

Undue Influence: A Prosecutor's Role in Parole Proceedings

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Abstract

Professor Cassidy explores what it means for a prosecutor to act as a “minister of justice” in the context of parole proceedings. He argues that prosecutors should not perceive themselves as zealous advocates in what is essentially an administrative setting, and that prosecutors should not oppose release simply because they believe that the nature and circumstances of the crime warrant continued incarceration. Rather, Cassidy argues that prosecutors ordinarily should refrain from personally testifying at parole hearings, and should submit written comments to the parole board only in those rare situations where the prosecutor is in possession of otherwise unavailable information pertaining to an inmate’s post-conviction behavior that would assist the board in making an accurate legal and factual determination. Cassidy surveys the approaches taken by parole board statutes and regulations in fifty states and discusses which of those approaches properly calibrate the scope and limits of a prosecutor’s input in release decisions.

I am delighted to contribute to this symposium honoring the work of Bennett L. Gershman. Professor Gershman and I have toiled together in the field of prosecutorial ethics for several decades. I have greatly admired his work, and his scholarship over the past years has inspired and informed mine. While we occasionally have disagreed on implementation strategies,¹ we share a core commitment to the prosecutor’s mission as a minister of justice to seek the truth and not partisan interests.

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¹ See Bennett L. Gershman, *Preplea Disclosure of Impeachment Evidence*, 65 VAND. L. REV. EN BANC 141 (2012).

In one of Professor Gershman's most influential articles, *The Prosecutor's Duty to Truth*,² he argued that a prosecutor's role at trial is to attempt to point the fact finder towards truth, which might be defined as a well-grounded, credible finding of fact and the application of law to fact.³ He highlighted the many ways that prosecutors sometimes deviate from this role and *distort* the truth at trial, particularly by 1) attacking the defendant's character and inviting the jury to decide the case based on impermissible use of character evidence, 2) misstating evidentiary facts on cross-examination or in closing argument, and 3) engaging in inflammatory arguments that may arouse the passions of the jury.⁴ While some scholars⁵—including myself⁶—have disagreed with Professor Gershman's conclusion that a prosecutor has a duty to *prejudge* the truth and to be personally convinced of the defendant's guilt before commencing a prosecution, one can disagree as an epistemological matter about the appropriateness and even administrability of that rigorous charging threshold without detracting from the validity of Professor Gershman's other core insights in that article about the various forms of trial conduct that distract the jury from their proper fact finding function.

In the seventeen years since *The Prosecutor's Duty to Truth* was published, its insights have been applied outside the trial context to a prosecutor's role in investigations,⁷ charging,⁸ plea bargaining,⁹ and statements to the media.¹⁰ To date, however, very few scholars have addressed the proper role of prosecutors (if any) at parole hearings.¹¹ What is the "truth" that a parole board is attempting to ascertain

² Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309 (2001).

³ *See id.* at 339.

⁴ *Id.* at 315.

⁵ *See* Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2197 (2010).

⁶ R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 14–15 (West, 2d ed. 2015).

⁷ *See, e.g.*, Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2125 (2010).

⁸ *See, e.g.*, Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 316–17 (2017).

⁹ *See, e.g.*, Adam N. Stern, *Plea Bargaining, Innocence, and the Prosecutor's Duty to "Do Justice"*, 25 GEO. J. LEGAL ETHICS 1027, 1034 (2012).

¹⁰ *See, e.g.*, Abigail H. Lipman, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 AM. CRIM. LAW REV. 1513, 1537 (2010).

¹¹ One laudable exception is Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373 (2014). Professor Russell examines state parole practices to determine whether jurisdictions are complying with the Eighth Amendment's requirement after *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 567 U.S. 460 (2012) that juvenile offenders be given a "meaningful opportunity for release." Although her article looks primarily at state responses to *Graham* and *Miller* in terms of the manner in which they conduct their parole proceedings and the evidence which they receive, the article's Appendix provides a very useful—although now somewhat dated—summary of which states allow prosecutorial input at parole proceedings and which do not. 89 IND. L. J. at 434–40.

at a release hearing, and does the prosecutor play any legitimate role in that inquiry?¹²

For two reasons, the topic of prosecutors and parole has become especially salient in recent years. First, Supreme Court decisions subject states to a new constitutional requirement to provide a “meaningful opportunity to obtain release” for some categories of juvenile offenders.¹³ In *Graham v. Florida*,¹⁴ the Supreme Court ruled that a sentence of life without parole for a juvenile offender in a non-homicide case violates the Eighth Amendment ban on cruel and unusual punishment. In *Miller v. Alabama*,¹⁵ the Supreme Court built upon the foundation of *Graham* and ruled that mandatory life without parole sentences for juvenile murderers also violate the Eighth Amendment.¹⁶ Thus, juvenile rapists, murderers, and habitual violent criminals who were once sentenced to effective or constructive terms of life imprisonment in the 80s, 90s, and first decade of the 21st century are now seeing parole boards. Second, the political pendulum has swung away from the “Truth in Sentencing” movement of the 1980s and 1990s toward meaningful opportunities for early release, even for adult defendants. Whether due to prison over-capacity, the budget-busting costs of lengthy prison terms, or the political realization that mass incarceration has failed as a social experiment, several states that once had

¹² This article uses the term “hearings” interchangeably for both parole hearings and parole interviews. States have varying structures for their discretionary parole proceedings. See Russell, *supra* note 11, at 401. Some states conduct a hearing at which numerous stakeholders are allowed to give evidence, other states conduct one-on-one interviews with the prisoner and take other evidence separately.

¹³ Russell, *supra* note 11, at 374–75.

¹⁴ 560 U.S. 48 (2010).

¹⁵ 567 U.S. 460 (2012).

¹⁶ By its terms, *Miller* only prohibits statutory schemes that mandate life without parole for juvenile murders. State judges are still free to impose life sentences without parole, although the circumstances in which they may do so seem especially narrow after *Miller* (such as habitual criminality, extremely atrocious murders, or multiple victims). Some states have reacted to *Miller* by prohibiting life without parole sentences for juvenile murderers entirely. See, e.g., ARK. CODE ANN. § 5-4-108 (West 2017); CONN. GEN. STAT. ANN. § 54-125a(f) (West 2015); *State v. Sweet*, 879 N.W.2d 811 (Iowa 2016); *Diatchenko v. Dist. Attorney for the Suffolk Dist.*, 27 N.E.3d 349 (Mass. 2015). Other states have enacted statutes that detail the factual circumstances in which LWOP is allowed. See, e.g., MICH. COMP. LAWS § 769.25 (2014) (permitting LWOP only at a prosecutor’s request for specified crimes); N.C. GEN. STAT. § 15A-1340.19(A-C) (2012) (permitting LWOP for juveniles for non-felony first degree murder). Still others set a release hearing date for juvenile murders (a so called “second look”) after a particular term of years, regardless of whether the judge sentenced the offender to life without parole or simply to life. See, e.g., DEL. CODE ANN. 11, § 4204A (2013); FLA. STAT. ANN. § 921.1402 (West 2015). For a comprehensive study of these so-called “*Miller* corrections” see Russell, *supra* note 11. Professor Russell argues that while these *Miller* corrections have begun to address the timing of parole hearings for juvenile offenders, states may not continue to rely on their existing parole board practices (right to appear, right to see and rebut evidence, right to counsel) for juvenile offenders without running afoul of the Eighth Amendment. *Id.* at 433.

abandoned parole have reinstated it by statute, while others are debating taking such a step.¹⁷

Why should scholars, legislators, or even members of the public care about whether prosecutors appear at parole proceedings, and if so how they testify? Some recent high-profile examples from the media highlight the ethical issues presented when prosecutors put their “thumbs on the scale” of parole decisions:

In Massachusetts, Alfred Brown, who murdered his parents and sister when he was sixteen, was being considered for parole after the Supreme Judicial Court ruled that life sentences without parole for juveniles—whether mandatory or discretionary—violated the state constitution.¹⁸ The prosecutor in the murder case, John Doherty, appeared personally and testified that if Brown were released, “he will kill again.” Brown, who was 55 years old at the time of his hearing, was denied release on parole.¹⁹

In Kansas, Michael Soles was being considered for parole for a random shooting spree he committed in 1976, at the age of nineteen, from the balcony of a Holiday Inn. Soles killed three people and injured eight others. The former District Attorney for Sedgwick County who prosecuted Soles—now Judge Keith Sanborn—appeared at the hearing and begged the parole board to keep Soles in prison: “I hope you’ll say ‘Michael, you made your bed, now you got to lie in it’ and make him stay.”²⁰ Current District Attorney Marc Bennett argued before the panel that if Soles committed the crime under current state law, he would have no chance for parole and would even face the death penalty.²¹ Soles was denied parole and the hearing was stayed for ten more years.²²

In California, Kings County District Attorney Keith Fagundes vowed in his reelection campaign that he would “ensure[] personal prosecutor appearance for all

¹⁷ For example, both Colorado and Connecticut abolished discretionary parole and later reinstated it, while Virginia’s Governor created a commission in 2015 to study re-establishing parole. Joan Petersilia, *Parole and Prison Reentry in the United States*, 26 CRIME & JUST. 479, 482 (1999); GEORGE COPPOLO, OFFICE OF LEGISLATIVE RESEARCH REPORT, PAROLE DURING THE 1980S (2008), <https://www.cga.ct.gov/2008/rpt/2008-R-0126.htm>; Jenna Portnoy et al., *McAuliffe Creates Commission to Study Bringing Parole Back to Virginia*, WASH. POST (June 24, 2015) https://www.washingtonpost.com/local/virginia-politics/mcauliffe-creates-commission-to-study-bringing-parole-back-to-virginia/2015/06/24/1a10c106-1a7b-11e5-bd7f-4611a60dd8e5_story.html?utm_term=.a4f3e728807f (describing Virginia Governor McAuliffe’s commission to study bringing back parole).

¹⁸ *Diatchenko v. Dist. Attorney for the Suffolk Dist.*, 466 Mass 655, 671–72 (2013).

¹⁹ Laura Crimaldi, *Man Appeals for Parole Decades After Murdering Parents, Sister*, BOSTON GLOBE (April 26, 2018), <https://www.bostonglobe.com/metro/2018/04/26/man-appeals-for-parole-decades-after-murdering-parents-sister/PGZWt76Nfvmhxgu49UKK/story.html>.

²⁰ Scott Evans, *Parole Denied for Holiday Inn Sniper*, KWCH (July 18, 2017), <http://www.kwch.com/content/news/Holiday-Inn-Sniper-up-for-parole-again-422812644.html>. The death penalty was reinstated in Kansas in 1994.

²¹ *Id.*

²² *Id.*

parole hearings for violent criminals.”²³ This campaign promise was made despite the fact that California law does not require prosecutors to testify at parole hearings, and further provides that if a prosecutor chooses to submit testimony, she may do so in writing.

The Brown case²⁴ from Massachusetts is an example of a prosecutor offering a prediction of future behavior that as a professional matter he is simply unqualified to make. The Soles case²⁵ from Kansas illustrates how prosecutors sometimes attempt to pressure the parole board with information that is both irrelevant and inflammatory; the fact that the death penalty was reinstated in Kansas after Mr. Soles’ conviction should not be used as a ground for extending his commitment in light of ex post facto prohibitions. And the campaign rhetoric in California leaves one wondering who will be left in District Attorney Fagundes’ office after his re-election²⁶ to cover criminal arraignments, bail hearings, motions to suppress, trials, and appeals if scarce prosecutorial resources are devoted to sending staff members to cover parole hearings for every prisoner serving time for a violent offense?²⁷

State parole procedures vary widely and are challenging to categorize.²⁸ Those states that presently have some form of discretionary parole have enacted a complex web of statutory and regulatory provisions that determine the timing and interval of hearings, the type of hearing to be provided, the information available to the parole board, and the documentary and testimonial evidence to be received.²⁹ Despite these

²³ Julissa Zavala, *Meet the Candidates: District Attorney*, HANFORD SENTINEL (May 25, 2018), https://hanfordsentinel.com/election2018/meet-the-candidates-district-attorney/article_76caec8c-0c16-5dfe-b2db-c760822c0bc6.html.

²⁴ Crimaldi, *supra* note 19.

²⁵ Evans, *supra* note 20.

²⁶ After making this campaign promise, Fagundes was re-elected to the position of Kings County District Attorney on June 6, 2018. Julissa Zavala, *Fagundes Poised to Remain District Attorney*, HANFORD SENTINEL (Jun. 6, 2018), https://hanfordsentinel.com/election2018/fagundes-poised-to-remain-district-attorney/article_5837d365-0b45-5da5-aebb-02dbda08f908.html.

²⁷ A prosecutor’s participation in parole proceedings should be justifiable not only as an ethical matter but also as a proper stewardship of resources. California parole boards already have at their disposal the facts of the crime, as well as all unprivileged information related to the conviction sent to them by the judge who presided over the trial. CAL. PENAL CODE § 3042 (West 2017).

²⁸ NEIL P. COHEN, *THE LAW OF PROBATION AND PAROLE* § 6.18 (2d ed. 2017). In this essay I will focus on state parole practices. Federal parole was eliminated by the Truth in Sentencing Act of 1984 for prisoners convicted on or after November 1, 1987. Sentencing Reform Act of 1984, Pub. L. No. 98–473 (HJRes 648), October 12, 1984, 98 Stat 1837, tit II, ch II, § 235(b)(1), 98 Stat. 2032.

²⁹ States are free to vary widely in their parole procedures because the Supreme Court has ruled that there is no liberty interest in discretionary parole protected by the Due Process Clause unless the state has by statute or regulation created in the prisoner an expectation of parole upon the fulfillment of certain conditions. Even then, due process requires very few procedural safeguards in the parole context: it does not require the board to articulate the specific evidence on which it has relied in denying release, it does not require that the prisoner be afforded counsel, and it does not require that the prisoner be allowed to cross examine witnesses. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 10–16 (1979). See *Swarthout v. Cooke*, 562 U.S. 216, 217 (2011) (“In the context of parole, we have held that the procedures required are minimal.”).

differences, states tend to agree on the basic “standards” for granting parole—that is, the questions parole board members are asked to consider. Most commonly, parole boards are allowed to grant release when 1) there is a reasonable probability that the inmate can live outside prison without reoffending, and 2) release would not be incompatible with public safety and welfare.³⁰ In answering these two questions, jurisdictions typically require their boards to consider the prisoner’s criminal history, the nature and seriousness of the offense for which he was imprisoned, his department of corrections disciplinary record, any rehabilitative or educational programs in which he participated while in prison, and his prospects for employment and family/community support upon release.³¹

As the United States Supreme Court has recognized, parole decisions “turn[] on a ‘discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done.’”³² At base, this is a risk assessment. It is not a finding of fact in any true sense of the term, but rather a prediction of future behavior based on prior conduct. What value can the prosecutor’s testimony add to this determination?

The nature and the circumstances of the offense are certainly matters known by the prosecutor and relevant to the parole board’s determination. The more depraved or heinous the crime, the more likely it may be in the public’s interest to deny release to the prisoner because such release could both undermine general deterrence and erode public confidence in the retributive value of the criminal law.³³ Or, the depravity of the crime could speak to internal motivations or impulses of the prisoner that may be difficult to overcome through treatment. Yet evidence regarding the nature and seriousness of the crime is available to the parole board from written information required to be contained in each parole board file—including an official written statement of the offense, pre-sentence report, victim-impact statements, and

³⁰ See, e.g., GA. CODE ANN. § 42-9-42 (West 2017); HAW. REV. STAT. ANN. § 353-69 (West 2017); IDAHO CODE ANN. § 20-223 (5) (West 2017); IOWA CODE ANN. § 906.4 (West 2010); KAN. STAT. ANN. § 22-3717 (West 2018); KY. REV. STAT. ANN. § 439.340 (2) (West 2018); MONT. CODE ANN. § 46-23-208 (West 2017); VT. STAT. ANN. tit. 28, § 502b (b) (West 2018); 120 MASS. CODE REG. 300.04 (2018).

³¹ See, e.g., IDAHO CODE ANN. §20-220 (West 1947); KY. REV. STAT. ANN. § 439.340 (West 2018); N.Y. EXEC. LAW § 259-i (McKinney 2017); IOWA ADMIN. CODE r. 205-8.10 (2017).

³² *Greenholtz*, 442 U.S. at 10 (quoting Sanford H. Kadish, *The Advocate and the Expert—Counsel in the Penal Correctional Process*, 45 MINN. L. REV. 803, 813 (1961)).

³³ Some states have parole standards that consider the nature and seriousness of the offense as a separate factor in parole considerations, rather than simply using it as a subsidiary factor in determining risk of re-offense and public interest. For example, New York requires the parole board to consider whether the prisoner’s release will “so deprecate the seriousness of his crime as to undermine respect for the law.” N.Y. EXEC. LAW § 259-i (2)(c)(A) (McKinney 2017). Rhode Island provides that a prisoner cannot be paroled if it would “depreciate the seriousness of the prisoner’s offense. . . .” 13 R.I. GEN. LAWS § 8-14 (a)(2) (1995).

the prisoner's criminal record.³⁴ Moreover, in most states the victim(s) of the crime are required to be notified and invited to give oral or written testimony before the parole board regarding the nature of the crime and its effect on them.³⁵

The defendant's expression of remorse and/or his willingness to accept responsibility for his conduct are also relevant considerations in ascertaining his likelihood to re-offend. The prosecutor may have information on this issue from post-arrest statements made by the defendant to police, plea negotiations, or testimony given by the defendant at trial. But evidence on this subsidiary fact is also ascertainable from written material typically contained in the parole board's files: including a presentence report from the probation department, the defendant's allocution (if any) during sentencing, a risk/needs assessment conducted by the department of corrections upon intake and classification, and a record of his participation in programming while in prison.³⁶

Recognizing the limited value, if any, of the prosecutor's input at parole hearings, a few states sharply curtail the prosecutor's role. Thirty-eight states now provide some form of discretionary parole for adult offenders.³⁷ In Texas³⁸ and

³⁴ See, e.g., 158-00 ARK. CODE R. §1-2 (2015); IOWA ADMIN. CODE r. 205-7.3 (2017); IOWA ADMIN. CODE r. 205-8.10 (2017); LA. ADMIN. CODE 22, § 701 (2017); 120 MASS. CODE REG. 300.5 (2018).

³⁵ See Russell, *supra* note 11, at 404–05. See also COLO. REV. STAT. ANN. § 17-2-214 (1)–(2) (West 2018); ALASKA ADMIN. CODE tit. 22, § 20.105 (2018); LA. ADMIN. CODE 22, § 510 (2017); 29-010 MISS. CODE R. § 201.3.3 (2013); OR. ADMIN. R. 255-030-0026 (2013).

³⁶ See, e.g., KY. REV. STAT. ANN. § 439.330 (West 2017); NEB. REV. STAT. § 83-1, 100.02 (West 2016); COLO. CODE REGS. § 1511-1:5.00 (2013); NEV. ADMIN. CODE § 213.514 (2008).

³⁷ Due to the wide variation in state statutory schemes, the number of states providing for discretionary parole has sometimes been listed as low as 35 and as high as 38. See, e.g., Alexis Lee Watts, *In Depth: Sentencing Guidelines and Discretionary Parole Release*, UNIVERSITY OF MINNESOTA ROBINA INSTITUTE OF CRIMINAL LAW AND CRIMINAL JUSTICE (February 23, 2018), <https://sentencing.umn.edu/content/depth-sentencing-guidelines-and-discretionary-parole-release>. These differences depend on how one defines discretionary parole. For example, Oregon only has discretionary parole for certain serious offenders; Kansas only has discretionary parole for certain serious "off-grid" crimes, such as first-degree murder or terrorism; New Mexico only has discretionary parole for those facing life in prison; South Dakota has presumptive parole, but if an inmate does not satisfy those presumptive requirements, the board will still hold a discretionary hearing. See KAN. STAT. ANN. § 22-3717 (d)(1) (West 2018); N.M. STAT. ANN. § 31-21-10 (West 2009); OR. REV. STAT. ANN. § 144.228 (West 2009); S.D. CODIFIED LAWS § 24-15A-39 (2012). For the purposes of this article, I have considered each of these states to have discretionary parole for adult offenders because there is a possibility that *some* offenders now being sentenced could face parole hearings. States that at one point had discretionary parole, but have since abolished it, are categorized in this article as not having discretionary parole, even though they continue to hold hearings for inmates sentenced prior to parole's abolition. See, e.g., Stephen Betts, *Number of Maine Prisoners Under Parole Authority Down to 4*, BANGOR DAILY NEWS (Jun. 7, 2014, 12:43 PM), <https://bangordailynews.com/2014/06/07/news/state/number-of-maine-prisoners-under-parole-authority-down-to-4/> (noting that Maine, which abolished discretionary parole in 1976, only has four remaining parole-eligible inmates).

³⁸ TEX. GOV'T CODE ANN. § 508.311 (West 1997).

Wyoming,³⁹ written submissions by the prosecutor are allowed, but only upon request and prior approval of the board; oral testimony by the prosecutor is prohibited altogether. Two other states (Nevada and West Virginia) permit written testimony from the prosecutor, but allow oral testimony only upon leave of the board.⁴⁰ Twelve states allow prosecutors to submit written testimony without prior leave in all cases, but they do not allow the prosecutor to testify in person.⁴¹ Massachusetts and Michigan allow prosecutors to testify orally only where the prisoner is serving a life sentence, otherwise prosecutors may submit only written comments.⁴²

Although a complete prohibition of prosecutor input in parole proceedings may seem facially attractive, I am hesitant to say that prosecutors cannot ever have factual information—unavailable from the written records or the victims—that might be pertinent to a parole board’s determination. I can imagine cases where either the prosecutor or trial witnesses have received threats of bodily harm from the prisoner after conviction, or where the government is investigating criminal conduct by the prisoner within the correctional facility that has not yet ripened into indictments or official disciplinary proceedings. Such instances, however, will be rare. The Texas and Wyoming approaches—allowing written submissions by the prosecutor but only upon leave of the board—appear sensibly drafted to allow for such circumstances.

³⁹ WYO. BOARD OF PAROLE, POL’Y AND PROC. MANUAL 2, 20 (Jan. 1, 2018).

⁴⁰ In Nevada, the prosecutor may give oral testimony only upon request of the board. NEV. BOARD OF PAROLE COMM’R, OPERATION OF THE BOARD MANUAL 5, 14 (2012). In West Virginia, prosecutors similarly may only give oral testimony at the board’s discretion. *See* W.V. CODE § 62-12-23 (West 2017); W.V. PAROLE BOARD, RULES OF THE W.V. PAROLE BOARD 11 (2006). At times, state parole board practices differ from the express terms of their operating statutes and regulations: for example, in West Virginia the board interprets state law to allow them to grant leave for the prosecutor to testify orally in rare situations, even though neither the statute nor the state parole procedures manual specifically provide for that situation. Telephone Interview by Sean Fishkind with Phillip W. Morrison II, Executive Director, West Virginia Prosecuting Attorney’s Institute (Aug. 14, 2018).

⁴¹ *See* CONN. GEN. STAT. ANN. § 54-125a(f) (West 2015); IOWA CODE ANN. § 906.7 (West 2010); N.J. STAT. ANN. § 30.4-123.54 (West 2014); N.Y. EXEC. LAW § 259-I (McKinney 2017); 61 PA. CONS. STAT. § 6135 (2009); VT. STAT. ANN. tit. 28, § 502 (e) (West 2001); ALASKA ADMIN. CODE tit. 22, § 20.100 (2018); 8 COLO. CODE REGS. § 1511-1:500; IOWA ADMIN. CODE r. 205-6.2 (2017); MD. Code Regs. 12.09.01.09 (2018); MD. Code Regs. 12.08.01.18 (I)(2) (2018); N.M. CODE R. § 22.510.2.8 (B)(4) (2001); N.M. Code R. § 22.510.3.8 (C)(2) (2001); N.Y. COMP. CODES R. & REGS. tit. 7, § 2200.5 (2006); UTAH ADMIN. CODE r. § 671-302-1 (2017); UTAH ADMIN. CODE r. § 671-303-1 (2015); S.C. DEP’T OF PROBATION PAROLE AND PARDON SERV. DIV. OF PAROLES AND PARDONS, S.C. BOARD OF PAROLES AND PARDONS POL’Y AND PROC. 21–23 (Jun. 2017); VT. BOARD OF PAROLE, THE VT. PAROLE BOARD MANUAL 16–19 (Oct. 2017); CT. BOARD OF PARDONS & PAROLES, *Parole FAQ’s*, <http://www.ct.gov/bopp/cwp/view.asp?a=4330&q=508202> (last visited Aug. 13, 2018).

⁴² 120 MASS. CODE REG. 301.06 (2018); MICH. COMP. LAWS ANN. §§ 791.234, 791.245 (West 2017); email from Holly Kramer, Michigan Parole Board Staff, to Sean Fishkind, B.C. Research Assistant (Jul. 16, 2018) (on file with Author).

Ethical rules prescribe two very different roles for prosecutors: that of advocate and that of minister of justice.⁴³ While this duality has been criticized,⁴⁴ it remains the dominant paradigm in the scholarly discourse about prosecutorial ethics. Although the prosecutor is expected to be a zealous advocate on behalf of the state at trial,⁴⁵ due to her simultaneous obligations as a minister of justice, even that adversarial role is *bounded* in a way that a traditional litigator's role is not. For example, the prosecutor must turn over exculpatory evidence to the defense,⁴⁶ may not urge an uncounseled defendant to relinquish pre-trial rights,⁴⁷ may not make intemperate comments during closing argument designed to arouse the passions of the jury,⁴⁸ and may not make public statements that serve only to heighten condemnation of the accused.⁴⁹ But outside of the trial stage of the criminal process—including investigations, charging decisions, plea bargaining, and law reform activities—we expect prosecutors to eschew adversarialism and behave as “ministers of justice,” a role that suggests impartiality, lack of personal or political bias, and neutrality toward the interests of other participants in the process.⁵⁰

Much of the prior professional work of my colleagues in this symposium has been devoted to unpacking the prosecutor's “minister of justice” obligation.⁵¹ As suggested above, one way to differentiate the prosecutor's role of adversary from that of minister of justice is the concept of “neutrality.” As Professor Gershman has thoughtfully argued, being neutral does not mean being disinterested or indifferent.⁵² Rather, neutrality means being willing and able to balance the prosecutor's tripartite responsibilities to the victim, the defendant, and the public at large without too closely aligning herself with one interest to the detriment of others.⁵³ A prosecutor

⁴³ See MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 1983).

⁴⁴ See Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1443 (2018).

⁴⁵ See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(a) (AM. BAR ASS'N 2015).

⁴⁶ MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 1983).

⁴⁷ MODEL RULES OF PROF'L CONDUCT r. 3.8(c) (AM. BAR ASS'N 1983).

⁴⁸ *Berger v. United States*, 295 U.S. 78, 87–88 (1935).

⁴⁹ MODEL RULES OF PROF'L CONDUCT r. 3.8(f) (AM. BAR ASS'N 1983).

⁵⁰ See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837 (2004) (“seek justice” admonition potentially encompasses a range of norms, each of which is itself uncertain in meaning); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1715–16 (2000) (arguing that in performance of non-adversarial roles, “the prosecutor should be sufficiently detached from his prospects as an advocate to reach a dispassionate appraisal of the interests of justice.”).

⁵¹ See, e.g., Alafair Burke, *Prosecution (Is) Complex*, 10 OHIO ST. J. CRIM. L. 703 (2013); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 412–14 (2006); Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607 (1999).

⁵² Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 561 (2005).

⁵³ *Id.*

does not serve as a minister of justice when “she undertakes her official functions for personal or political reasons, has an ‘ax to grind’ against the defendant, or has a special motivation to favor the victim or satisfy the victim’s private agenda if that agenda is inconsistent with the prosecutor’s public duty to serve all the people neutrally, i.e., equally and fairly.”⁵⁴

If the prosecutor interjects herself before the parole board she must do so as a minister of justice and not as an adversary. Once the defendant has been convicted and sentenced for the crime the prosecutor’s role as an advocate has concluded. This means that she should remain neutral between the interests of the prisoner, the victim(s), and their respective families. Her role, if any, is to help the board make accurate factual and legal decisions.⁵⁵ Where the information about the nature and circumstances of the prisoner’s crime is fully known to the board through other sources, there is real danger that submitting testimony—either in oral or written fashion—will be misperceived as advocacy, because it over-emphasizes one aspect of the board’s consideration to the possible exclusion of others.

My objection to prosecutors engaging in advocacy before the parole board does not extend to victim-witness coordinators from the district attorney’s office appearing to provide support and guidance to victims. In these situations, the victim-witness coordinator (typically a non-lawyer) is playing a critical function by providing information to the victim and supporting the victim emotionally through what can be another very harrowing experience.⁵⁶ But the victim-witness coordinator is not making any arguments before the board, supplying evidence, or purporting to represent the interests of the state.

I have not been able to uncover any data revealing 1) how often prosecutors submit testimony at parole hearings, and 2) whether release rates tend to be lower when they do. That would be an interesting empirical study to undertake, presuming that such data were collected in any searchable fashion by state parole boards. However, anecdotal evidence suggests that prosecutors most often take the time and effort to appear before the parole board in cases where murderers are serving life sentences.⁵⁷ In these situations, prosecutors essentially seem to be making a

⁵⁴ *Id.* at 562–63. *See also* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS’N 2015) (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment. . . .”).

⁵⁵ *See* Fish, *supra* note 44, at 1460. Fish eschews the adversary/minister of justice dichotomy, and instead urges scholars and bar overseers to think of the prosecutor’s two roles as positivist (quasi-judicial) and value weighing (quasi-administrative). In the former situations (most notably at trial), Fish recommends that prosecutors view their role as inquisitorial, along the lines of French and German models. “The positivist prosecutor is similarly indifferent to the outcomes of cases, not caring whether a defendant is convicted or acquitted but simply seeking the correct legal result.” *Id.*

⁵⁶ *See* Lisa Rule, *The Victim Witness Coordinator—A Partner in the Criminal Justice Arena*, 40 THE ADVOCATE 10, 10–11 (1997).

⁵⁷ *See, e.g.,* Mike Cason, *Parole Denied for Judith Ann Neelley in Teen’s 1982 Murder*, ADVANCE LOCAL (May 23, 2018), https://www.al.com/news/index.ssf/2018/05/judith_ann_neelleys_parole_hear.html; Michele W.

statement about the timing of parole *eligibility*—believing that the prisoner needs to serve more time prior to being eligible for parole due to the grievous nature of the offense. In Maryland, for example, prisoners serving life sentences are first eligible for parole after fifteen years.⁵⁸ Prosecutors might justifiably feel that this statute is too liberal and that fifteen years is insufficient to serve the deterrent and retributive goals of the criminal law. Yet in those circumstances the prosecutor’s disagreement is with the legislature, not with the parole board. The prosecutor should use the resources and power of her office to seek to change the statute rather than reflexively opposing parole on the prisoner’s first hearing date.⁵⁹

Release decisions are fraught with peril and often made under the microscope of public scrutiny. If the parole board releases a prisoner who goes on to commit a heinous act, public outcry and political backlash may ensue.⁶⁰ These high stakes decisions can be unduly influenced if a member of the prosecutor’s office appears personally to testify in opposition to parole. Professor Gershman’s scholarship has illuminated for us how prosecutors sometimes use their vast power and discretion to threaten, intimidate, and bully other actors in the criminal justice system—including “defendants, witnesses, attorneys, and even judges.”⁶¹ Parole board members are no exception. Since most chief state prosecutors in the United States are elected,⁶² they have political constituencies of their own to bolster their influence. The practice of fourteen states in allowing the prosecutor to submit written materials, but not to testify personally, appear to be well-calibrated to insulate the parole board from verbal intimidation or grandstanding by another political actor.⁶³

I recognize that the prosecutor at times may have legitimate interests in providing information to the parole board. In addition to the examples cited above, one such interest is assuring adequate and appropriate *conditions* of parole and parole supervision that will help safeguard the public—such as mental health or drug

Forehand, *Parole Denied for Two Inmates Serving Time for Area Murder; Rape Cases*, DOTHAN EAGLE (Jan. 24, 2018), https://www.dothaneagle.com/news/crime_court/parole-denied-for-two-inmates-serving-time-for-area-murder/article_78f1b5c6-011f-11e8-a401-d3cf1659c008.html; Stephanie Taylor, *Parole Denied in Slaying of Alabama Game Warden*, WASH. TIMES (June 29, 2017), <https://www.washingtontimes.com/news/2017/jun/29/parole-denied-in-slaying-of-alabama-game-warden/>.

⁵⁸ MD. CODE ANN., CORR. SERVS. § 7-301 (West 2017).

⁵⁹ See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(f) (AM. BAR. ASS’N 2015) (“The prosecutor should seek to reform and improve the administration of criminal justice, and when inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, the prosecutor should stimulate and support efforts for remedial action.”).

⁶⁰ See, e.g., John Appleton, *Gov. Deval Patrick Cleans House at Parole Board in Response to the Killing of Woburn Police Officer John Maguire*, MASSLIVE (Jan. 13, 2011), https://www.masslive.com/news/index.ssf/2011/01/gov_deval_patrick_cleans_house.html.

⁶¹ Bennett L. Gershman, *Threats and Bullying by Prosecutors*, 46 LOY. U. CHI. L.J. 327, 329 (2014).

⁶² Fish, *supra* note 44, at 1474.

⁶³ See, *supra* notes 40–42 and accompanying text.

interventions, non-contact with witnesses or victims, and employment restrictions. Nevertheless, where the prosecutor has views on appropriate parole conditions based on her familiarity with the prisoner or her experience in similar cases, there is no reason that such views cannot adequately be set forth in a written rather than oral submission.

The further step of allowing written testimony from the prosecutor only upon leave of the board—taken by Texas and Wyoming⁶⁴—helps insure that the board retains ultimate authority to prevent the prosecutor from unnecessarily interjecting herself into the proceeding. This “leave of the board” requirement does not have to impose a particularly high bar. Were states to enact such a provision, I suspect leave would typically be granted. All the prosecutor’s office would have to do is file a letter with the parole board explaining the type of evidence they possess and seek to present that is not otherwise available from the written record: e.g., evidence of the inmate’s post-conviction conduct while in prison, comparison to sentences served by other similarly-situated persons prosecuted by the same office, or conditions of parole that the prosecutor has found to be effective in other cases. Requiring the prosecutor to seek permission to intervene is a step in the right direction that could act as a prophylactic against reflexive prosecutorial opposition at release hearings, because it will require the prosecutor to think carefully about what unique contribution she can make to a parole proceeding that is consistent with her obligation as a minister of justice.

⁶⁴ TEX. GOV’T CODE ANN. § 508.311 (West 1997); WYO. BOARD OF PAROLE, POL’Y AND PROC. MANUAL 2, 20 (2017).

CONCLUSION

My goals in this essay are twofold. First, I hope to spur legislative action to limit the role of prosecutors in parole hearings. I recognize that this is an uphill battle, given the political clout prosecutors wield before state legislatures and the many other urgent reforms needed in our criminal justice system. Nevertheless, a secondary goal of this essay is to urge prosecutorial restraint. Each of the 38 states now providing some form of discretionary parole for adult prisoners allows prosecutors to give input in some fashion to the parole board. Unless prosecutors in those jurisdictions possess highly relevant, post-conviction information unavailable from documentary materials or the testimony of victims, I urge prosecutors to stay home and keep quiet. Empirical studies have shown that notwithstanding the nuances of state parole procedures and standards, release decisions turn primarily on crime severity, criminal history, incarceration length, the inmate's behavior in prison, mental illness, and victim input.⁶⁵ In light of these studies, prosecutorial input at parole hearings is likely to accomplish very little beyond either grandstanding for the media or intimidating the parole board into being risk averse in close cases. Both objectives are inconsistent with a prosecutor's role as minister of justice.

⁶⁵ Joel M. Caplan, *What Factors Affect Parole: A Review of Empirical Research*, 71 FED. PROBATION 16 (2007).