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The Zealous Prosecutor as Minister of Justice

BENNETT L. GERSHMAN*

I met Fred Zacharias for the first time while visiting at Cornell Law School in 1983. We had mutual interests. We both taught criminal law and enjoyed watching college basketball games, especially at the then-new Carrier Dome in Syracuse, New York. We talked about teaching, and we reminisced about our experiences as former prosecutors. Fred was intrigued by my project to write a treatise on prosecutorial ethics and misconduct. He did not much care for the title, *Prosecutorial Misconduct*; he thought it should convey a more balanced, less slanted approach. In retrospect, I probably should have taken his suggestion. Balanced, thoughtful, imaginative, passionate—those were some of the qualities that informed not only Fred’s amazing body of scholarship but also, as I came to learn from my somewhat limited perspective, his entire life.

As my contribution to this Memorial tribute to Professor Fred Zacharias, I have chosen to write about Fred’s 1991 article in the *Vanderbilt Law Review* entitled *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*¹ I have always seen this article as a classic, one of the finest and most important discussions of the special role of the prosecutor in the criminal justice system and of the meaning of the prosecutor’s ethical duty to “do justice.”² This article is cited repeatedly for numerous points: the conception of the

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1. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

2. *Id.* at 46.

prosecutor's duty not to win a case but to see that justice is done, the failure of the do-justice ethical standard to effectively regulate the behavior of prosecutors, the ability of prosecutors to exploit the gross imbalance of power in the adversary system between the prosecution and defense and the need to redress that imbalance by establishing clear ethical guidelines for prosecutors, the articulation of a methodology to structure prosecutorial trial ethics, and the need for drafters of codes of professional responsibility to write meaningful rules.

The settings for Professor Zacharias's inquiry into the duty to do justice are the provisions in the *ABA Model Rules of Professional Conduct* and the *ABA Model Code of Professional Responsibility*.³ Well before these codes were adopted, as Professor Zacharias points out, this "lofty, but undefined" prosecutorial duty⁴ was most authoritatively pronounced in Justice George Sutherland's famous passage in his 1935 opinion in *Berger v. United States*.⁵ In that case the Court reversed a federal conspiracy conviction for pervasive and persistent misconduct by the prosecutor.⁶ And even before *Berger*'s eloquent pronouncement of this ideal, the majestic conception of the prosecutor's duty to promote justice was recognized and applauded. As Professor Bruce Green, Professor Zacharias's longtime friend and collaborator, has observed, courts and commentators in the nineteenth century had described the prosecutor as a quasi-judicial official whose prodigious powers should properly be used for beneficent and not evil purposes.⁷ And to the extent that contemporary academic discourse began to focus much more

3. See MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2010) (describing prosecutors as "minister[s] of justice"); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1986) ("[The prosecutor's] duty is to seek justice . . .").

4. See Zacharias, *supra* note 1, at 47 n.6.

5. 295 U.S. 78, 88 (1935).

6. This passage is cited so often as to become an iconic statement of the role of the prosecutor:

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

Id.

7. Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 612 (1999) (citing several model rules and commentary, Professor Green observes that the concept of a prosecutor's duty to "seek justice" or "do justice" dates back well over a century).

extensively and creatively on the prosecutor's duty to do justice,⁸ it is abundantly clear that Professor Zacharias's groundbreaking article was not only the catalyst for this doctrinal development but also the most authoritative and substantive discussion of the meaning of justice.

As one of its several objectives, Professor Zacharias's article attempted to clarify the "justice" to which the modern codes refer. He suggested two fairly limited prongs: first, that a prosecutor must have a good faith belief in the defendant's guilt and second, that a prosecutor must ensure the functioning of the basic elements of the adversary system.⁹ However, except for a few continuing responsibilities of a prosecutor—refraining from prosecuting unsupported charges, ensuring that the accused has an opportunity to exercise procedural rights, and making some disclosures of information¹⁰—the codes offer no guidance on specific obligations that constitute a doing of justice in the setting of an adversarial trial.¹¹ To be sure, as Professor Zacharias observes, the codes are concerned with structuring adversarial practice, and the codes "do not exempt prosecutors from the requirements of zealous advocacy."¹² Therefore, as Professor Zacharias suggests, "'Justice' must have a special interpretation in the context of the adversary system."¹³

8. See, e.g., Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 GEO. J. LEGAL ETHICS 1301, 1305 (1996); R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty To "Seek Justice"*, 82 NOTRE DAME L. REV. 635, 637 (2006); Brandon K. Crase, *When Doing Justice Isn't Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 GEO. J. LEGAL ETHICS 475, 478 (2007); Green, *supra* note 7, at 612; Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation To "Seek Justice" in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337, 1339 (2004); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 61 (2009); Melanie D. Wilson, *Prosecutors "Doing Justice" Through Osmosis—Reminders To Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67, 85 (2008).

9. Zacharias, *supra* note 1, at 49.

10. *Id.* at 51 n.24.

11. *Id.* at 51 ("All modern codes are silent on the meaning of justice at trial.").

12. *Id.* at 52.

13. *Id.* at 53. Professor Zacharias respected prosecutors and the work they do. In other articles he sought to identify both the scope and excesses of their duty to do justice dispassionately and accurately. See, e.g., Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121 (1998). Fred was a bit impatient with critics—including me—who lamented the absence of professional discipline of prosecutors. He believed that the claim was somewhat overblown. In another often-cited article, Professor Zacharias examines carefully and impartially the issues surrounding bar discipline of prosecutors and concludes, with characteristic integrity, that bar discipline has not been completely

With creativity and inspiration, Professor Zacharias sets out to provide concrete meaning to the amorphous concept of a prosecutor's mandate to promote adversarial justice. Professor Zacharias's principal objective may be to encourage code drafters to take a serious look at the conduct of criminal trials and to clearly articulate ethical prosecutorial behavior. I suggest *may be* because I believe Fred may not have been overly sanguine that code drafters would possess the fortitude or willingness to engage in this task. More likely, Fred sought to challenge the conventional understanding that doing justice was entirely within the realm of prosecutorial discretion and an obligation that prosecutors could and should intuit depending on the situation.

How should a prosecutor attempt to preserve the adversarial balance? According to Professor Zacharias, a prosecutor should intervene when defense counsel's performance is deficient.¹⁴ A prosecutor should not impede defense counsel's access to all discoverable and disclosable information.¹⁵ A prosecutor should intervene, or at least not remain passive, when the trial judge demonstrates hostility towards the defense.¹⁶ And a prosecutor should avoid using inadmissible evidence.¹⁷ Undoubtedly, as Professor Zacharias well knew, each of these situations is much more than controversial; Professor Zacharias's proposals at a minimum reflect outside-the-box thinking that likely would make any prosecutor—even the most conscientious—cringe. Indeed, reconciling these proposed actions with a prosecutor's duty of "zealous advocacy" requires a mindset that, quite frankly, no prosecutor likely possesses. To be sure, intervening when defense counsel is incompetent or the judge is biased may make abundant sense to some prosecutors, but not with the purpose of doing justice. Rather, to the conscientious prosecutor, such intervention might be called for to preserve a likely guilty verdict from appellate reversal. Moreover, as Professor Zacharias correctly observes, refraining from using inadmissible evidence is a worthy objective to preserve adversarial balance, but often the question of admissibility is unclear, and for many prosecutors it is typically the judge's call. Also laudable for purposes of ensuring justice, as Professor Zacharias notes, is not impeding defense counsel's access to relevant information, but that objective may seem far less pressing today when viewed in the much more common practice of prosecutors' conduct in deliberately suppressing relevant and truthful

absent but "[n]either has it fulfilled its commitment to maintaining the letter and spirit of the codes." See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 778 (2001).

14. Zacharias, *supra* note 1, at 66–74.

15. *Id.* at 79–85.

16. *Id.* at 85–88.

17. *Id.* at 88–90.

information that is favorable to the defense and quite possibly would exculpate an innocent defendant.

Fred was a romantic. Achieving adversarial justice when the system breaks down, as the above examples illustrate, reflects Professor Zacharias's faith that the adversarial system has the capacity to correct itself and that prosecutors have the courage and integrity to step out of their purely adversarial roles and ensure that justice is done. Prosecutors, he believed, can be encouraged to compete properly and fairly as both zealous advocates and ministers of justice in order to establish the essential adversarial balance. And, if they fail or are unable to achieve that mission, then code drafters, by enacting clear and explicit rules, can discourage prosecutors from taking undue advantage of their built-in resources.

Fred understood clearly that prosecutors typically make difficult judgment calls in broad gray areas and that telling prosecutors to act noncompetitively may only complicate their self-image.¹⁸ Fred also understood that enacting explicit ethical requirements that are widely disobeyed may do more harm than good in fostering cynicism and encouraging further disobedience.¹⁹ As Professor Zacharias correctly notes, no prosecutor has ever been disciplined for failing to do justice at trial.²⁰ However, attempting to make somewhat more explicit an ethical mandate that is maddeningly vague and frustratingly amorphous has considerable merit; if nothing else, it teaches judges, lawyers, other participants in the adversary system, and the general public as well, the meaning of adversarial justice and what the legal profession expects of prosecutors. Even if the codes continue to resist giving content to the do-justice requirement, as Fred likely expected, his seminal vision of the appropriate conduct of a prosecutor in striving to do justice illuminates the empty rhetoric in the codes and offers those who continue to be educated and inspired by Fred's scholarship an honorable and dramatic alternative.

18. *Id.* at 103.

19. *See id.* at 104.

20. *Id.* at 105.

