

The Role of the Prosecutor

Summer 2021

Course Number: 223-R01

Scalia Law School, George Mason University
Tuesdays and Thursdays, 8:00 p.m. to 9:50 p.m.

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Syllabus

Course Description

This course will examine the role of the modern prosecutor through readings, discussions, and guest speakers. We will address the limits and extent of prosecutorial power, the degree to which prosecutors shape the criminal justice system, the significance of electoral politics in selecting prosecutors, the focus on prosecutors in current reform movements, and the relationships between prosecutors and other actors in the criminal justice system such as police, legislators, judges, defense counsel, victims, and the communities prosecutors serve. We will also touch on prosecutorial ethics and the challenges today's prosecutors face in their mission to be "Ministers of Justice".

Materials and Reading Assignments

During the course of the semester we will read chapters from the following title: *The Best Story Wins: And Other Advice for New Prosecutors*, by John Bobo. (Tower Publishing, 2010). We will also read selected portions of: *Prosecutorial Ethics* by R. Michael Cassidy. (Thomson/West, 2005). Students should place orders directly with the bookstore via this link: <https://gmu.bucollege.com/shop/gmu/page/find-testbooks> Students will have the option to pick up their books at the bookstore, or to have the books mailed directly to them. There is no shipping charge for book orders greater than \$75.00. Book orders which are \$75.00 or less will have a flat shipping charge of \$7.99.

Class Participation, Attendance and Evaluation

Every student is expected to attend each class and to come prepared and on time. Since participation is 30% of your grade, absences, late arrivals and failures to participate adequately will be factored into your final grade.

As mentioned above, 30% of your grade will be based on class participation. The study of prosecutors and the power they wield in the criminal justice system is a group-wide activity. If needed, I will call on

students to help facilitate group discussion. Please come to class prepared, having read the assigned readings. Prosecutors deal with gritty and sometimes controversial topics and our classmates will hold a variety of opinions. It's important for everyone to feel heard and respected at all times. All views are welcomed; robust, constructive, and respectful disagreement is expected and encouraged.

There will be three writing assignments. The first two papers will each be 3-5 pages in length and will each make up 15% of your grade. The third paper due on the last day of class should be no more than 10 pages in length and will make up 40% of your grade. On the first night of class we will discuss the assignment for the first two papers. The third paper will be on a topic of your choice in consultation with me.

Learning Outcomes: By the end of the course students will:

- 1) Gain a clearer, more comprehensive understanding of the role of the modern prosecutor in the American criminal justice system.
- 2) Learn about the complexities and competing considerations that inhere in prosecutorial decision making.
- 3) Develop a stronger appreciation for the qualities, temperament and judgment necessary to be a "just prosecutor".

Reading Assignments

The reading assignments and the dates they are expected to be completed are listed below. Over the course of the semester, there might be additional assignments as certain topics develop. Adequate notice will be given regarding any additional assignments.

Week One:

Tuesday, May 18: Course Administration, Expectations, Description of Writing Assignments.

Readings:

- John Bobo, *The Best Story Wins and Other Advice for New Prosecutors*, Tower Publishing, pp. 1-27.
- John H. Langbein, *The Origins of Public Prosecution at Law*, 17 Amer. J. Legal Hist. 313 (1973) **(Skim only)**.
- Joan E. Jacoby, *The American Prosecutor: A Search for Identity* (1980) Chapter 1: Origins and Development of American Prosecution, pp. 3-43, **(Skim only)**.

Thursday, May 20: Guest Speaker: Josh Katcher, Arlington County Senior Asst. Commonwealth's Attorney.

Readings:

- Abbe Smith, *Are Prosecutors Born or Made?* 25 Geo. J. Legal Ethics, 943, (2011).
- Jeffrey Bellin, *The Power of Prosecutors*, New York University Law Review, Vol. 94 (May 2019) pp. 171-182.
- Bobo, pp. 203-225.
- Virginia Rules of Professional Conduct – Rule 3.8, Additional Responsibilities of a Prosecutor. <https://www.vsb.org/pro-guidelines/index.php/rules/advocate/rule-2-8/>

Week Two:

Tuesday, May 25: Guest Speaker: Bryan Porter, Commonwealth's Attorney, City of Alexandria, VA.

Readings:

- National Study of Prosecutor Elections, UNC School of Law, February 2020 pp. 1-10, <https://law.unc.edu/academics/centers-and-programs/prosecutors-and-politics-project/>
- David Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 Ohio St. J. Crim. L. 647 (2017)
- *The Prosecution Never Rests* by Adam J. White, City Journal, Eye On The News, July 20, 2020 <https://www.city-journal.org>

Thursday, May 27:

- K. Babe Howell, *Prosecutorial Discretion. The Duty to Seek Justice in an Overburdened Criminal Justice System*, https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1113&context=cl_pubs pp. 305-334.
- Bellin, *The Power of Prosecutors*, pp. 182-212.
- Cassidy, *Prosecutorial Ethics*, pp.13-25
- *Wayte v. United States*, 470 U.S. 598 (1985) **Skim Only**.

Week Three: PAPER #1 DUE

Tuesday, June 1: Guest Speaker: Nancy Parr, Commonwealth's Attorney, City of Chesapeake, VA. President of the National District Attorneys Association (NDAA).

Readings:

- National District Attorneys Association, Prosecutor Well-being Task Force, <https://ndaajustice.medium.com/ndaajustice-launches-prosecutor-well-being-task-force-d0d561472314>.
- Institute for Innovation in Prosecution at John Jay College, Prosecutor Well-being, <https://www.prosecution.org/prosecutor-wellbeing>.
- *The Prosecutor's Evolving Role: Seeking Justice Through Community Partnerships and Innovations*, (May 2016) **Skim Only**
- ABA Journal, American Bar Association, *The Call for the Rise of the Modern Prosecutor, Criminal Justice, Winter, 2021*, [https://pceinc.org/topic/publications/ ABA CJ Magazine Article.pdf](https://pceinc.org/topic/publications/ABA_CJ_Magazine_Article.pdf)

Thursday, June 3: Guest Speaker: Jonathan Fahey, former Acting Director of U.S. Immigration and Customs Enforcement (ICE), Senior Advisor, Deputy Assistant Secretary (ICE), Acting Principal Legal Advisor (ICE), former federal prosecutor, Eastern District of Virginia.

Readings:

- John H Douglass, *Death As a Bargaining Chip: Plea Bargaining and the Future of Virginia's Death Penalty*, <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2090&context=law-faculty-publications>.
- Cassidy, *Prosecutorial Ethics*, pp. 81-93
- National District Attorneys Association, *National Prosecution Standards*, 3rd Edition, <https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf>, Sections 5-1.1 through 5-52 and Commentary. Propriety of Plea Negotiations and Plea Agreements.

Week Four: Prosecutorial Discretion: A Case Study: *U.S. v Michael Flynn*

Tuesday, June 8:

Readings:

- Department of Justice, Motion to Dismiss the Criminal Information Against the Defendant Michael T. Flynn, <https://assets.documentcloud.org/documents/6883959/Flynn-Govt-Motion-to-Dismiss.pdf>
- Zack Smith and Hans A. von Spakovsky, *Judge Sullivan's Long-Overdue Dismissal of Flynn Case Reveals His Bias*, <https://heritage.org/crime-and-justice/commentary/judge-sullivan-long-overdue-dismissal-flynn-case-reveals-his-bias>
- Oral Argument Summary: U.S. v. Flynn, Anna Salvatore, Benjamin Wittes, <https://lawfareblog.com/oral-argument-summary-us-v-flynn>
- K. Babe Howell, *Prosecutorial Discretion. The Duty to Seek Justice in an Overburdened Criminal Justice System*, <https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1113&context=cl>

Thursday, June 10: Guest Speaker: Prof. Lara Bazelon, University of San Francisco School of Law, author and Director, Criminal & Juvenile Justice and Racial Justice Clinics and holds the Barnett Chair in Trial Advocacy, Author of the novel: *A Good Mother*, (due out 5/11/21).

Readings:

- Lara Bazelon, *Kamala Harris Was Not a 'Progressive Prosecutor'* <https://www.nytimes.com/2019/01/17/opinion/kamala-harris-criminal-justice.html>
- Lara Bazelon and Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 Ohio St. J. Crim. L. 1 (2020) Available at: https://ir.lawnet.fordham.edu/faculty_scholarship/1079
- From Defendant to Top Prosecutor, This Tattooed Texas DA represents a New Wave in Criminal Justice, by Justin Jouvenal [www.washingtonpost.com>public safety>2018/11/19](http://www.washingtonpost.com/public-safety/2018/11/19)

Week Five:

Tuesday, June 15: Guest Speaker: Peter H. White, Former Federal Prosecutor, Partner, Schulte Roth & Zabel LLP, co-chair of the Litigation Group, member of the firm's Executive Committee.

Readings:

- R. Michael Cassidy, *What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice"*, 82 Notre Dame L. Rev. 635, 696 (2013)
<https://scholarship.law.nd.edu/ndlr/vol82/iss2/3>, pp. 635-697, (Skimming first 20 pages).
- NDAA, NPS: Sections 2-8.1 through 2-8.7 and Commentary, Prosecutors and Defense Attorneys
- Bobo, pp. 77-95
- Cassidy, *Prosecutorial Ethics*, pp. 65-80

Thursday, June 17: Paper #2 Due. Students present on Paper #1.

Readings:

- Jeffrey Bellin, *Theories of Prosecution*, (March 6, 2019) California Law Review, Forthcoming.
Available at SSRN: <https://ssrn.com/abstract=3347939>.

Week Six:

Tuesday, June 22: Guest Speakers: Rafael Mangual, Senior Fellow and Deputy Director of Legal Policy of the Manhattan Institute and Contributing Editor of City Journal. Jonathan Blodgett, District Attorney, Essex County, MA. Board Chair, Addiction Policy Forum, Former President, NDAA.

Readings:

- From Bad to Worse in New York by Rafael Mangual [City Council Reforms Will Make NY Crime Worse | City Journal \(city-journal.org\) https://www.city-journal.org/city-council-reforms-will-make-ny-crime-worse](https://www.city-journal.org/city-council-reforms-will-make-ny-crime-worse)
- Taking on "Progressive Prosecutors" by Craig Trainor, <https://www.city-journal.org/taking-on-progressive-prosecutors>
- Progressive Prosecutor Project – Commentary, <https://www.commentarymagazine.com/articles/the-progressive-prosecutor-project/2/18/2020>

Thursday, June 24: Guest Speaker, Robert McCulloch, former Prosecuting Attorney, St. Louis County, MO, led the grand jury investigation into the 2014 shooting death of Michael Brown, Ferguson, MO.

Readings:

- DOJ Report on the Shooting Death of Michael Brown, <https://www.justice.gov/sites/default/files/opa/>
- McCulloch Looks Back at 35 Years as St. Louis Prosecutor, <https://www.stltoday.com/news/local/crime-and-courts/mcculloch-looks-back-at-35-years-as-st-louis-county-prosecutor-say-ferguson-is-the/a>

Week Seven:

Tuesday, June 29: Criminal Justice/Police Reform

Readings:

- U.S. Department of Justice, President's Commission on Law Enforcement and the Administration of Justice, Final Report, December 2020 <https://www.justice.gov/file/1347866/download?> (Executive Summary, (xvii), Presidential/AG Recommendations, (xviii) Chapters 1, 3, and 6).
- Final Report of the MCCA Police Reform Working Group, <https://www.nationalpublicsafetypartnership.org>

Thursday, July 1: Guest Speaker: Saly Fayez, Director, Victim Services Division, Fairfax County Police Department, Liaison Commander for the Domestic Violence Squad.

FINAL PAPER DUE

Readings:

- law.lis.virginia.gov Constitution of Virginia, Article I. Bill of Rights, Section 8-A. Rights of Crime Victims.
- Section 19.2-11.01 Code of Virginia, 1950 as amended, Crime Victims and Witness Rights.
- Bobo, pp. 49-59
- Crime Victims' Rights Act (federal statute) 18 U.S.C Section 3771.
- Letter Opinion by Fairfax County Circuit Court Judge Randy Bellows, <https://www.fairfaxcounty.gov/circuit/sites/circuit/files/assets/documents/pdg/opinions/mi-2020-961-cw-v-sherrill-chastain.pdf>