


Fall 1998

What If There is No Client?: Prosecutors as "Counselors" of Crime Victims

Stacy Caplow

Brooklyn Law School, stacy.caplow@brooklaw.edu

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>

 Part of the [Civil Procedure Commons](#), [Criminal Procedure Commons](#), [Legal Education Commons](#), [Legal Profession Commons](#), and the [Other Law Commons](#)

Recommended Citation

5 Clinical L. Rev. 1 (1998-1999)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

WHAT IF THERE IS NO CLIENT?: PROSECUTORS AS “COUNSELORS” OF CRIME VICTIMS

STACY CAPLOW*

I. INTRODUCTION

As a teacher in a criminal practice-based clinic, I often feel like an eavesdropper on the discourse among clinicians about lawyering skills and professional values. Both the context of, and the language describing, criminal law practice, are sufficiently different from civil practice to make it difficult to teach many of the lessons and approaches developed in traditional texts used in clinical education, particularly those concerned with client-counseling.¹

The dissonance between the sounds heard in a criminal and civil practice was loud when I was teaching a criminal defense clinic. When I moved on to teach an in-house prosecutor’s clinic, the discord became deafening.² My experience in a prosecutor’s program, which I

* Professor of Law and Director of Clinical Education, Brooklyn Law School. Many thanks to Minna Kotkin for reading an early draft of this piece, to Randi Korobelnick for her reliable research assistance, to Paulette Thielman and Joanne Colonna for their tireless secretarial help, to Susan Herman, Nan Hunter, and Liz Schneider for their enduring support, and to the generous Brooklyn Law School Summer Research Stipend Program.

¹ The preeminent texts are ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* (1990); DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991); THOMAS L. SHAFFER & ROBERT S. REDMOUNT, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977); THOMAS L. SHAFFER & JAMES R. ELKINS, *LEGAL INTERVIEWING AND COUNSELING* (2d ed. 1987). Only GARY BELLOW & BEA MOULTON, *LAWYERING PROCESS: CRIMINAL PROBLEM SUPPLEMENT* (1978), develops criminal defense practice with the kind of detail conducive to inspiring reflection that clinicians usually apply to civil practice situations.

² Faculty-supervised clinics in which students personally handle the prosecution of the case are unusual. The more typical model is an externship that places students in local and federal prosecutors’ offices under the supervision of an attorney, a conclusion confirmed by recent exchanges on the lawclinic listserv. The advantages of the faculty-supervised prosecution model were examined in detail by Karen Knight who teaches one of those few in-house prosecution clinics. *To Prosecute is Human*, 75 NEB. L. REV. 847 (1996). See also Martin H. Belsky, *Review Essay: On Becoming and Being a Prosecutor*, 78 NW. U. L. REV. 1485, 1496-1500 (1984); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. CRIM. L. REV. 197 (1988) (Prof. Fisher, who taught Professional Responsibility at Boston University School of Law to students prosecuting cases, partially based this article on some of their experiences and observations). For an early CLEPR-published discussion of prosecutor clinics see MURRAY TEIGH BLOOM, *THE PROSECUTOR CLINICS* (1974).

began after many years of teaching a live-client defense clinic and several externships, posed many atypical, idiosyncratic pedagogical issues, none more paradoxical than whether and how to teach counseling in the absence of a client.³ The separateness I had always felt practicing and teaching about criminal law never felt wider than when I tried to explore approaches to relationships between prosecutors and the individual crime victims whose interests they ostensibly represented. I was now excluded even from the client-related concerns of my criminal defense clinical colleagues.

When clinicians write about criminal practice they almost always describe defense work.⁴ This scholarship has little utility for the prosecutor who is balancing a different set of goals and interests, and who often is the target at which this defense-oriented advice is aimed.⁵ For these reasons, the standard texts also are of limited use to those of us who teach in prosecutor clinics.⁶ Although it is possible to cull materi-

³ Student prosecutor programs are wholly dependent on the cooperation of the office with which the clinic is affiliated since only the duly elected or appointed prosecutor has legal authority to prosecute a case. Thus, the clinic is obligated to follow office policies and norms, as well as to obey any specific instructions emanating from the office. Most of the time, this simply means that the students have to fill out office forms and use certain personnel or resources. Sometimes, however, office directives or customs interfere with the kind of open-ended case planning and theory development clinicians try to teach. For example, the negotiation process is limited when office policy mandates that a particular plea offer must be made in every case in a certain category. Deprived of the ability to develop their own plan, students in this situation will learn less about negotiation than students with more independence. Given their relatively light caseloads, clinic students also dedicate much more time and effort to what is often their first lawyering experience. For example, they usually have much more victim contact which enables them to speak in court and to negotiate with defense attorneys with more first-hand knowledge of the facts. Full-time ADAs often rely on hearsay notes in a file and sometimes are forced to make compromises because they are unprepared to rebut assertions by better informed defense attorneys. Ironically, when this happens on occasion, judges have criticized my students for being more "hard-nosed" and "unreasonable" than the "regular" ADAs.

⁴ See, e.g., BELLOW & MOULTON, *supra* note 1; ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER (Rodney J. Uphoff ed. 1995) (many chapters were written by clinicians); Abbe Smith, *Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New-Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1 (1993); Charles J. Ogletree, *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239 (1993).

⁵ For example, the literature about negotiation aimed at defense attorneys usually attempts to analyze prosecutorial psychology or to offer strategies for handling DAs. See, e.g., Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 73-82 (1985); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLIN. L. REV. 73 (1995).

⁶ Although the majority of prosecutor clinics are externships, *supra* note 2, most offer classroom components in which the skills in question, as well as the prosecutorial role, are considered. The dearth of background reading is problematic for any clinical teacher seeking to assign materials and to make the classroom a locus for critical inquiry rather than only case-rounds. As Bob Dinerstein observed: "In the field of clinical legal education, textbooks matter . . . [c]linical texts organize what we think we know about the world of

als from a variety of sources about substantive criminal law and procedure, as well as topics such as plea bargaining, ethical obligations of prosecutors, and trial skills, there is very little writing about the communications that resemble client counseling which take place between a prosecutor and the crime victim.⁷ This is a regrettable gap which ignores an important segment of legal practice, in which many of our students find entry-level employment. Moreover, to the extent that clinical theories of practice have influenced other areas, they have had little direct impact on prosecution.⁸

Writings by and about prosecutors also fail to address the relation between prosecutor and crime victim.⁹ Any mention — and there are very few — of the prosecutor's responsibility to the crime victim is a cursory acknowledgment of some basic consideration owed.¹⁰ The only serious and substantive discussion of the nature of the relationship can be found in some recent writings about domestic violence "no-drop" policies that describe the shifting balance of prosecutor-victim decision making control.¹¹

lawyers and lawyering." Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 UCLA L. REV. 697 (1992).

⁷ In my search, I found only one book that had materials relating to a victim interview. SHAFFER & REDMOUNT, *supra* note 2, at 2-1 - 2-32, contains the transcript of an interview of a rape victim followed by some questions and problems. Of all crime victims to present to students, this choice is questionable given the conceded special skills and sensitivities required to compassionately, yet professionally, interview a rape victim. In most prosecutors' offices, rape cases are handled in designated units by more experienced, specially trained, assistant district attorneys.

⁸ As more and more students participate in law school clinics in which interviewing and counseling are taught, many neophyte ADA's will have been exposed during law school to concepts that they incorporate, even unwittingly, into their interactions with others.

⁹ See, e.g., JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* (1980) (in chapters on external factors affecting prosecution, no mention of victim); DAVID M. NISSMAN & ED HAGAN, *THE PROSECUTION FUNCTION* (1982) (in chapter on ethical considerations, no mention of crime victim). I also skimmed some popular books by and about prosecutors, but found no mention of how a prosecutor does or should relate to the crime victim. See, e.g., MARIO MEROLA, *BIG CITY D.A.* (1988) (autobiography of former District Attorney of the Bronx); JAMES MILLS, *THE PROSECUTOR* (1968) (author observed ADAs in Queens County District Attorney's Office); JAMES B. STEWART, *THE PROSECUTORS* (1987) (inside look at various state and federal prosecutors' offices).

¹⁰ The sole reference to interviewing a crime victim that I found was in an advice book to prosecutors. MICHAEL MARCUS, *TRIAL PREPARATION FOR PROSECUTORS* (1989). In the how-to chapter "Interviewing Witnesses," the author treats victims no differently than witnesses. The shallowness of this book's treatment of the subject is exemplified by this solitary reference: "Crime victims and eyewitnesses should always be interviewed at the crime scene where they will be better able to explain the circumstances of the crime" *Id.* at 72.

¹¹ See, e.g., Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1898-1900 (1996); Angela Corsilles, *No Drop Policies in the Prosecution of Domestic Violence Cases; Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 872-76 (1994). A no-drop policy restricts

The critical absence of an individual client to whom a lawyer owes allegiance and whose confidences are protected distinguishes prosecutors from most other lawyers engaged in litigation.¹² Essentially, the prosecutor makes decisions unilaterally and avoids the process of, and the values underlying, client-centered decision making. Wherever a lawyer may fall on the continuum of client counseling approaches regarding the extent and degree of client deference, the debate is academic in the prosecutorial world. The realm of the prosecutor is characterized by virtually unreviewable discretion, and expansive authority which is rarely circumscribed by the courts,¹³ and restrained only slightly by official self-regulation,¹⁴ or personal self-governance.¹⁵

Although the client-centeredness model is the most dominant amongst clinicians, it is nonetheless debatable whether it is followed in its pure form in the real world of practice. Crediting clients with an awareness of their problems and possible solutions, this model informs and empowers clients to take responsibility for choosing among possible alternative outcomes. This approach also acknowledges the complexities of the attorney-client relationship in which the former is more than a mere technical advisor and the latter has some personal expertise or ideas about the underlying issues that prompted the consultation.

None of the values embraced by client-centered decision making, the ultimate goal of client-centered counseling, feature in the

the prosecutor's discretion to dismiss a case simply because the victim does not want to continue the case and denies the victim the exclusive choice of withdrawing a complaint I use the term "individual client" to describe a one-client, one-lawyer relationship in contrast to representation of entities or groups. There are numerous examples of lawyers who do not advocate on behalf of an individual client.

¹² I use the term "individual client" to describe a one-client/one-lawyer relationship in contrast to representation of entities or groups. There are numerous examples of lawyers who do not advocate on behalf of individual clients but even those lawyers who represent government or corporations must defer to the decisions of those who speak on behalf of those entities such as agency counsel or corporate director. Moreover, many lawyers who represent groups either as an organization or a class struggle with conflicts between individual and collective goals. See Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation or Groups*, 78 VA. L. REV. 1103 (1992).

¹³ See, e.g., *United States v. Goodwin*, 457 U.S. 368 (1982) (pre-trial change in charge is a proper exercise of discretion); *United States v. Batchelder*, 442 U.S. 114 (1979) (selection of charge is a proper exercise of discretion); *Bordenkircher v. Hayes*, 434 U.S. 257 (1978) (plea bargaining part of prosecutorial discretion); see generally, Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. (1971).

¹⁴ E.g., U.S. Dept. of Justice, UNITED STATES ATTORNEY'S MANUAL, <http://www/usdoj.gov/usao/ousa/foia_reading_room/usam>.

¹⁵ Benjamin R. Civiletti, *The Prosecutor as Advocate*, 25 N.Y.L. SCH. L. REV. 1 (1979) ("[I]n the end, self-governance is the essential restraint.").

prosecutorial decision about whether, whom and what to charge, what plea offer to make, and what sentence to recommend.¹⁶ Neither client autonomy, empowerment, cooperative decision making, confidentiality, nor personal accountability to the client are serious concerns for a prosecutor. To most prosecutors, these are foreign notions that might not even be part of their ordinary world view, unless they had been introduced to these ideas in law school. While many prosecutors are willing to engage with victims during the case preparation, few defer to the victim in critical decision making where there are disagreements about the direction of the prosecution.¹⁷ Even when the prosecutor's choices reflect the victims' goals, this coincidence is usually fortuitous rather than the product of deference. In short, while prosecutors perform a multi-faceted role, they are not counselors of clients.

My claim is that client-centeredness is more than a technique of structuring information gathering from and advice-giving to a client. It is the behavioral manifestation of a choice of values about lawyering that can exist in all areas of practice, even where there is no individual client.¹⁸ I propose that these values can be translated into a victim-centered prosecution, an improvement on the traditional approach to prosecution in which the victim is only one of the prosecutor's many constituents, enjoying no special privileges.¹⁹ In addition,

¹⁶ BASTRESS & HARBAUGH, *supra* note 2, at 255-57; BINDER, ET AL., *supra* note 2, at 17-18. See also, Robert L. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 502 (1990).

¹⁷ This is not to say that a prosecutor never considers a victim's goals, concerns, fears, or needs. Individual prosecutors can be humane, caring, and sympathetic, open to hearing about the victim's feelings. Yet, one study reported that only 41% of the prosecutors surveyed were concerned about the victim's opinion of a plea bargain. William F. McDonald, Henry H. Rossman, & James A. Cramer, *The Prosecutor's Plea Bargaining Decisions*, in THE PROSECUTOR 173 (William F. McDonald ed. 1979). Furthermore, compassion to victims does not lead necessarily to a relinquishment of prosecutorial control. These authors also reported that a victim's wishes were rarely considered in plea bargaining except in high-publicity and rape cases. *Id.* at 160.

At sentencing, in particular, victim involvement often is sought by prosecutors in an effort to persuade the judge to sentence more harshly. The Supreme Court in *Payne v. Tennessee*, 501 U.S. 808 (1991) permitted the practice of victim impact statements at capital sentencing proceedings. Victim impact evidence is intended to influence the sentencing court at the conclusion of the case, not the prosecutor during the earlier stages of the adjudication process. Moreover, victim impact evidence is typically, even blatantly, emotional, calling in question its value to the judge. Some commentators defend their use, see, e.g., Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 135 (1996), while others criticize them, see, e.g., Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996).

¹⁸ Steve Ellmann makes this point when he argues that despite differences in the techniques needed to represent groups in public interest litigation, "[t]he elements of a well-considered decision are the same for a group as for an individual." Ellmann, *supra* note 12, at 1132.

¹⁹ CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 759-60 (1986) ("The office of

if we teach students a client-centered model of decision making and then they go to work in a prosecutor's office, they may find ways of retaining and using their capacity to engage in the kind of interactions inherent in a client-centered model even if they have to struggle against the classic prosecutorial archetype. Despite the professional norms and traditions shaping the relative roles of prosecutors and victims, prosecutors and students in prosecutors' clinics should be able to incorporate more of the victim's interests and objectives into their decisions while balancing the fiduciary responsibility of the prosecutor to protect the public interest and integrity of the office.

This essay has two parts. In the first, I will draw on my background in both state prosecution and defense as a practitioner and a clinical teacher to argue briefly that criminal and civil practice differ sufficiently to make many of the themes of clinical education more difficult to apply. I will sketch portraits of the traditional prosecutor and crime victim, and discuss their customary relationship. For the purposes of this discussion, the term "crime victim" refers to the thousands of everyday victims of such crimes as robbery, larceny, burglary, or assault who command neither headlines, community attention, nor other special treatment that might privilege their personal preferences.²⁰ The prosecutions of the cases arising out of these crimes would be characterized as "routine." In the second part, using transcripts from two movies, *The Accused*²¹ and *Criminal Justice*²² to illustrate some of the mistakes prosecutors make, I will propose a model of victim-centered prosecution that borrows the fundamental values of collaboration, participation, and communication inherent in client-centered lawyering.²³

prosecutor can best be conceptualized as a lawyer with no client but with several important constituencies," including the police, victims of crime, other government agencies and the courts).

²⁰ The term "victim" connotes a person who "suffers a loss or injury as a result of an act that constitutes a crime under federal, state or local law." AMERICAN BAR ASSOCIATION, CRIME ISSUES FOR CONSIDERATION IN LAW SCHOOL CRIMINAL PROCEDURE AND CRIMINAL LAW COURSES 10 (1988). The Department of Justice developed a working definition of a victim as "someone who suffers, direct or threatened physical, emotional or financial harm as a result of the commission of a crime." See 48 Fed. Reg. 33,774 (1983) (interpretation of the "Victim and Witness Protection Act of 1982, 18 U.S.C. § 1512).

²¹ THE ACCUSED (PARAMOUNT PICTURES 1988).

²² CRIMINAL JUSTICE (HBO 1990).

²³ These movies, familiar to many readers, offer two versions of a prosecutor-crime victim relationship. My exemplars are drawn from the movies rather than real interactions because my clinic usually did not videotape witness interviews. To do so would be poor lawyering, except in the unusual case where preservation of testimony would be prudent. In many jurisdictions, statements of testifying witnesses must be disclosed at trial to the defense. See, e.g., 18 U.S.C. § 3500; FED. R. CRIM. P. 26.2; Jencks v. United States, 353 U.S. 657 (1957); People v. Rosario, 9 N.Y.2d 286 (1961). Since any recorded version of the witnesses story could be used for impeachment, few prosecutors risk memorializing their

II. PROSECUTORS, VICTIMS AND THEIR WORLDS

A. *Lawyering in a Criminal Practice*

Several factors distinguish the typical criminal practice from its civil counterpart. First, since most cases begin with an arrest and a prosecution, criminal practice is, from the outset, almost always adversarial in nature and stance. The two sides rarely have equal resources and stature. In criminal proceedings, the prosecutor has enormous, disproportionate power to wield against the defendant, although not necessarily to the benefit of the crime victim. While these characteristics are hardly unique to criminal practice, the critical difference is in the degree and intensity of the resulting emotions. Even when lawyers in the adversarial criminal practice setting might be inclined to cooperate in order to achieve such shared goals as a negotiated guilty plea or a diversion program, any surface harmony conceals much antagonism.²⁴ The second major difference between these two areas of practice is that there are inherent entrenched tensions, suspicions, and emotions in a high-volume criminal justice system where individual liberties are at stake. The emotional atmosphere is intensified by the tragic and depressing circumstances of the individuals involved.

Most criminal practitioners are associated with institutions such as the public defender or the district attorney, or are specialists in the private bar. As such, they are repeat performers with well-known reputations and abilities in that closed community. In this courthouse culture, personality, integrity and credibility (or the lack thereof) may play a larger than normal role since the same individual attorneys interact daily. While mutual respect might develop, distrust and positional advocacy are commonplace. Where prosecutors believe that defense counsel use underhanded tactics, defense attorneys suspect misconduct by prosecutors. These role-derived suspicions and anxieties must coexist with the prosecutor's other roles of representing community values and concerns, serving a justice ideal, preserving

witness's words in writing, let alone on videotape. Also, the movies dramatize the conflict more vividly than any actual conversation would.

²⁴ Some commentators have noticed that at least in the context of plea bargaining, regular contact between prosecutors and defense attorneys may lead to increasingly cooperative relationships that are part of the very fabric of the adjudication process. See e.g., Malcolm Feely, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J. 338, 341-42 (1982). In one study, the author not surprisingly discovered that a majority of prosecutors are more inclined to cooperate with defense attorneys who were "friendly, communicative, unabrasive, and easy to deal with." Juanita Jones, *Prosecutors and Public Defenders: Cooperative Relationships and Non-Negotiable Cases*, in *THE INVISIBLE JUSTICE SYSTEM: DISCRETION AND THE LAW* 199 (Burton Atkins and Mark Pogrebin eds. 1978). Similar attitudes were described in William F. McDonald, Henry H. Rossman & James A. Crasser, *The Prosecutor's Plea Bargaining Decisions*, in *THE PROSECUTOR* 159-160 (William F. McDonald ed. 1979).

fairness in the procedures, searching for the truth, and observing and enforcing legal constraints that govern themselves and their agents. Adversarialness is the norm, resulting in instances of misconduct and abuse of discretion, at the expense of the more judicial or managerial roles which call for more self-confident independent judgment.²⁵ This so-called "adversary model" is characterized by its identification with law enforcement, its emphasis on winning and obtaining convictions, and an inclination to "get tough."²⁶

There also are enormous environmental differences between the most criminal and civil practice settings, at least in state court criminal practice. Many criminal cases transpire in the pressure-cooker of the courtroom, the courthouse hallways, or some kind of lock-up. For example, because a speedy arraignment is a due process right, the initial client interview is often hasty and superficial, focused on the issues of a release decision or quick guilty plea. Judges, often coping with long calendars in crowded, edgy courtrooms, can exacerbate the stress by being impatient, intolerant, or coercive. Prosecutors carry large case loads and, as such, are often unfamiliar with the facts of a particular case, educating themselves at a hasty hallway conversation or from a file, rather than from an in-depth discussion with someone with first-hand knowledge. The same description applies to many public defenders who shoulder burdensome caseloads.²⁷

Certainly, the distinctions mentioned above are not universally true, and civil lawyers could argue persuasively that many of these attitudes and conditions are no different in their areas of practice. The key characteristic which inexorably separates criminal and civil practice and propels this essay is that only one of the interested par-

²⁵ It is often easier to theorize about abstract obligations to fairness and justice than put them into practice. In job interviews with District Attorneys, students report that it is standard to be asked about situations in which their understanding of the dual role of the prosecutor is tested. In the hypothetical, the better answer would require them to dismiss, refuse to bring charges, or release a dangerous defendant because the prosecutor has a higher obligation to the public and the law than simply to seek convictions. In reality, when adverse consequences might flow from such a decision, most of the interviewees themselves probably would try to avoid the very result they advocate to the job-seekers. Yet, they downgrade the applicant who gives the answer that actually resembles the course of action that might occur in a real case. In other words, it is not so easy to practice what you preach.

²⁶ LEIF CARTER, *THE LIMITS OF ORDER* 66-68 (1974) (suggesting that the crime fighter type is undesirable); Pamela J. Utz, *Two Models of Prosecutorial Professionalism*, *THE PROSECUTOR* 103-09 (William F. McDonald ed. 1979); Fisher, *supra* note 2, at 204-08.

²⁷ A recent study of the quality of legal representation provided indigent criminal defendants reported an average of 650 cases per Legal Aid Society lawyer in Manhattan. This overwhelming caseload caused lawyers to show up late, leaving their clients to wait long hours in the courtroom or in holding cells, only to have a stand-in lawyer postpone or even mishandle the case. David Rohde, *Decline is Seen in Legal Help for City's Poor*, N.Y. TIMES, Aug. 26, 1998, at B1.

ties in a criminal case, namely the defendant, is a "client."

B. *The Traditional Prosecutor*

Most basic Criminal Law courses begin with some discussion of the differences between criminal and civil sanctions in which students learn that community judgment and condemnation distinguishes the former from the latter. After teasing out some comments, the first year Criminal Law student might conclude that a crime "is conduct which . . . will incur a formal and solemn pronouncement of the moral condemnation of the community."²⁸ From the outset, the purpose of criminalizing conduct is justified by a societal need to impose public punishment independent from the private motives, needs, and interests of the victim.

The instrument of this process in the American criminal justice system is the public prosecutor, an office that has evolved from the private prosecutor of Colonial times to the modern version. The victim's role in initiating the criminal process has disappeared in favor of prosecution by a public, independent, and by now, wholly professional agency.²⁹ In theory, the prosecutor is detached from the arrest decision, objective about whether and what crimes to charge, and equitable in determining whether and to what charges the defendant can plead guilty. The prosecutor balances the often conflicting priorities of the community, the victim, the defendant, and the judiciary while enforcing legislative goals and constitutional mandates. Although tempered by office policies and prosecutorial priorities, the individual prosecutor has broad powers and discretion, and operates as a free agent, making myriad daily judgments and decisions, hopefully in a lawful, ethical, and honorable fashion.

None of these wide-ranging responsibilities — law enforcement officer, elected official, officer of the court, administrator, gatekeeper — require the prosecutor to assume the role of counselor to crime victims.³⁰ It is beyond debate that crime victims are not clients of the

²⁸ Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401 (1958), as quoted in JOSHUA DRESSLER, *CRIMINAL LAW* 3 (1994); see also GEORGE E. DIX & M. MICHAEL SHARLOT, *CRIMINAL LAW* 63 (4th ed. 1996).

²⁹ JOAN E. JACOBY, *THE AMERICAN PROSECUTOR* 3-43 (1980); JOHN F. LAWLESS, *IN PROSECUTORIAL MISCONDUCT* 3-7 (Supp. 1988); William F. McDonald, *The Prosecutor's Domain*, *THE PROSECUTOR* 19-28 (William F. McDonald ed. 1979); Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 *HARV. J.L. & PUB. POL'Y.* 357, 364-72 (1986); Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 *PEPP. L. REV.* 117, 127-32 (1984).

³⁰ In many prosecutors' offices, there are other resources for counseling. Psychological counseling may be available. Para or non-professional staff may act as liaison with the victim, explaining the court system and the process of the case. For victims who do not speak English, these kinds of contacts may be less frequent and less informative. The in-

prosecutor because prosecutors “represent” an amorphous entity of the “people,” “state,” or “government.”

Yet, since this entity has no identifiable voice or spokesperson articulating its goals for particular cases, the prosecutor’s representational duties are often self-defined. In 1935, the Supreme Court characterized the multi-dimensional role of the prosecutor in a now-classic formulation:

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. He is . . . the servant of the law . . .³¹

Formal guidelines for prosecutorial conduct, describe the consequences of this unique relationship as follows:

[W]here it is practical to do so, the prosecutor should give victims an opportunity to consult and to provide relevant information prior to the prosecutor’s taking [a] final action. Since, however, the prosecutor’s client is not the victim but the people who live in the prosecutor’s jurisdiction, the prosecutor obviously retains the discretionary authority to make such decisions without regard to the victim’s — or any other person’s — views on the matter.³²

Thus, however sympathetic and concerned a prosecutor may be about the painful experiences of a crime victim, the relationship is typically conducted at a safe distance that discourages connections and attachments and functions along clearly established lines of power and control. Moreover, the quasi-judicial role of the prosecutor requiring fidelity to a host of institutional and societal goals and values precludes the partisanship and loyalty owed a client and mandates an allegiance to truth-seeking, impartiality, and objectivity.³³ Even in an

terpreter becomes the victim’s lifeline to an understanding of what is happening when non-English speaking victims are involved. Thus, a host of non-prosecutors, and often non-lawyers, give advice to crime victims.

³¹ *Berger v. United States*, 295 U.S. 78, 88 (1935). “[T]he client of every prosecutor is the public.” WOLFRAM *supra* note 19, at 760.

³² ABA STANDARDS FOR CRIMINAL JUSTICE, *Prosecution Function* § 3-3.2 (3d ed. 1992). Other sources of professional norms governing prosecutorial behavior can be found in the NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 26.1 (1977); CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-13 (1981) (prosecutor represents the sovereign and makes decisions “normally made by an individual client.”); MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.8 (as amended 1996).

³³ Abbe Smith, lifelong criminal defense attorney, recounts the difficulties of her cross-over experience when she allied with a prosecutor to protect the interests of her client, the victim of a brutal, homophobic assault. Although she describes the prosecutor handling the case as quite receptive and sympathetic, at times his prosecutorial instincts diverged from Abbe’s client-oriented goals and her defense-oriented expectations. Abbe Smith, *On Representing the Victim of Crime*, in *LAW STORIES* 149-67 (Gary Bellow & Martha Minow eds. 1996).

adversarial setting, in the pursuit of justice (whatever that elusive and subjective term actually means), the crime victim's goals necessarily do not occupy a primary position. For example, the prosecutor must follow the law even if it means the suppression of evidence harmful to the defendant or the disclosure of evidence favorable to the defendant despite the risk of losing the case and perhaps failing to secure the victim's goals. Indeed, in the final analysis, the crime victim is merely a witness, with a limited role to play, and is basically dependent on the prosecutor for information and support.³⁴

Despite the absence of an individual client, prosecutors often appear to be representing the interests of crime victims, and when those interests do not conflict with any preemptive justice goals, articulate the interests of the victim to the defense attorney and judge. In addition, even though the individual victim is off-stage, the prosecutor frequently casts a particular victim in the role of every-victim, thereby conflating the role of guardian of the public welfare with the protector of individual interests.³⁵ Even in the absence of a client, the prosecutor often resorts to the rhetoric of representation raising arguments about redress of individual harm, restitution, and victim-based concerns and goals.

Although the platitude that prosecutors serve the public interest implies that the prosecutor indeed has a client, for the most part this client is a silent, invisible entity, indifferent to the decisions and choices the prosecutor makes.³⁶ In turn, in routine cases, those deci-

³⁴ Ellen Yaroshefsky, *Balancing Victims' Rights and Vigorous Advocacy for the Defendant*, 1989 ANN. SURV. AM. L. 135, 138-39. To do their jobs, prosecutors also depend on the participation and cooperation of types of witnesses who have a very different set of interests and concerns than a party, some of which are unique to criminal prosecution. Prosecutors rely heavily on law enforcement witnesses, who ostensibly have no stake in the outcome of a case, and who are part of the system rather than involuntary participants. In many cases, a prosecutor relies on cooperating witnesses, who have been immunized, given deals, or otherwise coerced to testify. Interviewing and counseling those types of witnesses, skills related to fact-gathering and case theory development, are fundamentally the same in criminal and civil cases. For example, the discussion of basic witness interviewing principles in BASTRESS & HARBAUGH, *supra* note 2, at 199-202, includes two illustrations, one criminal and one civil.

³⁵ Fisher, *supra* note 2, at 209. One study questioned prosecutors and police about their perception of the attorney-client relationship between the prosecutor and the crime victim. Eighty-four percent of the prosecutors agreed that the prosecutor's primary responsibility is to the citizens of his country, who, as a group represent the prosecutor's clientele. More surprisingly, 45% of the prosecutors agreed that the prosecutor and the crime victim function under an attorney-client relationship. Donald M. McIntyre, *Impediments to Effective Police-Prosecutor Relationships*, 13 AM. CRIM. L. REV. 201, 219 (1975).

³⁶ When a case generates a lot of attention in the community or a lot of publicity, the notion of the "people" becomes more concrete and more politically charged. While no prosecutor would admit to giving special treatment to a case that is in the public eye, there are more factors to balance when prosecutorial decisions are subject to public scrutiny and reaction. In such cases, prosecutors, who are largely elected officials with considerable

sions and choices are often invisible to the crime victim, the public, and anyone else outside the system. Indeed, the prosecutor has obligations to so many other constituencies, that decision making necessarily calls for a delicate balancing of these interests.

If a prosecutor chooses to act in a manner associated with a counselor — consulting, explaining, including, deferring — that role is assumed voluntarily when an individual prosecutor determines that the case necessitates such inclusion. Even so, the terms of this relationship are set unilaterally by the prosecutor, usually when inclusion benefits the case. Even when a victim is included, in this one-sided arrangement the prosecutor retains the trump card in the decision making process. It is the prosecutor who ultimately makes the charging, plea, and sentence recommendation decisions whether or not the victim endorses those choices.

The prosecutor's unique client-independent, yet quasi-representational, role is not replicated in other litigation contexts. A civilian crime victim who might initiate a civil suit against the defendant is the client of the lawyer handling the matter. In a criminal case the identical individual is not entitled to receive from the prosecutor the same loyalty, zeal, or even competence, the bedrock values of ethical representation. Most prosecutors are chary of victim participation, fearing undue interference with their case processing,³⁷ resulting in at best begrudging, minimal inclusion in, but more often virtual exclusion from, all decision making.

To what extent should prosecutors communicate with and take into account a crime victim's interests? Certainly, the prosecutor implicitly considers the harm suffered by the victim and the victim's goals in any calculation of "justice," nonetheless the conventional wisdom that exempts people who have been harmed criminally from having a direct and meaningful voice seems entrenched. Yet, if the case is tried, it will be the victim's voice and story that the prosecutor needs in order to convict. This creates the paradox that the prosecutor must forge a bond in order to motivate the victim, but may abandon the victim when his or her cooperation is no longer necessary.

For most crime victims, the criminal process will be their only source of vindication.³⁸ Although a crime victim has civil recourse in a law suit against the defendant, for several obvious reasons, few victims ever sue the wrongdoers who harms them. First, many defen-

political savvy, do not delegate to their assistants the kind of independent discretion that they ordinarily enjoy in more routine matters.

³⁷ David A. Starkweather, *The Retributive Theory of "Just Deserts" and Victim Participation in Plea Bargaining*, 67 *IND. L.J.* 853, 874 (1992).

³⁸ Gittler, *supra* note 29, at 138-39.

dants are judgment-proof. Second, the victim often lacks the resources to hire a lawyer to file a civil suit. Also, most civil suits are deferred for legal and strategical reasons until the conclusion of the criminal case, an event which might occur years after the incident. Finally, if the defendant is convicted and sentenced to prison, even the victim with the resources and the will to proceed may be sufficiently satisfied or too exhausted to pursue a civil suit, preferring to bring closure to the entire episode. Given all of these disincentives, it is unlikely that most victims will have any opportunities other than the criminal case to seek redress, or to confront the defendant and testify about what happened.

A crime victim is not merely another witness for the prosecution. Unlike the usual cooperating, expert, or eyewitnesses, or the law enforcement agent, the civilian complaining witness has an acknowledged stake in the case and frequently exhibits many of the same traits, expects the same considerations, and attempts to assert the same prerogatives as civil clients. For example, crime victims may believe that they are entitled to have a say in the charging decision or expect to have some control over the disposition of a case and to disapprove of the prosecutor's plea bargain. This view by the victim of her role in the decision making may occur even when the prosecutor has not invited this involvement nor wishes to be burdened by the knowledge of the victim's perspective.³⁹ Also, like a client, a crime victim may attempt to exercise control over the case when, after losing interest, being inconvenienced, or becoming reconciled with, or intimidated by, the defendant, she decides to drop the charges, often against the prosecutor's advice, and in contradiction to the prosecutor's objective to convict.⁴⁰

³⁹ The victims' rights movement argues for greater ownership of the case by the victim. Victims' rights advocates essentially challenge the current balance of defendants and victims' rights by conceiving of the prosecutor as the representative of victims only, eliminating obligations to protect defendants. Of course, these developments are controversial, in part due to their redefinition of the role of the victim in the arena of public prosecutions. See generally Cardenas, *supra* note 29 (arguing that historical and comparative law justifications give crime victim some participation in prosecution as a private party); Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691 (1997) (discussing proposed Victim's Rights Amendments to the U.S. Constitution); see also *A Proposed Constitutional Amendment to Establish a Bill of Rights for Crime Victims: Hearing before the Committee on the Judiciary on S.52, 10th Cong., 2d Sess.* (1996).

⁴⁰ Even though the prosecutor technically acts for the public welfare, generally, a victim's disinterest in further proceedings signals the end of the case for several reasons. First, it may be impossible to prove the essential crime elements. Also, the victim's disinterest is a disincentive to a prosecutor balancing resources and heavy caseloads. Social justice goals can be sacrificed in the face of such practical concerns. The relatively recent development of "no-drop" policies in domestic violence cases that allow the prosecutor to

Most of the time, however, the prosecutor has exclusive control over all aspects of a case, operating with a degree of autonomy unimaginable in a client-based relationship. Prosecutors also have tools that further differentiate them from the typical attorney-client relationship.⁴¹ If the victim attempts to disengage from the case against the will of the prosecutor, prosecutors have at their disposal an arsenal of motivational tools and coercive weapons such as contempt citations⁴² or custody pursuant to a material witness order,⁴³ that most lawyers do not possess and would not dream of imposing on their clients. Imagine a chapter in a client-centered counseling text on how to motivate a client to make a decision by threatening contempt or arrest!

In the congested urban criminal justice system with which I am most familiar, the prosecutor often has little contact with the crime victim, delegating information gathering to police, paralegals, or more junior ADAs. Case processing can resemble an assembly line, but one without much oversight and quality control. In many prosecutors' offices, there is little case handling continuity particularly when a prosecution is structured horizontally so that the arrest, indictment, plea negotiation and final stages are handled by ADAs assigned to the particular bureaus through which a case passed before its final resolution (i.e. complaint room, lower court, grand jury, superior trial court). At the early stages of a case, before any decisions about the direction of the prosecution have been made, the ADA who eventually will handle the trial and the plea negotiations has not even been assigned. Given this discontinuity and disconnectedness, it is easy to see how a prosecutor can enter a plea bargain or even dismiss a case without the complainant's knowledge, input, or acquiescence.⁴⁴ In the absence of a relationship of trust and collaboration, it is also not surprising that the victim might lose commitment to the case, particularly after the typical adjournments and delays, resulting in a dismissal or a disproportionately low guilty plea.⁴⁵ Alternatively, the prosecutor might be

compel the victim to testify or to proceed with other witnesses is a response to the psychological ambivalence of victims of these crimes. See Hanna, *supra* note 11; Angela Corsilles, *supra* note 11.

⁴¹ James E. Lobsenz, *Prosecutorial Management & the Uncooperative Crime Victim*, 15 CRIM. L. BULL. 301, 311-17 (1979) (suggesting strategies to ease victim fears and to overcome inconvenience).

⁴² See, e.g., 28 U.S.C. § 1826.

⁴³ See, e.g., N.Y. CRIM. PROC. LAW Art. 620 (McKinney 1984).

⁴⁴ Cardenas, *supra* note 29, at 388.

⁴⁵ One study found that victims who became more involved in assisting the prosecutor prepare the case are less likely to be dissatisfied with the administration of justice even in the face of delay and expense. Richard D. Knudten et al., *The Victim in the Administration of Criminal Justice: Problems and Perceptions*, CRIMINAL JUSTICE AND THE VICTIM 119

compelled to use, or threaten to use, coercive means to assure the victim's cooperation against her will.

Because this association is so one-sided and so unsuited to achieve the usual empowerment goals of the client-centered attorney-client relationship, the lessons found in counseling texts have only limited relevance to students or fledgling prosecutors even for one inclined to question, motivate, understand, empathize with, and advise victims. If the victim is credible and sympathetic, the prosecutor, relieved to have a pliant and cooperative witness, probably shifts into a combative mode, more preoccupied with the quest for a conviction than eliciting or addressing the victim's own more layered and subtle goals. In less clear-cut cases, the prosecutor's attitude is largely determined by resources. Overburdened prosecutors do not want to invest time and energy in preparing or trying a case when the conviction is less certain, even if the trial furnishes the victim with the desired opportunity to be center stage regardless of the outcome.

ADAs are assigned staggering numbers of cases so they quickly learn some efficiency techniques, many of which sacrifice victim involvement. Even in a case in which there is a civilian complainant, it is more practical to listen to the hearsay version of the crime from the police officer, to enlist the assistance of a victim services representative to intervene, and to postpone actual victim contact until the case has progressed to the trial preparation stage. After a while, losing contact with the victim becomes habit, making victim-centered counseling a challenge that few prosecutors have the time or inclination to undertake. Given the high disposition rate by negotiated plea, most victims never participate in the post-arrest stages of the adjudication process.

When I was running training programs for entry level ADAs,⁴⁶ I tried to import models from clinical education to teach a victim-centered approach to working with crime victims. Unfortunately, my efforts fit awkwardly with both office practices and the prevailing understanding of the prosecutorial role. As soon as the recently graduated, neophyte ADAs begin to conduct their own interviews, to handle their own cases, and to respond to the pressures of the job, the quasi-client-centered counseling model collapses. I confess, therefore, to a naiveté about the nature of *being* a prosecutor and the deep influence of the socialization process of *becoming* a prosecutor. Within their first year in the office, my former clinic students undoubtedly

(William F. McDonald ed. 1976).

⁴⁶ I served as Director of Training in the Brooklyn District Attorney's Office from 1983-1986. My early years of practice, however, were on the defense side so I never experienced personally learning about prosecution from the ground up.

consider my advice hopelessly idealistic, unrealistic, and impractical — if they remember it at all.

C. *The Moral Prosecutor*

None of the models of collaborative counseling and decision making are directly relevant to the work of the prosecutor. Yet these lawyers make daily decisions that profoundly affect the psychological welfare of crime victims, and that resolve without recourse or accountability any emotional and moral claims the victim may have on the criminal justice system or the defendant.⁴⁷ In so doing, the prosecutors communicate information and relate to victims from a very different posture than do other lawyers with their clients.

Admittedly, prosecution is not an easy job, but all of this power and control inevitably is transformative.⁴⁸ The fledgling ADA learns judgment and evaluative skills, and simultaneously embraces the authoritarian role of decision maker. I reviewed some literature concerned with moral lawyering, to try to determine what model of lawyer the prosecutor most resembles, or whether this lawyering is *sui generis*. I found two plausible referents. First, prosecutors epitomize William Simon's "discretionary lawyer" who considers broader social needs in an effort to "promote justice."⁴⁹ After all, discretion is the heart and the sinew of prosecution.⁵⁰ Indeed, Simon cites the public prosecutor as an inspiration for his discretionary approach.⁵¹ It may belabor the obvious to observe how often prosecutors claim to make decisions "in the interests of justice" instead of a narrower, restrictive basis.

Second, I was struck how aptly a synthesis of the "godfather" and

⁴⁷ In New York City, on any given day, there are close to 2,000 lawyers prosecuting cases in the state courts of five counties. Many of them are no more than three years out of law school. If my own experience is representative, no one seriously teaches them how to relate to crime victims. This is not to suggest that all or even most ADAs are insensitive, abusive, or callous in their treatment of crime victims. However, the very nature of their authority, their power, and their ability to control often makes this relationship invisible and beyond critique. Moreover, since young prosecutors usually learn their styles and attitudes from more senior role models in the office who have internalized this power, bad habits often are passed along to the next generation.

⁴⁸ It is impossible to deny that occasionally this transformation can be negative given the range of activities collectively labeled "prosecutorial misconduct." Prosecutors act improperly when they withhold evidence, knowingly rely on perjured testimony, engage in racism at jury selection, or vindictive prosecution, to name only a few grounds. *See generally*, BENNETT L. GERSHMAN, *PROSECUTORIAL MISCONDUCT* (1986); Lawless, *supra* note 26.

⁴⁹ William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988)

⁵⁰ *See, e.g.*, Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970).

⁵¹ Simon, *supra* 49, at 1091. Simon advocates a discretionary justice model or client-based lawyering so he does not discuss prosecutors more fully.

the "guru" approaches described by Shaffer and Cochran in their typology of lawyer models⁵² applies to the prosecutors I have taught and trained. It is easy to see the prosecutor as godfather. The godfather-prosecutor is both a technician and a parent, using legal skills to achieve what the lawyer perceives are the best interests of the client without much, if any, respect for the client's autonomy.⁵³ The godfather-prosecutor makes all of the moral choices in the case both on behalf of society and the victim (*e.g.*, the decision to seek punishment, the exercise of leniency in a plea recommendation). Like godfathers, prosecutors are authoritarian, even when cloaked with benign motives or even genuine kindness and sensitivity.

Given the multiple missions of the prosecutor, however, there is a substantial amount of guru mixed in with every godfather. According to Shaffer and Cochran, the client specifically entrusts the guru to make the correct moral choice on behalf of the client, with some broader consideration of general welfare in mind.⁵⁴ Although decision making control is retained by the lawyer who again knows what is legally best, this approach comprehends more than the client's narrow interests. The guru also decides what is morally correct. The guru-prosecutor is more than the victim's guardian. He or she protects the integrity of the legal system, the welfare of the community, and the legal rights of the defendant.

The continual balancing of interests in which prosecutors engage while exercising discretion — what is fair to the victim, to the defendant, to society in charging, plea negotiation, and sentencing decisions — adds more than a touch of the guru to the godfather-prosecutor. Guru-prosecutors play the conventional role of gathering and analyzing information, and then presenting it to the fact-finder. Less visibly, but within the bounds of their considerable discretion, they also perform decision making roles that we normally associate with the police, the judge, and even the legislature. A decision to decline to charge "in the interests of justice" even when there is sufficient evidence to believe that the defendant committed the crime is tantamount to decriminalizing, usually a legislative preserve. When the ADA impartially examines the evidence bearing in mind the prosecutor's multiple obligations to several values (*e.g.*, truth and justice, upholding law), he or she performs a quasi-judicial function. When the selection of particular charges restricts the sentencing range available to the judge, the prosecutor intrudes on the traditional province of the judiciary.

⁵² THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* 3-14 (1994).

⁵³ *Id.* at 9.

⁵⁴ *Id.* at 31-32.

The guru-prosecutor mediates the application of the broad terms of the law taking into account the individual circumstances of the defendant certainly and the interests of the victim occasionally.

In carrying out their duties, prosecutors play certain roles with respect to the other participants in the system. The outraged query "How can you defend these people?"⁵⁵ comes from the prosecutor who sees herself a "defender of justice," a self-image which may lead to the injection of a large dose of personal morality and self-righteousness into the mix. Prosecutors see themselves as "guardians" or "protectors" of the welfare of the victims and the public. When protecting what they perceive and represent to be the interests of the victim, prosecutors often engage in objectionable condescension, making decisions on behalf of, and without consultation with, the victim that are in the victim's best interest solely in the opinion of the prosecutor. Some prosecutors see themselves as "problem-solvers" in some cases, insisting on certain conditions such as restitution, drug treatment programs, community service without any follow-up to ascertain if the solutions worked. Despite their differences, the "defender of justice," the "guardian," and the "problem-solver" are each variations on the theme of "godfather-guru," and often pay no more than lip service to the real needs and concerns of the victim.

Certain attributes of the criminal justice system reinforce the godfather-guru typology. First, there is no external pressure by judges to include victims in the decision making process. While this traditionally enables the prosecutor to act impartially, the exclusion of the victim has become so routine that the victim virtually vanishes after the arrest. Indeed, judges presumably accept the notion that the victim's case is public property and can be adjudicated without any victim participation. In the large metropolitan prosecutor's office that is my frame of reference, individual assistant district attorneys rarely have contact with the victim in connection with the charging decision, relying instead on the hearsay report of the police. Indeed, in many states as well as in the federal system, the initial accusatory instrument can be based on hearsay.⁵⁶ Subsequent contacts with the victim may take place on the phone, and may be conducted by designees from victim service agencies or by paralegals. The victim might speak to an assistant district attorney prior to testifying in the grand jury, but many states do not require an indictment, or following the federal system, permit hearsay testimony in the grand jury.⁵⁷ If the case is dis-

⁵⁵ JAMES SIMON KUNEN, *HOW CAN YOU DEFEND THESE PEOPLE?* (1983).

⁵⁶ *See, e.g.*, N.Y. CRIM. PROC. L. § 100.15 (McKinney 1984); FED. R. CRIM. P. 4.

⁵⁷ *Costello v. United States*, 350 U.S. 359 (1956) (permitting federal grand jury indictment based solely on hearsay evidence). A majority of states follow *Costello*. WAYNE R.

posed of by a guilty plea, the victim may never participate in the process at all. In a plea bargained case, the prosecutor responsible for the guilty plea, negotiation and sentencing recommendation may have never seen or spoken to the victim in person.

Lack of continuity is also a big problem. A victim may speak to several people — police, different ADAs, victim services representatives and counselors, probation officers — without ever knowing a name or having a good understanding of who each person is. Obviously, this is not true for all cases, particularly major crimes, but it is true enough in the mundane prosecution, even for serious charges such as assault, robbery, or rape.⁵⁸

Most victims' rights reform proposals focus on efforts to secure more inclusion, consultation, and communication, and, in some, the right to be heard in court at various proceedings.⁵⁹ None go so far as to give victims the right to approve or veto a disposition or sentence. The absence of the victim's voice and physical presence can lead to a depersonalization of the case in the eyes of everyone engaged in the adjudication process. While individual justice for the defendant purports to be an accepted value, often the crime and the victim become prototyped and generalized. In plea negotiations, stereotypes abound. "A one-witness ID case" telegraphs that the case must be weak since proof of the case will hinge on highly impeachable testimony. If the victim is imperfect, with a criminal record, for example, the case is devalued regardless of the strength of the evidence. The prosecutor objectifies the crime by omitting all facts about the events and the victim, saying no more than "this is a C felony" in order to communicate a plea offer. The details of who was harmed, and how badly, are omitted from this bare-bones outline.

Both the discretionary lawyer-prosecutor and the godfather/guru-prosecutor function in a universe almost free from specific formal ethical oversight of victim relations. There are surprisingly few allusions to the duties of the office of the prosecutor to victims interspersed throughout the obvious sources. The *Model Rules of Professional Conduct* devote an entire section to the special responsibilities of a

LAFAYE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 714-15 (2d ed. 1992).

⁵⁸ There have been vast changes in the prosecution of sex crimes and domestic violence cases. Many offices have specialized bureaus so that closer victim contact is more the norm. While victims of sexual and family violence certainly deserve this attention, other victims are just as entitled to attentive treatment.

⁵⁹ For example, the National District Attorney's Association guidelines, require whenever feasible that the victim be informed of all stages of the criminal proceedings and should explain all decisions. NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, *supra* note 32, at §§ 26.1-26.2. One recent version of a proposed Victims' Rights Amendment included the right to be heard and submit a statement regarding the defendant's release, a negotiated guilty plea, and the sentence. S. J. Res. 6, 105th Cong., 1st Sess. (1997).

prosecutor in which no mention is made of victims, or even witnesses generally.⁶⁰ The *Model Code of Professional Responsibility* countenances the usurpation of decision making by the prosecutor in some circumstances. The *Code* states that "during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all."⁶¹ The *ABA Standards for Criminal Justice Prosecution Function and Defense Function*, where one might expect to find a more explicit reference to the obligations of a prosecutor to a crime victim, merely recommend that the victim be given "timely notice" of judicial proceedings, dispositions, and the defendant's release from custody.⁶² The *National Prosecution Standards*, written by prosecutors but which have no binding authority, aspire to be more inclusive by urging more communication, clearer explanation, and greater assistance for victims.⁶³

All of these forces combine to perpetuate the traditional form of decision making in which the prosecutor assumes many noble roles: gatekeeper protecting the defendant from false accusation or unprovable charges; conservator of the law and the criminal justice system; representative of the community; and defender of justice. In addition to these metaphoric roles, the prosecutor also undertakes to act as a benevolent guardian who, like other legal guardians, makes decisions, enters into agreements, and speaks for the interests of the victim. Unlike other legal guardians, however, the prosecutor has no legal responsibility or accountability to the victim for these decisions. It is no wonder that many victims feel mistreated, ignored, or silenced by their godfather-guru.

D. The "Typical" Victim

There is, of course, no single type of crime victim.⁶⁴ There are, however, several factors that contribute to shaping the relationship between the prosecutor and the victim. These include the severity of the harm to the victim, (i.e., the seriousness of the crime); the quality

⁶⁰ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (amended 1996).

⁶¹ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1981).

⁶² ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 3-3.2(g) (3d ed. 1992). Taking a pragmatic position, the commentary urges prosecutors to address victims' concerns in order to insure cooperation and commitment.

⁶³ NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS, *Relations with Witnesses* §§ 27.1 - 27.5 (2d ed. 1991).

⁶⁴ Social science research about the characteristics, treatment, behavior and attitudes of victims has evolved over the past twenty years. See e.g., VICTIMS OF CRIME AND THE VICTIMIZATION PROCESS (Marilyn McShane & Frank P. Williams, III eds., 1997); CRIMINAL JUSTICE AND THE VICTIM (William F. McDonald ed. 1976).

of the victim as a witness (*i.e.*, opportunity to observe events, ability to communicate those observations, cooperativeness, lack of undesirable qualities such as a criminal record); and the expectations about, and attitude of, the victim toward the criminal process. These factors influence both the prosecutor's enthusiasm about the case and behavior toward the particular person.

Like clients generally, most victims cede control to their "lawyer," acquiescing to decision making by the authoritarian prosecutorial figure because they have no choice if they want their interests vindicated. This surrender has costs. First, there is the predictable "out-of-sight, out-of-mind" consequence when the prosecutor has no reason to contact and communicate with the victim. An arm's length victim's plight becomes less compelling and less individualized as time blurs whatever connection the prosecutor may have had to the victim and adds more victims to the case load. Also, when victims abdicate control, they also relinquish other valued qualities of the attorney-client relationship such as autonomy, confidentiality, and privacy. Crime victims lack the power that civil clients theoretically have to reappropriate the control they have ceded. While the Model Rules require disclosure to a client about the status of the case and explanations sufficient to allow the client to make informed choices,⁶⁵ victims receive no such concessions. Victims also cannot assert control over what is disclosed about them in conversation with defense counsel or the judge. Since there is no attorney-client privilege, nothing revealed by the victim to the prosecutor is confidential — a lack of privacy that exposes the victim's story and interests to an audience of strangers. Indeed, most prosecutors freely disclose facts and feelings disclosed by victims to the judge and defense attorney to advance plea negotiations.

When the victim is complicit in this abdication and the prosecutor assumes sole responsibility for seeking justice on behalf of the abstract client, the virtual divorce of victim from process can have deleterious effects on the very ability to prosecute. As time goes on without any active involvement or connection to the prosecution, victims lose interest, or become disheartened and cynical. They lose their proprietary interest in both the process and the outcome of the case. Victims also lose faith that the process has the capacity to achieve personal justice for them when they are so alienated from the day-to-day developments.

Too often, however, prosecutors with little personal contact with the victim reduce the particular circumstances of a case to stock sto-

⁶⁵ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (amended 1996).

ries, creating short-hand descriptions for crimes such as “subway chain snatch,” “push-in robbery,” “home invasion,” “buy and bust” or “date rape.” There might even be short-hand phrases that reflect a conclusory assessment of the evidentiary weaknesses of the case such as “drug deal gone bad,”⁶⁶ or “*Galbo*”⁶⁷ that lead to a “blow out.”⁶⁸

Some scholars, including clinicians, recently have begun to explore schema, narratives and other aspects of cognitive theory as a form of fact organization to enrich an understanding of the meaning of events.⁶⁹ Ironically, for years prosecutors have used a shorthand exemplified by the phrases above to communicate with each other about the nature of the case, including the qualities of the victim. This tendency to stereotype can have negative rather than helpful results. First, the case is compartmentalized and denied its particularity. Rather than elucidating and contextualizing, the stock story shuts off the prosecutor’s openness to the individual victim’s story. The absence of the victim’s voice and physical presence pigeon holes the individual crime into one of these recognizable categories. To most prosecutors, the millions of stories in the Naked City boil down to only a handful of plot lines such as “who did it?”, “what happened?”, or “did he mean to do it?” This tendency to prototype cases extends from the charging decision to the courtroom where plea bargaining occurs. The defendant is being prosecuted for what *most* people do when they commit the specific crime charged. Such generalizations are already taken into account by statutory classifications based on the manner in which the crime is committed, or, in some instances, on the status of the victim, and in the sentencing structure. As depersonalizing devices, they serve no justifiable purpose except to facilitate the prosecutor’s job.

The central argument against victim inclusion in the decision making process emanates from the separation of the personal from the public aspects of the prosecutorial role, and from an emphasis on deterrence and incapacitation rather than on retribution and restitution. First, it is claimed the prosecutor would be the instrument of the

⁶⁶ This describes a robbery between drug dealers suggesting an obvious weakness in the credibility of the victim.

⁶⁷ *People v. Galbo*, 218 N.Y. 283 (1916) (establishing a legal standard for proving through circumstantial evidence knowing possession of stolen property).

⁶⁸ This is a signal to dismiss, i.e., “bad case. . . dump it.”

⁶⁹ See, e.g., Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. REV. 55 (1992); Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science and the Functions of Theory*, 45 J. LEGAL EDUC. 313 (1995); Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273 (1989); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994); Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681 (1994).

victim's vengeance if he or she acts as the victim's agent as a regular client's attorney does. Although not every victim is vengeful or desirous of the most punitive outcome, and some demonstrate remarkable compassion and forgiveness, the very nature of a victim's experience can produce highly emotional, often irrational responses which can be mollified appropriately by prosecution intervention. Prosecutors supposedly bring a non-arbitrary, comparative, universal perspective to the processing of a case, avoiding issues of emotion or revenge.

To continue the argument, if the victim's interests were the only ones to be taken into account, larger moral objectives might be unattainable. For example, sometimes the law's effects are unconscionably harsh or irrational so that prosecutorial discretion correct an unfair result. An outraged response to a defendant "getting off on a technicality" reflects a lay perspective that, if allowed to dominate, could eviscerate such remedies as the exclusionary rule, reversal due to procedural improprieties at trial, or dismissal on legal grounds.

Finally, not all crimes are the same but the damaged victim may be unwilling to acknowledge any such discriminations. The equilibrium between the victim's interest and those of the public shifts depending on the nature of the crime and the special characteristics of the victim. Criminal statutes traditionally grade offenses on the basis of the manner of the commission of the crime, the amount of harm caused, and the type of victim.⁷⁰ Prosecutors resort to similar criteria to make discriminations between cases even where the changes are identical.

Until now, I have used the term victim generically to include any civilian crime victim, an oversimplification that fails to account for the diversity of interactions that different kinds of victims might have with the prosecutor. Prosecutors also consider a victim's attitude and temperament when evaluating the strength of a case, even if they do not pay particular attention to the victim's interests and goals. Such factors might include cooperation (*i.e.*, availability, interest in the case); ability to communicate (*i.e.*, telling a coherent story), credibility (*i.e.*, consistency, motive to lie); and vulnerability (*i.e.*, age, disability).

⁷⁰ These observations are, of course, generalizations for which exceptions exist, but glance at the base offense levels set forth in the Federal Sentencing Guidelines should confirm this impression. For example, the base offense level for larceny is 4, U.S.S.G. § 2B1.1 and for burglary of a dwelling 17, U.S.S.G. § 2B2.1. In contrast, the base offense level for robbery is 20, U.S.S.G. § 2B3.1 and criminal sexual abuse is 27, U.S.S.G. § 2A3.1. Victim related adjustments appear in U.S.S.G. §§ 3A1.1 - 3A1.4.

Of course, the criminal history of the defendant will be taken into consideration in the plea bargaining and sentencing stage, although it should not enter into the charging decision which supposedly only focuses on the sufficiency of the probable cause and the evidence.

Another criterion for distinguishing between victims is the quality of the available evidence. In a case in which there is less likelihood of conviction due to a variety of factors having nothing to do with the victim (e.g., a strong defense case or a sympathetic defendant, weak forensics), the prosecutor may treat the case more leniently in charge or plea bargaining after an assessment of the likelihood of conviction. In *The Accused*, the prosecutor offered a very low plea to the college student defendant charged with rape who came from a respectable family. On the other hand, even if the crime is serious and the evidence strong, the prosecutor may feel some bias against a victim who has liabilities such as a prior criminal record or a history of substance abuse. This is the situation both in *Criminal Justice* where the victim of a brutal assault appeared to be, although never admitted to being, a prostitute and/or a crack user, and in *The Accused* where the rape victim was characterized as "asking for it."

When a victim is reluctant or recalcitrant and the case would be difficult or impossible to prove without the victim's participation, the prosecutor has two choices: motivate the alienated witness or devalue the case even to the point of dismissal.⁷¹ Motivation in the prosecutorial context can appeal to the altruistic (e.g., "Save other people from being hurt by this defendant."), to the psychological (e.g., "You'll feel better with closure knowing that you saw it through."), or to the material (e.g., "The only way you'll get restitution is if you cooperate."). Motivation also can be quite coercive. Prosecutors can use subpoenas, contempt orders, obstruction charges, or material witness arrest warrants to compel a witness to testify. Most of these remedies are reserved for the most serious cases so that normally the uncooperativeness of a victim will signal the end of a case, whether by dismissal or guilty plea to a lesser offense. If the prosecutor believes the defendant committed the crime, even if the victim disengages, convictions may still occur in through a charge bargain. Unfortunately, prosecutors often fail to grasp the obvious: early contact, frequent communication, and consultation might have avoided the alienation in the first instance.

On the other hand, many victims are emotionally involved in their cases. Overworked prosecutors who have to respond to these feelings rarely are trained in psychology or interpersonal sensitivity so they are discomforted by the intense feelings of some victims and cannot sensitively or effectively respond. Most victims have a legitimate

⁷¹ In New York State, a prosecutor can negotiate and recommend acceptance of a guilty plea while withholding information that the victim will not be available to testify at trial without violating the defendant's due process rights or committing an ethical transgression. *People v. Jones*, 44 N.Y.2d 76 (1978).

claim to their passions and grievances. Having been wronged or harmed in some way by the victim, they want to avoid being abused a second time by the system. Sometimes an emotionally demanding victim may begin to feel like a burden to the prosecutor, and even cause some speculation about the victim's motives or credibility, thereby undermining the prosecutor's commitment to the case.

Finally, there are some victims who simply do not impress the prosecutor for a variety of subjective reasons, resulting in some bias against the case. The victim may have some imperfections, such as a criminal record or a substance abuse problem, which alienate the prosecutor. Often the victim comes from a vastly different background than the prosecutor who typically has little inclination or incentive to learn about these differences.⁷² Indeed, crime victims in urban areas may feel just as alienated from the criminal justice system as the defendant. In many respects, they deserve to feel even more disaffected since not only does the defendant usually have a zealous advocate, but also the legal system is dedicated to protecting the defendant's constitutional and procedural rights. In contrast, the victim has no equivalent champion. In the normal attorney-client relationship, personality and attitudinal differences create a host of problems to resolve, or at least attempt to resolve, in order to provide effective representation. The prosecutor does not have any particular incentive to reconcile those differences. As a result, a host of negative subjective impressions about the victim may cause the prosecutor to take a particular position on the case having more to do with the subjectivity of the individual prosecutor than with the wishes of the victim or the seriousness of the crime.

If these descriptions sound like stereotypes, implying that certain types of people receive different treatment by the prosecutor, then I have made my point. Prosecutors offer many rationalizations for their judgmental or neglectful attitudes such as excessive case load, staff turnover, or the stress of trial work. While their explanations might contain some truth, they also are attributable to indifference to the victim coupled with an investment in controlling cases and winning trials.

Given all of the philosophical, institutional, and practical justifications for marginalizing the victim, it is audacious and perhaps presumptuous to advocate a viable alternative vision of the relationship of prosecutors to crime victims that will preserve their objectivity and their obligation to an ethos of fairness and justice. Despite the en-

⁷² Ellen Yaroshefsky observed controversially that: "We should recognize. . .that victims and defendants have more in common with one another than either of them have with lawyers, whether prosecution or defense." Yaroshefsky, *supra* note 34, at 166.

trenched behavior situating control over all decisions in the hands of the prosecutor, there some adjustments have to occur in order to reduce victim alienation from, and increase victim satisfaction with, the criminal justice system.

III. SOME STEPS TOWARD VICTIM-CENTERED "COUNSELING" BY PROSECUTORS

Victim right's advocates espouse an increased role for crime victims in various stages of the criminal process through communication, consultation, participation, and even representation by independent counsel. These changes would afford victims more visibility, dignity, and a sense of proprietorship of their own experiences. Any reforms along these lines will alter the traditional dynamic of prosecutor-victim relations to some degree. Many commentators have recommended measures to increase victim participation and voice,⁷³ but none have developed the kinds of scripts or protocols found in client counseling texts.

In the absence of representations of actual victim interactions with prosecutors, I turned to the movies for fictionalized depiction of the problems that I know exist in real life. Two movies, *The Accused*,⁷⁴ and *Criminal Justice*,⁷⁵ offer vivid examples of failed prosecutor-victim interaction. In the context of some excerpts from the films, I will identify the flaws in the prosecutor's conduct, most of which are painfully obvious, pose a preferable model of quasi-counseling, and then apply it to the circumstances of the films.

⁷³ See, e.g., Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515, 557-58 (1982) (recommending bringing victim into system by making victim a party, thus requiring the prosecutor to justify decisions in court); Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225 (1996) (developing a theory of 'affective lawyering' which meets clients — in this article domestic violence survivors — on their own terms and emotions); Starkweather, *supra* note 37, at 876 (recommending: 1) that prosecutors give victims a written statement describing and justifying plea offer, then consult with victim, and at least take into account victim's concerns; and 2) that before plea agreement is reached, victim and defendant meet); Cardenas, *supra* note 29, at 390-93 (recommending restitutionary model in which victim becomes a party occupying central role and collapses civil-criminal distinctions); Yaroshesky, *supra* note 34 at 145-46 (recommending appointment of counsel for defendant); Sarah N. Welling, *Victims in the Criminal Process: A Utilitarian Analysis of Victim Participation in the Charging Decision*, 30 ARIZ. L. REV. 85, 114-116 (1988) (recommending a victim's right to consult with the prosecutor); .

⁷⁴ THE ACCUSED (Paramount Pictures 1988).

⁷⁵ CRIMINAL JUSTICE (HBO 1990).

A. *The Reel World*

1. *The Accused*

In *The Accused*, Jodie Foster plays Sara Tobias, a victim of gang rape, who in addition to being hard-living and sexually provocative, is extremely clear about her victimization and what she wants from the criminal prosecution of her assailants. The prosecutor, Katherine, motivated by her legal assessment that a conviction would be impossible given the manner of the commission of the crime and the background of the victim, takes a plea to a charge of reckless endangerment, a non-sex offense. She thinks she has achieved a great result without risking an acquittal. The middle class defendants, willing to plead guilty as long as the conviction did not mention a sex crime, would be punished fairly substantially. This depiction of the prosecutor's thought process accurately captures a recognizable edgy, adversarial perspective.

Before the plea bargain, the movie shows the prosecutor attending an ice hockey match with two male colleagues. In between cheers for the game, the dialogue discloses Katherine's doubts about the case in which she is true to the stereotype of the competitive, egocentric prosecutor. She expresses concern about Sara's vulnerability on cross-examination, but her worries have less to do with Sara's feelings than the potential damage to the case. Ironically, her male colleagues sound more concerned about the victim's welfare than Katherine, who is preoccupied with her adversarial stance.

- Katherine: Now if I take it to trial, they'll destroy her. She walked in there alone, she got drunk, she got stoned, she came on to them, she's got a prior for possession.
- ADA #1: That's inadmissible.
- Katherine: Sure, it's inadmissible, but they'll ask her about it, I'll object and the judge will sustain it, but the jury will hear it. She's a sitting duck.
- ADA #1: I read her Q&A, gang rape on a pin ball machine. It's an ugly case.
- Katherine: The question is, is it a winnable case?
- DA (her boss): We understand that you love to win but I can't let you dismiss this because you don't have a lock.
- Katherine: A lock! I don't have a case.

The victim learns of the guilty plea for the first time in the newspaper. Feeling betrayed by both the plea and the absence of communication, she angrily confronts the prosecutor in a scene in which she

explodes with furious frustration:

Sara: You double crossing bitch. You sold me out. Did you see this? Did you see this? This is what you did. I wouldn't be a good witness! I'm too fragile! My past is too questionable! I'm a drunk! I'm a pot head! I'm a drug addict! I'm some slut who got bounced around in some bar! I never got raped!

Katherine: Of course you were raped.

Sara: How come it doesn't say that? How come it doesn't say Sara Tobias was raped? What the fuck is reckless endangerment?

Katherine: It's a felony that carries the same prison term as rape. You asked me to put them away and I did.

Sara: Who the hell are you decide that I ain't good enough to be a witness? I bet if I went to law school and I didn't live in some god awful dump, I would be good enough.

Katherine: I understand how you feel. I did my best.

Sara: No, you don't understand how I feel. I'm standing there with my pants down and my crotch hung out for the world to see and three guys are sticking it to me and a bunch of other guys are standing there clapping and yelling and you're standing there telling me that that's the best you can do. If that's the best you can do then your best sucks. I don't know what you got for selling me out, but I sure as shit hope it's worth it.

Although the prosecutor had interviewed Sara immediately after the rape occurred, had seen her battered condition and listened to her gruesome story of gang rape, she had not heard what Sara was saying about her feelings concerning the prosecution. Indeed, until this confrontation, her dealings with Sara had been cool, distant, and professional. Katherine had evaluated the facts of the case dispassionately and appraised the victim from the protection of her professional shell. Even her male colleagues had questioned her calculating, adversarial attitude toward the case, recoiling from a decision that seemed to diminish the seriousness of the crime.

When Katherine congratulates herself for the conviction, she clearly is oblivious to Sara's very different needs. No one, least of all Sara, believes her when Katherine claims, "I understand how you feel." The viewer, as well as Sara, is angered by this arrogance, since Katherine so clearly does *not* understand. Katherine never considered that Sara might even have preferred an acquittal to invisibility, a choice which her prosecutorial mentality would reject as illogical. Sara was willing to risk humiliation on the witness stand for an opportunity to tell her story and confront her attackers. Katherine had

never considered that to Sara being included in the decision making process, and telling her story publicly would be more beneficial than a conviction and jail sentence that did not reflect the defendant's true blameworthiness. Eventually, Sara's anger induces a prosecutorial epiphany, motivating Katherine to investigate other legally innovative theories to help Sara achieve her goals. In the subsequent trial, both Sara's need for an opportunity to tell her story with dignity, and Katherine's desire to convict were fulfilled. More importantly, they worked collaboratively.

This example of prosecutorial consciousness raising is dramatic and highly idealized. A more realistic version would stop with the guilty plea. Most prosecutors look and sound like Katherine and would agree with her evaluation of the case that the negotiated guilty plea had reduced the risk of an acquittal, had adequately punished the defendants, and thus had achieved justice for Sara. Like Katherine, most prosecutors would never even consider that Sara had different priorities: the opportunity to tell her story, to confront her assailants, to be treated with respect, and to be included in the process of determining what would happen to the men who brutalized her.

2. *Criminal Justice*

Criminal Justice exposes quite effectively the absence of absolutes in the criminal justice system. From the outset, the prosecutor, and the audience, is uncertain whether Denise Moore, the victim of a robbery/assault during which her face was savagely slashed, has correctly identified the defendant, a sympathetic loser (he is seen carrying Pampers for his child). The police and the prosecutor believe that Denise may have been using crack on the night of her attack, thus undermining her ability to observe her assailant, critical in any single-witness case, and her general credibility. Furthermore, Denise has a criminal record. She is a flawed, but not necessarily atypical, victim of crime.

When Liz Carter, the ADA assigned to the case meets Denise for the first time, she is all business, worried about the weaknesses of her case. During their conversation, she does not refer to Denise's disfiguring injury and makes only cursory attempts to bolster Denise's fragile self-confidence. Instead, Liz focuses on the upcoming grand jury presentation, eventually becoming quite adversarial with the victim.

Riley

(detective): Denise, this is Liz Carter from the District Attorney's office.

Liz: Nice to meet you, Denise. You okay?

Denise: Yeah.

Liz: I know it took a lot of guts to come over here.

- Denise: He ain't gonna be there, is he?
- Liz: Jesse Williams (the defendant)? No, I'm sure he won't.
- Denise: (looks over at Detective who is shaking his head no).
- Liz: Now the Grand Jury is real easy. There will be about 20 people in there. I'll ask you some questions. You tell the truth and they'll indict the creep. Don't worry— you and I, we're going to put this guy away for a long time (puts her hand on Denise's shoulder).
- Liz: Denise, did you know that the police went to 229 Kingman (the scene of the crime) and they couldn't find anyone living there named Anthony?
- Denise: Ahem.
- Liz: Do you know 229 is a crack spot?
- Denise: Yeah, so? There's a lot of crack spots.
- Liz: Denise, have you ever been convicted of a crime?
- Denise: No.
- Liz: Denise, there are two things I care about. One is putting this guy away for as long as possible. The other is helping you out so that you're not destroyed on the witness stand. And I gotta tell you, you're not being straight with me. I have your record here and it says for one that you were convicted of shoplifting on April 19, 1988.
- Denise: Yeah, but it wasn't me.
- Liz: But Denise, it says here that you plead guilty in criminal court.
- Denise: Yeah, but I didn't do it.
- Liz: So, when you were in court that day— in front of a judge— you were lying, is that it?
- Denise: No.
- Liz: And all these other times you plead guilty— prostitution, drug possession— you were lying to the judge also, is that true?
- Denise: No, see they said take a plea and you'll walk. Right? So I took one. I didn't want to go to jail. What's the big deal anyway? I'm not the one on trial here.
- Liz: No, but when there is a trial, Jesse's attorney is gonna rake you over the coals about your record. And, if he can make you seem like a liar about this or anything else— even what you had for dinner last night, the jury may not take your word about who robbed you and slashed your face.

- Denise: Yeah well, I wasn't out buying crack that night, alright?
- Liz: Denise, I'm going to be honest with you, okay? Every God damn case I've tried this year— every God damn one, has had crack floating around in it somehow. Every robbery is a drug deal gone bad. Every shooting is a battle over drug turf. And my gut instinct in this case, my guts is that Jesse needed money for crack and that you were at 229, maybe trying to score a little too, and it was the wrong spot at the wrong time. Does that ring a bell to you?
- Denise: God damn it. It doesn't ring a fucking bell with me. Jesse Williams slashed my face and everybody kept telling me that I wouldn't have to testify. And now you're telling me that I may have to testify? Well look, it's my face he slashed, alright? It's me he's gonna stomp on. And all you're fucking worried about is if I had crack that night? Fuck you, alright? Fuck you and fuck this shit.

This should be familiar dialogue to many prosecutors who believe that they are protecting the victim from devastating cross-examination and who want to prepare the victim for the attack by demonstrating how tough it will be on the stand. Under this barrage, most witnesses react as hostilely and defensively as Denise, and wonder whose side the prosecutor is on. But Liz is not giving Denise enough credit for her courage, intelligence and determination. She makes no effort to treat her as an individual, but instead stereotypes her as part of the drug scene with all its attendant liabilities.

Before the trial, Liz comes to see Denise at her home. Denise has been difficult but Liz needs her the next day and has come to be supportive. How big a stretch this is for the business-like prosecutor is evident from their conversation:

- Liz: Hi Denise. How are you feeling?
- Denise: Alright.
- Liz: Did Riley feed you?
- Denise: Yeah, he gave me some chicken McNuggets.
- Liz: Oh good.
- Denise: Um, the guy Williams, is he gonna be there?
- Liz: Yeah.
- Denise: Oh shit. He's gonna be sitting there and I'm going to have to point my finger at him and say "You're the one that did it, right?"
- Liz: Denise, you'll be protected.

- Denise: Look, I'm sorry about missing my appointments and all, but you don't understand what I'm going through.
- Liz: I do.
- Denise: No, you don't. I mean you can't tell me shit. You got a good job and you've probably got some cute, rich boyfriend. Yeah, and I doubt anybody is ever gonna slash your face.
- Liz: Denise, I wouldn't be here at 10 o'clock at night if I didn't care about you. Let's go in your room and talk.
- Denise: Okay. Excuse the place — it ain't much. Here, sit down.
- Liz: Now, let's talk about tomorrow. When I ask you questions, you just go through the story step by step.
- Denise: I didn't use crack that night.
- Liz: Did I ask you that? Denise, you've got to listen to the question before you answer it— especially when Williams' lawyer is cross-examining you. If a question calls for a one word answer— yes or no— just say yes or no. Don't volunteer anything. I guarantee this lawyer is going to argue with you and he is gonna try to get under your skin. You can't let him.
- Denise: Don't worry.
- Liz: Look, this happened 6 months ago so no one is gonna expect you to remember every detail. Just tell the truth.
- Denise: Are they gonna ask me about my record. You know, about the prostitution and drugs?
- Liz: Yes, I'm sure he will.
- Denise: Shit.
- Liz: And when he does, don't argue with him. Denise, just answer the questions. Don't forget, you are not the one that is on trial here. You're the victim. Oh, I almost forgot. I got this number for you— it's a drug rehab. Do you know the Odyssey House? They've got a really long waiting list. . .
- Denise: Look, I don't need no drug rehab.
- Liz: Well, I called them and they said they'd take you right after trial. How's that?
- Denise: I didn't ask for no favors, alright?
- Liz: Just take it, would you.
- Denise: (takes the piece of paper)
- Liz: So let's go through the story one time from the top.
- Denise: No, I've had enough of this shit. I'm tired, okay? I know what happened. Could you just please go? Would you get out of here? I just want to be by myself, okay? Please go.

Liz: See you tomorrow.

Denise: Just go.

This conversation surely represents some progress both in this particular relationship and in the depiction of prosecutor-victim relationships generally. Like Katherine, Liz has attempted to use empathy, averring that she 'understands' what Denise is going through. But even her insincere efforts are wasted on Denise who, like Sara, knows that the lawyer and victim are irrevocably different. Her references to the cute, rich boyfriend and the good job echo the scene in Katherine's apartment when Sara, screeching out of place, interrupts a dinner party for Katherine's yuppie friends.

Liz also tries to bolster Denise by reminding her that she is the victim and not the one on trial. Again, despite Liz's claim that she is preparing Denise for cross-examination, these reassurances are unconvincing, particularly after the skepticism Liz has expressed in the past. Her attempts to remediate are not wholly fruitless because Denise does calm down. Finally, Liz reveals her true colors when she tries to "fix" or "save" Denise by giving her information about a drug rehabilitation program, when Denise steadfastly denies any drug use. Liz clearly still does not believe her witness, an attitude that Denise understands and that explains her resistance to Liz's patronizing offer.

At the trial, tiny Denise courageously enters the courtroom, ready to testify, much to the consternation of the defendant who, the audience is meant to believe, had gambled that she would not appear. Quickly, the defendant hustles for a plea bargain, which Liz negotiates with the judge and the defense attorney despite Denise's presence in the courtroom. As the courtroom empties, Denise confronts Liz with her anger and disillusionment about the plea bargain, and with her feelings of betrayal:

Denise: Ms. Carter, why the fuck did you make that damn deal? I wanted to testify.

Liz: Denise, it was a big risk I did not want to subject you to. Jesse's lawyer was gonna be vicious. And you know juries in Brooklyn. They'll set anyone free.⁷⁶

Denise: But you were my lawyer. You were supposed to believe in me.

Liz: Denise, I'm not your personal lawyer. I represent the People of New York. But, I believed you. We had a chance to put this guy away for sure and I took it.

⁷⁶ No, they do not!

Denise: Look at my scar, Ms. Carter. Look at it (crying). It's not there for no 3 fucking years. It's there for the rest of my fucking life. I don't believe this shit man. First, my face gets fucked up by this fucking bastard and then my head gets fucked up by you and that stupid judge. The People of New York, my fucking ass. What about me, huh? Who cares what happens to me? Who the hell cares if he gets out and slices me up once more, huh?

Liz: Denise, we'll write the parole board. We'll get an order of protection. You'll be okay. I . . .

Denise: Okay? I'll never be okay. The scar is forever. Oh, I just swear to God, I hope that Jesse Williams gets stabbed to death in prison. I hope they call that piece of shit a bastard so he knows how the fuck that feels. Look at what he did to me.

Liz: Denise, I made a decision. I honestly believe it was the right one. I wish we could have put him away for 20 years, but this is the best we could do. Denise, you still have that drug rehab number I gave you?

Denise: You still don't get it, do you? (She then runs out of the court room)

No, Liz did not get it, nor did Katherine, nor do most prosecutors. The bromide offered by Liz that she was not Denise's personal lawyer and that she represents the "people," after months of acting otherwise, shocked Denise into her question: "Who cares what happens to me?" Momentarily, and against her better judgment, she trusted Liz, perhaps not wholeheartedly, but sufficiently to have counted on her to be the instrument of her dignity and visibility.

Both Sara and Denise misunderstood the prosecutor's role and were abetted in this misperception by the tactics used by Katherine and Liz to secure their cooperation for as long as the lawyers considered it important. Neither prosecutor was forthcoming about her agenda or honest about her relationship to the victim. Undoubtedly, neither questioned her own behavior, as evidenced by their identical hollow protests of "I know how you feel."

The two prosecutors have slightly different styles. Cool and distant Katherine apparently was oblivious to any alternative approach she might have to Sara and to her prosecutorial role. Her reaction to Sara's accusations was to take immediate and creative action, using her talents aggressively. After the trial, the viewer is left with the impression that Sara has taught Katherine a life-altering lesson about working with and for crime victims. The portrayal of Liz is more accurate, realistically capturing the cynicism of a Brooklyn prosecutor. Brusque and world weary, Liz has heard it all before, yet she has some awareness of the need to build a relationship with the victim, to gain

her trust, to motivate her cooperation, and to assuage her fears. She does this without much sensitivity or empathy. Liz knows a little bit about what she *should* do, but nothing about how to create a genuine connection with Denise, the individual.

That both ADAs are women is undoubtedly a dramatic device, even a cliché, intended to enhance the apparent conflict between their gender and their professionally detached response to the female victims of male violence. As a result, the viewer is pushed to wonder even more at the inability of these women to connect. In the case of *The Accused*, Katherine is made to feel shame for her careerism until she redeems herself. In *Criminal Justice*, the effect of Denise's accusation is unknown. The film ends ambiguously, leaving the viewer dubious about whether Liz believes she did achieve "justice," and how this experience will affect her in the future.

Many prosecutors might scoff at the idea of bringing a defendant to trial on legally speculative charges just to assuage her conscience as Katherine did. Yet because she persists even after her boss tells her that she will be a pariah in the office, many prosecutors who themselves might be less courageous might applaud her principled stand. They also might commend Liz for her more than minimal efforts to reach out to the victim by visiting her at home and trying to help her drug problem, and react with surprise at Denise's disillusionment. After all, as Liz says, he was convicted and is going to jail.

Whether the best response to the behavior of these prosecutors is respect or derision, it is likely that most actual prosecutors would handle their victims no better. In fact, both Katherine and Liz tried to be sensitive, and connect with the victims. They had substantial contacts with their victims, and listened in an attempt to take their interests into account, even though their efforts were imperfect. These victims were neither silent nor invisible, providing much more opportunity for communication than might be true in the routine real-life case. Nevertheless, these efforts were failures according to both Sara and Denise, and flawed in the eyes of the slightly more objective viewer, ultimately confirming a negative impression of the ability of the criminal justice system to respond to victim concerns.

B. *The Real World*

Is change in the non-cinematic world of the urban DA's office possible? Almost twenty years ago, Abraham Goldstein advocated a greater voice for the victim by permitting participation in dismissal, charge reduction, guilty pleas, and sentencing decisions.⁷⁷ Today, this

⁷⁷ ABRAHAM GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND*

voice is still a whisper. To improve, it need not be strident, as some might characterize the victim's rights agenda, just respected and attended. Any change would ameliorate the conventional prosecutor-victim relationship.

For domestic violence cases, Linda Mills has proposed a model of "affective lawyering" in which prosecutors embrace the emotional aspects of lawyering rather than remain detached.⁷⁸ While domestic violence victims have unique psychological problems, and similar claims might be made for rape survivors, the general notion that empathy and acceptance enhance the victim's confidence, credibility, and faith in the criminal justice system is so obvious, that any counter-arguments (usually focused on resources and time) seem weak and self-serving. I propose to reorient the current balance from an approach that admits a victim to the decision making process only at the sufferance of the prosecutor to a more collaborative model that esteems communication, consultation and participation.

Unlike a civil client or even a criminal defendant, a crime victim does not control the destiny of a criminal case. But neither the multi-dimensional obligations of the prosecutor nor concern about the vindictiveness or irrationality of the victim justify the current typical situation of exclusion which may result in a victim, like Sara Tobias, learning about the disposition of her case from the newspapers. Who other than the victim (or the victim's family and friends) actually has any interest in its disposition? Certainly, the fictitious "people" have no measurable stake in the outcome of the individual routine cases that constitute the majority of matters processed in the criminal justice system.⁷⁹ Given this unrivaled claim, it is difficult to justify excluding a victim who is aware that the prosecutor must serve other constituencies and, ethically has no obligation to defer to his or her wishes.⁸⁰ Ordinarily, the victim should be informed and consulted

THE GUILTY PLEA 70-73 (1981).

⁷⁸ Linda G. Mills, *supra*, note 73.

⁷⁹ Perhaps in a few instances, usually high publicity cases, other communities might have an interest and want a voice in the disposition of a case. In these cases, the victim, in competition with all these other, perhaps more powerful constituencies, is all the more likely to be discounted or ignored. See, e.g., GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: PROTECTING VICTIMS' RIGHTS IN CRIMINAL TRIALS 190-92 (1996), in which the author describes a case in Brooklyn of a teenager who had been kidnaped by an ultra-Orthodox rabbi and who, after he had been missing for two years charged, returned to denounce his parents as irreligious. Although the rabbi was charged with kidnaping, he was offered a guilty plea that would involve no imprisonment, but only probation and community service. The boy's parents were not consulted or even informed about this arrangement. Eventually, the judge, responding to the public denunciation of this plea from sympathizers of the parents, refused to honor the arrangement.

⁸⁰ One conventional view of the allocation of lawyer-client decision making authority draws a line between decisions about the general goals and the final disposition of the case

about the case unless something unusual occurs such as a ruling concerning a violation of the defendant's constitutional rights in the evidence-gathering phase or a legal challenge to the charges, that might produce conflict with the victim's goals. Even then, the prosecutor has some duty of explanation. Within the acknowledged parameters of the prosecutor's capacity to defer to the victim, this most closely resembles a collaborative model of lawyer-client relationship in which the lawyer and client "share responsibility for diagnosis, action and implementation."⁸¹

There are three victim-centric values that I propose all prosecutors should honor: respect, compassion, and empathy. If a state of genuine empathy is too difficult to attain, then at least sincere attentiveness. These values can be incorporated into any prosecutor-victim interaction through explanation, communication, and participation. The measure of the success of this approach would not be simply victim satisfaction, an amorphous concept that could as easily describe vengeance as a comfortable waiting room. Instead, it would be the victim's and prosecutor's mutual judgment about the quality of the shared experience. Liz had to convince herself, and failed to convince Denise, that the plea bargain was a just response to Denise's experience because the defendant will be serving time. The prosecutor who can assess the relationship and feel that she listened to and treated the victim with respect and compassion will not have to seek such reassurance. The dramatic courtroom (and dinner party in *The Accused*) accusations would not occur.

With these values as guideposts, there are three stages of the usual case when victim inclusion could be enhanced: charging, plea bargaining, and sentencing.

(the ends) and those about tactics and lawyering skills (the means). Robert D. Dinerstein, *supra* note 16, at 504; BINDER, *et al.*, *supra* note 2, at 16-18; *see also* ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.4 (amended 1996) ("The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.") There are many decisions about which the victim and prosecutor might disagree that could be called "technical" rather than "substantive." For example, the victim might not want a particular witness to testify for the prosecution (a minor child, for example) or might balk at testifying about past misconduct despite the prosecutor's intention to mitigate the revelation by bringing out potentially damaging evidence voluntarily ("taking out the sting). The victim, however, might not agree that these decisions are merely tactical. If the victim's preference might jeopardize the conviction, and if that is an undesirable outcome to the victim, then deference to the prosecutor's greater expertise is required.

⁸¹ JAMES E. MOLITERNO & JOHN M. LEVY, *ETHICS OF THE LAWYER'S WORK* 86 (1993).

1. Charging

The initial charging decision is arguably the most critical moment in a criminal case and for that reason is the exclusive province of the prosecutor.⁸² The prosecutor's quasi—judicial function, requiring fealty to the law and fairness to the defendant, governs the charging decision. First, the legal sufficiency of the evidence against the suspect must be examined objectively and independently. Second, the prosecutor relies on the neutral assessment of the arresting officer about the victim's story. Moreover, victim emotions are strongest immediately after the crime or the arrest so that the level of victim subjectivity is most potent, and expectations most unrealistic. A cooling-off period might help set the case on a more reasoned course. Finally, once a probable cause determination has been made, pressure to process the case expeditiously following the arrest militates against any in-depth probing with the victim.

In most jurisdictions, procedural rules require some kind of screening proceeding, such as a preliminary hearing or a grand jury presentation, at which the victim testifies following the arrest and charge. This is an opportunity for the prosecutor to begin the process of explanation and consultation. Usually, the preparation for these proceedings focuses on the facts rather than on the victim's goals or the prosecutor's long-range intentions. Since most cases in the criminal justice system are destined for a negotiated guilty plea rather than trial, this may be the first and only occasion for the prosecutor to discuss the process and possible resolution of the case. The success of these discussions as victim-centered lawyering depends on the commitment of the prosecutor to listen to and respect the victim's point of view.

This initial meeting, and any follow-up sessions, should include:

- a. *An express discussion of the realities of the apportionment of power in the decision making process.*

From the outset, the victim must be made to understand the myriad duties of the prosecutor, including some loyalty to the defendant, or else she will make Denise's mistake of thinking the ADA is the victim's lawyer. Furthermore, the prosecutor should educate the vic-

⁸² Most courts refuse to intervene in the prosecutor's decision to decline to charge, see, e.g., *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution"); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973); but see Stuart P. Green, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 *YALE L.J.* 488, 503 (1988) (proposing a statute that would enable a victim to seek a declaratory judgment that the prosecutor's failure to charge is an abuse of discretion).

tim about the legal constraints on the prosecutor's decisions.

If Katherine initially had paid attention to Sara, she would have heard about concerns that were more personal, but not necessarily incompatible with her own conviction-oriented goals. If she had taken seriously Sara's interests Katherine might have: 1) not taken a guilty plea at all; 2) insisted on a plea to a sex offense; 3) laid out the costs of testifying so that Sara understood the risk; and 4) explained convincingly why the guilty plea was the best vehicle to achieve Sara's goals despite her skepticism. Furthermore, if either Katherine or Liz had explained the realities of the system in which the vast majority of cases result in non-trial dispositions, neither Sara nor Denise would have counted so heavily on a trial for their empowerment.

b. A clear explanation of the impending proceedings.

The victim should understand the nature of any proceedings at which she must appear, and a summary of the nature of any proceedings from which the victim is likely to be absent. In addition, she should know other significant information such as an estimate of the case's duration, and, if possible a prediction about the probability of a negotiated guilty plea. At this time, the prosecutor could discuss evidentiary or procedural problems in order to lay the groundwork for more thorough explanations should the need arise in the future. This discussion also could elicit from the victim the degree to which she wants to be consulted or to participate.

c. A clear message to the victim that any disclosures are not confidential as a matter of law.

As early as this first conversation, the prosecutor should dispel any misconception that the victim has an expectation of privacy or confidentiality, but should do so in a manner designed to avoid inhibiting the victim's candor.

2. Plea Negotiations

Unless the prosecutor plans to negotiate purely on the basis of the crime charged and the defendant's record, detailed and accurate information is imperative. The best source of this information is the victim, but when discussing the facts that might be the basis of testimony or prompt additional investigation, the conversation should be reciprocal. Prosecutors, for both sensible and self-protective reasons, rarely divulge their evaluative thought process to the victim. Certainly, there may be legal issues that would be difficult to explain or factors that would be embarrassing to disclose (e.g., the loss of evidence, or a personal opinion that the victim would be an inarticulate

witness), but none of these reasons justifies withholding information from the victim. Moreover, prosecutors tend to look at the bottom line relating to the degree of the conviction and the sentence imposed rather than intermediate or alternative possibilities. In both *The Accused* and *Criminal Justice*, the knowledge that the defendants had admitted guilt and were going to jail did not appease their victims. Without any real discussion, both Katherine and Liz incorrectly presumed reticence to testify on the part of their respective witness, and thus predicated a plea offer on an effort to spare the victim this unpleasantness. As both Sara and Denise demonstrated, prosecutors can misjudge this easily.

Plea negotiations can be, but rarely are, a single moment in time. Usually it is an extended process of offer, counter-offer, and deliberation which comprehends the entire pretrial life of a case. During this period, a case might appear on the court calendar many times without any participation by or contact with the victim. Left in the dark, many times victims are unaware of periodic legal developments, such as pre-trial motions, or changed circumstances, such as the defendant's release or a new arrest. In an extreme version of this isolation, the victim may not even be informed when the defendant does plead guilty. If communication with the victim regularly has been delegated to others, such as paralegals or victim liaison personnel, who do not know the details and reasons behind the decision, the victim may know only the fact of the guilty plea but none of the underlying justifications.

At the early stages of the case, the prosecutor and victim should come to an agreement about the frequency and nature of their contacts during the pendency of the case.⁸³ Of course, if a victim initiates contact, a courteous and professional prosecutor should respond. When the burden falls on the prosecutor to decide how often and why to contact the victim, a preestablished understanding of the issues that will call for communication should avert unrealized expectations, alienation, and disaffection. Finally, better communication signals respect and compassion and should avoid the bitter personal feelings of betrayal expressed by a Sara or a Denise.

3. Sentencing

Victims' voices have been heard loudest at sentencing, although not without controversy.⁸⁴ In the closing chapter, the judge, rather

⁸³ This understanding resembles the collaborative relationship reached after a negotiation of its terms advocated in Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 *BUFF. L. REV.* 71, 83-84 (1996).

⁸⁴ See note 17 *supra*.

than the prosecutor, is the audience with which the victim wants to communicate. This job of facilitating an expression of a victim's feelings should be straightforward because, by this point, the prosecutor should have an accurate and comprehensive understanding of the victim's interests if the relationship until that point has embodied the recommended values. At sentencing after a guilty plea, the range of possibilities usually has been so predetermined, first by the charging decision and then by any sentencing bargaining, that the scope of the judge's discretion actually may be quite narrow. The opportunity to impart information may be more restorative for the victim than influential on the actual sentence imposed. By the time of sentencing, the victim may have little to offer the court other than an emotional plea which will have no effect on a preordained sentence. After a trial conviction, if there already has been a successful victim-prosecutor collaboration, the trust and respect cultivated throughout the case will have been reflected in the improved quality and impact of the victim's testimony, making a sentencing statement less critical.

In routine cases, prosecutors rarely invite victims to articulate how the crime has affected them. Since these feelings may change over time, unless the prosecutor inquires regularly, the information will either be lacking or inaccurate. Too often, nothing more is known at the time of sentencing than at the time of the crime. Some other person, perhaps a probation officer, has elicited information from the victim to include in a written report. Prosecutorial involvement for the first time at this stage would not only be redundant, it would be insincere — too little, too late. Instead of disturbing the traditional focus at sentencing on the defendant's deserts, the victim's story should be injected into the earlier stages when critical decisions about charging and pleading have a greater affect.

My argument for collaboration and victim inclusion in decision making is different from the demands made by victim right's advocates. I am addressing the tenor and quality of lawyering by prosecutors rather than urging the creation of rights. For example, one of the provisions of the most recent version of a proposed Victims' Rights Amendment contained a constitutional right to be heard and to submit a written statement at a proceeding to determine the acceptance of a negotiated guilty plea.⁸⁵ Open communication and mutual commitment by the prosecutor and the victim should obviate the need to legislate such participation.

Assuming that there is no legal obligation on the part of prosecutor to take into account the victim's wishes, preferences, and opinions,

⁸⁵ S.J. Res. 6, 105th Cong., 1st Sess. (1997).

are there any reasons to change the traditional model that cause so much victim marginalization? Greater inclusion of the victim in decision making could benefit dubious prosecutors in any of several ways.

- *Efficiency*

More collaboration between the prosecutor and the victim should increase efficiency by reducing delay and increasing access to information. If information is exchanged, a prosecutor will profit from increased opportunities to elicit facts which lead to theories. The common practice of relying on second-hand information is practical, only if the prosecutor's goal is no more than case management or a quick guilty plea. But if the prosecutor strives for a fair disposition of a case, whether by trial or guilty plea, then detailed, genuine knowledge about the facts of the case is essential.

Given the large case loads of the typical prosecutor, coupled with the high percentage of cases resolved by guilty plea, many prosecutors postpone serious preparation until the eve of trial. Last minute witness preparation that uncovers heretofore unknown evidence is commonplace, leading to embarrassment before the judge, or possibly even dismissal. Thorough and frequent contact with the victim would avoid this.

Greater victim involvement might also induce more effort to mediate rather than litigate a case. Mediation is a tool that is often used in connection with misdemeanor prosecutions in overcrowded lower courts. Any incentive to choose an alternative method of dispute resolution would be an advantage to the court system.

- *Fairness*

Accuracy and reliability in charging and plea negotiations would be enhanced through communication and consideration of the victim's views resulting in more faith generally in the criminal justice system. The initial charges would reflect the actual criminal conduct not just the hearsay information provided by the police. Although a victim might not appreciate all of the reasons for a particular guilty plea or sentence, and might even be hostile to the prosecutor for discounting the seriousness of the case, more consultation, explanation, or even persuasion would ameliorate this dissatisfaction.

The court and defense attorney would be more inclined to cooperate in a fair plea and sentence based on real, not speculative information. In addition, more contact with the victim would increase the prosecutor's integrity in the victim's eyes, making any plea bargain or sentence more credible after thorough and thoughtful explanation.

- *Confidence in the system*

Our criminal justice system is criticized for many reasons. Both the public and individual victims lack faith in the efficiency and fairness of the process. Public confidence would be bolstered by changing the current impression that the system does not value the interests of victims, and that their views have little influence on the outcome of a case. People would be more likely to cooperate when needed, and to trust rather than chastise the prosecutor who dismisses charges or diverts prosecutions.

Increased victim participation would also promote greater prosecutorial accountability. A more conspicuous victim would force the prosecutor to account for a particular decision. Because discretionary decisions would be more visible, prosecutors would have to be able to justify their exercise of discretion thereby enhancing public faith that the prosecutor is worthy of this vast power.

- *Victim satisfaction*

Criminal prosecution is not a consumer product for which the victim has to give a seal of approval, unlike private representation where client satisfaction is an explicit goal. Nonetheless, it seems obvious that something is wrong if a crime victim emerges even more disempowered and frustrated after a criminal prosecution than after the crime itself. To the victim, her story is unique so she cannot understand when the prosecutor does not share, or at least empathize with that view. Admittedly, victim satisfaction is not the primary goal of the prosecutor, but as goals go, it is lower on the list than it should be.⁸⁶ Many crime victims who do not grasp the implications of procedural or evidentiary rules and do not comprehend how their case is being judged relative to other cases would be able to understand if given a reasonable explanation.

Inclusion usually motivates cooperation. The victim might be more helpful about gathering evidence, more open to considering alternatives approaches, and more understanding about the other factors a prosecutor has to take into account. Collaboration fortifies the self-esteem of the victim.

IV. CONCLUSION

I have used the term victim-centered prosecution to describe a collaborative relationship that includes more consultation and explanation about the process, the prosecutor's options, and the broader context in which the prosecutor operates. It is a process which gives

⁸⁶ See McDonald, *supra* note 17.

the victim some choice about being involved in decision making. Any thoughtful prosecutor internally reflects on, as well as openly debates with supervisors and colleagues about, the best course of action. If the prosecutor were to share this thinking with the victim, listen to the victim's response, and explain the ultimate decision in terms that reflect a consideration for the victim's experience, viewpoint and desires, victim participation would be vastly increased and improved with all of the beneficial effects mentioned above. Of course, there will be many times when this approach might create friction with a victim who is not satisfied with the specific outcome. Nevertheless, assuming that the decision was rational, fair, and based on the information provided by the victim, the process of inclusion itself will have independent value which may be appreciated by the victim, even if only at a later, more reflective time.

Participation also means that the victim should be informed about developments in the case, including non-events. Often long adjournments between court appearances, postponements for procedural reasons, and a host of miscellaneous events cause long delays during which time the victim is ignorant of what is happening. It is not unusual for a year to elapse between contacts between the day of arrest and the final disposition. Since the prosecutor knows that either nothing of consequence is occurring, or believes that the victim would not understand or care, the prosecutor often overlooks the victim's curiosity and concern. The simple medicine of communication would decrease victim alienation and increase victim incentives to continue to care about the case.

Ultimately, my suggestions may be more about form than substance since the prosecutor can never abrogate decision making to the victim, or even consider the victim a full partner in the process. Nonetheless, the prosecutor can create a dynamic that recognizes and credits victim's opinions, interests, and needs. Furthermore, although I have made some simplistic assumptions about the views victims bring to the relationship with the prosecutor, the lessons of client-counseling which credit the "autonomy, intelligence, dignity and basic morality of the individual. . . ." have a place in this very unique relationship.

In the clinical education universe, the prosecutorial cohort is small. While there may be only a few of us directly teaching and supervising students in this context, every year our former students pour into prosecutors' offices where they receive little reinforcement for a victim-centered approach. This paper attempts to fill this gap by offering an approach to prosecutor-victim communication that imports some of the values of client-based counseling advocated by most clinicians that can be taught to law students in prosecutor's clinics as well

as fledgling assistant district attorneys. At the end of the day, the conversation might sound like this:

Denise: After our many conversations, I understand why it made sense for him to plead guilty. You listened to me and understood that I was afraid to get up on the witness stand and show my scar to all those people. But you helped me see that I had to be willing to do that in order to put him away. I now see the cause and effect — I was willing to go to court, so he got scared and pled guilty. You protected me and he still got punished. Thank you.

Liz: You're welcome.

