PROSECUTORIAL ETHICS AND VICTIMS' RIGHTS: THE PROSECUTOR'S DUTY OF NEUTRALITY

by
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In recent years, enhanced legal protections for victims has caused victims to become increasingly involved in the criminal justice process, often working closely with prosecutors. In this Article, Professor Gershman analyzes the potential challenges to prosecutors' ethical duties that victims' participation may bring and suggests appropriate responses.

I. INTRODUCTION

The role of the victim in the criminal justice system has increased dramatically in recent years. Whereas crime victims in the past lacked any meaningful role in the criminal justice process, crime victims today are afforded broad legal protections, including a right to be treated fairly and with dignity, a right to restitution for their injuries, a right to be protected from the accused, a right to be notified of and to be present at court proceedings, and a right to be heard at critical stages in the proceedings.[1] These protections are not

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[1] Thirty-three states now have victims' rights amendments, and every state and the federal government have victims' rights statutes with varying provisions. *See* Steven J. Twist, *On the Wings of Their Angels*, 9 LEWIS & CLARK L. REV. 581, 588 n. 30 (2005) (listing state victims' rights amendments). Congress has recently enacted the Crime Victims' Rights Act, *see* 18 U.S.C. § 3771(a)(2) (West, WESTLAW through March 2005 legislation), which affords crime victims (1) the right to be protected from the accused, (2) the right to timely and accurate notice of public court proceedings, (3) the right not to be excluded from public court proceedings, (4) the right to be heard at public court proceedings involving release, plea, sentencing, and parole proceedings, (5) the right to confer with the prosecutor, (6) the right to full and timely restitution, (7) the right to proceedings free from unreasonable delay, and (8) the right to be treated with fairness and respect. For the most comprehensive

self-executing, however. At a minimum, their enforcement requires the involvement and cooperation of the prosecutor.[2] Yet despite the prosecutor's important role in safeguarding the rights of victims, there has been little examination of the relationship between prosecutors and victims, and the extent to which that relationship implicates ethical rules regulating a prosecutor's conduct.[3] In fact, examining the role of the victim in criminal procedure illuminates the prosecutor's role as well.

Given the victim's critical role in identifying and punishing offenders, one would reasonably expect prosecutors, if only as a matter of self-interest, to maintain a meaningful and cooperative relationship with crime victims and to aggressively protect victims' rights.[4] To be sure, prosecutors enjoy several practical advantages in prosecuting crimes against victims that are not available to them in victimless crimes.[5] First, crimes involving victims, particularly crimes of physical violence, abuse of vulnerable persons, and invasions of personal and property rights, are likely to elicit a sympathetic response from a jury. Second, crimes against victims often produce indisputable evidence of an invasive act, permitting the prosecutor and his victim to present a compelling story that will readily be believed by a jury.[6] Third, the prosecutor, through skillful use of evidence and argument, can exploit a jury's natural instinct to

treatment of victims' rights, see DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE (1999).

[2] The court's involvement is at least as critical as that of the prosecutor in protecting victims' rights. *See* Walker A. Matthews, III, *Proposed Victims' Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL ETHICS 735, 748 (1998) ("judges are a major factor in the long term effects of victims' rights legislation"); State v. Casey, 44 P.3d 756 (Utah 2002) (although prosecutor breached his duty to notify victim of the right to be heard at defendant's plea proceeding, court remedied the violation by reopening plea proceeding and allowing victim to be heard).

[3] *See* Samuel R. Gross & Daniel J. Matheson, *What They Say at the End: Capital Victims' Families and the Press*, 88 CORNELL L. REV. 486, 513–14 (2003) (interviews with families of murder victims suggest that victims ordinarily take their cues from prosecutors whom they trust, who appear to be on the victims' side, and who have a monopoly over victims' cases).

[4] Victims, apart from their testimony, often provide investigative, financial, and tactical assistance to prosecutors. *See, e.g.,* People v. Eubanks, 927 P.2d 310 (Cal. 1997) (victim underwrites significant investigative costs); State v. von Bulow, 475 A.2d 995 (R.I. 1984) (victim's family and their private attorney provided prosecutor with relevant evidence obtained from private searches and interviews of witnesses); People v. Conner, 666 P.2d 5 (Cal. 1983) (*en banc*) (victim was a deputy prosecutor in same office prosecuting case); People v. Greer, 561 P.2d 1164 (Cal. 1977) (victim's mother employed in prosecutor's office and benefited from aggressive prosecution of defendant).

[5] These impressions are from my own experience as a prosecutor for ten years in New York City (1967−1976), as well as studying the criminal justice system for the past thirty years. To be sure, prosecutors may also enjoy advantages in prosecuting cases involving drugs, public corruption, white collar crimes, and organized crime. My own sense is that prosecuting crimes with victims gives prosecutors a surer means of winning a jury's sympathy and rapport than with victimless crimes.

[6] *But see* RICHARD OFSHE & ETHAN WATTERS, MAKING MONSTERS (1994) (claiming that victims of child abuse may be creating false narratives based on memories of abuse created during psychotherapy).

empathize with an alleged victim, and can invite revenge.[7] Fourth, since the issue before a jury usually is the victim's accuracy rather than her truthfulness, the prosecutor will probably be more successful in persuading a jury to accept the testimony of an honest but mistaken witness than the self-serving testimony of an unsavory witness with a strong motivation to lie (e.g., an accomplice or an informant).[8]

Despite these advantages, a prosecutor cannot align herself exclusively with the victim.[9] A prosecutor also owes an allegiance to constituencies that are independent of the victim—i.e., the general public and the accused. A prosecutor must attempt to reconcile this tripartite responsibility to protect the public from harm and protect the rights of the accused while at the same time protecting the rights of the victim.[10] Needless to say, balancing these interests properly and effectively requires considerable skill. To the extent that a prosecutor aligns herself too closely with a victim, a prosecutor may compromise her ability to evaluate the case objectively, to weigh the credibility of the victim impartially, to exercise her broad discretion fairly and dispassionately, and to protect the legal rights of the accused.[11] On the other hand, a prosecutor who seeks to zealously protect the public from harm may view the victim as merely a means to convict a dangerous offender, may undervalue the right of the victim to be afforded a meaningful role in the proceedings, and may disregard the right of the defendant to be treated fairly.[12] And finally, to the extent that a prosecutor seeks to protect a defendant's constitutional right to a fair trial, the prosecutor may engage in conduct that

[7] *See infra* notes 62−64 and accompanying text.

[8] *See* On Lee v. United States, 343 U.S. 747, 757 (1952) (noting that testimony of informers is a "dirty business" and "may raise serious questions of credibility"); Bruton v. United States, 391 U.S. 123, 136 (1968) (accomplice's testimony "is inevitably suspect" and "unreliab[le]"); Crawford v. United States, 212 U.S. 183, 204 (1909) (testimony "ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses"). This is not to say that the testimony of victims does not also raise concerns over false accusations. *See* State v. Michaels, 642 A.2d 1372 (N.J. 1994) (pretrial taint hearing ordered to protect against false accusations by child witnesses); People v. Pitts, 273 Cal. Rptr. 757 (Cal. App. 5 Dist. 1990) (false accusations of child abuse recanted and convictions overturned).

[9] The victim is not the prosecutor's client. *See* State *ex rel.* Romley v. Superior Court, 891 P.2d 246, 250 (Ariz. App. 1995) ("the prosecutor does not 'represent' the victim in a criminal trial; therefore, the victim is not a 'client' of the prosecutor"); ABA STANDARDS FOR CRIMINAL JUSTICE Standard 3−3.2 cmt. (1993) ("the prosecutor's client is not the victim but the people who live in the prosecutor's jurisdiction"); Carol A. Corrigan, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537, 537 (1986) ("The prosecutor does not represent the victim of a crime, the police, or any individual. Instead, the prosecutor represents society as a whole.").

[10] A prosecutor's tripartite responsibility to the public, the accused, and the victim resembles the "three-model" framework described by Professor Douglas Beloof—i.e., the "Crime Control Model," the "Due Process Model," and the "Victim Participation Model." *See* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (1999).

[11] *See infra* notes 27−52 and accompanying text.

[12] *See infra* notes 65−80 and accompanying text.

comports with legal and ethical requirements but may jeopardize the safety of the public and the rights of the victim.[13]

In attempting to reconcile these conflicting allegiances, a prosecutor receives only minimal guidance from the professional rules of ethics. These ethical codes, particularly the ABA's Model Rules of Professional Conduct and Model Code of Professional Responsibility, provide only a few specific rules addressing a prosecutor's ethical responsibilities to the defendant and the public, and do not address at all a prosecutor's ethical responsibilities to crime victims.[14] However, the absence of explicit guidance does not leave prosecutors without any ethical compass when dealing with victims. The ethical provision requiring a prosecutor to serve the cause of justice may provide an ethical framework for the prosecutor's relations with crime victims.[15] Although that provision is commonly understood as an obligation by the prosecutor to represent all of the people, not just the victim, establishing an ethical framework to reconcile a prosecutor's competing allegiances should focus initially and exclusively on that duty.

Implementing this duty to justice requires that a prosecutor, in making official decisions and judgments, behave not as a partisan for any particular constituency but, rather, in a manner that is neutral to each constituency.[16] As with the more general obligation to serve justice, the obligation to behave neutrally is neither unrealistic nor unattainable. Being neutral does not mean that a prosecutor should be indifferent to whether a victim suffered a grievous injury at the hand of the accused. Indeed, a prosecutor should feel personally outraged at such conduct, and if morally convinced of the defendant's guilt, is allowed, and indeed, obligated, to advocate that view zealously by any lawful and ethical means.[17] A prosecutor does not serve justice, however, when she

[13] To the extent that a prosecutor has a constitutional and ethical obligation to disclose exculpatory evidence to the defense, such disclosure may undermine the prosecutor's ability to secure a conviction. *See infra* note 37 and accompanying text.

[14] *See* Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 725 (2001) ("Many of the rules of professional conduct, however, are blunt instruments – altogether inapplicable, or barely applicable, to full-time prosecutors."). It should be noted that the American Bar Association and the National District Attorneys Association have promulgated standards addressing the prosecutor's relations with victims. *See* ABA STANDARDS FOR CRIMINAL JUSTICE Standard 3−3.2 (1993); NAT'L PROSECUTION STANDARDS, Standard 26.1−26.8 (1991). These standards offer guidance to prosecutors; they do not require compliance.

[15] *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2004) (stating that prosecutors are "minister[s] of justice"); MODEL CODE OF PROF'L RESPONSIBILITY EC 7−13(3) (2004) (stating that prosecutors must "seek justice"). *See also* ABA STANDARDS FOR CRIMINAL JUSTICE Standard 3−1.2(c) (1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); NAT'L PROSECUTION STANDARDS, Standard 1.1 (1991) ("The primary responsibility of prosecution is to see that justice is accomplished."). Every state has adopted the "do justice" standard of either the Model Rules or Model Code.

[16] *See supra* note 9. *See also* NAT'L PROSECUTION STANDARDS, Standard 1.3 (1991) (prosecutor "must place the rights of society in a paramount position in exercising prosecutorial discretion").

[17] *See* Wright v. United States, 732 F.2d 1948, 1056 (2d Cir. 1984) ("If honestly convinced of the defendant's guilt, the prosecutor is free, indeed obliged, to be deeply

undertakes her official functions for personal or political reasons, has an "ax to grind" against the defendant, or has a special motivation to favor the victim or satisfy a victim's private agenda if that agenda is inconsistent with the prosecutor's public duty to serve all the people neutrally, i.e., equally and fairly.

A prosecutor's duty of neutrality derives from several sources. First, a prosecutor does not represent a private client. A prosecutor's "clients" are the people who live in the prosecutor's jurisdiction, including police, witnesses, crime victims, and even the accused.[18] A prosecutor, as with all lawyers, has a fiduciary obligation to her client. But in contrast to attorneys representing private clients, a prosecutor's fiduciary duty requires the prosecutor to exercise professional judgment, as the ABA Criminal Justice Standard directs, "solely for the benefit of the client—the people—free of any compromising influences or loyalties."[19] Thus, a prosecutor's personal or private loyalties, or her political or ideological beliefs, must not be allowed to impede the lawful and professional performance of her official duties.[20]

Second, as courts, commentators, and professional codes consistently declare, the role of a prosecutor is not to win a case (and achieve professional and media acclaim) but, rather, to behave in a fair and lawful manner to promote the cause of justice.[21] This requirement to serve justice means that in order to achieve a fair and just result, a prosecutor must, again, exercise her powers in an objectively fair and disinterested manner without any implication of partiality that might tarnish her integrity.

Third, given a prosecutor's enormous power over people's lives, liberty, and reputations, as well as the limited checks on a prosecutor's discretion,[22] a prosecutor has an extraordinary opportunity for her sympathies for a victim to influence the exercise of official discretion, entirely without review. The duty to remain neutral serves as an assurance to courts, individual defendants, and the public that a prosecutor's unreviewable discretionary choices presumably are unaffected by personal, political, or private interests.

A prosecutor's relations with a crime victim may implicate a prosecutor's duty of neutrality in several ways. First, and at one extreme, a prosecutor's

interested in urging that view by any fair means."). *See also* Marshall v. Jerrico, Inc., 446 U.S. 238, 248 (1980) ("Prosecutors need not be entirely 'neutral and detached.' In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law.") (citation omitted).

[18] *See supra* note 9.

[19] *See* ABA STANDARDS FOR CRIMINAL JUSTICE Standard 3-1.3 cmt. at 9 (1993).

[20] *Id.*

[21] *See supra* note 14 and accompanying text.

[22] *See* Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 513 (1993) ("The prosecutor's decision to institute criminal charges is the broadest and least regulated power in American criminal law."). The prosecutor's discretion has been described as potentially "lawless," *see* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 290 (1968), "tyrannical," *see* Henderson v. United States, 349 F.2d 712, 714 (D.C. Cir. 1965), and "most dangerous," *see* Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 5 (1940).

interaction with a crime victim may create an actual or apparent conflict of interest that impairs the prosecutor's ability to remain neutral.[23] Disabling conflicts may exist when a prosecutor has previously represented the victim, has a current professional relationship with the victim or a representative of the victim, or represents the victim after leaving government service. Second, a prosecutor's duty of neutrality may be violated when a prosecutor seeks a conviction through inflammatory or otherwise unlawful or unethical advocacy on behalf of the victim.[24] Third, to the extent that a prosecutor allows the victim to play a substantial and influential role in critical discretionary decisions—charging, plea bargaining, and sentencing—the prosecutor may violate the duty of neutrality.[25] Last, and at the other extreme, a prosecutor's decision whether or not to force an unwilling victim to testify in order to convict a dangerous offender may also implicate the prosecutor's duty of neutrality.[26] Each of these problems is discussed below.

II. FOUR ETHICAL PROBLEMS

The following four hypothetical cases involve a prosecutor's interaction with a crime victim. These four cases are used to highlight ethical problems that may arise from the tension between a prosecutor's duty to seek justice and behave neutrally when confronted with competing demands from the public, the defendant, and the victim. Problems one and two describe a victim-centered model in which the prosecutor violates the principle of neutrality by appearing to advocate the interests of the victim almost exclusively, while subordinating the interests of the public and the accused. Problems three and four describe a victim-neutral model in which the prosecutor's public interest and the victim's interest do not coincide, and where the prosecutor's duty of neutrality requires conduct that is inconsistent with the interests of the victim. Analyzing the prosecutor's conduct in each of these problems may help illuminate the ethical challenges facing a prosecutor when she seeks to do justice and to safeguard a victim's rights.

A. The Prosecutor as the Victim's Surrogate

The family of a murder victim retained an attorney in private practice (P) to act as co-counsel with assistant district attorney (ADA) in the second prosecution of the defendant for that murder.[27] P was the assistant district

[23] *See infra* notes 27−52 and accompanying text.

[24] *See infra* notes 53−64 and accompanying text.

[25] *See infra* notes 65−80 and accompanying text.

[26] *See infra* notes 81−92 and accompanying text.

[27] Participation of such privately employed counsel is permitted under a state law that provides that "[a] victim of crime or the family members of a victim of crime may employ private legal counsel to act as counsel with the district attorney general or the district attorney general's deputies in trying cases, with the extent of participation of such privately employed counsel being at the discretion of the district attorney general." TENN. CODE ANN. § 8-7-401(a) (2002).

attorney who prosecuted the defendant in his first trial, which ended in a hung jury. He had since left the district attorney's office and entered private practice. At the second trial, P sat at counsel table with ADA, examined most of the prosecution witnesses, cross-examined the defendant, and gave the closing argument. One month after the defendant's conviction, ADA resigned and entered private practice with P. The two lawyers filed a civil wrongful death action on behalf of the victim's family against the defendant. Did the conduct of ADA violate a prosecutor's duty of neutrality?

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The kind of conflict broadly described in Problem 1 results from the practice, followed in many states, of allowing private complainants and private attorneys representing victims to assist the prosecution, and even to prosecute the case themselves.[28] The risk of a disqualifying conflict, as well as a constitutional violation, is clear. In *Young v. United States ex rel. Vuitton et Fils S.A.*,[29] the Supreme Court established a categorical rule against the practice in federal courts of appointing private counsel for an interested party that is the beneficiary of a court order from bringing a contempt prosecution alleging a violation of that order. Recognizing the "fundamental premise" that a prosecutor must wield her formidable criminal enforcement powers in a rigorously disinterested fashion,[30] the Court declared that the appointment of an interested prosecutor "creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general."[31]

As in *Young,* the prosecution of crimes against victims may present conflicts of interest that can threaten the prosecutor's neutrality and violate ethical and constitutional rules. Problem 1 illustrates the potential for conflict when so-called "private prosecutors" or "special prosecutors" hired by the victim or the victim's family assist the prosecution. As noted above, although criticized by courts[32] and commentators,[33] and subject to various limitations,

[28] Every American jurisdiction provides for a public prosecutor's office to prosecute criminal cases in the name of the state. However, several jurisdictions in the U.S. also allow the use of privately retained prosecutors for interested parties. *See* John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors,* 47 ARK. L. REV. 511 (1994); Andrew Sidman, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754 (1976). Moreover, some jurisdictions allow private individuals to prosecute minor crimes themselves. *Compare* Cronan *ex rel*. State v. Cronan, 774 A.2d 866 (R.I. 2001) (upholding assault victim's right to initiate by private complaint and prosecute defendant for misdemeanor assault) *with* New Jersey v. Imperiale, 773 F. Supp. 747 (D.N.J. 1991) (conflict of interest for private citizen pursuant to state rule to initiate and prosecute assault charges).

[29] 481 U.S. 787 (1987).

[30] *Id*. at 810 ("It is a fundamental premise of our society that the state wield its formidable criminal enforcement powers in a rigorously disinterested fashion, for liberty itself may be at stake in such matters.").

[31] *Id*. at 811 ("If a prosecutor uses the expansive prosecutorial powers to gather information for private purposes, the prosecution function has been seriously abused.").

[32] *See* Jones v. Richards, 776 F.2d 1244, 1247 (4th Cir. 1985) ("use of private prosecutors who are also representing plaintiffs in civil actions against the criminal defendant should be discouraged"); Woods v. Linahan, 648 F.2d 973, 977 (5th Cir. 1981)

the common-law practice of allowing private counsel retained by a crime victim or the family of a crime victim to assist the prosecution is allowed in many states.[34] To the extent that such a practice compromises the integrity of the prosecution, it would violate the ethical rule against a prosecutor "serving two masters" and thereby failing to serve the cause of justice single-mindedly.[35]

Problem 1 describes such a compromising situation. Here, a crime victim, represented by a "private" or "special" prosecutor, may be able to exert considerable leverage in the prosecution of the defendant. By having a victim's private lawyer assist the prosecutor and engage in prosecutorial activities, as P did, the victim can significantly influence the prosecution and the prosecutor's exercise of critical discretionary decisions. For example, since a private prosecutor's ethical allegiance is to her client, the victim, it is unlikely that ADA would accept an offer from the defendant to plead guilty if the victim opposed the plea.[36] By the same token, it is questionable whether ADA would readily disclose exculpatory evidence to the defense.[37] Moreover, that the victim probably influenced ADA's exercise of official discretion is evidenced by the attorneys' subsequent private practice affiliation and the bringing of a civil lawsuit against the defendant.[38]

The prosecutors' conduct described in Problem 1 is clearly unethical. Even if the victim did not actually influence the actions of the prosecutors, the appearance that the victim influenced the prosecution for private interests

("we note our concern about the practice of using a private attorney"); State v. Eldridge, 951 S.W.2d 775, 780 (Tenn. App. 1997) ("special dangers inherent in private prosecution").

[33] *See* Bessler, *supra* note 28, at 598 ("state courts should hold that it is a *per se* violation of a defendant's constitutional rights if a private prosecutor for an interested party participates in any way in the criminal trial of that defendant"). *See also Eldridge*, 951 S.W.2d at 786. ("[T]he participation by private counsel in the discretionary functions of the district attorney general is of greater concern because of not only the ethical dilemma faced by private counsel *but also* the inherent inadequacy of judicial review of potential abuses of those discretionary functions by private counsel.") (Welles, J., concurring) (emphasis in original).

[34] Bessler, *supra* note 28, at 529−40 (listing jurisdictions allowing private prosecutors under existing statutes and case law).

[35] For cases finding the use of private prosecutors violated due process, see Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967); Hughes v. Bowers, 711 F. Supp. 1574 (N.D. Ga. 1989); Adkins v. Commonwealth, 492 S.E.2d 833 (Va. App. 1997); State v. Eldridge, 951 S.W.2d 775 (Tenn. App. 1997); Cantrell v. Commonwealth, 329 S.E.2d 22 (Va. 1985).

[36] *See Ganger*, 379 F.2d at 713−14 ("strong possibility that the prosecuting attorney may have abdicated to the prosecuting witness (Ganger's wife) in the criminal case the exercise of his responsibility and discretion in making charge decisions. If she did not actually make the decision to prosecute for felonious assault, certainly her interests were influential, and those conflicting interests may have impeded appropriate plea bargaining").

[37] A prosecutor has a constitutional and ethical obligation to disclose exculpatory evidence to the defense. *See* Brady v. Maryland, 373 U.S. 83 (1963); MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2004); MODEL CODE OF PROF'L RESPONSIBILITY EC 7−13(3); ABA STANDARDS FOR CRIMINAL JUSTICE Standard 3−3.11(a) (1993).

[38] *See* Dick v. Scroggy, 882 F.2d 192, 195, 196 (6th Cir. 1989) (court finds that prosecutor's representation of victim in civil action less than one month after prosecuting defendant for assaulting victim, while "unseemly" and "less than disinterested," did not violate due process).

unrelated to the public interest is sufficient to compromise the integrity of the trial from an ethical standpoint.[39] Whether such unethical conduct compromises the fairness of a trial as a matter of due process is a different question, however, and depends on several factors: (1) whether P had an actual pecuniary or personal interest in the outcome of the case;[40] (2) the degree to which ADA exercised control over the prosecution and preserved the neutral prosecutorial role and function;[41] and (3) whether ADA had an interest in any pending civil case concerning the same facts as the criminal case.[42]

A good example of a constitutional violation by a private prosecutor is *Hughes v. Bowers*.[43] In that case, a federal district court vacated the defendant's manslaughter conviction based on the misconduct of a private attorney hired by the victim's family as a "special prosecutor" to assist the district attorney. Despite a request from the defense for evidence of the existence of insurance policies on the life of the deceased that would have impeached the testimony of relatives of the deceased, the special prosecutor, apparently with the district attorney's knowledge and acquiescence, misled the defense and the court by falsely denying the existence of such policies and then eliciting testimony that no policies existed.[44] The federal court concluded that the presence of a special prosecutor is not constitutionally improper per se, and that a defendant must establish either that the district attorney failed to retain control and management of the case or that the special prosecutor engaged in specific misconduct that prejudiced the defendant's right to a fair trial.[45] The court found that the special prosecutor had a personal financial stake in securing the defendant's conviction, and that his nondisclosure of the existence of the insurance policies constituted prejudicial misconduct.[46]

Problem 1 is not as clear-cut as *Bowers*, but presents similar problems. First, there is no indication that the plaintiff was involved in civil litigation on behalf of the victim's family at the time of the criminal prosecution; nor is there any indication that the ADA, despite ceding extensive prosecutorial authority to plaintiff, did not retain control of the prosecution and the various discretionary decisions needed to be made. Nor is there any indication of any actual misconduct by plaintiff or the ADA that prejudiced the defendant's right to a fair trial. It appears very likely, however, that the prosecution was intended to

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[39] *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 9−6 (2004) (lawyer has duty "to avoid not only professional impropriety but also the appearance of impropriety").

[40] *See* People v. Zimmer, 414 N.E.2d 705 (N.Y.1980) (district attorney who prosecuted charges against defendant was simultaneously representing corporation against whom defendant alleged to have committed crimes).

[41] *See Eldridge*, 951 S.W.2d at 780 ("The majority of jurisdictions that allow the use of private prosecutors, by statute or case law, requires the public prosecutor's consent and retention of control over the case.").

[42] *Ganger*, 379 F.2d at 711 (prosecution of criminal case at same time that prosecutor was representing defendant's wife in divorce proceeding based upon same alleged assault).

[43] 711 F. Supp. 1574 (N.D. Ga. 1989).

[44] *Id*. at 1580.

[45] *Id*. at 1582.

[46] *Id*. at 1584.

further a private agenda, particularly in view of the plaintiff and ADA's subsequent affiliation, as well as their joint representation of the victim's family in a civil action against the defendant.

Opportunities for conflicts resulting from a prosecutor's simultaneous representation of a private client, as in Problem 1, are also likely to occur when a prosecutor is employed part-time pursuant to state or local law, as are many prosecutors.[47] There is always a significant risk of a part-time prosecutor becoming involved in private matters that might relate to official matters. At one extreme, quite obviously, is a prosecutor who has a financial stake in the defendant's conviction based on his simultaneous private representation of the crime victim.[48] Although Problem 1 does not expressly indicate that either the plaintiff or the ADA had a pecuniary interest in the victim's case during the pendency of the prosecution, it is reasonable to assume that they were aware of the potential financial value of a civil action if the defendant were convicted. Other cases, however, describe how a part-time prosecutor's private financial interest in the victim's case may compromise a defendant's constitutional right to a fair trial.

In *Ganger v. Peyton*,[49] for example, the defendant's state conviction for assaulting his wife was vacated on due process grounds based on the part-time prosecutor's conflict of interest and misconduct. The prosecutor represented the wife in a divorce action which was precipitated by an assault on her by her husband. While representing the wife, the prosecutor initiated a prosecution against the husband for assault. The prosecutor then offered to drop the assault charge if the defendant husband made a divorce settlement favorable to the wife. The prosecutor's obvious self-interest in the civil litigation, particularly because the size of his fee might depend on the success of his prosecution, prevented him from exercising impartial judgment in the criminal case.[50] The court noted the strong likelihood that the prosecutor abdicated his official responsibility and discretion concerning whether to prosecute, reduce the charge, or recommend a suspended sentence.[51] The prosecutor's conduct "in

[47] According to the most recent official survey, approximately one-fourth of all U.S. prosecutors in state courts are employed part-time. *See* CAROL J. DEFRANCES, U.S. DEPT. OF JUSTICE, PROSECUTORS IN STATE COURTS, 2001 at 1 (July 1, 2002).

[48] *See* People v. Zimmer, 414 N.E.2d 705 (N.Y. 1980) (district attorney, at time he prosecuted case, was also counsel to and stockholder of corporation in the course of whose management the defendant alleged to have committed "white collar" crimes with which he was charged).

[49] 379 F.2d 709 (4th Cir. 1967).

[50] *Id*. at 712. The state attorney general conceded as much on appeal, and the state ethics committee "unequivocally condemned" the practice. *Id*. at 712 n.3.

[51] *Id*. at 713 ("Because of the prosecuting attorney's own self-interest in the civil litigation (including the possibility that the size of his fee would be determined by what could be exacted from defendant), he was not in a position to exercise fair-minded judgment with respect to (1) whether to decline to prosecute, (2) whether to reduce the charge to a lesser degree of assault, or (3) whether to recommend a suspended sentence or other clemency").

attempting at once to serve two masters," the court concluded, violated due process.[52]

B. The Prosecutor as the Victim's Avenger

Defendant was indicted for capital murder for the stabbing deaths of his former girlfriend, Victoria, and two of her children, Robert, age 10, and Emily, age 3. The killings occurred in Victoria's apartment two nights before Christmas. The defendant surrendered the next day, gave a detailed confession to the police, and claimed he was in a drunken and jealous rage. In announcing the indictment at a press conference, the district attorney stood beside Victoria's parents, other family members, and Victoria's only other child, Daniel, age 7, who was staying at his grandparent's apartment across the street on the night of the killings. The district attorney described the scene as a "house of horror, blood, and carnage—pools of blood were everywhere." She stated that this was "the most horrendous case" she ever prosecuted. She also praised Daniel as "a courageous little boy, a survivor" and claimed that the case demonstrates the need for the death penalty. Popular and charismatic, the district attorney routinely portrayed herself as a champion of crime victims. The district attorney refused to accept the defendant's offer to plead guilty to Murder in the First Degree and be sentenced to life imprisonment without the possibility of parole.

During the trial, the district attorney engaged in the following conduct: to counter the defense suggestion that Victoria had left her children every night during the week before Christmas drinking and partying, the district attorney offered a family photo showing Victoria with her arms around her three children in her apartment the night before the killings amidst Christmas decorations; and although police witnesses described the murder scene, and introduced crime scene and autopsy photographs, the district attorney called Daniel as her last witness. Daniel had arrived in the apartment early in the morning after his sleepover at his grandparents. He ran to a neighbor crying, "Mommy, mommy. . .She won't wake up. . .There's blood." In her closing argument, the district attorney asked the jury to avenge the killings. She concluded her summation with the following: "If you listen closely, you can hear Victoria crying from her grave, 'Avenge me. Avenge my little boy. Avenge my baby girl.'" Has the district attorney violated her ethical duty to seek justice and act neutrally?

* * * *

For personal, political, or tactical reasons, some prosecutors portray themselves as "Champions of the People" committed to protecting victims of crime.[53] By involving themselves too closely in the personal tragedies of their

[52] *Id*. at 714.

[53] *See* Bennett L. Gershman, *The Thin Blue Line: Art or Trial in the Fact-Finding Process?* 9 PACE L. REV. 275, 313 (1989) ("The popular myth about the prosecutor is that he is 'Mr. District Attorney,' a 'Champion of the People,' a virtuous protector, and even a 'Minister of Justice.'").

victims, however, these prosecutors may find it difficult to carry out their ethical responsibilities. Such prosecutors are elected officials who typically campaign on a victim-centered agenda, emphasize their win-loss record of convictions, advocate wider use of the death penalty, and portray themselves generally as seeking justice through vengeance.[54] For example, a district attorney in New York State has gained prominence by promoting such a victim-centered agenda. Her recent book, *To Punish and Protect* opens with the following passage:

> The office of the District Attorney is a battleground, where the fight between good and evil unfolds each day. We see the ugliest side of life, the pain that people go through for no reason. They didn't do anything. They didn't ask for it. Yet here they are, living their personal nightmares. We cannot take away their pain or turn back time to undo the damage, but we can be the avengers. We can seek justice on their behalf.[55]

This view, which is probably shared by many other prosecutors and much of the public, is not atypical. Given the increased attention to victims in the criminal justice process,[56] the prominence of advocacy groups that lobby on behalf of victims rights,[57] and the increased legal obligations on prosecutors to involve victims in various aspects of the decision-making process,[58] it is to be expected that prosecutors, particularly those that run for elected office, would align themselves closely with the victim, as has the district attorney in Problem 2. However, a prosecutor's close association and identification with victims presents complex ethical and constitutional problems, some of which are illustrated in Problem 2.

In the first place, it is at least arguable that such prosecutors, insofar as they promote a strong and explicit message that their official decisions and judgments are explicitly undertaken to "avenge" the "pain" and "personal nightmares" experienced by the victim, may find it difficult to evaluate the merits of a case and the credibility of the victim objectively, and may not be able to enforce the broad array of rules that protect a defendant's legal rights. For example, as noted in Problem 2, was the district attorney's refusal to accept the defendant's plea offer to an admittedly horrific crime based on an objective assessment of the merits of the case, and whether such plea would serve the ends of justice, or was the refusal based on the district attorney's pro-victim and pro-death penalty agenda? Moreover, can a prosecutor with a mindset bent

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[54] *See* Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537 (1996). *See also* Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941 (1994).

[55] *See* JEANINE PIRRO, TO PUNISH AND PROTECT: A DA'S FIGHT AGAINST A SYSTEM THAT CODDLES CRIMINALS 1 (2003).

[56] *See supra* note 1, and accompanying text. *See also* Payne v. Tennessee, 501 U.S. 808, 834 (1991) (noting "public sense of justice keen enough that it has found voice in a nationwide 'victims rights' movement") (Scalia, J., concurring).

[57] *Id*. at 867 (listing numerous victim advocacy groups submitting amicus briefs).

[58] *See supra* notes 14−16, and accompanying text.

on vengeance be trusted to disclose to the defense, as ethical and constitutional rules require, evidence that might exculpate the defendant or impeach prosecution witnesses?[59]

Further, given the ability of a prosecutor to use the media in ways that might prejudice a defendant's case and advance her own personal interests, will a prosecutor voluntarily limit public, extra-judicial statements that might reasonably impair a defendant's right to a fair trial before an impartial jury?[60] The temptation to manipulate the media is probably greatest when a prosecutor holds a press conference to announce an indictment that describes a brutal crime of violence against a vulnerable victim. For example, in Problem 2, the district attorney, at her press conference, made several statements that arguably were inflammatory and improper. The district attorney graphically described the heinousness of the crime, the courage of the young survivor, and the need for the death penalty. Such comments arguably violate ethical provisions that restrict a prosecutor's extra-judicial statements to the media that might impair a defendant's right to a fair trial.[61]

Additionally, the prosecution of crimes of violence against victims often gives the prosecutor an opportunity to engage in inflammatory tactics that appeal to the jurors' fears, passions, and biases.[62] Such tactics usually involve a

[59] Nondisclosure of exculpatory evidence by prosecutors is a frequent basis for reversal of convictions. *See* Ken Armstrong & Maurice Possley, *Trial & Error. How Prosecutors Sacrifice Justice to Win*, CHICAGO TRIBUNE, Jan. 10-14 1999 (five-part series reporting that 381 homicide convictions nationwide were reversed because prosecutors concealed evidence suggesting defendants' innocence or presented evidence they knew to be false).

[60] Ethical codes bar lawyers from making extra-judicial statements that might impair a fair trial. *See* MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2004) (lawyer "shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter"); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107(D) (2004) (lawyer "shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated").

[61] *See* MODEL RULES OF PROF'L CONDUCT R. 3.6(a); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-107(D).

[62] The extent to which a jury in a criminal trial should be exposed to evidence introduced for purely emotional reasons is admittedly a complex and controversial issue. *See* Sacher v. United States, 343 U.S. 1, 38 (1952) (a criminal trial "should have the atmosphere of an operating room") (Frankfurter, J., dissenting). The reality is otherwise, as most courts and commentators recognize. *But see* Payne v. Tennessee, 501 U.S. 808, 825 (1991) (allowing capital sentencing jury to consider "victim impact evidence" that may be highly inflammatory). It is unethical for prosecutors to engage in inflammatory conduct to prove a defendant's guilt when that evidence is deliberately used to appeal to the prejudices of the jury. *See* ABA STANDARDS FOR CRIMINAL JUSTICE Standard 3−5.6(c) (1993) (unethical to permit tangible items to be displayed to the jury that would prejudice fair consideration of the evidence); ABA STANDARDS FOR CRIMINAL JUSTICE Standard 3−5.6(d) (1993) (unethical for prosecutor to offer in evidence tangible items in view that would prejudice jury unless there exists a reason for its admission); ABA STANDARDS FOR CRIMINAL JUSTICE Standard 3−5.8 (1993) (unethical for prosecutor to make arguments calculated to appeal to prejudices of jury). *See also* FED. R. EVID. 403 advisory committee's note (rule excluding evidence

deliberate attempt to prejudice a defendant's right to a fair trial by improperly influencing the jury's evaluation of the evidence. For example, in Problem 2, the district attorney's introduction of the "in-life" photo of Victoria and her children, the calling of young Daniel as a witness, and the "revenge" comments in the closing argument, appear to be calculated to appeal to the prejudices of the jury. A call for vengeance is clearly out of bounds and would be condemned by all courts.[63] The introduction of the "in-life" photo and the calling of young Daniel would probably be permitted if a prosecutor could establish that the proof had some probative value.[64] However, a prosecutor committed to justice and neutrality might be more restrained in offering the "in-life" photo, or calling Daniel as a witness, particularly if the proof of guilt was strong, and the evidence was unnecessary and gratuitously inflammatory, as in Problem 2.

C. Compromising the Prosecutor's Discretion

Paul, a white, thirty-five year old accountant, was robbed in the lobby of his building and stabbed in the stomach. He was hospitalized for a month. He gave the police a detailed description of his assailant. Several months later, the police notified him that they had arrested a suspect in his case and wanted Paul to view a line-up. Paul immediately identified the defendant, a twenty-five year old black male with a record of petty thefts and drug possessions. Paul told the police and the prosecutor that he was absolutely certain that defendant was the person who attacked him.

The prosecutor has encountered some problems with the case. There is no corroboration, defendant has an alibi, and three of the persons in the six person line-up bore no similarity to defendant. The prosecutor knows that cases that hinge on single eyewitness identifications are notoriously difficult and the prosecutor knows that defense counsel is adept at exploiting these weaknesses. Defendant has offered to plead guilty to Attempted Robbery in the Third Degree, a felony punishable by four years imprisonment. The prosecutor has advised Paul of the plea offer and told Paul that given the nature of the case and the risks of going to trial, it appears to be an appropriate disposition. Paul adamantly disagrees, replying: "No. I can't do that. He almost killed me. I want

based on "unfair prejudice" refers to evidence that has "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one").

[63] *See* People v. Lombardi, 229 N.E.2d 206, 209 (N.Y. 1967) (condemning prosecutor's reference to victim crying out for vengeance).

[64] The admissibility in a murder trial of "in-life" photos of the deceased has divided the courts. Juxtaposing an autopsy photograph of the deceased next to a photograph depicting what the deceased looked like before her death can be highly prejudicial. Some courts exclude such "in-life" photographs unless the picture is relevant to some issue in the trial. *See, e.g.*, People v. Stevens, 599 N.E.2d 1278 (N.Y. 1990). Other courts have held that there is no inherent prejudice in use of "in-life" photographs even when not relevant to any issue. *See* Lilly v. Commonwealth, 499 S.E.2d 522 (Va. 1998). For a helpful discussion of the use of "in-life" photos in homicide cases, see Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 UTAH L. REV. 1373, 1407−09 (1994).

to go to trial." Assuming the prosecutor seeks to do justice and behave neutrally, what should she do?

* * * *

To be effective a prosecutor ordinarily needs to maintain a cooperative relationship with a crime victim. A prosecutor obviously wants to present her case as convincingly as possible, and does not want to elicit testimony from a witness who is resentful, who may damage the case during courtroom interrogation, or who may attract negative attention from the media. Prosecutors, however, have treated victims in ways that are counterproductive to the cause of justice and the public good.[65] Thus, a prosecutor is likely to impair her ability to achieve a successful result if she fails to respect a victim's interests, convenience, and attitudes about the case, or if she neglects to keep a victim informed about the progress of a case.[66] For example, a prosecutor is likely to alienate a victim and cause profound resentment if a prosecutor fails to notify a victim about the impending service of a subpoena, scheduling changes, the status of a case, or discretionary decisions concerning filing charges, dismissing charges, or pursuing a disposition by a guilty plea.

Before the advent of victims' rights legislation and ethical guidelines addressing a prosecutor's relations with victims, prosecutors would typically make discretionary decisions unilaterally and often fail to notify the victim about the disposition of the case.[67] A victim interested in the status of a case would usually have to take the initiative to contact the prosecutor or the court, and even if the victim was dissatisfied with the disposition, or wanted to bring the matter to a judge's attention, the victim would have virtually no legal recourse to affect any change in the result.

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[65] See Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 2, 96 Stat. 1248 (1982) (crime victims "have been transformed into a group oppressively burdened by a system designed to protect them," "are either ignored by the criminal justice or simply used as tools to identify and punish offenders, and "forced to suffer physical, psychological, or financial hardship first as a result of the criminal act and then as a result of contact with a criminal justice system unresponsive to the real needs of such victim"); ABA STANDARDS, Commentary to Standard 3−3.2 (victims often conclude that criminal justice system "part of the problem" which results in "unfortunate and counterproductive alienation from the interests of the criminal justice system"). Moreover, victims who felt aggrieved by the system lacked standing to bring a formal complaint. *See* Linda R.S. v. Richard D., 410 U.S. 614 (1973).

[66] *See* 18 U.S.C. § 3771 (a)(2) (West, WESTLAW through March 2005 legislation) (victim's "right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused"); ABA STANDARDS, Standard 3−3.2 (c) ("The prosecutor should readily provide victims and witnesses who request it information about the status of the of cases in which they are interested."); NATIONAL PROSECUTION STANDARDS, Standard 26.1 (victims "should be informed of all initial stages in the criminal justice proceedings to the extent feasible," including filing of charges, determination of pre-trial release, any pre-trial disposition, date and results of trial, date and results of sentencing, any proceeding in which may result in defendant's release from incarceration, and other proceedings which may place victim at risk of harm or harassment).

[67] *See supra* note 64, and accompanying text.

Today, however, participation by victims in the criminal justice process enjoys broad constitutional and statutory protection.[68] Crime victims currently have the right to be consulted prior to a prosecutor making key discretionary decisions and to be heard when the defendant pleads guilty.[69] The question posed by Problem 3, however, goes beyond giving the victim an opportunity to be consulted or to be heard when the guilty plea is taken. Problem 3 raises the question of the extent to which a victim has the ability to veto a prosecutor's exercise of discretion, for example, by requiring a prosecutor to alter his professional judgment in order to bring a particular plea or sentence into conformity with the dictates of a victim's private agenda.

Despite the enhanced status of victims, neither the victim nor his representatives have the power to control a prosecutor's discretionary decisions, particularly in the plea disposition process.[70] The position of most prosecutors undoubtedly is that while the victim should have an opportunity to consult with the prosecutor and provide relevant information to the prosecutor and the court, it is the prosecutor who retains the ultimate authority to make decisions without regard to the victim's views on the matter.[71] Indeed, if a prosecutor were to cede to the victim the authority to make discretionary decisions, a prosecutor would be violating his duty to exercise prosecutorial authority fairly, neutrally, and equitably for all of the people. As noted earlier, the ABA Standards emphasize that "the prosecutor's client is not the victim but the people who live in the prosecutor's jurisdiction, [and] the prosecutor obviously retains the discretionary authority to make [discretionary] decisions without regard to the victim's – or any other person's – views on the matter."[72]

Nevertheless, there have been occasions when prosecutors have given victims or their representatives the functional equivalent of a veto over plea deals with defendants.[73] These cases raise troubling questions over whether, by

[68] As Professor Douglas Beloof has observed, the inclusion of the victim as a key participant in criminal procedure "has shaken conventional assumptions about the criminal process to their foundation." *See* Beloof, *supra* note 10, at 290.

[69] *See supra* note 1, and accompanying text.

[70] *See* State v. McDonnell, 794 P.2d 780 (Or. 1990) (prosecutor must be guided by public interest and "cannot delegate to others this responsibility for carrying out public policy."). *See also* Sarah N. Welling, *Victim Participation in Plea Bargains*, 65 WASH. U. L. Q. 301, 338 (1987) (noting that victims traditionally had no formal or recognized rights regarding plea bargains and advocating greater role of victims); BELOOF, *supra* note 1, at 462−70 (describing increased victims' participation in plea bargains).

[71] *But see* State v. Casey, 44 P.3d 756 (Utah 2002) (prosecutor breached duty under state Victims' Rights Act by failing to notify victim of plea and by failing to notify the court of victim's request to be heard at plea proceeding). The court in *Casey* does not indicate whether there exists any remedy for the prosecutor's breach. Indeed, the right of the victim to be heard at the change of plea hearing may be illusory. *See id.* at 767 ("the right of a victim to be heard at a change of plea hearing is fragile at best, and may be made illusory by the intentional or unintentional mishandling of the situation by the prosecutor or the trial court, all without meaningful remedy.") (Wilkins, J., concurring).

[72] *See supra* note 8, and accompanying text.

[73] *See* McKenzie v. Risley, 842 F.2d 1525 (9th Cir. 1988) (no error in prosecutor's rejection in capital murder case to accept defendant's offer to plead guilty in exchange for receiving a fifty-year sentence based on refusal of victim's family to approve the deal).

allowing victims to influence their discretion in this manner, prosecutors are behaving responsibly or, more likely, are promoting the appearance of unequal justice. Two highly publicized criminal prosecutions in New York state illustrate the problem. In the racially charged and highly publicized 1989 slaying of Yusuf Hawkins, a young black man in Brooklyn, by a gang of white youths, Al Sharpton, a representative of the victim's family, advised the victim's family to "veto" an offer by two of the defendants to plead guilty. The plea would have subjected them to substantial terms of imprisonment on felony charges.[74] Deferring to the victim's family, the Brooklyn District Attorney rejected the plea and proceeded to trial. News of that "veto" became particularly controversial after Mr. Sharpton's involvement in the plea negotiation was disclosed, the implication was that the family's veto of the plea may have been to further Mr. Sharpton's political agenda. The dangers inherent in such a situation were manifest when, after the defendants were acquitted, Sharpton blamed the prosecutor for "botching" the case.[75]

In another highly publicized murder case – the prosecution of Robert Chambers for killing Jennifer Levin in Central Park – the Manhattan District Attorney reported that he had accepted the defendant's guilty plea to manslaughter only after the victim's family gave their approval.[76] While acceptance of the plea appeared to be the correct decision, the prosecutor's gratuitous public reference to the role played by the victim's family, and his announced refusal to accept the plea without the family's approval, suggested that the prosecutor sought the family's approval to justify a politically controversial decision.[77] Such a statement merely encourages the cynical view that some defendants are treated differently than others depending on the prosecutor's relations with the victim.

There is one area in which the victim's concerns may receive special attention: death penalty cases. Such disparate treatment probably is not uncommon. In deciding whether to seek the death penalty or allow a capital defendant to plead guilty to a certain term of life imprisonment, some prosecutors may rely heavily on the views of the victim's family.[78] Indeed, it has been suggested that the views of the victim's family in capital cases, on whether they wish to see the defendant live or die, often may be dispositive with respect to the prosecutor's decision to accept a guilty plea.[79] To these

[74] *See* Joel Cohen, *Should Prosecutors Obey the Wishes of Crime Victims in Negotiating Pleas?*, N.Y.L.J., April 30, 1991, at 1.

[75] *Id*.

[76] *See* Kirk Johnson, Chambers, *With Jury at Impasse, Admits 1st Degree Manslaughter*, N.Y. TIMES, March 26, 1988, at 1 (according to the district attorney, "without the family's approval, the plea bargain would not have been accepted by his office and the case would likely have been tried again.").

[77] *See* Cohen, *supra* note 74.

[78] *See McKenzie* , 842 F.2d 1525 (prosecutor rejects plea bargain in capital murder case based on unwillingness of victim's family to approve the deal).

[79] In a telephone conversation with Kevin Doyle, head of New York State's Capital Defender Unit, Mr. Doyle stated that prosecutors often make decisions on whether to seek the death penalty or permit a defendant to plead guilty to life without parole based on the

prosecutors, as well as under the law, the magnitude of the crime and the enormous impact it has on the survivors apparently gives them a special claim to being heard on the ultimate punishment.

The prosecutor in Problem 3 has an obligation to consult with Paul over the plea, which he did. The prosecutor needed to advise Paul of the likelihood of success at trial, the differences in potential applicable penalties, the emotional costs of proceeding to trial, and the right of Paul to convey to the court after a conviction the impact that D's crime had on Paul. To be sure, the views of Paul as to whether the prosecutor should accept the plea are an important factor in the prosecutor's decision. Moreover, Paul should have the opportunity to communicate his views to the court before the court accepts the plea and at the defendant's sentencing.[80] But, ultimately, the decision whether to accept a plea is the prosecutor's, and he must use his best professional judgment in making that decision. Giving Paul a veto over the plea, as in the cases described above, would appear to violate the prosecutor's duty to serve justice and would encourage the view that some victims are the beneficiaries of special and unequal justice.

D. The Unwilling Victim

The defendant has been arrested, accused by the police of being the notorious "Bedroom Bandit," who has burglarized and raped women in their suburban homes wearing a mask and threatening their life unless they submit to him. Only one of the victims, Kay, was able to make a positive identification, after the assailant's mask slipped off during the attack. Three other victims could only give a general description of the perpetrator's height and build. The totality of the evidence—Kay's testimony, the testimony of the other victims, the defendant's prior criminal record for burglary and rape, his suspicious absences from work during the hours when the crimes were committed, and a false alibi for one of the occurrences—convinces the prosecutor that the defendant is the serial rapist. Prior to trial, Kay has advised the prosecutor that she will not proceed with her testimony. The horrible memory of the event, the intense pressure from law enforcement officials to relive it, the exposure of the case to incessant media attention, and the terror she feels over having to appear in public to testify, have been so traumatic and so unremitting for her and her family that she wants no further involvement in the case. The defendant protests his innocence, and there is no possibility of a plea bargain that would be acceptable to both sides. Assuming the prosecutor seeks to serve justice and behave neutrally, what are his options?

* * * *

Problem 4 highlights a difficult ethical challenge to a prosecutor seeking justice in a neutral fashion, namely, the extent to which a prosecutor should

wishes of the victim's family. Telephone Interview with Kevin Doyle, head of New York State's Capital Defender Unit (Feb. 4, 2005).

[80] *See supra* note 1, and accompanying text.

employ coercive tactics to force an unwilling victim to appear and testify. The problem gained national attention recently when the woman who accused basketball star Kobe Bryant of sexual assault was unwilling to testify and the prosecutor agreed to drop all charges.[81] A similar dissolution of a criminal case based on an unwilling victim occurred in 1993, when Los Angeles prosecutors dropped their investigation of pop singer Michael Jackson, on sexual abuse charges, after the thirteen year old boy settled his civil lawsuit for over $15 million and refused to proceed with the criminal case.[82]

Moreover, the challenge to a prosecutor from an unwilling victim is highly controversial, and not unusual, in domestic violence prosecutions. For example, the prosecution of football star Warren Moon for battering his wife generated considerable media attention in 1993 when the prosecutor forced Moon's wife to testify over her objection, and she recanted her earlier statements that her husband had assaulted her.[83] By way of contrast, the Los Angeles District Attorney's Office dropped domestic assault charges against O.J. Simpson in 1993 after his wife, Nicole Brown Simpson, refused to press charges.[84]

Problem 4 assumes that the prosecutor is seeking in good faith to serve justice, is morally certain that the defendant is the notorious "Bedroom Bandit," and is confident that with Kay's testimony he has more than sufficient evidence to prove the defendant's guilt beyond a reasonable doubt. The prosecutor also is convinced that justice and the public good demand that the defendant be prosecuted, convicted, and punished as retribution for his serious crimes and to deter future violence by others. However, the prosecutor's desire to prosecute zealously is tempered by his concern for Kay's health, privacy, and autonomy. The prosecutor must try to overcome Kay's reluctance by impressing upon her the importance of the case and the indispensability of her testimony, and will likely employ specialized psychological services to work with Kay to overcome her reluctance to testify.[85] In the event Kay still refuses to testify, the prosecutor will consider the use of legal process to force her to testify.[86] The prosecutor plainly is ambivalent over whether forcing Kay to testify is a responsible exercise of prosecutorial discretion.

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[81] *See* Kirk Johnson, *As Accuser Balks, Prosecutors Drop Bryant Rape Case*, N.Y. TIMES, Sept. 2, 2004, at A1.

[82] For a vivid description of this settlement, as well as excerpts from court records, see The Smoking Gun, *Michael Jackson's Big Payoff* (June 16, 2004), at http://the smokinggun.com/archive/0616041jacko1.html.

[83] *See* Audrey Rogers, *Prosecutorial Use of Expert Testimony in Domestic Violence Cases: From Recantation to Refusal to Testify*, 8 COLUM. J. GENDER & L. 67, 67 (1998) ("*Moon* prosecutor made no attempt to call an expert witness to explain Mrs. Moon's recantation of her earlier statement that Moon 'beat the s**t out of me'").

[84] *See* Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1851 (1996).

[85] *Id*. at 1863 (although some prosecutors' offices employ "hard" policies preventing victims from routinely dropping cases, other prosecutors' offices employ so-called "soft" policies whereby prosecutors do not force victims to participate in the criminal process but, rather, provide victims with support services and encourage them to continue the process).

[86] *See* S.A. v. Superior Court, 831 P.2d 1297 (Ariz. Ct. App. 1992) (upholding prosecutor's subpoena to unwilling victim to force her to testify).

It is important to mention several points that might influence the prosecutor's resolution of the problem. First, in contrast to the Kobe Bryant case in which the proof of guilt appeared to be steadily eroding,[87] the case against the "Bedroom Bandit" appears relatively strong. Observers of the Bryant case suggested that the prosecutor's case had weakened from rulings by the trial judge that allowed the defense to introduce evidence of the victim's prior sexual conduct and the victim's own decision to sue the defendant in civil court. There are no such weaknesses with respect to Kay's testimony. Moreover, in contrast to domestic violence prosecutions, there is no suggestion that Kay has been intimidated by her batterer from testifying, or would face further violence from the defendant or anyone else if she decided to testify.[88] To be sure, by testifying, Kay will be exposing herself in a public arena to difficult and possibly embarrassing questioning. But these consequences, of course, are experienced by all courtroom witnesses.[89]

The prosecutor also is aware that issuing a subpoena to Kay that forces her to appear in court and give testimony may not only be ineffective, but may appear to be "re-victimizing" the victim for the actions of the defendant. Obviously, if Kay decides to recant her previous statements, the prosecutor will face the difficult task of trying to impeach his own witness.[90] Whether the prosecutor will be able to impeach her testimony under the applicable rules of evidence[91] or introduce contemporaneous statements made by Kay under available hearsay exceptions, is problematic.[92] Further, although a prosecutor

[87] *See* Johnson, *supra* note 81 (legal scholars who closely followed the Bryant proceedings believed that the prosecutor's case hade been steadily weakening after rulings by the trial judge, the accidental release of sealed information about Mr. Bryant's accuser, and the woman's own decision to sue Bryant in civil court).

[88] *See* Hanna, *supra* note 84, at 1865−66 (critics of "no drop" prosecution policies in domestic violence cases suggest that such policies place abused women at greater risk of harm).

[89] Evidentiary rules, such as "rape shield laws," protect rape victims from being questioned about their sexual history, including past sexual behavior and sexual predisposition. *See*, *e.g.*, FED. R. EVID 412. *See also* N.Y. CRIM. PROC. LAW § 60.43 (2004) (barring evidence of victim's sexual conduct in non-sex offense cases).

[90] The common law rule against impeaching one's own witness has been abolished by statute in many jurisdictions. *See, e.g.,* FED. R. EVID 607 ("The credibility of a witness may be attacked by any party, including the party calling the witness."). For a discussion of the common law rule, see Chambers v. Mississippi, 410 U.S. 284 (1973).

[91] If Kay testified and made statements inconsistent with previous statements she gave to the police, Kay could be impeached by the prosecutor confronting her with those prior statements. *See, e.g.,* FED. R. EVID 613.

[92] There are various hearsay exceptions under which Kay's prior statements might be admissible. *See, e.g.,* FED. R. EVID 803(1) (present sense impression); FED. R. EVID 803(2) (excited utterance); FED. R. EVID 803(3) (then existing mental, emotional, or physical condition); FED. R. EVID 803(4) (statements for purposes of medical diagnosis or treatment): FED. R. EVID, 803(5) (recorded recollection). If Kay did not testify, then it is highly questionable whether her prior statements could be introduced under a hearsay exception. *See* Crawford v. Washington, 541 U.S. 36 (2004) (defendant's Sixth Amendment right to confrontation violated if "testimonial" statements are sought to be admitted under hearsay exceptions if declarant did not testify at trial and the defendant had no opportunity to cross-examine declarant).

faced with an unraveling case ordinarily will attempt to negotiate a favorable plea bargain, the facts in Problem 4 indicate that no acceptable plea deal can be arranged.

In the end, the best response to Problem 4 is to acknowledge that there is no satisfactory response. Problem 4 is a paradigmatic challenge to a prosecutor's duty to do justice. A prosecutor must balance the seriousness of the offense, the strength of the case, and the public interest in punishing the defendant and deterring other offenders against the harm to the victim from being forced to testify. The tensions for an ethical prosecutor between convicting and punishing a dangerous offender while at the same time recognizing that his victim refuses to be the means to that end, and deferring to his victim's wishes, ultimately will leave one goal unattainable.

III. CONCLUSION

Given the increasingly prominent role of the victim in the criminal justice process, it is necessary to examine from an ethical standpoint the proper role of the prosecutor in litigating cases involving victims. Prosecuting crimes against victims has inherent advantages for prosecutors, but also has special challenges that require a prosecutor to reconcile conflicting duties to the public and the accused. Focusing on a prosecutor's relations with a victim illuminates the prosecutor's duty to serve justice, particularly where a prosecutor's capacity to evaluate a case objectively might be compromised by her close alignment with a person who has been victimized by crime. The four problems discussed in this Article highlight difficult issues in which a prosecutor's duty to serve justice and behave neutrally may be undermined by the participation of a crime victim.

Problem 1 addresses the ethical problem of a prosecutor "serving two masters" by simultaneously representing a victim while engaged in prosecuting the victim's offender. Problem 2 deals with prosecutors who, for personal or tactical reasons, so closely align themselves with victims that they engage in unethical conduct that violates their duty of neutrality. Problem 3 sheds light on a prosecutor's obligation not to cede key decision-making power to the victim. Finally, Problem 4 examines a prosecutor's dilemma when a victim is unwilling to testify. Here the prosecutor must decide whether the cause of justice demands that a dangerous offender be prosecuted, even by forcing an unwilling victim to testify. Although these problems do not lend themselves to categorical resolution, they do raise issues that could improve the prosecutor's service to justice in prosecutions involving victims.