What does it mean for prosecutors to seek justice? How independent should prosecutors be in endeavoring to seek justice? And how should their professional independence be secured? These fundamental questions lie beneath the surface of the Supreme Court’s recent decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

The case arose out of a lawsuit filed by Richard Ceballos, a deputy district attorney, against District Attorney Gil Garcetti and two supervisors in the Los Angeles District Attorney’s office. According to Ceballos’s complaint, while serving as a supervisor in a branch office, he fielded a defense lawyer’s allegation that a deputy sheriff had lied in an arrest warrant affidavit. After personally conducting an investigation, which included a visit to the location described in the affidavit and an interview of the deputy sheriff, Ceballos became convinced that the affidavit in fact contained serious misrepresentations. He spoke to his supervisors about his concerns and sent them a memorandum setting out the facts and his conclusions and recommending that the case be dismissed. Ceballos’s supervisor rejected the recommendation and asked Ceballos to soften the memorandum before showing it to the sheriff’s department, which he did. However, contrary to his supervisor’s further direction, Ceballos provided defense counsel a redacted memorandum containing the facts contradicting the affidavit, believing that he was required to do so to fulfill his duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963). He was later called to testify at a hearing in the case, and did so truthfully. Thereafter, Ceballos suffered adverse employment actions, which he believed to be retaliatory. Unable to win relief through the employment grievance process, Ceballos brought a civil rights action, claiming that the district
attorney had violated his First Amendment right to speak as a public citizen on matters of public concern.

Because of the case’s procedural posture, the U.S. Supreme Court focused on Ceballos’s memorandum and whether it comprised protected speech. In his decision for a closely-divided Court, Justice Kennedy found that even if Ceballos had been required to report the deputy sheriff’s perjury to his superiors, he was not engaged in First Amendment-protected speech in doing so. On the contrary, precisely because Ceballos was just “fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case,” the Constitution afforded him no protection. The Court reasoned that “restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”

Therefore, the Court held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” A contrary rule, according to the Court, would result in unwarranted “judicial oversight of communications between and among government employees and their superiors in the course of official business.”

The four dissenting Justices saw it differently. Justice Stevens noted the perversity of a “rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.” In a dissenting opinion joined by Justices Stevens and Ginsburg, Justice Souter maintained that “the government’s stake in the efficient implementation of policy” is outweighed when a public employee “speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it.”

Only Justice Breyer focused on the underlying issues of prosecutors’ ethics. He emphasized that “the speech at issue is professional speech—the speech of a lawyer. Such speech is subject to independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And where that is so, the government’s own interest in forbidding that speech is diminished.” Further, he stressed that “the Constitution itself here imposes speech obligations upon the government’s professional employee. A prosecutor has a constitutional obligation to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government’s possession.”

At bottom, the *Garcetti v. Ceballos* decision was about the First Amendment, not prosecutors’ ethics. But it certainly suggests questions and raises concerns from the perspective of prosecutors’ ethics. Among other things, it highlights both the inadequacy of existing rules and standards of prosecutorial conduct and the inadequacy of regulatory and procedural means of encouraging compliance. Most especially, the decision suggests the need for the profession to encourage prosecutors’ offices to nurture the very independence for which Ceballos claims to have been punished.

**Implications of the duty to seek justice**

Taking Ceballos’s allegations as true (as did the Supreme Court for purposes of its decision), consider how one would ideally have wanted Ceballos and his supervisors to act. What should Ceballos have done upon being told by a defense lawyer that the deputy sheriff had submitted a false affidavit? The ABA Standards Relating to the Prosecution Function (ABA Standards) call upon prosecutors “to seek justice” and to “exercise sound discretion in the performance of his or her functions.” (ABA Standards 3-1.2(b) and (c).) But the ABA Standards do not define the duty to “seek justice” or obligate prosecutors, in particular, to respond to allegations that their evidence or submissions are false.

One might conceivably take the view that seeking justice simply means seeking convictions of the guilty through lawful means. Ceballos could easily have shrugged off the defense lawyer’s concerns, since Ceballos and his prosecutorial colleagues had not themselves acted unlawfully by knowingly submitting false evidence. He might have thought that he was entitled, or perhaps even required by institutional imperatives, to accept the deputy sheriff’s representations at face value as long as they were not demonstrably false and to leave it to the adversary process to resolve issues of credibility. Further, even upon investigating and concluding, as he did, that the deputy sheriff’s affidavit was false, Ceballos did not have to disclose the relevant facts to the defense. Although both state penal law and the *Brady* decision required the prosecution to disclose exculpatory evidence to the defense, Ceballos might have construed the prosecution’s discovery obligation narrowly or, even if he did not, deferred to his supervisors’ narrow view, leaving it to the defense to conduct its own investigation. Certainly, generous disclosure would not have furthered the aim of winning a conviction.

Courts and commentators have, of course, taken a more

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**Bruce A. Green** is the Louis Stein Professor of Law at Fordham University School of Law in New York. Contact him at bgreen@law.fordham.edu.
expansive view of the duty to seek justice. Drawing on writings going back to the midnineteenth century, I have previously written that:

Doing justice comprises various objectives which are, for the most part, implicit in our constitutional and statutory schemes. They derive from our understanding of what it means for the [state] to govern fairly. Most obviously, these include enforcing the criminal law by convicting and punishing some (but not all) of those who commit crimes; avoiding punishment of those who are innocent of criminal wrongdoing (a goal which, as reflected in the “presumption of innocence,” is paramount in importance); and affording the accused, and others, a lawful, fair process. Additionally, most would agree, the [state] has at least two other aims. One is to treat individuals with proportionality; that is, to ensure that individuals not be punished more harshly than deserved. The other is to treat lawbreakers with rough equality; that is, similarly situated individuals should generally be treated in roughly the same way. (Bruce A. Green, Why Should Prosecutors “Seek Justice”? 26 FORDHAM URB. L.J. 607, 634 (1999).)

If one takes seriously the idea that seeking justice includes a commitment to ensure the fairness of the process by which convictions of the guilty are sought, then surely Ceballos did just what one would have hoped, even if no law, rules, or standards required it. The fairness of the criminal process turned, in part, on whether the arrest was lawful or, as defense counsel alleged, based on a deputy sheriff’s false representations. In most cases, a defense lawyer appointed to represent an indigent defendant would lack the necessary resources and time to investigate, and, in any case, would lack the prosecutor’s access to the deputy sheriff. Therefore, Ceballos could not fairly leave it to the defense’s investigation and the adversary process to resolve questions about the investigator’s integrity. Further, if one understands that the duty to seek justice generally, and the disclosure obligation in particular, are personal responsibilities (as Justice Breyer noted) and not simply institutional ones, Ceballos acted rightly in making an independent judgment to disclose the relevant facts.

But what about his supervisors’ contrary directions?

The ABA Standards say little about the relationship between superior and subordinate lawyers in the prosecutor’s office and, in particular, they are silent about how supervisory lawyers should inculcate and foster the necessary exercise of sound discretion. If the prosecutor’s office sought to encourage prosecutors to develop an expansive view of their duty to seek justice and to exercise sound, independent judgment in doing so, Ceballos’s supervisors might have lauded him for taking the initiative to ensure the truthfulness and fairness of the criminal justice process. By holding Ceballos up as an exemplar, the office would have encouraged its prosecutors, in the pursuit of justice, to go beyond the narrow obligations of legal and disciplinary duty. Alternatively, as they allegedly did, his supervisors might have punished Ceballos, thereby reinforcing assistant prosecutors’ subordination to superiors, the perceived obligation of fealty and deference to investigative agencies, and, ultimately, a narrow vision of the prosecutor’s role.

By denying protection to prosecutors in Ceballos’s position who act independently on a broad, public-spirited view of their professional role, the Supreme Court left it to other regulatory mechanisms to “provide checks on supervisors who would order unlawful or otherwise inappropriate actions.” Justice Kennedy envisioned the ethics rules and constitutional decisions such as Brady as a source of protection. But in fact, the Garcetti decision increases dependence on the institutional culture and self-regulation of prosecutors’ offices to define and enforce professional norms—precisely what was lacking, if one accepts Ceballos’s account.

The limitations of current regulation

Garcetti illustrates that existing rules and decisions barely scratch the surface of prosecutors’ professional obligations. Even when the issue is not simply procedural fairness, as in the case that Ceballos investigated, but the guilt or innocence of the accused, prosecutors have only a modest obligation to ensure the reliability of their evidence. The disciplinary rules impose no obligation on prosecutors to ensure the truthfulness of their evidence beyond advocates’ ordinary duty to avoid knowingly offering false evidence. (ABA Model Rules of Professional Conduct, Rule 3.3(a)(3).) Although much has been said about the problem of perjury in criminal cases, not only by accomplice witnesses but also at times by the police, no disciplinary rule requires prosecutors to avoid using techniques...
for interviewing and preparing witnesses that would tend to encourage false testimony, to investigate suspicions that prospective testimony is false, or to refrain from offering testimony that they reasonably believe to be false. The ABA Standards, which are meant to serve as nonenforceable guidelines, are no more demanding. For example, ABA Standard 3-5.6(a), which provides that “[a] prosecutor should not knowingly offer false evidence,” is, if anything, less demanding than the constitutional standard, under which a prosecutor must rectify a prosecution witness’s testimony if the prosecutor should have known the testimony was false. (E.g., United States v. Wallach, 925 F.2d 445 (2d Cir. 1991).)

Likewise, even when guilt and innocence are at issue, prosecutors are not currently required to take steps like those undertaken by Ceballos to reexamine the reliability of their evidence when it is called into question after the fact. Although exonerations based on DNA evidence have focused attention on the risk of erroneous convictions, the reinvestigation of questionable convictions is currently a matter of individual discretion, guided by a prosecutor’s personal understanding of and commitment to seeking justice, but unguided by ABA rules and standards. By way of contrast, the New York State Bar Association has recently endorsed provisions that would require a prosecutor to make disclosure and undertake further inquiry upon learning “of new and material evidence creating a reasonable likelihood that a convicted defendant did not commit the offense for which the defendant was convicted,” and that would require “a prosecutor [who] comes to know of clear and convincing evidence establishing that a conviction was wrongful” to “take appropriate steps to remedy the wrongful conviction.”

The ABA, which takes pride in its leadership on issues of lawyer ethics generally, has not reexamined and updated Rule 3.8 of the ABA Model Rules of Professional Conduct, which establishes the “Special Responsibilities of a Prosecutor,” in light of the problem of false convictions and many other concerns raised over the past quarter century. The last significant addition to the rule was in 1990, when the ABA added a provision, current Rule 3.8(e), restricting the issuance of subpoenas to lawyers—a restriction that few states have adopted and that has, at best, remote relevance to ensuring the reliability of criminal convictions. As I have discussed elsewhere, when the ABA comprehensively reviewed the Model Rules in the process leading to its 2002 amendments, it pointedly refrained from considering substantive changes to the rule on prosecutors’ ethics. (See Bruce A. Green, Prosecutorial Ethics as Usual, 2003 ILLINOIS L. REV. 1573 (2003).)

Since then, the ABA has directed considerable efforts at what it regards as overzealousness in the prosecution of corporations, but not at prosecutorial acts and omissions that may wrongly deprive innocent individuals of their freedom or even lives.

The Garcetti decision also serves as a reminder that even the existing disciplinary and legal obligations of prosecutors are widely acknowledged to be underenforced. Prosecutors are generally immune from civil liability (based on policy considerations similar to those underlying Justice Kennedy’s decision) and are rarely disciplined for professional misconduct. Regrettably, the Garcetti decision might be read by some to mean that not only are prosecutors barely accountable for doing wrong, but they can be punished for doing right.

**Securing prosecutors’ professional independence**

But perhaps the most interesting questions suggested by the Garcetti case are whether and how to foster professional independence on the part of assistant prosecutors. For lawyers generally, professional independence is valued as an ideal but is not well defined. That is no less true for assistant prosecutors. Like other lawyers, prosecutors must comply with legal and disciplinary obligations and cannot excuse their failure to do so (except perhaps in close cases) by saying that they were following directions. But that is not to say much. Every day, prosecutors make discretionary decisions that are not dictated by the law but, at most, are guided by the concept of seeking justice. The everyday decisions of prosecutors—such as whether to investigate and by what means, whether to authorize arrests, whether to seek to detain arrested individuals before trial, what charges to bring and whether to grant leniency, what witnesses to call, what arguments to make, what objections to raise, what sentences to seek—may have life-altering, even life-shattering, significance to people who are investigated or charged.

Ultimately, decision-making authority is vested in an elected district attorney or other chief prosecutor. But especially in a large office, this authority must be delegated to and exercised by assistant prosecutors. Offices may establish policies within which prosecutors make decisions and establish lines of reporting and supervision, but, in the end, a large amount of discretion is necessarily entrusted to prosecutors at all levels. Supervisors rely on the good judgment of lower-level prosecutors who are often in the better position to make judgments. For example, Ceballos was evidently entrusted with the initial question of whether to respond at all to the allegation of perjury in a warrant affidavit and, if so, how to respond. Afterwards, having personally investigated and spoken with the deputy sheriff, Ceballos was in a far better position than his supervisors to resolve questions about the truthfulness of the deputy sheriff’s affidavit. In other cases, decisions are made at higher levels.

It is important for junior prosecutors to learn to think...
and act for themselves in ways that are consistent with the professional injunction to “seek justice,” both because junior prosecutors invariably make many discretionary decisions without input or oversight from their supervisors and because today’s junior lawyers will be tomorrow’s senior ones, entrusted with even greater amounts of independent authority. Some have noted the importance of hiring prosecutors with good judgment or good character, but that is not enough. Making wise and fair decisions in the criminal context that are consistent with professional ideals requires more than simply the values that one learns in kindergarten. At the same time, it is not obvious how to train prosecutors to make good decisions and to take initiative. Presumably, it is not sufficient to tell junior prosecutors generally to seek justice, on one hand, or to tell them specifically what to do in given situations, on the other. They need to develop an understanding of what it means to seek justice—an understanding of the principles underlying specific rules, standards, and office policies—so that they can respond to situations not squarely addressed by existing instruction. And prosecutors need to be given incentives and rewards for putting that understanding into action. Junior prosecutors need opportunities both to see how others resolve questions of discretion and to receive constructive critique when they make decisions on their own.

All of this goes beyond what is now expected of prosecutors’ offices, however. A chief prosecutor has a narrow disciplinary obligation to ensure that junior lawyers comply with the disciplinary rules. (ABA Model Rules of Professional Conduct, Rule 5.1(a).) But few of the daily judgments made by prosecutors are dictated by the disciplinary rules. Although the ABA Standards recognize the importance of policy guidelines and training programs (Standards 3-2.5 and 3-2.6), they give minimal guidance on the content of the policies and on the substance of what prosecutors are being taught, not only in formal programs but by example. In undertaking to express rock-bottom expectations, existing rules and standards fail to encourage individual prosecutors to do more than is minimally required to prevent and correct wrongful and unfair convictions. Further, existing rules and standards fail to elaborate on how a prosecutor’s office should promote individual decision making and initiative, such as that of Ceballos, that exceeds minimal expectations. The result is that offices in which the institutional culture elevates winning cases over doing justice have little guidance or encouragement to do better.

One might ask how much should be left to be decided by individual prosecutors based on their understandings of what it means to seek justice. Consider a host of questions that might be addressed by individual prosecutors in the course of their work, and that might not be resolved by their offices through the adoption of institutional policy. To what extent do individual prosecutors have authority to be more generous in discovery than required by disciplinary rules and law, in order to serve justice as they understand it? To what extent may individual prosecutors decline to offer evidence that they disbelieve, even though it might advance their case, or decline to prosecute individuals about whose guilt they are unconvinced? To what extent may prosecutors investigate doubts about the reliability of their evidence or follow up on evidence suggesting that a conviction was wrongfully procured? To what extent, in general, should individual prosecutors proceed on a broad understanding of the duty to seek justice that, at times, weighs other public interests more heavily than the interest in winning or than the interest in convicting the guilty?

It is not self-evident whether questions such as these ought to be decided by junior prosecutors, by supervisors, or by the office as a matter of self-governance through the adoption of internal rules. No one would want junior prosecutors to act as automatons, blindly carrying out office policy and supervisors’ instructions and, in any case, it would be impossible entirely to strip prosecutors of discretion. But at the same time, it is often important to make decisions at a higher level, and thereby to restrict individual prosecutors’ freedom. There is a value to having important decisions in a prosecutor’s office made by supervisory lawyers who are more experienced, more familiar with office policy and its implementation over time, and, in many cases, more objective than the junior prosecutor on the line. Limiting the independence of individual prosecutors enables offices to rein in overzealous and inexperienced prosecutors and promote consistent approaches to recurring questions. Whereas Ceballos’s case might seem to exemplify the importance of allowing a well-intentioned prosecutor to have professional independence to promote fair processes and outcomes, other examples suggest the countervailing need to restrain overzealous prosecutors.

Consider, for example, People v. Pimpton, 2002 Cal. App. LEXIS 2296 (Apr. 8, 2002), a California case in
which a defendant convicted of petty theft faced 25 years’ to life imprisonment under the state’s “three strikes” law. Having evidently determined that such a sentence would be unduly harsh under new office policy, the bureau director instructed the trial prosecutor to move to dismiss the prior convictions. The trial prosecutor did so, but at the same time he personally opposed his own motion, telling the judge: “I will just say not as a representative of the People but just because I have a First Amendment right to say what I want to say that I disagree with this position, but I am not saying that as a representative of the People.” One might easily conclude that in this example, by intentionally subverting his office’s position and policy, the prosecutor exceeded the legitimate bounds of independence, and did so not to “seek justice” as the term is historically understood, but to pursue a private, and perhaps excessively vindictive, sense of justice. In any case, once the office made a considered decision regarding its sentencing position in a class of cases, it was important to have that policy implemented consistently by individual prosecutors so that similarly situated defendants are treated equally.

As this illustrates, although professional independence is an important value for prosecutors, it is important to explain what independence means and what are its limits. To what extent should offices authorize prosecutors to act independently, and when should prosecutors act independently where not specifically authorized to do so? Here is an area where the ABA might exercise its traditional role of bringing together practitioners, judges, and academics with varied perspectives to articulate expectations of professional conduct. With the healthy involvement of prosecutors and their representative organizations, the ABA should augment the rules and standards of prosecutorial conduct. The ABA should begin by broadly defining the duty to “seek justice.” In addition to identifying professional obligations and restrictions, it should identify areas where individual prosecutors should have discretion to seek justice, provide guidance about what it means to exercise that discretion soundly, and identify institutional conditions necessary to enable individual prosecutors to exercise sound discretion.

Of course, rules and standards only go so far. Like others, lawyers learn from example. The Garcia decision provides an unfortunate lesson to junior prosecutors. But there are many more stories of prosecutors and prosecutors’ offices whose work deserves to be spotlighted. It is easy to dwell on the negative, but important to reinforce the positive—such as the many cases in which prosecutors, with their offices’ encouragement, have initiated and spearheaded inquiries that resulted in the exoneration of individuals who were wrongly accused or convicted. Bar associations such as the ABA would contribute mightily to the education of prosecutors by identifying and honoring prosecutors whose conduct exemplifies high standards of professional independence in the pursuit of justice and prosecutorial offices that inculcate such high standards.

In the end, the most important implication of the Garcia decision, as far as prosecutorial ethics is concerned, may simply be that there is more work to be done. Which decisions should be entrusted to junior prosecutors exercising professional independence, which to supervisors, and which to office policy? How should prosecutors make the decisions entrusted to them; specifically, what does it mean to seek justice and how is that idea to be put into action? To what extent should professional preferences about prosecutorial conduct and discretion be codified in disciplinary rules or expressed in unenforceable standards and to what extent should they be left to individual prosecutors and their offices to resolve in light of broad principles? How should prosecutors’ offices, both large and small, train prosecutors to make good decisions? Given prosecutors’ extraordinary power over people’s lives, it is hard to think of a more important set of questions for the profession to tackle.