

WHEN THE EMPEROR HAS NO CLOTHES III: PERSONNEL POLICIES AND CONFLICTS OF INTEREST IN PROSECUTORS' OFFICES

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This Article examines and evaluates an alternate cause of overcharging, one that has not received much attention from courts or in the scholarly literature: the extent to which internal personnel policies in prosecutors' offices create incentives to overcharge. The number and seriousness of convictions and the amount of punishment are the basic standards by which the success of prosecutors is measured. In order to curb overcharging and other forms of prosecutorial misconduct, courts should disqualify prosecutors whose offices explicitly or implicitly determine their job status, compensation, or advancement on the basis of their conviction or sentencing record on the ground that such personnel policies create an actual conflict of interest. Career advancement should not be the controlling factor in how charging, prosecuting, and sentencing decisions are made.

"The duty of the prosecutor is to seek justice, not merely to convict."¹

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¹ A.B.A. TASK FORCE ON STANDARDS FOR CRIMINAL JUSTICE PROSECUTION, A.B.A. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION DEFENSE FUNCTION, std. 3-1.2(c) (1993).

INTRODUCTION

The thesis of this Article is that internal personnel policies in prosecutors' offices—defining job success primarily by conviction rates—create incentives for individual prosecutors to overcharge. Prosecutorial overcharging occurs for many reasons, including leverage in plea bargaining, now a mainstay of our criminal justice system, and increased odds of conviction on some charges at trial. The possibility of the defendant prevailing either at trial or on appeal is not adequate protection against overcharging.²

Prosecutors have enormous power in determining who is subjected to criminal punishment because they have broad discretion in deciding whom to charge.³ Through their charging decisions, choices among case-ending options (including dismissal and plea offers), and sentencing recommendations, they often become adjudicators of guilt and punishment, with courts simply confirming their underlying decisions.⁴ Absent a showing of invidious discrimination based on race or religion, for instance, courts will not question a prosecution's decision of whom and how to charge in a given case.⁵

² *United States v. Robertson*, 15 F.3d 862, 877 (9th Cir. 1994) *rev'd*, 514 U.S. 669, (1995), *opinion reinstated in part*, 73 F.3d 249 (9th Cir. 1996).

³ See Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1414–15 (2010); see, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“[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.”) (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (holding that it was constitutionally permissible for a prosecutor to threaten to bring significantly enhanced charges as a means of inducing a defendant to plead guilty to the current ones)); see also *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“[A] 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.’”) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926)). This discretion includes the decision of what evidence to present to the Grand Jury. See Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 *FORDHAM L. REV.* 1511, 1515–16 (2000) [hereinafter Podgor, *Ethics & Professionalism*].

⁴ See Luna & Wade, *supra* note 3, at 1422–23.

⁵ See, e.g., *Wade v. United States*, 504 U.S. 181, 186 (1992) (“Thus, a defendant would be entitled to relief if a prosecutor refused to file a substantial-assistance motion, say, because of the defendant’s race or religion.”); *United States v. Batchelder*, 442 U.S. 114, 123–24 (1979) (“This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants.”); *Bordenkircher*, 434 U.S. at 364 (1978) (“[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation’ so long as ‘the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’”) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). Studies have shown that defendants are seldom successful in proving selective-prosecution claims. See Ellen S. Podgor & Jeffrey S. Weiner, *Prosecutorial Misconduct: Alive and Well, and Living in Indiana?*, 3 *GEO. J. LEGAL ETHICS* 657, 660–61 (1990).

Further, courts are also hesitant to interfere with plea negotiations and agreements, except to evaluate alleged breaches of plea agreements using general contract principles.⁶ The only legal checks on prosecutorial discretion are the burden of proof and the procedural requirements that prosecutors must meet during the pretrial and trial processes.⁷ In most cases, prosecutors may “charge at will.”⁸ Moreover, this charging decision will preordain the ultimate resolution. The prosecutor, rather than the judge or the jury, is the “central adjudicator” of facts, legal issues, and appropriate sentencing, because the prosecutor evaluates potential defenses and mitigating information in forming plea agreements.⁹

This unreviewed prosecutorial discretion makes a nasty cocktail when mixed with invidious forms of prosecutorial conduct. For example, overly zealous prosecutors have exploited questionable scientific evidence to pressure defendants into guilty pleas.¹⁰ Similarly, some prosecutors have distorted or exaggerated the significance of certain sci-

⁶ See Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 202 (2006) (discussing the lack of judicial participation in plea negotiations and the problems that it produces); but cf. *Santobello v. New York*, 404 U.S. 257, 262–63 (1971) (remanding a case in which the State failed to abide by the terms of Santobello’s plea agreement).

⁷ The case of Domingo Negron provides a good example of why relying on the trial jury to “screen” cases can be unsatisfactory. Pennsylvania prosecutors charged Negron with first-degree murder, third-degree murder, and involuntary manslaughter in the death of Joseph Kwiatkowski. Bill Reed, *Philadelphia Man Acquitted of Murder in 1973 Shooting*, PHILA. INQUIRER, Oct. 21, 2011, http://articles.philly.com/2011-10-21/news/30305684_1_first-degree-murder-shooting-gunshot-wound. What made the case unusual was that Negron shot Kwiatkowski in Philadelphia in 1973, but Kwiatkowski died thirty-six years later in Florida. See *id.* Negron had been convicted of aggravated assault with intent to kill and weapons charges and had served time in prison at the time of the shooting. *Id.* The Commonwealth of Pennsylvania brought the additional charges after Kwiatkowski’s death, from bed sores, on the theory that it was the end of a causal chain going all the way back to the 1973 shooting. *Id.* The jury, rejecting the State’s arguments that Negron had been the direct cause of Kwiatkowski’s injuries, found Negron not guilty of all of the new charges, but only after he had spent almost a year in the county jail awaiting trial. *Id.*

⁸ Luna & Wade, *supra* note 3, at 1420. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2135 (1998) (“[Under a system of plea bargaining], the prosecutor acts as the administrative decision-maker [sic] who determines, in the first instance, whether an accused will be subject to social sanction, and if so, how much punishment will be imposed.”); see also Hans P. Sinha, *Prosecutorial Ethics: The Charging Decision*, 41 PROSECUTOR 32, 33 (2007) (former deputy district attorney who acknowledges “that if a prosecutor wants to bring charges against someone, the prosecutor will be able to do so,” and that “[a] prosecutor can . . . sit down at the onset of a typical case and fairly accurately plan and predict the outcome of the case”).

⁹ Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403–04 (2003).

¹⁰ See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 326–28, (3d ed. 2004).

entific evidence to obtain questionable convictions.¹¹ Prosecutorial discretion has become a tool for adversarial gamesmanship.¹² The result is that prosecutorial misconduct is one of the leading causes of wrongful convictions.

Additionally, the effects of prosecutorial misconduct are amplified by current trends in criminal law. For example, the number of federal crimes is growing rapidly.¹³ Similarly, prosecutors are able to use “short-cut” offenses like perjury, obstruction of justice, or making false statements to proceed with charges with relatively little proof.¹⁴ Finally, crimes themselves have become broader, both through definition and through diminished *mens rea* requirements.¹⁵

Much of the scholarly literature examining prosecutorial discretion has focused on the use and abuse of this power, analyzing the appropriateness of prosecutors’ exercise of discretion, charging decisions, and plea negotiations or plea bargaining.¹⁶ Some scholars have focused on

¹¹ See e.g., MARK FUHRMAN, *DEATH AND JUSTICE* (2003) (noting how a prosecutor’s dismissal of red flags in the forensic evidence and the forensic experts testimony led to the wrong man being prosecuted for murder); Steve Mills & Ken Armstrong, *Convicted by a Hair*, CHI. TRIB., Nov. 18, 1999, http://articles.chicagotribune.com/1999-11-18/news/9911180162_1_hair-evidence-sutherland-case-prosecution (recounting a number of cases of prosecutorial misuse of junk science to secure convictions).

¹² See Luna & Wade, *supra* note 3, at 1501.

¹³ See ABA TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, *THE FEDERALIZATION OF CRIMINAL LAW* 2 (1998) (“Of 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) (“There are now more than 3,000 federal crimes.”).

¹⁴ See, e.g., 18 U.S.C. § 1621 (2006) (criminalizing perjury); 18 U.S.C. § 1505 (2006) (criminalizing the obstruction of proceedings of federal departments, agencies, and committees); 18 U.S.C. § 1512 (2006) (criminalizing witness tampering); 18 U.S.C. § 1001 (2006) (criminalizing making false statements to federal officers).

¹⁵ See Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569, 1573 (2010) [hereinafter Podgor, *Tainted Federal Prosecutor*]. Unlike judges, prosecutors are not generally held to an “appearance of impropriety” standard. 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); see generally 28 U.S.C. § 455(a) (2006) (requiring judges to recuse themselves from any case that could give rise to an appearance of partiality); FED. CODE OF CONDUCT FOR U.S. JUDGES Canon 2 (2011), available at <http://www.uscourts.gov/rulesandpolicies/codesofconduct/codeconductunitedstatesjudges.aspx> (“A judge . . . should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”); Erwin Chemerinsky, *A Supreme Court Above Reproach*, L.A. DAILY JOURNAL, Feb. 15, 2011, at 1 (“Codes of judicial ethics require that judges avoid even the appearance of impropriety.”).

¹⁶ See, e.g., LLOYD L. WEINREB, *DENIAL OF JUSTICE* 135 (1977) (calling for the institution of an examining magistrate to investigate crime and consider charges); Donald M. Barry & Alexander Greer, *Sentencing Versus Prosecutorial Discretion: The Application of New Disparity Measure*, 18 J. RES. CRIME & DELINQ. 254 (1981); L.C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259 (2001); John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 439–43 (1974) (arguing that the unbridled discretion of American prosecutors could be curbed through the continental model of compul-

new ethics and conduct rules for prosecutors. For example, James Vorenberg has offered a comprehensive framework for prosecutorial power, including guidelines, “screening conferences,” the development of a record-keeping system of the discretionary decisions made by prosecutors, legislative oversight, and a strong judicial role.¹⁷ Ellen Podgor has advocated better educating prosecutors in their exercise of discretion and a broader approach to charging decisions that takes into account factors like the charging decisions in related cases, the general need for legal reform, and the broad imperative to do justice.¹⁸ Rory Little has advocated a new ethics rule for prosecutors to guide their discretion in the investigative stage, and “promote proportionality in investigation.”¹⁹ Norman Abrams has argued for the use of internal guidelines to assist in achieving what he terms a “tolerable consistency” in the exercise of prosecutorial discretion.²⁰ Laurie Levenson has also proposed the implementation of internal policies constraining individual prosecutors’ discretion.²¹

Other scholars have argued that external community controls, rather than internal guidelines and education, are the solution. For example, Andrew Taslitz has suggested incorporating community participation

sory prosecution); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 225–26 (2006); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 717–19 (1996); Michael A. Mulkey, *The Role of Prosecution and Defense in Plea Bargaining*, 3 POL’Y STUDIES J. 54 (1974); Heather Schoenfeld, *Violated Trust: Conceptualizing Prosecutorial Misconduct*, 21 J. CONTEMP. CRIM. JUST. 250 (2005); Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1410 (2003) [hereinafter Wright & Miller *Honesty and Opacity*] (“Only by improving transparency can we address the underlying concerns, such as convicting innocent defendants or providing prosecutors with such complete control over outcomes that defendants retain no realistic access to judges, trials, or trial rights.”); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002) [hereinafter Wright & Miller *Screening/Bargaining*] (suggesting a “screening” alternative to negotiated plea bargaining, which would include increased initial investigative information, the filing of only appropriate charges, and a restriction of plea bargaining).

¹⁷ James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1521–22 (1981) (discussing various limits on prosecutorial discretion).

¹⁸ See Podgor, *Ethics & Professionalism*, *supra* note 3, at 1514; Ellen S. Podgor, *Racing Prosecutors’ Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 474–75 (2009).

¹⁹ Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 752–53, 766–69 (1999).

²⁰ Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 7–9, 57 (1971) (discussing the need for DOJ policy statements on the exercise of discretion).

²¹ See Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 569 (1999) (“It has long been believed that maximum fairness will be achieved by neutral rules and standards to guide prosecutors’ exercise of discretion.”).

into the prosecutorial process.²² Anthony Alfieri has also advocated difference-based community participation in the prosecutorial process.²³ Tracey Meares has proposed the use of financial rewards “to shape a public prosecutor’s behavior in desired ways.”²⁴ Richard Uviller has advocated the disaggregation of prosecutorial decision-making authority.²⁵ Douglas Colbert has argued that courts are better served by appointing counsel to indigent defendants at bail hearings in part so that counsel can help to identify weaker cases and remove them from the system.²⁶ Even the American Law Institute offers a general guideline for plea discussions and agreements.²⁷

At the other end of the debate are scholars who have critiqued these and other suggestions for controlling prosecutorial discretion. Amanda Hitchcock has argued that “internal guidelines and policies in general fail to serve the purpose of restraining the prosecutor’s discretion to any meaningful degree.”²⁸ Marc Miller and Ronald Wright have argued that judicial oversight cannot address the problem because of a history of inaction and legislators’ and judges’ trend towards overcriminalization.²⁹ Alafair Burke has argued that fault-based solutions attribute too much rational choice to prosecutors and may not be effective if they are making poor decisions unconsciously rather than deliberately.³⁰ Instead, Burke has advocated increased oversight and decision making by super-

²² See Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 271, 314–16 (2006) (arguing that Criminal Justice Coordinating Councils should play a role in eyewitness identification lineup procedures).

²³ See Anthony V. Alfieri, *Prosecuting the Jena Six*, 93 CORNELL L. REV. 1285, 1292–96 (2008).

²⁴ Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 917 (1995); see Misner, *supra* note 16, at 766–67 (proposing tying the discretion of state prosecutors “to the availability of prison resources”).

²⁵ See H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1716 (2000) (arguing that separate prosecutors should make the quasi-adjudicative and advocacy-related decisions in each matter).

²⁶ See Douglas Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 43–44 (“Rather than waiting several weeks until a lawyer first appears, these weaker charges can be identified at the outset, allowing judges and prosecuting attorneys to avoid squandering valuable time on them.”).

²⁷ See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3 (1975) (establishing guidelines for plea discussions and agreements).

²⁸ Amanda S. Hitchcock, *Using the Adversarial Process to Limit Arbitrariness in Capital Charging Decisions*, 85 N.C. L. REV. 931, 961 (2007).

²⁹ See Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 128 (2008).

³⁰ See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1594–96 (2006) (describing the confirmation bias and its possible effects in prosecutors’ offices).

visory personnel.³¹ William Pizzi has argued that “attempts to limit prosecutorial discretion on the European model are unlikely to work in this country.”³²

Although these are important conversations, this Article accepts the existence of prosecutorial discretion and leaves to another day a discussion of the merits,³³ or lack thereof,³⁴ of the placement of this level of power in executive-branch agencies. This Article also omits discussion of what, if any, limits should be placed upon existing prosecutorial discretion because, despite the perhaps warranted suggestions of these other scholars, unbridled prosecutorial discretion remains. As opposed to seeking another way to limit prosecutorial discretion, this Article examines and evaluates an alternate cause of overcharging, one that has not received much attention from courts or in the scholarly literature: the extent to which internal personnel policies in prosecutors’ offices create

³¹ *Id.* at 1621 (“Another possible method to mitigate the influence of cognitive bias on prosecutorial decision making is to involve additional, unbiased decision makers in the process.”); see also Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 388 (2006) (urging “[m]ultiple levels of case screening” to minimize tunnel vision by prosecutors). The notion that prosecutorial discretion should be constrained through supervisory oversight underlies the current distribution of authority in the United States Department of Justice (DOJ). For example, federal prosecutors generally require authorization from the Attorney General or a high-ranking designee to subpoena a journalist, indict a defendant on RICO or tax charges, or ask a corporation to waive attorney-client privilege. Similarly, other potentially controversial decisions, such as authorization to seek the death penalty, are made centrally. Bruce A. Green & Fred C. Zacharias, “*The U.S. Attorneys Scandal*” and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187, 190 (2008) [hereinafter Green & Zacharias, *Allocation*]; U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL §§ 9-13.410 (news media subpoenas), 9-110.320 (RICO charges), 6-4.122(c) (tax charges), http://www.justice.gov/usao/eousa/foia_reading_room/usam/ [hereinafter UNITED STATES ATTORNEYS’ MANUAL]; see generally Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice’s Role*, 26 FORDHAM URB. L.J. 347, 435 (1999).

³² 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, 1372 (1993) (comparing the prosecutorial discretion given to American prosecutors to that granted to their civil law counterparts). Commentators have also examined the infiltration of politics into the justice system, particularly at the federal level, in a variety of contexts. See Sara Sun Beale, *Rethinking the Identity and Role of United States Attorneys*, 6 OHIO ST. J. CRIM. L. 369 (2009) (advocating regulating contact between DOJ and political actors); Green & Zacharias, *Allocation*, supra note 31; John McKay, *Train Wreck at the Justice Department: An Eyewitness Account*, 31 SEATTLE U. L. REV. 265 (2008) (discussing the “firings” of U.S. Attorneys); Podgor, *Tainted Federal Prosecutor*, supra note 15 (focusing on the importance of maintaining political neutrality in DOJ); James K. Robinson, *Restoring Public Confidence in the Fairness of the Department of Justice’s Criminal Justice Function*, 2 HARV. L. & POL’Y REV. 237 (2008) (discussing the politicization of DOJ and its need to restore credibility).

³³ See generally Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 673–76 (discussing the discretion that the adversary system affords to prosecutors).

³⁴ See Vorenberg, supra note 17, at 1560–72.

incentives to overcharge.³⁵ Instead of focusing only on the ways in which prosecutors exercise their discretion in the criminal justice system, scholars also need to focus on the policies governing those who exercise that discretion, particularly when those policies suggest the existence of bias.³⁶ Career advancement should not be the controlling factor in how charging, prosecuting, and sentencing decisions are made.

This Article proposes a doctrinal mechanism for reigning in the incentives to overcharge within the existing system of prosecutorial discretion. In order to curb overcharging and other forms of prosecutorial misconduct, courts should evaluate whether personnel policies that explicitly or implicitly determine their job status, compensation, or advancement on the basis of their conviction or sentencing record create an actual conflict of interest. If so, prosecutors whose offices use such policies must be disqualified on that basis³⁷

Section I argues that the number and seriousness of convictions and the amount of punishment are the basic standards by which the success of prosecutors is measured. Section II outlines and analyzes recent cases and developments in which courts have determined what circumstances justify the disqualification of a prosecutor from a criminal case. Section III examines the “minister of justice” values underlying prosecutorial discretion and presents a practical ameliorative suggestion for the status quo: judicial disqualification of prosecutors acting under personnel policies that reward them on the basis of the number and severity of the convictions and sentences that they obtain. This Note then concludes and outlines future possible work in the area of reigning in prosecutorial overcharging.

I. *DILBERT* LIVES: PROSECUTORIAL PERSONNEL POLICIES

How is success measured in prosecution? What information do supervising prosecutors use to make management decisions? Unfortunately, the answer to these questions, increasingly, is that the concept of “doing justice” is interpreted narrowly and the effectiveness of prosecutors is judged on the basis of their conviction and plea-bargain rates.³⁸

³⁵ The objective of this Article is to spawn a normative debate using specific information from real situations. It is therefore an initial inquiry into an area that calls for a larger empirical study.

³⁶ See David A. Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 *FORDHAM URB. L.J.* 509, 530-31 (1999) (discussing the failure of scholarship to address the question of how prosecutors should exercise their existing discretion).

³⁷ This Article uses “disqualify” and “recuse” interchangeably, because the use of these two terms varies by jurisdiction.

³⁸ See M. ELAINE NUGENT-BORAKOVE & LISA M. BUDZILOWICZ, *DO LOWER CONVICTION RATES MEAN PROSECUTORS' OFFICES ARE PERFORMING POORLY?* at i (Nat'l Dist. Att'y's Ass'n Mar. 2007).

There has been a nationwide movement over the past decade or two to increase prosecutorial accountability by utilizing tangible, numerical “performance-based measures” for evaluating the work of prosecutors, which in turn are used to determine advancement, salary, bonuses, and other benefits for individual prosecutors. Funding entities, like legislatures and county commissions/councils, are increasingly looking for performance-based budgets from prosecutors.³⁹

The Government Performance and Results Act of 1993 (GPRA) requires federal agencies, including the United States Department of Justice (DOJ), to, among other things, set goals, measure performance, and report on their accomplishments in their annual performance plans and annual performance reports in order to move toward a performance-based environment.⁴⁰ In keeping with this mandate, DOJ has developed performance measures⁴¹ that apply to United States Attorneys (USAs) in order to monitor the performance of United States Attorney’s Offices (USAOs).⁴² The Executive Office for United States Attorneys (EOUSA) has redesigned its internal evaluation program and has begun implementing a new process for collecting and analyzing information to assess each USAO’s progress toward addressing DOJ’s priorities and meeting performance expectations.⁴³ The purpose of this redesign is to move USAOs “toward a more results oriented, performance-based environment.”⁴⁴

In summer 2001, President Bush announced the President’s Management Agenda (PMA) to improve the management and performance of

³⁹ See M. ELAINE NUGENT-BORAKOVE ET AL., EXPLORING THE FEASIBILITY AND EFFICACY OF PERFORMANCE MEASURES IN PROSECUTION AND THEIR APPLICATION TO COMMUNITY PROSECUTION 2 (Nat’l Dist. Att’y’s Ass’n July 2009).

⁴⁰ Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285.

⁴¹ “A performance measure is a particular value or characteristic used to measure output or outcome.” U.S. GEN. ACCOUNTING OFFICE, GAO-04-422, REPORT TO CONGRESSIONAL REQUESTERS, U.S. ATTORNEYS PERFORMANCE-BASED INITIATIVES ARE EVOLVING 4 (2004) [hereinafter GAO REPORT].

⁴² See *id.* at 1. USAs are the principal litigators for the federal government in criminal proceedings. *Id.* at 2. According to the DOJ’s FY 2004 budget submission for USAs, USAOs handle approximately ninety-five percent of the criminal cases that DOJ prosecutes. *Id.* at 15. USAs investigate and prosecute a wide range of criminal activities, such as international and domestic terrorism, corporate fraud, public corruption, violent crime, and drug trafficking. *Id.* at 2, including cases investigated by federal law-enforcement agencies within DOJ, such as the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco, and Firearms, and those from many other departments, such as Customs and Border Protection in the Department of Homeland Security, the Postal Inspection Service, and the Internal Revenue Service. *Id.* at 32.

⁴³ See *id.* at 1. EOUSA provides the ninety-four USAOs with general executive assistance and direction, policy development, administrative management direction and oversight, operational support, and coordination with other components of the department and other federal agencies. *Id.* at 3.

⁴⁴ *Id.* at 7.

the federal government.⁴⁵ PMA mandated that federal agencies integrate their budgets with performance information to provide a greater focus on performance and to increase the value and use of program performance information in resource and management decisions.⁴⁶ One of the President's goals for requiring agencies to integrate their budgets with performance information was to increase the value and use of program performance information in management decisions.⁴⁷

In order to implement these two mandates, federal agencies, including USAOs, have been instructed, *inter alia*, to engage in activities with titles worthy of Orwell, such as "strategic human capital planning" that is "more fully and demonstrably integrated with mission and critical program goals" and building "results oriented organizational cultures" that "promote high performance and accountability."⁴⁸ In response, EOUSA has changed its internal evaluation program—including focusing on "personnel management"—intending to enhance DOJ's ability to assess the performance and management of USAOs.⁴⁹ DOJ has been working on a new employee performance appraisal system for General Schedule and Senior Executive Service Employees to link individual employee performance management to objectives, measures, and results.⁵⁰ EOUSA is working toward restructuring pay and performance systems and linking pay to performance in order to give USAOs more flexibility to provide larger pay increases and distinguish more precisely among varying levels of performance.⁵¹

In 2003, the American Prosecutors Research Institute (APRI), the research and development division of the National District Attorneys Association (NDAA), began to tackle what it perceived as the need for a menu of measures for prosecutor performance at the state and local level

⁴⁵ *Id.* at 20 n.3.

⁴⁶ *Id.*

⁴⁷ *Id.* at 43.

⁴⁸ *Id.* at 24. Strategic human capital management has also been designated as one of the five governmentwide initiatives under PMA. *Id.* In keeping with the Bush Administration's Sesame-Street-like devotion to rainbow coloring, the Office of Management and Budget grades agency progress and status on strategic human capital management using a red, green, and yellow scoring system. *See id.*

⁴⁹ *See id.* at 49. The evaluation program, which was initiated in 1969, was designed to evaluate each district's compliance with federal regulations and provide information to DOJ on performance, management, and various priorities and objectives. *Id.* at 49 n.1. Among other things, the evaluations assessed compliance with DOJ priorities, policies, and programs, reviewed staffing and workload, and determined whether USAOs were meeting the internal control requirements of the Federal Managers Financial Integrity Act. *Id.* In 1984, EOUSA established the Evaluation and Review Staff (EARS) as a component to coordinate the evaluation program. *Id.* The EARS guidance has subsequently been revised to provide greater focus on assessing the steps that each office is taking in regard to results oriented management. *See id.* at 50.

⁵⁰ *Id.* at 63.

⁵¹ *See id.* at 66-67.

by developing a performance measurement framework for prosecutors.⁵² The resulting framework, intended to provide a guide for performance measurement in prosecution, identified measurable goals and objectives for prosecutors that are linked to a series of possible performance measures.⁵³ The performance measures developed in the framework were intended to represent a menu of possible measures that a prosecutor's office might use depending on the office's specific policies and practices.⁵⁴ The result of the APRI study was a performance measurement framework intended for nationwide implementation.⁵⁵

Of course, there is nothing wrong with wanting to establish objective, quantitative measures linked to the overarching goal of the agency for evaluating the performance of prosecutors or even to pay individual prosecutors accordingly. On the contrary, these are laudable goals.⁵⁶ Rather, the problem is the way that those goals are usually defined, and methods of measuring those goals. In other words, deciding to reward successful prosecutors and punish unsuccessful ones is easy. Defining success and failure is much more difficult.

Unfortunately, across the country, prosecutors' offices maintain and track only the most elementary data on outcome: case disposition, length of sentence, and perhaps the number of offenders completing some type of diversion program.⁵⁷ Researchers and professional associations tend to focus on simple, practical indicators like conviction and dismissal rates.⁵⁸ The DOJ performance-evaluation measures, for example, include an "outcome measure," defined as the percentage of cases "favorably resolved," which is intended to show how USAs "contribute to DOJ's overall mission."⁵⁹ Many of these outcome measures are described in terms of "convictions" or the percentage of cases "successfully litigated" or "favorably resolved."⁶⁰ For Fiscal Year (FY) 2004, the

⁵² See NUGENT-BORAKOVE ET AL., *supra* note 39, at i.

⁵³ *Id.* at ii-v.

⁵⁴ See *id.*

⁵⁵ *Id.* at 2.

⁵⁶ By rigorously and systematically assessing the effectiveness of different policies and practices in their offices, prosecutors can answer important questions about the success of their work, set priorities, track progress in achieving goals, target areas for improvement, and direct resource allocation. See NUGENT-BORAKOVE & BUDZILOWICZ, *supra* note 38, at 3-4. Performance measures specifically linked to prosecution goals and objectives provide a framework for a more empirical and rigorous examination of the prosecution function. See NUGENT-BORAKOVE ET AL., *supra* note 39, at 2. The implementation of comprehensive and regular performance measurement could also increase transparency in prosecution, allowing for a more systematic assessment of prosecutorial operations and innovations. See B. Forst, *Prosecution's Coming of Age*, 2 JUST. RES. & POL'Y J. 21, 41 (1990).

⁵⁷ NUGENT-BORAKOVE ET AL., *supra* note 39, at 2.

⁵⁸ *Id.* at 3-4.

⁵⁹ GAO REPORT, *supra* note 41, at 5.

⁶⁰ *Id.* at 31.

“performance measures” that were used to evaluate the performance of federal prosecutors in criminal cases included the number of defendants “received,” “filed,” “prosecuted,” and “convicted” by broad case type (terrorism, violent and trafficking crimes, and white-collar crimes).⁶¹ For FY 2005, these measures were modified slightly for terrorism cases to “cases filed,” “convictions,” and defendants “sentenced to prison,” for violent crimes, drug trafficking, and white-collar crimes to “total defendants terminated”⁶² and defendants found guilty; and for all cases, to an outcome measure of “percentage of cases favorably resolved,” using data on defendants.⁶³ DOJ defines the percentage of cases actually or expected to be favorably resolved as the number of defendants found guilty divided by the number of defendants terminated—*i.e.*, the rate of conviction.⁶⁴ Under this definition, a case that results in the defendant being found guilty has had a favorable outcome; a case that does not result in the defendant being found guilty has not.⁶⁵

The performance measures developed by APRI similarly include the “ratio of convictions/cases charged,” “incarcerations,” and “dismissals.”⁶⁶ Incarcerations are measured by “sentence length,” the average number of years that felony offenders are “sentenced to incarceration.”⁶⁷ Dismissals are measured by the “ratio of public intoxication arrests to cases charged.”⁶⁸ These measures are used to evaluate a prosecutor’s performance with regard to the objective of holding offenders “accounta-

⁶¹ *Id.* at 35–36. The only other performance measures that were used for both civil and criminal Assistant United States Attorneys were training statistics tracking the number of students that were trained at DOJ and non-DOJ training programs. *Id.* at 38. These data were collected from the monthly reports that USAOs file and the USAOs’ central case-management system. *Id.* at 38.

⁶² As sinister as it sounds, DOJ uses the term “defendants terminated” to mean the total number of defendants for which some type of closure was reached—they were found guilty, acquitted, or the proceedings were dismissed or otherwise terminated. *Id.* at 44 n.2.

⁶³ *Id.* at 40, 44.

⁶⁴ *Id.* at 45. DOJ used the outcome measure—the percentage of cases favorably resolved—to enable all of its litigating components to use a single outcome measure. *Id.*; cf. Richard T. Boylan, *What do Prosecutors Maximize?: Evidence From the Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV. 379, 379 (2005) (finding that overall prison sentences, rather than simply conviction rates, lead to subsequent favorable career outcomes for USAs).

⁶⁵ In addition to DOJ’s performance goals and measures, individual USAOs may establish performance goals and measures in each office, which could vary considerably from district to district and even within a district. See GAO REPORT, *supra* note 41, at 54. A district that has different branch offices could have goals that vary from branch to branch. *Id.* at 54. As of 2003, approximately seventy-seven percent of the district USAOs had established district-level performance goals and measures. *Id.* at 54–55. Individual “performance workplan” goals are also established between supervisors and employees as part of each individual’s annual performance assessment. *Id.* at 55 n.3.

⁶⁶ NUGENT-BORAKOVE ET AL., *supra* note 39, at iv.

⁶⁷ *Id.*

⁶⁸ *Id.*

ble.”⁶⁹ Finally, APRI looks to “pleas to original charge,” measured by the “ratio of pleas to lesser charge/pleas as charged,” as a good performance measure with regard to the objective of a case disposition that is “appropriate for offense/offender.”⁷⁰ The APRI study concluded that conviction, sentence, and plea rates, *inter alia*, were “valid measures” of prosecutor performance.⁷¹ While prosecutors have always made their reputations by winning trials,⁷² these new quantitative standards mean that prosecutorial success, for the explicit purposes of job evaluation and remuneration, is now measured by the number of convictions and amount of punishment, leading to reelection for district attorneys and promotion for their deputies.⁷³

APRI had originally intended “to test the goal of promoting integrity in the prosecution profession and coordination in the criminal justice system,” by measuring the completion of “professional/legal training,” “meritorious ethics violations,” “prosecutorial error,” and “disciplinary actions.”⁷⁴ After “lengthy discussions with the prosecutors’ offices participating in the study, however, APRI decided not to include performance measurement data to assess the promotion of integrity in the prosecution profession and coordination in the justice system.”⁷⁵ One rationale for this decision was that “the prosecutors’ offices were most interested in understanding how their offices were performing in terms of ‘doing justice.’”⁷⁶ Because those offices did not see training and avoiding ethics violations, errors, and disciplinary actions as relevant measures of prosecutors’ performance in achieving justice, they chose to forgo this measurement.⁷⁷ As a result, there is no data to compare how those performance measures (training, ethics violations, errors, and disciplinary proceedings) may have correlated with more traditional performance measures, such as conviction rates and the length of sentences. A strong correlation, for example, between the number of ethics violations and a prosecutor’s (high) conviction rate would have been strong evidence that personnel policies that reward prosecutors for conviction rates encourage unethical behavior.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at xiii.

⁷² See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2472 (2004).

⁷³ Luna & Wade, *supra* note 3, at 1495; Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134-35 (2004) (“Prosecutors with the highest conviction rates (and, thus, reputations as the best performers) stand the greatest chance for advancement internally.”).

⁷⁴ NUGENT-BORAKOVE ET AL., *supra* note 39, at xiii, 8.

⁷⁵ *Id.* at vi.

⁷⁶ *Id.*

⁷⁷ See *id.*

II. PROSECUTORIAL CONFLICTS OF INTEREST

A number of jurisdictions have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon prosecutorial disqualification because of a conflict of interest.⁷⁸ The general principle prohibiting an attorney from representing adverse or conflicting interests applies to prosecuting attorneys and may provide grounds for disqualification from participation in a criminal case.⁷⁹ The American Bar Association Criminal Justice Standards for the Prosecution Function (ABA Prosecution Standards) declare that "prosecutors should avoid conflicts of interest with respect to their official duties."⁸⁰ Disqualification of a prosecutor is generally necessary if a trial court determines that a prosecutor has a conflict of interest that might prejudice him or her against the accused.⁸¹ Courts have held, in a variety of situations, that if a prosecutor has a private interest in a criminal case, it is the court's duty to disqualify the prosecutor and appoint a special prosecutor instead.⁸²

Many diverse private interests may result in disqualification.⁸³ Courts have concluded, for example, that they must disqualify prosecutors from participation in criminal prosecutions on the basis of ongoing civil litigation between the defendant and prosecutor, the victimization of the prosecutor by the criminal activity being prosecuted, and political confrontations.⁸⁴ What unifies this case law is that it is the prosecutor's duty to avoid violent partisanship and partiality in the performance of her duties, which may result in false accusations.⁸⁵ An important consideration emphasized by many of the courts in these cases is the dual nature of

⁷⁸ See, e.g., Scott N. Schools, *An Overview of the General Counsel's Office of the Executive Office for United States Attorneys*, 55 U.S. ATT'YS BULL. 1, 6 (May 2007) (explaining that recusal of a USA from a matter is usually warranted when an employee is a target, subject, witness, or victim or when the USA has had a prior business or personal relationship with a target, subject, or victim).

⁷⁹ See, e.g., CAL. PENAL CODE § 1424 (West 2000); MO. REV. STAT. 4-1.9 (1949) (barring lawyers from using information that they have learned about a former client in any subsequent case against that person).

⁸⁰ A.B.A. TASK FORCE ON STANDARDS FOR CRIMINAL JUSTICE PROSECUTION, *supra* note 1, at std. 3-1.3(a) (1993).

⁸¹ See, e.g., CAL. PENAL CODE § 1424 ("The motion [to disqualify a district attorney] shall not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial").

⁸² See, e.g., *People ex rel. Colorado Bar Ass'n v. Att'y at Law*, 9 P.2d 611, 612 (Colo. 1932) (holding that, if a prosecutor has a private interest in a criminal case under his jurisdiction, it is the court's duty to appoint another for him).

⁸³ *Wheeler v. District Court*, 504 P.2d 1094, 1095 (Colo. 1973).

⁸⁴ See, e.g., *City of Maple Heights v. Redi Car Wash*, 51 Ohio App. 3d 60 (1988); *People v. Zimmer*, 51 N.Y.2d 390 (1980) (victimization); *State v. Snyder*, 256 La. 601, 237 (1970) (political confrontation); *but see State v. Kadivar*, 460 So. 2d 391 (Fla. Dist. Ct. App. 1984) (holding that defendant's suit against the prosecutor's office did not disqualify the office staff from representing the state in defendant's criminal prosecution).

⁸⁵ See, e.g., *Wheeler*, 504 P.2d at 1095.

the prosecutor's duty and an analysis of whether a putative conflict is likely to impede a prosecutor's exercise of discretion in an evenhanded manner.⁸⁶

Typically, cases involving the putative disqualification of prosecutor(s) arise because of the existence of a past or present connection, relationship, acquaintance, or affiliation with the accused.⁸⁷ For example, courts routinely disqualify prosecutors from prosecuting defendants whom they have previously represented as defense attorneys,⁸⁸ particu-

⁸⁶ See *infra* § III(A)(1). See, e.g., *People v. Conner*, 34 Cal. 3d 141, 148 (1983).

⁸⁷ See, e.g., *United States v. Goot*, 894 F.2d 231 (7th Cir. 1990); *United States v. Troutman*, 814 F.2d 1428 (10th Cir. 1987); *United States v. Schell*, 775 F.2d 559 (4th Cir. 1985); *United States v. Caggiano*, 660 F.2d 184 (6th Cir. 1981); *United States v. Weiner*, 578 F.2d 757 (9th Cir. 1978); *Gajewski v. United States*, 321 F.2d 261 (8th Cir. 1963); *United States v. Stout*, 723 F. Supp. 297 (E.D. Pa. 1989).

⁸⁸ See, e.g., *Satterwhite v. State*, 359 So. 2d 816 (Ala. Crim. App. 1977) (holding that a prosecuting attorney improperly took "an active part" in the appellant's marijuana prosecution when the prosecutor had previously met with the appellant in his private office while still in private practice and discussed the three marijuana-related cases pending against him "to the extent, at least, that he could fix a fee for representing him"); *State ex rel. Romley v. Superior Court*, 908 P.2d 37 (Ariz. App. 1995) (holding that a deputy county attorney was prohibited from personally participating in the prosecution of fifteen criminal defendants because he had previously received confidential information while representing them in connection with criminal cases when he worked as a law office associate); *People v. Lepe*, 211 Cal. Rptr. 432 (Cal. Ct. App. 1985) (holding that the trial court had properly recused a district attorney and his entire office from prosecuting Lepe because the district attorney, before assuming that office, had defended him in two prior criminal cases); *Reaves v. State*, 574 So. 2d 105 (Fla. 1991) (holding that a state's attorney who was prosecuting the appellant for the murder of a police officer had to be disqualified because of his previous representation of the appellant in a case involving grand larceny charges when he was an assistant public defender); *People v. Rhymmer*, 336 N.E.2d 203 (Ill. App. Ct. 1975) (holding that the defendant was denied a fair trial by the conflict of interest on the part of the prosecutor who previously had discussed the defendant's criminal case with the defendant prior to becoming the prosecutor); *People v. Dyer*, 328 N.E.2d 716 (Ill. App. Ct. 1975) (holding that a *prima facie* violation of Dyer's constitutional right to due process had been established when the prosecutor in the case had previously represented him on unrelated criminal charges that were pending at the time that Dyer allegedly conversed with the prosecutor about facts surrounding the instant murder charges); *State v. Woods*, 283 So. 2d 753 (La. 1973) (recognizing that the prosecutor should have been recused because he had represented Woods at his arraignment while employed as an assistant public defender prior to being appointed as an assistant district attorney and conducting Woods's prosecution); *State v. Crandell*, 604 So. 2d 123 (La. Ct. App. 1992) (concluding that the trial court had properly recused a part-time prosecutor from any participation in the defendant's murder prosecution because he had previously represented him as counsel of record for two months at an earlier stage in the case); *Vandergriff v. State*, 920 So. 2d 486 (Miss. Ct. App. 2006) (holding that a prosecuting attorney was disqualified from acting in a criminal case if he had previously represented or been consulted professionally by the accused with respect to the offense charged); *State ex rel. Burns v. Richards*, 248 S.W.3d 603 (Mo. 2008) (holding that a prosecutor was disqualified from prosecution because, prior to being elected as prosecutor, he had served as the public defender in a prosecution in another county for a substantially related matter); *State v. Clark*, 162 N.J. 201 (2000) (prohibiting municipal prosecutors from defending clients in the same county in which they prosecute because such dual representation created the appearance of impropriety); *Mattress v. State*, 564 S.W.2d 678 (Tenn. Crim. App. 1977) (affirming the trial court's disqualification of an assistant district attorney from prosecuting the defendant for armed robbery because, previously in his capacity as staff attorney at

larly when such prior representation involved crimes that form the basis for a subsequent repeat-offender prosecution.⁸⁹ Courts also routinely disqualify prosecutors who have had other prior attorney-client relationships with defendants,⁹⁰ particularly when the prior representation involved a subject matter related to the instant criminal prosecution.⁹¹

a university legal aid clinic, the assistant district attorney had been assigned to a criminal case against the defendant involving charges unrelated to the instant armed robbery charges, even though the assistant district attorney did not recall the case in which he represented the defendant and the defendant did not claim to have been interviewed by him or to have divulged any confidential information to him); *State v. Stenger*, 760 P.2d 357 (Wash. 1988) (holding that the prosecuting attorney's prior representation of the defendant in unrelated criminal matters while he was in private practice required his disqualification from prosecuting this death-penalty murder prosecution when the defendant had confided uncharged crimes, drug use, and anti-social behavior during the prior representation); *see also* *People v. Tessitor*, 577 N.Y.S.2d 680 (N.Y. App. Div. 1991) (concluding that it was improper to allow an assistant district attorney who had once represented the defendant's codefendant to appear on the State's behalf at the defendant's sentencing for burglary and conspiracy). *Cf.* *Tyree v. State* 418 S.E.2d 16 (Ga. 1992) (noting that the prosecutor should have disclosed that he had twice represented the defendant while in private practice); *In re Ockrassa*, 799 P.2d 1350 (Ariz. App. 1990) (suspending an attorney for violating the Arizona Rules of Professional Conduct for not disqualifying himself from the prosecution of a defendant for driving under the influence of intoxicating liquors (DUI) when he represented the defendant in three prior DUI cases while acting as a contract public defender).

⁸⁹ *See, e.g., State v. Hursey*, 861 P.2d 615 (Ariz. 1993) (holding that a prosecutor who had represented the defendant in two earlier criminal cases should have disqualified himself from prosecuting the defendant in another criminal case, especially when the convictions in the two earlier cases were the basis for an enhanced sentence in the instant case); *Asbell v. State*, 468 N.E.2d 845 (Ind. 1984) (holding that the trial court did not err in appointing a special prosecutor after the defendant had been charged with being a habitual offender when the county prosecutor and his deputy had defended him against two previous charges that were offered to prove recidivism); *Sears v. State*, 457 N.E.2d 192, 195 (Ind. 1983) (holding that the appointment of a special prosecutor for the habitual offender phase of Sears's perjury trial was proper when the regular prosecutor had represented him "in one or more cases which were listed in the habitual offender charge"); *State v. Tippecanoe Cnty. Ct.*, 432 N.E.2d 1377 (Ind. 1982) (holding that the prosecutor had to be disqualified and a special prosecutor appointed when a habitual-offender charge was based upon two prior theft cases in which the prosecutor had represented the defendant); *State v. Gardner*, 651 So. 2d 282 (La. 1995) (affirming the trial court's granting of Gardner's motion to recuse the district attorney and the assistant district attorney from prosecuting him as a four-time driving while intoxicated (DWI) offender when the district attorney's prior representation of him as appointed counsel with regard to the two prior DWI offenses had included the filing of pretrial motions); *State ex rel. Keenan v. Hatcher*, 557 S.E.2d 361 (W. Va. 2001) (holding that the prosecutor's office was imputedly disqualified from initiating recidivist proceedings on the ground that the elected prosecutor and his assistant had acted as defense counsel in one of the cases involving a predicate offense, even though neither the prosecutor nor his assistant were directly involved in the sentencing phase of the case).

⁹⁰ *See, e.g., Lykins v. State*, 415 A.2d 1113 (Md. 1980) (holding that a prosecutor was disqualified from prosecuting the defendant for assault with the intent to murder when he had previously represented her and prepared a marital separation agreement for her, during which time he had discussed her personal and domestic history).

⁹¹ *See, e.g., People v. Chavez*, 139 P.3d 649 (Colo. 2006) ("[W]here the prosecuting attorney had an attorney-client relationship with the defendant in a case that was substantially related to the case in which the defendant is being prosecuted, circumstances exist that would render it unlikely that the defendant would receive a fair trial") (internal quotation omitted);

Additionally, courts frequently disqualify prosecutors who have been or are in an adverse relationship with a defendant.⁹² This Article proposes, by contrast, the disqualification of entire prosecutorial offices from the prosecution of cases when there is an inherent, actual conflict of interest arising from the structure of promotion and compensation decisions within them.

III. THE PROPOSAL: DISQUALIFICATION

A. *The Problem*

1. The Ethical Role of the Prosecutor: The “Client”

The prosecutor plays a unique role in the criminal justice system.⁹³ While the trial process has been referred to as a battle of adversaries in which lawyers meet to fight for the rights of their client,⁹⁴ within the criminal arena, the prosecutor serves a vastly different function than does

Nunn v. Commonwealth, 896 S.W.2d 911 (Ky. 1995) (holding that a prosecutor should have recused himself from the defendant’s prosecution for first-degree arson because his prior representation of the defendant in a bankruptcy proceeding was substantially related to the alleged motive underlying the arson prosecution); *State v. Allen*, 539 So. 2d 1232 (La. 1989) (holding that the trial court committed reversible error in denying the defendant’s motion to recuse an assistant district attorney from his arson prosecution when the assistant district attorney had represented him in a prior bankruptcy proceeding, which was “substantially related to” the prosecution); *Sharplin v. State*, 330 So. 2d 591 (Miss. 1976) (holding that, when a prosecutor in the defendant’s trial for the alleged murder of his estranged wife had been representing him in the divorce action against the victim, the relationship between the civil representation and the criminal prosecution was “so substantial and the facts of each so intertwined” that the prosecutor could not be expected to lay aside confidences entrusted to him during the civil representation, and the refusal of the court to disqualify the prosecutor upon Sharplin’s motion was reversible error); *State ex rel. McClanahan v. Hamilton*, 430 S.E.2d 569 (W. Va. 1993) (granting a writ prohibiting the trial court from proceeding further with the trial of the underlying criminal action until the prosecutor was disqualified from prosecuting the defendant for the malicious assault of her husband when he had previously represented her in a suit for divorce based on the ground of cruel and inhuman treatment, reasoning that her mistreatment at the hands of her husband was a central issue in the divorce proceeding and that these same facts and circumstances were substantially related to her defenses of self-defense and “battered wife syndrome” in the criminal action).

⁹² See, e.g., *Trujillo v. Superior Court*, 148 Cal. App. 3d 368 (Cal. Ct. App. 1983) (holding that a prosecutor who tackled the petitioner when he tried to bolt from the courtroom after a guilty verdict was announced was barred from prosecuting him for the resulting attempted escape charge but that the rest of his office was not); *State v. Snyder*, 237 So. 2d 392 (La. 1970) (holding that the district attorney should be disqualified from prosecuting Snyder in a state perjury case based on his personal animosity toward Snyder and his having actively campaigned against him during a mayoral election); *Commonwealth v. Balenger*, 704 A.2d 1385 (Pa. Super. Ct. 1997) (holding that the prosecutor’s amorous relationship with the defendant’s former girlfriend created an impermissible conflict of interest).

⁹³ See *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 826 (1987) (Powell, J., concurring in part and dissenting in part) (“A prosecutor occupies a unique role in our criminal justice system . . .”).

⁹⁴ See James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Messiah Doctrine*, 22 U.C. DAVIS L. REV. 1, 65 (1988).

the defense attorney.⁹⁵ Whereas the defense attorney's primary obligation is to protect a client's interest,⁹⁶ the prosecutor faces a dual role: that of advocate for the prosecution and administrator of justice.⁹⁷ The prosecutor serves a role in between that of the private attorney and the judge: on the one hand, zealously representing the client (the prosecution) in a role closely akin to that of the defense attorney and, on the other, observing the law.⁹⁸ The prosecutor's mission is not so much to secure a conviction as it is to achieve a just result. To that end, the prosecutor is supposed to prosecute and convict the guilty while ensuring that no inno-

⁹⁵ See Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958) ("The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client."); Vorenberg, *supra* note 17, at 1557 (observing that certain accepted practices of defense counsel are impermissible for prosecutors); cf. Richard Wassersstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. Q. 1, 12 (1975) (asserting that the behavior of criminal defense attorneys is "amoral" and distinguishable from the role of other lawyers).

⁹⁶ See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1060 (1976); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1244 (1991) ("The legal profession's basic narrative . . . pictures the lawyer as a partisan agent acting with the sanction of the Constitution to defend a private party against the government."); The Authenticated Journals Of The House Of Peers, *Her Majesty's Defense, in The Trial at Large of Her Majesty Caroline Amelia Elizabeth, Queen of Great Britain, in The House of Lords, on Charges of Adulterous Intercourse* 3 (1821). (" . . . [I]n performing this duty [an advocate] must not regard the alarm, the torments, the destruction which he may bring upon others."). But see *In re Hawaiian Flour Mills, Inc.*, 868 P.2d 419, 437 (Haw. 1994) (Levinson J., concurring) (urging all attorneys to be more "positively concerned . . . with the pursuit of truth") (quoting Judge Frankel, *The Quotable Lawyer*, WASHINGTON POST, May 7, 1978, at 101-02).

⁹⁷ See MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1997) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."); A.B.A. TASK FORCE ON STANDARDS FOR CRIMINAL JUSTICE PROSECUTION, *supra* note 1, at std. 3-1.3(a); John S. Edwards, *Professional Responsibilities of the Federal Prosecutor*, 17 U. RICH. L. REV. 511, e511 (1983) (describing the prosecutor's dual role as a zealous advocate who "must be vigorous and vigilant in attacking crime, but must temper his zeal with a recognition that his broader responsibilities are to seek justice . . ."); George T. Frampton, Jr., *Some Practical and Ethical Problems of Prosecuting Public Officials*, 36 MD. L. REV. 5, 7 (1976) ("The prosecutor . . . is both an advocate in the criminal justice system and also an administrator of that system." (emphasis in original)); Fuller & Randall, *supra* note 95, at 1218; Vorenberg, *supra* note 17, at 1557 (observing that prosecutors within the adversary system are "expected to be more (or is it less?) than an adversary").

⁹⁸ Compare *Young*, 481 U.S. at 804 (recognizing the need for a prosecutor to be a zealous advocate); Stephen A. Saltzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L. REV. 647, 656 (1986) (suggesting that prosecutors should present the "strongest argument" for conviction at trial); H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1159 (1973) (urging that prosecutors act primarily as zealous advocates), with *Blair v. Armonkout*, 916 F.2d 1310, 1352 (8th Cir. 1990).

cent person is wrongly convicted.⁹⁹ The NDAA expressed this view in its National Prosecution Standards:

[T]he prosecutor has a client not shared with other members of the bar, i.e., society as a whole The prosecutor must seek justice. In doing so, there is a need to balance the interests of *all* members of society, but when the balance cannot be struck in an individual case, the interest of society is *paramount* for the prosecutor.¹⁰⁰

In other words, the prosecutor is supposed to act “not only as an advocate, but also as a minister of justice.”¹⁰¹ In *Berger v. United States*, the Supreme Court characterized prosecutors not as ordinary parties to a controversy, but as representatives of a sovereignty.¹⁰² In keeping with this special role, the prosecutor owes allegiance to a broad set of societal values, avoiding the role of a “partisan eager to convict, and must deal fairly with the accused and other participants in the trial.”¹⁰³ This also entails the recognition that no single individual or constituency is “the client.”¹⁰⁴ Prosecutors are supposed to avoid punishing innocent individuals, apply a sense of proportionality (*i.e.*, advocate a punishment that

⁹⁹ See CHARLES E. WOLFRAM, *MODERN LEGAL ETHICS* 759 (1986); Fuller & Randall, *supra* note 95, at 1218 (“The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor’s duties are to be properly discharged.”).

¹⁰⁰ NAT’L DIST. ATTORNEYS’ ASS’N, *NATIONAL PROSECUTION STANDARDS* 9 stds. 1.1, 1.3 (1991) [hereinafter “NAT’L PROSECUTION STDS.”].

¹⁰¹ Flowers, *supra* note 15, at 703.

¹⁰² 295 U.S. 78, 88 (1935). The Court admonished that the prosecutor is the representative of the Government, “whose obligation to govern impartially is as compelling as its obligation to govern at all.” *Id.* The Court instructed, therefore, that the Government’s interest in a criminal case was not to win, but to see that justice was done. *Id.* For a discussion of *Berger*, see Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 635–36 (1972).

¹⁰³ *State v. Moss*, 376 S.E.2d 569, 574 (W. Va. 1988) (observing that the prosecutor’s duty to avoid overzealousness is especially important in cases involving serious offenses where the jury is apt to be predisposed against the defendant). See Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 218–20 (1988). See also *State v. Chambers*, 524 P.2d 999, 1003 (quoting *People v. Gerold*, 107 N.E. 165 (Ill. 1914)) (recognizing the prosecutor’s duty to see that the defendant is afforded a fair trial).

¹⁰⁴ See, e.g., *Newton v. Rumery*, 480 U.S. 386, 413 (1987) (concluding that the prosecutor represents both the public and the police); accord *Burns v. Reed*, 500 U.S. 478, 486–87 (1991) (denying a prosecutor absolute immunity for advice given to police). See generally James R. Harvey III, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1570 (1996) (recognizing the potential clients of the DOJ as being the public interest, the Government as a whole, agency officials, the agency itself, the President, and the Attorney General); Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C. L. REV. 625 (1979) (discussing the identity of possible prosecutorial “clients”); E. Michael McCann, *Opposing Capital Punishment: A Prosecutor’s Prospective*, 79 MARQ. L. REV. 649, 663 (1996) (describing the relationship between prosecutors and the police).

fits the crime), and treat all defendants with rough equality.¹⁰⁵ This role “places the prosecutor in the position of both advocating and considering procedural fairness.”¹⁰⁶

At times, this role means that prosecutors “wear two hats”—they must protect not only the prosecution, but the defense case as well.¹⁰⁷ The prosecutor’s duty to refrain from improper methods calculated to bring about a wrongful conviction is equal to the duty to use every legitimate means to obtain a just conviction.¹⁰⁸ The defendant is entitled to a full measure of fairness, and it is as much a prosecutor’s duty to see that the accused is not deprived of any statutory or constitutional rights as it is to prosecute.¹⁰⁹ The *Brady* rule, established by the Supreme Court in 1963, requiring prosecutors to disclose to the defendant favorable, material information, arises out of the recognition of this special role.¹¹⁰

2. Prosecutorial Discretion

Prosecutors have tremendous power over the life and liberty of defendants: “The prosecutor is a public official vested with considerable discretionary power to decide what crimes are to be charged and how they are to be prosecuted.”¹¹¹ Once a criminal matter has been referred for prosecution, the prosecutor decides the appropriateness of bringing criminal charges and, if deemed appropriate, initiates prosecutions.¹¹²

¹⁰⁵ See Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 634–36 (1999) [hereinafter Green, *Seek Justice*].

¹⁰⁶ Flowers, *supra* note 15, at 703.

¹⁰⁷ See Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 930–31 (1996); see also Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 66–74 (1991) (discussing the prosecutor’s responsibility to “do justice” when opposing counsel is ineffective). As the United States Court of Appeals for the Eighth Circuit observed in *Blair v. Armontrout*, “in criminal cases, the government must wear two hats. The prosecutor must act as an advocate, although he or she is repeatedly cautioned to put ahead of partisan success the observance of the law . . .” 916 F.2d 1310, 1352 (8th Cir. 1990).

¹⁰⁸ See *Berger v. United States*, 295 U.S. 78, 88 (1935).

¹⁰⁹ *State v. Crume*, 22 P.3d 1057, 1068 (Kan. 2001).

¹¹⁰ See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¹¹¹ *People v. Superior Court (Greer)*, 561 P.2d 1164, 1171 (Cal. 1977), superseded by statute, CAL. PEN. CODE ANN. § 1424 (West 2000), as recognized in *People v. Connor*, 666 P.2d 5 (Cal. 1983).

¹¹² See GAO REPORT, *supra* note 41, at 15. USAs receive most of their criminal referrals from federal investigative agencies or “become aware of criminal activities in the course of investigating or prosecuting other cases.” *Id.* They also “receive criminal matters from state and local investigative agencies or, occasionally, from private citizens.” *Id.* System-wide, USAs decline approximately twenty percent of all cases referred to them for prosecution. See U.S. DEP’T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 28 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf>.

Prosecutorial screening and charging policies may significantly impact case outcomes.¹¹³ Prosecutorial screening is “the first decision point in the system where the prosecutor exercises his/her discretion, determines which cases enter the system, which are diverted, and which are refused for prosecution.”¹¹⁴ The prosecutor brandishes tremendous authority and discretion in directing investigations,¹¹⁵ ordering arrest, defining the crimes to be charged,¹¹⁶ deciding whether to seek pretrial detention or grant immunity and plea bargaining. The prosecutor also affects punishment, making sentencing recommendations, and deciding whether to prosecute at all.¹¹⁷ Decisions about which charges to file and whether to negotiate a plea agreement are often a matter of prosecutorial policy.¹¹⁸ Across a wide swath of criminal conduct, prosecutors have a wealth of criminal statutes to consider in determining whether to use their discretionary power to proceed with a prosecution.¹¹⁹ In addition to the ever-increasing number of applicable statutes, the breadth of many criminal statutes, which subject a wide array of conduct to criminal prosecution, and the reduction of *mens rea* requirements over time afford prosecutors significant power in their prosecution role.¹²⁰

¹¹³ NUGENT-BORAKOVE ET AL., *supra* note 39, at 9 (citing Wright & Miller *Screening/Bargaining*, *supra* note 16).

¹¹⁴ *Id.*

¹¹⁵ See generally Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992) (discussing the trend of increasing prosecutorial involvement in criminal investigations).

¹¹⁶ See *Ball v. United States*, 470 U.S. 856, 859 (1985) (recognizing the long-standing rule that prosecutors have broad discretion in making charging decisions); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (explaining that a court cannot interfere with a prosecutor's decision to bring charges); see also Gershman, *supra* note 115, at 409 (arguing that the most extreme example of the prosecutor's discretion is in the area of charging decisions in capital cases); see generally Charles J. Yeager & Lee Hargrave, *The Power of the Attorney General to Supersede a District Attorney: Substance, Procedure & Ethics*, 51 LA. L. REV. 733, 743 (1991).

¹¹⁷ See Misner, *supra* note 16, at 718. Misner has identified three trends that have augmented the traditional discretion and authority of the prosecutor: (1) criminal codes with overlapping crimes; (2) the systemic reliance on plea bargaining; and (3) sentencing reforms, like charge-based guidelines and mandatory-minimum sentences, that have shifted much of the judge's historical sentencing discretion into the hands of the prosecutor. See *id.* at 742.

¹¹⁸ See NUGENT-BORAKOVE ET AL., *supra* note 39, at 9; but see ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 85–86 (2001) (“[P]rosecutors receive little formal training in sentencing theory; often they decide the fates of defendants rapidly and intuitively, without obligatory coordinating guidelines and without any institutionalized requirement to explain and compare their decisions in a reviewable manner.”); David T. Johnson, *The Organization of Prosecution and the Possibility of Order*, 32 LAW & SOC'Y REV. 247, 268 (1998) (“In other large American prosecution offices, one usually finds an office manual or handbook of some sort, but in most instances it is difficult to say that these materials set forth prosecutorial policy.”) (internal quotation marks omitted).

¹¹⁹ See Podgor, *Tainted Federal Prosecutor*, *supra* note 15, at 1578–79 (discussing the number of federal criminal statutes).

¹²⁰ See *id.* at 1580–81 (discussing the reduced *mens rea* requirements of certain federal statutes).

This discretionary power is virtually unquestioned and unquestionable.¹²¹ One commentator has described the prosecutor as “the single most powerful figure in the administration of criminal justice.”¹²² Another has noted that the centralization of power in prosecutors’ offices has made the prosecutor the “preeminent actor in the system.”¹²³ In other words, determining what it means to be a “minister of justice” is largely left “to the wisdom of the prosecuting attorney.”¹²⁴

3. Counting Convictions

Despite being described as impartial “ministers of justice,” in reality, prosecutors see themselves as advocates in a sometimes brutally adversarial process.¹²⁵ They are partisans in the criminal process, with chief prosecutors and their line deputies having strong incentives to maximize convictions and aggregate sentences.¹²⁶ Prosecutors perceive their role not as truth-seekers, which they are more likely to view as the job of the court, but as parties marshaling evidence and arguments that support a conviction and tough sentence.¹²⁷ This, in turn, inspires a mentality in which, because victory is all that matters, the ends always justify the means. For example, there have been some high-profile instances of prosecutors’ offices opposing defense efforts to preserve potentially exculpatory evidence for a long enough time to permit exhaustion of post-conviction review.¹²⁸ This is a serious concern to the proper administration of justice.

Prosecutorial adversarialism leads to two related but very different problems. The first is prosecutorial misconduct and the risk that prosecutorial personnel policies that encourage counting convictions lead prosecutors to run afoul of their constitutional obligations and commit

¹²¹ See Wayne A. Logan, *A Proposed Check on the Charging Discretion of Wisconsin Prosecutors*, 1990 WIS. L. REV. 1695, 1695–96 (1990); Catherine Lowe, *Project, Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991–1992*, 81 GEO. L.J. 853, 1029–32 (1993).

¹²² Charles P. Bubany & Frank F. Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 477 (1976). See Melilli, *supra* note 33, at 672.

¹²³ Misner, *supra* note 16, at 718.

¹²⁴ H. RICHARD UVILLER, *THE TILTED PLAYING FIELD* 70 (1999). The ABA standards provide that prosecutors’ offices should establish “a statement of (i) general policies to guide the exercise of prosecutorial discretion and (ii) procedures of the office.” A.B.A. TASK FORCE ON STANDARDS FOR CRIMINAL JUSTICE PROSECUTION, *supra* note 1, at std. 3-2.5 (1993). They note 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.*

¹²⁵ Compare *supra*§ III(A)(1) with KAGAN, *supra* note 118, at 61–96 (analyzing adversarialism in the American criminal justice system).

¹²⁶ See Luna & Wade, *supra* note 3, at 1508.

¹²⁷ See Johnson, *supra* note 118, at 263–64.

¹²⁸ Andrew E. Taslitz, *Convicting the Guilty, Acquitting the Innocent: The ABA Takes a Stand*, 19 CRIM. JUST. 18, 30 (2005).

prosecutorial misconduct. Prosecutorial misconduct is not a rarity in the criminal-justice system.¹²⁹ In recent decades, legal scholars have devoted enormous attention to intentional prosecutorial misconduct.¹³⁰ Although plenty of standards for the conduct of prosecutors exist,¹³¹ they have failed to diminish prosecutorial misconduct.¹³² Academic commentators have been particularly critical of *Brady* violations.¹³³ Though prosecutors routinely fail to comply with *Brady*, the failure is rarely discovered, and almost never punished.¹³⁴ Prosecutors' offices and bar associations hardly ever punish this behavior, judges seldom discipline prosecutors for such violations, and criminal sanctions are rarely imposed against prosecutors.¹³⁵ Richard Rosen has found that disciplinary

¹²⁹ See Flowers, *supra* note 15, at 734.

¹³⁰ See, e.g., BENNETT L. GERSHMAN, *TRIAL ERROR AND MISCONDUCT* (1997); JOSEPH F. LAWLESS JR., *PROSECUTORIAL MISCONDUCT* (2008); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001); Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 83–89 (2005); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 720–53 (1999); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987).

¹³¹ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1997); A.B.A. TASK FORCE ON STANDARDS FOR CRIMINAL JUSTICE PROSECUTION, *supra* note 1; NAT'L PROSECUTION STDS., *supra* note 100.

¹³² See, e.g., Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J.L. & PUB. POL'Y 167, 177–85 (2004) (discussing federal prosecution guidelines and the failure to enforce them).

¹³³ Under the rule established in *Brady* and its progeny, prosecutors are required, as a matter of due process, to disclose favorable material information that tends either to exculpate the defendant or to impeach witnesses against her. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963); see also *Kyles v. Whitely*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *United States v. Bagley*, 473 U.S. 667, 684 (1985) (holding that evidence was material under *Brady* if there was a reasonable probability that, had it been disclosed to the defense, the result of the proceeding would have been different); *Giglio v. United States*, 405 U.S. 150, 154–55 (1972) ("[E]vidence of any understanding or agreement as to a future prosecution would be relevant to [the witness'] credibility and the jury was entitled to know of it."). This makes *Brady* at once one of the most important obligations imposed on prosecutors, and one of the most common claims by criminal defendants in appealing their convictions. Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, e283 (2011). For an excellent assessment of *Brady* issues and criticisms of particular violations, see Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531 (2007).

¹³⁴ See Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1539–44 (2010) (discussing the widespread failure of prosecutors to disclose exculpatory evidence to defendants).

¹³⁵ See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 123–41 (2007) (discussing one study of more than 11,000 cases involving potential prosecutorial misconduct that found that, in only approximately 2,000 of those cases, courts reversed convictions, dismissed charges, or reduced sentences and that most of the prosecutors suffered no consequences as a result); Medwed, *supra* note 134, at 1544; Michael S. Ross, *Thinking Outside the Box: How the Enforcement of Ethical Rules Can Minimize the Dangers*

charges have been “brought infrequently under the applicable rules and that meaningful sanctions have been applied only rarely.”¹³⁶ Bennett L. Gershman has reported that he reviewed “literally hundreds of truly egregious instances of prosecutorial misconduct” and that none of these instances resulted in punishment of the prosecutor by either his superiors or the bar.¹³⁷ There is no shortage of recent high-profile examples of misconduct: the prosecutions of Alaska Senator Ted Stevens, the W.R. Grace Co., and members of the Duke Lacrosse Team.

Commentators have debated the cause of the prevalence of prosecutorial misconduct. One theory is that “[i]nstitutional and political pressures combine to create tremendous incentives for the prosecutor to

of Prosecutorial Leniency and Immunity Deals, 23 CARDOZO L. REV. 875, 890 (2002) (claiming that the Department of Justice’s Office of Professional Responsibility has been known to overlook acts of misconduct by prosecutors, even when such misconduct has been publicly noted by judges). Commentators have also documented that, on the rare occasions when prosecutors are disciplined, the sanctions imposed amount to little more than a “slap on the wrist.” Rosen, *supra* note 130, at 736. See also Misner, *supra* note 16, at 736 (noting the courts’ “hands-off” policy in sanctioning prosecutors); see generally Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 979–82 (1984).

¹³⁶ Rosen, *supra* note 130, at 693.

¹³⁷ BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT 13-2 n.4 (1998) [hereinafter GERSHMAN, PROSECUTORIAL MISCONDUCT] (concluding that attorney disciplinary sanctions are so rarely imposed as to make their use virtually a nullity). See LAWLESS, *supra* note 130, at 599 (noting that disciplinary sanctions against prosecuting attorneys are the exception rather than the rule); Alschuler, *supra* note 102, at 673 (“Courts have sometimes exhibited a strange hesitancy to subject prosecutors to the rules that are applicable to other lawyers.”); see also Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1604–09, 1613–17 (2010) (describing the “accountability deficit” of American prosecutors across a range of decisions). Similarly, in an “entirely unscientific and possibly incomplete” search of roughly 600,000 reported state disciplinary decisions since 1963, Professor Rory Little found only eighteen decisions involving the discipline of prosecutors in their official capacity. Flowers, *supra* note 15, at 735 n.258.

Several factors may contribute to the lack of formal discipline of prosecutors. One commentator has suggested that the lack of discipline may stem from the prosecutor’s “standing, prestige, political power and close affiliation with the bar.” GERSHMAN, PROSECUTORIAL MISCONDUCT, *supra*, at ix. Other commentators have asserted that the lack of discipline is the result of a hostile attitude on the part of the judiciary toward claims of prosecutorial misconduct that stems from the relationship between the judiciary and the prosecutor’s office, see Flowers, *supra* note 15, at 735; the difficulty in obtaining evidence to pursue violations successfully, disciplinary bodies’ lack of expertise in the criminal law area that makes them reluctant to judge prosecutorial conduct, see Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 70 (1995) [hereinafter Green, *Policing*]; and an inadequacy in the rules of professional conduct that means that many of the concerning actions of prosecutors do not technically violate ethical requirements. See Flowers, *supra* note 15, at 735–36.

Last year, the Supreme Court further weakened the ability of wronged defendants to hold prosecutors’ offices liable by giving these offices nearly absolute immunity against civil suits for instances of misconduct. See *Connick v. Thompson*, 131 S. Ct. 1350, 1353–54 (2011). In an apparently unintentional nod to irony, Justice Thomas justified the ruling by noting that an “attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.” *Id.* at 1362–63.

overlook her quasi-judicial obligation.”¹³⁸ As Justice Brennan explained: “Pressures on the government . . . to ‘do something[]’ can overwhelm even those of good conscience.”¹³⁹ The fear of having performance gauged by conviction record is foremost among these institutional pressures.¹⁴⁰ Given that conviction rates and sentence lengths are used both as indicators of success and as grounds for retention or promotion, this is hardly a surprise.

The career-advancement structures in prosecutors’ offices increase the danger of prosecutorial misconduct. A prosecutor protective of a “win–loss” record has an incentive to commit misconduct, to cut constitutional and ethical corners in order to secure a guilty verdict in a weak case, to make an incorrect decision about the law, and to win at all costs.¹⁴¹ Prosecutors intent on racking up convictions and lengthy sentences fail to disclose *Brady* material and likely run afoul of other constitutional and statutory obligations. For example, a prosecutor with a career at stake in the outcome of a case has an incentive not to ensure that law-enforcement agencies, forensic laboratories, and other experts understand their obligations to inform prosecutors about exculpatory or mitigating evidence. Otherwise unthinkable tactics—like bringing questionable or excessive charges, shaping beneficial testimony and mercilessly attacking opposing witnesses, ignoring or even hiding exculpatory evidence, and appealing to base emotions and prejudices—all become conceivable when winning means everything.¹⁴²

¹³⁸ Elizabeth L. Earle, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 COLUM. L. REV. 1212, 1219 (1992) (noting that political pressures can cause justice to “take a backseat”). See *Dick v. Scroggy*, 882 F.2d 192, 196 (6th Cir. 1989) (“Politically ambitious and aggressive prosecutors are by no means uncommon.”).

¹³⁹ *Wainwright v. Witt*, 469 U.S. 412, 459 (1985) (Brennan, J., dissenting).

¹⁴⁰ See Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 445 (1971) (quoting one prosecutor’s assessment that a prosecutor’s willingness to take a weak case to trial depended “on his position in the office at the time of trial”); see generally Kenneth Bresler, “I Never Lost a Trial”: When Prosecutors Keep Score of Criminal Convictions, 9 GEO. J. LEGAL ETHICS 537, 541–46 (1996) (discussing problems with the use of conviction records in performance evaluations); Earle, *supra* note 138; Donald Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 43 n.39 (1983).

¹⁴¹ See Bresler, *supra* note 140, at 543; Ronald Wright, *Trial Distortion and the End of Innocence*, 154 U. PA. L. REV. 79, 101 (2005) (“Low acquittal rates in some jurisdictions might reflect a tragic indifference to the truth and the prosecutors’ determination above all to secure convictions.”); see, e.g., *United States v. Mullins*, 22 F.3d 1365, 1376 (6th Cir. 1994) (Jones, J., concurring) (“[A] ‘win at all costs’ attitude . . . is inconsistent with [a prosecutor’s] oath of office.”); *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983) (explaining that prosecutors have “no obligation to win at all costs”); *State v. Ray*, 467 N.E.2d 1078, 1084 (Ill. App. Ct. 1984) (“The State’s interest in a criminal prosecution is not that it must win at all costs, but to assure that justice is done, and it is a prosecutor’s duty as much to refrain from improper methods calculated to produce a conviction as it is to employ legitimate techniques to secure a just conviction, striking hard blows, but not foul ones.”).

¹⁴² See KAGAN, *supra* note 118.

More broadly, this career interest in earning convictions can lead otherwise reasonable people to threaten excessive charges or disproportionate punishment in order to induce guilty pleas.¹⁴³ Prosecutors may employ dubious evidence and disconcerting strategies, all to sway fact-finders toward conviction.¹⁴⁴ After all, if a line prosecutor makes a decision for the wrong reasons, she is likely to face no sanction except a reversal of a conviction anyway.¹⁴⁵

The second problem that these prosecutorial incentive structures engender is not misconduct *per se*, but rather the poor exercise of prosecutorial discretion.¹⁴⁶ In these instances, prosecutors do not necessarily commit misconduct, but they are nonetheless unable to achieve the good results that they likely would accomplish in the absence of a biasing conflict of interest.

The already-adversarial conception that some prosecutors have of their role in the system can be exacerbated by prosecutorial performance-

¹⁴³ See Luna & Wade, *supra* note 3, at 1508.

¹⁴⁴ See *id.*

¹⁴⁵ See, e.g., Meares, *supra* note 24, at 900 (noting that reversal is not a true sanction, as it is not specifically directed towards punishing the prosecutor, but that it still may affect prosecutor behavior).

¹⁴⁶ This distinction, between prosecutorial misconduct and abuse of prosecutorial discretion, has practical as well as theoretical implications. For example, The DOJ Office of Professional Responsibility (OPR), the internal monitor of ethical violations committed by federal prosecutors, focuses on professional misconduct. See U.S. ATTORNEYS' MANUAL § 1-2.114 (1998) ("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."). Although 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. See Podgor, *Ethics & Professionalism*, *supra* note 3, at 1527.

Instances of OPR's examining discretionary decisions by prosecutors occur only in the context of investigations into whether misconduct has occurred. See *id.* at 1528. For example, the 1997 OPR Report references an investigation instigated when a "U.S. District Court found that a DOJ attorney acted in bad faith by refusing to file a substantial assistance motion [for a downward departure at sentencing] on behalf of a defendant who had entered into a plea agreement with the government." *Id.* OPR found that the prosecutor had not engaged in misconduct because there were "valid reasons for not filing a substantial assistance motion." *Id.* at 1528-29. Although a discretionary decision by a prosecutor was being examined in the case, the OPR investigation focused on whether misconduct had occurred and whether the prosecutor had breached a plea agreement. See *id.* at 1529.

Furthermore, central DOJ generally is not in a good position to evaluate the motivations of the individual USAs who choose which cases to pursue. See Green & Zacharias, *Allocation*, *supra* note 31, at 240. The ordinary criteria for supervisory controls rest on the assumption that prosecutors at each level of DOJ will at least try to perform their functions in accordance with their obligations to seek justice. See *id.* at 243. Routine review of fact-sensitive decision-making ordinarily is conducted at a relatively low level, by experienced supervisors who are in a position to familiarize themselves with individualized considerations relevant to the specific cases. See *id.* When ordinary supervisory oversight is insufficient, the favored method of preventing abuses of discretion centrally is to develop regulations that guide decision-making. See *id.* at 240.

measure structures, pursuant to which prosecutors with the highest conviction and sentencing statistics are in the best position for career advancement, but those who exercise their discretion to achieve the most just and beneficial outcomes are not.¹⁴⁷ A simple “screening” decision based on traditional concerns like the strength of the evidence and the individual’s relative culpability is inevitably influenced by the background consideration of the prosecutor’s career advancement; instinctively, the prosecutor becomes trigger happy, leaning toward conviction on the top count of the charging document and the maximum sentence.

Self-interest is clearly an illegitimate basis for prosecutorial conduct.¹⁴⁸ Prosecutors whose career success depends on their charging, conviction, or sentencing “records” have an actual personal interest in the outcome of the cases they prosecute.¹⁴⁹ They are not neutral and detached actors, but rather have a personal stake in individual case outcomes and net results over time.¹⁵⁰ Counting convictions acts as an incentive to seek convictions, as a prosecutor operating under one of these advancement-and-compensation regimes personally benefits from convictions and sentences.¹⁵¹ The overzealousness that this regime engenders offends the ethic of objective prosecutorial decision making, which considers fairness to defendants as well as the public.¹⁵²

In rare cases, this means prosecutors will not separate the innocent from the guilty because they have a strong incentive not to discover who

¹⁴⁷ See Luna & Wade, *supra* note 3, at 1466; see, e.g., Edward L. Glaeser et al., *What Do Prosecutors Maximize?: An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259, 263–65 (2000) (describing various motivating factors for prosecutors to gain convictions and finding, among other things, that federal prosecutors were more likely to accept cases with “higher career returns”).

¹⁴⁸ See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WASH. L. REV. 837, 852–53 (2004) (“[I]t may seem axiomatic that prosecutors should not rely on criteria such as race and gender, self-interest, idiosyncratic personal beliefs, or partisan politics in exercising their discretion.”).

¹⁴⁹ Cf. *People v. Zimmer*, 414 N.E.2d 705 (N.Y. 1980) (reversing Zimmer’s conviction for grand larceny, forgery, and the issuance of a false financial statement because the district attorney who presented the case to the grand jury was also counsel to and a stockholder of the corporation in the course of whose management Zimmer was alleged to have committed the crimes with which he was charged).

¹⁵⁰ Luna & Wade, *supra* note 3, at 1495.

¹⁵¹ See Bresler, *supra* note 140, at 545; cf. *People v. Superior Court*, 51 Cal. Rptr. 3d 356, 363–4 (Cal. Ct. App. 2d Dist. 2006) (affirming the trial court’s recusal of two deputy district attorneys because they demonstrated a one-sided perspective on the role of the prosecution and an apparent attempt to represent the alleged victim’s interest in protecting her privacy that exceeded the exercise of balanced discretion necessary to ensure a just and fair trial) *rev’d*, 43 Cal. Rptr. 3d 276 (2008); *In re N.R.*, 139 P.3d 671, 676–77 (Colo. 2001) (exploring what sorts of prosecutorial “interests” could serve as the basis for disqualification, in the context of political pressure from a victim’s parents, and holding that a prosecutor had to stand to receive some personal benefit from prosecution to be validly disqualified).

¹⁵² See Green & Zacharias, *Allocation*, *supra* note 31, at 240.

is innocent.¹⁵³ A prosecutor with a career stake in the outcome of a case has an incentive not to conduct an adequate examination of the quality of the evidence, especially of eyewitness testimony, confessions, or testimony from witnesses who receive a benefit in exchange. The prosecutor's cases make their way to trial without adequate critical examination of the quality of the evidence, especially of eyewitness testimony, confessions, or testimony from witnesses that receive a benefit. These personnel schemes remove any incentive for a prosecutor to track down a witness whose version of events might support a defendant's claim to an alibi, self-defense, an illegal search or seizure, or mistaken eyewitness identification.

Similarly, such schemes remove incentive to discover evidence undercutting the credibility of prosecution witnesses.¹⁵⁴ The prospect of advancement and the resulting office cultures hinder prosecutors from promptly dismissing weak cases, leaving innocent defendants imprisoned for far longer than necessary or with no choice but to accept too-good-to-refuse guilty-plea offers to crimes that they did not commit. The result is that the burden of investigating potential claims of innocence falls entirely on the shoulders of defense counsel, who have fewer investigatory resources at their disposal,¹⁵⁵ and innocent defendants are regu-

¹⁵³ Perhaps understandably, prosecutors are skeptical of most defendants' claims of innocence. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 909, 946 (1992) ("In the absence of reliable signals that they can afford to take seriously, prosecutors have no viable option other than to ignore claims of innocence."). Prosecutors who are promoted and rewarded on the basis of conviction rates and sentence lengths spend all their time trying to convict defendants (whom they presumably firmly believe to be guilty) rather than exploring undocumented theories that could exculpate innocent defendants. Without this powerful incentive to look the other way, prosecutors might have a more realistic chance of finding witnesses to support innocent defendants' cases, especially when the possibility of favorable defense evidence is only obtainable after additional prosecutorial investigation. Thus, the hopefully-rare defendants who deserve to be acquitted, either because they are factually innocent or because there are legitimate questions about the evidence against them, may be convicted anyway.

¹⁵⁴ This problem is compounded by the frequency with which key prosecution witnesses are involved in criminal activity. See generally Michael M. O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 327 (2007) ("[M]any victims are themselves involved in criminal activity, live in neighborhoods with high crime rates, or are otherwise at high risk for involvement in or exposure to additional offenses."). Such impeachment evidence is not necessarily exculpatory, and it may not turn out to be favorable to the defense at all after it is investigated, so it is likely to be overlooked by a prosecutor whose career depends on a body count.

¹⁵⁵ If the defense attorney is competent and not overburdened, there is nothing inherently wrong with this approach. On the contrary, it is what the adversarial system of criminal justice envisions. The reality, however, is that many defense attorneys are overburdened. In some jurisdictions, compensation for appointed counsel representing indigent defendants is capped for each case, encouraging defense attorneys to take more cases and creating a parallel financial incentive for them to avoid spending much time working to prove their clients' innocence. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 11 (1997) ("[A] typical appointed defense lawyer faces something

larly convicted of crimes, both after trial¹⁵⁶ and as a result of guilty pleas.¹⁵⁷

Far more frequently, these compensation schemes means that prosecutors will not exercise their discretion to distinguish the most culpable defendants from those who committed the crimes but are not deserving of as harsh a punishment (e.g., because they played a minor role in the offense, had a diminished mental capacity, or had no prior criminal record) or to divert appropriate defendants to specialized programs, like drug courts, which are designed to treat and rehabilitate nonviolent offenders rather than incarcerate them.¹⁵⁸ Prosecutors' career incentives

like the following pay scale: \$30 or \$40 an hour for the first twenty to thirty hours, and zero thereafter."). Defense attorneys who are paid what amounts to a capped rate for criminal defense are unlikely to fare much better than prosecutors who are rewarded for obtaining convictions and sentences in uncovering compelling evidence that a defendant is factually innocent.

¹⁵⁶ See D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780 (2007) (finding a minimum rate of 3.3% for wrongful convictions in capital rape-murder trials during the 1980s).

¹⁵⁷ Most innocent defendants who are wrongfully convicted are not necessarily the victims of prosecutorial misconduct or inept defense lawyers, but rather are convicted because they knowingly and voluntarily pleaded guilty to offenses they did not commit - often at the advice of counsel. See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1174 (2008). Innocent defendants plead guilty because of long trial backlogs and short-sentence plea offers, which permit them to leave pretrial detention earlier by pleading guilty (through an offered sentence of time served) than they would if they were acquitted at trial. *Id.* at 1136 ("The trial course is long; even if convicted, the defendant often has already served any post conviction sentence, and then some. In this way, conviction may counterintuitively inaugurate freedom.") (footnote omitted); Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 798 (2006) ("[E]ven innocent defendants choose to plead guilty simply to get out of jail."). For example, after languishing for almost six months in jail without seeing a lawyer, Ramiro Games pleaded guilty to simple possession of cocaine, a misdemeanor, despite having no attorney and no understanding that he was even pleading guilty. See Ruben Castaneda, *Without English, Inmate was Trapped*, WASH. POST, Apr. 10, 2006, at A1. The circuit court judge who accepted Games's plea acknowledged: "My object in this case was not criminal justice. My object was to get him the hell out of jail." *Id.* at A9. Perversely, the incentive to plead guilty for a sentence of time served is likely heightened for innocent defendants because, prosecutors likely have weaker cases against them, and are more likely to dispose of those cases with "generous" plea offers. The result is that innocent defendants have good reasons (and few obstacles) to plead guilty to crimes that they did not commit. See Gershowitz & Killinger, *supra* note 133, at 291.

¹⁵⁸ This is particularly important when, as too often is the case, a defendant is represented by an overburdened or underqualified defense attorney who fails to conduct any investigation or to bring the relevant information to the sentencing court's attention. See Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1540 (2004) ("The prosecutor exercises the sole power to recommend that a defendant be diverted to drug court If the prosecutor decides that the criteria do not apply, the defendant has no further recourse and must proceed through the criminal justice system in the normal manner.") (footnote omitted); see also Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender about Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 57 (2001) ("Like other diversionary programs, most drug treatment courts operate at the whim of the prosecution. In New York, drug courts cannot make promises to defendants without the approval of the Office of the District Attorney.") (footnote

do not encourage them to carefully assess which defendants are most deserving of punishment. For them, punishment is not merely a matter of justice, but an adversarial tool to be used to increase conviction rates, particularly through the coercive practices of plea bargaining.¹⁵⁹ Threats of harsh sentences are not only allowed, they are expected.¹⁶⁰ Guilty defendants with mitigating circumstances do not receive the sentencing discounts they would receive in the absence of a prosecutor's career incentives to seek a more severe sentence. Candidates for diversionary prosecution policies and specialized rehabilitative courts may not be diverted to those programs because prosecutors have a career incentive not to recognize worthy defendants.¹⁶¹

B. *The Solution*

These personnel incentives pose a severe conflict of interest and should be considered an actual conflict of interest worthy of disqualification because there is a high likelihood that such incentives would negatively influence a prosecutor's substantial discretionary judgment, and thus would interfere with a defendant's right to a fair trial.¹⁶² This solu-

omitted). Although studies conflict, there is evidence that defendants who complete drug court have lower recidivism rates. For a list of the conflicting studies, see Leslie Paik, *Maybe He's Depressed: Mental Illness as a Mitigating Factor for Drug Offender Accountability*, 34 LAW & SOC. INQUIRY 569, 575 (2009).

¹⁵⁹ Luna & Wade, *supra* note 3, at 1496.

¹⁶⁰ *Id.*

¹⁶¹ This definition of career success is not universal. European criminal justice systems typically charge prosecutors with a duty to be completely objective in their pursuit of the truth, based on a belief in the existence of a "substantive" or "material" truth that can be determined by a dispassionate factfinder. See Francisca Van Dunem, *The Role of the Public Prosecution Office in the Penal Field*, in *THE ROLE OF THE PUBLIC PROSECUTION OFFICE IN A DEMOCRATIC SOCIETY* 109, 109–10 (1997) (describing prosecutorial adherence in Europe to "principles that seek the closest possible correspondence between procedural veracity and the underlying facts in order to secure substantive justice"). This ideal of objectivity deeply affects the way in which European prosecutors view their role and work. See Luna & Wade, *supra* note 3, at 1469. Success is not measured by convictions, and acquittals are not seen as failures. *Id.* Instead, continental prosecutors are supposed to find the truth and achieve evenhanded outcomes. *Id.* Senior prosecutors are expected to make sure that those under their supervision apply the law even-handedly and in line with policy. *Id.* at 1475. This expectation and the concomitant job culture affect discretionary decision-making and encourage case-ending solutions that comport with the interests of justice, whatever those interests may be. *Id.* at 1469 (finding no evidence that prosecutors in the European countries that they studied were "led by anything other than a judicially informed vision of truth and fairness"). These norms, rather than a drive for courtroom victories, exert the greatest influence on prosecutorial decision-making. *Id.* at 1474. For an international comparison of prosecutorial decision making and case outcomes based on a hypothetical case, see Jenia Iontcheva Turner, *Prosecutors and Bargaining in Weak Cases: A Comparative View*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* (Erik Luna & Marianne Wade eds., 2012).

¹⁶² This Article does not address the question of the extent to which a prosecutor's office's compensation and promotion policies should be discoverable by the defense in a criminal case.

tion involves courts asserting a greater role at the front end of the criminal process, premised in part on the separation-of-powers doctrine.¹⁶³

A central purpose of courts is to provide an institutional check on the other branches of government. While the majority of states do not have disqualification statutes, trial courts nonetheless have the authority to disqualify prosecuting attorneys from participating in particular criminal prosecutions if they have a conflict of interest that might prejudice them against the accused or otherwise cause them to seek results that are unjust or adverse to the public interest.¹⁶⁴

Federal courts have inherent powers, including the power to regulate attorneys and the conduct of litigation. Article III vests “judicial power” in the federal courts.¹⁶⁵ The Supreme Court has, at times, recognized that the federal courts have certain inherent rulemaking powers—arising from the nature of the judicial process—to control their internal process and the conduct of litigation.¹⁶⁶ This includes the inherent authority of federal courts to exercise certain non-adjudicatory powers.¹⁶⁷ Federal courts have thus recognized a variety of powers as inherent, including a court’s power to control its own proceedings and dockets,¹⁶⁸ “control admission to its bar and to discipline attorneys who appear

¹⁶³ See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 594–95 (2001) (suggesting a constitutional basis for checking abuses); Markus Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 530–70 (2003) (arguing that notions of dignity and personal autonomy should limit substantive criminal law); Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335, 335 (2000) (“The definition of an offense must be constructed in a way that makes the infringement of liberty justified in light of the harm the prohibited conduct inflicts.”). Others argue that determinate-sentence laws and prosecutorial charging decisions that require a (sometimes excessive) punishment, rather than allowing the court to sentence based on its assessment of the offense and offender, violate due process. See, e.g., Luna & Wade, *supra* note 3, at 1511 n.436. Although a few lower courts have also suggested as much, so far they remain outliers and have had little, if any, impact on legal doctrine. *Id.*

¹⁶⁴ Eli Wald, *Disqualifying a District Attorney When a Government Witness Was Once the District Attorney’s Client: The Law Between the Courts and the State*, 85 DENV. U. L. REV. 369, 383 (2007).

¹⁶⁵ U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

¹⁶⁶ See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1990); see generally Carrie Leonetti, *Watching the Hen House: Judicial Rulemaking and Judicial Review*, 91 NEB. L. REV. (forthcoming October 2012).

¹⁶⁷ See, e.g., *Chambers*, 501 U.S. at 46–49 (discussing the inherent power to sanction litigants for bad faith conduct); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 793 (1987) (discussing the inherent power of the courts to initiate contempt proceedings and to appoint counsel to prosecute them); *In re Snyder*, 472 U.S. 634, 643 (1984) (discussing the inherent power of the courts to suspend or disbar attorneys); see generally Leonetti, *supra* note 166.

¹⁶⁸ See *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936); *United States v. Correia*, 531 F.2d 1095, 1098 (1st Cir. 1976); *United States v. Inman*, 483 F.2d 738, 740 (4th Cir. 1973) (*per curiam*).

before it,"¹⁶⁹ and promulgate internal procedural rules for the conduct of litigation.¹⁷⁰ In other words, the inherent power of the federal courts, once called into existence by Article III, includes the powers to protect themselves, to administer justice, to promulgate rules for practice, and to provide process where none exists.¹⁷¹ This, in turn, includes the power to preserve the integrity of the justice system, which is at issue when prosecutors with personal career stakes in the outcomes of cases prosecute those cases. It is pursuant to this power that state supreme courts regulate attorneys in all fifty states.¹⁷²

This inherent-powers doctrine generally encompasses the power to disqualify attorneys.¹⁷³ Courts have routinely justified this power on the ground that attorneys are officers of the court,¹⁷⁴ and, as such, their conduct directly affects the integrity, efficiency, and public perception of the judiciary.¹⁷⁵ In other words, the court is concerned with the fairness of the trial.

Nonetheless, the executive, legislative, and judicial branches sometimes battle over the regulation and control of prosecutors, including the courts' exercise of their inherent powers to disqualify.¹⁷⁶ When the judiciary invokes its inherent powers to disqualify prosecutors, the executive and legislative branches often respond by asserting their exclusive au-

¹⁶⁹ *Chambers*, 501 U.S. at 43. See also *United States v. Colorado Supreme Court*, 988 F. Supp. 1368, 1370 (D. Colo. 1998) (noting that state courts have the inherent power to discipline lawyers licensed by it or practicing before them).

¹⁷⁰ *Chambers*, 501 U.S. at 44; Linda Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1297 (1992).

¹⁷¹ See Mullenix, *supra* note 170, at 1297.

¹⁷² Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1171 (2003).

¹⁷³ See *Hempstead Video, Inc. v. Valley Stream*, 409 F.3d 127, 132 (2d Cir. 2005) ("The authority of federal courts to disqualify attorneys derives from their inherent power to 'preserve the integrity of the adversary process.'" (quoting *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979); *Talecris Biotherapeutics, Inc. v. Baxter Int'l, Inc.*, 491 F. Supp. 2d 510, 513 (D. Del. 2007) (noting that the court had the power to govern the conduct of any attorney appearing before it, including through disqualification); *Conley v. Chaffinch*, 431 F. Supp. 2d 494, 496 (D. Del. 2006) (holding that the court's inherent power to govern attorneys "appearing before it" included disqualification as a regulatory measure).

¹⁷⁴ See *Theard v. United States*, 354 U.S. 278, 281 (1957) (noting that, upon acceptance as a member of the bar, an attorney becomes "an officer of the court") (quoting *People ex rel. Karlin v. Cullin*, 248 N.Y. 465, 470-71 (1928)); see generally Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989) (examining the meaning of "officer of the court" with regard to the attorneys' roles and responsibilities in contemporary practice realities).

¹⁷⁵ See Henry M. Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A. J. 635, 639 (1935) (explaining that, if an attorney disregards the principles of justice, the court "has the right to discipline the unworthy member, and to exclude those who, in contempt of the tribunal, seek to practice law before it without proper admission, or otherwise disparage the court's dignity").

¹⁷⁶ Wald, *supra* note 164, at 404.

thority to exercise executive powers free from the undue interference of courts, reasoning that the function of prosecuting criminal cases has historically been within the province of the legislative and executive branches and that judicial interference therefore violates the separation-of-powers doctrine.¹⁷⁷

The assertion of exclusive executive power in this context is mistaken. Courts' inherent powers include, specifically, the power to disqualify prosecuting attorneys, and there are strong practical, ethical, and symbolic reasons for disqualifying a prosecutor with an actual conflict of interest.¹⁷⁸ It is the assertion of exclusive executive authority that threatens the separation of powers by infringing upon the inherent power of courts to protect the integrity of the judicial process. The inherent powers of the judiciary are the powers that logically flow from the existence of the judiciary as a third and coequal branch of government. Courts' inherent authority to protect the integrity of the judicial process, therefore, is an embodiment of the separation-of-powers doctrine, not an encroachment upon it.

The judicial system's interest in conflict-free prosecution goes beyond public policy. Recognizing the state's immense power and inherent advantage over defendants, the criminal justice system incorporates safeguards—often by means of broad judicial interpretation—to protect the right of the accused to a fair trial.¹⁷⁹ The dual role that prosecutors occupy as officers of the court and executive officers of the state gives rise to the courts' concurrent interest in regulating their ethical conduct.¹⁸⁰ The Constitution permits, and in some cases mandates, that a court disqualify a prosecutor when her participation would taint the proceeding, as permitting a personally-interested prosecutor to prosecute a defendant,

¹⁷⁷ *Id.* at 374–75. In the battle for control over prosecutors, the “Government” is represented by both the executive branch and the legislative branch, working together to curb the power of the judiciary and its exercise of inherent powers. *Id.* at 370 n.5.

¹⁷⁸ See *Rhodes v. Miller*, 437 N.E.2d 978, 979–80 (Ind. 1982) (“A trial judge does have the authority, and, in fact, the responsibility, to find that a prosecuting attorney, and/or members of his staff, should be disqualified if he finds facts to be true with reference to such disqualification and to then appoint a special prosecuting attorney to try the cause.”); *Lux v. Virginia*, 484 S.E.2d 145, 148 (Va. Ct. App. 1997) (“In order to protect prosecutorial impartiality, a trial court has the power to disqualify a Commonwealth’s attorney from proceeding with a particular criminal prosecution if the trial court determines that the Commonwealth’s attorney has an interest pertinent to a defendant’s case that may conflict with the Commonwealth’s attorney’s official duties.”); see also *State v. Copeland*, 928 S.W.2d 828, 840 (Mo. 1996); *State v. Culbreath*, 30 S.W.3d 309, 313 (Tenn. 2000).

¹⁷⁹ See *People v. Palomo*, 31 P.3d 879, 882 (Colo. 2001) (holding that courts had the inherent power, in the absence of a specific statutory grant of authority, to disqualify the District Attorney’s Office on the basis of an appearance of impropriety); Wald, *supra* note 164, at 370. The role of the judiciary in safeguarding the rights of the criminal defendant against abrogation by the power of the Government has been well documented. See *id.* at 370 n.6.

¹⁸⁰ See *supra* § III(A)(1).

particularly in light of the unbridled nature of prosecutorial discretion, would violate the due process rights of that defendant.¹⁸¹

While no court has ever disqualified a prosecutor (or prosecutor's office) on the ground that the office promotion and retention policies created an actual conflict of interest, some courts have disqualified prosecutors on closely analogous grounds, while others have refused to do so. For example, in *Haraguchi v. Superior Court*, the California Court of Appeal held that the trial prosecutor prosecuting Haraguchi for rape in Santa Barbara County had an actual conflict of interest stemming from a book she wrote about a fictional rape case with facts similar to those alleged in *Haraguchi*, and that this conflict warranted her recusal.¹⁸² Under the circumstances, the court found that there was a reasonable possibility that the prosecutor's desire to see her book succeed was so strong that it would trump her duty as a prosecutor to see that justice was done and to accord Haraguchi his constitutional rights.¹⁸³ The court noted that obtaining a conviction in a case similar to the one described in her book could generate favorable media publicity for her book and concluded that she might not exercise her discretionary functions in an even-handed manner as a result.¹⁸⁴ On appeal, however, the California Supreme Court disagreed, reversing Court of Appeals and reinstating Haraguchi's conviction, reasoning, *inter alia*, that the prosecutor's personal views as reflected by the novel did not create a conflict supporting recusal.¹⁸⁵

¹⁸¹ See *Lane v. State*, 233 S.E.2d 375 (Ga. 1977) (holding that the participation of an attorney who had represented Lane's alleged coconspirator as special prosecutor in Lane's trial for murder and armed robbery denied him fundamental due process); see also *People v. Cnty. Court*, 854 P.2d 1341 (Colo. App. 1992) (holding that the appearance of impropriety was not only a proper ground for disqualification of a district attorney, but also a compelling basis for such action). Most jurisdictions authorize the appointment of a special prosecutor when the prosecuting attorney is disqualified from conducting a criminal prosecution. See, e.g., GA. CODE ANN. § 15-18-65 (a) (2008) (authorizing appointment of a special prosecutor when "a solicitor-general's office is disqualified from interest or relationship to engage in the prosecution"); 55 ILL. COMP. STAT. ANN. 5/3-9008 (West 2012) (authorizing appointment of a special prosecutor "whenever the State's attorney is . . . interested in any cause or proceeding . . ."); IOWA CODE § 331.754.2 (authorizing the appointment of a special prosecutor if the district attorney is "disqualified because of a conflict of interest from performing duties . . ."); MICH. COMP. LAWS ANN. § 49.160 (1) (West 2012) (authorizing the appointment of a special prosecutor when "the prosecuting attorney . . . is disqualified by reason of conflict of interest . . ."); MO. REV. STAT. § 56.110 (2012); NEV. REV. STAT. ANN. § 252.100.1 (2011) ("If the district attorney . . . for any reason is disqualified . . . the court may appoint some other person to perform the duties of the district attorney."); OKLA. STAT. ANN. tit. 22, § 859 (West 2007) ("If the district attorney . . . is disqualified, the court must appoint some attorney-at-law to perform the duties of the district attorney on such trial.").

¹⁸² 49 Cal. Rptr. 3d 590, 596-98 (Cal. Ct. App. 2006), *rev'd*, 182 P.3d 579 (Cal. 2008).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

In *People v. Eubanks*,¹⁸⁶ the California Supreme Court upheld a trial court's order granting Eubank's motion to recuse the entire Santa Cruz County District Attorney's Office from prosecuting Eubanks for the alleged theft of trade secrets from a computer-software company on the ground that the company's contribution of approximately \$13,000 toward the cost of the district attorney's investigation created a conflict of interest for the prosecutor because it evidenced a reasonable possibility that the prosecutor might not have exercised his discretionary functions in an evenhanded manner.¹⁸⁷

The Colorado Supreme Court, by contrast, rejected a disqualification attempt on grounds that belong under the same broader heading of career incentives to prosecute, although not on the specific ground of internal promotion and remuneration policies. In *People ex rel. N.R.*, the Colorado Supreme Court explored the contention that the district attorney should have been disqualified due to his potential political gain from the prosecution of N.R. (a juvenile).¹⁸⁸ The court found that "even if [the district attorney] owes his election to the Office of District Attorney in part to the efforts of the [victim's] family, this fact [was not] likely to cause him to 'over extend' in performing his prosecutorial function."¹⁸⁹ This conclusion, however, rested on the factual record in the case. N.R.'s disqualification claim was based on an unsupported allegation of the prosecutor's political indebtedness to the family of the alleged victim, in the absence of any evidence that the prosecutor had "overextended" himself on its behalf.¹⁹⁰ In other words, the court did not rule out a "political payoff" as a relevant consideration in assessing "special circumstances" (the test under the Colorado disqualification statute) but instead found that, in this particular case, N.R. had not proven that political indebtedness in fact caused the district attorney to overextend himself.¹⁹¹

¹⁸⁶ 927 P.2d 310 (Cal. 1996) (holding that (1) a district attorney's conflict of interest did not warrant disqualification unless it was so grave as to render fair treatment of defendant unlikely; (2) a victim's financial assistance to prosecutor could, but did not necessarily, create conflict of interest warranting disqualification; and (3) under the circumstances of the case, disqualification was warranted).

¹⁸⁷ Cf. *People v. Choi*, 80 Cal. App. 4d 476 (Cal. Ct. App. 2000) (disqualifying a prosecutor, and the entire district attorney's office, when the prosecutor's loss of a close friend had adversely affected his independent judgment in such a way that defendants' right to a fair trial had been endangered).

¹⁸⁸ 139 P.3d 671, 674 (Colo. 2006).

¹⁸⁹ *Id.* at 678.

¹⁹⁰ *Id.* at 677-78 ("[E]ven if [the district attorney] owes his election . . . in part to the efforts of the [victim's] family, this fact will be no more likely to cause him to 'over extend' [than those deemed appropriate in other cases].")

¹⁹¹ See *id.* at 678. The Colorado statute establishes three grounds for disqualification: a request by the district attorney, a personal or financial conflict of interest, and "special circumstances." COLO. REV. STAT. ANN. § 20-1-107 (2) (West 2007). N.R. alleged that the district

CONCLUSION

"It is important for the courts, scholars, bar associations and the press to keep reminding prosecutors that they must comply with an entirely different set of standards than those applicable to the defense bar."¹⁹²

This Article is not meant to suggest, of course, that promotion and compensation structures are the sole driving force behind prosecutorial overcharging and overreaching. A comprehensive solution to prosecutorial overcharging will take time, resources, and concerted efforts by numerous constituencies. Instead, this Article has merely tried to prime the discussion by highlighting a trend in prosecutorial promotion and compensation that seems to have gone unnoticed in criminal-procedure scholarship.

The description of prosecutorial conflicts of interest in this Article is necessarily broad and incomplete. Nonetheless, this Article highlights some of the reasons why internal prosecutorial personnel policies should be disconcerting to scholars, policymakers, and the general public. Prosecutorial discretion is supposed to help ensure that charges and sentences fit the offenders and their offenses, rather than to maximize conviction rates and aggregate sentences.¹⁹³ If a criminal trial is about finding the truth after an impartial review of all aspects of a case, there is good reason to doubt that prosecutors whose careers depend primarily on the number of convictions and length of sentences that they obtain are the appropriate actors to fulfill this function.

attorney's potential political gain from his prosecution required disqualification under the third ground ("special circumstances") and did not argue that such potential gain created a personal or financial conflict of interest under the second. See *N.R.*, 139 P.3d 671.

¹⁹² LAWLESS, *supra* note 130, at xv.

¹⁹³ This Article should not be read as advocating the elimination of prosecutorial discretion, which, when exercised fairly, serves an important role in achieving the goals of criminal punishment. Prosecutors need discretion in making their charging decisions. Depending on the individual circumstances of an offense or offender, criminal conduct may warrant a lesser-included offense, a deferred prosecution, or no prosecution at all. Some of the reasons often cited for the prosecutor's extensive discretion in charging decisions are: (1) the separation of powers doctrine, (2) limited resources, (3) the impossibility of enforcing all of the laws, (4) prosecutorial expertise, and (5) the need for individualized case analysis and consideration of particular needs of leniency. See LAWLESS, *supra* note 130, at 139-40. Perhaps more to the point, prosecutorial discretion is inherent in the system. See Frank O. Bowman III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 727 (1996) ("[I]t is difficult to imagine a system which could eliminate prosecutorial charging discretion."). The focus of this Article, instead, is on *who* does the exercising rather than the *what* being exercised.

There has been significant academic, legislative,¹⁹⁴ and judicial¹⁹⁵ attention to disqualification of prosecutors in general,¹⁹⁶ and to disqualification of prosecutors who previously represented that particular defendant. Despite this, the idea that disqualification is warranted on the basis that internal personnel policies create actual conflicts of interest has received no academic attention, has not been addressed by statutes or prosecutors' offices' guidelines, and has not been decided by courts.¹⁹⁷ Courts have been relatively reluctant to exercise their power to disqualify prosecutors for any reason.¹⁹⁸ Even the current American Bar Association Criminal Justice Standards for Prosecution and Defense Functions

¹⁹⁴ See, e.g., ALA. CODE§ 12-17-186(a) (West 2005) (authorizing disqualification when a prosecutor is "connected with the party against whom it is his duty to appear"); CAL. PENAL CODE § 1424(a)(1) (West 2007) (authorizing disqualification if "the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial"); COLO. REV. STAT. ANN. § 20-1-107 (2) (West 2007) ("A district attorney may only be disqualified in a particular case at the request of the district attorney or upon a showing that the district attorney has a personal or financial interest or [if the court] finds special circumstances that would render it unlikely that the defendant would receive a fair trial . . ."); IOWA CODE ANN. § 31-2603(a) (authorizing disqualification when a prosecutor "acted as counsel or attorney for a party accused in relation to the matter of which the accused stands charged, and for which he is to be tried on a criminal charge"); IND. CODE§ 33-39-1-6(b)(2)(B) (West 2004) (authorizing the court to disqualify a prosecutor if it finds "by clear and convincing evidence that the appointment [of a special prosecutor] is necessary to avoid an actual conflict of interest"); KY. REV. STAT. ANN. 15.733(2)(e) (requiring the disqualification of a prosecuting attorney if she "has served in private practice or government service, other than as a prosecuting attorney, as a lawyer or rendered a legal opinion in the matter in controversy"); LA. CODE CRIM. PROC. ANN. art. 680(3) ("A district attorney shall be recused when he . . . has been employed or consulted in the case as attorney for the defendant before his election or appointment as district attorney."); OR. REV. STAT. § 8.710 (2011) (enumerating grounds for disqualification, including "if a district attorney . . . represented the accused in the matter to be investigated . . . or the crime charged" and "because of any other conflict [that would prevent] ethically serve as a district attorney in a particular case"); VA. CODE ANN. § 19.2-155 (2008) (authorizing disqualification when a prosecutor "is so situated with respect to such accused as to render it improper . . . for him to act"); W. VA. CODE ANN. § 7-7-8 (2010).

¹⁹⁵ See§ III(B) *supra*; see, e.g., *People v. Eubanks*, 927 P.2d. 310, 318 (specifying a two-part test for determining whether prosecutorial disqualification due to a conflict of interest was necessary: (1) whether there was a conflict of interest, and (2) if so, whether the conflict was so grave or severe as to disqualify the prosecutor from acting); *People v. Conner*, 666 P.2d. 5, 9 (Cal. 1983) (defining a disqualifying conflict as existing "whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an even-handed manner").

¹⁹⁶ See Wald, *supra* note 164.

¹⁹⁷ For example, in addition to OPR, DOJ also maintains a Departmental Ethics Office (DEO), which "is responsible for administering the Department-wide ethics program and for implementing Department-wide policies on ethics issues." Podgor, *Ethics & Professionalism*, *supra* note 3, at 1529. While DEO is tasked with considering issues like conflicts and "impartiality in performing official duties," its ethics outline and handbook do not cover the discretionary decisions made by federal prosecutors or the impact that internal personnel policies have on them. *Id.* at 1529-30.

¹⁹⁸ See Wald, *supra* note 164, at 374; see generally BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT vi (1991) (lamenting the passivity of the judiciary in overseeing prosecutorial power).

contain no discussion of improper biases for prosecutors or of the concept of prosecutors acting within an organizational structure.¹⁹⁹

Of course, court use of a more searching judicial review of prosecutorial conflicts of interest is not the only means to stem overcharging. On the contrary, while current law does little to stop a prosecutor from overcharging defendants in pursuit of an enhanced record of success, appropriate legislation could do far more to ameliorate some of its worst consequences. Legislatures could empower judges to review charging decisions and strike those that are excessive, mandate that prosecution offices promulgate enforceable and comprehensive charging guidelines, or enact “safety valve” provisions that allow sentencing judges to go below otherwise mandatory minimum sentences when certain criteria are met.²⁰⁰

For now, however, it is unlikely that prosecutorial discretion is going anywhere. The Supreme Court has consistently blessed it.²⁰¹ Although Congress, in 1998, extended the application of ethical rules to federal prosecutors, these rules do not directly regulate prosecutors’ discretionary decisions.²⁰² Attorney disciplinary agencies cannot initiate proceedings against prosecutors who may have violated obligations im-

¹⁹⁹ See A.B.A. TASK FORCE ON STANDARDS FOR CRIMINAL JUSTICE PROSECUTION, *supra* note 1; but see MODEL RULES OF PROF’L CONDUCT, R. 1.10, 5.1, 5.2 (2010).

²⁰⁰ See Luna & Wade, *supra* note 3, at 1512 (2010); see, e.g., Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 21 (2010).

²⁰¹ The Supreme Court has repeatedly reaffirmed the doctrine underlying the prosecutor’s discretionary powers. See *Garrett v. United States*, 471 U.S. 773, 791 n.2 (1985) (noting that the Government, rather than the court, is responsible for initiating a criminal prosecution, unless the charging decision is based on race, religion, or another arbitrary classification); *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) (noting that there is no constitutional right to plea bargain); *Olyer v. Boles*, 368 U.S. 448, 456 (1962) (finding no equal protection violation based on selective prosecution); see, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (explaining that prosecutors retain broad discretion in deciding whom to prosecute, subject only to constitutional restraints); *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.”); see also Gifford, *supra* note 140, at 53–54 (distinguishing plea bargaining from other negotiations because of the prosecution’s total discretion); see generally Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383 (1976); Uviller, *supra* note 25.

²⁰² See Citizens Protection Act of 1998, 28 U.S.C. § 530(B) (2006). Prosecutors may also be subject to “ad hoc judicial rules.” Green, *Policing*, *supra* note 137, at 75–76. The only significant limits on prosecutorial discretion in the federal system are those contained in DOJ guidelines. See U.S. ATTORNEYS’ MANUAL, *supra* note 146; see generally Abrams, *supra* note 20. These guidelines, however, are internal regulations and are legally unenforceable by defendants. See, e.g., *United States v. Blackley*, 167 F.3d 543, 548–49 (D.C. Cir. 1999) (holding that the DOJ guidelines for prosecutors created no enforceable rights for Blackley); *United States v. Piervinanzi*, 23 F.2d 670, 682 (2d Cir. 1994) (holding that the DOJ guidelines did not create substantive rights for Piervinanzi); *United States v. Busher*, 817 F.2d 1409, 1411 (9th Cir. 1987) (holding that the DOJ guidelines did not create substantive or procedural rights for Busher).

plicit in their “duty to seek justice” but not codified in the disciplinary rules.²⁰³ In the absence of legislative or Supreme Court action restricting discretion, courts could at least use their existing powers to ensure that, if excessive charges are brought, they are at least brought by a prosecutor who is exercising independent and unbiased judgment concerning the necessity of those charges. Prosecutors exercising their discretion in the shadow of their career advancement is not in the public interest.

The stakes are much higher than an academic dispute over the separation of powers. At issue is the welfare of real individuals, whose lives may be irreparably and unjustifiably harmed by a take-no-prisoners approach to prosecution. The *Morton* case in Texas is only the latest in a string of high-profile prosecutorial misconduct cases involving decision making entirely inconsistent with the sacred ideal of the prosecutor as a minister of justice.²⁰⁴ In December 2011, DNA evidence exonerated Michael Morton after his wrongful conviction for murdering his wife for which he served nearly twenty-five years in a Texas prison.²⁰⁵ Morton’s post-conviction attorneys found evidence in recently-unsealed court records that the prosecutor in Morton’s original trial suppressed critical exculpatory evidence that may have helped him prove his innocence, in violation of “a direct order from the trial court to produce the exculpatory police reports from the lead investigator” in the case.²⁰⁶ Specifically, Morton alleged that the prosecutor willfully failed to disclose police notes indicating that another man committed the murder, concealed from the trial judge that he did not provide the full police report to the defense as ordered, and advised his successor prosecutor “to oppose all of Mr. Morton’s post-conviction motions for DNA testing.”²⁰⁷

This Article does not even address the most awesome prosecutorial power of all: the power to seek and obtain the death penalty. As is true in non-capital cases, self-interest can play a significant role in decisions about capital punishment, with some prosecutors explicitly seeking election based on the defendants they have put on death row.²⁰⁸ Putting aside whether this political reality is troubling in and of itself, the incentive structure inherent in current “performance-based” evaluations may encourage prosecutors to pursue unsavory strategies in capital cases,

²⁰³ See generally Green, *Seek Justice*, *supra* note 105 (analyzing rationales for prosecutors’ duty to “seek justice”).

²⁰⁴ See *Justice and Prosecutorial Misconduct*, N.Y. TIMES, December 29, 2011, at A26.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See, e.g., Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates’ Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941, 943 (1994) (detailing the “particularly gruesome campaign practice . . . of prosecutors and former prosecutors politicking on the defendants they have sent to death row . . .”).

such as presenting inconsistent theories in pursuit of multiple death verdicts (*e.g.*, arguing in separate trials that two different defendants were the sole principle agent of the crime).²⁰⁹ Moreover, the infusion of politics and self-interest into a decentralized, unguided approach to prosecution virtually ensures inconsistent decision-making in capital cases.²¹⁰ In other instances, the mere threat of the death penalty allows the prosecutor to force a guilty plea in the case, with defendants entering into plea bargains to avoid execution regardless of any factual or legal claims they might have.²¹¹ Prosecutors' career self-interest should not further muddy these ethical waters.

²⁰⁹ See Luna & Wade, *supra* note 3, at 1508; *see, e.g.*, Stumpf v. Mitchell, 367 F.3d 594, 613 (6th Cir. 2004) ("In this case, the state clearly used inconsistent, irreconcilable theories at Stumpf's hearing and Wesley's trial."), *rev'd sub nom.* Bradshaw v. Stumpf, 545 U.S. 175 (2005); Thompson v. Calderon, 120 F.3d 1045, 1057 (9th Cir. 1997), *rev'd*, 523 U.S. 538 (1998) ("The prosecutor manipulated evidence and witnesses, argued inconsistent motives, and at Leitch's trial essentially ridiculed the theory he had used to obtain a conviction and death sentence at Thompson's trial.").

²¹⁰ See Luna & Wade, *supra* note 3, at 1508.

²¹¹ *Id.* at 1508–09.