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Cover Page Footnote

Professor of Law, Case Western Reserve University. I wish to thank Stanley Fisher, Paul Giannelli, Peter Joy, Robert Lawry, Kenneth Margolis, Matt Pavone, and Ellen Podgor for helpful comments and Richard Batson for suggesting the hypothetical that appears in Part III.

ARE PROSECUTORIAL ETHICS STANDARDS DIFFERENT?

Kevin C. McMunigal[*]

INTRODUCTION

DESCRIPTIONS of the ethical standards of public prosecutors often emphasize that such standards differ from ethical standards imposed on criminal defense lawyers or lawyers representing private parties in civil litigation.[1] In attempting both to define and justify this difference, reference is often made to the prosecutor's special obligation to seek justice. In this Article I argue that overstatement of the differences between prosecutorial ethical standards and ethical standards for other lawyers contributes to the ambiguity that currently plagues the subject of prosecutorial ethics. It tends to push us toward seeing the ethical obligations of prosecutors and defense lawyers in dichotomous terms, as mutually exclusive or contradictory black and white alternatives.

This dichotomous approach is misleading because it fails to convey that in many, perhaps most, instances the standard of conduct for the prosecutor is identical to the standard for the criminal defense lawyer and the civil advocate. It also masks the fact that when prosecutorial standards of conduct do differ from those for criminal defense lawyers and civil advocates, they typically differ in degree rather than in kind, in shades of gray rather than in black and white. Finally, the notion of an obligation to seek justice often provides little guidance to prosecutors, judges, or disciplinary authorities in resolving subtle and nuanced questions about when and how prosecutorial ethical standards differ from those applicable to other lawyers.

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* Professor of Law, Case Western Reserve University. I wish to thank Stanley Fisher, Paul Giannelli, Peter Joy, Robert Lawry, Kenneth Margolis, Matt Pavone, and Ellen Podgor for helpful comments and Richard Batson for suggesting the hypothetical that appears in Part III.

1. *See, e.g.*, Model Code of Professional Responsibility EC 7-13 (1980) ("The responsibility of a public prosecutor differs from that of the usual advocate...."); Monroe H. Freedman, Understanding Lawyers' Ethics 213 (1990) ("Special ethical rules are appropriate for prosecutors...."); Charles W. Wolfram, Modern Legal Ethics § 13.10.4, at 765 (1986) ("The most striking difference between a prosecutor and a defense lawyer or any non-governmental lawyer is that a prosecutor is much more constrained as an advocate.").

I. ORDINARY VS. EXTRAORDINARY DUTIES

Justice Sutherland's opinion in *Berger v. United States*[2] is perhaps the most frequently cited authority in cases, ethics opinions, and academic writing on the ethical obligations of prosecutors. One particular paragraph describing the prosecutor as "the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done"[3] and stating that the prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones"[4] has been cited so often that the *Berger* opinion has come to be viewed as "[t]he locus classicus for discussion of the *extraordinary* duties of a prosecutor."[5]

From this description, one would expect the *Berger* case to deal with one of the prosecutor's extraordinary duties, one not shared by other lawyers, and to provide a concrete starting point in charting the differences between prosecutorial standards and those applicable to other lawyers. Though the case is frequently cited and passages from it frequently quoted, the facts in *Berger* are seldom discussed.[6] When one looks beyond the often-quoted paragraph and considers the facts and context of the case, one finds that *Berger* neither defines nor applies an extraordinary prosecutorial duty. Rather, it enforces an obligation that is quite ordinary in the sense that it applies equally to prosecutors, criminal defense lawyers, and civil advocates—the obligation of lawyers in a trial not to assert their personal knowledge of facts in issue.

The prosecutor's conduct in *Berger* drew condemnation not only in the Supreme Court from Justice Sutherland but also in the Second Circuit from Judge Learned Hand, who described the prosecutor's actions as an "abuse of his position."[7] The prosecutor did a number of

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2. 295 U.S. 78 (1935).

3. *Id.* at 88.

4. *Id.* The paragraph from which these quotes are taken reads as follows:

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

Id.

5. Wolfram, *supra* note 1, § 13.10.2, at 760 (emphasis added).

6. For a source that discusses the facts of *Berger* and the standard enforced in the case, see William H. Fortune et al., Modern Litigation and Professional Responsibility Handbook § 13.3.3, at 419 (1996).

7. United States v. Berger, 73 F.2d 278, 281 (2d Cir. 1934).

improper things to merit this criticism, but Justice Sutherland primarily focused on the prosecutor's assertion in closing argument of his personal knowledge of a fact he had attempted but failed to prove during the evidentiary phase of the trial.[8]

The prosecutor at trial had called a witness named Goldstein to identify the defendant but, according to Justice Sutherland, she "had difficulty in doing so."[9] Nonetheless, the prosecutor was apparently convinced Goldstein knew the defendant and told the jury as much in his closing argument:

> Mrs. Goldie Goldstein takes the stand. She says she knows Jones, *and you can bet your bottom dollar she knew Berger.* She stood right where I am now and looked at him and was afraid to go over there, and when I waved my arm everybody started to holler, "Don't point at him." You know the rules of law. Well, it is the most complicated game in the world. I was examining *a woman that I knew knew Berger and could identify him,* she was standing right here looking at him, and I couldn't say, "Isn't that the man?" Now, imagine that! But that is the rules of the game, and I have to play within those rules.[10]

After quoting this passage from the prosecutor's argument and emphasizing the prosecutor's assertions about what the witness Goldstein knew, Justice Sutherland stated that "[t]he jury was thus invited to conclude that the witness Goldstein knew Berger well but pretended otherwise; and that this was within the personal knowledge of the prosecuting attorney."[11]

Clearly what the prosecutor in *Berger* did in his closing argument was improper. Both the Model Rules and the Model Code prohibit prosecutors from asserting personal knowledge of facts in issue during a trial.[12] But that duty is not an extraordinary one imposed only on prosecutors as later references to *Berger* seem to suggest. The Model Rules' provision prohibiting such conduct is not found in Rule 3.8 covering the "Special Responsibilities of A Prosecutor," but in Rule 3.4, captioned "Fairness to Opposing Party and Counsel," which sets out rules applicable to all lawyers.[13] In short, the critical prosecutorial ethical obligation in *Berger* was the same as that imposed on criminal defense lawyers and civil advocates. Thus, like much of the rhetoric one encounters on the subject of prosecutorial ethics, *Berger* provides

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8. *See Berger*, 295 U.S. at 85-88.
9. *Id.* at 86.
10. *Id.* at 86-87.
11. *Id.* at 88.
12. *See* Model Rules of Professional Conduct Rule 3.4(e) (1983) ("A lawyer shall not . . . assert personal knowledge of facts in issue except when testifying as a witness. . . ."); Model Code of Professional Responsibility DR 7-106(C)(3) (1980) ("In appearing in his professional capacity before a tribunal, a lawyer shall not . . . [a]ssert his personal knowledge of the facts in issue, except when testifying as a witness.").
13. *See* Model Rules of Professional Conduct Rules 3.4 & 3.8.

little help in mapping the contours of how and when prosecutorial standards differ from those of other lawyers. Treatments that describe *Berger* as dealing with extraordinary duties of prosecutors, when it actually enforces an ordinary duty, contribute to confusion about those contours.

If not offered to justify the imposition of some extraordinary duty on the prosecutor, what then was the purpose of Justice Sutherland's classic description of the prosecutor? When placed in the context of Justice Sutherland's entire opinion, the classic passage serves to justify the *remedy* of the new trial that Sutherland had granted rather than to define the standard of conduct used to determine whether there was misconduct.

Though Hand concluded in the court of appeals that the prosecutor had engaged in misconduct, he nonetheless affirmed Berger's conviction. Hand thought that a new trial was not warranted because

> it is fantastic to suppose that [the prosecutor's misconduct] substantially determined the outcome. If it colored the whole, as perhaps it did, and as it was certainly intended to do, the shade that it added we can scarcely detect; to-day, when *mere possibilities* do not interest us as they did our forerunners, we demand more tangible evidence that damage has been done.[14]

Sutherland disagreed with Hand's estimation of the likelihood that the prosecutor's misconduct had affected the outcome, concluding that Hand had underestimated it.[15] Sutherland departed from Hand on the appropriate remedy for the prosecutor's misconduct and this departure in turn depended on Sutherland's much higher assessment of the probability that the misconduct affected the outcome in the case.[16] Sutherland used the classic passage in *Berger* to introduce his discussion of the appropriate remedy and to justify his departure from Hand.[17]

The central point Sutherland makes in the remedy portion of the *Berger* opinion is that because of the prosecutor's special role, there was a much greater probability that the misconduct affected the outcome than Hand had found.[18] Because of the status of the prosecutor as a government representative, Sutherland thought the jury much more likely to accept the prosecutor's improper assertions than if he had been a private lawyer representing a criminal defendant or a private party.[19] In Sutherland's words, because of the special status described in his now classic description of the prosecutor's role, the prosecutor's "improper suggestions, insinuations and, especially, as-

14. United States v. Berger, 73 F.2d 278, 281 (2d Cir. 1934) (emphasis added).
15. *See Berger*, 295 U.S. at 89.
16. *See id.*
17. *See id.* at 88.
18. *See id.*
19. *See id.*

sertions of personal knowledge are *apt to carry much weight* against the accused when they should properly carry none."[20] Where Hand had found "mere possibilities" of harm,[21] Sutherland found "prejudice to the cause of the accused . . . *so highly probable* that we are not justified in assuming its non-existence."[22] In short, rather than defining an extraordinary obligation, *Berger* is a case about imposing an extraordinary remedy for breach of an ordinary obligation.

A often expressed sentiment regarding misconduct by public officials is that we should hold them to a "higher standard." What do we mean when we say this? Such a statement expresses the feeling that, though we expect all citizens to obey the law, for a variety of reasons we do and should have an even higher expectation that those who make and enforce the law should abide by it. But such statements can lead to confusion if taken literally to mean that a different rule than the one applied to ordinary citizens will be used to determine whether or not a public official actually engaged in misconduct.

Sometimes the standards applied to public officials are different, but often they are not. For example, although we may legitimately feel that a police officer should be "held to a higher standard" relating to the commission of homicide, a police officer charged with murder is tried under the same homicide laws as any other citizen. Similarly, though we may feel that prosecutors should be held to a higher standard regarding rules about the proper bounds of closing argument, in *Berger* the prosecutor was held to the same standard of conduct applicable to any other lawyer. In such cases, "higher standard" rhetoric can lead to false conclusions about the applicable rules.

A second point of possible confusion illustrated by the *Berger* case and how it has been viewed is the failure to distinguish between a standard of conduct and the remedies available for its breach. Even if the applicable standard of conduct for prosecutors is the same as that for other lawyers, as in *Berger*, a different remedy may be appropriate when a prosecutor violates that standard for various reasons. There may be a greater risk of prejudice because greater reliance is likely to be placed on the prosecutor by judge or jury due to his position, as Justice Sutherland stated. Or the prosecutor's violation of a rule may raise a constitutional issue where the same violation by a defense lawyer or civil advocate would not. In *Berger*, for example, the prosecutor by asserting his personal knowledge of a disputed fact in closing argument in a criminal case raises a confrontation clause issue where similar improper assertions by a defense lawyer or civil advocate would not.[23] If we fail to distinguish clearly between remedy and the

20. *Id.* (emphasis added).
21. United States v. Berger, 73 F.2d 278, 281 (2d Cir. 1934).
22. *Berger*, 295 U.S. at 89 (emphasis added).
23. *See, e.g.*, Ronald L. Carlson, *Argument to the Jury and the Constitutional Right of Confrontation*, 9 Crim. L. Bull. 293, 294 (1973) (discussing how assertions of fact

underlying standard of conduct in such cases, however, clarity in defining the prosecutor's underlying obligations suffers.

II. HOW ARE PROSECUTORIAL STANDARDS DIFFERENT?

Though there are many instances in which the prosecutor's ethical obligations are identical to those of the criminal defense lawyer and the civil advocate, there are also situations in which those obligations are "different," "special," or "extraordinary." When they do differ, how are they different? In answering this question it is helpful to think about rules of lawyer conduct as compromises between two competing views on the proper stance a lawyer should adopt in litigation.

A. *Two Views of Lawyer Conduct*

Competition between two views permeates debates about how lawyers should act in litigation. One view sees the appropriate stance for a lawyer as adversarial. Emphasizing the lawyer's role as "zealous advocate," this view adopts the pursuit of client interests as the lawyer's touchstone, while leaving the protection of interests such as those of the opposing party, the public, or the legal system to others. The competing view sees the appropriate stance for a lawyer as cooperative. Emphasizing the lawyer's role as "officer of the court," this view sees the lawyer's duty to assist in the fair, expeditious, and accurate resolution of cases as more important than the interests of her client.

One rarely encounters either the cooperative or adversarial views in a pure form. Rules on lawyer conduct typically embody compromises between them. The issue of disclosure of legal authority provides a straightforward example. A pure cooperative view would require the lawyer to reveal to the court all legal authority the court might need to arrive at a well informed decision in the case, regardless of whether the authority helped or hurt her client's case. Under an adversarial approach, by contrast, the lawyer would have no such obligation.[24]

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that are made outside the record during closing argument violate a defendant's right of confrontation).

24. For an exchange of views on the relative merits of the cooperative and adversarial views on disclosure of adverse authority, see generally Monroe H. Freedman, *Arguing the Law in an Adversary System*, 16 Ga. L. Rev. 833 (1982) ("[T]he best and most appropriate assurance that adverse authorities and arguments will come out is the adversary system itself."); Geoffrey C. Hazard, Jr., *Arguing the Law: The Advocate's Duty and Opportunity*, 16 Ga. L. Rev. 821 (1982) (arguing that an advocate's duty is to be "frank [when] dealing with the law, adverse as well as favorable"); Geoffrey C. Hazard, Jr., *Response*, 16 Ga. L. Rev. 861 (1982) ("[T]he vocation of advocacy depends on there being rules that define and therefore limit what advocates may do."); D. Robert Lohn & Milner S. Ball, *Legal Advocacy, Performance, and Affection*, 16 Ga. L. Rev. 853 (1982) (developing a conceptual construct that "the courtroom event [is] something other than battle"); Jeffrey M. Smith & Thomas B. Metzloff, *The Attorney as Advocate: "Arguing the Law,"* 16 Ga. L. Rev. 841 (1982) (questioning the

The lawyer might choose to reveal adverse authority because she sees it as in her client's best interest to do so. Her opponent, after all, might bring the adverse authority to the judge's attention or the judge and his law clerk might find it in doing their own research. In either case, the lawyer may see strategic advantage in preemptively revealing adverse authority both to gain credibility with the judge and to increase the odds of having a chance to distinguish or otherwise neutralize the adverse authority if the judge learns about it.[25] But under the adversarial view, the lawyer would have no obligation to make such a revelation. This view sees it as the opponent's obligation to inform the court of authorities adverse to the lawyer's position.

As one might expect under a rule captioned "Candor Toward the Tribunal," Model Rule 3.3(a)(3) mandates disclosure of adverse legal authority and thus one's initial impulse is to see this rule as a pure example of the cooperative view.[26] But close examination of its terms and legislative history reveals that current Rule 3.3(a)(3) in fact strikes a compromise between the cooperative and adversarial views. Rule 3.3(a)(3) only requires revelation of adverse legal authority which is "in the controlling jurisdiction" and "directly adverse."[27] The Kutak Commission proposed a draft version of this rule that was more expansive in its revelation requirements and thus more cooperative than the rule finally enacted. This earlier draft required revelation of all legal authority "that would probably have a substantial effect on the determination of a material issue."[28] Contrary to the Kutak draft, current Rule 3.3(a)(3) explicitly adopts a cooperative stance only toward a limited category of adverse legal authority, that which is directly adverse and from the controlling jurisdiction. But it implicitly adopts an adversarial stance toward the revelation of all other adverse authority by not explicitly requiring its disclosure. Rule 3.3(a)(3) is thus a blend of the cooperative and adversarial views.

Rule 3.3(a)(4), on the use of false evidence, is another example of a

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value of "transforming the attorney from a client's advocate into the law's advocate").

25. *See* Wolfram, *supra* note 1, § 12.8, at 682.

> Effective advocacy of a client's legal position will most often involve full revelation of adverse authorities, together with arguments distinguishing or criticizing them. Candor here both takes the wind from an opponent's sails and instills judicial trust in the quality and completeness of presentation. If nothing else, a court's late discovery that an advocate has failed to confront an adverse authority is likely to produce the impression that the awakened precedent, because suppressed, should be regarded as particularly vicious.

Id.

26. *See* Model Rules of Professional Conduct Rule 3.3(a)(3) (1983).

27. *Id.* ("A lawyer shall not knowingly... fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel....").

28. Model Rules of Professional Conduct Rule 3.1(c) (Discussion Draft 1980) ("If a lawyer discovers that the tribunal has not been apprised of legal authority known to the lawyer that would probably have a substantial effect on the determination of a material issue, the lawyer shall advise the tribunal of that authority.").

rule that initially strikes one as purely cooperative, but on closer examination turns out to be a cooperative/adversarial blend.[29] Rule 3.3(a)(4) says that the lawyer may not "offer evidence that the lawyer *knows* to be false."[30] If the lawyer knows the evidence is false, then the lawyer is required to take the cooperative stance of not offering the evidence to protect the justice system from possible contamination. But what if the lawyer's mental state is less than knowledge? What if the lawyer suspects the evidence may be false?[31] What if the lawyer should know but fails to diligently inquire about whether the evidence is false?[32]

Rule 3.3(a)(4) explicitly limits the cooperative duty not to offer false evidence to situations in which the lawyer has knowledge of the falsity.[33] The Model Rules specify that knowledge means actual knowledge.[34] And in Rules other than 3.3(a)(4), the Model Rules use mental states other than knowledge, such as "reckless disregard,"[35] "reasonably should know,"[36] and "reasonable believes"[37] in setting standards for lawyers. This reinforces the inference that Rule 3.3(a)(4) is limited to situations in which the lawyer has actual knowledge and not some lesser mental state regarding falsity. Indeed, Rule 3.3(c) states that a refusal to offer evidence the lawyer "reasonably believes is false" is discretionary.[38]

Rule 3.3(a)(4) implicitly adopts an adversarial stance to situations in which the lawyer's mental state regarding the falsity of the evidence is less than knowledge. Rather than requiring the lawyer to protect the legal system from false evidence by revealing his doubts, Rule 3.3(a)(4) trusts the opposing lawyer to use the adversary system's mechanisms, such as cross-examination and the presentation of counter-proof, to reveal false evidence to the judge or jury.[39] Again, as with disclosure of adverse authority, the lawyer may choose to act in a

29. *See* Model Rules of Professional Conduct Rule 3.3(a)(4) (1983).

30. *Id.* (emphasis added).

31. Using Model Penal Code terminology, the lawyer who suspects falsity might be said to have the mental state of recklessness rather than knowledge regarding the falsity of the evidence. *See* Model Penal Code § 2.02(2)(c) (1962).

32. Here the lawyer's mental state regarding the falsity of the evidence would be described as one of negligence rather than knowledge. *See id.* § 2.02(2)(d).

33. *See* Model Rules of Professional Conduct Rule 3.3(a)(4).

34. *See id.* Terminology para. 5 ("'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.").

35. *Id.* Rule 8.2(a).

36. *Id.* Rule 3.6(a); see Federal Rule of Criminal Procedure 16 for examples of rules using knowledge and negligence to trigger a lawyer conduct rule. Rule 16(a)(1)(A), (B) & (D) require disclosure of items known to the prosecutor or "by the exercise of due diligence may become known" to the prosecutor. Fed. R. Crim. P. 16(a)(1)(A), (B) & (D).

37. Model Rules of Professional Conduct Rule 3.3(c).

38. *Id.*

39. *See id.* Rule 3.3(a)(4).

cooperative fashion if she determines that it is in her client's interest not to offer evidence when the lawyer suspects but does not know that the evidence is false. Use of such evidence could harm her client's case if her opponent reveals that it is false or even raises serious doubts about its truthfulness. But Rule 3.3 does not require the lawyer cooperatively to refrain from offering the evidence.[40] Again, Rule 3.3(a)(4) reflects a mix of cooperative and adversarial views.

What about prosecutorial standards of conduct? Are they cooperative, adversarial, or some mix of the two? It is often stressed that "prosecutors have a dual role as advocates and ministers of justice"[41] in a way which suggests that this dual role is what makes prosecutorial standards of conduct different from those applicable to other lawyers. But all lawyers, even criminal defense lawyers, have dual roles in the sense that the standards of conduct that govern them draw on the cooperative and adversarial views about how lawyers should act in litigation.

In his work on comparative criminal procedure, Professor William Pizzi has written about our tendency to view trial systems in dichotomous terms as either adversarial or inquisitorial.[42] The trial systems in America, England, and other common law countries are typically labeled adversarial and the trial systems of the countries in Continental Europe inquisitorial.[43] Professor Pizzi makes the telling point that neither common law nor Continental trial systems currently fall neatly into these dichotomous, black and white categories.[44] Rather, the American, English, and Continental European trial systems represent various points on a spectrum, each blending characteristics associated with adversarial and inquisitorial models in differing proportions to achieve various shades of gray.[45]

Professor Pizzi's point is equally valid in describing the ethical obligations of criminal defense lawyers, civil advocates, and prosecutors. Each can be seen as representing various shades of gray along a spectrum between the poles of the adversarial and cooperative views. To understand where each falls on this spectrum, it is helpful to compare them.

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40. *See id.* Rule 3.3.

41. Deborah L. Rhode & David Luban, Legal Ethics 322 (2d ed. 1995); *See* Model Rules of Professional Conduct Rule 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

42. *See* William T. Pizzi, *The American "Adversary System"?*, 100 W. Va. L. Rev. 847, 848 (1998).

43. *See id.* at 847-49.

44. *See id.*

45. *See* William T. Pizzi, Trials Without Truth 89-116 (1999) (discussing the trial systems in England, Norway, Germany, and the Netherlands).

B. *Disclosure Obligations of Prosecutors, Criminal Defense Attorneys, and Civil Advocates*

Based on statements that prosecutors have "different," "special," or "extraordinary" ethical obligations in comparison to criminal defense lawyers and civil advocates, the initial impulse is to place prosecutors further to the cooperative side than civil advocates or criminal defense lawyers. A leading legal ethics treatise suggests just this when it states that "[t]he most striking difference between a prosecutor and a defense lawyer or any non-governmental lawyer is that a prosecutor is much more constrained as an advocate."[46] But close examination of areas in which different or special standards clearly do apply to prosecutors as opposed to criminal defense lawyers and civil advocates reveals that though prosecutors are regularly required to be more cooperative than criminal defense lawyers, at times the standards applicable to them are more adversarial than those for civil advocates.

Take, for example, the subject of disclosure. To chart disclosure obligations, it is helpful to distinguish between exculpatory and inculpatory information. Though these terms seem awkward when used in the context of civil cases, they can still be used to help compare the disclosure obligation of lawyers in criminal practice with those of civil advocates. The civil analog to inculpatory information in a criminal case is information that tends to establish the defendant's liability, while the civil analog to exculpatory information is information that tends to defeat such liability.

Criminal defense lawyers, in large part because of the Fifth Amendment privilege against self-incrimination, occupy the most adversarial position of any lawyer on the adversarial/cooperative spectrum in the area of disclosure.[47] As with all lawyers, ethical confidentiality rules and evidentiary attorney-client privilege prevent the criminal defense lawyer from disclosing or being required to disclose inculpatory information which might be quite helpful to the prosecutor, judge, and jury unless some particular rule overrides these protections. Because of the Fifth Amendment, criminal defense lawyers have no general duty to disclose inculpatory information reciprocal to the prosecutor's duty to disclose exculpatory information.[48]

But it is a mistake to see the defense lawyer as occupying a purely adversarial position regarding disclosure. The defense lawyer's obligations are a mix of adversarial and cooperative elements with the proportion of the cooperative element varying from jurisdiction to ju-

46. Wolfram, *supra* note 1, § 13.10.4, at 765.

47. For an overview of criminal disclosure obligations, see Wayne R. LaFave & Jerold H. Israel, Criminal Procedure §§ 20.1-20.7 (2d ed. 1992). For treatment of the defense lawyer's disclosure obligations, see *id.* §§ 20.4, 20.5.

48. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); Model Rules of Professional Conduct Rule 3.8(d) (1983).

risdiction.[49] Accordingly, the defense lawyer has a "dual role" just as the prosecutor does. It is just that the proportions of the cooperative and adversarial views that make up that dual role are different for the criminal defense lawyer than they are for the prosecutor.

A number of cooperative obligations are frequently imposed on the defense lawyer. Under federal law, for example, Rule 16[50] requires the defense lawyer to disclose what are typically exculpatory items, such as documents, tangible objects and scientific reports regarding evidence the defense intends to introduce at trial.[51] Also under federal law, the defense lawyer is required to give advance notice of his intent to use an alibi,[52] an insanity defense,[53] or introduce evidence of a complainant's prior sexual behavior in a sexual offense case.[54] Additionally, Rule 26.2 requires the defense lawyer to turn over prior written or recorded statements of any witnesses he calls other than the defendant, though such statements need not be turned over until after the witness has testified.[55] Finally, although subject to much debate and variation from jurisdiction to jurisdiction, the Model Rules require defense lawyers to disclose information if necessary to correct perjury, clearly a cooperative obligation.[56]

The modern civil discovery regime ushered in by the Federal Rules of Civil Procedure put all civil advocates in a more cooperative posture than either the criminal defense lawyer or the prosecutor.[57] Though those rules retained some adversarial aspects, such as making disclosure obligations dependent upon asking for the information in the appropriate fashion and exemptions for work product and privilege, they were heavily weighted toward the cooperative view.[58] Controversial amendments to the federal civil discovery rules in 1993 moved the position of the civil advocate even further toward the cooperative pole on the adversarial/cooperative spectrum. The amendments require initial disclosure of certain information, such as the

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49. *See* LaFave & Israel, *supra* note 47, § 20.5.
50. Fed. R. Crim. P. 16.
51. *See id.* 16(b)(1)(A) & (B).
52. *See id.* 12.1.
53. *See id.* 12.2.
54. *See* Fed. R. Evid. 412(c)(1).
55. *See* Fed. R. Crim. P. 26.2.
56. *See* Model Rules of Professional Conduct Rule 3.3(a)(4) & cmt. 11-12 (1983).
57. For an overview of civil disclosure obligations under the Federal Rules of Civil Procedure, see Jack H. Friedenthal et al., Civil Procedure, §§ 7.1-.18 (2d ed. 1993).
58. *See* Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. Rev. 833, 868-69 (1990).

> The modern rules of discovery are based on the assumption that lawyers and the parties they represent would engage in a period of nonadversarial, open exchange of information prior to and in preparation for trial. The idea was that the competitive forces inherent in the adversary system would be contained within the courtroom for the actual trial of the case, and that they would not spill over into the period of trial preparation.

Id.

names of witnesses and copies of relevant documents, whether inculpatory or exculpatory, without a request from the opposing lawyer.[59] Even under the 1993 amendments, though, the position of the civil advocate retains some adversarial features, such as the exemption from discovery for privilege and work product, both clearly adversarial doctrines.[60]

What about the prosecutor? The generalization noted above about the prosecutor being "much more constrained as an advocate" than defense lawyers and civil advocates suggests that plotting the prosecutor's disclosure obligations on the adversarial/cooperative spectrum should be simple:[61] she should be located significantly to the cooperative side of the civil advocate. Such plotting, however, is often difficult and at times the prosecutor's position on the cooperative/adversarial spectrum winds up being much more adversarial than this generalization suggests.

Specific and detailed rules do not exist for many areas of prosecutorial conduct, but they do on the subject of disclosure. Nonetheless, it is difficult to gain quickly a complete, accurate grasp of the prosecutor's disclosure obligations because these rules are scattered among a wide variety of sources, such as constitutional case law,[62] statutes,[63] ethics,[64] criminal procedure,[65] and evidence rules.[66] Because these rules mandate a variety of disclosures, one's initial impulse is to classify all of them as examples of the cooperative view. Such a classification supports the generalization that the "prosecutor is much more constrained as an advocate"[67] than the criminal defense lawyer or the civil advocate.

Although these rules have cooperative elements, on closer examination they turn out to be blends that mix cooperative and adversarial elements in various proportions. The adversarial elements usually take the form of limits in scope or timing and defense request re-

59. For a description of the 1993 amendments to the federal discovery rules and parallel developments in some states, see Geoffrey C. Hazard, Jr. et. al., Pleading and Procedure 913-16 (8th ed. 1999).

60. *See id.* at 914-15.

61. *See supra* note 46 and accompanying text.

62. *See, e.g., United States v. Bagley*, 473 U.S. 667 (1985) (interpreting the prosecutor's due process duty to disclose exculpatory evidence), *United States v. Agurs*, 427 U.S. 97 (1976) (same), and *Brady v. Maryland*, 373 U.S. 83 (1963) (same).

63. The Jencks Act, 18 U.S.C. § 3500 (1994), governs disclosure of prior written or recorded witness statements. The substance of the Jencks Act was later incorporated into the Rule 26.2 of the Federal Rules of Criminal Procedure.

64. *See* Model Rules of Professional Conduct Rule 3.8(d) (1983) (creating an ethical disclosure obligation for prosecutors).

65. *See* Fed. R. Crim. P. 16 & 26.2 (creating disclosure obligations for prosecutors).

66. *See* Fed R. Evid. 404(b) (requiring that the prosecutor, upon request by the accused, give advance notice of intent to use "other crimes, wrongs, or acts" evidence).

67. Wolfram, *supra* note 1, § 13.10.4, at 765.

quirements. The cooperative/adversarial blends found in some of these rules make them less cooperative than the disclosure requirements for civil advocates. Some are just as adversarial as the rules for the criminal defense lawyer.

Some prosecutorial disclosure rules deal exclusively with exculpatory information. The *Brady* rule, for example, creates a constitutional duty for the prosecutor to turn over exculpatory evidence.[68] The scope of the rule, however, is narrow, limited by a strict materiality test compelling disclosure only if the probative value of the evidence is great enough to create a "reasonable probability" that its admission would change the outcome of the case.[69] Exculpatory evidence that has less probative value does not trigger the rule. Though not required to trigger the *Brady* disclosure obligation, the specificity of a defense request under one of the older cases in the *Brady* line, *United States v. Agurs*,[70] could change the scope of the prosecutor's disclosure obligation.[71] Under current *Brady* doctrine, though, the role of a defense request and its specificity is murky.[72]

Thus, *Brady* provides a mixed rule. It adopts a cooperative view regarding a limited category of information—material exculpatory evidence. Implicitly, the rule adopts an adversarial view toward disclosure of exculpatory information that does not qualify as evidence or has insufficient probative value to be material and does not require disclosure of any inculpatory information.

Model Rule 3.8(d) takes a more cooperative view of the disclosure of exculpatory material than the *Brady* rule. Rule 3.8(d) requires the disclosure of all exculpatory information without a defense request.[73] It has no materiality restriction and is not limited to admissible evidence. Like the *Brady* rule, however, Rule 3.8(d) implicitly adopts an adversarial view toward inculpatory information by failing to require its disclosure.

The *Brady* rule and Rule 3.8(d) clearly place the prosecutor in a

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68. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

69. *See* United States v. Bagley, 473 U.S. 667, 682 (1985) ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.").

70. 427 U.S. 97 (1976).

71. *See id.* at 107.

72. *See* LaFave & Israel, *supra* note 47, at 891-92 (discussing the significance of a defense request under the *Brady* doctrine).

73. *See* Model Rules of Professional Conduct Rule 3.8(d) (1983). Rule 3.8(d) requires that the prosecution:

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

Id.

more cooperative position than the criminal defense lawyer, because the criminal defense lawyer has no reciprocal obligation to provide the prosecutor with inculpatory evidence or information. But the prosecutor's position under *Brady* and Rule 3.8(d) is not as cooperative as the position of the civil advocate under current federal discovery rules. Under those rules, the civil advocate must turn over all relevant information,[74] whether exculpatory or inculpatory. Unlike the *Brady* rule, there is no materiality limit and civil discovery is not limited to admissible evidence. Rather, the standard is whether the information "appears reasonably calculated to lead to the discovery of admissible evidence."[75] And, because all relevant matter is subject to discovery,[76] both inculpatory and exculpatory information is subject to disclosure by civil advocates, unlike Model Rule 3.8(d).

Federal Rule of Criminal Procedure 16, captioned "Discovery and Inspection," is the federal criminal justice system's primary discovery vehicle.[77] Its main function, in relation to prosecutorial disclosure, is to provide the defense with advance notice of items the prosecution will use at trial. Such items are typically inculpatory. Rule 16 requires the prosecution to turn over statements by the defendant, the defendant's prior record and documents, tangible objects, and reports of tests or examinations.[78] Rule 16 also has several adversarial features. None of its obligations are triggered without a request from the defense and it specifically exempts from disclosure witness statements and government reports[79]—two critical sources of information needed by the defense to effectively prepare a challenge to the prosecution's case. Again, Rule 16 is considerably more adversarial than the discovery rules applicable to civil advocates.[80]

Another interesting feature of Rule 16 is that two of its four provi-

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74. *See* Friedenthal, *supra* note 57, § 7.2, at 381.

> The scope of discovery is extremely broad under the Federal Rules and comparable state practice. Information can be obtained regarding any matter, not privileged, that is relevant to the subject matter involved in the action, whether or not the information sought will be admissible at trial, just so long as it is reasonably calculated to lead to the discovery of admissible evidence.

Id. (footnote omitted).

75. Fed. R. Civ. P. 26(b)(1) ("The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.").

76. *See id.* ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . .").

77. Fed. R. Crim. P. 16.

78. *See id.*

79. *See id.* 16(a)(2).

80. *See* LaFave & Israel, *supra* note 47, §§ 20.1-.2, at 836-42, 843-44 (providing comparisons of the historical development of criminal and civil discovery rules and of the range of approaches to discovery among various state jurisdictions).

sions are reciprocal. It imposes on the defense, as noted above, the obligation to disclose exhibits and reports that it intends to introduce at trial, though the scope of these obligations is narrower than those for the prosecution.[81] These reciprocal features bring the defense counsel and prosecutor closer together than one initially might suppose on the adversarial/cooperative spectrum because they share a number of cooperative duties.

The most adversarial of the prosecutorial disclosure rules in the federal system is the one dealing with witness statements under the Jencks Act.[82] A prosecutor need not disclose the names of witnesses to the defense prior to trial. Only prior written or recorded statements made by a witness who actually testifies are required to be disclosed and then only "after a witness . . . has testified."[83] Government reports summarizing prior oral statements of the witness are not included.

The foundation of any criminal prosecution is the testimony of the witnesses the prosecutor calls at trial. The identity of those witnesses and the substance of their testimony is, in many cases, the most critical information needed by the defense to prepare for trial. The Jencks Act and Rule 26.2 adopt a highly adversarial stance on this critical information. They give the defense no access to this information in the pretrial phase and, unless the judge grants a continuance, give access only minutes before the statements are to be used in cross-examination. In order to avoid such continuances, federal trial judges often pressure prosecutors to provide Jencks material prior to trial. The prevalence of negotiated pleas in the criminal justice system creates an additional incentive for prosecutors to adopt a more cooperative stance and disclose not only written and recorded statements covered by Jencks, but police reports summarizing witness testimony as well. Prosecutors may do so in order to convince the defendant that the prosecution's case is strong and induce a guilty plea from the de-

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81. Rule 16 requires the prosecutor to disclose documents and objects he intends to use at trial, if they *were taken from or belong to the defendant or are material to preparation of the defense. See* Fed. R. Crim. P. 16(a)(1)(C). The rule requires the prosecutor to disclose test and exam reports it intends to introduce or which are *material to preparation of the defense. See id.* 16(a)(1)(D). Rule 16's reciprocal disclosure requirements for the defense counsel do not include these highlighted categories. *See id.* 16(b)(1)(A) & (B).

82. The rule about prior written and recorded statements of witnesses is found in the Jencks Act, 18 U.S.C. § 3500 (1994), and in the Federal Rules of Criminal Procedure Rule 26.2.

83. 18 U.S.C. § 3500(a).

> In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection *until said witness has testified on direct examination in the trial of the case.*

Id. (emphasis added).

fendant.

Whether or not one agrees with these rules, the interesting point is that the rules on advance notice of inculpatory witness testimony are highly adversarial—much more adversarial than the obligations applicable to the civil advocate who must turn over the names of witnesses early in the pretrial phase[84] and disclose the substance of their testimony by allowing them to be deposed. Another interesting point is that Rule 26.2 applies precisely the same disclosure standards to prior written or recorded defense witness statements, so the prosecutor and defense lawyer share the same highly adversarial standard regarding such information.

The preceding review and comparison of the disclosure obligations of prosecutors, criminal defense lawyers, and civil advocates reveals the misleading nature of two generalizations about prosecutorial ethics. First, it is not true that the standard for prosecutors is always more cooperative than the standards for criminal defense lawyers or civil advocates. In the area of disclosure under current federal law, for example, the civil advocate is often in a considerably more cooperative position than the prosecutor. Furthermore, criminal defense lawyers and prosecutors also share some of the same standards, both adversarial and cooperative. Second, prosecutors are not unique in having "a dual role as advocates and ministers of justice."[85] All lawyers, even criminal defense lawyers, have dual roles. The standards of conduct that govern them are made up of both adversarial and cooperative elements.

III. WHAT GUIDANCE DOES THE NOTION OF JUSTICE PROVIDE?

Prosecutors are often forced to choose between adopting a cooperative or an adversarial stance on a particular issue. Sometimes there are specific rules governing that choice, as in the area of disclosure. But often specific rules do not exist and the prosecutor is left trying to figure out which stance is consistent with the obligation to seek justice.

Everyone seems to agree that prosecutors have an obligation to seek justice. One finds this notion expressed repeatedly in cases as well as ethics codes, opinions, and treatises. But what does it mean to seek justice? What does it require of prosecutors in particular situations? Consider, for example, the following scenario.

The government has convicted a defendant on an embezzlement charge carrying a maximum sentence of ten years. The defendant is

84. *See* Fed. R. Civ. P. 26(a)(1)(A) (requiring parties to turn over "without awaiting a discovery request . . . the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts").

85. Rhode & Luban, *supra* note 41, at 322.

awaiting sentencing. Assume the relevant jurisdiction has not adopted sentencing guidelines such as those used in federal court. There are both mitigating and aggravating circumstances in the case. After reviewing the presentence report, the prosecutor realizes that if she emphasizes the aggravating factors and ignores the mitigating factors, she can make a credible argument for a sentence as high as six years. But, by taking into consideration *both* the mitigating and the aggravating circumstances, she decides a just sentence in the case is three years. Defense counsel informs the prosecutor that he will ask for straight probation for his client and the probation officer handling the presentence investigation supports the defense recommendation.

The judge who will impose sentence in the case often "splits the difference" when the prosecution and the probation officer differ substantially in their sentencing positions, as in this case, by imposing a sentence halfway between the two. The judge has also, at times, ignored both the defense's and probation office's sentencing recommendations and deferred to the prosecutor's recommendation. The prosecutor knows that the judge on several occasions has disagreed with the sentencing recommendations of the particular probation officer who prepared the presentence report in the present case.

What, then, should the prosecutor recommend to achieve the just result of a three year sentence? She might adopt either a cooperative or adversarial stance. Under the cooperative view, she would see her role as requiring a recommendation based on her evenhanded assessment of both the mitigating and the aggravating factors. Under this view, the prosecutor would recommend a three year sentence and hope that the judge accepts it. If, however, the judge splits the difference between the prosecution and defense positions, the defendant will receive an unjust eighteen month sentence due to the defense and probation office's overly lenient probation recommendations.

Under the adversarial view, the prosecutor would see her role as requiring a recommendation that is based only on the aggravating circumstances. She would leave to the defense lawyer the task of emphasizing the mitigating factors, which she is sure he will do quite competently. Under this view, she would recommend a six year sentence, anticipating that the judge would split the difference and impose the just three year sentence. In adopting such a strategy, the prosecutor would see her overly harsh six year sentencing recommendation as a means to achieve a just three year sentence, a necessary counterweight to the defense lawyer's overly lenient probation request. Under the adversarial view, just as the defense lawyer would focus exclusively on the case's mitigating factors, the prosecution, in order to achieve balance, would focus on the case's aggravating factors. Under this view, the just sentence should emerge from the clash of the opposing positions. If the prosecutor adopts this second strategy, however, and the judge decides not to split the difference but in-

stead defers to the prosecution, the defendant will receive an unjust six year sentence.

What should the prosecutor do? Clearly the prosecutor has an obligation to pursue the just result of a three year sentence. The question is *how* should she pursue it here. Either the cooperative or adversarial stance could result in justice or injustice. Which stance should she adopt?

Admittedly, this hypothetical is unrealistically simplified. By assuming a just sentence is three years, I have attempted to sidestep the considerable ambiguities inherent in an attempt to decide exactly what a just sentence is. Should the prosecutor adopt a retributive or a utilitarian viewpoint in assessing justice?[86] If she adopts a utilitarian one, should she emphasize deterrence, incapacitation, or rehabilitation? What if these utilitarian purposes pull in different directions? Should she attempt to blend them under a mixed theory of justice? These are all genuine issues. My motive for sidestepping them is to focus on the issue of the prosecutor's choice between a cooperative and an adversarial stance in pursuing whatever sentence results from the resolution of these other issues.

A starting point in thinking about this problem might be to examine what the defense lawyer's ethical obligation is at sentencing. The defense lawyer in the hypothetical appears to adopt an adversarial stance that takes a partisan position based solely on the mitigating facts most favorable to his client. This seems ethically appropriate since there are no specific or general rules that seem to dictate a cooperative stance for the defense lawyer in this situation.

The prosecutor's choice is not so simple. She may think about her choice in a number of ways. She may use a simple preponderance standard, making her best guess as to whether the judge will split the difference or adopt her recommendation. She may instead use a default standard, preferring the adversarial stance unless it is clear in a particular case that such a stance would lead to injustice. Under this standard in the above hypothetical, the prosecutor would adopt the adversarial stance because it is not clear that this would result in injustice. A different default standard might adopt the cooperative stance in all unclear cases. In the above case, such a default standard would dictate a cooperative stance because it is unclear how the judge would decide the sentence.

Another way for the prosecutor to choose her stance would be to resolve doubt in favor of the lesser recommendation, seeing underpunishment imposed on an individual as a lesser evil than overpunishment, a resolution she could see as consistent with the underlying values of our criminal justice system. Still another way for her to

86. *See* Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 Am. J. Crim. L. 197, 235-38 (1988).

choose would be to resolve her doubts by favoring the high recommendation on the theory that if the judge imposes too high a sentence she could always make a motion for downward modification to achieve justice. If the judge errs with too light a sentence, the possibility of a later motion for upward modification is not a possibility.

I am not sure how this hypothetical situation should be resolved. I have received almost as many different responses to it as the number of people I have asked to decide what the prosecutor should do. Professor Stanley Fisher, after an exhaustive analysis of a similar sentencing problem, was unable to conclusively resolve the issue.[87]

My point in using this hypothetical situation is that current standards for prosecutors, such as those found in Model Rule 3.8, provide virtually no guidance on how the prosecutor should act in this situation. First, there are no specific rules here as there are in the area of disclosure. And the sort of generalizations about prosecutorial ethics that I reviewed earlier in this Article provide no help.

The prosecutor, all agree, has obligations that are "different" from those of the criminal defense lawyer. But we saw that though the prosecutor's obligations at times are different, many times they are the same as those for the defense lawyer. Is this sentencing hypothetical a situation in which the prosecutor should adopt a stance different from or similar to the defense lawyer? It is true that the prosecutor is often more restrained in his advocacy than a criminal defense lawyer, but is this one of those situations? All agree that the prosecutor has a "dual role," but in this sentencing problem, which role should the prosecutor adopt—advocate or minister of justice? Even if her minister of justice role governs here, which stance best achieves justice? Here, either stance might end up serving or defeating justice.

The lack of specific standards together with vague and often misleading generalizations about "different" standards, "dual roles," and "seeking justice" leave the prosecutor here with virtually no guidance in choosing among the various approaches discussed in this Article.

CONCLUSION

The science section of the New York Times recently carried an article about a rift of sorts in the field of geology.[88] Traditional geologists put hammer to rock. Focused on detail, they look at the earth's surface up close through field work to assess its structures and history. Recently, though, physicists have invaded the field, using mathematical theories and satellite maps to develop universal laws and theories on a much grander scale and at a higher level of abstraction than tra-

87. *See id.* at 242-50.

88. *See* James Glanz, *Physicists Invading Geologists' Turf,* N.Y. Times, Nov. 23, 1999, at F1.

ditional geologists.[89] One can see a similar divide in the rules and academic writing on prosecutorial ethics. Like traditional geologists, some prosecutorial rules and academic commentary focus on very narrow issues, such as subpoenas to defense lawyers or prosecutorial contact with subjects of investigations who are represented by lawyers. But like the physicists, other prosecutorial standards and academic commentary focus at a very high level of generalization and abstraction, such as the prosecutor's obligation to seek justice. In this Article, I have focused on a number of such generalizations about prosecutorial ethics that have contributed to the ambiguity surrounding this subject and have suggested ways to rephrase and qualify these generalizations.

Rather than simply saying that prosecutorial ethical standards are different or special, it is more accurate to say that prosecutorial ethical standards are often the same as those of other lawyers, but that in certain areas prosecutors are held to different or special standards. Rather than simply saying that the prosecutor has a "dual role" as both advocate and minister of justice, it is more accurate to say that all lawyers, even criminal defense lawyers, have such dual roles, but that the prosecutor's dual role sometimes strikes a different balance between cooperative and adversarial stances. Rather than saying that the prosecutor is always required to be more cooperative than other lawyers, it is more accurate to say that when the prosecutor's standard differs from the standard for other lawyers it differs only in degree. Finally, rather than simply saying that prosecutors are required to "seek justice," we need to provide guidance on when prosecutors should seek justice by adopting a cooperative stance and when they should seek it by adopting an adversarial stance. Reducing the ambiguities caused by these misleading generalizations will give us a clearer picture both of what the standards for prosecutors currently are and whether those standards ask as much of prosecutors as they should.

89. *See id.*