

Can Prosecutors Be Both Coach and Referee?

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Eric Fish, *Prosecutorial Constitutionalism*, **S. Cal. L. Rev.** (forthcoming 2016), available at [SSRN](#).

In his intriguing new article, *Prosecutorial Constitutionalism*, Eric Fish develops a theory about when prosecutors ought to act as public officials, interpreting the Constitution as a judge would do, and when they should serve as advocates seeking a conviction or the maximum punishment possible. He concludes that when the adversary system fails, prosecutors should assume the role of judges. They should act according to their own interpretation of the Constitution, as other public officials are expected to do.

When prosecutors are in full control of the criminal justice process, as in plea bargaining or charging, the adversary checks are absent, and prosecutors should interpret and apply the Constitution to protect defendants' rights. Similarly, when judges under-enforce constitutional norms out of procedural or structural concerns like separation of powers, the prosecutor should serve as a guardian of defendants' rights rather than their adversary. In other moments when the system is functioning as a proper check, prosecutors should be free to pursue convictions and high sentences with zeal.

Fish argues that individual prosecutors are incapable of determining which role to inhabit, of knowing when to assume the stance of adversary lawyer as opposed to that of neutral arbiter. Internal policies like the Department of Justice's *United States Attorneys' Manual* or rules of professional conduct can and do guide them, but there needs to be a better, more comprehensive theoretical framework for understanding when a prosecutor should advocate for harsher sentences and when she should protect the rights of defendants and uphold the Constitution.

Fish starts with the rather uncontroversial premise, articulated by many scholars and courts before him, that prosecutors embody a dual role. They are expected to seek convictions while simultaneously ensuring fairness and protecting the integrity of the criminal justice system. They must pursue their cases with diligence while also protecting the rights of defendants and preserving the legitimacy of the process. This is a difficult balance and there is ample evidence that prosecutors often neglect their obligation to defendants and the law in favor of harsher charges and sentences.

But then he writes that this dual role is not only complex and difficult, it is impossible. It is like asking "the same person to be both coach and referee." He joins scholars like Rachel Barkow in concluding that the two expectations are fundamentally incompatible.¹ Here is where readers may disagree. Some may side with those who argue that not only can prosecutors negotiate these two roles, but they also do and they must. If they cannot seek convictions and also protect defendants' rights at the same time, then our entire criminal justice system breaks down. The roles cannot be disentangled. At every stage of the prosecution, both aspects of the prosecutor's job must come into play. Even in the most adversary phase of a trial, a prosecutor ought to be wary of playing too hard and coming too close to the line. The obligation to pursue convictions is always uncomfortably lodged within the duty to protect defendants' rights, to uphold the Constitution, and to ensure the integrity of the process. There is no doubt that the prosecutor's dual function is fraught with tension and complexity. Fish further asserts that it is an impossible and irreconcilable role.

Fish writes that the prosecutor "is assigned the task of obtaining convictions, and so must necessarily take positions in litigation that undermine defendants' constitutional rights," but this assertion is less than obvious. A prosecutor may take positions that interpret the defendant's constitutional rights in such a way that they are consistent with pursuing a conviction. But if, at any point, obtaining a conviction requires a prosecutor to undermine a defendant's rights, then the

prosecutor should, and must, dismiss the case.

Fish locates the dual roles of the prosecutor in the history of the American criminal justice system. He argues that the adversary role is rooted in the Anglo-American tradition of private prosecution. The quasi-judicial role, according to Fish, emerged when the country moved to a system of public prosecutors. While there is some merit to this narrative, Fish emphasizes the stark divide. Yet, private prosecutors themselves were expected to preserve and promote the public interest. They too were supposed to find balance between their adversary role and the dictates of justice. The shift to public prosecutions occurred in part because critics felt that the victim put too much pressure on prosecutors so they could not fully attend to their public function. So, the history seems to point to a tradition of entangled roles.²

Fish argues that ethical rules reinforce the adversary model by pushing prosecutors to pursue convictions, but the duty of zealous advocacy does not, in fact, mandate that conclusion. Prosecutors have a duty to pursue the interests of their client diligently, but a prosecutor's client is the public, and the public has a complex interest, which includes not only putting guilty people in jail but also preserving the rights of the innocent and the principles of the law.

While the historical premise of Fish's analysis is less than obvious, his conclusion is both insightful and valuable. Like Professor William Simon, he argues that a lawyer's duty to do justice is most intense when the adversary system is not working.³ Applying this theory to prosecutors, Fish points to policies like the Petite Policy in the federal system, in which the Department of Justice has stepped in with a more robust protection for defendants where courts, for various structural and procedural reasons, decline to fully define and enforce the Constitution's limits. The Petite Policy requires federal prosecutors to seek permission from the DOJ when they pursue a prosecution that is substantially similar to one that has been brought in a different jurisdiction. As Fish points out, this is an example of an internal policy that asks those at the top ranks of the office to interpret the Constitution (here, the Double Jeopardy Clause) to provide greater protection for defendants than courts mandate.

Fish's argument contributes a great deal to the growing literature about the prosecutor's role. It helps to answer a question that has preoccupied scholars for years: how do we encourage prosecutors to fulfil their public function rather than just accumulate convictions and harsh sentences? Moving forward, perhaps we need to focus not on how to separate the two functions, but on training lawyers simultaneously to embrace both sides of their role.

1. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 **Stan. L. Rev.** 869 (2009). [?]
2. John L. Worrall, *Prosecution in America: A Historical and Comparative Account*, in **The Changing Role of the American Prosecutor** 3 (John Worrall & M. Elaine Nugent-Borakove eds., 2008). [?]
3. William H. Simon, **The Practice of Justice** (1998). [?]

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