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Cover Page Footnote

Arthur Levitt Professor of Law, Columbia University. I am grateful for the contribution of my able Research Assistant, Wendy Witten.

THE NEUTRAL PROSECUTOR: THE OBLIGATION OF DISPASSION IN A PASSIONATE PURSUIT

*H. Richard Uviller**

INTRODUCTION

WHEN I was a young prosecutor in New York County,¹ the most baffling part of my job was the decision—which I was regularly required to make: what was the case at hand really worth? Two notches below the grade charged in the top count in the indictment? Half the maximum prison time the legislature had prescribed for cases of this sort? Crimes are described in the penal law in their worst manifestation. Indictments often compose a network of accusations in the most serious degrees and combinations that the facts might conceivably support. Occasionally—very rarely—a case comes along that fits the most aggravated accusation the prosecutor can devise. On such cases, the subsequent appraisal was easy: “top count; max time.” But even in the deliberate homicides, the major robberies, and the brutal rapes, there was usually some room for a reconsideration of the true gravity of the case. I have since come to understand that these appraisals, or re-appraisals, of the worth of a case are an indispensable—and largely healthy—part of the process. No less than the power to charge, to dismiss charges, and to immunize witnesses, the power to tailor a charge to the gravity of a particular offense and the deserts of a particular offender is the essence of the executive function in the prosecution of crime. At this point in my tour, I was not assigned to try the cases I evaluated for disposition. So I could ponder the elusive appraisal of worth in its full mystery.

As a trial Assistant, thumbing through the case jacket, talking to witnesses, I could focus on only one question: what were my chances of persuading a jury of twelve at a full—and fully contested—trial that my charges were in all likelihood true? But even as I revisited the plea offer with only the “triability” of the case in mind, I knew, and still believe, that reading these portents is not the whole story. It is not enough to say, as some have, that the just disposition of a criminal

* Arthur Levitt Professor of Law, Columbia University. I am grateful for the contribution of my able Research Assistant, Wendy Witten.

1. I served as an Assistant in the office of Frank S. Hogan, District Attorney for New York County, from 1954 to 1968.

charge is the point at which the interests of the state in conviction and of the accused in the lightest possible punishment intersect.² There is another, less pragmatic, element in the assessment of worth. I was just too zipped, buckled, and helmeted into my flight suit at that point to think about much else than the impending trial mission.

It is not easy to describe this normative element in the appraisal of a case. It is in part a calibration of the level of contextual social outrage. In part, it is the location of the particular instance of the crime on a moral spectrum of similar crimes. In part, it is a reflection of the customary level of punishment for crimes of the same category. But, thankfully, I have no purpose here to attempt to discern—or to defend—the retributive valence as it contributes to the resolution of a criminal accusation. Rather, I hope to describe the process by which the evaluation is made, and to call it “adjudicative” as distinct from “adversary.” And inasmuch as this adjudicative task is part of the public prosecutor’s executive function, I will argue that it should be performed by members of the staff who are detached from the demands of zealous advocacy.

As I shall describe the prosecutor’s responsibilities, a third aspect will emerge. Long before setting a date for trial, very likely before opening discussions about disposition by guilty plea, the prosecutor will be asking questions, possibly directing further interviews with witnesses, examining documents, experts, reports; in short, investigating the case. Overlapping somewhat with the adjudicative function, this investigative responsibility also requires a level of neutrality quite different from the attitude with which the prosecutor prepares for trial. At the pre-adversary stage, I shall contend, the prosecutor should be schooled in the detached exercise of discretion. As facts are sifted and weighed, as the resulting accusation is assessed for gravity, neutrality is a critical component of diligence. The abandoned investigation, the light plea offer—these are no less worthy accomplishments than the selection of a suspect to prosecute to the fullest.

In that connection, I shall ask, too, whether the virtuous prosecutor is not ethically constrained—if not legally³—to inform the grand jury

2. Robert E. Scott and William J. Stuntz, for example, analyze plea bargaining within classic contract theory in their contribution to a noteworthy Yale symposium on the subject: *Plea Bargaining as Contract*, 101 Yale L.J. 1909 (1992).

3. The United States Supreme Court decision in *United States v. Williams*, 504 U.S. 36 (1992), relieved the prosecutor of any legal obligation to present exculpatory evidence to a grand jury. In that case, the Court declined to exercise its supervisory powers to direct the prosecutor’s performance before a grand jury, apparently leaving the matter of fairness beyond legal control. See *id.* at 54-55. For a further discussion of *Williams*, see *infra* note 19 and accompanying text. However, a recent statute, known as the McDade Law, provides that U.S. government prosecutors must abide by local rules regarding the ethical obligations of counsel. See 28 U.S.C. § 530B (Supp. 1999). This, the government now fears, may have overruled *Williams* in those jurisdictions where the state prosecutor is under some obligation to present

to whom he submits inculpatory evidence that there is support for a conflicting hypothesis. Neutrality, I will suggest, puts the prosecutor in the position of advocate for all the people—including the person against whom the evidence has been accumulating. Thus, I will urge, whatever the court's role might be in supervising the prosecutor before the grand jury, the ethical imperatives require full and balanced prosecutorial presentation. Finally, I will ask whether we have imposed fundamentally inconsistent obligations on our prosecutors, bending them into psychological pretzels by requiring them to be the neutral investigator and the "quasi-judicial" adjudicator while at the same time imagining themselves as the zealous courtroom advocate.

I. THE ROLE OF THE PROSECUTOR IN THE AMERICAN MODEL

In the American model of criminal justice—in contrast to the British, for example—the prosecutor is not just a lawyer assigned to represent the interests of the government in the trial of a criminal case. The American prosecutor, state or federal, is a public official, elected or appointed to exercise executive authority. The prosecutor doesn't have a client; he has a constituency. The local prosecutor is not responsible to the state government but to the people directly. The federal prosecutor is affiliated with, and in some sense subject to, a department of the central government, the Department of Justice. And the DOJ exercises a certain amount of supervisory control over its far-flung district prosecutors. But essentially, all prosecutors—unlike lawyers generally—enjoy independence in the exercise of discretion. Free of client control, they have the luxury and burden of developing the standards for the exercise of public authority. While they function within the adversary system, they function also as administrative policy makers. And, as such, they allocate resources in the pursuit and disposition of cases according to their own best judgment of the demands of justice.

As Americans have long known, and are beginning to acknowledge openly,⁴ our system of criminal justice is compound and complex. Only a relatively small proportion—an extremely important, but small portion—of criminal cases are disposed of in anything resembling the simple, traditional adversary mode of which we have been so inordinately proud down through the centuries. The pristine paradigm has, essentially, three sequential and interwoven phases. The first is the commencement. Following an arrest predicated on probable cause—and often very little more—or a grand jury

exculpatory evidence to the grand jury, thus converting the local ethical rule into a federal obligation of law.

4. See, e.g., Symposium, *The Changing Role of the Federal Prosecutor*, 26 Fordham Urb. L.J. 347 (1999) (reflecting on the various roles and responsibilities of prosecutors).

indictment, the formal charge is lodged. Normally, the charge is the result of the prosecutor's judgment, confirmed (usually *pro forma*) by the grand jury in those jurisdictions that maintain the relic for the ordinary felony case.⁵ That judgment takes heavily into consideration the likely outcomes of succeeding phases.

Phase two is investigation and trial preparation. Here, the prosecutor begins the arduous process of getting all his witnesses and documents in order, perhaps conducting supplementary forays to patch and mend, to fill and brace, to trim and align the diverse, faint, and chaotic traces of the facts clinging to the bare beams of the counts in the indictment. In this, the prosecutor gets no help from the accused, nor does he expect any. And in this old-fashioned paradigm, the prosecutor does not share his discoveries with defense counsel, who would be a fool if she did not react to such advance intelligence by devising evasions and rehearsing counter-thrusts. If the defendant has any colorable defense, let him develop it on his own. For his response to the evidence adduced against him, he can wait for phase three, the trial. After all, that's what a trial is for: to display in neat and persuasive array the case against the defendant.

So the final phase is the adversary encounter. The burdened prosecutor⁶ parades his best case before a neutral and attentive panel of citizens, each witness subject to vigorous challenge, perhaps impeachment. The defense receives a full opportunity to contradict the prosecutor's evidence, and the issue is finally submitted to the jury for their secret and dutiful deliberation and (let us hope) their indelible verdict. Through this critical third stage, the judge—fair, detached, and in all likelihood ignorant of the facts—exercises her passive control over the proceedings, maintaining order and assuring the appearance of justice, while taking some pains to exhibit fidelity to applicable law. But even the most participatory judge does not presume to present or evaluate the evidence. There is some room in this idealized version of the adversary confrontation for appellate review, but not too much stress is laid upon it. It should be but an emergency procedure to correct grievous and devastating deviations from legal protocol by a foolish or foolhardy trial judge, or an

5. Twenty-three states and the District of Columbia have retained the indicting grand jury for certain offenses. See Susan W. Brenner, *The Voice of the Community: A Case for Grand Jury Independence*, 3 Va. J. Soc. Pol'y & L. 67, 101 (1995). These jurisdictions generally require an indictment for capital crimes and/or serious offenses. See *id.* Two states, Connecticut and Pennsylvania, have abolished the indicting grand jury by constitutional amendment. See *id.* at 102. All 50 states have preserved the investigative grand jury. See Kathryn E. White, *What Have You Done With My Lawyer?: The Grand Jury Witness's Right to Consult with Counsel*, 32 Loy. L.A. L. Rev. 907, 925 (1999). England abolished the grand jury system in 1933. See Susan M. Schiappa, *Preserving the Autonomy and Function of the Grand Jury*: *United States v. Williams*, 43 Cath. U. L. Rev. 311, 313 n.9 (1993).

6. By "burdened," I mean, of course, bearing the burden of proof.

impulsive or ignorant prosecutor.

Add to this paradigm a dollop of discovery and a robust helping of pre-trial motion practice and you have a recipe for a procedure resembling today's trial regime. But what has been airbrushed out of this adversary myth is adjudication by agreement, the so called "plea-bargaining" and the demands it makes on the prosecutor to resolve the case she intended merely to try. It is difficult, even in this record-saturated world, to know precisely what percentage of the trial docket is disposed of by guilty plea. Different jurisdictions vary in their plea policies, and keep their records by significantly different schemes for counting: if you include misdemeanors and petty offenses in the "trial docket," the disposition-by-verdict column will shrink dramatically; so too, if you include dismissals and consolidations with the guilty pleas, the proportion of verdicts is further reduced. A crudely calculated number that many commentators take as an honest estimate is 80% to 90% dispositions by guilty plea.⁷ Even at the high end of the estimate, the cases that are tried to verdict remain a very important component in the system, both for themselves (they are likely to be cases involving major factual disputes or extremely serious crimes), and for the influence they exert on the disposition policies regarding the others (a couple of jury verdicts convicting tavernkeepers as accessories to drunk driving will raise the plea offers in future prosecutions).⁸ Thus, neither concern about the inefficiencies and inequities of the adversary paradigm, nor efforts to improve upon the method of adjudication of contested cases should be disparaged because of the relatively few cases affected. At the same time, we would do well to pay greater attention to the problems of prosecutor as adjudicator.

Today, I believe things are much as they were in my time as a prosecutor over 30 years ago.⁹ Young Assistants¹⁰ think of themselves

7. Trials account for about 10%; dismissals may add up to another 5% - 10%. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 Fordham L. Rev. 2117, 2121 (1998); see also Robert C. Black, *FIIA: Monkeywrenching the Justice System?*, 66 UMKC L. Rev. 11, 24 (1997) (stating that "[o]nly about ten percent of felony cases go to trial"); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L.J. 1969, 1978 n.22 (1992) (stating that the percentage of guilty pleas in federal criminal cases fluctuates between 80% - 90%); William S. Laufer, *The Rhetoric of Innocence*, 70 Wash. L. Rev. 329, 374-75 (1995) ("Across the United States, the percentage of felony arrests that are adjudicated at trial ranges from one percent . . . to ten percent The national average is three percent."); Spiros A. Tsimbinos, *Limitations on Parole and its Possible Consequences*, 13 N.Y. Crim. L. News, April, 1996, at 1, 2 (noting that in 1995, only 5.7% of felony cases in New York State went to trial, and 84.8% were disposed by guilty plea).

8. Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 951 (1979) (discussing when divorcing couples will decide to go to court as opposed to reaching agreement through out of court negotiations).

9. My colleague Jerry Lynch's description from his more recent experience sounds very familiar to me. See Lynch, *supra* note 7, at 2136-41.

primarily as advocates. The case they make, or (more likely) inherit from a law enforcement unit, is cast immediately as a trial scenario. It is refined and amplified—as it usually requires—in preparation for exposure to a jury. In this posture, of course, the Assistant cares a good deal more for supplementary information that fortifies the case against the defendant than new data that call his thesis into question. What is shared with the defense is shared reluctantly and only because of the law's stern injunction,¹¹ and what is received from the defense is taken with suspicion and the assumption that, insofar as it contradicts the prosecution version, counsel is likely to be disingenuous, misinformed, or naive.

If and when the overture is made for a possible disposition by guilty plea, the young gladiator is ready. It is all but routine. As others have noted, the term "plea bargaining" or even "negotiating" is misleading.¹² Having spent several years in the process, I can vouch that little, if any, haggling goes on in these sessions. For the most part, the prosecutor announces to defense counsel the counts or crimes to which he would accept a guilty plea in satisfaction of the entire accusation, and perhaps—implicitly or explicitly—the sentence that he would recommend or not object to. The announcement is not likely to surprise experienced defense counsel. The proposal is the composite of several factors: the stress of the docket backlog (a parameter), the strength of the evidence (suspected by diligent counsel), and a conventional "market price" for the particular constellation of facts in the case. A robbery with a weapon but no injuries by a defendant with only minor offenses on his record may go for three years regardless of the legislative maximum for first degree robberies. Counsel may argue: "This is no robbery! Your victim—no

10. Assistant United States Attorneys or Assistant District Attorneys are commonly called "Assistants." They are, of course, technically assistants, but in fact they are usually wholly autonomous, individually endowed with all the prerogatives of the office they serve.

11. See Jencks Act, 18 U.S.C. § 3500 (1994) (requiring the government to produce upon demand any available statement, made by its own witness, which relates to the subject matter of such witness's testimony at trial); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); Fed. R. Crim. P. 16(a) (setting forth five categories of information which must be disclosed by the government upon defendant's request). The Jencks Act and Rule 16 apply in the federal courts, and similar statutes have been enacted in most states. The *Brady* rule applies in all criminal cases.

Another former prosecutor remembers that plea-inducing inculpatory information was more readily imparted than potentially damaging exculpatory data. Maybe so. But I still recall the sense that even inculpatory details, served up to wily counsel in advance of trial, might well stimulate the artful construction of an evasive defense.

12. See Black, *supra* note 7, at 25; Lynch, *supra* note 7, at 2129. But see Easterbrook, *supra* note 7, at 1972 ("Although the disclosure and assessment of information [during plea bargaining] about innocence is imperfect, some defendants can identify their status with high reliability.").

winner himself—and my client had been drinking together and were both drunk when my client got a little too insistent in trying to collect an old gambling debt from his buddy.” But the prosecutor has probably already heard this story, and factored it into the winability equation. So the offer stands, take it or leave it.¹³

What is going on here? And how does it comport with our picture of the prosecutor as advocate? Prosecutorial discretion in general and the practice of plea bargaining in particular have attracted the attention of generations of scholars and commentators. It is not my present purpose to summarize—or to quarrel—with their work. Rather, I propose to devote some paragraphs to the second question, the role of the prosecutor, of which her performance in the drama of plea bargaining is only a part. It is my thesis that we need to reconceptualize the prosecutor to take account of her substantial responsibility as investigator and, in a real sense, arbiter of the accusation. Discharge of this major obligation, the wise exercise of virtually unilateral discretion in the matter, demands neutrality, the suspension of the partisan outlook, and at least until the case passes to the adversarial stage, dedication to interests that may prove antithetical to her ultimate position. And because these conflicting obligations may impair quasi-judicial detachment, I will propose a structural change that might better accommodate the neutrality of the prosecutor in the pre-adversary mode.

I start with the faith that thorough investigation by a detached and dedicated investigator is the best assurance of a conclusion that comports with historical truth.¹⁴ I do not mean to say that the clash of thesis and antithesis in a courtroom setting has not on occasion revealed the truth. And I take full account of the social importance of the public forum for dispute, and of the shows and trappings of the law’s dispassion. But I am far from confident that the devoted pursuit of inconsistent contentions in the artificial setting of a trial readily allows a naive and sheltered fact-finder to distinguish truth from dissimulation, to tell the sturdy inference from the artful.¹⁵ Still, I share with many observers some distrust of the free-ranging exercise of official discretion. First, let us acknowledge that not all prosecutors

13. Of course, I do not mean to say there are no cases—particularly close or complex cases—in which defense counsel may not bring some factor to the attention of the prosecutor that alters the prosecutor’s evaluation of the case. It is not, however, a commonplace.

14. I have elsewhere expounded on this faith at somewhat greater length. See H. Richard Uviller, *The Tilted Playing Field: Is Criminal Justice Unfair?* 73-112 (1999) [hereinafter Uviller, *Playing Field*].

15. I should note here (with some astonishment) that judges with whom I am well acquainted do not seem to share my misgivings, being, by and large, thoroughly content that the adversary process delivers a close approximation of the truth in most cases. See H. Richard Uviller, *Virtual Justice: The Flawed Prosecution of Crime in America* 279-305 (1996) [hereinafter Uviller, *Virtual Justice*].

are up to the task they have undertaken. Not all are diligent, learned, or wise. And even the best of the prosecutors—young, idealistic, energetic, dedicated to the interests of justice—are easily caught up in the hunt mentality of an aggressive office.

Yet, I confess that notwithstanding the sporadic wimps and whiners, the occasional Batmen and blockheads, from what I have known of prosecutors and former prosecutors, I consider them by and large the flower of the bar. At a critical stage in their careers, they have, or have had, the supreme professional luxury known to the practice of law: the blessing of working without regard to the interests of a single-minded client. Virtually alone among their classmates—most of whom were laboring in the competitive world of billable hours and client promiscuity—they were told by their superiors: “Do only what you think is right; bend every professional effort to achieve an outcome that you think best comports with justice within the constraints of law.” And the instruction was sincere. Heady wine, especially for a newly fledged lawyer. And in the best of the breed—perhaps in most of them—assimilation of this extraordinary mission gave rise to a conscious and conscientious project to refine their judgment, to define for themselves the just provinces of law, and to temper all with an acute appreciation for the demands of reality. If discretion is to be lodged anywhere in the system—as it must be—I tend to favor the prosecutor’s office.

But, as I say, I am wary. I know that the earnest effort to do justice is easily corrupted by the institutional ethic of combat. So long as the prosecutor is primarily an advocate, sees himself, armor-clad, prepared to do battle for what is right, detachment falters. I am, then, seeking a way to capture the neutrality implicit in the mission as first declared without undermining the adversary posture of the courtroom advocate that the prosecutor may ultimately become.

It might be well to begin with an examination of the prosecutorial responsibilities antecedent to the assumption of armor and lance. I realize that there will be some old veterans who will snort: “There is nothing antecedent to arming for battle. From first to last, the prosecutor’s duty is to advance the eventual triumph of the government’s case.” And I know there is sufficient truth to that proposition that I admit uncertainty about just where to inscribe the line dividing the neutral prosecutor from the committed advocate. But I shall try.

A prosecutor’s first contact with a case comes in one of two ways. Most commonly, and particularly on the state side (where the overwhelming proportion of criminal prosecutions are found), criminal cases begin with an arrest. The prosecutor greets the case, along with the arresting officer, at the courthouse door. Some of these arrests may be the product of long and painstaking investigation by the law enforcement corps. In some jurisdictions, the custom may

be to consult with the prosecutor long before arrest in these protracted police investigations, flipping the case into my second category. But often—particularly where the local police have experience and pride in their detection skills, the investigation that precedes the arrest is a police operation exclusively. In these cases, the police like to say: the case comes to the prosecutor “trial ready.” This is rarely the prosecutor’s view, however.

Most of the other cases that come in for arraignment—cases in which a more modest investigation, if any, preceded arrest—are grand jury ready or information ready. An alert prosecutor at the arraignment desk, however, will not automatically process what the line officer brings in. At the very least, the complainant should be interviewed first hand. Too, the facts must be reviewed to make sure the officer has not mis-designated the offense. The result is that the prosecutor, on first contact, does provide some filtration and a number of these cases do wash out at the first stage.¹⁶ Arraignment must be prompt so the prosecutor has little time for preliminary investigation. But between arraignment and accusation, the prosecutor has an opportunity for some further inquiry. Prosecutors realize that an indictment is more than a mere accusatory formality—a piece of paper that serves only to bring the case to court, as judges like to instruct juries. To the accused, it is an instrument of terror, to say nothing of a major incision in the pocketbook (if the accused has one). The conscientious prosecutor, then, will not be content with “technical” sufficiency for the commencement of a criminal prosecution. The prosecutor should be assured to a fairly high degree of certainty that he has the right person, the right crime, and a good chance of success with a petit jury. To reach that point of assurance, the prosecutor should approach the case handed to him with a working degree of suspicion. The good prosecutor—like any good trial lawyer—is skeptical of what appears patent to others, and curious concerning details that seem trivial to the casual observer. Looking back on my own courtroom days, I now realize that I was weakest in this essential characteristic of the best of the breed; in a word, my gullibility and compassion dulled my suspicion and lulled my doubts.

The point being that even the cases presented wrapped and tied with a ribbon—“we’ve got a positive ID by the complainant, an independent witness who puts him at the scene, a patently incredible

16. In the federal system, from Oct. 1, 1995 through Sept. 30, 1996, of the 98,454 suspects in criminal matters, 58% were prosecuted in district courts, 33% were declined for prosecution, and 9% were referred to federal magistrate judges. See Bureau of Justice Statistics, U.S. Dep’t of Justice, *Compendium of Federal Justice Statistics, 1996*, 16 (1999). Of the 32,832 declinations, 27% occurred because of case-related reasons (such as weak evidence); 23% occurred because there was no crime or criminal intent; and 19% occurred for other reasons, such as agency requests and lack of federal interest. See *id.* at 17. These statistics are also available in Bureau of Justice Statistics, U.S. Dep’t of Justice (visited Feb. 1, 2000) <<http://www.ojp.usdoj.gov/bjs/>>.

story from the perp, and a handsome criminal record”—deserves further investigation. Positive IDs are frequently mistaken, on-the-scene presence may explain his arrest but does not necessarily attest to his culpability, “patently incredible” stories are sometimes true, and there are many innocent people walking around out there with criminal records. The mindset with which the prosecutor should approach this task is different from the advocate shoring up a somewhat equivocal case; it is the mindset of the true skeptic, the inquisitive neutral.

Following a judgment of conviction, the prosecutor should maintain her adversary stance, fighting off motions, writs, and appeals with which the judgment is besieged: one juror told another juror during a lunch break that the accused looked like a liar to her; during deliberations, one juror shook his fist in the face of another; defense counsel came back from lunch smelling of booze and dozed through the afternoon; during her summation, the prosecutor hinted that she and her office believed the testimony of the accusing witnesses; in his charge to the jury, the judge hiccupped meaningfully. All such attacks on an adverse disposition must be resisted with full adversary zeal.

But where a post-judgment motion goes directly to the issue of guilt, the prosecutor is returned to the pre-adversary mode, and neutrality must resurface. A critical prosecution witness recants; a cop is accused of fabricating evidence in another case; a DNA test discloses that the defendant could not have been the rapist. Upon tenable grounds for such allegations, the prosecutor must resume the role of neutral investigator. A thorough and dispassionate investigation of the new development must be made and, where the result warrants, the prosecutor must not hesitate to cancel the victorious judgment and see that justice is done in the light of the amplified or revised facts. We have read of instances in which DNA evidence has unequivocally contradicted eyewitness testimony, and the prosecutor refuses to join in the motion to set aside the prior judgment or to move to dismiss the charges after the court does so. This seems to me a grievous deviation from the role of neutral servant of justice, which the prosecutor is duty-bound to fulfill. I do not say that the prosecutor should cave at the first allegation of miscarriage; the government’s case, presumably, strong and convincing when tried, does not become instantly so weak it can no longer support the verdict. But a firmly based charge that a woeful mistake was made, that an innocent person was convicted, is not to be taken lightly. We know such mistakes are made (though we have no inkling how frequently) and each one threatens the probity of the entire system. All efforts must be bent to the diligent investigation of the claim and, if substantiated, it is incumbent upon the people’s representative, the guardian of the integrity of the process, to urge immediate remedy to

assist the court in righting the wrong.

II. THE PROSECUTOR BEFORE THE GRAND JURY

The other way the prosecutor makes first contact with a case occurs long before it becomes a case. In this prenatal stage, the creature may be no more than a whiff of suspicion. Our investigative grand jury, the Supreme Court has told us forcefully, and more than once, is an independent panel of citizens, free to follow its flimsy suspicions wheresoever they lead.¹⁷ And the prosecutor, as their guide, may stimulate those nascent hunches to reflect his own. So the decision to put a matter into a grand jury, to open an investigation with the aid of subpoenas *ad testificandum* and *duces tecum*, along with immunity if it comes to that, is an exercise of discretion of some moment.¹⁸ And, with or without the grand jury behind him, the prosecutor may direct the employment of a number of potent tools for uncovering evidence, including search warrants, eavesdrops, and espionage. We are now avowedly looking for evidence of criminal conduct of some sort by someone. But it is well to remember that we are not yet prosecuting any particular person for any particular crime. And suspects may be exculpated along the line, as others may be drawn in. Indeed, the whole venture may come to naught, the initial suspicion withering in the light of further discoveries. And when that happens, let us hope that the prosecutor, notwithstanding his own and his patient jurors' investment in the project, will be courageous enough to fold his tent and silently steal away.

At this exploratory stage, the relationship among the prosecutor, the grand jury, and the court is a delicate balance of prerogative and restraint. As a matter of form (and with some patriotic flourish), it could be said that the grand jury—the citizenry—is sovereign in the triumvirate. Though empanelled by the court, guided by the prosecutor, governed to some extent by statute, and reporting to the court, the choices of the ordinary folk sitting as a grand jury—where to look, whom to hear, whom to immunize, what and whom to charge—are theirs alone. Their prerogative, however, does not oblige the prosecutor—their counsel—to bring to their attention all known material for their consideration, not even matter which might lead them away from indictment. As recently as 1992, the United States Supreme Court declined to exercise its supervisory power to require

17. The most recent reminder from the Supreme Court was *United States v. Williams*, 504 U.S. 36 (1992), which is discussed at *supra* note 3 and *infra* note 19 and accompanying text. For older authority to the same effect, see *United States v. Dionisio*, 410 U.S. 1, 13 n.12 (1973); *Hendricks v. United States*, 223 U.S. 178 (1912); see also, e.g., *United States v. Calandra*, 414 U.S. 338, 344 (1974) ("The grand jury's investigative power must be broad if its public responsibility is adequately to be discharged.").

18. See Uviller, *Playing Field*, *supra* note 14, at 32-72.

the prosecutor to submit exculpatory evidence to the grand jury.

In *United States v. Williams*,¹⁹ the Court designated the grand jury an accusatory rather than an adjudicatory body, and placed it outside the supervision of the courts. John H. Williams, Jr., an Oklahoma investor, was accused of misinforming a bank of his worth and income in support of a loan application. After reading the grand jury minutes, Williams moved to dismiss the indictment on the ground that documents and testimony concerning his knowledge of the value of his assets had not been presented though the evidence had a bearing on a material allegation of the indictment. Under Tenth Circuit precedent,²⁰ the government bears a burden to submit "substantial exculpatory evidence" that might affect the grand jury's decision whether to indict.²¹ Accordingly, the motion to dismiss was granted and the dismissal affirmed.²²

In the United States Supreme Court, the case was important enough to the Government to be argued by the Solicitor General, Kenneth Starr, himself. General Starr opened to the court by announcing the issue: "This case brings before the Court an issue concerning the obligations of a prosecutor before a Federal grand jury."²³ I think that states it exactly right. The Government, however, immediately shifted the focus from the prosecutors' obligations to "the concept of the grand jury's function."²⁴ The Solicitor General stated his theme thus: "The grand jury is a screening mechanism. It is there to determine whether probable cause exists. It is not an adversary proceeding, and thus historically, has not been charged with evaluating defenses."²⁵ This approach was echoed in the opinion of the majority. Justice Scalia, writing for the Court, noted:

Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office.²⁶

He continued in this familiar vein, emphasizing the independence of the grand jury. On this basis, the Court declined—as it has before—to

19. 504 U.S. 36 (1992).

20. See *United States v. Page*, 808 F.2d 723, 728 (10th Cir. 1987).

21. The Government denies this legal obligation, but nonetheless assumes the obligation as a matter of policy to present or disclose to a grand jury "substantial evidence which directly negates the guilt of a subject." U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-11.233 (1987). See *infra* notes 35-37 and accompanying text.

22. See *Williams*, 504 U.S. at 39.

23. Transcript of Oral Arguments for *United States v. Williams*, 1992 WL 687851, at *3 [hereinafter Transcript].

24. *Id.* at *4.

25. *Id.*

26. *Williams*, 504 U.S. at 47.

exercise its supervisory power over the functions of the grand jury.²⁷ The Court further rejected any argument based on the Fifth Amendment on the grounds that the right of indictment does not imply a right to have the grand jury adjudicate the issue after a full presentation of both sides of the issue.²⁸

Powerful arguments. They demonstrate that the grand jury, an independent body of citizens, enjoys considerable autonomy, and functions to evaluate prosecution evidence only. But what does it say about General Starr's opening question, what is the responsibility of the prosecutor in the presentation of a case to them? Justice Scalia comes eventually to that question. First, he rejects the notion that the prosecutor is obliged to present a "balanced" picture of the events in question. He writes:

If a "balanced" assessment of the entire matter is the objective, surely the first thing to be done—rather than requiring the prosecutor to say what he knows in defense of the target of the investigation—is to entitle the target to tender his own defense. To require the former while denying (as we do) the latter would be quite absurd.²⁹

It is not a wholly persuasive argument. Requiring a prosecutor to acquaint a jury with all evidence known to him on a critical point hardly requires abandonment of the *ex parte* mode. It does not seem absurd to me that we entrust to the grand jury's counsel the duty of balanced presentation rather than having the "target" (whoever he may turn out to be) present his own "defense" to an unknown and inchoate charge.

Justice Scalia's principal argument, however, is that the prosecutor has no greater obligation of presentation than to provide what the grand jury requires for its accusatory purposes.³⁰ He spells out the point thus:

Respondent acknowledges (as he must) that the "common law" of the grand jury is not violated if the grand jury itself chooses to hear no more evidence than that which suffices to convince it an indictment is proper. Thus, had the Government offered to familiarize the grand jury in this case with the five boxes of financial

27. See, e.g., *United States v. Calandra*, 414 U.S. 338, 349 (1974) (rejecting the proposal that the exclusionary rule be applied in grand jury proceedings); *Costello v. United States*, 350 U.S. 359, 364 (1956) (declining to apply the hearsay rule in grand jury proceedings).

28. See *Williams*, 504 U.S. at 53. In pertinent part, the Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" U.S. Const. amend. V.

29. *Williams*, 504 U.S. at 53.

30. He is not alone in this view. The Court of Appeals of the State of New York, for example, agrees. See *infra* notes 41-43.

statements and deposition testimony alleged to contain exculpatory information, and had the grand jury rejected the offer as pointless, respondent would presumably agree that the resulting indictment would have been valid. Respondent insists, however, that courts must require the modern prosecutor to alert the grand jury to the nature and extent of the available exculpatory evidence, because otherwise the grand jury "merely functions as an arm of the prosecution." We reject the attempt to convert a nonexistent duty of the *grand jury itself* into an obligation of the prosecutor. The authority of the prosecutor to seek an indictment has long been understood to be "coterminous with the authority of the grand jury to entertain [the prosecutor's] charges." If the grand jury has no obligation to consider all "substantial exculpatory" evidence, we do not understand how the prosecutor can be said to have a binding obligation to present it.³¹

Again, Justice Scalia's logic escapes me. Defense counsel has no obligation to offer in evidence material that he has received by discovery; he may surely ignore the evidence as "pointless." But the nonexistent duty of counsel does not diminish the obligation of the prosecutor to furnish the discoverable evidence. The authority of the prosecutor to seek an indictment is not at issue here. And I certainly hope that the Court is not saying that, like the grand jury, the prosecutor should look no further than the barely sufficient evidence that would warrant an accusation.

Although a grand jury does not normally concern itself with questions of credibility, and they rarely deliberate on the nicer questions of intent, their superficial consideration does not relieve the conscientious prosecutor of the obligation to do both. Moreover, if the result of the prosecutor's investigation is ambiguous, it might be well for the prosecutor to acquaint the grand jury with the conflict in evidence and seek from them a resolution. The faint flavor of "adjudication" in such a process should not offend either Justice Scalia or the precedent he cites. In my experience (on the state side), one of the substantial virtues in working with a grand jury is that occasionally, the uncertain prosecutor can seek the detached advice of the panel. I recall in particular a charge of corruption against a police officer who insisted he was innocent and had bank records that he claimed bore him out. I was very glad to put the conflicting evidence before my citizens' panel and ask them in effect: what do you think? Is this evidence strong enough to warrant prosecution to a petit jury?³² I hope Justice Scalia does not imply that, as a prosecutor, I should not fully explore and consider evidence of innocence because a grand jury

31. *Williams*, 504 U.S. at 53 (citations omitted).

32. To be sure, I was working under a state law that entitles a potential defendant to be heard by the grand jury considering the evidence against him, and empowers a grand jury to hear such defense evidence as it chooses to. See N.Y. Crim. Proc. § 190.65 (McKinney 1993).

need not.

Exploration and consideration by the prosecutor of conflicting evidence does not necessarily translate into a duty to present the whole ball of twine to the grand jury. And the grand jury is not, as Scalia rightly points out, under any obligation to expand its inquiry beyond the minimal scope of the evidence required to support an indictment.³³ But the obligation of the grand jury is not at issue, and the prosecutor may have a greater obligation to acquaint the jury with investigative products than the jury has to consider them. What I fail to understand is the Court's failure to understand how the prosecutor may have a professional obligation to present what the grand jury has no obligation to consider. By acquainting the grand jury with the existence of evidence critical to an issue before them, though inconsistent with the theory of culpability, the prosecutor fulfills her duty as counsel to provide the jury with the option to inform itself as it chooses.

Consider this little paradigm. The prosecutor has a simple bank robbery with four eyewitnesses and little else, two tellers and two nearby patrons. None suffers any impairment to perception or credibility. Three make a certain, positive identification, and the fourth is equally confident that the robber was not the defendant. Should the prosecutor, having presented the testimony of the three, inform the grand jury that a fourth contradicts them? Or is it enough, as Scalia would have it, that the evidence of the three is sufficient to support the indictment? Many people would argue that though one identifying witness suffices, if three said the robber was not the defendant, the prosecutor should not present the case at all. A two-two split probably calls for very careful evaluation of the other circumstances and the relative vantage of the positive and negative witnesses, and probably should be a grand jury call in the end. But it does seem pretty clear to me that the division with which I began, three positive one negative, is a case that should be presented with advice to the jury concerning the dissent, if not actual testimony from the dissenter. The point of this little exercise is to demonstrate that it is not enough for the conscientious prosecutor to present the evidence sufficient to support the indictment.

It may be that the prosecutors' duty of impartial investigation derives neither from the Fifth Amendment right to accusation by grand jury nor from any rules of grand jury procedure enforceable by the courts.³⁴ But if—as I contend—there is such an obligation, John

33. See *Williams*, 504 U.S. at 53.

34. It is interesting that, despite the challenge of the Chief Justice at the oral argument, the Solicitor General maintained in answer to a question from Justice O'Connor at the outset of his oral argument, that an indictment should be dismissed where the prosecutor knowingly put material false evidence before the grand jury. General Starr relied on the law in several circuits, with which the Government had no

Williams' suggestion that "the modern prosecutor [should] alert the grand jury to the nature and extent of the available exculpatory evidence" should not be so summarily rejected. Even conceding the fullest autonomy to grand juries, prosecutors are their counsel and may be expected to discharge that office by informing the jury of the evidentiary options. Grand juries, notwithstanding their non-adjudicatory role, may be expected, as citizens, to consider the appropriateness of indictment in addition to the sufficiency of the case supporting it. And the existence of substantial evidence inconsistent with guilt may properly influence their judgment.

I do not mean to say or imply that the neutral prosecutor's obligation of fairness requires the presentation of all evidence, or even all evidence that might be evaluated as helpful to the future defendant. Desirable as it might be in an ideal world, practical considerations all but obliterate this idea. In a case of any complexity, the files of the prosecutor would be overwhelming to a grand jury without prudential editing. And there is no reason why such an inordinate burden should be laid upon the hapless citizens whose ill fortune brought them into assembly as a grand jury. So too, the obligation to present all possible exculpatory evidence would fall afoul of practical problems of recognition. In the early stages of presentation, the prosecutor himself can hardly recognize the documents, the fragments of testimony that point away from accusation, much less any judge attempting to supervise the performance of the prosecutor. And the last thing I hope to do is to encumber the process further with wrangles after the fact about whether the prosecutor should have known its significance, and should have offered to the grand jury this or that item that might have affected their resolution.

Rather, I am proposing that the neutral prosecutor, despite the unsupervised license accorded by Justice Scalia & Co., should inform the grand jury of evidence known to the prosecutor that, if true, would substantially undermine the thesis of culpability, discredit witnesses on whose credibility the prosecution case depends, or tend to establish a substantial defense of excuse or justification. Although to the Government, this proposal may sound more in terms of policy than law, I am heartened to know that, as such, they endorse it, despite *Williams*. The famous Department of Justice Manual which, in twelve loose-leaf volumes, advises the constituent prosecutors on a few essentials of the job, then set forth:

[I]t is the Department's [of Justice] internal policy . . . [that] when a prosecutor conducting a grand jury inquiry is personally aware of

quarrel. See Transcript, *supra* note 23, at *5-*6. The Solicitor General might have also mentioned Section 9-11.233 of the U.S. Attorneys' Manual, entitled "Presentation of Exculpatory Evidence." See U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-11.233 (1987); *supra* note 21.

substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.³⁵

While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review. Presumably, the announced policy has moved U. S. Attorneys to bring evidence contrary to the theory of prosecution to grand juries with little fuss or bother. Some judgment is doubtless called for in differentiating the "substantial evidence" from the trivial, and that which "directly negates" from that which only indirectly casts doubt on guilt, especially at the early stages of an unformed case, but apparently the DOJ expects no less.³⁶

If I were to move the obligation from policy to law, I would encounter two major problems. The first is that I would insert detached judicial oversight into what has been heretofore a wholly precatory duty, obedience or disregard being all but invisible. Though I can hear the Attorney General protest the "interference" of the courts, I hardly consider the fairness of the prosecutors' performance as being a matter of executive turf. And with the Department's acknowledgment of the importance of the imperative ("*must* present or otherwise disclose"³⁷), they can hardly be heard to protest the courts' efforts at enforcement. The second of the problems is the creation of yet another "technical" grounds for adversary combat. Even an obligation limited to the big ticket items invites contention and drags the reluctant court into yet another mire of *post facto* litigation.

The rule-clogged American machinery of justice can ill-afford new engagements for the judicial resolution of loosely articulated constraints of prosecutorial propriety. I am deeply sympathetic to this complaint, I hasten to say. But I must also say that, when it comes to causes and grounds for litigation, I count among the more important those that have a direct bearing on guilt and innocence. And even at the indictment stage, sparing the innocent the injury of indictment and the burden of trial is among the more worthy reasons to litigate. The best defense of the grand jury is today, as it has always been, that it provides a citizen panel to review executive decisions to prosecute.

35. U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-11.233. Oddly, (despite the fact that it is cited with approval by dissenters), Justice Scalia does not allude to this document. Though subsequently amended to take account of *Williams*, there was no substantive change in the Manual, as reproduced herein. The implication is unmistakable: the stated policy of the United States is "quite absurd." See *supra* note 29 and accompanying text.

36. *Id.*

37. *Id.* (emphasis added).

And particularly in dubious cases where evidence on vital elements conflicts, that shield is meaningful only if the grand jury has knowledge of and access to exculpatory evidence. I believe that prosecutors know this, that the injunction of the DOJ Manual is generally observed, and that the court will have little to do in the way of enforcement. And to the extent that the odd (or routine) motion raises the issue of a substantial prosecution dereliction, decision should not be unduly burdensome to a court accustomed to resolving similar allegations.

Even without quarreling with the Supreme Court's sparing application of its supervisory jurisdiction in *Williams*, I do wish that they had not characterized the investigating prosecutor as exercising authority "coterminous" with the grand jury, but rather had underscored the prosecutor's unique obligation of impartiality. For, though the grand jury be not adjudicatory, the prosecutor, I claim, is necessarily so at the investigatory stage. And we need some good clear recognition of this aspect of the job.

I cannot help but note that, in addition to its hazy logic, the Court's opinion with respect to "coterminous" obligations stands on dubious authority. The case quoted by Justice Scalia for this critical phrase, *United States v. Thompson*,³⁸ is a 1920 decision on the question whether the prosecutor must seek the approval of the court before submitting to a second grand jury charges on which the first grand jury had failed to indict. The Government, defending the second indictment, asserted that certain propositions were well established law in the United States, among them:

That the United States district attorney, in virtue of his official duty and to the extent that criminal charges are susceptible of being preferred by information, has the power to present such informations without the previous approval of the court; and that by the same token *the duty of the district attorney to direct the attention of a grand jury to crimes which he thinks have been committed is coterminous with the authority of the grand jury to entertain such charges.*³⁹

Thus, it appears that the phrase the *Williams* Court quoted—voiced to support a totally different proposition—was merely the Government's contention in *Thompson*, not the opinion of the Court. The *Thompson* Court's majority opinion by Justice White does later use the word "coterminous." It appears in a convoluted sentence that is part of the Court's explanation of why the "exception" requiring court approval for resubmission is inconsistent with the "rule" regarding the authority of the prosecutor to present cases to grand juries. The Court's sentence (employing slightly different language

38. 251 U.S. 407 (1920).

39. *Id.* at 413-14 (emphasis added).

from that quoted by Justice Scalia) follows:

[B]ecause, while the general rule which is stated establishes the authority of the district attorney as official prosecutor, and makes it, as we have seen, coterminous with the right of the grand jury to consider, the exception subjects that authority to the exercise of a judicial discretion, which, as well illustrated by the case under consideration, destroys it.⁴⁰

In all, this authority provides weak support, if any, for the Court's major assertion.

Finally, in the interests of caution, I should emphasize that my quarrel with *Williams* and my regret that the duty of presentation was so narrowly framed should not be read to advocate broad judicial review of the depth and breath of the prosecutor's presentation to a grand jury. Even the State of New York, to choose one example, a jurisdiction that recognizes the obligation of the prosecutor to fairness, premised on the "familiar doctrine that a prosecutor serves a dual role as advocate and public officer . . . [and is] charged with the duty not only to seek convictions but also to see that justice is done,"⁴¹ does not require full presentation. "[T]he People maintain broad discretion in presenting their case to the Grand Jury and need not seek evidence favorable to the defendant or present all of their evidence tending to exculpate the accused."⁴² Rather, the Court of Appeals in New York has set forth, as the flexible standard for the obligation to acquaint the grand jury with a defense, the following: "whether a particular defense need be charged depends upon its potential for eliminating needless or unfounded prosecution."⁴³

III. THE DUALITY OF THE PROSECUTOR'S RESPONSIBILITY

To return, then, to the bifurcated responsibilities of the prosecutor, what sort of mindset is called for by this extraordinary task? Can we expect a dispassionate investigator to maintain the initiative, to persist in the pursuit of elusive veils of suspicion, to summon the energy to pore through cartons of documents, interview dozens of reluctant and prevaricating participants in the hope of finding a case buried in the haystack? Or is it only the taste of the trial to come that fires the soul of the investigator? It may well be the latter, I know. But my experience is that, in the investigative bureaus of my shop—especially the commercial frauds bureau—the prosecutors did not really expect that a trial would result from their prodigious labors. By the time they

40. *Id.* at 415.

41. *People v. Pelchat*, 62 N.Y.2d 97, 105 (1984).

42. *People v. Mitchell*, 82 N.Y.2d 509, 515 (1993) (citing *People v. Lancaster*, 69 N.Y.2d 20, 25-26 (1986)).

43. *People v. Lancaster*, 69 N.Y.2d 20, 27 (1986) (quoting *People v. Valles*, 62 N.Y.2d 36, 38 (1984)).

had assembled a case warranting indictment, the guilty plea was virtually assured. Indeed, the object was to close every loophole so securely, to knit the skein so tightly, that surrender was the defendant's only option. And of course, from the purely tactical standpoint, one way to assure the guilty plea was to cut loose any suspects who had a tenable defense. That requires an open mind and a relentless pursuit of possible defenses not only to destroy the untenable, but to honor the tenable.

For the cases in which the prosecutor expects a resolution of the accusation by guilty plea, as well as for the ordinary case working its way up the docket toward a jury trial, the prosecutor must pause and consider what is the just disposition of the case by agreement?⁴⁴ Since docket economy is an ongoing imperative, some discount is probably granted solely in exchange for bypassing the trial and appeal. Projected success with a jury counts too. But underlying the state's accord to a reduction in the top count penalty must be a defensible assessment of the gravity of the crime and the deserts of the defendant.

This process looks a lot like adjudication. Not the familiar adversary process of adjudication, but a model closer to the civil law system. In the European model—sometimes called, disparagingly, “inquisitorial” by those in our “adversarial” tradition⁴⁵—a semi-judicial figure (called in some places a *juge d'instruction*) supervises the investigation and prepares the detailed, all-but-dispositive accusation in the *dossier*. In the prevalent mode of American adjudication, the prosecutor emerges from her role as *ex parte* investigator to preside over the disposition of the accusation she has brought. Of course, the judge will actually preside, ultimately reviewing the case and authorizing the agreed upon resolution. But, if the parties have done their work truly and well, there will be little left for the court to adjudicate beyond signing off on the disposition approved by the prosecutor.

Again, we see our prosecutor in a role quite different from that of the gladiator, his mind set on the public exposure of his skills and the mettle of his cause in the colonnaded arena. Is this, should this be, can this be the same person imbued with the same ethic of the same office?

I think it would be well if we recognized the difficulty of sustaining the detachment of an adjudicator with the commitment of an advocate. Prosecutors were not designed to be both simultaneously. The adjudicatory function evolved from the simple surrender of a

44. It should be acknowledged that today, in many jurisdictions, the appropriate resolution by guilty plea is agreed upon before the accusation is filed. See 5 Wayne R. LaFare et al., *Criminal Procedure* § 21.1(h), at 30-31 (2d ed. 1999).

45. I have to confess that I do not rest my patriotism on pride in the adversary system. See Uviller, *Virtual Justice*, *supra* note 15, at 241-65.

guilty plea—a matter between the confessing defendant and the judgmental court. With increasing regularity, counsel for the penitent began to visit the prosecutor's office in search of some extra consideration in exchange for the client's guilty plea. As long as pleading guilty meant only throwing oneself upon the mercy of the court—meaning, hoping for leniency within the court's sentencing discretion—the prosecutor was no part of the transaction. But where the prosecution's recommendation was solicited in support of the bid for lenity or, more likely, some adjustment in the accusation was sought to facilitate the award of a lighter sentence, the prosecutor became a critical player in the disposition drama. Under federal and many state constitutions, the grand jury was the accusing authority, and even the court, alone, could not redact their charge. Traditionally, pardon and clemency were reserved to the executive, descendant of the divinely-endowed monarch. And modifications to a less from a more serious charge are variants on the forgiveness power. Hence, laws such as New York's⁴⁶ specifically require the consent of the executive officer, the prosecutor, for dismissal or acceptance of a plea to a charge less than the grand jury's top count. So, as courts increasingly deferred to the judgment of the prosecutor who, presumably, represented the interests of the law-abiding community, the prosecutor gradually displaced the court as the arbiter of a just resolution.⁴⁷

How does the prosecutor meet the demands for quasi-judicial performance? As others have noted, and many lawyers know from personal experience, prosecutors perform this prerogative largely by unarticulated, unreviewed, intuitive standards proudly designated "the interests of justice." The question of whether these standards should be written and promulgated, and thereby somehow achieve the status of law is a difficult and debatable point. I do not mean here to enter the debate on this question.⁴⁸ It is sufficient for present purposes to note that in the performance of the quasi-judicial role, the prosecutor should be sufficiently detached from his prospects as an

46. See N.Y. Crim. Proc. §§ 210.20, 210.40, 220.10, 220.50 (McKinney 1993).

47. Of course, the prosecution cannot *enter* the guilty plea, but with some judicial input, the recommendation of the prosecutor usually becomes the disposition of the court.

48. But if pushed, I would probably vote negative if for no other reason than reluctance to introduce yet another ground for procedural challenge. In-house articulation of customary practice is doubtless a healthful exercise. But once the standards are known (as they shortly would be), the office suffers the unnecessary headache of defending its own decision against the claim that its own standards were ignored. Moreover, there is considerable doubt that a working articulation could be compiled even were it desirable to do so. Either it would be bland and flexible or voluminous and rigid. And our sour experience with the federal sentencing guidelines counsels against another effort to tote up of the values of the multiple variables of fact, the strength of case, the moral gravity of crime, and the criminal history of defendant that animate the discretionary decisions.

advocate to reach a dispassionate appraisal of the interests of justice.

I believe that for the office of prosecutor faithfully to discharge the incompatible roles of advocate and arbiter, the investigators and adjudicators should be segregated from the advocates. I do not say that the two bands can not live happily under one roof, both responsible to the same chief. But I do think that those who investigate, assess, and negotiate settlement should belong to a different cadre from those who try the cases that fail to reach accord. Since the disposition of a charge should never ignore entirely the trial potential of the case, I would staff my adjudicative team with trial veterans. And insofar as the trial process may abort at any time and the question of a fair disposition raise its head anew deep into the trial process, I would have stage one and stage two prosecutors collaborate on its resolution. With these and other adjustments for overlap, I would encourage my adjudicators to celebrate their dispassion, to relish their role not only as the fact-seekers initially, but the justice-seekers ultimately. These people should be honored by defense counsel and judges, along with their colleagues, for their devotion to the right result regardless of adversarial considerations. And where they find it impossible, for one reason or another, to adjudicate the case by accord, they should step out of it and turn the cause over to a warrior to take into battle.

There is some (though inadequate) recognition of the importance of these values in the bureaucratic arrangement in some large offices that disempowers trial assistants from granting immunity to witnesses, dismissing indictments, or accepting pleas to reduced charges. These adjudicative decisions must be approved by senior supervisors. One may assume that the supervisors are trial veterans with some degree of detachment, if not neutrality. It's the right idea. But such supervision is often nominal at best since the senior assistant knows only what the young trial assistant tells him and is inclined to approve any reasonable course the trial assistant advises. As I envision the ideal arrangement, the senior "adjudicative assistant" would have exclusive control of the case from inception, through investigation and accusation, and into plea assessment and whatever negotiation accompanies it. The case would be surrendered to the young gladiator—the "adversary assistant"—only when all else fails. And any future plea overtures would be considered only with the advice of the adjudicative assistant.

I am told that the glamour factor cuts against this scheme. Trial assistants are the stars of an office and the most desirable recruits to the private sector to which they will, most likely, graduate. Under my regime, investigators and plea bargainers would be seen as mere clerks. Look at the American trial mythology. Or compare the romance of the English barrister with his dull compatriot, the solicitor. I am not so sure. For one thing, wealthy, prominent leaders of the bar

on either side of the Atlantic are likely to be solicitors or the American analog, lawyers who do not take cases to trial. For another, from my own experience I believe that if the normal routine was to put juniors in court and to reserve the more mature and experienced assistants for the pretrial stage, the office ethic would soon reflect the fact—especially since the assistants themselves would recognize the just allocation of responsibility. While many lawyers might relish exposure on the evening news, I think by and large that sort of glamour pales fast.

More troublesome in my plan is a factor I have tried to ignore, but every experienced trial dog will attest to its importance. The strongest impetus to disposition by guilty plea is the imminence of trial. Any well-run prosecutor's office hates the last minute, eve-of-trial repentance, the desperate attempt (often abetted by the judge) to revive a lapsed offer as the prospective jurors file into the courtroom. Defendants are told in the strongest language that an offer must be seized at once or lost forever. But I am forced to conclude there is something about the criminal mentality that blocks reception of the message. They persistently hope for miraculous deliverance—a vital prosecution witness will step in front of a truck, an unintelligible motion will hit the magic number and the indictment will vaporize, the prosecutor will get married and lose interest in prosecuting the case. Somehow getting away with it is the ethic of the trade. It is only at the very last minute, as the jury is being empanelled, that the accused will face the inevitability of judgment; only at this point is he ready to accept the fact that surrender is the wisest course. And I well remember my reluctance to revive the offer when my defendant belatedly faces the music—I had gone to expense and trouble assembling all my witnesses, I had put in many hard hours preparing for the trial. I was up for it. I thought the defendant should pay for his tardiness with a higher plea.⁴⁹ But it is hard to fight with a judge who urges you to relent, arguing: if the disposition was right last week, it must be right today.

My plan virtually ignores the imminence factor insofar as it assumes that the evaluation of the case will be done well before the jury call goes out. And I should recognize that there will inevitably be many cases in which the first serious approach to the prosecutor regarding disposition will be made to the trial assistant. Yet, I maintain that the position of the trial assistant if and when she gets that telephone call will be greatly aided, and office policy will be stabilized by the earlier work done by the adjudicator. There is no reason that I can imagine why the late broach of the possibility of plea should not return the case to the pre-adversary mode, with the added factor that the trial

49. Of course, it can be—and has been—argued vigorously that the higher sentence is, or is not, a premium exacted for the exercise of the right of conviction by trial. I do not venture into that topic here.

assistant can now offer the additional input that she wants very much to go to trial—or is reluctant to do so.

CONCLUSION

So, in sum, I see prosecutors as executing multiple functions within three general categories: investigative, adjudicative, and adversary. The first two of these call for a quality of professional disposition different from the last. Investigation and adjudication call for neutrality, while the trial mode of the advocate demands full partisan commitment. Passion and dispassion are not cut from the same mentality. Dedicated detachment is a precious quality in a public prosecutor, difficult to cultivate and best developed at some remove from the adversary zeal that characterizes the trial phase. Conscientious commitment to an office policy or tradition goes a long way toward the ideal of quasi-judicial performance. So, too, effective and devoted supervision can imbue the line assistance with an appreciation of his or her dual responsibilities. But neither commitment nor supervision of this sort can be generally assumed. Indeed, enjoining the same person to be at once neutral and contentious may induce some discomfort. So I propose that some structural reflection of the bifurcation in prosecutorial function might encourage development of both orientations. Recognition of the division by separating the Assistants who assemble and evaluate evidence from those who present it in adversary form to a factfinder might enhance both commitments.