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Bennett L. Gershman

Elisabeth Haub School of Law at Pace University

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A MORAL STANDARD FOR THE PROSECUTOR'S EXERCISE OF THE CHARGING DISCRETION

*Bennett L. Gershman**

I. Introduction

The prosecutor's decision to institute criminal charges is the broadest and least regulated power in American criminal law. The judicial deference shown to prosecutors generally is most noticeable with respect to the charging function. Limited constitutional and statutory constraints on charging are manifested in the presumption of prosecutorial good faith, and are reflected in the courts' acknowledgment that they lack the knowledge and expertise to supervise the prosecutor's exercise of discretion.¹ The Separation of Powers doctrine merely reinforces this policy of judicial noninterference. To the extent that sufficient evidence exists, and no improper motivation is shown, the charging decision is virtually immune from legal attack.²

This is not to say that the prosecutor's discretion is unbounded. Various legal,³ political,⁴ experiential,⁵ and ethical considerations⁶ inform and guide the charging decision. Still, no subject in criminal law is as elusive as that of prosecutorial discretion in the charging process. A large body of literature has addressed the problem of ensuring responsible decision-making by persons who are authorized to make complex and controversial evaluations of harm, proof, and culpability in a system that allows them virtually unfettered power to make mo-

* Professor of Law, Pace University School of Law.

1. *Wayte v. United States*, 470 U.S. 598, 607 (1985).

2. The doctrines of selective, vindictive, and bad faith prosecutions provide modest constraints on the prosecutor's charging power. See BENNETT L. GERSHMAN, *PROSECUTORIAL MISCONDUCT* §§ 4.3-4.5 (1985).

3. Legal considerations include an evaluation of the strength of the case, the credibility of complainants and witnesses, the existence and admissibility of corroborating proof, and the nature and strength of the defense.

4. Political considerations include an assessment of the harm caused by the offense, the availability of investigative and litigation resources, the existence of non-criminal alternatives, and an alertness to relevant social and community concerns.

5. Experiential considerations include the prosecutor's background, training, experience, intuition, judgment, and common sense.

6. Ethical considerations involve a sensitive appreciation that in the context of the above factors, the ends of justice would be served by criminal prosecution, and that neither personal, political, discriminatory, nor retaliatory motives have influenced the charging decision.

mentous choices that can destroy a person's reputation, liberty, and even life itself.⁷

This Essay does not attempt to retrace the subject of prosecutorial discretion from the standpoint of the controlling factors, doctrinal limitations, or norms of conduct applicable to prosecutors generally. Rather, it addresses the charging process in a narrower compass. It poses three hypothetical cases that present both realistic and recurrent challenges to the prosecutor's charging power. The first case depends on a factual determination of a witness's reliability; the second case depends on a factual determination of a witness's truthfulness; the third case revolves around not a factual determination but, rather, a legal determination regarding the applicability of a defense.

Through these cases we can examine the circumstances that might lead an ethical prosecutor to institute or decline to institute criminal charges when she believes that the defendant is probably guilty, that prosecution of this particular crime would be consistent with the public interest, and that legally sufficient and admissible proof exists to convince a jury beyond a reasonable doubt of the defendant's guilt. They provide the setting in which a moral standard is proposed to guide the prosecutor's discretion.

II. Three Hypothetical Cases

A. A Robbery Case

Steven, a white, thirty-five-year-old accountant, was returning home from work on January 21st. He entered his apartment building at 5:30 p.m. and waited in the lobby for the elevator. The lobby is illuminated by recessed lighting in the ceiling, but visibility is not as clear as it would be in daylight. As Steven waited, a male darted up to him from somewhere in the lobby, put a sharp-looking object to Steven's midsection, and demanded Steven's wallet. Steven quickly fumbled for his wallet and gave it to him. The male fled out the front door of the building. There were no witnesses.

Entering his apartment, Steven immediately dialed 911 to report the crime. The police arrived in about twenty minutes and took a statement. Steven, clearly unsettled by the experience, described his assailant as a black male, dark complexion, about six feet tall, stocky build, and wearing a green jacket and dungarees. He reported that the event took less than a minute, but that he believed he could identify the person if he saw him again.

7. Some of the literature supporting this proposition is noted in Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 405 n.74 (1992).

Three days later, the police called Steven and asked him to come to the police station to look at photographs. There, Steven was asked to look through a large folder filled with several hundred "mug-shots," and to advise the police if he recognized the person who robbed him. The photographs were chosen based on Steven's description, and constituted a fair sample of persons with relatively similar appearances. After examining the photographs for more than an hour, Steven chose two pictures, and after looking carefully at the two for about five minutes, selected the picture of the person whom he recognized as the person who robbed him.

The man Steven identified, Fred, was located by the police and asked to come to the police station. After he arrived, Fred was placed in a line-up with five other males of similar appearance. Steven viewed the line-up carefully and positively identified Fred as the perpetrator. Fred was arrested on a charge of robbery in the first degree. A search of Fred's apartment yielded no tangible proof linking Fred to Steven's robbery. Fred, a thirty-two-year-old African American, has a record of two previous arrests within the past five years for narcotics possession offenses. One charge was dismissed and Fred pleaded guilty to the other and received a sentence of six months. Fred matched the general description that Steven had given the police with the exception of a noticeable scar on his forehead, which Steven never mentioned. At his arraignment, Fred pleaded not guilty, and was remanded to the county jail since he was unable to post the \$5,000 bail. Fred's public defender has informed the prosecutor that Fred claims he had nothing to do with the robbery, was in a different part of the city at the time, but has no alibi witness to support this claim. Fred refuses to plead guilty to second degree robbery, which the prosecutor's office routinely offers.

Prior to deciding what charges to institute, the prosecutor interviewed Steven.⁸ Steven is intelligent and articulate. He is emphatic that he has identified the right person. If a jury believes Steven's testi-

8. Each of these hypotheticals allows the prosecutor some lead time between the defendant's arrest by the police and the prosecutor's charging decision, thereby enabling the prosecutor to evaluate the case with greater care. In busy prosecutors' offices, particularly in urban areas, the huge volume of cases may require more expeditious case processing and impose substantial time constraints on the thoroughness of the investigation and evaluation. These pressures are not incompatible with responsible and non-mechanical decision-making. For example, the most experienced prosecutors could be assigned to the earliest stages of the decision-making process, or in the unit that determines whether felony charges will be sought. Similarly, policies could be adopted that require more extensive investigation in cases that traditionally have presented difficult factual or legal choices. The hypothetical cases in this Essay represent prototypes of the kinds of situations that might require more extensive investigation before instituting formal charges.

mony, Fred will be found guilty. However, the prosecutor knows that the case has weaknesses, i.e., Steven's limited opportunity to observe his assailant, his failure to recall the scar, the lack of any corroborating evidence, Steven's initial selection of two photographs from the array, and the cross-racial nature of the identification. Moreover, the prosecutor is aware that eyewitness identifications historically have resulted in innocent persons being wrongfully convicted. Nevertheless, on the basis of Steven's convincing testimony, the prosecutor knows from experience that a jury could very likely convict. The prosecutor is preparing the case for charging purposes. Should the prosecutor charge Fred with robbery? What degree of moral confidence should guide the prosecutor's decision?

B. A Rape Case

Jane went to the police station on Monday evening with the following account. She stated that on the previous Saturday evening, she had a date with Ed. She had never dated Ed before. Jane is twenty-eight and unmarried. She has been an associate in a large law firm for four years. She first met Ed, an attorney in another law firm, at an office party. Jane and Ed struck up a conversation, and she found him pleasant and engaging. Before leaving, Ed asked Jane if he could call her. She said yes, and gave him her unlisted telephone number. Ed called her the following week and they made a date for dinner on Saturday evening. The dinner was enjoyable, and Jane invited Ed back to her apartment for coffee.

There, after casual conversation for about an hour, while seated together on the sofa, Ed reached for Jane and tried to kiss her. Moving away from him, Jane told Ed that it was very late, she was tired and wanted to retire, and asked him if he would please leave. At these remarks, Ed suddenly became agitated, appeared surprised, and reached for Jane again, stating that he did not want to leave, and that he wanted to make love to her. Jane said "No" firmly, and again asked Ed to leave. However, Ed was much taller and heavier than Jane, and as he held her arms and spoke with such insistence, Jane observed an intense look in his eyes that frightened her. She believed that if she tried to resist him physically, Ed would harm her. She acquiesced, and allowed Ed to have sexual intercourse with her. Jane did not seek medical or other assistance, and told no one about the incident. Two days later, feeling deeply depressed, she went to the police station to make a formal charge of rape against Ed. Based on her complaint, the police arrested Ed.

The prosecutor has interviewed Jane. She has given a credible ac-

count of the event. The prosecutor questioned her very closely, and there did not appear to be any motive for her to accuse Ed of rape falsely. Ed's lawyer discussed the case with the prosecutor, stating that his client did have intercourse with Jane that night, but that it was voluntary and consensual on Jane's part, and that Jane even called Ed the next day to tell him that she had a nice time. When asked about the telephone call, which Jane did not mention during her initial interview with the prosecutor, Jane admitted that she was angry and depressed, and called Ed, asking him in a crying voice how he could do such a horrible thing to her. There is nothing in Ed's background or character that would suggest his having committed this crime, nor anything in Jane's background or character that would suggest any motive to fabricate the accusation. There is no corroboration of Jane's account.

The prosecutor believes Jane is telling the truth. However, the prosecutor has no basis other than Jane's assertion to disbelieve Ed. The prosecutor believes that a jury could convict Ed on the basis of Jane's testimony, there being sufficient proof of Jane's lack of consent, and the necessary force, or the threat of force. The prosecutor also knows from experience that juries are much more sensitive to charges of rape by nonstrangers, and are more likely to convict than ever before. Should the prosecutor institute charges of forcible rape? What degree of moral confidence should guide the prosecutor's decision?

C. A Murder Case

Ella had been married to Don for six years. They had one child, Tina, who is five years old. During virtually the entire period of the marriage, Don physically abused Ella. Don often drank excessively, and it was on these occasions that he would become most brutal. Ella summoned the police on several of these occasions when Don was out of control and the beatings were most violent, the last time being one week earlier. Ella went to the hospital on these occasions. Police and medical records confirm these facts, and describe Ella's injuries. Nevertheless, Ella was in love with Don, and because of their longstanding relationship, and for the sake of their child, she never initiated criminal charges against him, did not seek court orders of protection, and never left the household. Following the periods of abuse, Don would cry and ask Ella for forgiveness. Ella always forgave him.

Until the evening of June 5th. That evening, Don, drinking heavily and in a rage, punched Tina in her head for spilling her milk. Don had never before struck Tina so viciously. When Ella screamed at

him and sought to intervene, Don beat her repeatedly on her head and body with a broom handle. Don shouted that if Ella ever questioned his authority again, he would kill her. Ella, in terror, locked herself and Tina in the bathroom. Don left the apartment. He returned two hours later, undressed, and went to bed. Ella, under emotional shock and confusion, went into the kitchen and obtained a knife. She walked into the bedroom and stabbed Don, killing him. Ella immediately called the police and told them what happened. They arrested her on a charge of murder.

Ella's lawyer has informed the prosecutor of his client's version of the events, part of which Tina has confirmed, and has asked the prosecutor to review the report of Dr. Wall, a highly respected clinical psychologist who has treated battered women, has written in scholarly journals about forensic issues concerning the "Battered Women's Syndrome," and has testified as an expert witness in many criminal and civil proceedings involving this issue. Dr. Wall's lengthy report details the relationship between Ella and Don and provides considerable factual data for his conclusion that under the circumstances, on the night of the killing, Ella was in a state of shock, was afraid for her life and that of her child, and believed that she and her child were in danger of being killed by Don. Dr. Wall concluded that Ella's belief under the circumstances was reasonable.

The prosecutor, from background and experience, is sensitive to issues of domestic violence. The prosecutor does not doubt that Ella believed that the only way to protect her life and that of her child was to take her husband's life. The prosecutor has no reason to dispute Dr. Wall's conclusions that Ella was a battered victim who felt she had no other recourse than to kill her husband. The prosecutor knows from experience, however, that juries tend to reject the battered spouse syndrome as a defense to murder, and would probably find her guilty. Ella would then be subject to a mandatory sentence of fifteen years to life imprisonment. Should the prosecutor charge the defendant with murder? What degree of moral confidence should guide the prosecutor's decision?

III. The Decision-Making Process

These cases share several common characteristics. Each involves a serious felony; each involves a violent crime that commands the highest priority in a prosecutor's office and consequently does not realistically raise concerns over allocating scarce resources. Moreover, there is legally sufficient admissible evidence to charge each of these defendants with robbery, rape, and murder, respectively, and to convince a

jury of each defendant's guilt. Further, these cases are within the prosecutor's jurisdiction and cannot be referred to a different prosecutorial or correctional agency.

Analysis of these cases rests on the same body of assumptions. First, the prosecutor in each of these cases is acting responsibly with a view toward seeking justice for the victim, the accused, and society. Second, the prosecutor does not want to prosecute an innocent person, and does not want to see a guilty person go free. Third, the prosecutor is concerned that an acquittal can have a negative effect on her reputation, or engender public cynicism about the weaknesses of the criminal justice system. Despite this, the prosecutor would not let embarrassment or public criticism over a possible acquittal prevent an otherwise valid prosecution.

How will the prosecutor arrive at a decision? What factors will she look to? It is unlikely that the prosecutor's decision in any of these cases will be influenced by external constraints, such as constitutional, statutory, or ethical proscriptions, or the existence of internal prosecutorial guidelines. Constitutional and statutory rules merely set the outer boundaries for decision-making, requiring only that the prosecutor have sufficient evidence to convict and that she not engage in discriminatory or retaliatory behavior.⁹ Ethical rules go further, and mandate that the prosecutor seek justice.¹⁰ Although the obligation to seek justice can provide an effective restraint on prosecutorial overreaching, the concept is presently too vague to provide meaningful guidance.¹¹ Moreover, although official guidelines theoretically could address the specific cases involving uncorroborated "one-witness" identifications, uncorroborated "date-rape" accusations, or domestic violence cases involving claims of self-defense predicated on the battered-spouse defense, guidelines by their nature tend to articulate general policies of prosecution. Most likely, guidelines could not be sufficiently explicit to regulate prosecutorial discretion in fact-specific cases.¹² Further, an institutional reluctance to unduly restrict

9. See GERSHMAN, *supra* note 2.

10. ABA STANDARDS FOR CRIMINAL JUSTICE § 3-1.2(c) (3d ed. 1992) ("The duty of the prosecutor is to seek justice, not merely to convict."); NDAA NATIONAL PROSECUTION STANDARDS § 1.1 (2d ed. 1991) ("The primary responsibility of prosecution is to see that justice is accomplished.").

11. See Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?* 44 VAND. L. REV. 45 (1991).

12. For instance, guidelines might establish the following policies: what possession charge to bring when a weapon is discovered in a home or place of business; what larceny charge to bring when the value of stolen property does not exceed a certain amount; when to upgrade an unlawful trespass into a burglary charge; when to charge an automobile theft as a felony rather than a misdemeanor. On the other hand, guidelines could not

their own discretion makes it even more unlikely that prosecutors would promulgate overly specific guidelines.

Since these cases present difficult challenges to the exercise of discretion, the prosecutor may consider other institutional options that might allow her to avoid making these difficult decisions, and thereby be absolved from the responsibility for making the wrong decision. Consider the following: Would it be appropriate for the prosecutor simply to present the matter to a grand jury and let the grand jury decide whether to bring criminal charges? Would it be appropriate for the prosecutor to institute formal charges in the expectation that the defendant probably would plead guilty to a reduced charge? Would it be appropriate for the prosecutor to bring charges in the belief that if the case ultimately did go to trial, a jury reflecting the conscience of the community would do the right thing?

Although recourse to a grand jury might be politically expedient, in reality it does not lessen the prosecutor's ultimate charging responsibility. There is an assumption that the grand jury controls the charging function. This assumption is false. Anybody familiar with the criminal justice system knows that the grand jury does not act on its own and that the prosecutor controls grand jury action.¹³ Moreover, as a corollary to this power to control the grand jury, the prosecutor also has the ability to use the grand jury in order to be insulated from unpopular decision-making. Grand jury action can cloak with legitimacy decisions that the prosecutor wants to make but for which she does not wish to appear to take personal responsibility.

This ability to use the grand jury in order to depersonalize and validate prosecutorial decision-making was seen recently in the controversial case in Washington Heights, New York, which involved the fatal shooting by a police officer of a reputed drug dealer. The killing attracted widespread media attention and led to rioting. Following a lengthy investigation, the prosecutor concluded that the police officer acted in self-defense.¹⁴ Rather than declining to institute charges on his own, however, the prosecutor presented the case to the grand jury. Why did he do this? Probably to allay public suspicion that he was acting arbitrarily, and to make it appear that the decision not to bring charges was not his decision, but rather the decision of a group of public-minded citizens who, after careful consideration of the evi-

articulate how a prosecutor should weigh degrees of credibility or degrees of certainty, considerations which are often at the core of the prosecutor's charging decision.

13. MARVIN FRANKEL & GARY NAFTALIS, *THE GRAND JURY* 21-23 (1977).

14. *The Washington Heights Case: District Attorney's Findings Regarding the Killing of Jose Garcia*, N.Y. TIMES, Sept. 11, 1992, at B2.

dence, decided not to indict the officer. In sum, regardless of the reason why prosecutors decide to present a matter to a grand jury, in reality they are still responsible for the charging decision.

Would it be proper for the prosecutor to bring criminal charges in the expectation that the defendant probably would later accept a favorable plea offer to a reduced charge? It is improper for prosecutors to use overcharging as a leverage device to more readily obtain guilty pleas or to provide a trial jury a broader range of charges that might more readily produce a compromise verdict.¹⁵ However, proving such improper prosecutorial motivation is virtually impossible.¹⁶ Moreover, this option is tactically unwise as well as unethical. Since the prosecutor cannot control the defendant's decision-making, the prosecutor cannot ensure that the defendant inevitably will accept a plea offer. The prosecutor may be forced to fully litigate a charge that arguably should not have been brought in the first place, and that may result in a wrongful conviction.

Finally, is it proper for a prosecutor to bring charges in a close case in the expectation that if the case ultimately goes to trial, a jury will be entrusted to determine the truth, thereby absolving the prosecutor from the moral responsibility of convicting an innocent person? The central theme of this Essay goes to precisely this question. To what extent should the prosecutor allow the jury system to resolve close questions of guilt rather than grappling with those questions independently? One of the major flaws in this option is the assumption that juries always do the right thing and do not make mistakes. To the extent that juries are politically motivated, succumb to inflammatory appeals, or rely on ambiguous or uncertain proof, they can convict innocent persons. Although the adjudicatory process attempts to minimize the risk of jury error, its procedural protections come into play only after the prosecutor has made the independent judgment that criminal prosecution is appropriate. Under my thesis, rather than pass this responsibility to the jury, then, the prosecutor functions almost literally as a gatekeeper of justice with the obligation to prevent an injustice before the system, if left to its own devices, miscarries.

15. ABA STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(f) (3d ed. 1992); NDAA NATIONAL PROSECUTION STANDARDS § 43.4 (2d ed. 1991).

16. *United States v. Fine*, 644 F.2d 1018, 1022 n.13 (5th Cir. 1981); *United States v. Scafidi*, 564 F.2d 633, 642 (2d Cir. 1977); *State v. Pulawa*, 569 P.2d 900, 905 (Haw. 1977).

IV. A Moral Standard for Decision-Making

Once it is agreed that a prosecutor cannot avoid the charging decision by recourse to the kinds of options noted above, it is necessary to examine how a responsible prosecutor should approach the charging decisions presented in each of the hypothetical cases. I am not suggesting that there is one correct decision. My objective is less to suggest any particular charging result than it is to provoke inquiry into the degree of moral confidence that a prosecutor should have before bringing criminal charges. My thesis is that the prosecutor should engage in a moral struggle over charging decisions, and should not mechanically initiate charges. First, the prosecutor should apply all of the legal, political, experiential, and ethical factors noted above.¹⁷ After considering these factors, and before making the ultimate decision to charge, the prosecutor should then assure herself that she is morally certain that the defendant is both factually and legally guilty, and that criminal punishment is morally just. This standard of moral certainty governs the resolution of the three hypotheticals: it applies to charging decisions involving the reliability of a witness, the credibility of a complainant, and the applicability of a defense.¹⁸

Why a standard of moral certainty? Such a standard fits the reality that the prosecutor is the gatekeeper of justice. It requires the prosecutor to engage in a rigorous moral dialogue in the context of factual, political, experiential, and ethical considerations. It also requires the prosecutor to make and give effect to the kinds of bedrock value judgments that underlie our system of justice — that the objective of convicting guilty persons is outweighed by the objective of ensuring that innocent persons are not punished.¹⁹ Under this precept, society bears the cost of the prosecutor's moral uncertainty, rather than the defendant. Finally, the prosecutor who acknowledges moral uncertainty about a defendant's guilt but decides nonetheless to bring

17. See *supra* notes 3-6.

18. The term "moral certainty" is used in criminal cases based solely on circumstantial evidence. In such cases, the term is intended to convey to the jury the high level of confidence that the jury must have to convict. *People v. Barnes*, 406 N.E.2d 1071 (N.Y. 1980). My use of the term in this Essay requires that same degree of confidence on the part of the prosecutor in bringing charges. It requires the prosecutor to engage in a process of rigorous intellectual and emotional scrutiny and to act only if that scrutiny yields a conclusion that is so personally compelling that the prosecutor would not hesitate to act on that decision in vital matters affecting the prosecutor's own life. In short, only if the prosecutor would herself convict on that charge should the prosecutor institute that charge.

19. *In re Winship*, 397 U.S. 358, 372 (1970) (there exists "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.") (Harlan, J., concurring).

charges, violates the prosecutor's special obligation to seek justice, and tacitly invites the system to miscarry.

A. The Robbery Case

The robbery case presents the question of the degree of moral confidence that the prosecutor must have in a witness's reliability. The overriding challenge for the prosecutor in such cases is to make an assessment of the degree of reliability of the witness's identification, so that the prosecutor can feel morally certain that Fred is guilty and that punishing him would be proper. Thus, the prosecutor is not required to decide, nor usually able to decide, whether the complaining witness is telling the truth. The prosecutor in such cases does not doubt the victim's sincerity, i.e., that he honestly believes that he has accurately identified his assailant. The critical question for the prosecutor is not whether Steven is positive but whether he is right.

Several factors undermine the prosecutor's moral certainty of Fred's guilt. There is no corroborative proof that might confirm the accuracy of Steven's identification. No property was recovered that might link Fred to the crime. Fred gave no false alibi, and made no other statements that might have implied a consciousness of guilt.²⁰ Fred has no significant criminal history, e.g., a background involving robbery or other crimes of violence.²¹ Steven's description of Fred omits any detailed, distinctive, or unique attributes — i.e., a scar, hair style, or tone of voice — that might enhance the prosecutor's confidence in Steven's identification. Although Steven seems to be an intelligent and perceptive person, the amount of time he had to observe his assailant was not considerable — less than a minute — and under less than ideal viewing conditions. Moreover, the prosecutor knows from experience that although stress may heighten one's powers of observation, it also can interfere with a person's perception and memory.²² Moreover, Steven's identification of the defendant's photo-

20. There exists the possibility that the prosecutor might ask Fred to submit to a polygraph examination as a means of determining his truthfulness. Based on my knowledge and experience, most prosecutors do not use such tests in these circumstances because the tests do not have sufficient reliability and therefore do not add to the decision-making process.

21. Although this factor may have no independent evidentiary value, it might justifiably influence a prosecutor's evaluation of the case by enhancing the prosecutor's moral confidence of Steven's accuracy.

22. Mitchell M. Burken et al., *Experimental Studies of Psychological Stress in Man*, 76 *PSYCHOL. MONOGRAPHS* 534 (1962); Kenneth A. Deffenbacher, *The Influence of Arousal on Reliability of Testimony*, in *EVALUATING WITNESS EVIDENCE: RECENT PSYCHOLOGICAL RESEARCH AND NEW PERSPECTIVES* 235 (Brian R. Clifford & Sally M. Lloyd-Bostock eds., 1983).

graph came after he narrowed a large sample to two persons. This selection process could demonstrate either that Steven was being extraordinarily careful in making his selection, or unduly tentative and uncertain as to which of those two persons actually robbed him. Steven is positive that he has picked out the right person, but the prosecutor also knows from experience and training that there is little correspondence between an eyewitness's assurance and the accuracy of that identification.²³

There is also the issue of race. The prosecutor cannot avoid the question of whether, and to what extent, the race of the victim and the defendant might influence the accuracy of an identification. The prosecutor knows that cross-racial identifications present special problems that might undermine accuracy.²⁴ The prosecutor also is aware of the inherent difficulties faced by a defense lawyer in raising this subject before a jury.²⁵ Finally, from training and experience, the prosecutor is acutely aware of the inherent dangers of eyewitness identifications, i.e., the disproportionate impact such identifications can have upon juries,²⁶ and the numerous studies and case reports that have documented miscarriages of justice based on erroneous eyewitness identifications.²⁷

What standard should the prosecutor use in deciding whether to charge Fred with robbery? Before pressing ahead with criminal charges, a responsible prosecutor should be morally certain that the defendant is guilty and that criminal punishment is appropriate. Under the above analysis, the prosecutor has no basis other than her own experience and intuition to trust Steven's identification. Should the prosecutor charge Fred based on a visceral feeling that Steven is correct? If the prosecutor is unable to articulate a factual doubt as to Fred's guilt, ethical codes would allow the prosecutor to bring

23. Gary L. Wells & Donna M. Murray, *Eyewitness Confidence*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES 155 (Gary L. Wells & Elizabeth F. Loftus eds., 1984); Kenneth A. Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, 4 L. & HUM. BEHAV. 243 (1980); but see *Manson v. Brathwaite*, 432 U.S. 98, 114-15 (1977) (victim's positive assurance is relevant factor supporting reliability of identification).

24. Roy S. Malpass & Jerome Kravits, *Recognition for Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOL. 330-34 (1969).

25. The lawyer may be perceived as bringing up a racial stereotype — i.e., that all persons of a particular race look alike. This suggestion may offend certain jurors.

26. ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (1979).

27. See, e.g., *United States v. Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."); C. Ronald Huff et al., *Guilty Until Proved Innocent: Wrongful Conviction and Public Policy*, 32 CRIME & DELINQ. 518, 524 (1986) (eyewitness misidentification is the single most important factor leading to wrongful convictions).

charges.²⁸ However, the inability of the prosecutor to articulate a doubt is neither surprising nor dispositive. The complainant has stated quite firmly that "That's the man!" Such an assertion would probably be sufficient to convince many prosecutors that charges are appropriate.

Fred should not be charged with robbery. Fred may in fact be guilty, and the prosecutor may believe that he probably is guilty, but for all of the reasons outlined above, the prosecutor cannot be morally certain that he is guilty. The prosecutor will try to explain to Steven the grounds for her decision. Steven, the victim of a particularly heinous crime, will probably be outraged by the decision. Crime victims, the prosecutor will be told with biting sarcasm, have no rights, and through this decision are being further victimized by an insensitive and overly technical criminal justice system. Steven's reaction is perfectly understandable, and there is no satisfactory response. The prosecutor will try to explain that she is required to serve different, and conflicting, constituencies. Steven, Fred, and society are actual constituencies. Values such as justice and the presumption of innocence are abstract constituencies. The prosecutor will try to explain that these latter values transcend individual and societal harm, and involve a sensitive appreciation of the uses of power. That Steven may not be convinced merely underscores the difficulty and complexity of the decision, and why the prosecutor's task, as I have noted, "is more exacting than that of any other public official."²⁹

B. The Rape Case

The robbery case presents a factual issue that does not involve an evaluation of the victim's truthfulness. The rape case, on the other hand, does involve the prosecutor's determination of truthfulness. As in the robbery case, there is no evidence to corroborate Jane's story; nor is there evidence to corroborate Ed's claim. The credibility issue is compounded by the prosecutor's recognition, based on experience and intuition, that Jane and Ed could both honestly believe that they are telling the truth about the incident. Their accounts concerning

28. ABA STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(a) (3d ed. 1992) (charges must be supported by "probable cause"); ABA STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(b)(i) (3d ed. 1992) ("reasonable doubt that the accused is in fact guilty" a factor in prosecutor's exercise of discretion); NDAA NATIONAL PROSECUTION STANDARDS § 42.3(a) (2d ed. 1991) ("doubt as to the accused's guilt" a factor in prosecutor's exercise of discretion); NDAA NATIONAL PROSECUTION STANDARDS § 43.3 (2d ed. 1991) (charges proper only when prosecutor "reasonably believes" they can be substantiated by admissible evidence).

29. See GERSHMAN, *supra* note 2, at vii.

the issues of consent and force are not so widely divergent as to make this result unreasonable.

If the prosecutor cannot conclude to a moral certainty that Jane is telling the truth, then under my proposed standard, the prosecutor cannot charge Ed with rape. If, on the other hand, the prosecutor believes to a moral certainty that Jane is telling the truth, and is morally certain that her account provides legally sufficient evidence of lack of consent and force, then she could properly charge Ed with rape. How does the prosecutor go about making that all-important credibility determination? I am assuming that the prosecutor has experience in dealing with rape victims. Based on that experience, and intuition stemming from Jane's dramatic description of misplaced trust and betrayal, the prosecutor senses hallmarks of truth-telling. Moreover, the prosecutor has probed the existence of a motive for Jane to fabricate the charge, and has been unable to discern a motive for Jane to lie.³⁰

Our legal system authorizes prosecutors to make such credibility determinations, and when they do so, they cannot be second-guessed. That a jury may not believe Jane, or have a reasonable doubt, should not prevent the prosecutor from bringing the charge if the prosecutor is morally certain that Ed is guilty of forcible rape. By the same token, the prosecutor's estimation that the evidence is not strong, and the prediction that a jury might have a reasonable doubt of Ed's guilt, are relevant factors in the charging decision. Although an acquittal may result in a public perception of prosecutorial aggressiveness and a commitment to protecting the rights of crime victims, an acquittal also may result in a public perception of incompetence, vindictiveness, and a misallocation of resources. Moreover, an acquittal may engender public cynicism in the ability of courts to render justice, and dissuade victims from coming forward with complaints.

The prosecutor is sensitive to the political and legal issues involving gender discrimination, the traditional reluctance of rape victims to come forward with accusations, and the legal system's historical fail-

30. This inquiry into a possible motive for the complainant's accusation was a centerpiece in the recent rape prosecutions of William Kennedy Smith and Mike Tyson, and in the testimony of Anita Hill in the United States Senate's confirmation hearing of Clarence Thomas. See Robert Suro, *Lawyers in Palm Beach Will Test Issues on Rape*, N.Y. TIMES, April 22, 1991, at A14; E.R. Shipp, *Tyson Found Guilty on Three Counts as Indianapolis Rape Trial Ends*, N.Y. TIMES, Feb. 11, 1992 at A1; *The Thomas Confirmation: Women In Senate Have Their Say Before the Vote Confirming Thomas*, N.Y. TIMES, Oct. 16, 1991, at A18.

ure to treat nonstranger rape as rape.³¹ While the prosecutor should not use charging powers to bring doubtful prosecutions, the prosecutor also wants to inform the community that the prosecutor's office is receptive to allegations of rape by nonstrangers, and that women should not be discouraged from bringing such complaints by expecting that they will be lightly dismissed.

On balance, Jane's account of the event should be accepted, largely because of the manner in which she relates the facts, and also because the prosecutor is unable to find a motive for her to lie. However, the prosecutor is morally uncertain whether Ed used sufficient force or the threat of force to accomplish his purpose. Jane clearly was scared, and Ed used some degree of force. However, Jane's subjective evaluation of the likelihood of harm, although a factor to be considered, must be objectively reasonable.³² Ed was no doubt persistent in seeking Jane's consent; whether he used the degree of force necessary to transform aggressive persuasion into adequate physical force or the threat of force is the moral question central to the charging decision.

The prosecutor should not charge Ed with forcible rape because she cannot be morally certain that Ed used sufficient force, or the threat of force, to satisfy the legal elements for rape. There exists the possibility that Jane's compelling account of the events might cause a jury to convict Ed. This occurrence would violate the prosecutor's duty to seek justice, and to prevent the possibility that an innocent person is convicted. This is not to discount the prosecutor's ability to select a lesser charge that is morally consistent with the proof.³³ The prosecutor's decision once again would be unpopular. The prosecutor might be accused of sexism. It is unlikely that the prosecutor's explanation to Jane would be any more convincing than her explanation to Steven.

C. The Murder Case

The murder case presents the prosecutor with a third type of charging problem. Unlike the robbery and rape cases, the murder case presents no dispute about the facts. The prosecutor knows what happened but is required to resolve a legal problem: whether these facts establish a defense. The prosecutor faces a legal challenge to the traditional approach to legal justification, or self-defense. Traditionally, the defense of justification could be sustained only if the defend-

31. Beverly Balos & Mary L. Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599, 604 (1991).

32. *State v. Rusk*, 424 A.2d 720 (Md. 1981).

33. See MODEL PENAL CODE § 213.4 (1962) (sexual assault); N.Y. PENAL LAW § 130.20 (McKinney 1987) (sexual misconduct).

ant reasonably believed that it was necessary to protect herself or another person from the imminent use of deadly force.³⁴ How could Fred imminently use deadly force if he was asleep? Why did Ella not leave the apartment? These are predictable questions from a judge or a jury. Even if the prosecutor concludes to a moral certainty that Ella killed her husband based on her honest belief that the killing was necessary to protect her life and that of her child, is the prosecutor nonetheless required to charge Ella with murder?

Most prosecutors, I believe, would conclude that Ella's justification defense — even if honestly asserted — could not legally be sustained because the element of imminency of danger is lacking. However, a prosecutor with experience in domestic violence complaints, who has studied the legal and scholarly literature surrounding the phenomenon of spousal battering, who believes Ella's story and does not dispute Dr. Wall's conclusions, would find it morally difficult to charge Ella with murder. Should the prosecutor institute such a charge if she is morally certain that Ella honestly believed that in order to protect herself and her child she needed to kill her husband, that such claim is supported by considerable social and psychological literature,³⁵ but if she also knows that Ella would not be able to sustain the defense?

A more likely scenario might be that the prosecutor is morally uncertain of the scope of the justification defense as it relates to Ella's case. The prosecutor may be convinced that Ella honestly believed that her life was being imminently threatened by her husband, but that she acted unreasonably because she had other reasonable alternatives to killing her husband. The prosecutor undoubtedly could locate an expert witness to support that view. Based on her intuition and experience, the prosecutor strongly believes that a jury would find Ella guilty of murder, and that a judge would be required under the law to impose a substantial mandatory sentence. However, the prosecutor also knows that thousands of battered women throughout the country are incarcerated in prison under substantial sentences for crimes similar to Ella's, whose claims of justification either were not raised at trial, or were rejected by the jury.³⁶

34. WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 5.7 (1986).

35. Michael Dowd, *Dispelling the Myths About the "Battered Woman's Defense": Towards a New Understanding*, 19 FORDHAM URB. L.J. 567 (1992).

36. A prosecutor who seeks to avoid making a difficult decision might believe that she could present this case to a grand jury, advise the grand jury of the justification defense, and allow the grand jury to take whatever action the grand jury believes is appropriate. As noted above, however, this option is unrealistic, for it does not relieve the prosecutor of the charging decision; it only disguises the actual source of decision-making authority.

Under either scenario, Ella should not be charged with murder. The prosecutor knows that the reasonableness of Ella's belief that she was exposed to imminent danger will be the critical issue in her ability to raise that defense. The prosecutor is aware that her unreasonableness would as a matter of law prevent her from successfully raising this defense.³⁷ However, even if Ella was unreasonable, the honesty of her belief under the circumstances of her abuse makes the prosecutor morally uncertain whether justice would be served by charging Ella with murder and subjecting her to substantial mandatory imprisonment. Under these circumstances, the prosecutor should look to other charging options. The prosecutor could choose between bringing no charges, or charging Ella with a lesser degree of homicide based on her honest but unreasonable belief that killing her husband was necessary to protect herself and her child.³⁸ The prosecutor's choice would depend on her assessment of Ella's conduct, the harm Ella caused and the amount of punishment Ella should receive, the impact of prosecution on the incidence of domestic violence, and the impact of prosecution on the public's perception of the prosecutor's commitment and fairness in domestic violence cases.

V. Conclusion

The subject of prosecutorial discretion in the charging process is one of the most difficult problems in the administration of criminal justice. The prosecutor is afforded substantial leeway in making charging decisions, and there are few constraints on those decisions. This Essay presented three hypothetical charging problems, suggested a standard under which the prosecutor's charging discretion should

The grand jury will indict only if that is the prosecutor's recommendation. The prosecutor might also be tempted to institute murder charges, believing that she could induce any rational defendant to plead guilty to a reduced charge of manslaughter under a very favorable sentence promise. This option assumes that the defendant will plead guilty, and that the judge will impose the desired sentence. These assumptions are mere speculation. Moreover, even if these assumptions are correct, the prosecutor is engaging in unethical behavior when she uses her charging power not because it is the morally correct charge, but as a leverage device to compel a defendant to plead guilty. Finally, a prosecutor could simply avoid making the difficult moral decision and bring murder charges against Ella, recognizing that if plea negotiations fail to produce a settlement, a jury will decide the case on the merits. If the prosecutor is morally uncertain that Ella is guilty of murder, then allowing a jury to convict her of murder would violate the prosecutor's duty to prevent a miscarriage of justice.

37. Compare N.Y. PENAL LAW § 35.15(1) (McKinney 1987) (honest and reasonable belief) with MODEL PENAL CODE § 3.04(2)(b) (1962) (honest belief).

38. This assumes that such charge is available. In New York, an honest but unreasonable belief would provide no justification. See *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986).

be guided, and offered conclusions on whether charges should be brought. The charging problems raised by these hypothetical cases involved the degree of moral confidence of the prosecutor in the accuracy of a witness, the credibility of a complainant, and the applicability of a defense. The standard of moral certainty proposed by the Essay to guide the prosecutor's charging decisions rests on the prosecutor's obligation to seek justice in a legal system that values protecting the innocent more highly than convicting the guilty. That standard both fits and reinforces the prosecutor's role as a gatekeeper of justice.