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## The New Prosecutors

Bennett L. Gershman

*Elisabeth Haub School of Law at Pace University*

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## THE NEW PROSECUTORS

*Bennett L. Gershman\**

The power and prestige of the American prosecutor have changed dramatically over the past twenty years. Three generalizations appropriately describe this change. First, prosecutors wield vastly more power than ever before. Second, prosecutors are more insulated from judicial control over their conduct. Third, prosecutors are increasingly immune to ethical restraints. Only the last point may provoke some controversy; the first two are easily documented, and generally accepted by the courts and commentators.<sup>1</sup>

Several factors account for this change. The most obvious is the transition from a due process-oriented criminal justice model to a model that has placed increasing emphasis on crime control and crime prevention.<sup>2</sup> Crime has grown more complex and sophisticated since the early 1970s, particularly narcotics, racketeering, official corruption, and business fraud crimes, requiring a coordinated, powerful, and equally sophisticated response. The prosecutor has emerged as the central figure with the training and experience to administer this effort.<sup>3</sup>

Examples of this new prosecutor can be seen in the so-called "special prosecutors"<sup>4</sup> appointed to conduct major investigations such as Watergate,<sup>5</sup> Iran-Contra,<sup>6</sup> and local corruption probes,<sup>7</sup> as well as the

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\* Professor of Law, Pace University School of Law.

1. *United States v. Lane*, 474 U.S. 438 (1986); Sentencing Reform Act of 1984, 18 U.S.C. § 3551 (1988). See also Bennett Gershman, *Abuse of Power in the Prosecutor's Office*, *THE WORLD AND I*, June 1991, at 476.

2. See Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U. L.Q. 11, 18 (1988); Charles H. Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 471, 471 (1985).

3. Ronald Goldstock, *The Prosecutor as Problem Solver*, *Center for Research in Crime and Justice*, 66 N.Y.U. L. REV. 11 (1991) (prosecutors "may be the best fitted to assume the leadership or coordinating role" in crime prevention). Ronald Goldstock, a prosecutor of considerable experience, is presently the Director of the New York State Organized Crime Task Force and a Professor at Cornell Law School.

4. In *Morrison v. Olsen*, 487 U.S. 654 (1988), the Supreme Court upheld the legitimacy of the independent counsel statute (28 U.S.C. §§ 591-599) which authorizes a specially designated judicial panel to appoint special prosecutors to investigate high government officials.

5. *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977).

expanded use of undercover sting operations led by prosecutors.<sup>8</sup> To support these new prosecutorial initiatives, legislatures have armed prosecutors with broad new weapons such as RICO, Drug Enterprise, Forfeiture, and Sentencing Guidelines.<sup>9</sup> The judiciary has cooperated in this new effort too. First, by relaxing constitutional protections embodied in the exclusionary rule and due process, and by interpreting statutory and evidentiary rules broadly in the prosecutor's favor, the courts have made it much easier for prosecutors to win convictions.<sup>10</sup> Second, by their increasing deference to prosecutorial discretion in every form, the courts have stimulated a law enforcement mentality that the "end justifies the means." Finally, as resort to the death penalty increases, the prosecutor has become the most dominant figure on the question of who will live and who will die for crimes committed.

Part I of this article examines in greater detail this vast accretion of prosecutorial power, and explains how this transformation has resulted in a radical skewing of the balance of advantage in the criminal justice system in favor of the state. Part II then offers several suggestions on restoring some equilibrium to the process.<sup>11</sup> Equilibrium should be restored because the prosecutor, with the power of the state behind him or her, should not have this unfair advantage. Reliability and fairness will suffer if the equilibrium continues its shift.

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6. *United States v. North*, 910 F.2d 843 (D.C. Cir.), *modified*, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 223 (1991).

7. *Nigrone v. Murtagh*, 362 N.Y.S.2d 513 (N.Y. App. Div. 1974), *aff'd*, 330 N.E.2d 45 (N.Y. 1975).

8. *See infra* notes 17-43 and accompanying text.

9. *See infra* notes 79-88 and accompanying text. Prosecutors will occasionally attribute their "successes" in the War on Crime to the use of these new weapons. *See Selwyn Raab, U.S. Says Mob is Drying Up in New York*, N.Y. TIMES, Oct. 21, 1991, at B1. These comments, attributed to federal and state prosecutors, were made after eight defendants were cleared of racketeering charges in a major racketeering trial in New York aimed at ending the Mafia's influence in the window installation industry.

10. *See infra* Part IB.

11. This Article relies heavily on federal doctrine in the Supreme Court and the federal courts. These cases represent the national law, and are fairly representative of state criminal procedure doctrine generally. However, the increasing reliance by state courts on their own state constitutions has resulted in significant state departures from federal constitutional law to provide much greater protection of individual rights. *See* Hans A. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980); Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951 (1982). *See also* *People v. Vilardi*, 555 N.E.2d 915, 920-21 (N.Y. 1990) (rejecting more limited federal due process standard governing prosecutor's disclosure obligations in favor of broader standard under state constitution's due process clause).

## I. CHARACTERISTICS OF THE NEW PROSECUTORS

### A. *Skewing the Balance of Advantage*

In his seminal article on criminal procedure,<sup>12</sup> Professor Goldstein commented on the "subtle erosion of the accusatorial system."<sup>13</sup> More than thirty years later, as the prosecutor's investigating, charging, convicting, and sentencing powers have escalated, the "inherent inequality" between the prosecutor and the defendant has intensified, making the adversary system almost obsolete.<sup>14</sup>

#### 1. *Investigative Power*

The prosecutor has always been a major player in crime investigation, but today the prosecutor occupies the preeminent role.<sup>15</sup> Traditional functions have expanded, and new powers have been added. The prosecutor develops and coordinates strategies in major undercover investigations; uses the grand jury to investigate complex crimes such as narcotics trafficking, money laundering, official corruption, white collar crime, and organized crime; applies for authorization to obtain eavesdropping warrants; subpoenas records; and obtains the cooperation of

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12. Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

13. *Id.* at 1199.

14. As this article demonstrates, the heightened imbalance in the adversary system makes the prosecutor less accountable to his peers or to the courts than ever before. Sanctions for misconduct or overzealous advocacy are either nonexistent or not effective. It may be that the only effective check on prosecutorial power lies in the jury system. To be sure, only a fraction of cases go to trial, and most of those cases result in convictions. However, those instances when juries have decisively rejected the prosecutor's case—particularly in several recent high-profile cases involving celebrities, public officials, and major organized crime figures—constitute perhaps the most significant check on charging and adversarial abuses by prosecutors.

15. Goldstock, *supra* note 3, at 11 ("Legal rules concerning search and seizure, the right to counsel, electronic surveillance and related issues are now so arcane that police must routinely rely on lawyers to determine what they may and may not do even in the earliest stages of a complex investigation.").

A somewhat recent phenomenon in criminal procedure is the "cross-designation" of prosecutors by federal and state agencies to coordinate law enforcement strategies. This practice has been criticized as resulting in the manipulation of federal and state prosecutions, making one prosecution a mere subterfuge for the other. See *United States v. Bernhardt*, 831 F.2d 181 (9th Cir. 1987) (remanded to consider whether federal prosecution is a subterfuge for state prosecution). See also Joel Cohen, "Cross-Designation" of Prosecutors: They Shouldn't Have it Both Ways, NAT'L L.J., Mar. 2, 1987, at 36. The practice is reminiscent of the discarded "silver platter" doctrine, where federal police would cooperate with state police by giving them evidence that the federal officials had illegally seized, but which would be admissible in state courts prior to the exclusionary rule's application to state proceedings. See *Elkins v. United States*, 364 U.S. 206, 211-13 (1960).

witnesses through grants of immunity. Additionally, through sometimes controversial investigative methods, the prosecutor has been able to circumvent, neutralize, or even eliminate defense counsel as an impediment to effective investigation.

*a. Undercover Tactics*

Prosecutors have traditionally used undercover techniques to acquire evidence of crime. Courts recognize that investigative methods involving deception are indispensable to gathering evidence of certain types of unlawful activity, particularly with respect to crimes that are conducted covertly and do not rely on tangible evidence of past unlawful activity or on victims who will complain to law enforcement.<sup>16</sup> But, over the past twenty years, the scope and variety of undercover activity has surged.

The undercover operations of today involve infiltration and in many cases actual participation in the unlawful activity.<sup>17</sup> For example, law enforcement has established, supplied, and directed a huge array of illegal enterprises, including drug manufacturing and distribution rings,<sup>18</sup> counterfeiting operations,<sup>19</sup> bootleg whiskey operations,<sup>20</sup> bars and restaurants as fronts for criminal activity,<sup>21</sup> stolen merchandise rings,<sup>22</sup> fictitious corporations,<sup>23</sup> obscenity production,<sup>24</sup> and many other illegal commercial activities.<sup>25</sup>

The judiciary has approved such conduct, thereby encouraging even more aggressive and intrusive tactics such as the elaborate "Abscam" operation into legislative corruption,<sup>26</sup> and the "Greyford" oper-

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16. *United States v. Russell*, 411 U.S. 423, 432 (1973).

17. *Id.*

18. *United States v. Tobias*, 662 F.2d 381, 384-86 (5th Cir.), *cert. denied*, 457 U.S. 1108 (1982); *United States v. Twigg*, 588 F.2d 373, 380-81 (3d Cir. 1978).

19. *United States v. Milam*, 817 F.2d 1113, 1114 (4th Cir. 1987); *United States v. Gonzalez*, 539 F.2d 1238, 1239 (9th Cir. 1976); *United States v. McGrath*, 468 F.2d 1027, 1027-28 (7th Cir. 1972), *rev'd*, 412 U.S. 936 (1973), *rev'd on remand*, 494 F.2d 562 (7th Cir. 1974).

20. *Greene v. United States*, 454 F.2d 783, 787 (9th Cir. 1971).

21. *Chaney v. Dep't of Law Enforcement*, 393 N.E.2d 75 (Ill. App. 1979), *aff'd*, 412 N.E.2d 497 (Ill. 1980).

22. *Powers v. Lightner*, 752 F.2d 1251, 1252 (7th Cir. 1987); *United States v. Borum*, 584 F.2d 424, 426 (D.C. Cir. 1978).

23. *United States v. Alexandro*, 675 F.2d 34, 36 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982).

24. *United States v. Chin*, 934 F.2d 393, 395 (2d Cir. 1991).

25. *United States v. Luttrell*, 889 F.2d 806 (9th Cir. 1989), *vacated in part and amended*, 923 F.2d 764 (9th Cir. 1991) (en banc).

26. *United States v. Kelly*, 707 F.2d 1460, 1461 (D.C. Cir.), *cert. denied*, 464 U.S. 908

ation into judicial corruption.<sup>27</sup> Indeed, the Abscam investigation of the early 1980s was a watershed in undercover investigations. The courts' approval legitimized the most intrusive form of undercover tactics that had yet been used.

Under the supervision of local federal prosecutors and the Department of Justice, the FBI created a fictitious Middle Eastern corporation. Undercover agents posed as representatives of fantastically wealthy Arab sheiks willing to pay huge bribes to public officials for their assistance. When Abscam was launched, prosecutors had no specific knowledge of corruption against any public official. The sting operation was designed simply to "test the faith" of high government officials by contriving opportunities for corruption. The operation resulted in the convictions of a senior United States senator, six members of Congress, a mayor, and an assortment of other public officials, usually with videotaped evidence of the bribe transactions in progress providing the key for conviction. Every conviction was affirmed on appeal,<sup>28</sup> although several judges expressed outrage over the government's tactics.<sup>29</sup> Among the criticisms were the targeting of public officials without any suspicion of prior, ongoing, or future criminal activity on their part;<sup>30</sup> persistent solicitations with increasingly heavy pressure even after initial solicitations were rebuffed;<sup>31</sup> lavish inducements calculated to overwhelm even law-abiding citizens;<sup>32</sup> and "Gestapo"-like secret-police tactics seeking to generate new crimes and create new criminals.<sup>33</sup>

As prosecutors have become more aggressive, the judiciary has be-

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(1983); *United States v. Williams*, 705 F.2d 603, 606 (2d Cir.), *cert. denied*, 464 U.S. 1007 (1983); *United States v. Myers*, 692 F.2d 823, 860 (2d Cir. 1982), *cert. denied*, 461 U.S. 961 (1983); *United States v. Alexandro*, 675 F.2d 34, 43 (2d Cir.), *cert. denied*, 459 U.S. 835 (1982); *United States v. Jannotti*, 673 F.2d 578, 610 (3d Cir.), *cert. denied*, 457 U.S. 1106 (1982). See *ABSCAM ETHICS MORAL ISSUES AND DECEPTION IN LAW ENFORCEMENT* (George Caplan ed., 1983).

27. *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985). Other undercover operations into judicial corruption have included "Corkscrew," which investigated case-fixing in the Municipal Court in Cleveland, Ohio, and "Bar Tab," which investigated ticket-fixing in the Lake County Courts, Lake County, Indiana.

28. See *supra* note 26.

29. *Jannotti*, 501 F. Supp. 1182 (E.D. Pa. 1980) (Fullam, J.); *Kelly*, 539 F. Supp. 363 (D.D.C. 1982) (Bryant, J.).

30. *Kelly*, 539 F. Supp. at 371.

31. *Id.* at 374.

32. *Jannotti*, 501 F. Supp. at 1200.

33. *Jannotti*, 673 F.2d 578, 613-14 (3d Cir. 1982) (Aldisert, J., dissenting) (Abscam "emanates a fetid odor whose putrescence threatens to spoil basic concepts of fairness and justice that I hold dear.").

come more permissive. The judiciary will not interfere with these new undercover tactics absent governmental conduct that reaches "demonstrable levels of outrageousness."<sup>34</sup> However, courts have rarely found investigative conduct sufficiently outrageous to warrant intervention.<sup>35</sup> Thus, Abscam was an inevitable consequence of the courts' laissez-faire attitude, and has invited even more extreme undercover tactics. Prosecutors, though, want even more. In *United States v. Jacobson*,<sup>36</sup> prosecutors challenged the Court to extend even further the outer limits of permissible undercover operations.

Keith Jacobson was convicted of receiving in the mail a magazine depicting child pornography. Jacobson was a 57-year-old farmer who lived alone and supported his elderly parents. He was targeted for an undercover sting operation because his name was discovered on a bookstore's mailing list as having purchased two nudist magazines, the receipt of which did not violate any law, and a brochure listing stores selling sexually explicit material. The government had no information that Jacobson had ever ordered or advertised for any child pornography, had ever purchased child pornography or produced child pornography, or was likely to engage in the receipt or distribution of child pornography. Nevertheless, the government launched a two and one-half-year operation involving twelve solicitations from five separate government-created entities in order to entice Jacobson to purchase a magazine depicting child pornography produced and mailed by the government. He eventually succumbed to the enticement for which he was prosecuted and convicted. A panel of the Court of Appeals for the

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34. *Hampton v. United States*, 425 U.S. 484, 495 n.7 (1976) (Powell, J., concurring).

35. *United States v. Simpson*, 927 F.2d 1088, 1089-90 (9th Cir. 1991) (undercover agent enticed defendant into sexual relationship, and during investigation engaged in acts of prostitution, shoplifting, and heroin use, but "sleazy investigative tactics alone" are not necessarily outrageous); *United States v. Levasseur*, 699 F. Supp. 995, 1008 (D. Mass. 1988), *aff'd*, 867 F.2d 36 (1st Cir. 1989) (government efforts to bribe defendant's children to obtain information was shocking but not sufficiently outrageous); *United States v. Valona*, 834 F.2d 1334, 1342-44 (7th Cir. 1987) (pretargeting of defendants and contingent fee arrangements with informants not outrageous); *United States v. Ofshe*, 817 F.2d 1508, 1516 (11th Cir.), *cert. denied*, 484 U.S. 963 (1987) (government sets up lawyer to be informant against client); *United States v. Arango*, 670 F. Supp. 1558, 1566-67 (S.D. Fla. 1987), *aff'd*, 853 F.2d 818 (11th Cir. 1988) (government's unlawful entry into defendant's apartment and prosecutor's failure to make timely disclosure improper but not outrageous); *see also* *United States v. Jones*, 839 F.2d 1041 (5th Cir.), *cert. denied*, 486 U.S. 1024 (1988); *United States v. Esch*, 832 F.2d 531 (10th Cir. 1987), *cert. denied*, 485 U.S. 908 and 485 U.S. 991 (1988); *United States v. Irving*, 827 F.2d 390 (8th Cir. 1987); *United States v. Shoffner*, 826 F.2d 619 (7th Cir.), *cert. denied*, 484 U.S. 958 (1987); *United States v. Degollado*, 696 F. Supp. 1136 (S.D. Tex. 1988).

36. 916 F.2d 467 (8th Cir. 1990) (en banc), *cert. granted*, 111 S. Ct. 1618 (1991).

Eighth Circuit reversed his conviction, holding that Jacobson was entrapped as a matter of law.<sup>37</sup> Upon rehearing *en banc*, the court of appeals vacated the panel's decision and affirmed the conviction.<sup>38</sup> The Supreme Court granted certiorari,<sup>39</sup> limited to the question of whether a defendant has been entrapped as a matter of law when the government, having failed in several attempts to entice him to engage in illegal activity over a two year period, and in violation of their own guidelines for the conduct of undercover operations,<sup>40</sup> finally induces the defendant to receive child pornography through the mails.

The important point of this discussion transcends the particular merits of Abscam, Greylord, Jacobson, or any other undercover operation. The escalating use of more creative and more intrusive investigative techniques is predictably consistent with a prosecutorial mentality that seeks to stretch its power to the farthest limits that the courts will allow it to reach.<sup>41</sup> And this has been very far. As we have seen, the courts have become increasingly tolerant of highly offensive law en-

37. *Jacobson*, 893 F.2d 999 (8th Cir. 1990).

38. *Jacobson*, 916 F.2d 467 (8th Cir. 1990).

39. 111 S. Ct. 1618 (1991).

40. Department of Justice, Office of the Attorney General, *Attorney General Guidelines on FBI Undercover Operations* 16 (Dec. 31, 1980), reprinted in *Law Enforcement Undercover Activities: Hearing before Select Comm. to Study Law Enforcement Undercover Activities of Components of the Dep't of Justice*, Senate, 97th Cong., 2d Sess. 86, 101 (1982). The Guidelines provide that when offering inducements, specific written approval from the director is necessary unless the Undercover Operations Review Committee determines that:

(a) There is a reasonable indication, based on information developed through informants or other means, that the subject is engaged, has engaged, or is likely to engage in illegal activity of a similar type; or

(b) The opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

(italicized in text)

41. This is the point of Justice Jackson's statement in *Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring), in discussing the tendency of prosecutors to "expand" the use of conspiracy doctrine "to the limit of its logic." Prosecutors have shown this same tendency in using one of the most feared anti-racketeering weapons in their arsenal, the RICO conspiracy statute, against groups or individuals that hardly could be considered racketeers or engaged in racketeering activities. See *United States v. Pruba*, 900 F.2d 748 (4th Cir.), *cert. denied*, 111 S. Ct. 305 (1990) (bookkeeper for distributor of pornography); *United States v. Alexander*, 888 F.2d 777 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 2623 (1990) (local school board official); *United States v. Porcelli*, 865 F.2d 1352 (2d Cir.), *cert. denied*, 493 U.S. 810 (1989) (owner of gasoline stations); *United States v. Grayson*, 795 F.2d 278 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 1899 (1987) (member of motorcycle gang involved in narcotics trafficking); *United States v. LeFevour*, 798 F.2d 977 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986) (member of judiciary); *United States v. Tunnell*, 667 F.2d 1182 (5th Cir. 1982) (hotel owner charged with promoting prostitution); *United States v. Elliot*, 711 F. Supp. 425 (N.D. Ill. 1988) (stock broker).



forcement methods,<sup>42</sup> and prosecutors have been adept at capitalizing on the judiciary's reluctance to rein them in. Thus, notwithstanding claims to individual privacy encompassed by values such as "the right to be let alone,"<sup>43</sup> we can expect prosecutors increasingly to use more imaginative and intrusive undercover tactics both to investigate persons suspected of crime—a legitimate goal—and to test the integrity of persons not suspected of any crime—an illegitimate goal. Historically, such tactics have been favored by totalitarian regimes but have been regarded as antithetical to individual and political freedom.<sup>44</sup>

### *b. Grand Jury Tactics*

A similar phenomenon of enhanced prosecutorial power and reduced judicial supervision is observable in the prosecutor's conduct of grand jury investigations. Prosecutors traditionally have assumed a highly aggressive posture when using the grand jury as an investigative weapon.<sup>45</sup> In recent years, however, prosecutors, with the acquiescence of the judiciary, have used the grand jury even more aggressively, with considerably greater powers. The power to compel the appearance and interrogation of witnesses has been reaffirmed and reinforced,<sup>46</sup> the power to compel the production of documents has been strengthened,<sup>47</sup> and the power to dispense with fundamental protections of witnesses has been broadened.<sup>48</sup> This trend toward virtually unlimited grand jury

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42. See *supra* note 35.

43. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by* *Berger v. New York*, 388 U.S. 41 (1967).

44. See Bennett Gershman, *ABSCAM: The Judiciary and the Ethics of Entrapment*, 91 *YALE L.J.* 1565, 1585 (1982).

45. *United States v. Remington*, 208 F.2d 567, 573 (2d Cir. 1953) ("Save for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked *ex parte* examination.") (Hand, J., dissenting), *cert. denied*, 347 U.S. 913 (1954); Robert Campbell, *Delays in Criminal Cases*, 55 *F.R.D.* 229, 253 (1972) ("Any experienced prosecutor will admit that he can indict anybody at anytime for almost anything before any grand jury.").

46. *United States v. Washington*, 431 U.S. 181 (1977); *United States v. Wong*, 431 U.S. 174 (1977); *United States v. Mandujano*, 425 U.S. 564 (1976); *United States v. Calandra*, 414 U.S. 338 (1974); *United States v. Brito*, 907 F.2d 392 (2d Cir. 1990); *In re Grand Jury Proceedings*, 889 F.2d 220 (9th Cir. 1989); *United States v. Williams*, 874 F.2d 968 (5th Cir. 1989).

47. *United States v. R. Enterprises, Inc.*, 111 S. Ct. 722 (1991); *In re Grand Jury Subpoenas*, 906 F.2d 1485 (10th Cir. 1990); *In re Grand Jury Proceedings* 89-8, 742 F. Supp. 1154 (S.D. Fla. 1990); *United States v. Giovannelli*, 747 F. Supp. 891 (S.D.N.Y. 1989).

48. Some courts view the grand jury proceeding merely as a preliminary and insubstantial stage in the criminal justice process, and the indictment simply a determination that the accused should be formally tried. See *Bracy v. United States*, 435 U.S. 1301, 1302 (1978) (Rehnquist, J.) (application for stay).

power is underscored by an increasing reluctance of courts to check prosecutorial excesses, as noted above. Thus, the decline of supervisory powers,<sup>49</sup> the requirement that a defendant must await conviction and establish prejudice before he can raise a claim of prosecutorial misconduct,<sup>50</sup> and the recent application of the harmless error rule to grand jury proceedings,<sup>51</sup> make it unlikely that valid claims of prosecutorial abuse of the grand jury will be sustained.<sup>52</sup> This is a perversion of the historic function of the grand jury as a buffer between the citizen and the state.

*c. Attack on Lawyers*

Added to these new developments is an even more ominous threat to the adversary system: the unprecedented use by prosecutors of the grand jury and other means to attack and cripple the criminal defense bar.<sup>53</sup> One of the most alarming events during the last decade has been the prosecutor's attempt to compel criminal defense attorneys to give testimony and produce documents that might incriminate their clients.<sup>54</sup> The testimony is usually sought in connection with fees, a subject that most courts have held is not covered by the attorney-client privilege.<sup>55</sup> Recent statistics show that prosecutors in the United States issue subpoenas to defense attorneys at the rate of 645 per year.<sup>56</sup> Fur-

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49. Anne B. Poulin, *Supervision of the Grand Jury: Who Watches the Guardian?*, 68 WASH U LQ 885, 890 (1990).

50. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988).

51. *United States v. Mechanik*, 475 U.S. 66, 71-72 (1986). *See also* *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798-802 (1989) (denial of pretrial motion to dismiss indictment not subject to interlocutory appeal).

52. For a recent case, see *United States v. Williams*, 899 F.2d 898 (10th Cir. 1990) (on certiorari court to decide whether prosecutor is required to present exculpatory evidence to the grand jury).

53. David Rudovsky, *The Right to Counsel Under Attack*, 136 U. PA. L. REV. 1965 (1988).

54. Max D. Stern & David Hoffman, *Privileged Informers: The Attorney-Subpoena Problem and a Proposal for Reform*, 136 U. PA. L. REV. 1783, 1786 (1988). *See In re Grand Jury Subpoenas*, 906 F.2d 1485 (10th Cir. 1990); *In re Grand Jury Matter*, 906 F.2d 78 (3d Cir. 1990); *In re Grand Jury Subpoenas*, 803 F.2d 493, 498 (9th Cir. 1986). *See also* *United States v. Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991) (indictment dismissed on ground that prosecutor encouraged criminal defense attorney to set up his client to engage in criminal activity). *But see* *United States v. Klubock*, 832 F.2d 649 (1st Cir. 1987) (judicial approval needed before prosecutors can subpoena attorney).

55. *Tornay v. United States*, 840 F.2d 1424, 1429 (9th Cir. 1988); *In re Grand Jury Proceedings*, 517 F.2d 666, 671 (5th Cir. 1975).

56. *Behind Closed Doors*, THE CHAMPION 18 (Richard Bing ed., May 1990). Rule 3.8 of the ABA MODEL RULES OF PROFESSIONAL CONDUCT (1990) has been amended to place limits on the prosecutor's power to subpoena lawyers.

ther, most courts do not require any special evidentiary showing before a subpoena can be enforced against a lawyer.<sup>57</sup> Attorneys have been jailed for refusing to cooperate with the prosecutor.<sup>58</sup> As with grand jury subpoenas, prosecutors also have begun to use the statutory summoning power of the Internal Revenue Service to force criminal defense attorneys to disclose the identities of clients or third parties who pay fees in excess of \$10,000 cash. In *United States v. Goldberger & Dubin*,<sup>59</sup> the Court of Appeals for the Second Circuit recently upheld the enforcement of such an IRS summons against a law firm, rejecting claims that enforcement violated the attorneys' constitutional rights or ethical obligations toward their clients.

The new aggressive investigative tactics against attorneys are not limited to grand jury subpoenas or IRS summonses. There has been a rising incidence of law office searches,<sup>60</sup> disqualification of attorneys from representing clients,<sup>61</sup> forfeiture of attorneys' fees under broad

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57. *In re Two Grand Jury Subpoenas Duces Tecum* Dated August 21, 1985, 793 F.2d 69, 74 (2d Cir. 1986); *In re Grand Jury Proceedings*, 791 F.2d 663, 672 (8th Cir. 1986). Guidelines issued by the Justice Department and the United States Attorneys Office for the Southern District of New York require that information be first sought from alternative sources, and that negotiations with attorneys are required before subpoenas can be issued.

58. Julie DelCour, *Attorneys Jailed for Keeping Silent*, NAT'L L.J., Dec. 18, 1989, at 3; *Lawyer is Freed After Being Jailed Six Months for Refusing to Testify*, N.Y. TIMES, June 11, 1991, at A17.

59. 935 F.2d 501 (2d Cir. 1991).

60. Rudovsky, *supra* note 53, at 1967. For a recent and extremely heavy-handed law office search, see *Geilim v. Los Angeles County Superior Court*, 234 Cal. App. 3d 166 (1991) (huge numbers of client files seized from attorney under investigation for client fraud; judge to review every document seized).

61. *Wheat v. United States*, 486 U.S. 153, 163 (1988); *United States v. Moscony*, 927 F.2d 742, 747 (3d Cir. 1991); *United States v. DiTommaso*, 817 F.2d 201, 220 (2d Cir. 1987); *United States v. Gotti*, 771 F. Supp. 552, 559 (E.D.N.Y. 1991). See Bruce A. Green, "Through a Glass Darkly: How the Court Sees Motions to Disqualify Criminal Defense Lawyers," 89 COLUM. L. REV. 1201 (1989); Nancy J. Moore, *Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense*, 27 UCLA L. REV. 1 (1980).

forfeiture statutes,<sup>62</sup> and the prosecution of attorneys under obstruction of justice statutes for giving legal advice to clients.<sup>63</sup>

Today's law enforcement climate recalls the famous line from Shakespeare's play *Henry V*—"The first thing we do, let's kill all the lawyers."<sup>64</sup> This new strategy to "kill attorneys" appears to be the result of a new prosecutorial ethos that views the criminal defense bar as no more than an obstruction to legitimate government investigations. Prosecutors for quite some time have sought to circumvent the attorney-client relationship by contacting a represented individual directly and often surreptitiously.<sup>65</sup> However, in an unprecedented statement, the Attorney General of the United States recently instructed federal prosecutors that in the course of investigations that necessitate contact with persons who are represented by counsel, federal prosecutors are exempt from ethical rules that prohibit lawyers from communicating with clients who are represented by counsel.<sup>66</sup> The statement suggested that it was a response to efforts by some criminal defense lawyers who sought to enforce the disciplinary rule against prosecutors.<sup>67</sup>

The consequences of this new prosecutorial strategy may be the

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62. 21 U.S.C. § 853 (1988). The Supreme Court upheld the validity of criminal forfeiture over claims that it impermissibly burdened the defendant's Sixth Amendment right to retain counsel of his choice. *United States v. Monsanto*, 491 U.S. 600, 614 (1989); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989). In seeking forfeiture, federal prosecutors are asking courts to impose lower burdens of proof in forfeiture proceedings, and courts are acquiescing. *See United States v. Herrero*, 893 F.2d 1512, 1542 (7th Cir. 1990) (forfeiture statute requires standard of preponderance of evidence); *United States v. Sandini*, 816 F.2d 869, 876 (3d Cir. 1987) (legislative history of forfeiture statute reflects legislative intent to change burden of proof from beyond reasonable doubt to preponderance standard). *But see United States v. Elgersma*, 929 F.2d 1538, 1549 (11th Cir. 1991) (standard of proof in criminal forfeiture proceedings is beyond a reasonable doubt).

63. *United States v. Cintolo*, 818 F.2d 980 (1st Cir.), *cert. denied*, 484 U.S. 913 (1987); *United States v. Fayer*, 523 F.2d 661 (2d Cir. 1975). *See Joel Cohen & Norman Bloch, Can Lawyers be Prosecuted for the Advice They Give?*, N.Y.L.J., July 23, 1991, at 1, 5; Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. REV. 687, 699-704 (1991).

64. WILLIAM SHAKESPEARE, *KING HENRY V*, act 2, sc. 2.

65. *United States v. Morrison*, 449 U.S. 361 (1981); *Weatherford v. Bursey*, 429 U.S. 545 (1977); *O'Brien v. United States*, 386 U.S. 345 (1967); *Black v. United States*, 385 U.S. 26 (1966); *Hoffa v. United States*, 385 U.S. 293 (1966); *Massiah v. United States*, 377 U.S. 201 (1964).

66. Memorandum to All Justice Department Litigators from Dick Thornburgh, Attorney General, June 8, 1989. *See Jerry E. Norton, Ethics and the Attorney General*, 74 JUDICATURE 203, 204-07 (1991).

67. The Memorandum states that "the defense bar has continued to press its position that DR 7-104 does in fact limit the universe of appropriate federal investigative techniques." Norton, *supra* note 66, at 204.

destruction of the adversary system.<sup>68</sup> Defense attorneys are increasingly placed on the defensive, giving prosecutors greater leverage over their clients.<sup>69</sup> The trust and confidence that clients and their attorneys need in order to function together is being eroded. Moreover, many defense lawyers will be driven out of defense work by the pressures, harassment, and potential loss of income from return of fees.<sup>70</sup> Finally, and most ominously, prosecutors have been given the power to select or reject their own adversaries, and thereby refashion, and to some extent even control, the course of private criminal defense representation, foreshadowing the demise of the system of private criminal defense work.<sup>71</sup> It is wonderfully ironic that while the Supreme Court continues to demand the highest ethical standards from criminal defense lawyers,<sup>72</sup> the Court continues, in case after case to countenance instances

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68. A most unsettling recent phenomenon has been prosecutorial efforts to seek sanctions against attorneys who bring pre-trial motions. Such sanctions were recently upheld against a public defender for filing a pre-trial motion to strike the state's request for the death penalty. *Young v. Ninth Judicial District Ct.*, 818 P.2d 844 (Nev. 1991).

69. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 650 (1980) ("Perhaps most troubling is the fact that forfeiture statutes place the Government in the position to exercise an intolerable degree of power over any private attorney who takes on the task of representing a defendant in a forfeiture case.") (Blackmun, J., dissenting).

70. *Id.* at 650. "Government will be ever tempted to use the forfeiture weapon against a defense attorney who is particularly talented or aggressive on the client's behalf—the attorney who is better than what, in the Government's view, the defendant deserves." (Blackmun, J., dissenting).

71. *Id.* at 651. "The long-term effects of the fee-forfeiture practice will be to decimate the private criminal-defense bar." (Blackmun, J., dissenting).

72. *Nix v. Whiteside*, 475 U.S. 157 (1986) (not ethical violation or deprivation of Sixth Amendment right to effective assistance of counsel for lawyer to inform on client who intends to commit perjury); *Taylor v. Illinois*, 484 U.S. 400 (1988) (permissible to impose evidence sanctions against defendant for attorney's violation of discovery order); *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991) (State Bar has authority to impose disciplinary sanctions against criminal defense attorney who makes extrajudicial statements about pending case). The *Gentile* case is noteworthy in showing that bar associations are quite willing to impose disciplinary sanctions against defense lawyers for extrajudicial statements, but rarely invoke such sanctions against prosecutors for similar conduct, such as holding press conferences to announce indictments. See Gerald Stern, *Trial by Lawyer Press Conference: Why is Such a Fanfare Permitted?*, NAT'L L.J., May 6, 1985, at 17-20.

It is also ironic that while the Supreme Court demands increasingly higher ethical standards for defense lawyers, the Court also has imposed correspondingly lower standards for defense counsel's competence and loyalty. See *Strickland v. Washington*, 466 U.S. 668 (1984) (reasonable competence required); *Jones v. Barnes*, 463 U.S. 745 (1983) (lawyer need not argue points that defendant wishes to be argued); *Anders v. California*, 386 U.S. 738 (1967) (counsel need not argue seek to appeal if he believes client's case has no merit).

of prosecutorial misconduct that pose a far more pernicious threat to the future of adversarial justice and individual rights.<sup>73</sup>

## 2. Charging Power

Mostly as a result of his crime-charging power, the prosecutor has always been regarded as one of the most powerful officials in government.<sup>74</sup> Prosecutors historically have enjoyed almost unfettered discre-

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73. Perhaps taking a cue from the Supreme Court's prosecutor misconduct jurisprudence, courts seem increasingly skeptical not merely over claims of misconduct but of the term itself. In *McGrier v. United States*, 597 A.2d 36 (D.C. 1991), in a portion of the opinion entitled "A Word on Nomenclature," the court agreed that the term "prosecutorial misconduct" in most cases is "unwarranted" and "overused." "Some less sinister name should be given to the rhetorical excesses of attorneys who say what they should not say when engaged in forensic combat." *Id.* at 40-41. However, this court, and commentators, seem to forget that prosecutors have higher ethical obligations than lawyers generally. *See infra* notes 300-09 and accompanying text. For example, Judge Thomas M. Reavley of the Court of Appeals for the Fifth Circuit states that "[t]he greatest challenge is the case of the guilty criminal." Thomas M. Reavley, *The Moral Responsibility of Lawyers*, 19 TEX. TECH. L. REV. 1393, 1402 (1988). Nowhere in his article does Judge Reavley so much as mention the moral responsibility of prosecutors, or even hint that an equally "great challenge" to prosecutors (they are lawyers) might be "the case of the innocent defendant," or "the case of the invidiously selected defendant," or "the case of the guilty criminal who is entitled to a fair trial."

74. The Supreme Court made this point recently, stating: "Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987).

As any informed observer of the criminal justice system knows, the prosecutor "runs the show." The prosecutor decides whether or not to bring criminal charges; who to charge; what charges to bring; whether a defendant will stand trial, plead guilty, or enter a correctional program in lieu of criminal charges; and whether to confer immunity from prosecution. The prosecutor effectively has the power to invoke or deny punishment, and in those jurisdictions that authorize capital punishment, the power literally over life and death. Increasing scholarly attention is being focused on the prosecutor's role in criminal justice administration. *See, e.g.*, James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1555 (1981); FRANK W. MILLER, PROSECUTION—THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1970); KENNETH C. DAVIS, DISCRETIONARY JUSTICE (1969); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197 (1988); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991); Francis A. Allen, *A Serendipitous Trek Through the Advance-Sheet Jungle: Criminal Justice in the Courts of Review*, 70 IOWA L. REV. 311, 333-36 (1985); H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145 (1973); Randolph V. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550 (1987); Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970); John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U.L. REV. 174 (1965); Charles D. Breitell, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960).

tion in bringing charges.<sup>75</sup> Doctrines such as conspiracy, for example, have given prosecutors tremendous power to join parties and offenses in one indictment.<sup>76</sup> The presumption that prosecutors act in good faith has made the charging power virtually immune from judicial review.<sup>77</sup> However, we have witnessed recently an even larger accretion of the prosecutor's charging power through legislative enactments, bold prosecutorial initiatives, and judicial acquiescence.<sup>78</sup>

### a. *New Crimes*

To supplement the prosecutor's already considerable arsenal, Congress over the past twenty years has passed legislation providing prosecutors with more potent laws than ever before: Racketeer Influenced and Corrupt Organizations Act;<sup>79</sup> Continuing Criminal Enterprises Act;<sup>80</sup> Criminal Forfeitures Act;<sup>81</sup> Armed Career Criminal Act;<sup>82</sup> Money Laundering Act;<sup>83</sup> Bail Reform Act;<sup>84</sup> Comprehensive Thrift and Bank Fraud Act;<sup>85</sup> Victims of Child Abuse Act.<sup>86</sup> Moreover, the

75. See *supra* note 74. See also *McKleskey v. Kemp*, 481 U.S. 279, 312 (1987) ("A prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case.").

76. The oft-quoted passage by Judge Learned Hand referred to the conspiracy doctrine as "that darling of the modern prosecutor's nursery." *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

77. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Wayte v. United States*, 470 U.S. 598 (1985); *United States v. Batchelder*, 442 U.S. 114 (1979).

The courts occasionally impose some limits on excessive charging practices. See, e.g., *United States v. McNally*, 483 U.S. 350 (1987) (federal mail fraud statute, 18 U.S.C. § 1341, limited to money or property rights and does not extend to intangible right of citizen to good government); *United States v. Chestman*, 947 F.2d 551 (2d Cir. 1991) (en banc), *petition for cert. filed*, 60 U.S.L.W. 2903 (U.S. Jan. 28, 1992) (No. 91-1085) (prosecution for insider trading under Securities and Exchange Act reversed in absence of fiduciary duty); *United States v. Coates*, 949 F.2d 104 (4th Cir. 1991) (government manufactured federal interstate nexus through telephone call, thereby transforming state murder prosecution into federal offense); *United States v. Ivic*, 700 F.2d 51, 59-61 (2d Cir. 1983) (RICO prosecution dismissed where "enterprise" not shown to have financial purpose); *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973) (federal prosecution under Travel Act failed to show that interstate facilities were used to promote corruption).

78. A prosecutor is absolutely immune from civil liability for charging excesses. *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Burns v. Reed*, 111 S. Ct. 1934 (1991).

79. 18 U.S.C. §§ 1961-68 (1988 and Supp. I 1989). See *United States v. Turkette*, 452 U.S. 576 (1981); *Russello v. United States*, 464 U.S. 16 (1983).

80. 21 U.S.C. § 848 (1988).

81. 21 U.S.C. § 853 (1988).

82. 18 U.S.C. § 1202 (1988); see also 18 U.S.C. § 921 (1988).

83. 18 U.S.C. § 1956, § 1957 (1988).

84. 18 U.S.C. §§ 1341-43 (1988 and Supp. I 1989). See *United States v. Salerno*, 481 U.S. 739 (1987) (upholding pretrial detention provisions as not violative of due process).

85. Comprehensive Thrift and Bank Fraud Act, 18 U.S.C.A. § 1001 (Supp. 1991).

recent trend toward mandatory minimum sentencing<sup>87</sup> has given prosecutors greater leverage than ever to compel plea bargaining, force cooperation, and effectively determine the length of sentences.<sup>88</sup>

Faced with increasing public pressure to win the "War on Crime," lawmakers continue to add even more crimes. For example, the Senate and House recently passed a new crime bill that would allow federal capital punishment for drug kingpins and permit imposition of the death penalty for some fifty federal offenses.<sup>89</sup> Chief Justice Rehnquist publicly criticized the bill, arguing that it would inundate federal prosecutors with an unmanageable caseload of offenses that traditionally have been the province of state prosecutors.<sup>90</sup> Recent efforts for even stronger prosecutorial initiatives have resulted in some astonishing proposals, a striking example being a provision in President Bush's Anti-Crime Bill that would authorize prosecutors to convene special tribunals to try foreigners accused of acts of terrorism.<sup>91</sup> In proceedings before those tribunals, the defendants would not be allowed to rebut or even see the evidence against them. Expanding the Criminal Code in this way produces more convictions and is politically expedient, but the administrative and individual liberty costs are great. This is not a salutary development, especially in an era of tremendous overcrowding in the nation's prisons.

*b. Uncontrolled Discretion*

Commentators have described the prosecutor's discretion as potentially "lawless,"<sup>92</sup> "tyrannical,"<sup>93</sup> and "most dangerous."<sup>94</sup> The prosecutor carries out his charging function independent from the judiciary.

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86. Victims of Child Abuse Act, 18 U.S.C. § 2251; 42 U.S.C.A. §§ 13001 (1991).

87. *Mistretta v. United States*, 488 U.S. 361, 364 (1989) (emphasizing the power of Congress to impose mandatory sentences); *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978) (individualized sentencing not constitutionally required); *Ehrsam v. Rubenstein*, 917 F.2d 764, 766-67 (3d Cir. 1990) (upholding constitutionality of Pennsylvania's Mandatory Minimum Sentencing Act).

88. See *infra* notes 171-92 and accompanying text.

89. Clifford Krauss, *House Approves Measure Adding Capital Crimes*, N.Y. TIMES, Oct. 17, 1991, at A21.

90. Gwen Ifill, *Rehnquist Opposes Bill that Seeks Shift in Gun Trials in U.S. Courts*, N.Y. TIMES, Sept. 21, 1991, at A8.

91. David Johnston, *Crime Bill Would Establish Alien Deportation Tribunal*, N.Y. TIMES, June 1, 1991, at A6.

92. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 290 (1968).

93. *Henderson v. United States*, 349 F.2d 712, 714 (D.C. Cir. 1965) (Bazelon, C.J., dissenting).

94. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 5 (1940).



A prosecutor cannot be compelled to bring charges,<sup>95</sup> or to terminate them.<sup>96</sup> A private citizen has no standing to bring a criminal complaint if the prosecutor decides not to prosecute.<sup>97</sup> And the judiciary has shown a remarkable passivity when asked to review the prosecutor's charging decisions.<sup>98</sup> Indeed, some courts have deferred absolutely to the prosecutor's discretion, even though that decision has been shown to be demonstrably unfair.<sup>99</sup> Thus, overcharging crimes,<sup>100</sup> discriminating against defendants for prosecution,<sup>101</sup> improper joinder of charges or parties,<sup>102</sup> vindictiveness,<sup>103</sup> coercive dismissals,<sup>104</sup> plea bargaining abuses,<sup>105</sup> and immunity violations,<sup>106</sup> continue to occur regularly, without meaningful judicial review or correction.<sup>107</sup>

Uncontrolled discretion in the hands of a powerful government official has the potential for abuse. In the hands of prosecutors, this po-

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95. *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973).

96. *United States v. Lovasco*, 431 U.S. 783, 784-788 (1977).

97. *Tonkin v. Michael*, 349 F. Supp. 78 (D.V.I. 1972).

98. See ABRAHAM S. GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA* 5 (1981) (prosecutor considered "so integral and expert a part of the executive branch that he may not be interfered with by the judiciary").

99. *United States v. Rexach*, 896 F.2d 710 (2d Cir. 1989) (refusal to recommend leniency based on defendant's cooperation not reviewable), *cert. denied*, 111 S. Ct. 433 (1990); *United States v. Nathan*, 816 F.2d 230 (6th Cir. 1987) (refusal to grant defendant pretrial diversion not reviewable).

100. *Morris v. Mathews*, 475 U.S. 237 (1986), *cert. denied*, 492 U.S. 922 (1989) (prosecutor's violation of Double Jeopardy Clause by charging defendant with jeopardy-barred crime of aggravated murder not prejudicial in view of trial court's reduction of conviction to lesser included offense which was not jeopardy-barred); *United States v. Redondo-Lemos*, 955 F.2d 1296 (9th Cir. 1992 50 Cr. L. 1457) (court will not supervise the exercise of prosecutorial discretion even if that discretion is so arbitrary and capricious as to violate due process).

101. *Wayte v. United States*, 470 U.S. 598 (1985) (selective prosecution of draft protesters).

102. *United States v. Lane*, 474 U.S. 438 (1986) (misjoinder of charges upheld as not prejudicial).

103. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (retaliation against defendant by increasing charges after refusal to accept plea offer); *United States v. Goodwin*, 457 U.S. 368 (1982) (same).

104. *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (threat to prosecute unless defendant executes an agreement not to sue public officials in connection with arrest not coercive).

105. *Mabry v. Johnson*, 467 U.S. 504 (1984) (withdrawal of plea offer after acceptance but before execution of plea not violative of due process); *North Carolina v. Alford*, 400 U.S. 25 (1970) (threat of death penalty to force defendant to plead guilty to lesser murder charge not coercive).

106. *United States v. Mandujano*, 425 U.S. 564 (1976) (prosecution on charges for which immunity conferred not improper); *Ricketts v. Adamson*, 483 U.S. 1 (1987) (prosecutor's unilateral decision that defendant breached plea agreement so as to allow prosecution upheld).

107. See generally BENNETT GERSHMAN, *PROSECUTORIAL MISCONDUCT* (1985).

tential is now a reality. Courts are unwilling to systematically rein in the prosecutors, resulting in a decline in the fairness of, and a loss of public confidence in, the system.

An horrendous example of the prosecutor's exercise of virtually uncontrolled charging discretion is seen in capital cases. Prosecutors historically have sought the death penalty disproportionately against black defendants as opposed to white defendants.<sup>108</sup> In *McCleskey v. Kemp*,<sup>109</sup> the Supreme Court was presented with a statistical study of the capital punishment process in Georgia that showed that prosecutors sought the death penalty in seventy percent of the cases involving black defendants and white victims, and in only nineteen percent of the cases involving white defendants and black victims.<sup>110</sup> The study also showed that a defendant's odds of receiving a death sentence were 4.3 times greater if his victim was white than if the victim was black.<sup>111</sup> Although expressly assuming the validity of the study,<sup>112</sup> the Supreme Court found that the statistics did not prove that the death penalty was administered in a racially discriminatory manner.<sup>113</sup> Other studies also have shown that killers of white persons are prosecuted more vigorously than killers of black persons,<sup>114</sup> and that black defendants charged with raping white women were more likely to be executed than were white defendants charged with raping black women,<sup>115</sup> yet courts do not impose any restraints on these manifestly invidious prosecutorial charging decisions.

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108. See, e.g., *United States v. Wiley*, 492 F.2d 547, 555 (D.C. Cir. 1974) (of 455 men executed for rape since 1930, 405 [89 percent] of them were black; in vast majority of cases complainants were white) (Bazelon, J., concurring); William Tabak & Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 LOY. L.A. L. REV. 59, 89-93 (1989) (describing various studies documenting discriminatory application of capital punishment).

109. 481 U.S. 279 (1987).

110. *Id.* at 287 (the "Baldus Study"). See David C. Baldus, George Woodworth & Charles Pulaski, *Arbitrariness and Discrimination in the Administration of the Death Penalty*, 15 STETSON L. REV. 133 (1986); David C. Baldus, George Woodworth & Charles Pulaski, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983).

111. *McCleskey*, 481 U.S. at 287.

112. *Id.* at 291 n.7.

113. Commentators have compared the *McCleskey* case to the infamous "Dred Scott" decision. Hugo Adam Bedau, *Someday McCleskey Will be Death Penalty's Dred Scott*, L.A. TIMES, May 1, 1987, § 2 at 5; Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1389 (1988).

114. See Tabak & Lane, *supra* note 108, at 90-92.

115. See *supra* note 108.

*c. Megatrials*

Equally devastating as the prosecutor's unchecked power over who and what to charge is the prosecutor's power over how to charge. A graphic illustration is the new phenomenon known as the "megatrial."<sup>116</sup> The megatrial is a gargantuan criminal trial that can take up to two years to try, and involves numerous defendants, a myriad of varying charges and disparate criminal acts, a vast number of witnesses and exhibits, and an accompanying large number of defense counsel. Prosecutors deliberately seek to bring these "aberrations"<sup>117</sup> because the benefits are considerable. The rationale usually advanced is "efficiency" and "fairness"<sup>118</sup>—judicial resources are conserved and not duplicated; the burden on witnesses to repeat testimony is alleviated; the probability of inconsistent and erratic verdicts is reduced.

There are additional reasons why prosecutors want to charge defendants together in large group trials. Usually in large conspiracy cases, some defendants are directly involved, while others are only peripherally involved. The prosecutor's proof often is disproportionately addressed to defendants in different degrees. In a joint trial, the evidence comes in against all defendants together, notwithstanding their differing degrees of involvement.<sup>119</sup> Prosecutors know that in a long and complex case, it is virtually impossible for jurors to compartmentalize proof against individual defendants. Some prosecutors pin their hopes on convicting minor participants who are charged in a small proportion of the counts on the slowly accumulating evidence against the major players, and the likelihood of "spillover taint."<sup>120</sup> Moreover, in complex trials, such as RICO conspiracies, evidence will be admissible against some defendants but not against others. As Federal District Judge Jack Weinstein observed, "[T]here are conspiracies within conspiracies, and

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116. *United States v. Salerno*, 937 F.2d 797 (2d Cir. 1991), *cert. granted*, 60 U.S.L.W. 3498 (U.S. 1992) (13-month RICO conspiracy trial); *United States v. Casamento*, 887 F.2d 1141 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990) (17-month RICO conspiracy trial involving 35 charged defendants and 21 defendants tried together); *United States v. Shea*, 750 F. Supp. 46 (D. Mass. 1990) (cocaine trafficking indictment charging twenty-three defendants in 57 counts and 99 overt acts).

117. *Polizzi v. United States*, 926 F.2d 1311, 1313 (2d Cir. 1991) (describing RICO conspiracy trial of 22 defendants, lasting seventeen months, consuming 265 trial days, producing over 40,000 pages of transcript, and involving the introduction of thousands of exhibits and the testimony of more than 275 witnesses).

118. *Richardson v. Marsh*, 481 U.S. 200, 210 (1987) (Scalia, J.).

119. *United States v. Gallo*, 668 F. Supp. 736, 749-52 (E.D.N.Y. 1987).

120. *United States v. Salerno*, 937 F.2d at 799.

conspiracies to conceal other conspiracies, conspiracies which are discrete and finite, and those which are amorphous and indefinite, involving conspirators joining and leaving the conspiracy at various times.”<sup>121</sup> Asking jurors to make such factual distinctions over the course of many months “would be virtually impossible without the aid of a computer.”<sup>122</sup> Here again, although courts have criticized the prosecutorial tactic of bringing megatrials,<sup>123</sup> they usually defer to the prosecutor’s discretion.<sup>124</sup> This is a dangerous abdication of the judicial duty.

### 3. *Convicting Power*

#### a. *Greater Access to Evidence*

The prosecutor’s task of convicting defendants has been made easier by several factors. As noted above, broader investigative powers, more aggressive grand jury probes, and more elaborate undercover operations produce more evidence relevant to guilt. Judicial loosening of many of the restrictions on the exclusionary rule also produces more evidence.<sup>125</sup>

#### b. *Strategic Superiority*

Moreover, greater prosecutorial flexibility to join parties and crimes pursuant to broad new substantive statutes such as RICO and Continuing Criminal Enterprise offenses also makes convictions more likely. The “megatrial” phenomenon is just one dramatic application of this new power. The judiciary’s increased tolerance of prosecutorial excesses, notably the expanded use of harmless error review,<sup>126</sup> and the decline of supervisory power,<sup>127</sup> makes it easier to preserve convictions,

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121. *United States v. Gallo*, 668 F. Supp. at 751.

122. *Id.* at 752.

123. *Salerno*, 937 F.2d at 799. Bringing megatrials can be counterproductive. In one of the longest criminal trials in the United States, twenty defendants accused of making up the Luccheses crime family were acquitted after a twenty-one month trial in New Jersey. Interviews with the jury after the verdict suggest that the length and complexity of the case were partly responsible for the hasty verdict. Jesus Rangel, *All 20 Acquitted in Jersey Mob Case*, N.Y. TIMES, Aug. 27, 1988, at 1.

124. *But see* *United States v. Gallo*, 668 F. Supp. 736 (judge breaks up sixteen-defendant RICO conspiracy case into seven separate trials); *United States v. Shea*, 750 F. Supp. at 50-51 (judge grants severance in huge narcotics conspiracy trial involving twenty-three defendants).

125. *See, e.g.*, *United States v. Leon*, 468 U.S. 897 (1984); *New York v. Quarles*, 467 U.S. 649 (1984).

126. *See infra* notes 205-37 and accompanying text.

127. *See infra* notes 238-62 and accompanying text.

but also has a more sinister consequence in encouraging prosecutors to engage in misconduct to win convictions.<sup>128</sup> Finally, the judiciary's failure to set meaningful standards for competent defense advocacy results in more and more instances of defense ineffectiveness, which makes it much easier for prosecutors to win.<sup>129</sup> This failure has its greatest impact in capital cases, where the courts have condoned grossly ineffective representation resulting in defendants being convicted and executed.<sup>130</sup>

*c. More Favorable Rules of Evidence*

In addition to gaining access to more evidence, and enjoying new strategic superiority, today's prosecutor also is the beneficiary of more favorable rules of evidence. The Federal Rules of Evidence, for example, which are used in federal courts and most state courts, expand the admissibility of evidence that previously might have been excluded.<sup>131</sup> Since the prosecutor bears the exclusive burden of producing evidence in a criminal trial, he is naturally the principal beneficiary of these broadened standards of admissibility. For the same reason, while greater judicial discretion in admitting evidence, also provided in the

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128. See *infra* notes 232-37 and accompanying text.

129. See *infra* notes 264-310 and accompanying text.

130. *McKleskey v. Zant*, 111 S. Ct. 1454 (1991) (omission of claim from first habeas petition constituted abuse of writ; defendant executed); *Messer v. Kemp*, 760 F.2d 1080, 1096 (11th Cir. 1985), *cert. denied*, 474 U.S. 1088 (1986) (lawyer fails to present any evidence that defendant had no previous record and was honorably discharged from army; defendant executed), *cert. denied*, 474 U.S. 1088 (1986). See *Coleman v. Thompson*, 111 S. Ct. 2546 (1991) (notice of appeal of capital conviction not timely filed and therefore habeas petition properly dismissed); *Burger v. Kemp*, 483 U.S. 776 (1987) (lawyer fails to present any mitigating evidence at sentencing stage even though seventeen-year-old of sub-normal intelligence at time of killing); *Jones v. Thigpen*, 555 F. Supp. 870, 878-89 (S.D. Miss. 1983) (lawyer fails to present any evidence that defendant mentally retarded), *modified*, 741 F.2d 805 (5th Cir. 1984), *vacated on other grounds*, 475 U.S. 1003 (1986).

131. David P. Leonard, *Power and Responsibility in Evidence Law*, 63 S. CAL. L. REV. 937, 956 (1990) (federal rules demonstrate "decided bias toward admissibility rather than exclusion and the abrogation of many per se exclusionary rules"). To date, 34 states have adopted the Federal Rules of Evidence. See Kenneth W. Graham, Jr., *State Adoption of the Federal Rules: The Pros and Cons*, 43 OKLA. L. REV. 293 (1990). The Supreme Court has interpreted the Federal Rules broadly in favor of admissibility. See *United States v. Bourjaily*, 483 U.S. 171 (1987) (a court in determining admissibility of evidence under Federal Rule 104 may consider evidence that would not be admissible; rejects "bootstrapping rule" of *Glasser v. United States*, 315 U.S. 60 (1942)); *United States v. Owens*, 484 U.S. 554 (1988) (neither Confrontation Clause nor Federal Rule 802 bars admission of prior out-of-court statement of witness who is unable because of memory loss to explain basis for identification); *United States v. Inadi*, 475 U.S. 387 (1986) (Confrontation Clause does not require showing of unavailability as condition to admission of out-of-court statement of non-testifying co-conspirator).

Federal Rules of Evidence,<sup>132</sup> is theoretically of equal benefit to both the prosecution and the defense, in practice it is much more likely to assist the prosecutor. Several examples will illustrate this development.

*d. Character Proof*

Prosecutors are forbidden to seek a conviction by proving that a defendant has a bad character.<sup>133</sup> The prejudicial impact of such evidence on a jury can be devastating.<sup>134</sup> Although the Federal Rules of Evidence continue to prohibit character proof generally,<sup>135</sup> several exceptions actually authorize the admission of character proof,<sup>136</sup> and the courts have interpreted these exceptions expansively. For instance, Rule 404(b) of the Federal Rules allows the prosecutor to introduce proof that the accused committed other similar crimes for the purpose of proving an essential element of the crime charged. This rule has been interpreted to benefit the prosecutor. In *Huddleston v. United States*,<sup>137</sup> the Supreme Court adopted an evidentiary standard that would carry the greatest potential for admitting such proof.

The defendant was charged with criminal possession of stolen property. Proof that the defendant on two previous occasions had possessed stolen property was sought to be admitted to prove guilty knowledge. Although some federal courts had required the prosecutor to prove the defendant's commission of these other crimes by either "clear and convincing evidence,"<sup>138</sup> or by a "preponderance of evidence,"<sup>139</sup> the Supreme Court ruled that neither standard was appropriate because it imposed too heavy a burden on the prosecutor. The proof

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132. Thomas M. Mengler, *The Theory of Discretion in the Federal Rules of Evidence*, 74 IOWA L. REV. 413, 466 (1989) ("Federal Rules intended to give trial judges considerable leeway in making evidentiary decisions.").

133. FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.").

134. 1 JOHN H. WIGMORE, EVIDENCE 57 (3d ed. 1940) ("The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court."). Empirical studies have shown that when a defendant's criminal record is known and the prosecution's case has weaknesses, the defendant's chances of acquittal are 38 percent, compared to 65 percent otherwise. HERBERT KALVEN & HOWARD ZEISEL, THE AMERICAN JURY 160 (1966).

135. FED. R. EVID. 404(a).

136. FED. R. EVID. 404(b), 608, 609.

137. 485 U.S. 681 (1988).

138. *United States v. Leight*, 818 F.2d 1297, 1302 (7th Cir. 1987); *United States v. Weber*, 818 F.2d 14, 14 (8th Cir. 1987).

139. *United States v. Leonard*, 524 F.2d 1076, 1090 (2d Cir. 1975).

should be allowed, the Court concluded, "if there is sufficient evidence to support a finding by the jury that the defendant committed the similar act."<sup>140</sup> Similarly, in *Dowling v. United States*,<sup>141</sup> the Supreme Court allowed proof of other purported criminal conduct—a previous armed robbery of which the defendant was *acquitted*—to prove the commission of a robbery for which the defendant was being tried. This new standard will result in Rule 404(a) becoming virtually meaningless, thereby allowing inadmissible character proof to smear a defendant's character in front of the jury.<sup>142</sup>

*e. Sexual Abuse Cases*

New rules of evidence also have been enacted to make accessible to the prosecutor considerably more proof in sexual abuse cases, and to limit the ability of defendants to discredit complaining sex abuse victims. For example, the hearsay rule has been modified in many jurisdictions to allow an exception for the introduction of hearsay statements of child victims in sexual abuse cases.<sup>143</sup> By the same token, so-called "rape-shield statutes" have been enacted into the Federal Rules,<sup>144</sup> and the evidence codes in virtually every state,<sup>145</sup> to limit the ability of defense counsel to cross-examine victims in sexual abuse cases about their past sexual behavior. Statutes also have been enacted protecting such crime victims from having to confront the defendant physically during the trial.<sup>146</sup> Finally, legislation has been passed pro-

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140. *Huddleston*, 485 U.S. at 685.

141. 110 S. Ct. 668 (1990).

142. See *Estelle v. Maquire*, 112 S. Ct. 475 (1991) (crimes with which defendant was not even connected were admitted against the defendant, who was subsequently convicted).

143. KAN. STAT. ANN. § 60-460(dd) (1991); ILL. REV. STAT. § 115-10 (1990); COLO. REV. STAT. § 13-25-129 (1987).

144. FED. R. EVID. 412.

145. See, e.g., N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1981). See also J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544 (1980).

146. *Craig v. Maryland*, 110 S. Ct. 3157 (1990). The Victims of Child Abuse Act of 1990 authorizes the use of closed circuit television of the testimony of a child witness if one of four broadly worded factors is found: (1) the child is "unable to testify because of fear;" (2) there is "substantial likelihood that the child would suffer emotional trauma from testifying;" (3) the child suffers a "mental or other infirmity;" (4) conduct by defendant or defense counsel that "causes the child to be unable to continue testifying." If the television system or depositions are invoked, counsel for both sides may be present in the room with the child, but the defendant can be excluded, provided a closed circuit television system is set up to relay the defendant's image into the room where the child is testifying or being deposed, and means are available to permit the defendant to privately and contemporaneously communicate with counsel.

tecting crime victims in non-sex offense cases from unduly aggressive or harassing cross-examination concerning the victim's sexual conduct.<sup>147</sup>

*f. Expert Witnesses*

The ability of experts to give opinions has been expanded thus making it easier for the prosecutor to get key information admitted. Rule 702 of the Federal Rules has been interpreted to allow experts much wider latitude in giving conclusions about the ultimate issues in a case.<sup>148</sup> This trend is particularly noticeable in narcotics cases.<sup>149</sup> For example, experts for the prosecution have been allowed to give opinions that the defendant's conduct indicated that he was a "steerer" for drug sellers,<sup>150</sup> that a particular location appeared to be a narcotics "shooting gallery,"<sup>151</sup> or that furtive activity indicated that a sale of narcotics was taking place,<sup>152</sup> or that ambiguous scribbblings constituted notes of narcotics sales.<sup>153</sup> Rarely do the courts take note of the dangers from such conclusory testimony.<sup>154</sup>

*g. New Forensic Proof*

New forensic techniques have revolutionized prosecutions. DNA "fingerprinting," for example, has been hailed as the "single greatest advance in the 'search for truth' since the advent of cross-examina-

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147. N.Y. CRIM. PROC. LAW § 60.43 (McKinney 1981) (evidence of victim's sexual conduct in non-sex offense cases inadmissible unless judge determines evidence to be relevant and admissible in interest of justice).

148. FED. R. EVID. 704 ("testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact").

149. See Phyllis S. Bamberger, *The Dangerous Expert Witness*, 52 BROOK. L. REV. 855 (1986).

150. *United States v. Brown*, 776 F.2d 397, 400-01 (2d Cir. 1985), *cert. denied*, 475 U.S. 1141 (1986).

151. *United States v. Young*, 745 F.2d 733, 760-61 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985).

152. *United States v. Carson*, 702 F.2d 351, 369 (2d Cir.), *cert. denied*, 462 U.S. 1108 (1983).

153. *United States v. Duarte*, 950 F.2d 1255 (7th Cir. 1991).

154. See Bamberger, *supra* note 149. See also *United States v. Castillo*, 924 F.2d 1227 (2d Cir. 1991); *United States v. Long*, 917 F.2d 691, 702 (2d Cir. 1990); *United States v. Brown*, 776 F.2d 397, 401 (2d Cir. 1985) ("there is something rather offensive in allowing an investigating officer to testify not simply that a certain pattern of conduct is often found in narcotics cases, leaving it for the jury to determine whether the defendant's conduct fits the pattern, but also that such conduct fitted that pattern, at least when other inferences could have been drawn not unreasonably although perhaps not as reasonably as that to which the expert testified").



tion.”<sup>155</sup> Experts contend that DNA testing can prove with near-perfect accuracy the identity of a rapist or murderer.<sup>156</sup> Federal and state courts increasingly have accepted such proof, making it possible for prosecutors to gain convictions in cases that previously might not even have been brought.<sup>157</sup>

#### *h. Compelling Cooperation*

One of the most significant developments in skewing the balance of power in criminal procedure has been the prosecutor's enhanced ability to force witnesses to provide information and to cooperate by giving testimony.<sup>158</sup> The combination of the prosecutor's vast charging power coupled with mandatory sentencing laws enables prosecutors more than ever to force persons to cooperate with the prosecution, and to punish their failure to cooperate.<sup>159</sup> The ability of prosecutors to use immunity laws to compel reluctant witnesses to divulge information has been strengthened.<sup>160</sup> Indeed, immunity litigation graphically illustrates the disparity between the prosecution and defense. Courts have consistently held that prosecutors have the exclusive authority to select those

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155. *People v. Wesley*, 533 N.Y.S.2d 643, 644 (1988), *aff'd sub nom. People v. Bailay*, 549 N.Y.S.2d 846 (1989), *app. denied*, 551 N.E.2d 1238 (1990).

156. Herbert Moss, *DNA—The New Fingerprints*, 74 A.B.A. J. May 1, 1988 at 66. *See Cobey v. State*, 559 A.2d 391, 392 n.7 (Md. App. Ct.), *cert. denied*, 565 A.2d 670 (1989). Cellmark Diagnostics Corporation, located in Germantown, Maryland, one of the commercial laboratories marketing DNA testing, states that its DNA fingerprint test can identify a suspect with “virtual certainty,” and that the chance that any two people have the same DNA are one in 30 billion. *Id.* at 392 n.7.

157. *United States v. Jakobetz*, 747 F. Supp. 250 (D.C. Vt. 1990), *aff'd*, 1992 U.S. App. LEXIS 322 (Jan. 9, 1992); *State v. Davis*, 814 S.W.2d 593 (Mo. 1991), *cert. denied*, 1992 U.S. LEXIS 67 (Jan. 13, 1992); *Smith v. Deppish*, 807 P.2d 144 (Kan. 1991); *Caldwell v. State*, 393 S.E.2d 436 (Ga. 1990); *Spencer v. Commonwealth*, 384 S.E.2d 785 (Va. 1989), *cert. denied*, 493 U.S. 1093 (1990); *State v. Schwartz*, 447 N.W.2d 422 (Minn. 1989); *Andrews v. State*, 533 So. 2d 841 (Fla. App. Ct. 1988); *People v. Castro*, 545 N.Y.S.2d 985 (Sup. Ct. Bx. Co. 1989). *But see Commonwealth v. Curnin*, 565 N.E.2d 440 (Mass. 1991) (DNA results held invalid based on questionable testing); *Ex Parte Perry*, 586 So. 2d 242 (Ala. 1991) (foundation for DNA test results inadequate).

158. Under the Federal Sentencing Guidelines, and state immunity statutes, the prosecutor is the exclusive determiner of whether a person will be rewarded for giving assistance to law enforcement. On that determination hangs a person's life and liberty, or possible death sentence. *See Ricketts v. Adamson*, 483 U.S. 1 (1987) (prosecutor's unilateral determination that defendant broke plea bargain resulted in reinstatement of capital murder charge).

159. *See infra* notes 175-83 and accompanying text. In *Roberts v. United States*, 445 U.S. 552 (1980), the Supreme Court held that the defendant's failure to cooperate with the government may be urged by the prosecutor as a reason against lenity in the sentence.

160. *See United States v. Mandjuano*, 425 U.S. 564, 575 (1976); *Kastigar v. United States*, 406 U.S. 441 (1972).

persons who will be granted immunity, and those who will not be.<sup>161</sup> With minor exceptions,<sup>162</sup> the courts have refused to impose any restrictions on the prosecutor's immunity-granting power, such as requiring an equitable distribution of immunity to the defense where the prosecutor has already granted immunity to an important prosecution witness.<sup>163</sup>

### *i. Burden of Proof and Presumptions*

Legislatures and courts are sensitive to burden-of-proof issues in criminal prosecutions, and occasionally have sought to lessen the prosecutor's burden. For example, as a result of the prosecution of John Hinckley for attempting to assassinate President Reagan, Congress amended the insanity defense to shift the burden of proof from the prosecutor to the defense on the issue of legal insanity.<sup>164</sup> As a result of that change, the prosecutor is no longer required to disprove insanity;<sup>165</sup> the burden now has been placed on the defense to prove insanity by clear and convincing evidence.<sup>166</sup> Other burden-of-proof issues that often raise serious due process claims have been decided in the prosecu-

161. See *Blissett v. Lefevre*, 924 F.2d 434 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 158 (1991); *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981); *United States v. Bowling*, 666 F.2d 1052, 1055 (6th Cir. 1981), *cert. denied*, 455 U.S. 960 (1982); *Nebraska v. Ammons*, 305 N.W.2d 808 (Neb. 1981).

162. *United States v. Westerdahl*, 945 F.2d 1083 (9th Cir. 1991); *Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980); *United States v. DePalma*, 476 F. Supp. 775 (S.D.N.Y. 1979); *People v. Goetz*, 516 N.Y.S.2d 1007 (Sup. Ct. N.Y. 1987).

163. See *Earl v. United States*, 361 F.2d 531, 533-34 (D.C. Cir. 1966), *cert. denied*, 388 U.S. 921 (1967) (Circuit Judge Burger suggesting that the prosecutor's immunity granting power should not be used in a one-sided manner as to deny a defendant a fair trial).

In addition, there is generally no requirement that a prosecutor disclose the identity of an informant. See *United States v. Bourbon*, 819 F.2d 856, 860 (8th Cir. 1987); *United States v. Scafe*, 822 F.2d 928 (10th Cir. 1987). Nor is there a requirement that prosecution witnesses be ordered to talk to defense counsel. *United States v. Troutman*, 814 F.2d 1428 (10th Cir. 1987). However, a prosecutor must not "obstruct communication between prospective witnesses and defense counsel." ABA STANDARDS FOR CRIMINAL JUSTICE § 3-3.1(c) (2d ed. 1986); see *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966).

164. See Donald H.J. Hermann, *Assault on the Insanity Defense: Limitations on the Effectiveness and Effect of the Defense of Insanity*, 14 RUT. L.J. 241 (1983); Peter Arenella, *Reflections on Current Proposals to Abolish or Reform the Insanity Defense*, 8 AM. J.L. & MED. 271 (1982).

165. *Davis v. United States*, 160 U.S. 469 (1895); W.E. Shipley, Annotations, *Modern Status of Rules as to Burden and Sufficiency of Proof of Mental Irresponsibility in Criminal Cases*, 17 A.L.R. 3d 146 (1968).

166. See 18 U.S.C. § 17(b) (1989), which was added as part of the Comprehensive Crime Control Act of 1984. In more than half the states the defendant now must prove insanity by a preponderance of the evidence. H.R. REP. NO. 577, 98th Cong., 1st Sess. 14 (1983).

tor's favor on the merits,<sup>167</sup> or found to be harmless error.<sup>168</sup> By the same token, conclusive presumptions, such as the age of the victim,<sup>169</sup> or permissive presumptions, such as the rule that guns or drugs found in an automobile or an apartment are presumed to be in the possession of all occupants,<sup>170</sup> have been upheld against due process challenges.<sup>171</sup>

#### 4. Sentencing Power

##### a. Sentencing Guidelines

The prosecutor has traditionally played a crucial role at sentencing.<sup>172</sup> That role has expanded dramatically as a result of the Sentencing Reform Act of 1984, which produced the Federal Sentencing Guidelines.<sup>173</sup> The Guidelines were specifically designed to restrict the discretion of judges in imposing sentences.<sup>174</sup> Such restriction has pro-

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167. See *Patterson v. New York*, 432 U.S. 197 (1977); *Martin v. Ohio*, 480 U.S. 228 (1987). One of the controversial issues in criminal forfeiture law is the burden of proving forfeiture. Several courts have relieved the prosecutor of the burden of proving forfeiture beyond a reasonable doubt, and require only a preponderance of evidence. See *United States v. Herrera*, 893 F.2d 1512 (7th Cir.), cert. denied, 110 S. Ct. 2623 (1990); *United States v. Sandini*, 816 F.2d 869 (3d Cir. 1987).

168. *Kentucky v. Whorton*, 441 U.S. 786 (1979) (judge's refusal to give instruction on the presumption of innocence harmless error); *Rose v. Clark*, 478 U.S. 570 (1986) (jury instruction containing erroneous rebuttable presumption harmless error).

169. See, e.g., MODEL PENAL CODE § 216.6(1); N.Y. PENAL LAW § 15.20(3) (McKinney 1987).

170. See, e.g., N.Y. PENAL LAW § 265.15 (McKinney 1989) (presumption of possession of weapon from presence in automobile or dwelling); N.Y. PENAL LAW § 220.25 (McKinney 1989) (presumption of possession of drugs from presence in automobile or dwelling).

171. See *County Court v. Allen*, 442 U.S. 140 (1979). The prosecutor also enjoys the benefit of increasingly favorable standards of appellate review that seek to preserve convictions. See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (applicable standard to sustain conviction is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

172. See ABA STANDARDS FOR CRIMINAL JUSTICE § 18-6.3(a) (2d ed. 1986) (prosecutor responsible for assisting sentencing court "as helpful a manner as possible"). The prosecutor's influence on the sentencing decision traditionally has resulted from his initial decision on the nature and extent of the charges brought; whether to invoke special offender or habitual offender statutes (see, e.g., 18 U.S.C. § 924(c), § 3576); whether to permit the defendant to plead guilty; whether to recommend leniency based on the defendant's cooperation with law enforcement. The prosecutor also has an obligation to make all relevant information bearing on sentence accessible to the sentencing court.

173. The Sentencing Guidelines were a product of the Sentencing Reform Act of 1984, 18 U.S.C. § 3551 and 28 U.S.C. §§ 991-998 (1988). The Supreme Court upheld the Guidelines against constitutional challenges based on separation of powers and delegation of authority. *Mistretta v. United States*, 488 U.S. 361 (1989).

174. *United States v. LaGuardia*, 902 F.2d 1010, 1013 (1st Cir. 1990). Arguments supporting the new sentencing power have pointed out that the sentencing function historically has been a

duced a corresponding enhancement in the prosecutor's discretion to make charging decisions and to force persons to cooperate. One federal district judge has characterized the expanded prosecutorial power under the new sentencing regime as possibly "the most fundamental change in the criminal justice system to have occurred within the past generation."<sup>176</sup> Several aspects of the prosecutor's new power under the Guidelines raise extremely troubling questions: the prosecutor's exclusive power to have the defendant's sentence reduced due to his cooperation; the prosecutor's ability unilaterally to dismiss charges to avoid evidentiary and procedural obstacles at trial, but to then use the same acts underlying those unproven charges to enhance punishment under much more lenient standards of proof; and the prosecutor's ability to manipulate the charges to undermine other constitutional protections, such as due process and the right to a speedy trial. Moreover, the prosecutor's power to manipulate capital sentencing decisions continues to make the death penalty the most arbitrary form of punishment in America.

*b. Rewarding Cooperation*

The most important provision in the Guidelines enabling a court to impose a lesser sentence is Guideline 5K1.1, which authorizes the prosecutor to notify the sentencing court that the defendant has rendered "substantial assistance" to the government in the investigation and prosecution of crime and thus permits a "downward departure" from the Guidelines sentence.<sup>176</sup> Without the prosecutor's motion for a downward departure based on the defendant's cooperation, the court must impose the sentence required under the Guidelines.<sup>177</sup> The prose-

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shared responsibility among the three branches of government, *Mistretta*, 488 U.S. at 390, that a defendant has no constitutional right to individualized sentencing, *Lockett v. Ohio*, 438 U.S. 586, 602 (1978), that Congress could have removed all judicial discretion from the Guidelines, and therefore could guide that discretion through the Guidelines. *United States v. White*, 869 F.2d 822, 825 (5th Cir.), *cert. denied*, 490 U.S. 1112, and *cert. denied*, 493 U.S. 1001 (1989).

175. *United States v. Roberts*, 726 F. Supp. 1359, 1363 (D.D.C. 1989) (Greene, J.). "The Guidelines are a dismal failure, a cancer of the federal criminal justice system." John Taylor, *The Federal Sentencing Guidelines*, AMERICAN LAWYER, Jan. 23, 1992 at 6. Professor Alschuler has deplored the "mechanistic and dehumanizing" aspects of the Guidelines. Albert W. Alschuler, *Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 CHI L. REV. 901 (1991). See also Gerald W. Heaney, *The Realities of Guidelines Sentencing: No End to Disparity*, 28 AMER. CRIM. L. REV. 161 (1991).

176. 18 U.S.C. § 3553(e) (1988); Guideline 5k1.1.

177. *United States v. Bruno*, 897 F.2d 691 (3d Cir. 1990); *United States v. Lewis*, 896 F.2d 246 (7th Cir. 1990); *United States v. Rexach*, 896 F.2d 710 (2d Cir.), *cert. denied*, 111 S. Ct. 433

cutor thus becomes the sole arbiter of whether a defendant may receive a downward departure. Moreover, although the circuits have differed on the standard of review governing the prosecutor's refusal to make a motion for such a departure,<sup>178</sup> all of the courts agree that the standard is very high.<sup>179</sup> Some courts will review the prosecutor's decision only if the defendant establishes that the prosecutor's refusal was made in bad faith or was arbitrary.<sup>180</sup> Other courts have suggested that absent a plea agreement, the prosecutor's decision is immune from judicial review even if bad faith is shown.<sup>181</sup> This results in the courts tolerating blatant infringements of constitutional rights.

*c. Punishment for Untried and Unproved Crimes*

The Guidelines have empowered prosecutors to introduce at sentencing hearings crimes that are far more serious than the crimes of which the defendant was convicted, but which have not been proven at trial. Given the lesser procedural protections and evidentiary standards at a sentencing proceeding than in a trial, there exists the temptation for prosecutors to withhold proof of such crimes until sentencing. Probably the most dramatic example of a sentencing hearing that functions as "a tail which wags the dog of the substantive offense" is *United States v. Kikumura*.<sup>182</sup>

In *Kikumura*, the defendant was convicted of several passport and

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(1990); *United States v. Francois*, 889 F.2d 1341 (4th Cir. 1989), *cert. denied*, 494 U.S. 1089 (1990). *But see* *United States v. Paden*, 908 F.2d 1229, 1234 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 710 (1991); *United States v. Justice*, 877 F.2d 664 (8th Cir.), *cert. denied*, 493 U.S. 958 (1989); *United States v. Curran*, 724 F. Supp. 1239 (C.D. Ill. 1989).

178. *Compare* *United States v. Gonzalez*, 927 F.2d 139, 145-46 n.5 (3d Cir. 1991) (even if prosecutor's decision not to move under Guideline 5k1.1 is made in bad faith, it is not subject to judicial review) *with* *United States v. Villarino*, 930 F.2d 1527, 1530 (11th Cir. 1991) (prosecutor's decision not to move under Guideline 5k1.1 is reviewable to determine whether the prosecutor acted in good faith) *with* *United States v. Donatui*, 922 F.2d 1331, 1335 (7th Cir. 1991) (if prosecutor's refusal to make motion was "objectively reasonable," district court may not review that refusal merely because defendant alleges bad faith or vindictiveness).

179. *Id.*

180. *United States v. Hubers*, 938 F.2d 827 (8th Cir.), *cert. denied*, 112 S. Ct. 427 (1991); *United States v. Mena*, 925 F.2d 354, 355-56 (9th Cir. 1991); *United States v. Bayles*, 923 F.2d 70, 72 (7th Cir. 1991).

181. *United States v. Rexach*, 896 F.2d 710, 713 (2d Cir. 1989), *cert. denied*, 111 S. Ct. 433 (1990); *United States v. Wade*, 936 F.2d 169 (4th Cir. 1991), *cert. granted*, 112 S. Ct. 635 (1991).

182. 918 F.2d 1084, 1101 (3d Cir. 1990) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)). *McMillan*, a pre-Guidelines case, said that sentencing judge could hear evidence and find facts without any prescribed burden of proof so long as there is no legislation to the contrary. *McMillan*, 477 U.S. at 91.

weapons offenses having a sentencing range of between 27 and 33 months. The prosecutor introduced proof at the sentencing hearing that the defendant had manufactured three lethal home-made firebombs in preparation for a major terrorist bombing on American soil. Based on this conduct, for which the defendant was neither tried nor convicted, the district judge imposed a sentence of 30 years imprisonment, the largest departure since the Guidelines became effective. The Court of Appeals for the Third Circuit held that such a departure was legally permissible. Although he concurred in the result on preservation grounds,<sup>183</sup> Judge Rosenn expressed his concern that by deliberately collateralizing the most serious crimes for later use at sentencing, the prosecutor may have violated the defendant's right to due process.<sup>184</sup>

*d. Manipulation of Guidelines*

Prosecutors have manipulated the Guidelines in retaliation for defendants' exercise of constitutional rights. In *United States v. Mills*,<sup>185</sup> for example, the defendants claimed that the prosecutor's transfer of their cases from local court to federal court was a vindictive response to take advantage of the much harsher sentences under the Guidelines, in retaliation for the defendants' refusal to plead guilty in local court. The district court dismissed the indictments,<sup>186</sup> finding that the prosecutor had violated due process and the right to a speedy trial by arbitrarily selecting certain defendants for enhanced punishment after they had refused to plead guilty.<sup>187</sup> The Court of Appeals for the D.C. Circuit

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183. *Kikumura*, 918 F.2d at 1119. Judge Rosenn noted that the defendant failed to raise the objections on appeal, and the government had no opportunity to respond. *Id.* at 1121.

184. As Judge Rosenn observed, "Kikumura should have been charged and tried for that offense [attempted murder]. Failure to do so should preclude the Government from relying upon the separate crime of attempted murder as the vehicle for the drastic enhancement of the defendant's sentence." *Id.* at 1120. See also *United States v. Restrepo*, 946 F.2d 654, 661 (9th Cir. 1991) (en banc) (standard of proof of preponderance of evidence usually appropriate to prove factors to enhance sentence).

185. 925 F.2d 455, 463-64 (D.C. Cir. 1991).

186. *United States v. Holland*, 729 F. Supp. 125, 132 (D.D.C. 1990); *United States v. Roberts*, 726 F. Supp. 1359, 1377 (D.D.C. 1989), *rev'd sub nom.* *United States v. Mills*, 925 F.2d 455 (D.C. Cir. 1991).

187. *Holland*, 729 F. Supp. at 132; *Roberts*, 726 F. Supp. at 1377. In *Holland* the district court found a violation of the Speedy Trial Act because the federal indictment was filed well beyond the 30-day limit. *Holland*, 729 F. Supp. at 130, 132; see also 18 U.S.C. § 3161(b) (1988) (setting forth 30 day limit under Speedy Trial Act). The due process violation was found in the prosecutor's abuse of power by timing the transfers shortly after the defendants' rejections of the plea offers.

reversed,<sup>188</sup> upholding the prosecutor's discretion against the claim of vindictiveness.<sup>189</sup>

### *e. Capital Sentencing*

It is becoming increasingly evident that capital cases, from beginning to end, represent an extraordinary instance of the prosecutor's use and abuse of power.<sup>190</sup> As indicated above, the prosecutor's decision to seek the death penalty is immune from judicial review, even if it can be convincingly shown that the decision was racially motivated.<sup>191</sup> Moreover, the prosecutor's ability to obtain a capital conviction has been enhanced by his ability to select a conviction-prone jury.<sup>192</sup> Additionally, the spectre of the death penalty provides the prosecutor with powerful leverage to secure convictions through guilty pleas.<sup>193</sup> Capital sentencing also provides prosecutors with a forum to engage in overwhelming rhetoric designed to convince the jury to impose death.<sup>194</sup>

188. *Mills*, 925 F.2d at 463-64. The court, however, remanded the case to determine whether the transfer decision violated the defendants' Sixth Amendment right to a speedy trial. *Mills*, 925 F.2d at 465. The court cited *Barker v. Wingo*, 407 U.S. 514, 530 (1972), for the proposition that the Sixth Amendment right, unlike the statutory right, turns not on precise time periods but rather on a broad balancing of considerations, which include the length of the delay before trial, the reasons for the delay, the vigor with which the defendant asserted his speedy trial right, and the degree of prejudice to the defendant. *Mills*, 925 F.2d at 464.

189. Courts have held that when a defendant is arrested on nonfederal charges, the federal speedy trial "clock" does not begin to run until federal charges are actually filed. *United States v. Charles*, 883 F.2d 355, 356 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 750 (1990). A District of Columbia arrest has been treated as a state arrest. *United States v. Robertson*, 810 F.2d 254, 256-58 (D.C. Cir. 1987).

190. *See, e.g.*, *Amadeo v. Zant*, 486 U.S. 214, 217-18 (1988) (prosecutor instructed jury commissioners to underrepresent blacks and other minorities in jury pool); *Lindsey v. King*, 769 F.2d 1034, 1036-39 (5th Cir. 1985) (prosecutor withheld evidence that key prosecution witness had told police he could not identify perpetrator).

191. *See supra* notes 108-15 and accompanying text.

192. *See Lockhart v. McCee*, 476 U.S. 162, 173 (1986) (in holding that states may exclude from capital juries persons who would never be able to vote for death penalty, Court found it constitutionally irrelevant that such exclusions could produce conviction-prone juries); *Buchanan v. Kentucky*, 483 U.S. 402, 414-20 (1987); *Tabak & Lane, supra* note 108, at 66.

193. *North Carolina v. Alford*, 400 U.S. 25 (1970) (threat of execution permissible coercion in persuading defendant to plead to lesser degree of murder). *See Tabak & Lane, supra* note 108, at 66. *See also* WELSH S. WHITE, *THE DEATH PENALTY IN THE EIGHTIES. AN EXAMINATION OF THE MODERN SYSTEM OF CAPITAL PUNISHMENT* 40 (1987).

194. *Darden v. Wainwright*, 477 U.S. 168 (1986); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Edwards v. Scroggy*, 849 F.2d 204, 210 (5th Cir. 1988), *cert. denied*, 489 U.S. 1059 (1989) (taxpayers would save money if defendant executed); *Campbell v. Kincheloe*, 829 F.2d 1453, 1457 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988) (society has right to self-defense against defendant); *Harich v. Wainwright*, 813 F.2d 1082, 1095 (11th Cir.), *reh'g granted*, 828 F.2d 1497 (11th Cir. 1987) (prosecutor tells jury defendant's murder the most heinous, atrocious,

The Supreme Court has condoned various prosecutorial excesses in sentencing proceedings,<sup>195</sup> and has relaxed evidentiary restrictions on the use of inflammatory evidence. Thus, in *Payne v. Tennessee*,<sup>196</sup> the Court overruled recent precedents,<sup>197</sup> and validated the admission of evidence at capital sentencing hearings to prove that the murder committed by the defendant had an adverse impact on the victim's family. Before *Payne*, because "death is different,"<sup>198</sup> the Supreme Court believed that it was appropriate to make evidentiary distinctions that allowed proof of factors that mitigated against the death penalty, while disallowing proof of aggravating factors felt not to be relevant.<sup>199</sup> The Court no longer believes that this distinction is valid. The Court now apparently believes that the ability of a defendant to avoid death should be equated with the ability of the prosecutor to prove the value of the deceased's life. This is a perverse position to take. The worth of the deceased will invariably be shown to be more valuable than the life of the killer. This inflammatory proof unfairly increases the likelihood of execution.

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and evil he has ever known); *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *Willie v. Maggio*, 737 F.2d 1372 (5th Cir.), *cert. denied*, 469 U.S. 1002 (1984); *Commonwealth v. Chambers*, 599 A.2d 630, 643-44 (Pa. 1991). See Welsh S. White, *Prosecutors' Closing Arguments at the Penalty Trial*, 18 N.Y.U. REV. L. & SOC. CHANGE 297 (1991); Tabak & Lane, *supra* note 108, at 67; Ursula Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH. U. L.Q. 573 (1985).

195. See *California v. Brown*, 479 U.S. 538 (1987); *Zant v. Stephens*, 462 U.S. 862 (1983); *Gardner v. Florida*, 430 U.S. 349, 358 (1977); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

196. 111 S. Ct. 2597 (1991).

197. *South Carolina v. Gathers*, 490 U.S. 805 (1989); *Booth v. Maryland*, 482 U.S. 496 (1987). The Court in *Payne* explained its willingness to overrule recent precedents that were "wrongly decided."

*Booth* and *Gathers* were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by members of the Court in later decisions, and have defied consistent application by the lower courts.

*Payne v. Tennessee*, 111 S. Ct. 2597, 2610-11 (1991).

Justice Marshall, in dissent, wrote:

Power, not reason, is the new currency of this Court's decision-making . . . The implications of this radical new exception to the doctrine of *stare decisis* are staggering. The majority today sends a clear signal that scores of established constitutional liberties are now ripe for reconsideration, thereby inviting the very type of open defiance of our precedents that the majority rewards in this case.

*Id.* at 2619.

198. *Gregg*, 428 U.S. at 188 (Court has "recognize[d] that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice"). See also the Court's plurality decisions in *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Woodson v. North Carolina*, 428 U.S. 280 (1976).

199. *Gathers*, 490 U.S. at 805; *Booth*, 482 U.S. at 496.



## *B. From Deterrence to License*

The judiciary's willingness to use its power to deter governmental misconduct has been one of the overriding themes in modern criminal procedure. The Warren Court's criminal procedure jurisprudence sought to protect the rights of criminal defendants, in part, by establishing rules of proper conduct for prosecutors.<sup>200</sup> A major rationale for the exclusionary rule was to deter governmental violations of constitutional rights.<sup>201</sup> Similarly, a principal purpose of the use of supervisory power was to curb governmental conduct.<sup>202</sup> The erosion of the exclusionary rule has signaled the Court's rejection of deterrence as a goal of criminal justice policy in favor of a conviction-oriented model.<sup>203</sup> This transition has been supported by the expanded use of harmless error review, the demise of supervisory power, and the dilution of standards for prosecutorial conduct, which tacitly have granted prosecutors a license to "strike foul blows."<sup>204</sup>

### *1. Expansion of Harmless Error*

The harmless error rule authorizes appellate courts to affirm a conviction when the defendant's guilt is clear, even though he may have received an unfair trial.<sup>205</sup> The rule has been described as "insidious,"<sup>206</sup> for the way it insulates from appellate sanction flagrant constitutional as well as non-constitutional violations, and "chaotic"<sup>207</sup> and

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200. See, e.g., *Miller v. Pate*, 386 U.S. 1 (1967) (misconduct in presenting evidence); *Griffin v. California*, 380 U.S. 609 (1965) (improper closing argument to jury); *Brady v. Maryland*, 373 U.S. 83 (1963) (suppression of exculpatory evidence).

201. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) ("the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it'", quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

202. *United States v. Payner*, 447 U.S. 727, 735-36 n.8 (1980) ("detering illegality" one of principal purposes of supervisory power).

203. Charles H. Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASH. L.J. 471 (1985).

204. *Berger v. United States*, 295 U.S. 78, 88 (1935) ("while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones").

205. *Rose v. Clark*, 478 U.S. 570, 588-589 (1986) (Stevens, J., concurring); Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 646-47 (1972).

206. Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, J. CRIM. L. & CRIMINOLOGY 421 (1980).

207. Stephen A. Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 998 (1973).

"wayward,"<sup>208</sup> for its standardless and ad hoc application. The rule originally developed as an appellate device to prevent "the mere etiquette of trials" or the "minutiae of procedure" from upsetting a verdict.<sup>209</sup> The rule has developed into the most powerful judicial weapon to preserve convictions whenever an appellate tribunal, sitting as a "super-jury," concludes that the defendant is clearly guilty. The harmless error rule thus modifies prosecutorial behavior in the most pernicious fashion: it tacitly informs prosecutors that they can weigh the commission of evidentiary or procedural violations not against a legal or ethical standard of appropriate conduct, but rather, against an increasingly accurate prediction that the appellate courts will ignore the misconduct when sufficient evidence exists to prove the defendant's guilt.<sup>210</sup>

The harmless error rule has been a jurisprudential fiasco. The rule was never intended to sanction the denial of a fair trial.<sup>211</sup> As Justice

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208. ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 13 (1970).

209. *Bruno v. United States*, 308 U.S. 287, 294 (1939) (Frankfurter, J.).

210. Professor Goldberg has described the behavioral consequences on prosecutors resulting from the judiciary's increased reliance on harmless error review.

Every time an error is declared harmless in a particular situation, it diminishes the risk to the prosecutor in the use of the evidence or the technique. The lessening of the risk is added into a formula which favors risk-taking based upon the doctrine alone. In a sense, the doctrine encourages the prosecutor to use the evidence or the technique in every case. Initially, there are three possibilities: (1) the evidence or technique does not involve any error, (2) if the evidence or technique involves error, it will be harmless, and (3) the evidence or technique involves error that will cause a reversal because the remainder of the evidence is not "overwhelming." What should the intelligent and conscientious risk assessor do? The first two possibilities present no question. If there is no error there is no problem, and if the error is harmless the only problem is the time and expense of an appeal. The result is the same: a *legal* conviction. Convictions which are legal are, after all, what the society pays the prosecutor to obtain. The third choice is the problem. The court has defined a doctrine of harmless constitutional error which says to a prosecutor that if the case is not overwhelming any error will cause a reversal, and if it is overwhelming, no worry. The prosecutor then looks at the case and determines that it is not very strong. Use of the evidence or technique has two chances of success—no error and harmless—and one chance of failure. By the Court's definition of "harmless," that one chance of failure demands that the evidence or technique be crucial to the prosecutor's case. The prosecutor has no advocate's choice which mitigates in favor of not using the evidence or technique. Even if the prosecutor believes the case is strong, the likelihood is that the evidence or technique will be used. The odds are still two-to-one. Further, the advocate's predilection to cover every base is reinforced by the doctrine's admonition: if the evidence or technique is not needed by the advocate it is not likely to cause a reversal.

Goldberg, *supra* note 206, at 439-40.

211. Indeed, the harmless error rule is being used to redefine constitutional rights under an outcome-determinative analysis. See *Delaware v. Van Arsdall*, 475 U.S. 673, 685-86 (1986) (White, J., concurring) (recommending that the Court should conclude that there was no violation

Frankfurter wrote in *Bollenbach v. United States*,<sup>212</sup> "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts." However, four decades later, a majority of the Supreme Court would observe: "Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed."<sup>213</sup> And just last Term, in a startling overruling of a long-established precedent,<sup>214</sup> five Justices concluded that the admission at trial against a defendant of his coerced confession could be harmless error.<sup>215</sup> The feverish intensity with which courts throughout the country have invoked harmless error to ignore serious evidentiary and procedural violations<sup>216</sup> inevitably invites the cynical response that "if [a defendant] is obviously guilty as charged, he has no fundamental right to be tried fairly."<sup>217</sup>

The purpose of this discussion is not so much to point out the essential absurdity of harmless error review, or its misuse in particular

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of Confrontation Clause when no prejudice was demonstrated, rather than concluding that prejudice was shown, but that it was harmless). Justice White's opinion is very troubling for its willingness to so casually redefine constitutional rights based on the particular harm. See Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process Than the Bottom Line*, 88 COLUM. L. REV. 1298 (1988). Just as disturbing is the fact it was Justice White's dissenting opinion in *Stone v. Powell*, 428 U.S. 465, 538-542 (1976), that proved to be so influential in the Court's ultimate adoption of the good faith exception to the exclusionary rule. See *United States v. Leon*, 468 U.S. 897 (1984).

212. 326 U.S. 607, 614 (1946).

213. *Rose v. Clark*, 478 U.S. 570, 579 (1986).

214. *Chapman v. California*, 386 U.S. 18, 23 n.8 (1967) ("[T]here are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," one example being the use of a coerced confession against a defendant.).

215. *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991). Chief Justice Rehnquist, writing for a majority in *Fulminante*, made the distinction between "trial errors," every one of which could be considered harmless error, and so-called "structural defects," which cannot be harmless. Two such structural defects which "defy analysis by 'harmless error' standards" are the total deprivation of the right to counsel at trial, guaranteed by *Gideon v. Wainwright*, 372 U.S. 335 (1963), and the right to an impartial judge, guaranteed by *Tumey v. Ohio*, 273 U.S. 510 (1927). *Fulminante*, 111 S. Ct. at 1263-65.

216. The federal courts are using an even broader harmless error test when a constitutional claim is raised collaterally on habeas corpus. Under the test set forth in *Chapman v. California*, 386 U.S. 18 (1967), the standard on direct appeal for assessing whether reversal is required is whether the violation was harmless beyond a reasonable doubt. One new standard to be applied on habeas review is whether the violation "had substantial or injurious effect and influence in determining the jury's verdict." *Brecht v. Abrahamson*, 944 F.2d 1363 (7th Cir. 1991).

217. Note, *Prosecutor Indiscretion: A Result of Political Influence*, 34 IND. L.J. 477, 486 (1959).

cases. Rather, it is to suggest the noxious effect of the rule on prosecutorial behavior. There is a close connection between the expansion of harmless error review and the rise of the New Prosecutor. Indeed, the most sinister effect of the recent escalation of harmless error review has been in its capacity to unleash prosecutors from the restraining threat of appellate reversal. Commenting on the "corrosive impact" of the harmless error rule on prosecutorial behavior, Justice Stevens wrote that "an automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case."<sup>218</sup>

Initially, prosecutors are well aware of the judiciary's inability to accurately measure harmless error. Appellate judges are poorly equipped to determine reliably from "the cold black and white of a printed record"<sup>219</sup> the impact upon the jury of various evidentiary or procedural violations. Many appellate judges have never sat as trial judges,<sup>220</sup> and therefore have had no experience administering a trial, sitting as fact-finders themselves, ruling on the admissibility of evidence, dealing with attorney conduct, and instructing juries on the law, to name just a few of the situations in which trial error or misconduct can occur. Moreover, it is virtually impossible for appellate judges to assess from a "dead record"<sup>221</sup> the demeanor of the participants and the reactions of the jurors.<sup>222</sup> A good example of the futility of measuring the impact of inflammatory prosecutorial conduct is *Darden v. Wainwright*.<sup>223</sup>

In *Darden*, the prosecutor in argument to the jury characterized

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218. *Rose v. Clark*, 478 U.S. 570, 588-89 (concurring opinion).

219. *United States v. Grunberger*, 431 F.2d 1062, 1067 (2d Cir. 1970).

220. A survey of the biographies of all sitting federal appellate judges shows that almost one-half of these judges have had no experience as trial judges. State appellate judges have relatively more trial-judge experience than federal judges.

221. *Bollenbach v. United States*, 326 U.S. 607, 615 (1946).

222. See *State v. Forte*, 572 A.2d 941, 942 (Vt. 1990) (quoting *La Barge Water Well Supply Co. v. United States*, 325 F.2d 798, 801 (8th Cir. 1963)) ("Even if we were to find scant support in the record for the new trial ruling, we are hard pressed to review what the trial court saw or heard. The demeanor of the participants and the reactions of the jurors to the [prosecutor's] conduct are difficult, if not impossible, to assess on review of the record."). See generally Peter D. Blanck, Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985) (empirically investigating the ability of trial participants to communicate through nonverbal behavior).

223. 477 U.S. 168 (1986).

the defendant as an "animal;" told the jury that the only guarantee against his committing future crimes would be to execute him; that he should have "a leash on him;" and that he should have "his face blown away by a shotgun."<sup>224</sup> The Supreme Court split 5-4 on whether these comments were harmless. The majority believed they were harmless, echoing familiar language used to preserve convictions: "Darden's trial was not perfect—few are—but neither was it fundamentally unfair."<sup>225</sup> No one, of course, will ever know the extent to which the jury was influenced by the prosecutor's patently improper remarks. After *Darden*, however, it would be a fairly safe guess that prosecutors, when choosing between restrained or inflammatory rhetoric, would be more likely to choose the latter.<sup>226</sup>

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224. *Id.* at 180 n.12.

225. *Id.* at 183 (quoting *Darden v. Wainwright*, 513 F. Supp. 947, 958 (M.D. Fla. 1981)).

226. See, e.g., *United States v. Weiss*, 930 F.2d 185, 196 (2d Cir.), *cert. denied*, 112 S. Ct. 133 (1991) (prosecutor's allusions to greed in Shakespeare's *Merchant of Venice* were not sufficiently shown to be anti-Semitic references, although prosecutor "could have chosen his words more carefully"); *United States v. Smith*, 930 F.2d 1081, 1088-89 (5th Cir. 1991) (prosecutor "mischaracterized the jury's role" by alluding to the grand jury's indictment as proof that case was a "federal case" but remarks were harmless); *Fisher v. Nix*, 920 F.2d 549, 552 (8th Cir. 1990) (prosecutor's "misleading" remarks were harmless); *United States v. Sullivan*, 919 F.2d 1403, 1425 (10th Cir. 1990) (court does not decide whether prosecutor's "highly improper" remarks that denigrated role of jury would have been basis for reversal); *United States v. Smith*, 918 F.2d 1551, 1562-63 (11th Cir. 1990) (prosecutor's appeal to jury to act as conscience of the community not improper when not "intended to inflame"); *United States v. Phillips*, 914 F.2d 835, 845 (7th Cir. 1990) (prosecutor's remarks that defendant a "liar," a "clumsy thick tongued thug," and a "bozo" improper but harmless); *United States v. North*, 910 F.2d 843, 894-95 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2235 (1991) (prosecutor's statement that defendant used tactics favored by Adolph Hitler inflammatory but harmless); *United States v. Machor*, 879 F.2d 945 (1st Cir. 1989), *cert. denied*, 493 U.S. 1081 and 493 U.S. 1094 (1991) (prosecutor's inflammatory statement that drugs "are poisoning our community and our kids die because of this" harmless); *United States v. Parker*, 869 F.2d 1377, 1390 (10th Cir. 1989) (inflammatory reference to victim's death harmless); *Coleman v. Saffle*, 869 F.2d 1377 (10th Cir. 1989), *cert. denied*, 494 U.S. 1090 (1990); *United States v. Hernandez*, 865 F.2d 925, 927-28 (7th Cir. 1989) (improper racial reference to "Cuban drug dealer" harmless); *United States v. Rodriguez-Estrada*, 877 F.2d 153, 158-59 (1st Cir. 1989) (prosecutor's reference to defendant as "liar" and "crook" improper but harmless); *Hopkinson v. Shillenger*, 866 F.2d 1185 (10th Cir. 1989) (prosecutor's expression of fear after murder of prospective witness improper but harmless); *Shepard v. Lane*, 818 F.2d 615, 621-22 (7th Cir.), *cert. denied*, 484 U.S. 929 (1987) (calling defendant liar, dog, animal, and stating it was too bad arresting officer had not broken defendant's skull "grossly improper" but harmless); *Clark v. Wood*, 823 F.2d 1241, 1251 (8th Cir.), *cert. denied*, 484 U.S. 945 (1987) (calling defendant a master liar, and that many persons believe he is "100% guilty" improper but harmless); *United States v. Sblendorio*, 830 F.2d 1382, 1395 (7th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988) (derogatory remarks about defense lawyer improper but harmless); *United States v. Giry*, 818 F.2d 120, 133 (1st Cir.), *cert. denied*, 484 U.S. 855 (1987) (comparing defendant's denial of criminal intent with Peter's denial of Christ grossly improper but harmless); *United States v. Lowenberg*, 853 F.2d 295, 302 (5th Cir. 1988), *cert. denied*, 489 U.S. 1032

Even decisions that impose significant restrictions on prosecutorial misconduct may be ignored by prosecutors who evaluate prospective misbehavior under a harmless error calculation. A good illustration is *Griffin v. California*.<sup>227</sup> There, the Supreme Court reversed a murder conviction on the grounds that the prosecutor's comments on the defendant's silence violated the Fifth Amendment privilege against self-incrimination.<sup>228</sup> Despite *Griffin*, prosecutors have repeatedly commented on the defendant's silence, and the appellate courts often have upheld the convictions by finding that the comments were harmless.<sup>229</sup> There is little doubt that prosecutors make these comments with full knowledge that they are committing a constitutional violation and despite repeated criticism by the appellate courts, have continued to violate the rule. When one appellate court, after repeated warnings, finally reversed a conviction, the Supreme Court reversed the appellate court, finding that the error was harmless.<sup>230</sup> This message is not lost on prosecutors. Rather than being deterred from committing misconduct, they

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(1989) (calling defendant a "filthy pimp" and his lawyer a "jack-in-the-box" for making repeated objections improper but harmless); *United States v. O'Connell*, 841 F.2d 1408, 1428-29 (8th Cir.), *cert. denied*, 487 U.S. 1210 and 488 U.S. 1011 (1989) (inflammatory and unfounded remarks about defense counsel harmless); *United States v. Jones*, 839 F.2d 1041, 1049-50 (5th Cir.), *cert. denied*, 486 U.S. 1024 (1988) (claiming that defense counsel suborned perjury "reprehensible" but harmless).

227. 380 U.S. 609 (1965).

228. The prosecutor's remarks overtly alluded to the defendant's silence, advising the jury:

He (defendant) would know that. He would know how she got down the alley. He would know how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Villasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.

These things he has not seen fit to take the stand and deny or explain.

And in the whole world, if anybody would know, this defendant would know.

Essie Mae is dead, she can't tell you her side of the story. The defendant won't.

*Id.* at 611.

229. See, e.g., *United States v. Hasting*, 461 U.S. 499 (1983); *United States v. Le Quire*, 943 F.2d 1554 (11th Cir. 1991); *United States v. Pallais*, 921 F.2d 684 (7th Cir. 1990), *cert. denied*, 112 S. Ct. 134 (1991); *United States v. Shakur*, 888 F.2d 234 (2d Cir. 1989), *cert. denied*, 493 U.S. 1087 and 110 S. Ct. 1485 (1990); *United States v. Sblendorio*, 830 F.2d 1382 (7th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988); *United States v. Skandier*, 758 F.2d 43, 44 (1st Cir. 1985); *United States v. Lavoie*, 721 F.2d 407, 408-09 (1st Cir. 1983), *cert. denied*, 465 U.S. 1069 (1984); *Buttrum v. Black*, 721 F. Supp. 1268 (N.D. Ga. 1989), *aff'd*, 908 F.2d 719 (11th Cir. 1990); *United States ex rel. Burns v. Haws*, 717 F. Supp. 600 (N.D. Ill. 1989).

230. *United States v. Hasting*, 461 U.S. 499 (1983).

are tacitly given a license to do so if they think that they can get away with it.<sup>231</sup>

That prosecutors actually do assess the risks and benefits associated with misconduct is an intuitively, anecdotally, and empirically well-founded conclusion. Intuition alone suggests that much unethical behavior by prosecutors is not inadvertent.<sup>232</sup> Prosecutors are knowledgeable and experienced lawyers who understand and are trained to apply legal and ethical rules. They prepare their cases thoroughly, and carefully rehearse the testimony of their witnesses. Prosecutors ordinarily accumulate substantial impeachment material to cross-examine the defendant and his witnesses. They know in advance the precise extent of their interrogation. Further, it would be incredible that a prosecutor's closing summation to the jury would not contain language and arguments carefully selected and deliberately formulated to have a devastating impact on the jury. Prosecutors know that they are more likely to win a conviction when they present a powerful and dramatic argument to the jury than when they present a more restrained argument.<sup>233</sup>

Prosecutors are well aware of the impact of inadmissible evidence on a jury, and they realize that they are more likely to benefit than lose from using inadmissible proof. One study conducted at the University of Washington tested the effects of inadmissible evidence on the decisions of jurors, and found that the impact of the inadmissible evidence was inversely related to the strength of the prosecutor's case.<sup>234</sup> Thus, when the prosecutor presented a weak case, the inadmissible evidence strongly prejudiced the jury in the prosecutor's favor. In this situation, "the controversial evidence becomes quite salient in the juror's minds."<sup>235</sup> Moreover, as most judges and lawyers are aware, even if the evidence is stricken, it nevertheless has an impact, perhaps an uncon-

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231. Judge Jerome Frank's often-quoted dissenting opinion in *United States v. Antonelli Fireworks, Co.*, 155 F.2d 631, 661 (2d Cir.), *cert. denied*, 329 U.S. 742 (1946), emphasized that a judicial attitude of "helpless piety" in the face of prosecutorial misconduct, and the use of "purely ceremonial language" to express disapproval, merely encourages further prosecutorial excesses, and also "breeds a deplorably cynical attitude towards the judiciary."

232. See Goldberg, *supra* note 206.

233. Behavioral studies of forensic conduct by prosecutors have made this point. See Saul Pyszcynski, *The Effects of Opening Statements on Mock Juror's Verdicts in a Simulated Criminal Trial*, 11 J. APP. SOC. PSYCH. 301 (1981); Elizabeth Calder, *The Relation of Cognitive and Memorial Processes to Persuasion in a Simulated Jury Trial*, 4 J. APP. SOC. PSYCH. 62 (1974).

234. Richard Sue, *The Effects of Inadmissible Evidence on the Decisions of Simulated Jurors—A Moral Dilemma*, 3 J. APP. SOC. PSYCH. 345 (1973).

235. *Id.* at 351.

scious one, on the individual juror's judgment.<sup>236</sup> The conscious or unconscious effect of stricken testimony or evidence is not lost on a prosecutor in tune with the psychology of the jury.<sup>237</sup>

Of course, a prosecutor who adopts the unethical norm and improperly introduces inadmissible proof or argument probably recognizes the risk of jeopardizing a conviction. When the prosecutor has a weak case, however, a subsequent reversal may be worth that risk. "Let's get the conviction now, and worry about the appeal later on," is not an uncommon attitude among some prosecutors. Thus, if winning convictions is the *raison d'être* of prosecutorial work—and it is with many prosecutors—then the harmless error rule plays right into the prosecutor's hands. The prosecutor with a strong case will not be deterred from engaging in misconduct because even if his conduct is criticized by an appellate court, the conviction still will be affirmed. Similarly, the prosecutor with a weak case will feel that he has nothing to lose and everything to gain by engaging in unethical behavior.

Harmless error review undoubtedly preserves convictions and saves judicial resources. By insulating prosecutors from serious misconduct, however, harmless error review encourages a "winning is everything" attitude with fairness being a mere afterthought. Accordingly, many defendants have had their convictions affirmed despite clear prosecutorial overreaching.

## 2. *Demise of Supervisory Power*

Whatever judicial constraints over prosecutorial excesses that existed under the so-called Supervisory Power Doctrine have largely been removed. Nearly fifty years ago, in *McNabb v. United States*,<sup>238</sup> Justice

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236. See *Krulwich v. United States*, 336 U.S. 440, 453 (1949) (characterizing curative instruction as a "fiction") (Jackson, J., concurring); *United States v. Grunewald*, 233 F.2d 556, 574 (2d Cir. 1956), *rev'd*, 353 U.S. 391 (1957) (characterizing curative instruction as a "judicial lie") (Frank, J., dissenting); *United States v. Delli Paoli*, 229 F.2d 319, 321 (2d Cir. 1956), *aff'd*, 352 U.S. 232 (1957) (characterizing curative instruction as a "placebo").

237. Familiarity with prosecutorial tactics, which often do not differ markedly from tactics of trial lawyers generally, suggests that prosecutors frequently ask rhetorical questions knowing that the question is improper, but hoping to insinuate to the jury that the question itself conveys a factual basis adverse to the defendant. This practice is explicitly unethical. See ABA STANDARDS FOR CRIMINAL JUSTICE § 3-5.7(d) (2d ed. 1986) ("It is unprofessional conduct for a prosecutor to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking"). Of course, negating the prosecutor's claim of the existence of a good faith belief might be difficult. But, *quaere*, how often do trial judges even put the prosecutor on the spot by demanding a good faith belief?

238. 318 U.S. 332 (1943).



Frankfurter wrote that the federal courts have "the duty of establishing and maintaining civilized standards of procedure and evidence" that are broader in scope than protections afforded by the Constitution or statutes.<sup>239</sup> The twofold purpose of this supervisory power has been to deter governmental misconduct and preserve judicial integrity.<sup>240</sup> However, this effort to impose "extra-constitutional" standards on government behavior has been short-lived for several reasons. First, it required judges to impose on government officials their own notions of "good policy."<sup>241</sup> The judiciary has resisted this invitation.<sup>242</sup> Second, supervisory power increasingly has been viewed as an unwarranted judicial intrusion into the exclusive domain of a coordinate branch of government.<sup>243</sup> Finally, once supervisory power became subservient to the harmless error rule,<sup>244</sup> it became largely irrelevant.<sup>245</sup>

The Supreme Court has relied on the exercise of supervisory authority over the administration of criminal justice to promulgate rules of procedure and evidence in a variety of criminal settings, several of which regulated prosecutorial behavior.<sup>246</sup> Lower federal courts fol-

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239. *Id.* at 340-341. See Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984).

240. *United States v. Payner*, 447 U.S. 727, 735-736 n.8 (1980).

241. *Fay v. New York*, 332 U.S. 261, 287 (1947).

242. *United States v. Russell*, 411 U.S. 423, 435 (1973) (decisions of lower federal courts on law enforcement practices "introduce[] an unmanageably subjective standard"); *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991) ("The supervisory power simply does not give the courts the authority to make up the rules as they go, imposing limits on the executive according to whim or will").

243. *Russell*, 411 U.S. at 435 ("the execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government"); *Simpson*, 927 F.2d at 1091 ("The doctrine of separation of powers requires judicial respect for the independence of the prosecutor").

244. *United States v. Hasting*, 461 U.S. 499 (1983); *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988).

245. The most recent application of supervisory power by the Supreme Court was *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), in which the Court held that counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order. This case dealt with a blatant conflict of interest by an attorney; it did not address misconduct by prosecutors generally, nor seek to regulate any particular instance of prosecutorial conduct.

246. *United States v. Hale*, 422 U.S. 171 (1975) (restriction on impeachment by prosecutor); *Jencks v. United States*, 353 U.S. 657 (1957) (prosecutor's duty to provide defense with prior statements of witness); *Roviaro v. United States*, 353 U.S. (1957) (prosecutor's duty to disclose informant's identity); *Mesarosh v. United States*, 352 U.S. 1 (1956) (prosecutor witness who gave false testimony "polluted" integrity of trial).

lowed the Supreme Court's lead.<sup>247</sup> One of the principal areas in which the courts have exercised supervisory power has been in preventing prosecutorial abuse of the grand jury's process and authority.<sup>248</sup> Admittedly, the parameters of the supervisory power doctrine are unclear, and courts and commentators have disagreed on the underlying rationale for its use and on the circumstances justifying judicial intervention.<sup>249</sup>

Regardless of whether supervisory power is a legitimate doctrine to curb prosecutorial excesses, however, the important point is that prosecutors for over forty years recognized it as a limitation on their independence. Today, prosecutors can and would be foolish to regard supervisory power as a serious threat to their autonomy. The doctrine has become an empty shell, liberating prosecutors from a potential check on their authority, and serving mostly as a reminder to lower federal courts not to usurp the prosecutor's prerogative.<sup>250</sup>

The demise of supervisory power can be traced to *United States v. Russell*,<sup>251</sup> where the Supreme Court reinstated a drug conviction that had been reversed by the court of appeals for excessive governmental involvement in the crime.<sup>252</sup> Undercover agents participated in the manufacture of illegal drugs by supplying an essential chemical to the drug ring. Reproaching lower federal courts for developing a variety of extra-constitutional rationales to constrain overzealous law enforcement conduct, the Court, in an opinion by then-Justice Rehnquist, warned the federal judiciary against exercising a "chancellor's foot veto over

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247. See Beale, *supra* note 239, at 1455-62 (listing cases).

248. See, e.g., *United States v. Hogan*, 712 F.2d 757 (2d Cir. 1983); *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979); *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979); *In re Grand Jury Proceedings*, 507 F.2d 963 (3d Cir.), *cert. denied*, 421 U.S. 1015 (1975); *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972); *United States v. Shuck*, 705 F. Supp. 1177 (N.D. W. Va. 1989), *rev'd*, 895 F.2d 962 (4th Cir. 1990); *United States v. Omni Int'l Corp.*, 634 F. Supp. 1414 (D.C. Md. 1986). See also Douglas P. Currier, Note, *The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment—A Basis for Curbing Prosecutorial Misconduct*, 45 OHIO ST. L.J. 1077 (1984).

249. Compare Beale, *supra* note 239, at 1520-22 (contending that supervisory power lacks authority in federal law and term should be abandoned) with Nelson Monaghan, *The Supreme Court, 1974 Term—Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 34-38 (1975) (contending that supervisory power is an appropriate form of federal common law).

250. *United States v. Simpson*, 927 F.2d 1088, 1091 (1990) ("[d]ismissing an indictment with prejudice encroaches on the prosecutor's charging authority, substituting a judicial wag-of-the-finger for the prosecutorial nod.").

251. 411 U.S. 423 (1973).

252. *United States v. Russell*, 459 F.2d 671 (9th Cir. 1972).

law enforcement practices of which it did not approve."<sup>253</sup> Such judicial intervention, Justice Rehnquist pointedly commented, "unnecessarily introduces an unmanageably subjective standard," and violates the principle of Separation of Powers.<sup>254</sup> Thus, governmental investigative conduct would be immune from judicial supervision unless that conduct implicates an independent constitutional right, or "is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction."<sup>255</sup>

Even flagrant governmental illegality that actually violates individual rights would be exempt from judicial supervision. Thus, in *United States v. Payner*,<sup>256</sup> the Court held that the doctrine did not authorize a court to suppress evidence that was illegally seized by the police if the seizure did not violate the rights of the defendant himself. Known as the "briefcase caper," *Payner* involved an admittedly illegal search and seizure by the police of documents found in a third party's briefcase that incriminated the defendant. The district court, in invoking the supervisory power doctrine, held that society's interest in deterring government conduct that "knowingly and purposefully" and in "bad faith hostility" violated a person's rights required suppression of the resulting evidence.<sup>257</sup> The Supreme Court reversed, holding that the interests of society in deterring illegal conduct and preserving judicial integrity should be subordinated to the interest of presenting reliable evidence of guilt to the factfinder.<sup>258</sup> *Payner* is more than a body blow to the supervisory doctrine; it is a symbolic statement from our highest court that

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253. *Russell*, 411 U.S. at 435.

254. *Id.*

255. *Id.* at 431-32. The Court's opinion cited *Rochin v. California*, 342 U.S. 165 (1952) as authority for this rule. *Rochin* is the classic case illustrating the due process limits on law enforcement investigative tactics. In *Rochin*, the Supreme Court determined that the police officers' use of a stomach pump to force two capsules of narcotics from the defendant's stomach offended due process. The Court, in a famous opinion by Justice Frankfurter, reversed *Rochin*'s conviction in the state courts, stating: "This is conduct that shocks the conscience." *Id.* at 172. In *Hampton v. United States*, 425 U.S. 484 (1976), a majority would allow a due process defense only in extreme cases of governmental misconduct. *Id.* at 494-95 n.6. The concurring opinion of Justice Powell referred to Judge Friendly's statement in *United States v. Archer*, 486 F.2d 670, 676-77 (2d Cir. 1973), that it would be "unthinkable" to permit government, in effect, to join a gang of hoodlums and practice violence on innocent citizens, in order to obtain evidence against the gang.

256. 447 U.S. 727 (1980).

257. *United States v. Payner*, 434 F. Supp. 113, 130 (N.D. Ohio 1977), *aff'd per curiam*, 590 F.2d 206 (6th Cir. 1979), *rev'd*, 447 U.S. 727 (1980).

258. *Payner*, 447 U.S. at 735 (supervisory power does "not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court").

in certain cases involving law enforcement excesses, the end really does justify the means.

However, the real death-knell of supervisory power over prosecutorial misconduct at trial was struck in *United States v. Hastings*.<sup>259</sup> The Court of Appeals for the Seventh Circuit had reversed kidnapping convictions on the ground that the prosecutor's summation infringed on the defendants' Fifth Amendment privilege in direct violation of repeated and explicit warnings by the circuit court against such misconduct.<sup>260</sup> Clearly, the court of appeals sought to vindicate the interests that the supervisory power doctrine was explicitly designed to address—detering prosecutorial overreaching and preserving judicial integrity. The Supreme Court reversed, holding that supervisory power could not be used to censure prosecutorial misconduct without first determining whether the defendant was prejudiced by the conduct.<sup>261</sup> Of course, if the prosecutor's conduct was harmful, there would be no need to invoke the supervisory power doctrine, since reversal could then be predicated on the prejudicial conduct.

Finally, the use of supervisory power in the pretrial context to sanction the prosecutorial misconduct inside the grand jury was curbed in *Bank of Nova Scotia v. United States*,<sup>262</sup> essentially on the same prejudicial error rationale as *Hasting*. Here again, prejudice to the defendant was the linchpin; lacking harm, no foul would be found. As with harmless error review, the clear message to lower courts is that sufficient proof of guilt will insulate almost any amount of prosecutorial misconduct from reversal.<sup>263</sup>

### 3. *Absence of Meaningful Standards to Guide Prosecutorial Discretion*

One of the most disturbing developments in criminal justice over the last two decades has been the judiciary's failure to provide clear standards that would place some rational limits on the prosecutor's discretion. The decisions are increasingly ad hoc, and do not lend themselves to systematic analysis. They appear to allow the exercise of virtu-

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259. 461 U.S. 499 (1983).

260. *United States v. Hastings*, 660 F.2d 301 (7th Cir. 1981).

261. *Hasting*, 461 U.S. 499 (1983).

262. 487 U.S. 250 (1988).

263. But see *United States v. Marshank*, 777 F. Supp. 1507 (N.D. Cal. 1991) and *United States v. Lopez*, 404 U.S. 1213 (1971), for examples of courts breaking the trend and exercising their supervisory power.

ally unlimited prosecutorial discretion, and drastically curtail the ability of defendants to prove the existence of prosecutorial abuses.

Decisions dealing with the prosecutor's suppression of evidence make the point. In *Brady v. Maryland*,<sup>264</sup> the Supreme Court held, for the first time, that due process requires a prosecutor to disclose exculpatory evidence to the defense. Describing the prosecutor's duty, the Court said, "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."<sup>265</sup>

In decisions prior to *Brady* dealing with the prosecutor's use of perjured testimony,<sup>266</sup> and decisions following *Brady* dealing with a prosecutor's failure to disclose specifically requested evidence,<sup>267</sup> the Court indicated that the prosecutor's culpability in suppressing favorable evidence would be counted against the prosecutor in deciding on the appropriate remedy.<sup>268</sup> Plainly, if some degree of prosecutorial bad faith in this distortion of the fact-finding process is considered to be relevant, then a ruling imposing more severe sanctions upon prosecutors for intentionally withholding exculpatory evidence would make sense.<sup>269</sup> Faced with an opportunity to fashion a rule that might make prosecutors more alert to their disclosure obligations, and discourage acts of willful misconduct, the Supreme Court retreated. Thus, in *Smith v. Phillips*,<sup>270</sup> a murder trial, the prosecutor hid from the defense information that a juror had sought employment with the same prosecutor's office. The Court of Appeals for the Second Circuit granted the habeas corpus petition,<sup>271</sup> but the Supreme Court reversed, concluding that there was no proof of actual bias by the juror, nor proof that the defendant was prejudiced by the non-disclosure. Writing

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264. 373 U.S. 83 (1963).

265. *Id.* at 87.

266. *Pyle v. Kansas*, 317 U.S. 213 (1942); *Mooney v. Holohan*, 294 U.S. 103 (1935).

267. *United States v. Agurs*, 427 U.S. 97 (1976); *Moore v. Illinois*, 408 U.S. 786 (1972).

268. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (prosecutor's "deliberate deception . . . is inconsistent with rudimentary demands of justice"); *Napue v. Illinois*, 360 U.S. 264, 269 (1959) (prosecutor's "knowing [] use [of] false . . . testimony" violates due process); *Giglio v. United States*, 405 U.S. 150, 154 (1972) (prosecutor should have known about witness's false testimony); *Agurs*, 427 U.S. at 106 (prosecutor's failure to respond to defendant's specific request "seldom, if ever, excusable").

269. This is not to suggest that a prosecutor's inadvertent nondisclosure of material evidence should not result in the imposition of sanctions. Clearly sanctions should be imposed, first, to encourage prosecutors to be more vigilant about their discovery obligations, and second, to prevent a distortion of the fact-finding process regardless of the prosecutor's dereliction.

270. 455 U.S. 209 (1982).

271. *Smith v. Phillips*, 632 F.2d 1019 (2d Cir. 1980).

for the majority, then-Justice Rehnquist observed that the prosecutor's unethical conduct could be overlooked because the "touchstone of due process analysis is the fairness of the trial, not the culpability of the prosecutor."<sup>272</sup>

This failure to articulate standards for responsible conduct by prosecutors was further demonstrated in *United States v. Valenzuela-Bernal*.<sup>273</sup> There, the prosecutor ordered the deportation of illegal-alien eyewitnesses to the defendant's crime before they could be interviewed by defense counsel. The Court of Appeals for the Ninth Circuit reversed the conviction, finding that the prosecutor's conduct deprived the defendant of his Sixth Amendment right to compulsory process.<sup>274</sup> Again the Supreme Court reversed. The prosecutor's motive in deliberately ordering the deportation of these witnesses was irrelevant. According to the Court, the prompt deportation of illegal aliens is an overriding duty of the Executive Branch to which courts must defer absent a "plausible showing" that the lost evidence would be favorable and material to the defense.<sup>275</sup>

The Court also has made it much more difficult to remedy prosecutorial disclosure violations by imposing a heavier burden on the defense to prove prejudice. In *United States v. Agurs*,<sup>276</sup> the Court had formulated different standards for finding a due process violation depending on whether or not the evidence was specifically requested by the defense. The Court had fashioned a more stringent test against the prosecutor when the defense had made a specific request for evidence, since in that case the prosecutor was given notice, and it was therefore "reasonable to require the prosecutor to respond."<sup>277</sup> Indeed, "[w]hen

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272. 455 U.S. at 219 (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

273. 458 U.S. 858 (1982).

274. *United States v. Valenzuela-Bernal*, 647 F.2d 72 (9th Cir. 1981).

275. *Valenzuela-Bernal*, 458 U.S. at 873. Of course, as the dissent pointed out, *id.* at 883, showing the importance of evidence without an opportunity to examine that evidence first can be exceedingly difficult. This same difficulty in proving the materiality of lost or destroyed evidence was held by the Court in two subsequent decisions to be an insufficient basis on which to impose a higher standard on prosecutors. See *California v. Trombetta*, 467 U.S. 479 (1984); *Arizona v. Youngblood*, 488 U.S. 51 (1988).

276. 427 U.S. 97 (1976).

277. *Id.* at 106. Thus, reversible error occurs if the suppressed evidence "might have affected the outcome of the trial." *Id.* at 104. According to Justice Stevens, who authored the *Agurs* opinion, suppressed evidence that has been specifically requested is material "if there is 'any reasonable likelihood' that it could have affected the judgment of the trier of fact." *United States v. Bagley*, 473 U.S. 667, 713 (1985) (dissenting opinion).

the prosecutor receives a specific request, the failure to make any response is seldom, if ever, excusable."<sup>278</sup>

In *United States v. Bagley*,<sup>279</sup> however, the Court jettisoned this standard in favor of a single test to cover specific request and non-request cases. Under this standard, the prosecutor's willful failure to disclose specifically requested information will not be remedied unless there is a "reasonable probability" that had the evidence been disclosed, the result of the proceeding would have been different.<sup>280</sup> What this means in practice is that if the prosecutor hides important evidence and a conviction results, reversal will not be ordered unless an appellate court can conclude that the trial jury probably would have acquitted the defendant had the evidence been disclosed. However, as noted above in discussing the harmless error rule, if substantial evidence of guilt exists, the prosecutor need not worry about the consequences of hiding exculpatory evidence. A court will conclude that it probably would not have changed the result.<sup>281</sup> If the case is weak, disclosure might destroy any chance for a conviction. Moreover, if the prosecutor hides the evidence, it might never be discovered. Thus, under the Supreme Court's current disclosure rules, the prosecutor's decision to suppress favorable evidence would be a perfectly rational, albeit unethical,<sup>282</sup> act.

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278. *Agurs*, 427 U.S. at 106. The need for a more stringent standard in specific request cases is readily understandable. When a prosecutor fails to respond to a specific request, the defense is harmed in two distinct ways. First, the defense loses favorable evidence that it would otherwise be able to use. Second, the defense strategy is skewed by the assumption, based on the prosecutor's response, that such evidence probably does not exist. The prosecutor's nondisclosure has thereby distorted the adversary process by depriving the fact-finder of relevant information needed to more fully arrive at the truth, and has undermined the defendant's right to a fair trial.

279. 473 U.S. 667 (1985).

280. *Id.* at 682. This new federal constitutional standard has been rejected by at least one state appellate court. In *People v. Vilardi*, 555 N.E.2d 915 (N.Y. 1990), the New York Court of Appeals, citing the state constitutional due process clause, refused to apply the federal standard announced in *Bagley* and imposed instead the more protective *Agurs* standard for prosecutorial suppression of evidence following a specific request.

281. Indeed, the courts have construed the standard quite broadly in favor of the prosecutor. See, e.g., *United States v. Endicott*, 869 F.2d 452 (9th Cir. 1989); *Myatt v. United States*, 875 F.2d 8 (1st Cir. 1989); *Delap v. Dugger*, 890 F.2d 285 (11th Cir. 1989); *United States v. Tinch*, 749 F. Supp. 1494 (S.D. Ohio 1990), *vacated*, 943 F.2d 53 (6th Cir. 1991).

282. ABA STANDARDS FOR CRIMINAL JUSTICE § 3-3.11 (2d ed. 1982); more reprehensible than suppressing favorable evidence is suborning perjury, or falsely representing to the jury that certain facts exist. See *Mooney v. Holohan*, 294 U.S. 103 (1935) (prosecutor's subornation of perjury to obtain murder conviction); *Miller v. Pate*, 386 U.S. 1 (1967) (prosecutor misrepresents to jury in murder case that pair of shorts worn by defendant were stained with victim's blood, when prosecutor knew the stains were paint); *DeMarco v. United States*, 928 F.2d 1074 (11th

Thus, by avoiding any inquiry into the prosecutor's culpability, and focusing entirely on the materiality of the evidence, the Court encourages prosecutors, even ethical prosecutors, to withhold evidence.<sup>283</sup> It is not an understatement to say that prosecutorial suppression of evidence presents perhaps one of the principal threats to a system of rational and fair fact-finding. It skews the ability of the adversary process to function properly by denying important evidence to the defense. As a result, countless defendants have been unjustly convicted, with the consequent loss of their liberty, and even their lives.<sup>284</sup> Many of the Supreme Court's landmark decisions dealing with prosecutorial suppression of evidence involved defendants facing execution.<sup>285</sup> Recently, a series of sensational accounts in the media dramatized this pernicious conduct.<sup>286</sup> Indeed, just a few months ago, a defendant on death row was executed, despite convincing proof that the prosecutor suppressed crucial evidence relating to the credibility of the government's key witness.<sup>287</sup>

The absence of any blameworthiness requirement in the disclosure context is also the rule for trial misconduct generally.<sup>288</sup> The prosecu-

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Cir. 1991) (prosecutor suborned perjury); *Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991) (prosecutor in murder case falsely insinuates that deceased was robbed when prosecutor knew that his property had been retrieved by relatives at the hospital); *United States v. Roark*, 924 F.2d 1426 (8th Cir. 1991) (suppression of discoverable evidence was reversible error); *In re Carpenter*, 808 P.2d 1341 (Kan. 1991) (prosecutor disciplined for misleading jury on basis of false evidence).

283. Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550 (1987) (concluding that disclosure violations may be committed by highly ethical prosecutors who are systemically incapable of observing their disclosure obligations).

284. See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN L. REV. 21 (1987) (article documents that 350 innocent persons were convicted of capital murders, that 23 of those persons were executed, with 22 narrowly winning reprieves, and that a significant number of these cases involved claims of prosecutorial suppression of evidence). See also *infra* notes 190-99 and accompanying text.

285. *Moore v. Illinois*, 408 U.S. 786 (1972); *Miller v. Pate*, 386 U.S. 1 (1967); *Brady v. Maryland*, 373 U.S. 83 (1963); *Alcorta v. Texas*, 355 U.S. 28 (1957).

286. See *infra* notes 346-55 and accompanying text.

287. *McKleskey v. Zant*, 111 S. Ct. 1454 (1991). The Court found that Warren McKleskey had "abused" the writ of habeas corpus by failing to raise his claim in an earlier petition, and that therefore the federal circuit court was correct in refusing to entertain the claim. It should be noted that the district court affirmatively found that the government covertly planted an informant in McKleskey's jail cell for the purpose of eliciting incriminating statements from him, and then misled McKleskey and his lawyer about the role of that informant. This informant was the crucial witness at trial to prove that McKleskey was the triggerman in the murder. The jury that sentenced McKleskey to die did not know of the informant's role as a government-planted spy. *Id.* at 1486-88 (Marshall, J., dissenting).

288. *McGrier v. United States*, 597 A.2d 36, 40 (D.C. App. 1991) ("[F]rom our standpoint the prosecutor's motive is essentially irrelevant. What matters instead is the effect of the disputed



tor's motive to unfairly prejudice a defendant ordinarily is not relevant. In some situations, however, it may be legally relevant, but almost impossible to prove. For example, prosecutorial misconduct that triggers a mistrial, when committed by the prosecutor with a deliberate "bad faith" purpose to unfairly prejudice the defendant's right to a fair trial, should be sufficient to allow the defendant to invoke double jeopardy to bar retrial.<sup>289</sup> In *Oregon v. Kennedy*,<sup>290</sup> however, the Supreme Court adopted the strictest conceivable test to allow a defendant to successfully invoke double jeopardy as a bar to retrial on grounds of prosecutorial misconduct.

According to the Court, the test is whether the prosecutor's misconduct was "intended to goad the defendant into moving for a mistrial."<sup>291</sup> The defendant has the burden of proving such a prosecutorial mens rea. Short of an outright admission by the prosecutor that his conscious purpose was to provoke a mistrial, however, the prosecutor's motive would be almost impossible to prove.<sup>292</sup> Under the *Kennedy* standard, a prosecutor with a weak or damaged case is encouraged to commit prejudicial conduct. If he gets away with it, he has a better chance of winning. If the defendant objects, and succeeds in obtaining a mistrial, the prosecutor will be able to retry the defendant with a better-prepared case unless the defendant is able to prove that the prosecutor committed the misconduct with the purpose of securing a mistrial.

Even decisions that superficially have restricted the prosecutor's autonomy are enforced in a manner that neutralizes, or totally eviscer-

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comment on the verdict.").

289. That the defendant has a "valued right to have his trial completed by a particular tribunal" is undisputed. *Wade v. Hunter*, 336 U.S. 684, 689 (1949). When a prosecutor engages in misconduct that taints the jury, the defendant faces a "'Hobson's choice' between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error." *United States v. Dinitz*, 424 U.S. 600, 609 (1976). If a defendant believes that he must sacrifice his chosen jury because it has been irreparably tainted by "bad faith" prosecutorial misconduct, double jeopardy protects the defendant against being forced to stand trial again and thereby "afford[ing] the prosecut[or] a more favorable opportunity to convict." *Id.* at 611 (quoting *Donovan v. United States*, 372 U.S. 734, 736 (1963)).

290. 456 U.S. 667 (1982).

291. *Id.* at 676.

292. *Id.* at 688 (Stevens, J., concurring). According to Justice Stevens, it should be sufficient for double jeopardy purposes that egregious prosecutorial misconduct rendered unmeaningful the defendant's choice to continue or terminate the proceedings. Moreover, it would be almost impossible to show that the prosecutor specifically intended to provoke a mistrial, rather than trying to prejudice the defendant and thereby gain a better chance for a conviction.

ates, that restriction. Thus, in *Batson v. Kentucky*,<sup>293</sup> the Supreme Court held that the Equal Protection Clause prohibits a prosecutor from using peremptory challenges to exclude otherwise qualified jurors solely by reason of their race. The defendant, however, bears the burden of proving purposeful discrimination.<sup>294</sup> To avoid sanctions, the prosecutor must articulate a race-neutral explanation for striking those jurors after the defendant has made out a *prima facie* showing that the prosecutor exercised his peremptory challenges on the basis of race. In practice, though, prosecutors are becoming increasingly adept at articulating race-neutral reasons that often appear to be pretextual, but are commonly accepted by the courts. Thus, in *Hernandez v. New York*,<sup>295</sup> the prosecutor explained that he struck several Hispanic jurors because he was "very uncertain that they would be able to listen and follow the interpreter."<sup>296</sup> Even though the prosecutor made no effort to properly challenge these jurors for cause, the trial judge credited the prosecutor's sincerity. As the Supreme Court noted, courts should give "great deference" to findings of prosecutorial credibility.<sup>297</sup>

The judiciary's unwillingness to set meaningful limits on the prosecutor's charging discretion is the principal reason for the prosecutor's dominance over the criminal justice system. Doctrines that purport to set limits are increasingly avoided or subverted. For example, the doctrine of selective prosecution requires a prosecutor to charge in a non-discriminatory fashion.<sup>298</sup> However, there is a presumption that the prosecutor acts in good faith,<sup>299</sup> and overcoming that presumption is almost never successful.

In *Wayte v. United States*,<sup>300</sup> the Supreme Court upheld the prosecutor's decision to charge the defendant with failing to register for the draft.<sup>301</sup> The defendant was one of a handful of vocal draft protesters

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293. 476 U.S. 79 (1986).

294. *Id.* at 96-98. The issue whether *Batson* applies to the exercise of peremptory challenges by the defense is gaining increasing attention. See *People v. Kern*, 554 N.E.2d 1235 (N.Y. 1990) (holding that *Batson* applies to exercise of peremptory challenges by defense). The Supreme Court has granted certiorari to decide whether the Constitution forbids a defendant from exercising peremptory challenges in a racially discriminatory manner. *Georgia v. McCollum*, 112 S. Ct. 370 (1991).

295. 111 S. Ct. 1859 (1991).

296. *Id.* at 1864-65.

297. *Id.* at 1869.

298. *Oyler v. Boles*, 368 U.S. 448 (1962); *Yick Wo v. Hopkins*, 118 U.S. 356 (1866).

299. *United States v. Saade*, 652 F.2d 1126, 1135 (1st Cir. 1981).

300. 470 U.S. 598 (1985).

301. Prior to *Wayte*, the leading case of selective prosecution in the draft context was

who were prosecuted, out of nearly a million non-vocal non-registrants who were not prosecuted. Wayte made a colorable showing that he was impermissibly targeted for prosecution based on his exercise of first amendment rights. He sought discovery of information in the prosecutor's files to support his claim of improper prosecutorial motivation. When the prosecutor resisted, the district judge dismissed the indictment.<sup>302</sup>

Instead of deciding the discovery issue, the Supreme Court addressed the showing that a defendant must make to prove selective prosecution. According to the Court, a defendant must show that the prosecutor harbored a motive to discriminate against him "*because of* his protest activities."<sup>303</sup> However, discovering that motive would be almost impossible because, as the Court observed, the issue of the prosecutor's motive was "ill-suited to judicial review" given the presumption of prosecutorial good faith, the prosecutor's recognized expertise in law enforcement, and the prosecutor's goals and priorities.<sup>304</sup> Moreover, the defendant would not be allowed to inspect the prosecutor's files to help prove the motive.

Similarly, prosecutors are not allowed to vindictively charge, i.e., to retaliate against a defendant by increasing the charges after the defendant has exercised constitutional or statutory rights.<sup>305</sup> Here again, however, a doctrine that potentially could limit improper prosecutorial charging practices has been eroded. Thus, in cases arising in almost every conceivable procedural context where a prosecutor has increased charges after a defendant has exercised certain rights, the courts almost always defer to the prosecutor's discretion.<sup>306</sup> This pattern of judicial permissiveness also is exemplified in plea bargaining,<sup>307</sup> immu-

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United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc).

302. Wayte v. United States, 549 F. Supp. 1376 (C.D. Cal. 1982).

303. Wayte, 470 U.S. at 610 (emphasis in original).

304. *Id.* at 607.

305. Blackledge v. Perry, 417 U.S. 21 (1974). The Court had previously ruled that due process protected a defendant against vindictiveness by a judge who imposes a harsher sentence after a defendant has successfully exercised a constitutional or statutory right. North Carolina v. Pearce, 395 U.S. 711 (1969).

306. United States v. Goodwin, 457 U.S. 368 (1982) (permissible vindictiveness in plea bargaining context); Bordenkircher v. Hayes, 434 U.S. 357 (1978) (same); United States v. Lizza Industries, Inc., 775 F.2d 492 (2d Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986) (no vindictiveness in adding charges after mistrial due to hung jury); United States v. Krezdorn, 718 F.2d 1360 (5th Cir. 1983) (en banc), *cert. denied*, 465 U.S. 1066 (1984) (increasing charges after successful appeal not vindictive).

307. Mabry v. Johnson, 467 U.S. 504 (1984) (prosecutor allowed to withdraw plea offer after acceptance but before execution of plea); North Carolina v. Alford, 400 U.S. 25 (1970)

nity,<sup>308</sup> and dismissal decisions.<sup>309</sup> As the Court observed, "The Due Process Clause is not a code of ethics for prosecutors."<sup>310</sup> The discussion that follows shows that even the code of ethics may not be the code of ethics for prosecutors.

### C. *Exemption from Ethical Restraints*

Ethical codes attempt to regulate many areas of prosecutorial behavior. Principal among them are the prosecutor's investigative<sup>311</sup> and charging functions,<sup>312</sup> disclosure of evidence,<sup>313</sup> plea discussions,<sup>314</sup> trial

(prosecutor allowed to use threat of death penalty to induce defendant to plead guilty to lesser degree of murder); *Campbell v. Marshall*, 769 F.2d 314 (6th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986) (prosecutor not required to disclose exculpatory evidence to defendant during plea negotiations); *United States v. Bell*, 506 F.2d 207 (D.C. Cir. 1974) (prosecutor allowed to treat codefendants differently in making plea offers).

308. *Ricketts v. Adamson*, 483 U.S. 1 (1987) (defendant's breach of plea agreement removes immunity protection); *United States v. Mandujano*, 425 U.S. 564 (1976) (constitutionally-required immunity does not prohibit prosecutor from charging defendant with crimes covered by immunity grant); *Kastigar v. United States*, 406 U.S. 441 (1972) (same).

309. *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (prosecutor allowed to demand that defendant release officials from civil liability in exchange for dismissal of charges).

310. *Johnson*, 467 U.S. at 511.

311. ABA STANDARDS FOR CRIMINAL JUSTICE § 3-3.1 (2d ed. Supp. 1986).

312. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A) (1980) (prosecutor shall not institute criminal charges when he knows that the charges are "not supported by probable cause"); NATIONAL PROSECUTION STANDARDS § 9.4(A) (Nat'l Dist. Attorney's Assoc. 1977) (prosecutor "shall file only those charges which he believes can reasonably be substantiated by admissible evidence at trial.").

The ABA STANDARDS FOR CRIMINAL JUSTICE § 3-3.9 (2d ed. Supp. 1986) contain the following provisions regarding the prosecutor's discretion to charge:

(a) It is unprofessional conduct for a prosecutor to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

(b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances, and for good cause consistent with the public interest, decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his or her discretion are:

- (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
- (ii) the extent of the harm caused by the offense;
- (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
- (iv) possible improper motives of a complainant;
- (v) reluctance of the victim to testify;
- (vi) cooperation of the accused in the apprehension or conviction of others; and
- (vii) availability and likelihood of prosecution by another jurisdiction.

(c) In making the decision to prosecute, the prosecutor should give no weight to the per-

conduct,<sup>315</sup> trial publicity,<sup>316</sup> and conflicts of interest.<sup>317</sup> Ethical codes also mandate prosecutors to "seek justice."<sup>318</sup> The prosecutor's violation of an ethical rule can result in disciplinary action and the imposition of sanctions. Nevertheless, despite public and professional awareness of the existence of prosecutorial conduct that often violates ethical rules,<sup>319</sup> there has been for some time a sense of frustration at the failure of professional disciplinary organizations to deal with such misconduct.<sup>320</sup>

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sonal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions.

(d) In cases which involve a serious threat to the community, the prosecutor should not be deterred from prosecution by the fact that in the jurisdiction juries have tended to acquit persons accused of the particular kind of criminal act in question.

(e) The prosecutor should not bring or seek charges greater in number or degree than can reasonably be supported with evidence at trial.

313. ABA STANDARDS FOR CRIMINAL JUSTICE § 3-3.11 (2d ed. Supp. 1986) ("unprofessional conduct for a prosecutor intentionally to fail to make disclosure to the defense, at the earliest feasible opportunity, of the existence of evidence which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce the punishment of the accused").

314. *Id.* §§ 3-4.1, 3-4.2 (2d ed. Supp. 1986).

315. *Id.* §§ 3-5.6 (presentation of evidence), 3-5.7 (examination of witnesses), 3-5.8 (argument to the jury), 3-5.9 (facts outside the record) (2d ed. Supp. 1986).

316. *Id.* § 3-1.3 (2d ed. Supp. 1986). See MONROE H. FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS* 228-36 (1990).

317. ABA STANDARDS FOR CRIMINAL JUSTICE § 3-1.2 (2d ed. Supp. 1986); FREEDMAN, *supra* note 316, at 223-24. See also *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809 (1987) (holding that attorney who represented a party's interest in underlying civil matter cannot discharge duties impartially as private prosecutor on behalf of private party).

318. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1980) (prosecutors must "seek justice"); ABA STANDARDS FOR CRIMINAL JUSTICE § 3-1.1(c) (2d ed. Supp. 1986) ("The duty of the prosecutor is to seek justice, not merely to convict."). For a critical examination of the application in the trial context of the ethical rules mandating that prosecutors must seek justice, see Fred C. Zacharias, *Structuring The Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

319. ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* 187 (1930) ("The number of new trials for grave misconduct of the public prosecutor which may be found in the reports throughout the land in the past two decades is significant"); Alschuler, *supra* note 205; Richard G. Singer, *Forensic Misconduct by Federal Prosecutors—And How it Grew*, 20 ALA. L. REV. 227 (1968); Martin Hobbs, *Prosecutor's Bias, an Occupational Disease*, 2 ALA. L. REV. 40 (1949); John H. King, Jr., Note, *Prosecutorial Misconduct: The Limitations Upon the Prosecutor's Role as an Advocate*, 14 SUFFOLK U. L. REV. 1095 (1980); Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 COLUM. L. REV. 946 (1954). Surprisingly, there exists no record-keeping by any agency to document cases of professional discipline against prosecutors. See letter from John Jay Douglas, Dean of the National College of District Attorneys, dated October 3, 1989, to the writer (copy of letter enclosed).

320. Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for "Brady" Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); Alschuler, *supra* note 205, at 670-73; Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965 (1984); Jerry E.

Documenting the failure of bar grievance committees to invoke disciplinary sanctions against prosecutors is not difficult. There is an astonishing absence from appellate court decisions or reports by discipline groups of cases dealing with misconduct by prosecutors. For example, despite the recognized frequency of misconduct by prosecutors in argument to the jury,<sup>321</sup> this writer has found only one decision involving a disciplinary proceeding against a prosecutor for such conduct.<sup>322</sup> This failure to discipline prosecutors contrasts sharply with the fairly common use of disciplinary sanctions against private attorneys in civil and criminal matters.<sup>323</sup>

There are practical and institutional reasons for this default by disciplinary bodies. Professional discipline rules were drafted, have developed, and are presently used to regulate the private attorney-client relationship. Grievance committees are accustomed to disciplining the private bar. The prosecutor does not have a private client and, as a public figure, is outside the ambit of many of the ethical rules that regulate attorney-client behavior. Moreover, as a governmental figure of enormous power and prestige, the prosecutor is a person who professional bar organizations would not wish to alienate. Bar associations also are aware that in today's anti-crime climate, the prosecutor is encouraged to be zealous, and bar groups do not want to be seen as chilling this prosecutorial zeal. Further, the standards regulating prosecutorial behavior—i.e., to “seek justice”—are often so nebulous as to be unenforceable,<sup>324</sup> which merely reinforces the institutional reluctance to enforce the rules in the first place. Finally, with limited resources, grievance committees find that it is simpler and less costly to institute disciplinary proceedings against a private lawyer for a garden

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Norton, *Government Attorneys' Ethics in Transition*, 72 JUDICATURE 299 (1989); Greg Rushford, *Watching the Watchdog*, LEGAL TIMES OF WASH., Feb. 5, 1990, at 1, 18. See also *United States v. Hasting*, 461 U.S. 499, 522 (1983) (“Prior experience, for example, might have demonstrated the futility of relying on Department of Justice disciplinary proceedings.”) (Brennan, J., concurring in part and dissenting in part).

321. See generally *supra* note 226.

322. *In the Matter of the Discipline of an Attorney*, 2 MASS. ATTORNEY DISCIPLINE REPORTS 110 (1980) (prosecutor privately admonished but not identified by name). Informal discipline through private admonitions, as in the above case, may be somewhat helpful in upgrading ethics. A private admonition against a prosecutor becomes a matter of record. See Hal R. Lieberman, *Informal Discipline: Tool to Upgrade Ethics*, N.Y.L.J., Mar. 22, 1991, at 1.

323. See *United States v. Lopez*, 765 F. Supp. 1433, 1437 n.1 (N.D. Cal. 1991) (documenting the steady increase in attorney discipline proceedings).

324. See Zacharias, *supra* note 318, at 46-50.

variety violation, such as the theft of escrow funds, than against a prosecutor for the failure to disclose exculpatory evidence.

Prosecutors are well aware that professional discipline is lax. This awareness accounts for the extreme positions taken by some prosecutors recently, particularly the former Attorney General of the United States, who argued that federal prosecutors should be exempt from ethical restraints imposed by local bar associations, and should be subject only to federal discipline imposed by the Justice Department's Office of Professional Responsibility.<sup>325</sup> Indeed, the Attorney General's argument was recently articulated by a federal prosecutor in West Virginia, who, in *Kolibash v. Committee on Legal Ethics*,<sup>326</sup> successfully avoided disciplinary proceedings by the State Bar Association by having the proceeding removed to federal court. The Attorney General's argument that federal prosecutors are exempt from ethical rules dealing with lawyer contacts with a represented party has provoked considerable controversy.<sup>327</sup>

One commentator has argued that the ethical rule was not intended to apply to prosecutors, and that its intended scope is limited "entirely [to the] civil arena."<sup>328</sup> According to this commentator, even if the rule is applied to prosecutors, the most accurate construction of the "authorized by law" language is that prosecutors are exempt from the restriction. Several courts have taken a different view. In *United States v. Hammad*,<sup>329</sup> the Court of Appeals for the Second Circuit held

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325. The Office of Professional Responsibility traditionally has been lax in investigating complaints against government attorneys. See *United States v. Hasting*, 461 U.S. 499, 522 (1983) ("futility of relying on the Department of Justice disciplinary proceedings") (Brennan, J., concurring in part and dissenting in part). A Congressional Committee discovered that no disciplinary action had been taken against ten prosecutors found by federal courts to have engaged in misconduct. See H.R. REP. NO. 986, 101st Cong., 2d Sess. 23 (1990). The Committee observed:

[R]epeated findings of no misconduct, and the Department's failure to explain its disagreements with findings of misconduct by the Courts raises serious questions regarding what the Department considers "prosecutorial misconduct . . . within the meaning of either the MODEL CODE OF PROFESSIONAL RESPONSIBILITY or the Standards of Conduct in the Department of Justice."

*Id.* at 25.

See also Greg Rushford, *No Action Has Been Taken*, LEGAL TIMES OF WASH., Jan. 28, 1991, at 1; Rushford, *supra* note 320, at 1.

326. 872 F.2d 571 (4th Cir. 1989).

327. Norton, *supra* note 320; *Federal Prosecutorial Authority in a Changing Legal Environment: More Attention Required*, Thirty-third Report by the Committee on Government Operations, H.R. REP. NO. 986, 101st Cong., 2d Sess. 32 (1990).

328. H. Richard Uviller, *Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1176-83 (1987).

329. 858 F.2d 834 (2d Cir. 1988).

that the ethical rule applies to prosecutors in pre-indictment as well as post-indictment settings, and that judicial sanctions, such as suppression of evidence, could be applied for violations. Other courts, while agreeing that the rule applies to prosecutors, would apply it only in the post-indictment context.<sup>330</sup>

There can be little question that legitimate investigations might be impeded by an unqualified application of the ethical rule. This conflict was highlighted by a recent decision of a district court in California—*United States v. Lopez*<sup>331</sup>—which dismissed an indictment for violation by the prosecutor of the ethical rule. In *Lopez*, the defendant, together with two others, was indicted for various narcotics violations. Lopez obtained a lawyer who made it very clear to Lopez that he would defend the case aggressively, but that his policy was not to make a deal with prosecutors regarding his client's cooperation. Lopez, fearing for his welfare and that of his family, became ambivalent. Desiring to protect himself and his family, he authorized his co-defendant's lawyer to see if a deal could be arranged. Relying on the Attorney General's Memorandum, the prosecutor spoke to Lopez several times outside the presence of his lawyer, and eventually brought into the case a federal magistrate for the purpose of ascertaining whether Lopez had effectively waived his right to counsel. Throughout the proceedings, the federal prosecutor and the magistrate assumed that a third party was paying the fee of Lopez's attorney. After plea negotiations fell apart, Lopez's lawyer learned of the secret communications and moved to dismiss the indictment based on a violation of his client's Sixth Amendment right to counsel, and the government's violation of the ethical rule. The district judge, "convinced that no remedy short of dismissal will have any significant deterrent effect on future government misconduct of the type found in this case,"<sup>332</sup> dismissed the indictment in the exercise of her supervisory power. The court found that no Sixth Amendment violation occurred, but that a violation of the ethical rule did take place, mandating dismissal.

The district judge's decision to invoke the extreme sanction of dismissal was unusual. As noted above,<sup>333</sup> the Supreme Court has rendered the supervisory power doctrine a virtual nullity, particularly when no prejudice is shown, as was the case in *Lopez*. Moreover, the

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330. *United States v. Ryans*, 903 F.2d 731 (10th Cir.), *cert. denied*, 111 S. Ct. 152 (1990).

331. 765 F. Supp. 1433 (N.D. Cal. 1991).

332. *Id.* at 1464.

333. See *supra* notes 237-61 and accompanying text.



government's decision to include the federal magistrate in the discussions with Lopez may have removed any taint. Finally, Lopez's desire, in effect, to have his cake and eat it too, while not a controlling factor, may be relevant in deciding whether Lopez had validly waived his right to counsel, thereby permitting the prosecutor's otherwise unauthorized communication.

However, it is not so much the merits of this particular case that is most troubling. Clearly of greatest concern to the district judge was the Attorney General's assertion that the Supremacy Clause justifies the government's arrogation of the power to investigate crime without any ethical accountability. As the district court correctly observed, "the title U.S. Attorney does not give the prosecutor a hunting license exempt from ethical constraints of advocacy."<sup>334</sup>

The Attorney General's Memorandum, together with the *Kolibash* case, may foreshadow further attempts by federal prosecutors to try to insulate themselves from state ethical rules. Paralleling this development, and equally disturbing, is an indication that state prosecutors may be attempting to emulate the Attorney General's position, and arguing that the doctrine of Separation of Powers prevents state bar associations from interfering with the prosecutorial authority of the executive branch of state government.<sup>335</sup> This attitude reflects an arrogance of power that can ultimately undermine the public's faith in this important institution.

In sum, the American prosecutor, owing to a variety of social and political factors, has emerged as the most pervasive and dominant force in criminal justice. The prosecutor's substantive and procedural powers continue to expand, while the courts increasingly defer to the prosecutor's decisions. Given the absence of meaningful legal and ethical constraints on the prosecutor's abuse of power, the inherent inequality between the government and the accused has become magnified. As a consequence, interests of justice and fairness are regulated, and defined, not by formal and impartial mechanisms such as judges and juries, but by prosecutorial prerogatives and power.

## II. RESTORING THE BALANCE OF POWER

From an examination of the new prerogatives of prosecutors, and

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334. *Lopez*, 765 F. Supp. at 1463 (quoting *United States v. Beckett*, 706 F.2d 519, 521 n.5 (5th Cir. 1983)).

335. *In re Criminal Investigation No. 13*, 573 A.2d 51 (Md. 1990); *Triple A. Machine Shop Inc. v. State*, 213 Cal. App. 3d 131 (1989). See also Norton, *supra* note 320, at 207.

the lack of meaningful judicial or ethical oversight to temper prosecutorial zeal, one can understand why this may be the "Age of the Prosecutor."<sup>336</sup> The goal of attempting to restore equilibrium to the criminal justice system has been elusive and vexing. This article does not presume to offer simple or simplistic solutions. The following proposals are suggested to invite further discussion. These proposals would allow prosecutors to prosecute crime aggressively, while at the same time preserving the ability of defendants to defend themselves effectively. These proposals seek to reform outmoded and unfair criminal discovery laws, create an independent disciplinary body to investigate and impose sanctions for ethical violations by prosecutors, and suggest a model for prosecution and defense work that would allow some cross-fertilization between roles, and thereby make prosecutors more sensitive to the qualities that make a good prosecutor.

#### *A. Expanded Discovery*

The most formidable threat to rationality and fairness in the adversarial system comes not from restrictions on the exclusionary rule, or the erosion of due process constraints on prosecutorial excesses, but from the prosecutor's institutional role in controlling access to information relevant to a defendant's guilt, and the prosecutor's ability to withhold evidence that might prove a defendant's innocence. It is this power that most dramatically distorts the ability of the adversary system to function fairly and properly.<sup>337</sup>

The prosecutor acquires relevant information in a variety of ways.<sup>338</sup> By contrast, the defense attorney has no access to most of the prosecutor's data-gathering machinery. For example, the prosecutor at the earliest stages of a case can obtain police reports of investigative work, interviews of witnesses, scientific tests, and other field work; can force witnesses to appear before the grand jury and testify; can subpoena all documents and records relevant to the case; can acquire tangible and verbal evidence from court-ordered searches and electronic eavesdropping; and can obtain from well-staffed and experienced crime laboratories a variety of forensic proof.

The defendant's ability to acquire relevant information about the case is extremely limited. The defendant usually confronts the prosecu-

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336. See Fisher, *supra* note 74, at 261 n.263.

337. See *supra* notes 262-86 and accompanying text.

338. YALE KAMISAR, ET AL., MODERN CRIMINAL PROCEDURE 1127-31 (7th ed. 1990).

tion forces not only with meager resources, but also under statutory<sup>339</sup> and doctrinal rules<sup>340</sup> that restrict his ability to gather meaningful information about the case. Given these inequalities, it is not surprising that the adversary system, in Justice Brennan's familiar metaphor, is more like a sporting event than a quest for truth.<sup>341</sup>

Discovery in American litigation has never favored criminal defendants. Well into the early 1900s, pretrial discovery was largely nonexistent. Informal exchanges of information, or incidental discovery through preliminary proceedings, were the principal means of disclosure.<sup>342</sup> During the 1930s and 1940s, legislation and court rules dramatically altered pretrial discovery in civil cases. Through depositions, interrogatories, and the compulsory production of tangible items, each party gained access to virtually all relevant information possessed by the other side. Accompanying this expansionist trend in civil cases was a concomitant push in the 1950s and 1960s for broader pretrial discovery in criminal cases. Proponents of broader discovery argued that a trial should be a search for the truth, rather than a game of "blind man's bluff,"<sup>343</sup> and that the truth is more likely to emerge when each side is equipped with all relevant information about the case. Moreover, expanded discovery was believed necessary to offset the substantial advantages possessed by the prosecution in its investigation of crime, and the substantial disadvantages facing defense counsel who, from a resource standpoint alone, lacked the ability to obtain information.<sup>344</sup>

Opponents of expanded discovery argued that it would facilitate perjured testimony, would lead to bribery and the intimidation of witnesses, and because the privilege against self-incrimination protected defendants from reciprocal discovery, would be a one-way street favoring the accused. The opponent's position was best summed up by Chief Judge Arthur Vanderbilt, who said in *State v. Tune*<sup>345</sup> that

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339. See, e.g., FED. R. CRIM. P. 16; N.Y. CRIM. PROC. Law art. 240 (McKinney 1989).

340. See Bennett Gershman, *The Right to Evidence*, N.Y. STATE BAR JOURNAL Nov. 1989 at 52; Bennett Gershman, *The Prosecutor's Obligation to Grant Defense Witness Immunity*, 24 CRIM. L. BULL. 4 (1988).

341. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279.

342. See KAMISAR, *supra* note 338, at 1127. See also Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228 (1964).

343. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958).

344. For a helpful discussion of the effect of broad pretrial criminal discovery in one of the few states that allows pretrial criminal depositions, see John F. Yetter, *Discovery Depositions in Florida Criminal Proceedings: Should They Survive?*, 16 FLA. ST. U. L. REV. 675 (1988).

345. 98 A.2d 881, 884 (N.J. 1953). For a more contemporary rationale for limited defense

long experience in criminal cases has taught that . . . the criminal defendant who is informed of the names of all the state witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime.

That there exists a close nexus between limited discovery in criminal cases and enhanced opportunities for prosecutorial suppression of evidence is self-evident. The power to control evidence is the power to conceal it. This can result in the conviction and punishment of innocent persons. Consider the following cases.

### 1. *Randall Dale Adams*

Adams was convicted in Texas in 1977 of murdering a policeman.<sup>346</sup> He was sentenced to die largely on the testimony of a juvenile with a lengthy criminal record who made a secret deal with the prosecutor to implicate Adams,<sup>347</sup> and the testimony of two purported eyewitnesses to the killing. The juvenile actually murdered the policeman, as he later admitted. At Adams' trial, however, the prosecutor suppressed information about the secret deal, and successfully kept from the jury the juvenile's lengthy criminal record. The prosecutor also withheld from Adams' attorney proof that the two eyewitnesses had failed to identify Adams in a lineup, and even solicited from these witnesses testimony that they had made a positive identification of Adams. A Texas court recently freed Adams.<sup>348</sup> The court found that the prosecutor "knowingly used perjured testimony and knowingly suppressed evidence."<sup>349</sup>

### 2. *James Richardson*

Richardson was condemned to die in Florida for poisoning his children in 1967.<sup>350</sup> The prosecutor argued that Richardson, a penniless

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discovery by a federal prosecutor, see Edward S.G. Dennis, Jr., *The Discovery Process in Criminal Prosecutions: Toward Fair Trials and Just Verdicts*, 68 WASH. U. L.Q. 63 (1990).

346. Adams' case was documented in the recent film by Errol Morris, *THE THIN BLUE LINE* (Miramax Films 1988).

347. Harris received complete immunity for testifying. Harris acknowledged that the prosecutor told him not to disclose the deal to anyone, even if asked. Bennett Gershman, *The Thin Blue Line: Art or Trial in the Fact-Finding Process*, 9 PACE L. REV. 257, 308 (1989).

348. *Ex Parte Adams*, 768 S.W.2d 281 (Tex. Crim. App. 1989).

349. *Id.* at 291-93.

350. Richardson's case was memorialized in Mark Lane's book, *ARCADIA* (1970).

farm worker, killed his children to collect insurance. A state judge recently overturned the murder conviction, finding that the prosecutor had suppressed evidence that would have shown Richardson's innocence.<sup>351</sup> The undisclosed evidence included a sworn statement from the children's babysitter that she had killed the youngsters, a sworn statement from a cellmate of Richardson's that he had been beaten by a sheriff's deputy into fabricating a story implicating Richardson, statements from other inmates contradicting their claims that Richardson had confessed to them, and proof that Richardson had never purchased any insurance.

### 3. *James "Shabaka" Brown*

Brown's murder conviction recently was reversed by the Court of Appeals for the Eleventh Circuit.<sup>352</sup> Brown was hours away from being executed; he was measured for his burial suit and asked to order his last meal.<sup>353</sup> The federal court found that the prosecutor "knowingly allowed material false testimony to be introduced at trial, failed to step forward and make the falsity known, and knowingly exploited the false testimony in its closing argument to the jury."<sup>354</sup> The subornation of perjury related to the testimony of a key prosecution witness who falsely denied that a deal had been made with the prosecutor, and the prosecutor's misrepresentation of that fact to the trial court. In addition, the prosecutor misrepresented to the jury that ballistics evidence proved the defendant's guilt, when in fact the prosecutor knew that the ballistics report showed that the bullet that killed the deceased could not have been fired from the defendant's weapon.

### 4. *Eric Jackson*

Jackson's murder conviction was recently vacated by a New York state court.<sup>355</sup> Jackson was convicted of starting a fire in a Brooklyn supermarket that resulted in the death of six firefighters. If New York had a death penalty at the time, Jackson might have been sentenced to death. The court found that the prosecutor concealed evidence that

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351. *Convict Freed in Child Poisoning Case*, N.Y. TIMES, Apr. 26, 1989, at A19.

352. *Brown v. Wainwright*, 785 F.2d 1457 (11th Cir. 1986).

353. This dramatic description of Brown's last hours was captured by the novelist William Styron in *Death Row*, N.Y. TIMES, May 10, 1987, at A25.

354. *Wainwright*, 785 F.2d at 1458.

355. *People v. Jackson*, 538 N.Y.S.2d 677 (N.Y. Sup. Ct. 1988). See Leonard Bucler, *Convict Freed in Store Blaze that Killed 6*, N.Y. TIMES, Nov. 4, 1988, at B1.

would have shown that the fire was not arson-related, but was caused by an electrical malfunction. During a recent court hearing, the prosecutor consistently maintained that nothing had been suppressed. When the judge ordered the prosecutor's file to be submitted to him for his inspection, he found two internal memoranda from the trial prosecutor to an executive attorney in the prosecutor's office. The memoranda stated that an expert witness who had examined the evidence concluded that the fire had not been deliberately set, and that the expert's conclusion presented a major problem for the prosecution. None of this information was ever revealed to Jackson's lawyer.

These cases are indeed shocking, but they are neither unique nor aberrational. They represent a recurring and largely unsolved problem in American criminal litigation. An exhaustive article in the *Stanford Law Review* in 1987 concluded that an innocent person was convicted in 350 capital cases, and that 23 of those condemned were executed, with 21 narrowly winning reprieves.<sup>356</sup> A significant number of those cases involved claims of prosecutorial suppression of evidence. Neither the judiciary nor disciplinary bodies have been able to prevent the recurrence of this conduct. Discovery reform might be able to address the problem from a different perspective. By expanding defense access to information, broadened pretrial discovery might dramatically alter both the opportunity and the potential for prosecutorial withholding of evidence. A tentative hypothesis would suggest that disclosure violations occur less frequently in the few jurisdictions that permit broad criminal discovery,<sup>357</sup> than in the jurisdictions that restrict discovery.

### *B. Prosecutor Misconduct Commissions*

Prosecutors play a distinctive role in the criminal justice process. Their responsibility is not to an individual client but to the cause of justice. Accordingly, prosecutors are guided by higher ethical considerations than those governing attorneys generally.<sup>358</sup> The prosecutor exercises a "quasi-judicial" function.<sup>359</sup> Because the prosecutor exercises such awesome power, society requires "assurance that those who would

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356. Bedau & Radelet, *supra* note 284.

357. See Yetter, *supra* note 344.

358. *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958) (ABA report describes prosecutors obligations as higher than those of lawyers generally); FRIEDMAN, *supra* note 316, at 213-15.

359. ABA STANDARDS FOR CRIMINAL JUSTICE § 3-1.1 cmt. (2d ed. 1986) (prosecutor occupies "quasi-judicial position").

wield this power will be guided solely by their sense of public responsibility for the attainment of justice.”<sup>360</sup>

Regrettably, this “assurance” is sorely lacking, as many courts and commentators have concluded.<sup>361</sup> Indeed, the increasing incidence of prosecutorial misconduct suggests that it has become “normative to the system.”<sup>362</sup> Sanctions for misconduct are so infrequent as to appear almost non-existent. The courts focus on the impact of the misconduct upon the verdict, and professional disciplinary bodies appear unable or unwilling to grapple with ethical violations by prosecutors. However, given the prosecutor’s unique role, it may be appropriate to consider creating a disciplinary mechanism aimed solely at prosecutors. The model for such an institutional body would be the state judicial conduct organizations, which exist in every state, and are charged with the responsibility of regulating judicial conduct.<sup>363</sup> Such organizations have become an accepted part of government to assure that judges maintain high standards of integrity and responsibility. As a quasi-judicial officer functioning under special ethical standards, the prosecutor, like the judge, is an appropriate subject for regulation and enforcement of discipline.

In discussing the inadequacy of professional discipline, Professor Steele proposed a statute based partly on the Prosecutor Council of Texas.<sup>364</sup> Professor Steele’s proposed statute is similar procedurally to the judicial conduct commissions. The statute would authorize a grievance committee to conduct an investigation, institute formal proceedings before a hearing examiner, and impose disciplinary sanctions that include removal, fines, and admonitions. The Council, however, was created not to discipline prosecutors but rather, to deliver technical assistance and training.

There would seem to be no constitutional impediment to the creation of such a regulatory body. The prosecutor is a member of the executive branch of state government. The chief executive of the state ordinarily has the power to remove prosecutors, and appoint special

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360. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987).

361. *See supra* notes 319-20.

362. Steele, *supra* note 320, at 975.

363. *See* Jeffrey M. Shaman, *State Judicial Conduct Organizations*, 76 KY LJ 811 (1987).

364. Steele, *supra* note 320. *See also* TEX. REV. CIV. STAT. ANN. art. 332d (West Supp. 1984). The Council was abolished in 1985. Acts 1985, 69th Leg., ch. 480 § 26(1), effective Sept. 1, 1985.

prosecutors.<sup>365</sup> The creation of a prosecutorial conduct commission would be similar to the creation of a state inspector general to investigate misconduct in state government. This would be a welcomed development.

### C. *Redefining the Institutional Role of the Prosecutor*

The system of public prosecutions is rooted in early American common law.<sup>366</sup> It replaced a system of private prosecution in which individuals instituted and carried out their own proceedings. Every American jurisdiction today provides for a public prosecutor's office to prosecute criminal cases in the name of the state. The concept of the professional prosecutor has benefits as well as disabilities.

The benefits derive from having a trained and impartial professional advocate serving the public interest by prosecuting criminal offenders. The disabilities stem from the prosecutor's dual role: an aggressive advocate seeking convictions and a quasi-judicial official seeking justice. These roles, commentators have suggested, may be incompatible.<sup>367</sup> The existence of a zealous desire to win a conviction necessarily results in willful, or even unconscious, misconduct. As Professor Fisher has pointed out,<sup>368</sup> such overzealousness might manifest itself in prosecuting a case rather than dismissing it; overcharging; interpreting substantive laws expansively and procedural protections narrowly; winning as many convictions as possible; or obtaining the severest penalties. Overzealousness also manifests itself in other ways, such as hiding exculpatory evidence, engaging in racially motivated or other discriminatory charging practices, presenting inadmissible evidence, and engaging in inflammatory trial conduct. Commentators have repeatedly lamented the persistence of misconduct,<sup>369</sup> and the inability to "solve" the problem.<sup>370</sup>

Arguably, the problem of prosecutorial excess inheres in the char-

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365. See, e.g., N.Y. CONST., art. IV § 3 (imposing on Governor the power to "take care that the laws are faithfully executed"); N.Y. EXEC. LAW §§ 63(2), 63(8) (McKinney 1991) (authorizing Governor to issue executive orders to appoint special prosecutors).

366. For a helpful discussion of the history of prosecution in America, see Andrew Sidman, Note, *The Outmoded Concept of Private Prosecution*, 25 AM U. L. REV. 754, 762-65 (1976).

367. See Fisher, *supra* note 74, at 198-202.

368. *Id.* at 200.

369. See *supra* note 319.

370. Allen, *supra* note 74, at 335 ("minimizing prosecutorial excesses is one of this country's great unsolved problems in criminal law administration").



acter of the individual prosecutor. Justice Robert H. Jackson wrote the following about the "good prosecutor:"<sup>371</sup>

The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Contrast the foregoing statement with the following remark attributed to a state prosecutor: "Any prosecutor can convict a guilty man; it takes a great prosecutor to convict an innocent man."<sup>372</sup>

This statement is not representative of prosecutors. Many prosecutors I know, and have known, behave with consummate fairness. To these prosecutors, doing justice is what makes their public service meaningful. However, these anecdotal references, while reassuring, should not be taken to suggest that misconduct is aberrant.

Lord Patrick Devlin, one of the most distinguished English jurists, in his Sherrill Lectures at the Yale Law School, discussed the role of prosecutors in the English criminal justice system.<sup>373</sup> Prosecution in Great Britain, Lord Devlin explained, is not in the hands of any special body dedicated to that particular class of work, such as our District Attorney. The barristers who prosecute the case are not professional prosecutors, but professional attorneys. One day they may be prosecuting a case, the next day they may be defending a case. Thus, "the barristers who have to decide what is fair and unfair are not prosecution-minded."<sup>374</sup> They do not tend to see things from the point of view of any one side exclusively, and acquire no special sympathy for either. Lord Devlin also pointed out that the prosecuting counsel "is to act as a minister of justice rather than as an advocate; he is not to press for a conviction but is to lay all the facts, those that tell for the prisoner as well as those that tell against him, before the jury."<sup>375</sup>

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371. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 6 (1940).

372. Transcript, *The Thin Blue Line*, at 40 (Third Floor Productions, Inc. 1988) (defense attorney Melvyn Bruder).

373. PATRICK DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 16-25 (1960).

374. *Id.* at 21.

375. *Id.* at 23. It should be noted that Great Britain has attempted to professionalize the prosecutor by establishing in 1986 the Crown Prosecution Service. See JOSHUA ROZENBERG, *THE CASE FOR THE CROWN* (1987).

Whether American prosecutors can be the "ministers of justice" described by Lord Devlin, or should "temper zeal with human kindness," as Justice Jackson recommended, are unanswerable questions in a criminal justice model that emphasizes crime control over protecting individual rights.<sup>376</sup> However, Lord Devlin's emphasis on the need for prosecutorial objectivity, and the ability of attorneys to attain this goal through transferred roles, raises some provocative questions. Is it possible to de-professionalize the American prosecutor? Would such de-professionalization reduce the incidence of misconduct? Could de-professionalization occur through transferred roles between prosecution and defense. The ultimate objective, of course, would be to develop a prosecutorial ethos that can reconcile vigorous prosecution with fair prosecution.

As in Great Britain, prosecutorial power in America has frequently been encumbered by the participation of private prosecutors,<sup>377</sup> the removal of prosecutors for misconduct,<sup>378</sup> the disqualification of prosecutors for conflicts of interest,<sup>379</sup> and the appointment of special prosecutors by the judicial or executive branches.<sup>380</sup> Moreover, some jurisdictions allow private attorneys to be "loaned" to prosecutors' offices for special purposes, such as the reduction of heavy dockets.<sup>381</sup> Such programs are laudable for several reasons. They allow private attorneys to engage in public service, they enhance the public interest by helping to more expeditiously process criminal cases, and they introduce into prosecution attorneys who do not have a vested interest in winning convictions.

The concept of involving non-prosecutor attorneys in the prosecution process might be extended further. It may not be unreasonable, for example, to have members of a prosecutor and a public defender office in a particular locale replace each other for time periods of, perhaps, one year. This cross-fertilization has several benefits, and some risks. It could educate and sensitize both the prosecutor and the defense lawyer

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376. It should be made clear that prosecutors are not a homogeneous group, and urban prosecutors confront very different problems than suburban prosecutors. See JEAN A. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 273-295 (1980). Thus, while generalizations and "fearful stereotypes" (*id.* at 295) do not make analysis clearer, there are broad principles that may be usefully discussed, as this article has attempted to do.

377. See *supra* note 366 and accompanying text.

378. See *supra* note 365 and accompanying text.

379. *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987).

380. See *supra* notes 4-6 and accompanying text.

381. *Seth v. State*, 592 A.2d 436 (Del. 1991).

to each other's experiences and problems. It could produce a prosecutorial ethos that is increasingly associated with seeking justice, rather than an ethos based on winning convictions. Such a program, while not tempering legitimate advocacy, could, through mutual understanding and shared experiences, reduce the excesses resulting from adversarial combat.

It may be that our adversary system is incapable of accommodating such a proposal, and that neither prosecutors nor defense attorneys are capable of such cross-fertilization. There are ethical implications that need to be addressed, most significantly the ability to accommodate the different ethical standards for defense lawyers and prosecutors.<sup>382</sup> That may be the most serious obstacle of all.

To be sure, better training and supervision play a significant role in fostering an atmosphere in which ethical norms are understood and practiced.<sup>383</sup> However, the present ethos of overzealous prosecutorial advocacy may be too ingrained to be appreciably affected by education and training. It may be that only by fostering a new ethos through the kind of system that Lord Devlin discussed can prosecutors begin to demonstrate the qualities that make for a "good prosecutor."

### III. CONCLUSION

This article attempted to describe the recent accretion of power by prosecutors, the effect it has had on the adversary system, and the failure of judicial or disciplinary bodies to restrain prosecutorial excesses. Given the well-documented existence of misconduct, the current laissez-faire attitude of the courts, and the disappointing response of professional grievance committees, there is a potential for even greater misuse of "the awful instruments of the criminal law."<sup>384</sup> The suggestions in Part II are intended to encourage discussion about ways to foster a new prosecutorial ethos that balances zeal with fairness and results in truly fair criminal trials.

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382. See *supra* notes 358-60 and accompanying text.

383. See Fisher, *supra* note 74, at 254-60.

384. *McNabb v. United States*, 318 U.S. 332, 343 (1943) (Frankfurter, J.).