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The Prosecutor as "Minister of Justice"

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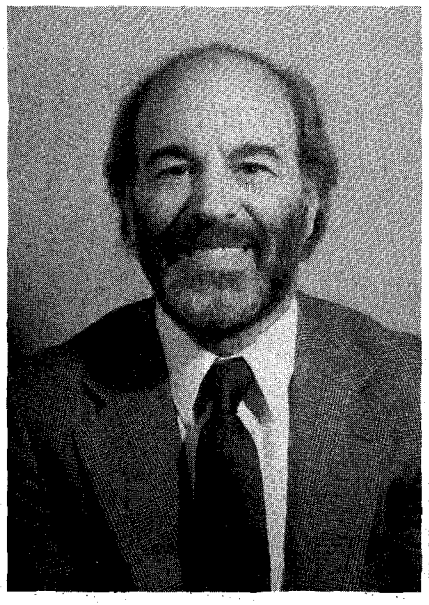

These are heady times for prosecutors. Gone are the days when the Supreme Court every other week, it seemed, would invoke a new due process right for criminal defendants; when prosecutors would frantically prepare for strange new hearings labeled "Mapp", "Huntley", and "Wade"; would be embroiled in sensational, political trials—Harlem 6; Chicago 7; Harrisburg 8; Boston 5; Panther 21—only to be rebuked by defense counsel, the press, the public, and juries. Prosecutors were often on the defensive in those days.

Times have changed. Today, prosecutors are on top of the world. Their powers are enormous, and constantly reinforced by sympathetic legislatures and courts. The "awful instruments of the criminal law," as Justice Frankfurter described the system,[1] are today supplemented with broad new crimes,[2] easier proof requirements,[3] heavier sentencing laws,[4] and an extremely cooperative judiciary, from district and state judges, to the highest Court in the land.

Indeed, Supreme Court watchers, and I am one of them, carefully analyze the oracles from our Nation's legal equivalent of Mt. Olympus, and try to discern trends. Some trends are easy to decipher, such as the Death of the Fourth Amendment; the continuing drift from adjudicative fair play, sym-

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[1] *McNabb* v. *United States*, 318 U.S. 332, 343 (1943).

[2] *See, e.g.* 18 U.S.C. §§ 1961 *et. seq.* (Racketeer and Corrupt Organizations Act); 18 U.S.C. § 1952 (A) (murder for hire); 18 U.S.C. § 1952 (B) (commission of violent crimes in aid of racketeering activity).

[3] *See* 18 U.S.C. § 1623 (lessening proof requirements in perjury prosecutions); Fed.R.Evid. 801 (d)(2)(E) (lessening proof requirements in conspiracy prosecutions, as interpreted in *Bourjaily* v. *United States*, 107 S.Ct. 2775 (1987).

[4] *See* 21 U.S.C. § 841 (b)(1) (increasing penalties for drug trafficking); 18 U.S.C. § 924 (c) (imposing mandatory penalty for use of firearms during commission of violent crime).

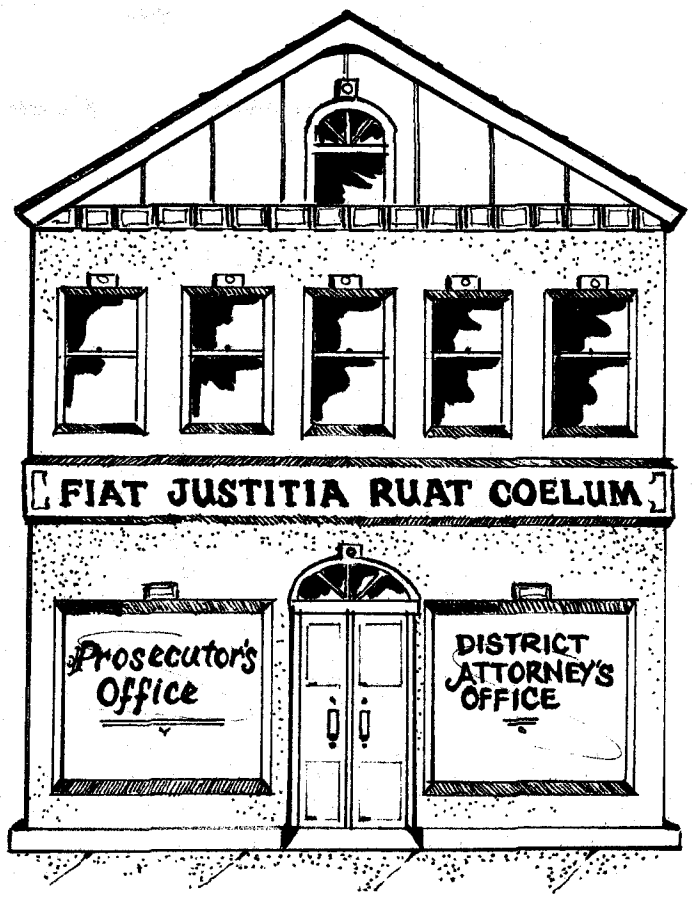
bolized by the Due Process Revolution of the Nineteen-Sixties, to crime control, epitomized by what I have termed the Counter-Revolution of Harmless Error;[5] and the increasing availability and use of draconian forms of punishment, whether labeled preventive detention,[6] consecutive jail sentences for overlapping criminal acts,[7] and more and more executions.[8]

Another trend, more subtle, perhaps, has been a change in the role of the prosecutor. Twenty-five years ago, in one of the great cases of this or any generation — *Brady* v. *Maryland*[9] — the Supreme Court could write this about the prosecutor's duty: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[10]

This statement was a kind of banner under which enthusiastic young men and women began legal careers in prosecutors offices, particularly in the office of New York County District Attorney Frank S. Hogan. Indeed, the cover story of one issue of the *New York Times Magazine* profiled that office, under the title: "Hogan's Office Is a Kind of Ministry of Justice."[11] For a long time it has been an accepted part of the conventional legal wisdom, translated into one of the principal Standards of Criminal Justice of the American Bar Association, that it is the duty of the prosecutor "to seek justice, not merely to convict."[12]

There are, however, serious practical and conceptual difficulties in squaring the prosecutor's function with that of a "Minister of Justice." The concept was seriously eroded in two important decisions of the Supreme Court —*Coolidge* v. *New Hampshire*[13] and *Gerstein* v. *Pugh*[14]—in which the Court recognized that it is realistically impossible for a prosecutor to play the dual roles of vigorous advocate and protector of public justice. In *Coolidge*, the Court said that the prosecutor is too heavily involved in the "competitive enterprise of ferreting out crime" to pass on the sufficiency of a search warrant in a case being investigated under his supervision. Only a judge is neutral and impartial enough to do so. And in *Gerstein*, the Court held that an information drafted by a prosecutor is not "judicial" enough to provide an objective guarantee of probable cause comparable to that furnished by a grand jury, because the prosecutor is inherently partisan, while the grand jury is an arm of the court.

Futhermore, anybody who has carefully followed recent developments in criminal justice, and particularly the Surpreme Court's treatment of prosecutorial behavior, must view such references to the prosecutor's purported justice function with considerable skep-



[5] Gershman, "The Harmless Error Rule: Overlooking Violations of Constitutional Rights," 14 West.B.J. 3 (1987).

[6] *United States* v. *Salerno*, 107 S.Ct. 2095 (1987) (upholding 18 U.S.C. § 3142 (e) of Bail Reform Act of 1984).

[7] *Albernaz* v. *United States*, 450 U.S. 333 (1981); *United States* v. *Blocker*, 802 F.2d 1102 (9th Cir. 1986).

[8] *See* "Rise in Executions Widening Debate," *N.Y. Times*, Nov. 1, 1987, p. 30. In *McCleskey* v. *Kemp*, 107 S.Ct. 1756 (1987), the Supreme Court upheld the imposition of the death penalty over claims that the penalty was imposed disproportionately against racial minorities. This decision may have involved the last major challenge to the death penalty as violative of the Eighth Amendment's proscription against "cruel and unusual punishments."

[9] 373 U.S. 83 (1963).

[10] *Id.* at 87.

[11] Mayer, "Hogan's Office is a kind of Ministry of Justice," *N.Y. Times Magazine*, July 23, 1967, p. 7.

[12] ABA, Standards for Criminal Justice, 3-1.1(c) (1980).

[13] 403 U.S. 443 (1971).

[14] 420 U.S. 103 (1975).

ticism. This is not to suggest that prosecutors by and large behave unfairly. They do not. However, the prosecutor's role is not that of a justice-giver, but of an advocate, a "Champion of the People," in the same way that defense counsel's role is not a defender of abstract justice, but, rather, a Champion of the Defendant. Frequent ceremonial language about the prosecutor's quasi-judicial function[15] is not only misleading, but may be detrimental. It places the prosecutor in an untenable conflict, forcing him constantly to walk a tightrope, and it invites the judiciary to display a kind of obeisance towards the prosecutor, suggesting that he or she stands above the fray, omnipotent and infallible.

To be sure, the prosecutor has a fundamental commitment to fair dealing, not foul play.[16] The respect, and success, of any prosecutor's office depends on a high degree of skill, good judgment, and fairness. If the prosecutor plays fairly and by the rules, justice probably will work itself out under our system of adversarial testing. However, to the extent that some courts, particularly the Supreme Court, continue to evince a consistent and unyielding philosophy of judicial permissiveness in the face of prosecutorial excesses, many prosecutors will get the wrong message, namely, that misconduct pays.[17] And to the extent that bar disciplinary committees wink at prosecutorial excesses, the message is reinforced.[18]

Clearly, prosecutors have legal and ethical obligations different from their defense counterparts. Prosecutors are guided by stricter rules, many of which are embodied in the constitution. Moreover, in contrast to defense counsel, prosecutors wield tremendous power and tremendous discretion. The juxtaposition of such power and discretion can be dangerous, especially if courts display restraint, passivity, and even withdrawal in the face of prosecutorial misbehavior. Indeed, such combination can be lethal. For example, in the recent capital case of *Darden* v. *Wainwright*,[19] the prosecutor, among other things, characterized the defendant as an "animal;" told the jury that the only guarantee against his future crimes would be to execute him; that he should have "a leash on him;" and that he should have "his face blown away by a shotgun." Darden's trial was "not perfect," said the Supreme Court in upholding his conviction and death sentence. "Few are." "But neither was it fundamentally unfair."[19a]

Obviously, we can never know to what extent the jury in finding guilt and imposing death, was influenced by the prosecutor's outrageous remarks. Was Darden treated unfairly? The answer depends, in part, on where one sits. One of the major problems with the Supreme Court's prosecutorial jurisprudence — and that of appellate courts generally — is that these courts look at trial proceedings retrospectively, and can only guess, quantitatively or qualitatively, at the prejudicial impact of such misconduct, or its influence on the fairness of the trial.[20]

To be sure, the Supreme Court has not tolerated every form of prosecutorial misconduct. In one case — *Batson* v. *Kentucky*[21] — the Court at long last outlawed the pernicious prosecutorial practice of peremptorily challenging minority jurors from jury service. *Batson*, as well as *Vasquez* v. *Hillery*,[22] which dealt with grand jury discrimination, are clearly long overdue and are to be applauded. However, they involve equal protection concerns to which the Court has displayed far greater sensitivity than to due process concerns. Indeed, virtually every important decision of the Supreme Court over the past several terms addressing the prosecutor's conduct involved a lower court judgment — state or federal — which had sustained the defendant's claim of improper prosecutorial behavior. In virtually every case, the Supreme Court reversed. It also should be noted that among the dozens of summary reversals by the Court — done without briefs or oral argument — well over 90% were decided in the prosecutor's favor.[23]

Any lingering notion that the prosecutor is obligated to dispense justice has been dispelled by recent decisions of the Supreme Court. For example, the increasingly expansive use of the harmless error doctrine is one of the principal themes in the Court's treatment of prosecutorial misconduct. Thus, in *United States* v. *Mechanik*,[24] the Court for the first time held that prosecutorial misconduct in the grand jury, reviewed on appeal following a conviction, could be harmless error. Similarly. in *United States* v. *Lane*,[25] the Court held for the first time that improper conduct in mischarging crimes, reviewed on appeal following a conviction, could be harmless error. Further, in *United States* v. *Hasting*,[26] the Court held that lower

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[15] *United States* v. *Young*, 470 U.S. 1, 7 (1985), quoting *Berger* v. *United States*, 295 U.S. 78, 88 (1935).

[16] *Berger* v. *United States*, *supra*.

[17] *See Rose* v. *Clark*, 106 Sup.Ct. 3101, 3112 (1986) (Stevens, J., concurring). *See also* Gershman, "Why Prosecutors Misbehave," 22 *Crim. L. Bull.* 131 (1986).

[18] Bar Committees rarely impose discipline on offending prosecutors. *But see In re Rook*, 276 Ore. 695, 556 P.2d 1351 (1976) (misconduct in plea bargaining). It is virtually unheard of for disciplinary sanctions to be imposed for misconduct in the courtroom.

[19] 106 Sup.Ct. 2464, 2471-73 (1986).

[19a] On March 15, 1988, Willie Darden was executed in Florida's electric chair. *N.Y. Times*, March 16, 1988, p. A15.

[20] *See* R. Traynor, THE RIDDLE OF HARMLESS ERROR (1969); Note, "Prosecutor Indiscretion: A Result of Political Influence" 34 Ind. L. J. 477, 486 (1959).

[21] 106 S.Ct. 1712 (1986).

[22] 106 S.Ct. 617 (1986).

[23] *See United States* v. *Benchimol*, 471 U.S. 453, 458 (1985) (dissenting opinion).

[24] 475 U.S. 66 (1986).

[25] 474 U.S. 438 (1986).

[26] 461 U.S. 499 (1983).

federal courts could not use their supervisory powers to discipline errant prosecutors who had consistently violated that circuit's rules. These courts were ordered to apply the harmless error test instead.

It is in the area of nondisclosure of exculpatory evidence, however, that the Supreme Court has rendered most meaningless notions of fundamental fairness and constitutional protections afforded criminal defendants. This is the one area above all else that depends on the integrity and good faith of the prosecutor. If the prosecutor hides evidence, it will probably never be known. Moreover, as an advocate, the prosecutor, if candid, will concede that his or her inclination is not to disclose. By way of rough analogy, we do not enjoy paying taxes. Since the government's auditing powers are severly limited, the tax system depends largely on the integrity of the individual taxpayer. Many evaders are not apprehended. But if a tax cheat is caught, the chances are good that the courts will impose severe sanctions, mostly for deterrent purposes.

So, it seems, should it be with prosecutorial suppression of evidence. But in this one area, where the prosecutor's fairness is so dramatically put to the test, the Supreme Court has continued to default. First, according to the Court, the prosecutor's good or bad faith in secreting evidence is irrelevant.[27] But surely if one seeks to deter prosecutors from hiding exculpatory evidence, willful violations should be severely punished. Not so, according to the Court. The hidden evidence has to be "material," that is, as the Court wrote recently in *United States* v. *Bagley*,[28] a case involving a prosecutor's false representations to defense counsel about monetary inducements to government witnesses, it has to be shown that *but for* the nondisclosure, the verdict *would* have been different.

Examples of this quagmire spawned by the Court are numerous. In *Smith* v. *Phillips*,[29] the prosecutor suppressed information that a juror in a murder trial had sought employment with the same prosecutor's office. The Supreme Court reversed the Second Circuit, which had granted the habeas corpus petition. The Court said first, that there was no showing of actual bias, nor, secondly, any showing that the defendant was prejudiced by the nondisclosure. Ethical standards may be overlooked, said Justice Rehnquist for the majority, because the "touchstone of due process analysis is the fairness of the trial, not the culpability of the prosecutor." But, *quaere*, how does one demonstrate prejudice if the juror swears: "I was not prejudiced"? Similarly, in *United States* v. *Valenzuela-Bernal*,[30] the prosecutor ordered the deportation of illegal-alien eyewitnesses to the defendant's crime before they could be interviewed by defense counsel. The Supreme Court reversed the Ninth Circuit, which had reversed the conviction. The prompt deportation of illegal-aliens is an overriding duty of the Executive Branch, the Court said, to which the Court will defer absent a plausible showing that the lost evidence would be material and favorable to the defense. Of course, as the dissent correctly pointed out, showing the importance of evidence without an opportunity to examine that evidence can be exceedingly difficult. And in *California* v. *Trombetta*,[31] the Court reversed the state court which had reversed the defendant's intoxicated driving conviction because the prosecutor had failed to preserve as evidence the contents of a breathilyzer test. The evidence was not sufficiently material, said the Court. To be material, a defendant is required to show that the evidence possessed an exculpatory quality that was apparent before the evidence was destroyed, and was of such nature that the defendant would be unable to obtain comparable evidence. Again, how does a defendant show the importance of evidence that is no longer available?

Moreover, the Supreme Court's undue deference to the prosecutor, as noted above, can result in wholesale abdication of traditional judicial functions. With due respect to the judiciary, the prosecutor is the most dominant and powerful official in the criminal justice system. The prosecutor runs the show. The prosecutor decides whether or not to bring criminal charges; who to charge; what charges to bring; whether a defendant will stand trial, plead guilty, or be conferred with immunity. The prosecutor even possesses broad sentencing powers, as the New York Court of Appeals' decision in *People* v. *Farrar* illustrates.[32] The prosecutor enjoys virtual independence. He has no superiors. He cannot be compelled to bring charges or to terminate them. Moreover, in using these vast powers, the prosecutor is presumed to act in good faith. The Supreme Court wrote a few months ago in a case involving the use of a private prosecutor: "Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor, with the power to employ the full machinery of the state in scrutinizing any given individual."[33] And, one might add, to stigmatize that person for life. To be sure, the prosecutor's vast charging discretion is contrained by a few modest doctrines: the prosecutor

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[27] *United States* v. *Agurs*, 427 U.S. 97 (1976); *Giglio* v. *United States*, 405 U.S. 150 (1972).

[28] 473 U.S. 667, 682 (1985).

[29] 455 U.S. 209 (1982).

[30] 458 U.S. 858 (1982).

[31] 467 U.S. 479 (1984).

[32] 52 N.Y.2d 304, 419 N.E.2d 864, 437 N.Y.S.2d 961. (1981).

[33] *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 107 S.Ct. 2124, 2141 (1987).

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must not be unfairly selective, vindictive, or demagogic in using his charging powers. These doctrines, however, are rarely invoked, and hardly ever successful.

No area of criminal justice is more complex and controversial than that of the prosecutor's discretion, particularly as it relates to charging, plea bargaining, dismissing, and granting immunity. It is here, in my judgment, that the courts should exercise more vigilance and control. Yet here, more than any other area, the courts have withdrawn more than ever.[34] Several recent cases illustrate the ineffectiveness of doctrine as it relates to the prosecutor's discretion. In *Wayte* v. *United States*,[35] for example, the defendant, a vocal opponent of the Selective Service system, was one of a handful of non-registrants who was prosecuted, out of nearly a million non-vocal non-registrants. Wayte made a colorable showing that he was impermissibly targeted for prosecution based on his exercise of First Amendment rights. He sought to discover information in the prosecutor's files. When the prosecutor resisted, the district court dismissed the indictment. The Supreme Court treated the case not as a discovery problem. The Court found that there was no showing that the defendant was selected *"because of* his protest activities," a showing of prosecutorial motivation that seems almost impossible to prove. Given the presumption of prosecutorial good faith, the prosecutor's expertise, and the prosecutor's law enforcement plans and priorities, matters which are ill-suited to judicial review, said the Court, there would be no interference with the prosecutor's discretion, even in this obvious instance of a prima facie case of selective prosecution.

Unfair selectivity is matched by prosecutorial retaliation in the form of increased charges after defendants raise statutory or constitutional claims. Prosecutors, however, may not be vindictive in response to a defendant's exercise of rights. Proving prosecutorial vindictiveness, however, is another matter. The courts have indulged the prosecutor in this area as well. Thus, prosecutorial retaliation by increasing charges after a plea offer is refused is not legally vindictive, said the Supreme Court in *United States* v. *Goodwin*,[36] reaffirming *Bordenkircher* v. *Hayes*,[37] even though such tactics may demonstrate actual vindictiveness. The concerns are purely pragmatic. Prosecutors need this leverage to run the system. If prosecutors could not threaten defendants by "upping the ante," they would obtain fewer pleas. Further, in virtually every pretrial context in which prosecutors have increased charges after defendants have exercised rights, courts uniformly have found no vindictiveness. This can result in some patently unfair decisions. In one recent New York case,[38] the prosecutor charged the defendant with perjury after his motion to suppress evidence was granted. The hearing court found that the defendant was a credible witness, and the police witnesses were not. This is a blatant instance of prosecutorial vindictiveness, or alternatively, of prosecutorial bad faith, particularly after a judge already had made a credibility determination in the defendant's favor.

Prosecutorial behavior in plea bargaining is standardless and often highly coercive. A plea bargain is a constitutional contract. The prosecutor must keep his promise. However, the prosecutor's decisions usually are deferred to by the Courts, and the prosecutor's interpretation of the bargain usually controls. A good example of this is *Ricketts* v. *Adamson*,[39] decided by the Supreme Court last June. The case arose out of the murder of Arizona newspaper reporter Don Bolles. The prosecutor and Adamson agreed that Adamson would testify fully and completely in

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return for a plea to a reduced murder charge and a reduced sentence. Adamson testified at the murder trial of two other co-defendants and was sentenced. All told, Adamson made 14 court appearances in 5 separate cases — 31 days of testimony and over 200 interview sessions with the prosecutor — but balked at testifying at a retrial after the above murder convictions were reversed. He claimed that his plea agreement, reasonably construed, did not require such additional testimony. The prosecutor disagreed, claimed that Adamson breached his agreement, and notwithstanding Adamson's willingness to accede to the prosecutor's interpretation, nonetheless indicted and convicted Adamson of first degree murder, and obtained a death sentence. A majority of the Court upheld the prosecutor's interpretation of the agreement, and found there was no double jeopardy bar to Adamson's conviction. The four dissenting Justices, on the other hand, said that Adamson had not breached, that there was a reasonable basis for his interpretation, and that the matter should have been submitted to the courts for resolution. Overzealousness may be an appropriate characterization of the prosecutor's conduct here. He behaved more like an "Avenging Angel" than a "Minister of Justice."

Although prosecutors may need "leverage" in plea bargaining, they do not need leverage when seeking a defendant's agreement to release the police or municipality from civil liability following an arrest, and using the dismissal of charges as a weapon to compel such agreement. In *Newton* v. *Rumery*,[40] the First Circuit, as had several other circuits, found such release-dismissal agreements invalid as contravening public policy. The Supreme Court reversed, finding that the agreement was voluntarily and knowingly entered into, as in the case of plea bargains. But as the dissent pointed out, the release-dismissal agreement is inherently coercive and unfair, there being no mutuality of advantage, as there is in plea bargaining. Moreover, there is a conflict of interest between the prosecutor's interest in furthering legitimate law enforcement objectives, and at the same time protecting the town, police, or other public officials, from civil liability.

Finally, as noted above, the standards applied by the courts to prosecutors often are unrealistic. Clearly, the search for a prosecutorial *mens rea*, or guilty mind, is hazardous at best. Prosecutors do not confess their misdeeds, and presumptions are rarely invoked. Thus, in *Oregon* v. *Kennedy*,[41] a case in which a prosecutor's misconduct provoked the defendant to ask for a mistrial, the Supreme Court was asked to decide whether retrial should be barred on double jeopardy grounds. Several courts, including some New York courts, looked to the seriousness of the misconduct in deciding whether to bar retrial.[42] The Supreme Court, however, adopted the most restrictive approach possible, requiring proof that the prosecutor's specific intention was to goad the defendant into seeking a mistrial, rather than prejudicing the defendant generally. Proving such specific intent, said the four dissenting justices, is "almost inconceivable."[43]

For some prosecutors, the temptation to cross over the allowable ethical line often must be irresistible, particularly because misconduct frequently creates distinct advantages to prosecutors in helping to win their case. It takes a steadfast effort on the part of prosecutors to maintain high moral and professional standards necessary to avoid such temptations. Regrettably, many courts, notably the Supreme Court, have provided few incentives to prosecutors to avoid misconduct. As with punishment generally, deterring misconduct requires the imposition of realistic sanctions. Such sanctions are either nonexistent or not used. Prosecutors are generally immune from civil liability.[44] Imposition of discipline by bar committees is virtually unheard of.[45] Contempt rulings by trial judges are rare.[46] Appellate reversals may punish society more than the prosecutor.[47] And although appellate courts occasionally issue stinging rebukes, the decisions rarely if ever identify the offending prosecutor by name. Perhaps if the prosecutor were forced to appear before the appellate tribunal to defend his or her conduct, the incidence of courtroom misconduct might diminish.

Although not a Minister of Justice, the prosecutor's role may well be the most exacting of any public official. But by the same token, the public has a right to require of that official the highest measure of responsibility, professionalism, and integrity. Prosecutors who use their prodigious powers gracefully and fairly are no less effective as Champions of the People, and will be far worthier of respect and admiration. Courts and bar associations have to send out better messages, and provide stronger incentives for prosecutors to behave fairly.

[34] *See* A. Goldstein, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA (1981).

[35] 470 U.S. 598 (1985).

[36] 457 U.S. 368 (1982).

[37] 434 U.S. 357 (1978).

[38] *People* v. *Stephens*, 122 A.D.2d 608, 505 N.Y.S.2d 393 (4th Dept. 1986).

[39] 107 S.Ct. 2680 (1987).

[40] 107 S.Ct. 1187 (1987).

[41] 456 U.S. 667 (1982).

[42] *See People* v. *Cavallerio*, 104 Misc.2d 436, 428 N.Y.S.2d 585 (1980). *See also Petrucelli* v. *Smith*, 544 F.Supp. 627 (W.D.N.Y. 1982).

[43] 456 U.S. at 688.

[44] *Imbler* v. *Pachtman*. 424 U.S. 409 (1976).

[45] *See* B. Gershman, PROSECUTORIAL MISCONDUCT § 13.6 (1985).

[46] *See* B. Gershman, PROSECUTORIAL MISCONDUCT § *13.3 (1985).*

[47] *See United States* v. *Modica*, 663 F.2d 1173, 1182-86 (2d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982).