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THE ETHICS AND PROFESSIONALISM OF PROSECUTORS IN DISCRETIONARY DECISIONS

*Ellen S. Podgor**

INTRODUCTION

PROSECUTORIAL discretion is a reality.¹ Its existence has been consistently endorsed by the United States Supreme Court.² Although Congress has recently extended the application of ethical rules to federal prosecutors, these rules do not directly supervise a prosecutor's discretionary decisions.³ Further, discretionary decisions

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Although the opinions expressed in this Article are those of the Author, the Author discloses that she is presently a co-chair of the National Association of Criminal Defense Lawyers' Discovery Reform Committee. See William D. Douglas, *Law Reviews and Full Disclosure*, 40 Wash. L. Rev. 227, 232 (1965).

1. See Wayne R. LaFare et al., 4 Criminal Procedure § 13.2(a), at 10 (2d ed. 1999) ("The notion that the prosecuting attorney is vested with a broad range of discretion in deciding when to prosecute and when not to is firmly entrenched in American law."); see also Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. Crim. L. & Criminology 717, 718 (1996) (discussing increased power in prosecutors' offices); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 Ohio St. L.J. 1325, 1336-46 (1993) (comparing the prosecutorial discretion allowed American prosecutors "with civil law counterparts"); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521, 1523-37 (1981) (discussing the breadth of prosecutorial discretion).

2. See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (explaining that subject only to constitutional restraints, prosecutors retain broad discretion in deciding whom to prosecute); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("[S]o 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.").

3. The recent passage of the McDade Amendment, included as part of the Citizens Protection Act, subjects federal prosecutors to ethics rules. See Citizens Protection Act of 1998, Pub. L. No. 105-277, § 101(b), 1999 U.S.C.C.A.N. (112 Stat.

will seldom reach a level of being "vexatious, frivolous, or in bad faith" to warrant a monetary award under the Hyde Amendment.⁴ The only real voice in the federal system that limits prosecutorial discretion can be found in the guidelines of the Department of Justice ("DOJ"),⁵ internal mechanisms which are legally unenforceable by defense counsel.⁶

Although it is important to discuss whether federal prosecutors should be allowed this amount of discretion, this Article accepts the existence of discretion, and leaves to another day a discussion of the merits,⁷ or lack thereof,⁸ of having this level of power placed within this executive body.⁹ This Article also omits discussion of what, if any,

2681, 2681-118 to -119) (to be codified at 28 U.S.C. § 530B). Prosecutors may also be subject to "ad hoc judicial rules." Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 St. Thomas L. Rev. 69, 75-77 (1995) [hereinafter Green, *Policing Federal Prosecutors*].

4. Hyde Amendment, Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997). The immunity provided to prosecutors precludes most civil remedies against them. See generally Lesley E. Williams, Note, *The Civil Regulation of Prosecutors*, 67 Fordham L. Rev. 3441 (1999) (discussing prosecutors' immunity in section 1983 actions).

5. See U.S. Dep't of Justice, U.S. Attorneys' Manual (1999). See generally Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. Rev. 1 (1971) (discussing the need for DOJ policy statements on the exercise of discretion). Individual federal prosecutors do not have the discretion to bring certain charges absent the review of higher authority within the DOJ. See, e.g., U.S. Dep't of Justice, United States Attorneys' Manual § 9-90.640 ("Prosecution of violations which involve the exportation of property in which a foreign national or foreign country has an interest shall not be undertaken without prior approval of the Criminal Division"); *id.* § 9-2.136 ("No United States Attorney is to initiate a criminal investigation, commence grand jury proceedings, file an information or complaint, or seek the return of an indictment in matters involving overseas terrorism without the express authorization of the Assistant Attorney General of the Criminal Division.").

6. Courts have consistently noted that DOJ guidelines are merely internal guidelines that cannot be enforced at law. See, e.g., *United States v. Blackley*, 167 F.3d 543, 548-49 (D.C. Cir. 1999) (finding guidelines provide no enforceable rights); *United States v. Piervinanzi*, 23 F.3d 670, 682 (2d Cir. 1994) (finding guideline in money laundering case did not provide substantive rights to criminal defendant); *United States v. Busher*, 817 F.2d 1409, 1411 (9th Cir. 1987) (finding guideline in RICO case did not provide substantive or procedural rights to defendant). The DOJ Guidelines contain, in many places, statements reminding that they are merely internal guidelines. See, e.g., U.S. Dep't of Justice, United States Attorneys' Manual § 1-1.100 ("It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal."); *id.* § 9-110.200 ("These guidelines provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.").

7. See generally Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. Rev. 669, 673-76 (discussing the discretion afforded prosecutors).

8. See Vorenberg, *supra* note 1, at 1560-72 (discussing various limits on prosecutorial discretion).

9. Although admittedly I find fault in a structure that allows prosecutors to have the existing breadth of discretion, I have not tackled this question in this Article. See

limits should be placed upon existing prosecutorial discretion.

In examining how best to promote "minister of justice"¹⁰ values in the exercise of discretion, this Article presents a practical suggestion for the status quo. The focus of this Article is on an ameliorative method—education—as a means to providing a more ethical and professional methodology in helping prosecutors navigate the discretionary decision-making process.

This Article looks to four key prosecutorial decisions in the federal system as examples of decisions that permit a wide breadth of discretion, namely: the decision of what evidence to present to the grand jury;¹¹ the charging decision;¹² the decision of when to provide witness statements,¹³ and the decision to offer a defendant the possibility of a reduced sentence under United States Sentencing Guideline 5K1.1.¹⁴ Although these discretionary decisions represent four different stages in the criminal process, they are by no means an exhaustive list of the many decisions made by federal prosecutors.¹⁵

In examining each of these decisions, it is obvious that discretionary decision-making can produce varying results. Although some variance is warranted to promote individual circumstances, decisions that differ without any semblance of reason except for the fact that a different Assistant United States Attorney handled the matter creates distrust in the methodology used in making these decisions. The laziness or aggressiveness of the prosecutor should not be the controlling factor in how these decisions are made.

David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 Fordham Urb. L.J. 509, 530-31 (1999) (discussing how scholars fail to address the question of how prosecutors should exercise discretion).

10. See Model Rules of Professional Conduct Rule 3.8 cmt. 1 (1999) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); see also Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 Vand. L. Rev. 45, 60-65 (1991) (discussing the vagueness of the "do justice" standard).

11. See *infra* Part I.A.

12. See *infra* Part I.B.

13. See *infra* Part I.C.

14. See *infra* Part I.D. Guideline section 5K1.1 permits a prosecutor to file a motion for a sentence reduction when a defendant offers "substantial assistance." See U.S. Sentencing Guidelines Manual § 5K1.1 (1999).

15. Not reflected here are an array of important decisions made by prosecutors, such as which witnesses will be called, whether to offer a plea, and whether to dismiss charges. There are also other sentencing issues accruing from the enactment of the federal sentencing guidelines that allow for prosecutorial discretion. See generally Paul M. Secunda, Note, *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 (1997) (noting as the "sources of prosecutorial discretion under the guidelines:" "the charging decision," "plea negotiation," "relevant conduct," and "substantial assistance motions"). Prosecutorial discretion also plays an integral role in forfeiture. See Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 Fordham Urb. L.J. 553, 564-65 (1999).

Decisions that reflect high moral values and impart a "minister of justice"¹⁶ consideration inspire a heightened respect for our judicial system. This can be difficult to achieve because the very nature of discretionary decisions makes achieving consistency problematic. What appears to be the appropriate resolution may differ among individuals. Prosecutors with the highest of ethical standards and professional motivations may not agree on what is the best result for a particular case.

Accepting that prosecutors, with the highest of motivations, can reach varying results on discretionary decisions does not diminish the fact that the existing system produces a certain inequity. Although not always considered the ideal,¹⁷ uniformity in sentencing is nonetheless promoted in the present federal sentencing structure.¹⁸ More importantly, a widespread lack of uniformity with respect to discretionary decision-making by prosecutors reduces the public's perception that the legal system employs a fair and ethical process.¹⁹ A lack of uniformity is particularly problematic when it occurs through actions of prosecutors, who unlike judges do not have an exclusively neutral role in the criminal justice system. This Article, however, recognizing that a myriad of factors encompassing the decision-making process often warrants differing results for individual cases, does not advocate for a strict uniform structure that would control all decisions.²⁰

The Article focuses on educating those making discretionary decisions.²¹ It suggests that discussion of the discretionary decision-making process be considered both in the law school setting²² and in programs following law school.²³ Consideration needs to be given to how conscious and unconscious bias may affect discretionary decisions. Informed and consistent decisions will engender a better system, one that is more respected by the public.

This discussion of the decision-making process should not be

16. See *supra* note 10 and accompanying text.

17. See generally Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833 (1992) (noting problems with uniformity in federal sentencing guidelines).

18. See U.S. Sentencing Guidelines Manual Introduction at A.3 (1999) ("Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders."). It has been questioned whether this uniformity has in fact been achieved. See generally Michael Higgins, *Sizing Up Sentences*, A.B.A. J., Nov. 1999, at 42 (noting disparities in white-collar sentences issued under the federal sentencing guidelines).

19. See *infra* Part II.

20. Although this author would prefer alternate solutions that would limit prosecutorial discretion, this Article is limited to proposing a solution within the existing structure.

21. See *infra* Part III.

22. See *infra* Part III.A.

23. See *infra* Part III.B.

focused exclusively on ethical mandates. It is equally important to consider issues of professionalism,²⁴ promoting a higher standard than adherence to minimum ethical rules.

It is also important that the rhetoric of leaders within each United States Attorney's office express the importance of ethics and professionalism. The key to changing the culture of an office is to have federal prosecutors consider ethics and professionalism in making all decisions.

I. DISCRETIONARY DECISIONS

A. *The Decision of What Evidence to Present to the Grand Jury*

Prosecutors have enormous discretion in deciding what evidence to present to a federal grand jury. Perhaps the strongest authorization of complete discretion to federal prosecutors is set forth in *United States v. Williams*,²⁵ where the Supreme Court held that there is no requirement for a federal prosecutor to present "substantial exculpatory evidence" to a federal grand jury.²⁶

The DOJ, recognizing the discretion allowed by the *Williams* case, has attempted to limit the Court's holding through an internal guideline. The guideline states that "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person."²⁷ Like all DOJ guidelines, however, this internal policy is not legally enforceable by the accused.²⁸ A defendant is not entitled to a dismissal of his or her case when the prosecutor fails to abide by the department policy.²⁹

24. Although professionalism has been the subject of many definitions, the basic premises of this concept offer definition. See generally Ellen S. Podgor, *Lawyer Professionalism in a Gendered Society*, 47 S.C. L. Rev. 323 (1996) (discussing the various definitions of professionalism).

25. 504 U.S. 36 (1992). See generally Fred A. Bernstein, *Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. Rev. 563 (1994) (discussing the ramifications of the *Williams* case).

26. See *Williams*, 504 U.S. at 45-55. The government is required, however, to release exculpatory evidence to a defendant. See *Brady v. Maryland*, 373 U.S. 83, 86 (1963); Model Rules of Professional Conduct Rule 3.8(d) (1999).

27. U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-11.233 (1999).

28. See *id.* ("While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review."); see also *United States v. Gillespie*, 974 F.2d 796, 801 (7th Cir. 1992) (failing to provide target warnings in contravention of DOJ policy does not mandate the exercise of the court's supervisory powers).

29. See *United States v. Isgro*, 974 F.2d 1091, 1098-99 (9th Cir. 1992); see also Green, *Policing Federal Prosecutors*, *supra* note 3, at 80-83 (discussing the Office of Professional Responsibility's review of the *Isgro* case).

Prosecutors can have differing motivations for presenting exculpatory matter to a federal grand jury. A prosecutor seeking justice would clearly desire to present full information to the charging body. Likewise, a prosecutor seeking convictions may find it beneficial to present all information to a grand jury to avoid risking a later trial that might result in an acquittal. The motivation of a prosecutor in deciding whether to present exculpatory evidence to a grand jury, however, is seldom relevant under law.

What in fact will be presented to a federal grand jury is left for the most part to the individual Assistant United States Attorney handling the grand jury.³⁰ Failure to offer exculpatory evidence to a grand jury presents a dilemma to the defense when a prosecutor requests a waiver of any possible discovery violations in return for a plea agreement. The accused individual risks the possibility of a heightened sentence under the federal sentencing guidelines if he or she decides to pursue full discovery.³¹ In this scenario the accused cannot confirm whether exculpatory evidence exists. More importantly, the accused does not even know if the indictment was issued with full information being provided to the grand jury.

B. *The Charging Decision*

Prosecutors also have an enormous power in the charging decision.³² Although this "discretion is broad, it is not 'unfettered.'"³³ Yet, absent a discriminatory intent and effect,³⁴ there are few avenues available for the accused to review this prosecutorial discretion.³⁵ The

30. Under certain circumstances, however, internal guidelines may restrict whether an Assistant United States Attorney can bring a matter to a grand jury. *See, e.g.,* U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-2.136 ("No United States Attorney is to initiate a criminal investigation, commence grand jury proceedings, file an information or complaint, or seek the return of an indictment in matters involving overseas terrorism without the express authorization of the Assistant Attorney General of the Criminal Division.").

31. *See generally* Erica G. Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 Stan. L. Rev. 567 (1999) (discussing requests for discovery waivers as part of a plea agreement).

32. Prosecutors, now bound by ethical rules, may not prosecute "a charge that the prosecutor knows is not supported by probable cause." Model Rules of Professional Conduct Rule 3.8(a) (1999); *see also* Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. Chi. L. Rev. 246, 256-77 (1980) (providing a quantitative study of prosecutorial discretion in the prosecution and declination of cases); Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. Pa. L. Rev. 1309, 1328-42 (1997) (discussing the rationales of prosecutorial discretion).

33. *Wayte v. United States*, 470 U.S. 598, 608 (1985) (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)); *see id.* (noting that the prosecutorial decision to charge cannot be made on an impermissible standard such as race or religion).

34. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 470-71 (1996) (finding that defendant was not entitled to discovery claim for selective prosecution).

35. *See generally* Anne Bowen Poulin, *Prosecutorial Discretion and Selective*

enormity of this power is seen not only in the decision of what to charge, but also in whether to charge.³⁶

The DOJ's "Principles of Federal Prosecution"³⁷ offer prosecutors general considerations³⁸ for making charging decisions.³⁹ In not providing guidance that is specific to a case, or at least to particular statutes, consistency in the decision-making process is not achieved.⁴⁰ Prosecutorial guidelines require that an Assistant United States Attorney receive departmental approval prior to proceeding with charges on some offenses⁴¹ or defendants.⁴² This is not, however, the case with respect to most criminal charges or defendants. Further, even when guidelines require special approval, there is little remedy for the accused when a prosecutor fails to adhere to these rules.⁴³

The American Bar Association also offers guidance that can assist prosecutors in their charging decisions. The ABA Standards of

Prosecution: Enforcing Protection After United States v. Armstrong, 34 Am. Crim. L. Rev. 1071 (1997) (discussing how best to handle prosecutorial discretion after the *Armstrong* case).

36. Defense counsel is seldom successful in proving a selective prosecution claim. See Ellen S. Podgor & Jeffrey S. Weiner, *Prosecutorial Misconduct: Alive and Well, and Living in Indiana?*, 3 Geo. J. Legal Ethics 657, 659-61 (1990). One criterion that may influence whether a prosecutor pursues criminal conduct is the ability to prove the case in court. Evidence rules can influence this decision. See generally Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 Va. L. Rev. 939 (1997) (discussing limitations on the nature of a prior felony conviction per the *Old Chief* case). Prosecutors can also find that limited resources will guide some of their decision-making. See Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 Fordham L. Rev. 917, 918 (1999).

37. See U.S. Dep't of Justice, U.S. Attorneys' Manual §§ 9-27.001 to .750B (1999).

38. These principles have been designed to assist in structuring the decision-making process of attorneys for the government. For the most part, they have been cast in general terms with a view to providing guidance rather than to mandating results. The intent is to assure regularity without regimentation and to prevent unwarranted disparity without sacrificing necessary flexibility.

39. The Principles of Federal Prosecution recommend charging the "most serious offense that is consistent with the nature of the defendant's conduct." U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-27.310. Applying this standard can result in different interpretations. What is meant by "consistent with the nature of the defendant's conduct?" For example, should a prosecutor charge odometer tampering or mail fraud when an individual is accused of rolling back odometers and the titles are mailed to the state? See *Schmuck v. United States*, 489 U.S. 705, 722 (1989) (involving use of mail fraud as charge where the conduct involved odometer tampering).

40. In defining the terms used in these principles, much is left "to the wisdom of the prosecuting attorney." H. Richard Uviller, *The Tilted Playing Field* 70 (1999) [hereinafter Uviller, *The Tilted Playing Field*] (discussing the benefits that accrue from the process of using general guidelines).

41. See, e.g., U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-110.101 (requiring prior approval from the criminal division for RICO charges); see also *id.* § 9-2.400 (providing a prior approvals chart).

42. See, e.g., *id.* § 9-2.136(5) (requiring prior approval to prosecute crimes against select U.S. officials).

43. See *supra* note 6 and accompanying text.

Criminal Justice provide general considerations for all prosecutors.⁴⁴ These standards, however, do not consider specific issues that may arise in the federal context.⁴⁵

Prosecutorial decisions are given a "presumption of regularity."⁴⁶ Discretionary decisions by prosecutors are seldom subject to review in higher courts.⁴⁷ A district court may not usurp the discretion afforded a prosecutor by eliminating charges unless there exists a proper legal basis for dismissing them.⁴⁸ As stated by Professor H. Richard Uviller, "despite frequent challenge, prosecutors in fact enjoy broad license."⁴⁹ This power is increased with the recent multiplication of federal criminal statutes.⁵⁰

The discretionary decisions of prosecutors can consciously or unconsciously be affected by race bias.⁵¹ Yet allegations of improper use of discretion premised upon racial bias are nearly impossible to prove.⁵² Despite studies tending to show that prosecutors have exhibited bias in some of their charging decisions,⁵³ courts have been

44. See Standards for Criminal Justice Standard 3-3.9, Discretion in the Charging Decision (3d ed. 1993); see also H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 Mich. L. Rev. 1145, 1148-50 (1978) (explaining the purpose of Criminal Justice Standard 3-3.9).

45. The American Law Institute also offers a general guideline for plea discussions and agreements. See Model Code of Pre-Arrest Procedure § 350.3, at 617 (1975) (establishing guidelines for plea discussions and agreements).

46. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chemical Found.*, 272 U.S. 1, 14-15 (1926)); see also *id.* ("In the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.") (quoting *Chemical Found.*, 272 U.S. at 14-15)).

47. See, e.g., *United States v. Tucker*, 78 F.3d 1313, 1317 (8th Cir. 1996) (discussing the "unreviewability" of prosecutorial discretion).

48. See *United States v. Hasting*, 461 U.S. 499, 505 (1983); *United States v. Zabawa*, 39 F.3d 279, 284-85 (10th Cir. 1994).

49. Uviller, *The Tilted Playing Field*, *supra* note 40, at 49.

50. See ABA Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* 2 (1998) ("[O]f all federal crimes enacted since 1865, over forty percent have been created since 1970."); see also Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979, 980 (1995) ("[T]here are now more than 3,000 federal crimes.").

51. See generally Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L. Rev. 13 (1998) (discussing how prosecutorial discretion has had racial implications); 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) (discussing prosecutorial issues in the context of death penalty cases).

52. See Davis, *supra* note 51, at 38-40. A recent addition to the comments to Rule 8.4 of the ABA Model Rules of Professional Conduct include that "[a] lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice." Model Rules of Professional Conduct Rule 8.4 cmt. 2 (1999).

53. See Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 Chi.-Kent L. Rev. 605, 644-65 & nn.119-21 (1998).

reluctant to scrutinize the prosecutorial decision-making process.

The prosecutor's discretionary power is magnified in the white collar crime context, where the characterization of conduct as criminal instead of tortious may be within the prosecutor's realm of decision-making.⁵⁴ Whether a prosecutor should pursue wrongful conduct in an administrative arena or the criminal courts can also be a prosecutorial decision. Internal limits for prosecution used in a particular United States Attorney's Office may be the controlling factor in some of these decisions. Offices might use different threshold levels for proceeding with prosecutions.

The possibility of using generic statutes such as mail fraud⁵⁵ and conspiracy to defraud⁵⁶ increases the variability in the decision-making process.⁵⁷ For example, prosecutors can charge mail fraud for a wide array of fraudulent conduct.⁵⁸ Despite particularized legislation, courts usually permit the use of the generic mail fraud statute when the prosecutor selects this statute as the charge.⁵⁹ The legislative role becomes less consequential when a myriad of different conduct can be placed within this one criminal offense.

The prosecutorial decision to use a felony statute such as mail fraud, when a misdemeanor statute more clearly describes the crime, provides the opportunity for a prosecutor to use his or her power to increase the possible sentence.⁶⁰ Prosecutors may also have an impact on the sentencing decision by adding charges such as RICO⁶¹ or

54. See generally John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 Yale L.J. 875 (1992) (discussing the difficulty of distinguishing between that which is civil and that which is criminal); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L.J. 1795 (1992) (comparing punitive civil sanctions with criminal sanctions). Prosecutors may also have the discretion to choose whether to file civil or criminal contempt charges. See, e.g., *United States v. Doe*, 125 F.3d 1249, 1255-56 (9th Cir. 1997) (emphasizing the broad discretion afforded prosecutors).

55. See 18 U.S.C. § 1341 (1994).

56. See *id.* § 371. See generally Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405 (1959) (exploring the dynamics of conspiracy).

57. See generally Ellen S. Podgor, *Criminal Fraud*, 48 Am. U. L. Rev. 729 (1999) (discussing differences in generic and specific fraud statutes).

58. See generally Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. Rev. 435 (1995) (addressing interpretive issues considered by courts in determining scope of federal jurisdiction over fraudulent schemes); Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. Rev. 223, 225 (1992) [hereinafter Podgor, *Mail Fraud*] (highlighting "confusion and ambiguity" resulting from case law and statutory modifications of mail fraud statute).

59. See, e.g., *United States v. Simon*, 510 F. Supp. 232, 236-37 (E.D. Pa. 1981) (permitting use of mail fraud charge despite the existence of specific Medicaid fraud statute).

60. In *Schmuck v. United States*, 489 U.S. 705 (1989), the prosecutor sought a felony charge of mail fraud for rolled-back odometers, despite the existence at that time of a misdemeanor offense of odometer tampering. See *id.* at 707-22.

61. See 18 U.S.C. §§ 1961-1968. Mail fraud is a commonly used predicate to a

money laundering⁶² to a mail fraud charge.⁶³ Adding these charges, or threatening to add these charges,⁶⁴ can stimulate an early plea agreement. These prosecutorial decisions are permitted under law,⁶⁵ yet clearly they place enormous power in the hands of individual Assistant United States Attorneys.

C. *The Decision of When to Provide Witness Statements*

Witness statements can be valuable in representing the accused. Although it appears that the law provides a uniform standard for release of witness statements to the defense, federal prosecutors in fact have enormous discretion in deciding when to turn this material over to the defense.⁶⁶ Often such statements are not provided until the eve of the trial, and technically need not be provided until after the trial begins.

In *Jencks v. United States*,⁶⁷ the Supreme Court provided that a defendant in a criminal case is entitled, for impeachment purposes, to the statements of government witnesses.⁶⁸ Although the Court did not specify when these statements must be made available to the defense, 18 U.S.C. § 3500, commonly referred to as the Jencks Act, clarified this issue. Under the Jencks Act, a statement must be provided no

RICO charge. The existence of two or more predicate acts within a specified time often permits the addition of RICO as a separate charge. See Podgor, *Mail Fraud*, *supra* note 58, at 263-64. RICO charges do require approval from the Criminal Division. See U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-110.101.

62. See 18 U.S.C. §§ 1956-1957; see also *United States v. Powers*, 168 F.3d 741, 753 (5th Cir. 1999) ("group[ing]" money laundering with mail and wire fraud charges resulting in a lengthened sentence).

63. The classic mail fraud offense starts with an offense level of six under the federal sentencing guidelines. See U.S. Sentencing Guidelines Manual § 2F1.1(a) (1999). If a charge under the Racketeer Influenced and Corrupt Organization Act ("RICO") is added then the guideline level becomes a base offense level of nineteen. See *id.* § 2E1.1(a)(1). Money laundering would use a base offense level of either twenty or twenty-three, depending on what provision the accused is charged under. See *id.* § 2S1.1(a).

64. See, e.g., Higgins, *supra* note 18, at 44 ("Money laundering is also a frequent tool in pre-indictment bargaining. Prosecutors may tell the target of an investigation that if he agrees to plead guilty, the prosecutors will limit the indictment to mail fraud . . ." (quoting David Rothman, criminal defense lawyer in Miami and then president-elect of the Florida Association of Criminal Defense Lawyers)).

65. See *United States v. Cespedes*, 151 F.3d 1329, 1332 (11th Cir. 1998) ("The Supreme Court has unambiguously upheld the prosecutor's ability to influence the sentence through the charging decision.").

66. The timing of the release of the *Jencks* material is but one of the *Jencks* issues that has proved controversial. There is continual discussion regarding issues such as what constitutes a statement, whether it includes FBI reports, and whether the statement is "substantially verbatim." Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 Ga. St. L. Rev. 651, 661-63 (1999) [hereinafter Podgor, *Criminal Discovery*].

67. 353 U.S. 657 (1957).

68. See *id.* at 672. See generally Podgor, *Criminal Discovery*, *supra* note 66 (discussing the role of prosecutorial discretion in the release of *Jencks* material).

later than after the "witness has testified on direct examination in the trial of the case."⁶⁹ Rule 26.2 of the Federal Rules of Criminal Procedure, in addition to making this provision reciprocal, reiterates that witnesses' statements are to be provided no later than after a witness testifies.⁷⁰ Rule 26.2 also extends the release of witness statements to include certain hearings.⁷¹

Although the statute and rule provide a standard that serves as the last possible time limit for providing witness statements (*Jencks* material) to the defense,⁷² in reality there is significant disparity⁷³ in

69. 18 U.S.C. § 3500(a) (1994). Section 3500 reads:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered to the defendant for his examination and use.

Id. § 3500.

70. *See* Fed. R. Crim. Proc. 26.2(a). The rule states:

After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the government or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

Id.

71. *See id.* Rule 26.2(g). The rule states:

This rule applies at a suppression hearing conducted under Rule 12, at trial under this rule, and to the extent specified:

- (1) in Rule 32(c)(2) at sentencing;
- (2) in Rule 32.1(c) at a hearing to revoke or modify probation or supervised release;
- (3) in Rule 46(i) at a detention hearing;
- (4) in Rule 8 of the Rule Governing Proceedings under 28 U.S.C. § 2255; and
- (5) in Rule 5.1 at a preliminary examination.

Id.

72. Although federal prosecutors are required to submit exculpatory material to the defense, it remains unclear whether the holding of *Brady v. Maryland*, 373 U.S. 83 (1963), trumps the time limits offered in the *Jencks* Act. *See* United States v. Snell, 899 F. Supp. 17, 21 (D. Mass. 1995) (finding it "inconceivable that a statutory obligation should supersede a constitutional one"). *But see* United States v. Scott, 524 F.2d 465, 467-68 (5th Cir. 1975) ("*Brady* is not a pretrial remedy and was not intended to override the mandate of the *Jencks* Act."); *see also* Podgor, *Criminal Discovery*, *supra* note 66, at 673-78 (discussing the interplay between *Brady* and *Jencks*).

73. The *Jencks* Act time limits have been termed "utterly impractical," thus accounting for its being "routinely ignored." United States v. Owens, 933 F. Supp. 76, 78 (D. Mass. 1996). For a full discussion as to problems with the time restrictions outlined in the *Jencks* Act, *see* Podgor, *Criminal Discovery*, *supra* note 66, at 692-700.

when defense counsel actually receives these statements.⁷⁴ For example, some federal prosecutors routinely provide witness statements "ten days before trial."⁷⁵ Other Assistant United States Attorneys use "Friday before trial" as the standard for the release of these statements.⁷⁶ Other federal prosecutors, however, refuse to release these statements until after the witness has testified.⁷⁷

Absent office policy, individual prosecutors are left to decide when *Jencks* material will be provided to defense counsel.⁷⁸ Some defense attorneys are fortunate to practice in jurisdictions that have "open-file" discovery practices and thus receive the material early in the case. Other criminal defense attorneys are forced to prepare their cases under severe time constraints because they must wait until after the witness has testified on direct examination to receive these statements.⁷⁹ Although courts often "encourage" early release of *Jencks* material, reported appellate decisions reflect that they are seldom successful in mandating the release of these statements prior to the witness's testifying.⁸⁰

Prosecutors clearly need to protect the safety of their witnesses.⁸¹ A later release of *Jencks* material, however, is often not a reflection of this meritorious goal. Criminal defense attorneys claim that federal prosecutors can be influenced by factors such as whether the

74. See generally Podgor, *Criminal Discovery*, *supra* note 66, at 678-92 (discussing a study of the varying times at which defense practitioners receive *Jencks* material).

75. See *id.* at 682.

76. See *id.*

77. See *id.*

78. See *id.* at 681-82. Seventy-nine percent of the attorneys responding to the survey conducted by this Author in the aforementioned article stated that they believed "the timing for receipt of *Jencks* material varied by Assistant United States Attorney." *Id.* at 686. This same survey also found that "approximately sixty percent of [criminal defense] attorneys believed that there was no set policy in their jurisdiction" as to when *Jencks* material is given to defense counsel. *Id.* at 688.

79. See *id.* at 692-701 (discussing the rationale for modifying the present time constraints in receiving *Jencks* material).

80. See, e.g., *United States v. Algie*, 667 F.2d 569, 571 (6th Cir. 1982) (court cannot require prosecutors to produce *Jencks* material in advance of the mandates in the statute); *United States v. Spagnuolo*, 515 F.2d 818, 821 (9th Cir. 1975) (court cannot compel early disclosure of *Jencks* material); *United States v. Mariani*, 7 F. Supp. 2d 556, 564 (M.D. Pa. 1998) ("[C]ourt cannot require early production of *Jencks* material."). Courts have been able to achieve early disclosure for the defense by finding prosecution agreements to discovery time limits binding. See, e.g., *United States v. Hubbard*, 474 F. Supp. 64, 86 (D.D.C. 1979) (finding that the government is required to turn over *Jencks* material before trial because it had previously agreed to turn this material over early). Courts have also used "case management" as a basis for requiring the early disclosure of *Jencks* material. See, e.g., *United States v. Snell*, 899 F. Supp. 17, 24 (D. Mass. 1995) (showing the court's use of "case management basis" to order early disclosure of witness statements).

81. See *United States v. Presser*, 844 F.2d 1275, 1285 (6th Cir. 1988) (noting the need to protect "potential government witnesses from threats of harm or other intimidation").

prosecutor is anxious to obtain a plea agreement from the defendant.⁸² When a statement is provided to defense counsel only after the witness has testified at trial, the prosecution is provided with a trial advantage.⁸³ In contrast, defense counsel is deprived of the opportunity to coordinate a consistent trial strategy when he or she receives witness statements only after the witness has testified.⁸⁴

There are obviously many alternatives that could reduce prosecutorial discretion with regard to when *Jencks* material is received by defense counsel.⁸⁵ A modification of 18 U.S.C. § 3500 and Rule 26.2, coupled with legislative action that places the burden on the federal prosecutor to demonstrate why a witness statement should not be immediately released, could replace existing prosecutorial discretion with judicial oversight.⁸⁶ Absent modification of the existing statute and rule, however, prosecutors will continue to exercise their discretion in deciding when witness statements will be released to defense counsel.

D. *The Decision to Offer a Defendant the Possibility of Sentencing Under 5K1.1*

Prosecutors have the exclusive authority to offer a defendant the possibility of a sentence reduction pursuant to section 5K1.1 of the federal sentencing guidelines.⁸⁷ Prosecutors file such a motion in cases

82. See Podgor, *Criminal Discovery*, *supra* note 66, at 687.

83. See *id.* at 697. There has been criticism of the disadvantage in which defense attorneys are placed in the discovery process. See, e.g., Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149 *passim* (1960) (discussing disadvantages faced by the defense in criminal procedure).

84. See Podgor, *Criminal Discovery*, *supra* note 66, at 697; see also *United States v. Johnston*, 127 F.3d 380, 390 (5th Cir. 1997) (“[D]elayed disclosures diverted defense counsels’ attention ‘from the tasks of defending to the task of preparing.’”).

85. Congress could require all witness statements to be immediately submitted to defense counsel. Considering the current crime control posture of the legislature, this possibility is highly unlikely.

86. See Podgor, *Criminal Discovery*, *supra* note 66, at 701-05.

87. See U.S. Sentencing Guidelines Manual § 5K1.1 (1999). The guideline reads:

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

- (1) the court’s evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant’s assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant’s assistance.

Id. There has been criticism of the 5K1.1 motion calling for elimination of the

where a defendant offers "substantial assistance in the investigation or prosecution of another person who has committed an offense."⁸⁸ Unlike many of the other sentence reductions under the federal sentencing guidelines, this reduction allows for a defendant to be sentenced outside the guidelines. Although a court determines the appropriate reduction,⁸⁹ the sole authority for initiating this discussion rests with the prosecutor.⁹⁰

The use of a section 5K1.1 motion by federal prosecutors has received criticism in part because differing results can be reached depending on the individual prosecutor or particular United States Attorneys' Office.⁹¹ Professor Cynthia Lee notes that

government motion requirement. See generally Cynthia K.Y. Lee, *The Sentencing Court's Discretion to Depart Downward in Recognition of a Defendant's Substantial Assistance: A Proposal to Eliminate the Government Motion Requirement*, 23 Ind. L. Rev. 681 (1990) (discussing the benefits of eliminating the requirement that the government move for sentence reduction pursuant to section 5K1.1); Philip T. Masterson, Comment, *Eliminating the Government Motion Requirement of Section 5K1.1 of the Federal Sentencing Guidelines—A Substantial Response to Substantial Assistance*: United States v. Gutierrez, 24 Creighton L. Rev. 929 (1991) (arguing for elimination of the government motion requirement for a sentence reduction pursuant to 5K1.1). At one point, the sentencing commission circulated a proposal that would remove the government motion requirement for a section 5K1.1 reduction. See John S. Austin, Note, *Prosecutorial Discretion and Substantial Assistance: The Power and Authority of Judicial Review*—United States v. Wade, 15 Cambell L. Rev. 263, 292 n.195 (1993).

88. U.S. Sentencing Guidelines Manual § 5K1.1.

89. See *supra* note 87 for the factors to be considered in assessing the sentence of the defendant. Courts also have the discretion to deny a 5K1.1 motion filed by the prosecution. See, e.g., United States v. Organek, 65 F.3d 60, 63 (6th Cir. 1995) (noting courts' discretion to grant or deny substantial assistance motion); United States v. Franks, 46 F.3d 402, 406 (5th Cir. 1995) (refusing to grant a 5K1.1 motion based upon defendant's conduct).

90. See Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 Yale L.J. 1681, 1696-98 (1992) (discussing limitation in a judge's sentencing discretion). A sentencing departure for the defendant differs from an "acceptance of responsibility" reduction, in that it is "directed to the investigation and prosecution of criminal activities by persons other than the defendant." U.S. Sentencing Guidelines Manual § 5K1.1 commentary at 2. In contrast, an acceptance of responsibility reduction, which can be initiated by a judge, is provided when there is a showing of the "defendant's affirmative recognition of responsibility for his [or her] own conduct." *Id.*

91. The section 5K1.1 motion has also been criticized for not considering situations where a defendant has no information to offer. This can occur where the defendant is a sole actor involved in criminality or when all individuals participating in the criminality have previously obtained their plea agreement and the defendant's information offers nothing new to the investigation. See Avern Cohn, *The Unfairness of 'Substantial Assistance'*, 78 Judicature 186, 186 (1995) (discussing many of the reasons that a defendant may not be able to offer substantial assistance, including that "[t]he defendant may honestly believe he or she is not guilty and will be acquitted"). Professor Cynthia K.Y. Lee also notes that "[a]llowing a downward departure for defendants who cooperate also raises questions about the wisdom of rewarding culpable offenders who 'snitch' on others." Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 Rutgers L. Rev. 199, 209 (1997) [hereinafter Lee, *From*

"[d]isparity . . . may result even under well-intentioned internal guidelines when they are not applied uniformly."⁹²

Courts have not provided relief for the disparity accruing from this discretionary decision-making process. In *Wade v. United States*,⁹³ the Supreme Court held that absent an impermissible basis for not filing a section 5K1.1 motion, such as race or religion, a court does not have the authority to depart.⁹⁴ The Court further solidified prosecutorial power in *Melendez v. United States*⁹⁵ by holding that a government motion pursuant to 5K1.1 does not authorize a court to depart below the statutory minimum unless the government specifically requests this departure.⁹⁶ Courts routinely reject defense arguments that the government's refusal to file a section 5K1.1 motion was improper.⁹⁷

There have been calls for modifications that would reduce prosecutorial discretion, including suggestions that would deny the prosecutor the sole voice in initiating the substantial assistance motion.⁹⁸ Recently, Professor Cynthia Lee discussed the implementation of nationwide guidelines that would offer prosecutorial guidance in making these discretionary decisions.⁹⁹ It has also been argued that an ethics rule is needed to provide a system that will limit prosecutorial discretion that has expanded as a result of the federal sentencing guidelines.¹⁰⁰

II. UNMONITORED DISCRETION

The four examples provided in Part I demonstrate the breadth of power placed with prosecutors. The discretion allowed prosecutors is not limited to the initial phases of a prosecution. Rather, prosecutorial discretion can occur throughout a defendant's case.

Gatekeeper to Concierge]. There has also been criticism regarding how prosecutors assess the individuals being offered cooperation agreements. *See generally* Yaroshefsky, *supra* note 36 (discussing cooperation and the reliability of cooperator testimony).

92. Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. Rev. 105, 122 (1994).

93. 504 U.S. 181 (1992).

94. *See id.* at 186.

95. 518 U.S. 120 (1996).

96. *See id.* at 128-29.

97. *See generally* Lee, *From Gatekeeper to Concierge*, *supra* note 91 (arguing for guidelines on the granting of substantial assistance). There are, however, several courts that have allowed the court some review of the substantial assistance motion. *See, e.g.*, *United States v. Khoury*, 62 F.3d 1138, 1141 (9th Cir. 1995) (holding that the court could consider substantial assistance despite withdrawal of motion by prosecutors); *United States v. Paramo*, 998 F.2d 1212, 1219 (3d Cir. 1993) (stating that the defendant should be given the opportunity to show that the government's reasons for not filing a section 5K1.1 motion are due to prosecutorial vindictiveness).

98. *See supra* note 87.

99. *See Lee, From Gatekeeper to Concierge*, *supra* note 91, at 245-51.

100. *See Secunda, supra* note 15, at 1286-91 (proposing that the Model Rules of Professional Conduct be used to curb prosecutorial discretion).

Prosecutorial discretion can be active despite the existence of statutory authority, as in the Jencks Act. It also is exhibited when applying the federal sentencing guidelines, despite the fact that the guidelines were enacted to promote uniformity and reduce discretion.

This discretionary power held by federal prosecutors is for the most part unmonitored.¹⁰¹ Their discretionary decisions seldom reach a level subject to the ethical standards now mandated by the McDade Amendment.¹⁰² Further, even the internal mechanisms within the DOJ do not sufficiently address the discretionary decision-making process. Although the National District Attorneys' Association,¹⁰³ the American Bar Association,¹⁰⁴ the American Law Institute,¹⁰⁵ and the Justice Department's United States Attorneys' Manual¹⁰⁶ provide policy statements that can guide prosecutors in some discretionary decisions, for the most part prosecutors receive limited education on the processes to be used in discretionary decisions.¹⁰⁷ Professor

101. See Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* 224 (1969) ("The enormous and much abused power of prosecutors not to prosecute is almost completely uncontrolled . . ."); Frase, *supra* note 32, at 303 ("This study reveals that the prosecutorial discretion of the U.S. Attorney is vast and unchecked by any formal, external constraints or regulatory mechanisms."). Recently, the DOJ requested that each U.S. Attorney's office appoint an ethics officer ("Professional Responsibility Officer"). See Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 Fordham L. Rev. 723, 763-69 (1999) [hereinafter Little, *Proportionality as an Ethical Precept*]; Professional Responsibility Advisory Office, U.S. Dep't of Justice, *Experienced Attorneys GS-13 to GS-15*, para. 2 (visited Jan. 23, 2000) <<http://www.usdoj.gov/careers/oapm/jobs/praofinalannouncement.htm>>.

102. See 28 U.S.C.A. § 530B(a) (West Supp. 1999); *supra* note 3. Unlike the judiciary, prosecutors are not held to an appearance-of-impropriety standard in reviewing their decisions. See Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 Mo. L. Rev. 699, 722-25 (1998).

103. See National District Attorneys Association, *Screening of Criminal Cases* 8 (1973), cited in David C. James, *The Prosecutor's Discretionary Screening and Charging Authority*, Prosecutor, Mar.-Apr. 1995, at 22, 29 (1995).

104. See Standards for Criminal Justice Standard 3-2.5 (3d ed. 1993). Standard 3-2.5 provides for a prosecutor's office to establish "a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures of the office." *Id.* This standard notes that "[t]he objectives of these policies as to discretion and procedures should be to achieve a fair, efficient, and effective enforcement of the criminal law." *Id.* Even if United States Attorneys' Offices were to have policies that addressed all discretionary decisions, it would be necessary to have a coordinated effort with other offices to achieve nationwide uniformity.

105. See, e.g., Model Code of Pre-Arrest Procedure § 350.3 (1975) (discussing guidelines for plea discussions and agreements).

106. See, e.g., U.S. Dep't of Justice, U.S. Attorneys' Manual § 9-27.400 (1999) (providing guidelines for entering into plea agreements); *id.* § 9-2.136 (providing guidelines for investigative and prosecutorial policy for international terrorism matters).

107. See James, *supra* note 103, at 22 ("[P]rosecutorial discretion is not the focus of much training within prosecution offices."). But see Little, *Proportionality as an Ethical Precept*, *supra* note 101, at 768-69 (discussing the relatively new ethics program in the DOJ); see also *infra* notes 131-33 and accompanying text (discussing

Bennett L. Greshman has vocalized the “[a]bsence of [m]eaningful [s]tandards to [g]uide [p]rosecutorial [d]iscretion.”¹⁰⁸

The Office of Professional Responsibility (“OPR”) is designated as the internal monitor of ethical violations committed by federal prosecutors.¹⁰⁹ In this role OPR focuses on professional misconduct.¹¹⁰ Although the OPR examines alleged abuses of prosecutorial authority, the conduct scrutinized usually relates to misconduct as opposed to the considerations that might be prevalent in the discretionary decision-making process.

In past years, the OPR has been criticized for failing to hold prosecutors “publicly accountable for misdeeds.”¹¹¹ In 1993, a new policy was implemented to include OPR reporting of certain investigations.¹¹² Of the “121 attorney matters closed during the fiscal year” 1997, “OPR found that [DOJ] attorneys engaged in professional misconduct in 20, or about 16.5%.”¹¹³

OPR typically investigates the role of the prosecutor in cases involving allegations such as “[a]buse of prosecutorial or investigative authority,”¹¹⁴ “[m]isrepresentation to the court or opposing

the functions of the recently created Professional Responsibility Office within the DOJ).

108. Bennett L. Gershman, *The New Prosecutors*, 53 U. Pitt. L. Rev. 393, 435-43 (1992).

109. See Office of Prof'l Responsibility, U.S. Dep't of Justice, *OPR's Annual Report for the Fiscal Year 1997*, Introduction (last modified Apr. 14, 1999) <<http://www.usdoj.gov/opr/97annual.htm>> (“In an order dated December 9, 1975, the Attorney General created the OPR for the purpose of ensuring that “[d]epartmental employees continue to perform their duties in accord with the professional standards expected of the Nation’s principal law enforcement agency.”); see also Green, *Policing Federal Prosecutors*, *supra* note 3, at 84-87 (discussing the DOJ’s OPR).

110. See Office of Prof'l Responsibility, U.S. Dep't of Justice, *OPR's Annual Report for the Fiscal Year 1997* (last modified Apr. 14, 1999) <<http://www.usdoj.gov/opr/97annual.htm>> (“The jurisdiction of the Office of Professional Responsibility (OPR) extends to the investigation of allegations of professional misconduct by Department of Justice attorneys that relate to the exercise of their authority to investigate, litigate, or provide legal advice.”); see also U.S. Dep't of Justice, U.S. Attorneys' Manual § 1-2.114 (“The Department’s Office of Professional Responsibility which reports directly to the Attorney General, is responsible for overseeing investigations of allegations of criminal and ethical misconduct by the Department’s attorneys and criminal investigators.”).

111. Jim McGee, *Prosecutor Oversight Is Often Hidden from Sight*, Wash. Post, Jan. 15, 1993, at A1 (“Critics say OPR and the Justice Department not only have failed to set clear standards for prosecutors and investigators, but have failed to hold them publicly accountable for misdeeds when it is determined they have occurred.”); see *OPR Only Part of the Problem, Experts Say*, DOJ Alert, Jan. 3-17, 1994, at 3-4 (“The February 1992 [General Accounting Office] study concluded that OPR was understaffed, highly informal in its operation and disorganized in its investigations.”).

112. See Office of Prof'l Responsibility, U.S. Dep't of Justice, *OPR's Annual Report for the Fiscal Year 1997* (last modified Apr. 14, 1999) <<http://www.usdoj.gov/opr/97annual.htm>>.

113. *Id.* These numbers reflect an increase in the number findings of professional misconduct on the part of DOJ attorneys. See *id.*

114. *Id.* at tbl. 2. In 1997, this subject matter provided 32% of the complaints

counsel,”¹¹⁵ “[u]nauthorized release of information (including grand jury information),”¹¹⁶ “[i]mproper oral or written remarks to the court or grand jury,”¹¹⁷ and “[c]onflicts of interest.”¹¹⁸ For example, the 1997 OPR Report includes an investigation resulting from the government’s dismissal of a case where a “U.S. Magistrate Judge found over twenty separate *Brady*, *Giglio*, and Jencks Act violations relating to the government’s failure to disclose information about its witnesses in a drug prosecution.”¹¹⁹ The OPR found that “the discovery violations were not intentional or designed to deprive the defendant of a fair trial, but rather stemmed from mistakes and carelessness.”¹²⁰ The OPR’s investigation concluded that the DOJ attorney engaged in “professional misconduct,” and the “DOJ attorney received a written reprimand.”¹²¹

Instances of the OPR’s examining possible discretionary decisions are seen only from the perspective of whether misconduct has occurred. For example, the 1997 OPR Report refers to a complaint relating to a “substantial assistance” motion. According to this 1997 report, a “U.S. District Court found that a DOJ attorney acted in bad faith by refusing to file a substantial assistance motion on behalf of a defendant who had entered into a plea agreement with the government.”¹²² The OPR found that the attorney had not engaged in misconduct because there were “valid reasons for not filing a

received by the OPR. *See id.* In 1996, this subject matter also provided the highest number of complaints, although it reflected 28% of the total number of complaints received by the OPR. *See* Office of Prof’l Responsibility, U.S. Dep’t of Justice, *OPR Annual Reports: 1996*, tbl. 2 (last modified Jan. 30, 1998) <<http://www.usdoj.gov/opr/96annual.htm>>.

115. Office of Prof’l Responsibility, U.S. Dep’t of Justice, *OPR’s Annual Report for Fiscal Year 1997*, tbl. 2 (last modified Apr. 14, 1999) <<http://www.usdoj.gov/opr/97annual.htm>>. In 1997, this subject matter provided 16% of the complaints received by the OPR. *See id.*

116. *Id.* In 1997, this subject matter provided 10% of the complaints received by the OPR. *See id.*

117. *Id.* In 1997, this subject matter provided 10% of the complaints received by the OPR. *See id.*

118. *Id.* In 1997, this subject matter provided 9% of the complaints received by the OPR. *See id.* The variety of conduct scrutinized by the OPR is seen by examining the numerous examples provided in each of the OPR reports. For example, in 1994 one finds as examples instances such as alleged improper use of frequent flyer miles and FTS lines for personal calls. *See* Office of Prof’l Responsibility, U.S. Dep’t of Justice, *OPR Annual Reports: 1994* (last modified Jan. 30, 1998) <<http://www.usdoj.gov/opr/94annual.htm>>; *see also* Office of Prof’l Responsibility, U.S. Dep’t of Justice, *OPR Annual Reports: 1995* (last modified Jan. 30, 1998) <<http://www.usdoj.gov/opr/95annual.htm>> (listing such examples as “[t]hreatening [c]riminal [p]rosecution to [c]oerce [s]ettlement of a [c]ivil [c]ase”).

119. Office of Prof’l Responsibility, U.S. Dep’t of Justice, *OPR’s Annual Report for Fiscal Year 1997* (last modified Apr. 14, 1999) <<http://www.usdoj.gov/opr/97annual.htm>>.

120. *Id.*

121. *Id.*

122. *Id.*

substantial assistance motion.”¹²³ Although a discretionary decision by a prosecutor was being examined in this case, the OPR investigation focused on whether misconduct occurred and whether the DOJ attorney had failed to honor a plea agreement.

The 1996 OPR Report also includes an investigation concerning two DOJ attorneys who failed to “renew a substantial assistance motion after the defendant withdrew his guilty plea and proceeded to trial.”¹²⁴ This investigation also resulted from a court’s criticism of the conduct of the DOJ attorneys. Disagreeing “with the court’s finding that the DOJ attorneys’ real motive in refusing to renew the substantial assistance motion was to retaliate against the defendant for exercising his right to a jury trial,” the OPR found that the attorneys had not engaged in misconduct.¹²⁵

In rare instances, courts have taken it upon themselves to reprimand prosecutors.¹²⁶ For example, in *United States v. Gross*¹²⁷ a district court decided not to forward a violation of DOJ policy to the OPR. In *Gross*, the Assistant United States Attorney failed to follow the DOJ guideline that would allow the accused to personally appear before the grand jury to present exculpatory material. Deciding that this was a first violation, the court sent its findings to “supervisors at the U.S. Attorney’s Office of the Central District of California.”¹²⁸

In addition to the OPR, the DOJ also maintains a Departmental Ethics Office. This office “is responsible for administering the Department-wide ethics program and for implementing Department-wide policies on ethics issues.”¹²⁹ The office, however, focuses on ethics laws and regulations. It considers issues such as conflicts, “[i]mpartiality in [p]erforming [o]fficial [d]uties,” outside employment, and “[p]ost-employment [r]estrictions.”¹³⁰ The ethics

123. *Id.* The OPR report stated:

The DOJ attorney concluded that the defendant’s cooperation had not provided a tangible benefit to the government in that the evidence the defendant was able to provide was insufficient to support the arrest or indictment of any other person. Accordingly, the DOJ attorney determined, with the express approval of his supervisors, that the defendant had not provided substantial assistance.

Id.

124. Office of Prof’l Responsibility, U.S. Dep’t of Justice, *OPR Annual Reports: 1996* (last modified Jan. 30, 1998) <<http://www.usdoj.gov/opr/96annual.htm>>.

125. *Id.*

126. See Green, *Policing Federal Prosecutors*, *supra* note 3, at 81 n.68.

127. 41 F. Supp. 2d 1096 (C.D. Cal. 1999).

128. *Id.* at 1100. The court stated, “[i]f this Court learns of future violations, the U.S. Attorney’s Office is on notice that this Court will not hesitate to make future referrals to the Office of Professional Responsibility for review.” *Id.*

129. Departmental Ethics Office, U.S. Dep’t of Justice, *Departmental Ethics Office*, para. 2 (last modified Nov. 1, 1999) <<http://www.usdoj.gov/jmd/ethics/>>.

130. See Departmental Ethics Office, U.S. Dep’t of Justice, *Departmental Ethics Office General Authorities and Resources*, pts. II.C, VII (last modified Oct. 26, 1999) <<http://www.usdoj.gov/jmd/ethics/generalb.htm>>.

outline of this department as well as its handbook do not focus on the discretionary decisions made by federal prosecutors.

Recently, the DOJ started a Professional Responsibility Advisory Office. This office "is responsible for providing advice and guidance to Department of Justice Attorneys on state, federal, and local rules of professional conduct."¹³¹ The office will also assist in disciplinary actions resulting from the recent application of ethics rules to federal prosecutors.¹³² In addition to ethics training programs, new developments require that each United States Attorney's office have "at least one professional responsibility officer."¹³³

III. EDUCATION

Many commentators have reflected on how best to improve the ways that prosecutors handle discretionary decisions. There have been suggestions of increasing the number and variety of internal guidelines to monitor prosecutors' discretion.¹³⁴ For example, Professor Norman Abrams reflects at length on the use of internal guidelines to assist in achieving what he terms a "tolerable consistency" in the exercise of prosecutorial discretion.¹³⁵ Professor James Vorenberg, noting the necessity of holding prosecutors "accountable for their decisions,"¹³⁶ offers a comprehensive formula including guidelines,¹³⁷ "[s]creening [c]onferences,"¹³⁸ development of a record-keeping system of the discretionary decisions made by prosecutors,¹³⁹ legislative oversight,¹⁴⁰ and a strong judicial role.¹⁴¹

131. Professional Responsibility Advisory Office, U.S. Dep't of Justice, *Experienced Attorneys GS-13 to GS-15*, para. 2 (visited Jan. 23, 2000) <<http://www.usdoj.gov/careers/oapm/jobs/paofinalannouncement.htm>>; see also Little, *Proportionality as an Ethical Precept*, *supra* note 101, at 768 (discussing the DOJ's ethics program).

132. See Professional Responsibility Advisory Office, U.S. Dep't of Justice, *Experienced Attorneys GS-13 to GS-15*, para. 2 (visited Jan. 23, 2000) <<http://www.usdoj.gov/careers/oapm/jobs/paofinalannouncement.htm>>.

133. Attorney General Janet Reno, Press Conference (June 18, 1998), in U.S. Department of Justice, *Press Conference: The Honorable Janet Reno, Attorney General*, para. 9 (visited Jan. 23, 2000) <<http://www.usdoj.gov/ag/speeches/1998/jun1898.htm>>.

134. See Higgins, *supra* note 18, at 47 ("[Marcia] Shein suggests there could be a policy regarding how U.S. attorneys make decisions on topics such as when to credit substantial assistance or when to charge money laundering."). Professor Rory Little advocates for a new ethics rule for prosecutors to guide them in the investigative stage. See Little, *Proportionality as an Ethical Precept*, *supra* note 101, at 769.

135. Abrams, *supra* note 5, at 57.

136. Vorenberg, *supra* note 1, at 1562.

137. See *id.* at 1562-65.

138. *Id.* at 1565 ("One way of increasing the likelihood that prosecutors will exercise their discretion fairly is to provide a formal procedural setting for discussions concerning charge and disposition.").

139. See *id.* at 1565-66.

140. See *id.* at 1566-68. Professor Vorenberg includes code revision as part of this discussion. See *id.*

Professor Tracey L. Meares reflects on the use of financial rewards “to shape a public prosecutor’s behavior in desired ways.”¹⁴² Professor Rory Little calls for an ethics rule to promote “[p]roportionality in [i]nvestigation.”¹⁴³

The reality is that despite the suggestions of many and the implementation of some of these suggestions, unmonitored prosecutorial discretion remains. As a result of federal sentencing guidelines, prosecutors have increased their discretionary power.¹⁴⁴ Internal guidelines have been disregarded with no legal enforcement mechanism to monitor the violations.¹⁴⁵ Additionally, although the conduct may be subject to scrutiny by the OPR, this rarely results in disciplinary action.¹⁴⁶ The attempt to limit discretion has not succeeded.¹⁴⁷

As opposed to proposing limitations to prosecutorial discretion, offering internal guidelines, or calling for legislative action, all of which may be warranted, this Article suggests an educational approach to modifying how prosecutors use their discretion. Heightening federal prosecutors’ awareness of how best to achieve a more ethical and professional system requires that prosecutors understand the ramifications and appearance of inequity resulting from inconsistency and abuse in the discretionary decision-making process.

141. *See id.* at 1568-72.

142. Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *Fordham L. Rev.* 851, 917 (1995); *see also* Robert L. Misner, *supra* note 1, at 766-67 (discussing having state prosecutor discretion tied “to the availability of prison resources”).

143. Little, *Proportionality as an Ethical Precept*, *supra* note 101, at 752-53.

144. *See United States v. Harrington*, 947 F.2d 956, 966 (D.C. Cir. 1991) (Edwards, J., concurring). Judge Edwards wrote:

I address the gamesmanship of the Guidelines and the problematic roles of the AUSAs and Probation Officers only to emphasize that the Guidelines have not eliminated sentencing discretion. Rather, they have merely transferred it from district judges—who, whatever their perceived failings, are at least impartial arbiters who make their decisions on the record and subject to public scrutiny and appellate review—to less neutral parties who rarely are called to account for the discretion they wield. Thus, the discretion and disparity game continues; it is only the players who have changed.

Id. (footnote omitted).

145. *See supra* note 6.

146. *See, e.g.*, Office of Prof’l Responsibility, U.S. Dep’t of Justice, *OPR’s Annual Report for Fiscal Year 1997* (last modified Apr. 14, 1999) <<http://www.usdoj.gov/opr/97annual.htm>> (“OPR also found that the DOJ attorney’s comments to the reporter controverted DOJ press policy, but that it did not rise to the level of professional misconduct.”).

147. Professor William Pizzi, using a comparative approach, shows “why attempts to limit prosecutorial discretion on the European model are unlikely to work in this country.” Pizzi, *supra* note 1, at 1372.

A. Law School

Law schools can start the process of education by using a "contextual"¹⁴⁸ or "pervasive"¹⁴⁹ method of teaching ethics in conjunction with a specific application. Future prosecutors may be graduating from law school without learning the intricacies of discretionary decision-making. Although issues of selective prosecution, vindictive prosecution, and prosecutorial misconduct enter criminal procedure classes, these discussions often focus on the legal issues. Understanding a case such as *United States v. Williams*¹⁵⁰ requires going beyond a discussion of the policy considerations in the Supreme Court's finding that prosecutors are not required to present evidence to a grand jury that is exculpatory to the accused.¹⁵¹ The discussion also needs to focus on the ethics and professionalism of a prosecutor who chooses not to present this evidence.

Attention in law school classes needs to be spent on bias within the criminal justice system. Students need to be attuned to unconscious racism to assure that the charging process is free of improper influences. Law students need to realize the responsibility placed upon prosecutors as a result of prosecutors' conduct having a presumption of propriety.¹⁵²

Likewise, discussion of the Jencks Act should emphasize that compliance with minimum standards does not always comport with the high standards attributed to professionalism. Students need to be made aware that most Assistant United States Attorneys provide *Jencks* material in advance of the requirements of the statute. Unless one has a proper justification for not providing this material early, such as witness protection, it is the "right thing to do."

148. See generally Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 Wm. & Mary L. Rev. 357, 359 (1998) [hereinafter Green, *Teaching Ethics in a Legal Context*] (proposing a contextual course in professional responsibility rather than a survey course).

149. See generally Deborah L. Rhode, *The Professional Responsibilities of Professional Schools: Pervasive Ethics in Perspective*, Teaching and Learning Professionalism: Symposium Proceedings 25 (Sponsored by the ABA Section of Legal Education and Admissions to the Bar Professionalism Committee and the Standing Committees on Professionalism and Lawyer Competence of the ABA Center for Professional Responsibility) (1997) (arguing for translation of moral principals into educational priorities); Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. Legal Educ. 31, 50 (1992) ("Contemporary justifications for the pervasive method generally assume that it should serve not as a substitute for, but as a supplement to separate coursework specifically focused on ethics. Only such an integrated approach can convey the range and importance of the moral dimensions of professional practice."); Andrew E. Taslitz, Essay, *Exorcising Langdell's Ghost: Structuring a Criminal Procedure Casebook for How Lawyers Really Think*, 43 Hastings L.J. 143, 170-73 (1991) (discussing a pervasive study of ethics that "include[s] a consideration of what is right, just, and fair").

150. 504 U.S. 36 (1992). See *supra* Part I.A.

151. See *supra* Part I.A.

152. See *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

Discussions regarding punishment and the role of the prosecutor in advocating for a particular sentence could include the considerations a prosecutor might use in filing a section 5K1.1 motion. Questions with regard to discretion can be explored here. For example, what should a prosecutor do when an accused, although cooperative, has no information to offer to assist a government investigation?

Classes in professional responsibility should include discussions beyond the Model Rules of Professional Conduct. Some ethics courses are taught "contextually" and focus on issues of prosecutorial discretion,¹⁵³ but do these professional responsibility classes sufficiently prepare a future prosecutor to decide whether money laundering is an *appropriate* addition to a mail fraud charge in a particular case?

Internships and externships offer practical experiences and thus provide another avenue to consider discretionary decision-making. The array of discretionary decisions, however, cannot be left to reviewing general principles of discretion. Specific applications need to also be considered.

Law school graduates with high moral values, an understanding of ethical issues, and a concern for professionalism may nonetheless remain clueless regarding how best to apply these values in practice. Incorporating ethics and professionalism concerns into criminal law and criminal procedure class discussions can set the stage for a heightened awareness of the issues faced in the world of prosecution. Understanding the policy considerations in these decisions will certainly benefit those proceeding to criminal defense legal positions. Detailed coverage of discretionary decisions with all its applications would certainly provide a better educated practitioner. The study of discretionary decision-making to this specificity within law school classes is, however, unrealistic.

B. Practice

Obviously, law schools cannot be the sole educators on how best to resolve the ethical problems of discretionary decision-making. The DOJ must also take a lead in providing federal prosecutors with programs that focus on the decision-making process. For example, programs should be implemented to consider conscious and unconscious biases in charging decisions.¹⁵⁴

153. Some schools may have instituted separate courses that focus on ethics in criminal advocacy. For example, Professor Bruce Green notes that the course at Fordham University School of Law includes discussion of "prosecutorial discretion." Green, *Teaching Ethics in a Legal Context*, *supra* note 148, at 373-74.

154. Some of the gender bias reports speak to educating on issues of bias. *See, e.g., Report of the Missouri Task Force on Gender and Justice*, 58 Mo. L. Rev. 485, 622 (1993) ("Educational programs are needed to inform and educate the judiciary, prosecutors, and police about how sexual stereotypes may taint the handling of sexual

Respect for fairness in the judicial system is decreased when lawyers see a prosecutor from one office providing *Jencks* material ten days before trial, while a prosecutor from another office, handling a similar type of case, offers the witness statements only after the witness has testified. Disseminating information of the practices used in other offices could assist in promoting consistency. Discussions of existing guidelines and the considerations that play a part in making these decisions can prove helpful in educating federal prosecutors.

Better coordination among the various United States Attorneys' offices offers increased awareness of the practice. For example, there needs to be an increased nationwide discussion on some of the following questions to fully understand the implications of prosecutorial discretion in sentencing. What has been the experience of offices that use screening committees to make section 5K1.1 decisions? Have formal office policies with respect to section 5K1.1 been successful in presenting a consistent approach to prosecutorial decisions?¹⁵⁵ A nationwide accepted practice could result from open discussions of these questions.

The educational process cannot rest with a single continuing legal education program. The fluid nature of laws in society, new crimes, and new approaches to handling criminality require that these discussions be a continual part of educating federal prosecutors. Through education, federal prosecutors can understand the ramifications that result to the legal profession when those with power fail to use caution in the exercise of that power.

CONCLUSION

As with any profession, there are individuals who have high ethical standards and others who through either laziness, inexperience, or personal motivations, take a different road. The ethical standards of a particular prosecutor can influence the outcome of discretionary decisions.¹⁵⁶ In addition to ethical values, discretionary decisions can be affected by the professionalism of the prosecutor handling the case. The discretionary decision-making process may also be inspired by the culture of a particular United States Attorneys' Office and the rhetoric from the upper echelon of that office.

It certainly would be beneficial to have guidelines that reduce discretion. It would likewise be an enhancement to have specific statutes that did not permit prosecutors to legislate.¹⁵⁷ As we await

assault and rape cases.").

155. See Fred C. Zacharias, *Justice in Plea Bargaining*, 39 Wm. & Mary L. Rev. 1121, 1188-89 (1998) (discussing how prosecutors' offices need binding theories of plea bargaining).

156. See Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 Geo. J. Legal Ethics 19 *passim* (1997).

157. Cf. Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and*

these structural changes, it seems appropriate to improve the discretionary decision-making process through education.

Enforcement Discretion, 46 UCLA L. Rev. 757, 759-60 (1999) (showing how Congress has not abdicated its legislative responsibility).

Notes & Observations