues. Is the contest actually the type of contest the adversary system envisions? Is the defendant being judged according to a process that satisfies the basic assumptions of a neutral and passive fact finder? If a prosecutor cannot answer affirmatively and is not persuaded that appeal will rectify the imbalance, the adversarial justice approach suggests that she may not proceed passively to convict.

The prosecutor has several courses of action. She could intentionally forfeit evidence to undo the impact of the judge's rulings or vocally oppose the intimidation. But since the prosecutor will have introduced the evidence initially (or raised the initial objection to the defendant's evidence), she probably does not want to give it up. Her limited goal in intervening is to restore defense counsel's ability to argue his points. Forfeiting evidence or opposing the judge may not "do justice" to the state's case.¹⁸⁴

Referring to the adversary system's underlying premises does not tell the prosecutor what remedial steps to take. Absent a more specific ethical mandate than to "do justice," she at best can attempt a common sense reconciliation of the procedural concerns and her role in presenting strong evidence against the accused. Recognizing adversarial imbalance as the source of her duty to act, however, does suggest approaches for the prosecutor to consider. The prosecutor may be able to rectify the imbalance by encouraging defense counsel to withstand judicial intimidation. She may be able to reinforce counsel's will by agreeing to testify on his behalf in any contempt proceeding. Although such interference with defense counsel's performance seems to contradict adversarial principles, it is reconcilable when its sole goal is to reestablish procedural fairness.

In extreme cases, the adversarial interpretation of "doing justice" always leaves a prosecutor one drastic option to assure an adversarially valid trial. With defense counsel's agreement, she can move to withdraw the charges and re prosecute at a later time, before a different judge. For reasons of economy, prosecutors naturally will disfavor this remedy. They also may resist using it for fear of offending the presiding judge. Yet the remedy can be efficient, particularly in cases in which defense objections, if made, would lead to appellate reversal and retrial. Before

teur" and have treated claims that "inexperienced counsel mishandled the trial defense" as a vehicle for granting review of asserted errors that were not properly preserved).

184. In other words, exercising these options may undermine the likelihood of meritorious conviction, draw the court's wrath on the prosecution itself, or produce a prejudicial ruling with which the prosecutor substantively disagrees.

intemperate arbiters, re prosecution may be the only way to achieve adversarial justice without undermining the prosecution's ability to make its case.

2. Decisions Based on Nonevidentiary Considerations

The most controversial area of prosecutorial ethics concerns methods of persuasion that government attorneys use to convince jurors. May a prosecutor play upon juror bias? May she raise false inferences in examining witnesses? How emphatically may a prosecutor sum up her case? Due process and equal protection principles limit prosecutorial activity in these contexts, but only haphazardly.¹⁸⁵ Because constitutional standards focus on the effect of prosecutorial conduct on verdicts, they fail to incorporate the professional codes' procedural concerns.

Adversarial justice presupposes that decision makers will reach their conclusions based solely on the evidence and arguments that the parties properly present. Various rules constrain an attorney's ability to argue facts beyond the record. The *Model Code of Professional Responsibility* forbids alluding to matter unsupported "by admissible evidence"¹⁸⁶ and forbids asserting "frivolous positions."¹⁸⁷ Courts also enforce due process to remedy arguments that courts determine, after the fact, have provoked verdicts based on "sympathy"¹⁸⁸ or "prejudice."¹⁸⁹

Although these standards, by their terms, do not differentiate among lawyers, private attorneys feel only a limited ethical obligation to prejudice their evidence or curb their rhetoric. Private counsel emphasize their client-centered duties: they must represent their clients with utmost zeal;¹⁹⁰ they must put forward the best possible claim or defense.¹⁹¹ The law even condones some defense efforts to obtain un-

185. See *infra* notes 207, 215, 223-31, 235 and accompanying text.

186. CODE, *supra* note 1, DR 7-106(C)(1); accord MODEL RULES, *supra* note 1, Rule 3.4(e).

187. CODE, *supra* note 1, EC 7-4; accord MODEL RULES, *supra* note 1, Rule 3.1.

188. Typical appeals to sympathy emphasize the loss suffered by a victim's family. See, e.g., *Lime v. State*, 479 P.2d 608, 609 (Okla. Crim. App. 1971); *Ramos v. State*, 419 S.W.2d 359, 368 (Tex. Crim. App. 1967). Limited references of this nature may be permissible under this Article's model. See *infra* note 241.

189. See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239-40 (1940) (appeal to class prejudice improper); *United States v. Stahl*, 616 F.2d 30, 31-33 (2d Cir. 1980) (references to defendant's wealth improper); *Joyner v. State*, 436 S.W.2d 141, 144 (Tex. Crim. App. 1969) (appeal to racial prejudice during period following local race riots improper).

190. See, e.g., CODE, *supra* note 1, DR 7-101; see also MODEL RULES, *supra* note 1, Rule 1.3 comment ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf").

191. See CODE, *supra* note 1, DR 7-101(A)(3) (lawyer may not "[p]rejudice or damage his client"); cf. MODEL RULES, *supra* note 1, Rule 1.3 comment (1) (lawyer is not bound to press every

supported verdicts, through jury nullification of the facts or law.¹⁹² Judicial oversight of the presentation, rather than lawyer self-restraint, provides the remedy for defense attempts to encourage decisions based on nonrecord considerations.

When a prosecutor relies on inadmissible evidence or plays to prejudice, she seeks what might be called "reverse jury nullification"—conviction when the evidence and law technically may not support that result. However, no legal rule or historical tradition supports the validity of reverse nullification.¹⁹³ This is significant because, unlike defense counsel, prosecutors have no separate client-oriented obligations that justify circumventing the law's limits on persuasion. The codes commit prosecutors to pursuing adversarial justice, which includes a verdict based exclusively on evidence that the fact finders legally may consider.

The obligation to do adversarial justice thus imposes limits on the prosecution that do not apply fully to the defense. Although prosecutors may aggressively advocate their interpretations of the evidence, they share a responsibility for assuring that the evidence itself is of the type jurors in the adversary system may rely on. Prosecutors have a greater duty than defense counsel to prejudge their evidence; prosecu-

advantage).

192. The Supreme Court emphatically has rejected the federal jury's right to set aside a trial judge's instructions on the law. See *Sparf & Hansen v. United States*, 156 U.S. 51 (1895). Although three state constitutions specifically empower juries to decide the law, see GA. CONST., art. I, § 1; IND. CONST., art. I, § 19; MD. CONST., art. 23, many state courts have rejected the notion of nullification. Scholars disagree on its appropriateness. Compare Simson, *Jury Nullification in the American System: A Skeptical View*, 54 Tex. L. Rev. 488, 490 (1976) ("jury nullification has no place, historically or functionally, in the federal jurisprudence") with Kunstler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L L. 71, 83 (1969) (jury nullification "is now a fundamental tenet of our federal jurisprudence") and Scheffin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 169 (1972) (the right to instruction authorizing nullification is "grounded upon the role of the jury in a constitutional democracy").

Nevertheless, jurors unquestionably have the power to nullify, see Simson, *supra*, at 488, and courts have let defense counsel encourage juries to exercise the power. See, e.g., *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969) (reversing trial judge's use of special verdict forms designed to enforce jury's adherence to the law); *United States ex rel. McCann v. Adams*, 126 F.2d 774, 775-76 (2d Cir.) (discussing reasons for jury's right to reject the law), *rev'd on other grounds*, 317 U.S. 269 (1942); see also authorities discussed in Scheffin, *supra*, at 199-201. In effect, courts recognize and allow the nullification defense, but refuse to tell the jury that it is appropriate. See *United States v. Boardman*, 419 F.2d 110, 116 (1st Cir. 1969) (a jury has the power to nullify, but the trial court was correct to instruct the jury on its duty to follow the law); *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969) ("We recognize . . . the undisputed power of the jury to acquit, even if its verdict is contrary to the law"). For an excellent discussion of jury nullification and an explanation of how and why the tradition persists despite the case law forbidding it, see M. KADISH & S. KADISH, *DISCRETION TO DISOBEY* 50-56 (1973).

193. See, e.g., *Rogers v. State*, 111 Tex. Crim. 419, 421-23, 13 S.W.2d 116, 118 (Crim. App. 1929) (forbidding prosecutor to urge the jury to reject a legal defense despite its support in the evidence); *Fleming v. Commonwealth*, 224 Ky. 160, 161-63, 5 S.W.2d 899, 899-900 (1928) (same).

tors have no valid reason to encourage courts to let them rely on un-introduced facts or play to juror prejudice.¹⁹⁴ To analyze the meaning of this one-sided obligation in practice, the following discussion considers examples from three different stages of trial.

a. *The Jury Selection Process*

In the course of jury selection, the prosecutor seeks to improve her chances of winning by planting the seeds of her trial theory in the prospective jurors' minds and by mentioning evidence that may be ruled inadmissible.

Does the prosecutor in the foregoing scenario satisfy the duty to do justice? Private lawyers typically manipulate the jury selection process for purposes other than picking an impartial, representative jury. They use voir dire to sensitize jurors to their arguments, present evidence at an early stage, and impanel strong-willed jurors who bring with them favorable biases. The hypothetical squarely poses the question of whether prosecutors may respond in kind.

A few model codes proscribe particular methods of jury selection, regardless of which side attempts to use them. The ABA Project on Standards for Criminal Justice, for example, instructs both prosecution and defense not to "intentionally use the voir dire to present factual matter which the [lawyer] knows will not be admissible at trial or to argue the [lawyer's] case to the jury."¹⁹⁵ The *Model Rules of Professional Conduct* and *Model Code of Professional Responsibility* leave control of jury selection to judicial discretion, with one notable exception: neither lawyer may "state or allude to any matter that he has no reasonable belief is relevant to the case or that will not be supported by admissible evidence."¹⁹⁶ Beyond that caveat, the codes typically proscribe only selection procedures that are "prohibited by law"¹⁹⁷ or designed to "harass" the panel.¹⁹⁸ As an ethical matter, defense counsel are governed primarily by the requirement of zealous representation of their client and prosecutors by the amorphous "do justice" concept.¹⁹⁹

In light of the codes' limited ethical prohibitions, if the governing

194. Largely for this reason, most courts have rejected the notion that improper argument by defense counsel invites a prosecutorial response in kind. *See, e.g.*, *United States v. Rios*, 611 F.2d 1335, 1343 (10th Cir. 1979); *Pool v. Superior Court*, 139 Ariz. 98, 103, 677 P.2d 261, 266 (1984); *cf. United States v. Perry*, 643 F.2d 38, 51 (2d Cir. 1981) (government's response to attack on credibility of government's case was "understandable, if not laudable").

195. ABA STANDARDS, *supra* note 131, Standards 3-5.3(c), 4-7.2(c).

196. CODE, *supra* note 1, DR 7-106(C); *accord* MODEL RULES, *supra* note 1, Rule 3.4(e).

197. *See, e.g.*, MODEL RULES, *supra* note 1, Rule 3.5(a).

198. CODE, *supra* note 1, DR 7-108(D).

199. *See* J. DOUGLASS, *supra* note 6, at 309 ("By condemning only the interjection of impermissible evidence . . . the Commentary [to the ABA Standards] appears to acknowledge that both counsel will attempt to influence the jury during voir dire").

court procedures let lawyers argue trial theory in voir dire and arguing will help the defendant's case, defense counsel will use the tactic.²⁰⁰ Adversarial justice principles permit prosecutors to compete—to advocate as zealously as the defense. Indeed, when a defense lawyer introduces argument early, the system actually may depend on the prosecutor to counteract it. According to adversary theory, the fact finder should be kept aware of conflicting theories at each stage of the proceeding.²⁰¹

Now consider the next step: May a prosecutor ethically mention evidence in voir dire that she knows may be ruled inadmissible at trial?²⁰² Under the code provisions applicable to all lawyers, the only issue seems to be whether a lawyer has a “reasonable belief” that his statement can be “supported by admissible evidence.”²⁰³ Private counsel who can make a good faith argument for admissibility owe it to their clients to let the judge determine and remedy any overstatement.²⁰⁴ Under the adversarial interpretation of “doing justice,” however, the prosecutor's ability to make a plausible argument for admissibility is insufficient.

The prosecutor must reconcile conflicting roles. As an advocate furthering competitive fact-finding, she must try to make her strongest legitimate presentation. As a “minister” of the adversary system, she must assure that defendants are tried in accordance with the system's premise that jurors rely only on facts in the record. Whether or not the prosecutor can find a good faith evidentiary argument, she knows a questionable voir dire statement may detract from adversarially appropriate decision making if it is later ruled inadmissible.²⁰⁵ The “do justice” requirement prevents her from simply applying the literal rules, pushing her presentation to the limits, and leaving it to court and adversary to worry about the presentation's effects.

200. Usually, courts require lawyers to accomplish the sensitizing process in the course of framing otherwise valid voir dire questions. In other words, lawyers must speak in terms that at least nominally relate to gathering information for selecting or disqualifying prospective jurors.

201. See *supra* notes 37-40 and accompanying text.

202. Of course, in doing so the prosecutor risks a subsequent mistrial or reversal. But as a legal matter, the mere fact that jurors hear prejudicial evidence often does not rise to the level of error requiring retrial.

203. See *supra* note 196 and accompanying text.

204. The codes require good faith in recognition of the fact that all lawyers have some obligation to constrain behavior that is damaging to the system. “The jurors must determine the issues upon the evidence. Counsel's address should help them do this, not tend to lead them astray.” CODE, *supra* note 1, DR 7-106(C) n.81 (quoting *Cherry Creek Nat'l Bank v. Fidelity & Cas. Co.*, 207 A.D. 787, 790-91, 202 N.Y.S. 611, 614 (App. Div. 1924)). By not requiring private lawyers to determine admissibility, however, the codes again make paramount the obligation to advance client interests zealously.

205. See D. LUBAN, *supra* note 29, at 16 (noting that “the problem [with good faith requirements] is that the notion of ‘good faith’ is itself open to instrumentalist manipulation”).

In some respects, "doing justice" directs the prosecutor in choosing among her options. It points to a balance that depends partly on subjective factors. If a prosecutor refers to evidence for the primary purpose of bringing inadmissible information to the jury's attention, she seeks to undermine the adversary system's mechanism for producing appropriate results. This conduct would directly violate her duty under an adversarial approach to the ethical rule.

Even if the prosecutor has the pure motive of selecting and persuading jurors in the most effective legitimate way, the "do justice" mandate obliges her to consider the effect her statement will have on the trial's decision-making process. She must recognize that, if the court later rejects the underlying evidence, the negative impact on the jurors' ability to decide properly cannot be undone. The adversarial interpretation of justice at least suggests baseline considerations: the prosecutor must determine whether the risk of infecting adversarial decision making can be avoided and, if not, whether the benefits of making the *voir dire* statements justify the risk to the system's proper operation.

It is at this point that the prosecutor may need more guidance than even an adversarial interpretation of justice provides. To minimize her dilemma, the prosecutor probably should avail herself of reasonable opportunities to seek advance rulings on the admissibility of dubious evidence, even if such motions come at a cost. Yet tactical reasons often prevent motions *in limine*, and judges may refuse to rule.²⁰⁶ The prosecutor then is left to make a two-fold prejudgment of her own. She must assess the likelihood that the evidence will be received and the importance to her presentation of introducing it at an early stage.

When she weighs the results, the ethical response may become evident: she should not risk infecting the process if the evidence underlying her statement is unlikely to be received. If, however, the prosecutor believes the evidence will be admitted, her reaction cannot be automatic. The adversarial justice approach requires her to look hard at the actual value of mentioning it early on. In the difficult case, notions of adversarial justice simply offer the prosecutor a cautionary guide: if she can avoid endangering the fact-finding process without undermining her advocacy, her duty to the system requires that she forego even potentially justifiable comments.

206. The prosecutor may hesitate to file a motion *in limine* because doing so attracts attention to the questionable piece of evidence and may foster an objection that otherwise might not surface.

b. *Witness Examination*

Consider now the prosecutor's duty to preserve appropriate fact-finding at the witness examination stage and, in particular, the extent to which prosecutors may seek to mislead the jury. Monroe Freedman has posited that defense counsel must try to win at virtually all cost, while prosecutors should neither rely on witnesses whose information they question nor cast doubt on defense witnesses they believe to be truthful.²⁰⁷ Is the adversarial justice model in accord?

The codes do not seem to adopt Freedman's unilateral approach.²⁰⁸ Lawyers may not "knowingly" offer "false" information.²⁰⁹ In some instances, lawyers are forbidden to allude to matter "that will not be supported by admissible evidence."²¹⁰ But only the ABA *Standards Relating to the Administration of Justice* draw a specific distinction between the prosecution and defense in witness examination.²¹¹ The *Standards* (and their distinctions) were not incorporated into the *Model Rules*.²¹²

207. See generally M. FREEDMAN, *supra* note 115, at 79-89; Freedman, *supra* note 38, at 1033-35. See also Braun, *Ethics in Criminal Cases: A Response*, 55 GEO. L.J. 1048, 1049-58 (1967) (responding to Freedman's position); Edwards, *supra* note 45, at 533 ("In cross-examining a defense witness whom he knows to be telling the truth, the prosecutor should not attempt to use techniques that make it appear that the witness is lying, since to do so would mislead the court"); Schwartz, *supra* note 135, at 1140-43 (discussing justifications for allowing ordinary lawyers to impeach truthful witnesses); cf. C. WOLFRAM, *supra* note 14, § 13.10.4, at 766 (prosecutor may "not employ forensic gambits whose use by other lawyers may be tolerated").

208. The National District Attorneys Association's standards do forbid asking questions that "impl[y] the existence of a factual predicate which the prosecution knows to be untrue." NDAA STANDARDS, *supra* note 131, Standard 17.6(B).

On the reasoning that the form of some questioning implies personal knowledge of the prosecutor that will carry weight with the jury, some courts have reversed convictions for improper cross-examination. See, e.g., Pool v. Superior Court, 139 Ariz. 98, 102, 677 P.2d 261, 267 n.7 (1984) (asking "you're pretty much a cool talker, aren't you?"); People v. Shapiro, 50 N.Y.2d 747, 757-62, 409 N.E.2d 897, 903-06, 431 N.Y.S.2d 422, 427-31 (1980) (threatening the witness with a charge of perjury); People v. Nunez, 74 A.D.2d 805-06, 426 N.Y.S.2d 2, 3-4 (App. Div. 1980) (implying that the witness was instructed to lie).

209. See MODEL RULES, *supra* note 1, Rule 3.3(a)(4); CODE, *supra* note 1, DR 7-102(A); ABA STANDARDS, *supra* note 131, Standards 3-5.6(a), 4-7.5.

210. CODE, *supra* note 1, DR 7-106(C)(1).

211. The ABA *Standards* instruct prosecutors not to "use the power of cross-examination to discredit or undermine a witness if the prosecutor knows the witness is testifying truthfully." ABA STANDARDS, *supra* note 131, Standard 3-5.7(b). Compare the defense standard, which states, "A lawyer's belief or knowledge that the witness is telling the truth does not preclude cross-examination, but should, if possible, be taken into consideration by counsel in conducting the cross-examination." *Id.* Standard 4-7.6(b).

212. See Saltzburg, *supra* note 42, at 651, 675-76 (suggesting that defense counsel should be able to cast doubt on a probably truthful prosecution witness, and questioning whether prosecutors should be treated differently than the defense); cf. Civiletti, *supra* note 64, at 18 (noting that codes treat prosecutors and defense attorneys equally, but that in practice prosecutors should be more restrained in making truthful witnesses look untruthful).

Interpreting the "do justice" rule through the lens of adversarial premises supports Freedman's double standard, but only in part. To the extent the rule reaffirms the adversary system, it suggests that prosecutors need not act as judges of their witness's testimony unless they are sure the witness is falsifying facts; nor should prosecutors treat a defense witness gingerly simply because they sense the witness is trustworthy.²¹³ The prosecution's function in illuminating truth is as a participant in a point-counterpoint process of advocacy. Theoretically, questionable prosecution witnesses will falter upon cross-examination by the defense. Similarly, with defense counsel's help, truthful defense witnesses can withstand cross-examination that seeks to distort their evidence. As long as a prosecutor pursues a line of examination in good faith, the adversarial model would let her sublimate her personal belief concerning the strength of the witness's testimony to her role as advocate.²¹⁴

At the same time, the adversarial interpretation of "doing justice" reinforces Freedman's position in the more extreme scenario: prosecutors should not rely on information they know to be false or pursue questions that suggest false factual predicates. Evidentiary and ethical rules render the underlying data inadmissible, whether presented by the prosecution or defense.²¹⁵ Even when a defense lawyer circumvents the evidentiary/ethical guidelines because of his client-centered role, the prosecutor must honor the spirit of the rules. As a "minister," she is responsible for safeguarding the adversary system's fact-finding process; she must assure that jurors rely only on properly introduced evidence. Regardless of defense counsel's conduct, the prosecutor's one-sided duty to do justice creates an absolute prohibition against supplying in-

213. As this Article discusses, a prosecutor should not discredit a witness by suggesting facts that she knows are false. *See infra* notes 215-16 and accompanying text. However, she should not hesitate to test the accuracy of the witness's assertions or credibility and leave the task of judging the value of the testimony to the jury.

214. I do not take the position that this is the best resolution of the witness examination issue, merely that this resolution is what the codes' underlying theory suggests. To interpret "do justice" as forcing prosecutors to evaluate the strength of their evidence and to adjust their presentations accordingly is inconsistent with the thrust of the codes. *See supra* notes 25-30 and accompanying text. At the same time, I acknowledge that the drafters properly might conclude that prosecutors routinely should prejudge their witness examinations, and that the drafters reasonably could adopt specific rules to that effect. *See infra* notes 271-72 and accompanying text; *cf.* Luban, *supra* note 26, at 1031 (noting that, even under the professional codes, all lawyers retain discretion to choose tactics less "brutal" than making a truthful witness look false).

215. *See* MODEL RULES, *supra* note 1, Rule 3.3(a)(1), (4); CODE, *supra* note 1, DR 7-102(A)(4), (5); *see also* Miller v. Pate, 386 U.S. 1, 7 (1967) (prosecutor's use of false evidence violates due process); Napue v. Illinois, 360 U.S. 264, 269 (1959) (holding that prosecutor's failure to correct witness's false testimony denied the defendant due process of law); Alcorn v. Texas, 355 U.S. 28, 29-31 (1957) (prosecutor committed error in allowing witness to suggest false facts on direct examination).

formation jurors should not consider.²¹⁶

This Article takes no position on whether code drafters should adopt Freedman's whole approach or on what constitutes proper conduct by the defense. The analysis simply suggests that one cannot read Freedman's full theory into the prevailing "do justice" provisions. In the ordinary case, the codes' thrust is to let prosecutors act as zealous advocates in offering questionable witnesses and discrediting the opponent's witnesses. Except in extreme situations, the codes let prosecutors assume that competitive trials will adequately ferret out truth.²¹⁷ Only in situations in which fair adversarial process is itself at risk do the "do justice" provisions impose the double standard for conduct that Freedman advocates across-the-board.²¹⁸

c. *Argument*

The area of prosecutorial conduct that has received the most attention is argument in opening and closing statements.²¹⁹ Courts enforcing

216. Murray Schwartz reaches similar conclusions through a different analysis. In his view, prosecutors, like defense counsel, are in theory entitled to impeach truthful witnesses in order to probe and expose their "level of certainty." However, the prosecutor becomes burdened with additional responsibility when she *knows* the witness is truthful because this knowledge triggers her independent duty to disclose exculpatory evidence. See Schwartz, *supra* note 135, at 1144.

217. Thus, ordinarily, prosecutors need not themselves decide the strength of the evidence or prejudge substantive rulings regarding witness examination. See Uviller, *supra* note 19, at 1159 (when the prosecutor "is honestly unable to judge where the truth of the matter lies, I see no flaw in the conduct of the prosecutor who fairly lays the matter before the judge or jury"); cf. *Mills v. Scully*, 653 F. Supp. 885 (S.D.N.Y. 1987) (prosecutor's reliance on false testimony mitigated by defense counsel's knowledge and ability to prove falsity).

This adversarial approach to prosecutions is at odds with the view of some judges. In *People v. Ellis*, 94 A.D.2d 652, 652-53, 462 N.Y.S.2d 212, 214 (App. Div. 1983), for example, the court relied upon the codes' "do justice" concept to hold that a prosecutor should have refrained voluntarily from impeaching the defendant with remote, but admissible, convictions. The court, however, offered neither an analysis of why pursuing the impeachment constituted a failure of "justice" nor an explanation of other types of examination that ethical prosecutors should forgo.

218. In one aspect of witness examination, the mandate clearly supports a double standard. It imposes on prosecutors a unique responsibility to second-guess judges on examination procedures. A judge who incorrectly restricts defense counsel's direct examination may give the prosecution an unfair advantage. In effect, the judge may shape the trial to put a fundamental premise of adversarial justice—that the parties have an equal opportunity to present the relevant facts—at risk. As discussed earlier, such a breakdown in the adversarial process may require the ethical prosecutor to take remedial steps. See *supra* notes 176-79 and accompanying text.

The prosecutor's options in this scenario are many. She can suggest to the court that counsel be allowed to proceed. She can avoid pressing the advantage by not objecting on relevance grounds to rephrased questions. She herself may open the door to the restricted line of questioning, thus allowing defense counsel to proceed. At a minimum, she should assist the defense counsel in making a record for appeal.

219. See generally Alschuler, *supra* note 6, at 629, 644-77 (discussing remedies for prosecutorial misconduct in argument); Balske, *Prosecutorial Misconduct During Closing Argument: The Arts of Knowing When and How to Object and of Avoiding the "Invited Response" Doctrine*, 37 MERCER L. REV. 1033 (1986) (discussing when vociferous defense argument invites

due process standards frequently have looked at cases in which prosecutors emphasize the heinousness of the crime, vilify the defendant, evoke juror sympathy for the victims, and appeal to prejudice. Despite numerous due process decisions and abundant commentary, the resulting case law offers few standards for proper prosecutorial argument.²²⁰ Appellate courts have assessed trials on a case-by-case basis, attempting to determine whether the jurors could have reached a fair or correct result.²²¹ Prosecutors are left to govern their own conduct, with little to guide them except a generalized fear of reversal for "overargument" and a commitment to satisfying their ethical obligation to do justice.²²²

Some standards governing argument are clear: like other lawyers, prosecutors may argue only facts in evidence;²²³ they may not express their personal opinions;²²⁴ they may not comment on a defendant's fail-

prosecutorial response in kind); Crump, *The Function and Limits of Prosecution Jury Argument*, 28 Sw. L.J. 505 (1974) (arguing for rules governing the content of argument); Genson & Martin, *supra* note 13, at 39 (calling for enhanced policing of rules against prosecutorial misconduct in argument); Vess, *supra* note 54, at 22 (surveying limits on prosecutorial summations).

220. Albert Alschuler has noted the inconsistency present in judicial decisions governing prosecutorial arguments that categorize the defendant in colorful terms:

It has been held reversible error to call the defendant . . . a "cleap, scaly, slimy crook," a "leech of society," a user of "Al Capone tactics of intimidation," and a "junkie, rat and 'sculptor' with a knife." Courts have, however, found no error in cases in which the defendant was called "animalistic," "lowdown, degenerate and filthy," "a mad dog," "a rattlesnake," "a traf-ficker in human misery," "a blackhearted traitor," "a hired gunfighter," "a creature of the jungle," "a type of worm," or "a brute, a beast, an animal, a mad dog who does not deserve to live."

Alschuler, *supra* note 6, at 642 (footnotes omitted). Compare, e.g., *People v. Washington*, 71 Cal. 2d 1061, 458 P.2d 479, 492, 80 Cal. Rptr. 567 (1969) (commenting on the brutality of the crime) and *People v. Nemke*, 46 Ill. 2d 49, 59, 263 N.E.2d 97, 102 (1970) (same) with *Perez v. State*, 466 S.W.2d 283, 284 (Tex. Crim. App. 1971) (improper to describe crime as the "worst murder" the prosecutor ever saw).

221. The underlying fear is that jurors fired by prejudice or emotion will convict the defendant because he personifies the evil discussed by the prosecutor, regardless of whether this defendant actually was involved in the crime.

222. See Note, *Prosecutorial Misconduct: The Limitations upon the Prosecutor's Role As an Advocate*, 14 SUFFOLK L. REV. 1095, 1135 (1980) ("despite efforts by the courts, the American Bar Association, and commentators to define proper and improper [prosecutorial argument], the guidelines available to the practicing attorney are either vague or inadequate").

223. See MODEL RULES, *supra* note 1, Rule 3.4(e) (stating that a lawyer shall not allude to matter that is irrelevant or unsupported by admissible evidence); CODE, *supra* note 1, DR 7-106(C)(1) (same); see also authorities cited in Vess, *supra* note 54, at 28 nn.58-60, 29 nn.65-70.

224. See MODEL RULES, *supra* note 1, Rule 3.4(e); CODE, *supra* note 1, DR 7-106(C)(4); see also Note, *Expression of Opinion by Prosecuting Attorney to Jury*, 25 MICH. L. REV. 203 (1926). As applied to prosecutors, these provisions can be justified on the basis of adversarial justice. By expressing a personal opinion, the prosecutor encourages jurors to rely on her word rather than on their own neutral judgment. *Brooks v. Kemp*, 762 F.2d 1383, 1410 (11th Cir. 1985), *vacated*, 478 U.S. 1016 (1986); see also *State v. Bujnowski*, 130 N.H. 1, 4-5, 532 A.2d 1385, 1387 (1987) (prosecutor approaches jury "with the inevitable asset of tremendous credibility"); *People v. Castelo*, 24 A.D.2d 827, 827, 264 N.Y.S.2d 136, 137 (App. Div. 1965) (prosecutor "convinced" that defendant was guilty); *Browder v. State*, 639 P.2d 889, 895 (Wyo. 1982) (prosecutor's "respect" in the commu-

ure to testify or present a defense.²²⁵ Beyond those caveats, neither the language of the codes nor the judicial decisions define how vociferously prosecutors may argue or to what extent they may appeal to the sympathies and common experience of the jurors.²²⁶ For every commentator who concludes that prosecutors commit misconduct by appealing to emotion, another can be found who suggests that arousing jurors is the role of summation.²²⁷

To understand how the adversarial justice framework defines more concrete ethical limits, we again must focus on specific cases. Consider the following situation:

In a prosecution involving a brutal murder, the district attorney introduces bloody

nity may transform trial into contest between prosecutor and defense counsel's credibility). Alternatively, the prosecutor suggests that she knows additional relevant facts which she was not permitted to introduce. *United States v. Modica*, 663 F.2d 1173, 1179 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982); *see also* *People v. Perez*, 58 Cal. 2d 229, 241-42, 373 P.2d 617, 626, 23 Cal. Rptr. 569, 576 (1962) (en banc) (expressing personal belief regarding witness's credibility); *State v. Reilly*, 446 A.2d 1125, 1128-29 (Me. 1982) (same); *People v. Whalen*, 59 N.Y.2d 273, 280-81, 451 N.E.2d 212, 215-16, 464 N.Y.S.2d 454, 456 (1983) (same); *cf.* *People v. Ivey*, 83 A.D.2d 788, 789, 443 N.Y.S.2d 452, 453-54 (App. Div. 1981) (reversal for commenting on court's failure to admit important evidence).

225. *See, e.g.*, *Griffin v. California*, 380 U.S. 609, 613-15 (1965); *United States v. Perry*, 643 F.2d 38, 51 (2d Cir. 1981), *cert. denied*, 454 U.S. 835 (1981); *United States v. Rodriguez*, 627 F.2d 110, 112-13 (7th Cir. 1980); *Hawk v. State*, 482 S.W.2d 183, 184 (Tex. Crim. App. 1972). *See generally* Vess, *supra* note 54, at 35-38 and authorities cited therein.

226. *Cf.* J. DOUGLASS, *supra* note 6, at 406 ("The NDAA standards on argument content is pretty plain vanilla, stating only 'Counsel's argument to the jury should be characterized by fairness, accuracy, rationality, and a reliance upon the evidence'"). The courts generally recognize that prosecutors may illustrate or dramatize their points by referring "to historical facts, public personalities, principles of divine law, biblical teachings, or prominent current events in the community or the nation." Vess, *supra* note 54, at 30 & n.76 (footnote omitted).

227. For example, in a seminal article on prosecutorial argument, Albert Alschuler suggests that the prosecutor "should not think of oratory as part of his job at all. . . . He should . . . strive for more 'Chesterfieldian politeness.' The prosecutor should forego not only appeals to prejudice, but any deliberate appeal to emotion." Alschuler, *supra* note 6, at 636. In contrast, commentators associated with prosecuting offices would afford more leeway for forceful argument. *See, e.g.*, Corrigan, *supra* note 58, at 542 ("Virtually all of prosecutorial ethics can be reduced to a single precept: 'Prosecute only those you believe to be guilty and press that prosecution forcefully, according to the rules'"); Seymour, *supra* note 54, at 312-13. Most commentators agree that judicial standards defining the limits of oratorical flourish are lacking. *See* Alschuler, *supra* note 6, at 634; Note, *Criminal Trial Practice—Prosecutor's Closing Argument—Pleas for Law Enforcement and Proper Inferences from the Evidence*, 43 Mo. L. REV. 342, 347 & nn.30-39 (1978) ("courts are continuously handing down inconsistent opinions regarding the reasonableness of similar statements").

The model codes conflict as well. The NDAA Standards, for example, suggest that all closing arguments "should be characterized by fairness, accuracy, rationality, and a reliance upon the evidence." NDAA STANDARDS, *supra* note 131, Standard 17.17(A) (emphasis added). The ABA Standards, in contrast, allow prosecutors to argue "all reasonable inferences from [the] evidence" and "matters of common public knowledge based on ordinary human experience." ABA STANDARDS, *supra* note 131, Standards 3-5.8, 3-5.9 (emphasis added). But the ABA Standards also forbid "arguments calculated to inflame the passions . . . of the jury." *Id.* Standard 3-5.8 (emphasis added).

photographs, emphasizes multiple wounds inflicted upon the victim, and describes the alleged murderer as a butcher coolly slaughtering an innocent lamb.

Some courts might determine that this summation violates due process because it "is unfair" or "evokes too much sympathy." Yet it is difficult to see how the prosecutor has acted unprofessionally. As long as defense counsel can point out that her remarks have little to do with the identity of the murderer, the prosecutor has not undermined adversarial justice. In the adversary system, a defendant's remedy for a vociferous closing argument by the prosecution is an effective summation of his own.²²⁸ Indeed, it would undermine truth-seeking to let defense lawyers stimulate a jury, while confining prosecutors to a dry, rational recitation of the facts.²²⁹ Juror sympathy is consistent with adversarial justice *as long as* that sympathy derives from the evidence.

The helter-skelter due process and prosecutorial misconduct decisions generally fail to recognize the distinction between sympathy stemming from the evidence and that which does not,²³⁰ the courts prefer to assess the general fairness of the whole trial, after the fact.²³¹ But the distinction is key for prosecutors who, planning arguments *ex ante*, strive to satisfy their obligation to the codes. It means that prosecutors ethically may not seek conviction based on sympathy or prejudice that jurors bring to the opening of court. On the other hand, arguments emphasizing victim pain or the seriousness of particular crimes may stem from the record and, if so, can fit legitimately within the contours of the adversarial scheme. To say that a prosecutor inflamed the jury's sympathy may mean only that she argued effectively, with verve and zeal. She cannot be deemed unprofessional on that ground alone.

Under the adversarial approach, the propriety of vociferous prosecutorial argument thus depends not on the jury's reaction, but rather on the reason for the reaction. The "do justice" rule, like due

228. In most jurisdictions, prosecutors make the final summation or have an opportunity for rebuttal. The ability of defense counsel to counteract specific emotional arguments thus may depend, in part, on counsel's ability to predict the argument. In extremely rare cases in which the defense clearly needs an opportunity to rebut, the court may allow it.

229. See, e.g., *United States v. Wexler*, 79 F.2d 526, 530 (2d Cir. 1935) (Hand, J.) ("truth is not likely to emerge, if the prosecution is confined to such detached exposition as would be appropriate in a lecture, while the defense is allowed those appeals in misericordiam which long custom has come to sanction"), *cert. denied*, 297 U.S. 703 (1936).

230. But see *Hance v. Zant*, 696 F.2d 940, 951 (11th Cir. 1983) (inflammatory evidence and argument, including pictures of body and fragments of corpse, are admissible because they are rooted in the facts of case), *cert. denied*, 463 U.S. 1210 (1983); see also Vess, *supra* note 54, at 27 & n.48 ("The general rule . . . is that . . . comment[ing] [on the evidence] is proper if it is either proved by direct evidence or is a fair and reasonable inference from the facts and circumstances proved and has bearing on an issue").

231. Presumably, in the hypothetical case, some courts would hold the argument unconstitutional, while others would not. For obvious reasons, such after-the-fact decision making causes prosecutors extreme difficulty in determining what they legally can say.

process decisions, forbids ploys resting on sympathy or prejudice, but only if those emotions are extrajudicial—not rooted in the admissible facts of the case.²³² Similarly, “doing justice” requires that prosecutorial appeals to common experience relate to the record.²³³ Prosecutors charged with maintaining adversarial justice justifiably can be expected to confine their zeal to the body of knowledge that the decision maker permissibly may consider.

The adversarial approach does not always answer whether a particular argument is appropriate, but a few more examples will illustrate how it at least provides guidance. Consider an extreme case:

In prosecuting a black defendant accused of raping a white woman, the prosecutor plans—subtly—to appeal to any racial prejudice the jurors may have.²³⁴

Here the prosecutor, in effect, seeks a conviction based on factors irrelevant to the alleged crime. One can look at her goal in two ways. On one view, the prosecutor wants the jury to rely on information that is not in the record. On another, she hopes to convert the jurors into biased fact finders who are unable to sift the arguments in a neutral way. Under either characterization, the prosecutor undermines a key adversarial premise—in direct contravention of her ethical obligation to uphold the system.²³⁵

232. After compiling the cases, one commentator has noted that the only improper argument is one the “sole effect” of which is to inflame passion or arouse prejudice and thereby to bring about a conviction based on factors other than the evidence. In his view, “[t]he questions for review are to what extent, for what reasons, and with what effect were the arguments advanced.” Vess, *supra* note 54, at 50 & nn.229-31.

233. A few courts have followed this approach in deciding whether a prosecutor’s argument violates constitutional due process standards. See, e.g., *Schmidtberger v. United States*, 129 F.2d 390, 392 (8th Cir. 1942) (prosecutor may use “invective language, if it accords with the evidence”); *State v. Nichelsen*, 546 S.W.2d 539, 543 (Mo. Ct. App. 1977) (if the prosecutor “stays within the confines of the evidence and its reasonable inferences therefrom, the argument is legitimate”); see also *State v. Feger*, 340 S.W.2d 716, 728 (Mo. 1960) (same).

234. Cf. *McFarland v. Smith*, 611 F.2d 414, 419 (2d Cir. 1979) (reversal on due process grounds for “illogical” reference to race that risked “stirring racially prejudiced attitudes”); *United States v. Horne*, 423 F.2d 630, 631-32 (9th Cir. 1970) (racial argument improper); *Dawson v. State*, 734 P.2d 221, 223 (Nev. 1987) (same); *People v. DePasquale*, 54 Misc. 2d 91, 91-92, 281 N.Y.S.2d 963, 963-64 (Sup. Ct. 1967) (reference to race, nationality, or religion should be avoided when possible).

235. An issue separate from appeals to bias is the question of whether a prosecutor ethically may seek to impanel a racially or religiously imbalanced jury in the hope that it will be biased. The ethical codes are silent on the subject. The United States Supreme Court has held that “the Equal Protection Clause forbids the prosecutor to challenge potential jurors *solely* on account of their race.” *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (emphasis added); see also *People v. Payne*, 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (App. Ct. 1982) (illustrating pre-*Batson* theory focusing on need to avoid the appearance of discriminatory intent). However, the Court did acknowledge the prosecutor’s right to justify exclusions based on a “neutral explanation related to the particular case.” *Batson*, 476 U.S. at 98. Thus, constitutional parameters do not define fully those occasions in which a prosecutor may take jurors’ potential biases into account in seeking favorable panelists.

Purely impartial jurors cannot exist. The whole panel brings with them experiences and atti-

Now consider a scenario in which the solution is less clear.

A prosecutor believes that a defendant accused of selling drugs is a menace to society and wants to evoke the same belief in the jury. She considers two possible lines of argument. In the first, she would present a strong, emotional discussion of the dangers of drug sales on the streets and in the schools. Alternatively, she would offer a vivid and emotional description of the likely effect this defendant's sale would have on persons like the buyer in the charged offense.²³⁶

Both versions are designed to create a setting prejudicial to the defendant's claim of innocence. But in the first, the prosecutor would encourage the jury to convict the defendant of crimes with which he has not been charged—to bear responsibility for the societal drug problem. In other words, the prosecutor would try to persuade the jury to convict based on facts that were not introduced and that, in essence, have little to do with the case.

In contrast, the images on which the second summation relies are rooted in the evidence, the crime charged (selling drugs to this victim), and its immediate effects.²³⁷ As an evidentiary matter, courts always

tudes that will favor one side or the other. Like defense counsel, the prosecutor's job is to select the most favorable and eliminate the most unsympathetic. Yet at some level of bias, a juror can no longer be viewed as a "neutral fact finder"—can no longer be expected to reach a decision constrained by the evidence. The prosecutor's duty to adversarial justice means the prosecutor should avoid impanelling jurors who carry this baggage.

Suppose that a prosecutor in a racially divided community regularly challenges young male black jurors. If the prosecutor uses this juror profile only in cases involving black defendants, on a theory that whites are more willing to convict blacks, then she seeks a less-than-neutral jury that will look beyond the facts. On the other hand, a prosecutor who believes young black males are defense-oriented and who applies the profile even in cases involving white defendants acts like the typical advocate. She does not press an advantage arising from a fault in the system. She merely selects a fact finder who fits within a large pool of persons with acceptable "neutral" predilections. As an ethical (not constitutional) matter, the adversarial justice model would allow the prosecutor to solicit jurors who maximize the chances of victory as long as the basic adversarial premises are intact.

236. I say "like the buyer" because the buyer actually may be an undercover agent. Under my approach, the prosecutor would be within her rights to develop an argument around the state of facts as the defendant perceived them to be. Thus, if the defendant sold drugs to someone whom he believed to be a child in a depressed ghetto, but who actually was a police agent from a middle-class neighborhood, the prosecutor should be able to discuss the hypothetical victim.

237. The Court of Appeals for the Eleventh Circuit followed similar reasoning in upholding a prosecutor's emotional appeal for the death penalty because the defendant, if alive, could kill someone else's daughter. The Court held that in another context the statements would violate due process, but here were "directly relevant to the consideration of whether [the defendant] would remain a threat to society." *Brooks v. Kemp*, 762 F.2d 1383, 1411 (11th Cir. 1985), *vacated*, 478 U.S. 1016 (1987). *But cf.* *Commonwealth v. Smith*, 478 Pa. 76, 81, 385 A.2d 1320, 1323 (1978) (improper to describe the defendant as "vicious, desperate criminal who would kill for a nickel").

Courts differ on the degree to which prosecutors may extrapolate from a specific crime to a general crime problem in the locality. In *People v. Williams*, 65 Mich. App. 753, 755, 238 N.W.2d 186, 187 (Ct. App. 1975), the court reversed a case in which a prosecutor argued that the jury had an "opportunity to [a]ffect the drug traffic in this city." Likewise, in *Commonwealth v. Cherry*, 474 Pa. 295, 378 A.2d 800, 805 (1977), the court reversed a case in which the prosecution told the jury that they should send a message to the community that shootings would not be tolerated. In con-

have permitted some discussion of the nature of the crime charged, even though it is only tangentially relevant to the issue of guilt.²³⁸ The hypothetical prosecutor's emphasis on this crime's seriousness and its effect on victims may reduce the defendant's ability to claim nonparticipation, but would not totally undermine it by diverting the jury's focus from this case. Defense counsel remains in a fair position to counteract the jury's tendency to convict on less-than-solid evidence.

The more difficult case appears at the margin. Assume the following scenario:

In a case involving an alleged serial killer, the prosecutor realizes that the evidence connecting the defendant to the crimes is weak. To bolster her argument, she plans to equate the defendant to the worst of history's killers, including Hitler.

This scenario bears some resemblance to the two drug hypotheticals. On the surface, the prosecutor merely plans to emphasize the heinousness of the charged offense through oratorical flourish. The jury probably can recognize that the reference to Hitler's crimes is a metaphor rather than an example of conduct for which the defendant is responsible. Yet the summation comes close to asking the jury to convict the defendant for uncharged crimes, based on events that are not even arguably related to the defendant's acts.²³⁹ If, as the argument is

trast, other courts have upheld arguments emphasizing the effects of a crime similar to that committed by the defendant. *See, e.g.,* *Robinson v. State*, 47 Ala. App. 51, 54, 249 So. 2d 872, 875 (Crim. App. 1971) (approving reference, in course of arson prosecution, to recent instances of arson in city); *Blue v. State*, 224 Ind. 394, 403, 67 N.E.2d 377, 380 (1946) (discussing illegal strikes' effects on war effort).

Under the adversarial justice framework, the nexus between the argument and the facts in the record is the key. A prosecutor who confines herself to the charged crime but emphasizes its heinousness does not ask the jurors to exceed their function. She simply asks the representatives of the community to judge the defendant in the context of their common knowledge of serious crime in the community. *See Note, supra* note 227, at 344-45 and authorities cited therein (noting that generalized comments about the "community crime wave" or the "need for deterrence" are permissible under Missouri law, but not an argument that the particular defendant is a habitual criminal and will commit new crimes if released). As the prosecutor strays to dissimilar crimes, she seeks reverse jury nullification—a conviction based on fears that have nothing to do with the facts of the case. *But see Celebrezze, supra* note 13, at 243-44 (the prosecutor should not raise issues broader than the guilt or innocence of the accused); Comment, *The Prosecutor's Closing Argument in Pennsylvania: The Quasi-Judicial Paradox*, 82 DICK. L. REV. 513, 536 nn.188-94, 537 (1978) ("The line should be drawn when the prosecution ceases to try the accused for the crime with which he has been charged and instead incites jury emotion to convict the defendant for crime in general").

238. *See infra* notes 269-70 and accompanying text.

239. In contrast, an emotional argument without the Hitler reference might be appropriate because it does not ask the jury to consider facts not in the record. *See Brooks*, 762 F.2d at 1413 (reference to the defendant as "cancer on the body of society" is "dramatic," but goes "directly to the appropriate concern"); *Tucker v. Kemp*, 762 F.2d 1496, 1507 (11th Cir. 1985) (argument that defendant was "less than human," "not somebody in our society that we can afford to keep," and "a time bomb" was supported by evidence in the record).

For the most part, courts have ruled inconsistently and without analysis upon prosecutorial references to historical atrocities. *Compare People v. Lion*, 10 Ill. 2d 208, 216, 139 N.E.2d 757, 761

phrased, the jury reasonably might connect the defendant's murders with Hitler's, the prosecutor has gone too far.

The scenario also shares attributes with the hypothetical involving racism. The reference to Hitler's Germany can evoke both religious and historically based sentiments that may interfere with some jurors' ability to reason.²⁴⁰ No amount of counterargument by the defense will be able to cleanse the attitude of jurors so affected. The prosecutor's planned closing may create a real possibility that the defendant will be judged by a nonneutral fact finder.

As this final scenario illustrates, the concept of adversarial justice does not solve all summation questions. But it is a step forward. Constitutional platitudes like "prosecutors may not appeal to emotion" are inadequate to guide prosecutors because judges do not uniformly mean or enforce them. In essence, these platitudes tell prosecutors little more than that some rhetorical flourishes are appropriate, but others are not. The adversarial interpretation of the codes, in contrast, offers a framework by which a prosecutor at least can analyze the ethical issues. This interpretation reassures the prosecutor that advocacy which evokes emotion remains one of her tools. But if the thrust of her appeal is to weaken the fact finder's impartiality, ability to reason, or willingness to consider only appropriate facts, the prosecutor can recognize that she puts the system's underpinnings—and justice—at risk.²⁴¹

(1957) (comparing defendant to Alger Hiss is possibly improper) *with* *McKeever v. State*, 118 Ga. App. 386, 390-91, 163 S.E.2d 919, 922-23 (Ct. App. 1969) (comparing defendant to Viet Cong is a "permissible inference").

240. *See* *Vess*, *supra* note 54, at 32 (the "primary question . . . is whether . . . the juror's fears and prejudices will be aroused in a way which impairs reasoned judgment"); *see also* *Skuy v. United States*, 261 F. 316 (8th Cir. 1919) (granting reversal for anti-Semitic argument). *But see* *Rosenthal v. United States*, 45 F.2d 1000, 1003 (8th Cir. 1930) (denying reversal for district attorney's anti-Semitic statement).

241. Using this approach, a prosecutor can recognize the impropriety of such conduct as personally attacking defense counsel, emphasizing societal crimes that have no relationship to the case, or referring to the conclusion by others in the criminal justice system that the defendant is guilty. *See, e.g.,* *People v. Podwys*, 6 Cal. App. 2d 71, 74-75, 44 P.2d 377, 378-79 (Ct. App. 1935) (attack on defense counsel violates due process); *People v. Johnson*, 62 A.D.2d 555, 559-60, 405 N.Y.S.2d 538, 541 (App. Div. 1978) (same); *Harris v. State*, 475 S.W.2d 922, 923-24 (Tex. Crim. App. 1972) (reference to grand jury indictment improper); *State v. Boyd*, 160 W. Va. 234, 244, 233 S.E.2d 710, 717-18 (1977) (attack on defense counsel violates due process). In contrast, despite suggestions in the case law that referring to a victim and her family are improper appeals to sympathy, calmly describing the effect of the alleged crime arguably is rooted in the evidence. *Compare* *Brooks*, 762 F.2d at 1410 (argument that family will miss victim at Thanksgiving "was no more than a compelling statement of the victim's death and its significance") *with* *United States v. Hughes*, 389 F.2d 535, 536 (2d Cir. 1968) (reference to crime's consequences for victim's family improper); *People v. Floyd*, 1 Cal. 3d 694, 722, 464 P.2d 64, 82, 83 Cal. Rptr. 591 (1970) (same); *and* *People v. Hyde*, 1 Ill. App. 3d 831, 840-41, 275 N.E.2d 239, 245-46 (App. Ct. 1971) (same). While the Supreme Court generally has forbidden "irrelevant" references to a victim's family, *Booth v. Maryland*, 482 U.S. 496, 502-03 (1987), the parameters and viability of that ruling are uncertain. *See* *South Carolina v. Gathers*, 109 S. Ct. 2207 (1989) (O'Connor, J., dissenting) (four

IV. IMPLICATIONS OF THE "DO JUSTICE" MANDATE

The above analysis is replete with examples in which prosecutors must make judgment calls and difficult assessments. The existence of broad gray areas illustrates the vagueness of the codes' justice rule, even when filtered through the lens of adversarial process. Some of the problems of this vagueness already have been noted. Most significantly, it limits the rule's effectiveness as a guide for behavior. However the rule's mandate affects prosecutorial conduct, it does not do so on the basis of a norm that leads to a measurably correct result. This, in turn, undermines our expectation that the law will be applied evenly.

Perhaps more problematic is the likely psychological effect of a vague "do justice" requirement on prosecutors. Telling government lawyers that they sometimes must act noncompetitively complicates their self-image; it eliminates their traditional adversarial benchmark for behavior. To the extent a prosecutor may determine what constitutes justice with reference to any of her constituencies, she can rationalize most conduct.²⁴² Interpreting the "do justice" requirement according to the basic elements of adversarial process adds some substance. But the resulting mandate to do "adversarial justice" still leaves much to the imagination.

The generality of any rule based on justice heightens the importance of enforcement and better definition through disciplinary proceedings. The notion of professionalism may include some expectation that every lawyer will exercise good judgment to implement standards of conduct in the public interest.²⁴³ But the vaguer a norm—the more it is allowed to become subject to varying interpretations—the less valuable it becomes. Prosecutors who lack a lodestar for behavior will bow to the instinct to minimize their responsibilities. Once the pattern of prosecutorial behavior settles at a low ethical level, institutional and peer pressure to obey a higher standard of conduct naturally will disappear. External pressures, such as occasional media comment, will not influence behavior because prosecutors and their superiors can rational-

Justices prepared to overrule).

242. See Steele, *supra* note 13, at 966 ("prosecutors may have developed a sense of insulation from the ethical standards of other lawyers"). This phenomenon of rationalization can have adverse effects on the system as a whole. Defendants and observers come to distrust the system and question why they or their counsel should follow ethical and legal rules. See Alschuler, *supra* note 6, at 633 (prosecutorial misconduct may cause "public resentment of the entire legal process," particularly among minorities who will doubt their ability to "expect fair treatment from the courts"). These defendants and observers, consequently, may refuse to lend respect or obedience to the justice system. According to one commentator, "[t]he devaluation of the prosecutor's credibility among those who engage in or witness crime and their attorneys can only weaken the effectiveness of the prosecutor and encourage many to flout the law." Adlerstein, *supra* note 11, at 758.

243. See generally Simon, *supra* note 8.

ize particular conduct and claim disagreement over the extent of the ethical requirements.

These considerations highlight three related reasons why even a well-interpreted, reinforced "do justice" rule may fall short of its goals. First, a practical concern: the rule seems largely unenforceable. Second, a behavioral concern: absent active enforcement, prosecutors have little incentive to fulfill its requirements.²⁴⁴ Finally, a theoretical concern: asking prosecutors simultaneously to advocate within a process and assure that the process is fair is inherently contradictory—and perhaps hopeless. Each of these are discussed in detail below.

If these concerns are borne out in practice, they undermine the drafters' assumption that a broad mandate can be effective in compelling prosecutors to seek trial justice. Any "justice" formulation of prosecutorial ethics at best provides limited guidance. A directive to "do adversarial justice" improves upon bare justice terminology, but it still incorporates multiple ideals. How satisfied one can be with such a flexible standard depends on one's tolerance for leaving questions of appropriate conduct to the intuition and discretion of prosecutors themselves. To the extent that drafters expect the codes' terms to direct prosecutorial behavior, this Article's adversarial approach may prove far more useful in drafting new particularized standards than as a mechanism that itself defines conduct which prosecutors must pursue.

A. *Problems of Enforcing a Generalized Call to Justice*

Let us assume that code drafters, prosecutors, courts, and disciplinary bodies accept adversarial justice as an accurate interpretation of the codes' mandate. In the few situations in which a prosecutor's duty to restore adversarial imbalance is clear, disciplinary bodies might enforce the "do justice" requirement. However, in those cases in which the prosecutor must exercise judgment or employ common sense, the authorities will hesitate to penalize her failure to choose correctly.

Every time a prosecutor considers "justice" in the trial context, the most concrete guidepost she can look to is the adversarial premises. These have far more meat than the simple term "justice," but each premise is subject to interpretation. Broad theoretical concepts like equal adversariness, equal resources, neutral and passive tribunals, and evidence in the record, though substantive, contain significant flexibility. Accordingly, we have seen that the questions they engender are themselves fuzzy: When is an adversary performing outside the wide range of

244. Cf. Ellmann, *Lawyering for Justice in a Flawed Democracy* (Book Review), 90 COLUM. L. REV. 116, 146 (1990) (noting that "ethical requirements that are widely disobeyed are likely to do more harm than good").

acceptable competence? What constitutes equal access to information or resources? Has a trial judge gone too far in restricting the opponent's evidentiary presentation? Is an argument based on irrelevant emotions or on facts in the record?

Interpretation of the standard is further complicated because the codes use "justice" not only as the trigger for determining when prosecutors should take unusual action, but also as the reference point for determining the type of action that is required. The concrete fact patterns discussed in this Article show that numerous options always will be available—ranging from leaving the matter to the opponent, trial judge, or appellate court to performing the role of defense counsel. Adversarial considerations sometimes suggest the appropriate remedy. But predicting the level of prosecutorial intervention that will restore adversarial balance is necessarily an inexact science. Discipliners necessarily will resist second-guessing prosecutors' judgments.

A similar impediment to enforcement of the "do justice" standard is its occasional focus on the prosecutor's state of mind. For example, a prosecutor may be justified in mentioning inadmissible evidence in an opening statement if she truly believes the evidence will be allowed and that introducing it early is important. In contrast, if the prosecutor's purpose is to focus jurors' attention on potentially inadmissible facts, she undermines adversarial justice.²⁴⁵ Although disciplinary bodies are capable of considering the motivation of alleged code offenders, they prefer to enforce rules that are objective in nature.²⁴⁶

Resource considerations also limit the likelihood of vigorous enforcement. To date, discipliners have treated "do justice" provisions as hortatory. No prosecutor has ever been sanctioned for failing to do justice at trial.²⁴⁷ That reality reflects, in part, the recognition that prosecutors are public servants. In trying to maintain the bar's professionalism, discipliners naturally prefer to focus their limited resources on attorney misconduct driven by personal self-interest or greed.

Moreover, investigating prosecutorial misconduct probably would consume more resources than cases of ethical violations by private lawyers. Disciplinary committees typically rely on client complaints to

245. See *supra* notes 205-06 and accompanying text. Similarly, a prosecutor's motives may determine the propriety of her selection of or appeals to potentially biased jurors. See *supra* note 235 and accompanying text.

246. Cf. *In re Warhaftig*, 106 N.J. 529, 533, 524 A.2d 398, 401 (1987) ("lawyer's subjective intent . . . is irrelevant to the determination of the appropriate discipline in a misappropriation case").

247. At least, this Author has found no reported opinions revealing discipline. See authorities cited *supra* note 14.

bring misconduct to their attention.²⁴⁸ Because prosecutors have no clients, the bar's only recourse to enforce the "do justice" rule is to institute its own investigations, based on news reports or occasional referrals by judges or opposing counsel.²⁴⁹ Even if the bar is in principle willing to commit time and effort to investigation, determining where to look may be difficult. A prosecutor's ethical breach rarely will appear clearly on the trial record.²⁵⁰ Often it will be known only to the prosecutor herself.²⁵¹

Enforcing the "do justice" mandate would force disciplinary committees to confront not only fiscal limitations but also limitations on their own authority. Prosecutors who appear in local courts or by virtue of their membership in a state bar seem subject to that state's ethical rules. Federal prosecutors, however, have taken the position that they are immune on preemption grounds.²⁵² Some state prosecutors even have asserted that intrastate enforcement would undermine separation of powers.²⁵³ To avoid spending resources on litigating such jurisdictional disputes, disciplinary authorities may forego implementing the codes against one or the other prosecution corps.

In short, the future prospects for vigorous enforcement of the

248. Defendants themselves offer a poor source of information because they virtually always will perceive prosecutors to have acted improperly in pursuing and convicting them. *See C. WOLFRAM, supra* note 14, § 13.10.2, at 761 ("disciplinary agencies are probably reluctant to pursue complaints against prosecutors that may be motivated by resentment at convictions").

249. Such referrals, of course, are rare throughout the realm of ethical violations. To the extent a standard of conduct is vague, such as "do justice," lawyers and judges are likely to be particularly hesitant to report misconduct. *Cf. Saltzburg, supra* note 42, at 689 (noting the failure of courts to refer instances of misconduct to the bar and urging requirement that courts do so); *Steele, supra* note 13, at 980 (finding "[o]nly one reported case . . . in which defense counsel reported a prosecutor to a bar grievance committee").

250. Defendants' appeals based on ineffective assistance of counsel routinely fail because the trial record does not clearly reflect the ineffectiveness. *See supra* notes 97-105 and accompanying text. To establish a breach of prosecutorial ethics, it often will be necessary to determine not only the nature of defense counsel's performance—including knowledge and strategy—but that of the prosecutor as well.

251. In cases of unequal adversariness, for example, the trial judge may not be aware of defense counsel's omissions. *See supra* notes 106-07 and accompanying text. Similarly, in questions involving access to information by the defense, the prosecutor's ethical obligation may arise specifically because only the prosecutor knows the information. *See supra* notes 162-74 and accompanying text. A prosecutor's practice of selecting jurors on the basis of racial or other bias is unlikely to be apparent from his conduct in a single case.

252. The United States Department of Justice has taken the position that state discipline does not apply to federal attorneys if it conflicts "with the attorneys' federal responsibilities." R. Thornburgh, Memorandum on Communication with Persons Represented By Counsel 3 (June 8, 1989); *see also Sperry v. Florida*, 373 U.S. 379, 402 (1963) (state rules regarding the practice of law are preempted by federal patent office's rules regulating persons who may appear before it).

253. *See J. DOUGLASS, supra* note 6, at 77-78 (discussing the possibility that bar disciplinary committees may lack jurisdiction to sanction state prosecutors); *Steele, supra* note 13, at 967-69 (same).

prosecutorial duty are dim. Even this Article's proposed clarification of the codes is unlikely to have a dramatic effect. Reading adversarial principles into the rule might facilitate discipline of clear violators, such as the prosecutor who fails to disclose police investigatory misconduct.²⁵⁴ Except at the fringes, however, few "trial justice" situations are obvious or compelling enough to shift the bar's traditional disciplinary focus.

B. Justice As an Inadequate Guide for Self-Restraint

The generality of the "do justice" mandate and the unlikelihood of enforcement alone do not undermine its significance. After all, the codes are a call to professionalism on the part of lawyers. Many ethical provisions are hortatory: lawyers must, for example, act with "zeal,"²⁵⁵ be "loyal,"²⁵⁶ consult regularly with clients,²⁵⁷ and avoid "fraud" upon the court.²⁵⁸ In reality, few rules are enforced vigorously. Their primary value lies in the guidance they provide, the continuing legal and ethical education they provoke, and their effect in encouraging lawyers to restrain their own conduct. Unethical lawyers always will ignore the codes when the codes conflict with their self-interest; scrupulous attorneys will try to follow the codes' commands.²⁵⁹

Two psychological factors limit the effectiveness of "do justice" provisions as instruments of prosecutorial self-restraint. First, the codes seem to send prosecutors conflicting mandates: be zealous advocates, but temper your zeal. The adversarial interpretation of justice reconciles the mandates as a theoretical matter. Yet it asks prosecutors to walk a fine line. It requires prosecutors to be conscious at all times of a dual, somewhat schizophrenic role.

Second, the codes expect prosecutors to accomplish the balance of roles in the setting least conducive to reflective thought. Nowhere do lawyers' competitive juices flow more freely than at trial. Winning is at a premium. Asking prosecutors to step calmly out of an advocacy pos-

254. See *supra* notes 154-56 and accompanying text. This assumes, of course, that the prosecutor's violation somehow comes to light.

255. MODEL RULES, *supra* note 1, Rule 1.3 comment; CODE, *supra* note 1, EC 7-1.

256. MODEL RULES, *supra* note 1, Rule 1.7 comment; CODE, *supra* note 1, EC 5-1.

257. MODEL RULES, *supra* note 1, Rule 1.2(a).

258. *Id.* Rule 3.3(a); CODE, *supra* note 1, DR 7-102(B).

259. Case histories suggest that many prosecutors regard the hortatory command to "do justice" seriously, often taking drastic steps to protect defendants' rights. See, e.g., Gross, *Loss of Innocence: Eyewitness Identification and Proof of Guilt*, 16 J. LEGAL STUD. 395, 423 (1987) (discussing prosecutorial actions to avoid convictions based on misidentifications); Kaplan, *The Prosecutorial Discretion—A Comment*, 60 Nw. U.L. REV. 174, 178-81 (1965) (discussing practices of author's office). The problem lies in the fact that, absent a clear definition of justice, prosecutors who emphasize a defendant's rights over the victim's can be seen to be miscarrying justice.

ture, therefore, may be unrealistic. As a psychological matter, prosecutors are apt to make choices within the codes' parameters that least reduce the chance of conviction.

Practical and institutional incentives reinforce this natural tendency. Government lawyers compete with each other for promotion and recognition. Prosecutors who restrain themselves may convict at a lower rate and thus appear less competent to their superiors. An ethical prosecutor's productivity may decline as well. Some of the actions necessary for "doing justice" may delay trials. Reporting ineffective defense counsel will provoke hearings. Providing previously undisclosed information will lead to defense motions. Because the ethical prosecutor consequently will process fewer cases, she may damage her reputation with a production-oriented bench. To the extent her actions highlight poor performance by defense counsel, her relationship with the bar also may deteriorate.²⁶⁰

To expect prosecutors themselves to interpret even "adversarial justice" broadly therefore may be unrealistic. In other contexts, the threat of sanctions is probably what keeps lawyers from understating ethical directives that contradict their selfish interests.²⁶¹ Here, because sanctions are virtually unimaginable, the self-established norm of adversarial justice is likely to settle at a low level. Most of the prosecutor's natural incentives point toward rationalizing defense performance as within the acceptable range, not deeming prosecutorial access to information and forensic services as unique, and leaving procedural fairness concerns to appellate review.²⁶²

Despite this analysis, the clarification of justice proposed by this Article probably would have some effect on prosecutorial conduct. Indeed, the substance that the clarification adds to the codes might prompt enough enforcement to make prosecutors take heed. Moreover, it might change how prosecutors' peers and observers of the criminal

260. Richard Danzig has discussed the problem of attempting to control ethical practices through open-ended rules. He concludes that "insofar as the approach is workable, it tends to confine the impact of the law to a reaffirmation of the predominant morals of the marketplace." Danzig, *supra* note 4, at 629.

261. Disciplinary committees tend to focus their resources on enforcing rules that lawyers wish to violate for selfish reasons. Most reported decisions deal with breaches of fiduciary duty, misuse of client funds, conflicts of interest, and lawyer fraud.

262. See Gershman, *supra* note 13, at 226 ("When misconduct is insulated from attack, there is no incentive to discontinue the practice"). One institutional incentive for prosecutors not to underestimate the "do justice" obligation may be their desire to be trusted and respected by judges and others in the legal community. However, because different judges and lawyers interpret the abstract notion of justice in varying ways, including "convict the guilty at all cost," it is unclear in which direction this incentive pushes prosecutors. Arguably, defining the meaning of "doing justice" would establish a consensus and would promote greater respect for justice-oriented prosecutors.

justice system perceive ethical behavior. Once prosecuting offices understand that justice has an identifiable meaning, they are likely to incorporate appropriate norms for prosecutorial conduct in training programs and in internal office manuals.²⁶³ They also may see the need for institutional reforms that reward, rather than punish, activities that promote justice.²⁶⁴ This change in orientation by supervisors and other staff members, in turn, could create pressure toward voluntary improvements in conduct. Referring to adversarial principles helps establish and clarify a baseline and, consequently, would encourage among all prosecutors the sense that "justice" should be taken seriously.²⁶⁵

At a minimum, the adversarial justice framework should rationalize the focus of prosecutors who would otherwise view the codes' mandate in radically different ways. The framework helps prosecutors and disciplinary bodies in identifying which situations constitute a problem of justice within the codes' meaning and which situations do not. It defines relevant considerations and draws lines that help conflicted prosecutors resolve their dilemmas. Unethical and unprofessional government lawyers will ignore those lines, but only as unethical and unprofessional private lawyers always have circumvented the codes.

C. Some Lessons for Rulemakers

By subjecting prosecutors to the professional codes, the bar imposes on them the obligation to be zealous. Within the adversary system, that turns prosecutors loose as advocates. It tells them to "play the game hard," subject only to rules that the codes set to assure a fair game.

263. In 1980 the United States Department of Justice issued a "comprehensive listing of policies and practices to be followed by all [federal] prosecutors." Comment, *Justice Department's Guidelines of Little Value to State and Local Prosecutors*, 72 J. CRIM. L. & CRIMINOLOGY 955, 958 (1981). Interestingly, these guidelines focused almost exclusively on the exercise of prosecutorial discretion in charging defendants, entering into plea and nonprosecution agreements, and sentencing. *Id.* at 967-71. To the extent that this Article alerts offices to the ethical dilemmas individual prosecutors face at trial, it may encourage them to offer their staffs more guidance.

264. Thus, for example, a prosecuting office might adjust its emphasis on convictions in evaluating individual prosecutors for promotions and other benefits. To the extent a prosecutor's conviction rate is all that counts, the institutional incentives point toward minimizing the responsibility to "do justice." Cf. Rhode, *Ethical Perspectives in Legal Practice*, 37 STAN. L. REV. 589, 624-25, 639-43 (1985) (discussing ways the structure of corporate law firms influence and fragment lawyers' views of appropriate moral responsibility).

265. It is possible that even minimal clarification of the justice provision's meaning will encourage actors other than prosecutors to take steps to foster justice. For example, if judges believe prosecutors will report inadequate defense counsel in the middle of trials—thus delaying verdicts or even causing mistrials—judges may take more care initially to appoint competent attorneys. Similarly, defense counsel awareness of the prosecutorial obligation to preserve a neutral tribunal may prompt counsel to enlist prosecutorial assistance when they otherwise might ignore the threat to justice.

The "do justice" rule is not simply another provision requiring or forbidding these lawyers to act in a particular way, when a particular problem arises. The rule delegates an oversight function to them. But the bare language of the rule is misleading. On a superficial reading, it seems to tell prosecutors to "play the game hard, but if the result will not be right, change the rules and fix the game."

Interpreting the codes' intent with reference to the essential elements of the adversary system clarifies the real meaning of the ethical directive and helps structure a prosecutor's supplemental role. It limits their umpiring function to ensuring that the game's preset rules are followed. Acting as player and referee, though, is still an inherently contradictory role. The expectation that prosecutors can fulfill both roles without better instruction may be misguided.

As a blueprint for writing rules, however, the concept of "adversarial justice" is clearly more valuable. It establishes three root principles: (1) ordinarily, we want prosecutors to advocate aggressively; (2) we should depart from the adversarial model when the process is not working as envisioned; and (3) prosecutors are in a unique position to notice and control certain situations in which the process has broken down. These principles give code drafters and intra-office rulemakers a basis for distinguishing when prosecutors should act as advocates and when they should not.²⁶⁶

The adversarial justice framework also would help code drafters prescribe prosecutorial responses to breakdowns in the adversary system. It leads drafters to consider specifically how the adversarial premises may fail, and thereby forces them to select among the available options for restoring adversarial balance. Those are choices that informed rulemakers should make, not prosecutors in the heat of battle.

Greater specificity in the rules for ethical prosecutorial behavior would promote consistent conduct throughout the prosecution corps. Government lawyers may resist or manipulate general commands like "do justice" or "assure adversarial balance." But most will obey direct requirements, such as a provision requiring them to inform a trial judge of defense counsel's failure to file a nonfrivolous, no-lose motion.²⁶⁷ Clear rules are enforceable. Violations are easily deterred.

266. One should not underestimate the importance of a governing framework. In attempting to promulgate rules for prosecutorial conduct in the early 1970s, an ABA committee drafted a hefty set of specific standards that lacked a theme. See ABA STANDARDS, *supra* note 131, Standards 3-1.1 to 3-6.2. Each provision reflected the personal, ad hoc reactions of the drafters on how prosecutors should act in particular settings. Naturally, when situations are considered on an individual basis, reasonable people will differ on appropriate prosecutorial conduct. The result was a set of compromised, helter-skelter rules; the standards lack coherence and underlying logic. The ABA declined to incorporate them in the *Model Rules of Professional Conduct*.

267. See *supra* notes 110-11 and accompanying text.

Focusing expressly on adversarial justice would have another, surprising benefit for rulemakers. It would enable them to decide when to depart from the overarching adversarial model in order to implement safeguards against inaccurate verdicts.²⁶⁸ Nothing prevents society, through code drafters, from adopting a new conception of prosecutors—one in which prosecutors toss off the traditional advocate's mantle.²⁶⁹ In analyzing trial conduct with reference to adversarial justice, drafters may encounter situations in which they are not satisfied with trial results even though they are adversarially "appropriate" or "valid." Having identified these situations, the drafters can decide whether and when they are prepared to limit prosecutorial advocacy solely for the protection of innocent defendants' rights.

Consider the question of whether prosecutors may emphasize the seriousness of a crime in summation. Arguably, a crime's gravity is irrelevant. The jury must decide only whether this defendant committed the crime. Nevertheless, although courts sometimes limit prosecutors' emphasis, they never prevent prosecutors from arguing heinousness altogether. Presumably, courts grant prosecutors this latitude in order to counteract defendants' ability to persuade jurors that the crime is excusable or does not warrant punishment.

Adversarial equality notions suggest that the prosecutor may argue heinousness aggressively as long as the argument is based on facts in the record and the court allows it.²⁷⁰ Yet code drafters justifiably may fear that overemphasizing heinousness distracts jurors from the truly relevant issues. In other words, a jury may become so appalled by a crime that it does not consider fairly whether the defendant committed it. Telling prosecutors to "do adversarial justice" does not address the problem.

Formulating rules according to the adversarial justice analysis thus forces drafters to confront and resolve their qualms. They have the authority to adopt ethical provisions that are more protective of defendants' interests than the law of procedure or the due process decisions. The options range from extreme rules (*e.g.*, "prosecutors may never argue the heinousness of an offense") to provisions that tolerate emotional arguments on a case-by-case basis (*e.g.*, "prosecutors may not refer to heinousness except when necessary to counteract a defendant's suggestion that the crime is not serious"). In the alternative, code drafters have some prerogative to reduce the prosecutor's obligations to the

268. See *supra* notes 88-90 and accompanying text.

269. See generally Luban, *supra* note 26 (criticizing the "standard conception" of the lawyer's role and making a case for lawyers as "moral activists"); Simon, *supra* note 8 (calling upon lawyers to exercise discretionary moral judgment in lawyering).

270. See *supra* notes 228-41 and accompanying text.

adversary system in order to enhance competitiveness and reduce the likelihood that guilty defendants will go free. An arguably reasonable rule, for example, could permit prosecutors to raise false inferences in argument when necessary to counteract similar conduct by the defense. Tailoring the rule to the concerns that prompt it forces the drafters to analyze the costs and benefits of restricting or enlarging the scope of prosecutorial argument.²⁷¹ Leaving the matter to prosecutors' unfettered sense of justice does not.²⁷²

Specific rules also would underscore the fundamental limitations of ethical codes. As previously discussed, justice depends on competent representation of defendants and rough equality of resources.²⁷³ Generalized "do justice" provisions create the impression that prosecutors have power to equalize the defense. The truth is that in our criminal justice system the adversary process often does not work.²⁷⁴ By writing

271. Pursuing this analysis forces drafters to compare due process and sixth amendment standards and to evaluate whether these standards sufficiently assure trial justice. The very concept of requiring prosecutors to do justice as an ethical matter suggests that the drafters sometimes expect prosecutors to exceed minimal constitutional requirements. Thus, for example, code drafters may restrict prosecutorial argument in a way that due process does not. Similarly, in enforcing equal adversariness, drafters may make prosecutors provide information that defendants do not request or that state and constitutional law do not require to be disclosed.

272. The witness examination scenarios discussed *infra* at notes 207-18 and accompanying text present another context in which code drafters might wish to depart from the adversarial model. The adversarial model suggests that prosecutors need not refrain from attacking truthful defense witnesses or presenting prosecution witnesses whose testimony they doubt. After reflecting upon that result, code drafters might well desire additional protections for truthful defense witnesses or special hurdles for questionable prosecution witnesses on the theory that the adversary system's built-in safeguards are inadequate. See Simon, *supra* note 8, at 1102-03 (noting that effective lawyering can undermine even reliable fact-finding procedures). Alternatively, code drafters might adopt a special rule for prosecutorial witness examinations because of a desire to afford prophylactic protections for innocent defendants, even at the risk of losing otherwise valid convictions. My point is simply that restrictions on prosecutorial witness examination do not flow from the "justice" envisioned by the prevailing codes. If prosecutors restrain themselves—and thereby lose some of their effectiveness—they should do so because lawmakers or code drafters have analyzed the costs and benefits of a departure from adversariness and have concluded that the departure is appropriate.

273. See *supra* notes 73-75, 93-175 and accompanying text.

274. Critiquing the adversary system as a whole is beyond this Article's scope. However, generalizing about the operation of adversarial premises in different litigation contexts provides insights into the codes' decision to handicap prosecutorial advocacy. In standard commercial litigation, one can expect adversaries to be roughly equivalent in competence and resources. Commercial litigators often represent both plaintiffs and defendants; in a given case, without knowing the parties, one usually could not predict which side would have the resource advantage.

In tort litigation, the bar begins to divide. In earlier years, at least, personal injury lawyers were poor and often were perceived as outclassed. However, with the development of an organized (and sometimes well-financed) plaintiffs bar, the dichotomy of counsel competence and resources has broken down somewhat. One therefore might assume, or at least hope, that the principles of equal adversariness and resources hold.

No one can argue seriously that these conclusions apply in routine criminal litigation. The appointed criminal bar tends to consist of lawyers who cannot find other work. The material re-

limited rules, tailored only to the extreme failures that require prosecutorial reaction, drafters will highlight how rarely prosecutorial good faith can supply a solution. This revelation may help teach legislators and taxpayers an important lesson: the answer to poor defense representation does not lie in ethical rules; it lies in the commitment of resources to provide better counsel and to repair other system-wide flaws.²⁷⁵

V. CONCLUSION

The generalized approach to prosecutorial ethics promises much and delivers little. Ethical standards by their nature are ideals. But the code drafters' use of the amorphous justice concept abdicates their responsibility to write meaningful rules. The drafters seem to take a stand on the prosecutorial role, but in practice fail to set standards affecting behavior. The major impact of "do justice" provisions is to permit the drafters to avoid looking seriously at the conduct of criminal trials. Code drafters could adopt a view of the prosecuting attorney's role that differs from the traditional conception of prosecutor as advocate. But such a radical restructuring of the role would have to be explicit and detailed. One cannot reasonably attribute that purpose to the terse mandate that prosecutors "do justice."

This Article has accepted as a given the adversary orientation of the codes and interpreted their justice provisions in the most substantive and meaningful way possible. Throughout the course of a prosecution, the prosecutor must have a good faith belief in the defendant's guilt. At the trial stage the prosecutor has additional obligations, but these are limited to assuring that the essential premises of the adversary system hold true. This adversarial conception of "justice" is instructive, for it confirms the prosecuting attorney's identity. A prosecutor may be zealous. She may advocate, almost to the limits of her talents. Once the charging and plea bargaining stages are complete, she usually may act like any trial lawyer acts.

The adversarial justice interpretation helps prosecutors understand when the codes oblige them to step out of role and suggests ways prosecutors can react. In this respect, however, the approach leaves much to

sources that courts allocate to indigent defendants pale in comparison to the government resources. That code drafters perceive a need to somehow equalize the balance thus is not surprising. Indeed, the most surprising element may be that society has opted for an adversarial process in criminal trials at all.

275. Similarly, adversarial justice principles only rarely will require prosecutors to provide the defense with information and forensic assistance. Identifying this limited impact through specific ethical rules again highlights the need for changes in discovery procedures if "equal resources" is society's true goal.

personal judgment. As a guide for prosecutorial conduct, it is only that—a general guide.

Thus, the Article's key message is for code drafters and other rulemakers. The analysis of the existing "do justice" provisions illustrates the need for rules or presumptions that help delineate ethical prosecutorial behavior. Amazingly, no one has ever provided a methodology for drafting unified standards. The adversarial framework presented here offers a blueprint for writing specific provisions in ways that make sense.