PRESERVING THE PUBLIC TRUST: PROSECUTORS' PROFESSIONAL RESPONSIBILITY TO ADVOCATE FOR THE ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS

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I. INTRODUCTION

For twelve years, the most regularly recorded interrogation room was in the fifteenth precinct on *NYPD Blue*. Approximately twenty-two weeks out of the year, Detective Andy Sipowicz would shout, threaten, and occasionally box ears until his quivering suspects would scrawl confessions onto a legal pad. Although the show rarely covered a case from start to finish, it was presumed that somewhere there was a prosecutor who would translate those confessions into long prison terms. For twelve years, citizens could rest well knowing that there was a cop like Andy Sipowicz who was willing to *cross the line* to lock criminals up.

Unfortunately, reality lacks stock villains that justify the dereliction of duty. In contrast to *NYPD Blue*, in most communities, there is no way to watch reruns of interrogations. Most interrogations are one show events. And, those responsible for checking the integrity of interrogations—such as prosecutors—can do little except trust the word of the interrogator. Unfortunately, vignettes of abuse, coercion, and the violation of constitutional rights have demonstrated that interrogators come in two forms—good cops and bad cops.[1] For example, in

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1984, Eddie Joe Lloyd, a patient at the Detroit Psychiatric Institute, was prompted to confess to murdering a sixteen-year-old girl after his interrogator promised that his confession would help in the apprehension of the *real* killer.[2] In 2002, eighteen-year-old Jorge Hernandez confessed to raping and beating a ninety-four-year-old woman after police officers told him that they had a videotape of him entering her apartment building.[3] Neither Eddie nor Jorge's interrogations were recorded and both were later cleared of their charges as were 123 other individuals whose cases were studied by Professors Steven A. Drizin and Richard A. Leo.[4]

After contrasting a weekly fiction with true examples of officers disregarding procedural safeguards, it might seem obvious that there is an ethical imperative to place a camera in every interrogation room.[5] As a confession yielded by misconduct neglects the rule of law, every level of *law enforcement*—from the police to prosecutors to judges—should advocate for the electronic recording of interrogations[6] so as to preserve the rights and laws they are sworn to protect. Yet, such advocacy is noticeably lacking. At the time of this writing,

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author shares the view of E. Michael McCann:

> [M]ost district attorneys are conscientious about their responsibilities; they attempt to prosecute only those persons they believe have truly committed the charged offense; usually employ a charging standard of proof beyond a reasonable doubt when probable cause would be sufficient, and are genuinely appalled upon discovering they have prosecuted an innocent person or convicted an accused of a higher degree of crime than appropriate.

E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 MARQ. L. REV. 649, 669 (1996).

2. Jeremy W. Peters, *Wrongful Conviction Prompts Detroit Police to Videotape Certain Interrogations*, N.Y. TIMES, Apr. 11, 2006, at A14.

3. Bill D'Agostino, *Police Interrogation Tactics Under Fire*, PALO ALTO WEEKLY, Nov. 20, 2002., *available at* http://www.paloaltoonline.com/weekly/morgue/2002/2002_11_20.questioning20.html.

4. *See infra* note 112.

5. This argument might be easier still if one included the interrogation abuses that occurred at Abu Ghraib prison in Iraq and in Guantanamo Bay, Cuba.

6. "Electronically recorded interrogation" or "videotaping interrogations" refers to the process of recording interrogations in their entirety. "Taped interrogation" is the traditional term; however, this term will probably fade from use as analog is replaced with digital technology. The terms "electronically recorded interrogation" and "taped interrogation" are understood to be synonymous. *See* Steven A. Drizin & Beth A. Colgan,

only a minority of states require interrogations to be electronically recorded in some form.[7]

In April of 2005, the District Attorney of Nassau County, which encompasses Long Island, New York (not far from Detective Sipowicz's beat), issued a short and little-reported statement advocating for the electronic recording of interrogations.[8] The District Attorney

7. *See* Stephan v. State, 711 P.2d 1156 (Alaska 1985); D.C. CODE ANN. § 5-133.20 (2007); 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2007); State v. Scales, 518 N.W.2d 587 (Minn.1994); N.J. R. CR. R. 3:17 (2007) (New Jersey); N.M. STAT. ANN. § 29-1-16 (West 2007) (New Mexico); TEX. CODE CRIM. PROC. ANN. art. 38.22(2)(b)(1) (Vernon 2007); WIS. STAT. § 938.195 (2007) (Wisconsin). *See also* Smith v. State, 548 So

professional rules).[49] The most basic interpretation of Rule 3.8(a) mirrors the legal requirement.[50] Like the legal interpretation,[51] the ethical *knowledge* requirement is subjective.[52] Likewise, the ethical probable cause requirement seems to be objective. Thus, although the ABA denies it,[53] most prosecutors can meet their ethical requirements by meeting the legal requirement.[54]

When ethics committees interpreted Rule 3.8(a), interpretations of the ethical "probable cause" demanded more than the legal standard of "probable cause." For example, New Jersey describes the probable cause determination as an "obligation to ascertain" the facts to support probable cause.[55] Thus, in New Jersey, the ethical probable

49. *See id.* at R. 3.8 cmt. 1.

50. *Id*. at pmbl. ¶ 5 (2004) ("A [prosecutor's] conduct should conform to the requirements of the law."); *id.* at scope ¶ 1 ("[Rule 3.8(a)] should be interpreted with reference to the purpose . . . the law itself.").

51. *Criminal Procedure*, *supra* note 33, at 13.

52. MODEL RULES OF PROF. CONDUCT R. 1.0(f). When the Wisconsin Supreme Court reviewed the issue, it "refused to apply [the 'should have known,'] relaxed negligence type standard, given the clear language of Rule 3.8 and the Terminology section of the rules, which taken together call for actual knowledge that the charges are improper." *Prosecutor Must 'Know' Charges Are Flawed In Order to be Disciplined for Pursing Them*, 16 ABA/BNA LAWYER'S MANUAL ON PROF'L CONDUCT: CURRENT REPORTS No. 12, at 332 (2000). *Contra* Cal. State Bar Rules of Prof'l Conduct 5-110 ("A [prosecutor] shall not institute or cause to be instituted criminal charges when the member knows or should know that the charges are not supported by probable cause."). California did not adopt the *Model Rules of Professional Conduct*. GILLERS & SIMON, *supra* note 11, at 699.

53. MODEL RULES PROF'L CONDUCT 3.8 annot. (2003) (General Applicability of Rule) ("[A] violation of Rule 3.8 may subject a prosecutor to professional discipline regardless of whether the underlying conduct violates a defendant's constitutional right.").

54. *See* Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669, 678 (1992) ("As a general proposition, however, the rules of ethical con-

cause inquiry might not ask: "Based on the facts *known* to the prosecutor, was the finding of probable cause reasonable?" but rather: "Was the finding of probable cause reasonable and did that finding stem from a minimum (and reasonable) level of investigatory diligence by the prosecutor?"[56] Instead of demanding just a *reasonable* conclusion, the ethical requirement has the potential to also demand an intermediate step (akin to New Jersey) to meet a threshold for the level of certainty required.[57]

The potential for the charging decision to ethically require more than the legal requirement also appears in other codes of professional conduct.[58] The National District Attorneys Association sets an objective standard, but one higher than probable cause.[59] "The prosecutor should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial."[60] Within the *Standards of Criminal Justice* adopted by the ABA, the probable cause requirement is coupled with the standard that "[a] prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."[61] Although these other codes do not necessarily bind courts and committees' interpretation of Rule 3.8(a), they illustrate awareness among attorneys that a heightened standard is compatible with the *professional* expectations of prosecutors.

Even within the *Model Rules* there is division as to what prosecuting entails. Prosecutors must be at once advocates and "minister[s] of justice."[62]

adversarial system except to the extent it is tempered by a duty to "justice."[63] Although a duty to "justice" is widely cited,[64] there are few statements clarifying what a duty to justice entails[65] and how it might impact an interpretation of an ethical probable cause requirement. The Comment to Rule 3.8 states that the role "carries with it special obligations to see that the defendant is accorded procedural justice and that guilt is established upon the basis of sufficient evidence."[66] In applying this vague duty, the Ohio Grievance Committee stated, "In seeking justice, it is a prosecutor's duty to dismiss charges that lack merit."[67] Thus, a "minister of justice" could (at a minimum) require prosecutors to temper their advocacy to the extent that they

of the prosecutorial role (i.e., filing the complaint, bringing a defendant to trial, winning a conviction, etc.); whereas the "minister of justice" role represents the discretionary function of the prosecutorial role (i.e., choosing who to charge, asking for varying sentences within a plea bargain, etc.). *See* Michael Q. English, Note, *A Prosecutor's Use of Inconsistent Factual Theories of Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 FORDHAM L. REV. 525, 529 (1999) (arguing that roles of "advocate" and "minister of justice" are quasi-exclusive and the prosecutor must alternate between them). Others may disagree with framing the probable cause ethical standard through the "minister of justice" role. *Contra* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 60 (1991) (arguing that the obligation to justice should be interpreted as requiring "adequate adversarial process" rather than "accurate outcomes"). However, the advocacy role is found within the constitutional conception of probable cause and the "minister of justice" role exists only in the ethical rules. *See* MODEL RULES PROF'L CONDUCT R. 3.8 cmt. 1.

63. *See* Fisher, *supra* note 14, at 223 (describing a conflict a prosecutor might have between ensuring procedural justice is met while trying to be an advocate); Melilli, *supra* note 54, at 690 (describing how the goal of convictions can overtake goal of justice).

64. Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 817 (1987); Berger v. United States, 295 U.S. 78, 88 (1935); MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2004); NAT'L PROSECUTION STANDARDS § 43.6 (1992); STANDARD FOR CRIMINAL JUSTICE 3-2.1(c) (1992). *See* Ken Takahasi, Student Author, *The Release-Dismissal Agreement: An Imperfect Instrument of Dispute Resolution*, 72 WASH. U. L.Q. 1789, 1790 (1994).

65. Fisher, *supra* note 14, at 212, 219; Abbe Smith, *Can You be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 379 (2001); Zacharias, *supra* note 62, at 46. *See also* English, *supra* note 62, at 533 ("[W]hile the ABA ethical codes and the Constitution find that probable cause is a sufficient standard to charge a defendant, the question remains whether this standard satisfies the prosecutor's 'seek justice' mandate.").

66. MODEL RULES OF PROF'L CONDUCT 3.8 cmt. 1. "Minister of justice" can also be interpreted to encompass the principles within the preamble such as, "A lawyer should strive . . . to improve the law and the legal profession and exemplify the legal profession's ideal of public service." *Id.* at pmbl. ¶ 7.

67. Ohio Bd. Comm'r Grievances & Disciplinary Ethical Op. 94-10 (August 12, 1994). *See also* Conn. Bar Ass'n Informal Ethical Op. 00-24 ("If the prosecutor knows that there is insufficient evidence to support the pending charges against the defendant, the prosecutor violates [3.8(a)] if he or she does not suspend prosecution.").

seek to protect innocent individuals[68] in their pursuit of enforcing laws—a mission reminiscent of the ethical overtones of the Fourth Amendment.

Some commentators have found parallels between the duty to justice and the ethical demands of probable cause. Specifically citing the probable cause determination, Kenneth J. Melilli has challenged, "If the 'beyond a reasonable doubt' standard is a necessary cushion against erroneous convictions by the trier of fact, then how can prosecutors, in pursuit of their obligation to 'seek justice,' impose any lower standard upon themselves?"[69] Stanley Z. Fisher conceptualizes "minister of justice" as a "quasi-judicial" role that requires a "prosecutor act[] 'impartially' and judge-like."[70] Bruce D. Green has asserted "minister of justice" implies a gate-keeping function.[71] Bennett L. Gershman believes that the duty to justice "embraces a duty to make an independent evaluation of the credibility of his witnesses, the reliability of forensic evidence, and the truth of the defendant's guilt."[72] However, because its meaning is ambiguous, some commentators have argued that "minister of justice" constructively means nothing[73] and "[i]ts vagueness leaves prosecutors with only their individual sense of morality to determine just conduct."[74]

Although failure to serve as a "minister of justice" cannot be sanctioned, sanctions are theoretically available for prosecutors who fail to fulfill Rule 3.8(a). Ethical requirements are enforced in three

68. Zacharias, *supra* note 62, at 50.

69. Melilli, *supra* note 54, at 700.

70. Fisher, *supra* note 14, at 216. Fisher also describes an administrative role and an adversarial role that the prosecutor must balance.

ways. First, a party may file a disciplinary complaint against a prosecutor. Second, a defendant may bring a motion to dismiss based upon prosecutorial misconduct[75] and cite an ethical violation.[76] Third, the prosecutor's supervisor, constituents, or the prosecutor alone can enforce the ethical requirements informally. Such sanctions can take the form of losing an election, transfer, discharge, or resignation.[77] Although absolute immunity does not shield these claims, prosecutors rarely need to argue for the presence of probable cause because they rarely face ethics claims.[78]

At present, defending an ethical challenge seems only to demand showing that the prosecutor met the legal safeguards.[79] As a result of this fact, the ambiguity of Rule 3.8(a)'s aspirations, and the duty to "justice," two extremes have emerged to guide prosecutors. Some commentators argue that the ethical conception of probable cause remains an objective, legal threshold and it is the role of the grand jury or the trial jury to make the final determination.[80] Other commentators argue for a personal[81] or moral certainty standard:[82] a prosecutor can-

75. *See supra* Section II.A.

76. MODEL RULES PROF'L CONDUCT R. 3.8 annot. (2003) (Judicial Remedies for Violating Ethics Rules). *See infra* Section III.A.

77. *See e.g.* Debra Cassens Moss, *A Prosecutor's Duty: Assistant A.G. Resigns Rather than Defend Conviction She Feels is Wrong*, 78 A.B.A. J. 28 (June 1992) (describing how an assistant state attorney general resigned on ethical grounds due to believing she was assigned to pursue an unjust action).

78. *See, e.g.* David Margolick, *Punish Demjanjuk's Prosecutors? Not Likely*, N.Y. TIMES, Nov. 19, 1993, at A1. S*ee* Melilli, *supra* note 54, at 683; Lyn M. Morton, Note, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. L. LEGAL ETHICS 1083, 1104-05 (1994); Ellen S. Podger, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1525-30 (2000); Jim McGee, *Prosecutor Oversight is Often Hidden from Sight*, WASHINGTON POST, Jan. 15, 1993, at A1.

79. As Monroe Freedman concluded:

> The ABA standard appears to mean that the prosecutor can ethically go forward under the . . . Model Rules regardless of whether he personally believes that the accused is guilty, and even though he knows that there is insufficient evidence against the accused to survive a motion for judgment of acquittal at the close of the gov-

not proceed unless he or she is morally certain of guilt.[83] These extremes either ignore Rule 3.8(a)'s possible separate and distinct demands of prosecutors or ground their arguments in nebulous principles of "morality" and "justice."

III. THE PROBLEMS WITH PROBABLE CAUSE

Although both the Constitution and the *Model Rules* require probable cause, these requirements are devoid of meaning unless enforced. Unfortunately, Rule 3.8(a) is both unenforceable and too low of a threshold to protect the innocent. Further, due to the prevalence of unrecorded interrogations, even well-intentioned prosecutors often inherit a probable cause determination that is tainted or beyond substantive review.

A. Probable Cause's Lack of Effectiveness and Enforcement

Protection of liberty underlies the probable cause requirement.[84] For prosecutors, it represents the threshold for charging suspects. Prosecutors' ability to charge someone when the prospects of proving the case at trial are doubtful conflicts with the ideal of personal liberty.[85] In a criminal system where trials rarely determine guilt, the probable cause standard is insufficient for charging and guiding prosecutors' decisions.[86]

The Supreme Court has distinguished probable cause from a de-

522 (advocating that prosecutors must have a moral certainty due to their duty to justice); Zacharias, *supra*, note 62, at 50 ("[P]rosecutor should exercise discretion so as to prosecute only persons she truly considers guilty.").

83. Griffin, *supra* note 74, at 298 (outline argument for moral certainty standard). *See* FREEDMAN & SMITH, *supra* note 59, at § 11.04 (quoting John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174, 178-79 (1965)) ("John Kaplan observed that the 'first and most basic standard' is that, 'regardless of the strength of the case,' a prosecutor who does not 'actually believe' that the accused is guilty does not feel justified in prosecuting.").

84. Gerstein v. Pugh, 420 U.S. 103, 112 (1975) (quoting Brinegar v. United States, 338 U.S. 160, 175-176 (1949)).

85. *See* Green, *supra* note 14, at 1584-85 & nn.50-53 (citing NIKI KUCKES, REPORT TO THE ABA COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT CONCERNING RULE 3.8 OF THE ABA MODEL RULES OF PROFESSIONAL RESPONSIBILITY 39-40 & nn.110-17 (Dec. 1, 1999)) (stating that 3.8(a) is criticized for not explicitly restraining charges without probable cause and being a low standard).

86. *See* Melilli, *supra* note 54, at 680-81 ("Probable cause is little more than heightened suspicion, and it is not even remotely sufficient to screen out individuals who are factually not guilty.").

termination of guilt.[87] "There is a large difference between . . . [guilt and probable cause], as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them."[88] This distinction is manifested in the use of evidence. Although the Rules of Evidence apply to trials, they do not apply to the charging decision.[89] Thus, "the ethical rules do not clearly prohibit the prosecutor from deciding to charge an accused with offenses which the prosecutor has probable cause to believe are

enforced is dubious.

B. The Unverifiable Interrogation

Besides being ineffective and not enforced, the probable cause requirement is also susceptible to misinformation. A prosecutor utilizing the most heightened personal standard is susceptible to making a flawed decision if he or she relies upon flawed information.[107] The common practice is for prosecutors to base their probable cause determinations on the information provided to them by police officers.[108] Sometimes a prosecutor is given a confession by a police officer that plays by the rules and other times the confession is from Detective Andy Sipowicz's interrogation room. Thus, the interrogation room is a potential well of misinformation.

The only category of evidence with substantial barriers to evaluation is a confession.[109] With only three categories of evidence—witness information, confessions, and physical evidence[110]—the potential that one-third of the available evidence is unverifiable is significant. This significance grows when one considers that a case can rely entirely on just one of the three categories. Prosecutors can verify witness information by independently questioning witnesses. They can verify physical evidence through experts. Although these steps do not yield absolute certainty, they afford prosecutors opportunities to verify the facts supporting probable cause.

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107. *See* McCann, *supra* note 1, at 665-66. Obviously, this process is susceptible to errors by police officers. *See, e.g.*, John D. Jackson, *The Effect of Legal Culture and Proof in Decisions to Prosecute*, 3 LAW, PROBABILITY & RISK 109, 125 (2004) (describing the problem of a police report being one-sided).

108. *See* McCann, *supra* note 1, at 663 ("[P]rosecutors may not have the knowledge,

ment[116] did he discuss how electronically recording interrogations would assuage prosecutors concerns about the nature of their probable cause determinations. Nevertheless, if prosecutors can independently verify the information culled from an interrogation, then probable cause determinations based upon interrogations have a higher level of certainty. Presently, Rule 3.8(a) does not demand a heightened level of certainty, but if interpretation of the Rule went beyond the confines of the legal conception of probable cause, it could demand that prosecutors aspire to a higher threshold to prosecute. And, this Article asserts that an expanded interpretation of Rule 3.8(a) demands that prosecutors advocate for recording interrogations.

A. Redefining the Ethical Probable Cause Requirement

Rule 3.8(a) constructively offers no more than what the Constitution asks.[117] Although it may have reflected various motives at the time it was drafted, presently Rule 3.8(a) is redundant and ineffective. If professionals do not internalize and self-define ethical obligations, they become externally imposed liabilities.[118] And, if these externally imposed liabilities are not enforced, then professionals are without uniform ethical norms and the public is without a safeguard. There is also a possibility that the lack of sanctions actually conditions professionals to violate ethical rules.[119] Thus, where an ethical precept is without corresponding sanctions, it can be understood only as an aspi-

116. Nassau County District Attorney's Office, *supra* note 8.

117. *See* Melilli, *supra* note 54, at 678.

118. *See id.* at 682 ("If a prosecutor can find no external ethical command, he or she may adopt the ethical minimum of probable cause as the only morality for excising charging discretion.").

119. In Bennett L. Gershman's discussion of the harmless error doctrine, he argues that the fact that prosecutors are less likely to face appellate reversal has conditioned prosecutors to disregard constitutional restraints when their case carries enough evidence to survive appellate review and the harmless error doctrine. Gershman, *supra* note 15, at 424-31. Thus, the stronger the prosecutor's case, the more lax a prosecutor can be in his adherence to the constitutional rules binding his behavior. *Id.* at 431. This concern is echoed by Stanley Z. Fisher who states,

> This pattern . . . [of not sanctioning prosecutors for] alleged misconduct tempts prosecutors to equate the relevant professional responsibility requirements with the constitutional standards developed in the appellate case law. Thus, the duty to "do justices" comes to be defined in terms of minimal due process, and proper prosecutorial conduct in terms of conduct consistent with a constitutionally fair trial.

Fisher, *supra* note 14, at 213. *See e.g.* Tom Teepen, *Conviction-Mad Lawyers Prosecute with Impunity*, ATLANTA CONSTITUTION, Oct. 14, 1993, at 9A (stating over 381 homicide convictions "thrown out because prosecutors cheated defendants out of fair trials").

ration. And it is an obligation of attorneys—in this case, prosecutors—to give aspirational precepts meaning lest they become meaningless.[120]

The *Model Rules* are replete with aspirational commands that require internalization and self-definition. Lawyers are first asked to adhere to their "personal conscience."[121] Beyond this, lawyers are asked to use their education to improve the law and "further the public's understanding of and confidence in the justice system."[122] "Lawyers should seek improvement of the law . . . [and] the administration of justice."[123] Prosecutors specifically are asked to be "minister[s] of justice."[124] These unregulated aspirations juxtaposed with the self-regulatory nature of the legal profession yield only an individual responsibility to maintaining professional integrity.[125] As stated by a former prosecutor, Kenneth J. Melilli, "My understanding was that my obligation as a prosecutor was to the public interest, an obligation fundamentally different than that of lawyers to their private clients."[126] Another prosecutor might have a different conception of his or her individual responsibility. No matter what conception a prosecutor maintains, the prosecutor will not be sanctioned for failing to fulfill aspirational edicts or failing to meet the requirements of his or her personal credos. Both these aspirations and responsibilities are the prosecutor's to define and the prosecutor's to self-impose.

Rule 3.8(a) is analogous to the explicit aspirational goals of the *Model Rules*. Like the aforementioned goals, Rule 3.8(a) carries an obligation, but (as discussed earlier) no sanctions exist for violations.[127] Further, there is ambiguity as to what Rule 3.8(a) entails.[128] Thus, for prosecutors, it comes down to a choice. What does an ethical requirement for probable cause mean? A prosecutor *can* satisfy the probable cause requirement by adhering to the legal requirements;

120. *Cf.* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1562 (1981) ("At the core of a system limiting discretion should be prosecutors' own guidelines indicating how they will make charging and bargaining decisions.").

121. MODEL RULES OF PROF'L CONDUCT pmbl ¶ 7 (2004).

122. *Id.* at ¶ 6.

123. *Id.*

124. *Id.* at R. 3.8 cmt. 1. *See* Zacharias, *supra* note 62, at 105 (citations omitted) ("To date, discipliners have treated 'do justice' provisions as hortatory. No person has ever been sanctioned for failing to do justice.").

125. MODEL RULES PROF'L. CONDUCT pmbl ¶ 12.

126. Melilli, *supra* note 54, at 669-700.

127. *See supra* notes 117-23.

128. *See supra* notes 59-71.

3.8(a)—at the very least—aspires to protect individual liberty. As Rule 3.8(a) assigns moral culpability to prosecutors for their subjective *knowledge* of the facts supporting probable cause, in situations where a probable cause determination relies on an interrogation, a recording is indispensable to a prosecutor verifying his or her foundation for probable cause and seeking to fulfill the ethical aspirations of Rule 3.8(a).[134] Thus, the obligation to advocate for recording interrogations stems from recording's utility to help prosecutors fulfill Rule 3.8(a)'s aspirations.

Despite an electronically recorded interrogation's utility for determining probable cause, some prosecutors have argued against recording interrogations.[135] These arguments range from concerns over cost to concerns that recording will impede investiing inte6 Tc0.LTm0 Tcle 1a80.0005 Tc0.208

watershed survey of police experiences with electronically recorded interrogations, he cited only praise from prosecutors as to the usefulness of recording interrogations.[138]

Although Rule 3.8(a)'s aspirations compel advocacy for recording interrogations for the purpose of improving probable cause determinations, the duty to advocate can also be found in prosecutors' role as "minister[s] of justice" and prosecutors' ethical obligations as lawyers,[139] which both clearly suggest an affirmative obligation to seek the betterment of the legal system.[140] Despite the fact that improving the probable cause determination is likely a sufficient improvement to the legal system, recording interrogations improves the legal system in other ways. First, as the District Attorney of Nassau County stated, recording interrogations protects police officers from unwarranted claims of abuse and coercion.[141] As police officers and prosecutors are extensions of the executive branch, prosecutors have an obligation to protect the government's credibility.[142] A police offi-

all departments in Alaska and Minnesota—that record full custodial interviews."). There are many excellent articles dispelling the myths that electronically recorded interrogations impede investigations. *See, e.g.*, Drizin & Colgan, *supra* note 6; Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619 (2004); Sullivan, *Electronic Recording*, *supra* note 137; THOMAS P. SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATIONS (2004), *available at* http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf [hereinafter SULLIVAN, POLICE EXPERIENCES]; Westling, *supra* note 110.

138. Thomas P. Sullivan obtained a number of exemplary quotes from prosecutors who have used electronically recorded interrogations:

cer whose credibility is tarnished by a claim of misconduct is forever weakened for evidentiary purposes.[143] Second, the District Attorney also cited the protection that an electronically recorded interrogation provides to the accused by preventing misconduct.[144] Third (but related to the second point), as political actors, prosecutors have an obligation to act in the interests of the community at large.[145] Fourth, recording interrogations produces excellent trial materials.[146] Fifth, recording interrogations makes for a smoother administration of the judicial process by reducing the number of defense motions.

quirements, prosecutors can advocate for recording's effectiveness and train other prosecutors to utilize recorded interrogations.

The ethical obligation to advocate for the recording of interrogations is not an enforceable obligation.[151] No prosecutor will have an ethics complaint filed against him or her for not sending out a press release or writing an editorial. Further, simply advocating for recording is not enough to make Rule 3.8(a) an entirely enforceable rule or a guide for all discretionary decisions. Nevertheless, electronically recorded interrogations allow for stricter scrutiny of prosecutors' probable cause determination. With electronically recorded interrogations, what a prosecutor *knows* about an interrogation cannot be questioned. Thus, a grievance committee could easily review an electronically recorded interrogation to determine if a prosecutor could reasonably find probable cause based upon its contents. Although electronically recorded interrogations do not address the failure of attorneys and judges to report ethics violations, the presence of independently verifiable evidence does offer an opportunity to monitor prosecutors. The obvious possible spillover of increased monitoring is increased adherence.

The assertion that Rule 3.8(a)'s aspirational character creates an obligation to advocate for electronically recorded interrogations is open to criticism. There is one school of thought that believes prosecutors should merely serve as conduits through which information is presented to the judge and jury.[152] According to this view, a prosecutor should not question the police officer's probable cause determination, but instead let the judge or grand jury determine whether or not there is probable cause. The weakness of this argument arises from the fact that, even when prosecutors assert that they are acting as conduits, they are still independently evaluating probable cause. Every time suspects and police officers' stories differ, a prosecutor submitting a complaint or presenting facts to a grand jury decides within his or her discretion that the police officer's version of the interrogation deserves the benefit of the doubt.[153] Thus, besides being held ethically

tations omitted) ("It takes courage, 'strength of character,' and a willingness to endure a certain amount of loneliness in order to 'do justice' in any meaningful sense.").

151. *See* Green, *supra* note 14, at 1598 (discussing prosecutors reaction to expectations that are aspirational).

152. *See* English, *supra* note 62, at 534-36.

153. *See* Fisher, *supra* note 14, at 230 (citations omitted) ("A prosecutor could say, 'Whether the defendant did it is for the judge or jury to decide—it's not my job.' But this response only partially retreats from fact-finding. The agnostic prosecutor in such a case has al-