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### The Prudent Prosecutor

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# The Prudent Prosecutor

LESLIE C. GRIFFIN\*

Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the *prudent prosecutor* will resolve doubtful questions in favor of disclosure.<sup>1</sup>

“The *prudent prosecutor* will resolve doubtful questions in favor of disclosure.”<sup>2</sup> I adopt the prudent prosecutor from *United States v. Agurs*, a Supreme Court case about the prosecutor’s disclosure obligations. The case is short, but it encapsulates many of the features that complicate the standards of prosecutorial ethics. James Sewell was stabbed to death by Linda Agurs in a motel room. He was killed with one of the two knives he was carrying. He had deep stab wounds; she had “no cuts or bruises of any kind, except needle marks on her upper arm.”<sup>3</sup> Her defense was that when he attacked her she killed him in self-defense. She was convicted of second degree murder.

Three months later, Agurs’ lawyer filed a motion for a new trial. The motion was based on his discovery that Sewell had a prior criminal record (one guilty plea to assault and carrying a deadly weapon, and another to carrying a deadly weapon). “Apparently both weapons were knives.”<sup>4</sup> The prosecutor knew about the record before trial and did not disclose it. Defense counsel had not requested the evidence.

The Supreme Court ruled that Agurs was not entitled to a new trial. The Court accepted the trial judge’s determination that Sewell’s prior record was cumulative of the evidence presented at trial and did not contradict any evidence presented by the prosecutor. The wound evidence, moreover, contradicted the claim of self-defense. Agurs was not deprived of her right to a fair trial. Accordingly, “there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor’s constitutional duty to disclose.”<sup>5</sup>

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1. *United States v. Agurs*, 427 U.S. 97, 108 (1976) (emphasis added).

2. *Id.* at 108 (emphasis added).

3. *Id.* at 100.

4. *Id.* at 101.

5. *Id.* at 108.

In its ruling, the Court distinguished Agurs' motion from appeals based on newly discovered evidence. In new evidence cases, the appellant faces the "severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal."<sup>6</sup> In making this distinction, the Court referred to the prosecutor's special responsibility to justice. "If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the *prosecutor's obligation to serve the cause of justice.*"<sup>7</sup>

For disclosure cases, the Court asserted that under *Brady v. Maryland*,<sup>8</sup> prosecutors must disclose "obviously exculpatory" evidence even absent a request from the defendant. The Court, however, rejected the Court of Appeals' holding that "the prosecutor has a constitutional obligation to disclose *any* information that might affect the jury's verdict,"<sup>9</sup> and opted for a reasonable doubt standard. "If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial."<sup>10</sup> Sewell's convictions were not "obviously exculpatory," nor did they establish reasonable doubt. Agurs' right to a fair trial was not denied. "[T]he prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."<sup>11</sup>

In its ruling, the Court also noted that its review of disclosure focuses on the evidence, not the prosecutor. "Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If the suppression of evidence results in constitutional error, it is because of the *character of the evidence, not the character of the prosecutor.*"<sup>12</sup> At the same time, it recognized the difficulty of characterization of the evidence in these cases:

Nevertheless, there is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge. Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the *prudent prosecutor* will resolve doubtful questions in favor of disclosure. But to reiterate a critical point, the prosecutor will not have

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6. *Id.* at 111.

7. *Id.* at 111 (emphasis added).

8. *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that the prosecutor's suppression of exculpatory evidence violates due process).

9. *Agurs*, 427 U.S. at 108 (emphasis added).

10. *Id.* at 112-13.

11. *Id.* at 108.

12. *Id.* at 110 (emphasis added).

violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.<sup>13</sup>

The dissent also invoked the "prosecutor's obligation to serve the cause of justice" — in order to criticize the high reasonable doubt standard set by the majority. "The burden thus imposed on the defendant is at least as 'severe' as, if not more 'severe' than, the burden he generally faces on a [newly discovered evidence case.] . . . The 'prosecutor's obligation to serve the cause of justice' is reduced to a status, to borrow the Court's words, of no special significance."<sup>14</sup>

*Agurs* illustrates many features of prosecutorial ethics. Both majority and dissent invoke the high *professional ideal* of the "prosecutor's obligation to serve the cause of justice," but disagree about its meaning. The Court identifies a *mandatory rule* for prosecutors under *Brady*: the requirement to turn over "obviously exculpatory" evidence, with or without a request from the defense attorney. The Court also acknowledges, however, that it is difficult to characterize evidence. The *pre-trial* perspective of the prosecutor may not match that of the trial or appellate judge. The Court is indifferent to the *moral culpability* of the prosecutor as long as the defendant receives a *fair trial*. There is a tension between the *professional* and *constitutional* standards. It is not clear that the constitutional standard sets a high professional standard or a clear disciplinary rule. Prosecutorial misconduct may remain undiscovered if defendants face a high threshold for challenging the fairness of the trial. Finally, as a last resort, the Court recommends prudence, which appears to set a standard higher than that required by the Constitution.

By "prudent," the Supreme Court presumably meant cautious or careful, perhaps pragmatic. Prudence also means the habit of good judgment. Prosecutors need good judgment (not just caution or pragmatism) because a large part of their job is discretionary. Indeed, in recent years, the discretionary part of prosecution has expanded. The concepts of good judgment and discretion, however, remain ambiguous. Accordingly, in this Article I focus on the discretionary component of prosecutorial practice and ethics. Part I identifies the centrality of discretion to prosecution. Despite differences of opinion about the merits of discretion, prosecutorial discretion has expanded in recent years. After explaining why discretion is needed in criminal prosecution in Part I(A), I identify in Part I(B) when it applies: in investigation, charging, plea bargaining, and sentencing. I report in Part I(C) that prosecutorial discretion may be unfettered. Appropriate judicial, legislative, or administrative review may not occur, leaving prosecutorial discretion unreviewed and unreviewable.

Because of the range of prosecutorial discretion and its unreviewable quality as described in Part I, numerous proposals for the reform of prosecutorial

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13. *Id.* at 108 (emphasis added).

14. *Id.* at 115-16.

discretion have been advanced. Part II examines these reforms, which include calls for new, more specific standards; better enforcement of those standards through supervision, oversight, and training; and improved judgment by individual prosecutors. These latter suggestions include recommendations for better *moral* as well as *legal* judgment by prosecutors.

The proposals and the uncertainty about discretion raise the question: Does one need good *moral* judgment in order to be a good prosecutor? In Part III, I explore what insights legal ethics offers on that question. Parts III(A) and III(B) distinguish substantive moral and substantive legal judgment. I argue that — like all human persons — individual prosecutors must make their own judgments about the morality of their jobs and the obligations they impose. In these circumstances, prosecutors appropriately rely on substantive theories of morality as they decide whether to be prosecutors or whether to enforce laws and policies that they conclude are unjust.

Such substantive moral judgment, however, is not the core of prosecutorial discretion. In Part III(C), I argue that prosecutorial discretion requires public moral judgment, a judgment rooted in prosecutorial practice and experience. Prosecutorial discretion is not the same as moral discretion; prosecutors should not become moral entrepreneurs who make discretionary decisions according to their own substantive theories of justice. Their legal role does not permit unfettered moral discretion.

Prosecutorial discretion requires attention to office policies and procedures. Prosecutorial offices should develop specific policies of discretion and mandate training, consultation, supervision and review of discretionary choices. “While strict rules designed to meet every conceivable situation would be impossible, detailed outlines, explicit hypotheticals, and mechanisms for accountability are feasible and needed.”<sup>15</sup> Policies alone cannot promote good judgment, however. That is developed through training by more experienced prosecutors and through consultation with peers and supervisors. Accordingly, in all matters, prosecutors should test their judgment by consulting fellow prosecutors. In addition, “[i]n any non-routine or high-profile matter . . . the investigating prosecutor should seek supervisory review and approval of his or her proportionate evaluation before proceeding.”<sup>16</sup>

“Meaningful control of discretion is impossible without at least some form of internal administrative review.”<sup>17</sup> Therefore, each prosecutorial office needs regular review of discretionary decisions. Courts may, with good reason, remain reluctant to police prosecutorial misconduct and discretion; disciplinary agencies

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15. Comment, *Justice Department's Prosecution Guidelines of Little Value to State and Local Prosecutors*, 72 J. CRIM. L. & CRIMINOLOGY 955, 961 (1981).

16. Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 752-53 (1999).

17. Comment, *supra* note 15, at 965.

can fill in some of the gaps. Consultation, supervision, and reporting requirements should be recorded. Failure to consult with peers or supervisors, or to seek review of discretionary decisions provides an identifiable basis for disciplinary sanction, one more enforceable than the post-trial standards of review employed in *Agurs*.

## I. PROSECUTORIAL DISCRETION

Ethical codes and case law provide some mandatory norms for prosecutors. The exercise of discretion is also an important component of the prosecutor's job. Discretion is employed, for example, in the investigation of cases, in charging decisions, in plea bargaining, and in sentencing. Many commentators have concluded that the role of discretion in prosecution has expanded in recent years, as have the prosecutor's powers in the criminal justice system.<sup>18</sup> Long before this expansion, however, the subject of discretion attracted extensive critical commentary and constructive suggestions for improvement.

### A. WHY DISCRETION IS NEEDED

Numerous arguments support a prominent role for prosecutorial discretion in our system of justice. First, as Professor LaFave argued in 1970, our system has "legislative overcriminalization,"<sup>19</sup> there are so many criminal statutes that prosecutors should not enforce them all. This point is arguably more correct in 2001 than it was in 1970.<sup>20</sup> Given the abundance of federal and state criminal statutes, "prosecutors must exercise *judgment* about which of the many cases that are technically covered by the criminal law are really worthy of criminal punishment."<sup>21</sup> Moreover, because there are so many statutes, some analysts have argued that prosecutors are more suited than the legislature to adapt the criminal law to new circumstances and to identify when the prosecution of

18. See, e.g., Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992) (describing escalation of prosecutor's investigating, charging, convicting, and sentencing powers).

19. Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. LAW 532, 533-35 (1970).

20. See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 718-19 (1997).

21. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2136-37 (1998) (emphasis added); see also *id.* at 2138-39 (explaining that prosecutorial discretion may be more effective than attempts to reform the penal code); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMPORARY PROBLEMS 23, 36-37 (Summer 1997) ("While the expansion of civil or regulatory alternatives to traditional criminal law has reduced the primacy of criminal justice as a vehicle for imposing punitive remedies for the most serious misconduct, the same period has seen a marked expansion of the criminal law itself . . . Prosecutors and courts, moreover, have utilized the broad discretion created by the criminalization of regulatory misconduct or by the vague terms of some criminal statutes, to change the terms in which certain forms of misbehavior are seen, and the consequences that attach to violations."); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31 (1978) ("[Criminal law] cannot be applied mechanically but demand[s] the use of *judgment*." (emphasis added)).

certain statutes would be anachronistic. "The need for discretion . . . also arises because public attitudes change over time, and it is not always possible immediately to adapt the statutory law to these changes. The exercise of discretion may also function as an informal means of testing public reaction to a change in enforcement practice that may lead to legislative revision in the area."<sup>22</sup>

Second, even if it were a good idea to prosecute all violations of all criminal statutes, prosecutors cannot do so because of "limitations in available enforcement resources."<sup>23</sup> Prosecutors do not have the ability to punish all crimes. Their budgets constrain their capacity to try cases and force administrators to develop policies that allow prosecution of some crimes but not others. Police resources, court schedules, and prison capacity may impose similar constraints.

Third, discretion is necessary because even the most detailed criminal statutes and office guidelines cannot codify every aspect of a prosecution. Individual discretion is required to determine how to apply laws and policies to the facts of the case. "The need for discretion arises in part because of the difficulty of encompassing within necessarily general rules the myriad circumstances that may be deemed relevant to a pending decision."<sup>24</sup> For example, office policies can provide guidance about what crimes the office will prosecute, but cannot tell prosecutors how to weigh the credibility of witnesses and how to assess other facts of specific cases.<sup>25</sup> These factual determinations will decide who will be prosecuted and what prosecutions will be declined.

Finally, there is an additional "need [for prosecutors] to individualize justice."<sup>26</sup> Some prosecutions might cause undue harm to the offender. The harm to the victim may be corrected without prosecution, or victims may ask that

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22. Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 3 (1971); see also Lynch, *Administrative System*, *supra* note 21, at 2138 (explaining that we should keep criminal laws on the books for their symbolic value while recognizing that we should not have full enforcement of those laws).

23. See LaFave, *supra* note 19, at 533-35; see also James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1542-43 (1981) ("Funding levels determine how many cases can be brought and inevitably force prosecutors' offices to give little or no attention to many chargeable crimes. Limited funding may also preclude some complex, costly investigations and prosecutions. Finally, the resources and interests of other agencies — police, courts, and correctional institutions — may limit the prosecutor's freedom of action, notwithstanding his substantial control of the docket.").

24. Abrams, *supra* note 22, at 3.

25. Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 519 (1993); see also *id.* at 519 n.12 (1993) ("Most likely, guidelines could not be sufficiently explicit to regulate prosecutorial discretion in fact-specific cases . . . For instance, guidelines might establish the following policies: what possession charge to bring when a weapon is discovered in a home or place of business; what larceny charge to bring when the value of stolen property does not exceed a certain amount; when to upgrade an unlawful trespass into a burglary charge; when to charge an automobile theft as a felony rather than a misdemeanor. On the other hand, guidelines could not articulate how a prosecutor should weigh degrees of credibility or degrees of certainty, considerations which are often at the core of the prosecutor's charging decision.").

26. LaFave, *supra* note 19, at 534.

offenders not be prosecuted.<sup>27</sup> There are times when a rigid application of the rules may not do justice and when “flexibility” and “sensitivity” are necessary to a just outcome.<sup>28</sup> This tension between rigorous enforcement of the general criminal laws and flexible adjustment to individual circumstances is a constant in discussions about the merits of prosecutorial discretion.<sup>29</sup> Legislators and prosecutors are always striving to strike the proper balance. The following quotation summarizes the central aspects of that ongoing debate between rigor and flexibility:

During the late 1960s and 1970s, academics and criminal justice experts examined prosecutorial discretion and, in particular, focused attention on the development of prosecutorial standards related to charging decisions. The broad debate that ensued explored the tension between the countervailing policy goals inherent in prosecutorial discretion: the goal of ensuring that prosecutors charge in a uniform, consistent, and non-arbitrary manner must be balanced against the need for sufficient latitude, flexibility, and sensitivity in adjusting charging decisions to individual circumstances. Whether the tension between these competing policy goals of flexibility and consistency can ever be conclusively resolved remains in doubt.

Twenty years after the onset of the debate, prosecutorial discretion has expanded rather than contracted. Today in the United States, commentators typically view prosecutors — both on the federal and local level — as possessing broad discretionary powers regarding investigatory and charging decisions.<sup>30</sup>

Battles over discretion continue unabated. On March 7, 2000, for example, California voters approved Proposition 21, the Juvenile Crime Initiative Statute. Under prior law, the decision to try minors in adult criminal court was made after

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27. See *id.* at 534-35.

28. See Abrams, *supra* note 22, at 2 (“The major advantage of such discretion is that it provides early in the decision-making process a flexibility and sensitivity not available in a system where prosecutorial decisions must be made according to predetermined rules. It permits a prosecutor in dealing with individual cases to consider special facts and circumstances not taken into account by the applicable rules.”); see also GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* 50 (1993) (“Although invidious discrimination is socially undesirable and legally indefensible, the presence of humanizing discretion prevents the legal system from becoming artificial, insensitive, and mechanistic.”).

29. See Abrams, *supra* note 22, at 3 (“There is a competing tension between the need in prosecutorial decision-making for certainty, consistency, and an absence of arbitrariness on the one hand, and the need for flexibility, sensitivity, and adaptability on the other.”); see also Kalyani Robbins, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 *STAN. L. REV.* 205, 216 (1999) (A no-drop policy in domestic violence cases “limits the prosecutor’s discretion to drop a case unless he or she can demonstrate a clear lack of evidence . . . [An] effective no-drop policy does, however, leave some room for prosecutorial discretion with regard to decisions affecting victims’ safety.” *Id.* Prosecutors may decide not to allow victims to testify or may drop prosecutions if necessary to protect the victim’s life and safety.).

30. Theodora Galacatos, *The United States Department of Justice Environmental Crimes Section: A Case Study of Inter- and Intra-branch Conflict Over Congressional Oversight and the Exercise of Prosecutorial Discretion*, 64 *FORDHAM L. REV.* 587, 641-42 (1995) (footnotes omitted).



a juvenile court hearing.<sup>31</sup> Proposition 21 gives adult criminal courts automatic jurisdiction over minors charged with murder or one of certain enumerated sex offenses. The decision to charge will determine the court's jurisdiction.<sup>32</sup> Judicial organizations characterized the legislation as a "power grab" by district attorneys that would enhance prosecutorial discretion at the expense of judicial discretion. The legislation also, however, adds to the list of serious felonies for which plea bargaining is prohibited — an apparent restriction on prosecutorial discretion.<sup>33</sup> Even those who agree that discretion is a valuable part of our criminal justice system may disagree about who is best qualified to exercise it.

## B. WHEN DISCRETION APPLIES

Prosecutorial discretionary power is quite broad and often unregulated. One annual survey of criminal law reiterates this theme of the breadth and scope of prosecutorial discretion each year:

Courts recognize a prosecutor's broad discretion to initiate and conduct criminal prosecutions, in part out of regard for the separation of powers doctrine and in part because "the decision to prosecute is particularly ill-suited to judicial review." In the absence of contrary evidence, courts presume that criminal prosecutions are undertaken in good faith and in a nondiscriminatory manner. So long as a prosecutor has probable cause to believe that the accused has committed an offense, the decision to prosecute rests within her discretion. A prosecutor has broad authority to decide whether to investigate, grant immunity, or permit a plea bargain, and to determine whether to bring charges, what charges to bring, when to bring charges, and where to bring charges.<sup>34</sup>

### 1. INVESTIGATION

Professor Little has recently examined the neglect of investigation in the prosecutorial ethical standards. He argues that "much of the modern-day prosecutor's time is spent making investigative decisions,"<sup>35</sup> including investiga-

31. CAL. WELF. & INST. CODE § 707 (West 1999).

32. See *id.* at § 602(b) (giving automatic adult criminal court jurisdiction for prosecution of minors 14 years or older for specified offenses.); see also SUE BURRELL, YOUTH LAW CENTER, ANALYSIS OF KEY PROVISIONS OF THE "GANG VIOLENCE AND JUVENILE CRIME PREVENTION ACT OF 1998" 14 (1998) (on file with Author). ("[C]ompletely eliminate the safeguard of a judicial determination as to whether the minor can be rehabilitated in the juvenile system. While most juveniles subjected to judicial fitness hearings in the past have been sent to adult court, the previous system enabled courts to hold back a small group of juveniles where there were mitigating circumstances to justify such a decision.")

33. See CAL. PENAL CODE § 1192.7 (West 2001) ("Plea bargaining in any case in which the indictment or information charges any serious felony . . . is prohibited").

34. Michelle A. Gail, *Prosecutorial Discretion*, 85 GEO. L. J. 983, 983-85 (1997) (citations omitted); Lara Beth Sheer, *Prosecutorial Discretion*, 86 GEO. L.J. 1353, 1353-55 (1998) (same); Richard Bloom, *Prosecutorial Discretion*, 87 GEO. L. J. 1267, 1267-68 (1999) (same).

35. Little, *supra* note 16, at 728.

tory decisions about business fraud, public corruption, and organized crime. Under the “investigative role” of the prosecutor, Little includes the prosecutor’s directions to law enforcement agents as well as prosecutorial advice to agents who seek guidance about these investigations.<sup>36</sup> He provides the following catalogue of activities included in the prosecutor’s investigative role:

Prosecutors have grand jury subpoenas for testimony and for documents or other physical items at their disposal. They may seek search warrants and various forms of electronic surveillance orders. They may authorize and oversee secretive undercover investigations. They may order physical surveillance of targets or witnesses. They may send agents to interview witnesses overtly, at the witness’s home or business. They may direct persons to provide fingerprints, voice exemplars, or other non-testimonial items of physical evidence. Finally, they may plea bargain with criminal actors, offering leniency or even immunity, in return for undercover assistance against other criminal targets and testimony later if requested.<sup>37</sup>

Although all criminal prosecution does not involve the prosecutor in investigation, “the importance of the investigative role lies not in the number of cases it affects, but in the significance of the role in the matters where it arises.”<sup>38</sup>

Accordingly, Little has proposed a new model rule of investigative discretion that emphasizes the proportionality of prosecutorial *judgment*.<sup>39</sup> Such a standard is necessary because investigative tactics that may be legal are not always proportionate. For example, criticisms of Independent Counsel Kenneth Starr’s tactics — namely the subpoenas of bookstore records, the decision to subpoena Monica Lewinsky’s mother to appear before the grand jury, and the surprise interview of Lewinsky without her lawyer—raise questions of discretion, not legality. Such tactics are employed by other prosecutors and are permitted by law. Good prosecutors need more than legal tactics; they require good discretion through proportionate judgment.

“Almost anything can spark the interest of an alert prosecutor.”<sup>40</sup> “When the case is one of those numerically few but substantively important prosecutions,

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36. *Id.* at 729-30; see also H. RICHARD UVILLER, *THE TILTED PLAYING FIELD: IS CRIMINAL JUSTICE UNFAIR?* 36, 36-37 (1999) (“These are the prosecutions for complex conspiracies, major frauds and other financial crimes, political corruption, drug smuggling, or racketeering. Often invisible, frequently without an individual victim to complain, these major cases would go unnoticed by the criminal justice system without the interest, energy, and perseverance of the prosecutorial agencies. Protracted investigation, multiple choice points, and options of all sorts are the hallmarks of these prosecutions. The special prerogatives of the public prosecutor are most vivid in the development of these special cases.”).

37. Little, *supra* note 16, at 737.

38. *Id.* at 728-29; see also Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 *FORDHAM URB. L.J.* 553, 561 (1999) (identifying broad discretion that prosecutors have to investigate in “that gap called investigative discretion”).

39. Little, *supra* note 16, at 723.

40. UVILLER, *supra* note 36, at 37.

state or federal, that are begun from scratch by the prosecutor, the elements of choice multiply and the prosecutor's authority to initiate prosecution becomes a major factor in shaping the case to come."<sup>41</sup> Prosecutors possess broad investigative discretion.

## 2. CHARGING

Prosecutors also have vast discretion to charge. The American Bar Association ("ABA") *Model Rules* and the *ABA Standards for Criminal Justice* acknowledge one restriction on the charging decision, namely that the prosecutor's decision must be supported by probable cause.<sup>42</sup> That standard, however, may not be very restrictive in practice, and may provide a low threshold for charging. If probable cause is the only restriction on prosecutorial charging discretion, then it is a very broad power indeed.<sup>43</sup>

The profession's response to this broad power has been to identify standards that the prosecutor should follow in charging. The *ABA Standards for Criminal Justice* exemplify these numerous attempts to mold discretion by identifying factors that may be considered by prosecutors when they exercise "Discretion in the Charging Decision:"

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of

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41. *Id.* at 36.

42. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(a) (1983) ("The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.") [hereinafter MODEL RULES]; ABA STANDARDS FOR CRIMINAL JUSTICE 3-3.9(a) (1993):

A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. 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.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A) (1980) ("[A] public prosecutor . . . shall not institute criminal charges when he knows or it is obvious that the charges are not supported by probable cause.") [hereinafter MODEL CODE].

43. See Kenneth J. Meljilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669, 680 (1992) ("An ethical prerequisite of probable cause is essentially meaningless."); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 864 (1995) ("It is clearly unethical for a prosecutor to charge an accused with offenses for which the prosecutor knows there is no factual basis. The ABA's *Model Rules* Rule 3.8(a) provides that 'the prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.' However, the ethics 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 probably will not be able to prove beyond a reasonable doubt at trial.") (footnotes omitted); MONROE H. FREDMAN, *UNDERSTANDING LAWYERS' ETHICS* 222 (1990) (contrasting the probable cause standard with the stricter prima facie case standard of the National District Attorney Association and criticizing the probable cause standard).

the factors which the prosecutor may properly consider in *exercising his or her discretion* are:

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;
- (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
- (iv) possible improper motives of a complainant;
- (v) reluctance of the victim to testify;
- (vi) cooperation of the accused in the apprehension or conviction of others; and
- (vii) availability and likelihood of prosecution by another jurisdiction.<sup>44</sup>

These factors point to the ambiguity of standards for discretion. As the text of the ABA standards states: "By its very nature, however, the exercise of discretion cannot be reduced to a formula. Nevertheless, guidelines for the exercise of discretion should be established."<sup>45</sup>

Professor Gershman highlights this ambiguity in an article that provides specific guidance for charging: "This is not to say that the prosecutor's discretion is unbounded . . . . Still no subject in criminal law is as *elusive* as that of prosecutorial discretion in the charging process."<sup>46</sup> His essay illuminates the role of discretion in the charging process by distinguishing general offenses from specific cases. Although guidelines assist prosecutors with some decisions, specifically about which offenses to charge, "[m]ost likely, guidelines could not

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44. ABA STANDARDS FOR CRIMINAL JUSTICE 3-3.9 (*emphasis added*); see also Rachel Ratliff, *Third-Party Money Laundering: Problems of Proof and Prosecutorial Discretion*, 7 STAN. L. & POL'Y REV. 173, 180-81 (1996) (quoting 8 U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S PROSECUTION MANUAL 504-06 (1993)) ("The decision to prosecute (as well as the outcome of the prosecution) is extremely fact-dependent. Generally, a prosecutor should charge a crime unless '[n]o substantial federal interest would be served by prosecution.' Considerations of substantial federal interest include the following:

- 1) Federal law enforcement priorities;
- 2) The nature and seriousness of the offense;
- 3) The deterrent effect of prosecution;
- 4) The person's culpability in connection with the offense;
- 5) The person's history with respect to criminal activity;
- 6) The person's willingness to cooperate in the investigation or prosecution of others; and
- 7) The probable sentence or other consequences if person is convicted.") (footnotes omitted);

Galacatos, *supra* note 30, at 643 ("For example, the USAM provides government attorneys with some guidelines concerning charging decisions; however, where the USAM provides such guidelines, it nonetheless allows for broad prosecutorial discretion. The DOJ's Principles of Federal Prosecution also provide broad guidelines that prosecutors should follow when making charging decisions. According to the PFP, each United States Attorney and responsible Assistant Attorney General should establish internal office procedures regarding prosecutorial decision making. The Principles also address the criteria prosecutors should consider when initiating or declining prosecution, and expressly prohibit government attorneys from considering political factors in making such determination."); *but see* Comment, *supra* note 15.

45. ABA STANDARDS FOR CRIMINAL JUSTICE 3-3.9.

46. Gershman, *supra* note 25, at 513 (*emphasis added*).

be sufficiently explicit to regulate prosecutorial discretion in fact-specific cases.”<sup>47</sup> A footnote explains the difference:

For instance, guidelines might establish the following policies: what possession charge to bring when a weapon is discovered in a home or place of business; what larceny charge to bring when the value of stolen property does not exceed a certain amount; when to upgrade an unlawful trespass into a burglary charge; when to charge an automobile theft as a felony rather than a misdemeanor. On the other hand, guidelines could not articulate how a prosecutor should weigh degrees of credibility or degrees of certainty, considerations which are often at the core of the prosecutor’s charging decision.<sup>48</sup>

As Professor Levenson has explained, charging discretion is not formulaic, but instead requires prosecutors to *fill in the gaps* with their own *judgment*:

If deciding how to charge a case were as simple as reading a statute and deciding whether its elements might apply to the defendant’s behavior, then new prosecutors who have demonstrated their academic acuity should be equipped to handle the task. Experienced prosecutors know, however, that the charging decision is much more complicated. The difficulty comes in evaluating those factors that are not defined by statute, including the severity of the crime, the defendant’s role in the crime, the defendant’s past and possible future cooperation, injury to the victim, complexity in trying the case and the likelihood of success. Prosecutors must be able to *fill in these gaps* in order to perform their charging functions.<sup>49</sup>

### 3. PLEA BARGAINING

“The charging decision is the basic source of prosecutorial authority, but the power to charge is enhanced by the prosecutor’s role in plea bargaining and by recent trends in sentencing.”<sup>50</sup> Because the normal resolution of criminal cases now occurs through plea bargains, not through criminal trials, the prosecutor’s discretion in plea bargaining is an essential component of the criminal system.<sup>51</sup>

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47. *Id.* at 519. *See also* Melilli, *supra* note 43, at 674-75 (Some aspects of prosecution (especially the kind of offense charged) lend themselves to categories while case-specific factors do not. In the first category may be offenses such as adultery that it would be anachronistic to prosecute. A policy could state that the office would not prosecute adultery. In the latter are quantity and quality of evidence, factors that must be assessed by individual prosecutors case-by-case); David A. Sklansky, *Starr, Singleton, and the Prosecutor’s Role*, 26 *FORDHAM URB. L.J.* 509, 532 (1999) (“The point I now wish to stress is that even when prosecutors operate without formal guidelines, their charging decisions almost always involve, in part, the application of general principles to particular situations.”).

48. Gershman, *supra* note 25, at 519 n. 12.

49. Levenson, *supra* note 38, at 559 (emphasis added).

50. Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 *J. CRIM. L. & CRIMINOLOGY* 717, 750 (1996).

51. *See* Lynch, *Administrative System*, *supra* note 21, at 2120 (“[F]or most defendants the primary adjudication they receive is, in fact, an administrative decision by a state functionary, the prosecutor, who acts essentially in an inquisitorial mode.”).

Charging, plea bargaining, and sentencing are interrelated; discretion in each area reinforces discretion in the others.

Once again, in plea bargaining the ethical standard is not very restrictive.<sup>52</sup> Officially, “[t]he prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial or than are necessary to fairly reflect the gravity of the offense.”<sup>53</sup> Broad charging discretion and the low threshold for charging, however, give prosecutors extensive control over defendants’ pleas. The probable cause charging standards:

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 probably will not be able to prove beyond a reasonable doubt at trial. ABA ethical standards specifically geared to the prosecutor’s function discourage this type of overcharging, but they do not prohibit it. Similarly, a prosecutor who possesses enough admissible evidence to pursue successfully a prosecution on a certain serious offense against an accused but who nevertheless is willing to accept a guilty plea to a less serious offense is not proscribed by the ethical rules from charging the accused with the more serious offense to induce the defendant to plead guilty to the lesser offense.<sup>54</sup>

Plea bargaining based on a low charging threshold may benefit the prosecutor, as it encourages defendants to plead guilty.<sup>55</sup> Professor Freedman has described how the prosecutor’s charging powers affect defendants. Once prosecutors

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52. Professor Meares has argued that “[t]here are few rules of professional responsibility to guide the prosecutor’s decision making in the plea bargaining arena.” Meares, *supra* note 43, at 864; *see also* ABRAHAM S. GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA* 38 (1981) (“The only limit imposed by the Court [in *Bordenkircher v. Hayes*] on the use of a threat to charge a more serious offense is that the prosecutor must not ‘bluff.’ He must have probable cause to believe the defendant committed the offenses that are the subject of his ‘threat.’”); *id.* at 43 (“In *North Carolina v. Alford*, where a defendant asserted his innocence while pleading guilty, the court said the trial judge must find ‘a strong factual basis’ for the offense to which he pleads. And in *Bordenkircher v. Hayes*, the court tied the prosecutor’s charging discretion to the existence of ‘probable cause to believe that the accused committed an offense defined by statute,’ which would seem to preclude both ‘bluff’ by prosecutor and hypothetical crimes.”) (citation omitted).

53. ABA STANDARDS FOR CRIMINAL JUSTICE 3-3.9 (f). For examination of the limitations on plea bargaining, *see* BENNETT L. GERSHMAN, *PROSECUTORIAL MISCONDUCT* § 7.1, at 7-3-7-4 (2d ed. 1999) [hereinafter GERSHMAN, *MISCONDUCT*] (“A prosecutor is not allowed to use deception or intimidation against a defendant that renders the plea involuntary. Nor may a prosecutor undermine a defendant’s right to counsel by bargaining privately with him. Courts closely monitor the extent to which a prosecutor can force a defendant to waive constitutional rights. A prosecutor’s failure to disclose exculpatory evidence in order to induce a plea may be grounds for vacating the plea. A prosecutor’s disparate treatment of similarly situated defendants also may be grounds for vacating the plea. After a plea has been struck, the prosecutor must perform his side of the bargain. He may not recommend a more severe sentence than agreed to, fail to recommend the agreed-upon sentence, fail to dismiss other charges as agreed to, or fail to adhere to other promises.”).

54. Meares, *supra* note 43, at 864-65 (footnotes omitted).

55. *Id.* at 865 (“Vast prosecutorial discretion at the charging stage allows the prosecutor to control the plea context because it enables her to trade on the continuum between the quantity and quality of evidence necessary to support a legitimate charge and the quantity and quality of evidence needed to prove that the defendant

decide to charge, even innocent defendants may feel compelled to plead guilty out of fear that a jury might convict them. "Although the defendant is innocent, that presents no problem with the bargained plea. The law, in its even-handed majesty, permits the innocent as well as the guilty to plead guilty in order to avoid the coercive threat of extended imprisonment."<sup>56</sup>

Plea bargaining discretion also undermines uniformity of pleas. Professor Zacharias has described the limitations of a discretionary standard in plea bargaining.<sup>57</sup> He demonstrates that theories of plea bargaining (which vary from office to office) influence the outcome of the case. Zacharias recommends that prosecutors' offices establish more clarity and uniformity in these theories of plea bargaining in order to avoid unbridled discretion.<sup>58</sup>

#### 4. SENTENCING

Charging decisions influence sentencing as well as plea bargaining. "While the formal act of sentencing rests with the court, a prosecutor's charging decisions very much will dictate what the judge's options are at the time of sentencing."<sup>59</sup>

*Judicial* discretion was the focus of the sentencing reform promulgated by the *Sentencing Guidelines (Guidelines)*. Proponents of the *Guidelines* argued that judicial discretion over sentencing had led to inconsistent and sometimes arbitrary sentencing. The confinement of judicial discretion under the *Guidelines* has also enhanced the discretion of the prosecutor.<sup>60</sup>

What has changed is the relative power of the prosecutor. To use Holmes' dragon metaphor, in jurisdictions that have adopted sentencing guidelines, three dragons of discretion have been dragged onto the plain. One (release discretion of parole boards) has been killed and one (judicial sentencing

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committed the charged offense. In short, there is a natural gap between the different standards of proof necessary to support an ethical charge and the standard of proof required to obtain a conviction at trial.").

56. FREEDMAN, *supra* note 43, at 220-21.

57. Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1150 (1998) ("[A]pplying different theories of plea bargaining produces different conceptions of justice").

58. *Id.*

59. Levenson, *supra* note 38, at 565; see also Misner, *supra* note 50, at 748 (explaining how broad discretion in charging impacts sentencing); Paul M. Secunda, *Cleaning Up the Chicken Coop of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutors Through the Use of the Model Rules of Professional Conduct*, 34 AM. CRIM. L. REV. 1267, 1268 (1997) ("Because of the determinate nature of the new sentencing system, decisions about how to charge a crime have become, in many cases, tantamount to imposing the actual sentence. The increased importance in prosecutorial charging decisions has, in turn, enabled the prosecutor to determine the parameters of plea bargaining before the negotiations have even started.") (footnotes omitted).

60. Gershman, *Prosecutors*, *supra* note 18, at 418-19 ("The prosecutor has traditionally played a crucial role at sentencing. That role has expanded dramatically as a result of the *Sentencing Reform Act of 1984*, which produced the *Federal Sentencing Guidelines*. The Guidelines were specifically designed to restrict the discretion of judges in imposing sentences. Such restriction has produced a corresponding enhancement in the prosecutor's discretion to make charging decisions and to force persons to cooperate.") (footnotes omitted).

discretion) has been significantly constrained. The remaining dragon (prosecutorial discretion), however, continues to roam the plain unrestrained.<sup>61</sup>

The prosecutorial dragon is unconstrained because power over sentencing enhances the prosecutor's power to charge and to plea bargain. The sentence is based on the charge and on the facts charged. Prosecutors gain more leverage in plea bargaining because judges usually cannot overrule the sentences.

Once the decision to prosecute has been made, prosecutors again wield great power in determining which offenses to charge. Although the U.S. Attorneys' Manual states that charging crimes to induce a plea is impermissible, defense lawyers accuse the government of "piling on" charges in order to induce plea agreements and cooperative testimony. *By charging multiple offenses, a prosecutor exercises significant control over the sentence a defendant will receive if convicted . . .*

Perhaps the most significant result of a prosecutor's discretion in charging crimes is in the sentence. A former Assistant U.S. Attorney admitted that "a lot of prosecutors view [length of sentences] as their benchmark." He told of a prosecutor who is rumored to have a "thermometer" which "measures" his career total years of sentencing. Since the advent of the *U.S. Sentencing Guidelines*, which severely limit judges' discretion in imposing sentences, prosecutors may exert more control over a defendant's sentence than even the judge.<sup>62</sup>

Moreover, prosecutors control the relevant conduct portions of the *Guidelines*.<sup>63</sup>

*Prosecutorial* sentencing discretion is also evident in the substantial assistance provisions of the *Guidelines*. "Congress has authorized, and the commission has implemented, a system in which the determination of whether a 'substantial assistance' discount is to be granted is left solely in the unreviewed discretion of the prosecutor. Its effect is to give to the prosecutor the sole key to leniency."<sup>64</sup> Thus the prosecutor's discretion is central to decisions to depart downward under the *Guidelines*:

[E]mbedded in the *Federal Sentencing Guidelines* is Rule 5K1.1 which explicitly provides that it is the federal prosecutor who must decide if a downward departure from the guidelines is warranted for substantial assistance

61. David Boerner, *Sentencing Guidelines and Prosecutorial Discretion*, 78 JUDICATURE 196, 197-98 (1995); see also David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1066 (1999) (footnote omitted) ("Sentencing reform arguably shifts discretion from relatively independent judges to more political actors — prosecutors and legislatures. Thus, far from solving the problem of discretion, sentencing reform may exacerbate it by increasing the likelihood that it will operate to the disadvantage of the politically powerless.").

62. Ratliff, *supra* note 44, at 181-82 (emphasis added) (footnotes omitted).

63. See Secunda, *supra* note 59, at 1273-74 (examining the four ways in which the *Guidelines* expand prosecutorial control of sentencing).

64. Boerner, *supra* note 61, at 200.



to the authorities. The prosecutor's decision is subject to review by the courts, but only if refusal to file a substantial assistance motion was based on an unconstitutional motive or not rationally related to any legitimate government end. Otherwise, it is up to the prosecutor to determine what serves a "legitimate government end." A prosecutor's decision as to whether to recommend a downward departure for substantial assistance is guided, in large part, by the prosecutor's personal evaluation of the defendant's assistance and its value to the prosecutor's case. This decision making process requires *judgment* — *judgment* gleaned from a prosecutor's experience and good faith willingness to evaluate a defendant's attempt to provide cooperation.<sup>65</sup>

The legacy of the *Guidelines* for discretion is mixed, as they limited unwarranted judicial discretion but raised the specter of unlimited prosecutorial discretion. In their study of the implementation of the *Guidelines*, Schulhofer and Nagel describe an ambiguous legacy:

[T]he *Guidelines* have brought a degree of order and consistency to the prosecutorial charging and bargaining decisions that affect sentencing. Having noted this achievement, we nevertheless recognize that prosecutors exercise a considerable degree of sentencing discretion through charging and bargaining decisions. This discretion, if unchecked, has the potential to recreate the very disparities that the *Sentencing Reform Act* was intended to alleviate.<sup>66</sup>

They also conclude, however, that "[c]ontrary to the claims of many judges, the *Guidelines* have not transferred sentencing discretion from the court to the prosecutor."<sup>67</sup>

Sentencing discretion includes decisions to seek the death penalty. The New York capital punishment law, for example, provoked a debate about whether the death penalty legislation allowed too much discretion to individual prosecutors.<sup>68</sup>

65. Levenson, *supra* note 38, at 566 (emphasis added) (footnotes omitted); see also Gershman, *Prosecutors*, *supra* note 18, at 419-20 (explaining prosecutor's role in 5K1.1 motions).

66. Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 Nw. U. L. REV. 1284, 1284 (1997).

67. *Id.* at 1284-85 (footnote omitted).

68. See, e.g., John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating A Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571, 2581-88 (1997) (examining a clash of decision-making authority between Governor Pataki and Bronx District Attorney Johnson); Anthony Neddo, *Prosecutorial Discretion in Charging the Death Penalty: Opening the Doors to Arbitrary Decisionmaking in New York Capital Cases*, 60 ALB. L. REV. 1949, 1950 (1997) ("[A]rbitrariness in sentencing may result because of the unbridled discretion placed into the hands of individual prosecutors."); UVILLER, *supra* note 36, at 60 ("'Seeking the death penalty' in a first-degree murder case in New York is part of the charging decision, and as a wholly unstructured, unilateral, virtually unreviewable exercise of discretion, it is worrisome. Far more consonant with the customary powers of initiation would be a decision by the prosecutor in the first instance to charge the case as a capital crime, followed by a submission of that choice to the judgment of the citizens sitting as a grand jury . . . . [T]he open-ended statute appears to be an invitation to arbitrary (or politically expeditious) choice.").

### C. RESTRAINTS ON PROSECUTORIAL DISCRETION

The sentencing discretion debate is not new. Many commentators from past to present have argued that prosecutorial discretion is insufficiently restrained or even unrestrained.<sup>69</sup> Even supporters of discretion acknowledge that too much of it is a bad thing. The critics have identified potential mechanisms of control, including judicial, legislative, and executive oversight: review by disciplinary agencies, intraoffice constraints (namely supervision and training, office policies, and budgetary restrictions), and election or re-election by voters who approve or disapprove of prosecutorial policies. There is much debate about the effectiveness of these mechanisms.<sup>70</sup>

#### 1. JUDICIAL OVERSIGHT

Much prosecutorial discretion is unreviewed or unreviewable by the courts, unless the prosecutor violates specific constitutional provisions. Separation of powers leaves courts reluctant to intrude on executive decisions. As the Supreme Court explained in *United States v. Armstrong*:

The Attorney General and the United States Attorneys retain “broad discretion” to enforce the Nation’s criminal laws. They have this latitude because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to “take Care that the Laws be faithfully executed.”<sup>71</sup>

The Court acknowledged that prosecutorial decision-making may be beyond judicial competence and so worthy of deference:

Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. “Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.” It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function.<sup>72</sup>

69. See, e.g., Vorenberg, *supra* note 23 (identifying the broad unrestrained nature of prosecutorial power).

70. See, e.g., Misner, *supra* note 50, at 717 (“The great majority of the decisions made by the various officials are effectively unreviewable either through judicial or administrative processes. In theory, the electorate holds decision-makers responsible for their actions. However, because of the current diffusion of responsibility, the electorate cannot easily scrutinize the actions of any one official or hold that official independently accountable for the successes or failures of the entire system.”) (footnote omitted).

71. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (citations omitted).

72. *Id.* at 465 (citations omitted). On separation of powers concerns, see GERSHMAN, *MISCONDUCT*, *supra* note 53, § 4.3, at 4-6.

For these reasons, courts restrict defendants' challenges and employ a standard of review that is favorable to prosecutors. The "prosecutor's discretion is . . . 'subject to constitutional constraints'" of equal protection and due process.<sup>73</sup> These constraints prohibit selective prosecution and vindictive prosecution.<sup>74</sup> Prosecutions cannot be based upon race, religion, the exercise of rights, or other arbitrary classifications.<sup>75</sup> It is difficult, however, for defendants to prove such constitutional violations. "To obtain discovery on a selective prosecution claim, a defendant must offer 'some evidence' of discriminatory effect and discriminatory intent."<sup>76</sup> In order to prove selective prosecution, a defendant must prove that similarly situated individuals were not prosecuted and that he was singled out for prosecution on arbitrary grounds.<sup>77</sup> The Court has set a high threshold of proof for these cases and gives a "presumption of regularity" to prosecutorial decisions:

[T]he *presumption of regularity* supports their prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."<sup>78</sup>

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73. *Wayte v. United State*, 470 U.S. 598, 608 (1985); see also Michelle A. Gail, *Twenty Sixth Annual Review of Criminal Procedure*, 85 GEO. L.J. 983, 985-86 (1997); Lisa Beth Sheer, *Twenty Seventh Annual Review of Criminal Procedure* 86 GEO. L.J. 1353, 1355-56 (1998) ("There are other limits to a prosecutor's discretion, and the judiciary has a responsibility to protect individuals from prosecutorial conduct that violates constitutional rights. Such conduct usually involves either selective prosecution, which denies equal protection of the law, or vindictive prosecution, which violates due process.") (footnotes omitted).

74. See GERSHMAN, MISCONDUCT, *supra* note 53, § 4.9, at 14-15. Selective prosecution is also prohibited by the ethical codes. See FREEDMAN, *supra* note 43, at 218 (reviewing AMERICAN LAWYER'S CODE OF CONDUCT Rule 9.2 and comparable District of Columbia and MODEL RULES provisions regarding selective prosecution); ABA STANDARDS FOR CRIMINAL JUSTICE 3-3.1(b) ("A prosecutor should not invidiously discriminate against or in favor of any person on the basis of race, religion, sex, sexual preference, or ethnicity in exercising discretion to investigate or to prosecute. A prosecutor should not use other improper considerations in exercising such discretion.").

75. UVILLER, *supra* note 36, at 50-51 (discussing *Wayte* and *Armstrong*).

76. GERSHMAN, MISCONDUCT, *supra* note 53, § 4.10, at 4-17 (footnote omitted).

77. *Id.*; see also Gershman, *supra* note 18, at 441 ("The judiciary's unwillingness to set meaningful limits on the prosecutor's charging discretion is the principal reason for the prosecutor's dominance over the criminal justice system. Doctrines that purport to set limits are increasingly avoided or subverted. For example, the doctrine of selective prosecution requires a prosecutor to charge in a non-discriminatory fashion. However, there is a presumption that the prosecutor acts in good faith, and overcoming that presumption is almost never successful.") (footnotes omitted); Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309 (1997) ("Until a model is established that provides for meaningful judicial review of prosecutorial discretion in the selective prosecution context, as the fiduciary model does, perhaps it will take '[a]nother hundred years . . . before a defendant demonstrates to the Court's satisfaction that race played a role in his prosecution.'").

78. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (citations omitted) (emphasis added); see also Lynch, *Administrative System*, *supra* note 21, at 2125 ("The ultimate decision whether to bring a charge, moreover, or whether to accept a guilty plea or some other disposition in satisfaction of the government's claims, is left to the prosecutor's essentially unreviewable choice.").

“Everybody knows: selective prosecution is a long-shot defense, a very long shot.”<sup>79</sup>

Sentencing is subject to review if the prosecutor’s motive is unconstitutional, and the defendant can meet a “substantial threshold showing.”<sup>80</sup> “Although it is the prosecutor’s prerogative to recommend leniency under the *Guidelines*, exercise of this discretion is reviewable if based on an unconstitutional motive. Furthermore, the prosecutor does not have unreviewable discretion to impose or waive the enhanced sentencing provisions available under 18 U.S.C. § 924(c)(1) by opting to charge and try a defendant in separate prosecutions or under a multi-count indictment.”<sup>81</sup>

Apart from these constitutional constraints (which are difficult for defendants to prove), courts defer to executive discretion for separation of powers reasons. This deference helps to explain why, in his review of prosecutorial discretion, Professor Misner concluded that many attempts to exercise judicial control over prosecutorial discretion have failed:

Legislators, police, prosecutors, and prison officials have enormous discretion as to most tasks for which they are responsible. Contrary to popular belief, attempts to impose any sort of judicial or administrative review on the great majority of the decisions of these offices have been grandly unsuccessful. To date review of these decisions through the political process has only come haphazardly. In those few areas in which the court has intervened, the recent trend is for the court to retreat to a “hands off” policy.<sup>82</sup>

While the “hands off” policy occurs in many areas of prosecutorial discretion, Professor Gershman has argued that it is especially true of the decision to charge:

The prosecutor’s decision to institute criminal charges is the broadest and least regulated power in American criminal law. The judicial deference shown to prosecutors generally is most noticeable with respect to the charging function.

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79. UVILLER, *supra* note 36, at 52.

80. Philip Oliss, *Mandatory Minimum Sentencing: Discretion, The Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1867 (1995) (“The Court [in *Wade v. United States*, 112 S. Ct. 1840 (1992)] [ ] determined that a defendant’s claim that he provided substantial assistance does not entitle him to judicial review of the prosecution’s decision. The Court stated that the only circumstance that would limit the prosecution’s discretion is the appearance of an unconstitutional motive. Specifically, the Court concluded that a defendant would be entitled to judicial review of the prosecution’s decision not to make a substantial assistance motion only upon his ‘substantial threshold showing’ that the prosecution had based its decision on an unconstitutional motive, such as race or religion.”) (footnotes omitted).

81. Gail, *supra* note 73, at 985-86; *see also* Sheer, *supra* note 73, at 1355-56; Richard Bloom, *Twenty Eighth Annual Review of Criminal Procedure*, 87 GEO. L.J. 1267, 1270-71 (1999).

82. Misner, *supra* note 50, at 736; *see also* Gershman, *supra* note 18, at 435-36 (“One of the most disturbing developments in criminal justice over the last two decades has been the judiciary’s failure to provide clear standards that would place some rational limits on the prosecutor’s discretion. The decisions are increasingly ad hoc, and do not lend themselves to systematic analysis. They appear to allow the exercise of virtually unlimited prosecutorial discretion, and drastically curtail the ability of defendants to prove the existence of prosecutorial abuses.”).

Limited constitutional and statutory constraints on charging are manifested in the presumption of prosecutorial good faith, and are reflected in the courts' acknowledgment that they lack the knowledge and expertise to supervise the prosecutor's exercise of discretion. The Separation of Powers doctrine merely reinforces this policy of judicial noninterference. To the extent that sufficient evidence exists, and no improper motivation is shown, the charging decision is *virtually immune from legal attack*.<sup>83</sup>

Charging discretion includes discretion not to charge. "Courts . . . cannot review decisions not to prosecute; thus, prosecutors possess ultimate discretion with respect to declination decisions."<sup>84</sup>

There is disagreement about the efficacy of judicial oversight. Professor Uviller believes that the system can still catch the worst abuses of discretion.

[D]iscretion implies a large dose of deference in the judicial review of the executive choices. And that makes the bulk of prosecutorial charging decisions virtually unreviewable. But, significantly, it leaves the atrociously bad calls vulnerable. For asserted abuses of discretion, prosecutors remain answerable to courts. . . . Though rarely invoked, this oversight is a *powerful constraint*, particularly insofar as it carries the potential for public disgrace.<sup>85</sup>

Other students of discretion, however, always worry that "the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness."<sup>86</sup> Some commentators see anarchy in the courts' limited review:

The prosecutor's decision not to prosecute a case is virtually unreviewable. Although for some this authority "borders on anarchy," the case law in both federal and state jurisdictions have ignored the criticism and have only rarely constrained the decision in any meaningful way. Likewise, decisions regarding diversion programs, venue, immunity, and victim participation are left to the

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83. Gershman, *supra* note 25, at 513 (emphasis added) (footnote omitted); *see also* Gershman, *supra* note 18, at 442 ("Thus, in cases arising in almost every conceivable procedural context where a prosecutor has increased charges after a defendant has exercised certain rights, the courts almost always defer to the prosecutor's discretion. This pattern of judicial permissiveness also is exemplified in plea bargaining, immunity, and dismissal decisions. As the Court observed, 'The Due Process Clause is not a code of ethics for prosecutors.' The discussion that follows shows that even the code of ethics may not be the code of ethics for prosecutors.") (footnotes omitted).

84. Galacatos, *supra* note 30, at 600; *see also* GERSHMAN, MISCONDUCT, *supra* note 53, § 4.5 (discussing *United States v. Cox*, 342 F. 2d. 167 (5th Cir. 1965) where the Fifth Circuit held that the prosecutor could not be held in contempt for refusal to prosecute); Meares, *supra* note 43, at 862 ("The prosecutor's decision to charge an accused is largely subject to the prosecutor's discretion. The prosecutor's charging discretion is, for the most part, unreviewable. So long as the prosecutor has probable cause to believe that the accused committed an offense, the prosecutor is entitled to bring the charge. The prosecutor's decision, moreover, is rarely second-guessed by the courts. Similarly, the prosecutor's decision not to initiate a prosecution or to dismiss a prosecution is effectively unreviewable by the courts.") (footnotes omitted).

85. UVILLER, *supra* note 36, at 46-47 (emphasis added).

86. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 3 (1969).

unreviewable discretion of the prosecutor. Even claims of selective enforcement are rarely successful. Attempts to convince prosecutors to publish the guidelines for making prosecutorial charging decisions, even in such prestigious studies as the ABA *Standards for Criminal Justice Prosecution Function and Defense Function* and the ALI's *Model Code of Pre-Arrest Procedure*, have generally gone unheeded. When guidelines have been drafted, they have generally been so broad as to be of little predictive value.<sup>87</sup>

Such commentary explains why law professors write about “the preeminent role of the prosecutor”<sup>88</sup> and conclude that the “prosecutor has been fairly described as the single most powerful figure in the administration of criminal justice.”<sup>89</sup>

## 2. CONGRESSIONAL OVERSIGHT AND ELECTION

Legislatures pass the criminal legislation that is applied by prosecutors. They can repeal — or re-enact — anachronistic statutes. Congress passed the *Guidelines* in order to provide more appropriate limits to judicial discretion. Perhaps Congress could improve the broad array of criminal statutes, with an attempt to write “seamless, nonoverlapping” statutes.<sup>90</sup>

Legislation may place some limits on prosecutorial discretion, so that it is not unfettered:

Although in most instances the exercise of prosecutorial discretion presents a nonjusticiable political question, the executive branch is not free to exercise this discretion whimsically. The oath of office binds executive officers to

87. Misner, *supra* note 50, at 743 (citations omitted); see also Gershman, *supra* note 18, at 407-08:

Commentators have described the prosecutor's discretion as potentially “lawless,” “tyrannical,” and “most dangerous.” The prosecutor carries out his charging function independent from the judiciary. A prosecutor cannot be compelled to bring charges, or to terminate them. A private citizen has no standing to bring a criminal complaint if the prosecutor decides not to prosecute. And the judiciary has shown a remarkable passivity when asked to review the prosecutor's charging decisions. Indeed, some courts have deferred absolutely to the prosecutor's discretion, even though that decision has been shown to be demonstrably unfair. Thus, overcharging crimes, discriminating against defendants for prosecution, improper joinder of charges or parties, vindictiveness, coercive dismissals, plea bargaining abuses, and immunity violations, continue to occur regularly, without meaningful judicial review or correction.

*id.* (footnotes omitted); but see UVILLER, *supra* note 36, at 34 (“It's certainly true that charging decisions are, in the main, discretionary (which is just another way of saying there is no ‘meaningful judicial review’ if Gershman meant by that close and regular supervision by a court). But I am dubious about the claim that vindictiveness, coercion, abuses, violations, and other improprieties in the charging process are not subject to concerned review by a judge. Also, whether abuses occur regularly (by which I assume Gershman means frequently) is another matter, difficult to prove or disprove, depending largely on whose courtroom stories you listen to — and how much credit you accord the storyteller.”).

88. Misner, *supra* note 50, at 728.

89. Melilli, *supra* note 43, at 672; see also Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940) (“The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous.”).

90. Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1519 (1993).

support and defend the Constitution and thus establishes the duty to give due regard to the lawmaking function of the legislative branch and the interpretive function of the judicial branch. Therefore, the proper exercise of prosecutorial discretion must be guided by what Congress has ordained the law to be, informed but not dictated by the language of the statutes and their legislative histories as well as by the interpretation of the law by the courts. And, within these constraints, prosecutorial discretion must be exercised so as to promote and protect the public interest.<sup>91</sup>

Congress has used its investigatory powers to examine prosecutorial decisions by the Department of Justice, although they may be accused of politicizing prosecutions when they do so.<sup>92</sup> Recently, Congress expressed its disapproval of Department of Justice prosecutorial ethics rules by passing the *Citizens Protection Act* ("CPA"), which requires federal prosecutors to comply with state bar codes.<sup>93</sup> "Congress has, until the CPA, never seen fit to involve itself in regulating legal ethics generally, let alone federal prosecutorial ethics. In part, this hesitation may stem from Congress' fear that entering the field will encroach upon the federal courts' realm of authority."<sup>94</sup> Unfortunately, when Congress undertakes such regulation, its product may be "remarkably unclear" and "mask the complexity of the issues."<sup>95</sup>

Some lawyers conclude that office budgets provide an important limitation on prosecutorial discretion.<sup>96</sup> If so, then legislatures may exercise some control over prosecutorial offices through their budgets. Professor Uviller emphasized the real and important constraints that office resources place on the prosecutor:

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91. William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 685-86 (1982); see also Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 250 (2000) ("In the law enforcement context, for example, Congress could not order the cessation of a particular prosecution or order the indictment of a particular defendant. It might, on the other hand, achieve the same results through less specific legislation.").

92. See Galacatos, *supra* note 30, at 641-42 (footnotes omitted).

93. Citizens Protection Act, Pub. L. No. 105-277, 112 Stat. 2681, § 801 (codified as amended at 28 U.S.C.A. § 530B (1998)). For a history of the adoption of this legislation, see Zacharias & Green, *supra* note 91, at 211-15.

94. Zacharias & Green, *supra* note 91, at 211-15.

95. *Id.* at 210.

96. See Lynch, *supra* note 21, at 2139-40 (explaining that prosecutors' decisions "inevitably combine judgments of desert with judgments of resource allocation" . . . and are thus "routinely influenced by questions of priority and cost"); Baxter, *supra* note 91, at 688-89 ("The faithful execution clause imposes a duty on the executive branch to utilize its discretion to promote the public interest. Every executive agency, therefore, must allocate its resources to promote the public interest to the maximum possible extent, given the constraints imposed by Congress in authorizing and appropriating funds. This rule applies to the use of resources in law enforcement activities as it does in all other endeavors of the executive branch. Consequently, some selectivity is required in initiating resource-consuming investigations and prosecutions.") (footnotes omitted); Robert W. Gordon, *Imprudence and Partisanship: Starr's OIG and the Clinton-Lewinsky Affair*, 68 FORDHAM L. REV. 639, 716 (1999) ("It is the combination of the political and budgetary constraints of prosecutors that makes our vague and broad criminal statutes tolerable; and their breadth and vagueness in turn stop up the loopholes through which serious criminals might otherwise escape justice.").

To the public prosecutor, I say first: Relish your crowded docket; be grateful for the multiple and diverse demands upon your attention. Do not curse your stretched budget, your short-handed staff, or the tide of new cases perpetually lapping at your beach. These constraints help teach you and your staff the fine faculty of *judgment*. In the conscientious prosecutor's office, the urgency and the variety of ordinary business present competing opportunities, and often on various coordinates of importance. Both selecting a target for pursuit and simply sorting out for prosecution, the harvest of the daily tide afford the prosecutor the obligation of choice. The discharge of that responsibility instructs the public officer that, while all cases standing alone are of prime importance, taken together some must yield to others. Prosecutors frequently use the phrase "the interests of justice;" it is not a purely rhetorical expression. Its discernment is part of the daily job of the prosecutor — and it must be learned the hard way. The art of triage is essential in the development of the sense of justice, it turns out, and no decent prosecutor can survive without it.

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As a prosecutor, I counted caseload as a burden. I longed for the freedom to prosecute each case as though it were my only obligation. The burden turns out to be a blessing. A full file cabinet does not dull sensibility and corrupt *judgment* by the urgency of making dispositions, as I previously believed. It provides the occasion for learning the difficult business of making comparative evaluations. And this, I have come to think, is an important ingredient in the sensible exercise of discretion.<sup>97</sup>

"The other main remedy for prosecutorial misconduct is public oversight."<sup>98</sup>  
Elected prosecutors may be constrained by public opinion and may be removed from office if too many voters disapprove of their practices.

[E]xecutive officers — including, in most states, local prosecutors — are periodically up for election. If the public dislikes the way their servant has been exercising discretion, if the people think targets for prosecution have been unfairly chosen or wrongly charged, the remedy is at hand. True, abuse of authority by the regional United States Attorney may have a marginal effect, at best, in the election of the President of the United States — the appointing authority. But perhaps it is not so far-fetched to think that the President's political party will suffer to some degree for the visible excesses of the prosecutor. After all, other executive officers wield considerable discretionary authority with considerably less visibility and no accountability other than the party's periodic review by voters.<sup>99</sup>

97. H. Richard Uviller, *Poorer But Wiser: The Bar Looks Back at its Contribution to the Impeachment Spectacle*, 68 *FORDHAM L. REV.* 897, 899-901 (1999) (emphasis added).

98. Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 *N.C. L. REV.* (forthcoming 2001) (manuscript at 38, on file with Author).

99. UVILLER, *supra* note 36, at 45; see also Zacharias, *supra* note 98 ("Misconduct within their offices — even by lawyers whom they have not directly supervised — commonly becomes an issue during elections.").



If election fails, then disciplinary agencies may do the job:

If the ballot, even in the best of democracies, is too remote to be an effective constraint on prosecutorial discretion, administrative remedies are still available. Every self-respecting government office — and prosecutors are nothing if not self-respecting — has some mechanism for integrity review. Admittedly, reliance on such internal controls is a little like relying on the bar to “police itself;” it risks the designation “naive.” But for one skeptical observer, at least, this is the place to put some attention and energy to work. Let’s make administrative control a serious undertaking.<sup>100</sup>

### 3. PROFESSIONAL DISCIPLINE

#### a. Findings of Misconduct

The debate is ongoing whether the discipline of prosecutors is “lax.”<sup>101</sup> Review of prosecutors by disciplinary agencies is important because their *professional* conduct is unlikely to receive full review in courts of law. Prosecutors possess absolute immunity for activities “intimately associated with the judicial phase of the criminal process” and qualified immunity for investigative functions (including advising the police).<sup>102</sup> Absolute immunity applies to prosecutorial advocacy while qualified immunity applies to investigative or administrative acts.<sup>103</sup> Some courts have ruled that decisions whether to prosecute or to initiate a prosecution without probable cause are protected by absolute immunity.<sup>104</sup>

Separate professional review of prosecution is also important because the appellate review of criminal trials (as in *Agurs*) focuses on the effect of the misconduct on the defendant’s trial and not on the specific intent of the prosecutor.<sup>105</sup> Appellate review of criminal convictions employs a harmless error standard. “By insulating prosecutors from serious misconduct, however, harm-

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Some district attorneys may also face removal by the governor. *See, e.g.*, Horowitz, *supra* note 68, at 2571 (discussing Governor Pataki’s removal of District Attorney Robert Johnson and raising the question of who is the proper official to control discretionary decisions about capital punishment).

100. UVILLER, *supra* note 36, at 45-46.

101. Gershman, *supra* note 18, at 443-46 (describing the “lax” discipline of prosecutors); *see generally* Zacharias, *supra* note 98; Lesley E. Williams, *The Civil Regulation of Prosecutors*, 67 *FORDHAM L. REV.* 3441, 3454-3457 (1999); Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 *FORDHAM L. REV.* 327 (1998); Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 *ST. THOMAS L. REV.* 69 (1995); Lyn M. Morton, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 *GEO. J. LEGAL ETHICS* 1083 (1994).

102. Williams, *supra* note 101 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)); *see also* Little, *supra* note 16, at 729 (citing *Imbler*, 424 U.S. at 430-31 (1976) and *Burns v. Reed*, 500 U.S. 478, 487-96 (1991)).

103. *See* Williams, *supra* note 101, at 3456-58 (reviewing *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993)).

104. *See id.* at 3460 (citations omitted).

105. *See generally* Bennett L. Gershman, *Mental Culpability and Prosecutorial Misconduct*, 26 *AM. J. CRIM. L.* 121 (1998) (arguing that a prosecutor’s intent should be relevant to review of prosecutorial misconduct).

less error review encourages a 'winning is everything' attitude with fairness being a mere afterthought. Accordingly, many defendants have had their convictions affirmed despite clear prosecutorial overreaching."<sup>106</sup> Courts will frequently refer errant prosecutors to disciplinary offices rather than issue sanctions in the midst of a criminal case.

Like courts, disciplinary agencies have reasons not to review prosecutorial misconduct rigorously. Professor Zacharias has stated that "[t]o the extent discipline requires an investigation of the workings of a prosecutor's office, disciplinary agencies may consider it invasive of the authority of a coordinate branch of government."<sup>107</sup>

My focus here is on prosecutorial discretion, not on all categories of prosecutorial misconduct. The *Model Rules* encapsulate the general standard for all attorney discipline: the violation of mandatory, but not discretionary, rules is subject to professional discipline. "Some of the *Rules* are imperatives, cast in the terms 'shall' or 'shall not.' These define proper conduct for purposes of professional discipline. Others, generally cast in the term 'may,' are *permissive* and define areas under the *Rules* in which the lawyer has *professional discretion*. *No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.*"<sup>108</sup> We have seen that offices provide guidelines to steer prosecutorial discretion. "Guidelines, however, do not have the force of law, are easily evaded, and can be revoked at will."<sup>109</sup>

Professor Zacharias has demonstrated that prosecutors rarely face discipline for their discretionary decisions.<sup>110</sup> "Allegations of prosecutorial misconduct typically concern five broad areas of activity: abuse of office in the charging stage; abuses in investigating crimes, including misuse of grand juries; pretrial misconduct (particularly, misconduct in discovery); trial misconduct; and miscellaneous other activity."<sup>111</sup> Consistent with the *Model Rules*, however, Zacharias explains that misconduct "does not always rise to the level of a disciplinable offense. Disciplinary authorities, for the most part, are limited to enforcing direct violations of specific prohibitions in the professional rules."<sup>112</sup> Discretionary decisions are unlikely to be sanctioned.

Almost by definition, reasonable observers differ on what conduct is appropriate in these areas. Thus, for example, so long as *some* evidence supports a criminal charge, observers typically might disagree over the propriety of a prosecutor's decision to support a police arrest pending further investigation.

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106. Gershman, *supra* note 18, at 430-31.

107. Zacharias, *supra* note 98, at 35.

108. MODEL RULES scope cmt. 13 (emphasis added).

109. GERSHMAN, *supra* note 53, at 4-8.

110. See Zacharias, *supra* note 98.

111. *Id.* at 10.

112. *Id.* at 13.

Similarly, some consider aggressive charging within constitutional limits to be a valid exercise of discretion, while others consider it to be "overcharging."<sup>113</sup>

Accordingly Zacharias concludes that findings of prosecutorial misconduct are more appropriately limited to the narrow range of areas that "include[s] primarily pretrial and trial conduct that is specifically forbidden in the codes, engaging in pretrial publicity, and the prosecutor's obligations to report other lawyers."<sup>114</sup>

The Annual Reports of the Justice Department's Office of Professional Responsibility ("OPR"), which oversees the professional competence of federal prosecutors, provide some support for Zacharias' conclusions. Their categories of misconduct include abuse of prosecutorial or investigative authority; misrepresentation to the court or opposing counsel; unauthorized release of information (including grand jury information); improper oral or written remarks to the court or grand jury; conflicts of interest; failure to perform duties properly; negligence; unprofessional behavior; failure to disclose exculpatory, impeachment or discovery material; criminality; and improper contacts with represented parties.<sup>115</sup> Many of the categories appear to cover violations of mandatory standards. Moreover, the case summaries suggest that discretionary decisions are not sanctioned. For example, four substantial assistance motions cases were dismissed without findings of misconduct.<sup>116</sup> OPR found no misconduct in one case of allegations of improper issuance of a subpoena. Moreover, there was no misconduct in a 1996 case in which the defendant alleged that she was charged because she had testified against the government at a different trial.<sup>117</sup>

Misconduct *was* found, however, in cases that were not discretionary. For example, OPR found misconduct in a plea bargaining and sentencing case, but it was because of the intentional misrepresentation of the evidence, not due to prosecutorial discretion.<sup>118</sup> (The government attorney said the inmate had used his fists in a fight (a misdemeanor) although he used a knife (a felony).) OPR also criticized the attorneys who did not follow the DOJ *policy* of presenting plea bargains to a supervisor.<sup>119</sup> Mandatory rules are more appropriate for discipline than prosecutorial discretion.

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113. *Id.* at 15 (emphasis added).

114. *Id.* at 16; *see also* UVILLER, *supra* note 36, at 46 ("It's difficult to conceive of a working system of external peer or public review of the discretionary decisions of a prosecutor's office. Who would be qualified to do the reviewing? And by what standards would it be done? The only system that occurs to me is already in place: judicial oversight of prosecutorial discretion.").

115. *See* Office of Professional Responsibility, Fiscal Year 1997 Annual Report, Table 2, *available at* <http://www.usdoj.gov/opr/97annual.htm> [hereinafter OPR 1997]; Office of Professional Responsibility, Fiscal Year 1996 Annual Report, Table 2, *available at* <http://www.usdoj.gov/opr/96annual.htm> [hereinafter OPR 1996].

116. *See* OPR 1997, *supra* note 115 (summarizing Examples of Matters Handled by OPR in Fiscal Year 1997); OPR 1996, *supra* note 115 (summarizing Examples of Matters Handled by OPR in Fiscal Year 1996).

117. *See* OPR 1997, *supra* note 115; OPR 1996, *supra* note 115.

118. OPR 1997, *supra* note 115.

119. *Id.*; *see also* OPR 1995, at 7.

b. High Professional Standards — Judgment

Disciplinary agencies often state that their goal is the promotion of high professional standards for everyone, not only the punishment of wrongdoers. The purpose of the Office of Professional Responsibility, for example, is “to ensure that Department of Justice attorneys continue to perform their duties in accordance with the high professional standards expected of the Nation’s principal law enforcement agency.”<sup>120</sup> In his famous speech to prosecutors, Attorney General Jackson urged that the prosecutor has “no better asset than to have his profession recognize that his attitude toward those who feel his power has been dispassionate, reasonable and just.”<sup>121</sup>

Prosecutors have practical as well as aspirational reasons to pursue high professional standards. Their professional reputations depend on good judgment. Even if they are not sanctioned for misconduct, poor judgment may undermine prosecutions and lead to judicial or supervisory criticism or review.

The OPR Public Summaries describe numerous situations in which prosecutors employed “poor judgment” short of misconduct. For example, OPR criticized the “extremely poor judgment” of a Florida United States Attorney who called opposing counsel about a petition they were filing and also “criticiz[ed] a judge in a conversation with a defense attorney.”<sup>122</sup> Two Department of Justice attorneys “exhibited bad judgment” when they did not inform the court that a witness had previously misrepresented his credentials.<sup>123</sup> Among the “mistakes of judgment” in that case was insufficient consultation with ethics advisors and supervisors in the DOJ.<sup>124</sup> A Texas Assistant United States Attorney “exercised poor judgment” when he did not follow up on a claim by plaintiff’s counsel that a Postal Service log was not produced in discovery.<sup>125</sup> A San Francisco Assistant United States Attorney “used poor judgment in relying solely on his agents to obtain all statements” made by a witness to the police because he had leads that the witness had made several statements.<sup>126</sup> A Colorado Assistant United States Attorney “demonstrated very poor judgment” when he purchased stock based on

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120. OPR 1997, *supra* note 115 (citing Attorney General order dated December 9, 1975).

121. Jackson, *supra* note 89, at 4.

122. Summary of the Investigation by the Office of Professional Responsibility into Certain Conduct of United States Attorney Larry Colleton, at 4.

123. See Summary of the Investigation by the Office of Professional Responsibility into the Conduct of Trial Attorneys J. Jared Snyder and William H. Hutchins in *United States v. Shaffer Equipment, Co., et al.*

124. See Summary of the Investigation by the Office of Professional Responsibility into the Conduct of Trial Attorneys J. Jared Snyder and William H. Hutchins in *United States v. Shaffer Equipment, Co., et al.*

125. Summary of the Investigation by the Office of Professional Responsibility into the Conduct of Assistant United States Attorney Randall P. Means in *Chilcutt v. United States*, p. 5.

126. Summary of the Investigation by the Office of Professional Responsibility into the Conduct of Assistant United States Attorney Eric Swenson in *United States v. Leung Tak Lun* (The “Goldfish Case”), p. 2.

information he received from a man he had previously prosecuted.<sup>127</sup> That prosecutor was admonished by the United States Attorney to avoid such conduct in the future. An Environment and Natural Resources Division attorney “exercised poor judgment” in filing and interpreting certain motions.<sup>128</sup> In all these cases, “poor judgment” short of misconduct resulted in complaints about attorney misconduct and warranted extensive investigation of the attorney’s actions that resulted in some criticism. Good prosecutors need good judgment.

Programs such as the 1994 Department of Justice Professional Responsibility Office training program were created to foster high professional standards and good judgment by prosecutors.<sup>129</sup> Representatives from the United States Attorneys’ Offices (“USAO”) attend national ethics training seminars and employ that training in the local office. Each USAO has a Professional Responsibility Officer who counsels attorneys on how to avoid misconduct and to achieve high professional standards — especially in the exercise of their discretion.

Of course, it is difficult to train prosecutors to use good judgment without knowing what good judgment is.

#### 4. SEEK JUSTICE

The ethical standards for prosecutors provide one last constraint on prosecutorial discretion. The prosecutor’s duty is to “seek justice.”<sup>130</sup> A justice standard, however, may be as vague as discretion. Professor Zacharias has argued that neither the ethical codes nor the interpretive literature assign much content to the duty of justice, and so prosecutors fall back upon their own morality.<sup>131</sup>

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127. Summary of the Investigation by the Office of Professional Responsibility into the Conduct of Assistant United States Attorney Robert E. Mydans, Oct. 27, 1997.

128. Summary of the Investigation by the Office of Professional Responsibility into the Conduct of Environment and Natural Resources Division Attorney Pamela S. West in *Mescal, et al. v. United States, et al.*

129. See Little, *supra* note 16, at 768; see also Zacharias & Green, *supra* note 91, at 238-39 (“[The Department of Justice] has established formal training programs through which its ethical understandings are transmitted. In recent years, the Department has required United States Attorneys’ Offices to appoint ethics officers to address ethical issues. It has established the Office of Professional Responsibility specifically for the purpose of internal regulation.”).

130. MODEL CODE EC 7-13 (1994) (“The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict.”); see also MODEL RULES Rule 3.8 cmt. 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); Bruce A. Green, *Why Should Prosecutors “Seek Justice?”* 26 *FORDHAM URB. L.J.* 607 (1999).

131. See Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 *VAND. L. REV.* 45, 46 (1991) (“Although the special prosecutorial duty is worded so vaguely that it obviously requires further explanation, the codes provide remarkably little guidance on its meaning. In effect, code drafters have delegated to prosecutors the task of resolving the special ethical issues prosecutors face at every stage of trial . . . . The interpretive literature is no more helpful than the codes in resolving these and other ethical trial issues raised by the ‘do justice’ admonition. Scholars have focused exclusively on constitutional requirements and on issues relating to prosecutorial policy at the pretrial and sentencing stages.”); see also

The “do justice” standard, however, establishes no identifiable norm. Its vagueness leaves prosecutors with only their *individual sense of morality* to determine just conduct. Some will decide that justice lies in conviction at all cost; others will bend over backwards to vindicate defendants’ rights — in the process underestimating their obligation to the community to assure that criminals are convicted. The result is inconsistent trial practice, both within a single prosecutor’s case load and among lawyers in the prosecution corps. This vagueness also undermines professional discipline of prosecutorial misconduct.<sup>132</sup>

“Justice” will not restrain unfettered discretion if it encourages prosecutors to rely on their “individual sense of morality.”

Professor Zacharias provides a limited, two-prong definition of prosecutorial justice: “(1) prosecutors should not prosecute unless they have a good faith belief that the defendant is guilty; and, (2) prosecutors must ensure that the basic elements of the adversary system exist at trial.”<sup>133</sup> He rejects a vague justice standard in favor of “precise ethical directives, either through formal rules, or, when flexibility is desirable, rebuttable presumptions.”<sup>134</sup>

The Justice Department has linked its ethical standards to the mandate to seek justice. “A variety of evidence suggests that, as a general rule, the Department of Justice takes its duty to serve justice to heart. Unlike most state and local prosecutors’ offices, the Justice Department continually has developed published guidelines that reflect its understanding of prosecutors’ duty to seek justice.”<sup>135</sup>

For prosecutors, established standards of justice are preferable to the individual’s application of her own sense of justice.

## II. GOOD JUDGMENT

Because of the range of prosecutorial discretion and its unreviewable quality as described in Part I, numerous proposals for the reform of prosecutorial discretion have been advanced. They include some combination of calls for new, more specific standards; better enforcement of those standards through supervi-

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Green, *supra* note 130, at 616 (“The disciplinary rules, however, do not fully consider how prosecutors’ duty to seek justice may translate into different or more demanding professional obligations: Indeed, the rules barely scratch the surface.”).

132. Zacharias, *supra* note 131, at 48 (emphasis added) (footnotes omitted); *see also* Lynch, *supra* note 21, at 59 (“Where the outcomes that can be expected in court are more severe than even prosecutors think are just or necessary for the protection of the public, prosecutorial discretion stops being a matter of triage (deciding where compromise from their preferred outcomes is necessary to maximize limited resources), and becomes instead a matter of deciding what outcomes are morally appropriate in the prosecutors’ own eyes.”); Secunda, *supra* note 59, at 1269-70 (“Federal prosecutors lack ethical guidance as to how to exercise their newly found discretion . . . . This lack of guidance has left a vacuum, which, if not filled, might lead federal prosecutors to follow their own notions of justice at the cost of fairness and uniformity in sentencing.”).

133. Zacharias, *supra* note 131, at 49.

134. *Id.* at 50.

135. Zacharias & Green, *supra* note 91, at 238-39.

sion, oversight and training; and improved judgment by individual prosecutors.<sup>136</sup> Professor Little's proposed model rule for prosecutorial investigation combines all three aspects of these reforms. He defends the "exercise of publishing written standards"<sup>137</sup> and insists that if such written standards are to be effective, "prosecutorial duties of supervision, reporting, and training are also essential."<sup>138</sup> "Proportionality" provides the standard for individual judgment. The supervisory and proportionality requirements are written into the text of the proposed rule, with an insistence on reporting and review of prosecutorial decisions.<sup>139</sup>

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136. See, e.g., Charles B. Bubany & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 495-96 (1976) (recommending a "system of controlled prosecutorial discretion" with "the following principal characteristics: (1) published rules, guidelines, and policies; (2) established procedural safeguards within the prosecutor's office; (3) increased centralization of prosecutorial power; and (4) limited administrative and judicial review"); Vorenberg, *supra* note 23, at 1562-72 (identifying corrections for prosecutorial discretion, including specific charging guidelines, screening conferences, a record of decisions, legislative oversight, more careful drafting of criminal codes, broader judicial review based on new standards and guidelines).

137. Little, *supra* note 16, at 726-27 ("In so proposing, it necessarily also argues that the exercise of publishing written standards that attempt to guide prosecutorial discretion ethically is not a meaningless exercise, even if the standards are largely aspirational and contextual, rather than prohibitory, in form.").

138. *Id.* at 728 ("For any such investigative rule to be effective, prosecutorial duties of supervision, reporting, and training are also essential. These concepts encompass not only a prosecutorial duty to provide supervision, but also to seek supervision. Reporting of discretionary investigative decisions and training on the ethical exercise of discretion should also be required for all prosecutors. These additional duties (to seek supervision, to report, and to provide ethics training) should be expressly placed on prosecutors not only in the investigative stage, but generally.").

139. See *id.* at 752-53. The proposed new rule's pertinent language is as follows:

1. A prosecutor is not obligated to take every possible step in the investigation of a suspected criminal offense. Rather, the prosecutor should consciously engage in an analysis of proportionality in choosing which investigative steps to pursue, and how aggressively to pursue them.

2. At a minimum, a proportionate investigative decision should consider:

- (a) the monetary cost of the step, not just for the prosecutor's office, but also for any witnesses who must comply with investigative demands;
- (b) nonmonetary costs of the step, such as intrusions on privacy, potential harm to innocent third parties, potential for violence or destructive harm, damage to the prosecution office's own credibility or community standing, and any unnecessary interference with witness's ongoing lives;
- (c) the potential benefits of the step, and whether those benefits could be achieved by less intrusive or costly means.

3. These costs and considerations should be balanced against the gravity of the offense and any exigent time constraints.

4. A prosecutor should not approve a particular investigative step or strategy that reasonably seems grossly disproportionate after evaluation, including supervisory evaluation as required below.

5. *Duty to Seek Supervision.* In any non-routine or high-profile matter, or for non-routine investigative techniques, the investigating prosecutor should seek supervisory review and approval of his or her proportionate evaluation before proceeding.

All prosecutorial discretion, not just investigation, requires improved standards, enforcement and good judgment.

#### A. STANDARDS

We have already seen that the *ABA Standards for Criminal Justice* and the *United States Attorneys' Manual* provide factors to guide prosecutorial discretion. I quote below a proposed set of administrative guidelines for prosecutors that would be overseen by courts of law. They are representative of numerous attempts to provide detailed criteria to guide discretion. The administrative criteria in prosecutors' offices should include the following:

The basic standard should be whether in the prosecutor's judgment:

- (1) a crime has been committed;
- (2) the perpetrator can be identified; and
- (3) sufficient evidence exists to support a verdict of guilty.

A second order of inquiry . . . [is] whether the benefits [of prosecution outweigh the costs.] Matters pertinent to this determination include:

- (1) the extent of the harm caused by the offense[.];
- (2) possible improper motives of a complainant;
- (3) reluctance of the victim to testify;
- (4) effect of non-enforcement upon the community's sense of security and confidence in the criminal justice system;
- (5) the direct cost of prosecution in terms of prosecutorial time, court time, and similar factors;
- (6) prolonged nonenforcement of the statute on which the charge is based;
- (7) the availability and likelihood of prosecution and conviction by another jurisdiction;
- (8) any assistance by the accused in the apprehension or conviction of other offenders, in the prevention of offenses by others, in the reduction of the impact of offenses committed by himself or others upon victims, and in engaging [in] any other socially beneficial activity that might be encouraged in others by not prosecuting the offender; and
- (9) the effect of nonenforcement on police department morale.

[The third level is effect on the offender, including:]

- (1) the impact of further proceedings on the accused and those close to him, especially the likelihood and severity of financial hardship or disruption of family life;
- (2) the effect of further proceedings in preventing future offenses by the offender in light of his commitment to criminal activity as a way of life;

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6. *Reporting and Training*. In all cases, a prosecutor's office should implement a system of reporting and supervisory review of investigative steps taken in all cases. In addition, training of all prosecutors on the ethics of investigative proportionality should be available, required, and periodically repeated. *Id.* at 752-53 (emphasis added) (footnotes omitted).



- (3) the disparity of the authorized punishment in relation to the particular offense or offender;
- (4) the seriousness of his past criminal activity which he might reasonably be expected to continue;
- (5) the possibility that further proceedings might tend to create or reinforce commitment on the part of the accused to criminal activity as a way of life; and
- (6) the availability of programs as diversion or sentencing alternatives that may reduce the likelihood of future criminal activity.<sup>140</sup>

Some proposed reforms are substantive in recommending policies to be implemented instead of factors to be weighed. In recognition of the administrative context of plea bargaining, for example, Professor Lynch recommends new standards for prosecutors' dealings with defense attorneys.

Even if prosecutors are not subjected to a full range of administrative law restrictions, it is likely that some reforms involving *greater formality of procedure* could enhance the fairness of the process. In my view, the two strongest candidates for formal recognition involve greater discovery rights, and the formalization of the opportunity to be heard before prosecutorial decisions are made.<sup>141</sup>

Professor Zacharias has recommended that prosecutors' offices establish specific policies about plea bargaining and justice. About plea bargaining, he recommends that prosecutors bargain in accordance with an explicit model. Their administrative regulations and manuals should identify the model of plea bargaining that the office expects individual prosecutors to use.<sup>142</sup> Offices should "assign[] priorities to the varying interests *ex ante*."<sup>143</sup> We have already seen that Zacharias also recognizes the "need for more precise ethical directives, either through formal rules, or, when flexibility is desirable, rebuttable presumptions" linked to the prosecutor's duty to seek justice.<sup>144</sup>

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140. Bubany & Skillern, *supra* note 136, at 496-97 (footnotes omitted). *See generally* Abrams, *supra* note 22 (considering how to establish policies of prosecutorial discretion).

141. Lynch, *Administrative System*, *supra* note 21, at 2147 (emphasis added).

142. *See generally* Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121 (1998).

143. *Id.* at 1183. *See also id.* at 1183-85 (emphasis added) (footnote omitted) ("One cannot accomplish that simply by listing the goals prosecutors should pursue. Such an approach ultimately would come to parallel the *unsatisfying discretionary approach of the current codes* . . . [I]dentifying a governing plea-bargaining theory prevents individual prosecutors from imposing a misguided view of justice upon defendants and the public. It both enables a prosecutorial agency to control its agents and makes the agency responsible for doing so. The very existence of a plea-bargaining policy itself may serve to equalize treatment among defendants.").

144. Zacharias, *supra* note 131, at 49-50 (1991) ("The Article's interpretation of the codes' 'justice' terminology is not intended to provide a touchstone for judicial enforcement. Defining the ethical standard, however, should help prosecuting attorneys react to ethical dilemmas they confront in trial practice. On a larger scale, it will enable federal agencies and local district attorneys offices to provide guidance for their staffs in training programs and in establishing internal norms. Spelling out the meaning of the 'do justice' rule also may provide a somewhat improved basis for professional discipline when individual prosecutors overstep their

Professor Gershman explains in this symposium that office policies and practices can encourage prosecutors to practice moral courage. “Moral courage” is the ability to perform the prosecutor’s job properly — by prosecuting some cases and declining questionable cases.<sup>145</sup> In contrast, office policies that focus on conviction statistics hinder just prosecution.<sup>146</sup>

Although numerous lists of standards have been provided over many years, it is still not clear how they are applied from office to office.

In effect, as the overbreadth of the formal substantive criminal law drives an increase in prosecutorial power, the resulting growth of prosecutorial authority will tend to increase pressure on prosecutors to develop internal administrative practices and standards for the exercise of discretion that will become a separate *de facto* substantive criminal law. The problem is that this body of law is largely unwritten and may vary from district attorney to district attorney, or even from individual prosecutor to individual prosecutor.<sup>147</sup>

Accordingly, offices need some kind of mechanism by which such standards will be enforced. The reader of these pages can agree that reading lists of factors is not likely to enhance good judgment.

## B. ENFORCEMENT OF STANDARDS

### 1. MORE JUDICIAL REVIEW

Aware of previous failures in judicial review of prosecutorial discretion, many reformers have recommended that their standards be enforced by judicial oversight. Violation of office policies would provide the basis for judicial review — a limited review, however, that does not address the merits of the policies themselves.

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bounds. Perhaps, more importantly, the Article highlights a need for more precise ethical directives, either through formal rules, or, when flexibility is desirable, rebuttable presumptions.”)

145. See Bennett Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS (forthcoming Winter 2001) (“Such courage is possible only in an office that encourages prosecutors to be ministers of justice. Prosecutors offices that instill such an ethos encourage prosecutors to discuss openly and critically with supervisor and colleagues the kinds of issues discussed in this Article. Prosecutors should be encouraged to evaluate a case critically with colleagues and supervisors to decide whether a prosecution should be undertaken in view of questionable proof, and the existence of alternative prosecutorial choices.”).

146. See *id.* (“A prosecutor’s moral courage to judge the truthfulness of a witness may be influenced by institutional considerations that discourage either critical evaluation or the ability to take appropriate action. Prosecutors offices that are heavily influenced by conviction statistics — both to project a tough law-and-order image and for leverage in budget negotiations — will probably maintain close supervision over individual decision-making by assistants, and principled decisions that might be perceived as inconsistent with a strong crime-fighting image may be discouraged. It is much more likely in such a setting that a possibly innocent defendant will be required to accept a generous plea offer on the eve of trial rather than that the prosecutor will dismiss a case in which she lacks confidence.”) (footnotes omitted).

147. Lynch, *supra* note 21, at 61.

[W]ith the promulgation of standards, judicial review could be limited to the issue of abuse of discretion, the defendant being required to make at least a colorable claim that his prosecution violated an established policy of the prosecutor. The court would consider whether the prosecutor's decision was in fact based on the standards and policies of the office or was motivated by extraneous factors. Normally, the court would not review the merits of the prosecutor's policy. Only in cases of the patent and complete absence of a relationship between a prosecutorial standard and a legitimate law enforcement objective would a court be authorized to invalidate the standard itself.<sup>148</sup>

In 1981 Professor Goldstein proposed a "common law of prosecutorial discretion" that would be developed by the courts in response to different fact-specific cases.<sup>149</sup> Prosecutors would be held accountable for their decisions to charge or to accept a plea by explaining to the court how they met the common law standards.<sup>150</sup> Another proposal recommended an administrative standard for plea bargaining, under which there would be "increased judicial review of the prosecutor's decisions with other administrative law techniques, such as the adoption of written guidelines and a requirement that the prosecutor justify his guilty plea concessions with statements of reasons."<sup>151</sup>

Many critics have complained that judicial oversight places little constraint on prosecutorial conduct. For this reason, Professor Misner recommended that prosecutorial decisions be linked to prison resources.<sup>152</sup> Meanwhile, Professor

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148. Bubany & Skillern, *supra* note 136, at 504. See generally KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 188-214 (1969).

149. GOLDSTEIN, *supra* note 52, at 58-59 ("A substantial body of research as well as the guidelines recently issued tells us why the prosecutor asks the court to dismiss or reduce a charge or to accept a guilty plea. His request may be based on evidentiary grounds or on the desire to facilitate another prosecution by obtaining the defendant's cooperation. He may wish to lighten an overly heavy case load or obtain treatment for a defendant in a noncriminal process. He may be following a policy of non-enforcement of certain crimes or trying to gain some procedural advantage, or he may want to avoid the risk of trial . . . I shall consider how judges might deal with such reasons, case by case, in order to illustrate the rules and distinctions that may be fashioned in building a common law of prosecutorial discretion — whether that discretion is exercised pursuant to guidelines or on an *ad hoc* basis.").

150. See *id.* at 74 ("The most important consequence of judicial review — if it is reinforced by occasional denial of motions to dismiss or rejection of guilty pleas — is that it would make the prosecutor more accountable. He would have to explain and justify his departures from the formal rules, and his explanations would become subject to verification. In some offices, sensible policies, rationally administered, would be exposed to view and the judicial role would be minimal. In other offices, where policies are not consistent, a burden of justification would reduce disparate treatment or require a rational basis for it. And it would minimize the use of bogus rationalizations to mask the real decision rules. Case-by-case articulation of the grounds for decision will bring to the fore competing statutory policies and the need for closer definition of what is best left to the executive branch and what is to be decided by the judiciary.").

151. Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 74 (footnotes omitted).

152. Misner, *supra* note 50, at 722 ("The time has come to accept the fact that the due process approach of ordering prosecutorial discretion has little support, as witnessed by the breadth of discretion permitted to the prosecution by both the judicial and legislative branches of state governments. Consistency and fairness are more likely to result from economic restraints and voter review than any attempt to place judicial controls upon

Mearns argues that “a system of financial rewards could influence the public prosecutor’s charging decisions and control prosecutorial misconduct occurring at trial.”<sup>153</sup>

## 2. TRAINING AND SUPERVISION

Because of skepticism about the capacity of courts to police prosecutorial discretion, good recruitment, training, and supervision are common themes for the internal reform of prosecutorial discretion and the enforcement of discretionary standards. New prosecutors need thorough orientation programs; these should be followed up with adequate re-training.<sup>154</sup> We have already seen that Professor Little recognizes a “duty to seek supervision” and recommends a “system of reporting and supervisory review of investigative steps” and constant re-training.<sup>155</sup> Departmental review committees also provide oversight or review of discretionary decisions, e.g., to seek the death penalty.<sup>156</sup> Defendants should have a right to be heard not only by prosecutors but by prosecutorial supervisors.<sup>157</sup>

“[J]udgment is cultivated through immersion in practice combined with critical reflection on practical experiences.”<sup>158</sup> Prosecutorial judgment is developed within the practice and patterns of prosecutors’ offices. Professor Kaplan explained the interaction of experience and judgment in a 1965 article that

the exercise of prosecutorial discretion. Therefore, in the final section, this Article proposes an outline for tying the exercise of prosecutorial discretion directly to the availability of prison resources.”)

153. Mearns, *supra* note 43, at 852.

154. See generally Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM J. CRIM. LAW 197, 256-60 (1988) (recommending programs of recruitment, training and reinforcement for prosecutors, with orientation and follow-up); Levenson, *supra* note 38, at 568-70 (suggesting that prosecutors’ offices must “hire the right people,” “train the people right,” “establish tolerable inconsistency,” and “remember the goals of federal law enforcement.”).

155. Little, *supra* note 16, at 752-53; but see Vorenberg, *supra* note 23, at 1544-45 (stating that manuals and interoffice memoranda may not address charging and plea bargaining. Limiting discretion of line attorneys may only push discretion upwards.).

156. See generally Horowitz, *supra* note 68 (recommending that committees in each county decide when death penalty should be applied); *id.* at 2572 (recommending that state legislatures remove the capital punishment decision “from the whims and idiosyncrasies of any individual, whether it be the governor or a prosecutor”); Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice’s Role*, 26 FORDHAM URB. L.J. 347 (1999) (assessing DOJ Capital Case Review Committee and offering suggestions for its improvement).

157. See Lynch, *Administrative System*, *supra* note 21, at 2148.

158. David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 32 (1995); see also DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 169 (1988) (“In Brandeis’ view, this unique combination of abstract reasoning ability and empirical keenness, debarred from the ivory tower by the press of circumstances, teaches the lawyer judgment.”); *id.* at 170 (“Taken together, these traits make the lawyer an embodiment of Aristotelian *phronesis*, ‘practical wisdom.’”); *id.* at 171 (“But it is not too farfetched to expect that legal training with its cultivation of practical judgment should enable lawyers to form a better picture of the human consequences of institutional arrangements than can those of us who have no comparable training. This is, the *phronimos* is especially well-suited to the kind of deliberation called for by the Fourfold Root of Sufficient Reasoning.”).

described how certain office practices appropriately influenced prosecutorial discretion in the Northern District of California. Individual judgments were checked and illuminated by good training and by communication among the attorneys in the office:

Although many different assistants made decisions as to whether to prosecute different cases, there tended to be a strong consensus as to which cases should and which should not be prosecuted. This was due to several factors: the assistants shared a common perception of their role; each new assistant had been taught the standards for prosecution by the other, more experienced hands; assistants often discussed their decisions and asked advice of each other; and finally, prosecutorial decisions were constantly being checked by the litigative process.

[The effect of office practices was that] each assistant always had to recognize the possibility that any cases in which he had authorized prosecution might eventually have to be tried by someone else. The very fact that the decision to prosecute might thus be carefully examined by another assistant who would then have the problem of trying the case, was a powerful factor inducing conformity to the general standards. This, of course, it not to say that all assistants were equally venturesome or that they would weigh the different variables in exactly the same way. However, differences in result caused by these and many other personal qualities tended to be lessened by the generally excellent communication among the assistants involved in criminal work and by the fact that disagreements as to whether a case should have been prosecuted were usually aired thoroughly.<sup>159</sup>

More recently, alumni of the Southern District of New York have described the merits of an office that includes good training and supervision and a practice of good judgment.<sup>160</sup>

A similar lesson arises from the experience of disciplinary agencies. Department of Justice Inspector General Michael Bromwich recommends more input from supervisors and more post mortems of prosecutorial mistakes: “there is not enough of an ethic and a culture of learning from one’s mistakes by focusing on them.”<sup>161</sup> Empirical studies suggest that such supervision (and a corresponding ability to correct mistakes) does not occur in all prosecutors’ offices:

[O]ffices in two districts expressly reject the notion of supervisory review, insisting that line attorneys produce better results if they are entrusted with *unfettered discretion* or that the office cannot hire excellent attorneys unless they are granted unfettered control over their cases. We cannot know whether the senior attorneys who gave us these explanations really believed them, but it

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159. John Kaplan, *The Prosecutorial Discretion — A Comment*, 60 NW. U.L. REV. 174, 177-78 (1965).

160. See generally Symposium, *The Changing Role of the Federal Prosecutor: In Memory of William Tandy*, 26 FORDHAM URB. L.J. 737 (1999).

161. *Id.* at 758.

is important to note here that these claims were on their face quite implausible and that the great majority of management level prosecutors reject them. In most offices, the idea of supervisory review is accepted in principle, but only a few of our districts seriously implement it.<sup>162</sup>

The goal of training and supervision is to develop good individual judgment so that prosecutors will make fewer mistakes. It remains difficult to implement good training procedures absent a concept of individual judgment.

### C. JUDGMENT

A discretionary system requires good judgment from individual prosecutors.

Discretion has two components: accuracy and *judgment*. Accuracy is the ability to process information, decide what actually happened, and determine what can be proved in court. For example, if a prosecutor misinterprets a forensic report and charges a person for murder based on that mistake, it is an error in accuracy, not judgment. Judgment is the ability to prosecute the most important cases. In other words, assuming the prosecutor's view of the situation is correct, was the decision either to charge or not to charge the correct one?<sup>163</sup>

Good training and supervision may enhance accuracy, but can they form good judgment? "We have little real notion of what mix of backgrounds, credentials, advancement patterns, skills, and temperaments works well to produce effective prosecutors under the traditional adversarial model, and still less whether the same blend functions as well where the prosecutor increasingly serves a quasi-judicial role."<sup>164</sup> If the discretion of the individual prosecutor plays such an enormous role in our criminal justice system, then we need a "real notion" of good judgment.

Discussions of prosecutorial judgment have frequently invoked moral as well as legal arguments. "Professor Davis named the principal ingredients for proper exercise of prosecutorial discretion as facts, values and influences. Yet, as he recognized, such decisions are generally intuitive."<sup>165</sup> "When it comes right

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162. Schulhofer & Nagel, *supra* note 66, at 1295 (emphasis added); see also Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501 (1992); Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231 (1989).

163. Michael Kades, *Exercising Discretion: A Case Study of Prosecutorial Discretion in the Wisconsin Department of Justice*, 25 AM. J. CRIM. L. 115, 120 (1997) (emphasis added) (footnote omitted).

164. Lynch, *Administrative System*, *supra* note 21, at 2150; see also Symposium, *supra* note 160, at 743 ("It is some internal content in the prosecutor, himself and herself. And that is the hardest topic to talk about, because we do not know how to raise character. We do not know how to train judgment. But we should at least be raising that question explicitly and trying to have that conversation.")

165. Levenson, *supra* note 38, at 568 (footnote omitted).

down to it, of course, there is no institutional substitute for personal integrity.”<sup>166</sup> Facts. Values. Influences. Intuitions. Integrity. Is the prosecutor’s discretion legal judgment, moral judgment, or some combination of the two?

Authors who envision a “virtuous prosecutor” suggest a moral component to the prosecutor’s task. Professor Fisher’s virtuous prosecutor possesses “great discretionary power” that “demands a high level of individual *moral responsibility*.”<sup>167</sup> Fisher was skeptical about the ability of rules and guidelines to solve the problem of discretion.<sup>168</sup> Instead, he thought that prosecutors’ offices should hire individuals who are willing to learn how to do justice. “[I]f competent prosecution demands the integration of personal values and professional skills, then prosecution agencies must encourage prosecutors to *reunite their personal and professional selves*, which many learned to separate as students. The question is how to do this.”<sup>169</sup>

In contrast, Professor Uviller’s virtuous prosecutor does not emphasize his personal morality. Although the prosecutor must learn “[t]o refine the *ethical ingredient* in the use of discretion,”<sup>170</sup> this ethical ingredient is not the personal morality of the prosecutor but the morality of the people he serves.

The prosecutor who senses the outrage of his constituency against the aggressive and unsightly hordes of prostitutes infesting the streets may ethically respond by stricter application of valid laws against prostitution. More questionable, it seems to me, is the same campaign waged by the prosecutor as

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166. UVILLER, *supra* note 36, at 66.

167. Fisher, *supra* note 154, at 255-56 (emphasis added).

168. *See id.* at 255-56 (“Leif Carter, an organizational analyst, has argued that prosecutorial decision making is inherently uncontrollable by pre-ordained rules and guidelines. In his important study of California prosecutors, he demonstrated that prosecutorial work is characterized by such uncertainty — regarding, e.g., the causes of crime and the impact of penalties, the constantly changing ‘facts’ of cases, the diverse and conflicting pressures from the work environment, the unpredictable behavior of judges, witnesses and other actors — that efforts to define and enforce uniform policies are bound to fail. Instead of trying to restrict prosecutors’ autonomy, Carter concludes, agencies should accept individual discretion as a ‘given’ and adapt to it. He recommends that district attorneys should hire subordinates who, regardless of their views of the best approach to crime control, have the interest and ability to do criminal justice research and to share new knowledge with their peers. Prosecutors should be individuals committed to continual learning in an atmosphere of uncertainty, openness, and inquiry; research should be part of their job.”)

Carter’s ‘philosopher-king’ model of prosecution might be impractical, but it points in the right direction. Prosecution agencies should actively foster responsible exercise of inherent discretion by subordinates. Such an approach would differ from the current one. Most prosecutors come to the job directly from law school and stay only a few years. Typically thrown into the ‘pit’ without adequate training or supervision, they become absorbed in mastering the knowledge and techniques of survival. Unprepared technically as they are, they are even less prepared to handle their suddenly acquired power over human lives. Most of these neophytes come fresh from the moral fragmentation and alienation of law school, and many feel ‘cut away from themselves’ even before they arrive. They are eager for someone to tell them ‘how to do it,’ a safer and less painful course than forming and asserting their own judgments, whether on matters of police credibility or — Heaven forbid — ‘justice.’ ”)

169. *Id.* at 256 (emphasis added) (footnotes omitted); *see also* Melilli, *supra* note 43, at 683-84 (arguing that prosecutorial decisions rely on personal standards of integrity and fairness).

170. H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1147 (1973) (emphasis added).

self-appointed custodian of community morality, impelled by personal distaste generated by his own values. I do not suggest that the honorable prosecutor be the slave of his electorate. Indeed, in many matters his duty clearly lies in the defiance of community pressures. But, within the confines of law, I would rather see his discretion guided by an honest effort to discern public needs and community concerns than by personal pique or moralistic impertinence.<sup>171</sup>

Moral language also pervades discussions of the discretionary decision to charge. Professor Levenson argues that prosecutors use a *moral* standard to fill the gaps in the rules.

Thus, charging decisions take place in a gap in the rules — a gap intentionally left so that prosecutors can tailor justice. In order to fill the gap, prosecutors must apply both a practical sense of what is right and a *moral standard*. Practically, prosecutors must consider the likelihood of success if the case is prosecuted and the availability of resources to achieve success. *Morally*, prosecutors must consider whether conviction is “consistent with the public interest,” in conjunction with their personal sense of the defendant’s culpability for the crime, including the prosecutor’s individual assessment of the credibility of witness’ testimony, the accuracy of evidence and the need to punish the defendant for his actions.<sup>172</sup>

Professor Gershman proposed *A Moral Standard for the Prosecutor’s Exercise of the Charging Discretion*.<sup>173</sup> He explained that various legal, political, experiential, and *ethical* considerations inform and guide the charging decision.

Legal considerations include an evaluation of the strength of the case, the credibility of complainants and witnesses, the existence and admissibility of corroborating proof, and the nature and strength of the defense. Political considerations include an assessment of the harm caused by the offense, the availability of investigative and litigation resources, the existence of non-criminal alternatives, and an alertness to relevant social and community concerns. Experiential considerations include the prosecutor’s background, training, experience, intuition, judgment, and common sense. *Ethical considerations* involve a sensitive appreciation that in the context of the above factors, the ends of justice would be served by criminal prosecution, and that neither

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171. *Id.* at 1152-53.

172. Levenson, *supra* note 38, at 558 (emphasis added) (footnotes omitted); *see also id.* at 570 (emphasis added) (“[u]nlike in war, there is room in the prosecutorial role for a prosecutor to turn to his or her own *conscience* in making decisions.”) (emphasis added); Lynch, *supra* note 21, at 2149 (“Whether or not formal rules to increase the fairness of prosecutorial procedures are the answer, a well-run district attorney’s or United States Attorney’s office must do whatever it can — as the best such offices already do — to instill a sense of fairness in the mostly young lawyers who serve on the front lines. Far more important than any rule permitting defense attorneys to be heard is the spirit in which such hearings are conducted. Prosecutors should be trained to approach their determinations of appropriate dispositions in a spirit of fairness and neutrality, as befits a governmental decision deeply adverse to a member of the community.”).

173. Gershman, *supra* note 25.



personal, political, discriminatory, nor retaliatory motives have influenced the charging decision.<sup>174</sup>

Gershman advocated a standard of *moral certainty* before prosecutors proceed to charge.<sup>175</sup>

The moral certainty standard has many competitors. Professor Zacharias's prosecutor charges "only persons she truly considers guilty."<sup>176</sup> Professor Uviller argues that when the issue is "in equipoise," the prosecutor may submit the case to the jury.<sup>177</sup> Professor Freedman rejects the equipoise view for a reasonable doubt standard.<sup>178</sup> Professor Kaplan wrote that the prosecutor must "actually believe" that the accused is guilty, and that it was "morally wrong" to initiate a prosecution unless one was "personally convinced" of guilt.<sup>179</sup>

Our prudent prosecutor errs in favor of disclosure. One virtuous prosecutor integrates personal and professional morality, while another refines the ethical ingredient by considering the morality of the people. They follow conscience beyond a reasonable doubt or to a moral certainty. All of them seek justice. Moral language permeates discussions of prosecutorial discretion.

The proposals and the uncertainty about discretion raise the question: Does one need good moral judgment in order to be a good prosecutor? In Part III, I explore what insights legal ethics provides on that question.

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174. *Id.* at 513 nn.3-6 (emphasis added).

175. *Id.* ("My thesis is that the prosecutor should engage in a moral struggle over charging decisions, and should not mechanically initiate charges. First, the prosecutor should apply all of the legal, political, experiential and ethical factors noted above. After considering these factors, and before making the ultimate decision to charge, the prosecutor should then assure herself that she is morally certain that the defendant is both factually and legally guilty, and that criminal punishment is morally just.

"The standard of moral certainty" requires the prosecutor to engage in a rigorous moral dialogue in the context of factual, political, experiential, and ethical considerations. It also requires the prosecutor to make and give effect to the kinds of bedrock value judgments that underlie our system of justice — that the objective of convicting guilty persons is outweighed by the objective of ensuring that innocent persons are not punished.").

176. Zacharias, *supra* note 131, at 50 (1991) ("At the charging, plea bargaining, and sentencing stages, the heart of the codes' mandate to do justice seems clear: the prosecutor should exercise discretion so as to prosecute only persons she truly considers guilty, and then only in a manner that fits the crime.").

177. Uviller, *The Virtuous Prosecutor*, *supra* note 170, at 1159 ("Thus, when the issue stands in equipoise in his own mind, when he is honestly unable to judge where the truth of the matter lies, I see no flaw in the conduct of the prosecutor who fairly lays the matter before the judge or jury.").

178. See FREEDMAN, *supra* note 43, at 219-220; *id.* at 221 ("In major part because of the unacceptable consequences of Professor Uviller's position, I agree with those prosecutors who will not go forward unless they are satisfied beyond a reasonable doubt that the accused is guilty. Beyond that, I have argued that a prosecutor should be professionally disciplined for proceeding with a prosecution if a fair-minded person could not reasonably conclude, on the facts known to the prosecutor, that the accused is guilty beyond a reasonable doubt."). See also Melilli, *supra* note 43, at 701 ("[T]he conscientious prosecutor, in zealous pursuit of society's interest in justice, does not and should not pursue cases unless personally satisfied beyond a reasonable doubt of the defendants' guilt.").

179. Kaplan, *supra* note 159, at 178 ("It was generally agreed that, regardless of the strength of the case, if the prosecutor did not actually believe in the guilt of the accused, he had no business prosecuting. This was more than a mere question of prosecutorial policy. The great majority, if not all, of the assistants felt that it was morally wrong to prosecute a man unless one was personally convinced of his guilt.").

### III. MORAL JUDGMENT

#### A. SUBSTANTIVE MORAL JUDGMENT

Morality-centered theorists have had an important influence on contemporary legal ethics. The morality-centered theorists examine legal ethics from the perspective of substantive moral theory.<sup>180</sup> They have addressed the relationship of role morality and common morality by asking, e.g., whether a good person can be a good lawyer or whether the adversary system permits conduct that would be prohibited by ordinary or universal morality. Their theme is illustrated in the “moral” of the first eight chapters of David Luban’s *Lawyers and Justice*: “nothing permits a lawyer to discard her *discretion* or relieves her of the necessity of asking whether a client’s project is worthy of a decent person’s service.”<sup>181</sup>

Professor Luban has written that “[t]he practice of plea-bargaining is extremely troubling on both moral and political grounds.”<sup>182</sup> Professor Smith decides the role morality question against prosecutors in this symposium by concluding that it is unlikely that one can be a good person and a good prosecutor. Like other role morality theorists, she bases this conclusion on an exploration of the context of criminal lawyering and the institutional and cultural pressures that corrupt the good intentions of prosecutors.<sup>183</sup>

“We have nowhere else to stand but on our own two feet.”<sup>184</sup> Individuals must make their own judgments about the morality of their roles and the obligations they impose. Based on their moral commitments, they must decide whether to participate in the adversary system. Like all persons, prosecutors are not freed of the obligation to consider the morality of their role. Nor should those who accept the role discard their consciences. When “the law points to a result that violates their deeply held moral beliefs,”<sup>185</sup> they may (or must) choose civil disobedience, with a corresponding penalty.

When individuals confront such decisions — to devote their lives to prosecution or to dissent from what the law requires — their decisions “will only be as sound as their ethical intuitions . . . . When one’s position, income, or friendships can turn on one’s ethical choices, it is hard to trust, and perhaps even

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180. See David Luban, *Reason and Passion in Legal Ethics*, 51 STAN. L. REV. 873, 881(1999) (Tracing history of legal ethics, and pointing out that Luban et al. were identifying a mistake in moral theory in legal ethics; Simon sees a mistake of jurisprudence.)

181. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 174 (1988).

182. *Id.* at 60.

183. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS (Forthcoming Winter 2001).

184. ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* 219 (1999).

185. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 113-14 (1999).

to know, one's intuitions about justice."<sup>186</sup> In such circumstances, substantive moral theories illuminate individual moral choices.

Ethical prosecutors are bound to exercise their discretion in a manner that is consistent with seeking justice.<sup>187</sup> Does this mean that prosecutors who possess a substantive theory of morality are best suited to develop good judgment for discretionary prosecutorial decisions?

No. Despite the claims of many writers that prosecutorial discretion includes moral judgment, there is no evidence that substantive moral judgment improves prosecutorial discretion. Indeed, allowing appeal to the variety of religious and philosophical substantive theories of justice available to prosecutors could undermine prosecutorial uniformity, expanding rather than contracting unfettered prosecutorial discretion. Conflicting substantive theories of morality are not likely to solve the problem of unreviewed and unreviewable prosecutorial discretion.

The same problem confronts those who recommend character as the basis of good legal judgment. In traditional philosophy, persons of character have a habit of good moral judgment. In legal ethics, Dean Kronman has argued that:

[T]he outstanding lawyer . . . is not simply an accomplished technician but a *person of prudence* or practical wisdom as well. It is of course rewarding to become technically proficient in the law. But earlier generations of American lawyers conceived their highest goal to be the attainment of a wisdom that lies beyond technique — a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess. They understood this wisdom to be a trait of character that one acquires by becoming a person of good judgment, and not just an expert in the law.<sup>188</sup>

This ideal assumes a strong link between excellent legal work and character, for it "affirm[s] that a lawyer can achieve a level of real excellence in his work *only* by acquiring certain valued traits of character."<sup>189</sup>

Some individuals possess good character because they have the habit of making good decisions within their substantive moral theories. Some prosecutors possess good judgment because they have the accumulated wisdom that arises from trying numerous criminal defendants. They are good at legal reasoning, adept at distinguishing truth-tellers from liars, and conscientious in requesting advice from their colleagues and superiors. In other words, they may exercise good judgment without demonstrating good character. The relationship between good legal judgment and good substan-

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186. Heidi Li Feldman, *Apparently Substantial, Oddly Hollow: The Enigmatic Practice of Justice*, 97 MICH. L. REV. 1472, 1482 (1999).

187. See Green, *supra* note 130.

188. ANTHONY T. KRONMAN, *FAILING IDEALS OF THE LEGAL PROFESSION* 2 (1993) (emphasis added).

189. *Id.* at 16 (emphasis added).

tive moral judgment is uncertain.<sup>190</sup> About a concrete linkage between them, there are good reasons to remain agnostic.

Perhaps because it is rooted in substantive moral theory, an ideal of character, moreover, remains “vague” about specific practices.<sup>191</sup> Aristotelian or Kantian practical reason may not be practical enough for prosecutors.

Anthony Kronman is wrong to say that “the kind of moral quandary in which ordinary men and women find themselves from time to time, and which demands the exercise of reason, is for judges a routine predicament.” He is confusing moral with normative, and moral reasoning with reasoning. Judges routinely confront issues that cannot be resolved by the application of an algorithm, that require instead the application of practical reason — that ensemble of methods, including gut reaction, that people use to make decisions when the methods of science or logic are unavailable or unavailing. This doesn’t mean that the judge is in a “moral quandary” and has to employ something called “moral reason” to get out. Editing a newspaper requires the constant use of practical reason, but only very occasionally the making of moral judgments.<sup>192</sup>

In this instance, prosecutors are like judges and newspaper editors. Neither substantive moral theory nor moral character may teach the prudent prosecutor the best exercise of her discretion. The Aristotelian ethics of virtue (which includes prudence) attributed “special moral insight to the virtuous agent. . . . Where the law is indeterminate, however, what operates is not insight but discretion. In such cases we make nonmoral choices among permissible acts.”<sup>193</sup>

## B. SUBSTANTIVE LEGAL JUDGMENT

If substantive moral theories should not guide prosecutorial discretion, perhaps the law itself contains moral principles capable of resolving discretionary questions. In legal ethics, Professor Simon has argued that the discretionary ethic

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190. *But see* Luban & Millemann, *supra* note 158, at 31 (“The centerpiece of our discussion is the concept of judgment. It is a commonplace that good judgment is the most valuable thing a lawyer has to offer clients — more valuable than legal learning or skillful analysis of doctrine. . . . We suggest that just as good judgment is the most valuable thing a lawyer has to offer clients, good moral judgment is the heart of legal ethics.”).

191. Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL L. REV. 885, 914 (1996) (“The flaws in Kronman’s use of virtue ethics instruct my effort. His account is too judicially oriented and the virtues he discusses are too vague.”); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* 23 (1998) (“In 400 pages ostensibly devoted to lawyers’ ethics, [the book] does not mention a single instance of lawyering.”); Luban & Millemann, *supra* note 158, at 60 (noting that Kronman’s practical reason is intellectualist, in the Kantian tradition, rather than practice-oriented, following Aristotle.).

192. POSNER, *supra* note 185, at 113; *see also id.* at 114 (opposing judging cases according to “academic moralism,” which is “taking sides on contested moral issues and using normative moral philosophy to resolve the contest.” “You don’t find moral theory deployed in appeals from convictions for rape or murder, even though the criminalizing of rape and murder is based upon a moral principle; and its absence is not missed.”).

193. J. B. SCHNEEWIND, *THE INVENTION OF AUTONOMY* 77 (1998).

of the prosecutor (the “Contextual View”) provides the model for *all* lawyers: lawyers and prosecutors are “to seek justice.”<sup>194</sup> Because it incorporates moral principles, the legal norm of justice provides guidance for discretionary decisions:

Following [Ronald] Dworkin, Simon insists that the substance of any body of law is defined, constituted, and constrained by moral principles of justice. In Anglo-American law at least, and maybe in any mature legal system, it is just not possible to accurately state a legal claim or argument without incorporating the principles of justice that define its limits and animate its core. Non-positivist moral principles such as “no person should profit from his own wrong,” or “manufacturers should not fleece the unsuspecting public through form contracts that strip them of their rights to recourse in the event of negligently caused personal injury,” for example, are not willy-nilly superimposed when a judge feels like it upon a body of otherwise positivistically pure and straightforward and amoral estate or contract laws. Rather, such principles of justice — potentially infinite in number and mind boggling in their complexity — are central to the law itself.<sup>195</sup>

With his emphasis on *legal* justice, Simon “rejects the common tendency to attribute the tensions of legal ethics to a conflict between the demands of legality on the one hand and those of nonlegal, personal or ordinary morality on the other.”<sup>196</sup> “Simon’s is a law-centered theory. . . [in contrast to] alternatives that view legal ethics as ‘applications of ordinary morality’ — what might be called morality-centered theories.”<sup>197</sup>

Contextual legal ethics advises prosecutors to seek justice. Simon insists that contextual or discretionary decisions about justice are not “assertions of personal preference, nor are they applications of ordinary morality. . . . They are legal judgments grounded in the methods and sources of authority of the professional culture. I use ‘justice’ interchangeably with ‘legal merit.’”<sup>198</sup>

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194. SIMON, *supra* note 191, at 10 (1998); *see also* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

195. Robin West, *The Zealous Advocacy of Justice in a Less Than Ideal World*, 51 STAN. L. REV. 973, 977-78 (1999).

196. Simon, *supra* note 194, at 1113-14; *see also* Luban, *supra* note 180, at 873-74 (“According to Simon, conventional conceptions of legal ethics misunderstand the nature of law. They fail to appreciate the resources that law contains, and they overlook the crucial role that lawyers’ discretionary judgments play in mobilizing those resources and bringing them to life . . . he offers a rigorous and far-reaching argument that legal ethics requires lawyers to make contextual, discretionary ethical judgments, rather than taking refuge behind categorical rules of zeal, confidentiality, and moral neutrality toward the client’s ends.”).

197. Luban, *supra* note 180, at 874 ; *see also id.* at 883 (“Where the role theorists favor a ‘law/morals characterization’ of value conflicts, Simon prefers a ‘law/law characterization.’”).

198. *See* SIMON, *supra* note 191, at 138 (“Lawyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice . . . ‘Justice’ here connotes the basic values of the legal system and subsumes many layers of more concrete norms. Decisions about justice are not assertions of personal preferences, nor are they applications of ordinary morality. The latter has the advantage of

Yet as often as Simon reiterates this point, it is difficult to see how his theory can meet this criticism that it allows assertion of personal preferences. Simon does not give substantive content to justice. He acknowledges that different theories of justice will influence the decisions of individual lawyers. "Lawyers are not by nature systematic moral philosophers, but their working theories include intuitions from all these doctrines."<sup>199</sup> Under the Contextual View they will employ these theories, these "intuitions," as a personal preference in order to provide content to the admonition to seek justice. This law-based theory allows continuing re-interpretation of the law in light of moral principles. Luban pinpoints the flaw succinctly when he states that "[t]he law-centered view of legal ethics turns out to be a morality-centered view in disguise."<sup>200</sup> As such, it cannot solve the problem of unreviewed or arbitrary discretion, and cannot ensure uniformity of prosecutorial practices.

The Contextual View is based on the ethics of prosecutors. Simon does not say much, however, about the practice of prosecution. Nor does he devote much attention to the institutional restraints on discretion that are necessary in prosecutors' offices.<sup>201</sup> It is the practices and institutions of prosecution, however, that cultivate good judgment in prosecutorial discretion.

### C. PUBLIC MORAL JUDGMENT

Because of these practices and institutions, a different question of role morality is relevant to our practicing prosecutor. With Luban and Smith, Professor Applbaum holds that we should not encourage "obedient servants" to do whatever their role dictates. Applbaum adds a second important point: we should

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reminding us that we are concerned with the materials of conventional legal analysis; the former has the advantage of reminding us that these materials include many vaguely specified aspirational norms.").

199. *Id.* at 82.

200. Luban, *supra* note 180, at 875; *id.* at 891 ("Apparently, Simon thinks you can find anything you want in the law, as long as some moral principle supports it. Here he departs from Dworkin.").

201. See Robert W. Gordon, *The Radical Conservatism of the Practice of Justice*, 51 STAN. L. REV. 919, 921-22 (1999) (review essay) ("In keeping with his project of internal critique, Simon's focus is primarily ethical rather than institutional, that is, on critique and reform of lawyers' ethical responses to dilemmas that the legal system as it currently operates routinely puts them in, rather than to the systems and structures that create the dilemmas . . . . Any set of legal institutions or processes will be subject to malfunctions that will cause major shortfalls from the ideals of equal and effective justice. His question is: How should a responsible lawyer adapt his practice to such failures?"); Tanina Rostain, *Waking Up From Uneasy Dreams: Professional Context, Discretionary Judgment, and the Practice of Justice*, 51 STAN. L. REV. 955, 956 (1999) (review essay) ("In limiting himself to individual dilemmas, Simon neglects the role that social and organizational factors play in shaping lawyers' judgments."); Deborah L. Rhode, *Symposium Introduction: In Pursuit of Justice*, 51 STAN. L. REV. 867, 872 (1999) ("Although the final chapter of *The Practice of Justice* proposes some promising reforms, Simon gives little attention to how they might be achieved or to the social, economic, and political barriers that stand in the way. A truly contextual analysis, as Tanina Rostain's essay suggests, requires greater attention to these barriers, as well as to the organizational settings and collegial relationships that shape lawyers' practice. Because Simon's analysis is almost entirely jurisprudential rather than structural, we get well-developed aspirations but without an equally well-developed program for institutionalizing them.").

not be governed by “entrepreneurs” who impose their own view of morality on everyone else. “[N]either the obedient servant nor the *catch-me-if-you-can* entrepreneur are proper models of official discretion.”<sup>202</sup>

The entrepreneur comment is important in the context of prosecutors who possess so much discretion. We know that they are hard to catch; their work is unreviewed and unreviewable. Prosecutors are like politicians and other executive officials. A significant part of their role is to represent the people, not their own conceptions of justice and morality. “If the claim is that each executive official should decide whether or not a statute violates moral rights, and that each should refuse to carry out his enforcement functions whenever he makes that judgment, then the claim is wrong . . . . However broad the appropriate range for individual judgment, he is, first and foremost, a representative of society at large and of the legislature, which is society’s formal voice.”<sup>203</sup> Professor Uviller was correct to insist that the virtuous prosecutor pursues the morality of the people he serves — public (not personal) morality. “I do not suggest that the honorable prosecutor be the slave of his electorate. Indeed, in many matters his duty clearly lies in the defiance of community pressures. But, within the confines of law, I would rather see his discretion guided by an honest effort to discern public needs and community concerns than by personal pique or moralistic impertinence.”<sup>204</sup>

Our law is rooted in moral principles. “[S]ome legal principles, notably those of the criminal law, are plainly informed by the moral opinions of the community”<sup>205</sup> and are based on moral concepts. But it is not substantive moral judgment that best illuminates discretion in criminal law. Like police discretion, prosecutorial discretion strikes a balance between collective and individual discretion — within a range of policies.

It is one thing to say that certain matters ought to be left to police discretion; it is another to say that they ought to be left to individual police discretion. As far

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202. APPLBAUM, *supra* note 184, at 12 (emphasis added).

203. KENT GREENWALT, *CONFLICTS OF LAW AND MORALITY* 354-55 (1987).

204. Uviller, *The Virtuous Prosecutor*, *supra* note 170, at 1152-53.

205. POSNER, *supra* note 185, at 114; *see also id.* at 141 n. 95 (“But I do wish to emphasize the difference between basing a judicial decision on a moral consensus and basing it on moral theory viewed as a method of resolving contested moral issues.”); *see also* Lynch, *supra* note 21, at 64 (“Moreover, to the extent that prosecutors are given to understand that the moral authority of the criminal law is one of the limited resources that they are responsible to allocate wisely, the development of moral standards for prosecution, in default of moral standards of criminal law-making, becomes not merely an ethical imperative but a practical part of the prosecutor’s accepted function. Just as a prosecutor (or a police department) may decide that its limited personnel, money, or energy can best be concentrated on particularly harmful or frequent crimes, shifting resources from auto theft to narcotics enforcement to burglary investigations depending on current trends in criminal behavior, so it makes eminent sense to concentrate the moral resources of criminal prosecution by focusing effort on those cases for which the criminal sanction was designed, prosecuting primarily cases in which the public designation of an offender as an outlaw is deserved, and can be made to stick — in the moral judgment of the community as well as in court.”).

as discretion is concerned, there are some things that police (collectively) are probably in the best position to decide. There are other things that ought to be left to the judgment of individual police officers. Striking some sort of balance between these two is one of the most problematic tasks for police policy makers.<sup>206</sup>

For the police, Professor Kleinig recommends that the discretionary labor be divided so that the greatest temptations can be avoided.

Prosecutors may be greatly tempted to become moral entrepreneurs, especially once they realize that their discretion is unreviewed and unreviewable. The prosecutor's "[e]thical considerations involve a sensitive appreciation that . . . the ends of justice would be served by criminal prosecution, and that neither personal, political, discriminatory, nor retaliatory motives have influenced the charging decision."<sup>207</sup> Moral entrepreneurs may mistakenly pursue their own personal, political, discriminatory or retaliatory agenda. Accordingly the first check on the prosecutor is to consult the policies developed by her office. Prosecutorial offices should limit entrepreneurs by developing specific office standards of discretion and mandating training, consultation, supervision and review.

The increased criminalization of conduct by the legislature has expanded the role of discretion in enforcing the law. In such circumstances, many prosecutors' offices already follow implicit or explicit policies. Yet "the fact of the matter is that we just do not know, in any systematic way, what kinds of standards are being used by our administrative adjudicators."<sup>208</sup>

We have seen above the types of reforms that should be made. In each office there is a need for "precise ethical directives, either through formal rules, or, when flexibility is desirable, rebuttable presumptions."<sup>209</sup> "[S]ome reforms

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206. JOHN KLEINIG, *THE ETHICS OF POLICING* 210 (1996).

207. Gershman, *supra* note 25, at 522 (emphasis added).

208. Lynch, *supra* note 21, at 62-63; *see also id.* at 60 ("But because we have limited ourselves, on the whole, to deploring the overbroad criminal law that leads to an excessive reliance on prosecutorial discretion, we have failed to study in any serious way how that discretion is exercised, or to provide prosecutors with guidance to exercise their judgment appropriately. Just as we are relatively blind to the actual operative rules of criminal procedure used to dispose of most of our criminal cases, we are almost completely ignorant of the operative rules of substantive criminal law that are being applied within that system."); *id.* at 62-63 ("In my experience, the substantive moral standards applied by prosecutors in many cases parallel the canons of a more human criminal law than appears in our statutes and appellate decisions. Moral blameworthiness, for example, tends to be important to prosecutors; 'how could he know that the pills were mislabeled?' is an objection prosecutors tend to take seriously, if convinced of the factual predicate. But the fact of the matter is that we just do not know, in any systematic way, what kinds of standards are being used by our administrative adjudicators. Moreover, because the role of the prosecutor in devising such standards is not fully recognized or legitimated, prosecutors themselves may shy away from this understanding of what they are doing, or, worse, may ignore the function altogether, defining themselves simply as adversarial enforcers of the overbroad criminal law handed to them by the legislatures and the courts.").

209. Zacharias, *supra* note 21, at 50.



involving *greater formality of procedure* could enhance the fairness of the process."<sup>210</sup>

Even published discretionary standards are insufficient to restrain moral entrepreneurs. Public moral judgment is developed through training by more experienced prosecutors and through consultation with peers and supervisors. Unfettered discretion is checked in offices where "the assistants shared a common perception of their role; each new assistant had been taught the standards for prosecution by the other, more experienced hands; assistants often discussed their decisions and asked advice of each other; and finally, prosecutorial decisions were constantly being checked by the litigative process."<sup>211</sup> Accordingly, in all matters, prosecutors should test their judgment by consulting fellow prosecutors. In addition, "[i]n any non-routine or high-profile matter, . . . the investigating prosecutor should seek supervisory review and approval of his or her proportionate evaluation before proceeding."<sup>212</sup>

Finally, "[m]eaningful control of discretion is impossible without at least some form of internal administrative review."<sup>213</sup> Offices should conduct regular case reviews on discretionary matters. The consultation, reporting and supervision requirements should be recorded throughout the case file. The records will demonstrate whether consultation and supervision occurred.

For separation of powers reasons, courts will remain reluctant to police prosecutorial misconduct and abuse of prosecutorial discretion. It is often difficult for courts and investigators to determine the mental state of prosecutors, and so misconduct is undiscovered or undeterred. Disciplinary agencies can, however, fill in some of the gaps. Failure to consult with peers or supervisors, or to seek review of discretionary decisions, is more easily identifiable and reviewable than the mental state of prosecutors. The OPR reports, for example, illustrate that it is difficult to define good judgment but easy to determine (and to hold someone responsible) for failure to consult a supervisor or to gain approval from Main Justice.<sup>214</sup>

## CONCLUSION

Criminal law "cannot be applied mechanically but demand[s] the use of *judgment*."<sup>215</sup> For this reason, our criminal justice system permits prosecutors vast discretion, in investigation, charging, plea bargaining and sentencing. "[T]he

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210. Lynch, *Administrative System*, *supra* note 21, at 2147 (emphasis added).

211. Kaplan, *supra* note 159, at 177-78.

212. Little, *supra* note 16, at 752-53.

213. Comment, *supra* note 15, at 965.

214. See Office of Professional Responsibility, Fiscal Year 1997 Report, Fiscal Year 1996 Report, available at <http://www.usdoj.gov/opr/index.html>.

215. DWORKIN, *supra* note 21, at 31 (1978) (emphasis added).

person who shows discretion is one who manifests good, sound, careful, or wise judgment in practical, and particularly interpersonal, affairs.”<sup>216</sup>

Everyone praises good judgment. Discussions of prosecutorial discretion, however, show much confusion about what it is, and what mix of moral and legal reasoning enhances it. In this Article I have argued that substantive moral judgment is not the core of prosecutorial discretion. Prosecutorial discretion requires public moral judgment, a judgment rooted in prosecutorial practice and experience. Prosecutorial discretion is not the same as moral discretion; prosecutors should not be moral entrepreneurs who make discretionary decisions according to their own substantive theories of justice. Their legal role does not permit unfettered moral discretion.

Prosecutorial discretion requires attention to office policies and procedures. Prosecutorial offices should develop specific policies of discretion and mandate training, consultation, supervision and review of discretionary choices. Failure to consult with peers or supervisors, or to seek review of discretionary decisions, provides an identifiable basis for disciplinary sanction, one more enforceable than the post-trial standards of review employed in *Agurs*. Good office policies could explain to prosecutors how and whether to err in favor of disclosure in circumstances similar to the *Agurs* case.

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216. KLEINIG, *supra* note 206, at 82.

