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## Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry

Bruce A. Green

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## Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry

Bruce A. Green\*

### ABSTRACT

Prosecutors' discretionary decisions have enormous impact on individuals and communities. Often, prosecutors exercise their vast power and discretion in questionable ways. This Article argues that, to encourage prosecutors to use their power wisely and not abusively, there is a need for more informed public discussion of prosecutorial discretion, particularly with regard to prosecutors' discretionary decisions about whether to bring criminal charges and which charges to bring. But the Article also highlights two reasons why informed public discussion is difficult—first, because public and professional expectations about how prosecutors should use their power are vague; and, second, because, particularly in individual cases, it is hard to know what decision-making process the prosecutor employed and what considerations entered into the prosecutor's decision. Despite these challenges, the public can and should engage in more rigorous scrutiny of prosecutors' work.

By way of example, the Article identifies a questionable practice that prosecutors have not adequately justified. Some prosecutors work with private debt collection agencies to

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threaten to prosecute low-income debtors whose checks bounced, demanding payment of the amounts owed plus additional fees, from which prosecutors' offices receive a cut. This practice appears abusive both because some innocent debtors are wrongly threatened with prosecution and because, for others, a threatened prosecution is disproportionately harsh. Because prosecutors have not been subject to serious, informed public questioning about potentially abusive practices such as this one, they have not publicly justified the practice. Informed public inquiry and discourse will both encourage prosecutors to use their power wisely and promote accountability when prosecutors use their power abusively.

TABLE OF CONTENTS

INTRODUCTION ..... 590

    I. PRELIMINARY OBSERVATIONS ABOUT PROSECUTORIAL DISCRETION ..... 595

    II. ABUSES OF PROSECUTORIAL DISCRETION—PUBLIC EXPECTATIONS ..... 601

    III. WHY ABUSES OF PROSECUTORIAL DISCRETION ARE HARD TO DEFINE AND HARD TO DETECT ..... 606

        A. *Definitional Problems* ..... 609

            1. *Addressing Doubts About Guilt and Evidentiary Reliability* ..... 609

            2. *Choosing Which Guilty People to Prosecute* .. 611

        B. *Problems of Detection* ..... 615

    IV. THE PROBLEMS WITH SOLUTIONS ..... 618

    V. CONCLUSION: THE NEED FOR PUBLIC INQUIRY AND DISCOURSE ..... 622

INTRODUCTION

In the United States, a prosecutor's job includes determining whether someone committed a criminal offense and, if so, whether to prosecute the offender. The aim of criminal justice is not to punish everyone who commits a crime.<sup>1</sup> Often, inflicting punishment

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1. See, e.g., Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 5 (1940). Then-Attorney General Jackson observed:

If the Department of Justice were to make even a pretense of reaching every probable violation of federal law, ten times its present staff would be inadequate. . . . What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is most flagrant, the public harm the greatest, and the proof the most certain.

*Id.*; see also *Pugach v. Klein*, 193 F. Supp. 630, 634 (S.D.N.Y. 1961) (“Paramount among [the elements prosecutors consider] is a determination that a prosecution

on offenders is unnecessary or excessive, or the criminal law's objectives can be accomplished less painfully. In such instances, among others, criminal punishment "would be socially unwise."<sup>2</sup> Prosecutors have discretion whether to file criminal charges and are expected to exercise their discretion wisely.<sup>3</sup>

Fifty years ago, for example, prosecutors only selectively prosecuted "bad check" cases—cases where customers purchased goods with checks they knew were not backed by sufficient funds.<sup>4</sup> Creditors were "normally interested only in restitution for the loss suffered by them" and were "seldom . . . willing to actually assist in prosecution, even if restitution [were] not made."<sup>5</sup> Moreover, someone who knowingly passed a bad check was not necessarily so morally culpable or dangerous as to deserve being branded as a criminal. In some jurisdictions, the police or the prosecutor's office itself made an effort to encourage restitution.<sup>6</sup> Although prosecutors might have been uncomfortable serving as "collection agencies," some regarded this as a legitimate use of the criminal

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will promote the ends of justice, instill respect for the law, and advance the cause of ordered liberty."); *State v. Winne*, 91 A.2d 65, 78 (N.J. Super. Law Div. 1952) ("[I]n the everyday function of a prosecutor, he discards, or commences, or abandons prosecutions, all in the exercise of his sound discretion. . . . [T]his discretion must exist and be used if justice is to be administered. Without it, the administration of justice would collapse.").

2. FRANK W. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* 163–64 (Frank J. Remington ed., 1970).

3. There is a considerable, decades-long, and ever-expanding body of scholarly writing on prosecutors' exercise of discretion. See, e.g., Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010); Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513 (1993); Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143 (2016); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467 (2009); Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259 (2001); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105 (1994); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669 (1992); 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 (1993); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471 (1993); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

4. MILLER, *supra* note 2, at 164, 271–73.

5. *Id.* at 271.

6. *Id.*

process.<sup>7</sup> If restitution were not made, the prosecutor's office then decided whether to initiate criminal charges, based on the relevant facts, such as whether the offender passed bad checks professionally or habitually.<sup>8</sup>

Beginning over a decade ago, some local prosecutors began handling bad check cases differently, so as to profit from these cases while shifting the initial prosecutorial decision-making to private debt collectors. Hundreds of elected prosecutors across the country cut deals with debt collection agencies, which were allowed to use prosecutors' official letterhead to threaten to prosecute and imprison consumers who issued checks on insufficient funds. The consumers were pressured not only to make restitution but also to pay additional fees from which prosecutors' offices would receive a cut.<sup>9</sup>

For example, one urban prosecutor's "Bad Check Restitution Program" sent an "official notice" to a customer whose bank returned her check for \$18.55. The letter warned that a felony conviction for issuing a worthless check is punishable by up to five years' imprisonment and a \$5,000 fine, but that the office "will not initiate criminal proceedings" if, within the next ten days, the customer paid \$223.55 to cover the check and other expenses including the cost of attending a required class in financial accountability.<sup>10</sup> Prosecutors and collection agencies have reportedly sent letters like this to millions of people, many living in marginal circumstances and some of whom are pressured through fear into forgoing meals or medication to scrape together the amounts they believe must be paid to avoid prison.<sup>11</sup>

One might ask whether the debt collectors are acting fairly. Consumer advocates filed a civil lawsuit around a decade ago, but litigation was forestalled in 2006, when, without debate, Congress amended the Fair Debt Collection Practices Act to protect the

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7. *Id.* In some jurisdictions, however, it may have been regarded as inappropriate for prosecutors to use their offices to assist private creditors. *Cf.* Okla. Bar Ass'n Ethics Counsel, Op. 156 (1970) ("A county attorney is a quasi judicial officer and he must be fair and impartial. . . . When he uses his office as a collection agency he cannot be fair and impartial and represent the citizens of a state."), <https://bit.ly/2HJYX6n> [<https://perma.cc/KG8M-VK2U>].

8. MILLER, *supra* note 2, at 271–72.

9. *See, e.g.,* Mosi Secret, *Bounced Checks: How Local District Attorneys Get a Cut of the Debt Collection Business*, PROPUBLICA (Mar. 2, 2009), <https://bit.ly/2Sef28y> [<https://perma.cc/MF63-3UJR>].

10. Letter from Katherine Fernandez Rundle, State Attorney, Miami-Dade Cty. State Attorney (Mar. 19, 2008), <https://bit.ly/2GegpO3> [<https://perma.cc/5LBY-8446>].

11. *See* AM. CIVIL LIBERTIES UNION, *A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT* 26–31, 56–59 (2018) [hereinafter *ACLU*], <https://bit.ly/2ENViTm> [<https://perma.cc/QG5W-EWCA>]; Secret, *supra* note 9.

debt-collection agencies.<sup>12</sup> In 2015, the Consumer Financial Protection Bureau sued a California-based debt-collection company then quickly settled the case when the company agreed to reform its most abusive practices. Among other things, the agreed-on reforms included: promising to work under prosecutors' direction, not sending letters unless the prosecutor found probable cause to believe the debtor had committed a crime, and not saying or implying that the recipient will be prosecuted.<sup>13</sup> More recently, the ACLU publicly attacked the private debt collectors' use of prosecutorial authority as racially and economically unjust.<sup>14</sup>

One might also question the fairness of the prosecutors who serve as the collection agencies' co-venturers. In 2014, the American Bar Association's ethics committee raised concerns about the deceptiveness of the practice. The committee said it is impermissibly deceitful under the rules of professional conduct for a prosecutor's office to let a debt collector use its official letterhead to threaten prosecution unless a prosecutor has first reviewed the case file to determine that a crime was committed and a prosecution is warranted.<sup>15</sup> Because its focus is on the professional conduct rules,

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12. Secret, *supra* note 9.

13. Complaint for Permanent Injunction and Other Equitable Relief, Consumer Fin. Prot. Bureau v. Nat'l Corr. Grp., No. 1:15-cv-00899-RDB (D. Md. Mar. 30, 2015), <https://bit.ly/2G0eQnN> [<https://perma.cc/YE34-73CR>]; Stipulated Final Judgment and Consent Order, Consumer Fin. Prot. Bureau v. Nat'l Corr. Grp., No. 1:15-cv-00899-RDB (D. Md. Mar. 31, 2015), <https://bit.ly/2UBMccwm> [<https://perma.cc/C8WU-2WJH>].

14. See ACLU, *supra* note 11; Jennifer Turner, *When Prosecutors and Debt Collection Companies Become Business Partners*, ACLU (Mar. 6, 2018), <https://bit.ly/2UzfbB3> [<https://perma.cc/SP5P-WGAB>]; see generally Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381 (2018); Creola Johnson, *Creditors' Use of Consumer Debt Criminalization Practices and Their Financial Abuse of Women*, 34 COLUM. J. GENDER & L. 5 (2016); Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175 (2014).

15. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 469 (2014); see also Peter A. Joy & Kevin C. McMunigal, *Misuse of Letterhead by Prosecutors and Attorneys General*, 30 CRIM. JUST. 48 (2016). Private debt collectors' use of prosecutors' letterhead to collect private debt differs from the practice upheld in *Sheriff v. Gillie*, 136 S. Ct. 1594 (2016), in which private debt collectors sought to collect public debt on behalf of the state Attorney General, which had statutory responsibility for collecting debt owed to the state. Rejecting a lawsuit under the Fair Debt Collection Practices Act, the Court held that it was not misleading or intimidating to use the Attorney General's letterhead, in part, because letters sent to debtors did not "imply that the Attorney General, as the State's top law enforcement official, intends to take punitive action against [debtors]. . . . Use of the Attorney General's letterhead merely clarifies that the debt is owed to the State, and the Attorney General is the State's debt collector." *Id.* at 1603. In contrast, letters sent to consumer debtors by state prosecutors or on state prosecutors' letterhead are misleading or intimidating, in that they *do* imply or assert that the prosecutors intend to take punitive action against consumer debtors, even

the ABA opinion begs at least two questions. First, given that prosecutors do not routinely prosecute consumers who knowingly write bad checks, when would a prosecution be “warranted”? Second, should prosecutors be collaborating with debt collectors in collecting on unpaid checks? Because these questions are not necessarily answered by laws or professional conduct rules, they are questions of prosecutorial discretion.

Prosecutors have depicted the practice of sending letters through debt-collection agencies as a “diversion program”—a merciful alternative to imprisonment—on the pretense that recipients of the threatening letters are criminals who would otherwise be prosecuted.<sup>16</sup> But prosecutors have not disclosed the extent to which they investigate and then determine that the letters’ recipients actually violated the criminal law and would be prosecuted if they did not make restitution. The routine and high-volume nature of the practice, along with the evidently dominant role of the collection agencies, suggests that prosecutors have been simply selling their letterheads, meaning that many recipients of threatening letters are not in fact offenders. For example, those who believed that they had sufficient funds when they wrote their checks would not be criminal offenders. Nor is it clear how many actual offenders would be prosecuted if they failed to make restitution. And of those who *would* actually be prosecuted, it is not clear how many *should* be prosecuted. If prosecutors have begun bringing charges against one-time bad-check writers who would not have been charged in the past, because the prosecutors now want to create a genuine threat of prosecution for the sake of their profit-making enterprise, the social wisdom of the prosecutor’s charging policy is seriously debatable.

In a 2012 *National Law Journal* article, I asserted that the prosecutors participating in this scheme are abusing their power,<sup>17</sup> but in the intervening years, public reaction to the practice has been sporadic. Consequently, prosecutors’ offices freely continue to profit from the practice with little pressure to justify it to the public. Perhaps the public is simply unsympathetic to consumers receiving

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though prosecutors are not statutorily authorized to serve as the private creditors’ debt collectors.

16. See Secret, *supra* note 9 (quoting prosecutors).

17. Bruce A. Green, *Prosecutors for Sale; The District Attorneys Selling Their Letterhead to Debt-Collection Agencies Have Committed a Gross Abuse of Power*, 35 NAT’L L.J., no. 5, Oct. 1, 2012, at 43. This was a response to a *New York Times* article describing the practice. See Jessica Silver-Greenberg, *In Prosecutors, Debt Collectors Find a Partner*, N.Y. TIMES (Sept. 15, 2012), <https://nyti.ms/2D0aSau> [<https://perma.cc/GV3U-5TWD>].

prosecutors' threats, or perhaps there are too many more serious injustices to occupy the public. But an additional part of the problem may be that public discussion of prosecutorial discretion is difficult. It is relatively easy to talk about prosecutors' *illegal* conduct because rules, statutes, and judicial decisions draw the relevant lines. However, it is hard to talk about prosecutors' unwise use of discretion both because there are no clear, accepted standards and because prosecutors do not reveal how they make their discretionary decisions. This Article describes these problems but concludes that public and professional discussion of prosecutorial discretion is nonetheless essential to holding prosecutors accountable for how they use their vast power.

By way of background, this Article begins in Part I with some preliminary observations about prosecutorial discretion, which is vast and pervasive. This Article focuses, however, on prosecutors' discretionary decisions about whether to bring criminal charges. Part II identifies the public's general expectations about how prosecutors should exercise charging discretion. Part III shows that, although these expectations are legitimate and that prosecutors appear to endorse them, the public cannot easily hold prosecutors accountable for badly or abusively exercising charging discretion, both because of the vagueness of the applicable principles and because of the opacity of prosecutors' decision-making. Part IV briefly observes that proposed solutions are inadequate, incomplete, or unattainable. Finally, Part V concludes that prosecutorial accountability requires, at minimum, robust public inquiry and conversation regarding prosecutors' discretionary decisions. Even when relevant standards and facts relating to prosecutors' decisions may be uncertain, the public should question prosecutors' doubtful policies and practices. Prosecutors' role as debt collectors is one example of where questions should be posed. And the public should hold prosecutors accountable when they fail to respond with persuasive answers.

## I. PRELIMINARY OBSERVATIONS ABOUT PROSECUTORIAL DISCRETION

In the course of a criminal prosecution, prosecutors make all the decisions on behalf of their client<sup>18</sup>—the “people,” the “state,”

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18. Included here are lawyers authorized to serve as prosecutors in individual cases, as in the case of lawyers who serve as special prosecutors when the prosecutor's office is disqualified because of a conflict of interest or who are appointed by the court to prosecute contempt of court cases.

the “government,” or the “commonwealth.”<sup>19</sup> Crime victims may express their preferences and may even have a legal right to weigh in, but they are not clients.<sup>20</sup> Nor are the police.<sup>21</sup> Although prosecutors may take account of other stakeholders’ views, they make the final call.<sup>22</sup> Prosecutors make a vast array of decisions—whether to seek an indictment or offer a plea bargain, whether to hold a press conference, whether to make disclosures to the defense that are more generous than the relevant laws require, what witnesses to call and what arguments to make at trial, and so on. Prosecutorial discretion pervades every aspect of prosecutors’ work.

Prosecutors are obligated to make and implement their decisions within the bounds of the law, including constitutional law, statutes, criminal procedure rules, and professional conduct rules. Violating the law qualifies as prosecutorial “misconduct,” at least if the prosecutor violates the law knowingly or intentionally. One can debate whether prosecutors’ unintentional violations of law should be called misconduct or, as some prosecutors would prefer, mere “errors.”<sup>23</sup>

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19. On the identity and nature of the prosecutor’s “client,” see for example Russell M. Gold, “*Clientless*” Prosecutors, 51 GA. L. REV. 693, 695 (2017) (describing prosecutors as “‘clientless’ lawyers . . . whose clients are diffuse entities without a decisionmaking structure” and who therefore “have to make decisions that would be reserved to clients in other types of representation such as decisions about the objectives of representation or whether to resolve a dispute without litigation”); Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors’ Conflicts of Interest*, 58 B.C. L. REV. 463, 465 (2017) (“Prosecutors’ clients are sovereignties, abstract public entities whose interests are hard to define.”); Irene Oritseweyinmi Joe, *The Prosecutor’s Client Problem*, 98 B.U. L. REV. 885, 895 (2018) (“The entities with the most potential to be considered the prosecutor’s client are the victim, the police, the community, the defendant, and the law. None of these options, however, can clearly be defined as the prosecutor’s client.”).

20. A prosecutor has been sanctioned for ceding to a victim the decision whether to enter into a plea bargain with the defendant. *In re Flatt-Moore*, 959 N.E.2d 241 (Ind. 2012); see Green & Levine, *supra* note 3, at 179–81.

21. This leaves aside low-level prosecutions which police or other law enforcement officials have authority to conduct. See, e.g., *Jeffryes v. Vance*, 61 N.Y.S.3d 851 (Sup. Ct. 2017) (upholding Police Department attorneys’ prosecution of petty crimes).

22. On the question of whether the President may direct federal prosecutors, see Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1 (2018).

23. See, e.g., Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391, 401 n.21 (2011) (acknowledging an article calling for a distinction between prosecutors’ deliberate misconduct and their inadvertent errors, but questioning the legal significance of such a distinction).

Both the range of prosecutors' discretionary decisions and the breadth of their discretion in making those decisions are vast. As long as prosecutors act lawfully, their decisions are discretionary and often unreviewable, meaning that their decisions are beyond the courts' power to overrule them.<sup>24</sup> The legal limits placed on prosecutors are not very restrictive and leave much to prosecutors' judgment. Moreover, prosecutors generally decide for themselves both the processes by which they make discretionary decisions and the grounds on which they make them. Because the job of prosecuting in the United States is decentralized—conducted by multiple prosecutors' offices headed by elected or appointed prosecutors on the federal, state, and local levels—there is no uniform approach to exercising prosecutorial discretion. There is no generally accepted prosecutorial training or handbook on how prosecutors should use their power. Different offices have different procedures, which can change when one chief prosecutor replaces another.<sup>25</sup> Sometimes different units in a given prosecutor's office, or individual prosecutors in a particular office, approach discretionary decisions differently—employing different criteria or different processes, and reaching different outcomes, in similar cases.<sup>26</sup>

Although ultimate authority for discretionary decision-making rests with a chief prosecutor, it would be impractical for chief prosecutors outside rural, one-lawyer offices to make all of the office's discretionary decisions. The chief prosecutor may make or ratify the most important decisions, but no chief prosecutor in an office of any significant size can avoid delegating some important decisions and many less important ones. In large offices, chief prosecutors

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24. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 837–38 (“Few decisions prosecutors make are subject to legal restraints or judicial review. Consequently, the key question for prosecutors ordinarily is not whether their decisions are lawless, in the sense that a court might overturn them, but rather whether the decisions are wise or imprudent.” (citations omitted)).

25. See Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosure*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 269, 279 (Leslie C. Levin & Lynn Mather eds., 2012) (“Organizations operating in the same field tend to converge on similar ways of working . . . Prosecutors' offices are something of an exception, partly because of their highly localized character. Since they are not directly in competition for business, the homogenizing pressures are much weaker.”).

26. See Kay L. Levine & Ronald F. Wright, *Prosecution in 3D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1152–53 (2012) (describing prosecutors' autonomy, and independence from office leadership, in prosecutor's office with nonhierarchical structure); Yaroshefsky & Green, *supra* note 25, at 281 (“Different understandings [regarding disclosure to the defense] may develop in [a prosecutor's] office or among units that handle different types of cases based on differences among types of cases.”).

typically delegate significant responsibility to supervisory prosecutors, but subordinate or “line” prosecutors (those on the front lines) also make many decisions, both because some decisions have to be made on the spot and because there are too many decisions for supervisors to make them all. Prosecutors can also make decisions collectively. Supervisors ratify the decisions of line prosecutors, who are most familiar with the facts of the case, or line prosecutors have input into decisions made by supervisors, who are presumably most familiar with the office’s decision-making criteria and history of decision-making.<sup>27</sup>

When scholars write about prosecutorial discretion, they usually focus on only the most important discretionary decisions, rarely on all smaller discretionary decisions. Many scholars focus exclusively on decisions about whether to initiate criminal charges and what charges to bring,<sup>28</sup> while some scholars look at other big decisions such as which investigative methods to employ,<sup>29</sup> whether to plea bargain and on what terms,<sup>30</sup> or what sentences to seek upon conviction.<sup>31</sup> Increasingly, scholars are beginning to examine less prominent aspects of prosecutorial discretion.<sup>32</sup> But like others, I will focus here on big discretionary decisions, and especially the “charging” decision—that is, the decision whether to initiate criminal charges.

There are two fundamental understandings about the exercise of prosecutors’ charging discretion in the United States. The first, which is fairly universal, is that prosecutors should not charge peo-

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27. On the allocation of decision-making within a prosecutor’s office, see generally Bruce A. Green & Fred C. Zacharias, “*The U.S. Attorneys Scandal*” and the Allocation of Prosecutorial Power, 69 OHIO ST. L.J. 187 (2008); Levine & Wright, *supra* note 26.

28. See, e.g., Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011); Gershman, *supra* note 3; Harry Litman, *Pretexual Prosecution*, 92 GEO. L.J. 1133 (2004).

29. See, e.g., Ellen S. Podgor, *White Collar Shortcuts*, 2018 U. ILL. L. REV. 925, 942–49.

30. See, e.g., Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225 (2016); Standen, *supra* note 3.

31. See, e.g., Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor’s Expanding Power over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199 (1997); Lee, *supra* note 3.

32. See, e.g., Bruce A. Green, *Gideon’s Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336 (2013) (addressing prosecutorial discretion in filing amicus briefs); Laurie L. Levenson, *The Problem with Cyclical Prosecutor’s Syndrome: Rethinking a Prosecutor’s Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335 (2015) (addressing prosecutorial discretion post-conviction); Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 FORDHAM L. REV. 2821 (2018) (addressing prosecutors’ use of discretion to support expungement applications).

ple with crimes they did not commit. The second is that people who commit crimes should not necessarily be punished as harshly as the law permits and should not necessarily be punished or prosecuted at all. The latter understanding is not shared by prosecutors in every legal system,<sup>33</sup> but it is shared to varying degrees by prosecutors in other common law countries.<sup>34</sup> This concept is especially essential in the United States because legislatures tend to define crimes broadly and in abundance with the expectation that prosecutors will decide which cases deserve to be prosecuted. Legislatures limit prosecutors' resources precisely because they want prosecutors to make wise and humane choices.

In general, the prosecutor's charging decision is not a binary choice between prosecuting criminal charges or ignoring apparently criminal conduct. Courts, legislatures, and prosecutors themselves have established informal and formal programs (such as "diversion programs") to offer further alternatives.<sup>35</sup> In many jurisdictions, in cases of minor crimes, prosecutors can enter into agreements providing that charges will not be brought or will be dismissed if the accused person conforms to the terms of the agreement, which, at minimum, may include not committing any further crimes over a specified period of time.<sup>36</sup> Prosecutors in many states can also initiate certain proceedings in specialized courts that provide for alternatives to criminal prosecution or incarceration—for example, they can bring certain drug cases to drug courts in which charges will not

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33. See *Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) ("In Europe, many countries adhere to what they aptly call the 'legality principle' by requiring prosecutors to charge all prosecutable offenses.").

34. See, e.g., United Kingdom Public Prosecution Service Annual Lecture on Prosecutors' Role (Oct. 23, 2009). In a lecture given by Director of Public Prosecutions, the Director stated:

The grant to, and the exercise by, the public prosecutor of discretion is essential in our system of criminal justice. Whilst it may be superficially attractive to declare that, where there is sufficient evidence, all crimes should be prosecuted, a moment's thought will demonstrate the bluntness and unfairness of such an approach. . . . We, as a society, have rightly and loudly trumpeted our ability to temper justice with mercy and compassion, and it is through the exercise of the prosecutor's discretion that we give practical effect to this laudable objective.

*Id.*

35. See, e.g., *State v. Hutson*, No. M1999-00329-CCA-R9-CD, 2000 Tenn. Crim. App. LEXIS 645 (Crim. App. Aug. 8, 2000) (finding no abuse of prosecutorial discretion in denying defendant access to diversion program).

36. See, e.g., David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295 (2013) (discussing use of deferred prosecution agreements with potential corporate defendants).

be filed, or will be dismissed, upon satisfactory completion of drug treatment.<sup>37</sup>

When exercising discretion, prosecutors rarely, if ever, write on a blank slate, pondering every decision as if for the first time. Prosecutors make decisions against the background of conventional professional understandings—for example, the understanding that, all things being equal, crimes that involve more serious harms (such as homicide or arson) should receive priority over crimes involving less serious harms, or that prosecutions of repeat offenders should receive priority over prosecutions of first-time offenders.

Prosecutors also make decisions against the background of office-wide understandings. These understandings may or may not be made explicit, incorporated into written office policy, or made public. For example, some offices have an unwritten understanding that, all things being equal, prosecutors should offer more lenient plea deals to defendants who plead guilty earlier in the criminal process as a reward and incentive for saving prosecutorial resources. Toward the same objective, other offices have formal policies, communicated to defense counsel at the outset of a case, that a plea offer will be withdrawn if the defendant does not accept it by a certain time.<sup>38</sup>

Some policies may be criticized as a misuse of power or as a dereliction of duty on the theory that the prosecutor is contravening the legislature's intent and therefore acting undemocratically. For example, some prosecutors have been criticized for announcing that they will never seek the death penalty.<sup>39</sup> But even a decision not to enforce a relatively trivial law can provoke controversy. For example, the Manhattan prosecutor has weathered some criticism for announcing that his office will no longer prosecute turnstile jumping.<sup>40</sup>

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37. See generally Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783 (2008) (describing drug treatment court as a popular alternative to the conventional war on drugs); Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595 (2016) (exploring the broader effects of the drug court movement).

38. See, e.g., Roland Acevedo, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987, 991-93 (1995) (discussing Bronx prosecutor's policy).

39. See Karl Racine et al., *The Constitutional Crisis in Florida We're All Missing*, WASH. POST (July 12, 2017), <https://wapo.st/2FznBht> [<https://perma.cc/7FC2-DSRJ>].

40. See Anthony M. DeStefano, *De Blasio, NYPD Criticize DA's Policy to Not Prosecute Fare-Beaters*, NEWSDAY (Feb. 7, 2018), <https://bit.ly/2toVOPv> [<https://perma.cc/UY32-E3BD>].

Many office policies are designed to promote consistent treatment of similarly situated defendants. For example, some urban prosecutors' offices have adopted policies identifying when drug offenders will be eligible for diversion programs or will be charged with particular offenses of varying levels of severity. These policies may turn on factors such as whether the individual is a drug user, the amount of drugs involved, the extent to which the individual profited or assumed a level of responsibility in a drug-dealing enterprise, or the individual's prior offense record. Furthermore, office policies can serve other functions. For example, some local prosecutors have publicly announced that they will no longer prosecute people arrested for possessing small amounts of marijuana for their own use.<sup>41</sup> The policy reflects a view, which the chief prosecutor seeks to communicate to the electorate, that marijuana use is not sufficiently culpable or socially harmful to warrant a criminal prosecution.

Prosecutors' discretionary decisions are enormously important, whether they are made by an office categorically or "wholesale" by adopting policies for recurring situations, or they are made individually or "retail" by one or more prosecutors considering all the relevant and available facts on an ad hoc basis. These decisions matter to individuals who may or may not be charged with a crime and to their families. And in the aggregate, decisions made by one or more prosecutors' offices matter to communities and groups because they influence whether people collectively feel safe and fairly treated or, conversely, whether they feel abused by prosecution practices that have led, in the view of many, to over-criminalization and over-incarceration, particularly of people of color.

## II. ABUSES OF PROSECUTORIAL DISCRETION—PUBLIC EXPECTATIONS

Prosecutorial discretion has garnered increasing public attention and discussion as the public has come to understand both the significance of prosecutorial discretion and, at times, its troubling uses.<sup>42</sup> Segments of the public often react when a prosecutor makes a controversial decision such as by bringing charges that seem unde-

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41. See Benjamin Mueller, *Two District Attorneys May Stop Prosecuting Most Marijuana Offenses*, N.Y. TIMES (May 14, 2018), <https://nyti.ms/2wJb8uZ> [<https://perma.cc/3DLH-XRSS>] (noting that Brooklyn and Manhattan prosecutors had stopped prosecuting low-level marijuana offenses and were considering further restrictions on marijuana prosecutions).

42. See, e.g., Radley Balko, *The Untouchables: Misbehaving Prosecutors, and the System That Protects Them*, HUFFINGTON POST (Aug. 1, 2013), <https://bit.ly/2xgWvtF> [<https://perma.cc/2SN4-XHAT>].

served or by declining to pursue charges that seem to be warranted. The public reactions reflect general expectations about how prosecutors should use their power—expectations that prosecutors often, but do not invariably, share.<sup>43</sup>

One obvious public expectation is that prosecutors should not prosecute innocent people. Members of the public might question a charging decision while a case is still ongoing because they think the defendant is, or may be, innocent.<sup>44</sup> But until the case has been tried and the evidence presented, prosecutors typically can shrug off such criticism as ill-informed. Later in the process, however, the public will likely have a firmer foundation for questioning a prosecutor's initial charging decision, particularly when the prosecutor drops the charges, the defendant is acquitted, or a conviction is overturned following the disclosure of exonerating information, which, though previously unknown to the defense, may have been accessible to the prosecution. At these points, one might ask whether the charging decision was a prudent one given what prosecutors apparently knew when they brought the case.<sup>45</sup>

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Over the last year or so, a number of high-profile stories have fostered discussion and analysis of prosecutorial power, discretion and accountability. . . . Even many on the political right, traditionally a source of law-and-order-minded support for prosecutors, have raised concerns about 'overcriminalization' and the corresponding power the trend has given prosecutors.

*Id.*; see also Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 71 (2016).

[T]he public perception is growing that misconduct is not limited to unlawful conduct. In particular, the public and the media are coming to understand that prosecutors' decisions about whom to charge, what plea bargains to offer, or what sentences to pursue may be not simply unwise, but abusive, reflecting wrongdoing in an ordinary, if not legal, sense.

*Id.*

43. Among the most controversial exercises of prosecutorial discretion in recent years have been prosecutors' decisions regarding whether to bring criminal charges against police officers for violence against civilians. See, e.g., Blanche Bong Cook, *Biased and Broken Bodies of Proof: White Heteropatriarchy, the Grand Jury Process, and Performance on Unarmed Black Flesh*, 85 UMKC L. REV. 567, 618–19 (2017).

44. A prominent example of where a prosecutor's charging decision was rightly questioned—and, indeed, the charges ended up being dismissed before trial—was the Duke Lacrosse case. For a discussion of the case, see Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice"*, 76 FORDHAM L. REV. 1337 (2007).

45. See, e.g., Bruce A. Green, *Access to Criminal Justice: Where Are the Prosecutors?*, 3 TEX. A&M L. REV. 515, 527 (2016) (observing that convicted defendant's exoneration "suggests at least on the face of it that the prosecutor did not act reasonably"); Susan Jones, *Liberal Law Prof: Zimmerman Case 'Should Never Have Been Brought in the First Place'*, CNS NEWS (July 15, 2013), <https://bit.ly/2DJGHWG> [<https://perma.cc/CN48-UBDE>]; Huma Yasin, *Noor Salman Should*

The public also understands that not everyone who commits a crime should be charged and that prosecutors should choose fairly. Sometimes, public concerns address the legitimacy of prosecutors' selection criteria and prosecutors' subjective motivations: the public asks whether prosecutors treated some people too harshly or too leniently based on improper considerations.<sup>46</sup> For example, prosecutors are sometimes suspected of engaging in favoritism when they decline to bring charges against the wealthy, powerful, and well-connected<sup>47</sup> or against people with whom they have a personal or professional relationship.<sup>48</sup> Conversely, prosecutors are sometimes suspected of bias—for example, of racial bias when they appear to bring undeserved or unduly harsh charges against people of color or when they appear to take cases less seriously in which people of color are victims.<sup>49</sup> Sometimes both favoritism and bias are thought to be at play, such as when prosecutors have decided not to bring

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*Never Have Been Prosecuted in the First Place*, WASH. POST (Mar. 30, 2018), <https://wapo.st/2TiCPS8> [<https://perma.cc/J2YR-7UAF>].

46. Recent cases of police violence against civilians are examples of where prosecutors have been accused of applying discretionary principles inconsistently, out of bias or favoritism. See generally Cook, *supra* note 43; Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745 (2016); Caleb J. Robertson, *Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police*, 67 EMORY L.J. 853 (2018).

47. See, e.g., Melito & Adolfsen, *Dismissal of Charges Against Former Virginia Governor McDonnell Is Another Lesson in Prosecutorial Discretion*, JD SUPRA (Sept. 12, 2016), <https://bit.ly/2Sp0rqR> [<https://perma.cc/BJ4L-GK3G>]; Stuart Diamond, *The Law; Prosecutorial Discretion: Worthy of Defense?*, N.Y. TIMES, July 22, 1988, at B20 (discussing independent counsel's decision not to bring charges against President Reagan's Attorney General, Edwin Meese); Charles Toutant, *Lawyers Fear Ray Rice Case Could Stymie Prosecutorial Discretion*, N.J.L.J. (Sept. 17, 2014), <https://bit.ly/2BB1BFZ> [<https://perma.cc/4DAK-JTGP>] (discussing admission of NFL football player to pretrial intervention program in lieu of criminal prosecution for domestic violence); *The Judgment on DSK: A Lesson in Prosecutorial Discretion*, WALL ST. J. (Aug. 24, 2011), <https://on.wsj.com/2SuiwnG> [<https://perma.cc/3895-QUFE>] (discussing Manhattan District Attorney's dismissal of sex offense charges against Dominique Strauss-Kahn); *Prosecutorial Discretion and Prosecutorial Protection*, MAL CONTENTS (Apr. 20, 2013), <https://bit.ly/2HRhZIm> [<https://perma.cc/9KYW-3PG7>] (discussing decision not to bring charges against then-county executive).

48. See, e.g., William Safire, *When Top Prosecutor Misuses His Discretion*, ST. LOUIS POST-DISPATCH, May 30, 1990, at 3B (accusing Attorney General of a "double standard" in pursuing drug charges against the Washington, D.C. mayor but not against his own subordinate).

49. See, e.g., Raj Jayadev, *Justice Hinges for Trayvon Martin and America Hinges upon Two Words: Prosecutorial Discretion*, MERCURY NEWS (Apr. 12, 2012), <https://bayareane.ws/2Sbl8SU> [<https://perma.cc/A43R-LCLR>]; see generally Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541 (2012); Yoav Sapir, *Neither Intent nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER J. 127 (2003).

charges against law enforcement officers for assaulting or killing civilians of color, even when publicly disclosed evidence suggests that the officers were unjustified or engaged in excessive force.

Sometimes in making discretionary decisions, prosecutors are suspected of relying on improper considerations, and these considerations are not limited to suspect categories such as race, ethnicity, religion, or gender. For example, the public sometimes raises concerns that chief prosecutors have been influenced by their self-interest in reelection or in otherwise advancing their political career, or that trial prosecutors have been influenced by their self-interest in obtaining trial experience or in burnishing their reputations.<sup>50</sup> Prosecutors are also suspected of engaging in deficient decision-making processes—for example, allowing their evaluation of the evidence to be distorted by their zeal to win cases.<sup>51</sup>

A related concern grows out of the understanding that prosecutors should not use their power arbitrarily and, therefore, similarly situated people should be treated in roughly comparable ways. If people who are equally culpable are treated differently for no apparent legitimate reason, one might assume that prosecutors relied on illegitimate considerations or that they simply acted arbitrarily. Either way, the disparity offends the popular sense of justice. Although there is no consensus around how harshly or leniently people should be treated in absolute terms in recurring situations,<sup>52</sup> it is assumed that prosecutors' standards should not shift

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50. See, e.g., David A. Graham, *Can the Baltimore Prosecutor Win Her Case*, ATLANTIC (May 6, 2015), <https://bit.ly/2MHDFFB> [<https://perma.cc/WR8L-NVZZ>] (quoting law professor's assertion that "[t]here's good reason to think that [the prosecutor] was driven by political considerations," to overcharge in a case involving an arrested person's death in police custody, and "[w]hile that's cause for concern, it's also absolutely typical in criminal cases involving defendants who aren't police"); see also Green & Roiphe, *supra* note 19, at 525 ("The line prosecutor . . . is often motivated, at least in part, by professional goals, and the career prosecutor's political ambitions may well affect almost every important decision.").

51. See, e.g., Bob Herbert, *In America: 'Sorry' Isn't Enough*, N.Y. TIMES, May 17, 2001, at A25 (asserting, with respect to conviction of two innocent men based on false testimony, that "[p]rosecutors tend to be far more interested in convictions than justice"); see also Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 137 (2004).

Taken together, [the] realities of life in the prosecutorial workplace—that one's "win" rate may be determinative of future success and that both the individual prosecutor and the office as a whole have interests in maintaining convictions—have arguably led to an organizational "conviction psychology," an environment where convictions are prized above all and the minister of justice concept becomes a myth.

*Id.*

52. It has often been noted that punishment tends to be harsher in the United States than in other Western countries. See Joshua Kleinfeld, *Two Cultures of*

from case to case. So, for example, prosecutors in death-penalty states have been questioned about their decisions, individually or collectively, to seek the death penalty when the decisions seem to be made arbitrarily or on biased distinctions among different defendants who are eligible for the death penalty.<sup>53</sup> When defendants are treated differently in different counties or districts in a state, prosecutors might respond that different elected prosecutors have different philosophies and each is elected to implement his or her own philosophy. When defendants appear to be treated differently within a single jurisdiction, prosecutors might respond that the public is unaware of, or indifferent to, salient distinctions among defendants. There may in fact be no salient distinctions, but it is difficult to test this kind of response.

Another recurring public concern is more elusive. It relates to the understanding that prosecutors should use their power with a sense of proportion. This concern tends to be raised most often when charging decisions appear to be overly harsh, that is, when the potential penalty for the crime, or a prosecution itself, seems out of proportion to the level of wrongdoing.<sup>54</sup> For example, there has been public debate about whether children should be prosecuted as adults.<sup>55</sup> Prosecutors have been accused of exercising bad judgment or abusing their power in certain classes of cases—for example, by

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*Punishment*, 68 STAN. L. REV. 933, 937 (2016) (“Starting in the 1970s and picking up speed in the 1980s, America adopted more and more severe criminal penalties as Europe adopted more and more mild ones, until today an enormous and startling chasm has opened up between the two.”).

53. See, e.g., Frank Green, ‘*Like They’re God*’; *Prosecutorial Discretion Called Awesome Power*, RICHMOND TIMES-DISPATCH, Feb. 5, 1998, at A1; Michael Kiefer, *Pursuing the Death Penalty is Sole Discretion of Prosecutors*, ARIZ. REP., Oct. 19, 2014, at A1; *Death Penalty Study Panel Looks at ‘Prosecutorial Discretion’*, CITY PAPER, Oct. 16, 2007.

54. See, e.g., *Libby Case Was a Questionable Use of Prosecutorial Discretion*, EAST VALLEY TRIBUNE, Mar. 12, 2007 (discussing an alternative perspective to the decision to indict Lewis Libby); Lincoln Caplin, *Aaron Swartz and Prosecutorial Discretion*, N.Y. TIMES (Jan. 18, 2013), <https://nyti.ms/2MHnbNB> [<https://perma.cc/2X3Q-S6G4>] (“[Prosecutors] go after defendants tooth and nail, overcharging them from the abundance of criminal laws with sentences so severe and out of proportion to the crime that, as now happens in 95 percent of criminal cases, the prudent choice is to cop a plea.”).

55. See, e.g., Maura Dolan, *More Teenagers Face Charges as Adults*, L.A. TIMES (Nov. 30, 2000), <https://lat.ms/2S8lr0Q> [<https://perma.cc/98W8-D3NW>] (discussing the impact of Proposition 21 on charged teenagers in adult court); Melissa Coretz Goemann, *Virginia, Too, Allows Unfettered Discretion*, RICHMOND TIMES-DISPATCH (Sept. 29, 2007), <https://bit.ly/2GMqRga> [<https://perma.cc/MW97-EJ7L>] (“Virginia allows prosecutors unfettered discretion in certain types of cases to determine whether to try a child as a juvenile or an adult. . . . [T]here is no oversight or accountability over this process and no ability for any court to review the decisions they make until after trial.”); ‘*No Place for a Child*’ Coalition Supports Bills

prosecuting juveniles for engaging in consensual underage sex or for sexting<sup>56</sup> or by prosecuting women for neglect when they have left children unattended.<sup>57</sup> Sometimes prosecutors have been accused of going overboard by enforcing laws too strictly in individual cases, without considering particular circumstances that make the individual more sympathetic or less blameworthy than most. For example, some have criticized prosecutors for bringing firearms charges carrying harsh penalties when defendants possessed guns for legitimate reasons but mistakenly failed to complete the right paperwork.<sup>58</sup>

### III. WHY ABUSES OF PROSECUTORIAL DISCRETION ARE HARD TO DEFINE AND HARD TO DETECT

There is a spectrum between the very best and the very worst uses of discretion, but there is no established vocabulary for judging prosecutors' exercise of discretion and for making salient distinctions between the best, the good, the bad, and the worst.<sup>59</sup> At one end might be decisions considered to be truly wise. At the other

*That Would Limit Children Being Prosecuted as Adults in Florida*, ACLU FLA. (Dec. 5, 2017), <https://bit.ly/2DNkqpP> [<https://perma.cc/3HF4-3VKZ>].

56. See, e.g., Tim Cushing, *Minnesota Prosecutor Hits Teen with Porn Charges for Taking Explicit Photos of Herself*, TECHDIRT (Jan. 2, 2018), <https://bit.ly/2t6uEfW> [<https://perma.cc/PU7M-ZPE8>]; Travis Fain, *James City County 'Sexting' Case Raises Many Legal Questions*, DAILY PRESS (Feb. 12, 2014), <https://bit.ly/2X5Erkk> [<https://perma.cc/8S9R-FDK8>]. For an argument that prosecutorial discretion should be narrowed in this context, see Eric S. Latzer, *The Search for a Sensible Sexting Solution: A Call for Legislative Action*, 41 SETON HALL L. REV. 1039 (2011).

57. See Kim Brooks, *Motherhood in the Age of Fear*, N.Y. TIMES (July 27, 2018), <https://nyti.ms/2LVIU4n> [<https://perma.cc/ZJ3F-YLQ9>].

58. See, e.g., Chase Brush, *Bramnick Urges Atlantic City Prosecutors to Use Discretion in Shaneen Allen Case*, OBSERVER (Sept. 16, 2014), <https://bit.ly/2B8KRWw> [<https://perma.cc/4JXQ-7ATZ>] (discussing press conference at which a New Jersey state assemblyman urged prosecutors to reduce charge, where woman faced a mandatory three-year sentence for carrying an unregistered gun for which she had obtained a concealed-weapon permit in the neighboring state); see also Sam Roberts, *Prison Isn't as Mandatory as the State's Gun Laws Say*, N.Y. TIMES (Jan. 20, 2013), <https://nyti.ms/2tr9QjG> [<https://perma.cc/QR6X-69TR>].

[I]n 2011, Bronx prosecutors did not seek the mandatory minimum in cases involving a state prison guard who was not authorized to carry a firearm only because he had failed to submit the required paperwork, and a Pennsylvania school bus driver who was traveling to his sister-in-law's wake in New York.

Roberts, *supra* note 58.

59. See, e.g., George C. Thomas, III, *Discretion and Criminal Law: The Good, the Bad, and the Mundane*, 109 PENN ST. L. REV. 1043, 1058 (2005).

Discretion is inevitable. Some of it is good. Much of it comes from traits of human nature that cannot be changed, what I have called mundane discretion. Some of it is bad because it is based on stereotypes about or

extreme might be intentional illegality, such as knowingly indicting someone in the absence of probable cause or intentionally treating someone more harshly than others because of their race or religion. What is in between? One might distinguish the apparently wise or prudent uses of discretion from those that seem to be debatable, the merely debatable from the affirmatively unwise, and the unwise uses of discretion from outright abuses of discretion that fall short of illegality. Surely, there are many more gradients.

When one talks about “prosecutorial misconduct” in the context of prosecutorial discretion, it may not be clear into which category the prosecutor’s decision falls. Illegal conduct qualifies as misconduct, of course. This would include not only unconstitutional uses of power (such as unconstitutionally discriminatory or selective prosecution) but also uses of prosecutorial power that violate statutory authority or professional conduct rules.<sup>60</sup> If prosecutors’ conduct is illegal, it falls outside the broad area in which prosecutors might be said to have discretion.

One might argue for a broader definition of “misconduct” to include exercises of power that, although not illegal, reflect abuses of discretion. But then we need an understanding of when discretion is abused. Some state courts have authority to review prosecutors’ charging, plea bargaining, and/or nollei (dismissal) decisions—for example, some state courts may dismiss charges “in the interest of justice” or deny a prosecutor’s motion to dismiss charges after they have been initiated.<sup>61</sup> When a court blocks or overturns a prosecutor’s decision, one cannot invariably infer that the court found an abuse of prosecutorial discretion. The court may simply have reached a different judgment than the prosecutor about whether a prosecution was in the interest of justice. Some state courts do have authority to make a finding that the prosecution

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animus toward women, minority racial groups, and lower socioeconomic classes.

*Id.*

60. Disciplinary actions against prosecutors for misusing their authority to initiate charges or plea bargain are infrequent and arguably should be increased. See generally Green & Levine, *supra* note 3; Samuel J. Levine, *The Potential Utility of Disciplinary Regulation as a Remedy for Abuses of Prosecutorial Discretion*, 12 DUKE J. CONST. L. & PUB. POL’Y 1 (2017).

61. See generally Samuel Becker, *Judicial Scrutiny of Prosecutorial Discretion in the Decision Not to File a Complaint*, 71 MARQ. L. REV. 749 (1988); Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 HOFSTRA L. REV. 63 (2017) (analyzing judicial authority and the role of judicial supervision); Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225 (2016) (comparing the current practice of prosecution-negotiated plea bargaining to English courts’ practice of reviewing decisions); Green & Levine, *supra* note 3.

abused its discretion,<sup>62</sup> which might be equated with prosecutorial misconduct. But, the case law on prosecutorial abuses of discretion is sparse. Federal courts and most state courts lack authority to review prosecutors' decisions under an abuse-of-discretion standard. Many prosecutorial decisions that the public might fairly consider to be bad or abusive are not remediable.

As discussed below in Part III.A, once one gets beyond the blatantly illegal or legally abusive conduct, it is difficult to define abuses or misuses of prosecutorial discretion because there is no professional or public consensus on the applicable standards, other than in the most vague and general sense. Although judges occasionally question the wisdom of prosecutors' discretionary decisions,<sup>63</sup> there is nothing in the law, in judicial decisions, or elsewhere to define whether an exercise of discretion is wise or unwise, and judges only rarely praise or criticize prosecutors' decision-making when prosecutors have unreviewable discretion.<sup>64</sup>

Moreover, as discussed in Part III.B, abuses and misuses of prosecutorial discretion are hard to detect. In general, prosecutors' decisions should be judged based on the facts known or reasonably available to them at the time they make their decisions and in light of their internal decision-making processes. But the public always stands outside the decision-making process. It is rare for the public to know what the prosecutor knows, or knew, in making a decision, and rarer still for the public to be privy to prosecutors' thought processes. When prosecutors decide collectively through discus-

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62. *See, e.g.,* *People v. Matulonis*, 230 N.W.2d 347, 351 (Mich. Ct. App. 1975). [T]he trial court, taking into consideration such factors as the offense with which the defendant was charged, the surrounding factual circumstances, the lesser included offense of the plea bargain, and the opinions of other interested parties, can refuse to accept a prosecutor's recommendation where it finds that the prosecuting attorney has abused his prosecutorial discretion.

*Id.*

63. *See, e.g.,* *United States v. Hashime*, 734 F.3d 278, 286 (4th Cir. 2013). [A]ttention to balance and degree often distinguishes the wise exercise of prosecutorial discretion from its opposite. For now we leave to the reflection of the appropriate authorities whether it was necessary to throw the full force of the law against this 19-year-old in a manner that would very likely render his life beyond repair.

*Id.*

64. *See, e.g.,* *State v. Steckel*, 708 A.2d 994, 1000 n.7 (Del. Super. Ct. 1996). [T]his case does not reflect any action by the prosecution to 'stack' aggravating circumstances in an attempt to inappropriately influence either the jury or the Court. In fact, the State exhibited wise and prudent prosecutorial discretion in only arguing for one aggravating circumstance when the possibility existed for several others to also apply.

*Id.*

sion, the discussion is not recorded. When individual prosecutors decide on their own, their reasons may not be verbalized and may not even be fully expressed to themselves.

Without settled standards and established facts, everything looks debatable. Prosecutors can almost always argue that their seemingly problematic decisions were legitimate. Consequently, it is hard for the public to hold prosecutors accountable for the quality of their discretionary decision-making or even to have well-informed public discussions of the subject.

### A. *Definitional Problems*

At the most general level, there may be broad agreement about how prosecutors should make discretionary decisions. But the vague standards are not workable either for prosecutors making decisions in individual cases or for those critiquing prosecutors' decision-making.

#### 1. *Addressing Doubts About Guilt and Evidentiary Reliability*

There is broad agreement that prosecutors should not prosecute innocent people, but it is unclear how to translate this principle into a standard of conduct. Prosecutors do not always know whether individuals are innocent or guilty. They have no first-hand knowledge. They rely on testimony that is not necessarily accurate, on confessions that are not invariably true, on forensic examinations that are not always reliable, on inferences that are not always conclusive, and so on. They are rarely 100 percent certain. There is no consensus on how sure prosecutors must be of a person's guilt before initiating charges or bringing a case to trial.<sup>65</sup> As a matter of law, prosecutors may not proceed without probable cause,<sup>66</sup> but that does not answer how in the face of uncertainty, prosecutors should exercise their discretion. All would agree that prosecutors should not proceed against those whom they *know* to be innocent, but what if they believe someone *may be* innocent? What if prosecutors have grave doubts about someone's guilt or just nagging doubts?

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65. See, e.g., Gershman, *supra* note 3 (arguing that prosecutors should be "morally certain" of guilt before taking a case to trial); Green & Yaroshefsky, *supra* note 3, at 497-501 (discussing alternative approaches).

66. See, e.g., *Lowth v. Town of Cheektowaga*, 82 F.3d 563 (2d Cir. 1996); Iowa Supreme Ct. Att'y Disciplinary Bd. v. *Howe*, 706 N.W.2d 360 (Iowa 2005); cf. MODEL RULES OF PROF'L CONDUCT r. 3.8(a) (AM. BAR ASS'N 1983) (requiring "probable cause" in order to bring a criminal prosecution).

Likewise, there is no agreement on what prosecutors should do to test the reliability of inculpatory evidence and testimony or to seek out exculpatory evidence, and on when prosecutors should refrain from relying on evidence of questionable reliability.<sup>67</sup> In general, under the law, prosecutors may not offer evidence they know or should know to be false and may not bury their heads in the sand,<sup>68</sup> but they have no legal obligation to probe the credibility of their witnesses' testimony or of other evidence. However, that is only the law. It does not resolve how prosecutors should exercise discretion. Suppose prosecutors believe the defendant to be guilty but have doubts about the reliability of some of the inculpatory evidence—for example, about the credibility of a jailhouse informant or of an accomplice witness or about the reliability of an eyewitness identification or the efficacy of a forensic test. May they use the evidence knowing that, historically, many wrongful convictions have been predicated on unreliable evidence that later turned out to be false?

There is no professional or public consensus on how, as a matter of discretion, prosecutors should answer these questions. Consequently, when prosecutors bring charges against defendants whose guilt is questionable or who turn out in hindsight to be innocent, there is no agreement about the standard by which to judge the prosecutors' earlier decision to prosecute or their reliance on false evidence in doing so.

In 2011, the Manhattan District Attorney publicized the standard that he employs in responding to doubts about guilt. In moving to dismiss charges accusing the managing director of the International Monetary Fund, Dominique Strauss-Kahn, of sexually assaulting a hotel maid, the District Attorney wrote:

For generations, before determining whether a case should proceed to trial, felony prosecutors in New York County have insisted that they be personally convinced beyond a reasonable doubt of the defendant's guilt, and believe themselves able to prove that guilt to a jury. . . . If, after careful assessment of the facts, the prose-

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67. See Green, *supra* note 45, at 527 n.71 (arguing that existing ethics rules do not adequately restrict prosecutors' use of unreliable evidence, and citing other authority addressing what standard should apply).

68. See, e.g., *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991) (stating "[w]here the prosecution knew or should have known of [its witness's] perjury, the conviction must be set aside" if the false testimony may have affected the outcome).

ctor is not convinced that a defendant is guilty beyond a reasonable doubt, he or she must decline to proceed.<sup>69</sup>

This standard seems eminently reasonable, given the substantial public interest in avoiding punishing the innocent. But it is uncertain how many prosecutors outside Manhattan concur. Indeed, it is uncertain whether this standard was communicated to Manhattan prosecutors prior to the public filing in Strauss-Kahn's case, whether individual prosecutors in the Manhattan District Attorney's office have accepted and implemented it, and how the standard has been enforced.

## 2. *Choosing Which Guilty People to Prosecute*

There is broad professional consensus around other general principles regarding prosecutorial discretion, relating to which cases prosecutors should bring when they believe people to be guilty of a crime. For example, prosecutors generally agree that they should not make arbitrary distinctions among cases—that is, similar cases should be treated similarly. But there is no consensus on what distinctions are or are not significant and how significant.

Some years ago, the Alabama Attorney General publicly battled the state district attorneys over this question in a murder case. The killer, who was a juvenile, and his accomplice, who was a young adult, were both initially convicted of capital murder, but the killer's sentence was changed to life imprisonment after the Supreme Court held the death penalty unconstitutional for crimes committed by juveniles. The district attorney who initially prosecuted the case then concluded that the accomplice should also be spared execution given his lesser role in the crime, explaining that, "out of plain fairness and simple equity in life, it's not fair to leave the person on death row who didn't kill anyone and take the person off death row who did."<sup>70</sup> The state Attorney General, who defended the death sentence at the post-conviction stage, disagreed, arguing that the sentence was appropriate and that, in maintaining otherwise, the district attorney engaged in "a shocking, inexcusable violation of his oath of office."<sup>71</sup> The state prosecutors' association defended the district attorney for "trying to ensure that similarly-

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69. Recommendation for Dismissal at 4, *People v. Strauss-Kahn*, No. 02526/2011 (N.Y. Sup. Ct. filed Aug. 22, 2011), <https://bit.ly/2BgKGZf> [<https://perma.cc/2HQH-DEMZ>].

70. Press Release, Ala. Dist. Attorneys Ass'n (Sept. 17, 2007) [hereinafter Press Release], <https://bit.ly/2GKHKrw> [<https://perma.cc/B7X8-LEYU>].

71. Troy King, Ala. Attorney Gen., Statement (Sept. 17, 2007) (on file with author).

situated defendants are treated similarly.”<sup>72</sup> But the Attorney General’s evident view that, as an adult, the accomplice was more blameworthy and therefore more deserving of the death penalty was arguably consistent with the idea of treating similarly situated defendants the same, given the assumption that adults are more culpable than juveniles for their offenses.

Even an individual prosecutor may waver on whether a consideration serves as a legitimate basis for distinguishing among otherwise similar cases. For example, in a short newspaper interview about prosecutorial discretion, a local Idaho prosecutor made seemingly contradictory statements about whether defendants who are similarly situated in other respects may be treated differently in statutory rape cases when the victims have different preferences.<sup>73</sup> His initial answer seemed to be “no”:

The purpose of prosecutorial discretion, is the idea that two similarly situated individuals be treated similarly under the law—a bedrock of our criminal justice system. One example may be a statutory rape case. Assuming all facts such as ages, et cetera are consistent, one victim may wish to pursue charges and a harsh sentence and yet the other victim may not want charges filed. Charges based solely upon the wishes of the victim may lead to inequitable results for similar cases.<sup>74</sup>

But a few sentences later, the prosecutor listed factors that his office considers important in making charging decisions, which included: “What are the feelings of the victim? The victim’s wishes should play a key role in any charging decision.”<sup>75</sup>

In trying to determine whether prosecutors are making arbitrary or impermissible distinctions, yet another problem is that there are so many considerations that may justify treating two largely similar cases differently. In making ad hoc determinations, prosecutors may take account of differences in the nature of the underlying criminal conduct, the individuals’ past criminal history, and other characteristics relevant to the likelihood of rehabilitation or recidivism, as well as the extent to which punishment will deter others, the impact of punishment on the individual, and the impact of a trial on witnesses. Prosecutors may also consider a host of administrative issues, including whether an individual cooperated truthfully or pled guilty early in the process and the cost and diffi-

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72. See King, *supra* note 71; Press Release, *supra* note 70.

73. Daniel R. Clark & Austin Allen, *Prosecutorial Discretion Is Key to Justice System*, IDAHO FALLS POST REGISTER, Sept. 9, 2016.

74. *Id.*

75. *Id.*

culty of a trial. Two cases may be alike, but no two cases are the same. And while it may be true that prosecutors take account of the relevant considerations inconsistently from case to case, in ways that reflect underlying biases of which they are not necessarily aware, prosecutors can claim that they have taken account of all the relevant factors and made relevant distinctions between cases that are prosecuted differently.<sup>76</sup>

There is also an understanding, at the most general level, that prosecutors should seek proportionate punishment, not the harshest available punishment. In other words, the punishment should fit the crime. But this is easier to express in theory than to implement in practice. To begin with, our plea bargaining system, which is the predominant means by which criminal cases are resolved, presupposes disproportional punishment: Depending on one's perspective, either those who are convicted after trial are punished too harshly, because they suffer a "trial penalty," or those who accept a plea offer are treated too leniently as an incentive for them to forgo their trial rights. The bygone premise that a guilty plea demonstrates one's contrition and potential for rehabilitation, justifying a lesser punishment, does not explain the vast charging and sentencing disparities.

The decentralized nature of criminal prosecution is another feature of the criminal justice process that makes proportionality, as well as consistency, virtually impossible. There is no national consensus on how different cases should be treated, and the various chief prosecutors invariably have different intuitions or philosophies. Some prosecutors may view drug use as primarily a criminal problem while others may view it primarily as a mental health problem, resulting in disparities in charging. Some may be more concerned than others when the impact of charging decisions, however justified in theory, falls disproportionately harshly on certain groups depending on class and race. For example, prosecutions of pregnant women for drug use tend to be directed principally at low-

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76. For example, federal tax prosecutors recognize that it is not a wise expenditure of resources to prosecute all tax evasion cases, but some cases should be prosecuted to promote general deterrence. The choice of which cases to prosecute may have nothing to do with the seriousness of the tax crime or the tax violator's level of moral culpability but may turn on which cases have already commanded a greater investment of investigative time, which are easier to prove, or which will obtain more publicity. While it is fair to regard these distinctions as salient, that does not mean that they are employed in a consistent way. The more factors enter into decisions, the greater the opportunity for illegitimate considerations and unconscious biases to play a role.

income women of color.<sup>77</sup> In the end, what one might be tempted to label an abuse of discretion may be, on reflection, the implementation of a contestable position on criminal justice policy.<sup>78</sup>

Further, there is broad agreement that certain considerations are an improper basis on which to distinguish among otherwise similar cases (and, in the case of race, religion, and gender, an unconstitutional basis as well). But, once one gets beyond the obvious suspect classifications, there is no agreement on which considerations are or are not legitimate. For example, there is disagreement on whether prosecutors may take account of a person's immigration status, and, if so, which way it cuts.<sup>79</sup>

There is also no agreement on what processes should be put in place to prevent prosecutors from relying, if only unconsciously, on impermissible considerations. In recent years, there has been a growing social science literature on unconscious racism and other unconscious biases and a growing legal literature on how legal decisions, including those of prosecutors, may be affected.<sup>80</sup> But there is no consensus on what, if any, processes should be implemented to try to reduce the unconscious influence of illegitimate biases. Nor is there agreement on whether prosecutors may make distinctions, based on facially nondiscriminatory rationales, that have a discriminatory effect.<sup>81</sup> For example, prosecutors could rationalize prosecuting street-level drug sales of crack more harshly than sales of cocaine to wealthy brokers (think "Wolf of Wall Street"), based on distinctions other than race and class.

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77. See Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CALIF. L. REV. 781, 873 (2014); Cortney E. Lollar, *Criminalizing Pregnancy*, 92 IND. L.J. 947 (2017); Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 938 (1997).

78. See Bruce A. Green, *Urban Policing and Public Policy—The Prosecutor's Role*, 51 GA. L. REV. 1179, 1196–1200 (2017) (discussing the role of public policy considerations in prosecutors' charging decisions).

79. See *Prosecutorial Discretion and Immigrants*, BALT. SUN (May 1, 2017), <https://bit.ly/2BjRxsS> [<https://perma.cc/5UMC-CXQD>] (supporting Baltimore prosecutor's policy of considering deportation consequences before charging lawfully resident noncitizens with minor, nonviolent crimes); see also Green, *supra* note 78, at 1197.

80. See, e.g., Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512 (2007); see also Bruce A. Green, *Legal Discourse and Racial Justice: The Urge to Cry "Bias!"*, 28 GEO. J. LEGAL ETHICS 177, 180–81 (2015) (citing scholarship on the influence of implicit biases on prosecutors).

81. See generally Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187 (2018).

### B. *Problems of Detection*

Even insofar as there are standards by which to measure prosecutors' discretionary decision-making, it is inordinately difficult to apply those standards, not only for outsiders but for prosecutors and their offices as well.

The ability to detect improper decision-making is most challenging for outsiders. The full range of facts available to the prosecutor are almost never available to the public. Nor are the office's internal deliberative processes or any individual prosecutor's internal thought processes. For example, when prosecutors go forward with a case, outsiders cannot know whether the prosecutor scrutinized the evidence and made a fair judgment whether there was reasonable doubt, or whether the prosecutor took illegitimate considerations into account. And when prosecutors decline to bring charges or dismiss them based on insufficient evidence, they rarely explain why, and if they do, the public will rarely have enough facts to confirm prosecutors' explanations or to determine whether they were pretextual.

For example, the Manhattan District Attorney came under challenge for his decision in 2015 not to bring charges against Harvey Weinstein for sexually assaulting an Italian model, based on the inadequacy of the evidence; indeed, the Governor asked the state Attorney General to investigate the prosecutor's decision.<sup>82</sup> But the public does not know everything the District Attorney knew at the time, what the prosecutors in the office discussed, or what they thought but did not express aloud. And assuming prosecutors declined to proceed in the Weinstein case for exactly the right reason—because of their own reasonable doubts—one might also wonder whether this standard is applied consistently: In cases involving less powerful figures, do felony prosecutors scrutinize witnesses' credibility so closely and perceive doubts so readily?<sup>83</sup>

The public will have a rare opportunity to examine and critique the Manhattan prosecutors' exercise of discretion in another high-profile case—the Central Park Five case, in which five young men of color were convicted of raping a jogger in Central Park. The key

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82. See Vivian Wang & James C. McKinley Jr., *Cuomo Orders a Review of Vance's Handling of Weinstein Investigation*, N.Y. TIMES (Mar. 19, 2018), <http://nyti.ms/2WjL9Tu> [<https://perma.cc/4PJR-XYEV>].

83. See, e.g., Jane Anne Murray, *A Perfect Prosecution: The People of the State of New York v. Dominique Strauss-Kahn*, 8 CRIM. L. & PHIL. 371, 386 (2014) (“[T]he prosecutorial procedures in the Strauss-Kahn case were exceptional. The case was treated like no other, and the prosecutors held themselves to standards rarely seen in the hundreds of cases processed daily in the same courthouse.”).

evidence was the young men's confessions, which turned out to be false: Years later, the men were exonerated when an arrested sex offender confessed to the assault and physical evidence corroborated his confession.<sup>84</sup> The men's exoneration does not in itself establish that the prosecutors proceeded despite reasonable doubts about the defendants' guilt, since the prosecutors' charging decision should be judged by what prosecutors knew, or reasonably should have known, at the time of the prosecution. But it will soon be possible to consider prosecutors' decisions in light of what they knew. Following the City's settlement of the exonerated men's civil rights action, the City agreed to release evidence and files accumulated by the police and prosecutors in the course of the investigation and prosecution.<sup>85</sup> After-the-fact judgments may be fallible because of the risk of hindsight bias and will be incomplete absent knowledge of the prosecutors' thought processes. But files showing what prosecutors knew when they made discretionary decisions should give outsiders their best opportunity to assess whether and how Manhattan prosecutors employed the reasonable-doubt standard, which the office says it has employed "for generations."<sup>86</sup>

Likewise, it is rare to be able to assess whether prosecutors made decisions based on illegitimate considerations, since prosecutors rarely reveal their debatable reasoning. Credit for transparency should go to a local North Carolina prosecutor who publicly discussed his prosecution of protesters who vandalized a confederate monument.<sup>87</sup> He was criticized for indicating that he would take into account that the protestors had "no proper recourse for asking our local government to remove or relocate this monument," and that "asking people to be patient and to let various government institutions address injustice is sometimes asking

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84. For a discussion of the case, see SARAH BURNS, *THE CENTRAL PARK FIVE: THE UNTOLD STORY BEHIND ONE OF NEW YORK CITY'S MOST INFAMOUS CRIMES* (2011). For legal scholarship addressing the case, see Sharon L. Davies, *The Reality of False Confessions—Lessons of the Central Park Jogger*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 220 (2006).

85. See Benjamin Lueller et al., *City Releases Trove of Documents in Central Park Jogger Case*, N.Y. TIMES (July 20, 2018), <http://nyti.ms/2B4lKEp> [<https://perma.cc/XT5F-5SWX>].

86. See *supra* note 69 and accompanying text (quoting New York County District Attorney's motion in the *Strauss-Kahn* case).

87. See Paul Mirengoff, *Dunham D.A. Admits Ideology Will Influence His Prosecutorial Discretion*, POWERLINE (Aug. 21, 2017), <https://bit.ly/2SnrQcM> [<https://perma.cc/8BMU-2YMM>]. For another example where a prosecutor publicly acknowledged some sympathy for protesters who were criminally prosecuted, see LARA BAZELON, *RECTIFY* 118–21 (2018) (discussing Alameda County prosecutor's prosecution of Black Lives Matter protestors who chained themselves to two Bay Area Rapid Transit trains).

more than those who have been historically ignored, marginalized, or harmed by the system can bear.” The prosecutor may not have meant to spark a public debate on whether the protestors’ motivation was a legitimate basis for leniency or whether taking account of it disrespected the equality principle—that similar cases should be treated similarly. But the prosecutor’s disclosure of his thinking (assuming the disclosure is candid) provides a rare window into the exercise of discretion. It gives the public a chance to debate whether the considerations he identified are legitimate ones. To the extent the debate is inconclusive, the public may develop a better appreciation of the complex, subjective, and contingent nature of prosecutors’ discretionary decision-making.

Incomplete information is not a problem only for outsiders. In prosecutors’ offices, it may be hard for the chief prosecutor or supervisory prosecutors to know how prosecutors other than themselves are making decisions. To the extent that prosecutors make decisions unilaterally, they may never have reason to disclose their thought processes, and when prosecutors make decisions collectively or require approval, their actual thought processes may not be fully disclosed.

Prosecutors may not even be candid with themselves. Decision-making is often impressionistic. Prosecutors may never verbalize their reasons, and may never acknowledge even to themselves everything that goes into their decisions. Even if prosecutors are committed to principled decision-making, they may be influenced by illegitimate considerations of which they are at best dimly aware.<sup>88</sup>

For example, once defendants have been charged, it becomes harder for prosecutors to weed out cases where there is insufficient evidence. Prosecutions acquire a momentum that makes it hard for prosecutors to see evidence objectively. If a case is brought by police or other investigators, there will be a tendency to rely on the investigators’ judgment, because the investigators are closer to the evidence, they are often more experienced, prosecutors want to maintain good relations with them, or for other reasons. Once a

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88. See, e.g., Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006); Barbara O’Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999 (2009); Myrna Raeder, *What Does Innocence Have to Do with It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315 (2003).

prosecutor makes an initial decision to proceed, it is hard to reconsider because of the difficulty of acknowledging error, the time and effort sunk into the case, and the tendency to review new information in light of one's preexisting assumptions about the case. On top of that, dismissing a case may be viewed as an implicit concession of error and may carry reputational risk within the prosecutor's office or, especially in a high-profile case, publicly.

#### IV. THE PROBLEMS WITH SOLUTIONS

In a famous speech to federal prosecutors, then-Attorney General (later Supreme Court Justice) Robert Jackson acknowledged prosecutors' immense power and the possibility for them to do immense harm by abusing it.<sup>89</sup> His answer to this problem was, essentially, to select prosecutors of good character.<sup>90</sup> It was an important speech but an inadequate solution. Prosecutors of good character who endeavor to exercise discretion wisely need an understanding of the difference between a wise decision and an unwise one. They need to know which considerations are legitimate and illegitimate and how to avoid unconscious as well as conscious reliance on illegitimate ones. Not all lawyers of good character have the good judgment to exercise discretion well. And, of course, there is no process to ensure that only lawyers of good character and good judgment become prosecutors.

Some suggest that what is needed is a different prosecutorial ethos. Although prosecutors have traditionally been told that they have a duty to "seek justice,"<sup>91</sup> many consider this injunction too vague to have any influence.<sup>92</sup> Alafair Burke has argued that prosecutors should adopt an attitude of vigilant agnosticism regarding

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89. See Jackson, *supra* note 1, at 3 ("The prosecutor has more control over life, liberty and reputation than any other person in America.").

90. *Id.*

Because of this immense power to strike at citizens . . . with all the force of government itself, the post of Federal District Attorney from the very beginning has been safeguarded by presidential appointment, requiring confirmation . . . . You are thus required to win an expression of confidence in your character by both the legislative and executive branches

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*Id.*

91. See generally Bennett L. Gershman, *The Zealous Prosecutor as Minister of Justice*, 48 SAN DIEGO L. REV. 151 (2011); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607 (1999); Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35 (2009).

92. See, e.g., Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 GEO. J. LEGAL ETHICS 1301 (1996).

defendants' guilt,<sup>93</sup> and Eric Fish recently suggested that prosecutors should adopt an attitude more like that of judges in inquisitorial legal systems.<sup>94</sup> Others agree that prosecutors should be more objective and less adversarial at least in certain phases of their work—for example, in making charging decisions or in reviewing new exculpatory evidence following a conviction. To prevent prosecutors from being over-adversarial, some favor dividing prosecutors' charging and trial functions between different prosecutors or different offices, with those making the charging decisions adopting a more judicial, less adversarial, mindset.<sup>95</sup> Likewise, it may be helpful to assign post-conviction review to a new set of prosecutors who lack the cognitive biases of the trial lawyers who secured the conviction.<sup>96</sup> Compartmentalizing or re-structuring prosecution in this manner might improve discretionary decision-making in some respects, but it would not fully address all problems. Specifically, it would not address situations where, after charges are brought, doubts about guilt are raised while prosecutors are preparing witnesses to testify or acquiring new evidence. Nor would it address all of the improper considerations and disparities that might be present in prosecutors' decisions.

Others have sought other ways to restructure decision-making to reduce abuses of discretion. All involve tradeoffs. For example, both categorical and ad hoc decision-making processes have their advantages and limitations. Office policies may reduce the risk that different prosecutors will treat similar cases differently and that prosecutors will rely on illegitimate considerations. But policies pose a risk that individual circumstances will not be given individual weight that is deserved. There may be considerations not reflected in office policies justifying why one person may be less deserving of prosecution or punishment than another who fits the same profile—considerations making the person less culpable, less dangerous, less likely to recidivate, or one for whom prison would be unusually harsh. Strict adherence to policy may exclude legitimate considerations. For example, DOJ policy, developed under Attorney General Ashcroft, regarding charging decisions under the sentencing

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93. See Alafair S. Burke, *Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. 79 (2010).

94. See Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1451 (2018) (arguing that prosecutors should not act as “partisan advocates”).

95. See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 897 (2009); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1704 (2000).

96. See, e.g., Green & Yaroshefsky, *supra* note 3.

guidelines were, in the view of some, too rigid, leading to excessively harsh punishment.<sup>97</sup>

There may also be advantages and disadvantages to making decision-making more centralized—for example, by consolidating responsibility for prosecution in a single state authority.<sup>98</sup> An entity with broader authority could apply uniform standards and processes for exercising prosecutorial discretion, thereby reducing disparities. But centralization is no panacea. In the absence of transparency, there would be no assurance that internal standards would be applied consistently.<sup>99</sup> And, given debatable philosophies, a central authority might broadly apply unfavorable standards. Decentralization affords more opportunity for experimentation, leadership, change, cross-pollination, and conversation among prosecutors of different jurisdictions. Decentralization also promotes legitimate regional distinctions that reflect different social conditions, different public preferences, or different philosophical approaches.

One might change internal decision-making processes in other ways. Some legal academics have suggested that, essentially in common law fashion, prosecutors should develop an internal jurisprudence of prosecutorial discretion: articulating the reasons for certain decisions, identifying principles on which their decisions are based and which their decisions exemplify, and employing prior decisions as exemplars for future decision-making, at least insofar as

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97. See, e.g., *Hearing to Examine the Prosecution of Ignacio Ramos and Jose Compean: Hearing Before the Subcomm. on Terrorism, Technology & Homeland Security of the S. Comm. on the Judiciary*, 110th Cong. (2007) (hearing into whether federal prosecutors' charging discretion was unduly limited by DOJ charging policy which led to sentences exceeding ten years' imprisonment for two convicted Border Patrol Agents); Richard B. Schmitt, *U.S. Attorneys Required to Seek Maximum Sentence*, L.A. TIMES, Sept. 23, 2003, at A13; Jonathan Turley, *Under Ashcroft, Justice Is Blind and Handcuffed*, L.A. TIMES (Aug. 11, 2003), <https://lat.ms/2B6Jtn8> [<https://perma.cc/4KUM-WKCH>].

98. Cf. Jackson, *supra* note 1, at 4 (discussing that “some measure of centralized control is necessary” in federal prosecution for various reasons, including to avoid different interpretations or applications of the criminal law and to promote uniform criminal justice policy).

99. See, e.g., Andy Ho, *Balancing the Prosecution; Publishing Prosecutorial Guidelines Will Improve Transparency and Respect for Law*, STRAITS TIMES, May 6, 2013. The article discusses apparent disparities in prosecutions in Singapore, pointing to the example of drug possession cases where some defendants were charged with amounts calling for the death penalty and others who appeared to be similarly situated were charged less harshly. *Id.* The article observes that although prosecutors follow internal written guidelines, they have not disclosed the guidelines, leading many in the public to find the charging differences “hard to accept.” *Id.*

they stand the test of time.<sup>100</sup> Further, some difficult decisions should be made collectively by prosecutors, articulating to each other the facts and reasoning on which their decisions are based.<sup>101</sup> This would increase the likelihood that decisions are thoughtful, justified by accepted decision-making criteria, and unaffected by illegitimate considerations. It would also serve as a better process to acculturate junior prosecutors than the ad hoc and haphazard means employed in many prosecutors' offices. However, many prosecutors would predictably resist this idea, seeing an elaborate, documented decision-making process as an unnecessary waste of limited resources.

Still other legal academics have focused on mechanisms of public accountability. Some suggest expanding judicial review of prosecutors' discretionary decisions<sup>102</sup> or disciplinary regulation of these decisions.<sup>103</sup> In effect, this would narrow the range of prosecutorial discretion, allowing courts more of a role in articulating impermissible standards and processes. But it would do nothing to address unwise or even abusive exercises of discretion that fall beyond the reach of the courts and disciplinary authorities.

Others have advocated for greater transparency in how prosecutors make decisions.<sup>104</sup> Greater transparency would allow voters and the public media to respond in a better-informed way to both laudable and questionable decision-making. But there are myriad barriers to substantially increased transparency, including the need to respect witnesses' privacy and protect them from obstruction, the need to protect uncharged people from embarrassment, and the need to avoid disclosures that will prejudice the legal process. Indeed, prosecutors have been criticized for explaining decisions not to initiate or continue prosecutions, at least where the explanations place uncharged or unprosecuted individuals in a negative light.<sup>105</sup>

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100. See Green & Roiphe, *supra* note 19, at 515–35.

101. *Id.* at 529–31.

102. See, e.g., Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37 (1983).

103. See Green & Levine, *supra* note 3, at 182; Levine, *supra* note 60.

104. See, e.g., Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 110 (2011); Chris Chambers Goodman et al., *Unpredictable Doom and Lethal Injustice: An Argument for Greater Transparency in Death Penalty Decisions*, 82 TEMPLE L. REV. 997, 1034 (2009).

105. See U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GEN., A REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND THE DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION 239–49 (2018), <https://bit.ly/2LQk7Nu> [<https://perma.cc/5F32-E7FB>]. Perhaps the most notable recent example involved James Comey's public explanation, prior to the 2016 presidential election, of his decision not to indict Hillary Clinton for communicating classified information over a private email server. *Id.*

Public accountability is essential, and prosecutors could safely disclose much more to the public about how they make decisions in general, in order to facilitate public understanding and critique. But prosecutors can rarely be expected to provide significant detail about their decision-making in individual cases.<sup>106</sup>

## V. CONCLUSION: THE NEED FOR PUBLIC INQUIRY AND DISCOURSE

It is important for the public to engage in informed discussion of the work of all public officials, including prosecutors. And there is no more important aspect of prosecutors' work than how they exercise discretion. Therefore, the public should scrutinize prosecutors' decision-making and endeavor to hold prosecutors accountable when they make decisions badly or abusively. The public cannot rely on courts to perform this function. Courts have processes to address many situations where prosecutors act illegally, but courts cannot hold prosecutors accountable for exercising discretion unwisely.

This Article has identified some of the challenges facing the public in overseeing and critiquing prosecutors' exercise of discretion. These include the lack of settled decision-making standards, the inaccessibility of facts on which prosecutors base their decisions, and the inaccessibility of prosecutors' decision-making processes in individual cases and in general. All of these present obstacles to the public's ability to make definite judgments in many situations. However, it does not follow that the public should simply assume that prosecutors are exercising power wisely. At the very least, the public can raise questions about prosecutors' decision-making and try to hold prosecutors accountable for not offering convincing answers.

Consider, for example, the prosecutorial practice with which this Article began: prosecutors' collaboration with private debt-collection agencies to target consumers who write bad checks, threatening them with criminal prosecution if they do not pay both the amount of the bad check and an additional fee, to be divided with

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106. The *Strauss-Kahn* case, discussed above, is the rare one in which a prosecutor has a legitimate vehicle to explain a discretionary decision. See *supra* note 69 and accompanying text. In that case, the prosecution required the court's permission to dismiss pending criminal charges, and, although the court undoubtedly would have granted a barebones motion filed by the prosecution with the defendant's asset, the prosecutor was able to provide a lengthy explanation for the decision, in which the public undoubtedly had a keen interest. See Recommendation for Dismissal, *supra* note 69.

the prosecutor's office. This practice raises a host of questions about whether prosecutors are exercising discretion wisely or abusively, and the public should demand answers.

From a broad public policy perspective, there is a question of whether individuals with limited means who are swept into the criminal justice system ought to be required to contribute to the state's and private vendors' costs, including not only prosecution costs but the costs of ancillary social services. This is a big, current, pervasive question, and it arises in many jurisdictions in different ways.<sup>107</sup> In the bad-check scenario, customers are required not only to make good on their bad checks, but to pay a fee toward the cost of collection and toward the cost of a class in financial responsibility which may or may not be useful. In another iteration, people arrested for marijuana possession have been charged hefty fees for the cost of drug education classes and drug testing.<sup>108</sup> States have also imposed court costs and counsel fees on criminal defendants, including those meeting indigency standards.<sup>109</sup> These sorts of fees, the payment of which is induced by threats of imprisonment, are highly regressive—imposing the cost of public services on those who can least afford them and who may not actually need or benefit from the services. The motivation for the arrangement is suspect, insofar as private companies running the programs are the financial beneficiaries, and even more so insofar as prosecutors' offices are the beneficiaries. Looking at the big picture, a threshold question is whether placing financial demands on people who write bad checks, presumably because they have limited financial resources, is wise public policy. A related question is whether prosecutors' judgment about the wisdom, fairness, and utility of this policy is distorted by prosecutors' institutional interest in sharing in the proceeds.

One might also ask whether prosecutors' implementation of this collections program, in tandem with private agencies, results in individual injustices. Prosecutors may have little or no role in selecting who receives a letter on their letterhead. While some recipients may be subject to prosecution and deserving of prosecution if they do not make restitution, it is fair to assume that many will not

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107. See U.S. COMM'N ON CIVIL RIGHTS, TARGETED FINES AND FEES AGAINST LOW-INCOME COMMUNITIES OF COLOR: CIVIL RIGHTS AND CONSTITUTIONAL IMPLICATIONS 19 (2017), <https://bit.ly/2TwwXEQ> [<https://perma.cc/3FCV-7CQX>].

108. See Shaila Dewan, *Caught with Pot? Get-Out-of-Jail Program Comes with a \$950 Catch*, N.Y. TIMES (Aug. 24, 2018), <https://nyti.ms/2C28cKH> [<https://perma.cc/TT37-BZG9>].

109. See J.D. King, *Privatizing Criminal Procedure*, 107 GEO. L.J. (forthcoming 2019).

be because they did not know that their bank account balances were too low when they wrote the checks and therefore did not commit a crime at all, or because the incident is so aberrational and/or the amount of money in question is so small that prosecutors would never use their limited resources to prosecute such a case. Prosecutors apparently are not conducting investigations before the letters are sent under their name. And private debt collectors do not necessarily have an incentive to conduct thorough investigations, even assuming they are tasked with doing so.<sup>110</sup> Is it fair to threaten those who have not, or may not have, broken the law—where the prosecutor has not conducted an adequate investigation to ascertain whether the person is guilty beyond a reasonable doubt?<sup>111</sup>

Those whom prosecutors have unfairly or idly threatened with prosecution for writing bad checks are misled, are caused needless anxiety, and are pressured to make payments that they have no obligation to make. The prosecutor's threat to bring criminal charges is not as personally devastating as actually being charged. But the threat alone invokes anxiety. It is an exercise of power that should be justifiable.<sup>112</sup> If prosecutors are making idle threats, unjustified by prosecutors' examination of the evidence, why is that a legitimate exercise of discretion?

And in cases where the threats turn out to be sincere, because prosecutors lawfully could and in fact would bring charges if restitution were not made, is that intended exercise of charging power wise or abusive? One question is whether it offends the proportionality principle—that is, whether it is an excessive use of state power to bring criminal charges and seek criminal punishment when a consumer knowingly writes a bad check. Another is whether it offends the equality principle—whether similarly situ-

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110. With regard to the general problem of delegating prosecutorial authority to private actors, see Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411 (2009).

111. See Green, *supra* note 17, at 43.

[N]ot everyone who bounces a check is a potential criminal. Most probably are not. Writing a bad check may be a crime if the person writing the check knew she had insufficient funds in her bank account and intended to defraud the vendor. But many people write bad checks innocently. Before threatening to bring charges, a prosecutor must review the evidence and conclude that there would be a fair basis for bringing charges. Otherwise, the threat is baseless and unjustified.

*Id.*

112. Cf. Jackson, *supra* note 1, at 3 (discussing that prosecutor's "tremendous" discretion includes the power to investigate citizens "to the tune of . . . veiled or unveiled intimations" and to order arrests and present cases to the grand jury as well as to cause citizens to be indicted and held for trial).

ated individuals who commit other financial or property crimes of equally small magnitude are being prosecuted. One might suspect that prosecuting bad checks is often an excessive response, out of proportion with how similar crimes are handled, and that the reason for treating these cases differently is that private agencies are willing to do most of the work and to provide prosecutors' offices part of the proceeds. If so, the further question is whether this is a legitimate basis for treating these cases differently, given that the distinctions are irrelevant to the offenders' level of moral culpability, to the public interests in deterrence and rehabilitation of offenders, or to any other traditional purpose of criminal punishment.<sup>113</sup>

Perhaps prosecutors have good answers to these questions. But prosecutors have not offered answers because they have not been subject to serious, informed public questioning. To say that prosecutors have discretion generally means that they do not have to answer to the courts, but it does not mean they do not have to answer to the public. The public has a responsibility to ask questions, drawing on informed understandings about the legitimate and illegitimate exercise of prosecutorial discretion. Informed public inquiry and discourse will both encourage prosecutors to use their power wisely and promote accountability when prosecutors use their power abusively.

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113. See Green, *supra* note 17, at 43.

If some bad check writers are occasionally to be prosecuted or threatened, the decision should be based on legitimate factors such as the amount of the check or whether the debtors are repeat offenders, not on the willingness of a particular creditor or collection agency to help fund the prosecutor's work.

*Id.*

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