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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1. Although this Article addresses issues relating to police and prosecutorial misconduct, the presence of misconduct is not assumed. If there are few cases of misconduct, it is just as reasonable to assume that police and prosecutors are doing stellar work as it is to assume that misconduct is underreported. *See generally* Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001). As someone who knows numerous prosecutors, this

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, *Let the Cameras Roll: Mandatory Videotaping of Interrogations is the Solution to Illinois' Problem of False Confession*, 32 LOY. U. CHI. L.J. 337, 385 (2001). In contrast, in a "taped confession" only a portion of the interrogation is recorded. Some jurisdictions refer to "interrogations" as "custodial interview." This Article will use the term "electronically recorded interrogation" with the understanding that interrogation is synonymous with "custodial interview."

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. 2d 673, 674 (Fla. Dist. Ct. App. 1987) (binding only the 4th District to recording interrogations when feasible); ME. REV. STAT. ANN. tit. 25, § 2803-B (2007) (Law enforcement agencies in Maine are required to have written policies concerning the electronic recording of custodial interviews in serious crimes.); Commonwealth v. DiGiambattista, 813 N.E.2d 516 (Mass. 2004) (Massachusetts allows jury instructions that state that the courts prefer electronically recorded interrogations.); WASH. REV. CODE § 9.73.090 (2006) (Washington police officers may record interrogations subject to statutory stipulations.). Some courts have held that there is no electronic recording requirement. *See* King v. State, 355 So.2d 1148 (Ala.Crim. App. 1978) (Alabama); State v. Jones, 49 P.3d 273 (Ariz. 2002); People v. Holt, 937 P.2d 213 (Cal. 1997); People v. Raibon, 843 P.2d 46 (Colo.Ct. App.1992); State v. James, 678 A.2d 1338 (Conn. 1996); Coleman v. State, 375 S.E.2d 663 (Ga. 1988); State v. Kekona, 886 P.2d 740, 745-46 (Haw. 1994); State v. Rhoades, 809 P.2d 455 (Idaho 1991); Stoker v. State, 692 N.E.2d 1386, 1390 (Ind. App. 1998); State v. Morgan, 559 N.W.2d 603 (Iowa 1997); State v. Torres, 121 P.3d 429 (Kan. 2005); Brashars v. Commonwealth, 25 S.W.3d 58 (Ky. 2000); State v. Allen, 955 So.2d 742 (La. Ct. App. 2007); Baynor v. State, 736 A.2d 325 (Md. 1999); People v. Fike, 577 N.W.2d 903 (Mich. Ct. App. 1998); Williams v. State, 522 So. 2d 201 (Miss. 1988); State v. Grey, 907 P.2d 951 (Mont. 1995); Jimenez v. State, 775 P.2d 694 (Nev. 1989); State v. Barnett, 789 A.2d 629 (N.H., 2001); People v. Falkenstein, 732 N.Y.S.2d 817 (N.Y. App. Div. 2001); State v. Thibodeaux, 459 S.E.2d 501 (N.C. 1995); State v. Goebel, 725 N.W.2d 578, 584 (N.D. 2007); State v. Smith, 684 N.E.2d 668 (Ohio 1997); Chambers v. State, 724 P.2d 776 (Okla. Crim. 1986); Commonwealth v. Craft, 669 A.2d 394 (Pa. Super. Ct. 1995); State v. Godsey, 60 S.W.3d 759, 772 (Tenn. 2001); State v. James, 858 P.2d 1012 (Utah Ct. App. 1993); State v. Gorton, 548 A.2d 419 (Vt. 1988); State v. Kilmer, 439 S.E.2d 881 (W. Va. 1993) (citing State v. Nicholson, 328 S.E.2d 180 (W. Va. 1985)); Jandro v. State, 781 P.2d 512 (Wyo. 1989).

8. Presented in its entirety, the statement simply read:

> Nassau County District Attorney Denis Dillon announced today that he is in favor of the police videotaping interrogations of suspects. After having his office review the experiences of several jurisdictions that engage in this practice, and his reading the report of Northwestern University School of Law's Center on Wrongful Convictions, Dillon stated his opinion that: "It's time to put this procedure into operation in Nassau County. While I have every confidence in the police department and in the reliability of the confessions that are obtained, the public should be permitted to share in this confidence. By employing technology that is readily available the integrity of the entire process, as well as public confidence, will be guaranteed. Videotaping interrogations safeguards not only the rights of the accused but also protects the police from unwarranted claims of abuse and coercion.

Press Release, Nassau County District Attorney's Office, Dillon Calls for Videotaping of Confessions (Apr. 13, 2005), *available at*

did not advocate in moral terms. Rather, he spoke of electronic recording's utility. If recording protects rights, it is because a judge or a jury can hit the "play" button and evaluate what they see according to a checklist of prohibited behavior.[9] The preservation of those rights is a means and not an end. Electronic recording of interrogations cannot be just the right thing to do.

Arguing that something is just "the right thing to do" does not work with lawyers—especially prosecutors. Although some individuals hold themselves to heightened standards of integrity, as *professionals*, prosecutors' ethical decisions are measured against negotiated and compromised codes of ethics—not ideals. There is a black letter standard. And, much to the chagrin of restorative justice advocates, prosecutors are essentially creatures of an Old Testament approach to adjudication. There is an eye to take for every eye lost. Their trade is based upon prohibitions and not on affirmative duties.

Other scholars have argued for the adoption of recording requirements for interrogators because such requirements are useful for effective law enforcement and the preservation of legal rights.[10] Unfortunately, although these discussions are compelling academic endeavors, they lack the rhetorical barbs to change the mindset of most practitioners.

This Article argues that prosecutors must advocate for electronic recording of interrogations because their unique position of trust requires unique duties. Specifically, this Article finds prosecutors' professional duty to advocate for electronic recording within Rule 3.8(a) of the American Bar Association's (ABA) *Model Rules of Professional Conduct* (*Model Rules*).[11] Rule 3.8(a) demands that prosecutors "refrain from prosecuting a charge that the prosecutor knows is not

http://www.nassaucountyny.gov/agencies/DA/NewsReleases/Archive/2005/04-13-05.html.

9. Although District Attorney Denis Dillon did not advocate on moral terms, his efforts are still to be commended especially because his statement was in opposition to the position of the New York County Attorneys Association. *See id.*; John Caher, *State Bar Unit Backs Videotaping of Police Custodial Interrogations*, NEW YORK LAW JOURNAL, June 22, 2004, at 1, col. 5.

10. *See infra* note 137.

11. This Article focuses on the *Model Rules of Professional Conduct* because "[t]he [Rules] are the primary influence on the rules of professional conduct that govern lawyers in the United States." *See* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS STATUTES AND STANDARDS 3 (2005) (stating forty-four jurisdictions have adopted a form of the *Model Rules*). The *Model Rules* are applicable to federal prosecutors through the *Citizens Protection Act*. 28 U.S.C. § 530B (2007).

supported by probable cause."[12] This Article seeks to demonstrate that inherent in prosecutors' determinations of whether a person committed a crime is an affirmative duty to ensure the integrity of the information upon which they base their determination. Furthermore, this Article argues that the lack of enforcement of probable cause determinations transforms Rule 3.8(a)'s character from regulatory to aspirational. Thus, the hope is that prosecutors will infuse Rule 3.8(a)'s aspirations with substantive meaning by advocating for a change in how information is gathered during interrogations.

Given these goals, Section II establishes a foundation for prosecutors' probable cause requirement. Section III furthers the analysis of Section II by demonstrating that Rule 3.8(a) is neither useful nor enforced in its current conception. Section III also presents the shadow of doubt that unrecorded interrogations cast upon the probable cause determination. To address this Article's criticism of probable cause jurisprudence, Section IV offers a new interpretation of the ethical demands of Rule 3.8(a) and argues that prosecutors have a duty to advocate for electronically recorded interrogations.

II. THE FOUNDATIONS OF PROSECUTORS' PROBABLE CAUSE REQUIREMENT

State prosecutors are unique among lawyers.[13] They neither represent clients nor do they solicit work.[14] Instead prosecutors are an arm of the executive branch—and a powerful arm at that.[15] The arm's purpose is to ensure laws are faithfully executed.[16] As articulated by United States Supreme Court Justice George Sutherland:

12. MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2004) (demanding that prosecutors "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause"). This Article focuses on the probable cause determination connected with the decision to prosecute and is not meant to address probable cause to search.

13. *See* Zacharias, *supra* note 1, at 725-30 (describing the "[i]napplicability of [m]any [p]rofessional [r]ules to [p]rosecutors").

14. *See* Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 220 (1988) (contrasting civil lawyers with prosecutors); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1576-1578 (2003) (describing why prosecutors should be treated differently).

15. *See* W.J. Michael Cody, *Special Ethical Duties for Attorneys who Hold Public Positions*, 23 MEM. ST. U. L. REV. 453, 456 (1993) ("The U.S. Attorney has more power than a good man should want or a bad man should have."); Bennett L. Gershman, *The New Prosecutor*, 53 U. PITT. L. REV. 393, 405 (1992); Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

16. *See* U.S. CONST. art. II, § 1, cl. 8.

> [The prosecutor is] the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[17]

In fulfilling their obligations, prosecutors are bound to a standard of probable cause to prosecute.[18] Generally, probable cause is "[a] reasonable ground to suspect that a person has committed or is committing a crime."[19] Although the probable cause requirement stems from the Fourth Amendment[20] and applies to state prosecutors through the Fourteenth Amendment[21] and by state law,[22] the ABA christened probable cause as an ethical rule.[23]

For both the ethical and legal requirements,[24] a prosecutor's probable cause determination is one step upon two alternative paths.[25]

17. Berger v. United States, 295 U.S. 78, 88 (1935).

18. U.S. CONST. amend IV. *See e.g.* MINN. R. OF CRIM. P. 4.03, subd. 2.

19. BLACK'S LAW DICTIONARY 1219 (Bryan A. Garner ed., 7th ed., West 1999). William C. Anderson's DICTIONARY OF LAW extends BLACK's definition. WILLIAM C. ANDERSON, A DICTIONARY OF LAW, CONSISTING OF JUDICIAL DEFINITIONS AND EXPLANATIONS OF WORDS, PHRASES, AND MAXIMS, AND AN EXPOSITION OF THE PRINCIPLES OF LAW: COMPRISING A DICTIONARY AND COMPENDIUM OF AMERICAN AND ENGLISH JURISPRUDENCE 157-158 (T. H. Flood & Co. 1998). Probable cause is defined as "a reasonable cause of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged. *Id.* at 157 (citations omitted).

20. U.S. CONST. amend IV.

21. U.S. CONST. amend XIV.

22. *See e.g.* MINN. R. OF CRIM. P. 4.03, subd. 2.

23. MODEL RULES OF PROF'L CONDUCT R. 3.8(a).

24. This Article will use the term "ethical requirement" in reference to the requirements of the *Model Rules* and "legal requirement" in reference to the requirements of the Constitution and state law.

25. Not all jurisdictions offer their prosecutors both paths. *See e.g.*, Gerstein v. Pugh, 420 U.S. 103, 118 (1975) (discussing how some jurisdictions substitute a grand jury for a magistrate judge). Some jurisdictions offer a third path through a grand jury. *See* U.S. CONST. amend. V. The "grand jury clause of the Fifth Amendment does not apply to state prosecutions" and thus, many states only have a prosecutor and magistrate judge determine probable

The presence of these paths and their course differ by jurisdictions, but, if traversed to their ends, each path results in an individual being charged with a crime. Along the first path, a prosecutor makes a probable cause determination and brings a complaint to a magistrate judge, who makes an independent probable cause determination.[26] The second path begins with a warrantless arrest based upon a police officer's determination of probable cause.[27] Following this arrest, a prosecutor must find probable cause and promptly present a complaint[28] or go before a grand jury to obtain a charge.[29] Thus, no matter the path, a prosecutor is not solely responsible for assessing probable cause.[30] However, not being *solely* responsible for a probable cause determination does not translate into not being *independently* responsible. As this Section will illustrate, prosecutors' probable cause requirement has both legal and ethical facets.

A. Probable Cause Within the Constitution and State Law

The Fourth Amendment contains procedural measures to prevent individuals from being unjustly imprisoned.[31] Despite its ethical overtones, probable cause is measured by standards of law and not by moral norms.[32]

Although jurisdictions vary, probable cause "exists when [the prosecutor has] knowledge of facts and circumstances grounded in reasonably trustworthy information and sufficient in themselves to

cause. SARA SUN BEALE, WILLIAM C. BRYSON, JAMES E. FELMAN, MICHAEL J. ELSTON, GRAND JURY LAW AND PRACTICE § 8:2 (2d ed. 2004). The general rule is that a prosecutor is not required to have probable cause to present facts to a grand jury. *See* Ex parte United States, 287 U.S. 241, 250 (1932) (grand juries determine probable cause to indict). Thus, the grand jury path will not be addressed within this Article.

26. *See* U.S. CONST. amend. IV; FED. R. CRIM. P. 3-4. *See also Gerstein*, 420 U.S. at 120 ("That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate.").

27. *See generally* 5 AM. JUR. 2D *Arrest* § 40 (2005).

28. *See Gerstein*, 420 U.S. at 114 (judge must make probable cause determination following warrantless arrest).

29. *See id.* (holding the Fourth Amendment requires a determination of probable cause). Again, probable cause is not needed to go before a grand jury. *See supra* note 25.

30. *See generally id.*

31. U.S. CONST. amend. IV. *See Gerstein*, 420 U.S. at 112 (quoting Brinegar v. United States, 338 U.S. 160, 175-176 (1949)) (the Fourth Amendment "safeguard[s] citizens from rash and unreasonable interferences with privacy and from unfounded charges").

32. *See e.g.* MINN. R. CRIM. P. 4.03, subd. 2; Mabry v. Johnson, 467 U.S. 504, 511 (1984) ("The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty.").

warrant a belief by a prudent person that an offense has been . . . committed [by the accused]."[33] Inherent in this legal articulation are objective and subjective elements. The *knowledge* requirement is entirely subjective; but, translating that knowledge into a probable cause *determination* is objective.

Although probable cause is meant to protect liberty, which is a central principle of our law, both elements of the definition are surprisingly imprecise. In terms of the objective half, the Supreme Court has described "reasonable belief" as a matter of probabilities, which "are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."[34] As described by Bruce A. Green, the "reasonable belief" constitutes "a fair possibility of guilt, something more than 'reasonable suspicion'"[35] and less than "beyond a reasonable doubt." Likewise, the subjective half lacks a definite standard. Each prosecutor is dealt a different hand in every case. The facts that constitute a prosecutor's knowledge (i.e., the basis of probable cause) stem from three categories of evidence gathered by police officers:[36] witness information, confessions,[37] and physical evidence.[38] If the prosecutor exercises discretion and folds the hand he or she was dealt for lack of probable cause, neither the objective nor subjective elements are subject to oversight.

If a prosecutor plays the hand, then the probable cause determination and the decision to charge are checked by sanctions—theoretically. In the course of a proceeding, dismissal and reversal act as checks on a prosecutor. However, dismissals[39] and reversals[40] serve

33. *Thirty-Fourth Annual Review of Criminal Procedure*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 13 (2005) (footnotes omitted) [hereinafter *Criminal Procedure*] (describing court's probable cause jurisprudence). *See* Carroll v. United States, 267 U.S. 132, 161-162 (1925).

34. *See Brinegar*, 388 U.S. at 175.

35. *See* Green, *supra* note 14, at 1588.

36. *See* Fisher, *supra* note 14, at 228-29 (describing sources of prosecutors information and how that information is processed). *Cf.* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 758 (2003) (describing the relationship between federal prosecutors and their agents).

37. "Confessions" is meant to signify information obtained from a suspect. This definition neither requires admittance of guilt nor even truthfulness.

38. *See Criminal Procedure*, *supra* note 33, at 13-17. For evidentiary purposes, the Supreme Court has broadened these categories for the charging decision to include hearsay evidence and illegally obtained evidence. *See* Gerstein v. Pugh, 420 U.S. 103, 120 (1975); United States v. Calandra, 414 U.S. 338, 354 (1974); Costello v. United States, 350 U.S. 359, 362-363 (1956).

39. *See e.g.* FED. R. CRIM. P. 4(a). A dismissal is the product of a judge finding the

more as procedural protections for the accused's legal rights than as sanctions for prosecutors. Unfortunately, the only direct sanctions prosecutors might face are reprimands within opinions and on the records or contempt charges for egregious behavior.[41]

Theoretically, prosecutors also face the possibility of direct sanctions in the civil realm[42] in the form of malicious prosecution[43] and § 1983 Civil Rights claims.[44] However, neither claim warrants significant discussion because prosecutors' probable cause determinations are shielded from both claims by absolute immunity.[45] Thus, similar to dismissal and reversal, malicious prosecution and § 1983 Civil Rights claims do not *directly* sanction prosecutors.

B. Probable Cause within the Rules of Professional Conduct

If the legal probable cause requirement lacks substantive en-

charge wanting for probable cause and rejecting the complaint or ruling on a motion submitted by the defendant. *See id*. (motions for "defect in instituting the prosecution" and for defect in indictment); *Criminal Procedure*, *supra* note 33, at 246-255; STEPHEN HRONES & CATHERINE C. CZAR, CRIMINAL PRACTICE HANDBOOK §§ 4-4(b), (d) (Miche Co. 1995).

40. *See* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 900 (1995); Walter W. Steele Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 977 (1984) ("[T]he purpose of reversal is and should be fairness to the defendant, not the imposition of sanctions on a prosecutor."). A reversal is typically a motion revisited on appeal. A reversal is unlikely to arise for a probable cause determination because appeals typically follow a guilty verdict, which is determined on a higher standard than probable cause.

41. Contempt charges also represent an independent check on prosecutors. Meares, *supra* note 40, at 893-95, 897. However, as the probable cause determination is within prosecutorial discretion, a contempt charge is unlikely unless a prosecutor engages in some wantonly contemptible behavior. As contempt in the probable cause determination stage would likely also result in a dismissal, the contempt charge will not be discussed further. *See id.*

42. Selective and vindictive prosecutions have been excluded from this section because they are not meant to solely address the issue probable cause. *See generally* Wayte v. United States, 470 U.S. 598 (1985) (selective); Bordenkircher v. Hayes, 434 U.S. 357 (1978) (vindictive). *See also* Megan M. Rose, Note, *The Endurance of Prosecutorial Immunity—How the Federal Courts Vitiated Buckley v. Fitzsimmons*, 37 B.C. L. REV. 1019 (1996).

43. Imbler v. Pachtman, 424 U.S. 409, 421 (1976).

44. 42 U.S.C. § 1983 (2007). A § 1983 Civil Rights claim stems from the accused being deprived of any right "secured by the Constitution" by someone acting "under the color of [law]." *Id*.

45. *Imbler*, 424 U.S. at 421, 426 (citing Yaselli v. Goff, 275 U.S. 503 (1927)) (prosecutors have common-law immunity against malicious prosecution claims and § 1983 claims). *See* Buckley v. Fitzsimmons, 509 U.S. 259, 274 n.5 (1993) ("The reason that we grant it for [malicious prosecution] is that we have found a common-law tradition of immunity for a prosecutor's decision to bring an indictment, whether he has probable cause or not."). *See also id.* at 274.

forcement, then the overlapping ethical requirement[46] might fill the void.[47] Unfortunately, Rule 3.8(a) is ambiguous and ethical claims against prosecutors are easily dismissed. Thus, as will be shown, Rule 3.8(a) in its present form might as well not exist.

Rule 3.8(a) states that a "prosecutor in a criminal case shall: refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."[48] The Rule's ambiguity arises from the fact that the ethical requirement is influenced by the legal requirement, interpretations by states' ethics committees and commentators, and the context in which Rule 3.8(a) operates (i.e., among the other

46. The probable cause ethical requirement is echoed in the ABA's STANDARD FOR CRIMINAL JUSTICE § 3-3.9(a) (1992), the MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103 (1983), and the RESTATEMENT OF THE LAW GOVERNING LAWYERS § 97 (2000).

47. The presence of both legal and ethical requirements should beg the question: Why have two standards for the same requirement? Answering this question to a depth of treatment that it likely deserves is beyond the scope of this Article. One reasoned answer might be that the ethical requirement exists to enforce a standard that cannot be enforced in the civil context. The foundation for this answer is based upon the Supreme Court's assertion that ethical requirement preserves a check against prosecutors where—due to absolute immunity—the civil adjudicative process cannot. *Imbler*, 424 U.S. at 429. The major weakness to this answer is that the ethical rules preceded the Court's assertion. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(A) (1983). The ABA House of Delegates approved the *Model Code of Professional Responsibility* in 1969. GILLERS & SIMON, *supra* note 11, at 523.

The more likely motive behind Rule 3.8(a) is that it answers the problem of prosecutors lacking guidance in their discretionary decisions. Prior to the adoption of the *Model Rules*, the qualities of an ethical prosecutor were largely undefined or were defined ambiguously. Representative of this understanding is then-Attorney General Robert Jackson's conception of prosecutors:

> The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Jackson, *supra* note 15, at 6. Although not as eloquent, Rule 3.8(a) breathed uniformity into an entirely discretionary decision. Although prosecutors can and often do hold themselves to higher standards, probable cause became the moral threshold for discretion. *See e.g.* State Bar of Mich. Ethics Op. RI-023 ("In cases where the prosecutor has reasonable doubt concerning the accused's guilt, a decision not to prosecute may be appropriate, notwithstanding there might be sufficient evidence to support a conviction."). This proposed purpose for Rule 3.8(a) becomes more probable when the Rule is interpreted in conjunction with the duty to justice. *See* Robin West, *The Zealous Advocacy of Justice in a Less Than Ideal Legal World*, 51 STAN. L. REV. 973, 977 (1999). If a sense of justice is meant to guide discretion, then an ethical requirement informed by justice cannot help but do the same. The weakness of the guide-discretion answer is that Rule 3.8(a) and even 3.8 in its entirety only represents a narrow slice of the discretionary pie. *See* Green, *supra* note 14, at 1588, 1602.

48. MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2004).

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 conduct for prosecutors' charging decisions require no more than the same minimalistic 'probable cause' required by the criminal, adjudicative process."). *Contra* Cal. St. B. Ethics Op. 1989-106 ("It is not unusual for conduct to be otherwise legally permissible but proscribed by rules of professional conduct.").

55. N. J. Sup. Ct. Advisory Comm. on Prof. Ethics Op. 661 (also stating that Rule 3.8 requires "certain active steps a prosecutor must take to ensure fair treatment of defendants"). The New Jersey definition seems to mirror the *Restatement*.

> One who initiates or continues criminal proceedings against another has probable cause for doing so if he correctly or reasonably believes
>
> > (a) that the person whom he accuses has acted or failed to act in a particular manner, and
> >
> > (b) that those acts or omissions constitute the offense that he charges against the accused, and
> >
> > (c) that he is sufficiently informed as to the law and the facts to justify him in initiating or continuing the prosecution.

RESTATEMENT (SECOND) TORTS § 662 (2005).

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] Advocacy is easily understood within the context of the

56. *See also* STANDARD FOR CRIMINAL JUSTICE 3-2.1(a) (1992) ("A prosecutor ordinarily relies on police and other investigative agencies for investigation of alleged criminal acts, but the prosecutor has an affirmative responsibility to investigate suspected illegal activity when it is not adequately dealt with by other agencies.").

57. *See e.g.* Fisher, *supra* note 14, at 232.

58. Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 337 (2001).

59. NAT'L PROSECUTION STANDARDS § 43.3 (Nat'l District Attorneys Ass'n, 1991) [hereinafter NAT'L PROSECUTION STANDARDS]. *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS § 11.05 (3d ed., LexisNexis 2004). *But see* Melilli, *supra* note 54, at 681.

60. NAT'L PROSECUTION STANDARDS, *supra* note 59, at § 43.3.

61. STANDARD FOR CRIMINAL JUSTICE § 3-3.9 (1992).

62. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2004). S*ee* Fisher, *supra* note 14, at 219 ("[The duty to seek justice's] very prominence in the professional rhetoric suggests that it says something meaningful to prosecutors, at least about how to apply other, more specific norms."). As the *Model Rules* frame the dual roles, the "minister of justice" comes in addition to being an advocate. *Id.* at 218. Thus, I interpret advocacy to represent the absolute function

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. *Id.* at 215-17.

71. Green, *supra* note 14, at 1588 ("It would unfair for a prosecutor to subject someone who is innocent, or who is expected to be acquitted, to the burdens of an indictment and criminal trial.").

72. Gershman, *supra*, note 58, at 337.

73. Bruce A. Green finds the weakness of the "seek justice" standard is that it cannot be enforced.

> [P]rosecutors may assume that the duty to 'seek justice' and various normative understandings that flow from it, are comparable to the provisions of a nonenforceable civility code or to the Ethical Considerations of the Model Code, in that it would be nice for prosecutors to attempt to abide by them but there is no necessity to do so.

Green, *supra* note 14, at 1598 (footnote omitted). *See also* Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of Charging Discretion*, 20 FORDHAM URB. L.J. 513, 519 (1993) (describing how duty to seek justice has potential but is "too vague to provide meaningful guidance").

74. Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 287 (2001) (footnote omitted) (asserting vagueness undermines disciplinary actions and that an objective of justice is preferable to each prosecutor operating individually).

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 government's case.

FREEDMAN & SMITH, *supra* note 59, at § 11.05. S*ee* Melilli, *supra* note 54, at 678.

80. *See* English, *supra* note 62, at 534-36 (criticizing "leave the discretion to the jury" position because prosecutor is in the best position to assess all of the information available).

81. *See id.* at 537-38 (discussing the view that a prosecutor should charge only those who are in the prosecutor's view guilty beyond a reasonable doubt).

82. *See* Fisher, *supra* note 14, at 238 ("Routine prosecutorial decisions have great moral significance inasmuch as they cause the defendant and/or others to suffer or avoid serious harm. This gives the prosecutor a corresponding moral duty."); Gershman, *supra*, note 58, at

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 factually justified but which the prosecutor believes she will probably not be able to prove beyond a reasonable doubt at trial."[90] Reasonable doubt may prevent a permanent denial of a person's liberty, but Rule 3.8(a) does not prevent denial of a person's liberty throughout the course of trial.[91]

Arguably, probable cause is a reasonable standard for an arrest. It allows police officers to conduct an investigation, protect the public, and—at worst—hold an innocent person for a brief time. Probable cause (as it exists presently within Rule 3.8(a)) is unreasonable for the charging phase because a charge initiates a process that is unlikely to stop. The ideal system is one in which prosecutors, grand juries, and magistrate judges' determinations of probable cause are checked by juries determining guilt beyond a reasonable doubt.[92] However, with

87. Draper v. U.S., 358 U.S. 307, 312 (1959) (quoting *Brinegar*, 338 U.S. at 172-173) ("It approaches requiring if it does not in practical effect require proof sufficient to establish guilt in order to substantiate the existence of probable cause.").

88. *Id.*

89. FED. R. EVID. 1101(d)(2).

90. Meares, *supra* note 40, at 864. As Bruce A. Green criticized, "Just to illustrate how minimal this [probable cause] standard is, it would allow a prosecutor to charge two individuals in two separate cases with the same criminal conduct even when the prosecutor knows that only one of the two could possibly have engaged in the alleged conduct." Green, *supra* note 14, at 1588.

91. *See* Melilli, *supra* note 54, at 677 ("[T]he minimal standard of probable cause is routinely and easily met by the government.").

92. *See* Shelby Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion-Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 380 (2000). However, even when the case is before a jury, there are critics who say the prosecutor's probable cause determination carries more weight than it should. As Bennett L. Gershman describes:

> Juries trust prosecutors; they are impressed by the prosecutor's prestige and expertise. Indeed, jurors may reasonably assume that a case would not be brought in the first place if the prosecutor harbored any doubt, and may even assume that additional evidence probably exists to support the hypothesis of guilt.

Gershman, *supra* note 58, at 341 (footnotes omitted).

ninety-five percent of all convictions occurring through pleas,[93] most probable cause determinations represent the highest threshold of guilt met.[94]

In theory, prosecutorial discretion acts as the check on the probable-cause-and-plead system. Unfortunately, probable cause—unaccompanied by other insights—does not serve as a useful guide for prosecutorial discretion.[95]

> [P]rosecutorial conduct is the exercise of discretion concerning such questions as whom to investigate, whom to charge and what charges to bring, whether to negotiate the terms of a guilty plea, whether to grant immunity from prosecution, whether to drop charges or continue a case to trial, what sentence to seek, and whether to move to vacate a conviction or sentence.[96]

Rule 3.8(a) only states that the "whom" and "what" must meet the threshold of probable cause.[97] Although commentators, other professional codes, and the prosecutor's role as "minister of justice" may imply prosecutors' ethical obligation demands a higher level of investigation and certainty,[98] the ethical decision is enforced to the same degree as the legal decision.[99] When ethical standards ask no more than the law, they cease to be questions of professional integrity and become questions of liability. And, unfortunately, there is substantively no liability for charging without probable cause.

Although the legal and ethical requirements carry with them the *possibility* of sanctions, the sanctions are woefully inadequate and rarely enforced.[100] Prosecutorial immunity shields civil sanctions.[101]

93. *See* Bureau of Justice Statistics: Criminal Case Processing Statistics (Aug. 6, 2006), http://www.ojp.usdoj.gov/bjs/cases.htm ("Ninety-five percent of convictions occurring within 1 year of arrest were obtained through a guilty plea. About 4 in 5 guilty pleas were to a felony."). *See also* Bordenkircher v. Hayes, 434 U.S. 357, 362 (1978) ("[T]he fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system.").

94. *See generally Bordenkircher*, 434 U.S. at 362; Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121 (1998).

95. *See* Green, *supra* note 14, at 1588 (criticizing Rule 3.8(a) for not guiding prosecutorial discretion).

96. *See id.* at 1587-88 (footnote omitted).

97. *See id.* at 1588.

98. *See generally supra* Section II.B.

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

100. *See* Steele, *supra* note 40, 980-81 (explaining why judges are reluctant to institute disciplinary proceedings against prosecutors); Zacharias, *supra* note 62, at 105-06 (exploring why prosecutorial ethical violations are rarely enforced).

And, no evidence suggests that internal sanctions are either widely in place or effective.[102] Dismissal and reversal for probable cause fail to check prosecutors and are rare because probable cause is an easily met threshold.[103] Even when higher courts rebuke prosecutors, ethical sanctions rarely follow.[104] In fact, ethical sanctions are rarely sought at all.[105] "Documenting the failure of bar grievance committees to invoke disciplinary sanctions against prosecutors is not difficult. There is an astonishing absence from appellate court decisions or reports by discipline groups of cases dealing with misconduct by prosecutors."[106] Thus, the effectiveness of a legal and ethical requirement that is never

101. Imbler v. Pachtman, 424 U.S. 409, 421, 426 (1976).

102. There is evidence that internal standards are ineffective. The Department of Justice's Office of Professional Responsibility is meant to be an internal check on prosecutor's behavior but its effectiveness has been significantly questioned. *See* Ellen S. Podger, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1525-1530 (2000) (discussing the lack of guidance Office of Professional Responsibility offers in relation to a prosecutor's discretion); Lyn M. Morton, Note, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 GEO. J. LEGAL ETHICS 1083, 1104-1105 (1994) (discussing efforts by the Department of Justice to shield its prosecutors); Jim McGee, *Prosecutor Oversight is Often Hidden From Sight*, WASHINGTON POST, Jan. 15, 1993, at A1. *See also* Melilli, *supra* note 54, at 683 ("[D]ecisions by prosecutors, including decisions to commence criminal prosecutions, must often be made spontaneously and instinctively with infrequent opportunities for serious internal review."). *Contra* Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 238-240 (2000) (arguing U.S. Attorneys' offices might take ethical requirements more seriously than district attorneys' offices); Zacharias, *supra* note 1, at 756 (suggesting that a peer network enforces higher ethical standards). *But cf.* Smith, *supra* note 65, at 385 ("The truth is most prosecutors have very little discretion.").

103. *See* Melilli, *supra* note 54, at 677.

104. *See e.g.* Margolick, *supra* note 78, at A1 (quoting Stephen Gellers [sic]) ("History tells us that prosecutors who are condemned in judicial opinions never suffer any blemish on their career.").

105. *See* Gershman, *supra* note 15, at 445-446. In his analysis, Bennett Gershman postulates a number of reasons for the lack of disciplinary sanctions against prosecutors. *Id.* These reasons include: 1) the fact that the majority of ethics rules are geared towards the private attorney-client relationship; 2) the fact that prosecutors have "enormous power and prestige" and "professional bar associations would not [want] to alienate them;" 3) "prosecutors are encouraged to be zealous;" (4) there is often ambiguity in the standards in Rule 3.8; and (5) it is cheaper to go after private attorneys. *Id.* at 445-446. Also, this author would assert that the prosecutorial election system also acts as a check upon prosecutorial misconduct. Zacharias, *supra* note 1, at 755-762 (exploring why prosecutors are rarely subject to sanctions). *See also* Meares, *supra* note 40, at 899 ("The practical reality is that few prosecutors are ever disciplined by these regulatory entities."); Melilli, *supra* note 54, at 683 ("Prosecutors are rarely disciplined for violating rules of professional responsibility."); Steele, *supra* note 40, at 976 ("If unethical conduct by prosecutors . . . occurs frequently, numerous disciplinary proceedings against prosecutors should be found, but such is not the case."); Zacharias, *supra* note 62, at 104.

106. Gershman, *supra* note 15, at 445. *See also* Zacharias, *supra* note 1, at 756-62.

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, energy, time, skill, or patience to scrutinize witnesses. Some prosecutors may simply work off police reports and undertake no independent assessment of witness reliability."); Melilli, *supra* note 54, at 687 ("This brief case evaluation will typically be made solely on the basis of information from a police officer and, if applicable (and then typically only indirectly), from the victim of the crime."); Smith, *supra* note 65, at 380 ("To prosecutors, the record is everything: police reports, criminal records, chemical analysis, physical evidence, documentary evidence. . . . The fact that the record may not tell the whole story, or that there is another story altogether, is a complicating detail to be dealt with at trial or sentencing.").

109. *See Criminal Procedure*, *supra* note 33, at 13-17.

110. Wayne T. Westling, *Something is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 J. MARSHALL L. REV. 537, 546 (2001) (citing Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 906-07 (1996)) (stating that "61% of prosecutors identified confessions as 'essential' or 'important' for conviction").

No opportunity exists to independently verify unrecorded confessions. In jurisdictions that do not record interrogations, prosecutors—at best—receive a written summary of the interrogations and taped confessions.[111] Often they receive less. Thus, interrogations that violate constitutional rights or involve coercion can provide the basis for probable cause determinations.[112] Measuring the extent of unconstitutional, coerced, and false confessions is difficult. However, substantial anecdotal evidence suggests that false and coerced confessions are prevalent enough to put prosecutors on guard.[113] If a prosecutor attempts to delve into the contents of an unrecorded interrogation, then any discrepancies between the police officer and the accused's versions of the interrogation yield a credibility battle.[114] If a police officer is willing to commit perjury,[115] or if an officer misinterpreted or forgot key information, then any hope of verifying the integrity of an unrecorded interrogation is all but erased.

IV. THE ETHICS OF PROBABLE CAUSE AND ELECTRONICALLY RECORDED INTERROGATIONS

Nowhere in the District Attorney of Nassau County's state-

111. *See* Jackson, *supra* note 106, at 125-26 (describing how police officers tend to focus on a suspect and build facts to support the suspects guilt rather than gather all the facts available); McCann, *supra* note 1, at 665 ("Some officers carefully record both inculpatory and exculpatory information [during an interrogation]. Other officers tend to brush aside exculpatory statements and record principally inculpatory ones, failing to properly appreciate that . . . some exculpatory information may turn out to be true. . . .").

112. *See* McCann, *supra* note 1, at 664 ("A key concern . . . is not that the officers would fabricate the confessions but that their testimony about the manner in which the confessions were secured would lack the candor critical to the juror's determination as to how trustworthy the confessions are."). *See e.g.* United States v. Acosta, 111 F.Supp. 2d 1082, 1088 (E.D.Wis. 2000); Gershman, *supra* note 15, at 452.

113. *See generally* Drizin & Colgan, *supra* note 6, at 349-78 (documenting false confessions that led to proposed electronically recorded interrogation bill in Illinois). *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004). *See also* Joe Sexton, *New York Police Often Lie Under Oath, Report Says*, N.Y. TIMES, Apr. 22, 1994, at A1 (discussing police officer's tendency to fabricate facts and commit perjury); James Sterngold, *Police Corruption Inquiry Expands in Los Angeles*, N.Y. TIMES, Oct. 1, 2003, at A16.

114. Westling, *supra* note 110, at 537-38, 543-47.

115. A young, inexperience prosecutor could be manipulated by an older police officer adept at lying. *Cf.* Heron Marquez Estrada, *St. Paul Homicide Unit Solves 29 of 29 Cases*, STAR TRIBUNE, Sept. 1, 2003, at B1 ("Homicide was where you went in the last eight to 10 years of your career. The most skilled investigators went to homicide with all of their 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.

however, doing so renders the ethical requirement redundant and, thus, meaningless. In contrast, besides meeting the legal requirement, a prosecutor might also internalize and self-define Rule 3.8(a)'s aspirations.

Individual prosecutors might look beyond the legal requirement of probable cause to the inherent ethical aspirations of Rule 3.8(a) in many ways. To do this, prosecutors might informally adopt a heightened probable cause standard that aspires to principles of liberty at the heart of the Fourth Amendment.[129] They might create tougher internal standards and report their colleagues for ethical violations. They might establish a form of external oversight.[130] Or, prosecutors might take an intermediate step such as advocating for electronically recorded interrogations.[131]

B. Professional Responsibility to Advocate for Recording Interrogations

The utility of an electronically recorded interrogation is that it allows prosecutors to ensure their probable cause determinations are based upon verifiable information, which in turn heightens the certainty of that determination.[132] As stated earlier, probable cause is susceptible to flawed information and does not serve as a substantive barrier for protecting individuals. Unrecorded interrogations threaten to yield both flawed information and a denial of individuals' procedural rights. Recording produces an independent record of interrogations.[133] Echoing the principles inherent in the Constitution, Rule

129. *See* McCann, *supra* note 1, at 669 (Prosecutors "usually employ a charging standard of proof beyond a reasonable doubt when probable cause would be sufficient."); Melilli, *supra* note 54, at 684 ("Many prosecutors impose a higher standard of probability upon their charging decision."). One reason prosecutors might not want to formally adopt a heightened probable cause standard is that a heightened standard might leave open the possibility of sanctions every time a defendant is acquitted. FREEDMAN & SMITH, *supra* note 59, at § 11.05.

130. *See* Steele, *supra* note 40, at 982-88 (presenting a sample model of oversight for prosecutorial discretion).

131. *See* Drizin & Colgan, *supra* note 6, at 420 (discussing the connection between prosecutor's duty to justice and supporting electronically recorded interrogations).

132. McCann, *supra* note 1, at 664-65. ("Any prosecutor worth his or her salt, confronted with . . . [questionable confessions] must employ all the experience, skill, and discernment at his or her command to determine the reliability of each respective confession and thereupon to use or not use the confession."); Westling, *supra* note 110, at 547 ("Electronic recording of all stages of police interrogation of suspects would remove most of the factors that contribute to unreliability."). *See also* Gershman, *supra* note 60, at 314-15.

133. *Cf.* Moore, *supra* note 92, at 379 ("The prosecutor is in the best position and has the

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 investigations because suspects could be reluctant to speak when recorded.[136] Although still in the minority, the experiences of jurisdictions that have adopted recording have largely dispelled concerns that electronically recording interrogations will impede investigations.[137] In Thomas P. Sullivan's

expertise to make the complex charging decision that are necessary in an individualized criminal justice system.").

134. *See* Drizin & Colgan, *supra* note 6 at 420. If a prosecutor is not scrutinizing an interrogation for probable cause purposes, an electronically recorded interrogation is still necessary for scrutinizing evidence before trial.

> A prosecutor in a rape case who is neither entirely confident nor strongly doubtful of the victim's credibility is justified in prosecuting the case. But when a prosecutor strongly suspects that her witness—often a police officer—is lying, she cannot blithely take refuge behind a presumption of credibility. The prosecutor has a duty to confront her doubts about credibility (or 'seriousness' or 'deviance'). The 'presumptions' must be regarded as only prima facie binding, and at some undefinable point, rebuttable.

Fisher, *supra* note 14, at 232 (footnotes omitted). *See also* Gershman, *supra* note 73, at 523-25 (analyzing a prosecutor's moral duty when a witness's description of events cannot be independently verified).

135. *See* Drizin & Colgan, *supra* note 6, at 340, 389-90 (describing prosecutors and police campaign against an electronically recorded interrogation bill in Illinois).

136. *See* Keith Findley, *Taping Would Help Prevent Wrongful Convictions*, MILWAUKEE JOURNAL SENTINEL, Feb. 13, 2005, *available at* www.jsonline.com/news/editorials/Feb05/301027.asp. Prosecutors are busy and electronic recording opponents might argue that prosecutors lack time to review interrogations prior to charging. This concern is addressed within Minnesota by requiring that police officers write incident reports or interrogation summaries. Assuming the police officers' summaries correspond with the interrogation recordings, prosecutors can rely on the summaries for their charging decisions. Prosecutors can verify the summary with the recording if there is anything questionable about the summary of the interrogation.

137. *See* Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1128 (2005) [hereinafter Sullivan, *Electronic Recording*] (There are "300 police and sheriff's departments in forty-three states—plus

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:

> *Los Angeles County, California prosecutor*—"I much prefer to have the evidence on tape, rather than in a police report or a statement written by the officer and signed by the suspect, because recordings provide the most persuasive evidence as to what was said and how the suspect was treated during the session."
>
> . . .
>
> *Hennepin County, Minnesota State Attorney*—"For police, a videoelectronically recorded interrogation protects against unwarranted claims that a suspect's confession was coerced or his constitutional rights violated. For prosecutors, it provides irrefutable evidence that we can use with a jury in a courtroom. For suspects, it ensures that their rights are protected."

SULLIVAN, POLICE EXPERIENCES, *supra* note 137, at 13.

139. *See e.g.*,STANDARDS FOR CRIM. JUSTICE 3-1.2(d) (1993).

140. *See* Westling, *supra* note 110, at 553.

141. Nassau County District Attorney's Office, *supra* note 8; SULLIVAN, POLICE EXPERIENCES, *supra* note 137, at 8.

142. *See* Stephan v. State, 711 P.2d 1156, 1161 (Alaska 1985) ("[A] recording also protects the public's interest in honest and effective law enforcement, and the individual interest of those police officers wrongfully accused of improper tactics."); Sullivan, *Electronic Recording*, *supra* note 137, at 1130.

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.[147] Finally, recorded interrogations are useful for training law enforcement and other prosecutors.[148]

The District Attorney of Nassau County utilized one method of advocating for electronically recorded interrogation—the press release. However, there are other methods that prosecutors can employ. Prosecutors can work with citizens' groups to persuade local governing bodies and police departments to adopt recording policies. Prosecutors can write articles and editorials describing the need for and benefits of electronically recorded interrogations. Prosecutors can also use their discretion to reject cases based upon unrecorded interrogations.[149] Although this may not be prudent in all cases, bold positions send bold messages.[150] In jurisdictions that already have recording re-

143. *See e.g.* Zacharias, *supra* note 1, 773-774 (concluding that more transparency might increase credibility).

144. Nassau County District Attorney's Office, *supra* note 8; SULLIVAN, POLICE EXPERIENCES, *supra* note 137, at 16. S*ee* MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt.1 (2004).

145. *See* Griffin, *supra* note 74, at 304 ("Prosecutors are like politicians and other executive officials. A significant part of their role is to represent the people.").

146. *See* McCann, *supra* note 1, at 665 ("Other officers tend to brush aside exculpatory statements [during unrecorded interrogations] and record principally inculpatory ones, failing to properly appreciate that while some exculpatory information may turn out to be true and thus lead to exoneration, some seemingly exculpatory information might be shown to be false and thus undercut the credibility of the accused."); Sullivan, *Electronic Recording*, *supra* note 137, at 1129.

147. *See* SULLIVAN, POLICE EXPERIENCES, *supra* note 137, at 8 ("Experience shows that recordings dramatically reduce the number of defense motions to suppress statements and confessions."); Westling, *supra* note 110, at 551-52 (describing cost-effectiveness of taping interrogations).

148. SULLIVAN, POLICE EXPERIENCES, *supra* note 137, at 16-18.

149. *See* McCann, *supra* note 1, at 665 ("Every good district attorney, exercising his or her best judgment, has occasionally told detectives seeking the filing of a homicide charge, 'You may have the right person, but you don't have the right evidence' or, when appropriate, 'You've got the wrong person.'").

150. *See* Gershman, *supra* note 58, at 350. *See also* Smith, *supra* note 65, at 391-92 (ci-

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-

accountable for the probable cause determination, prosecutorial review is inevitable.

Another potential criticism is that advocating for electronically recorded interrogations could harm a prosecutor's relationship with police officers.[154] A veteran prosecutor might argue that, through the use of discretion, a good prosecutor could neutralize the behavior of Andy Sipowicz—making recorded interrogations unnecessary.[155] However, not all prosecutors are good at judging honesty. Further, good cops, who are skilled interrogators, might still make mistakes, obtain false confessions, or misinterpret the statements made during interrogations.[156] More importantly, a concern always exists about lawsuits stemming from police misconduct. Thus, a prosecutor can advocate for recording as a matter of reducing liability and not as a matter of police oversight. As the Nassau County District Attorney implied, advocating for recording interrogations does not presuppose police misconduct.[157] Rather, recording interrogations should represent a proactive demonstration of integrity. With this position, a prosecutor should be able to both fulfill his or her ethical aspirations while maintaining a working relationship with police officers.

The internalization and re-characterization of Rule 3.8(a) as an aspiration (as opposed to an edict), prosecutors' role as "minister[s] of justice," and the other aspirations of the *Model Rules* should compel prosecutors to advocate for electronically recorded interrogation. Although the adoption of recording practices would not mend all of the holes in the probable cause ethical requirement, recorded interrogations would patch up many of the weak spots. Advocating for the

ready made a threshold factual judgment, *i.e.*, that probable cause (or a prima facie case) exists to find defendant guilty.").

154. *See* Smith, *supra* note 65, at 379 ("The prosecutor who becomes known for questioning police officers' honesty, or worse, for dismissing cases or seeking sanctions against lying cops is not going to get a lot of police cooperation on his or her other cases."). Prosecutors may also be concerned that advocating for electronically recorded interrogations will hurt their perception among voters. However, using Illinois as a gauge suggests that voters support police accountability. Drizin & Colgan, *supra* note 6, at 378-380 (citing Steve Mills, *One Step to Reform, 2 Steps Back; Corruption, Brutality Charges Still Tarnish Police*, CHICAGO TRIBUNE, Feb. 11, 1999, at § 1, p.1).

155. *See* Griffin, *supra* note 74, at 300 (Prosecutors "are good at legal reasoning, [and] adept at distinguishing truth-tellers from liars. . . .").

156. *See e.g.* Christopher Wills, *False Confessions: Taping Interrogations Won't Protect Suspects from Themselves*, ASSOCIATED PRESS, July 17, 2005 ("Commander Neil Nelson of the St. Paul, Minn., police department said he once elicited a false confession. Reviewing the recorded interrogation made him doubt the confession and the suspect wasn't charged.").

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

purpose of improving probable cause determinations expands the reviewable foundation of evidence, making a heightened level of certainty for Rule 3.8(a) decisions possible across all categories of evidence. Creating reviewable foundations allows for the possibility of enforcing Rule 3.8(a) in the ethics context where it cannot be enforced in the civil context. Advocacy also allows prosecutors to fulfill the aspirations of Rule 3.8(a) and the *Model Rules* and give meaning to that which otherwise might be meaningless.

V. CONCLUSION

In broad terms, the argument of this Article is one more vote on the side of self-regulation for prosecutors.[158] By examining the aspirational goals of Rule 3.8(a) and the *Model Rules of Professional Conduct*, this Article sought to define one area of prosecutorial ethics in need of improvement. Alan Harris, "a veteran prosecutor in Minnesota," called the state supreme courts' mandate to record "the best thing we've ever had rammed down our throats."[159] John P. Sullivan's survey of law enforcement agencies' experiences with recording interrogations demonstrates that the Detective Sipowiczs of the world can still be cops even without the shouting, threats, and boxing of ears. Thus, when juxtaposed with the external regulations that might be imposed upon prosecutors, advocating for recording does not seem to be the worst fate. Often proposals for external oversight are based upon a premise that there are rampant miscarriages of justice and prosecutorial misconduct is to blame. Rather than attack prosecutors' current behavior, the goal of this Article was to outline the weaknesses of the system and offer one tool that prosecutors might use to proactively demonstrate the integrity of their profession.

Even without the prodding of the *Model Rules of Professional Conduct*, prosecutors should feel morally compelled to improve their profession and the criminal justice system. Although this Article traversed through the *Model Rules of Professional Conduct* to make its case, at its most basic level it argued prosecutors' individual moral aspirations should yield advocacy for electronically recorded interrogation. In a philosophical discussion, relying on the "Golden Rule," Kant's categorical imperative, or Rawl's "veil of ignorance," would

158. *See* Green, *supra* note 14, at 1599 (quoting Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutor's Ethics*, 55 VAND. L. REV. 381, 442 (2002)).

159. Sullivan, *Electronic Recording*, *supra*, note 137, at 1127 (quoting a telephone interview with Alan K. Harris, Deputy Prosecutor, Hennepin County, Minn. (Feb. 8, 2005)).

likely yield the same moral responsibility. And, in the absence of enforceable regulations, prosecutors only have the moral underpinnings of their profession to guide their decisions. It does not matter whether these moral underpinnings are characterized as the aspirations of the *Model Rules* (and, specifically, Rule 3.8(a)) or an abstract conception of professionalism. Advocacy for recording interrogations answers the call of both.

Nevertheless, the solution presented in this Article does not answer all of the criticisms that can be leveled at the ethics rules directed toward prosecutors. An important next step would be to explore other ways prosecutors might self-regulate their niche of the legal profession. On one extreme is the possibility of creating an enforceable ethical model for addressing prosecutorial discretion.[160] On the other extreme are solutions similar to the advocacy for electronically recorded interrogations: solutions that answer concerns and do not broaden the present restraints on prosecutors.

Compelled advocacy for electronically recorded interrogation is not a sanctionable norm, but it is the right thing to do. Although this Article examined the weaknesses of the probable cause requirement and the aspirational goals of the *Model Rules of Professional Conduct* to make its argument, these legal constructs only carry persuasive thrust because they embody the principles that resonate the moral aspirations that call individuals to law enforcement. Hopefully, prosecutors seize the opportunity to advocate for electronically recorded interrogations and uphold society's ideals.

160. Green, *supra* note 14, at 1602.