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Discretion and Criminal Law: The Good, the Bad, and the Mundane

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Discretion and Criminal Law: The Good, the Bad, and the Mundane*

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Discretion in enforcement and prosecution of crime is inevitable; it can be restrained at the margin but it cannot be eliminated. Usually when an academic speaks of discretion in the enforcement and prosecution of criminal law, you can expect a diatribe about how the system should be radically changed to eliminate or greatly restrain that discretion. I come, however, largely to acknowledge Caesar rather than to bury him. Any system that permits an almost limitless set of decision points for police and prosecutors will be filled with almost limitless discretion. Imagine the number of times a police officer could intervene and make an arrest but does not. To take an extreme case, imagine a police officer in Manhattan enforcing the law against jaywalking. Presumably, the average officer working a beat sees hundreds of jaywalkers every day and probably arrests none.

While the discretion points in a prosecutor's life are not quite so numerous, she faces a wide range of decisions when she picks up a stack of new files. For example, the prosecutor can dismiss the cases, give them back to the police with a request for more evidence, begin a series of investigations on her own, or proceed to the next step in some or all of the cases. When the case stays in the system, most jurisdictions provide the prosecutor with an opportunity to offer a plea deal and a wide range of deals as to the appropriate charge and sentence. Some of the offers are probably so extreme (high and low) that she will not be aware of

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* This title, of course, is a play on the Clint Eastwood movie, *The Good, the Bad, and the Ugly*. Indeed, I originally wrote the essay with "ugly" as a description of one of the motives that underlie discretion but decided it was not very helpful in creating a workable taxonomy of motives.

** Professor of Law & Judge Alexander P. Waugh, Sr., Distinguished Scholar, Rutgers University School of Law. I thank the organizers of the Criminal Procedure Forum, especially Russell Weaver, for the wonderful hospitality. I thank Lexis-Nexis for helping fund the Forum and the Dean's Research Fund at Rutgers University School of Law, Newark for partial support for my research. Finally, I thank readers of an earlier draft for particularly perceptive and helpful comments: Jack Chin, Stuart Green, Peter Henning, Andy Leipold, Bob Mosteller, and Scott Sundby.

them and thus will not consciously reject them. But they exist. I had a second-degree murder case where the prosecutor ultimately took manslaughter and sixty days in the county jail.

So discretion is here to stay in the enforcement and prosecution of criminal law. Yet if we try to imagine a system that is completely discretionary—in which there are no rules or standards, and all results are completely within the discretion of the actors who have power—we have just imagined either chaos or a ruthless dictatorship. Thus, we should attempt to restrain some kinds of discretion at some points. The question is what types of discretion and at what points. To begin to answer that question, one must first understand the different kinds of discretion that play out in what we loosely call the criminal justice system.

I. Dimensions of Discretion

This essay leaves untouched several dimensions of the discretion question. Some acts of police or prosecutors are not governed by legal rules or norms—for example, the decision whether to set up radar on one highway versus another—and these are outside my concern. Moreover, discretionary acts that can be reviewed and corrected by others are likely in a different category from acts that are essentially un-reviewable. I focus only on the latter kind of discretionary acts. Another dimension of the problem is that the discretion not to act might be viewed differently from the discretion to act. The decision *not* to charge a crime might be less blameworthy than the decision to charge a crime when both are based on the same improper motive. But for purposes of this essay, I will assume that these types of discretion have morally equivalent consequences.

I wish to explore the motives of the criminal justice actor who is subject to rules or norms and who essentially has final discretion. So, for example, the police officer who pulls over a car because the driver is black is exercising bad discretion because the motive is inappropriate. The officer who sees a drunken driver and a speeder at the same time exercises good discretion if he pulls over the drunken driver and lets the speeder escape (based on the greater risk of harm posed by the drunken driver). The officer who looks the other way when jaywalkers pour like locusts onto the Manhattan city streets is perhaps utilizing discretion that is neither bad nor good but merely a practical concession to the day-to-day realities of life—the "mundane" of my title.

But even as limited in the last paragraph, there are aspects of the problem that I will not address. For example, different offenses likely have different tipping points for when discretion becomes "good" rather

than "mundane." We would not, I suspect, want the police or the prosecutor to exercise discretion not to arrest or charge someone they believe has committed murder. Speeding and jaywalking occupy the other end of that dimension of discretion. But trying to locate the tipping point for various categories of offenses is beyond the scope of this essay, if it is possible at all. Thus, I will simply use examples from different categories.

Another dimension of the problem is that all humans act out of mixed motives all the time. The officer who "gives" fifteen miles over the speed limit most of the time might stop a driver who is going ten miles over the limit in a school zone. To make matters more complicated, bad motives can mix with neutral ones. A police officer might decide not to stop a white motorist who is driving ninety miles per hour because the officer is both too busy that night and a racist. It is even possible that good motives can mix with bad ones. Consider a prosecutor who decides not to prosecute for minor domestic violence based on the wife's pleas that her husband would lose his job if he were prosecuted. The prosecutor might be acting to protect the family's breadwinner (a good motive, I will assume) and because he believes husbands should be able to discipline their wives. To keep my discussion as clear and simple as possible, I will engage in the artificial assumption that we can always extract the dominant motive from the mix of all motives.

In thinking about abstracted motives that we can label good, bad, and mundane, it might be useful to imagine the ideal or platonic police officer and prosecutor. The platonic police officer has no racial stereotypes about which racial group is more or less likely to commit particular crimes. She has no stereotypes relating to sex or gender. She is never lazy, bored, or drunk. She never considers when her shift is ending or when lunch is approaching in deciding whether to make an arrest. She has an endless appetite for paperwork even if she has to complete it on her own time. She views her job as protecting the public, not an "us against them" mentality where anyone who is not a police officer is potentially the enemy.

The ideal prosecutor is also unburdened with any racial or sex/gender stereotypes. She never considers the larger political ramifications of her decisions to prosecute or not prosecute. She has no political ambitions, not even to be re-elected if she is so unfortunate to live in a state where prosecutors are elected. She truly believes her obligation is to justice rather than to achieve a high conviction rate. She willingly opens her file for defense lawyers to examine. She goes out of her way to ensure that innocent people are removed from the process as soon as possible. She does not impugn the integrity or honesty of a

witness she believes told the truth on direct examination. She does not threaten to bring greater charges or ask for longer sentences than she thinks justified in order to induce defendants to plea bargain. She does not start the bargaining process by asking for a greater penalty than she believes justified. She practices what Saturn claims for its car sales force: a fair "price" in the beginning and no elaborate negotiations. If the judge asks her opinion about sentencing, she will recommend a sentence that she thinks justified, not a higher one that she thinks the judge is willing to impose.

I hope it does not sound too cynical to suggest that no prosecutor and no police officer will fit my platonic models. As law professors, defense lawyers, judges, prosecutors, and police officers, we are all human beings, and human beings have good days and bad days. We act in ways that maximize our self-interest even when it causes harm to others. We justify our acts even when they are not the best we could have done. We are, in short, all too human.

II. "Flavors" of Discretion

So what is wrong with discretion? I will wager that every one of us has driven past police radar at greater than the speed limit. Much more often than not, the officer will ignore the violation. I doubt that any reader has felt anything other than relief when the police car did not pull out to give chase. Who among us has turned ourselves in at the next police station to remedy this obvious failure of the police officer to enforce the law as written?

If the officer exercises discretion to arrest only speeders who are driving recklessly or who appear drunk or who fit some kind of drug courier profile, it is a different kind of discretion than the type I wish to study. To keep matters simple, assume the stop is only for speeding. In this universe of cases, the officer has to decide what constitutes speeding. If the speed limit is sixty-five, a sixty-six on the radar gun is technically speeding, but the officer is unlikely to stop that car for speeding. The radar gun might be inaccurate. The case will be difficult to prove. As the anecdotal evidence tends to show, police generally "give" so many miles per hour over the posted limit before they bother with a speeding stop. How many times have we seen drivers on interstates not even slow to the speed limit when they see a "speed trap" ahead?

One might think it is not discretion if the officer gives every driver the same five, ten or fifteen miles per hour over the posted speed limit. But does every police officer in a city, county, or state follows the same rule about how many miles per hour to "give" motorists before deciding

to stop the car for speeding?[1] More fundamentally, those who reject discretion in enforcement presumably reject the very idea that police departments or individual officers can decide what category of violations to ignore, even if they apply their own "law" faithfully. The legislature sets the speed limit on the New Jersey Turnpike, not the New Jersey State Police and surely not the individual officer.

But speeding is just a traffic offense so who cares? I think the point can be generalized. Do we really want police to arrest every seventeen-year-old they see in a public park with what appears to be a marijuana cigarette in her hand? Yet we might feel differently if the police observe the same someone with a bag of marijuana in her lap. I assume here that the quantity is not sufficient to give rise to a presumption of possession with intent to sell. The difference in these two cases might be that casual use is one kind of harm while possessing a bag of marijuana suggests a pattern of use. Presumably, it is the latter conduct that the legislature is seeking to deter.

For a more controversial example, imagine a case where a husband slaps his wife and regrets the assault the moment he did it, but the police are called by a neighbor who just happened to peer in the window. The wife tells the officer that it has never happened before and she does not want her husband arrested. Is it a bad use of discretion to "look the other way" in this case? Arguably, it is not. Yet there might be a reason to treat this case differently from the earlier examples. I shall return to this issue later in the paper.

So far the examples have concerned the discretion to ignore an act the officer believes violates the law. What if the officer is unsure about guilt? What if, for example, a prostitute seeks to extort more money for a sex act she has already performed by telling police that the john raped her. If the officer knows the true facts, then he would know no rape occurred. If he arrested the john in that case, it would not be discretion but a lawless act on the part of the officer. But assume the officer suspects, but does not know, that the sex act was consensual. This is probably a more likely scenario; as Blackstone famously remarked, even a prostitute can be raped. If the officer was relatively confident that the prostitute lied, would we want the officer to decline to make the arrest? Perhaps.

The same arguments can of course be made about prosecutors. We

1. Stuart Green recounted a conversation with an officer who said that his police department had a standard policy of not stopping anyone for speeding unless the driver was going at least 10 miles an hour over the limit. Even so, one officer might decide to "give" 11 or 12 miles over the limit. To say that there is a minimum below which an officer cannot give a ticket is not to say that every driver going 10 miles per hour over the limit must get a ticket.

would love the prosecutor to decide not to pursue a conviction on the speeding ticket when we were only four miles over the limit and Barney Fife arrested us. We would not, by the way, be at all mollified to learn that Barney arrests every driver who exceeds the speed limit by any amount. We would, I think, be inclined to react the way viewers of the Andy Griffith show reacted: they laughed when Barney insisted that he was just doing his job.[2]

Presumably, it is also a good thing for our benevolent prosecutor not to pursue the marijuana charge for the cigarette in hand in the park, the assault charge when it was atypical and the victim did not want to prosecute, and the rape charge when the facts suggest the defendant is innocent. Everything that is good about police discretion in these circumstances is a fortiorari good when the prosecutor exercises her discretion the same way.

So that leads us to the question we began with: what is wrong with discretion? As my examples suggest, we can sort discretion into two categories. Police and prosecutors exercise discretion when they believe a crime has occurred and they decide not to arrest or charge the culprit—as in the speeding, marijuana, and assault examples I mentioned earlier. A subcategory of this kind of discretion is the decision to arrest for or charge a lesser offense than the police/prosecutor believe occurred or to offer a plea to a lesser offense or lesser penalty than the prosecutor believes is justified on the facts as she knows them. A different category is when police and prosecutors decide that no crime has occurred—the alleged rape example.

I first thought these acts of discretion were fundamentally different and needed to be analyzed differently. But, upon reflection, the decision not to pursue the guilty is often substantively the same as a decision based on a belief in technical legal innocence. The police officer who looks the other way when a car is going ten miles per hour over the speed limit knows that the driver is technically guilty, but the officer is in effect substituting his own rough and ready judgment of what should "really" count as speeding for that of the legislature. To be sure, the officer could also be lazy, drunk, or too near the end of his shift to bother. If we assume a conscientious officer or prosecutor, however, the failure to pursue the guilty is likely based on a substantive view of what guilt entails. The actors are substituting their judgment of what the law prohibits or at least using their own judgment to decide which offenders

2. My memory is a little foggy on the particular episode. It might have involved parking violations that Andy normally ignored, but the point is the same. One reader of a draft said I could check it out on the Andy Griffith web site and provide the episode number but then wondered whether that would be a little too "geeky." Yes, I decided.

are worth pursuing. Thus, whether based on a belief that the actor is not guilty of what the legislature has defined as criminal or is not guilty of the crime as redefined by the police officer or prosecutor, it is the same use of discretion based on a belief in one or the other "kind" of innocence.

The question I wish to pursue in the rest of the paper is what motivates the act of discretion. We can begin with the "good" and the "bad" acts of discretion in my title—when the motive is appropriate or inappropriate. This leaves the "mundane" category for later discussion. If we could be sure that discretion is based on laudable criteria, perhaps everyone would trust police and prosecutors to look the other way when a crime, as defined by the legislature, has occurred. Similarly, if the reasons are laudable, perhaps we would be content to have the police or prosecutor single out particular crimes for arrest or prosecution. In a state that does not have "hate" crimes, for example, we might applaud a prosecutor who more vigorously prosecuted a battery that was committed out of racial hatred. A police officer might be more likely to arrest for the same conduct if it creates a higher risk of harm—reckless driving near a school as opposed to in a rural area.

Other types of "good" discretion include the youth of the offender, the minor nature of the offense, and the lack of evidence that it is a pattern of criminal behavior. Perhaps a crushing caseload that suggests using police and prosecutorial resources for more serious offenses is also a reason for discretion that we would consider "good." As for "bad" motives, two categories are obvious: racism and sexism. Perhaps decisions based on social class fall into the "bad" category too.

It seems to me that many motives are difficult to characterize as either good or bad. Consider some reasons *not to arrest*: police observe the crime near the end of their shift or when they are hungry or sleepy or already have "enough" arrests for one shift. We can turn these around and create reasons *to arrest*: police observe the crime when they are bored or have just started their shift or need another arrest to please the sergeant. Prosecutorial motives here include wanting a reputation for being tough on crime (a reason to prosecute or insist on a tough deal) and wanting to appear reasonable and flexible (a reason not to prosecute or to offer a lenient deal). Prosecutors who are new to the job likely have a different set of motives than prosecutors who are nearing retirement.

One could call these reasons "neutral," though it would not fit my title. Moreover, I don't believe these are truly "neutral" reasons because they are not based on desert and thus in a perfect world would not justify a decision to pursue, or not pursue, an actor. I call them mundane because they are characteristic of humans and human endeavors. As with every effort to categorize anything, some cases will fall close to the

lines marking the categories. Consider the officer who is drunk on duty. This is pretty close to the "bad" category (as more than one reader informed me), and repeated instances might lead to dismissal, but an isolated incident seems to me to fall into the "mundane" rather than the "bad" category. I intend my "mundane" category to include every motive that is neither good nor bad. And I intend "good" to represent motives that are truly laudable and "bad" to represent morally offensive motives or motives that, if uncovered, would lead to dismissal. As so construed, the "good" and "bad" categories are much smaller than the "mundane" category.

It seems clear why discretion based on good motives is not so troubling and why discretion based on bad motives is to be condemned. But why would we not be offended by at least some decisions based on mundane motives? Why should a cop's boredom level justify an arrest? Why should a prosecutor's desire to have a certain image justify deciding to prosecute? In truth, I am unsure that mundane reasons can justify an exercise of discretion. But if they do, it is because these motives have nothing to do with the individual's personal characteristics. These acts of discretion can be compared to the results of a game of chance. Most of the time when you commit a traffic offense, or smoke a marijuana cigarette in the park, the roulette ball is not going to land on your number. If it does, because the officer is bored, or the prosecutor is new on the job and wants to build her reputation, well, that is just part of the random chance of life. We are arrested or prosecuted, or not, because of the vagaries of life. The state actor is simply the handmaiden of fate.

To explore the differences in discretion further, think for a moment about how the good, the bad, and the mundane play out in real life. Compare the decision of whether to arrest for a barroom brawl to a decision of whether to arrest when answering a domestic disturbance call. In the former case, one can imagine bad motives. The officer, for example, might be of a different race than one of the combatants, or one of the combatants might be the son of the mayor and the other might be the son of a dock worker. But there is likely to be no consistent pattern to these cases. If police decide to arrest in a barroom brawl case, they probably view their job as arresting anyone who had a part and allowing the prosecutor to sort out the participants on culpability grounds. Moreover, police would not want to use race as part of their decision in any kind of obvious way. Police want to protect their jobs and their pensions.

If this is right, there is little reason to suspect wholesale bad motives in barroom brawl cases.[3] Instead, the officer's discretion is likely based

3. Indeed, one perceptive reader noted that the very locution "barroom brawl"

on either good or mundane motives. Here are three examples of what I would consider good motives: (1) the officer arrests only one actor because the other was young or noticeably weaker; (2) the bartender reports that neither patron has ever caused trouble before; and (3) the officer concludes that the fact of the matter about who was the aggressor will be very difficult to sort out. For examples of a mundane motive, it might be that the officer just does not want to write up an arrest report or the bartender asks him to look the other way.

Now consider the domestic abuse situation. Here, we can justifiably believe that the husband is the aggressor and that the current assault is not the first, nor will it be the last. If the police look the other way in these cases, the discretion can be condemned because many of these acts will be based on an improper motive—to favor the man's side of the dispute over the woman's. It makes sense then for the legislature to require the police always to make an arrest in a domestic violence situation, even if we can imagine a subcategory of cases in which a decision not to arrest would be the right decision. And it might make sense, though this seems more contestable, to require prosecutors not to decline to prosecute these cases.

Similarly, the decision whether to make, or not make, traffic arrests can also can be infected with bad motive. Police decide whether to make a traffic stop for dozens of reasons, but they might be motivated quite often by race or class considerations. If the officer looks the other way when the driver is white but almost always makes the stop when the driver is black, these acts are based on a bad motive. One reason this is bad discretion is that it is *not* like roulette. The ball does not randomly fall in or out of your slot. If you are black, you are far more likely to have it drop on you. If you are white, you are far less likely. This is profoundly unfair and morally offensive.[4]

What about the case where the police make a traffic stop because the driver has long hair or a "Dead" sticker or peace sticker on his Volkswagen van, as happened to one of my students three years ago. While driving cross country, he was stopped in Kansas, and consented to a search that took almost an hour. Is this less offensive than the stop based on race? The answer, I believe, depends on what we find morally offensive about the race-based stop. Perhaps, because of our awful history, imposing a penalty on account of race is particularly offensive. If this is what makes the race-based stop improper, then cases of race are

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connotes a bar populated by people of a certain social class. "Country club brawl" is not a way of describing a fight that we see very often!

4. *See* George C. Thomas III, *Blinded by the Light: How to Deter Racial Profiling—Thinking About Remedies*, 3 RUTGERS RACE & L. REV. 39 (2000).

sui generis and the use of class, or sex for that matter, to decide how to exercise discretion is different.

But while history counts, I think the real reason the race-based stop is offensive is that it represents a rigged roulette game—the ball falls disproportionately on a category of people, rather than randomly across the universe of slots. This use of discretion punishes or rewards us because of who we are, rather than what we did, which is I think at the heart of why we find it morally offensive. This account explains why we distrust police discretion that looks the other way when the assailant is the husband and the victim is the wife. If police ignore a serious assault because "men will be men" or because "she probably did something to provoke him," then they are rewarding him because he is male and punishing her because she is female.

This explanation of why some discretion is morally offensive requires further elaboration. After all, my student could take the "Dead" sticker off his car, and cut his hair, but one cannot change his race or sex. But American tradition encourages self-expression and discourages official punishment of that expression so I am inclined to think that a stop based on the "Dead" sticker or my student's long hair is an exercise of bad discretion.

For the same reasons, prosecutors should not be permitted to make charging decisions based on the race, sex, or class of the defendant. Punishment should fall only on those who deserve it, based on whatever calculus the prosecutor uses to measure desert. Race, sex, and class do not figure into a desert calculus. Moreover, if punishment is *not* going to fall on the guilty through an act of discretion, it should be because of a desert calculation and not because of race, sex, or class.

It goes without saying that bad discretion should not be exercised by any actor in the system. As for good and mundane discretion, whether we approve of the exercise might depend on who exercises the discretion. If the reason not to prosecute the alleged rapist is because of doubt about his guilt, I think we want the prosecutor and not the police to make that decision. If the reason not to pursue an actor is because of the trivial nature of the violation, we are probably happy to let the police exercise discretion and to have the case reviewed by the prosecutor if the police decide to arrest. Thus, we might be happy with the laws requiring police to arrest everyone who assaults his spouse because we do not want police making the guilt/innocence decision in these cases. On the other hand, laws forbidding prosecutors from dismissing spousal abuse cases raise more difficult questions because I think we want prosecutors to screen innocent suspects out of the system as soon as possible.

The prosecutor is better equipped to make that judgment, at least where serious crimes are concerned. First, the prosecutor has a case file

in front of him that hopefully offers more insight into what really happened than the police will possess. Second, I think we are more likely to trust prosecutors to make this decision for a good reason rather than a mundane or a bad reason. Prosecutors are lawyers and lawyers are trained to take their personal preferences out of the calculus when arguing a point or a case. I do not mean to say that lawyers succeed in becoming calculating machines, but I do think our training makes us less prone to acting on bad motives in exercising professional discretion. If police have probable cause to arrest, and the crime is serious, then it is the prosecutor's office in our system that acts as a filter to screen out weak cases.

So far I have argued that discretion in enforcement and prosecution is neither good nor bad as a global proposition. Some discretion is good, on my account, and is to be encouraged. Some discretion is mundane and thus, perhaps, to be tolerated and not condemned. Some is bad and thus both harmful and morally offensive. The next question is what to do about the bad discretion and what, if anything, to do about the mundane discretion. A full discussion of that topic would take a very long paper indeed, but I will sketch some preliminary thoughts in the few pages that I have left.

III. Remedies for Bad—and Mundane?—Discretion

I realize people may disagree with my argument that discretion motivated by good motives needs no remedy but I shall indulge that assumption for the rest of the paper. For the other issues, the remedy question needs to be broken into four categories: bad/police; bad/prosecutor; mundane/police; and mundane/prosecutor. The problem here is the one mentioned in the first sentence of my paper: "Discretion in enforcement and prosecution of crime is inevitable; it can be restrained at the margin but it cannot be eliminated."

Let's begin with mundane acts of discretion. They are mostly a matter of human nature. We are all sometimes bored, lazy, indifferent to our jobs, preoccupied with other things, physically tired, or prone to feeling that we work too hard for too little money. All of these feelings tempt us to cut corners and do it the easy way, whatever the relevant "it" is. For example, how many law professors give more than one exam per semester?[5] Trying to remove human nature from employment is, well,

5. One law professor reader of a draft recoiled at the notion that, by implication, I was accusing him of being lazy because he gives only one exam per semester. Rest assured that is not my point. My point is merely Bentham's point. *See, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 15-16 (Hafner Press 1948) (1843 edition). Human actors seek to minimize unpleasant experiences, one of which (to me) is grading blue books. I may spend more hours writing

quixotic at best.

Another category of mundane discretion is perhaps more troubling. Prosecutor A believes drugs are the scourge of human kind and, when prosecuting a drug offense always charges the most serious crime remotely plausible and seeks the most serious sentence allowed by law. Prosecutor B believes that the war on drugs is the most harmful and pointless social experiment since Prohibition. She thus seeks in various ways to blunt the effect of drug laws on defendants. Prosecutor C believes that the death penalty is the categorical imperative that Kant claimed and charges it in every case where it is remotely plausible. Prosecutor D believes the State lacks the moral authority to put people to death, regardless of their crime, and refuses to charge capital offenses. These are of course extreme examples but they allow me to make my point.

Similarly situated defendants will thus be treated differently, depending on the attitude of the prosecutor who represents the State, for reasons that have nothing to do with the legislature's view of just deserts and nothing to do with the individual defendant's just deserts. This troubles many academics, including some in this symposium, notably Ron Wright.[6] I am less troubled. If we can keep innocent defendants from being convicted, we are simply debating the proper punishment for crime. Punishments vary widely by state. A defendant who commits an atrocious murder in Iowa is not going to face the death penalty, because Iowa has no death penalty. However, if the victim happened to be standing just across the Missouri state line, the defendant might be executed. How is this different from the luck of the draw involved in committing a murder in Prosecutor C's district rather than D's?

Ron Wright approves of New Jersey's attempt to rein in mundane discretion exercised by "line" prosecutors in certain kinds of cases.[7] I take his underlying premise to be that each State is obliged to treat similarly-situated defendants equally. On this view, the Iowa-Missouri case is not the same as Prosecutor C in district two having a different attitude than Prosecutor D in district three if both prosecutors are in the same state. Perhaps Wright is correct to view equal punishment for equal crimes within a single jurisdiction as implicit in justice. That is certainly the premise of the Federal Sentencing Guidelines. Perhaps I do not require enough of justice. But from the defendant's perspective, how is the prosecutorial discretion in the C-D case any more unjust than the

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articles when I should be grading exams. The issue is not laziness. It is how we choose to spend our time in the job setting.

6. *See* Ronald F. Wright, *Prosecutor Guidelines and the New Terrain in New Jersey*, 109 PENN. ST. L. REV. 1087 (2005).

7. *See id.*

legislative discretion in the Iowa-Missouri example. The latter, after all, produces a death penalty or not, depending on which side of the state line the victim happens to be when shot.

My argument, therefore, is that we must accept good discretion and tolerate mundane discretion. As to bad discretion, we have to start small. Beginning with police, it is difficult to know the extent to which police are exercising bad discretion. We do not know, for example, the rate at which whites and blacks commit particular crimes. Thus, we would have no way to know whether police are arresting blacks at a higher rate than whites. One way to avoid that problem is to focus on a crime where the rate of commission seems likely to be constant across racial groups. A place to start is motor vehicle offenses. Intuition suggests, and a few studies tend to confirm, that various racial groups violate traffic laws at roughly the same rate. A New Jersey study, for example, showed that blacks constituted about fifteen percent of speeders on the New Jersey Turnpike but constituted forty-six percent of those stopped for speeding.[8] This disparity is over sixteen standard deviations from what random chance would predict, which makes it almost one hundred percent certain that something other than chance explained the disparity in stops based on race.

Is there a solution to this exercise of bad discretion? A starting place is the proposed federal legislation that would require police to keep records of traffic stops based on race of the driver.[9] But what remedy should result when individual officers or departments demonstrate that they are making stops in part based purely on race? In an earlier paper, I rejected, as largely futile, any attempt to "police the police" by threatening individual offenders with criminal or civil sanctions.[10] Officers who make stops or arrests based on race will seek to disguise their use of race to protect themselves from liability.

Even if we can show that a black motorist is three times more likely to be stopped on the New Jersey Turnpike than should be the case, the officer who can prove the black motorist was in fact speeding has what amounts to a perfect defense. How would we amass evidence of the white speeders the officer ignores? We could do studies of all the drivers on all the highways in the State, but would those data prove that on this day, on this stretch of highway, the usual number of white speeders was present?

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8. State v. Soto, 734 A.2d 350, 353 (N.J. Super. Ct. Law Div. 1996).

9. *See* The Traffic Stops Statistics Act, H.R. 118, 105th Cong. (1997), discussed in David A. Harris, Addressing Racial Profiling in the States: A Case Study of the "New Federalism" in Constitutional Criminal Procedure, 3 U. PA. J. CONST. L. 367, 386-89 (2001).

10. *See* Thomas, *supra* note 3.

Perhaps the comparability problem could be solved, but I think the focus on individual officers is too expensive and too intrusive. What we need is a systemic solution that is more easily managed. As I have proposed before,[11] to a response that can only be described as a deafening silence, it makes more sense to target police departments as a whole. Congress could deny federal money to departments that engage in racially-biased traffic enforcement. The law could require departments to keep records and could create a presumption of racially-biased enforcement when a court finds a statistically significant disparity in stops based on race. This would still require studies to determine the traffic offense rate for racial groups in the relevant area, but if the goal is to assess an entire department or state police unit over a long period of time, the comparability problem is much less severe.

One friend pointed out that in the wake of September 11, I could not expect Congress to deny federal funds to a police department found guilty of exercising bad discretion in traffic offenses. While my friend did not explain the comment, I took it to mean two things. First, police departments generally get more latitude in the post-9/11 world. Second, some people might applaud the use of discretion to identify young Arab men who might be terrorists and thus Congress might be reluctant to intrude into police discretion in making traffic stops.[12]

My proposal was first made before 9/11 and my friend was gently suggesting that whatever salience it might have had is now gone. If so, it means we are not serious about rooting out bad police discretion in making traffic stops. Maybe we are willing to live with it, as a cost of doing business in the war on terror. But any other solution is, I think, whistling past the graveyard. Discretion is too easy to disguise to have any realistic hope of targeting individual exercises. In my view, the solution is either a systemic one or nothing at all.

Outside the context of traffic stops, restraining bad police discretion looks impossible to me. Imagine the encounters police have on the street. How would we ever have a defensible baseline that would tell us whether police make suspicion-less stops of blacks more often than whites? To begin, we would have to keep track of each time an officer approached a potential suspect. We would have to know when an "approach" turns into a "stop" for purposes of the Fourth Amendment. Moreover, even if we had those numbers, an officer can explain a stop based on "furtive" gestures or "he looked nervous when I approached" or

11. *See* Thomas, *supra* note 3.

12. Indeed, I have argued that limited kinds of racial profiling of young Muslim men *might* be constitutional. *See* George C. Thomas III, *Terrorism, Race, and a New Approach to Consent Searches*, 73 MISS. L.J. 525 (2003).

"he was trying not to look nervous when I approached." Without a videotape, we could not begin to check the officer's story. And even with a videotape, whether a gesture is "furtive," or a look is suspicious, is pretty much a judgment call. Limiting that kind of bad police discretion seems hopeless to me.

We are left with one category: prosecutors exercising bad discretion. Assuming that it sometimes exists, how could we restrain it? We could institute a system like Germany's, where prosecutors are "supervised by a superior in a hierarchical system headed by the Minister of Justice, who is himself responsible to the cabinet."[13] Moreover, "the prosecutor is obliged by law to file charges whenever there is 'sufficient' suspicion that the suspect has committed a crime. The standard of sufficiency to be applied in this context is likelihood that the suspect will be convicted after trial."[14] Decisions to dismiss charges can be challenged by victims.[15] Decisions to prosecute or not prosecute are subject to review by a judge.

The German system is more bureaucratic and hierarchical than the typical American jurisdiction. The tentative efforts in New Jersey to restrain the discretion of "line" prosecutors are more bureaucratic and hierarchical than most systems. But do they restrain bad discretion or only provide more actors with an opportunity to exercise bad discretion? Remember, the issue here is not the mundane discretion that Ron Wright wants to restrain to achieve consistency. I have argued that we can tolerate mundane discretion as the luck of the draw. Here I am discussing bad discretion: racism and sexism. Why would supervising prosecutors be less prone toward conscious or unconscious racism or sexism than line prosecutors? For that matter, why would judges be any more immune from the influence of racism or sexism?

Involving victims is also unlikely to provide a solution to existing racism in the charging of crimes. In the German scheme, victims rarely contest the official decision about charging crime, although Thomas Weigend reports that "the mere existence of the possibility of judicial review provides a check on arbitrary dismissals by prosecutors."[16] More fundamentally, the German involvement of victims does not provide relief to the defendants who are *charged* because of bad discretion. In

13. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 194-95 (Louisiana State University Press 1969).

14. Thomas Weigend, *Germany, in* Criminal Procedure: A Worldwide Study 205 (Craig Bradley ed. 1999).

15. *See* Bernd Schünemann, *The Role of the Victim Within the Criminal Justice System: A Three-Tiered Concept*, 3 BUFF. CRIM. L. REV. 33, 44 (1999) (citing §§ 170-75 StPO [German criminal procedure statute]).

16. Weigend, *supra* note 12, at 206 (providing no supporting data).

the German model, victims can only check discretion when prosecutors seek to *dismiss* cases. Therefore, even if victims were wildly successful in preventing the dismissal of cases against culpable white defendants, the result would provide only psychological succor to blacks charged with crimes on the basis of their race. Except in a statistical sense, this is no remedy at all.

So what have we learned? Re-read the first sentence of the paper. 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 animus toward women, minority racial groups, and lower socioeconomic classes. A little of the bad discretion can be restrained, perhaps, if we are willing to spend large amounts of time and money on record-keeping, fact-finding, and bureaucratic reviews.

Is this a gloomy conclusion to my paper? Well, yes and no. Here I benefit from my age and background. I grew up in a very small town in West Tennessee in the 1950s. Blacks were forbidden by law from attending the schools I attended. Blacks were forbidden by social practice from entering stores. Black residents of the town had to knock on the back door of the store, await the shop-keeper's arrival, and tell him what items they wanted. Did *Brown v. Board of Education*[17] and the Civil Rights Act of 1964 solve all the racial problems in America? Hardly. But those brave acts addressed some of the overt, systemic problems. And today we live in a different era. I believe that what connects Americans to each other is more powerful than the forces that divide us. I believe that as the twenty-first century ages, the stereotypes that motivate various prejudices will fade.

What better solution to the problem of discretion in the criminal justice system than to have a criminal justice system in which the actors lack prejudice against other groups of Americans. In that world, the only kinds of discretion we would have would be the good and the mundane. As I have suggested, I think we can live with those acts of discretion.

17. 347 U.S. 483 (1954).