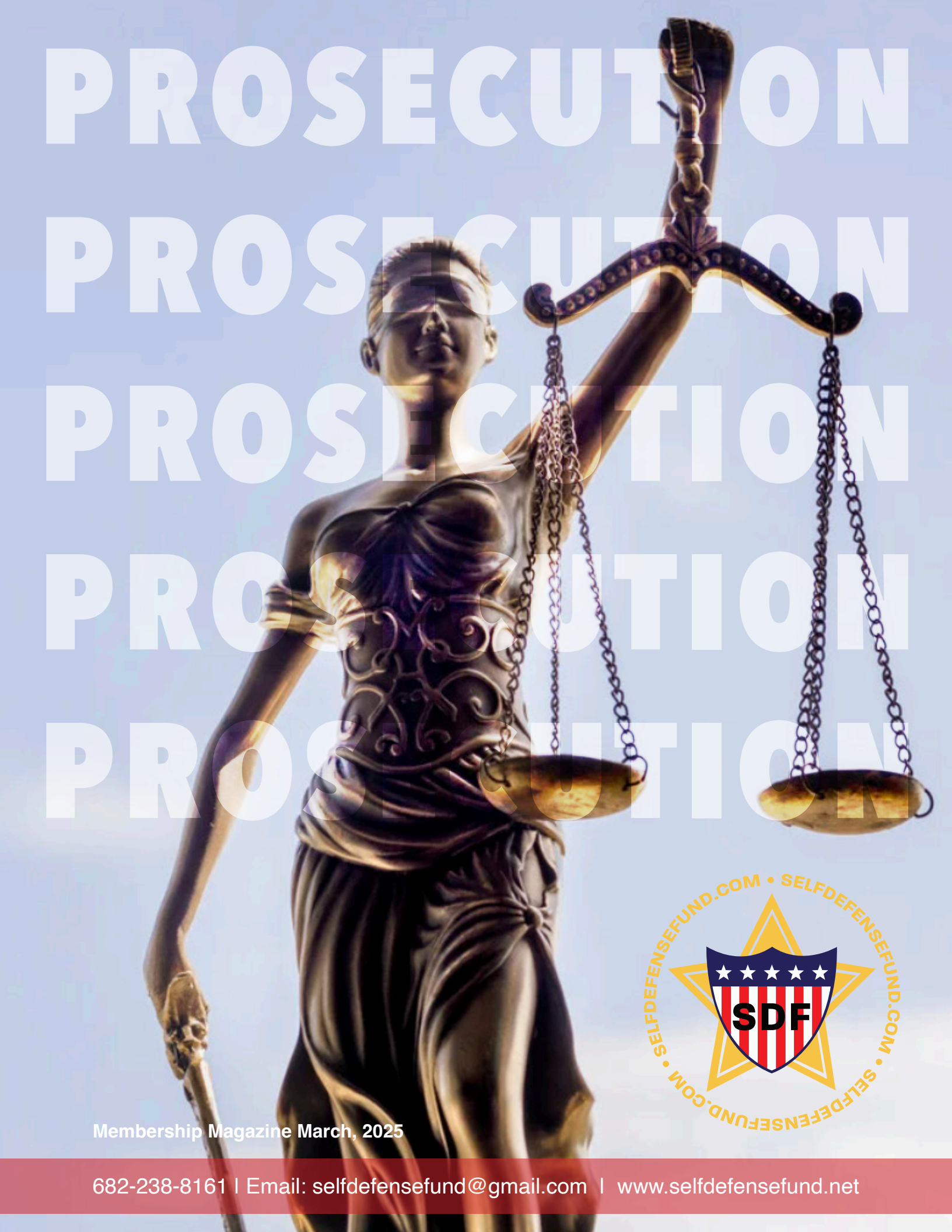


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# HOW THE PROSECUTOR DECIDES WHICH CASES TO CHARGE?

Police officers arrest suspects, but prosecutors decide whether to file formal charges. Learn how it works. Arrest and prosecution functions are separated primarily to protect citizens against the arbitrary exercise of police power. Police officers usually make arrests based only on whether they have good reason (probable cause) to believe a crime has been committed. By contrast, prosecutors can file formal charges only if they believe that they can prove a suspect guilty beyond a reasonable doubt.

Prosecutors can also take a broader perspective. They have what is called “prosecutorial discretion.” Prosecutors can look at all the circumstances of a case, including the suspect’s past criminal record, in deciding whether and what to charge. Prosecutors can file charges on all crimes for which the police arrested a suspect, can file charges that are more or less severe than the charges leveled by the police, or can decide not to file any charges at all.

## THE PROSECUTOR’S DECISION.

**Using the Police Report.** Typically, prosecutors base their initial charging decisions on the documents sent to them by the arresting police officers (usually called police or arrest reports). The police complete an arrest report soon after they make an arrest and then quickly forward the report to a prosecutor assigned to do case intake. Arrest reports summarize the events leading up to arrests and provide numerous other details, such as dates, time, location, weather conditions, and witnesses’ names and addresses.

Arrest reports are almost always one-sided. They recite only what the police claim took place and may include only witness statements that support the police theory. While they are generally not admissible as evidence in a trial, arrest reports can have a major impact in criminal cases.

Not only do arrest reports often determine what charges prosecutors file, but they also may play a key role in how much bail is required, the outcome of preliminary hearings (where hearsay evidence is often admissible), the willingness of the prosecutor to plea bargain, and trial tactics (for instance, the police report can be used to discredit testimony of the police officer who prepared the report.

## DECISION BASED ON POLITICAL PRESSURE.

Most head prosecutors are elected officials. Many of them view their position as a stepping-stone to higher office. Their charging decisions are often, therefore, affected by public opinion or important support groups. For example, a prosecutor may file charges on every shoplifting case, no matter how weak, to curry favor with local store owners who want to get the word out that shoplifters will be prosecuted. For similar reasons, a prosecutor may pursue otherwise weak prostitution charges to avoid alienating powerful civic groups. Deputy or assistant prosecutors may feel that appearing tough will help their careers, either within the prosecutor's office or later if they want to become judges.

Experienced defense attorneys understand that prosecutors must sometimes be seen as taking a strong stand publicly, even though they may be willing to respond to weaknesses in individual cases at a later stage of the process. This is one of the reasons why practically every criminal defendant will benefit from the help of an experienced, local criminal defense attorney: Only those professionals know where the pressure points are and how to work around them (or with them).

## PROSECUTORIAL DISCRETION

The term "prosecutorial discretion" refers to the fact that under American law, government prosecuting attorneys have nearly absolute and unreviewable power to choose whether or not to bring criminal charges, and what charges to bring, in cases where the evidence would justify charges. This authority provides the essential underpinning to the prevailing practice of plea bargaining, and guarantees that American prosecutors are among the most powerful of public officials. It also provides a significant opportunity for leniency and mercy in a system that is frequently marked by broad and harsh criminal laws, and, increasingly in the last decades of the twentieth century, by legislative limitations on judges' sentencing discretion.

The grant of broad discretion to prosecutors is so deeply ingrained in American law that U.S. lawyers often assume that prosecutorial discretion is inevitable. In fact, some countries in Europe and Latin America adhere to the opposite principle of "mandatory prosecution," maintaining, at least in principle, that prosecutors have a duty to bring any charge that is supported by evidence developed by the police or presented by citizens. The extent to which that principle is actually followed in practice in these countries has been controversial. Some scholars have argued that practices analogous to American prosecutorial discretion and plea bargaining generally exist, more or less covertly, in such countries, or that the discretion exercised by prosecutors in the United States is effectively exercised there by the police instead.

The general acceptance of prosecutorial discretion in the United States is closely linked to our adversarial system of justice. The adversarial principle is generally taken to mean that judges in American courts are not commissioned to investigate cases, determine the truth, and provide justice. Instead, the courts are understood as dispute-settling institutions, in which judges take a more passive role, considering only such facts as are presented to them by the parties, and deciding only such issues as are necessary to resolve the disputes thus presented. Primary responsibility for defining the nature of the dispute, and presenting the relevant facts, lies with the parties and their lawyers. More specifically, criminal cases are seen as disputes between the government and individuals accused of crime. Just as a plaintiff in a civil suit has the option of withdrawing his claim, or settling it privately with the defendant—in which case the court has no further role—so in a criminal case, the prosecutor, as representative of the government, can decide that the interests of his client are best served by not taking any legal action at all, or by settling for relief short of what could in theory be available if litigation were pursued to its final conclusion. On essentially the same reasoning, the American system recognizes a formal plea of guilty by a criminal defendant as a conclusive resolution of the case that removes the need for judicial inquiry into the facts. If the plaintiff government and the defendant are essentially in agreement about whether the defendant should be punished, there is no dispute, and nothing for the courts to do. The authority of both prosecutor and defendant to waive or settle their potential differences thus gives rise to the potential for plea bargaining, in which the prosecutor agrees to waive some potential charges or sanctions in return for the defendant's agreement not to contest others.

The prosecutor thus plays a pivotal role in the administration of justice in America. To the extent that the prosecutor is the lawyer for the state, her client is not the police department or the individual victim of a crime, but society itself. As a practical matter, moreover, the prosecutor is not merely the attorney who represents society's interest in court, but also the public official whose job it is to decide, as a substantive matter, the extent of society's interest in seeking punishment. The prosecutor is thus not merely a barrister, exercising technical skill to advocate positions decided by someone else, but a significant public official, exercising political authority on behalf of the state to determine its substantive position. Consequently, the prosecutor is normally a politically responsible actor. In most states, the chief prosecutor of a district is elected, usually at the county level. (Often, the state attorney general, usually also an elected official, has some—generally limited—degree of authority over local district attorneys.) In the federal system, the chief prosecutor in a judicial district (the United States attorney) is appointed by the president, subject to confirmation by the Senate. While not directly elected, she is responsible to the people through the elected president and her Attorney General. As a practical matter, in both state and federal systems, the locally elected district attorney or the local United States attorney is usually the final authority on prosecutorial decisions in individual cases.

## VARIETIES OF DISCRETION

The legal philosopher Ronald Dworkin has distinguished several senses in which the word "discretion" is used in legal discourse. Sometimes the word is used in a relatively weak sense, signifying that "the standards an official must apply cannot be applied mechanically but demand

the use of judgment." (Dworkin, 1977, p. 31). For example, we might say that the lieutenant left the sergeant a great deal of discretion if she ordered him to select the five most experienced soldiers for a particular mission, since the criterion of experience could be applied in different ways. In a different weak sense, we sometimes say an official has discretion when we mean that his decision cannot be reviewed and reversed by a higher authority: although the rules of baseball clearly define the strike zone, the umpire could be said to have discretion over the call of balls and strikes, because no higher power can overrule his call, whether or not a videotape replay shows that the decision was inconsistent with the rule. We also sometimes use the word in a very strong sense, to mean that the official is simply not bound by any standard at all. If the university registrar is told simply to divide the students taking chemistry into two sections, she might have complete discretion to divide them alphabetically, or by pulling names from a hat, or by assigning the first students to register to the more popular instructor; there are no governing criteria by which her decision can be said to be wrong.

Even in this strongest sense, discretion is always conferred for a particular purpose, and operates within some limits. The registrar in our example has been given no authority to assign students who have not registered for chemistry to one of the two sections. Moreover, there may be some assumed or external constraints even on extremely broad discretion of this type: for example, the registrar might be in violation of law if she divided the sections by assigning students to sections according to their race.

Although prosecutorial charging discretion is extremely broad, there are some limits of this kind. First, prosecutors' discretion operates within the universe of cases in which the minimum requirements for legal punishment exist; while the prosecutor has a wide discretion not to bring charges that could be supported, she has no right to bring charges that are not supported by sufficient evidence, and legal checks are in place to absolve defendants of such charges. When a prosecutor decides to bring a charge, that decision is ultimately subject to a judge's authority to determine whether the legal elements of a crime have been alleged, and to a jury's ultimate power to decide whether the facts have been established beyond a reasonable doubt. Indeed, in the vast

majority of U.S. jurisdictions, the prosecutor's assessment that the evidence warrants a felony charge must be submitted for review by a judge or grand jury before a trial or full judicial proceedings are instituted. (As a practical matter, however, such reviews are rarely a very significant check on the prosecutor. The evidentiary standard at this threshold stage is low, grand juries in particular operate under rules that permit prosecutors to dominate their proceedings, and in virtually every system, the pressure of case load requires that the review be cursory in most routine cases.)

Second, it is well established that a prosecutor's decision to bring charges against an individual may not be based on discriminatory grounds such as race, religion, or the expression of political opinion ("selective prosecution"), or as retaliation for the successful exercise of legal rights, such as the right of appeal ("vindictive prosecution"). The Supreme Court has ruled that when defendants claim to have been singled out for prosecution for discriminatory reasons, the prosecutorial decision is subject to the ordinary constitutional standard of equal protection. But this standard is extremely difficult to meet. It requires not merely a statistical showing that, for example, the vast majority of those prosecuted for a particular crime are members of minority groups, but also proof that prosecutorial decision-making was actually motivated by a discriminatory purpose. Even a statistical showing of disparate effect may well be difficult to establish, because the defendant must show not only that those prosecuted are members of a disfavored group, but also that there were cases in which members of favored groups were known to the authorities to have committed the offense, but were nevertheless not prosecuted. The latter information is not usually publicly available, the courts have resisted defendants' efforts to obtain discovery of statistical information from prosecutors about cases in which charges have not been filed, and it is difficult to control for the bewildering factual variations among different cases to eliminate possible nondiscriminatory explanations for suspicious patterns of results.

The Supreme Court has also held that the constitutional guarantee of due process protects a defendant against prosecutorial vindictiveness, that is, against a prosecutor increasing the charges in retaliation for a defendant's exercise of a statutory or constitutional right. For example, a prosecutor would be forbidden to bring a more serious charge in retaliation for the defendant's having appealed a conviction on a lesser charge. Indeed, in that situation, courts even apply a presumption of vindictiveness, requiring prosecutors to bear the burden of proving that the decision to increase the charge was not retaliatory. But the circumstances in which such a presumption is applied are extremely limited, and in the absence of a presumption, establishing that prosecutors acted from a deliberately vindictive motive is difficult. Moreover, the Supreme Court has held that the ordinary trade-offs of plea bargaining, in which a defendant forgoes a right in exchange for a reduction in charges, are legitimate, and do not constitute the equivalent of vindictively punishing those defendants who do choose to exercise their rights. Thus, the scope of this constraint also is more theoretical than practical.

Finally, it must be emphasized that even these limited legal constraints, even in theory, only permit a challenge to a charge that is brought for improper reasons; they do not provide a basis for

requiring action by a prosecutor who has decided not to bring charges. Victims, police agencies, and members of the public have not been permitted, for example, to use selective prosecution arguments in an effort to force prosecutors to be more aggressive against favored groups.

Thus, when a prosecutor chooses not to bring a case, it can probably be said that he exercises discretion that has elements of all three of Professor Dworkin's types. Even where there is general agreement on the standard prosecutors should apply—for example, that a prosecutor should not bring charges where the evidence would be insufficient to support a conviction—the prosecutor exercises substantial discretion in Dworkin's first weak sense, since determining the quantity and quality of evidence necessary to convict requires the exercise of substantial experience and judgment, and similarly qualified lawyers might well disagree about the decision in a particular case. Similarly, like the baseball umpire, the prosecutor's decision not to proceed in a particular case is within her discretion in the second weak sense, because no court has the authority to reverse that judgment, however mistaken it might be. Finally, the prosecutor has, for the most part, discretion in the strong sense as well, because, outside the limited zones in which the prosecutor's judgment might in principle be regarded as unlawful, it is up to the prosecutor herself to decide what principles should influence the decision whether to proceed and how much weight should be given to each.

## SUBJECTS OF PROSECUTORIAL DISCRETION

The most significant aspect of the prosecutorial discretion is the decision whether to bring charges, and what charges to bring. As noted above, the prosecutor has virtually unlimited discretion not to proceed with a case, for any reason that she deems appropriate. This discretion is very frequently exercised, particularly in minor cases, where the prosecutor will often decide that a particular incident, or even a particular category of offenses, does not warrant the expenditure of resources or serious social sanction entailed by a criminal prosecution.

In more serious cases, the decision to withhold the criminal sanction entirely is less common. But this does not render prosecutorial discretion less important. American criminal codes frequently contain overlapping statutes bearing different penalties for the same actions, and a particular criminal scheme may include a number of acts, some of which may be independently chargeable as separate crimes. For example, a particular fraudulent scheme may permit prosecutors to bring charges of larceny, which may be differentiated into degrees, as well as less serious charges of forgery, impersonation, making false statements or falsifying business records. The prosecutor may elect to forgo the most serious charges, or to bring only a subset of the charges that may in theory be sustainable.

This discretion may be particularly important where some or all of the charges contemplated contain mandatory minimum sentences. In such a case, the prosecutor may in effect exercise significant control over the sentence to be imposed if the defendant is convicted. By choosing to bring the charge that carries the mandatory penalty, the prosecutor can guarantee that the judge has no power to impose a lesser sentence, while choosing a different applicable charge that lacks the mandatory penalty will free the judge to impose a more lenient penalty if she wishes.

Moreover, prosecutors can also influence defendants' fates by a variety of other decisions that fall within their discretion. Like the police, prosecutors have broad power to institute investigations, and can choose among different investigative tools, generally without judicial supervision or constraint. Indeed, because of their control of the broad investigative powers of the grand jury, prosecutors have much more power to institute intrusive investigations than the police. Potential witnesses can decline to cooperate with the police for any reason or for no reason at all, but the prosecutor can exercise the grand jury's subpoena power to require witnesses to attend and to answer, absent a legally valid privilege. Thus, the prosecutor, subject only to very limited judicial review, can require witnesses to undergo extensive and intrusive questioning, or to respond to burdensome and expensive demands for the production of documents, whenever he deems it desirable to further an investigation. By the same token, a prosecutor can decide that a case is not even worth investigating, or that a cursory inquiry will be sufficient.

After a charge is brought, the prosecutor decides how aggressively the case should be litigated. As already discussed, this includes the power to compromise or settle the case by accepting a

lesser plea in satisfaction of the original charges. While courts have some authority to reject a plea bargain that is not in the public interest (in contrast to their lack of power to compel a prosecutor to bring a charge in the first instance), this power is exercised extremely rarely, out of deference to the executive branch's prerogatives and due to the impracticality of insisting that a prosecutor proceed to try a case to which she is no longer committed. Accordingly, the prosecutor for the most part retains throughout the case the discretion over charges that she had at the outset.

But even more routine litigation decisions, of the sort commonly entrusted to lawyers, can have a profound impact on a litigant, and as the state's lawyer, the prosecutor controls those decisions. The prosecutor's evaluation of the seriousness of the charges, and of the importance of securing a conviction, will determine whether a case is presented perfunctorily, or whether "hardball" tactics will be used. Will the resources necessary to call additional expert witnesses or to use expensive charts or computer graphics be devoted to the case? Will the office's best lawyers be assigned to work on it? Will the prosecutor resist motions for the suppression of evidence to the utmost, or agree not to present contested evidence to save time and effort? All of these decisions, and many more, rest in the prosecutor's power, and will significantly effect both the costs of presenting a defense and the likelihood that a particular defendant will be acquitted.

Even after conviction, discretionary choices by the prosecutor will have a significant effect on a defendant's fate. Even where mandatory sentences do not apply, and judges retain broad power to sentence anywhere within a broad range, the prosecutor's stance can influence the court. In a busy court operating under basic adversarial assumptions, judges will not often feel the need to impose a greater sentence than that recommended by the prosecutor. And the vigor with which a prosecutor advocates a severe sentence may influence a judge not only on the merits, but also by signaling to

the judge the likelihood that her decision will be the subject of public criticism if the recommendation is rejected. Accordingly, the prosecutor's decision to recommend a sentence or to stand mute, the particular sentence the prosecutor chooses to advocate, and the aggressiveness with which that recommendation is pursued will all be important. Where the judge's sentencing decision is constrained by quasi-mandatory sentencing guidelines, moreover, the prosecutor's role can become even more potent. Just as the prosecutor evaluates whether the evidence will support a particular criminal charge and whether it is in the state's interest to pursue that charge, the prosecutor will evaluate whether the evidence justifies the application of a particular aggravating or mitigating factor, and whether the state's interest permits or demands expending resources to litigate its applicability. Since the applicability of these sentencing factors, like the presence of the elements of the crime itself, will often be controversial, the prosecutor generally will have considerable discretion to choose to litigate or compromise these issues. (Under current federal law, the prosecutor has yet another source of power over the sentencing process. Where a defendant has cooperated with the prosecution by providing substantial assistance with the investigation and prosecution of others, the judge is authorized to impose a sentence below the otherwise-applicable guideline range, and even below the statutory mandatory minimum—but only if the prosecutor specifically authorizes the departure from the norm.)

## STANDARDS OF PROSECUTORIAL JUDGMENT

There are many reasons why a prosecutor would decline to prosecute a case that in theory could be brought, or to accept a guilty plea to lesser charges where a more serious charge could in principle be supported. First, the prosecutor might decide that the evidence in a case is simply not strong enough to justify prosecution. Evidence that is sufficient to justify the police in making an arrest is not necessarily enough to permit a finding of guilt. The prosecutor has the responsibility of reviewing the evidence developed by the police and determining whether a charge can be justified, and many charges brought by the police are dismissed at this stage. Of course, it is the prosecutor's duty to dismiss charges not founded on sufficient evidence, so that such cases might be seen as exercises of discretion only in the weaker senses.

In other cases, however, the evidence, while legally sufficient to permit a conviction, is still not strong enough to persuade the prosecutor himself of the suspect's guilt, or at least to create a reasonable likelihood of conviction. Most prosecutors believe that they have a moral obligation not to bring a charge where they themselves harbor doubts about the suspect's guilt. (This position is not universally held; some have argued that in some close cases, such as a victim's strongly confident but potentially questionable identification of a perpetrator, the matter should be put to a jury regardless of the prosecutor's personal view.) Even where the prosecutor herself is confident of guilt, and the evidence is legally sufficient, the prosecutor might decide that it is unduly wasteful of limited law enforcement and judicial resources to pursue a case in which the difficult burden of proving guilt beyond a reasonable doubt to a unanimous jury is unlikely to be carried successfully. This is a prototypical question of prosecutorial discretion: where the seriousness of the crime or the dangerousness of the offender is believed to create a significant societal interest in punishment, the prosecutor is more likely to choose to invest resources at a relatively lower likelihood of success.

Second, the prosecutor might decide in a particular case that the interest of society is better served by exercising mercy than by imposing a criminal punishment on an offender. Perhaps the offense was an unusual instance of yielding to extreme temptation by a person of otherwise good moral character, or perhaps the offender acted under the influence of drugs or alcohol, and could better be rehabilitated by a noncriminal treatment program than by prison. Or perhaps the offender's action, while falling within the letter of a broad law, did not really cause the harm or create the risk of harm that the law was designed to avoid, and might well have been excluded from its coverage had the legislature anticipated the specific situation and considered its language more carefully. In such situations, the prosecutor might decide that a criminal conviction, and the stigma of a criminal record, would be excessive punishment even if the judge was permitted to, and chose to, impose probation or some other minimal punishment.

Third, as already mentioned in passing, the prosecutor in most jurisdictions has a heavy responsibility to marshal limited law enforcement resources. American crime rates in the last third of the twentieth century have been high; moreover, American criminal law subjects to potential criminal punishment a wide range of conduct not included in the F.B.I.'s "index" of crime rates, which comprises mostly serious, common law crimes against person and property. The budgets of police departments, investigative agencies, prosecutors' offices, courts, and prisons do not permit the full investigation, prosecution, and punishment of all crimes reported to the police. As a consequence, the prosecutor engages in a kind of triage, determining which categories of case receive priority; which types of offenses should be pursued aggressively, more passively, or not at all; and which cases should be brought only where easy convictions can be expected. Even cases that the prosecutor might choose to pursue if the institutions of justice were better funded will be sacrificed if the prosecutor thinks that the overall goal of minimizing serious crime would be better

served by investing the necessary resources elsewhere. These decisions may be made on a case-by-case basis, or whole categories of crime may be relegated to a lower level of priority, or even not prosecuted at all.

Fourth, prosecutors frequently exercise discretion for tactical reasons. Leniency, or even complete immunity from prosecution, is commonly extended to criminals who "cooperate" with the authorities in the investigation or prosecution of more serious cases or more dangerous offenders. Although this practice is pervasive in the system, has deep historical roots, and is in principle justified, at least from a utilitarian standpoint, by the greater value to society of securing the testimony of minor offenders than of extracting full punishment, it remains controversial. Critics charge that serious offenders can escape prosecution based on the morally irrelevant degree to which they possess knowledge of others' crimes. Moreover, the availability of lenient treatment can create a strong incentive to criminals to implicate others falsely, or to fit their testimony to the theories of prosecutors regardless of the truth. Still more controversially, the potential for securing testimony against targets of investigation can lead prosecutors not only to be unduly generous to the dangerous criminal peddling information in return for leniency, but also to bring charges against marginal offenders who would not otherwise be charged, in order to pressure them to cooperate with investigators.

The prosecutor's control of this trade-off between prosecution and leniency, coupled with the prosecutor's authority to decide how much evidence is enough to proceed, and the need of the police for prosecutorial assistance in using certain investigative tools (such as the grand jury's power to compel testimony, the ability to provide statutory immunity to override a witness's invocation of his Fifth Amendment privilege, or formal legal applications to courts to authorize searches or electronic surveillance that require judicial approval), have expanded the role, and the discretion, of prosecutors beyond the courtroom into the investigative phase of the criminal process. In routine criminal cases, the traditional division of roles between the police, who investigate complaints and arrest offenders, and the prosecutors, who decide whether to bring formal charges and present the evidence in court, remains approximately in place. But in more complex investigations, such as those involving white-collar offenses, organized crime, and serious political corruption, the prosecutor is often an integral part of the investigative team, and is deeply involved in strategic decisions about the conduct of the investigation, from long before a case is ready to proceed to indictment and trial. The prosecutor's priorities, legal determinations, and sense of justice will thus be deeply implicated not only in ultimate decisions about the charges to be brought or the plea to be accepted, but also in the day-to-day control of the investigation.

## CONTROLLING PROSECUTORIAL DISCRETION

There is a fairly extensive academic literature concerning the desirability of controlling or limiting prosecutorial discretion. The issues and suggested remedies to a considerable degree parallel those relating to judicial sentencing discretion. Critics of discretion argue that equal justice is best achieved by the application of formal rules that constrain official decision-makers. Laws, in this

view, should be clear and relatively self-executing, to prevent officials from applying subjective and potentially biased standards. Discretionary decisions, moreover, are rarely transparent: unlike courts applying legal principles, officials making more subjective or intuitive choices operate behind closed doors, without an obligation to state reasons or to rationalize potentially conflicting decisions in different cases. These due process values are particularly important where the stakes are as high as they are in the criminal justice system.

Opponents of this view present both practical and conceptual arguments. The practical and contingent arguments are rooted in the actualities of the U.S. criminal justice system. This strand of argument concedes that it might be better in theory to have sharply defined rules that identify all and only that behavior that ought to be punished, and that leave little room for subjective choice. To achieve such a system, however, would require reform of much more in our legal system than simply the elimination of prosecutorial discretion. Our existing penal codes are filled with statutes that are unnecessary, over-broad, or poorly drafted, and the effort to enforce the law as written would be impossible without vastly expanded law enforcement and judicial resources, and intolerable if such resources were provided. Without thoroughgoing reform of the criminal law—a reform that may be impossible to achieve politically—the discretion of prosecutors and judges, it is argued, are necessary to avoid the injustice that would result from literal application of severe and ill-considered criminal statutes.

Other defenders of discretion take a stronger view, arguing that the need for discretionary systems of mercy and judgment are necessary and desirable in principle, and not only because our particular political or legal system is flawed. On this view, the aspiration to be "a government of laws, not men," is not an absolute value, to be pressed at all costs, but is a value that, like many others, would be intolerable if pressed to extremes. Criminal laws are often passed for expressive reasons, and not because the legislature expects or wants them to be enforced literally. From this perspective, that is not a regrettable failing of our political system, but a part of the function of the criminal law, that must in turn be moderated by sensible officials who understand that not every case that falls within the literal terms of the law is meant to be punished. No legal system can achieve a perfect congruence of formal rule and desired outcome, because the multiplicity and elusiveness of the factors that bear on the moral evaluation of human conduct cannot be captured without foreseeing and evaluating the infinite permutations of circumstances that might occur—a task perhaps beyond human wisdom, and certainly beyond the capacity of a body of legal rules that also aspires to be concise, clear, and understandable by the public.

Even if it were conceded that some measure of official discretion is necessary, however, it would not follow that prosecutors ought to be the officials exercising it, that the discretion should be exercised without public accountability, or that some form of review of the resulting decisions should not be permitted. Many have proposed schemes for regulating and reforming prosecutorial discretion, or for authorizing judicial review of prosecutorial decisions. It has been argued, for example, that prosecutors, like other administrative or executive agencies entrusted with substantial delegated

power, should be required to adopt formal regulations governing their decisions, or that prosecutors should be required to state their reasons for particular actions. Victims' rights advocates have proposed that victims should be given at least a consultative role, and perhaps even a veto power, over prosecutors' charging and plea bargaining decisions.

Few of these proposals have proved sufficiently appealing to secure broad political support. If it is accepted that discretionary decision making is to some degree inevitable, the quest for standards is to that extent quixotic—if the legislature cannot or will not capture in statutes the precise conduct it expects to lead to punishment, there is little reason to think that prosecutors or judges will be able to do a better job by way of regulations or common law articulation of standards. Nor is it clear that providing for additional levels of review will improve decision-making. The buck has to stop somewhere, and setting additional layers of review simply moves the ultimate decision to another official, without making that official's decision any more likely to be correct. Moreover, to the extent that the criteria for prosecution correctly include judgments about the social utility to be gained from the prosecution, as well as a moral evaluation of the wrongfulness of the defendant's conduct, the prosecutor—or at least some analogous, politically responsible official of the executive branch—is probably better placed, and has more political authority, to evaluate these factors than a judge. The recent unsatisfactory experience at the federal level with nonpolitically responsible independent prosecutors in high-visibility political cases has shown the importance of political accountability in making prosecutorial choices.