Review Essay On Becoming and Being a Prosecutor

Martin H. Belsky, University of Akron School of Law
REVIEW ESSAY

ON BECOMING AND BEING A PROSECUTOR

Martin H. Belsky*

A prosecutor is a detective, a litigator, a manager, and a policymaker. He is responsible for investigating illegalities and is permitted to use specially assigned tools—a grand jury or subpoena—to acquire information and evidence. As a litigator, he is counsel for an artificial client—the government or people—but also the representative of identifiable victims. Moreover, though he functions in an adversary system, he must temper his advocacy and zeal. His goal is not merely to “win,” but also to see that “justice is done.”

The prosecutor must manage an increasing set of responsibilities in a complex and often arbitrary system, and therefore must balance twin goals of efficiency and success. Finally, as a policymaker, she

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* Associate Professor of Law, University of Florida. B.A., Temple University (1965); J.D., Columbia University (1968); Dip. Crim., Cambridge University (1969).

1. I would like to thank my colleagues Professors Stanley Ingber, Don Peters and James Pierce for their helpful comments and criticisms on an earlier draft.


4. The Model Code of Professional Responsibility stresses the differences between a prosecutor and any other attorney. He “represents the sovereign” and makes decisions “normally made by an individual client.” MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-13 (1980) [hereinafter cited as CPR].

5. As one commentator recently explained, the theory is that the prosecutor serves society by helping the criminal law “to avenge identifiable victims”:

By guaranteeing individual victims that the state will impose punishment on the criminal offender, a criminal prosecution serves the function of satisfying the human lust for vengeance and eschews the danger of uncontrollable escalation and increasing violence, which is a likely by-product of a social system that tolerates private vigilante justice.


6. CPR, supra note 3, EC 7-13: “[H]is duty is to seek justice, not merely to convict.”

7. See R. Clark, Crime in America 101-15 (1971) (the “failing system”)


must make choices concerning both what laws to enforce and how to enforce them. Her power to make those choices is almost unfettered.

A thorough analysis of this difficult mixture of roles, responsibilities, and skills would be quite valuable. Such a general text on "The Prosecution Function" would assist in the training of new prosecutors and increase recognition of the prosecutorial perspective by the legal profession and the public.

Hoping for such an examination, one approaches "The Prosecution Function" by David M. Nissman and Ed Hagen with both expectation and concern. Will the two assistant district attorneys turned authors explore the special obligations and attitudes of the prosecutor? Will they allow their biases to taint their analysis? Will they reveal the broad scope and nature of the prosecution function? Will they lead the reader to see the need for better training and for increased reflection about the prosecutor?

Nissman and Hagen's text provides responses to these questions that highlight the problems of becoming and being a prosecutor. Most lawyers, including judges and prosecutors, define the prosecutorial role narrowly and analyze it in terms of the day-to-day courtroom combat. The public perceives the prosecutor as its legal representative in the "war against crime" and seldom, if ever, goes beyond that vision to look at her role as part of a larger and extremely troubled justice system. Students and new prosecutors, in turn, absorb these perspectives and seek training as "courtroom torpedoes," fighting to win a war against wrongdoers.

This review essay first presents Nissman and Hagen's view of the prosecutorial world as expressed in their text. Their view is limited in that it focuses on the local district attorney in the courtroom. The second section of this essay considers the extent to which Nissman and Hagen succeed in detailing and exploring that circumscribed perspective. This reviewer concludes that, while the text gives helpful guidance on selected prosecutorial functions and techniques, it is deficient in that it chooses too few areas of courtroom activity for analysis, and fails to describe the environment in which a prosecutor works. More-

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10 See Easterbrook, Criminal Procedure as a Market System, 12 J. LEG. STUD. 289, 299 (1983); Vorenberg, supra note 9, at 1525.
13 See Eagleton, Foreword, in THE PROSECUTOR, supra note 1, at 7-8.
14 D. NISSMAN & E. HAGEN, supra note 11, at xi, 1.
over, the text misses an opportunity to convey to a young prosecutor the need for ethical sensitivity in his day-to-day actions.

This essay then critiques the authors’ premise that a “clinical law” teaching text, or a “how to” book for students and new prosecutors should not delve into matters of policy. As this essay demonstrates, the authors’ view is misdirected. Clinical and other students and young prosecutors could use a more thorough text in order to put the prosecutor’s quasi-judicial role in its proper context.

Finally, this essay suggests the need for a broader prosecutorial sourcebook. The essay offers a proposed format that will increase the value of such a book to students, attorneys, and interested citizens.

**NISSMAN AND HAGEN’S VIEW OF THE PROSECUTOR’S FUNCTION**

Nissman and Hagen view the prosecutor as a combatant in a militaristic struggle of good versus evil in the war against crime. The prosecutor “represents the public order.” He is to use his powers “as a series of weapons and armaments.” He has an identifiable enemy—the criminal and his shield, the criminal defender.” In “punch[ing] through” this shield, the prosecutor “isolates him[self] from the rest of the profession.” As the soldier for “truth, justice and the American way,” he unites “with his fellow prosecutors” in reacting to the continuing, indiscriminate, and unconscionable attacks of the enemy.

The text, then, is a war plan—a “no-nonsense manual” for law students and new prosecutors. These individuals are indoctrinated into this special prosecutorial role and given the specific assistance needed to allow them to “blossom into courtroom torpedoes.” Space is not wasted on broad theories or analysis. Every page of the text is directed toward helping the new prosecutor to see this “big picture” of the war against crime and to help him fight that war by exposing “defense tricks” or by providing a “nuts and bolts trial technique that will assist in the conviction of guilty criminals.”

**The Prosecutor as Courtroom Attorney**

To carry out this task of teaching the “nuts and bolts” of the prosecutorial function, Nissman and Hagen intentionally narrow the

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15 Id. at 1.
16 Id.
17 Id.
18 Id. at 2.
19 Id. at xi.
20 Id. at 113.
21 Id. at xi.
22 Id.
23 Id.
24 Id.
scope of their book. Its coverage is limited to a traditional prosecutor in a county prosecutor's office who handles trials of criminal cases. The bulk of the text offers practical advice in handling pre-trial motions, negotiating pleas and presenting cases. The authors' advice is sound and extremely useful.

Tactics, techniques, and "tricks" can be learned and this book teaches them well. The text offers an excellent outline for trial preparation. Proposed questions are given for getting a confession into evidence, conducting a voir dire, and qualifying an expert witness.

The book skillfully demonstrates the difficult task of cross-examining a hostile witness. In one instance, for example, the authors go back into history and reprint part of the transcript from the trial of a lawyer-defendant charged with killing President Garfield. The court records show how a skilled prosecutor effectively destroyed the defendant's insanity defense. Other illustrations indicate how a prosecutor can discredit a witness's testimony by impeaching background material, eliciting admissions of prior perjury, or using admissions to bolster the prosecutor's trial theory.

The best chapter in the book is about "The Drunk Driver." Nisman and Hagen bring their techniques and suggestions into focus and "put it all together" for the reader. They first explain the practical problem in prosecuting drunk drivers. The defendant is "often a substantial, sympathetic character who drinks and drives no more often than, and is perhaps more law abiding than, your jurors." The evi-
dence is technical and abstract. The defense counsel is often a highly-
paid specialist who relies on his witness's impeccable character and
loyal friends and neighbors. The contest for truth is between the "up-
right" citizens, and a police officer "from the lowest echelon of the po-
lice agency, traffic control." 41 Nevertheless, Nissman and Hagen
demonstrate how "these cases can and should be won regularly" 42 by
detailing how a young prosecutor evaluates her case, 43 prepares for
trial, 44 selects the jury, 45 examines the witnesses, 46 and makes her win-
ning argument to the jury. 47

Unfortunately, the text artificially limits its coverage of the prose-
cutor's courtroom activities and fails to put the attorney's trial responsi-
bilities in the proper context of pre-trial, trial, and post-trial
procedures. There is no mention of the prosecutor's representation of
the state against accused juvenile offenders. 48 There is no discussion of
the prosecutor's role in bail, screening, or pre-trial diversion. Similarly,
Nissman and Hagen do not even touch upon the prosecutor's involve-
ment in sentencing, appeal, post-conviction relief, probation, pardon,
and parole. Finally, there is absolutely no mention of the prosecutor's
office—how it runs, how it relates to other participants in the criminal
justice system, and how it responds to changing societal desires and
pressures. 49

These omissions give the student or novice prosecutor a skewed
perspective on his trial responsibilities. In handling cases, he must de-

41 Id.
42 Id.
43 Id. at 177-79.
44 Id. at 179.
45 Id. at 180-82.
46 Id. at 180 (breath tests), 182-84 (cross-examination), & 184-85 (expert witness). Particularly
helpful is a set of "foundation questions" to get testimonial and other evidence admitted. Id. at
189-93.
47 Id. at 185-89.
48 Merola, Modern Prosecutorial Techniques, 16 CRIM. L. BULL. 232, 267-71 (1980). See also
National Advisory Commission on Criminal Justice Standards and Goals, Report on
Courts 289-305 (1973) [hereinafter cited as Standards and Goals Courts Report]; Na-
tional District Attorneys Association, National Prosecution Standards 315-18 (1977)
[hereinafter cited as NDAA Standards].

The importance of the prosecutorial role in the juvenile justice system is indicated by the
work of the Institute of Judicial Administration and the American Bar Association. They have
a complete set of standards for the prosecutor to follow in handling juveniles. See IJA-ABA Ju-
49 See Alpert, Recent Developments in the Office of The Prosecutor, 14 PROSECUTOR 341
(1979); Silburt, supra note 12. The scope of the prosecution function is best illustrated by referring
to the Table of Contents of the American Bar Association's and National District Attorneys
Association's standards for the prosecutor. See American Bar Association, Standards for Crim-
inal Justice, Chapter Three—The Prosecution Function, 3.3 to 3.4 (Approved February 12, 1979)
[hereinafter cited as ABA Standards]; NDAA Standards, supra note 48, at iv-xi. See also infra
note 120.
cide which cases to try, which cases to filter out, and which cases to divert to special programs.\textsuperscript{50} One common method of evaluating whether to try a drunk driving or drug case, for example, is to consider the alternative of treatment in lieu of trial.\textsuperscript{51} A discussion of pre-trial diversion, even if limited in scope, would arm the attorney with information essential in handling day-to-day responsibilities.

Similarly, although Nissman and Hagen fail to discuss the issue, a prosecutor cannot be a successful courtroom advocate unless she is aware of how sentencing hearings are held, and what sentencing alternatives are available. Such knowledge is essential in offering or accepting a plea, in deciding to proceed by bench or jury trial, or in representing the state in recommending punishment to a judge.\textsuperscript{52} Moreover, no courtroom attorney can be considered successful unless she knows the standards, rules, and practices that appellate courts apply in reviewing trials. In fact, for this reason, many prosecutors start their careers writing briefs and making post-trial and appellate arguments.\textsuperscript{53} By performing these tasks, they can identify common trial errors and learn how to avoid them. They can note the trend of the law or the courts or both and take those trends into account in their trial arguments. Nissman and Hagen define the elements of success as “superior understanding of the local statutory and case law” and a “feel for winning courtroom tactics.”\textsuperscript{54} That “understanding” and “feel” must involve at least some understanding of the appellate process.

Finally, an individual works in a particular environment, and that environment shapes how and what he does. This premise applies as well to prosecutors’ offices as it does to any other environment, and raises several relevant questions: What types of cases are handled? To what department of the office will a case be assigned? Who is responsible for case-scheduling? Who decides how a case is to be handled? Who obtains the witnesses? Who handles motions or appeals? What happens if a judge or defense counsel acts improperly? What are the office’s priorities and policies? What happens to a prosecutor’s job if

\textsuperscript{50} Jacoby, supra note 7, at 83-84.


\textsuperscript{52} See NDAA STANDARDS, supra note 48, at 289. For a discussion of the ethical issue involved in a prosecutor recommending a sentence, see infra note 204.

\textsuperscript{53} Another practical reason for this assignment relates to the increasing professionalization of prosecutors’ offices. As more and more district attorneys hire out of law schools, new prosecutors often spend substantial periods in an office waiting for bar examination results and formal admission. In offices which have motions or appellate sections, such recruits work on appellate or other posttrial motion briefs. In offices not so compartmentalized, they often assist trial attorneys by doing research on legal issues.

\textsuperscript{54} D. NISSMAN & E. HAGEN, supra note 11, at 177.
the chief prosecutor loses an election or is fired by the executive? The
prosecutor must be aware of these issues because they affect his day-to-
day life and, more important, his behavior. Failure to include even a
sketchy outline of this environment precludes the book from satisfying
the authors’ desire to show “the big picture.”

The Prosecutor as Warrior

Nissman and Hagen believe that “the nature of the prosecutor’s
function in the legal system tends to isolate him from the rest of the
profession and to unite him with his fellow prosecutors.” Defense
attorneys, for example, are cynical and ruthless. The authors do give
tacit recognition to “the important role that respect for the judiciary
plays in the legal profession,” and to the fact that “an adversary system
would not work without aggressive counsel” for the defendant. In the
authors’ view, however, defense counsel represent “the criminal,” and
may be more aptly described as “criminal defenders,” rather than pub-
dic defenders.

The prosecutor is the people’s warrior in the battle against “the
criminal and his shield, the criminal defender.” The authors intend to
enlist strong soldiers into the anti-crime forces. The book is to be used
as a tactical manual for this conflict. As such, it concentrates on the
prosecutor’s perspective on all issues. This approach, in itself, is not a
deficiency of the text. It is useful to see how a prosecutor views the
world and to see that this view is different than the civil libertarian
model often taught in law schools. Most individuals on trial for a
crime are, in fact, guilty. Acquittals in the adversary process are
sometimes achieved because of technical defects, court delays, or even
sharp practices. All too many students and instructors view the prose-
cutor as the “bad guy” without attempting to see his perspective on the
issues.

Nevertheless, the text goes too far, and reflects an insensitivity to

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55 The functions of a prosecutor’s office, how the office operates, and where to report problems can be combined with discussions on the role of the prosecutor in the system into a sourcebook that the student and young prosecutors can use as “a constant guide and reference to [the individuals working] in the office.” NDAA Standards, supra note 48, at 90.

56 D. NISSMAN & E. HAGEN, supra note 11, at xi.

57 Id.

58 Id.

59 Id.

60 Id. at 1.

There was no good reason to believe [even prior to the protections established in the 1960’s] that innocent people were being convicted in perceptible numbers, that the 80-odd percent of persons held for trial, who had confessed had not, in fact, committed the crime with which they were charged, or something very much like it.

62 See also M. FREEDMAN, LAWYER’S ETHICS IN AN ADVERSARY SYSTEM 79-98 (1975); NDAA Standards, supra note 48, at 437-39.
the unique ethical obligations of the prosecutor. Under the traditional rubric, he is an agent of the state and his "duty is to seek justice, not merely to convict."63 This means protection of both the rights of society and the rights of the accused.64 Yet his constituency expects him to be the people’s advocate. Victims, police, and the public want him to be a “tough adversary.” Success and reputation are measured by the ability to "win."65 The court and bar expect him to be a “colleague” and play by the rules not just of law but of courtesy.66 The prosecutor either works for, or is, a political person and must be responsive to public demands.67 Finally, all these various demands are aggravated by immense caseloads and understaffed offices which make careful

63 CPR, supra note 3, EC 7-13. See also ABA STANDARDS, supra note 49, at 3.6; NDAA STANDARDS, supra note 48, at 417-18. The classic statement of a prosecutor’s ethical responsibilities was given by Justice Sutherland in Berger v. United States, 295 U.S. 78, 88 (1934).

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold 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.

64 See ABA STANDARDS, supra note 49, at 3.7.


One prosecutor described the obvious temptations in his analysis of the prosecution of a highly publicized case:

For most lawyers, the truly big case, one which commands widespread public attention, is rare enough to be classified as a once in a lifetime event. As a result, many trial lawyers look upon the prospect of their involvement in a highly publicized case with great expectation. This interest is whetted, one suspects, when legal colleagues surface on the nightly news, captured in the dynamic sketches of courtroom artists, or simply standing in front of the courthouse explaining why their client has no comment. Every trial attorney yearns for that splendid moment in the courtroom when it all seems to come together—the right question to the witness, the convincing argument, the turn of phrase that helps to shift the jury’s favor in their direction. When combined with the vision of a courtroom packed with the press, of the artists laboring furiously to catch the gesture, and of rapt attention from assorted courtroom observers invariably drawn to the scene of a major trial, any lawyer can conjure up a setting of high drama, and even perhaps a singular chance to stand in the shoes of Clarence Darrow.


66 See CPR, supra note 3, EC 1-5, EC 7-19, EC 7-38. See also NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: A NATIONAL STRATEGY TO REDUCE CRIME 247, 249 (1973) [hereinafter cited as STANDARDS AND GOALS STRATEGY], ABA STANDARDS, supra note 49, at 3.31; NDAA STANDARDS, supra note 48, at 392-97.

67 "The prosecutor must also take into account the public temper of the moment." L. FORER, supra note 65, at 119. See Adlerstein, Ethics, Federal Prosecutors, and Federal Courts: Some Recent Problems, 6 HOFSTRA L. REV. 755, 758 (1978) (The prosecutor has a duty to the community
consideration, selection, and prosecution of each case a practical impossibility.\textsuperscript{68}

Nissman and Hagen highlight neither these conflicts nor the prosecutor’s obligations in her day-to-day practice. These omissions are especially troublesome since the authors intend their text to be used by students in a clinic. One of the proclaimed benefits of such clinical courses is the ability to integrate professional responsibility issues into the trial strategy thought process—to bring ethics to life.\textsuperscript{69}

Chapter two of the text does recite some “black letter” rules relating to discovery, trial tactics, ex parte communications, free press and fair trial, and counsel-judge interaction.\textsuperscript{70} The text also touches on ethical standards involved in interrogation,\textsuperscript{71} discretion,\textsuperscript{72} and conflicts of interest.\textsuperscript{73} Unfortunately, however, it includes little or no discussion about either the policies behind or the validity of these rules.

The authors treat the rules as “givens” to be complied with, albeit grudgingly. Because of the book’s militaristic framework, it focuses on how to succeed at the very edge of the rules.\textsuperscript{74} One notable illustration of this attitudes included in the introduction to the book’s chapter on pre-trial motions to suppress evidence:

Since the criminal defender is relying on a technicality to spring


\textsuperscript{70} D. Nissman & E. Hagen, supra note 11, at 7-12.

\textsuperscript{71} Id. at 100 (“It is unethical for a prosecutor to contact, or encourage police to contact, a criminal represented by counsel on the charge.”).

\textsuperscript{72} Id. at 13-14 (charging).

\textsuperscript{73} Id. at 10-11.

\textsuperscript{74} Although the authors do note that a prosecutor must wage his war on crime, “ethically with honor and duty,” id. at 5, they then give illustrations as to how to act at the very precipice of ethical obligations. See, e.g., id. at 51 (threats to secure a plea bargain); id. at 77 (a prosecutor “should use every technicality available”); id. at 105 (asking a defendant in a pretrial hearing if he admitted the crime and using this new confession at trial in rebuttal); id. at 156-57 (scope of rebuttal).
manifestly guilty criminals to freedom so that they may return to prey on the community the prosecutor is sworn to protect, the prosecutor should use every technicality available to the people to challenge the defense technicalities. The prosecutor must be expert and forceful. The gloves must come off. This chapter should supply the necessary groundwork for preventing criminals from extending these technicalities to new absurdities.75

In a similar vein, the authors do not hesitate to encourage prosecutors to “delve into the evil effects of crime” or to “urge the fearless enforcement of the criminal laws” in their closing arguments.76 Moreover, after reviewing how prosecutors have used derogatory characteristics of an accused in their arguments to the jury, the authors warn that use of such epithets is not “a good practice” but their tip to the reader is that “if a comment on the character of the accused is to be employed, it had better be supported by evidence.”77 Nissman and Hagen do not include use of such tactics within the ethical ban on “appeals of sympathy or bias against the defendant.”77

The assumption is that prosecutors must comply with ethical rules, but only to avoid disciplinary sanctions,79 a judge’s adverse response,80 or prejudicial error.81 There is no discussion about possible self-imposed extensions of the rules. Nevertheless, such extensions are not uncommon. Many prosecutors use their discretion, for example, to preclude enforcement of “unrealistic” moral and idealistic laws.82 Some are willing to call a truce in the battle against crime by establishing rehabilitation programs for offenders and diverting otherwise “clear winners” to those programs.83 Moreover, in general, most prosecutors take seriously the proposition that: “As a public prosecutor constantly in the public eye, it is imperative that the prosecutor, even more so than private attorneys, ‘avoid even the appearance of professional impropriety.’”84

**TEACHING THE PROSECUTION FUNCTION**

In writing their textbook, the authors portrayed too narrow a vi-

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75 Id. at 77.
76 Id. at 158 (quoting People v. Holmes, 41 Ill. App. 3d 956, 965, 354 N.E. 2d 611, 618 (1976)).
77 Id. at 159.
78 Id. at 158.
79 See, e.g., id. at 32. (“A prosecutor should never take a guilty plea unless he believes the defendant is guilty. To do otherwise would warp the good-versus-evil role that he plays and, of course, should result in ethical sanctions.”). See also id. at 8 (communications with a defendant could lead to “personal liability with the local ethics board”).
80 See, e.g., id. at 75 (a reassert “will likely raise the blood pressure of the judge.”).
81 See, e.g., id. at 8 (instructing a witness not to talk to defense counsel); id. at 101 (referring to a confession in opening even if it will be later excluded); id. at 158 (improper closing argument).
82 See NDAA STANDARDS, supra note 48, at 127.
83 Note, supra note 51, at 309-10 (the Philadelphia program).
84 NDAA STANDARDS, supra note 48, at 418 (emphasis in original).
sion of the function and role of courses intended to train potential prosecutors. The limited focus of Nissman and Hagen's text is based on its intended readership. Apparently, they were motivated to write it because of their experience with the Criminal Prosecution Clinic at the University of Oregon Law School. Their "nuts and bolts" manual is intended to be used to train young prosecutors through a similar clinical approach.

Criminal prosecution clinics typically focus on the practical, day-to-day aspects of the prosecutor's office. Rarely is there opportunity for discussion of the ethical and social issues that the prosecutor must face, or more generally, the role of the prosecutor in the American judicial system. On the other hand, seminars on criminal prosecution, by their classroom orientation, emphasize the ethical and theoretical issues facing prosecutors, rather than hands-on experience.

The thesis of this essay is that students can understand the prosecutorial function properly only if they learn about both the practical aspects of winning a case and the various ethical, policy, and social issues confronting the prosecutor's office. By narrowing their text to a combat manual, Nissman and Hagen fail to provide the clinical student with a complete picture of the prosecutor, and only reinforce the gap between the clinical and seminar experience.

85 The preface and acknowledgements of the book make reference to the authors' experience as clinic law students and first-year deputies and acknowledge the help of various members of the Lane County, Oregon, Prosecutor's Office and the University of Oregon Prosecution Clinic. On the final page of the book, entitled, "About the Authors," we learn that Mr. Nissman is both a deputy district attorney and instructor for the Prosecution Clinic at the University of Oregon School of Law.

86 D. NISSMAN & E. HAGEN, supra note 11, at xi.


88 This author has taught the prosecution function in both a clinic and seminar. In the early 1970s, while a prosecutor in the Philadelphia District Attorney's Office, I taught a prosecution function course at Temple University Law Center. The other instructor was the District Attorney and now United States Senator Arlen Specter. See Belsky, supra note 69.

From 1977 to 1982, I taught a seminar on The Prosecution Function at the Georgetown University Law Center. At that time, I was no longer a prosecutor but still worked in government, first in the legislative and then in the executive branch. At the present time, I am an Associate Professor at the University of Florida's Holland Law Center. Although I also direct a public interest law research center, my teaching responsibilities are for "traditional" classes and seminars. I neither run nor participate in a clinical instruction course.

In their 1977 article, Professors Gee and Jackson place law professors into a number of categories. One type described is the "practitioner-scholar." I place myself in this category:

Such professors usually have gained some professional expertise in practice, often in a highly specialized field, and then have moved to law school teaching rather early in their careers. Practitioner-scholars are more likely to identify with the practicing bar than are traditional legal scholars but they are also inclined to use traditional teaching methods and to
The Clinical Approach

Prosecution clinics have become relatively common. Students desire trial experiences. Prosecutors desire academic status and seek student assistants to handle increasing caseloads. Law schools have institutionalized clinical programs into their curriculum.

Whether offered as a prosecution, defense, or civil trial clinic, the nature of clinical courses could limit the opportunity to educate students in broader issues of policy. Because these courses involve "trials" in "the real world," decisions have to be made quickly. If caseloads are not controlled, students, like veteran trial attorneys, lack the time for policy reflection. In addition, law schools are often reluctant to allocate resources or credit hours to allow discussion periods for review of broader issues. In fact, programs are typically focused on acquisition of specific litigation skills. Students receive preliminary information identify substantive legal research as one of their primary goals. This type of professor sees less cleavage between law school and the practice of law than does the traditional legal scholar and is more likely to accept practical training as one of several goals of the law school.

Gee & Jackson, supra note 28, at 933.

89 See COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1978-79 at 1-20 (1979) [hereinafter cited as CLEPR REPORT]. The Report lists 82 such clinics. Id.

90 See Gee & Jackson, Current Studies of Legal Education: Findings and Recommendations, 32 J. LEGAL EDUC. 471, 504 (1982). Several studies have been made of attorneys as to their law school courses. They indicate that many attorneys wished they had had trial experiences as an option in the curriculum. See Gee & Jackson, supra note 28, at 936-51; Gee & Jackson, supra, at 473; McCauley, Law School and the World Outside the Doors II. Some Notes on Two Recent Studies of the Chicago Bar, 32 J. LEGAL EDUC. 506, 512 (1982).

91 NDAA STANDARDS, supra note 48, at 399-400.

92 Id. A student in my Prosecution Function Seminar prepared a paper on "The Student as Prosecutor." Through personal contact with students and instructors, he compiled information on six prosecution clinics at the law schools at Temple University, Georgetown University, Duke University, William and Mary, Antioch, and Hofstra University. G. Nelson, The Student as Prosecutor (December 31, 1979) (unpublished manuscript available from this reviewer).

His study showed that prosecutors in the State's Attorney's Office in Frederick, Maryland in the United States Attorney's Office for the Eastern District of Virginia, and at one time the United States Attorney's Office for the District of Columbia, sought students "to help ease their backlog." G. Nelson, supra, at 20, 26, 30.


94 Gee & Jackson, supra note 28, at 972.

95 See Swords & WalHer, Cost Aspects of Clinical Education, in AALS-ABA REPORT, supra note 69, at 133, 142-45.

96 See AALS-ABA REPORT, supra note 69, at 14-16 (listing skills to be taught); Gee & Jackson, supra note 28, at 884.
about the nature of the office in which they will work, are assigned
cases, and spend most of their classroom time discussing substantive
law or advocacy techniques. Students are taught the law and successful
strategies and then directed to apply them. By handling cases, they
gain practical experience in the application of substantive law and pro-
cedure and, especially in criminal clinics, constitutional law. Finally, in
order to present their arguments and evidence, they are required to fa-
miliarize themselves with local rules and practices.97

Such clinical programs only occasionally delve into the justice sys-
tem, the non-advocacy roles of the attorney, or the policies behind sub-
stantive rules. Many instructors believe that their students are anxious
about their upcoming trials and believe that their job is to help students
overcome these anxieties by giving practical advice. Once students feel
comfortable about their competence and find their instructors' advice
credible, they are more willing to allow their instructors to develop the
larger issues. Even then, because of the likelihood of an upcoming trial
and the limited time made available for out-of-court analysis, discussions
on ethical or systems issues focus on the instructors' or students' expe-
riences and frustrations.98

Most participants view class sessions as "practical." Policy dis-
cussions, they fear, would turn the course into a type of advanced criminal
or civil law seminar or law and social science workshop.99 Students,
responsible for learning and integrating a complex set of laws, rules, or
practices have a tremendous desire to get specific answers. A skillful
instructor could use the students' motivation to learn as a base on
which to give insights into professional responsibility and the justice
system.100

For most students, the purpose of taking a clinical course is dif-
ferent than the purpose of taking a traditional lecture, socratic dialogue,
or seminar course. Some see the clinic as an opportunity to get a job
after graduation. They concentrate their time and effort on the clinic,
sometimes to the detriment of other courses. They hope to impress at-
torneys and judges with their skill and then convert student practice

97 See; Bellow & Johnson, Reflections on the University of Southern California Clinical Semes-
ter, 44 S. CAL. L. REV. 664, 674-76 (1971); Belsky, supra note 69, at 424-26; Gee & Jackson, supra
note 28, at 888; Milstein, supra note 69, at 238, 239-42, 244-50.
98 This, of course, is not a criticism. Bringing the "law to life" through real experiences and
problems is one of the benefits of any clinical program. See Bird, Prefatory Remarks, in Sympo-
sium: Clinical Legal Education and the Legal Profession, 29 CLEV. ST. L. REV. 356, 359-60 (1980);
Gee & Jackson, supra note 28, at 885; Kelso & Kelso, supra note 87, at 1028.
99 See Bellow & Johnson, supra note 97, at 687-88 (discussing clinical students' "unreflective"
attitude towards the legal process in which they were engaged). Some believe that such discuss-
ions or lectures on the criminal law are "inconsistent with the clinical premise." Subin, supra
note 69, at 254, 262.
100 For an example of how this can be done, see Milstein, supra note 69, at 245-46.
into a career opportunity.\textsuperscript{101} Others view the clinical experience as a testing ground for them to determine whether they are "cut out" for litigation.\textsuperscript{102} Finally, the courtroom practice is often a way for some students to bring the law to life or, more accurately, to interrupt the monotony of traditional third year lectures and seminars.\textsuperscript{103}

The unique aspect of a criminal prosecution clinic is its dependence on a public governmental office that is responsible for the disposition of a regular set of cases. This connection provides both constraints and opportunities. Some prosecutors, for example, are reluctant to allow students to handle cases, and instead assign them to trial preparation, motions memoranda, or brief writing. They fear that in-court appearances by "untrained" law students could be viewed by judges or the public as inconsistent with their obligation to "represent the people zealously." Such prosecutors also are concerned that mistakes made by the "state's attorney" are more visible than those made by a defense counsel, and that errors made by students would lead to negative publicity.\textsuperscript{104}

On the other hand, these fears of judicial and public criticism can

\textsuperscript{101} See NDAA Standards, supra note 48, at 400; Gee & Jackson, supra note 28, at 889. At the present time I am teaching a seminar unrelated to the prosecution function. One student submitted a draft of his seminar paper which I considered inadequate. Impressed by his knowledge as demonstrated by his class participation, I asked him to come in and talk about it. He did and he admitted that he had not spent as much time as he would have preferred on the paper. His explanation demonstrates the practical reasons why some students enroll in a clinic. He was in a criminal defense clinic, he explained, and devoting almost all of his time to it. He had only slightly above-average grades and hoped to impress his colleagues of his litigation abilities so that he could get a job at the local public defender's office. He felt he had to balance the strong possibility of getting a job in a very tight local market against a slight reduction in his overall cumulative average. To resolve this problem, some teachers suggest clinics be full-time, semester-long courses. See Gorman, supra note 93, at 549.

\textsuperscript{102} The technique of litigation "is hardly inborn. It must be studied and those who lack it can acquire it." Younger, supra note 28, at 412. Yet, to some, litigation is all work and to others it is "working at play." See Burke, "Work" and "Play," 82 ETHICS 33, 37-47 (1971) (excerpted in G. Bellow and B. Moulton, THE LAWYERING PROCESS 1109-11 (1978)).

\textsuperscript{103} See Gee & Jackson, supra note 28, at 885. See also 1982 Gee & Jackson, supra note 90, at 473; Gorman, supra note 93, at 556, n.18. (remarks of Professor William Klein of the Wisconsin Law Faculty).

Justice Frankfurter wrote a note to an off-campus classmate about a discussion he had with fellow students about the third year of law school. He said they were "sick of reading cases" and with limited exceptions "The third year [was] fundamentally the same old stuff and therefore largely a bore." Dunne, The Third Year Blues: Professor Frankfurter After Fifty Years, 94 HARV. L. REV. 1237, 1240 (1981) (quoting F. Frankfurter, Some Observations on Third Year Work).

\textsuperscript{104} See generally NDAA Standards, supra note 48, at 400 (describing a NDAA survey of prosecutors' offices).

An example of this problem occurred with the Georgetown clinical program in the late 1970's. The United States Attorney for the District of Columbia established policies prohibiting students from handling any trials or motions. They were permitted only to take citizen complaints, prepare papers and prepare others for trial. Student interest in the program declined and the program was discontinued. G. Nelson, supra note 92, at 26-28.
lead to a close tie between the clinic and the prosecutor’s office, and to
direct supervision and instruction by the state’s attorney himself or his
senior assistants. With the support of the district attorney, and his dele-
gation of discretion to the supervisor of the clinic, the supervisor can
highlight the unique problems of the prosecutor and can select the
clinical experience he believes would be most educational.105

The role of the defense attorney differs from the role of the pro-
secutor, and skillful use of the clinic can teach that lesson. In a crimina-
defense clinic, the student public defender, like all defense counsel, has
minimal responsibility for scheduling or prompt disposition of cases.
In fact, he usually benefits from trial delays or inefficiencies that can
cause the loss of evidence or lead to a speedy trial defense. On the other
hand, the student or professional public defender has an identifiable
client and has to concentrate a large part of his time in securing the
client’s confidence. At trial, his handling of the case must be based on
the desires of the accused, who can limit the strategic options otherwise
available to counsel.106

The supervisor of a prosecution clinic has more options than the
supervisor of a defense clinic, and can use those alternatives to display
the prosecution function. A prosecution clinic can be organized like a
defense clinic in order to select several cases for each student. In such a
situation, however, the student prosecutor has more control of his case
than the student defense counsel. He can plan his strategy freely, lim-
ited only by the guidance of the supervisor, and yet have more respon-
sibility for case disposition. Trial continuances, or mishandling of
witnesses or evidence, easily can lead to eventual trial losses.107

Some schools have established prosecution clinics that handle all
cases of a particular type in a particular area, such as drunk driving
violations or shoplifting. With responsibilities for handling such cases,
the students in a clinic could get collective experience in office manage-
ment, bail, scheduling, plea bargaining and sentencing policies, and
even probation or parole revocation procedures. Teaching of the
broader prosecution function would be integrated into the day-to-day
handling of cases by the students.108

Finally, the prosecution clinic could be structured to give each stu-

105 The Temple seminar clinic was directed by the District Attorney and his selected assistant.
Therefore, I could direct trial assistants to work with students, invite the assistants to class discus-
sions, and integrate the clinic into the “ordinary” routine of the office. See Belsky, supra note 69,
at 424-25; supra notes 2, 9, 11 & 13. Compare Milstein, supra note 69, at 252.
106 See generally Subin, supra note 69, at 263-64 (describing student defense attorney’s
fieldwork).
107 See Milstein, supra note 69, at 239-40.
108 This is the structure of the University of Florida Law School Clinic. Interview with Profes-
sor James R. Pierce, Gainesville, Florida, (June 24, 1983). Professor Pierce is the supervisor of the
Criminal Prosecution Clinic at the University of Florida College of Law. He is also an Assistant
State Attorney in the districts in which the clinic operates.
dent a group of cases scheduled for a courtroom on a particular day each week. The student thus could experience the frustration of many urban assistant district attorneys in such “list rooms” in handling the prosecution trial problems of paper shuffling, inefficient courtroom management, witness and victim irritation, and case disposal instead of disposition.109

The need for strong support by the chief prosecutor has led to another difference between prosecution and other clinics. Most law schools delegate or “farm out” supervision of the clinics to the district attorney’s offices and give the district attorney or a trusted senior assistant direct responsibility for the program.110 Even in those clinics where supervision is credited to law school personnel, many of these personnel are prosecutors appointed as lecturers or adjunct faculty.111 When the supervisor is in fact a full-time faculty member, he is usually an individual who has gained the confidence of the chief prosecutor and he usually is given an appointment as a prosecutor in that office.112 When no prosecutor is given direct responsibility, the matters that the clinic students are allowed to handle usually are limited to appeals or petitions. Few clinic courses that allow students to perform trial work do not directly involve a prosecutor as supervisor.113

While the “farming out” clinic has been criticized by some academic writers,114 it can provide unique benefits in the context of prosecution clinics. Responsibility is usually given to a trusted senior assistant. She has the authority to require other trial attorneys to supervise the students’ work and to evaluate their performance.115 She can use the students to improve the quality of her staff attorneys by forcing them to think about their actions so that they can explain them to the interns. The trial assistants know that they are being watched as role models and seek to live up to that role.116

109 See Belsky, supra note 69, at 424.
110 See Bellow & Johnson, supra note 97, at 675. A 1979 survey indicates that of the 82 prosecution clinics listed, 66 are considered to be “farming out” types with direct prosecutorial supervision. CLEPR REPORT, supra note 89, at 1-20.
111 CLEPR REPORT, supra note 89, at 1-20; Bellow & Johnson, supra note 97, at 675. See Belsky, supra note 69, at 424, n.7.
112 See supra note 108.
113 CLEPR REPORT, supra note 89, at 1-20, 122-203. Where the supervising attorney is outside of the prosecutor’s office, such a person is often cast into the role of “observer and critiquer.” He or she “could not make meaningful input in the preparation of cases, nor could he participate in decision-making or the exercise of discretion.” Milstein, supra note 69, at 252.
114 See, e.g., Gorman, supra note 93, at 564.
115 See supra note 103.
116 The State’s Attorney for Anne Arundel County told an interviewer that the use of interns helps him to improve the quality of his staff.

He feels that every time one of his assistants stops to explain something to a student, [the assistant] forces himself to think and understand that aspect of his job more thoroughly. He also feels as though they perform better themselves because they know they are being
A senior attorney can bring war stories as well as more philosophical approaches into classroom discussions. This procedure allows students to analyze the prosecution function from the prosecutor's perspective. In fact, the prosecutor often uses the clinic as a method of selecting promising recruits. The course therefore can be used as a "specialization program" to train future lawyers to be prosecutors.

This analysis of the clinical approach to teaching the prosecution function illustrates that there is a great potential for using the course to explore the broader policies surrounding that function. The internal bureaucracy of the prosecutor's office and the external bureaucracy of the criminal justice system affect much of what the prosecutor does. Her ethical responsibility as a quasi-judicial officer should influence her case management and trial strategy. Her ability to fight individual battles in the "war on crime" is directly related to the pre-trial and post-trial processes and the social and legal policy constraints inherent in the administration of criminal justice. Litigation skills can be taught, but a prosecution clinic should integrate the use of those skills into the broader environment in which they are applied. A text that covers all of the prosecutorial roles and problems could help the clinic supervisor to explore this environment and thus increase the value of the clinical work to the students. Such a background text also could assist those who teach and study the prosecutorial function in the more traditional classroom context.

The Seminar Approach

A prosecution function course is occasionally offered in the more traditional classroom seminar format. Unlike a clinic, such courses do not attempt to teach litigation skills. Rather, they focus on the nature and scope of the prosecutor's role in the criminal justice system. The classes typically involve discussions led by an instructor who is watched as role models and by virtue of their personal pride try to perform that much more professionally.

G. Nelson, supra note 92, at 24.

117 In Philadelphia, discussions would often focus on a recently publicized event and the prosecutor's reaction. In addition, students would bring their experiences as student prosecutors and use them as a base to discuss "the complexities and problems of the District Attorney's Office and the criminal justice system . . . . often critically." Belisky, supra note 69, at 425. Compare id. with Subin, supra note 69, at 264-67.

118 See NDAA STANDARDS, supra note 48, at 399-400. The Temple clinic led to the hiring of 11 students as Assistant District Attorneys in the years 1972-1974. The National District Attorneys Association sees this as an explicit goal: "[A] properly conducted student intern program should . . . . provide not only a stimulus for recruitment but also permit a method of evaluating aspiring applicants." Id. at 400.

119 The courses are not common. See KURTZ, AN INVENTORY OF THE CRIMINAL JUSTICE CURRICULUM OF AMERICAN LAW SCHOOLS, 31 J. LEGAL EDUC. 164, 178, 180 (1981) (in a study made of 167 schools, only seven schools had courses that could be broadly placed in this category).
either a present or past prosecutor. She often invites guest lecturers

120 The syllabus for the Georgetown seminar on The Prosecution Function was modified periodically to adjust to guest lecturers. One year's syllabus was as follows:

PART ONE—OVERVIEW—THE PROSECUTION FUNCTION
A. Role
   1. Relationship to System—Case Management
   2. Types of Prosecutors
      a. Urban, rural and suburban
      b. Federal, state and local
      c. Criminal vs. non-criminal
B. Organization and Administration
   1. Selection
   2. Staffing
C. Training and Evaluation
D. Ethics and Discovery

PART TWO—DISCRETION
A. Discretion Generally
B. Charging and Selective Prosecution
C. Screening and Diversion
D. Bail
E. Pleas and Plea Bargaining
F. Sentencing
G. Post-Sentencing (Appeals; Collateral Release; Parole; Probation Revocation; Pardons; Prison Reform,
H. Special Problems of Discretion
   1. Juvenile Justice
   2. Mental Health Commitments
   3. Citizen Complaints
   4. Mass Disorders
   5. Family Violence
   6. Trial Options (Preliminary Hearing vs. Indictment; Jury vs. Judge; Stipulation vs. Live witnesses)

PART THREE—SPECIAL ASPECTS OF THE PROSECUTOR'S FUNCTION
A. The Prosecutor as Investigator
   1. Police Liaison and Advice
   2. The Grand Jury
   3. Special Responsibilities
      a. Corruption
      b. Organized Crime
      c. Police Investigations
      d. Environmental Law
      e. Economic Crimes and Fraud
      f. Other
B. The Prosecutor and Law Reform
   1. Legislation and Test Cases
   2. Selection of Other Members of the Criminal Justice System
   3. Community Relations
C. Special Rules for the Prosecutor
   1. Immunity
   2. Conflicts of Interest and Ethical Rules
   3. Politics
   4. Special Prosecutor and Other Remedies
to discuss various aspects of the prosecutor’s role. Unlike a clinic, a seminar format does not involve clients or cases. Rather, students are asked to perform familiar tasks of oral and written analysis. Specifically, they are usually required to prepare papers and present them to the class; substantial time is spent on these presentations and the resulting class discussions.

Like the clinic, the instructor and guest lecturers often use “war stories” to highlight issues, problems, and possible solutions. A clinical course can have a classroom component that discusses some criminal justice issues in the context of the students’ trial responsibilities. A seminar with a schedule of lectures or discussions and student papers and presentations, however, allows the added dimension of research and analysis of particular aspects of the prosecution function.

As with a clinic, many students take such a course because of their desire to be criminal attorneys, but students in a seminar as often desire to be on the defense side as on the prosecution side. In a clinic, students primarily are interested in acquiring and applying litigation skills. In a seminar, more students are interested in studying the mix of legal-social questions involved in the prosecution function, and the propriety of a particular role, policy, law, or rule.

121 In the Georgetown course, I brought in guest lecturers to give different perspectives. These included a legislative aide responsible for legislation and oversight of the D.C. Criminal Justice System, a rural prosecutor, a court administrator, a reporter, an assistant United States attorney (who handled grand jury investigations), and an enforcement attorney for the Securities and Exchange Commission.

122 The catalog for Georgetown described the seminar as follows:

The Prosecution Function in Theory and Practice: Seminar

Brings to the law student an understanding of the prosecution side of the criminal justice system. An effort is made to discuss the dual and sometimes conflicting role of the prosecutor as chief law enforcement officer and chief dispenser of justice. Topics such as prosecutorial discretion, the function of the grand jury, plea bargaining and the practical aspects of discovery (including Brady problems) are discussed. The course provides a theoretical basis for each topic through scholarly readings and court opinions augmented with hypothetical problems from practical experience. Guest lecturers [sic] who are present and former prosecutors participate. A final paper, treating in-depth an approved topic, is required.

123 The Georgetown course outline described the course as follows:

The course will be divided into two parts. [For the first seven classes, the seminar will be conducted in a lecture-discussion format with assignments in reading as explained in the syllabus. . . . During the semester, there will be special seminar participants to assist us in our discussions.

124 For the last eight classes] students will present papers which will then be discussed by other class members and myself. Oral presentations are to be for no more than one-half hour (which allows % hour to % hour for discussion).

125 At Georgetown, guest lecturers would often use the seminar as a “non-public” forum to discuss a topical issue in their office. Many of these discussions formed the basis for student papers, which, of course, were then given to the guest for future use.

125 See, e.g., Milstein, supra note 69, at 245-46.

126 Over the years, student papers have covered almost all possible subjects. Some looked at a prosecutor’s problems in handling certain types of cases, like rape, drugs, and spouse and child abuse. Others discussed issues of discretion, selective prosecution, screening, and diversion.
A seminar in the prosecution function is not a "simulated" clinic course. Students do not perform lawyer roles in mock hearings or trials. Instead, the course attempts to provide a multi-disciplinary review of the world of the prosecutor. A seminar therefore involves discussions of the interplay of the disciplines of law, sociology, psychology, and public administration.

Most clinics have classroom components, and classroom discussion can touch on some of the broader issues or policies. Few, however, have a seminar format or have been expanded either in duration or subject matter to allow in-depth review. A few schools offer both clinics and traditional seminars in the prosecution function. Nevertheless, seldom is either course a prior or contemporaneous requirement for the other.

The gap between the clinical and traditional methods of teaching the prosecution function is more apparent than real. Both must delve into the policy issues that surround a prosecutor's office and affect a prosecutor's day-to-day responsibilities. The difference in treatment is often only a matter of the availability of time and materials to explore these issues.

Others looked at the prosecutor's role at different stages such as bail, pleas, sentencing, pardons, and incarceration. Others looked at particular system issues such as prosecution management and training, immunity, police-prosecutor relations, and minority and women hiring. Comparative papers looked at the suburban prosecutor, the big city prosecutor, the military prosecutor, the special prosecutor, and the French and British prosecutors. The roles of the prosecutor as law reformer, investigator, and political leader were also studied. Finally, many papers looked at the nontraditional prosecutor who enforced energy, securities, environmental, and fishing regulations and statutes.

127 The head of the now defunct Council on Legal Education for Professional Responsibility, Inc. (CLEPR) defines a clinic as: "Lawyer-client work by law students under law school supervision for credit toward the law degree." Pincus, Clinical Training in the Law School: A Challenge and a Primer for the Bar and Bar Admission Authorities, 50 St. John's L. Rev. 479 (1976). The Special Committee on Guidelines for Clinical Legal Education defines a "simulation course" as one "in which each law student acts as a lawyer and performs lawyers' roles" through simulations. AALS-ABA REPORT, supra note 69, at 12. See id. at 60 (simulation as stepping stone to full clinical experience).

128 See Belsky, supra note 69; Milstein, supra note 69, at 245-46.

129 At Georgetown, for example, the prosecution clinic is totally separate from The Prosecution Function seminar. In fact, a study survey of the participants in the seminar from 1975 to 1980 indicated that about one third also took the clinic, but few in the same semester as the seminar.

130 Studies of courses classified as clinical show they run the continuum from purely practical, hands-on placement to law school supervised training, placement, and discussions. The philosophy of clinical legal education seems to be moving toward the idea of a broader clinic experience, which includes analysis of trial experiences, review of system problems, and discussions of ethical and legal issues. See, Gee & Jackson, supra note 28, at 883-87; Guidelines for Clinical Legal Education, in AALS-ABA REPORT, supra note 69, at 14-16; see, e.g., Milstein, supra note 69, at 241-50; Subin, supra note 69, at 255-58, 263-67; Redlich, Perceptions of a Clinical Program, 44 S. Cal. L. Rev. 574, 584-87 (1971) (University of Wisconsin Law School). For an early supporter of this perspective, see Everett, The Duke Law School Legal Internship Project, 18 J. Legal Educ. 185 (1965).
“Bridging the Gap”

One way to assure that clinic students get a broader perspective on the prosecution function is to require students to couple the clinic with a traditional seminar. Discussions could range from trial tactics, to ethics, to the problems of the system. The courses could interrelate the roles of a prosecutor as investigator, litigator, manager, and policy-maker.¹³¹

To mandate such a curriculum tie, however, may not be practical, possible, or even wise. Many law schools would be reluctant to allow a student to satisfy so many of his credit hour requirements with one subject matter. Students interested only in “a clinical experience” similarly may not wish to devote so many hours to one subject. Students desiring to study the nature and scope of the prosecution function may have no interest in a clinic. A better approach to “bridging the gap” between the clinical and seminar approaches would be for schools to use a general text on the prosecution function.

While there are texts and casebooks on the criminal justice system and the clinical approach to instruction, there was, until the Nissman and Hagen text,¹³² no organized collection of materials that an instructor in either a seminar or a clinical prosecution course could distribute to students.¹³³ The teacher had to put together his or her own set of materials.¹³⁴ These could include reports,¹³⁵ journals and periodi-

¹³¹ See Belsky, supra note 69.

¹³² D. NISSMAN & E. HAGEN, THE PROSECUTION FUNCTION supra note 11 at xi is the first book that categorizes itself as a text for both students and new prosecutors.

¹³³ In 1971, the National District Attorneys Association published a “desk book” with impressionistic views of the prosecutor’s function and a summary of relevant cases. While this book, which has been periodically updated, is a useful addition to any prosecutor’s library, it is not the kind of policy and practical manual that is needed. See P. HEALY & J. MANAK, THE PROSECUTOR’S DESKBOOK (1971). There are some collections of articles prepared by social scientists that would be useful to prosecutors. See, e.g., THE PROSECUTOR, supra note 1.

¹³⁴ In the Temple course, no text was assembled. Excerpts from books, commission reports, and studies were prepared and distributed. In the Georgetown seminar, students were required to get: AMERICAN BAR ASSOCIATION, PROJECT ON STANDARDS RELATING TO THE PROSECUTION FUNCTION (Approved Draft, 1970); NDDA STANDARDS, supra note 48; MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1975). The ABA standards have been slightly revised and included in a comprehensive set of criminal standards. See ABA STANDARDS supra note 49. The assignments for the seminar were for readings from these three sets of rules and commentary. Optional reading was also included for each of the subjects covered each class. See also Gee & Jackson, supra note 28, at 855-56.

¹³⁵ See, e.g., REPORT OF THE PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) [hereinafter cited as CRIME IN A FREE SOCIETY]; COMMISSION REPORT, supra note 68; STANDARDS AND GOALS STRATEGY, supra note 66; STANDARDS and GOALS COURTS REPORT, supra note 48; see also R. NIMMER, PROSECUTOR DISCLOSURE AND JUDICIAL REFORM (1975).

In addition to these general reports which discuss the prosecutor’s role and function, specific reports could be supplied to the student. For example, in Philadelphia, copies of the annual reports of the District Attorney’s Office would be given to students. These reports described the
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cals,\textsuperscript{136} popular magazine and newspaper articles,\textsuperscript{137} and even fiction and nonfiction.\textsuperscript{138} In a clinical course, instructors either would add or substitute materials on trial practice,\textsuperscript{139} leading cases, rules, or office practices.\textsuperscript{140} In a seminar, instructors also would rely on guest lectures and student paper presentations. In both clinics and seminars, of course, "war stories" from the instructors, guests, or students often would promote further discussion.

structure, finances, and successes of the office in the previous year. At both Temple and Georgetown, excepts from special studies or books would be collected and distributed. These included excerpts from a study of police corruption in Philadelphia and the involvement of the prosecutor's office in police investigations; excerpts from Philadelphia Judge Lisa Richette's book, L. RICHTER, THE THROWNWAY CHILDREN (1969), describing the juvenile justice system; excerpts from the 1974 Senate Watervate Report and Special Prosecutor Leon Jaworski's book, L. JAWORSKI, THE RIGHT AND THE POWER (1976), describing the role of federal prosecutors in the investigation and prosecution of the infamous burglary, and excerpts from T. ARMSTRONG, ACT OF VENGEANCE (1975), describing the prosecution of the Yablonski murderers.

A useful excerpt to describe the broad nature of the prosecution function, see infra notes 215-28, is Robert Kennedy's description of the establishment of a lawyer/investigator team for the Senate Select Committee on Improper Activities in the Labor or Management Field in his book, R. KENNEDY, THE ENEMY WITHIN 165-89 (1960).

\textsuperscript{136} In addition to regular legal periodicals on criminal law, such as the Criminal Law Bulletin, the American Criminal Law Review and the Criminal Law Reporter, the National District Attorney's Office publishes a monthly periodical called The Prosecutor.

 Articles could also be obtained from traditional law reviews. See, e.g., Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. CHI. L. REV. 50 (1968); Beatty, The Ability to Suppress Exculpatory Evidence: Let's Cut Off the Prosecutor's Hands, 17 IDAHO L. REV. 236 (1981); Vorelberg, supra note 9.


One of the better papers for the Georgetown seminar relied almost exclusively on newspaper clippings of the investigation of a Virginia prosecutor for improper use of his discretionary power in allowing charity bingo games. See A. Walker, Bingo, Brines and Billy (Dec. 21, 1978) (unpublished manuscript available from this reviewer).

\textsuperscript{138} See M. BELL, THE LAW REVOLUTION 220-28 (1968); M. MAYER, supra note 61, at 149-221. See also, C. ASHMAN, THE FINEST MACHINES MONEY CAN BUY (1975); L. FORER, supra note 65; H. MESSICK, THE POLITICS OF PROSECUTION (1978); J. MOLDOVKSY & R. DEWOLF, THE BEST DEFENSE (1975). R. TRAVER, ANATOMY OF A MURDERER (1958); These books provide students with distinct points of view (and biases) that must be recognized and should be examined. Compare M. TIMOTHY, JURY WOMAN (1973) (the story of the Angela Davis trial by the foreperson of the jury) with Belsky, Book Review, 13 Prosecutor 179 (1977) (reviewing M. TIMOTHY, JURY WOMAN (1975)).

\textsuperscript{139} See, e.g., T. MAULT & W. WOLFS, MATERIALS IN TRIAL ADVOCACY (1981); J. NOLAN, CASES AND MATERIALS ON TRIAL PRACTICE (1981); R. PARNELL & G. SHOLLHAS, CASES, EXERCISES AND PROBLEMS FOR TRIAL ADVOCACY (1982).


\textsuperscript{140} See Belsky, supra note 69, at 424, n.9; Milstein, supra note 69, at 249.
One text, properly constructed, could satisfy the needs of both seminar and clinic students and instructors. Background material on the policy issues that face a prosecutor and his office and on the broad scope of prosecutorial involvement in the justice system would allow clinic students to put their day-to-day experiences into context. A book including such material also could serve the needs of seminar students who wish to discuss and write papers on broader policy issues.

To satisfy both of these potential sets of readers, and others seeking a more general sourcebook, different types of materials could be combined in the same text. The book would contain tips on trial tactics and case preparation and give a limited overview of the relevant procedural and substantive law. The text also would include more detailed discussions about the prosecution function. For example, chapters could analyze the propriety of plea bargaining, the exercise of judicial and prosecutorial discretion, the involvement of the prosecutor in bail setting, sentencing, probation, parole, and prison reform. Other sections could discuss the different problems faced by different types of prosecutors—federal and state, urban and rural, investigatory and trial. The sourcebook might include a review of the relationship of prosecutors to other participants in the system—the victim, the defendant, the judge, the court administrator, the police, the parole or pardons board, the local government. The text could include discussions of the special ethical responsibility of the prosecutor, the political constraints, and the conflicts between state and local or federal and state prosecutor offices. It might offer a broad examination of the prosecutor's function—his or her role in investigations, law reform, police practices, and civil law enforcement. Finally, it could review the problems of a prosecutor's office—selection, training, community information, management.¹⁴¹

Instructors could pick and choose from the materials. Readings for the clinic would include more of the "practical" and less of the policy-oriented sections. Readings for the seminar would be balanced in the opposite direction. Still, students in both types of courses would have access to both types of information in the same text.

Use of the Nissman and Hagen Text

David Nissman and Ed Hagen's "The Prosecution Function" is the first textbook explicitly intended for use in teaching students and young prosecutors about the prosecutorial role. As noted earlier, the authors narrowed the scope of their book to the in-court advocacy role. Still, an instructor could supplement the text with other material and use it both as a base for a more comprehensive course book and as a stepping stone for policy discussions.

Messrs. Nissman and Hagen include extremely useful material on

¹⁴¹ See infra notes 147-229 and accompanying text.
how to handle motions, how to "prep" for trial, how to select a jury, and how to present a case. A broader text also should include such materials. Moreover, the authors include some background material that could be used to focus attention on the more theoretical issues.

Chapter one provides a good introductory overview of the function and historical development of the prosecutor's office. Chapter three on charging, chapter four on plea bargaining, and chapter five on extradition raise the policy issues related to these functions.

The deficiencies of the text discussed above, however, highlight the value of a more comprehensive sourcebook. The next part of this Article describes how to construct such a book. The sourcebook not only would satisfy the needs of instructors and students, but also could assist in the training of new prosecutors, and increase the recognition by the legal profession and the public of the prosecutor's perspective.

A Prosecution Function Sourcebook

Despite repeated calls for better prosecutor training, there is no background text for young prosecutors. Training usually consists of a short orientation, peer discussions, case reviews, and occasional out-of-office seminars or specialized courses. Like law school clinic programs, most classwork and discussion are directed toward litigation skills and techniques. The programs sometimes provide in-depth education on particular subjects, but these subjects tend to concern particular types of crimes, or particular stages of the adversary process.

Formal materials often are prepared and handed out to the new recruits, but these materials usually consist of only a copy of the applicable criminal code, squibs of leading cases, an overview of the local trial system, and a description of the office hierarchy. More and more prosecutor's offices supply new recruits with a manual of office policies. Such manuals, however, usually focus on general criteria related to charging, case scheduling, public and press relations, and con-
licts of interest. Seldom do these manuals include any background material on the exercise of discretion, the application of ethical considerations, the varied roles of a prosecutor, or the relationship of the prosecutor to other members of the justice system.

The instructional program generally follows the immersion theory: put the new recruit into an actual prosecutorial role as quickly as possible. Larger metropolitan prosecutors' offices, for example, may have a hierarchical system of in-house training through immersion. A new lawyer starts out in an appeals or motions office to learn the law. Next, he moves into a screening or indictment division to learn about discretion. He then gains trial experience through preliminary hearings or traffic and misdemeanor trials. Finally, he moves up to a felony room and eventually is allowed to handle major cases, including even homicide cases. In smaller offices, however, such step-by-step involvement in the prosecutorial function is impractical. An attorney is assigned responsibility on an ad hoc basis—he is told to go where the newest crisis requires his presence.

Whether through a gradual progression or an instant baptism, the immersion technique of training is no longer sufficient. The prosecutor's office has been directly affected by the increasing complexity of the law and the justice system and the public's demand that the prosecutor be involved in more and more public issues. In addition to the traditional range of criminal cases, district attorneys also are becoming involved in welfare fraud, environmental law enforcement, and rehabilitation programs. Many prosecutors and chief assistants "may find [that their] knowledge of substantive or procedural criminal law [is] less important than . . . skills . . . in personnel management, business administration, budgeting and statistical systems." Training in litigation skills or substantive and procedural law is not sufficient. "[A] criminal trial is only one segment of the prosecutor's new duties."

The job of prosecutor is becoming a specialty, yet training is still in its embryonic stages. A sourcebook can capture the essence of this new specialty, and while it cannot guarantee creation of a "highly skilled prosecutor at once . . . it can significantly shorten the period necessary

150 Id.
151 See NDAA Standards, supra note 48, at 52-56; ABA Standards supra note 49, at 3.27.
152 See NDAA Standards, supra note 48, at 52; Friedman, supra note 65, at 115. The "trial and error approach" is not limited, of course, to the training of just prosecutors. See Wolfe, Exploring Trial Advocacy: Tradition, Education and Litigation, 16 Tulsa L.J. 209, 226 (1980).
153 There are some hopeful signs that prosecutorial training is becoming more formalized. For example, the National College of District Attorneys at the University of Houston Law School is attempting to provide a regular series of courses and seminars for prosecutors around the country. See, e.g., Agenda, National College of District Attorneys, 69 A.B.A. J. 976 (1983).
154 Id.
155 Id. at 53.
to reach a satisfactory level of skill and performance.”156

The sourcebook also can serve the legal profession generally. Bar
associations, criminal defense attorneys, judges, and academics contin-
ually analyze the criminal justice system and the prosecutor's role
within it. A reference sourcebook could select from existing materials
and add materials giving the unique perspective of a prosecutor and his
response to the legal and political rules and to the day-to-day problems
he must face. There is, of course, much material from which to draw.
Both the American Bar Association157 and the National District Attor-
eys Association158 have prepared prosecution standards. The Code of
Professional Responsibility has some special ethical considerations and
disciplinary rules directed to the prosecutor.159 Special criminal justice
commissions have prepared reports discussing the prosecutor's role in
the criminal justice system.160 Individual prosecutors or former prose-

156 Id.
157 AMERICAN BAR ASSOCIATION, PROJECT ON STANDARDS RELATING TO THE PROSECUTION
FUNCTION (Approved Draft), (revised and updated as ABA STANDARDS, ch. 3, supra note 49).

The other chapters of the ABA STANDARDS, supra note 49, also make constant reference to
the prosecutor's role. See, e.g., id. ch. 1 (Urban Police Function); id. ch. 8 (Fair Trial and Free
Press); id. ch. 10 (Pre-Trial Release); id. ch. 11 (Discovery and Procedure Before Trial); id. ch. 12
(Speedy Trial); id. ch. 14 (Plea of Guilty); id. ch. 18 (Sentencing Alternatives and Procedures); id.
ch. 22 (Post-Conviction Remedies). For a discussion of the effect of all these standards on the
prosecutor and defense counsel, see Burger, Counsel for the Prosecution and Defense—Their Roles
Under the Minimum Standards, 5 AM. CRIM. L. Q. 2 (1969); Erickson, The Criminal Justice Stan-
158 NDAA STANDARDS, supra note 48.
159 CPR, supra note 3, EC 7-13, DR 7-103. Like the ABA STANDARDS, supra note 49, the
Model Code has other more general provisions that also involve the prosecutor's special obliga-
tions and duties. See, e.g., CPR, supra note 3, EC 5-9, EC 5-10, DR 5-102 (lawyer as witness); id.
EC 7-22 to EC 7-38, DR 7-106 (trial conduct); id. EC 7-33, DR 7-107 (trial publicity); id. DR 8-
101 (actions as a public official). See also ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY

The American Bar Association has recently approved a new set of "ethical rules" prepared by
the American Bar Association Commission on Evaluation of Professional Standards (popularly
called the Kutak Commission). Like the CPR, the Model Rules apply to all lawyers, including
prosecutors and also include specific provisions applicable to the prosecutor. See, e.g., AMERICAN
BAR ASSOCIATION COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES
OF PROFESSIONAL CONDUCT 3.8—Special Responsibilities of a Prosecutor (Final Draft incorpo-
rating amendments as of August 10, 1982, reprinted as an appendix to the November, 1982 issue
of the American Bar Association Journal [hereinafter cited as KUTAK RULES].

Finally, in part to oppose some of the Kutak Rules, the American Trial Lawyers Association
has prepared its own set of rules. They place an even more stringent code of conduct on the
prosecutor. See ROSCOE POUND—AMERICAN TRIAL LAWYERS FOUNDATION, COMMISSION ON
PROFESSIONAL RESPONSIBILITY, THE AMERICAN LAWYER'S CODE OF CONDUCT Rules 9.1 to 9.9 &
comment (Revised Draft, May, 1982) [hereinafter cited as TRIAL LAWYER'S CODE].
160 See, e.g., CRIME IN A FREE SOCIETY, supra note 135, at 147-48; COMMISSION REPORT, supra
note 68, at 72-79; STANDARDS AND GOALS STRATEGY, supra note 66, at 139-61 STANDARDS AND
GOALS COURTS REPORT, supra note 48, at 227-46.

The page references given above refer specifically to discussions of the prosecutor. Throughout
these Commissions' Reports, the roles, obligations, and problems of the prosecutor are noted
cutors have written articles that express their points of view on the prosecutorial role and problems. 161

Finally, a prosecution function sourcebook would be of great interest to non-lawyers. The criminal justice system is the focus of much non-legal undergraduate and graduate study. 162 In addition, many specialized programs have been established today to train future and present police officials, court administrators, probation, parole, and prison professionals, and social workers. 163 A background sourcebook could highlight the prosecutor's perspective in the total context of the criminal justice system. 164 In addition, there are, obviously, many citizens who have taken an interest in the system. 165 An overview of the prosecutor's point of view could benefit not only those citizens but, through increased awareness, also the prosecutors who have to deal

as part of the discussion of other issues such as guilty pleas, sentencing, case management, juvenile justice, police operations and crime control generally.


Many criminal justice students and practitioners have long complained about the gap between the separate disciplines despite their complementary nature and the value of cross-fertilization. See F. Prassel, Criminal Law, Justice and Society xii (1979). One hopeful note is the growth of courses and departments on the Administration of Criminal Justice. See Felkenes, Accreditation: Is It Necessary? Yes!, 8 J. CRIM. JUST. 77, 79 (1980); D. Newman, supra, at 2. Another is that funding of research is focusing on multidisciplinary approaches. See, e.g., Lalley, The Research Program of the Center for Studies of Crime and Delinquency, National Institute of Mental Health, 2 L. & POL'y Q. 498 (1980); Levine, The Law and Social Science Program, National Science Foundation, 2 L. & POL'y Q. 501 (1980).


164 See Standards and Goals System Report, supra note 163, at 170-71; T. Adams, G. Buck & D. Hallstrom, supra note 163, at 165-66. A recent book summarized the problem as follows:

[In textbooks and readers], if there is any discussion of the prosecutor at all, it usually constitutes a small subdivision of the section of [sic] the courts . . . . [A]lmost all the published works have one thing in common: the prosecutor and his functions get far less attention than other components of the justice system.

The Prosecutor, supra note 1, at 9.

165 Whether citizens establish quasi-formal "crime-watch" programs, community crime prevention organizations, or citizen's crime commissions, or just take an interest in law and order, they often focus on the system and its problems. See Citizen's Crime Commission of Philadelphia, Report of Citizen Court Observers Dec. 1975-June 1976 (Sept. 1976); R. Clark, supra
The Scope of the Prosecution Function

The prosecutor's office is an integral component of the criminal justice system. From the time of investigation through arrest, trial, and sentencing, the prosecutor—whether veteran or novice—must be involved. The scope of that responsibility means that a prosecutor's role is complex. In fact, in larger urban or suburban jurisdictions, a prosecutor's office is often compartmentalized, and attorneys often become specialists in a particular function or offense.

Police rely on prosecutors to provide advice on recent rules and cases, and tips on how to secure evidence so as to assure admissibility. Increasingly, prosecutors use their own detectives to investigate offenses. In many jurisdictions, they use grand juries to probe organized crime or official corruption. In all jurisdictions, their deci-

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Note 6, at 101-16; Crime in a Free Society, supra note 6, at 288-91; Lavakas & Herz, Citizen Participation in Neighborhood Crime Prevention, 20 Criminology 479 (1982). Legislatures are, of course, interested in the workings and policies of a prosecutor's office. See General Accounting Office, Greater Oversight and Uniformity Needed in U.S. Attorneys' Prosecutive Policies (Oct. 27, 1982) [hereinafter cited as GAO Report].

166 The National District Attorneys Association states the problem as follows: It is probably true . . . that the public has only a dim awareness of the prosecutor's role in the criminal justice system . . . . Ironically, this situation prevails in spite of the prosecutors [sic] position as the "chief law enforcement official" in an era where every public opinion poll reveals crime as among the greatest concern of the average citizen.

167 See Alpert, supra note 49; Friedman, supra note 65; Merola, supra note 48; Silbert, supra note 12.

168 See Silbert, supra note 12; Merola, supra note 48. The National District Attorneys Association divides the functions into "administrative" (including personnel, training, intergovernmental); "procedural" (including investigative, screening, charging, trial and post-trial) and "other" (including relations with the courts, defense, the press, and the public). See generally NDAA Standards, supra note 48.


170 See Sigler, supra note 1, at 61-62.

ions on whom to prosecute and which crimes to charge affect police powers and actions.

The court relies on the prosecutor for information relative to trial procedures, mental health dispositions, bail, diversion, pleas, and sentencing.\textsuperscript{172} In some jurisdictions, for example, decisions on whether a case can be handled without convening a jury require the district attorney's consent.\textsuperscript{173} Similarly, a plea bargain requires the consent of the state.\textsuperscript{174} Diversion of an accused out of the system is usually also a prosecutorial choice.\textsuperscript{175} Courts usually solicit the prosecutor's recommendations on both bail\textsuperscript{176} and sentence.\textsuperscript{177}

The system relies on the prosecutor for resolving problems of case scheduling, witness handling, and even post-conviction disposition. Prosecutors set priorities in case selection and disposition,\textsuperscript{178} and in larger offices must establish case management systems to keep track of their caseload.\textsuperscript{179} In many jurisdictions, they meet regularly with court administrators to establish more efficient courtroom use and to suggest special procedures to dispose of older, more complex, or special cases.\textsuperscript{180} Complaints about the effects of trial delays and the confusion caused by case scheduling have forced many prosecutors to establish victim-witness assistance programs. Special liaisons, phone-notice systems, and assigned waiting rooms are examples of the innovations

\textsuperscript{172} See Commission Report, supra note 68, at 72; Standards and Goals Courts Report, supra note 48, at 227-28; Kamm, supra note 161.

\textsuperscript{173} This is the federal rule. Fed. R. Crim. P. 23(a).

\textsuperscript{174} See ABA Standards, supra note 49, at 14.63 to 14.73.

\textsuperscript{175} NDAA Standards, supra note 48, at 150-54.

\textsuperscript{176} Id. at 134-47.

\textsuperscript{177} Id. at 289-92. See infra note 204.


\textsuperscript{179} See Work, A Prosecutor's Guide to Automation, 7 PROSECUTOR 479 (1971); Work, Richman, & Williams, Toward a Fairer System of Justice: The Impact of Technology on Prosecutorial Discretion, 12 CRIM. L. BULL. 289 (1976). The District of Columbia was one of the first to establish a “Prosecutor’s Management Information System” (PROMIS). See Bodine, PROMIS of Aid for Hardened Prosecutors, NAT’L J., Dec. 4, 1978, at 8, col. 2; Hamilton, Highlights of PROMIS Research, in The Prosecutor, supra note 1, at 125.

\textsuperscript{180} In Philadelphia, for example, prosecutors drafted local rules to provide for longer courtroom hours, night court sessions, and limitations on caseloads of overburdened attorneys.
adopted in such programs.\footnote{See Commission Report, supra note 68, at 91; 1973 Standards and Goals Courts Report, supra note 48, at 206-12; NDAA Standards, supra note 48, at 441-44; see also Lobsenz, Prosecutorial Management of the Uncooperative Victim-Witness, 15 Crim. L. Bull. 301, 314-17 (1979).}

Prosecutorial responsibilities continue beyond the trial phases. Prosecutors often are called upon to help city and state officials reduce prison populations. This goal may be achieved by such special procedures as expedited disposition, prison courts, and lower sentence recommendations.\footnote{In Philadelphia, representatives of the District Attorney's Office met regularly with city and state officials to discuss prison overcrowding. Special procedures were established to lower backlog, reschedule cases, and in some cases, lower sentence recommendations to decrease prison populations. See Gerald Jackson v. Hendrick, No. 2437, Feb. term, 1971, 11 Crim. L. Rep. (BNA) 2088 (Phila. Ct. Com. Pl. 1972).} Sometimes, the district attorney is forced to take affirmative action—by lawsuit or political education—to improve prison conditions.\footnote{In Philadelphia, the District Attorney filed suit to "mandamus" better prison facilities. Commonwealth ex rel. Spector v. Shapp, CD 1972, No. 1251 (Pa. Comm. Ct. 1972). See NDAA Standards, supra note 48, at 387, 389-90.} Prosecutors also are involved in parole, probation, and pardon matters. In fact, they often represent the state in parole, probation revocation, pardons, and commutation proceedings.\footnote{See NDAA Standards, supra note 48, at 386-90. See also Silbern, supra note 12, at 1719.}

Finally, members of the public expect the prosecutor to provide competent representation of their interests. To respond, the prosecutor must establish procedures to train and evaluate his staff\footnote{See Commission Report, supra note 68, at 428-33; ABA Standards, supra note 49, at 3.9 to 3.10. See also CPR, supra note 3, EC 7-33, DR 7-107. This line between public information and fair trial protection is not always clear. See Hurson, supra note 65.} and to receive and act upon citizen complaints.\footnote{See also, ABA Standards, supra note 49, at 3.10 to 3.11; NDAA Standards, supra note 48, at 33.37. This is, of course, an ethical obligation for all lawyers. See CPR, supra note 3, EC 8-9.} The prosecutor is expected to express forcefully his opinion whenever a criminal, a crime, or the criminal justice system is involved,\footnote{See Commission Report, supra note 68, at 73; Samuels & Goodman, The Politics of Picking U.S. Attorneys, 8 Jures Dr. 17 (Oct./Nov. 1978).} and to propose legislative changes that would improve the system or promote law and order.\footnote{To exercise these responsibilities, the state district attorney or United States attorney must become involved in political issues.} These can range from local-state, state-state, or state-federal rela-

\footnote{See also, ABA Standards, supra note 49, at 3.47 to 3.48; NDAA Standards, supra note 48, at 437.}
tions,\textsuperscript{190} to selection of judges\textsuperscript{191} or of the prosecutor herself.\textsuperscript{192}

A prosecution function sourcebook can give an overview of all of these prosecutorial roles. Through short narration and a few illustrations, readily available from existing sources, the reader could be guided through the complexities and conflicts inherent in the job. With adequate references, the text could direct those interested in a particular issue to more detailed analyses.

**Ethical Responsibilities and Conflicts**

The prosecutor constantly faces a series of conflicting pressures. He is a quasi-judicial officer whose obligation is “to govern impartially.” As a special “servant of the law,” he should be equally interested in assuring that “improper methods” are not used, that the innocent are protected, and the rights of even the guilty are paramount.\textsuperscript{193} At the same time, to assure success and re-election or reappointment, the prosecutor must consider the success record of the office. He can become hardened by handling robbery after robbery, murder after murder, or fraud after fraud. He becomes angry by meeting with victims, police, and witnesses. He becomes frustrated by “technicalities,” defense tactics, and judicial incompetence or insensitivity. He therefore may not always be able to distinguish a “hard blow” from a “foul” one.\textsuperscript{194}

The scope of the prosecutors’ function has been the subject of extensive litigation and commentary.\textsuperscript{195} For example, there are at least four separate sets of proposed standards describing the ethical responsi-

\textsuperscript{190} See Commission Report, supra note 68, at 75-79; Standards and Goals Courts Report, supra note 48, at 237-38; ABA Standards, supra note 49, at 3.14 to 3.18; NDAA Standards, supra note 48, at 23-32. See also GAO Report, supra note 165, at 10-16.

\textsuperscript{191} Sometimes, politics and turf-fighting can lead to “a public perception of disarray.” See Tooley, District Attorney/Attorney General Relationships: A Case Study of a Turn-Around of Cooperation, 14 Prosecutor 416 (1979).

\textsuperscript{192} See, e.g., Commonwealth ex rel. Spector v. Moak, 452 Pa. 482, 307 A.2d 884 (1973). The Code of Professional Responsibility says that all lawyers “should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those [worthy].” CPR, supra note 3, at EC 8-6.


\textsuperscript{194} Berger v. United States, 295 U.S. 78, 88 (1934).

\textsuperscript{195} See Adlerstein, supra note 67, at 756:

Accordingly, comment on the ethics of the federal prosecutor has become common fare in federal judicial opinions. Almost no aspect of the job has escaped judicial attention: the interviewing of witnesses, conduct of proceedings before the grand jury, application for arrest and search warrants, statements made in court and during trial, statements made to the press, the giving of information to or the withholding of information from the defendant’s attorney,
ibilities of the prosecutor.\textsuperscript{196} Yet, the issues are not clear cut and there is a continuing debate on these obligations.\textsuperscript{197} The sourcebook should include material on the ethical mandates and conflicts in its discussion of many of the roles included within the broad scope of the prosecution function. For example, discussions on discretion could review the propriety of selective prosecution.\textsuperscript{198} Review of a district attorney's relations with other members of the justice system could touch on the conflicts inherent in police-prosecutor relations.\textsuperscript{199} The ethical considerations involved in jury selection,\textsuperscript{200} trial conduct,\textsuperscript{201} press relations,\textsuperscript{202} and sentencing\textsuperscript{203} could be noted.

Two particularly difficult ethical issues highlight why and how a text can integrate such ethical issues. A prosecutor has a clear ethical duty to turn over exculpatory evidence to the defense. The Code of Professional Responsibility states that the prosecutor has an ethical ob-

\textsuperscript{196} See Friedman, supra note 65;
\textsuperscript{197} and Williams, Ethical Obligations of a Prosecutor, 41 CRIM. JUST. Q. 1 (1976), and the citations therein.
\textsuperscript{198} They are the Model Code of Professional Responsibility [CPR], supra note 3; American Bar Association Standards for Criminal Justice, supra note 49; National District Attorneys Association, National Prosecution Standards [NDAA Standards], supra note 48; and the new proposed Model Rules of Professional Conduct [Kutak Rules], supra note 159. In addition, one might want to consider the American Trial Lawyers Association Code of Conduct, supra note 159.
\textsuperscript{199} A leading spokesman on behalf of those lawyers and academics who wish tighter rules of ethics for the prosecutor is Professor Monroe Freedman. See Freedman, Improved, but Unworthy of Adoption, 69 A.B.A. J. 866, 867 (1983).
\textsuperscript{200} See Givelber, supra note 8; Vorenberg, supra note 9.
\textsuperscript{201} The debate about the "inherent" conflict of interest involved in police-prosecutorial relations often focuses on the need for police evidence at trial and the claim that some prosecutors overbook police perjury. See M. Freedman, supra note 62, at 91-94.
\textsuperscript{202} See ABA Standards, supra note 49, at 3.76 to 3.78.
\textsuperscript{203} See CPR, supra note 3, DR 7-106; ABA Standards, supra note 49, at 3.80 to 3.92; NDAA Standards, supra note 48, at 247-50, 265-80.
\textsuperscript{204} See CPR, supra note 3, DR 7-107; ABA Standards, supra note 49, at 3.9 to 3.10.
\textsuperscript{205} There is considerable controversy within prosecutors' offices, the bar, and courts as to whether a prosecutor should have the right to recommend a sentence, even over the court's objections. The original tentative ABA Standards precluded such actions. They have now been revised. See ABA Standards, supra note 49, at 3.92 to 3.94. The National District Attorneys Association has always taken a firm position in support of such recommendations. See NDAA Standards, supra note 48, at 285-92. Not all judges agree. See, e.g., Commonwealth v. Brooks, 1 Phila. Civ. Rptr. 440, 475-84 (Phila. Ct. Com. Pl. 1978).
ligation “to make timely disclosure to the defense of the existence of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.” The proposed new Model Rules of Professional Conduct only mandates disclosure of evidence that “supports innocence or mitigates the offense.” The American Trial Lawyers Association proposes an ethical obligation to “make available to defense counsel, without request for it, any information that the prosecutor knows or is likely to be useful to the defense.” Court cases interpret these ethical obligations narrowly. A reversal for failure to supply exculpatory evidence depends on its materiality, the existence of a specific request by the defendant, and the showing of potential effect on the fact finder.

Analysis of this issue from the prosecutor’s perspective illustrates the conflicts he faces. Most prosecutors feel obliged to disclose information indicating factual innocence, and feel a duty to disclose beyond the minimums established by court cases or rules. Nevertheless, they are skeptical about open disclosure and fearful of possible destruction of evidence or harassment of witnesses. Their proposed solution is reciprocal discovery—an open book for both prosecution and defense.

Another ethical issue involves the prosecutor’s decision about whether to charge a defendant with a crime when he has minimal evidence, or harbors doubts about the guilt of the accused. The black-letter rule is straightforward “a public prosecutor . . . shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.” Yet this does not resolve the issue. Should a prosecutor charge when—although he has sufficient probable cause—he has reasonable doubts about guilt? Should he charge in a case when he believes the accused is guilty but he has doubts about the admissibility of evidence?

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204 CPR, supra note 3, DR 7-103(B).
205 KUTAK RULES, supra note 159, Rule 3.8(d).
206 TRIAL LAWYER’S CODE, supra note 159, Rule 9.7.
210 CPR, supra note 3, DR 7-103(A).
211 Compare ABA STANDARDS, supra note 49, at 3.54 (exercise of discretion where prosecutor has reasonable doubt of guilt) with NDAA STANDARDS, supra note 48, at 131 (reasonable doubt not included in criteria). See also M. FREEDMAN, supra note 62, at 84-86.
212 See ABA STANDARDS, supra note 49, at 3.81 to 3.83 (inadmissible evidence at trial); NDAA STANDARDS, supra note 48, at 130-32 (need for sufficient admissible evidence to substantiate a charging decision at trial).
Should a charge be used as a tactical weapon to secure a plea? Prosecutors and scholars are split on these issues, but they nevertheless are important illustrations of the conflicts inherent in the prosecution function.

The Nature of the Prosecution Function

For many years, young lawyers were encouraged to gain experience as prosecutors and then, after a few years, go into private practice. Prosecution was not a career; it was a stepping stone. Young attorneys were to use their time in a county or state attorney’s office to learn litigation skills, make contacts, and then move on.

In some jurisdictions, an “assistantship” in the prosecutor’s office was a political prize. The office was a station on the way to higher political appointments or was itself a final reward for years of “party service.” In other jurisdictions, the position was a part-time plums that helped pay the bills while a young lawyer built up his practice. Few attorneys viewed their work in a local district attorney’s office as more than a tour of duty, and fewer still viewed it as a career.

Today, however, a new career line is emerging. Today’s prosecutor often is a trained specialist who can move up in a stratified office or move laterally in a growing criminal justice and judicial administration hierarchy. In fact, he now can move just as easily into positions in the non-criminal justice system that are oriented toward prosecutorial skills.

The development of prosecution as a “specialty” is due, in large part, to the professionalization of the prosecutor’s office and the expansion of the definition of prosecution. Young attorneys are recruited from law schools, not from among party leaders. Hiring and promotion are based on ability. Part-time work is considered unacceptable. Commitments to longer and longer periods of minimum service are required. More and more offices provide specialized units and encourage

213 The Supreme Court seems to have indicated that such a policy is not unconstitutional. See Bordenkincher v. Hayes, 434 U.S. 357 (1978).
214 See COMMISSION REPORT, supra note 68, at 73; Felkenes, The Prosecutor: A Look at Reality, 7 Sw. U. L. Rev. 98, 106 (1975); R. Clark, supra note 6, at 190.
216 Of course, such part-time work can easily lead to conflicts with potential private clients or just competing private and public workloads. See ABA STANDARDS, supra note 49, at 3.20; COMMISSION REPORT, supra note 68, at 73.
217 See Fishman, supra note 215, at 253.
218 Id.; See Kamm, supra note 161, at 299.
219 See STANDARDS AND GOALS COURTS REPORT, supra note 48, at 228. This professionalization includes better salaries, better facilities, and better assistance. See Y. Kamisar, W. L. Faye, & J. Israel, Modern Criminal Procedure 1-2 (3d ed. 1969); see also STANDARDS AND GOALS COURTS REPORT, supra note 48, at 232-36; ABA STANDARDS, supra note 49, at 3.18 to 3.24.
attorneys to aspire to the higher prestige departments. Finally, more
and more prosecutors retain staffs hired by their predecessors.220

Lateral movement of those trained in the prosecution function is
increasing. Of course, the prosecutor can handle criminal cases in
state, local, or federal attorney’s offices, and can move back and forth
among these offices.221 The more experienced she is and the more
specialized she has become, the better her opportunities. For example,
atorneys working in economic crime units of local offices often move up
to “white collar” crime units in federal prosecution agencies. Prosecu-
tors who have shown management skills in one office often are “stolen
away” by another office. Finally, skilled litigators are recruited ac-
tively by offices hoping to improve their “success rate.”

The opportunities are not limited, however, to traditional prosecutors’
offices. Federal, state, or local government departments recruit
attorneys to help them investigate and enforce their regulations in
administrative hearings or even trials. Environmental, safety, and cor-
porate securities agencies are a few examples.222 Similarly, bar discipli-

nary committees are adopting procedures and tactics that are quasi-
criminal in nature.223 These committees need lawyers trained in the
prosecution function to investigate and prosecute other attorneys ac-
cused of improprieties.224

Lawyers trained in the prosecutorial roles also are needed to serve
as counsel to legislative investigatory committees. The ability to investi-
gate, to examine and cross-examine witnesses, and generally to assem-
ble a case leads such committees to seek out prosecutors as staff.
Obvious examples include the Senate Watergate Committee, the House
Assassinations Committee, and numerous special investigatory com-

220ABA STANDARDS, supra note 49, at 3.18 to 3.22; STANDARDS AND GOALS COURTS REPORT,
supra note 48, at 232-33; NDAA STANDARDS, supra note 48, at 39.
221There are over 2,500 prosecuting attorneys in the 50 states. In addition, there are 94 United
States Attorneys whose offices range from a single assistant to over 150. Special prosecutors, strike
forces, some assistant attorneys general, and city attorneys can be included in the category of
“traditional” prosecutors who handle only criminal cases. See Y. KAMISAR, W. LAFAYE & J.
ISRAEL, supra note 219, at I-2.
Comment, SEC V. Wheeling-Pittsburgh Steel Corporation: Bad Faith and The Abuse-of-Process
Defense to Administrative Subpoenas, 82 Colum. L. Rev. 811 (1982); Comment, Incentives vs.
(Department of Labor); Comment, Criminal Enforcement of Federal Water Pollution Laws in an
223The disciplinary process closely resembles the criminal justice system. Marks & Cathcart,
Discipline Within the Legal Profession: Is It Self-Regulation?, 1974 U. Ill. L. F. 193, 221. See,
e.g., Carter v. Folcarelli, 121 R.I. 1667, 402 A.2d 1175 (1979); Attorney Grievance Comm’n v.
For a discussion of the process, see Middlesex County Ethics Comm. v. Garden State Bar Ass’n,
counsel from D.C. bar leaves to join D.C. United States Attorney’s Office).
mittees set up to investigate organized crime and labor or governmental corruption.\textsuperscript{225}

Police departments\textsuperscript{226} and corporate security offices\textsuperscript{227} look to prosecutors' offices for personnel to act as in-house counsel. Such individuals bring investigatory talents, and a knowledge of the system and its personalities. They are trained to deal with discretionary decisions such as whom to charge and whether to proceed with a case.

Individuals can be trained in the prosecution function, and young lawyers should be informed of the career employment opportunities for those so trained. The skills learned in a prosecutor's office can be transferred to other jobs.\textsuperscript{228} The problems and ethical obligations—especially as they relate to the exercise of discretion—are similar.\textsuperscript{229} A prosecution sourcebook can describe the true nature of the prosecutorial function and analyze the commonalities of roles and conflicts.

\textbf{CONCLUSION}

A law school text can satisfy many needs. It is intended to be used as a teaching tool. To do this, it must be broad enough to allow the instructor to shape his course. It must also have a sufficient variety of materials and references to allow the student to see the context of the subject matter and, if she has the desire, to do further analysis and research. On certain subjects, a text can bridge the gap between different approaches to the problems.

A text also can be written for a wider audience. It can be used as a training guide for some attorneys entering a specialized field. It can be used as a reference for other attorneys desiring an overview and a place to start their search for analysis of a particular issue. With certain legal topics, it also can serve as an exposition of a particular perspective, and

\textsuperscript{225} See R. Kennedy, supra note 135, at 165-89. The prosecutorial function is also involved in being counsel to the numerous state and federal legislative committees that exercise their oversight responsibilities by investigating government agencies and departments.

\textsuperscript{226} For a discussion about the need for "in-house" police counsel, see Standards for Criminal Justice, The Urban Police Function 1-211 to 1-224 (1980); National Advisory Commission on Criminal Justice Standards and Goals, Report on Police 280-88 (1973); NDAA Standards, supra note 48, at 363-64.

\textsuperscript{227} For example, a number of casinos in Atlantic City have hired prosecutors from the Philadelphia District Attorney's Office to run their legal offices. The theory was that they knew the criminal justice system and could both advise executives on their activities and also help secure prosecution of offenders. Other examples of lawyers who would benefit by prosecutorial experience are engaged in such activities as cargo security for trucking companies, shippers and airlines, and private security or detective organizations.

\textsuperscript{228} See Columbia Comment, supra note 222, at 825 (use of discretion in investigations); Duke Comment, supra note 222, at 313; J. Crim. L. & Criminology Comment, supra note 222, at 654 (enforcement from EPA to Justice Department).

\textsuperscript{229} Compare CPR, supra note 3 at EC 7-13 with id., EC 7-14. See also K. Davis, Discretionary Justice--A Preliminary Inquiry (1969).
thus assist those who wish to study an area or merely learn of that perspective.

Occasionally, a text can be written to help define its subject matter and thereby improve general understanding—by lawyer and layperson alike—of new legal trends or a changing legal institution. The book thus can become the focus of discussion and attention on that subject. The text also might lead to increased research and analysis, and maybe redefinition.

We need a text on “being a prosecutor” that could satisfy these training, reference, and analytical goals. It is not surprising that *The Prosecution Function* by Nissman and Hagen is not such a book. The text reflects the perceptions of most lawyers, including prosecutors, and laypersons, about the prosecution function itself. It reflects the lack of awareness of the special obligations, perspectives, and concerns of the prosecutor. There is even less understanding of the true scope and nature of the prosecutorial role. This lack of knowledge is reflected in how we teach potential prosecutors.