

5 Judges, Lawyers, and Ethics

Legal Ethics: Historical Context

In the early days of colonization in the United States, lawyers working in the colonies were few in number, poorly trained, and not recognized as members of a profession. Although detailed histories of the early legal profession in the United States have yet to be written, researchers such as David Papke (1986) have identified some aspects of the early practice of law in Virginia and Massachusetts.

In Virginia, the planter class conceived the law as functioning to support the existing social structure. The landed gentry supplied judges and legislators. To the Virginia elite, an independent legal profession was problematic; in fact, in 1645, an early piece of legislation ordered all lawyers practicing for a fee to be expelled from office. The leaders in that state felt that lawyers encouraged legal suits and showed more interest in fees than in the good of the community. Well into the 18th century, Virginia sought to limit the practice of law to “gentlemen,” and the prescribed form of legal education was study at the English Inns of Court.

In the early days of the colony of Massachusetts, natural law applied in the form of scriptures as well as imported law ([Chapter 1](#) discusses natural law). This contributed to the idea that legal education was unnecessary, as well as to public skepticism about the usefulness of lawyers at all. By the end of the 17th century, however, the colony, in effect, had accepted the legitimacy of the legal profession, but the courts determined who might take the oath to become a lawyer, what lawyers could charge, and what forms of practice they could engage in. In one case in the late 17th century, the court ordered a lawyer to be whipped for charging excessive fees.

It was not until the mid-18th century in the colonies that the legal profession began to gain general acceptance, but its size remained small; even in cities, lawyers engaged in clerical work, copying, and bookkeeping services, as well as providing legal advice. With greater acceptance and security, lawyers began to develop a professional identity and to become a self-conscious professional group. This, in turn, led the profession to address matters such as professional conduct and ethics, and county bar associations that were generally voluntary in nature began to create ethical rules. The prominence of lawyers such as John Adams, Patrick Henry, and Thomas Jefferson during the Revolutionary War period confirmed the strong growth of the legal profession. In fact, of the 56 delegates who signed the Declaration of Independence, 25 were lawyers.

Between the American Revolution and the Civil War, the practice of law grew rapidly, consistent with the growth of cities and the economy (Papke 1986). During the early 19th century, the public appeared hostile toward lawyers, an attitude fueled partly by their role as postwar debt collectors. During this period, legislators and courts continued to decide issues of legal training and admission to the bar, entrance examinations were often perfunctory, and apprenticeship periods were very short. Legislated codes of professional conduct existed but were short and vague. The legal profession grew from 22,000 lawyers in 1850 to 60,000 in 1880 and to 114,000 by 1900.

The work lawyers performed in the period from 1865 to 1915 varied according to location, but criminal work remained a staple along with debt collection. In rural areas, lawyers began to speculate on land. In the cities, many sole practitioners worked for low rates, and legal specialization existed in the form of the early Wall Street corporate lawyers and criminal law specialists. In 1870, the Bar Association of New York City was founded, and in 1878, the American Bar Association (ABA) was established. With these institutions came comprehensive bar associations that attempted to control the practice of law. During the last decade of the 19th century, some 20 bar associations adopted codes of professional responsibility. In 1908, the ABA accepted a draft of Canons of Professional Ethics, inspired by *An Essay on Professional Ethics* written by George Shars Wood in 1854 (Papke 1986). Wood insisted that lawyers' primary responsibility was to their clients and argued that social utility was not a factor that should concern lawyers in any cause they argued. He advocated prudence, restraint, and a taste for fine literature as the best qualities for lawyers. His proposals concerning contingency fees provoked some argument; however, many lawyers agreed with him that such fees corrupted and degraded the profession. Nevertheless, with urbanization and industrialization, work- and transport-related accidents had made such fees common, and the Supreme Court ruled them valid in 1877.

By 1914, three quarters of all state bar associations had adopted the Canons, and in most states, complaints about lawyer misconduct were heard by bar association committees, followed by a possible appeal to the court. By this time, the profession was virtually self-directed in ethical matters. With the 20th century came bureaucratization, as private law firms, sometimes with hundreds of lawyers, spread throughout the cities, and nearly every corporation had in-house legal staff. In the public arena, the number of prosecutors and defense lawyers expanded, raising questions about the relevance of the Canons as well as issues relating to admission standards.

After World War II, law school enrollments grew rapidly, and in the 1960s, with the civil rights movement and professional self-criticism, some lawyers began to argue in favor of public interest law and against too great a concern with making money. In 1969, the

ABA replaced the Canons with a new Code of Professional Responsibility specifying ethical considerations for all lawyers. Since that time there has been a continuing debate about legal professional ethics, and the dialogue has centered on the ABA's Commission on Evaluation of Professional Standards, which was formed in 1977. In 1980, the commission provided the ABA with new draft Model Rules of Professional Conduct that were approved in a revised version in 1983. The Model Rules also proved controversial, and the American Trial Lawyers Association offered an alternative code.

The ABA has been active in reviewing law school courses on legal ethics and professional responsibility with the aim of strengthening ethical standards. Despite this, a high percentage of law students in an ABA survey of seven law schools indicated that they were "not very" or "not at all" concerned with the subject of professional responsibility or ethics (Papke 1986: 45).

The Nature of Professional Ethics

Professional ethics is an expression that has a multitude of possible meanings, and it is frequently used to signify rules governing professionals and professions. The standards of conduct for professions are organized around the way in which a profession carries out its work. The development of canons and codes of ethics within professions has given professional ethics the status of law within those professions. Setting ethical standards is one way in which professions seek to persuade the public to entrust their affairs and confidence to members of the profession. *Trust* is an aspect of professionalism, and the encouragement of trust has become a fundamental characteristic in professional relationships because clients depend on the superior knowledge of the professional. In the legal profession, trust is a core value because trust between a lawyer and client is crucial if the lawyer is to gain full knowledge of the client's concerns. From the client's viewpoint, trust is an expression of faith or confidence in an expectation of honesty, competence, and diligence on the part of the lawyer. Breaching a client's trust undermines faith in the legal profession.

Discussions about the role of the lawyer often stress the lawyer's commitment to the pursuit of justice as a central purpose. Lawyers tend to see their role in securing justice as an important contribution toward establishing an efficient legal system, as supporting law as an institution, and as promoting procedural justice. These objectives are derived from the *adversarial system* that equates justice with the protection of rights. In the adversarial system, the decision-maker or judge adopts a passive role, listening to the arguments from both sides and making a decision based on the evidence and arguments presented. This contrasts with the *inquisitorial system* in which the judge takes an active role and controls the progress of the case. The adversarial system gives lawyers a great

deal of control over the court process, and an underlying assumption of the system is that if lawyers do their job well, the court will reach a wise decision.

The Principle of Partisanship

The adversarial system reflects an individualistic ethic, and this emphasis on the individual in society means that in some cases lawyers will do things for clients about which they may have moral qualms, such as misleading others or engaging in bullying tactics. In other words, lawyers may exercise virtue in their relationships with clients but in pursuing their clients' interests may engage in practices that could be considered unfair, uncooperative, or selfish, acts that would not be considered virtuous. Once it is accepted that lawyers see justice in terms of defending the rights of individuals, the lawyer's role in society becomes one of giving citizens access to vigorous representation, and this commitment is embodied in codes of conduct and ethics. In terms of ethics, therefore, the Anglo-American criminal adversarial system has the effect of putting the interests of the client above all other considerations, including the general social good. The ethical standards of conduct promulgated in codes and canons reflect this emphasis.

The Principle of Neutrality

The principle of neutrality requires that lawyers adopt a neutral stance in relation to their clients or their causes and that they defend causes that they may personally find morally repugnant. The lawyer, therefore, must put aside questions of personal morality when deciding to represent a client and determining how best to represent that client. The exercise of this principle enables the lawyer to abdicate responsibility for assisting a client in achieving a purpose that the lawyer might otherwise consider morally questionable.

The principles of neutrality and partisanship are seen as supporting the notion of equality before the law, which is itself considered a social good. Arguably, the effect of these two principles is to narrow the number of moral choices that lawyers may face because lawyers will make moral choices based on the duty owed to their clients and on their need to maintain neutrality in relation to clients' causes.

Richard Wasserstrom (1986: 122) argues that the lawyer's concentration on the interests of the client above all other considerations, including moral considerations, is especially justified in the case of the criminal defense lawyer. Specifically, he argues that factors such as the potential deprivation of liberty, the vast prosecutorial resources of the state, and a concern about punishment and its nature and extent justify what might be

considered the “amoral” behavior of a defense lawyer.

In contrast to this argument that lawyers are entitled to disregard any issues of morality in the interests of their clients, William Simon (1994) has suggested that such a position is an affront to the dignity of the legal profession and the legal system because it turns lawyers into mere instruments of their clients and the trial into an irrational battle. He argues that the purpose of judicial proceedings is to produce wise and informed decision-making and that within this context the lawyer’s task is to assist the decision-maker in achieving such decisions. Therefore, according to Simon, the lawyer’s obligation to protect and advance his client’s interests ought to be subordinated to the process of truth seeking, and the lawyer ought not to mislead the decision-maker by discrediting accurate testimony. The lawyer’s basic job is, therefore, to introduce accurate evidence, and any attempt by lawyers to influence decision-makers based on their own judgment of the evidence would usurp the function of the decision-maker. Simon contends that lawyers have a “professional duty of reflective judgment” and should therefore assess the client’s instructions to establish if they are “likely to promote justice” (p. 196). In other words, he suggests that lawyers should not assist clients who wish to employ procedural rules or technicalities to defeat, rather than promote, the interests of justice. This, he argues, applies even in an adversarial context.

Charles Fried (1994) attempts to resolve the issue of lawyers’ morality or amorality by equating the lawyer and client relationship with one of friendship. He argues that friends typically do things for each other that they would not do for a stranger and that this behavior is widely accepted in society. However, this argument has been subjected to considerable criticism because it appears to license a pure form of legal advocacy, such as would justify a lawyer remaining silent when a client lies under oath or lawyers attempting to influence the evidence of potential witnesses.

Stephen Pepper (1994) reasons that the autonomy of the client gives moral justification to the lawyer’s role, contending that law in itself is a public good, and through the courts and legislature, society has created the means enabling individuals to achieve goals and resolve conflicts. The system of freedom under the law is founded on individual autonomy as a social and moral good, so all persons should be entitled to make their own choices, and our legal system accommodates such individual autonomy and choice. The exercise of autonomy may require access to the law, and this is usually available only through a lawyer. Pepper suggests that it would be wrong for lawyers to impose their moral judgment in such a way as to interfere with the exercise of their clients’ autonomy and that to do so would put the lawyer’s morality above client autonomy. According to this argument, therefore, the lawyer should not merely participate in a client’s immoral objective but is *obliged* to do so. However, Pepper does recognize that

there may be circumstances that are so offensive to the lawyer's sense of morality that the lawyer may decline to represent the client; he calls this *conscientious objection*.

The Lawyer–Client Relationship

The most fundamental expression of legal ethics is that the client's interests should take precedence over those of the lawyer. Clients are dependent on lawyers to accomplish the particular tasks they assign their lawyers but are unable to assess the adequacy of the work that lawyers carry out. Thus, the lawyer's relationship with the client is such that incompetence or wrongdoing on the lawyer's part is considered a betrayal of the client's trust. The lawyer–client relationship requires that the lawyer hear a client's individual story before deciding what is to be done. This is part of a continual dialogue between lawyer and client. The progress of the lawyer's work should be evaluated at regular intervals in the context of the lawyer's aims and interests, and the relationship should be client centered, involving shared decision-making responsibility and the mutual participation of both lawyer and client. Neither the lawyer nor the client should dominate the relationship. In effect, the client controls decision-making while the lawyer takes the role of a technical advisor and counselor.

This modern view of the lawyer–client relationship can be contrasted with the older paternalistic view that held that once engaged by the client and broadly instructed about the client's objectives, the lawyer was left to make decisions in the best interests of the client. The paternalistic view contends that lawyers have superior knowledge, skills, and experience and therefore must know what is best — the issues being considered too complex for clients to understand and hence the need for a lawyer in the first place. The code of the American Bar Association does not mention the best interest of the client, but it does stress that the role of the lawyer is to do whatever the client requires, even if this is unwise. Thus, lawyers must “abide by a client's decisions concerning the objectives of the representation” (American Bar Association and Center for Professional Responsibility 1998: Model Rule 1.2). As David Luban (1984: 262) concludes, “The American model is loyalty to the client's wishes and not his interests.”

Is a lawyer required to accept any client who approaches him for assistance? In the United States, there is an obligation to accept particular types of clients based on the ABA Model Rule 1.2, which requires that legal representation should not be denied to those who are unable to afford legal services, whose cause is controversial, or who are the subject of popular disapproval. However, the comment to Model Rule 6.2 adopts a flexible approach by stating that a lawyer is not ordinarily obliged to accept a client whose character or cause the lawyer regards as repugnant. However, a lawyer has pro bono responsibilities under Model Rule 6.1 that can be met by accepting a fair share of

unpopular matters or indigent or unpopular clients.

When does the lawyer–client relationship end? ABA Model Rule 1.16 allows lawyers to withdraw their representation if “a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.” Sometimes it may be difficult to determine when the lawyer–client relationship has ended, and in some situations, duties toward clients, such as confidentiality and avoiding conflicts of interest, will continue even when there is no active relationship.

Can a defendant be required to accept a lawyer in a criminal case? The Supreme Court in *Faretta v. California* (1975) held that even in a serious criminal case, a defendant cannot be forced to be represented by counsel. The Court argued that the right to defend is personal, and the defendant will bear the personal consequences of a conviction; the lawyer or the state will not. The minority opinion in that case thought that the integrity of the system and public confidence in the system are undermined when the defendant’s waiver of counsel results in an easy conviction.

Confidentiality

Keeping the affairs of the client confidential is a fundamental ethical duty imposed on lawyers. Confidentiality represents a respect for privacy, and in practical terms, clients will be reluctant to consult lawyers who are known to gossip about their affairs. Further, breaching the duty of confidentiality would run afoul of other principles, such as acting in the client’s best interests and not personally profiting from information given by the client. It is important to note that this confidentiality belongs to the client and not to the lawyer, and thus only the client can waive it. Where the client is accused of a crime, confidentiality is particularly important because without confidentiality the client is likely to be less than frank, which will affect the lawyer’s ability to represent a client and give a zealous defense. The concept of confidentiality between lawyer and client has been doubted by some who argue that ethical rules relating to the practice of law should not protect the guilty client over an innocent third party (Simon 1988; Wasserstrom 1975). For example, as long ago as 1827, Jeremy Bentham strongly attacked the notion of confidentiality that protected a lawyer from testifying when a client had admitted guilt (in Kipnis 1986: 75). Similarly, Goldman (in Kipnis 1986: 75) argues that there ought to be limits to confidentiality and disclaimers warning clients of those limits. However, as Kenneth Kipnis (1986: 75) points out, the arguments favoring limiting confidentiality necessarily lead to the conclusion that clients will not disclose information for fear of it being revealed, and this might prevent a zealous defense.

The general duty of confidentiality to the client should not be confused with lawyer–

client privilege. The latter is a principle of evidence relating to revealing information during trial, and it provides that client confidences that are revealed by an attorney may not be used as evidence (Luban 1988: 187). The duty of confidentiality is broader because it requires the lawyer to keep the client's confidences generally, whereas the privilege relates only to confidences being used as evidence.

Client Perjury

What should a lawyer do when a client commits perjury or makes it clear that he or she intends to commit perjury? Monroe Freedman (1966) argues that the first duty of the lawyer is to try to persuade the client not to commit perjury, but if the lawyer cannot persuade the client, the lawyer should present the testimony as if it were true. He contends that imposing a duty on the lawyer to divulge perjury would involve the lawyer in a situation of inconsistent obligations. Thus, the lawyer must find out all the facts of the case to offer the best defense and must keep the client's confidences but must also divulge that the client's testimony is false, a fact that has been learned through the client's confidences. It is clear that if any two of these are to be honored, the third cannot be honored. Attempting to withdraw from the case is not a solution because doing so would merely provide defendants with an excuse for a delay or a mistrial, and in any event, the next lawyer would be faced with the same situation as the withdrawing lawyer.

Until the mid-1980s, the law on this ethical issue was unclear, but courts generally held that in a civil case, a lawyer who is aware that a client has committed perjury must disclose it to the court if the client refuses to do so. However, in criminal cases, there is an added constitutional dimension that produces more complexity, the argument being that informing on one's own client is such a grave violation of the confidentiality rule as to be unconstitutional. Model Rule 3.3 now requires that lawyers "take reasonable remedial measures" when they come to know that evidence is false, and this duty applies even if it involves the disclosure of confidential information (Luban 1988: 198–199).

Client Crime

Lawyer–client confidentiality is completely negated if the client consults the lawyer in furtherance of a crime or fraud. This applies even if the lawyer was unaware of the true nature of the client's purpose. Where this exception applies, information that would otherwise have been privileged must be disclosed when a proper demand is made (Hazard and Hodes 2002: 9–34). In addition, Model Rule 1.6 (b)(1) allows a lawyer, in

certain narrowly defined circumstances, to disclose confidential client information to prevent future harm. For example, disclosure is permitted to the extent necessary to prevent a client from committing a criminal act that the lawyer reasonably believes is likely to result in imminent death or substantial bodily harm. It is important to note that this exception applies to crimes that have *yet to be committed*, and it should be contrasted with completed *past* crimes for which disclosing client information is *not permitted*. A good example of the completed crimes rule is the “Buried Bodies” case discussed in [Case Study 5.1](#).

If, in [Case Study 5.1](#), the lawyers had taken physical possession of the bodies or had in some other way impeded the police discovery of that evidence, the confidentiality situation would be different because despite the existence of lawyer–client confidentiality, courts commonly require lawyers to make voluntary disclosure of the benefits and means of their client’s crimes. Court decisions concerning this duty begin with the principle that a lawyer may not actively participate in hiding an item or take possession of it in such a way as to impede its discovery by the authorities (Hazard and Hodes 2002: 9–103). For example, in one case, a lawyer removed a sawed-off shotgun and the proceeds of a robbery from a client’s safety deposit box and put them in his own box in the same bank. The court held the lawyer’s conduct to be improper. The court cases also indicate that lawyers must comply with statutes that prohibit destroying, altering, or concealing evidence or that require lawyers to voluntarily turn over physical evidence that has come into their possession. For example, the Alaska Supreme Court has ruled that a lawyer had a duty to turn over a client’s written kidnap plan to prosecutors, even without having been asked for it, and in a California case, after the defendant was arrested on charges of strangling his girlfriend, his family found incriminating writings in his room, which they gave to the defendant’s lawyer, who passed them to the judge, who in turn gave them to the prosecutor (*Morrell v. State* 1978). The court held that the defendant’s lawyer was fulfilling his legal obligation when delivering the documents to the judge (Hansen 2005: 3).

Case Study 5.1 Buried Bodies Case

Lawyers represented a defendant charged with murder, and during the period before trial, the defendant told his lawyers about two other murders he had committed and described where the bodies were buried. The lawyers located the bodies, which were those of two young women who had been missing for some time. It happened that the authorities came to suspect the defendant of murdering the missing women, and the father of one of the victims asked one of the lawyers if he knew anything about her fate. The lawyers did not disclose the location of the bodies to the authorities or the father but attempted to use their knowledge to the advantage of their client in plea bargaining. It was only when those negotiations failed and the case went to trial that the location of the bodies was revealed, together with the lawyers’ knowledge of that fact. The lawyers had information about a completed crime given to them in confidence by a defendant in a criminal case and acted properly within the

bounds of the ABA Code of Ethics in withholding that information.

In moral terms, it can be argued that even without a rule of nondisclosure, nondisclosure would not have been morally required because the victims were already dead and could not be helped. Of course, the victim's father suffered, and withholding the truth increased his period of uncertainty, but if such suffering were to outweigh confidentiality, a client's disclosure of a past crime would never be protected. If, in this case, the lawyers had discovered the two victims wounded but still alive, then they would have been faced with a scenario falling under the rule concerned with preventing future harm. Morally, however, it is hard to imagine any lawyer leaving the victims to die, and in practice, rules of ethics would play little part in such a scenario.

SOURCE: Hazard and Hodes 2002: 9–79.

Defense Lawyers

The two main systems under which lawyers represent clients in the West are adversarial and inquisitorial. In *adversarial* systems of law, the parties and their lawyers play the principal role of gathering evidence and examining witnesses in court, and the court plays a less active role. In the *inquisitorial* system, the court plays the main role in gathering evidence and questioning witnesses. It is sometimes argued that the judge in the inquisitorial system is more concerned with discovering “the truth,” whereas in the adversarial system, lawyers dominate, and judges, acting as referees, are mainly concerned about due process and procedures being followed and not so much the search for the truth. Marvin Frankel (1975) contends that the legal profession in the United States is held in low regard because establishing truth has a low priority as an overall objective of the process. This raises the issue of the adversarial system privileging procedural fairness over truth, and Frankel suggests that too much emphasis is placed on the advancement of the client's interests and not enough on public interest in discovering the truth. Freedman (1975a) refutes Frankel's position by arguing that the notion of truth has been an elusive concept throughout history and that those who devised the adversarial system took account of the complexities of determining truth.

Luban (1988: 67–93) outlines six reasons commonly argued in favor of the adversarial system:

1. It is the best system for discovering the truth.
2. It is the best way of defending the rights of clients.
3. The nature of the lawyer–client relationship is intrinsically good.
4. It prevents abuse through checks and balances.
5. It honors human dignity.
6. It is so embedded in the social fabric that adopting another system would be too disruptive.

After examining each justification, Luban (1990) concludes that only the last has any validity because in his view the adversarial system has merit in the sense that it is not shown to be worse than any other system. In terms of criminal defense, Luban suggests that adversarial advocacy is crucial for protecting the rights of individuals “against a powerful and potentially dangerous bureaucratic institution” (p. 1019).

The defense lawyer carries out the function of representing an accused within an adversarial system that emphasizes *due process*. According to Model Rule 1.3, a lawyer is to act with reasonable diligence and promptness in representing a client. The comment to this Model Rule makes it clear that the lawyer is expected to use *zeal, commitment, and dedication* and that zeal is an appropriate method in litigation. Lawyers operate as agents of their clients and must serve their clients’ interests loyally and effectively. There is no absolute standard against which a lawyer’s performance may be measured, and every case in which an issue of diligence or promptness arises is dependent on its own context (Hazard and Hodes 2002: 4–8).

It has been suggested that criminal defense lawyers may run into conflict with the commitment that a lawyer must use the utmost zeal and dedication in representing clients. In particular, because criminal defense lawyers may have aims and motivations that extend beyond the interest of their client, they can be regarded as “cause lawyers” (Etienne 2005: 1200)—that is, “activist lawyers who use the law as a means of creating social change” (p. 1196), including public interest and poverty lawyers. Thus, for the cause lawyer, the client’s defense is not necessarily an end in itself because the cause lawyer has a broader set of objectives, such as using the law as a vehicle to build a better society. An example of a potential conflict comes from the field of so-called *impact litigation* where lawyers select certain cases to raise certain issues. In this sense, the criminal defendant and the case are a means for effecting social change; this departs somewhat from a client-centered approach to the conduct of the law (p. 1251). An impact litigation lawyer might forego an argument in one case that could possibly benefit the client to employ that argument in another case where there is a greater chance of its success. Ethically, this is a questionable practice in view of the lawyer’s duty to devote herself to the client’s interest with the utmost zeal.

The ethical questions that commonly arise in the minds of nonlawyers about the role of a defense lawyer include the following three questions:

1. Is it ethically proper to represent a client accused of a criminal offense when the lawyer knows the client is guilty?

Some commentators have stated that lawyers will seldom be in a position to conclude from the available facts that their client is definitely guilty. However, there will still be

times when lawyers will be quite confident of their client's guilt. When lawyers know their client is guilty, can they still conduct a defense leading to their acquittal? Model Rules 3.1, 3.3, and 6.2 set the ethical standard in such situations. Under these rules, a lawyer is not permitted to defend a proceeding unless there is a basis for doing so that is not considered frivolous. Further, a defendant's lawyer in criminal proceedings may defend the proceedings to require that every element of the case be established.

The comment to these rules requires that if a defendant has admitted to defense counsel the facts that establish guilt, and defense counsel's independent investigation has also established that the defendant's admissions are true, yet the defendant insists on standing trial, defense counsel must strongly discourage the defendant from perjury in testifying. Further, if in advance of the trial the defendant insists that he or she will take the stand and perjure himself or herself when testifying, the lawyer may withdraw from the case and seek leave of the court to do so if necessary, but the court must not be advised of the lawyer's reason for seeking to withdraw.

The problem with lawyers determining that their client is guilty is that a lawyer will not really know that the client is factually guilty unless the client admits all the facts that constitute the offense. This is the case even in circumstances when the client may be lying or mentally ill or mistaken. Also, a client who confesses to his or her lawyer may not understand the existence of certain legal defenses, such as provocation or self-defense, and admitting guilt might result in the lawyer failing to explore these possibilities. In addition, the prosecution is required to prove to a jury that the client is guilty beyond a reasonable doubt, and it is argued, therefore, that a client cannot be legally guilty so far as the lawyer is concerned without undergoing the full scrutiny of a trial.

There are significant differences between a client who may be *factually guilty* and a client who is *legally guilty* (Pool 1979). Usually, the standard required for a lawyer to be satisfied that a client is guilty is that the lawyer has proof of the client's guilt through credible evidence that meets the standard of "beyond reasonable doubt." However, some commentators go further, arguing that lawyers need to be certain, not merely of guilt, but that a conviction will be obtained (Subin 1987). One lawyer suggested that the fleeting and temporary nature of the truth was rationale enough for this argument when he expressed his view of this issue in the following statement: "Truth cannot be known. Facts are indeterminate, contingent, and in criminal cases, often evanescent" (Babcock 1983: 177).

Lawyers offer a number of reasons for defending those who are "guilty." They might argue that by providing defendants with competent counsel, whether or not they have committed a serious offense or are innocent, they uphold the human dignity of that

person. Freedman (1975a) endorses this view, arguing that the right to counsel is a significant demonstration of our regard for the dignity of the individual. Further, he makes the case that lawyers have an obligation to protect their clients and not to sit in judgment over them because the determination of a client's guilt or innocence is not a lawyer's function.

Another reason put forward for lawyers not to decide their clients' guilt is that it is their function to ensure that those operating the criminal justice system do so in a proper manner. In this context, criminal defense lawyers not only induce prosecutors to prove their case but also ensure that they do so ethically and legally. The adversarial system requires lawyers to present a fearless defense of their clients, and lawyers may therefore argue that they are simply fulfilling the aims of that system. From this perspective, the lawyer is a functionary in the system.

Others justify the representation of the "guilty" by reasoning that lawyers have an obligation as agents in the legal system to provide their services to those in need. Thomas Shaffer (1981), for example, contends that by serving the guilty, lawyers fulfill their Christian role to those in need. Thus, defending criminals is considered by Shaffer as an act of Christian charity by helping and not judging one's neighbors. Finally, some defense lawyers argue that by providing a defense, they may prevent people who are guilty, but who do not deserve to be put in prison, from going to prison. As John Mitchell (1980: 334) states,

Those guilty of serious crime merit the wrath of our society. But almost no one deserves the hellholes we call jails and prisons. There is almost no case I would not defend if that meant keeping a human, as condemnable as he or she may be, from suffering the total, brutal inhumanity of our jails and prisons.

2. Is it ethically proper to cross-examine a witness with the aim of discrediting the witness's credibility or reliability when the lawyer knows the witness is telling the truth?

Assume a lawyer represents a criminal defendant charged with robbery who admits to his lawyer that he committed the crime but does not testify at his trial. The lawyer then attempts to attack the credibility of a truthful prosecution witness who observed the crime. The lawyer does this by establishing, through cross-examining the witness, that she had been drinking heavily before the crime, had a violent argument with the defendant immediately before the crime, and had convictions for shoplifting. Essentially, the lawyer intends to mislead the jury and challenge the credibility of this

truthful witness.

It might be argued here that the lawyer's conduct, even though legally permissible, is immoral because it is an effort to obscure the truth and frustrate justice and because it inflicts harm on the innocent witness. There seems to be no social good in this case because the only purpose of the deception is to obtain an undeserved acquittal for the client (Haskell 1998: 66). However, Freedman (1966) argues that in light of the importance of the lawyer's adversarial role as protection against the power of the state, a lawyer is obliged to act zealously, and it therefore follows that the lawyer in this example is entitled, and in fact obliged, to do everything he or she can on the client's behalf to discredit a witness known to be telling the truth.

John Noonan (1966) protests that Freedman (1975a), in conceiving trials as battles in which lawyers are bound to do everything in zealous defense of their clients, misrepresents the nature of the justice system. He contends that a lawyer's duty is to assist the judge in making an impartial, wise, and informed decision in seeking to establish the truth. In other words, a lawyer's level of zeal should be defined by the promotion of a wise and informed decision in the case. Fundamentally, therefore, the argument is that unrestrained zeal undermines the system of justice. In addition to the zeal argument, it can also be said that the lawyer may have no absolute knowledge of the witness's truthfulness. How does the lawyer know the witness is truthful? From this point of view, the level of honesty may often be discovered only through a rigorous cross-examination that tests the witness's credibility.

Additional arguments against Freedman's view include the nature of the lawyer's duty to the court, particularly in not misleading the court, given that it can be argued that lawyers ought not to attack the credibility of a truthful witness when they have no basis to do so (Noonan 1966). Such an attack conflicts with a lawyer's duty to the court and with his or her overriding obligation to promote justice. Ultimately, the resolution of this difficult question seeks to define the limits of a zealous defense and calls into question conflicts between the lawyers' duty to clients and duty to the court, to the administration of justice, and to the promotion of truth seeking in criminal proceedings. It should be noted that Freedman does not advocate the lawyer's unlimited zealousness in noncriminal proceedings. However, in the final analysis, many would argue that in criminal proceedings, the lawyer's duty to protect the client against the state justifies the lawyer's conduct.

3. Is it ethically proper to have a witness give testimony when the lawyer knows that the witness will commit perjury?

Freedman (1966) proposes that the most common method of avoiding this problem is

for the lawyer to withdraw from the case in circumstances where the witness is the accused. However, he suggests that the accused would simply find another lawyer and withhold the facts of his or her guilt from that new lawyer. Accordingly, on ethical grounds, the first lawyer ought not to withdraw because perjured testimony will ultimately be presented. Freedman concludes that the obligation of confidentiality in the context of the adversarial system gives the lawyer no alternative but to put the perjuring witness on the stand without disclosing his or her knowledge of the perjury to the court or jury. Noonan (1966) disagrees, arguing again that the presentation of such evidence must be unethical because it will lead to injustice. Two cases contradict Freedman's position. In one, the court decided that the lawyer was entitled to withdraw from a case in which the client admitted perjury and would be subject to disciplinary action only if he continued the case without reporting the matter to the court (*McKissick v. United States* 1967). In the other case, the conduct of a lawyer who advised several persons, including the client, to perjure themselves was considered bad enough to warrant disbarment (*Dodd v. Florida Bar* 1960). In other countries, Freedman's position is considered untenable because lawyers may not knowingly lend themselves to any false story being put before the court and, if asked to do so, must immediately cease to act for the client.

Will disclosure of future perjury violate the Sixth Amendment to the Constitution? In *Nix v. Whiteside* (1986), the U.S. Supreme Court held that a criminal defendant has no right to the assistance of counsel in giving false testimony and that lawyers who refused to give such assistance or who threatened to disclose the future perjury of the client have not denied the client effective legal assistance under the Sixth Amendment to the Constitution. The ABA has endorsed the view put forward in this case but also points out that the case may not overcome the constitutional provisions of some states that may still prohibit the lawyer's disclosure of the client's perjury. It should be noted that under Model Rule 3.3 lawyers may not assist a client in committing perjury. Lawyers have attempted to avoid a violation of this rule by adopting what is called a "narrative approach" in which they do not question the client but simply allow the narration of evidence without asking questions. However, this narrative approach can also be criticized because when the lawyer does not question the client and does not refer to the narrative in closing arguments, it may seem obvious to the jury that the defendant has given flawed testimony.

The Prosecutor

Freedman (1975b: 79) explains that ethical difficulties and their solutions differ between prosecution and defense lawyers because of the significantly different roles and functions they each play. In essence, the contest between prosecution and defense

counterbalances the rights of the individual to the power of the state. The prosecutor has extraordinary discretion in directing investigations, deciding on the crime to be charged, and influencing the punishment to be imposed. In contrast, the defense lawyer has particular responsibilities that link with the adversarial system and to issues of lawyer–client confidentiality, as well as the assertion of constitutional rights to due process and to freedom from self-incrimination.

In their role as protectors of the state and the public, prosecutors act in an adversarial capacity, which requires zealous advocacy. Prosecutors are supposed to represent the public interest, but they may also see themselves as accountable to the police and to victims. Unlike other lawyers, prosecutors, in their representation of the public, in effect make their decisions without the assistance of a client. Prosecutors ought to place themselves in the shoes of the public, who is the client, before deciding on the best course of action. It follows that, in practice, prosecutors have an important role in the creation of public policy within criminal proceedings.

Many district attorneys are required to maintain a high conviction rate and to win big, public cases that arouse strong passions. Failure to do so might lead to the loss of their office in the next election (Fisher 1988). Thus, prosecutors are subject to a number of stresses and tensions, including their public constituency; their need to adhere to professional codes and standards; and pressure from academics, the judiciary, and the media to act fairly. As Bennett Gershman (2001) notes in reference to Rule 6.2, a prosecutor who is under a duty to keep the public informed about pending cases has a corresponding duty not to make statements out of court that might prejudice the right to a fair trial, and prosecutors must also not use the media in a way intended to benefit themselves personally.

Gershman (2001) argues that many prosecutors have violated these duties and that experienced news reporters are able to draw improper statements out of prosecutors by using trickery and persuasion. With respect to statements to the media, Gershman explains that prosecutors have come under criticism for calling press conferences to celebrate indictments and for using such occasions to “improperly characterize charges, disparage defendants, disclose evidence, and otherwise employ inflammatory rhetoric that often presumes guilt” (Rule 6.4). Among the prohibitions on prosecutorial conduct, Gershman lists the release of grand jury material, making references to a defendant’s bad character, commenting on the nature of the crime with which a defendant is charged, and revealing a defendant’s confession to the media.

The Duty to Ensure Justice Is Done

At least since 1935 when the Supreme Court decided *Berger v. United States*, it has been the law that for prosecutors, winning is not everything. According to the Supreme Court, the primary duty of a prosecutor is to see that justice is done. In other words, the prosecutor must “seek justice, not merely to convict” (American Bar Association 1993: Standard 3–1.2 [c]):

While (a prosecutor) 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. (*Berger v. United States* 1935)

In performing the function of achieving justice, the prosecutor must assist the court in arriving at the truth fairly. Thus, if an accused has incompetent counsel who neglects to present all the material facts that might assist the defendant, the prosecutor has an ethical duty to make sure these facts are presented consistent with the responsibility to achieve a just result (Fisher 1988). Gershman (2001) specifies that prosecutors have a duty to the truth based on a number of sources, such as their role as a “minister of justice,” their constitutional obligation not to use false evidence or suppress evidence favorable to the defendant, the ethical rules that apply to the prosecutor, their domination of the criminal justice system, and their role as a representative of the state. Gershman sets out instances in which prosecutors may violate their duty to the truth. These include situations in which the prosecutor engages in misleading conduct by confusing the jury’s view of the evidence; inflammatory conduct, such as appeals to racial or class biases, in the practice of attacking the defendant’s character; and subverting and suppressing the truth. Stanley Fisher (1988: 218) seeks to further define the prosecutor’s quest for justice and concludes that its definition is problematic. He argues that the prosecutor’s role in seeking justice suggests that “justice” has some independent meaning of special relevance to prosecutors. However, he suggests that its meaning may shift according to the context. Thus, where effective adversarial system safeguards exist, the role most consistent with justice is to be a zealous advocate; however, where those safeguards are lacking, the prosecutor’s quasi-judicial function should be emphasized (p. 226). Further, he suggests that where safeguards do function properly, the prosecutor’s primary duty is to promote crime control values (p. 254).

[Case Study 5.2](#) is an example of a prosecutor focusing on winning the case rather than on pursuing justice.

Model Rule 3.8 sets out the general duties for a prosecutor in a criminal case, which are designed to ensure that an accused receives a fair trial. Specifically, a prosecutor

- must not prosecute a charge unless it is supported by probable cause;
- must make reasonable efforts to ensure that an accused has been advised of the right to obtain counsel and has been given a reasonable opportunity to do so;
- must not seek to secure from an unrepresented defendant any waiver of important pretrial rights such as the right to a preliminary hearing;
- must make timely disclosure to the defense of all evidence or information that the prosecutor is aware of that tends to negate the guilt of the accused or that mitigates the offense; and
- with respect to sentencing, must disclose to the defense and to the court all mitigating information known to the prosecutor, unless the court directs otherwise.

In terms of the administration of criminal justice, ABA standards state that prosecutors are administrators of justice and advocates and officers of the court and must exercise sound discretion in the performance of their functions. Prosecutors are subject to the same standards of professional conduct as other lawyers. However, additionally, the prosecutor has a general obligation to improve the administration of criminal justice and to seek remedial action if defects are discovered in the system.

Case Study 5.2 Prosecutor Misconduct

After 16 years in prison, Jabbar Collins was freed when Brooklyn prosecutors vacated his murder conviction. He was arrested in March 1994 on charges that he murdered a landlord during an attempted robbery. The prosecution relied on three witnesses who, Mr. Collins claims, were forced by threats from the prosecutors to testify falsely against him.

After being released from prison in 2010, in August 2011 he filed a suit for \$150 million against the Brooklyn district attorney's office, accusing the prosecutors in that office of a range of unethical and illegal practices and claiming that Charles J. Hynes, the district attorney, directly fostered that behavior. The case was settled with the city for \$10 million, and Collins was released after spending 15 years in prison (Marzulli 2014).

The suit claimed that improperly using court orders to detain witnesses, physically threatening witnesses, and forcing them to provide false testimony to support the prosecution case were standard practices of the district attorney staff. It is alleged that while the purpose of a subpoena is to compel a witness to attend court, the district attorney's office regularly uses them to direct witnesses to attend their office, where they try to convince witnesses to cooperate with the prosecution. As well, it is claimed that the district attorney staff regularly brought witnesses picked up on warrants to their office to be interrogated, rather than talking them directly to court. A material witness warrant is issued by a judge, requiring the arrest of a witness who has ignored a subpoena to testify in court. But the order requires the witness to appear in court, where they are given legal representation and can secure bail.

SOURCE: Eligon 2011 and Marzulli 2014.

Discretion to Bring Charges

The prosecutor has broad discretion over bringing charges; this charging decision is protected by almost absolute immunity. It is arguable that the probable cause standard adopted in Rule 3.8 is an insufficient deterrent against prosecutorial abuse because a violation of that rule can generally be found only in instances in which prosecutors must have known that they lacked probable cause (Hazard and Hodes 2002: 34–36). Geoffrey Hazard and William Hodes argue that rather than knowledge, a better basis is “reasonable belief” in the presence of probable cause—that is, whether prosecutors can show that they carefully considered the issue and formed a reasonable belief that a conviction would be secured. Freedman (1975b) argues that merely being charged with a crime results in a damaged reputation, regardless of a failure to convict. The anguish, anxiety, and emotional strain of a criminal trial as well as the financial burden are all set in motion when an indictment is sought. In view of the grave consequence of an indictment, Freedman (p. 85) suggests that this test (that charges be supported by probable cause) is inadequate because probable cause may be based on hearsay and satisfied by less than a substantial likelihood of guilt.

Michael Gottfredson and Don Gottfredson (1988: 114) point out that the breadth of the discretion granted to the prosecutor in making the decision to charge is not accompanied by any controls over its exercise and that the decision of whether or not to charge is “the single most unreviewed exercise of the power of the criminal law available to an individual in the American system of justice.” They argue that there is no guidance available about the exercise of this discretion in statutes and that charging decisions are not judicially supervised. For example, in a study of felony processing in Washington, D.C., in half of the felony arrests referred by police, the prosecutor decided not to charge, but the decision not to prosecute was not justified publicly or reviewed by any authority (p. 115).

Sometimes prosecutors elect not to enforce a particular statute and follow a policy of nonprosecution. Abrams (in Gottfredson and Gottfredson 1988: 118) suggests some criteria that might influence a prosecutor to adopt such a policy, including community opposition, difficulties in legally enforcing a statute, the existence of an alternative, and the ability to prosecute for another offense. The ABA (in Gottfredson and Gottfredson 1988: 119) suggests that in deciding whether to bring charges, the criteria to be considered should include

- the prosecutor’s assessment of guilt;
- the harm caused by the offense;
- the disproportion of the punishment to the offense;

- the possibility of improper motives for a complaint;
- any extended nonenforcement of a statute where the community accepts that nonenforcement;
- the reluctance of the victim to testify;
- the cooperation of the accused in the arrest or conviction of others; and
- the possibility of prosecution by another jurisdiction.

Although welcoming any criteria that would circumscribe the prosecutorial discretion, Gottfredson and Gottfredson note that criteria of this kind do not go far enough and that the criteria need to be ranked in priority and given weighting and better definition. Fisher (1988: 232) has suggested that in deciding to bring charges,

the prosecutor's usual orientation should be one of special alertness to the existence of facts supporting guilt and a corresponding eagerness to seek them out. In "borderline" cases she should rely on rebuttable presumptions of guilt to resolve factual conflicts and certainties against the defendant.

Forst (in Gottfredson and Gottfredson 1988: 132) summarizes the results of an empirical study of prosecution decisions, noting that for many, if not most cases, the decision to prosecute is virtually automatic, regardless of whether the evidence is weak or strong or the offense serious or minor. Most recently, a study in Maryland has found that prosecutors there are far more likely to seek the death penalty for accused African Americans charged with killing white victims (Levine and Montgomery 2003). The research suggests that offenders who kill white victims are significantly more likely to be charged with a capital crime and that the probability of such a charge is twice as high as when an African American kills another African American. As well, geography has proved a significant factor in prosecutorial decision-making in capital cases. The study found, for example, that in Baltimore County a death sentence was 26 times more likely than in the city of Baltimore and 14 times more likely than in Montgomery County.

Prosecution Disclosure of Evidence to the Defense

Rule 3.8, requiring disclosure of evidence to the defense, is broader than the Brady rule on which it is based (Hazard and Hodes 2002: 34–38). The ABA Standing Committee on Ethics and Professional Responsibility, in a formal opinion on Rule 3.8, has noted, "Courts as well as commentators have recognized that the ethical obligation is more demanding than the constitutional obligation." The prosecutor's constitutional duty to make voluntary disclosure of evidence to the defense is set out in *Brady v. Maryland*

(1963) and subsequent cases. In considering this constitutional duty, the courts determined that a conviction can be overturned based on the prosecutor's failure to provide evidence. However, this constitutional rule takes account of other factors such as the significance of the evidence and whether the defense made a proper request for it. When a prosecutor fails to disclose evidence to the defense and suppresses that evidence, the Supreme Court in *United States v. Agurs* (1976) held that exculpatory evidence not made available to the accused could result in denial of the constitutional right to a fair trial, with the outcome that a new trial will be ordered. This duty to disclose exculpatory evidence applies even if it has not been requested by the defense.

In a number of ways, the pretrial disclosure standard remains imprecise. For example, the exculpatory evidence that was not disclosed must be "material" and prosecutors and defense lawyers can disagree on this. As well, there are issues about the timing of disclosure: While many courts require disclosure well in advance of trial, others do not enforce this rule until immediately before the trial. As noted, the ABA standard is higher than that imposed by the Constitution, and the ABA has stated that the rule requires disclosure before the entry of a guilty plea (Yaroshefsky and Green 2012: 274). Some prosecutors follow a practice of "open file discovery," under which virtually the entire prosecution file is disclosed, while others take a less liberal approach and produce very little or nothing at all. Sometimes prosecutors will adopt a restrictive approach because they fear that liberal disclosure will adversely affect their conviction rates (p. 275).

When a prosecutor violates Rule 3.8, he or she is liable to be disbarred, as occurred following a prosecution involving rape charges filed against members of the men's lacrosse team at Duke University by Michael Nifong, the district attorney for Durham County, North Carolina. After filing charges, Nifong failed to disclose to the defendants that their DNA samples did not match any of the DNA from unidentified males found on the alleged victim's body and clothing. Nifong's failure to disclose not only resulted in the dismissal of all charges against them but also in disciplinary proceedings against him by the North Carolina State Bar that led to his disbarment in 2007 (Libby 2009).

The Innocence Project reported in 2011 that prosecutorial misconduct, including failure to disclose evidence to the defense, had contributed to the convictions in 45% of the first 100 cases of exoneration revealed by the Project. There have been calls for the systematic review of prosecutors' disclosure practices (Yaroshefsky and Green 2012: 270).

Plea Bargaining

After charging but before trial, the prosecutor may begin negotiating with the defense to

arrive at a plea bargain. The aim is to achieve a compromise by reducing the charges against the defendant or securing a reduced sentence in exchange for a guilty plea (McDonough, McDonough, and Keenan 2000: 58). Plea bargaining is not supported by the public, even though it disposes of 95% of all criminal cases (Bureau of Justice Statistics 2002: 416, tbl. 5.17). For example, in a survey of public attitudes in Washington State, while most expressed positive views toward courts, 82% of respondents rejected plea bargaining as a means of processing criminal cases (Herzog 2004: 590–591). Similarly, in a survey in Chicago, 64% rejected the practice. Some have suggested that this negative public attitude reflects its punitive views on criminality and that the secretiveness of plea negotiating practices increases public suspicion (p. 591). Thus, the more lenient the sentence handed down, the less support for plea bargaining.

In relation to plea discussions, ABA Standard 3–4.1 states that it is “unprofessional conduct for a prosecutor knowingly to make false statements or representations in the course of plea discussions.” The ABA Standards Relating to Administration of Criminal Justice were adopted in 1971 and have strong moral force (Hazard and Hodes 2002: 34–35). In spite of the moral force of these standards, a prosecutor may deliberately overcharge a defendant as a plea-bargaining tactic. Hazard and Hodes (pp. 34–36) give the example of a prosecutor charging an accused with three offenses arising out of the same incident, intending to accept a guilty plea to the least serious charge in exchange for dismissal of the others, assuming that such a plea bargain is advised by the defense. In such a situation, the prosecutor is aware that he or she lacks probable cause for the first and most serious of the charges and has deliberately included it, purely as a bargaining chip. The second charge could be sustained, but the prosecutor doubts whether he or she could gain a conviction and in any event is not inclined to put in the effort required to prove it. In this sense, therefore, this second charge is also a bargaining chip. The inclusion of the first charge is clearly improper and a violation of Rule 3.8, and the prosecutor must not present it. Presenting the second charge is not considered improper and is normal procedure in plea bargaining. The second charge is proper because it could legitimately be prosecuted to a conclusion, and if the prosecutor gives up this charge in a plea bargaining, he gives up something of legal significance.

Freedman (1975b: 88) points to the device of overcharging as a means of obtaining a sufficient number of plea bargains, arguing that cases are commonly drawn up as felonies with prosecutors ready to accept a plea for a misdemeanor and thereby coercing defendants into foregoing their right to trial by jury. He argues that the justification for this practice, seen to be the need to transact a great volume of business through the criminal justice system, is insufficient to justify the infringement of a constitutional right by “duress and trickery.” He refers also to instances in which prosecutors have failed to

advise the court of ineffective assistance provided to an accused by counsel and to situations in which prosecutors have placed their prosecution of a case in a forum where the defense lawyer is likely to overlook defects in the prosecution's case.

Chris McDonough, Diana McDonough, and Raymond Keenan (2000) point out that although some may see a plea bargain as beneficial to the defendant, in fact, a plea bargain benefits the prosecutor because a guilty plea saves many hours of the prosecutor's time and, in eliminating the expense and time of a trial, prevents the criminal justice system from becoming overloaded. They note that plea bargains may also assist the prosecutor if an essential element of the prosecution case is weak (p. 59). For example, Hal Pepinsky (2000: 67) reports that in his home county in Indiana, prosecutors bring only 25 to 30 criminal cases a year to jury trial and that these together compose less than 1% of all prosecuted cases. He points out that this number is all that can be accommodated on the local court calendar each year. In 1974 in New York City, 80% of all felony cases were settled as misdemeanors through plea bargains, and only 2% of all felony arrests resulted in a trial (Kipnis 2001: 362). As long ago as the 1920s and 1930s, crime surveys documented the dependence of the criminal justice system on plea bargaining. Researchers found that plea bargaining had largely displaced trial by jury so that, for example, in Chicago 85% of all felony convictions resulted from guilty pleas. Similar rates applied in Detroit (78%) and Los Angeles (81%) (Remington 1993: 80).

In discussing the negotiated plea, Kipnis (2001: 362) points out that both sides have bargaining power. The prosecutor may be burdened with conducting many cases, and perhaps in some there is insufficient evidence to secure a conviction. At the same time, the prosecutor is under administrative and political pressure to complete cases and secure convictions. On the defense side, a number of factors may influence a defendant to plead guilty. These include feelings of guilt, which may or may not be relevant to the crime charged; the stresses of being locked up before trial; the costs of going to trial; and the delays that always occur in awaiting trial (p. 363). Kipnis points out that the practice of negotiating pleas has never been discussed by any deliberative body or legislature; rather, it has evolved within the criminal justice system in an unregulated, ad hoc manner (p. 364).

Plea bargains are required to be voluntary; however, the question of whether duress has been applied can be problematic. The Federal Rules of Criminal Procedure require the court to be satisfied that a plea of guilty is voluntary through "addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or promises apart from a plea agreement" (in Kipnis 2001: 365). Kipnis notes two cases in which defendants agreed to plead guilty to avoid probable death sentences and

where the court decided that the pleas were voluntary, even though in one case the defendant testified at the time of the entry of his plea that he was innocent of the crime charged and had pleaded guilty because he said he had been told that if he did not “they would gas me for it” (p. 365). The essence of plea bargaining in such situations is that a defendant must make a hard choice between something certain and something uncertain, and even when the defendant is innocent and the prosecution’s case weak, the defendant may accept the plea bargain for its certainty rather than take the chance on what may happen at trial.

Kipnis (2001) points out that hard choices of this kind contain an element of duress where “the state forces a choice between adverse consequences that it imposes” (p. 367). He concludes that plea bargaining “falls short of the justice we expect of our legal system” (p. 371). He identifies plea bargaining’s adverse effects in its coercion of criminal defendants, its acceptance of a measure of punishment less than that consistent with a guilty plea, and its relaxation of the standards for conviction.

Rudolph Gerber (1999: 31) agrees that the issue of duress harms innocent defendants and that “the accused enjoy few truly realistic strategic choices.” He suggests that innocent defendants may plead guilty because of their lack of expertise in plea bargaining and their inability to demonstrate their innocence (p. 32). Gottfredson and Gottfredson (1988: 130) summarize the criticisms of plea bargaining as follows

- Some innocent persons may be induced to plead guilty by promises of leniency.
- Plea bargaining results in excessive leniency.
- It is impossible to control.
- It shifts sentencing policy from the judge and legislature to the prosecutor and in so doing blurs the distinction between guilt and proper punishment.

What would be the effects of a ban on plea bargaining? White (in Gottfredson and Gottfredson 1988: 130) studied the effects of a ban on plea bargaining in Alaska and concluded that the court processes did not become overloaded, that defendants seemed to plead guilty at the same rate, and that there was little change in conviction rates.

Giving a judicial view of plea bargaining, Gerber, a judge of the Arizona Court of Appeals, maintains that the complexity of the criminal trial is a major cause of plea bargaining because detailed trial procedures have meant that the trial has “ceased to be an efficient routine disposition of a criminal charge” (Gerber 1999: 25). He argues that the strongest justification for plea bargaining is expediency and that there are no principled arguments to justify the practice. In his view, the practice is unfair because it determines a defendant’s guilt without investigation, evidence, or fact finding by an impartial body and may adversely affect the poor and unsophisticated (p. 26). Gerber

suggests that lawyers' caseloads are a major reason for the practice and that neither prosecutors nor defense lawyers want to try criminal cases. The prosecutors' aversion arises because they cannot progress with their cases without guilty pleas, and the defense lawyers entertain plea bargains because they are less able to secure new clients if they are tied up with a multitude of trials. Gerber stresses that victims often find plea bargaining to be an offensive practice because they believe that the sentence imposed in a plea is more lenient than would have been imposed for the original charge. He agrees with other commentators that prosecutors often overcharge to gain a negotiating advantage (p. 28).

Gerber (1999) explains the political aspect of plea bargaining by suggesting that an elected district attorney is concerned with securing a high conviction rate, maintaining his or her good relationships with private lawyers of influence in the community, and avoiding the loss of high-profile trials. Ensuring a conviction through plea negotiation keeps the conviction rate high and supports the likelihood of reelection at the end of the prosecutor's term (p. 29).

One consequence of plea bargaining is the absence of a public trial that shows accountability and condemnation. Gerber (1999: 35) suggests that a criminal justice system that displaces guilt out of the public space of the courtroom and avoids the public display of due process, guilt, and punishment abandons the public role of criminal law.

Prosecutorial Misconduct

Freedman (1975b: 79) argues that the ABA ethical standards are inadequate in ensuring the ethical duty of a prosecutor. Specifically, he suggests that the prosecutor's decision about whether to investigate a suspected crime is not the subject of any code of professional responsibility, even though the prosecution's motive in conducting an investigation might be open to question. He reasons that selective prosecution based on improper motives is an abuse of official power and a violation of fundamental rights, and as such, it constitutes unethical conduct.

There have been a number of reported cases of prosecutorial misconduct, some of which result from overzealousness in seeking a conviction, but most of which involve issues such as conflict of interest, failure to enforce the law, and filing charges vindictively (Wolfram 1986: 764). Gershman (1986: 132) provides examples of what he terms "outrageous conduct," such as *Miller v. Pate* (1967), where the prosecutor in a murder case concealed from the jury a crucial piece of evidence—namely, the fact that a pair of undershorts with red stains were stained not by blood, but by paint. Another example

was in the case of *United States v. Perry* (1981), where the prosecutor in his summation said that the “defendants and their counsel are completely unable to explain away their guilt.” The Center for Public Integrity in Texas identified almost 600 appeals in Texas between 1970 and 2003 in which defendants raised allegations of prosecutorial misconduct. In 152 of those cases, a court held that the prosecutor’s conduct prejudiced the defendant and that 118 of those cases involved improper trial behavior, including making improper statements during arguments, improperly cross-examining witnesses, discrimination in jury selection, withholding evidence from the defense, and failing to correct false testimony (Gier 2006: 193). Prosecutorial misconduct was a factor in 45% of recent cases overturned because of DNA evidence and in 24% of recently overturned death penalty cases (Scheck, Neufeld, and Dwyer 2000). In considering the issue of why misconduct occurs, Gershman (1986: 133) suggests that the reason lies in its success, pointing out that if prosecutors are prepared to take ethical risks in argument, they do so because they believe that approach to be effective. The opening statement by the prosecutor is crucial in the process, according to Gershman, because juries are most affected by the first strong presentation they observe and hear. In addition to presenting an action-packed opening statement, a prosecutor who uses the same strategy for the closing argument is more likely to be effective.

Gershman (1986: 136) concludes that when prosecutors are faced with a difficult case, they might be tempted to influence the jury to decide in favor of a conviction by referring to a matter that might be highly prejudicial. Referring to inadmissible and stricken testimony, Gershman (2001) argues that such testimony does have an impact on the individual juror, and that the prosecutor, who is aware of jury psychology, knows this. He suggests that prosecutors have a general duty to the truth, which includes refraining from misleading conduct that distorts the search for truth. Although he argues that the prosecutor has the capacity to mislead at many stages during the trial process, he identifies the prosecutor’s relationship with the jury as one area where misleading conduct occurs. Arguing that the jury is likely to place great confidence and trust in the prosecutor, he notes that familiar types of misleading conduct include

- attempts to place in the jurors’ minds innuendo that is damaging and prejudicial to the defendant;
- allusions to expert testimony casting doubt on a defense witness’s credibility;
- attempts to enhance a witness’s credibility by referring to the witness’s willingness to take a polygraph test; and
- comments and questions that suggest that a defendant’s reliance on constitutional rights establishes evidence of guilt.

For example, a defendant who offers an innocent explanation for his conduct at trial may

have that explanation impeached by the prosecutor, who insinuates that the defendant's failure to give an account of his conduct following a Miranda warning suggests that his account is fabricated. Similarly, Gershman (1986) asserts that it is misleading for a prosecutor to ask a jury to conclude that the defendant's failure to testify is evidence of guilt. Distortion of the process can occur when prosecutors appeal to a jury's fears and prejudices, and Gershman also points out that presenting gruesome physical evidence and engaging in impassioned oratory can have the effect of manipulating the jury's prejudices. Another form of prosecutorial misconduct involves the prosecution attempting to intimidate or improperly influence key witnesses. For example, in a ruling in the 2009 case of *United States v. Ruehle*, District Court Judge Carney found gross prosecutorial misconduct where prosecutors contacted the employer of a witness who refused to cooperate and caused her to be terminated from that employment. They also subjected her to 26 "grueling interrogation" sessions, during which they attempted to shape her testimony to benefit the prosecution case. Another witness was forced to submit to 30 interrogation sessions and was ultimately forced to agree to an "unconscionable plea agreement" under which he would "plead guilty to a crime he did not commit and pay a ridiculous sum of \$12 million" (Chalmers 2010). Prosecutors also threatened to issue a grand jury subpoena to the 13-year-old son of one defendant and to force the boy to testify against his father (Chalmers 2010).

Gershman (1986: 141) suggests that prosecutorial misconduct continues to exist because of the absence or inadequacy of penalties imposed on the prosecutor for such misconduct. Even when an appellate court does sanction a prosecutor by cautioning him or her or by reversing the case, this may not be enough to dissuade prosecutors from further impropriety. Fisher (1988: 213) argues that for prosecutors the endorsement of "conviction affirmed" in appellate opinions is more important than any condemnation of prosecutorial misconduct. He notes that such opinions often refrain from identifying the prosecutors whose conduct has been condemned and that the courts rarely make references to disciplinary bodies in such incidents. Furthermore, prosecutors are not personally liable for their misconduct and enjoy absolute immunity, so during the course of a trial, the prosecutor is free from any civil liability arising from any misconduct, even if it was performed with malice (Gershman 1986: 142).

Explanations for prosecutorial misconduct include the notion that prosecutors aim to secure justice and, believing most defendants to be guilty, feel compelled to avoid problems that might render a not-guilty verdict. Such conduct would include allowing a witness to lie in the interest of serving the prosecutor's "truth" (Schoenfeld 2005: 252). Thus, it is the prosecutor's firm belief in the defendant's guilt that allows him or her to use means that justify the end. In this sense, prosecutorial misconduct appears to mirror the police noble cause corruption discussed in [Chapter 2](#). Other explanations blame

misconduct on the mentality that compels prosecutors to win at all costs (p. 252). A district attorney, for example, may be under some pressure to secure convictions to ensure reelection because voters commonly look at conviction records to assess the competence of a prosecutor.

Some commentators also suggest that the Supreme Court has been reluctant to control prosecutorial misconduct (Fisher 1988). For example, Gershman (1987: 218) contends that the Court has refused to specify ethical standards for prosecutors and has encouraged “prosecutorial overreaching.” In one case, the Illinois Supreme Court said that a prosecutor had acted improperly but refused to discipline him because he was motivated by “a sincere, if misguided, desire to bring corrupt attorneys to justice” (In re Friedman 1979). Generally, in cases of prosecutorial misbehavior, the courts excuse misbehavior by applying arguments of fundamental fairness and harmless error. Francis Allen (1985: 335) has concluded that the problem of controlling prosecutorial excess “is one of ... [the] great unsolved problems in criminal law administration.” Allen (p. 334) cites the position taken by a court in Texas on an apparently deliberate attempt by a prosecutor to mislead a jury when the court decided that even though there had been a deliberate attempt to mislead, it would only consider the effect of the prosecutor’s comment and not the intent of the speaker. In that case, the court found that the error had been ameliorated by the court’s instruction to the jury.

State bar associations and disciplinary bodies are empowered to sanction prosecutorial misconduct but do so infrequently. For example, a 1999 investigation by the *Chicago Tribune* found that not one single prosecutor was sanctioned by a professional body in relation to 381 convictions reversed on appeal because of misconduct (Schoenfeld 2005: 261). In February 2006, the *San Jose Mercury News* reported that after reviewing 1,464 lawyer discipline cases published in the *California Bar Journal* between 2001 and 2005, they were able to find only one case where disciplinary action was taken against a prosecutor for misconduct (Ridolfi 2007: 11). The possibility of criminal prosecution for misconduct is equally remote, and according to Heather Schoenfeld (2005), “Criminal sanctions for misconduct are practically nonexistent” (p. 261). She gives one example, however, of a prosecutor who fabricated and withheld evidence and knowingly introduced perjured testimony who received a \$500 fine and an official censure from the court.

Model Rule 3.6 forbids prosecutors from making specific kinds of statements out of court that might prejudice a criminal trial. However, the rule includes an exception for necessary statements directed toward public information and for legitimate law enforcement purposes. Hazard and Hodes (2002) give the example of an accused escaping from prison after murdering a prison officer and the prosecutor being permitted

to issue a warning that the accused was armed and dangerous as a legitimate exception.

The practice of deferred sentencing, in which the prosecutor delays the sentencing of a witness who has pleaded guilty but will not be sentenced until after giving testimony against another defendant in a way satisfactory to the prosecution, is also condemned (Freedman 1975b: 89). Freedman points to another common form of witness coercion involving the use of prior convictions to impeach a defendant or defense witness as an instance where the prejudicial effect on the jury outweighs the attempt to cast doubt on credibility. He suggests that a prosecutor's actual motive in using prior convictions should be considered, noting that in one case the prosecutor argued before the jury that it should consider the "kind of person the defendant was" in view of the criminal records of the defense witnesses with whom the defendant had associated. Freedman (p. 91) also notes that prosecutors must maintain strong relationships with the police, and this may influence the prosecutor's conduct because it could lead to covering up police abuses such as brutality, perjury, and unlawful interrogation.

[Case Study 5.4](#) is an example of a determined prosecutor who resisted DNA evidence that would have exonerated a convicted rapist who asserted that he had given a false confession because of threats from the police who interrogated him.

[Case Studies 5.5](#) and [5.6](#) reveal prosecutors who withheld information in the interests of securing a conviction.

Case Study 5.3 Wrongful Conviction Payment

New York City has agreed to pay \$3.5 million to a man from Queens wrongfully imprisoned for 12 years after being convicted of attempted murder. The man, Shih-Wei Su, was convicted in 1992 on what turned out to be false testimony from a star witness. The prosecution was aware that the evidence was false, and the district attorney's office was condemned by the U.S Court of Appeals when overturning the conviction. Mr. Su's lawyer said that he was aware that about 80 convictions in Queens had been overturned because of wrongdoing by prosecutors, but no disciplinary or other action had ever been taken against them.

It was alleged at trial that Mr. Su had ordered fellow members of a youth gang to shoot a member of a rival gang at a pool hall in 1991. He was convicted after a key witness was offered leniency by prosecutors. Mr. Su received a sentence of 16 to 50 years and was released in 2003. The federal appeals court found that the prosecutor, Linda Rosero, had secured false testimony and misled members of the jury.

Mr. Su was 17 years old when he went to prison. After his release, he filed a complaint against prosecutor Linda Rosero with the Grievance Committee of the 2nd and 11th Judicial Circuits. The committee accepted Ms. Rosero's argument that the misconduct was not hers but that the responsibility lay elsewhere within the district attorney's office. The committee considered her conduct to have been "naïve, inexperienced and, possibly, stupid" and issued her a written admonition.

SOURCE: Kilgannon 2008.

A Closer Look

Justice Department Acts on Prosecutor Misconduct

On August 9, 2011, the Department of Justice announced the establishment of a new unit to assess disciplinary action for career officials who commit prosecutorial misconduct. That action could include referral to a state bar association for punishment.

The unit, called the “Professional Misconduct Review Unit,” will be tasked to review cases in which the department’s ethics watchdog—the Office of Professional Responsibility—finds that an official intentionally or recklessly violated the rules under which they operate—for example, the obligation to reveal mitigating evidence to the defense.

SOURCE: Savage 2011.

Case Study 5.4 Convict’s DNA Sways Labs, Not a Determined Prosecutor

In May 1987, Bruce Godschalk, 26, was convicted of raping two women who lived in the same housing complex in a suburb of Philadelphia. He was sentenced to 10 to 20 years in prison, and his conviction was based largely on a confession that he retracted long before his trial. Following his conviction, tests by two laboratories engaged by the prosecution and the defense produced the same outcome—namely, that both rapes were committed by the same man, but that Mr. Godschalk was not the perpetrator.

The Montgomery County District Attorney, Bruce L. Castor Jr., has rejected cause to release Mr. Godschalk, claiming that the DNA testing is flawed and that he has confidence in the tape-recorded confession. Mr. Castor wanted more time to review the DNA testing results in Godschalk’s case, orders for which Godschalk obtained after 7 years of battling with prosecutors. Over the last decade, DNA testing has freed more than 100 wrongfully convicted persons, with about 20% of those convictions resulting from false confessions. Mr. Godschalk’s only previous arrests were for possession of marijuana and driving while impaired.

During the investigation, Mr. Godschalk’s picture was shown to one of the rape victims by police 6 months after the rape incident, and after considering his and other photographs for more than an hour, the victim identified Godschalk as the rapist. Godschalk was then interrogated by a police detective and admitted the crime, but the detective did not record the hours of interrogation leading up to the confession. According to Mr. Godschalk, his confession was false as a result of threats made by the detective, but his motion to suppress the confession was denied during the trial. Mr. Castor refused to let Mr. Godschalk out of prison and stated, after being asked what scientific basis he had for deciding the testing was flawed, “I have no scientific basis. I know because I trust my prosecutors and my tape-recorded confession. Therefore the results must be flawed until someone proves to me otherwise.”

At the request of *The New York Times*, the DNA test results from the prosecution and the defense were reviewed by a third expert, who concluded that Mr. Godschalk was not the rapist.

SOURCE: Rimer 2002.

Case Study 5.5 Prosecutor Withholds Evidence

In 2004, Ernest Ray Willis was released from death row after spending 17 years there for a crime he did not commit. He was convicted in 1987 of setting a house on fire and killing two women. During his trial, the prosecutor referred to him as a “rat,” “an animal,” “a mean vicious dog,” and “a satanic demon.” Jurors had to decide during the sentencing procedure whether Willis posed a future danger to society, and they answered in the affirmative and sentenced him to death.

It was discovered during a postconviction investigation that a state psychologist had examined Willis before trial and reported that he would not present much of a future danger to society, but this information, which could have helped him avoid a death sentence, was never given to his lawyer. However, the prosecutor did know of this report because a FedEx record showed that it had been delivered to his office; additionally, the psychologist remembered personally meeting with the prosecutor and advising him that Willis would not make a convincing death penalty case. The prosecutor has denied lying about the psychologist or the report.

A federal judge ordered the state to retry Willis or set him free, determining that suppressing the report plus other factors violated his rights. Following the investigation, the new district attorney requested Willis’s immediate release from jail. The original prosecutor maintains that Willis was guilty and has no second thoughts about his prosecution of the case.

SOURCE: Gier 2006: 192.

Case Study 5.6 Release After 14 Years

On December 28, 2000, Michael Ray Graham Jr., 37, was freed from death row at Louisiana State Penitentiary at Angola after 14 years of incarceration. The state had dismissed all charges against him because it did not have any credible evidence linking him to the crime for which he had been incarcerated. As compensation, he received only a check for \$10 from the prison to cover his transportation out of Angola.

In another trial, Albert Ronnie Burrell, 45, had been convicted of the same crime as Mr. Graham—the murder of an elderly couple in Louisiana—and he, too, had spent almost 14 years at Angola on death row. He, too, had all charges against him dismissed by the state. Mr. Burrell, who is mentally challenged and illiterate, came very close to being executed, missing it by only 17 days.

The release of the men brought to eight the number of wrongfully imprisoned death row inmates exonerated in the year 2000; altogether, over 100 such inmates on death row have been cleared of all crimes and released since the reintroduction of the death penalty in 1973.

According to their lawyers, prosecutorial misconduct was the cause of the incarceration of these two men. No physical evidence linked them to the crime, and their convictions rested largely on the evidence of a jailhouse snitch, who, according to law enforcement officials, was known to them as a habitual liar. The snitch claimed that both men had confessed to the murders while in jail, but he admitted at his own trial that he had spent time in several mental hospitals and had written countless

bad checks. The fact that the prosecution had made a plea agreement with the snitch had not been revealed at Mr. Graham's trial, nor had the fact that the snitch had previously been found to be mentally incompetent. As well, demonstrating the weak case against Mr. Graham and Mr. Burrell, even the prosecutor had admitted to the court that the case should never have been taken to the grand jury.

SOURCE: "Texas Judge Reprimanded in Death Row Case." 2010. New York Times, July 17; "92nd Death Row Inmate Freed Since '73." New York Times, January 5, 2001.

Judicial Ethics

The judicial function is a core part of our society. Judges must be competent and ethical, and their actions must always promote respect for their decisions. Judges have considerable power and authority over individuals, and they exercise substantial discretion when acting judicially. They are expected to conduct themselves according to high standards of professional conduct and are held to higher standards of law than lawyers or other persons not invested with the public trust. A judge's duty extends beyond the limits of his or her court and into the judge's personal life, where standards of propriety are far higher than those set for others (Shaman, Lubet, and Alfini 2000: 1). These strictures concerning judges and judicial conduct are reflected in the Code of Judicial Conduct of the American Bar Association (ABA Standing Committee on Ethics and Professional Responsibility 1999).

A Model Code of Judicial Conduct was adopted by the ABA in 1990 and establishes standards for ethical conduct by judges. The ABA warns that the code is not intended as an exhaustive guide for the conduct of judges but is intended to state basic standards governing judicial conduct and provide guidance to assist judges in maintaining high standards of personal and judicial behavior. Some of the most important canons of the code relate to impartiality and bias. Under Canon 3, judges are to perform their duties without bias or prejudice and are not to exhibit bias or prejudice, including that based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status. Further, judges are not to allow staff and court officials to show bias or prejudice.

Judges must also be faithful to the law; must not be swayed by partisan interests, public clamor, or fear of criticism; and must be patient, dignified, and courteous to those with whom they deal. Judges are not to make public comments about proceedings that are pending in court that might reasonably be expected to affect the outcome of such proceedings, impair their fairness, or substantially interfere with a fair trial. However, judges are allowed to make public statements explaining the procedures of the court for public information.

One significant aspect of the U.S. judicial system is the election of judges, sometimes through partisan elections. This raises questions about the influences that elected judges may be subject to in performing their judicial duties. In many states, judges are elected through partisan or nonpartisan elections. When an election is nonpartisan, the candidate's political party affiliations do not appear on the ballot (Comisky, Patterson, and Taylor 1987: 9). In states that use partisan elections, judicial candidates are usually nominated in primaries or conventions or through nominating petitions. The proponents of partisan elections for judges argue that judges are policy makers and should therefore be directly chosen by, and be accountable to, the people who are affected by those policies; that a partisan election is an open method of selection; and that identifying a potential judge's political affiliation gives voters an indication of his or her political ideology (p. 8).

Would-be judges who conduct campaigns to get elected usually have to raise money to fund their election, but in 29 of the 38 states that require judges to be elected, there are bans on them directly soliciting funds. As reported in *The New York Times* (Editorial 2015), such a ban was challenged by a candidate for a county court seat in Florida who sent out a letter to local voters soliciting funds, contrary to a Florida rule that bans such conduct. She claimed that the ban was a violation of the First Amendment, but the U.S. Supreme Court ruled that judges are not politicians even when they have to go through an election process, and their authority depends on the public's confidence in their integrity. The ruling of the Court has limited effect in practice because judges may still raise money through campaign committees, and it does not prevent them from learning the identity of their donors.

The former chief justice of Alabama, Sue Bell Cobb, has stated that she needed \$2.6 million to win the election for chief justice there and that her opponent raised nearly \$5 million. Judges are permitted to directly solicit funds in Alabama, and Judge Cobb made calls to friends, family, and also to lawyers "who have appeared before us, lawyers who are likely to appear before us, officials with companies who may very well have interests before the court" (Politico March/April 2015). Judge Cobb considers that public trust is eroded when candidates for judicial office have to seek funds from donors and claims to have seen cases where "fellow justices consistently ruled a certain way because business community backing alone had brought them to the court."

Those who argue against partisan judicial elections contend that

- voters generally have no knowledge of the candidates' qualifications and in any event are not competent to assess qualifications;
- that nominees are selected by political leaders based on political grounds rather than merit;

- that successful candidates are likely to feel obligated to the political leaders who selected them and to those who contributed to their campaign funds;
- that many otherwise qualified candidates are deterred from seeking office because they are required to conduct political campaigns;
- that voters have a tendency to be influenced by nonjudicial qualifications such as political affiliation; and
- that having to periodically seek reelection discourages many potentially worthwhile candidates (Comisky et al. 1987: 8).

To what extent do judges take ideological approaches in their judging? Even though judges in Arizona are no longer elected but are appointed, Susan Philips (1998: 22) found that the judges with whom she worked generally agreed that the judicial selection process remains a political one. In one study of judges in a superior court in Arizona, Philips (p. 14) found that judges presented themselves as mere implementers of law, divorced from their political and social backgrounds, despite the fact that they were required to be significantly involved in local political processes to become judges. Her research indicates that judges who take a procedure-oriented stance on due process represented a politically liberal approach to the role of the state in relation to the individual. By contrast, judges who take a record-oriented stance followed a politically conservative notion of the role of the state in relation to the individual (p. 79).

Philips's (1998) study revealed that the conservative view sees the state as attempting to minimize interference in the lives of individuals, whereas the liberal view considers the state as the protector of human liberties (p. 79). In looking at judicial approaches to guilty pleas, she observed that record-oriented judges did not regard it as their responsibility to ensure that a defendant knowingly and voluntarily pleads guilty. These judges often referred to their assumption that defendants are aware of what they are doing and that they are capable of comprehending judicial instructions. In the case of procedure-oriented judges, however, the responsibility for protecting the defendant's due process rights is taken on by the judge, who also recognizes that some persons need more help than others in comprehending court procedures. Philips's study, along with the systems of political appointment and partisan election of judges, raises the issue of the linkages between political ideology and judicial performance, especially in relation to the ethical duty of a judge to make nonpolitical, unbiased decisions (see the "Election of Judges Proposed for Maricopa County, Mesa, Arizona" Closer Look box).

Ethical Rules Governing Judges

As well as acting without prejudice or bias, judges are expected to disqualify themselves in any proceeding in which their impartiality might be questioned. This includes

instances in which a judge has a personal bias or prejudice concerning a party or lawyer, has personal knowledge of disputed evidence, or has previously served as a lawyer in the matter in dispute.

In terms of a judge's personal life, under Canon 4 personal activities are categorized as "extra-judicial activities," and judges are required to minimize the risk of conflict between those activities and their obligations as judges. Accordingly, judges are not to act in extrajudicial activities in a way that will cast doubt on their impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. The commentary to this canon gives as examples of expressions of extrajudicial bias or prejudice racial slurs and jokes that may cast doubt on the judge's capacity to act impartially.

In financial activities, judges are not to engage in financial and business dealings that may be seen as exploiting their positions as judges or to become involved in transactions or business relationships with lawyers or other persons likely to come before the court. Judges are not to accept, and are to urge members of their families not to accept, gifts, loans, or favors—except those permitted as listed in the code. Permitted activities include accepting public testimonials or gifts, ordinary social hospitality, scholarships and fellowships, and loans, provided they are not from lawyers or their firms if they have come or are likely to come before the judge.

Canon 3 prohibits judges from commending or criticizing jurors for their verdict. In Utah, which has a code of judicial conduct almost identical to the ABA Code, a judge was criticized for violating this prohibition. He reportedly told the jury, "This was a pretty clear case ... I don't know how you came out with this result, and this is one of the very few times I've criticized the jury" (Averett 2004: 698).

In a discussion of the application of virtue ethics to judges (see [Chapter 14](#) for a discussion of virtue ethics), Farrelly and Solum (2007: 1) identify the following virtues as being relevant to the social role of a judge: incorruptibility, sobriety, courage, good temper, impartiality, diligence, and carefulness. They argue that these virtues, which they refer to as "uncontested judicial virtues" are widely expected assumptions about what constitutes "good judging" and ought to be applied when federal judges are selected instead of focusing on their views on social issues. [Case Studies 5.7](#) through [5.13](#) show examples of breaches of judicial ethics.

A Closer Look

Election of Judges Proposed for Maricopa County, Mesa, Arizona

In Maricopa County, judges have not been elected since 1974, when a system was installed under which judges are chosen by a panel of legal experts and the state governor. However, in a recent move to change the system, Rep. Russell Pearce (R-Mesa) wants to change the law and have judges elected, as they are in other states. Critics of the move say that the proposal will result in the election of judges who will make decisions based on political popularity.

Chief Justice Ruth McGregor of the Arizona Supreme Court is firmly against the proposal, pointing out that the present system has meant that judges have not had to campaign to secure office and that they have been able to remain independent of political influence in their decision-making. The chief justice believes that changing the system to a ballot of judges will conflict courtrooms because of the influence of lawyers and lobbyists who provide campaign funds. Also, she points out that judges are not representative officials and are responsible for upholding the laws and the constitution.

Chief Justice McGregor argued that if passed the measure would vastly increase the number of Republican judges, disturbing the existing balance in which the courts have an even number of Democrats and Republicans. McGregor favors every judge in Arizona to be appointed and said she would oppose the proposal, which appeared on the November ballot, where voters would decide whether Maricopa County judges should again be elected. The proposal was defeated, and again in 2012.

SOURCE: "Judges Might Go on Ballot in Maricopa County." 2008. East Valley Tribune, March 24.

Judicial Misfeasance

The following case studies provide examples of judicial misfeasance.

Case Study 5.7 Prosecutor Says Tape Shows Brooklyn Judge Took a Bribe

On February 8, 2002, *The New York Times* reported that a Brooklyn judge had been arraigned on a charge of accepting a bribe. Prosecutors had obtained a covert tape recording showing the judge laughing as he persuaded a lawyer to give him what both men seemed to understand was a payoff in a civil case that would net the lawyer a \$1.6 million fee. The lawyer had been wired by the prosecutors and had delivered \$18,000 to the judge's robing room at the state supreme court in Brooklyn. Prosecutors claim the judge wanted the payment in exchange for his approval for the settlement of a civil case. Justice Barron was charged with one count of bribe receiving and could face a prison term of 15 years. The prosecutor explained that his investigators were expanding their inquiry into judicial wrongdoing in Brooklyn, including examining hundreds of Justice Barron's cases.

SOURCE: Associated Press 2011.

Case Study 5.8 Judge Receives 28-Year Sentence for Taking Bribes

In Pennsylvania, former Luzerne County Judge Mark Ciavarella received a jail sentence of 28 years in

federal prison for taking \$1 million in bribes from the builder of two juvenile detention centers.

Because of the actions of the judge, the state supreme court had to vacate about 4,000 convictions entered by former Judge Ciavarella between 2003 and 2008 because of violations of the rights of the juveniles involved to legal counsel and to enter an informed plea.

Prosecutors said that Ciavarella and another judge, Michael Conahan, had accepted more than \$2 million in bribes and had extorted hundreds of thousands of dollars from the co-owner of the juvenile facilities. Ciavarella made sure that the two juveniles facilities were kept full of juveniles, many of whom were first-time offenders convicted of minor offenses. Former Judge Conahan pleaded guilty and was later sentenced to 17½ years. Ciavarella was sentenced to 28 years.

SOURCE: Associated Press 2011.

Case Study 5.9 Federal Judges and Financial-Interest Conflicts

Responding to criticism from Congress about lapses in judicial ethics, the chief justice decided in 2006 that all federal judges would be required to install software on their computers to avoid unknowingly participating in cases in which they have a financial interest. Also, judges were prohibited from being reimbursed for attending a private seminar, unless the seminar sponsor filed a public disclosure statement on the program content and financing sources. About 700 complaints a year are received about federal judges.

SOURCE: Greenhouse 2006.

Case Study 5.10 Appearance of Partiality

In October 2006, a panel of the Washington Supreme Court reprimanded a judge of the court who visited a facility holding sexually violent predators who had completed their sentences but had been determined by the court to be likely to engage in predatory acts of sexual violence. The judge was sanctioned with admonishment, the mildest punishment, for creating an appearance of partiality when he questioned inmates and accepted documents from them at the facility. The complaint was made by prosecutors, and the judge was invited by several inmates.

SOURCE: Liptak 2006.

Case Study 5.11 Judicial Bribery

In August 2004, it was reported that surveillance tapes recorded in a Brooklyn matrimonial judge's office showed the judge offering a lawyer detailed instructions on how to argue a case before him and informing the lawyer that he would award his client the rights to a house in a divorce case. The judge has been charged with accepting cash, cigars, and dozens of meals from the lawyer in exchange for giving him an advantage in divorce cases and referring clients to him. The tapes also show the judge accepting \$1,000 cash and a \$250 box of cigars from the lawyer.

SOURCE: Newman 2004: 1.

Case Study 5.12 Gross Abuse of Power

In December 2004, it was reported that an upstate New York judge had been censured for sending people to jail for minor misbehavior at his courthouse. In one case, a college student at Skidmore College was told by the judge that he was “an obnoxious young man,” to which the student responded that the judge was “an obnoxious old man.” In retaliation, the judge ruled the student in contempt and sent him to jail, where he was held in solitary confinement for 4 days. In a second case, the judge ordered the parents of a young man to attend before him after their son had pleaded guilty on some traffic tickets. Reportedly, the judge told the parents he had overheard them exchange curse words in the parking lot before the court case began. The judge ordered the father to be handcuffed and taken to a jail cell and, despite her objections, told the wife that she needed an order of protection from her husband. The state’s Commission on Judicial Conduct censured the judge, calling the two acts a gross abuse of power.

SOURCE: Baker 2004: 5.

Case Study 5.13 Texas Judge Reprimanded

A Texas judge who refused to keep the courthouse open for a last minute appeal from a death row inmate was reprimanded by a judicial panel on August 12, 2011. It was on September 25, 2007, that lawyers for Michael W. Richard requested the court to stay open to receive an appeal, but the judge reportedly told the clerk that the court closes at 5 p.m. That same night, Mr. Richard was put to death.

The judge, Sharon Keller, is the state’s highest ranking criminal judge and was warned publicly by the State Judicial Commission on Judicial Conduct for “willful or persistent misconduct” that “casts public discredit on the judiciary.”

SOURCE: “Texas Judge Reprimanded” 2010.

Summary

Like members of most professions, lawyers enjoy the benefit of detailed rules concerning ethical conduct, and judges are in a similar position. Ethical dilemmas for lawyers can usually be resolved by applying the relevant ethical standard. This mechanism has the effect of simplifying moral issues that arise in legal practice. There are notable tensions within the criminal justice system affecting lawyers, and the adversarial system itself underpins and promotes these tensions. Questions about a defense lawyer’s proper role are answered by ethical standards, but the morality of keeping silent about a client’s criminal conduct continues to provoke debate among the general public. However, once an understanding is gained about the connection between the protection of individual rights in the criminal process and the task of the defense lawyer in ensuring those protections are enforced, these moral issues can be seen within context, particularly within the framework of the adversarial system.

Prosecutors are in a special position because of the tensions and conflicts to which they may be subjected. To a great extent, these arise as a result of the existence of wide prosecutorial discretion. Whether the primary concern is for the victim, the community, reelection, or discovering the truth, prosecutors must make choices and decide their constituency, either generally or in a particular case.

Generally, there exists considerable potential for judges and prosecutors to become corrupted because they enjoy such wide discretions and powers. Although judges perform in public and are subject to a high level of accountability, prosecutors' positions are much more problematic due to the lack of transparency surrounding their prosecutorial decision-making.

Discussion Questions

1. Explain the importance of lawyer–client confidentiality, and discuss any exceptions to the confidentiality rule.
2. The existence of the adversarial system and the need for lawyers to act zealously explains why lawyers are not troubled by what some see as their “immoral” actions in defending those they know to be guilty. Discuss.
3. In what circumstances must lawyers disclose crimes committed by their clients?
4. What are lawyers' responsibilities if their clients insist on perjuring themselves in testimony to the court?
5. Consider the advantages and disadvantages of plea bargaining from the prosecutor's point of view.
6. Prosecutors have too much discretion and are accountable to no one for the exercise of their discretion. Discuss.
7. If accused individuals have incompetent counsel who neglect to present all the material facts that might assist them, prosecutors have an ethical duty to make sure these facts are presented consistent with their responsibility to achieve just results. Discuss.
8. Explain how public opinion about crime might influence the decisions of prosecutors and judges in light of the fact that both are often elected officials.
9. Discuss the ethical requirement for prosecutors to “seek justice, not merely to convict” and how this expectation might be enhanced in the justice system.
10. The practice of overcharging as a means of obtaining a sufficient number of plea bargains, in which cases are commonly drawn up as felonies with the prosecutor ready to accept a plea for a misdemeanor, coerces the defendant into foregoing the right to trial by jury. Discuss and explain the consequences.
11. The exercise of discretion granted to the prosecutor in making the decision to charge is not accompanied by any controls, and the decision of whether or not to

charge is “the single most unreviewed exercise of the power of the criminal law available to an individual in the American system of justice” (Gottfredson and Gottfredson 1988: 114). The ABA has made recommendations for criteria that a prosecutor should consider when deciding to charge, including the disproportion of the punishment to the offense. Discuss the prosecutor’s decision to overcharge in drug offenses in light of the mass incarceration outcome of the war on drugs, mandatory sentencing, three-strikes-and-you’re-out legislation (see [Chapters 4 and 9](#)), and the conspiracy laws that punish small drug users and dealers the same as kingpins.